



EXECUTIVE CHAMBERS
HONOLULU

NEIL ABERCROMBIE
GOVERNOR

GOV. MSG. NO. 1390

July 8, 2013

The Honorable Donna Mercado Kim,
President and Members
of the Senate
Twenty-Seventh State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

The Honorable Joseph M. Souki,
Speaker and Members of
the House of Representatives
Twenty-Seventh State Legislature
State Capitol, Room 431
Honolulu, Hawaii 96813

Dear President Kim, Speaker Souki, and Members of the Legislature:

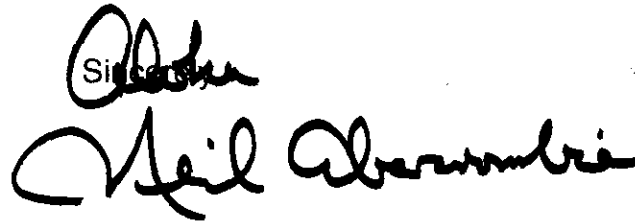
Re: Senate Bill No. 966, H.D. 1, C.D. 1

Senate Bill No. 966, H.D. 1, C.D. 1, entitled "A BILL FOR AN ACT RELATING TO THE UNIFORM MEDIATION ACT" will become law without my signature, pursuant to Section 16 of Article III of the State Constitution.

The purpose of this bill is to adopt the Uniform Mediation Act of the National Conference of Commissioners on Uniform State Laws.

Concerns have been raised regarding confidentiality in these proceedings and the possibility that potential agreements may be vulnerable to claims of malpractice or misconduct by the mediator. Although I am cautiously optimistic that other states have successfully implemented similar laws without experiencing severe setbacks, I encourage the Legislature and other stakeholders to monitor the implementation of this measure and make necessary adjustments in the future.

For the foregoing reasons, Senate Bill No. 966, H.D. 1, C.D. 1 will become law as Act 284, Session Laws of Hawaii 2013, effective July 9, 2013, without my signature.

A handwritten signature in black ink, appearing to read "Neil Abercrombie". The signature is written in a cursive, flowing style. The word "Signed" is faintly visible in the background behind the signature.

NEIL ABERCROMBIE
Governor, State of Hawaii

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 "International commercial mediation" means a process,
10 whether referred to by the expression conciliation, mediation,
11 or similar expression, whereby parties:

12 (1) To an agreement to conciliation have, at the time of
13 the conclusion of that agreement, their places of
14 business in different countries; or

15 (2) Who have their places of business in a country that is
16 different from either the country in which a
17 substantial part of the obligations of the commercial
18 relationship is to be performed or the country with



1 which the subject matter of the dispute is mostly
2 closely connected,
3 request a third person or persons, who do not have the authority
4 to impose upon the parties a solution to the dispute, to assist
5 them in their attempt to reach an amicable settlement of their
6 dispute arising out of or relating to a contractual or other
7 legal relationship.

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

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

16 "Mediation party" means a person who participates in a
17 mediation and whose agreement is necessary to resolve the
18 dispute.

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

20 "Model law" means the Model Law on International Commercial
21 Conciliation adopted by the United Nations Commission on
22 International Trade Law on June 24, 2002, and recommended by the



1 United Nations General Assembly in a resolution (A/RES/57/18)
2 dated November 19, 2002.

3 "Nonparty participant" means a person, other than a party
4 or mediator, who participates in a mediation.

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

10 "Proceeding" means:

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

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

19 "Sign" means to:

- 20 (1) Execute or adopt a tangible symbol with the present
21 intent to authenticate a record; or



1 (2) Attach or logically associate an electronic symbol,
2 sound, or process to or with a record with the present
3 intent to authenticate a record.

4 § -3 Scope. (a) Except as otherwise provided in
5 subsection (b) or (c), this chapter applies to a mediation in
6 which:

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

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

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

19 (b) This chapter shall not apply to a mediation:

20 (1) Relating to the establishment, negotiation,
21 administration, or termination of a collective
22 bargaining relationship;



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



1 § -4 Privilege against disclosure; admissibility;
2 discovery. (a) Except as provided in section -6, a
3 mediation communication is privileged as provided in subsection
4 (b) and is not subject to discovery or admissible in evidence in
5 a proceeding unless waived or precluded as provided by section
6 -5.
7 (b) In a proceeding, the following privileges apply:
8 (1) A mediation party may refuse to disclose and may
9 prevent any other person from disclosing a mediation
10 communication;
11 (2) A mediator may refuse to disclose a mediation
12 communication, and may prevent any other person from
13 disclosing a mediation communication of the mediator;
14 and
15 (3) A nonparty participant may refuse to disclose, and may
16 prevent any other person from disclosing, a mediation
17 communication of the nonparty participant.
18 (c) Evidence or information that is otherwise admissible
19 or subject to discovery does not become inadmissible or
20 protected from discovery solely by reason of its disclosure or
21 use in a mediation.



1 § -5 Waiver and preclusion of privilege. (a) A
2 privilege under section -4 may be waived in a record or
3 orally during a proceeding if it is expressly waived by all
4 parties to the mediation and:

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

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

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

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

19 § -6 Exceptions to privilege. (a) There is no
20 privilege under section -4 for a mediation communication that
21 is:



- 1 (1) In an agreement evidenced by a record signed by all
2 parties to the agreement;
- 3 (2) Available to the public under chapter 92F or made
4 during a session of a mediation that is open, or is
5 required by law to be open, to the public;
- 6 (3) A threat or statement of a plan to inflict bodily
7 injury or commit a crime of violence;
- 8 (4) Intentionally used to plan a crime, attempt to commit
9 or commit a crime, or to conceal an ongoing crime or
10 ongoing criminal activity;
- 11 (5) Sought or offered to prove or disprove a claim or
12 complaint of professional misconduct or malpractice
13 filed against a mediator;
- 14 (6) Except as provided in subsection (c), sought or
15 offered to prove or disprove a claim or complaint of
16 professional misconduct or malpractice filed against a
17 mediation party, nonparty participant, or
18 representative of a party based on conduct occurring
19 during a mediation; or
- 20 (7) Sought or offered to prove or disprove abuse, neglect,
21 abandonment, or exploitation in a proceeding in which
22 a child or adult protective services agency is a



1 party, unless the department of human services
2 participates in the mediation.

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

10 (1) A court proceeding involving a felony or misdemeanor;
11 or

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

16 (c) A mediator shall not be compelled to provide evidence
17 of a mediation communication referred to in subsection (a)(6) or
18 (b)(2).

19 (d) If a mediation communication is not privileged under
20 subsection (a) or (b), only the portion of the mediation
21 communication necessary for the application of the exception
22 from nondisclosure may be admitted. Admission of evidence under



1 subsection (a) or (b) does not render the evidence, or any other
2 mediation communication, discoverable or admissible for any
3 other purpose.

4 § -7 Prohibited mediator reports. (a) Except as agreed
5 to in writing by the parties or as permitted in subsection (b),
6 a mediator shall not make a report, assessment, evaluation,
7 recommendation, finding, or other communication regarding a
8 mediation to a court, administrative agency, or other authority
9 that may make a ruling on the dispute that is the subject of the
10 mediation.

11 (b) A mediator may disclose:

- 12 (1) Whether a mediation occurred or has terminated,
13 whether a settlement was reached, and attendance at
14 the mediation;
- 15 (2) Mediation communication as permitted under
16 section -6; or
- 17 (3) A mediation communication evidencing abuse, neglect,
18 abandonment, or exploitation of an individual to a
19 public agency responsible for protecting individuals
20 against such mistreatment, except as prohibited under
21 section -6(a)(7).



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

5 § -8 **Confidentiality.** Unless subject to disclosure
6 pursuant to part I of chapter 92 or chapter 92F, mediation
7 communications are confidential to the extent agreed by the
8 mediation parties or provided by other law or rule of this
9 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 mediation party or nonparty participant in the
21 mediation; and



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

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

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

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

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

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

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

20 § -11 **International commercial mediation.** (a) Except
21 as provided in subsections (b) and (c), if a mediation is an



1 international commercial mediation, the mediation is governed by
2 the model law.

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

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

13 § -12 **Relation to Electronic Signatures in Global and**
14 **National Commerce Act.** This chapter modifies, limits, or
15 supersedes the federal Electronic Signatures in Global and
16 National Commerce Act, 15 United States Code Section 7001 et
17 seq.; provided that this chapter shall not modify, limit, or
18 supersede Section 101(c) of that Act or authorize electronic
19 delivery of any of the notices described in Section 103(b) of
20 that Act.

21 § -13 **Application to existing agreements or referrals.**

22 (a) This chapter shall govern a mediation pursuant to a



1 referral for mediation or an agreement to mediate made on or
2 after July 1, 2013.

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

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

APPROVED this day of , 2013

GOVERNOR OF THE STATE OF HAWAII