Attorney-Client Privilege and Financially Distressed Businesses
Meeting Confidentiality Challenges Arising from Heightened Regulatory Oversight, Insolvency Proceedings and Bankruptcy

A Live 90-Minute Audio Conference with Interactive Q&A

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Overview of the Attorney-Client Privilege

Meeting Confidentiality Challenges Arising from Heightened Regulatory Oversight, Insolvency Proceedings and Bankruptcy

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Overview of the Attorney–Client Privilege

- Who has the Privilege: Understanding Ownership of the Attorney-Client Privilege
- Waiver: How to Avoid Exposing Your Confidential Communication to Third Parties
Who has the Privilege: Understanding Ownership of the Attorney-Client Privilege

1. Privilege within the Corporation
2. Privilege Consideration During Employee Interviews
3. Former Employees
4. The Garner Doctrine
Basics of Privilege Law

- A communication between client and lawyer sent under confidential conditions for purposes of seeking or giving legal advice.

- In state court the state law on privilege governs.

- In federal court Fed. R. Evid. 501 governs:
  - Diversity: Use governing state law
  - Federal Question: Apply federal law to federal and pendent claims
Upjohn Principle


- Communications with lower-level employees may be protected if:
  - The communications are made to corporate counsel
  - The communications are made at the direction of corporate superiors to secure legal advice from counsel
  - The information communicated is not available from upper management
  - The information communicated concerns matters within the scope of the employee’s duties
  - The employees are made aware that they are being questioned in order for the corporation to secure legal advice

- Applies in federal cases using federal law; states may differ
Control Group Test

• Pre-*Upjohn* test for confidentiality

• Currently used to distinguish those who can direct lower-level employees to secure legal advice for purposes of *Upjohn*

• Some states consider it the appropriate standard even after *Upjohn*

• Control Group:
  - Upper management decision-makers
  - Employees in a position of control or who have a substantial role in determining what action the corporation should take in response to legal advice or who is “an authorized member of a body or group which has that authority”
**In re Vioxx: Legal v. Business Communication**

- Applies to communications to and from in-house counsel
- Only *legal* communications by in-house counsel are protected by attorney-client privilege
  - “An attorney’s involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all incidents of such a transaction.”
- Ask: Is the primary purpose of the communication to obtain legal or business advice?
Special Committee as Separate Entity

• In derivative suits, a special committee may be formed to investigate. Also used in investigations.
  – Board of directors appoint the committee
  – The committee must be of one or more independent and disinterested directors

• As an independent entity it can waive its attorney client privilege

  – Special committee was formed to investigate alleged violations of stock option plans
  – Special committee shared its final report with the board of directors, some of whom were implicated in allegations
  – Special committee waived privilege because it “disclosed its communications concerning the investigation and the final report to third parties – the individual director defendants . . . whose interests were not in common with the client”
**Effect of Insolvency**

- When a company is on the edge of insolvency, fiduciary duty rules start to change. Management may see their duty to the shareholders become a balanced duty between shareholders and expected creditors.

- However, for Attorney-Client Privilege purposes, there is a more bright line rule. So long as management retains control of the corporate entity, control of the privilege stays with management.
The Corporate Privilege in Bankruptcy

- During bankruptcy, corporate management effectively changes hands. Thus, the ability to assert or waive privilege passes from the corporation to the trustee-in-bankruptcy.

- The trustee-in-bankruptcy is tasked with investigating prior management to determine possible causes of action against officers and directors. This would be nearly impossible if the former officers and directors of the bankrupt corporation still controlled privilege.
  
The Corporate Privilege in Bankruptcy

  - The Supreme Court held that because the power to waive privilege resides with corporate management, the trustee-in-bankruptcy of a brokerage firm could waive the attorney-client privilege belonging to the firm. The Court found that the trustee-in-bankruptcy is management for a corporation in bankruptcy.

  - The Eastern District of Wisconsin bankruptcy court allowed waiver of the attorney-client privilege by a Chapter 7 trustee, even over the objections of in-house and outside counsel.

  - “We hold, therefore, that the officers of a bankrupt corporation may not assert or waive the corporation’s attorney-client privilege because that power vests exclusively in the bankruptcy trustee upon the bankruptcy adjudication.”
The Corporate Privilege in Bankruptcy: Creditors’ Committee

- In general, the ACP applies in most dealings with the Committee. The Committee is treated as a third party, even though it may be stepping into the role of shareholder or owner. Similar to the situation solvent companies face with shareholders.

- Consideration: Garner doctrine. May limit ability to claim privilege in certain types of actions where committee is effectively the shareholders.

- Work Product consideration: Is there adversity?
 Who has the privilege?

1. Privilege within the Corporation
2. Privilege Consideration During Employee Interviews
3. Former Employees
4. The Garner Doctrine
Holder of privilege during employee interviews

• Corporation holds the privilege
  – Unlike the privilege against self-incrimination, the attorney-client privilege may be asserted by a corporation
  – See Radiant Burners, Inc. v. American Gas Ass’n, 320 F.2d 314 (7th Cir. 1963).

• But it is important to inform the employee that the privilege is the corporation’s
  – Employee may mistakenly believe the privilege is his
  – If that belief is reasonable, courts may hold the privilege applies to both the employee and the corporation
  – Employer corporation may be prevented from disclosing information
Upjohn Warnings

- When to give the warning: Before interviewing employees

- Instructions:
  - Counsel represents the corporation, not the individual employee
  - The interview is covered by attorney-client privilege
  - The corporation holds that privilege
  - The corporation may decide to waive the privilege and disclose the contents of the interview, even if it is to the detriment of the employee

Who has the privilege?

1. Privilege within the Corporation
2. Privilege Consideration During Employee Interviews
3. Former Employees
4. The Garner Doctrine
Continued conversations with former employees

- Courts are mixed but communications may be privileged

- For privilege to apply, the communications must involve relevant information needed by corporate counsel to advise the client

- Some courts will not extend privilege to post-employment conversations because the former employee cannot be distinguished from other third parties
How to treat communications had when person was still employed

• General rule: Prior privileged communications remain privileged

• Chief Justice Burger’s concurrence in *Upjohn*:
  - "[A] communication is privileged at least when, as here, an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment."

• Determine if the communication met the standards of privilege while the employee was still with the company
  - Does it satisfy *Upjohn*?
Deposition Preparation

• Conversations that extend beyond activities within the course of the ex-employee’s employment are not privileged

• Sharing certain information may result in waiver of privileged communications
  - Do not discuss any communications that may affect the witness’s testimony
  - Do not discuss testimony of other witnesses or other facts of the case of which the former employee would have no knowledge

• *E.g.*, *Peralta v. Cendant Corp.*, 190 F.R.D. 38 (D. Conn. 1999)

• Work Product as alternative
Who has the privilege?

1. Privilege within the Corporation
2. Privilege Consideration During Employee Interviews
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4. The Garner Doctrine
Garner Doctrine


- Based on the ultimate commonality of Interest between counsel and minority shareholders
  - Thus, a corporation cannot keep its minority shareholders from gaining access to information by claiming privilege
  - Indicia of Good Cause

- Not universal rule

- Courts are less clear on whether Garner applies to Work Product
Garner

- *In re Int’l Systems and Control Corp.*, 693 F.2d 1295 (5th Cir. 1982). Derivative action arising out of company’s improper payments to third parties.
  - Work Product not based on fiduciary relationship; Issue is one of adversity.
  - Where Management and Shareholders are adverse the company should be entitled to work product protection.

- **Key issues:**
  - Is there adversity?
  - Did it exist at time the document was created?

- **Issue in Investigatory Context**
  - *In re Perrigo Co.*, 128 F.3d 430 (6th Cir. 1997).
Waiver: How to Avoid Exposing Your Confidential Communication to Third Parties
Waiver: Potential Sources for Claims of Waiver

1. Voluntary Disclosure: Dealing with the Government
2. Involuntary Implied Disclosure
3. Inadvertent Disclosure
Voluntary Disclosure

- The voluntary disclosure of otherwise privileged communications to third parties constitutes a waiver of the attorney-client privilege.

- Disclosure must be made by someone with authority to act as the Corporation’s agent:
  - Board of Directors
  - Trustee
  - Authorized Committee
  - Officer
  - Counsel

- A non-authorized or former employee cannot waive privilege and an attempt to do so is not effective. Highlights need for *Upjohn* warnings.
  - Litigation with Former Employees

- **Work Product Protection**
  - Protection waived if disclosed to adversary, or to someone who substantially increases opportunity for potential adversaries to obtain the information (conduit).
“Voluntary” Disclosure to the Government

- Holder Memorandum
- Thompson Memorandum
- December 2006: DOJ issues McNulty Memorandum
- Imposes “requirement” that prosecutors must meet before requesting privilege waiver. Requires local prosecutors to consult with or obtain approval from main justice.
- Sets up two category system
  - Category One: Underlying Factual Information
  - Category Two: Document revealing Attorney Mental Impressions
- Must Exhaust Cat. One before asking for Cat. Two
- Allows Company to “voluntarily waive” without request
- Ongoing effort: Attorney-Client Privilege Protection Act in Congress
- 2009: New DOJ Corporate Charging Guidelines
The New Guidelines and ACP

• **Disclosure of Facts Only**: Credit for cooperation will not depend on whether the company has waived attorney-client privilege or work product protections, or whether it has produced materials that are protected. Instead, the corporation's cooperation credit will depend solely on the disclosure of facts. If the company timely discloses relevant facts, it can receive credit for cooperation, regardless of whether it did so through disclosure of privileged or protected material. Corporations that do not disclose such facts typically will not receive such credit. The stated goal is to try to treat corporations and individuals the same in this context.
The New Guidelines and ACP

- **Non-Factual Communications**: Prior DOJ policy allowed prosecutors to request that the corporation disclose non-factual attorney-client communications (Category II information, under the McNulty Memo). DAG Filip observed that these communications lie at the core of the attorney-client privilege and work product protections. The new policy prohibits prosecutors from asking for such information, with two exceptions that are well recognized in legal doctrine: the advice of counsel defense and the crime fraud exception.
Federal Rule of Evidence 502

- Prior to Adoption of New Rule
  - AC Privilege: Subject Matter Waiver
  - WP Protection: Waiver of WP disclosed and perhaps underlying documents; generally no subject matter waiver
- Post-Adoption of Rule 502: Subject Matter Waiver only with respect to Intentional “Disclosure” and only in “Unusual Situations,” but applies to both AC Privilege and WP Protection.
- Rule 502 addresses only “Disclosure,” not “Use” of privileged or protected material.
Rule 502

(a) Disclosure made in a federal proceeding or to a federal office or agency; scope of a waiver. - When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.
Waiver: Potential Sources for Claims of Waiver

1. Voluntary Disclosure: Government Investigations and Regulators

2. Involuntary/Implied Waiver

3. Inadvertent Disclosure
Types of Implied Waiver

• Advice of Counsel: Generally where a party relies on advice of counsel as a defense they allow the opposing party to explore privileged matters to see what advice was given and what was taken.
  

• Attorney as Witness

• Attorney as 30(b)(6) Deponent
  
Advice of Counsel

- Elements of Advice of Counsel Defense:
  - Client made complete disclosure to counsel;
  - Client sought advice as to legality of contemplated action;
  - Counsel advised client action was legal; and
  - Client relied on that advice.

- Asserting advice of counsel precludes use of the privilege to shield that advice from scrutiny.
  - See, e.g., *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (9th Cir. 1992); Restatement (Third) of the Law Governing Lawyers § 79.

- Scope of Waiver: The Subject Matter of the Advice.
Waiver: Potential Sources for Claims of Waiver

1. Voluntary Disclosure: Government Investigations and Regulators
2. Involuntary/Implied Waiver
3. Inadvertent Disclosure
The Wayward Document

- Most commonly at issue in pre-trial discovery or large scale document production to the Government
- Courts generally enforce a fiction of confidentiality if
  - Efforts were taken to avoid disclosure
  - Disclosure was quickly discovered
  - Immediate action taken to retrieve communication
(b) Inadvertent disclosure. – When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ.P. 26(b)(5)(B).
Attorney-Client Privilege in the Regulation and Investigation of a Company’s Financial Health

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Agenda

• Protecting the Privilege while Dealing with Regulators
  – Regulatory Exam Process
  – Bank Regulators
  – Preparing for and Responding to Regulatory Inquiries

• Investigations and Audits
  - Privilege Within the Corporation
    - Reporting results of an internal investigation to the board
  - Communication among Management
  - Audit Committees
Protecting the Privilege while Dealing with Regulators: Regulatory Exam Process

• What Information is Typically Requested by Regulators?
  – Public SEC Filings
  – Minutes and Presentation to:
    • Board of Directors
    • Audit Committees
    • Risk management and other management committees
  – Financial Reports
    • Balance sheet and capital reports
    • Business line performance data, including credit metrics
  – Audit Reports
What Information is Typically Requested by Regulators? (continued)

- Examination reports of affiliates
  - Requires other regulator’s consent

- One-off requests that require preparation of materials for the regulators

- Significant contracts, particularly requested in technology exams
  - May need to redact sensitive information that is not relevant to the exam, e.g. pricing
  - May need to notify counterparty or obtain consent
Difficulties of Attorney-Client Privilege in a Highly Regulated Environment

Potential:
- Loss of Privilege
- Damage to Reputation
- Expensive Lawsuits

Additional potential access in regulated environment, e.g., SR 97-17 (SUP)
Availability of Privilege vis-à-vis Regulators

The Premise

US or Non US Regulators

Plaintiffs’ Attys

Assert Att'y-Client Privilege vis-à-vis regulators?

Corporation’s Inside/Outside Counsel

Attorney-Client Privilege
Protecting the Privilege while Dealing with Regulators: Bank Regulators

- Financial Services Regulatory Relief Act of 2006, P.L. 109-351
  - Preserves a claim of attorney-client privilege if a bank provides an examiner otherwise privileged material.
    - Applies to FDIC-insured bank
    - Applies to documents provided to bank regulators during a supervisory or regulatory process
  
  "The submission by any person of any information to any Federal banking agency, State bank supervisor, or foreign banking authority for any purpose in the course of any supervisory or regulatory process... shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law..." (Section 607)
Protecting the Privilege while Dealing with Regulators: Preparing for Regulatory Inquiries

• Drafting E-Mails with the Attorney-Client Privilege in Mind

  – Awareness of legal v. business advice in e-mail.

  – Clearly indicate that the communication is intended to request or to provide legal advice.

  – Address business and legal advice separately if possible.

  – Fundamental Issues: “Am I using legal skills?” or “Am I requesting legal advice?”
Protecting the Privilege while Dealing with Regulators: Responding to Regulatory Inquiries

• Does Privilege Apply?
  – Much of the information that is subject to discovery and that is requested in regulatory examinations is not privileged information.

  – The attorney-client privilege also generally does not protect factual information, including financial performance data, PowerPoint slides prepared by management for general business purposes, etc.
Protecting the Privilege while Dealing with Regulators: Responding to Regulatory Inquiries

**Whether or Not Privilege Applies -- FOIA**

FOIA:

- All Federal agencies are required under Freedom of Information Act (FOIA) to disclose records requested by public

- Agencies may withhold information pursuant to certain exemptions and exclusions

XYZ-000001
CONFIDENTIAL TREATMENT REQUESTED
FOIA EXEMPTION CLAIMED
Protecting the Privilege while Dealing with Regulators: Responding to Regulatory Inquiries

Whether or Not Privilege Applies -- FOIA

- July 2005 Southern District of New York decision (ICP v. FRB)
  - Community groups sued FRB to obtain contents of an application to the Federal Reserve (Wachovia/SouthTrust merger)
  - The Federal Reserve denied the FOIA request based on exemption for trade secrets and commercial/financial information that is privileged or confidential
  - “Confidential” if (1) publicizing impairs gov’t’s ability to obtain in the future, or (2) causes substantial competitive harm to person from who obtained
  - Court said FOIA exemptions “given a narrow compass”
  - The Court held that the exemption covers client name, loan terms, amounts but not – aggregate exposure of outstanding loan amounts or due diligence practices
Protecting the Privilege while Dealing with Regulators: Responding to Regulatory Inquiries

Whether or Not Privilege Applies -- FOIA

Pointers for claiming FOIA exemptions:

• Materials must be non-public

• Written requests needs to follow the regulator’s FOIA exemption rules

• Claiming more than one exemption is perfectly fine

• Claims involving competitive harm exemption require justification
Protecting the Privilege while Dealing with Regulators: Responding to Regulatory Inquiries

*Protection of Privileged Documents*

• When regulators request privileged documents, you should consider:
  
  • Obtaining a formal written request
    – Reduce voluntary aspect of disclosure
  
  • Exploring alternative ways to reduce written information to the regulator
  
  • Obtaining a letter from regulators confirming that they do not view the disclosure as a waiver of any applicable privilege
Investigations and Audits: Privilege Within the Corporation

• Who does the privilege protect?
  – The corporation itself, not its individual officers, directors or employees.

• Can a communication between even a junior employee and counsel for the corporation be privileged?
  Yes --
  • *Upjohn v. U.S.* -- the U.S. Supreme Court ruled that communications with employees at any level could be protected, provided: (1) the communication was made at the direction of corporate officials to obtain legal advice; (2) the matters communicated fell within the scope of the employee's duties and were not available from upper level employees; (3) employees were aware that the purpose of the inquiry was to help in obtaining legal advice; and (4) the communications were intended to be kept confidential
Investigations and Audits: Privilege Within the Corporation

Best practices for protection of privileged documents include:

• Training/Awareness.

• Make sure attorneys are giving legal advice.
  – Presumptions with Outside vs. Inside Counsel.

• Having outside counsel retain consultants, experts, accountants and advisors.

• Consider having internal “experts” work under outside counsel’s direction.

• Note that communications and discussions are for legal purposes or in anticipation of litigation.
Investigations and Audits: Privilege Within the Corporation

Reporting the results of an internal investigation to the board of directors -- best practices:

- Selectively use “Privileged & Confidential” notation on communications.
- Limit distribution of privileged materials and work product.
- Be careful with e-mails!
- Careful of Waiver
Investigations and Audits: Communication Among Management

- Attorney-client privilege covers only communications between an attorney and client for the purpose of obtaining legal advice.

- When in-house counsel or outside counsel also serves in a management capacity in the corporation (e.g., on the board of directors), is every communication between the counsel/board member and others in the corporation considered privileged?
  - A court will look to two main factors to determine whether the privilege applies:
    - Was the counsel acting in a legal capacity when this communication took place?
    - Was the purpose of the communication to secure or provide legal advice?
Investigations and Audits: Audit Committees

Structuring Audits

- Reports prepared by an audit firm, for example, are more likely to be protected by attorney-client privilege if the firm is acting as agent of law firm rather than the corporation.
Questions & Answers

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Attorney-Client And Work Product Privileges In Bankruptcy Proceedings
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¹ This presentation reflects the views of the author only and not necessarily those of Sidley Austin LLP. This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and the receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this information without seeking advice from professional advisors.
I. SCOPE OF PRIVILEGES

A. Not Every Attorney-Client Communication Is Privileged

B. Creditors’ Committee Privileged Communications

C. Attorneys’ Fee Petitions
I. SCOPE OF PRIVILEGES

A. Not Every Attorney-Client Communication Is Privileged

- Discussion of purely business matters or the communication of facts distinct from the seeking of legal advice is not privileged.

- Facts or documents provided to an attorney for inclusion in a public bankruptcy filing are not privileged.

- *United States v. White* (7th Cir.) – witness interview notes and draft bankruptcy pleadings may not be privileged.
I. SCOPROF PRIVILEGES

B. Creditors’ Committee – Privileged Communications

– Communications between creditors’ committee or its members and counsel for the committee concerning the seeking of legal advice.

– Documents reflecting committee counsel’s impressions of the bankruptcy litigation.

– Communications made relating to purely business matters which do not raise legal questions are not privileged.
I. SCOPE OF PRIVILEGES

C. Attorneys’ Fee Petitions

- Contemporaneous billing records to justify attorneys’ fee petition.

- Fee amount, time spent, general description of work performed are not privileged.

- Time billing entries that reflect client’s legal inquiries or specific nature of attorney work are privileged and should be redacted.

- Possible in-camera review.
II. COMMUNICATIONS BETWEEN DEBTOR AND CREDITORS

A. Settlement Negotiations

B. Common Interest Privilege
II. COMMUNICATIONS BETWEEN DEBTOR AND CREDITORS

A. Settlement Negotiations

- Many bankruptcy negotiations involve settlement of claims.

- Federal Rule of Evidence 408 governs use of settlement negotiations – may not be used to prove liability, invalidity or the amount of the claim.

- May be used and is discoverable for other purposes.

- May also qualify for “settlement privilege” under the 6th Circuit Court of Appeals holding in Goodyear Tire.
II. COMMUNICATIONS BETWEEN DEBTOR AND CREDITORS

B. Common Interest Privilege

- Where debtor and creditors have a common legal interest in a matter, they may share privileged documents and communications without waiving versus third parties.

- Maximizing likelihood of application by confirming confidentiality and articulating the common interest.
III. PARENT-SUBSIDIARY RELATIONSHIPS

- Application of privileges is complicated by complex corporate structure.

- Parent-subsidiaries share joint representation, but interests diverge.

- 2007 3rd Circuit Court of Appeals decision in *Teleglobe* illustrates complexities.

- Subsidiary companies gain access to and can make use of privileged communications arising from joint representation in litigation versus parent.
IV. ISSUES CONCERNING SENSITIVE VALUATION MATERIALS AND BUSINESS INFORMATION

A. Valuation Materials

- Valuation materials may be privileged work product when prepared under supervision of counsel in a bankruptcy proceeding.

- Need to avoid waiver.

- Need genuine attorney involvement.
IV. ISSUES CONCERNING SENSITIVE VALUATION MATERIALS AND BUSINESS INFORMATION

B. Financial Advisors

- Financial advisors share in privileged documents of information of debtor.

- May remain privileged in certain jurisdictions where financial advisor is “facilitating” the legal advice to debtor.

- Four-part test. Other jurisdictions employ more or less restrictive standards. Need to research jurisdiction.

- Again, need to avoid overreaching.
IV. ISSUES CONCERNING SENSITIVE VALUATION MATERIALS AND BUSINESS INFORMATION

C. Business Strategy Immunity

- Limited evidentiary privilege.

- Protects from discovery confidentiality valuation or business information where protective disclosure would harm debtor.

- In federal civil courts, reflects Federal Rule of Civil Procedure 26(c) balancing test: importance of information vs. harm to debtor.

- Immunity only lasts until harm subsides.
I. SCOPE OF PRIVILEGES

A. Not Every Attorney-Client Communication Is Privileged

- Not every communication between a client and an attorney is privileged.

- The discussion of purely business matters or the communication of facts separate and distinct from the seeking of legal advice is not privileged.

- Facts communicated to an attorney or documents provided by a client to an attorney for inclusion in a public bankruptcy filing are not privileged. This is because when information is given by the client to an attorney with the understanding that it will be turned over to a third party, such information is not confidential.

- In *United States v. White*, for example, the 7th Circuit Court of Appeals relied on this theory in holding that debtor’s counsel was obligated to produce witness interview notes and draft bankruptcy pleadings.

- Most of the cases in this area involve individual debtors charged with bankruptcy crimes. It is not clear how applicable the precedent may be to commercial and corporate debtor situations.

I. SCOPE OF PRIVILEGES

B. Creditors’ Committee Privileged Communications

- Communications between the creditors’ committee or its members and committee counsel seeking legal advice are privileged attorney-client communications.

- Documents or information reflecting committee counsel’s impressions of the bankruptcy litigation is privileged work product.

- These privileges facilitate full and frank communication between the members of the creditors’ committee and committee counsel.

- Privileged communications must be made in confidence and for the purpose of obtaining or providing legal advice. Communications made relating to purely business or other matters that do not raise legal questions are not privileged.

- The committee’s privilege log should specify the relation between the communications and the committee’s duties and purposes.

I. SCOPE OF PRIVILEGES

C. Attorneys’ Fee Petitions

- In bankruptcy proceedings, contemporaneous billing records frequently are required to justify attorneys’ fee petitions.

- In general, an attorney’s billing statement is not an attorney-client privileged communication where it only shows the fee amount, the general nature of the services performed and communications with third parties.

- Billing statement entries that reflect the client’s motive in seeking representation, the client’s litigation strategy or the specific nature of services (such as legal issues researched) may be privileged.

- Privileged entries in the billing statements should be redacted. If the redacted material is sufficiently extensive to infringe upon the Court’s ability to evaluate the reasonableness of the fee, the Court may require an in-camera review of unredacted billing records.

- Where the debtor challenges his own attorney’s fee petition, any privileged communication may be waived.

II. COMMUNICATIONS BETWEEN DEBTOR AND CREDITORS

- In bankruptcy proceedings, the debtor and creditors have frequent and extensive communications.

- Many of these communications involve business and financial matters or commercial negotiations which are not privileged against third parties.

- Are any of these communications potentially privileged? They can be under limited circumstances.
II. COMMUNICATIONS BETWEEN DEBTOR AND CREDITORS

A. Settlement Negotiations

- Many negotiations in bankruptcy proceedings involve the settlement of claims.

   - The confidentiality of those negotiations, for the most part, is governed by Federal Rule of Evidence 408 which provides that settlement negotiations are inadmissible when offered to prove liability, invalidity or the amount of the claim.

   - Rule 408 may bar admissibility or even discovery of settlement negotiations in appropriate circumstances.

   - If settlement negotiations are offered for a purpose other than those described in Rule 408, they may be discoverable and admissible.


   - Settlement negotiations among a debtor and creditors may also qualify for the “settlement privilege” recognized in the Goodyear Tire case decided by the 6th Circuit Court of Appeals in 2006.

   - The Goodyear court applied a balancing test to determine whether communications made in furtherance of settlement are discoverable by third parties to the negotiation. Those factors include (i) public policy favoring confidentiality of settlement discussions; (ii) the need for confidentiality to foster effective settlement discussions; and (iii) the inherent “questionability” of the truthfulness of statements made in such negotiations.


   - Although it arose in the context of civil product liability litigation, the settlement privilege may very well apply to settlement negotiations in bankruptcy proceedings.

   - Some courts may be hostile to recognizing this privilege, but in the right situation, it is an important doctrine to recognize.

   - To maximize the effectiveness of this argument, counsel should consider making explicit the confidentiality of settlement negotiations.
II. COMMUNICATIONS BETWEEN DEBTOR AND CREDITORS

B. Common Interest Privilege

- The common interest privilege protects certain types of communications between the debtor and creditors or amongst creditors.

- Parties asserting the common interest privilege must have a common legal interest such as where parties are co-parties to litigation or reasonably believed they could become co-parties to a litigation.

- Counsel may maximize the likelihood of application of the common interest privilege by confirming with all parties explicitly the confidentiality of communications and specifically articulating the common interest.

- Privileged documents and information shared among different creditors or among different creditors’ constituencies may remain privileged.

- Even information shared between the debtor and creditors may be privileged under circumstances where the debtor and creditors have a common interest.

III. PARENT-SUBSIDIARY RELATIONSHIPS

- The application of privileges can be complicated where the attorney is providing legal advice to various levels of a complex corporate structure.

- This is especially true under circumstances where a parent corporation and its subsidiaries are represented by the same attorney but their interests in the bankruptcy proceeding have begun to diverge.

- The 2007 Third Circuit Court of Appeals decision in *Teleglobe* illustrates this situation.

- *Teleglobe* involved litigation over a decision by parent corporation, Bell Canada, to cease funding the operation of its Teleglobe subsidiaries.

- The subsidiaries sued the parent corporation in Delaware bankruptcy court and sought documents concerning pre-bankruptcy legal advice rendered jointly to the parent and subsidiaries.

- The *Teleglobe* court held that the subsidiaries were entitled to the privileged information. Where a dispute arises between two parties who previously were represented by counsel as a joint client, privileged information arising from that joint representation may be used by one party against the other even as it may remain privileged against the rest of the world.

- Illustrates need for careful pre-bankruptcy planning in retention of counsel. Consider written agreements and limitations on joint representation. Consider separate counsel for subsidiaries and affiliates.

*See In re Teleglobe Communications Corporation*, 493 F.2d 345 (3rd Cir. 2007).
IV. ISSUES CONCERNING SENSITIVE VALUATION MATERIALS AND BUSINESS INFORMATION

- There are unique privilege issues concerning sensitive valuation materials and business information.

A. Valuation Materials

- Valuation materials may be privileged work product when they are prepared under the supervision of counsel in a bankruptcy proceeding.


- Counsel must take care to avoid waiver which can occur if the parties act under the assumption the materials will be made public or if valuation issues are directly placed at issue in the proceedings.


- Courts may also order production of otherwise privileged valuation materials where unique circumstances surrounding the preparation of the materials suggest an attempt at artifice fraud.

- In In re Asousa P'Ship, 2005 WL 3299823 (Bankr. E.D. Pa. Nov. 17, 2005), the Court ordered the production of valuation materials to the opposing parties in an adversary proceeding. The materials were prepared under the supervision of counsel under circumstances where it was obvious that the participation of counsel in the preparation of the report was solely to attempt to create a work product privilege.
B. **Financial Advisors**

- In the course of performing services in a bankruptcy proceeding, financial advisors and investment bankers may become privy to otherwise privileged communications. The question arises whether and under what circumstances does this waive the privilege?

- Different jurisdictions apply varying legal standards in this context to evaluate waiver. Under the “facilitator standard,” sharing privileged communications with a financial advisor does not waive the privilege where the financial advisor is “facilitating” the giving of legal advice to the client.

- Four-part test
  - the financial advisor must be an agent of the attorney;
  - the financial advisor must facilitate the communication between the attorney and the client;
  - the communications with the financial advisor must be confidential;
  - the privilege must not otherwise be waived.


- Some courts have extended protection under the facilitator standard to financial advisors retained by the debtor and not by counsel.


- Other Courts have limited the sharing of the debtor’s privileged information with an advisor to situations where the advisor is the “financial equivalent of an employee.”

- Again – as with valuation materials, if a court views the financial advisor’s participation on privileged communications as an artifice to cloak those communications in securing the privilege may not be maintained. For example, a financial advisor has no intervention with the client.

C. **Business Strategy Immunity**

- Delaware and several federal courts have recognized a limited evidentiary privilege known as the business strategy immunity. (It is also sometimes referred to as the white-knight privilege as it first arose in the contents of capital control contests).

- The business strategy privilege protects from discovery confidential valuation or business information that is not yet public where the premature disclosure of the information would harm the debtor.


- In the federal civil courts, it reflects an application of the Rule 26(c) balancing test. To involve the doctrine, the Court balances the importance of the matter sought to be discovered to the party seeking it; the risk of non-litigation injury that might occur to the other party if discovery is permitted; and the stage of the company’s efforts, as well as the stage of the litigation.

- The business strategy privilege is not strictly a privilege but an immunity from discovery under certain circumstances. As a result, the business strategy immunity is not infinite in time. Once the need for confidentiality has passed, the information must thereafter be disclosed.

- The business strategy privilege has rarely been asserted in bankruptcy proceedings, but, armed with this doctrine, bankruptcy counsel has another argument besides work product to protect against premature disclosure of valuation materials and sensitive business information of the debtor.