HOUSE BILL REPORT
HB 1055

As Reported by House Committee On:
Judiciary

Title: An act relating to the uniform mediation act.

Brief Description: Enacting the Uniform Mediation Act.

Sponsors: Representatives Lantz, Priest and Morrell.

Brief History:
Committee Activity:
Judiciary: 1/18/05, 1/25/05 [DPS].

Brief Summary of Substitute Bill

- Adopts the Uniform Mediation Act (UMA), which, among other things, establishes when mediation communications are privileged and confidential.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Lantz, Chair; Flannigan, Vice Chair; Williams, Vice Chair; Priest, Ranking Minority Member; Campbell, Assistant Ranking Minority Member; Kirby, Serben and Wood.

Staff: Trudes Tango Hutcheson (786-7384).

Background:

General
Mediation is an alternative dispute resolution process in which the parties use a neutral third party to help them negotiate a settlement or compromise to their dispute. The mediator does not act as a judge and does not make decisions or issue orders in the case. The parties do not reach a solution unless all sides agree.

Mediation can be required by written agreements between the parties, or by court rules or statutes. For example, specific statutes require all causes of actions for damages in health care cases to be mediated prior to trial. Court rules govern the procedures and confidentiality of those mandatory mediations. In family law matters, mediation is often required by local court rules or by the parties' own agreed upon parenting plan.

Privilege and confidentiality in mediation proceedings

Generally, communications made and materials submitted in connection with the mediation are privileged and confidential and are not subject to disclosure in any judicial or administrative proceeding. However, this privilege and confidentiality does not apply:

- to the settlement agreement from the mediation proceeding;
- to communications pertaining solely to administrative matters incidental to the mediation;
- when the parties to the mediation agree in writing to disclosure;
- when the materials are otherwise discoverable and were not prepared specifically for use in and actually used in the mediation proceedings;
- when disclosure is required by statute; and
- in a subsequent action between the mediator and a party.

Privilege and confidentiality in mediations conducted by a state or federal agency under collective bargaining laws are governed by the agency's rules.

Statutes governing dispute resolution centers established by a municipality, county, or nonprofit organization specify what types of mediation communications are privileged and confidential. Work product and case files in those dispute resolution centers are confidential and privileged unless the materials were submitted to purposefully avoid discovery of the material. Threats to injure any person or damage a party's property are not privileged and confidential to the extent such communication may be relevant evidence in a criminal matter.

Statutes and court rules applicable to family law mediations generally provide that those mediations are confidential unless it is a postdecree mediation required under a parenting plan.

Other provisions

Generally, the Open Public Meetings Act requires all meetings of a public agency to be open and public. Some of the exceptions provided in the Act include collective bargaining sessions and quasi-judicial matters between named parties as distinguished from matters having general effect on the public. In addition, the Public Disclosure Act generally requires state agencies to make all documents available to the public unless specifically exempted by statute.

There are federal laws governing electronic records and signatures in interstate or foreign commerce. Among other things, the federal law provides that a signature, contract or other record relating to a transaction may not be denied legal effect solely because it is in electronic form, and a contract may not be denied legal effect solely because an electronic signature or electronic record was used in its formation. The federal act allows a state statute to modify, limit, or supersede the federal provisions under certain circumstances.

Summary of Substitute Bill:

The UMA, which addresses privilege and confidentiality of mediation communications, is adopted.

Scope and applicability

The UMA applies to a mediation in which:

- mediation is required by statute, a court, or administrative agency rule;
- the parties are referred to mediation by a court, administrative agency, or arbitrator;
- there is a record showing that the parties and the mediator agreed that mediation communications will be privileged; or
- the parties use as a mediator an individual or entity that holds itself out as a mediator or providing mediation.

The UMA does not apply to a mediation:

- conducted by a judge who might make a ruling on the case;
- conducted by a primary or secondary school when all the parties are students;
- conducted by a correctional institution for youths if all the parties are residents of the institution; and
- that has been referred or agreed upon before the effective date of the Act unless the parties agree otherwise.

Privilege and confidentiality

Unless subject to the Open Public Meetings Act, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule.

With certain exceptions, a mediation communication is privileged and not subject to discovery or admissible in a proceeding unless the privilege is waived or is precluded from privilege.

The UMA provides broad privileges against disclosure of mediation communications. A mediation party may refuse to disclose and may prevent any other person from disclosing a mediation communication. The mediator and any nonparty mediation participant have the privilege of nondisclosure as to their own mediation communications.

Communications are not made privileged simply because it is used in a mediation if the communication would be admissible or subject to discovery otherwise.

Waivers and exceptions to the privileges

The parties may agree in advance that all or part of a mediation is not privileged. However, a person's communications made before the person received actual notice of the party's agreement is still privileged under the UMA.

A privilege may be waived either in a record or orally during a proceeding if it is expressly waived by the parties to the mediation and by the person who made the communication.

A person who intentionally uses a mediation to plan or commit a crime or to conceal an ongoing crime is precluded from asserting the privileges.

A person who discloses a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege to the extent necessary for the prejudiced person to respond to the disclosure.

The privilege also does not apply to a mediation communication that is:

- in any agreement signed by the parties;
- a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
- intentionally used to plan a crime or conceal an ongoing crime;
- sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;
- 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
- 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 agency participated in the mediation.

Even if a mediation communication would be privileged, such a communication can be disclosed in a criminal court proceeding involving a felony if a court finds that the mediation communication is not otherwise available and the need for disclosure of the communication substantially outweighs the interest in protecting confidentiality. This exception to the privilege also applies in a proceeding to prove a claim to rescind or reform or defend a contract arising out of the mediation.

Records of mediation communications that are privileged are exempt from the public disclosure laws.

A mediator may disclose:
- whether the mediation occurred or has terminated;
- whether a settlement was reached;
- attendance and efforts to schedule a mediation ordered by a court, administrative agency, or other authority that may make a ruling on the dispute;
- a mediation communication that the UMA has excepted from privilege; or
- a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

A mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication about 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.

The confidentiality of mediation communications in family law mediations that are postdecree and required by a parenting plan is narrowed. Such communications are not privileged for the purpose of proving:
- abuse, neglect, abandonment, exploitation, or unlawful harassment of a child;
- abuse or unlawful harassment of a family or household member; or
- that a parent used or frustrated the dispute resolution process without good reason.

When mediation-arbitration is required under the parenting plan and the same person acts as both mediator and arbitrator, then communications in the mediation phase can be disclosed during the arbitration phase.

The statute governing privilege and confidentiality applicable to dispute resolution centers are amended to conform with the UMA. Statutes authorizing mediation in other contexts are amended to reference application of the UMA.

The general statute applicable to disclosure of mediation communications is repealed. The statute authorizing a federal or state agency's rules to govern questions of privilege and confidentiality for collective bargaining mediation is also repealed.

Mediator's disclosure of conflicts

Before accepting a mediation, a potential mediator must make an inquiry that is reasonable under the circumstances to determine if there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator. The individual must also disclose any known fact to the parties as soon as practical before accepting a mediation. If a person fails to disclose such facts in violation of the UMA, the person is precluded from asserting the privileges provided by the UMA.

Other provisions

The UMA does not require a mediator to have any special qualification by background or profession.

A party may have an attorney or other individual accompany the party in a mediation unless the dispute being mediated is the subject of a small claims court proceeding. In that case, an attorney may accompany the party only if the small claims statutes allow it.

The UMA expressly modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, except as it pertains to electronic delivery of certain notices.

Definitions of some terms are provided. "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." "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."

Substitute Bill Compared to Original Bill:

The substitute bill changes the effective date from July 1, 2006 to January 1, 2006.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date of Substitute Bill: This bill takes effect on January 1, 2006.

Testimony For: (Original bill) The bill protects the parties in a mediation when they have a reasonable expectation that their mediation is confidential. It provides some stop gap measure

for parties if they fail to get a written understanding of confidentiality and privilege. Washington has mediation privilege statutes that are inconsistent with each other. This bill will bring uniformity. Numerous groups looked at the bill and support it. The bill represents four years of hard work and some of the best thinking on mediation concerns.

Testimony Against: None.

Persons Testifying: (In support of original bill) Nicholas Wager, Washington State Bar Association; Alan Kirtley, University of Washington School of Law; Evan Ferber, Resolution Washington, Dispute Resolution Centers of Washington State.

Persons Signed In To Testify But Not Testifying: None.