
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 an international
10 commercial conciliation as defined in Article 1 of the Model
11 law.

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

15 "Mediation communication" means a statement, whether oral,
16 in a record, verbal, or nonverbal, that occurs during a
17 mediation or is made for purposes of considering, conducting,



1 participating in, initiating, continuing, or reconvening a
2 mediation or retaining a mediator.

3 "Mediation party" means a person who participates in a
4 mediation and whose agreement is necessary to resolve the
5 dispute.

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

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

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

14 "Person" means an individual, corporation, business trust,
15 estate, trust, partnership, limited liability company,
16 association, joint venture, or government; governmental
17 subdivision, agency, or instrumentality; public corporation; or
18 any other legal or commercial entity.

19 "Proceeding" means:

20 (1) A judicial, administrative, arbitral, or other
21 adjudicative process, including related pre-hearing



1 and post-hearing motions, conferences, and discovery;

2 or

3 (2) A legislative hearing or similar process.

4 "Record" means information that is inscribed on a tangible
5 medium or that is stored in an electronic or other medium and is
6 retrievable in perceivable form.

7 "Sign" means to:

8 (1) Execute or adopt a tangible symbol with the present
9 intent to authenticate a record; or

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

13 § -3 Scope. (a) Except as otherwise provided in
14 subsection (b) or (c), this chapter applies to a mediation in
15 which:

16 (1) The mediation parties are required to mediate by
17 statute or court or administrative rule or referred to
18 mediation by a court, administrative agency, or
19 arbitrator;

20 (2) The mediation parties and the mediator agree to
21 mediate in a record that demonstrates an expectation



- 1 that mediation communications will be privileged
2 against disclosure; or
- 3 (3) The mediation parties use as a mediator an individual
4 who holds himself or herself out as a mediator or the
5 mediation is provided by a person that holds itself
6 out as providing mediation.
- 7 (b) The chapter shall not apply to a mediation:
- 8 (1) Relating to the establishment, negotiation,
9 administration, or termination of a collective
10 bargaining relationship;
- 11 (2) Relating to a dispute that is pending under or is part
12 of the processes established by a collective
13 bargaining agreement, except that this chapter shall
14 apply to a mediation arising out of a dispute that has
15 been filed with an administrative agency or court;
- 16 (3) Conducted by a judge who might make a ruling on the
17 case; or
- 18 (4) Conducted under the auspices of:
- 19 (A) A primary or secondary school if all the
20 mediation parties are students; or



1 (B) A correctional institution for youths if all the
2 mediation parties are residents of that
3 institution.

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

13 § -4 **Privilege against disclosure; admissibility;**
14 **discovery.** (a) Except as provided in section -6, a
15 mediation communication is privileged as provided in subsection
16 (b) and is not subject to discovery or admissible in evidence in
17 a proceeding unless waived or precluded as provided by section
18 -5.

19 (b) In a proceeding, the following privileges apply:
20 (1) A mediation party may refuse to disclose and may
21 prevent any other person from disclosing a mediation
22 communication;



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

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

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

12 § -5 **Waiver and preclusion of privilege.** (a) A
13 privilege under section -4 may be waived in a record or
14 orally during a proceeding if it is expressly waived by all
15 parties to the mediation and:

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

18 (2) In the case of the privilege of a nonparty
19 participant, it is expressly waived by the nonparty
20 participant.

21 (b) A person who discloses or makes a representation about
22 a mediation communication that prejudices another person in a



1 proceeding is precluded from asserting a privilege under section
2 -4, but only to the extent necessary for the person
3 prejudiced to respond to the representation or disclosure.

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

8 § -6 **Exceptions to privilege.** (a) There is no
9 privilege under section -4 for a mediation communication that
10 is:

- 11 (1) In an agreement evidenced by a record signed by all
12 parties to the agreement;
- 13 (2) Available to the public under chapter 92F or made
14 during a session of a mediation that is open, or is
15 required by law to be open, to the public;
- 16 (3) A threat or statement of a plan to inflict bodily
17 injury or commit a crime of violence;
- 18 (4) Intentionally used to plan a crime, attempt to commit
19 or commit a crime, or to conceal an ongoing crime or
20 ongoing criminal activity;



- 1 (5) Sought or offered to prove or disprove a claim or
2 complaint of professional misconduct or malpractice
3 filed against a mediator;
- 4 (6) Except as provided in subsection (c), sought or
5 offered to prove or disprove a claim or complaint of
6 professional misconduct or malpractice filed against a
7 mediation party, nonparty participant, or
8 representative of a party based on conduct occurring
9 during a mediation; or
- 10 (7) Sought or offered to prove or disprove abuse, neglect,
11 abandonment, or exploitation in a proceeding in which
12 a child or adult protective services agency is a
13 party, unless the department of human services
14 participates in the mediation.
- 15 (b) There is no privilege under section -4 if a court,
16 administrative agency, or arbitrator finds, after a hearing in
17 camera, that the party seeking discovery or the proponent of the
18 evidence has shown that the evidence is not otherwise available,
19 that there is a need for the evidence that substantially
20 outweighs the interest in protecting confidentiality, and that
21 the mediation communication is sought or offered in:



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

3 (2) Except as provided in subsection (c), a proceeding to
4 prove a claim to rescind or reform, or a defense to
5 avoid, liability on a contract arising out of the
6 mediation.

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

10 (d) If a mediation communication is not privileged under
11 subsection (a) or (b), only the portion of the mediation
12 communication necessary for the application of the exception
13 from nondisclosure may be admitted. Admission of evidence under
14 subsection (a) or (b) does not render the evidence, or any other
15 mediation communication, discoverable or admissible for any
16 other purpose.

17 **§ -7 Prohibited mediator reports.** (a) Except as agreed
18 to in writing by the parties or as permitted in subsection (b),
19 a mediator shall not make a report, assessment, evaluation,
20 recommendation, finding, or other communication regarding a
21 mediation to a court, administrative agency, or other authority



1 that may make a ruling on the dispute that is the subject of the
2 mediation.

3 (b) A mediator may disclose:

4 (1) Whether a mediation occurred or has terminated,
5 whether a settlement was reached, and attendance at
6 the mediation;

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

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

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

18 § -8 **Confidentiality.** Unless subject to disclosure
19 pursuant to part I of chapter 92 or chapter 92F, mediation
20 communications are confidential to the extent agreed by the
21 mediation parties or provided by other law or rule of this
22 State.



1 § -9 Mediator's disclosure of conflicts of interest;

2 **background.** (a) Before accepting a mediation, an individual
3 who is requested to serve as a mediator shall:

4 (1) Make an inquiry that is reasonable under the
5 circumstances to determine whether there are any known
6 facts that a reasonable individual would consider
7 likely to affect the impartiality of the mediator,
8 including a financial or personal interest in the
9 outcome of the mediation and an existing or past
10 relationship with a mediation party or foreseeable
11 mediation party or nonparty participant in the
12 mediation; and

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

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

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



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

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

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

8 § -10 **Participation in mediation.** An attorney or other
9 individual designated by a party may accompany the party to and
10 participate in a mediation. A waiver of participation given
11 before the mediation may be rescinded.

12 § -11 **International commercial mediation.** (a) Except
13 as provided in subsections (b) and (c), if a mediation is an
14 international commercial mediation, the mediation is governed by
15 the model law.

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



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

5 § -12 Relation to Electronic Signatures in Global and
6 National Commerce Act. This chapter modifies, limits, or
7 supersedes the federal Electronic Signatures in Global and
8 National Commerce Act, 15 United States Code Section 7001 et
9 seq.; provided that this chapter shall not modify, limit, or
10 supersede Section 101(c) of that Act or authorize electronic
11 delivery of any of the notices described in Section 103(b) of
12 that Act.

13 § -13 Application to existing agreements or referrals.

14 (a) This chapter shall govern a mediation pursuant to a
15 referral for mediation or an agreement to mediate made on or
16 after July 1, 2013.

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

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

20
RCW. 8m

INTRODUCED BY:

[Handwritten signatures and initials over the text "INTRODUCED BY:"]



H.B. NO. 418

Della, A. Beletti

Kennel
John M. [Signature]

JAN 18 2013



H.B. NO. 418

Report Title:

Uniform Mediation Act

Description:

Adopts the Uniform Mediation Act, which provides basic procedural and confidentiality rules for mediations. Provides for confidentiality, disclosure and evidentiary rules, and guidelines for mediators.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

