Dallas Bar Association
Friday, October 20, 2017

KEEPING SECRETS:
EVIDENTIARY PRIVILEGES IN BANKRUPTCY CASES

Presented by:
The Honorable Harlin D. Hale
United States Bankruptcy Judge for the Northern District of Texas

-and-

Amber Carson, Esq.
Gray Reed & McGraw, LLP

I. Introduction

"Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."
– Chief Justice Burger, *United States v. Nixon*, 418 U.S. 683, 710 (1974).

The Federal Rules of Evidence provide the basis for most of the privileges that are applicable in bankruptcy cases. Federal Rule of Evidence 501 provides:

> The common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege unless any of the following provides otherwise:
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> • the United States Constitution;
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> • a federal statute; or
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> • rules prescribed by the Supreme Court.
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> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.[1]

Courts are generally careful with evidentiary privileges because they exist to further some greater societal good—greater even than truth in litigation. However, in a bankruptcy context, privileges sometimes take turns which surprise lawyers. The authors hope that this brief presentation will provide you with some guidance on the operation of evidentiary privileges in bankruptcy cases.

II. The Attorney-Client Privilege[2]

The attorney-client privilege has long been a part of our legal system.[3] The doctrine developed in an effort to promote "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."[4] Indeed, the Supreme Court of the United States repeatedly points to this policy concern to justify further expansions of the privilege.[5]

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[1] Fed. R. Evid. 501.

[2] The Ethical Rules of Confidentiality generally prevent an attorney from disclosing privileged information as well, but this article focuses on the evidentiary attorney-client privilege.

[3] *See* Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 Vill. L. Rev. 469, 474 (2003); *see also Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) ("The attorney-client privilege is one of the oldest recognized privileges for confidential communications.").

[4] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[5] *See Swidler*, 524 U.S. at 408 (1998) (expanding the privilege to survive the death of the client); *Upjohn*, 449 U.S.at 394 (expanding the privilege to corporate employees); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 183 (2011) (rejecting the specific compelling interest test because it would compromise the Government's "ability to

In general, the attorney-client privilege protects communications only when the proponent proves "(1) that he made a confidential communication; (2) to a lawyer or his subordinate; (3) for the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding."[6] However, an important distinction must be made: the privilege protects only *communications* not underlying *facts*. Thus, a client cannot be compelled to disclose what he said or wrote to his attorney, but must disclose a relevant fact within his knowledge—even if he communicated that fact to his attorney.[7] Each question of application of the privilege must be determined on a case-by-case basis.[8] Outside of bankruptcy, the privilege belongs to the client, rather than the attorney.[9]

A. The Attorney-Client Privilege of Corporations

Addressing the privilege of a corporation causes unique problems, since it is axiomatic that a corporation must act through agents and cannot speak directly to its lawyers. The seminal case regarding the attorney-client privilege in the corporate context is *Upjohn Co. v. United States*.[10] In *Upjohn*, General Counsel for a pharmaceutical manufacturing corporation received information leading to an internal investigation within the company. The investigation involved questionnaires by and interviews with various employees. When the Internal Revenue Service became involved, it demanded production of the questionnaires and notes from the interviews. The company refused to produce the requested documents on the grounds that they were protected under the attorney-client privilege.[11]

The Court rejected the control group test applied by the circuit court and held that the communications were protected because they were made by employees, concerning matters within the scope of the employees' corporate duties, at the direction of their superiors, to the company's counsel while counsel was acting as such, in order to secure legal advice, and while the employees were aware that they were being questioned so that the company could obtain legal advice.[12] The Court explained that limiting the privilege to those in control of a corporation "overlooks the fact that the privilege exists to protect not only the giving of professional advice to those who can act

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receive confidential legal advice" and because of a difficulty in predicting what would qualify as a "specific competing interest.").

[6] *E.E.O.C. v. BDO USA, L.L.P.*, 856 F.3d 356, 362 (5th Cir. 2017) (citing *United States v. Robinson*, 121 F.3d 971, 974 (5th Cir. 1997)).

[7] *City of Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830 (E.D. Pa. 1962).

[8] *Upjohn*, 449 U.S. at 396; *Trammel v. United States*, 445 U.S. 40, 47 (1980).

[9] *Ramette v. Bame (In re Bame)*, 251 B.R. 367, 372 (Bankr. D. Minn. 2000).

[10] 449 U.S. 383 (1981).

[11] The company also argued that the documents were protected under the work-product doctrine, which will not be discussed for our purposes here.

[12] *Id.* at 394-95.

on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[13]

In the bankruptcy context, the appointment of a trustee can complicate matters relating to attorney-client privilege. During the course of the trustee's duties, she often requires privileged information and records—and the Code requires that the debtor turn over certain things to the trustee.[14] Thus, answering the question, "who owns the attorney-client privilege?" is crucial when representing parties in bankruptcy.

This question was left unanswered in the Bankruptcy Code in the context of a trustee appointed over a corporation. To provide guidance, the Supreme Court in *Commodity Futures Trading Commission v. Weintraub* held in a unanimous opinion that "the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications."[15] The Court applied the rationale from *Butner v. United States*[16] that "in the absence of either (a) direct guidance from the Bankruptcy Code, or (b) some other explicit federal interest, questions presented to the bankruptcy courts are resolved in the same manner in which they are resolved outside of bankruptcy."[17]

Outside of bankruptcy, an inanimate entity's management team has the power to waive the corporation's attorney-client privilege. Thus, in a bankruptcy case, the person who holds the role "most closely analogous" to the role that management holds outside of bankruptcy should be the person who controls the privilege. When a corporation files a petition for relief and a trustee is appointed, management of the debtor retains very little power over the bankrupt corporation. The Court in *Weintraub* found that the person who holds the role "most closely analogous" to the role that management holds outside of bankruptcy is the trustee and granted the trustee the discretion over the use of the corporation's attorney-client privilege.[18] The takeaway here is that when a company files bankruptcy and a trustee is appointed, new management in control of the company (here, the trustee) has control over the corporation's attorney-client privilege, even as to communications made by former management, and even over former management's objection.[19]

However, the ability of a trustee to waive the entity's attorney-client privilege only exists when the "practical consequences of [a given transaction] result in the transfer of control of the

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[13] *Id.* at 390.

[14] *See* 11 U.S.C. §§ 521(a)(3), (a)(4).

[15] 471 U.S. 343, 358 (1985).

[16] 440 U.S. 48 (1979).

[17] Julianna M. Thomas, *Fifteen Years After Weintraub: Who Controls the Individual's Attorney-Client Privilege in Bankruptcy?*, 80 B.U. L. Rev. 635, 653 (2000).

[18] *Weintraub*, 471 U.S. at 353.

[19] *See id.* at 349. This tenant remains true for other entities, as well as corporations. *See United States v. Campbell*, 73 F.3d 44, 47 (5th Cir. 1996) ("the [rule that the bankruptcy trustee may waive the attorney-client privilege on behalf of a corporation] that applies to corporations in bankruptcy should apply to a bankrupt limited partnership.").

business and the continuation of the business under new management."[20] The attorney-client privilege of a corporation does not transfer when there has merely been a transfer of assets.[21] When determining whether a transfer results in a transfer of *control*, rather than merely of *assets*, courts consider the "extent of the assets acquired, including whether stock was sold, whether the purchasing entity continues to sell the same product or service, whether the old customers and employees are retained, and whether the same patents and trademarks are used."[22]

B. The Attorney-Client Privilege of Individuals in Bankruptcy

In *Weintraub*, the Court explicitly stated that the attorney-client privilege does not transfer to a trustee in an individual debtor's estate under the same rationale for transferring the corporate attorney-client privilege and that "[i]f control over that privilege passes to a trustee, it must be under some theory different from the one that we embrace in this case."[23] However, the Court opted not to give any further guidance on that "different theory." Consequently, courts disagree regarding the extent to which the privilege transfers in bankruptcy cases filed by individuals.[24] For purposes of this article, only courts in the Fifth Circuit will be discussed.

After *Weintraub*, courts discussing the individual's attorney-client privilege in bankruptcy generally fall into three groups, holding that: (1) the trustee obtains control of the privilege in all individual bankruptcies, (2) the courts must balance the trustee's need for the information against the potential harm to the debtor, or (3) the individual continues to control the privilege in bankruptcy.[25]

In the Fifth Circuit, the majority of courts have fallen into the last category. The leading case in this group is Judge Abramson's *In re Hunt*.[26] In *Hunt*, in an effort to recover preferential and fraudulent transfers, liquidating trustees sought production of documents and testimony of lawyers and accountants for individual debtors regarding the debtors' prepetition transactions. Under each of the debtors' plans of reorganization, estate assets of the debtors were transferred

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[20] *John Crane Prod. Sols., Inc. v. R2R & D, LLC*, No. 3:11-CV-3237-D, 2012 WL 3453696, at *3 (N.D. Tex. Aug. 14, 2012) (citing *Soverain Software LLC v. Gap, Inc.*, 340 F.Supp.2d 760, 763 (E.D.Tex.2004).

[21] *Id.*, No. 3:11-CV-3237-D, 2012 WL 3453696, at *3.

[22] *Id*.

[23] *Weintraub*, 471 U.S. at 356-57 ("Under our holding today, [the attorney-client privilege] passes to the trustee because the trustee's functions are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor's directors. An individual, in contrast, can act for himself, there is no 'management' that controls a solvent individual's attorney-client privilege.").

[24] *Compare Whyte v. Williams (In re Williams)*, 152 B.R. 123 (Bankr. N.D. Tex. 1992) (holding that a liquidating trustee acquires control over the individual's attorney-client privilege in bankruptcy), *with In re Hunt*, 153 B.R. 445 (Bankr. N.D. Tex. 1992) (disallowing trustee control over the privilege where the trustee and the debtor are in adversarial positions).

[25] *See* Thomas, *supra* note 16 at 658; *see also In re Bounds*, 443 B.R. 729, 734 (Bankr. W.D. Tex. 2010).

[26] 153 B.R. at 445.

into liquidating trusts. The court first held that it would not recognize an accountant-client privilege[27] before moving on to a discussion of the attorney-client privilege in bankruptcy.

The court reiterated the general principle articulated in *Butner* and *Weintraub* and noted that clients control the attorney-client privilege outside of bankruptcy.[28] The court determined that distinguishing between individuals and corporations in determining whether the privilege transfers to the trustee is completely consistent with the rationale in *Weintraub*. "The individual debtor who seeks legal advice on his own behalf is. . .fundamentally different from the corporate debtor's manager. The manager cannot expect to retain control over his corporation's attorney-client privilege forever, because new management may replace him." The court also pointed out that when the trustee is appointed in an individual case, the trustee assumes control over the individual's *assets*, but not the individual *himself*. The trustee does not manage the affairs of an individual the way that the trustee manages the affairs of a corporate debtor.[29] The court explicitly disagreed with the holding of *Williams,* discussed below, that control over the debtor's attorney-client privilege transferred automatically with the causes of action that were transferred pursuant to the debtor's confirmed plan. "The mere fact that the [debtors], as debtors-in-possession, transferred their avoidance causes of action to the Independent Trustees does not mean they transferred their privileges as well."[30]

Like many courts, the court also placed great importance on the policies behind the privilege and emphasized that "full and frank communication" would "presumably be inhibited if clients cannot expect continued confidentiality when they find themselves in bankruptcy."[31] The court was not swayed by the trustees' argument that the debtors would be left unharmed by the transfer of control over the privilege. "[T]he [debtors'] right to assert the attorney-client privilege does not disappear simply because this Court may think disclosure will not harm them."[32] Thus, the court held that allowing the attorney-client privilege to transfer was not warranted in this instance because it would not comply with the policies behind the privilege or the rationale from *Weintraub*.

The district court in *Yaquinto v. Touchstone, Bernays, Johnston, Beall & Smith, L.L.P.*,[33] cited *Hunt* with approval and held that a trustee was unable to waive an individual debtor's attorney-client privilege. The court explained that allowing the privilege to pass unfettered to the trustee would chill the "full and frank communication" that the privilege is intended to promote. Furthermore, the court disagreed with the bankruptcy court's finding that the Bankruptcy Code provides the theory for such a transfer, stating that "this Court does not believe that the Supreme Court would have engaged in such a lengthy analysis in *Weintraub*, over the corporate structure,

[27] The accountant-client privilege is discussed in part III, below.

[28] *See Weintraub*, 471 U.S. at 353.

[29] *Id.* at 453-54.

[30] *Id*.

[31] *Id*. at 452.

[32] *Id*.

[33] No. CIV. A. 398-CV-1671P, 1999 WL 354228 (N.D. Tex. June 1, 1999).

if the bankruptcy code or the mere filing of bankruptcy provided a trustee with the right to assume the debtor's attorney-client privilege."[34]

More recently, Judge Gargotta also agreed with *Hunt* for the same reasons expressed in *Yaquinto*—allowing the privilege to transfer to the trustee would be against the rationale in *Weintraub* and would not comport with the policy behind the privilege.[35]

On the other side of the fence, falling into the first category, is yet another case out of the Northern District of Texas, which was decided just a few months prior to *Hunt.* In *Whyte v. Williams (In re Williams)*,[36] Judge Felsenthal held that a debtor's attorney-client privilege transfers along with related causes of action under the terms of a debtor's plan of liquidation. The court began its discussion by mentioning yet another principle behind the attorney-client privilege—that "evidentiary privileges operate to exclude relevant evidence and thereby block the judicial fact finding function, they are not favored and, where recognized, must be narrowly construed."[37] He then discussed the holding in *Weintraub*, and explained that when an individual files a chapter 11 petition and becomes a debtor in possession, he becomes a fiduciary with duties to his estate. After citing two cases in which the privilege was transferred to committees along with related causes of action, the court stated that in the instant case, the privilege had to transfer to the trustee along with the Chapter 5 causes of action. According to the court, failing to allow the privilege to transfer along with the causes of action would hamper the trustee's duties to prosecute the causes of action and, in turn, impede a potential benefit to the bankruptcy estate.[38]

> The court, however, seems to have missed the point of *Wientraub*.
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> > What the court failed to recognize, however, is that the *Weintraub* rationale rested on the unique nature of corporations as inanimate entities. An individual, unlike a corporation, controls her own attorney-client privilege at all times outside of bankruptcy. Therefore, the chapter under which an individual files for bankruptcy protection cannot alter her rights under *Weintraub*.[39]

As of the date of this article, there have been no cases in the Fifth Circuit following the rationale of the *Williams* court.

In the middle of the road, some courts have opted for application of a balancing test. In one of the leading cases in this group, *Moore v. Eason (In re Bazemore)*, the court held that a determination of control over the privilege "requires balancing the interests of a full and frank discussion in the attorney-client relationship and the harm to the debtor upon a disclosure with the

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[34] *Id.* at *2.

[35] *Bounds*, 443 B.R. at 734.

[36] 152 B.R. 123 (Bankr. N.D. Tex. 1992).

[37] *Id.* at 127.

[38] *Id.* at 128-29.

[39] Thomas, *supra* note 24 at 660.

trustee's duty to maximize the value of the debtor's estate and represent the interests of the estate."[40] The authors have been unable to find any cases in the Fifth Circuit applying similar rationale. Focusing on the harm to the debtor could be a persuasive argument, but is less so following the court's statement in *Hunt* that control of the privilege does not "disappear" simply because no harm will come to the debtor.[41]

It is clear that management of corporations hold the attorney-client privilege in, and outside, of bankruptcy, *unless* a trustee is appointed. In such a case, pursuant to *Weintraub*, the privilege is transferred to the trustee. In the case of an individual debtor, however, the law is less than clear. Here in the Fifth Circuit, the safest route seems to be to follow the rationale of *Hunt*—that the privilege does not automatically transfer to the trustee upon entering bankruptcy.

C. The Work Product Privilege

The foremost case on the work product doctrine is *Hickman v. Taylor*.[42] In that case, the Supreme Court explained that:

> Proper preparation of a client's case demands that [a lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.[43]

After *Hickman*, the work product doctrine was codified in the Federal Rules of Civil Procedure, made applicable to bankruptcy cases through Federal Rule of Bankruptcy Procedure 7026: "Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."[44]

The burden is on the person who asserts the work product doctrine to establish that the requested documents fall under the privilege.[45] The burden then shifts to the party seeking discovery to overcome that protection by showing that the work products "are otherwise discoverable under Rule 26(b)(1)" and that the party "has substantial need for the materials to

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[40] 216 B.R. 1020, 1024 (Bankr. S.D. Ga. 1998).

[41] *Hunt*, 153 B.R. at 452.

[42] 329 U.S. 495 (1947).

[43] *Id.* at 510–11.

[44] Fed. R. Civ. P. 26(b)(3)(A).

[45] *King v. Odeco Inc.*, 106 F.3d 396 (5th Cir. 1997).

prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[46]

The doctrine protects from discovery work by a lawyer that was prepared in anticipation of litigation, but not that work created "in the ordinary course of business, or pursuant to public requirements unrelated to litigation."[47] Courts are split regarding how to evaluate whether a document was prepared "in anticipation of litigation." In the Fifth Circuit, the test is the more restrictive of the two, and requires that although litigation "need not necessarily be imminent," the "primary motivating purpose" behind the document's creation must be to "aid in possible future litigation."[48]

D. Miscellaneous Issues

Courts have defined several checks on abuse and unwarranted assertion of the attorney-client privilege, most importantly, the crime-fraud exception. As aptly stated by the Supreme Court,

> The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—'ceas[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing.'[49]

Other exceptions or rules have been created, namely the "common interest" doctrine, and the law of waiver,[50] which will not be discussed for purposes of this article.

On an ending note, a court in the Southern District found that when an attorney signs a proof of claim he or she becomes a fact witness, resulting in waiver of the work-product and attorney-client privilege regarding the facts alleged within the claim.[51] The new proof of claim form, Form B 410, took effect on December 1, 2015.

III. The Accountant-Client Privilege

For over forty years, federal courts have followed the rule that "no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in

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[46] Fed. R. Civ. P. 26(b)(3)(A)(ii)-(iii).

[47] *United States v. El Paso Co*., 682 F.2d 530, 542 (5th Cir. 1982).

[48] U*nited States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981); *El Paso Co*., 682 F.2d at 542.

[49] *United States v. Zolin*, 491 U.S. 554, 562–63 (1989) (citing 8 J. Wigmore, Evidence § 2298 (McNaughton rev. 1961)).

[50] *See* Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 Vill. L. Rev. 469, 510 (2003).

[51] *Schmidt v. Rodriguez (In re Rodriguez)*, 2013 WL 2450925, at 7 (Bankr. S.D. Tex. June 5, 2013).

federal cases."[52] It's safe to say that since the Supreme Court in *Couch* first articulated this tenet, courts have consistently rejected the application of the accountant-client privilege in federal cases dealing with matters under federal law.[53]

However, if an adversary proceeding involves claims under purely state law, the accountant-client privilege might apply. For instance, one court allowed the privilege to stand when an adversary proceeding involved claims and defenses relating to breach of contract, fraud, and misrepresentation claims grounded in state law.[54] Importantly for our purposes, Texas does not recognize the accountant-client privilege.[55] The takeaway here is—know that this privilege exists, but do not spend much time worrying about it unless you have to apply the state law of a jurisdiction that recognizes the accountant-client privilege.[56]

IV. The Fifth Amendment Privilege

"While a debtor is free to assert his fifth amendment privilege against self-incrimination during the bankruptcy proceedings, he may not turn the shield of the Fifth Amendment into a sword to cut his way to a discharge while carrying his property with him."[57]

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[52] *Couch v. United States,* 409 U.S. 322, 335 (1973).

[53] *Int'l Horizons, Inc. v. Committee of Unsecured Creditors (In re Int'l Horizons, Inc.)*, 689 F.2d 996, 1003–04 (11th Cir. 1982); *Doubet, LLC v. Palermo (In re Palermo)*, 370 B.R. 599 (Bankr. S.D.N.Y. 2007); *In re Oxford Royal Mushroom Prod., Inc.*, 41 B.R. 863, 864 (Bankr. E.D. Pa. 1984); *In re Mori*, 1 B.R. 265, 267 (Bankr. S.D. Fla. 1979) ("The accountant-client privilege, if allowed in a voluntary bankruptcy proceeding, as to information relating to assets, liabilities and income of a voluntary Debtor, would severely prejudice creditors and destroy the concepts of full disclosure embodied in the Bankruptcy Act. The 'light of reason and experience' as referred to in Rule 501, requires otherwise.")

[54] *Providers Fid. Life Ins. Co. v. Tidewater Grp., Inc. (In re Tidewater Grp., Inc.)*, 65 B.R. 179, 183 (Bankr. N.D. Ga. 1986).

[55] *United States v. White*, 326 F. Supp. 459, 462 (S.D. Tex. 1971), *aff'd*, 477 F.2d 757 (5th Cir. 1973), *adhered to on reh'g*, 487 F.2d 1335 (5th Cir. 1973); *Cantu v. TitleMax, Inc.*, No. 5:14-CV-628 RP, 2015 WL 5944258, at *6 (W.D. Tex. Oct. 9, 2015) ("[I]in Texas, accountant-client communications are confidential, but not privileged.").

[56] **Arizona:** Ariz. Rev. Stat. Ann. § 32-749; *State v. O'Brien*, 601 P.2d 341 (Ariz. Ct. App. 1979); **Colorado:** Colo. Rev. Stat. Ann. § 13-90-107; *Neuster v. Dist. Court*, 675 P.2d 1 (Colo. 1984); **Florida:** Fla. Stat. Ann. §§ 90.5055 and 473.316; *Choice Rest. Acquisition Ltd. v. Whitley, Inc.*, 816 So. 2d 1165 (Fla. Dist. Ct. App. 2002); **Georgia:** Ga. Code Ann. § 43-3-32(b); *GMAC v. Bowen Motors, Inc.*, 306 S.E.2d 675 (Ga. Ct. App. 1983); **Idaho:** Idaho Code Ann. § 9-203A; Idaho R. Evid. 515; **Illinois:** 225 Ill. Comp. Stat. 450/27; *W. Emp'rs Ins. Co. v. Merit Ins. Co.*, 492 F. Supp. 53 (N.D. Ill. 1979); **Indiana:** Ind. Code § 25-2.1-14-1; *First Cmty. Bank & Tr. v. Kelley, Hardesty, Smith & Co.*, 663 N.E.2d 218 (Ind. Ct. App. 1996); **Kansas:** Kan. Stat. Ann. § 1-401; *Holley v. Allen Drilling Co.*, 740 P.2d 1077 (Kan. 1987); **Louisiana:** La. Rev. Stat. Ann. § 37:86; **Maryland:** Md. Code Ann., Cts. & Jud. Proc. § 9-110; *Sears, Roebuck & Co. v. Gussin*, 714 A.2d 188 (Md. 1998); **Michigan:** Mich. Comp. Laws § 339.732; **Missouri:** Mo. Rev. Stat. § 326.322; **Nevada:** Nev. Rev. Rev. Stat. §§ 49.125-49.205 (with some specific exceptions); **New Mexico:** N.M. Stat. § 61-28B-24; **Oklahoma:** Okla. Stat. tit. 12, § 2502.1; **Pennsylvania:** 63 P.S. § 9.11a; *Agra Enters., Inc. v. Brunozzi*, 448 A.2d 579 (Pa. Super. Ct. 1982); **Tennessee:** Tenn. Code Ann. § 62-1-116.

[57] *U.S. Trustee v. Gregg (In re Gregg)*, 510 B.R. 614, 626 (Bankr. W.D. Mo. 2014) (citing *Bee v. Brady (In re Brady)*, 154 B.R. 82, 86 (Bankr.W.D.Mo.1993) (citation omitted), *abrogated on other grounds*, *Cohen v. de la Cruz*, 523 U.S. 213 (1998).

While not especially common in bankruptcy cases, the Fifth Amendment to the United States does have an application in some cases. The Fifth Amendment provides, in pertinent part, "No person … shall be compelled in any criminal case to be a witness against himself … ." Although the Amendment only specifies application to "criminal" cases, the privilege has been held to apply in "any proceeding, civil or criminal ... and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might so be used."[58] The application of the privilege is especially difficult in bankruptcy cases, when it directly conflicts with the debtor's obligations to disclose the particulars of his financial affairs.[59]

The application of the Fifth Amendment privilege is limited, and does not apply to future offenses (with rare exception), when perception of danger of prosecution is imaginary or fanciful,[60] to artificial persons,[61] when "there can be no further incrimination," or to testimony that is not compelled.[62] However, in order to be self-incriminating for purposes of the privilege, the testimony need only prove useful in providing a "link in a chain of evidence" for a prosecutor.[63] Another important note is that a debtor cannot make a blanket assertion of his or her Fifth Amendment privilege on his or her schedules, or refuse to answer all questions when posed.[64] The court, not the person claiming privilege, must ultimately make the determination of whether the privilege was properly invoked in each instance.[65]

As with all privileges, the Fifth Amendment privilege can be waived. However, unlike other privileges, the privilege is not as lightly inferred and "courts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights.'"[66] Indeed, only under the most compelling circumstances should a waiver of the Fifth Amendment's privilege against self-

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[58] *Kastigar v. United States,* 406 U.S. 441, 444–45 (1972); *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

[59] *See* 11 U.S.C. § 521.

[60] *United States v. Apfelbaum,* 445 U.S. 115, 128 (1980); *Shakman v. Democratic Org. of Cook Cty.*, 920 F. Supp. 2d 881, 887 (N.D. Ill. 2013).

[61] Or to representatives of artificial persons as to corporate documents. *See Braswell v. United States*, 487 U.S. 99 (1988).

[62] *Apfelbaum*, 445 U.S. at 130–31; *Mitchell v. United States*, 526 U.S. 314, 326 (1999); *In re Cassandra Grp.*, 338 B.R. 600 (Bankr. S.D.N.Y. 2006); *see also* 3 COLLIER ON BANKRUPTCY ¶ 344.03[4][c] (Alan N. Resnick & Henry J. Sommer eds,.16th ed).

[63] *United States v. Hubbell*, 530 U.S. 27, 37–38 (2000); *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

[64] *Gustafson v. Seaver (In re Hecker)*, No. CIV.10-1904 (MJD), 2010 WL 1875553 (D. Minn. May 10, 2010); 3 COLLIER ON BANKRUPTCY ¶ 344.03[b].

[65] *Hoffman*, 341 U.S. at 486; *In re Brogna*, 589 F.2d 24, 27 (1st Cir.1978).

[66] *Emspak v. United States*, 349 U.S. 190, 198 (1955) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

incrimination be inferred.[67] Notwithstanding the foregoing, if a debtor testifies to incriminating facts, the court may find that the debtor waived his or her right to invoke the privilege.[68]

> Once waiver is made by disclosure of an inculpating fact, the privilege is also waived as to the details of that fact unless such disclosure would further incriminate the person. Thus, when a person has testified to a criminating fact but claims privilege as to the details, the court must determine whether the answer to that particular question would subject the witness to a real danger of further crimination.[69]

The most widely-adopted test for determining whether a waiver should be inferred from prior testimonial statements was articulated by the Second Circuit in *Klein v. Harris*.[70] Waiver should only be inferred from a witness' prior statements if "(1) the witness' prior statements have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth, and (2) the witness had reason to know that his prior statements would be interpreted as a waiver of the [F]ifth [A]mendment's privilege against self-incrimination."[71] Production of a document does not necessarily mean that the debtor waived his ability to plead the Fifth when questioned about the document.[72]

The Fifth Amendment privilege applies in a limited respect to turnover of documents by a debtor. It is only in rare circumstances that the *contents* of documents of a debtor may be privileged.[73] This is because when documents were prepared voluntarily, "they cannot be said to contain compelled testimonial evidence."[74] Indeed, courts have held that the contents of personal documents of a debtor were not protected under the Fifth Amendment privilege.[75]

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[67] *Klein v. Harris*, 667 F.2d 274, 288 (2nd Cir. 1981).

[68] *Rogers v. United States*, 340 U.S. 367, 373 (1951); *In re Marble*, No. 07-50099-RLJ-7, 2008 WL 2048025, at *3 (Bankr. N.D. Tex. May 9, 2008).

[69] *Marble*, No. 07-50099-RLJ-7, 2008 WL 2048025, at *3 (internal citations omitted).

[70] 667 F.2d at 287. Courts in the Fifth Circuit have also adopted this test. *See In re Hulon, 92 B.R. 670 (Bankr. N.D. Tex. 1988)*; *In re Mudd*, 95 B.R. 426, 429–30 (Bankr.N.D.Tex.1989); *Marble*, No. 07-50099-RLJ-7, 2008 WL 2048025, at *3; *Grayson v. State*, 684 S.W.2d 691 (Tex.Crim.App.1984); *Allstate Ins. Co. v. Plambeck*, No. CIV.A. 12-175, 2012 WL 1597308, at *6 (E.D. La. May 7, 2012); *Balderas Cortez v. State*, 735 S.W.2d 294, 303 (Tex. App.-Dallas 1987).

[71] *Klein*, 667 F.2d at 287.

[72] *See Arndstein v. McCarthy*, 254 U.S. 71, 72 (1920)("The schedules, standing alone, did not amount to an admission of guilt or furnish clear proof of crime, and the mere filing of them did not constitute a waiver of the right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him.").

[73] *Butcher v. Bailey*, 753 F.2d 465, 469 (6th Cir. 1985) "[I]f contents are protected at all, it is only in rare situations").

[74] *Fisher v. United States*, 425 U.S. 391, 409–10 (1976).

[75] *See, e.g. Butcher,* 753 F.2d at 469 ("The records at issue in the instant case are personal records, but only those personal records which relate to property of the bankrupt's estate. Information relating to property of the estate is not so intimately personal as to evoke serious concern over privacy interests, particularly in bankruptcy where the trustee has a strong interest in knowing the nature and scope of the estate's holdings."); *Slone-Stiver v. Broock (In re Tower Metal Alloy Co.)*, 200 B.R. 598, 606 (Bankr. S.D. Ohio 1996).

However, "[t]he act of producing evidence … nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced"[76] and thus, production can be protected if the act of production *itself* is both testimonial and incriminating.[77] This protection is commonly called the "act of production privilege."[78] There are three ways that production can be testimonial: "by acknowledging that the documents exist; by acknowledging that they are in the control of the person producing them; or by acknowledging that the person producing them believes they are the documents requested and thereby authenticating them for purposes of Fed.R.Evid. 901."[79]

The act of production is not testimonial if each of the three above-listed acknowledgements would otherwise be a "foregone conclusion."[80] As explained by the Honorable Leif Clark, "In other words, if the government (or here, the trustee) already knows that the requested documents exist, then the act of producing those documents would not be 'testimonial;' it would not serve as an implicit admission of the existence of the documents."[81]

The act of production privilege also does not apply if the requested documents fall under the "required records" exception to the privilege. If a person is required under law to maintain certain records, for instance, W–2 forms, 1099 statements, tax returns, and employee earnings statements,[82] or records created by a trustee during the course of his official duties,[83] the act of production privilege does not apply when those records are ordered to be produced.[84] To qualify as a required record, a document must satisfy a three-part test: "(1) it must be legally required for a regulatory purpose, (2) it must be of a kind that the regulated party customarily keeps, and (3) it must have assumed 'public aspects' which render it analogous to public documents."[85]

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[76] *Fisher*, 425 U.S. at 410; *United States v. Doe*, 465 U.S. 605, 612 (1984); *Miller v. Cabcrane, Inc. (In re Sambrano Corp.)*, 441 B.R. 562, 566 (Bankr. W.D. Tex. 2010)("[B]y producing documents, the producing party implicitly concedes possession and control of the documents and indicates that the documents produced are, in fact, the documents described in the subpoena, thus implicating the testimonial prerequisite for Fifth Amendment protection.").

[77] *Doe,* 465 U.S. at 611. However, a person can be compelled, pursuant to subpoena, to disclose the existence of incriminating documents if a grant of immunity under 18 U.S.C. §§ 6002–03 is given. *Hubbell*, 530 U.S. at 120.

[78] *Sambrano*, 441 B.R. at 566.

[79] *Butcher*, 753 F.2d at 469; *see also* 3 COLLIER ON BANKRUPTCY ¶ 344.03.

[80] *See Fisher*, 425 U.S. at 411; *Doe*, 465 U.S. at 614 n. 13.

[81] *Sambrano*, 441 B.R. at 567.

[82] *See United States v. Clark*, 574 F.Supp.2d. 262, 267 (D.Conn.2008); *Sambrano*, 441 B.R. at 568.

[83] *In re Grand Jury Proceedings*, 119 B.R. 945 (E.D. Mich. 1990).

[84] *See United States v. Doe (In re Two Grand Jury Subpoenae Duces Tecum)*, 793 F.2d 69, 73 (2d Cir.1986) (the required records exception overrides the Fifth Amendment privilege "in situations in which the privilege would otherwise apply...."); *Doe v. United States (In re Doe)*, 711 F.2d 1187, 1191 (2d Cir.1983).

[85] *AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. and Trade Servs. Inc.*, No. 96CIV.9056(JGK)(AJP), 1999 WL 970402, at *1 (S.D.N.Y. Oct. 25, 1999) (citing *Grosso v. United States*, 390

The proper method for courts to utilize when determining whether the Fifth Amendment privilege applies, without requiring the debtor to disclose the very information that he or she believes might be incriminating, is far from clear. In *Boston Children's Heart Found., Inc. v. Nadal-Ginard*,[86] Magistrate Judge Karol discussed this issue and the various procedures that have been employed:

> Some [courts] have required the person claiming the privilege to provide general descriptions of the withheld documents by categories, in the hope that those general descriptions alone would suffice to enable the court to make a reasoned decision. *See, e.g., Butcher v. Bailey*, 753 F.2d 465, 470 (6th Cir.1985). Other courts have required that the documents be submitted for in camera inspection. *See, e.g., In re Sealed Case*, 950 F.2d at 738–39; *United States v. Kretz Equip. Co*., No. 82–681, 1985 WL 1489, at *1 (N.D.Ind.1985). Another possible approach would be to require the person claiming the privilege to submit for in camera inspection a complete, item by item, index of the documents, perhaps accompanied by an explanation of why the production of any particular document whose description appeared benign was nevertheless potentially incriminating. *Cf. McIntyre's Mini Computer Sales Group, Inc. v. Creative Synergy Corp*., 115 F.R.D. 528, 532 (D.Mass.1987) (ordering the privilege claimant, among other things, to submit a written explanation of why the act of production of each requested document might be incriminating). Along the same lines, the claimant could, through the use of either live testimony at an ex parte hearing or an ex parte affidavit, provide general or even specific information sufficient to establish a foundation for the claim of privilege. Clearly, no single approach is ideal for all the varied cases and circumstances in which the issue is apt to arise; but equally clearly, a person who asserts that the compelled production of documents in his possession would violate his Fifth Amendment right against self-incrimination must somehow provide sufficient information to the court to enable it to determine whether all the requirements for invoking the privilege are satisfied. See *Butcher*, 753 F.2d at 470; *McIntyre*, 115 F.R.D. at 531.[87]

One thing is clear—the decision to invoke the Fifth Amendment privilege should not be made lightly. Courts can make an adverse inference when a debtor claims the privilege,[88] and such an inference can lead to a denial of discharge.[89]

U.S. 62, 67–68 (1968)); *see also In re Grand Jury Subpoenas*, 772 F.Supp. 326, 331 (N.D. Tex. 1991) (applying same three-part test for required records exception to act-of-production privilege).

[86] No. C.A. 93-12539-REK, 1994 WL 129648, at *4 (D. Mass. Mar. 31, 1994).

[87] *Nadal-Ginard*, No. C.A. 93-12539-REK, 1994 WL 129648, at *5.

[88] *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a Civil cause.'" (citing 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961))).

[89] *See, e.g. Gregg*, 510 B.R. at 626.

V. Statements Made In Mediation and Settlement Offers[90]

A. Reliance on Rule 408

There is no federal bankruptcy rule on mediation confidentiality.[91] However, Federal Courts are governed by 28 U.S.C. §651(b) and 652(a)[92] which authorize district and bankruptcy courts to adopt local rules to encourage ADR proceedings as an alternative to trial.[93] For instance, the Southern District of Texas has adopted Local Rule 16.4.A to encourage and specifically address mediation in a bankruptcy context among others.[94] In doing so, the Southern District also instated Local Rule 16.4.I, which provides:

> Confidentiality, Privileges and Immunities. All communications made during ADR proceedings (other than communications concerning scheduling, a final agreement, or ADR provider fees) are confidential, are protected from disclosure, and may not be disclosed to anyone, including the Court, by the provider or the parties. Communications made during ADR proceedings do not constitute a waiver of any existing privileges and immunities. The ADR provider may not testify about statements made by participants or negotiations that occurred during the ADR proceedings. This provision does not modify the requirements of 28 U.S.C. § 657 (1998) applicable to non-binding arbitrations.[95]

The Western District of Texas enacted a similar local rule.[96] For now, no such Local Rule exists speaking to statements made in mediation or settlement offers in the Northern or Eastern Districts of Texas.[97]

This absence likely forces local litigators to unduly rely on the Federal Rules of Evidence to shield communications made during mediation or settlement offers. This reliance is not without

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[90] The authors thank Hunter S. Higgins for his contributions to this section of the paper.

[91] Donald L. Swanson, *Mediation Confidentiality: Federal Evidence Rule 408 Leaks Like a Sieve*, MEDIATBANKRY, Nov. 11, 2016, available at https://mediatbankry.com/2016/11/01/mediation-privilege-rule-408-leaks-like-a-sieve/.

[92] Michael J. Durrschmidt, *Impact of the Texas ADR Act (Chapter 154 Civil Practice and Remedies Code) on the Role of the Mediator*, (Feb. 6, 2017), Hirsch & Westheimer, available at http://www.hirschwest.com/impact-of-the-texas-adr-act-chapter-154-civil-practice-and-remedies-code-on-the-role-of-the-mediator/.

[93] *Alternative Dispute Resolution Act of 1998*, 28 U.S.C. § 651(b). ("Each United States district court shall authorize, by local rule adopted under 2071(a), the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance with this chapter, except that the use of arbitration may be authorized only as provided in section 654.").

[94] *See In re Smith*, 524 B.R. 689, 702 (Bankr. S.D. Tex. 2015).

[95] S.D. Tex. L.R. 16.4.I.

[96] *See* W.D. Tex. Local Court Rule CV-88(h).

[97] *See* N.D. Tex L.B.R. 9019-2; N.D. Tex. L.R. 16.3; E.D. Tex. L.B.R.; E.D. Tex. L.R.

risk, as the applicable Rule 408[98] has permitted seemingly privileged mediation and settlement discussions to be admitted in a variety of circumstances, including to determine the amount-in-controversy, statute of limitations, reasonableness of an attorney fee award, and whether a settlement agreement has been performed or breached,[99] as well as in a discovery context.[100] Federal Rule of Evidence 408 (Compromise Offers and Negotiations) provides:

> (a) Prohibited Uses. Evidence of the following is not admissible--on behalf of any party--either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> > (1) furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and
> >
> > (2) conduct or a statement made during compromise negotiations about the claim--except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.[101]

Part of the problem with relying on Rule 408 is that it is intended to bar the admission of evidence relating to a "disputed claim." Determining when a claim is in dispute, particularly within a bankruptcy context, can prove to be an ambiguous and slippery pursuit.[102] For instance, the Eleventh Circuit held that where the validity of a monetary claim and the amount due are admitted, "Rule 408 does not bar evidence relating to the concessions or any offer to pay as might arise naturally during a settlement offer or mediation."[103] To make matters more convoluted, mediation and settlement discussions may qualify under the exception enumerated in Rule 408(b) so long as a party can effectively argue such settlement-related evidence is merely being admitted "for another purpose."[104]

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[98] Gerald E. Burns, *Admissibility of Settlement-Related Evidence at Trial,* AMERICAN BAR ASSOCIATION, July 31, 2013, available at http://apps.americanbar.org/litigation/committees/businesstorts/articles/summer2013-0713-admissibility-of-settlement-related-evidence-at-trial.html.

[99] Swanson, *supra* note 82.

[100] *Id.* (finding Fed.R.Bankr.P. 7026 and 9014(c) authorize discovery of nonprivileged matters relevant to a party's claim or defense.).

[101] Fed. R. Evid. 408.

[102] Burns, *supra* note 87.

[103] *Id*.

[104] Fed. R. Evid. 408.

The Fifth Circuit's application of Rule 408 has also proven confusing, in one instance holding that Rule 408 does not cover documents or records exchanged during settlement negotiations that were not created for settlement purposes,[105] and in another that the Rule's "protection extends to legal conclusions, factual statements, internal memoranda and the work of lawyers and non-lawyers alike so long as the communications were 'intended to be part of … negotiations toward compromise.'"[106] Perhaps most troublesome in this discussion arises in connection with the admissibility of settlements with third parties. The Fifth Circuit has held that district courts *should* consider third-party settlements in determining whether to remit damages after trial if they arise from the same transaction as the subject claim, or at least that the claims share a factual nexus.[107]

B. 154.073(a) and (b):

Although not binding upon federal courts, some Texas courts may turn to Sections 154.053 and 154.073 of the Texas ADR Act to inform their adjudication of confidential discussions. If so, there is a significant body of caselaw arising out of interpretations of the Texas ADR Act and its exceptions in admitting mediation and settlement statements. In relevant part, Sections 154.053(b) and (c) prescribe the standards and duties of impartial third parties, which includes mediators:[108]

> (b) Unless expressly authorized by the disclosing party, the impartial third party may not disclose to either party information given in confidence by the other and shall at all times maintain confidentiality with respect to communications relating to the subject matter of the dispute.
>
> (c) Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.[109]

When coupled with Section 154.073(a) and (b), the Texas ADR Act offers a broad scope of confidentiality in settlement and mediation procedures:[110]

> (a) [A] communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject

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[105] *Chenevert v. Springer*, 431 F. App'x 284, 2011 WL 2534192 (5th Cir. June 27, 2011).

[106] *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 295 (5th Cir. 2010).

[107] *Id.* at 297-98.

[108] *Smith v. Smith*, 154 F.R.D. 661, 667 (N.D. Tex. 1994).

[109] Tex. Civ. Prac. & Rem. Code §§ 154.073(b) and (c).

[110] *Michael D. Young & David S. Ross*, *Confidentiality of Mediation Procedures*, C879 ALI-ABA 571, 578 (1993). ("Texas is in the vanguard of affording protection during ADR procedures.").

> to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.
>
> (b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.[111]

However, the above-cited sections of the ADR Act are subject to four enumerated exceptions in subsections 154.073(c) through (f). Most of these exceptions have been addressed by various courts throughout Texas:

In *FDIC v. White*, the Northern District of Texas held that a mediation privilege does not apply at all when parties ask a court to determine the enforceability of an agreement that the parties reached during a mediation.[112] Distinguishing "confidentiality" from "privilege," the court determined that mediation communications should not be privileged when the parties ask the court to consider the propriety of the mediation or the mediated agreement.[113]

In 2010, a Texas Appellate Court determined that compelling discovery and attorney testimony was "barred by sections 154.073(a) and 154.073(b) of the civil practice and remedies code…[and] the trial court abused its discretion by ordering the testimony and production of documents at issue."[114]

A Texas court has found no confidentiality when the material sought did not relate to the substantive issues of the mediation.[115] The lower court ruled that because "the matter in contention concerns only the procedural issue of attendance, not the subject matter of the dispute being mediated" the court's order did not violate the ADR statute.

A court in the Northern District held that § 154.073(c) "provides that oral communications and written materials that are otherwise admissible or discoverable are not made inadmissible or non-discoverable solely because they have been uttered or disseminated in an alternative dispute resolution proceeding. To interpret § 154.073(c) as do defendants would unjustifiably create an exception to the confidentiality proviso of § 154.073(b) that is not expressly set out in the ADR

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[111] Tex. Civ. Prac. & Rem. Code §§ 154.073(a) and (b).

[112] *See FDIC v. White*, 76 F. Supp. 2d 736 (N.D. Tex. 1999).

[113] *See* Eric Laufgraben, *Protecting Mediation Communications in Federal Courts*, UNIVERSITY OF MICHIGAN LAW SCHOOL. ("Notably, the FDIC court never discussed the role of the mediator or what the mediation process looked like. The judge presumed that the same rules apply to settlement negotiations with or without a mediator present. But the court viewed the case at hand as a dispute about contract enforcement -- not about the underlying substance of the parties' original dispute -- and permitted defendants to raise common law defenses to enforcement.").

[114] *See In re Empire Pipeline Corp.*, 323 S.W.3d 308, 315 (Tex. App.-Dallas 2010, no pet.).

[115] *See In re Daley*, 29 S.W.3d 915, 918 (Tex. App.-Beaumont 2000, no pet.).

Act and that should not be impliedly recognized in the face of the Act's pellucid confidentiality requirements."[116]

Also excepted from confidentiality under subsection (c) is an example of videotaping for the purposes of mediation. A Texas Appellate court concluded that "videotapes constitute discoverable material, that the mediation activities did not provide a blanket protection for all such material, and that this particular material is not protected by that privilege."[117]

"A cloak of confidentiality surrounds mediation, and the cloak should be breached only sparingly."[118] In 2013, Hydroscience Techs intended to use discussions from a prior mediation to dispute terms of a settlement agreement. The court found a party may not rely on evidence from a prior mediation to create a fact issue thereafter because "such information is protected by the mediation privilege." The court, however, held that where a document used in mediation discussions makes references outside of its four corners, such parol evidence would not be protected by mediation privilege and could be admissible to create a fact issue.[119]

In 2002, a Texas Appellate court ordered mediation in a wrongful death action. The court held, "[W]here a claim is based upon a new and independent tort committed in the course of the mediation proceedings, and that tort encompasses a duty to disclose, section 154.073 does not bar discovery of the claim where the trial judge finds in light of the 'facts, circumstances, and context,' disclosure is warranted."[120]

C. Miscellaneous Issues

The Bankruptcy Code grants creditors' committees with broad power in bankruptcy cases. Under Section 1103(c), the role of a creditors' committee is generally to advise debtors, exert influence in bankruptcy cases, protect and promote the interests of the collective unsecured creditors, and adhere to any fiduciary duties arising out of the new relationship. Creditors' committee members owe a duty of confidentiality to each other and to the creditors that they represent.[121] Creditors' committees are bound by a Duty of Confidentiality in addition to traditional fiduciary duties.[122] The duty of confidentiality prevents the committee's disclosure of commercially sensitive or proprietary information shared by groups of unsecured creditors or third

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[116] *Smith*, 154 F.R.D at 669.

[117] *See In re Learjet Inc.*, 59 S.W.3d 842, 845 (Tex. App.-Texarkana 2001, no pet.).

[118] *Hydroscience Techs., Inc. v. Hydroscience, Inc.,* 401 S.W.3d 783, 796 (Tex. App. 2013) citing *Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 260 (Tex.App.-Austin 2002, pet. granted, judgm't vacated w.r.m.).

[119] *Hydroscience Techs.*, 401 S.W.3d at 796–97.

[120] *See Avary v. Bank of Am.*, N.A., 72 S.W.3d 779, 786 (Tex. App.- Dallas 2002, pet. denied).

[121] *In re Refco Inc*., 336 B.R. 187, 197 (Bankr. S.D.N.Y. 2006). This duty prevents the disclosure of communications between the committee and third parties, and among committee members themselves, particularly in situations where the disclosure of information could harm some or all of the unsecured creditor class.

[122] Creditors' Committee members owe the fiduciary duties of care, loyalty, and obedience as well as a duty to share information and a duty of confidentiality.

parties during plan negotiations and settlement discussions or obtained through the committee's own investigations. Disclosure of material non-public information about the debtor raises securities law issues and could breach the committee's fiduciary duties if it harms the debtor and its business. The committee must also maintain the confidentiality of certain information to preserve its attorney-client privilege and common interest privilege.

VI. Conclusion

There used to be a great television show called Hillstreet Blues. In every show, the sergeant ended his morning charge before the police officers went out with, "Let's be careful out there." That is a good tenet to keep in mind with evidentiary privileges in bankruptcy cases.