

# HOUSE BILL REPORT

## SB 5147

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*As Passed Legislature*

**Title:** An act relating to mediator privilege, confidentiality, and admissibility of evidence arising from mediation.

**Brief Description:** Protecting alternative dispute resolution processes and mediators and arbitrators from legal action.

**Sponsor(s):** Senators Nelson, A. Smith and Newhouse.

**Brief History:**

Reported by House Committee on:  
Judiciary, April 5, 1991, DPA;  
Passed House, April 18, 1991, 97-0;  
Conference Committee Report adopted;  
Passed Legislature, 95-0.

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**HOUSE COMMITTEE ON  
JUDICIARY**

**Majority Report:** *Do pass as amended.* Signed by 18 members: Representatives Appelwick, Chair; Ludwig, Vice Chair; Padden, Ranking Minority Member; Paris, Assistant Ranking Minority Member; Belcher; Broback; Forner; Hargrove; Inslee; R. Meyers; Mielke; H. Myers; Riley; Scott; D. Sommers; Tate; Vance; and Wineberry.

**Staff:** Jeff Fishel (786-7191).

**Background:** Mediation, arbitration, and other alternatives to the judicial system have become important in easing the congestion of our courts. The Revised Code of Washington has at least 37 references to mediation, mediators, or mediating disputes.

Mediation is a process where the parties reach a consensual agreement settling their differences. The mediator, unlike an arbitrator, acts to facilitate agreement by consulting with each party independently and then bringing the parties to the table to negotiate. A successful mediation depends on the parties' openness with the mediator.

In 1984, as part of the Court Improvement Act, the Legislature established a process for municipalities, counties, or nonprofit corporations to form Dispute

Resolution Centers to handle domestic relations matters, small claims, or consumer complaints. Seven counties have such centers. All communications and material presented during the mediation of disputes through these centers are privileged from disclosure in a subsequent legal action.

Historically, mediation is a tool used in settling labor disputes. Private employee-employer labor disputes are governed by federal law. Public employee-employer labor disputes are governed by state law. The state Public Employment Relations Commission regulates labor-management relations in the public arena, and its employees act as mediators in labor disputes. The commission has adopted rules governing the confidentiality of records and communications made during a labor mediation. In addition, the duty of good faith bargaining often makes it necessary to subpoena mediation documents for use in a subsequent legal proceeding.

Information and communications from mediations that are either required by court order or by mutual consent are not privileged.

**Summary of Bill:** When parties enter into a written agreement to mediate, or a court has ordered mediation, any materials submitted or communications made in connection with the mediation are privileged and generally are not subject to disclosure in subsequent legal proceedings.

Disclosure is allowed when:

1. The parties agree in writing to disclosure;
2. The materials are otherwise subject to discovery and were not specifically prepared for, and used in, mediation;
3. Disclosure is required by statute;
4. The materials consist of written agreements reached through mediation; or
5. They pertain to administrative matters incidental to the mediation proceedings.

In an action between a mediator and a party to the mediation, materials submitted or communications made in the mediation may be disclosed and the mediator may be compelled to testify. In other circumstances, the mediator may be compelled to testify only when all parties to the mediation and the mediator agree in writing.

Mediations conducted by a state or federal agency during a labor dispute are governed by that agency's rules concerning privilege and confidentiality.

**Fiscal Note:** Not requested.

**Effective Date:** The bill contains an emergency clause and takes effect immediately.

**Testimony For:** Original bill: A privilege for the communications and materials produced during mediation meet the four requirements of establishing a common law privilege, State v. Rinaldo, 102 Wn.2d 749 (1984). Confidentiality is necessary to promote alternative means of resolving disputes. Evidence Rule 408 provides uncertain protection because of the scope of the exceptions to the rule.

**Testimony Against:** Original bill: The bill could cover labor mediations between public employees and their employer. This would hinder efforts to determine the statutory requirement that employers bargain in good faith. There needs to be an exception in the bill exempting such mediations.

**Witnesses:** Original bill: Senator Nelson, Prime Sponsor (pro); Wayne Blair, Washington State Bar Association, Alternative Dispute Resolution Section (pro); Alan Kirtley, Professor, University of Washington School of Law (pro); and Eugene L. St. John, Washington Public Employees Association (pro, if amended).