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Maureen Laflin
University of Idaho College of Law, mlaflin@uidaho.edu

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THE MEDIATOR AS FUGU CHEF: PRESERVING PROTECTIONS WITHOUT POISONING THE PROCESS

MAUREEN E. LAFLIN*

* Professor of Law and Director of Clinical Programs at the University of Idaho College of Law. I am grateful to the following friends and colleagues for their productive discussions on the topic and/or helpful comments on earlier drafts of this piece: Molly Laflin, Bob Collins, Dale Goble, Jack McMahon, Connie Taylor, Patrick Costello, and the presenters and participants at this symposium. I thank Katherine Spenner for her excellent research assistance as well as her support throughout this process. I also want to thank Dean Alfini, Professor Kimberlee Kovach, and the South Texas Law Review for their support.

Fugu fish, one of the most celebrated and notorious dishes in Japanese cuisine, is lethal if not prepared correctly. Because the fugu's poison can lead to death, only licensed cooks are allowed to prepare this delicacy. Despite its inherent dangers, fugu remains a special feast in Japan.[1]

Like the fugu chef,[2] the concerned mediator must know how to carefully dissect the parties' dispute, allowing them to reap the benefits of mediation without harming themselves in subsequent criminal litigation. Like the consumers of fugu, mediation participants must be warned of potential dangers. Participants need to know that there are limits to confidentiality and that everything said in mediation is not necessarily privileged.[3] Without such a caveat, mediation participants may open their mouths and unwarily take a bite of the "poisonous fish," leaving on the table statements that could be used against them in later criminal proceedings.

One of the hallmarks of mediation is its claim that people should feel free to speak openly because mediation communications are confidential.[4] Unfortunately, participants and attorneys alike often blur the distinction between confidential and privileged.

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1. Japanese Lifestyle, Fugu, http://www.japaneselifestyle.com.au/food/fugu.html (last visited Mar. 27, 2008).

2. *See* British Broadcasting Corporation, Fugu Fish, http://www.bbc.co.uk/dna/h2g2/A752429 (last visited Apr. 18, 2008) ("The rules for preparing fugu are extremely strict. There are rules for cleanliness and preparation, storage of the toxic parts, and careful reporting on the amount of fish handled and the distribution of the internal organs. People with poor vision or who are colour blind are not eligible to train as fugu chefs.").

3. *See* Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise?*, 2004 J. DISP. RESOL. 401, 401 (2004).

4. Scott H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9, 24–25 (2001) ("Confidentiality is constructed from two distinct, but intertwined principles which arise out of certain professional relationships such as: attorney-client, clergy-penitent, doctor-patient, and now, mediator-disputant. Confidentiality represents, first, a positive duty not to disclose secret communications and, second, the freedom to refuse to answer questions in court." (footnotes omitted)); *see also* Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 35 (2001) ("One of the fundamental axioms of mediation is the importance of confidentiality. It is deemed necessary to foster the neutrality of the mediator and essential if parties are to participate fully in the process.").

Confidentiality is an obligation not to disclose certain information;[5] whereas privilege is the right to preclude protected information from disclosure in legal proceedings.[6] The significance of this distinction is that something that is confidential is not necessarily privileged.[7] As the support for mediation in the civil and criminal context continues to expand,[8] the distinction between confidentiality and privilege becomes increasingly critical. For mediation to function effectively, mediation privilege rules must address not only the actual dispute but also the possible use of the mediation communications in subsequent criminal litigation.[9]

This article focuses on the interplay between mediated disputes and subsequent criminal litigation. Part I discusses the differences between confidentiality and privilege. Part II analyzes five pre-Uniform Mediation Act cases, which illustrate the problems that can arise when someone seeks to introduce exculpatory or inculpatory evidence gleaned from mediation in a subsequent criminal proceeding. Part III focuses on the Uniform Mediation Act[10] (UMA or the Act)—how mediation privilege differs from other recognized privileges, and the exceptions to privilege under the UMA, with particular focus on the criminal proceedings exception and its substantially outweighs standard. Part IV explores how the outcomes of the five cases might have been affected had they been decided in UMA jurisdictions, and what guidance the Act provides in determining the parameters of the criminal proceedings exception. Part V asks whether mediators in UMA jurisdictions have an ethical

5. Hughes, *supra* note 4, at 25.

6. Evidentiary privilege is "[a]n evidentiary rule that gives a witness the option not to disclose the fact asked for, even though it might be relevant; [or] the right to prevent disclosure of certain information in court, esp[ecially] when the information was originally communicated in a professional or confidential relationship." BLACK'S LAW DICTIONARY 1235 (8th ed. 1999).

7. In analyzing qualified privileges, courts weigh the need for the evidence against the societal benefit of upholding the privilege. Alan Kirtley, *Best of Both Worlds, Uniform Mediation Privilege Should Draw from Both Absolute and Qualified Approaches*, DISP. RESOL. MAG., Winter 1998, at 5, 6.

8. Mindy D. Rufenacht, Comment, *The Concern Over Confidentiality in Mediation—An In-Depth Look at the Protection Provided by the Uniform Mediation Act*, 2000 J. DISP. RESOL. 113, 113 (2000).

9. *See* Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571, 619–20 (2004).

10. Reimund, *supra* note 3, at 420 ("The UMA is a collaboration between the NCCUSL and the American Bar Association's (ABA) Section on Dispute Resolution to establish a confidentiality privilege for mediators and participants. The UMA . . . has received support from the ABA, dispute resolution professional organizations and service providers and leading dispute resolution scholars.").

obligation to inform mediation participants about the limits of confidentiality under the criminal proceedings exception. The article concludes by recommending that: (1) courts should consider the particular sequence of events on a case-by-case basis when balancing the admissibility of exculpatory evidence from mediation; (2) courts should be reluctant to admit mediation communications from a session convened to resolve a criminal matter; (3) mediators should inform participants about the criminal proceedings exception that now exists in jurisdictions that have adopted the UMA; and (4) the mediation community should implement an on-line tutorial training for mediators on confidentiality and privilege.

I. CONFIDENTIALITY V. PRIVILEGE IN THE MEDIATION CONTEXT

Confidentiality and privilege differ both in their bases and purposes.[11] Confidentiality is based on a promise not to share information with anyone outside the confidential relationship and is designed to promote candid discussions.[12] In contrast, privilege is the right to refuse to disclose confidential information and the right to preclude others from disclosing that information in court.[13] Privileges are meant to nurture specific interpersonal or professional relationships that courts, society, and legislatures deem desirable.[14]

Ambiguity arises because mediators frequently begin mediations with sweeping statements such as, "Everything we say here is confidential. Nothing that we say here can be used in court;" or "It's very important in mediation that people talk honestly about the situation and about what they need. Confidentiality is critical to the process. Will you promise not to repeat to anyone outside this mediation what is said here?" These broad statements fail to distinguish between confidentiality and privilege and provide mediation participants with a false sense of security that their statements will remain within the confines of the room.[15]

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11. *See generally* Hughes, *supra* note 4, at 25–36 (discussing confidentiality and privilege in the mediation context).

12. *Id.* at 25.

13. BLACK'S LAW DICTIONARY 1235 (8th ed. 1999).

14. Deborah A. Ausburn, Note, *Circling the Wagons: Informational Privacy and Family Testimonial Privileges*, 20 GA. L. REV. 173, 181 (1985) (indicating that privileges are intended to "serve a function outside the courtroom"); Kathleen L. Cerveny & Marian J. Kent, *Evidence Law—The Psychotherapist-Patient Privilege in Federal Courts*, 59 NOTRE DAME L. REV. 791, 793–94 (1984).

15. Reimund, *supra* note 3, at 401 ("Repeating the promise of confidentiality during mediation gives mediators and parties a sense of security about their conversations, but unfortunately the promise does not yield an impermeable shield of confidentiality.").

Providing parties with an assurance of confidentiality has advantages and disadvantages. Confidentiality in mediation serves several important purposes including fostering a sense of trust in the mediator and facilitating the parties' openness and willingness to work through the process.[16] A cornerstone of confidentiality is the understanding of the parties that the mediator will not disclose their statements to anyone outside their confidential relationship.[17]

Although essential to creating confidence in the mediation process, confidentiality can also be an impediment to effective monitoring of the participants' conduct.[18] Confidentiality may conflict with each party's desire in a judicial proceeding to access all relevant evidence,[19] whether that simply be reporting on disputants' refusal to participate in good faith, [20] or using exculpatory or inculpatory

16. *See* Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 243–51 (2002) (discussing the important role that the perception of confidentiality plays in fostering the flow of communication between mediation participants as well as the other important functions of confidentiality in the mediation context); Rufenacht, *supra* note 8, at 114 ("In order for the parties to reach an acceptable agreement, the process of mediation must provide both parties with a sense of trust and encourage them to make comments, verify facts, and discuss documents in the mediation.").

17. Most mediators fail to fully and accurately explain confidentiality and privilege to the disputants. Shawn P. Davisson, *Balancing the Scales of "Confidential" Justice: Civil Mediation Privileges in the Criminal Arena—Indispensable, Impracticable, or Merely Unconstitutional?*, 38 MCGEORGE L. REV. 679, 681 n.8 (2007) ("[I]n the area of mediation confidentiality, the web of confidentiality caveats . . . are rarely disclosed to parties in a mediation, at least not in their entirety. The default approach is to inform participants that the mediation is confidential and that the mediator will not voluntarily disclose communications during the mediation. But even where there is selective disclosure regarding exceptions to the confidentiality protection, the parties are never fully informed of the myriad of circumstances under which something said during a mediation may make its way onto the public streets or into the halls of justice, whether caused by actual party disclosure or an 'involuntary' disclosure by the mediator.").

18. Monitoring participants' conduct is controversial. *See infra* note 20.

19. For further discussion of the efforts by which states have sought to create mediation privilege rules that strike the proper balance between the need for mediation confidentiality and the public's interest in access to information, see Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 15 (1995).

20. Whether the mediator should monitor and report if the parties participated in good faith or not is the subject of numerous articles and is beyond the scope of this article. *See* Dr. iur. Ulrich Boettger, *Efficiency Versus Party Empowerment—Against a Good-Faith Requirement in Mandatory Mediation*, 23 REV. LITIG. 1, 2, 13–14, 16 (2004) (arguing that the good faith requirement enforced by many courts during mandatory, court-annexed mediation poses serious risks to the confidentiality of the mediation process and the role of the mediator, both of which are crucial to the effective working of the mediation process as a whole); Carol L. Izumi & Homer C. La Rue, *Prohibiting "Good Faith" Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J.

statements made during mediation in a subsequent criminal case.[21] Similarly, if a party admits to a past criminal wrong during the course of mediation, an important question arises whether such evidence should later be made available to the wronged person or to the court in its truth-seeking role.[22]

Further, there remains a practical problem in differentiating between confidential and privileged information. The distinction between confidentiality and privilege becomes particularly important when mediation statements are the subject of litigation. In such circumstances, parties may contend that privilege precludes the other party from using highly probative mediation communications in litigation.[23] Privileges by their very nature, however, "expressly subordinate the goal of truth seeking to other societal interests."[24] In contrast, relying solely on confidentiality—without privilege—a party will likely be unsuccessful in preventing such statements from being admitted in court.[25] In essence, if it is not privileged, much of what would be considered "confidential" in a social or contractual context

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DISP. RESOL. 67, 92, 97 (2003) (arguing that by omitting good faith reporting requirements for mediators from the Uniform Mediation Act and, instead, including other provisions to specifically deal with egregious party behavior, the drafters created an act that serves to protect mediations' process and values); Roger L. Carter, *Oh, Ye of Little [Good] Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations*, 2002 J. DISP. RESOL. 367, 391–92, 398–405 (2002) (arguing for specific good faith standards in mediations (including court ordered) but specifically precluding mediator testimony about the conduct of the parties); Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 618, 633 (2001) (arguing that there is an implied good faith obligation on mediation participants and, as such, confidentiality must give way, at least in some part, to allow for effective monitoring and applicable sanctions for violations of this good faith obligation).

21. *See* Gabriel H. Teninbaum, *Easing the Burden: Mediating Misdemeanor Criminal Matters*, DISP. RESOL. J., May/July 2007, at 62, 65.

22. *See id.* at 65–66 (discussing the use of mediation as an alternative to criminal litigation in jurisdictions that cannot keep up with the volume of misdemeanor criminal matters entering their court systems). This author suggests that information discussed during mediation in a criminal matter should not be subject to disclosure at trial if the mediation does not result in settlement.

23. *See generally* 1 MCCORMICK ON EVIDENCE § 72 (Kenneth S. Broun ed., 6th ed. 2006). Privilege is not designed to "facilitate the fact-finding process" or the "illumination of truth"; privilege inhibits this process. *Id.* Privileges protect certain interests and relationships that "are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice." *Id.*

24. *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1454 (1985).

25. For a more detailed discussion of the difference between confidentiality and privilege and a proposed harmonization of the two from the context of attorney-client privilege, see Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 70–74, 89, 92–93, 95 (1999).

is often within the bounds of discovery or production in court. Thus, the difference between privilege and confidentiality in the mediation context can be critical.

II. FIVE CASES IN SEARCH OF A THEORY OF MEDIATION PRIVILEGE

Although few cases address the admissibility of mediation communications in subsequent criminal cases, the existing case law reveals the critical role mediation privilege rules play in the process. Five published appellate decisions,[26] from four different states, highlight the problems that can arise when someone attempts to introduce mediation communications in subsequent criminal proceedings—a Florida case, *State v. Castellano*;[27] two Georgia cases, *Williams v. State*[28] and *Byrd v. State*;[29] an Idaho case, *State v. Trejo*;[30] and a New York case, *People v. Snyder*.[31]

These five cases are instructive on the evolution of mediation privilege over the last twenty years and on the importance of delineating the scope of mediation privilege rules. The cases address the potential admissibility of both exculpatory evidence and inculpatory evidence.[32]

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26. Rinaker v. Superior Court of San Joaquin County, 62 Cal. App. 4th 155 (Ct. App. 1998). This case is not included in the list of five cases, as it is a juvenile case. In *Rinaker*, two minors were charged with vandalism. *Id.* at 161–62. In the juvenile delinquency proceeding, the defendants offered the victim's statement from a civil harassment mediation that ran concurrent to the delinquency proceeding. *Id.* at 162. During the mediation, the victim admitted that he did not see the person who threw the rocks. *Id.* The minors sought to subpoena the victim's testimony as a means of impeaching the victim's statement at trial. *Id.* The court permitted the mediator's testimony holding that the juveniles' constitutional right to confrontation trumped the public policy providing confidentiality in mediation. *Id.* at 163.

27. 460 So. 2d 480, 481 (Fla. Dist. Ct. App. 1984).

28. 342 S.E.2d 703, 704 (Ga. Ct. App. 1986). *Williams*, a private settlement case, is instructive in the court's subsequent decision in *Byrd v. State*, 367 S.E.2d 300 (Ga. Ct. App. 1988).

29. 367 S.E.2d at 302–03.

30. 979 P.2d 1230, 1235, 1237 (Idaho Ct. App. 1999).

31. 492 N.Y.S.2d 890, 891–92 (Sup. Ct. 1985).

32. With the increased use of mediation to resolve criminal disputes, the question of admitting mediation communications containing inculpatory evidence will become more prevalent. *See* Davisson, *supra* note 17, at 681–83 (arguing for an amendment to the UMA's criminal proceedings provision for a categorical privilege for evidence arising from criminal mediations); *see generally* Laflin, *supra* note 9, at 572–74 (discussing case management criminal mediation).

A. Exculpatory Evidence Cases

Three cases—one from Florida, one from Idaho, and one from New York—raise questions about whether a criminal defendant can use statements from a mediation to support a claim of self-defense.[33] In two of these cases, *State v. Castellano*[34] and *State v. Trejo*,[35] the appellate courts ruled that the exculpatory statements were admissible in the subsequent criminal cases. In the third, the court in *People v. Snyder* quashed the subpoena to a community dispute center based on the legislature's expressed intent to keep such communications confidential.[36]

The admission of exculpatory evidence is based on a defendant's Sixth Amendment right, which guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."[37] Central to this right are the rights to cross-examine [38] and to impeach.[39] Self-defense claims are premised on the belief that the victim's conduct justified the defendant's actions.[40]

1. State v. Castellano

In the mid-1980s, in *State v. Castellano*, a Florida appellate court refused to quash the subpoena of a mediator from a neighborhood dispute resolution program when the accused claimed that threats made during the mediation would support his claim of self-defense.[41] The defendant, accused of murder, claimed that the victim made life-threatening statements against him during the mediation.[42]

In the absence of a codified mediation privilege rule, the court held that the mediator had no legal authority on which to base an

33. *See generally* James Fayette, *"If You Knew Him Like I Did, You'd Have Shot Him, Too . . ." A Survey of Alaska's Law of Self-Defense*, 23 ALASKA L. REV. 171, 183–206 (2006) (discussing some of the essential questions about self-defense such as: Was this a "force crime?" Who was the first aggressor? Did Defendant have a duty to retreat? Did Defendant face an "imminent" threat? Were there prior combative acts near the time of the incident?).

34. 460 So. 2d 480, 482 (Fla. Dist. Ct. App. 1984).

35. 979 P.2d at 1236.

36. 492 N.Y.S.2d at 890.

37. U.S. CONST. amend. VI.

38. Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.").

39. *Id.*

40. New Orleans & Ne. R.R. Co. v. Jopes, 142 U.S. 18, 23 (1891).

41. 460 So. 2d 480, 482 (Fla. Dist. Ct. App. 1984).

42. *Id.* at 481.

assertion of confidentiality.[43] The court commented, "If confidentiality is essential to the success of the [mediation] program, the legislature is the proper branch of government from which to obtain the necessary protection."[44] Florida took heed, and today has a mediation privilege rule[45] and one of the most comprehensive ADR programs in the country.[46]

2. State v. Trejo

In contrast, the Idaho Court of Appeals, in *State v. Trejo*, relied on a technical reading of the State's mediation privilege rule to hold that an estranged wife's statement made in the course of a child custody mediation was admissible in her husband's subsequent criminal trial.[47] During one of the husband's weekends with his children, the wife found him drinking in a bar and became angry, believing he was misusing his visitation time.[48] In spite of an outstanding no contact order, the wife took her sister and the sister's boyfriend to the husband's house.[49] An altercation ensued, and the husband shot his sister-in-law's boyfriend in the stomach.[50] As a result of the incident, the State charged the husband with aggravated

43. *Id.* at 481–82.

44. *Id.* at 482.

45. Effective July 1, 2004, the Florida legislature passed the Mediation Confidentiality and Privilege Act, which provides confidentiality to any required mediation and any mediation facilitated by a Florida Supreme Court certified mediator. Further, the Act delineates the duration of mediation for confidentiality purposes and provides for specific exceptions, an opt-out provision, and a civil remedy for violations of the Act. FLA. STAT. ANN. § 44.405 (West Supp. 2008).

46. *See, e.g.*, Fran L. Tetunic, *Florida Mediation Case Law: Two Decades of Maturation*, 28 NOVA L. REV. 87, 142 (2003) (discussing that Florida's mediation law includes comprehensive laws and rules); Sharon Press, *Institutionalization of Mediation in Florida: At the Crossroads*, 108 PENN ST. L. REV. 43, 53–54 (2003) (discussing the comprehensiveness of Florida's mediation statute); Paul Dayton Johnson, Jr., *Confidentiality in Mediation: What Can Florida Glean from the Uniform Mediation Act?*, 30 FLA. ST. U. L. REV. 487, 491, 93, (2003) (discussing the promotion of uniformity). UMA prefatory note 3 spotlights Florida's ADR program, discussing that uniformity is a necessary predicate to predictability if there is any potential that a statement made in mediation in one state may be sought in litigation or other legal processes in another state. For this reason, the UMA will benefit those states with clearly established law or traditions, such as Texas, California, and Florida, ensuring that the privilege for mediation communications made within those states is respected in other states in which those mediation communications may be sought.

47. State v. Trejo, 979 P.2d 1230, 1233 (Idaho Ct. App. 1999).

48. *Id.*

49. *Id.*

50. *Id.*

battery.[51]

After the shooting, but before trial, the husband and wife attempted to resolve their custody dispute through mediation.[52] During the session, the wife stated, "I want to see him six feet under."[53] At trial, defense counsel sought to introduce testimony from the mediator on this comment.[54] The State objected, claiming that the statement was privileged from disclosure under Idaho's mediation privilege rule.[55]

The trial court allowed the mediator to invoke the privilege, stating that it was "satisfied that the intent [of the mediation privilege rule] was to make an absolute privilege."[56] On appeal, the Idaho Court of Appeals cited the express language of Idaho Rule of Evidence 507, which states that "a client [in a mediation] has a privilege in any civil or criminal action *to which the client is a party*."[57] Relying on the language of the rule, the court reasoned that since the wife was not a party in the criminal action, she was not entitled to assert the privilege in the criminal action.[58] The court held that the privilege found in Rule 507 "cannot be invoked in a subsequent proceeding unless the mediation client is a *party* to that proceeding. Furthermore, however broadly the definition of a party may be read in other contexts, it certainly does not include a mere witness, such as [the wife] was in this criminal action."[59] Under this rule, the victim could never assert the

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51. *Id.*

52. *Id.* at 1235. Many question the wisdom of mediating cases with a history of domestic violence. *See, e.g.*, Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317, 317–39 (1990); Mildred Daley Pagelow, Commentary, *Justice for Victims of Spouse Abuse in Divorce and Child Custody Cases*, 8 VIOLENCE & VICTIMS 69, 75–76 (1993).

53. *Trejo*, 979 P.2d at 1235.

54. *Id.*

55. *Id.* Idaho Rule of Evidence 507 is Idaho's mediator privilege rule. IDAHO R. EVID. 507. The husband-wife privilege was not a defense. *Id.* Rule 504(a) defines a "communication" as "confidential" for purposes of the husband-wife privilege "if it is made during marriage privately by any person to the person's spouse, and is not intended for disclosure to any other person." IDAHO R. EVID. 504(a). In *Trejo*, the wife's statement was made to the mediator, in Trejo's presence, and thus did not fall under the husband-wife privilege. *See id.*; *Trejo*, 979 P.2d at 1235.

56. *Trejo*, 979 P.2d at 1236 (quotation marks omitted) (quoting the trial court).

57. *Id.* (quotation marks omitted) (quoting then existing IDAHO R. EVID. 507). The Idaho Supreme Court adopted the UMA in January 2008. *In re* Adoption of New Idaho Rule of Evidence 507, ID Order 08-03 (2008), *available at* http://www.isc.idaho.gov/rules/IRE_ord108.pdf.

58. *Trejo*, 979 P.2d at 1236. This case makes it clear that only defendants in Idaho can assert the privilege in a criminal proceeding, as a private party would never be a "party" in a criminal action.

59. *Id.* The court ultimately concluded that while the trial court erred in admitting the

privilege, as only the defendant and the State are the parties in criminal cases.

3. People v. Snyder

In contrast, in *People v. Snyder*, a New York trial court presiding over a murder case quashed a subpoena requesting records from a community dispute resolution center relating to a prior mediation between the victim and the defendant.[60] Defendant's counsel raised the defense of justification, claiming that the defendant shot the victim in self-defense; defense counsel referred in his opening statement to the victim and defendant having participated in mediation prior to the shooting.[61] The prosecutor subpoenaed the mediation records, and the community dispute resolution center moved to quash the subpoena.[62] The court invalidated the subpoena, relying on the confidentiality provisions of New York's statute governing community dispute resolution centers, which dictated that "all memoranda, work products, or case files of the mediator are confidential and not subject to disclosure in any judicial or administrative proceeding."[63] The court stated it did not want to "subvert the legislature's clear intention to guarantee the confidentiality of all such records and communications."[64]

These three cases illustrate the importance of a well-drafted mediation privilege rule. In the absence of a rule, mediators have no legal authority on which to assure confidentiality. In jurisdictions with a rule in place, courts generally follow the plain language of the rule, whether the result is to restrict the scope of the privilege, such as in *Trejo*, or to provide the privilege even in murder cases, such as in *Snyder*.

B. Inculpatory Evidence Cases

1. Williams v. State

In the latter part of the 1980s, Georgia courts issued two seemingly conflicting decisions regarding the admissibility of

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statement, the error was harmless. *Id.*

60. 492 N.Y.S.2d 890, 891 (Sup. Ct. 1985).

61. *Id.*

62. *Id.*

63. *Id.* (quoting N.Y. JUD. CT. ACTS LAW § 849-b(6) (McKinney 2003)).

64. *Id.* at 892.

inculpatory evidence. In *Williams v. State*, a privately negotiated settlement agreement in which a former employee acknowledged taking $60,000 and agreed to repay her former employer was admitted into evidence in her subsequent criminal trial.[65] Recognizing that admissions made with a view towards compromise are not proper evidence in civil cases, the Georgia Court of Appeals affirmed; the court held that the rule had no application in criminal cases.[66]

2. Byrd v. State

Surprisingly, two years later in *Byrd v. State*, the Georgia Court of Appeals held that a mediated settlement agreement was inadmissible in a subsequent criminal case.[67] In *Byrd*, the trial court directed a contractor—the criminal defendant—and a homeowner to take their dispute to the Neighborhood Justice Center in hopes that a civil settlement would eliminate the need to proceed with the criminal matter.[68] Although the parties reached an agreement, the contractor failed to comply with its terms, and the criminal case was set for trial.[69] At the trial, the mediated agreement was admitted into evidence.[70] Reversing the trial court's decision to admit the agreement, the Georgia Court of Appeals held the following:

> By allowing this alternative dispute resolution effort to be evidenced in the subsequent criminal trial, the trial court's ruling eliminates its usefulness. For no criminal defendant will agree to "work things out" and compromise his position if he knows that any inference of responsibility arising from what he says and does in the mediation process will be admissible as an admission of guilt in the criminal proceeding which will eventualize if mediation fails.[71]

In addition, the court found that admission of the mediation

65. 342 S.E.2d 703, 704 (Ga. Ct. App. 1986).

66. *Id.* (citing Moore v. State, 199 S.E.2d 243, 244 (Ga. 1973)).

67. 367 S.E.2d 300, 303 (Ga. Ct. App. 1988). In *Byrd*, a homeowner hired a contractor and paid him $800 to perform certain work in the homeowner's basement laundry room. *Id.* at 301. The contractor did not begin work immediately, so the homeowner terminated the contract and sought a refund of the funds. *Id.* The criminal division sent the theft-by-taking claim to mediation. *Id.* at 302. Although the contractor signed an agreement to repay the homeowner $800 plus interest, he failed to pay, and the criminal case went to trial. *Id.*

68. *Id.* at 302.

69. *Id.*

70. *Id.*

71. *Id.*

communication raised significant constitutional issues.[72] The court noted that admission of the contested evidence created serious Fifth and Fourteenth Amendment problems of self-incrimination.[73] The court reasoned that just as a withdrawn guilty plea is not admissible against the defendant at trial, the defendant's efforts to comply with the court-ordered mediation should not be used against him.[74] If the parties cannot work out their differences in mediation, then the defendant should be able to proceed to trial without any of the prior discussions being used against him.

The court distinguished *Byrd* from *Williams*, stating that the agreement in *Williams* was privately negotiated rather than instigated by the court.[75] The privately negotiated agreement in *Williams* was admissible, whereas the court's direction in *Byrd* rendered the court-ordered mediation statements inadmissible.[76]

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72. *Id.* at 303; *see* Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE L. REV. 667, 685 (2005) ("The constitutional rights of a person accused of a crime and directed into a restorative process could be violated if she was not given any warning about rights against self-incrimination and then revealed information which later could be used against her in court.").

73. *Byrd*, 367 S.E.2d at 303 ("[D]efendant's mediation-related statements and actions were not made with any warning of rights against self-incrimination, and yet they were prompted by court action itself creating a close procedural tie.").

74. *Id.* (citing GA. CODE ANN. § 17-7-93(b) (2004)). Although there was no mediation privilege at the time, the court in *Byrd* cited to Federal Rule of Criminal Procedure 11(e)(6), which "protects statements and conduct made in negotiations and plea bargains in criminal cases except in very limited circumstances." *Id.* The court also cited to the 1987 Texas Alternative Dispute Resolution Procedures Act, TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon 1987), and numerous policy reasons, including the following:

> (1) offers of compromise are privileged because public policy encourages the settlement of disputes without trial; (2) such offers are irrelevant because they are not intended as admissions; and (3) the negotiation process establishes express or implied agreements that admissions made during negotiations will be excluded and courts will enforce those agreements.

Byrd, 367 S.E.2d at 303.

75. *Byrd*, 367 S.E.2d at 303.

76. *Id.* Other courts have also held that constitutional issues are implicated when mediation- and arbitration-related statements are admitted in a criminal case. The court, in *United States v. Gullo*, stated that the Fifth and Fourteenth Amendments may be invoked to dismiss a criminal indictment or to suppress mediation- and arbitration-related statements when the mediation or arbitration proceeding arises out of state action instead of private action. 672 F. Supp. 99, 102 (W.D.N.Y. 1987); *see also* Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO ST. J. ON DISP. RESOL. 157, 175–78 (1994) (providing an in-depth analysis of *Gullo*); Colorado v. Connelly, 479 U.S. 157, 166 (1986) (holding that the Fifth and Fourteenth Amendments are implicated only if the arbitration process is found to be government action).

3. Self-Incrimination: Constitutional Concerns

As noted by the appellate court in *Byrd v. State*, the most serious constitutional question that arises in the context of mediation confidentiality is the potential violation of a criminal defendant's Fifth Amendment right against self-incrimination.[77] The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself."[78] The U.S. Supreme Court has construed the Fifth Amendment to protect statements by witnesses that are compelled, testimonial, and incriminating.[79] Because mediation statements that raise these types of issues in a subsequent criminal case will undoubtedly be testimonial and incriminating, the pivotal issue will be whether the statements made in the course of a court-ordered mediation meet the standard for "compelled."[80]

Under the Fifth Amendment, the question of compulsion focuses on whether the witness involuntarily made incriminating statements due to physical or psychological coercion or in reliance on assurances given by a Miranda warning.[81] The mediation setting does not generally meet the necessary requisites—custodial interrogation by a person charged with law enforcement duties—to merit a Miranda warning.[82] Because mediation does not require a Miranda warning, a Fifth Amendment challenge to the admissibility of statements must allege that the court-ordered mediation was so coercive as to render the participant unable to freely choose whether or not to make the statements.[83]

The Supreme Court has held that statements are involuntary any time the speaker is unable to make a free and rational choice due to a

77. *Byrd*, 367 S.E.2d at 303. *See generally* Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 APPALACHIAN J.L. 1, 12–33 (2004) (discussing the constitutional implications of restorative justice and concluding that restorative justice is not on a collision course with the Constitution).

78. U.S. CONST. amend. V.

79. Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 189 (2004).

80. One can argue that an order to attend does not equate to an order to respond to all questions posed. As such, it is highly unlikely that a specific statement made during the mediation would meet the compelled standard and, thus, would not run afoul of the Fifth Amendment. The other side of the argument is that when a party is required to participate in mediation as part of a court order, the involuntary aspect of the mediation process triggers a Fifth Amendment issue.

81. Doyle v. Ohio, 426 U.S. 610, 618 (1976); Miranda v. Arizona, 384 U.S. 436, 476 (1966).

82. *See generally* Reimund, *supra* note 3, at 406–07 (providing a more detailed analysis); Reimund, *supra* note 77, at 26–28 (same).

83. *See* Reimund, *supra* note 77, at 28–29.

coercive atmosphere.[84] Cases in which the Court has found compulsion have largely focused on factors such as being placed in a police-dominated atmosphere, being cut off from the world, being subjected to coercive police interrogation procedures, or being faced with threats of a long incarceration.[85] Thus, the Court has found compulsion in custodial interrogations, but not necessarily in situations where facts are simply being gathered.[86]

Courts that have considered the admissibility of pre-arrest silence as evidence of guilt have admitted the evidence when the statements were made without the police being present. In two of these cases, decided by the Ninth and Eleventh Circuits respectively, responses were given to questions posed by a customs inspector and an employment supervisor.[87]

If questioning by a customs inspector or employment supervisor is not considered compulsion under the Fifth Amendment, then participation in an arguably less intimidating mediation situation is unlikely to be considered compelled. The typical mediation atmosphere is generally more congenial, as it does not restrict the participant's ability to move freely and does not typically leave the participant feeling as if he or she was unable to make a free and rational choice to respond. Even in a court-ordered mediation, statements are unlikely to be viewed as compelled because the atmosphere is not typically thought to be threatening—largely because mandatory attendance does not require disputants to disclose everything and due to the absence of police presence.

The counter argument is that because a mediation participant faces potential court sanctions for refusing to participate in the mediation in "good faith," he or she is compelled to give potentially self-incriminating testimony in mediation.[88] This argument raises two interesting issues. First, to what extent must the mediation participant

84. Oregon v. Elstad, 470 U.S. 298, 312 (1985).

85. *See, e.g.*, Lynumn v. Illinois, 372 U.S. 528, 534 (1963) (determining that the confession of a suspect who was threatened by police with the possibility of a long incarceration and the loss of her children was not the product of her voluntary choice because it was compelled by the psychologically coercive tactics of the interrogators).

86. *See Miranda*, 384 U.S. at 467–68.

87. *See* United States v. Rivera, 944 F.2d 1563, 1567–68 (11th Cir. 1991) (holding that silence in response to questioning by customs inspector was admissible); United States v. Oplinger, 150 F.3d 1061, 1066 (9th Cir. 1998) (holding that silence in response to employment supervisor's inquiry was admissible).

88. Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIMONIAL LAW. 69, 87, 93 (2001).

"participate" in the mediation in order to fulfill his or her good faith obligation? In *Graham v. Baker*, for example, the Supreme Court of Iowa found that a mediation participant's attendance at the session and statement that his position was "not-negotiable" satisfied the minimal participation required by the state's mediation statute.[89] It is important to note that courts vary in both their good faith parameters and their willingness to impose sanctions for violations of the requirement of good faith participation in mediation.[90] In jurisdictions where such sanctions are imposed, the sanctions are generally court fees or similar small penalties,[91] which probably do not rise to the level—such as the threat of lengthy incarceration—needed to implicate the Fifth Amendment.[92]

Second, the confidentiality issue can also arise in the context of a claim for failure to participate in good faith because either the opposing party or the mediator can bring the party's refusal to cooperate to the attention of the court; however, this would violate the confidentiality of the mediation proceedings.[93] This situation poses a significant risk both to the trust the parties place in the mediator and

89. 447 N.W.2d 397, 401 (Iowa 1989).

90. For a collection and discussion of cases in which the courts have either imposed or refused to impose sanctions for violations of the duty to participate in alternative dispute resolution, see generally Richard D. English, Annotation, *Alternative Dispute Resolution: Sanctions for Failure to Participate in Good Faith in, or Comply with Agreement Made in, Mediation*, 43 A.L.R. 5th 545 (1996). A sampling of these cases include *Zapata v. Zapata*, in which the court held that sanctions in the form of a contempt citation could be imposed against a party in a divorce action for failure to participate in a mediation. 499 A.2d 905, 908–09 (D.C. 1985). Compare *Strandell v. Jackson County*, in which the court held that a federal trial court may not impose contempt citations against a party for refusing to participate in nonbinding summary jury trials. 838 F.2d 884, 886–88 (7th Cir. 1987). *See also* Avril v. Civilmar, 605 So. 2d 988, 989–90 (Fla. Dist. Ct. App. 1992) (holding that failure to make an offer of settlement satisfactory to plaintiff during a court-ordered mediation of automobile collision case was not basis for sanctions). Similarly, a Texas appellate court held in *Hansen v. Sullivan* that the trial court improperly imposed sanctions for failure to participate in good faith against the defendant-dentist in a medical malpractice suit. 886 S.W.2d 467, 468–69 (Tex. App.—Houston [1st Dist.] 1994, no writ). The defendant's participation did not violate the good faith standard because he attended the mediation for more than three hours and at no time refused to participate. *Id.* at 468.

91. Where sanctions for violation of the duty of good faith participation in mediation have been imposed on mediation parties, those "parties have been ordered to pay fees and costs related to the mediation and [have] been subject to a contempt ruling." Izumi & La Rue, *supra* note 20, at 73. For example, Utah imposes sanctions for participants who violate the requirements of good faith participation in child custody mediation, including monetary fines "in excess of mediation fees and even *a temporary change in custody or visitation*." Zylstra, *supra* note 88, at 85.

92. Mary A. Shein, Note, *The Privilege Against Self-Incrimination Under Siege:* Asherman v. Meachum, 59 BROOK. L. REV. 503, 518 (1993).

93. Zylstra, *supra* note 88, at 96.

to the mediator's neutrality.[94]

To illustrate, in *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*, the California Supreme Court refused to allow the mediator to report sanctionable bad faith conduct from a party during the course of mediation.[95] The holding in *Foxgate* significantly diminishes one's ability to argue, at least in California, that the mediation process compels a person to disclose potentially incriminating evidence. Further, this case highlights the tension between the good-faith standard and confidentiality.[96]

However, although cases like *Foxgate* suggest that mediation confidentiality and the evolving mediation privilege rules minimize the threat of sanctions for failing to mediate in good faith, this may do little to ease the compulsion felt by the ordinary mediation participant. A party ordered by the court to participate in mediation may be unaware that his or her failure to participate fully by revealing all facts known to him or her, including those that may be self-incriminating, will not be immediately reported to the court. As such, they may enter the mediation fearful, on the one hand, of incriminating themselves, and on the other, of facing criminal or monetary sanctions for failing to participate in good faith. Nonetheless, fear of "phantom" sanctions does not likely meet the level of compulsion required for Fifth Amendment protection.

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94. Patrick Gill, Note, *When Confidentiality Is Not Essential to Mediation and Competing Interests Necessitate Disclosure*, 2006 J. DISP. RESOL. 291, 294 (2006) ("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."). See also L. Randolph Lowry & Peter Robinson, *Mediation Confidential*, L.A. LAW., May 2001, at 28, 32, which explains the following:

> The promise of confidentiality enables disputants to candidly share information about their circumstances and their legal case that otherwise would be closely guarded. The mediation process depends upon the sharing of that information for success in bringing opposing sides together in a consensual settlement agreement. If mediation confidentiality is not maintained in a way that supports the confidence of disputants and their lawyers, they simply will not share information and cases will not settle.

95. 25 P.3d 1117, 1128 (Cal. 2001).

96. *But see* Sharbono v. Universal Underwriters Ins. Co., 161 P.3d 406, 424–25 (Wash. Ct. App. 2007). In *Sharbono*, the trial court allowed the plaintiffs to present evidence of the defendant's bad faith conduct in the mediation in which the defendant, insurance company, stated that they would not present a necessary underwriting file unless they were sued. *Id.* at 424. This evidence would have otherwise been precluded by the Washington Mediation Statute's privilege provision; however, the appellate court found that the privilege did not apply because the defendant was unable to affirmatively show that the mediation was a result of a court order, a written agreement between the parties, or other mandate. *Id.* For a further discussion see Deason, *supra* note 4, at 45–52.

III. MEDIATION PRIVILEGE UNDER THE UNIFORM MEDIATION ACT

The Uniform Mediation Act,[97] the result of a collaborative effort by the National Conference of Commissioners on Uniform State Laws (NCCUSL), the American Bar Association (ABA), and the Association for Conflict Resolution (ACR),[98] is intended to promote candor, encourage resolution of disputes, provide structure and predictability to the mediation experience, and create uniformity among the states.[99] Several issues addressed by the UMA remain controversial,[100] and to date only ten states and the District of Columbia have adopted the Uniform Mediation Act since its inception in 2003.[101]

A. Differences Between Mediation Privilege Under the UMA and Other Privileges

In contrast to the other commonly recognized privileges (priest-penitent, attorney-client, doctor-patient),[102] the mediation privilege

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97. UNIF. MEDIATION ACT (2003), *available at* http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.pdf.

98. The ACR actively participated in the drafting process, having two members involved in the drafting meetings and advocating the importance of the ACR's principles. *See generally* Gregory Firestone, *An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act*, 22 N. ILL. U. L. REV. 265 (2002) (discussing in detail the eleven principles behind the creation of the UMA).

99. UNIF. MEDIATION ACT prefatory note.

100. *See* Brian D. Shannon, *Dancing with the One that "Brung Us"—Why the Texas ADR Community Has Declined to Embrace the UMA*, 2003 J. DISP. RESOL. 197, 201–15 (2003) (focusing criticisms of the UMA on two primary areas—the UMA's approach to confidentiality and the complexity of the Act).

101. *See* MEDIATION WORKS INC., MODIFICATIONS OF THE UNIFORM MEDIATION ACT BY STATES THAT HAVE FORMALLY ADOPTED THE UMA AS OF JULY 2007 (2007) [hereinafter MEDIATION WORKS], *available at* http://www.mwi.org/uma/UMA_Summary_by_State_v1.doc. States that have formally adopted the Uniform Mediation Act: District of Columbia, D.C. CODE §§ 16-4201 to -4213 (Supp. 2007); Illinois, 710 ILL. COMP. STAT. 35/11–35/99 (2004); Iowa, IOWA CODE §§ 679C.101–115 (2005); Nebraska, NEB. REV. STAT. §§ 25-2930 to -2942 (2003); New Jersey, N.J. STAT. ANN. §§ 2A:23C-1 to -13 (West Supp. 2004); Ohio, OHIO REV. CODE ANN. §§ 2710.01–.10 (LexisNexis Supp. 2007); South Dakota, S.D. CODIFIED LAWS § 19-13A-1 to -15 (Supp. 2007); Utah, UTAH CODE ANN. §§ 78-31c-101 to -114 (Supp. 2007); Vermont, VT. STAT. ANN. tit. 12, §§ 5711–5723 (2006); Washington, WASH. REV. CODE §§ 7.07.010–.904 (2006). The Idaho Supreme Court adopted the UMA on January 3, 2008, amending Idaho Rule of Evidence 507. *In re* Adoption of New Idaho Rule of Evidence 507, ID Order 08-03 (2008), *available at* http://www.isc.idaho.gov/rules/IRE_ord108.pdf. The Idaho Legislature passed the UMA Bill, and the governor signed the Bill into law. Uniform Mediation Act, ch. 35, 2008 Idaho Sess. Laws 35 (2008). Also, New York has a bill pending to adopt the UMA. S. 1967, 2007 Leg., Reg. Sess. (N.Y. 2007).

102. *See generally Developments in the Law—Privileged Communications*, *supra* note

under the UMA has several distinguishing characteristics, including that it is held by many individuals. Under the UMA, all mediation participants, including the mediator, hold the privilege to varying degrees. Pursuant to UMA section 4(b), the parties,[103] the mediator,[104] and even nonparty participants[105] (to a limited extent) can each claim the privilege.[106] The scope of the privilege depends on who is asserting its protection, with parties holding the most comprehensive privilege.[107] Parties may refuse to disclose and may prevent any other person from disclosing mediation communications.[108] The mediator may refuse to disclose mediation communications and may also stop others from revealing the mediator's communications.[109] Nonparty

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24 (providing a detailed discussion on privileges); MCCORMICK, *supra* note 23, §§ 72–113, at 338–503 (discussing privileges generally as well as chapters on various privileges); EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE, EVIDENTIARY PRIVILEGES §§ 6.1–6.2.8, at 439–517 (Richard D. Friedman ed., 2002) (discussing the traditional privileges).

103. UNIF. MEDIATION ACT § 2(5) (defining mediation party as "a person that participates in a mediation and whose agreement is necessary to resolve the dispute").

104. *Id.* § 2(3) (defining mediator as "an individual who conducts a mediation").

105. *Id.* § 2(4) (defining nonparty participant as "a person, other than a party or mediator, that participates in a mediation").

106. *Id.* § 4(b). This subsection provides that the following privileges apply in a proceeding:

> (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
>
> (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.
>
> (3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

Id.

107. *See id.*

108. *Id.* § 2(2) ("'Mediation communication' means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.").

109. *Id.* § 4(b)(2). In the labor context, efforts to compel mediator testimony have been rejected. *See, e.g.*, NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 55–56 (9th Cir. 1980). The National Labor Relations Board explained the following regarding labor disputes:

> To execute successfully their function of assisting in the settlement of labor disputes, the conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference. If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other.

participants may refuse to disclose mediation communications and may also deter other individuals from disclosing the nonparty participant's mediation communication.[110] The most controversial of these provisions is the mediator as holder of the privilege.[111]

Under the UMA, there are two equally important elements of the mediator privilege: (1) the mediator's privilege to refuse to testify as to mediation communications; and (2) the mediator's ability to preclude others from testifying as to statements made by the mediator in the course of sessions.[112] The first element of the privilege—allowing the mediator to refuse to testify as to mediation communications in a subsequent proceeding[113]—is fundamentally important to maintaining the parties' perceptions of mediator neutrality.[114] Applying the privilege to the mediator protects both the mediation at issue as well as the mediation process as a whole. The risk that a mediator may potentially be called to testify in a subsequent proceeding jeopardizes the mediator's ability to function effectively as a third party neutral and the mediator's obligation to the individual parties.[115] Providing the mediator privilege removes doubt from the minds of the parties that it could be an advantage in litigation to sway the mediator in his or her favor. The Act specifically protects the mediator from unwillingly being called as a tie-breaker witness.[116]

Moreover, the possibility that the mediator could be called upon to testify in court in order to settle a dispute as to what transpired

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Id. (quoting *In re* Tomlinson of High Point, Inc., 74 N.L.R.B. 681, 685 (1947)).

110. UNIF. MEDIATION ACT § 4(b)(3).

111. The decision to make the mediator a holder of the privilege almost derailed the adoption of the UMA in Idaho. Notes from the Evidence Rules Subcommittee on the UMA (on file with the author). *See generally* Rufenacht, *supra* note 8, at 117–22 (discussing the mediator as holder of the privilege).

112. UNIF. MEDIATION ACT § 4(b)(1).

113. Section 2(7) of the UMA broadly defines the term "proceeding": "(A) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences, and discovery; or (B) a legislative hearing or similar process." *Id.* § 2(7).

114. UMA section 6(c), comment 12 provides that the mediator may "decline to testify or otherwise provide evidence in a professional misconduct and mediated settlement enforcement cases to protect against frequent attempts to use the mediator as a tie-breaking witness, which would undermine the integrity of the mediation process and the impartiality of the individual mediator." *Id.* § 6(c) cmt. 12.

115. Lisa Bench Nieuwveld, *Florida Continues to Lead the Nation in Mediation*, FLA. BAR J., July/Aug. 2007, at 48, 49 ("In order for the mediation to have a chance at reaching a settlement, there are generally two prerequisites: first, the parties must have faith in the mediation's neutrality and, second, they must trust in the confidentiality of the process.").

116. UNIF. MEDIATION ACT § 6(c) cmt. 12 (providing that the mediator may decline to testify to protect against attempts to use the mediator as a tie-breaking witness).

during the mediation could lead the parties, whether consciously or unconsciously, to color their conduct and communications in order to win favor with the mediator. Certainly each party would have an interest in having the mediator take a more sympathetic view of his or her version of events or side of the story.[117] Without the ability to assert the privilege on the mediator's own behalf, the mediator would then be placed in the precarious position of choosing between the parties' conflicting versions of events[118] and having his or her impartiality called into question.[119] By preserving such privilege, the mediator's position as third party neutral is thus protected.

Further, allowing mediators to be called to testify as to mediation communications could discourage participants and mediators from engaging in the process with candor and honesty.[120] This would risk erosion of society's trust in the confidentiality of mediation in general. Under the UMA, the mediator holds the privilege and can choose whether or not to exercise the privilege,[121] balancing his or her obligation to the parties as well as the obligation to the process. In this way, the mediator ensures that both the parties' interests and society's trust in the confidentiality of the mediation process are safeguarded.

The second element of the mediator privilege is the mediator's ability to preclude others from disclosing the mediator's own statements made in the sessions. From the mediator's perspective, this portion of the privilege is key to ensuring that the mediator's own

117. The distinction between the roles of mediators and litigators was notable during the process of drafting the UMA, as mediators sought to highlight conflict resolution through interest-based discussion and consensus while proponents of the legal system focused on the road to court and adjudicated results. Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 99, 106–07 (2003).

118. The chaotic events that transpired during the mediation session at issue in *State v. Williams*, 877 A.2d 1258 (N.J. 2005), exemplify the problem. Certainly the "truth" of what happened was subject to the mediator's interpretation, and for that reason the court refused to allow the mediator to testify. *Id.* at 1268, 1270.

119. Hughes, *supra* note 4, at 37 ("[T]he idea of extending the privilege to the agent or helper is unique among all of the professional relationships. The argument for a separate mediator privilege rests upon the continuing need for impartiality.").

120. UNIF. MEDIATION ACT prefatory note cmt. 1 ("Candor during mediation is encouraged by maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications."); *In re* Anonymous, 283 F.3d 627, 636 (4th Cir. 2002) ("The assurance of confidentiality is essential to the integrity and success of the Court's mediation program, in that confidentiality . . . serves to protect the mediation program from being used as a discovery tool for creative attorneys.").

121. UNIF. MEDIATION ACT § 4(b)(1)–(2). The mediator's decision whether to exercise his or her privilege is contingent in part on the other parties and participants agreeing. *See id.* § 5. The mediator cannot waive the privilege and disclose mediation communications unless the parties agree. *See id.*

statements will not come back to haunt them, short of a malpractice action.[122] This necessary safeguard prevents situations in which mediators' words could be misconstrued against them, or even worse, embroil mediators in heated battles between mediation parties. Furthermore, this protection facilitates the full and active participation of qualified mediators in the process; without it, mediators would likely be more guarded and hesitant to accept private and, more particularly, court ordered mediations.[123]

The mediation privilege is necessarily different from other traditionally recognized privileges because of the temporal nature of the mediator-client relationship and the adversarial and often contentious nature of the parties' relationship.[124] Most other privileges involve one party and one professional in a direct trust relationship, for example, doctor-client, priest-penitent, and attorney-client.[125] In such trusting relationships, it is natural for the client to feel at ease, sharing freely and openly with the professional.[126] In contrast, in the mediation relationship, the mediator generally enters without a prior relationship with either party and needs to develop a relationship as a neutral third party with at least two people with conflicting interests.[127] It is crucial that the parties present as much pertinent information as possible to reach the most equitable solution, recognizing that disclosure creates a tension—full disclosure leaves one too vulnerable and nondisclosure leads to impasse.[128] Because the mediation relationship lacks the established foundational trust and confidence existing in other privilege settings, extending the privilege to the

122. *Id.* § 6(a)(5) ("There is no privilege under Section 4 for a mediation communication that is . . . sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator.").

123. This does not preclude participants from raising concerns about a mediator's conduct. *See id.*

124. J. Brad Reich, *A Call for Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure*, 2001 J. DISP. RESOL. 197, 239–40 (2001) (arguing that privilege is inappropriate in the mediation context because of the adversarial nature of the relationships involved). Reich compares the relationships of trust and confidence where privilege typically arises, such as priest-penitent and psychotherapist-patient, with the adversarial nature of the relationship between mediation parties. *Id.* at 230–40.

125. Ellen E. Deason, *The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach*, 54 U. KAN. L. REV. 1387, 1407 (2006).

126. *Id.*

127. *Id.* at 1408 ("Disclosing communications is inconsistent with this relationship and normally is not undertaken lightly.").

128. Robert H. Mnookin, Commentary, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 13–14 (2003).

mediator enhances the sense of trust in the mediation setting and, thereby, fosters the parties' communication.[129]

An additional distinction between the mediation relationship and traditional privilege relationships is the amount of risk disclosure poses for the parties. Although the mediation setting involves the same "external" risk that one party to any communicative disclosure will divulge its contents outside the protected relationship, the presence of the adverse party in the mediation setting adds an additional or "internal" risk.[130] Basically, parties to mediation are asked to "let their guards down" in order to effectively negotiate with their adversary during the mediation process. As noted by one author in a discussion regarding the importance of trust in the mediation context, "[T]here are significant disclosure risks in mediation that arise from within the process itself. These internal risks of disclosure stem from the presence of multiple participants and the fact that their interests are not aligned in the way that characterizes more typical privileged settings."[131] It is, however, this distinction from the traditional paradigm that sets the mediation privilege apart from the traditional privileges, which do not extend the privilege to the non-client professional.[132] In order to ease the risks, increased protections, such as extending the privilege to mediators, are necessary for mediation communications.

Another unique aspect of the UMA is that it treats oral agreements as part of the confidential mediation communication and requires that mediation agreements be formally executed—in writing and signed by all parties—before they lose the protection of confidentiality.[133] Even then, only the written agreement falls outside

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129. Deason, *supra* note 125, at 1392. According to Professor Deason:

> The mediator is a disinterested third party who intervenes to assist the negotiators in resolving their conflict by performing a variety of functions designed to help parties overcome barriers to an agreement. Building trust between the parties has been described as "[o]ne of the most obvious and important [mediator] roles."

Id. (alteration in original) (quoting Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, 27 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 255, 292 (1995)).

130. *Id.* at 1407.

131. *Id.* at 1408.

132. *Id.*

133. Rebecca H. Hiers, *Navigating Mediation's Uncharted Waters*, 57 RUTGERS L. REV. 531, 555 (2005) (citing UNIF. MEDIATION ACT § 6(a)(1) (2003)). At least one court, from a non-UMA state, has held that a party must expressly waive the mediation privilege; a California appellate court held that, under California state law, the mediation privilege, in contrast to the attorney-client and psychotherapist-patient privileges, could not be impliedly waived. Kieturakis v. Kieturakis, 41 Cal. Rptr. 3d 119, 137 (Ct. App. 2006). In *Kieturakis*, although the party to the divorce action filed suit to amend the child support

of the scope of the privilege.[134] The written agreement can be "introduced in a subsequent court proceeding... to determine whether the terms of that settlement agreement had been breached."[135] All other mediation communications leading up to the signing of the document remain subject to the mediation privilege rule.[136]

B. Exceptions to Privilege Under the UMA

The UMA provides two categories of exceptions to the general rule of inadmissibility. The exceptions recognize that society's interest in protecting confidentiality in mediation may be outweighed by the justice system's need for evidence in a particular case.[137] Section 6(a) contains the absolute or the "above the line" exceptions,[138] which reflect a determination that the justice system's need for the evidence "categorically outweigh[s] its interest in the confidentiality of mediation communications."[139] The Section 6(a) exceptions for a mediation communication include a signed mediated agreement, a public document, a threat of bodily harm or violent crime, a plan to commit or conceal criminal activity, the response to a claim of misconduct or malpractice, and abuse or neglect cases in which child or adult protective services is a party.[140]

Section 6(b) contains the qualified or the "below the line" exceptions,[141] which require judges to hold an in camera evidentiary hearing before a determination is made about the admissibility of the desired evidence.[142] These exceptions include use of the mediation

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provisions of the mediation agreement claiming that he and his ex-spouse had agreed to terms outside the presence of the mediator, this did not constitute waiver of confidentiality allowing his ex-spouse to bring forth the mediator as a potential witness. *Id.* at 122–25.

134. UNIF. MEDIATION ACT § 6(a)(1) (2003) ("There is no privilege under Section 4 for a mediation communication that is . . . in an agreement evidenced by a record signed by all parties to the agreement.").

135. *Id.* § 6 cmt. 2.

136. "The parties may still provide that particular settlement[] agreements are confidential with regard to disclosure to the general public, and provide for sanctions for the party who discloses voluntarily." *Id.*

137. Reuben, *supra* note 117, at 121 (noting that the exceptions are consistent with those commonly found in state mediation confidentiality statutes).

138. *Id.* (noting that during the UMA drafting process, the 6(a) exceptions became known as the "above the line" exceptions, and the 6(b) exceptions became known as the "below the line" exceptions).

139. *Id.*

140. UNIF. MEDIATION ACT § 6(a)(1)–(7).

141. Reuben, *supra* note 117, at 121.

142. *Id.*

communication in a criminal proceeding and challenges to the mediated agreement.[143] These exceptions are applied on a case-by-case basis, weighing the relative strength of the justice system's need for the mediation communication against society's interest in protecting mediation confidentiality.[144]

In the criminal context, the state's and the defendant's interests in evidence supporting guilt or innocence and the parties' and society's interests in confidentiality are all important. Section 6(b)(1) allows for otherwise privileged information to be disclosed in subsequent felony, and possibly misdemeanor, cases[145] if, after an in camera hearing,[146] the

143. UNIF. MEDIATION ACT § 6(b)(1)–(2).

144. *Id.* § 6 cmt 1.

145. Section 6(b)(1)'s balancing process clearly applies to subsequent felony proceedings and may apply to subsequent misdemeanor proceedings if the state elects to include that category of cases. *See id.* § 6 cmts. 9–10. To date ten states and the District of Columbia have adopted the UMA. *See* MEDIATION WORKS, *supra* note 101. Six states apply the exception to both felonies and misdemeanors. *See* D.C. CODE § 16-4205(b)(3)(A) (Supp. 2007); UTAH CODE ANN. § 78–31c–106(2)(c)(i) (Supp. 2007); S.D. CODIFIED LAWS § 19-13A-6(b)(1) (Supp. 2007); N.J. STAT. ANN. § 2A:23C-6.b(1) (West Supp. 2007); VT. STAT. ANN. tit. 12, § 5717(b)(1) (2006); OHIO REV. CODE ANN. § 2710.05(B)(1) (LexisNexis Supp. 2007). Idaho recently adopted the Uniform Mediation Act with an exception applicable to both felonies and misdemeanors. Uniform Mediation Act, ch. 35, 2008 Idaho Sess. Laws 35 (2008). Three states limit the exception to felonies only. *See* 710 ILL. COMP. STAT. 35/6(b)(1) (2004); WASH. REV. CODE § 7.07.050(2)(a) (2006); NEB. REV. STAT. § 25-2935(b)(1) (2003). The bill proposing the Uniform Mediation Act currently pending in the New York Senate also contains the felony only exception. S. 1967, 2007 Leg., Reg. Sess. (N.Y. 2007). See also Reuben, *supra* note 117, at 123, which explains the UMA drafters' intentions in limiting the misdemeanor exception:

> [T]he Act gives states the option of including misdemeanors within this exception if they so desire as a matter of policy. The drafters declined to take this step because adding misdemeanors to the exception would have the effect of *diminishing*, not increasing, mediation confidentiality. Moreover, they were particularly concerned about potentially undermining the many successful victim-offender mediation programs by making victim-offender mediations more vulnerable to invasion for evidence in subsequent prosecutions.

146. In *Rinaker v. Superior Court*, the court recognized the importance of an in camera viewing, stating "an in camera hearing maintains the confidentiality of the mediation process" while considering whether factors in the case "compel[] breach of the confidential mediation process." 74 Cal. Rptr. 2d 464, 467 (Ct. App. 1998). The process also allows the court to determine whether the mediator is competent to testify and whether the information could be introduced without breaching the mediation's confidentiality. *Id.* at 472–73. Courts also use an in camera hearing to determine the crime-fraud exception to the attorney–client privilege. *See* United States. v. Zolin, 491 U.S. 554, 574 (1989); Kristen V. Cunningham & Jessica L. Srader, Comment, *The Post 9-11 War on Terrorism . . . What Does It Mean for the Attorney-Client Privilege?*, 4 WYO. L. REV. 311, 320–25 (2004); *see also* Jennifer L. Hebert, Note, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 TEX. L. REV. 1453, 1468 (2005) (discussing in camera review of mental health records); Euphemia B. Warren, Note, *She's Gotta Have It Now: A Qualified Rape Crisis Counselor-Victim*

court determines that the desired evidence is otherwise unavailable, and the need for the information in the particular case substantially outweighs the interest in protecting mediation confidentiality.[147] The criminal proceedings exception applies to both exculpatory and inculpatory evidence.[148]

The UMA's adoption of an ex-post facto balancing test is controversial. One commentator explains that allowing courts to apply these balancing tests is problematic because the potential admissibility of such statements is not determined until after a party has made them.[149] This type of uncertainty places the parties in a very precarious position because they may not be aware of the potential adverse criminal consequences until later.[150] Although the UMA sought to provide "greater certainty in judicial interpretation"[151] in the use of mediation communications in subsequent criminal proceedings, it has not accomplished this goal. The commentator notes that it is precisely this type of uncertainty that has led the Supreme Court to reject such after-the-fact exceptions to other privileges, including the attorney-client and psychotherapist-patient privileges.[152]

The UMA drafters' decision to use the substantially outweighs

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Privilege, 17 CARDOZO L. REV. 141, 149 (1995) (discussing in camera inspection of confidential rape counseling records).

147. UNIF. MEDIATION ACT § 6(b)(1).

148. *Id.* § 6(b)(1) cmt. 10 ("It is drafted in a manner to ensure that both the prosecution and the defense have the same right with respect to evidence, thus assuring a level playing field."); Reuben, *supra* note 117, at 122 ("In the felony context, the exception permits evidence affecting someone's physical liberty, and possibly their life, as well as the public's interest in safety and the enforcement of society's most serious criminal laws—if that evidence is really necessary in the case and is otherwise unavailable.").

149. Hiers, *supra* note 133, at 583.

150. *Id.*

151. UNIF. MEDIATION ACT § 4 cmt. 2.

152. Hiers, *supra* note 133, at 583–84 (citing Swidler & Berlin v. United States, 524 U.S. 399, 409 (1998) (rejecting the use of a balancing test in defining the contours of the attorney-client privilege)); Jaffee v. Redmond, 518 U.S. 1, 17–18 (1996) (citing Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)) (noting that the uncertainty in after-the-fact balancing risks undermining the psychotherapist-patient privilege). The Supreme Court in *Jaffee* explained the problem with in camera reviews:

> Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."

Id. (quoting *Upjohn*, 449 U.S. at 393).

standard raises the bar in favor of protecting mediation communications, making it more difficult to overcome the privilege.[153] Not all scholars support this standard as an appropriate balance of the competing societal interests. This decision has been criticized by at least one scholar as placing the confidentiality interest above the interests of justice and of the constitutional rights of the accused.[154] That scholar advocates altering the standard to reflect the anticipated infrequency of the exception's invocation.[155] However, focusing solely on the scarcity of prior case law in this area ignores the increased use of mediation to resolve criminal disputes[156] and misapprehends the consequences to the mediation process if parties lose faith in confidentiality. No doubt, the qualified exception will become the subject of future litigation as courts are called upon to interpret the substantially outweighs standard.[157]

The drafters of the UMA recognized that "society's need for evidence to avoid an inaccurate decision is greatest in the criminal context."[158] They stated that, even without an exception for criminal matters, "the courts can be expected to weigh heavily the need for the evidence in a particular case, and sometimes will rule that the defendant's constitutional rights require disclosure."[159] Therefore,

153. Davisson, *supra* note 17, at 709 (noting that the determination of whether the need for the specific evidence substantially outweighs the general need for confidentiality will be determined on a case by case basis). Under the UMA standard, the interest in confidentiality will be weighed from a macro perspective while the need for the information will be weighed from a micro perspective. *Id.*

154. *Id.* at 683. The commentator argues that "the UMA's qualified privilege for civil mediation communications is unconstitutional as applied to *criminal* proceedings, or at the very least undesirable from a justice perspective." *Id.* He further criticizes the UMA section on criminal proceedings, asserting that the UMA's privilege standard under the criminal proceedings exception is unconstitutional because it is weighed toward inadmissibility and therefore violative of individuals' Sixth Amendment right to confrontation. *Id.* at 687.

155. *Id.* at 718.

156. Laflin, *supra* note 9, at 573–74.

157. *See* Hiers, *supra* note 133, at 578–79 ("This potential criminal proceedings exception could become one of the most controversial issues in emerging mediation law."); Davisson, *supra* note 17, at 698 ("Whether application of mediation privileges is appropriate in criminal proceedings and to what extent they should apply . . . is by far the most controversial question in this area because the answer carries with it the greatest of implications.").

158. UNIF. MEDIATION ACT § 6(b)(1) cmt. 10 (2003); *see also* Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1178 (C.D. Cal. 1998) ("Although the Court need not, and indeed may not, address the outer limits of a federal mediation privilege, it seems appropriate to note one potential limitation here. A federal mediation privilege may be attenuated of necessity in criminal or quasi-criminal cases where the defendant's constitutional rights are at stake.").

159. UNIF. MEDIATION ACT § 6(b)(1) cmt. 10.

courts must determine, on an individual case basis,[160] whether the confidentiality assurances provided in most mediations trump the need for evidence in a criminal prosecution.[161]

The concern that adversaries will hear potentially incriminating statements is less of a problem for mediators who do not hold joint sessions. By conducting their mediations exclusively in private caucuses, mediators ensure that the parties are never present with one another in the same room, thereby eliminating the possibility of the adverse parties hearing exculpatory or inculpatory statements.[162] While this method may work in certain types of cases and for some mediators, the UMA seeks to create a uniform rule that applies to all mediations. Some mediators never use caucuses, others selectively use them, while others almost exclusively use them. Requiring all mediations to be conducted in private caucuses would run contrary to many mediators' practice and adversely change the collaborative nature of many mediations.[163]

IV. APPLICATION OF THE UMA TO THE FIVE PRE-UMA CASES

How would the results of the five previously discussed cases be affected if they had been decided under the UMA? Analysis of the admissibility of mediation communications in subsequent criminal proceedings must address two fundamental questions: (1) who is the holder of the privilege, and (2) how important is the desired information to the case.

A. Holders of the Privilege

The issue determinative of the admissibility question in the *Trejo*

160. *Id.* ("After great consideration and public comment, the Drafting Committees decided to leave the critical balancing of these competing interests to the sound discretion of the courts to determine under the facts and circumstances of each case.").

161. Reimund, *supra* note 3, at 425 (discussing Section 6(b)(1)'s balancing test in the victim-offender context).

162. Mediators would still have to grapple with whether to report certain mediation communications, such as child abuse, future crimes, etc.

163. *See generally* Pamela F. Olson & David B. Robison, *Recently Developed IRS Audit and Dispute Resolution Techniques*, 796 PLI/Tax 841 (2007) (discussing the IRS's collaborative mediation process); Hanan M. Isaacs & Jennifer L.B. Katz, *New Jersey Ethics Opinion Will Alter How Neutrals Operate at Mediation Centers, Highlighting the Nature and Structure Not Only of Their Relationships, but also the Parties' Obligations*, 25 ALTERNATIVES TO HIGH COST LITIG. 150, 151 (2007) (noting that clients select mediation centers for their divorces because they use a collaborative process); P. Oswin Chrisman et al., *Collaborative Practice Mediation: Are We Ready to Serve this Emerging Market?*, 6 PEPP. DISP. RESOL. L.J. 451, 454 (2006) (discussing collaborative law practice).

case is who is the holder of the privilege. Under the UMA, Trejo's wife, as a party to the custody mediation, would have been allowed to assert the privilege in the subsequent criminal proceeding.[164] Unlike Idaho's privilege rule, the UMA does not require one to be a party in the subsequent criminal action in order to assert the privilege.[165] As a party to the custody mediation, the wife could have refused to disclose and may have prevented another (in this case the mediator) from disclosing particular mediation communications.[166] Further, the defendant's desire to waive the privilege would not overcome the wife's assertion of the privilege.[167]

The UMA also makes it clear that the mediator could not have been compelled to testify about the wife's statements even if both parties to the mediation waived the privilege.[168] Under the UMA, the policies behind providing the mediators the right to assert the privilege are to ensure that parties will participate fully and candidly in the mediation process and to encourage competent and eligible mediators to participate in the process.[169] The UMA allows the mediator to choose whether he or she wants to claim the privilege.[170] The parties hold their privilege separate from that of the mediator, and their waiver does not affect the mediator's choice to assert his or

164. UNIF. MEDIATION ACT § 4(b)(1) ("A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.").

165. *Compare* IDAHO R. EVID. 507 (defining the privilege narrowly to apply only when the one asserting the privilege is a party to civil or criminal proceeding), *with* UNIF. MEDIATION ACT § 4(b)(1) (defining the privilege broadly to apply in any situation).

166. UNIF. MEDIATION ACT § 4(b)(1); *id.* § 4 cmt. 4 ("The mediation privilege of the parties draws upon the purpose, rationale, and traditions of the attorney-client privilege, in that its paramount justification is to encourage candor by the mediation parties, just as encouraging the client's candor is the central justification for the attorney-client privilege.").

167. *Id.* § 4 cmt. 4. Conversely, "if all parties agree that a party should testify about a party's mediation communications, no one else may block them from doing so, including a mediator or nonparty participant." *Id.* Thus, the mediator and the nonparty participant can only block a party from testifying as to the mediator's or nonparty participant's mediation communication. *Id.*

168. *Id.* § 6(c) ("A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) [professional misconduct or malpractice actions filed against a mediation participant] or (b)(2) [a proceeding to challenge the validity of a contract arising from the mediation].").

169. *Id.* § 4(b), cmt. 4 ("Mediators are made holders . . . so that they will not be viewed as biased in future mediations . . . ."). *But see* United States v. Partin, 601 F.2d 1000, 1009 (9th Cir. 1979) (holding that the attorney-client privilege runs with the client, not the attorney). It is unclear whether, in light of the UMA, the federal courts will make the mediator the holder of the privilege.

170. UNIF. MEDIATION ACT § 4(b)(2).

her privilege.[171] As such, the parties cannot force a mediator to waive the privilege under the UMA.

B. Exculpatory and Inculpatory Cases: The Balancing Act

The central question in the five cases discussed above—the admissibility of mediation communications in subsequent criminal cases[172]—is addressed by UMA Section 6(b)(1): the "below the line" exception requiring the court to conduct a balancing test.[173] In reality, courts will address the micro level—whether justice requires the information from the mediation in that particular case—before ever moving to the macro level—whether the need for the information substantially outweighs the need to preserve confidentiality. If a statement fails to meet the micro standard, the court need not proceed to the macro issue. Thus, the balancing test will only be used once a court determines that a significant need for the evidence has been established.

1. Exculpatory Cases

How would or should a court decide exculpatory cases today under the UMA's qualified privilege standard?[174] In addition to looking at the usual indicia of reliability such as relevance and hearsay,[175] the timing of the exculpatory statements may become a crucial factor in balancing the defendant's need for the evidence with the public's interest in protecting confidentiality. Exculpatory statements made after the criminal act can be fraught with reliability concerns. In contrast, statements made prior to the criminal act may

171. *See id.* § 4(b).

172. Several jurisdictions that do not have a criminal proceedings exception have recognized a strong interest in protecting mediation communications. *See, e.g.*, Williams v. State, 770 S.W.2d 948, 949 (Tex. App.—Houston [1st Dist.] 1989, no pet.) ("[This court] can not consider any evidence from the dispute resolution procedure that appellant and complainant participated in prior to his arrest, as disclosures made in an ADR procedure are confidential, and not subject to disclosure." (citing TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon Supp. 1989))); United States v. Gullo, 672 F. Supp. 99, 104 (W.D.N.Y. 1987) (concluding that statements made during a dispute resolution proceeding must be suppressed at the criminal trial).

173. Reuben, *supra* note 117, at 121 (noting that exceptions under Section 6(b) are "below the line" exceptions whereas Section 6(a) contains the "above the line" exceptions).

174. Davisson, *supra* note 17, at 724 ("[T]he criminal proceedings exception should be extended to permit the admissibility of any otherwise admissible evidence that is exculpatory in nature (i.e., a categorical exception).").

175. *See* FED. R. EVID. 401, 801–804 (rules regarding relevance and hearsay).

be more probative and relevant to a defendant's claim of self-defense especially if they evidence imminent danger.[176] Defendants and victims have less of a motive to skew their statements toward their self-interest prior to the bad acts; whereas, they would have more motive after the criminal act has been committed. Therefore, courts will need to consider the timing and context of the exculpatory statements in addition to the other indicia of reliability, when determining their admissibility.

State v. Williams, which was heard on appeal after New Jersey adopted the UMA, and *State v. Trejo* concerned potentially exculpatory statements made in a mediation setting after the alleged criminal act.[177] The timing was similar in each: the criminal act occurred, charges were filed, potentially exculpatory statements were made in mediation, and then the criminal case came to trial.[178] Exculpatory statements made after the fact can have low probative value as they are often a reaction to the event and not relevant as to motive.[179] In contrast, exculpatory statements made before the act occurs may show motive, especially if the statements are credible and threaten imminent harm against the defendant.[180]

In *Trejo*, the husband had already shot his sister-in-law's boyfriend before he and his wife attempted to mediate their divorce and custody dispute.[181] By the time the custody matter came to mediation, the wife was no longer just angry at her husband for misusing his visitation time, she was no doubt also furious that he had shot her sister's boyfriend.[182] Her statements made weeks or months after the criminal act were less probative of his self-defense claim because the criminal act was a significant intervening event that could

176. *See* Ha v. State, 892 P.2d 184, 194 (Alaska Ct. App. 1995). The court explained the requirement that a self-defense claim include imminent danger:

> [Even if a] defendant . . . actually and reasonably believe[s] that, sooner or later, his enemy will choose an opportune moment to attack and kill him . . . the law does not allow a defendant to seek out and kill his enemy . . . . The defendant's use of force against his enemy is authorized only when the defendant actually and reasonably believes that the enemy's threatened attack is imminent.

Id.

177. State v. Williams, 877 A.2d 1258, 1261 (N.J. 2005); State v. Trejo, 979 P.2d 1230, 1235 (Idaho Ct. App. 1999); *see* N.J. STAT. ANN. §§ 2A:23 C-1 to -13 (West Supp. 2007).

178. *Williams*, 877 A.2d at 1260; *Trejo*, 979 P.2d at 1233, 1235.

179. *See, e.g.*, United States v. Radtke, 415 F.3d 826, 840–41 (8th Cir. 2005).

180. *See, e.g.*, Davisson, *supra* note 17, at 700 n.107 (discussing a case where the defendant subpoenaed a mediator's testimony concerning the victim's statements in mediation to support a self-defense claim).

181. *Trejo*, 979 P.2d at 1233, 1235.

182. *Id.* at 1235.

have prompted the comment. Thus, under a UMA analysis, the post-criminal act statements in *Trejo* would probably fail on the micro level—the need for the information—and never reach the second prong of the balancing test.

The more recent case, *State v. Williams*, provides further refinement for the admissibility analysis concerning post-crime mediation statements.[183] In *Williams*, the issue on appeal was whether a court-appointed mediator may testify in a subsequent criminal proceeding regarding a participant's statements made during mediation.[184] While the appellate division affirmed the defendant's conviction, it acknowledged that the mediator's testimony could potentially have helped the defendant establish a self-defense claim, "a key defense contention."[185] The New Jersey Supreme Court held, in a split decision, that the court-appointed mediator in the civil harassment action could not testify in the subsequent criminal proceeding regarding the alleged victim's statements made during the mediation.[186]

Although the underlying situation arose prior to the state's enactment of the UMA, the New Jersey Supreme Court used the UMA as "an appropriate analytical framework" in determining whether the defendant could overcome the mediator's privilege not to testify.[187] The court noted that the defendant had the burden to establish that he satisfied each of the three conditions in the balancing test: (1) the mediation communication is sought in a criminal proceeding; (2) the need for the evidence "substantially outweighs the interest in protecting confidentiality"; and (3) the evidence is not available otherwise.[188] While the court discussed all three requirements, it focused primarily on the substantially outweighs provision, concluding that "the mediator's testimony was not sufficiently probative to strengthen [the] defendant's assertion of self-defense."[189] The court considered the public policy of preserving

183. *Williams*, 877 A.2d at 1265.
184. *Id.* at 1260.
185. *Id.* at 1262.
186. *Id.* at 1270.
187. *Id.* at 1265.
188. *Id.* at 1264–65 (citing N.J. STAT. ANN. § 2A:23C-6b (West Supp. 2007)).
189. *Id.* at 1269. The court found the mediator's statement in this case to be particularly unreliable, noting that the mediation participants were "talking at the same time" and describing the environment as bedlam. *Id.* at 1268. Further, although he stated that he was not friends with the defendant, the mediator's trustworthiness was questionable in the court's eyes in light of the fact that the mediator had conferred with the defendant outside of court and by his very presence and willingness to testify. *Id.*

mediation as a forum for dispute resolution and held that the "defendant's need for the mediator's testimony [did] not outweigh the interest in protecting mediation confidentiality."[190] Thus, the court's decision focused primarily on the micro level before turning briefly to the macro level.

In addition, the court found that the defendant had not satisfied the third condition that the evidence was not otherwise available.[191] According to the court, there were other eyewitnesses available to testify and both parties had access to other additional evidence.[192] Because the defendant did not meet the conditions necessary to overcome the confidentiality of the mediation proceeding, the New Jersey Supreme Court affirmed the lower courts' decision to refuse the testimony of the mediator.[193] Although not the basis of the court's ruling, *Williams* supports the proposition that post-criminal act exculpatory statements are less likely to "substantially outweigh" the need to protect mediation confidentiality.

The defendant in *Williams* also claimed that the UMA's substantially outweighs requirement in criminal proceedings created "an unconstitutional evidentiary restriction."[194] The defendant argued that the court should impose a less onerous burden on him in deciding whether the need for the mediation communication outweighed the confidentiality interests.[195] The court rejected defendant's constitutional claims, stating that the defendant "received that which the Confrontation Clause guarantees: 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'"[196]

Unlike the *Trejo* and *Williams* cases, which concerned exculpatory statements made after the crime had occurred,[197] in *State v. Castellano*, the victim's life threatening statement was made in a

190. *Id.* at 1269.

191. *Id.* at 1270.

192. *Id.* at 1269–70. For example, the defendant's wife testified about the defendant's confession, and excerpts of the defendant's statement to the police were admitted. *Id.*

193. *Id.* at 1270.

194. *Id.* at 1265.

195. *Id.*

196. *Id.* at 1270 (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985)). *But see* Gill, *supra* note 94, at 303 (disagreeing with the majority's decision in *State v. Williams*). "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." *Id.*

197. State v. Trejo, 979 P.2d 1230, 1235 (Idaho Ct. App. 1999); *Williams*, 877 A.2d at 1260.

mediation session prior to the criminal act.[198] The defendant's right to a fair opportunity to present a defense may well prevail in pre-UMA cases, especially if the threat is imminent. In such a situation, courts must focus on both the micro and macro levels. An in camera review of the evidence allows the court to examine the reliability of the proffered testimony before deciding whether to allow it into evidence. However, assuming that the threat was credible and imminent, the defendant's need for pre-criminal act statements supporting his claim of self-defense could substantially outweigh the need to protect mediation confidentiality. In these circumstances, a defendant's constitutional rights could very well override the interest of mediation confidentiality.

Some statutes, such as the one governing New York's community dispute resolution centers, provide stronger protection for mediation confidentiality in the criminal arena than the UMA does.[199] Under the UMA, the court in *Synder* would have been required to make an in camera review of the potentially exculpatory evidence and then determine whether the interests of confidentiality would be "substantially outweighed" by the need for the evidence.[200] While New York's protection of confidentiality in criminal mediations is laudable, the lack of uniformity diminishes its value. Uniformity is one of the UMA's major contributions.

2. Inculpatory Cases

When the defendant admits to past criminal behavior in a mediation session conducted for the purpose of settling the matter, defendant's inculpatory statements should generally not be admissible in a subsequent criminal case.[201] In *Byrd*, the State sought to use the defendant's statements from the court-ordered mediation in the subsequent criminal trial.[202] Applying a UMA analysis to the facts in *Byrd* raises two issues—one with respect to the admissibility of the mediated agreement and the other with respect to communications made during the course of the mediation.

As to the mediated agreement, Section 6(a)(1) of the UMA provides that an agreement signed by all parties memorializing the

198. State v. Castellano, 460 So. 2d 480, 481 (Fla. Dist. Ct. App. 1984)
199. N.Y. JUD. LAW § 849-b (McKinney 2003).
200. UNIF. MEDIATION ACT § 6(b) (2003).
201. Davisson, *supra* note 17, at 724 ("[A]ny criminal proceedings exception should not apply to mediation communications that originate from a 'criminal mediation.'").
202. Byrd v. State, 367 S.E.2d 300, 302–03 (Ga. Ct. App. 1988).

parties' resolution is not privileged.[203] Even though the signed mediated agreement loses its privileged status, it can remain confidential.[204] This being so, mediators, especially those conducting criminal mediations or mediations designed to resolve a criminal matter, need to take note from civil law practitioners who do not include admissions in their settlement agreements. In *Byrd*, the defendant could have avoided having incriminating statements memorialized in the non-privileged document and later used as evidence against her by agreeing to pay the amount in question without admitting to the underlying crime in the mediated agreement.

Similarly, in *Williams v. State*, the defendant could have agreed to pay $60,000 without admitting to embezzlement in the settlement document.[205] With the stakes so high in criminal mediations, courts should seriously consider appointing counsel to represent the defendant in court-mandated mediations or, at the very least, ensure that the mediators are skilled enough to omit admissions from mediated agreements.[206]

Even though a signed settlement agreement is admissible under the UMA, all other nonexempt mediation communications should remain privileged.[207] Without this assurance, defendants could suffer severe consequences[208] and thus would have little incentive to

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203. UNIF. MEDIATION ACT § 6(a)(1) ("There is no privilege under Section 4 for a mediation communication that is . . . in an agreement evidenced by a record signed by all parties to the agreement.").

204. *Id.* § 6(a)(1) cmt. 2 ("The exception permits such an agreement to be introduced in a subsequent court proceeding convened to determine whether the terms of that settlement agreement had been breached."). The comment section does not discuss the situation in *Byrd* where the agreement is sought to establish one of the parties' guilt. *See id.*

205. 342 S.E.2d 703, 704 (Ga. Ct. App. 1986). The agreement could have also been framed as an Alford Plea. Under an Alford Plea, the defendant would not have to admit to the act and could continue to assert innocence. *See* North Carolina v. Alford, 400 U.S. 25, 37–38 (1970). The defendant, however, admits that sufficient evidence exists with which the prosecution could likely convince a judge or jury to find the defendant guilty. *See id.*

206. To resolve a criminal mediation, the defendant may have to admit guilt in order to get the court to agree to the terms of the settlement. However in diversion programs, where the criminal matter will be dismissed if the parties come to a mutually agreeable resolution, the agreement need not include an admission of guilt. *See generally* Elizabeth Goussetis, *Prosecutor Candidates Debate Pros, Cons of Diversion, Mediation*, ATHENS MESSENGER, Feb. 29, 2008, http://athensmessenger.com/Main.asp?SectionID=1&ArticleID=8810.

207. UNIF. MEDIATION ACT § 6(a)(1) ("There is no privilege under Section 4 for a mediation communication that is . . . in an agreement evidenced by a record signed by all parties to the agreement.")

208. Hiers, *supra* note 133, at 585 ("A defendant, who attempts conciliation through taking responsibility for prior harmful conduct, may face severe consequences for doing so.").

participate in any conciliation efforts. Mediation should not be used to put the state in a better position than it would have been in but for the mediation. The state has the burden to prove its case beyond a reasonable doubt and should not be allowed to use mediation communications to meet its burden.[209] Prosecutors should not be allowed to use mediation as a means to gain a strategic advantage.[210] These desired communications would not exist but for the parties' settlement attempts.[211]

Mediators must be impartial and at the same time be guardians of the process.[212] The mediator must not be co-opted as a pawn of the state.[213] As such, mediators have an obligation to not allow the process to leave one of the parties in a worse position than he or she would have been in but for the mediation. Resolutions must be mutually beneficial and should not provide the state with the bonus of a confession if something goes awry later. Thus, the state's desire for inculpatory evidence obtained from criminal or quasi-criminal mediations should generally not substantially outweigh the benefits the community gets from mediated agreements.

Unfortunately, the UMA is not explicit about the specific applicability of confidentially in the context of criminal matters and, at this point, UMA jurisdictions will resolve such questions through the balancing test. In contrast, the Oregon Legislature has adopted a

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209. *See generally* Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 613 (1992) ("The failure to hold statements elicited by the prosecution to a higher standard of admissibility defeats the objective of protecting the individual against the power of the government and interferes with the jury's historical function of guarding our civil liberties.").

210. *See* Carter, *supra* note 20, at 372. While Carter was not specifically discussing criminal matters, his argument is particularly relevant in the criminal context.

211. Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 38 (1986) ("Compromise negotiations often require the admission of facts which disputants would never otherwise concede.").

212. *See generally* Boettger, *supra* note 20 (arguing against the imposition of a good-faith requirement on participants in mandatory mediation, and noting the mediator's role as guardian of the mediation process). "The mediator's neutral role ensures that he or she will not take a stand for or against one side when resolving the dispute. The mediator maintains responsibility for the process and adapting it to the parties' needs." *Id.* at 16. *See also* Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 601 (1997) (stating that the mediator is in control of the process).

213. *See* Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 82 (2001) ("[I]f a mediator can be converted into the opposing party's weapon in court, then her neutrality is only temporary and illusory.").

broad confidentiality provision dealing specifically with confidentiality in criminal matters entitled "Mediating Criminal Offenses."[214] Under Oregon law, parties in a criminal mediation "must be informed . . . [o]f the right to enter into a written agreement concerning confidentiality of the mediation proceedings; and . . . [t]hat mediation communications or agreements may not be used as an admission of guilt or as evidence against the offender in any adjudicatory proceeding."[215] Thus, the parties' written confidentiality agreement precludes a court from receiving into evidence any mediation communications or mediated agreement.[216] This provision removes the uncertainty currently existing under the UMA in the area of criminal mediations. At the same time, because this law is specific to Oregon, it lacks the advantage of uniformity.

The hope is that courts will use the substantially outweighs standard in weighing evidence from criminal mediations to uphold the privilege and exclude inculpatory evidence. This would prove beneficial to both participants and the criminal justice system as it would encourage mediation of criminal matters and protect defendants' constitutional rights against self-incrimination.

3. Criminal Mediations and the Balancing Test Under the UMA

Some scholars question the wisdom of applying Section 6(b)(1)'s balancing test to communications from criminal mediations.[217] While there is merit to the argument for fortifying the protections given to these communications, the pragmatic response is that such changes are unlikely to occur under the UMA. The UMA was five years in the making, and significant amendments are unlikely within the framework of the uniform act.[218] Therefore, it is incumbent upon courts to consider the purpose of the mediation when balancing the evidence.

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214. OR. REV. STAT. §§ 135.951–.959 (2005).

215. *Id.* § 135.957.

216. *Id.* The statute provides some limited exceptions.

217. Davisson, *supra* note 17, at 724 ("[A]ny criminal proceedings exception should not apply to mediation communications that originate from a 'criminal mediation.'"); Teninbaum, *supra* note 21, at 64 (suggesting that communications from criminal mediations should be privileged if the matter has not reached settlement).

218. Reuben, *supra* note 117, at 100 (noting that the UMA was the result of "five years of research, drafting, and vetting"). As noted in the UMA Prefatory Comments, a central goal of the UMA was to provide uniformity. UNIF. MEDIATION ACT prefatory note cmts. (2003). NCCUSL would not consider a state statute to be part of the UMA if it gave mediation communications absolute protection from use in subsequent criminal proceedings (notes on file with author from conversation with member of NCCUSL).

If the judicial system wants to encourage the resolution of criminal actions through victim offender programs or other criminal mediation programs, then the parties must feel free to fully participate without concern that what they say may come back to haunt them in a subsequent criminal proceeding.[219] If parties to criminal mediations come to believe that their statements can be used against them, they will be reluctant to participate. Victims will feel further victimized, and defendants will feel entrapped. Both will result in fewer people using criminal mediations to resolve their disputes. Accordingly, when courts turn to the macro level of the balancing test, they should be mindful of the benefits associated with criminal mediations.

V. DUTY TO WARN PARTICIPANTS OF LIMITATIONS ON CONFIDENTIALITY

Given this lack of clarity and predictability, do mediators in UMA jurisdictions have an ethical obligation to inform participants about the limitations on confidentiality—and in particular of the possibility that statements made during the course of mediation may be admissible in subsequent criminal proceedings?

While many mediators recognize that a blanket assertion that all mediation communications are confidential is misleading, few mediators provide participants with a detailed explanation of the limits to confidentiality. Most opt for a generic confidentiality statement such as "mediation communications are generally privileged." They do this for a variety of reasons: (1) they do not want to dissuade the participants from fully engaging in the process;[220] (2) the chances of mediation communications having any relevance in a subsequent criminal proceeding are rare, especially in non-criminal mediations; (3) mediators are uncertain themselves as to the parameters of mediation privilege; and (4) most participants will not understand the limits on confidentiality, and thus it is not worth risking the confusion by attempting to explain something that very likely will not occur.

While each of these justifications has some merit, mediators still

219. *See generally* Reimund, *supra* note 77 (regarding the constitutional implications of restorative justice); Ilyssa Wellikoff, Note, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO J. CONFLICT RESOL. 1 (2003) (regarding victim-offender mediation and more serious cases).

220. A participant who understands that the confidential nature of the mediation may not prevent statements from being used against him or her in later litigation may be reluctant to participate candidly in the mediation, thereby minimizing the chances of reaching a fair and comprehensive settlement. *See* Hiers, *supra* note 133, at 585.

must determine whether they have an ethical obligation to warn participants about the criminal proceedings exception. Surely they do. The Model Standards of Conduct for Mediators assists with the analysis of the ethical question,[221] and the UMA provides guidance on the scope of the warning.[222]

A fundamental tenet of mediation is party self-determination.[223] The Model Standards of Conduct for Mediators defines self-determination as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome."[224] In order to make free and informed choices, participants need to know the parameters of confidentiality before they enter into the mediation process. Parties enter mediation because they are in conflict. As such, the participants generally are in an adversarial relationship with one another and, thus, do not enter the process with each other's best interest in mind. Accordingly, it is imperative that each participant understands that nothing in mediation is necessarily confidential or privileged. In addition, there may be constitutional ramifications for participants who, erroneously believing that they are fully protected by confidentiality, make self-incriminating statements in the course of mediation—particularly in criminal mediations.[225]

The obligation to warn, however, must be juxtaposed against the consequences of providing such a warning. Warnings could discourage full, candid, and honest participation.[226] After such a warning,

221. MODEL STANDARDS OF CONDUCT FOR MEDIATORS pmbl. (2005), *available at* http://www.abanet.org/dispute/documents/model_standards_conduct_april207.pdf. In 2005, the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution approved the revised set of mediation ethics standards. *See id.*

222. Susan Nauss Exon, *How Can a Mediator Be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. DISP. RESOL. 387, 393 (2006) (noting that the UMA provides no guidance about mediators' ethical obligations because it is a privilege rule, as opposed to an ethical code of conduct).

223. Paula M. Young, *Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators*, 5 APPALACHIAN J.L. 195, 220–25 (2006) (discussing self-determination under the revised Standards); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001) (discussing the history of self-determination and its changing nature in court-connected mediations).

224. MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard I.A.

225. *See* Reimund, *supra* note 3, at 406–07 ("A criminally accused person's constitutional rights may be jeopardized if he is directed to mediation by the court, not given any warning about rights against self-incrimination, and then the court uses evidence of admissions made during the mediation."); Reimund, *supra* note 72, at 85–86.

226. Hiers, *supra* note 133, at 584–85. The author argues that in states that have adopted the criminal proceedings exception, "attorneys and mediators probably should make sure that the parties know that statements they make during a mediation may be

participants could become hesitant to reveal any information that could possibly be used to injure their credibility, incriminate them, or implicate them in some future criminal trial. As such, warning participants of the limits of confidentiality could inhibit full disclosure.

Even with the potential adverse consequences, mediators must stop making broad and misleading assertions concerning confidentiality. Mediators need to explain the interplay between mediation communications and subsequent criminal proceedings and inform participants that there is a chance, although slim, that what they say in mediation may be used against them in subsequent proceedings.[227] This notice is consistent with the criminal proceedings exception of the UMA.[228] Although the substantially outweighs standard requires courts to tip the scale in favor of upholding the privilege and excluding the evidence, the Act is relatively new, and therefore it is hard to predict how courts will apply this standard to particular facts.

As previous noted, only one court, *State v. Williams*, has discussed Section 6(b)(1)'s balancing test, and that case resulted in a split decision.[229] In time, courts, having applied the standard to a broader array of factual scenarios, will provide a fuller understanding of how this exception will apply, and mediators will be better equipped to explain it to mediation participants. In the meantime, however, mediators need to acknowledge the limitations to confidentiality, noting that the chances of the exception applying in the context of a civil mediation are relatively unlikely. Mediators can

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used later to prosecute them in criminal proceedings." *Id.* at 584. She also acknowledges any such warnings "likely would chill meaningful discussion of any conduct which could trigger both civil and criminal actions." *Id.* at 585.

227. Requiring mediators to explain the limits of confidentiality to the participants is consistent with some of the ethical codes of conduct for mediators. *See, e.g.*, MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000), *available at* http://www.afccnet.org/pdfs/modelstandards.pdf. Standard III.A.8 provides in part: "Before family mediation begins a mediator should provide the participants with an overview of the process and its purposes, including . . . describing the obligations of the mediator to maintain the confidentiality of the mediation process and its results as well as any exceptions to confidentiality." *Id.* Standard III.A.8. Standard VII.B provides in part: "Prior to undertaking the mediation the mediator should inform the participants of the limitations of confidentiality such as statutory, judicially or ethically mandated reporting." *Id.* Standard VII.B. *See also* CALIF. DISPUTE RESOLUTION COUNCIL'S STANDARDS OF PRACTICE FOR CALIF. MEDIATORS § 4.A, *available at* http://www.sbcadre.org/neutrals/ethicsmed.htm ("If a Mediator or the law has established specific exceptions to the general rule of confidentiality, these exceptions must be disclosed to the participants prior to reaching an agreement to mediate.").

228. UNIF. MEDIATION ACT § 6(b)(1) (2003).

229. 877 A.2d 1258, 1265 (N.J. 2005).

then proceed with the mediation feeling confident that all participants are fully informed.

VI. CONCLUSION

The UMA, the product of five years of research and debate, is a major step forward for the mediation community. While it has its critics,[230] numerous proponents recognize its tremendous strengths[231]—the most notable is providing uniformity among the states.[232] In spite of its length and depth of coverage, the Act does not provide a blueprint or reliable prediction for how courts will decide cases involving the qualified exceptions.

The UMA provides limited guidance to courts, mediators, and participants concerning the emerging problems associated with confidentiality and mediation privilege in subsequent criminal cases. While the substantially outweighs standard is high, the official comments to Section 6(b)(1) make clear that these situations will be viewed on their individual facts leaving the ultimate decision to the "sound discretion of the courts."[233] The drafters note that "even without this exception, the courts can be expected to weigh heavily the need for the evidence in a particular case, and sometimes will rule that the defendant's constitutional rights require disclosure."[234] The best way to reconcile the high standard with the comment is to

230. *See, e.g.*, Hughes, *supra* note 4, at 51–52 (attacking the mediation community for providing itself with more protections against testifying than are necessary under the UMA); Shannon, *supra* note 100, at 211–12 (criticizing the UMA's approach to confidentiality and the complexity of the Act).

231. The ABA, NCCUSL, and ACR approved the UMA. UNIF. MEDIATION ACT (2003); Firestone, *supra* note 98. To date, ten states plus the District of Columbia have adopted the UMA. *See* MEDIATION WORKS, *supra* note 101; Uniform Mediation Act, ch. 35, 2008 Idaho Sess. Laws 35 (2008). New York has a bill pending to adopt the UMA. S. 1967, 2007 Leg., Reg. Sess. (N.Y. 2007).

232. Nat'l Conference of Comm'rs on Unif. State Laws, *Uniform Mediation Act*, 2003 J. DISP. RESOL. 1 (2003). Because the increasing use of mediation in both private and court ordered contexts across the states, the drafters of the UMA set forth to create a uniform law that would "simplify a complex area of the law." *Id.* at 10. The introductory note to a 2003 symposium on the UMA highlighted four significant reasons why uniformity of mediation law "helps bring order and understanding across state lines," including (1) providing predictability that a statement made in the course of mediation in one state may be sought as evidence in a subsequent legal proceeding in another state; (2) as relating to cross-jurisdictional mediations; (3) a party deciding whether or not to sign an agreement to mediate may not know where the mediation will occur and, as such, what privilege rules will be applicable (4) a uniform law will contribute to simplicity for mediators, mediation participants, and the courts. *Id.* at 10–11.

233. UNIF. MEDIATION ACT § 6(b)(1) cmt. 10.

234. *Id.*

recognize that there are no absolutes and that courts will apply the standard based on the specific facts in a particular case. The Act is new and fairly untested, and thus uncertainty remains.[235]

Looking at the five pre-UMA cases, it is doubtful that the mediation communications would be admissible in any except for the pre-crime exculpatory case—*Castellano*. Nonetheless, it is important to reflect on these cases to discern what guidance they can provide jurisdictions adopting the UMA's substantially outweighs standard in exculpatory and inculpatory evidence cases.

The UMA's adoption of the substantially outweighs standard means that most cases will be decided on the micro level—the need for the evidence and whether the evidence can be obtained from other sources. Courts will only progress to the macro level on really tough cases.

In exculpatory evidence cases, the probative value of the evidence as well as the sequence of events is crucial. Assertions made before the criminal act may explain the subsequent events. In contrast, statements made after the criminal act often serve little purpose other than to expound upon one's emotional reaction to the event.

In inculpatory evidence cases, the purpose or subject matter of the mediation is a critical factor in assessing admissibility. If the admission is part of a settlement agreement from a mediation convened to resolve a criminal act, then the agreement should be admissible to determine compliance, but mediation communications leading up to the agreement should be privileged. If the mediation does not result in a settlement, then courts should focus on the macro issue and only in rare circumstances allow inculpatory statements made in an attempt to resolve the underlying offense to be used against the defendant. If defendants and their counsel come to believe that the mediation process is not confidential and that the state can use it as a discovery device, then criminal mediation will no longer remain a viable option for resolving criminal matters. The state should not be allowed to use the mediation process to gain evidence for the prosecution of its cases.[236]

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235. Deason, *supra* note 213, at 85. "[I]t is not useful to regard confidentiality as an 'all or nothing' proposition. Mediation participants need to develop more nuanced expectations about circumstances that may trigger the need for disclosure. An adequate level of predictability requires, at a minimum, knowledge of the boundaries at which uncertainty begins for confidentiality." *Id.*

236. *See generally* Berger, *supra* note 209 (proposing more prosecutorial restraint in compliance with the Sixth Amendment).

These suggested outcomes and guidelines are simply that—tools to interpret and predict how courts will apply the qualified criminal proceedings exception. New fact scenarios will continue to arise, and courts will be called upon to hold in camera hearings and to interpret the criminal proceedings qualified exception.

The mediation community cannot wait for the lengthy legal process to resolve all the confidentiality issues before taking action to address the specific ethical obligations that arise under the UMA's criminal proceedings exception. Mediators have an ethical obligation: (1) to stop making blanketed statements about confidentiality that mislead the participants; and (2) to become knowledgeable about the limits of confidentiality and the exceptions to privilege.

The issue of training and credentialing takes on new importance in light of the UMA. Although this article has not addressed training, the topic is ripe for further study.[237] Like the fugu chef who must take specialized training and pass tests before being licensed,[238] so too should mediators demonstrate a level of proficiency about the limits of confidentiality prior to engaging in the process. It is only after they possess this knowledge that they can adequately inform participants about the limits of confidentiality.

The mediation community should consider implementing an online tutorial, Mediation Expectations and Limitations that addresses the specific issues of confidentiality and privilege. All mediators wishing to be on court rosters, court appointed, or certified by a mediation association would be required to take and pass the tutorial prior to being allowed to mediate, especially in criminal matters. Other disciplines have adopted similar tutorial programs. For example the National Institutes of Health (NIH) provides a free, online, two-hour tutorial for those conducting research involving human participants.[239]

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237. For information about mediation training, see TASK FORCE ON MEDIATOR CERTIFICATION, ACR REPORT AND RECOMMENDATIONS TO THE BOARD OF DIRECTORS (2004), *available at* http://www.acrnet.org/pdfs/certificationreport2004.pdf.

238. Fugu chefs must pass a written test and a practical test. British Broadcasting Corp., Fugu Fish, http://www.bbc.co.uk/dna/h2g2/A752429 ("[O]nly a quarter of applicants pass the written test, and the practical test includes eating the fish that has been prepared.").

239. The course is a "free, web-based course [that] presents information about the rights and welfare of human participants in research. The two-hour tutorial is designed for those involved in conducting research involving human participants. It satisfies the NIH human subjects training requirement for obtaining Federal Funds." Nat'l Cancer Inst., Human Participant Protections Education for Research Teams, http://cme.cancer.gov/clinicaltrials/learning/humanparticipant-protections.asp (last visited Feb. 18, 2008). The current training was replaced on March 1, 2008. *Id.*

Like the fugu chefs who must hone their skills, know their limits and inform their patrons of the risks as well as the benefits of partaking in the feast, the ethical mediator must know the limits to confidentiality and must inform participants of those limits, especially the criminal proceedings exception. There is an old Japanese expression, "I want to eat fugu, but I don't want to die."[240] For mediation participants, the expression might be, "I want to resolve my dispute, but I don't want to eat my words."

240. Setsuko Yoshizuka, *Fugu-Blow Fish: The World's Most Deadly Feast?*, ABOUT.COM, http://japanesefood.about.com/cs/seafoodfish/a/fugublowfish.htm (last visited Apr. 10, 2008).