

# MAINE STATE LEGISLATURE

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STATE LAW OFFICE  
ALEXANDER MAINE

# 124th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2009

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Legislative Document

No. 1378

H.P. 968

House of Representatives, April 2, 2009

### An Act To Adopt Portions of the Uniform Mediation Act

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Reference to the Committee on Judiciary suggested and ordered printed.

*Millicent M. MacFarland*  
MILLICENT M. MacFARLAND  
Clerk

Presented by Representative WAGNER of Lewiston.  
Cosponsored by Senator BLISS of Cumberland and  
Representatives: DILL of Cape Elizabeth, HASKELL of Portland, HAYES of Buckfield,  
WATSON of Bath.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 14 MRSA Pt. 8** is enacted to read:

3 **PART 8**

4 **MEDIATION**

5 **CHAPTER 801**

6 **UNIFORM MEDIATION ACT**

7 **§10001. Title**

8 This chapter may be known and cited as "the Uniform Mediation Act."

9 **§10002. Definitions**

10 As used in this chapter, unless the context otherwise indicates, the following terms  
11 have the following meanings.

12 1. **Mediation.** "Mediation" means a process in which a mediator facilitates  
13 communication and negotiation between parties to assist them in reaching a voluntary  
14 agreement regarding their dispute.

15 2. **Mediation communication.** "Mediation communication" means a statement,  
16 whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is  
17 made for purposes of considering, conducting, participating in, initiating, continuing or  
18 reconvening a mediation or retaining a mediator.

19 3. **Mediation party.** "Mediation party" means a person that participates in a  
20 mediation and whose agreement is necessary to resolve the dispute.

21 4. **Mediator.** "Mediator" means an individual who conducts a mediation.

22 5. **Nonparty participant.** "Nonparty participant" means a person, other than a  
23 mediation party or mediator, that participates in a mediation.

24 6. **Person.** "Person" means an individual; corporation; business trust; estate; trust;  
25 partnership; limited liability company; association; joint venture; government;  
26 governmental subdivision, agency or instrumentality; public corporation; or any other  
27 legal or commercial entity.

28 7. **Proceeding.** "Proceeding" means:

29 A. A judicial, administrative, arbitral or other adjudicative process, including related  
30 prehearing and posthearing motions, conferences and discovery; or

31 B. A legislative hearing or similar process.

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



1        **§10004. Privilege against disclosure; admissibility; discovery**

2            **1. Privileged unless waived or precluded.** Except as otherwise provided in section  
3        10006, a mediation communication is privileged as provided in subsection 2 and is not  
4        subject to discovery or admissible in evidence in a proceeding unless waived or precluded  
5        as provided by section 10005.

6            **2. Privileges.** In a proceeding, the following privileges apply.

7            **A. A mediation party may refuse to disclose, and may prevent any other person from**  
8        **disclosing, a mediation communication.**

9            **B. A mediator may refuse to disclose a mediation communication and may prevent**  
10       **any other person from disclosing a mediation communication of the mediator.**

11          **C. A nonparty participant may refuse to disclose, and may prevent any other person**  
12       **from disclosing, a mediation communication of the nonparty participant.**

13          **3. Admissibility; discovery.** Evidence or information that is otherwise admissible  
14       or subject to discovery does not become inadmissible or protected from discovery solely  
15       by reason of its disclosure or use in a mediation.

16        **§10005. Waiver and preclusion of privilege**

17          **1. Waiver.** A privilege under section 10004 may be waived in a record or orally  
18       during a proceeding if it is expressly waived by all parties to the mediation and:

19          **A. In the case of the privilege of a mediator, it is expressly waived by the mediator;**  
20       **and**

21          **B. In the case of the privilege of a nonparty participant, it is expressly waived by the**  
22       **nonparty participant.**

23          **2. Prejudice; precluded.** A person that discloses or makes a representation about a  
24       mediation communication that prejudices another person in a proceeding is precluded  
25       from asserting a privilege under section 10004, but only to the extent necessary for the  
26       person prejudiced to respond to the representation or disclosure.

27          **3. Crime or criminal activity; precluded.** A person that intentionally uses a  
28       mediation to plan, attempt to commit or commit a crime or to conceal an ongoing crime  
29       or ongoing criminal activity is precluded from asserting a privilege under section 10004.

30        **§10006. Exceptions to privilege**

31          **1. Exceptions.** There is no privilege under section 10004 for a mediation  
32       communication that is:

33          **A. In an agreement evidenced by a record signed by all parties to the agreement;**

34          **B. Available to the public under Title 1, chapter 13, subchapter 1 or made during a**  
35       **session of a mediation that is open, or is required by law to be open, to the public;**

36          **C. A threat or statement of a plan to inflict bodily injury or commit a crime of**  
37       **violence;**

1 D. Intentionally used to plan a crime, attempt to commit or commit a crime or to  
2 conceal an ongoing crime or ongoing criminal activity;

3 E. Sought or offered to prove or disprove a claim or complaint of professional  
4 misconduct or malpractice filed against a mediator;

5 F. Except as otherwise provided in subsection 3, sought or offered to prove or  
6 disprove a claim or complaint of professional misconduct or malpractice filed against  
7 a mediation party, nonparty participant or representative of a party based on conduct  
8 occurring during a mediation; or

9 G. Sought or offered to prove or disprove abuse, neglect, abandonment or  
10 exploitation in a proceeding in which a child or adult protective services agency is a  
11 party, unless the case is referred by a court to mediation and a public agency  
12 participates.

13 **2. Evidence not otherwise available.** There is no privilege under section 10004 if a  
14 court, administrative agency or arbitrator finds, after a hearing in camera, that the party  
15 seeking discovery or the proponent of the evidence has shown that the evidence is not  
16 otherwise available, that there is a need for the evidence that substantially outweighs the  
17 interest in protecting confidentiality and that the mediation communication is sought or  
18 offered in:

19 A. A court proceeding involving a murder or a Class A, B or C crime; or

20 B. Except as otherwise provided in subsection 3, a proceeding to prove a claim to  
21 rescind or reform or a defense to avoid liability on a contract arising out of the  
22 mediation.

23 **3. Mediator may not be compelled; certain situations.** A mediator may not be  
24 compelled to provide evidence of a mediation communication referred to in subsection 1,  
25 paragraph F or subsection 2, paragraph B.

26 **4. Limitations.** If a mediation communication is not privileged under subsection 1  
27 or 2, only the portion of the mediation communication necessary for the application of the  
28 exception from nondisclosure may be admitted. Admission of evidence under subsection  
29 1 or 2 does not render the evidence, or any other mediation communication, discoverable  
30 or admissible for any other purpose.

31 **§10007. Prohibited mediator reports**

32 **1. Prohibited communication by mediator.** Except as required in subsection 2, a  
33 mediator may not make a report, assessment, evaluation, recommendation, finding or  
34 other communication regarding a mediation to a court, administrative agency or other  
35 authority that may make a ruling on the dispute that is the subject of the mediation.

36 **2. Permitted communication by mediator.** A mediator may disclose:

37 A. Whether the mediation occurred or has terminated, whether a settlement was  
38 reached and attendance;

39 B. A mediation communication as permitted under section 10006; or

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

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

6 **§10008. Confidentiality**

7 Unless subject to Title 1, chapter 13, subchapter 1, mediation communications are  
8 confidential to the extent agreed by the parties or provided by other law or rule of this  
9 State.

10 **§10009. Uniformity of application and construction**

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

13 **§10010. Application to existing agreements or referrals**

14 **1. New referrals or agreements.** This chapter governs a mediation pursuant to a  
15 referral or an agreement to mediate made on or after January 1, 2010.

16 **2. All agreements.** On or after July 1, 2010, this chapter governs an agreement to  
17 mediate whenever made.

18 **§10011. Effective date**

19 This chapter takes effect January 1, 2010.

20 **SUMMARY**

21 The purpose of this bill is to encourage parties involved in mediation to communicate  
22 openly, and to protect the confidentiality of participants in the mediation process. This  
23 bill adopts those portions of the Uniform Mediation Act, as adopted by the National  
24 Conference of Commissioners on Uniform State Laws, that:

- 25 1. Establish privileges for mediation communication regarding disclosure,  
26 admissibility and discovery;
- 27 2. Authorize exceptions and waivers to the established privileges;
- 28 3. Specifically prohibit and permit various communications by a mediator; and
- 29 4. Establish the confidentiality of mediation communications.