

Memorandum 2014-35

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Law of Other Jurisdictions

As requested by the Legislature, the Commission has been studying “the relationship between mediation confidentiality and attorney malpractice and other misconduct, and the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation.”¹ The Commission is still in the initial phase of gathering information; it has not yet begun preparing a legislative proposal or other recommendation.

Most recently, the Commission has been focusing on the directive to consider “[t]he law in other jurisdictions, including the Uniform Mediation Act, as it has been adopted in other states, other statutory acts, scholarly commentary, judicial decisions, and any data regarding the impact of differing confidentiality rules on the use of mediation.”² Staff memoranda for the April and June meetings examined the Uniform Mediation Act (“UMA”) and its implementation in eleven states plus the District of Columbia.³ This memorandum continues the process of examining the law of other jurisdictions.

The following materials are attached for the Commission’s consideration:

	<i>Exhibit p.</i>
• Florida Mediation Confidentiality & Privilege Act	1
• CLRC Staff, chart entitled “Protection of Mediation Communications: Non-UMA States (except CA, FL, MA, NY, PA & TX)”	5

1. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)).

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)).

3. See Memorandum 2014-14; Memorandum 2014-24.

At the June meeting, the Commission identified five populous and influential non-UMA states for particular attention: Florida, Massachusetts, New York, Pennsylvania, and Texas. This memorandum describes the law in Florida, Massachusetts, and New York. A supplement or later memorandum will describe the law in Pennsylvania and Texas.

In addition, the staff has prepared a lengthy chart (listed above), which provides information about laws protecting mediation communications in the other non-UMA states. In a supplement to this memorandum, we will summarize what we found out about the laws in those states, and discuss particularly relevant materials from some of them.

The staff will describe federal law later, as well as the remaining matters that the Legislature asked the Commission to consider (including in particular scholarly commentary and some California sources not yet discussed in detail). Once the Commission completes its initial research, it will be in a position to start comparing and contrasting possible approaches and evaluating their merits.

In preparing this memorandum, the staff's research has been extensive, but not exhaustive. Being more thorough would have been prohibitively time-consuming. Of particular note, we made no attempt to study the numerous statutes that protect mediation communications in a limited setting, such as a statute specific to a particular context (e.g., child custody) or a particular court (e.g., the Second Judicial Court).

As the Commission instructed at the outset of this study, we primarily focused "on attorney malpractice and other attorney misconduct, which is clearly within the scope intended by the Legislature" in the resolution directing the Commission to conduct this study.⁴ However, we also examined materials on mediator misconduct or professional misconduct generally, because such materials might be useful by analogy and the Commission has not yet resolved the precise scope of this study.

In addition, we looked to some extent at how other jurisdictions have addressed mediation-related misconduct in a nonprofessional capacity. In this regard, the materials that seem most pertinent are ones involving allegations of noncriminal mediation-related misconduct (e.g., negligence), or nonviolent behavior that could be subject to criminal penalties but usually is only punished civilly (e.g., fraud).

4. Minutes (Aug. 2013), p. 3; see also 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)); Memorandum 2013-39, pp. 33-34.

Materials pertaining to serious crimes seem less relevant, because California’s mediation confidentiality provisions do not apply to evidence offered in a criminal case. Similarly, materials concerning noncompliance with a court-order to mediate appear only marginally relevant, because California does not require a party to make a settlement offer (or other progress towards settlement) to comply with a court order to mediate,⁵ and other types of noncompliance might be subject to proof, at least to some degree, without revising California’s protections for mediation communications.⁶ Accordingly, the staff paid relatively little attention to these two types of materials.

In the discussion that follows, we refer occasionally to unpublished decisions. In doing so, we do not mean to suggest that those decisions have any precedential value in their respective jurisdictions. Rather, we are merely bringing the unpublished opinions to the Commission’s attention so that it can consider them to the extent, if any, that they shed light on how to frame California law.

We turn now to the first three of the jurisdictions singled out by the Commission:

- (1) Florida.
- (2) Massachusetts.
- (3) New York.

We cover each jurisdiction in order below.

5. See generally Evid. Code § 1115(a) (defining “mediation” as “a process in which a neutral person or persons facilitate communication between disputants to assist them in reaching a *mutually acceptable* agreement”) (emphasis added); 6 B. Witkin, Cal. Procedure *Proceedings Without Trial* § 486, p. 942 (5th ed. 2008) (mediator’s function is to “assis[t] the parties to reach *their own* agreement.”) (emphasis added).

As a Florida commentator explained,

While parties may be required to attend mediation, they are in no way required to settle or even make a settlement offer. Applying a general good faith obligation to mediation is foreign to the process in both theory and practice. By definition, the parties are the decision makers and exercise self-determination.

Fran Tetunic, *Mediation Myths and Urban Legends*, Fla. Bar J., vol. 82, no. 5 (May 2008) (footnote omitted) (hereafter “Tetunic (2008)”).

6. See *Foxgate Homeowners’ Ass’n, Inc. v. Bramalea California, Inc.*, 26 Cal. 4th 1, 18 n. 14, 25 P.3d 1117, 108 Cal. Rptr. 2d 642 (2001):

To the extent that the declaration of counsel stated that the mediator had ordered the parties to be present with their experts, there was no violation [of mediation confidentiality]. As noted earlier, neither section 1119 nor section 1121 prohibits a party from revealing or reporting to the court about noncommunicative conduct, including violation of the orders of a mediator or the court during mediation.

See also *Radford v. Shehorn*, 187 Cal. App. 4th 852, 857, 114 Cal. Rptr. 3d 499 (2010) (same).

FLORIDA

Florida has abundant law on mediation and protection of mediation communications. In the discussion that follows, we describe its mediation culture, its law governing protection of mediation communications, pertinent case law, and some aspects of its grievance system for a complaint against a mediator.

Mediation in Florida

“Florida has been at the forefront of the mediation movement as one of the first states to officially recognize the value of ADR in the legal system.”⁷ In 1975, Florida established a Citizen Dispute Settlement (“CDS”) Center for court-ordered ADR.⁸ Twelve years later, having experienced success with CDS and divorce mediation programs, the Florida Legislature gave trial judges “broad discretion to order any civil case to mediation ... subject to Florida Supreme Court rule.”⁹ In the past quarter-century, Florida’s use of mediation “has steadily increased to become a vital component of the court system.”¹⁰ By way of comparison, mediation is also thriving in California, but California courts have limited authority to order parties to mediate.¹¹

The volume of mediation in Florida is impressive:

As of December 2005, over 18,000 people had completed certified mediation training programs. In August 2005, 1,391 county mediators, 1,682 family mediators, 2,166 circuit mediators, and 138 dependency mediators operated as certified mediators in the state. Sharon Press, the Director of Florida’s DRC, estimates that courts refer over 100,000 cases a year to mediation.¹²

7. Paul Johnson, Jr., *Confidentiality in Mediation: What Can Florida Glean From the Uniform Mediation Act?*, 30 Fla. State Univ. L. Rev. 487, 493 (2003) (footnote omitted).

8. Paula Young, *Take It or Leave It, Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 Ohio St. J. Disp. Resol. 721, 790 (2006) (footnote omitted).

9. Fran Tetunic, *Florida Mediation Case Law: Two Decades of Maturation*, 28 Nova L. Rev. 87, 90 (2003) (footnote omitted) (hereafter, “Tetunic (2003)”).

10. Fran Tetunic, *Demystifying Florida Mediator Ethics: The Good, the Bad, and the Unseemly*, 32 Nova L. Rev. 205, 207 (2007) (footnote omitted) (hereafter, “Tetunic (2007)”).

11. See Cal. Code Civ. Proc. §§ 1775.2 (civil action mediation program “shall apply” to Los Angeles Superior Court and other courts may elect to participate), 1775.5 (“The court shall not order a case into mediation where the amount in controversy exceeds fifty thousand dollars ...”); <http://www.lasuperiorcourt.org/ADR/ui/> (“In response to state-imposed budget cuts, the Los Angeles Superior Court ADR Department has closed. However, the Court is working with various county-funded agencies to ensure mediation services are provided in courthouses throughout the county.”).

12. Young, *supra* note 8, at 750 (footnotes omitted).

"[A]ll twenty judicial circuits refer a portion of their caseload to mediation."¹³ In 2006, the state had "9 CDS programs, 49 county mediation programs, 45 family mediation programs, 13 circuit civil mediation programs, 40 dependency mediation programs, ... and 1 appellate mediation program."¹⁴ "Interestingly, mediation has seen its largest growth in the private sector for both court-ordered cases and matters without court involvement."¹⁵

While California has some requirements for court-connected mediators and its civil action mediation program,¹⁶ Florida has a more extensive regulatory system governing its mediators and mediations. The Florida Supreme Court has created three standing committees on alternative dispute resolution: the Supreme Court Committee on ADR Rules, the Supreme Court Committee on ADR Policy, and the Mediator Ethics Advisory Committee ("MEAC"),¹⁷ which "writes and publishes ethics opinions in response to questions posed by practicing mediators, lawyers, judges and the public."¹⁸ The Court has also developed a mediator certification program, and it has adopted a detailed set of rules for certified and court-appointed mediators.¹⁹ "Six volunteer bodies and the Florida Supreme Court perform the duties arising under the qualifications, ethics, and disciplinary rules of the Florida Supreme Court."²⁰ In addition to MEAC, these include the Mediator Qualifications Board, the Mediation Training Review Board, the Qualifications Complaint Committee, a 3-member ethics committee for each cognizable complaint against a mediator, and a 5-member hearing panel for each complaint that requires a panel hearing.²¹ Among other things, the state provides an elaborate grievance system "allowing unhappy mediation parties to file and pursue complaints against mediators for practices that violat[e] the Florida Standards of Professional Conduct."²² In comparison, California has a more limited system for complaints about mediators, applicable only to mediators serving in court-ordered mediations, which we will describe later in this study.

13. Tetunic (2003), *supra* note 9 at 90 (footnote omitted).

14. Young, *supra* note 8, at 791 (footnote omitted).

15. Tetunic (2007), *supra* note 10, at 207 (footnote omitted).

16. See Cal. R. Ct. 3.850-3.878; see also Cal. Code Civ. Proc. §§ 1775-1775.15.

17. Tetunic (2003), *supra* note 9, at 90 (footnote omitted).

18. Young, *supra* note 8, at 794.

19. See Fla. Rules for Certified & Court-Appointed Mediators.

20. Young, *supra* note 8, at 792 (footnote omitted).

21. *Id.* at 792-95.

22. *Id.* at 804. For a detailed description of Florida's grievance system, see *id.* at 804-14.

Florida Law Governing Protection of Mediation Communications

Although Florida and California both have active mediation communities, they have taken different approaches to protection of mediation communications. As described below, for many years Florida provided only limited protection for mediation communications. Florida expanded the degree of protection in 2004, but its statutory scheme remains quite different from corresponding California law.

Pre-2004 Law

“Florida has had a statutory mediation privilege for court-ordered mediation since 1987.”²³ Until fairly recently, however, there was no statutory protection for other types of mediation. As a commentator explained in 2003,

Presently, all statutory coverage of mediation is limited to court-ordered mediation. The statute does not cover presuit and voluntary mediation disputes, and they do not fall under the protection of the confidentiality privilege. Parties of a non-court-ordered mediation who desire to preserve the confidentiality of the process must rely on a signed confidentiality agreement. A contractual agreement does provide some measure of protection, but it pales in comparison to Florida’s statutory privilege²⁴

Uncertainties also existed regarding the extent of the statutory protection.²⁵ After describing the situation in detail, a law professor made the following plea for reform:

Florida mediators, attorneys, and parties need clear guidance as to what is not confidential during mediation. The statutory confidentiality privileges apply to only some of the many mediated cases. The mediation privilege for court-ordered cases leaves doubt as to the mediator’s obligation to report matters that may be deemed “required by law,” and does not clarify what, if anything, is required by law. Additionally, mediators who are not certified or court-appointed do not have the ethical obligation to keep mediation communications confidential unless required by law. Given the many variables, confidentiality will vary greatly based on whether a privilege applies, the court ordered mediation, the mediator is certified, and the parties entered into a confidentiality agreement. *The legislature would do well to clarify the confidentiality*

23. Fran Tetunic, *Act Deux: Confidentiality After the Florida Mediation Confidentiality and Privilege Act*, 36 Nova L. Rev. 79, 80 (2011) (footnote omitted) (hereafter, “Tetunic (2011)”).

24. Johnson, *supra* note 7, at 496.

25. Tetunic (2003), *supra* note 9, at 92-97; see also Lisa Nieuwveld, *Florida Continues to Lead the Nation in Mediation*, Fla. Bar J., vol. 81, no. 7 (July/Aug. 2007).

*privilege with careful attention to the experiences and concerns of the mediators, attorneys, judges, and parties.*²⁶

Other persons raised similar concerns,²⁷ and Florida “responded by greatly broadening its narrow confidentiality protection for mediation.”²⁸

The Mediation Confidentiality and Privilege Act of 2004

In 2004, Florida enacted the Mediation Confidentiality and Privilege Act (“MCPA”).²⁹ The MCPA applies to any mediation that is (1) required by statute, court rule, agency rule or order, oral or written case-specific court order, or court order, (2) conducted under the MCPA by express agreement of the mediation parties, or (3) facilitated by a mediator certified by the Supreme Court.³⁰ The mediation parties may vary certain terms of the MCPA by agreement.³¹ For convenient reference, a copy of the MCPA is attached.³²

Subject to certain exceptions, the MCPA provides that “all mediation communications shall be confidential.”³³ Thus, a mediation participant “shall not disclose a mediation communication to a person other than another mediation participant or a participant’s counsel.”³⁴ “[T]he prohibition on disclosure of mediation communications *does not apply among participants* to the mediation.”³⁵ A “mediation communication” is defined as “an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made

26. *Id.* at 97 (emphasis added).

27. See, e.g., Johnson, *supra* note 7, at 501-02; see also Tetunic (2003), *supra* note 9, at 97 (referring to unpublished circuit court suggestion); H.R. Staff Analysis of HB 1765, pp. 2-3 (March 31, 2004) (same).

28. Nieuwveld, *supra* note 25.

29. Fla. Stat. §§ 44.401-44.406.

30. Fla. Stat. § 44.402.

31. *Id.*

32. Exhibit pp. 1-4.

33. Fla. Stat. § 44.405(1).

34. *Id.* See also Rule 10.360 of the Fla. Rules for Certified & Court-Appointed Mediators:

(a) *Scope.* A mediator shall maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties.

(b) *Caucus.* Information obtained during caucus may not be revealed by the mediator to any other mediation participant without the consent of the disclosing party.

(c) *Record Keeping.* A mediator shall maintain confidentiality in the storage and disposal of records and shall not disclose any identifying information when materials are used for research, training, or statistical compilations.

35. Maplewood Partners L.P. v. Indian Harbor Ins. Co., 295 F.R.D. 550, 627 (So. Dist. Fla. 2013) (emphasis added).

in furtherance of mediation.”³⁶ Importantly, “[t]he commission of a crime during a mediation is not a mediation communication.”³⁷

The MCPA further provides that “[a] mediation *party* has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.”³⁸ Mediation parties are “the only mediation participants who hold the statutory privilege.”³⁹ Accordingly, the confidentiality or privilege against disclosure may be waived by agreement of the parties, regardless of whether the mediator or other mediation participants agree.⁴⁰ In this respect, the MCPA differs from California law and the UMA.

For purposes of this study, another significant difference is that the MCPA’s protection for mediation communications, unlike California law, is subject to two exceptions that specifically address professional misconduct. In particular, there is no confidentiality or privilege for any mediation communication:

4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;

....

6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

The first of these exceptions focuses on professional malpractice, while the second focuses on investigation of professional misconduct, presumably by a regulatory body of some type. In both settings, the statute permits disclosure of a mediation communication *solely* for purposes of the proceeding in question.⁴¹ Further, the mediation participants may only disclose evidence of professional wrongdoing that occurred *during* the mediation, not evidence of other

36. Fla. Stat. § 44.403(1).

37. *Id.*

38. Fla. Stat. § 44.405(2) (emphasis added).

39. Tetunic (2011), *supra* note 23, at 83; see also Tetunic (2008), *supra* note 5, at item #6 (Although mediator is not holder of privilege, mediator is ethically required to maintain confidentiality of all information revealed during mediation except where disclosure is required or permitted by law or is agreed to by all parties).

40. Fla. Stat. § 44.405(4)(a); see also Tetunic (2011), *supra* note 23, at 83.

41. Fla. Stat. § 44.405(4)(a)(4) & (6), (b); see also Tetunic (2008), *supra* note 5, at item #1 (“The permissive disclosure of ‘reporting, proving, or disproving professional malpractice [or misconduct] occurring during mediation’ is ... limited ‘for the purpose of the professional malpractice proceeding’ or ‘internal use of the body conducting the investigation.’”).

professional wrongdoing.⁴² They may use that evidence not only to prove professional wrongdoing, but also to report or disprove such wrongdoing.⁴³

In addition to the exceptions specifically addressing professional misconduct, there are several other exceptions to the MCPA's protection for mediation communications:

- There is "no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise."⁴⁴
- There is no confidentiality or privilege for a mediation communication for which "the confidentiality or privilege against disclosure has been waived by all parties."⁴⁵ "A party that discloses or makes a representation about a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation."⁴⁶
- There is no confidentiality or privilege for a mediation communication that is "willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence."⁴⁷
- There is no confidentiality or privilege for a mediation communication that "requires a mandatory report pursuant to chapter 39 [child abuse] or chapter 415 [protection of vulnerable adults] solely for the purpose of making the mandatory report to the entity requiring the report."⁴⁸ "Reporting abuse and neglect of children and vulnerable adults is the Act's only mandatory reporting requirement."⁴⁹ All of the other exceptions to confidentiality "are permissive."⁵⁰
- There is no confidentiality or privilege for a mediation communication that is "[o]ffered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation."⁵¹ Such evidence may be used *solely* for that purpose.⁵²

42. Fla. Stat. § 44.405(4)(a)(4) & (6).

43. *Id.*

44. Fla. Stat. § 44.405(4)(a).

45. Fla. Stat. § 44.405(4)(a)(1).

46. Fla. Stat. § 44.405(6).

47. Fla. Stat. § 44.405(4)(a)(2).

48. Fla. Stat. § 44.405(4)(a)(3); see also Fla. Stat. § 44.405(4)(b).

49. Tetunic (2011), *supra* note 23, at 83 (footnote omitted).

50. *Id.*

51. Fla. Stat. § 44.405(4)(a)(5).

52. Fla. Stat. § 44.405(4)(b).

- “Information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in mediation.”⁵³

Some of these exceptions are similar to provisions in California law; others have no clear California counterpart.⁵⁴

Florida’s MCPA also includes a provision governing when a mediation begins and ends⁵⁵ and a provision specifying remedies for a knowing and willful disclosure of a protected mediation communication.⁵⁶ The available remedies include equitable relief, compensatory damages, mediator’s fees, attorney’s fees and costs incurred in the mediation proceeding, and attorney’s fees and costs incurred in seeking relief for the improper disclosure.⁵⁷ “With the specter of harsh sanctions, ... all mediation participants need to keep the boundaries of mediation confidentiality in mind.”⁵⁸ According to the director of the Florida Dispute Resolution Center, “the law works as a deterrent by ‘putting people on notice of the risks of breaching confidentiality.’”⁵⁹

A separate statute provides immunity for mediators. The extent of immunity depends on whether the mediation is court-ordered or otherwise.⁶⁰

Florida Case Law and MEAC Opinions on Protection of Mediation Communications

Because mediation has been well-established in Florida for a long time, there are many court decisions addressing aspects of Florida law on protection of mediation communications. There are also a number of MEAC opinions on ethical issues pertaining to mediation confidentiality. A comprehensive

53. Fla. Stat. § 44.405(5).

54. See Cal. Evid. Code §§ 1120(a) (“Evidence otherwise admissible or subject to discovery outside of a mediation or mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation.”); 1122(a) (admissibility & disclosure of mediation materials upon express agreement of all mediation participants); 1123 (admissibility & disclosure of written settlement agreement reached in mediation).

55. Fla. Stat. § 44.404.

56. Fla. Stat. § 44.406.

57. *Id.* For a pre-MCPA decision in which the plaintiff’s complaint was involuntarily dismissed because the plaintiff breached contractual mediation confidentiality, see *Paranzino v. Barnett Bank*, 690 So.2d 725 (Fla. Dist. Ct. App. 1997).

In another pre-MCPA decision, the Florida Supreme Court ruled that if a judge is wrongly exposed to protected mediation communications, the judge is not automatically disqualified from hearing the case. See *Enterprise Leasing Co. v. Jones*, 789 So.2d 964 (Fla. S.Ct. 2001).

58. Tetunic (2011), *supra* note 23, at 92.

59. T. Noble Foster & Seldon Prentice, *The Promise of Confidentiality in Mediation: Practitioners’ Perceptions*, 2009 J. Disp. Resol. 163, 169 (quoting Sharon Press, director of Florida Dispute Resolution Center).

60. See Fla. Stat. § 44.107(1)-(2); see also Fla. Stat. § 44.102 (court-ordered mediation).

discussion of that body of law is beyond the scope of this memorandum, but is available in the legal literature.⁶¹ Instead, we focus on aspects of particular relevance to the Commission's ongoing study.

Many Florida cases involving mediation communications predate the 2004 enactment of the MCPA. It is nonetheless instructive to examine some of the early opinions discussing alleged mediation misconduct, as well as the more recent cases.

We begin with a few general comments about Florida case law on protection of mediation communications. We then discuss (1) alleged party misconduct, (2) alleged mediator misconduct, and (3) alleged attorney misconduct.

General Comments on Florida Case Law

As in California, Florida court decisions involving mediation communications contain some statements emphasizing the importance of protecting such communications from disclosure. For example, a widely-quoted opinion (*DR Lakes v. Brandsmart U.S.A.*) bluntly asserts that “[m]ediation could not take place if litigants had to worry about admissions against interest being offered into evidence at trial, if a settlement was not reached.”⁶² Similarly, another Florida opinion says that “the very basis of court ordered mediation is that parties can rely upon the confidentiality of all oral or written statements.”⁶³ Still another case explains that Florida's privilege for mediation communications “plays a central role in Florida's mediation scheme by preserving the neutrality of the mediator.”⁶⁴

In general, however, such comments are relatively infrequent, and the Florida courts do not expound much on the need for protection of mediation communications. The results of the cases are mixed: Some Florida cases protect mediation communications,⁶⁵ while others do not. Even in *DR Lakes*, with its widely-quoted line emphasizing the need for protection, the court held that “the privilege does not bar evidence as to what occurred at mediation under the facts in this case.”⁶⁶

61. See Tetunic (2011), *supra* note 23; see also Tetunic (2003), *supra* note 9, at 91-105.

62. 819 So.2d 971, 974 (Fla. Dist. Ct. App. 2002).

63. *Paranzino v. Barnett Bank*, 690 So.2d 725, 728 (Fla. Dist. Ct. App. 1997).

64. *Royal Caribbean Corp. v. Modesto*, 614 So.2d 517, 519 (Fla. Dist. Ct. App. 1992).

65. See, e.g., *Paranzino*, 690 So.2d at 727-30 (affirming trial court order dismissing case with prejudice because plaintiff and her attorney willfully and deliberately breached agreement to keep mediation communications confidential).

66. 819 So.2d at 974. *DR Lakes* involved allegations of a clerical error constituting a mutual mistake in the mediated agreement. The court of appeals could not “imagine that the legislature

Florida also recognizes what is known as the “sword and shield doctrine.” Under that doctrine, if a party raises a claim that will necessarily require proof by way of a privileged communication, the party cannot insist that the communication is privileged.⁶⁷ This is thus a potential justification for disclosing mediation communications in Florida.⁶⁸

Having provided a little background on Florida case law, we turn now to the cases involving alleged wrongdoing at a mediation, starting with cases focusing on party misconduct.

Alleged Party Misconduct

“Early cases brought to overturn or reform mediated agreements dealt primarily with party wrongdoing.”⁶⁹ For example, in *Cooper v. Austin*, it was undisputed that a woman sent her husband a threatening note during a divorce mediation, which said:

If you can't agree to this, the kids will take what information they have to whomever to have you arrested, etc. Although I would get no money if you were in jail — you wouldn't also be living freely as if you did nothing wrong.⁷⁰

The parties settled at the mediation, but the husband later sought relief from the mediated settlement agreement due to extortion. The trial court denied his request for lack of causation and the husband appealed.

The court of appeal found that the wife's note was “clearly extortionate,” her presentation of the extorted settlement agreement to the trial court was “contemptuous of the judicial process and undercuts the very foundation of our judicial system,” and she “should not profit from her actions.”⁷¹ It therefore reversed and remanded the case for proceedings consistent with its opinion.

intended that a party to a contract reached after mediation should not have the same access to the courts to correct a \$600,000 mutual mistake, as a party entering into the same contract outside of mediation.” *Id.* The court made clear that an alleged unilateral mistake would not be sufficient to warrant relief. See *id.* at 974 n.2; see also *Sponga v. Warro*, 698 So.2d 621, 625 (Fla. Ct. App. 1997) (“[C]ases settled in mediation are especially unsuited for the liberal application of a rule allowing rescission of a settlement agreement based on unilateral mistake.”).

67. *Allstate Ins. Co. v. Levesque*, 263 F.R.D. 663, 667 (M.D. Fla. 2010).

68. See *Bradfield v. Mid-Continent Casualty Co.*, 2014 U.S. Dist. LEXIS 58162 (M.D. Fla. 2014) (applying sword and shield doctrine in mediation context).

69. Tetunic (2011), *supra* note 23, at 89.

70. 750 So.2d 711, 711 (Fla. Ct. App. 2000).

71. *Id.* at 711 n.1, 713.

The *Cooper* decision predates the MCPA. The court of appeal did not mention mediation confidentiality, so the basis for admission of the wife's note is not altogether clear.

Similarly, in *Still v. Still*, the trial court set aside a mediated marital dissolution agreement due to the wife's fraudulent statements about where a child would live. The court of appeal affirmed, but it did not explain whether the fraudulent statements were made during the mediation and, if so, why they were admissible.⁷²

A third such case, also predating the MCPA, is *Crupi v. Crupi*, in which a wife sought to undo a mediated settlement agreement due to alleged coercion, fraud, and unfairness.⁷³ The trial court denied her motion and the court of appeal affirmed. It explained that "[t]he inquiry on a motion to set aside an agreement reached through mediation is limited to whether there was fraud, misrepresentation in discovery, or coercion."⁷⁴ It agreed with the trial court that there was insufficient evidence of any of those grounds.⁷⁵ In particular, it explained that

[T]hree Xanax pills, and anxiety and pressure to settle are insufficient proof of coercion necessary to set aside such an agreement. Otherwise, few, if any mediated settlement agreements would be enforceable.⁷⁶

Again, the appellate opinion does not discuss mediation confidentiality but nonetheless refers to testimony about the mediation, such as a friend's testimony that the wife "was not in her right mind" during the mediation.⁷⁷

In contrast to the three decisions just discussed, *McKinlay v. McKinlay*⁷⁸ is a pre-MCPA case that directly discusses the intersection of mediation confidentiality and allegations of impropriety in obtaining a mediated marital dissolution agreement. In *McKinlay*, the wife contended that the mediated agreement was obtained through intimidation or duress. The husband called the mediator to testify in response, but the wife's attorney asserted the statutory mediation privilege and the trial court sustained her objection.

72. 835 So.2d 376 (Fla. Ct. App. 2003).

73. 784 So. 2d 611 (Fla. Ct. App. 2001).

74. *Id.* at 612.

75. *Id.* at 613-14.

76. *Id.* at 614.

77. *Id.* at 613.

78. 648 So.2d 806 (Fla. Ct. App. 1995).

The court of appeal reversed, explaining that the wife had waived the mediation privilege by introducing mediation evidence herself:

[A]s the party who objected to the settlement based on allegations of duress and intimidation, Wife availed herself of the opportunities to file a written letter to the trial judge and to testify at the ... hearing. However, with only her side of the story presented, she invoked a statutory privilege to preclude testimony or a proffer from other witnesses such as the mediator. These particular facts lead us to conclude that Wife waived her statutory privilege of confidentiality and that, as a result of the waiver, it was error and a breach of fair play to deny Husband the opportunity to present rebuttal testimony and evidence.⁷⁹

The pre-MCPA cases described above “would now likely fit within the current statutory exception allowing parties to establish or refute recognized bases to void or reform their mediated agreement.”⁸⁰ Some cases, such as *Cooper*, “would also fit within the exclusion for any mediation communication ‘willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence.’”⁸¹ A recent similar case, in which the court of appeal rejected a husband’s attempt to set aside a mediated agreement due to duress, simply cites to the MCPA list of exceptions and says that “[t]he mediator testified without objection and without any party asserting confidentiality as to the mediation communications.”⁸²

Alleged Mediator Misconduct

A few years before the MCPA was enacted, a Florida court of appeal considered a case in which a wife alleged mediator misconduct, as well as misconduct by her husband and her husband’s attorney. In *Vitakis-Valchine v. Valchine*, the court of appeal held that the record “adequately supports the finding that neither the husband nor the husband’s attorney was involved in any duress or coercion and had no knowledge of any improper conduct on the part of the mediator.”⁸³

79. *Id.* at 810.

80. Tetunic (2011), *supra* note 23, at 89.

81. *Id.*

82. *Williams v. Williams*, 939 So.2d 1154, 1156 n.2 (Fla. Ct. App. 2006). A recent, unpublished federal case rejects a claim of duress against a mediation party without referring to the MCPA or mediation confidentiality. See *Shepard v. Florida Power Corp.*, 2011 U.S. Dist. LEXIS 44242, *9 n.12 (M.D. Fla. 2011) (“If Plaintiff means to suggest that Defendant’s announcement of its intention to leave coerced Plaintiff into accepting the settlement, Plaintiff is mistaken,” because it is not duress to threaten what one is legally entitled to do).

83. 793 So.2d 1094, 1096 (Fla. Ct. App. 2001).

With regard to the allegations of mediator misconduct, however, the result was different. The wife alleged that the mediator used multiple coercive tactics to convince her to settle, such as claiming that the trial judge would order destruction of the couple's frozen embryos, threatening to tell the trial judge that "the settlement failed because of her," and giving the wife only five minutes to reach a decision.⁸⁴ She contended that the mediated settlement agreement should be set aside due to coercion.

As a general rule under Florida law, however, "a contract or settlement may not be set aside on the basis of duress or coercion unless the improper influence emanated from one of the contracting parties — the actions of a third party will not suffice."⁸⁵ Because there was then no authority holding that mediator misconduct could serve as a basis for overturning a mediated agreement, the lower court made no findings regarding the wife's assertions of mediator misconduct.⁸⁶

On appeal, the court framed the issue as "whether the wife's claim that the mediator committed misconduct by improperly influencing her and coercing her to enter into the settlement agreement can be an exception to the general rule that coercion and duress by a third party will not suffice to invalidate an agreement between the principals."⁸⁷ The appellate court decided to recognize such an exception, because "it would be unconscionable for a court to enforce a settlement agreement reached through coercion or any other improper tactics utilized by a court-appointed mediator."⁸⁸

In reaching that conclusion, the court noted that Florida rules prohibit a mediator from coercing a party, knowingly misrepresenting a material fact, or opining on what a trial judge will do.⁸⁹ It also observed that "[d]uring a court-ordered mediation, the mediator is no ordinary third party, but is, for all intent and purposes, an agent of the court carrying out an official court-ordered function."⁹⁰ For those reasons, it "h[e]ld that the court may invoke its inherent power to maintain the integrity of the judicial system and its processes by invalidating a court-ordered mediation settlement agreement obtained through

84. *Id.* at 1096-97.

85. *Id.* at 1096.

86. *Id.*

87. *Id.*

88. *Id.* at 1099.

89. *Id.* at 1098-99; see also Tetunic (2007), *supra* note 10, at 233 (mediator must adjourn or terminate mediation if mediator believes it entails fraud, duress, absence of bargaining ability, or unconscionability).

90. *Id.* at 1099.

violation and abuse of the judicially prescribed mediation procedures.”⁹¹ It therefore remanded the case for findings “as to whether the mediator actually committed the alleged misconduct.”⁹²

The opinion in *Vitakis-Valchine* only refers to mediation confidentiality in passing.⁹³ The court does not question or comment on the use of “confidential” mediation communications to prove or disprove mediator misconduct, much less examine whether such use would have any impact on candid discussions and the effectiveness of mediation. The lack of discussion might be because Florida courts already took for granted the admissibility of mediation communications to prove or disprove party misconduct. In any event, there is no indication of any concern about the possibility of triggering disclosure by alleging mediator misconduct.

Two unpublished federal court opinions, decided under Florida law after enactment of the MCPA, also involved allegations that a mediator engaged in duress. In both cases, the court distinguished *Vitakis-Valchine*, concluding that there was insufficient evidence of duress to overturn the mediated settlement agreement.⁹⁴

In one of the cases, the court did not consider any mediation communications other than the allegations in the complaint (e.g., the mediator was “pushy”), which would not have constituted duress even if true.⁹⁵ In the other case, the mediator testified in response to the duress claim, but his testimony was “limited due to confidentiality rules.”⁹⁶ Neither case cites to the MCPA or contains any significant discussion of the confidentiality and privilege rules.

Presumably, if a party seeks to set aside a mediated agreement due to mediator misconduct, and the party wants to introduce evidence of mediation communications, the situation would be governed by Section 44.405(4)(a)(5) of the MCPA, which provides:

(4)(a) ... [T]here is no confidentiality or privilege ... for any mediation communication:

....

91. *Id.*

92. *Id.* at 1100.

93. See *id.* at 1098.

94. See *Menaged v. City of Jacksonville Beach*, 2014 U.S. Dist. LEXIS 16630 (M.D. Fla. 2013); *Clark v. School Bd.*, 2010 U.S. Dist. LEXIS 120216 (M.D. Fla. 2010). See also *Marlowe v. Brown*, 944 So.2d 1036, 1038 (Fla. Ct. App. 2006) (noting, without discussion, that trial court denied husband’s motion to set aside mediation agreement due to mediator misconduct).

95. See *Menaged*, 2014 U.S. Dist. LEXIS 16630, at *9-*10.

96. *Clark*, 2010 U.S. Dist. LEXIS 120216, at *13.

5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation

The MCPA exceptions relating to professional misconduct would not seem to apply, because one of them pertains to a professional malpractice claim,⁹⁷ and the other refers to an investigation of professional misconduct by a “body,”⁹⁸ which appears to mean a regulatory body of some type, not a court.

A Florida law professor recently made the following comments about mediator misconduct:

Not yet a decade old, the law of mediator misconduct is still in its infancy. Case law does not provide the answer to what constitutes mediator misconduct rising to the level required to set aside or reform a mediated agreement. Proving mediator misconduct would likely be challenging. While one party looks to overturn or reform the mediated agreement, the other party seeks to enforce it. The mediator would likely deny violating ethical rules and testify as to facts consistent with the party looking to enforce the mediated agreement. Additionally, counsel who accompanied the parties to mediation will also likely testify that they did not stand idly by as the mediator coerced, threatened, or otherwise violated ethical rules. Yet, alleging mediator misconduct may be attractive as a means to reform or set aside a mediated agreement. *Given the limited number of options, it remains a viable cause of action to consider.*⁹⁹

The professor does not analyze the pros and cons of permitting such a claim.

Alleged Attorney Misconduct

In addition to claims of party misconduct and mediator misconduct, Florida has encountered some claims that an attorney acted wrongfully in a mediation. As previously discussed, for example, the court rejected such a claim with little discussion in *Vitakis-Valchine*.¹⁰⁰ Similarly, one of the above-described, unpublished federal decisions on mediator misconduct (*Clark*) involved such a claim, which the court rejected based on testimony about what the attorney said during the mediation:

Plaintiff alleges she was threatened when defense counsel advised her at the mediation that Defendant may pursue attorneys’ fees in the event Defendant won the suit. Defense counsel contends

97. Fla. Stat. § 44.405(4)(a)(4).

98. Fla. Stat. § 44.405(4)(a)(6).

99. Tetunic (2011), *supra* note 23, at 95 (emphasis added).

100. See 793 So.2d at 1096.

that during the joint discussion, Defendant informed Plaintiff that according to procedural rules, if Defendant were to win on the pending motion to dismiss, it may seek reimbursement of attorneys' fees and costs on a frivolous case. The information relayed to Plaintiff about attorneys' fees was given during a joint discussion with the mediator present. *The undersigned finds the Defendant's act of informing Plaintiff of a possible claim does not rise to a level of coercion or support Plaintiff's claim that she was placed in a state of duress.*¹⁰¹

Another unpublished federal decision (*Shepard v. Florida Power Corp*¹⁰²) also rejects a claim that an attorney acted improperly in a mediation:

Plaintiff does not allege any improper influence by any person other than his former attorney. Although the unintelligibility of parts of Plaintiff's motion prevents certainty on this point, Plaintiff apparently alleges that, although recognizing that Plaintiff was "not okay," Plaintiff's former attorney advised Plaintiff to accept the settlement and sign the mediated settlement agreement. Plaintiff's mere dissatisfaction with the advice of his attorney cannot support a finding that his agreement to settle and release his claims was not knowing or voluntary.¹⁰³

In contrast, yet another unpublished federal decision (*Nova Casualty Co. v. Santa Lucia*¹⁰⁴) refers to a party's allegations that an attorney gave negligent advice about a High-Low Agreement during a mediation. But the court did not resolve those allegations on the merits.¹⁰⁵

None of the four above-mentioned decisions cite to the MCPA or contain any discussion of the confidentiality and privilege rules. The staff was not able to find any decision, published or unpublished, in which the court directly addresses the MCPA provision on professional malpractice¹⁰⁶ or the MCPA provision on an investigation of professional misconduct.¹⁰⁷

We did, however, find several MEAC opinions that discuss the relationship between mediation confidentiality and alleged attorney misconduct. "MEAC opinions do not carry the weight of law."¹⁰⁸ But they do involve real-life

101. *Clark*, 2010 U.S. Dist. LEXIS 120216, at *12 (emphasis added, citations omitted).

102. 2011 U.S. Dist. LEXIS 44242 (M.D. Fla. 2011).

103. *Id.* at *9-*10 (citations omitted).

104. 2010 U.S. Dist. LEXIS 58693, *1 (M.D. Fla. 2010).

105. See *id.* at *1. The mediation took place before the defendant attorney joined one of the defendant law firms. The court denied that firm's motion for summary judgment, explaining that "[w]hether [the attorney's] alleged negligent acts continued after he joined [the firm] on September 1, 2006, remains an issue of fact to be decided by a jury." *Id.* at *7.

106. Fla. Stat. § 44.405(4)(a)(4).

107. Fla. Stat. § 44.405(4)(a)(6).

108. Tetunic (2007), *supra* note 10, at 209.

situations, not hypotheticals,¹⁰⁹ and “serve as advisory opinions upon which mediators may rely in good faith.”¹¹⁰

Each of the pertinent MEAC opinions poses a question about whether a mediator should report misconduct by an attorney or law firm personnel. In the first opinion, a mediation party told the mediator that his attorney’s secretary advised him that “he would not have to pay any attorney’s fees and the attorney for the other party was well known to ‘rape’ his clients financially”¹¹¹ The mediator was “disturbed that a) the party apparently received legal advice from a non-lawyer; b) that the party received questionable information which [the mediator] felt was prejudicial to the mediation process; and c) that a non-lawyer in an attorney’s office may be making slanderous remarks without the knowledge of the attorney.”¹¹²

The panel advised the mediator not to disclose the communication because that would violate the statutory mediation privilege.¹¹³ The panel recommended some other options for the mediator to consider.¹¹⁴

The advice in a later MEAC opinion (still predating the MCPA) was similar. During an attorney-client fee mediation, the attorney threatened to turn an incriminating videotape over to prosecutors unless his client resolved the fee dispute in his favor.¹¹⁵ The MEAC panel advised the non-lawyer mediator not to report the incident to the Florida Bar: “A non-attorney Florida Supreme Court certified mediator should not disclose communications made during a Florida Bar Grievance Mediation session *even if such testimony may be relevant in a subsequent disciplinary proceeding.*”¹¹⁶

109. MEAC 2001-005, at 2 n.1, available at <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/information-trainers-legal-professionals/meac-opinions.shtml>.

110. Tetunic (2007), *supra* note 10, at 209.

111. MEAC 1995-010, at 1, available at <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/information-trainers-legal-professionals/meac-opinions.shtml>.

112. *Id.*

113. *Id.* at 2.

114. *Id.* at 2-3.

115. MEAC 2001-005, at 1, available at <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/information-trainers-legal-professionals/meac-opinions.shtml>.

116. *Id.* (emphasis added); see also MEAC 2002-002, available at <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/information-trainers-legal-professionals/meac-opinions.shtml> (reaffirming advice given in MEAC 2001-005).

For MEAC opinions involving threats by non-attorneys, see MEAC 96-005 and MEAC 97-006, available at <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/information-trainers-legal-professionals/meac-opinions.shtml>. In both of those opinions, the panel advised the mediator not to report the incident. The second opinion pointed out, however, that

More recently, the MEAC panel considered a mediation in which a participant revealed evidence that an attorney acted wrongfully spent funds held in escrow.¹¹⁷ Again, the panel advised the mediator not to report the matter to the Florida Bar.¹¹⁸

In reaching that conclusion, the panel parsed the language of the MCPA exception relating to an investigation of professional misconduct:

Having determined that the statement was a mediation communication, one must next determine whether it fits within any of the listed statutory exceptions to confidentiality. One of the listed statutory exceptions to the confidentiality of mediation communications is a communication “offered to report, prove or disprove **professional misconduct occurring during the mediation**, solely for the internal use of the body conducting the investigation of the conduct.” Section 44.405(4)(a)6. Emphasis added. Since the misconduct which would be the subject of the report, the escrow violation, did not occur during the mediation, the misconduct statutory exception does not apply.¹¹⁹

The panel’s decision thus turned on whether the alleged misconduct occurred during the mediation; because it did not, the panel concluded that the statutory exception was inapplicable.

The panel was careful to point out that if the escrow violation “were to be ‘discovered’ outside of the mediation, the fact that it was disclosed at the mediation does not render it protected from discovery or admissibility.”¹²⁰ In other words, the escrow violation could still be proved through other evidence; only the mediation communications about it would be unavailable. That would also be true in California.¹²¹

If attorney misconduct instead occurs *during* a mediation, the MEAC panel might give different advice to a mediator under the MCPA, because then the statutory exception for an investigation of professional misconduct (Section 44.405(4)(a)(6)) would apply. That possibility seems especially likely with regard

“[t]he panel has not yet offered an opinion based on a situation in which there is a realistic threat of imminent harm during the mediation session.” *MEAC 97-006*, at 2.

117. MEAC 2006-005, available at <http://www.flcourts.org/resources-and-services/alternative-dispute-resolution/information-trainers-legal-professionals/meac-opinions.shtml>.

118. *Id.* at 2-3.

119. *Id.* at 2 (emphasis in original).

120. *Id.* at 2 n.2.

121. See Cal. Evid. Code § 1120(a) (“Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or mediation consultation.”).

to an attorney-mediator, because a Florida attorney is obligated to report certain types of misconduct by a fellow member of the Florida Bar.¹²²

Florida's Grievance System for a Complaint Against a Mediator

"Florida was the first state to implement a process allowing unhappy mediation parties to file and pursue complaints against mediators for practices that violated the Florida Standards of Professional Conduct."¹²³ "The Florida Disciplinary Rules allow the investigation of complaints, create informal and formal processes for resolving complaints, and permit the imposition of sanctions against mediators, including their removal from the certified court list, if they do not meet the standards of skill or professionalism expected by the court."¹²⁴ "The Florida Disciplinary Rules apply to certified mediators doing either court-ordered or privately-referred cases and to non-certified mediators doing court-ordered mediations."¹²⁵ "Florida has evolved a disciplinary process, based on its experience with filed complaints that provides more due process protections for mediators than any other state system."¹²⁶ The process "provid[es] four levels of review, with each level of review having a clearly defined function."¹²⁷

It does not seem necessary to describe that disciplinary process in detail here. The staff can provide such a description later if the Commission desires.¹²⁸ For present purposes, it seems appropriate to focus primarily on the available data regarding the incidence of complaints about Florida mediators and the resolution of those complaints.

From May 1992 to April 2005, Florida's Dispute Resolution Center ("DRC") processed 74 grievances against certified mediators, and a final result was obtained in 69 of them.¹²⁹ Florida courts order approximately 100,000 cases to mediation each year.¹³⁰ This data suggests that "an individual mediator's risk

122. See Fla. Bar Reg. R. 4-8.3 ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority."); see also Tetunic (2008), *supra* note 5, at item #2; Tetunic (2007), *supra* note 10, at 220-21.

123. Young, *supra* note 8, at 804.

124. *Id.*; see Fla. Rules for Certified & Court-Appointed Mediators.

125. Young, *supra* note 8, at 804.

126. *Id.*

127. *Id.* at 879.

128. For a detailed description of Florida's disciplinary system for mediators, see Young, *supra* note 8, at 750-56, 790-813, 876-80.

129. *Id.* at 750-51.

130. *Id.* at 749.

that he or she will have to defend a grievance complaint in Florida remains extremely low.”¹³¹

During the time period in question, “Florida parties most often alleged that a mediator interfered with the party’s self-determination.”¹³² The second most common allegation was that a mediator was not impartial.¹³³ Other complaints were:

- The mediator improperly continued, adjourned, or terminated the mediation.
- The mediator lacked integrity.
- The mediator failed to conduct an appropriate orientation session at the beginning of the mediation.
- The mediator had a conflict of interest.
- The mediator’s fees and expenses were excessive.
- The mediator failed to maintain confidentiality.
- The mediator’s demeanor was not befitting a mediator.
- The mediator engaged in improper advertising practices.
- The mediator lacked professional competence.
- The mediator’s scheduling practices were unfair.¹³⁴

Of the 69 complaints that the Florida DRC resolved between May 1992 and April 2005, “about 25 percent of them resulted in a sanction or remedial action against the mediator.”¹³⁵ More specifically,

- Complaint committees found 13 of the complaints facially insufficient (i.e., the facts, even if taken as true, did not state an ethical violation).
- Complaint committees dismissed 21 of the complaints for lack of probable cause.
- A hearing panel heard and dismissed one complaint.
- In three instances, the complainant dismissed the grievance, typically after meeting with the mediator and complaint committee members.
- Florida regulators imposed sanctions on 12 mediators.
- Another six mediators agreed to remedial measures.
- Complaint committees dismissed the remaining complaints for various reasons (e.g., lack of jurisdiction, non-compliance with the

131. *Id.* at 750.

132. *Id.* at 752.

133. *Id.* at 752-53.

134. *Id.* at 753-55.

135. *Id.* at 751.

complaint-filing requirements, or settlement at an informal meeting).¹³⁶

In other words, many of the claims against Florida mediators lacked merit, but not all of them.

The most frequent sanction was a requirement that the mediator get further training (sometimes coupled with a suspension or restriction on mediating until completion of the required training).¹³⁷ Various other sanctions were also used, such as fee adjustments, oral or written reprimands or admonishments, requiring a mediator to observe one or more mediations conducted by a certified mediator, or requiring a mediator to mediate under the observation and supervision of a certified mediator.¹³⁸

Until sanctions are imposed on, or accepted by, a mediator, or an application for sanctions is denied, the Florida disciplinary process is confidential.¹³⁹ Thereafter, “all documentation including and subsequent to the filing of formal charges shall be public with the exception of those matters which are otherwise confidential under law or rule of the supreme court, regardless of the outcome of any appeal.”¹⁴⁰

Thus, “[w]hen the hearing panel imposes sanctions, the DRC publishes the name of the mediator, along with a short summary of the rule violation, the circumstances of that violation, and any sanctions imposed.”¹⁴¹ “Even when a mediator is not sanctioned, the DRC makes public information about the complaint and its resolution without disclosing the name of the mediator.”¹⁴² In this respect, Florida is unusual. Other states with mediator grievance systems do not make as much grievance-related information available to the public.¹⁴³ According to one commentator, due to Florida’s public disclosures, “the complaints filed against mediators serve a highly educational function.”¹⁴⁴

It is not clear to the staff whether those public disclosures include any mediation communications. The above-quoted rule permitting public disclosure of mediator grievance materials excepts “those matters which are otherwise

136. *Id.*

137. *Id.* at 755.

138. *Id.* at 755-56.

139. Rule 10.850 of the Fla. Rules for Certified & Court-Appointed Mediators.

140. *Id.* (emphasis added).

141. Young, *supra* note 8, at 813.

142. *Id.*

143. *Id.* at 878.

144. *Id.* at 813.

confidential under law.” Under the MCPA, although a mediation communication may be offered to report, prove, or disprove professional misconduct occurring during a mediation, the disclosure is “solely for the *internal use* of the body conducting the investigation of the conduct.”¹⁴⁵

Because the statute permits disclosure solely for “internal use,” public disclosure of mediation communications used in investigating a mediator would appear to be impermissible. This strikes the staff as an important point. Unless the Commission instructs otherwise, we will try to learn more about whether our understanding of it is correct.

Summary of Florida Law

Florida has had a large, active mediation community for many years. In contrast to California, Florida courts have broad authority to order civil cases to mediation. Florida also has a highly-developed regulatory system for mediators.

Until 2004, Florida’s statute protecting mediation communications applied only to a court-ordered mediation. There were also uncertainties regarding the extent of statutory protection.

In 2004, Florida enacted the MCPA, which protects mediation communications in a wide variety of mediations. The MCPA’s protection for mediation communications is subject to a number of exceptions.

Of particular importance in this study, there is an exception for a professional malpractice proceeding¹⁴⁶ and an exception for an investigation of professional misconduct by a “body.”¹⁴⁷ Key features of these exceptions are:

- The exceptions may be invoked not only to prove professional wrongdoing, but also to report or disprove such wrongdoing.
- The exceptions apply only to evidence of professional misconduct that occurred *during* a mediation, not evidence of other professional wrongdoing.
- The exceptions permit disclosure solely for purposes of the proceeding in question (the malpractice proceeding or the investigation of professional misconduct).

There are many Florida cases and MEAC opinions involving allegations of wrongdoing at a mediation, including some involving allegations of professional misconduct. Not infrequently, Florida courts and federal courts applying Florida

145. Fla. Stat. § 44.405(4)(a)(6) (emphasis added).

146. Fla. Stat. § 44.405(4)(a)(4).

147. Fla. Stat. § 44.405(4)(a)(6).

law have considered mediation communications in resolving such allegations, with little or no discussion of the point. There do not seem to be any published court decisions construing the MCPA exceptions relating to professional wrongdoing.

Florida has an extensive disciplinary system for mediators. As compared to the number of mediations conducted, there are very few complaints against mediators. Of the complaints received, approximately 25% resulted in sanctions, generally relatively mild in nature. After a complaint is resolved, information about it is made public. The staff will check further regarding whether such public disclosure can include a mediation communication; our preliminary assessment is “no.”

MASSACHUSETTS

Proceeding alphabetically, the next jurisdiction that the Commission singled out for special attention is Massachusetts. We begin by describing the current Massachusetts statute on protection of mediation communications and case law interpreting that statute. Next, we report some criticism of that law. Finally, we describe the history and status of efforts to revise the current statute and enact the UMA in Massachusetts.

Current Massachusetts Statute

The key Massachusetts statute on protection of mediation communications is Section 23C of Chapter 233 of the General Laws of Massachusetts, which was enacted in 1985.¹⁴⁸ The first paragraph of that statute provides:

23C. All memoranda, and other work product prepared by a mediator and a mediator’s case files shall be confidential and not subject to disclosure in any judicial or administrative proceeding involving any of the parties to any mediation to which such materials apply. Any communication made in the course of and relating to the subject matter of any mediation and which is *made in the presence of such mediator* by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.¹⁴⁹

148. For additional sources of protection, see Rule 514(a) of the Massachusetts Guide to Evidence and Massachusetts Uniform Dispute Resolution Rule 9(h).

149. Emphasis added.

The provision flatly protects memoranda and other work product prepared by a mediator, as well as a mediator's case files. With regard to mediation communications, the protection is more limited, applying only to a communication made in the mediator's presence.¹⁵⁰ This is different from California law, which protects mediation communications regardless of whether they were made in the mediator's presence, so long as they were made "for the purpose of, in the course of, or pursuant to a mediation or a mediation consultation."¹⁵¹

The second (and last) paragraph of the Massachusetts statute defines the term "mediator":

For the purposes of this section a "mediator" shall mean a person not a party to a dispute who *enters into a written agreement* with the parties to assist them in resolving their disputes and has completed *at least thirty hours of training in mediation and who either has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years or one who has been appointed to mediate by a judicial or governmental body.*¹⁵²

This definition of "mediator" significantly limits the scope of the statutory protection.

As a Massachusetts trial court explained in an unpublished decision, "[f]or 23C to apply, the mediator must enter into a written agreement with the parties in which the parties agree to have the mediator resolve their disputes."¹⁵³ "Additionally, 23C requires that a mediator have completed 30 hours of mediation training,"¹⁵⁴ plus "four years of professional experience as a mediator" or accountability to "a dispute resolution organization which has been in existence for at least three years."¹⁵⁵ In the alternative, the mediator must have been "appointed to mediate by a judicial or governmental body."¹⁵⁶ The statute does not make clear whether such an appointment is sufficient by itself, or must

150. See Mass. Gen. Laws. ch. 233, § 23C; see also *ZVI Construction Co., LLC v. Levy*, 2013 Mass. Super. LEXIS 110, *4-*5 (explaining that contractual provision at issue was "broader than the statutory provision," which only shields communications made in mediator's presence).

151. Cal. Evid. Code § 1119.

152. Mass. Gen. Laws. ch. 233, § 23C (emphasis added).

153. *White v. Holton*, 1993 Mass. Super. LEXIS 306, *12 (Mass. Super. 1993) (finding Section 23C inapplicable to conflict resolution proceedings in dispute over whether Reverend White should continue to serve as senior minister of Church).

154. *Id.* at *13.

155. Mass. Gen. Laws. ch. 233, § 23C.

156. See *id.*

be coupled with a written agreement and 30 hours of training; a closely parallel evidentiary rule suggests the latter.¹⁵⁷

Case Law

There is relatively little case law (particularly published decisions) interpreting Section 23C.¹⁵⁸ Several cases suggest that if the statutory requirements are met (i.e., when dealing with a mediator's materials or a communication made in the presence of a "mediator," as statutorily defined), the statutory protection is robust.

For example, in *Leary v. Geoghan*, the Appeals Court of Massachusetts said that "[u]nlike the mediation statutes in some other States, G.L. c. 233, § 23C, confers *blanket confidentiality protection* on the mediation process, including an explicit prohibition on disclosure in judicial proceedings, without listing any exceptions, other than one for labor mediations, which are governed by a separate statute."¹⁵⁹ The court also pointed out that "unlike some other statutes, G.L. c. 233, § 23C, is silent as to whether confidentiality ever may be waived, and if so, by whom."¹⁶⁰ The court concluded that

whether or not the parties have chosen to maintain the confidentiality of the mediation, G.L. c.233, § 23C, does not permit a party to compel the mediator to testify, when to do so would require the mediator to reveal communications made in the course of and relating to the subject matter of the mediation. Compelling such testimony, even if potentially helpful to the motion judge's decision on the merits of the parties' dispute, would conflict with the plain intent of the statute to protect the mediation process and to preserve mediator effectiveness and neutrality.¹⁶¹

Leary is an unpublished decision by a single appellate justice, so its precedential value is questionable. Nonetheless, at least three unpublished decisions by Massachusetts trial courts refer to *Leary* in excluding mediation evidence.¹⁶² A federal district court recently reached a similar result (without referring to *Leary*) in an unpublished decision applying Massachusetts law.¹⁶³

157. See Rule 514(a) of the Massachusetts Guide to Evidence.

158. See *Modern Continental Construction Co. v. Zurich*, 2006 Mass. Super. LEXIS 202, *15 (Mass. Super. 2006); *Town of Clinton v. Geological Services Corp.*, 2006 Mass. Super. LEXIS 526, *4 (Mass. Super. 2006).

159. 2002 Mass. App. LEXIS 1706, *9 (Mass. App. Ct. 2002) (emphasis added).

160. *Id.* at *10.

161. *Id.* at *10-*11.

162. See *Town of Clinton v. Geological Services Corp.*, 2006 Mass. Super. LEXIS 526, *4-*8 (Mass. Super. 2006) ("Under the circumstances of this case, there has been no waiver of the blanket confidentiality privilege conferred by G.L. c. 233, § 23C"); *Modern Continental*

The staff only found one published decision construing Section 23C: *Bobick v. United States Fidelity & Guaranty Co.*, which was issued by the highest state court in Massachusetts (the Supreme Judicial Court).¹⁶⁴ *Bobick* was a personal injury case; the plaintiff also sued two insurers for failing to make a reasonable settlement offer when liability was clear, as required by Massachusetts law.

During a mediation between the plaintiff and the insurers, a settlement offer was made but the plaintiff rejected it. Evidence of the offer was later admitted over plaintiff's objection that it was protected by Section 23C.

On appeal, the Supreme Judicial Court explained that the plaintiff's objection lacked merit because he had *implicitly* waived the mediation privilege:

The plaintiff's attempt to characterize this offer as a privileged communication under G.L. c. 233, § 23C, is unavailing. That the offer of \$200,000 was extended ... and rejected is undisputed and is relevant to demonstrate USF&G's continuing attempt to settle the plaintiff's claim and thus relieve the plaintiff of his burden to litigate. In our view, *by accusing USF&G of failing to make a reasonable settlement offer, the plaintiff implicitly has waived the privilege*, at least with respect to the issue whether such an offer indeed was made. See *Darius v. Boston*, 433 Mass. 274, 277-278, 741 N.E.2d 52 (2001), and cases cited (accepting principle that litigant may implicitly waive attorney-client privilege by injecting certain claims or defenses into case).¹⁶⁵

The Court also noted that "if the plaintiff's position were deemed correct, *there could be no evidence in cases involving alleged misfeasance by a mediator or breach of settlement agreements achieved during the mediation process.*"¹⁶⁶ The Court thus seemed to indicate, in dictum, that mediation evidence would be admissible if necessary to prove, or at least to disprove, alleged mediator misfeasance.¹⁶⁷

Construction Co., Inc. v. Zurich, 2006 Mass. Super. LEXIS 202, *15-*16 (Mass. Super. 2006) (agreeing with appellant that mediation materials fall within scope of Section 23C); *Golka v. Brockton Family Life Center, Inc.*, 2005 Mass. LCR LEXIS 101, *13 (Mass. Land Ct. 2005) ("It is inappropriate to inquire into the substance of the mediation sessions, whose confidentiality is absolute.").

163. See *Logistics Information Systems, Inc. v. Braunstein*, 2010 U.S. Dist. LEXIS 32667, *12-*15 (D. Mass. 2010).

164. 439 Mass. 652, 790 N.E.2d 653 (Mass. 2003).

165. *Id.* at 658 n.11 (emphasis added).

166. *Id.* (emphasis added).

167. For another case demonstrating the Supreme Judicial Court's commitment to ethical mediating, see *In re Bott*, 462 Mass. 430, 438, 969 N.E.2d 155 (Mass. 2012) (holding that "an attorney who has resigned while the subject of disciplinary investigation, or who has been disbarred or suspended from the practice of law, may be prohibited, in some circumstances, from acting as a mediator").

The Court did not address attorney misfeasance in mediation, but its logic could easily be extended to that situation:

- If a client alleges that an attorney acted wrongfully in a mediation, the client will be deemed to have implicitly waived the mediation privilege.
- The mediation privilege cannot be absolute, because then there could be no evidence in cases involving alleged mediation misfeasance by an attorney.

Consequently, although Section 23C is not subject to an express exception for attorney misconduct, there is a reasonable possibility that the Massachusetts Supreme Judicial Court would imply such an exception.

Criticism of Current Massachusetts Law

There has been some criticism of the Massachusetts statute protecting mediation communications. In 2003, for example, one commentator wrote:

In Massachusetts, where we have had a statute protecting the confidentiality of mediation since 1985, the situation is no better than elsewhere. The vagueness of our statute makes it difficult to determine who qualifies as a mediator. The statute provides confidentiality protection for only those mediations in which the mediator has 30 hours of “training in mediation” and either “has four years of professional experience as a mediator or is accountable to a dispute resolution organization which has been in existence for at least three years.” There has been no appellate decision to date as to what the quoted language means. Moreover, because the state maintains no list of mediators who meet these qualifications (nor has there been any proposal that the state should maintain such a list), parties enter into mediations to some degree at their peril.¹⁶⁸

Similarly, Massachusetts mediator Diane Levin views Section 23C as “a deeply flawed statute.”¹⁶⁹ She explains:

It fails to specify exceptions to privilege or identify how or by whom the privilege could be waived. It creates uncertainties about what kind of mediation communications are protected from disclosure, since the language suggests that pre-mediation communications may not be covered, particularly if there is no written contract between mediator and parties. It is also not clear

168. David Hoffman, *Symposium on the Uniform Mediation Act: Introduction*, 2003 J. Disp. Resol. 61, 61 (2003) (footnotes omitted).

169. See <http://mediationchannel.com/category/uniform-mediation-act>.

from the language of the statute whether the law prohibits disclosure of out-of-court statements.

Controversially, the statute applies only to mediations conducted by mediators as the statute defines them This definition, as even a superficial reading reveals, is vague, raising more questions than it answers. It is also arbitrary and baseless: the qualifications for mediators shoehorned into the statute — the 30 hours of training, four years of professional experience, and three years in existence for a dispute resolution organization — were plucked from thin air by the drafters.¹⁷⁰

Another critic emphasized the lack of exceptions in Section 23C, arguing that it is bad policy:

The Massachusetts statute fails to recognize that limited exceptions to mediator confidentiality may be necessary to protect mediation participants, the judicial system, and the public. The statute's unbending privilege provides unnecessary weight to the need for confidentiality when balanced against the need for evidence. Excessive protection of confidentiality may even thwart the willingness of disputants to participate in mediation. At least one court has suggested that the ability to pierce the privilege in certain circumstances could increase the willingness of disputing parties to participate in mediation.¹⁷¹

In particular, he maintains that the Massachusetts provision, like the UMA, should "includ[e] an exception for evidence of mediator malpractice, to make mediators accountable and to allow mediators to defend a malpractice claim."¹⁷² He does not specifically mention the possibility of an exception for evidence of attorney malpractice or other attorney misconduct.

Efforts to Revise Massachusetts Law

Given criticism such as the comments quoted above, it is not surprising that there have been efforts to revise Section 23C. In early 2006, for example, the Boston Bar Association ("BBA") "stunned members of the closely-knit alternative dispute resolution community" in Massachusetts by proposing to amend the statute so as to "defin[e] a mediator merely as 'an individual who conducts a mediation.'"¹⁷³ At the time, reaction from Massachusetts mediators was

170. *Id.* (footnotes omitted).

171. Michael Moran, Note, *Just Between You and Me: The Blanket Mediation Privilege in Massachusetts Unnecessarily Undermines Access to Evidence*, 39 Suffolk U. L. Rev. 539, 540 (2006) (footnotes omitted).

172. *Id.*

173. See <http://mediationblog.blogspot.com/2006/04/change-proposed-to-massachusetts.html>.

“overwhelmingly negative.”¹⁷⁴ Many of them feared that “the BBA’s proposed amendment with its omission of training requirements for mediators would undo years of effort by many in the ADR field to improve the quality and integrity of mediation services and build public confidence in the profession.”¹⁷⁵

The BBA proposal did not go far, but later the same year a group of mediators (the MassUMA Working Group) “convened at Suffolk University Law School to address th[e] statutory shortcomings and consider whether the Uniform Mediation Act might be a better choice for Massachusetts practitioners.”¹⁷⁶ The group “met numerous times between September 2006 and April 2009 to discuss the UMA and consider whether to adapt it to meet the needs of Massachusetts mediators and consumers of mediation services.”¹⁷⁷ The group did not specifically explore the intersection of mediation communications and professional misconduct, but the concern did come up in some of their discussions.¹⁷⁸

Ultimately, the MassUMA Working Group was unable to reach consensus, so it disbanded and put its efforts on hold to regroup and perhaps rethink the situation. According to mediator Diane Levin (who participated in the group),

Among the several causes of impasse was this: the Working Group was stymied by its inability to agree upon a definition of mediator, since many could not accept a statute that did not specify minimum qualifications for mediators and that defined a mediator simply as one “who conducts a mediation.” The minority view, held by me and a handful of others, was to accept the UMA’s definition and take up the discussion of credentialing in a different venue. The great majority of my colleagues preferred to graft the old definition ... onto the UMA, with some small changes¹⁷⁹

“[T]he obvious division between supporters and critics of the UMA” was another reason for disbanding,¹⁸⁰ as well as differing views on specific aspects of the UMA.¹⁸¹

Several bills to enact the UMA, including its exception for mediator misconduct and its exception for professional misconduct or malpractice, have been introduced in Massachusetts. None of them have been enacted.¹⁸²

174. *Id.*

175. *Id.*

176. See <http://mediationchannel.com/category/uniform-mediation-act>.

177. *Id.*

178. Email from D. Levin to B. Gaal (8/28/14).

179. See <http://mediationchannel.com/category/uniform-mediation-act>.

180. *Id.*

181. See, e.g., *id.* (criticizing UMA’s optional requirement that mediator be “impartial”).

The most recent bill¹⁸³ was introduced in 2013, and referred to the Committee on the Judiciary for study during the legislative recess that began in June of this year.¹⁸⁴ As yet, the MassUMA Working Group does not appear to have regrouped. According to Ms. Levin, if it does revisit the UMA, “it would certainly want to invest time” in considering the intersection of mediation confidentiality and professional misconduct.¹⁸⁵

Summary of Massachusetts Law

The Massachusetts statute on protection of mediation communications is subject to significant limitations on its scope. In particular, it only protects mediation communications made in the presence of a “mediator,” and it defines “mediator” to include only persons who satisfy certain qualifications and enter into a written agreement with the mediating parties.

There is relatively little case law interpreting the Massachusetts statute. Several unpublished decisions suggest that the statutory protection is strong when applicable. But a published decision by the highest court in Massachusetts found an implicit waiver of the statutory protection; its reasoning suggests that the Court might imply exceptions for mediator misconduct and attorney misconduct.

The Massachusetts statute has been criticized on multiple grounds, including failure to specify exceptions such as one for mediator misconduct. Efforts to enact the UMA or otherwise revise the statute have proved controversial and have not been successful thus far.

NEW YORK

New York is another state that the Commission singled out for attention. Based on its large population and its leading role in many spheres, New York seems a natural choice for close examination on the issue of protecting mediation communications.

As explained below, however, New York law on the subject is comparatively undeveloped. Nonetheless, its legal community has provided some thoughtful analyses of the topic.

182. See House No. 33 (2013-2014 session); House No. 30 (2011-2012 session); Senate No. 697 (2009-2010 session); House No. 94 (2009-2010 session).

183. House No. 33 (2013-2014 session).

184. See House No. 4218 (2013-2014 session).

185. Email from D. Levin to B. Gaal (8/28/14).

Statutory Law, Court Rules, and Other Means of Protecting Mediation Communications

“New York lags behind other states that have years of experimentation with and development of mediation standards and statutes.”¹⁸⁶ As the ADR Committee of the New York State Bar Association wrote in late 2002, “[u]nlike some states, New York case law and statutory law related to mediation are just beginning to be developed.”¹⁸⁷ Thus, “New York is only starting to define the parameters of acceptable mediation practice.”¹⁸⁸

Of particular note, New York does not have a statute or rule that broadly or generally addresses mediation communications. Rather, it has a few provisions that protect mediation communications in certain contexts.¹⁸⁹ For example, there is a confidentiality provision for its community dispute resolution center program, which provides:

Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person present at the dispute resolution shall be a confidential communication.¹⁹⁰

“In spite of the first sentence in this statute, there appears nowhere else in the article an exception to the restrictive language of the statute.”¹⁹¹

New York also has a provision similar to Federal Rule of Evidence 408, which makes evidence of settlement negotiations inadmissible, but only if the evidence

186. N.Y. State Bar Ass’n Committee on ADR, *The Uniform Mediation Act and Mediation in New York* 24 (Nov. 1, 2002) (hereafter, “ADR Committee of NY State Bar”), available at http://websearch.nysba.org/search?rm_timestamp=1409183470826&SEARCH_query=uniform+mediation+act&FUNCTION=SEARCH&&SELECTEDSERVER=documents&VIEW=summary.

187. *Id.*

188. *Id.*

189. See, e.g., N.Y. Judiciary Law § 849-b(6) (confidentiality of mediation in community dispute resolution center program); N.Y. Supreme Ct. R. 605.20(f)(3) (Bar Mediator must comply with confidentiality requirement of N.Y. Judiciary Law § 90(10)); see also N.Y. Judiciary Law § 90(10) (confidentiality requirement for attorney disciplinary proceeding); N.Y. Ct. Chief Administrator R. 116.3 (center “must keep confidential all memoranda, work products or case files of a mediator, and must not disclose any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator or any person present at the dispute resolution.”); N.Y. Ct. Chief Administrator R. 146.2 (in guidelines specifying qualifications for ADR neutral serving on court roster, “mediation” is a “confidential dispute resolution process in which a neutral third party (the mediator) helps parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome”).

190. N.Y. Judiciary Law § 849-b(6).

191. *People v. Snyder*, 129 Misc. 2d 137, 492 N.Y.S.2d 890, 891 (N.Y. Sup. Ct. 1985).

is introduced for certain purposes. That provision is Section 4547 of the Civil Practice Law and Rules, which provides:

Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible *as proof of liability for or invalidity of the claim or the amount of damages*. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations. Furthermore, the exclusion established by this section shall not limit the admissibility of such evidence when it is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proof of an effort to obstruct a criminal investigation or prosecution.¹⁹²

Because Section 4547 provides only limited protection, and most New York mediations are not addressed by a confidentiality statute, New York mediators “have all sought confidentiality in mediation by contract.”¹⁹³ However, contractual confidentiality requirements are not binding on third parties.

Case Law

Given the sparsity of New York law on protection of mediation communications, it is not surprising that there are only a few court decisions interpreting such law.

There is, of course, a body of law construing the provision that governs settlement negotiations generally (Section 4547). That body of law includes some cases arising in a mediation context, in which the court determined the admissibility of mediation evidence by examining the proponent’s purpose for proffering the evidence.¹⁹⁴

The staff also found a New York case in which the court excluded mediation evidence pursuant to the confidentiality provision for its community dispute resolution center program (Section 849-(b)(6)). In reaching that result, the court explained that the provision was enacted “to assure confidentiality to the parties

192. Emphasis added.

193. See http://nysbar.com/blogs/ResolutionRoundtable/2013/04/mediation_privilege_in_new_yor.html.

194. See, e.g., PRG Brokerage, Inc. v. Aramarine Brokerage, Inc., 107 A.D. 559, 968 N.Y.S.2d 439 (N.Y. App. Div. 2013); Arben Corp. v. New York State Thruway Auth., 18 Misc. 3d 1138(A), 859 N.Y.S.2d 892 (N.Y. Ct. Cl. 2008) (uncorrected opinion not published in printed official reports).

involved, and thereby encourage their full, frank, and open participation”¹⁹⁵ The court further noted that “[t]o grant the District Attorney’s request to review the records of the Community Dispute Resolution Center would subvert the Legislature’s clear intention to guarantee the confidentiality of all such records and communications.”¹⁹⁶ The court thus interpreted the confidentiality provision to restrict admissibility in a criminal prosecution, a context not covered by California’s statute on mediation evidence.

The staff also found two federal cases (one published and one unpublished) that apply federal common law but, in so doing, defer to and rely on the protection afforded by New York’s Section 849-(b)(6).¹⁹⁷ In deciding to show such deference, the courts in these cases applied a test that balances four factors:

“[F]irst, the federal government’s need for the information being sought in enforcing its substantive and procedural policies; second, the importance of the relationship or policy sought to be furthered by the state rule of privilege and the probability that the privilege will advance that relationship or policy; third, in the particular case, the special need for the information sought to be protected; and fourth, in the particular case, the adverse impact on the local policy that would result from non-recognition of the privilege.”¹⁹⁸

After analyzing those factors, both courts decided to exclude the mediation evidence in question, emphasizing the strong state interest in ensuring confidentiality.¹⁹⁹

195. *Snyder*, 492 N.Y.S.2d at 891.

196. *Id.*

197. See *United States v. Gullo*, 672 F. Supp. 99 (W.D.N.Y. 1987); *Lolonga-Gedeon v. Child & Family Services*, 2012 U.S. Dist. LEXIS 67843 (W.D.N.Y. 2012).

198. *Gullo*, 672 F. Supp. at 104, quoting *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976); see also *Lolonga*, 2012 U.S. Dist. LEXIS at *33-*34.

199. The *Gullo* court explained:

[T]he policy sought to be further by the state promulgated privilege is the encouragement of participation in “the resolution of disputes in an informal atmosphere without restraint and intimidation.” The confidentiality outlined under subdivision 849-b.6 is core to establishing an atmosphere “without restraint and intimidation.” Although it is unclear whether the privilege acts in any primary sense to encourage participation in the program, it directly serves to insure the effectiveness of the program and thereby, secondarily, it serves to promote continued support for and existence of the program. It should be noted that abrogation of the privilege would place funding for the program in jeopardy.

672 F. Supp. at 104. Similarly, the *Lolonga* court observed that “failure to recognize the privilege could interfere with frank discourse in mediation, discourage participation in the dispute resolution program, and jeopardize funding for the CDRC program.” 2012 U.S. Dist. LEXIS at *36.

Aside from these cases, we found just two other decisions construing New York law on protection of mediation communications. One is an unpublished decision in which the court declined to “direc[t] disclosure or even production for in camera review of the mediation documents.”²⁰⁰ The court relied on a policy of its Commercial Division “to maintain the confidentiality of submissions and statements made during mediation proceedings.”²⁰¹

The other case was a divorce proceeding in which a mediator was subpoenaed to testify. The trial court denied the mediator’s motion to quash the subpoena and refused to enforce the parties’ contractual agreement to keep the mediation confidential. The mediator unsuccessfully appealed to the Appellate Division of the Supreme Court,²⁰² and later to the Court of Appeals, which concluded that to the extent there was any protection for the mediation communications, it had been waived by the parties.²⁰³ The opinion issued by the Court of Appeals is quite short and does not explain why waivers by the parties were sufficient, without a waiver by the mediator.²⁰⁴ Neither this case nor any of the other above-described cases discuss the intersection of mediation confidentiality with professional misconduct.

Efforts to Revise New York Law

New York’s relatively weak protection for mediation communications has drawn some unfavorable comments. For example, a New Jersey attorney and mediator claims that New Jersey is “way better off than states that do not have the UMA.”²⁰⁵ In explaining that remark, he pointed out that “next door in New York mediators may be forced by courts to testify about mediation communications.”²⁰⁶

New York attorneys and mediators have not been oblivious to mediation confidentiality developments elsewhere. In fact, the ADR Committee of the New York State Bar Association followed the development and eventual creation of the UMA for almost three years.²⁰⁷ Shortly after the UMA was finalized, the

200. *NYP Holdings, Inc. v. McClier Corp.*, 14 Misc. 3d 1232(A), 836 N.Y.S.2d 494 (N.Y. Sup. Ct. 2007) (uncorrected opinion not published in printed official reports).

201. *Id.*

202. *Hauzinger v. Hauzinger*, 43 A.D.3d 1289 (N.Y. App. Div. 2007), *aff’d*, 10 N.Y.3d 923, 892 N.E.2d 849 (N.Y. 2008).

203. *Hauzinger v. Hauzinger*, 10 N.Y.3d 923, 892 N.E.2d 849 (N.Y. 2008).

204. *Id.*

205. See www.jamsadr.com/files/Uploads/Documents/DRA/DRA-2011-06.pdf#Depth.

206. *Id.*

207. ADR Committee of NY State Bar, *supra* note 186, at 7.

committee urged the ABA to approve it, but did not take a position on whether the UMA was appropriate for introduction in New York.²⁰⁸

At about the same time, the New York City Bar endorsed the UMA and prepared a document explaining why New York should enact it.²⁰⁹ Among other things, the group stated that “[e]ffective mediation requires confidentiality,” “UMA provides the confidentiality mediation needs,” and “UMA contains needed exceptions.”²¹⁰ It elaborated to some extent on each of these points.²¹¹ Of particular note for purposes of this study, the group said that “[t]he exceptions that have been carved out in the UMA are limited and make very good sense.” It went on to cite some examples, including the exception for a “mediator engaged in professional malpractice or misconduct.”²¹²

Like the New York City Bar, the New York State Dispute Resolution Association (“NYSdra”) has recommended that New York enact the UMA.²¹³ It says that New York needs “a comprehensive mediation bill, which *will protect New Yorkers from any potential abuses during the mediation process* as well as the professionals who practice mediation.”²¹⁴ The group’s evident concern about “potential abuses during the mediation process,” as well as its endorsement of the UMA, suggest that it favorably views the UMA exceptions relating to professional misconduct and mediator misconduct.

In April 2002, the UMA was introduced in the New York Legislature (Senate Bill 6842). At the time, another bill on protection of mediation communications was already pending (Senate Bill 3495). The competing bill would have made communications in a court-annexed mediation confidential, inadmissible, and protected from disclosure, subject to a number of exceptions, including an exception for “evidence necessary to disciplinary proceedings arising out of the mediation,” and “evidence necessary to prove or defend against a claim for fees brought by the mediator ... for services rendered in the proceeding.”²¹⁵

Later the same year, the ADR Committee of the New York State Bar Association issued a lengthy, thorough report on whether New York should enact the UMA.²¹⁶ The committee stood by its initial recommendation urging the

208. *Id.*

209. See <http://www.nycbar.org/pdf/report/UMA-2003.pdf>.

210. *Id.*

211. *Id.*

212. *Id.*

213. See <http://www.nysdra.org/advocacyoutreach/legactivity/positionpapers/uma.aspx>.

214. *Id.* (emphasis added).

215. SB 3495 (2001-2002 session); see also SB 5406 (2003-2004 session).

216. See ADR Committee of NY State Bar, *supra* note 186.

ABA to approve the UMA, but “conclude[d] that now is not the right time for New York to adopt the UMA.”²¹⁷

The committee gave many reasons for that conclusion. First, it observed that the UMA is confusing:

[T]he UMA’s text and construction lack simplicity. They are, in many ways, confusing to read and difficult to understand. Even the title “Uniform Mediation Act” is somewhat misleading because it suggests a more sweeping statute....

The confusing nature of the Act is evidenced in a very fundamental way — it took the UMA Subcommittee, whose members are attorneys sophisticated in the field of mediation and experienced in reading statutes, many meetings and repeated readings of the Act and its comments before being able to understand fully its plain meaning.²¹⁸

The committee recommended simplifying the Act to make it more easily understandable and accessible.²¹⁹

Next, the committee noted that the UMA “proposes uniformity not only among all states, but also among all subject areas of mediation.”²²⁰ The committee questioned whether uniformity “is equally beneficial and achievable for conflicts involving different subject matters.”²²¹ It illustrated that point with several examples,²²² and went on to express numerous other concerns about aspects of the UMA, such as ambiguous definitions,²²³ issues relating to notice and opting out,²²⁴ various concerns about the UMA’s approach to waiver and who holds the mediation privilege,²²⁵ and potential difficulties coordinating the UMA with existing New York provisions.²²⁶ The committee’s report does not express any concerns about the UMA exceptions relating to professional misconduct and mediator misconduct.

For the many reasons given in its report, the ADR Committee felt that “this is simply not the right time for adoption of a uniform act, at least not the UMA.”²²⁷

217. *Id.* at 4.

218. *Id.* at 10.

219. *Id.*

220. *Id.* at 11.

221. *Id.* at 11-12.

222. See *id.* at 12-14.

223. See *id.* at 18-24.

224. See *id.* at 14-18.

225. See *id.* at 28-36.

226. See *id.* at 24-27.

227. *Id.* at 40.

In order to move toward future adoption of the UMA in New York, the committee recommended:

1. Continued consensus building in New York about mediation priorities;
2. Further clarification of how adoption of the UMA might impact existing court rules and statutes;
3. Further examination about how to achieve uniformity across different subject matters;
4. Further evaluation about how to achieve uniformity among states;
5. Redrafting the UMA so that it is simple and easy to understand;
6. Inclusion of a notice provision for when a mediation falls within the scope of the UMA;
7. Inclusion of a notice provision for when a mediation privilege is being waived;
8. A provision allowing parties to opt out of the entire UMA;
9. Provisions addressing the concerns about the dissimilarities between the UMA and other professional privileges.²²⁸

Neither the UMA bill (SB 6842) nor the competing bill on protection of mediation communications (SB 3495) was enacted in the 2001-2002 legislative session. Since then, one or more bills to enact the UMA have been introduced in every session of the New York Legislature.²²⁹ None of them have been enacted or even been brought up for a vote.

Earlier this year, the staff contacted the office of the legislator who introduced the most recent bill, in hopes of learning about the prospects for enactment of the UMA in New York. The author of the bill, Senator John Sampson, returned the call himself. He explained that in New York, the Chair of a legislative committee can hold a bill without bringing it up for a vote. That happened to his UMA bill in 2013; it happened again this year after we spoke with him. He said he was not aware of any opposition to the bill, but the Chair of the Judiciary Committee did not seem to regard it as a priority matter.

Summary of New York Law

New York does not have a statute or rule that broadly or generally addresses mediation communications. It just has some provisions protecting mediation

228. *Id.*

229. See SB 1340 (2003-2004 session); SB 1527 (2005-2006 session); SB 1967 (2007-2008 session); AB 8497 (2009-2010 session); SB 5422 (2009-2010 session); AB 1756 (2011-2012 session); SB 683 (2011-2012 session); SB 139 (2013-2014).

communications in specific contexts, and a statute restricting the admissibility of settlement negotiations in a manner similar to Federal Rule of Evidence 408.

Not surprisingly, there is little case law construing New York's provisions protecting mediation communications. The few cases the staff found do not shed light on the intersection of mediation confidentiality and professional misconduct.

New York's legal and mediation community has carefully analyzed the UMA. Other ideas have also been raised, such as revising the UMA in certain respects and the approach proposed in a competing bill in the 2001-2002 legislative session. The UMA has received some support, but bills to enact it have not advanced and statutory reform does not appear imminent. In short, the topic of mediation confidentiality appears to be controversial in New York, just as it is in Massachusetts and here in California.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

FLORIDA MEDIATION CONFIDENTIALITY & PRIVILEGE ACT
(FLA. STAT. §§ 44.401 - 44.406)

§ 44.401. Mediation Confidentiality and Privilege Act

44.401. Sections 44.401-44.406 may be known by the popular name the “Mediation Confidentiality and Privilege Act.”

§ 44.402. Scope

44.402. Except as otherwise provided, ss. 44.401-44.406 apply to any mediation:

(a) Required by statute, court rule, agency rule or order, oral or written case-specific court order, or court administrative order;

(b) Conducted under ss. 44.401-44.406 by express agreement of the mediation parties; or

(c) Facilitated by a mediator certified by the Supreme Court, unless the mediation parties expressly agree not to be bound by ss. 44.401-44.406.

(2) Notwithstanding any other provision, the mediation parties may agree in writing that any or all of s. 44.405(1), s. 44.405(2), or s. 44.406 will not apply to all or part of a mediation proceeding.

§ 44.403 Definitions

44.403. As used in ss. 44.401-44.406, the term:

(1) “Mediation communication” means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation. The commission of a crime during a mediation is not a mediation communication.

(2) “Mediation participant” means a mediation party or a person who attends a mediation in person or by telephone, videoconference, or other electronic means.

(3) “Mediation party” or “party” means a person participating directly, or through a designated representative, in a mediation and a person who:

(a) Is a named party;

(b) Is a real party in interest; or

(c) Would be a named party or real party in interest if an action relating to the subject matter of the mediation were brought in a court of law.

(4) “Mediator” means a neutral, impartial third person who facilitates the mediation process. The mediator’s role is to reduce obstacles to communication, assist in identifying issues, explore alternatives, and otherwise facilitate voluntary agreements to resolve disputes, without prescribing what the resolution must be.

(5) “Subsequent proceeding” means an adjudicative process that follows a mediation, including related discovery.

§ 44.404. Duration of mediation

44.404. A court-ordered mediation begins when an order is issued by the court and ends when:

(1) A court-ordered mediation begins when an order is issued by the court and ends when:

(a) A partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties and, if required by law, approved by the court;

(b) The mediator declares an impasse by reporting to the court or the parties the lack of an agreement;

(c) The mediation is terminated by court order, court rule, or applicable law; or

(d) The mediation is terminated, after party compliance with the court order to appear at mediation, by:

1. Agreement of the parties; or

2. One party giving written notice to all other parties in a multiparty mediation that the one party is terminating its participation in the mediation. Under this circumstance, the termination is effective only for the withdrawing party.

(2) In all other mediations, the mediation begins when the parties agree to mediate or as required by agency rule, agency order, or statute, whichever occurs earlier, and ends when:

(a) A partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties and, if required by law, approved by the court;

(b) The mediator declares an impasse to the parties;

(c) The mediation is terminated by court order, court rule, or applicable law; or

(d) The mediation is terminated by:

1. Agreement of the parties; or

2. One party giving notice to all other parties in a multiparty mediation that the one party is terminating its participation in the mediation. Under this circumstance, the termination is effective only for the withdrawing party.

§ 44.405. Confidentiality, privilege, and exceptions

44.405. (1) Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel. A violation of this section may be remedied as provided by s. 44.406. If the mediation is court ordered, a violation of this section may also subject the mediation participant to sanctions by the court, including, but not limited to, costs, attorney's fees, and mediator's fees.

(2) A mediation party has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications.

(3) If, in a mediation involving more than two parties, a party gives written notice to the other parties that the party is terminating its participation in the mediation, the party giving notice shall have a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding only those mediation communications that occurred prior to the delivery of the written notice of termination of mediation to the other parties.

(4)(a) Notwithstanding subsections (1) and (2), there is no confidentiality or privilege attached to a signed written agreement reached during a mediation, unless the parties agree otherwise, or for any mediation communication:

1. For which the confidentiality or privilege against disclosure has been waived by all parties;

2. That is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence;

3. That requires a mandatory report pursuant to chapter 39 or chapter 415 solely for the purpose of making the mandatory report to the entity requiring the report;

4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;

5. Offered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation; or

6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

(b) A mediation communication disclosed under any provision of subparagraph (a)3., subparagraph (a)4., subparagraph (a)5., or subparagraph (a)6. remains confidential and is not discoverable or admissible for any other purpose, unless otherwise permitted by this section.

(5) Information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its disclosure or use in mediation.

(6) A party that discloses or makes a representation about a privileged mediation communication waives that privilege, but only to the extent necessary for the other party to respond to the disclosure or representation.

§ 44.406. Remedies for knowing and willful disclosure of protected mediation communication

44.406. (1) Any mediation participant who knowingly and willfully discloses a mediation communication in violation of s. 44.405 shall, upon application by any party to a court of competent jurisdiction, be subject to remedies, including:

(a) Equitable relief.

(b) Compensatory damages.

(c) Attorney's fees, mediator's fees, and costs incurred in the mediation proceeding.

(d) Reasonable attorney's fees and costs incurred in the application for remedies under this section.

(2) Notwithstanding any other law, an application for relief filed under this section may not be commenced later than 2 years after the date on which the party had a reasonable opportunity to discover the breach of confidentiality, but in no case more than 4 years after the date of the breach.

(3) A mediation participant shall not be subject to a civil action under this section for lawful compliance with the provisions of s. 119.07.

Protection of Mediation Communications: Non-UMA States (except CA, FL, MA, NY, PA & TX)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Alabama	<p>Ala. Civ. Ct. Mediation R.11; see also Ala. App. Ct. Mediation R.8; <i>Cain v. Saunders</i>, 813 So. 2d 891, 904 (2001) (Murdock, J. dissenting) (“When an agreement is reached in mediation ... and that very agreement is challenged in a subsequent court action as having been a result of fraud or mutual mistake occurring in the course of the mediation, the Alabama Civil Court Mediation Rules were not intended to prevent the injured party from proving such fraud or mistake.”)</p>	<p>11. (a) All information disclosed in the course of a mediation, including oral, documentary, or electronic information, shall be deemed confidential and shall not be divulged by anyone in attendance at the mediation except as permitted under this Rule or by statute....</p> <p>(b) The following are exceptions to the general rule stated in Rule 11(a):</p> <p>....</p> <p>(3) The confidentiality provisions of this Rule shall not apply:</p> <p>(iii) to the extent necessary if a party to the mediation files a claim or complaint against a mediator or mediation program alleging professional misconduct by the mediator arising from the mediation.</p> <p>(c) Except as provided in Rule 11(b) above, a court shall neither inquire into nor receive information about the positions of the parties taken in mediation proceedings; the facts elicited or presented in mediation proceedings; or the cause or responsibility for termination or failure of the mediation process.</p> <p>(d) A mediator shall not be compelled in any adversary proceeding or judicial forum ... to divulge the contents of documents received, viewed or drafted during mediation or the fact that such documents exist nor shall the mediator be otherwise compelled to testify in regard to statements made, actions taken, or positions stated by a party during the mediation.</p> <p>Comment. Confidentiality is the backbone of mediation. The freedom to discuss issues privately with a mediator and in joint session with another party, without fear of disclosure outside the mediation, allows parties to safely explore potential alternative solutions to the dispute. Rule 11 is also designed to protect the mediator from later becoming embroiled in the parties’ dispute by being called as a witness in later proceedings between the parties.</p> <p>....</p> <p>.... The exception in Rule 11(b)(3)(iii) is ... similar to provisions in other states. In the event a claim of professional misconduct is levied against a mediator, the mediator should not be barred from a reasonable defense to such allegations, including the use of statements made during a mediation. Any review of mediation proceedings as allowed under Rule 11(b)(3) should be conducted in an <i>in camera</i> hearing or by an <i>in camera</i> inspection.</p> <p>....</p>	<p>Ala. Civ. Ct. Mediation R.11 includes an exception for mediator misconduct, which involves an <i>in camera</i> review of mediation proceedings. Ala. Civ. Ct. Mediation R.11 does not expressly address other types of professional misconduct. Ala. App. Ct. Mediation R.8 does not expressly address any type of professional misconduct.</p>

Protection of Mediation Communications: Non-UMA States (except CA, FL, MA, NY, PA & TX)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Alaska	Alaska R. Civ. Proc. 100(g); see also Alaska R. Evid. 408	<p>100.... (g) Confidentiality. -- Mediation proceedings shall be held in private and are confidential. The mediator shall not testify as to any aspect of the mediation proceedings. Evidence of conduct or statements made in the course of court-ordered mediation is inadmissible to the same extent that conduct and statements are inadmissible under Alaska Rule of Evidence 408. This rule does not relieve any person of a duty imposed by statute.</p> <p>408. Compromise and Offers to Compromise Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution, but exclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement.</p>	Alaska R. Civ. Proc. 100(g) makes a mediation proceeding “confidential,” but the rule provides only limited protection against use of a mediation communication in a court-ordered mediation. The provision does not expressly address professional misconduct of any kind.

Protection of Mediation Communications: Non-UMA States (except CA, FL, MA, NY, PA & TX)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Arizona	Ariz. Rev. Stat. § 12-2238	<p>12-2238. A. Before or after the filing of a complaint, mediation may occur pursuant to law, a court order or a voluntary decision of the parties.</p> <p>B. The mediation process is confidential. Communications made, materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence unless one of the following exceptions is met:</p> <p>....</p> <p>2. The communication, material or act is relevant to a claim or defense made by a party to the mediation against the mediator or the mediation program arising out of a breach of a legal obligation owed by the mediator to the party.</p> <p>3. The disclosure is required by statute.</p> <p>....</p> <p>C. Except pursuant to subsection B, paragraph 2, 3 or 4, a mediator is not subject to service of process or a subpoena to produce evidence or to testify regarding any evidence or occurrence relating to the mediation proceedings....</p> <p>....</p> <p>F. A mediator is not subject to civil liability except for those acts or omissions that involve intentional misconduct or reckless disregard of a substantial risk of a significant injury to the rights of others.</p> <p>....</p>	<p>Ariz. Rev. Stat. § 12-2238 includes an exception for evidence relating to a claim or defense by a party against a mediator. The statute does not expressly address other types of professional misconduct, but it is possible that evidence of such misconduct might fall within another exception, such as the one for a disclosure required by statute. A mediator in Arizona is only subject to civil liability in limited circumstances.</p>

Protection of Mediation Communications: Non-UMA States (except CA, FL, MA, NY, PA & TX)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Arkansas	Ark. Code Ann. § 16-7-206	<p>16-7-206. (a) Except as provided by subsection (c) of this section, a communication relating to the subject matter of any civil or criminal dispute made by a participant in a dispute resolution process, whether before or after the institution of formal judicial proceedings, is confidential and is not subject to disclosure and may not be used as evidence against a participant in any judicial or administrative proceeding.</p> <p>(b) Any record or writing made at a dispute resolution process is confidential, and the participants or third party or parties facilitating the process shall not be required to testify in any proceedings related to or arising out of the matter in dispute or be subject to process requiring disclosure or production of information or data relating to or arising out of the matter in dispute.</p> <p>(c) If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine in camera whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.</p>	<p>Ark. Code Ann. § 16-7-206 does not expressly address professional misconduct of any kind. However, subdivision (c) allows a party to raise the issue of confidentiality at an <i>in camera</i> proceeding when the statute “conflicts with other legal requirements for disclosure of communications or materials” The statute does not specify which standard the court should apply in such an <i>in camera</i> proceeding.</p>

Protection of Mediation Communications: Non-UMA States (except CA, FL, MA, NY, PA & TX)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Colorado	<p>Colo. Rev. Stat. § 13-22-307; see also Colo. Rev. Stat. §§ 301 <i>et seq.</i> (Dispute Resolution Act); <i>Yaekle v. Andrews</i>, 195 P.3d 1101, 1109 (Colo. S.Ct. 2008) (Under Dispute Resolution Act, “mediation communications” are “limited to those made in the presence or at the behest of the mediator”); <i>National Union Fire Ins. Co. v. Price</i>, 78 P.3d 1138, 1140 (Colo. Ct. App. 2003) (Colorado Dispute Resolution Act “applies to all mediation services or dispute resolution programs conducted in the state, including those conducted by a private mediator”); S. Choquette, <i>Colorado Law on Mediation: A Primer</i>, 35 Colo. Law. 21, 21 (March 2006) (In addition to Dispute Resolution Act, 44 Colorado statutes “address mediation in some manner”).</p>	<p>13-22-307. (1) Dispute resolution meetings may be closed at the discretion of the mediator.</p> <p>(2) Any party or the mediator or mediation organization in a mediation service proceeding or a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator or a mediation organization, unless and to the extent that:</p> <p>....</p> <p>(d) Disclosure of the mediation communication is necessary and relevant to an action alleging willful or wanton misconduct of the mediator or mediation organization.</p> <p>....</p> <p>(5) Nothing in this section shall prevent the gathering of information ... for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, mediation service, or dispute resolution program, so long as the parties or the specific circumstances of the parties’ controversy are not identified or identifiable.</p>	<p>Colo. Rev. Stat. § 13-22-307 includes an exception for evidence relating to mediator misconduct, which applies only with regard to alleged willful or wanton misconduct. The statute does not expressly address other types of professional misconduct.</p>

Protection of Mediation Communications: Non-UMA States (except CA, FL, MA, NY, PA & TX)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Connecticut	<p>Conn. Gen. Stat. § 52-235d</p> <p>(The UMA was introduced in 2005, but was not enacted despite being endorsed by the Connecticut Bar Ass’n.)</p>	<p>52-235d. (a) As used in this section, “mediation” means a process, . . . which is not court-ordered, in which a person not affiliated with either party to a lawsuit facilitates communication between such parties and, without deciding the legal issues in dispute or imposing a resolution to the legal issues, which assists the parties in understanding and resolving the legal dispute of the parties.</p> <p>(b) Except as provided in this section, by agreement of the parties or in furtherance of settlement discussions, . . . any . . . participant in a mediation shall not voluntarily disclose or, through discovery or compulsory process, be required to disclose any oral or written communication received or obtained during the course of a mediation, unless . . . (3) the disclosure is required by statute or regulation, or by any court, after notice to all parties to the mediation, or (4) the disclosure is required as a result of circumstances in which a court finds that the interest of justice outweighs the need for confidentiality, consistent with the principles of law.</p> <p>(c) Any disclosure made in violation of any provision of this section shall not be admissible in any proceeding.</p> <p>....</p>	<p>Conn. Gen. Stat. § 52-235d “refers to protection relating to a ‘party to a lawsuit,’ giving rise to the interpretation that the statute applies only to mediations of disputes that are in suit.” P. Benner, <i>Time to Support Uniform Mediation Act</i>, Conn. Law Tribune (Feb. 13, 2006). “[M]ediations that are not convened to resolve a case in court do not fall within the protections of the current statute.” <i>Id.</i></p> <p>The statute does not expressly address any type of professional misconduct. However, it contains four exceptions and “[t]wo of them — disclosure required by court order after notice to the parties, and disclosure required when the ‘interest of justice outweighs the need for confidentiality’ — are broad and of uncertain application.” <i>Id.</i></p> <p>For a legal malpractice case allowing disclosure of mediation evidence under the “interest of justice” exception to prove the case settled in mediation, see <i>Sharon Motor Lodge v. Tai</i>, 2006 Conn. Super. LEXIS 643 (Conn. Super. Ct. 2006) (“a party that seeks the disclosure of privileged mediation communications can obtain such material on the basis that disclosure is required in that “the interest of justice outweighs the need for confidentiality” if the party shows that it has a substantial need for the materials, i.e., that the materials are essential to its claims or defenses, that it would suffer undue hardship if the materials were not disclosed, and that these two considerations outweigh the interests of preserving the confidentiality of the communications.”).</p>

Protection of Mediation Communications: Non-UMA States (except CA, FL, MA, NY, PA & TX)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Delaware	Del. Super. Ct. Civ. R. 16(b)(4)(d) (for compulsory mediation in Superior Court); Del. Ch. Ct. R. 174 (for mediation resulting from a referral by the Chancellor or a Vice Chancellor); 6 Del. Code § 7716 (confidentiality under Voluntary ADR Act)	<p>R. 16(b)(4)(d): All memoranda, work products, and other materials contained in the case files of an ADR Practitioner or the Court related to the mediation are confidential. Any communication made in or in connection with the mediation which relates to the controversy being mediated, whether made to the ADR Practitioner or a party, or to any person made at a mediation conference, is confidential... Confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding except:</p> <p>....</p> <p>(ii) In any action between the ADR Practitioner and a party to the mediation for damages arising out of the mediation</p> <p>R. 174(c): ... Confidentiality. — Mediation conferences are private proceedings such that only parties and their representatives may attend, unless all parties agree otherwise. A mediator may not be compelled to testify in any judicial or administrative proceeding concerning any matter relating to service as a mediator. All memoranda, work product, and other materials contained in the case files of a mediator are confidential. Any communication made in or in connection with the mediation that relates to the controversy being mediated, whether made to the mediator or a party, or to any person if made at a mediation conference, is confidential. Such confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding with the following exceptions:</p> <p>(1) Where all parties to the mediation agree in writing to waive the confidentiality, or</p> <p>(2) Statements, memoranda, materials, and other tangible evidence otherwise subject to discovery, which were not prepared specifically for use in the mediation conference.</p> <p>....</p> <p>Civil Immunity. — Designated mediators shall be immune from civil liability for or resulting from any act or omission done or made while engaged in efforts to assist or facilitate a mediation, unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a wilful, wanton disregard of the rights, safety, or property of another.</p> <p>6 Del. Code § 7716: All ADR proceedings shall be confidential and any memoranda submitted to the ADR Specialist, any statements made during the ADR and any notes or other materials made by the ADR Specialist or any party in connection with the ADR shall not be subject to discovery or introduced into evidence in any proceeding and shall not be construed to be a waiver of any otherwise applicable privilege. Nothing in this section shall limit the discovery or use as evidence of documents that would have otherwise been discoverable or admissible as evidence but for the use of such documents in the ADR proceeding.</p>	<p>“Arguably, the Delaware public policy protecting the confidentiality of the mediation process is even stronger than that reflected in the UMA.” <i>Princeton Ins. Co. v. Vergano</i>, 883 A.2d 44, 61 (Del. Ch. 2005). But there are limits on the protection. For example, a recent unpublished opinion says that a party “cannot ... assert confidentiality for communications that undermine its position when it already has introduced mediation communications that purportedly support its position.” <i>United Health Alliance, LLC v. United Medical LLC</i>, 2013 Del. Ch. LEXIS 115, *11 (Del. Ch. 2013).</p> <p>R. 16(b)(4)(d) has an exception for mediator misconduct, but does not expressly address any other type of professional misconduct. R. 174 and § 7716 do not expressly address any type of professional misconduct.</p>

Protection of Mediation Communications: Non-UMA States (except CA, FL, MA, NY, PA & TX)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Florida	See discussion in memo	See discussion in memo	See discussion in memo
Georgia	Ga. ADR R. VII; see also Ga. ADR Appendix C (confidentiality & other ethical standards for neutrals; procedure for complaint against neutral); Model Ct. Mediation R. XII(d)(2) (party who had no attorney at court-ordered mediation has 3 days after signing of settlement agreement to make objection)	<p>Rule VII. Confidentiality and immunity</p> <p>A. The Extent of Confidentiality: Any statement made during a court-annexed or court-referred mediation ... or as part of intake by program staff in preparation for a mediation ... is confidential, not subject to disclosure, may not be disclosed by the neutral or program staff, and may not be used as evidence in any subsequent administrative or judicial proceeding.... Any document or other evidence generated in connection with a court-annexed or court-referred mediation ... is not subject to discovery.... Neither the neutral nor any observer present with permission of the parties in a court-annexed or court-referred ADR process may be subpoenaed or otherwise required to testify concerning a mediation ... in any subsequent administrative or judicial proceeding....</p> <p>B. Exceptions To Confidentiality: ... Confidentiality does not extend to documents or communications relevant to legal claims or disciplinary complaints brought against a neutral or an ADR program and arising out of an ADR process. Documents or communications relevant to such claims or complaints may be revealed only to the extent necessary to protect the neutral or ADR program.... Collection of information necessary to monitor the quality of a program is not considered a breach of confidentiality.</p> <p>C. Immunity: No neutral in a court program shall be held liable for civil damages for any statement, action, omission or decision made in the court of any ADR process unless that statement, action, omission or decision is 1) grossly negligent and made with malice or 2) is in willful disregard of the safety or property of any party to the ADR process.</p>	<p>Ga. ADR R. VII includes an exception for legal claims and disciplinary complaints against a mediator, but a mediator in Georgia is only subject to civil liability in limited circumstances. The rule does not expressly address other types of professional misconduct.</p> <p>Ga. ADR R. VII applies only to court-ordered mediation. According to a commentator, “private mediations ... are protected only by the evidentiary exclusion rules that protect the content of settlement discussions.” See http://georgiaadr.blogspot.com/2007/11/should-georgia-adopt-uniform-mediation.html.</p> <p>For a Georgia Supreme Court decision on protection of mediation communications, see <i>Wilson v. Wilson</i>, 282 Ga. 782, 653 S.E.2d 702, 732 (Ga. S.Ct. 2007) (urging trial courts to exercise caution in requiring mediators to testify, while concluding that “fairness to the opposing party and the integrity of mediation process dictate that we create [an exception to the confidentiality of a court-referred mediation] when a party contends in court that he or she was not competent to enter a signed settlement agreement that resulted from the mediation.”).</p> <p>For a detailed description of Georgia’s system of processing complaints against mediators (including the confidentiality rules for that system), see P. Young, <i>Take It or Leave It, Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field</i>, 21 Ohio. St. J. Disp. Resol. 721, 763-66, 830-48 (2006).</p>

Protection of Mediation Communications: Non-UMA States (except CA, FL, MA, NY, PA & TX)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Indiana	Ind. ADR R. 2.11; see also Ind. Code Ann. § 4-21.5-3.5-27 (administrative procedures)	<p>2.11. Mediation shall be regarded as settlement negotiations governed by Ind. Evidence rule 408. For purposes of reference, Evid. R. 408 provides as follows:</p> <p>Rule 408. Compromise and Offers to Compromise</p> <p>Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. Compromise negotiations encompass alternative dispute resolution.</p> <p>Mediation sessions shall be closed to all persons other than the parties of record, their legal representatives, and other invited persons.</p> <p>Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matter shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by the parties, and an objection to the obtaining of testimony or physical evidence from mediation may be made by any party or by the mediators.</p>	<p>According to the Indiana Supreme Court, “Indiana judicial policy strongly urges the amicable resolution of disputes and thus embraces a robust policy of confidentiality of conduct and statements made during negotiation and mediation.” <i>Horner v. Carter</i>, 981 N.E.2d 1210, 1210 (Ind. S.Ct. 2013). The key provision (Ind. ADR R. 2.11) says that “any matter discussed during the mediation . . . shall be considered confidential and privileged in nature.” The provision does not list any exceptions to mediation confidentiality, for professional misconduct or anything else.</p> <p>With certain limitations, the rule applies “to ‘all civil and domestic relations litigation filed’ in Indiana trial courts . . .” <i>Vernon v. Acton</i>, 732 N.E.2d 805, 808 n.5 (Ind. S.Ct. 2000). The rule “do[es] not apply to a mediation not instituted pursuant to judicial action in a pending case.” <i>Id.</i> Parties may protect the confidentiality of a pre-suit mediation by private agreement. <i>Id.</i> A 1999 bill (H.B. 1587) to provide pre-suit protection was unsuccessful.</p> <p>One commentator says Rule 2.11 “is not as clear, specific and broad as the UMA.” See http://www.theindianalawyer.com/van-winkle-should-indiana-adopt-uniform-mediation-act/PARAMS/article/27414. “[A]lthough Indiana’s mediation rule both specifically applies Evidence Rule 408 and states that matters in mediation are ‘confidential and privileged,’ it does not specifically delineate the scope of mediation nor does it explain the interplay and relationship of the concepts of confidentiality under 408 and privilege.” <i>Id.</i></p> <p>A critical issue is the extent to which the rule permits introduction of mediation evidence that is offered for a purpose other than proving liability for the claims mediated. As construed by the Indiana Supreme Court, “[t]he admissibility provided for mediation evidence ‘offered for another purpose’ pertains to the use of such evidence <i>only in collateral matters</i> unrelated to the dispute that is the subject of the mediation.” <i>Horner</i>, 981 N.E.2d at 1210 (emphasis added).</p> <p>In 2013, the Indiana ADR community was exploring the possibility of revising Indiana law on protection of mediation communications. See <i>id.</i> at 1210 n.1; http://www.theindianalawyer.com/article/print?articleId=31054; Memorandum 2014-24, pp. 12-13. The study is still in progress.</p>

Protection of Mediation Communications: Non-UMA States (except CA, FL, MA, NY, PA & TX)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Kansas	<p>Kan. Stat. Ann. § 60-452a (in Kan. Rules of Evidence); Kan. Stat. Ann. § 5-512 (in Kan. Dispute Resolution Act); see also Kan. Sup. Ct. R. 903 (Ethical Standards for Mediators)</p>	<p>60-452a. (a) All verbal or written information transmitted between any party to a dispute and a neutral person conducting the proceeding, or the staff of an approved program under K.S.A. 5-501 et seq., and amendments thereto, shall be confidential communications. No admission, representation or statement made in the proceeding shall be admissible as evidence or subject to discovery. A neutral person shall not be subject to process requiring the disclosure of any matter discussed during the proceedings unless all the parties consent to a waiver. Any party and the neutral person or staff of an approved program conducting the proceeding, participating in the proceeding has a privilege in any action to refuse to disclose, and to prevent a witness from disclosing, any communication made in the course of the proceeding....</p> <p>(b) The confidentiality and privilege requirements of this section shall not apply to:</p> <p>(1) Information that is reasonably necessary to allow investigation of or action for ethical violations against the neutral person conducting the proceeding or for the defense of the neutral person or staff of an approved program conducting the proceeding in an action against the neutral person or staff of an approved program if the action is filed by a party to the proceeding;</p> <p>....</p> <p>(Kan. Stat. Ann. § 5-512 is almost identical to Kan. Stat. Ann. § 60-452a.)</p>	<p>Kan. Stat. Ann. § 60-452a(b)(1) creates an exception for mediation evidence that is relevant to a claim against a mediator or an allegation that a mediator committed an ethical violation. The provision does not expressly address other types of professional misconduct. Kan. Stat. Ann. § 5-512(b)(1) is similar.</p> <p>According to the Court of Appeals of Kansas, the two provisions, taken together, “establish a strong rule that communications made during mediation are confidential and may not be admitted over a party’s objection.” <i>Baraban v. Hammonds</i>, 49 Kan. App. 2d 530, 536, 312 P.3d 373 (Kan. Ct. App. 2013).</p> <p>The same court also said that “when the [Kansas] legislature expressly includes several listed exceptions to a statutory rule, <i>it intends to exclude other exceptions.</i>” <i>Id.</i> at 537 (emphasis added). Given that principle of statutory construction, it seems unlikely that the Kansas mediation confidentiality provisions are subject to an <i>implied</i> exception for attorney misconduct.</p>

Protection of Mediation Communications: Non-UMA States (except CA, FL, MA, NY, PA & TX)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Kentucky	Ky. Model Ct. Mediation R. 12; numerous local court rules (e.g., Ky. 11th Jud. Cir. L.R. 912 (includes good cause exception); Ky. 20th Jud. Cir. L.R. 152-8 (does not include good cause exception))	<p>12. A. Mediation sessions shall be closed to all persons other than the parties, their legal representatives, and other persons invited by the mediator with the consent of the parties.</p> <p>B. Mediation shall be regarded as settlement negotiations for purposes of K.R.E. 408.</p> <p>C. Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matters shall be considered confidential and privileged in nature except on order of the Court for good cause shown. This privilege and immunity reside in the mediator and may not be waived by the parties.</p> <p>D. Nothing in this rule shall prohibit the mediator from reporting abuse according to KRS 209.030, KRS 620.030, or other applicable law.</p>	<p>Many jurisdictions in Kentucky have a local rule that is similar or identical to Ky. Model Ct. Mediation R. 12 (shown here). The model rule does not expressly address any type of professional misconduct. However, it is subject to an exception “on order of the Court for good cause shown.”</p>

Protection of Mediation Communications: Non-UMA States (except CA, FL, MA, NY, PA & TX)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Louisiana	La. Rev. Stat. § 9:4112	<p>9:4112. A. Except as provided in this Section, all oral and written communications and records made during mediation, whether or not conducted under this Chapter and whether before or after the institution of formal judicial proceedings, are not subject to disclosure, and may not be used as evidence in any judicial or administrative proceeding.</p> <p>B. (1) The parties, counsel, and other participants therein shall not be required to testify concerning the mediation proceedings and are not subject to process or subpoena, issued in any judicial or administrative procedure, which requires the disclosure of any communications or records of the mediation, except with respect to the following:</p> <p>....</p> <p>(c) A judicial determination of the meaning or enforceability of an agreement resulting from a mediation procedure if the court determines that testimony concerning what occurred in the mediation proceeding is necessary to prevent fraud or manifest injustice.</p> <p>(2) The mediator is not subject to subpoena and cannot be required to make disclosure through discovery or testimony at trial except in a judicial or administrative procedure with respect to Subparagraph B(1)(a) of this Section.</p> <p>....</p> <p>D. If this Section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order or whether the communications or materials are subject to disclosure.</p> <p>....</p>	<p>La. Rev. Stat. § 9:4112(B)(1)(a)-(b) (not shown) are exceptions designed to ensure that parties comply with a court order to mediate. Aside from those exceptions, the statute protecting mediation communications does not expressly address any type of professional misconduct.</p> <p>However, a court may admit mediation evidence in determining the meaning or enforceability of a mediated settlement, if such evidence is necessary to prevent fraud or manifest injustice (La. Rev. Stat. § 9:4112(B)(1)(d)). In addition, when La. Rev. Stat. § 9:4112 conflicts with other legal requirements for disclosure, a court may use an <i>in camera</i> procedure to determine whether to permit disclosure (La. Rev. Stat. § 9:4112(D)). The statute does not provide any guidance on what standard the court should use in making such a determination. These two provisions might provide a basis for introducing mediation evidence that tends to prove or disprove that professional misconduct occurred at a mediation.</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Maine	Maine R. Evid. 408(b); Maine R. Evid. 514; see also Maine R. Civ. Proc. 16B(k) (applicable to certain cases in Superior Court)	<p>408....(b) Mediation. Evidence of conduct or statements by any party or mediator at a mediation session undertaken to comply with any statute, court rule, or administrative agency rule or in which the parties have been referred to mediation by a court, administrative agency, or arbitrator or in which the parties and mediator have agreed in writing or electronically to mediate with an expectation of confidentiality, is not admissible for any purpose other than to prove fraud, duress, or other cause to invalidate the mediation result in the proceeding with respect to which the mediation was held or in any other proceeding between the parties to the mediation that involves the subject matter of the mediation.</p> <p>514....(b) Mediator Privilege. All memoranda and other work product, including files, reports, interviews, case summaries, and notes, prepared by a mediator shall be confidential and not subject to disclosure in any subsequent judicial or administrative proceeding involving any of the parties to any mediation in which the materials are generated; nor shall a mediator be compelled to testify in any subsequent judicial or administrative proceeding concerning a mediation or to any communication made between him or her and any participant in the mediation process in the course of, or relating to the subject matter of, any mediation.</p> <p>(c) Exceptions. There is no privilege under this rule:</p> <p>....</p> <p>(4) <i>Mediator misconduct.</i> For communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator.</p> <p>(5) <i>Party or counsel misconduct.</i> For communications 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.</p> <p>....</p>	<p>Maine’s current approach to mediation communications was adopted recently, after consideration of the UMA. See, e.g., M. Bigos, <i>Maine Considers the Uniform Mediation Act</i>, 18 Maine Bar J. 222 (2003).</p> <p>Maine’s “Mediator Privilege” (Rule 514) includes an exception for mediator misconduct and an exception for other types of professional misconduct. Its Rule 408 does not expressly address professional misconduct. However, that rule includes an exception for mediation evidence that is used “to prove fraud, duress, or other cause to invalidate the mediation result.” Also, that rule only appears to provide protection in cases between the mediation parties that involve the subject matter of the mediation.</p> <p>In a recent criminal case, the Supreme Judicial Court of Maine held that the trial court properly admitted mediation evidence. See <i>State v. Tracy</i>, 2010 ME 27, 991 A.2d 821 (2010). Among other things, the Court explained that “revised Rule 408(b) does not render statements in mediation inadmissible in proceedings involving third parties, such as criminal proceedings, or even in proceedings between the mediating parties that do not involve the subject matter of the mediation. Nor does it insulate statements in mediation from civil discovery.” <i>Id.</i> at 827 n.8, quoting Advisory Committee Note to Jan. 1, 2010 amendment to Rule 408(b).</p> <p>For a detailed description of Maine’s system of processing complaints against mediators, see P. Young, <i>Take It or Leave It, Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field</i>, 21 Ohio. St. J. Disp. Resol. 721, 771-74, 862-76 (2006).</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Maryland	Md. Code, Courts & Judicial Proceedings §§ 3-1801 to 3-1806 (Maryland Mediation Confidentiality Act)	<p>3-1803. (a) ... Except as provided in § 3-1804 of this subtitle, a mediator or any person present or otherwise participating in a mediation at the request of a mediator:</p> <p>(1) Shall maintain the confidentiality of all mediation communications; and</p> <p>(2) May not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.</p> <p>(b) Except as provided in § 3-1804 of this subtitle:</p> <p>(1) A party to a mediation and any person present or otherwise participating in the mediation at the request of a party may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding; and</p> <p>(2) 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.</p> <p>3-1804.... (b) Disclosures allowed. — In addition to any other disclosure required by law, a mediator, a party, or a person who was present or who otherwise participated in a mediation at the request of the mediator or a party may disclose mediation communications:</p> <p>....</p> <p>(2) To the extent necessary to assert or defend against allegations of mediator misconduct or negligence.</p> <p>(3) To the extent necessary to assert or defend against allegations of professional misconduct or malpractice by a party or any person who was present or who otherwise participated in the mediation at the request of a party, except that a mediator may not be compelled to participate in a proceeding arising out of the disclosure; or</p> <p>(4) 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.</p> <p>(c) Disclosure by court order; limitations — A court may order mediation communications to be disclosed only to the extent that the court determines that the 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.</p>	<p>The Maryland Mediation Confidentiality Act includes an exception for mediator misconduct and an exception for other types of professional misconduct. The Act also includes other potentially applicable exceptions and limitations on the protection for mediation communications. See, e.g., §§ 3-1804(b)(4) & (c); see also http://adrlawblog.blogspot.com/2012/11/maryland-mediation-confidentiality-act.html (“The provision in the Act requiring mediators to certify adherence to ethical standards means that the statutory confidentiality protections can be lost if the mediator fails to so certify, in writing.”); http://www.americanbar.org/content/dam/aba/publishing/dispute_resolution_magazine/DanDozier.authcheckdam.pdf (parties who voluntarily agree to mediate must agree in writing that mediation communications are confidential <i>and</i> mediator must state in writing to all parties that mediator has read and will abide by Maryland Standard of Conduct for mediators).</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Massachusetts	See discussion in memo	See discussion in memo	See discussion in memo
Michigan	Mich. Ct. R. 2.412	<p>2.412. (A) Scope. This rule applies to cases that the court refers to mediation as defined and conducted under MCR 2.411 and MCR 3.216.</p> <p>....</p> <p>(C) Confidentiality. Mediation communications are confidential. They are not subject to discovery, are not admissible in a proceeding, and may not be disclosed to anyone other than mediation participants except as provided in subrule (D).</p> <p>(D) Exceptions to Confidentiality. Mediation communications may be disclosed under the following circumstances:</p> <p>....</p> <p>(4) The disclosure is necessary for a court to resolve disputes about the mediator’s fee.</p> <p>....</p> <p>(7) Court personnel reasonably require disclosure to administer and evaluate the mediation program.</p> <p>....</p> <p>(10) The disclosure is included in a report of professional misconduct filed against a mediation participant or is sought or offered to prove or disprove misconduct allegations in the attorney discipline process.</p> <p>(11) The mediation communication occurs in a case out of which a claim of malpractice arises and the disclosure is sought or offered to prove or disprove a claim of malpractice against a mediation participant.</p> <p>(12) The disclosure is in a proceeding to enforce, rescind, reform, or avoid liability on a document signed by the mediation parties or acknowledged by the parties on an audio or video recording that arose out of mediation, if the court finds, after an in camera hearing, that the party seeking discovery or the proponent of the evidence has shown</p> <p>(a) that the evidence is not otherwise available, and</p> <p>(b) that the need for the evidence substantially outweighs the interest in protecting confidentiality.</p> <p>....</p>	<p>Mich. Ct. Rule 2.412 applies only to court-referred mediations. The staff did not find any statute or court rule protecting pre-suit mediations.</p> <p>Rule 2.412 is subject to numerous exceptions, including an exception for professional misconduct and attorney discipline (R. 2.412(D)(10)) and an exception for evidence relating to a malpractice claim (R. 2.412(D)(11)). Several other exceptions may also provide a basis for addressing professional misconduct that occurs in a mediation. See in particular R. 2.412(D)(4), (7), (12).</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Minnesota	<p>Minn. Gen. R. Prac. 114.08 & Comment (applicable to ADR proceedings, which are required by Minn. Gen. R. Prac. 114.01 in almost all civil cases); Minn. Stat. § 595.02, Subd. 1(m), Subd. 1a; Minn. Stat. § 572.36; see also R. Reuben, <i>The Sound of Dust Settling: A Response to Criticisms of the UMA</i>, 2003 J. Disp. Resol. 99, 128 (2003) (Minnesota has about 25 statutes, court rules & rules of evidence affecting mediation confidentiality)</p>	<p><u>Rule 114.08:</u> (a) <i>Evidence</i> — Without the consent of all parties and an order of the court, ... no evidence that there has been an ADR proceeding or any fact concerning the proceeding may be admitted in a trial de novo or in any subsequent proceeding involving any of the issues or parties to the proceeding. (b) <i>Inadmissibility</i> — Subject to Minnesota Statutes, section 595.02, and except as provided in paragraphs (a) and (d), no statements made nor documents produced in non-binding ADR processes which are not otherwise discoverable shall be subject to discovery or other disclosure. Such evidence is inadmissible for any purpose at the trial, including impeachment. (e) <i>Records of Neutral</i> — Notes, records, and recollections of the neutral are confidential, which means that they shall not be disclosed to the parties, the public, or anyone other than the neutral, unless (1) all parties and the neutral agree to such disclosure or (2) required by law or other applicable professional codes. No record shall be made without the agreement of both parties, except for a memorandum of issues that are resolved. (The 2004 Comment to R. 114.08 underscores the need for confidentiality) <u>§ 595.02, Subd. 1:</u> <i>Competency of witnesses</i> — Every person of sufficient understanding ... may testify in any action or proceeding ..., except as provided in this subdivision: (m) A person cannot be examined as to any communication or document, including work notes, made or used in the course of or because of mediation pursuant to an agreement to mediate. This does not apply to the parties in the dispute in an application to a court by a party to have a mediated settlement agreement set aside or reformed. A communication or document otherwise not privileged does not become privileged because of this paragraph. This paragraph is not intended to limit the privilege accorded to communication during mediation by the common law.</p>	<p>Minnesota’s legal community participated in the drafting of the UMA. See http://www2.mnbar.org/sections/adr/cmdr-comment.htm. But Minnesota has not enacted the uniform act.</p> <p>One commentator, focusing on Rule 114.08 & Comment, says that Minnesota “has concluded that confidentiality in mediation is imperative” and “Minnesota does not provide any exceptions to the mediation confidentiality requirements.” B. Schwartz, <i>The Intricacies of Mediation Confidentiality</i> (available at http://www2.mnbar.org/sections/new-lawYERS/2013-14%20Newsletter/Fall2013/SchwartzArticle.pdf).</p> <p>But the statute making a mediator incompetent to testify (§ 595.02, Subd. 1a) is inapplicable to any statement or conduct that could “constitute professional misconduct” or “give rise to disqualification proceedings under the Rules of Professional Conduct for attorneys.” A law professor says that although this statutory language is not clear, “it indicates that a neutral could defend against a complaint, but it says nothing about when the complaining party may breach confidentiality to support a complaint against a mediator.” P. Young, <i>Take It or Leave It, Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field</i>, 21 Ohio. St. J. Disp. Resol. 721, 854 (2006).</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Minnesota (cont'd)		<p><u>§ 595.02, Subd. 1a:</u> <i>Alternative dispute resolution privilege</i> — No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could:</p> <p>....</p> <p>(2) give rise to disqualification proceedings under the Rules of Professional Conduct for attorneys; or</p> <p>(3) constitute professional misconduct.</p> <p><u>§ 572.36</u> In any action, a court of competent jurisdiction shall set aside or reform a mediated settlement agreement if appropriate under the principles of law applicable to contracts, or if there was evident partiality, corruption, or misconduct by a mediator prejudicing the rights of a party. That the relief could not or would not be granted by a court of law or equity is not ground for setting aside or reforming the mediated settlement agreement unless it violates public policy.</p>	<p>In contrast to the statute making a mediator incompetent to testify, the provision that says a person cannot be examined regarding mediation communications or documents (§ 595.02, Subd. 1) does not expressly refer to any type of professional misconduct. But it is expressly inapplicable when a party to the mediated dispute applies to have a court set aside or reform the mediated settlement agreement. See also § 572.36 (mediated settlement agreement may be set aside due to partiality, corruption, or misconduct by a mediator prejudicing the rights of a party).</p> <p>For a detailed description of Minnesota’s system of processing complaints against mediators (including the confidentiality rules for that system), see P. Young, <i>supra</i>, at 848-62.</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Mississippi	Rule VII of the Court Annexed Mediation Rules for Civil Litigation; see also Rule XV(E) of the Court Annexed Mediation Rules for Civil Litigation & Comment	<p>Rule VII. Confidentiality of Communications in Mediation</p> <p>A. Except as provided by subsections C and D below, a communication relating to the subject matter of any civil dispute made by a participant in a mediation is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.</p> <p>B. Mediation is confidential and no record shall be made. The participants or the mediator may not be required to testify in any proceedings relating to matters occurring during the mediation session, nor shall they be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.</p> <p>C. Any oral communication or written material used in or made a part of a mediation is admissible or discoverable only if it is admissible or discoverable independent of the mediation.</p> <p>D. If this section conflicts with other legal requirements for disclosure of communications or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.</p> <p>Rule XV. Standards of Conduct for Mediators</p> <p>....</p> <p>E. Confidentiality: <i>A Mediator shall Maintain the Reasonable Expectations of the Parties with Regard to Confidentiality</i></p> <p>The mediator shall follow the requirements of Rule VII regarding confidentiality. The reasonable expectations of the parties with regard to confidentiality shall be met by the mediator. The parties' expectations of confidentiality depend on the provisions of Rule VII, the circumstances of the mediation and any agreements they may make. The mediator shall not disclose any matter that a party expects to be confidential unless given permission by all parties or unless required by rule, law or other public policy.</p>	<p>Rule VII only applies when a court refers a civil case to mediation. In other contexts, the extent of protection for mediation communications appears to be up to the parties. Even in a court-referred mediation, Mississippi emphasizes the importance of respecting the expectations of the parties regarding confidentiality. See Rule XV(E) & Comment.</p> <p>Rule VII does not expressly address any type of professional misconduct. However, the rule calls for an <i>in camera</i>, case-specific analysis in the event of a conflict with other legal requirements for disclosure of mediation communications.</p> <p>In addition, the Comment to Rule XV(E) says that the protection for mediation confidentiality “should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible persons.” That might mean that Mississippi would permit disclosure of mediation communications for purposes of investigating alleged misconduct at a mediation.</p> <p>For a recent case in which a party sought to undo a settlement agreement due to alleged duress and coercion during mediation, see <i>Chantey Music Publishing, Inc. v. Malaco, Inc.</i>, 915 So.2d 1052 (Miss. S.Ct. 2005). The Mississippi Supreme Court upheld the settlement agreement, emphasizing that</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Mississippi (cont'd)		<p><u>Comment to Rule XV(E):</u></p> <p>Within the limitations of Rule VII, the parties may make their own rules with respect to confidentiality, or other accepted practice of an individual mediator, or the appointing court may dictate a particular set of expectations. Since the parties' expectations regarding confidentiality are important, the mediator should discuss these expectations with the parties.</p> <p>If the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions.</p> <p>In order to protect the integrity of the mediation, a mediator should avoid communicating information about how the parties acted in the mediation process, the merits of the case, or settlement offers. The mediator may report, if required, whether parties appeared at a scheduled mediation.</p> <p>Where the parties have agreed that all or a portion of the information disclosed during a mediation is confidential, the parties' agreement should be respected by the mediator.</p> <p>Confidentiality should not be construed to limit or prohibit the effective monitoring, research, or evaluation of mediation programs by responsible persons. Under appropriate circumstances, researchers may be permitted to obtain access to the statistical data and, with the permission of the parties, to individual case files, observations of live mediation, and interviews with participants.</p>	<p>"[c]ompromise reached by way of mediation is a favored form of dispute resolution in Mississippi." <i>Id.</i> at 1060.</p> <p>In reaching that conclusion, the Court considered extensive evidence of mediation communications, without discussing confidentiality at all. Presumably, the parties agreed to waive the protection of Rule VII, or agreed that it did not apply. Another recent case was similar in this respect. See <i>Ammons v. Cordova Floors, Inc.</i>, 904 So.2d 185 (Miss. Ct. App. 2005).</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Missouri	Mo. Rev. Stat. § 435.014; Mo. S.Ct. R. 17.06	<p>§ 435.014. (1) If all the parties to a dispute agree in writing to submit their dispute to any forum for ... mediation, then no person who serves as ... mediator, nor any agent or employee of that person, shall be subpoenaed or otherwise compelled to disclose any matter disclosed in the process of setting up or conducting the ... mediation.</p> <p>(2) ... [M]ediation proceedings shall be regarded as settlement negotiations. Any communication relating to the subject matter of such disputes made during the resolution process by any participant, mediator, ... or any other person present at the dispute resolution shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such proceedings not otherwise discoverable or obtainable shall be admissible as evidence of subject to discovery.</p> <p>17.06. (a) An alternative dispute resolution process undertaken pursuant to the Rule 17 shall be regarded as settlement negotiations. Any communication relating to the subject matter of such dispute made during the alternative dispute resolution process by a participant or any other person present at the process shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such process shall be admissible as evidence or subject to discovery, except that, no fact independently discoverable shall be immune from discovery by virtue of having been disclosed in such confidential communication.</p> <p>(b) No individual or organization providing alternative dispute resolution services pursuant to this Rule 17 ... shall be subpoenaed or otherwise compelled to disclose any matter disclosed in the process of setting up or conducting the alternative dispute resolution process.</p> <p>....</p> <p>(d) An individual or organization providing alternative dispute resolution services pursuant to this Rule 17 or any agent or employee of the individual or organization may be called in an action to enforce the written settlement agreement reached following the conclusion of the alternative dispute resolution process for the limited purpose of describing events following the conclusion of the alternative dispute resolution process.</p>	<p>Neither § 435.014 nor Rule 17.06 refer to any type of professional misconduct. On its face, each provision appears to provide essentially blanket protection for mediation communications.</p> <p>Case law reinforces the view that Missouri provides strong protection for mediation communications. See <i>Williams v. Kansas City Title Loan Co., Inc.</i>, 314 S.W.3d 868, 873 (Mo. Ct. App. 2010) (“We hold that Rule 17 means what it says: the essential terms of settlements reached during court-ordered mediation sessions must be reduced to a writing signed by the parties in order for such settlements to be enforced.”); <i>Kenney v. Emge</i>, 972 S.W.2d 616, 621 (Mo. Ct. App. 1998) (“The trial court erred in requiring the mediator to appear and testify in court.”).</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Montana	Mont. Code Ann. § 26-1-813	<p>§ 26-1-813....</p> <p>(2) Except upon written agreement of the parties and the mediator, mediation proceedings must be:</p> <p>(a) confidential;</p> <p>(b) held without a verbatim record; and</p> <p>(c) held in private.</p> <p>(3) A mediator’s files and records, with the exception of signed, written agreements, are closed to all persons unless the parties and the mediator mutually agree otherwise. Except as provided in subsection (5), all mediation-related communications, verbal or written, between the parties or from the parties to the mediator and any information and evidence presented to the mediator during the proceedings are confidential. The mediator’s report, if any, and the information or recommendations contained in it, with the exception of a signed, written agreement, are not admissible as evidence in any action subsequently brought in any court of law or before any administrative agency and are not subject to discovery or subpoena in any court or administrative proceeding unless all parties waive the rights to confidentiality and privilege.</p> <p>(4) Except as provided in subsection (5), the parties to the mediation and a mediator are not subject to subpoena by any court or administrative agency and may not be examined in any action as to any communication made during the course of the mediation proceeding without the consent of the parties to the mediation and the mediator.</p> <p>(5) The confidentiality and privilege provisions of this section do not apply to information revealed in a mediation if disclosure is:</p> <p>(a) required by any statute;</p> <p>(b) agreed to by the parties and the mediator in writing, whether prior to, during, or subsequent to the mediation; or</p> <p>(c) necessary to establish a claim or defense on behalf of the mediator in a controversy between a party to the mediation and the mediator.</p> <p>(6) Nothing in this section prohibits a mediator from conveying information from one party to another during the mediation, unless a party objects to disclosure.</p>	<p>The protection of Section 26-1-813 is subject to an exception for evidence “necessary to establish a claim or defense on behalf of the mediator in a controversy between a party to the mediation and the mediator.” It is not clear whether this exception would encompass evidence necessary to establish a claim <i>against</i> a mediator, or only evidence necessary to establish a claim <i>on behalf of</i> the mediator. The wording is ambiguous on this point.</p> <p>Section 26-1-813 does not expressly address any other type of professional misconduct.</p> <p>For a recent case construing § 26-1-813, see <i>Kluver v. PPL Montana, LLC</i>, 368 Mont. 101, 293 P.3d 817 (Mont. S.Ct. 2012). In that case, the Montana Supreme Court held that the trial court erroneously admitted evidence protected by the mediation confidentiality statute, but the error was harmless. Two justices dissented, saying the error was harmful.</p> <p>In explaining its reasoning, the <i>Kluver</i> majority said it was “reluctant to allow exceptions” to mediation confidentiality, other than the ones expressly established by the Legislature. <i>Id.</i> at 120. That might mean that the Montana Supreme Court would be reluctant to imply an exception for evidence relating to attorney misconduct.</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Nevada	<p>Nev. Rev. Stat. § 48.109; there are also provisions specific to a particular court or context, such as Nev. Foreclosure Mediation Rule 19, which was discussed by the Nevada Supreme Court in <i>Civil Rights for Seniors v. Administrative Office of the Courts</i>, 313 P.3d 216 (Nev. S.Ct. 2013)</p>	<p>§ 48.109. (1) A meeting held to further resolution of a dispute may be closed at the discretion of the mediator.</p> <p>(2) The proceedings of the mediation session must be regarded as settlement negotiations, and no admission, representation or statement made during the session, not otherwise discoverable or obtainable, is admissible as evidence or subject to discovery.</p> <p>(3) A mediator is not subject to civil process requiring the disclosure of any matter discussed during the mediation proceedings.</p>	<p>Section 48.109 does not expressly refer to any type of professional misconduct.</p> <p>The staff did not find any case law construing Section 48.109, just a passing reference to it in a federal case (<i>Clarendon Nat'l Ins. Co. v. Nat'l Fire & Marine Ins. Co.</i>, 512 Fed. Appx. 671, 673 (9th Cir. 2013)).</p> <p>The only express exception to Section 48.109 is the one for evidence “otherwise discoverable or obtainable.” Because there does not appear to be any case law construing the provision, it is difficult to predict whether the Nevada courts would imply any exceptions.</p>
New Hampshire	<p>N.H. Super. Ct. R. 170(E)</p>	<p>170.... (E) <i>Inadmissibility of Alternative Dispute Resolution Proceedings</i></p> <p>(1) ADR proceedings and information relating to those proceedings shall be confidential. Information, evidence, or the admission of any party or the valuation placed on the case by any neutral shall not be disclosed or used in any subsequent proceeding. Statements made and documents prepared by a party, attorney, or other participant in aid of such proceeding shall be privileged and shall not be disclosed to any court or arbitrator or construed for any purpose as an admission against interest. All non-binding ADR proceedings are deemed settlement conferences consistent with the Superior Court Rules and Rules of Evidence. In addition, the parties shall not introduce into evidence in any subsequent proceeding, the fact that there was an ADR proceeding or any other matter concerning the conduct of the ADR proceedings except as required by the Rules of Professional Conduct or the Mediator Standards of Conduct.</p> <p>(2) Evidence that would otherwise be admissible at trial shall not be rendered inadmissible as a result of its use in an ADR proceeding.</p>	<p>Rule 170 applies to all New Hampshire ADR proceedings, not just mediation. The rule does not expressly refer to any type of professional misconduct.</p> <p>The staff did not find any case law construing the protections of Rule 170(E).</p> <p>The only express exception to Rule 170(E) is for “[e]vidence that would otherwise be admissible at trial.” Because there does not appear to be any case law construing the provision, it is difficult to predict whether the New Hampshire courts would imply any exceptions.</p> <p>The UMA was introduced in New Hampshire as HB 308 in 2003, but the bill was not enacted.</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
New Mexico	N.M. Stat. Ann. Sections 44-7B-4 and 44-7B -5, which are part of the New Mexico Mediation Procedures Act (“MPA”)	<p>44-7B-4. Except as otherwise provided in the Mediation Procedures Act or by applicable judicial court rules, all mediation communications are confidential, and not subject to disclosure and shall not be used as evidence in any proceeding.</p> <p>44-7B-5. A. Mediation communications are not confidential pursuant to the Mediation Procedures Act if they:</p> <p>....</p> <p>(8) are sought or offered to disprove a claim or complaint of professional misconduct or malpractice based on conduct during a mediation and filed against a mediation party or nonparty participant;</p> <p>....</p> <p>B. Mediation communications may be disclosed if a court, after hearing in camera and for good cause shown, orders disclosure of evidence that is sought to be offered and is not otherwise available in an action on an agreement arising out of a mediation evidenced by a record. Nothing in this subsection shall require disclosure by a mediator of any matter related to mediation communications.</p> <p>C. Mediators shall not be required to make disclosure, either through discovery or testimony at trial or otherwise, of any matter related to mediation communications, except:</p> <p>(1) Pursuant to Paragraphs (3) through (10) of Subsection A and Paragraph (3) of Subsection D of this section; and</p> <p>(2) to prove or disprove a claim of mediator misconduct or malpractice filed against a mediator.</p> <p>D. Nothing in the Mediation Procedures Act shall prevent:</p> <p>....</p> <p>(2) the gathering of information for research or educational purposes or for the purpose of evaluating or monitoring the performance of a mediator; provided that the mediation parties or the specific circumstances of the dispute of the mediation parties are not identified or identifiable;</p> <p>....</p>	<p>The MPA became effective on July 1, 2007. “The only exceptions under the MPA to the confidentiality of mediation communications are identified in Section 44-7B-5.” <i>Warner v. Calvert</i>, 150 N.M. 333, 258 P.3d 1125, 1132 (N.M. Ct. App. 2011); see also <i>Carlsbad Hotel Associates, LLC v. Patterson-UTI Drilling Co.</i>, 145 N.M. 385, 199 P.3d 288, 297 (N.M. Ct. App. 2008) (“The Act nowhere requires good faith participation or provides sanctions for failing to act in good faith.”).</p> <p>Section 44-7B-5 states many exceptions, including paragraph (A)(8), which permits use of mediation communications that “are sought or offered to <i>disprove</i> a claim or complaint of professional misconduct or malpractice based on conduct during a mediation and filed against a mediation party or nonparty participant.” (Emphasis added.)</p> <p>It is less clear whether mediation communications may be used to <i>prove</i> professional misconduct or malpractice. Paragraph (C)(2) specifically refers to “prov[ing] a claim of <i>mediator</i> misconduct or malpractice filed against a mediator.” (Emphasis added.) With regard to proving other types of misconduct, it might be possible to invoke one of the other exceptions, depending on the circumstances.</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
New York	See discussion in memo	See discussion in memo	See discussion in memo
North Carolina	<p>N.C. Gen. Stat. §§ 7A-38.1(l) (applicable to superior court civil actions), 7A-38.4A(j) (applicable to district court actions); N.C. Settlement Conf. R. 4(F); Rule III of the N.C. Standards of Professional Conduct for Mediators; Rule 8.3 of the Revised Rules of Professional Conduct of the N.C. State Bar</p>	<p>§ 7A-38.1.... (l) Inadmissibility of negotiations — Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions <i>on the same claim</i>, except:</p> <p>....</p> <p>(2) In proceedings to enforce or rescind a settlement of the action.</p> <p>(3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals</p> <p>....</p> <p>No mediator, other neutral, or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding pursuant to this section <i>in any civil proceeding for any purpose</i>, including proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and <i>except</i> proceedings for sanctions under this section, <i>disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals</i>, and proceedings to enforce laws concerning juvenile or elder abuse.</p> <p>(Emphasis added.) Section 7A-38.4A(j) (applicable to district court actions) is essentially identical to Section 7A-38.1 (shown above).</p> <p>Rule 4(F): No recording. There shall be no stenographic, audio or video recording of the mediation process by any participant. This prohibition precludes recording either surreptitiously or with the agreement of the parties.</p>	<p>“Section 7A-38.1(l) was enacted to prevent a chilling effect on settlement negotiations by allowing parties to freely make settlement offers without fear that these offers would be revealed to a subsequent finder of fact as some evidence of liability on either the present or a future substantive claim.” <i>Few v. Hammack Enterprises, Inc.</i>, 132 N.C. App. 291, 296 (N.C. Ct. App. 1999).</p> <p>Notably, however, Section 7A-38.1(l) makes mediation communications inadmissible only in the action mediated or another civil action “on the same claim.” The same is true of Section 7A-38.4A(j).</p> <p>With regard to inadmissibility of mediation communications, both statutes include an exception for a disciplinary proceeding against an attorney or a mediator.</p> <p>Sections 7A-38.1(l) and 7A-38.4A(j) also prevent a mediator from being compelled to testify in <i>any</i> civil action for any purpose. This rule is also subject to an exception for a disciplinary proceeding against an attorney or a mediator.</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
North Carolina (cont'd)		<p>Rule III. <u>Confidentiality</u>: A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtaining within the mediation process.</p> <p>A. A mediator shall not disclose ... to any non-participant, any information communicated to the mediator by a participant within the mediation process</p> <p>B. A mediator shall not disclose ... to any participant, information communicated to the mediator in confidence by any other participant in the mediation process, ... unless that other participant gives the mediator permission to do so....</p> <p>C. A mediator shall not disclose to court officials ... any information communicated to the mediator by any participant within the mediation process ... except</p> <p>D. The confidentiality provisions set forth in A, B, and C above notwithstanding, a mediator may report otherwise confidential conduct or statements ... in the circumstances set forth in sections (1) and (2) below:</p> <p>(1) A statute requires or permits a mediator to testify, to give an affidavit, or to tender a copy of any agreement reached in mediation to the official designated by the statute.</p> <p>(2) To a participant, non-participant, law enforcement personnel or other persons affected by the harm intended where public safety is an issue, in the following circumstances:</p> <p>If the mediator is a North Carolina lawyer and a lawyer made the statements or committed the conduct reportable under subsection D(2) above, then the mediator shall report the statements or conduct to the North Carolina State Bar ... or the court having jurisdiction over the matter in accordance with North Carolina State Bar Rule of Professional Conduct 8.3(e).</p> <p>F. Nothing in this Standard shall prohibit a mediator from revealing communications or conduct occurring prior to, during, or after a mediation in the event that a party to or a participant in a mediation has filed a complaint regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator and the mediator reveals the communication or conduct for the purpose of defending him/herself against the complaint. In making any such disclosures, the mediator should make every effort to protect the confidentiality of non-complaining parties to or participants in the mediation and avoid disclosing the specific circumstances of the parties' controversy. The mediator may consult with non-complaining parties or witnesses to consider their input regarding disclosures.</p>	<p>Rule III of the N.C. Standards of Professional Conduct for Mediators and Rule 8.3 of the Revised Rules of Professional Conduct of the N.C. State Bar further coordinate North Carolina's protection of mediation communications with its discipline systems for attorneys and mediators.</p> <p>For a detailed description of North Carolina's system of processing complaints against mediators (including the confidentiality rules for that system), see P. Young, <i>Take It or Leave It, Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field</i>, 21 Ohio. St. J. Disp. Resol. 721, 881-88 (2006).</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
North Carolina (cont'd)		<p>Rule 8.3. (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.</p> <p>....</p> <p>(e) A lawyer who is serving as a mediator and who is subject to the North Carolina Supreme Court Standards of Professional Conduct for Mediators (the Standards) is not required to disclose information learned during a mediation if the Standards do not allow disclosure. If disclosure is allowed by the Standards, the lawyer is required to report professional misconduct consistent with the duty to report set forth in paragraph (a).</p> <p><u>Comment...</u> [7] The North Carolina Supreme Court has adopted Standards of Professional Conduct for Mediators ... to regulate the conduct of certified mediators and mediators in court-ordered mediations. Mediators governed by the Standards are required to keep confidential the statements and conduct of the parties and other participants in the mediation, with limited exceptions, to encourage the candor that is critical to the successful resolution of legal disputes. Paragraph (e) recognizes the concurrent regulatory function of the Standards and protects the confidentiality of the mediation process. Nevertheless, if the Standards allow disclosure, a lawyer serving as a mediator who learns of or observes conduct by a lawyer that is a violation of the Rules of Professional Conduct is required to report consistent with the duty set forth in paragraph (a) of this Rule. In the event a lawyer serving as a mediator is confronted with professional misconduct by a lawyer participating in a mediation that may not be disclosed pursuant to the Standards, the lawyer/mediator should consider withdrawing from the mediation or taking such other action as may be required by the Standards. <i>See, e.g.,</i> N.C. Dispute Resolution Commission Advisory Opinion 10-16 (February 26, 2010).</p>	

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
North Dakota	N.D. Cent. Code § 31-04-11; N.D. R. Ct. 8.8; see also N.D. Code of Mediation Ethics R. IV	<p>31-04-11. When persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute, evidence of anything said or of any admission made in the course of the mediation is inadmissible as evidence and disclosure may not be compelled in any subsequent civil proceeding except as provided in this section. This section does not limit the compulsion nor the admissibility of evidence if:</p> <ol style="list-style-type: none"> 1. The evidence relates to a crime, civil fraud, or a violation under the Uniform Juvenile Court Act; 2. The evidence relates to a breach of duty by the mediator; 3. The validity of the mediated agreement is in issue; or 4. All persons who conducted or otherwise participated in the mediation consent to disclosure. <p>8.8. (a) Scope. Parties to civil suits are encouraged to participate in alternative dispute resolution (“ADR”) before commencing a case or at any early stage of the case; and all parties in civil cases must discuss early ADR participation and the appropriate timing of such effort.</p> <p>....</p> <p>(d) Confidentiality. The ADR processes are confidential and not open to the public. When persons agree to conduct and participate in ADR processes for the purpose of compromising, settling, or resolving a dispute, evidence of anything said or of any admission made in the course of the ADR processes is inadmissible as evidence and disclosure of confidential ADR communications is prohibited, except as authorized by the court and agreed to by the parties or as permitted under N.D.C.C. §§ 31-04-11 and 14-09.1-06.</p>	<p>Section 31-04-11 protects mediation communications, but its protection does not apply to evidence that “relates to a breach of duty by the mediator.” See Subd. (2).</p> <p>The statute does not expressly refer to any other type of professional misconduct. Depending on the circumstances, evidence of such misconduct might be admissible under the exception for evidence relating to a crime or civil fraud (Subd. (1)), or under the exception for evidence bearing on the validity of the mediated agreement (Subd. (3)).</p> <p>The staff did not find any case law construing Section 31-04-11. Consequently, it is difficult to predict whether the North Dakota courts would recognize any exceptions that are not expressly stated.</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Oklahoma	Okla. Stat. tit. 12 § 1805 (applicable to proceedings under the Dispute Resolution Act); Okla. Stat. tit. 12, § 1824 (applicable to mediation under the District Court Mediation Act); see also Okla. Stat. tit. 12, §§ 1836 (confidentiality under Choice in Mediation Act), 1837 (complaint about mediator under Choice in Mediation Act); Rule 10 and Appendices A & C of the Rules & Procedures for the Dispute Resolution Act	<p>1805. A. Any information received by a mediator or a person employed to assist a mediator, through files, reports, interviews, memoranda, case summaries, or notes and work products of the mediator, is privileged and confidential.</p> <p>B. No part of the proceeding shall be considered a matter of public record.</p> <p>C. No mediator, initiating party, or responding party in a mediation proceeding shall be subject to administrative or judicial process requiring disclosure of any matters discussed or shall disclose any information obtained during any party of the mediation proceedings.</p> <p>....</p> <p>E. No mediator, employee, or agent of a mediator shall be held liable for civil damages for any statement or decision made in the process of mediating or settling a dispute unless the action of such person was a result of gross negligence with malicious purpose or in a manner exhibiting willful disregard of the rights, safety, or property of any party to the mediation.</p> <p>F. If a party who has participated in mediation brings an action for damages against a mediator arising out of mediation, for purposes of that action the privilege provided for in subsection A of this section shall be deemed to be waived as to the party bringing the action.</p>	<p>“Mediation sessions pursuant to the Oklahoma Dispute Resolution Act are confidential.” <i>Shirley v. Shirley</i>, 104 P.3d 1142, 1144 n.2 (Okla. Ct. App. 2004). The confidentiality provision of the Oklahoma Dispute Resolution Act (Okla. Stat. tit. 12, § 1805) has an exception for “an action for damages against a mediator arising out of mediation.” In such an action, the mediation privilege “shall be deemed waived <i>as to the party bringing the action.</i>” (Emphasis added.) It is not clear whether mediation evidence could be used if another mediation participant objected.</p> <p>Aside from the language discussed above, the confidentiality provision of the Oklahoma Dispute Resolution Act does not expressly refer to professional misconduct.</p> <p>In addition to the Dispute Resolution Act, Oklahoma has a Mediation Act, which “was promulgated by the Legislature in 1998 to enable district courts, by agreement of the parties, to refer pending civil cases to mediation in order to promote settlement.” <i>Garnett v. Gov’t Employees Ins. Co.</i>, 186 P.3d 935, 940 (Okla. S.Ct. 2008). According to the Oklahoma Supreme Court, the Mediation Act “emphasizes that mediation proceedings are to be private and confidential.” <i>Id.</i></p> <p>The confidentiality provision of the Oklahoma Mediation Act (Okla. Stat. tit. 12, § 1824) does not expressly refer to any type of professional misconduct. It has only one express exception, for a “fact independently discoverable.”</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Oklahoma (cont'd)		<p>1824. The following provisions shall apply to any mediation ordered by a court pursuant to Section 3 of this act:</p> <p>....</p> <p>6. Any communication relating to the subject matter of the dispute made during the mediation process by a participant or any other person present at the mediation shall be a confidential communication. No admission, representation, statement, or other confidential communication made in setting up or in conducting the mediation shall be admissible as evidence or subject to discovery, except that, no fact independently discoverable shall be nondiscoverable solely by virtue of having been disclosed in such confidential communication. There shall be no stenographic or electronic record, including audio or video, of the mediation process unless it is agreed upon by the parties, interested non-parties, and the mediator, and it is not otherwise prohibited by law. No participant in the mediation proceeding, including the mediator, shall be subpoenaed or otherwise compelled to disclose any matter disclosed in the process of setting up or conducting the mediation proceeding</p>	<p>It is difficult to predict whether the Oklahoma courts would imply any exceptions to mediation confidentiality that are not expressly stated in the statutory provisions discussed above. Interestingly, a special provision for workers' compensation disputes says: "No mediator shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a mediation conference in any civil proceeding for any purpose, <i>except for proceedings of the State Bar Association, disciplinary proceedings of any agency established to enforce standards of conduct for mediations</i>, and proceedings to enforce laws concerning juvenile or elder care. Rule 53(I)(4) of Okla. Rules of the Workers' Compensation Court (emphasis added).</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Oregon	Or. Rev. Stat. §§ 36.220 to 36.238; see also Or. Rev. Stat. § 36.110 (definitions for Or. Rev. Stat. §§ 36.220 to 36.238)	<p>36.220 (1) Except as provided in ORS 36.220 to 36.238:</p> <p>(a) Mediation communications are confidential and may not be disclosed to any other person.</p> <p>....</p> <p>36.222. (1) Except as provided in ORS 36.220 to 36.238, mediation communications and mediation agreements that are confidential under ORS 36.220 to 36.238 are not admissible as evidence in any subsequent adjudicatory proceeding, and may not be disclosed by the parties or the mediator in any subsequent adjudicatory proceeding.</p> <p>....</p> <p>(4) In any proceeding to enforce, modify, or set aside a mediation agreement, confidential mediation communications and confidential mediation agreements may be disclosed to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.</p> <p>(5) In an action for damages or other relief between a party to a mediation and a mediator or mediation program, confidential mediation communications or confidential mediation agreements may be disclosed to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.</p> <p>....</p> <p>(7) The limitations on admissibility and disclosure in subsequent adjudicatory proceedings imposed by this section apply to any subsequent judicial proceeding, administrative proceeding or arbitration proceeding. The limitations on disclosure imposed by this section include disclosure during any discovery conducted as part of a subsequent adjudicatory proceeding, and no person who is prohibited from disclosing information under the provisions of this section may be compelled to reveal confidential communications or agreements in any discovery proceeding conducted as part of a subsequent adjudicatory proceeding. Any confidential mediation communication or agreement that may be disclosed in a subsequent adjudicatory proceeding under the provisions of this section may be introduced into evidence in the subsequent adjudicatory proceeding.</p>	<p>Oregon’s statutory protection for mediation communications is subject to various exceptions, including Section 36.222(5), which pertains to an action between a mediation party and a mediator.</p> <p>No exception expressly refers to any other type of professional misconduct.</p> <p>There is an exception applicable in “any proceeding to enforce, modify, or set aside a mediation agreement” (§36.222(4)). It is possible that a party would rely on that exception in seeking relief from alleged professional misconduct occurring at a mediation.</p> <p>The staff found two cases involving the relationship between legal malpractice and Oregon’s protection for mediation communications. For descriptions of those cases, see discussion in memo.</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Pennsylvania	To be discussed in a later memo	To be discussed in a later memo	To be discussed in a later memo
Rhode Island	R.I. Gen. Laws § 9-19-44; see also R.I. Supreme Ct. Rule 35 (applicable to appellate mediation)	<p>9-19-44. (a) All memoranda and other work product, including files, reports, interviews, case summaries, and notes, prepared by a mediator shall be confidential and not subject to disclosure in any subsequent judicial or administrative proceeding involving any of the parties to any mediation in which the materials are generated; nor shall a mediator be compelled to disclose in any subsequent judicial or administrative proceeding any communication made to him or her in the course of, or relating to the subject matter of, any mediation by a participant in the mediation process. For the purposes of this section, “mediation” shall mean a process in which an impartial third party who is a qualified mediator, who lacks authority to impose a solution, helps participants reach their own agreement for resolving a dispute, whether or not a judicial action has been filed; and a “mediator” shall mean an impartial person who enters into a written agreement with the parties to assist them in resolving their dispute and who has completed at least thirty (30) hours of training in mediation, or has two (2) years of professional experience as a mediator, or has been appointed to mediate by a judicial or governmental body.</p> <p>(b) This section shall not be applicable to any and all collective bargaining mediation, including but not limited to collective bargaining mediation conducted pursuant to chapters 9.1 - 9.5 and 10 of title 28 and chapter 11 of title 36.</p>	<p>Section 9-19-44 provides limited protection. It just (1) protects materials “prepared by a mediator,” and (2) prevents a mediator from being compelled to testify regarding mediation communications.</p> <p>The statute does not have any express exceptions. It does not refer to any type of professional misconduct.</p> <p>The staff did not find any case law construing Section 9-19-44. Consequently, it is difficult to predict whether the Rhode Island courts would recognize any exceptions that are not expressly stated.</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
South Carolina	Rule 8 & Appendix B (Part V) of the S.C. Court-Annexed ADR Rules	<p>8. (a) Confidentiality. Communications during a mediation settlement conference shall be confidential. Additionally, the parties, their attorneys and any other person present must execute an Agreement to Mediate that protects the confidentiality of the process. To that end, the parties and any other person present shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any oral or written communications having occurred in a mediation proceeding</p> <p>(b) Limited Exceptions to Confidentiality. This rule does not prohibit:</p> <p>....</p> <p>(3) The mediator or participants from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the ADR program;</p> <p>....</p> <p>(5) Any disclosures required by law or a professional code of ethics.</p> <p>....</p> <p>(e) Mediator Not to be Called as Witness. The mediator shall not be compelled by subpoena or otherwise to divulge any records or to testify in regard to the mediation in any adversary proceeding or judicial forum. All records, reports and other documents received by the mediator while serving in that capacity shall be confidential.</p> <p>Appendix B of the S.C. Court-Annexed ADR Rules sets forth Standards of Conduct for Mediators. Part V of Appendix B is similar to Part E of Mississippi’s Standards of Conduct for Mediators (shown above).</p>	<p>Rule 8 and Part V of Appendix B protect the confidentiality of communications in a court-annexed mediation settlement conference. A commentator has faulted Appendix B for being unclear about whether it applies to voluntary ADR. See V. Anderson, <i>Comment: Alternative Dispute Resolution and Professional Responsibility in South Carolina: A Changing Landscape</i>, 55 S.C. L. Rev. 191, 202 (2003).</p> <p>Rule 8 is subject to “Limited Exceptions,” including (1) an exception for information needed to monitor or evaluate a court’s ADR program and (2) an exception for “[a]ny disclosures required by law or a professional code of ethics.” These exceptions do not directly address malpractice or discipline of attorneys, mediators, or other professionals. Neither Rule 8 nor Part V of Appendix B contain any language along those lines.</p> <p>The staff found only one case discussing Rule 8, which does not provide much insight on whether the South Carolina courts would recognize any exceptions that are not expressly stated. See <i>Burch v. Burch</i>, 395 S.C. 318, 717 S.E.2d 757 (S.C. S.Ct. 2011); see also Anderson, <i>supra</i>, at 210 (“The strict confidentiality rules that apply to mediators seem to foreclose any possibility of reporting or testifying to misconduct that occurred at a mediation conference.”).</p> <p>The UMA was introduced in South Carolina in 2001 (HB 4499), but was not enacted.</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Tennessee	Tenn. S.Ct. R. 31, §§ 7, 10(d); see also Tenn. S.Ct. R. 31, §§ 11(b)(14)-(18) (proceedings for discipline of Rule 31 Mediators), 12 (immunity of Rule 31 Neutral) & Appendix A, §§ 1(c)(4), 7	<p><u>Rule 31, § 7:</u> Evidence of conduct or statements made in the course of Rule 31 ADR Proceedings and other proceedings conducted pursuant to an Order of Reference shall be inadmissible to the same extent as conduct or statements are inadmissible under Tennessee Rule of Evidence 408.</p> <p><u>Rule 31, § 10(d):</u> Rule 31 Neutrals shall preserve and maintain the confidentiality of all information obtained during Rule 31 ADR Proceedings and shall not divulge information obtained by them during the course of Rule 31 ADR Proceedings without the consent of the parties, except as otherwise may be required by law.</p> <p><u>Rule 31, § 11(b)(14)-(18):</u> (14) All matters, investigations, or proceedings involving allegations of misconduct by the mediator, including all hearings and all information, records, minutes, files or other documents of the ADRC, the Grievance Committee, and staff shall be confidential and privileged and shall not be public records, until or unless: (i) a recommendation for the imposition of public discipline, without the initiation of a hearing, is filed with the ADRC by the Grievance Committee; or (ii) the Grievance Committee determines that a hearing must take place; or (iii) the mediator requests that the matter be public; or (iv) the complaint is predicated upon conviction of the mediator for a crime. (15) All work product and work files ... of the ADRC, Grievance Committee, and staff shall be confidential and privileged and shall not be public records. (16) All participants in any matter, investigation, or proceeding shall conduct themselves so as to maintain confidentiality. However, nothing in this rule shall prohibit the complainant, the mediator, or any witness from disclosing the existence or substance of a complaint, matter, investigation, or proceeding under this rule or from disclosing any documents or correspondence filed by, served on, or provided to that person.</p>	<p>According to a Tennessee Court of Appeals, confidentiality is an “essential attribute of the court-annexed procedures permitted by Tenn. S. Ct. R. 31” <i>Team Design v. Gottlieb</i>, 104 S.W.3d 512, 521 (Tenn. Ct. App. 2002), <i>overruled in part on other grounds by Tuetken v. Tuetken</i>, 320 S.W.3d 262, 268 (Tenn. S.Ct. 2010). “All parties in a mediation proceeding trust that the proceeding will be confidential because these proceedings permit them to ‘bare their soul’ to the mediator and provide them the opportunity to vent which, in some instances, is all that stands in the way of a negotiated settlement.” <i>Id.</i></p> <p>Despite these assertions, Tennessee appears to provide only limited protection for mediation communications. See in particular Rule 31, § 7, which provides protection comparable to FRE 408’s protection for settlement negotiations; see also <i>Team Design</i>, 104 S.W.3d at 521 & nn. 27-30 (describing changes to Rule 31).</p> <p>Under Rule 31, § 11(b)(17), “the confidentiality of a mediation is deemed waived by the parties” with regard to a complaint against a mediator.</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Tennessee (cont'd)		<p><u>Rule 31, § 11(b)(14)-(18) (cont'd):</u> (17) The confidentiality of a mediation is deemed waived by the parties to the extent necessary to allow the complainant to fully present his/her case and to allow the mediator to fully respond to the complaint. The waiver relates only to information necessary to deal with the complaint. The ADRC, the Grievance Committee, and staff will be sensitive to the need to protect the privacy of all parties to the mediation to the fullest extent possible commensurate with fairness to the mediator and protection of the public. (18) Once the Grievance Committee has issued an opinion, a synopsis of the case may be published in the ADRC quarterly newsletter. If the mediator is not publicly sanctioned, the name of the complainant and mediator will not be included in the synopsis.</p> <p><u>Rule 31, § 12: Activity of Rule 31 Neutrals in the course of Rule 31 ADR proceedings shall be deemed the performance of a judicial function and for such acts Rule 31 Neutrals shall be entitled to judicial immunity.</u></p> <p><u>Rule 31, Appendix A, § 1(c)(4):</u> (c) <i>General Principles</i> A dispute resolution proceeding under Rule 31 is based on principles of communication, negotiation, facilitation, and problem-solving that emphasize: (4) Privacy and confidentiality. </p> <p><u>Rule 31, Appendix A, § 7. Confidentiality</u> (a) <i>Required</i> A Neutral shall preserve and maintain the confidentiality of all dispute resolution proceedings except where required by law to disclose information. (b) <i>When Disclosure Permitted</i> A Neutral conducting a Rule 31 Mediation shall keep confidential from the other parties any information obtained in individual caucuses unless the party to the caucus permits disclosure. (c) <i>Records</i> A Neutral shall maintain confidentiality in storing or disposing of records and shall render anonymous all identifying information when materials are used for research, training, or statistical compilations.</p>	<p>The rule describes in detail how to handle a complaint against a mediator (including a complaint against an attorney-mediator). Rule 31 does not expressly address any other type of professional misconduct. The staff is not aware of any other provision addressing this point.</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Texas	To be discussed in a later memo	To be discussed in a later memo	To be discussed in a later memo
Virginia	<p>Va. Code Ann. § 8.01-581.22; see also Va. Code Ann. § 8.01-576.10 (applicable to court-referred dispute resolution proceedings). Other relevant provisions include Va. Code Ann. §§ 8.01-576.9 (standards & duties of neutrals in court-referred dispute resolution proceedings), 8.01-576.12 (vacating mediated agreement in court-referred dispute resolution proceeding), 8.01-581.23 (civil immunity for mediator meeting certain requirements), 8.01-581.24 (standards & duties of mediators)</p>	<p>8.01-581.22. All memoranda, work products and other materials contained in the case files of a mediator ... are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, ... is confidential....</p> <p>Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except ... (ii) in a subsequent action between the mediator ... and a party to the mediation for damages arising out of the mediation, ... (vi) where an ethics complaint is made against the mediator by a party to the mediation to the extent necessary for the complainant to prove misconduct and the mediator to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party’s legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or (ix) as provided by law or rule....</p> <p>(Va. Code Ann. § 8.01-576.10, applicable to court-referred dispute resolution proceedings, is similar in content.)</p> <p>8.01-581.26. Upon the filing of an independent action by a party, the court shall vacate a mediated agreement reached in a mediation pursuant to this chapter, or vacate an order incorporating or resulting from such agreement, where:</p> <ol style="list-style-type: none"> 1. The agreement was procured by fraud or duress, or is unconscionable; 3. There was evidence partiality or misconduct by the mediator, prejudicing the rights of any party. <p>For purposes of this section “<i>misconduct</i>” includes failure of the mediator to inform the parties at the commencement of the mediation process that: (i) the mediator does not provide legal advice, (ii) any mediated agreement may affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent legal counsel prior to signing the agreement.</p>	<p>Va. Code Ann. § 8.01-581.22 includes several exceptions relating to mediator misconduct (Exceptions (ii), (vi) & (viii)).</p> <p>The statute also includes an exception relating to attorney misconduct (Exception (vii)).</p> <p>The statute does not expressly address any other type of professional misconduct.</p> <p>For a detailed description of Virginia’s system of processing complaints against mediators, see P. Young, <i>Take It or Leave It, Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field</i>, 21 Ohio. St. J. Disp. Resol. 721, 771-74, 814-30 (2006).</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
West Virginia	W.Va. Trial Ct. R. 25.12	<p>25.12. Mediation shall be regarded as confidential settlement negotiations, subject to W.Va. R. Evid. 408. A mediator shall maintain and preserve the confidentiality of all mediation proceedings and records. Confidentiality as to opposing parties within a mediation session shall be maintained in a manner agreed upon by the parties and mediator. For example, all information may be kept confidential unless disclosure is specifically authorized by the party, or, all information may be shared unless specifically prohibited by the party. A mediator may not be subpoenaed or called to testify or otherwise be subject to process requiring disclosure of confidential information in any proceeding relating to or arising out of the dispute mediated.</p> <p>W.Va. R. Evid. 408 is similar to FRE 408. It provides: 408. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.</p>	<p>W.Va. Trial Ct. R. 25.12 provides only limited protection for mediation communications. The rule (1) directs the mediator, but not the parties, to maintain the confidentiality of “all mediation proceedings and records,” (2) protects a mediator from being called to testify “in any proceeding relating to or arising out of the dispute mediated,” and (3) empowers the parties and the mediator to set rules governing confidentiality within the mediation session. Aside from those points, the rule is similar to FRE 408’s protection for settlement negotiations.</p> <p>W.Va. Trial Ct. R. 25.12 does not expressly address professional misconduct of any kind.</p> <p>The staff did not find any Va. case law addressing the relationship between mediation confidentiality and professional misconduct.</p> <p>For a W.Va. case on mediation confidentiality generally, see <i>Riner v. Newbraugh</i>, 211 W.Va. 137, 563 S.E.2d 802 (W.Va. S.Ct.App. 2001) (“While we do not approve of the trial court’s entire line of questioning of the mediator, we do not find a violation of TCR 25.12 due to the non-disclosure by the mediator of confidential information discussed during the mediation process.”). See also <i>Allen v. Monsanto Co.</i>, 2013 W.Va. LEXIS 1384 (W.Va. S.Ct.App. 2013) (memorandum decision) (“[T]here is nothing about this aspect of the negotiation that creates the ‘rare circumstance’ necessary for intrusion into confidential mediations.”).</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Wisconsin	Wis. Stat. § 904.085; see also Wis. Stat. § 802.12(4) (“Except for binding arbitration, all settlement alternatives are compromise negotiations for purposes of s. 904.08 and mediation for purposes of s. 904.085.”)	<p>904.085. (1) <i>Purpose.</i> The purpose of this section is to encourage the candor and cooperation of disputing parties, to the end that disputes may be quickly, fairly and voluntarily settled.</p> <p>....</p> <p>(3) <i>Inadmissibility.</i></p> <p>(a) Except as provided under sub. (4), no oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party is admissible in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding. Any communication that is not admissible in evidence or not subject to discovery or compulsory process under this paragraph is not a public record under subch. II of ch. 19.</p> <p>(b) Except as provided under sub. (4), no mediator may be subpoenaed or otherwise compelled to disclose any oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party or to render an opinion about the parties, the dispute whose resolution is attempted by mediation or any other aspect of the mediation.</p> <p>(4) <i>Exceptions.</i></p> <p>....</p> <p>(e) In an action or proceeding distinct from the dispute whose settlement is attempted through mediation, the court may admit evidence otherwise barred by this section if, after an in camera hearing, it determines that admission is necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.</p>	<p>Wis. Stat. § 904.085 does not expressly address professional misconduct of any kind.</p> <p>However, the statute includes a “manifest injustice” exception (sub. (4)(e)) that is potentially broad enough to cover evidence of professional misconduct. That exception permits a court to admit mediation evidence if it conducts an <i>in camera</i> hearing and determines that certain requirements are met.</p> <p>The staff found only one published case interpreting the “manifest injustice” exception. See <i>Dyer v. Blackhawk Leather LLC</i>, 313 Wis. 2d 803, 758 N.W.2d 167, 177 (Wis. Ct. App. 2008) (“[W]e find no basis whatsoever for the plaintiffs’ claims that the ‘manifest injustice’ exception should apply in this case.”); see also <i>David B. v. Stephanie C.S.</i>, 677 N.W.2d 732 (Wis. Ct. App. 2004) (<i>unpublished</i> decision holding that tape of mediation session was admissible under “manifest injustice” exception).</p> <p>Because there is little case law, “what constitutes ‘manifest injustice’ and what factual circumstances would serve as the basis for the admission of mediation communications in a subsequent action is left to be determined.” B. Schwartz, <i>The Intricacies of Mediation Confidentiality</i> (available at http://www2.mnbar.org/sections/new-lawYERS/2013-14%20Newsletter/Fall2013/SchwartzArticle.pdf).</p> <p>For Wis. cases on compliance with conditions for court-ordered mediation, see <i>Lee v. Geico Indemnity Co.</i>, 321 Wis. 2d 698, 776 N.W.2d 622 (Wis. Ct. App. 2009) (upholding sanctions for company’s failure to have person with authority to settle attend mediation); <i>Gray v. Eggert</i>, 248 Wis. 2d 99, 635 N.W.2d 667 (Wis. Ct. App. 2001) (overturning trial court’s determination that party failed to participate in mediation in good faith).</p>

Protection of Mediation Communications: Non-UMA States (except CA)

STATE	GOVERNING LAW	KEY LANGUAGE	STAFF COMMENTS
Wyoming	Wyo. Stat. §§ 1-43-102, 1-43-103; see also Wyo. Stat. §§ 1-43-101 (definitions); 1-43-104 (mediator immunity)	<p>1-43-102. Any communication is confidential if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the mediation process or those reasonably necessary for the transmission of the communication.</p> <p>1-43-103. (a) A party to the mediation has a privilege to refuse to disclose and to prevent all mediation participants from disclosing confidential communications.</p> <p>(b) The privilege under this section may be claimed by a representative of the party or by a party, his guardian or conservator, the personal representative of a deceased party, or the successor, trustee or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the mediator may claim the privilege but only on behalf of the party. The mediator's authority to do so is presumed in the absence of evidence to the contrary.</p> <p>(c) There is no privilege under this section if any one (1) of the following conditions is met:</p> <p>(i) All the parties involved provide written consent to disclose;</p> <p>(ii) The communication involves the contemplation of a future crime or harmful act;</p> <p>(iii) The communication indicates that a minor child has been or is the suspected victim of child abuse as defined by local statute;</p> <p>(iv) The communication was otherwise discoverable prior to the mediation;</p> <p>(v) One of the parties seeks judicial enforcement of the mediated agreement.</p>	<p>Wyo. Stat. §§ 1-43-102 and 1-43-103 do not expressly address professional misconduct of any kind.</p> <p>The staff did not find any Wyo. case law addressing the relationship between mediation confidentiality and professional misconduct.</p> <p>For Wyo. cases on other aspects of mediation confidentiality, see <i>Donnelly v. Donnelly</i>, 92 P.3d 298 (Wyo. S.Ct. 2004) (holding that new trial was not needed when trial judge was exposed to, but refused to consider, certain mediation evidence); <i>VJL v. Red</i>, 39 P.3d 1110, 1113 n.3 (Wyo. S.Ct. 2002) (“[T]he function of a mediator is to be a conciliator Interjecting oneself into court proceedings after the fact of the mediation as basically a witness to discredit the truthfulness and character of a party to the mediation would not seem to comport with the functions of a mediator.”)</p>