

Everything in Mediation Remains Confidential, Unless One of Four Specific Exceptions is Met

[ARS §12-2238](#) is Arizona's mediation statute, and it provides:

B. The mediation process is confidential. Communications made, materials created for or used and acts occurring during a mediation are confidential and may not be discovered or admitted into evidence unless one of the following exceptions is met:

1. *All of the parties to the mediation agree to the disclosure.*
2. *The communication, material or act is relevant to a claim or defense made by a party to the mediation against the mediator or the mediation program arising out of a breach of a legal obligation owed by the mediator to the party.*
3. *The disclosure is required by statute.*
4. *The disclosure is necessary to enforce an agreement to mediate.*

[subsection 5 left out, as it relates to disclosures necessary for law enforcement or child safety/neglect reports]

An Arizona Court of Appeals decision makes it clear that unless one of these four (4) exceptions specifically applies, the confidentiality of mediation will not be disturbed by a court proceeding. [Grubaugh v. Blomo](#) (2015).

In that case which alleged legal malpractice stemming from advice given from attorney to client during the course of mediation, which led to a mediated agreement which the client later sought to repudiate, the Arizona Court of Appeals found that the communications between lawyer and client during the mediation could not be explored or revealed. The lawsuit did not involve the mediator, so subsection 2 above didn't apply; the disclosure was not required by statute, nor was it necessary to enforce an agreement to mediate, so subsections 3 and 4 didn't apply. This left subsection 1, and because all parties to the mediation did not agree to the disclosure, that exception didn't apply either.

“All of the parties to the mediation” would presumably be defined, per this case, as both parties, both attorneys, and the mediator himself or herself. The Court noted that the statute does not provide any exception for communications done solely between one attorney and one client (although the statute certainly could have included that exception).

This decision explores the history of mediation confidentiality, the history of this Arizona statute, common law privileges, and a comparison/ contrast of the mediation privilege with the attorney-client privilege. (Short answer: the attorney-client privilege exists in common law as well as statute, unlike the mediation privilege which is purely statutory. At common law, the attorney/ client privilege includes a broad definition of when that privilege may be waived, but there is no corresponding waiver history with mediation privilege.)

Overall, the “strong policy of confidentiality” which is integral to the mediation process was preserved.

As a result of the finding of mediation confidentiality, any claims made by the Plaintiff/ client that related to mediation communications had to be stricken from her Complaint, and the trial court was instructed to identify and strike any claims which were dependent on confidential communications. *“To hold otherwise would allow a plaintiff to proceed with a claim, largely upon the strength of confidential communications, while denying the defendant the ability to fully discover and present evidence crucial to the defense of that claim.”*