I. INTRODUCTION

The attorney-client privilege is the oldest and arguably most well-known of all the evidentiary privileges and protections afforded under the law.\(^1\) It has been the subject of innumerable treatises, restatements, and cases, and although a creature of common law, the privilege has made its way into the federal rules of evidence and civil procedure. The attorney-client privilege takes on a new dimension, however, in the bankruptcy context, in which numerous parties, all with varying degrees of adversity and commonality to each other and to the debtor, converge to engage in the process of resolving their claims through bankruptcy. In many ways, the bankruptcy court’s unique forum tests the underlying rationale for and assumptions contained in the privilege. This article briefly sets forth the general principles surrounding the attorney-client privilege and other evidentiary privileges, protections, and exceptions, and provides an overview of some of the ways in which these privileges play out in the bankruptcy context.

II. PRIVILEGE BASICS

A. Attorney-Client Privilege

The attorney-client privilege is designed to encourage full and open communication between clients and their attorneys.\(^2\) To properly assert attorney-client privilege, there must be:

\(^1\) Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (“The attorney-client privilege is the oldest privilege for confidential communications known to the common law.”)

\(^2\) See Restatement (Third), The Law Governing Lawyers § 68 cmt. c (2000) (“The rationale for the privilege is that confidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services.”); McCormick on Evidence § 89 (7th ed. 2013) (noting that the modern justification of the privilege is “that of
(1) a communication; (2) made by persons having a privileged relationship; (3) in confidence; and (4) for the purpose of seeking, obtaining, or providing legal assistance for the client. The advice must be legal in nature; communications or documents containing only non-legal business issues will not be protected by the attorney-client privilege simply because they may have been sent or received by a lawyer.

Generally, the privilege is waived when a client shares an otherwise privileged communication with a third party. In addition, the privilege belongs to and must be raised by the client, and can only be asserted by the client. The party asserting the privilege has the burden of proving the existence of an attorney-client relationship and the confidentiality of the encouraging full disclosure by the client for the furtherance of the administration of justice”). See also Upjohn, 449 U.S. at 389–91 (finding that the purpose of the attorney client privilege is “to encourage full and frank communication between attorneys and their clients” and that “the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.”).

See RESTATEMENT (THIRD), THE LAW GOVERNING LAWYERS § 68 cmt. c (2000). See generally MCCORMICK ON EVIDENCE §§ 89-91. See also UNIF. R. EVID. 502(b).

In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1037 (2d Cir. 1984); Pacific Gas and Elec. Co. v. U.S., 69 Fed. Cl. 784, 811 (2006); In re FiberMark, Inc., 330 B.R. 480, 499-500 (2005) (“The attorney client privilege grants protection only to those communications where the advisor’s role was to assist the attorney in rendering legal advice; if a communication was merely to aid the Committee in making a business decision it is outside the scope of the attorney client privilege”) (citations omitted).

See UNIF. R. EVID. § 510 (“A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person’s predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the privileged matter”).

FiberMark, 330 B.R. at 497-98; In re von Bulow, 828 F.2d 94, 100 (2d Cir. 1987) (“the privilege belongs solely to the client”).
communications at issue. Specifically, the privilege holder must prove the communication was “(1) intended to remain confidential and (2) under the circumstances was reasonably expected and understood to be confidential.”

B. **Attorney Work Product Protection**

The attorney work product protection is codified in Federal Rule of Civil Procedure 26(b)(3). As the Supreme Court has observed, the protection “is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye toward litigation, free from unnecessary intrusion by his adversaries.” The attorney work product protection governs documents prepared for the purpose of litigation where litigation could reasonably have been anticipated. Specifically, work product protection attaches when: (1) the material sought is a document or a tangible thing; (2) prepared by or for a party or by her representative; and (3) prepared in anticipation of litigation. Importantly, the work product protection can be overcome if there is a “substantial need” for the materials in preparation of an adverse party’s case, and that party is unable to obtain the substantial equivalent of the materials...

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8 *United States v. Bell*, 776 F.2d 965, 971 (11th Cir. 1985).


10 *Id.* See generally MCCORMICK ON EVIDENCE § 96.

11 *Fed. R. Civ. P. 26(b)(3)* (“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”).
without “undue hardship.”\textsuperscript{12} The burden of showing “substantial need” rests with the party seeking discovery.\textsuperscript{13}

What does it mean for work product to be prepared in “anticipation of litigation”? According to the Second Circuit, “documents should be deemed prepared ‘in anticipation of litigation,’ and thus within the scope of [the work product protection] if 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.”\textsuperscript{14} In one case, the fact that documents were created in connection with the filing of a bankruptcy case was enough to render those documents created “in anticipation of litigation.”\textsuperscript{15} In \textit{In re Quigley}, the court found that the withheld documents at issue had been created “because of the anticipated bankruptcy filing by Quigley or in connection with the pending chapter 11 case,” and that the documents “would not have been created if Quigley never contemplated or filed bankruptcy.”\textsuperscript{16} The court based its determination that these documents constituted attorney work product on its finding that “the bankruptcy, without more [i.e., an adversary proceeding], can be considered litigation for the

\textsuperscript{12} \textit{Fed. R. Civ. P. 26(b)(3)(A)(ii)} (“those materials may be discovered if . . . the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means”).

\textsuperscript{13} \textit{Hickman}, 329 U.S. at 512.

\textsuperscript{14} \textit{U.S. v. Adlman}, 134 F.3d 1194, 1202 (2d Cir. 1998) (quotations omitted). \textit{See also FiberMark}, 330 B.R. at 501 (“in order to qualify for this evidentiary protection, the party seeking protection must show the relevance of the document to anticipated litigation.”)

\textsuperscript{15} \textit{In re Quigley Co., Inc.}, Case No. 04-15739 (SMB), 2009 Bankr. LEXIS 1352 (Bankr. S.D.N.Y. Apr. 24, 2009) (documents created in anticipation of bankruptcy filing or in connection with pending chapter 11 filing satisfy the “in anticipation of litigation” requirement).

\textsuperscript{16} \textit{Id.} at *21.
purpose of the work product privilege.”

Although there is not a large body of case law on the subject, other bankruptcy courts generally agree.

As is the case with attorney-client privilege, the work product protection can be waived through disclosure of the work product to third parties, but unlike the attorney-client privilege which can be waived by any third-party disclosure, the work product protection is generally waived only when such disclosure makes it more likely that the material will be revealed to an adversary.

The case of *Granite Partners v. Bear, Stearns & Co.* is one such example. In *Granite Partners*, a bankruptcy trustee and his counsel, on behalf of the debtor investment funds, had published in a report the findings from their investigation as to what caused the debtors’ losses. The debtors then commenced an action in federal district court against their broker-dealers, alleging that the broker-dealers had liquidated the funds’ securities at below market prices. The broker-dealers moved to compel the debtors to produce the witness interview notes,

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17 *Id.* at *19-*22.

18 *See In re McDowell*, 483 B.R. 471, 494 (Bankr. S.D. Tex. 2012) (“The key question is therefore whether documents prepared in anticipation of bankruptcy are prepared in anticipation of litigation. The Fifth Circuit has implied that the filing of a bankruptcy petition itself creates litigation . . . [T]his Court concludes that the filing of a bankruptcy petition constitutes the filing of a lawsuit; and, therefore, this Court concludes that documents prepared in anticipation of a bankruptcy filing are prepared for litigation. Accordingly, these documents may be protected by the attorney work-product doctrine.”) *But see U.S. v. Naegele*, 468 F.Supp.2d 165, 174 (D.D.C. 2007) (holding without citation that within the context of a criminal proceeding for bankruptcy fraud, “[the defendant's] bankruptcy filing was not itself ‘litigation’ in anticipation of which protected attorney work product can be created.”).

19 *Gramm v. Horsehead Indus., Inc.*, No. 87 Civ. 5122, 1990 WL 142404, at *2 (S.D.N.Y. Jan. 25, 1990) (“Waiver of work-product immunity is found whenever a party has disclosed the work-product in such a manner that it is likely to be revealed to his adversary.”)

valuations and analyses upon which the trustee’s report was based.\textsuperscript{21} The court found that, through the publication of the trustee’s final report, which was publicly available and which contained excerpts from the allegedly privileged documents, the debtors (through their trustee) had waived application of the work product protection as to those documents.\textsuperscript{22}

C. \textbf{Other Evidentiary Privileges and Protections}

1. \textit{Joint Defense/Common Interest Protection}

The joint defense/common interest doctrine is an exception to the rule that an evidentiary privilege is waived when the party asserting privilege shares the communication with a third party.\textsuperscript{23} The doctrine “permits persons who have common interests to coordinate their positions without destroying the privileged status of their communications with their lawyers.”\textsuperscript{24}

“Common interest” can exist, for example, between a debtor and a creditors’ committee, or even between creditor constituencies.\textsuperscript{25}

The joint defense/common interest doctrine protects communications between counsel for different clients who share similar legal interests. The joint defense/common interest doctrine requires that “(1) the party who asserts the rule must share a common legal interest with the party with whom the information was shared and (2) the statements for which protection is

\begin{flushleft}
\textsuperscript{21} \textit{Id.} at 51.
\textsuperscript{22} \textit{Id.} at 54.
\textsuperscript{23} \textit{HSH Nordbank AG N.Y. Branch v. Swerdlow}, 259 F.R.D. 64, 71 (S.D.N.Y. 2009) (finding that the common interest doctrine is “an exception to the general rule that voluntary disclosure of confidential, privileged material to a third-party waives any applicable privilege.”)
\textsuperscript{24} \textit{Restatement (Third) of the Law Governing Lawyers} § 76 cmt. b.
\end{flushleft}
sought were designed to further that interest.” The common or shared interests do not need to
be identical; indeed, “a joint defense may be made by somewhat unsteady bedfellows.”

Joint defense groups have advantages and disadvantages. For example, forming a joint
defense group often eliminates or lowers costs of litigation substantially, combines the expertise
and skill set of the attorneys in the group, and allows for coordination of strategy and tasks. On
the other hand, joint defense groups can create tension amongst parties, depending on who has
more at stake in the litigation, and can also slow down the process of decision-making, not least
because parties may disagree on case strategy.

How is the privilege waived in the context of a joint defense group, and what is the scope
of the waiver? Courts have found that each co-defendant can only waive privilege with respect
to its own communications, and not to the entire group. Moreover, if the communications at

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26 In re Velo Holdings, 473 B.R. 509 (Bankr. S.D.N.Y. 2012) (citing Nordbank); Quigley,
2009 Bankr. LEXIS 1352, at *8-*9; Gulf Islands Leasing, Inc. v. Bombardier Capital,

27 United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989); Velo, 473 B.R. at 515;
Nordbank, 259 F.R.D. at 70-73; Quigley, 2009 Bankr. LEXIS 1352, at *9; In re Megan-
is not necessary, the parties asserting the privilege must have a common legal interest.”);
Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F.Supp. 381, 392
(S.D.N.Y. 1975).

28 Bradley C. Nahrstadt, W. Brandon Rogers, In Unity There is Strength: The Advantages
(and Disadvantages) of Joint Defense Groups, 80 DEF. COUNS. J. 29 (Jan. 2013).

29 In re Grand Jury Subpoenas 89-3 & 89-4, 902 F.2d 244 (4th Cir. 1990); John Morrell &
Co. v. Local Union 304A of United Food & Commercial Workers, 913 F.2d 544 (8th Cir.
1990); Interfaith Hous. Delaware, Inc. v. Town of Georgetown, 841 F.Supp. 1393 (D.
Del. 1994); Great American Surplus Lines Ins. Co. v. Ace Oil Co., 120 F.R.D. 533 (E.D.
Cal. 1988); Western Fuels Ass’n, Inc. v. Burlington Northern Railroad Co., 102 F.R.D.
201 (D. Wyo. 1984).
issue involve multiple parties to the joint defense group, courts have required that all co-
defendants must consent to a waiver of the privilege.\textsuperscript{30}

Joint defense groups frequently enter into written joint defense agreements in order to
memorialize a common interest among various parties. While this can assist in establishing the
existence of a common legal interest, it is not necessary that the agreement be reduced to
writing.\textsuperscript{31} Rather, a simple “meeting of the minds” is sufficient, provided that communications
were given in confidence and the clients reasonably understood them to be so given.\textsuperscript{32}

A central issue in chapter 11 cases, in particular, is whether a “common interest” really
exists between the parties at issue. The answer to that question can depend on whether the
“common interest” is legal or commercial in nature.\textsuperscript{33} For example, “[a] common legal interest
exists where the parties asserting the privilege were co-parties to litigation or reasonably
believed they could be made a party to litigation,”\textsuperscript{34} but merely asserting that one concern in a
joint business strategy includes the element of litigation is not sufficient to establish application

\textsuperscript{30} Id.


\textsuperscript{32} Am. Mgmt. Servs., LLC, 842 F. Supp. 2d 859, 876 (E.D. Va. 2012), aff’d, 703 F.3d 724 (4th Cir. 2013) (quoting Hunton & Williams v. U.S. Dep’t of Justice, 590 F.3d 272, 287 (4th Cir. 2010) (“The common-interest doctrine requires a meeting of the minds, but it
does not require that the agreement be reduced to writing or that litigation actually have commenced”). See also Schwimmer, 892 F.2d at 244; Xerox Corp v. Google, Inc., 802 F.Supp.2d 293, 303 (D. Del. 2011).

\textsuperscript{33} Velo, 473 B.R. at 515 (“A ‘key consideration’ is that the nature of the interest ‘be legal,
not solely commercial.’”) (quoting Norbank).

\textsuperscript{34} Megan-Racine, 189 B.R. at 573.
of the common interest doctrine.\textsuperscript{35} The existence of litigation is not an absolute requirement, however, and courts will apply the doctrine as long as the shared interest is legal in nature. For example, in \textit{In re Velo}, the court found a shared legal interest in “developing a strategy to prevent the termination of the company’s . . . merchant processing agreements with . . . Paymentech.”\textsuperscript{36}

While joint defense groups are commonly formed in bankruptcy proceedings, at least one court has expressed some concern about the potential for abuse inherent in certain types of joint defense groups in bankruptcy. The court in \textit{In re Ginn-LA St. Lucie Ltd.} commented:

> Enforcement of a [joint defense agreement], designed to provide a special protection to insiders who controlled a debtor pre-petition, would be decidedly unfair in the context of bankruptcy. Enforcement of [such an agreement] – which was executed in anticipation of a possible bankruptcy filing – creates a situation that is ripe for abuse. The special protection provided by [such an agreement] invites collusion among the entities that allegedly controlled the Debtors and creates the potential for wrongdoers to shield evidence of their wrongdoing. Therefore, it is against public policy and unfair to the Debtors’ estates and their creditors to . . . [withhold] documents that would be discoverable if not for the [joint defense agreement].\textsuperscript{37}

2. \textit{Joint Client Protection}

The joint client relationship is related to the common interest doctrine, and arises when two or more persons or entities consult the same attorney regarding the same matter. The joint client privilege has been applied in bankruptcy,\textsuperscript{38} where typical examples of joint clients include

\begin{itemize}
\item \textit{Velo}, 473 B.R. at 516.
\item \textit{In re Ginn-LA St. Lucie Ltd., LLLP}, 439 B.R. 801, 807-08 (Bankr. S.D. Fla. 2010).
\end{itemize}
multiple members of an ad hoc creditors committee, multiple members of an official creditors committee, or two or more defendants to an adversary proceeding who share counsel.

The joint client privilege is generally waived when former co-clients become adverse in litigation. As recognized by the court in *Garner v. Wolfinbarger*, “[i]n many situations in which the same attorney acts for two or more parties having a common interest, neither party may exercise the privilege in a subsequent controversy with the other.”

In addition, the rule applies “whether or not the co-client’s communications had been disclosed to the other during the co-client representation.” Nonetheless, while the privilege is waived as to the co-clients that are now adverse, the communications at issue remain privileged as to third parties. As some commentators have noted, this concept applies equally in the context of a joint defense group: if parties to a joint defense group become adverse to each other in a subsequent litigation, a third

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39 *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). See also *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 359 (3d Cir. 2007) (“Neither the co-client nor community-of-interest privilege is effective in adverse litigation between the former clients.”); *Brennan’s, Inc. v. Brennan’s Rests., Inc.*, 590 F.2d 168, 172 (5th Cir. 1979).

40 *Teleglobe*, 493 F.3d at 366.

41 *Id.* at 363 (“When co-clients and their common attorneys communicate with one another, those communications are ‘in confidence’ for privilege purposes. Hence the privilege protects those communications from compelled disclosure to persons outside the joint representation. Moreover, waiving the joint-client privilege requires the consent of all joint clients. A wrinkle here is that a client may unilaterally waive the privilege as to its own communications with a joint attorney, so long as those communications concern only the waiving client; it may not, however, unilaterally waive the privilege as to any of the other joint clients’ communications or as to any of its communications that relate to other joint clients.”).
party cannot access their communications made in connection with their participation in the joint
defense group.42

3. Rule 408 and Settlement Communications

Federal Rule of Evidence 408 states that “[e]vidence of conduct or statements made in
compromise negotiations is . . . not admissible,” except “when the evidence is offered for
another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue
delay, or proving an effort to obstruct a criminal investigation or prosecution.”

Courts disagree as to whether Rule 408 establishes a privilege protecting settlement-
related communications from discovery or whether it simply relates to the admissibility of those
documents at trial. Most courts are of the opinion that Rule 408 only limits the admissibility of
settlement material, not discovery of that material.43 As the Northern District of California
recognized in Matsushita v. Mediatek, “[o]n its face, Federal Rule of Evidence 408 is not a
discovery rule. It only limits the admissibility of some, but not all, evidence of events that occur
during the course of settlement negotiations.”44 In declining to create a new federal settlement
privilege, the court in Matsushita relied heavily on the detailed analysis provided by the District

42 Nahrstadt and Rogers, 80 DEF. COUNS. J. at *32 (citing Thomas G. Pasternak and R.
David Donoghue, Making Joint Defense Agreements Work, 34 LITIGATION 26 (Summer
2008)).

43 Matsushita Electric Ind. Co., Ltd. v. Mediatek, Inc., 2007 WL 963975 (N.D. Cal. 2007);
In re Subpoena Issued to Commodity Futures Trading Comm’n, 370 F.Supp.2d 201
(D.D.C. 2005). See also In re Gen. Motors Engine Interchange Litig., 594 F.2d 1106,
1124 (7th Cir. 1979); Primetime 24 Joint Venture v. Echostar Commc’ns Corp., No.
98Civ.6738, 2000 WL 97680, at *4 n.5 (S.D.N.Y. Jan. 28, 2000); Alcan Int’l Ltd. V. S.A.
Fundware, Inc., 831 F.Supp. 1516, 1531 (D.Colo. 1993); NAACP Legal Defense and
1985).

44 Matsushita, 2007 WL 963975, at *3.
of Columbia in *In re Subpoena Issued to Commodity Futures Trading Commission*. In *In re Subpoena*, Judge Bates determined that a federal settlement privilege does not exist, and declined to find a new federal settlement privilege. In so doing, the court made three observations. First, while public policy favors the promotion of settling disputes outside the judicial process, it was unclear that a federal settlement privilege would result in a substantial enough increase in settlements to justify an exception to the general rule favoring the admission of relevant and probative evidence.45 Second, the court noted that there was no “consensus” among the states as to the existence of a settlement privilege.46 Third, Congressional intent was clear that Rule 408 was intended to protect the settlement process through limiting admissibility of settlement materials, and not through preventing discovery of those materials.47 The court also made the point that Rule 408 already contemplates the admissibility of evidence regarding settlement negotiations for “other purposes,” which made it “unlikely that Congress anticipated that discovery into such documents would be impermissible.”48

On the other hand, the Sixth Circuit in *Goodyear Tire v. Chiles Power Supply* has recognized a settlement privilege.49 In coming to its conclusion, the Sixth Circuit noted the existence of “a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations,” observing the need for parties to feel “uninhibited” and “able to


46 Id. at 210.

47 Id. at 211.

48 Id.

abandon their adversarial tendencies to some degree” when engaged in settlement discussions. The court also recognized that “confidential settlement communications are a tradition in this country.” The Sixth Circuit further noted that “[t]he fact that Rule 408 provides for exceptions to inadmissibility does not disprove the concept of settlement privilege . . . [T]he exceptions have been used only to admit the occurrence of settlement talks or the settlement agreement itself for ‘another purpose.’” The Sixth Circuit concluded that, “[i]n sum, any communications made in furtherance of settlement are privileged.”

While a number of courts within and outside of the Sixth Circuit have followed suit, even some of those courts have placed limits on this privilege. For example, courts have excluded from the privilege “statements or documents which have not been communicated to other parties or are not related to settlement communications,” or to “documents that have been

50 Id. at 980.
51 Id.
52 Id. at 981.
53 Id. at 981-82.
communicated to other parties, but which were not authored or created for the purpose of settlement negotiations.”\textsuperscript{55} In any event, most courts outside the Sixth Circuit – including bankruptcy courts – have recognized that Rule 408 only governs the admissibility, and not the discoverability, of communications related to settlement negotiations.\textsuperscript{56}

4. “Business Strategy” Immunity

The “business strategy” immunity has been recognized by a number of state and federal courts. Generally speaking, it protects against the disclosure of business plans, proposals, or alternatives under consideration by an entity contemplating engaging in, or defending against, a contest for corporate control.\textsuperscript{57} It is not a privilege “in the sense that proof of certain elements creates something akin to an entitlement, but is in the nature of a qualified immunity to discovery similar to the attorney’s work product doctrine.”\textsuperscript{58} In applying the “business strategy” immunity, federal courts balance “the importance of the matter sought to be discovered to the party seeking it; the risk of nonlitigation injury that might occur to the target corporation if discovery is permitted; and the stage of the company’s efforts, as well as the stage of the litigation.”\textsuperscript{59} Nevertheless, “the documents protected from discovery by the “business strategy” immunity

\textsuperscript{55} Graff, 2012 WL 5495514, at *31.

\textsuperscript{56} See supra n.42. See, e.g., In re Blue Water Land Development, LLC, Nos. 08–00842–8–JRL, 08–00856–8–JRL, 2008 WL 4186895 (Bankr. E.D.N.C. Sept. 4, 2008) (observing that “Rule 408 does not bar the discovery of information related to settlement negotiations”).


\textsuperscript{58} BNS, 683 F. Supp. at 454.

“will not be denied [to the requesting party] . . . forever.” We are not aware of any reported decisions specifically applying this doctrine in the context of bankruptcy proceedings, but the fact that discovery in bankruptcy is often conducted in “real time” while parties are in the midst of negotiations regarding a plan and other issues militates in favor of its application.

D. The “At Issue” Exception/“Sword and Shield” Doctrine

In addition to waiver through third-party disclosure, an evidentiary privilege can be waived when a party puts privileged communications “at issue” in a litigation. This concept is commonly referred to as the “at issue” exception, an “implied waiver,” or the “sword and the shield” doctrine. Simply put, the attorney-client privilege and work product protection can be waived when a party places otherwise protected documents or communications “at issue” in a litigation. The “at issue” exception stems from a recognition that parties should not be allowed to make arguments in court that evoke privileged information, yet simultaneously deny the opposing party access to that information on the ground that it is privileged. In Hearn v. Rhay, the district court set out a three-part test to determine when a party waives the attorney-client privilege by putting privileged communications at issue:

(1) assertion of the privilege as a result of some affirmative act, such as filing suit, by the asserting party;
(2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and

60 BNS, 683 F.Supp. at 458.

application of the privilege would have denied the opposing party access to information vital to his defense.62

The Second Circuit in *U.S. v. Bilzerian* has held that “the attorney-client privilege cannot at once be used as a shield and a sword.”63 Therefore, “[a] party who intends to rely at trial on the advice of counsel must make a full disclosure during discovery; failure to do so constitutes a waiver of the advice-of-counsel defense.”64 The bankruptcy-specific issues that come into play with respect to this doctrine in the context of Rule 9019 motions are discussed further below.

**III. DEBTOR ISSUES**

**A. Pre-Bankruptcy Planning**

A distressed company will frequently communicate with its affiliates or parent companies, as well as its counsel, in deciding whether to ultimately file for bankruptcy, and once the decision is made, in preparing the bankruptcy petition. Are any of these communications privileged?

As an initial matter, provided a trustee is not appointed, a chapter 11 debtor-in-possession retains the pre-petition corporation’s right to assert (or waive) the attorney-client privilege. The Supreme Court in *Commodity Futures Trading Commission v. Weintraub*, discussed in further detail below, observed that, “if a debtor remains in possession – that is, if a trustee is not appointed – the debtor’s directors bear essentially the same fiduciary obligation to creditors and shareholders as would the trustee for a debtor out of possession . . . Surely, then, the management of a debtor-in-possession would have to exercise control of the corporation’s attorney-client


privilege consistently with this obligation to treat all parties, not merely the shareholders, fairly.”65 Other courts have also recognized that “the attorney-client privilege for a debtor corporation belongs to the debtor in possession . . . because it is a fiduciary.”66

As to communications between a distressed debtor and its affiliates or subsidiaries, they may not be privileged as to parties within the corporate family, but they most likely will be privileged vis-à-vis third parties. The court in In re Teleglobe found that a joint-client relationship arose between the parent and subsidiary when they hired the same attorney to represent them on the same matter and that, accordingly, the subsidiaries were entitled to the information withheld from it by its parents, but that the communications were not discoverable as to third parties.67

B. Who Owns the Privilege?

1. Trustees

The Supreme Court has held in Commodity Futures Trading Commission v. Weintraub that a debtor corporation’s privilege rights are passed onto a bankruptcy or litigation trustee as of his or her appointment, and that those rights can apply to communications made prior to the trustee’s appointment. In Weintraub, the Commodity Futures Trading Commission (“CFTC”) and Chicago Discount Commodity Brokers (“CDCB”) had entered into a consent decree

67 Teleglobe, 493 F.3d at 362-63.
following an investigation pursuant to which CDCB would file for chapter 7 and a receiver would be appointed. As part of its investigation, the CFTC had served a subpoena upon CDCB’s former counsel, Gary Weintraub, who appeared for his deposition but refused to answer many questions on the basis of attorney-client privilege. The CFTC asked the trustee whether he would waive privilege as to the debtor’s communications with Weintraub, and the trustee ultimately agreed to waive privilege. However, former principals of the debtor objected, arguing that the trustee could not waive privilege over their objection.

Facing a “lack of direct guidance from the [Bankruptcy] Code,” the Supreme Court relied on the law governing privilege rights with respect to corporations, specifically in situations where a change in management has taken place. As the Supreme Court observed, “[d]isplaced managers may not assert the privilege over the wishes of current managers, even as to statements that the former might have made to counsel concerning matters within the scope of their corporate duties.” The Court then considered the role of the trustee, noting that the trustee has “the duty to maximize the value of the estate,” “investigate the debtor’s financial affairs,” and

69 Id.
70 Id. at 346.
71 Id.
72 Id. at 347.
73 Id. at 351.
74 Id. at 350.
“operate the debtor’s business,” among other things. Drawing the analogy to the corporate succession context, the Court ultimately held that the “trustee of a corporation in bankruptcy has the power to waive the corporation’s attorney-client privilege with respect to prebankruptcy communications.”

It is important to note, however, that the Supreme Court limited its holding in *Weintraub* to trustees in the context of debtor corporations. The Court recognized in *Weintraub* that “if control over the privilege passes to the trustee [in the case of an individual debtor] it must be under some theory different than the one we embrace in this case.” Indeed, in the context of individual debtors, there appears to be some disagreement among the lower courts as to whether a bankruptcy trustee unilaterally retains all of the individual debtor’s privilege rights when he or she is appointed. The approach that appears to be favored in more recent cases is one in which the court examines the particular circumstances of each case to determine if the bankruptcy trustee has the power to waive the debtor’s attorney-client privilege over the debtor’s objection.

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75 Id. at 352.

76 Id. at 358.

77 *Weintraub*, 471 U.S. at 356-57 (“our holding today has no bearing on the problem of individual bankruptcy, which we have no reason to address in this case”).

78 Id.


For example, the court in *In re Rice* found the individual debtor had an adversarial relationship with the trustee with respect to personal injury claims that the individual debtor had listed as exempt on her petition. This was a “crucial factor” that ultimately lead to the court’s finding that the trustee could not waive privilege over attorney work-product relating to the debtor’s personal injury claims.\(^\text{81}\) Moreover, at least one court has recognized that principals of the debtor corporation control their own attorney-client privilege where they can show that the confidential communications sought to be waived were for the purpose of seeking *personal* advice in their individual capacities, not concerning matters within the debtor corporation or its affairs.\(^\text{82}\)

2. Creditors Committees

Unlike trustees in the context of a debtor corporation, official creditors committees that pursue an estate cause of action do not automatically succeed to the debtor’s attorney-client privilege. The court in *Official Committee of Asbestos Claimants of G-I Holding, Inc. v. Heyman* dealt specifically with this issue.\(^\text{83}\) In *Heyman*, a creditor’s committee comprised of asbestos tort claimants moved to discover certain communications that had been withheld by the debtor, its subsidiary and its former CEO on the grounds of attorney-client privilege and work-product protection.\(^\text{84}\) The court found that the principles set forth in *Weintraub* with respect to trustees

\(^{81}\) *Rice*, 224 B.R. at 471. *See also Miller*, 2000 Bankr. LEXIS 355, at *16 (in holding that, in this case, the trustee could not succeed to the individual debtors’ attorney-client privilege, court found that “[o]f significance in this decision is the fact that the Trustee and the Debtors are in an adversarial relationship.”)

\(^{82}\) *In re Tippy Togs of Miami, Inc.*, 237 B.R. 236 (S.D. Fla. 1999) (“the Court finds the privilege may be asserted by the individual if, as here, the evidence establishes that the communications were part of a meeting in which the officer was seeking personal, not corporate advice.”).


\(^{84}\) *Heyman*, 342 B.R. at 420-21.
did not apply to creditors committees.85 Specifically, the court observed that “no authority has been cited to extend a trustee’s power to a creditor’s committee,” and that, unlike trustees, “[c]ommittee creditors have no responsibility or authority to operate or manage the debtor corporation and, of course, represent a particular class of creditors.”86 Accordingly, “the Committee owes a duty only to its constituent creditors.”87 As was observed by the court in a more recent case, In re Big M, if the interests of the creditor body diverged from those of the debtor or the estate, the committee would owe a duty to the creditors before the estate; the court in Big M found this to be a “fundamental difference” between the roles of a trustee and a creditors’ committee justifying differing treatment of evidentiary privileges.88

C. **Issues Concerning Former Directors and Officers**

Can former directors and officers gain access to their former company’s privileged communications? If those communications were created at the time the directors and officers

85 *Id.* at 421-23.

86 *Heyman*, 342 B.R. at 422-23.

87 *Id.* at 423. Note, however, that the court in *Heyman* applied the “fiduciary exception” doctrine set forth in *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) to defeat the exercise of the attorney-client privilege by the defendants. The “fiduciary exception” doctrine, which had originally arisen in the context of shareholders’ derivative lawsuits, holds that “where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of these interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.” *Id.* at 1103-04. For our purposes, *Heyman* teaches that it is not always a foregone conclusion that creditors committee will never be able to assert or waive the debtor’s privilege, but it does not happen by operation of law, in the way that a trustee assumes the privilege rights of the debtor once appointed.

88 *In re Big M*, No. 13-10233 DHS, 2013 WL 1681489, at *1 (D.N.J. Apr. 17, 2013) (“This Court finds no authority, nor has it been presented with any, to support the Committee’s [assertion of privilege] . . . such a power [to assert or waive attorney-client privilege] does not extend to a creditors’ committee that asserts causes of action on behalf of the estate.”).
were employed by the company, courts have generally held that they are entitled to those documents under the “joint client” privilege. For example, in *Kirby v. Kirby*, several family members were embroiled in a dispute amongst themselves over the administration of their family-owned charitable foundation.\(^89\) The plaintiffs moved to compel the production of communications between the defendant, the foundation’s only undisputed member, and his counsel. Half of the communications had been prepared when the plaintiffs had been directors of the foundation and the other half had been prepared after the plaintiffs allegedly were removed from the board of directors.\(^90\) The court was “not persuaded” that the defendant could claim privilege over the documents created while plaintiffs had been directors of the foundation.\(^91\) Observing that “the issue is whether the directors, collectively, were the client at the time the legal advice was given,” and finding no basis to determine otherwise, the court felt it was “consistent with [the plaintiffs’] joint obligations [of responsibility over the proper management of the corporation] that they be treated as the ‘joint client’ when legal advice is rendered to the corporation through one of its officers or directors.”\(^92\) As to the documents created after the plaintiffs had been allegedly removed, however, the court found that “it would indeed be a ‘fiction’ to say the plaintiffs were the clients to whom the legal advice was rendered,” given that,


\[90\] *Kirby*, 1987 WL 14862, at *1.

\[91\] Id. at *7.

\[92\] Id.
after their purported removal, the plaintiffs no longer participated in meetings or corporate
decision-making with respect to the foundation.93

However, former directors and officers do not always have the “unfettered or unlimited
right” to obtain discovery of all privileged materials generated by the corporation during their
tenure.94 In In re Braniff, certain parties adverse to the debtor and creditor’s committee – some
of whom claimed to have been former officers and directors of the debtor – requested production
of documents created during their tenure, arguing that the debtor placed the facts and
circumstances of their service as officers and directors at issue during the litigation. The court
distinguished the case before it from Kirby, noting that, in Kirby, the court found a joint client
relationship existed between the corporation and its former directors. Here, the former directors
did not put forth any evidence that they had a “joint client” relationship with the corporation, and
the court found that, in fact, “Braniff [the debtor] was the only client, and any participation of the
BIA-COR parties [the former directors and officers] was merely that of corporate agents working
on behalf of Braniff. As a consequence, the privilege here is held solely by Braniff.”95
Accordingly, while former officers and directors can usually claim that they are entitled to access
privileged communications from the time period in which they served, it is not a foregone
conclusion and the answer can depend on the specific facts and circumstances.

D. A Common Interest Between Debtor and Creditor?

As bankruptcy practitioners can attest, alliances between the debtor and its creditors can
shift dramatically depending on the issue being litigated. In the bankruptcy context, a common

93 Id.
94 Braniff, 153 B.R. 941, 943 (M.D. Fla. 1993).
95 Id. at 944.
interest warranting protection of privileged material has been found to exist between a debtor and
(1) creditor’s committee counsel (Mortgage & Realty Trust); (2) an ad hoc committee of asbestos
claimants and future claims representative (Leslie Controls); (3) an unsecured creditors
committee and certain secured creditors (Tribune); and (4) an affiliate company (Quigley).96

Moreover, even if the debtor’s and creditor group’s interests are adverse in some
respects, communications between a debtor and a creditor group can nonetheless be protected by
the common interest doctrine. For example, in In re Cherokee Simeon Venture I, the court
applied the common interest doctrine to testimony about communications between and among
the debtor, debtor’s counsel, and counsel for the entity that managed the debtor and served as its
postpetition DIP lender, Zeneca Inc. Another secured creditor, EFG, alleged that the debtor, in

96 See, e.g., In re Tribune Co., No. 08-13141 (KJC), 2011 WL 386827, at *4 (Bankr. D.
Del. Feb. 3, 2011); In re Leslie Controls, 437 B.R. 493, 496 (Bankr. D. Del. 2010);
Quigley, 2009 WL 9034027, at *1; In re Mortgage & Realty Trust, 212 B.R. 649 (Bankr.
C.D. Cal. 1997) (court held communication between debtor officer, debtor’s bankruptcy
counsel and creditors’ committee counsel was subject to common interest privilege).

In addition, communications among different creditor groups have been found to be
protected under the “common interest” doctrine. For example, in In re Circle Corp.,
Case No. 96-CV-5801 (JFK), 1997 WL 31197 (S.D.N.Y. Jan. 28, 1997), a bankruptcy
court confirmed the debtor’s plan of reorganization, which did not provide for any
distribution to one group of creditors, the debenture holders. The unsecured creditors’
committee unsuccessfully appealed the confirmation order. Former committee members
and debenture holders (who were not constituents represented by committee) then
commenced an adversary proceeding to revoke the confirmation order on the ground that
the reorganized debtors had fraudulently procured the confirmation order and had
undervalued the debtor’s assets in the confirmation process. The debtors subpoenaed
memoranda concerning the interim order and plan and an agreement discussing the
proposed plan that had been shared between the committee and the debenture holders, but
the committee members and debenture holders asserted common interest privilege as to
these documents. The court agreed, finding that the committee members and debenture
holders had a common legal interest in ensuring that the debenture holders received some
distribution under the plan, and that although the creditors had different views on other
aspects of the proceedings, they found common ground with respect to valuation issues.
To the court, this provided a sufficient basis to protect documents shared between the two
creditor groups.
concert with Zeneca, had filed the bankruptcy case in bad faith. Among other arguments, EFG claimed that the debtor and Zeneca could not share a common interest because Zeneca was “only an insider asserting large claims against the estate.” The court rejected EFG’s argument, finding that it ran “contrary to established precedent, because the privilege still applies even where parties’ interests are adverse in substantial respects, but aligned with respect to others.”

An even stronger example of a case in which a debtor’s and a creditor constituency’s interests aligned, despite inherent adversity, is In re Leslie Controls. Leslie Controls involved a discovery dispute between the debtor asbestos company and its insurers. Among many documents requested by the insurers as to which the debtor asserted privilege, there was a memorandum that debtor’s counsel had prepared on the insurers’ likely position on insurance recoveries under various bankruptcy scenarios. The debtor had shared the memorandum during negotiations with its asbestos claimants and the pre-petition future claims representative.

Recognizing that the common interest privilege can apply where the interests of the parties are “not identical,” the court noted that the privilege can apply even “when the parties’ interests are adverse in substantial respects.” Despite the insurers’ argument that the parties were by nature adversarial when the memorandum was shared because they were in negotiations and the terms of a plan had not yet been delineated, the court opted not to take a “black-line rule” approach to the case, noting that, for example, parties engaged in merger negotiations may share a common

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98 Id. at *10.
99 Id.
100 Leslie Controls, 437 B.R. at 496.
101 Id. at 497.
interest in some cases. Rather, the court said, “commonality must be measured on a case by case basis.”\textsuperscript{102}

IV. \hspace{1em} OTHER ISSUES

A. \hspace{1em} Creditors

1. \hspace{1em} Creditor Committees

It is well-established that creditor committees may assert the attorney-client privilege over their own privileged communications.\textsuperscript{103} For example, in Marcus v. Parker, the former manager of the debtor corporation subpoenaed documents reflecting communications between the committee and its counsel.\textsuperscript{104} The committee’s counsel moved to quash the subpoenas, claiming attorney-client privilege.\textsuperscript{105} The court recognized the committee’s attorney-client privilege “at least in the limited circumstance of this case,” noting that “[t]he primary function of the committee is to advise the creditors of their rights and proper course of conduct, which requires competent and effective representation,” and that “[c]ounsel for a creditors’ committee is best able to serve his or her client if the attorney can engage in full and frank communications.”\textsuperscript{106} The court also noted that it believed there was a “stronger need for confidentiality in this case” because “the disclosure of documents claimed to be confidential is

\textsuperscript{102} \textit{Id.} at 501-02.

\textsuperscript{103} \textit{In re Baldwin-United Corp.}, 38 B.R. 802 (Bankr. S.D. Ohio 1984); \textit{In re Refco}, 336 B.R. 187 (Bankr. S.D.N.Y. 2006) (“Maintaining confidentiality against unsecured creditors generally also may be necessary to preserve a committee’s attorney-client privilege. That privilege clearly can be enforced against those who are not represented by the committee or who are standing in an adversarial relationship to the unsecured creditors as a group.”).

\textsuperscript{104} Marcus v. Parker (\textit{In re Subpoenas Duces Tecum}), 978 F.2d 1159, 1160 (9th Cir. 1992).

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.} at 1161.
sought by a person who is engaged in adversarial litigation with the Committee and its counsel.”

The Marcus court was persuaded by the reasoning in *In re Baldwin-United Corp.* In *Baldwin-United*, counsel for the creditors’ committee made an attempt to eliminate two *ex officio* nonvoting members of the committee. The concern was that, according to committee counsel, non-voting members were not “‘necessary’ to the workings of the committee because their non-voting status deprives them of a major incident of committee membership, and accordingly that their presence during meetings with the committee's counsel might be deemed a waiver of the committee's attorney/client privilege.” The objecting parties argued that the committee was not entitled to assert attorney-client privilege. The court rejected the objecting parties’ argument, and instead found that the attorney-client privilege applies equally to committees as it does to other entities. The court noted the rationale for the attorney-client privilege applied to committees “at least when disclosure of privileged communication is sought by those who are not represented by the committee, or who stand in an adversarial relationship with it.”

While committees can rest assured that they can claim privilege with respect to their own attorney-client communications, who exactly is the client – the committee as a whole, or its respective individual members? The privilege generally belongs to the committee, and not its respective members. As noted by the court in *FiberMark*, “[t]he Committee exists to represent

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107 *Id.*


109 *Id.* at 804-05.

110 *Id.*

the interests of all creditors in the case, not just to represent its members’ own interests” (emphasis added). In FiberMark, certain committee members asserted attorney-client and work product privileges over certain documents. Those documents, according to the court, “relate[d] to conflicts among members of the Committee,” and the court ultimately found no attorney-client privilege because these documents were “not directed at protecting the interests of the Committee or its constituents, but rather at advancing or reconciling the needs of individual Committee members.” The court found that “only communications wherein the Committee is the client are eligible for protection under the attorney client privilege” (emphasis added).

Similarly, for work product that was alleged to have been privileged, the court found that the “communications with, and work done for, AIG, . . . the chair of the Committee [which involved] disputes with the other members of the Committee regarding, for example, corporate governance issues,” was not subject to work product protection.

2. Secured Lender Syndicates

Secured lender syndicates are common participants in bankruptcies. Syndicates are comprised of multiple secured lenders, each of which may have their own individual counsel (inanimate, the attorney-client privilege belongs to the entity, not the individual who made the communication.”) The court in Artra addressed the question of who holds the attorney-client privilege after the committee has dissolved, and, while noting some disagreement in the very few cases on point, found that the creditors committee’s attorney-client privilege ceased to exist whenever the committee ceased to exist (i.e., upon confirmation of a plan).


Id. at 499.

Id.

Id. at 502.
house or outside). Typically, the agent bank or a steering group within the syndicate will “lead” the syndicate throughout the bankruptcy proceeding.

While there is a dearth of case law on the kinds of privileges and protections that might be afforded to secured lender syndicates, it is likely that these issues will arise at some point in the future. For example, what privilege, if any, governs communications between members of the syndicate and counsel to the agent bank? Would those communications still be privileged as to third parties? In addition, does the very nature of the syndicate group lead to the creation of an attorney-client privilege between counsel for the agent bank, or counsel for the steering group, and the rest of the syndicate members? Although there appear to be few – if any – reported decisions on these issues, members of a lending syndicate would have a good argument that, at the least, otherwise privileged communications with counsel to the agent bank are subject to the common interest doctrine.

B. Rule 9019 Motions

As discussed above, an evidentiary privilege can be waived if a party puts those privileged communications “at issue” in a litigation. In bankruptcy, this concept has been put to the test in the context of Bankruptcy Rule 9019 settlement motions. In evaluating whether to approve a settlement pursuant to Rule 9019, “the court must determine whether the compromise is fair, reasonable, and in the best interest of the estate.”  


117 See, e.g., In re Spansion, Inc., Case No. 09-10690, 2009 WL 1531788 (Bankr. D. Del. June 2, 2009) (where “reliance on counsel” advice explicitly not put forth in support of settlement approval, court did not approve settlement because debtors provided “little information as to the specifics . . . to provide a basis for evaluating the strengths and
However, does this “reliance on counsel” approach necessarily waive the privilege because it puts privileged communications “at issue” in a litigation?

In *In re Washington Mutual*, the debtor sought approval of a global settlement with JPMorgan. Certain bondholders, who believed that the debtor was not receiving adequate value under the settlement, argued that the debtors could not prove the reasonableness of the settlement because the debtors had objected to testimony from their witnesses regarding their discussions with counsel, which the court found “essentially precluded any testimony regarding the likelihood of success on any of the Debtors’ positions with respect to the disputed claims.”

The settlement supporters argued that the witnesses did testify to the analysis they themselves performed, and that this, in addition to the pleadings filed by the parties in the litigation, should have been enough for the court to make its determination as to the reasonableness of the settlement. The court ultimately agreed with the settlement supporters, finding that it did not need testimony on “what counsel felt was the likelihood that they would win on the claims being settled,” or “testimony of a legal expert on the strength and weaknesses of each side’s position.”

The court observed that it had the responsibility of determining whether the settlement was reasonable, and that “mere arguments of counsel or opinions of experts cannot substitute for that decision-making.” In that case, the settlement was ultimately approved because the debtor was able to point to sufficient evidence regarding the reasonableness of the settlement in addition to the advice of its counsel.

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119 *Id.*
120 *Id.*
 Nonetheless, a party cannot “cherry-pick” what evidence it will introduce if it plans to rely largely or entirely on advice of counsel in supporting a settlement. In In re Residential Capital, during a contentious battle between the debtors and the creditors’ committee regarding a settlement the debtors had entered into with a certain group of creditors, the committee sought production of all documents and deposition testimony bearing on the evaluation, negotiation and approval of the settlement, including those communicating legal advice and analysis of claims and potential liabilities. The parties stipulated to a “limited waiver” that allowed for the production of certain documents previously designated as privileged. The debtors claimed that they entered into this “limited waiver” in order to preserve their ability to argue that they relied on counsel in agreeing to the settlement. However, the debtors continued to assert privilege with respect to other documents and also vigorously asserted attorney-client privilege during depositions taken by the committee. As a result, the committee brought a motion to preclude any “reliance on counsel” evidence or testimony at the hearing for approval of the settlement. The court held that the debtors should be precluded from introducing “reliance on counsel” evidence because “[t]he law does not permit such cherry-picking of reliance on counsel evidence.”

C. Work of Financial Advisors

Disclosure of privileged materials to a party’s financial advisors does not necessarily waive any applicable privilege. If confidentiality is maintained between the attorney, client, and financial advisor, and the advisor is facilitating the provision of legal advice to the client, the communication will remain subject to the attorney-client privilege. The Second Circuit addressed this issue in United States v. Kovel, holding that, otherwise attorney-client privileged documents shared with a third party retain their privilege if that third party is an agent of the

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121 In re Residential Capital, LLC, Case No. 12-12020, slip op. at 10 (Bankr. S.D.N.Y. Apr. 12, 2013).
client’s attorney and is facilitating communication between attorney and client for legal advice. In addition, the communications must be kept confidential, and the privilege must not otherwise be waived.\textsuperscript{122}

Other courts have weighed in on the issue.\textsuperscript{123} In \textit{FiberMark}, the court stated that “the presence of an accountant or financial advisor, whether hired by the lawyer or the clients, does not destroy the privilege, any more than would the presence of a linguist when needed to translate legal papers in a foreign language.”\textsuperscript{124} The court in \textit{Hardwood P-G} similarly noted that “[w]hile normally disclosure to third parties waives the privilege, an exception applies for disclosures to accountants or other professionals hired to assist the lawyer in providing legal advice to the client.”\textsuperscript{125} While the court recognized that the professional “must have been hired for a specific purpose, which significantly relates to the disputed communications,”\textsuperscript{126} the court also rejected the defendants’ argument that such professional communications can only be

\begin{thebibliography}{1}
\bibitem{122} \textit{United States v. Kovel}, 296 F.2d 918, 920-24 (2d Cir. 1961).
\bibitem{123} \textit{See also Adlman}, 68 F.3d at 1499; \textit{Hardwood P-G}, 403 B.R. at 458-59; \textit{Silverman v. Hidden Villa Ranch (In re Suprema Specialties, Inc.)}, Case No. 02-10823, 2007 Bankr. LEXIS 2304, at *12 n.5 (Bankr. S.D.N.Y. Jul. 2, 2007); \textit{Ferko v. National Ass’n for Stock Car Auto Racing, Inc.}, 218 F.R.D. 125, 140 n.15 (E.D. Tex. 2003) (“If the client instead of the attorney hires a financial professional, the attorney client privilege protects communications between the attorney and that financial professional if that financial professional is effectively an employee of the client”); \textit{In re Tri-State Outdoor Media Group, Inc.}, 283 B.R. 358, 362 (Bankr. M.D. Ga. 2002); \textit{Byrnes v. Empire Blue Cross Blue Shield}, 98 Civ. 8520, 1999 U.S. Dist. LEXIS 17281, at *6 (S.D.N.Y. Nov. 4, 1999) (holding that attorney-client privilege “encompasses contacts between the attorney and a client’s agent or representative and between the client and the attorney’s agents, provided that the communications are intended to facilitate the provision of legal services by the attorney to the client.”).
\bibitem{124} \textit{FiberMark}, 330 B.R. at 499.
\bibitem{125} \textit{Hardwood P-G}, 403 B.R. at 458.
\bibitem{126} \textit{Id.}
\end{thebibliography}
protected if the attorney, not the client, hired the professional. In so doing, the court recognized that under the Bankruptcy Code, third party professionals such as financial advisors “must be hired by the bankruptcy estate rather than by debtor’s counsel, or risk not being compensated for their services.”¹²⁷

In addition, the work actually performed by financial advisors themselves may be protected from disclosure as attorney work product. In In re Celotex, the debtor’s financial consultants and counsel prepared valuation reports, memoranda on plan balloting and confirmation issues, and documents related to the structure of the trust fund. The creditors’ committee sought to compel production of the documents in an adversary proceeding against the debtor to set aside certain transfers. The committee argued that, among other things, the documents were not privileged because they had been shared with the parent company/insider. In finding that the disclosure to the parent company/insider did not waive any privilege, the court also held that valuation reports put together by financial advisors are generally protected by work product privilege because, among other things, they are prepared in anticipation of litigation.

D. Importance of Not Over-Designating and Providing Accurate Logs

The importance of making appropriate designations and providing accurate privilege logs cannot be overemphasized. Disputed documents may be, and frequently are, submitted to the court for in camera inspection, so it is always possible that a court will test the assertion of privilege by reviewing the documents that a party has withheld.¹²⁸ It is important to bear this in

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mind when making judgment calls on privilege issues as courts have imposed sanctions or found waiver where non-privileged documents were withheld or where misleading entries appeared on a party’s privilege log.129

V. CONCLUSION

The bankruptcy process provides a unique forum for novel privilege issues to arise. In many cases, bankruptcy courts have relied on the principles originating outside the bankruptcy context to make determinations as to privilege issues that are unique or common to bankruptcy, such as when a debtor and creditor might share a common interest, whether a financial advisor’s communications with debtor or committee counsel is privileged, or when a party, in support of a Rule 9019 motion, mounts a “reliance on counsel” defense but refuses to produce documents on the basis of privilege. We expect that these principles will continue to develop as the bankruptcy process becomes more litigious.