

MEDIATION CONFIDENTIALITY CONFUSION – WHAT PROFESSIONALS REALLY NEED TO KNOW



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INTRODUCTION



- Mediation communication protections established by each state
- Great variation among states and, in some cases, within state.
- Some states provide different protections for mediating child custody matters in a court context vs. mediating divorce issues outside the court.
- This focus of this workshop will be to understand the elements of communication protections.
- Will highlight Uniform Mediation Act (UMA) and Florida Mediation and Confidentiality and Privilege Act (FMCPA) to demonstrate.
- This is not legal advice regarding your state mediation communication protections or your practice.
- Unlike law, mental health, etc., mediation communication protections control disclosures by everyone, not just the professional.

RATIONALE FOR MEDIATION COMMUNICATION PROTECTIONS

WHY?

- Protecting Settlement Offers
- Promoting Candor
- Protecting the Neutral
- Preventing Additional Animosity
- Protecting the Integrity of the Process
- Promoting Greater Participation Enhances Sense of Procedural Justice

CONCERNS ABOUT COMMUNICAITON PROTECTIONS



- Denying the Court Access to Information
- Concealing Harm and Improper Party Behavior
- Protecting the Professionals' Bad Behavior
- Party Self-Determination Inhibited When Neutrals and Non-Party Participants Given Privileges

COMMON COMMUNICATION PROTECTIONS

- **Privilege** – Disclosures in court or similar proceedings can be prevented by holder of privilege
- **Confidential** – two definitions
 - Used broadly to refer to not disclosing mediation communications
 - Used more narrowly to refer to limiting the disclosures to virtually anyone outside a court or similar proceeding unless waived by all the parties
- **Mediator Incompetency to Testify** – mediator not competent to testify
- **Contractual Confidentiality Agreements** - Customized Communication Protections



PRIVADENTIALITY



- Propose new term for ADR to refer to all forms of communication protections including
 - Privilege
 - Confidential
 - Evidentiary Exclusion
 - Mediator Incompetency
 - Contractual
 - Privacy
- Propose replacing confidentiality as term for general ADR communication protections
- Unlike other types of confidential relationships (JD, MD, MHP, Clergy) privadentiality applies to all participants and not just to the professional
- Privadentiality not lost when others present as may be case in other confidential relationships
- To reduce confusion, "confidentiality" should uniquely mean preventing disclosure outside a proceeding while privilege refers the ability to prevent testimony in a court or similar proceeding (inadmissibility).

MOST COMMON SOURCES OF PRIVADENTIALITY

- Statute – Ideal if courts uniformly apply the law.
- Court Rule – Helpful if court rule is statewide
- Common Law – How clear is common law to new situations?
- Court Order – Administrative Orders or Case Specific Court Orders
- Agreement – Privadentiality Contract by Parties –





EXAMPLES OF STATE LAWS

- **UNIFORM MEDIATION ACT (UMA)**
 - Adopted in 11 states and Washington DC*
 - Provides privilege protection to prevent disclosures in a proceeding (including judicial or other adjudicative process and related pre-hearing and post-hearing motions, conferences, and discovery)
- **FLORIDA MEDIATION CONFIDENTIALITY AND PRIVILEGE ACT (FMCPA)**
 - Provides privilege protection to prevent any other person from testifying in a subsequent proceeding regarding mediation communications AND
 - Provides confidentiality protection outside a proceeding by preventing a mediation participant from disclosing a mediation communication to a person other than another mediation participant or a participant's counsel.

*D.C., Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, Washington and Washington

FAMILY MEDIATION SCENARIO

FACTS: Sue and Mark Nolonger have two young children and have had a nine-year troubled marriage. Sue is 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.

QUESTION: Can Mark disclose Sue's admission to the press in time for the upcoming mayoral election or compel the mediator to testify about Sue's admission of having an affair in their upcoming divorce hearing resolve the outstanding financial issues?



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SCOPE OF PRIVADENTIALITY

When do mediation privadentiality protections apply in your state?

- Only court ordered mediations
- Only "qualified mediators"
- Court based programs
- Parties Agree?
- All mediations?



Uniform Law Commission
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UMA & FLORIDA MCPA



• UMA APPLIES TO ANY MEDIATION

- When a "mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."

• FLORIDA MCPA APPLIES TO A MEDIATION WHEN

- "(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"

FLORIDA MEDIATION ACT

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WHAT'S ACTUALLY PRIVADENTIAL?



- Does your state define what's protected?
- If so, is there a definition of a "mediation communication?"
- Does it include
 - Verbal Communication?
 - Written Communication?
 - Non-Verbal Communication?
- Does the definition of "mediation communication" exclude anything?

UMA & FMCPA



• UMA MEDIATION COMMUNICATION

- “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. [UMA Section 2(2)]

• FMCPA

- “Mediation communication” means an oral or written statement, or nonverbal conduct intended to make an assertion, by or to a mediation participant made during the course of a mediation, or prior to mediation if made in furtherance of a mediation. The commission of a crime during a mediation is not a mediation communication. [44.403(1)]

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WHO CONTROLS PRIVADENTIALITY?

In your state, whose permission is required to permit disclosure outside mediation?

- Parties?
- Mediator?
- Non-Party Participants?

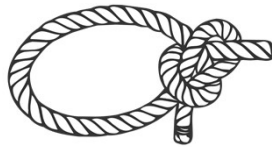


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WHO'S BOUND BY PRIVADENTIALITY?

In your state, whose communications are limited by privadentiality?

- Parties?
- Non-Party Participants?
- Mediator?



UNIFORM MEDIATION ACT



SECTION 4. (a) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.

(b) In a proceeding, the following privileges apply:

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

FMCPA



44.405 (1) Except as provided in this section, all mediation communications shall be confidential. A mediation participant shall not disclose a mediation communication to a person other than another mediation participant or a participant's counsel...

44.405(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.

44.405(4)(a) Notwithstanding subsections (1) and (2), there is no confidentiality or privilege...for any mediation communication:

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

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IN YOUR STATE, WHEN DO PRIVADENTIALITY PROTECTIONS START?

- After court orders case to mediation?
- After parties contact mediator?
- After parties appear at mediator's office?
- After mediator makes opening statement?

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IN YOUR STATE, WHEN DO PRIVADENTIALITY PROTECTIONS END?

- At end of mediation session?
- When mediator declares an impasse?
- When court approves mediated settlement if required by law?

UMA MEDIATION COMMUNICATION INCLUDES DEFINITION OF DURATION OF PROTECTION

- UMA - "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.

FMCPA Mediation Duration Begins...



44.404 Mediation; duration.—

- (1) A court-ordered mediation begins when an order is issued by the court...
- (2) In all other mediations, the mediation begins when the parties agree to mediate or as required by agency rule, agency order, or statute, whichever occurs earlier,

FMCPA Mediation Duration Ends When...



44.404 (1) A court-ordered mediation...ends when:

- (a) A partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties and, if required by law, approved by the court;
- (b) The mediator declares an impasse by reporting to the court or the parties the lack of an agreement;
- (c) The mediation is terminated by court order, court rule, or applicable law; or
- (d) The mediation is terminated, after party compliance with the court order to appear at mediation, by:
 - (a) 1. Agreement of the parties; or
 - (b) 2. One party giving written notice to all other parties in a multiparty mediation that the one party is terminating its participation in the mediation. Under this circumstance, the termination is effective only for the withdrawing party.

FMCPA Non-Court Ordered Mediation ends...



44.404(2) In all other mediations, the mediation... ends when:

- (a) A partial or complete settlement agreement, intended to resolve the dispute and end the mediation, is signed by the parties and, if required by law, approved by the court;
- (b) The mediator declares an impasse to the parties;
- (c) The mediation is terminated by court order, court rule, or applicable law; or
- (d) The mediation is terminated by:
 - 1. Agreement of the parties; or
 - 2. One party giving notice to all other parties in a multiparty mediation that the one party is terminating its participation in the mediation. Under this circumstance, the termination is effective only for the withdrawing party.



IN YOUR STATE, WHAT ARE THE EXCEPTIONS TO PRIVADENTIALITY?

UMA EXCEPTIONS TO PRIVILEGE

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;
- (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 or 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].

(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.



UMA

4(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

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ARE THERE PROVISIONS TO ENFORCE BREACHES OF PRIVACY?



FMCPA CIVIL REMEDIES



44.406 Confidentiality; civil remedies. —

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

- (a) Equitable relief.
- (b) Compensatory damages.
- (c) Attorney's fees, mediator's fees, and costs incurred in the mediation proceeding.
- (d) Reasonable attorney's fees and costs incurred in the application for remedies under this section.

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

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

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IN YOUR STATE, ARE PRIVADENTIALITY PROTECTIONS UNIFORM THROUGHOUT THE STATE?



UNIFORMITY OF PROTECTIONS WITHIN STATE

- Most UMA states and Florida have statewide uniformity of privadentiality protections.
- In Illinois, no statewide there was no uniformity as of 2015. Each circuit court in the state can determine whether to apply the UMA or enact local circuit rules with different privadentiality protections.* (may still be the case today)

*Suzanne Schmidt, Survey of Illinois Law: To Maximize Confidentiality Protections For Family Mediations, The Courts Should Rely On the Illinois Uniform Mediation Act, 39 2015 So. Ill. U. L. J. 591.

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IN YOUR STATE, WHAT IS MEDIATOR'S
OBLIGATION TO DESCRIBE PRIVADENTIALITY?



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