

**Department of Legislative Services**  
Maryland General Assembly  
2013 Session

**FISCAL AND POLICY NOTE**  
**Revised**

Senate Bill 409

(Senator Raskin)

Judicial Proceedings

Judiciary

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**Courts and Judicial Proceedings - Maryland Mediation Confidentiality Act -  
Applicability**

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This bill alters the scope of the Maryland Mediation Confidentiality Act (MMCA). Under the bill, the MMCA applies to a mediation in which (1) the parties are required to mediate by law; (2) the parties are referred to mediation by an administrative agency or arbitrator; or (3) the mediator states in writing to any and all parties to the mediation and persons with whom the mediator has engaged in mediation communications that the mediation communications will remain confidential in accordance with MMCA and the mediator has read, and consistent with State law, will abide by the Maryland Standards of Conduct for Mediators during the mediation.

The bill repeals statutory provisions that (1) apply the MMCA to mediations in which the parties agree in writing to keep the communications confidential and (2) render the MMCA inapplicable to mediations in which the parties and the mediator agree to exclude the mediation communications from the MMCA through a written and signed agreement made in advance of the mediation. Instead, the bill authorizes parties and the mediator to agree to exclude the mediation communications from the MMCA through a written and signed agreement made in advance of the mediation.

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**Fiscal Summary**

**State Effect:** The bill is procedural/technical and does not materially affect State finances.

**Local Effect:** The bill is procedural/technical and does not materially affect local finances.

**Small Business Effect:** None.

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## **Analysis**

**Current Law:** “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 MMCA, which was established by Chapter 309 of 2012 (SB 856) applies 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 Standards of Conduct for Mediators during the mediation.

The MMCA does not apply to a mediation:

- to which Title 17 of the Maryland Rules, (which governs alternative dispute resolution (ADR) when a court refers all or part of a civil action to ADR ) 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 the MMCA'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.

Rule 17-105 of the Maryland Rules establishes confidentiality in mediations only when a court refers all or part of a civil action to mediation. The bill extends, to mediations that occur outside the court system, the same confidentiality protections that apply to court-ordered mediations.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** HB 697 (Delegate Dumais) - Judiciary.

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

**Fiscal Note History:** First Reader - February 22, 2013  
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