

## MEDIATION CONFIDENTIALITY: A FEDERAL COURT OXYMORON

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Despite the alleged existence of a federal common law mediation privilege, statutory mediation confidentiality rules and the actual existence of individual Court's local mediation confidentiality rules, federal courts to date have so limited the scope of mediation confidentiality that one might as well call federal mediation confidentiality an oxymoron.

### **BABASA v. LENS CRAFTERS**

A good starting point for any analysis of the federal mediation confidentiality rule is the Ninth Circuit's opinion in *Babasa v. LensCrafters, Inc.*, 498 F. 3d 972 (9<sup>th</sup> Cir. 2007) ("Babasa"). Although the *Babasa* Court focused on whether it had removal jurisdiction under 28 U.S.C. §1446(b), along the way it carved out a huge exception to the principle of mediation confidentiality.

In April 2005, Patrick Babasa and others filed a putative class action in state court against LensCrafters, Inc. alleging various California Labor Code violations. After the plaintiffs filed an amended complaint, the parties agreed to mediate. In December of that same year, counsel for Babasa and the other plaintiffs sent a letter to counsel for LensCrafters confirming certain issues regarding the size of the class and the number of potential violations. The letter noted that it was sent "[i]n preparation for the mediation." It further discussed the amount of potential damages, noting that missed meal periods amounted to \$4.5 million while potential penalties could soar as high as an additional \$5 million under provisions of the California Labor Code ("Letter").<sup>1</sup>

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<sup>1</sup> As a notice of damages, this correspondence demonstrated that the amount in controversy was sufficient to satisfy the federal jurisdictional requirements of 28 U.S.C. §1332, permitting LensCrafters to remove the case to federal court.

When the mediation did not resolve the case, LensCrafters filed a notice of removal to federal court, alleging ignorance of the amount in controversy until November 1, 2006, nearly a year after the Letter at issue was written. The issue before the Court was whether the December 2005 Letter – prepared for purposes of mediation and therefore protected from disclosure under *California’s* rules of evidence (Cal. Evid. Code section 1115 *et seq.*) – was admissible for the purpose of remand to the State court.

The Ninth Circuit affirmed, rejecting LensCrafters’ argument that the “. . . letter could not serve as proper notice of the amount in controversy for removal purposes because the letter is privileged under state law.” *Id.* at 974.<sup>2</sup>

Though using the letter as evidence of the amount in controversy, the appellate court side-stepped the confidentiality issue, noting only that California law did not apply. *Id.* at 974.

Citing Fed. R. Evid. 501, the Ninth Circuit determined that “state law does not supply the rule of decision here.” *Id.* Because federal law determines whether this case meets the amount in controversy requirement necessary for diversity jurisdiction in federal court, 28 U.S.C. §1332, then it is also federal law that applies to determine whether the Letter constituted notice for purposes of removal jurisdiction. *Id.* at 974-975. The Ninth Circuit held that it did, avoiding the

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<sup>2</sup> California Evidence Code §1119:

Except as otherwise provided in this chapter:

(a) No **evidence** of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the **evidence** shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential. (Emphasis added.)

issue whether federal mediation confidentiality law protected the communication from disclosure. In a footnote, the appellate court noted that LensCrafters did not raise the argument that the Letter was privileged under federal law or that it fell within a federal common law privilege or federal mediation privilege. Based upon LensCrafters' failure to raise these issues, the Court refused to consider them. *Id.* at 975, fn.1.

In short, the Court focused quite narrowly: since this was an issue to be decided under federal law, California state law on mediation confidentiality did not apply.

### **THE ALTERNATIVE DISPUTE RESOLUTION ACT OF 1998**

After reading this decision, the question arises: is there mediation confidentiality in federal court? If so, what are its parameters? If not, then why not and what rule, if any, controls mediations conducted under the auspices of the federal district and appellate courts?

Technically, the answer to the first question should be "yes." Mediation confidentiality in federal proceedings arises under the *Alternative Dispute Resolution Act of 1998*, Pub. L. No. 105-315, 112 Stat. 2998 (105<sup>th</sup> Cong. 2<sup>nd</sup> Sess.) (Oct. 30, 1998) codified at 28 U.S.C. §§651-658. ("ADR Act"). In Section 2 of this Act, Congress finds among other things, that:

*(1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the Court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;*

*(2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, mini-trials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently. . . .*

In Section 3, Congress authorizes the district courts to adopt, by local rule, the use of alternative dispute resolution (“ADR”) processes that include not only mediation, but early neutral evaluation, mini-trials and voluntary arbitration, as well.

Section 4 (28 U.S.C. §652) addresses “Jurisdiction” and confidentiality:

*(d) Confidentiality Provisions – Until such time as rules are adopted under Chapter 131 of this title providing for confidentiality of alternative dispute resolution processes under this chapter, each district court shall, by local rule, adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.*

While a cursory review of Chapter 131 of Title 28, United States Code (28 U.S.C. §§2071-2077) reveals that Congress has yet to amend this chapter to include an ADR confidentiality provision, both district and appellate courts have amended their local rules to include such confidentiality provisions. *See, e.g.* Central District of California Local Rule 16-15.8 (confidentiality of proceedings); Northern District of California ADR Local Rule 5-12 (confidentiality in early neutral evaluation); 6-12 (confidentiality in mediation) and 7-5 (confidentiality at settlement conferences) and Ninth Circuit Court of Appeals Rule 33-1 (confidentiality in settlement conferences).

Thus, at least by federal statute and local court rule, mediations are to be kept confidential. Now, things get interesting.

***FOLB v. MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS, INC.***

Several months before Congress enacted the ADR Act, the Honorable Richard A. Paez, United States District Judge sitting in the Central District of California issued an opinion in *Folb v. Motion Picture Industry Pension and Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal 1998) (July 8, 1998), *aff’d.*, 216 F. 3d 1082 (9<sup>th</sup> Cir. 2000) (“*Folb*”). Although the narrow issue was whether to affirm the Magistrate’s decision to compel production of a mediation brief and

communications between counsel who were privy to that brief, the broader issue was whether to recognize and adopt a federal common law mediation privilege.

Plaintiff Scott Folb sued for gender discrimination and retaliatory actions based on his alleged whistle blowing activities. The defendants allegedly relied on a complaint by a co-employee, Vivian Vasquez, that Folb had sexually harassed her. Plaintiff contended that defendant used this as a pretext for firing him. He alleged that the real cause for his dismissal was his accusation that the Directors of the Pension Plans had violated their fiduciary duties under federal law. During the litigation, the parties attended a formal mediation in an attempt to settle the case. Though no settlements were reached in mediation, Vasquez settled her claims with the Defendant Plans soon thereafter. Without permission, counsel for the Defendant Plans shared Vasquez' mediation brief with outside counsel who was hired to investigate Vasquez' sexual harassment claim.

Plaintiff Scott Folb subpoenaed outside counsel's copy of the mediation brief in response to which counsel claimed mediation confidentiality under Fed. R. Evid. 408 and Cal. Evid. Code §1119. The Magistrate denied the motion to compel any documents or notes connected to the mediation.

The district court took a more narrow approach, concluding that while production of the mediation brief should be denied, information relating to settlement negotiations conducted *after* the conclusion of the formal mediation was discoverable.

To reach this conclusion, the Court started with Rule 501 of the Federal Rules of Evidence which 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 applies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.*

The Court cited *Religious Technology Center v. Wollersheim*, 971 F. 2d 364, 367n.10 (9<sup>th</sup> Cir. 1992) as binding precedent for the proposition that the federal common law controls privilege questions in any federal question case that includes pendent state law claims. *Id.* at 1169-70.

Looking to the U.S. Supreme Court for guidance, the Court, quoting *Jaffee v. Redmond*, 518 US 1, 135 L. Ed. 2d 337, 116 S. Ct. 1923 (1996) noted that, “. . . the federal courts are authorized to define new privileges based on interpretation of “common law principles. . . in light of reason and experience. *Jaffee*, 518 U.S. at 8.”” *Id.* However, “. . . that authority must be exercised with caution because the creation of a new privilege is based upon consideration of public policy.” *Id.* at 1171. Here, one must remember that the “. . . general rule is that the public is entitled to every person’s evidence and that testimonial privileges are disfavored.” *Id.* Thus, a court must determine whether the “public good” of recognizing a testimonial privilege outweighs the general duty of everyone to give evidence. *Id.* To determine this and thus whether an asserted federal common law privilege (*i.e.*, here, a federal mediation privilege) should be recognized, four factors must be considered:

*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. Id. at 9-13.*

*Id.* at 1171.

Applying these four factors, the district court determined that a federal mediation privilege pursuant to federal common law principles enunciated in Fed. R. Evid. 501 should exist. *Id.* at 1171-1181.

The court defined the contours of the privilege as follows:

*The mediation underlying the instant dispute was a formal mediation with a neutral mediator, not a private settlement discussion between the parties. Accordingly, the mediation privilege adopted today applies only to information disclosed in conjunction with mediation proceedings with a neutral. Any interpretation of Rule 501 must be consistent with Rule 408. To protect settlement communications not related to mediation would invade Rule 408's domain; only Congress is authorized to amend the scope of protection afforded by Rule 408. Consequently, any post-mediation communications are protected only by Rule 408's limitations on admissibility.*

*Id.* at 1180.

In short, communications to the mediator and between the parties during the mediation, are protected. Also protected are communications made to the neutral in preparation for the mediation. But, subsequent communications between the parties are *not* protected. To gain that protection, the parties must return to mediation! Otherwise, the province of Rule 408<sup>3</sup> settlement negotiations would be invaded. *Id.*

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<sup>3</sup> Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or offering or promising to furnish--or accepting or offering or promising to accept--a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or statements made in compromise negotiations regarding the claim, except when

The stage is thus set. Do other courts follow suit?

### RECENT CASES

Only a few courts have followed *Folb*, recognizing the existence of a “federal mediation privilege” grounded in Fed. R. Evid. 501. An often cited case recognizing a federal mediation privilege is *Sheldone v. Pa. Turnpike Com’n*, 104 F. Supp. 2d 511 (W.D. Pa 2000) involving a claim brought under the Fair Labor Standards Act. During the litigation, Plaintiffs, members of the local union, sought discovery of documents generated during the course of a mediation of union grievances. *Id.* at 511-512. The Defendant employer sought a protective order, urging the court to adopt a federal mediation privilege. After discussing the four factors considered by *Jaffee*, the trial court adopted the privilege, but defined its contours in accordance with W. Dist. Local R. 16.3.5.(E) and 16.3.1 which (1) protects from disclosure all written and oral communications made in connection with or during a mediation made before a neutral mediator; (2) prohibits the use of any such written or oral communication for any purpose – including impeachment – in any proceeding; and (3) except for a written settlement agreement or any written stipulations executed by the parties or their counsel, bars any party or counsel from being bound by anything done or said during the mediation process. In adopting these provisions, the Court stressed that the privilege does *not* protect from disclosure any other evidence nor any information independently discoverable merely because it was presented during a mediation. *Id.* at 517.

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offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

A more recent case discussing the issue is *Sampson v. School Dist.* 2008 U.S. Dist. Lexis 91421, 105 Fair Empl. Prac. Cas. (BNA) 96 (E.D. Pa, Nov. 5, 2008). In its discussion of the federal privilege, it cites other cases recognizing its existence while at the same time noting that in some of these instances, the “privilege” is actually based on the local rule enacted pursuant to the ADR Act.

Similarly, the United States Bankruptcy Court in *Hays v. Equitex, Inc. (In Re: RDM Sports Group, Inc.)*, 277 B.R. 415, 2002 Bankr Lexis 468 (Bankr. N.D. Ga 2002), recognized a federal mediation “privilege” while nevertheless stressing that neither the Eleventh Circuit nor any federal district court in that circuit had done so before. *Id.* at 426. That court also relied upon the *Jaffee* factors and adopted the scope of the privilege as set out by the court in *Sheldone*. As the *Hays* Court held,

*The mediation privilege should operate to protect only those communications made to the mediator, between the parties during the mediation, or in preparation for the mediation. Therefore, the mediation privilege does not apply to shelter from disclosure documents prepared prior to the mediation, merely because those documents were presented to the mediator during the course of the mediation.*

*Id.* at 431, but see *In Re: Subpoena Issued to CFTC*, 370 F. Supp. 2d 201, 67 Fed. R. Evid. Serv. (CBC) 117 (D.D.C 2005) (refusing to recognize a federal “settlement” privilege under Fed. R. Evid. 501.)

In *EEOC v. Albion River Inn, Inc.*, 2007 U.S. Dist. Lexis 97805 (N.D. CA, Sept. 4, 2007), the court side-stepped the issue whether a federal mediation privilege existed by noting that there was no formal nor court ordered mediation in the case before it -- , only a third party

attempting to help adverse parties resolve their dispute.<sup>4</sup> Thus, according to the *Albion River Inn* case even the local rules governing mediation confidentiality did not apply.

To confuse the issue even more, a more recent decision in the Central District of California (which decided *Folb*), took a different stance. In *Molina v. Lexmark International, Inc.*, 2008 U.S. Dist. Lexis 83014, 77 Fed. R. Evid. Serv. (Callaghan) 905 (C.D. CA. Sept. 30, 2008) (“*Molina*”), the Honorable Margaret Morrow, U.S. District Judge and past chair of the Court’s Settlement Officer program, questioned the existence of a federal common law mediation privilege, stressing the *Folb* Court’s insistence that its holding be limited to its facts, i.e., to those cases where a third party who did not participate in the mediation sought discovery of the mediation materials. *Id.* at 25-26. The Court further noted that no circuit court has ever adopted or applied such a privilege: “indeed both the Ninth and Fourth Circuits have expressly declined to consider whether such a privilege exists.” *Id.* at 30.

Factually, plaintiff Rob Molina filed a class action against his former employer, Lexmark International, in Los Angeles Superior Court, alleging violations of the California Labor Code relating to vacation and personal day pay and under California’s Unfair Competition Act, Business and Professions Code §§17200-17208. Two weeks before trial in state court, defendant Lexmark removed the matter to federal court. Plaintiff Molina filed a motion to remand, asserting the removal was untimely. *Id.* at 2-10. As in *Babasa*, the issue was whether information learned during settlement negotiations (both during and after mediation) commenced the running of the 30 day removal window. *Id.* at 17-21 .

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<sup>4</sup> Note that this would be sufficient under California law for confidentiality to attach. See California Evidence Code section 1115 which defines mediation as: *a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement. Id.*

In holding that removal was not timely and remanding the matter back to Los Angeles Superior Court, the *Molina* Court explained::

*“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. (Citation omitted). Id. at 35.*

The Court went on to note that numerous courts, including *Babasa*, had concluded that “. . . Rule 408 does not make settlement offers inadmissible in the removal context as evidence of the amount in controversy.” *Id.* at 42-43. The Court rejected the argument that either mediation confidentiality or Fed. R. Evid. 408 precluded the use of information exchanged during mediated settlement discussion for purposes of removal, holding that even though parties to a mediation

*generally have a duty to keep their discussions confidential, this duty does not prevent the use of mediation discussions for the limited purpose of establishing the amount in controversy.*

*Id.* at 45.

The court opined that this “rule” was in accord with the rationale behind both Fed. R. Evid. 408 and mediation confidentiality which is “. . . to encourage honest assessment and acknowledgement of litigation strengths and weaknesses by limiting the parties’ ability to make use of compromise discussions.” *Id.*

In sum, even when settlement discussions are protected by the “federal mediation privilege,” “mediation confidentiality” or Fed. R. Evid. 408 or 501, the secrecy surrounding mediation in federal court cases is quite limited. If mediation communications are fair game to assist the Court in determining the amount in controversy for removal purposes (*id.* at 56 and *Munoz v. J.C. Penney Corp., Inc.*, 2009 U.S. Dist. Lexis 36362 (C.D. Cal. April 9, 2009), for

what other purposes are they fair game? To assist the Court in deciding summary judgment motions or motions *in limine*? Or, in determining whether a party, such as an insurance carrier, acted in bad faith toward its insured. Or, in determining whether to sanction an attorney for bad faith conduct of litigation? In what objective way can Courts in future cases make credible distinctions between information the Court needs to determine its jurisdiction and that which it needs to determine how to exercise its jurisdiction.

### CONCLUSION

While each court has a local rule providing for confidentiality in mediation and/or other alternative dispute resolution processes, under the case law developed to date, each court will have good grounds to interpret and apply it narrowly based upon *Jaffee*'s rationale that "the public. . . has a right to every man's evidence. . . and thus [to utilize] all rational means for ascertaining the truth." (*Jaffee v. Redmond, supra, at 9*) and *Molina*'s conclusions that information disclosed in mediation is "confidential" but not "privileged" and that confidential mediation communications may be used to assist the Court in determining the existence of federal jurisdiction.

In short, beware and be wary: "mediation confidentiality" and/or "mediation privilege" in federal court may well be oxymoronic.