

# Legal Assistance Resource Center ❖ of Connecticut, Inc. ❖

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## **S.B. 598 -- Uniform Mediation Act** Judiciary Committee Public Hearing -- March 14, 2006 Testimony of Raphael L. Podolsky

**Recommended Committee action: POSSIBLE AMENDMENT**

This bill sets out the rules of privilege for mediation. It appears to me that it is most appropriate for private mediation as a form of alternative dispute resolution. By its terms, however, it also appears to apply to mediations and pre-trial settlement negotiations conducted by court staff (e.g., housing specialists and family relations officers) and agency personnel (e.g., CHRO staff handling discrimination complaints). Thus, by its terms, Section 3(a) of the bill applies the act to any mediation in which the parties are "required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency or arbitrator" (l. 40-42). This is in contrast to Connecticut's existing mediation statute (C.G.S. 52-235d), which applies only to mediations that are not court-ordered. That statute is repealed by Section 16 of S.B. 598. While Section 3(b)(3) of the bill (l. 58-62) does exclude judicial pre-trial mediations, it does so only for pre-trials conducted by judges, referees, magistrates, fact-finders, arbitrators, masters, and small claims commissioners.

It is not clear to what extent this act will or will not force changes in the way housing specialists and family relations officers function, both in a mediation itself and in these mediators' relationships with judges. It is also not clear to what extent the act parallels the common understanding of litigants who participate in this specialized type of mediation.

Because we are uncertain of the effect of the bill on court- and statute-mandated mediations conducted by state officers, we think that the Judiciary Committee should proceed cautiously and should consider exempting such mediations from the bill.

The Connecticut Trial Lawyers Association respectfully urges you to reject Raised Bill NO. 598, entitled “*AN ACT ADOPTING THE CONNECTICUT UNIFORM MEDIATION ACT.*”

CTLA urges the rejection of this bill for two principal reasons:

1. Since the bill is a “Model Act”, it is a one size fits all solution that fails to take Connecticut law and practice into account;
2. The bill addresses a problem that does not exist; and
3. The bill creates privileges that are both unnecessary and unwise.

**1. Effect on Connecticut Practice**

The bill’s proponents argue that this bill is necessary in order to clarify the rules of confidentiality associated with private mediations. CTLA submits that this issue does not require a legislative solution, as current law sufficiently deals with judicial mediations, whereas private mediations are often governed by contracts between the parties.

Moreover, even insofar as the bill purports to attempt to make the rules of confidentiality uniform, the bill fails. The bill expressly exempts mediations with a judge who “might make a ruling on the case.” Since this standard would exclude any Superior Court Judge, as any one “might” rule on issues in the case. As such, the statute will not streamline Connecticut practice; rather it will leave Connecticut with 3 different rules of confidentiality:

1. Private mediations will have the broad confidentiality provided in the Statute;
2. Court ordered mediation will be left to the common law and Court rules; and
3. Non-court ordered mediation will be governed by 52-235d.

**2. Confidentiality rules**

One of the bill’s provisions provides “nonparty” participants with the ability to prevent the disclosure of his or her communications during a mediation in subsequent legal actions. This provision could cause great harm and greatly expands Connecticut common law. For example, this provision could prevent a defendant from testifying against his own insurance company, who acted in bad faith at a mediation, during a subsequent bad faith action. In other words, A sues B, who insured by XYZ Insurance Company. B wants the case settled, but XYZ refuses to negotiate and makes statements at the mediation that are in bad faith. In this way, the bill could hinder the utility of mediations.

For both of these reasons, this bill constitutes an unwise and unneeded bill and CTLA urges its rejection.