

OHIO'S UNIFORM MEDIATION ACT: A READER'S GUIDE

(Ohio Revised Code Sections 2710.01-2710.10)

Signed by Governor Taft January 28th, 2005
Effective Date October 29, 2005

What is the Purpose of this Guide?

Mediation involves people sitting down together and talking about their problems. Unless they agree otherwise, mediation is a private process with only the mediator, the parties and their representatives present. This private nature of mediation helps parties feel comfortable enough to speak openly so that they can come up with solutions that work for everyone.

The Uniform Mediation Act (UMA) works hard to keep mediation communications private, but understands that there are times when it is necessary that courts or other authorities hear what has been said in a mediation. This Guide has been written so that you can understand when courts are likely to keep mediation private and when they are likely to allow testimony. Our goal is to help you organize your thoughts before and during mediation so that you will feel comfortable enough to speak openly and come to the best solution possible.

If you have been to mediation before, or if you have mediated before, you are probably aware of Ohio's previous mediation law. This Guide will help you understand the difference between that law and the UMA. However, if this is your first time in mediation, or your first time mediating, don't worry. The Guide will help you understand your rights and responsibilities under the UMA whether you have any prior experience or not.

With these goals in mind, we have organized the Guide into several sections:

1. A brief summary of the UMA
2. Steps under the UMA to determine if what was said in mediation can be testified about in court
3. The history of the UMA
4. Ohio's previous mediation law
5. The differences between the UMA and Ohio's previous mediation law
6. How the UMA will impact the Ohio Revised Code

For many of you, the summary in Section 1 will be enough to familiarize yourself with Ohio's new mediation law. Section 2 provides a detailed explanation of the inner workings of the UMA and should be read if you have specific questions about something that may come up in mediation. Section 3 may be helpful to those of you interested in why the UMA was written, and how its drafters meant for it to be read and understood. Those of you with previous experience in mediation may want to take a look at Sections 4 and 5 so that you understand the differences between Ohio's previous mediation law and the UMA. Finally, for those of you interested in which Ohio Revised Code sections were affected by the UMA, Section 6 is a brief outline of which sections will be repealed, amended, and enacted.

For even more detailed explanations about the UMA, please see the *Uniform Mediation Act Draft with Prefatory Note and Comments*, available via the NCCUSL website, at www.nccusl.org.

SECTION 1. A SUMMARY OF THE UMA

The UMA affects the majority of mediations conducted in Ohio. Here are the main points you need to know before you are involved in mediation.

A. Will my mediation be covered under the UMA?

Most mediations are covered under the UMA. If the parties are told to mediate by a court, statute or arbitrator, they agree to mediate, or someone calling herself a mediator mediates, the mediation will be covered under the UMA. *For a more detailed explanation and for specific types of mediations not covered under the UMA, please see Section 2.*

B. Are mediations confidential under the UMA?

The UMA uses “confidential” and “privileged” to describe when mediation can be discussed outside of mediation.

- **“Confidential”** refers to when mediation communications can not be discussed outside of formal proceedings. The UMA only applies to formal proceedings, so if you want people to keep a mediation confidential — for example, you do not want the media informed or parties discussing what happened with their family or friends — you will need to make a separate agreement among the parties, the mediator, and any nonparty participants.
- **“Privileged”** refers to when mediation communications can not be discussed in a subsequent formal proceeding. What happens in mediation is considered

privileged unless one of two things happens. First, the person who has the power to keep someone from testifying decides to allow them to testify, or second, what a person wants to testify about falls under an exception, such as child abuse, malpractice, or violent crimes. This means that unless either of those things occurs, what happens in mediation cannot be shared in a legal or other formal proceeding.

C. Who can stop others from telling what was said in mediation?

A mediation party has the power to stop others from telling a court what was said by anyone in the mediation. The mediator has the power to stop others only from telling what the mediator said. A nonparty participant also has the limited power to stop others from telling only what he or she said.

D. Are there times when mediation communications can be disclosed in a formal proceeding?

Yes! Sometimes the need to have access to information can be more important to society than the need to keep mediation communications private. Under the UMA, the following types of information are not privileged, and can be shared with courts and other authorities:

1. A signed mediation agreement
2. Something said in a mediation that is either open to the public or part of a public record
3. A threat of bodily injury or a crime of violence
4. When mediation is intentionally used to plan, attempt to commit, commit, or conceal a crime
5. Malpractice or professional misconduct by a mediator
6. Malpractice or professional misconduct by a party or a participant or party representative
7. Child abuse
8. Knowledge of a felony as required under Ohio Revised Code Section 2921.22
9. Something said in mediation when offered in a felony proceeding or a delinquent child proceeding based on what would have been a felony if the child were an adult

In addition, a judge will determine whether mediation is privileged when the proceeding at issue involves a misdemeanor or a contract arising out of the mediation.

E. What can the mediator tell a court?

In general, mediators may not report to a court or another formal body. However, a mediator can always report whether or not the mediation occurred or has ended, who attended, and whether a settlement was reached. The mediator can also disclose evidence of child abuse to an agency responsible for protecting the child against abuse, and may have to report if required by the mediator's other professional standards.

F. Does the mediator have to tell parties anything?

Yes! The mediator must disclose possible conflicts of interest that exist before the mediator accepts the mediation or that the mediator discovers after accepting the mediation. In addition, when asked, the mediator must disclose his or her qualifications to mediate.

G. Does a mediator have to be impartial?

Yes! A mediator must be impartial unless the parties agree otherwise. For example, if a mediator tells parties about a possible conflict of interest with one party, the parties may (knowing that the mediator may not be impartial) still agree to keep the mediator.

H. Who can be a mediator?

Under the UMA, a mediator does not need a special background or profession, including law. Courts and community mediation centers may require training, however.

I. Who can come to the mediation?

The parties have the right to bring an attorney or other support person to the mediation, even if they have previously agreed not to bring anyone. Some mediators may decide that they cannot mediate with the attorney or support person in the mediation, and may decide to withdraw as mediator.

SECTION 2. STEPS UNDER THE UMA TO DETERMINE IF WHAT WAS SAID IN MEDIATION CAN BE TESTIFIED ABOUT IN COURT

The UMA requires courts to answer the following questions when determining whether a mediation communication can be used in formal proceedings.

STEP 1: Is the process “mediation” as defined by the UMA?

- If no, the UMA does not apply. However, another law may apply. It may be best to see an attorney before proceeding.

- If yes, continue on to Step 2.

Just because you or another person call a process “mediation” does not mean that it will be covered under the UMA. The UMA defines mediation in Ohio Revised Code Section 2710.01 as “any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.” A mediator is defined as “an individual who conducts a mediation.”

These two definitions are very open-ended, which means that it is very likely that your mediation is a “mediation” as defined in the UMA. The key things to think about here are “facilitates” and voluntary agreement.

- A mediator “**facilitates**” or helps parties talk, but doesn’t decide for them or tell them what they must do. However, a mediator can evaluate the strengths and weaknesses of each party’s case. You may want the mediator to do that to help you decide for yourself what you should do.
- Your agreement also must be “**voluntary.**” Mediation under the UMA is not a process in which another person decides for you. Mediation parties decide whether or not to reach an agreement and what that agreement entails—in contrast to a judge or arbitrator who decides what the parties must do and tells them in an order.

STEP 2: Is the mediation covered by the UMA?

- If no, the UMA does not apply. Parties may agree to keep a mediation confidential, in which case the court looks to contract law to see if the agreement is valid and binding.
- If yes, the court continues on to Step 3.

Most mediations are covered by the UMA. There are three ways your mediation can be covered, and you only need to fit into one category. Ohio Revised Code Section 2710.02 defines these as referral or requirement to mediate, party agreement to mediate, and use of mediator.

1. Referral or Requirement to Mediate. This means that mediation parties are required to mediate by a statute, a court, or an administrative agency rule, or referred to mediation by a court, administrative agency, or arbitrator.
2. Party Agreement to Mediate: The mediation parties and the mediator agree to mediate in a record. The record must show the parties’ expectation that mediation communications will be “legally privileged against disclosure.” This means that

the record has to show that the parties expect that they will have legal rights and responsibilities regarding mediation communications.

This is important to understand. A record simply asking someone to keep the matter quiet is NOT enough to trigger the UMA, because keeping something quiet could mean not telling neighbors, family members, or other office workers. In order to have your agreement to mediate covered by the UMA you will need to show that you expect that courts or other official bodies will look at legal rules to decide whether your mediation communications, or what you say in mediation, will remain private.

3. Use of Mediator: Finally, you may not have been referred or required to mediate. Although it is advisable, you may not have a party agreement to mediate. Don't worry. If the person who is mediating advertises his or her services as a mediator, you are covered under the UMA. Or, if you mediate with a volunteer at community mediation center and that center "holds" itself out as providing mediation, you are covered under the UMA.

The above three ways cover most mediations. However, and this is important, even if your mediation fits into in one of the three categories above, it is *not* covered by the UMA if one of the following apply. This is because drafters of the act and people involved in the following types of mediation decided that the UMA was not appropriate for their type of mediation. Other laws may apply, and you may want to know those laws before you mediate.

1. Collective Bargaining Relationships: Mediation of collective bargaining relationships, or labor-union disputes, has been around for a long time, and has a lot of law and history behind it. Unlike other types of mediation, mediation about collective bargaining relationships is already governed by uniform federal rules. Labor mediators and union and management representatives wanted to be sure that the UMA would not cover mediation involving the establishment, negotiation, administration, or termination of a collective bargaining relationship, or involving a dispute that is part of a process established by a collective bargaining agreement. However, the UMA *does* apply to a mediation arising out of a dispute that has been filed with an administrative agency or court.

2. Conducted by a Judge: A judge or magistrate who might make a ruling on the case sometimes conducts a mediation, often called a "settlement conference." The UMA does not cover this type of mediation because parties may feel obligated to settle. This does not include court mediators or an outside mediator who contracts or volunteers to mediate the case for the court, because they are not going to later make a ruling on the case.

3. Youth as Parties: The UMA does not cover a mediation conducted under the auspices of a primary or secondary school if all the parties are students, or by a correctional institution for youths if all the parties are residents of that institution. This is because school and institution administrators need to be able to respond appropriately to information that comes from mediations in which all the parties are students or residents. For example, two students could come to mediation for getting into an argument during recess. The mediator might find out that one of the students brought a knife to school, and needs to be able to go to the school administrator and report the weapon.

The UMA would apply if one of the parties was NOT a student or resident. For example, if a student complained about a teacher and the school mediator mediated between the student, her parents, and the teacher, the UMA would apply.

4. Parties Decide to Opt Out: Parties can decide that they do not want the privilege provisions of the UMA to apply to their mediation or parts of their mediation. However, all parties must agree in advance in either a signed record or a record of a proceeding, such as a record of a court proceeding. Nonparty participants and the mediator must receive actual notice of the agreement, otherwise any mediation communications of those persons will be covered by the UMA. “Nonparty participants” are defined by the UMA as people other than the mediator or party who participate in a mediation, and can include experts, family members, neighbors, translators, lawyers, etc.

STEP 3: Is what happened in mediation a “mediation communication” as defined by the UMA?

- If no, it can be used in formal proceedings, unless blocked by a different law or rule of evidence.
- If yes, it is privileged, and the court continues on to Step 4.

Ohio Revised Code Section 2710.01 says that a mediation communication can be written, verbal, or non-verbal. If non-verbal, it must be meant to inform. For example, a nod in response to a question is meant to inform, and would be privileged. Involuntary nodding due to old age or illness is not meant to inform, and would not be a mediation communication. It would not be privileged, and could be testified about in formal proceedings.

Mediation communications also encompass communications that occur (1) during a mediation or (2) outside of a mediation for the purposes of “considering, conducting,

participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.” For example, conversations to begin mediation or retain a mediator are still mediation communications.

STEP 4: Who holds the privilege to the mediation communication under the UMA?

- Once the court determines who holds the privilege, it continues on to Step 5.

Ohio Revised Code Section 2710.03 shows three types of people who may hold a privilege:

1. Mediation Party: A mediation party is a person who “participates in a mediation and whose agreement is necessary to resolve the dispute.” A mediation party may refuse to testify about a mediation communication, and may prevent any other person from testifying about a mediation communication. The mediation party’s power is very broad then, since he or she can refuse to disclose a mediation communication made by anyone – the person herself, another mediation party, the mediator or a nonparty participant.
2. Mediator: A mediator is someone who “conducts a mediation.” The mediator may refuse to testify about a mediation communication. The mediator may prevent any other person from testifying about a mediation communication made by him or herself, but does not have the power to prevent people from testifying about mediation communications made by other people.
3. Nonparty participant: A nonparty participant is a person who participates in a mediation, other than a party or mediator. For example, a nonparty participant could be an expert witness, a translator, a neighbor or a support person, or an attorney. Like a mediator, a nonparty participant may refuse to testify about a mediation communication made by him or herself. A nonparty participant may also prevent any other person from testifying about a mediation communication made by him or herself, but does not have the power to prevent people from testifying about mediation communications made by *other* people.

STEP 5: Has the privilege been waived?

- If no, it may not be used in formal proceedings unless the mediation communication falls under an exception, and the court continues to Step 6.
- If yes, it may be used in formal proceedings.

Ohio Revised Code Section 2710.04 says that a privilege may be waived in a record or orally in a proceeding, so long as the right people expressly waive it. An express waiver

means that the person must clearly show through a written record or orally in court that he or she wishes to waive a privilege; verbally to neighbors or family is not enough.

1. Mediation party: If a mediation party holds the privilege, all mediation parties must expressly waive it.
2. Mediator: If the mediator holds the privilege, all parties and the mediator must expressly waive it.
3. Nonparty participant: If the nonparty participant holds the privilege, all parties and the nonparty participant must expressly waive it.

There are limits to privilege. If someone has testified about a damaging mediation communication, the person who has been hurt by the testimony may testify in response, and the first person may not claim a privilege to prevent him or her from testifying. Also, you may not claim a privilege if you have used the mediation to plan, attempt to plan, or commit a crime, or conceal an ongoing crime.

Finally, a mediation communication may contain information that can be found in other ways, such as the use of a tax return in mediation. Even if the holder of the privilege does not waive his right to keep that mediation communication out of court, a party may be able to find another law or rule to allow it to be testified about in court.

STEP 6: Does an exception apply?

- If no, and the mediation communication has not been waived, it may not be used in formal proceedings.
- If yes, the mediation communication will NOT be confidential under the UMA, and MAY be used in formal proceedings.

Ohio Revised Code Section 2710.05 lists the following exceptions.

1. The mediation communication is in a written agreement signed by all the parties. For example, settlement agreements signed by all the parties would fall under this exception, but notes made by a party about an oral agreement would not.
2. The mediation communication is available to the public under Ohio Revised Code Section 149.43 or made during a session of a mediation that is open or is required by law to be open to the public. There are two parts to this exception.

- Ohio Revised Code Section 149.43(1)(i) states that a “public record” does not include records containing information that is confidential under Ohio Revised Code Section 2710.03. Under Ohio Revised Code Section 2710.03, a mediation communication is privileged and may not be used in formal proceedings unless it falls under one of the exceptions listed in Ohio Revised Code Section 2710.05. This tracks previous Ohio mediation law in making most mediation communications confidential.
- The second part to this exception concerns mediation communications made during an open mediation or one required to be open. These are not privileged, since it does not make sense for that mediation communication to be made confidential since it was made in a meeting that was open to the public.

3. The mediation communication is an imminent threat or statement of a plan to inflict bodily injury or commit a crime of violence. Only the threat can be used in formal proceedings, not the rest of the communication. Ohio has included the word “imminent,” so that a vague threat “I’m going to hurt you” might not be testified about, but the more specific threat, “I’m going to hurt you when we leave this room” might be testified about.

4. The mediation communication is intentionally used to plan, attempt to commit, or commit a crime or to conceal an ongoing crime or ongoing criminal activity. Only communications that are “intentionally” used fall under this exception. If then, a party unintentionally suggests something illegal during brainstorming sessions that does not fall within this exception, such as a divorcing spouse innocently suggesting a way of figuring out their taxes that later is found to be illegal, the party’s communication would not be covered under this exception and would be protected.

5. The mediation communication is about professional misconduct or malpractice by a mediator. This exception makes sure that mediators can be held responsible for their conduct during mediation.

6. The mediation communication is about professional misconduct or malpractice by a mediation party, a nonparty participant or a representative of a party. This exception makes sure that other professionals can be held responsible for their conduct during mediation. However, a mediator may not be forced to give evidence relating to the professional misconduct or malpractice of others.

7. The mediation communication about abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the case is referred by a court to mediation and a public agency

participates. This exception protects children and adults by allowing courts to hear communications involving abuse, neglect, abandonment, or exploitation, but only in proceedings brought to protect children or at risk adults or proceedings in which a public agency participates. Private proceedings, such as divorce, would NOT fall under this exception. This is similar to Ohio Revised Code Section 2317.02(H) that prohibits mediators from testifying in private proceedings, such as divorce and allocation of parental rights and responsibilities. Ohio Revised Code Section 2151.421 requires certain persons to report child abuse or neglect.

8. The mediation communication is required to be disclosed under Ohio Revised Code Section 2921.22. Section 2921.22 is a long-standing law in Ohio requires all persons to report felonies. Specifically, Ohio Revised Code Section 2921.22 states that “No person, knowing that a felony has been or is being committed, shall knowingly fail to report such information to law enforcement authorities.”

The UMA does not change this. Under Ohio Revised Code Section 2710.05(A)(8), there is no privilege for a mediation communication required to be disclosed under Ohio Revised Code Section 2921.22. The key to this section is the word “knowing.” Ohio Revised Code Section 2901.22(B) states that “a person has knowledge of circumstances when he is aware that such circumstances probably exist.” This is the standard for deciding whether your knowledge that a felony has been or is being committed is enough to come under this exception and require you to tell law enforcement. Please note that this requires you to know what Ohio considers to be a felony, which is beyond the scope of this publication.

9. The mediation communication is sought in connection with a proceeding involving a felony, a delinquent child proceeding based on what would be a felony if committed by an adult, or a proceeding initiated by a state or child protection agency alleging an abused, neglected or dependent child. This exception tracks Ohio Revised Code Section 2317.02(H), which specifically does not prohibit mediators from testifying in criminal, delinquency, and child abuse, neglect and dependency proceedings. This exception has been added by Ohio and is not part of the UMA draft circulating to all states.

The next two exceptions allow courts to decide if testifying about the mediation communication is necessary to prevent a manifest injustice. Courts weigh the need to keep mediation private against the court’s need for the information.

1. A court proceeding involving a misdemeanor. This exception allows courts to weigh interests in maintaining confidentiality with the need to discover evidence in criminal contexts. Ohio has substituted the phrase “manifest injustice” for the

UMA draft's phrase "substantially outweighs" to track previous mediation law language.

2. A proceeding involving a contract arising out of mediation. This exception makes sure that parties and nonparty participants can testify, if necessary, about mediation communications involving settlement agreements. However, a mediator may not be forced to testify about a contract arising out of mediation.

That's it for how the UMA works in Ohio! For more explanations, please see "Uniform Mediation Act: Frequently Asked Questions," and "Uniform Mediation Act: Quiz".

SECTION 3. THE HISTORY OF THE UMA

Currently, over 2,500 state statutes regulate the use of mediation. These statutes differ widely within and among different states, leading to confusion and legal uncertainty. For example, what happens to a mediation communication made in divorce mediation in Ohio if the spouse bringing the suit files in Indiana? Or an Ohio mediator speaks with one party via telephone from Florida? Which state law applies? How will the parties and the mediator know?

The UMA was created to provide a uniform law that states could enact, so that everyone would be on the same page. It was drafted over the course of five years by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association's (ABA) Section of Dispute Resolution. The UMA was approved and recommended for enactment by NCCUSL in 2001 and the ABA in 2002.

The Drafters wanted courts to make decisions about the UMA using the following principles:

1. The need for uniformity of mediation law throughout the states;
2. The need to keep mediation confidential so that parties feel comfortable enough to be candid;
3. Society's need for disclosure in certain circumstances;
4. The need to encourage the prompt, economical, and peaceful resolution of disputes;
5. The integrity of the mediation process; and
6. The need to help people make their own, informed decisions and encourage active participation.

SECTION 4. OHIO’S PREVIOUS MEDIATION LAW: SECTION 2317.023

Ohio’s previous statute Ohio Revised Code Section 2317.023 protected mediation communications as confidential and provided a qualified privilege. The UMA will repeal that statute as of October 29, 2005 and replace it with Sections 2710.01—2710.10.

Section 2317.023 became effective on January 1997. The statute defined a mediation communication as a communication made “in the course of and relating to the subject matter of a mediation.” The statute stated that a mediation communication was confidential, and prohibited disclosure in civil or administrative proceedings. A mediation communication was not confidential in the following circumstances:

1. Any person could disclose a communication by a mediator if all parties to the mediation and the mediator consented to the disclosure, unless Section 2317.02 (H) or 3109.052 (C) applied. These Sections concern exceptions for a mediator involved in any proceeding for divorce, dissolution, legal separation, annulment, or the allocation of parental rights and responsibilities for the care of children.
2. Any person other than the mediator could disclose a communication by a person other than the mediator if all parties consented.
3. A communication was not protected if its disclosure is required by Section 2921.22, which requires persons to report a felony to law enforcement authorities.
4. A communication could be disclosed if a court, after a hearing, determined the following:
 - Disclosure did not circumvent Evidence Rule 408,
 - Disclosure was necessary in the particular case to prevent a manifest injustice, and
 - The necessity for disclosure was of sufficient magnitude to outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings.

Finally, the statute stated that otherwise admissible evidence did not become inadmissible just because it was also a mediation communication. For example, evidence that was subject to discovery or disclosure due to public records law remained admissible under those laws or rules of evidence, but not under Section 2317.023.

Only one Ohio court case has interpreted this statute. In Schneider v. Kreiner (1998), the Supreme Court of Ohio held that a preliminary complaint form used by a mediator was protected under Section 2317.023. The form described the allegations made by a party,

the relationship between the parties, and information relating to the parties, including the mediator's personal observations about the mediation and the dispute. The Court decided that the form was confidential as a mediation communication and not subject to disclosure under the Ohio Public Records Act.

SECTION 5. THE DIFFERENCES BETWEEN THE UMA AND OHIO'S PREVIOUS MEDIATION LAW

The UMA is more specific than Section 2317.023, which it has replaced. Because the UMA is more specific, courts have less leeway in deciding what is and what is not privileged information. Mediation parties now have a clearer idea of how courts will decide, and can plan with more certainty. The UMA also covers the following issues, which are not mentioned in Section 2317.023.

1. Section 2710.06 of the UMA prevents mediators from making a report to a court, department, agency or a state officer that may make a ruling on the dispute that is the subject of the mediation. Exceptions to this are:
 - The mediator may report whether the mediation has occurred or has terminated, whether a settlement was reached, and who attended.
 - The mediator may report any mediation communications that the parties agreed are not confidential.
 - The mediator must report any communications showing abuse, neglect, abandonment, or exploitation of a person to the public agency responsible for protecting that person, such as reporting child abuse to children's protective services.

2. Section 2710.08 (A)(B) of the UMA requires mediators to tell parties about possible conflicts of interest the mediator may have with the parties that may affect the mediator's impartiality. Mediators must tell parties even if they do not ask.

3. Section 2710.08(C) of the UMA requires mediators to tell parties their qualifications to mediate, but only when asked by a party.

4. Section 2710.08(G) of the UMA requires mediators to be impartial, or evenhanded, unless, after disclosure of the mediator's potential conflicts of interest, the parties agree to continue with the mediation, knowing that the mediator may not be able to be completely impartial. This is an optional section within the UMA, and other states may not enact it.

5. Section 2710.09 of the UMA allows parties to be accompanied by an attorney or other support persons, even if the party had previously waived his or her right to do so. In other words, a party can change his or her mind in the middle of mediation.

6. Section 2 of this Guide has already discussed exceptions to privilege. Two of those exceptions are not covered in any form by previous Ohio mediation law. These are mediation communications about professional misconduct or malpractice by a mediator, or by other professionals in the mediation.

SECTION 6. HOW THE UMA WILL IMPACT THE OHIO REVISED CODE

The UMA will:

Repeal section 2317.023 of the Ohio Revised Code (ORC) – Ohio’s mediation statute;

Amend section 149.43 – Public Records; and

Enact sections 2710.01 to 2710.10 – to be known as the Uniform Mediation Act.