

“Top 10” Mediation Confidentiality Points to Remember

1. **APPLICATION OF TITLE 17 OF THE MARYLAND RULES (“Title 17”).** The mediation confidentiality rule in Title 17 (Rule 17-105) may apply if, and only if, a court ordered or referred a civil case (action) or proceeding to mediation.
2. **APPLICATION OF THE MARYLAND MEDIATION CONFIDENTIALITY ACT (“MMCA”).** The MMCA may apply if, and only if: (1) the mediator makes a specific written statement¹ to everyone the mediator has mediation communications with, or (2) the parties are required to mediate by law, or (3) the parties are referred to mediation by an administrative agency or arbitrator.
3. **EXCLUSIONS FROM CONFIDENTIALITY LAWS.** Title 17 and the MMCA each exclude specific types of cases and mediations from their operation. (See Table 1, below.) Mediations covered by Title 17 are excluded from the MMCA.
4. **DISCLOSURE AND DISCOVERY IN LEGAL PROCEEDINGS.** If either Title 17 or the MMCA applies, the mediator, the parties, and other participants may not disclose or be compelled to disclose mediation communications in any judicial, administrative or other proceeding and mediation communications are not subject to discovery.
5. **MEDIATOR’S OBLIGATION TO MAINTAIN CONFIDENTIALITY.** If either Title 17 or the MMCA applies, the mediator and anyone participating at the mediator’s request must generally maintain the confidentiality of all mediation communications.
6. **PARTIES’ OBLIGATION TO MAINTAIN CONFIDENTIALITY.** The parties and anyone participating at a party’s request are generally not required to maintain the confidentiality of mediation communications, under either Title 17 or the MMCA.
7. **PARTY AGREEMENTS TO MAINTAIN CONFIDENTIALITY.** If either Title 17 or the MMCA applies, the parties may agree (in writing) that they will maintain confidentiality of mediation communications. The parties also may require anyone participating at the request of a party to maintain confidentiality of mediation communications.
8. **AGREEMENTS NOT TO MAINTAIN CONFIDENTIALITY.** The parties may agree to exclude mediation communications from confidentiality under the MMCA (if they do so in writing, before the mediation begins), but not under Title 17.
9. **AGREEMENTS REACHED IN MEDIATION.** If either Title 17 or the MMCA applies, a signed agreement or document stating points of agreement reached in mediation is not confidential unless the parties agree in writing that it is.
10. **PERMITTED DISCLOSURES.** The mediator, parties, and participants may report or disclose mediation communications that would otherwise be confidential when a disclosure or report is required by law or under other circumstances specified in Title 17 and the MMCA. (See Tables 2 and 3.)

TABLE 1: MEDIATIONS EXCLUDED FROM TITLE 17 AND THE MMCA

Type of case (action) or context of mediation excluded from confidentiality	Excluded from Title 17 by Rule	Excluded from MMCA by Sec.
Mediation covered by Title 17 of the Maryland Rules	Not excluded	3-1802(b)(1)
Action to enforce an agreement to use arbitration or, under Title 17, to use any type of ADR	17-101(b)(1)	3-1802(b)(4)
Action to foreclose a lien against owner-occupied residential property subject to foreclosure mediation by the Office of Administrative Hearings	17-101(b)(2)	3-1802(b)(5)
Action pending in the Health Care ADR Office	17-101(b)(3)	Not excluded
Matter referred to a magistrate, examiner, auditor, or parenting coordinator	17-101(b)(4)	3-1802(b)(6)
Mediation concerning a collective bargaining relationship or agreement (unless the dispute has been filed with an administrative agency or court)	Not excluded	3-1802(b)(2) 3-1802(b)(3)
Mediation conducted by a judge who might make a ruling concerning the dispute	Not excluded	3-1802(7)
Mediation which the parties and mediator agreed to exclude from the MMCA	Not excluded	3-1802(c)

¹ See Maryland Code, Courts and Judicial Proceedings, § 3-1802(a) for the specific statement that must be made.

Disclosures of Mediation Communications Permitted by Title 17 of the Maryland Rules and the Maryland Mediation Confidentiality Act

TABLE 2: PERMITTED DISCLOSURES. Title 17 of the Maryland Rules and the Maryland Mediation Confidentiality Act (MMCA) permit, but do not require, certain disclosures of mediation communications.

Type of disclosure permitted	Permitted by Title 17, Rule	Permitted by MMCA, Sec.
Disclosures required by law (see Table 3 for examples)	17-105(d)	3-1804(b)
To a potential victim or the appropriate authorities to prevent serious bodily harm or death to the potential victim	17-105(d)(1)	3-1804(b)(1)
To assert or defend against allegations of mediator misconduct or negligence	17-105(d)(2)	3-1804(b)(2)
To assert or defend against allegations of professional misconduct or malpractice by a party or a person who participated at the request of a party	Not specifically excluded ²	3-1804(b)(3)
To assert or defend against a claim that an agreement arising out of a mediation should be rescinded (cancelled) because of fraud, duress, or misrepresentation or, under the MMCA, that damages should be awarded on these grounds	17-105(d)(3)	3-1804(b)(4)

TABLE 3: EXAMPLES OF REPORTS REQUIRED BY LAW. Title 17 of the Maryland Rules and the Maryland Mediation Confidentiality Act permit disclosure of mediation communications when required by other laws. Some examples of laws that require reports, and the people who must make them, are:

Type of report required	People who must report	Law requiring report
Child abuse or neglect	Generally, <u>any person</u> who has reason to believe that a child has been subjected to abuse or neglect ³	Family Law, §§ 5-704 and 5-705
Vulnerable adult abuse, neglect, etc.	<u>Health practitioners, police officers, educators, and human services workers</u> who have reason to believe that a vulnerable adult has been subjected to abuse, neglect, self-neglect, or exploitation	Family Law, § 14-302
Abuse of person with developmental disability	<u>Any person</u> who believes that an individual with a developmental disability has been abused	Health - General, § 7-1005
Attorney misconduct	<u>An attorney</u> who knows that another attorney has committed a violation of the Maryland Attorneys' Rules of Professional Conduct that raises a substantial question as to that attorney's honesty, trustworthiness or fitness as an attorney	Maryland Rules, Rule 19-308.3
Animal bite or non-bite contact	<u>Any person</u> who knows that another was bitten by, or had a scratch or abrasion involving potential contamination from, an animal	COMAR ⁴ § 10.06.02.05
Communicable diseases	<u>Health care providers, teachers, directors of medical laboratories, owners and operators of food establishments, and others who know</u> of a case of a reportable disease, condition, outbreak, etc.	COMAR § 10.06.01.04

² Title 17 does not say that mediation communications may be disclosed to assert or defend against allegations of professional misconduct or malpractice committed by anyone other than a mediator. However, Rule 19-308.3 of the Maryland Attorneys' Rules of Professional Conduct requires an attorney who knows that another attorney has committed a violation of those rules that raises a substantial question as to the attorney's honesty, trustworthiness or fitness as an attorney to inform the appropriate authorities. An attorney's disclosure of mediation communications in such a report would be permitted by Rule 17-105(d).

³ A person who is not a health practitioner, police officer, or educator or human service worker is not required to report suspected child abuse or neglect if the information is protected by the Lawyer-Client Privilege or the Clergy Person Privilege and certain other conditions are satisfied. (See Family Law, section 5-705.)

⁴ COMAR is the Code of Maryland Regulations and is available at www.dsd.state.md.us/COMAR/ComarHome.html.