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Murlyn Craig Reese v. Tingey Construction and/or Freemont Compensation Insurance Group: Brief of Appellant

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

MURLYN CRAIG REESE, Plaintiff-Respondent, v. TINGEY CONSTRUCTION AND/OR FREEMONT COMPENSATION INSURANCE GROUP, Defendants-Respondents, LWP CLAIMS SOLUTIONS, INC., Real Party in Interest and Petitioners.	SUPPLEMENTAL BRIEF OF REAL PARTY-IN-INTEREST AND PETITIONER, LWP SOLUTIONS, INC. Case No. 20060594-SC

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I. ISSUE PRESENTED FOR REVIEW & STANDARD OF REVIEW

1. Whether the Utah Uniform Mediation Act of 2006 should in fact govern this case and if so, its affect on the questions presented for appeal? `

"Statutory Construction is a question of law and is reviewed by the Court de novo. When interpreting court rules, we apply our rules of statutory construction with an understanding that rules, like statutes, are passed as a whole and not in parts or sections. [O]ur primary goal is to evince the true intent and purpose of the rule-making body and to render all parts [of the rule] relevant and meaningful." Cox v. Krammer, 76 P.3d 184, 187 (Utah Ct. App. 2003) (internal quotations and citations omitted)(alterations original).

"We review for correctness questions regarding the law applicable in a case, including the issue of whether a given law can or should be applied retroactively." Goebel v. Salt Lake Southern Railroad Company, 104 P.3d 1185, 1197 (Utah 2004).

II. STATEMENT OF FACTS

On December 30, 2005, LWP Solutions, Inc. ("LWP") was asked to participate in a mediation of a dispute between Murlyn Craig Reese and Tingey Construction ("Tingey Construction") and/or Freemont Compensation Insurance Group. The mediation took place at the law offices of Richard Henriksen, attorney for plaintiff Reese. Paul Felt acted as the mediator of the dispute. R77. The

mediation lasted all day but ultimately an agreement was not reached between Plaintiff Reese and LWP. Mr. Reese asked that LWP execute a Memorandum of Understanding during the mediation but LWP refused because the Memorandum of Understanding contained a term to which LWP had not agreed.

Effective May 1, 2006, five months after the mediation between LWP, Mr. Reese and Tingey Construction, the Utah Legislature passed Utah Code Section 78-31c-101 et. seq., the Utah Uniform Mediation Act (the "Act"). Section 78-31c-114 of the Act provides as follows:

> (1) This chapter governs a mediation pursuant to a referral or an agreement to mediate made on or after May 1, 2006.
> (2) Notwithstanding Subsection (1), on or after May 1, 2007, this chapter governs all agreements to mediate whenever made.

At issue in this appeal is whether the Utah Uniform Mediation Act applies to the mediation between Mr. Reese, LWP and Tingey Construction since the mediation occurred five months prior to the Act's effective date, and indeed prior to the legislature considering the matter. Also relevant is what impact, if any, the Act has on the questions presented for appeal.

The district court, in a hearing heard on May 22, 2006, granted Mr. Reese's request for discovery of mediation discussions so as to challenge LWP's claim that it did not reach an agreement with Mr. Reese during the mediation. In essence, though not functioning under or referencing the Utah Uniform Mediation Act of

2006, the district court granted Mr. Reese an "exception" to the general rule set forth in Utah Code Section 78-31b-8 that precludes disclosure to third parties "any information about any ADR proceeding." See Section 78-31b-8(4).

The Act also sets forth "Exceptions to privilege" at Section 78-31c-106. Section 78-31c-106 provides as follows:

(1) There is no privilege under Section 78-31c-104 for mediation communications that is:
   a. in an agreement evidenced by a record signed by all parties to the agreement;
   b. available to the public under Title 63, Chapter 2, Government Records Access and Management Act, or made during a mediation session which is open, or is required by law to be open, to the public;
   c. a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
   d. intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;
   e. sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice file against a mediator;
   f. except as otherwise provided in Subsection (3), 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
   g. sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a 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.

(2) There is no privilege under Section 78-31c-104 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:

a. the evidence is not otherwise available;
b. there is a need for the evidence that substantially outweighs the interest in protecting confidentiality; and
c. the mediation communication is sought or offered in:
    i. a court proceeding involving a felony or misdemeanor; or
    ii. except as otherwise provided in Subsection (3), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(3) A mediator may not be compelled to provide evidence of a mediation communication referred to in Subsection (1)(f) or (2)(c)(ii).

(4) If a mediation communication is not privileged under Subsection (1) or (2), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under Subsection (1) or (2) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

Section 78-31c-106.

Most relevant here is § 78-31c-106(2)(c)(ii), which seems to provide for an exception to confidentiality to "rescind or reform or a defense to avoid liability on a contract arising out of the mediation." This appears to be the section of the Act upon which Mr. Reese relies in asking the Court to affirm the district court's order granting him the right to conduct discovery into confidential mediation discussion. Later, LWP will prove that Mr. Reese has misread this section and taken it out of context and that it does not provide Mr. Reese with the relief he seeks.

III. SUMMARY OF ARGUMENT

LWP Claims Solutions, Inc. does not believe that the Act does or should govern this case.

Mediation discussions are confidential pursuant to Utah Code Ann. § 78-31b-08, Utah Code Ann. § 78-31c-101 et. seq., Rule 101 of the Utah Rules of Court-Annexed Alternative Dispute Resolution, and Rule 408 of the Utah Rules of Evidence. The district court erred when it ordered that LWP's counsel could be deposed regarding confidential mediation discussions.

The Utah Uniform Mediation Act (the "Act") does not apply to the mediation between Mr. Reese, LWP and Tingey Construction because the Act is intended to apply retroactively only to agreements "to mediate" and not to mediation which have already occurred. Utah Code Ann. § 78-31c-114.

Moreover, if the Act were to apply to the mediation between Mr. Reese, LWP and Tingey Construction, §78-31c-106(1)(a) only provides for an exception to confidentiality for written agreements. Moreover, § 78-31c-106(2)(c)(ii) only provides for an exception to confidentiality to "rescind or reform or a defense to avoid liability on a contract arising out of the mediation" but not for litigation involving the proof of the existence of a contract itself. Section 78-31c-106(2)(c)(ii) presupposes the existence of a contract that the parties are seeking to

modify or avoid. Section 78-31c-106(2)(c)(ii) does not allow an exception from privilege to prove the existence of a contract.

If, in the alternative, the Act intends to modify the Utah rule that parties need to protect themselves and reduce all agreements to some form of writing prior to the end of the mediation, see Lyons v. Booker, 982 P.2d 1142 (Utah Ct. App. 1999), then the Act is a substantive change in the law which cannot be applied retroactively to LWP. Such an effect would be an attempt to govern activity after it occurred.

The courts are not to delve into confidential mediation discussions to determine whether an oral agreement was reached during mediation. The bright-line rule is that oral agreements made during mediation will not be enforced by the courts and LWP refused to execute any "Memorandum of Understanding" that was presented to it at the end of the mediation because the memorandum contained a term to which it did not agree. LWP communicated its refusal plainly to the others at the mediation. This is conclusive proof that the parties do not have an enforceable agreement.

IV. ARGUMENT

The Utah Uniform Mediation Act Does Not Apply to This Appeal.

A. Retroactivity is Disfavored in the Law.

"Generally, legislation is not given retroactive effect. Utah Code section 68-3-3 codified this principle, stating that 'no part of these revised statutes is retroactive, unless expressly so stated.'" B.A.M. Development, L.L.C. v. Salt Lake County, 128 P.3d 1161, 1166 (Utah 2006) (quoting Utah Code § 68-3-3 (2004)). Stated differently, "[a] statute is not to be applied retroactively unless the statute expressly declares that it operates retroactively." Goebel v. Salt Lake Southern Railroad Company, 104 P.3d 1185, 1197-98 (Utah 2004).

"'[A]s a general rule, retroactivity is not favored in the law.'" B.A.M., 128 P.3d at 1166. "[T]he rule against retroactivity applies only where a statute implicates substantive laws. By contrast, 'statutes that do not "enlarge, eliminate, or destroy" substantive rights can be applied retroactively.'" Id. (citations omitted). "Convenience, reasonableness, and justice are factors we consider in deciding whether a statute has a merely remedial or procedural purpose." Goebel, 104 P.3d at 1198.

> When analyzing whether applying a statute as amended would have retroactive effects inconsistent with the usual rule that legislation is deemed to be prospective, we should use a common sense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment. This judgment should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations. Considering the strong presumptions against retroactivity in the law, and the common sense, functional factors that we consider in deciding whether to apply a law retroactively, we should err on the side of finding a statute substantive if we have doubt about the issues.

Id. (citations and quotations omitted); see also, Olsen v. Samuel McIntyre Investment Company, 956 P.2d 257, 261 (Utah 1998) (noting that the Utah Supreme Court, "narrowly draws the boundaries of what constitutes a procedural statute.") (citations and quotations omitted)).

"Procedural law 'prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective.' In contrast, substantive law 'creates, defines and regulates the rights and duties of the parties which may give rise to a cause of action.'" Olsen, 956 P.2d at 261 (citations omitted).

B. Utah Law and the Agreement between the Parties Required Any Settlement Reached In Mediation Be Reduced to Writing.

The first inquiry in determining whether a statute has an impermissible retroactive affect is to determine if the statute changes the law. Prior to the enactment of the Act, Lyons v. Booker, 982 P.2d 1142 (Utah Ct. App. 1999), provided that statements made during a court-ordered mediation were confidential. The Court in Lyons stated, "'guarantee of confidentiality is essential to the proper functioning of a . . . settlement conference program.'" Id. at 1144 (quoting Clark v. Stapleton Corp., 957 F.2d 745, 746 (10th Cir. 1992)). "'[P]articipants must trust that matters discussed at a conference will not be revealed to the judges.'" Id.

The Court in Lyons plainly stated that "If settlement is agreed to, the parties are required to reduce the agreement to writing, and execute a mutual stipulation of

dismissal before the appeal is considered resolved by the court." Id. at 1143. The Court also noted that it was the failure by the parties "to execute a signed agreement" which "created an additional dispute on top of the previously existing one." Id. Thus, it appeared to be law in Utah that mediation agreements should be reduced to writing.[1]

Similarly, Utah Code Ann. § 78-31b-08, Rule 101 of the Utah Rules of Court-Annexed Alternative Dispute Resolution, and Rule 408 of the Utah Rules of Evidence all protect mediation communication as confidential. These statutes and rules also precluded parties from introducing evidence of settlement discussions into evidence at trial.

Moreover, Mr. Reese, LWP and Tingey Construction also expected and overtly agreed that any agreement reached during the mediation between the parties on December 30, 2005 would be reduced to writing. Mr. Reese has admitted that the mediator drafted a Memorandum of Understanding at the close of the mediation that LWP refused to sign. Thus, any argument by Mr. Reese that the parties did not intend the mediation agreement be reduced to writing is

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[1] This is further evidenced by the fact that the Utah Rules of Court-Annexed Alternative Dispute Resolution require mediation agreements be reduced to writing to be enforceable. While it is in dispute whether the court-annexed rules apply to the mediation involving Mr. Reese and LWP, it is clear that Mr. Reese, Tingey Construction and LWP expected that any agreement reached in the mediation would be reduced to writing and executed by the parties. Otherwise, the mediator would not have drafted the Memorandum of Understanding and presented it to the mediation participants for signature.

disingenuous and disproved by the parties' own actions. The parties' behavior proves that the parties intended any agreements reached during the mediation be reduced to writing.[2] Thus, prior to the affective date of the Act, LWP and Mr. Reese agreed that only written agreements between the parties would be enforceable.

C. The Act Expressly Provides for Specific Limited Retroactive Application, But the Act Doesn't Apply to This Appeal.

Section 78-31c-114(1) specifically provides for an effective date of May 1, 2006. However, § 78-31c-114(2) plainly states that "on or after May 1, 2007, this chapter governs all agreements to mediate whenever made." See Olsen, 956 P.2d at 262 (noting the courts do not "apply retroactively legislative enactments that alter substantive law or affect vested rights unless the legislature has clearly expressed that intention").

1. The Act Only Applies to Agreements to Mediate At a Future Date.

However, the Act--even if applied retroactively--does not affect this appeal. The legislature plainly stated that the Act would apply to "agreements to mediate." "Because we assume that the legislature used each term in the statute advisedly, we

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[2] Obviously, LWP's refusal to execute the Memorandum of Understanding is a clear manifestation of LWP's intent not to be bound by the writing or any alleged oral agreement evidenced therein.

read the statute's words literally 'unless such a reading is unreasonably confused or inoperable.'" Id. at 259 (citations omitted).

Here, the use of the prepositional phrase, "to mediate" suggests some future action and does not encompass mediations that have already occurred. The plain, ordinary language of the Act suggests that the Act (even if applied retroactively) does not apply to mediations that have already been completed. The Act, by its plain language, intends only to apply to mediations that are to come.

This interpretation of the Act is consistent with "common sense [and] functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." Goebel, 104 P.3d at 1198. It is hard to believe that the Act would control a mediation that is over and done with. Common sense dictates that the Act not apply to the mediation between Mr. Reese and LWP because such mediation is already completed.

2. Exception to Confidentiality Does Not Apply to Oral Contracts or When the Existence of the Contract is in Dispute.

Section 78-31c-106 of the 2006 Act sets forth the exceptions to the general rule that all mediation communications are confidential. Section 78-31c-106(1)(a) states that there is no privilege under the Act for a mediation communication that is "an agreement evidenced by a record signed by all parties to the agreement." Thus, pursuant to this section, a party may seek to enforce a written mediation

agreement that is signed by all parties to the agreement without running afoul of confidential mediation communications.

What is most relevant is that § 78-31c-106 does not provide for an exemption from privilege for the enforcement of oral mediation agreements. As the court in Vernon v. Action, 732 N.E.2d 805 (Ind. 2000), stated:

> [The exception from confidentiality for a final written document] is noteworthy only for what it does not include: oral agreements. The disadvantage of exempting oral settlements is that nearly everything said during a mediation session could bear on either whether the disputants came to an agreement or the content of the agreement. In other words, an exception for oral agreements has the potential to swallow the rule.

Id. at 809-10.

The legislature chose to adopt a section of the Act that sets forth those instances in which the confidentiality privilege does not apply. The legislature specifically mentioned instances involving written contracts but failed to mention oral contracts. Courts assume that the legislature uses language advisedly and, as a consequence, presume that the expression of one thing should be interpreted as the exclusion of another. See State v. Jacobs, 144 P.3d 226, 228-29 (Utah App. 2006) (noting that the inclusion of one item is seen as the exclusion of another). Thus, this Court should view the legislature's omission of oral contracts in this portion of the statute as purposeful and conclude that there is no exemption to the confidentiality privilege for the enforcement of oral contracts. See id. Any

attempt by Mr. Reese to rely upon § 78-31c-106 as grounds for allowing him to prove the existence of an oral contract is without merit.

In similar vein, § 78-31c-106(2)(c)(ii) does not allow Mr. Reese to prove the existence of his alleged contract. Section 78-31c-106(2)(c)(ii) provides an exception to the confidentiality privilege in a proceeding "to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of mediation."[3] (Emphasis added).

The plain language of the Act limits this exception to the confidentiality privilege only to instances when a party seeks to rescind, reform or avoid liability on a contract. Based on the plain language of the statute, the exception to confidentiality addressed in 2(c)(ii) is limited only to circumstances when there is no doubt that a contract exists. The legislature did not provide that the confidentially privilege is waived so that a party can prove the existence of a contract. It is unreasonable that the legislature would pass an Act that promotes confidentiality, only to abrogate it totally in a section that allows for that the introduction of evidence to prove an agreement that has not been reduced to writing. The most reasonable interpretation of the Act is that only written

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[3] Section 78-31c-106(2)(c) also requires that the party seeking to introduce confidential mediation communication show that "the evidence is not otherwise available" and "there is a need that substantially outweighs the interest in protecting confidentiality." The first requirement is met here. This second requirement will be discussed shortly.

agreements are exempt from the confidentiality privilege. Similarly, a contract may only be exempt from privilege if its existence is not in dispute. Logically, this means that the legislature only contemplated allowing written agreements to be challenged and did not expect that oral agreements would be exempt from confidentiality pursuant to § 78-31c-106.

3. This is Not A Circumstance Where "There is a Need that Substantially Outweighs the Interest in Protecting Confidentiality."

Section 78-31c-106(2)(c) also requires that Mr. Reese prove that "there is a need that substantially outweighs the interest in protecting confidentiality" before he is entitled to any exemption from the confidentiality privilege. Mr. Reese cannot do this.

As expressed in great detail in LWP's earlier briefs, public policy greatly favors the development of a "bright-line" rule prohibiting the enforcement of oral agreements reached during mediation. The best approach for this Court is to find that oral agreements allegedly reached during mediation are not enforceable because the only way to prove the existence of these oral contracts is by disclosing confidential mediation communication.

Under no circumstances involving alleged oral agreements is there "a need for evidence that substantially outweighs the interest in protecting confidentiality." Sec. 78-31c-106(2)(b). The Court should find that the greatest good is served by requiring that all agreements reached during mediation be reduced to writing and

find that allowing parties to prove the existence of oral agreement runs afoul of the cornerstone of mediation---confidentiality.

Parties to a mediation can protect themselves by ensuring that all agreements reached during a mediation are reduced to writing. If a party fails to reduce an agreement to a signed writing, that party is precluded from seeking to enforce the alleged oral agreement at a later date. This approach is consistent with the Act, which allows for an exemption from the confidential privilege for "an agreement evidenced by a record signed by all parties to the agreement." Sec. 78-31c-106(1)(a). The Act, however, does not grant an exemption from the confidential privilege to prove the existence of an alleged oral contract. See generally, In re Acceptance Insurance Company, 33 S.W.3d 443, 452 (Tex. Civ. App. 2000) (noting that "communications made by a participant to mediation relating to the subject matter of the dispute are 'confidential, [are] not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.'")(citations omitted)(modifications original)); Wilmington Hospital L.L.C. v. New Castle County, 788 A.2d 536, 541 (Del. Ch. 2001) (noting that "it is inconsistent with the public policy favoring voluntary mediation for a court to entertain a motion to enforce a mediation settlement agreement that is not reduced to writing and signed by the parties to the mediation and the mediator."); Wilmington Hospital, 788 A.2d at 542-42("[I]t is consistent

with the purpose of [ADR Rules to interpret the rules] as requiring that any settlement agreement between the parties to the mediation be reduced to writing and signed by them and the mediator as a condition for enforceability. As this proceeding itself well illustrates, it is reasonable to expect that such a bright-line rule is the best way to protect the confidentiality of the mediation when disputes arise over the terms of a putative settlement."); Ryan v. Garcia, 33 Cal.Rpt.2d 158, 161 (Cal. Ct. App. 1994) ("Judicial sifting of statements made at a confidential mediation to select those which can be used as evidence of an agreement contravenes the legislative intent underlying adoption [of ADR rules.]").

D. To the Extent that the Act Allows for the Enforcement of Oral Agreements it is a Substantive Change in the Law That Cannot Be Applied Retroactively.

If the Act is applied to the mediation involving Mr. Reese and LWP, it cannot be done so to the extent that it creates a substantive change in the law. See B.A.M., 128 P.3d at 1166. If, as Mr. Reese argues, § 78-31c-106(2)(c)(ii) provides for an exemption to confidentiality to prove the existence of an oral contract, it is a change in the substantive law that cannot be applied against LWP.

As set forth herein, Mr. Reese, LWP and Tingey Construction agreed that the terms of any settlement would be reduced to writing in the form of a Memorandum of Understanding. Moreover, the court in Lyons v. Booker, made clear that agreements reached during mediation should be reduced to writing so as to avoid "the unenviable position of having created an additional dispute on top of

a previously existing one." Lyons, 982 P.2d at 1143. If the Act modifies the requirement that the agreement would be reduced to writing, it imposes a substantive change in the law that cannot be applied retroactively. If the Act allows for oral agreements to be enforced it will "'enlarge, eliminate, or destroy'" LWP's right to only be bound by written agreements. Goebel v. Salt Lake Southern Railroad, 104 P.3d at 1198. This is an unjust result and should not be allow by the Court.

V. CONCLUSION

It appears that the legislature expressed an intent that the Utah Uniform Mediation Act apply retroactively. However, even if the Act is applied retroactively, it does not apply to this case on appeal. The plain language of the Act restricts it applicability only to agreements "to mediate" and not to mediations that have already occurred. Moreover, while the Act provides for exceptions to the confidentiality privilege, it does not do so to prove the existence of an oral contract. The plain language of the Act only exempts written agreements from the confidentiality privilege.

Public policy dictates that this Court adopt a "bright-line" approach and preclude the enforcement of oral contracts allegedly reached during mediation. The value of mediation is enhanced by requiring that agreements that come out of this confidential process be agreements that are in writing and signed by the parties

or their agents, after the terms have been spelled out and put down on paper where they can be clearly understood. The better reasoned approached is to find that the district court erred in allowing Mr. Reese to conduct discovery into confidential mediation communication so as to prove the existence of an oral contract to settle. The district court's ruling should be reversed and the matter remanded to the district court with directions that the Motion to Enforce Settlement Agreement be dismissed for lack of evidence in support thereof.

RESPECTFULLY SUBMITTED, on this 1st day of June 2007.

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VI. ADDENDUM

UTAH UNIFORM MEDIATION ACT

§ 78-31c-101. Title

This chapter is known as the "Utah Uniform Mediation Act."

§ 78-31c-102. Definitions

As used in this chapter:
(1) "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.
(2) "Mediation communication" means conduct or a statement, whether oral, in a record, 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.
(3) "Mediation party" means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.
(4) "Mediator" means an individual who is neutral and conducts a mediation.
(5) "Nonparty participant" means a person, other than a party or mediator, that participates in a mediation.
(6) "Person" means an individual, corporation, estate, trust, business trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.
(7) "Proceeding" means:

(a) a judicial, administrative, arbitral, or other adjudicative process, including related prehearing and posthearing motions, conferences, and discovery; **or**

(b) a legislative hearing or similar process.

(8) "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.
(9) "Sign" means:

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

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

§ 78-31c-103. Scope

(1) Except as otherwise provided in Subsection (2) or (3), this chapter applies to a mediation in which:

(a) the mediation parties are required to mediate by statute, court, or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;

(b) 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

(c) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by an entity that holds itself out as providing mediation.

(2) The chapter does not apply to a mediation:

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

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

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

(d) 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.

(3) If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under Sections 78-31c-104 through 78- 31c-106 do not apply to the mediation or part agreed upon. However, Sections 78-31c-104 through 78-31c-106 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

§ 78-31c-104. Privilege against disclosure--Admissibility—Discovery

(1) Except as otherwise provided in Section 78-31c-106, a mediation communication is privileged as provided in Subsection (2) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as

provided by Section 78-31c-105.
(2) In a proceeding, the following privileges apply:

(a) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(b) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(c) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.
(3) 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.

§ 78-31c-105. Waiver and preclusion of privilege

(1) A privilege under Section 78-31c-104 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation, and:

(a) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(b) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.
(2) 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 78-31c-104, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.
(3) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under Section 78-31c-104.

§ 78-31c-106. Exceptions to privilege

(1) There is no privilege under Section 78-31c-104 for a mediation communication that is:

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

(b) available to the public under Title 63, Chapter 2, Government Records Access and Management Act, or made during a mediation session which is open, or is required by law to be open, to the public;

(c) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

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

(e) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(f) except as otherwise provided in Subsection (3), 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

(g) subject to the reporting requirements in Section 62A-3-305 or 62A-4a-403.

(2) There is no privilege under Section 78-31c-104 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:

(a) the evidence is not otherwise available;

(b) there is a need for the evidence that substantially outweighs the interest in protecting confidentiality; and

(c) the mediation communication is sought or offered in:

(i) a court proceeding involving a felony or misdemeanor; or

(ii) except as otherwise provided in Subsection (3), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(3) A mediator may not be compelled to provide evidence of a mediation communication referred to in Subsection (1)(f) or (2)(c)(ii).

(4) If a mediation communication is not privileged under Subsection (1) or (2), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under Subsection (1) or (2) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

§ 78-31c-107. Prohibited mediator reports

(1) Except as required in Subsection (2), 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.

(2) A mediator may disclose:

(a) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance;

(b) a mediation communication as permitted under Section 78-31c-106; or

(c) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.
(3) A communication made in violation of Subsection (1) may not be considered by a court, administrative agency, or arbitrator.

§ 78-31c-108. Confidentiality

Unless subject to Title 52, Chapter 4, Open and Public Meetings Act, and Title 63, Chapter 2, Government Records Access and Management Act, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this state.

§ 78-31c-109. Mediator's disclosure of conflicts of interest—Background

(1) Before accepting a mediation, an individual who is requested to serve as a mediator shall:
(a) 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
(b) disclose any known fact to the mediation parties as soon as practical before accepting a mediation.
(2) If a mediator learns any fact described in Subsection (1)(a) after accepting a mediation, the mediator shall disclose it as soon as practicable.
(3) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.
(4) Subsections (1), (2), (3), and (6) do not apply to an individual acting as a judge or ombudsman.
(5) This chapter does not require that a mediator have a special qualification by background or profession.
(6) A mediator must be impartial, unless after disclosure of the facts required in Subsections (1) and (2) to be disclosed, the parties agree otherwise.

§ 78-31c-110. Participation in mediation

An attorney or other individual designated by a party may accompany the party to, and participate in, a mediation. A waiver of participation given before the

mediation may be rescinded.

§ 78-31c-111. International commercial mediation

(1) In this section:

(a) "International commercial mediation" means an international commercial conciliation as defined in Article 1 of the Model Law.

(b) "Model Law" means the Model Law on International Commercial Conciliation adopted by the United Nations Commission on International Trade Law on 28 June 2002 and recommended by the United Nations General Assembly in a resolution (A/RES/57/18) dated 19 November 2002.

(2) Except as otherwise provided in Subsections (3) and (4), if a mediation is an international commercial mediation, the mediation is governed by the Model Law.

(3) Unless the parties agree in accordance with Subsection 78-31c-103(3) that all or part of an international commercial mediation is not privileged, Sections 78-31c-104 through 78-31c-106 and any applicable definitions in Section 78-31c-102 of this chapter apply to the mediation and nothing in Article 10 of the Model Law derogates from Sections 78-31c-104 through 78-31c-106.

(4) If the parties to an international commercial mediation agree under Article 1, Section (7), of the Model Law that the Model Law does not apply, this chapter applies.

§ 78-31c-112. Relation to Electronic Signatures in Global and National Commerce Act

This chapter modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act or authorize electronic delivery of any of the notices described in Section 103(b) of that act.

§ 78-31c-113. Uniformity of application and construction

In applying and construing this chapter, consideration should be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§ 78-31c-114. Application to existing agreements or referrals

(1) This chapter governs a mediation pursuant to a referral or an agreement to mediate made on or after May 1, 2006.

(2) Notwithstanding Subsection (1), on or after May 1, 2007, this chapter governs all agreements to mediate whenever made.

VII. Certificate of Service

I hereby certify that on the 1st Day of June, 2007, a true and accurate copy of the Appellate Brief of LWP Solutions, Inc. was served by hand delivery on the following:

Richard Henricksen 320 South 500 East Salt Lake City, UT 84102	( ) U.S. Mail, Postage Prepaid (X) Hand Delivered ( ) Overnight Mail ( ) Facsimile (355-0246)
Joseph E. Minnock Morgan, Minnock, Rice & James Attornys for Defendant Kearns Building, Eighth Floor 136 South Main Street Salt Lake City, Utah 84101	( ) U.S. Mail, Postage Prepaid (X) Hand Delivered ( ) Overnight Mail ( ) Facsimile

S. Grace Acosta