

**ARE “CONFIDENTIAL” MEDIATION PROCEEDINGS
REALLY CONFIDENTIAL?:**

**WILL THE UNIFORM MEDIATION ACT REALLY KEEP
MEDIATION COMMUNICATIONS OUT OF COURT IN
SUBSEQUENT ENVIRONMENTAL LITIGATION?**

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I. Introduction

These days, the Uniform Mediation Act (“UMA”) is all the rage among the Alternative Dispute Resolution (“ADR”) community. New Jersey has received kudos for being the third state in the Union to adopt UMA, which was developed by the National Conference of Uniform State Laws (“NCUSL”), and has been approved and promulgated by the American Bar Association (“ABA”) Section of Dispute Resolution, Association of Conflict Resolution (“ACR”) and New Jersey Association of Professional Mediators (“NJAPM”).¹ Although there has been a need for some time to establish the rules of the game regarding actual confidentiality of communications made in “confidential” ADR proceedings, and although UMA imposes a state-sanctioned presumption of confidentiality attaching to mediation communications in subsequent court and agency proceedings, there is still much uncertainty as to: (1) the scope of UMA and similar state confidentiality statutes, (2) how and when the exceptions to this presumption of confidentiality will apply, and (3) the “chilling effect” that these confidentiality exceptions will have on the frank exchange of information that is so crucial to the alternative resolution of disputes in many areas of practice, including the environmental arena.

This paper seeks to address some of these issues in the context of environmental disputes on a state and federal level, although many of these confidentiality issues will similarly arise in connection with ADR proceedings in other practice areas. Section I provides an introduction and overview of the history and emergence of environmental ADR. Section II provides an overview of ADR programs developed and utilized by federal and state environmental agencies in New Jersey. Section III provides a brief

report of how courts across the country have ruled on the issue of the confidentiality of ADR communications in subsequent legal proceedings. Section IV provides an overview of New Jersey's Uniform Mediation Act ("UMA"), including: (A) enumerated confidentiality exceptions, (B) conflicts between UMA confidentiality provisions and federal disclosure requirements, and (C) conflicts between UMA states when subsequent proceedings occur in non-UMA states. Section V proposes arguments in favor of disclosure, while Section VI advances the case for confidentiality.

But first, before delving into confidentiality issues and conflicts of law, a brief background is provided to establish a framework within which to analyze confidentiality issues in the context of environmental ADR, including: (A) the history of environmental ADR, (B) types of environmental disputes and typical parties, and (C) types of ADR methods used in the environmental area.

A. *History and Emergence of Environmental ADR*

Prior to the 1960s, the American public perception was largely in favor of industry and land development, without much regard for environmental consequences.² Beginning in the 1960s, the winds had shifted and environmental concerns emerged as an increasingly salient issue for the general public.³ Environmental disputes began to grow in number, and ADR professionals appeared on the scene in the 1970s, with the first documented environmental mediation occurring in 1974.⁴ The continuing growth of environmental disputes since that time, including the significant increase in the number of multi-party and multi-district lawsuits filed in New Jersey and other states over the past few years, has led to an increase in the demand placed on limited judicial resources. Not surprisingly, this has led to an increased acceptance of and demand for alternative

means to litigation in resolving disputes in many practice areas, including the environmental area. The success of ADR as a method by which to resolve disputes quickly, cheaply and effectively has elevated its status from an “alternative” method to the method of “first choice” among governmental agencies and private corporations.⁵

B. *Types of Environmental Disputes and Parties*

Environmental issues include, *inter alia*, disputes regarding pollution of the natural environment, preservation of the natural environment, preservation of wildlife, land use controls, insurance, industry practices, and whether governmental agencies or legislatures overreach their constitutional authority in regulating environmental issues. In 2004, the most commonly litigated type of environmental dispute in New Jersey was with regard to land use, although significant cases were also decided regarding the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), insurance coverage, and whether the New Jersey Department of Environmental Protection (“NJ DEP”) violated the commerce clause by levying fees on solid waste transporters.⁶

Parties to environmental disputes may include private individuals, business entities, environmental interest groups, and governmental agencies. In 2004, very few environmental lawsuits were filed between private parties in New Jersey.⁷ Today, most environmental disputes occur between governmental agencies and regulated parties.⁸

C. *Types of ADR Methods Utilized to Resolve Environmental Conflicts*

Common methods of resolving disputes by means other than litigation include facilitation, mediation, arbitration, and med/arb.⁹ Facilitation is an assisted negotiation, less formal than mediation, where a neutral third party guides the disputants in a

controlled negotiation with emphasis directed at the parties' issues and ultimate goals.¹⁰

The facilitator has no authority to force a settlement.¹¹

Mediation is more formal than facilitation, but less so than an administrative hearing or court trial. In mediation, parties attempt to resolve their disputes via consensual agreement, with the mediator acting as a facilitator and/or evaluator.¹² Essentially, “[m]ediation is third party assistance with negotiation . . . [with the] goal [of] . . . help[ing] the conflicting parties reach a voluntary agreement.”¹³ The mediator has no authority to force a settlement between the parties, but the mediator can effectively intervene and assist in resolving the dispute by “modify[ing] the physical and social structure of the dispute, alter the issue structure of the dispute, and motivate the parties to move toward settlement.”¹⁴

Arbitration is “a process by which each party and/or its counsel presents its case to a neutral third party, who then renders a specific award.”¹⁵ Arbitration is generally more formal than mediation, but less so than a courtroom trial, and “is most often used when a set of rules already exists and the issue is how to interpret them.”¹⁶ Arbitration can be either binding or non-binding, depending on the forum and prior agreement of the parties, and “the third party [arbitrator] must be acceptable to both disputants.”¹⁷

Med/arb is a hybrid form of ADR, wherein “binding arbitration is imposed if the disputants fail to reach agreement through mediation.”¹⁸ Two advantages to med/arb are: (1) “the disputants may be motivated to reach agreement during mediation because of fear that they will [otherwise] lose control over the final outcomes,” and (2) “that a final settlement is always reached.”¹⁹

II. Environmental Agencies

Environmental agencies at the federal and state levels have adopted their own ADR procedures, having implemented their own facilitation and mediation programs, and endorsing arbitration as an alternative means to litigation.²⁰

A. *Environmental Protection Agency*

The federal agency that is responsible for creating, implementing and enforcing environmental regulations, rules and policies is the Environmental Protection Agency (“EPA”).²¹ This agency has created the Conflict Prevention and Resolution Center (hereinafter “CPRC”), which is responsible for EPA’s ADR policy and guidance.²² EPA states that it strongly supports the use of ADR in resolving environmental conflicts with outside parties, such as environmental advocacy groups, industry, and state agencies.²³ EPA states that the benefits to using ADR in resolving environmental conflicts include: (1) quicker resolution of issues, (2) more creative, long-term and satisfying resolutions, (3) reduced costs, (4) better relationships between the agency and regulated parties, and (5) increased support among regulated parties for EPA programs.²⁴

EPA has adopted the definition of ADR that is used in the Administrative Dispute Resolution Act of 1996 (“ADRA”), which is “any procedure that is used to resolve issues in controversy, including but not limited to, conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombuds, or any combination thereof.”²⁵ The enumerated ADR processes all require the involvement of a neutral third party who has no stake in the substantive outcome. Sometimes this “neutral” third party is an EPA employee, other times it will be someone from outside the agency.²⁶ However, some

question may arise as to the impartiality of an EPA employee serving as a “neutral” third party in a mediation where EPA is a disputant.

B. *New Jersey Department of Environmental Protection*

In New Jersey, the state agency that is responsible for creating, implementing and enforcing environmental regulations is the Department of Environmental Protection (“NJ DEP”).²⁷ The NJ DEP has created the Office of Dispute Resolution (“ODR”), which provides a forum for facilitation and/or mediation between the NJ DEP and affected parties.²⁸ ODR was created with the goals of avoiding lengthy, expensive proceedings in trial and administrative courts, and improving communication between the NJ DEP and the individuals or entities which are subject to its regulations.²⁹ An additional benefit to regulated parties is the opportunity to participate and have a voice in the regulatory process as it directly pertains to them,³⁰ which traditionally was not an option when dealing with administrative agencies.

The types of disputes that are commonly addressed by ODR include those pertaining to the issuance of and compliance with permits for water, air and land use, and the assessment of penalties.³¹ The types of disputes that cannot be resolved by ODR include disputes between private parties and challenges to NJ DEP policies, rules or regulations.³² ODR attempts to resolve disputes via facilitation and/or mediation.³³

In ODR facilitation, an informal meeting between the disputants is arranged, usually prior to the filing of a formal complaint.³⁴ ODR sets the structure for facilitated meetings to keep the parties focused on substantive issues and ultimate goals, in an effort to resolve the issue before the commencement of formal proceedings.³⁵

In mediation, ODR serves as an “impartial third party” to assist the disputants in resolving environmental matters outside of the administrative and judiciary courts.³⁶ Most of the mediations handled by ODR pertain to matters which have already been docketed and are already scheduled for an administrative hearing or trial.³⁷ However, a question could be raised as to how impartial an ODR mediator employed by NJ DEP really is when mediating a dispute where NJ DEP is a party.

Prior to ODR mediation, parties are required to sign an agreement that: (1) they will mediate in good faith, (2) agreements reached during mediation will be binding and will have the effect of a contract in any future actions, (3) parties “**will not** use any information obtained in the mediation in any subsequent proceedings,” and (4) parties “**will not** subpoena the mediator in any subsequent proceedings.”³⁸ However, there appear to be some internal inconsistencies in this agreement. The second provision of the agreement specifies that the mediation agreement will have the effect of a contract in future proceedings, but the third and fourth sections prohibit parties and mediators from disclosing confidential mediation information in subsequent proceedings, which is often necessary for a successful contract enforcement action. This dilemma has contributed to inconsistent and unpredictable rulings across the country regarding the admissibility of “confidential” ADR communications in subsequent litigation.

III. Courts have ruled inconsistently regarding ADR confidentiality

In recent years, state and federal courts have begun to subpoena mediation records, mediators and parties, compelling them to testify about “confidential” mediation communications in order to ascertain the intent of the parties and decide whether there existed the requisite elements necessary for a contract to be enforceable (*e.g.*, consent,

meeting of the minds, absence of mutual mistake).³⁹ In 2003, the 10th Circuit found “no violation of mediation confidentiality rules” in a settlement enforcement case “where the magistrate revealed settlement negotiations” during a party’s motion to reopen, finding that disclosure was necessary to determine whether to reopen the case.⁴⁰ In 2002, the Florida Court of Appeals refused to afford statutory confidentiality protection to mediation communications in a settlement enforcement proceeding alleging mutual mistake, when at trial the mediator testified as to a particular dollar amount being mentioned by a party during the mediation.⁴¹

In 2003, by far the most commonly litigated mediation issue across the country was the enforcement of mediated settlement agreements.⁴² In that same year, the third most commonly litigated mediation issue, out of seven categories, was breach of confidentiality.⁴³ Courts were literally and figuratively all over the map with their rulings on whether to allow the use of “confidential” mediation information in subsequent legal proceedings.⁴⁴ For example, in 2003, the Northern District of California ruled in favor of mediation confidentiality when it granted a party’s motion to strike an adversary’s brief, which referred to the party’s confidential mediation brief.⁴⁵ This ruling was consistent with applicable California law, which mandates that “no aspect of the mediation shall be relied upon or introduced as evidence in any . . . judicial . . . proceeding.”⁴⁶

By contrast, in 2002, the Hawaii Supreme Court ruled against mediation confidentiality when it overruled the Intermediate Court of Appeals decision directing trial courts to refrain from the existing practice of “seeking to discover during settlement conferences what occurred during the course of mandatory court-annexed arbitrations.”⁴⁷ In so holding, the Hawaii Supreme Court stated that the objectives of ADR and

settlement are “more readily fulfilled if trial courts – when acting as mediators – have knowledge of information regarding prior arbitration proceedings or previous settlement attempts.”⁴⁸

These conflicting opinions provide uncertainty as to whether “confidential” information provided in ADR proceedings such as facilitation, mediation or arbitration will be used in a subsequent legal proceeding.

IV. Uniform Mediation Act

This uncertainty has led the National Conference of Uniform State Laws (“NCUSL”) to develop and draft the Uniform Mediation Act (“UMA”), which purports to establish a uniform and predictable treatment of confidential mediation communications. On November 22, 2004, New Jersey became the third state to enact UMA,⁴⁹ which provides a uniform level of confidentiality to all applicable mediations, including those mediations required or referred by administrative agencies and courts.⁵⁰ At the time of this writing, six states had already passed their own versions of UMA, including Illinois, Nebraska, Ohio, Washington, and Iowa,⁵¹ while other states are considering similar bills.⁵² This paper will focus on the provisions of the New Jersey UMA.

Under UMA, with the exception of enumerated exemptions, a presumption of confidentiality attaches to the mediation and all communications pertaining to the mediation, including phone calls, correspondence and conversations outside of the mediation room.⁵³ This presumption of confidentiality generally precludes the neutral, the parties, and others from revealing any of the mediation communications in other proceedings, including subsequent lawsuits or arbitrations.⁵⁴ Prior to the passing of

UMA, the State of New Jersey provided no statutory confidentiality privilege for private mediations, and limited confidentiality for court-ordered mediations.⁵⁵

A. Confidentiality Exceptions

There are express exceptions and waiver provisions to UMA's confidentiality protections.⁵⁶ In subsequent criminal cases, or in contract enforcement proceedings pertaining to the mediation settlement agreement, the confidentiality provision may be set aside by the court if the need for this evidence "substantially outweighs" the interest in mediation confidentiality, and there is no alternative way for the court to obtain this evidence.⁵⁷ Additionally, UMA does not apply to proceedings arising out of disputes regarding collective bargaining agreements under the auspices of the New Jersey Public Employment Relations Commission ("PERC"), or to mediations "conducted by a judge who may make a ruling on the case."⁵⁸ UMA does not cover mediations conducted by primary or secondary schools where all of the parties are students, or to mediations conducted by juvenile detention facilities if all the parties are residents of that facility.⁵⁹

UMA's confidentiality protections do not apply when the parties have agreed in writing that a mediation, or certain parts of a mediation, shall not remain confidential.⁶⁰ Additionally, any person who "intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a [confidentiality] privilege."⁶¹ Other exceptions to confidentiality protection include mediation communications used in a subsequent complaint or malpractice claim filed against the mediator, a party or a non-party participant for conduct that occurred during the mediation, or threats to inflict bodily injury or to commit a future crime. Additional exceptions to confidentiality include

mediation communications pertaining to child abuse or neglect in a proceeding where the New Jersey Division of Youth and Family Services (“DYFS”) is a party, or communications made during a mediation session which is open to the public.⁶²

The criminal exception to the confidentiality protection provided by UMA impacts the integrity of environmental dispute mediation, since “[a]lmost every federal environmental statute imposes criminal liability. Congress has made virtually all ‘knowing’ and some ‘negligent’ violations of pollution control standards, limitations, permits, and licenses subject to criminal . . . sanctions.”⁶³ Most of these statutes fail to state thresholds which specify when a defendant’s conduct rises to the level of criminal activity, instead leaving such determinations to administrative enforcement officials.⁶⁴ This lack of clarity could lead to uncertainty and disagreement as to whether a party or participant in an environmental mediation will be afforded confidentiality protection in a related criminal proceeding.

B. *How Will New Jersey Courts Apply UMA?*

On July 28, 2005, the New Jersey Supreme Court endorsed UMA and applied its reasoning retroactively to the issue of mediation confidentiality in *State v. Williams*, a criminal case where the mediation in question occurred in New Jersey prior to the enactment of New Jersey’s UMA.⁶⁵ In *Williams*, prior to trial the defendant and victim had attempted to mediate a municipal court issue.⁶⁶ The mediation was not successful, and the defendant attempted to call the municipal mediator as a defense witness in his criminal trial.⁶⁷ The trial court precluded the mediator from testifying at trial, pursuant to N.J. Ct. R. 1:40-4(c), “which prohibits a mediator from testifying in any subsequent proceeding.”⁶⁸ The Appellate Division affirmed, and the New Jersey Supreme Court

affirmed, applying UMA principles rather than those of the N.J. Court Rule relied upon by the trial court, since UMA “is much more finely tuned and precise than [Rule] 1:40-4(c).”⁶⁹ The *Williams* Court held that the “Defendant’s need for the mediator’s testimony does not outweigh the interest in mediation confidentiality, and defendant has failed to show that the evidence was not otherwise available.”⁷⁰ Hence, the New Jersey Supreme Court has upheld and applied the reasoning and policies underlying UMA, and has provided further clarification and guidance to the lower courts regarding the treatment of mediation confidentiality.

C. Will Federal or State Law Govern?

Although UMA has a confidentiality exemption for information that is subject to disclosure by other law, there remains a question as to how it will interact with federal disclosure laws and regulations, such as the Freedom of Information Act (“FOIA”). There is some concern about the confidentiality of mediations conducted by governmental agencies such as EPA, since FOIA requires that federal agencies disclose certain agency records to the public.⁷¹ Non-parties to the mediation could obtain confidential mediation records under the guise of submitting a request for agency records.⁷² This disclosure requirement under FOIA could trump state mediation confidentiality provisions, such as those provided by UMA.⁷³

Another question arises as to whether federal courts will apply the state-sanctioned UMA. The Third Circuit did not even mention UMA in a recent decision which denied a party’s motion to enforce an oral agreement reached at mediation, because doing so “would compromise the confidentiality of the negotiations, require the settlement attorneys to become witnesses in appellate factfinding proceedings, and

substantially complicate the disposition of litigation.” Beazer East, Inc. v. The Mead Corp., Nos. 02-3727 and 4185 (3d. Cir. June 23, 2005) (quoting Herrnreitter v. Chicago Housing Auth., 281 F.3d 634, 637 (7th Cir. 2002)). Although the Beazer appeal originated in the Pennsylvania District Courts, the Third Circuit chose to follow the reasoning and policy considerations of another circuit regarding mediation confidentiality, rather than look to the provisions of UMA, which had already been passed in four states, including New Jersey, which is within the jurisdiction of the Third Circuit.⁷⁴

Federal courts already recognize a limited confidentiality rule under Federal Rule of Evidence (“FRE”) 408, which governs confidentiality of “compromise and offers to compromise.” FRE 408 precludes admission into evidence of offers or promises to accept “valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount,” for the purpose of proving “liability for or invalidity of the claim or its amount.” However, FRE 408 “does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.” The policy considerations underlying this rule are two-fold: (1) such evidence is not relevant, “since the offer may be motivated by a desire for peace rather than from any concession of weakness of position,” and (2) the “more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes.”⁷⁵ This rule provides protection for “evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself,” because without this protection “an inevitable effect is to

inhibit freedom of communication with respect to compromise, even among lawyers.” Id. If federal courts follow UMA, then mediation confidentiality will be much broader than the protection provided by FRE 408, which only precludes admission of mediation communications for the purpose of proving liability or the amount in dispute.

Federal Rule of Evidence (“FRE”) 501 adds another wrinkle to the question of whether state privilege laws such as UMA will hold muster in federal court. In pertinent part, FRE 501 states:

the privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the **privilege of a witness ... shall be determined in accordance with State law.**⁷⁶

Thus, if New Jersey state law controls under FRE 501, then the state UMA would govern the privilege of witnesses, and a mediator who is subsequently called as a witness in federal court could assert the state-sanctioned mediation privilege. However, if New Jersey state law does not control under FRE 501, which appears to be the case in federal criminal proceedings and some civil suits, then federal judges are free to determine whether a mediator who is called as a witness can assert a mediation privilege in accordance with the federal judge’s interpretation of common law, without regard to UMA.

The *Erie* doctrine addresses such choice of law matters, stating that federal courts shall apply the Federal Rules to “procedural” issues and state common law to “substantive” issues.⁷⁷ The test for whether an issue is “procedural” or “substantive” is whether the choice of law will be “outcome determinative” to the litigation.⁷⁸ Although the admission of a mediator’s testimony or mediation communication may seem at first to

be a procedural, evidentiary matter, the admission or preclusion of such evidence could be outcome determinative, and thus considered to be substantive. Hence, the *Erie* doctrine may provide support for UMA's confidentiality provisions in subsequent litigation in federal courts, if the admission of the mediation communication is deemed to be outcome determinative.

The interplay between confidentiality provisions in state laws such as UMA and disclosure requirements in federal environmental laws and regulations could raise constitutional questions as to the vertical separation of powers, and where the line should be drawn in policing the state-federal divide. The text and structure of the Supremacy Clause in Article VI clearly establishes that federal laws shall preempt conflicting state laws.⁷⁹ However, the U.S. Supreme Court can strike down a federal law if it violates the textual and structural provisions of the Tenth Amendment and vertical separation of powers by infringing on the traditional province of states' rights (e.g., police power to protect the "health, safety and welfare" of its citizens). Additionally, the Necessary and Proper Clause allows Congress to take all means necessary and proper to carry out its constitutional duties.⁸⁰ Historically, the Framers intended that these provisions be used to establish a national economy, free from imposition by the states.⁸¹ However, the environmental issues that would be created by the emergence of the industrial revolution, which would form the basis for our national economy, could not have been foreseen by the Framers. Thus, the Constitution is silent as to whether a state confidentiality statute such as UMA should trump federal disclosure requirements in the environmental context.

In general, the federal Department of Justice and EPA are both strongly opposed to state privilege and immunity laws, and have taken the position that they are not bound

by such laws in federal proceedings.⁸² In recent times, the U.S. Supreme Court has taken a conservative stance on some issues, leaning toward a renewed sense of states' rights and a stronger Tenth Amendment, as is evidenced by recent rulings where federal statutes criminalizing gun possession in school zones⁸³ and violence against women⁸⁴ based on Congress's Commerce Clause power were struck down as a violation of the state's police power to protect the "health, safety and welfare" of its citizens. One could argue that few issues are as salient to the "health, safety, and welfare" of Americans than those raised in environmental disputes, and thus the confidentiality of environmental ADR communications should fall under the state's police power, pursuant to the Tenth Amendment. However, since the days of the New Deal and President Roosevelt's "court-packing" proposal in the late 1930s, the Supreme Court has generally upheld the constitutionality of federal environmental regulation and disclosure requirements based on a broad reading of Congress's Commerce Clause power.⁸⁵

There are compelling public policy arguments as to why the federal government is better suited to handle environmental issues. It is more efficient and consistent than having each state define its own environmental agenda. Additionally, it prevents the states from engaging in a "race to the bottom," where environmental integrity would be compromised in order to attract polluting industries that could improve the local economy by creating more jobs, commerce, and tax revenue, albeit at the expense of clean air and water. Although the federal government may be better suited than the states to handle environmental regulation, it is debatable whether the federal government is better suited to determine whether state mediation confidentiality provisions should be trumped by federal disclosure requirements in subsequent environmental litigation.

D. *Which State Law Will Govern?*

Confidentiality issues could also arise when a mediation occurs in a state governed by UMA, such as New Jersey, and then the issue becomes the subject of subsequent court proceedings in another state which has not adopted UMA. In such a case, if the New Jersey mediator is called as a witness in the subsequent, out-of-state court proceeding, would the mediator be able to assert the New Jersey mediation confidentiality privilege? The text of New Jersey's UMA is silent on the issue of asserting its privileges in other jurisdictions, but rather makes a blanket statement that mediation communications shall not be admissible in any subsequent court proceedings.⁸⁶ However, it is questionable whether other states which do not recognize UMA will honor New Jersey's mediation confidentiality privilege when determining the admissibility of "confidential" mediation communications as evidence in subsequent, out-of-state court proceedings.

If another state adopts another version of UMA which provides a different level of confidentiality protection than that of the New Jersey version (as do some of the versions of UMA pending in various states⁸⁷), then which state's version of UMA will be followed in determining the admissibility of prior "confidential" communications from the New Jersey mediation in the subsequent, out-of-state court proceeding? The National Conference of Uniform State Laws ("NCUSL"), which developed the concept and original draft of UMA, is currently lobbying other states to adopt certain provisions to their versions of UMA, at least one of which New Jersey declined when it passed UMA.⁸⁸ Thus, it is not unreasonable to assume that some of these states may adopt or

not adopt NCUSL's recommended changes, which would create a situation where the Uniform Mediation Act would be less than "uniform."

V. The Case for Disclosure

There are compelling public policy arguments in favor of mandatory disclosure of mediation communications, especially when a party or neutral discovers during the course of mediation that one party is engaging in activity that could potentially harm the health, safety and welfare of innocent citizens.⁸⁹ An example is the Firestone tire case, where large numbers of people were getting into serious and fatal car accidents as a result of a manufacturer's defect, because the manufacturer continuously settled the onslaught of products liability lawsuits via confidential ADR.⁹⁰ If these cases had gone to court instead, then information about the defective tires would have become public record and would have been reported in the news.⁹¹ This would have armed consumers with the information necessary to protect themselves from additional highway deaths by simply changing their tires.⁹² In 2002, the federal Appeals Court in the Sixth Circuit upheld the tradition of public access to judicial proceedings and information, stating, "Democracies die behind closed doors."⁹³

One could easily imagine a similar circumstance arising in the environmental context, where a polluting defendant would quietly settle in a confidential ADR proceeding with plaintiffs who had been injured by the defendant's emission of toxic fumes or dumping of hazardous chemicals into the community's drinking water. Such a confidential settlement would keep the continuing danger secret from other citizens who are likely to be similarly harmed. In such a case, with innocent lives at stake, it could be argued that the interests of the community in obtaining disclosure of the information

relating to the pollution would outweigh the privacy interests of the parties in the ADR proceeding.

VI. The Case for Confidentiality

Despite the arguments in favor of disclosure, most ADR cases do not affect the health, safety and welfare of large numbers of people; thus the public is not harmed by the enforcement of confidentiality provisions in ADR proceedings.⁹⁴ There is a widely held opinion that in the majority of cases, the privacy interests of the mediation parties outweighs the public's right to information about settlements.⁹⁵ The privacy interests of the parties and the integrity of the mediation process becomes compromised when parties fear that frank disclosure of information, which is often necessary for successful resolution, will be made public.

There is also an adverse effect on professional mediators and other types of neutrals when courts order the disclosure of "confidential" mediation communications. Mediators are increasingly being sued by mediation parties, and a court order to disclose "confidential" mediation communications conflicts with the mediator's ethical obligations and representations of confidentiality to the parties.⁹⁶ In this regard, the passage of UMA is a step in the right direction, because now the rules of the game have been somewhat clarified, with UMA expressly stating that the mediator has a responsibility at the start of the mediation to explain to the parties how the exceptions to the presumption of confidentiality may affect subsequent litigation.⁹⁷

However, this increased risk of mediator malpractice, arising from the growing trend of parties suing their mediators and the uncertainty regarding the applicability of mediation confidentiality provisions, will likely drive up the cost of mediator malpractice

insurance. This increased risk and cost of doing business is likely to be passed on to the consumer. Thus, if this trend continues, in the future mediators may follow the path down which today's attorneys have already traveled, by becoming generally too expensive for the average person to hire. This could seriously undermine one of the most significant benefits of mediation, which is cost effectiveness.

VII. Conclusion

Although UMA and other state mediation confidentiality provisions are a step in the right direction, in that they clarify the rules of an ambiguous game, there are still many instances and avenues by which parties and nonparties can circumvent the confidentiality of mediation communications. While some guidelines provided by UMA are better than the previous alternative, which provided no statutory guidelines, there still remains uncertainty as to when and whether "confidential" mediation provisions are really confidential. Despite the policy arguments in favor of disclosure, the potential for loss of confidentiality protection in subsequent litigation, even in the presence of a properly executed confidentiality agreement, will most likely have a "chilling effect" on the frank exchange of information and accessibility to mediators by the average citizen that is so vital to the success of ADR proceedings in many areas of practice, including that of environmental disputes.

¹ Gregory Firestone, Ph.D., *Legislative Update: New Jersey Legislature Adopts the Uniform Mediation Act*, ACRESOLUTION, Winter 2005, at 10.

² LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 1 (Lawrence Susskind ed., Plenum Press 1987) (1984).

³ *Id.*

⁴ Gail Bingham, *The Environment in the Balance: Mediators Are Making a Difference*, ACRESOLUTION, Summer 2002, at 20, 21; J. Walton Blackburn & Willa Marie Bruce, *MEDIATING ENVIRONMENTAL CONFLICTS 1* (Blackburn & Bruce ed., Quorum Books 1995).

⁵ William N. Miller, *Commercial ADR: The WD-40 of the Global Economy*, ACRESOLUTION, Winter 2005, at 12.

⁶ Dennis J. Krumholz, *Environmental Year in Review: DEP Finds it Harder to Win Land Use Appeals*, N.J. LAWYER, Nov. 29, 2004, at 7.

⁷ *Id.*

⁸ *See id.*

⁹ N.J. Dep't of Env'tl. Prot., *Office of Dispute Resolution*, at <http://www.nj.gov/dep/adr> (last visited Nov. 25, 2005).

¹⁰ *Id.*

¹¹ *See id.*

¹² *Id.*

¹³ DEAN G. PRUITT & SUNG HEE KIM, *SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT* 232 (Rebecca Hope ed., 3d ed., McGraw-Hill 2004).

¹⁴ *Id.*

¹⁵ N.J. Ct. R. 1:40-2(a)(1) (2005).

¹⁶ PRUITT, *supra* note 13, at 246.

¹⁷ *Id.* at 245.

¹⁸ *Id.* at 247.

¹⁹ *Id.*

²⁰ N.J. Dep't of Env'tl. Prot., *supra* note 9.

²¹ U.S. Gov't., *U.S. Env'tl. Prot. Agency*, at <http://www.epa.gov/epahome/aboutepa.htm> (last visited Nov. 25, 2005).

²² *Id.* at http://www.epa.gov/adr/cprc_about.html.

²³ *Id.* at http://www.epa.gov/adr/cprc_adratepa.html.

²⁴ *Id.* at <http://www.epa.gov/adr/>.

²⁵ *Id.* at http://www.epa.gov/adr/cprc_adratepa.html.

²⁶ *Id.*

²⁷ N.J. Dep't of Env'tl. Prot., *supra* note 9.

²⁸ *Id.* at <http://www.nj.gov/dep/adr>.

²⁹ *Id.*

³⁰ *See id.* at <http://www.epa.gov/stakeholders/index.htm>.

³¹ *Id.* at <http://www.nj.gov/dep/adr>.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ James R. Coben, *Mediation Case Law Revue: Program Book*, A.B.A. SEC. DISPUTE RESOLUTION, RESOLUTION AND RESILIENCE IN N.Y. CONFERENCE (April 15-17, 2004).

⁴⁰ *Id.* at 5 (citing *Zhu v. Countrywide Realty Co., Inc.*, 66 Fed. Appx. 840, No. 02-3087, 2003 WL 21399026 (10th Cir. June 18, 2003), *cert.denied* 124 S. Ct. 1083 (Jan. 12, 2004)).

⁴¹ *Id.* at 7 (citing *Feldman v. Kritch*, 824 So.2d 274 (Fl. App. 2002)).

⁴² *Id.* at 1.

⁴³ *Id.* (other categories of mediation issues that were litigated in 2003 include: sanctions/attorney fees, whether to mediate, ethics/malpractice, arbitration-mediation connection, and miscellaneous).

⁴⁴ *See id.*

⁴⁵ *Id.* at 12 (citing *Johnson v. America Online, Inc.*, 280 F. Supp. 2d 1018 (N.D. Cal. 2003)).

⁴⁶ *Id.*

⁴⁷ *Id.* at 10 (quoting *Kamaunu v. Kaaea*, 57 P.3d 428 (Haw. 2002)).

⁴⁸ *Id.*

⁴⁹ Uniform Mediation Act, N.J.S.A. 2A:23C-1 (2004) (hereinafter "UMA"); Hanan M. Isaacs, *Strengthening Arbitration in New Jersey*, N.J. LAWYER, Dec. 27, 2004, at 7; Mary P. Gallagher, *Mediation Confidentiality, Privilege Are [sic] Codified Under New Statute*, N.J. L.J., Dec. 6, 2004, at <http://www.njlj.com>, at 1.

⁵⁰ *Id.*; MichaelAnn Knotts, *Confidentiality: New Rule for Mediation*, N.J. LAWYER, Nov. 29, 2004, at 4.

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- ⁵¹ Assoc. for Conflict Resolution (“ACR”) website, at <http://www.acrnet.org/uma/> (last updated May 18, 2005) (last visited Nov. 25, 2005).
- ⁵² Firestone, *supra* note 1.
- ⁵³ UMA, *supra* note 49; Knotts, *supra* note 50; Gallagher, *supra* note 49.
- ⁵⁴ *Id.*
- ⁵⁵ Gallagher, *supra* note 49.
- ⁵⁶ UMA, *supra* note 49.
- ⁵⁷ *Id.*
- ⁵⁸ *Id.*
- ⁵⁹ *Id.*
- ⁶⁰ *Id.*
- ⁶¹ *Id.*
- ⁶² *Id.*
- ⁶³ ROGER W. FINDLEY & DANIEL A. FARBER, ENVIRONMENTAL LAW 205 (West 2004) (1983).
- ⁶⁴ *Id.* at 205, 211.
- ⁶⁵ *State v. Williams*, 184 N.J. 432, 444-45 (2005).
- ⁶⁶ *Id.* at 436
- ⁶⁷ *Id.*
- ⁶⁸ *Id.*
- ⁶⁹ *Id.* at 444.
- ⁷⁰ *Id.* at 454 (emphasis added).
- ⁷¹ Mark H. Grunewald, *Freedom of Information and Confidentiality Under the Administrative Dispute Resolution Act*, 9 ADMIN. L.J. AM. U. 985, 985 (1996).
- ⁷² *Id.*
- ⁷³ *Id.*
- ⁷⁴ *See generally id.*
- ⁷⁵ FRE 408, Notes of Advisory Committee on Rules (2005).
- ⁷⁶ FED. R. EVID. 501 (emphasis added).
- ⁷⁷ Steven L. Emanuel, CIVIL PROCEDURE 226 (Aspen Publishers 2003).
- ⁷⁸ *Id.* at 229-30.
- ⁷⁹ U.S. CONST., art. VI.
- ⁸⁰ *Id.*
- ⁸¹ JONATHAN NEVILLE, CONSTITUTIONAL LAW 23 (Angel Murphy ed., BarBri Group 2003) (2002).
- ⁸² *Id.* at 213.
- ⁸³ *U.S. v. Lopez*, 514 U.S. 549 (1995).
- ⁸⁴ *U.S. v. Morrison*, 529 U.S. 598 (2000).
- ⁸⁵ *See* NEVILLE, *supra* note 81, at 29.
- ⁸⁶ UMA, *supra* note 49.
- ⁸⁷ Firestone, *supra* note 1.
- ⁸⁸ *Id.*
- ⁸⁹ Stephanie Brenowitz, *Deadly Secrecy: The Erosion of Public Information Under Private Justice*, 19 OHIO ST. J. ON DISP. RESOL. 679 (2004).
- ⁹⁰ *Id.*
- ⁹¹ *Id.*
- ⁹² *Id.*
- ⁹³ *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (upheld public access to deportation proceedings concerning suspected terrorists).
- ⁹⁴ Brenowitz, *supra* note 89, at 680.
- ⁹⁵ *Id.* at 690.
- ⁹⁶ *See* Coben, *supra* note 39.
- ⁹⁷ UMA, *supra* note 49.