

First Supplement to Memorandum 2014-35

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: Law of Other Jurisdictions

Earlier this year, the Commission examined the Uniform Mediation Act (“UMA”) and the implementation of that Act in eleven states plus the District of Columbia.¹ At the June meeting, the Commission identified five non-UMA jurisdictions for particular attention in this study: Florida, Massachusetts, New York, Pennsylvania, and Texas. Memorandum 2014-35 discusses the pertinent law in Florida, Massachusetts, and New York.

The key provisions protecting mediation communications in Pennsylvania and Texas are attached to this supplement as follows:

	<i>Exhibit p.</i>
• 42 Pa. Cons. Stat. § 5949	1
• Tex. Civ. Prac. & Rem. Code § 154.053	3
• Tex. Civ. Prac. & Rem. Code § 154.073	4

The staff will provide a detailed description of the law in those states in a future memorandum.

Attached to Memorandum 2014-35 is a 38-page chart that briefly summarizes the relevant law in the non-UMA states that the Commission did not single out for special attention. This supplement discusses that chart and provides some analysis of the state of the law across the country.

For convenient reference, the UMA provisions on (1) professional misconduct or malpractice and (2) mediator misconduct or malpractice are attached as follows:

1. See Memorandum 2014-14; First Supplement to Memorandum 2014-14; Memorandum 2014-24.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

	<i>Exhibit p.</i>
• Uniform Mediation Act § 6(a)(6), (c)	5
• Uniform Mediation Act § 6(a)(5)	5

Also attached is the following 2-page table, which provides an overview of the information we have gathered about the fifty states and the District of Columbia:

	<i>Exhibit p.</i>
• CLRC staff, <i>Summary Table: States with Express Exception(s) for Alleged Professional Misconduct or Malpractice</i>	6

We begin by saying a few words about the chart attached to Memorandum 2014-35.

CHART ENTITLED “PROTECTION OF MEDIATION COMMUNICATIONS: NON-UMA STATES (EXCEPT CA, FL, MA, NY, PA & TX)”

The 38-page chart attached to Memorandum 2014-35 compiles information about how 33 non-UMA jurisdictions have approached mediation communications.² For each of those jurisdictions, the staff has provided:

- (1) A citation to the statute(s) or rule(s) on protection of mediation communications.
- (2) A quotation of key language in the governing statute(s) or rule(s).
- (3) Some staff comments on the law, particularly aspects of the law most pertinent to this study (provisions relating to professional misconduct and malpractice).
- (4) In some instances, additional information, such as references to relevant cases or commentary.

As noted in Memorandum 2014-35, our research has been extensive, but not exhaustive. It is possible that we did not fully describe the pertinent law in one or more jurisdictions. However, the chart attached to Memorandum 2014-35 gives a good general picture of the law in these non-UMA states, and contains an abundance of information that may be useful in this study.

We encourage members of the Commission and other interested persons to examine that chart carefully. Through such examination, whether before or after the upcoming meeting, readers will gain an appreciation for the variety of

2. Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming.

approaches used in other states. Perhaps more importantly, readers may spot one or more ideas that might be useful in California, or could be adapted in some manner to be appropriate for California. The chart might also provide clues as to approaches to avoid. The staff expects to refer back to the chart or materials in it from time to time as this study progresses.

OVERVIEW OF THE LAW IN THE FIFTY STATES AND THE DISTRICT OF COLUMBIA

Between the chart just described, the UMA information previously presented, the discussions of Florida, Massachusetts, and New York law in Memorandum 2014-35, the Pennsylvania and Texas statutes attached to this supplement, and our familiarity with California law, the staff now has a general understanding of the state of the law in each of the fifty states and the District of Columbia. We plan to discuss federal law later.

To provide a concise overview of the law across the country, we prepared a table summarizing the results of our research.³ As the table shows, in nineteen states plus the District of Columbia, the statute(s) or rule(s) protecting mediation communications has one or more exceptions *expressly* addressing alleged attorney misdeeds or alleged professional misdeeds more generally (thus encompassing attorney misdeeds). Those jurisdictions have a total population of approximately 102.8 million people, or about 36.9% of the total U.S. population.

The remaining 31 states fall into the following categories:

- In eleven of those states (with approximately 39.1 million people, or about 14.0% of the total U.S. population), the statute or rule protecting mediation communications includes one or more express exceptions relating to alleged mediator misdeeds but not any other type of professional misdeeds.
- In California and seventeen other states (with approximately 114.0 million people, or about 40.9% of the total U.S. population), the statute or rule protecting mediation communications has no exception expressly addressing professional misdeeds of any type.
- Two states (with approximately 22.9 million people, or about 8.2% of the total U.S. population) provide little or no protection for mediation communications.

3. Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming.

In considering these figures, it is important to bear in mind that the staff's table only shows which jurisdictions have *expressly* addressed professional misdeeds in a statute or rule protecting mediation communications. If a jurisdiction has not expressly addressed the subject, a court might still imply an exception for evidence of alleged attorney misdeeds or for evidence of professional misdeeds more generally.

In addition, if a jurisdiction lacks an exception expressly addressing professional misdeeds, that does not necessarily mean that a mediation communication bearing on such misdeeds will be inadmissible and protected from disclosure. The communication might still be subject to disclosure because it is beyond the scope of the provision protecting mediation communications, or because it falls within another type of exception (e.g., an exception for evidence of fraud,⁴ an exception for a disclosure required by statute,⁵ or a “manifest injustice” exception⁶).

Having provided an overview of our research results, it may also be helpful to discuss the extent of variation among the states. We turn to that next.

EXTENT OF VARIATION IN EXPRESSLY ADDRESSING ATTORNEY MISDEEDS AND OTHER PROFESSIONAL MALFEASANCE

In expressly addressing the relationship between mediation confidentiality and professional malfeasance, states have taken a wide range of approaches. There are many different variables. For example,

- ***Attorney vs. Mediator vs. Professional.*** Some provisions squarely address attorney discipline or legal malpractice,⁷ the topic most clearly within the scope of this study. Other provisions expressly focus on alleged mediator wrongdoing.⁸ Still other provisions refer

4. See, e.g., Maine R. Evid. 408(b).

5. See, e.g., Ariz. Rev. Stat. § 12-2238(B)(3).

6. See, e.g., Wisc. Stat. § 904.085(4)(e).

7. See, e.g., N.C. Gen. Stat. § 7A-38.1(l)(2) (Evidence of statement made in mediated settlement conference is inadmissible in any action on same claim except “[i]n disciplinary proceedings before the State Bar ...”); Va. Code Ann. § 8.01-581.22 (Any mediation communication is confidential and is not subject to disclosure in judicial or administrative proceeding except “where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party’s legal representative based on conduct occurring during a mediation.”).

8. See, e.g., Ala. Civ. Ct. Mediation R. 11(a)(3)(iii) (Confidentiality provisions shall not apply “to the extent necessary if a party to the mediation files a claim or complaint against a mediator or mediation program alleging professional misconduct by the mediator arising from the mediation.”); Md. Code, Court & Judicial Proceedings § 3-1804(b)(2) (Mediation participant may

to professional misconduct or malpractice, which could encompass professionals other than attorneys or mediators, such as accountants, doctors, building contractors, and others.⁹

Some of the states with a provision referring to professional malfeasance also have a separate provision that addresses mediator malfeasance in a different manner,¹⁰ or supplements the general treatment of professional misconduct.¹¹ Other states appear to treat mediator malfeasance the same way as other types of professional malfeasance.¹²

- ***Disciplinary Proceeding vs. Malpractice Proceeding.*** Some states have separate exceptions for a disciplinary proceeding (e.g., a State Bar proceeding seeking suspension of an attorney for extortionate statements in a mediation) and a malpractice proceeding (e.g., a suit by a client against his attorney, seeking to recover damages for providing incorrect tax advice in a mediation).¹³ Other states lump the two types of proceedings together in a single exception,¹⁴ or only provide an exception for only one of them.¹⁵
- ***Proof of Allegations vs. Defense Against Allegations.*** Some of the exceptions are even-handed, permitting use of mediation communications to prove or disprove alleged professional malfeasance.¹⁶ Florida's exceptions expressly extend not only to

disclose mediation communications “[t]o the extent necessary to assert or defend against allegations of mediator misconduct or negligence.”).

9. See, e.g., Minn. Stat. § 595.02, Subd. 1a(3) (No person presiding at ADR proceeding shall be competent to testify in subsequent civil proceeding or administrative hearing as to any statement or conduct in ADR proceeding except statement or conduct that could “constitute professional misconduct.”); N.M. Stat. Ann. § 44-7B-5(A)(8) (Mediation communications are not confidential if they “are sought or offered to disprove a claim or complaint of professional misconduct or malpractice based on conduct during a mediation and filed against a mediation party or nonparty participant.”).

10. See, e.g., Md. Code, Courts & Judicial Proceedings § 3-1804(b)(2)-(3) (mediator can be compelled to testify with regard to allegations of mediator misconduct or malpractice, but not with regard to other alleged professional misconduct or negligence); N.M. Stat. Ann. § 44-7B-5(C)(2) (same); UMA § 6(a)(5)-(6), (c) (same).

11. See, e.g., Mich. Ct. R. 2.412(D)(4) (permitting disclosure of mediation communications when “necessary for a court to resolve disputes about the mediator’s fee”).

12. See, e.g., Fla. Stat. §§ 44.405(4)(a)(4), (6); N.M. Stat. Ann. § 44-7B-5(A)(8); see also Maine R. Evid. 514(c)(4)-(5) (professional misconduct exception for mediation party, nonparty participant, or representative of party applies to claim “based on conduct occurring during a mediation,” while similar exception for mediator misconduct contains no such limitation, presumably because it is assumed that any claim involving mediator would be “based on conduct occurring during a mediation.”).

13. See, e.g., Fla. Stat. §§ 44.405(4)(a)(4), (6); Mich. Ct. R. 2.412(D)(10), (11).

14. See, e.g., Maine R. Evid. 514(c)(4), (5); N.M. Stat. Ann. § 44-7B-5(A)(8).

15. See, e.g., N.C. Gen. Stat. § 7A-38.1(l)(2).

16. See, e.g., Kan. Stat. Ann. § 60-452a (Mediation confidentiality and privilege shall not apply to “[i]nformation that is reasonably necessary to allow investigation of or action for ethical violations against the neutral person conducting the proceeding or for the defense of the neutral person or staff of an approved program conducting the proceeding in an action against the neutral person or staff of an approved program if the action is filed by a party to the

proving and defending against allegations of professional malfeasance, but also to reporting of such conduct.¹⁷

In other states, the statutory exception appears exclusively or primarily directed at allowing a mediator to defend against allegations of professional malfeasance.¹⁸

- ***Professional Malfeasance During Mediation vs. Other Professional Malfeasance.*** Some provisions create an exception to mediation confidentiality only for evidence of professional malfeasance that allegedly occurred *during* mediation.¹⁹ In other states, the exception is not expressly limited to malfeasance *during* mediation.²⁰
- ***In Camera Proceedings.*** Some states use *in camera* procedures in handling mediation communications bearing on professional malfeasance. For example, the Comment to Alabama’s mediation confidentiality provision explains: “Any review of mediation proceedings as allowed under Rule 11(b)(3) [relating to alleged mediator misconduct] should be conducted in an *in camera* hearing or by an *in camera* inspection.”²¹
- ***Limitations on the Extent of Disclosure.*** Some states impose explicit limitations on the extent to which mediation communications can be used to prove or disprove professional malfeasance. For example, Florida’s mediation confidentiality exception for professional malpractice applies “solely for the

proceeding.”); Maine R. Evid. 514(c)(4), (5) (There is no mediation privilege for communications sought or offered to “prove or disprove” a claim of professional misconduct or malpractice).

17. Fla. Stat. §§ 44.405(4)(a)(4), (6).

18. See, e.g., Ga. ADR R. VII(B) (“Confidentiality does not extend to documents or communications relevant to legal claims or disciplinary complaints brought against a neutral or an ADR program and arising out of an ADR process. Documents or communications relevant to such claims or complaints may be revealed only to the extent necessary to protect the neutral or ADR program.”); Okla. Stat. tit. 12, § 1805(F) (“If a party who has participated in mediation brings an action for damages against a mediator arising out of mediation, for purposes of that action the privilege provided for in subsection A of this section shall be deemed to be waived as to the party bringing the action.”).

19. See, e.g., Maine R. Evid. 514(c)(5) (There is no mediation privilege for “communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation.”) (emphasis added); Va. Code Ann. § 8.01-581.22 (Mediation communications are confidential and protected from disclosure except “where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party’s legal representative based on conduct occurring during a mediation.”) (emphasis added).

20. See, e.g., Mich. Ct. R. 2.412(D)(10) (Mediation communication may be disclosed when “[t]he disclosure is included in a report of professional misconduct filed against a mediation participant or is sought or offered to prove or disprove misconduct allegations in the attorney discipline process.”).

21. Comment to Ala. Civ. Ct. Mediation R.11.

purpose of the professional malpractice proceeding.”²² Similarly, an Oregon provision says that “[i]n an action for damages or other relief between a party to a mediation and a mediator or mediation program, confidential mediation communications or confidential mediation agreements may be disclosed *to the extent necessary to prosecute or defend the matter.*”²³ The same provision further states that “[a]t the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.”²⁴

- ***Professional Malfeasance by a Mediation Party.*** Some of the provisions expressly addressing the intersection of mediation confidentiality and professional malfeasance clearly encompass evidence relating to professional malfeasance *by a mediation party*, not just evidence relating to professional malfeasance by a mediation participant who is assisting a party or conducting the mediation.²⁵ Other provisions are less clear on this point, or appear inapplicable to a mediation party.²⁶

The Commission should **bear these variables in mind as it assesses the various provisions and their impact, and determines how to proceed in California.** It should also **be mindful of other important distinctions between the protection for mediation communications provided in different states** (such as differing waiver rules and scope limitations), **as well as differences in mediation cultures** (such as usage of mandatory mediation). Due to the many factors that may differ from one state to another, the Commission should be **cautious and careful in drawing comparisons across state lines.**

NEXT STEPS

The staff’s research on the law of other jurisdictions is almost complete. For the next meeting, we will present detailed information about the pertinent law in Pennsylvania and Texas, as well as some further information about a few of the non-UMA states. We will also describe federal law on the subject.

If anyone is aware of a potentially interesting approach used by another country, please share your knowledge and thoughts with the Commission. Unless the Commission otherwise instructs, the staff does not plan to

22. Fla. Stat. §§ 44.405(4)(a)(4); see also Fla. Stat. §§ 44.405(4)(a)(6) (imposing similar limitation with respect to investigation of professional misconduct).

23. Or. Rev. Stat. § 36.222(5).

24. *Id.*

25. See, e.g., Maine R. Evid. 514(c)(5); Md. Code, Courts & Judicial Proceedings § 3-1804(b)(3).

26. See, e.g., UMA § 6(a)(6); Va. Code. Ann. § 8.01-581.22.

systematically research international law on the subject. While such research might be helpful, our resources are too limited to invest the necessary effort.

After completing the above work, we will begin reviewing and analyzing the scholarly commentary relevant to this study. Our tentative plan is to focus on articles containing empirical data first, and then look at the literature more broadly.

In addition to researching the law of other jurisdictions and scholarly commentary, we still need to devote some time to examining certain aspects of California law on the subject: Some key cases not already discussed in detail, Evidence Code Section 958, California's system for handling complaints about mediators in court-ordered mediations, and perhaps a few other matters.

Once the Commission has completed the background work described above (most of which is explicitly called for by the resolution directing this study), it will be ready to begin formulating a tentative recommendation. **Until the background work is completed, it seems wise to keep an open mind on how to address the issues.** We encourage everyone to be patient with the Commission's time-tested study process.

Respectfully submitted,

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PENNSYLVANIA MEDIATION PRIVILEGE
(42 PA. CONS. STAT. § 5949)

§ 5949. Mediation Privilege

5949. (a) *General rule.* — Except as provided in subsection (b), all mediation communications and mediation documents are privileged. Disclosure of mediation communications and mediation documents may not be required or compelled through discovery or any other process. Mediation communications and mediation documents shall not be admissible as evidence in any action or proceeding, including, but not limited to, a judicial, administrative or arbitration action or proceeding.

(b) *Exceptions.*

(1) A settlement document may be introduced in an action or proceeding to enforce the settlement agreement expressed in the document, unless the settlement document by its terms states that it is unenforceable or not intended to be legally binding.

(2) To the extent that the communication or conduct is relevant evidence in a criminal matter, the privilege and limitation set forth in subsection (a) does not apply to:

- (i) a communication of a threat that bodily injury may be inflicted on a person;
- (ii) a communication of a threat that damage may be inflicted on real or personal property under circumstances constituting a felony; or
- (iii) conduct during a mediation session causing direct bodily injury to a person.

(3) The privilege and limitation set forth under subsection (a) does not apply to a fraudulent communication during mediation that is relevant evidence in an action to enforce or set aside a mediated agreement reached as a result of that fraudulent communication.

(4) Any document which otherwise exists, or existed independent of the mediation and is not otherwise covered by this section, is not subject to this privilege.

(c) *Definitions* — As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Mediation." — The deliberate and knowing use of a third person by disputing parties to help them reach a resolution of their dispute. For purposes of this section, mediation commences at the time of initial contact with a mediator or mediation program.

"Mediation communication." — A communication, verbal or nonverbal, oral or written, made by, between or among a party, mediator, mediation program or any other person present to further the mediation process when the communication occurs during a mediation session or outside a session when made to or by the mediator or mediation program.

"Mediation document." — Written material, including copies, prepared for the purpose of, in the course of or pursuant to mediation. The term includes, but is not limited to, memoranda, notes, files, records and work product of a mediator, mediation program or party.

"Mediation program." — A plan or organization through which mediators or mediation may be provided.

"Mediator." — A person who performs mediation.

"Settlement document." — A written agreement signed by the parties to the agreement.

TEXAS CIVIL PRACTICE & REMEDIES CODE
SECTION 154.053

§ 154.053. Duties of impartial third party

154.053. (a) A person appointed to facilitate an alternative dispute resolution procedure under this subchapter shall encourage and assist the parties in reaching a settlement of their dispute but may not compel or coerce the parties to enter into a settlement agreement.

(b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.

(c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.

(d) Each participant, including the impartial third party, to an alternative dispute resolution procedure is subject to the requirements of Subchapter B, Chapter 261, Family Code, and Subchapter C, Chapter 48, Human Resources Code.

TEXAS CIVIL PRACTICE & REMEDIES CODE
SECTION 154.073

§ 154.073. Confidentiality of communications in alternative dispute resolution procedure

154.073. (a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

(e) If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure.

(f) This section does not affect the duty to report abuse or neglect under Subchapter B, Chapter 261, Family Code, and abuse, exploitation, or neglect under Subchapter C, Chapter 48, Human Resources Code.

(g) This section applies to a victim-offender mediation by the Texas Department of Criminal Justice as described in Article 56.13, Code of Criminal Procedure.

UMA EXCEPTION FOR PROFESSIONAL MISCONDUCT OR
MALPRACTICE (UMA § 6(a)(6), (c))

SECTION 6. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege under Section 4 for a mediation communication that is:

....

(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation

....

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6)

UMA EXCEPTION FOR MEDIATOR MISCONDUCT OR
MALPRACTICE (UMA § 6(a)(5))

SECTION 6. EXCEPTIONS TO PRIVILEGE.

(a) There is no privilege under Section 4 for a mediation communication that is:

....

(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator

SUMMARY TABLE: STATES WITH EXPRESS EXCEPTION(S) FOR
ALLEGED PROFESSIONAL MISCONDUCT OR MALPRACTICE

☞ Staff Note. In the chart that follows, gray shading indicates jurisdictions in which the statute or rule protecting mediation communications has one or more exceptions expressly addressing alleged attorney misdeeds or alleged professional misdeeds more generally (thus encompassing attorney misdeeds).

The unshaded parts of the chart pertain to jurisdictions in which the statute or rule protecting mediation communications has no such exception, or there is no statute or rule specifically protecting mediation communications. Those jurisdictions fall into several categories: (a) jurisdictions with one or more exceptions that expressly address alleged mediator misdeeds but not any other type of professional misdeeds, (b) jurisdictions that do not expressly address any type of professional misdeeds, and (c) jurisdictions that do not have a statute or rule specifically protecting mediation communications.

Deciding how to categorize each jurisdiction for purposes of this chart involved some judgment calls. The staff did its best to properly classify each jurisdiction. While there may be room for debate about how to classify certain jurisdictions, we hope that this chart will be useful in providing an overall picture of the state of the law.

In using this chart, it is important to bear in mind that it only shows which jurisdictions have *expressly* addressed professional misdeeds in a statute or rule protecting mediation communications. If a jurisdiction has not expressly addressed the subject, a court might still imply an exception for evidence of alleged attorney misdeeds or for evidence of professional misdeeds more generally. In addition, if a jurisdiction lacks an exception expressly addressing professional misdeeds, that does not necessarily mean that a mediation communication bearing on such misdeeds will be inadmissible and protected from disclosure. The communication might still be admissible pursuant to another type of exception (e.g., an exception for evidence of fraud, an exception for a disclosure required by statute, or a “manifest injustice” exception).

TYPE OF STATUTE OR RULE	STATES	TOTAL	POPULATION (APPROXIMATE)
Uniform Mediation Act (includes express exception for professional misconduct or malpractice & express exception specifically for mediator misconduct or malpractice)	HI, ID, IL, IA, NE, NJ, OH, SD, UT, VT, WA (plus DC)	11 (plus DC)	48,900,000
Statute protecting mediation communications includes express exception for attorney disciplinary proceeding & mediator disciplinary proceeding	NC	1	8,000,000
Statute protecting mediation communications includes several express exceptions relating to mediator misdeeds & express exception relating to attorney misconduct or malpractice	VA	1	7,000,000

TYPE OF STATUTE OR RULE	STATES	TOTAL	POPULATION (APPROXIMATE)
Statute protecting mediation communications includes express exception for investigation of professional misconduct & express exception for malpractice	FL, MI (also includes express exception for dispute re mediator's fee)	2	25,800,000
Statute protecting mediation communications includes express exception for professional misconduct or malpractice, plus caveat precluding mediator testimony unless claim is against mediator	NM	1	1,800,000
Statute or rule protecting mediation communications includes express exception(s) for professional misdeeds & express exception(s) specifically for mediator misdeeds	ME, MD, MN (also specifically addresses attorney disqualification)	3	11,300,000
Statute or rule protecting mediation communications includes express exception(s) for mediator misdeeds but not for any other type of professional misdeeds	AL, AZ, CO, DE, GA, KS, MT, ND, OK, OR, TN	11	39,100,000
Statute or rule protecting mediation communications has no exception expressly addressing professional misdeeds of any type	AK, AR, CA, CT, IN, LA, MA, MO, MS, NV, NH, PA, RI, SC, TX, WV, WI, WY	18	114,000,000
Little or no protection of mediation communications	NY, KY	2	22,900,000