A 1756 Lentol (MS) Same as S 683
SAMPSON
Civil Practice Law and Rules
TITLE....Establishes the uniform mediation act
01/11/11referred to judiciary

S683 SAMPSON Same as A 1756 Lentol (MS)
ON FILE: 01/05/11 Civil Practice Law and Rules
TITLE....Establishes the uniform mediation act
01/05/11 REFERRED TO CODES
03/08/11 COMMITTEE DISCHARGED AND COMMITTED TO JUDICIARY

STATE OF NEW YORK

1756

2011-2012 Regular Sessions

IN ASSEMBLY

January 11, 2011

Introduced by M. of A. LENTOL, KAVANAGH -- read once and referred to the Committee on Judiciary

AN ACT to amend the civil practice law and rules, in relation to establishing the *uniform mediation* act

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Short title. This act shall be known and may be cited as the *"uniform mediation* act".

§ 2. The civil practice law and rules is amended by adding a new article 74 to read as follows:

ARTICLE 74

UNIFORM MEDIATION

Section 7401. Definitions.
7402. Scope.
7403. Privilege against disclosure; admissibility; discovery.
7404. Waiver and preclusion of privilege.
7405. Exceptions to privilege.
7406. Prohibited mediator reports.
7407. Confidentiality.
7408. Mediator's disclosure of conflicts of interest; background.
7409. Participation in mediation.
7410. Relation to electronic signatures in global and national commerce.
7411. Uniformity of application and construction.

§ 7401. Definitions. As used in this article the following terms shall have the following meanings:

(a) "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.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD03857-01-1

(b) "Mediation communication" means a statement, whether oral or in a record or 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.

(c) "Mediator" means an individual who conducts a mediation.

(d) "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(e) "Nonparty participant" means a person, other than a party or mediator, that participates in a mediation.

(f) "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.

(g) "Proceeding" means:

(1) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or

(2) a legislative hearing or similar process.

(h) "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.

(i) "Sign" means:

(1) to execute or adopt a tangible symbol with the present intent to authenticate a record; or

(2) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record.

§ 7402. Scope. (a) Except as otherwise provided in subdivision (b) or (c), this article applies to a mediation in which:

(1) the mediation parties 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 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 or herself out as a mediator, or the mediation is provided by a person that holds itself out as providing mediation.

(b) This article does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that this article shall apply to a mediation arising out of a dispute that has been filed with an administrative agency or court;

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

(4) conducted under the auspices of:

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

(ii) a correctional institution for youths if all the parties are residents of that institution.

(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 seventy-four hundred three, seventy-four hundred four and seventy-four hundred five do not apply to the mediation or part agreed upon. However, section seventy-four hundred three applies to a mediation communication made by a person that has not

received actual notice of the agreement before the communication is made.

§ 7403. Privilege against disclosure; admissibility; discovery. (a) Except as otherwise provided in section seventy-four hundred five, a mediation communication is privileged as provided in subdivision (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided in section seventy-four hundred four.

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

§ 7404. Waiver and preclusion of privilege. (a) A privilege under section seventy-four hundred three 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 that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under section seventy-four hundred three, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a mediation to plan, to attempt to commit, or to commit a crime, or to conceal an ongoing crime or ongoing criminal activity, is precluded from asserting a privilege under section seventy-four hundred three.

§ 7405. Exceptions to privilege. (a) There is no privilege under section seventy-four hundred three for a mediation communication that is:

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

(2) available to the public under article six or seven of the public officers law, or made during a session of a mediation which 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 of violence;

(4) intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) later 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 in subdivision (c), later 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) later sought or offered in a proceeding in which a child or adult protective services agency is a party to prove or disprove abuse, neglect, abandonment, or exploitation, unless the child or adult protective services agency participated in the mediation.

(b) There is no privilege under section seventy-four hundred three if a court, administrative agency, or arbitrator finds, after a hearing held 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 felony; or

(2) except as otherwise provided in subdivision (c), a proceeding (i) to prove a claim to rescind or reform, or (ii) to establish 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 six of subdivision (a) or paragraph two of subdivision (b).

(d) If a mediation communication is not privileged under subdivision (a) or (b), only that portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subdivision (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

§ 7406. Prohibited mediator reports. (a) Except as required in subdivision (b), a mediator may not make a report, assessment, evaluation, recommendation, finding, or other 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, or whether a settlement was reached, and attendance;

(2) a mediation communication as permitted under section seventy-four hundred five; or

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

(c) A communication made in violation of subdivision (a) may not be considered by a court, administrative agency, or arbitrator.

§ 7407. Confidentiality. Unless subject to article six or seven of the public officers law, mediation communications are confidential to the greatest extent agreed to by the parties or provided by this article or other law or rule of this state.

§ 7408. 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 practical before accepting a mediation.

(b) If a mediator learns any fact described in paragraph one of subdivision (a) after accepting a mediation, the mediator shall disclose it as soon as is practicable.

(c) At the request of the 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 that violates subdivision (a) or (b) is precluded by the violation from asserting a privilege as to his or her own statements under section seventy-four hundred three.

(e) Subdivisions (a), (b), and (c) do not apply to an individual acting as a judge.

(f) No provision of this article requires that a mediator have a special qualification by background or profession.

§ 7409. Participation in mediation. An attorney may represent a party, or another 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.

§ 7410. Relation to electronic signatures in global and national commerce. This article modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et seq., but this article does not modify, limit, or supersede § 101(c) of such act or authorize electronic delivery of any of the notices described in § 103(b) of such act.

§ 7411. Uniformity of application and construction. In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§ 3. Severability clause. If any provision of this act 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.

§ 4. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all agreements to mediate and mediations pursuant to a referral entered into on or after such effective date.

NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: A1756

SPONSOR: Lentol¦(MS)¦¦¦¦¦¦¦¦¦

TITLE OF BILL: An act to amend the civil practice law and rules, in relation to establishing the uniform mediation act

PURPOSE:
This bill would enhance the level of confidentiality afforded to communications made in the context of mediation, require mediators to disclose conflicts of interest and promote uniformity among state mediation laws.

SUMMARY OF PROVISIONS:
A new Article 74 would be added to the Civil Practice Laws and Rules creating a privilege against the disclosure of communications made in the course of a mediation; creating a baseline presumption of confidentiality for such communications; setting forth definitions, scope, exceptions, and waivers; setting forth what a mediator may and may not disclose; requiring a mediator to disclose conflicts of interests before accepting a mediation; permitting attorneys or others to represent parties in mediation; guiding construction of the Act by consideration of the need for uniformity among the States; and providing effective dates as to existing and future mediations; and providing for severability.

EXISTING LAW: Current law provides for mediation confidentiality in some circumstances. For example, mediation communications are confidential in the Community Dispute Resolution Centers Program, under Article 21-A of the Judiciary Law. Under CPLR 4547, offers to compromise are inadmissible to prove the validity or value of claims, or to prove liability for such claims. Various courts have established confidentiality rules to govern the mediations they order.

JUSTIFICATION:
Mediation provides a speedy and inexpensive method of resolving disputes. New York's state-funded Community Dispute Resolution Centers produced voluntary agreements in 86 percent of the 26,472 cases they handled in FY 2000-2001. NASDAQ, the Better Business Bureau, the American Arbitration Association, and other private dispute-settlement organizations also show impressive success rates. But mediation could and would serve a far greater population of New Yorkers, and serve it better, if participants could be assured of the confidentiality of their mediation communications. Open and honest communication produces better mediation outcomes. The more candidly participants express their needs and preferences, the more effectively they can produce mediation solutions. Although current law provides for confidentiality in some mediations, practitioners generally cannot ascertain whether or not the courts will protect the confidentiality of their mediation communi-

cations, since no New York State law currently governs mediation in general, or provides a clear baseline for mediation confidentiality.

The Uniform Mediation Act provides precisely that: a clear baseline for mediation confidentiality. The increased use of mediation, which would almost certainly follow upon enactment of the UMA, would reduce the costs of disputes for individuals and businesses in New York.

LEGISLATIVE HISTORY:
A.8497 of 2009-10

FISCAL IMPLICATIONS:
None.

EFFECTIVE DATE:
This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to all agreements to mediate and mediations pursuant to a referral entered into on or after such effective date.