The Ongoing Split Within The Third Circuit Over The Existence Of A Federal Mediation Privilege

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ABSTRACT

This article considers the dichotomy that exists between Pennsylvania state and federal courts concerning communications and statements made during the mediation process. While state courts generally recognize a mediation privilege that protects such information from disclosure, federal courts have not uniformly recognized the privilege under either the common law or the Federal Rules of Evidence.

This article examines the basis for the split in authority among Pennsylvania federal district courts, the arguments weighing in favor of enforcing a mediation privilege, and the practical considerations that arise when deciding whether to litigate in the state or federal forum.

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I. INTRODUCTION

Two essential components of successful and effective mediation are trust and candor. Indeed, most jurisdictions have implemented some version of a mediation privilege fostering these important goals. However, federal courts have been much more hesitant to adopt evidentiary privilege around mediation. For example, the Third Circuit has not explicitly determined whether a mediation privilege exists un-

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der Federal Rule of Evidence 501 or federal common law.[4] This has resulted in a split among Pennsylvania district courts as to whether discussions and positions taken in mediation deserve protection from disclosure. The seminal district court case addressing mediation privilege in the Third Circuit, *Sheldone v. Pennsylvania Turnpike Comm'n*, recognized a federal mediation privilege under Rule 501.[5] However, following *Sheldone*, several courts have either refused to enforce the existence of a federal mediation privilege or simply declined to rule on the issue.

II. APPLICABLE FEDERAL RULES AND THE *JAFFEE* STANDARD

As a starting point, Federal Rule of Evidence 501 governs all evidentiary privileges asserted in federal court. As last amended in 2011, Rule 501 provides:

Rule 501. Privilege in General

The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.[6]

District courts in Pennsylvania have been inconsistent in their approach to a federal mediation privilege, and the Third Circuit has yet to clarify the law.

Therefore, under Rule 501, "federal privileges apply to federal law claims and state privileges apply to claims arising under state law."[7] Where cases involve the determination of both federal and state law claims, the federal privilege under Rule 501 is controlling.[8]

In determining whether a potential evidentiary privilege should be recognized, the United States Supreme Court outlined the relevant standard in *Jaffee v. Redmond*, which provides a framework for federal courts to apply Rule 501.[9] The relevant factors established in *Jaffee* are: (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 an exercise of the privilege is modest; and (4) whether the denial of the federal privilege would frustrate a parallel privilege adopted by the states.[10]

It is important to note that evidentiary privileges under Rule 501 are not guaranteed merely because they are raised. Even if the court determines that a privilege exists under federal law, an opposing party can still argue that the privilege asserted, even if valid, should be overcome. Because evidentiary privileges contravene "the fundamental principal that the public has a right to every man's evidence," courts generally construe privileges narrowly.[11] As a result, the party asserting the

4. *But see In re* Teligent, Inc., 640 F. 3d 53 (2nd Cir. 2011) (enforcing confidentiality of alternative dispute resolution procedures) .
5. Sheldone v. Pennsylvania Turnpike Comm'n, 104 F. Supp. 2d 511, 517 (W.D. Pa. 2000).
6. Fed. R. Evid. 501.
7. Pearson v. Miller, 211 F. 3d 57, 66 (3rd Cir. 2000).
8. *Id*.
9. Jaffee v. Redmond, 518 U.S. 1 (1996).
10. *Id*. at 10-13; *see also Sheldone*, 104 F. Supp.2d at 513.
11. University of Pa. v. EEOC, 493 U.S. 182, 189 (1990).

privilege bears the initial burden of establishing entitlement to such privilege.[12] The burden then shifts to the party seeking the information, who must demonstrate why the privileged material should nonetheless be produced.[13]

III. PENNSYLVANIA DISTRICT COURTS' DIFFERING TREATMENT OF THE FEDERAL MEDIATION PRIVILEGE

With that as background, the Third Circuit has not conclusively determined whether the federal privilege standard outlined in Rule 501 and *Jaffee* applies to information gathered or disclosed in the mediation process. This has led to a dispute among Pennsylvania district courts in the Third Circuit as to whether a federal mediation privilege is enforceable.[14]

In *Sheldone*, the Pennsylvania Western District Court found that the factors outlined in *Jaffee* favor the recognition of a federal mediation privilege.[15] The court reasoned, under the first factor, that confidentiality and trust serve an essential role in the mediation process to allow the parties to effectively work through their dispute.[16] The *Sheldone* court also found that this privilege would better serve the public by encouraging parties to settle their disputes, which, in turn, would reduce the burden on the courts.[17]

The court noted that the Alternative Dispute Resolution Act of 1998 requires each federal court to "provide litigants in all civil cases with at least one alternative dispute resolution process, including . . . mediation," and expressly directs the courts to adopt local rules "provid[ing] for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications."[18] The court then cited its own rule requiring such confidentiality, W. Dist. Local R. 16.3.5(E), as well as corresponding rules of both the Middle and Eastern Districts.[19]

Additionally, the court found only a modest evidentiary detriment resulting from the exercise of the mediation privilege. Specifically, the court stated that it saw "no reasoned basis for allowing the Plaintiffs to enjoy the benefit of an alleged admission arising through the mediation process when it seems doubtful that such an admission would have otherwise come into existence."[20] Lastly, the court held that denying parties a federal mediation privilege would frustrate a parallel privilege adopted by most states. "The states' 'promise[s] of confidentiality' regarding mediation would have little value if the participants were aware that the privilege would not be honored . . . in federal court."[21] Therefore, the court concluded its analysis by

12. United States v. Schwimmer, 892 F.2d 237, 244 (2nd Cir. 1989).
13. *Id*.
14. *Compare Sheldone*, 104 F. Supp. 2d at 512-16 and Chester Cty. Hosp. v. Indep. Blue Cross., 2003 U.S. Dist. LEXIS 25214 (recognizing a federal mediation privilege) with: Stewart Title Guar. Co. v. Owlett & Lewis, P.C., 297 F.R.D. 232 (M.D. Pa. 2013) (finding a mediation memo in a breach of contract action was privileged under Pennsylvania's mediation privilege); Sampson v. Sch. Dist., 262 F.R.D. 469 (E.D. Pa. 2008) (finding the reasoning outlined in *Sheldone* to be persuasive); and Gatto v. Verizon Pa., Inc., 2009 U.S. Dist. LEXIS 86601 (W.D. Pa. 2009) (finding a settlement agreement created during mediation to be unenforceable and failing to uphold a mediation privilege).
15. *See generally Sheldone*, 104 F. Supp. 2d at 513.
16. *Id*. at 513-14.
17. *Id*. at 514
18. *Id*. at 513, citing 28 U.S.C. §652(d).
19. *Id*. at 513-514.
20. *Id*. at 515.
21. *Id*. (citing *Jaffee*, 518 U.S. at 13).

determining that all four of the factors outlined in *Jaffee* favored the adoption of a federal mediation privilege.[22]

After giving life to the federal mediation privilege, the *Sheldone* court defined its scope. More specifically, the court defined the contours of this privilege as follows: "The privilege protects from disclosure 'all written and oral communications made in connection with or during' a mediation conducted before a neutral mediator."[23] These communications must also not be used for any purpose in a civil action or in any other proceeding.[24] Lastly, no party or counsel shall be bound by anything done or said during the mediation process, except where a written settlement agreement or any written stipulations executed by the parties or their counsel exists.[25]

Most federal courts have found that a federal mediation privilege exists using the same or a similar rationale as outlined in *Sheldone*.[26] However, no federal appellate courts have definitively addressed this issue. Thus, until the Third Circuit squarely rules on the application of a federal mediation privilege, *Sheldone* remains viable and supports a good-faith assertion of the privilege. However, it is an open question as to whether mediation-related communications are absolutely privileged considering several post-*Sheldone* rulings permitting discovery of information disclosed during the mediation proceeding.

By way of example, a subsequent decision in the Western District Court declined to follow *Sheldone* and extend privilege to statements made in the presence of a mediator.[27] In *Gatto v. Verizon Pa., Inc.*, the plaintiff's former attorney, Holmes, sought to enforce a settlement agreement reached between the parties, Gatto and Verizon, several weeks after the conclusion of mediation.[28] The terms of the settlement agreement were initially discussed between Gatto and Holmes during the mediation caucus.[29] However, Gatto disputed Holmes' authority to enter into the settlement agreement with Verizon.[30] Gatto and Holmes' testimony regarding the events that unfolded both during and after the mediation largely conflicted.[31] Since the only other individual present during the mediation caucus was the mediator, the court ignored any mediation privilege and found it necessary to call the mediator as a witness to determine which version of the events was accurate.[32] Although the *Gatto* decision seems to challenge whether communications during the mediation process should be deemed privileged under federal law, the holding should be narrowly interpreted and limited to its unique facts. There is no indication in the decision that the court even considered a federal mediation privilege, and the case was decided under state law.

Other courts in the Third Circuit have stopped short of recognizing a federal mediation privilege.[33] In *Sampson v. Sch. Dist.*, the Eastern District of Pennsylvania re-

22. *Id.* at 515-16 (stating that "the mediation privilege creates a 'public good' transcending the normally predominant principle of utilizing all ration means for ascertaining truth.").
23. *Id.* at 517.
24. *Id.*
25. *Id.*
26. *See In re* RDM Sports Group, Inc., 277 B.R. 415, 430 (Bankr. N.D. Ga 2002); Folb v. Motion Picture Industry Pension & Health Plans, 16 F.Supp.2d 1164 (C.D. Cal. 1998); Chester Co. Hospital v. Independence Blue Cross, 2003 U.S. Dist. LEXIS 25214 (E.D. Pa. 2003).
27. *See generally* Gatto v. Verizon Pa., Inc., 2009 U.S. Dist. LEXIS 86601 (W.D. Pa. 2009).
28. *Id.* at *1.
29. *Id.* at *3.
30. *Id.* at *11.
31. *Id.* at *21.
32. *Id.* at *18 (noting that, although the mediator was called as a witness, he could not remember any of the salient points about the mediation).
33. *See* Stewart Title Guar. Co. v. Owlett & Lewis, P.C, 297 F.R.D. 232, 239 n.3 (M.D. Pa. 2013); *see also* Sampson v. Sch. Dist., 262 F.R.D. 469 (E.D. Pa. 2008).

fused to decide whether the federal mediation privilege extended to documents generated during the course of mediation.[34] Instead, the court analyzed the issue through the lens of attorney-client privilege and recognized that "[t]he United States Supreme Court has cautioned federal courts to create or expand federal privileges only with extreme reluctance."[35] Similarly, the Eastern District of Pennsylvania refused to acknowledge the existence of a federal mediation privilege in *Stewart Title Guar. Co. v. Owlett & Lewis, P.C.*[36] Here, the court applied Pennsylvania's state mediation privilege, stating that "although [the defendant] also mentions a federal mediation privilege, we need not, and do not, determine whether such a federal privilege exists or, if it does, the contours of such a privilege."[37]

IV. CONCLUSION

Overall, despite the importance of fostering open and candid communications in the mediation process, the viability of a federal mediation privilege in the Third Circuit remains unclear. District courts have not conclusively determined whether a federal mediation privilege exists under F.R.E. 501. The Pennsylvania Western District Court's decision in *Sheldone* supports the application of a federal mediation privilege, with the caveat that *Sheldone* has not been uniformly followed. Thus, in order to provide clear guidance to federal trial courts, the Third Circuit will need to address this issue.

Until that time, however, the split within the Third Circuit continues to be an important consideration when a party decides whether to remove a case from state court. Since Pennsylvania state courts unquestionably recognize a mediation privilege, parties could inadvertently lose the privilege upon removal. Worse yet, participants in a mediation may unwittingly (and wrongly) assume the state court mediation privilege is readily available in federal court litigation.

However, by recognizing the potential dichotomy between state and federal law regarding mediation privileges, as well as the unsettled state of the law within the Third Circuit, litigants can take steps to bring order and additional certainty to the process. One such tool is the use of a written mediation agreement expressly precluding disclosure and rendering any communications made in connection with the mediation confidential, including the exchange of documentary evidence, settlement valuations, and admissions concerning the strengths and weaknesses of the parties' positions. Coupled with the mediation privilege recognized in *Sheldone*, a mediation agreement signed by all parties and participants provides an additional layer of protection. Without that certainty of privilege, the parties' willingness to speak openly, candidly and freely may well be inhibited, dimming the prospects of a successful mediation outcome in federal court. As the United States Supreme Court said in *Upjohn Co. v. United States*,[38] "[a]n 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."

34. *See Sampson*, 262 F.R.D. at 480.
35. *Id*. at 475. (citing Brunt v. Hunterdon Cnty., 183 F.R.D. 181, 184 (D.N.J. 1998)).
36. *See generally Stewart Title Guar. Co.*, 297 F.R.D. at 239.
37. *Id*.
38. 449 U.S. 383, 393 (1981).