Comment

STEPHANIE RUBSTELLO*

Predictable Protection for Mediated Pendent State Claims: A Judicial Solution

* J.D. Candidate 2012, University of Oregon School of Law; Managing Editor, *Oregon Law Review* 2011–2012. This Comment would not have been possible without the inspiration and thoughtful feedback of Dean Michael Moffitt. None of this would be possible without the love and support of my family and friends. Many, many thanks to you all.

INTRODUCTION

Imagine for a moment that you own a small local bank, struggling to keep its doors open. One day, the lawyer of one of your patrons sends you a letter that alleges the patron deposited $200,000 with your bank, but her certificate of deposit says only $100,000. This alleged mistake by your bank happened years ago, and since that time your bank has been sending the patron statements saying she had deposited $100,000. Because the incident was so long ago, the teller does not remember anything about it, and there is no security video or any other way to verify this patron's story.

You do not have the time or money to take this case to trial, and you want to keep this woman as a customer, not to mention keep all your current customers. You consult with a lawyer and decide to take the case to mediation to try to settle it. You sign a confidentiality agreement with the woman, because to reach a fair settlement and make this case go away, you plan to share sensitive information about your employees and bank procedures. You go through mediation, make what you think is a fair offer (considering neither side has any proof), and the woman rejects it.

* * * *

Ideally, nothing said in mediation would ever become public. Unfortunately for the local bank owner in the case on which this hypothetical is based, the patron went on to disregard the confidentiality agreement and disclose the settlement offer and other sensitive information the bank owner revealed in mediation.[1] The trial court subsequently sanctioned the woman's lawyer, but by that time the damaging information about the bank had already been revealed to the fact finder.[2] In the bank's case, mediation looked like a good choice at the beginning, but after the patron's blatant refusal to follow any sort of confidentiality agreement, the bank owner likely regretted his decision to mediate.

Disputants faced with the choice between a long, expensive court battle or a mediation, where parties have more control over their destiny, will often choose mediation. Although mediation can be the perfect format to resolve some disputes, not every case settles in mediation. Parties cannot be certain which of their communications

---

[1] Paranzino v. Barnett Bank of S. Fla., 690 So. 2d 725, 726–27 (Fla. Dist. Ct. App. 1997).

[2] *Id.* at 729.

during that mediation process will remain within the confines of the mediation and which communications will become public if the case goes to court. Some jurisdictions have adopted a privilege for mediation communications. The basic definition of a privilege is "a rule that gives a person a right to refuse to disclose information to a tribunal that would otherwise be entitled to demand and make use of that information in performing its assigned function."[3] Federal privilege law is a mixture of statutory and common law: Federal Rule of Evidence 501 gives courts the power to adopt and interpret privileges but does not codify any federal privileges. It is up to the courts to adopt privileges in accordance with Rule 501.[4] If a mediated claim ends up in state court, disputants can take solace in the fact that "every state in the Union, with the exception of Delaware, has adopted a mediation privilege of one type or another."[5] If a claim ends up in federal court, however, the situation becomes less clear.

Some districts, from the Central District of California to the Western District of Pennsylvania, have found and applied a federal mediation privilege,[6] whereas other districts, including the Northern District of California, are skeptical of creating a federal mediation privilege.[7] Additionally, depending on whether a state claim in federal court found its way there through diversity or federal question jurisdiction, the outcome is murkier still. A federal court deciding a case based on only state law, which is common in diversity jurisdiction cases, will usually use the applicable state privilege. However, if a state claim is pendent to a federal claim in federal court, the court may apply state privilege to the state claim or may apply federal privilege to the state claim. Which of these paths a court chooses to take may seem arbitrary to disputants trying to navigate the court system and makes little more sense to anyone else.

---

3 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5422 (1980).

4 *See* Jaffee v. Redmond, 518 U.S. 1 (1996) (adopting a psychotherapist–patient privilege under FED. R. EVID. 501).

5 Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1179 (C.D. Cal. 1998) (citing Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney–Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 BYU L. REV. 715, app. A).

6 Sheldone v. Pa. Tpk. Comm'n, 104 F. Supp. 2d 511, 517 (W.D. Pa. 2000); *Folb*, 16 F. Supp. 2d at 1179–80.

7 Olam v. Cong. Mortg. Co., 68 F. Supp. 2d 1110, 1122 (N.D. Cal. 1999).

Without a clear directive from the U.S. Supreme Court, lower courts have seemingly chosen which privilege to use for a pendent state claim based on that day's weather.

Mediation privilege and confidentiality present a multitude of issues. Privilege is not standardized across the states;[8] there is no federal privilege for purely federal claims brought in federal court;[9] and the Alternative Dispute Resolution Act of 1998 requires some sort of mediation confidentiality in federal courts, but there is no standard and likely no enforcement.[10] Additionally, it is often unclear how to protect a mediation agreement when one party is trying to enforce the terms of the agreement against another party.[11] Furthermore, parties may try to contract for their own customized confidentiality requirements; those contracts, however, may not turn out to be as binding as parties imagined them to be.[12]

Choosing among the issues that mediation privilege and confidentiality present, this Comment will address the unpredictability of what, if any, protections mediation communications will have when a previously mediated state claim ends up in federal court. It may be true that mediation does not need confidentiality or privilege to bring maximum benefits to participants.[13] But more and more courts are supporting alternative dispute resolution processes that include formal arbitration, formal mediation, or simply ordering parties to attempt to settle their cases before going to trial.[14] With mediation becoming ever more prevalent, courts need to provide a predictable framework for what protections mediation communications will have if the case goes beyond mediation. Participants and mediators need to know what information will be protected and what information will not be protected.

---

8 Kentra, *supra* note 5.

9 Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 264 (2002).

10 *Id.* at 264–65.

11 Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality*, 35 U.C. DAVIS L. REV. 33, 35–36 (2001).

12 Deason, *supra* note 9, at 303–10.

13 J. Brad Reich, *A Call for Intellectual Honesty: A Response to the Uniform Mediation Act's Privilege Against Disclosure*, 2001 J. DISP. RESOL. 197, 199.

14 Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 30–32 (2003).

This Comment begins by providing a general overview of privilege law. It discusses the differences between privilege and confidentiality, looks at how choice of law plays into privilege issues, outlines state and federal privilege, and shows what can happen when state and federal privileges come into conflict. Next, this Comment focuses on privilege in the context of mediation by contrasting mediation privilege with settlement protections, and it gives an overview of how various courts have looked at addressing questions of mediation privilege and confidentiality. This Comment concludes that, in order to provide claimants with predictability surrounding their mediation communications related to state claims ending up in federal court, federal courts should always treat state mediation communication protections as substantive law and apply state protections to state claims.

I

PRIVILEGE IN GENERAL

Categorizing a certain set of communications as privileged is one of the highest forms of protection the judicial system can offer. Privileged communications are not allowed into court, nor are they often discoverable.[15] When Congress wrote the *Federal Rules of Evidence*, it left the development of privilege law to the courts, asking courts to "define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'"[16] Currently, federal law recognizes only a few privileges, which include attorney–client, psychotherapist–patient, husband–wife, clergymen–penitent, and state secrets.[17] Many more types of seemingly sensitive communications fall outside privilege protections, including "the identity of reporters' confidential sources, . . . parent–child communications, academic peer-review records, documents relating

---

15 *In re* Subpoena Issued to Commodity Futures Trading Comm'n, 370 F. Supp. 2d 201, 207 (D.D.C. 2005).

16 Jaffee v. Redmond, 518 U.S. 1, 8 (1996) (quoting FED. R. EVID. 501).

17 Jeffrey J. Lauderdale, *A New Trend in the Law of Privilege: The Federal Settlement Privilege and the Proper Use of Federal Rule of Evidence 501 for the Recognition of New Privileges*, 35 U. MEM. L. REV. 255, 257 (2005); Raymond F. Miller, Comment, *Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 CONN. L. REV. 771, 775–76 (1999).

to the protective function of the Secret Service, . . . [and] communications between an insurer and an insured."[18]

Privileges are one of the strongest ways to ensure the privacy of communications, and because of that strength, all courts, federal courts especially, have been hesitant to expand the protections of privilege any further than absolutely necessary.[19] The Supreme Court's power to create new privileges under Federal Rule of Evidence 501 is tempered by the Court's view of itself as a truth-seeking body, and it follows the "fundamental maxim that the public . . . has a right to every man's evidence [and] there is a general duty to give what testimony one is capable of giving."[20] Privileged communications are a significant exception to this principle of openness.

Courts may classify certain sets of communications as privileged, however, if a court finds there to be a transcendent public good in keeping that information hidden.[21] The Supreme Court recently recognized communications between a psychotherapist and patient as privileged, and the analysis of the Court in recognizing that privilege sets out the factors the Court considered when discussing whether to adopt a new privilege.[22] First, the Court looked to whether adding a psychotherapist–patient privilege "promotes sufficiently important interests to outweigh the need for probative evidence," and it concluded the privilege did promote important public interests.[23]

Second, the Court discussed the important role confidence and trust play in the relationship between a psychotherapist and a patient, and it recognized that a patient must be able to rely completely on a therapist never disclosing patient information to enable the patient to be open and honest.[24] The Court also noted that openness and honesty create an essential foundation for the psychotherapist–patient relationship to function as it is intended.[25] Third, a privilege must

---

18 *In re Subpoena Issued to Commodity Futures Trading Comm'n*, 370 F. Supp. 2d at 208 n.8 (citations omitted).

19 *See* Lauderdale, *supra* note 17, at 258–59; *see also* Miller, *supra* note 17, at 775–76, 780 (noting that the Supreme Court has recognized nine federal privileges while Connecticut state law recognizes twenty-nine privileges).

20 8 J. WIGMORE, EVIDENCE § 2192, at 64 (3d ed. 1940).

21 *Jaffee*, 518 U.S. at 9.

22 *Id.* at 10–16.

23 *Id.* at 9–10 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)) (internal quotations omitted).

24 *Id.* at 10–11.

25 *Id.*

serve public ends and benefit the public by improving the treatment of the mentally ill.[26]

Last, the Court looked at how each state treated psychotherapist–patient communications.[27] It was persuasive, in the Court's decision to adopt a privilege, that every state and the District of Columbia had some form of psychotherapist privilege; the uniformity showed how important the entire country viewed those communications to be.[28] The Court would likely conduct a similar analysis when it next considers a new privilege.

A. Distinguishing Privilege from Confidentiality

Although the terms *privilege* and *confidentiality* conjure up similar inferences of privacy and secrecy, and although the two are sometimes used interchangeably, *privilege* and *confidentiality* are distinct concepts.[29] Confidentiality is the duty of parties to keep information about their own case secret, and this is often a voluntary choice.[30] Parties can write and sign agreements delineating the extent of confidentiality they prefer in each transaction.[31] But unless it is incorporated into a court order, confidentiality may not be enforceable and parties may be forced to rely on the opposing party to keep their word to not share information obtained in the transaction.[32] Privilege takes confidentiality and ramps it up a step by preventing third parties from compelling discovery of privileged information.[33] Courts do not, in any context, require parties to disclose privileged information, and in some cases, courts prohibit parties from disclosing privileged information, even if the parties want to share it.[34]

The *Federal Rules of Evidence* do little more than say that privileges in federal cases are subject to any privileges created by federal common law and state cases are subject to privileges created by state common law.[35] The Rules do not discuss confidentiality,

---

[26] *Id.* at 11.

[27] *Id.* at 12–13.

[28] *Id.*

[29] Molina v. Lexmark Int'l, Inc., No. CV 08-04796 MMM (FMx), 2008 WL 4447678, at *10 (C.D. Cal. Sept. 30, 2008).

[30] *Id.*

[31] Deason, *supra* note 9, at 303.

[32] *Id.* at 304–05.

[33] *Molina*, 2008 WL 4447678, at *10.

[34] FED. R. CIV. P. 26(b)(1).

[35] FED. R. EVID. 501.

which further indicates the less formal nature of confidentiality.[36] But the only privilege the Rules mention specifically is the existence of an attorney–client privilege.[37] And in recognizing that privilege, the Rules describe the privilege only so far as to say it "means the protection that applicable law provides for confidential attorney–client communications."[38]

B. Choice of Law

With both federal and state privileges, choice of law comes into play when courts have to decide which privilege to apply. In general, when a federal court sits in diversity, the court must use the substantive laws of the forum state and federal procedural laws: a rule known as the *Erie* doctrine.[39] In explaining the *Erie* doctrine, the Court reasoned that Congress intended diversity jurisdiction to give parties equal access to state law no matter who the parties were and where those parties were from, not to let parties duck state laws.[40] The *Erie* doctrine raised the question of what constituted substantive law and what constituted procedural law.[41] In deciding whether a law is substantive or procedural, the court looks to "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[42] The Court further explained, in *Hanna v. Plumer*, that when a state claim is filed in federal court, courts may consider whether or not the state rule would "have a marked effect upon the outcome of the litigation."[43] Litigants cannot just pick and choose a patchwork of state and federal rules and laws to decide their case.[44]

The *Federal Rules of Evidence* are procedural and apply to all cases in federal district courts, courts of appeal, and the Supreme Court; therefore, the Rules apply in diversity actions.[45] Federal Rule of Evidence 501 says that in federal courts, state privileges apply

---

[36] *See id.* at 501, 502.

[37] *Id.* at 502.

[38] *Id.* at 502(g)(1).

[39] Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

[40] *Id.* at 74–75.

[41] Hanna v. Plumer, 380 U.S. 460, 465–66 (1965).

[42] *Id.* at 468.

[43] *Id.* at 469.

[44] *See id.*

[45] FED. R. EVID. 1101.

when state law supplies the rule of decision.[46] Additionally, the House of Representatives committee notes for Rule 501 further explain that "privilege rules are and should continue to be considered substantive for *Erie* purposes."[47] While the committee notes are not law, they are helpful in interpreting the rules.

In practice, states generally recognize more privileges than federal courts do.[48] If federal courts consider state privileges substantive, they *would* apply state privileges to state claims in federal court. But if federal courts consider state privileges procedural, they *would not* apply state privilege to state claims in federal court, instead using a relevant federal privilege if one exists. Federal privileges, however, do not exist in parallel to many state privileges. As a result, if state privileges are considered procedural, much of the information that would be protected had the claim been brought in state court would be admissible in federal court.

Uncertainties with choice of law come into play when a state claim makes its way into federal court under supplemental jurisdiction and the claim is attached to a federal question claim. Federal courts have supplemental jurisdiction over claims that are of the same case or controversy as a claim over which the federal courts have original jurisdiction.[49] Supplemental jurisdiction is often used, and most importantly for purposes of this Comment, to bring state-law claims into federal courts when the state claims are related to a claim brought under federal question jurisdiction. And although there is a line of precedent over what law, state or federal, applies in diversity cases,[50] courts have been less clear about what law applies to cases brought under supplemental jurisdiction.[51] Courts should use the state law to decide the substantive portion of the claim, but because of the lack of precedent, courts have more leeway in using federal privileges on state-law claims under supplemental jurisdiction. Bringing both state and federal claims in one suit is not uncommon, but having different

---

46 *Id.* at 501.

47 Samuelson v. Susen, 576 F.2d 546, 550 (3d Cir. 1978).

48 Miller, *supra* note 17, at 775–76, 780 (noting that the Supreme Court has recognized nine federal privileges while Connecticut state law recognizes twenty-nine privileges).

49 28 U.S.C. § 1367 (2006).

50 *See* Hanna v. Plumer, 380 U.S. 460 (1965); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

51 *See* Bruce I. McDaniel, *Situations in Which Federal Courts Are Governed by State Law of Privilege Under Rule 501 of Federal Rules of Evidence* (§ 2[a]), 48 A.L.R. FED. 259, 261–62 (1980).

standards to judge similar claims brings up a multitude of uncertainties.

Virtually every state has some sort of protection for mediation communications.[52] Some may think that the state's layer of protection is enough, because if the mediation fails and the parties end up in state court, the state privilege protects the mediation communications. But not all failed mediations go to state court. Mediation participants may never imagine their case could end up in federal court, and many participants settle in mediation and never have issues with their communications being disclosed. Others find themselves in state court where they can rely on state protections of mediation communications. Some cases, however, will end up in federal court. And it is in federal court where parties risk having their statements from mediation admitted contrary to their expectations and intentions.

C. When State and Federal Privileges Conflict

The question of which privilege law, state or federal, applies in federal courts begins in a straightforward manner. The *Federal Rules of Evidence* apply in federal courts, even in diversity cases.[53] As Part I.B of this Comment explains, Rule 501 states that federal common law or statutory privilege governs, unless "[s]tate law supplies the rule of decision, [then] the privilege . . . shall be determined in accordance with [s]tate law."[54] State privilege laws protect parties filing a claim under state law in state court.[55] State privilege law should also cover cases brought in federal court under diversity jurisdiction when only state claims are raised.[56] Federal privilege law will cover cases brought under federal question jurisdiction when only federal claims are raised.[57]

Privilege law becomes complicated when a case in federal court involves both state and federal claims. A literal interpretation of Rule 501 seems to suggest applying state privilege to the part of the claim decided under state law and federal privilege to the part of the claim decided under federal law.[58] Most courts have rejected this approach

---

52 Kentra, *supra* note 5.

53 Fitzgerald v. Expressway Sewerage Constr., Inc., 177 F.3d 71, 74 (1st Cir. 1999).

54 FED. R. EVID. 501.

55 Super Tire Eng'g Co. v. Bandag Inc., 562 F. Supp. 439, 440 (E.D. Pa. 1983).

56 Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 458 (N.D. Cal. 1978).

57 *Id.*

58 *Id.*

because of the difficulty in applying two different privileges to one set of communications in the same case.[59] The most common approach when there are both federal and state claims and the privileged evidence is relevant to both is to use the federal privilege for all of the claims.[60] A U.S. Senate Report suggests that the intent of Rule 501 aligns with the common approach: that federal privilege law is to be applied to pendent state-law claims when the claims arise in a federal question case.[61]

The U.S. Supreme Court has yet to define how to apply privileges when confronted with a case involving both state and federal claims, and this absence of a ruling has resulted in wide variation in how different lower courts approach the same issue.[62] But the Court is aware the variation exists.[63] When the Court established the psychotherapist–patient privilege, the case involved both a federal and a state claim, and the forum state had a psychotherapist–patient privilege.[64] Because the Court decided there was also a federal privilege, both the federal and state claims were covered by a psychotherapist privilege.[65] The Court did point out that lower courts are split over what to do when there are both federal and state claims in federal court and certain information is protected by state privilege but not by federal privilege.[66] Unhelpfully for lower courts, because the parties did not raise the question of which privilege to use, and it was not outcome-determinative, the Court did not express an opinion on which privileges federal courts should use.[67]

This issue comes into play when a state claim uses supplemental jurisdiction to accompany a federal claim into federal court. Cases result in different outcomes depending on whether the

---

59 *Id.*

60 Pinkard v. Johnson, 118 F.R.D. 517, 519–20 (M.D. Ala. 1987) (citing Wm. T. Thompson Co. v. Gen. Nutrition Corp., 671 F.2d 100, 104 (3d Cir. 1982); Mem'l Hosp. v. Shadur, 664 F.2d 1058, 1061 n.3 (7th Cir. 1981)); *see also* Motley v. Marathon Oil Co., 71 F.3d 1547, 1551 (10th Cir. 1995); von Bulow v. von Bulow, 811 F.2d 136, 141 (2d Cir. 1987); Sabree v. United Bhd. of Carpenters & Joiners, Local No. 33, 126 F.R.D. 422, 424 (D. Mass. 1989).

61 *Sabree*, 126 F.R.D. at 424 (quoting S. REP. NO. 93-1277, at 12 n.16 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059 n.16).

62 *See* Jaffee v. Redmond, 518 U.S. 1, 15–16 n.15 (1996).

63 *Id.*

64 *Id.*

65 *See id.*

66 *Id.*

67 *Id.*

communications the party is trying to keep privileged are relevant to both the state and federal claims, or whether the communications are relevant to just the state claim. The following analysis focuses on supplemental claims where, first, communications are relevant only to state claims and, second, communications are relevant to both state and federal claims.

First, the communications a party is trying to keep privileged may be relevant only to the state claim. Some courts will apply the state privilege to the state claim because there is no conflict with keeping communications privileged for the only claim to which they are relevant.[68] This approach is supported by an opinion from the U.S. District Court for the Western District of Texas, which found nothing in Rule 501 that explicitly limits that statement to diversity jurisdiction cases.[69] The court said that applying state privilege to state claims, as long as the documents are not also relevant to federal claims, is the plain and more correct reading of Rule 501.[70]

Another court chose the opposite route and applied federal privilege to information that was relevant only to the pendent state claim.[71] The Eastern District of Pennsylvania preferred the policy of having a bright-line rule that dictated using federal privilege for the entire claim, even if the documents were not relevant to the federal claim.[72] The court cited the federal policy for narrow construction of privileges and argued that once a plaintiff has filed an action with both federal and state claims, it is not up to the court to lighten the plaintiff's burden.[73]

Second, and more complicatedly, the communications a party wants to keep privileged may be relevant to both the state and federal claims. Without federal or state privilege, and assuming the evidence met all other statutory barriers, there would be nothing to keep the sensitive information out of court. This is an acceptable outcome in that while parties may not want information disclosed in court, no one was under any false expectations that the information would be protected. If there were a state privilege but not a federal privilege,

---

[68] Garza v. Scott & White Mem'l Hosp., 234 F.R.D. 617, 625 (W.D. Tex. 2005); *see also* Motley v. Marathon Oil Co., 71 F.3d 1547, 1551 (10th Cir. 1995); Freeman v. Fairman, 917 F. Supp. 586, 588 (N.D. Ill. 1996).

[69] *Garza*, 234 F.R.D. at 625.

[70] *Id.*

[71] Doe v. Special Investigations Agency, Inc., 779 F. Supp. 21, 23 (E.D. Pa. 1991).

[72] *Id.*

[73] *Id.* at 23–24.

however, the court would likely apply the lack of federal privilege to both the state claim and the federal claim and allow the communications to be disclosed.[74] This would happen even if the disclosure were contrary to how the claim would be handled in state court or in a federal court sitting in diversity.[75] A party may see this outcome as unfair if it intended to bring a state claim in state court and wanted the privilege but ended up in federal court through removal.

Admittedly, it would be difficult for courts to have two very similar claims and apply two different privileges to the different claims. It could mean a set of documents or a transcript would be admissible for one claim but not for another, and the trier of fact would have to keep everything separate and judge similar claims based on different evidence. And although a strict reading of Rule 501 might suggest using both federal and state privileges in the same case, there are fewer federal privileges than state privileges and some believe "it would be meaningless to hold [a] communication privileged for one set of claims but not for the other."[76] The idea is that once confidentiality is broken at all, privilege has disappeared.[77]

In keeping with a Senate Report suggesting that federal privilege should be applied to pendent state-law claims in federal question cases, courts usually defer to federal privilege to cover every claim when communications are relevant to both the federal- and state-law claims.[78] A majority of circuits faced with this question follow the Senate Report's suggestion.[79] An Illinois district court also ended up at this same result but based its decision on the federal policy of favoring admission of evidence whenever possible.[80]

---

[74] This approach reflects the plain meaning of Rule 501. *See* Pinkard v. Johnson, 118 F.R.D. 517, 519–20 (M.D. Ala. 1987) (citing S. REP. NO. 93-1277, at 12 n.16 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059 n.16) (following FED. R. EVID. 501); *see also* McDaniel (§ 3), *supra* note 51, at 264–67.

[75] *See* Pearson v. Miller, 211 F.3d 57, 67–68 (3d Cir. 2000).

[76] Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 458 (N.D. Cal. 1978).

[77] *Id.*

[78] *Pinkard*, 118 F.R.D. at 519–20 (citing S. REP. NO. 93-1277, at 12 n.16 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059 n.16).

[79] Virmani v. Novant Health Inc., 259 F.3d 284, 286 n.3 (4th Cir. 2001) (agreeing with *Pearson*, 211 F.3d at 66, Hancock v. Dodson, 958 F.2d 1367, 1373 (6th Cir. 1992); von Bulow v. von Bulow, 811 F.2d 136, 141 (2d Cir. 1987)).

[80] FDIC v. Mercantile Nat'l Bank of Chicago, 84 F.R.D. 345, 349 (N.D. Ill. 1979) (citing S. REP. NO. 93-1277, at 12 n.17 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059 n.17).

Other courts have also come up with their own creative ways to clarify the confusion. The Western District of Wisconsin suggested splitting up the federal and state claims and hearing each separately to maintain the integrity of the separate privileges.[81] The Wisconsin court was dealing with different versions of attorney–client privilege, where most of the disputed information was going to be privileged in some way, and therefore the court did not have to decide between two extremes of privilege versus no privilege.[82] Another court suggested that if a party found federal privilege law too unfavorable to a state claim, the party could decline to bring the state claim along with their federal claim or bring both claims in state court.[83] This argument is flawed, however, because through the opposing party's use of joinder and/or removal, a party could end up in federal court without choosing to do so. Also, forcing parties to abandon valid claims because they want to keep certain communications secret ultimately deprives parties of possible remedies otherwise provided when those parties have the opportunity to bring multiple claims for the same injury.

II
PRIVILEGE LAW IN THE CONTEXT OF MEDIATION

Many of the arguments and issues relating to protections for communication in other contexts also apply to both settlement and mediation. Many mediations result in settlements. But not all mediations are meant to settle cases, and not all settlements take the form of formal mediation. Regardless of form, the goals and rationale for protecting both mediations and settlement offers are similar, although protection for settlement offers, having been codified in the *Federal Rules of Evidence*, rests on a more established viewpoint. The current states of both settlement privilege and mediation privilege are set out below.

A. Settlement Protections and Privilege

Federal Rule of Evidence 408 currently provides some protection to settlements and offers to settle. Rule 408 disallows only the use of settlement offers in court to prove liability or the amount of a claim.

---

[81] Research Inst. for Med. & Chemistry, Inc. v. Wis. Alumni Research Found., 114 F.R.D. 672, 675 n.2 (W.D. Wis. 1987).

[82] *Id.*

[83] Doe v. Special Investigations Agency, Inc., 799 F. Supp. 21, 23 (E.D. Pa. 1991).

The settlement offer can be admitted into court in other ways. Rule 408 provides that any offer to settle (in mediation or not) can be admitted for purposes such as showing bias, undue delay, or obstruction of a criminal proceeding.[84] Even though evidence of a settlement or settlement offer is supposed to be used for very limited purposes, once the evidence is admitted it can often be hard for the trier of fact, especially a jury, to compartmentalize those facts from the question of liability for other issues.

For example, there could be a situation where the defendant made a series of very generous settlement offers in order to avoid the time, expense, and uncertainty of taking a case to trial, and the plaintiff only equivocated, never taking the offer, but never expressing a strong desire to go to trial. The defendant may want the court to admit those settlement offers as evidence of the plaintiff's delay in concluding the case. The jury might infer, however, that the defendant felt guilty, and was guilty, simply because the defendant wanted to settle. Thus, a settlement or offer of settlement can influence the jury's perception of a party's guilt or innocence even if that perception is contrary to what the weight of the *admissible* evidence suggests. Rule 408 was established based on the public policy favoring compromise and dispute settlement.[85] Because Rule 408 allows sensitive information into court for a variety of purposes, however, the Rule can be problematic for parties who never expected their settlements or settlement offers to be introduced as evidence at trial.

Some federal courts have discussed whether or not to adopt a settlement privilege to further protect settlement communications. Statements covered by Rule 408 are discoverable because the statements can be used for certain purposes at trial.[86] If settlements and settlement offers were privileged, the opposing side would not even be able to access the statements through discovery.[87] A settlement privilege tracks with one of the purposes of Rule 408, which says "statements made in furtherance of settlement are *never* relevant."[88] The advisory committee for the *Federal Rules of*

---

84 FED. R. EVID. 408.

85 FED. R. EVID. 408 advisory committee's note.

86 Goodyear Tire & Rubber Co. v. Chiles Power Supply, 332 F.3d 976, 979 (6th Cir. 2003).

87 *Id.*

88 *Id.* at 983.

Evidence even noted that a settlement "offer may be motivated by a desire for peace rather than from any concession of weakness of position."[89]

The Sixth Circuit's privilege rule exemplifies the argument for adopting a federal settlement privilege.[90] When the Sixth Circuit adopted a federal settlement privilege, it argued that there is "a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations."[91] Without a privilege, parties can expect to see their proposed settlement solutions appear "on cross examination, under the ruse of 'impeachment evidence,' by some future third party."[92] Additionally, the court argued that parties must be able to be creative in settlements by offering hypothetical concessions and developing possible trade-offs that will not be used against the parties in the future.[93]

The District Court for the District of Columbia put forth the argument against a federal settlement privilege.[94] The court rejected the Sixth Circuit's reasoning and said that courts cannot create privileges whenever they please because privileges impair the court's search for the truth.[95] The court also argued that a lack of consensus supporting settlement privilege in federal courts or state law also weighs against adopting a settlement privilege.[96] Deference to Congress was another consideration, as the district court said Congress wanted to protect settlement communications only under a few circumstances and did not support the wider scope of protection offered by mediation privilege.[97]

There are strong arguments both for and against a rule making settlement offers and agreements privileged, but few courts, state or federal, currently offer a settlement privilege. There is still protection for cases in federal court through Rule 408, but it is not unimaginable that an opposing party could circumvent the meaning of Rule 408 by arguing that it is admitting a settlement offer to show bias, even when

---

89 *Id.* (quoting FED. R. EVID. 408 advisory committee's notes).

90 *Id.* at 981.

91 *Id.* at 980.

92 *Id.*

93 *Id.*

94 *In re* Subpoena Issued to Commodity Futures Trading Comm'n, 370 F. Supp. 2d 201, 212 (D.D.C. 2005).

95 *Id.* at 208.

96 *Id.* at 209–10.

97 *Id.* at 211.

the party's real purpose is to convince the jury the other party is liable. A high level of protection for settlements would be better encouragement for parties to attempt to settle an issue.

B. Mediation Privilege

There is no widely established federal mediation privilege. Some courts have adopted a federal mediation privilege, but most courts that have been presented with this issue have chosen not to recognize any kind of federal mediation privilege.[98] Under basic choice-of-law doctrine, if a mediated claim ends up in state court, or in federal court on diversity jurisdiction with no federal claims, then the parties are entitled to whatever privilege the forum state has to offer.[99] If there is a federal claim, the court will most likely hold that federal privilege law applies—resulting in no privilege for mediation communications.[100]

Even courts that have adopted federal mediation privileges have supported their adoption in different ways. The Central District of California went through the factors the Supreme Court used to adopt the psychotherapist–patient privilege in *Jaffee* and used those factors to analyze and adopt a federal mediation privilege.[101] The first factor was confidence and trust necessary between the parties for the relationship to be productive.[102] The goal of many confidential mediation programs is to benefit parties by providing a safe space to speak candidly about each side's strengths and weaknesses and work together to propose possible solutions. Conversely, admitting mediation communications into court proceedings induces parties to stay antagonistic and only share information they do not mind becoming public.[103] The second factor is whether the privilege serves the public good.[104] A mediation privilege would serve the public "by encouraging prompt, consensual resolution of disputes, minimizing the social and individual costs of litigation, and markedly reducing

---

98 *See, e.g.*, Olam v. Cong. Mortg. Co., 68 F. Supp. 2d 1110, 1122 (N.D. Cal. 1999).

99 *See supra* Part I.B.

100 *See supra* notes 78–79 and accompanying text.

101 Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1179–80 (C.D. Cal. 1998).

102 Jaffee v. Redmond, 518 U.S. 1, 10 (1996); *Folb*, 16 F. Supp. 2d at 1171.

103 *See Folb*, 16 F. Supp. 2d at 1171–76.

104 *Jaffee*, 518 U.S. at 11.

the size of . . . court dockets."[105] Third, the privilege must not unduly affect evidence produced.[106] A mediation privilege allows participants to feel secure sharing sensitive information in promotion of a settlement while knowing that those disclosures will not be allowed into court—and many of the disclosures may be things they would not have shared if there were no mediation privilege.[107] Fourth, the court looks to how the states have treated the privilege.[108] The adoption of some sort of mediation protections by forty-nine states and the District of Columbia demonstrates that protecting mediation communications has wide support.[109] Each of these factors pointed to, and resulted in, the court adopting a federal privilege for mediation.[110]

The Central District of California was one of the first courts to recognize a federal mediation privilege. The court was faced with a federal question that included pendent state claims on an employment termination discrimination case.[111] The plaintiff, Scott Folb, alleged that the defendant, Motion Picture Industry Pension & Health Plans (the Plans), discharged Folb because he objected when the defendant violated fiduciary duties under the Employee Retirement Income Security Act (ERISA).[112] The Plans alleged that Folb had sexually harassed another employee and that that was why Folb was fired, not for his whistle-blowing activities.[113] Folb attempted to compel "a mediation brief and related correspondence" between the Plans and the employee whom Folb allegedly sexually harassed.[114] The court opinion suggests that the brief may have indicated that the Plans argued in its mediation that the employee had never actually been sexually harassed, contrary to the Plan's allegations in the termination suit.[115] The trial court refused to admit the mediation brief as evidence.[116] Because the suit was under federal question jurisdiction with pendent state-law claims, the precedent in the Ninth Circuit

---

105 *Folb*, 16 F. Supp. 2d at 1176.
106 *See Jaffee*, 518 U.S. at 12.
107 *Folb*, 16 F. Supp. 2d at 1177–78.
108 *Jaffee*, 518 U.S. at 14.
109 *See Folb*, 16 F. Supp. 2d at 1178–79.
110 *Id.* at 1179–80.
111 *Id.* at 1166.
112 *Id.*
113 *Id.*
114 *Id.* at 1167.
115 *Id.*
116 *Id.*

required the district court to use federal privilege law for every claim in the case.[117] The court then had to decide whether to adopt a federal mediation privilege to cover the brief; the court chose to adopt a privilege.[118]

Another court, the Western District of Pennsylvania, used similar reasoning, arguing that without a "privilege, parties and their counsel would be reluctant to lay their cards on the table so that a neutral assessment of the relative strengths and weaknesses of their opposing positions could be made."[119] That case involved an alleged admission made during a formal mediation, and without the mediation, the party would likely not have made the admission.[120] And although the Eastern District of Pennsylvania has not yet formally adopted a federal mediation privilege, that court has noted that the reasoning from the Western District was persuasive.[121]

Another consideration that the Pennsylvania district court cited was an equity argument. The court did not want the other side to benefit from an alleged admission that came only as a result of attending mediation.[122] If mediation communications are admissible in court, that rule could create a perverse incentive for parties to go to mediation as a discovery tool, to compel the opposing party to show their hand, and to then use that at trial.

A Massachusetts district court framed protecting mediation communications as an evidentiary privilege.[123] The court excluded evidence of a settlement offer made during mediation by citing Massachusetts's mediation statute.[124] The other side tried to argue that the settlement offer was admissible under Rule 408(b), which permits settlement offers as long as the offer is not admitted to prove liability.[125] In this case, the party wanted to use the settlement offer to show state of mind, not liability.[126] The settlement offer was applicable only to the state claim, and the court said that the

---

117 *Id.* at 1169.

118 *Id.* at 1170.

119 Sheldone v. Pa. Tpk. Comm'n, 104 F. Supp. 2d 511, 514 (W.D. Pa. 2000).

120 *Id.* at 515.

121 Sampson v. Sch. Dist. of Lancaster, 262 F.R.D. 469, 477 n.6 (E.D. Pa. 2008).

122 *Sheldone*, 104 F. Supp. 2d at 515.

123 Logistics Info. Sys., Inc. v. Braunstein (*In re* Logistics Info. Sys., Inc.), 432 B.R. 1, 8-9 (Bankr. D. Mass. 2010).

124 *Id.*

125 *Id.*

126 *Id.*

mediation statute created an evidentiary privilege, so it excluded the settlement offer.[127]

A different way to look at adopting mediation privilege, as described more thoroughly in Part I.B, is to consider whether the state privilege is procedural or substantive under the *Erie* doctrine. If state privileges are substantive, they would apply to state claims in federal court, but if state privileges are procedural, then federal privileges apply and there is no federal mediation privilege.

A Washington district court construed the state's Uniform Mediation Act (UMA) as substantive law, which was to be used for state claims because the reason that Washington implemented the UMA was substantive.[128] The court said that the UMA was not a privilege but was a rule concerning evidence admissibility.[129] Additionally, Washington's UMA was an exception to using federal rules for evidence admissibility in diversity cases.[130] The court considered the UMA substantive law because it is "an integral component of Washington's substantive state policy of protecting the privacy of mediation communications and is properly characterized as substantive law within the meaning of *Erie*."[131] The Washington case involved insurance claims from a car accident.[132] One of the claims was mediated, and the party settled with one insurance company some time after the mediation.[133] The two insurance companies involved litigated against each other, and the company that had settled requested all of the communications of the other company surrounding the mediation.[134] Washington had adopted the UMA, which privileges mediation communications, not allowing them to be subject to discovery or admissibility.[135] Ultimately, the court ended up admitting the mediation communications as evidence because the mediated dispute was a different issue than the suit in court in accordance with the rules of the UMA.[136]

---

127 *Id.* at 9.

128 Mut. of Enumclaw v. Cornhusker Cas. Ins. Co., No. CV-07-3101-FVS, 2008 WL 4330313, at *2 (E.D. Wash. 2008).

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.* at *1.

133 *Id.*

134 *Id.*

135 *Id.* at *3.

136 *Id.*

Another court, the District Court for the Northern District of California, used a variation of Washington's approach and concluded that although the court applies state privilege law for a state claim, extra procedures the state had developed surrounding mediation communications were procedural for *Erie* purposes and thus did not apply.[137] The district court discussed the state court's procedure of holding *in camera* examinations to determine what, if anything, from the mediation to allow into the trial.[138] The court reasoned that, as long as the court was sensitive to the issues of disclosure of mediation communications, *Erie* did not "impose any such procedural straight jacket on federal [courts]."[139] The decision went more to the methods used to screen the mediator's testimony than to the testimony itself, but it showed how procedure and substance are intertwined.[140] Thus, federal courts may follow the spirit of state mediation privileges but not always the exact procedures states have adopted.

Yet another California court refused altogether to decide on the issue of whether a mediation privilege existed, saying that a letter sent as preparation for mediation was relevant to the amount in controversy, which is a federal and not a state issue.[141] In that case, when mediation did not work, the parties ended up in state court, and then one party tried to remove to federal court using the mediation letter as evidence of the amount in controversy.[142] The other side, which wanted to stay in state court, argued that the letter was privileged under California's evidence code pertaining to mediation.[143] The court declined to say whether the letter would be privileged under California law but used Rule 501 to say that because removal was a federal issue, the letter was not privileged.[144] The court used the letter, decided that the party had waited too long to remove the case, and sent it back to state court.[145]

Although a few courts have adopted a federal mediation privilege, courts have gone about it in different ways. One court mirrored the

---

137 Olam v. Cong. Mortg. Co., 68 F. Supp. 2d 1110, 1126 (N.D. Cal. 1999).

138 *Id.*

139 *Id.*

140 Christopher DeMayo, Note, *The Mediation Privilege and Its Limits*, 5 HARV. NEGOT. L. REV. 383, 388 (2000).

141 Babasa v. Lenscrafters, Inc., 498 F.3d 972, 974 (9th Cir. 2007).

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.* at 975.

analysis of the U.S. Supreme Court; other courts have looked at evidentiary privileges and equity concerns. Yet another set of courts has used a procedural versus substantive analysis. Until the Supreme Court adopts or rejects a federal mediation privilege, mediation participants will face uncertainty when any failed mediation goes to trial. The parties may argue for a privilege, and in some jurisdictions the courts may adopt one. Currently the most uncertainty relates to state claims pendent to federal claims. And this uncertainty is something the courts can address now, before the Supreme Court adopts an overarching federal mediation privilege.

III
PREDICTABILITY FOR STATE CLAIMS—A JUDICIAL SOLUTION

Uncertainty for participants in mediation will not magically disappear. This Part discusses three options the judicial system has in light of the ambiguity facing anyone who is choosing whether or not to mediate a claim and how much information to disclose if they do mediate. First, as this Comment recommends, courts could treat state mediation communication protections as substantive, meaning that every court will have to use the state protections for a state claim. Second, the Supreme Court could adopt a federal mediation privilege. Third, the courts could ignore the issue and do nothing.

A. Treat Mediation Communication Protections as Substantive State Law

The best way for courts to provide predictability for mediation participants in the least amount of time is to treat the forum state's mediation communication protections as substantive. Treating state mediation protections as substantive law means that if a state claim ends up in court through federal question jurisdiction as a pendent claim, the court will have to use the forum state's mediation protections when deciding the state claim. This is a solution that, although not comprehensive for all mediation participants, can be implemented immediately. It does not require waiting for Congress to pass new evidence rules that include a mediation privilege. It does not require us to wait around for all states to agree on the same mediation privileges. And it does not depend on the Supreme Court to decide whether there is a federal mediation privilege. As a result, parties mediating what could turn out to be a state-law claim can look to the laws of their forum state with more certainty. If a party's claim

ends up in state court, in federal court on diversity jurisdiction, or in federal court on federal question jurisdiction, the state claim will have the same protections. There will not be any surprises regarding the mediation communications.

Almost all states have some sort of protection for mediation confidentiality.[146] Currently, most courts view mediation protections as evidentiary rules. Because evidentiary rules are procedural, the state evidentiary rules are not used in federal courts—even for state claims. And although evidentiary concerns are often an aspect of mediation confidentiality, state mediation acts encompass a wider range of issues.

The District Court for the Eastern District of Washington said that Washington's Uniform Mediation Act "embodie[d] a state substantive interest in the confidentiality of mediation discussions in order to promote candid participation in mediations. . . . [It] is an integral component of Washington's substantive state policy of protecting the privacy of mediation communications . . . ."[147] States pass mediation acts and other mediation protections not because they are aiming to regulate evidentiary rules, but because the states want to support mediation. States have an interest in solving disputes between their citizens in quick and cost-effective ways. States also have an interest in protecting the privacy of their citizens. These state interests should be preserved in federal court, and parties should not be able to circumvent them simply by pleading an extra and possibly unnecessary claim.

For example, a state that wants to encourage mediation passes strong protections for mediation communications. Citizens of that state know about these protections or find out about them when choosing whether to participate in mediation. More people may turn to mediation before litigation because of the strong protections for mediation communications. If any of those mediations do not settle and end up in state court, the parties will get the benefit of having been able to be as candid as they wanted to be in mediation, and they will not worry about those statements coming into a trial. If the federal courts in that jurisdiction do not apply state mediation protections, however, parties may still be hesitant to speak openly in mediation because of the risk that the case could in some way wind

---

146 Kentra, *supra* note 5.

147 Mut. of Enumclaw v. Cornhusker Cas. Ins. Co., No. CV-07-3101-FVS, 2008 WL 4330313, at *2 (E.D. Wash. 2008).

up in federal court and their mediation communications would be admissible evidence. Therefore, even if the state strongly encourages and protects mediation, the local federal courts can completely undermine the state's interest if the federal courts do not use state mediation protections.

State protections for mediation communications are likely to be stronger than federal protections, leaving room for parties to manipulate claims to get mediation communications admitted as evidence at trial. If a party wants mediation communications regarding a state claim admitted at trial, but it cannot get them admitted because the state strongly protects mediation, that party has an incentive to do anything it can to directly file in or remove the case to federal court.

Differences in mediation privileges or levels of confidentiality protections can affect the outcome of a case. The differences could also affect a party's choice to settle or go to trial. Mediation disclosures could reflect poorly on one party, encouraging the opposing party to take them to court to disclose the unflattering statements. The goals of *Erie* are to prevent forum shopping and to avoid inequitable administration of laws.[148] *Hanna* expands on this idea, saying that when looking at whether to apply a state law in federal court, it is relevant to look at whether applying the state "rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court."[149] While *Hanna* specifically talks about cases brought under diversity jurisdiction, the concerns can easily be extended to supplemental claims in federal question cases. Federal courts that do not apply state mediation protections to state claims in federal court may encourage vertical forum shopping.

While most states do protect mediation communications to some extent, there is a wide variation in the level of protections each state offers. This variation in protections could lead to horizontal forum shopping. Although the extent of privilege in mediation communications would be even more predictable for mediation participants if they had the same mediation protections in every state, it is beyond the scope of this Comment to survey the breadth of state mediation protections and recommend the one every state should

---

[148] Hanna v. Plumer, 380 U.S. 460, 468 (1965).

[149] *Id.* at 468 n.9.

adopt. Also, waiting for every state to adopt the same mediation protection would take quite some time.

There are some problems with requiring courts to use state protections for state claims when the suit involves both state and federal claims. If the communications a party seeks to protect are relevant only to the state claim, there is no issue. The communications can be protected without affecting the federal claim. If the communications are also relevant to the federal claim, however, it is difficult for courts to protect communications for one claim but allow them in for the other.[150] It is difficult, once evidence is admitted, for the trier of fact to compartmentalize completely, not taking the communications into account for the state claim, but analyzing them for the federal claim. Triers of fact, however, are asked to compartmentalize information on a regular basis. Many statements that cannot be admitted to prove the substance of the statement can be admitted to show bias.[151] The trier of fact must evaluate the statement for the bias of the speaker and not let the substance of the statement affect the decision. If courts can compartmentalize in that situation, there is no reason they should not be able to compartmentalize differences in privileges.

Even with no concerns about having competing mediation protections in the same case, federal courts are dismissive of the importance of state mediation protections. The more courts treat mediation protections as substantive, as something stronger than simple evidentiary rules, the more other courts may be convinced to apply state mediation protections to all state-law claims. Treating state protections as substantive will provide a much-needed first step toward ensuring predictability for mediation participants entering court.

B. Adopt a Federal Mediation Privilege

Another possible way to add more predictability to the disclosure of mediation communications would be for the U.S. Supreme Court to adopt a federal mediation privilege. A few lower courts have gone this route, but a widespread adoption seems to be far off. A federal

---

150 Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 458 (N.D. Cal. 1978).

151 *See* United States v. Abel, 469 U.S. 45, 52 (1984) ("Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.").

mediation privilege would be more expansive than recognizing state privileges as substantive, and it would generally provide better protection for mediation communications. But if a state offered broader protections than the federal privilege, parties would still be uncertain about the level of protection they would receive if their claims ended up in federal court.

A federal mediation privilege would have the benefit of communicating to mediation participants that all levels of the judicial system supported mediation as a valid way to resolve disputes. And it would assure all participants that if parties did not settle in mediation, they would not be penalized in court for what they had said in mediation. More expansive protections mean parties will be less guarded in what they disclose, and the system will not betray the parties by allowing the disclosures they believed would be confidential to be admitted as evidence at trial.

Unfortunately, there are many barriers to a federal mediation privilege. There is a strong belief in the principle that privileges should be confined to extremely narrow limits.[152] The Supreme Court has been cautious in recognizing privileges, and only a few, including the attorney–client privilege, exist.[153] The *Federal Rules of Evidence* were adopted in 1975 without mandating any privileges, but the original privilege rule as submitted to Congress contained nine privileges the Rules would have required the courts to recognize.[154] These privileges were "required reports, lawyer–client, psychotherapist–patient, husband–wife, communications to clergymen, political vote, trade secrets, secrets of state and other official information, and identity of informer."[155] This shows that the psychotherapist–patient privilege was recognized as important in 1974 during the process of writing the rules, but the Supreme Court still did not adopt the privilege until 1996.[156] Waiting for the courts to adopt a privilege for mediation communications, a relatively new tool in the judicial system's tool kit, forces too many more parties to face uncertainty in the current mediation privilege scheme.

Additionally, although almost every state has protected mediation communications in some way, there is a "lack of uniformity and uneven protection" among the states, suggesting federal courts may

---

152 Sampson v. Sch. Dist. of Lancaster, 262 F.R.D. 469, 473 (E.D. Pa. 2008).

153 *Id.* at 479.

154 H.R. REP. NO. 93-650, commentary on FED. R. EVID. 501.

155 *Id.*

156 Jaffee v. Redmond, 518 U.S. 1, 18 (1996).

want to refrain from adopting a privilege on which the states disagree.[157] It is also difficult to define the scope of what constitutes a mediation that should be protected.[158] One court limited its privilege to mediations in which parties "agreed in writing to participate in a confidential mediation with a neutral third party."[159] If courts are unsure how broadly to define mediation for purposes of the privilege, courts may be hesitant to adopt a privilege that could be interpreted to be far broader than originally intended. Or, courts could define mediation extremely narrowly and require that all protected mediations fit a single mold. But then courts would lose some of the flexibility and informality that makes mediation unique. If the Supreme Court considers adopting a federal mediation privilege, it will have to address this issue of scope and how much of the communications surrounding the mediation will be protected.[160]

If every state supports greater mediation protections, the states could encourage a federal privilege by all adopting the Uniform Mediation Act as a way to show a united front to the federal courts.[161] While it does not solve the problem of federal courts using federal privileges on state claims when the courts feel like it, a unified approach by the states could make it easier for federal courts to simply adopt the same privilege as a federal privilege. But states do not have a good history of adopting uniform acts,[162] and at this point only a handful of states have adopted the Uniform Mediation Act.[163]

Although a federal mediation privilege would give more expansive protections to mediations, and the combination of the federal privilege and state protections would cover most mediations that ended up in court, the barriers to the adoption of a federal mediation privilege make it an unlikely solution to the current problems.

---

157 Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1179 (C.D. Cal. 1998).

158 *Id.* at 1172.

159 *Id.*

160 *See* Rebecca M. Owen, Note, *In re Uncertainty: A Uniform and Confidential Treatment of Evidentiary and Advocatory Materials Used in Mediation*, 20 OHIO ST. J. ON DISP. RESOL. 911, 914–20 (2005) (laying out the different types of materials and communications that should be covered under a mediation privilege).

161 Deason, *supra* note 9, at 314.

162 *Id.* at 315.

163 Will Pryor, *Alternative Dispute Resolution*, 64 SMU L. REV. 3, 5 n.9 (2011) (stating that the UMA has been adopted by only eleven states).

C. Never Protect Mediation Communications

Alternatively, courts could simply choose to ignore mediation protections entirely. Once parties have reached a federal trial, courts tend to hold each party to the litigation responsible for almost all of their actions and speech that brought them to litigation. This is shown by how the *Federal Rules of Evidence* treat what they call "Admissions by Party-Opponents" (APOs).[164] Although the Rules place a high bar for admission of most out-of-court statements, APOs are freely allowed.[165] The policy for allowing APOs is that once parties have gone through all of the preliminary stages, have not settled, and are in court, they should be held accountable for what got them to that point.[166] Also, both parties are usually in court and have the opportunity to tell their side of the story if they want to do so. This same argument could be used to admit statements made in mediation. The parties tried to mediate, failed, and are now using the courts to settle their disputes, so anything they said in mediation is fair game in courts because the parties are there to defend themselves. But even the Rules want to encourage parties to try and settle their cases before they make it to court. Rule 408, however, excludes offers of settlement from trial only if the other party is trying to use the offer to show liability or how much the case is worth.

Alternatively, there is a public policy rationale for supporting stronger protection for mediation communication. Mediation offers people a way to resolve their disputes quickly, with an outcome that is supported by both parties.[167] Mediation also reduces the money parties have to spend to resolve a case and reduces the size of court dockets.[168] While mediation is growing in popularity, its growth will be limited if communications are not predictably protected.

The many people who now take advantage of mediation with the uncertainty of what communications will be protected show that participants either do not know about the uncertainty, do not have a choice, or do not care. Some participants may never think about the possibility of ending up in court and may never look to what would happen if they did. Others may sign something that says

---

164 Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 458 (N.D. Cal. 1978).

165 FED R. EVID. 801(d)(2).

166 FED. R. EVID. 801(d)(2) advisory committee's notes.

167 Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1177 (C.D. Cal. 1998).

168 *Id.*

"confidential" and never look into what that means, naively assuming that no one will ever find out what they say in mediation. Another group may participate in court-ordered mediations, in which they do not have a chance to choose another path despite confidentiality concerns. Still another group may know about the uncertainty but not care about them for various reasons. Few cases go to trial; therefore, the risks of admitting mediation communications to court may be negligible.

So, even though providing more predictability for parties is supported by the argument that more predictability means more people will take advantage of mediation, it may not be true. Or, it may not be true to the extent that mediation proponents hope. Uninformed or unconcerned participants may continue to mediate, and mediation as a field may continue to grow, without putting more predictable protections into place.

But just because people may mediate without such protections does not mean they should not be put into place. Some parties may mediate only because the court ordered them to, regardless of the confidentiality and privilege in place, and because other parties are sophisticated enough to contract for their desired level of mediation. That does not mean, however, that the court does not have an obligation to step in and provide predictability that would encourage those parties that do have a choice to consider mediating their claims with all the privacy protection the courts can offer. Mediation may not be for everyone, but those who can benefit from mediation should be able to take full advantage of mediation—in the best form the judicial system can provide.

CONCLUSION

Protecting the privacy of disclosures made in mediations is about more than just admissible evidence: it is about a culture of promoting settlement outside of a courtroom. It shows mediation participants that judges and courts approve of their attempts to come to creative solutions on their own. And it demonstrates that participants will not be penalized for not coming to a solution in the mediation and ending up in court.

Protecting mediation participants who candidly and in good faith make sensitive disclosures to further an out-of-court settlement should be a major goal of the judicial system. Although getting at the truth is important, allowing people to create their own solutions to their

problems without utilizing already crowded court systems may be more important.

Providing predictable outcomes to mediation participants who have state claims is an important step toward promoting mediation and making it more accessible. If courts treat state mediation protections as substantive, mediations of state claims will immediately be given more predictability in what will or will not be admissible if the case goes to trial. The hope is that greater predictability means that more people will continue to take advantage of mediation as a flexible and cost-effective alternative to the judicial system, while knowing that if their case does go trial, they can take comfort in the fact that the court will hear a fair presentation of their case without either or both parties being penalized for having tried to mediate the dispute.