

# **The Path Toward A Federal Mediation Privilege: *Approaches Toward Creating Consistency For A Mediation Privilege In Federal Courts***

## I. INTRODUCTION

In commencing a mediation, the mediator provides an opening statement promising confidentiality. This promise however is wrought with a complex legal analysis where federal courts have contradicted one another. The courts' inconsistent analyses have removed predictability with respect to confidentiality during mediation.<sup>1</sup> Although research has not proven a direct link between success in mediation and confidentiality, judges and scholars have accepted that confidentiality is one of the most crucial components to the mediation process.<sup>2</sup> In order to weigh in favor of excluding mediation communications from discovery and evidence, courts must find that trust and confidentiality are crucial to mediation.<sup>3</sup> In determining whether to adopt a federal mediation privilege, consistency is crucial to the process. The federal courts' varied and inconsistent interpretations of the existence of a mediation privilege hinder both the progress of mediation, and the movement for consistency with the Uniform Mediation Act.<sup>4</sup> The current jurisprudence surrounding mediation leaves mediators unable to comprehensively ensure a mediation privilege. Attorneys are unable to advise their clients on the future effect of mediation, potentially making clients unwilling to mediate.

Similar to the attorney-client relationship, there is an important distinction between confidentiality and privilege; this distinction is often conflated.<sup>5</sup> In professional relationships and in the context of mediation, confidentiality is a promise by the mediator to not voluntarily disclose any information communicated during mediation.<sup>6</sup> Privileges however are meant to avoid involuntary testimony in court concerning communications during mediation.<sup>7</sup> Courts and the legislature cautiously enact privileges, because they exclude crucial information from the discovery process and the courtroom. These exclusions hinder the courts' ability to reach the most just result. Federal Rule of

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<sup>1</sup> See Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239 (2002).

<sup>2</sup> Scott Hughes, *A Closer Look: The Case For a Mediation Privilege Still Has Not Been Made*, DISP. RESOL. MAG., at 14, 16 (Winter 1998); Ellen E. Deason, *The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach*, 54 U. KAN. L. REV. 1387 (2006).

<sup>3</sup> Deason, *The Need for Trust as a Justification for Confidentiality in Mediation; A Cross-Disciplinary Approach*, 54 U. KAN. L. REV. 1387.

<sup>4</sup> UNIF. MED. ACT (2003) ("The Act is designed to simplify a complex area of the law").

<sup>5</sup> Fred Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69 (1999).

<sup>6</sup> Scott Hughes, *The Uniform Mediation Act: To The Spoiled Go the Privileges*, 85 MARQ. L. REV. 9 (2001).

<sup>7</sup> *Id.* at 32, 33.

Evidence 408 and its state law counterparts exclude communications during settlement negotiations from evidence in court if the communications prove liability.<sup>8</sup> A privilege is much broader than this evidentiary exclusion.<sup>9</sup> A mediation privilege prevents parties from obtaining information from mediation in discovery.<sup>10</sup> Privileges infringe on the trier-of-fact's ability to reach a decision, and the courts' ultimate goal of reaching the truth. Despite the limitations that a privilege imposes on courts, many states have followed the Uniform Mediation Act's lead in adopting a mediation privilege.<sup>11</sup> The state legislatures which have adopted the UMA believe the importance of trust in mediation outweighs any evidentiary benefit.<sup>12</sup> Although academics and state legislators have embraced the move toward adopting a mediation privilege, federal courts have been less willing to implement a mediation privilege, resulting in inconsistencies and a lack of predictability.

The federal courts' development of a mediation privilege and its contours has been gradual and restrained. One study has shown, the reason for this slow development in the law is due to courts and practitioners, who continually ignore and fail to raise the issue of a mediation privilege.<sup>13</sup> In approximately one third of all the decisions in the study's database, courts admitted evidence from communications during mediation. Surprisingly, in many of the courts' decisions, the courts admitted evidence without a party raising the issue of a mediation privilege, or the court raising the issue *sua sponte*.<sup>14</sup> As attorneys and judges neglect to address the issue of the mediation privilege, courts miss opportunities to rule on this complex and contentious area of law. The future of the mediation privilege has substantial implications for the future of mediation. The courts should adopt a mediation privilege to ensure predictability and integrity in the mediation process.<sup>15</sup>

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<sup>8</sup> FED. R. EVID. 408.

<sup>9</sup> FED. R. EVID. 408; *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), *aff'd*, 216 F.3d 1082 (9<sup>th</sup> Cir. 2000) ("Viewed in combination with Fed. R. Civ. P. 26(b), Rule 408 only protects disputants from disclosure of information to the trier of fact, not from discovery by a third party. Consequently, without a federal mediation privilege under Rule 501, information exchanged in a confidential mediation, like any other information, is subject to the liberal discovery rules . . .").

<sup>10</sup> GOLDBERG, SANDER, ROGERS, COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 443 (5<sup>th</sup> ed. 2007).

<sup>11</sup> *Id.* at 444; UNIF. MED. ACT §4.

<sup>12</sup> Deason, *supra* note 1, at 314.

<sup>13</sup> James Cohen & Peter Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

<sup>14</sup> *Id.* at 58, 59.

<sup>15</sup> Deason, *supra* note 1, at 319.

## II. ADOPTION OF THE FEDERAL MEDIATION PRIVILEGE

Federal Rule of Evidence 501 grants the authority to federal courts to adopt evidentiary privileges through their judicial reason and experience.<sup>16</sup> Congress enacted Rule 501 instead of specifically enumerated privileges that the Advisory Committee on Rules of Evidence drafted.<sup>17</sup> The Committee drafted nine specific privileges, which the Supreme Court and the Judicial Conference approved.<sup>18</sup> Congress rejected this rigid approach to adopting privileges, preferring the more flexible approach of Rule 501, “leav[ing] the door open to change.”<sup>19</sup> In determining whether an evidentiary privilege exists, courts follow the four-pronged test of *Jaffee v. Redmond*.<sup>20</sup> In *Jaffee*, the Supreme Court explained, there is a default presumption that evidence is admissible; there is a “fundamental maxim that the public . . . has a right to every man’s evidence.”<sup>21</sup> Federal courts are hesitant to grant new privileges, but they will create a privilege to further a public good. To determine whether the privilege furthers a public good, courts examine four factors: (1) whether the privilege is necessary for confidence and trust, (2) whether the privilege serves public ends, (3) whether the loss of evidence due to the privilege is modest, and (4) whether denying the privilege would frustrate similar state privileges.<sup>22</sup>

To justify the creation of a psychotherapist-patient privilege in *Jaffee*, the Supreme Court relied on empirical data; studies displayed that the lack of a privilege would undermine psychotherapy.<sup>23</sup> However, research has suggested that the cited authorities in *Jaffee* do not sufficiently show the necessity for this privilege.<sup>24</sup> If this research is accurate, it appears the Court lowered its threshold for the necessity of empirical data.<sup>25</sup> This observation has important implications for the federal courts’ willingness to accept a common law mediation privilege, because there is limited data displaying the need for confidentiality to reach an agreement in mediation.<sup>26</sup> If judges believe empirical data is necessary before adopting a privilege, more data will be necessary before the courts adopt a mediation privilege.

Pursuant to Rule 501 of the Federal Rules of Evidence, when a federal court confronts a federal question or pendent state claims, the common law of the federal court applies.<sup>27</sup> Following the analysis from *Jaffee*, the Central District of California adopted a

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<sup>16</sup> FED. R. EVID. 501.

<sup>17</sup> *Trammel v. U.S.*, 445 U.S. 40, 47 (1980).

<sup>18</sup> *Id.* at 47.

<sup>19</sup> *Trammel*, 445 U.S. at 47; S. REP. NO. 93–1277, at 11 (1974); H.R. REP. NO. 93–650, at 8 (1973).

<sup>20</sup> *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996).

<sup>21</sup> *Id.* at 9.

<sup>22</sup> *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d at 1171.

<sup>23</sup> *Jaffee*, 518 U.S. at 10 n. 9.

<sup>24</sup> Edward Imwinkelried, *The Rivalry Between Truth and Privilege: The weakness of the Supreme Court’s Instrumental Reasoning in Jaffee v. Redmond*, 518 U.S. 1 (1996), 49 HASTINGS L.J. 969 (1998).

<sup>25</sup> *Id.*

<sup>26</sup> Hughes, *supra* note 2.

<sup>27</sup> FED. R. EVID. 501.

federal common law mediation privilege in *Folb*.<sup>28</sup> This holding established a framework upon which other courts have relied to either apply or reject a federal mediation privilege. *Folb* serves as the bedrock of the federal common law mediation privilege. However, the boundaries of the mediation privilege set forth in *Folb* are narrow and undefined.<sup>29</sup> While all information revealed during mediation and created in preparation for mediation is protected, any subsequent negotiation lacks *Folb*'s mediation privilege. In creating a mediation privilege, the Court in *Folb* avoided a confrontation with Rule 408 of the Federal rules of Evidence.<sup>30</sup> A decade after the Court's holding in *Folb*, the same district court found, the "contours of the privilege [are] . . . unclear."<sup>31</sup> *Folb* followed the trend of the Uniform Mediation Act and a majority of the states, which overwhelmingly have embraced a mediation privilege. Although *Folb* noted the new privilege would have to be "fleshed out over time,"<sup>32</sup> federal courts have been surprisingly reluctant to follow *Folb*'s reasoning.<sup>33</sup> Rather than consistently applying or overruling *Folb*, the federal courts have created a wide spectrum of analysis. In *Molina v. Lexmark*, the Central District of California declined to apply *Folb*'s reasoning. In questioning *Folb*'s relevance, the Court in *Molina* opined, only three cases have followed *Folb*'s reasoning in approximately ten years. While *Molina* did not overrule *Folb*, it limited *Folb* to its narrow set of facts, and called into question the future of a federal mediation privilege.<sup>34</sup>

The decisions following *Folb* help elaborate on the current status of the common law federal mediation privilege. Outside of the Ninth Circuit, the Western District of Pennsylvania followed the reasoning of *Folb* and potentially broadened its interpretation.<sup>35</sup> Applying the four-factor test from *Jaffee, Sheldone* adopted and applied a federal mediation privilege.<sup>36</sup> However, this Court struggled to define the privilege's contours and merely stated, the privilege will follow the district court's local rules enacted pursuant to the ADR Act. The Court recognized the incompleteness of their analysis, leaving open the possibility that a district court with different local rules may create a different common law privilege.<sup>37</sup> Similar to *Folb*, *Sheldone* articulated vague boundaries to the privilege. *Sheldone* perhaps moved beyond *Folb*'s scope, suggesting the privilege may apply to settlement discussions after the formal mediation as well.<sup>38</sup>

The Sixth Circuit further complicated privileges in *Goodyear Tire & Rubber Co. v. Chiles Power Supply*.<sup>39</sup> In *Goodyear*, the Court addressed whether settlement communications were privileged, precluding them from evidence and discovery under

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<sup>28</sup> *Folb*, 16 F. Supp. 2d at 1181.

<sup>29</sup> Deason, *supra* note 1, at 268.

<sup>30</sup> *Folb*, 16 F. Supp. 2d at 1180.

<sup>31</sup> *Molina v. Lexmark*, No. CV 08-04796 at 8 (C.D. Cal Sept. 30, 2008).

<sup>32</sup> *Folb*, 16 F. Supp. 2d at 1179.

<sup>33</sup> *Molina*, No. CV 08-04796; In re Grand Jury Subpoena Dated December 17, 1996, 148 F.3d 487, 493 (5<sup>th</sup> Cir. 1998).

<sup>34</sup> *Molina*, No. CV 08-04796 at 8.

<sup>35</sup> *Sheldone v. Pa. Tpk. Comm'n*, 104 F. Supp. 2d 511 (W.D. Pa. 2000).

<sup>36</sup> *Id.* at 513–517.

<sup>37</sup> *Id.* at 517.

<sup>38</sup> Deason, *supra* note 1, at 269.

<sup>39</sup> 332 F.3d 976 (6<sup>th</sup> Cir. 2003).

Rule 26 of the Federal Rules of Civil Procedure.<sup>40</sup> This case did not address mediation, nor did the court address a federal mediation privilege, but the Court adopted a broad settlement privilege following the policy from *Jaffee*.<sup>41</sup> The Sixth Circuit did not rigidly apply the four-factor test of *Jaffee*, but rather broadly applied the policy, that due to the Court's "reason and experience," it believes settlement communications are privileged.<sup>42</sup> While the courts in *Folb* and *Sheldone* took an incremental approach, adopting a limited test in compliance with local rules, *Goodyear* has potentially tremendous evidentiary implications. Although not formally a mediation privilege, the broad scope of a settlement privilege appears to create a broader category, which encompasses mediation. The Sixth Circuit explained that settlement communications are inadmissible not because they are irrelevant as evidence, but rather out of a desire to curb litigation.<sup>43</sup> This dicta from the Sixth Circuit is important in considering the future of the mediation privilege. The Sixth Circuit conceded that settlement communication evidence is relevant, but held this determination was not dispositive. The Court believed the desire to curb litigation surpassed this evidentiary detriment.<sup>44</sup> This has important implications because *Folb*'s holding made an effort to not address settlement negotiations, because they fall under Rule 408.<sup>45</sup> If courts followed the Sixth Circuit's reasoning in adopting a federal mediation privilege, they could move beyond *Folb* and be less weary of the limits of Rule 408, like the Sixth Circuit in *Goodyear*.

### III. CIRCUIT COURTS' RELUCTANCE TO ADOPT A FEDERAL MEDIATION PRIVILEGE

Despite the increasing use of mediation, and the increasing number of states adopting mediation privileges, federal courts have been reluctant to adopt a common law mediation privilege. The courts' inconsistent applications of a mediation privilege will likely chill a party's candidness in mediation, and discourage mediation.<sup>46</sup> In *Babasa v. LensCrafters*,<sup>47</sup> the Ninth Circuit surprisingly denied the opportunity to address the precedent of *Folb*.<sup>48</sup> In *Babasa*, *LensCrafters* sought to preclude evidence from

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<sup>40</sup> *Id.* at 979; FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant . . .").

<sup>41</sup> *Goodyear*, *supra* note 39, at 983.

<sup>42</sup> *Id.* at 980. The Court broadens the holding of *Cincinnati Gas & Elec. v. Gen. Elec.*, 854 F.2d 900 (6<sup>th</sup> Cir. 1988), where the court merely precluded the press from accessing pre-trial settlement discussions. The Court broadly interprets this holding to indicate the private and privileged nature of settlement negotiations.

<sup>43</sup> *Goodyear*, 332 F.3d at 983; FED. R. EVID. 408 advisory Committee's notes 1972.

<sup>44</sup> *Goodyear*, *supra* note 39, at 980.

<sup>45</sup> *Folb*, 16 F. Supp. 2d at 1180.

<sup>46</sup> Deason, *The quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79, 84 (2001).

<sup>47</sup> 498 F. 3d 972 (9<sup>th</sup> Cir. 2007).

<sup>48</sup> *Id.* at 975 n.1.

mediation, but they failed to raise the issue of a federal mediation privilege.<sup>49</sup> *Babasa* is an illustrative example of the Cohen and Thompson study, which displayed that attorneys continually fail to raise the issues of a mediation privilege.<sup>50</sup> Similarly, the Court declined to address the issue, despite the influential and controversial *Folb* holding in the Ninth Circuit. The Court recognized the potential privilege in a footnote, but did not address the issue's merit.<sup>51</sup> In *Babasa*, it is apparent the Court contemplated a mediation privilege, but sidestepped the issue because LensCrafter's attorney failed to raise the issue. Avoiding the mediation privilege leaves divergent holdings and jurisdictional splits in place. By avoiding any substantive analysis, and burying the issue in a footnote, the Court provided a disservice to the predictability of mediation. Similar to *Babasa*, the Fourth Circuit also declined to address the federal mediation privilege.<sup>52</sup> Instead, the Court applied a narrow holding based upon a local rule, again only mentioning the mediation privilege in a footnote.<sup>53</sup>

While some federal courts avoid addressing the federal mediation privilege, other federal courts have unequivocally rejected the adoption of a mediation privilege. In *In re Grand Jury Subpoena*, the Fifth Circuit reversed a lower court, which held that documents relating to mediation are privileged and therefore need not be disclosed.<sup>54</sup> The Court interpreted a confidentiality provision narrowly, holding that confidentiality is independent from a mediation privilege.<sup>55</sup> The Court did not apply the *Jaffee* factors to determine whether to create a new privilege. The Court stated that absent a clear manifestation from Congress for a privilege, they would not create one.<sup>56</sup> Unlike the Ninth Circuit, the Fifth circuit in *In re Grand Jury* addressed the mediation privilege and established precedent for the district courts. The Northern District of Texas followed this holding in *F.D.I.C. v. White*, holding that it will not create a mediation privilege without congressional intent.<sup>57</sup> Although one may find indirect congressional intent through the ADR Act, 28 U.S.C. §652, the Court found the legislative history insufficient to find Congress intended to enact a federal mediation privilege.<sup>58</sup>

The adoption of a broad settlement privilege in *Goodyear* appeared to indicate a willingness to create privileges more broadly. However, much like jurisdictions which have been unwilling to adopt a mediation privilege, the Washington D.C. district court disapproved of creating a new settlement privilege. In *In re Subpoena*, the Court

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<sup>49</sup> Phyllis G. Pollack, *Mediation Confidentiality: A Federal Court Oxymoron*. THE RESOLVER 8, available at <http://www.pgpmmediation.com/blog/wp-content/uploads/2009/08/mediation-confidentiality-a-federal-court-oxymoron31.pdf>.

<sup>50</sup> Cohen & Thompson, *supra* note 13.

<sup>51</sup> *Babasa*, 498 F.3d at 975 n.1.

<sup>52</sup> *In re Anonymous*, 283 F.3d 627, 639 n.16 (4<sup>th</sup> Cir. 2002).

<sup>53</sup> *Id.* at 639 n.16 (“Because we are able to interpret and apply Rule 33 without the adoption and application of a federal mediation privilege, we will reserve this issue for another day”).

<sup>54</sup> *In re Grand Jury Subpoena* Dated Dec. 17, 1996, 148 F.3d 487, 493 (5<sup>th</sup> Cir. 1998)

<sup>55</sup> *Id.* at 492–93.

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

<sup>57</sup> 76 F. Supp. 2d 736, 738 (N.D. Tex 1999).

<sup>58</sup> *Id.* at 738.

scathingly disapproved of an expansive interpretation *Jaffee* and the federal courts' liberal creation of new privileges under Rule 501.<sup>59</sup> This Court enumerated a list of other privileges that federal courts have declined to adopt.<sup>60</sup> The Court claimed to follow *Jaffee*, but it applied a more stringent factors test, which varied from the four-factor test in *Folb*. In *re Subpoena* examined, (1) whether there is agreement between state and federal law favoring a privilege, (2) whether Congress considered and failed to adopt the privilege, (3) whether the advisory committee recommended this evidentiary privilege, and (4) whether the party seeking a privilege has shown with extreme clarity that a privilege will advance a public good.<sup>61</sup> Divergent holdings and jurisdictional splits frustrate predictability within evidentiary privileges, but a different Supreme Court test breaks down predictability much further. This Court's higher threshold for adopting an evidentiary privilege follows Scalia's dissent in *Jaffee* rather than *Jaffee*'s majority opinion.<sup>62</sup> Scalia disagreed with the notion that adoption in all fifty states of a similar privilege weighs in favor of creating a federal common law privilege. Rather, Scalia believed this was an argument against a judicial adoption of a privilege, because it displays the legislature is better situated to create new privileges.<sup>63</sup> Scalia's reasoning, if followed by the federal courts, will vastly hinder the creation of a federal mediation privilege.<sup>64</sup> *In re Subpoena* adopted Scalia's view, persuading the Court to not adopt a federal privilege. If other courts follow Scalia dissent in *Jaffee*, it is unlikely that there will be a federal mediation privilege.

*Folb* first defined the federal mediation privilege, but courts have been reluctant to apply its reasoning. Subsequent holdings are beginning to indicate that *Folb* was an outlier rather than a pioneer. The broad question facing courts is whether a mediation privilege is ultimately more important than an underlying goal of determining truth.<sup>65</sup> The Court in *Folb* believed, the need for trust in mediation warrants finding a privilege, but subsequent cases and scholarship indicate that *Folb* glossed over a thorough analysis with the other *Jaffee* factors.<sup>66</sup> For example, the third *Jaffee* factor questions whether the evidentiary detriment is modest. The frequency of using mediation communications in litigation demonstrates that mediation communications may often determine a case's outcome.<sup>67</sup> *Folb* provides a cursory explanation of this third factor. Rather than analyzing

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<sup>59</sup> *In re Subpoena Issued to Commodity Future Trading Com'n*, 370 F. Supp. 2d 201, 208 (D.D.C. 2005).

<sup>60</sup> *Id.* at 208 n.8 (Courts have not adopted the privilege of confidential sources, child abuse records, parent-child communications, and insurer-insured communications).

<sup>61</sup> *Id.* at 208–09.

<sup>62</sup> *Jaffee*, 518 U.S. at 19–39 (Scalia, J., dissenting).

<sup>63</sup> *Id.* at 26.

<sup>64</sup> *Id.* at 26 n.1. Scalia points out the few cases where courts judicially created an privilege. Scalia believes the majority opinion should have stated, “[t]he common law had indicated *scant* disposition to recognize psychotherapist-patient privilege when (*or even after*) legislatures began moving into the field.” *Id.*

<sup>65</sup> *Jaffee*, 518 U.S. at 15.

<sup>66</sup> Ryan D. O'Dell, *Federal Court Positively Adopts a Federal Common Law Testimonial Privilege for Mediation: Is it Justified?*, 1999 J. DISP. RESOL. 203, 215 (1999).

<sup>67</sup> *Id.* at 216; Cohen & Thompson, *supra* note 13.

whether the evidentiary detriment is truly modest, the Court reiterated the importance of confidentiality.<sup>68</sup> The fear of an evidentiary detriment is less important when looking at the Courts reasoning in *Goodyear*, which adhered to the policy rather than the test from *Jaffee*.<sup>69</sup> However, courts have not yet looked to the Sixth Circuit to justify adopting a mediation privilege, because few courts indicate a willingness to adopt a mediation privilege. Perhaps the unspecified analysis from *Folb* made it a less powerful pioneer for adopting a federal mediation privilege. Despite the states and some courts' movement toward adopting a privilege, many courts are still not persuaded by *Folb*'s reasoning.

#### IV. *MOLINA V. LEXMARK* AND THE FUTURE OF THE MEDIATION PRIVILEGE

Amongst the backdrop of the diverse range of opinions about the federal mediation privilege, Judge Morrow has set the tone for the future of the federal mediation privilege. Ten years after *Folb*, the Court in the Central District of California limited its influential holding with *Molina*.<sup>70</sup> In this case, Molina filed a class action against Lexmark in California state court.<sup>71</sup> Lexmark attempted to remove the case to federal court. Lexmark claimed the suit was within the Class Action Fairness Act, because the amount in controversy exceeded five million.<sup>72</sup> Molina filed a motion to remand, claiming that Lexmark knew the amount in controversy much earlier and failed to seek removal within the appropriate time period. Molina claimed it provided Lexmark with documents revealing the amount in controversy exceeding five million during mediation. Removal hinges upon the date at which Lexmark received notice of the amount in controversy, because a party must remove within thirty days after learning the amount in controversy.<sup>73</sup> Lexmark denied they learned the amount in controversy at mediation. Alternatively, Lexmark argued, *Folb*'s mediation privilege precludes the use of communications during mediation.<sup>74</sup>

Ultimately, *Molina* limited *Folb* to its facts, holding that the mediation documents were admissible to determine whether removal was appropriate.<sup>75</sup> Before applying their reasoning, the Court mentioned an alternative analysis which may further limit *Folb* in future cases. The Court opined, the privilege adopted in *Folb* only applies to "communications between parties who agreed *in writing* to participate in a confidential mediation . . . ."<sup>76</sup> The Court in *Molina* reasoned, Lexmark and Molina did not sign a confidentiality agreement prior to mediation, and therefore may be outside *Folb*'s scope.<sup>77</sup> Therefore, even if the Court found *Folb* appropriately applied to the facts of *Molina*, the Court likely would have not applied the privilege due to the absence of a

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<sup>68</sup> Dell, *supra* note 66, at 214–15.

<sup>69</sup> See *Goodyear*, 332 F.3d at 983.

<sup>70</sup> Pollack, *supra* note 49.

<sup>71</sup> *Molina v Lexmark*, No. CV 08-04796 at 8 (C.D. Cal. Sept. 30, 2008).

<sup>72</sup> *Id.*; See 28 U.S.C. §1332(d).

<sup>73</sup> 28 U.S.C. §1441.

<sup>74</sup> *Id.* at 1–6.

<sup>75</sup> *Id.* at 25.

<sup>76</sup> *Folb*, 16 F. Supp. 2d at 1180 (emphasis added).

<sup>77</sup> *Molina*, *supra* note 71, at 8 n.59.

signed agreement. While this analysis is merely dicta, it demonstrates the Court's unwillingness apply the underlying spirit of *Folb*. This analysis provides other courts with a model to further distinguish *Folb* and limit its underlying purpose.

*Molina* held, the duty of confidentiality is more applicable than a federal mediation privilege. The Court believed that confidentiality is analogous to the policies underlying Rule 408; the Court then proceeded to analyze the issue under the jurisprudence of Rule 408 rather than a mediation privilege. Rule 408 does not preclude the admissibility of settlement offers in order to show amount in controversy, because 408 is only meant to address fears of proving liability.<sup>78</sup> Lexmark claimed, relying on mediation communication for removal would be "improper."<sup>79</sup> The Court rejected this argument, citing to a line of cases where parties rely on mediation communications to remove to federal court.<sup>80</sup>

In *Molina*, Judge Morrow examined the *Jaffee* factors for determining whether the Court should find a mediation privilege. The Court found the privilege would not advance confidence in mediation, because the privilege discourages plaintiffs from being candid with respect to the amount in controversy.<sup>81</sup> Next, the Court found that the evidentiary benefit would be severe because it frustrates the timeliness of removal, giving the defendant a tactical advantage. Last, the Court limited the impact of *Jaffee*'s fourth factor, which examines whether admissibility of evidence would frustrate parallel state privileges. The Court opined, the consistency between jurisdictions with respect to the mediation privilege is scattered, and has been inconsistent for the past decade.<sup>82</sup> Therefore, the Court did not fear frustrating parallel privileges, and the Court disregarded the fourth *Jaffee* factor.

Although the Court in *Molina* dismissed the fourth factor based on the inconsistencies of the mediation privilege between the states, this analysis is not justified given the facts of *Jaffee*. The fact that all fifty states and the District of Columbia adopted a psychotherapist privilege was an important consideration for the Court in *Jaffee*.<sup>83</sup> However, consistency between these state privileges was not as important as *Molina* indicates. Similar to the state mediation privileges, which have varying exceptions, the Court explained that the psychotherapist privileges varied with respect to their exceptions, and to whom exactly the privilege applied.<sup>84</sup> The Court ultimately concluded, these discrepancies were insufficient to diminish the fact that all fifty states enacted a privilege. Identical statues were not essential, because a consistent body of law was

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<sup>78</sup> *Id.* at 13; FED. R. EVID. 408 advisory Committee's notes 1975.

<sup>79</sup> *Id.* at 13 n.65.

<sup>80</sup> *Id.* These cases further illustrate Cohen and Thompson findings that mediation communications are regularly used throughout the litigation process without the parties or the court raising the mediation privilege. James Cohen & Peter Thompson, *Disputing Irony: A systematic Look at Litigation about Mediation*, 11 HARV. NEGOT. L. REV. 43 (2006).

<sup>81</sup> *Molina*, No. CV 08-04796 at 15.

<sup>82</sup> *Id.* at 16.

<sup>83</sup> *Jaffee*, 518 U.S. at 12, n.11.

<sup>84</sup> *Id.* at 14, n.13 ("The range of exceptions recognized by the States is similarly varied.").

sufficient to conclude that reason and experience dictated the adoption of a privilege.<sup>85</sup> Although the states vary with respect to how they treat a mediation privilege, the states are consistent with their application of some form of mediation privilege. Although increased horizontal consistency between the states would present a stronger justification for adopting a federal mediation privilege, the Court in *Molina* removed the fourth factor from the factual setting in *Jaffee*. This heightened requirement for consistency was an additional means for Judge Morrow to diminish the reasoning of *Folb*, and question the existence of a federal mediation privilege.

It is increasingly confusing to determine the current law of the mediation privilege after *Molina*. *Molina* distinguished itself from *Folb*, because the underlying issue was amount in controversy, and the Court suggests there is a lower expectation of mediation confidentiality in the class action context.<sup>86</sup> However, *Molina* did not simply try to establish a narrow holding that distinguished *Folb*. Rather, the Court made great efforts to demonstrate the dubious qualities of *Folb*'s holding. The Court concluded by stating, "[e]ven if such privilege exists, moreover, its scope and application are unclear."<sup>87</sup> Although the Ninth Circuit avoided the issue of the federal mediation privilege in *Babasa*, *Molina* looks to the *Babasa* footnote as an indicator that the Ninth Circuit is unwilling to create a federal mediation privilege. With *Babasa* as the controlling precedent, *Folb*'s relevance as the touchstone of the federal mediation privilege decreases in importance.<sup>88</sup> A publication that provides practitioners with litigation tips relies on *Molina* to assure litigators that a mediation privilege is not usually applicable.<sup>89</sup> This demonstrates that *Molina* has real implications for the mediation privilege, and affects how attorneys view mediation.

## V. SOLUTIONS

The existence and scope of the federal mediation privilege is nebulous. As mediation continues to grow, more litigation will raise issues of what is or is not privileged. As complex parties from different regions of the United States see the benefits of engaging in mediation, there is a greater likelihood that more disputes will enter federal courts. Arguments both for and against adopting a new privilege have merit. However, the worse possible outcome for the courts would be the status quo, where predictability of a mediation privilege is impossible. The courts must strive more toward uniformity to maintain integrity in the mediation process. Consistency would encourage attorneys to recommend mediation to clients. With the current law however, some

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<sup>85</sup> *Id.* at 13.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 25.

<sup>88</sup> The future of the federal mediation privilege is especially vague in the Ninth Circuit. Judge Paez, who adopted a federal mediation privilege in *Folb* is now on the Ninth Circuit. One wonders, as pioneer of the federal mediation privilege, will Judge Paez attempt to make *Folb* binding precedent in the Ninth Circuit. This is unlikely; Judge Paez has resided in the appellate court since 2000. Oppositely, has his silence since *Folb* allowed Judge Morrow in the Central District to be more comfortable in limiting *Folb*, despite Judge Paez's presence at the appellate level.

<sup>89</sup> Don Zupanec, FEDERAL LITIGATOR: LAW AND MOTION, 24 No. 3 at 7 (March 2009).

attorneys may notify clients of a mediation privilege, while other attorneys may advise clients that the privilege is obsolete.<sup>90</sup>

#### A. *The States Should Uniformly Adopt The UMA*

An important consideration in the *Jaffee* four-factor test is determining whether a failure to adopt a privilege would frustrate parallel state privileges.<sup>91</sup> The Court in *Molina* glossed over this inquiry, finding the fourth factor less important amidst the backdrop of immense inconsistencies between state laws. The Court concluded, the state mediation privilege statutes are so inconsistent, that no ruling could frustrate parallel state privileges.<sup>92</sup> *Molina* exaggerated the influence of inconsistent state statutes to justify not adopting a privilege. The fourth factor is not a dispositive indicator of finding a privilege, and even the Court in *Jaffee* recognized that all states did not have the same psychotherapist privilege. While complete consistency between the states is not necessary, it is much more likely for the federal courts to adopt a mediation privilege if all the states had an identical privilege. With the diverse ways in which the states have treated the mediation privilege, federal courts have no guide for the appropriate contours of a mediation privilege. Courts are hesitant to craft their own common law privilege, especially with no precedent from a higher court, and with the recognition that any privilege must be “fleshed out over time.”<sup>93</sup> Courts currently prefer their default presumption that evidence should be admissible, which is much more strongly rooted in Supreme Court precedent.<sup>94</sup>

Consistent with this analysis from *Molina*, if the states universally enacted the Uniform Mediation Act, predictability in the federal courts would greatly increase.<sup>95</sup> In *Jaffee*, the Court enacted a psychotherapist privilege, in part because “all 50 States and the District of Columbus [had] enacted into law some form of psychotherapist privilege.”<sup>96</sup> This analysis has influenced courts in ruling on other privileges as well.<sup>97</sup> The D.C. Circuit rejected an opportunity to adopt a privilege for secret service officers, placing an emphasis on the fact that no other court has recognized a similar privilege.<sup>98</sup> The Uniform Mediation Act has already been effectively implemented in many states, and the statute already has identified exceptions; the contours are not too ambiguous.<sup>99</sup>

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<sup>90</sup> Compare, *Id* (“A mediation privilege is not widely recognized”) with Federal Procedure, Lawyers Edition §33:365 (Aug. 2009) (“[T]here is some authority recognizing a federal evidentiary privilege for communications made in the course of mediation”).

<sup>91</sup> *Jaffee*, 518 U.S. at 9–13.

<sup>92</sup> *Molina*, No. CV 08-04796 at 16.

<sup>93</sup> *Folb*, 16 F. Supp. 2d at 1179.

<sup>94</sup> See, e.g., *Trammel v. United State*, 445 U.S. 40, 50 (1980); *United States v. Nixon*, 418 U.S. 683, 710 (1974).

<sup>95</sup> Deason, *supra* note 1, at 314–315.

<sup>96</sup> *Jaffee*, 518 U.S. at 12.

<sup>97</sup> See *In re Sealed Case*, 148 F.3d 1073, 1076 (D.C. Cir. 1998).

<sup>98</sup> *Id* (“The Supreme Court has put considerable weight upon federal and state precedent when recognizing a privilege”).

<sup>99</sup> UNIF. MED. ACT §4.

Even if federal courts hesitate to follow the trend of adopting a mediation privilege, a widespread adoption of the Uniform Mediation Act would nonetheless increase consistency in the federal courts. The cases examined in this article address disputes where courts apply federal law. However, Rule 501 mandates, in diversity suits where state law provides the rule of decision, state law applies.<sup>100</sup> Although this would not create a common law privilege, the federal courts would quickly become more comfortable applying the UMA's privilege in diversity actions,<sup>101</sup> which may eventually transition into an adoption of a common law privilege. During the mediation stage of a dispute, it is often difficult to predict whether state or federal law will apply in federal court. Even if the subject matter jurisdiction underlying the claim is pursuant to a federal statute, the court implements state law if state law applies the rule of decision.<sup>102</sup> Therefore, if a party perceived a federal common law privilege, but the courts applied state law, a UMA application would not frustrate their expectation. Courts and attorneys will become increasingly familiar with the mediation privilege from the UMA in diversity actions in federal court, which may gradually encourage adopting a federal privilege.

As shown earlier, federal courts have varied in their interpretation of the *Jaffee* test. *In re Subpoena* implemented a slightly different four-factor test from *Jaffee*; *In re Subpoena*'s first factor was whether there is a broad consensus among state and federal law supporting the privilege.<sup>103</sup> Similar to *Molina*, this Court sought a heightened degree of consistency between the states, which was not present in *Jaffee*. If federal courts applied this narrower interpretation of *Jaffee*, it is unlikely that a court would adopt a mediation privilege under current law. Even if more courts adopted a common law mediation privilege, the absence of widely adopting the UMA precludes any broad consensus amongst the states. While many federal courts may still differ on whether to adopt a mediation privilege, federal court inconsistency does not "preclude recognition of the privilege in question where the states have uniformly recognized that privilege."<sup>104</sup> The Court in *In re Subpoena* specifically stated, the plaintiff must display a framework in state law for the privilege they ask the court to adopt. If the states unanimously adopted the UMA, this would greatly influence the courts, providing an already viable framework for the mediation privilege. Scalia's dissent in *Jaffee* expressed his disapproval of the Court's reasoning which formulated a new common law privilege. Courts that have rejected the federal mediation privilege have cited the *Jaffee* dissent as the touchstone of their reasoning. However, Scalia states, he would excuse the majority's poor justifications if they relied on "the unanimous conclusion of state courts."<sup>105</sup> A comprehensive adoption of the UMA by the states would perhaps sway those courts that look to the *Jaffee* dissent in determining whether to adopt a privilege.

Although it is possible that a statewide adoption of the UMA will sway the minds of federal judges, this is an uncertain and indirect route. While it may serve as a

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<sup>100</sup> FED. R. EVID. 501.

<sup>101</sup> See Deason, *supra* note 1.

<sup>102</sup> See *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1120–22 (N.D. Cal 1999).

<sup>103</sup> *Subpoena*, *supra* note 59, at 208.

<sup>104</sup> *New York Times v. Gonzalez*, 382 F. Supp. 2d 457, 495 (S.D.N.Y. 2005).

<sup>105</sup> *Jaffee*, 518 U.S. at 25 (Scalia, J., dissenting).

convincing argument for courts that look to Scalia's *Jaffee* dissent, there is also a powerful rebuttal. State adoption of the UMA is a legislative act, made by elected representatives with deliberation in a democratic process. With legislation, those with interests in the underlying issue provide input, which is very different from the judicial enactment of a common law privilege. One may argue, judges should be very hesitant to create law, especially when Congress can draft a privilege. Congress can follow the example of the states that have legislatively adopted mediation privileges. Scalia explained in *Jaffee*, adoption of a privilege in all fifty states argues against creating a similar privilege judicially.<sup>106</sup> One may argue, state adoption of the UMA displays that not a single state thought it was appropriate to judicially adopt a privilege, and therefore the federal courts should wait for Congress as well.

Although Scalia's dissent is persuasive in that the states have enacted a privilege through the legislature rather than the judiciary, this argument is not consistent with Supreme Court jurisprudence. The majority in *Jaffee* explained, "[i]t is of no consequence that recognition of the privilege in the vast majority of States is the product of legislative action rather than judicial decision."<sup>107</sup> The Supreme Court has previously recognized that state statutes indicate that reason and experience entered into the legislature's policy determinations.<sup>108</sup> The Court further explained, the fact that state legislatures have enacted privilege statutes before the judiciary does not detract from their importance.<sup>109</sup> The legislature did not draft these statutes due to fear of judicially created privileges, but rather because the legislature found a compelling interest in adopting the privileges more rapidly. Courts should not hesitate to adopt a mediation privilege merely because a majority of the state legislatures believed the privilege was necessary for the integrity of the mediation process.

While state legislatures adoption of the UMA may be an effective step toward creating a federal mediation privilege, it may not be the most efficient way to advance mediation. Legislatures are constantly faced with politically charged issues. Hundreds of bills die in committees each year, as they are bypassed by more pressing issues. If courts merely wait for legislatures to act, a federal mediation privilege may not come soon enough. Currently, only a fraction of the states have adopted the UMA. Even for the states that are willing to adopt the UMA, their state legislatures may be burdened with other matters. If the federal courts wait for all the states to adopt the UMA before adopting a federal mediation privilege, the courts may never adopt this common law privilege.

A statewide adoption of the UMA is a lofty goal, which will not guarantee an adoption of a federal mediation privilege. However, it is a worthwhile goal, which will increase consistency between the states, and may contribute toward the adoption of a federal mediation privilege.

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<sup>106</sup> *Id.*

<sup>107</sup> *Jaffee*, 518 U.S. at 13.

<sup>108</sup> *Funk v. United States*, 290 U.S. 371, 376–281 (1933).

<sup>109</sup> *Jaffee*, 518 U.S. at 13.

## B. Synchronize Rule 501 And The ADR Act

The Alternative Dispute Resolution Act, 28 U.S.C. §652, instructs federal district courts to adopt local rules to apply confidentially in their dispute resolution programs.<sup>110</sup> Despite Congressional effort to limit disclosure of mediation communications, the ADR Act is less significant when read in connection with Rule 501. Rule 501 instructs courts to follow common law when determining an evidentiary privilege, which supersedes local rules.<sup>111</sup> Courts have continually held that §652 did not create a federal mediation privilege.<sup>112</sup> The text of §652(d) does not mention a mediation privilege; it only instructs courts to “provide for the confidentiality of the alternative dispute resolution processes and prohibit disclosure of confidential dispute resolution communications.”<sup>113</sup> The Court in *F.D.I.C.* explained, the judiciary should not broadly interpret this confidentiality provision, especially when the legislative history does not indicate that Congress contemplated a privilege.<sup>114</sup> Local rules drafted pursuant to §652 are also not relevant in federal court when state law provides the rules of decision.<sup>115</sup> Although one may argue that Congress intended §652(d) to supersede Rule 501 in particular circumstances, Judge Brazil explains that if Congress intended this result, they would have been more deliberate.<sup>116</sup> Congress gave each district court the power to enact local rules, and it is unlikely that if Congress sought to create a mediation privilege, they would have allowed every court to have its own variation of a privilege.<sup>117</sup> Due to the intersection between Rule 501 and §652, the local rules of a district court’s ADR program may promise a degree of confidentiality which may in fact not exist.<sup>118</sup> This inconsistency harms the predictability of mediation, and may dissuade parties from mediation. Local rules pursuant to §652 also present a problem if courts actually choose to adopt a mediation privilege. The Court in *Sheldone* outlined a privilege consistent with its local rules,<sup>119</sup> but other courts have created privileges independent from local rules. Since local ADR rules

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<sup>110</sup> 28 U.S.C. §652 (2006).

<sup>111</sup> FED. R. EVID. 501 (“the privilege of a witness...shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience”).

<sup>112</sup> *F.D.I.C. v. White*, 76 F. Supp. 2d 736, 738 (N.D. Tex. 1999); *see also* *Fields-D’Arpino v. Restaurant Associates, Inc.*, 39 F. Supp. 2d 412, 418 (S.D.N.Y. 1999).

<sup>113</sup> 28 U.S.C. §652(d).

<sup>114</sup> *F.D.I.C.*, 76 F. Supp. 2d at 738; 144 CONG. REC. H10457-01 (Oct. 10, 1998) (statement of Rep. Coble).

<sup>115</sup> FED. R. EVID. 501; *Olam v. Congress Mortg. Co.*, 68 F. Supp. 2d 1110, 1123 (N.D. Cal. 1999).

<sup>116</sup> *Olam*, 68 F. Supp. 2d at 1123 (“[W]e should assume that Congress would change it only after a visible public debate and only through a direct and unequivocal pronouncement. We should not base a finding that there has been a change in a rule of such significant on inferences about intersections of law that there is no evidence Congress saw”).

<sup>117</sup> *Id.* at 1123.

<sup>118</sup> Deason, *supra* note 1, at 316.

<sup>119</sup> *Sheldone*, 104 F. Supp. 2d at 517.

may vary by court, two district courts may adopt a privilege consistent with local rules, but the privileges may vary in scope.<sup>120</sup> In order to give meaning to §652(d) and increase predictability in mediation, Congress should synchronize Rule 501 and §652; there are a variety of different ways to synthesize these enactments.

One solution is for Congress to amend Rule 501. Congress could make an exception to the traditional method of adopting of a common law privilege when local district court rules are in place.<sup>121</sup> Rule 501 could state, “the privilege of a witness . . . shall be governed by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience, *unless the district court has enacted local rules pursuant to a federal statute.*” Under this hypothetical rule, when confronted with a mediation issue, the court would refer to their local rules rather than crafting a new common law privilege. In an unreported case in the District Court of the Virgin Islands, the Court applied this method.<sup>122</sup> This Court applied a mediation privilege from their local rule to preclude the use of mediation communication, and did not even address the common law privilege analysis under Rule 501.<sup>123</sup> This synchronization would place attorneys on notice of how each specific court treats mediation communications through their local rules. This would not force judges to create common law, but rather act pursuant to a congressional mandate. This would give importance to the ADR Act and allow a deliberative decision making process in drafting local rules. This would be much more comparable to the legislature adopting a privilege, rather than a judicially created privilege.

Another method to synchronize §652 and Rule 501 is to require courts to adopt common law privileges pursuant to Rule 501, but expand their method of adopting privileges. Courts currently adopt privileges based on “reason and experience,” but Congress could amend Rule 501 to allow the Courts to consider “reason and experience *and local court rules enacted pursuant to a federal statute.*”<sup>124</sup> Courts that are hesitant to adopt privileges, explain that creating common law privileges is counter to the goal of a fair trial that seeks an adjudication on the merits.<sup>125</sup> This hypothetical amendment would help cure these reservations and ensure flexibility. This amendment gives Congress the power to decide what should be privileged, while also giving the courts some leeway in adopting their own rules. Essentially, this is the analysis the court in used in *Sheldone*. Through §652, Congress has already displayed a strong interest in keeping mediation confidential. This change to Rule 501 merely gives the congressional mandate more relevance. Flexibility is especially important in this context because as mediation has developed, the local rules enacted pursuant to §652 perhaps did not contemplate all the possible legal issues. The local rules will not dictate the court’s holding, but rather add

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<sup>120</sup> *Olam*, 68 F. Supp. 2d at 1123 (“It is not likely that Congress intended to give 94 district courts the power to vary in potentially quite different ways the proviso in Rule 501.”).

<sup>121</sup> Deason, *supra* note 1, at 316.

<sup>122</sup> *Nielsen-Allen v. Indus. Maint. Corp.*, No. Civ. 2001/70 FR. (D.V.I. Jan. 28, 2004).

<sup>123</sup> *Id.* at 3.

<sup>124</sup> *Id.*

<sup>125</sup> *See Nixon*, 418 U.S. at 710.

another consideration to the *Jaffee* analysis, allowing a wavering court to more easily find a mediation privilege.

A synchronization of Rule 501 with §652 however would prove very difficult and perhaps not drastically increase predictability. It appears very unlikely that Congress is willing to amend Rule 501 to address the issue of predictability in mediation. Congress specifically adopted Rule 501 to avoid the enumerated privileges that the Advisory Committee drafted.<sup>126</sup> As Judge Brazil explained, it appears Congress “devoted no thought” to the relationship between §652 and Rule 501,<sup>127</sup> and since the enactment of §652, it is likely that Congress has not considered the issue. This proposed amendment would also disrupt the Supreme Court’s holding in *Jaffee*. The Court articulated its test for finding a privilege in *Jaffee*, and these changes to Rule 501 would either carve out exceptions to this rule, or supplement a new consideration to the *Jaffee* four-factor test. It is unlikely that Congress will change a Supreme Court holding, especially when the reasoning from *Jaffee* is consistent with Congress’ intent with Rule 501 to judicially create privileges through common law reason and experience.

A reliance on local rules would also not end inconsistencies because the local rules may vary. Courts may begin applying a wide array of different mediation privileges pursuant to the different local rules. The local privilege that the District Court of the Virgin Islands used in *Nielsen-Allen* was a very broad privilege; the only exception was to notify the judge if a party mediated in bad faith.<sup>128</sup> This privilege offers more protection than the UMA, and this analysis displays that local rules will vary greatly in scope. If Congress sought to encourage a federal mediation privilege, it would be more beneficial to address the issue directly and uniformly through legislation.

While a synchronization of Rule 501 and §652 may increase consistency in the mediation privilege, if Congress were to enact a change, they would likely choose a more direct route.

### C. Congress Should Codify A Federal Mediation Privilege

Perhaps the best way to ensure stability and predictability in federal court would be a Congressional enactment of a federal mediation privilege.<sup>129</sup> A statute codifying a federal mediation privilege would concretely define the boundaries of the privilege and end inconsistencies.

With a federal statute, parties would enter mediation with knowledge of which communications are and are not privileged. This would make it much more likely that parties would be candid in mediation. Unlike the local rules pursuant to §652, a federal statute would be uniform. Parties would not be subject to judges and their personal views on whether a mediation privilege exists. In the *Jaffee* dissent, Scalia opined, the fact that all fifty states have enacted a psychotherapist privilege argues against enacting a privilege judicially.<sup>130</sup> Scalia believes, state statutes demonstrate that the legislature is better suited

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<sup>126</sup> *Trammel*, 445 U.S. at 47.

<sup>127</sup> *Olam*, 68 F. Supp. 2d at 1123.

<sup>128</sup> *Nielsen-Allen*, No. Civ. 2001/70 FR at 3.

<sup>129</sup> See Deason, *supra* note 1, at 317–18.

<sup>130</sup> *Jaffee*, 518 U.S. at 26 (Scalia J., dissenting).

to shape a privilege, because the legislature is flexible and can respond to political pressure from interested parties.<sup>131</sup> As the federal courts have shown, perhaps the judiciary is not the best way to enact a federal mediation privilege. Courts are split on whether to adopt a privilege, and those that have adopted a privilege are inconsistent with one another. A federal statute would appease judges who believe that a mediation privilege should exist, and mollify judges in favor of the legislative approach. Allowing the legislature to draft a solution could also reduce overlapping confusion between a mediation and settlement privilege. Congress could draft a statute consistent, and not in conflict with Rule 408, a fear that Judge Paez explained in *Folb*.

The Uniform Mediation Act was drafted by a committee of experts in the field of mediation, with a strong interest in the future of mediation. This Act has proved very effective and has been successfully implemented in many states. This legislative method may be much more advantageous than a common law privilege. A federal common law privileges will not face nearly as much deliberation and debate by interested parties, and therefore it may be less viable. Perhaps the problem in *Folb* was that without proper deliberation and input from experienced mediators, the Court drafted an unworkable privilege. Another benefit of a congressional enactment is that it is much more efficient. Judicially created privileges may take years of jurisdictional splits which will only be resolved if the Supreme Court takes a case to decide the issue. With increasingly crowded dockets, it is unlikely that the Supreme Court will take a case pertaining to the federal mediation privilege soon. Even if the Supreme Court were to take a case, it is unclear how they will rule. The Court may follow the tone of Scalia's dissent in *Jaffee*, that if the legislature wants to adopt this privilege, they should adopt it, rather than seek a judicially created privilege.

Based on the overwhelming support and congressional consensus for the ADR Act, it is realistic that Congress will adopt a federal mediation privilege. The ADR Act passed by unanimous consent in the Senate and by a 405–2 margin in the House of Representatives.<sup>132</sup> In the House Report for the ADR Act, Congress explained, this legislation is necessary to curb the burden of high caseloads in the federal courts.<sup>133</sup> A perceived benefit of §652 was that even with the funds needed to implement dispute resolution programs, the Congressional Budget Office believed increased dispute resolution would “yield some net savings in the costs of court administration.”<sup>134</sup> A federal mediation privilege would be a fairly noncontroversial bill, which would increase the use and consistency of a program that Congress supports.<sup>135</sup> In addition to the ADR

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<sup>131</sup> *Id.*

<sup>132</sup> 144 CONG. REC. 105<sup>th</sup> CONG. 2<sup>nd</sup> Session 1998, available at <http://clerk.house.gov/evs/1998/roll101.xml> (last visited Dec. 10, 2009).

<sup>133</sup> H.R. REP. 105–487, at 5.

<sup>134</sup> *Id.* at 8.

<sup>135</sup> CONG. REC., July 8, 1997, page S7012 (statement of Sen. Grassley) (“ADR is not a legal vogue, not is it second-class justice. ADR is an intelligent and efficient alternative to litigation, and it is a way to ensure that civil matters can be handled as quickly as possible with low cost to the parties. . . with the informality necessary for parties to discuss their positions in a manner that promotes and allows for detailed exploration of the issues.”).

Act, the United States has shown strong support for alternative dispute resolution through its effort in helping draft the UNCITRAL Model Law on International Commercial Conciliation.<sup>136</sup> The UMA and the different versions adopted in the states greatly influenced the UNCITRAL Model Law.<sup>137</sup> Article Ten of the Model Law explains that conciliation proceedings are not admissible, and that a court or tribunal cannot order such disclosure.<sup>138</sup> Much like the justification for the privilege found in *Folb* and in state legislatures, the comment to Article Ten explains that its purpose is to “encourage frank and candid discussion in conciliation.”<sup>139</sup> The United States’ participation in UNCITRAL and use of the UMA, which helped craft the United Nations’ Model Law, displays that the United States believes a privilege is important to the mediation process. A Congressional adoption of a mediation privilege would not be highly controversial, but rather a statute resembling the Model Law they helped draft. A mediation privilege is already present in most states and several nations have also adopted legislation based on the UNCTIRAL Model Law.<sup>140</sup> The United States should follow the example of the states and the nations that have adopted this Model Law by adopting a federal mediation privilege which ensures candidness and consistency in mediation.

The states that have successfully implemented a mediation privilege have done so with the legislature. Perhaps the last ten years of inconsistent holdings display that the legislature is the best method for adopting an evidentiary privilege. If Congress adopted a mediation privilege that resembled the Uniform Mediation Act, predictability in the confidentiality of mediation would increase even more. This would solve not only the horizontal discrepancy between the federal courts, but it would solve vertical discrepancies between the states which have enacted the Uniform Mediation Act.<sup>141</sup>

#### D. Courts Should Place A Premium On Consistency

The Cohen and Thompson study displays that evidence from mediation is often admitted, and the issue of whether a privilege exists is often not raised. To cure this problem, the courts should begin to address the issue more directly. The courts should encourage predictability and consistency, and only by creating precedent that explains their holding on whether a privilege exists will the law progress. Whether the courts

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<sup>136</sup> UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2002Model\\_conciliation.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation.html) (last visited Dec. 14, 2009).

<sup>137</sup> UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2002Model\\_conciliation\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html) (last visited Dec. 14, 2009).

<sup>138</sup> UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use, Article 10, p. 5, United Nations, 2004, *available at* [http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf) (last visited Dec. 14, 2009).

<sup>139</sup> *Id.* at 44.

<sup>140</sup> UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2002Model\\_conciliation\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html) (last visited Dec. 14, 2009). Canada, Croatia, Hungary, Nicaragua and Slovenia have all adopted legislation similar to the Model Law, which drew influence from the UMA.

<sup>141</sup> Deason, *supra* note 1, at 318.

reject or adopt a privilege, the courts should provide parties with a better understanding of their current jurisprudence.

The Ninth and Fourth Circuit have both declined the opportunity to address the issue of whether a federal mediation privilege exists.<sup>142</sup> In both these Circuits, the courts mention in a footnote that they need not address the issue at this time. In *Babasa*, the parties did not raise the issue and therefore the Court assumed they waived it. In this situation, the appellate courts could have at least provided a cursory analysis for future courts to follow. *Babasa* was an appellate opinion in the Ninth Circuit where *Folb* was decided on the district level, and it should have at least indicated whether it had a general disposition toward the reasoning of *Folb*. Courts' avoidance of the issue leaves the lower courts further divided and unsure how to interpret the mediation privilege. Although the attorneys raised the issue in the Fourth Circuit, the Court still avoided addressing the issue because they could decide the case more narrowly. A narrow holding in this instance halts mediation's growth. As courts continually ignore the mediation privilege, consistency is less likely. In *Molina*, the Court disregarded Lexmark's argument that relying on mediation communications for the amount in controversy would have been improper because of the confidentiality in the mediation.<sup>143</sup> The Court did not address the merits of its assertion. The Court explained, because mediation communications are often used for removal, it is an accepted practice.<sup>144</sup> Common practice should not guide the courts' precedent. Courts should address this issue and create precedent, so other courts do not rely on how others have ignored a potentially potent argument.

#### E. Courts Should Implement Sanctions

Disclosing privileged communication from mediation is not merely poor strategy, but it is an act for which courts may grant sanctions.<sup>145</sup> The Cohen and Thompson study displayed that mediation communications are frequently used in litigation, and courts have taken no disciplinary action to discourage this conduct.<sup>146</sup> Courts could reduce the continual use of privileged communications by using their authority to grant sanctions. The legislature could also cure this attorney oversight by drafting a statute, which directly places attorneys on notice that courts can grant sanctions for the use of privileged mediation communications.

Currently, only a Florida statute directly allows courts to grant sanctions for improperly using mediation communication.<sup>147</sup> However, the Florida statute is limited

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<sup>142</sup> See *Babasa*, 498 F.3d at 975 n.1; *In re Anonymous*, 283 F.3d at 639 n.16.

<sup>143</sup> *Molina*, No. CV 08-04796 at 8, 13 n. 65 (“[P]arties in Lexmark’s position frequently rely on information obtained during mediation to support removal of a state action to federal court”).

<sup>144</sup> *Id.*

<sup>145</sup> Sarah Rudolph Cole, *Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 U. KAN. L. REV. 1419 (2006).

<sup>146</sup> *Id.* at 1424; See *Johnson v. Am. Online Inc.*, 280 F. Supp. 2d 1018 (N.D. Cal. 2003) (Court recognized the intentional misuse of mediation communications but declined to sanction the party).

<sup>147</sup> Cole, *supra* note 145, at 1440; FLA. STAT. ANN. §44.406(1) (West 2006).

because it requires parties to act knowingly and willfully.<sup>148</sup> To more affirmatively place attorneys on notice of the importance of keeping mediation communications confidential, courts should use their authority to grant sanctions in federal court. Rule 11 of the Federal Rules of Civil Procedure grants courts the broad authority to sanction parties for submitting documents for “any improper purpose.”<sup>149</sup> Federal judges could begin using Rule 11 as their basis for granting sanctions against parties that rely on privileged mediation communications. With the increasing use of mediation and a general recognition that communications during the process are confidential and potentially privileged, it is not unreasonable to conclude that their use is improper. This broader interpretation of Rule 11 would be an effective mechanism to alter the problematic frequency with which attorneys use mediation communications in litigation. As Cohen and Thompson demonstrate, attorneys are continually failing to raise the privilege in the adversarial setting. Therefore, courts may have to display that confidentiality in mediation is crucial enough to warrant attorney sanctions.

The UMA addresses the issue of a party improperly using mediation communications during litigation, but the UMA does not give courts the authority to grant sanctions.<sup>150</sup> Instead of sanctions, the UMA allows an opposing party to use the mediation communications to controvert the improperly used evidence.<sup>151</sup> Professor Cole explains that the position taken by the UMA should go farther than a mere right to rebuttal, which is consistent with the right of rebuttal from the Uniform Rules of Evidence.<sup>152</sup> A privilege is more robust and warrants more protection than a mere violation of an evidentiary exclusion. Therefore, Professor Cole explains, the drafters should amend the UMA to provide for sanctions, as opposed to merely the right of rebuttal.<sup>153</sup>

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<sup>148</sup> FLA. STAT. ANN. §44.406(1).

<sup>149</sup> FED. R. CIV. P. 11; *See* Cole, *supra* note 145, at 1433. In her article, Professor Cole explains that there is no exhaustive list of what constitutes an improper purpose under Rule 11. Although the courts have never granted sanction under Rule 11 for disclosure of mediation communications, Professor Cole explains that disclosing communications that directly contradict local federal court rules or a state statute is improper.

<sup>150</sup> UNIF. MED. ACT §6.

<sup>151</sup> UNIF. MED. ACT §5(b).

<sup>152</sup> Cole, *supra* note 145, at 1442; UNIF. R. EVID. 106.

<sup>153</sup> *Id.* at 1452. Professor Cole suggests an amendment to the UMA which would replace §5 with the following text:

Section 5. Waiver and Preclusion of Privilege.

(a) A privilege under Section 4 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(b) Any mediation party or nonparty participant who intentionally discloses a mediation communication in a judicial, administrative, or arbitral proceeding involving the same or substantially related subject matter as the mediation in

If not pursuant to a specifically tailored statute or Rule 11, federal courts may also adopt local rules to place attorneys on notice that courts will grant sanction for using privileged mediation communications.<sup>154</sup> The ADR Act instructs district courts to adopt local rules to ensure confidentiality during the mediation process.<sup>155</sup> Pursuant to this statute, courts may expand their local rules to explicitly grant themselves the authority to issue sanctions.<sup>156</sup> Even if courts are reluctant to actually grant sanctions pursuant to this local rule, the mere drafting of a sanctions provision will display the importance of confidentiality during mediation. Even in jurisdictions that are hesitant to adopt a federal mediation privilege and prefer to only have the communications confidential, a local rule shows that the courts are placing a premium on confidentiality. If courts drafted a sanctions provision pursuant to §652, it would display that courts respect Congress' desire to protect communications during mediation, and that attorneys should be weary of using them freely.

Although sanctions are harsh, the possibility of facing repercussions would place attorneys on notice of the importance of confidentiality in mediation. If attorneys continually fail to raise the mediation privilege, courts will not have to confront the

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which the communication occurred shall, by application of one of the parties or action by the judicial, administrative, or arbitral body, be subject to remedies, including:

- (1) Equitable relief;
- (2) Compensatory damages;
- (3) Attorney's fees, mediator fees, and costs incurred in the mediation proceeding;
- (4) Reasonable attorney's fees, if any, for the application for remedies under this Section.

(c) Any mediation party or nonparty participant who intentionally discloses a mediation communication in a judicial, administrative, or arbitral proceeding involving a subject matter substantially unrelated to the mediation in which the communication occurred in violation of Section 4 of this Act may, by application of one of the parties or action by the judicial, administrative, or arbitral body, be subject to remedies, including:

- (1) Equitable relief;
- (2) Compensatory damages;
- (3) Attorney's fees, mediator fees, and costs incurred in the mediation proceeding;
- (4) Reasonable attorney's fees, if any, for the application for remedies under this Section.

(d) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under Section 4.

<sup>154</sup> *Id.* at 437.

<sup>155</sup> 28 U.S.C. §652(d).

<sup>156</sup> Cole, *supra* note 145, at 1436. Professor Cole also explains that courts could adopt a local rule authorizing them to grant sanction without §652. Professor Cole explains that Rule 83(a)(1) of the Federal Rules of Civil Procedure gives district courts the authority to draft this local rule.

common law mediation privilege. This will further delay a consistent common law jurisprudence on a mediation privilege. With increasingly crowded dockets, the courts have an important interest in encouraging mediation, and sanctions may be necessary to accomplish this goal. If attorneys did not consistently present mediation communications in litigation, the mediation process would likely be more predictable and consistent. An attorney seeking to admit mediation communication will be much more cautious with the prospect of sanctions, increasing respect for the privacy of mediation. Attorneys will look for alternative methods to discover this potential evidence. If this evidence cannot be discovered elsewhere, it will force attorneys to reshape their claim without the mediation evidence. Just as the courts and legislature vehemently protect the attorney-client and doctor-patient privilege, this would place a strong emphasis on protecting communications during mediation.

## VI. CONCLUSION

Despite the increasing use of mediation, and the fact that most states have enacted a mediation privilege, federal courts are still reluctant to adopt a mediation privilege. Federal courts' holdings diverge on whether to adopt a common law mediation privilege, which has greatly decreased predictability in mediation. The courts' lack of consistency creates a fear that attorneys and clients will either participate less often in mediation, or become less candid in the process. A decade ago, *Folb* set a framework for adopting a common law mediation privilege. Most courts have either declined to follow *Folb* or have ignored its analysis. Recently, the Court which found a common law privilege in *Folb*, narrowed the scope of the mediation privilege, and called its existence into question. For the sake of protecting the integrity of mediation, courts have a responsibility to rule on whether a privilege exists. As attorneys continually fail to raise the mediation privilege, too many courts have ignored the issue. The courts should firmly decide whether a mediation privilege exists. Either way the courts rule, an affirmative stance will increase predictability in the process.

To increase the likelihood of finding a federal mediation privilege, the states should comprehensively adopt the Uniform Mediation Act. This will create consistency between the states, providing a framework for the federal courts. Consistency would also greatly increase if the Court began directly addressing the issue of a mediation privilege, because attorneys continually fail to raise a mediation privilege. If attorneys continually use mediation communications in litigation, courts should also use their power to grant sanctions. Only through these sanctions can the courts begin to erase the ambiguities surrounding the federal mediation privilege. A consistent jurisprudence would also increase if the legislature synchronized Rule 501 with the ADR Act. These two statutes are in conflict, creating tension in the development of a mediation privilege. Last, the legislature could bypass the delay of waiting for the courts to rule on a common law privilege by codifying a federal mediation privilege. A federal mediation privilege, which reflects the Uniform Mediation Act, would greatly increase predictability in mediation. It would circumvent the gradual determination of whether a common law mediation privilege exists. Congress has continually displayed their support for alternative dispute resolution, and a federal mediation privilege would increase the effectiveness of one of the fastest growing and efficient dispute resolution mechanisms.