

Memorandum 2014-58

**Relationship Between Mediation Confidentiality and Attorney Malpractice
and Other Misconduct: Further Discussion of Federal Law**

In October, the Commission began examining federal case law bearing on the relationship between mediation confidentiality and attorney malpractice and other misconduct.¹ This memorandum continues that discussion.

In researching this area, the staff focused primarily on published court decisions. The memorandum also mentions a few unpublished decisions that caught our attention. To keep the project manageable, we did not attempt to systematically research such decisions.

Nor does the memorandum discuss all of the relevant decisions from federal courts in California. We left some of them for a future memorandum, which will explore various aspects of the California situation not previously addressed.

This memorandum begins by explaining the choice-of-law rules that apply when a mediation confidentiality issue arises in a federal case. The memorandum then takes a general look at how federal courts have addressed such issues. Finally, the memorandum focuses specifically on cases involving allegations of misconduct, particularly allegations of professional misconduct.

CHOICE-OF-LAW RULES

When a party proffers or seeks disclosure of mediation evidence in a federal case, the threshold question is what law to apply. The key provision on that point is Federal Rule of Evidence 501. We first describe that rule and how it operates, and then discuss its implications.

1. See Memorandum, 2014-45 (discussing *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999)).

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

Federal Rule of Evidence 501

As the Commission discussed in September, the Federal Rules of Evidence do not include a set of privilege rules like the attorney-client privilege, the doctor-patient privilege, and other specific privileges or confidentiality rules. The draft of those rules approved by the U.S. Supreme Court included nine different privileges, but those proposed privileges proved “extremely controversial” in Congress.²

“Since it was clear that no agreement was likely to be possible as to the content of specific privilege rules, and since the inability to agree threatened to forestall or prevent passage of an entire rules package, the determination was made that the specific privilege rules proposed by the Court should be eliminated”³ Instead, Congress substituted a single rule (Federal Rule of Evidence 501), which “[e]ft the law in its current condition to be developed by the courts of the United States utilizing the principles of the common law.”⁴ Congress also approved a proviso “requiring Federal courts to recognize and apply state privilege law in civil cases governed by *Erie R. Co. v. Tompkins*,⁵ ... as under present Federal case law.”⁶

Thus, Rule 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme court pursuant to statutory authority, *the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law* as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense *as to which State law supplies the rule of decision*, the privilege of a witness, person, government, State, or political subdivision thereof *shall be determined in accordance with State law.*⁷

This rule refers to “the privilege of a witness,” but evidentiary protections for mediation communications are not always labeled as a “privilege.”⁸ Nonetheless,

2. Sen. Rep. No. 93-1277, 93rd Cong. 2d Sess. (Oct. 18, 1974).

3. *Id.*

4. *Id.*

5. 304 U.S. 64 (1938).

6. Sen. Rep. No. 93-1277, 93rd Cong. 2d Sess. (Oct. 18, 1974).

7. Emphasis added.

8. For example, California’s statutes protecting mediation communications are not classified as a privilege in the Evidence Code. See Evid. Code §§ 703.5 (competency restriction applicable to mediator); 1115-1128 (evidentiary exclusion for mediation communications, based on extrinsic policy).

federal courts have routinely applied Rule 501 in addressing evidentiary issues relating to mediation communications. As Magistrate Judge Brazil explained in *Olam v. Congress Mortgage Co.*, to do otherwise would be “little more than a semantic slight of hand.”⁹

“It is well established that federal privilege law governs in a federal question case involving only federal law and that state privilege law applies in a diversity case involving only state law.”¹⁰ Thus, for example, federal common law governed the admissibility of mediation evidence in a federal case solely alleging violations of the federal Fair Labor Standards Act.¹¹ In contrast, state law governed the admissibility of mediation evidence in a legal malpractice case removed to federal court based on diversity of citizenship.¹²

How Rule 501 applies in a case involving both federal and state law is more complex. Where the same evidence relates to both federal and state law claims, “federal privilege law governs.”¹³ As courts have explained, this approach is warranted because applying different privilege rules to different claims in the same lawsuit could undermine federal evidentiary policies and be unworkable.¹⁴

Where, however, the evidence at issue relates only to a state law claim, and has no relevance to any federal claim, most courts have concluded that Rule 501’s proviso requires application of state privilege law.¹⁵ As one court put it, “[w]here

9. 68 F. Supp. 2d 1110, 1120 n. 15 (N.D. Cal. 1999).

10. *Guzman v. Memorial Hermann Hosp. System*, 2009 U.S. Dist. LEXIS 13336 (S.D. Texas 2009); see, e.g., *Gilbreath v. Guadalupe Hosp. Foundation, Inc.*, 5 F.3d 785, 791 (5th Cir. 1993) (applying federal privilege law in federal question case); *International Ins. Co. v. RSR Corp.*, 426 F.3d 281, 299 n.26 (5th Cir. 2005) (applying state privilege law in diversity case); see also *In re Sealed Case*, 381 F.3d 1205, 1212 (D.C. Cir. 2004) (“It is thus clear that when a plaintiff asserts federal claims, federal privilege law governs, but when he asserts state claims, state privilege law applies.”); *Platypus Wear, Inc. v. K.D. Co., Inc.*, 905 F. Supp. 808, 811 (S.D. Cal. 1995) (“It is clear that State law governs a claim of privilege in a pure diversity case, and that in pure federal question cases the federal common law of privilege governs.”); but see *Babasa v. LensCrafters, Inc.*, 498 F.3d 972, 974-75 (9th Cir. 2007) (federal law, including federal privilege law, governs determination of whether case exceeds amount-in-controversy necessary for diversity action to proceed in federal court).

11. See *Sheldone v. Pennsylvania Turnpike Comm’n*, 104 F. Supp. 2d 511 (W.D. Pa. 2000).

12. See *Benesch v. Green*, 2009 U.S. Dist. LEXIS 117641 (N.D. Cal. 2009); see also *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1124 (N.D. Cal. 1999) (“[I]f the basis for subject matter jurisdiction was diversity of citizenship, F.R.E. 501 would require application of state privilege law in all phases of the proceedings in federal court ...”).

13. *Wilcox v. Arpaio*, 753 F.3d 872 (9th Cir. 2014); see also *Guzman*, 2009 U.S. Dist. LEXIS at *12 (collecting authorities establishing that “[i]n cases in which there are federal and state claims, the evidence at issue is relevant to both, and the privilege rules conflict, courts have generally applied federal privilege law ...”).

14. See, e.g., *In re Sealed Case*, 381 F.3d at 1213; *Pearson v. Miller*, 211 F.3d 57, 66 (3d Cir. 2000).

15. See, e.g., *Doe v. Archdiocese of Milwaukee*, 2014 U.S. App. LEXIS 21114 (No. 13-3783, Nov. 5, 2014); *Garza v. Scott & White Memorial Hosp.*, 234 F.R.D. 617, 624-25 (W.D. Tex. 2005); *Platypus Wear, Inc. v. K.D. Co., Inc.*, 905 F. Supp. 808, 811-12 (S.D. Cal. 1995); *Guzman*, 2009 U.S. Dist. LEXIS at *17-*24 (collecting & analyzing cases).

the application of state privilege law to evidence in support of a claim arising under state law creates no conflict, such as where the evidence sought can be relevant only to state law claims, the state law privilege should be applied consistent with the express language of Rule 501.”

Implications of Federal Rule 501 and Related Matters

Due to Rule 501, whether a mediation communication is protected from disclosure may depend on the forum in which a party seeks disclosure: federal court as opposed to state court. In federal court, the level of protection may further depend on the type of claim in which the evidence is proffered (federal or state). If a party proffers the evidence in connection with a state claim, it will also be necessary to consider whether that claim is coupled with one or more federal claims, and, if so, whether the evidence is relevant to any federal claim or only to the state claim.

Further complicating the picture, different states protect mediation evidence to different degrees, as discussed in previous staff memoranda. When a party proffers mediation evidence, the case may not be pending where the mediation took place, raising questions about which state’s privilege law is applicable if state law governs the matter.

In addition, evidence from a court-connected mediation might be protected by a court rule. For example, the Alternative Dispute Resolution Act of 1998 requires each federal district court to provide civil litigants with at least one alternative dispute resolution (“ADR”) process and directs each court to adopt a local rule providing for the confidentiality of its ADR process(es) and prohibiting disclosure of confidential ADR communications.¹⁶ In response to this requirement, the federal district courts have adopted local rules for their ADR programs, which vary in how they protect confidentiality.¹⁷ Federal appeals courts also have local rules regarding the confidentiality of their ADR programs, which vary as well.¹⁸

The staff has not attempted to research all of these local rules; we are simply pointing out that the details of a local rule might affect the level of protection for a communication made in a court-connected mediation. To further complicate the situation, there is some uncertainty as to whether a local rule can create a “privilege” as opposed to a confidentiality requirement — i.e., whether a local

16. 28 U.S.C. § 652(a), (d).

17. See, e.g., N.D. Cal. ADR Local Rule 6-12; N.D.N.Y. Local Rule 83.11-5(d).

18. See, e.g., 3d Cir. Local Rule 33.5(c); 11 Cir. Local Rule 33-1(c)(3).

rule can restrict the admissibility or discoverability of a mediation communication in a court proceeding, instead of generally prohibiting disclosure to third persons.¹⁹

Lastly, in both private and court-connected mediations, the participants may enter into a contractual agreement that protects mediation evidence to whatever extent the participants specify and the law allows. Such contractual agreements are another avenue for variation in the way courts treat mediation evidence.

Importantly, the existence and terms of a contractual agreement signed at the outset of a mediation are within the control of the participants. In contrast, at the time of mediating, the participants have no way to reliably anticipate the forum in which someone might seek to use their mediation communications in the future, much less the circumstances under which that might occur.

In general, however, contractual agreements are binding only on the signatories, not on third parties. Consequently, they are not a complete solution to the problem of providing predictability with regard to the treatment of mediation evidence.

The bottom line is that considerable uncertainty about the potentially applicable rules exists, due to Rule 501 and the other factors discussed above. The possibility of a future rule change complicates the picture still more, at least if such a change were retroactively applicable to a previously conducted mediation.

Of course, this lack of predictability would not matter if all of the potentially applicable rules were the same or closely similar. As the Commission already knows from its review of the laws of the various states, that is not the case. As discussed below, federal jurisprudence on the subject presents further variation; it bears important similarities to the approaches used in California and other states, but it includes unique features and even varies from one federal jurisdiction to another.

FEDERAL CASE LAW: IN GENERAL

The next section of this memorandum takes a general look at how federal courts have handled mediation evidence. Some of the federal cases addressing

19. See *Facebook, Inc. v. Pacific Northwest Software Inc.*, 640 F.3d 1034, 1041 (9th Cir. 2011) (“But privileges are created by federal common law. See Fed. R. Evid. 501. It’s doubtful that a district court can argument the list of privileges by local rule.”).

such evidence discuss whether federal common law includes a “federal mediation privilege.” We begin by examining those cases.

Federal Mediation Privilege

The pioneering decision on the existence of a federal mediation privilege is *Folb v. Motion Picture Industry Pension & Health Plans*.²⁰ We describe it first, and then discuss later cases.

Folb

In *Folb*, the plaintiff sought to compel production of a brief and other materials relating to a mediation between the defendants and a third party. The defendants refused to produce the requested materials, claiming that they were privileged under California law and Federal Rule of Evidence 408. The plaintiff moved to compel.

A magistrate judge denied the motion, “relying on California law as a matter of comity to shape the federal common law.”²¹ More specifically, the magistrate judge “held that although state law privileges do not govern in cases presenting federal questions, California’s mediation privilege, CAL. EVID. CODE § 1119, applies in this action as a matter of comity because it is consistent with federal interests.”²²

The plaintiff objected to that ruling and a district court judge (Judge Richard Paez, now sitting on the Ninth Circuit Court of Appeals) reviewed it. Like the magistrate judge, he concluded that federal common law governed the claim of privilege, because the requested mediation materials were relevant to both federal and state claims. He also reached the same end result as the magistrate judge, but his reasoning was different.

In particular, he said it was improper to look to the law of the forum state as a matter of comity in determining the contours of federal privilege law.²³ He explained that the U.S. Supreme Court had rejected that approach in *Jaffee v. Redmond*,²⁴ when it recognized the psychotherapist-patient privilege under

20. *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), *aff’d without opinion*, 216 F.3d 1082 (9th Cir. 2000).

21. *Id.* at 1170.

22. *Id.*

23. *Id.*

24. 518 U.S. 1 (1996).

federal common law.²⁵ Instead, he noted, “federal privilege law is informed ... by the law of the 50 states in the aggregate as evidence of reason and experience.”²⁶

He then began to analyze “whether to adopt a federal mediation privilege under FED. R. EVID. 501.”²⁷ He acknowledged the general rule that “the public is entitled to every person’s evidence and ... testimonial privileges are disfavored.”²⁸ He pointed out, however, that a federal court may define a new privilege based on interpretation of common law principles in the light of reason and experience, when a public good transcends the normally predominant principle of using all rational means of ascertaining the truth.²⁹ He further explained that to determine whether an asserted privilege constitutes such a public good under *Jaffee*, a court must consider all of the following factors:

- (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.
- (4) Whether refusal to create a federal privilege would frustrate a parallel privilege adopted by the states.³⁰

Judge Paez then proceeded to examine each of the four factors. With regard to the need for confidence and trust, he carefully examined case law, court rules, legislative developments, and scholarly literature.³¹ He concluded that there is an imperative need for confidence and trust in the context of mediation:

The proliferation of federal district court rules purporting to protect the confidentiality of mediation and the ADR Bill now pending before the United States Senate indicate a commitment to encouraging confidential mediation as an alternative means of resolving disputes that would otherwise result in protracted litigation. Academic authors differ on the necessity of creating a mediation privilege, but most federal courts considering the issue have protected confidential settlement negotiations and mediation proceedings, either by relying on state law or by applying the confidentiality provisions of federal court ADR programs. Having carefully reviewed the foregoing authority, the Court concludes

25. *Folb*, 16 F. Supp. 2d at 1170.

26. *Id.*

27. *Id.*

28. *Id.* at 1171.

29. *Id.* at 1170-71.

30. *Id.* at 1171.

31. *Id.* at 1171-76.

that the proposed blanket mediation privilege is rooted in the imperative need for confidence and trust among participants.³²

Judge Paez was similarly thorough in examining the other three factors of the *Jaffee* test. With regard to the second factor (whether the proposed privilege would serve public ends), he concluded that “a mediation privilege would serve important public ends by promoting conciliatory relationships among parties to a dispute, by reducing litigation costs and by decreasing the size of state and federal court dockets, thereby increasing the quality of justice in those cases that do not settle voluntarily.”³³

With regard to the third factor (whether the proposed privilege would cause only modest evidentiary detriment), he concluded that “there is very little *evidentiary* benefit to be gained by refusing to recognize a mediation privilege.”³⁴ He cautioned that there might be a need to limit such a privilege in a criminal or quasi-criminal case where the defendant’s constitutional rights are at stake.³⁵ But the case before him did not involve that situation; he viewed it as “directly in line with the Supreme Court’s conclusion in *Jaffee* that a new federal privilege *results in little evidentiary detriment where the evidence lost would simply never come into being if the privilege did not exist.*”³⁶

Finally, Judge Paez considered whether failure to recognize a mediation privilege in federal court would frustrate a parallel privilege adopted by the states. He decided that it would, because “state legislatures and state courts have overwhelmingly chosen to protect confidential communications in order to facilitate settlement of disputes through alternative dispute resolution.”³⁷

Having examined all four *Jaffee* factors, Judge Paez concluded that “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.”³⁸ “In short,” he said, “encouraging mediation by adopting a federal mediation privilege under FED. R. EVID. 501 will provide ‘a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.’”³⁹

32. *Id.* at 1176.

33. *Id.* at 1177.

34. *Id.* at 1178 (emphasis in original).

35. *Id.*

36. *Id.* (emphasis added).

37. *Id.* at 1179.

38. *Id.* at 1179-80.

39. *Id.* at 1181, quoting *Jaffee*, 518 U.S. at 9.

Judge Paez did not attempt to flesh out all of the contours of the new privilege. He simply determined that (1) it “applies only to information disclosed in conjunction with mediation proceedings with a neutral,”⁴⁰ (2) subsequent negotiations “are not protected even if they include information initially disclosed in the mediation,”⁴¹ and (3) the privilege could be waived only through intentional relinquishment of a known right.⁴² He thus upheld the magistrate judge’s denial of the plaintiff’s motion to compel, but gave the plaintiff leave to renew the motion with regard to any communications “that took place between counsel privy to the mediation after the mediation formally concluded.”⁴³

Judge Paez also stressed that in adopting a mediation privilege, “the federal courts must attempt to provide a clear rule of protection.”⁴⁴ In so doing, he referred to *Jaffee*, in which the U.S. Supreme Court said:

If the purpose of the privilege is to be served, the participants in the confidential conversation *must be able to predict with some degree of certainty whether particular discussions will be protected*. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.⁴⁵

Subsequent Developments

Since the 1998 *Folb* decision, courts have applied similar reasoning and reached similar holdings in a bankruptcy court opinion⁴⁶ and three federal district court opinions (one published⁴⁷ and two unpublished⁴⁸). In addition, some federal courts have expressed apparent support for the existence of a federal mediation privilege, without holding as much.⁴⁹

40. *Folb*, 16 F. Supp. 2d at 1180.

41. *Id.*

42. *Id.*

43. *Id.* at 1180-81.

44. *Id.* at 1180.

45. 518 U.S. at 18 (emphasis added; quotation marks omitted).

46. See *Hays v. Equitex, Inc.*, 277 B.R. 415, 425-31 (N.D. Ga. Bankr. 2002).

47. See *Sheldone v. Pennsylvania Turnpike Comm’n*, 104 F. Supp. 2d 511 (W.D. Pa. 2000).

48. See *Chester County Hosp. v. Independence Blue Cross*, 2003 U.S. Dist. LEXIS 25214 (E.D. Pa. 2003); see also *Microsoft Corp. v. Suncrest Enterprise*, 2006 U.S. Dist. LEXIS 21269 (N.D. Cal. 2006).

49. See *Sampson v. School Dist.*, 262 F.R.D. 469, 477 n. 6 (E.D. Pa. 2008) (“We decide this case on grounds other than the federal mediation privilege. Nevertheless, we find persuasive the reasoning set forth by the court in [*Sheldone*] and by other courts that have adopted the federal mediation privilege.”); *U.S. Fidelity & Guaranty Co. v. Dick Corp.*, 215 F.R.D. 503, 506 (W.D. Pa. 2003) (“Because there are no Pennsylvania cases directly on point we look to federal case law construing the federal mediation privilege for guidance.”); see also *United States v. Union Pacific Railroad Co.*, 2007 U.S. Dist. LEXIS 40178, *14-*20 (E.D. Ca. 2007) (seemingly accepting existence of federal mediation privilege but concluding that requested documents were not privileged).

Like *Folb*, these cases provide some information about the scope of the federal mediation privilege, but they do not spell out its full contours.⁵⁰ In particular, none of the cases discuss whether the federal mediation privilege is subject to an exception for evidence relating to legal malpractice or other professional misconduct. The closest mention is in one of the unpublished cases, in which the court rejected an argument based on an alleged crime-fraud exception to the federal mediation privilege. The court explained that such an exception only applies to communications regarding future crimes, not evidence of past crimes.⁵¹ The court appeared to accept the existence of such an exception, without definitively saying as much.⁵²

In addition to the cases supporting the existence of a federal mediation privilege, there are several decisions in which the court refers to the issue but declines to decide whether such a privilege exists. In particular, the Fourth Circuit⁵³ and the Ninth Circuit⁵⁴ have done so, as well as two federal district courts.⁵⁵

There is also a relatively recent, unpublished district court decision in which a party argued that (1) the federal mediation privilege barred consideration of mediation evidence regarding the federal amount-in-controversy requirement for a class action, and thus (2) removal of the case to federal court was not untimely. That decision, *Molina v. Lexmark International, Inc.*,⁵⁶ was issued by Judge Margaret Morrow of the Central District of California, the same court Judge Paez was sitting on when he issued his decision in *Folb*.

In her lengthy opinion, Judge Morrow said that the *Folb* court “stressed repeatedly that its creation of a federal mediation privilege was limited to the

50. See *Sheldone*, 104 F. Supp. at 517 (local rule provides starting point in defining federal mediation privilege; privilege does not protect evidence otherwise and independently discoverable merely because it was presented in course of mediation); *Hays*, 277 B.R. at 430-31 (federal mediation privilege protects mediation evidence from disclosure or use for any purpose in civil action or other proceeding, but does not shelter documents prepared before mediation, “merely because those documents were presented to the mediator during the course of the mediation”); *Microsoft*, 2006 U.S. Dist. LEXIS at *5 (federal mediation privilege does not distinguish between oral communications that signify agreement and those that comprise ongoing negotiations over settlement terms); *Chester County Hospital*, 2003 U.S. Dist. LEXIS at *21-*23 (rejecting argument that party had waived federal mediation privilege through inadvertent disclosure).

51. See *Chester County Hospital*, 2003 U.S. Dist. LEXIS at *17-*21.

52. See *id.*

53. See *In re Anonymous*, 283 F.3d 627, 639 n. 16 (4th Cir. 2002).

54. See *Babasa v. LensCrafters, Inc.*, 498 F.3d 972, 975 & n. 1 (9th Cir. 2007).

55. See *EEOC v. Hibbing Taconite Co.*, 266 F.R.D. 260, 271-72 (D. Minn. 2009); *Smith v. Smith*, 154 F.R.D. 661, 675 (N.D. Tex. 1994).

56. 2008 U.S. Dist. LEXIS 83014 (C.D. Cal. 2008).

factual context before it, i.e., a situation in which a third party who did not participate in a formal mediation sought discovery of mediation-related communications.”⁵⁷ She distinguished that situation from the one before her, in which mediation evidence was proffered in the context of assessing the timeliness of removal.⁵⁸

Having distinguished *Folb* and other cases involving the discoverability of mediation communications, Judge Morrow noted that “[t]he existence of a federal common law mediation privilege is not nearly as well established as [defendant] suggests it is.”⁵⁹ In particular, she pointed out that “[n]o Circuit court has ever adopted or applied such a privilege”⁶⁰

Judge Morrow also drew a distinction between confidentiality and privilege:

Although “confidentiality” and “privilege” are often used interchangeably in discussions of mediation, the terms refer to two distinct concepts. “Confidentiality” refers to a duty to keep information secret, while “privilege” refers to protection of information from compelled disclosure. Communications are confidential when the freedom of the parties to disclose them voluntarily is limited; they are privileged when the ability of third parties to compel disclosure of them, or testimony regarding them, is limited.⁶¹

Because of this distinction, she concluded that Federal Rule of Evidence 408 (making evidence of settlement negotiations inadmissible to prove or disprove liability) was “a better reference point” for the case at hand than the analysis in *Folb*.⁶² She explained that “unlike *Folb*’s mediation privilege ..., Rule 408 is primarily concerned with avoiding the chilling effect that potential disclosure may have on a party to a communication, rather than the threat of compelled discovery.”⁶³

Judge Morrow then cited numerous cases in which “courts, including the Ninth Circuit, have concluded that Rule 408 does not make settlement offers inadmissible in the removal context as evidence of the amount in controversy.”⁶⁴ From those cases, she determined that

57. *Id.* at *25.

58. See *id.* at *25-*30.

59. *Id.* at *30.

60. *Id.* at *41-*44.

61. *Id.* at *35 (citations omitted).

62. *Id.* at *38-*40.

63. *Id.* at *40.

64. *Id.* at *40.

use of settlement offers as evidence of the amount in controversy has not hindered Rule 408's goal of encouraging open and honest discussion during negotiation. This makes sense; concern that one's adversary will use statements during negotiation as proof of liability or wrongdoing, not concern that it will use them as proof of the amount in controversy, is the primary obstacle to forthright negotiation discussions.⁶⁵

Judge Morrow also examined the four *Jaffee* factors discussed in *Folb*, and concluded that they too favored use of mediation evidence in evaluating the timeliness of a removal petition. In particular, she said that a contrary rule would discourage, rather than promote, candor in mediation sessions: "Plaintiffs will avoid sharing their valuation of the case during mediation because the information will give defendants the ability to 'test the waters' before deciding to remove."⁶⁶ Consequently, she further concluded that such an approach would not effectively serve the public end of encouraging prompt and effective mediation.⁶⁷ She also warned that the approach would lead to gamesmanship.⁶⁸ She acknowledged that most states had adopted a mediation privilege, but said that "the lack of uniformity in the privileges recognized limits the weight to which this factor is entitled."⁶⁹ Lastly, she referred to data suggesting that there is a reduced expectation of mediation confidentiality in the class action context.⁷⁰

Based on all of these considerations, Judge Morrow determined that the court could consider the proffered mediation evidence regarding the amount in controversy. Because that evidence put the defendants on notice that the case was removable, and they failed to file a removal petition within 30 days thereafter, she ruled that the removal was improper and remanded the case to state court.

A second unpublished decision from the same court also rejects a request "to adopt a 'federal mediation privilege that precludes the use of mediation-related settlement communications for purposes of assessing the sufficiency of a removal."⁷¹ The court's opinion is much shorter than Judge Morrow's opinion in *Molina*, but the reasoning is similar.

65. *Id.* at *44-*45.

66. *Id.* at *49-*50.

67. *Id.* at *50-*51.

68. *Id.* at *51-*53.

69. *Id.* at *53-*55.

70. *Id.* at *55-*57.

71. *Munoz v. J.C. Penney Corp.*, 2009 U.S. Dist. LEXIS 36362, at *7 (C.D. Cal. 2009).

Thus, there is considerable, but far from definitive, support for the existence of a federal mediation privilege. The courts recognizing such a privilege have provided only limited guidance on its contours. Whether the privilege includes any type of exception relating to legal malpractice or other professional misconduct remains to be seen.

Federal Settlement Privilege and Federal Rule of Evidence 408

For the sake of completeness, it is important to note that in addition to the cases exploring the existence of a federal mediation privilege, some federal cases examine whether the federal common law includes a settlement privilege — i.e., a privilege that extends to settlement negotiations generally, not just to mediation communications. Of particular note, the Sixth Circuit has recognized the existence of a settlement privilege.⁷² It explained:

There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties. The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. In order for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of “impeachment evidence,” by some future third party. Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative *quid pro quos*, and generally make statements that would otherwise belie their litigation efforts. Without a privilege, parties would more often forego negotiations for the relative formality of trial. Then the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost.⁷³

While the Sixth Circuit has recognized the existence of a settlement privilege, both the Seventh Circuit⁷⁴ and the Federal Circuit⁷⁵ have rejected the notion, and

72. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003).

73. *Id.*

74. See *In re General Motors Corp. Engine Interchange Litigation*, 594 F. 2d 1106, 1124 n.20 (7th Cir. 1979).

75. See *In re MSTG, Inc.*, 675 F.3d 1337 (Fed. Cir. 2012).

the District of Columbia Circuit has expressly left the question open.⁷⁶ “District courts are divided on whether a settlement negotiation privilege exists.”⁷⁷

Regardless of whether the federal common law includes a settlement negotiation privilege, settlement negotiations receive some protection under Federal Rule of Evidence 408, which provides:

(a) **Prohibited Uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) **Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

In enacting Rule 408, however, Congress only restricted the admissibility of settlement negotiations for certain purposes, and it did not expressly provide any protection from discovery. Nonetheless, the rule helps ensure that mediation communications receive at least a certain minimum level of protection in the federal courts. In other words, it operates as a floor on the amount of protection.

Other Federal Cases That Involve Mediation Evidence or Discuss Mediation

In addition to diversity cases applying state law and the cases construing federal common law or Rule 408, there are other federal cases that involve mediation evidence or discuss mediation. For example, some cases construe a federal statute⁷⁸ or a local rule⁷⁹ pertaining to a certain type of mediation. Other cases involve mediations in different ways.⁸⁰

76. See *In re Subpoena Duces Tecum*, 439 F.3d 740, 754 (D.C. Cir. 2005).

77. 675 F.3d at *MSTG*, at 1342 n.2.

78. See, e.g., *J.D. v. Kanawha County Board of Education*, 571 F.3d 381 (4th Cir. 2009) (construing mediation confidentiality provision in Individuals with Disabilities Education Act).

79. See, e.g., *Davis v. Nat'l Council of Negro Women*, 821 F. Supp. 2d 262 (D.D.C. 2011) (construing mediation confidentiality provision in local rule).

80. See, e.g., *In re Joint Eastern and Southern Districts Asbestos Litigation*, 737 F. Supp. 735 (E.D.N.Y. & S.D.N.Y. 1990) (discussing mediation in context of motion to disqualify special master appointed to help settle asbestos litigation).

The discussion below pertains to such cases generally. Afterwards, the memorandum turns specifically to federal cases that involve mediation evidence bearing on alleged wrongdoing, particularly professional misconduct.

Concept of Protecting Mediation Communications

In many federal cases, the court expresses support for the concept of protecting mediation communications. For example, in construing the mediation confidentiality provision in the Individuals with Disabilities Education Act, the Fourth Circuit noted that the provision helps “ensure that mediation discussions will not be chilled by the threat of disclosure at some later date.”⁸¹ The court therefore excluded certain mediation evidence, explaining that enforcing the confidentiality provision is “critical to ensuring that parties trust the integrity of the mediation process and remain willing to engage in it.”⁸²

Similarly, the Third Circuit rejected a contention that the mediation confidentiality rule for its Appellate Mediation Program was subject to an exception “for the limited purposes of proving the existence and terms of a settlement.”⁸³ Among other things, the court explained that the proposed exception

would effectively undermine the rule and would compromise the effectiveness of the Appellate Mediation Program. A confidentiality provision “permits and encourages counsel to discuss matters in an uninhibited fashion often leading to settlement.” ... If counsel know beforehand that the proceedings may be laid bare on the claim that an oral settlement occurred at the conference, they will “of necessity ... feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute.”⁸⁴

Other federal courts have expressed similar sentiments.⁸⁵ Some have gone so far as to impose sanctions for a violation of a provision protecting mediation

81. *J.D.*, 571 F.3d at 386.

82. *Id.*; see also *In re Anonymous*, 283 F.3d 627, 636 (4th Cir. 2001) (“The assurance of confidentiality is essential to the integrity and success of the Court’s mediation program, in that confidentiality encourages candor between the parties and on the part of the mediator, and confidentiality serves to protect the mediation program from being used as a discovery tool for creative attorneys.”).

83. *Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429, 435 (3d Cir. 2005).

84. *Id.*, quoting *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 929 (2d Cir. 1979).

85. See, e.g., *Fields-D’Arpino v. Restaurant Associates, Inc.*, 39 F. Supp. 2d 412, 417 (S.D.N.Y. 1999) (“Successful mediation ... depends upon the perception and existence of mutual fairness throughout the mediation process. In this regard, courts have implicitly recognized that

communications.⁸⁶ Others have upheld such a provision against a due process challenge.⁸⁷

Some federal courts have also noted that Congress has shown support for the concept of protecting mediation communications. For example, the District of Columbia Circuit noted not long ago that “Congress understood what courts and commentators acknowledge, namely, that confidentiality plays a key role in the informal resolution of disputes.”⁸⁸

In other cases, however, federal courts have found that other considerations trump the interest in protecting mediation communications. For example, in a dispute stemming from a train collision, the federal district court for the District of Columbia recently balanced the interest in mediation confidentiality against the common law right of public access to judicial records. It concluded that the latter interest was more compelling in the circumstances before it:

Had the Corporate Defendants complied with the confidentiality provision of their mediation agreement, the mediation-related documents would not have become judicial records to which the common law right of access attaches. But the Corporate Defendants chose a different route, unilaterally deciding to submit the

maintaining expectations of confidentiality is critical.”); *Willis v. McGraw*, 177 F.R.D. 632, 632 (S.D. W.Va. 1998) (local rule regarding mediation confidentiality “was drafted to ensure confidentiality, to reassure the parties and counsel they would suffer no prejudice, perceived or actual, as a result of the full, frank, conciliatory, and sometimes heated, exchanges that occur inevitably during the mediation process.”); *Asbestos Litigation*, 737 F. Supp. at 739 (“The parties engaged in a mediated settlement process recognize that they must, if the process is to work, fully disclose to the mediator their needs and tactics — not only those that have been publicly revealed, but also their private views and internal arrangements.”); *Pipefitters Local Union No. 208 v. Mechanical Contractors Ass’n*, 507 F. Supp. 935, 935 (D. Colo. 1980) (“Effective mediation hinges upon whether labor and management negotiators feel free to advance tentative proposals and pursue possible solutions that later may prove unsatisfactory to one side or the other. Such uninhibited interaction may be impaired absent the assurance that mediation proceedings will remain confidential.”).

86. See, e.g., *Williams v. Johanns*, 529 F. Supp. 2d 22, 23 (D.D.C. 2008) (holding counsel in civil contempt for violating court’s order regarding mediation confidentiality, because it is “essential that counsel maintain the confidentiality of mediation sessions and comply with orders of the Court to ensure that such proceedings operate fairly, efficiently, and effectively.”); *Frank v. L.L. Bean, Inc.*, 377 F. Supp. 2d 229 (D. Maine 2005) (applying 5-factor test and imposing \$1,000 sanction on plaintiff for disclosing settlement offer made in mediation); *Bernard v. Randolph*, 901 F. Supp. 778 (S.D.N.Y. 1995) (imposing \$2,500 sanction on plaintiff’s lead counsel for willfully and deliberately disclosing details of mediation); but see *In re Anonymous*, 283 F.3d 627, 635-36 (4th Cir. 2001) (applying 5-factor test and determining that sanctions for violation of local rule on mediation confidentiality were not warranted).

87. See *In re Anonymous*, 283 F.3d at 634; *New York State Inspection, Security & Law Enforcement Employees v. New York State Public Employment Relations Bd.*, 629 F. Supp. 33, 50-53 (N.D.N.Y. 1984).

88. *Blackmon-Malloy v. United States Capitol Police Bd.*, 575 F.3d 699, 711 (D.C. Cir. 2009); see also *Fields-D’Arpino*, 39 F. Supp. 2d at 417 (“Congress’ view on the importance of alternative dispute resolution, and the need for confidentiality is equally clear.”).

mediation dispute for judicial resolution. By doing so, the Corporate Defendants assumed the risk that the records relating to that dispute would be made public. In light of these circumstances, disclosure in this case would not, as a general matter, have a chilling effect on the mediation process. Rather, the upshot of the Court's ruling is this: a party who enters into an agreement to keep mediation strictly confidential should not expect to retain confidentiality if it brings a dispute arising out [of] the mediation to a court's attention, contrary to the terms of the confidentiality agreement.⁸⁹

Other examples along these lines are discussed later in this memorandum.

Special Considerations Applicable to Mediator Testimony

Some of the federal cases involving mediation evidence stress that special considerations apply to testimony *by a mediator* relating to a mediation.⁹⁰ Of particular note in this regard is the Ninth Circuit's decision in *N.L.R.B. v. Macaluso*.⁹¹

In that case, the court framed the question as follows: "[C]an the NLRB revoke the subpoena of a mediator capable of providing information *crucial* to resolution of a factual dispute *solely* for the purpose of preserving mediator effectiveness?"⁹² The court's answer was a clear "yes." It explained:

However useful the testimony of a conciliator might be to the (NLRB) in any given case, we can appreciate the strong considerations of public policy underlying the regulation (denying conciliator testimony) and the refusal to make exceptions to it, because of the unique position which the conciliators occupy. To execute successfully their function of assisting in the settlement of labor disputes, the conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference. If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, *not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other.* The inevitable result would be that the usefulness of the [Federal Mediation and Conciliation Service] in the settlement of future

89. In the Matter of the Fort Totten Metrorail Cases, 960 F. Supp. 2d 2, 15-16 (D.D.C. 2013).

90. See, e.g., *Smith v. Smith*, 154 F.R.D. 661, 673 (N.D. Tex. 1994) ("The determination whether to recognize a *mediator* privilege should not be resolved, ... at the level of generality represented by examination of *mediation* confidentiality.") (emphasis in original).

91. 618 F.2d 51 (9th Cir. 1980).

92. *Id.* at 53 (emphasis added).

disputes would be *seriously impaired, if not destroyed*. The resultant injury to the public interest would *clearly outweigh* the benefit to be derived from making their testimony available in particular cases.⁹³

The court thus called for special treatment not only with regard to mediator testimony, but also with regard to production of documents or other materials from a mediator.

Similarly, in *In re Anonymous*,⁹⁴ the Fourth Circuit considered whether to grant a waiver from the confidentiality requirement applicable to mediations conducted by Office of the Circuit Mediator for that court. With regard to mediation evidence generally, the Fourth Circuit decided that the appropriate test for waiver was to disallow disclosure “unless the party seeking such disclosure can demonstrate that ‘manifest injustice’ will result from non-disclosure.”⁹⁵ With regard to disclosures by the mediator, however, the court established a more stringent test:

[T]he threshold for granting of consent to disclosures by the mediator is substantially higher than that for disclosures by other participants. Thus, we will consent for the Circuit Mediator to disclose confidential information only where such disclosure is mandated by manifest injustice, is indispensable to resolution of an important subsequent dispute, and is not going to damage our mediation program.⁹⁶

The court explained that a heightened standard was necessary because “granting of consent for the mediator to participate in any manner in a subsequent proceeding would encourage perceptions of bias in future mediation sessions involving comparable parties and issues and it might encourage creative attorneys to attempt to use our court officers and mediation program as a discovery tool.”⁹⁷

Current California law already draws a distinction between evidence from a mediator and evidence from other mediation participants: Subject to certain exceptions, a mediator is incompetent to testify regarding a mediation that the mediator conducts.⁹⁸ Whether to leave that provision intact, draw any further

93. *Id.* at 55-56 (emphasis added), quoting Tomlinson of High Point, Inc., 74 N.L.R.B. 681, 688 (1947).

94. 283 F.3d 627 (4th Cir. 2001).

95. *Id.* at 637.

96. *Id.* at 640.

97. *Id.* at 639.

98. See Evid. Code § 703.5 (“No ... mediator ... shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or

distinctions, or modify the existing distinction in some manner, are questions for the Commission to consider as this study moves forward.

USE OF MEDIATION EVIDENCE TO ESTABLISH ATTORNEY MALPRACTICE
OR OTHER PROFESSIONAL MISCONDUCT

The focus of this study is on “the relationship between mediation confidentiality and attorney malpractice and other misconduct”⁹⁹ Consequently, federal cases involving attempts to use mediation evidence to establish misconduct warrant special attention here. Those cases are discussed below, with the discussion organized according to the type of misconduct alleged:

- (1) Alleged criminal conduct.
- (2) Alleged failure to participate in a mediation in good faith.
- (3) Alleged attorney misconduct.
- (4) Alleged mediator misconduct.
- (5) Alleged fraud by the opposing party.

Alleged Criminal Conduct

Cases addressing the use of mediation evidence in a criminal case seem relatively unimportant for purposes of the instant study, because California’s statutes protecting mediation communications do not apply to evidence offered in a criminal case.¹⁰⁰ That approach reflects a policy determination that when criminal liability is at stake, using mediation communications in the search for truth and justice is sufficiently important to trump the interest in keeping such communications confidential.

The staff found two federal cases that reflect a similar policy determination. In *In re Grand Jury Proceedings*, the Fifth Circuit considered “whether documents relating to mediation proceedings ... are privileged and protected from disclosure to the grand jury under the Agricultural Credit Act.”¹⁰¹ The court

criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.”)

99. 2012 Cal. Stat. res. ch. 108 (ACR 98 (Wagner)).

100. See, e.g., *Cassel v. Superior Court*, 51 Cal. 4th 113, 135 n.11, 244 P.3d 1080, 119 Cal. Rptr. 3d (2011).

101. 148 F.3d 487, 492 (5th Cir. 1998).

noted that the Agricultural Credit Act provides for confidentiality of mediation sessions relating to agricultural loans, and that “[c]onfidentiality is critical to the mediation process because it promotes the free flow of information that may result in the settlement of a dispute.”¹⁰²

But the court said that “confidential” and “privileged” are distinct concepts, and “privileges are not lightly created.”¹⁰³ It declined to infer an evidentiary privilege in the Agricultural Credit Act and thus held that the Act “does not protect documents relating to mediation proceedings ... from disclosure to the grand jury.”¹⁰⁴ It went on to explain, however, that the degree of harm to mediation would be limited unless the grand jury returned an indictment, in which case the public interest in the administration of criminal justice would be paramount:

[D]ue to the secrecy of grand jury proceedings, ... the confidentiality of the Moczygembas’ mediation sessions will not be severely compromised by the disclosure of information relating to those sessions to the grand jury. Of course, if the grand jury returns an indictment, such information may become public. In returning an indictment, however, a grand jury indicates that it has found probable cause to believe that a criminal offense has occurred. We are satisfied that Congress did not intend that [the mediation confidentiality provision of the Agricultural Credit Act] be used to shield wrongdoing arising out of the state agricultural loan mediation process.... Thus, if an indictment is returned, any interest the Moczygembas have in the confidentiality of their mediation sessions will have to give way to the public interest in the administration of criminal justice.¹⁰⁵

An earlier decision by a federal district court is similar, but it involved a subpoena directing a mediator to testify before a grand jury.¹⁰⁶ The mediator moved to quash the subpoena and the court denied the motion, concluding that “the interest in fact-finding which would be served by the subpoena outweighs any interests that would be served by recognizing the privilege in this case.”¹⁰⁷ It explained that the federal interest in fact-finding is “particularly strong in this case,” because the prosecution had asserted that the requested mediation

102. *Id.*

103. *Id.* at 492-93.

104. *Id.* at 493.

105. *Id.*

106. *In re March, 1994* — Special Grand Jury, 897 F. Supp. 1170 (S.D. Ind. 1995).

107. *Id.* at 1173.

statements may determine whether to seek an indictment and were critical evidence for the grand jury to consider.¹⁰⁸

Alleged Failure to Participate in Good Faith in a Court-Ordered Mediation

The staff also found a couple of federal cases involving an alleged failure to participate in good faith in a court-ordered mediation. In one of them, a bankruptcy court ruled that a bank had failed to mediate in good faith because it had refused to discuss certain topics, its representative had limited settlement authority, and it sought to influence the mediation procedure in certain ways.¹⁰⁹ The bank appealed to the federal district court, which reversed. It held that “confidentiality considerations preclude a court from inquiring into the level of a party’s participation in mandatory court-ordered mediation, i.e., the extent to which a party discusses the issues, listens to opposing viewpoints and analyzes its liability.”¹¹⁰

The court noted, however, that its holding did “not mean that all conduct in a mandatory mediation is outside the scope of a court’s inquiry into good faith.”¹¹¹ Rather, it said, where a party “demonstrates dishonesty, intent to defraud, or some other improper purpose, the benefits of inquiry into such conduct may outweigh considerations of coercion and confidentiality.”¹¹² But it did not reach that question, because there were no such allegations in the case before it.¹¹³

In contrast, in an earlier, unpublished case, the defendant filed a summary judgment motion on the eve of a mediation, refused to offer more than \$1,000 at the mediation, and failed to notify the plaintiff of the motion or its position on settlement before the plaintiff incurred significant travel costs. The court awarded sanctions against the defendant’s attorney for failing to mediate in good faith.¹¹⁴

Like the cases involving alleged criminal conduct, these cases on good faith participation in a court-ordered mediation are not at the heart of the Commission’s ongoing study. Their relevance is limited, because California does not require a party to make a settlement offer (or other progress towards

108. *Id.* at 1173.

109. *In re A.T. Reynolds & Sons, Inc.*, 452 B.R. 374, 380 (S.D.N.Y. 2011).

110. *Id.* at 383-84.

111. *Id.* at 384 n.4.

112. *Id.*

113. *Id.*

114. *Fisher v. Smithkline Beecham Corp.*, 2008 U.S. Dist. LEXIS 76207 (W.D.N.Y. 2008); see also *Fisher v. Smithkline Beecham Corp.*, 2009 U.S. Dist. LEXIS 24543 (W.D.N.Y. 2009).

settlement) to comply with a court order to mediate,¹¹⁵ and other types of noncompliance might be subject to proof, at least to some degree, without revising California's protections for mediation communications.¹¹⁶

Alleged Attorney Misconduct

As the Commission recognized at the outset of this study, legal malpractice and other attorney misconduct are most clearly within the scope of the legislative resolution directing this study.¹¹⁷ A number of federal cases involving such allegations are discussed below.

The Second Circuit's Test for Disclosure of Confidential Mediation Communications

In re Teligent,¹¹⁸ decided by the Second Circuit, is a leading federal case concerning use of mediation evidence with regard to allegations of attorney misconduct. This case did not involve allegations that an attorney committed misconduct during a mediation. Rather, it involved an attempt by a law firm accused of legal malpractice to obtain discovery of information from a mediation it did not attend, which it claimed was critical to issues in the legal malpractice case. The mediation was ordered by a bankruptcy court, and was confidential pursuant to protective orders routinely used by that court in the context of court-order mediations. The law firm moved to lift the confidentiality provisions of the protective orders, but the bankruptcy court denied the motion and the federal district court affirmed.

On further appeal, the Second Circuit established the following test for disclosure of confidential mediation communications:

A party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material; (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality. All three factors are necessary to warrant disclosure of otherwise non-discoverable documents.¹¹⁹

115. See generally Evid. Code § 115(a); 6 B. Witkin, Cal. Procedure *Proceedings Without Trial* § 486, p. 942 (5th ed. 2008).

116. See *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*, 26 Cal. 4th 1, 18 n.14, 25 P.3d 1117, 108 Cal. Rptr. 2d 642 (2001); *Radford v. Shehorn*, 187 Cal. App. 4th 852, 857, 114 Cal. Rptr. 3d 499 (2010).

117. See Minutes (Aug. 2013), p. 3.

118. 640 F.3d 53 (2d Cir. 2011).

119. *Id.* at 58 (citations omitted).

The court drew that standard from the Uniform Mediation Act, the Administrative Dispute Resolution Act of 1996, and the Administrative Dispute Resolution Act of 1998. According to the court, each of those sources “recognizes the importance of maintaining the confidentiality of mediation communications and provides for disclosure in only limited circumstances.”¹²⁰

Applying the 3-part test to the case before it, the Second Circuit found that the law firm had failed to satisfy any of the three requirements. Accordingly, it upheld the order denying law firm’s request for the mediation evidence. It specifically warned that “[w]ere courts to cavalierly set aside confidentiality restrictions on disclosure of communications made in the context of mediation, parties might be less frank and forthcoming during the mediation process or might even limit their use of mediation altogether.”¹²¹

Notably, the 3-part *Teligent* test does not appear to be limited to evidence of attorney misconduct, evidence of professional malfeasance, or even evidence of wrongdoing. Rather, it conceivably could apply to any type of request for disclosure of mediation communications. Whether the Second Circuit actually intended for it to apply so broadly remains to be seen.

In a recent unpublished decision, a federal district judge extended the 3-part *Teligent* test to a mediation in which the confidentiality order was purely private.¹²² Emphasizing that the “special need” prong is a stiff requirement (akin to a compelling need), the judge found that the test had not been satisfied.¹²³ Similarly, in another recent unpublished decision, a federal district judge denied disclosure of materials submitted to a mediator, saying that the Federal Circuit was likely to adopt a rule “at least as restrictive” as the 3-part *Teligent* test.¹²⁴

The 3-part *Teligent* test is another possible approach for the Commission to consider in this study.

The Seventh Circuit’s Approach to Alleged Misconduct in Settlement Negotiations

While the Second Circuit denied disclosure of mediation evidence in *Teligent*, the Seventh Circuit considered such evidence in a disciplinary proceeding (*In the Matter of Young*¹²⁵) stemming from a mediation conducted by a mediator in its

120. *Id.*

121. *Id.* at 59-60.

122. *Dandong v. Pinnacle Performance Ltd.*, 2012 U.S. Dist. LEXIS 145454, at *13 (S.D.N.Y. 2012).

123. *Id.* at *13-*18.

124. *Avocent Redmond Corp. v. Raritan Americas, Inc.*, 2011 U.S. Dist. LEXIS 109596, at *3 (S.D.N.Y. 2011).

125. 253 F.3d 926 (7th Cir. 2001).

Settlement Conference Office. The mediator had directed appellants' lawyers to bring their clients to meet with him, but the lawyers refused to do so. The underlying case eventually settled, but the Seventh Circuit was troubled by the lawyers' conduct and issued an order to show cause regarding that matter.

In resolving the order to show cause, the Seventh Circuit considered evidence from the mediation. It first briefly explained that “[a]lthough settlement negotiations are of course confidential for most purposes, *their contents may be revealed insofar as necessary for the decision of an issue of alleged misconduct in them.*”¹²⁶

The court then described what had happened at the mediation:

[T]he mediator expressed concern that the lawyers might have a conflict of interest with their clients over the matter of attorney's fees.... The mediator asked the lawyers to arrange for the clients to meet with him so that he could advise them that refusing the appellees' offer might jeopardize the appellants' receipt of the \$100,000 (or any) payments. The lawyers refused to produce their clients on the grounds that the mediator was trying to usurp the lawyers' role and that only the court itself could order them to produce the clients.¹²⁷

Because there was no evidence that the mediator tried to coerce a settlement, the court determined that “[t]he lawyers' refusal to produce their clients in response to the mediator's order was unjustifiable and indeed contumacious.”¹²⁸ Nonetheless, it refrained from imposing sanctions, because of the “novelty in this circuit of the question of the mediator's authority to issue such an order”¹²⁹

Perhaps significantly, the Seventh Circuit's concern about the lawyers' conduct in this case may have gone beyond the lawyers' refusal to obey the mediator. Like the mediator, the court presumably was concerned that the lawyers might be acting contrary to the interests of their clients. That context might help explain the court's relative lack of concern about revealing mediation discussions.

126. *Id.* at 927 (emphasis added). In support of this statement, the Seventh Circuit cited only a decision in which the Tenth Circuit said, without support or elaboration, that an attorney had not violated the local rule making Tenth Circuit mediations confidential when he disclosed settlement negotiations in response to an order to show cause why he should not be sanctioned. See *Pueblo of San Ildefonso v. Ridlon*, 90 F.3d 423, 424 n.1 (10th Cir. 1996). In making that statement, however, the Tenth Circuit had cautioned that it was making “no determination as to the exact scope of confidentiality nor [was it] establish[ing] a basis for counsel to disclose such matters in the future.” *Id.*

127. *Id.* at 927-28.

128. *Id.* at 928.

129. *Id.*

Other Cases Involving Alleged Attorney Misconduct

In addition to the Second Circuit and Seventh Circuit decisions just described, the staff found several district court decisions involving the intersection of mediation confidentiality with alleged attorney misconduct. These include the following:

- *Cornelius v. Independent Health Ass’n, Inc.*¹³⁰ In this case, a court-appointed mediator conducted a mediation and the parties apparently reached an oral agreement. When the defendant sought to memorialize the terms in writing, however, the plaintiff refused to sign. The defendant moved to enforce the alleged settlement. For multiple reasons (unrelated to mediation confidentiality), the court ruled that there was no enforceable settlement. Accordingly, the court saw no need to act in response to plaintiff’s further contention that opposing counsel “improperly attempted to ‘bully and coerce’ her into signing the Settlement Agreement and General Release, and that the mediator did not intervene to prevent this conduct.”¹³¹ Because the court did not resolve this point, its opinion provides no guidance on how to handle future allegations of this type.
- *FDIC v. White.*¹³² Here, a post-trial mediation resulted in a settlement agreement, but the defendants moved to set it aside, alleging that it was the product of coercion. To resolve their motion, the court considered mediation communications, despite its local rule providing for mediation confidentiality in accordance with the Alternative Dispute Resolution Act of 1998 (“ADRA”). The court did 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.”¹³³ It noted that “such a privilege would effectively bar a party from raising well-established common law defenses such as fraud, duress, coercion, and mutual mistake,” and said it was unlikely that “Congress intended such a draconian result under the guise of preserving the integrity of the mediation process.”¹³⁴ After considering the mediation evidence, the court rejected the defendants’ claim that opposing counsel and the mediator coerced the settlement by threatening criminal prosecution. The case thus supports the admissibility of mediation evidence to prove a traditional contract defense.

130. 912 F. Supp. 2d 26 (W.D.N.Y. 2012).

131. *Id.* at 31.

132. 76 F. Supp. 2d 736 (N.D. Tex. 1999).

133. *Id.* at 738.

134. *Id.*

- *Allen v. Leal*.¹³⁵ This case involved a federal civil rights claim that was mediated and apparently settled. But the plaintiffs refused to go through with the settlement, alleging that their attorney failed to properly advise them regarding its consequences, the mediator coerced and intimidated them into signing it, and their attorney failed to protect them against the mediator's untoward pressure. The defendants then counterclaimed for breach of the purported settlement agreement. In connection with the counterclaim, the court "fully recognize[d] the importance and gravity of the rules of confidentiality governing mediation."¹³⁶ It said, however, that "because the plaintiffs, in this particular situation, actually 'opened the door' by attacking the professionalism and integrity of the mediator and the mediation process, the Court was compelled, in the interests of justice, to breach the veil of confidentiality."¹³⁷ Upon considering evidence from the mediation, the court declined to exercise supplemental jurisdiction over the counterclaim.¹³⁸ Thus, the case supports the use of mediation communications to resolve allegations of attorney and mediator misconduct, but the merits of the allegations in question remain unclear.

Alleged Mediator Misconduct

In addition to the above-discussed cases involving allegations of both attorney misconduct and mediator misconduct (*Cornelius, FDIC, and Allen*), the staff found three other cases that involve the intersection of mediation confidentiality and alleged mediator misconduct. Those cases merit discussion here, because they might be useful by analogy to attorney misconduct, and because the Commission has not yet resolved whether this study will focus exclusively on attorney misconduct or also cover other types of professional misconduct.

One of the three additional cases, *CEATS v. Continental Airlines, Inc.*,¹³⁹ was just decided by the Federal Circuit this year. It held that, based on the totality of the facts and circumstances, a mediator had breached his duty as a mediator to disclose all actual and potential conflicts of interest that are reasonably known to

135. 27 F. Supp. 2d 945 (S.D. Tex. 1998).

136. *Id.* at 947 n.4.

137. *Id.*

138. *Id.* at 948-50. The court also chastised the president of the Houston Chapter of the Association of Attorney-Mediators ("AAM"), who stated in an amicus brief that "what some people might consider a little bullying is really just part of how mediation works." *Id.* at 948. The court said that statement was "deplorable," and warned that "[c]oercion or 'bullying' clearly is not acceptable conduct for a mediator in order to secure a settlement, notwithstanding the statement of the president of the AAM." *Id.*

139. 755 F.3d 1356 (Fed. Cir. 2014).

him and could reasonably be seen as raising a question about his impartiality.¹⁴⁰ The court concluded, however, that there was not “a sufficient threat of injustice in other cases to justify the extraordinary step of setting aside a jury verdict.”¹⁴¹

The Federal Circuit did not discuss mediation confidentiality except when it described the role of a mediator. It simply pointed out that “mediation is not effective unless parties are completely honest with the mediator,” and “because parties are encouraged to share confidential information with mediators, those parties must have absolute trust that their confidential disclosures will be preserved.”¹⁴² The case is thus just another example of support for those principles.

Significantly, California’s mediation confidentiality statute (and presumably also the comparable provision in *CEATS*) includes an exception for a mediator’s conflict-of-interest disclosure.¹⁴³ It is possible, however, that the California exception is not framed broadly enough to cover all key disclosure information. The Commission may want to consider that point as this study moves forward.

A second recent case involving similar issues is *Savoie v. Martin*,¹⁴⁴ in which the Sixth Circuit considered whether a mediator who later acted as a judge in a case he had mediated was entitled to judicial immunity. It concluded that the mediator-judge probably should have recused himself.¹⁴⁵ Nonetheless, it further concluded that the mediator-judge was entitled to judicial immunity, even though he had allegedly disclosed confidential mediation communications during a court hearing.¹⁴⁶

Although *Savoie* involves mediation confidentiality and alleged misconduct by a mediator, the misconduct allegedly occurred when the mediator was acting in his role as a judge. Thus, the case is really about judicial misconduct and judicial immunity, matters that are beyond the context of this study.

The third case we found, *Local 808 v. National Mediation Bd.*,¹⁴⁷ was a labor dispute decided by the District of Columbia Circuit a quarter-century ago. It involved a mediation under the Railway Labor Act, which sets forth a detailed

140. *Id.* at 1365.

141. *Id.* at 1366.

142. *Id.* at 1363.

143. See Evid. Code § 1120 (b)(3) (This chapter does not limit “[d]isclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.”).

144. 673 F.3d 488 (6th Cir. 2012).

145. *Id.* at 492-93.

146. *Id.*

147. 888 F.2d 1428 (D.C. Cir. 1989).

dispute resolution procedure applicable to railway labor disputes. That procedure is quite different from a California mediation, because the mediator has the “power to hold the parties in mediation or, at any time, to proffer arbitration.”¹⁴⁸ “The Act specifies no time limit on mediation, and the Supreme Court has repeatedly recognized that the RLA’s mediation procedures are purposely long and drawn out.”¹⁴⁹

Interpreting the Act, the district court determined that the National Mediation Board had kept a dispute in mediation too long (about two years), and it ordered the Board to instead offer arbitration. The District of Columbia Circuit reversed on appeal, explaining that the power to hold the parties in mediation “is a coercive tool essential to bring the parties to conciliation,”¹⁵⁰ and a “mediator’s choice to let a recalcitrant party sit until the pressure seriously to negotiate builds is hardly an extraordinary situation justifying judicial intervention.”¹⁵¹

The case thus condones a very specific type of mediator coercion, but just in the context of a federal statute applicable only to a rare type of mediation. It does not involve issues of mediation confidentiality, yet the court does express an appreciation for the importance of free-flowing discussions in the mediation process:

It is in the separate caucuses that the most meaningful progress and groundwork for progress is usually made. It is where confidential and privileged information may be communicated to the mediator, ideas explored without commitment, previous positions re-examined without embarrassment. It provides an opportunity to both “sell” and “unsell” as well as to get each party to adopt a solution as its own. At any point during this process, the mediator may drop an idea, suggest a procedure, make a substantive suggestion, informally or formally, and at the outer range of his options, make an informal or even formal recommendation to the parties, orally or in writing.¹⁵²

Because the case is so factually and legally distinct from the vast majority of mediations in California, in which the process is purely voluntary, *Local 808* is only marginally relevant to the Commission’s study.

148. *Id.* at 1438.

149. *Id.*

150. *Id.*

151. *Id.* at 1437.

152. *Id.* at 1436.

Alleged Fraud by the Opposing Party

Lastly, the staff found two federal cases in which a party argued that a mediated settlement had been procured through fraudulent statements by a mediation party. Again, such allegations of misconduct are potentially relevant to the Commission's study by analogy to attorney misconduct. In both of these cases, the court refused disclosure of mediation communications, but neither case involved interpretation of federal common law.

The earlier of the two cases was *Smith v. Smith*,¹⁵³ in which the defendants subpoenaed a mediator to testify regarding the plaintiff's claim that they had made certain misrepresentations and material omissions to induce a grossly inadequate settlement. The defendants contended that the mediator's testimony was important because he was the "only impartial witness" to the mediation.¹⁵⁴ The mediator moved to quash the subpoena. Applying Texas law and its local rule on mediation confidentiality, a federal magistrate judge granted the motion and the district court affirmed. Because the parties assumed the applicability of Texas law and the Dallas District Court Mediation Rules, the court declined to consider how federal common law would apply to the circumstances.¹⁵⁵

The other case involving allegations that a party fraudulently induced a mediated settlement is the Ninth Circuit's recent decision in *Facebook, Inc. v. Pacific Northwest Software, Inc.*¹⁵⁶ There, the Winklevosses argued that Facebook misled them into believing its shares were worth much more than Facebook represented in an internal valuation that it provided to them only after they signed the mediated settlement agreement. They contended that had they known about the internal valuation during the mediation, "they never would have signed the Settlement Agreement."¹⁵⁷

In support of their position, "the Winklevosses proffered evidence of what was said and not said during the mediation."¹⁵⁸ The federal district court excluded that evidence based on its local rule on mediation confidentiality. It further found that the mediated settlement agreement was enforceable.

On appeal, the Ninth Circuit said that although a local rule can create a duty of confidentiality, "[i]t's doubtful that a district court can augment the list of

153. 154 F.R.D. 661 (N.D. Tex. 1994).

154. *Id.* at 664.

155. See *id.* at 675.

156. 640 F.3d 1034 (9th Cir. 2011).

157. *Id.* at 1038.

158. *Id.* at 1040.

privileges by local rule.”¹⁵⁹ The Ninth Circuit also noted that the mediation was not subject to the district court’s local rule, because “the parties used a private mediator rather than a court-appointed one.”¹⁶⁰

Nonetheless, the Ninth Circuit said that “the district court was right to exclude the proffered evidence.”¹⁶¹ Instead of relying on the district court’s local rule, it relied on a confidentiality agreement that the parties executed before the mediation.¹⁶² Stressing that the Winklevosses were sophisticated parties who “brought half-a-dozen lawyers” to the mediation,¹⁶³ the court concluded that they were bound by the terms of that confidentiality agreement and the settlement agreement they had signed.

Facebook thus shows that at least in the Ninth Circuit, in a case involving sophisticated parties, a contractual agreement for mediation confidentiality will be enforced between the parties, despite allegations that a mediated settlement was fraudulently induced during the mediation. Whether the Ninth Circuit would take the same position in a case involving unsophisticated parties is not clear, nor is it clear how other federal courts would handle the same situation.

SUMMARY

Many factors, beyond the content of California law, may affect whether communications or other evidence from a California mediation are admissible, subject to discovery, or can otherwise be disclosed or used in the future. Among those factors are the following:

- Whether a person seeks disclosure in California or in some other state, and which state’s law applies to the request.
- Whether a person seeks disclosure in federal court as opposed to state court.
- If the evidence is sought in federal court, whether the evidence is sought in connection with a federal claim as opposed to a state claim.
- If the evidence is sought in federal court in connection with a state claim, whether that claim is coupled with a federal claim, and, if so, whether the evidence is relevant to the federal claim or only to the state claim.

159. *Id.* at 1041.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 1039.

- Whether the mediation was court-connected and is subject to a local rule governing mediation confidentiality, and, if so, how that rule is interpreted.
- Whether the mediation participants entered into a contractual confidentiality agreement and, if so, the terms of that agreement, whether the party seeking disclosure is a party to that agreement, and whether the court considers the agreement enforceable under the circumstances of the case.
- If the evidence is sought in federal court, which federal court is considering the request. Different doctrines apply in different federal circuits (such as whether to recognize a federal mediation privilege or a federal settlement privilege, and what test to apply when someone seeks disclosure of mediation communications).

Given all of these potential variables, no matter what California law says on the subject, it will be difficult for participants in a California mediation to predict with confidence whether their mediation-related communications could later be used to support or refute allegations of legal malpractice or other misconduct.

In other words,

there is little parties to a mediation can do to guard against later disclosure should a non-participant manage to show compelling need. Lawyers preparing for mediation should thus be alert to the risk that a third party may seek access to their mediation materials and proceed with appropriate caution depending on the degree of risk.¹⁶⁴

At least one California commentator has argued that federal courts should modify their local rules on mediation confidentiality to provide protection more comparable to that afforded by California law.¹⁶⁵ Similarly, the Uniform Mediation Act was of course drafted in hopes of eliminating variations in the treatment of mediation communications. Some other California commentators have counseled a more readily implemented, but incomplete solution: “The *Facebook* decision confirms that in order to avoid having something stated in mediation used against an attorney or client, the best practice is to execute a confidentiality agreement at the outset of the mediation.”¹⁶⁶

164. Edward Spiro & Judith Mogul, *Mediation Confidentiality: Meaningful But Not Absolute*, 248 N.Y.L.J. (No. 117, Dec. 18, 2012).

165. See Jan Schau, *Dear ADR Participants: Are Your Secrets Really Safe With Me?*, S.F. Daily J. (June 25, 2010).

166. Noah Steinsapir & John Zaimis, *Critical Differences in Federal and State Mediation Privilege*, S.F. Daily J. (June 26, 2013).

The uncertain situation is certainly of some concern, because it is contrary to the teaching of the United States Supreme Court's decision in *Jaffee v. Redmond*,¹⁶⁷ which emphasizes that a provision protecting confidentiality must be predictable to be effective.¹⁶⁸ Fully resolving the situation is beyond the power of the Commission or even the Legislature and the Governor. But it may be helpful to bear the situation in mind in determining how to address the issues in this study.

Although there is considerable variation in the extent of protection, many federal courts have emphasized the importance of protecting mediation communications. In addition, Federal Rule of Evidence 408 provides a floor on the level of federal protection. These factors serve to mitigate the degree of uncertainty, at least a little.

Federal law provides a number of possible models for addressing the relationship between mediation confidentiality and attorney malpractice and other misconduct. For instance, the Second Circuit used a 3-part test in *Teligent*, the Seventh Circuit simply admitted such evidence in *Matter of Young*, and, in a different context, the Fourth Circuit in *Anonymous* applied a heightened standard for mediator disclosures than for disclosures by other mediation participants. These present options that the Commission might, or might not, want to consider further.

Respectfully submitted,

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167. 518 U.S. 1 (1996).

168. *Id.* at 9.