

Department of Legislative Services
Maryland General Assembly
2012 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 856

(Senator Raskin, *et al.*)

Judicial Proceedings

Judiciary

Courts and Judicial Proceedings - Maryland Mediation Confidentiality Act

This bill establishes the Maryland Mediation Confidentiality Act and establishes that communications made during the course of specified mediations must be kept confidential.

Fiscal Summary

State Effect: Ensuring compliance with the bill's provisions will not materially affect State operations or finances.

Local Effect: Ensuring compliance with the bill's provisions will not materially affect local government operations or finances.

Small Business Effect: Minimal.

Analysis

Bill Summary: "Mediation communication" means a communication, whether by speech, writing, or conduct, made as part of a mediation. It includes a communication made for the purpose of considering, initiating, continuing, reconvening, or evaluating a mediation or a mediator.

Applicability

The provisions of the bill apply to a mediation in which (1) the parties are required to mediate by law or are referred to mediation by an administrative agency or arbitrator or agree in writing that the mediation communications will remain confidential; and (2) the

mediator states in writing to any and all parties to the mediation that the mediator has read and, consistent with State law, will abide by the Maryland Standard of Conduct for Mediators during the mediation.

The bill's provisions do not apply to a mediation:

- to which Title 17 of the Maryland Rules, (which governs alternative dispute resolution proceedings in the circuit court) applies;
- relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;
- relating to a dispute that is pending under, or is part of the process established by, a collective bargaining agreement unless the dispute has been filed with an administrative agency or court;
- relating to an action to enforce an agreement to arbitrate, as specified;
- relating to an action to foreclose a lien against an owner-occupied residential property subject to specified foreclosure mediation conducted by the Office of Administrative Hearings;
- arising from a referral of a matter to a master, examiner, auditor, or parenting coordinator under specified Maryland Rules;
- conducted by a judge who might make a ruling on a case based on the dispute; or
- in which the parties and the mediator, by a written and signed agreement made in advance of the mediation, agree to exclude all or part of the mediation communications from the application of this bill's provisions.

Confidentiality Requirements

Unless otherwise provided, a mediator, a party to a mediation, or any person present or otherwise participating in a mediation at the request of a mediator must maintain the confidentiality of all mediation communications and may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.

Agreements

The parties may enter into a written agreement to maintain the confidentiality of all mediation communications and may require any person present or otherwise participating

in the mediation at the request of a party to maintain the confidentiality of all mediation communications. A party to a mediation and any person present or otherwise participating in the mediation at the request of the party may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.

Unless the parties agree otherwise in writing, a document signed by the parties that records points of agreement expressed by the parties or that constitutes an agreement reached by the parties as a result of mediation is not confidential.

Permitted Disclosures

In addition to any other disclosure required by law, a mediator, a party, or a person who was present or otherwise participated in a mediation at the request of the mediator or a party may disclose mediation communications:

- to a potential victim or to the appropriate law enforcement authority to the extent that the mediator, party, or person reasonably believes that disclosure is necessary to prevent bodily harm or death to the potential victim;
- to the extent necessary to assert or defend against allegations of mediator misconduct or negligence;
- to the extent necessary to assert or defend against allegations of professional misconduct or malpractice, except that a mediator may not be compelled to participate in a proceeding arising out of the disclosure; or
- to the extent necessary to assert or defend against a claim or defense that, because of fraud, duress, or misrepresentation, a contract arising out of a mediation should be rescinded or damages should be awarded.

A court may order mediation communications to be disclosed only to the extent that the court determines that disclosure is necessary to prevent an injustice or harm to the public interest that is of sufficient magnitude in the particular case to outweigh the integrity of mediation proceedings.

Mediation communications that are confidential under these provisions are not subject to discovery, however, information that is otherwise admissible or subject to discovery does not become inadmissible or protected from disclosure solely by reason of its use in mediation.

Current Law/Background: Rule 17-109 of the Maryland Rules establishes confidentiality in mediations only for civil actions in circuit court. The bill extends, to mediations that occur outside the court system, the same confidentiality protections that apply to court-ordered mediations.

Additional Information

Prior Introductions: None.

Cross File: HB 762 (Delegate Dumais) - Judiciary.

Information Source(s): Office of Administrative Hearings, Judiciary (Administrative Office of the Courts), Department of Legislative Services

Fiscal Note History: First Reader - February 22, 2012
mlm/kdm Revised - Senate Third Reader - March 24, 2012
Revised - Enrolled Bill - May 15, 2012

Analysis by: Jennifer K. Botts

Direct Inquiries to:
(410) 946-5510
(301) 970-5510