

SENATE BILL REPORT

ESSB 5173

As Passed Senate, March 2, 2005

Title: An act relating to the uniform mediation act.

Brief Description: Enacting the Uniform Mediation Act.

Sponsors: Senate Committee on Judiciary (originally sponsored by Senators Johnson, Weinstein, Esser and Kline).

Brief History:

Committee Activity: Judiciary: 1/11/05, 2/3/05 [DPS, DNPS].

Passed Senate: 3/2/05, 47-1.

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 5173 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Weinstein, Vice Chair; Johnson, Ranking Minority Member; Esser, Hargrove, McCaslin, Rasmussen and Thibaudeau.

Minority Report: Do not pass substitute.

Signed by Senator Carrell.

Staff: Lidia Mori (786-7755)

Background: The Uniform Mediation Act (UMA) is the result of collaboration between the National Conference of Commissioners on Uniform State Laws and the Dispute Resolution Section of the American Bar Association. The stated intent of the UMA is the promotion of candor of parties through confidentiality, encouragement of prompt, economical, and amicable resolution of disputes, and advancement of the policy that decision-making authority in the mediation process rests with the parties. A work group representing a wide range of interest groups was formed by the Dispute Resolution Section of the Washington State Bar Association. The work group concluded that the UMA would constitute a substantial improvement over existing Washington law, subject to several amendments contained in the legislation.

Summary of Bill: The Uniform Mediation Act allows disclosure of mediation communications made during a session of a mediation that is open, or is required by law to be open, to the public. There are six exceptions to the privilege of confidentiality in the UMA. The six exceptions include when the mediation communications: (1) constitute a threat or statement of a plan to inflict bodily injury or commit a violent crime; (2) are intentionally used to plan a crime, attempt to commit a crime, or conceal ongoing criminal activity; (3) are sought or offered to prove or disprove a claim of professional misconduct filed against a mediation party based on conduct occurring during a mediation; (4) are 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; (5) are sought or offered in a court proceeding involving a criminal felony; and (6) are sought or offered in a proceeding to prove a claim or avoid liability on a contract arising out of the mediation.

The UMA applies to mediations mandated by any statute, court or administrative rule, mediations to which parties have been referred by a court, administrative agency, or arbitrator, and mediations conducted by a professional mediator. The UMA does not cover mediations conducted by a judge who might make a ruling on the case and mediations conducted under the auspices of a primary or secondary school, if all the parties are students, or a correctional institution for youths, if all the parties are residents of the institution.

The UMA applies to dissolution of marriage and legal separation mediations except that communications in postdecree mediations that are mandated by a parenting plan are admissible in subsequent proceedings for limited purposes. The limited purposes include proving: (1) abuse, neglect, abandonment, exploitation, or unlawful harassment of a child; (2) abuse or unlawful harassment of a family or household member; and (3) that a parent used or frustrated the dispute resolution process without good reason.

A mediator is not allowed to make a report 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. The UMA requires prospective mediators to disclose conflicts of interest to the parties and answer the parties' questions about qualifications. A party has a right to be accompanied by a support person and have the person participate in the mediation. If the dispute is the subject of a pending small claims action, the person may not be represented by an attorney at the mediation, unless chapter 12.40 RCW allows it. Whenever any part participates in mediation conducted by a state or federal agency under the provisions of a collective bargaining law or similar statute, the agency's rules govern questions of privilege and confidentiality.

Regardless of any provision to the contrary in chapter 42.17 RCW, the open records act, all work products or case files of dispute resolution centers are confidential and privileged unless a court, or administrative tribunal, determines that the materials were submitted by a participant to the center for the purpose of avoiding discovery of the material. The effective date is January 1, 2006.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: The bill takes effect on January 1, 2006.

Testimony For: Mediation has exploded onto the scene in the last ten years. One reason uniform laws are beneficial is that they create order and predictability. The Uniform Mediation Act has been adopted in three states. For mediation to work it needs to be voluntary. There is no privilege in current law for post-decree family law mediations. Many interested parties worked very hard to reach the agreed upon language that is contained in section 15 of the bill. The effective date in the bill should be changed to January 1, 2006 so that the bill can go into effect sooner.

Testimony Against: None.

Who Testified: PRO: Marlin Appelwick, Washington Uniform Legislation Commission; Alan Kirtley, University of Washington School of Law; Philip Cutler, Washington State Bar Association, Alternative Dispute Resolution Roundtable; Susan Slagle, American Arbitration Association; Evan Ferber, Resolution Washington, Association of Washington State Dispute Resolution Centers.