

SENATE No.

The Commonwealth of Massachusetts

PRESENTED BY:

Thomas M. McGee

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act relative to mediation.

PETITION OF:

NAME:

Thomas M. McGee

DISTRICT/ADDRESS:

Third Essex and Middlesex

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT RELATIVE TO MEDIATION.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 **SECTION 1. TITLE.** This Act may be cited as the Uniform Mediation Act.

2 **SECTION 2. DEFINITIONS.** In this Act:

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

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

8 (3) "Mediator" means an individual who conducts a mediation.

9 (4) "Nonparty participant" means a person, other than a party or mediator, that
10 participates in a mediation.

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

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

16 (7) "Proceeding" means:

17 (A) a judicial, administrative, arbitral, or other adjudicative process, including related
18 pre-hearing and post-hearing motions, conferences, and discovery; or

19 (B) a legislative hearing or similar process.

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

22 (9) "Sign" means:

23 (A) to execute or adopt a tangible symbol with the present intent to authenticate a
24 record; or

25 (B) to attach or logically associate an electronic symbol, sound, or process to or with
26 a record with the present intent to authenticate a record.

27 **SECTION 3. SCOPE.**

28 (a) Except as otherwise provided in subsection (b) or (c), this [Act] applies to a mediation in
29 which:

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

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

34 (3) the mediation parties use as a mediator an individual who holds himself or
35 herself out as a mediator or the mediation is provided by a person that holds itself out as providing
36 mediation.

37 (b) The [Act] does not apply to a mediation:

38 (1) relating to the establishment, negotiation, administration, or termination of a
39 collective bargaining relationship;

40 (2) relating to a dispute that is pending under or is part of the processes established
41 by a collective bargaining agreement, except that the [Act] applies to a mediation arising out of a
42 dispute that has been filed with an administrative agency or court;

43 (3) conducted by a judge who might make a ruling on the case; or

44 (4) conducted under the auspices of:

45 (A) a primary or secondary school if all the parties are students or

46 (B) a correctional institution for youths if all the parties are residents of that
47 institution.

48 (c) If the parties agree in advance in a signed record, or a record of proceeding reflects
49 agreement by the parties, that all or part of a mediation is not privileged, the privileges under Sections 4

50 through 6 do not apply to the mediation or part agreed upon. However, Sections 4 through 6 apply to a
51 mediation communication made by a person that has not received actual notice of the agreement
52 before the communication is made.

53 **SECTION 4. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY.**

54 (a) Except as otherwise provided in Section 6, a mediation communication is privileged as
55 provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding
56 unless waived or precluded as provided by Section 5.

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

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

60 (2) A mediator may refuse to disclose a mediation communication, and may prevent
61 any other person from disclosing a mediation communication of the mediator.

62 (3) A nonparty participant may refuse to disclose, and may prevent any other person
63 from disclosing, a mediation communication of the nonparty participant.

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

66 **SECTION 5. WAIVER AND PRECLUSION OF PRIVILEGE.**

67 (a) A privilege under Section 4 may be waived in a record or orally during a proceeding if it is
68 expressly waived by all parties to the mediation and:

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

70 (2) in the case of the privilege of a nonparty participant, it is expressly waived by the
71 nonparty participant.

72 (b) A person that discloses or makes a representation about a mediation communication
73 which prejudices another person in a proceeding is precluded from asserting a privilege under Section 4,
74 but only to the extent necessary for the person prejudiced to respond to the representation or
75 disclosure.

76 (c) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime,
77 or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under
78 Section 4.

79 **SECTION 6. EXCEPTIONS TO PRIVILEGE.**

80 (a) There is no privilege under Section 4 for a mediation communication that is:

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

82 (2) available to the public under [insert statutory reference to open records act] or
83 made during a session of a mediation which is open, or is required by law to be open, to the public;

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

86 (4) intentionally used to plan a crime, attempt to commit or commit a crime, or to
87 conceal an ongoing crime or ongoing criminal activity;

88 (5) sought or offered to prove or disprove a claim or complaint of professional
89 misconduct or malpractice filed against a mediator;

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

93 (7) sought or offered to prove or disprove abuse, neglect, abandonment, or
94 exploitation in a proceeding in which a child or adult protective services agency is a party, unless the

95 [Alternative A: [State to insert, for example, child or adult protection] case is
96 referred by a court to mediation and a public agency participates.]

97 [Alternative B: public agency participates in the [State to insert, for example,
98 child or adult protection] mediation].

99 (b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator
100 finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has
101 shown that the evidence is not otherwise available, that there is a need for the evidence that
102 substantially outweighs the interest in protecting confidentiality, and that the mediation communication
103 is sought or offered in:

104 (1) a court proceeding involving a felony [or misdemeanor]; or

105 (2) except as otherwise provided in subsection (c), a proceeding to prove a claim to
106 rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

107 (c) A mediator may not be compelled to provide evidence of a mediation communication referred
108 to in subsection (a)(6) or (b)(2).

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

113 **SECTION 7. PROHIBITED MEDIATOR REPORTS.**

114 (a) Except as required in subsection (b), a mediator may not make a report, assessment, evaluation,
115 recommendation, finding, or other communication regarding a mediation to a court, administrative
116 agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

117 (b) A mediator may disclose:

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

120 (2) a mediation communication as permitted under Section 6; or

121 (3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an
122 individual to a public agency responsible for protecting individuals against such mistreatment.

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

125 **SECTION 8. CONFIDENTIALITY.** Unless subject to the [insert statutory references to open meetings act
126 and open records act], mediation communications are confidential to the extent agreed by the parties
127 or provided by other law or rule of this State.

128 **SECTION 9. MEDIATOR'S DISCLOSURE OF CONFLICTS OF INTEREST; BACKGROUND.**

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

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

134 (2) disclose any such known fact to the mediation parties as soon as is practical before accepting a
135 mediation.

136 (b) If a mediator learns any fact described in subsection (a)(1) after accepting a mediation, the mediator
137 shall disclose it as soon as is practicable.

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

140 (d) A person that violates subsection [(a) or (b)][(a), (b), or (g)] is precluded by the violation from
141 asserting a privilege under Section 4.

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

143 (f) This [Act] does not require that a mediator have a special qualification by background or profession.

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

146 **SECTION 10. PARTICIPATION IN MEDIATION.** An attorney or other individual designated by a party may
147 accompany the party to and participate in a mediation. A waiver of participation given before the
148 mediation may be rescinded.

149 **SECTION 11. INTERNATIONAL COMMERCIAL MEDIATION.**

150 (a) In this section, “Model Law” means the Model Law on International Commercial Conciliation
151 adopted by the United Nations Commission on International Trade Law on 28 June 2002 and
152 recommended by the United Nations General Assembly in a resolution (A/RES/57/18) dated 19
153 November 2002, and “international commercial mediation” means an international commercial
154 conciliation as defined in Article 1 of the Model Law.

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

157 (c) Unless the parties agree in accordance with Section 3(c) of this [Act] that all or part of an
158 international commercial mediation is not privileged, Sections 4, 5, and 6 and any applicable definitions
159 in Section 2 of this [Act] also apply to the mediation and nothing in Article 10 of the Model Law
160 derogates from Sections 4, 5, and 6.

161 (d) If the parties to an international commercial mediation agree under Article 1, subsection (7),
162 of the Model Law that the Model Law does not apply, this [Act] applies.

163 **SECTION 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT.**

164 This Act modifies, limits, or supersedes the federal Electronic Signatures in Global and National
165 Commerce Act, 15 U.S.C. Section 7001 et seq., but this [Act] does not modify, limit, or supersede Section
166 101(c) of that Act or authorize electronic delivery of any of the notices described in Section 103(b) of
167 that Act.

168 **SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In applying and construing this [Act],
169 consideration should be given to the need to promote uniformity of the law with respect to its subject
170 matter among States that enact it.

171 **SECTION 14. SEVERABILITY CLAUSE.** If any provision of this [Act] or its application to any person or
172 circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act]
173 which can be given effect without the invalid provision or application, and to this end the provisions of
174 this [Act] are severable.

175 **SECTION 17. APPLICATION TO EXISTING AGREEMENTS OR REFERRALS.**

176 (a) This Act governs a mediation pursuant to a referral or an agreement to mediate made on or after the
177 effective date of this Act.

178 (b) On or after January 1, 2010 this Act governs an agreement to mediate whenever made.

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