AMERICAN BANKRUPTCY INSTITUTE

Annual Spring Meeting

Privilege Issues in Bankruptcy

Tanya Behnam
Polsinelli, LLP; Los Angeles

Hon. Hannah L. Blumenstiel
U.S. Bankruptcy Court (N.D. Cal.); San Francisco

Paul R. Hage
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Jessica Kenney Bonteque
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CONCURRENT SESSION

2024

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JUDICIAL MENTAL OR PHYSICAL DISABILITY COMPLAINTS

Hon. Martin Glenn
Chief United States Bankruptcy Judge
Southern District of New York

Under the Judicial Conduct and Disability Act[1] (the "Act"), any person may file a complaint alleging that a judge[2] is "unable to discharge all the duties of office by reason of mental or physical disability."[3] A complainant may file a disability complaint following the standards and procedures promulgated by the Judicial Conference of the United States (the "Judicial Conference") in the Rules for Judicial-Conduct and Judicial Disability Proceedings (collectively, the "Rules," and each, a "Rule").[4] However, disability complaints under the Act are rare. As the Judicial Conduct and Disability Act Study Committee (the "Study Committee") chaired by Justice Stephen Breyer found, "[a]lmost all complaints allege misconduct rather than disability."[5] Nevertheless, recent high-profile litigation has brought the Act to the forefront and raised questions on the extent of the federal judiciary's power to "keep its own house in order."[6] This article will examine the Act's key provisions, the review structure established under the Rules, and how the statutory framework has been applied in case law.

I. The Act's Key Provisions

A. Filing a Complaint

Under Section 351(a) of the Act, "[a]ny person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, **or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability**" is authorized to initiate a complaint.[7] Complainants "may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct" to commence the process.[8]

Notably, under Section 351(b), the Act also authorizes the chief judge to "identify a complaint" and thereby begin the review process without the need for a party to file a written

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1 Judicial Conduct and Disability Act, 28 U.S.C. §§ 351–64 (2012).

2 Under the Act, the term "judge" is defined as "a circuit judge, district judge, bankruptcy judge, or magistrate judge." *Id*. § 351(d)(1).

3 *Id*. § 351(a).

4 *See* Rules for Judicial–Conduct and Judicial–Disability Proceedings, 249 F.R.D. 662 (U.S. Jud. Conf. 2008) [hereinafter Rules].

5 Implementation of the Judicial Conduct and Disability Act Of 1980, 239 F.R.D. 116, 123 (Sept. 2006). [hereinafter the Study Committee Report]

6 *McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Ords. of Jud. Conf. of U.S.*, 264 F.3d 52, 61 (D.C. Cir. 2001)

7 28 U.S.C. § 351(a) (emphasis added).

8 *Id*.

complaint.[9] The chief judge must identify a complaint by written order "on the basis of information available to the chief judge."[10]

After the clerk receives a written complaint filed under Section 351(a), they must promptly transmit it to (1) the chief judge of the circuit (however, if the chief judge is the subject of the complaint, the clerk must deliver the complaint to the next most senior active circuit judge), and (2) the judge the complaint is against.[11] After the chief judge receives the complaint the formal review process begins.

B. Review of the Complaint by the Chief Judge

Section 352(a) authorizes the chief judge to "expeditiously review" written complaints (Section 351(a)) or identified complaints (Section 351(b)).[12] However, the chief judge's inquiry at this stage is limited and she may not "make findings of fact about any matter that is reasonably in dispute."[13] Instead, the chief judge must determine whether "appropriate corrective action has been or can be taken without the necessity for a formal investigation" or whether "the facts stated in the complaint are either plainly untrue or are incapable of being established through investigation."[14] To make these determinations, the chief judge may: require a written response from the subject judge; review relevant documents; and communicate, orally or in writing, with the parties to the complaint or any other persons with knowledge regarding the complaint. [15]

After review, the chief judge may decide to conclude the process pursuant to Section 352(b). She may do so by either dismissing the complaint or finding that "appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events."[16] The chief judge may dismiss the complaint on the following bases: (1) not being in conformity with Section 351(a) (*i.e.*, the allegations do not fall under the categories in Section 351(a)); (2) being "directly related to the merits of a decision or procedural ruling"; or (3) being "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation."[17] And each complaint may have more than one reason for its dismissal. The overwhelming majority of complaints under the Act are dismissed by chief judges. For example, of the 1,363 complaints filed in 2023, 1,286 were dismissed in whole or in part.[18] The chief judge's order under Section 352 is a potential termination point for a disability complaint against a judge.

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9 *Id.* § 351(b).
10 *Id.*
11 *Id.*
12 *Id.* § 352(a).
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.* § 352(b).
17 *Id.* § 352(b).
18 The figure for dismissed complaints includes "complaints that later were terminated with finality by circuit judicial council orders on petitions for review, as well as complaints for which additional review was still possible." *Complaints Against Judges–Judicial Business 2023*, U.S. COURTS, https://www.uscourts.gov/statistics-reports/complaints-against-judges-judicial-business-2023 (last visited Apr. 12, 2024).

A complainant may petition the judicial council of the circuit to review the chief judge's final order.[19] If the judicial council accepts the petition, it may refer it to a panel comprised of at least five (5) members of the council.[20] However, if the petition is denied by the judicial council, then the chief judge's order becomes final and barred from further appeals.[21]

C. The Special Committee Investigation and Report

If the chief judge does not issue a final order under Section 352(b), she must form a special committee to investigate the facts and allegations in the complaint.[22] The chief judge must appoint herself and "equal numbers of circuit and district judges of the circuit to [the] special committee."[23] The special committee's investigation is comprehensive. Specifically, section 353(c) authorizes the committee to "conduct an investigation as extensive as it considers necessary."[24] When the investigation is complete, the special committee must promptly file a written report with the judicial council (the "Report").[25] The Report includes "the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit."[26]

D. Judicial Council Actions

After receiving the Report, the judicial council is authorized to either conduct additional investigation, dismiss the complaint, or take actions that are "appropriate to assure the effective and expeditious administration of the business of the courts within the circuit."[27] If the judicial council does not terminate the complaint, it may take the actions listed in Section 354(a)(2) subject to limitations regarding removals outlined in Section 354(a)(3). For example, the council may take any of the following actions with respect to the subject judge: pausing the assignment of cases; public or private censure or reprimand; certifying the disability of Supreme Court justices, and federal circuit and district judges (the "Article III Judges") subject to 28 U.S.C. § 372(b); requesting the voluntary retirement of Article III Judges; or ordering the removal of magistrate or bankruptcy judges (subject to the relevant statutory procedures).[28]

Notably, under Section 354(a)(2)(b)(i), the judicial council is authorized to certify an Article III judge's disability "pursuant to the procedures and standards provided under section 372(b)."[29] In turn, Section 372(b) provides that if a certificate of disability is signed "by a majority of the members of the Judicial Council of his circuit in the case of a circuit or district judge" and presented to the President, and the President finds that "**such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability** and

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19 28 U.S.C. § 352(c).
20 At least 2 of the members of the panel must be district judges. *Id.* § 352(d).
21 *Id.* § 352(c).
22 *Id.* § 353(a).
23 *Id.*
24 *Id.* § 353(c).
25 *Id.* § 353(c).
26 *Id.*
27 *Id.* § 354(a).
28 *See Id.* § 354(a)(2); § 354(a)(3)
29 *Id.* § 354(a)(2)(b)(i).

that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment by and with the advice and consent of the Senate."[30]

Mental and physical disability is also an express cause for removal for magistrate and bankruptcy judges under the relevant statutory procedures, and, therefore, not a violation of the removal limitations outlined in Section 354(a)(3).[31]

With respect to bankruptcy judges, Section 152(e) provides as follows:

> (e) **A bankruptcy judge may be removed during the term for which such bankruptcy judge is appointed**, only **for** incompetence, misconduct, neglect of duty, or **physical or mental disability** and only by the judicial council of the circuit in which the judge's official duty station is located. Removal may not occur unless a majority of all of the judges of such council concur in the order of removal. Before any order of removal may be entered, a full specification of charges shall be furnished to such bankruptcy judge who shall be accorded an opportunity to be heard on such charges.[32]

E. Judicial Conference Referral to the Judicial Conference

Section 354(b) authorizes the judicial council, in its discretion, to refer complaints arising under section 351 to the Judicial Conference. However, if the council determines that the subject judge may be impeached under article II of the Constitution, or that the complaint is not "amenable to resolution by the judicial council," it *must* certify such determination and refer it to the Judicial Conference.[33] Alternatively, a complainant may petition the Judicial Conference to review a judicial council order under Section 357.[34]

The Judicial Conference can take the actions specified in Section 354(a)(1)(C) and (2) (*i.e.*, substantively the same actions that the judicial council may take) by majority vote.[35] And the Judicial Conference has the responsibility to refer the matter to the House of Representatives if it determines that impeachment of the subject judge is warranted. Importantly, the Judicial Conference is authorized to create a "standing committee" to "exercise the authority provided in [the Act]."[36] The Judicial Conference has established the Committee on Judicial Conduct and Disability to serve as the standing committee.[37]

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30 *Id.* § 372(b) (emphasis added).

31 *See Id.* § 631(i) (outlining removal procedures for a magistrate judge); § 152(e) (outlining removal procedures for a bankruptcy judge).

32 *Id.* § 152(e) (emphasis added).

33 *Id*. § 354(b).

34 *Id*. § 357.

35 *Id*. § 355(a).

36 28 U.S.C. § 331.

37 *See* Judicial Conference of the U.S., Report of the Proceedings of the Judicial Conference of the United States 17 (2023), available at https://www.uscourts.gov/sites/default/files/jcus_sep_2023_proceedings_0.pdf

II. The Rules Framework

In March 2008, the Judicial Conference established the Rules to govern the "substantive and procedural aspects of misconduct and disability proceedings under the Act."[38] The rules are mandatory and nationally uniform as authorized by Section 358 (a) and (c) to promote consistency across proceedings.[39] Notably, prior to the adoption of the Rules, the Study Committee found that chief judges were generally conducting effective proceedings under the Act despite the lack of uniform standards and procedures. The Study Committee analyzed 593 terminations in their sample and determined that only 20 dispositions were "problematic" for procedural reasons.[40] The Study Committee made a series of recommendations to improve the application of the Act, including suggested standards that drew from the "observed patterns of chief judge and judicial council actions in applying the Act."[41] Ultimately, after a public comment and hearing process, the Judicial Conference published the nationally binding Rules to address the Study Committee's concerns.

The Rules create the standards, procedures, and definitions necessary to operationalize the self-policing mechanism envisioned by the Act. Under the Rules, a disability is defined as "a temporary or permanent condition rendering a judge unable to discharge the duties of the particular judicial office," and examples of actionable disability include "substance abuse, the inability to stay awake during court proceedings, or a severe impairment of cognitive abilities."[42] Furthermore, the Rules give detailed guidance on how the complaint and review process should be conducted. Specifically, Article III of the Rules discusses the initiation of the complaint, including the form of complaint, rules regarding the timing of a complaint, and whether there has been abuse of the complaint procedure.[43] Notably, for a complaint based on disability, the complainant must provide a concise statement detailing the specific facts of the disability and provide any "additional facts that form the basis of that allegation."[44] Circuits may personalize the complaint procedures and promulgate other local rules so long as the local procedures only supplement the Rules.[45] Other notable provisions of the Rules include Article IV–Review of Complaint by Chief Judge; Article V–Investigation and Report by Special Committee; Article VI–Review by Judicial Council and Article VII–Review by Committee on Judicial Conduct and Disability. In sum, the Rules establish a detailed and comprehensive national framework for the administration of the Act.

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38 Rules, *supra* note 4, R. 2 cmt. The Rules were adopted on March 11, 2008, and became effective on April 10, 2008. Thereafter, the Rules have been amended on September 17, 2015, and March 12, 2019. The Rules were conformed on February 8, 2022.

39 28 U.S.C. § 358.

40 Study Committee Report, *supra* note 5, at 44.

41 *Id*. at 17.

42 Rules, *supra* note 4, R. 4(c).

43 *See generally Id*. Art. III–Initiation of Complaint.

44 *Id*. R. 6(b)(4).

45 Importantly, circuits are authorized to promulgate local rules; however, such local rules are supplemental to the Rules. The Rules apply in the event of a conflict with the local rules. *See* Fourth Circuit Local Rules for Judicial–Conduct and Judicial–Disability Proceedings (4th Cir. 2023), available at https://www.ca4.uscourts.gov/docs/pdfs/jcd_national_4th_cir_rules_combined.pdf.

III. Recent Case Law

The case law on complaints under the Act arising from disability allegations is sparse. In 2023, a total of 1,363 complaints against judges were initiated and only 20 of those presented allegations of disability.[46] Disability and the competence to serve are inherently delicate matters that are not generally considered by the judiciary in formal, public platforms. However, the recent disability complaint against Judge Pauline Newman and the subsequent litigation arising from the complaint have offered a rare insight into the process.

A. The Initial Disability Complaint and Investigation

On March 24, 2023, Federal Circuit Chief Judge Moore identified a complaint against Judge Newman under the Act and as prescribed under Rule 5(a).[47] The order identifying the complaint noted concerns regarding the "extensive delays in processing and resolution of [Judge Newman's] cases."[48] In addition, the same order stated that Judge Newman "may suffer from impairment of cognitive abilities (*i.e.,* attention, focus, confusion, and memory) that render [her] unable to function effectively in discharging case-related and administrative duties."[49] Chief Judge Moore's written order identifying a complaint satisfied the requirements of Rule 5(a) and initiated the formal review process.

On the same day the complaint was identified, Chief Judge Moore appointed a special committee (the "Special Committee" or "Committee") to investigate the allegations.[50] The Special Committee ordered Judge Newman "to submit to neurological and neuro-psychological testing by physicians of the [C]ommittee's choosing" and share her medical records with the Committee.[51] When Judge Newman refused to undergo the required testing and share her medical records, the Special Committee "narrow[ed] the investigation" to Rule 4(a)(5), which recognizes that "refusing, without good cause shown, to cooperate in the investigation of a complaint" is cognizable misconduct.[52] The Special Committee also conducted extensive interviews with court employees, reviewed case records, and "consulted with a physician experienced in judicial-disability matters."[53] Following the investigation, the Special Committee shared its report and recommendations with the Federal Circuit's judicial council (the "Judicial Council"). Notably, the report found that "there [was], at a minimum, a reasonable basis for concluding that Judge Newman ***may suffer from a disability that renders her unable to perform the duties of her office***" and that her "failure to cooperate with the Committee's orders constitute[d] misconduct."[54]

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46 *Table S-22, Report of Complaints Commenced and Action Taken Under Authority of 28 U.S.C. § 351-364 During Twelve Month Period Ending September 30, 2023*, U.S. COURTS (2023), *available at* https://www.uscourts.gov/sites/default/files/data_tables/jb_s22_0930.2023.pdf.

47 See *Newman v. Moore*, 2024 WL 551836, at *3 (D.D.C. 2024).

48 See *In re Complaint No. 23-90015*, C.C.D No. 23-01, 2 (U.S. Jud. Conf. Feb 7, 2024) [hereinafter Judicial Conference Order].

49 *Id*.

50 *Newman*, 2024 WL 551836, at *4.

51 *Id.*

52 *Id*.

53 *Id.; see also* Rules, *supra* note 4, R. 13 (authorizing a special committee's use of "appropriate experts or other professionals").

54 *Id*. (emphasis added).

Accordingly, the Special Committee recommended suspending Judge Newman from hearing new cases for one year or until she cooperated with the investigation.[55]

In its September 20, 2023, unanimous order, the Judicial Council accepted the Special Committee's recommendations and agreed that Judge Newman's failure to cooperate was not excused. The Judicial Council emphasized that Judge Newman's misconduct had brought the "statutory mechanism for addressing disability to a grinding halt" and the Special Committee was unable to make "an informed assessment . . . about whether Judge Newman suffers from a disability."[56] Accordingly, the Judicial Council barred Judge Newman from hearing any cases "for a period of one year, subject to 'consideration of renewal'" if Judge Newman continued to not cooperate with the investigation.[57]

Judge Newman petitioned the Judicial Conference to review the Judicial Council's order pursuant to Rule 21.[58] Specifically, the petition argued that the Judicial Council had: (1) abused its discretion by refusing to transfer the investigation to another circuit under Rule 26; (2) violated the Act, the Rules, and the Fifth Amendment, thereby providing "good cause" for Judge Newman's denial to cooperate; and (3) imposed sanctions that violated the Constitution, the Act, and the Rules. On February 7, 2024, the Judicial Conference denied the petition for review and affirmed the Judicial Council's order, including the sanctions imposed therein.

B. Subsequent Litigation

While the Judicial Council investigation and proceedings were ongoing, Judge Newman filed a lawsuit in the U.S. District Court for the District of Columbia (the "Court").[59] The complaint brought eleven counts against Chief Judge Moore, Judge Prost, and Judge Taranto of the Special Committee (the "Defendants").[60] Specifically, Judge Newman brought facial and as-applied constitutional challenges against the Act. Judge Newman also sought preliminary injunction to enjoin the Defendants from suspending her docket.[61] The Court encouraged the parties to engage in mediation, which was conducted by retired D.C. Circuit Judge Thomas B. Griffith.[62] But the informal mediation did not resolve the issues between the parties.

The Court interpreted Judge Newman's complaint as a challenge against the judiciary's self-regulatory regime, and it "decline[d] the invitation."[63] Notably, the opinion emphasized that Section 357(c) of the Act, which states "[e]xcept as expressly provided in [the Act] and section 352(c), ***all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise,***" precluded Judge

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55 *Id*.
56 *See Judicial Conference Order*, *supra* note 46, at 13.
57 *Id*. at 13-14.
58 Rules, *supra* note 4, R. 21.
59 *Newman*, 2024 WL 551836, at *5.
60 *Id*.
61 *Id*.
62 *Id*.
63 *Id*. at 2.

Newman's as-applied claims.[64] Accordingly, the Court was barred from exercising jurisdiction over six of Judge Newman's claims. The Court grouped the barred claims as follows:

> First, Counts II and III allege that neither the JC&D Act nor § 332(d) permit the Judicial Council to suspend Judge Newman from her cases, reduce her staff, or force her to submit to a mental health examination, among other restrictions.
>
> Second, Count IV, titled 'As Applied Due Process of Law Violation,' contends that Defendants' continued investigation 'violates the fundamental principles of due process because the Special Committee is composed of complainants about and witnesses to Plaintiff's alleged disability.'
>
> Third, Count VI alleges that '[n]either the [Act] nor the U.S. Constitution authorizes compelling an Article III judge to undergo a medical or psychiatric examination or to surrender to any investigative authority her private medical records.'
>
> Finally, Counts X and XI raise as-applied Fourth Amendment challenges. The counts claim Judge Newman's rights were violated because Defendants lacked 'either a warrant issued on probable cause' or 'a constitutionally reasonable basis' for requiring her 'to submit to an involuntary medical or psychiatric examination' (Count X) or 'to surrender her private medical records' (Count XI).[65]

Meanwhile, the Court found that it could exercise jurisdiction over Counts I, V, and VII–IX consistent with Section 357(c) because they presented facial challenges. While most of these claims alluded to specific Judicial Council orders, they primarily challenged the language of the Act authorizing the actions in the orders.[66] As a result, the Court could review these challenges and apply the highly demanding standard that "'no set of circumstances exists under which' the Judicial Council could validly apply those parts of the statute."[67] The Court noted that it would decide on the merits of only Count I and Count VII because "Judge Newman [did] not seek a preliminary injunction based on the likelihood of prevailing on the other counts."[68] With respect to Counts I and VII, the Court held:

> Count I challenges the [Act's] authorization to suspend Article III judges from office. . . . Judge Newman contends that the [Act] unconstitutionally "delegate[s]" to judges "the impeachment power which the Constitution reserves to the House and Senate." . . . **The D.C. Circuit considered and rejected this argument in *McBryde*.** . . . The D.C. Circuit held that at least

64 *Id*. at 8.
65 *Id*. at 11-12.
66 *Id*. at 12.
67 *Id*.
68 *Id*. at 16.

> some suspensions do not unconstitutionally arrogate Congress's impeachment power.
>
> Finally, Count VII contends that the [Act] violates the Fifth Amendment's due process protection and Article III's guarantee of judicial independence by 'vest[ing] virtually complete discretion in the hands of a Special Committee to determine when compliance with [orders] may be compelled.' . . . And two related features of [Act] investigations cabin a special committee's discretion. First, the [Act] does not vest special committees with the authority to compel compliance with their orders. … Second, the [Rules] erect guardrails around a special committee's investigation. . . . Accordingly, the Court grants Defendants' motion to dismiss as to Count I and part of Count VII. Because Judge Newman has not shown a likelihood of prevailing on the merits of these counts, the Court also denies her motion for a preliminary injunction.[69]

In summary, the Court denied Judge Newman's Motion for a Preliminary Injunction and granted in part and denied in part the Defendants' Motion to Dismiss. The matter is still ongoing, and the parties have submitted memoranda in support and in opposition for judgment on the pleadings.

IV. Conclusion

The Act and Rules have rarely been used to their full extent in connection with a disability complaint. Such claims are inherently sensitive and rarely handled in high-visibility, public cases. The recent disability complaint identified against Judge Newman in the Federal Circuit has provided a rare opportunity to see the entire process in practice. These proceedings demonstrate that the Act and Rules are intimately connected and, together, they provide a crucial mechanism for the judiciary's self-regulation.

One last observation as it relates to bankruptcy judges. Many of the arguments raised by Judge Newman would not apply to bankruptcy judges who do not have Article III protection. As already pointed out, Section 152(e) provides that a bankruptcy judge may be removed for physical or mental disability by a majority vote of all of the judges on the circuit council.

Martin Glenn

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[69] *Id*. at 17-18.

Privilege Issues in Bankruptcy

American Bankruptcy Institute
Annual Spring Meeting

Saturday, April 20, 2024
8:30 a.m. – 9:30 a.m.

Panelists

Tanya Behnam
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I. Accountant-Client Privilege

In federal courts, the starting point for determining the existence of a privilege is Rule 501 of the Federal Rules of Evidence ("FRE"), which provides:

> Rule 501--Privilege in General
>
> The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Under this rule, in cases presenting federal questions, the federal common law of privilege applies, but where state law provides the rule of decision, state law will govern. *Wm. T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 103 (3d Cir. 1982).

As a matter of federal common law, there is no right to assert an accountant-client privilege or an accountant work product privilege. Indeed, the Supreme Court has expressly disapproved of the so-called "accountant-client privilege," stating that "no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases." *Couch v. U.S.*, 409 U.S. 322, 334 (1973); *see also U.S. v. Arthur Young & Co*., 465 U.S. 805, 817–19 (1984).

Nevertheless, approximately half of the states in the country recognize an accountant-client privilege. *See, e.g.,* Ariz. Rev. Stat. § 32-749; Colo. Rev. Stat. § 13-90-107; Fla. Stat § 90.5055; Ga. Code Ann. § 84-220(b); MCL 339.732; Pa. Stat. Ann. tit. 63, § 9.11a. Further, some states, including California and Kentucky, require accountants to maintain confidentiality, unless subpoenaed. *See* Cal. Code Regs. Tit. 16 § 54.1; Ky. Rev. Stat. § 325.440.

To determine whether a state law accountant-client privilege should apply in a bankruptcy case, the focus should be on the purpose for which a trustee or other party in interest seeks access to information. An accountant-client privilege may be recognized in garden variety state law civil litigation that happens to be pending in a bankruptcy case, such as in an adversary proceeding. *See, e.g., Providers Fid. Life Ins. Co. v. Tidewater Group, Inc. (In re Tidewater Group, Inc.)*, 65 B.R. 179, 183 (Bankr. N.D. Ga. 1986) (in denying a discovery request based upon the Georgia accountant-client privilege, the court concluded "[t]he claims and defenses involved in this proceeding are grounded in breach of contract, fraud, and misrepresentation, which are all clearly areas where state law must supply the rule of decision."); *Wells v. THB America, LLC (In re Clements Mfg. Liquidation Co.)*, 486 B.R. 400 (Bankr. E.D. Mich. 2012) (accountant-client privilege applied in adversary proceeding where the parties stipulated that state law supplied the rule of decision for the pending claims and defenses).

Conversely, if the information is being sought to ascertain information about the debtor's assets, financial condition, or other matters relating to the administration of the estate, federal law should apply and the privilege should not be assertable. This conclusion is supported by Rule 2004

of the Federal Rules of Bankruptcy Procedure ("FRBP")[1] and the generally accepted need for full disclosure of financial information in bankruptcy cases. *See, e.g., In re S3 Ltd.*, 242 B.R. 872, 876 (Bankr. E.D. Va. 1999) (there is no accountant-client privilege under federal law, and all substantive information contained in accountant's workpapers that pertains to financial affairs of accountant's client are proper subjects for discovery.); *Barnett Bank of Tampa, N.A. v. Muscatell (In re Muscatell)*, 93 B.R. 268, 271 (Bankr. M.D. Fla. 1988) (since the issues involved in the adversary proceeding were governed by bankruptcy law, the state accountant-client privilege rule was not applicable); *In re Kroh*, 80 B.R. 488, 490 (Bankr. W.D. Mo. 1987) (requested documents were within the scope of FRBP 2004 and were not subject to privilege); *Joyner v. Liprie (In re Liprie)*, 480 B.R. 658, 663 (Bankr. W.D. La. 2012) ("The claims raised in the present case are claims to exclude certain debts from discharge under 11 U.S.C. § 523 and to deny the discharge under 11 U.S.C. § 727. While the court may look to state law for guidance in applying the elements of a non-dischargeability claim, these claims are governed by federal law. Accordingly, federal law on privileges applies to this case.").

In *Matter of Intl. Horizons, Inc.*, 689 F.2d 996 (11th Cir. 1982), the Eleventh Circuit Court of Appeals held that a bankruptcy court need not apply a state law accountant-client privilege. In that case, an accounting firm for a debtor appealed from an order of the bankruptcy court requiring the accounting firm to permit the creditors' committee access to financial documents and work papers in its possession. The accounting firm argued that state law should supply the rule of decision and that Georgia law, which recognizes an accountant-client privilege, should be applied.

The Eleventh Circuit held that since the proceeding did not yet involve claims or defenses as to which state law supplied the rule of decision, the bankruptcy court was not required to apply Georgia's accountant-client privilege. The court reasoned:

> We recognize that Georgia's legislature has decided that the accountant-client relationship needs the protection of an evidentiary privilege and that federal refusal to acknowledge this privilege might tend to undermine Georgia's policy of encouraging accountant-client candor. However, recognition of the accountant-client privilege in bankruptcy proceedings would substantially thwart an important federal interest. A creditors committee is empowered by federal law to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business." 11 U.S.C. § 1103(c)(2). Application of an accountant-client privilege in federal bankruptcy proceedings would deny courts and creditors access to a vital source of information relating to a debtor's assets and liabilities. Thus, recognition of an accountant-client privilege in federal bankruptcy proceedings would completely undermine the important federal interest in providing bankruptcy courts and creditors with complete and accurate information regarding a debtor's financial condition.

Id. at 1004-05.

[1] FRBP 2004(b) provides that any party in interest may take an examination related to "the acts, conduct, or property or to the liabilities and financial condition of the debtor . . ." or to "any matter which may affect the administration of the debtor's estate."

In *In re Grabill Corp.*, 109 B.R. 329 (N.D. Ill. 1989), the court held that the Illinois accountant-client privilege did not apply in a federal bankruptcy proceeding to prohibit the disclosure of the accountant's work papers and documents concerning its audits of the debtor where those documents were sought in connection with resolving "traditional questions of federal bankruptcy law." The court reasoned that the trustee had a duty under section 704(7) of the Bankruptcy Code to "furnish such information concerning the estate and the estate's administration as is requested by a party in interest," unless the court ordered otherwise.

Similarly, in *In re Oxford Royal Mushroom Products, Inc.*, 41 B.R. 863 (Bankr. E.D. Pa. 1984), a chapter 7 trustee subpoenaed the debtor's accountant for purposes of obtaining information that would help identify potential avoidable transactions made by the debtor. The accountant objected to the subpoena, asserting an accountant-client privilege under Pennsylvania law. The bankruptcy court ordered the accountant to turnover the requested information, noting that the trustee's inquiries were central to the system of bankruptcy administration and, as such, lie singularly within the realm of federal law rather than state law. The court stated, "[t]hus, state law does not provide the rule of decision, and Pennsylvania's accountant-client privilege does not apply." *Id.* at 865.

It is worth noting that a limited federal accountant-client privilege is provided in 26 U.S.C. § 7525(a). This statute makes communications between a taxpayer and a federally authorized tax practitioner privileged "to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney." *Id*. This privilege, however, can only be asserted in a noncriminal tax matter before the IRS or in federal court if brought by or against the United States. *Id.*

Relatedly, in *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), the Second Circuit Court of Appeals decided that the presence of an accountant, hired by the lawyer or client, during the communication of complicated tax matters should not destroy attorney-client privilege. The court reasoned: "if the lawyer has directed the client . . . to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose ought to fall within the privilege . . . ." *Id.* at 922.

II. Mediation Privilege

In recent years, mediation has become an increasingly popular tool for resolving bankruptcy disputes in a more efficient manner. Courts have encouraged, and even ordered, mediation to alleviate the burden on their dockets and to minimize the expense and delay associated with litigation. Bankruptcy mediation can be more complicated than traditional mediation because, instead of involving just two parties, some bankruptcy mediations (*e.g.* mediations regarding plan negotiations, complex adversary proceedings) often involve multiple stakeholders with a wide variety of interests and perspectives.

For mediation to work as intended, communications made during mediation must be candid, honest and confidential. The mediation privilege ensures that parties to mediation can engage in a dialogue about the strengths and weaknesses of their cases without facing the risk that

their statements in mediation will subsequently be used against them if mediation is unsuccessful. As one court put it, "[t]he process works best when parties can speak with complete candor, acknowledge weaknesses, and seek common ground, without fear that, if a settlement is not achieved, their words will later be used against them in the more traditionally adversarial litigation process." *Princeton Ins. Co. v. Vergano*, 883 A.2d 44, 66 (Del. Ch. 2005).

Although there is no federal bankruptcy rule specifically addressing mediation confidentiality,[2] federal courts have typically held that a broad privilege exists with respect to communications made in conjunction with a mediation proceeding. To determine whether to adopt new evidentiary privileges, courts generally apply the Supreme Court's four-pronged test from *Jaffee v. Redmond*, 518 US. 1 (1996), which asks: (i) whether the privilege is "rooted in the imperative need for confidence and trust," (ii) whether applying a privilege would serve a public end, (iii) whether the evidentiary loss resulting from the privilege would be modest, and (iv) whether denial of the federal privilege would frustrate the purposes of the state legislation that was enacted to foster confidential communications. The first case to apply *Jaffee* to establish a federal common law mediation privilege was *Folb v. Motion Picture Industry Pension & Health Plans,* 16 F. Supp. 2d 1164 (C.D. Cal. 1998), wherein the court held that the mediation privilege protected communications to the mediator and communications between the parties. Subsequently, most courts faced with the issue of a mediation privilege have likewise found that the mediation privilege falls within the scope of *Jaffee. See, e.g., Sheldone v. Pennsylvania Turnpike Comm'n.,* 104 F. Supp. 2d 511 (W.D. Pa. 2000).

In *Hays v. Equitex, Inc. (In re RDM Sports Group Inc.)*, 277 B.R. 415 (Bankr. N.D. Ga. 2002), the bankruptcy court followed *Folb* and *Sheldone* and held that the mediation privilege protected the turnover of documents related to a settlement reached in mediation noting that the encouragement of settlement negotiations and alternative dispute resolution is a compelling interest sufficient to justify recognition of a mediation privilege. The court stated:

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[2] Support for protecting mediation communications can be found in FRE 408, which provides:

> Rule 408. Compromise Offers and Negotiations
> (a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
> (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
> (2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

But FRE 408 only excludes evidence to the extent that it is being offered to "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement"; the rule expressly permits a court to "[a]dmit this evidence for another purpose." Moreover, FRE 408 only governs the admissibility of settlement communications and documents, not the discoverability of such communications and documents.

> It would appear that, regardless of whether the confidentiality afforded to these communications arises in the form of a privilege or merely a prohibition on voluntary disclosure, the evidence is strong that parties engage in mediation with an expectation that the information will remain protected from future use by other parties. Therefore, it seems logical to assume that once this expectation is removed, the willingness of those parties (or more accurately their counsel) to engage in mediation, with full knowledge that the information will not be protected from disclosure in the event of future federal litigation, would decrease.

Id. at 430. The court, however, limited the scope of the privilege to "protect only those communications made to the mediator, between the parties during the mediation, or in preparation for the mediation." *Id.* at 431. Therefore, the mediation privilege would not extend to "documents prepared prior to the mediation, merely because those documents were presented to the mediator during the course of the mediation." *Id.*

While most courts that have considered a mediation privilege have found that communications in mediation are privileged, there are a handful of opinions where courts have declined to recognize the existence of a federal mediation privilege. *See, e.g., In re Lake Lotawana Cmty. Improvement Dist.*, 563 B.R. 909, 924 (Bankr. W.D. Mo. 2016) (citing *Carman v. McDonnell Douglas Corp.*, 114 F.3d 790, 793 (8th Cir. 1997)).

Federal courts are governed by 28 U.S.C. § 651(b) and 652(a), which authorize district and bankruptcy courts to adopt local rules to encourage alternative dispute resolution proceedings. Fortunately, in most jurisdictions, any uncertainty about the existence of a mediation privilege has been addressed through the enactment of local rules which provide that mediation communications are confidential and/or privileged. For example, the U.S. Bankruptcy Court for the District of Delaware adopted Local Rule 9019-5(d), which provides:

> Confidentiality of Mediation Proceedings. Confidentiality is necessary to the mediation process, and mediations shall be confidential under these rules and to the fullest extent permissible under otherwise applicable law . . . Without limiting the foregoing, except as may be otherwise ordered by the Court, the following provisions shall apply to any mediation under these rules:
>
> (i) F.R.E. 408. To the fullest extent applicable, Rule 408 of the Federal Rules of Evidence (and any applicable federal or state statute, rule, common law or judicial precedent relating to the protection of settlement communications) shall apply to the mediation conference and any communications with the mediator related thereto. In addition to the limitations of admissibility of evidence under Rule 408, no person may rely on or introduce as evidence in connection with any arbitral, judicial or other proceeding, including any hearing held by this Court in connection with the referred matter, whether oral or written, (i) views expressed or suggestions made by a party with respect to a possible settlement of the dispute, including whether another party had or had not indicated a willingness to accept a proposal for settlement, (ii) proposals made or views expressed by the mediator, or (iii) admissions made by a party in the course of the mediation.

(ii) Protection of Information Disclosed to the Mediator or During Mediation. Subject to subparagraph (iv) herein, the mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties or witnesses to or in the presence of the mediator, or between the parties during any mediation conference.

(iii) Confidential Submissions to the Mediator. Subject to subparagraph (iv) herein, any submission of information or documents to the mediator, including any Submission (as defined in Del. Bankr. L.R. 9019 5(c)(iii)), prepared by or on behalf of any participant in mediation and intended to be confidential shall not be subject to disclosure, regardless of whether such Submission is shared with other participants in the mediation during a mediation conference.

(iv) Information Otherwise Discoverable. Information, facts or documents otherwise discoverable or admissible in evidence do not become exempt from discovery or inadmissible in evidence merely by being disclosed or otherwise used in the mediation conference or in any Submission to the mediator.

(v) Discovery from the Mediator. The mediator shall not be compelled to disclose to the Court or to any person outside the mediation any records, reports, summaries, notes, communications, Submissions, recommendations made under subpart (e) of this Local Rule, or other documents received or made by or to the mediator while serving in such capacity. The mediator shall not testify, be subpoenaed or compelled to testify regarding the mediation in connection with any arbitral, judicial or other proceeding. The mediator shall not be a necessary party in any proceedings relating to the mediation. Nothing contained in this paragraph shall prevent the mediator from reporting the status, but not the substance, of the mediation effort to the Court in writing, from filing a Certificate of Completion as required by Local Rule 9019-5(f), or from otherwise complying with the obligations set forth in this Local Rule.

(vi) Protection of Confidential Information. For the avoidance of doubt, nothing in this sub-part 9019 5(d) is intended to or shall modify any rights or obligations any entity has in connection with confidential information or information potentially subject to protection under Section 107 of the Bankruptcy Code.

(vii) Preservation of Privileges. Notwithstanding Rule 502 of the Federal Rules of Evidence, the disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

Mediation procedures established by the U.S. Bankruptcy Court for the Southern District of New York similarly provide as follows:

> 5.1 Confidentiality as to the Court and Third Parties. Any statements made by the mediator, by the parties or by others during the mediation process shall not be divulged by any of the participants in the mediation (or their agents) or by the mediator to the Court or to any third party. All records, reports, or other documents received or made by a mediator while serving in such capacity shall be confidential and shall not be provided to the Court, unless they would be otherwise admissible. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in connection with any arbitral, judicial or other proceeding, including any hearing held by the Court in connection with the referred matter.
>
> 5.2 Confidentiality of Mediation Effort. Rule 408 of the Federal Rules of Evidence shall apply to mediation proceedings. Except as permitted by Rule 408, no person may rely on or introduce as evidence in connection with any arbitral, judicial or other proceeding, including any hearing held by this Court in connection with the referred matter, any aspect of the mediation effort, including, but not limited to: (A) views expressed or suggestions made by any party with respect to a possible settlement of the dispute; (B) admissions made by the other party in the course of the mediation proceedings; and (C) proposals made or views expressed by the mediator.

In the U.S. District Court for the Southern District of Texas, Local Rule 16.4.H provides:

> Confidentiality, Privileges and Immunities. All communications made during ADR proceedings (other than communications concerning scheduling, a final agreement, or ADR provider fees) are confidential, are protected from disclosure, and may not be disclosed to anyone, including the Court, by the provider or the parties. Communications made during ADR proceedings do not constitute a waiver of any existing privileges and immunities. The ADR provider may not testify about statements made by participants or negotiations that occurred during the ADR proceedings.

Finally, the U.S. Bankruptcy Court for the Eastern District of Michigan has a more concise rule, Local Rule 7016-2(a)(5), but it too provides for a broad mediation privilege: "All proceedings and writing incident to the mediation will be privileged and confidential and must not be reported or placed in evidence." Local rules such as these go a long ways towards eliminating any uncertainty that may otherwise have existed as to the confidentiality of communications made in mediation.

Given the protection afforded to communications made in the context of mediation, it is not surprising that parties seeking disclosure of mediation communications face an uphill battle. This issue was addressed by the Second Circuit Court of Appeals in *Savage & Assocs., P.C. v. K&L Gates LLP (In re Teligent, Inc.)*, 640 F.3d 53 (2d Cir. 2011). In that case, the court affirmed the lower courts' orders which denied a law firm's motion to lift two protective orders prohibiting disclosure of communications made during mediation. The estate of a bankrupt company and its Chief Executive Officer had engaged in court-ordered mediation, in which they agreed to be bound

by the terms of the standard protective orders employed by the bankruptcy court for the Southern District of New York.

Following mediation, the parties reached a settlement, one aspect of which required the CEO to sue his former lawyers for malpractice and to remit to the bankruptcy estate fifty percent of any amounts he recovered. During discovery, the defendant law firm sought all mediation and settlement communications and, after the estate objected, sought an order lifting the confidentiality restrictions to obtain the requested materials. The court found a presumption against modifying confidentiality provisions contained in protective orders entered in the mediation context, and observed the importance of confidentiality in mediation to promote the free flow of information that may result in the settlement of a dispute.

It set forth a three-prong test that a movant must meet to obtain mediation material:

> (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence out-weighs the interest in maintaining confidentiality. All three factors are necessary to warrant disclosure of otherwise non-discoverable documents.

As to the first prong, the court found that the firm had made a blanket request to lift the confidentiality provisions without demonstrating any special need for specific communication. The second prong was not met because the firm had access to the information sought through other means. Finally, because the firm could not demonstrate that its need outweighed the interest of maintaining confidentiality, it failed the third prong. Accordingly, the court denied the motion to lift the confidentiality provisions.

III. Informal Settlement Negotiations

FRE 408 – Compromise Offers and Negotiations

> **(a) Prohibited Uses.** Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or a statement made during compromise negotiations about the claim – except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> **(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FRE 501 – Privilege in General

> The common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Neither FRE 408 nor FRE 501 establish a privilege that applies to evidence concerning parties' settlement negotiations. FRE 408 limits the admissibility of evidence of a settlement or of settlement negotiations; FRE 501 clarifies that the assertion of privilege in federal court is governed by common law unless such privilege is addressed by the U.S. Constitution, federal law, or a rule promulgated by SCOTUS.

Relevant Caselaw

Federal courts have split on whether evidence of a settlement or of settlement negotiations is privileged. The leading case holding that such evidence *is* privileged is *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003).

Goodyear began as a breach of contract action brought in state court in Ohio by a manufacturer of rubber hosing (Goodyear) against a customer (Heatway) who refused to pay for product, alleging that it was defective. Heatway removed the lawsuit to federal court. The parties engaged in unsuccessful settlement negotiations.

Both parties had been sued in another jurisdiction by homeowners whose homes had been damaged after certain heating and snowmelt systems installed by Heatway, and into which Goodyear's hoses had been incorporated, failed. The homeowners sought third party discovery of Goodyear and Heatway's settlement discussions. The district court rebuffed the homeowners' efforts to obtain such discovery. The homeowners appealed to the Sixth Circuit, asking it to address "whether statements made in furtherance of settlement are privileged and protected from third-party discovery."

The Sixth Circuit began its analysis by acknowledging the parameters established by FRE 408. It then turned to FRE 501 and how courts have determined whether to apply a privilege. Relying on *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Sixth Circuit recognized that any "asserted privilege must serve some public interest 'transcending the normally predominant principle of utilizing all rational means for ascertaining truth" and that the "proposed privilege must promote a public interest that is 'sufficiently important . . . to outweigh the need for probative evidence."[3]

Against that backdrop, the Sixth Circuit examined what it characterized as a long-standing tradition of treating settlement communications – formal or informal – as confidential and found that "[t]he public policy favoring secret negotiations, combined with the inherent questionability of the truthfulness of any statements made therein, leads us to conclude that a settlement privilege

[3] *Goodyear*, 332 F.3d at 980 (internal citations omitted).

should exist . . . ."[4] But the court did not stop there, holding that "even if negotiation communications were not privileged, [the homeowners have] not presented any evidence that the alleged statements are *relevant* . . ."[5] The Sixth Circuit rejected the homeowners' assertion that such evidence was necessary to show bias on the part of Goodyear executives or to impeach Goodyear or Heatway witnesses because they could make such showings through other means.[6] "In sum, any communications made in furtherance of settlement are privileged. Moreover, any such statement is likely not relevant [because the homeowners have] not demonstrated a legitimate, admissible use."[7]

Cases following *Goodyear* have clarified that, in order for a statement or a document to be protected from discovery, the statement or document must constitute a "communication", i.e., a document or statement exchanged between the parties during settlement negotiations; and the document must have been authored or created for the purpose of settlement negotiations.[8]

One of the leading cases refusing to recognize a settlement privilege is *In re MSTG, Inc.*, 675 F.3d 1337 (Fed. Cir. 2012). *MSTG* involved a claim of patent infringement brought by a patent owner against one of its competitors. The alleged infringer succeeded in obtaining an order requiring the patent owner to produce evidence related to its negotiation of licenses of its intellectual property in connection with the settlement of other infringement litigation. The patent owner petitioned for a writ of mandamus instructing the trial court to vacate its order.

After discussing the propriety of seeking review of discovery orders by mandamus, the Federal Circuit noted *Goodyear*'s holding, as well as that of the Seventh Circuit in *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979), which refused to adopt a settlement privilege. The Federal Circuit also noted SCOTUS' warning that federal evidentiary privileges under FRE 501 "are not lightly created nor expansively construed, for they are in derogation of the search for truth."[9]

From there, the Federal Circuit dove into *Jaffee*,[10] from which it drew several reasons why it should decline to follow *Goodyear*. First, it noted that *Jaffee* instructs federal courts to follow the States' lead on whether to recognize a new federal privilege. "[T]here is no state consensus as to a settlement negotiation privilege. Although all courts have apparently enacted a statutory mediation privilege . . . [w]e are not aware of any state that recognizes a settlement privilege

[4] *Id.* at 981.

[5] *Id.* at 982.

[6] *Id.* at 982-83.

[7] *Id.* at 983.

[8] *Graff v. Haverhill North Coke Co.*, 2012 WL 5495514, *32 (S.D. Ohio Nov. 13, 2012).

[9] *MSTG*, 675 F.3d at 1343 (citing *U.S. v. Nixon*, 418 U.S. 683 (1974)).

[10] *Jaffee v. Redmond*, 518 U.S. 1 (1996).

outside the context of mediation. Thus, the failure to recognize a federal settlement privilege will not 'frustrate the purposes' of any state legislation . . . ."[11]

Next, the Federal Circuit looked to Congressional intent and made two points: (1) in enacting FRE 408, Congress could have – but did not – enact a settlement privilege;[12] and (2) a settlement privilege was "not included among the nine specific privileges recommended by the Advisory Committee [of the Judicial Conference] in promulgating the Federal Rules of Evidence.[13] From this, the Federal Circuit concluded that "[a]dopting a settlement privilege would require us to go further than Congress thought necessary to promote the public good of settlement."[14]

The Federal Circuit rejected the notion that a settlement privilege would "effectively advance a public good", finding the "need for confidence and trust alone . . . insufficient . . . to create a new privilege."[15] The court noted other circumstances in which SCOTUS had rejected the need for confidentiality as a grounds for recognizing a new privilege, as well as the fact that "disputes are routinely settled without the benefit of a settlement privilege."[16]

Next, the court noted that any settlement privilege would "necessarily have numerous exceptions," the existence of which would "distract from [its] effectiveness, clarity, and certainty."[17] Quoting *Jaffee*, the court recognized that "[a]n uncertain privilege . . . is little better than no privilege at all."[18]

Finally, the Federal Circuit noted that "to the extent we need to protect the sanctity of settlement discussions and promote the compromise and settlement of dispute, there are other effective methods to limit the scope of discovery to achieve those ends – primarily Rule 26 of the Federal Rules of Civil Procedure."[19] Under FRCP 26, courts can limit discovery by using protective orders, by engaging in a relevance analysis, and/or by weighing the burden of

[11] *MSTG*, 675 F.3d at 1343.

[12] *Id.* at 1343-44.

[13] *Id.* at 1345.

[14] *Id.* at 1344.

[15] *Id.* at 1345.

[16] *Id.*

[17] *Id.* at 1346.

[18] *Id.* (quoting *Jaffee*, 518 U.S. at 18).

[19] *MSTG*, 675 F.3d at 1346.

production against its likely benefit.[20] Weighing all of these factors, the Federal Circuit declined to recognize a settlement negotiation privilege.[21]

Practical Takeaways

- Formal mediation might protect settlement negotiations from discovery.

  MSTG acknowledged that every state appears to have enacted legislation that gives rise to a "mediation privilege";[22] thus, if you are truly concerned about protecting the confidentiality of settlement agreements or settlement negotiations, you might wish to formally mediate your dispute.

- Move to exclude evidence of settlement or settlement negotiations with a motion *in limine*.

  Such a motion will at the very least elicit your opponent's take on the question, along with the court's.

- At trial, you must timely and specifically object to the introduction of evidence of compromise.

  If you fail to object, you risk voluntary waiver of whatever protection FRE 408[23] might provide and the loss of any claim of error on appeal.[24]

- Make sure you understand the law in your jurisdiction.

  If you take nothing else from these materials, let it be that courts are all over the map on the existence of a blanket settlement privilege. Do your own research!

- Consider arguments or strategies other than one advocating for or against a blanket settlement privilege.

  Consider, for example, challenging or encouraging the introduction of evidence of settlement or settlement negotiations on relevance grounds, in light of FRE 408. If you are trying to introduce evidence of compromise negotiations, make sure you are prepared to provide the court with an offer of proof explaining exactly why you need this evidence in

[20] *Id.*

[21] *See also In re Subpoena Issued to Commodity Futures Trading Comm'n*, 370 F. Supp. 2d 201 (D. D.C. 2005) (engaging in an analysis similar to *MTSG* and declining to recognize a federal settlement privilege) and *Matsushita Elec. Industrial Co., Ltd. v. Mediatek, Inc.*, 2007 WL 963975 (N.D. Cal. Mar. 30, 2007) (same; collecting cases).

[22] *MSTG*, 675 F.3d at 1343.

[23] J. Weinstein & M. Berger, *Weinstein's Evidence*, § 408.02 at 2-408 (2016).

[24] FRE 103(a).

the record and why that purpose falls within what FRE 408 permits. If you are trying to protect such evidence from admission, be prepared to counter relevance arguments. If you cannot convince the court to prohibit discovery of compromise evidence, then consider a protective order, which would give you and your client the ability to weigh in on any further dissemination of the information you wish to protect.

IV. Fifth Amendment

The 5th Amendment to the United States Constitution states, in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." Despite the fact that the Fifth Amendment expressly refers to criminal cases, its privilege against self-incrimination has applied in civil proceedings, too, for more than a century.[25]

Who Can Invoke the Fifth Amendment Privilege Against Self-Incrimination?

Given the plain language of the Fifth Amendment, individuals cannot be compelled to give self-incriminating testimony. But the Fifth Amendment also protects an individual from having to produce personal papers or other personal material if such production would be considered (a) compelled; (b) testimonial; and (c) self-incriminating.[26]

The Fifth Amendment's privilege against self-incrimination does not apply to corporate entities.[27] This means that individuals in possession of corporate records can be compelled to produce them, even if those records tend to incriminate the individual who possesses or produces them.[28]

When Can the Fifth Amendment Privilege be Invoked?

Courts typically construe an individual's right to invoke the Fifth Amendment's privilege against self-incrimination very liberally.[29] Courts recognize that, in order to successfully invoke the Fifth Amendment privilege, an individual need only show the possibility of criminal prosecution, as opposed to a likelihood or greater probability.[30]

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[25] *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (recognizing that the Fifth Amendment's privilege against self-incrimination "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it" and finding the privilege applicable in bankruptcy cases); *Kastigar v. U.S.*, 406 U.S. 441, 444 (1972) (acknowledging that the privilege against self-incrimination can apply in "any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory").

[26] *U.S. v. Doe*, 465 U.S. 605, 613-14 (1984); *Couch v. U.S.*, 409 U.S. 322, 327-28 (1973).

[27] *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906) overruled in part on other grounds by *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964).

[28] *Braswell v. U.S.*, 487 U.S. 99, 109-110 (1988).

[29] *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951).

[30] *In re Folding Carton Litigation, Appeal of R. Harper Brown*, 609 F.2d 867, 871 (7th Cir. 1979); *Convertino v. U.S. Dep't of Justice*, 795 F.3d 587, 593 (6th Cir. 2015).

How Does One Invoke the Fifth Amendment Privilege?

Courts require no "magic language" in order to successfully invoke the Fifth Amendment's privilege against self-incrimination.[31] A simple assertion that the witness refuses to respond to written discovery or to provide testimony based upon their right not to incriminate themselves will suffice.[32]

Blanket or pre-emptive assertions of the Fifth Amendment privilege against self-incrimination, however, will not be effective. An individual must invoke the privilege in response to specific written discovery requests or in response to specific questions during a deposition or trial.[33]

Can the Fifth Amendment Privilege be Waived?

Yes.[34] This means that any individual who believes they will need to assert their privilege against self-incrimination must do so at the earliest appropriate opportunity – even in their answer to a complaint[35] – and must consistently assert it thereafter, until the need to do dissipates. And while waiver of the Fifth Amendment's privilege against self-incrimination in one proceeding generally does not affect an individual's right to assert that privilege in another proceeding,[36] that rule is not ironclad, so caution requires consistent assertion in order to avoid waiver.[37] Any waiver must be knowing and voluntary;[38] inadvertent waivers are not recognized.

What are the Ramifications of Asserting the Fifth Amendment Privilege?

Courts have long recognized that an individual's invocation of their Fifth Amendment privilege against self-incrimination can give rise to significant problems for that individual's

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[31] *Quinn v. U.S.*, 349 U.S. 155, 162-63 (1955).

[32] *Id.*

[33] *Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc.*, 553 F. Supp. 45, 50 (S.D.N.Y. 1982) (blanket assertion of Fifth Amendment privilege against self-incrimination not appropriate); *Phillips v. First Nat'l. Ins. Co. of Amer.*, 2011 WL 2447954, *3 (S.D. Tex. June 15, 2011) (affirming bankruptcy court's denial of motion to quash notice of deposition as premature).

[34] *Rogers v. U.S.*, 340 U.S. 367, 373 (1951).

[35] *National Acceptance Co. of Amer. v. Bathalter*, 705 F.2d 924, 927 (7th Cir. 1983) (recognizing an individual's right to assert the Fifth Amendment's privilege against self-incrimination in their answer to a complaint).

[36] *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 58, 66 (D. D.C. 2000).

[37] *See, e.g.*, *Interim Investors Committee v. Jacoby*, 90 B.R. 777, 780 (W.D.N.C. 1988) (recognizing that defendant waived their Fifth Amendment privilege against self-incrimination when, in a bankruptcy proceeding, they answered questions in response to which they had previously asserted the privilege) *aff'd* 914 F.2d 1491 (4th Cir. 1990).

[38] *Brown v. U.S.*, 356 U.S. 148, 155 (1958).

opponents in litigation.[39] In light of this, courts have crafted means to keep the playing field as level as possible.

Negative Inference

In criminal proceedings, the trier of fact may not draw negative inferences from a criminal defendant's decision not to testify.[40] This prohibition, however, does not extend to civil proceedings.[41] This can result in satisfaction of an essential element of a cause of action by way of such a negative inference.[42]

Whether to draw a negative inference from an individual's assertion of their privilege against self-incrimination is discretionary.[43] In deciding whether to exercise that discretion, courts should consider: (1) the nature of the relationship between the party and the witness asserting the privilege; (2) the degree to which the party controls the witness; (3) the compatibility of interests between the party and the witness in the outcome of the litigation; and (4) the role of the witness in the litigation.[44] In addition, one may not obtain a judgment based solely on a negative inference drawn from the assertion of the privilege against self-incrimination.[45]

Exclusion of Evidence

Where an individual invokes their privilege against self-incrimination but later seeks to introduce testimony or other evidence they had previously refused to provide, courts may prohibit them from doing so.[46]

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[39] *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187, 190 (3d Cir. 1994); *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518 (1st Cir. 1996).

[40] *Carter v. Kentucky*, 450 U.S. 288, 305 (1981).

[41] *Baxter v. Palmigiano*, 425 U.S. 308, 318-20 (1976).

[42] *In re Powers*, 261 Fed. App'x 719, 723 (5th Cir. 2008) (recognizing that a debtor's invocation of their privilege against self-incrimination permitted the inference that they had committed embezzlement, which rendered a debt non-dischargeable under 11 U.S.C. § 523(a)).

[43] *In re Carp*, 340 F.3d 15, 23 (1st Cir. 2003).

[44] *LiButti v. U.S.*, 107 F.3d 110, 123 (2d Cir. 1997); *In re Tableware Antitrust Litig.*, 2007 WL 781960, *5 (N.D. Cal. May 13, 2007).

[45] *Cho v. Holland*, 2006 WL 2859453, *5 (N.D. Ill. Oct. 3, 2006) ("a judgment may not be based directly, automatically, or solely on Fifth Amendment silence") (internal citation omitted); *National Acceptance*, 705 F.2d at 925 (reversing judgment entered by default solely due to defendant's assertion of their Fifth Amendment privilege against self-incrimination); *U.S. v. White*, 589 F.2d 1283, 1287 (5th Cir. 1979) (recognizing that granting summary judgment based on the assertion of the Fifth Amendment privilege against self-incrimination would "unduly penalize" that constitutional right).

[46] *Lawson v. Murray*, 837 F.2d 653, 656 (4th Cir. 1988) (holding that trial court properly struck the testimony of witness who responded to questions on direct, but asserted the Fifth Amendment's privilege against self-incrimination on cross-examination concerning the same subjects).

V. Spousal Privilege

There are two privileges that arise from the marital relationship: (1) the confidential marital communications privilege (available to either spouse relating to confidential marital communications and documentation), and (2) the adverse spousal witness privilege (available to the non-defendant spouse in criminal proceedings). "The purpose of the marital privilege is to encourage domestic peace, and the sanctity of the marital relation. The spousal communication privilege, developed at common law, also seeks to protect uninhibited communication." *Horwitz v. Sheldon* (*In re Donald Sheldon & Co., Inc.*), 191 B.R. 39, 49 (Bankr. S.D.N.Y. 1996).

While the specifics may vary by jurisdiction, the confidential marital communications privilege generally requires (a) a confidential communication, (b) a valid marriage at the time of the communication, and (c) the privilege must not have been waived. Either spouse may invoke the confidential marital communications privilege and prevent the other from testifying about their private marital communications in a civil or criminal matter. The privilege does not, however, protect non-communicative conduct or actions.

To claim the adverse spousal witness privilege generally requires (a) a valid marriage at the time the privilege is asserted, (b) that one spouse is a defendant, and the other spouse is called to testify against the defendant, and (c) a valid privilege claim by the non-defendant spouse. This privilege is used to prevent one spouse from being compelled to testify against the other in a criminal case.

Prior to adoption of the Bankruptcy Reform Act of 1978, the former Bankruptcy Act addressed certain subject areas that are deemed to be privileged. 1 Bankruptcy Litigation § 4:30 (October 2023 Update). Former §21(a) provided that a debtor's spouse could be examined about business transacted by the spouse, notwithstanding state or federal law. *Id.*

Today, FRBP 9017 provides that the FRE are applicable in bankruptcy cases.[47] And the ability to assert the spousal privilege in bankruptcy proceedings is now governed solely by FRE 501, which provides that, in (a) criminal cases and in civil cases based on federal law, federal common law applies, and (b) in civil cases based on state law, state law determines whether a matter is privileged.

Bankruptcy cases follow the edict set by FRE 501, applying state privilege laws to matters based on state causes of action, and applying federal privilege laws to questions of federal law. *See, e.g. Schilling v. Heavrin* (*In re Triple S. Restaurants, Inc.*), 2009 WL 3459211, at *1-2 (Bankr. W.D. Ky. Oct. 26, 2009) (Debtor could not use state spousal privilege to prevent spouse from testifying in post-judgment enforcement action; the action, brought in federal court and based upon federal law, did not transform into a state action after the Court entered the judgment and collection efforts began); *compare Sheldon*, 191 B.R. at 47 (After Trustee obtained judgment against debtor's principal, Trustee sought principal's deposition for post-judgment enforcement purposes and deponent asserted confidential marital communications privilege. Court held that where underlying judgment at issue was based upon state causes of action

[47] FRE 1101(b) also provides that the rules are applicable to bankruptcy cases.

(breach of fiduciary duty and breach of contract), state privilege law is controlled) and *In re Rafsky*, 300 B.R. 152, 153 (Bankr. D. Conn. 2003) (Spouse of Chapter 7 debtor filed motion for protective order in connection with proposed FRBP 2004 examination of her by judgment creditor, asserting a marital privilege under Connecticut law. Court held that the issues of the proposed FRBP 2004 examination centered on federal bankruptcy law (specifically the chapter 7 provisions which grant a discharge to honest debtors) and, thus, Connecticut's marital privilege was unavailable.)

Dischargeability actions, for example, are decidedly governed by federal privilege law. *See, e.g. In re Mitchell*, 2019 WL 1054715, at *8 (Bankr. D. Idaho Mar. 5, 2019) (Creditor sought the Court's approval to conduct a Rule 2004 examination of debtor's spouse in matter related to dischargeability under § 523(a)(9); per Court, adverse spousal witness privilege was not available because § 523(a)(9) is a question of federal law, and federal common law holds that spousal privilege applies only in criminal proceedings. Conversely, Court held that the confidential marital communications privilege may be applicable if the criteria for use are met); *see also Rafsky*, 300 B.R. at 153.

In comparison, an adversary case proceeding under a state's own fraudulent transfer law would apply that state's privilege law. *In re Carmean*, 153 B.R. 985 (Bankr. S.D. Ohio 1993) (Ohio evidentiary rules relating to spousal privilege, rather than Federal Rules of Evidence, were applicable in adversary proceeding brought by bankruptcy trustee to recover conveyances made by debtor to his parents as violating Ohio Uniform Fraudulent Conveyance Act. Where Court is deciding issues only under Ohio law on fraudulent conveyances; therefore, Ohio evidentiary rules relating to privilege apply.)

As in some non-bankruptcy cases, some bankruptcy courts have held that "the marital privilege is not available to refuse disclosure of communications designed to perpetrate frauds on third parties." In *Sheldon*, 191 B.R. at 49, for example, the Court denied Judgment-Debtor's attempt to invocate spousal privilege where the communications at issue were not privileged, as there was probable cause to believe that the communications were intended to facilitate judgment debtor's efforts to secrete assets and thereby prevent judgment creditor from executing on the judgment.) According to the *Sheldon* Court, the confidential marital communications privilege "was meant to promote domestic peace, not to afford opportunity to the married couple to engage in protected communications to perpetrate a fraud upon a judgment-creditor." *Id.*

Finally, to use the adverse spousal witness privilege in bankruptcy court, the "mere prospect of potential criminal liability" is insufficient. *See, e.g., Lawrence Arms Assocs. v. Shur* (*In re Shur*), 225 B.R. 295, 300 (Bankr. E.D.N.Y. 1998) (Chapter 7 debtor's spouse could not use adverse spousal witness privilege to avoid discovery by adversary plaintiff seeking denial of debtor's Chapter 7 discharge; mere prospect of debtor's potential criminal liability was far too speculative to justify application of privilege in civil proceeding, and spouse's bare assertion of seeking to avoid rift between spouses did not provide basis for extending the privilege.)

VI. Common Interest Privilege

The common interest privilege, also known as the "joint defense doctrine", is applicable to the attorney-client communications and work product privileges. Ordinarily, the attorney-client privilege does not protect attorney-client communications with, in the presence of, or later shared with third parties. However, the common interest privilege allows for an exception to this rule. When correctly applied, the doctrine allows one party and its counsel to engage in confidential communications with another party and their counsel, without waiving attorney-client and work product privilege.

The common interest privilege is not a "stand-alone" privilege; rather, the doctrine "comes into play only if a privilege or protection already covers the material disclosed to the third party." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 2022 WL 1189886, at *2 (N.D. Cal. Apr. 21, 2022); *see also Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) ("The joint defense and common interest doctrines are not privileges in and of themselves. Rather, they constitute exceptions to the rule on waiver where communications are disclosed to third parties.") For this reason, the common interest privilege is often described as an extension of the attorney-client communications and work product privileges.[48]

The common interest privilege requires express agreement between parties' counsel that their communications will remain confidential. Though the agreement itself must be express, courts typically do not require a written agreement.[49] The privilege is applicable to communications (a) made by separate parties in the course of common interest, (b) intended to further shared objectives; and (c) where the privilege has not been waived.

To utilize the common interest privilege, "[t]he parties need not be aligned or non-adverse on all issues, but only on those subjects of the agreement." Ronald E. Mallen, 2 Legal Malpractice § 15:23 (2024 ed.); *Value Property Trust v. Zim Co.* (*In re Mortg. & Realty Tr.*), 212 B.R. 649, 653 (Bankr. C.D. Cal. 1997) ("The common interest privilege does not require a complete unity of interests among the participants. The privilege applies where the interests of the parties are not identical, and it applies even where the parties' interests are adverse in substantial respects . . . The privilege applies even where a lawsuit is foreseeable in the future between the codefendants.")

Depending on the jurisdiction, the privilege may apply whether or not the parties are engaged in active litigation. *See, e.g. Schaeffler v. U.S.*, 806 F.3d 34, 42 (2d Cir. 2015); *In re Teleglobe Commc'ns. Corp.*, 493 F.3d 345, 364 (3d Cir. 2007); *U.S. v. BDO Seidman LLP*, 492

[48] Compare, e.g., California, where California law characterizes the common interest doctrine as a nonwaiver doctrine rather than an extension of the attorney-client privilege. *Meza v. H. Muehlstein & Co.*, 98 Cal.Rptr.3d 422, 432 (Cal. Ct. App. 2009).

[49] A written agreement should define what information is covered by the common interest privilege and what the parties deem to be confidential. Ronald E. Mallen, 2 Legal Malpractice § 15:23 (2024 ed.). Note, however, that some courts do not extent privilege protection to the agreement itself. *See, e.g. R.F.M.A.S., Inc. v. So*, 2008 WL 465113, at *1 (S.D.N.Y. Feb. 15, 2008) (denying protection).

F.3d 806, 816 (7th Cir. 2007). Other courts require either pending, contemplated, or anticipated litigation to invoke the doctrine. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 629 (2016); *U.S. v. Newell*, 315 F.3d 510, 525 (5th Cir. 2002).

Typically, a party to a common interest privilege may waive the privilege as to its *own* communications unilaterally. A party cannot, however, waive privilege over confidential communications shared by *another* party subject to the common interest agreement. *See MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 605-06 (S.D. Fla. 2013); *U.S. v. Agnello*, 135 F. Supp. 2d 380, 383 (E.D.N.Y. 2001).

Crucially, if parties to the common interest privilege were to become adverse to one another, that privilege is deemed waived. 1 Bankruptcy Litigation § 4:30 (October 2023 Update) ("[A]ny protections afforded by the joint defense privilege are lost where the parties to the joint defense communications find themselves facing each other as adversaries in litigation.") However, "when such parties subsequently become adverse to each other, they still retain a reasonable expectation of confidentiality as to third parties." *Angell Invs., L.L.C. v. Purizer Corp.*, 2002 WL 1400543, at *1 (N.D. Ill. June 27, 2002)

The ability to assert the common interest privilege in bankruptcy proceedings is governed by Rule 501 of the Federal Rules of Evidence, which provides that in (a) criminal cases and in civil cases based on federal law, federal common law applies, and (b) in civil cases based on state law, state law determines whether a matter is privileged.

In bankruptcy cases, the common interest privilege is often employed and applied between a debtor and (1) an ad hoc committee; (2) a prepetition future asbestos claims representative; (3) a creditors [sic] committee; and (4) an affiliate company. *In re Cherokee Simeon Venture I LLC*, 2012 WL 12940975, *3 (Bankr. D. Del. May 31, 2012) *citing In re Tribune Co*., 2011 WL 386827 at *4 (Bankr. D. Del. Feb. 3, 2011); *In re Leslie Controls*, 437 B.R. 493, 496 (Bankr. D. Del. 2010); *Kaiser Steel Corp. v. Frates,* 84 B.R. 202, 205 (Bankr. D. Colo. 1988); *In re Quigley Co.*, 2009 WL 9034027, *1 (Bankr. S.D.N.Y. Apr. 24, 2009).

In the Debtor-Committee context, courts have reasoned that "the Committee's role requires that debtor be able to share information without waiving privilege and that the Debtor and the Committee share the common obligation of maximizing the estate. *Id.* (citations omitted). The Debtor and the Committee "have common interests. Each has an obligation to seek to maximize the assets in the Debtor's estate." *Durkin v. Shields* (*In re Imperial Corp. of Am.*), 179 F.R.D. 286, 289 (S.D. Cal. 1998), *quoting Frates*, 84 B.R. at 205 (per the *Kaiser* Court, "The Committee's role cannot be achieved in a vacuum. It must have access to the Debtor's records. Further, in order to properly foster negotiations over reorganization plans, the Debtor must be able to provide information to the Committee free of the risk that the Committee may be forced to disgorge such records and information to adverse third parties without the opportunity of the Debtor to preserve, if appropriate, any objections it may have to such disclosures.")

In *Leslie Controls*, 437 B.R. at 501, for example, the common interest privilege was permitted to permit the debtor, *ad hoc* committee of asbestos claimants, and future claims

representative to share privileged communications among them in furtherance of their claims against liability insurers and in order to preserve and maximize the insurance available to pay asbestos claims. Per the Court, the mere fact that parties were involved in ongoing plan negotiations regarding the treatment of asbestos claims in plan (the pieces of the pie) did not mean that they did not have a common legal interest in maximizing the assets of the estate (the size of the pie).

The common interest doctrine has been used against the debtor as well. In *In re Int'l Oil Trading Co. LLC*, 548 B.R. 825 (Bankr. S.D. Fla. 2016), judgment creditor initiated an involuntary bankruptcy proceeding against the alleged debtor. Therein, the bankruptcy court held that the judgment creditor's communications with his litigation funder were protected by the common interest privilege as the communications were necessary to obtain informed legal advice.

Some courts have held that the common interest privilege extends to trustees. *In re Fundamental Long Term Care, Inc.*, 489 B.R. 451 (Bankr. M.D. Fla. 2013) (Communications among parties to settlement agreement relating to the defense of wrongful death claims brought against debtor's wholly-owned non-debtor subsidiary and its former parent company, though protected by the common interest doctrine from disclosure to third parties, were not protected from disclosure to Chapter 7 trustee, standing in shoes of subsidiary).

VII. Attorney-Client Privilege

Confidential communications, that are made for the purpose of obtaining or rendering legal advice, by and between an attorney and their client, or their respective agents is protected by the attorney-client privilege. The protection afforded by the attorney-client privilege cannot be overcome by a showing of substantial need. It is absolute.

When faced with a question of attorney-client privilege, the first question to ask is what law applies. The analysis to determine what law applies to attorney-client privilege claims in federal court begins with the basis for federal jurisdiction. In diversity cases, federal courts apply state law to attorney-client privilege issues. Pursuant to FRE 501 "state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Further, "the law of the forum state in a federal diversity action controls the applicability of a claim of privilege." *Pac. Life Ins. Co. v. Wells Fargo Bank, NA*, 2023 WL 7487175, at *4 (D. Md. Nov. 13, 2023) (internal citations omitted).

However, when federal jurisdiction is based upon federal question, most courts apply federal common law to all claims, as explained by the Court in *Pearson v. Miller,* when it noted that "applying two separate disclosure rules with respect to different claims tried to the same jury would be unworkable, [therefore,] when there are federal law claims in a case also presenting state law claims, the federal rule favoring admissibility, rather than any state law privilege, is the controlling rule." *Pearson v. Miller,* 211 F.3d 57, 66 (3d Cir. 2000) (internal citations and quotation marks omitted).

Under the federal common law, the attorney-client privilege protects from disclosure any communications that involve **only** clients, counsel, and certain third parties, such as client-agents and attorney-agents. Such communications must be (i) confidential when they occur and intended to be kept confidential and (ii) made for the purpose of obtaining or rendering legal advice. *See, e.g.*, *Obeid v. La Mack*, 2015 WL 5581577, at *2 (S.D.N.Y. Sept. 16, 2015) (citing *In re Cnty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007)) ("The federal-law variant of the attorney-client privilege protects from disclosure communications between a client and his attorney that were undertaken to elicit or provide legal advice or other legal services, and that were made and retained in confidence.")

By definition, the attorney-client privilege is relied upon to stop the production of what is otherwise relevant information. In light of this, the attorney-client privilege is construed narrowly. As explained by the Ninth Circuit in *U.S. v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) (citations omitted), in which it noted, that "[t]he privilege stands in derogation of the public's 'right to every man's evidence' and as 'an obstacle to the investigation of the truth,' [and] thus, ... '[i]t ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.'"

Analyzing and applying the elements of the attorney-client privilege test under federal common law.

First, there must be an attorney-client relationship for the privilege to attach. Absent a formal retainer agreement, courts generally agree that the privilege may also attach to communications when: (a) an individual reasonably believes that the lawyer represents the individual, even if no attorney-client relationship ever materializes or (b) a prospective client seeks legal advice from a lawyer.

Second, there must be a communication. The attorney-client privilege protects many different types of communication, including: written and oral communications[50], electronic communications[51], and physical gestures.[52]

Third, and often the most complicated factor to analyze, is was the communication is limited to clients, counsel, and certain third parties, such as client-agents and attorney-agents, who do not destroy the privilege. To perform this part of the analysis, the client must be clearly identified. In the context of an individual client that analysis is usually fairly straight-forward. However, in the context of an organizational client counsel must determine who stands in for and speaks on behalf of that client, for privilege purposes, such as current or former employees, consultants, or employees of an affiliate.

[50] *See e.g., Wielgus v. Ryobi Techs., Inc.*, 2010 WL 3075666, *3 (N.D. Ill. Aug. 4, 2010).

[51] *See e.g., CSX Transp., Inc. v. Gilkison,* 2009 WL 1528190, *5 (N.D. W. Va. May 29, 2009).

[52] *See e.g., Restatement (Third) of the Law Governing Lawyers* § 69 cmt. e (2000)).

Are communications between counsel and the client's employees protected by the attorney-client privilege?

An organization's right to claim privilege over an employee's communication with counsel depends, in part, on whether the employee satisfies the applicable standard. The prevailing standards are: (a) the *Upjohn* test and (b) the control group test. The communication at issue must also be legal not commercial in nature. *See e.g., Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Tr. No. 1B*, 230 F.R.D. 398, 411 (D. Md. 2005) ("In sum, the Court concludes that the communication between a client and a lawyer must be for the purpose of requesting legal advice. While not the sole purpose for such communication, it must be the primary purpose. A related inquiry is whether the advice sought and given is in the nature of business, as opposed to legal.)

What is the *Upjohn* test?

In all federal cases based upon federal law, federal courts will apply the *Upjohn*[53] test. The *Upjohn* test determines whether a communication between a corporate employee and the corporation's counsel is within the scope of the employer corporation's attorney-client privilege. Most states have also adopted the *Upjohn* test.

The *Upjohn* test permits a corporation to assert privilege over employee-counsel communications when: at the direction of the employee's corporate superior, the employee communicates with the corporation's counsel to: secure legal advice for the corporation; and provide facts that counsel need to give the corporation legal advice. The employee is aware that counsel is questioning the employee so that the corporation may obtain legal advice. The communication at issue concerns matters within the scope of the employee's corporate duties and was confidential. *Upjohn*, 449 U.S. at 394-95.

What is the control group test and when is it applied?

States that do not follow the *Upjohn* test, have developed a narrower attorney-client privilege, known as the control group test. Under the control group test, an organization may only claim privilege over communications between its counsel and its control group. The control group is often defined as upper management or those in a position to control, or play a substantial part in a decision about organizational actions taken in response to counsel's advice. For example, the Court in *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962) found that the control group includes any "employee making the communication, of whatever rank he may be," if he "is in the position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority." *Id.* at 485.

[53] *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

Are communications between employees or with former employees privileged under the corporate attorney-client privilege?

The attorney-client privilege is extended to communications between employees without counsel in certain circumstances, such as communications that relate to legal advice and are communications between employees that are all privileged persons under the relevant standard. *See e.g., McCall v. Procter & Gamble Co*., 2019 WL 3997375, at *5 (S.D. Ohio Aug. 22, 2019) (finding that in "the corporate context, the attorney-client privilege extends to communications, between non-attorney employees, made to obtain or relay legal advice"); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 518 (D. Conn. 1976) ("privileged communication should not lose its protection if an executive relays legal advice to another who shares responsibility for the subject matter underlying the consultation.").

Moreover, most courts do uphold an organization client's right to claim privilege over communications involving former employees. For example, in *Peralta v. Cendant Corp.,* 190 F.R.D. 38, 41 (D. Conn. 1999), the Court "conclude[d] that any privileged information obtained by [former employee] while an employe[d], including any information conveyed by counsel during that period, remains privileged upon the termination of her employment."

In certain circumstances, organizational clients may assert that communications with affiliated entities and outside consultants are covered by the attorney-client privilege.

Courts that find that organizational clients may asset privilege over communications with affiliates do so by treating affiliated organizations as if they are a singular entity, even if there is not complete ownership. *See e.g., Admiral Ins. Co. v. U.S. Dist. Ct. for Dist. of Arizona*, 881 F.2d 1486, 1493 (9th Cir. 1989) (*"Upjohn* rejected a mechanistic approach to applications of the attorney-client privilege in the corporate context. Thus, communications between employees of a subsidiary corporation and counsel for the parent corporation, like communications between former employees and corporate counsel, would be privileged if the employee possesses information critical to the representation of the parent company and the communications concern matters within the scope of employment.") However, there is dispute on this point and it will depend in what circuit you are litigating. *See e.g., In re Grand Jury Subpoena # 06-1*, 274 Fed. App'x 306, 310-11 (4th Cir. 2008) (declining to recognize as privileged communications between a subsidiary's employees and the parent company's counsel); *Neuberger Berman*, 230 F.R.D. at 416 (partial common ownership does not suffice).

Another subset of parties' communications that are particularly relevant in bankruptcy cases, are communications from outside consultants. Such communications can be protected if the outside consultant was acting as the functional equivalent of an employee as for the purposes of the privilege analysis. As discussed in *Export-Import Bank of the U.S. v. Asia Pulp & Paper Co. Ltd.*, 232 F.R.D. 103, 113-14 (S.D.N.Y. 2005), when analyzing the functional equivalent doctrine, courts, in part, look at whether the consultant had a continuous and close working relationship with the client, had primary responsibility for key jobs, and unique knowledge.

What is the duration of the attorney—client privilege?

The privilege generally continues to protect communications made during the attorney-client relationship even after the relationship ends if the client has not released the attorney from the attorney's duty of confidentiality. For individual clients, the attorney-client privilege survives the client's death. For corporate clients, the attorney-client privilege generally does not survive a corporate dissolution, at least where there is no successor or surviving entity. Other changes in corporate structure or ownership may affect the privilege differently.

How does a change in an organization's ownership or structure impact the attorney-client privilege?

It depends.

If a corporation dissolves, the right to asset privilege over prior communications is usually lost.

In a stock sale, unless the purchase agreement provides otherwise, the purchaser acquires the seller's privileged communications. *See e.g., McCaugherty v. Siffermann*, 132 F.R.D. 234, 245 (N.D. Cal. 1990)*; In re Sealed Case*, 120 F.R.D. 66, 70-71 (N.D. Ill. 1988) (recognizing that the purchaser and seller of the corporation's stock may vary this rule in the purchase agreement)). By contrast, in an asset sale the seller generally retains control of the privilege over prior communications. *See e.g., Zenith Elecs. Corp. v. WH-TV Broad. Corp*., 2003 WL 21911066, *1-2 (N.D. Ill. Aug. 7, 2003)).

In a bankruptcy case, the bankruptcy trustee or debtor-in-possession generally has the right to assert or waive the privilege over the prior communications. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349 (1985) (holding that when corporate control passes, new management controls the corporation's privilege).

In *Weintraub,* as noted above, the Supreme Court held that a corporation's attorney-client privilege "with respect to prebankruptcy communications" is controlled—and thus waivable—by the trustee of the corporation in bankruptcy. The Court, in *Weintraub* further found:

> In seeking to maximize the value of the estate, the trustee must investigate the conduct of prior management to uncover and assert causes of action against the debtor's officers and directors. It would often be extremely difficult to conduct this inquiry if the former management were allowed to control the corporation's attorney-client privilege and therefore to control access to the corporation's legal files. To the extent that management had wrongfully diverted or appropriated corporate assets, it could use the privilege as a shield against the trustee's efforts to identify those assets. The Code's goal of uncovering insider fraud would be substantially defeated if the debtor's directors were to retain the one management power that might effectively thwart an investigation into their own conduct.

471 U.S. at 353–54 (citations omitted).

VIII. Work Product Privilege

The work-product privilege protects from disclosure certain items

The work-product privilege (or "work-product doctrine") protects from discovery "documents and tangible things that are prepared in anticipation of litigation or for trial." FRCP 26(b)(3)(A). The purpose of the work-product doctrine is to protect an attorney's "mental impressions, conclusions, opinions, or legal theories." See *City of Fort Collins v. Open Int'l LLC*, 2022 WL 7584857, *5 (D. Colo. Aug. 16, 2022).

Under federal law the standard for the work product doctrine is found in FRCP 26(b)(3), which provides:

> (A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> (i) they are otherwise discoverable under Rule 26(b)(1); and
>
> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
>
> (B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.
>
> (C) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:
>
> (i) a written statement that the person has signed or otherwise adopted or approved; or
>
> (ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

The scope of the work product protection under federal law varies depending on whether the item is fact or opinion work product. As discussed in *U.S. v. Petit*, 438 F. Supp. 3d 212, 214–15 (S.D.N.Y. 2020):

> [a]ccording to Fed. R. Civ. P. 26(b)(3)(A) and (B), there are two categories of work product, where each affords a different level of protection: (1) fact work

> product that can be subject to discovery upon a showing of "substantial need" and "undue hardship" to acquire the document or substantial equivalent; and (2) opinion work product - i.e., "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation" - that requires a higher standard of "a highly persuasive showing" or extraordinary justification to secure its release.

438 F. Supp. 3d at 214–15.

Unlike attorney-client privilege, which is absolute, work product privilege can be breached. An opposing party may obtain fact work product if the requesting party demonstrates that it has a substantial need for the document or thing to prepare its case and cannot, without undue hardship, obtain the substantial equivalent of the document or material by other means. FRCP 26(b)(3)(A)(ii); *see, e.g., Petit*, 438 F.Supp.3d at 214-15.

However, opinion work product can only be required to be disclosed in very limited circumstances. Opinion work product "is to be protected unless a highly persuasive showing is made." *U.S. v. Adlman*, 134 F.3d 1194, 1204 (2d Cir. 1998).

Experts

Under FRCP 26(b)(4)(C), communications between the party's attorney and their retained testifying expert witness are protected under the attorney-work product privilege, except as those communications, regardless of the form of the communications, that:

> (i) relate to compensation for the expert's study or testimony;
>
> (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
>
> (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

If a testifying expert prepares a report, that expert report is discoverable. However, drafts of the report are protected as attorney-work product privilege under FRCP (b)(4)(B).

Faculty

Tanya Behnam is a bankruptcy and financial restructuring associate with Polsinelli in Los Angeles, where her practice focuses on corporate restructuring, bankruptcy litigation, distressed asset sales and other insolvency matters. She represents debtors, lenders, unsecured creditor committees, secured and unsecured creditors, financial institutions and other parties in interest in a variety of chapter 11 cases, bankruptcy litigation and appeals. In addition to representing national chapter 11 debtors and committees in distressed health care matters, Ms. Behnam represents corporations in their out-of-court restructuring efforts. Prior to joining Polsinelli, she served as a business and legal affairs intern at a national cable network. Ms. Behnam is a U.S. Court of Appeals for the Ninth Circuit Lawyer Representative (2023-present) and a member of ABI's Bankruptcy Battleground West advisory board, a board member of the Los Angeles Bankruptcy Forum and a member of the Women Lawyers Association of Los Angeles. She received her B.A. *magna cum laude* in psychology in 2013 from the University of Southern California, and her J.D. in 2018 from Loyola Law School-Los Angeles.

Hon. Hannah L. Blumenstiel is a U.S. Bankruptcy Judge for the Northern District of California in San Francisco. Prior to her appointment on Feb. 11, 2013, Judge Blumenstiel was an associate (2003-08) and then a partner (2008-12) with Winston & Strawn LLP, where she focused her practice on creditors' rights litigation in state and federal court, including bankruptcy court. From 2001 to 2003, Judge Blumenstiel was an associate with Murphy Sheneman Julian & Rogers LLP, where she represented debtors, creditors and trustees in bankruptcy cases and adversary proceedings. She served as a law clerk to Hon. Charles M. Caldwell of the U.S. Bankruptcy Court for the Southern District of Ohio (Eastern Division) from 1998 to 2001, and from 1997-98, she represented the State of Ohio's interests in bankruptcy cases as an assistant attorney general with the Revenue Recovery Section of the Ohio Attorney General's Office. Judge Blumenstiel is ABI's Vice President-Research Grants and serves as an Executive Editor of the *ABI Journal*. She received her J.D. from Capital University Law School in 1997 while working full-time for the Columbus Bar Association as director of its *pro bono* initiative, "Lawyers for Justice," and her B.A. from Ohio State University in 1992.

Paul R. Hage is co-chair of the Business Restructuring, Bankruptcy and Creditors' Rights Group at Taft, Stettinius & Hollister, LLP in Southfield, Mich. He also is a member of the firm's Diversity, Equity and Inclusion Committee. Mr. Hage is ABI's Secretary on its Board of Directors and is an Executive Editor of the *ABI Journal*. He is a Fellow in the American College of Bankruptcy and serves as the president of Access to Bankruptcy Court, a nonprofit that raises funds to provide experienced bankruptcy counsel, free of charge, to low-income individuals residing in the Eastern District of Michigan. Additionally, he serves as co-cirector of the Conrad B. Duberstein National Bankruptcy Moot Court Competition, the largest single-site moot court competition in the country. In 2017, Mr. Hage was selected as a member of ABI's inaugural "40 Under 40" class. He received his bachelor's degree from James Madison College at Michigan State University, his J.D. from Loyola University Chicago School of Law and his LL.M. in bankruptcy from St. John's University School of Law.

Jessica Kenney Bonteque is a partner with Duane Morris LLP in New York. She practices in the areas of business reorganization and financial restructuring, representing secured and unsecured

creditors, debtors, official committees of unsecured creditors, equityholders, purchasers of distressed assets, and other parties in interest in a wide range of restructuring matters, including chapter 11 cases, out-of-court restructurings and cross-border insolvency proceedings. Ms. Kenney Bonteque has represented creditors and debtors faced with insolvency situations in a variety of industries, including health care, transportation, shipping, retail, gaming, oil & gas, storage, farming and dairy, and food and beverage. She also has participated in a wide variety of litigation in federal and state courts involving fraudulent conveyance actions, breaches of fiduciary duty, secured and unsecured financings, letters of credit, foreclosures and the enforcement of guaranties. Ms. Kenney Bonteque was recognized as a Rising Star in the 2014, 2015 and 2016 editions of *Southwest Super Lawyers* and in the 2017, 2018 and 2019 editions of *New York Metro Super Lawyers*. She is also featured in the April 2014 issue of *Arizona Business* magazine's Arizona's Top Lawyers List (Generation Next), and she received the Turnaround of the Year Award: Mid-Size Company by the Turnaround Management Association and the Healthcare/Life Sciences Deal of the Year by The M&A Advisor, both in 2017. She also was named one of the"Ones to Watch" for 2023 and 2024 in *The Best Lawyers in America*. While in law school, Ms. Kenney Bonteque was a Pedrick Scholar and a legal extern for Hon. Ronald Stienle, III of Maricopa County Superior Court and Hon. David K. Duncan of the U.S. District Court for the District of Arizona. She received her B.A. *cum laude* from Northern Arizona University and her J.D. with honors from Arizona State University.