

LBD03857-01-1

1 (A) "MEDIATION" MEANS A PROCESS IN WHICH A MEDIATOR FACILITATES COMMU-
2 NICATION AND NEGOTIATION BETWEEN PARTIES TO ASSIST THEM IN REACHING A
3 VOLUNTARY AGREEMENT REGARDING THEIR DISPUTE.

4 (B) "MEDIATION COMMUNICATION" MEANS A STATEMENT, WHETHER ORAL OR IN A
5 RECORD OR VERBAL OR NONVERBAL, THAT OCCURS DURING A MEDIATION OR IS MADE
6 FOR PURPOSES OF CONSIDERING, CONDUCTING, PARTICIPATING IN, INITIATING,
7 CONTINUING, OR RECONVENING A MEDIATION OR RETAINING A MEDIATOR.

8 (C) "MEDIATOR" MEANS AN INDIVIDUAL WHO CONDUCTS A MEDIATION.

9 (D) "MEDIATION PARTY" MEANS A PERSON THAT PARTICIPATES IN A MEDIATION
10 AND WHOSE AGREEMENT IS NECESSARY TO RESOLVE THE DISPUTE.

11 (E) "NONPARTY PARTICIPANT" MEANS A PERSON, OTHER THAN A PARTY OR MEDI-
12 ATOR, THAT PARTICIPATES IN A MEDIATION.

13 (F) "PERSON" MEANS AN INDIVIDUAL, CORPORATION, BUSINESS TRUST, ESTATE,
14 TRUST, PARTNERSHIP, LIMITED LIABILITY COMPANY, ASSOCIATION, JOINT
15 VENTURE, GOVERNMENT, GOVERNMENTAL SUBDIVISION, AGENCY, OR INSTRUMENTALI-
16 TY, PUBLIC CORPORATION, OR ANY OTHER LEGAL OR COMMERCIAL ENTITY.

17 (G) "PROCEEDING" MEANS:
18 (1) A JUDICIAL, ADMINISTRATIVE, ARBITRAL, OR OTHER ADJUDICATIVE PROC-
19 ESS, INCLUDING RELATED PRE-HEARING AND POST-HEARING MOTIONS, CONFER-
20 ENCES, AND DISCOVERY; OR
21 (2) A LEGISLATIVE HEARING OR SIMILAR PROCESS.

22 (H) "RECORD" MEANS INFORMATION THAT IS INSCRIBED ON A TANGIBLE MEDIUM
23 OR THAT IS STORED IN AN ELECTRONIC OR OTHER MEDIUM AND IS RETRIEVABLE IN
24 PERCEIVABLE FORM.

25 (I) "SIGN" MEANS:
26 (1) TO EXECUTE OR ADOPT A TANGIBLE SYMBOL WITH THE PRESENT INTENT TO
27 AUTHENTICATE A RECORD; OR
28 (2) TO ATTACH OR LOGICALLY ASSOCIATE AN ELECTRONIC SYMBOL, SOUND, OR
29 PROCESS TO OR WITH A RECORD WITH THE PRESENT INTENT TO AUTHENTICATE A
30 RECORD.

31 S 7402. SCOPE. (A) EXCEPT AS OTHERWISE PROVIDED IN SUBDIVISION (B) OR
32 (C), THIS ARTICLE APPLIES TO A MEDIATION IN WHICH:
33 (1) THE MEDIATION PARTIES ARE REQUIRED TO MEDIATE BY STATUTE OR COURT
34 OR ADMINISTRATIVE AGENCY RULE OR REFERRED TO MEDIATION BY A COURT,
35 ADMINISTRATIVE AGENCY, OR ARBITRATOR;
36 (2) THE MEDIATION PARTIES AND THE MEDIATOR AGREE TO MEDIATE IN A
37 RECORD THAT DEMONSTRATES AN EXPECTATION THAT MEDIATION COMMUNICATIONS
38 WILL BE PRIVILEGED AGAINST DISCLOSURE; OR
39 (3) THE MEDIATION PARTIES USE AS A MEDIATOR AN INDIVIDUAL WHO HOLDS
40 HIMSELF OR HERSELF OUT AS A MEDIATOR, OR THE MEDIATION IS PROVIDED BY A
41 PERSON THAT HOLDS ITSELF OUT AS PROVIDING MEDIATION.

42 (B) THIS ARTICLE DOES NOT APPLY TO A MEDIATION:
43 (1) RELATING TO THE ESTABLISHMENT, NEGOTIATION, ADMINISTRATION, OR
44 TERMINATION OF A COLLECTIVE BARGAINING RELATIONSHIP;
45 (2) RELATING TO A DISPUTE THAT IS PENDING UNDER OR IS PART OF THE
46 PROCESSES ESTABLISHED BY A COLLECTIVE BARGAINING AGREEMENT, EXCEPT THAT
47 THIS ARTICLE SHALL APPLY TO A MEDIATION ARISING OUT OF A DISPUTE THAT
48 HAS BEEN FILED WITH AN ADMINISTRATIVE AGENCY OR COURT;
49 (3) CONDUCTED BY A JUDGE WHO MIGHT MAKE A RULING ON THE CASE; OR
50 (4) CONDUCTED UNDER THE AUSPICES OF:
51 (I) A PRIMARY OR SECONDARY SCHOOL IF ALL THE PARTIES ARE STUDENTS; OR
52 (II) A CORRECTIONAL INSTITUTION FOR YOUTHS IF ALL THE PARTIES ARE
53 RESIDENTS OF THAT INSTITUTION.

54 (C) IF THE PARTIES AGREE IN ADVANCE IN A SIGNED RECORD, OR A RECORD OF
55 PROCEEDING SO REFLECTS, THAT ALL OR PART OF A MEDIATION IS NOT PRIVI-
56 LEGED, THE PRIVILEGES UNDER SECTIONS SEVENTY-FOUR HUNDRED THREE, SEVEN-

1 TY-FOUR HUNDRED FOUR AND SEVENTY-FOUR HUNDRED FIVE DO NOT APPLY TO THE
2 MEDIATION OR PART AGREED UPON. HOWEVER, SECTION SEVENTY-FOUR HUNDRED
3 THREE APPLIES TO A MEDIATION COMMUNICATION MADE BY A PERSON THAT HAS NOT
4 RECEIVED ACTUAL NOTICE OF THE AGREEMENT BEFORE THE COMMUNICATION IS
5 MADE.

6 S 7403. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY; DISCOVERY. (A)
7 EXCEPT AS OTHERWISE PROVIDED IN SECTION SEVENTY-FOUR HUNDRED FIVE, A
8 MEDIATION COMMUNICATION IS PRIVILEGED AS PROVIDED IN SUBDIVISION (B) AND
9 IS NOT SUBJECT TO DISCOVERY OR ADMISSIBLE IN EVIDENCE IN A PROCEEDING
10 UNLESS WAIVED OR PRECLUDED AS PROVIDED IN SECTION SEVENTY-FOUR HUNDRED
11 FOUR.

12 (B) IN A PROCEEDING, THE FOLLOWING PRIVILEGES APPLY:

13 (1) A MEDIATION PARTY MAY REFUSE TO DISCLOSE, AND MAY PREVENT ANY
14 OTHER PERSON FROM DISCLOSING, A MEDIATION COMMUNICATION.

15 (2) A MEDIATOR MAY REFUSE TO DISCLOSE A MEDIATION COMMUNICATION, AND
16 MAY PREVENT ANY OTHER PERSON FROM DISCLOSING A MEDIATION COMMUNICATION
17 OF THE MEDIATOR.

18 (3) A NONPARTY PARTICIPANT MAY REFUSE TO DISCLOSE, AND MAY PREVENT ANY
19 OTHER PERSON FROM DISCLOSING, A MEDIATION COMMUNICATION OF THE NONPARTY
20 PARTICIPANT.

21 (C) EVIDENCE OR INFORMATION THAT IS OTHERWISE ADMISSIBLE OR SUBJECT TO
22 DISCOVERY DOES NOT BECOME INADMISSIBLE OR PROTECTED FROM DISCOVERY SOLE-
23 LY BY REASON OF ITS DISCLOSURE OR USE IN A MEDIATION.

24 S 7404. WAIVER AND PRECLUSION OF PRIVILEGE. (A) A PRIVILEGE UNDER
25 SECTION SEVENTY-FOUR HUNDRED THREE MAY BE WAIVED IN A RECORD OR ORALLY
26 DURING A PROCEEDING IF IT IS EXPRESSLY WAIVED BY ALL PARTIES TO THE
27 MEDIATION AND:

28 (1) IN THE CASE OF THE PRIVILEGE OF A MEDIATOR, IT IS EXPRESSLY WAIVED
29 BY THE MEDIATOR; AND

30 (2) IN THE CASE OF THE PRIVILEGE OF A NONPARTY PARTICIPANT, IT IS
31 EXPRESSLY WAIVED BY THE NONPARTY PARTICIPANT.

32 (B) A PERSON THAT DISCLOSES OR MAKES A REPRESENTATION ABOUT A MEDI-
33 ATION COMMUNICATION WHICH PREJUDICES ANOTHER PERSON IN A PROCEEDING IS
34 PRECLUDED FROM ASSERTING A PRIVILEGE UNDER SECTION SEVENTY-FOUR HUNDRED
35 THREE, BUT ONLY TO THE EXTENT NECESSARY FOR THE PERSON PREJUDICED TO
36 RESPOND TO THE REPRESENTATION OR DISCLOSURE.

37 (C) A PERSON THAT INTENTIONALLY USES A MEDIATION TO PLAN, TO ATTEMPT
38 TO COMMIT, OR TO COMMIT A CRIME, OR TO CONCEAL AN ONGOING CRIME OR ONGO-
39 ING CRIMINAL ACTIVITY, IS PRECLUDED FROM ASSERTING A PRIVILEGE UNDER
40 SECTION SEVENTY-FOUR HUNDRED THREE.

41 S 7405. EXCEPTIONS TO PRIVILEGE. (A) THERE IS NO PRIVILEGE UNDER
42 SECTION SEVENTY-FOUR HUNDRED THREE FOR A MEDIATION COMMUNICATION THAT
43 IS:

44 (1) IN AN AGREEMENT EVIDENCED BY A RECORD SIGNED BY ALL PARTIES TO THE
45 AGREEMENT;

46 (2) AVAILABLE TO THE PUBLIC UNDER ARTICLE SIX OR SEVEN OF THE PUBLIC
47 OFFICERS LAW, OR MADE DURING A SESSION OF A MEDIATION WHICH IS OPEN, OR
48 IS REQUIRED BY LAW TO BE OPEN, TO THE PUBLIC;

49 (3) A THREAT OR STATEMENT OF A PLAN TO INFLICT BODILY INJURY OR COMMIT
50 A CRIME OF VIOLENCE;

51 (4) INTENTIONALLY USED TO PLAN A CRIME, ATTEMPT TO COMMIT A CRIME, OR
52 TO CONCEAL AN ONGOING CRIME OR ONGOING CRIMINAL ACTIVITY;

53 (5) LATER SOUGHT OR OFFERED TO PROVE OR DISPROVE A CLAIM OR COMPLAINT
54 OF PROFESSIONAL MISCONDUCT OR MALPRACTICE FILED AGAINST A MEDIATOR;

55 (6) EXCEPT AS OTHERWISE PROVIDED IN SUBDIVISION (C), LATER SOUGHT OR
56 OFFERED TO PROVE OR DISPROVE A CLAIM OR COMPLAINT OF PROFESSIONAL

1 MISCONDUCT OR MALPRACTICE FILED AGAINST A MEDIATION PARTY, NONPARTY
2 PARTICIPANT, OR REPRESENTATIVE OF A PARTY BASED ON CONDUCT OCCURRING
3 DURING A MEDIATION; OR

4 (7) LATER SOUGHT OR OFFERED IN A PROCEEDING IN WHICH A CHILD OR ADULT
5 PROTECTIVE SERVICES AGENCY IS A PARTY TO PROVE OR DISPROVE ABUSE,
6 NEGLECT, ABANDONMENT, OR EXPLOITATION, UNLESS THE CHILD OR ADULT PROTEC-
7 TIVE SERVICES AGENCY PARTICIPATED IN THE MEDIATION.

8 (B) THERE IS NO PRIVILEGE UNDER SECTION SEVENTY-FOUR HUNDRED THREE IF
9 A COURT, ADMINISTRATIVE AGENCY, OR ARBITRATOR FINDS, AFTER A HEARING
10 HELD IN CAMERA, THAT THE PARTY SEEKING DISCOVERY OR THE PROPONENT OF THE
11 EVIDENCE HAS SHOWN THAT THE EVIDENCE IS NOT OTHERWISE AVAILABLE, THAT
12 THERE IS A NEED FOR THE EVIDENCE THAT SUBSTANTIALLY OUTWEIGHS THE INTER-
13 EST IN PROTECTING CONFIDENTIALITY, AND THAT THE MEDIATION COMMUNICATION
14 IS SOUGHT OR OFFERED IN:

15 (1) A COURT PROCEEDING INVOLVING A FELONY; OR

16 (2) EXCEPT AS OTHERWISE PROVIDED IN SUBDIVISION (C), A PROCEEDING (I)
17 TO PROVE A CLAIM TO RESCIND OR REFORM, OR (II) TO ESTABLISH A DEFENSE TO
18 AVOID LIABILITY ON, A CONTRACT ARISING OUT OF THE MEDIATION.

19 (C) A MEDIATOR MAY NOT BE COMPELLED TO PROVIDE EVIDENCE OF A MEDIATION
20 COMMUNICATION REFERRED TO IN PARAGRAPH SIX OF SUBDIVISION (A) OR PARA-
21 GRAPH TWO OF SUBDIVISION (B).

22 (D) IF A MEDIATION COMMUNICATION IS NOT PRIVILEGED UNDER SUBDIVISION
23 (A) OR (B), ONLY THAT PORTION OF THE COMMUNICATION NECESSARY FOR THE
24 APPLICATION OF THE EXCEPTION FROM NONDISCLOSURE MAY BE ADMITTED. ADMIS-
25 SION OF EVIDENCE UNDER SUBDIVISION (A) OR (B) DOES NOT RENDER THE
26 EVIDENCE, OR ANY OTHER MEDIATION COMMUNICATION, DISCOVERABLE OR ADMISSI-
27 BLE FOR ANY OTHER PURPOSE.

28 S 7406. PROHIBITED MEDIATOR REPORTS. (A) EXCEPT AS REQUIRED IN SUBDI-
29 VISION (B), A MEDIATOR MAY NOT MAKE A REPORT, ASSESSMENT, EVALUATION,
30 RECOMMENDATION, FINDING, OR OTHER COMMUNICATION REGARDING A MEDIATION TO
31 A COURT, ADMINISTRATIVE AGENCY, OR OTHER AUTHORITY THAT MAY MAKE A
32 RULING ON THE DISPUTE THAT IS THE SUBJECT OF THE MEDIATION.

33 (B) A MEDIATOR MAY DISCLOSE:

34 (1) WHETHER THE MEDIATION OCCURRED OR HAS TERMINATED, OR WHETHER A
35 SETTLEMENT WAS REACHED, AND ATTENDANCE;

36 (2) A MEDIATION COMMUNICATION AS PERMITTED UNDER SECTION SEVENTY-FOUR
37 HUNDRED FIVE; OR

38 (3) A MEDIATION COMMUNICATION EVIDENCING ABUSE, NEGLECT, ABANDONMENT,
39 OR EXPLOITATION OF AN INDIVIDUAL TO A PUBLIC AGENCY RESPONSIBLE FOR
40 PROTECTING INDIVIDUALS AGAINST SUCH MISTREATMENT.

41 (C) A COMMUNICATION MADE IN VIOLATION OF SUBDIVISION (A) MAY NOT BE
42 CONSIDERED BY A COURT, ADMINISTRATIVE AGENCY, OR ARBITRATOR.

43 S 7407. CONFIDENTIALITY. UNLESS SUBJECT TO ARTICLE SIX OR SEVEN OF THE
44 PUBLIC OFFICERS LAW, MEDIATION COMMUNICATIONS ARE CONFIDENTIAL TO THE
45 GREATEST EXTENT AGREED TO BY THE PARTIES OR PROVIDED BY THIS ARTICLE OR
46 OTHER LAW OR RULE OF THIS STATE.

47 S 7408. MEDIATOR'S DISCLOSURE OF CONFLICTS OF INTEREST; BACKGROUND.
48 (A) BEFORE ACCEPTING A MEDIATION, AN INDIVIDUAL WHO IS REQUESTED TO
49 SERVE AS A MEDIATOR SHALL:

50 (1) MAKE AN INQUIRY THAT IS REASONABLE UNDER THE CIRCUMSTANCES TO
51 DETERMINE WHETHER THERE ARE ANY KNOWN FACTS THAT A REASONABLE INDIVIDUAL
52 WOULD CONSIDER LIKELY TO AFFECT THE IMPARTIALITY OF THE MEDIATOR,
53 INCLUDING A FINANCIAL OR PERSONAL INTEREST IN THE OUTCOME OF THE MEDI-
54 ATION AND AN EXISTING OR PAST RELATIONSHIP WITH A MEDIATION PARTY OR
55 FORESEEABLE PARTICIPANT IN THE MEDIATION; AND

1 (2) DISCLOSE ANY SUCH KNOWN FACT TO THE MEDIATION PARTIES AS SOON AS
2 IS PRACTICAL BEFORE ACCEPTING A MEDIATION.

3 (B) IF A MEDIATOR LEARNS ANY FACT DESCRIBED IN PARAGRAPH ONE OF SUBDI-
4 VISION (A) AFTER ACCEPTING A MEDIATION, THE MEDIATOR SHALL DISCLOSE IT
5 AS SOON AS IS PRACTICABLE.

6 (C) AT THE REQUEST OF THE MEDIATION PARTY, AN INDIVIDUAL WHO IS
7 REQUESTED TO SERVE AS A MEDIATOR SHALL DISCLOSE THE MEDIATOR'S QUALI-
8 FICATIONS TO MEDIATE A DISPUTE.

9 (D) A PERSON THAT VIOLATES SUBDIVISION (A) OR (B) IS PRECLUDED BY THE
10 VIOLATION FROM ASSERTING A PRIVILEGE AS TO HIS OR HER OWN STATEMENTS
11 UNDER SECTION SEVENTY-FOUR HUNDRED THREE.

12 (E) SUBDIVISIONS (A), (B), AND (C) DO NOT APPLY TO AN INDIVIDUAL
13 ACTING AS A JUDGE.

14 (F) NO PROVISION OF THIS ARTICLE REQUIRES THAT A MEDIATOR HAVE A
15 SPECIAL QUALIFICATION BY BACKGROUND OR PROFESSION.

16 S 7409. PARTICIPATION IN MEDIATION. AN ATTORNEY MAY REPRESENT A PARTY,
17 OR ANOTHER INDIVIDUAL DESIGNATED BY A PARTY MAY ACCOMPANY THE PARTY TO,
18 AND PARTICIPATE IN, A MEDIATION. A WAIVER OF REPRESENTATION OR PARTIC-
19 IPATION GIVEN BEFORE THE MEDIATION MAY BE RESCINDED.

20 S 7410. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL
21 COMMERCE. THIS ARTICLE MODIFIES, LIMITS, OR SUPERSEDES THE FEDERAL ELEC-
22 TRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT, 15 U.S.C. S 7001
23 ET SEQ., BUT THIS ARTICLE DOES NOT MODIFY, LIMIT, OR SUPERSEDE S 101(C)
24 OF SUCH ACT OR AUTHORIZE ELECTRONIC DELIVERY OF ANY OF THE NOTICES
25 DESCRIBED IN S 103(B) OF SUCH ACT.

26 S 7411. UNIFORMITY OF APPLICATION AND CONSTRUCTION. IN APPLYING AND
27 CONSTRUING THIS ARTICLE, CONSIDERATION MUST BE GIVEN TO THE NEED TO
28 PROMOTE UNIFORMITY OF THE LAW WITH RESPECT TO ITS SUBJECT MATTER AMONG
29 STATES THAT ENACT IT.

30 S 3. Severability clause. If any provision of this act or its applica-
31 tion to any person or circumstance is held invalid, the invalidity does
32 not affect other provisions or applications of this act which can be
33 given effect without the invalid provision or application, and to this
34 end the provisions of this act are severable.

35 S 4. This act shall take effect on the first of January next succeed-
36 ing the date on which it shall have become a law and shall apply to all
37 agreements to mediate and mediations pursuant to a referral entered into
38 on or after such effective date.