

**Representative Lorie D. Fowlke** proposes the following substitute bill:

**UNIFORM MEDIATION ACT**

2006 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: Lyle W. Hillyard**

House Sponsor: Lorie D. Fowlke

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**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



- 26            **78-31c-102**, Utah Code Annotated 1953
- 27            **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



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

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

42                            **CHAPTER 31c. UTAH UNIFORM MEDIATION ACT**

43            **78-31c-101. Title.**

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

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

46            **78-31c-102. Definitions.**

47            As used in this chapter:

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

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

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

57 (4) "Mediator" means an individual who is neutral and conducts a mediation.

58 (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) subject to the reporting requirements in Section 62A-3-305 or 62A-4a-403.

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

153 (a) the evidence is not otherwise available;

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

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

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

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

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

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

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

168 **78-31c-107. Prohibited mediator reports.**

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

173 (2) A mediator may disclose:

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

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

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

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

181 court, administrative agency, or arbitrator.

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

183 **78-31c-108. Confidentiality.**

184 Unless subject to Title 52, Chapter 4, Open and Public Meetings, and Title 63, Chapter  
185 2, Government Records Access and Management Act, mediation communications are  
186 confidential to the extent agreed by the parties or provided by other law or rule of this state.

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

188 **78-31c-109. Mediator's disclosure of conflicts of interest -- Background.**

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

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

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

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

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

202 (4) Subsections (1), (2), (3), and (6) do not apply to an individual acting as a judge or  
203 ombudsman.

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

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

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

209 **78-31c-110. Participation in mediation.**

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

212 rescinded.

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

214 **78-31c-111. International commercial mediation.**

215 (1) In this section:

216 (a) "International commercial mediation" means an international commercial  
217 conciliation as defined in Article 1 of the Model Law.

218 (b) "Model Law" means the Model Law on International Commercial Conciliation  
219 adopted by the United Nations Commission on International Trade Law on 28 June 2002 and  
220 recommended by the United Nations General Assembly in a resolution (A/RES/57/18) dated  
221 19 November 2002.

222 (2) Except as otherwise provided in Subsections (3) and (4), if a mediation is an  
223 international commercial mediation, the mediation is governed by the Model Law.

224 (3) Unless the parties agree in accordance with Subsection 78-31c-103(3) that all or  
225 part of an international commercial mediation is not privileged, Sections 78-31c-104 through  
226 78-31c-106 and any applicable definitions in Section 78-31c-102 of this chapter apply to the  
227 mediation and nothing in Article 10 of the Model Law derogates from Sections 78-31c-104  
228 through 78-31c-106.

229 (4) If the parties to an international commercial mediation agree under Article 1,  
230 Section (7), of the Model Law that the Model Law does not apply, this chapter applies.

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

232 **78-31c-112. Relation to Electronic Signatures in Global and National Commerce**  
233 **Act.**

234 This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global  
235 and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or  
236 supersede Section 101(c) of that act or authorize electronic delivery of any of the notices  
237 described in Section 103(b) of that act.

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

239 **78-31c-113. Uniformity of application and construction.**

240 In applying and construing this chapter, consideration should be given to the need to  
241 promote uniformity of the law with respect to its subject matter among states that enact it.

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



243            **78-31c-114.** Application to existing agreements or referrals.

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

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

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**Fiscal Note**  
**Bill Number SB0061S01**

**Uniform Mediation Act**

*17-Feb-06*

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**State Impact**

No fiscal impact.

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**Individual and Business Impact**

May have a positive or negative fiscal impact on individuals or businesses depending on the case.

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**Office of the Legislative Fiscal Analyst**