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When Confidentiality Is Not Essential to Mediation and Competing Interests Necessitate Disclosure

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When Confidentiality is not Essential to Mediation and Competing Interests Necessitate Disclosure

State v. Williams[1]

I. INTRODUCTION

Mediation is a process where a neutral intervener helps disputing parties develop a mutually beneficial resolution. Confidentiality is an established element of mediation. In general, confidentiality furthers the ability of the parties to seek mutually beneficial outcomes to disputes that would otherwise customarily produce a win/lose result. Confidentiality encourages parties to explore their underlying interests, without fear of the repercussions of revealing such information. Arguments are asserted that mediation will not succeed without the assurance that communications will be protected by a confidentiality privilege. The Uniform Mediation Act (UMA) has attempted to clarify the various confidentiality protections afforded by individual states. No confidentiality statute that includes the UMA provision creates an absolute confidentiality privilege, and in fact all such statutes provide a number of express exceptions. One such exception exists when mediation information is sought for use in a criminal proceeding.[2] A criminal defendant is entitled under the United States Constitution to present a complete defense and the confidentiality privilege protecting mediation can intrude on a criminal defendant's constitutional rights.[3] Mediation is now well-established, and the need for confidentiality to maintain the effectiveness and integrity of the process may not be as necessary as once thought when there is a substantial competing interest.

II. FACTS & HOLDING

Defendant-Appellant Carl Williams (Williams) was embroiled in a family dispute with his brother-in-law Brahima Bocoum (Bocoum), which culminated in an altercation between the two.[4] Bocoum left threatening messages on Williams' voicemail that prompted Williams to drive to Bocoum's residence and confront him.[5] Williams coaxed Bocoum out of his home and the altercation became physical.[6] The scuffle resulted in Bocoum requiring medical treatment.[7] Each party described a different sequence of events leading up to Bocoum's injuries.[8]

1. 877 A.2d 1258 (N.J. 2005).
2. UNIF. MED. ACT. § 6(b)(1)(2005).
3. U.S. CONST. amend. XIV, § 1, amend. VI.
4. *See Williams*, 877 A.2d at 1260.
5. *Id.*
6. *Id.*
7. *Id.* at 1261. Bocoum was treated for the cut on his wrist and then released. *Id.*
8. *Id.* at 1260.

Bocoum claimed that Williams wielded a machete and cut Bocoum on the wrist and foot.[9] Williams, however, claimed that he did not have a machete and Bocoum cut himself when they fell into some garbage cans.[10] Furthermore, Williams claimed that Bocoum hit him with a large shovel, while Bocoum and two other witnesses claimed Bocoum never picked up a shovel.[11]

Williams left the scene and the police later arrested him at his apartment.[12] After Williams' arrest, he filed a harassment complaint in municipal court against Bocoum for the threatening messages left on Williams' voicemail.[13] The municipal court sent the harassment complaint to mediation.[14] The mediation was unsuccessful and therefore the case was sent back to municipal court.[15]

A grand jury indicted Williams on aggravated assault and two charges of weapons possession.[16] At trial, Williams claimed self-defense and sought, in support of his claim, the testimony of Josiah Hall (Hall), the mediator for the harassment complaint mediation.[17] During the trial, Williams' attorney questioned Hall outside the courtroom; Hall stated that Bocoum had admitted in mediation that he had picked up the shovel.[18] The trial court refused to relax the confidentiality protections of the mediation session, and rejected Hall's testimony because of the strong public policy considerations supporting confidentiality of mediation sessions.[19] The jury found Williams guilty on two of the three charges.[20] The appellate division upheld the trial court's exclusion of the mediator's testimony and affirmed the jury conviction, maintaining that Williams had received a fair trial.[21]

Williams appealed the trial court's denial of the use of Hall's testimony and the New Jersey Supreme Court granted certification on the issue of admissibility of the mediator's testimony.[22] Williams asserted that the mediator's testimony could help exonerate him and claimed that the trial court's exclusion of the mediator's testimony "deprived him of his right to fully present a defense."[23] Williams

9. *Id.*

10. *Id.*

11. *Id.* Bocoum's wife and his wife's brother both witnessed the altercation and claimed that Bocoum never picked up the shovel and never swung it at Williams. *Id.*

12. *Id.* The police found an unsheathed machete at Williams' apartment and found a machete sheath on the sidewalk in front of Bocoum's home. *Id.* at 1260-61.

13. *Id.* at 1261.

14. *Id.* The municipal court may require parties to attend mediation at any time after a complaint is filed. N.J. R. Gen. App. R. 1:40-4 (2004).

15. *Williams*, 877 A.2d at 1261.

16. *Id.*

17. *Id.* at 1261, 1268-69.

18. *Id.* Hall stated that Bocoum admitted picking up the shovel, but claimed he did not hit anyone with it. *Id.*

19. *Id.* at 1262. The court stated that relaxing the confidentiality of mediation "really obliterates the whole dispute resolution process." *Id.*

20. *Id.* The jury convicted Williams of third-degree aggravated assault and fourth-degree possession of a weapon and acquitted Williams on the third-degree weapons charge. *Id.* Williams was sentenced to three years probation, fined $1,162 (including court costs), and required to attend anger management counseling and perform community service. *Id.*

21. *Id.* The Appellate court held that, in this case, justice did not require relaxing the confidentiality requirements of mediation created by N.J. R. Gen. App. R. 1:40-4 because Williams had received a fully tried case before a jury. *Id.* However, the court also noted that the mediator's testimony may have helped establish Williams' self-defense claim. *Id.*

22. *State v. Williams*, 866 A.2d 983 (N.J. 2004).

23. *Williams*, 877 A.2d at 1262.

claimed Hall's testimony would help establish Williams' assertion of self-defense by bolstering the credibility of Williams' earlier testimony that Bocoum had "wielded" the shovel.[24] In addition, Williams claimed that Hall's testimony would contradict the State's witnesses, who said Bocoum did not charge at Williams with the shovel, and thus Williams could move the court to impeach their testimony.[25] While the State recognized Williams' right to present a complete defense, the State also argued that courts may limit a defense and Williams presented no "compelling reasons" why the trial court should have admitted Hall's testimony.[26] Affirming the Appellate Division ruling that Hall's testimony was inadmissible, the New Jersey Supreme Court held in a 5-2 decision that Williams' need to present a complete defense with testimony concerning statements made in mediation, did not outweigh the interest in preserving mediation confidentiality when the evidence was otherwise available.[27]

III. LEGAL BACKGROUND

Mediation is a unique dispute resolution process in which a neutral third party facilitates problem solving and conciliation between the parties while aiding the parties in developing a mutually agreeable resolution themselves.[28] Mediation has been utilized in various forms ranging from international disputes mediated by political leaders to community disagreements in remote African and Central American regions settled by an "elder" family member.[29] In the United States, mediation was used to settle conflicts in colonial New England. Mediation has become more formalized over the years, beginning with the creation of the Federal Mediation and Conciliation Service in 1947 as a means to resolve union-management conflicts.[30] With the alternative dispute resolution movement in the 1960s, mediation became more prominent and widely used throughout the United States as a means for disputing parties to develop a resolution superior to other possible outcomes.[31]

A. Public Policy Supporting Confidentiality in Mediation

The proposition that confidentiality is an essential element of effective mediation is evidenced by strong scholarly support for mediation confidentiality and the

24. *Id.*
25. *Id.* at 1263.
26. *Id.*
27. *Id.* at 1270. Williams was allowed at trial to give testimony as to what Bocoum said during the mediation. *Id.* The New Jersey Supreme Court also noted that Williams' defense had ample opportunity to cross-examine Bocoum and the State's witnesses. *Id.* In dissent, Justice Long agreed with the majority's holding that relevant and necessary evidence necessary to the defense in a criminal proceeding will not be shielded by a privilege. *Id.* (Long, J., dissenting). However, Justice Long disagreed with the court's conclusion that Hall's testimony was not relevant and necessary because Hall was the only "neutral" witness and therefore his testimony was not "otherwise available." *Id.* at 1271 (Long, J., dissenting).
28. *See* Anne M. Burr, *Confidentiality in Mediation Communications: A Privilege Worth Protecting*, 57 APR -DISP. RESOL. J. 66, 66 (2002).
29. JAMES J. ALFINI, MEDIATION THEORY AND PRACTICE 1 (2001).
30. *Id.*
31. *Id.* at 1-2.

existence of statutes protecting confidentiality of mediation communications in every state.[32] Unrestrained communication between the parties and the mediator is necessary during the mediation process to foster agreements which may not otherwise be reached.[33] Confidentiality alleviates the "threat of disclosure" of sensitive information that commonly restricts open communication between adverse parties in other forums.[34] Not only does confidentiality in mediation facilitate candor between the parties, but in some disputes, confidentiality is essentially a "substitute for trust" between adverse parties and may be required for any communication to occur between them.[35]

Additionally, confidentiality is important to the mediation process because it assists mediators in maintaining neutrality by assuring participants that the mediator will not disclose mediation communications.[36] Mediator neutrality is a fundamental principal of mediation because it encourages effective relationships between the mediator and the parties, as well as maintains the perception of mediators as unbiased neutrals to the public at large.[37] Moreover, if judicial action is pursued after the mediation, confidentiality is necessary to maintain the judicial process as a separate action from the mediation.[38] The separation between the mediation and future litigation preserves the integrity of both processes. Confidentiality is even more essential to preserve the integrity of the processes when the mediation is court-mandated due to the risk that the neutrality of the judge or mediator may be compromised.[39]

Another consideration which supports mediation confidentiality is that mediators and mediation programs require insulation from the harassment and distraction of frequent subpoenas.[40] Confidentiality is also important to protect unsophisticated or unrepresented parties from being disadvantaged by revealing information or making admissions that would undermine their position in future litigation.[41]

B. New Jersey Mediator's Privilege

New Jersey has established the Complementary Dispute Resolution Program (CDR), which authorizes a Superior Court or Municipal Court judge to order parties to participate in mediation at any time after a complaint is filed.[42] The statutes governing the CDR program establish confidentiality for the mediation process by prohibiting, without consent of the parties, admission of disclosures by the parties

32. Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 80 (2001). *See* ARIZ. REV. STAT. ANN. § 12-2238 (1994); IOWA CODE ANN. §§ 679C.104 (West 2005); KAN. STAT. ANN. § 60-452a (1999); LA. REV. STAT. ANN. § 9:4112 (2001); OKLA. STAT. tit. 12, § 1805 (1993).
33. Deason, *supra* note 32, at 80.
34. *Id.* at 81.
35. *Id.* at 82.
36. *Id.*
37. *Id.*
38. *Id.* at 83.
39. *Id.*
40. ALFINI, *supra* note 29, at 195.
41. *Id.* at 194-95.
42. N.J. R. Gen. Application R. 1:40-4(a).

during the mediation process in any "civil, criminal, or quasi-criminal proceeding."[43] This statute establishes confidentiality protections for the mediator participating in a CDR mediation by stating that "[n]o mediator may participate in any subsequent hearing or trial of the mediated matter or appear as witness or counsel for any person in the same or any related matter."[44] However, the statute also establishes a duty of the mediator to report any information received at the mediation if the mediator reasonably believes that such disclosure will prevent a mediation participant "from committing a criminal or illegal act likely to result in death or serious bodily harm."[45]

The New Jersey statutes also provide that the Rules of Court "shall be construed to secure a just determination . . . [and] fairness in administration."[46] Furthermore, the statutes allow the court to relax or dispense with any rule, as long as it does not explicitly prohibit relaxation, if adhering to the rule would create an injustice.[47] The CDR rules similarly allow relaxation or modification of the CDR rules to prevent injustice or inequity.[48] There is significant support, though, for the position that relaxation should be an exception and not the rule.[49]

C. Mediator Privilege Under the Uniform Mediation Act

New Jersey has adopted the Uniform Mediation Act (UMA), which also establishes confidentiality for mediation sessions.[50] The UMA provides that mediating parties, the mediator, and non-party participants of the mediation may "refuse to disclose, and may prevent any other person from disclosing, a mediation communication."[51] However, there are several exceptions to this privilege. The privilege is ineffective in a criminal proceeding "if a court . . . finds, after a hearing in camera, that the . . . proponent of the evidence has shown that the evidence is not otherwise available, and that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality."[52] The party seeking the evidence or testimony from a mediation has the burden of proving that the evidence is not otherwise available and that the need for the evidence substantially outweighs the interest in preserving mediation confidentiality.[53]

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43. *Id.* at 1:40-4(c).
44. *Id.*
45. *Id.*
46. N.J. R. Gen. Application R. 1:1-2.
47. *Id.*
48. *Id.* at 1:40-10.
49. *See* Stewart Title Guar. Co. v. Lewis, 788 A.2d 941, 947 (N.J. Super. Ct. Ch. Div. 2001) ("While having a laudable purpose, *R.*1:1-2 provides a very limited basis for relaxation. . . . A frequent or freewheeling use of *R.*1:1-2 would lead to a sublimation of all other rules, allowing decisions to be rendered on nothing more than a gestalt-like methodology."); Ricci v. Corporate Express of The East, Inc., 779 A.2d 1114, 1119 (N.J. Super. Ct. App. Div. 2001) ("[R]ecourse to the relaxation provision should be sparing."); ERA Advantage Realty, Inc. v. River Bend Dev. Co., Inc., 663 A.2d 656, 658 (N.J. Super. Ct. Law Div. 1994) ("[T]he rules are to be relaxed when the interests of justice require."); Oliviero v. Porter Hayden Co., 575 A.2d 50, 52 (N.J. Super. Ct. App. Div. 1990) ("*R.* 1:1-2 should be used sparingly.")
50. N.J. STAT. ANN. § 2A:23C-1 to -13.
51. *Id.* § 2A:23C-4b.
52. *Id.* § 2A:23C-6b(1).
53. UNIF. MED. ACT. § 6, cmt. 9.

The UMA's approach to confidentiality of mediation communications when such communication is sought in criminal proceedings does not establish a bright-line rule, but instead gives courts discretion to determine when the need for the testimony outweighs the interest of protecting mediation communications.[54] By creating a framework for courts to use that is balanced and flexible, the UMA acknowledged the split within the states regarding the privilege afforded mediation communications when sought in criminal proceedings and strove to create a universally acceptable uniform law.[55] While the UMA neither prohibits nor permits all mediation communications from being used in criminal proceedings, the UMA does provide that, initially, the privilege exists and can only be overcome in specific cases.[56] However, it is not easy for the party seeking admission of mediation communications into evidence to overcome the privilege because not only must the evidence be otherwise unavailable, but the need for the evidence must substantially outweigh the interest in protecting mediation confidentiality.[57]

D. Criminal Cases and the Fourteenth Amendment

The Fourteenth Amendment of the United States Constitution prohibits states from depriving citizens of life or liberty "without due process of law."[58] In *Strickland v. Washington*,[59] the United States Supreme Court held that the Fourteenth Amendment guarantees every criminal defendant the right to a fair trial.[60] Further, the Court held that the Constitution's guarantee of a fair trial is defined by several provisions of the Sixth Amendment.[61] The Sixth Amendment provides the criminal defendant with the ability to confront adverse witnesses and "compulsory process[es] for obtaining witnesses in his favor," such as subpoenas and court orders.[62] The guarantee of a fair trial essentially provides the criminal defendant with a "fair opportunity to defend against the State's accusations."[63]

The New Jersey Constitution has language identical to that of the United States Constitution, thereby affording defendants the same rights.[64] The right to confront adverse witnesses provides criminal defendants the opportunity to cross-examine and impeach the State's witnesses.[65] The rights to examine adverse witnesses, present testimony, and be represented by counsel are the minimum essential requirements for a criminal defendant to have a fair trial.[66] The New Jersey Supreme Court held that the constitutional right to a compulsory process is based

54. Deason, *supra* note 32, at 106-10.
55. *Id.*
56. *Id.*
57. *Id.* There are many arguments supporting confidentiality in mediation. *See* Rojas v. Superior Court, 93 P.3d 260, 265 (Cal. 2004) (confidentiality essential to mediation because it fosters open communication); *See supra* Part III.A.
58. U.S. CONST. amend. XIV, § 1.
59. 466 U.S. 668, 684-85 (1984).
60. *Id.* at 684-85.
61. *Id.*
62. U.S. CONST. amend. VI
63. Chambers v. Mississippi, 410 U.S. 284, 294 (1973).
64. *See* N.J. CONST. art I, ¶ 10.
65. *See* Davis v. Alaska, 415 U.S. 308, 315-16 (1974).
66. *Chambers*, 410 U.S. at 308.

on the fundamental right of "an accused to present witnesses in his own defense."[67]

In *Crane v. Kentucky*,[68] the United States Supreme Court held that the confrontation clause and compulsory process rights of the United States Constitution guarantee "a meaningful opportunity to present a complete defense."[69] Further, the Court held that the "opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on . . . credibility . . . when such evidence is central to the defendant's claim of innocence."[70] However, the rights to examine adverse State witnesses and present testimony are "not absolute, and may, in appropriate circumstances, bow to competing interests."[71] Courts may reject testimony helpful to a criminal defendant if such exclusion will further "interests of fairness and reliability."[72] Therefore, assertions of privilege to exclude testimony, which often "'undermine[s] the search for truth in the administration of justice,' are accepted to the extent that they outweigh the public interest in the search for truth."[73] The New Jersey Supreme Court held that "if evidence is relevant and necessary to a fair determination of the issues, the admission of the evidence is constitutionally compelled."[74]

IV. INSTANT DECISION

In *State v. Williams*,[75] the New Jersey Supreme Court decided the extent to which confidentiality will protect mediation communications when the defendant in a criminal prosecution seeks testimony from the mediator to resolve a factual issue and establish his self-defense claim.[76] In upholding the trial court and appellate court decisions, the New Jersey Supreme Court held that the privilege establishing mediation confidentiality can only be overcome in a criminal case when the information is not otherwise available and the need for the evidence substantially outweighs the interest in protecting mediation communications.[77]

The court gave several reasons for justifying why it did not address the constitutionality of the confidentiality provision of the UMA. First, the court did not address constitutionality because the issue had not been raised in oral arguments to the court.[78] Second, the UMA was not in effect when the events at issue in the case occurred.[79] Third, the court held that the facts of this case did not even meet the lesser proposed "Constitutional" standard for waiving mediation confidential-

67. State v. Sanchez, 670 A.2d 535, 544 (N.J. 1996).
68. 476 U.S. 683 (1986).
69. *Id.* at 690.
70. *Id.*
71. State v. Budis, 593 A.2d 784, 790 (N.J. 1991).
72. *Id.*
73. State v. Szemple, 640 A.2d 817, 821 (N.J. 1994) (quoting State v. Dyal, 478 A.2d 390, 394 (N.J. 1984)).
74. State v. Garron, 827 A.2d 243, 257 (N.J. 2003).
75. 877 A.2d 1258 (N.J. 2005).
76. *Id.* at 1263.
77. *Id.* at 1270.
78. *Id.* at 1265.
79. *Id.*

ity.[80] Therefore, the UMA was used as a "framework" to determine whether the facts of the case should prompt the court to relax the mediator's privilege.[81]

An initial inquiry by the court found that the first requirement necessary to relax the mediator's privilege, evidence sought in a criminal proceeding, was easily met because the proponent for relaxing the privilege was being prosecuted on criminal charges relating to the mediation.[82] However, the court next noted that public policy supports settling legal disputes, and that confidentiality is an essential element of successful mediation to help parties reach agreeable settlements.[83] Further, confidentiality is necessary to enhance the conciliatory nature of mediation as well as the goal of open and honest communication within mediation.[84] Because of the unique characteristics of mediation in promoting unrestrained communication, confidentiality is important to allow the participants to fully participate without fear that their words will be used against them.[85] The importance of mediator neutrality was stressed as essential to successful mediation. The court found that mediator confidentiality fosters mediator neutrality by assuring participants that the mediator will hold their information in confidence.[86]

After finding a "substantial interest in protecting mediation confidentiality," the court assessed the "nature and quality" of the evidence in question to determine the actual need for the information.[87] Because there were questions regarding the reliability of the mediator's testimony, the court held that the evidence was not essential for the defendant to have a complete defense for a fair trial.[88] Therefore, the court held that the minimal need for the mediator's testimony did not outweigh the substantial interest in preserving mediation confidentiality.[89]

In completing their analysis of the UMA, the court last addressed whether the evidence sought from the mediator's testimony was otherwise available.[90] To begin, the court noted there was "substantial evidence" other than that from the mediation sufficient to present the claim of self-defense.[91] In this case, the defendant testified as to what was said during mediation, and further, there was sufficient evidence other than the mediator's testimony that would still have presented a complete defense.[92] Because the defendant presented significant evidence concerning his claim of self-defense, and because the defendant was not prevented from asserting a complete defense, the court held that the evidence sought from the mediator's testimony was, in fact, otherwise available.[93]

Justice Long, in a dissent joined by Justice Albin, agreed with the majority's interpretation of the law governing mediation confidentiality and the right to relax

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 1266.
84. *Id.*
85. *Id.*
86. *Id.* at 1266-67.
87. *Id.* at 1268.
88. *Id.*
89. *Id.* at 1269.
90. *Id.*
91. *Id.*
92. *Id.* The defense thoroughly cross-examined three witnesses testifying for the State. *Id.* Defendant's wife testified in support of defendant's position. *Id.*
93. *Id.* at 1270.

the privilege for use in criminal proceedings.[94] However, Justice Long disagreed with the majority's application of the law to the present facts. Justice Long believed that the evidence was not otherwise available because the mediator was the only disinterested party with knowledge of the events and therefore his testimony was essential to the defense.[95] In conclusion, the New Jersey Supreme Court, in a 5-2 decision, held that under the guidance of the UMA, mediator testimony could not be introduced into evidence in a criminal proceeding where the information was otherwise available and where the need for the testimony did not substantially outweigh the interest in preserving mediation confidentiality.[96]

V. COMMENT

A cursory reading of the New Jersey Supreme Court ruling in *State v. Williams* could easily lead one to conclude that the confidentiality privilege afforded mediation proceedings will not be relaxed, absent extreme circumstances.[97] The UMA is clear, though, that it does not create a blanket privilege for mediation.[98] Although there are many public policy reasons that are routinely asserted to justify the need for confidentiality protections of mediations, it is also clear that no legislature has sought to employ an absolute privilege, and that all allow examination of exceptions on an individual basis.[99]

When mediation information is sought for use in a criminal proceeding, the UMA provides a process whereby the party seeking the information may prove at an in camera hearing that the information is not otherwise available and the need for the evidence substantially outweighs the interest in protecting mediation communications.[100] This exception places an acceptable burden on the party seeking the information, but the *Williams* court essentially made this an insurmountable requirement.

The existence of mediation does not depend entirely on maintaining a confidentiality privilege protecting mediation disclosures.[101] Further, mediation participants do not require the protections of strict confidentiality because other safe-

94. *Id.* (Long, J., dissenting).
95. *Id.*
96. *Id.*
97. *Id.* at 1266.
98. Several exceptions are expressly provided to allow relaxation of the confidentiality privilege. UNIF. MED. ACT, § 6. Exceptions exist if all parties waive the privilege in a written agreement, if the mediation was open to the public, when threats of committing a crime are made, when information used in mediator malpractice claims, if the mediation revealed information proving adult or child abuse or neglect, and in certain circumstances when information is sought to prove a defense in a criminal proceeding. *Id.*
99. *See generally* ARIZ. REV. STAT. ANN. § 12-2238(C) (1994); COLO. REV. STAT. § 13-22-307(4) (Supp. 1993); FLA. STAT. § 44.201(5) (Supp. 1994); MINN. STAT. § 595.02(1)(k) (1994); MO. REV. STAT. § 435.014(2) (1992); OR. REV. STAT. § 36.205(2)(c) (1993); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(c) (West Supp. 1994); UTAH CODE ANN. § 78-31b-7(1)(a) (1992); VA. CODE ANN. § 8.01- 581.22(iii) (Michie 1992); WASH. REV. CODE § 5.60.070(1)(b) (Supp. 1994); WYO. STAT. Ann. § 1-43- 103(c)(iv) (Supp. 1994).
100. UNIF. MED. ACT, § 6.
101. *See* Joel M. Grossman, *Clarifying the Confidentiality of Mediation Evidence*, 27 APR.-L.A. Law 14, 20 (2004) ("The benefits of mediation are so significant that it will continue to thrive as the best alternative to costly and uncertain litigation.").

guards currently exist.[102] In fact, mediation has flourished without the existence of an absolute privilege protecting mediation communications.[103] It is clear that mediation is most successful when parties are open and honest, and willing to objectively view their position and the position of the opposing party; however, the protections afforded to information revealed during mediation by a confidentiality privilege only minimally improve the candor between the parties.[104] Confidentiality cannot eliminate the preexisting, deep-rooted animosity and distrust that exists between adverse parties in most cases. Once a dispute has escalated to the point that a resolution process such as mediation is required, the parties have likely exhausted all other options and are now relying on outside assistance to help facilitate a resolution to their conflict.

It is naïve to believe that simply informing mediation participants that their statements made during the mediation are protected by the privilege of confidentiality will eliminate all apprehension of the parties to offering information.[105] An unrepresented party will likely be unsure of the mediation process and unwilling to fully participate for fear of saying something that will harm their position. First, unrepresented parties who are unaware of the mediation process are not likely to completely understand the brief explanation by the mediator of the confidentiality protections of the process. Second, even when a party has read a mediation agreement completely, without representation, the party will still be uncertain of the implications of confidentiality and, therefore, may not be completely candid with their communications. Skepticism of the law in general, and reluctance to participate in legal proceedings, will prevent the unsophisticated and unrepresented party from being completely open and honest during mediation even with the assurance of confidentiality.[106]

On the other hand, parties who are more familiar with the law and are represented by counsel, whether or not the attorney is present during the mediation, also may not be completely candid simply because of the existence of a confidentiality privilege.[107] An attorney representing a client participating in mediation

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102. *See* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 35-36 (1986) ("An expanded Rule 408, coupled with careful drafting of the confidentiality clause in a mediation agreement where such agreements are used, and attention to the public policy generally favoring out-of-court settlements, adequately protects parties to mediation.").

103. *Id.* at 32.

104. *See* J. Brad Reich, *A Call For Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure*, 2001 J. DISP. RESOL. 197, 213-15 (2001) ("There was no significant difference in disclosure between no mention of privilege and mention of privilege."); *See generally* U.S. v. Nixon, 418 U.S. 683, 712 (1974) (The Supreme Court noted that the candor of advisors to the President will not be hindered because no privilege protects such communication.).

105. *See generally* Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269, 345-48 (1999) (indicating that some parties in mediation do not wish to participate for numerous reasons).

106. *See generally* Carol M. Langford, *Depression, Substance Abuse, and Intellectual Property Lawyers*, 53 U. KAN. L. REV. 875, 886-87 (2005) (stating that there is a "societal disconnect" within the law, and the general public has a poor perception of those in the legal profession); *See generally* Frederick Schauer, *The Calculus of Distrust*, 77 VAL. U. L. REV. 653, 653-55 (1991) (discussing the American distrust for governmental power, including a distrust of the judicial system).

107. *See* Carrie Menkel-Meadow, *The Lawyer As Consensus Builder: Ethics For a New Practice*, 70 TENN. L. REV. 63 (2002) (stating that there is no obligation forcing lawyers to be candid during mediation and some neutrals actually seek contractual agreements to force disclosure from participating

will certainly prepare his or her client prior to the mediation.[108] The preparation will likely include an explanation of the confidentiality protections afforded the mediation process. However, the attorney will also caution the client not to offer more information than is necessary, and not to admit anything or offer anything that will compromise their position in negotiating with the other party or in future litigation.[109]

No matter how great the protections afforded by a confidentiality privilege, the communications between the parties will never be completely unrestrained because of the inherent nature of the relationship between disputing parties. Further, because communication between adverse parties will always be strained, confidentiality will not eliminate that tension. Confidentiality may help foster open communications between mediation participants; however, the assistance of confidentiality is not essential to a successful mediation. Whenever competing interests are present, the confidentiality privilege should yield to the competing interests.[110] It is clear that when a privilege is generally asserted, that privilege must yield to the competing interests of presenting a complete defense in a criminal proceeding.[111] Therefore, a mediation privilege must yield to the specific need for essential evidence in a criminal proceeding, a need that existed in *Williams*.

Other arguments in support of confidentiality include that it maintains mediator neutrality and protects the integrity of mediation and other judicial proceedings by keeping the processes separate; however, when a factual dispute exists and the mediator is in a position to "break the tie," the testimony should be admitted unless it would require the mediator to make a judgment or conclusion rather than simply relate an objective accounting of facts disclosed during the mediation. Although the perception of partiality may arise when one party seeks mediator testimony, this risk does not outweigh the importance of having a fair decision based on the facts ascertained from all available evidence and successfully complete the "pursuit of justice." A concern may arise regarding mediator bias if a mediator is asked to make statements of opinion concerning mediation communications. If a mediator testifies based on his or her own conclusion as to the parties' statements or liability based on the facts, then the mediator's neutrality can certainly be called into question. Mediators are supposed to maintain impartiality

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attorneys); *See generally* Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, Consequently, 19 OHIO ST. J. ON DISP. RESOL. 509, 537 (2004) (even when a mediator encourages candor, parties likely may not believe disclosures of other party).

108. 6 WILLIAM L. NORTON, JR., NORTON BANKRUPTCY LAW AND PRACTICE § 146:11 (2d ed. 2006) ("Prior to mediation, clients and attorneys should discuss mediation strategies and alternatives.")

109. *See id.* Attorneys are expected to "coach" their clients prior to and during mediation. *See* Randy Frances Kandel, *Power Plays: A Sociolinguistic Study of Inequality in Child Custody Mediation and a Hearsay Analog Solution*, 36 ARIZ. L. REV. 879, 971 (1994); Mark R. Privratsky, Comment, *A Practitioner's Guide to General Order 95-10: Mediation Plan For the United States District Court of Nebraska*, 75 NEB. L. REV. 91, 108 (1996).

110. *See* Rinaker v. Superior Court, 74 Cal. Rptr. 2d 464, 469 (Cal. Ct. App. 1998) (holding that mediator's privilege must yield to the competing interest of a minor's constitutional right to impeach an adverse witness in a delinquency proceeding). Foxgate Homeowners' Ass'n, Inc. v. Bramalea California, Inc., 92 Cal. Rptr. 2d 916, 928 (Cal. Ct. App. 2000) (stating that the Legislature did not intend the statutory confidentiality privileges afforded mediation to allow lawyers acting in bad faith to avoid sanctions).

111. *Nixon*, 418 U.S. at 713.

and not draw conclusions as to any of the mediation communications. However, mediator testimony which simply states a fact or recounts a statement made by a party during mediation does not call the mediator's impartiality into question as long as the mediator does not include his own impressions of the statement. Therefore, confidentiality should yield and mediators should be allowed to testify as to specific facts concerning mediation or statements made during mediation as long as the testimony does not include the mediator's impressions or conclusions of those facts.

While the party opposing disclosure may question the neutrality of the mediator, mediation participants in general will not immediately question the neutrality of all mediators. Rather, the public is likely to support the disclosure of information that will essentially further the pursuit of justice. It is argued that allowing testimony from mediations in judicial proceedings will create a perception that mediation is simply an extension of the judicial process. However, all dispute processes are inherently tied together and unless parties use mediation solely as a discovery tool, any perceived connection between mediation and judicial processes is not detrimental to either institution. Further, the acceptance of evidence tending to promote justice in settling disputes will improve the integrity of all dispute resolution processes.

The current UMA exception to mediation confidentiality when information is sought in a criminal proceeding provides the party seeking disclosure the opportunity to show that the need for the information outweighs the interests in protecting mediation confidentiality. While the burden of showing that the need for the information "substantially outweighs" the interest in maintaining mediation confidentiality is a high standard, courts should not further increase the difficulty of satisfying that standard by making an individual assessment of the validity of the evidence and basing its decision on that analysis.

The New Jersey Supreme Court did not allow mediator testimony in *Williams*, and justified its refusal to relax the confidentiality of mediation because they did not believe the mediator's testimony would be unbiased and therefore found that the evidence was otherwise available.[112] The court's discretion to admit testimony is separate from the jury's duty to afford the proper weight to specific testimony.[113] However, the *Williams* court assessed the "nature and quality" of the mediator's testimony and determined that it did not qualify as competent evidence.[114] The court reasoned that the evidence the mediator would present was already present and did not support the defendant's claim of self-defense because the mediator's testimony did not exactly confirm the defendant's position.[115] However, it is clear that the mediator's testimony did contradict the statements made by the victim and could have influenced the jury's decision on the defendant's claim of self-defense.[116] Considering the substantial constitutional rights provided to a criminal defendant in presenting their defense, it is hard to reconcile the court's decision to uphold the confidentiality privilege and not allow the mediator's testimony. In a factual dispute, a mediator with knowledge of the facts is

112. *State v. Williams*, 877 A.2d 1258, 1268 (N.J. 2005).
113. *Id.* at 1272 (Long, J., dissenting).
114. *Id.* at 1268.
115. *Id.* at 1269.
116. *Id.* at 1271 (Long, J., dissenting).

uniquely suited to present unbiased testimony that sheds light on the dispute and therefore it is not the type of information that is "otherwise available."

Applying *Williams* to future criminal cases where information from mediation is sought may produce unconstitutional results. The constitutional rights embodied in the Confrontation Clause and the Due Process Clause demand that a criminal defendant have the opportunity to present a complete defense.[117] Confidentiality of mediation proceedings is in conflict with these constitutional rights when the defendant seeks admission of mediation disclosures to prove their defense. If the evidence is otherwise available, then the information can remain confidential and no constitutional concerns arise. However, when the evidence is not otherwise available and the court prevents admission of the testimony on the basis of confidentiality, a defendant's constitutional rights are affected. The defendant must prove that the need for the evidence "substantially outweighs" the interest in protecting mediation confidentiality. While this appears to place a substantial burden on the defense, the overwhelming interest in allowing a complete defense for criminal defendants will almost always substantially outweigh any subordinate interest in preserving mediation confidentiality. The result in *Williams* could lead other courts to erroneously exclude essential defense evidence because of the court's choice to weigh the evidence, rather than leaving that to the jury, and determining that the need for the evidence is not substantial.

VI. CONCLUSION

Mediation is a unique alternative dispute resolution process whereby disputing parties engage in a conciliatory process in which the actual parties determine whether or not to settle, and dictate the terms of any subsequent agreement. Confidentiality has long been seen as an essential element of mediation without which mediation may not be effective or as widely used for settling disputes. While confidentiality is now well entrenched in mediation, it should not be seen as an absolute requirement to promoter successful mediation. In *Williams*, the court chose to examine the validity of the mediation information sought and denied relaxation of the privilege to allow the criminal defendant to introduce the evidence because it questioned the veracity of the evidence and decided it was not substantial enough to overcome the need for mediation confidentiality. When confidentiality is used to prevent the defendant in a criminal proceeding from presenting a complete defense, the interests in preserving mediation confidentiality must give way to overwhelming Constitutional rights afforded criminal defendants and allow that evidence to be presented.

PATRICK GILL

117. *See generally* U.S. CONST. amend. XIV, § 1; amend. VI.