

Be Careful What You Say: One Court's Look At Confidentiality Under The Uniform Mediation Act

Lowenstein Sandler PC

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On November 22, 2004, the New Jersey Legislature enacted the Uniform Mediation Act (the "UMA" or the "Act") codifying for the first time "uniform standards and procedures for mediation and mediators." Central to the Act is its provisions on confidentiality. Three of the UMA's thirteen sections are devoted to this topic: the first sets forth a privilege against disclosure, the second details waiver and preclusion of the privilege, and the third outlines exceptions to the privilege. In *State v. Williams*, the New Jersey Supreme Court had its initial 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 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. *Williams* 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.

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

A. In order to understand the confidentiality provisions of the UMA, it is first necessary to review several terms defined by the Act. The critical term is "mediation communication" -- defined to be "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." The other important defined terms are "mediation party" ("a person who participates in a mediation and whose agreement is necessary to resolve the dispute"), "non-party participant" ("a person, other than a party or mediator, who participates in a mediation"), 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").

N.J.S.A. 2A:23C-4 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." Mediators, mediation participants, and non-party participants are all entitled to assert the privilege; however, mediators and non-party participants can only protect their own statements from disclosure, while parties "may refuse to disclose, and may prevent any other person from disclosing, a mediation communication" without limitation.

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

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 which are in a record signed by all parties, made in a public mediation, a threat or plan of criminal activity, used in criminal activity or to conceal crime, used to prove or disprove a complaint against the mediator, used to prove or disprove a complaint arising from conduct occurring during a mediation, 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, all 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 that exception which 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 ...” Such exception, which can only be authorized following an in camera hearing, applies to “a court proceeding involving a crime defined by the New Jersey Code of Criminal Justice,” or a “proceeding to prove a claim to rescind or reform a defense to avoid liability on a contract arising out of the mediation.” It was the former exception that the Court analyzed in *Williams*, and which will likely be the subject of litigation and debate in years to come.

B. The facts in *Williams* are uncomplicated. Defendant was charged with various crimes arising from a physical altercation with a relative. Defendant’s principal contention was that he had acted in self-defense. Following his arrest, Defendant filed charges against the victim in municipal Court which were referred to mediation under R. 1:40-1. However, the mediator appointed by the municipal Court was unsuccessful in resolving the case. At his criminal trial, Defendant sought to offer the testimony of the mediator that the victim had admitted during mediation that he had threatened Defendant with a shovel in an effort to bolster his claim of self-defense. The Court interviewed the mediator outside the presence of the jury and ultimately decided to bar the mediator’s testimony. 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. Rather, the Court predicated its ruling solely on R. 1:40-4(c) which mandates confidentiality in mediation. The trial 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 the mediation process was said after the people were told it was confidential and wouldn’t be used in a criminal proceeding thereafter.

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

The Supreme Court granted “defendant’s petition for certification solely on the issue of the admissibility of the mediator’s testimony,” framing the issue as “whether, and under what circumstances, a mediator’s testimony may be excluded from a criminal trial.” The Supreme Court ultimately affirmed both rulings below, finding that the trial judge had properly refused to admit the mediator’s testimony.

The Court began with a discussion of the “background of the mediator’s privilege and the rights defendant claims are impaired by that privilege.” The starting point was R. 1:40-4(c). The Court quickly found that all the requirements of R. 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.”

The next question which the Court confronted was whether R. 1:40-4(c) could be “relaxed” under these circumstances. To answer that issue, the Court had to balance 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. 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.”

At that point, the Court turned to the confidentiality provisions of the UMA. 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 R. 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.” However, the Court specifically declined to reach the constitutionality of the relevant UMA provisions, leaving that question for another day for a variety of reasons.

The Court summarized the confidentiality provisions of the UMA as “empowering disputants, mediators, and non-party participants to ‘refuse to disclose, and [to] prevent any other person from disclosing, a mediation communication.’” 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.’” The Court found the “burden [to be] on defendant to satisfy these requirements,” and that each one must be met to prevail. According to the Court, the first requirement -- “the mediation communication is sought or offered in” a “criminal proceeding” -- is “clearly satisfied” as “defendant is on trial for assault and weapons charges and seeks to introduce evidence of mediation statements into that trial.” 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.’” The Court noted that mediation depends upon confidentiality -- 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. According to the Court, in the mediation process, “the appearance of mediator impartiality is imperative.” The Court recognized that a mediator must have the trust and confidence of the parties to be effective. Such trust and confidence depends, in large part, on the belief that “information conveyed to the mediator will remain in confidence.”

The Court rejected 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, especially considering that R. 1:40-4(c) does not prohibit 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. The Court 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 Defendant.

Having found a “substantial interest in protecting mediation confidentiality,” the Court turned to Defendant’s “need for the mediator to testify.” 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,” and thus was not “sufficiently probative” to the issue of self-defense. Specifically, the Court found that the mediator was not clear on what occurred during the session and what statements were attributable to each participant. Second, the Court questioned the mediator’s impartiality -- noting that Defendant “stopped by [the mediator’s] house and informed him that the trial was about to begin.” The Court also determined that the mediator’s proposed testimony did not support Defendant’s version of events -- in other words, the mediator could not testify that the victim admitted to actually threatening Defendant, thus giving rise to a need for self-defense. Finally, the Court found that defense counsel “induced the mediator’s breach of confidentiality without first seeking the Court’s permission,” and failed to allow the victim “to explain the mediator’s account of his statements.” Thus, the Court concluded that, on balance, “defendant’s need for the mediator’s testimony does not outweigh the interest in protecting mediation confidentiality.”

Thereafter, the Court turned its attention to the question of whether the mediator’s testimony was “not otherwise available.” The Court first noted that defense counsel thoroughly cross-examined each state’s witness. Also, Defendant and his wife both testified as to Defendant’s version and to discredit the witnesses for the prosecution. Under these circumstances, the Court concluded that “the jury heard evidence of [the victim’s] purported inconsistent statement,” thus Defendant could not sustain his burden to show that the mediator’s testimony was not otherwise available.

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

C. Before turning to the Court’s opinion in Williams and the questions raised by that decision, it is first necessary to address certain provisions of the UMA which, although not addressed in Williams, will likely be the subject of debate among ADR practitioners, and which 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.

1. The Role of Non-Party Participants: The role of non-party participants in a UMA mediation is not clear. First, it is uncertain whether a mediation party can prevent a non-party from attending. The Act states that an “attorney or other individual designated by a party may accompany the party to and participate in a mediation.” 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: 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.” The UMA does not indicate whether “parties” in this context refers to “mediation parties” as defined, or encompasses non-parties as defined, 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 uncertain.

2. The Scope of Mediation Communication: As noted above, 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 ...” Unaddressed by the UMA is whether a document or letter signed by one mediation party confirming an agreement to mediate but unsigned by the other 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 a mediation communication (i.e., made for “considering”, or “conducting”, “initiating” a mediation) and thus could be excluded unless the non-signing party consents to its admission.

3. To What Cases Does The Balancing Exception Apply: On first glance, the balancing exception of N.J.S.A. 2A:23C-6(b) appears to apply only to criminal cases. The Williams Court did not focus on the issue -- rather, the Court glazed over the question: “The first requirement is clearly satisfied because defendant is on trial for assault and weapons charges and seeks to introduce evidence of mediation statements into that trial.” On closer inspection, however, the exception is not limited to criminal cases, but rather applies more broadly to “court proceedings involving a crime as defined in the ‘New Jersey Code of Criminal Justice,’” (emphasis added).

If the drafters of the UMA or the New Jersey Legislature, when adopting the Act, meant for this exception to only apply 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 an indictment or other criminal process initiated by the State.” As it stands, the exception includes a variety of civil cases within its scope, in which the tort alleged also constitutes and thus “involves” a “crime.” Examples which come to mind 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 in a civil trial and a court will be faced with and have to resolve just what was intended by this exception and its scope.

D. The decision in Williams leaves various unanswered questions, in particular, whether the “balancing exception” infringes a criminal defendant’s constitutionally protected confrontation rights. However, issues more practical to Courts and practitioners alike 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 actually looking 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: “I have personally very serious reservations about the reliability of his testimony, but I am not deciding this based on that.” Rather, the Court made its decision on the basis of the confidentiality requirements of R. 1:40-4(c) and the concern that the mediation participants had been assured of confidentiality. Not so with the Supreme Court. The justices who decided Williams specifically made a qualitative evaluation of the mediator’s testimony in considering Defendant’s need for the testimony: “the mediator’s testimony in this matter does not exhibit the indicia of reliability and trustworthiness demanded of competent evidence.” 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 “to ascertain whether the testimony is ‘necessary to prove’ self-defense, we assess its nature and quality.”

In fact, the only authority given for this holding is *State v. Garron*, which involved the balancing which a Court must engage in considering whether to admit evidence under the “rape shield law.” However, the provision of the statute at issue in *Garron* expressly authorizes the trial judge to make a qualitative decision on the proposed testimony -- the UMA does not. In her dissent, Justice Long faulted the majority for its ruling: “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.’” 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 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 connection with this exception.

The other area of concern focuses on the proper procedure for requesting the Court to conduct the balancing analysis and to admit a mediator’s testimony. Unfortunately, the opinion in *Williams* does not give much detail as to what occurred at trial. Apparently, 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. The Court then interviewed the mediator outside the presence of the jury before deciding to bar the testimony. Both the trial and Supreme Courts were critical of counsel’s conduct -- the trial judge found that both the mediator and counsel had breached the confidentiality of the mediation proceedings, and the Supreme Court found likewise: “Finally, by asking the mediator to divulge the disputant’s statements made during mediation, the defense induced the mediator’s breach of confidentiality without first seeking the court’s permission.”

However, neither the trial Court nor the Supreme Court justices offer 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 Defendant had advised his counsel as to what was said at the mediation before counsel ever spoke to the mediator (why else would counsel have sought to speak with him?), and 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 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 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 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.

E. 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 the 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.