Journal of Dispute Resolution

Volume 2000 | Issue 2 Article 11

2000

Mediator's Privilege: Can a Mediator Be Compelled to Testify in a Civil Case - California Privilege Law Says Yes - Olam v. Congress Mortgage Co., The

Jennifer C. Bailey

NOTES

The Mediator's Privilege: Can a Mediator Be Compelled to Testify in a Civil Case? California Privilege Law Says Yes

Olam v. Congress Mortgage Co.[1]

I. INTRODUCTION

Mediation has become a popular means of resolving disputes outside the courtroom. The focus on problem solving, instead of an adversarial "get what you can" attitude, is appealing to participants.[2] This non-confrontational approach by the mediator allows participants to express their emotions, feelings, and desires about the dispute. Consequently, parties tend to divulge much more, both in spoken words and in actions, than they otherwise would in the hope of resolving the dispute.[3] Parties freely divulge, though, because they expect what they say to remain confidential.[4] It is because of this that many scholars attribute the success of mediation to the confidentiality requirement.[5]

Even given the expectation of confidentiality, instances arise where one or all parties seek to compel mediation testimony. Jurisdictions differ on whether and under what circumstances testimony may be compelled. In addition, some commentators have noted a possible distinction between seeking general mediation testimony and the mediator's testimony.[6] In such instances, a separate confidentiality privilege runs with the mediator, as opposed to the privilege running with parties.[7] Even in jurisdictions that do not establish a distinct mediator's privilege, there still exists concern over whether a mediator can be compelled to testify. This is because the mediator is supposed to be viewed as impartial.[8] When courts require mediators to testify, however, their appearance of impartiality weakens. The issue then becomes whether a mediator can be forced to testify when one or all of the parties desire the testimony.

---

1. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).
2. *See* Kentra, *infra* note 56, at 720.
3. *Id.* at 722.
4. *Id.*
5. *Id.*
6. *See* Rosenberg, *infra* note 142, at 159.
7. *Id.*
8. *Id.*

In the present case, *Olam v. Congress*, the United States District Court for the Northern District of California has, in a precedent-setting opinion, forced a mediator to testify in a subsequent civil procedure.[9] This Note will examine two recurring issues regarding mediation: first, the appropriate law to be applied when a case sits in federal court; and second, the history of the mediation privilege, the present state of the mediation privilege within the federal and state courts, and the consequences of the instant case.

II. FACTS AND HOLDING

In 1992, Donna Olam ("Olam") received a $187,000 loan from Congress Mortgage ("Congress") secured by a lien on two homes.[10] Olam subsequently defaulted on this loan, whereby Congress began foreclosure proceedings.[11] In May of 1993, Olam, represented by her attorney, Carl Windell, and Congress entered into a "work-out" agreement that stayed the foreclosure proceedings.[12] In the present case, Olam claims that although both parties signed the agreement, Windell was not her attorney, and that she was under "extreme duress" at the time she signed the agreement.[13] Later in 1993, Olam defaulted on the payments under the agreement, and Congress informed Olam that they would once again begin foreclosure proceedings.[14]

In 1994, the parties began negotiations with the hope of restructuring the payments in a manner amenable to both parties.[15] The negotiations were successful,[16] and in October 1994, the parties entered into another signed agreement.[17] However, Olam claims that like the 1993 agreement, she was under "economic duress," the terms of the agreement were not explained to her by her attorney, and she was experiencing "incapacitating medical conditions" that kept her from realizing the "nature, purpose, and effect" of the agreement.[18]

In the present case, Olam claims a violation of the federal Truth in Lending Act ("TILA"), fraud, and breach of fiduciary duty by Congress.[19] Congress filed a Motion to Compel Contract Arbitration pursuant to the original 1992 loan agreement.[20] Olam opposed this motion, arguing that she had not read the loan

9. 68 F. Supp. 2d 1110.

10. *Id.* at 1113.

11. *Id.*

12. *Id.* at 1113-14. The work-out agreement provided that renovation funds be applied to the outstanding loan. *Id.* at 1113.

13. *Id.* at 1114.

14. *Id.*

15. *Id.*

16. *Id.* The terms of the agreement called for one of the homes to be sold. *Id.* The proceeds of the sale would be applied to the outstanding debt of the second home, thus reducing the monthly payments. *Id.*

17. *Id.* For the signing of the 1994 agreement, Olam was represented by her attorney, Paul H. Melbostad. *Id.*

18. *Id.*

19. *Id.* at 1115. Olam was represented by her attorney, Carol Johnson Lundberg, when the original complaint was filed. *Id.*

20. *Id.*

agreement and did not know of the arbitration requirement.[21] Congress' Motion to Compel Arbitration was subsequently denied in 1995.[22] In 1997, after the case had appeared before two other judges, Judge Brazil was assigned the case for all further proceedings.[23] At the court's request, the parties agreed to a mediation, which was scheduled for March of 1998.[24] However, the mediation was canceled by Olam's attorney, Phyllis Voisenat ("Voisenat"), due to communication problems between Voisenat and Olam.[25] At the final pretrial conference, the parties, encouraged by the court, agreed to mediation.[26]

The mediation, mediated by Howard Herman, was conducted on September 9, 1998.[27] The mediation went well, and at 1:00 a.m., the parties signed a "Memorandum of Understanding" ("MOU") that gave the terms and settlement of the mediation.[28] Consequently, the case never proceeded to trial.[29] Approximately seven months after the mediation, Congress filed a motion to enforce the mediation settlement.[30] Olam opposed this motion, through her new attorney, Terrence P. Murphy, claiming that the MOU was unconscionable and that Olam was "incapable (intellectually, emotionally, and physically) of giving legally viable consent."[31]

In response to the filed motion and reply, the court concluded that an evidentiary hearing was necessary to determine what actually transpired during the mediation.[32] In order to best evaluate Olam's claims, the court considered (1) the choice of law (state or federal) regarding "to what extent, and through what procedures [the court] may consider evidence about what occurred during the mediation"; and (2) whether, under the applicable law, Herman, as a mediator, can be compelled to testify regarding his "perceptions in and recollections" of the mediation.[33] In anticipation of the evidentiary hearing, the parties agreed to waive their mediation privilege.[34]

In resolving the preceding issues, the United States District Court for the Northern District of California concluded that: (1) a district court must apply state law regarding mediation privilege when the rule of decision of the underlying claim is governed by state law, regardless of whether the district court's local rule regarding mediation privilege pursuant to 28 U.S.C. § 652(d) is more protective of

---

21. *Id.* The court noted that Olam's argument was partly based on her not having her reading glasses when she signed the 1992 loan agreement. *Id.*

22. *Id.* at 1115 & n.4.

23. *Id.* at 1115.

24. *Id.*

25. *Id.* at 1115-16. The court noted its "disappointment" that the assigned mediator had been inconvenienced. *Id.* at 1116.

26. *Id.* at 1116. At this time, no mediation between the parties had ever taken place. *Id.*

27. *Id.* Herman was an "extensively trained" court-appointed mediator. *Id.*

28. *Id.* at 1117. The MOU stated that it was "intended as a binding document itself." *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 1117-18.

32. *Id.* at 1118.

33. *Id.* at 1118, 1120, 1129.

34. *Id.* at 1118-19. Olam waived the attorney-client privilege between her and Voisenat, her former attorney. *Id.* at 1118. In addition, Olam waived any mediation privilege she had to communications made during the mediation and to any communications she may have had with the mediator after the mediation. *Id.* at 1118 & n.13. Congress agreed to a limited waiver of testimony regarding the mediator's and Congress' interactions with Olam and her attorney. *Id.* at 1119.

mediation communications; and (2) a mediator can be compelled to testify about his observations of the mediation when (a) there exists a signed agreement of the results of the mediation, (b) the mediator's testimony would do little or no harm to the relationships between the mediator and a party,[35] (c) the mediator's testimony is extremely probative and crucial to the outcome of the underlying claim, and (d) the harm caused to the interests of mediation would be little or none.[36]

III. LEGAL BACKGROUND

A. Choice of Law

Before a federal court can decide the merits of a claim, the court must first determine whether state or federal law applies. This choice of law can clearly impact the disposition of a case, especially when a privilege issue arises. Under Federal Rule of Evidence 501 ("Rule 501"), when a case is in federal court due to a federal question, the court is required to apply the federal common law of the applicable privilege.[37] This bright-line rule is qualified, however, when the "issue governed by State substantive law is the object of the evidence."[38] As the legislative history of Rule 501 explains, "State privilege law is not to be applied unless the matter to be proved is an element of that state claim or defense . . . ."[39] For example, in *Baravati v. Josephthal, Lyon, & Ross, Inc.*, the United States Court of Appeals for the Seventh Circuit ruled that state defamation privilege law applies in a federal court because defamation is clearly an area of state law.[40] Therefore, it is possible, although rare, that a case can be in federal court due to a federal question, yet still apply state privilege law because the issue to be decided is governed by state law.[41] For distinguishing purposes, when federal law incorporates state law, such as when state law is used to determine damages under the Federal Torts Claim Act, a federal

35. *Id.* at 1134. The court noted that because all parties wanted Herman to testify there would be less harm to the relationships between Herman and a party than there otherwise would be if a party did not want Herman to testify. *Id.*

36. *Id.* at 1125, 1134, 1139.

37. FED. R. EVID. 501 states:

> [T]he privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law. *Id.*

38. S. REP. NO. 93-1277, at 11 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7058. *See also* Davis v. Leal, 43 F. Supp. 2d 1102, 1108-09 (E.D. Cal. 1999) (stating that Rule 501 "does not provide that diversity jurisdiction actions are the only actions in which state law will supply the rule of decision").

39. S. REP. NO. 93-1277, at 11-12 (1974), *reprinted in* 1974 U.S.C.C.A.N. at 7058. *See also* Davis v. Leal, 43 F. Supp. 2d at 1109. The *Davis* court noted that if Congress had desired that state privilege law be applied only in diversity cases, then Congress would have stated such. *Id.* As it is, Congress did not do so but instead directed that state privilege law applies when "[s]tate law supplies the rule of decision." *Id.*

40. Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 707 (7th Cir. 1994).

41. S. REP. NO. 93-1277, at 11-12 (1974), *reprinted in* 1974 U.S.C.C.A.N. at 7058.

action, federal privilege law still applies because the "interests of the United States" are affected.[42]

Another way of expressing the prescription of Rule 501 is by determining what law is operative.[43] A law is "operative of its own force" if the law provides the "source of the right sued upon," commonly referred to as the rule of decision.[44] Therefore, when the rule of decision is state law, state privilege law is also the applicable privilege law under Rule 501.[45] However, as noted above, when federal law provides the rule of decision, then federal privilege law applies.[46] This balancing between federal and state law ensures that federal interests are protected while limiting forum shopping.[47] Without Rule 501, federal courts are forced to apply state privilege law to a federal question, which leads to inequitable and inconsistent application of federal law.[48]

A wrinkle in the choice of law commentary exists with regard to the policy of comity when federal jurisdiction is based on a federal question with additional state claims. Some courts have found that where federal law and state law is consistent or where no federal common law exists, state law may be applied in federal court as a matter of comity.[49] However, recent cases express a distrust of the "application of state law as a matter of comity policy" in federal court.[50] Problems regarding privileges arise because often there is no existing federal privilege law.[51] In hopes of circumventing the issue, courts will apply the privilege law of the state "under the guise that it is simply being used to 'guide' development of the federal common

42. Burrows v. Redbud Community Hosp. Dist., 187 F.R.D. 606, 608 (N.D. Cal. 1998). *See* Federal Torts Claim Act, 28 U.S.C. § 1346(b) (1994 & Supp. III 1997). *See generally* Davis v. Leal, 43 F. Supp. 2d 1102, 1108-09 (E.D. Cal. 1999) (observing that an action based entirely on state law does not require federal privilege law to be applied because there is no overriding federal interest); Menses v. United States Postal Service, 942 F. Supp. 1320, 1322 (D. Nev. 1996) (stating that a federal court "incorporating" state law is also described as "adopt[ing] state law").

43. *Burrows*, 187 F.R.D. at 608.

44. *Id.*

45. *Id. See* FED. R. EVID. 501.

46. S. REP. NO. 93-1277, at 11-12 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059 (stating that "[I]n Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced").

47. *Burrows*, 187 F.R.D. at 608.

48. *Id.*

49. *See In re* March, 1994-Special Grand Jury, 897 F. Supp. 1170, 1172 (S.D. Ind. 1995) (finding that state law can be applied as a matter of comity when there is "no substantial cost to federal substantive and procedural policy,") (quoting Mem'l Hosp. v. Shadur, 664 F.2d 1058, 1061 (7th Cir. 1981)); Smith v. Smith, 154 F.R.D. 661, 668-69 (N.D. Tex. 1994) (refusing to reverse magistrate judge's ruling that comity and the parties' expectations that state law would be applied to an issue regarding Texas mediator's privilege).

50. *See* Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1170 (C.D. Cal. 1998) (overruling district court's decision to apply state mediation privilege as a matter of comity); Jackson v. County of Sacramento, 175 F.R.D. 653, 654 (E.D. Cal. 1997) (holding that federal privilege law should not be determined by comity to the law of the forum state in a federal question case). *See also* Ryan O'Dell, Note, *Federal Court Positively Adopts a Federal Common Law Testimonial Privilege for Mediation: Is It Justified?*, 1999 J. DISP. RESOL. 203, 208 (noting that a federal court should not apply state mediation privileges as a matter of comity).

51. *See Folb*, 16 F. Supp. 2d at 1169.

law."[52] However, under *Jaffee v. Redmond*, federal courts considering whether to make new federal privilege law should rule under a more thorough and rigorous analysis other than simply "comity compels adoption of state law."[53] Therefore, in federal question cases, a court must balance Rule 501 and the *Jaffee* analysis to determine what privilege law applies, instead of adopting state privilege law as a matter of comity.[54]

B. Mediator's Privilege

1. Civil Cases

The mediation process is primarily viewed as one of candor and trust – in exchange for one's candor during the mediation, there is trust that what is said during the mediation will remain confidential.[55] The widespread acceptance of privileged mediation communications is demonstrated by the not so insignificant fact that forty-nine states have adopted at least one statute or local court rule regarding mediation confidentiality.[56] Two developments within the past three years have further strengthened protection of mediation communications. First, Congress passed the Alternative Dispute Resolution Act of 1998 ("ADR Act"), which "provide[s] for the confidentiality of alternative dispute resolution processes" and "prohibit[s] disclosure of confidential dispute resolution communications" in federal district courts.[57] Second, also in 1998, the United States District Court for the Central District of California established the first-ever federal mediation privilege in *Folb v. Motion Picture Industry Pension & Health Plans*.[58] Although these two events greatly contributed to the law regarding mediation privileges, they did little to acknowledge the developing issue of the mediator's protection.

Although rare, instances arise where a party seeks to compel a mediator to testify to events of a mediation. One of the earliest cases to debate the issue, *NLRB v. Macaluso, Inc.*, applied a balancing test to determine whether mediator testimony

---

52. *Id.* (quoting A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5434, at 488 (1980 & Supp. 1999)).

53. Jaffee v. Redmond, 518 U.S. 1, 9-13 (1996) (outlining a four-part test to determine whether a federal court may adopt a federal privilege). *See also* O'Dell, *supra* note 50, at 208.

54. *Folb*, 16 F. Supp. 2d at 1170-71.

55. James L. Knoll, *Protecting Participants in the Mediation Process: The Role of Privilege and Immunity*, 34 TORT & INS. L. J. 115, 115 (1998). *See generally* 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, 10 (noting that one purpose of confidential mediations is "to maintain the public's perception that individual mediators and the mediation process are neutral and unbiased"); National Conference of Commissioners on Uniform State Laws, Uniform Mediation Act (Proposed Official Drafts) (visited March 8, 2000), <http://www.law.upenn.edu/bll/ulc/mediat/med300.htm> [hereinafter U.M.A.] (noting that "candor [is] crucial to mediation").

56. 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, 733 (providing a comprehensive list of state statutes regarding confidentiality in the mediation process).

57. Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 652(d) (1998).

58. 16 F. Supp. 2d 1164 (C.D. Cal. 1998).

should be compelled.[59] In *Macaluso*, the Macaluso company ("Company") and Retail Store Employees Union Local 1001 ("Union") participated in collective-bargaining agreement negotiations mediated by a member of the Federal Mediation and Conciliation Service ("FMCS").[60] The Union argued that three mediated sessions produced an agreement, whereas the Company contended they had not.[61] Crucial to the Company's case was the mediator's testimony, which the Company sought to compel.[62] The FMCS, filing amicus curiae, argued that successful mediation was contingent on the mediator's "appearance of neutrality," and therefore, the mediator's testimony should not be heard.[63] The court noted, however, that a "fundamental principle of Anglo-American law [is] that the public is entitled to every person's evidence."[64] In evaluating these interests, the court stated that in order to deny the mediator's testimony, there must exist a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[65] The court ultimately denied compelling the mediator's testimony, stating that mediation in labor relations was important enough that the need for neutral mediators outweighed the benefits to the parties and the public of the mediator's testimony.[66]

At least one state court has compelled a mediator to testify in a civil case. In *McKinlay v. McKinlay*, a Florida appeals court allowed a mediator to testify as to whether the mediation produced an agreement.[67] At the end of the mediation in *McKinlay*, which focused on the distribution of divorce proceedings, the mediator checked "[A]greement signed (total resolution)" on the "Disposition of Mediation Conference" form.[68] In a letter dated the same day, the wife claimed that she was under "severe emotional distress" and was pressured into reaching an agreement.[69] When the husband sought to enforce the terms of the agreement by calling the mediator to testify that an agreement had been reached, the wife argued mediator privilege under Florida's mediation confidentiality statutes.[70] The wife, in support of denying the mediator's testimony, cited a previous Florida case which denied

59. NLRB v. Macaluso, Inc., 618 F.2d 51, 54 (9th Cir. 1980).
60. *Id.* at 52.
61. *Id.* at 52-53.
62. *Id.* at 53.
63. *Id.* The NLRB also joined the FMCS in amicus curiae. *Id.*
64. *Id.* at 54.
65. *Id.* (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)). *See generally* WIGMORE, WIGMORE ON EVIDENCE § 11, at 296 (1940).
66. *Macaluso*, 618 F.2d at 54. *See also In re* Tomlinson of High Point, Inc., 74 N.L.R.B. 681, 685 (1947) (stating "conciliators must maintain a reputation for impartiality, and the parties to conciliation conferences must feel free to talk without any fear that the conciliator may subsequently make disclosures as a witness in some other proceeding, to the possible disadvantage of a party to the conference"); Sonenstahl v. L.E.L.S., Inc., 372 N.W.2d 1, 6 (Minn. Ct. App. 1985) (holding it proper to deny testimony of mediator in negotiations between union and county based on "policy of promoting successful mediation" in labor disputes).
67. McKinlay v. McKinlay, 648 So. 2d 806 (Fla. Dist. Ct. App. 1995).
68. *Id.* at 807.
69. *Id.*
70. *Id.* at 809.

mediator testimony of a purported mediation agreement.[71] The court declined to follow, however, stating that because the wife had alleged "duress and intimidation" during the mediation, she waived her statutory privilege to confidentiality.[72] Therefore, the wife was precluded from disallowing the mediator's testimony which might otherwise benefit the husband.[73] In applying such a strict waiver of rights, the court relied on Florida's "Dead Man's Statute," which mandates waiver of a party's privileges when that party "open[s] the door" to otherwise excluded evidence.[74]

Contrary to the broad standard applied in *McKinlay* is the less generous standard proposed in the March 2000 draft of the Uniform Mediation Act ("UMA").[75] Section 8(b)(2) of the UMA provides no confidentiality privilege for evidence offered "in a proceeding in which fraud, duress, or incapacity is in issue regarding the validity or enforceability of an agreement . . . ," except when the "evidence is provided by persons other than the mediator of the dispute at issue."[76] In addition, all parties to the mediation may waive their privileges under section 6(a), but a mediator's privilege may not be waived unless the mediator and the parties expressly waive the privilege under section 6(b).[77] As noted in the Reporter's Working Notes ("Notes") to the UMA, there exists a separate mediator's privilege in order to "protect the institution rather than the client's expectations."[78] This is further illustrated by the Notes regarding section 5(d), which state that even if all parties agree to disclose, the mediator may "decline to testify and protect against disclosure of the mediator's communications."[79]

2. *Criminal Cases*

The most common exception to a mediation privilege arises in criminal cases, where the constitutional need for mediator testimony in order to impeach or cross-examine a witness outweighs any benefit to the mediation process in suppressing mediator testimony.[80] Although few cases have arisen with this issue, it appears that if the defendant wishes to invoke her mediation privilege, courts will deny the mediation testimony; however, if the defendant seeks to compel testimony, the mediation testimony will be granted.[81]

---

71. *Id.* at 809-10. *See* Hudson v. Hudson, 600 So. 2d 7, 8-9 (Fla. Dist. Ct. App. 1992) (holding that introduction of evidence of mediation negotiations violated the "spirit and letter" of the confidentiality provisions).

72. *McKinlay*, 648 So. 2d at 810.

73. *Id. But see* Kenney v. Emge, 972 S.W.2d 616, 621 (Mo. Ct. App. 1998) (holding that Missouri statute requires denial of mediator's testimony, even to prove existence of mediation agreement).

74. *McKinlay*, 648 So. 2d at 810.

75. U.M.A. § 8.

76. *Id.*

77. *Id.* § 6. Waiver and Estoppel, states: "(a) The disputant's privilege . . . may be waived, but only if expressly waived by all disputants . . . . (b) The mediator's privilege . . . . may be waived, but only if expressly waived by all disputants and the mediator . . . ." *Id.*

78. *Id.* § 5 reporter's notes (6)(b)(ii).

79. *Id.* § 5 reporter's notes (6)(a).

80. *See* Rinaker v. Superior Court, 62 Cal. App. 4th 155, 161-62 (Cal. Ct. App. 1998).

81. *See generally* United States v. Gullo, 672 F. Supp. 99, 104 (W.D.N.Y. 1987); *Rinaker*, 62 Cal. App. 4th at 161; State v. Castellano, 460 So. 2d 480, 481-82 (Fla. Dist. Ct. App. 1984).

The early case of *United States v. Gullo* involved the issue of mediator testimony in a criminal proceeding.[82] In *Gullo*, defendant Gullo participated in a mediation proceeding sponsored by the New York court system.[83] In a subsequent grand jury investigation, the prosecution sought and obtained the testimony of the mediator.[84] Gullo argued that the testimony was privileged, and therefore, his resulting indictment should be dismissed.[85] The court ultimately ruled that the testimony should be suppressed at trial, although the testimony to the grand jury was not sufficiently prejudicial to dismiss the indictment.[86] The court based its decision partly on the need for confidentiality in mediation in order to support "candor" and an "atmosphere without restraint and intimidation."[87] However, the court noted that there is a "strong policy in favor of full development of facts and admissibility in criminal cases."[88] This exception for the admissibility of evidence in criminal proceedings served as the foundation for the recent decision in *Rinaker v. Superior Court*.[89]

In *Rinaker*, the California Court of Appeals held that a mediator can be compelled to testify when the testimony is needed to ensure the constitutional right to cross-examination and impeachment of a witness under a two-part balancing test.[90] *Rinaker* revolved around a mediation involving the mediator, Rinaker; two juveniles charged with vandalism and harassment; and Torres, the victim of the alleged actions by the juveniles.[91] The mediation produced an agreement as to the civil harassment action brought by Torres.[92] In a subsequent juvenile proceeding, which is deemed a civil action under California law, the juveniles sought Rinaker's testimony in order to impeach Torres' testimony.[93]

The court first acknowledged the strict protection of mediation communications mandated by section 1119 of the California Evidence Code.[94] The court stated that even though the need for confidentiality is great, this need must be balanced against "preventing perjury" and "preserving the integrity of the truth-seeking process of trial . . . ."[95] The court noted, though, that an in camera proceeding may be held before the mediator is questioned at trial so that the "constitutional need" for the mediator's testimony may be weighed against the mediator's privilege.[96] If the in

82. 672 F. Supp. 99 (W.D.N.Y. 1987).
83. *Id.* at 102.
84. *Id.*
85. *Id.* at 103.
86. *Id.* at 104. *But see* State v. Castellano, 460 So. 2d 480, 482 (Fla. Dist. Ct. App. 1984) (holding that criminal defendant may compel mediator's testimony).
87. *Gullo*, 672 F. Supp. at 104.
88. *Id.*
89. 62 Cal. App. 4th 155.
90. *Id.* at 161. *See also* U.M.A. § 5 reporter's notes (6)(c).
91. *Rinaker*, 62 Cal App 4th at 161-62.
92. *Id.* at 162.
93. *Id.*
94. *Id.* at 163-64. Section 1119 states: "(a) No evidence of anything said or any admission made . . . in . . . a mediation . . . is admissible . . . and disclosure of the evidence shall not be compelled . . . . (c) All communications, negotiations, or settlement discussion by and between participants in the course of a mediation . . . shall remain confidential." Cal. Evid. Code § 1119 (West 1999).
95. *Rinaker*, 62 Cal. App. 4th at 167.
96. *Id.* at 169-71.

camera proceeding produced testimony that could impeach or be used to cross-examine Torres, then the use of Rinaker's testimony would be necessary to ensure that the juveniles' constitutional rights would not be abrogated.[97]

IV. INSTANT DECISION

In the present case, the court first considered the choice of law issue and analyzed Olam's desire that federal law apply based on pendent jurisdiction due to the federal TILA claim.[98] Olam argued that under *Folb*, privilege issues contemporaneous with the merits of a federal claim are to be decided under federal law, which is the federal common law of privilege.[99] In response, the court further suggested a related argument Olam could have proffered involving the ADR Act, namely that it requires all district courts to adopt a rule providing for confidential mediations and prohibiting "disclosure of confidential dispute resolution communications."[100] The court rebutted the above arguments, however, stating that Federal Rule of Evidence 501 still existed and was applicable to the present facts.[101]

Rule 501 requires that state privilege law be applied when the issue before the court is purely a state and civil matter.[102] The court peremptorily noted that Congress' motion to enforce the mediation settlement is clearly a civil matter in which state law provides the rule of decision.[103] Therefore, given the consequence of Rule 501, California privilege law applies.[104] The court further stated that given the facts of the case, the parties should have realized that there existed the possibility of a proceeding, decided under state law, which would determine whether the mediation produced an enforceable contract.[105]

In arguing that Olam is not unduly prejudiced by the court's decision, the court pointed to California's "strong statutory protections for mediation communications."[106] The court intimated that these protections are as strong or

97. *Id.* at 169.

98. *Olam*, 68 F. Supp. 2d at 1119. Note that the court discussed three additional matters regarding choice of law: (1) the applicable law regarding Olam's underlying claims, one of which was a federal matter; (2) the applicable law regarding whether the mediation resulted in an enforceable contract; and (3) the applicable law regarding procedural issues, such as whether or not to hold an in camera proceeding. *Id.* at 1119, 1126-27.

99. *Id.* at 1120. *See Folb*, 16 F. Supp. 2d 1164 (holding that a mediation privilege exists under the federal common law of privilege).

100. *Olam*, 68 F. Supp. 2d at 1121. *See* Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 652(d) (1998).

101. *Olam*, 68 F. Supp. 2d at 1121.

102. *Id.* Federal Rule of Evidence 501 states that "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness . . . shall be determined in accordance with State law." FED. R. EVID. 501.

103. *Olam*, 68 F. Supp. 2d at 1121. In addition, the court noted that a party may only seek to enforce mediations that produce a "writing that appears to constitute an enforceable contract." *Id.* at 1125.

104. *Id.* at 1121.

105. *Id.* at 1121-22. The "facts" the court refers to probably include the longevity of the dispute between the parties, the fact that a date for mediation had been canceled once, and Olam's previous claims of economic and mental duress.

106. *Id.* at 1122.

stronger than the protections Olam would have been afforded under the federal common law of privilege outlined in *Folb*.[107] In addition, if Olam wished to argue that the newly adopted ADR Act supplanted the scope of Rule 501, Olam would have to prove that the United States Congress clearly intended to do so.[108] Otherwise, the considerable importance of Rule 501 will not be so easily disregarded.[109]

The court next considered the applicable California privilege law, namely sections 703.5, 1119, and 1123 of the California Evidence Code.[110] Section 1123 allows for the admissibility of any signed agreement between the parties.[111] Therefore, in the present case, the court noted that the MOU between Olam and Congress was admissible because it was a signed writing.[112] In addition, the court reiterated the parties' waiver of their mediation privilege; Olam's waiver consisted of any "perceptions" or "recollections" by Congress, the mediator, and Olam's attorney regarding Olam's "appearance, demeanor, condition, and conduct during the mediation . . . ."[113]

Under sections 703.5 and 1119 of the California Evidence Code, a mediator's privilege is mutually exclusive of a party's mediation privilege.[114] Therefore, the

---

107. *Id. See Folb*, 16 F. Supp. 2d 1164.

108. *Olam*, 68 F. Supp. 2d at 1122. *See* Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 652(d) (1998). The court, at length, noted that both California's mediation privilege laws and Rule 501 would "pose very little threat to achieving the purposes of § 652(d) [of the ADR Act]." *Olam*, 68 F. Supp. 2d at 1125. As previously noted, California's mediation privilege laws are extremely aggressive in protecting mediation communications. *Id.* at 1124. In addition, because most states have some type of mediation privilege and because enforcement proceedings of an alleged mediation settlement are rare, Rule 501 and § 652(d) should be able to coexist harmoniously. *Id.* at 1125. However, this might not be the case if a state were to provide less mediation privilege protection than the local district court. *Id.* at 1124-25.

109. *Id.* at 1123.

110. *Id.* at 1128. Section 703.5 states: "No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding . . . ." CAL. EVID. CODE § 703.5 (West 1995). Section 1119 states:

> (a) No evidence of anything said or any admission made . . . in the course of, or pursuant to, a mediation . . . is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any . . . noncriminal proceeding . . . .
> (b) No writing . . . prepared in the course of, or pursuant to, a mediation . . . is admissible or subject to discovery, and disclosure of the writing shall not be compelled in any . . . noncriminal proceeding . . . .
> (c) All communications . . . by and between participants in the course of a mediation . . . shall remain confidential.

Cal. Evid. Code § 1119 (West 1997).

Section 1123 states: "[a] written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure . . . if the agreement is signed by the settling parties and . . . . (b) The agreement provides that it is enforceable or binding or words to that effect." CAL. EVID. CODE § 1123 (WEST 1997).

111. *Olam*, 68 F. Supp. 2d at 1128.

112. *Id.* at 1128-29. The court further noted that if the parties only had an oral agreement, as opposed to a signed writing, then under California law, the court would be precluded from even considering whether there was an enforceable contract using "evidence from the mediation." *Id.* at 1131. *See* Ryan v. Garcia, 27 Cal. App. 4th 1006, 1007 (Cal. App. 3 Dist. 1994) (requiring a signed written agreement of the resolution of the mediation in order to be admissible in future judicial proceedings).

113. *Olam*, 68 F. Supp. 2d at 1129.

114. *Id.* at 1130. *See* CAL. EVID. CODE §§ 703.5, 1119.

parties' waiver of their mediation privilege does not automatically waive the mediator's privilege.[115] In determining whether a mediator may testify as to what she observed during a mediation, the court has an "independent duty" under section 703.5 to decide the "competency" of the mediator's testimony.[116] This determination, the court stated, was governed by the leading California case discussing the issue, *Rinaker v. Superior Court.*[117] In applying *Rinaker's* two-stage balancing test, the court first observed that compelling a mediator to testify as to what she observed during a mediation "threatens values underlying the mediation privileges."[118] However, the importance of these values is greatly diminished when both parties have waived their mediation privilege.[119]

The court acknowledged several concerns which caution against compelling a mediator to testify: (1) "economic and psychic burdens" could dissuade a mediator who served pro bono or for very little money; (2) a mediator might feel "violated" by being forced to give testimony against parties with whom she had established "a relationship of trust," which could "threaten" a mediator's sense of "personal integrity"; and (3) a mediator's ability to create an "environment of trust" would be hampered if parties to a mediation knew that their communications might be used against them in a subsequent case.[120] These concerns will vary from case to case depending on the "nature of the testimony that is sought."[121] Therefore, the court stated, it is important for a court analyzing the parties' positions using a *Rinaker* balancing test to first note the kinds of "techniques and processes" used in the mediation.[122] If the mediation "focus[ed] . . . on feelings rather than facts," the mediator's testimony might do considerable harm to the relationship between the mediator and party and to the mediation process as a whole.[123] The counterargument is that if the parties and the mediator view the mediation as more "adjudicat[ive]/evaluative," then the focus on "evidence, law, and traditional analysis of liability, damages and settlement options" will not undermine the fairness and reliability of a mediator's testimony.[124] The court opined, however, that because the

115. *Olam*, 68 F. Supp. 2d at 1130.

116. *Id.* at 1130-31.

117. *Id* at 1131. Before proceeding, the court noted an "analytical curiosity" of the *Rinaker* opinion, namely that the *Rinaker* court did not consider section 703.5 in their analysis of a mediator's privilege. *Id.* at 1132. The court in the present case concluded, however, that due to the facts at issue, the balancing test developed in *Rinaker* would be the same under both sections 705.3 and 1119. *See Rinaker*, 62 Cal. App. 4th 155.

118. *Olam*, 68 F. Supp. 2d. at 1133. In addition, the court noted that "'without the promise of confidentiality it would be appreciably more difficult to achieve the goals of mediation programs . . . [and] . . . some litigants [would be deterred] from participating freely and openly in mediation.'" *Id.*

119. *Id.*

120. *Id.* at 1133-34.

121. *Id.* at 1134. The court further noted that in *Rinaker* there was more of a need to keep the mediator's testimony privileged because of the nature of the relationships formed between the mediator and the parties — that of trust and security. *Id.* at 1134-35. However, in the present case, that need is not nearly as great because both parties want the mediator to testify. *Id.* at 1134. The court noted that "[i]n some mediations . . . . [t]he neutral may ask the parties to set aside preoccupations with what happened as she tries to help the parties understand underlying motivations and needs and to remove emotional obstacles . . . ." *Id.* at 1135.

122. *Id.*

123. *Id.*

124. *Id.*

testimony sought in the present case was more of a "general and impressionistic level [of Olam's] condition and capacities," the "probable degree of harm" to the mediation process would be little.[125]

In applying the balancing analysis, the court first noted the interests that might be harmed (or advanced) by compelling the mediator's testimony were "crucial" and "probative" to the present issue of whether there existed an enforceable contract.[126] Without the testimony of the mediator, "justice" might not be served, which would "threaten values of great significance" to both parties.[127] The court observed that this is in great part due to the mediator being the only source of neutral evidence as to the mental, emotional, and physical condition of Olam during the mediation.[128] Therefore, given the probative value of the mediator's testimony, California law allows the court to compel the mediator to testify in an in camera proceeding.[129]

After the court heard the mediator's testimony, the court stated that it was "well situated" to make an informed decision on whether the testimony would be of enough evidentiary importance to outweigh the harm caused to the mediation privilege and process.[130] The court first noted the applicable California law regarding a claim of undue influence.[131] In order to successfully make this claim, the claimant must show "(1) that she had a lessened capacity to make a free contract and (2) that the other party applied its excessive strength to her to secure her agreement."[132] In ruling that Olam was not unduly influenced, the court centered on the discrepancies between Olam's and the mediator's testimony regarding how long Olam was left by herself and the amount of communication Olam had with the mediator.[133] In addition, the court noted that Olam's doctor testified that Olam had not seen him about any serious medical condition in or around the time of the mediation; therefore, the court observed, this evidence tends to abrogate Olam's version of her extreme medical condition.[134] Given the testimony of the neutral mediator, the court ultimately found that Olam's version of the events of the mediation was clearly incorrect, and that Olam was not subjected to any undue influence or distress.[135] Consequently, Congress' motion to enforce the settlement agreement was granted.[136]

---

125. *Id.* at 1136.
126. *Id.*
127. *Id.* at 1136-37.
128. *Id.* at 1138-39.
129. *Id.* at 1139.
130. *Id.*
131. *Id.* at 1140. California law states that "[u]ndue influence consists . . . ; (2) In taking an unfair advantage of another's weakness of mind; or (3) In taking a grossly oppressive and unfair advantage of another's necessities or distress." CAL. CIV. CODE § 1575 (West 1982).
132. *Olam*, 68 F. Supp. 2d at 1141 (citing Odorizzi v. Bloomfield Sch. Dist., 246 Cal. App. 2d 123, 131-32 (1966)).
133. *Olam*, 68 F. Supp. 2d at 1145-47.
134. *Id.* at 1144-45.
135. *Id.* at 1146.
136. *Id.* at 1151.

V. COMMENT

A. Choice of Law

A considerable portion of the *Olam* opinion discusses the choice of law issue. Although the choice of law largely impacts the result of the case, the court's lengthy discussion on the distinctions between the newly evolving federal mediation privilege and the well-founded California privilege is misleading and ultimately not dispositive.[137] An interested person reading the opinion might conclude that the choice of law is partly based on the degree of protection afforded by the federal privilege versus the state privilege. However, as noted previously in Part III(A) of this Note, the law a federal court must apply is mandated by Federal Rule of Evidence 501; the desires of the parties and the various protections of the state and federal laws do not dictate the choice of law.

The legislative history of Rule 501 and its subsequent applications make very clear that when the rule of decision is state law, state privilege law applies.[138] As the history states, it is only when there are federal interests to protect that a court should apply federal privilege law.[139] When the issue before the court is merely the enforceability of a contract, which is without doubt grounded in state law, no federal interests are considered.

It was unnecessary and superfluous for the court in *Olam* to consider anything beyond the history and meaning of Rule 501. However, in an effort to justify the "fairness" of its ruling, the court noted California's "strong statutory protections for mediation communications."[140] Even given California's aggressive protections, these protections were not strong enough to safeguard the mediator's privilege in *Olam*.

B. Mediator's Privilege

It is interesting to note that Judge Brazil, the author of the present opinion, is a leading figure in the rising acceptance and use of ADR.[141] As such, it would be unsurprising if his articles and opinions, especially regarding ADR, were given considerable weight. The sheer volume of scholarly articles about mediation privileges evidences the legal community's concern and importance regarding the

137. *See Olam*, 68 F. Supp. 2d at 1122-25.
138. *See supra* note 46 and accompanying text.
139. *See supra* note 42 and accompanying text.
140. *Olam*, 68 F. Supp. 2d at 1122, 1124.
141. Wayne D. Brazil, *Comparing Structures for the Delivery of ADR Services by Courts: Critical Values and Concerns*, 14 OHIO ST. J. ON DISP. RESOL. 715 (1999); Wayne D. Brazil, *Continuing the Conversation about the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11; Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L. J. 955 (1988). *See also* William B. Leahy, Karen E. Rubin, *Keeping the 'R' in ADR: How Olam Treats Confidentiality*, 17 Alternatives to the High Cost of Litig. 187, 187 (1999) (stating that Judge Brazil is "an acknowledged expert on court-sponsored ADR").

mediation process.[142] Therefore, it can be expected that Judge Brazil's present opinion will receive much attention, both as precedent for the direction in which the mediation privilege is evolving and as a California case, a state often considered the upstart of rising judicial change.[143]

Unfortunately, the opinion fails to apply the law it so strongly claims to protect. With extremely few exceptions, a mediator is not compelled to testify, primarily to protect the mediation process.[144] However, Judge Brazil forces the mediator to testify in the present case. Although Judge Brazil notes the strong California protections of the mediation privilege, he relies heavily on the California appeals case of *Rinaker v. Superior Court*.[145] The fallacy of this reliance, though, is that *Rinaker* is distinguishable as a normally accepted exception to a mediation privilege, namely that of a criminal proceeding. In California, a juvenile proceeding is labeled as civil, yet the process has all the trappings of at least a quasi-criminal, if not a complete, criminal proceeding.[146] In fact, the *Rinaker* court noted the constitutional considerations in a criminal proceeding, and that these considerations carried over to "proceedings that may result in confinement or other sanctions, whether the state labels these proceedings 'criminal' or 'civil.'"[147]

Judge Brazil, in the present case, declined to distinguish between criminal and civil proceedings and instead relied on the two-part balancing analysis outlined in *Rinaker*.[148] However, he failed to account for the *Rinaker* court's note that its analysis was "against the backdrop of the constitutional right to due process of law."[149] Hence, it was misguided to apply the *Rinaker* balancing test to a civil case with no due process concerns.

In applying the *Rinaker* balancing test, Judge Brazil talked at length about the need for confidentiality and the harm against the mediation process if there was not a mediator's privilege.[150] He ultimately decided, though, that the mediation process will not be harmed if the mediator is forced to testify, at least in this particular case.[151] This is partly due to the type of testimony sought: that of perceptions instead of disclosures. Additional basis for the decision was the fact that both parties wanted the mediator to testify, and that without the mediator's testimony, the mediation agreement would have to be vacated.[152] This last consideration the court noted as

---

142. *See generally* Kentra, *supra* note 56; Kirtley, *supra* note 55; Knoll, *supra* note 55; Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO ST. J. ON DISP. RESOL. 157 (1994).

143. *See generally* William B. Leahy & Karen E. Rubin, *Keeping the 'R' in ADR: How Olam Treats Confidentiality*, 17 Alternatives to the High Cost of Litig. 187; Richard C. Reuben, *Court Issues Major Ruling on Mediation Confidentiality*, DISP. RESOL. MAG., Fall 1999, at 25.

144. *Compare McKinlay*, 648 So. 2d 809 (ordering mediator to testify in a civil case) *and* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1 (1986) (arguing against a blanket mediation privilege), *with* Kentra, *supra* note 56, at 722 (stating that "[m]ediation would not be nearly as effective if the parties were not assured their discussions would remain private").

145. *See Olam*, 68 F. Supp. 2d 1131.

146. *See Rinaker*, 62 Cal. App. 4th at 164.

147. *Id.* at 165.

148. *Olam*, 68 F. Supp. 2d at 1131.

149. *Rinaker*, 62 Cal. App. 4th at 165.

150. *See Olam*, 68 F. Supp. 2d at 1133-35.

151. *Id.* at 1137.

152. *Id.* at 1136.

"doing justice" because of the crucial and probative value of the mediator's testimony.[153] However, justice and fairness are not always equal, and one result that might be fair, as in the present case, does not necessarily result in justice to the mediation process as a whole. If a party can rely on such transparent terms as "justice," then the integrity of the process breaks down.

In addition, Judge Brazil did not outline a clear application of when a mediator can be compelled to testify but instead based his ruling on several previously-mentioned considerations. Perhaps this was in a desire to limit subsequent reliance on the precedent of the ruling. However, it is quite possible that in reality this opinion will serve as a tool for other judges to compel mediator testimony when the facts seem to justify such. The law is not based on simple ideals and parties' desires, though. It is based on reliance of black-letter law, and here, the California law stated that mediation communications are to be strictly protected in a civil case.

As previously noted in Part III(B)(1) of this Note, the March 2000 draft of the Uniform Mediation Act supports not compelling the mediator to testify under facts such as those in *Olam*.[154] The UMA's standard is a middle ground in that it allows for some exceptions to the mediator's privilege, yet does not stretch the privilege to allow mediator testimony when the situation seems ripe for it.[155] The UMA limits any post-hoc judicial analysis, such as Judge Brazil's, while still allowing enough exceptions so that the mediation privilege does not become a tool for manifest injustice. In addition, the UMA supports the mediator's privilege as separate and distinct from that of the parties.[156] Therefore, even if the parties desired to compel the mediator's testimony, the mediator could refuse to testify based on her own mediator's privilege.[157]

The parties going into a mediation need the assurance that what they say will remain confidential, and the mediator needs to rely on that in order to gain the parties' trust and respect so that the mediation proceeding can be fruitful.[158] If the mediator is not confident that what she and the parties say during the mediation will not later be compelled, the mediator's job becomes that much more difficult.

VI. CONCLUSION

Olam stands as the next case in an evolution of the current law regarding mediation. The facts of the case are unique enough to give a solid example of when state privilege law should be applied in a federal court not sitting in diversity jurisdiction. However, *Olam's* significance does not end with another helpful

153. *Id.*

154. *See* U.M.A § 8(b)(2) (Proposed Official Draft Mar. 2000).

155. *Id.* Some of the UMA exceptions allow for mediation evidence when offered to prove or disprove "professional misconduct" or "abuse or neglect," or to show a "significant threat to public safety or health." *Id.* § 8.

156. *Id.* § 5(d).

157. *Id.*

158. *See Rinaker*, 62 Cal. App. 4th 155. In *Rinaker*, the mediator argued that if she were compelled to testify, then "the very atmosphere that serves to promote resolution in mediation would quickly become a trap for the unwary if proceedings were not kept confidential." *Id.* at 166.

pigeonhole of choice of law. *Olam* further comments on the mediator's privilege, which some consider the backbone of mediation.

Perhaps it is inevitable that application of the mediator's privilege will become a tenuous, fact-oriented investigation, even though the law likes a bright-line rule when it can find one. In this instance, however, it is especially needed so that parties (and mediators) not trained in the law can apply a bright-line rule that their communications in the mediation will not be repeated. Travel down a slippery slope has begun, one which will probably do some damage, albeit possibly minor, to the integrity of the mediation process. The desire for a "fair" result in *Olam* has paved the way for unjust application of mediation statutes in the future.

JENNIFER C. BAILEY