

New Jersey Uniform Mediation Act and What it Means to Divorcing Couples



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On November 22, 2004, New Jersey passed the Uniform Mediation Act (UMA). The purpose of the new law is to establish uniform standards and procedures for mediation and mediators. The UMA was passed to protect those who choose to resolve their disputes through mediation. The purpose of this article is to provide a simplified explanation of the new law to the public, and especially to divorcing clients, many of whom start the mediation process without being represented by an attorney. Your mediator probably will ask you to sign an agreement to mediate, which may or may not include reference to the UMA. Regardless of this, it is helpful for you to know details of the law that apply to your divorce mediation. For your reference, I have also enclosed the full-text of the act below.

1. **Applicability:** The Act applies to most court ordered mediation and private mediations. There are exceptions such as when the mediation is conducted by a judge who may make a ruling on the case.
2. **Privilege:** This is a legal term that provides a special advantage or immunity, beyond the advantage of other citizens, because otherwise, without this indulgence, the duties of a particular job could not be performed. With the UMA, what is said in mediation and documents prepared in mediation are not usually not admissible in court, either by the clients or the mediator. Unless the mediator agrees to waive his privilege, even if the clients waive their privilege, such as in a court trial, they cannot reveal what the mediator said in mediation or use documents prepared in mediation. There are exceptions to this such as in cases of child abuse. It is important to note that there is no privilege for a mediation communication that is in an agreement evidenced by a record that is signed by the parties. That is why it is important that any agreements reached in mediation should not usually be signed by the parties. These agreements may later be incorporated into a legally binding agreement, that you both sign that is admissible in court, but that is separate from the mediation process.
3. **Reporting to the Court:** This bill prohibits mediators from making a report, assessment, recommendation or oral or written communication to a court that would rule on the matter, unless the mediator and the parties consent. The mediator is allowed to report to the court whether

the mediation occurred or has terminated, whether a settlement was reached, and attendance.

4. **Confidentiality:** Confidentiality refers to keeping information about the mediation private (e.g., not publishing articles naming the parties). The UMA focuses rather narrowly on privilege, leaving confidentiality to be governed by other sources of authority: "Unless made during a session of a mediation which is open, or is required by law to be open, to the public, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State." Court ordered mediations such as those under the Family Economic Mediation Program are confidential. However, for private mediations in New Jersey, it is going to be important for mediators to work with their clients to specify the limits of confidentiality in their Agreement to Mediate, since only the UMA and not the court standards, apply to these cases.
5. **Disclosure of Conflicts:** Mediators are required not only to disclose any facts that may impact their impartiality, but also to ask the clients whether there are any known facts that might reasonably be understood to affect his/her impartiality. Additionally, after accepting a mediation, if new facts are uncovered, the mediator should disclose these as soon as is practicable. As example, if the mediator learns mid-way through the mediation that he once worked for the same firm as the wife, he has a duty to disclose this. If he feels he can remain impartial, he should indicate this. The clients then need to decide whether they want to continue the mediation.
6. **Participation in Mediation:** An attorney or other individual designated by a party may accompany the party to and participate in a mediation. Clients should note that most mediators retain the right to terminate the mediation for any reason; therefore, if you choose to bring an inappropriate party such as your new boyfriend or girlfriend to the mediation, you take the risk that the mediator will exercise this right.
7. **Timing:** This act shall take effect immediately and shall apply to any agreements to mediate made on or after the effective date of this act. This act will not be retroactively applied to agreements to mediate signed prior to November 22, 2004.



P.L. 2004, CHAPTER 157

An Act creating the "Uniform Mediation Act" and supplementing Title 2A of the New Jersey Statutes.

Be It Enacted by the Senate and General Assembly of the State of New Jersey.

C.2A:23C-1 Short title.

1. This Act shall be known and may be cited as the "Uniform Mediation Act."

C.2A:23C-2 Definitions.

2. Definitions. As used in this act:

"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.

"Mediation communication" means a statement, whether verbal or nonverbal or in a record, 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. A

mediation communication shall not be deemed to be a public record under P.L. 1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented by P.L.2001, c.404 (C.47:1A-5 et seq.).

"Mediator" means an individual who conducts a mediation.

"Nonparty participant" means a person, other than a party or mediator, who participates in a mediation.

"Mediation party" means a person who participates in a mediation and whose agreement is necessary to resolve the dispute.

"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.

"Proceeding" means 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.

"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.

"Sign" means 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.

C.2A:23C-3 Scope.

3. Scope.

a. Except as otherwise provided in subsection b. or c., this act shall apply to a mediation in which:

(1) the mediation parties are required to mediate by statute, court rule or administrative agency rule, or are 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 out as a mediator, or the mediation is provided by a person who holds itself out as providing mediation.

b. The act shall not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship or to any mediation conducted by the Public Employment Relations Commission or the State Board of Mediation;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the act applies to a mediation arising out of a

dispute that has been filed with a court or an administrative agency other than the Public Employment Relations Commission or the State Board of Mediation;

(3) conducted by a judge who may make a ruling on the case; or

(4) conducted under the auspices of:

(a) a primary or secondary school if all the parties are students; or

(b) a juvenile detention facility or shelter if all the parties are residents of that facility or shelter.

c. If the parties agree in advance in a signed record, or a record of proceeding so reflects, that all or part of a mediation is not privileged, the privileges under sections 4 through 6 of P.L. 2004, c.157 (C.2A:23C-4 through C.2A:23C-6) shall not apply to the mediation or part agreed upon. Sections 4 through 6 of P.L. 2004, c.157 (C.2A:23C-4 through C.2A:23C-6) shall apply to a mediation communication made by a person who has not received actual notice of the agreement before the communication is made.

C.2A:23C-4 Privilege against disclosure; admissibility; discovery.

4. Privilege against Disclosure; Admissibility; Discovery.

a. Except as otherwise provided in section 6 of P.L. 2004, c.157 (C.2A:23C-6), a mediation communication is privileged as provided in subsection b. of this section and shall not be subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by section 5 of P.L. 2004, c.157 (C.2A:23C-5).

b. In a proceeding, the following privileges shall 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 shall not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

C.2A:23C-5 Waiver and preclusion of privilege.

5. Waiver and Preclusion of Privilege.

a. A privilege under section 4 of P.L.2004, c.157 (C.2A:23C-4) 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 who discloses or makes a representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under section 4 of P.L.2004, c.157 (C.2A:23C-4), but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

c. A person who 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 section 4 of P.L.2004, c.157 (C.2A:23C-4).

C.2A:23C-6 Exceptions to privilege.

6. Exceptions to Privilege.

a. There is no privilege under section 4 of P.L.2004, c.157 (C.2A:23C-4) for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

- (2) made during a session of a mediation that 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 or commit a crime;
- (4) intentionally used to plan a crime, attempt to 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 filed against a mediator arising out of a mediation;
- (6) except as otherwise provided in subsection c., 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 child abuse or neglect in a proceeding in which the Division of Youth and Family Services in the Department of Human Services is a party, unless the Division of Youth and Family Services participates in the mediation.
- b. There is no privilege under section 4 of P.L.2004, c.157 (C.2A:23C-4) 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 there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:
- (1) a court proceeding involving a crime as defined in the "New Jersey Code of Criminal Justice," N.J.S. 2C:1-1 et seq.; or
 - (2) except as otherwise provided in subsection c., 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 paragraph (6) of subsection a. or paragraph (2) of subsection b.
- d. If a mediation communication is not privileged under subsection a. or b., 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. does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.
- C.2A:23C-7 Prohibited mediator reports.
7. Prohibited mediator reports.
- a. Except as required in subsection b., a mediator may not make a report, assessment, evaluation, recommendation, finding, or other oral or written communication 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.
 - b. A mediator may disclose:
 - (1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance; or
 - (2) a mediation communication as permitted under section 6 of P.L.2004, c.157 (C.2A:23C-6);
 - c. A communication made in violation of subsection a. may not be considered by a court, administrative agency, or arbitrator.
- C.2A:23C-8 Confidentiality.
8. Confidentiality.
- Unless made during a session of a mediation which is open, or is required by law to be open, to the public, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.
- C.2A:23C-9 Mediator's Disclosure of Conflicts of Interest; Background.
9. 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 practicable before accepting a mediation.
- b. If a mediator learns any fact described in paragraph (1) of subsection a. 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 who violates subsection a., b., or g. shall be precluded by the violation from asserting a privilege under section 4 of P.L.2004, c.157 (C.2A:23C-4), but only to the extent necessary to prove the violation.
- e. Subsections a, b, c., and g. do not apply to a judge of any court of this State acting as a mediator:
- f. This act does not require that a mediator have a special qualification by background or profession.
 - g. A mediator shall be impartial, notwithstanding disclosure of the facts required in subsections a. and b.
- C.2A:23C-10 Participation in mediation.
10. Participation in Mediation.
- An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of representation or participation given before the mediation may be rescinded.
- C.2A:23C-11 Relation to Electronic Signatures in Global and National Commerce Act.
11. Relation to Electronic Signatures in Global and National Commerce Act.
- This act modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. s.7001 et seq., but this act does not modify, limit, or supersede s.101(c) of that act or authorize electronic delivery of any of the notices described in s.103(b) of that act.
- C.2A:23C-12 Uniformity of application and construction.
12. Uniformity of application and construction.
- In applying and construing this act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.
- C.2A:23C-13 Severability clause.
13. Severability clause.
- If any provision of P.L.2004, c.157 (C.2A:23C-1 et seq.) or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.
14. This act shall take effect immediately and shall apply to any agreements to mediate made on or after the effective date of this act.
- Approved November 22, 2004.