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# 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 shall not include hooponopono, ifoga, or other  
12   similar, traditional or customary dispute resolution practices.

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

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

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



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

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

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

13 "Proceeding" means:

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

18 (2) A legislative hearing or similar process.

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

22 "Sign" means to:



- 1 (1) Execute or adopt a tangible symbol with the present  
2 intent to authenticate a record; or  
3 (2) 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 rule or referred to  
11 mediation by a court, administrative agency, or  
12 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 who holds himself or  
20 herself out as providing mediation.  
21 (b) This chapter shall 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 shall  
7 apply to a mediation arising out of a dispute that has  
8 been 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  
13 mediation parties are students; or
- 14 (B) A correctional institution for youths if all the  
15 mediation parties are residents of that  
16 institution.
- 17 (c) If the mediation parties agree in advance in a signed  
18 record, or a record of proceeding reflects agreement by the  
19 mediation parties, that all or part of a mediation is not  
20 privileged, the privileges under sections -4 through -6  
21 shall not apply to the mediation or part agreed upon. However,  
22 sections -4 through -6 shall apply to a mediation



1 communication made by a person that has not received actual  
2 notice of the agreement before the mediation communication is  
3 made.

4 § -4 Privilege against disclosure; admissibility;  
5 discovery. (a) Except as provided in section -6, a  
6 mediation communication is privileged as provided in subsection  
7 (b) and is not subject to discovery or admissible in evidence in  
8 a proceeding unless waived or precluded as provided by section  
9 -5.

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

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

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

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

21 (c) Evidence or information that is otherwise admissible  
22 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 who discloses or makes a representation about  
13 a mediation communication that prejudices another person in a  
14 proceeding is precluded from asserting a privilege under section  
15 -4, but only to the extent necessary for the person  
16 prejudiced to respond to the representation or disclosure.

17 (c) A person who 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 that 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 provided in subsection (c), sought or  
18             offered to prove or disprove a claim or complaint of  
19             professional misconduct or malpractice filed against a  
20             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 provided in subsection (c), a proceeding to  
16          prove a claim to rescind or reform, or a defense to  
17          avoid, liability on a contract arising out of the  
18          mediation.

19          (c) A mediator shall not be compelled to provide evidence  
20          of 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 mediation  
3 communication necessary for the application of the exception  
4 from 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 permitted in subsection (b),  
10 a mediator shall 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 a mediation occurred or has terminated,  
17 whether a settlement was reached, and attendance at  
18 the mediation;
- 19 (2) Mediation communication as permitted under  
20 section -6; or
- 21 (3) A mediation communication evidencing abuse, neglect,  
22 abandonment, or exploitation of an individual to a



1 public agency responsible for protecting individuals  
2 against such mistreatment, except as prohibited under  
3 section -6(a)(7).

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

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

13 § -9 Mediator's disclosure of conflicts of interest;  
14 background. (a) Before accepting a mediation, an individual  
15 who is requested to serve as a mediator shall:

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



1 mediation party or nonparty participant in the  
2 mediation; and

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

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

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

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

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

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

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



1           §   -11   International commercial mediation. (a) Except  
2 as provided in subsections (b) and (c), if a mediation is an  
3 international commercial mediation, the mediation is governed by  
4 the model law.

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

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

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



1           §   -13   Application to existing agreements or referrals.

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

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

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



**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. (HB418 HD1)

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

