

STATE OF OKLAHOMA

2nd Session of the 48th Legislature (2002)

SENATE BILL 1557

By: Coffee

AS INTRODUCED

An Act relating to mediation; creating the Uniform Mediation Act; providing short title; defining terms; stating applicability of act; stating exceptions to applicability of act; prohibiting application of certain privileges under certain circumstances; providing exception; specifying certain privileged communications; stating admissibility of certain communication under certain circumstances; allowing waiver of certain privilege; precluding assertion of privilege in certain circumstances; stating exceptions to privilege; limiting admissibility of certain evidence; prohibiting mediator reports to certain entities; permitting mediator to disclose certain information; providing for confidentiality of certain communications; requiring mediator to disclose conflict of interest; requiring mediator to disclose qualifications; prohibiting assertion of certain privilege under certain circumstances; stating exceptions to applicability of certain provisions; stating qualifications of mediator; permitting representation by counsel or other individual; limiting and construing certain portions of federal Electronic Signatures in Global and National Commerce Act; construing act; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1831 of Title 12, unless there is created a duplication in numbering, reads as follows:

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

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1832 of Title 12, unless there is created a duplication in numbering, reads as follows:

As used in this act:

1. "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;

2. "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;

3. "Mediator" means an individual who conducts a mediation;

4. "Nonparty participant" means a person, other than a party or mediator, that participates in a mediation;

5. "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve that dispute;

6. "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;

7. "Proceeding" means:

a. a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery, or

b. a legislative hearing or similar process;

8. "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; and

9. "Sign" means:

a. to execute or adopt a tangible symbol with the present intent to authenticate a record, or

- b. to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

SECTION 3. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1833 of Title 12, unless there is created a duplication in numbering, reads as follows:

A. Except as otherwise provided in subsection B or C of this section, this act applies to a mediation in which:

1. The mediation parties are required to mediate by statute or court or administrative agency rule or 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 or herself out as a mediator, or the mediation is provided by a person that holds himself or herself out as providing mediation.

B. The act does not apply to a mediation:

1. Relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

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 an administrative agency or court;

3. Conducted by a judge who might 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 correctional institution for youths if all the parties are residents of that institution.

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

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1834 of Title 12, unless there is created a duplication in numbering, reads as follows:

A. Except as otherwise provided in Section 6 of this act, a mediation communication is privileged as provided in subsection B of this section and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5 of this act.

B. In a proceeding, the following privileges 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; and

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 does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1835 of Title 12, unless there is created a duplication in numbering, reads as follows:

A. A privilege under Section 4 of this act 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 that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under Section 4 of this act, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

C. A person that 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 this act.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1836 of Title 12, unless there is created a duplication in numbering, reads as follows:

A. There is no privilege under Section 4 of this act for a mediation communication that is:

1. In an agreement evidenced by a record signed by all parties to the agreement;

2. Available to the public under the Oklahoma Open Records Act or made during a session of a mediation which 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 of violence;

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 of professional misconduct or malpractice filed against a mediator;

6. Except as otherwise provided in subsection C of this section, 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 abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the public agency participates in the child or adult protection mediation.

B. There is no privilege under Section 4 of this act 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 felony or misdemeanor; or

2. Except as otherwise provided in subsection C of this section, 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 of this section.

D. If a mediation communication is not privileged under subsection A or B of this section, 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 of this section does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1837 of Title 12, unless there is created a duplication in numbering, reads as follows:

A. Except as required in subsection B of this section, a mediator may not make a report, assessment, evaluation, recommendation, finding, or other 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;

2. A mediation communication as permitted under Section 6 of this act; or

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

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

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1838 of Title 12, unless there is created a duplication in numbering, reads as follows:

Unless subject to the Oklahoma Open Meeting Act and Oklahoma Open Records Act, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this state.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1839 of Title 12, unless there is created a duplication in numbering, reads as follows:

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 practical before accepting a mediation.

B. If a mediator learns any fact described in paragraph 1 of subsection A of this section 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 that violates subsection A or subsection B of this section is precluded by the violation from asserting a privilege under Section 4 of this act.

E. Subsections A, B and C of this section do not apply to an individual acting as a judge.

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

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1840 of Title 12, unless there is created a duplication in numbering, reads as follows:

An attorney may represent, 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.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1841 of Title 12, unless there is created a duplication in numbering, reads as follows:

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.

SECTION 12. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1842 of Title 12, unless there is created a duplication in numbering, reads as follows:

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

SECTION 13. This act shall become effective November 1, 2002.

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