Mediation Confidentiality

How strict it is varies with each state.

The UMA which we will discuss in a moment is adopted in 11 states plus D. C. It is pending in NY and Mass where it was previously defeated.

The UMA has been enacted in the District of Columbia and eleven states: Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington.

Four states- Kentucky, New York and Tennessee have no real protection for mediation confidentiality.

In seven other states, (plus the UMA states) there is a statute or rule protecting mediation confidentiality but also contains one or more exceptions expressly addressing alleged attorney misconduct or alleged professional misconduct more generally. - These are Florida, Maine, Maryland, Michigan, New Mexico, North Carolina, and Virginia.

Ten other states have no exception to mediation confidentiality that expressly addresses attorney misconduct or professional misconduct in general but has one that expressly references mediator conduct.

(Alabama, Arizona, Colorado, Delaware, Georgia, Kansas, Montana, N. Dakota, Okla., Oregon)

The remaining 17 states plus California do not have an exception for mediation confidentiality that addresses misconduct of any type.

(Alaska, Arkansas, Connecticut, Indiana, Louisiana, Massachusetts, Missouri, Mississippi, Nevada, New Hampshire, Pennsylvania, Rhode, Island, S. Carolina, Texas, W. VA, Wisconsin, Wyoming)

Of the states that have some sort of exception for attorney misconduct or other professional misconduct, the exceptions vary:

1. Some have separate exceptions for a disciplinary proceeding (atty vs state bar) and for a malpractice proceeding (i.e. civil suit by client vs atty)
2. Some states will lump these two different proceedings together.
3. Some states will allow evidence both to prove and defend against the professional malpractice, i.e. an even-handed approach
4. Some states limit the allegation of malpractice to only what occurred during mediation while other states allow it to apply to any aspect of the attorney representing the client;
5. Some states will use an *in camera* or private proceeding to handle mediation communications during an alleged malpractice proceeding,
6. Other states limit the extent that mediations communications can be disclosed in an alleged malpractice proceeding e.g. only that which is necessary to prosecute or defend the allegations.

Oregon for example in ORS 36.220 provides that mediation communications are confidential, are not admissible and may not be disclosed in any subsequent adjudicatory proceeding and may not be disclosed to any other person. But the parties may agree to waive this in writing.

However, the terms of a mediation agreement are NOT confidential unless the parties agree otherwise. In any proceeding to enforce, modify or set aside the agreement, confidential mediation communications or agreements may be disclosed to extent necessary to prosecute or defend the matter. At the request of a party, the court can seal the record to prevent public disclosure.

A mediation communication is not confidential if the mediator believes it is necessary to disclose it to prevent a party from committing a crime likely to result in death or substantial bodily injury to a specific person.

Further, the neither the parties nor the mediator can be compelled to disclose confidential mediation communications in a subsequent adjudicatory proceeding. That is, a mediator cannot be compelled to testify in a later proceeding. (ORS 36.222)

Obviously, the parties can agree to waive the confidentiality. And the mediator (and mediator program if any) must also agree to waive it. (ORS 36.222)

The statute contains other exceptions as well.

To show the contrast: For example, in 2015 the Oregon Supreme Court held that mediation confidentiality did NOT apply to private communications between a mediating party and his or her attorney that occurred outside of the mediation proceedings even though those communications were integral to the mediation. The Supreme Court concluded that “mediation” includes only that part of the process involving the mediator, so that separate interactions between atty and client held OUSTIDE presence of mediator and without the mediator’s direct involvement are not part of the mediation, even if relating to it. And so, mediation confidentiality not apply.

In California- a directly different result etc.

Uniform Mediation Act

Section 2 contains definitions

(1) "Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(2) "Mediation communication" means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator. NON-VERBAL ASSERTIVE CONUCT IS INCLUDED!

(3) "Mediator" means an individual who conducts a mediation.

Also makes a distinction between mediating party (one who participates in mediation and whose agreement is necessary for resolution) and a non-party participant (a non-party to the dispute who participates in mediation e.g., a spouse, significant other, expert etc.)

Section 3 provides what the UMA applies to and does not apply to.

For example, it does NOT apply to a mediation:

(b) The [Act] does not apply to a mediation:

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

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

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

(4) conducted under the auspices of:

(A) a primary or secondary school if all the parties are students or

(B) a correctional institution for youths if all the parties are residents that institution.

(c) If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under Sections 4 through 6 do not apply to the mediation or part agreed upon.

However, Sections 4 through 6 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

Section 4 provides that except for the exceptions listed in section 6, a mediation communication is privileged and is not subject to discovery or admissible in evidence unless waived or precluded as set out in section 5.

Section 4 makes clear that a mediation party as well as the mediator may refuse to disclose and prevent others from disclosing a mediation communication.

It also makes clear that simply because evidence or information was used in a mediation that otherwise is discoverable or admissible, it does not become inadmissible or non-discoverable simply because it was used in mediation. (Also true under Oregon law,)

Section 5 discusses waiver and preclusion of privilege.

If all parties agree, the privilege may be waived orally during a proceeding or on the record.

If one person makes a representation as to what happened in mediation, that prejudices another, she cannot then assert the privilege to preclude the other from stating what is necessary to respond to the disclosure.

A person who intentionally uses the mediation to plan, attempt to commit or commit a crime or to conceal a crime or ongoing crime, is precluded from asserting the privilege.

SECTION 6- EXCEPTIONS TO PRIVILEGE

This is a VERY IMPORTANT SECTION OF UMA

**SECTION 6. EXCEPTIONS TO PRIVILEGE.**

(a) There is no privilege under Section 4 for a mediation communication that is:

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

(2) available to the public under [insert statutory reference to open records act] or made during a session of a mediation which is open, or is required by law to be open, to the public; (also true under Oregon law)

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

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

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

(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the

[Alternative A: [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates.]

[Alternative B: public agency participates in the [State to insert, for example, child or adult protection] mediation].

(Oregon law allows report to extent mediator is a mandated reporter. – child or elder abuse)

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or

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

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2). (malpractice against a party and action to avoid settlement agreement)

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

Section 7- provides that a mediator may not be required to make a report, recommendation, evaluation, finding, etc. of what happened to a court or administrative agency. And if the mediator does, the court or admin agency can NOT consider the report.

The mediator can advise whether the mediation occurred, who attended and whether a settlement was reached as well as any communication allowed under section 6.

Also, the mediator can report abuse, neglect, abandonment, or exploitation or an individual to a public agency responsible for such issues.

Section 8- Confidentiality- states the obvious:

Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

Section 9 is important because it requires the mediator to disclose all possible conflicts of interest as soon as she learns of them, both prior to the mediation and even while the mediation is ongoing and provide her qualifications upon request.

If she fails to do so, she can NOT assert mediation confidentiality.

a) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.

(b) If a mediator learns any fact described in subsection (a)(1) after accepting a mediation, the mediator shall disclose it as soon as is practicable.

(c) At the request of a mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

(d) A person that violates subsection [(a) or (b)] [(a), (b), or (g)] is precluded by the violation from asserting a privilege under Section 4.

(e) Subsections (a), (b), [and] (c), [and] [(g)] do not apply to an individual acting as a judge.

(f) This [Act] does not require that a mediator have a special qualification by background or profession.

[(g) A mediator must be impartial, unless after disclosure of the facts required in subsections (a) and (b) to be disclosed, the parties agree otherwise.]

**SECTION 10. PARTICIPATION IN MEDIATION.**

An attorney or other person is permitted to attend the mediation with the disputing party and to participate.

This often arises when a party wants to bring a spouse or significant other to mediation. The UMA specifically says it is okay!

How to avoid a subpoena

UMA specifically states section 6 c that a mediator cannot be compelled to testify. First- obtain e and o insurance. Second, if you do get a subpoena, turn it over to your insurer and ask that they move to quash it asap.

Thank you!

Questions?

Comments?