PRIVILEGE IN A SEA OF ADVERSARIES: A GUIDE TO NAVIGATING THE BOUNDS OF MEDIATION PRIVILEGE IN BANKRUPTCY CASES

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INTRODUCTION

In recent years, mediation privilege in bankruptcy proceedings has taken on a greater significance, particularly in its scope. Debtors, seeking a faster and more economical exit from bankruptcy, often agree to mediate with their primary creditor constituents early in the case in an effort to coalesce around the terms of an agreed-upon plan. But this state of play strains the normal mediation process, which is generally geared toward the resolution of disputes among a small number of parties. With numerous issues among a multiplicity of parties within the scope of the same bankruptcy mediation—the landscape of which parties are mediating which issues and who shares a common interest at any given time—creates the potential for massive confusion and misuse of mediation and its attendant privileges. This Article examines these recent trends before proposing some practical solutions to help practitioners wade through the morass to maximize the potential benefits of mediation.

I. PRIVILEGE FUNDAMENTALS

Before diving into the complex issues that are the focus of this article, it is first helpful to review the basics of privilege and the important purpose it serves. This Section will begin with the traditional privileges for a single client—the attorney-client privilege and the work-product privilege. After establishing these basics, the Section concludes with the more expansive privileges that can apply to groups of entities working toward a specific, identified goal.

A. Attorney-Client Privilege

In Delaware,[1] the attorney-client privilege "extends to a (1) communication, (2) which is confidential, (3) which was for the purpose of facilitating the rendition of professional legal services to the client, (4) between the client and his attorney."[2] Federal law is essentially the same.[3] The client has the "privilege to refuse to disclose and to prevent any other person from disclosing confidential communications" that

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[1] This article will focus on privileges under Delaware state law and federal law, as applicable. As discussed herein, practitioners should be aware of the particular nuances of privilege in their jurisdiction.

[2] Moyer v. Moyer, 602 A.2d 68, 72 (Del. 1992) (internal citations omitted); *see also* DEL R. EVID. 502(b) (2018). The attorney-client privilege extends to privileged persons, which includes "the client, the attorney(s), and any of their agents that help facilitate attorney-client communications or the legal representation." *See* Teleglobe USA Inc. v. BCE Inc. (*In re* Teleglobe Comms. Corp.), 493 F.3d 345, 359 (3d Cir. 2007) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. L. INST. 2000)).

[3] *See In re* Teleglobe, 493 F.3d at 359 (holding that generally the attorney-client privilege protects "(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client") (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (AM. L. INST. 2000)); *accord* DEL. R. EVID. 502; UNIFORM R. EVID. 502 (UNIF. L. COMM'N 1999).

fulfill these criteria.[4] The purpose of the privilege, which is a fundamental part of our legal system, is "to foster the confidence of the client and enable[] him to communicate without fear in order to seek legal advice."[5] Because privilege prevents discovery of evidence and contradicts the nature of the open process of litigation, the burden of establishing privilege rests with the party asserting it.[6]

A claim that a document or communication is protected by the attorney-client privilege may be overcome through application of one of several exceptions, all of which result in a waiver of the privilege, although to differing degrees depending on the type of waiver. Waiver may result from either disclosing privileged information to a third party, public disclosure, or from placing a privileged communication "at-issue."[7]

1. Voluntary waiver

In Delaware, voluntary waiver of the attorney-client privilege is governed by the Delaware Uniform Rules of Evidence ("DRE"), which provide that the privilege is waived when the "holder of the privilege . . . [voluntarily] discloses or consents to disclosure of any significant part of the privileged or protected communication or information."[8] A party can make a partial or limited waiver, which only waives the privilege as to a certain communication, document, or set thereof, or a selective waiver, which waives the privilege as to certain parties.[9]

The Delaware Supreme Court has made clear that waiver of privilege with regard to a certain subset of privileged communications "does not open to discovery all communications between attorney and client," but rather the waiver is properly limited "to the subject matter of the disclosed communication."[10] However, the

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[4] DEL. R. EVID. 502(b).

[5] DONALD J. WOLFE & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 7.02 (Lexis Nexis 2020) (quoting *Moyer*, 602 A.2d at 72); *see* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (finding that attorney-client privilege is intended to "encourage full and frank communications between attorneys and their clients").

[6] *See Moyer*, 602 A.2d at 72.

[7] *See* WOLFE & PITTENGER, *supra* note 5, at § 7.02(c)(1); Texaco, Inc. v. Phoenix Steel Corp., 264 A.2d 523, 525 (Del. Ch. 1970)). Attorney-client privilege can also be waived by failing to provide a timely or sufficient privilege log. *See, e.g.*, Klig v. Deloitte LLP, C.A. No. 4993-VCL, 2010 WL 3489735, at *8 (Del. Ch. Sept. 7, 2010).

[8] DEL. R. EVID. 510(a). Courts, however, have made exceptions to this waiver rule "[w]hen disclosure to a third party is necessary for the client to obtain informed legal advice . . . ." WebXchange, Inc. v. Dell, Inc., 264 F.R.D. 123, 126 (D. Del. 2010).

[9] *See* Citadel Holding Corp. v. Roven, 603 A.2d 818, 825 (Del. 1992) (explaining "[t]he so-called 'rule of partial disclosure' limits the waiver to the subject matter of the disclosed communication").

[10] *Id.* at 825; *see also* Zirn v. VLI Corp., 621 A.2d 773, 781–82 (Del. 1993) ("The purpose underlying the rule of partial disclosure is one of fairness to discourage the use of the privilege as a litigation weapon . . . ."). Any waiver of the attorney-client privilege is to be construed narrowly. *See* Am. Standard, Inc. v. Pfizer, Civ. A. No. 83-834, 1986 WL 9713, at *4 (D. Del. Mar. 31, 1986) (citing Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Del. 1977)).

limited nature of the waiver cannot be tactically used by a litigant as both a sword and a shield.[11]

Although waiver is to be construed narrowly, that "restraint does not mean that the intention of the disclosing party determines the scope of the waiver . . . because the privilege does not countenance the manipulative disclosure of only favorable information."[12] In fact, "[w]hen a client voluntarily waives the privilege as to some documents that the client considers not damaging and asserts the privilege as to other documents that the client considers damaging, the rule compelling production of all documents becomes applicable."[13] This general rule of absolute waiver, however, is only held to apply to the narrow subject matter of the disclosed privileged documents.[14]

Parties may also voluntarily make a partial waiver by disclosing portions of privileged communications or documents while maintaining the privilege as to the undisclosed portions.[15] In determining whether partially disclosed privileged communications result in a waiver of the privilege, fairness is the guiding principle.[16] An assertion of partial disclosure will result in waiver as to undisclosed portions only when the party seeking additional discovery has been subjected to some unfairness or disadvantage.[17]

2. Inadvertent disclosure

Because waiver typically requires some voluntary and knowing act, inadvertent disclosure of privileged information typically will not result in waiver of the attorney-client privilege unless the disclosing party does not take adequate precautions to

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[11] *See* Sealy Mattress Co. of NJ, Inc. v. Sealy, Inc., 1987 WL 12500, at *6 (Del. Ch. June 19, 1987) ("[A] party cannot take a position in litigation and then erect the attorney-client privilege in order to shield itself from discovery by an adverse party who challenges that position."); *see also Citadel Holding Corp.*, 603 A.2d at 825 ("The exact extent of the disclosure is guided by the purposes behind the rule: fairness and discouraging use of the attorney-client privilege as a litigation weapon.").

[12] *See Am. Standard Inc.*, 1986 WL 9713, at *4 (citing Diematic Mfg. Corp. v. Packaging Indus. Inc., 22 Fed. R. Serv. 2d 1015, 1017 (1976); Technitrol, Inc. v. Digital Equip. Corp., 18 Fed.R.Serv.2d 651, 562 (N.D. Ill. 1974)).

[13] *Hercules Inc*., 434 F. Supp. at 156 (quoting Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1161–62 (D.S.C. 1974)).

[14] *Id.*

[15] *See* Saito v. McKesson HBOC, Inc., No. Civ.A. 18553, 2002 WL 31657622, at *6 (Del. Ch. Nov. 13, 2002), *aff'd*, 870 A.2d 1192, 1192 (Del. 2005) (citing Westinghouse Elec. Corp. v. Philippines, 951 F.2d 1414, 1414 (3d Cir. 1992)).

[16] *See* Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254, 260 (Del. 1995) ("Partial disclosure of facts protected by the privilege is not enough . . . . Implicit waiver also requires that the partial disclosure place the party seeking discovery at a distinct disadvantage due to an inability to examine the full context of the partially disclosed information.") (internal citations omitted); *see also In re* Teleglobe Comms. Corp., 493 F.3d 345, 361 (2007) (finding that whether a privilege waiver extends to additional documents or communications is a fairness analysis).

[17] *See, e.g.*, Metro. Bank and Tr. Co. v. Dovenmuehle Mortg., Inc., No. CIV. A. 18023, 2001 WL 1671445, at *5 (Del. Ch. Dec. 20, 2001) (ruling that plaintiffs failed to establish "any unfairness" that would justify inquiry to the privileged communications beyond the scope of partial waiver).

protect the privileged information and fails to promptly remedy the disclosure once it becomes known.

Delaware Courts use a balancing test to determine whether an inadvertent disclosure constitutes a waiver of the attorney-client privilege.[18] The factors a court will consider are: (1) "the reasonableness of the precautions [taken] to prevent inadvertent disclosure;'' (2) "the time taken to rectify the error;" (3) "the scope of the discovery and the extent of the disclosure;'' and (4) the overall fairness, "judged against the care or negligence with which the privilege is guarded . . . .''[19] To prevent a finding of waiver, inadvertent disclosure is usually covered by a stipulation among the parties where they agree that such disclosures shall not constitute a waiver and will be returned to the disclosing party immediately. Additionally, attorneys have an ethical obligation to return inadvertently disclosed privileged information upon request.[20]

3. The at-issue exception

"Under the 'at-issue' exception, a party waives the attorney-client privilege in one of two ways: (1) the party injects the attorney-client communication themselves into the litigation, or (2) the party injects an issue into the litigation, the truthful resolution of which requires an examination of attorney-client communications."[21] Further, the party seeking the privileged communications must be placed at a disadvantage due to the inability to access the privileged communications.[22] This disadvantage is typically the movant's inability to obtain the same information from other sources if the privilege is upheld.[23]

The first prong of the at-issue exception is triggered when a party itself injects a privileged communication into the litigation. This prong "appears to apply to more limited circumstances; for example, a privileged document is disclosed by one party, and the court determines that all related privileged documents should be disclosed to the adversary."[24] In *In re Kent County*, the Court of Chancery held that where a party voluntarily and intentionally produced documents sent to its attorney regarding the drafting and preparation of its motion for a protective order, the attorney-client privilege had been waived not only with respect to those documents, but also with respect to similar communications regarding the drafting and preparation of the

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[18] *See, e.g.*, Monsanto Co. v. Aetna Cas. & Sur. Co., No. 88C-JA-118, 1994 WL 315238, at *6 (Del. Super. Ct. May 31, 1994) (balancing the factors set forth in Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985)).

[19] *Lois Sportswear*, 104 F.R.D. at 105; *see also* WOLFE & PITTENGER, *supra* note 5, at § 7.02(c)(1).

[20] *See* ABA Comm. on Ethics & Pro. Responsibility, Formal Opinion 92-368 (1992).

[21] Fitzgerald v. Cantor, No. 16297-NC, 1999 WL 64480, at *2 (Del. Ch. Jan. 28, 1999).

[22] *See id.*

[23] *See id.*; *see also* Pfizer, Inc. v. Warner-Lambert Co., No. CIV.A.17524, 1999 WL 33236240, at *1 (Del. Ch. Dec. 8, 1999) (finding the at-issue exception is another means of preventing a party from using attorney-client privilege as both sword and shield).

[24] JOHN E. JAMES, PRIVILEGED COMMC'NS AND THE DEL. CORP. 85 (2000).

documents.[25] In so holding, the court reasoned that "fairness mandates . . . complete discovery regarding the drafting and preparation of the [documents] . . . . [C]onversely, however, it would be unfair . . . if the Court deemed this particular instance of limited disclosure to constitute a broad waiver."[26]

The second prong is broader and "encompasses any privileged material relating to a claim or defense that the party who is asserting the privilege places in issue."[27] Where a party "makes factual assertions in defense of a claim which incorporate, expressly or implicitly, the advice and judgment of its counsel, it cannot deny an opposing party 'an opportunity to uncover the foundation for those assertions in order to contradict them.'"[28] Nevertheless, even if a factual issue could be resolved by the production of privileged communications, those communications will not necessarily be at-issue where the protected party can avoid directly placing the communications in the litigation, where the protected party relies upon objective, non-privileged facts to support its claims or defenses, and where the party seeking discovery has recourse to alternative sources to rebut those objective, non-privileged facts.[29]

B. Work Product

The work-product doctrine protects from discovery documents that have been created in anticipation of litigation or in preparation for trial.[30] Although work-product protection goes beyond documents prepared in response to pending litigation, a mere "remote possibility of litigation is not sufficient."[31] Rather, the material at-issue will only be protected if it was prepared "specifically for threatened or anticipated litigation."[32] It does not protect documents prepared in the ordinary course of business.[33] "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."[34] As with the attorney-client privilege, the party asserting a claim of work-product immunity has the burden of proving that the protection applies to a specific document.[35]

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[25] *See In re* Kent County Adequate Pub. Facilities Ordinances Litig., No. 2921-VCN, 2008 WL 1851790, at *4 (Del. Ch. Apr. 18, 2008).

[26] *Id.* at *5 n.25.

[27] JAMES, *supra* note 24, at 85.

[28] Tackett v. State Farm Fire and Cas. Ins. Co., 653 A.2d 254, 259 (Del. 1995) (citations omitted).

[29] *See In re* William Lyon Homes S'holder Litig., No. 2015-VCN, 2008 WL 3522437, at *3–4 (Del. Ch. Aug. 8, 2008).

[30] *See Tackett*, 653 A.2d at 261 (Del. 1995) (citing Del. Super. Ct. Civ. R. 26(b)(3)).

[31] *See* Reese v. Klair, Civ. A. No. 7485, 1985 WL 21127, at *7 (Del. Ch. Feb. 20, 1985) (citation omitted).

[32] *Id.* (citation omitted).

[33] *See* Clausen v. Nat'l Grange Mut. Ins. Co., 730 A.2d 133, 140 (Del. Super. 1997).

[34] *Tackett*, 653 A.2d at 261 (citing United States v. Nobles, 422 U.S. 225, 238 (1975)).

[35] *See* WOLFE & PITTENGER, *supra* note 5, at § 7.01 (citations omitted).

Courts within the Third Circuit have adopted a two-part test for assessing work product.[36] The first inquiry asks "'whether in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'"[37] "Although the litigation need not be imminent, 'there must be an identifiable specific claim of impending litigation.'"[38] The second question is whether the documents were prepared primarily for a litigation purpose.[39] As with the analysis under Delaware law, documents prepared in the ordinary course of business are not protected by the work-product doctrine.[40] Neither are "'[d]ocuments prepared for other purposes that prove useful in subsequent litigation . . . .'"[41]

Courts have distinguished between two categories of work product: factual work product and opinion work product. Factual work product consists of trial preparation material not containing the attorney's mental impressions, such as witness statements, and is given a qualified immunity (*i.e.*, protection from discovery unless a substantial need is established).[42] Opinion work product consists of material containing an attorney's "mental impressions, conclusions, opinions, or other legal theories . . . ," and is given a much higher level of protection.[43]

The same rules that codify the work-product doctrine also carve out an exception to its application.[44] The rules state that the work-product immunity will not apply where the party seeking discovery has shown a "substantial need of the materials in the preparation of [his] case, and that [he] is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[45] This exception applies only to factual work product, as opinion work product is afforded a higher level of protection. For a party to overcome the immunity given to opinion work product, a "more substantial need" must be shown.[46] The Delaware Supreme Court has held that "in order to obtain mental impressions under Rule 26(b)(3), the mental impressions must be directed to the pivotal issue in the current litigation and the need for the material must be compelling."[47]

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[36] *See, e.g.*, Louisiana Mun. Police Emp. Ret. Sys. v. Sealed Air Corp., 253 F.R.D. 300, 306 (D.N.J. 2008).

[37] *Id.* (quoting Maertin v. Bally's Park Place Hotel & Casino, 983 F.2d 1252, 1258 (3d Cir. 1993)).

[38] *Id.* (quoting Maertin v. Armstrong World Indus., 172 F.R.D. 143, 148 (D.N.J. 1997)).

[39] *Id.*

[40] *See id.* at 307.

[41] *Id.* (quoting *In re* Gabapentin Patent Litig., 214 F.R.D. 178, 184 (D.N.J. 2003)).

[42] *See* WOLFE & PITTENGER, *supra* note 5, at § 7.01(a) (citations omitted); *see also* Carlyle Inv. Mgmt. v. Moonmouth Co. S.A., C.A. No. 7841-VCP, 2015 WL 778846, at *12 (Del. Ch. Feb. 24, 2015).

[43] *Id.* (quoting Tackett v. State Farm Fire & Cas. Ins. Co, 653 A.2d 254, 262 (Del. 1995)); *see also In re* AE Liquidation, Inc., No. 10-55460, 2012 WL 6139950, at *4 (Bankr. D. Del. Dec. 11, 2012) ("Opinion work product, unlike ordinary, fact-based work product, includes documents that contain 'an attorney's legal strategy, his intended lines of proof, his evaluation of the strengths and weaknesses of the case, and the inference he draws from interviews with witnesses.'").

[44] *See* DEL. CH. CT. R. 26(b)(3); *see also* DEL. SUPER. CT. R. CIV. P. 26(b)(3); FED. R. CIV. P. 26(b)(3).

[45] DEL. CH. CT. R. 26(b)(3).

[46] *See Tackett*, 653 A.2d at 262.

[47] *Id.*

Work-product immunity may be waived in the same ways as the attorney-client privilege—through voluntary waiver, partial waiver, or inadvertent disclosure—and the analysis for each is similar to the analysis used in determining whether the attorney-client privilege has been waived. In a similar analysis, Delaware courts apply stricter scrutiny and are more reluctant to deem a voluntary or limited waiver as a general waiver because they "vigorously protect work product and treat waiver as an extremely harsh result[,]" and have held that "[w]aivers are a penalty reserved for egregious abuses by the privilege holder."[48] In its attempt to vigorously protect work product from the harsh result of a broad waiver, the Delaware Court of Chancery has adopted the Third Circuit's additional form of limited waiver called selective waiver.[49]

In *Saito v. McKesson HBOC, Inc.*, the Delaware Court of Chancery applied selective waiver in a narrow holding, allowing a party to maintain work-product immunity against its adverse party in litigation as to documents it had voluntarily disclosed to the United States Securities and Exchange Commission ("SEC"), pursuant to a confidentiality agreement.[50] The court reasoned that the attorneys for the party invoking the privilege had protected their expectation of privacy as to the documents by having a confidentiality agreement in place before producing the documents and had not abused the privilege by cooperating with the investigation of a law enforcement agency.[51] The court made it clear, however, that such selective waiver applied only to documents disclosed to law enforcement agencies and did not extend to private plaintiffs.[52]

C. Common Interest Privilege

As legal disputes have gotten more complex, the traditional privileges discussed above have proven, at times, to be inadequate to address the myriad of situations that arise in modern transactions and litigation. Mergers, spinoffs, and other corporate restructuring transactions among multiple parties have proven especially susceptible to privilege inadequacies, as parties on both sides of such transactions usually need to collaborate to ensure a smooth transaction. Similarly, bankruptcy negotiations surrounding plans of reorganization or liquidation typically involve numerous parties with adverse desires but a common goal in maximizing the value of the debtor's assets. In these situations, the common interest privilege plays an important role in maintaining the sanctity of these transactions.

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[48] Saito v. McKesson HBOC, Inc., No. Civ.A. 18553, 2002 WL 31657622, at *7 (Del. Ch. Nov. 13, 2002).

[49] Although selective waiver has only been applied to work product, the Delaware Superior Court has suggested that the analysis would also be applicable to the attorney-client privilege. *See* Wal-Mart Stores, Inc. v. AIG Life Ins. Co., C.A. No. 07C-05-171 CLS, 2008 WL 498743, at *5 n.14 (Del. Super. Ct. Jan. 30, 2008).

[50] 2002 WL 31657622, at *11.

[51] *Id.* at *7.

[52] *Id.* at *10.

Generally, attorney-client privilege only protects confidential communications between a lawyer, her client, and persons necessary for the client to receive effective legal advice.[53] Disclosing otherwise privileged communications to an extraneous third-party waives attorney-client privilege, as discussed above.[54] The joint defense, common interest privilege, and common interest doctrines[55] modify this rule by widening the scope of who can be party to a privileged communication without breaking confidentiality. The party invoking the joint-client privilege must show that: (a) a joint-client representation relationship existed, (b) the communications were "designed to further the effort," and (c) "the privilege has not been waived."[56]

Originally, the common interest privilege was intended to allow attorneys for co-defendants in criminal trials to share defense strategies without waiving privilege.[57] This approach also prevented one co-defendant from waiving the privilege unilaterally.[58] Eventually, this privilege was expanded to allow attorneys representing different clients with similar legal interests to share information in support of their common goal.[59]

1. Common interest under Delaware law

Delaware Rule of Evidence 502(b)(3) establishes common interest privilege that permits parties to share confidential information without waiving privilege when some form of common interest between the parties exists.[60] In relevant part, Rule 502(b) provides:

> [a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to

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[53] *See* Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1423–24 (3d Cir. 1991) (citing Fisher v. United States, 425 U.S. 391, 403 (1976)).

[54] *See id.* at 1424; *see also* Teleglobe USA Inc. v. BCE Inc. (*In re* Teleglobe Commc'ns. Corp.), 493 F.3d 345, 361 (3d Cir. 2007).

[55] While technically different, this article uses the terms "joint-client privilege," "joint-defense privilege," and "common interest privilege" interchangeably. *See id.* at 362–66 (discussing the similarities and differences between the two concepts). Similarly, some courts have questioned whether the common interest acts as an extension of the attorney-client privilege (*i.e.*, common interest privilege) or as an exception to the waiver of such privilege (*i.e.*, the common interest doctrine). *See* 10X Genomics, Inc. v. Celsee, Inc., 505 F. Supp. 3d 334, 337 (D. Del. 2020). As Chief Judge Connolly aptly summarizes, regardless of the title, the results are typically the same: the protection of "the confidentiality of communications among attorneys and clients allied in a common legal cause[,]" and accordingly, this article refers to both concepts as the common interest privilege. *Id.* It must be cautioned, however, that the privilege is treated differently, both in scope and application, from jurisdiction to jurisdiction and counsel should be apprised of the specific nuances of their jurisdiction when seeking to invoke the privilege.

[56] *In re* Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 126 (3d Cir. 1986).

[57] *See In re* Teleglobe, 493 F.3d at 364.

[58] *See id.*

[59] *See id.*

[60] *See* DEL. R. EVID. 502(b)(3).

> the client . . . (3) by the client or the client's representative or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another in a matter of common interest . . . .[61]

Under this rule, the common interest must be sufficient to justify invocation of the privilege,[62] and such may be the case with respect to communications between counsel for co-defendants in civil or criminal litigation. Likewise, the privileged legal advice must relate to the common enterprise of the parties to avoid a waiver.[63] Evidence that the parties' legal interests are substantially similar is sufficient to invoke the common interest privilege.[64] "[S]eparately represented clients sharing a common legal interest may, at least in certain situations and under the close supervision of counsel, communicate directly with one another regarding that shared interest."[65]

In *Jedwab v. MGM Grand Hotels, Inc.*, the plaintiff-stockholders sued to enjoin a merger between defendants MGM and Bally Manufacturing Corporation, and sought the production of documents that had been exchanged among counsel for the defendants during the course of certain merger negotiations.[66] Seeking to prevent the plaintiffs from obtaining these documents, the defendants invoked Rule 502(b), claiming that the parties to the merger had an interest in seeing the transaction consummated, and therefore shared a common interest.[67] Chancellor Allen explained that Rule 502(b):

> is a recognition that a disclosure may be regarded as confidential even when made between lawyers representing different clients if in the circumstances, those clients have interests that are so parallel and non-adverse that, at least with respect to the transaction involved, they may be regarded as acting as joint venturers.[68]

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[61] *Id.*

[62] *See* Am. Legacy Found. v. Lorillard Tobacco Co., No. Civ.A 19406, 2004 WL 2521289 at *3 (Del. Ch. Nov. 3, 2004) (finding two parties shared a common interest when both anticipated litigation and took steps to prepare); *see also* Metro. Bank & Tr. Co. v. Dovenmuehle Mortg., Inc., No. Civ. A. 18023, 2001 WL 1671445, at *5 (Dec. 20, 2001).

[63] *See* Kurz v. Holbrook, No. Civ.A. 5019-VCL, 2009 WL 4682622 at *4 (Del. Ch. Dec. 1, 2009) (stating that communications between one member of a section 13D group and his attorney do not fall outside the scope of DRE 502(b) just because other members of the group were also present. The members were deemed to share a common interest and therefore privilege could be properly invoked); *see also* Rembrandt Techs., L.P. v. Harris Corp., C.A. No. 07C-09-059-JRS, 2009 WL 402332 at *7 (Del. Super. Feb. 12, 2009).

[64] *See Rembrandt Techs*, 2009 WL 402332 at *7 (finding substantially similar legal interests where the parties agreed to enforce and exploit certain patents); *see also Am. Legacy Found.*, 2004 WL 2521289 at *3.

[65] *Rembrandt Techs.*, 2009 WL 402332 at *8.

[66] No. 8077, 1986 WL 3426, at *1 (Del. Ch. Mar. 20, 1986).

[67] *See id.*; DEL. R. EVID. 502(b).

[68] *Jedwab*, 1986 WL 3426 at *2.

Turning to the facts at hand, however, the Chancellor found that the documents in question were not privileged because, "[w]ith respect to the functions they were performing when the documents sought were prepared, these lawyers obviously represented clients with adverse interests."[69] The Chancellor concluded that the defendants' claim of privilege was "ill-founded" because the communications between counsel for the defendants, with respect to the negotiation and documentation of the merger, did not possess the requisite confidentiality under the circumstances.[70]

Com Corp v. Diamond II Holdings, Inc.[71] also involved a merger agreement that failed for lack of regulatory approval. The parties engaged in litigation over the termination fee, and the buyer withheld communications between itself and a merger partner that was going to take a minority interest in the new company. When the seller challenged the buyer's assertion of the "common interest privilege," the court ordered that the documents be reviewed in camera to determine the buyer and its merger partner's "position vis-à-vis one another at the time each challenged communication was made."[72] In so holding, the court noted that "the transactional context" of common interest, for purposes of Rule 502(b), has been defined as an interest "so parallel and non-adverse that, at least with respect to the transaction involved, [the two parties] may be regarded as acting as joint venturers."[73]

2. Common interest privilege in bankruptcy court

Issues concerning common interest privilege have also arisen in bankruptcy cases, as parties to complex disputes align with one another in attempting to maximize the value of the debtor's estate, negotiating plans of reorganization, or resolving contested matters, among other things.

In the context of a bankruptcy, the common interest privilege has been applied between, among others, a debtor and: (1) an ad hoc committee; (2) a pre-petition future asbestos claims representative; (3) a creditors committee; and (4) an affiliate company.[74] While emphasizing that the question of whether and to what extent the common interest privilege applies is a fact-specific inquiry that must be examined on

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[69] *Id.*

[70] *See id.*

[71] No. CIV.A. 3933, 2010 WL 2280734 (Del. Ch. May 31, 2010).

[72] *Id.* at *8.

[73] *Id.* at *7 (quoting *Jedwab*, 1986 WL 3426, at *2).

[74] *See, e.g., In re* Tribune Co., No. 08-13141, 2011 WL 386827, at *4 (Bankr. D. Del. Feb. 3, 2011) (holding DCL plan proponents share a common legal interest of having their settlement approved); *In re* Leslie Controls, 437 B.R. 493, 497, 500 (Bankr. D. Del. 2010) (ruling interest in "preserv[ing] and maximiz[ing] the insurance available to pay asbestos claims" is an inherently legal question, and therefore, a common interest); Kaiser Steel Corp. v. Frates, 84 B.R. 202, 205 (Bankr. D. Colo. 1988) (finding a debtor and a creditors committee have common interests); *In re Quigley Co.*, No. 04–15739, 2009 WL 9034027, *1 (Bankr. S.D.N.Y. Apr. 24, 2009) (finding a debtor and an ad hoc committee can share common interests).

a case-by-case basis, courts have invoked the common interest doctrine when confronted with a variety of scenarios.

Courts have found that the goal of maximizing the debtor's estate may be sufficient to invoke the common interest doctrine when a joint strategy is pursued by the parties. For example, *In re Leslie Controls Inc.*[75] involved an exchange of certain insurance related documents between the debtor and other parties (including an ad hoc committee and claimants' representative) pre-petition during the development of a plan of reorganization.[76]

Judge Sontchi found that, despite the fact that plan negotiations were ongoing, the debtor had a shared common legal interest with the other parties in working against their common enemy, the insurers, to maximize the insurance proceeds available to pay asbestos claims.[77] The insurers argued that the parties did not share a common interest where "the interests of such parties are 'profoundly adverse to each other' because the 'claimants wish to receive as much as possible' and the prospective debtors 'wish to hold their payment obligations to a minimum.'"[78] Nevertheless, in finding that the common interest doctrine applied, the court reasoned that, even before plan terms have been agreed to, the parties shared a common legal interest in "preserv[ing] and maximiz[ing] the insurance available to pay asbestos claims," thereby increasing the size of the pie.[79] Moreover, under the facts of the case, maximizing insurance proceeds was "an inherently legal question" because it would require "an analysis of the insurance documents, as well as contract, insurance and bankruptcy law."[80]

Similarly, bankruptcy courts have invoked the common interest doctrine to protect shared communications from disclosure when separately represented parties have pursued quintessential bankruptcy goals, such as plan confirmation. In *In re Tribune Co.*, the debtors, their lenders, the creditors' committee, and other parties came together to seek confirmation of a plan following court-ordered mediation.[81] Post-mediation, a group of noteholders sought from the plan proponents documents and communications containing discussions regarding their plan's proposed settlement of the certain causes of action "[t]o test the arms-length nature and good faith of the settlement negotiations . . . ."[82] The noteholders argued that the common interest privilege did not apply because the parties did not have common legal interests; the debtors' and committee's interests were in maximizing the estate, and the lenders' interests were in paying as little as possible to resolve the leveraged

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[75] 437 B.R. 493, 493 (Bankr. D. Del. 2010).
[76] *See id.* at 496.
[77] *See id.* at 500–02.
[78] *Id.* at 501.
[79] *Id.* at 497, 500.
[80] *Id.* at 500.
[81] No. 08–13141, 2011 WL 386827, at *1 (Bankr. D. Del. Feb. 3, 2011).
[82] *Id.* at *3.

buyout litigation at issue.[83] The plan proponents countered that the common legal interest was to attain court approval of the plan and settlement.[84] The court ultimately sided with the plan proponents and upheld the common interest privilege.[85]

The court stated that although the plan proponents' "interests are not completely in accord, they share the common legal interest of obtaining approval of their settlement and confirmation of the DCL Plan, thereby resolving the legal disputes between and among them."[86] The court emphasized that the common interest privilege can apply to parties whose interests are not totally in accord.[87] It also analyzed the question of when the privilege arose and found that the privilege attached to communications after the party filed the term sheet, setting forth material terms of agreement among parties.[88] In doing so, the court cautioned that the determination of whether the common interest doctrine applies "is an intensely fact-and-circumstance-driven exercise," and thus:

> [T]his is not to say that parties who are co-proponents of a plan or parties who reach settlements arising from mediation are always entitled to assert this privilege. Neither should it be said that the privilege can never be invoked unless the circumstances involve the proposal of a joint plan or a settlement resulting from mediation.[89]

The scope of the common interest doctrine within bankruptcy context was further clarified in *In re Imerys Talc America Inc.*, where the court found that, while the common interest doctrine can protect from disclosure certain privileged communications exchanged among plan proponents depending on the context, it does not apply when parties' interests on certain issues are more adverse than aligned.[90]

In *Imerys*, the plan proponents asserted common interest protection over plan related communications from numerous discovery requests propounded by potential plan opponents.[91] The debtors also separately asserted a common legal interest between themselves and their non-debtor parent over communications that "discuss or address legal issues related to a proposed plan prior to March 5, 2020" and those "regarding the bankruptcy action from at least [the petition date]."[92]

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[83] *See id.*
[84] *See id.*
[85] *See id.* at *5.
[86] *Id.* at *4.
[87] *See id.*; *see also In re* Quigley Co., No. 04-15739, 2009 WL 9034027, at *4 (Bankr. S.D.N.Y. Apr. 24, 2009) (holding that common interest privilege protected communications between debtor and non-debtor parent corporation because "they share a common interest and overall strategy geared toward the confirmation of [debtor's] plan").
[88] *See In re* Tribune Co., 2011 WL 386827, at *5.
[89] *Id.* at *9.
[90] No. 19-10289, 2021 Bankr. LEXIS 428, *2, *7–8 (Bankr. D. Del. Feb. 23, 2021) (letter opinion).
[91] *See id.* at *7–9.
[92] *Id.* at *14–15.

The bankruptcy court noted three takeaways from prior decisions, including *Leslie*, *Controls*, and *Tribune*, applying the common interest doctrine in the context of a chapter 11 plan:

> (i) the common interest doctrine can be, but is not necessarily, applicable in the plan context; (ii) parties can simultaneously share a common legal interest with respect to some issues but not other issues; and (iii) to the extent that parties share a common legal interest, the common interest doctrine only protects the communications that are in furtherance of that common legal interest.[93]

Concerning parties who share common and adverse interests simultaneously, the court found that plan proponents share a common legal interest with respect to maximizing total recoveries available under a plan and confirming the plan itself.[94] Plan proponents, however, have adverse legal interests with respect to the apportionment of recoveries under a plan. In other words, when analyzing the common interest privilege, there is a distinction between the "size of the pie" and the "pieces of the pie."[95]

D. Mediation Privilege

Mediation has become an increasingly popular tool for adverse parties to resolve their disputes in a more economical and efficient manner than litigation or even arbitration. Courts nationwide have accepted, encouraged, and even mandated mediation or other alternative dispute resolution methods to alleviate the burden on their dockets. Mediation typically has the benefit of encouraging the early resolution of disputes, diminishing the costs of litigation for the parties, and leading to greater satisfaction of the participants by giving them the feeling of control over the outcome.[96] For mediation to work as intended, however, communications made during mediation must be frank, remain confidential, and cannot be used against a party if mediation is unsuccessful. Indeed, the majority view is that the key goal of mediation privilege is to promote candor, which is encouraged by "maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications."[97]

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[93] *Id.* at *7–8.

[94] *See id.* at *19.

[95] *See id.* at *13–14.

[96] *See* Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 891, 896, 904 (1998).

[97] *See* UNIF. MEDIATION ACT, 7A U.L.A. 403 (UNIF. L. COMM'N 2003) (Prefatory Note); Doe v. Archdiocese of Milwaukee, 772 F.3d 437, 442 (7th Cir. 2014); Folb v. Motion Picture Indus. Pension & Health

1. The Uniform Mediation Act

The importance of confidentiality and candor in communications at mediation was recognized by the Uniform Law Commission in drafting the Uniform Mediation Act ("UMA").[98] Although the UMA has only been enacted by a handful of states, section 4 of the UMA provides a privilege against disclosure of communications made during mediation.[99] In particular, the UMA provides that the following privileges apply:

> (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication. (2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator. (3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.[100]

Disclosure at mediation by itself, however, does not protect otherwise admissible evidence from discovery.[101]

Like other privileges, the mediation privilege can be waived. Per comment 4 to section 4 of the UMA, the consent of the parties to the communication, as well as the party making the communication, is required before an otherwise privileged communication can be disclosed.[102] Likewise, the mediator's communications can only be disclosed with the permission of the mediator and all parties to the mediation.[103] In addition to these waivers, a person loses the right to assert the mediation privilege where the person "discloses or makes a representation about a mediation communication which prejudices another person in a proceeding" or "intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity . . . ."[104] Unlike other privileges, however, the mediation privilege provided by the UMA cannot be waived by implied conduct; rather, it must be expressly waived and recorded.[105]

Plans, 16 F. Supp. 2d 1164, 1172 (C.D. Cal. 1998); *In re* Teligent, Inc., 417 B.R. 197, 205–06 (Bankr. S.D.N.Y. 2009).

[98] *See generally* UNIF. MEDIATION ACT (Prefatory Note).

[99] *See* UNIF. MEDIATION ACT § 4(a).

[100] *Id.* § 4(b).

[101] *See id.* § 4(c).

[102] *See id.* § 4 cmt. 4.

[103] *See id.*

[104] *Id.* § 5(b), (c).

[105] *See id.* § 5 cmt. 1.

Finally, the UMA provides a list of exceptions to the mediation privilege, mostly centered around fraudulent, criminal, or unethical actions during the mediation.[106] Of more importance to this article, the UMA excludes evidence of a signed agreement—whether an agreement to mediate or the settlement arising therefrom—from the scope of the mediation privilege.[107] Although the parties can separately agree that such agreements are confidential, those agreements "are subject to the need for evidence and public policy considerations."[108] Moreover, the mediation privilege does not apply where the court, following an in camera hearing, determines that the evidence is not available from any other source and the parties' need for the evidence substantially outweighs the interest in protecting the confidentiality of the information, but only where the communication is offered in connection with a criminal prosecution or in a proceeding to modify or avoid an obligation under a contract arising from the mediation.[109] Admission of evidence under one of these exceptions is limited to the extent of the exception and shall not render any other portion of the mediation discoverable or admissible.[110]

2. Case law applications

While many states have adopted mediation privilege through legislation, courts across the country have adopted approaches similar to the one proposed in the UMA. These courts have recognized the need for confidentiality and candor in mediation in adopting a mediation privilege. For example, in *Sheldone*, the court found:

> [A]bsent confidentiality, participants would necessarily feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program which has led to settlements . . . , thereby expediting cases at a time when . . . judicial resources . . . are sorely taxed.[111]

Jurisdictions vary greatly as to the extent confidentiality in mediation is protected. Most statutory protections for mediation privilege fall under one of these

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[106] *See id.* § 6.
[107] *See id.* § 6(a)(1).
[108] *Id.* § 6 cmt. 2.
[109] *See id.* § 6(b).
[110] *Id.* § 6(d).
[111] Sheldone v. Pennsylvania Tpk. Comm'n*,* 104 F. Supp. 2d 511, 513 (W.D. Pa. 2000) (internal citations omitted); *see also* Wilmington Hosp., L.L.C. v. New Castle Cty. *ex rel.* New Castle Dep't of Land Use, 788 A.2d 536, 541 (Del. Ch. 2001) ("Confidentiality of all communications between the parties or among them and the mediator serves the important public policy of promoting a broad discussion of potential resolutions to the matters being mediated.").

three categories: (1) blanket confidentiality, whereby no disclosure of any mediation communications may be made (California and Ohio); (2) nearly absolute confidentiality, subject to enumerated exceptions, which vary by state statute, or disclosure only upon consent by all parties, including the mediator (states that have adopted the UMA such as New Jersey); or (3) qualified confidentiality, providing mediation confidentiality but expressly recognizing judicial discretion to order disclosure in individual cases where needed to prevent a manifest injustice or to enforce court orders (Wisconsin).[112] Courts in the Third Circuit treat communications made in preparation for, during, or in anticipation of further mediation as privileged, while treating communications without a clear nexus to the mediation session as discoverable and potentially admissible. In *U.S. Fidelity*, settlement negotiations continued after the mediation formally ended.[113] The mediator remained in contact with the parties only for the purpose of receiving updates on the negotiations.[114] Applying Pennsylvania privilege law, but turning "to federal case law construing the federal mediation privilege for guidance," the court found that the eventual settlement agreement was discoverable because there was no nexus between the mediation and settlement.[115]

The *Sandoz* decision from the District of New Jersey deemed the same "clear nexus to . . . mediation" principle decisive to determining applicability of mediation privilege.[116] In doing so, the court found that the settlement negotiations and exchange of drafts among the parties in the months leading up to execution of the term sheet and the continued negotiations in converting those terms into a final long-form settlement agreement, all of which were conducted pursuant to the mediation process put in place by the mediator, had sufficient nexus to mediation to be protected under the privilege.[117] The court added that "[t]he mere fact that the mediator was not copied on email communications between the parties during this time does not mean that those communications were not in furtherance of the mediation."[118]

Interpreting the Supreme Court's rule in *Jaffee*[119] for determining the applicability of federal common law privileges, the Central District of California in *Folb* articulated a test to determine whether a mediation privilege shall be recognized in federal court by balancing the:

> (1) imperative need for confidence and trust among participants in mediation; (2) "important public ends serve[d] by promoting

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[112] *See* Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 49 (2003).

[113] *See* U.S. Fid. & Guar. Co. v. Dick Corp./Barton Malow, 215 F.R.D. 503, 505 (W.D. Pa. 2003).

[114] *Id.*

[115] *Id.* at 506–07.

[116] Sandoz, Inc. v. United Therapeutics Corp., No. 19-cv-10170, 2021 WL 5122069, at *4 (D.N.J. Nov. 2, 2021).

[117] *See id.*

[118] *Id.*

[119] Jaffee v. Redmond, 518 U.S. 1, 9 (1996).

> conciliatory relationships among parties to a dispute, reducing litigation costs, and decreasing size of federal and state court dockets, thereby increasing quality of justice in cases that do not settle;" (3) the modest loss of "likely evidentiary benefit;" and (4) the consistent body of state law adopting such a privilege.[120]

Folb involved an attempt by a plaintiff to discover a mediation brief and other settlement materials submitted by the defendant in a separate case.[121] The district court concluded that public policy favored a privilege barring non-parties to a mediation from discovering statements made during the mediation, but that "the Court need not, and indeed may not, address the outer limits of a federal mediation privilege . . . ."[122] The court noted that several other district court decisions "h[e]ld that settlement communications between parties should be privileged in one fashion or another, whether the information was communicated in the course of a formal mediation with a neutral or simply in private settlement negotiations between the parties."[123]

The court balanced these factors, with a particular emphasis on the first one, and "conclud[ed] that the proposed blanket mediation privilege is rooted in the imperative need for confidence and trust among participants."[124] Addressing the issue of whether the "imperative need for confidence and trust" should extend so far as to protect all oral and written communications between the parties to a mediation, particularly after the parties have concluded their formal mediation with the neutral, the court explained that if parties are forced to disclose information provided in confidential mediation, then "the side [that is] most forthcoming in the mediation process is penalized when third parties can discover confidential communications with the mediator."[125] The court reviewed the public policy implications of such a privilege and concluded that "a mediation privilege would serve important public ends by promoting conciliatory relationships among parties to a dispute, by reducing litigation costs and by decreasing the size of state and federal court dockets, thereby increasing the quality of justice in those cases that do not settle voluntarily."[126] The court held there would be little "evidentiary detriment" to the creation of a mediation privilege because the evidence it protects from disclosure would not exist without the mediation privilege, meaning that without this privilege, mediation communications would be chilled.[127] The court then noted that nearly every state had adopted a

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[120] Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1171–81 (C.D. Cal. 1998).
[121] *See id.* at 1167.
[122] *Id.* at 1178.
[123] *Id.* at 1174 (citing Cook v. Yellow Freight Sys., Inc. 132 F.R.D. 548, 550 (E.D. Cal. 1990) (applying underlying policy of Rule 408 to protect documents related to settlement negotiations from discovery)).
[124] *Id.* at 1176.
[125] *Id.* at 1172, 1174.
[126] *Id.* at 1177.
[127] *Id.* at 1178.

mediation privilege and denial of the privilege would "frustrate the purposes of the state legislation."[128] For these reasons, the court held that federal mediation privilege applies to "all communications made in conjunction with a formal mediation[,]" though it stops short of extending to "[s]ubsequent negotiations between the parties . . . even if they include information initially disclosed in the mediation."[129]

II. MEDIATION PRIVILEGE IN PLAN NEGOTIATIONS

Plan negotiations in bankruptcy cases have proven to be fertile ground for the application of mediation privilege in recent years. Because bankruptcy is a collective proceeding involving numerous parties and multiple complex issues, debtors frequently must negotiate with, at a minimum, their secured creditors and the creditors' committee regarding the terms of the plan. With the growing popularity of restructuring support agreements, the debtor often enters bankruptcy aligned with a host of parties, all of whom are arguably subject to the common interest privilege during the bankruptcy proceeding.[130] Because, however, the common interest privilege only begins once there has been a "meeting of the minds" among adverse parties, the creditors' committee and any other parties that are not subject to the restructuring support agreement do not share in the protections of that common interest privilege (and indeed the creditors' committee's primary task in such a situation is to investigate the merits of the restructuring support agreement).[131] This Section discusses recent efforts to expand the protections of common interest privilege to otherwise adverse parties using the mediation privilege.

A. Restructuring Support Agreements

Bankruptcy is a collective process, and the debtor usually needs to negotiate with a variety of parties in interest to maximize the value of its assets and formulate and prosecute its plan. Given the need to fund the costs of the bankruptcy, the debtor almost always engages in negotiations with its lenders (or a new source of funding) prior to filing the bankruptcy petition regarding the timeline, funding, and goals for the bankruptcy case. Indeed, debtor in possession ("DIP") financing and cash collateral orders often contain "case milestones" whereby the debtor agrees to meet certain deadlines in exchange for the funding provided by the lender.[132] Likewise, the

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[128] *Id.* at 1179 (quoting Jaffee v. Redmond, 518 U.S. 1, 13 (1996)).

[129] *Id.* at 1180.

[130] *See, e.g., In re* Tribune Co., No. 08-13141, 2011 WL 386827, at *4 (Bankr. D. Del. Feb. 3, 2011) (discussing benefits of the common interest privilege being applied among adverse parties in a bankruptcy case).

[131] *See* Imerys Talc Am., Inc., No. 19-10289, 2021 Bankr. LEXIS 428, at *13–14 (Bankr. D. Del. Feb. 23, 2021) (discussing diverging interests between adverse parties).

[132] *See, e.g.*, Interim Order (I) Authorizing the Debtors to Obtain Post Petition Financing, (II) Authorizing the Debtors to Use Cash Collateral, (III) Granting Liens and Providing Superpriority Administrative Expense

official committee of unsecured creditors (the "Committee") is tasked with assisting the debtor in formulating the plan, while serving as the primary adversarial check on the debtor's actions during the case.[133]

Because of the costs associated with chapter 11, debtors are increasingly turning to restructuring support agreements to lock in the anticipated terms of a plan with as many creditor groups as possible.[134] Parties to these agreements include, in addition to the debtor, the debtor's lenders and major unsecured creditors such as bondholders or noteholders, as well as various insiders or major equity holders. The negotiations giving rise to these restructuring support agreements are perfect examples of the use of common interest privilege in bankruptcy. The parties to the agreement all have a "meeting of the minds" prior to the bankruptcy filing, meaning that the common interest privilege exists and protects all communications among the parties that take place during the bankruptcy proceeding.[135] Moreover, because the exact terms of the plan usually have not yet been finalized in the restructuring support agreement, the post-petition communications between the Restructuring Support Agreement Parties ("RSA Parties") regarding the plan itself all fall within the scope of the common interest privilege and are protected from discovery by other parties in interest that are not RSA Parties.[136]

B. Extension of Common Interest Privilege to Adverse Parties

The common interest privilege potentially created by the Restructuring Support Agreement, however, does not protect communications between the debtor—or any of the other RSA Parties—and the Committee, which did not exist prior to the petition date.[137] Because the Committee will be tasked with investigating the bona fides of any settlement or other terms embodied in the restructuring support agreement, one of the first acts taken by the Committee is to serve discovery on the Debtor and the RSA Parties regarding that agreement.[138] As discussed above, disclosure of information subject to the common interest privilege to the Committee, as an adverse party, would waive the common interest privilege and subject all, or at least a portion of, the pre-petition communications among the RSA Parties to discovery from not

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Claims, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, (VI) Scheduling a Final Hearing, and (VII) Granting Related Relief ("DIP Order") at ¶14, *In re* MD Helicopter, Inc., No. 22-10263 (Bankr. D. Del. Apr. 4, 2022), ECF No. 114.

[133] *See* 11 U.S.C. § 1103(c)(3) (2018).

[134] *See, e.g.*, RSA Motion, *In re* Gulf Coast Health Care, LLC, No. 21-11336, at *29 (Bankr. D. Del. October 22, 2021).

[135] *See* Camisha L. Simmons, *News at 11: Can Subchapter V Trustees Invoke the Common-Interest Doctrine?*, 40-12 AM. BANKR. INST. J., Dec. 2021 at *18, *62.

[136] *See In re* Maxus Energy Corp., 617 B.R. 806, 824 (Bankr. D. Del. 2020).

[137] *See In re* Leslie Controls, Inc., 437 B.R. 493, 501 (Bankr. D. Del. 2010) (opining courts have "rejected arguments that a common interest exists to protect information exchanged during bankruptcy negotiations between" adverse parties).

[138] *See, e.g., In re* Serignese, No. 19-10724, 2019 WL 2366424, at *1–5 (Bankr. S.D.N.Y. June 3, 2019).

just the Committee, but from any other party in interest in the bankruptcy case.[139] Nevertheless, the RSA Parties usually need to share certain privileged information with the Committee to convince it that the debtor made an informed and supportable business decision in agreeing to the terms of the restructuring support agreement.[140] In this scenario, the mediation privilege can be used to essentially expand the common interest privilege to include the Committee.

To accomplish this feat, the debtor and the other RSA Parties, if necessary, simply agree to mediate their dispute with the Committee.[141] Mediation provides the parties with multiple benefits, including providing a third-party neutral to guide the parties through what is often a complex series of disputes related to the final terms of the plan.[142] Although bankruptcy professionals are extremely adept at negotiating their own settlements without the involvement of a mediator, as evidenced by the terms of the restructuring support agreement itself, the addition of a mediator to the process allows the RSA Parties to maintain their existing common interest privilege while sharing critical financial analysis and legal theories with the Committee as part of the broader plan negotiations.[143] Indeed, one could argue that without the availability of mediation and its related privilege, debtors would be less inclined to agree to pre-petition restructuring support agreements out of fear that those discussions would ultimately be discoverable in connection with the confirmation process. Thus, mediation not only saves costs during the bankruptcy, but it also aids in shortening the bankruptcy process by offering an ability to protect pre-petition negotiations that lead to quicker confirmation hearings.

An example of using mediation to share information among potentially adverse parties can be found in the bankruptcy of *Imerys Talc America, Inc.*[144] *Imerys* involved a settlement between Imerys and its predecessor in interest, Cyprus Mines Corporation ("Cyprus"), to address the treatment of certain asbestos-related claims arising out of the talc mined by the two companies.[145] In an unusual twist, the settlement required Cyprus to file for bankruptcy and take certain actions to have the

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[139] *See In re* Maxus Energy Corp., 617 B.R. at 820 ("[I]f a client subsequently shares a privileged communication with a third party, then it is no longer confidential, and the privilege ceases to protect it.").

[140] *See, e.g., In re* Genco Shipping & Trading Ltd., 509 B.R. 455, 468 (Bankr. S.D.N.Y. 2014) (holding the RSA was approved because it was a "valid exercise of the debtors' business judgment").

[141] *See In re* Hunt, No. 14-13109, 2016 WL 8115493, at *2 (Bankr. D.N.M. Dec. 23, 2016).

[142] *See, e.g., In re* Diocese of Buffalo, N.Y., 634 B.R. 839, 844 (Bankr. W.D.N.Y. 2021) ("If a settlement was easy to accomplish, the parties would already have achieved that result. Tremendous complexity suggests a need for mediation.").

[143] *See In re* Excel Mar. Carriers, Ltd., No. 13-23060, 2013 Bankr. LEXIS 3876, at *2–3 (Bankr. S.D.N.Y. Sept. 13, 2013) ("There shall be an absolute mediation privilege, and all communications made during the mediation shall be confidential, protected from disclosure, and shall not constitute a waiver of any existing privileges and immunities . . . .").

[144] *See* Order Appointing Mediator at 3, *In re Imerys Talc Am., Inc.*, No. 19-10289-LSS (Bankr. D. Del. 2019), ECF No. 2703.

[145] *See* Notice of Filing of Plan Exhibit (Cyprus Settlement Agreement) at Ex. 1, *In re* Imerys, No. 19-10289-LSS (Bankr. D. Del. Jan. 23, 2021).

settlement approved in its case.[146] Once Cyprus filed its bankruptcy, its tort claimants committee and future claims representative began an investigation into the merits of the settlement and the process used to reach it.[147] To facilitate the exchange of information between the two estates and their representatives, the parties ultimately agreed to a complicated mediation process before two mediators.[148]

At the hearing on the four mediation motions, counsel for Imerys argued that "there should be an exchange of information so that the parties could have a fulsome mediation and discussion regarding the global settlement."[149] Counsel for the Cyprus committee agreed, noting that "an important consideration to make this mediation successful is that people be able to exchange information that would otherwise be protected, and have it remain protected so that the parties have a greater chance of reaching ultimately successfully mediated resolutions."[150] Likewise, counsel to the Cyprus FCR indicated that "our willingness to enter into mediation at this point is driven in no small measure by the need to get the documents that we haven't gotten yet to allow us to complete our due diligence."[151] Counsel for one of the insurers, who was also participating in the mediation, raised concerns about whether the mediation process was simply a method to prevent the insurers from accessing documents.[152]

When considering the issues, Judge Silverstein noted that it was important "to make certain people are on the same page as to what the mediation privilege is and how it should be applied and try to minimize later disputes . . . ."[153] To that end, she proclaimed that not all communications between parties to the mediation would be protected by the mediation privilege.[154] Rather, the mediation privilege would only protect: (1) communications from a party to the mediator; (2) mediation statements or positions papers requested by or provided to the mediator; and (3) direct discussions with the mediator.[155] Settlement communications between the parties outside the presence of the mediator, however, may not be subject to the mediation privilege.[156] Judge Silverstein also cautioned the parties that the mediation privilege may not be as broad as they think.[157] Finally, she warned the debtors to consider what

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[146] *See id.* at § 5.

[147] Note that this dispute was unquestionably one that fell outside of the protection of the common interest privilege because the estates were on opposite sides of the settlement agreement and the Cyprus estate was potentially seeking to challenge the propriety of the settlement.

[148] *See* Order (I) Appointing Mediators, (II) Referring Certain Matters to Mediation, and (III) Granting Related Relief at 4–5, *In re* Imerys, No. 19-10289-LSS (Bankr. D. Del. Nov. 30, 2021).

[149] *See* Transcript of Hearing to Appoint Mediator at 17:9–11, *In re* Imerys, No. 19-10289-LSS (Bankr. D. Del. Nov. 15, 2021).

[150] *Id.* at 19:19–23.

[151] *Id.* at 20:20–23.

[152] *See id.* at 23:8–10.

[153] *Id.* at 33:3–5.

[154] *Id.* at 33:10–12.

[155] *Id.* at 33:13–21.

[156] *See id.* at 33:21–24.

[157] *See id.* at 38:2–6.

evidence they would need to prove their case at confirmation and to not simply rely on the fact that mediation occurred.[158]

C. The Misuse of Mediation to Disadvantage Parties Not Involved in the Mediation

For creditors who are not RSA Parties, a debtor's potential use of the mediation privilege to shield communications that are the underpinnings of the plan can prove to be a significant hurdle to accessing critical information. In most cases, this information vacuum is not problematic because the Committee serves as a cross-section of the unsecured creditor body and typically consists of the debtor's largest unsecured creditors.[159] Likewise, the debtor typically includes most of its major creditors as RSA Parties in an effort to obtain enough supporting votes to confirm the proposed plan.[160] Nevertheless, where all of Committee members' interests are aligned and adverse to a certain subset of unsecured creditors, this lack of representation can make any settlement agreed to by the Committee unfair and inequitable.[161] Likewise, the debtor's insurers will likely be on the outside of the discussions, with the other parties arguing that they have a common interest in "maximizing the pie" at the insurers' expense. In short, certain creditors have a strong incentive to investigate how the parties reached their deal and whether that process was the product of good faith and fair dealing. Those efforts, however, can be stymied by the mediation privilege in the hypothetical situation discussed herein.

This problem may be unique to bankruptcy given the number of parties in interest that may be involved in each case. In traditional litigation, the parties themselves will all be involved in the mediation and whatever settlement arises therefrom.[162] In bankruptcy, however, it is possible for a group of creditors to mediate with the debtor to reach a settlement that treats the creditors involved in the mediation more favorably than those that were not in the room.[163] While both the debtor and the Committee owe

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[158] *See id.* at 38:24–39:3.

[159] *See, e.g., In re* Nutritional Sourcing Corp., 398 B.R. 816, 836 (Bankr. D. Del. 2008) (quoting *In re* Sharon Steel Corp., 100 B.R. 767, 777–78 (Bankr. W.D. Penn. 1989).

[160] *See* Christopher A. Jones & Alexandra G. DeSimone, *Courts Should Approve Exculpation for the Pre-Petition Conduct of RSA Parties,* 41 AM. BANKR. J., July 2022, at *18, *53 ("Pre-negotiated and pre-packaged cases involve important pre-petition negotiations that help the debtor fare better once in and upon exiting chapter 11. In such cases, exculpation for RSA parties and their pre-petition conduct incentivizes a fair, transparent, and efficient chapter 11 process.").

[161] *See In re* Nutritional Sourcing Corp., 398 B.R. at 836 ("Adequate representation of the [non-represented] creditors was wholly lacking and the fact that the Committee held a fiduciary duty does not make up for the lack of a cross-section of Debtors' creditors.").

[162] *See* Transcript of Telephonic Ruling at 11:24–13:8, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del. Oct. 25, 2021), ECF No. 6798 (describing the situation in the Boy Scouts of America bankruptcy as a "square peg, round hole" and noting how "[m]uch of the law around mediation appears to be designed for two-party disputes").

[163] *See In re* Peabody Energy Corp., 582 B.R. 771, 783 (E.D. Mo. 2017).

fiduciary duties to all creditors,[164] achieving the best result for all creditors sometimes requires a sacrifice of certain creditors' interests, or at least that is what the estate fiduciaries would argue under the auspices of the business judgment rule. Arguably, in these circumstances, the adversely affected creditors are entitled to discovery into the reasons why their claims are being treated differently under the plan and the process the debtor used in arriving at that decision.[165]

The situation described above was faced by Judge Carey in *Tribune*.[166] Although *Tribune* did not involve a pre-petition restructuring support agreement, it did arise from a post-petition mediation where certain mediation parties agreed to a term sheet that served as the foundation to the plan.[167] Afterwards, a group of noteholders, who were not party to the mediation, sought discovery of documents about the proposed settlement "[t]o test the arms-length nature and good faith of the settlement negotiations . . . ."[168] One of the open disputes was whether the parties to the term sheet had to either waive the protections of the mediation privilege or be precluded from introducing evidence from the mediation.[169] The noteholders argued that this discovery was warranted under the "at-issue" exception because the debtor argued that the settlement was "fair because it is the product of a mediation conducted by a judge."[170] Without access to the relevant documents, the noteholders asserted that the debtor would be permitted to use the mediation as both a "sword and a shield."[171]

In an effort to resolve the dispute, the debtor offered a limited waiver of the privilege, whereby the only documents that would continue to be protected from discovery would be: (1) any communications directly with the mediator; (2) any communications between the mediation parties to the mediation that were exchanged on days when a mediation session occurred; (3) communications between the mediation parties regarding the substance of any discussion during a mediation session or reflecting any offers or agreements exchanged or reached during a mediation session; and (4) communications between the mediator and the examiner or his professionals.[172] According to the debtor, this proposal would allow discovery into the mediation process while protecting the substance of the mediation.[173] In balancing the need to provide discovery into relevant information with the "strong

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[164] *See In re* Rental Car Intermediate Holdings, LLC, No. 20-11247, 2022 WL 2760127, at *11 (Bankr. D. Del. July 14, 2022).

[165] *See* Transcript of Telephonic Ruling at 40:25–41:2, *In re* Imerys Talc America, Inc., No. 19-10289-LSS (Bankr. D. Del. Nov. 15, 2021), ECF No. 4355 ("I'm more concerned about people who are not mediation parties who might request information, and it's hard for me to make this order binding on non-mediation parties . . . .").

[166] *See In re* Tribune Co., No. 08-13141, 2011 WL 386827 (Bankr. D. Del. Feb. 3, 2011).

[167] *See id.* at *2.

[168] *Id.* at *3.

[169] *See id.* at *6.

[170] *Id.* at *7.

[171] *See id.*

[172] *Id.*

[173] *See id.*

policy in promoting full and frank discussions during a mediation," Judge Carey found the debtor's proposal to be reasonable, but modified it slightly so that only communications between mediation parties who were present or actively participating in the mediation session on the day the communication occurred would be protected.[174] Thus, *Tribune* provided a process that allowed outsiders to the mediation to seek discovery into the fairness of the mediation process while still protecting the confidentiality of the substantive mediation discussions.

More recently, Judge Owens held that the mediation privilege was absolute in *In re Gulf Coast Health Care, LLC*.[175] In *Gulf Coast*, the debtor entered bankruptcy after negotiating a restructuring support agreement (the "RSA") with certain of its affiliates, insiders, and other related parties, as well as its lender and primary landlord (collectively, the "RSA Parties").[176] Once in bankruptcy, the Committee served informal discovery requests on the debtor and certain other RSA Parties to investigate the bona fides of the settlement contained in the RSA.[177] Ultimately, the RSA Parties and the Committee agreed to mediate their disputes about the RSA, which led to an enhanced settlement that was the foundation for the debtor's plan of liquidation.[178] The settlement provided that the contributions from the RSA Parties would be shared among unsecured creditors, with 63 percent going to general unsecured creditors and the remaining 37 percent going to litigation claimants.[179] The Committee, however, had no member that was a litigation claimant, which led several groups of litigation claimants to object to the plan and seek discovery into how the allocation of proceeds was reached.[180] This time, unlike in *Tribune*, the debtor chose to rely upon the mediation privilege to shield all information related to the settlement discussions from discovery.[181] That decision would backfire, as discussed below.[182]

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[174] *See id.* at *8.

[175] *See* Order Approving Stipulation Regarding Mediation Relating to Disclosure Statement and Plan at 2–4, *In re* Gulf Coast Health Care, LLC, No. 21-11336 (Bankr. D. Del.), ECF No. 729.

[176] *See* Motion of Debtors For Entry of Order Approving Assumption of Restructuring Support Agreement at 1, *In re* Gulf Coast Health Care, LLC, No. 21-11336 (Bankr. D. Del. Oct. 22, 2021), ECF No. 107.

[177] *See* Transcript of Second Day Hearing at 6, *In re* Gulf Coast Health Care, LLC, No. 21-11336 (Docket No. 249) (Bankr. D. Del. Nov. 15, 2021), ECF No. 249.

[178] *See* Order Approving Stipulation Regarding Mediation Relating to Disclosure Statement and Plan at 1, *In re* Gulf Coast Health Care, LLC, No. 21-11336 (Bankr. D. Del. Jan. 20, 2022), ECF No. 729.

[179] Notice of Filing of Debtors' Second Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code, Ex. A at 7, 11, *In re* Gulf Coast Health Care, LLC, No. 21-11336 (Bankr. D. Del. June 10, 2022), ECF No. 1383.

[180] *See* Objection of the Florida Plaintiffs to Confirmation of the Debtors' First Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code at 17, *In re* Gulf Coast Health Care, LLC, No. 21-11336 (Bankr. D. Del. Apr. 8, 2022), ECF No. 1104; Objections of Certain Plaintiff-Creditors to the Debtors' Proposed Joint Amended Plan of Liquidation and Joinder in Objections to the Proposed Plans by the United States Trustee and By the Florida Plaintiffs at 14, *In re* Gulf Coast Health Care, LLC, No. 21-11336 (Bankr. D. Del. Apr. 8, 2022), ECF No. 1103.

[181] *See* Hearing Transcript at 151:3-18, *In re* Gulf Coast Health Care, LLC, No. 21-11336 (Bankr. D. Del. Apr. 27, 2022), ECF No. 1202.

[182] *See infra* Section V.A.1.

III. CAUTIONARY TALES/PRACTICAL CONSIDERATIONS

A. Advice for Mediation Participants

1. Produce necessary evidence

In *Gulf Coast*, the debtor made a strategic decision to block discovery—both document production and deposition testimony—into the reasonableness of the proposed plan and its related releases on the basis of attorney/client and work-product privileges.[183] In essence, the debtor argued that its investigation of the estate's claims, recoveries, and releases was at the direction of counsel and therefore not discoverable.[184] During debtor's deposition, counsel questioning the debtor's deponent noted their disagreement with that position and set the record to ensure it could not be used later, going so far as questioning whether debtor's position prevented the necessary evidence to allow the court to rule on the plan.[185] Despite the debtor's position at the confirmation hearing, it submitted direct testimony in the form of declarations regarding the reasonableness of the plan, which relied almost exclusively on the debtor's internal investigation and report—the very same areas of inquiry blocked by the debtor during discovery.[186] When the debtor then tried to spring that evidence and testimony at the confirmation hearing, objections were submitted and presented to the court prior to and during the hearing.[187] The result was that the court gave:

> limited to no weight to [the witness's] beliefs regarding the reasonableness of the plan supplement because it's based, in part, on an investigation report that's not been disclosed and it's not been tested. I have not—there was no way for me to understand or give any consideration or weight to the reasonableness of his beliefs because nothing was shared with me regarding the substance of the report or the investigation. So, therefore, I'm not able to make findings that are reasonable . . . .[188]

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[183] *See* Transcript of Zoom Hearing Held Apr. 19, 2022, RE: Confirmation at 43:20–44:17, *In re* Gulf Coast Health Care, LLC, No. 21-11336 (Bankr. D. Del. Apr. 24, 2022), ECF No. 1190 ("[D]ebtors have stonewalled any inquiry or discovery, whether document production or deposition testimony, into that investigation, into that report . . . . They cannot use this investigation, and this report, and the privilege relating to the two of those as a sort of shield . . . . [I]t's a strategic decision on behalf of [the] debtors.").

[184] *See id.* at 79:9–83:25.

[185] *See id.* at 49:19–24.

[186] *See id.* at 43:11–24.

[187] *See id.* at 49:19–50:2.

[188] *Id.* at 143:17–144:6 ("So, if you're trying to move [the witness's] testimony into evidence for the truth of any of those statements, then it's problematic because there's been no testing of that truth. And it you're trying to enter that testimony in for his belief, I cannot give it much weight because there's been no explanation to even support it. There's no details. There's nothing. There's been nothing, okay. So, it's problematic.").

With the core testimony needed to confirm the plan being of limited or no use to the Court, the debtor agreed to adjourn the hearing, produce the report, and allow deposition testimony into the same.[189] This, of course, resulted in further delay of the plan confirmation and additional expense for the debtor, in a situation where the debtor repeatedly stated that it was running out of cash to continue operating in chapter 11.[190]

Notwithstanding the result above, the importance of preserving privilege cannot be overstated. Missteps, whether by counsel or the clients themselves, can lead to waiver and disclosure of information otherwise thought to be protected. And that disclosure itself can lead to other disclosures. For example, in *Maxus Energy Corp.*, the disclosure of an executive summary to an adverse party led to the production of a detailed memorandum referenced in the disclosed summary because the documents were intertwined, and waiver as to the first resulted in waiver as to the second.[191]

To prevent this, privilege must be preserved during litigation by counsel, but also by the client prior to any disputes arising. Accordingly, counsel should caution their clients to be mindful of what is being shared, whom it is being shared with, and the potential impacts of improper disclosure. This is particularly important where directors or employees may have dual or multiple roles.

During litigation, it is paramount that counsel take steps to maintain the shield of privilege. This typically arises in the discovery phase of the dispute and continues through trial. First, in the form of responses and objections to discovery requests, prudent counsel will include clarifications that any responses to discovery requests are not intended to be a waiver of any applicable privilege, and that the responding party will only be producing non-privileged documents or information responsive to the respective request. Further, it is advisable for counsel to obtain an agreed-upon protective order prior to the production of documents.[192] Not only does this allow for an agreed-upon process for designating information as confidential or professionals' eyes only, but it should also detail the parties' agreement on how to handle inadvertently produced privileged information during the proceeding. For example, most protective orders include a process for clawing back inadvertently produced privileged information, as well as mandating the receiving party's obligations with regard to that information—typically the requirement to certify the destruction of that information and any notes or impression arising from the same.[193]

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[189] *See id.* at 148:1–152:10.

[190] *See* Transcript of Zoom Hearing, RE: Debtors' First Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code at 123:19–127:21, *In re* Gulf Coast Health Care, LLC, No. 21-11336 (Bankr. D. Del. Apr. 19, 2022), ECF No. 1190.

[191] *In re* Maxus Energy Corp., No. 16-11501, Adv. 18-50489, 2021 WL 924302 at *2 (Bankr. D. Del. Mar. 11, 2021).

[192] *See* Del. Bankr. L.R. 7026-1(a) (2023) ("Parties are expected to confer and in good faith attempt to reach agreement cooperatively on how to conduct discovery under FED. R. CIV. P. 26–36 and these Local Rules.").

[193] *See id.* Rule 9019-5(d)(vii).

Once discovery has commenced and the parties set their expectations through an appropriate protective order, documents are typically produced and depositions scheduled. Here, counsel must be mindful of protecting privilege both in preparation sessions with the deponent as well as during the deposition itself. During the preparation, counsel is well-advised to remind the deponent of the scope of any applicable privileges, to be mindful to not disclose privileged information, and importantly, to allow time between a question and the answer for counsel to interject and either caution that the answer not divulge privileged information or to instruct the deponent to not answer the question at all.

Nevertheless, in its effort to preserve and protect the privilege, counsel should remain mindful of its client's evidentiary burdens at trial. By strictly adhering to privilege, counsel may find itself short of evidence at trial, where the devastating consequences of such a decision could arise. Indeed, Judge Silverstein cautioned counsel on this issue in *Imerys*.[194] Thus, if privileged material is needed to satisfy the required burden of proof, counsel should determine a strategy to limit the privilege waiver only to the extent necessary. This could include unilateral limited disclosure as discussed above, notwithstanding the potential risks of such a strategy. More ideally, however, would be entering into a Rule 510(f) stipulation allowing for the production and use of such information in the proceeding without such use constituting a waiver.[195]

2. Define the scope of mediation upfront in a court order

The chapter 11 plan process itself is a structured negotiation that is overseen by a third-party neutral, *i.e.,* the bankruptcy judge, and often involves multiple parties (and loosely allied groups of parties) sparring over multiple discrete but often interconnected issues. Negotiations concerning a chapter 11 plan entail resolving such disputes through separate mediations with separate parties, and pulling these parties together to air their differences and assist counsel and their clients in coming to a compromise on the various issues.

To ensure an effective process, both with respect to plan negotiations and narrower disputes, parties should attentively determine the nature and scope of the mediation before it commences. The 2022 changes to the Delaware Mediation Rule and the lessons from recent cases such as *In re Boy Scouts of America* echo the importance of parties defining the scope of mediation upfront.

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[194] *See* Transcript of Hearing to Appoint Mediator at 38:24–39:3, *In re* Imerys Talc America, Inc., No. 19-10289 (Bankr. D. Del. Nov. 15, 2021), ECF No. 4355 ("And I suggest that the debtors, as they're going through mediation, think about how they're going to prove their case at confirmation, and suggest you not simply rely on the fact that a mediation occurred, if that's what you're planning to do.").

[195] *See* DEL. R. EVID. 510(f) (2017) ("Notwithstanding anything in these rules to the contrary, a court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other proceeding.").

On February 1, 2022, the Delaware Bankruptcy Court revised the local rules regarding mediations held under Del. Bankr. L.R. 9019-5 (the "Delaware Mediation Rule"). The old Delaware Mediation Rule provided, *inter alia*, a general prohibition against divulging, outside of the mediation, any information disclosed by parties or witnesses in the course of the mediation.[196] It also discussed the applicability of relevant privilege rules, and provided that no person shall seek discovery from any participant in the mediation with respect to information disclosed during the mediation.[197] Further, the old Delaware Mediation Rule required all parties, mediators, and mediation participants to protect proprietary information.[198]

The latest Delaware Mediation Rule clarifies the language in the earlier version of the rule; in abandoning the "in the course of the mediation" standard, the new rule instead protects against divulgence of information disclosed by parties or witnesses "to or in the presence of the mediator, or between the parties during any mediation conference."[199] The new version of the rule also contains a new section for confidential submissions to the mediator, whereby any document or information that was prepared by any participant to the mediation and submitted to the mediator is non-discoverable, regardless of whether it was shared with other participants in the mediation during a mediation conference.[200] This attempt at clarifying mediation protections and the scope of confidentiality reflects the preference of the court to minimize any ambiguity about information utilized in or for the purposes of mediation that can be discoverable. Nevertheless, the new Delaware Mediation Rule also clarifies that otherwise admissible documents do not become inadmissible simply by being shared or disclosed during the mediation.[201]

In *Boy Scouts*, with approximately 275 lawsuits pending in state and federal courts across the United States asserting sexual abuse related claims, the Boy Scouts of America ("BSA") began exploring strategic options for achieving an equitable global resolution of abuse claims by engaging in discussions with affected parties, including insurers and attorneys representing significant numbers of abuse claimants, and other creditors.[202] After these global mediation and settlement efforts failed,[203] BSA filed for bankruptcy. In its first day filings, BSA requested the bankruptcy court appoint mediators and mandate mediation of various disputes (the "Mediation Motion").[204] BSA's Mediation Motion received several objections and informal comments from parties in interest, regarding the debtors' inadequate

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[196] *See* DEL. BANKR. L.R. 9019-5(d) (2020).
[197] *See id.* Rule 9019-5 (2020).
[198] *See id.*
[199] *Id.*
[200] *See id.* Rule 9019-5(d)(iii).
[201] *See id.* Rule 9019-5(d)(iv) (2022).
[202] *See* Debtor's Informational Brief, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del., Feb. 18, 2020), ECF No. 41.
[203] *See* Declaration of Brian Whittman in Support of the Debtors' Chapter 11 petitions and First Day Pleadings at 24–25, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del., Feb. 18, 2020), ECF No. 16.
[204] *See* Debtor's Informational Brief, *supra* note 203.

consultation/communication with insurers concerning the mediation process, the identity of the mediators, and more notably, the lack of information in the Mediation Motion and related proposed order regarding the scope of mediation, including how the mediation will be organized and which entities and other parties will be directed to participate in the mediation and be bound by its terms.[205]

After a hearing on the motion, BSA submitted a revised order consistent with the court's findings and the record from the hearing as well as the resolutions reached with the objectors.[206] Nevertheless, as mediation proceeded, and as the parties moved toward plan confirmation, potential objectors sought discovery.[207] In response, the debtors filed a motion for a protective order which relied on, among other things, the mediation privilege in seeking to protect various documents from discovery—including board meeting minutes that contained a discussion of the mediation, communications between mediation parties about the settlement, the restructuring support agreement, plan, and related documents, and drafts of settlement proposals exchanged among mediation parties.[208]

Applying the prior version of Local Rule 9019-5, the court found that the case law and commentary concerning the mediation privilege have arisen in the more traditional context of two-party disputes,[209] but the principals of "integrity of the process, [active] party involvement, and informed self-determination . . ."[210] that are hallmarks of two-party mediation do not apply to a multiparty mediation where:

> [n]ot all parties are involved in every aspect of the comprehensive resolution. Not all parties agree with the comprehensive resolution. And even if there is an agreed-to resolution by most or even all of the mediation parties, creditors must still vote on the plan and the Court must still conclude that the relevant standards are met. This is . . . not wholly consistent with self-determination.[211]

In other words, the court determined that attempting to apply the mediation privilege to a multi-party, multi-issue bankruptcy mediation is like trying to fit a

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[205] *See, e.g.*, Century Indem. Co. Limited Objection and Partial Joinder in Part to Limited Objection of Creditors First State Insurance Company and Twin City Fire Insurance Company to Debtors' Motion for Entry of an Order (I) Appointing a Judicial Mediator, (II) Referring Certain Matters to Mandatory Mediation, and (III) Granting Related Relief at 2, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del., Apr. 10, 2020), ECF No. 161; *see also* First State Insurance Company. Limited Objection, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del., Mar. 11, 2020), ECF No. 161.

[206] *See* Certification of Counsel Regarding Debtors' Motion for Entry of An Order (I) Appointing a Judicial Mediator, (II) Referring Certain Matters to Mandatory Mediation, and (III) Granting Related Relief at 1–2, *In re* Boy Scouts of Am., No. 20-10343 (Bankr. D. Del., June 9, 2020), ECF No. 6798.

[207] *See* Transcript of Telephonic Ruling at 2:6–18, *In re* Boy Scouts of America, No. 20-10343 (Bankr. D. Del. Oct. 25, 2021), ECF No. 6798.

[208] *See id.* at 4:12–5:2.

[209] *See id.* at 11:24–12:22.

[210] *Id.* at 12:13–16.

[211] *Id.* at 13:2–13:8.

square peg into a round hole.[212] The court made no ruling as to admissibility but denied, without prejudice, debtors' motion for a protective order with respect to debtors' other requests.[213]

3. Protect yourself with a common interest agreement where possible

As noted above, the common interest privilege can be a useful tool to facilitate discussions surrounding common goals and to offer a shield against legal inquiry into those goals. However, when being challenged, the existence and scope of the privilege can be a fact-intensive inquiry, particularly where the common interest has not been definitively agreed upon by the cohorts. A tool that can be applied to this situation is to memorialize the parties' common interests and understandings in a common interest agreement. While a common interest agreement alone does not establish, or guarantee, the application or preservation of the privilege, it will provide a useful stake in the ground by which the aligned parties can order their discussions and, if necessary, evidence for the court to weigh on the existence and applicability of the privilege.[214]

Such agreements can and should detail the scope of the common interest, including the legal questions, goals, or strategy upon which there is commonality, how the parties intend to coordinate among themselves, their counsel and advisors, confidentiality of the documents, and how to address third-party information requests. These agreements may also detail who will coordinate the communications and the manner the information is identified as being subject to the agreement (*i.e.*, designating emails or correspondence as subject to "common interest privilege").[215] Further, the agreement should contemplate when the common interest concludes and how to handle common interest documents at that time. That may include the timing or triggering event that ends the common interest, as well as outlining the parties' respective obligations for the handling of information that was exchanged during the period of common interest and going forward. Given the nuances between jurisdictions in the application of the common interest privilege, counsel should also be mindful when selecting the choice of law provision to govern the parties' agreement.

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[212] *See id.* at 11:24–12:2.

[213] *See id.* at 15:8–15:11.

[214] *See In re* Simplexity, LLC, 584 B.R. 495, 499 (Bankr. D. Del. 2018) (explaining that common interest agreement alone "does not create the common interest privilege").

[215] For example, ensuring that counsel is involved in applicable common interest communications to prevent an inadvertent waiver from occurring. *See, e.g.*, Gelman v. W2 Ltd., 2016 WL 8716248, at *6 (E.D. Pa. Feb. 5, 2016) (explaining that the common interest privilege and related agreement did not protect communications between principals "outside the presence of counsel" and that to the extent the common interest agreement sought to protect any communications regardless of their legal nature, then the agreement would be invalid or unenforceable).

B. Advice for Non-Participants

1. Preserve evidentiary record

a. Depositions

When taking a deposition, counsel for the party who is not included within the mediation or common interest privilege must be mindful of this additional layer of potential privilege when questioning a deponent. While it is typical that counsel asking the questions is not intending to seek privileged communications, the questioner should be mindful of when a privilege objection is being raised and the basis of that objection. For example, if a question regarding the consideration parties have provided to support third-party releases is met with a mediation privilege objection, the questioner should establish a record regarding the scope of that claimed privilege and whether discovery into that area is being blocked. This includes confirming that the defending counsel is not just cautioning the witness but actually instructing the witness not to answer. Similarly, if an objection is raised as to a common interest privilege, it is advisable to get counsel to define the contours of that common interest on the record, such as when the common interest arose, the basis of the commonality of interests, and whether there is a formal agreement memorializing that interest. This allows the questioning attorney to shape a response at the moment of the objection, as well as creating a record in the event of motion practice or when it comes time to address what is or is not admissible at an evidentiary hearing or trial. The latter consideration becomes particularly important in the event the objecting side seeks to introduce testimony or evidence on the very issue it precluded inquiry into during discovery. In short, be sure to preserve the record so that the same information cannot be sprung on you later in the case after discovery has closed.

b. Trial

Much like during depositions, should a witness's examination seek privileged information in open court that was not disclosed during discovery or is otherwise protected, or if a potentially privileged document is to be presented, counsel should be prepared to object and argue the merits of the objection with the Court to preserve the privilege. In Delaware, such an objection would rely on DRE 507,[216] and counsel should be prepared to discuss the scope of privilege, the participants involved in the communication or document at issue, whether the privilege dispute was previously brought to the Court's attention and if not, why, and to request an in camera review, if necessary.

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[216] *See* DEL. R. EVID. 507 ("A person has a privilege to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person.").

2. Object up front

As discussed at length in this article, one of the emerging uses of mediation is to allow the mediation parties to share information with adversaries under the guise of the mediation process. While the use of mediation as a sword in this fashion has been questioned, parties who are not participating in plan mediation should be prepared to object to a motion to appoint a mediator or establish a mediation process. By raising these issues at the outset, outsiders to the mediation may be able to clarify their rights with respect to the discoverability of key information or at least preserve the ability to raise those issues in the future. By failing to object to the proposed mediation order, parties may be barred from seeking relevant information as the mediation progresses.[217]

An example of the type of objection that can be filed is the limited objection filed by Johnson & Johnson ("J&J") in the *Imerys* bankruptcy.[218] In *Imerys*, four different parties sought the entry of a mediation order to define the scope of the mediation over the debtor's plan and the treatment of talc claims.[219] J&J filed a limited objection to those motions, asking the court to apply limitations on the mediation privilege to ensure that the mediation privilege was not abused to prejudice parties not involved in the mediation.[220] While acknowledging the critical importance of honest and open discussions to successful mediations, J&J argued that "the promotion of frank discussions is not a legitimate basis for denying discovery regarding issues addressed during the mediation that directly impact non-mediating parties, nor is it a basis to abuse the mediation privilege."[221] Citing *Boy Scouts*, J&J argued that providing clarity up front on the scope of the mediation and the applicable mediation privilege is better for everyone involved because it can serve to minimize future discovery disputes.[222] Ultimately, J&J resolved its objection by agreeing to the following language, which was incorporated into the mediation order:

> [N]otwithstanding entry of this Order, the rights and arguments of all parties to the Mediation and other parties-in-interest in the Imerys Cases and the Cyprus Case with respect to the discoverability or admissibility of information and documents exchanged in connection with the Mediation are expressly preserved and nothing in this Order precludes any party from obtaining such discovery or

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[217] *See* Transcript of Telephonic Ruling at 58:4–19, *In re* Boy Scouts of Am. No. 20-10343 (Bankr. D. Del. 2022), ECF No. 6000.

[218] *See* Johnson & Johnson and LTL Mgmt. LLC's Omnibus Ltd. Objection to the Motions Referring Certain Matters to Mediation ("Objection to Mediation") at 3, *In re* Imerys Talc Am., Inc., 2021 WL 4786093 at *14.

[219] *See In re* Imerys Talc Am., Inc., 2021 WL 4786093 at *1 (noting the outcome in this case determines whether the voting class has accepted the plan, and whether debtors can vote to support an argument that they are entitled to a section 524(g) injunction).

[220] *See* Objection to Mediation*, supra* note 219, at 3.

[221] *Id.* at 4.

[222] *See id.* at 5–6.

> admitting such information or documents in evidence, if otherwise appropriate, including after considering any applicable privileges or protections.[223]

For outsiders to the mediation process, this language can serve as a template to preserve their right to discovery in connection with any settlement arising out of the mediation.

Later, a group of insurers who had participated in the *Imerys* mediation process filed a motion for reconsideration of the mediation order to require the parties to provide them with information shared during the mediation process among other mediation participants.[224] These insurers argued that they had largely been left out of the mediation process and had only participated in one mediation session with the mediators.[225] More importantly, they argued that other parties to the mediation (i.e. the debtors and their tort committees) had been engaged in significant discussions and had shared large numbers of documents with each other.[226] Citing the arguments of counsel at the original hearing regarding the importance of a free flow of information, the insurers argued that they should be entitled to the same flow of information as the other mediation parties.[227] The debtors and tort claimants committees all objected to the relief sought, arguing that the mediation process was really a series of separate mediations and that the insurers had been involved in all discussions related to insurance issues.[228] They also argued that the insurers were not entitled to the requested documents because they are adverse to the other parties with respect to insurance coverage issues and those parties' communications are protected by the common interest privilege.[229] Ultimately, Judge Silverstein denied the insurers' motion for reconsideration but suggested that they should bring a separate motion if they believe that the debtors were violating the mediation order.[230] Judge Silverstein's ruling on this motion provides further support for the need of a party to

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[223] *See* Order (I) Appointing Mediators, (II) Referring Certain Matters to Mediation, and (III) Granting Related Relief at ¶ 24, *In re* Imerys, No. 19-10289 (Bankr. D. Del. Nov. 30, 2021), at ¶ 24, ECF No. 4835.

[224] *See* RMI Insurers' Motion for Reconsideration of Orders Approving Stipulations and Agreements By and Among the Mediation Parties at 2, *In re* Imerys, No. 19-10289 (Bankr. D. Del. Mar. 23, 2022), ECF No. 4819.

[225] *Id.* at 3.

[226] *Id.* at 3–4.

[227] *Id.* at 4–5.

[228] *See* Objection of the Official Committee of Tort Claimants to the RMI Insurers' Motion for Reconsideration at ¶ 4, *In re* Imerys, No. 19-10289 (Bankr. D. Del. June 15, 2022), ECF No. 4862.

[229] *See* Debtor's Response in Opposition to the RMI Insurers' Motion for Reconsideration of Orders Approving the Mediation Parties and Limited Objection to Debtors' Certification of Counsel Extending Mediation Orders at ¶ 14, *In re* Imerys, No. 19-10289 (Bankr. D. Del. June 15, 2022), ECF No. 4860 (citing *In re* Leslie Controls, Inc., 437 B.R. 493, 502 (Bankr. D. Del. 2010)).

[230] *See* Rick Archer, *Imerys, Cyprus Don't Need To Share Docs With Insurers*, LAW360 (June 22, 2022 2:58 PM EDT), https://www.law360.com/delaware/articles/1505123/imerys-cyprus-don-t-need-to-share-docs-with-insurers?nl_pk=4be44720-1313-47de-bc34-e444da0236cf&utm_source=newsletter&utm_medium=email&utm_campaign=delaware&utm_content=2022-06-23.

object up front if necessary to preserve its rights to discovery or to clarify the scope of the mediation order.

CONCLUSION

Most courts appear to agree that communications directly with the mediator are protected by the mediation privilege, but it is less clear whether settlement communications between the parties outside of the mediator's presence will be protected by the mediation privilege. Likewise, documents that were created prior to the commencement of the mediation likely will not be subject to mediation privilege in most cases, but they could be protected from discovery by the common interest privilege if the communicating parties are not adverse. While the full extent of the contours of the mediation privilege continue to be developed, the scope of the privilege appears to be highly fact dependent. Recent decisions have made clear that it is imperative that parties make efforts to define the scope of the mediation and the related privilege as much as possible in the mediation order. The intentions behind the mediation privilege are best protected when all the parties understand the rules of the mediation process, and by following the steps outlined herein, all parties in interest can preserve their rights and privileges while providing the necessary flexibility to put on their respective evidentiary records at confirmation.