# P.L. 2004, c.157
# Approved November 22, 2004

## SENATE, No. 679

## STATE OF NEW JERSEY
## 211th LEGISLATURE

INTRODUCED JANUARY 26, 2004

**Sponsored by:**
**Senator ROBERT J. MARTIN, District 26 (Morris and Passaic)**
**Senator DIANE ALLEN, District 7 (Burlington and Camden)**
**Assemblywoman LINDA R. GREENSTEIN, District 14 (Mercer and Middlesex)**
**Assemblyman PATRICK DIEGNAN, JR., District 18 (Middlesex)**

**Co-Sponsored by: Assemblyman McKeon**

**SYNOPSIS**
Enacts the "Uniform Mediation Act."

**CURRENT VERSION OF TEXT**
As introduced.

**AN ACT** creating the "Uniform Mediation Act" and supplementing Title 2A of the New Jersey Statutes.

**BE IT ENACTED** *by the Senate and General Assembly of the State of New Jersey:*

1. This Act shall be known and may be cited as the "Uniform Mediation Act."

2. Definitions. As used in this act:
"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.
"Mediation communication" means a statement, whether verbal or nonverbal or in a record, 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. A mediation communication shall not be deemed to be a public record under P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented by P.L.2001, c.404 (C.47:1A-5 et seq.).
"Mediator" means an individual who conducts a mediation.
"Nonparty participant" means a person, other than a party or mediator, who participates in a mediation.

"Mediation party" means a person who participates in a mediation and whose agreement is necessary to resolve the dispute.

"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.

"Proceeding" means a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or a legislative hearing or similar process.

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

"Sign" means to execute or adopt a tangible symbol with the present intent to authenticate a record, or to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

3. Scope.

a. Except as otherwise provided in subsection b. or c., this act shall apply to a mediation in which:

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

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

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

b. The act shall not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship or to any mediation conducted by the Public Employment Relations Commission or the State Board of Mediation;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the act applies to a mediation arising out of a dispute that has been filed with a court or an administrative agency other than the Public Employment Relations Commission or the State Board of Mediation;

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

(4) conducted under the auspices of:

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

(b) a juvenile detention facility or shelter if all the parties are residents of that facility or shelter.

c. If the parties agree in advance in a signed record, or a record of proceeding so reflects, that all or part of a mediation is not privileged, the privileges under sections 4 through 6 of P.L. , c. (C. ) (now pending before the Legislature as sections 4 through 6 of this bill) shall not apply to the mediation or part agreed upon. Sections 4 through 6 of P.L. , c. (C. ) (now pending before the Legislature as sections 4 through 6 of this bill) shall apply to a mediation communication made by a person who has not received actual notice of the agreement before the communication is made.

4. Privilege against Disclosure; Admissibility; Discovery.

a. Except as otherwise provided in section 6 of P.L. , c. (C. ) (now pending before the Legislature as section 6 of this bill), a mediation communication is privileged as provided in subsection b. of this section and shall not be subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by section 5 of P.L. , c. (C. ) (now pending before the Legislature as section 5 of this bill).

b. In a proceeding, the following privileges shall apply:

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

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

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

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

5. Waiver and Preclusion of Privilege.

a. A privilege under section 4 of P.L. , c. (C. ) (now pending before the Legislature as section 4 of this bill) may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

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

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

b. A person who discloses or makes a representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under section 4 of P.L. , c. (C. ) (now pending before the Legislature as section 4 of this bill), but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

c. A person who intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under section 4 of P.L. , c. (C. ) (now pending before the Legislature as section 4 of this bill).

6. Exceptions to Privilege.

a. There is no privilege under section 4 of P.L. , c. (C. ) (now pending before the Legislature as section 4 of this bill) for a mediation communication that is:

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

(2) made during a session of a mediation that is open, or is required by law to be open, to the public;

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

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

(5) sought or offered to prove or disprove a claim or complaint filed against a mediator arising out of a mediation;

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

(7) sought or offered to prove or disprove child abuse or neglect in a proceeding in which the Division of Youth and Family Services in the Department of Human Services is a party, unless the Division of Youth and Family Services participates in the mediation.

b. There is no privilege under section 4 of P.L. , c. (C. ) (now pending before the Legislature as section 4 of this bill) if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a crime as defined in the "New Jersey Code of Criminal Justice," N.J.S. 2C:1-1 et seq.; or

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

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

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

7. Prohibited mediator reports.

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

b. A mediator may disclose:

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

(2) a mediation communication as permitted under section 6 of P.L. , c. (C. )(now pending before the Legislature as section 6 of this bill);

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

8. Confidentiality.

Unless made during a session of a mediation which is open, or is required by law to be open, to the public, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

9. Mediator's Disclosure of Conflicts of Interest; Background.

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

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

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

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

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

d. A person who violates subsection a., b., or g. shall be precluded by the violation from asserting a privilege under section 4 of P.L. , c. (C. ) (now pending before the Legislature as section 4 of this bill), but only to the extent necessary to prove the violation.

e. Subsections a, b., c., and g. do not apply to a judge of any court of this State acting as a mediator.

f. This act does not require that a mediator have a special qualification by background or profession.

g. A mediator shall be impartial, notwithstanding disclosure of the facts required in subsections a. and b.

10. Participation in Mediation.

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

11. Relation to Electronic Signatures in Global and National Commerce Act.

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

12. Uniformity of application and construction.

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

13. Severability clause.

If any provision of P.L. , c. (C. )(now pending before the Legislature as this bill) or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

14. This act shall take effect immediately and shall apply to any agreements to mediate made on or after the effective date of this act.