Dennis M. Papp *Legislative Service Commission*

Sub. H.B. 303

125th General Assembly
(As Passed by the House)

Reps. Oelslager, DeGeeter, C. Evans, Kearns, McGregor, Skindell

BILL SUMMARY

- Creates the Uniform Mediation Act.
- Specifies when the Uniform Mediation Act applies to a mediation proceeding.
- Sets forth specific exclusions from the Uniform Mediation Act and provides parties with an opportunity to opt out from the coverage of the Act.
- Provides that mediation communications are privileged and are not subject to discovery or admissible in evidence, except when the privilege is waived by all parties or in specified exceptions.
- Prohibits communications by a mediator in specified circumstances.
- Requires mediators to make a reasonable inquiry before accepting a mediation to determine whether any conflict of interests arise and to disclose any conflicts to the mediation parties as soon as is practicable.
- Provides that mediation communications generally are confidential to the extent agreed by the parties.
- Provides that an attorney or other individual designated by a party may accompany the party to and participate in a mediation.

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CONTENT AND OPERATION

Uniform Mediation Act

The bill enacts R.C. 2710.01 through 2710.10, which will be known as the Uniform Mediation Act. The Uniform Mediation Act (UMA) was developed through a joint study and drafting effort by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. The UMA provides guidance for mediation practice in the areas of confidentiality, privilege, and disclosure of conflicts of interest. The UMA will govern a mediation pursuant to a referral or an agreement to mediate made on or after the effective date of this bill. The bill specifies that R.C. 2701.01 to 2701.10, and Sections 3 and 4, take effect six months after the bill's effective date. (Sections 3, 4, and 5.)

Scope of the UMA

General application

The bill outlines when the UMA applies to a "mediation" (see "***Definitions***," below). It also carves out specific exclusions from the UMA's coverage and provides the parties involved in the mediation with the opportunity to opt out of the UMA. The bill provides that, except as provided below in "Exclusions from the UMA" and "Opting out of the UMA," the UMA applies to a mediation under any of the following circumstances (R.C. 2710.02(A)):

(1) The "mediation parties" (see "***Definitions***," below) 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" (see "***Definitions***," below) agree to mediate in a record that demonstrates an expectation that "mediation communications" (see "***Definitions***," below) will be privileged against disclosure.

(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.

Exclusions from the UMA

However, the bill states there are specific situations in which the UMA does not apply to a mediation. The UMA does not apply to a mediation in which any of the following apply (R.C. 2710.02(B)):

(1) The mediation relates to the establishment, negotiation, administration, or termination of a collective bargaining relationship.

(2) The mediation relates to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the UMA applies to a mediation arising out of a dispute that has been filed with an administrative agency or court.

(3) The mediation is conducted by a judge or magistrate who might make a ruling on the case.

(4) The mediation is conducted under the auspices of either a primary or secondary school if all the parties are students or a correctional institution for youths if all the parties are residents of that institution.

Opting out of the UMA

The UMA allows parties involved in a mediation to opt for a non-privileged mediation or mediation session by mutual agreement. The bill provides that, if the parties agree in advance in a "signed record" (see "***Definitions***," below), or a record of "proceeding" (see "***Definitions***," below) reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges found in the UMA, as described below, do not apply to the mediation or part agreed upon. However, the privileges do apply to a mediation communication made by a "person" (see "***Definitions***," below) that has not received actual notice of the agreement before the communication is made. (R.C. 2710.02(C).)

Privilege against disclosure

R.C. 2710.03 sets forth the evidentiary privilege provisions of the UMA. It provides that, except as otherwise provided below in "***Exceptions to privilege***," a mediation communication is privileged and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided below in "***Waiver and preclusion of privilege***." (R.C. 2710.03(A).)

The bill further states that in a proceeding, the following privileges apply (R.C. 2710.03(B)):

(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. A mediator 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.

However, 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 (R.C. 2710.03(C)).

The bill also repeals R.C. 2317.023, which currently regulates the disclosure of mediation communication (see **COMMENT**), and replaces it with R.C. 2710.03 (Section 2).

Waiver and preclusion of privilege

R.C. 2710.04 provides for the waiver and preclusion of privilege. The bill states that a privilege described above in "***Privilege against disclosure***" may be waived in a record or orally during a proceeding if it is expressly waived by all mediation parties and by whichever of the following is applicable (R.C. 2710.04(A)):

(1) In the case of the privilege of a mediator, it is expressly waived by the mediator.

(2) In the case of the privilege of a "nonparty participant" (see "***Definitions***," below), it is expressly waived by the nonparty participant.

The bill also provides that a person that discloses or makes a representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under R.C. 2710.03, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure. 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 the UMA. (R.C. 2710.04(B) and (C).)

Exceptions to privilege

The bill sets forth specific exceptions to the grant of privilege provided to mediation communications. There is no privilege under the UMA for a mediation communication to which any of the following applies (R.C. 2710.05(A)):

(1) The mediation communication is contained in a written agreement evidenced by a record signed by all parties to the agreement.

(2) The mediation communication is available to the public under the existing Public Records Law (R.C. 149.43) or made during a session of a mediation that is open, or is required by law to be open, to the public.

(3) The mediation communication is an imminent threat or statement of a plan to inflict bodily injury or commit a crime of violence.

(4) The mediation communication is intentionally used to plan, attempt to commit, or commit a crime or to conceal an ongoing crime or ongoing criminal activity.

(5) The mediation communication is 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 below, the mediation communication is 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.

(7) Except as provided in existing R.C. 2317.02 and 3109.052[1], the mediation communication is sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective

[1] *R.C. 2317.02* (not in the bill) *specifies certain persons who are prohibited from testifying, and R.C. 3109.052* (not in the bill) *provides for the mediation of differences as to allocation of parental rights and responsibilities.*

services agency is a party, unless the case is referred by a court to mediation, and a public agency participates.

(8) The mediation communication is required to be disclosed pursuant to existing R.C. 2921.22.[2]

(9) The mediation communication is sought in connection with or offered in any criminal proceeding involving a felony, a delinquent child proceeding based on what would be a felony if committed by an adult, or a proceeding initiated by the state or a child protection agency in which it is alleged that a child is an abused, neglected, or dependent child.

The bill also provides that there is no privilege under the UMA 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 the disclosure is necessary in the particular case to prevent a manifest injustice, and that the mediation communication is sought or offered in either of the following (R.C. 2710.05(B)): (1) a court proceeding involving a misdemeanor, or (2) except as otherwise provided below, a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

However, a mediator may not be compelled to provide evidence of a mediation communication referred to in clause (6) of the second preceding paragraph or in clause (2) of the immediately prior paragraph (R.C. 2710.05(C)).

The bill states that, if a mediation communication is not privileged under the specific exceptions set forth by the UMA, as described above, only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose. (R.C. 2710.05(D).)

Prohibited mediator reports

Mediators are prohibited by the bill from communicating information regarding mediations in prescribed circumstances. Except as provided below and in existing R.C. 3109.052 (not in the bill--it pertains to mediation of certain controversies in domestic relations proceedings), a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, department, agency, or officer of Ohio or its

[2] *R.C. 2921.22* (not in the bill) *specifies when certain persons are required to report a crime or knowledge of a death or burn injury.*

political subdivisions that may make a ruling on the dispute that is the subject of the mediation. A communication made in violation of the provision cannot be considered by a court, administrative agency, or arbitrator. (R.C. 2710.06(A) and (C).)

However, the bill does permit disclosure of particular facts. A mediator may disclose any of the following (R.C. 2710.06(B)):

(1) Whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(2) A mediation communication as permitted by R.C. 2710.07;

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

Disclosure of conflicts of interest

The bill requires mediators to make a reasonable inquiry before accepting a mediation to determine whether any conflict of interests arise and to disclose any conflicts to the mediation parties as soon as is practicable. Before accepting a mediation, an individual who is requested to serve as a mediator must do both of the following (R.C. 2710.08(A)):

(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;

(2) Disclose any known fact described in (1), above, to the mediation parties as soon as is practical before accepting a mediation.

If a mediator learns any fact described in paragraph (1), above, after accepting a mediation, the mediator must disclose it to the mediation parties as soon as is practicable. At the request of a mediation party, an individual who is requested to serve as a mediator is required to disclose the mediator's qualifications to mediate a dispute. A mediator is required to be impartial, unless after disclosure of facts required to be disclosed as required above the parties agree otherwise. (R.C. 2710.08(B), (C), and (G).)

The bill also provides that a person that fails to disclose any information as required above is precluded from asserting a privilege under the UMA. The provisions above do not apply when the mediation is conducted by a judge who

might make a ruling on the case. The UMA does not require that a mediator have a special qualification by background or profession. (R.C. 2710.08(D), (E), and (F).)

Confidentiality; participation in mediation

Except as provided in the existing Open Meetings Law (R.C. 121.22--not in the bill) and the existing Public Records Law (R.C. 149.43), mediation communications are confidential to the extent agreed by the parties or provided by other sections of the Revised Code or rules adopted under any section of the Revised Code (R.C. 2710.07).

An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded. A mediator is permitted to withdraw as mediator at any time. (R.C. 2710.09.)

Relation to Electronic Signatures in Global and National Commerce Act

The bill provides that the UMA may modify, limit, or supersede the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 *et seq*. (E-Sign Act), but the UMA may 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. The effect of this provision is to reaffirm state authority over matters of contract by making clear that state law is the controlling law if there is a conflict between the UMA and the federal E-sign Act, except for E-sign's consumer consent provisions found in section 101(c) and its notice provisions found in section 109(b), which have no substantive impact on the UMA. (R.C. 2710.10.)

Uniformity; severability clause; delayed effective date

The bill specifies that, in applying and construing the UMA, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among other states that have enacted substantially similar laws. If any provision of the bill or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this bill that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable. (Sections 6 and 7.)

Definitions

The bill contains the following definitions for use in the Uniform Mediation Act (R.C. 2710.01):

(1) "Mediation" means any 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, in a record, 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 the dispute.

(6) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, agency or instrumentality of the state or of any political subdivision of the state, public corporation, or any other legal or commercial entity.

(7) "Proceeding" means either a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery, or 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 either to execute or adopt a tangible symbol with the present intent to authenticate a record or to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

COMMENT

Existing R.C. 2317.023, repealed by the bill, provides as follows:

> (A) As used in this section:
>
> (1) "Mediation" means a nonbinding process for the resolution of a dispute in which both of the following apply:

(a) A person who is not a party to the dispute serves as mediator to assist the parties to the dispute in negotiating contested issues.

(b) A court, administrative agency, not-for-profit community mediation provider, or other public body appoints the mediator or refers the dispute to the mediator, or the parties, engage the mediator.

(2) "Mediation communication" means a communication made in the course of and relating to the subject matter of a mediation.

(B) A mediation communication is confidential. Except as provided in division (C) of this section, no person shall disclose a mediation communication in a civil proceeding or in an administrative proceeding.

(C) Division (B) of this section does not apply in the following circumstances:

(1) Except as provided in division (H) of section 2317.02 and division (C) of section 3109.052 of the Revised Code, to the disclosure by any person of a mediation communication made by a mediator if all parties to the mediation and the mediator consent to the disclosure;

(2) To the disclosure by a person other than the mediator of a mediation communication made by a person other than the mediator if all parties consent to the disclosure;

(3) To the disclosure of a mediation communication if disclosure is required pursuant to section 2921.22 of the Revised Code;

(4) To the disclosure of a mediation communication if a court, after a hearing, determines that the disclosure does not circumvent Evidence Rule 408, that the disclosure is necessary in the particular case to prevent a manifest injustice, and that the necessity for disclosure is of sufficient magnitude to

outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings.

(D) This section does not prevent or inhibit the disclosure, discovery, or admission into evidence of a statement, document, or other matter that is a mediation communication but that, prior to its use in a mediation proceeding, was subject to discovery or admission under law or a rule of evidence or was subject to disclosure as a public record pursuant to section 149.43 of the Revised Code. This section does not affect the admissibility of a written settlement agreement signed by the parties to a mediation or the status of a written settlement agreement as a public record under section 149.43 of the Revised Code.

HISTORY

ACTION	DATE	JOURNAL ENTRY	
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