

UNIFORM MEDIATION ACT

2006 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Lyle W. Hillyard

House Sponsor: Lorie D. Fowlke

LONG TITLE

General Description:

This bill enacts the Utah Uniform Mediation Act.

Highlighted Provisions:

This bill:

- ▶ enacts the Utah Uniform Mediation Act;
- ▶ provides definitions;
- ▶ applies to most mediations;
- ▶ sets waiver provisions for privileges and communications within mediation;
- ▶ states mediation information is confidential and not admissible in court, and specifies exceptions; and
- ▶ provides for mediator's disclosure of conflicts of interest.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

ENACTS:

78-31c-101, Utah Code Annotated 1953

78-31c-102, Utah Code Annotated 1953

78-31c-103, Utah Code Annotated 1953



- 28 **78-31c-104**, Utah Code Annotated 1953
- 29 **78-31c-105**, Utah Code Annotated 1953
- 30 **78-31c-106**, Utah Code Annotated 1953
- 31 **78-31c-107**, Utah Code Annotated 1953
- 32 **78-31c-108**, Utah Code Annotated 1953
- 33 **78-31c-109**, Utah Code Annotated 1953
- 34 **78-31c-110**, Utah Code Annotated 1953
- 35 **78-31c-111**, Utah Code Annotated 1953
- 36 **78-31c-112**, Utah Code Annotated 1953
- 37 **78-31c-113**, Utah Code Annotated 1953
- 38 **78-31c-114**, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78-31c-101** is enacted to read:

CHAPTER 31c. UTAH UNIFORM MEDIATION ACT

78-31c-101. Title.

This chapter is known as the "Utah Uniform Mediation Act."

Section 2. Section **78-31c-102** is enacted to read:

78-31c-102. Definitions.

As used in this chapter:

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

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

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

(4) "Mediator" means an individual who **Ŧ→ is neutral, and ←Ŧ** conducts a mediation.

(5) "Nonparty participant" means a person, other than a party or mediator, that

59 participates in a mediation.

60 (6) "Person" means an individual, corporation, estate, trust, business trust, partnership,
61 limited liability company, association, joint venture, government, governmental subdivision,
62 agency, or instrumentality, public corporation, or any other legal or commercial entity.

63 (7) "Proceeding" means:

64 (a) a judicial, administrative, arbitral, or other adjudicative process, including related
65 prehearing and posthearing motions, conferences, and discovery; or

66 (b) a legislative hearing or similar process.

67 (8) "Record" means information that is inscribed on a tangible medium or that is stored
68 in an electronic or other medium and is retrievable in perceivable form.

69 (9) "Sign" means:

70 (a) to execute or adopt a tangible symbol with the present intent to authenticate a
71 record; or

72 (b) to attach or logically associate an electronic symbol, sound, or process to or with a
73 record with the present intent to authenticate a record.

74 Section 3. Section **78-31c-103** is enacted to read:

75 **78-31c-103. Scope.**

76 (1) Except as otherwise provided in Subsection (2) or (3), this chapter applies to a
77 mediation in which:

78 (a) the mediation parties are required to mediate by statute, court, or administrative
79 agency rule or referred to mediation by a court, administrative agency, or arbitrator;

80 (b) the mediation parties and the mediator agree to mediate in a record that
81 demonstrates an expectation that mediation communications will be privileged against
82 disclosure; or

83 (c) the mediation parties use as a mediator an individual who holds himself or herself
84 out as a mediator or the mediation is provided by an entity that holds itself out as providing
85 mediation.

86 (2) The chapter does not apply to a mediation:

87 (a) relating to the establishment, negotiation, administration, or termination of a
88 collective bargaining relationship;

89 (b) relating to a dispute that is pending under or is part of the processes established by

90 a collective bargaining agreement, except that the chapter applies to a mediation arising out of
91 a dispute that has been filed with an administrative agency or court;

92 (c) conducted by a judge who might make a ruling on the case; or

93 (d) conducted under the auspices of:

94 (i) a primary or secondary school if all the parties are students; or

95 (ii) a correctional institution for youths if all the parties are residents of that institution.

96 (3) If the parties agree in advance in a signed record, or a record of proceeding reflects
97 agreement by the parties, that all or part of a mediation is not privileged, the privileges under

98 Sections 78-31c-104 through 78-31c-106 do not apply to the mediation or part agreed upon.

99 However, Sections 78-31c-104 through 78-31c-106 apply to a mediation communication made
100 by a person that has not received actual notice of the agreement before the communication is
101 made.

102 Section 4. Section **78-31c-104** is enacted to read:

103 **78-31c-104. Privilege against disclosure -- Admissibility -- Discovery.**

104 (1) Except as otherwise provided in Section 78-31c-106, a mediation communication is
105 privileged as provided in Subsection (2) and is not subject to discovery or admissible in
106 evidence in a proceeding unless waived or precluded as provided by Section 78-31c-105.

107 (2) In a proceeding, the following privileges apply:

108 (a) A mediation party may refuse to disclose, and may prevent any other person from
109 disclosing, a mediation communication.

110 (b) A mediator may refuse to disclose a mediation communication, and may prevent
111 any other person from disclosing a mediation communication of the mediator.

112 (c) A nonparty participant may refuse to disclose, and may prevent any other person
113 from disclosing, a mediation communication of the nonparty participant.

114 (3) Evidence or information that is otherwise admissible or subject to discovery does
115 not become inadmissible or protected from discovery solely by reason of its disclosure or use in
116 a mediation.

117 Section 5. Section **78-31c-105** is enacted to read:

118 **78-31c-105. Waiver and preclusion of privilege.**

119 (1) A privilege under Section 78-31c-104 may be waived in a record or orally during a
120 proceeding if it is expressly waived by all parties to the mediation, and:

121 (a) in the case of the privilege of a mediator, it is expressly waived by the mediator;
 122 and

123 (b) in the case of the privilege of a nonparty participant, it is expressly waived by the
 124 nonparty participant.

125 (2) A person that discloses or makes a representation about a mediation
 126 communication which prejudices another person in a proceeding is precluded from asserting a
 127 privilege under Section 78-31c-104, but only to the extent necessary for the person prejudiced
 128 to respond to the representation or disclosure.

129 (3) A person that intentionally uses a mediation to plan, attempt to commit or commit a
 130 crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting
 131 a privilege under Section 78-31c-104.

132 Section 6. Section **78-31c-106** is enacted to read:

133 **78-31c-106. Exceptions to privilege.**

134 (1) There is no privilege under Section 78-31c-104 for a mediation communication that
 135 is:

136 (a) in an agreement evidenced by a record signed by all parties to the agreement;

137 (b) available to the public under Title 63, Chapter 2, Government Records Access and
 138 Management Act, or made during a mediation session which is open, or is required by law to
 139 be open, to the public;

140 (c) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

141 (d) intentionally used to plan a crime, attempt to commit or commit a crime, or to
 142 conceal an ongoing crime or ongoing criminal activity;

143 (e) sought or offered to prove or disprove a claim or complaint of professional
 144 misconduct or malpractice filed against a mediator;

145 (f) except as otherwise provided in Subsection (3), sought or offered to prove or
 146 disprove a claim or complaint of professional misconduct or malpractice filed against a
 147 mediation party, nonparty participant, or representative of a party based on conduct occurring
 148 during a mediation; or

149 (g) ~~§→ [sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation~~
 150 ~~in a proceeding in which a child or adult protective services agency is a party, unless the case is~~
 151 ~~referred by a court to mediation and a public agency participates.] subject to the reporting~~
 151a ~~requirements in 62A-4a-403 or 62A-3-305. ←§~~

152 (2) There is no privilege under Section 78-31c-104 if a court, administrative agency, or
153 arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of
154 the evidence has shown that:

155 (a) the evidence is not otherwise available;

156 (b) there is a need for the evidence that substantially outweighs the interest in
157 protecting confidentiality; and

158 (c) the mediation communication is sought or offered in:

159 (i) a court proceeding involving a felony or misdemeanor; or

160 (ii) except as otherwise provided in Subsection (3), a proceeding to prove a claim to
161 rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

162 (3) A mediator may not be compelled to provide evidence of a mediation
163 communication referred to in Subsection (1)(f) or (2)(c)(ii).

164 (4) If a mediation communication is not privileged under Subsection (1) or (2), only
165 the portion of the communication necessary for the application of the exception from
166 nondisclosure may be admitted. Admission of evidence under Subsection (1) or (2) does not
167 render the evidence, or any other mediation communication, discoverable or admissible for any
168 other purpose.

169 Section 7. Section **78-31c-107** is enacted to read:

170 **78-31c-107. Prohibited mediator reports.**

171 (1) Except as required in Subsection (2), a mediator may not make a report,
172 assessment, evaluation, recommendation, finding, or other communication regarding a
173 mediation to a court, administrative agency, or other authority that may make a ruling on the
174 dispute that is the subject of the mediation.

175 (2) A mediator may disclose:

176 (a) whether the mediation occurred or has terminated, whether a settlement was
177 reached, and attendance;

178 (b) a mediation communication as permitted under Section 78-31c-106; or

179 (c) a mediation communication evidencing abuse, neglect, abandonment, or
180 exploitation of an individual to a public agency responsible for protecting individuals against
181 such mistreatment.

182 (3) A communication made in violation of Subsection (1) may not be considered by a

183 court, administrative agency, or arbitrator.

184 Section 8. Section **78-31c-108** is enacted to read:

185 **78-31c-108. Confidentiality.**

186 Unless subject to Title 52, Chapter 4, Open and Public Meetings, and Title 63, Chapter
 187 2, Government Records Access and Management Act, mediation communications are
 188 confidential to the extent agreed by the parties or provided by other law or rule of this state.

189 Section 9. Section **78-31c-109** is enacted to read:

190 **78-31c-109. Mediator's disclosure of conflicts of interest -- Background.**

191 (1) Before accepting a mediation, an individual who is requested to serve as a mediator
 192 shall:

193 (a) make an inquiry that is reasonable under the circumstances to determine whether
 194 there are any known facts that a reasonable individual would consider likely to affect the
 195 impartiality of the mediator, including a financial or personal interest in the outcome of the
 196 mediation and an existing or past relationship with a mediation party or foreseeable participant
 197 in the mediation; and

198 (b) disclose any known fact to the mediation parties as soon as practical before
 199 accepting a mediation.

200 (2) If a mediator learns any fact described in Subsection (1)(a) after accepting a
 201 mediation, the mediator shall disclose it as soon as practicable.

202 (3) At the request of a mediation party, an individual who is requested to serve as a
 203 mediator shall disclose the mediator's qualifications to mediate a dispute.

204 (4) Subsections (1), (2), (3), and (6) do not apply to an individual acting as a judge ~~§~~ or
 204a ombudsman ~~←~~§ .

205 (5) This chapter does not require that a mediator have a special qualification by
 206 background or profession.

207 (6) A mediator must be impartial, unless after disclosure of the facts required in
 208 Subsections (1) and (2) to be disclosed, the parties agree otherwise.

209 Section 10. Section **78-31c-110** is enacted to read:

210 **78-31c-110. Participation in mediation.**

211 An attorney or other individual designated by a party may accompany the party to, and
 212 participate in, a mediation. A waiver of participation given before the mediation may be
 213 rescinded.

214 Section 11. Section **78-31c-111** is enacted to read:

215 **78-31c-111. International commercial mediation.**

216 (1) In this section:

217 (a) "International commercial mediation" means an international commercial

218 conciliation as defined in Article 1 of the Model Law.

219 (b) "Model Law" means the Model Law on International Commercial Conciliation

220 adopted by the United Nations Commission on International Trade Law on 28 June 2002 and

221 recommended by the United Nations General Assembly in a resolution (A/RES/57/18) dated

222 19 November 2002.

223 (2) Except as otherwise provided in Subsections (3) and (4), if a mediation is an

224 international commercial mediation, the mediation is governed by the Model Law.

225 (3) Unless the parties agree in accordance with Subsection 78-31c-103(3) that all or

226 part of an international commercial mediation is not privileged, Sections 78-31c-104 through

227 78-31c-106 and any applicable definitions in Section 78-31c-102 of this chapter apply to the

228 mediation and nothing in Article 10 of the Model Law derogates from Sections 78-31c-104

229 through 78-31c-106.

230 (4) If the parties to an international commercial mediation agree under Article 1,

231 Section (7), of the Model Law that the Model Law does not apply, this chapter applies.

232 Section 12. Section **78-31c-112** is enacted to read:

233 **78-31c-112. Relation to Electronic Signatures in Global and National Commerce**

234 **Act.**

235 This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global

236 and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or

237 supersede Section 101(c) of that act or authorize electronic delivery of any of the notices

238 described in Section 103(b) of that act.

239 Section 13. Section **78-31c-113** is enacted to read:

240 **78-31c-113. Uniformity of application and construction.**

241 In applying and construing this chapter, consideration should be given to the need to

242 promote uniformity of the law with respect to its subject matter among states that enact it.

243 Section 14. Section **78-31c-114** is enacted to read:

244 **78-31c-114. Application to existing agreements or referrals.**

245 (1) This chapter governs a mediation pursuant to a referral or an agreement to mediate
246 made on or after May 1, 2006.

247 (2) Notwithstanding Subsection (1), on or after May 1, 2007, this chapter governs all
248 agreements to mediate whenever made.

Legislative Review Note
as of 1-5-06 3:28 PM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel