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Federal Mediation Privilege: Should Mediation Communications Be Protected From Subsequent Civil & Criminal Proceedings?

*In re: Grand Jury Subpoena Dated December 17, 1996*¹

I. INTRODUCTION

The mediation process depends upon the promise that all oral and written communication generated during mediation remains confidential. Confidentiality protects the process from accusations of partiality and promotes the exchange of information between the parties by ensuring that the communication will not be entered in court if the mediation fails. However, the term confidentiality alone does not cast an iron-clad protection over mediation communications. For instance, non-parties to a mediation are not precluded from obtaining information because they were not a party agreeing to keep the communications in confidence. In addition, mediators and mediation programs are susceptible to subpoenas compelling them to hand over mediation records.

Some state legislatures have responded to these problems by enacting statutes that grant a mediation privilege. The federal government has not responded with the same vigor. The federal courts have been reluctant to create a new common-law privilege to cover mediation. Instead, many of the courts believe that the legislature is the appropriate forum to create the privilege and will wait for Congress to expressly interject and manifest an intention to create a federal mediation privilege.

This Note examines the decision of the Fifth Circuit to deny the existence of a federal mediation privilege when parties moved to quash a grand jury subpoena that sought mediation records to investigate criminal wrongdoing allegedly committed in the mediation program. This Note will focus on the federal government's refusal to establish a mediation privilege despite the fact that some states have embraced such a privilege.

II. FACTS AND HOLDING

In November of 1996, a dispute arose between an individual involved in a mediation proceeding and the Federal Government when the Government served a grand jury subpoena on the custodian of records of the Texas Agricultural Mediation Program ("TAM").² TAM was suspected of criminal wrongdoing when the Office of Investigator General ("OIG") of the United States Department of Agriculture

1. 148 F.3d 487 (5th Cir. 1998).

2. *Id.* at 489-90. TAM, a state agricultural loan mediation program at Texas Tech University, is administered by the state of Texas. *Id.*

(“USDA”) discovered irregularities during an audit in 1995.³ The subpoena sought documents generated from a mediation proceeding that involved Gervase and Ira Moczygembas and the Poth Land and Cattle Company (hereinafter referred to collectively as the “Moczygembas”).⁴ On December 16, 1996, the Moczygembas, as a third party, moved to intervene and quash the subpoena on the grounds that a mediation privilege protected their proceeding from disclosure.⁵ TAM receives funding under the Agricultural Credit Act of 1987, which was passed due to escalating farm debt that accrued in the United States in the mid-1980s.⁶ The Agricultural Credit Act grants funding to the states to operate an agricultural loan mediation program to resolve disputes between farmers and their lenders.⁷ In order for a state program to be approved for this funding, the state must mandate that all mediation sessions remain confidential.⁸ The state of Texas proposed that TAM would follow the “confidential” guidelines of the Texas Alternative Dispute Resolution Procedures Act (“Texas ADR statute”) as set forth in the Texas Civil Practice & Remedies Code Section 154.001.⁹ This statute requires that “communication [made by a party] . . . in an alternative dispute resolution procedure . . . is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.”¹⁰ The Texas ADR statute further provides that if the above provision conflicts with other legal requirements, then a court must decide *in camera* whether the ADR proceedings warrant a protective order of the court, or instead are subject to disclosure.¹¹

The District Court referred the case to a magistrate judge who denied the Moczygembas’ motion to quash the grand jury subpoena on the grounds that federal law does not recognize a mediation privilege.¹² The Moczygembas appealed the decision, and the District Court vacated the magistrate’s order and held that the subpoenaed documents were protected by a federal mediation privilege.¹³ The District Court relied on three separate statutes in deciding that the mediation communications were protected from disclosure to the grand jury: 1) the Agricultural Credit Act; 2) the Texas ADR statute; and 3) the Alternative Dispute Resolution Act (“ADRA”), which allows federal agencies to use ADR processes to resolve

3. *Id.*

4. *Id.* at 489.

5. *Id.* at 490. The Fifth Circuit Court of Appeals rejected the Government’s argument that the Moczygembas lacked standing to challenge the grand jury subpoena. The Moczygembas’ claim of privilege regarding the mediation records at issue provided standing as a third party to challenge the grand jury subpoena. *See In re Grand Jury*, 111 F.3d 1066, 1073-74 (3d Cir. 1997); *In re Grand Jury Proceedings*, 814 F.2d 61, 66 (1st Cir. 1987).

6. *In re Grand Jury Subpoena*, 148 F.3d at 489; *see* Agricultural Credit Act of 1987, 7. U.S.C. § 5102 (1998).

7. *In re Grand Jury Subpoena*, 148 F.3d at 489.

8. *Id.* The Secretary of Agriculture certifies the state program subject to this condition. *Id.*

9. *Id.*

10. *Id.* (citing TEX. CIV. PRAC. & REM. CODE § 154.073(a)).

11. *Id.* (citing TEX. CIV. PRAC. & REM. CODE § 154.073(d)).

12. *Id.* at 490.

13. *Id.*

disputes.¹⁴ On remand, the magistrate judge entered an order quashing the subpoena as to documents involving the Moczygembas' mediation proceedings at TAM.¹⁵ The Government subsequently appealed the District Court's decision to the Fifth Circuit.¹⁶

The Fifth Circuit Court of Appeals reversed.¹⁷ The court found that the although mediation proceedings are "confidential," they do not rise to the level of "privileged" communication.¹⁸ The court held information revealed in mediation proceedings is not precluded from being disclosed to a grand jury when Congress has deemed the proceedings to be "confidential," but not "privileged."¹⁹

III. LEGAL BACKGROUND

A. *The Mediation Process*

The mediation process uses a third-party neutral to oversee and facilitate negotiations between disputing parties.²⁰ Mediation proceedings are non-binding, with the third-party neutral having no authority to force a solution on the parties.²¹ In fact, the inability to impose a solution upon the parties is exactly what makes mediation a favorable and increasingly popular alternative to adjudicatory processes.²² Mediation is an informal process where legal rules of procedure and evidence are inapplicable.²³ The process excludes witness testimony and is sometimes conducted without counsel for the respective parties.²⁴ These arrangements allow mediation to be a faster, less stressful, and less expensive alternative to traditional legal proceedings.²⁵ The mediation proceedings are

14. *Id.* at 491; see Agricultural Credit Act of 1987, 7 U.S.C. § 5101(c)(3)(d) ("mediation sessions shall be confidential"); TEX. CIV. PRAC. & REM. CODE § 154.073(a) ("a communication . . . made . . . in an alternative dispute resolution procedure . . . is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding"); Alternative Dispute Resolution Act, 5 U.S.C. § 574(a) ("a neutral . . . shall not voluntarily disclose or through discovery or compulsory process be required to disclose . . . any communication provided in confidence").

15. *In re Grand Jury Subpoena*, 148 F.3d at 490.

16. *Id.* The Court ruled that the decision was a final judgment and, therefore, appealable. *Id.* (citing *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118, 1122 (5th Cir. 1990)).

17. *Id.* at 493.

18. *Id.* at 492 (citing *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1205 (9th Cir. 1975) (holding that ADR records were confidential but not privileged)).

19. *Id.* at 493

20. Alan Kirtley, *The Mediation Privilege's Transition From Theory to Implementation: Designing A Mediation Privilege Standard To Protect Mediation Participants, The Process And The Public Interest*, 1995 J. DISP. RESOL. 1, 5 (1995).

21. *Id.* at 6.

22. See Peter S. Chantilis, *Mediation U.S.A.*, 26 U. MEM. L. REV. 1031, 1033-82 (1996) (a national survey on mediation, conducted by contacting each state's bar association, reports to what extent the 50 states, the District of Columbia, and Puerto Rico use mediation to resolve disputes).

23. Kirtley, *supra* note 20, at 8.

24. *Id.*

25. *Id.*

undertaken with the goal that the disputing parties will reach a mutually agreed upon settlement that satisfies the needs of all interested parties.²⁶ The informal nature of mediation also allows the parties to expand the pie by implementing non-traditional legal remedies.²⁷ Besides the ability to allocate monetary resources, mediation settlements can incorporate remedies as diverse as the offering of employment, the writing of apologies, the exchanging of labor, and unconventional payment options.²⁸

By holding itself out as an informal process, mediation invites openness.²⁹ The neutral mediator helps foster this openness through the use of joint sessions and caucuses where a rapport and understanding of underlying interests is built.³⁰ The mediator uses "techniques designed to circumvent strategic, cognitive, and other barriers that often impede negotiations."³¹ Mediation is designed to encourage the parties to discuss relevant issues, facts, interests, and emotions.³² Promoting frank and honest discourse between the parties and the mediator allows for the broader solutions mentioned above.³³ The mediator uses the blanket promise of confidentiality to promote free-flowing exchange.³⁴ As a result, parties "reveal personal and business secrets, share deep-seated feelings about others, and make admissions of fact and law."³⁵

B. Confidentiality Versus Mediation Privilege

The promise that communications will remain confidential is crucial to the success of mediation proceedings.³⁶ The Second Circuit found that a confidentiality guarantee allows parties to "discuss matters in an uninhibited fashion" and that if the communication produced during mediation sessions is not protected, then "[parties] of necessity will feel constrained to conduct themselves in a cautious, tight lipped, non committal manner more suitable to poker players . . . This atmosphere, if allowed to exist, would surely destroy the effectiveness of [the] program."³⁷ The mediator must ensure that statements remain confidential, because it allows the parties to see the mediator as completely neutral, and encourages bold disclosures that enable creative, satisfying solutions which are otherwise strangled in adjudicative proceedings that usually operate without confidence.³⁸ Confidentiality helps erase any suspicion that the mediator will disclose information gathered during

26. *Id.* at 5.

27. 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, 720-21 (1997).

28. *Id.* at 721 n.16.

29. Kirtley, *supra* note 20, at 9.

30. *Id.*

31. Michael A. Perino, *Drafting Mediation Privileges: Lessons From The Civil Justice Reform Act*, 26 SETON HALL L. REV. 1, 6 (1995).

32. Kirtley, *supra* note 20, at 9.

33. *Id.* see text accompanying note 28.

34. Kirtley, *supra* note 20, at 9.

35. *Id.*

36. Kenneth R. Feinberg, *Mediation — A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S29 (1989).

37. *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F. 2d. 928, 929-30 (2d Cir. 1979).

38. Feinberg, *supra* note 36, at S29.

the proceedings in subsequent legal matters.³⁹ Confidentiality, however, does not translate into a protective mediation privilege.

Various practices and theories have been used to protect the confidentiality of mediation, including: (1) private contracts; (2) common law protections; (3) state statutes; and (4) evidentiary rules of privilege.⁴⁰ Private contracts are dangerous because a party may breach the contract, forcing the harmed party to bring suit after confidence has been compromised.⁴¹ The contracts are not binding on third-parties and, therefore, communications could be used as evidence.⁴² The use of the "relevancy rule" is the common law basis.⁴³ "The relevancy rule allows the court to exclude evidence of a proposed compromise under the assumption that this information is not reliable evidence of the truth of the offeror's claim."⁴⁴ This rule, however, allows evidence of conduct and independent statements of fact made by the parties to be admitted into evidence.⁴⁵

State statutes provide another basis for confidentiality.⁴⁶ These statutes vary in the amount of protection offered,⁴⁷ and some have clauses that defer to other statutes if its provision conflicts with another statute's provision.⁴⁸ The statutes that are the most effective in providing protection from the disclosure of oral and written mediation communications use a three phrase wording scheme to provide an ironclad protective rule.⁴⁹ The Texas ADR statute uses the three phase protection, holding that a statement made in mediation "is confidential, is not subject to disclosure, and may not be used as evidence" to protect communication in mediation proceedings.⁵⁰ Sherman comments that "this provision protects communication from disclosure to any source, such as a court, a prosecutor, [or] an administrative agency . . . [T]he drafters obviously wanted to emphasize that records are confidential and that participants may not be required to testify or be subject to process. [Section 154.073(a)] provides an explicit privilege against required disclosure in any form."⁵¹

The final theory used for protecting confidentiality in mediation proceedings, and the theory emphasized in this note, is the evidentiary rule of privilege. There are two major ways to create an evidentiary privilege. The Federal Rules of Evidence

39. *Id.*

40. Kentra, *supra* note 27, at 727 (1997).

41. *Id.* at 731.

42. *Id.*

43. *Id.* at 732.

44. *Id.*

45. *Id.*

46. *Id.* at 733.

47. *Id.* Categories of protection range from: blanket protection; waiver statutes; statutes safeguarding protected groups; confidentiality statutes that promote the court's and society's need for evidence; public protection confidentiality exception statutes; exceptions related to court administration needs; governmental and subject-matter-specific confidentiality exceptions; and research and record-keeping exceptions. *Id.*

48. In re *Grand Jury Subpoena*, 148 F.3d at 491.

49. Edward S. Sherman, *Confidentiality In ADR Proceedings: Policy Issues Arising From The Texas Experience*, 38 S. TEX. L. REV. 541, 547 (1997).

50. *Id.* (citing Tex. Civ. Prac. & Rem. Code § 154.073 (1997)).

51. *Id.*

allow the courts to create a common-law privilege,⁵² or the legislature can use its law-making ability to enact privileges.⁵³

When considering whether or not to create a common-law privilege, the court uses the four-part Wigmore balancing test.⁵⁴ The elements of the four-part test developed by Dean John Henry Wigmore are:

(1) the communications must originate in confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties; (3) the relation must be one which, in the opinion of the community, ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.⁵⁵ To create a common-law privilege, a court uses this four-part test to weigh the public interest to be promoted by protecting the information against the need for probative evidence and the fundamental principle of the public's right to every person's evidence.⁵⁶

The federal courts have been unwilling to create a universal privilege to govern the mediation process.⁵⁷ "Privileges are based on the idea that certain societal values are more important than the search for truth . . . [therefore] Judge-made privileges have fallen into disfavor."⁵⁸ The Ninth Circuit, however, did recognize a mediator privilege in *Joseph Macaluso*, believing a mediation privilege was necessary to protect the appearance of a mediator's neutrality, which the court said was essential to the success of the mediation process.⁵⁹ Congress, in the Civil Justice Reform Act of 1990, directed all ninety-four districts to examine the benefits of ADR processes in an effort to decrease the costs and delays incurred in civil litigation, but it did not create a mediation privilege.⁶⁰

The states have been more supportive of a mediation privilege, with at least forty-one states having some type of mediation privilege created by state statutes.⁶¹ The Texas ADR Statute has been considered one of the most comprehensive in providing the protection of confidentiality of written and oral communications made during the mediation process.⁶² The state of Washington and other state statutes have extended the mediation privilege to preclude communications from criminal proceedings.⁶³ These statutes use phrases like "civil and criminal," "any proceeding," "any subsequent legal proceeding," or "judicial or administrative

52. Kentra, *supra* note 27, at 728; *see* FED. R. EVID. 501.

53. Kentra, *supra* note 27, at 728.

54. Perino, *supra* note 31, at 11 n.60.

55. *Id.*

56. Smith v. Smith, 154 F.D.R. 661, 673 (N.D. Tex. 1994) (citing Trammel v. United States, 445 U.S. 40, 47, 51 (1980)).

57. Perino, *supra* note 31, at 10-11 n.57. *But see* NLRB v. Joseph Macaluso, Inc., 618 F.2d 51 (9th Cir. 1980); Maine Cent. R.R. Co. v. Bhd. of Maintenance of Way Emps., 117 F.R.D. 485 (D. Me. 1987) (recognizing a federal mediation privilege). *See, e.g.*, Smith v. Smith, 154 F.R.D. 661 (N.D. Tex. 1994) (refusing to recognize a federal mediation privilege)).

58. Smith, 154 F.R.D. at 673 (citing *In re Dinnan*, 661 F.2d 426, 429 (5th Cir. 1981)).

59. Perino, *supra* note 31, at 10-11.

60. *Id.* at 2.

61. *Id.* at 1.

62. Smith, 154 F.R.D., at 666-67.

63. Kirtley, *supra* note 20, at 29.

proceeding,” to extend the privilege to criminal proceedings.⁶⁴ State statutes that apply to both civil and criminal cases “are consistent with existing privilege law and will undoubtedly be interpreted to extend to such actions.”⁶⁵ Extending the privilege to protect communications that might lead to evidence of criminal activity is not likely to be embraced by federal courts, which have so far lacked the enthusiasm to create a general mediation privilege in the less controversial arena of civil proceedings.

IV. INSTANT DECISION

The Fifth Circuit Court of Appeals reviewed the district court’s statutory interpretation *de novo*.⁶⁶ The court began by noting that the Texas ADR statute and the ADRA had no application to the case, because the Agricultural Credit Act does not indicate that the meaning of “confidential” should be determined by outside sources.⁶⁷ The court compared the ADRA to the Agricultural Credit Act and found that the ADRA used differing language from that of the Agricultural Credit Act to establish a privilege.⁶⁸ In the instant decision, the court reasoned that the use of the word “confidential” in the Agricultural Credit Act could not be construed to create a mediation privilege based on legislative intent.⁶⁹ The court stated that Congress recognized that confidentiality is needed in mediation proceedings in order to promote the free flow of information between the parties, however, Congress did not clearly express a desire to make these communications privileged.⁷⁰ The court noted that Congress “obviously” desired to protect the communications of mediation proceedings to some extent by using the word “confidential.”⁷¹ However, it noted that privileges are created only with clear legislative intent.⁷² The court cited *Nguyen Da Yen v. Kissinger*, and *State v. Thompson*, for the proposition that “confidentiality” does not mean “privileged.”⁷³

The court, relying on *United State v. Nixon*, was unwilling to establish a privilege claiming that privileges are not created lightly.⁷⁴ The Court stated that it did not believe that the Moczygembas’ confidential mediation proceedings were in grave danger of being compromised by disclosure to the grand jury alone, because

64. *Id.* at 28.

65. *Id.*

66. *In re Grand Jury Subpoena*, 148 F.3d at 491.

67. *Id.* at 491-92. This was a departure from the district courts analysis. The district court used these two statutes to determine that a federal mediation privilege existed when they looked to these statutes to determine the meaning of “confidential” under the Agricultural Credit Act § 5101(c)(3)(D). *Id.*

68. *Id.* The ADRA § 574(a) provides that a mediator “shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any dispute resolution communication or any communication provided in confidence” to the mediator. *Id.*

69. *Id.* at 492.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* (citing *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1205 (9th Cir. 1975); *State v. Thompson*, 338 P.2d 319, 322 (1959)).

74. *Id.* at 493 (citing *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

the Federal Rules of Criminal Procedure under rule 6(e) provide for a general rule of secrecy.⁷⁵ The Court stated that the secretive nature of grand jury proceedings do not severely compromise the confidentiality of mediation proceedings.⁷⁶ However, it was noted in the decision that if the grand jury did find probable cause of criminal wrongdoing the communications could become public.⁷⁷ This potential disclosure by the grand jury process did not concern the court because the language used in the Agricultural Credit Act should not act as a "shield" for criminal wrongdoing arising from a mediation process.⁷⁸ The Court said that the public's interest in the administration of criminal justice outweighs the need to uphold the integrity of dispute resolution proceedings even if this reduces a future party's confidence that their communications will remain confidential.⁷⁹ The court stated that even the ADRA provides for disclosure of mediation proceedings when the disclosure is needed to establish a violation of law.⁸⁰ The Fifth Circuit, therefore, held that the documents and communications generated during mediation proceedings are not protected from disclosure by a privilege when Congress only uses the term "confidential" in a statute applicable to ADR proceedings.⁸¹

V. COMMENT

As evidenced by the instant case, the creation of a mediation privilege, although popular with the states, is not likely to be established by the federal judiciary anytime soon. Rule 501 of the Federal Rules of Evidence allows the court to declare new privileges, however, the Rule envisions that these new privileges will be incrementally developed by the court.⁸² The court did not go through the four-part Wigmore balancing test to see if the communications should be protected by a privilege. However, if the Wigmore test had been applied by the Fifth Circuit it is likely that a mediation privilege would conflict with the fourth part of this test⁸³

The first part of the test appears to be satisfied. In the present case the parties were presumably operating under the assumption that the communication would remain confidential as warranted under the Texas ADR Statute that governed the farm debt mediation program used in Texas. The second part is also satisfied. It is widely recognized that mediation's success directly correlates to the free-flow of

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. See *Smith*, 154 F.R.D. at 673 (citing *Trammel*, 445 U.S. at 47).

83. *Perino*, *supra* note 31, at 11 n.60. The four-parts of the Wigmore balancing test are: (1) the communications must originate in confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties; (3) the relation must be one which, in the opinion of the community, ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. 8 JOHN H. WIGMORE, EVIDENCE AT TRIALS AT COMMON LAW § 2285, at 527 (rev. ed. 1961).

information between the parties. As discussed earlier, this exchange is prompted by the declared and perceived neutrality of the third-party neutral. If communications are not protected then the process could fail, as parties would be more reluctant to disclose damaging information to the opponent and the neutral mediator.⁸⁴ The third part is also satisfied, as ADR processes have undoubtedly graduated from passing fad to a legitimate way of dealing with disputes in a number of areas.⁸⁵ With forty-one states adopting a mediation privilege,⁸⁶ a few federal courts recognizing the need for a mediation privilege,⁸⁷ and the bulk of scholarly authority supporting the use of such a privilege,⁸⁸ it appears that the a privilege for mediation communications is "sedulously fostered" by the opinion of the community.⁸⁹

As for the fourth part, the Fifth Circuit found that it was not satisfied. The Fifth Circuit was concerned about the possibility of a privilege denying the grand jury information that, if precluded from disclosure, would shield the wrongdoing of participants, including the parties, mediators, and directors of mediation programs. The court stated that "any interest the Moczygembas have in confidentiality of their mediation sessions will have to give way to the public interest in the administration of criminal justice."⁹⁰ Most of the authority supporting the recognition of a federal mediation privilege is directed toward civil matters. However, a mediation privilege that ends up protecting the disclosure of criminal wrongdoing in mediation proceedings should not be troublesome.⁹¹ It is argued that parties would only tell of criminal wrongdoing during ADR proceedings if they thought it was protected from disclosure.⁹² Thus parties that might disclose incriminating information in order to facilitate a settlement during a mediation proceeding, would be unlikely to disclose this information and expose themselves to criminal prosecution. Therefore, a chilling effect might result in mediation discussions which inhibits the effectiveness of the mediation process to resolve disputes.

In the instant case, the grand jury subpoena sought the communications, not for the criminal prosecution of the parties, but to further establish the criminal wrongdoing suspected of TAM, the mediation program, during a USDA audit of TAM. Some state statutes would probably protect this communication even under the present situation if the issue arose in a state matter, because of the broad protection these statutes create.⁹³ By receiving this particular case on appeal, the Fifth Circuit was able to delay a decision on whether to recognize a federal mediation privilege in civil proceedings. However, the Fifth Circuit's referral to *United States v. Nixon*,⁹⁴ which states that evidentiary privileges are not created lightly when left to the judiciary, because of the public's right to every person's

84. Kirtley, *supra* note 20, at 16, n.99 (listing scholarly authority supporting the theory that confidentiality is the primary factor in the success of mediation).

85. Kentra, *supra* note 27, at 719.

86. Perino, *supra* note 31, at 1

87. *Id.* at 10 n.57.

88. Kirtley, *supra* note 20, at 16 n.99, 17 n.105.

89. *Id.* at 16, 17.

90. *In re Grand Jury Subpoena*, 148 F.3d at 493.

91. Kirtley, *supra* note 20, at 45.

92. *Id.* at 29.

93. TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a) (Supp. 1997).

94. 418 U.S. 683, 710 (1974).

evidence, suggests that the Fifth Circuit would not establish a mediation privilege for civil disputes. This fact, coupled with the statement of the court that the term “confidential” is not construed to mean “privileged” would seem to support the theory that the Fifth Circuit has a distaste for a mediation privilege in any context. Until the Supreme Court has the chance to hear the issue or Congress passes a law granting a mediation privilege, this decision leaves the mediation processes in the Fifth Circuit unprotected when litigated under the jurisdiction of federal courts.

VI. CONCLUSION

The Fifth Circuit’s decision under the facts in the present case was probably what a majority of scholars, courts, and state legislatures would support. It would be difficult for a court to grant a mediation privilege in the face of suspected criminal wrongdoing, especially since the grand jury hearing was investigating the mediation program and not the parties themselves. The Fifth Circuit has not even granted a mediation privilege to parties in civil disputes. Since the courts are supposed to move slowly when creating new privileges, it would be unlikely for a court to establish the privilege in a criminal proceeding before doing so in a civil context. The creation of a federal mediation privilege would practically assure the parties that their discourse in mediation proceedings would remain protected from discovery. Some scholars would argue that a mediation privilege is needed, while others would abhor it. The present system leaves much to be desired; varying state statutes and differing opinions in circuit and district courts leave present and future participants of mediation proceedings wondering if their communications will be protected from opponents and outsiders.

JOSHUA J. ENGELBART