PRIVADENTIALITY: DEVELOPING A COHERENT FRAMEWORK FOR ESTABLISHING COMMUNICATION PROTECTIONS IN FAMILY AND CHILD PROTECTION DISPUTE RESOLUTION METHODS

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The emergence of innovative family and child protection dispute resolution (DR) methods has resulted in a varying array of communication protections. Review of these communication protections in the United States reveals a lack of consistency and clarity within each form of DR, and no clear policy to guide the development of the different communication protections across the spectrum of DR methods. This article proposes a new term, privadentiality, to describe communication protections which may be provided for a wide range of DR methods and a framework for categorizing DR methods in order to develop more consistent and appropriate communication protections across the spectrum of DR. This article concludes with recommendations to improve party and professional understanding of DR communication protections; protect families from escalating conflict; promote the integrity of DR methods; and enable courts to appropriately review and, where appropriate, approve DR outcomes.

Key Points for the Family Court Community:

- Each form of family and child protection dispute resolution has different confidentiality, privilege or other communication protections.
- The term confidentiality is used to mean different concepts and often is confusing.
- The term, privadentiality, is proposed to refer to dispute resolution communication protections that relate to all dispute resolution participants in contrast with confidentiality protections which typically only bind the professional.
- Dispute resolution methods are categorized according to the underlying nature of the method and levels of privadentiality protection are proposed for each.
- Professionals and the court need to clearly inform parties of the extent to which parties can expect their communications to be privadential.

Keywords: *Arbitration; Collaborative Law; Confidentiality; Family Group Conferencing; Mediation; Parenting Coordination; Privadentiality; Privilege.*

Communication protections limiting disclosures outside of family and child protection[1] dispute resolution (DR) processes in the United States are inconsistent and confusing. Given the importance of enabling parties to self-determine, in an informed manner, what to disclose within any dispute resolution process, professionals and policy makers need to create more consistent, constructive, and understandable communication protections. While it is reasonable to provide different communication protections across different DR methods, there does not appear to be any clearly established rationale for the different communication protections offered for various methods.

It is time to study the spectrum of DR methods and develop a coherent framework for when communications should be protected. Part I of this article will review the evolution of the most common types of family and child protection DR methods. Part II will identify the lack of definitional clarity in the term "confidential" and propose a new term, privadentiality,[2] to help address the confusion. Part III will review the rationale for providing communication protections. Part IV

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examines communication protections across the spectrum of DR methods. Part V will propose a new paradigm for establishing privadentiality protections; and Part VI will offer recommendations for remedying some of the inconsistency and confusion.

This article focuses on what DR communications can be disclosed outside a DR method and therefore, will not address communication protections within a process. For example, this article will not discuss circumstances where the "neutral"[3] may meet privately with some DR participants (e.g., a mediation caucus) and be prohibited from sharing with other participants what the neutral learned in the private meeting, absent the permission of the disclosing participant. Generally, we also will not be reviewing ethical rules governing disclosures outside the DR process by the neutral to the court or elsewhere. Given the multitude of varying ethical standards and rules that would need to be considered, such a review would more likely obfuscate rather than assist in developing a new framework.

PART I: EVOLUTION OF DR METHODS

Over the past fifty years, there has been an exponential growth in dispute resolution (DR) options to resolve family and child protection disputes.[4] Beginning in the early 1970s, courts began to experiment with the use of mediation for parenting plan disputes. A seminal talk by Frank Sander at the "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice" (Pound Conference) in 1976, encouraged the consideration of alternatives to litigation,[5] and two pioneering family mediation books, by O.J. Coogler[6] and John Haynes[7] respectively, delineated and promoted the initial development of mediation as an effective alternative to resolving most family law disputes. By 1995, thirty-three states had adopted statutes or court rules mandating mediation[8] in contested parenting plan proceedings.[9]

Child protection mediation started in the 1980s,[10] and by the 1990s, was highlighted by the National Council of Juvenile and Family Court Judges as an alternative method for improving court practices in child abuse and neglect cases.[11] In addition, the enactment of the U.S. Adoption and Safe Families Act in 1997 led many courts to encourage mediation of agreements that would more quickly achieve permanency for children.[12]

While mediation[13] evolved as the first widely used method for resolving family and child protection disputes outside of court, additional methods of DR have emerged over the years. The most prominent forms of family DR now include arbitration,[14] collaborative law,[15] family group conferencing,[16] mediation, neutral evaluation,[17] and parenting coordination.[18] While most of these methods have been used for resolving family matters, mediation, and to a lesser extent family group conferencing and similar methods,[19] have been the most common DR methods for resolving child protection cases. In addition to these, there are hybrid processes which typically involve a combination of the above methods. Hybrid processes include parenting coordination, med-arb,[20] and arb-med.[21] While combining methods can be problematic, especially if the same neutral is used, parties may choose such methods to voluntarily settle disputes.

While all of these methods arguably fit under the DR umbrella, there are significant differences between them. These differences can have important implications for the level of protection that participants can expect with regards to their communications. Given the tremendous divergence between the types of communication protections provided to various family and child protection DR methods across states (as well as possibly within states), we will analyze some of the communication protections provided and offer recommendations for a more consistent and coherent manner to address communication protections in family and child protection DR processes.

PART II: DEFINITIONAL CONFUSION OVER THE MEANING OF "CONFIDENTIAL"

The term "confidential" is often used as both an umbrella term to include a broad array of communication protections which may be provided in a DR process, and as a specific form of communication protection. For example, in the Uniform Mediation Act (UMA) Prefatory Note, confidentiality refers to preventing disclosures in a future proceeding[22] (inadmissibility), while later it appears to mean preventing disclosures outside such proceedings[23] (confidentiality). Further, most people equate the concept of confidentiality with information that is secret or private and protected from disclosure everywhere, not only in future adjudicative proceedings.[24]

These concepts—inadmissibility and confidentiality—are often confused but they are distinct. Inadmissibility specifically refers to the restriction on the use of communications in a future adjudicative proceeding. It often takes the form of a privilege whereby someone (e.g., one of the litigants/parties), can restrict the disclosure in a future proceeding. Confidentiality, on the other hand, is a concept that limits disclosures more broadly (e.g., as provided under HIPAA[25] for medical records) and is not tied to a future proceeding.

We find this lack of clarity to be problematic because it creates ambiguity such that participants in DR might not clearly understand in what settings or contexts their communications will be protected. This ambiguity can be a trap for the unwary. For example, parties believing everything in a DR method is both confidential and inadmissible in court, may disclose facts, perceptions, or interests which later may be used against them in court, or vice versa. The information may be protected from being introduced in court, but the participants may be free to post this information on social media, such as Facebook. This is particularly troubling in the context of family DR where people are often court-ordered to engage in a process and often do so without the benefit of an attorney.[26] In addition to the concern that parties might not know how their communications may be disclosed later in a proceeding or outside a proceeding, parties and participants could also be liable for innocently breaching confidentiality requirements when they do not understand or appreciate the extent to which communication protections may limit any DR participant from disclosing anything outside the DR process, or the consequences of breaching communication protection requirements.[27]

For this reason, we propose a new umbrella term, *privadentiality*, to replace the term confidentiality when referring to the umbrella of all communication protections including: confidentiality,[28] privilege,[29] incompetency to testify,[30] evidentiary exclusions,[31] and the privacy[32] of proceedings. Privadentiality would encompass all of these concepts, as well as other variations of communication protections established by contract, common law, or court or administrative rule.

Another confusion with referring to a process as being confidential is that outside the DR field, confidentiality generally applies only to the professional and not to the person whom the professional is helping. For example, lawyers, doctors, psychotherapists, and priests are prohibited, except when an exception applies, from revealing any disclosures made by their clients, patients, or penitents. The client, patient, or penitent generally is not bound by confidentiality laws and is free to make disclosures about the conversation with their lawyer, physician, etc., to anyone.

In addition, the privilege or confidentiality may be lost if another person is present when the communications are made. For example, a client's communication with an attorney when another person is present could result in the loss of attorney-client privilege. Privadentiality would apply when all participants and the professional(s) are prohibited from disclosing DR process communications and where the presence of other parties (even those with adverse interests) would not result in a loss of DR communication protections.

While others have suggested that mediation communication protections are derived from the right to privacy,[33] we reject the use of "privacy" as the umbrella term because it is a much broader concept and is considered a fundamental human right. By adopting the term privadentiality, confidentiality then only refers to protecting all DR communication from disclosure outside of a proceeding. Because privadentiality is a newly proposed term, we believe it will not be subject to the same

type of confusion associated with the term confidentiality, which is used to refer to different concepts.

Separate and apart from privadentiality protection provided to a DR process, there may be some communications within a DR process that are confidential or privileged because they occur between a client or patient and a professional. For example, communications between an attorney and client in any of the DR processes may also be considered attorney-client communications. For example, during a mediation caucus where the party and attorney are waiting for the mediator, such discussions may also be considered privileged attorney-client communication. Similarly, communications between a patient and a mental health professional would be protected by HIPAA (Health Insurance Portability and Accountability Act)[34] if the relationship between the two otherwise falls under the HIPAA. In child protection mediation, the records of the child protection agency likely also contain confidential information concerning the parent(s) or child.[35] As such, the use of the term privadential would help to distinguish the DR communication protections associated with a given DR process from any other confidentiality or privilege protections associated with a given relationship between a client/patient/penitent and lawyer/healthcare provider/priest.

PART III: RATIONALE FOR DR PRIVADENTIALITY

To understand the need for privadentiality protections requires an appreciation of the underlying rationale for protecting DR communications including:[36]

- **Protecting settlement offers**. This rationale is an extension of the protection that all settlement negotiations are afforded which was adopted for two reasons: relevance and extrinsic policy.[37] Since many people make settlement offers after concluding that spending time and money litigating the issue would not be worth it, and not because they have acknowledged or accepted responsibility for any wrongdoing, the settlement offer should not be considered an admission. A settlement offer, for example, may be seen as less costly than defending an expensive lawsuit. Further, there is a policy rationale for protecting these communications, namely, the "promotion of compromise and settlement as a way of resolving conflicts."[38]
- **Promoting candor**. The concept here is that individuals will be more willing to discuss sensitive information and be more forthcoming (and perhaps expansive with their offers) if they feel confident that their information will be protected and not shared beyond the specific conversation. They also might be more willing to acknowledge responsibility and offer an apology if it helps to resolve a dispute.
- **Protecting the integrity of the process.**[39] If a neutral were compelled to testify as to what was communicated during a process, it could require the neutral to testify in a manner that would favor one participant over the other, thereby undermining public confidence in the impartiality of the neutral and, by extension, the integrity of the process.
- **Preventing additional animosity**. A common attribute of family disputes is that they often involve strong emotions and have the potential to escalate and cause harm to family members, in particular, children. Making DR a "safe" space with protected information can help to limit the destructive escalation of the conflict. Research[40] has shown that children in family disputes are impacted much more severely when the parents are unable to "get along." If communications by parents in family disputes were protected from disclosure, the children might be better protected from escalating parental conflict outside of the DR process, and the chances of escalating conflict among mutual friends and the extended family might be reduced.
- **Encouraging the disclosure of different perspectives.** In most ADR processes, the participants are not sworn-in or required to tell the truth. In fact, in some processes, like mediation, the participants are encouraged to share their perspectives, interests, and

concerns, in addition to sharing factual information. As a result, information that is shared should not be considered testimony or definitively relied on as being factually accurate.

- **Promoting better problem solving.** To the extent that communication is protected, participants will be less fearful about how the information they disclose to each other will be used, and thus, they may be more forthcoming and more willing to brainstorm possible solutions. This has the potential to lead to better and more creative resolutions.
- **Enhancing procedural justice and confidence in the DR process.** When information is protected, parties are more likely to accept responsibility, apologize, and express sympathy. Even more importantly, parties are more likely to feel heard by the neutral and hopefully other DR participants. The research on procedural justice shows that providing an opportunity for the disputants to express their voice enhances their perception of procedural justice.[41]
- **Protecting the neutral.** ADR proceedings are generally conducted by "neutrals." Restricting the use of communications made in ADR processes protects the neutrals from having to spend time in court attesting to what was said in the ADR process when a party seeks to admit the "neutral's" perspective to "sort out the truth." While not as compelling, protecting neutrals from needing to appear in court, will enable them to spend more time providing services and perhaps, have the added benefit of limiting the amount of post-DR process litigation.[42]

While a strong case can be made for protected ADR communications, concerns have also been raised about providing such protections including:

- **Denying the court access to information.** One of the strongest arguments against protecting communications is that courts should have access to all relevant information in order to make the best decision. One could argue that especially in situations involving families, where facts and perceptions matter, a judge should be privy to all information. Without all of the evidence, a judge could make a determination regarding parental responsibility or parenting time that s/he would not make if the judge more fully understood the relationship between the parents. Furthermore, judges are often put in a position to hear information and then assign it the appropriate level of probative weight; so, on balance, the argument is that it may be better for a decision-maker to have all information and then determine relevancy.
- **Concealing harm and improper behavior.** Individuals should not be permitted to use communication protections to hide things such as abuse and neglect of a child or vulnerable adult, intentions to harm themselves or another, undisclosed assets in a divorce, admissions of prior criminal conduct or planned future criminal conduct.[43]
- **Protecting the professionals' bad behavior.** Privadentiality protections, in some cases, are "overbroad" and protect professionals at the expense of the parties.[44]
- **Providing a privilege to neutrals and nonparty participants inhibits party self-determination outside the ADR process.** The UMA provides an independent privilege to the mediator, and both the UMA and the Uniform Collaborative Law Act (UCLA) provide an independent privilege to nonparty participants. As currently formulated, these privileges prevent the parties, who may mutually waive their privilege, from presenting all the information they wish the court to consider.[45]

PART IV: COMMUNICATION PROTECTIONS ACROSS THE SPECTRUM OF DR

Communications are generally protected to some extent in all forms of DR. Communication protections are generally described as part of the process in collaborative law[46] and mediation[47]; and, in some jurisdictions, family group conferencing[48] and parenting coordination[49]; while in arbitration,[50]

broad communication protections are not typically in place although a family arbitration is still a "private" process in that outsiders may be excluded from the process. In addition, agreements to arbitrate may include confidentiality agreements. For each DR method, the above pros and cons for privadentiality need to be considered. For some DR processes, one or more of these issues may have greater relevance or import. For example, denying court access to information would seem to be more defensible to processes that emphasize self-determination, such as mediation and collaborative law, than for parenting coordination where the process involves greater ongoing coordination with the court.

Some of the differences in the privadentiality protections may closely track the difference in the intended use of the communication. In collaborative law and mediation, the participants engage in exchanges of generally protected information in an effort to arrive at an amicable resolution of their concerns while in arbitration, the participants provide information in order to persuade the arbitrator(s) of the correctness of their position. Since the purpose of communication in each of these processes is different, it is reasonable for different privadentiality protections to apply. While negotiations in mediation and collaborative law might include a discussion of feelings, interests, and perspectives aimed at the other person, the information disclosed in an arbitration more likely matches the information that might be presented in litigation and is aimed at persuading the decisionmaker of the correctness of one's position.

The role of the DR neutral may also necessitate differences. For example, while a mediator typically operates independent of the court, a parenting coordinator may work closely with the court. Currently most states do not provide privadentiality for parenting coordination, and those that do provide communication protections permit greater communication between the parenting coordinator and the court, than between a mediator and the court.[51] For example, in Florida where parenting coordination is afforded limited privadentiality protections, a parenting coordinator is permitted to provide the court with:

> … a party's compliance with the order of referral to parenting coordination, orders for psychological evaluation, counseling ordered by the court or recommended by a health care provider, or for substance abuse testing or treatment.[52]

Florida mediators, on the other hand, may only report an agreement to the court,[53] or no agreement ("without comment or recommendation"),[54] and who attended mediation.[55] For collaborative law in Florida, "[i]f a proceeding is pending before a court, the parties shall promptly file with the court notice in a record when a collaborative law process concludes."[56]

A. EXCEPTIONS TO PRIVADENTIALITY

Generally, communication protections are not absolute, and we support the need for limited exceptions. Determining appropriate exceptions requires a careful balancing of the benefits and concerns of privadentiality. Common (though not universal) exceptions to privadentiality include: court review, adoption, and enforcement of a signed agreement or delegated decision reached during a DR process[57]; waivers by all of the parties[58]; mandatory reporting of abuse or neglect[59]; prevention of subsequent injury or criminal activity[60]; reports of malpractice or misconduct[61]; or the standard contract defenses such as coercion, fraud, unconscionability, or overreaching.[62] Not only is there a great deal of variability in the exceptions across processes and jurisdictions, but there is also variability as to whether the exceptions are absolute or limited in some fashion; such as where an in-camera review may be required before an exception might apply.[63]

While most privadentiality protections provide exceptions to comply with mandatory reporting laws and threatened harm, most current exceptions do not allow for all improper behavior to be reported. For example, a DR neutral may terminate a DR process after discovering the presence of domestic violence when no children live in the home; but, the neutral often may not be allowed to

notify the court or the authorities unless the domestic violence is deemed a mandatory report or the neutral hears one party threaten to physically injure another party.[64]

B. INCONSISTENT PRIVADENTIALITY PROTECTIONS ACROSS THE SPECTRUM OF FAMILY AND CHILD PROTECTION DR

Across the Family and Child Protection DR spectrum, there is considerable variability as to what, and in what contexts, communications are protected for each DR method. Initial development of these communication protections occurred on a state-by-state basis, either by common law, statute, court rule, or a combination of the methods. Because of this nonstandardized approach to communication protections, there has been a great deal of innovation which has resulted in a wide disparity in the types of communication protections available for DR processes. In response to the variation of protections, the Uniform Law Commission has proposed some uniform acts such as the UMA,[65] UCLA,[66] and the Uniform Family Law Arbitration Act (UFLAA),[67] with the goal of increasing the consistency of communication protections across states for each DR method.

Currently, a majority of states have not adopted these uniform acts.[68] While some have adopted similar protections for certain DR methods, others have created different communication protections for each form of DR within a state.

Three examples are provided to illustrate different approaches for providing privadentiality protections.

1. Privadentiality Uniformity across Most DR Methods: Minnesota[69]

DR in Minnesota is established primarily by court rule, with some supporting statutes. Minnesota's Court Rule 114 specifies nine DR processes.[70] The eight "non-binding" processes[71] are "not open to the public except with the consent of all parties,"[72] and statements and documents produced in nonbinding DR processes, which are not otherwise discoverable, are not subject to discovery or other disclosure.[73] Further, citing the need for discussions and notes from a DR proceeding to be held in confidence for "candid discussions of the issues to take place,"[74] the court rule contains the following provisions:

1. "no evidence that there has been an ADR proceeding or any fact concerning the proceeding may be admitted in a trial de novo or in any subsequent proceeding involving any of the issues or parties to the proceeding without consent of the parties or an order of the court."[75] The rule contains a specific exception for when a party to an arbitration moves to vacate the arbitration award.
2. The "notes, records, and recollections of the neutral" are protected from disclosure to the parties, the public, or anyone else, unless all parties and the neutral agree to such disclosure, or it is required by law or other applicable professional codes. With the exception of a "memorandum of issues that are resolved," no record of the ADR process is to be made without the agreement of the parties.[76]

The court rule also regulates communication by the neutral[77] to the court[78] and contains ethical requirements for individuals approved by the Minnesota Supreme Court-appointed ADR Review Board to act as neutrals in court-referred cases.[79]

In addition to court rules, Minnesota's Evidence Statute contains two ADR provisions—the first relates to all ADR neutrals and the second applies only to mediation. The ADR provision creates an "incompetency" standard for ADR neutrals.[80]

The mediation-specific provision prohibits any "person" from being "examined as to any communication or document, including work notes, made or used in the course of or because of mediation pursuant to an agreement to mediate."[81] The statute continues, stating that it does not apply to the situation where a party is trying to set aside or reform a mediated settlement agreement, nor is

it intended to make a communication or document privileged if it would not otherwise be privileged. Finally, the paragraph is not intended to limit the common law privilege which might otherwise exist.[82]

This combination of court rules and state statues set up a system whereby there is some consistency regarding communication protections across DR processes and differences between such protections are based on process differences. Participants in DR processes can locate all of the information needed regarding communication protections in a single court rule or state statute.[83]

2. Privadentiality Uniformity across Some ADR Methods: UMA and UCLA States

As of the writing of this article, a handful of jurisdictions (Hawaii, Illinois, New Jersey, Ohio, Utah, Washington and the District of Columbia) have adopted both the UMA[84] and the UCLA.[85] As both Acts provide relatively similar communication privilege protections for these forms of ADR, the states achieve greater consistency and leave less room for confusion by parties and professionals who may find themselves participating in both processes in the same case or deciding between processes. However, even in such circumstances there is still room for inconsistency.

In addition to possible inconsistent application of the UMA within a state, both Acts provide for optional language. For example, the UMA and UCLA states may provide that the privilege protections [apply] or [do not apply] when the communications are sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult if a child protective services agency or adult protective services agency is a party to, or otherwise participated in, the process.[86] In adopting each statute, if different decisions are made concerning privadentiality, this unfortunately would lead to a lack of uniformity within the state.

3. Absence of Privadentiality Uniformity across ADR Methods: Florida

Florida created different communication protections for each form of ADR, in part, because different groups participated in the drafting of arbitration, mediation, parenting coordination, and collaborative law statutes. Currently, no general communication protections are established by Florida law or court rule for family group conferencing or neutral evaluation; while mediation, arbitration, parenting coordination, and collaborative law have varying degrees of protection. While the creation of different communication protections for some forms of DR allowed for tailored approaches for some DR processes, taken as a whole, the variability of communication protections across the spectrum of DR methods has the potential to lead to confusion among practitioners, the court, and participants as to what level of protection is applicable in each process.

In Florida, mediation communications are explicitly confidential *and* privileged for mediations that fall within the scope of the Florida Mediation and Confidentiality Act.[87] As such, these communications cannot be disclosed in a proceeding or outside of a proceeding.[88] In addition, the Florida Mediation Confidentiality and Privilege Act provides for civil remedies for a breach of confidentiality.[89] However, for mediations that do not fall under the scope of the Florida Mediation Confidentiality and Privilege Act, there are no statutory privadentiality protections. For collaborative law, communications are privileged, but not confidential, as Florida adopted the UCLA. The procedural rules governing arbitration allow for the parties to make a "record and transcript" of the arbitration.[90] The only statutory confidentiality provision addressing arbitration provides that "[a]n arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this state."[91] Lastly, Florida's parenting coordination statute provides that communications are confidential and privileged, except that the parties and the parenting coordinator may communicate some information with the court. For example, the parenting coordinator must report to the court if the parenting coordinator believes a parent "is expected to wrongfully remove or is wrongfully removing the child from the jurisdiction of the

court."[92] The result of this varied approach to providing communication protections likely results in greater confusion for all involved because parties and professionals must consult multiple rules, and understand the nuances and differences between processes and between protections provided.

In terms of neutrals' disclosures to the court, the procedural rules in Florida include three different provisions.[93] Additionally, ethical standards vary across the types of DR, including arbitration, collaborative law, mediation, and parenting coordination, which is understandable given the different DR methods and privadentiality provisions associated with each.

PART V: A NEW PARADIGM FOR ESTABLISHING PRIVADENTIALITY PROTECTIONS

In general, DR processes can be classified into one of four categories: advisory, collaborative, delegated, or hybrid. Advisory processes provide parties with a neutral's assessment and perspective of their dispute. Examples of advisory processes include neutral evaluation and nonbinding arbitration. In neutral evaluation, the neutral "offers an evaluation of likely court outcomes,"[94] while in non-binding arbitration the parties receive a nonbinding "decision about the dispute after receiving evidence and hearing arguments."[95] In both cases, the parties, while potentially benefiting from the input, determine the outcome.

In delegated decision-making processes, the parties surrender the decision-making authority to a third person. For example, in binding arbitration, the role of the neutral is to make a binding decision to resolve the dispute after receiving evidence and hearing arguments.

In collaborative methods, the parties communicate and negotiate with each other in the hope of reaching a mutually agreeable resolution. In mediation, the mediator assists the parties, who may or may not be represented by attorneys.[96] In collaborative law, the parties are represented by attorneys and engage in a collaborative process without the automatic assistance of a mediator or other neutral.[97] Lastly, in family group conferencing,[98] the family or extended family seeks to resolve a problem with some assistance from a facilitator who may or may not participate when the family meets to resolve an issue, and may assist with writing up the family's agreement.

Hybrid processes involve a combination of advisory, collaborative, and delegated DR methods. Parenting coordination is an example of a hybrid processes. In many states the parenting coordinator may help to facilitate negotiation between the parties, serve as a decisionmaker (subject to court review) for nonsubstantive parenting issues in dispute, and serve in other roles unique to the parenting coordinator. Similarly, med-arb and arb-med are hybrid processes.

When considering the nature of needed privadentiality protections, we propose that each of these four categories of DR processes should be considered separately. In collaborative processes, the greatest privadentiality protections should apply because most of the rationales articulated for privadentiality are relevant. While in delegated processes, the fewest privadentiality protections are applicable. Below is a chart laying out the four groups. We recognize that some processes, such as evaluative mediation, may blur the distinctions we make below.

Advisory	Collaborative	Delegated	Hybrid
Neutral Evaluation	Mediation	Binding Arbitration	Parenting Coordination
Nonbinding Arbitration	Collaborative Law		Med/Arb
	Family Group Conferencing		Arb/Med

In advisory processes, we believe the level of privadentiality should be determined by whether there are any consequences to a party not following a nonbinding decision of the neutral. Generally, the parties should be able to communicate in a protected manner, and unless one of the exceptions

discussed above exists, the parties' communications should not be disclosed. This would be true for neutral evaluations where the information should remain privadential because parties are free to use (or not use) the evaluation in any way they wish, whereas in nonbinding arbitration the arbitrator's decision may be utilized to assess penalties if the parties seek a trial *de novo* and are awarded a decision that is less favorable than that received from the arbitrator.[99] As such, the actual nonbinding decision of the arbitrator may be deemed admissible, while there is no reason for the court to be advised of the neutral evaluator's assessment of the dispute.

When hybrid methods fall within the same category (such as when a collaborative lawyer utilizes the assistance of a mediator), we believe the privadentiality protections should remain intact. However, when DR methods combine processes from two or more different DR categories (such as parenting coordination), then the privadentiality protections should be crafted in a manner that takes into consideration the unique consequences associated with the disclosures made in combined DR methods.

PART VI: FAMILY DR PRIVADENTIALITY RECOMMENDATIONS

The family and child protection DR field has evolved to a point where policymakers should consider a comprehensive paradigm for addressing the privadentiality protections across the spectrum of DR methods. During such consideration, we offer the following recommendations:

1. There should be increased definitional clarity for communication protections. Specifically, we recommend the term "confidentiality" be used only in reference to prohibitions against disclosures outside of a proceeding by the involved professional(s), and a new umbrella term, "privadentiality," be adopted to broadly convey the array of communication protections afforded DR processes that limit disclosures by all DR participants and/or maintain the privacy of such DR proceedings for all participants.
2. Absent compelling rationale otherwise, privadentiality protections for family and child protection DR methods should provide, where possible, that DR communications should not be disclosed in a proceeding (privileged), or elsewhere (confidential), to children, extended family, or on social media, etc., in order to reduce the likelihood of escalating conflict between the parents, or otherwise causing harm to children and other family members.
3. Jurisdictions should strive to create uniform privadentiality protections for similar DR processes. We believe that DR processes can be divided into four categories (advisory, collaborative, delegated, and hybrid), and that privadentiality protections can be guided by the category within which a particular DR method belongs. Further, state legislatures and courts should work together to create statewide uniformity. Adopting the same privadentiality protections for each category of DR method would provide consistency that will make it easier for professionals who serve in different roles to adhere to privadentiality constraints, and for parties who participate in more than one process to understand more clearly, the different privadentiality protections associated with each form of DR.
4. Prior to beginning any Family and Child Protection DR process, parties should be advised, with clarity, of the extent of and limitations of privadentiality which may be afforded by statute, rule, or party agreement to their DR communications.
5. Generally, in court-connected cases, family DR neutrals should only advise the court of party attendance and whether the matter was resolved. In hybrid cases, laws and rules concerning communication with the court should be developed to fit the hybrid process in a manner consistent with the parties' expectations.
6. Appropriately memorialized family DR agreements and decisions should be admissible for review, acceptance, and/or enforcement by the court, in such a manner that maintains

the privadentiality of the process and is consistent with the form of ADR employed. For example, for agreements stemming from mediation, nonbinding arbitration, and collaborate law, it is appropriate for the court to review the partial or final agreement prior to entering an order, especially where children are involved. Whereas in parenting coordination, when the parenting coordinator is given decision-making authority and makes a decision that one party is challenging, privadentiality protections, if provided by statute or court rule, should provide that courts may only rely upon information that is admissible, and prevent admission of parenting coordination communications which may be protected.

7. Exceptions to privadentiality should be permitted to protect the parties, their families and others, and the integrity of the process. Appropriate exceptions include mandatory reporting pursuant to law for allegations of child abuse/neglect/abandonment and elder abuse/neglect/exploitation; reporting or defending professional misconduct complaints; pursuing and defending malpractice claims; asserting contract challenges such as unconscionability, duress, overreaching, and coercion; and using the process to plan or commit a crime.[100]
8. The privadentiality exceptions should only be as broad as necessary. For example, professional misconduct or malpractice exceptions should only be for the limited scope of addressing the specific claims of malpractice or misconduct and limited to the body obligated to consider such claims. In such circumstances, permitted DR disclosures in a professional misconduct or malpractice hearing should remain otherwise privadential and therefore inadmissible in any other hearing and/or confidential as otherwise provided by law or court rule. Similarly, once a legally required mandatory report has been made, the reporting obligation should be satisfied, and the DR neutral should not be required to testify in a court proceeding or otherwise participate in the investigation or prosecution of the abuse, neglect, abandonment, or exploitation case.[101]
9. Protecting professionals should not be achieved at the expense of party self-determination. In a court-connected DR process, the parties should be able to exercise self-determination to mutually agree on the disclosure of any DR communications. Professionals should not be able to prevent disclosures of DR communications from future proceedings when the parties mutually agree to do so. As such, court referrals to a DR process with privadentiality protections that inadvertently protect unethical behavior by professionals (including the neutral) are contrary to ensuring the integrity of the process and unfairly impede a party's right to trial.[102] Similarly, neutrals should not have an independent privadentiality privilege because it lessens the parties' right to self-determination in the event all parties wish to compel the neutral to testify in court.[103] Finally, providing nonparty participants with a privilege to block others from subpoenaing them to testify in court, or state what the nonparty participant said in the ADR process, inappropriately protects the nonparty professionals at the expense of party self-determination.
10. When DR methods are combined, privadentiality protections afforded for each separate form of DR should not automatically apply to the hybrid process. DR methods utilizing the same neutral for more than one of the combined methods are often changed in some ways when combined.[104] Since it is unreasonable to expect that appropriate privadentiality provisions could be adopted in advance for all types of hybrid processes (some of which may not yet be known), parties should jointly determine the privadentiality provisions that will apply. If the parties voluntarily enter into a hybrid DR process, they should have the freedom to set their own privadentiality provisions and should do so prior to engagement in the DR process so that everyone has clear expectations as to what communication protections exist.
11. Ethical Standards for neutral should include provisions specifically prohibiting the neutral from disclosing privadential communications, allowing only for limited exceptions, such as for complying with mandatory reporting laws.

12. Privadentiality protections should apply consistently to each DR process.[105] Basing privadentiality protections upon whether a DR process is court-ordered or not court-ordered, or whether the DR neutral is qualified in a given state or not,[106] creates confusion and the possibility of inadvertent breach of communication protections. With privadentiality as the default, parties are free to opt out of these protections by mutual agreement, if so desired.

In conclusion, we believe the time has come to review the communication protections afforded across the various forms of Family and Child Protection DR and make changes to provide for greater clarity and consistency, as appropriate. A good place to start would be to adopt the use of the term privadentiality as the umbrella term for these protections and to cease using the term confidentiality in confusing and inconsistent ways. Similarities and differences between various forms of DR, and the needs of families utilizing these DR methods, should guide this exploration. Specifically, the greatest privadentiality protections should apply to collaborative processes because most of the rationales articulated for privadentiality are relevant; while, the fewest privadentiality protections should apply in delegated decision-making processes.

ENDNOTES

1. For purposes of this article we are defining family disputes as including, but not limited to, cases involving married and unmarried persons, before and after judgments, involving dissolution of marriage; property division; shared or sole parental responsibility; child support; and parenting plans. Child protection disputes refer to resolving the noncriminal aspects of cases involving allegations of child abuse and neglect where the court must determine such issues as whether child abuse or neglect has occurred, whether the parents or children should be evaluated or receive treatment, placement of the child, and, in some cases, whether parental rights should remain or be terminated.

2. Privadentiality is an umbrella term meant to cover all of the ways that communications may be protected from disclosure including privileges, confidentiality outside of adjudicative proceedings, incompetency to testify, statutes, and other evidentiary restrictions. Privadentiality protections apply to all participants in a DR process. As will be discussed later in the article, "confidentiality" is often used as an umbrella term, but it does not have a consistent meaning across individuals, processes, and jurisdictions (and often within the same jurisdiction), leading to ambiguity and confusion. Moreover, confidentiality often just applies to the professional and not to the disclosing client, patient, or penitent.

3. Most forms of DR involve the use of "… an independent third person, called a "neutral" who tries to help resolve or narrow the areas of conflict." *Alternative Dispute Resolution/Mediation*, Minn. Jud. Branch (last visited October 15, 2019), http://www.mncourts.gov/Help-Topics/AlternativeDisputeResolution.aspx.

4. Sharon Press, *Family Court Services: A Reflection on 50 Years of Contributions*, 51 Fam. Ct. Rev., 1, 48–55 (2013).

5. Frank E.A. Sander, *Varieties of Dispute Processing*, *Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (April 7–9, 1976), in *70 F.R.D*. 111, 133–34 (1976).

6. O.J. Coogler, Structured Mediation in Divorce Settlement: A Handbook for Marital Mediators (Lexington Books 1977).

7. John Haynes, Divorce Mediation: A Practical Guide for Therapists and Counselors (Springer Publishing Company 1981).

8. Mandated mediation is generally associated with court-connected mediation services rather than mediation delivered by private providers. For purpose of this article, we are generalizing that mediation is a facilitative process that relies on the parties to exercise self-determination. We will not be discussing the differences between court-connected and private sector family mediation, not the differences, if any, between family and civil mediation.

9. Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, 17 Fam. Advisor 35 (1995).

10. *See*, *e.g.*, Bernard Mayer, *Mediation in Child Protection Cases: The Impact of Third-Party Intervention on Parental Compliance Attitudes*, 24 Mediation Quarterly 89 (1989). *See also* Charlene Saunders et al., *Mediation in the Los Angeles County Superior Court Juvenile Dependency Court*, 29 Fam. & Conciliation Cts. Rev., 259 (1991); Gregory Firestone, *Dependency Mediation: Where Do We Go From Here?* 35 Fam. & Conciliation Cts. Rev. 223 (1997).

11. *See Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, Nat. Counc. of Fam. & Juv. Ct. Judges 133 (1995).

12. Marilou Giovannucci & Karen Largent, *A Guide to Effective Child Protection Mediation: Lessons from 25 Years of Practice*, 47 Fam. Ct. Rev. 38 (2009).

13. "[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 Practice for Family and Divorce Mediation*, Assoc. of Fam. & Conciliation Cts. 1 (2000). https://www.afccnet.org/Portals/0/PublicDocuments/CEFCP/ModelStandardsOfPracticeForFamilyAndDivorceMediation.pdf.

14. "[A] private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments … The arbitration process may be either binding or non-binding. When arbitration is binding, the decision is final, can be enforced by a court, and can only be appealed on very narrow grounds. When arbitration is non-binding, the arbitrator's award is advisory and can be final only if accepted by the parties." *Arbitration*, Am. Bar Assoc. Dispute Resolution Processes (last visited October 15, 2019), https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/.

15. "[A] voluntary, contractually based alternative dispute resolution process for parties who seek to negotiate a resolution of their matter rather than having a ruling imposed upon them by a court or arbitrator. The distinctive feature of collaborative law … is that parties are represented by lawyers ("collaborative lawyers") during negotiations. Collaborative lawyers do not represent the party in court, but only for the purpose of negotiating agreements. The parties agree in advance that their lawyers are disqualified from further representing parties by appearing before a tribunal if the collaborative law process ends without complete agreement." Unif. Collaborative Law Act (Unif. Law Comm'n 2010).

16. "[A] process led by family members, with the assistance of an independent family group conference coordinator, to plan and make decisions for a child who is at risk. Children and young people are normally involved in their own family group conference, although often with support from an advocate. It is a voluntary process and families cannot be forced to have a family group conference." *Family Group Conferences and Lifelong Links*, Fam. Rts. Grp. (last visited October 15, 2019), https://www.frg.org.uk/involving-families/family-group-conferences.

17. "[A] neutral person with subject-matter expertise hears abbreviated arguments, reviews the strengths and weaknesses of each side's case, and offers an evaluation of likely court outcomes in an effort to promote settlement. The neutral evaluator may also provide case planning guidance and settlement assistance with the parties' consent." *See Alternative Dispute Resolution*, *Court Connected ADR*, *Supreme Court Matrimonial Neutral Evaluation Program*, New York Unif. Ct. Sys., http://ww2.nycourts.gov/ip/adr/What_Is_ADR.shtml.

18. "[A] hybrid legal-mental health role that combines assessment, education, case management, conflict management, dispute resolution, and, at times, decision-making functions. Parenting coordination is a child-focused process conducted by a licensed mental health or family law professional, or a certified, qualified, or regulated family mediator under the rules or laws of their jurisdiction, who has practical professional experience with high conflict family cases. The parenting coordinator (PC) assists co-parents engaged in high conflict co-parenting to implement their parenting plan by: (1) facilitating the resolution of their disputes in a timely manner; (2) educating co-parents about children's needs; and, (3) with prior approval of co-parents or the court, making decisions within the scope of the court order or appointment contract. A PC seeks to protect and sustain safe, healthy, and meaningful parent-child relationships." *See Guidelines for Parenting Coordination*, Assoc. of Fam. & Conciliation Cts., 2 (2019) https://www.afccnet.org/Portals/0/Guidelines%20for%20Parenting%20Coordination%202019.pdf?ver=2019-06-12-160124-780.

19. *See* Lisa Merkel-Holguin et al., *The New Zealand Family Groups Conference Confidentiality Protections: Lessons Learned and an Application in US Child Welfare System*, 58 Fam. Ct. Rev. (January 2020).

20. "A hybrid process pursuant to which, by agreement, the parties engage in mediation with the intention of submitting all unresolved issues to final and binding arbitration. Most commentators caution that, to ensure the integrity of the arbitration process, Med/Arb agreements should provide that the arbitrator shall not be the same person who served as mediator in the matter." *ADR Primer*, Int'l Inst. for Conflict Prevention & Resol. (last visited October 15, 2019), https://www.cpradr.org/resource-center/toolkits/adr-primer.

21. "A hybrid process by which an arbitrator is asked to serve as mediator to assist the parties in resolving the dispute at hand, prior to issuance of the award." *ADR Primer*, Int'l Inst. for Conflict Prevention & Resol. (last visited October 15, 2019), https://www.cpradr.org/resource-center/toolkits/adr-primer.

22. "'Proceeding means: (1) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or (2) a legislative hearing or similar process." Unif. Mediation Act, § 2 (Unif. Law Comm'n 2003).

23. *See* UMA Prefatory Note: "Candor during mediation is encouraged by maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications. *See* Sections 4–6. 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." Uniform Mediation Act, Act, Sect. 8 Comment: confidentiality UMA PREFATORY NOTE. *See* also UMA Section 8: Confidentiality where the title of the section (Confidentiality) is described in the UMA Section 8 Comment as referring to "disclosures outside of proceedings."

24. Merriam-Webster defines confidential as: "marked by intimacy or willingness to confide; private, secret; entrusted with confidences; containing information whose unauthorized disclosure could be prejudicial to the national interest." https://www.merriam-webster.com/dictionary/confidentiality?src=search-dict-box; "As a legal term, confidentiality refers to a duty of an individual to refrain from sharing confidential information with others, except with the express consent of the other party. There are rules and regulations which place restrictions on the circumstances in which a professional, such as a doctor or attorney, may divulge information about a client or patient, and other situations may be deemed confidential by the use of a contract." https://legaldictionary.net/confidentiality/

25. *Health Information Privacy*, U.S. Dep't of Health & Hum. Serv (2019). https://www.hhs.gov/hipaa/for-professionals/privacy/index.html.

26. "There have been dramatic increases in the number of people representing (self-represented litigants or SRL's) themselves in family and civil court over the past decade, across North America. In some family courts this number now reaches to eighty percent and is consistently sixty to sixty-five percent at the time of filing." Julie Macfarlane, The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants Final Report (May 2013).

27. *See*, *e.g.*, Fla. Stat. § 44.406(1) (2019).

28. *See*, *e.g.*, Fla. Stat. § 44.405 (2019), Confidentiality; privilege; exceptions.—"(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…"

29. See, *e.g.*,: UMA, Section 4. PRIVILEGE AGAINST DISCLOSURE; ADMISSIBILITY;
DISCOVERY. "(1) Except as otherwise provided in Section 6, a mediation communication is privileged as provided in subsection (2) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5."

30. *See*, *e.g.*, Cal. Evidence Code § 703.5 (West 2019). "No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (1) give rise to civil or criminal contempt, (2) constitute a crime, (3) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (4) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code." Note the California Family Code creates some exceptions to the mediator's incompetence to testify when only parenting plan aspects of divorce are mediated.

31. *See*, *e.g.*, Minn. Stat. § 595.02 (2019), Testimony of Witnesses, subdivision 1 (m) "A person cannot be examined as to any communication or document, including work notes, made or used in the course of or because of mediation pursuant to an agreement to mediate or a collaborative law process pursuant to an agreement to participate in collaborative law…".

32. *See*, *e.g.*, Minn. R. 114.07 (2019), "Attendance at ADR Proceedings (a) Privacy. Nonbinding ADR processes are not open to the public except with the consent of all parties." https://www.revisor.mn.gov/court_rules/gp/id/114/ (last visited October 15, 2019); see also Minn. Stat. § 595.02 Subd. 1a (2019) ("No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceedings or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could: (1) constitute a crime; (2) give rise to disqualification proceedings under the rules of professional conduct for attorneys; or 93) constitute professional misconduct.").

33. *See* Susan Oberman, *Confidentiality in Mediation: An Application of the Right to Privacy*, 27 Ohio St. J. on Disp. Resol. 539, 542. ("This article examines the roots of confidentiality in privacy law and proposes that mediators comply with standards of self-determination by informing parties about the legal rights and limitations represented in the choice to maintain or waive confidentiality in mediation.").

34. *See* Health Insurance Portability and Accountability Act, Pub. L. 104–91 (1996).

35. *See*, *e.g.*, Fla. Stat. § 39.202 (2019), Confidentiality of reports and records in cases of child abuse or neglect.—"(1) In order to protect the rights of the child and the child's parents or other persons responsible for the child's welfare, all records held by the department concerning reports of child abandonment, abuse, or neglect, including reports made to the central abuse hotline and all records generated as a result of such reports, shall be confidential and exempt from the provisions of s. 119.07(1) and shall not be disclosed except as specifically authorized by this chapter. Such exemption from s. 119.07(1) applies to information in the possession of those entities granted access as set forth in this section."

36. Not all rationales are applicable to all forms of DR processes.

37. *Id*. at 534 (citing F.R.E. 408 advisory committee note to 1975 amendment).

38. *Id*.

39. Scott H. Hughes, *Fall The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 Marq. L. Rev. 9, 70–71 (2001) (No matter how objectively neutral, the mediator's testimony will not be so construed by the disadvantaged party. This damages the mediator's impartiality, both in the disputant's eyes and those of similarly situated parties. It is crucial, the argument concludes, that the future vitality of mediation depends heavily on creating and enforcing privileges in order to prevent any adverse impact on the principle of impartiality.).

40. *See*, *e.g.* Marsha Kline, Janet Johnston & Jeanne Tschan, *The Long Shadow of Marital Conflict: A Model of Children's Postdivorce, 53 Adjustment*, J. of Marriage and the Fam. 306, 306–07 (1991) ("The strong mediating effects of the parent child relationship provide support for the notion that conflictual parents are less able to provide consistent discipline and nurturance during the divorcing process and hence their children are at greater risk."). *See also* Robert Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 Psychological Bull. 310, 310 (1982) ("The idea that marital turmoil is the cause of a variety of behavior problems in children is widely held both in the public and in the professional domain.").

41. Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories* 54 J. Legal Educ. 49, 52 (2004).

42. Michael Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 Seton Hall Legis. J. 1, 3 (1988).

43. Becky Jacobs, *Mandatory ADR Notice Requirements: Gender Themes and Intentionality in Policy Discourse*, Harv. Negot. L. Rev. 1, 16 (2016) ("Moreover, the confidential nature of informal processes such as mediation shields the potentially criminal conduct of perpetrators from public view.").

44. *See*, *e.g.*, *Cassel v. Superior Court*, 51 Cal. 4th 113, 119 (2011). Subsequent to Cassel, the California Legislature considered creating an exception to allow such malpractice claims, but instead opted to require that prior to mediation lawyers advise clients in writing that lawyer conduct in mediation is inadmissible in court. California Evidence Code 1129.

45. Unif. Mediation Act, § 4(b) (Unif. Law Comm'n 2003).

46. *See* David Hoffman & Andrew Schepard, *To Disclose or Not to Disclose? That is the Question in Collaborative Law*, 58 Fam. Ct. Rev. (January 2020).

47. *See* Gregory Firestone & Fran Tetunic, *Family and Child Protection Mediation Confidentiality and Privilege: A Roadmap for Sorting Through the Innovation, Inconsistency and Confusion*, 58 Fam. Ct. Rev. (January 2020).

48. *See* Lisa Merkel-Holguin et al., *supra* note 19.

49. *See* Debra K. Carter & Douglas N. Frenkel, *Parenting Coordination and Confidentiality: A (Not-So) Delicate Balance*, 58 Fam. Ct. Rev. (January 2020).

50. *See* Linda D. Elrod, *The Need for Confidentiality in Evaluative Processes: The Case of Arbitration and Med/Arb in Family Law Cases*, 58 Fam. Ct. Rev. (January 2020).

51. While there have been some early types of mediation which permitted mediator recommendations directly the court, for example, California, generally, mediators are prohibited from providing comments or recommendations to the court. Unif. Mediation Act, § 7 (Unif. Law Comm'n 2003).

52. According to Fla. Stat. § 61.125(7)(c), a parenting coordinator may testify if "The testimony or evidence is limited to the subject of a party's compliance with the order of referral to parenting coordination, orders for psychological evaluation, counseling ordered by the court or recommended by a health care provider, or for substance abuse testing or treatment…".

53. Fla. Fam. L. R. of Proc. 12.740(f)(1).

54. *Id*. at 12.740(f)(3). ("With the consent of the parties, the mediator's report may also identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.").

55. Fla. Stat. § 44.403(1) (2019) (stating attendance at mediation is not a mediation communication and therefore the mediator may report attendance to the court).

56. Fla. Fam. L. R. of Proc. 12.745(b)(2)(D).

57. Appropriately memorialized agreements and settlements generally are exempted from privadentiality to enable court review. This ensures that the best interest of the children is respected since the court retains jurisdiction to make that determination and also ensures the integrity of the process to allow for enforceability of agreements. However, some states, such as Arkansas, provide that the written mediation agreement remains confidential after execution unless the parties agree otherwise. Ark. Code Ann. § 16-7-206 (2019).

58. In keeping with self-determination, parties should be able to waive, by mutual agreement, privadentiality prior to or after a process.

59. To protect children and vulnerable adults from abuse and neglect, parties should not be able to assert privadentiality to hide disclosures made in a DR process.

60. Criminal activity is typically not privadential only regarding future activity not admissions of prior criminal behavior. This enables appropriate sharing of information while also providing protection to potential future victims and protects the integrity of the process.

61. Professionals should not be given free license to commit acts of malpractice or misconduct and then assert privadentiality to protect themselves.

62. *See* Unif. Mediation Act, § 6 (Unif. Law Comm'n 2003). *See also* Unif. Collaborative Law Act § 19 (Unif. Law Comm'n 2010).

63. Unif. Mediation Act, § 6(b) (Unif. Law Comm'n 2003).

64. *Id*. at § 6(b)(3).

65. Unif. Mediation Act (Unif. Law Comm'n 2003).

66. Unif. Collaborative Law Act (Unif. Law Comm'n 2010).

67. Family Law Arbitration Act (Unif. Law Comm'n 2016).

68. At the time this article was published, twelve jurisdictions have adopted the UMA; nineteen jurisdictions have adopted the UCLA; and three jurisdictions have adopted the FLAA.

69. Collaborative law is not considered a rule 114 ADR process. *See* Minn. R. 111.05 (2017).

70. Minn. R. 114.02 (2017) (The rule divides the DR processes into four categories including three adjudicative processes: arbitration, consensual special magistrate, and summary jury trial; three evaluative processes: early neutral evaluation (ENE), nonbinding advisory opinion, and neutral fact finding; one facilitative process: mediation; and two hybrid process: mini-trial and mediation-arbitration (med-arb); plus "other" which is defined as an ADR process created by agreement of the parties.).

71. Nonbinding arbitration, summary jury trial, ENE, nonbinding advisory opinion, neutral fact finding, mediation, mini-trial and med-arb.

72. Minn. R. 114.07(a) (2017).

73. Minn. R. 114.08(b) (2017). The rule makes clear that such evidence is inadmissible for any purpose at the trial, including impeachment. This is contrasted with rule 114.08(c) and 114.08(d) which state that "[e]vidence in consensual special master proceedings, binding arbitration and non-binding arbitration after the period for a demand for trial expires, may be used in subsequent proceedings for any purpose for which it is admissible under the rules of evidence." Minn. R. 114.08 (c) (2017). ("Sworn testimony in summary jury trial may be used in subsequent proceedings for any purpose for which it is admissible under the rules of evidence." *See also* Minn. R. 114.08(d) (1993) (identifying two examples for when evidence may be admissible under the rules of evidence: (1) when a witness is unavailable and (2) as a prior statement.).

74. Minn. R 114.08 (1993) Implementation Committee Comments.

75. Minn. R. 114.07(a) (2017).

76. *Id*.

77. Minn. R. 114.10(a) (2017). (In adjudicative processes, ex parte (communication between the neutral and one of the parties outside of the presence of the other) communication is prohibited "unless approved in advance by all parties and the neutral.") *See also id*. R. 114.10(b). (For nonadjudicative processes, ex parte communication is permitted with the consent of the neutral "so long as the communication encourages or facilitates settlement.").

78. *Id*. R. 114.10(c). (*During* the process, the court "may be informed only of the following: the failure of a party or an attorney to comply with the order to attend the process; any request by the parties for additional time to complete the ADR process; with the written consent of the parties, any procedural action by the court that would facilitate the ADR process; and the neutral's assessment that the case is inappropriate for that ADR process.") *See also id*. R. 114.10(d). (*After* the process, the court may only be informed of the following: the lack of an agreement without comment or recommendations, if no agreement is reached; if agreement is reached, any requirement that its terms be reported to the court should be consistent with the jurisdiction's policies governing settlement in general; and with the consent of the parties, the neutral's report also may identify any pending motions or outstanding legal issues, discovery process, or other action by any party which, if resolved or completed, would facilitate the possibility of a settlement.)

79. *Id*. R. 114 (Appendix Code of Ethics Introduction; Ethics Rule IV, entitled Confidentiality, makes it an ethical obligation for the neutral to "maintain confidentiality to the extent provided by [court rules and any additional agreements with or between the parties." Ethics Rule IV, entitled Confidentiality, makes it an ethical obligation for the neutral to "maintain confidentiality to the extent provided by [court rules and any additional agreements with or between the parties]".).

80. Minn. Stat. § 595.02 Subd. 1a (2019). ("No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could: constitute a crime; give rise to disqualification proceedings under the rules of professional conduct for attorneys; or constitute professional misconduct.)

81. *Id*. § 595.02 Subd. 1(m).

82. *Id*.

83. The exception is for Collaborative Law, which is not considered an ADR process under rule 114.

84. Unif. Mediation Act (Unif. Law Comm'n 2003).

85. Unif. Collaborative Law Act (Unif. Law Comm'n 2010).

86. *See* Unif. Mediation Act § 6(a)(7) (Unif. Law Comm'n 2003). *See also* Unif. Collaborative Law Act § 19(b)(2) (Unif. Law Comm'n 2010).

87. *See* Fla. Stat. § 44.402 (1) (2019). Except as otherwise provided, ss. 44.401-44.406 apply to any mediation: (1) Required by statute, court rule, agency rule or order, oral or written case-specific court order, or court administrative order; (2) Conducted under ss. 44.401-44.406 by express agreement of the mediation parties; or (3) 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.).

88. Fla. Stat.§ 44.405 (1) and (2) (2019).

89. Fla. Stat.§ 44.406 (2019).

90. *See* Fla. R. Civ. P. 1.820(f) for non-binding arbitration and for voluntary binding arbitration, Fla. R. Civ. P. 1.830(b) ("A record and transcript may be made of the arbitration hearing if requested by any party or at the direction of the chief arbitrator. The record and transcript may be used in subsequent legal proceedings subject to the Florida Rules of Evidence." Pursuant to statute, the section on binding arbitration does not "apply to any dispute involving child custody, visitation, or child support…" Fla. Stat. § 44.104(14) (2019).

91. Fla. Stat. § 682.08(5) (2019).

92. Fla. Stat. § 61.125(7) (2019).

93. For family mediation, *see* R. 12.740 and R. 12.741, *see* also Fla. Fam. L. R. of Proc. For Parenting coordination, *see* R. 12.742 and R. 12.745

94. *See* definition of neutral evaluation in footnote 16.

95. *See* definition of arbitration in footnote 14.

96. We adopt the facilitative model of mediation which is based on the self-determination of the parties. While some embrace models where the mediator offers advice and recommendations which can compromise mediator impartiality and party self-determination, we believe that is a different process and should not be referred to as mediation.

97. In some collaborative law models, the collaborative law team might involve a person who helps to facilitate discussions. *See e.g*., Robert Joseph Merlin, *The Collaborative law Process Rule: This is How We Do It*, 92 Fla. Bar J. 36 (2018).

98. Merkel-Holguin et al., *supra* note 19.

99. *See*, *e.g.*, Fla. Stat. § 44.103(6) (2019).

100. *See* Unif. Mediation Act § 6 (Unif. Law Comm'n 2003). *See also* Unif. Collaborative Law Act § 19 (Unif. Law Comm'n 2010).R.19. Omitted from act manifest injustice included as exception in some jurisdiction.

101. *See e.g.*, Fla. Stat. § 44.405(4)(a)(3).

102. Examples such as California's rule limiting a parties' ability to sue their attorney for poor representation in mediation and the UMA providing a privilege to a mediator who does not conduct herself impartially only serve to threaten the integrity of the ADR process and the public's trust in the process.

103. While some have argued that providing a neutral with a privilege protects the integrity of the process, it would appear that such a privilege compromises party self-determination to admit certain statements in court when desired by all parties and may negatively impact the integrity of the process by allowing the neutral to possibly conceal their own misconduct in the disputed matter.

104. For example, if the neutral in a med-arb case is free to use information learned during the mediation phase, it raises questions as to whether the parties treat the mediation portion of the med-arb process as confidential at all. *See* Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 Harv. Negot. L. Rev. 157, 172 (2015).

105. This also means that privadentiality protections should be the same in a given process regardless of type of case, that is, the same privadentiality protects should apply to mediation—civil, family or otherwise.

106. *See e.g.*, Fla. Stat. § 44.402 (2019).

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