

**78B-10-106 Exceptions to privilege.**

- (1) There is no privilege under Section 78B-10-104 for a mediation communication that is:
  - (a) in an agreement evidenced by a record signed by all parties to the agreement;
  - (b) available to the public under Title 63G, Chapter 2, Government Records Access and Management Act, or made during a mediation session which is open, or is required by law to be open, to the public;
  - (c) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;
  - (d) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;
  - (e) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;
  - (f) except as otherwise provided in Subsection (3), 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; or
  - (g) subject to the reporting requirements in Section 62A-3-305 or 62A-4a-403.
- (2) There is no privilege under Section 78B-10-104 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that:
  - (a) the evidence is not otherwise available;
  - (b) there is a need for the evidence that substantially outweighs the interest in protecting confidentiality; and
  - (c) the mediation communication is sought or offered in:
    - (i) a court proceeding involving a felony or misdemeanor; or
    - (ii) except as otherwise provided in Subsection (3), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.
- (3) A mediator may not be compelled to provide evidence of a mediation communication referred to in Subsection (1)(f) or (2)(c)(ii).
- (4) If a mediation communication is not privileged under Subsection (1) or (2), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under Subsection (1) or (2) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

Renumbered and Amended by Chapter 3, 2008 General Session