CONFIDENTIALITY AND PRIVILEGE FOR FAMILY AND CHILD PROTECTION MEDIATION: A ROADMAP FOR NAVIGATING THE INNOVATION, INCONSISTENCY AND CONFUSION

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This article will identify the inconsistency and confusion in mediation regarding the definition of mediation, the role of the mediator, and the difference between mediation confidentiality and privilege. Further, it will discuss the confusion and inconsistency in the protection of mediation communication, specifically regarding the definition of mediation communication, the time frame for protected communication, waiver of the protections and exceptions to protected mediation communication. It will provide a roadmap and fact pattern for determining whether mediation communications are protected and if so, the protection they are afforded. Lastly, it will offer recommendations so parties, professionals and the courts may better understand and reap the benefits of mediation.

Key Points for the Family Court Community:

- Considerable confusion in mediation communication protection definitions highlighted.
- Inconsistent state protection of mediation communications demonstrated and examples provided.
- Privilege and confidentiality are most common mediation communication protections utilized.
- Privilege limits admissibility of mediation communication in court.
- Parties and others may have a privilege to prevent disclosure of mediation communications in court.
- Confidentiality limits mediation disclosures outside a proceeding unless the parties waive otherwise.
- Parties need to know if mediation communications are privileged and/or confidential or otherwise protected.
- Professionals and the court need to clearly inform parties about mediation communication protection.
- A roadmap to determine when a mediation communication is protected is provided.
- A fact pattern analysis of protection of mediation communication utilizing roadmap is demonstrated.

Keywords: *Child Protection; Confidentiality; Divorce; Family; Mediation; Prividentiality; Privilege.*

I. INTRODUCTION

Throughout the United States, family law and child protection cases routinely go to mediation[1,2] by court order or party initiative. The process gives parties the opportunity to share information, identify their issues and concerns, explore resolution options, and oftentimes, reach an agreement that uniquely meets their family needs and interests. The highly personal and emotive nature of these cases combined with the significant issues to be resolved make confidentiality essential. The process of mediation offers a means by which the parties can improve family communication, reduce parental conflict that causes harm to children, and reduce the likelihood of future litigation.[3] The confidentiality protection offers the needed reassurance that shared information will not be weaponized to injure family members or escalate family conflict.

The Uniform Mediation Act (UMA) was drafted to provide increased predictability and consistency in mediation law. At the time of its drafting, there were over 250 varying state mediation privilege statutes.[4] The number and variety of protections reflect innovative state efforts to devise

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mediation communication protections consistent with jurisdictional priorities. Unfortunately, this beneficial mediation innovation has led to markedly different mediation definitions, rules, statutes, and case law concerning mediation communication protections. In particular, the failure to provide a consistent, coherent definition of "confidentiality" related to mediation is troubling as the term is presently used to mean distinctly different things.

With good reason, commentators have analogized deciphering mediation confidentiality to swimming in a sea of ambiguity.[5] The time has come to decipher this ambiguity to provide the information people need to decide whether to use the mediation process and what to disclose during the process. This article will identify significant inconsistencies and confusion regarding the definition of mediation, the role of the mediator, and the difference between mediation confidentiality and privilege. Further, it will discuss the confusion and inconsistency in the protection of mediation communication, specifically regarding the definition of mediation communication, the time frame for protected communication, waiver of the protections and exceptions to protected mediation communication. To demonstrate the variation in mediation communication protection law, this article will compare provisions of the UMA with the Florida Mediation Confidentiality and Privilege Act (FMCPA), with reference to other states' relevant mediation rules, statutory and case law. It also will provide a roadmap and fact pattern for determining whether mediation communications are protected and if so, the protection they are afforded. Lastly, it will offer recommendations so parties, professionals and the courts may better understand and reap the benefits of mediation.

For purposes of this article, "privilege" means protection of a mediation communication from disclosure in a subsequent proceeding, and the term "confidentiality" refers to protection of mediation communication outside a proceeding. The phrase "protected mediation communication" references mediation confidentiality and privilege. However, when discussing cases, the court's terminology will be used.

II. INCONSISTENCY AND CONFUSION IN THE DEFINITION OF MEDIATION AND COMMUNICATION PROTECTIONS

A. DEFINITION OF MEDIATION AND ROLE OF THE MEDIATOR

The definition of mediation varies greatly among states and based on the type of mediation. Some states have brief, broad definitions, while others have longer more specific ones. The UMA defines mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[6] Surprisingly, it provides a definition of mediator using the word mediation without offering information on the role of the mediator. The UMA defines mediator as "an individual who conducts a mediation."[7] With greater specificity, Florida Mediation Confidentiality and Privilege Act (FMCPA) states:

> Mediation means a process whereby a neutral third party called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives[8]

Interestingly, the Florida Supreme Court adopted court rules defining mediation as a process in which the mediator is not only neutral but impartial as well.[9] The role of the mediator will differ in UMA adopting states as well as non-UMA states. Unlike the FMCPA, the UMA does not require mediators to be neutral, but does give states the option of incentivizing mediators to be impartial.[10] Mediator neutrality and impartiality, while sometimes used interchangeably, are decidedly different. Neutrality requires that a mediator "have no personal preference that the dispute be resolved in one

way rather than another."[11] In contrast, impartiality has to do with the treatment of parties, requiring the mediator to "treat all parties in comparable ways, both procedurally and substantively."[12]

California, like Florida, has a definition of mediator including neutrality: "a neutral person who conducts a mediation" and "mediation" as "a process in which a neutral person or persons facilitates communication between the disputants to assist them in reaching a mutually acceptable agreement." Inconsistent state definitions of both mediation and mediator mean that a mediation or mediator in one state will not necessarily be viewed as a mediation or mediator in another state.

Definitions may prove dispositive in court decisions on mediation privilege. In a recent California case, the court looked at the definition of mediation and role of the mediator to reach its decision. The wife in a dissolution of marriage case sought to introduce evidence of mediator misconduct, alleging that the privilege did not apply in her case because the process did not fit the definition of mediation and the person conducting the process did not fit the definition of mediator. She argued that the privilege only protected those who qualify as a mediator, meaning "a neutral person who conducts a mediation" when the process is mediation, meaning "a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement."[13] She alleged that the "mediator" was not neutral due to his prior relationship with her husband. The appellate court interpreted "neutral person" to mean a third party who does not act as either party's representative and who is not in a position to decide the dispute," but rather performs the role of an intermediary to facilitate negotiations between the parties to enable them to mutually resolve their dispute."[14] It rejected the wife's position, finding that the privilege applied in her case.[15]

The question of whether someone is serving as a mediator arises in other California family law cases as well. While the California Family Code provides that mediation proceedings shall be confidential and held in private,[16] court custody and visitation mediators in some counties are authorized to make certain recommendations to the court.[17] Making recommendations to the court regarding mediated matters does not fit within the normally accepted role of the mediator in California[18] or other states.[19] California has addressed this inconsistency, in part, by providing that if mediators are authorized to submit "recommendation to the court as to the custody of or visitation with the child" the mediator and recommendation process is called "child custody recommending counselor."[20] The retitled mediator for this purpose is still subject to requirements for mediators for other purposes. Additionally, inconsistency may still result in the role of the mediator for California family law cases because disputes involving the financial aspects of divorce and certain child custody and visitation disputes do not fall under the California Family Code and are governed by the California Evidence Code.[21] Consequently, for these cases recommendations by the mediator are prohibited.[22]

Courts have also looked to see if a mediator was part of the process, as well as whether the process was legitimately mediation. In 1999, a Virginia court agreed with the husband in a divorce mediation that the trial court erred in excluding the testimony of a psychologist pursuant to mediation confidentiality provisions because he was serving as a psychologist rather than a mediator for the couple's custody dispute.[23] In contrast, in 2018, a California court rejected a husband's claim that the trial court erred in finding that an individual was the parties' mediator rather than the attorney for their dissolution of marriage. The court determined that the individual had been retained as a mediator, with the retainer agreement specifying the provision of mediation services.[24]

B. CONFIDENTIALITY AND PRIVILEGE

Significant variation exists nationwide regarding the states' handling of protected mediation communications. Mediation communications may be protected by mediation-specific evidentiary rules,[25] statutory law granting privileges[26] or confidentiality,[27] agreement by the parties,[28] court orders,[29] as well as the courts' reliance on established case law or persuasive law from other jurisdictions that may guide the court in its balancing obligations.[30] Usual protections take the form of privilege or confidentiality. Privilege protections give the holder the ability to refuse to disclose and

prevent others from disclosing mediation communications in a subsequent proceeding.[31] While parties are the expected privilege holders, in some jurisdictions the mediator and nonparty participants may also be afforded a privilege to block admissibility of certain communications.[32] The privilege should identify who holds the privilege and who is bound by the privilege, as well as the mediation communications for which the privilege holder may prevent disclosure, and the types of proceedings in which a mediation communication may not be disclosed.

Unlike privilege, confidentiality offers broader protection by limiting disclosure of mediation communications outside proceedings. For example, Florida's Mediation Confidentiality and Privilege Act (FMCPA) provides "[a] mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel."[33] When communications are deemed confidential, parties have the protection that such communications will not be disclosed to family, friends, business associates and others with whom they come in contact.

While some of the national mediation organizations[34] recommended including both confidentiality and privilege, the UMA drafters opted to only provide privilege protections for mediation communications, while giving the adoptees[35] the option of adding confidentiality.[36] Accordingly, variability regarding confidentiality remains for the jurisdictions that adopted the Act.[37] The states that have adopted the UMA have statutes with *provisions* reading "mediation communications are confidential to the extent agreed to by the parties or provided by other law or rule of this state", unless subject to exception.[38] One then needs to research the law of each state to determine whether the mediation communication protection against disclosure outside a proceeding is afforded mediation communications elsewhere in a mediation statute, evidence code or court rule, as well as review any agreement to mediate which may pertain to an individual mediation.

In contrast, the FMCPA directly provides for confidentiality in addition to privilege, thereby giving parties the reassurance that their mediation communications will be protected from disclosure generally, not just in subsequent proceedings. Florida grants broad confidentiality, meaning that unless a statutory exception applies "all mediation communications are confidential."[39] However, unlike the UMA, the FMCPA does not provide a privilege to the mediator[40] or to nonparty participants.[41]

Unfortunately, the term "confidential" is often used to describe different communication protections. The confusion, while not unique to the UMA, is displayed when comparing language used in the Prefatory Note with the Act's provisions on confidentiality.[42] As is often found throughout mediation scholarly writing and mediation law, the UMA uses the term confidentiality to mean two different things. As used in the UMA Prefatory Note, it has the general meaning that mediation communications are protected from disclosure, and include the privilege protection.[43] In contrast, UMA Section 8 titled "Confidentiality"[44] offers states the option of providing confidentiality by limiting "disclosures outside of proceedings."[45] The UMA Section 8 Comment also notes, "[c]onfidentiality is viewed by many as the lynchpin of mediation proceedings, and the confidentiality of mediation communication against disclosures outside of proceedings may be as important to the integrity of the mediation process for some as the protection against disclosures of mediation communications in subsequent proceedings that is assured by the privilege."[46] Here, confidentiality is used to mean protecting mediation communication outside of legal proceedings, and is distinguished from privilege.[47]

The UMA offers states the option of providing confidentiality provisions elsewhere in their state laws or rules to prevent disclosures outside a proceeding in addition to the privilege protection. The UMA also allows parties to agree that their mediation communication will be confidential and accordingly not subject to disclosure outside a proceeding.

The omission of a consistent definition for mediation confidentiality is a missed opportunity and perplexing. Failing to adequately define confidentiality and/or misunderstanding the distinction between confidentiality and privilege can have very serious consequences. For example, in a 1997 Florida case[48] a party's lawsuit against a bank for $100,000 was dismissed with prejudice because the plaintiff disclosed confidential mediation communications to a local newspaper. If parties believe a confidential communication is only privileged, they could suffer dire consequences for making a disclosure outside a proceeding.[49]

The term confidentiality needs to be adequately defined as it is presently used to mean different things that result in a lack of clarity regarding the protection of mediation communications. Confidentiality is being used to mean: (1) a mediation communication cannot be disclosed in a proceeding; (2) a mediation communication cannot be disclosed outside a proceeding; and (3) a mediation communication cannot be disclosed in a proceeding or outside a proceeding. If a different term was used to reference mediation privilege and confidentiality jointly, confusion would be lessened, and we would know if someone was referring to mediation communication protection generally or in addition to that provided by privilege. Further, if someone is referring to the protection of privilege, they should use the term "privilege" rather than "confidentiality."

To further complicate the matter, mediation confidentiality and privilege differ from confidentially and privilege generally, which typically bind only the professionals to whom the information was disclosed, such as to attorneys, health and mental health professionals and clergy, and not the discloser of the confidential communication. In contrast, mediation confidentiality and privilege bind all mediation participants from making disclosures. In a recent article, two commentators have proposed the term "privadential" to describe communication protections that bind all participants and not just the professional(s).[50] Further, they note that privadential protections are not waived by the presence of certain third or adversary parties as is generally the case with attorney client communication.[51]

III. PROTECTED MEDIATION COMMUNICATION INCONSISTENCY AND CONFUSION[52]

A. DEFINITION OF MEDIATION COMMUNICATION

Communications occurring during mediation are not necessarily protected from subsequent disclosure. Definitions of mediation communications will identify what is protected, and often what is not protected. The UMA defines mediation communication as "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".[53] Florida takes a similar, but slightly different approach, by defining a mediation communication 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 in furtherance of a mediation. The commission of a crime during a mediation is not a mediation communication." [54]

Determining whether a communication fits within the definition of a mediation communication is not always easy. The UMA and FMCPA both include nonverbal communication in their definitions, with some variation in description. An Indiana appellate court did not find that the trial court had abused its discretion when it allowed testimony regarding the insurance adjuster's observation of a party during the mediation.[55] Similarly, in a criminal case, the judge permitted the mediator and defendant's attorney to testify about observations made in the defendant's dissolution of marriage mediation shortly before she was charged with first degree murder and aggravated child abuse for causing the death of her two-year old daughter.[56] The court might have found an exception to introduce the evidence, but did not need to do so, given its decision that the mediator's and lawyer's observations did not constitute mediation communications.[57]

Courts have often decided that communications were within the definition of mediation communication and therefore inadmissible at subsequent adjudicatory proceedings. Predictably, the Indiana Supreme Court found the husband's purported statements to the mediator during mediation were protected communications that fell clearly within the inadmissibility of evidence.[58] Less predictably, an Oregon appellate court found that settlement letters written by a party's attorney were mediation communications protected by the statute as they were direct settlement communications which were

made to a representative of one of the parties.[59] The court determined that this was true whether or not the letters were prepared specifically for the mediation.[60]

B. SCOPE OF MEDIATION PROTECTION

Mediation communications are not protected in all mediations. The state mediation privilege or confidentiality provisions will identify those mediations that are afforded communication protections. The scope of the afforded protection, usually found in a state statute or evidence code, identifies the types of cases that are afforded protection. However, parties may also agree to keep matters confidential,[61] and court or administrative orders may provide mediation communication protection for certain proceedings.[62] Importantly, while parties generally can agree to communication protections that provide for confidentiality, which limits disclosure outside a proceeding, parties are not able to make decisions about the admissibility of evidence with certainty, since such decisions fall within the court's domain. Further, mediation communication protection may only apply to court connected cases. A Maryland court held that a mediation was not covered by Maryland's confidentiality rules because the parties attended a private voluntary mediation.[63]

States provide the scope of coverage by noting the matters that will either be included or excluded. For example, The FMCPA applies to mediations identified in the Act, and specifically covers mediations when parties agree to be bound by the Act. However, it does not cover pre-suit mediations mediated by mediators not certified by the Florida Supreme Court if the parties do not expressly agree to be bound by the FMCPA.[64] While the UMA excludes peer mediation between students under the auspices of schools[65] and mediations between youths who are residents in correctional institutions,[66] family and child protection mediations would generally be covered, even if pre-suit, when a mediator is involved.[67] The UMA and FMCPA differ in family and child protection mediation communication protection in type and scope. The FMCPA provides both confidentiality and privilege protection,[68] while the UMA generally only provides a privilege. However, the UMA[69] provides privilege protections to a larger percentage of family and child protection mediations than does the FMCPA. Nonetheless, the extent of the UMA mediation privilege protections afforded parental admissions to the allegations of child abuse and neglect before the child protection court varies significantly across UMA states.[70]

C. PROTECTED TIME FRAME

The time frame outlining when communications will be considered mediation communications and therefore subject to protection from disclosure varies considerably. Some states require that the communication occur during a mediation session, while other states protect certain communications made outside a mediation session. Both the UMA and FMCPA protect communication that occurs in a mediation session as well as certain communications that occur outside a mediation. For example, the UMA drafters included language to cover communications made during a mediation session as well as communications "made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator."[71]

For Florida court ordered cases, the communication protections begin when the case is ordered to mediation and, in non-court ordered cases, the mediation communication protection begins when the "parties agree to mediate or as required by agency rule, agency order, or statute." The Florida legislation specifies a specific time for both the beginning and ending of the mediation for purposes of determining the timeframe of protected mediation communications. The ending time may extend through agreement approval by the court, if the approval is required by law.[72] For other cases, the protection continues up until the time the parties reach agreement, the mediator declares impasse or the mediation is terminated.[73] In contrast, the UMA does not establish a specific time for the conclusion of mediation privilege, leaving the determination to the court.[74] As such, there may be instances where communications made after the parties reach agreement will be considered

differently under the UMA and the FMCPA. Similarly, some states have a narrow view of mediation and may limit protection to the mediation session. Arizona's Rules of Family Law Procedure provide that mediation conferences are private and the exchanged oral and written communications are confidential.[75] Similarly, the Supreme Court of Oregon, in a matter of first impression held that private communications between a client and attorney outside the mediation session did not constitute a protected mediation communication.[76]

D. WAIVER OF PROTECTED MEDIATION COMMUNICATION

Generally, all holders of the protected mediation communication must waive protection of the mediation communication for the waiver to take effect. For example, the Montana Act explicitly provides that confidentiality and privilege do not apply to the information revealed during mediation if the parties and mediator agree to such in writing before, during, or after the mediation.[77] Similarly, Oregon allows mediation parties to agree in writing that part or all of their mediation communications are not confidential.[78] Other states permit parties to waive without specifying that a written waiver is required.[79] The FMCPA provides that parties may agree in writing that all or some of the statute will not apply.[80] The UMA provides that privileges "may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation."[81]

However, under the UMA not all mediation communication protections can be waived by the parties alone. The UMA affords privileges to the mediator[82] and nonparty participants,[83] which may prevent the parties from admitting certain communications in court. For example, even if all the parties waive their privilege, they cannot introduce statements made by the mediator or nonparty participant unless the mediator or nonparty participant who made the communication also waives their privilege. In addition, the parties cannot compel the mediator to disclose any mediation communication (made by any mediation participant) in a proceeding.[84] In contrast, states such as Florida do not provide a separate privilege for mediators or nonparty participants. States providing a privilege to nonparties do so at the risk of diminishing party self-determination in resolving their issues. This may occur when parties have waived their privilege yet are precluded from admitting mediation communication into evidence because others' privileges limit their decision-making ability.

Early case law foreshadowed current statutory provisions on mediation protection waiver. In 1995, a Florida court found implicit waiver by a former wife who sought to introduce evidence to prove her case, opening the door for the former husband to do the same.[85] The FMCPA makes the implicit waiver explicit, stating "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." Likewise, the UMA provides that a person who discloses or makes a representation regarding a mediation communication is precluded from asserting a privilege if the disclosure or representation prejudices another person in a proceeding.[86]

Courts in states that have not adopted the UMA have nonetheless considered portions of the UMA when deciding mediation communication protection issues. For example, the Supreme Court of Georgia, in a dissolution of marriage case, referenced UMA language (although the state had not adopted the Act) in affirming the trial court's enforcement of the parties mediated agreement and concluding that the court had not erred in calling the mediator to testify.[87] The trial court admitted testimony by the mediator regarding the husband's mental capacity to participate in the mediation and the settlement.[88] The supreme court determined that, consistent with Georgia case law, he had waived his confidentiality when he sought to block enforcement of the mediated agreement.[89] Further, the court noted that the mediator did not testify about confidential statements made during the mediation, and that there were no other witnesses available to testify on this matter.[90] Despite its holding, the court acknowledged the importance of mediation confidentiality and urged trial judges to exercise caution when deciding to hear the testimony of mediators.[91]

IV. COMMONLY FOUND EXCEPTIONS TO PROTECTED MEDIATION COMMUNICATIONS

A. MEDIATED AGREEMENTS

Signed, written mediated agreements are often not confidential to allow for court notification and enforcement. Both Florida and Virginia deem written mediated agreements signed by the parties, as not confidential, unless the parties agree otherwise. Virginia requires that the agreement be in writing. In contrast, Arkansas provides that mediated agreements are confidential, and participants and third parties shall not be required to testify in proceedings relating to the matter in dispute.[92] The Arkansas Code also provides that if this section conflicts with other legal requirements, the issue of confidentiality may be presented to the court to determine *in camera* whether the communications are subject to disclosure.[93]

In contrast, oral agreements are commonly not recognized or enforced by the courts. Florida courts definitively reject oral agreements, requiring mediated agreements to be in writing and signed by the parties.[94] California specifically recognizes oral mediated agreements under certain circumstances, meaning they are admissible.[95] California similarly recognizes written mediation agreements if they are signed by the parties and one of the following applies: the agreement provides that (1) it is subject to disclosure or admissible, (2) enforceable or binding, (3) all parties expressly waive in writing or orally, or (4) the agreement is used to show fraud, duress, or illegality related to the dispute.[96]

B. MANDATORY REPORTING FOR ALLEGATIONS OF ABUSE/NEGLECT PERTAINING TO CHILDREN AND VULNERABLE ADULTS

Generally, state mediation communication protections provide exceptions for mandatory reporting of mediation communications involving allegations of (1) child abuse, neglect, and abandonment, and (2) vulnerable adult abuse, neglect and exploitation, as states have an interest in protecting their most vulnerable members. Florida's exception to confidentiality and privilege is for any mediation communication that requires a mandatory report, pursuant to the statutes protecting children and vulnerable adults, "solely for the purpose of making the mandatory report to the entity requiring the report."[97] Significantly, the admission in mediation, requiring mandatory report in Florida, "remains confidential and is not discoverable or admissible for any other purpose…"[98]

For states that only provide a mediation privilege to protect mediation communications, there is little or no need for a mandatory reporting exception as a privilege only prevents disclosure in a proceeding and the report regarding abuse or neglect would not be made in the context of a proceeding. However, in child protection mediation cases, where the focus of the discussion typically involves allegations of abuse, neglect or abandonment, states vary as to whether such parental admissions of abuse or neglect may be admitted as evidence in the child protection proceeding. There is a special need for communications to be privileged in child protection mediation, as the actual allegations of abuse or neglect may be the central subject of the mediation. During mediation, parents may be asked whether they will admit to any of the allegations of child abuse, neglect or abandonment in the petition before the court. Not surprisingly, a parent would be unlikely to openly discuss whether such abuse or neglect occurred if the child protection agency would be able to advise the court that the parent admitted to the abuse or neglect in mediation even when no agreement was reached in mediation.

To address this concern, the UMA offered optional language for state adoption that would allow admissions of child abuse or neglect made in a child protection mediation to remain privileged. In some UMA states, the evidence is not admissible if a public agency participates in the mediation[99] or the public agency participates, and the mediation was court ordered.[100] In one UMA state, Utah, there is no privilege for such admissions whatsoever and a parent's admission in mediation is

admissible in court. Consequently, parents participating in child protection mediation in states such as Utah are at risk of their admissions in a child protection mediation being disclosed in court.[101]

C. MEDIATOR MALPRACTICE AND MISCONDUCT

Some states specifically mention mediator misconduct as an exception to protected communications. The UMA excepts from privilege, a mediation communication "sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator."[102] Similarly, Virginia provides an exception for an action between the mediator and a party for damages arising from the mediation.[103] Likewise, the FMCPA provides an exception for disclosing mediation communications "[o]ffered 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"[104] as well as "[o]ffered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding.[105]

In some UMA states mediators who are determined not to be impartial, even after the parties' have been advised of any mediator conflicts and agreed to proceed, could be "precluded by the violation from asserting a privilege."[106] Under such circumstances where mediators are not impartial, they lose their privilege, which might result in their being compelled to testify in the UMA jurisdictions of the District of Columbia, Illinois, Iowa, Nebraska, New Jersey, Ohio and Vermont. In the remaining UMA states, mediators determined not to be impartial could still retain their privilege if they otherwise comply with the UMA Section on Mediator's Disclosure of Conflicts of Interest.[107]

D. MALPRACTICE AND MISCONDUCT BY OTHER PROFESSIONALS

State law and policy governing the protection of mediation communications vary greatly, with courts from different states sometimes reaching polar-opposite results on the same issue. The issue of lawyer misconduct arising during mediation exemplifies the variance among states as to whether a party may successfully sue an attorney for malpractice occurring during mediation. In a 2015 case of first impression, the Oregon Supreme Court addressed the issue of whether mediation communications would be admissible in a subsequent legal proceeding in which a party sued his attorney for lawyer malpractice occurring during the mediation.[108] Having determined that the parties had mediated, it reviewed the definitions of mediation[109] and mediation communication,[110] as well as the scope and duration of mediation provided in the statute. Applying the confidentiality provisions of the statute, the supreme court concluded that the mediator's statements made to parties regarding their dispute are mediation communications and, therefore, inadmissible.[111] Similarly, statements made by attorneys while participating in the mediation proceedings are also mediation communications, which would therefore be inadmissible.[112] However, the court found that private attorney-client discussions between a party to the mediation and his attorney, which do not take place during the mediation session, are not mediation communications.[113] Consequently, they are neither confidential nor inadmissible mediation communications but may still fall under attorney-client privilege. The private conversations outside the mediation session were distinguished from communications occurring during the mediation related to the substance of the dispute, which were covered by the mediation privilege.[114]

Also, in 2015 an Arizona court addressed this issue when a former client sued the attorney who represented her at mediation, alleging substandard advice during the family mediation. Consistent with the Oregon decision, the Arizona court held "that the mediation process privilege applies in this case and renders confidential all materials created, acts occurring, and communications made as a part of the mediation process." The Arizona Rules of Family Law Procedure specifically provide that mediation conferences are to be private and all verbal and written communications shall be confidential.[115] The court strictly construed the statute, finding its language to be clear, unequivocal and providing for broad protection that included attorney-client communications.[116] Therefore, there

were no exceptions to cover attorney-client communication that would allow for their admission into evidence.

These decisions are consistent with California cases, which also held that attorney-client communication is protected and inadmissible in court when parties seek to sue their attorneys for malpractice occurring during mediation. The District Court of Appeals, confirming that California does not have an attorney malpractice exception to mediation confidentiality, expressed sympathy for the plaintiff's position that "mediation confidentiality was never intended to protect attorneys from malpractice claims." [117] The court noted it was an issue for the Legislature to permit consideration of countervailing public policies.[118] However, the California legislature did not enact a change to the privilege which would allow alleged lawyer malpractice occurring during mediation to be admitted into evidence.[119] Instead, the law was changed to require attorneys to advise their clients in writing, in advance of mediation, about protected communication with their attorneys, including the following:

> This means that all communications between you and your attorney made in preparation for a mediation, or during a mediation, are confidential and cannot be disclosed or used (except in extremely limited circumstances), even if you later decide to sue your attorney for malpractice because of something that happens during the mediation.[120]

Florida, and states adopting the UMA, allow an exception to protect mediation communication applicable to this situation. Florida specifically provides an exception for any mediation communication "[o]ffered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct."[121] The FMCPA also provides an exception for disclosures of mediation communications "[o]ffered 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."[122] Similarly, the UMA provides that there is no privilege for mediation 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."[123] Virginia specifically provides an exception "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."[124]

Similarly situated parties in different states may have opposite results regarding whether they will be able to sue their attorney or other professionals participating in mediation for malpractice occurring during mediation. In some states, parties will be able to admit evidence of professional malpractice occurring during mediation. In other states the professional-client communications will be deemed privileged and therefore inadmissible at trial. If clients' malpractice lawsuits depend on admitting evidence of what transpired during the mediation and the communications are inadmissible, the clients will be unable to prove their cases, and the professionals will not be held accountable even if they did, in fact, commit malpractice.

E. OVERTURNING, REFORMING AND ENFORCING MEDIATED AGREEMENTS

The UMA and FMCPA both provide exceptions for voiding or reforming a mediated agreement. The UMA provision covers "a proceeding to prove a claim to rescind or reform a defense to avoid liability on a contract arising out of the mediation."[125] Similarly, the FMCPA provides an exception for any mediation communication offered "for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation."[126] The FMCPA largely codifies the case law in existence at the time the Act was drafted, which established the legally recognized grounds for reforming or voiding a mediated agreement. A review of Florida mediation cases displays the recognized exceptions, with some cases dating back

over two decades. They identify the viable causes of action courts have found to grant parties court access and warrant admitting the evidence needed to prove their case. Significantly, the cases reflect the courts discretion in deciding the relevant law to determine whether parties have a legally recognized basis for reforming or overturning their mediated agreement.

As with contracts generally, Florida courts have granted mediation parties the opportunity to challenge their mediated agreements, recognizing causes of action including fraud, misrepresentation, extortion and mutual mistake. Consistent with established contract law, a party who sufficiently alleges intrinsic fraud in a motion to set aside a dissolution of marriage is entitled to a hearing on its merits.[127] A party in a dissolution of marriage case is entitled to a hearing on a motion to dismiss a mediated settlement agreement when the motion is facially sufficient.[128] Similarly, a court vacated a mediation agreement when the evidence demonstrated that the former wife made false statements regarding a material fact, knew the representation was false, intended the representation to induce reliance by the former husband, and the former husband was injured by his reliance on the representation.[129]

At times, Florida courts have not looked specifically at mediation confidentiality and privilege, but rather whether the parties have a recognized cause of action. Deciding that parties should not benefit from their extortion actions and courts should not ignore them, the appellate court remanded a dissolution of marriage case to the trial court with instructions to proceed in accordance with its opinion. During the mediation, wife passed husband a note saying "[i]f 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 be living freely as if you did nothing wrong." Husband, who had previously been in trouble for photographing nude underage girls, finalized the mediated agreement with wife after he read the note. The Florida court, unwilling to condone extortion, stated that presentation of an extorted agreement to the court is a fraud on the court, making the court an instrument of extortion.[130]

Confronting the issue of whether the mediation privilege applied to a party's allegation of mutual mistake, a Florida court concluded that the statutory privilege protecting the inadmissibility of oral and written communications should not apply.[131] Further, in a dissolution of marriage case in which the parties agreed that there was a mutual mistake, the appellate court found that the trial court had erred in not rescinding the settlement agreement based on the persuasive evidence presented to the court.[132] Scrivener's error has also been used as a basis for parties to modify mediated agreements, providing the opportunity to have the court admit evidence to make a determination regarding the allegation.[133]

While most case law regarding overturning or enforcing mediated agreements is consistent with principles of contract law, the case of *Vitakis-Valchine v. Valchine*[134] significantly departs from established contract law in that the wrongdoing of a third party served as the basis for potentially reforming the mediated agreement.[135] The court held that mediator misconduct can be the basis for setting aside a mediated agreement in a court ordered case.[136] The appellate court remanded to the trial court for its determination of whether the mediator had substantially violated the ethical rules, and if so, whether the violation had led the plaintiff to enter into the mediated agreement.[137] On remand, the trial court did not find mediator misconduct warranting the setting aside of the agreement.[138] Nonetheless, the FMCPA lists legally recognized bases for voiding or reforming a mediated agreement as an exception to confidentiality,[139] and mediator misconduct is now such a legally recognized basis in Florida.

F. MANIFEST INJUSTICE

Neither the UMA[140] nor the FMCPA contain a "manifest injustice" exception. The UMA drafters considered including such a provision but noted strong opposition to including a broad manifest justice exception.[141] Some commenters feared that the exception would allow too much judicial discretion to create unwarranted exceptions.[142] Other states do include a manifest injustice

exception. For example, Connecticut's mediation privilege exception requires a court to determine if "the interest of justice outweighs the need for confidentiality, consistent with the principles of law."[143] The court determines if this decision is necessary as a result of the circumstances. Unlike Connecticut, Maine's manifest injustice exception to privilege requires an *in camera* determination that the requested disclosure is of sufficient magnitude to outweigh the protection of mediation confidentiality.[144] Further, a Connecticut bankruptcy case reflects the court's analysis in balancing the heightened protection afforded mediation materials and the need for disclosure of financial information.[145] The parties had met with a mediator regarding their contemplated divorce. Subsequently, the mediator was directed to produce documents regarding the parties' divorce mediation. The court found that the interest of justice and the need for complete and full financial disclosure, outweighed the need for mediation confidentiality.[146]

G. COMMISSION OF A CRIME, CERTAIN STATEMENTS CONCERNING CRIMINAL BEHAVIOR, AND THREATS DURING MEDIATION

Some mediation statutes provide exceptions for threats made during mediation, as well as the intentional or willful use of a mediation communication to commit a crime, plan a crime or conceal ongoing criminal activity. The UMA does not provide a privilege for "a threat or statement of a plan to inflict bodily injury or commit a crime." Similarly, Virginia provides an exception "where a threat to inflict bodily injury is made."[147] In UMA states there is no privilege where communications are "intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity."[148] Virginia also provides an exception for planning, attempting to commit, committing or concealing ongoing crime.[149] In Oregon, "[a] mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a specific person."[150] Similarly, the FMCPA provides an exception for "any mediation communication… that is willfully used to plan a crime, commit or attempt to commit a crime, conceal ongoing criminal activity, or threaten violence."[151]

H. OTHERWISE DISCOVERABLE MATTERS

The fact that something is communicated during mediation does not guarantee protection if it might be otherwise discoverable. A party cannot disclose what was communicated in mediation but may otherwise discover the information and admit it in court. The FMCPA provides that "[i]nformation 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."[152] Similarly, the UMA provides that "[e]vidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation."[153] Also, California provides that "[e]vidence 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 a mediation consultation."[154]

V. DETERMINING WHETHER MEDIATION COMMUNICATIONS ARE PROTECTED FROM DISCLOSURE: ANALYSIS OF A HYPOTHETICAL FACT PATTERN

As states protect mediation communications in various ways with differing results, it becomes challenging to determine whether a particular mediation communication will be protected from future disclosure. We offer the below roadmap for determining whether a mediation communication is protected in a particular jurisdiction and, if so, what protections would apply.

A. ROAD MAP

1. Is the process considered a mediation that is afforded mediation communication protection?
2. Does the communication in question qualify as a protected mediation communication?
3. If the communication qualifies as a protected communication, what types of protection are afforded to the communication?
4. Did the parties waive communication protections, if permitted by law?
5. Are there applicable exceptions to the protection?

B. FACT PATTERN FOR USE WITH THE ROAD MAP

We provide a brief fact pattern to demonstrate the utility of the road map. Each question will be addressed using the UMA and the FMCPA. For each, we offer an answer based on our analysis of the applicable law. Of course, we are unable to accurately predict specific court determination on the issues. Court decisions may vary based on specific case facts, statutory interpretation, evidentiary rulings and case precedent.

> Sue and Mark Nolonger have had a nine-year troubled marriage and have two young children. Sue is the mayor of a small town and Mark works for the local utility company. Their first mediation session was court ordered and did not result in an agreement. They quarreled over Mark's challenge that some of Sue's inherited funds were now marital and whether Mark was entitled to a portion of those funds. The court later ordered them to participate in a second mediation concerning only timesharing and a parenting plan for their children. After much contentious arguing, the parties were able to reach an agreement concerning the issues the court had referred to mediation. They signed an agreement and no subsequent mediation session was scheduled. On the way out of the mediation conference room, Sue, angry about some of the concessions she made, declared in frustration that she feels Mark always tries to get his way. She then tells him that he really hasn't been getting his way for the past two years because she's been having an affair with another man and recently bought her lover a new car. Can Mark disclose: (1) Sue's admission (of having an affair and purchasing a car for her lover) in their upcoming divorce hearing regarding the unresolved monetary divorce issues? (2) Sue's admission to the press in time for the upcoming mayoral election?

C. ANALYSIS

1. Is the Process a Mediation that Is Afforded Mediation Communication Protection?

We necessarily begin with the applicable definition of mediation. The UMA defines mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[155] With greater specificity, the FMCPA provides that mediation is "a process whereby a neutral third party called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives."[156]

Therefore, Sue and Mark's dispute resolution process fits the definition of mediation under both the UMA and FMCPA.

Having determined that the process is mediation, we next determine if the mediation is afforded protection of its communications. We look to see if the state has a privilege or confidentiality provision applicable to the mediation in question. The scope of the afforded protection identifies the types of cases that are afforded protection. The FMCPA applies to any mediation conducted pursuant to the Act; facilitated by a Florida Supreme Court certified mediator, unless the parties agree

not to be bound by the Act; or required by court order, statute, court rule, agency rule or order.[157] This case was court-ordered and neatly fits within the FMCPA's scope. The scope section of the UMA includes that the Act applies to a mediation in which "the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation."[158] Therefore, this mediation falls squarely within the scope of both the UMA and FMCPA and thus the answer is yes, the mediation is afforded protection of its communications in UMA states and Florida.

2. Does the Communication in Question Qualify As a Protected Mediation Communication?

We now look to the definition of mediation communication to determine what is covered by the applicable provision governing protection of mediation communication. The UMA defines mediation communication as "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."[159] Florida's approach varies somewhat, defining a mediation communication 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 in furtherance of a mediation. The commission of a crime during a mediation is not a mediation communication."[160]

Sue's statement does not fit within the UMA definition of mediation communication. The definition does not include communications made after the agreement is signed, the mediation has ended, and no further mediation is contemplated.[161] Consequently, there is no protection for Sue's statement under the UMA. In contrast, Sue's statement does fall within the protection of the FMCPA because it is a mediation communication occurring during the protected time frame. The FMCPA mediation communication protection time frame begins when the court orders the case to mediation[162] and extends after the mediation session has ended, to court approval of the parties' agreement, when court approval is required by law.[163] As the court referred matter for mediation was the parties' parenting plan, including time sharing, their mediated agreement would require court approval, justifying extension of mediation communication protection pursuant to this statutory provision.[164] Therefore, Sue's statement is a protected mediation communication under the FMCPA.

3. What Protections Are Afforded the Communication?

No mediation communication protection is afforded to Sue's statement under the UMA as it took place after the mediation ended and does not fit within the definition of mediation communication.[165] Therefore, her statement will receive neither privilege nor confidentiality protection in states that have adopted the UMA, and Mark is not limited in his communication because the statement was made after mediation and was not "made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator."[166] Mark is able to disclose to the court and alert the media as to Sue's statement. He could probably disclose her statement to the press, even if it were deemed a mediation communication, since UMA states do not generally provide confidentiality protection to mediation communication.[167]

The FMCPA provides both privilege and confidentiality protection for mediation communication.[168] Under the FMCPA, Sue's statement would be considered a mediation communication because it meets the definition and occurred within the time frame for protection.[169] The FMCPA grants Sue "a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications."[170] Notably, in addition to the privilege, the FMCPA provides confidentiality for Sue's statement, meaning Mark cannot disclose her comment about having an affair to the media. The FMCPA provides that "[a] mediation participant shall not disclose a mediation communication to a person other than another mediation participant or participant's counsel."[171]

4. Did the Parties Waive the Mediation Communication Protection?

The FMCPA provides that parties may agree in writing that portions of the statute will not apply.[172] The UMA provides that privileges "may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation."[173]

However, Sue has done nothing to waive privilege or confidentiality under the UMA or the FMCPA. She did not have a privilege to waive under the UMA as her statement was not protected under the Act. Sue does have privilege and confidentiality under the FMCPA.[174] Significantly, if Mark were to violate the confidentiality provisions of the FMCPA by disclosing Sue's statement to someone other than a mediation participant or participant's counsel, he would be subject to remedies including compensatory damages, equitable relief, mediation fees and costs, and reasonable attorney's fees for the remedies application.[175] Additionally, as the case was court ordered, he could also be subject to sanctions by the court under the FMCPA.[176] Further, if Mark did disclose Sue's statement in court, he would have waived his privilege to the extent necessary for Sue to respond to his disclosure.[177]

5. Is There an Exception to the Protection?[178]

The UMA[179] and FMCPA[180] delineate a list of specific exceptions. While the UMA requires "in camera review" of certain exceptions to the privilege,[181] Florida does not require such a review for any of the stated exceptions. No specific exceptions seem to apply to the limited facts provided in the hypothetical fact pattern. However, if facts were provided to reflect wrongdoing at the mediation, such as fraud or extortion, an exception might well apply. Regardless, Sue's affair might still be something Mark could disclose if he were to find other evidence of her affair. Generally, information otherwise admissible is not made inadmissible by virtue of being disclosed in mediation. Both the UMA[182] and FMCPA[183] provide exceptions for information otherwise admissible or subject to discovery. Therefore, Mark would not be limited in his ability to seek other evidence and to disclose the discovered information either in a proceeding or outside a proceeding.

VI. RECOMMENDATIONS

1. Mediation communication protections should be clearly delineated in each state or similar jurisdiction to provide predictability concerning the protections afforded their disclosure outside of mediation. Ideally, such delineation should at a minimum address the following:
   - A clear definition of "mediation" and "mediation communication";
   - The type of protection afforded a mediation communication;
   - The duration of time when mediation communications are protected;
   - Who is bound by the communication protections and who is required to waive communication protections in order for a particular communication to be disclosed; and
   - What exceptions apply to the mediation communication protections.
2. Given the very private nature of family and child protection mediation and the stresses that families are under at such times, communication protections should include both privilege and confidentiality protections so that disclosures are prohibited in a proceeding as well as outside a proceeding.
3. Clearly stated exceptions to mediation confidentiality and privilege should be in place for each state. The exceptions should be carefully crafted to permit compliance with mandatory reporting laws, ensure self-determination by the parties when they mutually wish to permit disclosures of mediation communications, hold professionals accountable for actions and inactions regarding mediation, not conceal criminal behavior in mediation, and allow a party to challenge or defend the enforceability of an agreement reached in mediation.

4. Intrastate consistency regarding mediation communication protections should be established in those states where the protections may be inconsistent to allow for reasonable expectations of the parties concerning their mediation communications to be consistently applied within a state.
5. Given the complexity of mediation communication protections, greater emphasis should be placed upon educating mediators, lawyers, the court and all others involved in ordering, managing and/or participating in mediation.
6. Given the high rate of unrepresented parties participating in family mediation, courts should include detailed and understandable information in the order of referral to mediation concerning the protections afforded in mediation communication so that parties can better self-determine the extent to which they wish to make disclosures in mediation and better comply with applicable laws and rules governing mediation communications.
7. Prior to mediation, mediators should provide mediation participants with clearly written and easily understood information explaining the extent to which mediation communications are protected from disclosure. Mediators should also explain these protections verbally in order to promote better party understanding and compliance with mediation communication protections.

VII. CONCLUSION

Early innovative efforts to promote mediation have led to its widespread use throughout the country, with the realization that the process is uniquely suited for family and child protection cases. Unfortunately, extensive innovation in the development of mediation communication protections has had the deleterious effect of creating an inconsistent and confusing body of mediation law, which demands attention. Therefore, states and the court should ensure that laws and rules concerning mediation communication protections are understandable, clear and predictable.

For parties to effectively and fairly use the process, they need to know what mediation communication will be protected from subsequent disclosure and what may be subject to disclosure in a future proceeding or to the world at large. This necessitates that the definitions, law and rules regarding privilege and confidentiality be clearly communicated to the parties in advance of their participation in the process. Additionally, at the beginning of mediation, mediators should explain existing communication protections in an understandable manner to the parties, so they may make informed decisions concerning what they elect to reveal in mediation as well as what obligations they have to not disclose mediation communications in the future. To do anything less could lead to an abuse of the process and undermine public confidence in mediation.

ENDNOTES

1. “Family and divorce mediation ("family mediation" or "mediation") is a process in which a mediator, an impartial third party, facilitates the resolution of family disputes by promoting the participants’ voluntary agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements.” Model Standards of Prac. for Fam. & Divorce Mediation (Ass’n of Family and Conciliation Courts 2000) (citing to the Overview and Definitions), https://www.afccnet.org/Portals/0/PublicDocuments/CEFCP/ModelStandardsOfPracticeForFamilyAndDivorceMediation.pdf.

2. “Child protection mediation (CPM) is a collaborative problem-solving process involving an impartial and neutral person who facilitates constructive negotiation and communication among parents, lawyers, child protection professionals, and possibly others, in an effort to reach a consensus regarding how to resolve issues of concern when children are alleged to be abused, neglected or abandoned.” Model Standards of Prac. for Fam. & Divorce Mediation §1.1 (Ass’n of Family and Conciliation Courts 2012), https://www.afccnet.org/Portals/0/Guidelines%20for%20Child%20Protection%20Mediation.pdf.

3. *See, e.g.*, Marsha Kline, Janet Johnston & Jeanne Tschan, *The Long Shadow of Martial Conflict*, 53 J. Marriage and Fam. 297 (1991); Robert Emery, *Interparental Conflict and Children of Discord and Divorce*, 92 Psychol. Bulletin, 310 (1982).

4. Sarah R. Cole et al., Mediation: Law, Policy & Practice §8:13 (2018 ed.); (citing Unif. Mediation Act, Prefatory Note (2001)).

5. James R. Coben & Peter N. Thompson, *Disputing Irony: A Systemic Look at Litigation About Mediation*, 11 Harv. Negot. L. Rev. 43, 144 (2006).

6. Unif. Mediation Act § 2(1) (Unif. Law Comm'n 2003).

7. *Id*. § 2(3)

8. Fla. Stat. § 44.1011 (2019).

9. "Mediation is a process whereby a neutral and impartial third person acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. It is an informal and nonadversarial process intended to help disputing parties reach a mutually acceptable agreement." Fla. Rules for Certified & Ct-Appointed Mediators § 10.210 (2018).

10. Unif. Mediation Act §9 (g) (Unif. Law Comm'n 2003).

Some UMA drafters expressed concern that requiring mediators to be impartial would subject them to unwarranted exposure to civil litigation, create a questionably workable statutory requirement and that some parties want to use a mediator who has a duty to be partial to some extent, such as mediators who are charged with protecting the interests of children. *Id*. (cmt 5). If states elect to include the optional language requiring mediators to be impartial, UMA section 9(d) provides that a mediator found to not be impartial would be "precluded by the violation from asserting a privilege under Section 4." While recognizing the importance of neutrality and impartiality to the credibility and integrity of the mediation process, the UMA drafters warned that "Contrary use of the provisions of this Act to involve mediators in the discovery or trial process would have a destructive effect on the mediation process and would not be in keeping with the intent and purpose of the Act." *Id*. Prefatory Note cmt.1.

11. Joseph B. Stulberg, Taking Charge/Managing Conflict 37 (Lexington Books 1987).

12. *Id*.

13. *Wolf v. Loring Ward Int'l*, No. B275678, 2019 Cal. Ct. App. LEXIS 3025, at *6-7 (Cal. Ct. App. Apr. 30, 2019).

14. *Id*. at 7.

15. *Id*. at 10.

16. "Mediation proceedings pursuant to this chapter shall be held in private and shall be confidential. All communications, verbal or written, from the parties to the mediator made in the proceeding are official information within the meaning of Section 1040 of the Evidence Code." Cal. Fam. Code § 3177 (Deering 2019).

17. Sofya Perelshteyn, *Mediator or Judge?: California's Mandatory Mediation Statute in Child Custody Disputes*, 17 Pepp. Disp. Resol. L. J. May 2017, at 2.

18. "'Mediator' means a neutral person who conducts a mediation. 'Mediator' includes any person designated by a mediator either to assist in mediation or to communicate with the participants in preparation for a mediation." Cal. Evid. Code § 1115(b) (Deering 2019).

19. *See, e.g.*, Fla. Stat. § 44.403(4) (2019) (stating "'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, without prescribing what the resolution must be.").

20. Cal. Fam. Code § 3183(a) (Deering 2019).

21. Cal. Evid. Code § 1121 (Deering 2019) ("Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.").

22. *Id*.

23. *Anderson v. Anderson*, 514 S.E2d 369.374 (Va. Ct. App. 1999).

24. *In re* Marriage of Booth, No. B285119, 2019 Cal. Ct. App. LEXIS 7499, at *13 (Cal. Ct. App. Nov. 2, 2018).

25. *See, e.g.*, Cal. Evid. Code § 1119 (Deering 2019).

26. *See, e.g.*, Va. Code Ann. § 8.01-581.22 (2019).

27. *See, e.g.*, Fla. Stat. § 44.405 (2019).

28. *See, e.g.*, Unif. Mediation Act, § 8 (Unif. Law Comm'n 2003).

29. *Paranzino v. Barnett Bank*, 690 So.2d 725 (Fla. 4th Dist. Ct. App. 1997).

30. *Wilson v. Wilson*, 653 S.E.2d 702 (Ga. 2007).

31. *See, e.g.*, Unif. Mediation Act § 4 (Unif. Law Comm'n 2003). The mediation party may refuse to disclose and prevent others from disclosing mediation communications, so they are not subject to discovery or admissible in evidence in subsequent proceedings, unless they fit within a statutory exception. *Id*. at § 4(a). The mediator and nonparty participant may prevent disclosure of only their mediation communications. *See §§*4(b)(2) and 4(b)(3) respectively. State statutes vary greatly.

32. *Id*.

33. Fla. Stat. § 44.405(1) (2019). The Act also gives the mediation party "a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding mediation communications." Fla. Stat. § 44.405 (2).

34. The Association for Conflict Resolution, the Society of Professionals in Dispute Resolution, and the Academy of Family Mediators are national mediation organizations that recommended including both confidentiality and privilege.

35. Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington D.C. have adopted the UMA.

36. Unif. Mediation Act § 8 (Unif. Law Comm'n 2003). "Unless subject to the [insert statutory references to open meetings act and open records act], mediation communications are confidential to extent agreed by the parties or provided by other law or rule of this State." *Id*.

37. *Id*.

38. *Id*. § 8 (explaining the UMA provides for exception for open meetings act and open records act).

39. Fla. Stat. § 44.405(1) (2019).

40. Unif. Mediation Act § 4(b)(2) (Unif. Law Comm'n 2003).

41. *Id*. § 4 (b)(3).

42. *Id*. § 8.

43. *Id*. Prefatory Note. "[A] central thrust of the Act is to provide a privilege that assures confidentiality in legal proceedings." Virtually all state legislatures have recognized the necessity of protecting mediation confidentiality to encourage the effective use of mediation to resolve disputes. "Indeed, state legislatures have enacted more than 250 mediation privilege statutes.". *Id* cmt. 1 (citing Cole et al., Mediation: Law, Policy & Practice (2001 2d ed. and 2001 Supp)).

44. Unif. Mediation Act § 8.

45. *Id*.

46. *Id*. § 8 (cmt a).

47. *See id*. (noting the evidentiary privilege "assures party expectations regarding the confidentiality of mediation communications against disclosure in subsequent legal proceedings. However, it is also possible for mediation communications to be disclosed outside of proceedings, for example to family members, friends, business associates and the general public.").

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

49. The Mediation Report and Agreement signed by the parties read in relevant part: "[T]his report and agreement is the result of a confidential proceeding and all signers agree to be bound by such confidentiality and shall not disclose any discussions unless agreed to in writing by all signators or unless ordered by the court." "If the trial court were to allow this willful and deliberate conduct to go unchecked, continued behavior in this vein could have a chilling effect upon the mediation process." *Id*.

50. Gregory Firestone & Sharon Press, *Privadentiality: Developing a Coherent Framework for Establishing Communication Protections in Family and Child Protection Dispute Resolution Methods*, 58 Fam. Ct. Rev. page start, pincite (2020).

51. *Id*.

52. *See infra "*Section V" for analysis of fact pattern to determine protection of mediation communications.

53. Unif. Mediation Act § 2(2) (Unif. Law Comm'n 2003).

54. Fla. Stat. § 44.403(1) (2019).

55. *Bridges v. Metromedia Steakhouse Co*., L.P., 807 N.E.2d 162 (Ind. Ct. App. 2004).

56. *Polanco v. McNeil*, No. 09-60448-Civ-COHN, 2010 U.S. Dist. LEXIS 77716, at * 75-76 (S.D. Fla. April 19, 2010).

57. *Id*.

58. *Horner v. Carter*, 981 N.E.2d 1210, 1213 2013 (citing Ind. Rules of Court, Rules for Alternative Disp. Resol. R. 2.11 2019) (incorporating Ind. Code Ann. § 408 2019)).

59. Bidwell & Bidwell, 21 P.3d 161, 164 (Or. Ct. App. 2001).

60. *Id*. at 165.

61. Parties may sign agreements to keep communications confidential. *See* Unif. Mediation Act, Commentary § 8a ((Unif. Law Comm'n 2003).

62. *See e.g*., Paranzino *supra* note 29, at 727 (finding that the appellant disrespected the court's authority when she violated the court-ordered mediation and confidentiality provision of the Mediation Report and Agreement which required her to keep mediation confidential).

63. *See, e.g*., Na. v. Gillespie, 234 Md. App. 742 (2017) (holding that the mediation was not covered by the Maryland confidentiality rules as the parties attended a private voluntary mediation).

64. Fla. Stat. § 44.402 (2019) ("(1) 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.").

65. Unif. Mediation Act § 3(b)(4)(A) (Unif. Law Comm'n 2003).

66. *Id*. § 3(b)(4)(B).

67. *Id*. § 3(a)(3).

68. Fla. Stat. § 44.405 (2019).

69. Unif. Mediation Act § 6 (Unif. Law Comm'n 2003).

70. *See infra* Section IV.B.

71. Unif. Mediation Act §2(2) (Unif. Law Comm'n 2003) (defining "mediation communication" as "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.").

72. Fla. Stat. § 44.404 (1) (2019).

73. *Id*. § 44.404(2).

74. Unif. Mediation Act §2(2) cmt. (Unif. Law Comm'n 2003) ("Responding in part to public concerns about the complexity of earlier drafts, the Drafting Committees also elected to leave the question of when a mediation ends to the sound judgment of the courts to determine according to the facts and circumstances presented by individual cases.").

75. Ariz. Fam. Law Proc. R. § 67.3.

76. *Alfieri v. Solomon*, 365 P.3d. 99 (Or. 2015).

77. Mont. Code Ann. § 26-1-813 (2019).

78. Or. Rev. Stat. Ann. § 36.220(1)(b) (West 2019).

79. *See* Ariz. Rev. Stat. Ann. § 12-2238 (West through 2019 Legis. Sess.) (allowing the mediation parties to agree to disclosures).

80. Fla. Stat. §44.402 (2019).

81. Unif. Mediation Act § 5(a) (Unif. Law Comm'n 2003).

82. *Id*. § 4(b)(2).

83. *Id*. § 4(b)(3).

84. *Id*. § 4(b)(2).

85. *Taylor v. Taylor*, 650 So.2d 662 (Fla. Dist. Ct. App. 1995).

86. Unif. Mediation Act § 5(b) (Unif. Law Comm'n 2003).

87. *Wilson v. Wilson*, 653 S.E.2d 702,706 (Ga. 2007) ("This case law is consistent with Section 6(b)(2) of the UMA (2001), which provides that, when a party contends that a mediated settlement agreement is unenforceable, the mediator may testify regarding relevant mediation communications if a court determines that 'the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, [and] that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality.' Although neither this Court nor the Georgia Commission on Dispute Resolution has adopted this exception to the confidentiality of a court-referred mediation, we conclude that fairness to the opposing party and the integrity of mediation process dictate that we create such an exception when a party contends in court that he or she was not competent to enter a signed settlement agreement that resulted from the mediation.").

88. *Id*. at 703.

89. *Id*. at 706.

90. *Id*. at 707.

91. *Id*.

92. Ark. Code Ann. § 16-7-206(a) (West 2019) ("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."); *Id*. (b).

93. *Id*. (c).

94. *See, e.g*., *Hudson v. Hudson*, 600 So.2d 7,9 (Fla. Dist. Ct. App. 1992) (holding courts will not recognize oral mediated agreements or hear testimony alleging their existence); *Cohen v. Cohen*, 609 So.2d 785 (Fla. Dist. Ct. App. 1992) (holding an oral settlement agreement reached during mediation is inadmissible as privileged unless it has been reduced to writing).

95. Cal. Evid. Code, Div. 9, Ch. 2 § 1118 (Deering 2019) (requiring an oral agreement to be recorded, terms recited on the record in the presence of the parties and the mediator, with their agreement on the record, one of the following applies: parties stating on the record that the agreement is enforceable or binding, and the recording is reduced to writing and signed by the parties within seventy-two hours after it was recorded).

96. *Id*. § 1123 (providing that the waiver must meet the requirements of Cal. Evid. Code, Ch. 2 § 1118).

97. Fla. Stat. § 44.405 (4)(a)(3) (2019).

98. *Id*. § 44.405 (4)(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.").

99. Hawaii, Idaho, Washington, New Jersey and Nebraska.

100. South Dakota, District of Columbia, Vermont, Ohio, Iowa and Illinois.

101. Utah Code Ann. § 78B-10-106(1) (West 2019); *see also* Michael Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 Seton Hall Legis. J. 1, 1-3, (1988-89) (noting mediation can be used as a discovery device and use of information obtained during mediation may unfairly prejudice parties, especially unsophisticated parties).

102. Unif. Mediation Act § 6 (a)(5) (Unif. Law Comm'n 2003).

103. Va. Code Ann. §8.01-581.22 (West 2019).

104. Fla. Stat. § 44.405(6) (2019).

105. *Id*. § 44.405(4).

106. Unif. Mediation Act § 9(d) (Unif. Law Comm'n 2003).

107. *Id*. § 9.

108. *Alfieri v. Solomon*, 358 Or. 383, 365 P.3d 99 (Or. 2015).

109. Or. Rev. Stat. § 36.110(5) (West 2019).

110. ORS 36.110(7).

111. *Alfieri*, 358 Or. at 404.

112. *Id*. at 405.

113. *Id*. at 406.

114. *Id*. at 404.

115. *Grubaugh v. Blomo*, 359 P.3d 1008 (Ariz. Ct. App. Div. 1 2015) (citing A.R.S. § 12-2238)(2015)).

116. *Id*. at 1011 (discussing that not one of the four exceptions would cover attorney-client communication).

117. *Amis v. Greenberg Traurig*, 235 Cal. App. 4th 331, 340 (2015).

118. *Id*. at 339 (citing *Cassel v. Superior Court*, 244 P.3d 1080 (Cal. 2011)).

119. E-mail from Mr. Kelly to coauthors (May 2019) (on file with coauthors) (commentator Ron Kelly advises that California has been unfairly criticized for having a near absolute or overbroad mediation privilege. He advises that the state has fifteen current exceptions).

120. Cal Evid.Code § 1129 (Deering 2019).

121. Fla. Stat. § 44.405(4) (2019).

122. *Id*. § 44.405(6).

123. Unif. Mediation Act § 6(a)(6) (Unif. Law Comm'n 2003).

124. Va. Code Ann. § 8.01-581.22 (West 2019).

125. Unif. Mediation Act § 6 (b)(2) (Unif. Law Comm'n 2003) (noting the exception does not include compelling a mediator to provide evidence of a mediation communication for this purpose); *Id*.§ 6 (c).

126. Fla. Stat. § 44.405(4)(a)(5) (2019).

127. *Gostyla v. Gostyla*, 708 So.2d 674 (Fla. Dist. Ct. App. 1998).

128. *Moree v. Moree*, 59 So.3d 205 (Fla. Dist. Ct. App. 2011).

129. *Still v. Still*, 835 So.2d 376 (Fla. Dist. Ct. App. 2003).

130. *Cooper v. Austin*, 750 So.2d 711 (Fla. Dist. Ct. App.2000).

131. *Feldman v. Kritch*, 824 So.2d 274 (Fla. Dist. Ct. App. 2002) (finding that any mistake was unilateral rather than mutual); *see also D.R. Lakes v. Brandsmart*, 819 So.2d 971 (Fla. Dist. Ct. App. 2002) (affirming trial court's ruling determining that there had been a mutual mistake); *May v. May*, 2019 WL 3310392 (S.C. Ct. App. July 24, 2019) (affirming family court's decision to reform mediated agreement to correct the parties' mutual mistake).

132. *Barber v. Barber*, 878 So.2d 449 (Fla. Dist. Ct. App. 2004).

133. *Haffa v. Haffa*, No. 93-013422, (Fla Cir. Ct. 1994) (finding there was a Scrivener's error, and the mediator testified as to the terms of the agreement).

134. *Vitakis-Valchine v. Valchine*, 793 So.2d 1094 (Fla. Dist. Ct. App. 2001).

135. *See* Fran L. Tetunic, *The Irony of Mediator as Problem Maker: Mediator Misconduct Setting Aside Mediated Agreements*, 23 Harv. Neg. L. R. 177 (2017) (discussing mediator misconduct overturning or reforming mediated agreements.)

136. Vitakis, 793 So.2d at 1100; *see also Everett v. Morgan*, No. E2007-01491-COA-R3-CV, 2009 Tenn. Ct. App. WL 113262, at *8 (Tenn. Ct. App. Jan 16, 2009) (setting aside a mediated agreement based on fraud by the mediator).

137. *Id*. at 1099.

138. *Valchine v. Valchine*, 923 So.2d 511 (Fla. Dist. Ct. App. 2006) (unpublished table decision). The Florida Mediator Qualifications Board did find that the mediator had violated the Florida Rules for Certified and Court-Appointed Mediators); Fla. Mediator Qualification Bd.: Case 2005-002 (2006).

139. Unif. Mediation Act § 6(a)(5) (Unif. Law Comm'n 2003).

140. *Id*.§ 6 (b) cmt. 9 (explaining the UMA does provide an exception if after a hearing in camera, a party has shown that the evidence sought is not otherwise available and the need for it substantially outweighs the interest in the protection of confidentiality. Further it must be sought in a court felony or misdemeanor proceeding or a proceeding regarding a claim to rescind or reform or a defense to avoid liability involving a mediated agreement. The UMA drafters saw the exception as applying for only unique circumstances when the evidence was not otherwise available and the need for it outweighed the policies underlying the mediation principles).

141. *Id*. § 8 cmt. c ("efforts to create a simpler rule with fewer exceptions but with greater judicial discretion to act as appropriate on a case-by-case basis to prevent "manifest injustice" also met severe resistence [sic] from many different sectors of the mediation community, as well as a number of state bar ADR communities.").

142. *Id*.

143. Conn.Gen. Stat. § 52-235d(b)(4).

144. Me.R. Evid. § 514(c)(7).

145. *In re* Michael S. Goldberg, L.L.C., No. 09-233370, 2012 WL 71594 (D. Conn. 2012).

146. *Id*. at 3.

147. Va. Code Ann. § 8.01-581.22 (West 2019).

148. Unif. Mediation Act § 6(a)(4) (Unif. Law Comm'n 2003); *see also* Fla. Stat §44.403(1) (2019) (excluding the commission of a crime during mediation from the definition of mediation communication).

149. Va. Code Ann. § 8.01-581.22 (West 2019).

150. Or. Rev. Stat § 36.220(6) (West 2019).

151. Fla. Stat. §44.405(4)(a)(2) (2019).
152. *Id*. § 44.405(5) (2019).
153. Unif. Mediation Act § 4(c) (Unif. Law Comm'n 2003).
154. Cal. Evid. Code § 1120 (West 2019).
155. Unif. Mediation Act § 2(1) (Unif. Law Comm'n 2003).
156. Fla. Stat. § 44.1011(2) (2019).
157. *Id*. § 44.402 (2019).
158. Unif. Mediation Act § 3 (a)(1) (Unif. Law Comm'n 2003) (applying when the mediation parties are required to mediate). *See also* Unif. Mediation Act § 3 (a)(1)(2) (applying when the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure).
159. *Id*. § 2(2).
160. Fla. Stat. § 44.403(1) (2019).
161. Unif. Mediation Act § 2(2) (Unif. Law Comm'n 2003).
162. Fla. Stat. § 44.404(1) (2019).
163. *Id*.
164. *Id*.
165. Unif. Mediation Act § 2(2) (Unif. Law Comm'n 2003) ("'[m]ediation 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.").
166. *Id*.
167. States adopting the UMA have the option to provide confidentiality protections. However, such a specific protection is not included in the model UMA.
168. Fla. Stat. § 44.405 (2019) "(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.").
169. *Id*. § 44.403(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.").
170. *Id*. § 44.405(2).
171. *Id*. § 44.405(1).
172. *Id*. § 44.402(2).
173. Unif. Mediation Act § 5(a) (Unif. Law Comm'n 2003).
174. Fla. Stat. §44.406(1) (2019).
175. *Id*.
176. *Id*. § 44.405(4)(a)(5).
177. *Id*. § 44. 405(6).
178. *See infra* Section IV (discussing usual exceptions to mediation communication protection).
179. Unif. Mediation Act § 6 (Unif. Law Comm'n 2003).
180. Fla. Stat. § 44.405(4)(a) (2019).
181. Unif. Mediation Act § 6(b) (Unif. Law Comm'n 2003).
182. *Id*. § 4(c).
183. Fla. Stat. § 44.405(5) (2019).

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