

SENATE BILL NO. 292—SENATOR CARE

MARCH 15, 2007

Referred to Committee on Judiciary

SUMMARY—Enacts the Uniform Mediation Act. (BDR 3-1114)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in *bolded italics* is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to mediation; enacting the Uniform Mediation Act; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Mediation Act in 2001 and amended it in 2003.

Section 13 of this bill provides that the Act applies to all mediations, except those involving collective bargaining, minors in a primary or secondary school peer review context, prison inmate mediation and proceedings conducted by judicial officers who might rule in a dispute or who are not prohibited by court rule from disclosing mediation communications with a court, agency or other authority. In addition, **section 13** allows parties to opt out of the Act.

Section 14 of this bill provides that a mediation communication is not subject to discovery or admission into evidence in a formal proceeding, unless an exception to this rule applies. Under **section 14**, in proceedings following a mediation, a party may refuse to disclose, and prevent any other person from disclosing, a mediation communication. Mediators and nonparty participants may refuse to disclose their own statements made during mediation, and may prevent others from disclosing them as well.

Section 15 of this bill provides for the waiver of a privilege for mediation communications and for the circumstances in which a party is precluded from asserting the privilege. **Section 16** of this bill provides for exceptions to the privileges for mediation communications. **Section 16** also provides that if a court, administrative agency or arbitration panel finds that the need for the information outweighs the interest in confidentiality in a felony or misdemeanor proceeding or a proceeding to prove a claim or defense to reform or avoid liability on a contract arising out of the mediation, there is no privilege.

Section 17 of this bill prohibits a mediator, other than a judicial officer, from submitting a report or certain other information to a court, agency or other authority that may make a ruling on the dispute that is the subject of the mediation. The mediator may report that a mediation is ongoing or has concluded, attendance at the mediation and mediation communications evidencing abuse, neglect or abandonment or other nonprivileged mediation matters.



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Section 19 of this bill does not prescribe qualifications or other professional standards for mediators, but requires a mediator to disclose his or her qualifications upon request by a party to the mediation. **Section 19** also requires a mediator to disclose conflicts of interest before accepting a mediation or as soon as practicable after discovery.

Section 21 of this bill adopts by reference the Model Law on International Commercial Conciliation, promulgated by the United Nations Commission on International Trade Law in 2002. **Section 21** provides that, unless there is an agreement otherwise, this Model Law applies to any mediation that is an international commercial mediation.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 38 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 23, inclusive, of this act.

Sec. 2. *Sections 2 to 23, inclusive, of this act may be cited as the Uniform Mediation Act.*

Sec. 3. *As used in sections 2 to 23, inclusive, of this act, unless the context otherwise requires, the words and terms defined in sections 4 to 12, inclusive, of this act have the meanings ascribed to them in those sections.*

Sec. 4. *“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.*

Sec. 5. *“Mediation communication” means a statement, whether oral or in a record or 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.*

Sec. 6. *“Mediation party” means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.*

Sec. 7. *“Mediator” means an individual who conducts a mediation.*

Sec. 8. *“Nonparty participant” means a person, other than a party or mediator, that participates in a mediation.*

Sec. 9. *“Person” means an individual, corporation, business trust, estate, trust, partnership, limited-liability company, association, joint venture, government, governmental subdivision, agency or instrumentality, public corporation or any other legal or commercial entity.*

Sec. 10. *“Proceeding” means:*



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1 1. A judicial, administrative, arbitral or other adjudicative
2 process, including, without limitation, related prehearing and
3 posthearing motions, conferences and discovery; or

4 2. A legislative hearing or similar process.

5 **Sec. 11.** "Record" means information that is inscribed on a
6 tangible medium or that is stored in an electronic or other medium
7 and is retrievable in perceivable form.

8 **Sec. 12.** "Sign" means:

9 1. To execute or adopt a tangible symbol with the present
10 intent to authenticate a record; or

11 2. To attach or logically associate an electronic symbol,
12 sound or process to or with a record with the present intent to
13 authenticate a record.

14 **Sec. 13.** 1. Except as otherwise provided in subsection 2 or
15 3, sections 2 to 23, inclusive, of this act apply to a mediation in
16 which:

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

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

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

26 2. Sections 2 to 23, inclusive, of this act do not apply to a
27 mediation:

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

30 (b) Relating to a dispute that is pending under or is part of the
31 processes established by a collective bargaining agreement, except
32 that sections 2 to 23, inclusive, of this act apply to a mediation
33 arising out of a dispute that has been filed with an administrative
34 agency or court;

35 (c) Conducted by a judge who might make a ruling on the
36 case; or

37 (d) Conducted under the auspices of:

38 (1) A primary or secondary school if all the parties are
39 students; or

40 (2) A correctional institution for youths if all the parties are
41 residents of that institution.

42 3. If the parties agree in advance in a signed record, or a
43 record of proceeding reflects agreement by the parties, that all or
44 part of a mediation is not privileged, the privileges under sections
45 14, 15 and 16 of this act do not apply to the mediation or part



1 *agreed upon. However, sections 14, 15 and 16 of this act apply to a*
2 *mediation communication made by a person that has not received*
3 *actual notice of the agreement before the communication is made.*

4 **Sec. 14.** 1. *Except as otherwise provided in section 16 of*
5 *this act, a mediation communication is privileged as provided in*
6 *subsection 2 and is not subject to discovery or admissible in*
7 *evidence in a proceeding unless waived or precluded as provided*
8 *by section 15 of this act.*

9 2. *In a proceeding, the following privileges apply:*

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

12 (b) *A mediator may refuse to disclose a mediation*
13 *communication and may prevent any other person from disclosing*
14 *a mediation communication of the mediator.*

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

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

22 **Sec. 15.** 1. *A privilege under section 14 of this act may be*
23 *waived in a record or orally during a proceeding if it is expressly*
24 *waived by all parties to the mediation and:*

25 (a) *In the case of the privilege of a mediator, it is expressly*
26 *waived by the mediator; and*

27 (b) *In the case of the privilege of a nonparty participant, it is*
28 *expressly waived by the nonparty participant.*

29 2. *A person that discloses or makes a representation about a*
30 *mediation communication which prejudices another person in a*
31 *proceeding is precluded from asserting a privilege under section*
32 *14 of this act, but only to the extent necessary for the person*
33 *prejudiced to respond to the representation or disclosure.*

34 3. *A person that intentionally uses a mediation to plan,*
35 *attempt to commit or commit a crime or conceal an ongoing crime*
36 *or ongoing criminal activity is precluded from asserting a privilege*
37 *under section 14 of this act.*

38 **Sec. 16.** 1. *There is no privilege under section 14 of this act*
39 *for a mediation communication that is:*

40 (a) *In an agreement evidenced by a record signed by all parties*
41 *to the agreement;*

42 (b) *Available to the public under chapter 239 of NRS or made*
43 *during a session of a mediation which is open, or is required by*
44 *law to be open, to the public;*



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

3 (d) Intentionally used to plan a crime, attempt to commit or
4 commit a crime or conceal an ongoing crime or ongoing criminal
5 activity;

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

9 (f) Except as otherwise provided in subsection 3, sought or
10 offered to prove or disprove a claim or complaint of professional
11 misconduct or malpractice filed against a mediation party,
12 nonparty participant or representative of a party based on conduct
13 occurring during a mediation; or

14 (g) Sought or offered to prove or disprove abuse, neglect,
15 abandonment or exploitation in a proceeding in which a child or
16 adult protective services agency is a party, unless the child or adult
17 protection case is referred by a court to mediation and a public
18 agency participates.

19 2. There is no privilege under section 14 of this act if a court,
20 administrative agency or arbitrator finds, after a hearing in
21 camera, that the party seeking discovery or the proponent of the
22 evidence has shown that the evidence is not otherwise available,
23 that there is a need for the evidence that substantially outweighs
24 the interest in protecting confidentiality and that the mediation
25 communication is sought or offered in:

26 (a) A court proceeding involving a felony or misdemeanor; or

27 (b) Except as otherwise provided in subsection 3, a proceeding
28 to prove a claim to rescind or reform or a defense to avoid liability
29 on a contract arising out of the mediation.

30 3. A mediator may not be compelled to provide evidence of a
31 mediation communication referred to in paragraph (f) of
32 subsection 1 or paragraph (b) of subsection 2.

33 4. If a mediation communication is not privileged under
34 subsection 1 or 2, only the portion of the communication
35 necessary for the application of the exception from nondisclosure
36 may be admitted. Admission of evidence under subsection 1 or 2
37 does not render the evidence or any other mediation
38 communication discoverable or admissible for any other purpose.

39 **Sec. 17. 1.** Except as otherwise required in subsection 2, a
40 mediator may not make a report, assessment, evaluation,
41 recommendation, finding or other communication regarding a
42 mediation to a court, administrative agency or other authority that
43 may make a ruling on the dispute that is the subject of the
44 mediation.

45 2. A mediator may disclose:



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

3 (b) A mediation communication as permitted under section 16
4 of this act; or

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

8 3. A communication made in violation of subsection 1 may
9 not be considered by a court, administrative agency or arbitrator.

10 **Sec. 18.** Unless subject to chapters 239 and 241 of NRS,
11 mediation communications are confidential to the extent agreed by
12 the parties or provided by other law or rule of this State.

13 **Sec. 19. 1.** Before accepting a mediation, an individual
14 who is requested to serve as a mediator shall:

15 (a) Make an inquiry that is reasonable under the
16 circumstances to determine whether there are any known facts
17 that a reasonable individual would consider likely to affect the
18 impartiality of the mediator, including, without limitation, a
19 financial or personal interest in the outcome of the mediation and
20 an existing or past relationship with a mediation party or
21 foreseeable participant in the mediation; and

22 (b) Disclose any such known fact to the mediation parties as
23 soon as is practical before accepting a mediation.

24 2. If a mediator learns any fact described in paragraph (a) of
25 subsection 1 after accepting a mediation, the mediator shall
26 disclose it as soon as is practicable.

27 3. At the request of a mediation party, an individual who is
28 requested to serve as a mediator shall disclose the mediator's
29 qualifications to mediate a dispute.

30 4. A person that violates subsection 1, 2 or 7 is precluded by
31 the violation from asserting a privilege under section 14 of this
32 act.

33 5. Subsections 1, 2, 3 and 7 do not apply to an individual
34 acting as a judge.

35 6. Sections 2 to 23, inclusive, of this act do not require that a
36 mediator have a special qualification by background or
37 profession.

38 7. A mediator must be impartial, unless after disclosure of the
39 facts required in subsections 1 and 2 to be disclosed, the parties
40 agree otherwise.

41 **Sec. 20.** An attorney or other individual designated by a
42 party may accompany the party to and participate in a mediation.
43 A waiver of participation given before the mediation may be
44 rescinded.



Sec. 21. 1. *Except as otherwise provided in subsections 2 and 3, if a mediation is an international commercial mediation, the mediation is governed by the Model Law.*

2. *Unless the parties agree in accordance with subsection 3 of section 13 of this act that all or part of an international commercial mediation is not privileged, sections 14, 15 and 16 of this act and any applicable definitions in sections 4 to 12, inclusive, of this act also apply to the mediation and nothing in Article 10 of the Model Law derogates from sections 14, 15 and 16 of this act.*

3. *If the parties to an international commercial mediation agree under Article 1, subsection (7), of the Model Law that the Model Law does not apply, sections 2 to 23, inclusive, of this act apply.*

4. *As used in this section:*

(a) *“International commercial mediation” means an international commercial conciliation as defined in Article 1 of the Model Law.*

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

Sec. 22. *Sections 2 to 23, inclusive, of this act modify, limit or supersede the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 et seq., but do not modify, limit or supersede Section 101(c) of that act, 15 U.S.C. § 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. § 7003(b).*

Sec. 23. *In applying and construing the Uniform Mediation Act, consideration should be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.*

Sec. 24. NRS 40.680 is hereby amended to read as follows:

40.680 1. Except as otherwise provided in this chapter, before a claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the matter must be submitted to mediation, unless mediation is waived in writing by the contractor, subcontractor, supplier or design professional and the claimant.

2. The claimant and each party alleged to have caused the constructional defect must select a mediator by agreement. If the claimant and the other parties fail to agree upon a mediator within 20 days after a mediator is first selected by the claimant, any party



1 may petition the American Arbitration Association, the Nevada
2 Arbitration Association, Nevada Dispute Resolution Services or any
3 other mediation service acceptable to the parties for the appointment
4 of a mediator. A mediator so appointed may discover only those
5 documents or records which are necessary to conduct the mediation.
6 The mediator shall convene the mediation within 30 days after the
7 matter is submitted to him and shall complete the mediation within
8 45 days after the matter is submitted to him, unless the parties agree
9 to extend the time.

10 3. Before the mediation begins:

11 (a) The claimant shall deposit \$50 with the mediation service;
12 and

13 (b) Each other party shall deposit with the mediation service, in
14 equal shares, the remaining amount estimated by the mediation
15 service as necessary to pay the fees and expenses of the mediator for
16 the first session of mediation and shall deposit additional amounts
17 demanded by the mediation service as incurred for that purpose.

18 4. Unless otherwise agreed, the total fees for each day of
19 mediation and the mediator must not exceed \$750 per day.

20 5. If the parties do not reach an agreement concerning the
21 matter during mediation or if any party who is alleged to have
22 caused the constructional defect fails to pay the required fees and
23 appear, the claimant may commence an action or amend a complaint
24 to add a cause of action for the constructional defect in court and:

25 (a) The reasonable costs and fees of the mediation are
26 recoverable by the prevailing party as costs of the action.

27 (b) Any party may petition the court in which the action is
28 commenced for the appointment of a special master.

29 6. A special master appointed pursuant to subsection 5 may:

30 (a) Review all pleadings, papers or documents filed with the
31 court concerning the action.

32 (b) Coordinate the discovery of any books, records, papers or
33 other documents by the parties, including the disclosure of witnesses
34 and the taking of the deposition of any party.

35 (c) Order any inspections on the site of the property by a party
36 and any consultants or experts of a party.

37 (d) Order settlement conferences and attendance at those
38 conferences by any representative of the insurer of a party.

39 (e) Require any attorney representing a party to provide
40 statements of legal and factual issues concerning the action.

41 (f) Refer to the judge who appointed him or to the presiding
42 judge of the court in which the action is commenced any matter
43 requiring assistance from the court.



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1 The special master shall not, unless otherwise agreed by the
2 parties, personally conduct any settlement conferences or engage in
3 any ex parte meetings regarding the action.

4 7. Upon application by a party to the court in which the action
5 is commenced, any decision or other action taken by a special
6 master appointed pursuant to this section may be appealed to the
7 court for a decision.

8 8. A report issued by a ~~mediator or~~ special master that
9 indicates that a party has failed to appear before him or to mediate in
10 good faith is admissible in the action . ~~[, but a statement or~~
11 ~~admission made by a party in the course of mediation is not~~
12 ~~admissible.]~~

13 **Sec. 25.** NRS 3.475 is hereby amended to read as follows:

14 3.475 1. In a county whose population is 400,000 or more,
15 the district court shall establish by rule approved by the Supreme
16 Court a program of mandatory mediation in cases that involve the
17 custody or visitation of a child.

18 2. The program must:

19 (a) Require the impartial mediation of the issues of custody and
20 visitation and authorize the impartial mediation of any other
21 nonfinancial issue deemed appropriate by the court.

22 (b) Authorize the court to exclude a case from the program for
23 good cause shown, including, but not limited to, a showing that:

24 (1) There is a history of child abuse or domestic violence by
25 one of the parties;

26 (2) The parties are currently participating in private
27 mediation; or

28 (3) One of the parties resides outside of the jurisdiction of the
29 court.

30 (c) Provide standards for the training of the mediators assigned
31 to cases, including, but not limited to:

32 (1) Minimum educational requirements, which must not be
33 restricted to any particular professional or educational training;

34 (2) Minimum requirements for training in the procedural
35 aspects of mediation and the interpersonal skills necessary to act as
36 a mediator;

37 (3) A minimum period of apprenticeship for persons who
38 have not previously acted as domestic mediators;

39 (4) Minimum requirements for continuing education; and

40 (5) Procedures to ensure that potential mediators understand
41 the high standard of ethics and confidentiality related to their
42 participation in the program.

43 (d) Prohibit the mediator from reporting to the court any
44 information about the mediation other than ~~whether the dispute was~~



~~resolved.]~~ *the information which the mediator may disclose pursuant to subsection 2 of section 17 of this act.*

(e) Establish a sliding schedule of fees for participation in the program based on the ability of a party to pay.

(f) Provide for the acceptance of gifts and grants offered in support of the program.

(g) Allow the court to refer the parties to a private mediator.

3. The costs of the program must be paid from the county general fund. All fees, gifts and grants collected pursuant to this section must be deposited in the county general fund.

4. The court shall submit a report to the Director of the Legislative Counsel Bureau for distribution to each regular session of the Legislature on or before March 1 of each odd-numbered year that must include:

(a) A summary of the number and types of cases mediated and resolved by the program during the previous biennium;

(b) The fees collected by the program and any gifts or grants received by the court to support the program; and

(c) Suggestions for any necessary legislation to improve the effectiveness and efficiency of the program.

5. This section does not prohibit a court from referring a financial or other issue to a special master or other person for assistance in resolving the dispute.

Sec. 26. NRS 3.500 is hereby amended to read as follows:

3.500 1. In a county whose population is more than 100,000 and less than 400,000, the district court shall establish by rule approved by the Supreme Court a program of mandatory mediation in cases which involve the custody or visitation of a child. A district court in a county whose population is 100,000 or less may establish such a program in the same manner for use in that county. The district courts in two or more counties whose populations are 100,000 or less may establish such a program in the same manner for use in the counties in which the courts are located.

2. The program must:

(a) Require the impartial mediation of the issues of custody and visitation and any other nonfinancial issue deemed appropriate by the court.

(b) Allow the court to exclude a case from the program for good cause shown, including a showing of a history of child abuse or domestic violence by one of the parties, ongoing private mediation or residency of one of the parties out of the jurisdiction of the court.

(c) Provide standards for the training of the mediators assigned to cases pursuant to the rule, including but not limited to:

(1) Minimum educational requirements, which may not be restricted to any particular professional or educational training;



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(2) Minimum requirements for training in the procedural aspects of mediation and the interpersonal skills necessary to act as a mediator;

(3) A minimum period of apprenticeship for persons who have not previously acted as domestic mediators;

(4) Minimum requirements for continuing education; and

(5) Procedures to ensure that potential mediators understand the high standard of ethics and confidentiality related to their participation in the program.

(d) Prohibit the mediator from reporting to the court any information about the mediation other than ~~[whether the mediation was successful or not.]~~ *the information which the mediator may disclose pursuant to subsection 2 of section 17 of this act.*

(e) Establish a sliding schedule of fees for participation in the program based on the client's ability to pay.

(f) Provide for the acceptance of gifts and grants offered in support of the program.

(g) Allow the court to refer the parties to a private mediator for assistance in resolving the issues.

3. The costs of the program must be paid from the account for dispute resolution in the county general fund. All fees, gifts and grants collected pursuant to this section must be deposited in the account.

4. The district court in any county which has established a program pursuant to this section shall submit a report to the Director of the Legislative Counsel Bureau for distribution to each regular session of the Legislature on or before March 1 of each odd-numbered year. If two or more district courts establish such a program, only one of those courts is required to submit such a report for that program. The report must include a summary of the number and type of cases mediated and resolved by the program during the previous biennium, the fees collected by the program and any gifts or grants received by the court or courts to support the program. The report must also contain suggestions for any necessary legislation to improve the effectiveness and efficiency of the program.

5. This section does not prohibit a court from referring a financial or other issue to a special master or other person for assistance in resolving the dispute.

Sec. 27. NRS 48.109 is hereby amended to read as follows:

48.109 ~~[1.]~~ A meeting held to further the resolution of a dispute may be closed at the discretion of the mediator.

~~[2.—The proceedings of the mediation session must be regarded as settlement negotiations, and no admission, representation or statement made during the session, not otherwise discoverable or obtainable, is admissible as evidence or subject to discovery.~~



~~3. A mediator is not subject to civil process requiring the disclosure of any matter discussed during the mediation proceedings.]~~

Sec. 28. 1. The amendatory provisions of this act govern a mediation pursuant to a referral or an agreement to mediate made on or after October 1, 2007.

2. On or after October 1, 2008, the amendatory provisions of this act govern an agreement to mediate whenever made.

