

Uniform Mediation Act Frequently Asked Questions

1. I have been ordered to mediate by a court. Does this mean that my mediation will be covered under the Uniform Mediation Act?

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. The first category from Ohio Revised Code Section 2710.02 fits this situation – it says that the UMA applies when 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. Please see FAQ 4 for information about how to opt out of the privileges provided by the UMA under Ohio Revised Code Section 2710.02 (C).

2. My wife and I want to mediate our divorce with a private mediator. How can we be sure that our mediation will be covered under the UMA?

Very simply, you'll need to agree to mediate. The second category from Ohio Revised Code Section 2710.02 says that the UMA applies when 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 merely mean not telling neighbors, family members, or even 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 will remain private. Please see FAQ 4 for information on how to exclude your mediation from the UMA's coverage.

3. I plan to mediate at a community mediation center. Does this mean that my mediation will be covered under the UMA?

Yes, you're also covered. The third category from Ohio Revised Code Section 2710.02 says that you are covered under the UMA if the person who is mediating advertises his or her services as a mediator. Or, you are covered under the UMA if you mediate with a volunteer at a community mediation center, since that center "holds" itself out as providing mediation. Please see FAQ 4 for information about how to opt out of the privileges provided by the UMA under Ohio Revised Code Section 2710.02 (C).

4. What if I don't want my mediation to be covered under the UMA?

The UMA provides quite a lot of protection for mediation, but it may not be right for you. If you fit into one of the above three categories but have decided for whatever reason that

you would rather not be covered by the privilege sections of the UMA, you can decide that all or part of a mediation is not privileged. When parties “opt out” of the UMA, they are choosing not to take advantage of the privileges provided by the UMA. 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.

5. Are there any other ways my mediation won't be covered under the UMA?

Yes! Even if your mediation fits into 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.

A. Collective Bargaining Relationships: The UMA does not cover a 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.

B. Conducted by a Judge: The UMA does not cover a mediation mediated by a judge or magistrate who might make a ruling on the case. This is 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 make a ruling on the case.

C. 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 correctional institution administrators need to be able to respond appropriately to information that comes from mediations in which all the parties are students or residents. 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.

6. 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 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 can not be discussed in a 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 one of the two things occurs, what happens in mediation cannot be shared in a legal or other formal proceeding.

7. When does the confidentiality aspect of the UMA start?

One of the great aspects of the UMA is that it covers a wide range of the mediation experience. The confidentiality aspect of the UMA starts when you consider, conduct, participate in, initiate, continue or reconvene a mediation, or retain a mediator. This is very broad — basically it covers everything about mediation, from the time you contact the mediator or mediation center, until you walk away from the mediation experience.

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

The UMA defines “mediation communication” broadly to include oral and nonverbal statements made (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.” There are three types of people who can stop others from disclosing mediation communications: a mediation party; a mediator; and a nonparty participant.

A. A mediation party is a person who “participates in a mediation and whose agreement is necessary to resolve the dispute.” That person 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.

B. A mediator is someone who “conducts a mediation.” A mediator may refuse to testify about a mediation communication. A 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.

C. 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. 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.

9. Are there times when mediation is not private?

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

- A signed mediation agreement
- Something said in a mediation that is either open to the public or part of a public record
- A threat of bodily injury or a crime of violence
- When mediation is intentionally used to plan, attempt to commit, commit, or conceal a crime
- Malpractice or professional misconduct by a mediator, a party, a participant, or a party representative
- Child abuse
- 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
- Knowledge of a felony as required under Ohio Revised Code Section 2921.22

In addition, a judge will determine whether mediation is privileged when the proceeding at issue involves a misdemeanor or a contract arising from the mediation. FAQs 10 – 13 go into more detail on some of these exceptions.

10. My family has a history of child abuse. If this gets brought up in mediation, what happens?

This is a tricky question. It depends on what type of proceeding you were in before being referred to mediation. Ohio Revised Code Section 2710.05 (A) (7) of the UMA protects children by allowing courts to hear communications involving child abuse and neglect, but only in proceedings in which a child or adult protective services agency initiated and is a party to the proceeding. Therefore, there is no exception to the privilege in cases, such as divorce or custody cases, in which a public agency is *not* a participant. If a case

is referred to mediation by a court and a public agency participates, similarly, the communications remain privileged.

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 2710.06(B)(3) says the mediator may disclose child abuse and neglect to a public agency responsible for protecting the child, for example child protective services. Finally, Ohio Revised Code Section 2151.421 requires certain persons to report child abuse or neglect.

To put these all together, a person can testify if a proceeding was brought to protect the child, such as an abuse, neglect or dependent child proceeding. A person may not testify for a divorce proceeding, unless a caseworker from child protective services was present at the mediation. However, a mediator may disclose child abuse and neglect to a public agency responsible for protecting the child.

11. What if I suggest something in mediation that later turns out to be illegal, like a way of doing taxes with my ex-husband?

The UMA makes an exception to the privilege for mediation communications that are 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, such as divorcing spouses 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.

12. What happens if someone threatens to hurt me during mediation?

The UMA makes an exception to the privilege for a mediation communication that 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 the vague threat “I’m going to hurt you” would probably be inadmissible, but the more specific threat, “I’m going to hurt you when we leave this room” would probably be admissible.

13. I’ve heard that you can be guilty of a crime if you don’t report a felony. What if you hear about it in mediation?

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.” Failure to report a crime under Section 2921.22 is a misdemeanor offense. Disclosure is only *not* required when the communication is subject to certain independent privileges listed in Section 2921.22(G).

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.

14. What can the mediator tell a court?

In general, mediators may not 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. However, a mediator may always report whether or not the mediation occurred or has ended, who attended, and whether a settlement was reached. In addition, the mediator may report any mediation communications that the parties agreed are not confidential.

Finally, the mediator may 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. Some mediators are also professionals who are required to report such communications under their professional code or statute, so be sure to ask the mediator if they have a special duty to report.

15. Does the mediator have to tell parties anything?

Yes! The mediator must disclose possible conflicts of interest and, when asked, qualifications to mediate. Specifically, under Ohio Revised Code Section 2710.08(A) (1) before accepting the mediation, the mediator must make a reasonable effort to find out if there is anything about the dispute that a reasonable person would consider likely to affect the mediator’s impartiality. Under Ohio Revised Code Section 2710.08 (B), if the mediator discovers something after accepting a mediation, the mediator must tell the parties as soon as possible. Under Ohio Revised Code Section 2710.08 (G), the parties then have the option of retaining the mediator with the knowledge that the mediator’s impartiality may be affected or finding another mediator.

16. Does a mediator have to be impartial?

Yes! A mediator must be impartial unless the parties agree otherwise. For example, a mediator may tell parties about a possible conflict of interest with one party. The parties may still agree to keep the mediator, knowing about the lack of impartiality. However, if the parties do agree to keep the mediator, they may not argue later that the mediation was flawed because of the lack of impartiality of the mediator.

17. Who can be a mediator?

Under the UMA, a mediator does not need a special background or profession, including law. Because different types of cases require different skills, the UMA leaves this issue of qualifications up to individual programs and courts. For example, the Supreme Court of Ohio requires that family mediators have special qualifications. Also, courts and community mediation centers may require training. When selecting a mediator, you might consider mediation training, experience as a mediator in general and in the particular type of dispute you have, and specific knowledge of courts, if that is important to you.

18. Who can come to mediation?

Under the UMA, 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. A support person could include a family member, a friend, a translator, or a neighbor. Nothing in the UMA prevents you from bringing more than one attorney or support person. However, some mediators may decide that they cannot mediate with the attorney or support person in the mediation, and there, the mediator has the option of withdrawing.

19. I know that Ohio had a mediation statute, why did it adopt 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?

The UMA was drafted to help deal with these problems. It was created 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.

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.

The UMA is more specific and more complex than Section 2317.023. Because the UMA is more specific, courts have less leeway or discretion in interpreting what is and 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 addresses many areas that Ohio's previous mediation law did not, such as the following:

1. Mediators may only make certain reports to a court.

2. Mediators must tell parties about possible conflicts of interest the mediator may have that may affect the mediator's impartiality, whether or not parties ask.
3. Mediators must tell parties their qualifications to mediate, but only when asked by a party.
4. Mediators must be impartial.
5. Parties may come to mediation with an attorney or other support persons, even if the party had previously waived his or her right to do so.
6. Mediation communications about professional misconduct or malpractice by a mediator or by other professionals in the mediation are not protected communications.

20. How do I find more information about the UMA and mediation in Ohio?

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

In addition, the Ohio Commission on Dispute Resolution and Conflict Management has information about court, private, school, and community mediation, available via their website at www.disputeresolution.ohio.gov.

Finally, the Dispute Resolution Section of the Supreme Court of Ohio has information about court mediation in Ohio, available via their website, at www.sconet.state.oh.us/dispute_resolution.