

Settlement Week Mediation Privilege and Confidentiality

Ohio Uniform Mediation Act

Ohio Revised Code (O.R.C.) Section 2710 et seq.

The Ohio Uniform Mediation Act (UMA) distinguishes between protecting mediation communications from disclosure in court and the more general concept of confidentiality outside of legal proceedings. Privilege means that an individual cannot be required to reveal a mediation communication in a court or administrative proceeding. (O.R.C. 2710.03).

The UMA provides that mediation communications are privileged unless they fall within the statutory exceptions, or the parties voluntarily waive their privilege. (O.R.C. 2710.07) All parties might waive the privilege if they have settled their case in mediation and want to present their agreement to the court for approval.

There are seven (7) types of mediation communications that are not privileged, and therefore, a mediation participant can testify about them in a court or administrative proceeding. (O.R.C. 2710.05) The exceptions to privilege include the following:

1. Public Records and Open Meetings. The public records and open meetings laws have priority over the UMA privilege.
2. Imminent threats or plans to inflict bodily injury.
3. Mediation communications intentionally used to plan a crime, attempt a crime, or conceal an ongoing crime.
4. Mediation communications that reveal that a felony has been or is being committed.
5. Professional misconduct claims filed against the mediator.
6. Mediation communications regarding abuse, neglect, abandonment or exploitation of a child or a protected adult made to an individual or agency responsible for protecting individuals or in a proceeding in which a child or adult protective services agency is a party. [Note: The mediator may also have mandatory reporting responsibilities pursuant to O.R.C. 2151.421 or O.R.C. 5101.63.]

7. Written agreements reached in mediation and signed by all parties.

A mediator is also prohibited from making a report, assessment, recommendation, or other communication about the mediation to the court. (O.R.C. 2710.06). The only information a mediator may disclose to the court is the following:

1. Whether the mediation occurred, and if it has terminated.
2. Who attended the mediation.
3. Whether or not a settlement was reached.

Confidentiality

The Model Standards of Conduct for Mediators and the Model Standards for Family and Divorce Mediation, which are incorporated within Rule 16 of the Rules of Superintendence for the Court of Ohio, require mediators to keep mediation communications confidential unless an exception applies, such as the exceptions to privilege in O.R.C. 2710.05. Thus, a mediator may not share information about what was said in the mediation with others.

There are no legal provisions requiring the parties to keep mediation communications confidential unless they specifically agree to confidentiality provisions prior to or during the mediation session. Many mediators include a confidentiality agreement in the Agreement to Mediate document they ask the parties to sign at the beginning of the mediation. In some cases, the parties agree to and sign a confidentiality agreement before the mediation process begins. Whatever agreements the parties make concerning confidentiality should be in writing and signed by all mediation participants.