

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2009

A N A C T

RELATING TO COURTS AND CIVIL PROCEDURE -- PROCEDURE IN PARTICULAR
ACTIONS

Introduced By: Senators Lynch, and Sosnowski

Date Introduced: February 26, 2009

Referred To: Senate Judiciary

It is enacted by the General Assembly as follows:

1 SECTION 1. Title 10 of the General Laws entitled "COURTS AND CIVIL
2 PROCEDURE-PROCEDURE IN PARTICULAR ACTIONS" is hereby amended by adding
3 thereto the following chapter:

4 CHAPTER 3.1

5 UNIFORM MEDIATION ACT

6 **10-3.1-1. Title.** – This chapter shall be known may be cited as the Uniform Mediation
7 Act.

8 **10-3.1-2. Definitions.** – As used in this chapter:

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

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

16 (3) "Mediator" means an individual who conducts a mediation;

17 (4) "Nonparty participant" means a person, other than a part or mediator, that participates
18 in a mediation;

1 (5) “Mediation party” means a person that participates in a mediation and whose
2 agreement is necessary to resolve the dispute;

3 (6) “Person” means an individual, corporation, business trust, estate, trust, partnership,
4 limited liability company, association, joint venture, government; governmental subdivision,
5 agency, or instrumentality; public corporation, or any other legal or commercial entity;

6 (7) “Proceeding” means:

7 (i) A judicial, administrative, arbitral, or other adjudicative process, including related pre-
8 hearing and post-hearing motions, conferences, and discovery; or

9 (ii) A legislative hearing or similar process.

10 (8) “Record” means information that is inscribed on a tangible medium or that is stored in
11 an electronic or other medium and is retrievable in perceivable form; and

12 (9) “Sign” means:

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

14 or

15 (ii) To attach or logically associate an electronic symbol, sound, or process to or with a
16 record with the present intent to authenticate a record.

17 **10-3.1-3. Scope.** – (a) Except as otherwise provided in subsection (b) or (c), this chapter
18 applies to mediation in which:

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

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

23 (3) The mediation parties use as a mediator an individual who holds himself or herself
24 out as a mediator or the mediation is provided by a person that holds itself out as providing
25 mediation.

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

27 (1) Relating to the establishment, negotiation, administration, or termination of a
28 collective bargaining relationship;

29 (2) Relating to a dispute that is pending under or is part of the processes established by a
30 collective bargaining agreement, except that the chapter applies to a mediation arising out of a
31 dispute that has been filed with an administrative agency or court;

32 (3) Conducted by a judge who might make a ruling on the case; or

33 (4) Conducted under the auspices of:

34 (i) A primary or secondary school if all the parties are students; or

1 (ii) A correctional institution for youths if all the parties are residents of the institution;
2 (c) If the parties agree in advance in a signed record, or a record of proceeding reflects
3 agreement by the parties, that all or part of a mediation is not privileged, the privileges under
4 sections 10-3.1-4 through 10-3.1-6 do not apply to the mediation or part agreed upon. However,
5 sections 10-3.1-4 through 10-3.1-6 apply to a mediation communication made by a person that
6 has not received actual notice of the agreement before the communication is made.

7 **10-3.1-4. Privilege against disclosure – Admissibility -- Discovery.** – (a) Except as
8 otherwise provided in section 10-3.1-6, a mediation communication is privileged as provided in
9 subsection (b), and is not subject to discovery or admissible in evidence in a proceeding, unless
10 waived or precluded as provided by section 10-3.1-5;

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

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

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

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

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

21 **10-3.1-5. Waiver and preclusion of privilege.** – (a) A privilege under section 10-3.1-4
22 may be waived in a record, or orally during a proceeding, if it is expressly waived by all parties to
23 the mediation and:

24 (1) In the case of the privilege of a mediator, it is expressly waived by the mediator; or

25 (2) In the case of the privilege of a nonparty participant, it is expressly waived by the
26 nonparty participant;

27 (b) A person that discloses or makes a representation about a mediation communication
28 which prejudices another person in a proceeding is precluded from asserting a privilege under
29 section 10-3.1-4 but only to the extent necessary for the person prejudiced to respond to the
30 representation or disclosure;

31 (c) A person that intentionally uses a mediation to plan, attempt to commit or commit a
32 crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a
33 privilege under section 10-3.1-4.

34 **10-3.1-6. Exceptions to privilege.** – (a) There is no privilege under the section 10-3.1-4

1 for a mediation communication that is:

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

3 (2) Available to the public under chapter 38-2 or made during session of a mediation

4 which is open, or is required by law to be open, to the public;

5 (3) A threat or statement of a plan to inflict bodily injury or commit a crime of violence;

6 (4) Intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal
7 an ongoing crime or ongoing criminal activity;

8 (5) Sought or offered to prove or disprove a claim or complaint of professional
9 misconduct or malpractice filed against a mediator;

10 (6) Except as otherwise provided in subsection (c), sought or offered to prove or disprove
11 a claim or complaint of professional misconduct or malpractice filed against a mediation party,
12 nonparty participant, or representative of a party based on conduct occurring during a mediation;
13 or

14 (7) Sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in
15 a proceeding in which a child or adult protective services agency is a party;

16 (b) There is no privilege under section 10-3.1-4 if a court, administrative agency, or
17 arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the
18 evidence has shown that the evidence is not otherwise available, that there is a need for the
19 evidence that substantially outweighs the interest in protecting confidentiality, and that the
20 mediation communication is sought or offered in:

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

22 (2) Except as otherwise provided in subsection (c), a proceeding to prove a claim to
23 rescind or reform or a defense to avoid liability on a contract arising out of the mediation;

24 (c) A mediator may not be compelled to provide evidence of a mediation communication
25 referred to in subdivision (a)(6) or (b)(2);

26 (d) If a mediation communication is not privileged under subsection (a) or (b), only the
27 portion of the communication necessary for the application of the exception from nondisclosure
28 may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence,
29 or any other mediation communication, discoverable or admissible for any other purpose.

30 **10-3.1-7. Prohibited mediator reports.** – (a) Except as required in subsection (b), a
31 mediator may not make a report, assessment, evaluation, recommendation, finding, or other
32 communication regarding a mediation to a court, administrative agency, or other authority that
33 may make a ruling on the dispute that is the subject of the mediation;

34 (b) A mediator may disclose:

1 (1) Whether the mediation occurred or has terminated, whether a settlement was reached,
2 and attendance;

3 (2) A mediation communication as permitted under section 10-3.1-6;

4 (3) A mediation communication evidencing abuse, neglect, abandonment, or exploitation
5 of an individual to a public agency responsible for protecting individuals against such
6 mistreatment;

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

9 **10-3.1-8. Confidentiality.** – Unless subject to chapter 38-2, mediation communications
10 are confidential to the extent agreed by the parties or provided by other law or rule of this state.

11 **10-3.1-9. Mediator’s disclosure of conflicts of interest -- Background.** – (a) Before
12 accepting a mediation, an individual who is requested to serve as a mediator shall:

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

18 (2) Disclose any such known fact to the mediation parties as soon as is practical before
19 accepting a mediation;

20 (b) If a mediator learns any fact described in subdivision (a)(1) after accepting a
21 mediation, the mediator shall disclose it as soon as is practical;

22 (c) At the request of a mediation party, an individual who is requested to serve as a
23 mediator shall disclose the mediator’s qualifications to mediate a dispute;

24 (d) A person that violates subsection [(a) or (b)][(a), (b), or (g)] is precluded by the
25 violation from asserting a privilege under section 10-3.1-4;

26 (e) Subsections (a), (b) [and] (c), [and] [(g)] do not apply to an individual acting as a
27 judge;

28 (f) This chapter does not require that a mediator have a special qualification by
29 background or profession;

30 (g) A mediator must be impartial, unless after disclosure of the facts required in
31 subsections (a) and (b) to be disclosed, the parties agree otherwise.

32 **10-3.1-10. Participation in mediation.** – An attorney or other individual designated by a
33 party may accompany the party to and participate in a mediation. A waiver of participation given
34 before the mediation may be rescinded.

1 **10-3.1-11. International commercial mediation.** – (a) In this section, “Model Law”
2 means the Model Law on International Commercial Conciliation adopted by the United Nations
3 Commission on International Trade Law on 28 June 2002 and recommended by the United
4 Nations General Assembly in a resolution (A/RES/57/18) dated 19 November 2002, and
5 “international commercial mediation” means an international commercial conciliation as defined
6 in Article 1 of the Model Law;

7 (b) Except as otherwise provided in subsections (c) and (d), if a mediation is an
8 international a commercial mediation, the mediation is governed by the Model Law;

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

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

15 **10-3.1-12. Relation to electronic signatures in global and national commerce act.** –
16 This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global and
17 National Commerce Act, 15 U.S.C. section 7001 et seq., but this chapter does not modify, limit or
18 supersede section 101(c) of that act or authorize electronic delivery of any of the notices
19 described in section 103(b) of that act.

20 This section adopts standard language approved by the Uniform Law Conference that is
21 intended to conform Uniform Acts with the Uniform Electronic Transactions (EUTA) and its
22 federal counterpart, Electronic Signatures in Global and National Commerce Act (E-sign) (15
23 U.S.C. 7001, etc seq. (2000)).

24 Both EUTA and E-sign were written in response to broad recognition of the commercial
25 and other use of electronic technologies for communications and contracting, and the consensus
26 that the choice of medium should not control the enforceability of transactions. These sections are
27 consistent with both UETA and E-sign. EUTA has been adopted by the Conference and receive
28 the approval of the American Bar Association House of Delegates. As of December 2001, it had
29 been enacted in more than 35 states.

30 The effect of this provision is to reaffirm state authority over matters of contract by
31 making clear that UETA is the controlling law if there is a conflict between this Act and the
32 federal E-sign law, except for E-sign’s consumer consent provisions (Section 101(c)) and its
33 things, such clarification assures that agreements related to mediation – such as the agreement to
34 basis of a conflict between this act and the federal E-sign law. Such challenges should be

1 [dismissed summarily by the courts.](#)

2 **10-3.1-13. Uniformity of application and construction.** – [In applying and constructing](#)
3 [this chapter, consideration should be given to the need to promote uniformity of the law with](#)
4 [respect to its subject mater among states that enact it.](#)

5 **10-3.1-14. Severability clause.** – [If any provision of the chapter or its application to any](#)
6 [person or circumstance is held invalid, the invalidity does not affect other provisions or](#)
7 [applications of the chapter which can be given effect without the invalid provision or application,](#)
8 [and to this end the provisions of the chapter are severable.](#)

9 SECTION 2. This act shall take effect upon passage.

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EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF
A N A C T
RELATING TO COURTS AND CIVIL PROCEDURE -- PROCEDURE IN PARTICULAR
ACTIONS

- 1 This act would create a comprehensive Uniform Mediation Law.
- 2 This act would take effect upon passage.

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