

## Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws

The overcrowding of courts is a problem that plagues the American judicial system.<sup>1</sup> In response, many states and agencies are trying to avoid using courts by turning to methods of alternative dispute resolution. These alternative proceedings have proven to be more cost effective and less time consuming than traditional litigation.<sup>2</sup> As a result, alternative dispute resolution is now one of the fastest growing fields of law.<sup>3</sup>

An increasingly important aspect of alternative dispute resolution is the privilege which attaches to both parties in an alternative dispute resolution proceeding and the individual(s) presiding over the proceeding.<sup>4</sup> The mediation privilege assures a right of confidentiality to all parties involved so that the information disclosed in a mediation proceeding cannot be used against any of the parties in a later proceeding. Not all states have adopted the privilege, and where it has been adopted, it has not been applied uniformly.<sup>5</sup> Thus, the stage is set for conflicts between states that recognize the privilege and states that do not.<sup>6</sup>

The goal of this Note is to champion the implementation of a broader mediation privilege and to assert the need for this policy to be uniformly applied on a federal and state level. The first section explores the rationale for the privilege of confidentiality in mediation. The second section examines the Federal Rules of Evidence and their applicability to the law of privileges in conflict situations. The third section details all of the potential conflicts that may arise as a result of a non-uniform application of the

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<sup>1</sup> See generally Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37 (1986). Freedman and Prigoff argue that while the growth of mediation in relation to formal justice has been void of great controversy, confidentiality represents a major point of contention. *Id.* They also argue that accommodating the balance between mediation's need for confidentiality and the law's search for evidence is best accomplished through a statute or rule. *Id.*

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> For the purposes of this Note, the terms mediation or mediator privilege are used even though this type of privilege extends to other types of alternative dispute resolution proceedings, including arbitration.

<sup>5</sup> See *infra* notes 17-19 and accompanying text.

<sup>6</sup> See, e.g., William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953) ("The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled by it.").

mediation privilege. An analysis of *United States v. Gullo*,<sup>7</sup> the leading mediation privilege and conflicts case, is helpful in understanding the stance likely to be taken by courts in a conflict situation. Following this analysis, possible solutions to achieving greater uniformity are explored. Finally, the Note concludes by advocating a system in which the greatest possible protection for the mediation privilege will apply in any conflicts of law case.

## I. THE RATIONALE BEHIND THE MEDIATION PRIVILEGE

### A. Defining the Privilege

Over half the states now recognize some kind of mediation privilege.<sup>8</sup> Historically, mediation procedures have been most common in labor disputes. However, with the burdened dockets of the courts, mediation is expanding to other areas of the law.<sup>9</sup> In fact, many states now require mediation in the settlement of various types of disputes before they can be brought in court.<sup>10</sup>

Not all states have reacted the same way in defining the strength of the mediation privilege. Generally, courts have created mediation privileges with an eye toward protecting the loss of information.<sup>11</sup> There is a rift between states that grant the mediator and mediation proceedings an absolute privilege<sup>12</sup> and those that extend only a limited or qualified

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<sup>7</sup> 672 F. Supp. 99 (W.D.N.Y. 1987).

<sup>8</sup> NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* 243-72 (1989).

<sup>9</sup> These areas would include family matters, especially divorce mediation, as well as minor criminal matters.

<sup>10</sup> See, e.g., ARIZ. REV. STAT. ANN. § 25-381.23 (1993) (local court may order family mediation participation); ARIZ. REV. STAT. ANN. § 44-1265 (1993) (prerequisite to specified recovery in car warranty cases); CAL. CIV. CODE §§ 4351.5, 4607 (Deering 1993) (family); DEL. CODE ANN. tit. 6, § 5007 (1993) (prerequisite to specified recovery in car warranty cases); FLA. STAT. ANN. § 39.442(1)(b) (West 1993) (court may order family mediation participation); ME. REV. STAT. ANN. tit. 24, § 2851 (West 1993) (professional negligence); MICH. COMP. LAWS § 600.4951 (1990) (tort); NEV. REV. STAT. ANN. § 41A.056(1) (Michie 1993) (medical malpractice); OHIO REV. CODE ANN. § 3117.08(B) (Baldwin 1993) (mandatory if minor child involved).

<sup>11</sup> *Port Arthur v. United States*, 517 F. Supp. 987, 1003 n.105 (D.D.C. 1981), *aff'd*, 459 U.S. 159 (1982) (the public interest outweighs the need for the plaintiff's testimony).

<sup>12</sup> See N.Y. JUD. LAW § 849-b(6) (McKinney 1993); OKLA. STAT. ANN. tit. 12, § 1805(C) (West 1993) (prohibiting disclosure of "any matters discussed" in mediation).

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privilege.<sup>13</sup> Courts prefer qualified privileges, which exclude the use of evidence only when the benefit created by the privilege exceeds the need for evidence in a particular case.<sup>14</sup> This follows the trend away from absolute personal privileges and toward qualified institutional privileges.<sup>15</sup>

It is significant to note the wide disparity between states, not only in their recognition of the privilege, but also in how they recognized it. As previously illustrated, there are many facets of the privilege which can be interpreted differently. These distinctions pose further problems when state courts have to decide which state's rules to apply in deciding in an interstate case.

State statutes have recognized a distinction between privileges that run with the mediator and those that run with the parties to a mediation proceeding. Privileged communications are seen as statements made by certain persons within a mediation proceeding which the law protects from forced disclosure on the witness stand at the option of the mediator or party to the proceeding.<sup>16</sup> As a result, states that provide for a mediator privilege differ on whether the privilege runs with the mediator,<sup>17</sup> the parties to the mediation,<sup>18</sup> or the proceedings themselves.<sup>19</sup> This is significant because it is the privilege holder who may assert or waive the privilege. The privilege may also be asserted on behalf of the holder by the mediator.<sup>20</sup> A statute designed to promote free general discussion among the parties may make all the parties holders of the privilege, while a statute designed to protect the mediator's reputation for impartiality may make the mediator the sole holder of the privilege. Unfortunately, of the states that have statutory recognition of the mediation privilege, about half fail to state who may

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<sup>13</sup> See CAL. CIV. PROC. CODE § 1747 (Deering 1982); COLO. REV. STAT. § 13-22-307 (Supp. 1993).

<sup>14</sup> See, e.g., *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 55 (9th Cir. 1980) ("The public interest in maintaining the perceived and actual impartiality of federal mediators does outweigh the benefits derivable from Hammond's testimony.").

<sup>15</sup> *Developments in the Law — Privileged Communications*, 98 HARV. L. REV. 1450, 1593-94 (1985).

<sup>16</sup> See Freedman & Prigoff, *supra* note 1, at 40-45.

<sup>17</sup> See, e.g., COLO. REV. STAT. § 12-22-307 (Supp. 1983); 29 C.F.R. § 1401.2(b) (1983).

<sup>18</sup> See, e.g., ARIZ. REV. STAT. ANN. § 25-381.16 (1993); CAL. CIV. PROC. CODE § 1747 (Deering 1982); KAN. STAT. ANN. § 23-606 (1988); N.Y. JUD. LAW § 849-b(6) (McKinney 1993).

<sup>19</sup> See, e.g., CAL. CIV. CODE § 4607 (Deering 1982) (citing that the privilege belongs to mediation program).

<sup>20</sup> See generally CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 73.1 (Edward W. Cleary et al. eds., 3d ed. 1984).

assert or waive the privilege.<sup>21</sup> These statutes may create problems where there is a conflict of law because the forum state may provide no guidance as to how the state statute would apply the privilege to the concerned parties.

In *United States v. Partin*,<sup>22</sup> the Ninth Circuit held that the mediator privilege was akin to the attorney-client privilege in that the privilege runs with the client, not the attorney (or in this case, the mediator). The attorney or mediator can only invoke the privilege on behalf of the client or parties.<sup>23</sup> Labor mediation has granted the testimonial privilege to the mediator and the mediation process.<sup>24</sup> It is argued that granting the privilege to the mediator assures the preservation of the mediator's neutrality.<sup>25</sup> There is a fear that unless the mediator is seen as being unbiased, parties will refuse to participate and disclose information in a mediation proceeding. If a mediator cannot project this image, her effectiveness will be compromised. The best way to preserve this interest would be to grant absolute veto power to either party in mediation to prohibit a mediator from testifying at subsequent litigation proceedings.<sup>26</sup>

### B. *The Argument for Confidentiality in Mediation*

Many commentators have argued both for and against the protection of confidentiality in mediation.<sup>27</sup> The code of the Society of Professionals in Dispute Resolution (SPIDR) states:

Maintaining confidentiality is critical to the dispute resolution process. There may be some types of cases, however, in which confidentiality is not protected. In such cases, the neutral must advise the parties when appropriate in the dispute resolution process, that the

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<sup>21</sup> See ROGERS & MCEWEN, *supra* note 8, at 243-72.

<sup>22</sup> 601 F.2d 1000, 1009 (9th Cir. 1979), *cert. denied*, 446 U.S. 964 (1980).

<sup>23</sup> *Id.* (recognizing that the privilege is that of the client or parties, not the attorney or mediator).

<sup>24</sup> 29 C.F.R. § 1401.2(b) (1983).

<sup>25</sup> *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441, 456 (1984) [hereinafter *Protecting Confidentiality*].

<sup>26</sup> See, e.g., ARK. CODE ANN. § 11-2-204 (Michie 1987) (waiver requires the consent of the parties to the mediation); FLA. STAT. ANN. § 61.183 (West Supp. 1993) (waiver requires the written consent of all parties to the proceeding and privilege may be asserted by each party); OR. REV. STAT. § 107.785 (1990) (waiver requires the consent of the parties to the mediation); TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(b)(c) (West Supp. 1994) (all parties must agree to a waiver).

<sup>27</sup> See, e.g., Freedman & Prigoff, *supra* note 1.

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confidentiality of the proceedings cannot necessarily be maintained. Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process.<sup>28</sup>

This statement illustrates the general feeling that the mediator should try to do everything in her power to prevent the release of any information used in the proceeding. However, the statement also makes it clear that there are other circumstances in which the confidentiality of a proceeding is not protected. This is where reasonable minds begin to differ. The extent to which the privilege of confidentiality in mediation should be protected has been open to considerable debate.

Commentators have argued that the mediation privilege should not be absolute because there must be some form of review of the mediation process in order to create public accountability.<sup>29</sup> This would allow mediation to earn the public trust. The only time when it seems to be unanimously clear that a mediator has the duty to break confidentiality is when there is the duty to warn of imminent harm.<sup>30</sup> Examples would include general threats made in the mediation proceedings, allegations or reports of other crime or abuse that surface during the proceedings, and whistle-blowing in the interests of protecting public welfare if the mediator knows that a crime is being or is about to be committed.<sup>31</sup>

Mediator confidentiality is controlled by statute and case law. States that have mandatory mediation have generally passed statutes detailing the requirements.<sup>32</sup> In states where there are no statutes, courts generally balance the benefits of maintaining confidentiality against the potential harms of disclosure.<sup>33</sup> The communications may be required to pass the four prong "Wigmore Test" which states:

1. Communications must originate in confidence so that they will not be disclosed to others.
2. The preservation of secrecy must be essential to the success of the

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<sup>28</sup> See Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment*, 1992 J. DISP. RESOL. 25, 29 (citing SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY § 3 (1986)).

<sup>29</sup> *Id.* at 65.

<sup>30</sup> See, e.g., *Tarasoff v. Regents of the Univ. of California*, 551 P.2d 334 (Cal. 1976).

<sup>31</sup> See, e.g., TEX. FAM. CODE ANN. § 34.01 (West Supp. 1994); KAN. STAT. ANN. § 38-1522 (1993); KY. REV. STAT. ANN. § 620.030 (Michie/Bobbs-Merrill 1990); OKLA. STAT. tit. 21, § 846 (West Supp. 1994); TENN. CODE ANN. § 37-1-403 (1991).

<sup>32</sup> Gibson, *supra* note 28, at 34.

<sup>33</sup> See, e.g., *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51, 54 (9th Cir. 1980).

relationship.

3. The relationship is one which the public ought to foster and protect.
4. The injury from disclosure must be greater than the benefit to be gained by the public from non-disclosure.<sup>34</sup>

Although the courts may compel evidence when deemed necessary, this test has been used to give validity to mediators' attitudes toward confidentiality.<sup>35</sup> It has also made mediators optimistic about the prospects of invoking the privilege in a more uniform manner.

The "Wigmore Test" was applied in *NLRB v. Joseph Macaluso, Inc.*<sup>36</sup> This case involved statutes that permitted the revocation of a subpoena by the National Labor Relations Board. The Board found that the mediation of collective bargaining disputes by the Federal Mediation and Conciliation Service would result in a settlement that would advance industrial peace, the interests of the parties, and the economic health of the nation.<sup>37</sup> The Ninth Circuit held that since the parties in a labor mediation suit were informed of the inability of the mediator to testify,<sup>38</sup> they had implicitly consented to that condition.<sup>39</sup> The court said that "[p]arties participating in mediation efforts must have the assurance and confidence that information disclosed to commissioners and other employees of the service will not subsequently be divulged. . . . The complete exclusion of mediator testimony is necessary to the preservation of an effective system of labor mediation."<sup>40</sup> Thus, the courts have assumed that the protection of confidentiality in mediation falls on the benefit side of the fourth prong of the "Wigmore Test." They have interpreted the statute to require a privilege protecting the mediator from testifying while leaving open the possibility that in future cases the mediator's privilege might succumb to the greater need for the testimony.

With the growth in popularity of mediation as an alternative means of solving disputes, the extent to which the rules of privilege should guarantee the confidentiality of communications that are made during the mediation process becomes important. Clients view confidentiality as a hallmark of mediation and are often given the impression that the events of a mediation proceeding will be confidential and hence, immune from being used in later

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<sup>34</sup> JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2285 (1961).

<sup>35</sup> Gibson, *supra* note 28, at 35.

<sup>36</sup> 618 F.2d at 54.

<sup>37</sup> *Id.* at 56.

<sup>38</sup> *Id.* at 54.

<sup>39</sup> See *Protecting Confidentiality*, *supra* note 25, at 450 n.71.

<sup>40</sup> *Joseph Macaluso, Inc.*, 618 F.2d at 56.

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proceedings.<sup>41</sup> Confidentiality promotes a sense of trust that is necessary to the workings of a mediation proceeding.<sup>42</sup> However, the reality is that given current law, a mediator may not be able to keep the mediation proceedings confidential.<sup>43</sup> Confusion as to the limits of mediation confidentiality is now grave enough that it places mediation programs in jeopardy.<sup>44</sup>

### II. FEDERAL RULES OF EVIDENCE

The fields of evidence and conflicts of law rarely overlap.<sup>45</sup> The rules of evidence help to facilitate proof of facts in a case, but the various rules apply only to the fact-finding process of the forum court. Thus, other states would seem to have no legitimate interest in the application of its rules to the exclusion of those of the forum.

When dealing with the laws of privilege, the rules of evidence and conflicts of law run a collision course. While rules of evidence generally try to elicit the facts, the rules of privilege serve to cloak them in order to preserve other presumably greater interests.<sup>46</sup> The protection of confidences that a state finds important may require the application of another state's rules of admissibility of evidence. Evidence has traditionally been considered "procedural," calling for the application of forum law.<sup>47</sup> In many instances, the same result is reached under modern conflicts of law doctrines which call for analysis of relevant state policies.<sup>48</sup> Nevertheless, a forum state's recognition or rejection of the privilege law of another state may unduly limit or expand the legitimate scope of its application.<sup>49</sup>

A situation in which a state court must choose between the laws of privilege of two states occurs when testimony is sought in the forum state regarding a communication that occurred in another state. In this situation,

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<sup>41</sup> LAWRENCE FREEDMAN ET AL., CONFIDENTIALITY IN MEDIATION: A PRACTITIONER'S GUIDE 205 (1985).

<sup>42</sup> N.Y. JUD. LAWS § 849-b (McKinney 1992) (Historical and Statutory Notes) (stating that mediation requires an atmosphere free from "restraint and intimidation").

<sup>43</sup> See LAWRENCE FREEDMAN, CONFIDENTIALITY: A CLOSER LOOK, ABA SPECIAL COMM. ON DISPUTE RESOLUTION OF THE PUB. SERVS. DIV., ALTERNATIVE DISPUTE RESOLUTION: MEDIATION AND THE LAW 68, 72 (1983).

<sup>44</sup> See Gibson, *supra* note 28, at 29.

<sup>45</sup> Donald W. Price, Note, *A Choice of Law Analysis of Evidentiary Privileges*, 50 LA. L. REV. 157, 157-58 (1991).

<sup>46</sup> McCORMICK, *supra* note 20, at 170-71.

<sup>47</sup> See, e.g., *Ammerman v. Hubbard Broadcasting, Inc.*, 551 P.2d 1354, 1354 (N.M. 1976).

<sup>48</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 138 (1971).

<sup>49</sup> Price, *supra* note 45, at 158.

the witness may claim that the communication is privileged in the state where it occurred even though it may not be in the forum state. The inverse situation is plausible as well. A party may seek to introduce information that is privileged in the forum state, but not in the state in which the communications occurred. The problem becomes more complex because there may be other states interested in the claim as well.<sup>50</sup>

### A. Federal Rule 408

Critics have argued that Federal Rule of Evidence 408 is sufficient to exclude evidence of a mediation proceeding and that a privilege for mediators is unnecessary and unwise.<sup>51</sup> The rule provides that "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible."<sup>52</sup> Rule 408 excludes both offers of compromise and evidence of conduct or statements made during compromise negotiations. The rule gives broader protection to the negotiation of private settlements than did the common law which looked to whether the party intended to be bound by the statement in subsequent litigation.<sup>53</sup> Although Rule 408 was intended to protect settlement negotiations, the rule should be extended to mediation since the goals of mediation and negotiation are inherently the same: reaching a compromise solution in a more informal and efficient manner.

Rule 408 does have several weaknesses that need to be addressed. First, it excludes evidence of negotiations only when offered to prove the validity or amount of the plaintiff's claim. As a result, the rule does not exclude evidence involving other related claims that may come up in a mediation

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<sup>50</sup> For example, other states interested in the claim may be the states of the parties' domicile, or in business litigation, the center of gravity.

<sup>51</sup> See Gibson, *supra* note 28, at 41 n.82. See also Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986).

<sup>52</sup> FED. R. EVID. 408 states:

Evidence of (1) furnishing or offering or promising to furnish or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromised negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an offer to obstruct a criminal investigation or prosecution.

<sup>53</sup> See *Protecting Confidentiality*, *supra* note 25, at 448.



proceeding.<sup>54</sup> This can have a chilling effect on the informal discussion that provides the backbone of mediation. In addition, Rule 408 does not prevent the collateral use of statements in settlement negotiations from being used in subsequent litigation.<sup>55</sup> Thus, Rule 408 does not adequately protect the confidentiality of the parties in a mediation proceeding.

The evidentiary exclusions for negotiations differ from privileges, which usually provide protection against any disclosure rather than merely protection against admission into evidence at a court hearing.<sup>56</sup> As a result, most mediation privileges apply in all fora as opposed to those judicial hearings that are governed by the rules of evidence. The privilege may be raised by or on behalf of anyone who is deemed to hold it,<sup>57</sup> while the evidentiary objection may only be made by a party to the litigation.<sup>58</sup> Furthermore, the protection from the mediator privilege applies regardless of the purpose for disclosing, while the evidentiary exclusion makes evidence inadmissible only when offered to prove the validity or amount of the claim.<sup>59</sup>

### B. Contractual Agreements

Like Rule 408, contractual agreements not to disclose, subpoena, or offer into evidence information conveyed during a mediation proceeding do not protect the information from disclosure. Moreover, when evidence is sought by a nonparty to the agreement, the agreement is generally not binding on the nonparty, and the agreement is seen as an attempt to suppress evidence. Therefore, the agreement is void as against public policy.<sup>60</sup>

The courts have not treated contractual agreements as stipulated protective orders. In *Grumman Aerospace Corporation v. Titanium Metals Corporation*,<sup>61</sup> the court ordered a party to the agreement to comply with a discovery request filed by a nonparty to the agreement. The court reasoned that parties should not be permitted to contract privately for confidentiality

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<sup>54</sup> See *Protecting Confidentiality*, *supra* note 25, at 449.

<sup>55</sup> *Id.* at 450.

<sup>56</sup> MCCORMICK, *supra* note 20, §§ 72.1, 73.

<sup>57</sup> See generally *id.* § 73.1.

<sup>58</sup> See, e.g., FED. R. EVID. 103(a).

<sup>59</sup> See, e.g., FED. R. EVID. 408; OHIO R. EVID. 408.

<sup>60</sup> ROGERS & MCEWEN, *supra* note 8, at 135-36 (citing RESTATEMENT OF CONTRACTS 554 (not included in RESTATEMENT (SECOND)). See also 14 SAMUEL WILLISTON & WALTER H.E. JAEGER, A TREATISE ON THE LAW OF CONTRACTS 881, 885 (3d ed. 1961).

<sup>61</sup> 91 F.R.D. 84 (E.D. N.Y. 1981).

of documents, which would prohibit others from obtaining relevant materials in the course of litigation.<sup>62</sup>

Courts are more likely to enforce a contractual agreement against a party, not only because of contractual doctrines, but also because permitting one party to repudiate the agreement may result in practices that violate public policy.<sup>63</sup> However, the remedy for breaching a contract may be inadequate to prevent disclosure because it is difficult to prove actual damages as a result of a violation of the contract. Thus, contractual agreements in mediation proceedings, although increasingly popular, are not very effective because they do not apply to nonparties to the contract and may not serve as a deterrent to the contracting parties.

### C. Federal Rule 501

The cross between conflicts and evidence probably happens most frequently in federal diversity cases. In these situations, the courts apply Rule 501 of the Federal Rules of Evidence. The rule states:

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 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.<sup>64</sup>

There are two major problems with this rule. The most obvious is that it does not specify which state's law will be applied to a claim of privilege.<sup>65</sup> This might confuse a court trying to make a ruling, and could have a large impact on the outcome of the case. However, it is important to note that in a criminal or civil action to which state law supplies the rule of decision, the

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<sup>62</sup> *Grumman*, 91 F.R.D. at 87-88.

<sup>63</sup> ROGERS & MCEWEN, *supra* note 8, at 137 (citing *Simrin v. Simrin*, 43 Cal. Rptr. 376, 379 (1965), which enforced an agreement not to subpoena a rabbi who acted as a marriage counselor to both parties because this would go against the strong public policy favoring such counseling).

<sup>64</sup> FED. R. EVID. 501.

<sup>65</sup> *Price*, *supra* note 45, at 160.

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privilege shall be determined in accordance with state law.<sup>66</sup> The second problem is that it may be difficult to determine what privileges are rooted in common law. Rule 501 leaves open the privileges that should continue to be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases. The intent of Congress was not to freeze the law of privilege, but rather to make the rules a living document that can adapt to the times.<sup>67</sup>

In all federal cases, civil and criminal, Rule 501 instructs federal courts to apply the federal common law of privilege.<sup>68</sup> In federal civil cases, the courts must apply state rules of privilege where state law supplies the law of decision on a claim or defense. As a result, the issues in a case determine the applicable privilege law, which then affects whether a communication will be privileged.

The effect of Rule 501 is that federal courts usually apply federal privilege law in federal question cases and state privilege law in diversity cases.<sup>69</sup> Yet, a claim or defense in a diversity case may sometimes be based on federal law. In these cases, courts must look not only at the substantive law which controls the issues in the case, but also the jurisdictional basis under which the suit was brought to determine whether to apply state law.<sup>70</sup>

State privilege policy may have a profound influence on federal cases in which state law does not supply the rule of decision because Rule 501 does not prohibit the application of state privilege law in federal law cases.<sup>71</sup> When federal courts adopt state privilege law, the privilege becomes part of the federal common law so that the court is technically applying federal privilege law.<sup>72</sup> Under Rule 501, federal courts can still apply state privileges in federal question cases.

The uncertainty involved in federal privilege undermines the privilege's purpose of promoting full communications between the parties to a mediation proceeding. When the parties convey information to a mediator, they are often unaware of the legal problems that may evolve in a later lawsuit as a result of their communication. This uncertainty will lead to the communication to the mediator of only the information that would be

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<sup>66</sup> MICHAEL H. GRAHAM, *FEDERAL RULES OF EVIDENCE IN A NUTSHELL* 136 (3d ed. 1992).

<sup>67</sup> *Id.* at 136.

<sup>68</sup> FED. R. EVID. 501.

<sup>69</sup> CHARLES A. WRIGHT, *LAW OF FEDERAL COURTS* 626 (4th ed. 1970).

<sup>70</sup> *Id.* at 396-97.

<sup>71</sup> 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5432 (1980).

<sup>72</sup> FED. R. EVID. 501; H.R. CONF. REP. No. 1597, 93rd Cong., 2d Sess. 7 (1974).

privileged under the strictest test that may possibly apply. This may result in the "chilling" of potentially important communications.<sup>73</sup>

### III. CONFLICTS OF LAW

#### A. State — State Conflicts

The Second Restatement of Conflicts of Laws (hereinafter Restatement) §§ 138 and 139 provide guidance on the treatment of evidence in different states.<sup>74</sup> The Restatement's position that "[t]he local law of the forum determines the admissibility of evidence, except as stated in §§ 139 - 141"<sup>75</sup> is quite troubling in an analysis of the mediator privilege. The Restatement basically excludes other states from having any interest in the litigation. Thus, even a state with significant contacts to the litigation would appear to have no rights against the forum state.<sup>76</sup> For example, this is particularly troubling in the instance of a subpoena of a mediator from a state in which there is a mediation privilege to a state in which the mediation privilege does not exist. According to § 138, the mediator could then be forced to disclose what was previously thought to have been confidential communications. Although § 138 was not intended to be read independently of its companion sections, it is necessary to examine this section in order to ascertain the foundations of the presumptions that work against the recognition of privileges.

Tempered by § 139, which deals most accurately with the mediator privilege, the Restatement recognizes that "most privileges are designed to encourage socially desirable confidences."<sup>77</sup> Part (1) of § 139 basically states that if the evidence was not privileged under the law of the state with

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<sup>73</sup> For a similar discussion on attorney client privileges, see Julie Elizabeth Rice, *The Attorney-Client Privilege in the Corporate Context: The Intersection of Federal and Illinois Law*, 1984 U. ILL. L. REV. 175, 188 (1984).

<sup>74</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 138-39 (1971).

<sup>75</sup> *Id.* § 138.

<sup>76</sup> *Id.* § 138 cmt. b. Comment (a) states:

Rationale. Considerations of efficiency and convenience require that questions relating to the admissibility of evidence, whether oral or otherwise, should usually be determined by the local law of the forum. The trial judge must make most evidentiary decisions with dispatch if the trial is to proceed with reasonable clarity. The judge should therefore, as a general rule, apply the local law of his own state. The exceptional situations where some other law is applied, either as a general rule or at least on occasion, include privileges against the disclosure of confidential information (§ 139).

<sup>77</sup> *Id.* § 139 cmt. b.

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the most significant contacts, it will nevertheless be admitted in a forum state which recognizes the privilege.<sup>78</sup> This provision would seem to follow the idea that where there is no expectation of confidential communications, none will be given. While it is clear that this is a rational premise, the question of the rights of the forum state must then be addressed. That the people of the forum state felt that the privilege was important enough to grant it confidential status is not factored into the equation. In this way, the forum state loses its rights in the case. If the forum state decides that a privilege is important enough to protect its citizens, should it not be able to assert privilege for communications not made within the state, but brought to trial within its boundaries?

Arguments exist on both sides. However, an inflexible rule like the Restatement's is an inappropriate solution to the potential problem. A balancing test that may weigh in favor of providing an "expectation" privilege is a good idea, but it should be tempered with the forum state's claim that greater protection should exist within its boundaries in accordance with the value judgments that were made by the citizens of that state. However, where the forum state recognizes the privilege, the cases do not permit a confidential communication to be divulged even though it was not privileged in the state in which the communication took place.<sup>79</sup> The Restatement may be persuasive authority, but it is not binding and, courts are free to make their own interpretations on conflicts of law.

The flaws of Part (1) of § 139 pale in comparison to the flaws in Part (2) of § 139. Part (2) takes Part (1) and inverts it, addressing the situation in which the state with the most significant relationship to the communication has the privilege while the forum state does not.<sup>80</sup> In this

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<sup>78</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(1) (1971). Section 139 (1) states:

Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.

<sup>79</sup> See generally *Metropolitan Life Ins. Co. v. McSwain*, 115 So. 555, 557 (Miss. 1928) (holding that the law of the state of communications does not apply because the forum state's statute creating the privilege must be considered a rule of evidence, not substantive law); *Webster v. Columbian Nat'l Life Ins. Co.*, 116 N.Y.S. 404, 408 (N.Y. App. Div. 1909); *Wexler v. Metropolitan Life Ins. Co.*, 38 N.Y.S.2d 889, 890 (N.Y. City Ct. 1942).

<sup>80</sup> RESTATEMENT (SECOND) CONFLICT OF LAWS § 139(2) (1971). Section 139(2) states:

Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the

instance, the Restatement states that there is a presumption of admissibility of the statement unless it can be shown that there is some prevailing reason why the court should decide otherwise. The rationale for this provision is not clear. Here the Restatement seems to abandon the notion of "expectations" or "reliance" that it used in Part (1). Even though a mediation proceeding was expected to be held confidential in the state in which the communications were made, it will not be deemed confidential if a lawsuit is brought in a state that does not recognize that privilege. This situation would violate fundamental fairness to the parties involved because the parties should not be punished for reasonable, good faith reliance on the laws of their state.

The Restatement may have avoided many problems in Part (2) by including the "special" reason clause.<sup>81</sup> For example, application of the balancing test would avoid harm in situations where the state in which the communication took place recognizes the privilege while the forum state does not. The Restatement balances the strong interest of the forum state in favoring disclosure of all relevant facts against the interest of the state which has the most significant relationship with the communication to apply its own privileges.<sup>82</sup> However, this determination is still left to the judgment of the court, and must therefore be viewed on a case-by-case basis. The presumption should not run against the state where the communications took place because the parties to the communication had a right to assume that their communications would be held confidential, regardless of whether or not they relied on that right. Even if the correct result is reached through application of the balancing test, the fact that the presumption works against the state of the communications leaves a greater chance for error and injustice. In addition, one could argue that the forum state should recognize the privileges of the state in which the communications took place under the Full Faith and Credit Clause of the Constitution. However, the Supreme Court has not been aggressive in

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forum will be admitted unless there is some special reason why the forum policy favoring admission should not be given effect.

<sup>81</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(2) (1971).

<sup>82</sup> *Id.* § 139 cmt. d. Subsection (2) states:

The state of the forum will wish to reach correct results in domestic litigation. It will therefore have a strong policy favoring disclosure of all relevant facts that are not privileged under its own local law. On the other hand, the state which has the most significant relationship with the communication has a substantial interest in determining whether evidence of the communication should be privileged. It is also the state to whose local law a person might be expected to look for guidance in determining whether to make a certain statement or to make certain information available.

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enforcing the rules of conflicts of law as constitutional law. The Court has traditionally deferred to the forum state in its decision of how to handle a conflict with privileges.<sup>83</sup>

Where the forum state recognizes a privilege not recognized in the state where the communications occurred, the forum court should continue to recognize the privilege. The rationale for recognition is that any failure to enforce the local privilege in local courts may cause a loss in confidence by the public in the sanctity of the mediation relationship. In addition, the practical need for quick decisions at trial favors following the forum rule. Similarly, in a forum that does not recognize a privilege, the court should look outside itself to the law of the state in which the communications took place to determine whether there was a reasonable expectation of confidentiality. If it can be found that there was such an expectation, then the privilege should be upheld. Adherence to these rules will help insure that, barring exceptional circumstances, the mediation privilege would remain safe and confidentiality would not be broken.

### *B. Federal Diversity Cases*

Another potentially troublesome situation occurs when dealing with federal diversity cases. According to the *Erie* doctrine,<sup>84</sup> federal courts in diversity cases must focus on the state rights that are being vindicated. State law affecting those rights may not be ignored even though that law is considered to be procedural. Federal Rule of Civil Procedure 43(a) permits the state law of admissibility to govern where it is more liberal than the federal rule.<sup>85</sup> Since state law varies, a non-uniform law of evidence for

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<sup>83</sup> *The Supreme Lodge, Knights of Pythias v. Meyer*, 198 U.S. 508, 517 (1905).

<sup>84</sup> *Erie v. Tompkins*, 304 U.S. 64, 78 (1938), involved a tort action by Harry Tompkins for injuries received from a passing train while walking along the Erie Railroad's right-of-way in Hughestown, Pennsylvania. Under Pennsylvania law, Erie could be held liable only for gross or willful negligence because Tompkins was viewed as a trespasser. Under the "general" law of the federal courts, Tompkins would be considered a licensee and consequently Erie could be held liable for ordinary negligence. Tompkins, a citizen of Pennsylvania, brought suit against Erie Railroad, a citizen of New York, in a New York federal court under diversity of citizenship. In an effort to promote the uniformity of law throughout the United States, Justice Brandeis concluded that state law supplied the rule of decision. *Id.*

<sup>85</sup> FED. R. CIV. P. 43(a) states: "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."

federal courts in civil cases is implied.<sup>86</sup> Federal courts should treat privileges as matters of substance for the same reasons that the forum state should enforce the privileges of the state in which the communications took place.<sup>87</sup> The federal courts in diversity cases generally have followed the privilege rule announced by statute or decision of the state in which they are sitting.<sup>88</sup> Under the *Erie* test, privileges are matters of substance.<sup>89</sup> Thus, the courts should apply the law of the state in which they are sitting.

In diversity cases, there is strong authority for the proposition that state evidentiary privileges should be recognized and deferred to in the absence of either injustice or extenuating circumstances.<sup>90</sup> Where the interests of more than one state are involved (such as where a deposition is conducted under subpoena from a federal court in one state for use at trial in a federal court in another state), a "center of gravity" approach has been used to determine which state's law will apply when there are multiple states with an interest in the outcome of the litigation.<sup>91</sup> However, this test should be modified to preserve the interests of the state with the strongest privilege statute as long as the state has a significant contact with the pending litigation. This would strengthen the rights of the parties in a mediation proceeding and would not infringe on the rights of states that do not recognize the privilege. Any information sought from a mediation proceeding for trial would have to follow that state's discovery rules and would therefore be discoverable in the normal litigation process. The federal courts should maintain a uniform approach, although not necessarily uniform decisions, as to the treatment of claims of privilege based on state

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<sup>86</sup> See Michael H. Graham, *Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach*, 1991 U. ILL. L. REV. 353, 356 (1991); Thomas F. Green, Jr., *Federal Civil Procedure Rule 43(a)*, 5 VAND. L. REV. 560, 562-63 (1952).

<sup>87</sup> *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (stating that the forum will follow the conflicts rule of the state in which the action is tried in making the choice of the law of privilege).

<sup>88</sup> See *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U.S. 250 (1884) (holding that, in a diversity case, the New York physician-patient statute should be followed in federal courts); see also *In re Freedman*, 541 F.2d 373 (3d Cir. 1976); *Palmer v. Fisher*, 228 F.2d 603 (7th Cir. 1955).

<sup>89</sup> See, e.g., *Samuelson v. Susen*, 576 F.2d 546 (3d Cir. 1978); *Super Tire Eng'g Co. v. Bandag Inc.*, 562 F. Supp. 439 (E.D. Pa. 1983).

<sup>90</sup> See *In re Freedman*, 541 F.2d 373 (3d Cir. 1976); *Palmer v. Fisher*, 228 F.2d 603 (7th Cir. 1955).

<sup>91</sup> See, e.g., *Shaffer v. Heitner*, 433 U.S. 186 (1977) (holding that a balancing test is to be used to determine which state had the most significant contacts with the parties or events in order to determine jurisdiction).



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law in diversity cases. This approach would discourage forum shopping and would insure just results in more cases.

Where both states involved have the same public policy, no choice is necessary. However, in the instance where one state recognizes the privilege and the other does not, the federal court reviewing the claim of privilege should carefully weigh which state, on the facts presented, is most interested in the claim of privilege and, in general, defer to the law of that state. For example, consider a case of a non-party witness deposed in State *A* (his home state) with regard to a diversity case pending in State *B* (the forum state) between citizens of States *A* and *B*, where the conduct in question took place in State *A*. Then, State *A* would appear to have a more direct and substantial interest in the litigation. On the other hand, if State *B* has an overriding public policy on the question of the privilege involved, a federal court may determine that justice requires deference to that policy. If the privilege of State *B* is stronger than that of State *A*, then in order to preserve fundamental fairness, the policies of State *B* should be given preference so as to favor the policy that a state should be able to afford its citizens broader rights than the federal government<sup>92</sup> and other states.

### *C. Federal Question Cases*

Where Congress has declared a substantive federal policy by enacting specific legislation, the weight of authority holds that the federal courts should resolve questions of privilege under federal law, not state law.<sup>93</sup> There are, however, several cases which hold that federal courts may consider and adopt state law where there is a substantial state interest.<sup>94</sup> As a result, federal question cases have recognized a witness's right to assert an evidentiary privilege based upon a state privilege statute.

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<sup>92</sup> See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) (holding that a state may grant greater protection to its citizens than the federal government).

<sup>93</sup> See *Garner v. Wolfinbarger*, 430 F.2d 1093, 1098 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) (finding that the attorney-client privilege applies in federal securities cases); *Falsone v. United States*, 205 F.2d 734 (5th Cir. 1953), *cert. denied*, 346 U.S. 864 (1953) (examining accountant-client privilege in federal tax investigation); *Margaret Hall Found., Inc. v. Strong*, 121 F.R.D. 141 (D. Mass. 1988) (rejecting the need to show fiduciary relationship for the communications of attorney and client to be privileged).

<sup>94</sup> See, e.g., *United States v. Kibell Foods, Inc.*, 440 U.S. 715 (1979) (federal lien priority governed by state law); *United States v. Goings*, 527 F.2d 183 (8th Cir. 1975) (state law applied pursuant to statutory requirement for prosecutions on an Indian reservation); *Garner*, 430 F.2d at 1098 (holding that, in a federal question case, federal courts may apply their own rules of privilege if substantial state interests are not infringed).

The problem becomes complex because federal question cases range from those where federal substantive law is uniformly applied to situations where the federal courts are specifically enforcing state tort law.<sup>95</sup> As the spectrum shifts from federal to state policy, we can expect the rule on recognition of state privilege to shift. Federal courts and administrative agencies applying a national policy have refused to be bound by state privileges.<sup>96</sup> In bankruptcy, where the national policy of uniform enforcement is paramount, the spousal privilege has been abolished.<sup>97</sup> However, in federal tort claim cases, state privileges have been recognized.<sup>98</sup>

Federal compulsion to testify does reduce the effectiveness of the state privilege. For example, a man about to tell his accountant the secrets of his financial success is encouraged to do so by state privilege, but discouraged by the federal government which disregards the state's belief in favor of the long-run economic need to encourage such confidences because of its desire to collect taxes.<sup>99</sup> The federal courts are aware that their proceedings may fail to recognize certain privileges and should therefore be sensitive to construe communication as being within the state privilege.<sup>100</sup> Nevertheless, the end result will ultimately reflect the federal courts' need to implement a policy of national control regardless of whether it impinges on state privilege law.

The ultimate task for a court is to analyze the purpose and force of the federal interest involved and to balance it against the rationale and comparative strength underlying the particular state evidentiary privilege. The court must then determine, on the facts presented, which should dominate. State evidentiary privileges should generally be accepted barring an overriding federal policy which would be undermined by deference to the particular state privilege claimed. The policy interests of uniformity of

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<sup>95</sup> See, e.g., Alfred Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 HARV. L. REV. 66 (1955).

<sup>96</sup> *Falson*, 205 F.2d at 742; *Fraser v. United States*, 145 F.2d 139 (6th Cir. 1944), cert. denied, 324 U.S. 849 (1945).

<sup>97</sup> Bankruptcy Act, ch. 575, § 21(a), 52 Stat. 852 (1938).

<sup>98</sup> See, e.g., *Van Wie v. United States*, 77 F. Supp. 22 (N.D. Iowa 1948).

<sup>99</sup> See, e.g., *Falson*, 205 F.2d at 734.

<sup>100</sup> *United States v. Becton Dickinson & Co.*, 212 F. Supp. 92 (D.N.J. 1962). In this civil antitrust suit, the government sought to subpoena records which the defendant claimed were privileged based on the attorney-client privilege. The court upheld this argument on the ground that the New Jersey statute expressed an overriding public policy contrary to reception of the evidence in question. The court found that it should not deny to the defendant the protection of that state policy in the absence of a statute or rule specifically authorizing the disregard of the privilege. *Id.*

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decision among the federal courts and the policy underlying Federal Rules of Civil Procedure 43(a) need to be considered as well. However, these concerns are secondary in importance to the policy considerations underlying the particular federal substantive right and the particular state evidentiary privilege involved.

Communication privileges involve matters of substantive law. In federal cases, the privileges of the jurisdiction whose substantive policy is decisive should be applied. Unless a serious federal interest is at stake, one who has made confidential statements in reliance on his home state's mediation privilege should not be forced into disclosure of those confidences and penalized for the reliance his state law has fostered because he finds himself in federal court.

### IV. ANALYSIS OF *UNITED STATES V. GULLO*<sup>101</sup>

*United States v. Gullo* involved a motion by the plaintiff Joseph Gullo to dismiss a grand jury indictment which arose out of his participation, as a party, in an arbitration proceeding.<sup>102</sup> In January of 1986, Gullo received a notice from the Community Dispute Resolution Settlement Center indicating that a complaint had been lodged against him. Gullo executed the grievance form which stated that "BY SIGNING THE AGREEMENT, YOU ARE INDICATING YOUR WILLINGNESS TO TRY AND RESOLVE YOUR DISPUTE WITHOUT COURT ACTION. THIS FORM DOES NOT BIND YOU TO THE PROCESS OR GUARANTEE YOUR CASE WILL BE RESOLVED."<sup>103</sup> The form additionally stated that "the neutral will hold all information received during the hearing as confidential and will not voluntarily divulge that information. [The Parties] agree that the neutral will not be subpoenaed by either party in any subsequent legal proceeding."<sup>104</sup> During the course of the proceedings, Gullo made certain statements that were later used against him by the United States in grand jury proceedings. Gullo argued that New York's statute created a privilege of confidentiality for the mediation of arbitration proceedings and decisions.<sup>105</sup> Gullo asserted that this privilege applied, and therefore, the

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<sup>101</sup> 672 F. Supp. 99 (W.D.N.Y. 1987).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 102.

<sup>104</sup> *Id.*

<sup>105</sup> N.Y. JUD. LAW § 849-(b) (McKinney 1992). Section 849-(b)6 states:

Except as otherwise expressly provided in this article, all memoranda, work products, or case files of a mediator are confidential and not subject to disclosure in any judicial or administrative proceeding. Any communication relating to the subject matter of the resolution

indictment should be dismissed because confidential material had been divulged to the grand jury. Alternatively, Gullo argued that all information obtained from and arising out of the arbitration proceeding should be suppressed.<sup>106</sup>

In its analysis, the federal court looked to Federal Rule of Evidence 501 for guidance. Rule 501 leaves privileges to statutory and common law development "in the light of reason and experience."<sup>107</sup> To determine whether to recognize specific privileges that are not "firmly embedded in federal law" requires balancing four factors:

1. the government's need for the information being sought in enforcing its substantive and procedural policies;
2. the importance of the relationship or policy sought to be furthered by the state rule of privilege and the probability that the privilege will advance that relationship or policy;
3. the special need for information to be protected; and
4. the adverse impact on the local policy that would result from non-recognition of the privilege.<sup>108</sup>

The court found a strong policy in favor of full development of the facts in criminal cases.<sup>109</sup> Suppression of the evidence in this situation would impinge on such a policy. The policy sought to be furthered in this instance is the encouragement of participation in alternative dispute resolution proceedings.<sup>110</sup> Although it is difficult to ascertain the correlation between confidentiality and its effect on alternative dispute resolution, confidentiality serves to insure the effectiveness of the dispute resolution

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made during the resolution process by any Participant, mediator, or any other person present at the dispute resolution shall be a confidential communication.

<sup>106</sup> *Gullo*, 672 F. Supp. at 103.

<sup>107</sup> FED. R. EVID. 501.

<sup>108</sup> *Gullo*, 672 F. Supp. at 104 (citing *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976)).

<sup>109</sup> Even absolute privileges may have to yield to the constitutional rights of litigants and particularly criminal defendants. *Davis v. Alaska*, 415 U.S. 308 (1974), involved a criminal defendant who was blocked by the trial court from impeaching the prime prosecution witness to show bias stemming from the witness' probationary status and the witness' juvenile adjudication on a similar charge to that of the defendant. The Supreme Court ruled that the privilege must yield to a criminal defendant's constitutional right to confront a witness. *Id.*

<sup>110</sup> *Gullo*, 672 F. Supp. at 104.

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program.<sup>111</sup> In this case, the court stated that the United States did not show any particular need for the evidence.<sup>112</sup> Finally, the privilege serves to encourage participation in the program and serves to promote candor by those participating. The effectiveness of the program would be reduced by compelled disclosure of information.<sup>113</sup> The court felt that the balancing equation worked in favor of recognizing the privilege and suppression of all statements made during the mediation proceedings.<sup>114</sup>

The decision in *Gullo* is very limited. Most importantly, the case does not involve true conflicts of laws issues. It represents a federal court giving deference to the statutory rules of a state. However, even this is not clear. The decision does not indicate whether the court held the statements inadmissible because of the clause in the signed contract or because of the New York State statutory provision. Furthermore, by applying a balancing test for Rule 501, the court established a precedent of looking at the privilege on a case-by-case basis. As a result, the decision in *Gullo* provides little guidance as to any concrete rule that might be established. Although the decision sees the mediation privilege in a favorable light, no "bright line" test is established, and the value of the precedent set is questionable.

The *Gullo* case reaffirms the notion that if a state mediation privilege is based in substantive policy, then it will be given effect in other jurisdictions as well. Nevertheless, even though the *Gullo* court recognized mediator privilege, its rationale behind doing so is not clear. Because this is a criminal case in a court ordered mediation proceeding in a United States District Court, its holding is limited as courts usually grant greater deference to the defendant in criminal cases.<sup>115</sup> This limits the precedent set by *Gullo*, and the rationale of the holding is at best unclear. However, it is still the only example of a court recognizing another jurisdiction's mediation privilege.

Another case similar to *Gullo* is *Royal Caribbean Corporation v. Modesto*,<sup>116</sup> which involved a claim brought under the principles of substantive federal law in a state court. In this case, Jerry Modesto sued Royal Caribbean and Sun Viking under the Jones Act<sup>117</sup> and general maritime law for personal injuries that were sustained aboard a ship. The defendants did not respond, and the court ordered the parties to mediation, which was unsuccessful. The Defendants moved to enforce an oral

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<sup>111</sup> *Gullo*, 672 F. Supp. at 104.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See ROGERS & McEWEN, *supra* note 8, at 126.

<sup>116</sup> 614 So. 2d 517 (Fla. Dist. Ct. App. 1992).

<sup>117</sup> 46 U.S.C. § 688 (1982).

settlement agreement, which they alleged was reached during the mediation proceedings, and subpoenaed the mediator to testify at a hearing on the motion. The mediator moved to quash the subpoena, invoking the privilege codified in section 44.302 of the Florida Statutes.<sup>118</sup> The Florida Court of Appeals held that:

The enforceability and validity of settlement agreements reached in this case is [sic] determined by federal law — at least where the substantive rights and liabilities of the parties derive from federal law. . . . However, it is not, and cannot be, the rule of law that federal law also governs all procedural and evidentiary issues that arise and that federal maritime law supersedes Florida's Mediation Act."<sup>119</sup>

In this case, the Florida court upheld the state's mediation privilege with vigor, allowing the state privilege to exist in a case brought under federal law. In reality, the laws of privilege are considered to be substantive.<sup>120</sup> So if the court were to remain true to its words, it actually should have applied the federal law with regard to the mediation privilege. In essence, the court treated its state laws as procedural instead of substantive. While this decision advances the privilege in this case, in the long run it may lead to the contraction of the mediation privilege.

## V. POSSIBLE SOLUTIONS

Both *Gullo*<sup>121</sup> and *Modesto*<sup>122</sup> involved instances where courts actively expanded mediation privileges. While both of these decisions work to further mediation privileges, they are limited by the fact that they both involve federal-state scenarios. No true conflicts of laws case has been tried regarding state mediation privileges. These decisions provide little guidance to the more vexing questions of conflicts of laws.

One solution to the conflicts problem would be through the judiciary. The problem with the aforementioned cases is that even though the federal

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<sup>118</sup> This section provides that "[e]ach party involved in the mediation proceeding has a privilege to refuse to disclose, and to prevent any person present at the proceeding from disclosing, communications made during such proceeding whether or not the dispute was successfully resolved." FLA. STAT. ANN. § 44.302 (West 1988).

<sup>119</sup> *Modesto*, 614 So. 2d at 518-19.

<sup>120</sup> For a discussion on the classification of "privilege" as a substantive area of law, see *infra* note 125 and accompanying text.

<sup>121</sup> *Gullo*, 672 F. Supp. at 99.

<sup>122</sup> *Modesto*, 614 So. 2d at 517.

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courts have followed *Gullo*,<sup>123</sup> the holding only applies to federal court cases. States still have to make their own conflicts of laws decisions to resolve interstate disputes. Yet, outside of the Restatement, the states have little guidance in making their decisions. Therefore, the judicial solution is quite limited. However, a ruling from the Supreme Court would not help to clarify the interstate questions because a Supreme Court ruling would be applicable only to federal courts or an individual state conflict situation. In addition, as previously noted, a Supreme Court ruling on conflicts of laws is unlikely because the Court has traditionally given deference to state courts on such matters.<sup>124</sup>

The most effective judicial solution would be for all state courts to make uniform rulings on such privilege cases. This Note argues strongly for the preservation and expansion of the mediation privilege. It must be recognized, however, that whether or not the mediation privilege is expanded, there is much to be said for uniformity of laws. As long as the courts decide uniformly, an attorney will know how to advise his client on the potential future confidentiality of the proceedings. Then all parties would know what to expect even if the privilege is not upheld in all cases.

Another possible solution would involve the drafting of a model statute. This statute would clarify matters and offer some guidance to both state and federal courts. It could also help make the recognition of the mediation privilege more predictable and stable. In addition, it would help protect the expectations of nonresidents and the state's interest in finding the facts in its courts.

Ideally, the statute would be constructed to respect mediation privilege to the greatest extent possible and still be as broad as the Restatement. The great advantage to broad recognition is that the parties involved in a mediation proceeding would know what to expect in future litigation. Unfortunately, enacting a model statute is a slow process because the statute would have to be drafted, and then all state legislatures would have to adopt it. A strong possibility is that not all state legislatures would adopt the statute. In this case, there would be as much confusion and chaos in the law of privileges between states as there was before the model statute.

A more radical solution to this problem involves Congress' apparent authority to enact federal privileges. There has been much debate over Congress' power to enact a federal privilege statute applicable in state law

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<sup>123</sup> *Gullo*, 672 F. Supp. at 99.

<sup>124</sup> See E. Merrick Dodd, Jr., *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws*, 39 HARV. L. REV. 533, 560 (1926) (stating there are not yet any settled doctrines as to the relation between conflicts and constitutional law); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 20 (1991).

cases in federal courts. Initially, experts believed privileges were substantive law under the *Erie* doctrine<sup>125</sup> and thought that federal courts had to honor state privileges in diversity cases.<sup>126</sup> However, the Supreme Court's decision in *Hanna v. Plumer*<sup>127</sup> gave an indication that federal privileges are constitutional. Based on *Hanna*,<sup>128</sup> there is authority indicating that Congress does have the power to enact privileges for federal courts to apply in all cases without regard to the *Erie* doctrine.<sup>129</sup>

Although the wisdom of the federal government overriding state privilege policies has been questioned,<sup>130</sup> the need for a uniform federal privilege law is compelling with regard to the mediation privilege. One solution is for Congress to exempt the mediation privilege from the ambit of Rule 501 of the Federal Rules of Evidences and adopt a uniform law of mediation privilege.<sup>131</sup> Rule 501's general coverage of privileges does not apply when otherwise provided for by an act of Congress.<sup>132</sup> Rule 501 would then require federal courts to apply the federal privilege in all cases barring preemption for the Rule's state law proviso.<sup>133</sup>

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<sup>125</sup> *Erie*, 304 U.S. at 78. The *Erie* doctrine states that:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

*Id.*

<sup>126</sup> Martin J. Ward, *Erie, Privileges, and the Proposed Federal Rules of Evidence: Confusion*, 10 NEW ENG. L. REV. 399 (1975).

<sup>127</sup> 380 U.S. 460 (1964).

<sup>128</sup> *Id.* at 472. The Court stated:

[T]he constitutional provision for a federal court system . . . carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

*Id.*

<sup>129</sup> See, e.g., Charles Alan Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563 (1967). Wright reads *Hanna* to mean that federal courts can constitutionally apply federal evidence rules without regard to the *Erie* doctrine.

<sup>130</sup> See, e.g., WRIGHT, *supra* note 69, at 415.

<sup>131</sup> Price, *supra* note 45.

<sup>132</sup> FED. R. EVID. 501.

<sup>133</sup> FED. R. EVID. 501, Report to House Committee on the Judiciary, H.R. REP. No. 650, 93d Cong., 1st Sess. 8 (1974), reprinted in 1974 U.S.C.C.A.N. 7075, 7082 ("The [state law] proviso is designed to require the application of State privilege law in civil actions and proceedings governed by *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).").



## PRIVILEGE AND CONFLICTS OF LAWS

A uniform test of the mediation privilege that is at least as broad as the privilege in each state would protect the state's interest in the mediation proceeding. Under this test, a federal court could not compel disclosure of any communication protected by state privilege. Unless a state actively discouraged the mediation privilege, there would not be a problem if the federal law should grant greater protection than the state law. Thus, a uniform federal privilege standard that did not infringe on any state's policies would satisfy the rationale of Rule 501, as well as promote certainty in the application of the mediation privilege.<sup>134</sup>

One final option remains: Congress could enact statutes declaring federal choice of law rules for categories of disputes that arise frequently in multi-state disputes. These rules could determine which state's law would apply to a dispute when a conflict arises. Congress has the constitutional power to enact such rules, but has failed to do so.<sup>135</sup> Although a large undertaking, this solution would prove most effective in guaranteeing uniformity when dealing with conflicts of laws cases involving state privileges. The benefits of a federal statute, which would provide a uniform national rule and a single interpreter of this rule, would mark a substantial improvement over the status quo.

## VI. CONCLUSION

The mediation privilege involves matters of substantive policy. The courts should recognize that, implicit in the assertion of a privilege, is an important issue of what constitutes fair treatment of the individual and her right of privacy, particularly in civil litigation. In federal cases, if the mediation privilege exists with any of the interested parties, it should be applied. For the same reasons, the rule should be applied in conflicts cases. To do otherwise would seriously undermine the effectiveness of the mediation privilege. If participants in a mediation proceeding do not feel that their communications will be held confidential, then clients will tend not to divulge information. A sense of trust and informality is paramount to mediation proceedings. If these elements are lacking from a mediation proceeding, then there will be a breakdown in the system. With the overcrowding of courts, society cannot afford to let alternative methods of dispute resolution crumble. Greater uniformity, which allows for an

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<sup>134</sup> For a similar conclusion on the attorney-client privilege, see Rice, *supra* note 73.

<sup>135</sup> See Gottesman, *supra* note 124, at 2. Gottesman argues that no solution to conflicts problems will arrive until "a national solution imposed 'from above,' by a tribunal in which the states are fairly represented, can bring order back to this important area of the law. Congress is that tribunal." *Id.*

extension of the mediation privilege, should be required in conflicts of laws cases.

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