

BE CAREFUL WHAT YOU SAY: ONE COURT’S LOOK AT CONFIDENTIALITY UNDER THE UNIFORM MEDIATION ACT

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I. Introduction

On November 22, 2004, the New Jersey Legislature enacted the Uniform Mediation Act (“UMA” or “Act”),¹ codifying for the first time “uniform standards and procedures for mediation and

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¹ N.J. STAT. ANN. § 2A:23C-1 to -13 (West 2006).

mediators.”² The Act’s provisions on confidentiality are central to its purpose. Three of the UMA’s thirteen sections are devoted to this topic: the first sets forth a privilege against disclosure;³ the second details waiver and preclusion of the privilege;⁴ and the third outlines exceptions to the privilege.⁵ In *State v. Williams*,⁶ the New Jersey Supreme Court had its first opportunity to consider the UMA and, in particular, the Act’s confidentiality provisions. Although the Court was careful to note that it did not address the constitutionality of the UMA and that its ruling was not dependent on the Act, as it was not in force when the operative events of the instant case took place, the Court analyzed the confidentiality provisions of the UMA and ultimately affirmed the trial court’s refusal to permit a mediator’s testimony at a criminal trial on behalf of the defendant. The *Williams* decision constitutes the first word on the UMA and thus will be the “slate” on which future decisions regarding confidentiality under the Act will be written.⁷

This article outlines the UMA sections on confidentiality as adopted in New Jersey, addresses the ruling in *Williams*, and explores issues inherent in the UMA as well as questions the Court left open in its decision and the resulting impact on mediators and lawyers who practice regularly in the ADR field.

II. Confidentiality Provisions of the UMA

In order to understand the confidentiality provisions of the UMA, it is first necessary to review several terms defined by the Act. The most critical term is “mediation communication,” which is defined as “a statement, whether verbal or non-verbal or in a record, 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.”⁸ Other important

² S. 679, 211th Leg. (N.J. 2004) (as reported by S. Judiciary Comm., Jan. 26, 2004).

³ N.J. STAT. ANN. § 2A:23C-4.

⁴ *Id.* at § 2A:23C-5.

⁵ *Id.* at § 2A:23C-6.

⁶ *State v. Williams*, 877 A.2d 1258 (N.J. 2005).

⁷ As of the completion of this article, research had not revealed any other case construing or interpreting the UMA.

⁸ N.J. STAT. ANN. § 2A:23C-2 (West 2006). The Act is virtually identical to the version drafted by the National Conference of Commissioners of Uniform State Laws. See generally *Sess. Law Serv.*157, 211th Leg., 1st Ann. Sess. (N.J. 2004). In addition to New Jersey, only Illinois and Nebraska have enacted the UMA to date.

terms are “mediation party”: “a person who participates in a mediation and whose agreement is necessary to resolve the dispute”;⁹ “non-party participant”: “a person, other than a party or mediator, who participates in a mediation”;¹⁰ and “proceeding”: “a judicial, administrative, arbitral or other adjudicative process, including related pre-hearing and post-hearing motions, conferences and discovery; or a legislative hearing or similar process.”¹¹

Title 2A, chapter 23C, section 4 of the New Jersey Statutes sets forth the general rule regarding confidentiality: mediation communications are privileged and not “subject to discovery or admissible in evidence in a proceeding unless waived or precluded”¹² Mediators, mediation participants, and non-party participants are all entitled to assert the privilege; however, mediators and non-party participants can protect only their own statements from disclosure, while parties “may refuse to disclose, and may prevent any other person from disclosing, a mediation communication”¹³ without limitation.¹⁴

The privilege may be waived if done so expressly by all of the parties to the mediation¹⁵ and, with respect to the privileges of the mediator and of non-party participants, it must be expressly waived by each.¹⁶ The privilege is also waived by a person who discloses a mediation communication, but only to the extent necessary for the person prejudiced by the disclosure to respond.¹⁷ Finally, a privilege cannot be asserted by anyone who uses a mediation to commit or conceal a crime.¹⁸

S.H.A. 710 ILCS 35/1 to 35/99; R.R.S. 1943, §§ 25-2930 to 25-2942.

⁹ N.J. STAT. ANN. § 2A:23C-2.

¹⁰ *Id.*

¹¹ *Id.*

¹² N.J. STAT. ANN. § 2A:23C-4(a).

¹³ *Id.* at § 2A:23C-4(b)(1).

¹⁴ See N.J. STAT. ANN. § 2A:23C-4(c) (West 2006) (“evidence or information that is otherwise admissible or subject to discovery shall not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.”). The statute does not state that a court or other adjudicative body will make the decision as to whether the evidence or information is in fact admissible or discoverable. See *id.* at § 2A:23C-4. This issue becomes difficult in certain situations, such as with compilations prepared for use in mediation containing otherwise discoverable or admissible data. Resolution of this issue will necessarily involve disclosure of a “mediation communication” raising a variety of confidentiality issues that are beyond the scope of this article.

¹⁵ N.J. STAT. ANN. § 2A:23C-5(a).

¹⁶ *Id.*

¹⁷ *Id.* at § 2A:23C-5(b).

¹⁸ *Id.* at § 2A:23C-5(c).

The Act also sets forth several exceptions to privilege, those instances where the privilege established by the UMA yields to another statute or a compelling policy or other consideration: mediation communications that are in a record signed by all parties,¹⁹ mediation communications made in a public mediation,²⁰ mediation communications constituting a threat or plan of criminal activity,²¹ mediation communications used in criminal activity or to conceal crime,²² mediation communications used to prove or disprove a complaint against the mediator,²³ mediation communications used to prove or disprove a complaint arising from conduct occurring during a mediation,²⁴ and mediation communications used to prove or disprove child abuse or neglect in a case in which the Division of Youth and Family Services (“DYFS”) is involved unless DYFS is a participant in the mediation.²⁵ All of the foregoing constitute exceptions to the general rule of confidentiality.

In contrast to those exceptions, which apply by agreement or as a result of the public nature or substance of the mediation communication and thus do not involve a balance of competing interests, there is an exception that allows a Court or other adjudicator to weigh the need for confidentiality and the opposing desire for a full presentation of evidence in order to make a subjective determination as to whether disclosure is appropriate. In this regard, the Act allows a court, administrative agency, or arbitrator to permit disclosure of an otherwise privileged mediation communication after concluding that “the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available [and] that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality”²⁶ This exception, which can only be authorized following an in camera hearing, applies to “a court proceeding involving a crime as defined in the ‘New Jersey Code of Criminal Justice’”²⁷ or a “proceeding to prove a claim to rescind or reform or a defense to

¹⁹ *Id.* at § 2A:23C-6(a)(1).

²⁰ N.J. STAT. ANN. § 2A:23C-6(a)(2) (West 2006).

²¹ *Id.* at § 2A:23C-6(a)(3).

²² *Id.* at § 2A:23C-6(a)(4).

²³ *Id.* at § 2A:23C-6(a)(5).

²⁴ *Id.* at § 2A:23C-6(a)(6); *see also id.* at § 2A:23C-6(c) (stating that a “mediator may not be compelled to provide evidence of a mediation communication” in such instances).

²⁵ *Id.* at § 2A:23C-6(a)(7).

²⁶ N.J. STAT. ANN. § 2A:23C-6(b) (West 2006).

²⁷ *Id.* at § 2A:23C-6(b)(1).

avoid liability on a contract arising out of the mediation.”²⁸ It is the former exception, in a proceeding involving a crime, that the New Jersey Supreme Court analyzed in *Williams* and that will likely be the subject of litigation and debate in years to come.

III. State v. Williams

The facts in *Williams* are uncomplicated. The State charged the defendant with various crimes arising from a physical altercation with a relative.²⁹ The defendant’s principal contention was that he had acted in self-defense.³⁰ Following his arrest, the defendant filed charges against the victim in municipal court, which then referred the dispute to mediation under New Jersey Rule of Court (“Rule”) 1:40-1.³¹ However, the mediator appointed by the municipal court was unsuccessful in resolving the case. At his criminal trial, in an effort to bolster his claim of self-defense, the defendant sought to offer the testimony of the mediator that the victim had admitted during mediation that he had threatened the defendant with a shovel.³² The court interviewed the mediator outside the presence of the jury and ultimately decided to bar the mediator’s testimony.³³ Both the Appellate Division and the Supreme Court affirmed.

Although the trial court expressed doubt about the reliability of the mediator’s testimony, the court did not exclude the evidence on that basis.³⁴ Rather, the court predicated its ruling solely on Rule 1:40-4(c), which mandates confidentiality in mediation.³⁵ The trial

²⁸ *Id.* at § 2A:23C-6(b) (2).

²⁹ *State v. Williams*, 877 A.2d 1258, 1260 (N.J. 2005).

³⁰ *Id.*

³¹ *Id.*; see N.J. R. Ct. 1:40 (providing for “Complimentary Dispute Resolution Programs” for the Superior and Municipal courts of New Jersey).

³² *Williams*, 877 A.2d at 1260.

³³ *Id.*

³⁴ *Id.* at 1261-62.

³⁵ *State v. Williams*, 877 A.2d 1258, 1261-62 (2005). Rule 1:40-4(c) provides, in full:

Confidentiality. Except as otherwise provided by this rule and unless the parties otherwise consent, no disclosure made by a party during mediation shall be admitted as evidence against that party in any civil, criminal, or quasi-criminal proceeding. A party may, however, establish the substance of the disclosure in any such proceeding by independent evidence. A mediator has the duty to disclose to a proper authority information obtained at a mediation session on the reasonable belief that such disclosure will prevent a participant from committing a criminal or illegal act likely to result in death or serious bodily harm. No mediator may participate in any subsequent hearing or trial of the

judge stated on the record:

I have personally very serious reservations about the reliability of his testimony, but I'm not deciding this based on that. I'm deciding it based on the fact that whatever was said in that mediation process was said after the people were told it was confidential and wouldn't be used in a criminal proceeding thereafter.³⁶

In an unreported decision, the Appellate Division affirmed.³⁷ Although the appellate judges believed that the mediator's testimony had the potential to assist the self-defense claim,³⁸ the Appellate Division ultimately found that there was no need to relax Rule 1:40-4(c) because the defendant had a full opportunity to present his self-defense claim and thus was not deprived a fair trial.³⁹

The Supreme Court granted "defendant's petition for certification solely on the issue of the admissibility of the mediator's

mediated matter or appear as witness or counsel for any person in the same or any related matter. A lawyer representing a client at a mediation session shall be governed by the provisions of RPC 1.6.

N.J. R. Ct. 1:40-4(c).

³⁶ Williams, 877 A.2d at 1262.

³⁷ *Id.* at 1262.

³⁸ *Id.*

³⁹ *Id.* The defendant's request for relaxation was made under Rule 1:1-2, Construction and Relaxation, which states:

The rules in Part I through Part VIII, inclusive, shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice. In the absence of rule, the court may proceed in any manner compatible with these purposes and, in civil cases, consistent with the case management/trial management guidelines set forth in Appendix XX of these rules.

N.J. R. Ct. 1:1-2.

The Court also considered the relaxation provision contained in Rule 1:40-10, Relaxation of Court Rules and Program Guidelines, which provides:

These rules, and any program guidelines may be relaxed or modified by the court in its discretion if it determines that injustice or inequity would otherwise result. Factors to be considered in making that determination include but are not limited to as (1) the incapacity of one or more parties to participate in the process, (2) the unwillingness of one or more parties to participate in good faith, (3) the previous participation by the parties in a CDR program involving the same issue, and (4) any factor warranting termination of the program pursuant to Rule 1:40-4(f).

N.J. R. Ct. 1:40-10.

testimony,”⁴⁰ framing the issue as “whether, and under what circumstances, a mediator’s testimony may be excluded from a criminal trial”⁴¹ The Supreme Court ultimately affirmed both rulings below, finding that the trial judge had properly refused to admit the mediator’s testimony.⁴²

The Supreme Court began its opinion with a discussion of the “background of the mediator’s privilege and the rights that defendant claims are impaired by that privilege.”⁴³ The starting point was Rule 1:40-4(c).⁴⁴ The Court quickly found that all the requirements of Rule 1:40-4(c) had been met and thus held that “under a plain reading of *Rule 1:40-4(c)*, the trial court correctly prevented the jury from hearing the mediator’s testimony.”⁴⁵

The next question the Court confronted was whether Rule 1:40-4(c) could be “relaxed” under these circumstances.⁴⁶ To answer that issue, the Court balanced the defendant’s constitutionally guaranteed right to a fair trial and, in particular, his Sixth Amendment right to confront the witnesses against him against competing interests, such as privileges, which serve to exclude evidence sought to be used by the defense.⁴⁷ The Court summarized the United States Supreme Court’s and its own jurisprudence in this area as follows: “if evidence is relevant and necessary to a fair determination of the issues, the admission of the evidence is constitutionally compelled.”⁴⁸

At that point, the Court turned to the confidentiality provisions of the UMA.⁴⁹ Initially, the Court noted that, although the Act was not in effect in New Jersey at the time of the defendant’s criminal trial, the UMA is more “precise” than Rule 1:40-4(c) and thus is the “appropriate analytical framework for the determination whether defendant can overcome the mediator’s privilege not to testify.”⁵⁰ However, for a variety of reasons, the Court specifically

⁴⁰ *State v. Williams*, 877 A.2d 1258, 1262 (N.J. 2005).

⁴¹ *Id.* at 1263.

⁴² *Id.* at 1270.

⁴³ *Id.* at 1263.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *State v. Williams*, 877 A.2d 1258, 1263 (N.J. 2005).

⁴⁷ *Id.* at 1264.

⁴⁸ *Id.* at 1265 (quoting *State v. Garron*, 177 N.J. 147, 171 (2003)).

⁴⁹ *Williams*, 877 A.2d at 1256. The Court considered the Act at the urging of the New Jersey State Bar Association as well as the Committee for Dispute Resolution, both of who appeared and filed briefs amicus curiae.

⁵⁰ *Id.* at 1265.

declined to reach the constitutionality of the relevant UMA provisions, leaving that question for another day.⁵¹

The Court summarized the confidentiality provisions of the UMA as “empowering disputants, mediators, and nonparty participants to ‘refuse to disclose, and [to] prevent any other person from disclosing, a mediation communication.’”⁵² According to the Court, the “privilege yields, however, if a court determines ‘that the mediation communication is sought or offered in’ a criminal proceeding, ‘that there is a need for the evidence that substantially outweighs the interests in protecting confidentiality,’ and ‘that the proponent of the evidence has shown that the evidence is not otherwise available.’”⁵³ The Court found that the defendant bears the burden of satisfying these requirements and that each one must be met in order to prevail.⁵⁴ According to the Court, the first requirement, that “‘the mediation communication [be] sought or offered in’ a criminal proceeding,” was “clearly satisfied” since the defendant faced charges for assault and weapons possession and sought to introduce evidence of mediation statements into the ensuing trial.⁵⁵ Accordingly, the Court turned its attention to the “need” and “availability” components of the confidentiality test.

The Court first focused its analysis of the “need” prong by “considering the ‘interest in protecting confidentiality.’”⁵⁶ The Court noted that mediation depends upon confidentiality since the fundamental purpose of mediation, i.e., settlement, is best served where the parties can speak freely with the belief that their statements, in furtherance of compromise, will be protected from disclosure.⁵⁷ According to the Court, “the appearance of mediator impartiality is imperative” in the mediation process.⁵⁸ The Court

⁵¹ *Id.* In addition to the fact that the Act was not yet effective as of the date of trial, the Court declined to address the constitutionality of the Act because the constitutional question (i.e., whether the Act’s requirement that the need for the mediator’s evidence “substantially outweigh” the need for confidentiality infringed defendant’s confrontation rights) was raised only after oral argument and because the Court found that confidentiality was appropriate even removing the “substantiality” requirement. *See id.*

⁵² *State v. Williams*, 877 A.2d 1258, 1265 (N.J. 2005) (quoting N.J. STAT. ANN. 2A:23C-4(b)).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1265.

⁵⁶ *Id.* at 1266.

⁵⁷ *See id.* at 1266-67 (quoting *Isaacson v. Isaacson*, 348 N.J. Super. 560, 575 (App. Div. 2002)).

⁵⁸ *State v. Williams*, 877 A.2d 1258, 1266 (N.J. 2005).

recognized that, to be effective, a mediator must have the trust and confidence of the parties.⁵⁹ Such trust and confidence depends, in large part, on the belief that “information conveyed to the mediator will remain in confidence.”⁶⁰

The Court rejected the defendant’s argument that the other participant in the mediation, the victim in the criminal trial, was not a party to the criminal case and thus did not have an interest in whether his mediation communications were disclosed in the criminal trial.⁶¹ The defendant argued that this was especially true considering that Rule 1:40-4(c) allows for disclosure of a mediation communication where the person who made the communication is not a party in the case in which the disclosure is sought.⁶² The Court disagreed and determined that the victim could not “trust that the mediator was impartial” if the victim knew that statements made during the mediation could be used to exculpate the defendant.⁶³

Having found a “substantial interest in protecting mediation confidentiality,”⁶⁴ the Court turned to the defendant’s “need for the mediator’s testimony.”⁶⁵ Based on the proffer made to the trial court as well as other factors, the Court found that the mediator’s testimony lacked “the indicia of reliability and trustworthiness demanded of competent evidence”⁶⁶ and thus was not “sufficiently probative” to the issue of self-defense.⁶⁷ Specifically, the Court found that the mediator was not clear on what had occurred during the session and what statements were attributable to each participant.⁶⁸ The Court also questioned the mediator’s impartiality by noting that the defendant had “stopped by [the mediator’s] house and informed him that the trial was about to begin.”⁶⁹ The Court also determined that the mediator’s proposed testimony did not support the defendant’s version of events. In other words, the mediator could not testify that the victim admitted to actually threatening the defendant, thus giving rise to the need for self-defense.⁷⁰ Finally, the

⁵⁹ *Id.* at 1267.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1268.

⁶³ *Id.* at 1267-68.

⁶⁴ *State v. Williams*, 877 A.2d 1258, 1268 (N.J. 2005).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 1269.

⁶⁸ *Id.* at 1268.

⁶⁹ *Id.* at 1268.

⁷⁰ *State v. Williams*, 877 A.2d 1258, 1269 (N.J. 2005).

Court found that the defense counsel had “induced the mediator’s breach of confidentiality without first seeking the court’s permission” and also failed to allow the victim “to explain the mediator’s account of his statements.”⁷¹ Thus, the Court concluded that, on balance, the “defendant’s need for the mediator’s testimony [did] not outweigh the interest in protecting mediation confidentiality.”⁷²

The Court then turned its attention to the question of whether the mediator’s testimony was “not otherwise available.”⁷³ The Court began by noting that defense counsel had thoroughly cross-examined each of the state’s witnesses.⁷⁴ Furthermore, the defendant and his wife had both testified as to the defendant’s version of events and sought to discredit the witnesses for the prosecution.⁷⁵ Under these circumstances, the Court concluded that “the jury heard evidence of [the victim’s] purported inconsistent statement,”⁷⁶ thus the defendant could not sustain his burden to show that the mediator’s testimony was otherwise unavailable.⁷⁷

In the end, the Court concluded that the defendant’s confrontation rights were satisfied at trial and that he had been provided “the opportunity to present substantial evidence . . . to support his assertion of self-defense”⁷⁸ Because the defendant did not show that his “need for the mediator’s testimony . . . outweigh[ed] the interest in mediation confidentiality, and [because the] defendant . . . failed to show that the evidence was not otherwise available,”⁷⁹ the trial court’s refusal to admit the “mediator’s testimony rested upon the sound policy justifications underlying mediation confidentiality.”⁸⁰

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* (quoting N.J. Stat. Ann. 2A:23C-6(b)).

⁷⁴ *Id.*

⁷⁵ *Id.* Apparently, the defendant did testify during direct examination as to the victim’s statements during the mediation. Although noting that “the UMA’s confidentiality provision applies with equal force to a mediation participant, such as defendant” and thus “there is a serious question . . . whether defendant should have been allowed to testify at all” in this regard, the Court did not rule on the issue because it was not raised by the parties. *Id.* at 1270.

⁷⁶ *State v. Williams*, 877 A.2d 1258, 1270 (N.J. 2005).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

IV. UMA Provisions

Before turning to the Court's opinion in *Williams* and the questions the decision raised, it is first necessary to address certain provisions of the UMA that, although not addressed in *Williams*, will likely be a subject of debate among ADR practitioners and ultimately may have to be interpreted by the courts. These provisions concern the role of non-party participants, the scope of the term "mediation communication," and to what cases the "balancing" exception to privilege applies, none of which were addressed in *Williams*.

A. *The Role of Non-Party Participants*

The role of non-party participants in mediation under the UMA is not clear. First, it is uncertain whether a mediation party can prevent a non-party from attending the mediation. The Act states that an "attorney or other individual designated by a party may accompany the party to and participate in a mediation."⁸¹ However, the UMA does not state whether that party can insist on the presence of a non-party or what any other mediation party's rights are in this regard. Presumably, the mediator makes these decisions, but the Act does not so state, nor does it give any guidance in this regard. This issue is significant as a particular mediation party may be less candid or frank in his or her disclosures during the mediation in the presence of a non-party to whose presence he or she objects or finds unwelcome.

More importantly, the UMA is unclear as to whether a non-party participant plays any role in the waiver of the confidentiality privilege. According to the Act, a privilege may be waived "if it is expressly waived by all parties to the mediation"⁸² The UMA does not indicate whether "parties" in this context refers to "mediation parties" as defined, or also encompasses non-parties as well. Logically, a non-party should not be able to prevent disclosure of a mediation communication, especially where the communication at issue is not the non-party's and the mediation parties are in accord on disclosure. However, the answer is currently uncertain.

⁸¹ N.J. STAT. ANN. § 2A:23C-10 (West 2006).

⁸² *Id.* at § 2A:23C-5.

B. *The Scope of Mediation Communication*

As previously noted, the UMA does not limit the privilege on disclosure to communications made during the mediation itself. Rather, the term extends to statements made for “purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation”⁸³ The UMA does not address whether a document or letter signed by one mediation party confirming an agreement to mediate but unsigned by the other party is a “mediation communication” and thus could not be introduced in an action by the signing party to compel mediation. Although at first glance it would seem that such a document or letter could be readily used in such an action, a document or letter of this nature squarely falls within several of the terms used to define “mediation communication”⁸⁴ and thus could be excluded unless the non-signing party consents to its admission.

C. *To What Cases Does the Balancing Exception Apply*

On first glance, the balancing exception of title 2A, chapter 23C, section 6(b) of the New Jersey Statutes appears to apply only to criminal cases. The *Williams* Court did not focus on the issue. Rather, the Court glazed over the question, finding that the “first requirement [was] clearly satisfied because defendant [was] on trial for assault and weapons charges and [sought] to introduce evidence of mediation statements into that trial.”⁸⁵ On closer inspection, however, the exception is not limited to criminal cases, but rather applies more broadly to “court proceeding[s] involving a crime as defined in the ‘New Jersey Code of Criminal Justice’”⁸⁶

If either the UMA drafters or the New Jersey Legislature, in adopting the Act, meant for this exception to apply only to “criminal cases”—i.e., to those arising from indictment or a criminal complaint initiated by law enforcement—they could have used language so indicating, such as a “court proceeding in which a party is defending

⁸³ *Id.* at § 2A:23C-2.

⁸⁴ That is, whether the “mediation communication” is made for “considering”, or “conducting”, “initiating” a mediation. *Id.*

⁸⁵ *State v. Williams*, 877 A.2d 1258, 1266 (N.J. 2005) (emphasis added).

⁸⁶ N.J. STAT. ANN. 2A:23C-6(b)(1) (emphasis added). The text of the UMA as drafted by the National Conference of Commissioners on Uniform State Laws is similar, stating that the exception applies to “a court proceeding involving a felony or misdemeanor.” UNIFORM MEDIATION ACT § 6(b)(1) (2001).

an indictment or other criminal process initiated by the State.” As it now stands, the exception includes a variety of civil cases that are within its scope, in which the tort alleged also constitutes and thus “involves” a “crime.” Examples include cases for fraud, for insurance coverage arising from a theft, and for sexual harassment in the workplace involving a “touching.” The significance of this issue cannot be over-emphasized given the frequency of mediation in civil cases. It will not be long before a lawyer looks to the “balancing exception” to admit a mediation communication into a civil trial and a court will be faced with having to resolve what is intended by the exception and its scope.

V. Williams’ Unanswered Questions

The *Williams* decision leaves various questions unanswered, in particular, whether the “balancing exception” infringes a criminal defendant’s constitutionally protected confrontation rights. However, there are issues more practical to Courts and practitioners alike that need to be addressed, such as: the role of the trial court in actually balancing the competing interests, i.e., the extent to which the Court can make a qualitative assessment of the mediator’s proposed testimony, and the proper procedure for an attorney to follow in seeking to introduce a mediator’s testimony. These two questions are discussed below.

It is clear from the excerpt of the record quoted in *Williams* that the trial judge had very clear, and perhaps correct, concerns about the reliability of the mediator’s testimony. However, it is equally certain that the Court did not factor the value of the testimony into the decision to exclude the testimony, quoting the trial judge, “I have personally very serious reservations about the reliability of [the mediator’s] testimony, but I’m not deciding this based on that.”⁸⁷ Rather, the Court made its decision on the basis of the confidentiality requirements of Rule 1:40-4(c) and the concern that the mediation participants had been assured of confidentiality.⁸⁸ However, this was not of concern to the Supreme Court. The justices who decided *Williams* specifically made a qualitative evaluation of the mediator’s testimony in considering the defendant’s need for the testimony. The majority stated that “the mediator’s testimony in this matter does not exhibit the indicia of reliability and trustworthiness

⁸⁷ *Williams*, 877 A.2d at 1262.

⁸⁸ 184 N.J. at 1261-62.

demanded of competent evidence.”⁸⁹ The problem is, however, that the balancing exception as drafted does not give trial courts the ability to make a qualitative assessment of the proffered testimony in considering the “need” for the testimony. More significantly, the *Williams* Court did not point to any authority justifying its holding that “[t]o ascertain whether [the] testimony is ‘necessary to prove’ self-defense, we assess its ‘nature and quality.’”⁹⁰

In fact, the only authority given for the Court’s holding is *State v. Garron*,⁹¹ which involved the balancing that a Court must engage in when considering whether to admit evidence under the “Rape Shield Law.”⁹² However, the provision of the statute at issue in *Garron* expressly authorizes the trial judge to make a qualitative decision on the proposed testimony⁹³; the UMA does not.⁹⁴ In her dissent, Justice Long faulted the majority for its ruling, stating, “Finally, I believe that this court overstepped its bounds in declaring that the mediator’s testimony ‘does not exhibit the indicia of reliability and trustworthiness demanded of competent evidence.’”⁹⁵ However, it is not clear whether Justice Long disagreed with the Court’s findings in this regard, i.e., she concluded the testimony was reliable and trustworthy, but was otherwise comfortable with the Court’s ability to make the assessment, or whether she felt that the Court had no power to act in this capacity in the first instance.

Whatever the view on whether the trial Court should qualitatively assess the proposed testimony as part of the balancing analysis, the fact remains that the UMA does not allow for such a weighing, and the *Williams* Court did not cite any authority for the position it took. Whether this view will survive future Court decisions remains to be seen. The better approach would be for the Legislature to amend the UMA in this regard in the event it actually intended Courts to determine the value of the proffered evidence in

⁸⁹ *Id.* at 1268.

⁹⁰ *Id.*

⁹¹ 827 A.2d 243 (N.J. 2003).

⁹² N.J. STAT. ANN. § 2C:14-7 (West 2006).

⁹³ See N.J. STAT. ANN. § 2C:14-7(d) (“Evidence . . . shall be considered relevant if it is *probative* of whether a reasonable person . . . would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.” (emphasis added)).

⁹⁴ Although not cited by the Court in this context, Rule 403 of New Jersey Rules of Evidence allows a court to exclude evidence if its probative value is outweighed by other considerations such as undue prejudice. N.J. R. EVID. 403. However, this rule is limited by the qualifier “except as provided by other law”—presumably meaning that statutes, such as the UMA, can override the Court’s power in this regard.

⁹⁵ *State v. Williams*, 877 A.2d 1258, 1271 (N.J. 2005).

connection with this exception.

The other area of concern focuses on the proper procedure for requesting a court to conduct the balancing analysis and to admit a mediator's testimony. Unfortunately, the opinion in *Williams* does not provide much detail as to what actually occurred at trial. Apparently, the defense counsel spoke to the mediator during a break in the proceedings and then sought the court's permission to call the mediator as a witness.⁹⁶ The court then interviewed the mediator outside the presence of the jury before deciding to bar the testimony.⁹⁷ Both the trial court and the Supreme Court were critical of counsel's conduct: the trial judge found that both the mediator and defense counsel had breached the confidentiality of the mediation proceedings,⁹⁸ and the Supreme Court likewise found that "by asking the mediator to divulge the disputants' statements made during mediation, the defense induced the mediator's breach of confidentiality without first seeking the court's permission."⁹⁹ However, neither the trial court nor the Supreme Court offered any guidance on what counsel should have done, and the UMA is silent on the issue. In any event, the Court's criticism of counsel seems unwarranted. In *Williams*, presumably the defendant had advised his counsel as to what was said at the mediation before his counsel ever spoke to the mediator.¹⁰⁰ Thus, the mediator's discussion with counsel was not truly a disclosure of "confidential" information, but rather confirmation of what counsel had already been told. Even assuming that such a discussion was an improper disclosure, the Supreme Court's suggestion that counsel should have sought permission from the court before speaking with the mediator offers little in the way of protection for the mediation communication or fairness to the client or counsel. Presumably, the Court meant that the trial judge should have interviewed the mediator independently and then made a ruling. But how is a disclosure to the judge any less of a breach of confidentiality than a discussion between the mediator and counsel? Also, how can counsel adequately protect his client's trial and appellate rights if a court makes a ruling to bar the testimony outside of the presence of the attorneys, providing no opportunity to hear what the mediator has to say and argue as to its

⁹⁶ *Id.* at 1261.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1261-62.

⁹⁹ *Id.* at 1269.

¹⁰⁰ Otherwise there would appear to be no reason for his counsel to have sought to speak with the mediator.

admissibility?

The better course, which should be adopted by courts in the future or added to the UMA by amendment, is for an attorney whose client has advised that there is a need for the mediator's testimony or who knows from his or her own participation in a mediation on behalf of the client that the testimony is needed to request an interview of the mediator in the presence of the trial judge and counsel with the understanding that the mediation communications at issue will not be disclosed further unless authorized by the judge. The confidentiality of the disclosures can be preserved by sealing that portion of the record containing the testimony. In this way, the communications are preserved as much as possible, while at the same time counsel's ability to protect his or her client's trial and appellate rights remains intact.

VI. Conclusion

In conclusion, in its efforts to define and codify the mediation process and, in particular, its protection of mediation communications, the UMA has laid the groundwork for modern mediation practice. However, questions remain, especially as to the scope of the confidentiality created by the Act and the ability to disclose mediation communications in the face of the cloak of confidentiality. In particular, the scope of cases to which the balancing exception applies, as well as how counsel should utilize the exception, have yet to be decided. These questions will likely be the subject of debate and litigation for some time. The hope is that through continuing discussion and the intervention of the courts and legislature the UMA will be refined to better serve the needs of ADR practitioners and mediation participants alike and that by so doing, litigants will look to mediation in increasing numbers to prevent or resolve disputes.