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What law governs the mediation privilege in federal cases?

By Jonah Orlofsky, Chicago

Many states have mediation statutes that create statutory privileges for all communications that a part of the mediation process. There is, however, no similar federal statute. This raises the question of whether there is a mediation privilege for federal court cases. Two recent Illinois federal district courts examined this issue. Illinois has a typical mediation privilege provision in the Illinois Uniform Mediation Act, 710 ILCS 35/4.

In *Mustafa v. Mac's Convenience Stores, LLC*, 2014 WL 1088991 (N.D.Ill. March 18, 2014), the plaintiff filed a claim under an Illinois anti-discrimination statute, which was removed to federal court based on diversity jurisdiction. No federal law claim was at issue. When the plaintiff moved to compel testimony concerning what had occurred during a mediation session, the defendant argued that the testimony was protected by the mediation privilege in the Illinois Uniform Me-

diation Act. The court agreed, denying the motion to compel because under Federal Rule of Evidence 501, "in a civil case, state law governs privilege regarding a claim of defense for which state law supplies the rule of decision." Because the claim was based solely on a state statute, the mediation privilege in the Illinois Act controlled.

In contrast, *Craftwood Lumber Co. v. Interline Brands, Inc.*, 11 C 4462, 2014 WL 1389041 (N.D. Ill. Apr. 9, 2014), was a case that involved federal law. The question of a mediation privilege arose because the defendant wanted to introduce evidence of what occurred during a mediation to demonstrate that a binding agreement had been reached. While the written mediation agreement provided that communications during the mediation would be privileged, the court did not find this contractual provision to be a bar the court's inherent power to hear evidence as to whether an agreement had been reached.

Furthermore, while the plaintiff argued for the existence of a federal mediation privilege, the court rejected this, noting that: "The Seventh Circuit has not recognized a federal mediation privilege, nor has any Northern District of Illinois court, and [plaintiff] has not presented us with any persuasive authority from other federal courts that would lead us to recognize such a privilege."

These two decisions, therefore, show that the question of whether there is a mediation privilege in federal cases will differ depending upon the basis for jurisdiction. In diversity cases, state statutory mediation privileges will control, whereas in federal law cases, the provisions of the mediation contract will be the only basis for asserting a privilege. ■

Jonah Orlofsky (www.orlofskylaw.com) is a mediator certified in Cook County and Will County and is on the American Arbitration Association's roster of neutral mediators.

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