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CONFIDENTIALITY IN ENVIRONMENTAL MEDIATION: SHOULD THIRD PARTIES HAVE ACCESS TO THE PROCESS?

Karen L. Liepmann*

I. INTRODUCTION

Environmental mediation is a new, rapidly growing field both within and outside of the legal profession. The first explicit effort to mediate an environmental dispute dates from 1973. Since then, environmental mediation has gained in popularity as an alternative to the traditional, adjudicatory methods of environmental dispute resolution. Because environmental mediation is a new field, few statutes or common-law rules govern the process. This article focuses on one unresolved issue in environmental mediation: whether

* Executive Editor, 1986–1987, Boston College Environmental Affairs Law Review.

1 The courts have long recognized the right of parties to settle claims privately. See, e.g., Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910); United States v. City of Miami, 614 F.2d 1322, 1330 (5th Cir. 1980). Many environmental mediators are not lawyers. For example, the mediator in the Port Townsend Ferry Terminal struggle was a history teacher, TALBOT, SETTLING THINGS, SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION, 85 (1983), and Dr. Cormick, Director of the Office of Environmental Mediation in Seattle, Washington, has an academic background in business administration.


3 "[M]ediation has quickly become a bandwagon which attracts a large and diverse group of riders." G. Cormick, Environmental Mediation in the United States: Experience and Future Directions 2 (unpublished paper presented to the American Association for the Advancement of Science, 1981 Annual Meeting, Toronto, Canada) [hereinafter CORMICK, EXPERIENCE AND FUTURE DIRECTIONS].

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communications made by the parties during the mediation process are protected from compulsory process sought by third parties during subsequent litigation. Specifically, this article addresses whether courts should grant environmental mediators a testimonial privilege, and if so, what form should this privilege take?

Environmental mediators assert that a guarantee of confidentiality of the communications among a mediator and the parties to a dispute is a fundamental characteristic of mediation, and they consider a

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4 A 1981 ABA Survey of Mediation Programs, on confidentiality, found that whether statements made by participants during an alternative dispute resolution session can be used as evidence in a subsequent legal proceeding, is of predominant practical concern to dispute resolution programs. Freedman, Confidentiality: A Closer Look, in ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND THE LAW: WILL REASON PREVAIL? 70 (Compiled by the Special Committee on Dispute Resolution, Public Services Division, American Bar Association (1983)); “... there is an unresolved legal question as to whether ... [the mediators’] involvement should be regarded as confidential in any subsequent legal proceedings.” G. Cormick, How And When Should You Mediate Natural Resource Disputes? 8–14 (unpublished paper presented to Alternatives to Litigation Seminar, Washington State Bar Association, July 26, 1985) [hereinafter Cormick, Natural Resource Disputes].

Whether communications made during mediation are privileged from compulsory process sought by a party involved in the mediation (which could become an issue if negotiations broke down and the case ended up in court) is not discussed here. Almost all practicing environmental mediators require parties to disputes to sign confidentiality agreements guaranteeing that admissions or confessions made by one party may not be used against it by its adversaries if the negotiations break down and the case goes to trial. See, e.g., Freedman, supra, at 80.

5 Because of judicial reluctance to grant privileges except in rare situations, see, e.g., United States v. Nixon, 418 U.S. 683, 711–13 (1974), it is unlikely that any court would grant a common-law privilege to all mediators. This is especially so because there are no licensing requirements for, or procedures to check abuses by, environmental mediators. Anyone can hold him or herself out as a mediator. Granting a privilege to mediators generally could lead to abuses of the role and would also be too broad an exception to the general rule that the public is entitled to every person’s evidence. Courts have, however, been more willing to carve out narrow, specific privileges for professionals such as accountants, labor arbitrators, and social workers.

It is possible that the courts would create a narrow exception for environmental mediators because environmental mediators and environmental mediation are unique in a few significant ways. First, environmental mediation efforts are usually organized under the auspices of environmental mediation centers, some of which are associated with universities. See infra note 22. Second, the government is a party in many mediated environmental disputes. See infra notes 59–61, and accompanying text. This government participation lends legitimacy to the environmental mediator’s participation. Finally, because of the number and complexity of claims, the large number of parties, the expense of litigation and the possible long range consequences of environmental disputes, the courts have encouraged environmental litigants to use extrajudicial methods for resolving their disputes. See infra note 89.

6 McCrory, Environmental Mediation—Another Piece for the Puzzle, 6 Vermont L. Rev. 49, 56 (1981). In an affidavit filed in support of a successful motion to quash a subpoena served upon the mediator of an environmental dispute in Adler v. Adams, No. 673-7362 (W.D. Wash., 1979) Robert Caulson, President of the American Arbitration Association, made the following statement regarding confidentiality:
promise of confidentiality to be a pre-requisite to successful mediation. Unless environmental mediators are granted a testimonial privilege, and their written communications are protected from compulsory process sought by third parties, environmental mediators may not be able to honor their promises of confidentiality. A lack of a testimonial privilege, they argue, will lead to a reduction in the use of environmental mediators.

On the other hand, allowing mediators a testimonial privilege may result in abuses. It could also encourage parties who either want to avoid public disclosure of certain facts or the creation of adverse precedent, to shield themselves from public scrutiny by hiding their decision-making processes behind a screen of confidentiality.

Allowing mediators a testimonial privilege may also impede the public's right to hear every person's evidence. Recognizing that the integrity of the judicial system depends on full disclosure of all the relevant facts, the United States Supreme Court has held that the public has a right to every person's evidence, "except for those persons protected by a constitutional, common-law or statutory privilege." Such privileges are granted rarely and are designed to protect "weighty and legitimate competing interests . . . ." Most states protect the attorney-client, labor arbitrator-disputants, and Public policy requires that mediators be privileged from disclosing information acquired in the course of their mediation duties. It is deponent's belief that the mediation process would be severely damaged if parties are not permitted to speak freely to the mediators. Coupled with free disclosure is the knowledge that the mediator may not subsequently make disclosures as a witness in some other proceeding to the possible disadvantage of a party to the mediation. Mediation's success depends upon total privacy.

Deponent's experience is that without complete confidentiality the usefulness of third party intervention in the settlement of future disputes would be seriously impaired if not destroyed.

7 New York, for example, only funds mediation programs if they guarantee confidentiality. See N.Y. JUD. LAW § 849-b(3)–b(6) (McKinney Supp. 1983–1984).

8 E.g., McCrory, supra note 6 at 81–83; Defendant's Memorandum of Law in Support of Motion to Quash Subpoena or for Protective Order 7, Adler v. Adams, No. 673–73C2 (W.D. Wash. 1979).


10 Nixon, 418 U.S. at 709.

11 Id. Such privileges are created only when "permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).


13 "Considerations of public policy are the reasons for the rule and like other judicial officers,
priest-penitent, and physician and psychotherapist-patient relationships from judicial scrutiny by statute and/or common law. Some states have also created testimonial privileges for accountants and social workers. All of these protected relationships turn on activities that society seeks to foster, and for which there are no realistic alternatives. If the judicial process were to intrude into such relationships, it would interfere with the achievement of the aims of these activities.

Mediation differs from these activities because there is another way to achieve its goal—litigation. It is only because this recourse to litigation exists that the confidentiality of the mediator versus concealment of the facts issue arises. This conflict does not exist, in the other privileged relationships largely because concealment of the facts is an accepted, encouraged occurrence given the recognized necessity of the activities. Similarly, the argument for a judicial recognition of a privilege for environmental mediators hinges on a judicial decision to encourage mediation. For environmental mediators to persuade courts to protect confidentiality of communications, they need to show that mediation of environmental disputes is necessary and desirable. They must also show that, in some cases, litigation is not a realistic alternative because it would neither serve the courts’ search for the truth, nor the aims of the interested parties.

Under current law however, there are few statutory guidelines regarding environmental mediators’ privilege or the confidentiality...
of their notes and documents. Nor is there widespread recognition by the states’ common laws of an environmental mediator’s privilege. To date only one federal court, and no state court, has held that such a privilege exists.

This Comment concludes that there is a need for the development of a common-law privilege for environmental mediators. The first section presents a general discussion of mediation, and then discusses the growth of environmental mediation, and the advantages of using environmental mediation to resolve environmental disputes. The second section considers the advantages and disadvantages of granting a privilege to environmental mediators and their documents arising out of the mediation process. The third section outlines Adler v. Adams—a recent federal decision granting an environmental mediator’s motion to suppress a subpoena duces tecum issued by a third party. Finally, the Comment discusses the applicability of Adler to the development of a common-law privilege for environmental mediators. This section considers whether the analysis the Adler court used is the best framework upon which to base such a privilege, and suggests possible alternatives to the Adler approach.

II. ENVIRONMENTAL MEDIATION

Mediation is a voluntary process during which a neutral mediator helps those involved in a dispute to explore and reconcile their differences. Mediators have no authority to impose a settlement on...
the disputants. Instead, mediators help the disputants work together to identify issues, explore possible bases of agreement, accommodate the interests of other parties, structure future working relationships, and ultimately, to formulate their own settlement. Mediators consider a conflict resolved only when the parties reach a solution that the parties themselves consider workable.\textsuperscript{23} Most environmental mediators possess no technical expertise in the matters and issues in dispute.\textsuperscript{24}

One commentator has identified the following four traits as fundamental characteristics of mediation: 1) the neutrality of the mediator (both perceived and actual); 2) the voluntariness of the process; 3) the confidentiality of the relationships between the mediator(s) and the parties; and 4) the procedural flexibility available to the mediator.\textsuperscript{25} Successful mediation efforts almost invariably meet all four of the above criteria. These basic characteristics of

Seattle, WA 98104; The New England Environmental Mediation Center, 108 Lincoln Street, Boston, MA 02111; Project on Environmental Conflict, Upper Midwest Council, Federal Reserve Bank Building, Minneapolis, MN 55480; RESOLVE, Center for Environmental Conflict Resolution, 360 Bryant Street, Palo Alto, CA 94301; ROMCOE (Rocky Mountain Center on the Environment), 5500 Central Ave. Suite A, Boulder, CO 80301; Wisconsin Center for Public Policy, Environmental Mediation Project, 1605 Monroe Street, Madison, WI 53711. These centers are funded largely through grants from philanthropic foundations such as the Ford Foundation, the William and Flora Hewlett Foundation, the Rockefeller Foundation, Atlantic Richfield, and the Mellon Foundation. MCCARTHY supra note 2, at 82.

Some states do fund environmental mediation efforts, but limit their funding to specific types of disputes such as the siting of solid waste facilities. Id. at 83. Only New Jersey funds mediation services for a broad range of disputes. Id. Attempts to secure government funding for environmental mediation services have failed in the federal government, Massachusetts, and New York. Id. In 1974 Massachusetts rejected a proposal to fund the environmental mediation work of then secretary of the Massachusetts Executive Office of Environmental Affairs. Id. In 1980, the New York State Legislature turned down legislation that would have established and funded an environmental mediation center in Syracuse. Id. A proposal to include environmental mediation under the jurisdiction of the Federal Mediation & Conciliation Service has met with legal, political, and administrative resistance. Id. at 84. In light of the heavy involvement of federal, state, and local governments and agencies as parties to environmental disputes, perhaps it is wiser to continue to fund environmental mediation privately. Government funding of environmental mediation would be likely to raise questions of conflict of interest and impair the perceived or actual neutrality and impartiality, which is a fundamental requirement of mediation. McCrory, supra note 6, at 56. On the other hand, TALBOT, supra note 1, at 100–01, believes that government funding is the "most practical, long-range answer" because mediation serves the public interest and offers major benefits to government agencies.

\textsuperscript{23} Cormick, Experience and Future Directions, supra note 3, at 1. See MCCARTHY, supra note 2, at 87–104 for three examples of settlement agreements to environmental disputes.

\textsuperscript{24} "Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal." Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1854).

\textsuperscript{25} McCrory, supra note 6, at 56.
mediation sustain the process and make it suitable to resolve a broad spectrum of disputes.26

Mediation is a cooperative, rather than adjudicatory or adversarial process; it gives disputing parties the opportunity to define and, if they want, preserve ongoing relationships.27 Nonetheless, mediation is not entirely independent from the judicial system because mediated settlements ultimately depend on the courts for implementation and enforcement.28 The possibility of impending court action or a stalemate in the courts often precipitates mediation.29 Mediation differs from arbitration because arbitrators, unlike mediators, are usually appointed by the courts to decide the matters submitted to them, and the parties are bound by their decisions.30 Mediators, on the other hand, possess no decision-making authority.

A. The Growth of Environmental Mediation

Commentators cite many reasons for the rapid growth of the use of mediation to resolve environmental disputes.31 The principle reason for the rise in environmental mediation is the tremendous in-

26 Note, Protecting Confidentiality in Mediation, 48 HARV. L. REV. 441, 444 (1984) [hereinafter Confidentiality in Mediation].

27 Id.

28 TALBOT, supra note 1, at 97.

29 Id. One dispute, which involved the location of the Storm King pump-storage plant on the Hudson River, was tied up in the courts for seventeen years before the parties reached agreement through mediation. See generally L. BACOW & M. WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 10–12 (1984) for a description of the Storm King dispute.

30 Cormick, Natural Resource Disputes, supra note 4, at 8–13. Dr. Cormick cites four reasons why mediators need not have technical expertise. They are:

First, “experts” have a tendency to rely on their own assumptions and values. Second, they have a tendency to filter information and communication based on their own assessment of the “facts.” Third, there is the danger that discussions will tend to focus on technical matters, ignoring the basic value issues, and resulting in solutions that, while technically sound, do not represent an accommodation of the real differences that separate the parties. Finally, to the extent the mediator leads the parties to an agreement that he or she believes is appropriate, the parties will have a decreased sense of ownership and commitment, making implementation difficult.

crease in environmental disputes since the 1960’s.\textsuperscript{32} The emergence of alternative processes for resolving environmental disputes was one consequence of the surge of environmental disputes that arose after Congress enacted preemptive federal legislation on environmental issues during the late 1960’s and early 1970’s.\textsuperscript{33} Acts such as the National Environmental Policy Act of 1969,\textsuperscript{34} the Clean Air Act Amendments of 1970,\textsuperscript{35} and the Clean Waters Act Amendments of 1977,\textsuperscript{36} articulate national goals, set compliance deadlines, and delegate to federal agencies a major role in enforcing new federal standards.\textsuperscript{37} Federal courts soon became involved in reviewing challenged agency practices. Because federal courts agreed to review carefully all challenged administrative decisions in environmental cases,\textsuperscript{38} the courts were soon deluged with a flood of complex environmental litigation.\textsuperscript{39} The federal courts had very little precedent or statutory guidance on how to resolve equitably these disputes. This lack of guidance has led to what one commentator terms a “clear power situation.” That is, many agencies, groups and individuals have standing to challenge, delay, or stop a project, but no group has the authority to commence or accomplish any planned objective.\textsuperscript{40}

In the environmental arena, legislation and caselaw in the United States have created a clear power situation, often in what might be characterized as a no-win configuration for all concerned. Legislation has created elaborate processes for assessment and review of the environmental impact of proposed public and private projects or programs. The courts are given the responsibility to review the implementation of those procedures whose very complexity has provided extensive bases for court challenge.\textsuperscript{41}

\textsuperscript{32} One study reveals that environmental conflict is spreading geographically, once it emerges in a region it remains, and that the frequency of environmental conflict is rising in part because an increasing percentage of heavy industrial projects are encountering local opposition. Gladwin, \textit{Environmental Conflict}, 2 EIA REV. 48–49 (1978) \textit{quoted in} BACOW AND WHEELER, \textit{supra} note 29, at 3.

\textsuperscript{33} Lake, \textit{supra} note 31, at 1.

\textsuperscript{34} 42 U.S.C.A. §§ 4321–4370a.

\textsuperscript{35} 42 U.S.C.A. §§ 7401–7642.

\textsuperscript{36} 33 U.S.C.A. §§ 1251–1376.

\textsuperscript{37} Lake, \textit{supra} note 31, at 1; Susskind and Weinstein, \textit{supra} note 31, at 317.

\textsuperscript{38} Lake, \textit{supra} note 31, at 1.

\textsuperscript{39} \textit{Id.}; Susskind and Weinstein, \textit{supra} note 31, at 317.


\textsuperscript{41} \textit{Id.}
Faced with this situation, and the courts' apparent administrative inability to deal with the complex technical, economic, and social issues involved in most environmental disputes, as well as dissatisfaction with costly, delay-ridden, winner-take-all litigation, parties to environmental disputes are seeking alternative methods to resolve their conflicts.

Mediation has emerged as one of the more popular alternative methods of resolving environmental disputes. Both the process of mediation itself and the unique problems engendered by environmental disputes make mediation an attractive alternative. Generally, mediation is faster, less expensive, and provides solutions more satisfactory to all the parties than does litigation. By definition, a settlement reached through mediation is an efficient outcome; all the disputants and stakeholders prefer it to no agreement at all, or to any other feasible outcome.

B. The Advantages of Environmental Mediation

Mediation is an especially appropriate method of alternative dispute resolution for environmental conflicts for a number of reasons. First, environmental disputes usually involve many parties, each with its distinct issues and needs. Courts do not have the time, facilities, or trained personnel to handle the multiplicity of complex

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43 For example, a dispute over the extension of Interstate 90 into Seattle, Washington was successfully mediated in ten months. Before the parties agreed to mediate, estimates of how much longer the dispute would be tied up in the courts ranged from one to five years, with an estimated escalation cost of $140,000 per day. Cormick and Patton, supra note 2, at 92.
44 Id.
46 For example, the Storm King dispute regarding the building of a pump-storage plant on the Hudson River involved three environmental groups, four public agencies, and five electric utility companies. The parties involved were: Scenic Hudson, the Natural Resources Defense Council, and the Hudson River Fisherman's Association. The public agencies were: the Environmental Protection Agency, the New York State Department of Environmental Conservation, the Nuclear Regulatory Commission, and the Federal Energy Regulatory Commission. The utility companies were: Consolidated Edison, Orange and Rockland Utilities, Central Hudson Gas & Electric, Niagara Mohawk, and the New York State Power Authority. TALBOT, supra note 1, at 7.
issues, the many conflicting interests, and the tremendous number of documents involved in such multiparty cases.

Environmental disputes often involve complex economic, technical, and scientific matters, about which most judges have little training. This lack of specific training and background makes it especially difficult and time-consuming for judges to reach equitable solutions. Mediation reduces this problem of adjudicators' lack of technical expertise. Mediators and judges do not need to possess the same level of technical expertise because of the difference in the nature of their roles in the resolution of environmental disputes. Judges are adjudicators and fact finders. Their role is to examine all the evidence and produce a decision based on the facts of the case. Furthermore, judges write opinions. To do this successfully, judges must comprehend all of the technical, scientific data presented by the parties. Mediators, on the other hand, act mainly as facilitators. While their role does require familiarity with the legal and factual issues, the mediators' role does not require them to have a sophisticated understanding of all the technical specifics.

In mediation, the parties serve as the ultimate adjudicators and fact finders. It is important therefore, that they, more so than mediators, understand the technical facts. One goal of cooperative dispute resolution is for the parties to acquire this information through educating each other as to their respective positions. Ideally, this educational process also helps each party to become aware of the legitimacy of the others' position. As a result of this acquisition of information about the other parties' position, parties to the dispute are often more willing and likely to compromise.

Educating the other parties is an especially important function of environmental dispute resolution for two reasons. First, environ-

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47 See D. Horowitz, The Courts and Social Policy (1977). Chief Judge David L. Bazelon of the United States Court of Appeals for the District of Columbia has been especially articulate about the discomfort of judges when required to arbitrate complex and disputed scientific information. He believes that "the courts are not the proper forum either to resolve the factual disputes, or to make the painful value choices on technical and scientific issues." McCarthy, supra note 2, at 55, quoting the judge.

48 For example, in the seventeen years the Storm King dispute was in the courts, the administrative record alone totaled about 200,000 pages. Bacow and Weinstein, supra note 29, at 11.

49 See supra note 24 and accompanying text for a discussion of mediators and technical expertise.

50 See supra notes 22–23 and accompanying text.

51 See supra note 24.

52 Id.

53 Susskind, Bacow, and Wheeler, supra note 45, at 257.

54 See, e.g., id. regarding the EPA's change of position in the Brayton Point Dispute.
mental science is not advanced enough for anyone to predict accurately the environmental costs and benefits of any party's claims. Second, most disputants have legitimate and scientifically substantiable positions, of which all decision makers should be aware. Thus, working together to reach an agreement satisfactory to the largest number of groups will provide a more even-handed and value-free solution than would a decision by a single judge. As one environmental mediator has stated, the lack of knowledge regarding environmental science "reduces the effectiveness of the courts in [environmental] disputes because all the courts can do is decide which experts to believe."\(^{55}\)

As is the case during litigation, parties involved in mediation hire technical experts. In mediation though, the parties use mutually agreed upon experts and jointly devised and managed research efforts.\(^{56}\) This cooperative use of experts helps contain costs and avoids the battle of the experts that is common in litigation. Adjudication based on settlements reached through compromise and understanding rather than on the credibility of disagreeing experts is preferable, especially in environmental cases, where the outcomes often significantly and permanently affect large numbers of people.

Another reason why mediation may be a more satisfactory technique than judicial adjudication for resolving environmental disputes is the lack of precedent on many environmental issues. Most current environmental cases hinge on interpretations of such relatively recent statutes such as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.\(^{57}\) This lack of pertinent caselaw, combined with a lack of specific scientific environmental knowledge, and the difficulty in predicting how certain measures will affect the environment, make it difficult to predict who would win if a case went to court. Indeed, it is difficult to know what would be a "win." For example, the construction of a power plant on a shoreline may threaten the coastal ecosystem depending on whether specifically designed pollution control devices turn out to be effective. If the technology is new or the geology unique, no one can be absolutely sure of all the consequences.\(^{58}\) In such cases, flexible settlements that allow for renegotiation are preferable, for both the disputants and the courts, to court-ordered solutions where the parties must return to court if the original solutions prove unworkable.

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55 Id.
56 Cormick, Natural Resource Disputes, \textit{supra} note 4, at 8–16.
57 42 U.S.C. 9601 et seq.
58 Id. at 5–6.
Finally, mediation may be preferable to litigation in environmental disputes because the parties to environmental disputes often are, and must continue to be, involved in ongoing relationships with each other. Neighboring cities and towns, different federal and state agencies, and utilities and the towns and states in which they are located, often oppose each other in environmental disputes. These opposing parties cannot choose to terminate their relationships as easily as can litigants who are not locked into ongoing relationships. Unlike litigation, mediation encourages disputants to resolve their present disagreements and provides a forum in which they may structure, preserve, or redefine their relationships.

In spite of the many advantages mediation has over litigation for resolving environmental disputes, only approximately ten percent of environmental disputes can be mediated successfully. Generally, mediation becomes a feasible choice only when the issues are clearly defined, the disputants perceive that a balance of power exists among themselves, and the parties realize they cannot achieve their objectives without negotiation. Issues involving broad policy decisions or having ideological overtones (i.e., anti-nuclear), in which the principles involved are so important to the parties that they may not be likely or willing to compromise, are not appropriate for mediation. Other disputes inappropriate for mediation are those in which one party wants to create judicial precedent (and would thus rather litigate), or where one party would rather delay the action than work to end the conflict, or where the parties are unable to

59 E.g., the I-90 dispute, see infra notes 119–61, and accompanying text; the Eau Claire Wisconsin Landfill dispute, TALBOT, supra note 1, at xiii.
60 E.g., the Storm King dispute, see supra note 29; the I-90 dispute, see infra notes 119–61, and accompanying text.
61 E.g., the Hydro-Power at Swan Lake dispute, TALBOT supra note 1, at xii; the Greylocks Dam dispute, BACOW AND WEINSTEIN, supra note 29, at 46–50.
62 Note, Confidentiality in Mediation, supra note 26, at 444. Susskind and Weinstein have found that mediation leads to an increase over litigation in the likelihood of achieving stable agreements—that is, agreements honored by all parties for at least seven years. SUSSKIND AND WEINSTEIN, supra note 31, at 312–13.
63 TALBOT, supra note 1, at 91 (quoting Howard Bellman, an environmental mediator who worked on a dispute among towns and state agencies over the location of a landfill in Wisconsin).
64 Cormick, Natural Resource Disputes, supra note 4, at 8–18; TALBOT, supra note 1, at 91.
65 TALBOT, supra note 1, at 91.
66 Id.; Cormick, Natural Resource Disputes, supra note 4, at 8–18.
make a long-term commitment. Thus, although mediation has many advantages over litigation, courts will continue to resolve the majority of environmental disputes because the parties are unwilling or unable to make the compromises mediation requires.

III. SHOULD A PRIVILEGE BE GRANTED?

Once the parties to an environmental dispute agree to mediate, the question remains whether an environmental mediator's communications, either written or oral, made during mediation should be protected from compulsory process sought by groups not parties to mediated settlement agreements. Legitimate arguments exist on both sides of this issue.

Opponents to an environmental mediator's privilege argue that neither public policy nor common law supports such a privilege and that there are no compelling policy reasons to change the status quo. That the public is entitled to every person's evidence is a presumption deeply rooted in the common law. The policy behind this presumption is that the "underlying aim of judicial inquiry is ascertainable truth . . . ." Thus, all evidence "rationally related" to determining the truth is presumed admissible. Mediators are sometimes the sole sources of information relevant to a plaintiff's case. Thus, if environmental mediators and their records were immune from discovery, the plaintiff might be barred from relief because a mediator was the sole source of relevant information. Such a result could have especially grave consequences in environmental cases, where the outcomes of disputes may significantly and permanently affect the environment and large numbers of people.

Another reason why some oppose granting a privilege to environmental mediators and their records is to avoid unscrupulous parties

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67 Talbot, supra note 1, at 94, 95; Cormick, Natural Resource Disputes, supra note 4, at 8-18.
68 Many of the arguments regarding an environmental mediator's privilege may also apply to a privilege for all mediators. But, the nature of environmental mediation is such that often arguments are especially germane to a privilege limited to environmental mediators.
72 Id.
73 For example, this was a disputed issue in the Adler case. See infra text accompanying notes 222-25.
from choosing to mediate to escape public disclosure of certain facts and information.\(^{74}\) This is especially undesirable when public officials and agencies are involved in the mediation process, as is very often the case.\(^{75}\) Confidentiality would permit public officials, whose actions are otherwise subject to close public scrutiny, to shield themselves from such scrutiny by choosing to mediate. Confidential mediation involving public officials and agencies may also be challenged in some jurisdictions because it would violate open meeting laws. In addition to this accountability issue, granting a privilege to environmental mediators raises a problem of delegation. The public has delegated certain administrative decisionmaking tasks to its elected officials and public agencies. For these public officials to in turn delegate these responsibilities to members of the private sector—namely, environmental mediators—creates a potential delegation problem.

Some advocates of unlimited discovery of the environmental mediation process argue that because there are no licensing or quality control procedures to ensure the ethical behavior of environmental mediators, their records must be discoverable to deter dishonest practices in mediation.\(^{76}\) There are no guidelines regarding to whom and how environmental mediators are accountable.\(^{77}\) That is, there is no process for those affected by the actions of environmental mediators to chastise, sue or fire them.\(^{78}\) On the other hand, The Federal Mediation and Conciliation Service and The American Arbitration Association govern labor arbitrators, who do have a judicially recognized privilege. A labor arbitrator’s failure to comply with applicable regulations can result in disaccreditation.\(^{79}\) Labor mediators may also be sued if they violate statutes or caselaw on proper mediation procedure.\(^{80}\) Furthermore, the parties to labor disputes may discharge labor mediators.\(^{81}\) Because there are no regulations governing who may mediate environmental disputes, environmental mediators are not required to be, and often are not,\(^{82}\)

\(^{74}\) See, e.g., Plaintiffs’ Memorandum in Support of Review, supra note 69.

\(^{75}\) See supra notes 57–61 and accompanying text.

\(^{76}\) See, e.g., Plaintiffs’ Memorandum in Support of Review, supra note 69.

\(^{77}\) Nor does the mediation process offer any checks to prevent the parties from telling each other lies or from snowing each other with irrelevant information. Unlike litigation, sanctions for perjured testimony and contempt of court are not available to mediating parties.


\(^{79}\) Id. at 5.

\(^{80}\) Id.

\(^{81}\) Id.

\(^{82}\) See supra note 1.
attorneys. Consequently, they are not bound by state and federal rules of professional conduct. Unlike labor mediators, who usually mediate as a career, environmental mediation is often undertaken by "one time only" mediators, on whose future careers attempts to discharge them would have little effect. For all of the above reasons, until accreditation, procedural, and sanctioning regulations similar to those governing labor mediators are established for environmental mediators, the threat of possible judicial review may be the best way to police environmental mediators and environmental mediation.

Finally, if environmental mediation efforts were not discoverable, there would be no way for those not represented in the mediation process to ascertain whether their interests were fairly and adequately considered. This possible lack of adequate representation presents a potential due process problem. The government is deciding issues that affect large numbers of people who have no access to the decisionmaking process, and are thus denied a full and fair hearing on the facts. Although ideally environmental mediation would include representatives of every party, in reality this cannot be. Often parties either cannot afford or refuse to join the mediation process; other times, some parties are excluded from the process for political reasons.

On the other hand, mediators argue that the confidential nature of their relationships with the disputants is critical to their success as mediators. Confidentiality allows the parties to engage in frank discussions without fear that their statements will be made public.

83 Susskind, supra note 78, at 5.
84 If most environmental mediation efforts continue to be mediated by "one time only" mediators, such sanctions and licensing requirements would have little effect, except perhaps to discourage one time only mediators by requiring them to obtain licenses. If, however, the current trend toward establishing environmental mediation centers continues, fewer environmental mediators will be one time only participants, and it may thus become more feasible to police environmental mediation efforts through the promulgation of accreditation, procedural and sanctioning regulations. See generally McCrory, supra note 6 for a discussion on institutionalizing environmental mediation.
85 The Adler plaintiffs alleged that the defendant environmental mediators violated their due process rights by not allowing the plaintiffs access to the records of the mediators. The Adler court did not address this contention directly. Instead, the court concentrated its decision and analysis on the procedural and policy reasons for granting environmental mediators a testimonial privilege. See infra notes 117-87 and accompanying text.
86 For example, in the I-90 dispute, environmental and neighborhood groups, claiming to represent a majority of citizens in Seattle were not invited to join in the mediation process. Plaintiffs' Memorandum in Support of Review, supra note 69.
87 See, e.g., Memorandum of Law in Support of Motion to Quash Subpeona or for Protective Order 4-5, Adler v. Adams, No. 673-73C2 (W.D. Wash. 1979) [hereinafter Memorandum in Support of Motion to Quash].
Absent a guarantee of confidentiality, the candor that such confidentiality encourages would be lost. 88

Many judges encourage parties to use alternative forms of dispute resolution. 89 Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia believes that judges are uncomfortable when required to decide cases that involve complex and disputed scientific information. 90 He has stated that "the courts are not the proper forum either to resolve the factual disputes, or to make the painful value choices on technical and scientific issues." 91 Thus, to entice parties to use alternative forms of dispute resolution, such as mediation, it is important that the courts and legislatures make alternative forms attractive to disputants. Making mediation attractive to the disputants is especially important in the environmental arena, where there are many compelling reasons to use mediation rather than litigation to resolve disputes. 92

Absent a privilege, third parties could subpoena mediators and request their testimony regarding issues discussed during the mediation process. Forcing mediators to testify and compelling production of a mediator's notes would discourage mediators and parties from choosing to mediate. Mediators would have to be concerned with keeping a clear record that would withstand judicial scrutiny of the mediation process. 93 Such a requirement would tend to formalize the mediation process and impede the free flow of thoughts and ideas. 94 Mediators would also be less willing to use unusual or unconventional strategies to reach compromises if they knew their actions might be reviewed in court. 95

Mediators [now] have procedural flexibility not available to judges or to decision-makers who function in a quasi-judicial capacity. They need not be concerned with prohibitions against ex-parte communications, with supervising the formation of a record or with other formalities which would prohibit or impair confidential relationships with the parties and would inhibit settlement efforts. A mediator may adopt procedures or methods of operation which meet the needs of each situation, and may alter those procedures if the need arises.

88 "It is only through frank and open discussions with the parties that the mediator can identify and explore areas of flexibility in a party's negotiating stance." Id. at 6-7.
90 McCARTHY, supra note 2, at 55 (quoting the Judge).
91 Id.
92 See supra notes 46-62, and accompanying text.
93 McCORY, supra note 6, at 82.
94 See, e.g., Memorandum in Support of Motion to Quash, supra note 87, at 4.
95 Id.; McCORY, supra note 6 at 82.
sponded to the threat of a subpoena of their records by refusing to keep records. This type of self-defeating logic is not a viable long-term solution to the problem. Instead, it merely sidesteps the issue at the price of decreased efficiency and professionalism.

As long as mediators cannot guarantee protection of confidences made during mediation against compulsory process sought by third parties, disputants will be less willing to mediate. They would be less willing to participate in open discussions and brainstorming sessions if their ideas could possibly be scrutinized by a court or used against them in a lawsuit. In short, "if a mediator could be sued, form would prevail over substance and procedural flexibility would be the victim."

A final reason why proponents of the privilege argue that mediators' notes should be confidential is that they often reflect a mediator's mental impressions and speculations for future use in negotiations. Because the notes are interpretive, these speculations and impressions are not always accurate. Public disclosure of these notes could thus be more misleading than helpful.

IV. How Should a Privilege be Granted?

A. Federal Rule of Evidence 408

Commentators and the courts have proposed guidelines for the creation of a common-law privilege for environmental mediators. One rationale for granting environmental mediators and their work a common-law privilege is Federal Rule of Evidence (FRE) 408. FRE 408 provides that an offer to compromise is "not admissible to prove liability for or invalidity of the claim or its amount." FRE 408 further provides that "[e]vidence of conduct or statements made in compromise negotiations is likewise inadmissible." The underlying policy of FRE 408—to provide "free and frank" discussions of
settlement proposals—is also a goal of mediation. Thus, although FRE 408 has traditionally been used only in the context of pending litigation, the language and policy behind the rule may be construed to include mediation programs.

A major limitation with using FRE 408 to protect mediators’ common-law privilege is it excludes evidence of negotiations only when offered to prove the validity or amount of a plaintiff’s claim; and the rule does not exclude evidence offered to prove or challenge the actual settlement agreement that arose from the negotiations. Thus, FRE 408 would not be relevant in a case such as Adler v. Adams, where the plaintiffs challenged the legality of the settlement agreement.

B. The Relevancy Rule

In jurisdictions that have not enacted FRE 408, mediators may argue that the “relevancy rule” protects their communications and testimony from disclosure to third parties. This common-law doctrine excludes from evidence all offers to compromise made during negotiations. The relevancy rule is based on the premise that such offers to compromise are not reliable evidence of the offeror’s claim. The relevancy rule forces courts to distinguish between offers to compromise and admissible independent admissions of fact. This potentially arbitrary distinction has garnered criticism from many sources. Furthermore, the logic behind the relevancy rule does not support a privilege for mediators. The exclusion was intended merely to ensure the probative value of the evidence rather than encourage settlement negotiations. Thus, the relevancy rule offers even less protection to mediator’s communications than does FRE 408.

104 2 J. WEINSTEIN & M. BERGER, WEINSTEIN’S EVIDENCE ¶ 408 [01] at 408–09.
105 "... expansion of the rule’s coverage to mediation programs is a logical step in promoting the underlying policy considerations.” Friedman, Protection of Confidentiality in the Mediation of Minor Disputes, 11 CAP. U.L. REV. 181, 205 (1981); “... the language and the logic of the rule [408] clearly would appear to encompass mediation programs.” Freedman, supra note 4, at 75.
106 Note, Confidentiality in Mediation, supra note 26, at 449.
109 Id.
110 See Note, Confidentiality in Mediation, supra note 26, at 447–48.
111 Id. at 447.
C. A Balancing Test

Many commentators advocate that the courts use a balancing test to grant a privilege to environmental mediators. With this test, courts would weigh the benefits of free discovery against policy considerations that favor protecting confidential communications. Traditional legal doctrine supports the use of such a test to establish a claim of privilege. Professor Wigmore has developed four criteria to decide whether to grant a claim of privilege. They are:

1. The communications must originate in confidence that they will not be disclosed. 2. The element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties. 3. The relation must be one which in the opinion of the community ought to be sedulously fostered. 4. The injury that would inure to the relations by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation.

Two cases that have used a balancing test to find a privilege for mediators against third parties seeking confidential information are Richards of Rockford, Inc. v. Pacific Gas & Electric Co., and Adler v. Adams. These two cases, though, ultimately fail as precedent because they fail to resolve the key policy problem: the protection of confidences versus the public's right to know. Instead, Richards and Adler approach the issue of confidentiality with a fact-bound test that only peripherally addresses the public policy concerns that Wigmore's analysis raises.

V. ADLER V. ADAMS

Adler involved an attempt by third parties to subpoena the mediator and discover documents generated during the mediation of a dispute among municipalities and state agencies over the proposed extension of an interstate highway. In Adler, the United States District Court for the Western District of Washington State considered two issues: whether to grant an environmental mediator a...
testimonial privilege, and whether the mediator’s documents arising out of the mediation process of the dispute were protected from compulsory process. 120

In 1964, the Washington State Highway Department proposed the construction of a ten-lane highway to link Seattle to the eastern towns of Bellevue and Mercer Island. 121 The Seattle City Council, and neighborhood environmental groups such as the Washington Environmental Council, a coalition of major environmental organizations in Washington State, opposed this plan. 122 Opponents argued that the proposed highway would reduce property values, and that the city’s emphasis should be on improving the public transit system rather than building more lanes for private automobile traffic. 123 In 1973, these groups successfully challenged the first environmental impact statement for I-90 that the State Highway Department had prepared. 124 The groups argued that the Highway Department had not sufficiently examined mass-transit alternatives to I-90. 125

By 1975, in response to this opposition, the Highway Department had scaled down the proposed project to six new lanes and incorporated an existing four-lane floating bridge into the interstate plan. Of these ten lanes, eight were to be automobile lanes, and two were to be transit lanes (commonly referred to as a 4-2T-4 configuration). 126 This revised plan still did not satisfy the environmental and neighborhood groups. They objected to the new proposal for the same reasons they had opposed the original plan: the highway would adversely affect the neighborhoods around the new road, and it would be more prudent to upgrade the mass-transit system in light of the energy crisis. 127 These groups exerted tremendous pressure on the Seattle City Council to oppose the plan. 128

On the other side of the controversy were the outlying communities of Bellevue and Mercer Island, whose residents faced a congested daily commute to Seattle on deteriorating roads and bridges. 129 The Metropolitan Transit Authority (“Metro”) also sup-

120 Id.
121 TALBOT, supra note 1, at 27.
122 Id. at 28.
123 Id.
124 Id.
125 Id.
126 Cormick and Patton, supra note 1, at 92; TALBOT, supra note 1, at 29.
127 Id.
128 TALBOT, supra note 1, at 30.
129 Id. at 27-28.
ported the 4-2T-4 configuration because it gave the Metro two new, much-needed rapid transit lanes into Seattle. 130

While this dispute was being fought both in and out of the courts, Congress amended the Interstate Highway Act, which provided for ninety percent Federal financing for interstate roads. 131 The 1974 Amendments allowed states to reassign some of the money allocated for highway construction in urban areas to other transportation projects, including mass transit. 132 This development delayed the commencement of construction of the I-90 extension for another two years while Seattle, Mercer Island, Bellevue and nearby King County debated whether to trade the highway funds for mass transit. By January of 1976, all of the towns had voted against the reallocation. 133

Thus, after twelve years of dispute, how, where, and even whether to extend the interstate remained unsolved. Estimates of how much longer the project would be tied up in the courts ranged from one to five years. 134 The costs of this delay were astronomical. The price of the $500 million project was escalating at the rate of approximately $140,000 per day. 135 Although the ultimate decision about whether and how to extend I-90 rested with the State Highway Commission, the Commission did not want to go ahead with any plan unless the affected communities agreed on the exact number of lanes and how they were to be used. 136 The Highway Department believed that the project could withstand an expected legal attack on the revised Environmental Impact Statement from the neighborhood and environmental groups only if the affected communities supported the highway construction. 137 Thus, the decision to mediate was a tactical one.

In February 1976, the Highway Department asked two mediators from the Office of Environmental Mediation (OEM) to work with Seattle, Mercer Island, Bellevue, King County, and the Metro to resolve their conflicts. 138 The environmental and neighborhood groups that opposed the highway construction did not join the me-

130 Cormick and Patton, supra note 2, at 93.
131 TALBOT, supra note 1, at 28.
132 Id.
133 Id. at 29–30.
134 Cormick and Patton, supra note 2, at 92.
135 Id.
136 TALBOT, supra note 1, at 31.
137 Id.
138 Id. The OEM is a privately-funded, non-profit environmental dispute resolution service. Cormick, Experience and Future Directions, supra note 3, at 18.
The mediation process. The Highway Department, Mercer Island, and Bellevue resisted including these groups, and the groups refused to be bound by any settlements that arose out of the mediation.

The participants in the mediation process were elected officials who formally represented the four communities, and representatives from the Department of Highways, and the Metro, and the State Highway Commission.

During the mediation process, the formal negotiation sessions were open to the public, and covered by the media. Several of these open meetings were televised. Throughout the process, the mediators held informal briefing sessions for the opposing environmental and neighborhood groups. Most of the mediation effort, however, was not made public. Instead, the process consisted of caucuses among the parties, with the mediators functioning as messengers, and informal discussions between the mediators and each of the parties, where the mediators made strategic suggestions and explored possible areas of accommodation.

By November 1976, nine months after formal mediations began, the parties reached a settlement. Their agreement called for a 3-2T-3 lane configuration with special access lanes for carpool and traffic originating on Mercer Island. The settlement also called for improvements in transit inter-connections to Bellevue and Seattle. The highway was to be lidded over in parts of Bellevue and Seattle to lessen the environmental impact on the neighborhoods and to encourage urban redevelopment. Finally, the agreement established joint committees of citizens and elected officials to assist in the planning and overseeing implementation of the project.

A subsequent legal challenge to the revised environmental impact statement by the opposing groups failed. Then, in April 1979, Dr.

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139 Plaintiffs' Memorandum in Support of Review, supra note 69, at 2.
140 TALBOT, supra note 1, at 33.
141 Cormick and Patton, supra note 2, at 94.
142 Id. at 95.
143 Id.
144 TALBOT, supra note 1, at 33.
145 Id. at 38.
146 Memorandum in Support of Motion to Quash, supra note 87, at 4.
147 Cormick and Patton, supra note 2, at 95.
148 Id.
149 Id.
150 Id.
Cormick, one of the two mediators involved in the settlement agreement, received a subpoena *duces tecum* ordering him to testify on behalf of the environmental groups who were not represented in the mediation process.\[152\] The subpoena also ordered Dr. Cormick to produce

> [all documents and records of any kind pertaining to the background of circumstances surrounding, and accomplishment of the “negotiated settlement” between Seattle, King County, the State Highway Department, and Eastside cities, as the improvements on the I–90 corridor between I–405 and I–5, including handwritten notes, memoranda, notes and telephone conversations, file memoranda, correspondence, and contracts of employment.\[153\]

Dr. Cormick responded to the subpoena *duces tecum* with a motion to quash the subpoena because it was unreasonable and oppressive under Rule 45 of the Federal Rules of Civil Procedure.\[154\] He also filed a motion for a protective order to limit the plaintiffs' inquiry to information that was not confidential.\[155\] This subpoena *duces tecum* was the first step in the plaintiffs' legal challenge of the process by which the parties had reached the 1976 settlement agreement. The heart of the plaintiffs' claims was that the mediators "failed to consider adequately adverse environmental impacts and feasible alternatives to the I–90 project, and that appellants denied to low income and minority plaintiffs residing in Seattle equal protection of the laws and due process of law."\[156\] A United States Magistrate for the District Court of the Western District of Washington State used a balancing test of interests to conclude that the mediators were not required to disclose memoranda, summaries and other documents reflecting their work product that they had not already made public.\[157\] The magistrate also granted Dr. Cormick's motion to quash the plaintiffs' request to depose Dr. Cormick.\[158\]

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\[153\] *Id.*
\[154\] *Fed. R. Civ. P.* 45(b) says, in relevant part, "... the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable or oppressive. ...">
\[155\] Motion to Quash Subpoena and Motion for Protective Order, *Adler*, 673-73C2.
\[158\] *Id.* at 4.
based this decision on the grounds that the areas of inquiry of the requested deposition would violate the confidentiality of the mediation discussions, and that the relevant data were already available in the environmental impact statement.\textsuperscript{159} In a summary opinion, the United States District Court of the Western District of Washington State affirmed and adopted the Magistrate's order.\textsuperscript{160} The court found that the "magistrate's decision properly resolve[d] the questions presented for the reasons stated therein."\textsuperscript{161}

The holding in \textit{Adler} is the first judicial decision regarding whether environmental mediators' written and oral communications made during the mediation process are privileged.\textsuperscript{162}

In holding that environmental mediators and their communications are privileged from compulsory process sought by third parties during subsequent litigation, the \textit{Adler} court adopted the four-part balancing test suggested in \textit{Richards}.\textsuperscript{163} The \textit{Richards} court employed this test in its holding that in a breach of contract and defamation action where the plaintiff had sought to compel a third party university research assistant to disclose interview notes and the identities of plaintiffs' employees whom the assistant had interviewed under a promise of confidentiality for a research project, the public interest in maintaining a confidential relationship between academic researchers and their sources outweighed the plaintiffs' interest in satisfying their discovery requests.\textsuperscript{164}

The four guidelines the \textit{Richards} court suggested for deciding between discovery and non-disclosure are: the nature of the proceeding; whether the deponent is a party; whether the information

\textsuperscript{159} [Id.]
\textsuperscript{161} [Id. Although the dispute over the extension of I-90 formally ended in 1976, 10 years later, the project is not completed. In 1981 the Washington State Legislature authorized up to 120 million dollars for construction, with the expectation that the federal government would provide a ninety percent match of the costs of the project. TALBOT, \textit{supra} note 1, at 38. The highway department is building according to the mediated settlement agreement. \textit{Id.}
\textsuperscript{162} A major stumbling block in the use of the \textit{Adler} decision by future litigants is that neither the magistrate's order nor the district court's summary affirmation is published. Thus, the precedent-setting decision will not turn up during a routine search.
\textsuperscript{163} Magistrate's Order, \textit{supra} note 157, at 3.
\textsuperscript{164} 71 F.R.D. 588, 390 (N.D. Cal. 1976) "Compelled disclosure of confidential information would . . . severely stifle research into questions of public policy, the very subjects in which the public interest is greatest." \textit{Id.}
sought is available elsewhere; and whether the information sought goes to the heart of the claim. The Richards court found all four of these considerations weighed in favor of the researchers.

In holding that the defendant need not testify or release his memoranda, notes, and summaries to the plaintiffs, the Adler court relied almost exclusively on the Richards decision. The Adler court first held that the mediator need not produce "[a]ll memoranda, notes, summaries and other documents prepared by Dr. Cormick, Ms. Leota K. Patton, or their colleagues or staff at OEM, and any other documents reflecting their work product, unless the document has previously been made available to the general public." Here the court noted the existence of a substantial public interest in encouraging effective mediation techniques in settling disputes. The Adler court then adopted the defendants' argument that requiring mediators to disclose confidential documents arising out of mediation would inhibit proper performance of mediators' duties and thus undercut the effectiveness of the mediation process. After the holding that public policy favors the fostering of effective mediation

166 Magistrate's Order, supra note 157 at 3; Richards, 71 F.R.D. at 390. This test originated in cases involving the qualified first amendment privilege of newsreporters not to testify. Id. See generally Baker v. F. and F. Investment, 470 F.2d 778 (2d Cir., 1972), cert. denied, 411 U.S. 966 (1973) (first amendment rights would not be yielded to compel disclosure by a journalist of his confidential news sources where disclosure was not essential to protect public interest in orderly administration of justice, and disclosure did not go to the heart of the case).

166 Richards, 71 F.R.D. at 390. The researchers prevailed on the first criterion because the case was a civil one and the researchers had not collected the confidential material in anticipation of litigation. Id. The court had no difficulty resolving the second consideration in favor of the researchers because neither the professor nor his assistant were parties to the original action. Id. The court also resolved the third criterion in favor of non-disclosure because the factual issues over which the parties disagreed could be resolved with access to the information the plaintiff's employees gave to the researchers. Id. The court also ruled for the researchers on the fourth criterion: whether the information sought went to the heart of the claim. Here the court held that the information the plaintiff's sought from the researchers was privileged because it was "largely supplementary," and did not go to the heart of the claim. Id. at 391. The Richards court based its decision not to compel the researchers to testify or produce documents on the liberal discovery provisions of the Federal Rules of Civil Procedure. "Rule 27(b)(1) of the Federal Rules of Civil Procedure authorizes discovery of any relevant matter not privileged. Nevertheless the trial judge is invested with broad discretion in supervising the course and scope of discovery." Id. at 389.

167 Magistrate's Order, supra note 157, at 2.

166 Id. at 3.

169 Id. at 2. Here the court also mentioned that a local rule, CR 39.1(d)(2)-(E)(3-4) establishing mandatory mediation in civil cases, and specifically calling for confidentiality in mediation, was instructive but not conclusive. Id. at 3.
techniques in settling disputes, the court turned to the common law to strengthen this conclusion. Here, the Adler court relied exclusively on the balancing test suggested in the Richards case.

The Adler court decided that the first and second criteria of the Richards test, the nature of the case, and whether the deponent was a party to the case, both weighed in favor of the mediators. Adler was a civil case, and Dr. Cormick was not a party to the suit. The court also decided the third criterion: whether the information sought was available from other sources, in favor of the mediators. Here, ruling in favor of the mediators, the court held that "any information properly sought from [the mediators] is equally available from other sources, indeed, generally from the parties to this litigation." Finally, the court noted that it was not clear whether the information plaintiffs sought from the mediators was related to the legitimate issues before the court. Thus, the fourth criterion, whether the information went to the heart of the claim, also supported non-disclosure.

The Adler court next held that Dr. Cormick need not disclose "[c]ommunications or other documents furnished to Dr. Cormick or his colleagues and staff at the OEM by parties to the mediation or their representatives . . . ." The court based this ruling on the same factors on which it held that documents produced by the mediators were privileged.

Finally, the Adler court granted the defendant's motion to quash the subpoena insofar as the plaintiffs sought to depose Dr. Cormick. Here again the court relied on the discussion regarding whether the documents produced by the mediators were privileged. The court also noted that questions plaintiffs sought to ask Dr. Cormick during a deposition would more appropriately be asked of the parties to the mediation themselves. Plaintiffs' counsel wished to depose Dr. Cormick as to "what was within the minds of the parties in initiating the mediation" and "what were the under-

170 See supra notes 165–67 and accompanying text.
171 Magistrate's Order, supra note 157, at 3.
172 Id.
173 Id.
174 Id. at 4.
175 Id. at 157, at 4.
176 See supra notes 167–73 and accompanying text.
177 Magistrate's Order, supra note 157, at 4.
178 Id.
179 Id.
180 Id.
standings of the respective parties as to the alleged ambiguities in the ultimate agreement. The court also held that asking Dr. Cormick to disclose whom among the parties originally proposed the highway configuration to which all parties ultimately agreed, and if it was Dr. Cormick, on what data did he rely, would violate the confidentiality of the mediation discussions. The court noted that such information was only of questionable relevance because the environmental impact statement formally set forth the proposed highway design and relevant data.

Three factors suggested that Dr. Cormick need not answer the question regarding what transpired during the open, public mediation sessions. These three factors are: (1) the information regarding the events at the meetings was available from other sources, (2) during the mediation process Dr. Cormick participated in both open and closed discussions; three years later he might not be able to remember who said what where, and (3) some of the records prepared by the mediators might summarize the public meetings, and the court had already held that such records were confidential.

The remainder of this article will discuss the applicability of the Adler decision to the development of a common law privilege for environmental mediators.

VI. Adler as Precedent

Most environmental mediators and commentators advocate that courts use a balancing test to find a privilege for environmental mediators. Although the balancing test the Adler court used led to a finding of confidentiality for the mediators and their notes, it is not the best analysis on which to base this holding. The test advo-

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181 Id.
182 Id.
183 Id.
184 Id. at 5.
185 Here the court noted that "[o]ne of the plaintiffs allegedly tape-recorded portions [of the public meetings]." Id.
186 Id.
187 Id. The defendant, Dr. Cormick, submitted to the court the following documents: Motion to Quash Subpoena and Motion for Protective Order, Memorandum of Law in Support of Motion to Quash Subpoena and Motion for Protective Order, Notes on Mediation and Confidentiality, Affidavits of Dr. Cormick, Cornelius Peck, Professor of Law at the University of Washington, and Robert Coulson, President and Chief Executive Officer of the American Arbitration Association.
188 Freedman, supra note 4, at 77; Memorandum in Support of Motion to Quash, supra note 87, at 6.
cates an *ex post facto* review to determine whether a privilege exists, and emphasizes procedural fairness over substantive policy considerations. This approach is not widely recognized by the common law, and grew out of cases involving “qualified First Amendment” privileges. A better avenue for environmental mediators and courts desirous of developing a privilege for environmental mediators would be to base granting of the privilege on the common law balancing test such as the one recognized by Wigmore.

The *Adler* decision is very narrow. It does not establish a privilege for all environmental mediators, but merely holds that the specific facts of the case warrant protection of the communications made during the mediation of the I-90 dispute. A fundamental problem with the *Adler* court’s use of the *Richards* test to decide the issue of confidentiality is that the test only allows for an *ex post facto*, case-by-case determination of confidentiality. Environmental mediators cannot rely on the *Adler* decision to guarantee confidentiality to the parties to a dispute. Instead, in the absence of a privilege, environmental mediators will have to continue to rely on the after-the-fact discretion of judges. Thus, parties entering into the mediation process will not know whether their confidences will be protected unless and until someone challenges the process and the dispute ends up in court. This result is consistent with the express purpose of the *Richards* decision, where the court states that its aim “is not to create a privilege, but rather to achieve a balance between certain competing interests.”

This result, though, does not address the *Adler* defendants’ central concern: that there be a guarantee of confidentiality *before* the parties begin to negotiate. Such a guarantee is critical to the performance of the mediator’s role, and the success of the mediation process. The *Adler* court’s holding also will not allay fears of potential

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189 *Richards*, 71 F.R.D. at 390.
190 8 *Wigmore, Evidence* § 2285 (McNaughton rev. 1961); see text accompanying note 115 supra, for Wigmore’s 4 fundamental conditions necessary to establish a privilege.
191 Even a common-law privilege would not fully protect environmental mediators because of the possibility of judicial reversal. The most desirable scenario would be for the legislature to codify the privilege in a statute after the courts have established it through reasoning such as Wigmore’s analysis provides.
193 Memorandum in Support of Motion to Quash, supra note 87, at 7. “Unless the parties are assured of the ability of the mediator to maintain confidences ... they cannot reasonably be expected to share with the mediator their personal concerns and possible areas of accommodation.” Notes on Mediation and Confidentiality submitted with Memorandum of Law in Support of Motion to Quash Subpoena or for Protective Order, *Adler*, No. 673-73C2.
parties to future environmental mediation efforts. Those familiar with the Adler case, expressed their concern that courts could scrutinize the communications made during their impending mediation efforts.194

After-the-fact adjudication of the issue of a privilege defeats the general purpose behind granting privileges—that accurate fact-finding is promoted when the fact-finder has all the relevant information. Although the role of a mediator is not that of a fact-finder per se, a mediator’s role requires him or her to know and understand each party’s position to discover areas of agreement and possible accommodation.195 To fulfill this role, a mediator must know all the facts of the disputed case. Thus, the general policy behind privileges supports a finding of privilege for mediators. Courts, though, traditionally have been reluctant to create privileges.196 The reason for this reluctance is that creating privileges interferes with the ultimate fact-finder’s ability to use all rational means for discovering the truth.197 As the Court in United States v. Nixon stated, privileges are “not created lightly nor expansively construed for they are in derogation of the search for the truth.”198 In mediation though, the parties themselves act as the ultimate fact-finders and decision-makers. Creating a privilege for the mediator would not decrease the parties’ access to important information. Thus, as long as the parties to the dispute are fairly and accurately represented in the mediation process, the judicial reluctance to create privileges because they interfere with discovering the truth is not relevant.

In the Adler case though, the plaintiff environmental and neighborhood groups contended that their views were not fairly and accurately represented during the mediation of the I–90 dispute.199 Because of this lack of adequate representation, perhaps the I–90 dispute is one of the ninety percent of environmental disputes that commentators believe are not appropriate for mediation.200 Dr. Cormick has written that when deciding whether a dispute is appropriate for mediation, the first questions mediators and the parties

194 Id. at 5.
195 Memorandum in Support of Motion to Quash, supra note 87, at 7.
196 Elkins v. United States, 364 U.S. 206, 233–34 (1960) (Frankfurter, J., dissenting). See also 8 Wigmore, EVIDENCE § 2192 (McNaughton rev. 1961) (“All privileges of exemption from this duty [to testify] are exceptional, and are therefore to be discountenanced.”) (emphasis in original).
197 Elkins, 364 U.S. at 234 (Frankfurter J., dissenting).
198 418 U.S. at 710.
199 See supra note 86.
200 See supra note 63 and accompanying text.
should ask themselves are, whether “all the parties who have a stake in the outcome of the negotiations [are] represented,” and “[i]s any party excluded that would prevent an agreement from being carried out?”201 The participants in the mediation of the I–90 dispute would have to decide both of these questions against mediating. In the Adler case, neither side disputed that the plaintiffs had a major stake in the outcome of the mediation process. Nor did either side dispute that the plaintiffs could prevent the mediated agreement from being enforced. Why then did the mediators agree to mediate without the plaintiffs present? One commentator feels that it would have been better to include the neighborhood and environmental groups in the mediation process.202 But, because these groups refused to be bound by a mediated settlement, and were unwilling to negotiate, the mediators achieved a “second-best solution”—agreement among the affected jurisdictions—which the highway department considered the minimum condition for proceeding with the highway extension.203 In spite of the Adler plaintiffs’ lack of participation, several factors may have made mediation the better choice for resolving the I–90 dispute: the exorbitant costs of delay,204 the fear of losing government funding,205 and the possibility of being held up in the courts for another five years.206

Another problem with using the Richards test to create a common-law privilege for environmental mediators is that the Richards test grew out of cases involving a “qualified First Amendment privilege of journalists.”207 In Baker v. F & F Investment,208 where the court advocated using the test later relied on by the Richards and Adler courts, the issue was not whether a privilege should be granted, but whether to override a journalist’s first amendment rights by compelling him to reveal confidential news sources.209 The Baker court began with the assumption that the defendant’s information was privileged, and then asked whether policy or procedural considerations were compelling enough to outweigh this privilege.210 The

201 24 ENVT. No. 7, 14, 16–17 (Sept. 1982).
202 TALBOT, supra note 1, at 96.
203 Id.
204 Cormick and Patton, supra note 2, at 92.
205 Id. at 94. In fact, in the summer of 1979, the Carter administration did (temporarily) halt all interstate highway funding as an anti-inflation measure. TALBOT, supra note 1, at 38.
206 Cormick and Patton, supra note 2, at 92.
207 Richards, 71 F.R.D. at 390.
209 Id. at 779.
210 Id. at 782–83.
courts in *Richards* and *Adler*, on the other hand, did not begin with an assumption of a privilege. Because of this difference in approach, it is important to examine carefully the criteria the *Baker* court used to determine if they are the best guidelines to apply to the *Adler* and *Richards* situations. The *Richards* test emphasizes procedural fairness more than substantive policy considerations. Not one of the four *Richards* criterion mentions public policy or the public good. This approach conflicts with case law and commentary, both of which advocate that a tribunal consider public policy in developing common-law privileges. In his treatise on evidence, Professor Wigmore asserts:

[w]hen the course of justice requires the investigation of the truth, no man has any knowledge that is rightly private. All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused . . .

Professor Wigmore suggests that the following four fundamental conditions are necessary to establish a privilege against the disclosure of communications between persons standing in a given relationship:

1) the communications must originate in a *confidence* that they will not be disclosed, 2) the element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties, 3) the *relation* must be one which in the opinion of the community ought to be sedulously *fostered*, 4) the *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Case law also supports the use of such a policy-oriented balancing test. In his dissent to *Elkins*, Justice Frankfurter wrote,

Limitations are properly placed upon the operation of this general principle only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public

211 Furthermore, the *Richards* court is quite clear that it based its decision on the liberal discovery provisions of the Federal Rules of Civil Procedure rather than on the law of privilege. *Richards*, 71 F.R.D. at 389 n. 2, 391.


213 8 *Wigmore* § 2192 (McNaughton rev. 1961).

214 *Id*.

215 8 *Wigmore* § 2285 (McNaughton rev. 1961) (emphasis in original).

216 *Elkins*, 364 U.S. at 234 (Frankfurter J., dissenting).
good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.\textsuperscript{217}

If the \textit{Adler} court had used such a policy-based balancing test, it would probably have more fully considered the policy arguments both for and against granting the mediators a privilege. By using the \textit{Richards} test, the court avoided having to resolve directly the conflict of policy problem: the protection of confidences versus the public’s right to know. Both \textit{Adler} and \textit{Richards} raise public policy concerns\textsuperscript{218} but ultimately fail as precedent because they fail to resolve this key public policy problem. By using the \textit{Richards} test, the \textit{Adler} court did not, nor was it compelled to consider seriously the plaintiffs’ public policy arguments.\textsuperscript{219}

The \textit{Adler} plaintiffs, who claimed they represented “the majority of the citizens of Seattle and every resident of Seattle who would be affected directly by the I-90 project,”\textsuperscript{220} contended that no public policy supported the “secret decisionmaking” that invoking environmental mediator’s privilege would encourage.\textsuperscript{221} The plaintiffs’ most compelling public policy argument against an environmental mediator’s privilege was that such a privilege would allow public officials to make decisions affecting their constituents without public scrutiny.\textsuperscript{222} The plaintiffs argued that “[s]uch a ruling would have the effect of permitting public officials, whose actions are otherwise (and properly so) subject to close and careful public and judicial scrutiny, to shield the decisionmaking process from such scrutiny, by hiding behind a screen of mediation . . . .”\textsuperscript{223}

Because of the nature of environmental disputes, granting environmental mediators a testimonial privilege raises problems of accountability, delegation, and due process, especially when the government is a party to the dispute. These problems need to be addressed before a testimonial privilege is granted to environmental

\textsuperscript{217}Id. \textsuperscript{218}See supra, notes 166–70 and accompanying text. 
\textsuperscript{219}For example, in support of their contention that no public policy supports mediators’ privilege, the \textit{Adler} plaintiffs cited to Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (administrative decisions must be based upon complete record), and Handguards, Inc. v. Johnson & Johnson, 69 F.R.D. 451 (N.D. Cal. 1975) (danger that abuse of the attorney-client privilege could convert corporate in-house counsel into privileged sanctuary for corporate records). Neither of these cases deals with mediators. The \textit{Adler} decision does not address either of these cases. Nonetheless, if the \textit{Adler} court had applied a policy-based analysis such as Wigmore’s, it could, and perhaps should, have considered the \textit{Volpe} case. \textsuperscript{220}Plaintiffs’ Memorandum in Support of Review, supra note 69, at 2. 
\textsuperscript{221}Id. 
\textsuperscript{222}Id. 
\textsuperscript{223}Id.
mediators. Possible solutions to these problems include statutes to license and regulate mediators, as well as statutes to limit parties' access to the mediation process. States could also enable their officials to serve as environmental mediators, thus circumventing the problem of delegation of public sector responsibilities to the private sector. Another possible solution would be to fund environmental mediation efforts publicly, thus making environmental mediators members of the public sector. The main problem here would be to find a way to pay mediators without raising questions about the mediators' neutrality.

Another reason for courts to use a policy-based test such as Wigmore's to decide whether to grant a privilege, is that the test is recognized widely in the common law. Thus, courts might be more willing to find a privilege for environmental mediators using the more familiar Wigmore criteria than by means of a procedural fairness analysis based on the Richards test.

Also, the Wigmore test is less fact-bound than the Richards test. That is, the Richards test asks specific questions about the particular case before the court, such as "whether the deponent is a party, and whether the information sought is available from other sources." Under the Richards criteria, it would be difficult to convince a court that all environmental mediator's communications should be privileged. Environmental mediators may be parties to original actions, and not always is the information sought available only from environmental mediators.

The Wigmore analysis, on the other hand, asks more generally whether a type of relationship ought to be protected. Using this analysis it would be easier for courts to decide that the environmental mediator/disputant relationship is one that the community feels should be sedulously fostered, and that the element of confidentiality is essential to the maintenance of this relationship.

The nature and importance of environmental mediation is such that, using Wigmore's analysis, courts might be willing to find that it is in the public's best interest to foster the environmental mediator/disputant relationship without finding that all such relationships ought to be privileged. Three aspects of the environmental mediation

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224 See McCrory, supra note 6, at 64-77 for a discussion of methods for holding environmental mediators accountable.

225 TALBOT, supra note 1, at 100-01.

226 Id. at 101.

227 Elkins, 364 U.S. 234 (Frankfurter J., dissenting); Nixon, 418 U.S. 683.

228 Richards, 71 F.R.D. at 390.
process that distinguish it from mediation generally such that courts
might be willing to make this distinction are: the potential significant
and permanent impact of the resolutions of many environmental
disputes, the involvement of public agencies in a large number of
environmental disputes, and the tremendous expenses and amounts
of time necessary to litigate environmental disputes.

Under Wigmore's analysis any one of these three factors might
be enough to tip the balance in favor of a privilege for environmental
mediators. First, the heavy public impact that most environmental
problems exert on a community encourages speedy resolution. Be­
cause environmental mediation may be able to solve such disputes
faster and more satisfactorily than litigation,229 courts should be
willing to foster the environmental mediator/disputant relationship
by protecting confidences made during environmental
mediation,

Looking at Wigmore's fourth condition: that the "injury that would
inure to the relation by the disclosure of the communications must
be greater than the benefit thereby gained for the correct disposal of
litigation,"230 a court would most likely conclude that the carrying
out of the win-win solutions such mediation ideally achieves231 would
probably benefit the public more than a prolonged court battle to
discover if the mediated settlement agreement is the "correct dis­
posal" of the problem. This is especially true in environmental cases,
where very often nobody knows what the correct disposal is until
many years after the dispute arises.

Second, courts and the public ought to want to foster the environ­
mental mediator/disputant relationship because, as discussed in Part
I of this article, litigating some environmental disputes is too costly
and time consuming for the courts to handle effectively. A real
danger exists that environmental cases may not be decided fairly
and accurately if the courts do not overcome these administrative
hurdles associated with litigating environmental disputes. Many
judges do not have the time or technical expertise to wade through
and comprehend all the data involved in complex technical cases, or
even if they do have the requisite expertise, because of their heavy
caseload, and the amount of information involved, it may take judges
too long to reach equitable solutions. Encouraging environmental
mediation by granting a privilege to environmental mediators will
thus serve the public interest by relieving the courts of some of their
more ponderous cases.

229 See supra notes 45-54 and accompanying text.
230 § WIGMORE EVIDENCE § 2285 (McNaughton rev. 1961) (emphasis in original).
231 See supra note 45 and accompanying text.
If the Adler court had used Wigmore's test to determine whether the environmental mediators' communications during mediation should be privileged, the court would most likely have reached the same conclusion that it did using the Richards test; that is, that the mediator's communications were privileged. Nonetheless, because of the previously discussed differences between the two tests, the Adler court would have created a better, more useful precedent for the proposition that courts should grant environmental mediators a testimonial privilege.

Under the first condition of Wigmore's policy-based analysis, the court would have had to ask whether the parties' confidences during the mediation of the I-90 dispute had originated in a confidence that they would not be disclosed. At the outset of the I-90 dispute, the mediators guaranteed all of the parties that "all confidential communications would be kept confidential both during and after the mediation." Thus, throughout the mediation, the disputants relied on this guarantee in disclosing confidential information to the mediators.

Second, the Adler court would have had to decide whether this element of confidentiality is essential to the full and satisfactory maintenance of the relationship between the parties. Based on the Adler court's decision, it seems very likely that, had the court addressed this question, it would have found that the element of confidentiality was essential to the mediator/disputant relationship. The Adler court held that "requiring a mediator to make such a disclosure [of confidences] would severely inhibit the proper performance of his or her duties, and thereby undercut the effectiveness of the mediation process." The Adler court went on to address Wigmore's third condition: whether in the opinion of the community the relation ought to be fostered. Here, the court held that "[t]here is a substantial public interest in fostering effective mediation techniques in settlement of disputes." Thus, it is quite likely that the Adler court would have decided that Wigmore's third fundamental condition weighed in favor of confidentiality.

Finally, the Adler decision does not give many clues whether it would have found that the injury to the mediator/disputant relationship by disclosure to the plaintiffs of the communications made during mediation would have been greater than the benefit gained for

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232 See supra notes 229-31 and accompanying text.
233 Memorandum in Support of Motion to Quash, supra note 87, at 5.
234 Magistrate's Order, supra note 157, at 3.
235 Id.
the correct disposal of litigation. The facts of the I–90 dispute though, warrant a finding that the public interest was better served by allowing the communications made in mediation to remain confidential. If negotiating among the parties had broken down, no highway would have been built until a court had decided on the merits of the entire case, which could have delayed action for up to another five years.\textsuperscript{236} In light of the admittedly unsafe condition of the present roads linking Seattle, Bellevue, and Mercer Island,\textsuperscript{237} it would have not been in the public’s best interest to have nothing done for another five years. Other factors the Adler court probably would have considered are the high costs of delay,\textsuperscript{238} and the possibility of losing government funding for the highway project.\textsuperscript{239}

Also in balancing the concerns stated in Wigmore’s fourth condition, the Adler court might have asked whether disclosing all the communications made during the mediation effort would have resulted in a more correct disposal of the dispute. In cases such as Adler, there is no one “correct” solution. The best that courts can hope to do in such complex environmental cases is aim for the most efficient outcome, which is exactly the goal of mediation.\textsuperscript{240} From this, one can infer that the Adler court would have decided that Wigmore’s final criterion weighed in favor of confidentiality.

Thus, it is quite likely that the Adler court, having found that the I–90 dispute met all four of Wigmore’s conditions, would have held that the environmental mediators’ communications deserved to be privileged.\textsuperscript{241}

VI. CONCLUSION

The use of mediation to resolve environmental disputes has risen significantly since the 1960's. Because environmental mediation is such a new field, there are few statutory or common-law guidelines on the process. This Comment addresses one unresolved issue in environmental mediation: whether communications made during the mediation process are protected from compulsory process sought by third parties during subsequent litigation. Other judicial or statutory

\textsuperscript{236} Cormick and Patton, supra note 2, at 92.
\textsuperscript{237} Id.
\textsuperscript{238} Id.
\textsuperscript{239} Id. at 93.
\textsuperscript{240} See supra note 45 and accompanying text.
\textsuperscript{241} “Only if these four conditions are present should a privilege be recognized.” 8 WIGMORE EVIDENCE § 2285 (McNaughton rev. 1961).
privileges such as priest-penitent and doctor-patient turn on relationships that society would like to foster, and for which there are no alternatives. There is however a possible alternative to mediation: litigation. Thus, to argue convincingly that the environmental mediation process should be protected, environmental mediators must show that the mediation of environmental disputes is an activity that ought to be sedulously fostered, and in some cases, litigation is not a realistic alternative to mediation.

In Adler v. Adams, the only federal case on this issue, a federal district court granted an environmental mediator a testimonial privilege, and held that the mediator need not disclose to third parties the records generated during the mediation process. Although the Adler court used a balancing test to find a privilege for environmental mediators, the test it used does not provide the best analysis on which to base this holding. A better test to reach the same conclusion is based on the four criteria advocated by Professor Wigmore. Professor Wigmore's analysis emphasizes substantive policy considerations, does not always require an ex post facto adjudication, and is recognized widely in the common law.