

# Protecting Mediation Communications in Federal Courts

Eric Laufgraben  
University of Michigan Law School

## I. INTRODUCTION

In order to resolve the question about privileging mediation communications, one must essentially mediate between two policy positions. The first is grounded in the Anglo-American legal tradition that the public is entitled to every person's evidence.<sup>1</sup> The second policy position contemplates that the adversarial, Anglo-American litigation system is not always the best way to resolve a dispute.<sup>2</sup> The adversarial system anticipates (i) a winner and a loser, (ii) one set of "facts," and (iii) that adversarial litigation is the superior way to find those facts. The growing trend toward using mediation as a mechanism to resolve disputes, both outside of the court system, and in connection with pending litigation, indicates that cooperation between parties may lead to superior results. An agreement that parties reach mutually through negotiation, with the assistance of a neutral mediator, should lead to more satisfactory results than a verdict reached by a disinterested judge or jury. In light of the overwhelming dockets that federal and state judges are faced with, this tool designed to promote efficient and agreeable resolution of disputes for the parties themselves, will help to alleviate the enormous burden placed on the court system in this country. The need for judicial economy prompted Congress to pass the Alternative Dispute Resolution Act of 1998,<sup>3</sup> authorizing federal district and bankruptcy courts to adopt Local Rules that encourage at least one form of alternative dispute resolution proceedings as an alternative to trial. Most states have adopted statutes granting broad

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<sup>1</sup> *Branzburg v. Hayes*, 405 U.S. 665, 688 (1972). *See also* Hardwicke, L.C.J., 12 Cobbet's 675, 693 (1742) (cited by *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

<sup>2</sup> *See, e.g.*, *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 55 (9th Cir. 1980).

<sup>3</sup> Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651 *et seq.* (West 2005).

protections to mediation communications; all states afford at least some protection to alternative dispute resolution programs.<sup>4</sup>

Mediation proponent John Van Winkle describes the “core value” of mediation as providing “the parties with a formalized, facilitated opportunity to negotiate, converse, and explore options -- to exhaustively determine if a settlement is possible.”<sup>5</sup> Echoing *Getting to Yes*,<sup>6</sup> Van Winkle argues convincingly that this is most-often possible when parties can focus on their *interests* in the matter, rather than their *positions*.<sup>7</sup> This model varies significantly from the adversarial model in courts that require a fact-finder to choose between two legal positions. While courts, scholars, practitioners, and potential litigants all recognize the benefits of mediating a dispute, however, opinions diverge about what to do when the mediation fails. Confidentiality is a hallmark of the mediation process; thus, if mediation is to be successful, parties must speak freely without the fear that other parties will use their statements and

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<sup>4</sup> See Aaron J. Lodge, *Legislation Protecting Confidentiality in Mediation: Armor of Steel or Eggshells?*, 41 Santa Clara L. Rev. 1093, 1107 (2001).

<sup>5</sup> John R. Van Winkle, *Mediation: A Path Back for the Lost Lawyer* 24 (2001).

<sup>6</sup> Roger Fisher, William Ury & Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (1981).

<sup>7</sup> Van Winkle, *supra* Note 5, at 28. See also Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U. L. Rev. 715, 720 (1997) (“One particularly unique attribute of the mediation process is that it is future-oriented, concentrating on ways to resolve disputes between parties by focusing on what will happen in the future. This is directly opposite to the litigation process, which focuses on the past: What happened? Who broke the rules? Who incurred liability due to their negligence? While judges look to the past to apply sets of rules to resolves disputes in one party’s favor, mediators look to the future, searching for ways that parties can come to common ground and find a lasting solution.”)

communications against them in future litigation or in another capacity.<sup>8</sup> But how much confidentiality is necessary and what are its limits?<sup>9</sup>

Federal courts have been struggling with these questions with increasing frequency when negotiations occur in the context of a mediation.<sup>10</sup> In *Folb v. Motion Picture Industry Pension & Health Plans*, the Central District of California crafted a federal, common law mediation privilege under Rule 501. Applying the Supreme Court's *Jaffee v. Redmond* test,<sup>11</sup> the *Folb* court held that communications made in connection with a mediation are privileged, and may not be discoverable or admissible as evidence in future litigation.<sup>12</sup> In

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<sup>8</sup> See Lodge, *supra* note 4, at 1095.

<sup>9</sup> Note that there are a number of issues that are beyond the scope of this paper. Choice of law presents a significant challenge to judges trying to determine whether state law or federal law should apply when a case that deals with both state and federal claims is before a federal judge. See, e.g., *Hancock v. Hobbs*, 967 F.2d 462 (11th Cir. 1992) (holding that the federal law of privilege applies where the court's jurisdiction is premised on a federal question, even if the evidence sought is relevant to pendent state law claims). Other commentators have discussed the importance of establishing certification procedures for mediators and the role of the mediator in reporting attorney misconduct during a mediation. See, e.g., *Kentra*, *supra* note 6. Some cases and commentators have considered the use of mediation in domestic relations, see, e.g., Lydia Belzer, *Domestic Abuse and Divorce Mediation*, 5 Loy. J. Pub. Int. L. 37 (2003), and in criminal matters. See, e.g., Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, 40 Idaho L. Rev. 571 (2004). Other commentators have considered whether there is a "good faith" requirement in mediations. See, e.g., James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of Emerging Case Law*, 54 Ark. L. Rev. 171 (2001). In addition, the Uniform Mediation Act and state privilege rules regarding mediation are beyond the scope of this paper, although some federal cases cited in this paper have applied state privilege laws. See Uniform Mediation Act (2001 draft), available at <http://www.mediate.com/articles/umafinalstyled.cfm> (last visited April 20, 2006).

<sup>10</sup> See *FDIC v. White*, 76 F. Supp. 2d 736 (N.D. Tex. 1999); *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999); *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998).

<sup>11</sup> See *Folb*, 16 F. Supp. 2d at 1171 (*quoting* *Jaffee v. Redmond*, 518 U.S. 1, 9-13 (1995) ("To determine whether an asserted privilege constitutes such a public good, in light of reason and experience, the Court must consider (1) whether the asserted privilege is 'rooted in the imperative need for confidence and trust[;]' (2) whether the privilege would serve public ends; (3) whether the evidentiary detriment caused by exercise of the privilege is modest; and (4) whether denial of the federal privilege would frustrate a parallel privilege adopted by the states"))

<sup>12</sup> *Folb*, 16 F. Supp. 2d at 1171-80.

contrast, in *Olam v. Congress Mortgage*, the Northern District of California applied California state privilege law to determine that only the parties *themselves* hold a privilege with respect to mediation communications, and can waive the privilege in order to compel the mediator *himself* to testify.<sup>13</sup> The Northern District of Texas took another approach in *FDIC v. White*, holding that a mediation privilege does not apply at all when parties ask a court to determine the enforceability of an agreement that the parties reached during a mediation. Distinguishing “confidentiality” from “privilege,” the court determined that mediation communications should not be privileged when the parties ask the court to consider the propriety of the mediation or the mediated agreement.<sup>14</sup>

But despite the differences in the outcomes of the case and the subtle distinctions drawn by the courts, viewed from a different angle, courts generally are focused on one point: the party’s *purpose* for introducing the mediation communications. When a party wants to introduce mediation communications **defensively**, *i.e.*, in order to defend against the enforcement of a mediated agreement, courts have been amenable to receiving mediation communications. That was the case in both *Olam v. Congress Mortgage Co.* and *FDIC v. White*.<sup>15</sup> However, when parties seek to introduce statements or communications made during a mediation **offensively**, *i.e.*, to undermine the credibility of their adversary’s position in present litigation, then courts have routinely denied their admissibility. The Central District of California’s opinion in *Folb* provides the most thorough discussion about the necessity of a federal mediation privilege in matters where a party attempts to introduce mediation

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<sup>13</sup> *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

<sup>14</sup> *FDIC v. White*, 76 F. Supp. 2d 736 (N.D. Tex. 1999).

<sup>15</sup> *But see Willis v. McGraw*, 177 F.R.D. 632, 633 (S.D. W. Va. 1998) (holding that court will not involve itself in sorting out *any* disputes in connection with written mediated agreement).

communications offensively.<sup>16</sup> Arguing that Federal Rule of Evidence 408 does not provide sufficient protection in these cases since settlement communications are admissible for other purposes, such as to show bias or to impeach, the *Folb* court protected *all* mediation communications from being used for *any* purpose. Other federal courts followed suit. These common-sense legal norms distinguishing the introduction of mediation communications offensively vs. defensively stand for the proposition that mediation must be protected in order to ensure that it's not misused as a tactic to gain an advantage in litigation. But at the same time, if the litigation is *specifically about* enforcing a mediated agreement, disallowing a party to introduce any communications whatsoever potentially undermines the entire process by denying that party the right to assert common-law contract defenses.

Simply put, the role of the mediator is not to facilitate litigation; her role is to prevent litigation. The federal rules of evidence and the rules of civil and criminal procedure demonstrate the importance of order and predictability in federal courts; in contrast, mediation affords parties a level of flexibility to create a self-determined agreement that is unavailable in a different context. And it's also important to recognize that mediation sometimes just doesn't work. A solution to protect mediation and parties who attend mediations should be pragmatic and simple.

## II. DETERMINING THE PROPER ROLE OF THE JUDICIARY WHEN EVALUATING MEDIATIONS.

Case law demonstrates that federal courts are struggling to determine their correct roles in the enforcement of mediations and in admitting communications from a mediation as evidence in subsequent litigation. When a court rules that communications from a prior

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<sup>16</sup> *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp. 2d 1164, 1171-72 (C.D. Cal. 1998) (discussing the limitations of Rule 408 in protecting the “need for confidence and trust” in the context of a mediation).

mediation are privileged, it expresses the view that courts should stay out of mediation proceedings. The mediation is separate from related or unrelated litigation, and information that arises from the mediation cannot be admitted to benefit or harm another party. Most courts understand that the approaches parties take during mediations are (or at least should be) different from the approaches that they take during litigation. But by the same token, most courts suggest that litigation must be available as a safety valve. The biggest divergences are found along this axis detailing the availability of litigation. Most opinions can be located somewhere along this axis where, at one end, courts stay completely out of disputes involving mediation and, at the other end, courts have evaluated the mediation process itself.

In *Local 808 v. Nat'l Mediation Board*, the D.C. Circuit adopted a position close to the first endpoint of the spectrum when they considered the court's role in evaluating mediation proceedings. In *Local 808*, the court dismissed the trial court's ruling that ordered the union and the employer to stop mediation proceedings pursuant to the Railway Labor Act and attend arbitration.<sup>17</sup> Although the statutory obligations of the Railway Labor Act distinguish this mediation from ones that are purely voluntary or under the direction of a trial court, the court's discussion about the role of the judiciary in mediation proceedings is relevant. In *Local 808*, the court stated that "[t]he Concept of Mediation is the Antithesis of Justiciability."<sup>18</sup> The court reasoned:

[J]udges are in no position to second-guess the actions of mediators. Much of the work of a mediator is not amenable to judicial oversight because it does not culminate in what judges normally recognize as an appealable order. Mediation is a art-form

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<sup>17</sup> *Local 808 v. Nat'l Mediation Bd.*, 888 F.2d 1428, 1430 (1989).

<sup>18</sup> *Id.* at 1435; *see also* *Gen. Comm'n. of Adjustment v. Mo.-Kan.-Tex. R.R.*, 320 U.S. 323, 337 (1943).

used to avoid or break an impasse in a negotiation. It relies heavily on personal powers of persuasion, not adjudication.<sup>19</sup>

Similarly, John Van Winkle commented that “[e]ffective mediators assist in identifying interests and brainstorming to find options and alternatives to meet them.”<sup>20</sup> This process of exploration and re-examination that characterizes mediation led the *Local 808* court to conclude that the unique role of mediators and the unique processes involved in mediation require extreme deference from the courts.<sup>21</sup> Indeed, the court stated that the success of mediation is predicated on the impartiality of the mediator and “the subsequent *assurance that neither party will be able to enlist the courts to further its own partisan ends.*”<sup>22</sup> Granted, the mediation that was at issue in *Local 808* took place against the backdrop of the Railway Labor Act and was facilitated by a member of the National Mediation Board, and with few exceptions, subsequent cases that cite *Local 808* also deal with mediations that occur within the purview of the Act.<sup>23</sup> Still, there is nothing to suggest that the court’s reasoning about mediations in railroad labor disputes is inapplicable in other contexts.

**A. Defensive Use of Mediation Communications.**

The Northern District of Texas indicated that courts have an active role in the enforcement of mediated agreements. In *FDIC v. White*, the court ordered the parties to participate in post-trial mediation to arrive at a settlement agreement.<sup>24</sup> The defendants moved to set aside the agreement on the grounds that the FDIC coerced them into signing it. Although the

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<sup>19</sup> *Id.* at 1436.

<sup>20</sup> Van Winkle, *supra*, note 5, at 27.

<sup>21</sup> *Local 808*, 888 F.2d at 1435 (“The unique role of mediators requires such a deferential judicial posture, as the Supreme Court has recognized.”)

<sup>22</sup> *Id.* at 1433-34 (emphasis in original) (*quoting* *Trans World Airlines v. Ind. Fed. of Flight Attendants*, 489 U.S. 426, 441 (1989)).

<sup>23</sup> *Cf.* *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998).

<sup>24</sup> *FDIC*, 76 F. Supp. 2d at 736.

Order of Referral for Mediation contained a confidentiality provision,<sup>25</sup> the court distinguished between privilege and confidentiality, and permitted the defendants and their attorneys to testify about communications during the mediation: “The Court does not read the ADRA or its sparse legislative history as creating an evidentiary privilege that would preclude a litigant from challenging the validity of a settlement agreement based on events that transpired at a mediation. Indeed, such a privilege would effectively bar a party from raising well-established common law defenses[.]”<sup>26</sup> After the court reviewed the testimony by the defendants, it concluded that the type of information that the defendants deemed coercive during the mediation (threats of criminal prosecution) were known by them before they began the mediation in the first place.<sup>27</sup> Notably, the *FDIC* court never discussed the role of the mediator or what the mediation process looked like. The judge presumed that the same rules apply to settlement negotiations with or without a mediator present. But the court viewed the case at hand as a dispute about contract enforcement -- not about the underlying substance of the parties’ original dispute -- and permitted defendants to raise common law defenses to enforcement. In *Olam v. Congress Mortgage Co.* and *Fisher v. Standard Insurance Co.*, the Northern District of California reached similar results, when it enforced settlement agreements between plaintiffs and defendants that were signed after a court-ordered mediation. Again, the district court permitted the parties to offer defenses to the enforcement of the mediated agreement although they were summarily rejected.<sup>28</sup>

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<sup>25</sup> *Id.* at 737.

<sup>26</sup> *Id.* at 738.

<sup>27</sup> *Id.* at 739.

<sup>28</sup> See *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1118 (N.D. Cal. 1995) (considering -- but rejecting -- defenses of unconscionability and undue influence in proceeding to enforce mediated agreement); *Fisher v. Std. Ins. Co.*, No. C-03-4865-MMC, 2004 U.S. Dist. LEXIS

In contrast, the Southern District of West Virginia took a different approach in *Willis v. McGraw*, tracking closely to *Local 808*, even outside the context of the Railway Labor Act.<sup>29</sup> The parties in *Willis* reached an agreement after attending a mediation session, pursuant to the Local Rules of the district court. After the defendant failed to perform on the agreement, the plaintiff brought a motion to enforce; the district court denied the motion.<sup>30</sup> The court echoed *Local 808* when it reasoned that the policies behind the Local Rule referring parties to mediation -- amicable, efficient resolution of civil actions and the assurance of confidentiality to promote open exchange -- could only be achieved if the court refused to “involve itself under any circumstances in sorting out disagreements amongst the parties emanating from the mediation process.”<sup>31</sup> The court found that a bright-line rule was necessary because “the mediation process is one whose vitality and success depends on a minimum of Court involvement and interference.”<sup>32</sup> It is important to note that the *Willis* court focused on protecting the *process* of mediation, rather than the result of the mediation -- the agreement.<sup>33</sup> True, litigation is usually available to resolve the underlying matter and courts cannot imitate the processes of mediation, but *Willis* took this principle one step further, arguing that courts will not be available to resolve a dispute regarding the enforcement of a mediated agreement, because it “eminat[ed]” from the mediation.<sup>34</sup> *Willis* is problematic because it can induce divergent results. On one hand, parties may be reluctant to attend mediation and sign agreements if they know that courts will not enforce them, and they still have to incur the costs of litigating the dispute. On the other hand,

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1011, at \*9-10 (N.D. Cal. 2004) (considering -- but rejecting -- defenses of fraud and undue influence in proceeding to enforce agreement).

<sup>29</sup> *Willis v. McGraw*, 177 F.R.D. 632 (S.D. W. Va. 1998).

<sup>30</sup> *Id.* at 632.

<sup>31</sup> *Id.* at 632-33.

<sup>32</sup> *Id.* at 633.

<sup>33</sup> *See id.*

<sup>34</sup> *See id.*

the decision could encourage parties to return to the *mediator*, rather than the *judge* in order to determine a solution to the enforcement of the mediated agreement.

Most cases fall somewhere in the spectrum between *Willis* and *FDIC*. In cases where courts consider whether communications that transpire during mediations are privileged, courts suggest that they have some sort of role in determining the scope of the mediation's discoverability in later proceedings. Courts that exclude disclosure of mediation or communications or recognize a privilege under Rule 501 suggest that the role of the judiciary is protective.<sup>35</sup> On the other hand, some courts merely identify mediation as an effective means for docket control; they value confidentiality up to the point where it does not compromise the breadth of evidence available for their courts.<sup>36</sup>

#### **B. Offensive Use of Mediation Communications.**

As a general rule, courts have routinely ruled that mediation communications are privileged when the party who seeks discovery of mediation communications to further their interests in present litigation. Simply put, courts will not allow *Party A* to use communications from a mediation with *Party B* -- whether or not *Party A* even participated in the prior mediation -- to gain an advantage in current litigation.<sup>37</sup> The Southern District of New York was adamant about this: in *Bernard v. Galen Group, Inc.*, the court sanctioned the plaintiff's attorney after he disclosed information about settlement amounts offered by the defendants, the name of the private mediator, and statements made by the mediator during the court-ordered mediation

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<sup>35</sup> See, e.g., *Bernard v. Galen Group, Inc.*, 901 F. Supp. 778 (S.D.N.Y. 1995).

<sup>36</sup> See, e.g., *In re: March 1994 -- Special Grand Jury*, 897 F. Supp. 1170 (S.D. Ind. 1995).

<sup>37</sup> See *Bernard*, 901 F. Supp. at 782-84 (sanctioning attorney for disclosing communications from failed court-ordered mediation); *Folb*, 16 F. Supp. 2d at 782-84 (precluding plaintiff-employee from discovering defendant's communications in a prior, related mediation with another employee).

process.<sup>38</sup> The judge determined that monetary sanctions were appropriate in light of the fact that the attorney violated the confidentiality provisions that the parties agreed to before they started the mediation.<sup>39</sup> The court described the importance of the confidentiality provisions established in the court's Mediation Program and attributed the Program's 80% settlement rate, at least in part, to the assurances of confidentiality.<sup>40</sup> Although the court did not describe the communications as "privileged," the fact that the judge levied sanctions on the attorney for violating the confidentiality provisions suggested that the privilege was implicit. The rationale behind the decision was simple: plaintiffs could not use communications made *in front of the mediator* in order to undermine defendant's credibility *in front of the judge*.

In *Folb v. Motion Picture Industry Pension & Health Plans*, the plaintiff brought a sex discrimination claim under Title VII and a retaliation claim under ERISA against his employer after he was terminated from his position.<sup>41</sup> The employer ("Pension Plan") argued that it fired Mr. Folb because of sexual harassment charges made against him by one of his co-workers, Ms. Vasquez. Earlier that year, Ms. Vasquez and the Pension Plan settled her harassment claim through mediation.<sup>42</sup> Mr. Folb sought discovery of that mediation to bolster his argument; if the Pension Plan challenged the validity of Ms. Vasquez's sexual harassment charge during their mediation, then Mr. Folb would be able to show evidence that the Pension

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<sup>38</sup> *Bernard*, 901 F. Supp. at 782. See also *Fields-D'Arpino v. Restaurant Assoc., Inc.*, 39 F. Supp. 2d 412, 417 (S.D.N.Y. 1999) (disqualifying attorney who acted as a "neutral" mediator in the parties' prior mediation from representing defendant in current litigation, noting that allowing the attorney to represent the defendant would "perpetuate[] an unacceptable appearance of impropriety and raise[] the specter that the litigation will be tainted by one side's 'unfair advantage'") (quoting *Cheng v. GAF Corp.*, 631 F.2d 1052, 1059 (2d Cir. 1980), *vacated on other grounds*, 450 U.S. 903 (1981)).

<sup>39</sup> *Id.* at 784. The court ordered the plaintiff's attorney to pay \$2,500 and applied the fee to the operating expenses of the court's Mediation Program.

<sup>40</sup> See *id.* at 780, 784.

<sup>41</sup> See *Folb*, 16 F. Supp. 2d at 1166.

<sup>42</sup> See *id.* at 1167.

Plan's decision to fire him was pretextual.<sup>43</sup> The court denied Mr. Folb's discovery request and found that the communications were privileged under Rule 501. The *Folb* court rejected the argument that privileges only apply to ongoing relationships, such as the one between spouses, between attorneys and clients, and between psychotherapists and patients. That argument posited that mediations should not be privileged because the mediator and the parties have a limited relationship with each other.<sup>44</sup> The *Folb* court reasoned that the parties themselves often have ongoing relationships that should be protected by open communications in mediation.<sup>45</sup> And at another level of abstraction, the court recognized an additional public good of encouraging prompt resolution of disputes and minimizing the costs of litigation.<sup>46</sup> *Folb* makes sense. If Mr. Folb could have used statements that his employer made in the course of a prior mediation with another employee in his litigation against them, there would be a likely chilling effect in the use of mediation.

It is important to note, however, that the court declined Mr. Folb's request to discover a mediation brief, although it permitted him to discover a settlement agreement that the parties reached without the assistance of a mediator after the mediation broke down.<sup>47</sup> The court

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<sup>43</sup> *See id.* at 1170-81.

<sup>44</sup> *See Note, Making Sense of Rules of Privilege Under the Structural (II)logic of the Federal Rules of Evidence*, 105 Harv. L. Rev. 1339, 1356-57.

<sup>45</sup> *See Folb*, 16 F. Supp. 2d at 1177.

<sup>46</sup> *Id.* at 1176. *See also* *Goodyear Tire & Rubber Co. v Chiles Power Supply, Inc.*, 332 F.3d 976, 983 (6th Cir. 2003) (extending Rule 408 to preclude discovery of settlement agreement by third party); *EEOC v. Northlake Foods, Inc.*, 411 F. Supp. 2d 1366, 1368-69 (M.D. Fla. 2005) (granting defendant's motion for a protective order to prevent the EEOC from disclosing the amount of its settlement with employee). *But see* *In re Subpoena Issued to CFTC*, 370 F. Supp. 2d 201, 209-10 (D.D.C. 2005) (refusing to recognize "settlement privilege" that would preclude plaintiff from discovering materials related to prior settlement between defendant and CFTC -- but, CFTC settlement did not occur in the context of a mediation).

<sup>47</sup> *See Folb*, 16 F. Supp. 2d at 1180 ("Subsequent negotiations between the parties, however, are not protected even if they include information initially disclosed in the mediation. To protect additional communications, the parties are required to return to mediation").

recognized that the privilege must protect both the parties who participate in the mediation and the uniqueness of the mediation process itself. The *scope* of the privilege only goes as far as the mediation. Admittedly, sometimes it is difficult to locate this point. The *United States Fidelity & Guaranty Co. v. Dick Corp.* court considered this question and decided that mediation communication implies actual communication by the parties to the mediator and from the mediator to the parties: “[o]therwise, we would be hard pressed to distinguish between garden variety settlement discussions, which are not protected, and those which are a part of the mediation process and are privileged.”<sup>48</sup>

In *Sheldone v. Pennsylvania Turnpike Commission*, the court also found a mediation privilege under Rule 501 when the plaintiffs sought discovery of previous mediation communications that the current defendant participated in.<sup>49</sup> The plaintiffs argued that admissions made by a representative of the defendant were “extremely significant to their claims of retaliation.”<sup>50</sup> The extreme significance of the communications underscored the need for protection. Consequently, the *Sheldone* court limited the scope of privileged mediation communications to anything that would not have come into being “*but for* the mediation process[.]”<sup>51</sup> The court reasoned that the evidentiary detriment was modest because the communication would never have existed in the first place without the mediation. The court noted that the privilege did not preclude the plaintiffs from investigating the alleged admission or the facts underlying it outside the scope of the mediation process.<sup>52</sup> Another district court came

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<sup>48</sup> U.S. Fidelity & Guaranty Co. v. Dick Corp., 215 F.R.D. 503, 506 (W.D. Pa. 2003).

<sup>49</sup> *Sheldone v. Penn. Turnpike Comm’n*, 104 F. Supp. 2d 511, 513-17 (W.D. Pa. 2000) (analyzing *Jaffee* factors to find mediation privilege under Rule 501).

<sup>50</sup> *Sheldone*, 104 F. Supp. 2d. at 512.

<sup>51</sup> *Id.* at 517 (emphasis added).

<sup>52</sup> *See id.* at 515.

to a similar conclusion.<sup>53</sup> In *Society of Lloyds v. Ward*, the court held that plaintiffs did not violate a mediation privilege when they attached a trust document regarding a parcel of real estate to their complaint; the document was (i) originally produced in connection with a mediation, but (ii) later became publicly-available.<sup>54</sup> The court stated that “facts otherwise admissible or subject to discovery do not become inadmissible or protected from discovery solely by reason of disclosure in an ADR proceeding...”<sup>55</sup>

Notably, this position seems to square with *FDIC v. White* where the court admitted communications about the FDIC’s threats of criminal prosecution against the defendants during the mediation at a later adjudicative proceeding to determine the enforceability of the mediated agreement. Applying the language of *Sheldone*, the communications about criminal prosecution did not exist “but for” the mediation and were admissible.

Recently, in *Beazer East, Inc. v. Mead Corp.*, the Third Circuit considered a twist on this notion of the offensive use of mediation communications, but reached similar results, when it rejected a party’s attempt to introduce mediation communications to prove the existence of and enforce an *oral* agreement.<sup>56</sup> Following a Local Appellate Rule that prohibited the parties to a mediation “from using *any* information obtained as a result of the mediation process as a

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<sup>53</sup> See *Soc’y of Lloyds v. Ward*, No. 1:05-CV-32, 2006 U.S. Dist. LEXIS 29 (S.D. Ohio Jan. 3., 2006).

<sup>54</sup> See *id.* at \*27.

<sup>55</sup> *Id.* at \*28 (quoting S.D. Ohio Local R. 16.3(c)(1)). See also *Chester County Hosp. v. Independence Blue Cross*, Civ. Action No. 02-2746, 2003 U.S. Dist. LEXIS 25214 (W.D. Pa. Nov. 7, 2003), at \*9-10 (without these guarantees of confidentiality, mediation participants will “feel constrained to conduct themselves in a cautious, tightlipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempted to arrive at a just resolution of a civil dispute”) (quoting *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979)); *Hays v. Equitex, Inc.*, 277 B.R. 415, 430 (N.D. Ga. 2002) (without assurances of confidentiality, parties are given two options: “1) provide a thorough analysis of the strengths and weaknesses of your case to the mediator, or 2) do not participate in the mediation”).

<sup>56</sup> *Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429 (3d Cir. 2005).

basis for *any* motion or argument to *any* court,” the court determined that the plaintiff could not prove the existence or terms of an oral settlement without violating the Local Rule.<sup>57</sup> And in *Microsoft Corp. v. Suncrest Enterprises*, the district court refused to hear information about mediation communications in connection with plaintiff’s attempt to enforce an alleged oral agreement made during a telephonic mediation conference.<sup>58</sup> *Microsoft* and *Beazer East, Inc.* indicate that a successful mediated agreement will necessarily be reduced to writing and without that writing, courts will not allow parties to use mediation communications *offensively* because the agreement may not exist at all.

In contrast, one outlying case took a wholly different approach and ruled that Rule 501 does not privilege mediation communications because of the competing federal interest in fact-finding.<sup>59</sup> The Southern District of Indiana compelled a mediator to testify about a prior civil mediation at a federal grand jury hearing because his testimony could have determined whether or not the government would seek indictments against a party.<sup>60</sup> Accordingly, the court denied the mediator’s motion to quash the subpoena to testify before the grand jury and ordered him to bring with him the file that he maintained in connection with the mediation.<sup>61</sup> *In re March 1994 – Special Grand Jury Proceedings* stood for the proposition that mediation is valuable until it competes with the federal policy favoring the judicial fact-finding function. In that case, the mediator helped to facilitate an agreement related to civil slip-and-fall claims made

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<sup>57</sup> *Id.* at 435 (*citing* Local App. R. 33.5(c)).

<sup>58</sup> *Microsoft Corp. v. Suncrest Enterprise*, No. C-03-5424-JF-(HRL), 2005 U.S. Dist. LEXIS 39065, at \*6-7 (N.D. Cal. Dec. 28, 2005) (“In the Court’s view, this mediation privilege extends to the substance of the mediator-sponsored conference call during which the mediator allegedly obtained oral confirmation of the settlement agreement from Microsoft’s counsel and [defendant]”).

<sup>59</sup> *See In re: March 1994 -- Special Grand Jury*, 897 F. Supp. at 1173. *See also In re Subpoena Issued to CFTC*, 370 F. Supp. 2d at 209-10.

<sup>60</sup> *See id.*

<sup>61</sup> *See id.* at 1171.

by Mr. and Mrs. Doe. Later, a grand jury called him to testify about that mediation when they were investigating the Does on charges of mail and wire fraud. Not only would this chill the participation of the parties in a mediation, it compromised the independent role of the mediator. The court noted that the mediator would not have to testify about settlement amounts at the grand jury hearing.<sup>62</sup> Apparently conflating Rule 408 with Rule 501, the court suggested that mediation serves no purpose other than facilitating settlement. This precedent undermines the assurances of confidentiality that inform successful mediation and compromises their predictability.

### III. CONCLUSION.

#### A. Common themes in federal courts.

The limited amount of case law dealing with whether to protect mediation confidentiality is rather low. This, combined with the statistics in a number of cases about the success of mediation programs in and out of their courts, suggests that most mediations function smoothly. However, when examining cases where confidentiality is at issue, some patterns emerge. *Folb*, *Sheldone*, and *Beazer East* all suggest that courts should not allow parties to use mediation communications *offensively*, and have refused discovery of completed mediation proceedings in connection with present litigation in the court, no matter how probative the evidence could be in the litigation. All of these courts have found that a common-law privilege under Federal Rule of Evidence 501 protects these communications from discovery. Cases such as *Local 808*, *Maine Central Railroad*, *Bernard* and *Macaluso* indicate that when the court is satisfied that the mediation was conducted in an appropriate manner, they will not consider

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<sup>62</sup> *See id.* at 1173.

evidence or testimony in connection with the mediation in related litigation, even if the negotiations break down or show signs of strain.<sup>63</sup>

On the other hand, *Folb*, *Microsoft*, and *U.S. Fidelity Corp.* suggest that courts will not protect negotiations or discussions that do not take place in the context of a mediation.<sup>64</sup> In *Folb*, the court said that the protection ended when the mediation ended, permitting the plaintiff to discover a settlement agreement that his employer reached with another employee after the mediation failed, but precluding him from discovering a mediation brief. And in *Olam* and *FDIC*, the courts admitted mediation communications *defensively* -- to allow parties to raise contract defenses to the mediated agreement, arguing that it was unenforceable. One principle that can be gleaned from all of these cases is that courts will not permit discovery into mediation communications when the parties are acting within the scope of the mediation. *Folb* and *U.S. Fidelity* explicitly dealt with the issue of **scope**; the disagreements that the courts struggled with in *Olam* and *FDIC* suggest that the settlement negotiations may not have been conducted within the scope of what we would consider to be a proper mediation. If the parties could not have reached an agreement, then presumably, the mediation should have failed. Once the parties complain about the type of agreement that the mediation produced, a red flag goes up and suggests that something may have been wrong.

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<sup>63</sup> *Cf.* *In Re: 1994 -- Special Grand Jury Proceedings*, 870 F. Supp. 1170 (S.D. Ind. 1995) (allowing a mediator to testify at a grand jury hearing of an accused when the accused participated in a prior mediation). This case was a poorly-reasoned decision that undermined the credibility of a completed mediation and the importance of a mediator's impartiality, and cannot be reconciled with case law dealing with mediation confidentiality. Perhaps the fact that the court was dealing with a criminal defendant informed the decision, but it would be poor policy to compel a civil mediator to testify in a criminal grand jury hearing.

<sup>64</sup> *See, e.g., Microsoft Corp.*, 2005 U.S. Dist. LEXIS 39065, at \*6 ("The mediation privilege clearly does not extend to the telephonic settlement negotiations conducted by the parties *without the aid of the mediator*, or do the draft settlement agreement sent to [defendant] by Microsoft's counsel").

Legislative solutions have proven to be unpredictable.<sup>65</sup> For example, despite California's broad mediation privilege, the *Olam* court wrote a balancing test into the statute. In addition, the Uniform Mediation Act also provides a number of exceptions to the privilege; if all states adopted this statute, then states with broad mediation confidentiality protection would offer considerably less.<sup>66</sup> But if courts and the legislature are sincere about encouraging the use of mediation as an alternative to litigation, then courts must take care to remove themselves from adjudicating disputes between parties in connection with mediations. To be sure, there may reach a point where it's necessary to protect the rights of a party to a mediated agreement to raise a common-law contract defense to argue that the agreement is unenforceable. Here, again, the question of a party's intent to use the communications offensively or defensively comes into play. Although the legislature could be helpful in setting up institutional structures such as the National Mediation Board or FMCS, or draft rules regarding certification of mediators to instill confidence in the process, case law suggests that protecting the communications that result from mediation is more of an exercise of judicial restraint than anything else.

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<sup>65</sup> See Lodge, *supra* note 4, at 1095.

<sup>66</sup> See *id.* at 1112.