Protecting The Goal of Mediation[1]: Rule 408 & The Creation of a Mediation Privilege Under Rule 501

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This paper addresses the problems associated with protecting the confidentiality of mediation - whether court-ordered or voluntary.[2] Ultimately, this paper arrives at the conclusion that in order to encourage the settlement of disputes without actually litigating claims, it is necessary to protect statements made in mediation through two different means: (1) excluding statements made in mediation pursuant to Rule 408 of the Federal Rules of Evidence[3]; and (2) fostering a "mediation privilege" under Rule 501 of the Federal Rules of Evidence. The latter classification is necessary because Rule 408 offers no protection against the actual discovery of mediation discussion or the admission of such discussions in proceedings that are not governed by the rules of evidence such as in administrative hearings[4] and criminal cases.[5] The recent case law exemplifies the balance between the need for confidence and trust among participants in

[1] For purposes of this paper, "'mediation' means a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives." §44.1011(2), *Florida Statutes.*

[2] There are several different ways that this problem arises: (1) communications disclosed to the opposing party in the course of mediation; and (2) private communications between one party and the mediator. *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F.Supp. 2d 1164, 1173 (C. D. Ca. 1998). For the sake of brevity, this paper will not distinguish between the two situations.

[3] *See generally, In re Hillard Development Corp.*, 221 B.R. 282, 283 (Bankruptcy S.D. Fla. 1998).

[4] *See e.g., National Labor Relations Board v. Macaluso*, 618 F. 2d 51 (9th Cir. 1980).

[5] Alan Kirtley, The Mediation Privilege's Transition From Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest, 1995 J. OF DISP. RESOL. 1, 11-14. *See also e.g., U.S. v. Gullo*, 672 F. Supp. 99, 104 (W.D.N.Y. 1987)(finding that the confidentiality provision in New York's Community Dispute Resolution Centers Program helped to ensure the effectiveness of the program and ultimately held that Rule 501 required the suppression of evidence in a criminal proceeding of all statements made during the dispute resolution process.)

mediation and the loss of evidence with high probative value.[6] The very problem is that "[p]arties who fear that the results of an unsuccessful mediation attempt will come back to haunt them in a court of law will have little incentive to cooperate and compromise…."[7]

In particular, it is urged that federal courts should adopt a bright-line rule pursuant to Rule 501 that protects all statements, documents and discussions made in mediation, even regarding matters collaterally related to the mediation.[8] Moreover, as a result of the problems associated with protecting statements made in mediation, Congress should be urged to consider a federal mediation privilege to Rule 501, thus making it the tenth privilege identified in the Proposed Federal Rules of Evidence.[9] There should be a universal federal mediation privilege which would apply to all communications made in conjunction with a formal mediation proceeding with a neutral mediator.[10] The creation of such a privilege pursuant to Rule 501 of the Federal Rules of Evidence would serve public ends by encouraging prompt, consensual resolution of disputes, minimize the social and individual costs of litigation, and reduce the size of federal court dockets.[11]

A. Rule 408

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[6] *See Folb*, 16 F.Supp.2d att 1171-1181, creating a four part analysis (1) imperative need for confidence and trust among participants in mediation; (2) important public ends served by promoting conciliatory relationships among parties to a dispute, reducing litigation costs, and decreasing size of federal and state court dockets, thereby increasing quality of justice in cases that do not settle; (3) the modest loss of likely evidentiary benefit, since most mediation-related evidence not otherwise discoverable would never come into being were it not for the confidentiality of the process; and (4) the consistent body of state law adopting such a privilege.

[7] *Sheldone v. Penn. Turnpike Com'n*, 104 F. Supp. 2d 511, 514 (W.D. Pa. 2000), *quoting Willis v. Trenton Memorial Ass'n*, 1998 WL 812110 at *2 (4th Cir. 1998)

[8] *See e.g.*, 4th Cir. R. 33.

[9] *See In re Subpoena Issued to Commodity Futures Trading Com'n*, 370 F. Supp. 2d 201 (D.D.C. 2005)(trial court refused to recognize a new settlement privilege that would protected documents produced in mediation from third party discovery because of the lack of support for such a privilege under the federal rules, noting that Congress could write a federal mediation privilege to extend the scope of its coverage and further discussed how the privilege was not one of the nine privileges identified in the Proposed Federal Rules of Evidence and that there was no "certainty" that such a privilege would advance a public good.).

[10] *See Folb*, 16 F.Supp.2d 1164.

[11] *Id.*

It seems that the obvious answer to protect statements made in mediation is by simply arguing that mediation is a settlement negotiation and thus inadmissible when offered in a subsequent proceeding.[12] Federal Rules of Evidence, Rule 408 provides in pertinent part that:

> Evidence of (1) furnishing or offering or promising to furnish , or (2) accepting or offering or promising to accept, valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount…. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

However, Rule 408 is not exhaustive enough to protect the confidentiality of mediation. First, the rule explicitly protects only statements which are offered to prove "*liability for or invalidity of the claim or its amount.*"[13] Thus, other statements made in the course of mediation proceedings are not protected under Rule 408. The failure of Rule 408 to protect such other statements undermines the effectiveness of mediation proceedings. As Kirtley explains,

> [w]ithout adequate legal protection, a party's candor in mediation might well be "rewarded" by a discovery request or the revelation of mediation information at trial. A principal purpose of the mediation privilege is to provide mediation parties protection against these downside risks of a failed mediation.[14]

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[12] *See In re Hillard Development Corp.*, 221 B.R. at 283. (statements made in court-ordered mediation inadmissible pursuant to Federal Rule of Evidence 408).

[13] Fed. R. Evid. 408. *See also e.g., Zurich Amer. Ins. Co. v. Watts Indus., Inc.*, 417 F. 3d 682, 689 (7th Cir. 2005) (district court has broad discretion to admit evidence of settlement negotiations for a purpose other than proving liability).

[14] Kirtley at 9-10. *But see Folb* at 1173, *quoting* Green, "*A Heretical View of the Mediation Privilege,*" 2 OHIO ST. J. ON DISP. RESOL. 1, 32 (1986)("Although most mediators assert that confidentiality is essential to the process, there is no data of which I am aware that supports this claim, and I am dubious that such data could be collected. Moreover, mediation has flourished without recognition of a privilege, most likely on assurance given by the parties and the mediator that they agree to keep mediation matters confidential, their awareness that attempts to use the fruits of mediation for litigation purposes are rare, and that courts, in appropriate circumstances, will accord mediation evidence Rule 408 and public policy based protection.").

See also Folb at 1173, *quoting* Gibson, "Confidentiality in Mediation: A Moral Reassessment," 1992 J. DISP. RESOL. 25,26. (posits that, while a certain level of confidentiality may be necessary to make mediation effective, "it is wrong to assume that mediation needs absolute confidentiality" because, although parties may be more guarded in the absence of confidentiality provisions, open mediations are as successful as confidential

The active threat that statements made in mediation can later be admitted against a party stands as a detriment to encouraging parties to enter into such meditation in the first place. Mediation is distinguished from other forms of settlement negotiations in part because it is an *alternative* form of dispute resolution and is not adversarial in nature – whereas settlement negotiations are usually the product of the adversarial system.

The inadequacies of Rule 408 in protecting statements made in negotiation in exemplified in *Vernon v. Acton*[15], where the Indiana Court of Appeals agreed with the lower court's decision to admit statements offered to show whether or not a settlement agreement was reached because such statements were not about liability or invalidity of a claim. However, the author of this paper posits that there is not a justifiable reason to exclude statements when offered to prove whether a settlement was reached, and denying the admission of statements offered for this purpose actively undermines the ability of parties to engage in full and frank mediation negotiations.[16] However, there cannot be a black-letter rule espoused for this issue because of

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mediations if measured by the settlement rate.). Notably, the problem with these authors is that they are making the broad assumption that parties would even enter into the initial mediation absent a confidentiality agreement.

[15] 693 N.E. 2d 1345 (1998). The case revolved around Ind. Evid. Rule 408, which virtually mirrors the corresponding federal rule. *But see* fn 9.

[16] The argument against admitting statements offered to prove whether a settlement negotiation is reached is further undermined if the trial judge simply takes the testimony from the mediator or party in a closed proceeding, under seal. This is precisely what Magistrate Judge Brazil of Northern District of California did in *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1128 (N.D. Cal. 1999)("After hearing [the mediator's] testimony in this protected setting, and after considering all the other evidence adduced at the hearing, I was positioned to determine much more reliably whether, or to what extent, overriding fairness interests required me to publicly disclose testimony from the mediator to making my decision about whether the parties had entered an enforceable settlement contract.") . By doing this, the judge struck the precise balance between preserving the effectiveness of mediation proceedings and encouraging settlement negotiation. If such statements cannot be offered to show that an enforceable settlement negotiation was entered into, then courts (in certain situations) effectively destroy the settlement itself.

However, where there is a rule present which specifically addresses the question – courts should not admit the testimony of a mediator who has been part of settlement negotiation which has not been reduced the writing. It seems logical to encourage a rule that settlement contracts should not be enforceable per the statute of frauds and cannot be proven by admitting statements made in confidence during mediation negotiations. *See Vernon v. Acton*, 732 N.E. 2d 805 (Ind. 2000)(holding that the testimony of a mediator regarding an alleged oral settlement agreement in a voluntary pre-suit mediation, in which the parties agreed that the Indiana Alternative Dispute Resolution Rules

the differing factual situations – e.g., if the settlement agreement has been reduced to writing, whether coercion or duress is alleged, and other relevant issues that arise when settlement negotiations are challenged.

Secondly, Rule 408 is an inadequate protector of statements made in mediation because it offers no protection against discovery of mediation discussions or against their admission in proceedings that are not governed by the rules of evidence such as administrative hearings and criminal cases.[17] More importantly, however, Rule 408 applies a heightened standard which only provides for a "semi-privilege to confidential settlement agreement and negotiations."[18] Notably, Rule 408, when viewed *in pari materia* with Rule 26(b) of the Federal Rules of Civil Procedure[19] protects only disputants from disclosure of information to the trier of fact, *not from discovery by a third party.*[20] Thus, without a federal mediation privilege under Rule 501, information provided in confidential mediation remains subject to the liberal discovery rules of the Federal Rules of Civil Procedure.[21] In light of this consideration, it is absolutely necessary for federal courts to recognize a mediation privilege under Rule 501 of the Federal Rules of Evidence.

B. Rule 501 – Fostering a Mediation Privilege

i. Local Rules for Federal Appellate Courts

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were applicable, was confidential and privileged under the ADR Rules as evidence of compromise settlement negotiations and thus inadmissible in suit subsequently filed by the plaintiff.). However, it is necessary to note that the Indiana court placed yet another limitation on the ADR Rules: the rules do not apply to a mediation not instituted to judicial action in a pending case and only apply to pre-suit mediation if the parties agree to do so.

Thus, as exemplified in the proceeding, Rule 408 is simply not enough to protect statement made in mediation.

[17] *See supra, fn. 5.*

[18] *See Folb*, 16 F. Supp. 2d at 1171.

[19] *Id.* Rule 26(b) of the Federal Rules of Civil Procedure provides in relevant part that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

[20] *Id.*

[21] *Id.*

In light of the inherent inadequacies of protecting the confidentiality of mediation pursuant to Rule 408 – it is necessary to create a Federal Mediation Privilege under Rule 501. Notably, at this point, the privilege (to the extent that it actually exists) is largely a judicially-created doctrine and is not recognized in all circuits by rule. Some federal appellate courts recognize the privilege to be broader than others. By way of example, the Fourth Circuit Court of Appeals has crafted a bright line rule[22] that prohibits the disclosure of "*all* statements, documents and discussions"[23] which protects against disclosure of even those matters which are collaterally related to the mediation. Moreover, the rule restricts disclosure to any other person outside the mediation program participants."[24]

In *In re Anonymous*,[25] the Fourth Circuit recognized the broad protection of the local rule and held that the mediation confidentiality rule prohibits disclosure of all statements, documents, and discussions disclosed in a court-sponsored mediation, does not distinguish between matters central to the mediated dispute and matters collaterally related, and does not provide an exception for disclosures made to a confidential forum.[26]

The broad protection, as exemplified by the Fourth Circuit Rule, fosters the correct result, which thus shows how the underlying rationale between fostering it under Rule 408 is not

[22] *In re Anonymous*, 283 F. 3d 627, 633 (4th Cir. 2002).
[23] 4th Cir. R. 33.
[24] *In re Anonymous*, 283 F. 3d at 633, *quoting* 4th Cir. R. 33. *See also* 10th Cir. R. 33.1(d) ("Statements made during the conference and in related discussions, and any records of those statements, are confidential and must not be disclosed by anyone (including the circuit mediation office, counsel, or the parties; and their agents or employees), to anyone not participating in the mediation process. Proceedings under this rule may not be recorded by counsel or the parties."); 11th Cir. R. 33.1(c)(3)("Communications made during the mediation and any subsequent communications related thereto shall be confidential. Such communications shall not be disclosed to any party or participant in the mediation in motions, briefs or argument to the Eleventh Circuit Court of Appeals or to any court or adjudicative body that might address the appeal's merits, except as necessary … nor shall such communications be disclosed to anyone not involved in the mediation or otherwise not entitled to be kept informed about the mediation by reason of a position or relationship with the party unless the written consent of each mediation participant is obtained.").
[25] *Id.*
[26] *Id.*

exhaustive enough[27] and it thus matters whether the local rules dictate that such statements are protected under Rule 408[28], Rule 501, or not expressly stated. For example, the local rule in Third Circuit is less exhaustive than the corresponding rule in the Fourth Circuit. The Third Circuit rule explicitly states that mediations are considered settlement negotiations under Rule 408[29] – and thus subject themselves to all the problems associated with the limited scope of protection offered under that rule. However, the Third Circuit Rule essentially seeks to avoid the problem of enforcing settlement negotiation by expressly stating that the "bare fact that a settlement has been reached as a result of mediation should not be considered confidential."[30] By doing this, it seems that the Rule effectively prevents parties from later arguing that a settlement was not reached and seeking to avoid their own statements being admitted against them to contest that very issue. This seems to be a good approach that preserves the policy behind promoting mediation as an alternative form of dispute resolution while avoiding the problems associated with allowing the fact that a settlement has been reached to be confidential.[31]

ii. Caselaw

In the absence of a court rule or statute that explicitly grants a certain level of confidentiality to mediations, courts have articulated different tests to determine whether a mediation privilege should be recognized pursuant to Rule 501 of the Federal Rules of

[27] The author of this paper assumes that the writers of the Fourth Circuit Rule were drafting it pursuant to Rule 501 – even though it is not expressly stated in the Rule.
[28] *See e.g.*, 3rd Cir. R. 33.5(c).
[29] *Id.*
[30] 3rd Cir. R. 33.5(c).
[31] *See supra*, fn. 16.

Evidence.[32] The federal courts are empowered to define new privileges based on the interpretation of "common law principles … in the light of reason and experience."[33] This standard requires that federal courts exercise this power with caution because the creation of new privilege is based upon public policy and the general rule is that the public is entitled to every person's evidence and that testimonial privileges are disfavored.[34] Consequently, testimonial privileges may be justified by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth."[35]

In following the traditional test articulated by the Supreme Court in *Jaffee v. Redmond,*[36] a California District Court articulated a test to determine whether a mediation privilege shall be recognized in federal court by balancing the (1) imperative need for confidence and trust among participants in mediation; (2) important public ends served by promoting conciliatory relationships among parties to a dispute, reducing litigation costs, and decreasing size of federal and state court dockets, thereby increasing quality of justice in cases that do not settle; (3) the modest loss of likely evidentiary benefit, since most mediation-related evidence not otherwise discoverable would not come into being were it not for the confidentiality of the process; and (4) the consistent body of state law adopting such a privilege.[37]

a. Confidence and Trust

[32] The author of these paper posits that it would make more sense to establish a bright-line rule of law recognizing a federal mediation privilege – but in the absence of that, the balancing test makes the most logical sense.
[33] *Folb* at 1170, *quoting Jaffee v. Redmond,* 518 U.S. 1, 8 (1996).
[34] *Id.* at 1170-71, *quoting In re Grand Jury,* 103 F. 3d 1140, 1154 (3d Cir. 1997) (*quoting Jaffee,* 518 U.S. at 35 (Scalia, J., dissenting)), *cert. denied, Roe v. U.S.*, 520 U.S. 1253 (1997).
[35] *Id., quoting Jaffee,* 518 U.S. at 9. (internal quotation marks omitted).
[36] 518 U.S. at 1.
[37] *See Folb* at 1171-1181.

In *National Labor Relations Board v. Macaluso,*[38] the Ninth Circuit approved the revocation of a subpoena that would have required a Federal mediator to testify in an NLRB proceeding.[39] Ultimately, in favor of the policy of encouraging resolution of labor disputes through collective bargaining, the Ninth Circuit concluded that the public interest in maintaining the impartibility of federal mediators does not outweigh the benefits derivable from the mediator's testimony, and the court would effectively impair or destroy the usefulness of such mediation proceedings in disputes.[40] Further, "mediation in other context has clearly become a critical alternative to full-blown litigation, providing the parties a more cost-effective method of resolving disputes … [and] the purpose of excluding mediator testimony … is to avoid a breach of *impartiality,* not a breach of confidentiality."[41]

If parties or mediators are forced to disclose information provided in confidential mediation, then the side that is most forthcoming in the mediation process is effectively penalized when third parties can discover confidential communications with a mediator.[42] Thus, "*refusing to establish a privilege to protect confidential communications in mediation proceedings creates an* ***incentive*** *for participants to withhold sensitive information in mediation or refuse to participate at all."*[43] In most cases, the crucial need for confidence and trust outweighs any loss of credible evidence because if the parties to the mediation cannot rely on the confidential treatment of everything that transpires during mediation sessions, they will feel constrained and will be less likely to arrive at a just solution in a civil dispute.[44]

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[38] 618 F. 2d at 52.
[39] *See Folb* at 1172, discussing *Macaluso.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* (emphasis added).
[44] *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F. 2d 928 (2d. Cir. 1979) ("[i]f participants cannot rely on confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker

b. Public Ends

Ultimately, the creation of a federal mediation privilege would serve the public ends by allowing courts to devote such limited resources to fairly adjudicating those cases that do require actual litigation instead of reaching "hasty judgment born of overcrowded dockets, the courts are able to provide more carefully considered decisions in matters of sufficient public concern that the parties submit their disputes to a court of law, having found it too difficult to reach a mutually agreeable settlement."[45] Further, the general public interest in encouraging prompt, fair resolution of disputes, as discussed in the preceding section of this paper, is further served by fostering a mediation privilege.

c. Evidentiary Detriment

In *Folb*[46], the Court discussed how the loss of evidence that may occur when the mediation privilege is invoked is similar to that when a psychotherapist-patient privilege is invoked, "'much of the desirable evidence to which litigants … seek access- for example, admissions against interest by a party – is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged.' The same rationale applies with respect to party admissions in mediation proceedings."[47] Ultimately, the *Folb* Court held that there is very little *evidentiary* benefit to be gained by

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players in a high-stakes game than adversaries attempting to arrive at a just solution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program which has led to settlements and withdrawals of some appeals and to the simplification of issues in other appeals, thereby expediting cases at a time when the judicial resources of this Court are sorely taxed."); *Sheldone v. Penn. Turnpike Com'n,* 104 F. Supp. 2d at 514. (same).

[45] *Folb* at 1177. *See generally e.g., Bank of America Nat. Trust & Sav. Ass'n v. Rittenhouse Assoc.*, 800 F. 2d 339, 344 (3d Cir. 1986) (discussing the strong public interest in encouraging settlement of civil litigation); *Univ. of Tenn. v. Elliot*, 478 U.S. 788, 798 (addressing the public's interest in "conserving judicial resources").
[46] *Id.* at 1177-78.
[47] *Id., quoting Jaffee,* 518 U.S. at 11-12.

refusing to recognize a mediation privilege because evidence disclosed in mediation may be obtained directly from the parties through normal discovery channels.[48] Moreover, anyone who attends a mediation or decides not to use mediation to attempt to resolve a dispute will almost definitely consider the effect of disclosures on the pending or potential litigation.[49] Thus, in most cases, there is very little evidentiary loss as a result of parties (and mediators) invoking a mediation privilege.

D. Mediation Privilege in the 50 States[50]

Generally, the policy decisions of the States largely fall on the question of whether federal courts should recognize a new privilege.[51] Simply put, the confidential status accorded to mediation proceedings by the states will be of little significance if the federal courts decline to adopt a corresponding mediation privilege.[52] Without going into an in-depth analysis of individual state laws, the issue seems to fall on whether federal court should attempt to strike a balance or refrain altogether from adopting a privilege when the states are in disagreement about the proper scope of the privilege.[53] Notably, every state in the Union, except Delaware, has adopted a mediation privilege in one way or another.[54] The Supreme Court said it best nearly ten years ago in *Jaffee* and the conclusion reigns most true here, "[d]enial of the federal privilege … would frustrate the purposes of the state legislation that was enacted to foster these confidential

[48] *Id.* at 1178.
[49] *Id.* The *Folb* Court noted this in reference to how the rationale for creating a privilege applies even more strongly in the context of mediation proceedings than in a psychotherapeutic relationship because mediation is part of an overall litigation strategy and thus decided considering the impact of future or current litigation. In contrast, the decision to seek out a therapist is often made without considering the potential impact on pending litigation – the decision to seek out a mental health professional is made under health considerations.
[50] A complete analysis of the mediation privilege in the fifty states is beyond the scope of this paper.
[51] *Folb* at 1179.
[52] *Id.*
[53] *Id.*
[54] *Id.*

communications.[55] Accordingly, as ultimately held in *Folb*, "it is appropriate, in light of reason and experience, to adopt a federal mediation privilege applicable *to all communications made in conjunction with a formal mediation.*" [56]

iii. Application of the Privilege

i.

For example, suppose P has filed an antitrust action against D. P and D are vigorously litigating the case for 2 years. Then, a couple months before discovery is scheduled to end, P and D start in engaging in serious settlement negotiations and the judge stays the case pending the negotiations. After a couple months of negotiations, the parties fail to reach an agreement and decide to hire a mediator to help them reach a settlement. During caucus, D's CEO admits to some monopolistic behavior as a concession to amicably bring the dispute to an end (who knows why). Eventually, the parties reach a settlement in mediation which is later approved by the court and the case is closed.

Then, one year later, the same firm who represented P in the preceding action is now representing a group of indirect purchasers in a class action against D, on a similar antitrust issue. Discovery commences and the lawyer who was present in the mediation in the first action (and is now representing the class of indirect purchasers) has a sneaking suspicion that D's CEO made some statements during caucus that would be dispositive on one of the issues in this action. When D's CEO is deposed, he is asked whether he engaged in certain monopolistic behavior, and he simply says no. P's lawyer then asks him whether he admitted to monopolistic behavior in the mediation in the first action and he does not acknowledge making such statements, and his lawyer objects, asserting that the statements were confidential and that, even if CEO made such statements, he does not have to answer the question. Before the issue of the

[55] *Id., quoting Jaffee*, 518 U.S. at 13.
[56] *Id.* at 1179-80.

confidentiality of the previous mediation comes up before the Judge, P's lawyer hurries up and subpoenas the mediator to testify that D's CEO made such statements. When served with the subpoena, the mediator attempts to invoke the mediator privilege. There was no confidentiality statement signed in the original action. Both issues come before the Judge presiding over the case.

Discussion:

Here, there is the issue of whether (1) D's CEO and (2) the mediator can be forced to testify in the second action regarding statements made during caucus in the mediation in the first case. The very problem is that, neither party probably would have entered into the mediation in the first place if they knew that their own statements could be admitted against them in a later action. And, even if they would have entered into such meditation, they probably would have been tight-lipped and much less likely to reach a settlement. In the first case, however, they were able to reach a settlement in a very complex case as a result of the mediation. Now, if we are in a jurisdiction that follows *only* Rule 408 in recognizing the confidentiality of mediation, then both the CEO and the mediator may be forced to testify if the CEO's statement is used for impeachment purposes. However, it probably would not be admitted if offered to show liability on the claim.

If, however, we are in a jurisdiction that has enacted a Rule pursuant to Rule 501 – for example, a rule that is the same as the Fourth Circuit Court of Appeals bright-line rule,[57] then neither party can be forced to testify. This produces the correct result. There is no chance that a sophisticated party fighting over hundreds of millions of dollars would be able to reach a

[57] *See, supra* p. 6. The author recognizes that appellate court rules are not binding on lower courts – the Fourth Circuit Rule is simply offered as an example of such a protective bright-line rule.

settlement in mediation if they knew there was any chance of any statements being admitted against them in a later proceeding. Without a rule that truly protects the confidentiality of mediation, mediation cannot be successful as an alternative form of dispute resolution.

iv. Conclusion

In light of the foregoing, it should be obvious that federal courts should adopt bright-line rules pursuant to Rule 501 of the Federal Rules of Evidence in order to protect confidentiality of mediation, and thus preserving its' effectiveness as an alternative form of dispute resolution.