

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; providing that the Uniform Mediation Act does not apply to certain mediation programs; 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 the family court mediation program established pursuant to NRS 3.475 or 3.500, the mediation program established by the Nevada Supreme Court pursuant to NRS 38.250 to 38.259, inclusive, 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.



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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.

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,*



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1 *association, joint venture, government, governmental subdivision,*
2 *agency or instrumentality, public corporation or any other legal or*
3 *commercial entity.*

4 **Sec. 10. “Proceeding” means:**

5 *1. A judicial, administrative, arbitral or other adjudicative*
6 *process, including, without limitation, related prehearing and*
7 *posthearing motions, conferences and discovery; or*

8 *2. A legislative hearing or similar process.*

9 **Sec. 11. “Record” means information that is inscribed on a**
10 *tangible medium or that is stored in an electronic or other medium*
11 *and is retrievable in perceivable form.*

12 **Sec. 12. “Sign” means:**

13 *1. To execute or adopt a tangible symbol with the present*
14 *intent to authenticate a record; or*

15 *2. To attach or logically associate an electronic symbol,*
16 *sound or process to or with a record with the present intent to*
17 *authenticate a record.*

18 **Sec. 13. 1. Except as otherwise provided in subsection 2 or**
19 **3, sections 2 to 23, inclusive, of this act apply to a mediation in**
20 **which:**

21 *(a) The mediation parties are required to mediate by statute or*
22 *court or administrative agency rule or referred to mediation by a*
23 *court, administrative agency or arbitrator;*

24 *(b) The mediation parties and the mediator agree to mediate in*
25 *a record that demonstrates an expectation that mediation*
26 *communications will be privileged against disclosure; or*

27 *(c) The mediation parties use as a mediator an individual who*
28 *holds himself out as a mediator or the mediation is provided by a*
29 *person that holds itself out as providing mediation.*

30 *2. Sections 2 to 23, inclusive, of this act do not apply to a*
31 *mediation:*

32 *(a) Relating to the establishment, negotiation, administration*
33 *or termination of a collective bargaining relationship;*

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

39 *(c) Conducted by a judge who might make a ruling on the*
40 *case; or*

41 *(d) Conducted under the auspices of:*

42 *(1) A primary or secondary school if all the parties are*
43 *students; or*

44 *(2) A correctional institution for youths if all the parties are*
45 *residents of that institution.*



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1 (e) Conducted under a program of mandatory mediation
2 established pursuant to NRS 3.475 or 3.500.

3 (f) Conducted under a program of mediation adopted by the
4 Supreme Court pursuant to NRS 38.250 to 38.259, inclusive.

5 3. If the parties agree in advance in a signed record, or a
6 record of proceeding reflects agreement by the parties, that all or
7 part of a mediation is not privileged, the privileges under sections
8 14, 15 and 16 of this act do not apply to the mediation or part
9 agreed upon. However, sections 14, 15 and 16 of this act apply to a
10 mediation communication made by a person that has not received
11 actual notice of the agreement before the communication is made.

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

17 2. In a proceeding, the following privileges apply:

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

20 (b) A mediator may refuse to disclose a mediation
21 communication and may prevent any other person from disclosing
22 a mediation communication of the mediator.

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

26 3. Evidence or information that is otherwise admissible or
27 subject to discovery does not become inadmissible or protected
28 from discovery solely by reason of its disclosure or use in a
29 mediation.

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

33 (a) In the case of the privilege of a mediator, it is expressly
34 waived by the mediator; and

35 (b) In the case of the privilege of a nonparty participant, it is
36 expressly waived by the nonparty participant.

37 2. A person that discloses or makes a representation about a
38 mediation communication which prejudices another person in a
39 proceeding is precluded from asserting a privilege under section
40 14 of this act, but only to the extent necessary for the person
41 prejudiced to respond to the representation or disclosure.

42 3. A person that intentionally uses a mediation to plan,
43 attempt to commit or commit a crime or conceal an ongoing crime
44 or ongoing criminal activity is precluded from asserting a privilege
45 under section 14 of this act.



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

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

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

8 **(c) A threat or statement of a plan to inflict bodily injury or**
9 **commit a crime of violence;**

10 **(d) Intentionally used to plan a crime, attempt to commit or**
11 **commit a crime or conceal an ongoing crime or ongoing criminal**
12 **activity;**

13 **(e) Sought or offered to prove or disprove a claim or complaint**
14 **of professional misconduct or malpractice filed against a**
15 **mediator;**

16 **(f) Except as otherwise provided in subsection 3, sought or**
17 **offered to prove or disprove a claim or complaint of professional**
18 **misconduct or malpractice filed against a mediation party,**
19 **nonparty participant or representative of a party based on conduct**
20 **occurring during a mediation; or**

21 **(g) Sought or offered to prove or disprove abuse, neglect,**
22 **abandonment or exploitation in a proceeding in which a child or**
23 **adult protective services agency is a party, unless the child or adult**
24 **protection case is referred by a court to mediation and a public**
25 **agency participates.**

26 **2. There is no privilege under section 14 of this act if a court,**
27 **administrative agency or arbitrator finds, after a hearing in**
28 **camera, that the party seeking discovery or the proponent of the**
29 **evidence has shown that the evidence is not otherwise available,**
30 **that there is a need for the evidence that substantially outweighs**
31 **the interest in protecting confidentiality and that the mediation**
32 **communication is sought or offered in:**

33 **(a) A court proceeding involving a felony or misdemeanor; or**

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

37 **3. A mediator may not be compelled to provide evidence of a**
38 **mediation communication referred to in paragraph (f) of**
39 **subsection 1 or paragraph (b) of subsection 2.**

40 **4. If a mediation communication is not privileged under**
41 **subsection 1 or 2, only the portion of the communication**
42 **necessary for the application of the exception from nondisclosure**
43 **may be admitted. Admission of evidence under subsection 1 or 2**
44 **does not render the evidence or any other mediation**
45 **communication discoverable or admissible for any other purpose.**



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

7 **2.** *A mediator may disclose:*

8 *(a) Whether the mediation occurred or has terminated,*
9 *whether a settlement was reached and attendance;*

10 *(b) A mediation communication as permitted under section 16*
11 *of this act; or*

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

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

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

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

22 *(a) Make an inquiry that is reasonable under the*
23 *circumstances to determine whether there are any known facts*
24 *that a reasonable individual would consider likely to affect the*
25 *impartiality of the mediator, including, without limitation, a*
26 *financial or personal interest in the outcome of the mediation and*
27 *an existing or past relationship with a mediation party or*
28 *foreseeable participant in the mediation; and*

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

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

34 **3.** *At the request of a mediation party, an individual who is*
35 *requested to serve as a mediator shall disclose the mediator's*
36 *qualifications to mediate a dispute.*

37 **4.** *A person that violates subsection 1, 2 or 7 is precluded by*
38 *the violation from asserting a privilege under section 14 of this*
39 *act.*

40 **5.** *Subsections 1, 2, 3 and 7 do not apply to an individual*
41 *acting as a judge.*

42 **6.** *Sections 2 to 23, inclusive, of this act do not require that a*
43 *mediator have a special qualification by background or*
44 *profession.*



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

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



1 submitted to mediation, unless mediation is waived in writing by the
2 contractor, subcontractor, supplier or design professional and the
3 claimant.

4 2. The claimant and each party alleged to have caused the
5 constructional defect must select a mediator by agreement. If the
6 claimant and the other parties fail to agree upon a mediator within
7 20 days after a mediator is first selected by the claimant, any party
8 may petition the American Arbitration Association, the Nevada
9 Arbitration Association, Nevada Dispute Resolution Services or any
10 other mediation service acceptable to the parties for the appointment
11 of a mediator. A mediator so appointed may discover only those
12 documents or records which are necessary to conduct the mediation.
13 The mediator shall convene the mediation within 30 days after the
14 matter is submitted to him and shall complete the mediation within
15 45 days after the matter is submitted to him, unless the parties agree
16 to extend the time.

17 3. Before the mediation begins:

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

20 (b) Each other party shall deposit with the mediation service, in
21 equal shares, the remaining amount estimated by the mediation
22 service as necessary to pay the fees and expenses of the mediator for
23 the first session of mediation and shall deposit additional amounts
24 demanded by the mediation service as incurred for that purpose.

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

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

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

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

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

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

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

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

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



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

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

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

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

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

Sec. 25. (Deleted by amendment.)

Sec. 26. (Deleted by amendment.)

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]~~ *In a mediation conducted under a program of mandatory mediation established pursuant to NRS 3.475 or 3.500 or under a program of mediation adopted by the Supreme Court pursuant to NRS 38.250 to 38.259, inclusive, 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 *who conducted a mediation under a program of mandatory mediation established pursuant to NRS 3.475 or 3.500 or under a program of mediation adopted by the Supreme Court pursuant to NRS 38.250 to 38.259, inclusive,* 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.

