

**Litigation Section
Alternative Dispute Resolution Committee
Boston Bar Association**

**Draft Amendment to Mass. Gen. Laws c. 233, § 23C
April 2006**

DRAFT AMENDMENT

Mass. Gen. Laws c. 233 § 23C: Mediation Confidentiality

- (a) For purposes of this section,
 - (1) “mediation” means the process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute;
 - (2) “mediator” means an individual who conducts a mediation; and
 - (3) “communication” means a statement, whether oral or written, 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.
- (b) Any communication made in the course of or relating to the subject matter of any mediation by any participant, mediator or other person shall be a confidential communication and not subject to disclosure outside of the mediation process including, without limitation, in any judicial, administrative, or arbitration proceeding. Information included in a communication that was not confidential prior to the mediation, shall not become confidential solely by virtue of its use in connection with mediation.
- (c) There is no prohibition against disclosure for a communication:
 - (1) when all parties to the mediation, including the mediator, agree to the disclosure;
 - (2) in an agreement evidenced by a record signed by all parties to the agreement or their agent(s) or attorney(s), unless it limits or precludes disclosure;
 - (3) available to the public by statute or made during a session of a mediation which is open, or is required by law to be open, to the public;

- (4) that is a threat or statement of a plan to inflict bodily injury, commit a crime of violence, or commit a felony;
 - (5) that is intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;
 - (6) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;
 - (7) 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, except that a mediator may not be compelled to provide evidence of such a communication;
 - (8) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation when communicated to a child or adult protective services agency or in a subsequent proceeding in which a child or adult protective services agency is a party, unless the case is referred by a court to mediation and a public agency participates;
 - (9) 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
 - i. a court proceeding involving a felony or misdemeanor; or
 - ii. a proceeding to prove a claim to rescind or reform, or a defense to avoid liability on, a contract arising out of the mediation, except that a mediator may not be compelled to provide evidence of such a communication.
- (d) If an exception to nondisclosure applies, only the portion of the communication necessary for the application of the exception may be admitted or disclosed. Admission of a communication under any of the above-listed exceptions does not render the communication, or any other mediation communication, discoverable or admissible for any other purpose.
- (e) The provisions of this section shall not apply to the mediation of labor disputes.

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