

2004

## Confidentiality in Victim Offender Mediation: A False Promise

Mary Ellen Reimund

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

Mary Ellen Reimund, *Confidentiality in Victim Offender Mediation: A False Promise*, 2004 J. Disp. Resol. (2004)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2004/iss2/3>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# Confidentiality in Victim Offender Mediation: A False Promise?

Mary Ellen Reimund\*

## I. INTRODUCTION

Mediators often promise to keep everything that is said during mediation confidential. The promise of confidentiality seems straightforward<sup>1</sup> but presents a trap for the unwary, especially in victim offender mediation. Repeating the promise of confidentiality during mediation gives mediators and parties a sense of security about their conversations, but unfortunately the promise does not yield an impermeable shield of confidentiality. Victim offender mediation (VOM) programs rely on the assurance of confidentiality as a vital part of providing a safe space for dialogue. Yet, the unsettled state of confidentiality in mediation should be of grave concern to the hundreds of restorative justice programs mediating criminal cases between victims and offenders.<sup>2</sup>

What secures the promise of confidentiality when a mediator faces the following hypothetical? A volunteer mediator is facilitating a victim offender case involving a burglary. In preparation for the meeting, she tells the victim and offender that mediation is a confidential process and everything said in the room will stay in the room. The mediator re-iterates the promise of confidentiality during the opening ground rules of the mediation. Through the course of the mediation, the offender explains why he broke into the victim's home. During his rendition of the events, he tells how he also committed several other burglaries the same night. The heart-felt honesty of the offender is well received by the victim who is relieved to know the details regarding why they were victimized. An agreement is worked out for the payment of restitution by the offender, and the parties are satisfied.

Several months later, the mediator receives a subpoena from the county prosecutor requiring her testimony in a criminal trial where the offender from her mediation has been charged with other burglaries. When a volunteer mediator comes to the director of the VOM program clutching the subpoena, how does the

---

\* Mary Ellen Reimund is Assistant Professor and Director of Law and Justice at Central Washington University-SeaTac. LL.M., University of Missouri-Columbia 2000; J.D. and M.A., Drake University 1987; B.S., Bowling Green State University 1978. The author wishes to thank Bobbi McAdoo and Jean Sternlight for their comments in the formulation of the paper. Anne Joiner for her editorial expertise and CWU-SeaTac Law and Justice student Christine Henderson for her preparation assistance.

1. Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. DISP. RESOL. 1, 9 (mediators regularly require promises from those present to keep the mediation discussion confidential and assure the participants that the proceedings are confidential even though there is uncertainty as to legal protection).

2. See Mark Umbreit & Jean Greenwood, *National Survey of Victim Offender Mediation Programs in the United States*, 16 MEDIATION Q. 235 (1999).

program respond? Is there something to support the mediator's promise of confidentiality to the parties—or is it a false promise?

Both restorative justice victim offender mediators and civil mediators share uncertainty about confidentiality. One civil mediation commentator has gone so far as to describe the law regarding confidentiality in mediation as “a mess.”<sup>3</sup> The situation in VOM is not any better, and could be worse. A critic of restorative justice says, “The confidentiality of mediation is generally a controversial issue, and absent a clear statutory privilege protecting the mediation, considerable information may become available to people and institutions outside mediation.”<sup>4</sup>

Working out confidentiality conflicts in VOM is of the utmost importance in light of increasing usage of this well known and effective means of resolving criminal conflicts; a process supported by restorative justice philosophy that focuses on the needs of victims and allows offenders to repair harms caused to victims and communities.<sup>5</sup> It would be tragic for the momentum of restorative justice VOM to be diminished because the limitations on confidentiality are not clearly understood by the parties. This is especially critical as more serious cases are undertaken by VOM programs, and as lawyers evaluate whether clients can participate in VOM without jeopardizing the offenders constitutional rights.<sup>6</sup>

The answer is not to “yearn for paradise, live in limbo,”<sup>7</sup> by operating a VOM program under the blind faith assumption that there will be total confidentiality.<sup>8</sup> The better practice, in order to maintain a viable victim offender program with restorative justice goals, is to consider and answer the following questions before a crisis—like the crisis in the hypothetical—emerges.

- Is there statutory authority providing confidentiality for mediation?<sup>9</sup>

3. Phillip J. Harter, *The Uniform Mediation Act: An Essential Framework for Self-Determination*, 22 N. ILL. U. L. REV. 251, 251 (2002).

4. Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1288 (1994).

5. Alyssa H. Shenk, Note, *Victim-Offender Mediation: The Road to Repairing Hate Crime Injustice*, 17 OHIO ST. J. ON DISP. RESOL. 185, 186 (2001). Studies show that there is a high level of satisfaction with victim offender mediation and finds that victims are more likely to be satisfied with the way that criminal justice has dealt with their cases than those who went through the regular court process. Mark S. Umbreit et al., *The Impact of Victim-Offender Mediation: Two Decades of Research*, 65 FED. PROBATION 29, 31 (2001).

6. See generally Mary Ellen Reimund, *Is Restorative Justice on a Collision Course with the Constitution?*, 3 APPALACHIAN J.L. 1 (2004) [hereinafter Reimund, *Collision Course*] (for more regarding the constitutional implications of restorative justice); Ilyssa Wellikoff, Note, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO ONLINE J. CONFLICT RESOL. 2 (2004) (regarding victim offender mediation and more serious cases). See also Restore, a program that is using a restorative justice model for sexual assault cases, at <http://restoreprogram.publichealth.arizona.edu/Default.htm> (last visited Aug. 9, 2004).

7. David Sally, *Yearn for Paradise, Live in Limbo: Optimal Frustration for ADR*, 108 DICK. L. REV. 89 (2003).

8. At an international victim offender mediation conference presentation with about fifty participants, given a similar hypothetical as is presented at the beginning of this paper, a poll of the group revealed some programs had specific policies regarding confidentiality but many are operating on the assumption that confidentiality protections are absolute. See Kathleen Bird & Mary Ellen Reimund, *RJ Dialogue Processes - Are They Confidential? Erosion of Confidentiality in Some Jurisdictions is Cause for Careful Evaluation*, VOMA Connections, Autumn 2001, at 1, available at <http://voma.org/docs/connect9.pdf>.

9. *Id.*

- If so, does the statute cover VOM?<sup>10</sup>
- Are there relevant court cases that provide guidance on matters of mediation confidentiality?
- What impact will the Uniform Mediation Act<sup>11</sup> have?

The intent of the article is to provide the framework by which victim offender programs can delve into the complexities of mediation confidentiality and avert potential disaster. First, a foundation is needed to explain the philosophical goals of restorative justice, the VOM process, and mediation as it relates to restorative justice. With that background, areas that are likely to spark confidentiality concerns will be discussed as will exemplary confidentiality statutes, cases, and the Uniform Mediation Act. By carving a path of awareness through this previously unexplored topic as it relates to VOM, there will be less likelihood of false promises about confidentiality being made to the detriment of VOM programs.

## II. RESTORATIVE JUSTICE AND VICTIM OFFENDER MEDIATION

### A. *Restorative Justice*

In the eleventh century, the focus of crime changed from being a conflict between the victim and the offender, to a violation of the king's peace.<sup>12</sup> Crimes were no longer against individuals in the community but rather a violation against the king, thus giving the crown jurisdiction. Our current criminal justice system evolved from that legal model with crimes viewed as violations against the state rather than against the individual victim; a retributive view where crime is defined by lawbreaking and guilt. As a result, victims, offenders, and community members do not feel that the justice provided by the criminal justice system meets their needs.<sup>13</sup> Their frustration is mirrored by judges, lawyers, prosecutors, and probation and parole officers.<sup>14</sup>

Restorative justice is an effort to fulfill those needs. Defining restorative justice is not an easy task.<sup>15</sup> The definitions we use are based on "our personal experience, our culture and worldviews, the audience to whom we are speaking, our experiences as practitioners or academics, our understanding of victimization and offending, our experiences with a particular application . . ."<sup>16</sup> The grandfather of the restorative justice movement, Howard Zehr, uses this working definition: "Restorative justice is a process to involve, to the extent possible, those who have

---

10. *Id.* at 10.

11. Unif. Mediation Act (2003) (National Conference of Commissioners on Uniform State Laws), available at <http://www.law.upenn.edu/bll/ulc/mediat/2003finaldraft.htm>.

12. MARK S. UMBREIT, VICTIM MEETS OFFENDER: THE IMPACT OF RESTORATIVE JUSTICE AND MEDIATION 1 (1994); DANIEL VAN NESS & KAREN HEETDERKS STRONG, RESTORING JUSTICE 135 (1997).

13. HOWARD ZEHR, THE LITTLE BOOK OF RESTORATIVE JUSTICE 3 (2002).

14. *Id.*

15. This was an assessment made after a two-day symposium that brought together academics, lawyers and restorative justice visionaries and practitioners to discuss restorative justice, mediation and the law. James Coben & Penelope Harley, *Intentional Conversations About Restorative Justice, Mediation and the Practice of Law*, 25 HAMLINE J. PUB. L. & POL'Y 235, 239 (2004).

16. Howard Zehr & Barb Toews, *Principles and Concepts of Restorative Justice*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 1 (Howard Zehr & Barb Toews eds., 2004).

a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”<sup>17</sup> The goals of restorative justice are to put key decisions into the hands of those most affected by crime, make justice more healing—ideally more transformative—and reduce the likelihood of future offenses.<sup>18</sup> There are a wide range of restoratives practices that seek to achieve those goals.<sup>19</sup> One of the most dominant of the models is VOM.<sup>20</sup>

### *B. Victim Offender Mediation*<sup>21</sup>

As one of the first restorative justice initiatives in the United States during the 1970s and 1980s,<sup>22</sup> VOM is one of the most widely used restorative justice practices with more than 300 programs in this country.<sup>23</sup> Victim offender mediation, under the direction of a trained mediator, gives the victim an opportunity to meet the offender and discuss how the crime has affected his life, express concerns and feelings, and work out a restitution agreement.<sup>24</sup> The process supports healing by providing a safe environment where “the victim is able to tell the offender about the crime’s physical, emotional, and financial impact and to receive answers to lingering questions about the crime and the offender.”<sup>25</sup> During the mediation, the offender learns how the crime has affected the victim and has the opportunity to take responsibility for his behavior.<sup>26</sup>

Cases get into victim offender processes through a variety of ways. In some programs, cases are referred to VOM as a diversion from prosecution.<sup>27</sup> Others are referred after a formal admission of guilt has been accepted by the court, with mediation being a condition of probation.<sup>28</sup> More VOM programs work with

17. ZEHR, *supra* note 13, at 37.

18. SUSAN SHARP, *RESTORATIVE JUSTICE: A VISION FOR HEALING AND CHANGE* (1998).

19. Coben & Harley, *supra* note 15, at 240. “Restorative justice practices can include offering restitution, writing apology letters, doing community service and the use of victim impact panels or community reparation boards.” *Id.*

20. The other practices are family group conferencing and circles. See Leena Kurki, *Restorative and Community Justice in the United States*, 27 *CRIME & JUST.* 235 (2000); Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, *Juvenile Justice Bulletin* (United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Wash. D.C.), Feb. 2001; KAY PRANIS ET AL., *PEACEMAKING CIRCLES: FROM CRIME TO COMMUNITY*; SUSAN SHARP, *BEYOND THE COMFORT ZONE: A GUIDE TO THE PRACTICE OF COMMUNITY CONFERENCING* (2003).

21. Also called victim offender reconciliation program (VORP), victim offender conference, victim offender dialogue, victim offender meeting.

22. Kurki, *supra* note 20, at 266.

23. Umbreit & Greenwood, *supra* note 2, at 235.

24. The parts of a meeting are: (1) Introductory opening statement by mediator; (2) Storytelling by victim and offender; (3) Clarification of facts and sharing of feelings; (4) Reviewing victim losses and options for compensation; (5) Developing a written restitution agreement; and (6) Closing Statement by mediator. MARK UMBREIT, *MEDIATING INTERPERSONAL CONFLICTS: A PATHWAY TO PEACE* 143 (1995).

25. U.S. DEP’T OF JUSTICE, *RESTORATIVE JUSTICE FACT SHEET 1*, 11 (1997), available at <http://2ssw.che.umn.edu/rjp/Resources/Documents/USDoJ97A.pdf> (last visited Aug. 7, 2004).

26. *Id.*

27. Umbreit & Greenwood, *supra* note 2, at 240.

28. See *id.*

juveniles than adults.<sup>29</sup> The majority of cases handled in VOM programs in the United States are misdemeanors,<sup>30</sup> as opposed to other countries where VOM is used for more serious crimes.<sup>31</sup> As restorative justice has gained acceptance, more programs in the United States are handling serious and violent crimes.<sup>32</sup>

### C. What's in a Name? Is Victim Offender Mediation Really Mediation?<sup>33</sup>

The first victim offender programs were called victim offender reconciliation programs (VORP). In the early 1990s when the American Bar Association (ABA) was considering an endorsement of VORPs,<sup>34</sup> a victims' caucus objected because the term reconciliation "seemed to diminish the legitimate anger that most crime victims experience" and suggested that victims were expected to forgive the offender.<sup>35</sup> To meet those objections, the term VOM was used because it focuses on the process rather than the outcome.<sup>36</sup> The debate continued with the victims' caucus only supporting the ABA's resolution if the terminology "VOM and dialogue" was used to distinguish it from settlement driven civil court mediation.<sup>37</sup>

This conversation continues today in the VOM field. In one of his more recent books, Howard Zehr asserts that restorative justice is not mediation.<sup>38</sup> Although the term mediation was adopted early in the restorative justice field, it is increasingly being replaced with terms such as "conferencing" or "dialogue."<sup>39</sup> "Like mediation programs, many restorative justice programs are designed around the possibility of a facilitated meeting or an encounter between victims, offenders and perhaps community members."<sup>40</sup> However, in conflicts such as divorce or custody cases, community disputes, commercial disputes and other civil court conflicts, the parties are considered disputants and the assumption is that "both are contributing to the conflict and . . . must compromise to reach a settlement."<sup>41</sup>

Shared blame may be appropriate in some criminal cases, but frequently it is not appropriate. One of the parties has committed a criminal offense and admitted doing so, while the other has been victimized.<sup>42</sup> Consequently, guilt or innocence is not mediated nor is there an expectation that crime victims need to compromise.<sup>43</sup> Victims are not expected to give something up in order to resolve the

29. *Id.* at 239.

30. The three most commonly referred offenses are vandalism, minor assaults, and theft. *Id.* But, there are an increasing number of victims of serious crimes who are interested in meeting with the offender, most often an inmate in a correctional facility. MARK S. UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH* 255 (2001). [hereinafter UMBREIT, HANDBOOK]

31. Kurki, *supra* note 20, at 269.

32. *See generally* Wellikoff, *supra* note 6, at 2.

33. *See* Coben & Harley, *supra* note 15, at 248-263 (for a detailed look at the history of mediation, institutionalization of mediation and how it relates to justice).

34. *See* discussion *infra* Part III.D.

35. Umbreit & Greenwood, *supra* note 2, at 236.

36. *Id.*

37. *Id.*

38. ZEHR, *supra* note 13, at 8-9.

39. *Id.* at 9.

40. *Id.* at 8.

41. UMBREIT, HANDBOOK, *supra* note 30, at xl.

42. *Id.*

43. *Id.*

conflict. While many types of mediation are settlement driven, VOM differs because it is primarily dialogue driven with emphasis upon "victim healing, offender accountability, and restoration of losses."<sup>44</sup> Although most VOM sessions result in a signed restitution agreement, that is secondary to the importance of the parties having the opportunity to talk and address the emotional and informational needs of victims.<sup>45</sup>

What victim offender programs are called could be a factor in evaluating confidentiality statutes and determining whether they apply to restorative processes. Since most confidentiality statutes do not specifically include VOM, a determination of whether they would receive protection under those provisions could turn on the terminology used to describe the program. Whether the terminology actually describes the process could be a factor too, as will be discussed below regarding a Texas Attorney General Opinion.<sup>46</sup> Although criticized as being wrong, this opinion defined VOM as a therapeutic and emotional way to cope with the crime rather than the resolution of a civil or criminal dispute.<sup>47</sup>

When traversing the uncharted course of VOM confidentiality, all of these factors need to be considered. Terminology and process are areas that are ripe for exploration by those who will be deciding challenges about whether discussions in VOM are really confidential or if the conversations can be revealed outside the sacred dialogue space.

### III. CONFIDENTIALITY FOR VICTIM OFFENDER MEDIATION PROGRAMS

Confidentiality is a critical component of VOM. Without that protection, it is unlikely that meaningful discussion will take place between the offender and the victim. Of even greater concern in mediating criminal cases, is the risk an offender takes if confidentiality cannot be guaranteed and whether the defense bar will buy into restorative processes with that issue unsettled.<sup>48</sup>

Should mediators in victim offender meetings warn participants that except for information about the instant case, any admissions about past crimes and any future threats of crimes might not be held in confidence? Self-incrimination may be a factor if such information is revealed in a meeting. A criminally accused person's constitutional rights may be jeopardized if he is directed to mediation by the court, not given any warning about rights against self-incrimination, and then the court uses evidence of admissions made during the mediation.<sup>49</sup>

"Due process protections may be required during the mediation process if . . . mediation is used as a tool of the state or if the offender could be subjected to further legal sanction."<sup>50</sup> The "loss of evidence to the justice system must be weighed against the benefit of a broad-based mediation privilege."<sup>51</sup>

44. *Id.*

45. *Id.*

46. See discussion *infra* Part III.D.1.

47. Tex. Att'y Gen. Op. No. 659 (Aug. 5, 1999).

48. Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571, 620 (2004).

49. See Kirtley, *supra* note 1, at 45.

50. Deborah Gartzke Goolsby, Note, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183, 1209 (1990).

51. Kirtley, *supra* note 1, at 43. See generally Reimund, *Collision Course*, *supra* note 6.

Another tenet to this discussion is the continuing tension between providing protective guidelines without sacrificing the restorative principles by bureaucratizing VOM in the criminal justice system.<sup>52</sup> Trying to use traditional legal tools can be complicated for restorative processes since “[t]he legal safeguards which are contained in the traditional penal system cannot simply be transposed [to restorative justice].”<sup>53</sup>

In mediating criminal cases, the scenarios for confidentiality concerns that would be more likely to occur in VOM may be ranked differently than for civil mediation. The hypothetical at the beginning of the paper addresses one of the primary concerns—prior crimes. Two other concerns are future crimes and child/vulnerable adult abuses.

### *A. Prior Crimes*

Because a victim offender meeting process encourages offenders to openly discuss their version of the criminal offense being mediated, admissions of prior wrongdoing beyond the current crime may be revealed as part of the story telling or as a result of the offender’s desire to “come clean.” Once the offender discloses that information, what is the obligation of the mediator to report it? One author has suggested that public policy in favor of enforcement of criminal laws should prevail over the privacy interest in mediation.<sup>54</sup> “If a party discloses past criminal activity in a mediation, the statements should not be privileged.”<sup>55</sup> Other literature provides a contrary view, arguing that “[a]dmissions of past criminal activity made during mediation should not be excepted from the [mediation] privilege” because otherwise it would eliminate programs from mediating criminal cases and stifle mediation in other types of disputes.<sup>56</sup> There are two potential conflicts presented in the prior crimes debate. One deals with the obligation of the mediator to proactively disclose the information in the instant case, and the other has to do with the mediation communications being sought for subsequent prosecution as described in the hypothetical.

### *B. Future Crimes*

Is a mediator obligated to disclose information coming out of mediation when there are threats of crime? Most codes of ethics for doctors, attorneys, psychologists and other professions allow for confidentiality to be breached if the professional reasonably believes that severe physical injury or death may occur.<sup>57</sup> Imminent threats of physical harm should not be protected and should be reported to

---

52. Kurki, *supra* note 20, at 265. There is skepticism that restorative justice goals can be adopted into the bureaucratic criminal justice agencies where there are contradictory values. *Id.*

53. Lode Walgrave, *Restorative Justice and the Law: Socio-ethical and Juridical Foundations for A Systemic Approach*, in *RESTORATIVE JUSTICE AND THE LAW* 191, 216 (Lode Walgrave ed., 2002).

54. Peter N. Thompson, *Confidentiality, Competency and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota*, 18 *HAMLIN J. PUB. L. & POL’Y* 329, 365 (1997).

55. *Id.*

56. Kirtley, *supra* note 1, at 45.

57. Dennis Sharp, *The Many Faces of Mediation Confidentiality*, 53 *DISP. RESOL. J.* 56, 61 (1998).



appropriate authorities.<sup>58</sup> The landmark case of *Tarasoff v. Regents of the University of California*<sup>59</sup> is the precedent when confidentiality is in conflict with the duty to warn third parties. Currently, the duty to warn has not been specifically imposed on mediators, although the analogy seems to be strong enough to support a parallel duty to that of therapists and counselors.<sup>60</sup> Yet mediator codes of ethics have not made it clear “whether the mediator has an ethical duty to warn of a party’s intent to commit a crime.”<sup>61</sup>

A distinction to be made with future crimes is whether all crimes should be treated equally. Should warnings and non-confidential status attach to imminent threats of serious crime or death only with less serious property crimes still being protected?

### C. Child or Vulnerable Adult Abuses

Since many VOM programs work with juveniles,<sup>62</sup> through the course of discussing why an offender has committed a crime, information may come forward about abusive living environments. The duty to report cases of child abuse is derived from a legal requirement in force in all fifty states.<sup>63</sup> Even though there are laws nationwide requiring that child and vulnerable adult abuse be reported, there is some unsettled law as to who fits within the definition of mandatory reporters. Generally, the list of professionals who must report abuse includes “physicians, nurses, social workers, psychologists, chiropractors, public officials, law enforcement personnel, attorneys, clergy and dentists,”<sup>64</sup> but some statutes include anyone.<sup>65</sup>

In some instances mediators are allowed to report evidence of child abuse but are not required to disclose it—and even mandatory reporters are not obligated to disclose child abuse when serving as mediators.<sup>66</sup> Because of the variability from state to state, victim offender programs need to be aware of the law in their jurisdiction and square the legal statutory mediation requirements with other profes-

58. Thompson, *supra* note 54, at 365.

59. 551 P.2d 334 (1976). In *Tarasoff*, Poddar was a patient who told his therapist during psychotherapy that he would kill an unnamed, but identifiable woman. *Id.* at 339-40. The therapist informed campus police, who then took Poddar into custody, but he was released without any warning to the potential victim, Tarasoff. *Id.* Poddar ended therapy and killed Tarasoff two months after making the threat. *Id.* The *Tarasoff* court held that psychotherapists are required to disclose information needed to protect the public from violent patients, even though confidentiality is breached. *Id.*

60. Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25, 50.

61. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* § 9.31 (2001).

62. Umbreit & Greenwood, *supra* note 2, at 239.

63. Caroline T. Trost, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183, 194 (1998); Gibson, *supra* note 60, at 51-52.

64. *Id.*

65. See KY. REV. STAT. ANN. § 620.030(1) (Michie 2004). This statute requires that any person who knows or has reasonable cause to believe that a child is abused or neglected shall immediately report to law enforcement. *Id.*

66. Maria R. Volpe, *Promises and Challenges: ADR in the Criminal Justice System*, 7 DISP. RESOL. MAG. 4, 6 (2000). See N.Y. Att’y Gen. Op. No. 44 (1983). See generally Fran L. Tetunic, *Florida Mediation Case Law: Two Decades of Maturation*, 2 NOVA L. REV. 87, 95-96 (2003) (for analysis of the mandatory reporting statute in Florida versus ethical obligations to keep everything confidential during mediation).

sional ethical requirements so that parties can be apprised of confidentiality limitations.

Now that some of the most likely areas of confidentiality conflict have been discussed as they relate to VOM, it is critical to identify whether there are statutes or cases that provide guidance on how to deal with them.

#### D. Statutory Privilege Protections<sup>67</sup>

Mediation confidentiality can be provided by various theories including contract<sup>68</sup> and evidence.<sup>69</sup> Both have shortcomings,<sup>70</sup> supporting the notion that the preferred way to protect confidentiality is through mediation privilege statutes.

There is limited statutory authority that provides guidelines for VOM programming, much less discussing confidentiality for the programs. A recent review of state statutes on this topic revealed that twenty-nine states have VOM or VOM-type statutory authority with only nine of those making any mention of confidentiality.<sup>71</sup>

In 1994, the ABA passed a resolution urging federal, state, and local governments to incorporate publicly operated VOM/dialogue programs into their criminal justice processes.<sup>72</sup> Along with that resolution a list of thirteen program requirements was created. One resolution created by the ABA deals with confidentiality in VOM and states that:<sup>73</sup> "The statements made by victims and offenders and documents and other materials produced during the mediation/dialogue process are inadmissible in criminal or civil court proceedings."<sup>74</sup> If the suggested requirement on confidentiality had been statutorily enacted nationwide, there would be no question that anything said during VOM could not be used in a sub-

---

67. The scope of this paper is not to do a detailed analysis of all of the statutory confidentiality provisions that might be available to protect victim offender mediation but rather to focus on examples of statutes that apply directly to victim offender mediation that could guide a programmatic assessment.

68. It is not uncommon for mediation participants to enter into agreements holding mediation communication confidential. Kirtley, *supra* note 1, at 10.

69. Evidence of compromise negotiations are excluded by Federal Rule of Evidence 408, a rule that has been adopted by most states. FED. R. EVID. 408.

70. Confidentiality agreements alone, without the legislative support of mediation privilege are "ill advised." Kirtley, *supra* note 1, at 11. Agreements to suppress evidence have been rejected by courts as being against public policy. Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, 731-732 (1997). Rule 408 does not exclude evidence from negotiation if it is used for "another purpose." FED. R. EVID. 408. See also Kirtley, *supra* note 1, at 13. "Since mediation discussions tend to be free flowing and often unguarded, revelations later serving as impeachment, bias or 'another purpose' evidence are likely." *Id.* There is also a question as to the applicability of the rule in VOM because, in many cases, the offender has already pled guilty to the crime and the mediation is post adjudication which would not fit within the settlement negotiation definition of the rule.

71. Mark S. Umbreit et al., *Legislative Statutes on Victim Offender Mediation: A National Review*, VOMA Connections, Fall 2003, at 5, 9, available at <http://voma.org/docs/connect15.pdf> (last visited Aug. 8, 2004). The VOM state statutes with some mention of confidentiality are Delaware, Illinois, Louisiana, Maine, Nebraska, New York, Oklahoma, Tennessee and Texas. *Id.* at 8.

72. American Bar Association, *Victim/Offender Mediation/Dialogue Program Requirements*, (Aug. 1994), available at <http://www.abanet.org/crimjust/victd.html> (last visited Sept. 23, 2004).

73. *Id.*

74. *Id.*

sequent prosecution. An effort by the prosecutor to subpoena the mediator to secure evidence of other crimes committed by the offender would be quashed without question. There would be a clear guide for victim offender mediators. Unfortunately, that is not the case.

### 1. *Specific VOM Confidentiality Statutes*

Delaware<sup>75</sup> and Tennessee<sup>76</sup> both have statutes under their VOM chapters that afford some of the protections recommended by the ABA. The Tennessee statute states:

All memoranda, work notes or products, or case files of centers established under this chapter are confidential and privileged and are not subject to disclosure in any judicial or administrative proceeding unless the court or administrative tribunal determines that the materials were submitted by a participant to the center for the purpose of avoiding discovery of the material in a subsequent proceeding. Any communication relating to the subject matter of the resolution made during the resolution process by any participant, mediator, or any other person is a privileged communication and is not subject to disclosure in any judicial or administrative proceeding unless all parties to the communication waive the privilege. The foregoing privilege and limitation on evidentiary use does not apply to any communication of a threat that injury or damage may be inflicted on any person or on the property of a party to the dispute, to the extent the communication may be relevant evidence in a criminal matter.<sup>77</sup>

Reviewing the Delaware and Tennessee statutes makes clear they do not protect against disclosure of "any communication of a threat that injury or damage may be inflicted on any person or on the property of a party to the dispute"<sup>78</sup> if the information is relevant evidence in a criminal matter. Prior crimes are not an exception to confidentiality, according to these statutes, and would appear to protect the mediator in the hypothetical from having to reveal the offender's admissions of prior crimes made during the mediation.

When reading mediation statutes in victim offender programming it is critical to be aware of what is protected under the statute. In looking at these statutes, memos, notes and case files are protected as is any communication relating to the subject matter of the mediation made during the resolution process made by the participants, mediators or any other participants.

When does the protection begin? What is unclear about these statutes is the meaning of "during the resolution process." Does this cover conversations with

75. DEL. CODE ANN. tit. 11, § 9503 (2001).

76. TENN. CODE ANN. § 16-20-103 (2004). See Susan C. Taylor, *Victim-Offender Reconciliation Program—A New Paradigm Toward Justice*, 26 U. MEM. L. REV. 1187 (1996) (for specific information about the VORP Programs in Tennessee).

77. TENN. CODE ANN. § 16-20-103 (2004).

78. *Id.* The Delaware statute has nearly identical language to the Tennessee statute, except for the additional line at the end of the section which states: "Nothing in this section shall prevent the Victim-Offender Mediation Committee from obtaining access to any information it deems necessary to administer this chapter." DEL. CODE ANN. tit. 11, § 9503 (2001).

the victim and offender that took place in preparation for the mediation? In VOM, most programs meet individually with the participants to discuss the program and assess whether it is appropriate to proceed with this process,<sup>79</sup> so the scope of confidentiality coverage is important. Many statutes—like those found in Delaware and Tennessee—could fall prey to a narrow interpretation because the definition of “resolution process” is not more specific.<sup>80</sup>

The Delaware and Tennessee statutes are more thorough than some because the confidentiality privilege covers communications by the participants, mediator and “any other person.” There is variability among state confidentiality statutes regarding who is covered by the privilege since some statutes only cover parties or mediators or both but then leave others who may be present at the mediation free to disclose or open to subpoena.<sup>81</sup>

When reading mediation statutes it is also critical to be aware of who holds the privilege once it is given in the statute.<sup>82</sup> These statutes are silent as to who holds the privilege.<sup>83</sup> Other statutes vary with parties being holders, mediators being holders and with joint holders.<sup>84</sup>

A third state statute that specifically covers VOM confidentiality is section 154.073 of the Texas Civil Practice and Remedies Code. The Texas statute states:

(a) Except as provided by subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

....

(g) This section applies to a victim-offender mediation by the Texas Department of Criminal Justice as described in Article 56.13, Code of Criminal Procedure.<sup>85</sup>

79. See generally UMBREIT, HANDBOOK, *supra* note 30, at 37-40.

80. Kirtley, *supra* note 1, at 25; Umbreit & Greenwood, *supra* note 2, at 239 (for a more detailed discussion on this issue and related state statutes).

81. See Kirtley, *supra* note 1, at 26-27.

82. See *id.* at 30-34.

83. *Id.*

84. *Id.*

85. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (1997 & Vol. 4 Supp. 2004-05).

The Texas statute has been touted as one of the broadest provisions in the country, but there are conflicting opinions as to whether a broad confidentiality provision does not also come with coverage gaps.<sup>86</sup> The exceptions not warranting confidentiality protection deal with communications and materials independently discoverable outside of the mediation,<sup>87</sup> a final written agreement with the government as signatory,<sup>88</sup> conflicts with other legal requirements for disclosure,<sup>89</sup> and mandatory reporting of abuse and neglect.<sup>90</sup>

The provision allows for the court to make a determination in camera whether the communication or materials will be protected or have to be disclosed.<sup>91</sup> An argument could be made by the prosecutor to have the court review the mediator's knowledge of the prior crimes from the mediation in camera to determine if they would be subject to disclosure under this provision. With no guarantee on how the court would rule, this is a potential weakness in the statute which purports to have blanket confidentiality.<sup>92</sup> When provisions like these appear in mediation statutes, the guarantee of confidentiality is eroded by the variability in how courts could rule.

The Texas statute says that it includes civil and criminal disputes.<sup>93</sup> However, one critic believes there is confusion as to whether it applies to criminal matters since it appears in the Civil Practice and Remedies Code while the Act's preamble says it applies to all courts.<sup>94</sup> The statute clearly covers VOM,<sup>95</sup> but the victim offender program referred to here is one that provides mediation services for victims or relatives of victims and offenders in cases where the criminal conduct causes bodily injury or death to victims,<sup>96</sup> not the wide range of victim offender services that are practiced in the state. The specific language of victim offender was added to the statute in 2001,<sup>97</sup> which filled a void created by an earlier Attorney General opinion.<sup>98</sup>

---

86. Brian D. Shannon, *Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems*, 32 TEX. TECH L. REV. 77, 78 (2000) [hereinafter Shannon, *Ruminations*]; Greg Dillard, Note, *The Future of Mediation Confidentiality in Texas: Shedding Light on a Murky Situation*, 21 REV. LITIG. 137, 140 (2002). For the pros and cons of mediation privilege versus a general mediation confidentiality provision, see Brian D. Shannon, *Dancing With the One that "Brung Us" - Why the Texas ADR Community Has Declined to Embrace the UMA*, 2003 J. DISP. RESOL. 197; Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 99.

87. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(c) (Vernon Supp. 2004).

88. *Id.* § 154.073(d).

89. *Id.* § 154.073(e).

90. *Id.* § 154.073(f).

91. *Id.* § 154.073(e).

92. Shannon, *Ruminations*, *supra* note 86, at 78.

93. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a).

94. Eric R. Galton & Kimberlee K. Kovach, *Texas ADR: A Future So Bright We Gotta Wear Shades*, 31 ST. MARY'S L.J. 949, 974 (2000). "Victim-offender" mediation is also allowed under the Texas Code of Criminal Procedure as a condition of probation in misdemeanor cases. TEX. CRIM. PROC. CODE ANN. art. 42.12, § 11(a)(16) (Vernon Supp. 2004).

95. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(g) (Vernon Supp. 2004).

96. TEX. CRIM. PROC. CODE ANN. art. 56.13.

97. TEX. CIV. PRAC. & REM. CODE ANN. § 154.973.

98. The 2001 amendment added only the program which the earlier Attorney General opinion had said was not considered mediation. E-Mail from David Doerfler, former Coordinator of the Texas Department of Criminal Justice Victim Services Divisions, to author (Aug. 12, 2004) (on file with author). This was done so that this program too could be considered "part of the mediation family." *Id.*

The confidentiality provisions as applied to VOM in this statute were eviscerated in 1999 by an opinion of the Attorney General.<sup>99</sup> The opinion was the result of the actions of a prosecuting attorney, who had used a subpoena to obtain tapes from victim offender mediations when the offenders made admissions about other crimes,<sup>100</sup> a situation similar to the hypothetical. The Texas Attorney General ruled that VOM conducted by the Texas Department of Criminal Justice was not considered mediation under the state's ADR Act and not entitled to the Act's confidentiality provisions.<sup>101</sup> The Attorney General reasoned that "the objective of the department's victim-offender mediation is to provide a means for the victims and offenders to therapeutically and emotionally cope with the aftermath of the commission of a crime rather than resolving any civil or criminal dispute."<sup>102</sup> However, the opinion said VOM may be protected by common law privacy provisions in section 552.101 of the Government Code.<sup>103</sup> It is interesting to note that the Attorney General opinion said that the VOM program run by the Texas Department of Criminal Justice Victim Services Division was not afforded protection under section 154.073 of the Texas Civil Practice and Remedies, but programs called criminal dispute mediation operated by the Texas courts may have protection since they occur prior to adjudication.<sup>104</sup> The opinion did not definitively say the court programs would be afforded protection under the statute.

David Doerfler, Coordinator of the Texas Department of Criminal Justice Victim Services Division at that time, believed the opinion was poorly reasoned and showed lack of knowledge regarding mediation processes.<sup>105</sup> He said, "It cuts to the core of what we are trying to establish by providing a personal process and a safe place for discussion and healing." Even though the process requires the offender to admit guilt, various aspects of a "dispute" may still need to be resolved in mediation.<sup>106</sup> The opinion should have sent a warning flare to all victim offender programs since it brings to the forefront problems that can arise in the unsettled area of VOM confidentiality. It also highlights the distinction between how programs are named and what processes they actually practice.<sup>107</sup>

## 2. Statute that Specifically Provides for Confidentiality in Criminal Cases

Another scheme that could be applied to VOM is found in states where a statute specifically authorizes mediation of criminal cases. One such state, Oregon,

99. Tex. Att'y Gen. Op. No. 659 (Aug. 5 1999).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 9 n.3.

105. Telephone Interview with David Doerfler, Coordinator, Texas Department of Criminal Justice, Victim Services Division (Mar. 9, 2000) (Mr. Doerfler is no longer Coordinator of the Texas Department of Criminal Justice). Two independent mediation experts who gave interpretations of the statute and found the Texas Department of Criminal Justice victim-offender mediations to be confidential within the provisions of section 154.073 support his opinion. Opinion of D. Gene Valentini, South Plains Association of Governments-Dispute Resolution Center Director and Master of Dispute Resolution for Lubbock County (Nov. 6, 1998) and John A. Coselli, Attorney, Mediator and Arbitrator (Nov. 30, 1998) (on file with author).

106. *Id.*

107. See discussion *infra* Part II.D.

has a statute with very broad reaching confidentiality provisions in place—even more protective than the Delaware and Tennessee statutes—with a chapter titled “Mediating Criminal Offenses.”<sup>108</sup>

If the parties enter into a written agreement for confidentiality of the mediation, a court may not receive in evidence in any proceeding any mediation communications or mediation agreement to the extent provided by sections 36.220 to 36.238 of the Oregon Revised Statutes.<sup>109</sup> The parties participating in mediation must be informed:

- Of the right to enter into a written agreement concerning confidentiality of the mediation proceedings.
- That mediation communications or agreements may not be used as an admission of guilt or as evidence against the offender in any adjudicatory proceeding.<sup>110</sup>

The Oregon statute prohibits the use of mediation communications as an admission of guilt or as evidence against the offender in a court proceeding.<sup>111</sup> This statute would provide protection to the mediator in the hypothetical from having to disclose what was said in the mediation if the parties had entered into a written confidentiality agreement.<sup>112</sup> Although the statute was not specific to VOM, it would be a good fit in the criminal case.<sup>113</sup>

However, there are some areas in the statute not given confidentiality protection. For example, the terms of the mediation are not confidential except in cases of child and elder abuse for mandatory reporters,<sup>114</sup> where the parties agree that they are,<sup>115</sup> and if the mediator believes that disclosure of the communication is necessary to prevent a party from committing a crime that is likely to result in death or substantial bodily injury to a specific person.<sup>116</sup>

The language regarding future crimes, in comparison to the Delaware and Tennessee statutes, is more narrowly worded in the Oregon statute, since it applies to threats of serious injury or death. In the Delaware and Tennessee statutes no protection of confidentiality is afforded for threats of injury, regardless of how serious, and even extends to threats of property damage.<sup>117</sup>

---

108. OR. REV. STAT. § 135 (2001). For factors which determine whether criminal cases are appropriate for mediation see OR. REV. STAT. § 135.951.

109. *Id.* § 135.957.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* OR. REV. STAT. § 36.238 states that § 36.220 applies to all mediations whether they are publicly funded or private programs. *Id.* § 36.238.

114. Section 36.220(5) states as follows:

Any mediation communication relating to child abuse that is made to a person who is required to report child abuse under the provisions of [section] 419B.010 is not confidential to the extent that the person is required to report the communication under the provisions of [section] 419B.010. Any mediation communication relating to elder abuse that is made to a person who is required to report elder abuse under the provisions of [sections] 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under the provisions of [sections] 124.050 to 124.095.

OR. REV. STAT. § 36.220.

115. *Id.* § 36.220(2)(a).

116. *Id.*

117. DEL. CODE ANN. tit. 11, § 9503 (2003); TENN. CODE ANN. § 16-20-103 (2004).

### 3. Community Dispute Resolution Centers

Another place where VOM provisions can be found is within community mediation center statutes. However, in many of the statutes, victim offender language is not used. So, although there are statutory provisions that allow criminal case referrals to community mediation centers, it is not clear if restorative practices are used. It is a misnomer to say that all criminal mediation cases use VOM or other restorative practices to resolve the parties' conflict.<sup>118</sup> Without specific restorative language in the statute or knowledge of the practices of each individual program, it is difficult to categorize VOM statutes for analysis.

A review of several examples of community mediation statutes in Oklahoma and New York which have expansive protection provisions provides a guide to evaluate the variations in statutory language. Authority to refer cases to victim-offender reconciliation programs (VORP) is allowed by an Oklahoma criminal procedure statute.<sup>119</sup> The statute requires written consent forms from the victim and offender, which specify methods to be used in resolving the issues along with the obligations and rights of each party.<sup>120</sup> Volunteer mediators and employees of the victim offender reconciliation program have confidentiality rights under the state's Dispute Resolution Act.<sup>121</sup>

Under the Oklahoma statute, information received by the mediator or a person employed to assist the mediator, "through files, reports, interviews, memoranda, case summaries, or notes and work products of the mediator" is confidential and privileged.<sup>122</sup> The statute protects the mediator, the initiating party or responding party in a mediation proceeding from being required to disclose any matters discussed or information obtained during any part of the mediation proceedings.<sup>123</sup> The statute appears comprehensive in scope in that it protects the mediator and parties from having to testify—if subpoenaed—to disclose information discussed by the offender about prior crimes. However, the statute does not prohibit others who may be in attendance at the mediation from disclosing information learned during the mediation.<sup>124</sup>

---

118. Laflin, *supra* note 48, at 579-580 (discussing the restorative justice model and the case-management evaluative model); Andre R. Imbrogno, *Recent Development: State v. Tolias*, 14 OHIO ST. J. ON DISP. RESOL. 699, 707 (1999) (there are two ways ADR is used in criminal cases: victim offender mediation and community dispute resolution programs); Mark William Bakker, *Repairing the Breach and Reconciling the Discordant: Mediation In the Criminal Justice System*, 72 N.C. L. REV. 1479, 1485 (1994) (there are two strains of criminal mediation that include VORP and community dispute resolution models).

119. OKLA. STAT. tit. 22, § 991a(A)(1)(m) (2004).

120. *Id.*

121. OKLA. STAT. tit. 12, § 1805 (2000).

122. *Id.*

123. *Id.* "No mediator, initiating party, or responding party shall be subject to administrative or judicial process requiring disclosure of any matters discussed or shall disclose any information during any part of the mediation proceedings." *Id.*

124. *See id.* The statute makes no reference to other people who may be present such as support, persons for the victim or offender, leaving those people free to disclose what is said during the mediation. *Id.*



Another statute which has broad confidentiality protection is the New York Community Dispute Resolution Center's provision.<sup>125</sup> This statute does not specify that it is a victim mediation program but it does cover criminal cases, with the exclusion of certain felonies and drug cases.<sup>126</sup> Unique to the statute is language providing a written statement to the parties relating to "their rights and obligations; the nature of the dispute; their right to call and examine witnesses; that a written decision with the reasons . . . will be rendered; and that the dispute resolution process will be final and binding upon the parties."<sup>127</sup> Some wording in the statute such as "calling and examining witnesses" is contrary to what happens in the VOM restorative justice process. VOM is dialogue driven rather than adversarial, with the right to confrontation and cross-examination, which is implied by "calling and examining witnesses." So it appears the statute does not refer to VOM, although if the statutes are not clear in their wording it is difficult to know for sure.

The New York statute protects "memoranda, work products, or case files of a mediator" from being disclosed in any judicial proceeding.<sup>128</sup> It offers a broad blanket of confidentiality: "Any communication relating to the subject matter of the resolution made during the mediation process by a participant, mediator, or any other person at the dispute resolution shall be a confidential communication."<sup>129</sup> The wording of the New York and Oklahoma confidentiality statutes afford greater protection than is found in the prior statutes discussed.

This statutory review shows the wide range of coverage and language that is provided in statutes that could cover VOM. A few are specific to VOM, some cover criminal cases and yet others encompass community dispute resolution centers. These examples show how varied statutory confidentiality coverage can be and highlight the importance that programs become familiar with the nuances of the statutes in their jurisdictions.

#### IV. CASES

There is little case law available on the topic of mediation and confidentiality that is relevant to this discussion. The five cases selected show the variability of court decisions based on differences in statutory language for individual states. They also illustrate the potential peril regarding outcome when the decision rests with the court in interpreting a qualified privilege. In such cases, the court weighs the need for the evidence versus the societal benefit of upholding the privilege.<sup>130</sup>

125. N.Y. JUD. LAW § 849(b) (McKinney 1981). New York is considered a pioneer in having community based mediation programs handling misdemeanor cases. Volpe, *supra* note 66, at 6.

126. N.Y. JUD. LAW § 849.

127. *Id.*

128. *Id.*

129. *Id.*

130. Alan Kirtley, *Uniform Mediation Privilege Should Draw from Both Absolute and Qualified Approaches*, 5 DISP. RESOL. MAG. 5, 6 (1998).

A. *Williams v. State*<sup>131</sup>

In a Texas criminal case, there is a brief but important reference to mediation confidentiality. The defendant, Williams, was challenging his theft conviction claiming insufficient evidence.<sup>132</sup> The state asked the court to consider statements made in an ADR procedure prior to the defendant's arrest to bolster evidence in the case. The court rejected the state's assertion on the grounds that disclosures made in the dispute resolution procedure were confidential and not subject to disclosure.<sup>133</sup> The court cited the provision discussed earlier in section 154.073 of the Texas Civil Practice and Remedies Code.<sup>134</sup> Details of the case are very limited, so the type of ADR process the defendant participated in is unknown, which could influence the applicability of the statute to VOM.

This case is much like the earlier hypothetical where statements from the VOM are being sought in a subsequent prosecution. The case could assist in answering the dilemma if the setting is Texas or in a state that has a similarly worded confidentiality statute.

B. *People v. Snyder*<sup>135</sup>

In *Snyder*, a New York murder case, the prosecutor subpoenaed records of a mediation between the victim and the defendant from the community dispute resolution center. The center moved to quash.<sup>136</sup> The defendant was raising a justification defense and made reference to the victim and defendant participating in mediation prior to the shooting.<sup>137</sup> In refusing to allow the records to be revealed the court relied on the confidentiality provisions of section 849 b(6) of the New York Judiciary Law which says "all memoranda, work products, or case files of the mediator are confidential and not subject to disclosure in any judicial or administrative proceeding."<sup>138</sup> The court stated it did not want to "subvert the Legislature's clear intention to guarantee confidentiality of all such records and communications."<sup>139</sup> Even in a murder case, the court upheld the validity of confidentiality, which shows the strength of confidentiality in the New York statute. This is contrary to other statutes, including the Uniform Mediation Act, and those following the Uniform Mediation Act which would require the court to make an in camera determination of whether the interests of confidentiality would be outweighed by the need for the evidence, and not allow for confidentiality if the evidence was needed in a subsequent felony prosecution.<sup>140</sup>

---

131. 770 S.W.2d 948 (Tex. Ct. App. 1989).

132. *Id.* at 949.

133. *Id.* See Shannon, *Ruminations*, *supra* note 86, at 99 (for a related hypothetical and more discussion of this case).

134. See discussion *infra* Part III.D.1.

135. 492 N.Y.S.2d 890 (N.Y. Sup. Ct. 1985). See Christopher H. Macturk, *Confidentiality In Mediation: The Best Protection Has Exceptions*, 19 AM. J. TRIAL ADVOC. 411 (1995) (for more discussion of *Snyder*).

136. *Snyder*, 492 N.Y.S.2d at 891.

137. *Id.*

138. *Id.*

139. *Id.* at 892.

140. Unif. Mediation Act § 6(b)(1) (2003). See discussion *infra* Part V.C.2.

### C. *State v. Castellano*<sup>141</sup>

The outcome of *Castellano* is contrary to the two cases discussed above. The defendant was on trial for attempted murder and raised a claim of self defense.<sup>142</sup> The defendant subpoenaed the community resolution center mediator to testify about threats the victim made to the defendant that were discussed in a prior mediation between the defendant and the victim.<sup>143</sup>

Unlike the prior two cases, the statute available for the mediator to rely upon dealt with the admissibility of offers to compromise.<sup>144</sup> The court found that the statute only excluded evidence of an offer to compromise presented to prove liability or the absence of liability for a claim, and was not relevant in a case where a mediator is testifying in a criminal case about alleged threats.<sup>145</sup> The court suggested that if confidentiality was important to the community dispute resolution program, they should get protection from the legislature.<sup>146</sup>

This Florida case shows the difference in outcomes when dispute resolution centers do not have statutory support for confidentiality. Texas did what the Florida court suggested in *Castellano*. When the Texas VOM program was not happy with the Texas Attorney General's opinion, they legislatively made the adjustment by having their program included within the language of the confidentiality statute.<sup>147</sup>

### D. *Byrd v. State*<sup>148</sup>

In the *Byrd* case the Georgia court held that a defendant's admissions in mediation between himself and the victim were not admissible in his subsequent criminal case.<sup>149</sup> In this case, the parties were directed to a neighborhood justice center to mediate the dispute through a civil settlement while a criminal charge was pending, dependent on the outcome of the mediation.<sup>150</sup> When the defendant did not comply with the mediated agreement, criminal proceedings began.<sup>151</sup>

The court found that "no criminal defendant will agree to 'work things out' and compromise his position if he knows that any inference of responsibility arising from what he says and does in the mediation process will be admissible as an admission of guilt in the criminal proceeding which will eventualize if mediation fails."<sup>152</sup> The court's ruling goes to the heart of the issue in mediating criminal offenses through VOM. If the parties are not able to work out their differences in mediation, then the defendant should be able to walk away and go through the

141. 460 So. 2d 480 (Fla. Dist. Ct. App. 1984).

142. *Id.* at 481-82.

143. *Id.*

144. *Id.*

145. *Id.* Evidence of compromise negotiations are excluded by the Federal Rules of Evidence and most states. FED. R. EVID. 408.

146. *Castellano*, 460 So. 2d at 482.

147. See discussion *infra* Part III.D.1.

148. 367 S.E.2d 300 (Ga. Ct. App. 1988).

149. *Id.*

150. *Id.* at 302.

151. *Id.*

152. *Id.*

traditional criminal justice process without any of the prior discussion being revealed in a future prosecution.

*E. Rinaker v. Superior Court*<sup>153</sup>

Another case widely cited and discussed in the mediation literature is *Rinaker*.<sup>154</sup> This case is of less importance to our discussion since it originates in the civil context of the California Evidence Code section 1119(a).<sup>155</sup> It deals with prohibited admission or discovery of anything said or any admission made during mediation in a civil, non-criminal matter.<sup>156</sup>

In *Rinaker*, two minors were charged with vandalism in a rock throwing incident that went to mediation for a civil harassment action.<sup>157</sup> During the mediation, the victim admitted that he did not see the person who threw the rocks.<sup>158</sup> The youths then subpoenaed the victim's testimony for their juvenile delinquency hearing so they could impeach the victim for prior inconsistent testimony.<sup>159</sup> In this case, the court held the juveniles' constitutional right to confrontation trumped the public policy providing confidentiality in mediation.<sup>160</sup> This case may be instructive when looking at mediation provisions which leave determination of evidentiary necessity in the judge's hands. Although confidentiality in mediation is recognized as important, constitutional rights of offenders may prevail.<sup>161</sup>

V. UNIFORM MEDIATION ACT

Does the Uniform Mediation Act (UMA) solve the confidentiality dilemma in victim offender mediations? To answer that query, the background of the UMA

---

153. 74 Cal. Rptr. 2d 464 (Cal. Ct. App. 1998).

154. *Id.*

155. CAL. EVID. CODE § 1119 (2004), section (a) states as follows:

No evidence of anything said or any admission made for the purpose of, in the course of, of pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative proceeding in which, pursuant to law, testimony can be compelled to be given.

*Id.*

156. *Rinaker*, 74 Cal. Rptr. 2d at 466.

157. *Id.* at 467.

158. *Id.*

159. *Id.* at 466-467.

160. *Id.* at 466. The *Rinaker* case has been discussed in numerous articles. See William J. Caplan, *Mediation Is Confidential - Not Exactly*, 46 ORANGE COUNTY LAW 16 (2004); Laura A. Miles, *Absolute Mediation Privilege: Promoting or Destroying Mediation by Rewarding Sharp Practice and Driving Away Smart Lawyers?*, 25 WHITTIER L. REV. 617 (2004); L. Randolph Lowry & Peter Robinson, *Mediation Confidential: In Three Recent Cases, Courts Have Carved Out Exceptions to the Rule of Strict Secrecy in Mediation Proceedings*, 24 L.A. LAW 28 (2001).

161. Confidentiality in mediation has been addressed in other cases. See *Rojas v. Super. Ct.*, 93 P.3d 260 (Cal. 2004) (ruling in a civil case that all evidentiary material submitted in mediation is privileged against disclosure in subsequent litigation); *In re Paternity of Emily C.B.*, 677 N.W.2d 732 (Wis. Ct. App. 2004) (court ruled that tape of mediation from a civil lawsuit is admissible in subsequent custody matter involving one of the participants); *State v. Trejo*, 979 P.2d 1230 (Idaho Ct. App. 1999) (wife's statement in child custody hearing is not privileged in subsequent criminal prosecution because she was not a party in the criminal matter).

needs to be examined, as does the text of the Act, its definitions, applications, and exceptions.

### A. Background

Some states have already adopted the UMA<sup>162</sup> and more are considering its adoption.<sup>163</sup> In 2001, the National Conference of Commissioners on Uniform State Laws (NCCUSL), in approving the UMA, recommended its adoption by all states.<sup>164</sup> The UMA is a collaboration between the NCCUSL and the American Bar Association's (ABA) Section on Dispute Resolution to establish a confidentiality privilege for mediators and participants.<sup>165</sup> The UMA is the product of "five years of research, drafting, and vetting"<sup>166</sup> and has received support from the ABA, dispute resolution professional organizations and service providers and leading dispute resolution scholars.<sup>167</sup> The UMA's goal of promoting candor in mediation by protecting the parties and the mediators' expectations of confidentiality, and by providing state uniformity in confidentiality provisions<sup>168</sup> seems as though it would be welcomed by the restorative justice community. But, does it apply?

### B. Is Victim Offender Mediation Covered Under the UMA?

The UMA provides a privilege against disclosure of mediation communications.<sup>169</sup> Specifically the UMA provides that "[a] mediation communication is privileged . . . and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by section 5."<sup>170</sup> In order to determine whether the UMA would apply to VOM, it is necessary to review the definition of mediation in section 2(1). Mediation is defined by section 2(1) as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."<sup>171</sup> In VOM, communication is an important process, and there might be some negotiation as part of the dialogue. Although restorative practices are not settlement driven, as contrasted to civil mediation,<sup>172</sup> a voluntary agreement for

---

162. National Conference of Commissioners on Uniform State Laws, Fact Sheet, *available at* [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-uma2001.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp) (reporting Nebraska and Illinois have adopted the UMA) (last visited Aug. 30, 2004).

163. *Id.* Eight states introduced the UMA in 2004 including the District of Columbia, Indiana, Iowa, Massachusetts, New Jersey, New York, Ohio and Vermont (with the UMA dying in the house in Indiana and Iowa). *Id.*

164. Unif. Mediation Act (2003).

165. National Conference of Commissioners on Uniform State Laws, Summary, *available at* [http://www.nccusl.org/Update/uniformact\\_summaries/uniformacts-s-uma2001.asp](http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-uma2001.asp).

166. Reuben, *supra* note 86, at 100.

167. *Id.*

168. Unif. Mediation Act, Prefatory Note (2003).

169. Unif. Mediation Act § 4.

170. *Id.* § 4(a).

171. *Id.* § 2(1).

172. Mary Ellen Reimund, *Mediation in Criminal Justice: A Restorative Approach*, ADVOC., May 2003, at 22 ("[v]ictim offender mediation is primarily dialogue driven with emphasis upon victim healing, offender accountability, and restoration of losses following a humanistic model"). See Mark

restitution or community service would likely be the outcome of a victim offender meeting. However, some VOM programs would not fit within the definition, such as those dealing with cases of serious violence, since a written restitution agreement is less likely as an outcome.<sup>173</sup> Because of the variation in victim offender programs, an evaluation would need to be made of by each individual program, to determine if the UMA mediation definition fits.

If a determination is made that the mediation definition covers the VOM program, the next question is whether the restorative process is within the UMA's scope of coverage.<sup>174</sup> Section 3(a)(1) of the UMA states that parties required to mediate by statute, courts, administrative agencies and arbitrators are covered under the statute.<sup>175</sup> Some VOM programs may be empowered through statute, the court or an administrative agency, but whether this authorization requires mediation raises an important question. Requiring the parties to mediate in a victim offender program would be dependent on the individual language of the statute, court or agency authorization. However, the philosophy behind restorative justice is that participation in VOM be voluntary. A mediation requirement, rather than mediation as an option, would signal coerciveness and be contrary to restorative principles.<sup>176</sup>

Section 3(a)(2) of the UMA—the provision most likely to cover VOM—says, “[T]he mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that the mediation communications will be privileged against disclosure.”<sup>177</sup> This section would apply to many VOM programs when the parties enter into a written agreement to mediate and part of that agreement includes language that the proceedings would be confidential.

The UMA provides a third coverage area when the parties use a third party who holds herself out to be a mediator or “the mediation is provided by a person that holds itself out as providing mediation.”<sup>178</sup> Victim offender mediation programs require training for people facilitating meetings between victims and offenders, although they might not always use the term mediator to describe the person in that role.<sup>179</sup> This gets back to the language debate discussed earlier about whether VOM is mediation.<sup>180</sup> If the program used the term mediator, would it trigger UMA coverage under this section? Comments on section 3(a)(2)

---

Umbreit, *Humanistic Mediation: A Transforming Journey of Peacemaking*, 14 *MEDIATION Q.* 201 (1997) (for detailed discussion of the humanistic model of mediation).

173. ZEHR, *supra* note 13, at 47.

174. Unif. Mediation Act § 3 (2003).

175. *Id.* § 3(a)(1).

176. One of the key components of restorative justice is that the participation is voluntary. “Victim participation must be entirely voluntary. . . . Efforts are made to maximize the offender’s voluntary participation as well.” ZEHR, *supra* note 13, at 46. Although current criminal justice procedures are coercive for victims and offenders, restorative justice “places a premium on voluntary involvement.” Daniel W. Van Ness, *New Wine and Old Wineskins: Four Challenges of Restorative Justice*, 4 *CRIM. L.F.* 251, 275 (1993). See Brown, *supra* note 4, at 1267 (for critique of restorative justice arguing that when offenders participate in victim offender mediation per court order they will feel coerced but even if a court order is not involved “the offender may often sense that participation is mandatory”).

177. Unif. Mediation Act § 3 (2003).

178. *Id.* § 3(a)(3).

179. UMBREIT, *HANDBOOK*, *supra* note 30, at 150 (mediator training in victim offender mediation can vary from twelve to forty hours, although thirty-two to forty hours of training including apprenticeship is recommended).

180. See discussion *infra* Part II.C.

say it focuses on individuals and organizations that provide mediation services, such as volunteer mediators with a community mediation center.<sup>181</sup> A large percentage of VOM programs are run through private providers,<sup>182</sup> so if the other provisions of the UMA did not apply, and if the program called their facilitators "mediators," section 3(a)(2) would apply.

Given the scope of the UMA's coverage, many VOM programs would be covered. But, there could be some VOM programs which would fly under the radar of the UMA if the programs do not meet section 2 definitions or section 3 inclusions. Programs that classify themselves as victim offender meeting, conferencing or reconciliation may not fit within the mediation definition or the mediator coverage provision.

The UMA comments following section 3, which discuss circle ceremonies and family conferencing in relation to cultural or religious practices, say "there are instances in which the application of the Act to those practices would be disruptive of the practices and therefore undesirable."<sup>183</sup> In these situations, if the parties did not want to be covered by the UMA, they could opt out by not triggering application of the UMA. The same argument for opting out could be made for victim offender programs if they did not desire to be covered by the UMA. The UMA also has a provision whereby the parties can agree in advance that all or part of their mediation is not privileged.<sup>184</sup> Opting out gets the victim offender program beyond the reach of the UMA, but still leaves the confidentiality of the process in limbo.

Other than opting out, the UMA has carved out exceptions to its application.<sup>185</sup> The exceptions which could be relevant to victim offender mediations involve primary and secondary school programs if all the parties are students or correctional institutions for youths, if all the parties are residents of that institution.<sup>186</sup> According to the comments, these exceptions were made for these programs so information that could impact the institutions' safety and security could be shared with the appropriate authorities.<sup>187</sup>

---

181. Unif. Mediation Act § 3 (2003).

182. UMBREIT, HANDBOOK, *supra* note 30, at 113. A national survey finds that 43% of victim offender programs are private community-based with 23% being church based. *Id.*

183. Unif. Mediation Act § 3 (2003).

184. *Id.* § 3(c).

185. *Id.* § 3(b). The UMA states:

(b) The [Act] does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the [Act] applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;

(3) conducted by a judge who might make a ruling on the case; or

(4) conducted under the auspices of:

(A) a primary or secondary school if all the parties are students or

(B) a correctional institution for youths if all the parties are residents of that institution.

*Id.*

186. Unif. Mediation Act § 3(b)(4).

187. *Id.* § 3 cmt. 5-6.

### C. What Confidentiality Protections Does the UMA Give Victim Offender Mediation?

If VOM is covered by the definition and scope of the UMA, then there are protections in place that help to assure the process will be confidential in legal proceedings, with some exceptions. The UMA provides a privilege against disclosure which would protect the mediation communication from being admitted as evidence in a court proceeding or being available through discovery.<sup>188</sup> Beyond the evidentiary privilege, the UMA “does not include an affirmative duty—or gag rule—on mediators and parties that would prevent them from disclosing what was said in mediation outside of the proceeding.”<sup>189</sup> Under the UMA, whether the mediation communications will remain confidential—beyond the evidentiary privilege—depends on the parties’ self-determination in their written agreement to mediate, subject to the applicability of relevant state law.<sup>190</sup> This is problematic for VOM programs where value is placed on total confidentiality of the meeting. Victim offender mediation would be better served by a blanket of confidentiality, similar to that provided for in the Oklahoma and New York statutes discussed above.<sup>191</sup>

#### 1. Who Is Covered Under the UMA?

Existing mediation statutes vary greatly as to who may hold or waive the confidentiality privilege, with disagreement regarding whether the parties alone hold the privilege, or whether the privilege is held solely by the mediator.<sup>192</sup> The UMA is more comprehensive since it covers parties to the mediation,<sup>193</sup> the mediator,<sup>194</sup> and non party participants.<sup>195</sup> The privilege belongs to each of these individuals under the UMA so that they can prevent others from disclosing a mediation discussion as well as refusing to disclose themselves. Parties have the greatest control over disclosure since they can refuse to answer or disclose as well as prevent any person from disclosing what is said at the mediation.<sup>196</sup> The mediator can refuse to discuss the mediation, but can only prevent his own communication from being disclosed by others.<sup>197</sup> The non-party participant may refuse to disclose what is said during the mediation but is limited to preventing anyone from disclosing only what the non-party participant said.<sup>198</sup> The broad scope of the UMA provides more protections than would currently be afforded in most victim offender programs because of its broad band coverage of parties and nonparty par-

---

188. *Id.* § 4(a).

189. Reuben, *supra* note 86, at 124. According to Reuben, the drafters “concluded that confidentiality outside of proceedings was not an issue upon which uniform law was necessary, appropriate, or practicable.” *Id.*

190. Unif. Mediation Act § 8 (2003).

191. See discussion *infra* Part III.D.3.

192. Unif. Mediation Act § 4 cmt. 4(a)(1) (2003).

193. *Id.* § 4(b)(1).

194. *Id.* § 4(b)(2).

195. *Id.* § 4(b)(3).

196. *Id.* § 4(b)(1).

197. *Id.* § 4(b)(2) (2003).

198. *Id.* § 4(b)(3).



ticipants. It is not uncommon in VOM to have support people present for both the victim and offender, and the UMA would cover those individuals as well, adding an additional confidentiality safeguard not currently in place with some victim offender programs.

## 2. Crimes and Criminal Activity Precluded From the Privilege

A preclusion from the UMA privilege against disclosure in a court proceeding or discovery has to do with criminal activities. "A person that intentionally uses mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting the privilege under section 4."<sup>199</sup> According to the UMA Comments, this provision applies only to instances where a person is using the mediation to further the commission of a crime, but not to instances where crimes are merely being discussed.<sup>200</sup>

There are other areas involving criminality in the UMA where the privilege against disclosure of the communication is not protected.<sup>201</sup> If "a threat or statement of a plan to inflict bodily injury or commit a crime of violence"<sup>202</sup> is revealed during mediation, there is no protection against disclosure provided by the UMA. Furthermore, the cloak of protection would not be afforded if there was mediation discussion that was "intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity."<sup>203</sup> Since VOM deals with resolving the harms caused by criminal violations, the provisions of the UMA that discuss criminality are of importance.

The gap, not covered by many existing confidentiality statutes, relates to revelations by the offender of prior crimes. If an offender in a dialogue with the victim brings up prior crimes that they have committed, the UMA extends the confidentiality privilege to prevent disclosure of those prior crimes. According to UMA comments, the committee considered creating an exception for past criminal conduct but decided against doing so since nothing in the act would "prevent a party from calling the police, or warning someone in danger."<sup>204</sup> Although, the inclusion of a general confidentiality coverage in their agreement to mediate—which would be allowed under section 8 of the UMA—may prevent a party from doing so. The act would also allow a "mediator to disclose if required by law to disclose felonies or if public policy requires."<sup>205</sup> This emphasizes the purpose of the UMA not as a general confidentiality protector but limited as an evidentiary and discovery privilege.<sup>206</sup>

One caveat for VOM programs regarding the UMA is a provision that could allow mediation communications to be used in subsequent felony or misdemeanor court proceedings.<sup>207</sup> This provision is most likely to be triggered if the offender

199. *Id.* § 5(c).

200. *Id.* § 5 cmt. 2.

201. *Id.* § 6.

202. *Id.* § 6(a)(3).

203. *Id.* § 6(a)(4).

204. *Id.* § 6 cmt. 5.

205. *Id.*

206. *Id.*

207. Unif. Mediation Act § 6(b)(1). The UMA gives the option of including misdemeanors within the exception. *Id.*

reveals information of prior crimes during the mediation and a subsequent prosecution is sought for those crimes. The prosecutor could subpoena that evidence under the UMA, and after an in-camera hearing a judge could find that the evidence is not otherwise available and that there is a need for the evidence that substantially outweighs the interest of protecting confidentiality.<sup>208</sup> So, the UMA could not assure that the mediation communication would not be admitted in the subsequent prosecution. It would be up to the judge, on an individual case basis, to make the determination if the confidentiality assurances that were asserted as part of the VOM agreement are more sacred to preserve than the need for evidence in a criminal prosecution.

States have the option to include misdemeanors in this provision, although the drafters limited the exception to felonies. Reporter to the UMA Drafting Committees, Richard Reuben, says the drafters did not include misdemeanors because:

[T]hey were particularly concerned about potentially undermining the many successful victim-offender mediation programs by making [them] more vulnerable to invasion for evidence in subsequent prosecutions. Out of respect for these programs, and an Act-wide philosophy of keeping encroachments on mediation confidentiality to a minimum, the drafters elected to leave the question of misdemeanors to states to decide under the policies, practices and traditions of their own criminal laws.<sup>209</sup>

Those very concerns of the drafters are the same ones that VOM programs should keep in mind in evaluating how the UMA will impact their programs. If strong confidentiality protections are not in place, there are no guarantees that information revealed in the VOM could not be used in future prosecutions. The UMA provides confidentiality protection for evidence needed for misdemeanor cases (although the states could opt to include misdemeanors),<sup>210</sup> but the information could be used in a felony case depending on the court's discretion. There would be some assumption of risk on the part of an offender regarding what is revealed in the mediation, given this confidentiality gap. As programs handle more serious offenses and adult cases, awareness of confidentiality vulnerabilities in VOM is critical as is knowledge about what the UMA will and will not protect.

### 3. *Evidence of Abuse or Neglect*

The UMA confidentiality privilege does not cover mediation communication "sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party."<sup>211</sup> There are some variations in language offered to adopters of the UMA regarding this provision. Most VOM programs rely upon their state statute regarding mandatory reporting in cases of child or vulnerable adult abuse as discussed above. The UMA is more limited in scope than many statutes since infor-

---

208. *Id.* § 6(b).

209. Reuben, *supra* note 86, at 123.

210. *Id.*

211. Unif. Mediation Act § 6(a)(7) (2003).

mation discussed in the mediation indicating abuse, neglect or abandonment would be protected from disclosure unless protective services was a party.

#### *D. The UMA and VOM for Better or Worse?*

The UMA falls short in some critical areas for VOM. Dialogue between parties is a valued component of VOM. Confidentiality can help to assure parties they are in a safe place where they can speak freely. Because VOM works with criminal cases, it is even more imperative than in civil cases, that things said in the meeting between the victim and offender be kept in confidence. In criminal cases, offenders have constitutional protections such as due process and the privilege against self incrimination which could be violated if confidentiality is breached.<sup>212</sup> The UMA does not provide blanket confidentiality for communication during mediation in court proceedings. The possibility looms that prior crimes revealed during the mediation could be used in a subsequent criminal prosecution and the decision will rest in the discretionary hands of a judge in a weighing process.

There is no broad confidentiality rule in the UMA that keeps the mediation communication from being shared with others, beyond discovery or court evidence submission. The comments in section 8 suggest that "to avoid misunderstandings about the extent of confidentiality, it is wise for mediation participants to consider whether to enter into a confidentiality agreement at the outset of mediation for purposes of guiding their expectations with respect to the disclosure of mediation communications outside of legal proceedings."<sup>213</sup> In this regard, the UMA does nothing more than the parties could work out themselves regarding confidentiality without the UMA. If states have no statutory protections or limited protections of confidentiality for VOM, the UMA will be helpful in providing guidance, even with its limitations. In states where there are already specific guides in place for confidentiality in VOM<sup>214</sup> or more thorough confidentiality protections afforded, the UMA is not a better alternative.

### VI. CONCLUSION

A major benefit of VOM is to provide parties with an opportunity to discuss in private the righting of a wrong through the sharing of their stories—thus promoting closure and healing for victims and accountability for offenders. Lack of confidentiality in VOM impedes those efforts and could lead to the demise of restorative programming. There are over 300 victim offender programs operating in the United States<sup>215</sup> through a variety of forums including private organizations, community dispute resolution centers, state agencies, and courts making the analysis of mediation confidentiality a complex issue. Determining the source of confidentiality for VOM is daunting when considering there are more than 250 state statutes on mediation confidentiality.<sup>216</sup>

212. Reimund, *Collision Course*, *supra* note 6.

213. Unif. Mediation Act § 8 cmt. c (2003).

214. See discussion *infra* Part III.D.

215. Umbreit & Greenwood, *supra* note 2, at 215.

216. Unif. Mediation Act, Prefatory Note (2003).

Initially, VOM programs need to accomplish the task of determining statutory authority and if it even applies to VOM. This article, as a guide, has given examples of specific victim offender statutes, a criminal mediation statute and dispute resolution center provisions. If the statute does cover VOM, programs need to determine what is protected, when it is protected, who is protected, and who can trigger the protection. There are some court cases that assist in sorting out these questions but they are limited to a few jurisdictions.<sup>217</sup>

The Uniform Mediation Act is being considered by states as a way to provide clarification and uniformity to mediation confidentiality concerns, but how it applies to VOM is not definitive. Victim offender mediation programs should be aware of this movement and play a role in their state discussions where adoption of the UMA is under consideration, by understanding the pros and cons of the Act.

Given all of the complexities of confidentiality, Community Resource Director for the Vermont Department of Corrections, Chris Dinnan makes the following observation:

I am inclined to advise participants in any conference that, yes, what is said may be used against them. I go on to say it most likely will not be, which is easy enough for me to say. Only if a State's Attorney gave 'limited use immunity,' could any guarantee be offered to participants in a specific conference. This is unfortunate since absolute honesty and candor is so desirable.<sup>218</sup>

Relying on legal tools when discussing VOM may seem contradictory given the tension between the philosophy of restorative justice and the law.<sup>219</sup> "Restorative justice claims to be based on a different view of society and to offer another paradigm for doing justice. . . . Legal theory on restorative justice must therefore be reconstructed from the ground."<sup>220</sup> Until restorative justice is embraced systematically, living under the rule of law and its interpretations is how issues of confidentiality will be resolved. Being proactive in addressing anticipated confidentiality concerns and having program guidelines is important to protect against making false promises of confidentiality in VOM. "An adequate level of predictability requires, at a minimum, knowledge of the boundaries at which uncertainty begins for confidentiality."<sup>221</sup>

---

217. See discussion *infra* Part IV.

218. Chris Dinnan, *Grossly Negligent Operation with Death Resulting: A Conferencing Case Study*, in *RESTORATIVE JUSTICE: REPAIRING COMMUNITIES THROUGH RESTORATIVE JUSTICE* 166 (John Perry ed., 2002).

219. Timothy Hedeon, *Institutionalizing Community Mediation: Can Dispute Resolution "of, by and for the People" Long Endure?*, 108 DICK L. REV. 265, 275 (2003). Hedeon states, "Many communitarian restorative justice practitioners have long operated outside the perimeters of the formal system and express dismay about the appropriation of their processes by government. They cannot fail to recognize, however, that through the criminal justice system comes broader acceptance, awareness, and use of restorative justice."

220. Walgrave, *supra* note 53, at 216.

221. Ellen E. Deason, *The Quest for Uniformity In Mediation Confidentiality: Foolish Consistency or Crucial Predictability*, 85 MARQ. L. REV. 79, 85 (2001).

