

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA**

**COMMONWEALTH OF PENNSYLVANIA** : **No. 03-10,050**  
:   
:   
**vs.** : **CRIMINAL**  
:   
**RICHARD WAYNE ILLES,** : **Motion to Quash Subpoena**  
**Defendant** : **Of Dr. Montanye**

**O R D E R**

AND NOW, this \_\_\_ day of February 2004, upon consideration of the Motion to Quash filed by Benjamin Landon, Esquire on behalf of Dr. Montanye, it is ORDERED and DIRECTED as follows:

The defense may call Dr. Montanye as a witness to testify that he was appointed mediator for the custody case involving Miriam Illes and Richard Illes, that an agreement was reached and what the terms or substance of that agreement was. Counsel for Dr. Montanye agreed that these matters were not confidential because the order appointing Dr. Montanye and the custody agreement reached during mediation are part of the court file in the custody case.

The Court would also permit the defense to ask Dr. Montanye whether communications made during mediation are statutorily privileged and confidential, whether there is an exception to the statute that would allow Dr. Montanye to reveal a communication by either party which contains a threat that bodily injury may be inflicted on another person, and whether there was anything that occurred in the mediation between Richard and Miriam Illes that would fall within the

purview of this exception to the privilege. The Court believes this is the line of questioning that was proposed by Craig Miller, co-counsel for Defendant at oral argument.

In making this ruling, the Court examined not only the statute, 42 Pa.C.S.A. §5949, but also Pennsylvania appellate court cases regarding the interplay between privileged information and a defendant's constitutional rights to compulsory process, confrontation of witnesses and due process. Relying on precedent from the United States Supreme Court, the Pennsylvania Supreme Court and several of its own holdings,<sup>1</sup> the Pennsylvania Superior Court set forth the following schematic for discerning what level of access, if any, a court should afford a defendant when requesting confidentially privileged materials:

First, a defendant's right to access is dependent upon whether the information is protected by a statutory privilege and whether that privilege is absolute. Information which is protected by an absolute statutory privilege is not subject to disclosure and denial of access to a criminal defendant is required.

. . .

On the other hand, a privilege which is statutorily enacted, but which is subject to exceptions, is not absolute and access to a criminal defendant may be required.

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Finally, privileges which are not statutorily enacted, but rather are recognized by the common law, must yield to the constitutional rights of a criminal defendant.

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1 These cases were Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.ed.2d 40 (1987); Commonwealth v. Wilson/Aultman, 529 Pa. 268, 602 A.2d 1290 (1992); Commonwealth v. Kennedy, 413 Pa. Super. 95, 604 A.3d 1036 (en banc), allocatur denied, 531 Pa. 638, 611 A.2d 711 (1992); and Commonwealth v. Kyle, 367 Pa. Super. 484, 533 A.2d 120 (1987), allocatur denied, 518 Pa. 617, 541 A.2d 744 (1988).

Commonwealth v. Herrick, 442 Pa. Super. 412, 432, 660 A.2d 51, 61 (1995), quoting Commonwealth v. Eck, 413 Pa. Super. 538, 544-46, 605 A.2d 1248, 1252-53 (1992).

Mediation communications and mediation documents are privileged, but this privilege is subject to exceptions. 42 Pa.C.S.A. §5949. The exception at issue in this case states:

To the extent that the communication or conduct is relevant evidence in a criminal matter, the privilege and limitation set forth in subsection (a) does not apply to:

(i) a communication of a threat that bodily injury may be inflicted on a person;

42 Pa.C.S.A. §5949(b)(2)(i). The defense seeks to introduce evidence that no threats were communicated during mediation. Attorney Landon argued that the exception only applies to threats actually made, not the lack of threats, which would be the converse. Since the statutory privilege is qualified and not absolute, the Court conducted an *in camera* review and balanced the competing interests. See Commonwealth v. Kennedy, 413 Pa. Super. 95, 112, 604 A.2d 1036, 1045 (1992) ("The court in PAAR recognized only a qualified privilege of confidentiality... and therefore balanced this qualified privilege against defendant's constitutional rights and established an in camera review procedure."). The Court finds that under the facts and circumstances of this case, the defense should be permitted to elicit from Dr. Montanye that there were no communications that would fall within the exception. During its case-in-chief, the Commonwealth presented evidence that the defendant had a motive to kill the victim due to various custody and support issues and

disputes. The Commonwealth also introduced testimony of various statements made by the defendant and the victim to friends and relatives. For example, the victim made statements that the defendant said "You could die" during an altercation on the porch and on a separate occasion the defendant said that if she ever took Richie away from him or tried to get a dime of child support he would kill her. In light of these and numerous other statements introduced thus far in the trial, the fact that Dr. Illes did not make any threats during mediation and that the parties reached a custody agreement through the mediation process are relevant. The defense has a need for this testimony, i.e., to respond to the Commonwealth's evidence regarding motive and intent. Furthermore, this ruling does not reveal what was discussed during the mediation sessions. Thus, the Court finds that in this case the limited testimony of the mediator permitted by this Order is required.

The Court would not permit the defense to examine Dr. Montanye's notes and records from the mediation. The Court has reviewed the materials in camera and did not find any reference to threats.

By The Court,

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Kenneth D. Brown, P.J.

cc: George Lepley, Esquire

Craig Miller, Esquire  
Michael Dinges, Esquire  
Kenneth Osokow, Esquire  
Benjamin Landon, Esquire  
Work file  
Gary Weber, Esquire (Lycoming Reporter)