

AN ACT

*Codification  
District of  
Columbia  
Official Code*

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IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To enact the Uniform Mediation Act in the District of Columbia, to provide for confidentiality in mediation proceedings, to establish an evidentiary privilege for mediators and participants in mediation that applies in later legal proceedings, to create an obligation of confidentiality for mediators, and to facilitate international commercial mediation in the District.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Uniform Mediation Act of 2006".

Sec. 2. Title 16 of the District of Columbia Official Code is amended as follows:

(a) The table of contents is amended by adding the phrase "42. Mediation; Uniform Act. . . . 16-4201" after the phrase "41. Sureties. . . . 16-4101".

(b) A new Chapter 42 is added to read as follows:

“CHAPTER 42.

“MEDIATION; UNIFORM ACT.

“Section

“16-4201. Definitions.

“16-4202. Scope.

“16-4203. Privilege against disclosure; admissibility; discovery.

“16-4204. Waiver and preclusion of privilege.

“16-4205. Exceptions to privilege.

“16-4206. Prohibited mediator reports.

“16-4207. Confidentiality.

“16-4208. Mediator’s disclosure of conflicts of interest; background.

“16-4209. Participation in mediation.

“16-4210. International commercial mediation.

“16-4211. Relation to Electronic Signatures in Global and National Commerce Act.

“16-4212. Uniformity of application and construction.

“16-4213. Application to existing agreements or referrals.

New  
Chapter 42,  
Title 16,

New  
§§ 16-4201 -  
16-4213

“§ 16-4201. Definitions.

“For the purposes of this chapter, the term:

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

“(4) “Mediator” means an individual who conducts a mediation.

“(5) “Nonparty participant” means a person, other than a party or mediator, that participates in a mediation.

“(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.

“(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.

“§ 16-4202. Scope.

“(a) Except as otherwise provided in subsection (b) or (c) of this section, this chapter 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 itself out as providing mediation.

“(b) The chapter 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 chapter 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 mediation parties are students;

“(B) A correctional institution for youths, if all the mediation parties are residents of that institution; or

“(C) The Office of the Attorney General for the District of Columbia or the Mayor, if the mediation arises from a consumer complaint under authority of Chapter 39 of Title 28 of the District of Columbia Official Code, and one of the mediation parties is the consumer complainant.

“(c) If the mediation parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under §§ 16-4203 through 16-4205 shall not apply to the mediation or part agreed upon; provided, that §§ 16-4203 through 16-4205 shall apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

“§ 16-4203. Privilege against disclosure; admissibility; discovery.

“(a) Except as otherwise provided in § 16-4205, 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 § 16-4204.

“(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.

“(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.

“§ 16-4204. Waiver and preclusion of privilege.

“(a) A privilege under § 16-4203 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 § 16-4203, 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 § 16-4203.

“§ 16-4205. Exceptions to privilege.

“(a) There is no privilege under § 16-4203 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 § 1-207.42, 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 as defined by § 22-407, or commit a crime of violence as defined by § 22-4501(f) and § 23-1331.

“(4) Intentionally used to plan, attempt to commit, or 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 case is referred by a court to mediation and a public agency participates.

“(b) There is no privilege under § 16-4203 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:

“(1) The evidence is not otherwise available;

“(2) There is a need for the evidence that substantially outweighs the interest in protecting confidentiality; and

“(3) The mediation communication is sought or offered in:

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

“(B) 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 subsection (a)(6) or (b)(3)(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.

“§ 16-4206. Prohibited mediator reports.

“(a) Except as permitted 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, arbitrator, 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 §16-4205; 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, arbitrator, or other authority that may make a ruling on the dispute that is the subject of the mediation.

“§ 16-4207. Confidentiality.

“Unless subject to § 1-207.42, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of the District of Columbia.

“§ 16-4208. 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 practical

before accepting a mediation.

“(b) If a mediator learns any fact described in subsection (a)(1) 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), (b), or (g) of this section is precluded by the violation from asserting a privilege under § 16-4203.

“(e) Subsections (a), (b), (c), and (g) of this section do not apply to an individual acting as a judge or administrative law judge.

“(f) This chapter does not require that a mediator have a special qualification by background or profession.

“(g) A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) of this section to be disclosed, the parties agree otherwise.

“§ 16-4209. Participation in mediation.

“(a) An attorney or other individual designated by a mediation party may accompany the party to and participate in a mediation.

“(b) A waiver of participation given before the mediation may be rescinded.

“§ 16-4210. International commercial mediation.

“(a) For the purposes of this section, the term:

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

“(2) “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.

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

“(c) Unless the mediation parties agree in accordance with § 16-4202(c) that all or part of an international commercial mediation is not privileged, §§ 16-4203, 16-4204, and 16-4205 and any applicable definitions in § 16-4201 also apply to the mediation and nothing in Article 10 of the Model Law derogates from §§ 16-4203, 16-4204, and 16-4205.

“(d) 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, this chapter applies.

“§ 16-4211. Relation to Electronic Signatures in Global and National Commerce Act.

“This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, approved June 30, 2000 (114 Stat. 464; 15 U.S.C. § 7001 *et seq.*), but this chapter 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.

“§ 16-4212. Uniformity of application and construction.

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

“§ 16-4213. Application to existing agreements or referrals.

“On or after January 1, 2007, this chapter governs a mediation pursuant to a referral or an agreement to mediate, whenever made.”.

**Sec. 3. Fiscal impact statement.**

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

**Sec. 4. Effective date.**

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

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Chairman  
Council of the District of Columbia

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Mayor  
District of Columbia