

Mediation: Confidentiality And Privilege

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INTRODUCTION

What Does *Gatto v. Verizon* Mean for the Future of Mediation Confidentiality? On September 22, 2009, U.S. District Judge Conti published an opinion that on its face challenged the accepted confidentiality of mediations. In *Gatto v. Verizon Pennsylvania, Inc.*, (2009 WL 3062316 (W.D. Pa.)) an attorney who had mediated the dispute at an earlier stage was subpoenaed to testify at trial, and despite attempts by the mediator to quash the subpoena, was called as a witness by the defendant. The court chose not to quash the subpoena, and actually encouraged the defendant to subpoena the mediator, thereby brushing aside the Pennsylvania Mediation Statute, the federal mediation privilege which had generally been accepted by the Third Circuit, and the court's own Local Rules. This article will examine the relevant statutes, privilege and rules, and then place this case into context in order to explain the ramifications of the *Gatto* decision and what it means for the future of mediation confidentiality.

PROTECTING THE CONFIDENTIALITY OF MEDIATION—STATUTES, PRIVILEGES, AND RULES

It would be prudent to remember that the confidentiality of mediation is rarely placed at issue in a trial. Most courts are understanding of the mediation process and respectful of the need to keep the process confidential, so there are only a handful of cases that even address mediation confidentiality, and most of those involve a

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discussion of whether the federal mediation privilege is applicable to a given set of facts. By and large mediators and the programs and organizations that support mediation have been successful at keeping mediators out of court proceedings, especially within the Third Circuit.

STATE STATUTE

All states now have some form of statute that codifies the confidentiality of mediation.¹ The actual nuances of how far this protection extends varies from state to state, but all states have recognized to some extent the need to protect the process of mediation from later legal proceedings. A full discussion of the various state mediation statutes is outside the scope of this article. *Gatto* took place in the Western District of Pennsylvania, thus the Pennsylvania Mediation Statute is relevant to a discussion of the case.

The Pennsylvania Mediation Statute² defines mediation as “[t]he deliberate and knowing use of a third person by disputing parties to help them reach a resolution of their dispute.”³ Communications made in mediation

The *Gatto* case is narrow and easily distinguishable so the protections of confidentiality and privilege granted in mediation remain protected.

and documents created for the mediation are protected by the statute and “[d]isclosure of mediation communications and mediation documents may not be required or compelled through discovery or any other process.”⁴ There are some exceptions to this blanket confidentiality. First, settlement agreements can be used in later legal proceedings to enforce the agreement. Second, for criminal matters the privilege does not protect communications containing a threat of bodily injury, communications of threat that damage may be inflicted on real or personal property where such action would be a felony, or conduct during the mediation that causes direct bodily injury to someone. Third, the privilege does not protect fraudulent communications that become relevant in an action to enforce the mediation agreement or to set aside the mediated agreement. Fourth, the privilege does not cover documents that exist independent of the mediation.⁵

While on its face it seems as though the Pennsylvania mediation statute would protect the mediator from being compelled to testify about what was discussed at mediation, the judge in *Gatto* determined that the need for the mediator’s testimony outweighed the statute and told the defendant to subpoena the mediator despite the defendant’s belief that the mediator could not be subpoenaed because of the statute.⁶ Perhaps the judge’s decision was in part due to the case’s venue in a federal court rather than a state court.

For state courts, a state mediation statute is a definitive answer to the issue of mediation confidentiality. The issue is less clear for federal courts, who often hear

1. At the time of *Sheldone v. Pennsylvania Turnpike Commission* (104 F. Supp. 2d 511, 514 (W.D. Pa. 2000)) all but Delaware had a statute providing for the confidentiality of mediations. Delaware Code now provides for the confidentiality of commercial ADR proceedings under 6 Del.C. § 7716, and court-sponsored mediation programs provide confidentiality protection as well, though there is still no general mediation statute.

2. 42 Pa.C.S.A. §5949.

3. 42 Pa.C.S.A. §5949(c).

4. 42 Pa.C.S.A. §5949(a).

5. 42 Pa.C.S.A. §5949(b).

6. Transcript of Motion to Enforce Settlement Hearing, Day 2, February 11, 2009 at pp. 68-72.

mixed issues of both state and federal law. In those cases the courts have generally held that state mediation statutes are not a definitive answer to mediation confidentiality questions, and instead some courts turn to a common law federal mediation privilege.

FEDERAL PRIVILEGE

The federal mediation privilege is a common law answer to mediation confidentiality issues in some jurisdictions. The privilege itself is based on applying Federal Rule of Evidence 501 through the framework provided in *Jaffee v. Redmond*, 518 U.S. 1 (1996), (establishing standards to use in determining whether a potential federal evidentiary privilege should be recognized). Not all courts recognize this privilege, and some circuits have refused to apply a federal privilege to retain the confidentiality of mediations. There is no conclusive Third Circuit decision on this issue, but the first case to discuss the need for confidentiality in ADR was out of the Second Circuit, *Lake Utopia Paper Limited v. Connelly Containers, Inc.*⁷

In *Lake Utopia Paper*, the court determined that confidentiality of a pre-argument conference was paramount to the process.

If participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program which has led to settlements and withdrawals of some appeals and to the simplification of issues in other appeals, thereby expediting cases at a time when the judicial resources of this Court are sorely taxed.⁸

The above language is quoted by the court in *Sheldone v. Pennsylvania Turnpike Commission*, the main Pennsylvania case to address a federal mediation privilege.⁹ In *Sheldone*, the plaintiffs had brought suit against the defendant for a violation of the Fair Labor Standards Act when the defendant instituted a policy of paying the plaintiffs via a fluctuating hours method which the plaintiffs alleged was illegal because it resulted in less compensation for overtime. The defendant presented an affirmative defense that it had a good faith belief it was not violating the law at the time the policy was implemented. The plaintiffs sought an admission made by the defendant in mediation of a similar settlement where the defendant had admitted he knew it was illegal to engage in the compensation policy.¹⁰

In determining whether the admission the plaintiffs sought was discoverable, the court in *Sheldone* turned initially to Federal Rule of Evidence 501, which governs all federal privileges. Federal Rule of Evidence 501 states in relevant part: "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."¹¹ Other courts have determined that this language applies to federal claims as well as mixed questions of state and federal law.¹² The well-established standard used to apply Federal Rule

7. *Lake Utopia Paper Limited v. Connelly Containers, Inc.*, 608 F.2d 928 (C.A.N.Y.1979).

8. *Id.* at 930.

9. *Sheldone v. Pennsylvania Turnpike Commission*, 104 F.Supp.2d 511, 513 (W.D. Pa. 2000).

10. *Id.* at 512.

11. Fed. R. Evid. 501.

12. *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F.Supp.2d 1164, 1170 (C.D. Cal. 1998).

of Evidence 501 to specific questions of whether a privilege is “governed by the principles of the common law as they may be interpreted by the courts . . . in the light of reason and experience” comes from *Jaffee*.¹³ According to the court in *Sheldone*, there are four relevant factors of the *Jaffee* standard for asserting a privilege that apply in deciding whether a federal mediation privilege should be created. The four factors are:

1. whether the asserted privilege is ‘rooted in the imperative need for confidence and trust’;
2. whether the privilege would serve public ends;
3. whether the evidentiary detriment caused by an exercise of the privilege is modest; and
4. whether denial of the federal privilege would frustrate a parallel privilege adopted by the states.¹⁴

In applying these factors, the *Sheldone* court determined that a federal mediation privilege should be recognized. Citing the above quote from *Lake Utopia Paper*, the *Sheldone* court emphasized that confidentiality is essential to the mediation process in order for it to be effective in helping parties work through the dispute. The court also cites to the variety of protections offered by the Pennsylvania Mediation Statute, federal ADR Act of 1998¹⁵ and local court rules (the latter two are discussed below in more detail).¹⁶ The *Sheldone* court determined that a mediation privilege would serve public ends because it encourages settlement and reduces court dockets, and that without a privilege, “the effectiveness of mediation would be destroyed.”¹⁷ The court determines that the evidentiary detriment of a mediation privilege would be minimal, because generally the communication or documents sought after the mediation are complete and would not have come into existence but for the presumed confidentiality of the mediation.¹⁸ Finally, the *Sheldone* court considers that “nearly all states have adopted a mediation privilege” yet a state’s promise of confidentiality would mean little if the protection did not apply in federal court.¹⁹ Based on the application of the *Jaffee* factors for recognizing a federal privilege under Federal Rule of Evidence 501, the *Sheldone* court finds a federal mediation privilege exists.²⁰

Most federal courts have recognized a federal mediation privilege using the same or a similar rationale to that found in *Sheldone*.²¹ There are virtually no circuit court decisions on the matter, however, and at least two circuit courts have “declined to consider” whether a federal mediation privilege exists.²² The Third Circuit has not addressed the application of a federal mediation privilege, so for now, most courts refer to *Sheldone* as the primary authority for deciding questions involving the federal privilege.

13. *Jaffee*, 518 U.S. at 2.

14. *Sheldone*, 104 F.Supp.2d at 513.

15. Alternative Dispute Resolution Act of 1998, Pub. L. 105-315, October 30, 1998, *as amended*, 28 U.S.C.A. §651 *et seq.*

16. *Sheldone* at 513-14.

17. *Id.* at 514.

18. *Id.* at 515.

19. *Id.*

20. *Id.* at 513.

21. See *In re RDM Sports Group, Inc.*, 277 B.R. 415, 430 (Bankr. N.D. Ga 2002); *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F.Supp.2d 1164 (C.D. Cal. 1998); *Chester Co. Hospital v. Independence Blue Cross*, 2003 U.S. Dist. LEXIS 25214 (E.D. Pa. 2003).

22. *Molina v. Lexmark International, Inc.*, 2008 WL 4447678 (C.D. Cal. 2008).

ADR ACT OF 1998 AND LOCAL RULES OF COURT

The ADR Act of 1998 provides for district courts to create at least one ADR option for dispute resolution in each district.²³ The type of ADR program that the courts are to offer is not determined by the Act, rather discretion is given to the court based on its resources and own ideas of what would work best in the district. In addition the Act provides that each district court shall require that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation,²⁴ except where the use of ADR would be inappropriate or in conflict with the authority of the Attorney General.²⁵ In providing an ADR program and requiring parties to make use of the program, “each district court shall, by local rule adopted under section 2071(a), provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications.”²⁶

The Western District of Pennsylvania, in order to comply with the ADR Act of 1998, published Local Rule 16.2 (2006), which established its ADR program of mediation, early neutral evaluation, and arbitration. LCvR 16.2 also allowed the district to publish policies and procedures to govern the ADR Programs. The policies and procedures published by the Western District ADR Program provided the specific regulations for the program, including mediation confidentiality. As of the time of the *Gatto* decision, the Western District policies and procedures regarding mediation confidentiality provided for a presumption of confidentiality, but the comment to the Rule stated that: “[t]he law may provide in some limited circumstances in which the need for disclosure outweighs the importance of protecting the confidentiality of a mediation.” Such a determination is left to judicial discretion.²⁷

The mediator in *Gatto* was subpoenaed after the second day of testimony, so some point after February 11, 2009²⁸ but before the final day of testimony on May 26, 2009.²⁹ On July 15, 2009, Judge Ambrose signed an order amending the Western District policies and procedures.³⁰ The revised policies and procedures provide for a much stricter protection of confidentiality:

1. limiting the use of documents and communications “in connection with” an ADR process to the parties and neutrals involved in the ADR procedure;
2. banning the use of such documents and communications outside of the ADR process except in limited circumstances such as:
 - a. claims involving the neutral as a party;
 - b. failure of the parties to pay the neutral;
 - c. when the neutral must respond or defend against a claim of professional misconduct or malfeasance;
 - d. when parties fail to appear for the ADR process;

23. 28 U.S.C. A. §651(b).

24. 28 U.S.C. A. §652(a).

25. 28 U.S.C. A. §652 (b) and (c).

26. 28 U.S.C. A. §652 (d).

27. Changes made to Policies and Procedures, sec. 6, available at: http://www.pawd.uscourts.gov/Applications/pawd_adr/Documents/09-mc-203-Changes to Policy and Prodedures.pdf (last accessed on April 23, 2010.)

28. Transcript of Motion to Enforce Settlement Hearing, Day 2, February 11, 2009 at p.1.

29. Transcript of Motion to Enforce Settlement Hearing, Day 3, March 5, 2009 at p.26.

30. *In Re: Alternative Dispute Resolution Policies and Procedures*, Misc. No.06-203, available at: http://www.pawd.uscourts.gov/Applications/pawd_adr/Documents/OrderAmendingP_P.pdf (last accessed on April 23, 2010.)

- e. when consent from both parties is obtained; and
- f. the exceptions found in the Pennsylvania Mediation Statute.

While there is no explicit correlation between *Gatto* and the changes in the Western District Court policies and procedures, there is little doubt that the changes in the procedures are now significantly more protective of mediation confidentiality.

THE GATTO DECISION—THE FACTS OF THE CASE

In order to understand why the mediator was so important in *Gatto* that the court ignored the PA Mediation Statute, federal mediation privilege and the spirit of its local rules, the facts of the case must be explained. The crux of the dispute in *Gatto* was a motion to enforce a settlement agreement reached after mediation had concluded. The plaintiff's former attorney, Holmes, had entered into a settlement agreement with the defendant, Verizon, a few weeks after the mediation which included a global settlement of all claims the plaintiff, Gatto, had pending against Verizon. Gatto challenges the validity of this settlement by claiming Holmes did not have the express authority needed to create a binding and enforceable settlement of the claims.

Gatto was a former employee for Verizon. During the course of her employment, Gatto had brought two separate suits against Verizon, the first of which was brought under the collective bargaining agreement and was being pursued by the union in a pending arbitration when the second suit was brought.³¹ The court in the second suit ordered the parties to mediation. Verizon stated that at the mediation it told Gatto and her attorney, Holmes, that any settlement reached would be a global settlement of all claims pending against Verizon. In addition, the settlement would include an agreement of no re-employment, a confidentiality agreement, and a non-disparagement agreement.³² Verizon claims that these terms were paramount to any settlement agreement and that they were included as terms of every offer, starting at mediation.³³ At the conclusion of the mediation session, Gatto requested more time to consider the offer and terms Verizon had placed on the table, which she later rejected.³⁴

Holmes testified regarding the continuing negotiation which eventually led to a settlement under the same terms presented at the mediation.³⁵ He stated that he had explained the terms and what they involved to Gatto and that she had understood the terms and gave him a monetary amount to offer that Verizon later accepted.³⁶ Gatto's testimony differed significantly from Holmes' testimony, as she stated, after she rejected Verizon's offer presented at mediation, she told Holmes to move forward with the case and never gave authority for further negotiations.³⁷ Gatto also said that while the terminology of a "general release" was used at the mediation, she did not know what it meant and no one explained it to her.³⁸ She stated that she had told Holmes her arbitration case was not a bargaining chip in the negotiations and she would never agree to settlement that included her arbitra-

31. Transcript of Motion to Enforce Settlement Hearing, Day 1, February 6, 2009 at p.11.

32. *Id.* at pp.15-16.

33. *Id.* at pp.14-15.

34. *Id.* at p.32.

35. *Id.* at p.73.

36. Transcript of Motion to Enforce Settlement Hearing, Day 2, February 11, 2009 at pp.34-35.

37. *Id.* at p.44.

38. *Id.* at pp.44, 55, 71.

tion.³⁹ Gatto thus challenged the express authority of Holmes to settle the case on her account.

Due to the significant differences between Gatto's and Holmes' versions of what transpired in and after mediation, the court determined that it would be necessary to call the mediator as a witness to determine which version of the events were correct.⁴⁰ The mediator was the only other person present during the caucus, which is where the terms of the current settlement agreement were initially discussed.

WHAT GATTO CHANGES FOR MEDIATION CONFIDENTIALITY— NEXT STEPS AND SAFEGUARDS

In order to make sense of why the mediator is so important in this case, it is necessary to understand that not everyone sees mediation as a separate process. While mediators describe mediation as a separate and parallel process of dispute resolution that is only related to the surrounding negotiations in that it gets parties communicating and can resolve some aspects of the dispute. Those who are not as familiar with the process have a difficult time separating the mediation from the surrounding negotiations, prior and subsequent. The judge in *Gatto* saw mediation as a step in the process of resolving the dispute, thus the understanding of what terms were discussed and understood at mediation were of utmost importance, as they carried through the rest of the negotiation process as referenced by the parties. The judge's view of mediation as just one step in the negotiations is evidenced by her reference to wanting a written version of the "final proposed terms of a mediation offer."⁴¹ From this inclusive perspective, having the mediator testify to the terms when Gatto and Holmes disagreed as to what was discussed in caucus makes sense; however, it is contrary to a correct understanding of a mediator's role and the role of mediation in the dispute resolution process.

Mediation is not simply an element on the continuum of the ongoing negotiations between the parties, rather it is a self-contained dispute resolution process. While the benefits of mediation can extend well beyond the mediation sessions, the actual process of mediation has a definitive ending point. At that ending point there are only two options: either the parties have an agreement on some or all points, or there is no agreement whatsoever. If there is an agreement of any sort, a written document will reflect the agreement reached between the parties, even if such agreement settles only one of many issues. That writing could then be enforced in court at a later date should the need arise and the mediator can be called to testify about the written document that reflects the agreement reached at mediation. If there is no agreement, there is no writing because none of the issues were settled, thus there is no document for the mediator to testify about in a later proceeding. Once the mediation concludes, per the Pennsylvania state statute and federal mediation privilege, the only reason a mediator should be called to testify at a later proceeding is when there is a motion to enforce or vacate an agreement that was reached through mediation. If no such agreement exists, then a subpoena is improper and in violation of the statute and privilege.

The facts of *Gatto* are convoluted, and it is possible that the mediator was subpoenaed for the judge to determine if there was an agreement or not to the non-monetary terms at mediation. However, it is uncontested that at the end of media-

39. Transcript of Motion to Enforce Settlement Hearing, Day 2, February 11, 2009 at p.45.

40. *Id.* at pp.69-75.

41. *Gatto*, 2009 WL 306231 at 10 (FN1).

tion, the parties left with an offer on the table that was later rejected, thus there was no agreement reached as a result of the mediation.⁴² Although the parties referenced mediation as the point of origin for the terms later included with the challenged settlement, the understanding of those terms during caucus is irrelevant, as mediation had concluded with no agreement. Thus the negotiations post-mediation technically started with a blank slate, and it would be Gatto's understanding and her express authority given post-mediation that would be at issue in the motion to enforce an agreement reached after the mediation concluded.

One way to avoid the issue of a judge subpoenaing a mediator in order to determine whether or not an agreement has been reached would be to have the parties sign one of three documents at the end of mediation. If a total agreement has been reached, then the mediation agreement would contain all terms of agreement; if a partial agreement has been reached, then the mediation agreement would contain only those terms agreed upon by the parties; if no agreement has been reached, then the parties and the mediator would execute a document stating that no agreement had been reached in mediation. This process will clarify for the parties that any agreement reached after mediation is separate from the mediation itself. In addition, it would allow a judge to know definitively where the parties stood after the mediation, thereby eliminating the need to subpoena a mediator when a determination of whether a partial mediation agreement is paramount to the enforcement of a later settlement.

A further point to consider in this discussion is that ultimately courts have judicial discretion, and it is up to attorneys to object and seek to make sure mediation confidentiality is protected when mediators are subpoenaed. If a court acts despite the awareness of an applicable statute or privilege, then that ruling, if prejudicial, is subject to reversal at the appellate level. Analogous to testimony sought that would violate the attorney-client privilege, it is to the responsibility of the attorney to object and implore the court to consider the ramifications of violating the privilege, but if the court is persistent in seeking the testimony, ultimately that attorney will have to choose whether to testify or face contempt of court. If to avoid contempt the attorney testifies, he can later seek to appeal the decision on the basis of a violation of the attorney-client privilege. A similar remedy is available to mediators under the Pennsylvania Mediation Statute and federal mediation privilege.

In *Gatto*, the mediator's testimony did not add or detract from the evidence, as he "did not remember any salient points about the mediation"⁴³ so in effect his testimony had no bearing on the case. Many mediators do not keep records or notes of mediations after the conclusion of a mediation, which leave no documents for parties to later subpoena. Plus memories fade over time, especially when a mediator deals with a large number of cases. These factors can further discourage parties and courts from issuing subpoenas for mediators to testify, especially when parties are informed of such policies at the beginning of a mediation session. An additional safeguard can be added by having the parties sign a stipulation in their Agreement to Mediate that neither party will subpoena the mediator in future proceedings. While this does not protect a mediator from a court subpoena, it does add a layer of protection as neither party can subpoena the mediator on their own, or the mediator can reply that such a subpoena is a breach of the contractual agreement to

42. Transcript of Motion to Enforce Settlement Hearing, Day 1, February 6, 2009 at p.17.

43. *Gatto*, 2009 WL 3062316 at 7.

mediate, in addition to pointing out the violation of statutes, privileges, and local court rules.

CONCLUSION

Overall, *Gatto* has changed little in regard to the confidentiality of mediations. The judge either misunderstood the role of mediation in the overall process of dispute resolution and considered it a facet of the ongoing negotiation, or the judge was uncertain as to whether there had been a partial agreement at the end of the mediation and could not rely on the differing testimony of the parties, so she was determined to call the mediator to testify. The latter issue is easily resolved in the manner described above, and the former shows how much work is left to be done in educating the legal world about the role of mediation within the larger dispute resolution process. Either way, this case is narrow and easily distinguishable, so the protections granted in the Pennsylvania Mediation Statute and federal mediation privilege still stand. In addition, the Western District Court's revised local rules have added protection for mediators who practice in that Court. Ultimately, *Gatto* is not the ground breaking case many thought it to be, and its primary lesson can be found in acknowledging the continuing need for education and training as to the role of mediation in resolving disputes.