Protecting Mediation Communications in Bankruptcy Cases

By Russell C. Silberglied[*]

Over the past decade, some of the most important aspects of Chapter 11 reorganizations have been sent to mediation with increased frequency. Headline-grabbing cases like The Weinstein Companies, Purdue Pharma and Boy Scouts of America have all turned to mediation to attempt to achieve consensus concerning significant tort, personal injury and abuse claims, while smaller and/or lower-profile cases that have utilized mediation are too numerous to mention. Due to the increased frequency of mediation, including in high-stakes (and high-profile) cases, bankruptcy courts have begun to grapple more regularly with an issue non-bankruptcy judges and commentators have struggled with for years: the extent to which mediation communications are confidential, privileged and/or excluded from admissible evidence.

Determining whether to afford confidentiality or privilege status to mediation communications or bar their admissibility is a balance of competing policy concerns. On the one hand, most agree that in order for mediation to be successful, a participating party must have confidence that it can be honest in communicating with the mediator and opposing parties without fear that the communications will be used against it in court if the mediation is unsuccessful.[1] As one court put it, "[t]he process works best when parties speak with complete candor, acknowledge weaknesses, and seek common ground, without fear that, if a settlement is not achieved, their words will be later used against them in the more traditionally adversarial litigation process."[2] Thus, "[w]ithout the expectation of confidentiality, parties would hesitate to propose compromise solutions out of concern that they would later be prejudiced by their disclosure."[3] On the other hand, creating new evidentiary bars and privileges interferes with the tenet in American jurisprudence that the public is entitled to "every person's evidence."[4] Indeed, there are times that *the only* evidence in support of a claim or defense is something that was stated or learned at mediation, such as communications tending to show that in fact no agreement was reached at mediation where the existence or not of a settlement is the issue being litigated.[5]

Given those competing tensions, even if confidentiality, an evidentiary bar or a privilege is generally recognized, courts may draw the line at what is privileged or barred and what is not in many different ways. For example,

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while the courts and commentators that conceptually recognize a privilege readily acknowledge that an offer made at mediation falls within that privilege, they may diverge on many other categories, such as documents exchanged at mediation, documents created before mediation for potential use at mediation, and settlement offers made after mediation in furtherance of continued settlement efforts. Indeed, statutes and courts have drawn many different lines, thereby leading to uncertainty and confusion. As of 2003, the year that a revised version of the Uniform Mediation Act ("Model Act") was published, remarkably there were 250 separate state statutes dealing with mediation confidentiality and/or privilege.[6] Thirteen states have adopted the Model Act in an attempt to gain clarity and uniformity, but only one state (Georgia) has adopted it since 2013, so the effort appears to have stalled. In federal courts, including bankruptcy courts, federal common law rather than state law governs whether or not a privilege exists unless state law supplies the rule of decision.[7] The case law on mediation privilege in federal courts has been mixed, with some courts embracing it and others rejecting it, and even those courts that have recognized it have differed in defining the precise contours of what is confidential and/or privileged and what is not.

In recent years, many bankruptcy courts have attempted to define an evidentiary bar, a privilege or confidentiality of mediation communications in their local rules. As high-stakes mediations have proliferated, bankruptcy judges are increasingly being asked to rule on the application of these rules. One thing is certain: since every court's local rules are different, this approach is not likely to yield uniformity, which creates its own set of issues discussed below.

A. Confidentiality, an Evidentiary Bar or a Privilege?

Mediation communications can be protected by three related but distinct concepts (or some combination of them): confidentiality, an evidentiary bar and the creation of a privilege. Treating such communications as confidential likely is the least controversial. Indeed, bankruptcy courts are accustomed to entering protective orders protecting confidential information under Section 107(b)(2) of the Bankruptcy Code, and one could make the case that communications at a mediation constitute "confidential . . . commercial information" under the terms of the statute. Unfortunately, solely providing the protections afforded to confidential communications does not typically suffice with respect to mediation communications. Suppose that the debtor presents the mediator with an analysis showing that the maximum offer it can make without jeopardizing the plan's feasibility is $X, and because the debtor wants to leave negotiating room it makes an offer of 80% of $X. If the only protection were confidentiality, the opposing party could agree to be bound by a protective order barring disclosure to non-litigating third parties and then seek discovery and even to introduce the analysis into evidence under seal at a hearing. If the point of providing special protection to mediation communications is to foster a party's honest communications with the mediator (and sometimes opposing counsel) without fear that those communications will endanger the party's litigation efforts if mediation fails, the

"confidential" treatment described in this hypothetical provides almost no assistance.

Of course, Federal Rule of Evidence 408 provides added protection in that it excludes the admission of evidence of both settlement offers and "conduct or a statement made during compromise negotiations about the claim."[8] But Rule 408 only excludes evidence to the extent that it is being offered "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement"; the rule expressly permits a court to "admit this evidence for another purpose."[9] Take the example above and further assume that exclusivity had expired and a tort claimant committee has proposed a competing plan. Notwithstanding Rule 408, the tort claimant committee could introduce the evidence of the feasibility analysis described above not to show that the debtor has liability on tort claims, but instead in support of its contention that its own plan is feasible. Moreover, Rule 408 is only a bar to admissibility of evidence; it provides no protection with respect to discovery. Thus, even if the tort claimant committee ultimately could not get the analysis admitted into evidence, it could obtain the analysis and other documents related to it in discovery.[10] The debtor likely does not typically anticipate that result, and if the bar understands that these types of documents will be discoverable and in certain circumstances even admitted into evidence, it will tend to undercut the debtor's willingness to engage in mediation in the first instance or to share an honest assessment of the issues at a mediation.

The most complete stand-alone protection is the creation of a privilege (though privilege in combination of with confidentiality and an evidentiary bar would provide the best protection). If the communication is considered to be privileged, testimony cannot be compelled and documents cannot be discovered or admitted into evidence absent waiver or consent of all parties (including the mediator and entities that were party to the mediation, but not additional parties in the contested matter or adversary proceeding at issue). But as described below, not all federal courts recognize a mediation privilege.

B. Existence of a Privilege

While there is no time-honored mediation privilege, as there is an attorney-client privilege, Federal Rule of Evidence 501 provides that the common law allows the federal courts to develop additional evidentiary privileges through "reason and experience." Courts generally apply the Supreme Court's four-pronged test from *Jaffee v. Redmond* to determine whether to adopt new evidentiary privileges, such as the psychotherapist-patient privilege asserted in that case.[11] The test asks whether the proposed new privilege is "rooted in the imperative need for confidence and trust,"[12] whether applying a privilege would serve a public end,[13] whether the evidentiary loss resulting from the privilege would be modest,[14] and whether denial of the federal privilege "would frustrate the purposes of the state legislation that was enacted to foster these confidential communications."[15]

The first case to apply *Jaffee* to establish a federal common law mediation

privilege was *Folb v. Motion Picture Industry Pension & Health Plans*.[16] In *Folb*, the plaintiff moved to compel production of a mediation brief and related documents used in the mediation and correspondence between the defendants and a third party.[17] Applying the four-pronged *Jaffee* test, the district court concluded that the mediation privilege protected communications to the mediator and communications between the parties.[18] In the years since *Folb* was decided, some courts have distinguished or even rejected it. The Fifth Circuit Court of Appeals held, in *In re Grand Jury Subpoena Date December 17, 1996,*[19] that mediation communications may be confidential but are not privileged. And in the very district that decided *Folb*, the court held several years later, in *Molina v. Lexmark International Inc.,*[20] that mediation communications were not privileged because they were directly relevant to the issue before the court: whether the damages being asserted in the case met the threshold for diversity jurisdiction removal. The *Molina* formulation could also be read to suggest that if there is a privilege, it only applies to third-party attempts for discovery.[21]

In contrast, other courts have followed *Folb* and sought to define its contours. For example, in *Sheldone v. Pennsylvania Turnpike Commissioner*,[22] the court adopted a federal common law privilege in granting a protective order regarding communications that occurred during mediation. In defining the scope of the privilege, the court held that even if the evidence in question was presented during mediation, the privilege does not protect the evidence if it is otherwise independently discoverable. A rare published bankruptcy court opinion on the subject, *In re RDM Sports Group, Inc.*,[23] also adopted the privilege but limited it in a different way: it held that the privilege "only [covered] those communications made to the mediator, between the parties during the mediation, or in preparation for the mediation."[24] Thus, the privilege did not cover documents prepared *prior to* mediation.[25]

Another case, *ACQIS, LLC v. EMC Corporation*,[26] focused on documents from the other end of the time continuum. There, the court held "that communications to which a mediator was personally privy, communications that were directly made at a mediator's explicit behest, or communications undertaken with the specific intent to present them to a mediator for purposes of mediation are protected by the federal mediation privilege."[27] However, the court also concluded that "[s]ettlement negotiations in which a mediator is not actively and directly involved *that follow a formal mediation* are not protected by the mediation privilege, even when they contain information learned during the mediation or where they occurred in light of mediation, and such communications must therefore be produced barring any other applicable rules."[28]

A more recent case that sought to define the contours of the privilege is *In re Wendy's Company Shareholder Derivative Action*.[29] Two shareholder groups that had participated in a mediation with the company and its fiduciaries had settled after the mediation, but a third shareholder group that participated in the mediation did not settle and objected to the court's approval of the settlement. The non-settling shareholders sought relief from the

mediation privilege to allow them to disclose the company's settlement communications during the mediation and documents disclosed during the mediation. The court held that the mediation privilege protected the settlement communications and denied that portion of the motion on that basis. But it held that the mediation privilege did not protect documents that were disclosed in a background portion of the mediation, ruling that documents not created for purposes of settlement negotiations are not protected by the mediation privilege even if they are used in mediation.[30]

Thus, some but not all federal cases support the existence of a mediation privilege, and even where the privilege is acknowledged, sometimes it is limited. The privilege is most likely to apply to submissions to the mediator or made during the mediation, but it might not apply to communications and documents that pre- or post-date the mediation, even if they are in furtherance of settlement. And courts will not apply a privilege to a communication just because it was used in mediation if the communication is otherwise discoverable.

While many courts are loathe to press for a more expansive adoption of a federal privilege because of their vantage point of needing more evidence to assist their fact-finding charge rather than more shields from evidence, many commentators have advocated for a greater and universal adoption of the privilege.[31] One commentator has argued that states should adopt the Uniform Mediation Act because if the states have widespread acceptance of a privilege, that would enhance the argument under *Jaffee* that the adoption of a federal privilege is warranted.[32] However, as set forth above, the states' momentum for adoption the Model Act has stalled.[33]

C. Protection of Settlement Communications in Local Rules

Settlements are favored in bankruptcy.[34] As a result, bankruptcy courts support and encourage mediation in an effort to increase settlements.[35] Indeed, bankruptcy courts are so invested in mediation that in many districts, a sitting bankruptcy judge will frequently act as a mediator for cases over which she or he is not presiding.[36] Many districts have adopted local bankruptcy court rules governing mediation in an effort to maximize effectiveness and fairness and assure that parties' expectations are being met.

Frequently, among those rules are ones dealing with the confidentiality, admissibility and/or privilege of mediation communications because those courts recognize that "[c]onfidentiality is necessary to the mediation process."[37] These local rules essentially are intended to play the role of cases like *Folb* or legislation like the Model Act in the context of stalled adoption of statutes and the lack of a robust body of federal case law. The bankruptcy courts for the District of Delaware, the Southern District of New York and the Southern District of Texas each have a local rule that not only protects confidentiality but limits discoverability.[38] The rules vary in length, detail, reach and (arguably) clarity, but they all go beyond merely providing for confidentiality and confirming the protections of Federal Rule of Evidence 408; they provide that mediation communications may not be disclosed,

which prevents discovery and admissibility beyond Rule 408, provided that just because a document was used at mediation does not mean that it is shielded from discovery if it would otherwise have been discoverable.

The Eastern District of Virginia also has a local rule that prevents the disclosure of "[t]he substance of communications and writings in the mediation process," but the rule is phrased in a manner that gives rise to several questions.[39] For example, it says that mediation communications "shall not be disclosed to any person other than participants in the mediation process,"[40] which implies that communications that one side made to the mediator but not to the opposing party at the mediation *are* discoverable by the opposing party. Moreover, the limitation on disclosure to third parties is given a seemingly odd caveat: "provided, however, that nothing herein shall modify the application of Federal Rule of Evidence 408."[41] Of course, Rule 408 concerns admissibility, not disclosure or discoverability, so it is not clear what this caveat is intended to mean. If the intention is to limit the discovery prohibition in the same way that Rule 408 limits the bar to admissibility (i.e., settlement communications are only inadmissible if offered "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction"[42] but can be admitted "for another purpose"[43]), litigants frequently would come up with a way to justify seeking discovery of settlement communications. This would make the reach of the Eastern District of Virginia local rule not nearly as expansive as the local rules of the Southern District of New York, the Southern District of Texas and the District of Delaware.

Such a discrepancy highlights one problem with relying on local rules to substitute for stalled efforts to develop a body of case law or pass statutes: local rules on a given subject differ in every district, or don't exist at all. As the Prefatory Note to the Uniform Act recognizes, uniformity of the rules regarding mediation confidentiality, admissibility and privilege is useful in many scenarios, chief among them if the mediation communication might be used in separate litigation in a jurisdiction other than the one in which the mediation is pending;[44] as described below, without uniformity, a substantial question exists in such a scenario of which jurisdiction's law would apply to an attempted use of the communication in the separate litigation. Moreover, bankruptcy tends to be a national practice, and leaving such an important issue to the local rules of each district, which could differ significantly or have nuanced differences, risks that counsel that is accustomed to the treatment of mediation privilege in one district might not appreciate subtle differences in a different district, which in turn either risks serious error if too much is disclosed or can be an impediment to candid mediation communications if counsel is overly guarded and protective in what she or he is willing to disclose.[45]

Notwithstanding the drawbacks of the patchwork nature of local rules, those districts that employ local rules to address mediation communication confidentiality, admissibility and/or privilege succeed in clarifying in advance how communications concerning mediations within their district

will be treated in most circumstances. This, in turn, furthers the goal of facilitating honest discussions at mediations, thereby increasing the likelihood of settlement. Thus, while perhaps not the ideal solution, well-crafted local rules concerning mediation communications significantly advance the ball, while any attempts at legislation or the development of a robust body of case law under *Folb* do not appear to be on the horizon.

But when relying on local rules, parties must be aware of several issues. First, exactly what documents are covered by any mediation privilege or protection? Are documents that a debtor shares with one creditor group discoverable by a different creditor group? How about documents that were prepared after the mediation session ended but before negotiations officially terminated? Some local rules are more specific than others, and therefore these types of issues might be addressed in some districts but not others.

Second, what happens when the local rules of one district protect mediation communications, but litigation commences or continues in state court or a different federal district? For example, in a mass tort bankruptcy, if mediation over how to treat mass tort claims in a plan is unsuccessful, the stay might ultimately be lifted to litigate individual tort claims in state court. The local rules of certain bankruptcy courts purport to limit the use of mediation communications *in other courts*, not just in the bankruptcy court.[46] Typically, local rules are not intended to affect the rights of parties in litigation in a different district or jurisdiction.[47] No reported case to date has had to grapple with whether a state court or a court in a different district should afford a mediation communication protection based upon a local bankruptcy court rule. Parties in cases like mass tort bankruptcies or similar situations must consider that, notwithstanding a local bankruptcy court rule, mediation communications might not be deemed privileged, confidential or inadmissible in a state court proceeding.

Third, if a party affirmatively intends to use the fact that mediation took place in support of a finding, such as that a plan was proposed in good faith, there will be obvious tensions with a local rule providing for confidentiality and privilege. This issue is discussed further below in Section E.

D. Protecting Settlement Communications with a Mediation Agreement

Given the lack of a federal statute and the undeveloped case law, another way parties and mediators have attempted to protect mediation communications is through the use of mediation agreements.[48] These contractual arrangements can be as specific as the parties and mediator agree, and they contractually bind the mediation parties to follow the rules that they have set for themselves. Thus, for example, parties can contractually agree that they will not introduce into evidence any mediation communication. While some mostly older case law holds that such agreements are unenforceable to the extent that they commit parties not to introduce evidence because "[a]greements to suppress evidence are generally void as against public policy,"[49] most recent court opinions enforce the parties' contractual commitments.[50]

Of course, such an agreement cannot bind non-signing third parties. Thus, for example, if there is a mediation between the debtor, the secured lenders and the creditors committee, that agreement cannot bind a non-signing, non-mediating ad hoc committee or other significant creditor. Additionally, a contract cannot create a privilege; it can only bind signing parties to their agreement not to seek discovery or admissibility. Accordingly, even if the mediator requires the mediation parties to sign his or her standard mediation agreement and that agreement provides that the mediation parties will not introduce any document or oral communication made during the mediation into evidence, there are no guarantees that the document will not be admitted into evidence anyway if an ad hoc committee seeks and obtains it in discovery and introduces it at a hearing.

As a result, mediation agreements, like local rules, are a very useful tool in the absence of a statute or extensive case law, but do not solve all possible issues.

E. Recent Case Law Applying Local Rules and Mediation Agreements

With the increasing usage of mediation agreements and local rules to address mediation communication confidentiality, discoverability and admissibility, federal courts (including bankruptcy courts) have recently had to grapple more frequently with the contours of the protections of those agreements and rules.

In re Wendy's Company Shareholders Derivative Action[51] demonstrates that a mediation agreement generally is enforceable. There, the court held that certain communications were protected by a federal mediation privilege and some were not.[52] But the court nevertheless denied a motion seeking permission to disclose even the non-privileged documents because the movant had executed a non-disclosure and confidentiality agreement in advance of the mediation. That agreement prohibited the signing parties from disclosing information exchanged during the mediation, so the court held that the movant could not use the communications in a court proceeding.

Tilton v. MBIA, Inc. (In re Zohar III, Corp.)[53] holds that "court's [sic] strictly enforce their [local] rules i[m]posing mediation confidentiality[,] permitting disclosure in only limited exceptional circumstances warranting disclosure that sufficiently counter the policy considerations underscoring confidentiality of mediation communications." The court was addressing, and granted, the debtor's motion to strike portions of an adversary complaint that disclosed under seal plaintiff's "version of the relevant facts concerning the global mediation and related communications."[54] The case primarily involved the application of a prior version of Bankr. D. Del. 9019-5(d), and the court additionally noted that the mediator had required the parties to agree that the local rule applied and all parties agreed;[55] thus, in effect the decision also can be viewed as one enforcing a mediation agreement.[56] The court noted that the rule prevented "disclosure 'outside the mediation' of any oral or written information disclosed by the parties or by witnesses in the course of mediation" and also prohibited "any person from relying on or introducing in any . . . judicial . . . proceeding evidence pertaining to any

aspect of the mediation effort."[57] It therefore held that "by its clear terms, the local rule requires that all of the mediation information disclosed by [plaintiffs] in their . . . claim and their . . . complaint and . . . adversary proceeding, be stricken as confidential and not considered by the court."[58] The court also determined that a party seeking an exception from the rule carries a "heavy burden" and the plaintiff did not meet the heavy burden.[59]

Finally, a recent opinion, *In re Boy Scouts of America*, is informative, as it touches on many of the matters described above.[60] At issue was the debtors' motion for a protective order concerning discovery and admissibility at the confirmation hearing of testimony and documents related to ongoing mediation proceedings.[61] Over a year earlier, the court had ordered certain parties to participate in a global mediation—some of whom desired mediation and some of whom opposed it—in hopes of a comprehensive resolution of the issues and claims in the debtors' Chapter 11 case.[62] The mediation order stated that, with one exception, Delaware Local Rule 9019-5 governed the mediation.[63] Mediation proceeded, and as the parties moved toward plan confirmation, potential objectors sought discovery. The debtors' motion for a protective order relied on, among other things, the mediation privilege in seeking to shield various documents, including board meeting minutes that contained a discussion of the mediation; communications between mediation parties about the settlement, restructuring support agreement, plan and related documents; and drafts of settlement proposals exchanged among mediation parties.[64]

The court began its legal analysis by observing that the Third Circuit has not acknowledged a federal common law mediation privilege and that only one circuit court, the Sixth Circuit, had done so.[65] Thus, mediation communications ordinarily are discoverable. However, the court acknowledged that Delaware Local Rule 9019-5, which was incorporated into the court's mediation order, affected the analysis. The version of the local rule in place at the time provided that "[e]xcept as set forth in the previous sentence, no person shall seek discovery from any participant in the mediation with respect to any information disclosed during the mediation." In applying the local rule, the court opined that the case law and commentary concerning the mediation privilege have arisen in the more traditional context of two party disputes in which the parties desire to try to settle at a mediation.[66] In that context, the potential for a successful mediation outcome is dependent on the following principles: "integrity of the process, [active] party involvement, and informed self-determination . . .".[67] But the court held that such principles are inapplicable to a multiparty mediation where

> not all parties are involved in every aspect of the comprehensive resolution. Not all parties agree with the comprehensive resolution. And even if there is an agreed-to resolution by most or even all of the mediation parties, creditors must still vote on the Plan and the Court must still conclude that the relevant standards are met. This is . . . not wholly consistent with self-determination.[68]

As a result, the court found that attempting to apply the mediation privilege to a multi-party, multiple-issue bankruptcy mediation is like trying to fit a square peg into a round hole because, as discussed above, much of the

existing law and commentary has arisen in a two-party dispute context.[69] Accordingly, notwithstanding the local rule and the order, the court denied the motion for a protective order in part on this basis.[70]

F. Potential Waiver Issues

Considering mediation communications to be privileged and/or confidential invites a related question: can such privilege or confidentiality be waived? Of course, other types of privileges and confidentiality treatment may be waived.[71] Among other reasons, privileges may be waived if a party (a) waives subject matter by disclosing some but not all privileged communications concerning that subject matter,[72] or (b) affirmatively places the subject matter of the privileged communication "at issue."[73]

Each of the recent opinions described in section E, *supra*, also addressed contentions of waiver. In *Wendy's*, the non-settling stockholders contended that the parties moving for approval of the settlement waived protection because "they disclosed, albeit at a 'high level', the mediation process in their court filings."[74] The court rejected this contention, noting that high-level disclosures, such as the fact that a mediation took place, are not privileged and therefore cannot be the basis of waiver, and the settling parties refrained from disclosing more specific facts that could have waived the privilege.[75]

Tilton v. MBIA Inc. (In re Zohar) also rejected a waiver argument, but on different grounds. As described above, the decision turned primarily on the application of the confidentiality, admissibility and privilege provisions of a local rule. The plaintiff argued that the parties moving for a protective order waived the protections of the local rule. The court rejected this argument, holding that "[n]o case law has been cited to support the idea that a waiver of our local rule can occur, let alone under the circumstances presented here."[76]

Finally, the *Boy Scouts* opinion dealt extensively with waiver and related issues. In support of the Bankruptcy Code's requirement that a plan must be proposed in good faith, the debtors intended to introduce into evidence at the confirmation hearing certain high-level facts, such as that the agreements that formed the backbone of the plan were reached at a mediation, the parties who participated in the mediation, the length of the mediation and related facts. The debtors argued, consistently with the *Wendy's* opinion, that these facts are not privileged and therefore could not form the basis of waiver. The court held that relying on these facts put the mediation "at issue," but stated that "debtors are correct that the facts that they seek to put into evidence may not be privileged";[77] thus, introduction of those facts did not necessarily waive privilege. However, the court held that while "courts have relied upon such facts in determining good faith in the context of class actions and settlements,"[78] that did not end the analysis. The court noted that "none of the decided cases" determining that that the existence of mediation was relevant to a finding of good faith "discuss any related discovery or admissibility disputes."[79] It ultimately held that "[i]t cannot be that if a party is relying on the very fact of mediation to meet its standard of proof, that discovery is

prohibited regarding the *bona fides* of the mediation."[80] Accordingly, for this and other reasons, the court permitted discovery and declined to rule on admissibility issues, notwithstanding the Bankruptcy Court of the District of Delaware's broad local rule.

G. Conclusion

Opinions concerning the mediation privilege and the application of local bankruptcy court rules and mediation agreements are increasing in frequency. While this has the potential to lead to the development of a body of case law that provides guidance for future cases, the opinions to date have not been uniform. Partially this is due to different facts and arguments in the cases, differing local rules and/or differing mediation agreements. But in large measure it is because there remains a tension between granting confidentiality in an effort to aid the effectiveness of mediations and making sure that parties have the right to discover and present evidence in aid of their case. This tension might be exacerbated in bankruptcy because, as the *Boy Scouts* opinion notes, bankruptcy is not a two-party dispute, and frequently certain parties to a dispute in a bankruptcy case will settle while other parties, who might not have mediated and were not a party to the mediation agreement, actively oppose the settlement.

In light of the foregoing, it would greatly enhance predictability if a uniform act protecting mediation communications was passed, applicable to federal courts. Failing that, it would be useful to address the issue in the Federal Rules of Bankruptcy Procedure rather than relying on a patchwork group of different local rules.

NOTES:

[1]See Unif. Mediation Act, prefatory n. (Nat'l Conf. of Comm'rs on Unif. State Ls.).

[2]Princeton Ins. Co. v. Vergano, 883 A.2d 44, 62 (Del. Ch. 2005).

[3]883 A.2d at 62 (quoting Wilmington Hospitality, L.L.C. v. New Castle County ex rel. New Castle Department of Land Use, 788 A.2d 536, 541 (Del. Ch. 2001)).

[4]Eric Laufgraben, Protecting Mediation Communications in Federal Courts, 1 Am. J. Mediation 87 (2007) (quoting Branzburg v. Hays, 408 U.S. 665, 92 S. Ct. 2686, 33 L. Ed. 2d 657 (1972)).

[5]Laufgraben, Protecting Mediation at 89.

[6]Unif. Mediation Act, prefatory n., Section 3 (2003).

[7]FED. R. EVID. 501.

[8]See FED. R. EVID. 408(a)(1) and (2).

[9]FED. R. EVID. 408(a), (b).

[10]This assumes, for the sake of argument, that the document in question is not separately protected by the attorney work product doctrine—perhaps because it was prepared by a financial advisor or was shared with a key constituency and therefore privilege or immunity was waived.

[11]Jaffee v. Redmond, 518 U.S. 1, 116 S. Ct. 1923, 135 L. Ed. 2d 337, 44 Fed. R. Evid.

Serv. 1 (1996).

[12]518 U.S. at 10 (citing Trammel v. U.S., 445 U.S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186, 5 Fed. R. Evid. Serv. 737 (1980)).

[13]518 U.S. at 11 (citing Upjohn Co. v. U.S., 1981-1 C.B. 591, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584, Fed. Sec. L. Rep. (CCH) P 97817, 1980-81 Trade Cas. (CCH) ¶ 63797, 81-1 U.S. Tax Cas. (CCH) P 9138, 7 Fed. R. Evid. Serv. 785, 30 Fed. R. Serv. 2d 1101, 47 A.F.T.R.2d 81-523 (1981)).

[14]518 U.S. at 12.

[15]518 U.S. at 13.

[16]Folb v. Motion Picture Industry Pension & Health Plans, 16 F. Supp. 2d 1164, 50 Fed. R. Evid. Serv. 760 (C.D. Cal. 1998), aff'd, 216 F.3d 1082 (9th Cir. 2000).

[17]16 F. Supp. 2d at 1167.

[18]16 F. Supp. 2d at 1180.

[19]In re Grand Jury Subpoena Dated December 17, 1996, 148 F.3d 487, 49 Fed. R. Evid. Serv. 1308 (5th Cir. 1998).

[20]Molina v. Lexmark Intern., Inc., 77 Fed. R. Evid. Serv. 905 (C.D. Cal. 2008).

[21]2008 WL 4447678 at *6.

[22]Sheldone v. Pennsylvania Turnpike Com'n, 104 F. Supp. 2d 511, 517, 48 Fed. R. Serv. 3d 943 (W.D. Pa. 2000)order aff'd, (Aug. 8, 2000).

[23]In re RDM Sports Group, Inc., 277 B.R. 415 (Bankr. N.D. Ga. 2002).

[24]277 B.R. at 431.

[25]277 B.R. at 431.

[26]ACQIS, LLC v. EMC Corporation, 2017 WL 2818984 (D. Mass. 2017).

[27]2017 WL 2818984 at *2.

[28]2017 WL 2818984 at *2 (emphasis added).

[29]In re Wendy's Company Shareholder Derivative Action, 2021 WL 3268841 (S.D. Ohio 2021).

[30]See Richard Mason, Wendy's Offers A Cautionary Tale On US Mediation Privilege, Law 360, Aug. 23, 2021.

[31]See, e.g., Alan Kirtley, The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process, and the Public Interest, 1995 J. Disp. Resol. 1 (1995); Charles W. Ehrhardt, Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court, 60 La. L. Rev. 91 (1999); Brian Levin, Protecting the Goal of Mediation: Rule 408 & the Creation of Mediation Privilege under Rule 501, 1 Am. J. Mediation 75, 75 (2007); Joseph Lipps, The Path Toward a Federal Mediation Privilege: Approaches Toward Creating Consistency for a Mediation Privilege in Federal Courts, 4 Am. J. Mediation 55 (2010).

[32]See Lipps, 4 AM. J. at 67–70.

[33]See supra p. 2.

[34]10 Levin & Sommer, Collier on Bankruptcy ¶ 9019.01 (16th 2022).

[35]Jarrod B. Martin, A User's Guide to Bankruptcy Mediation and Settlement Conferences, 11 Transactions 185 (2009).

[36]Hon. Cecelia G. Morris & Cheryl J. Lee, From Behind the Bench: Toward an Efficient Mediation Model — Evaluative Mediation in Bankruptcy, NORTON BANKR. L. ADVISER (Norton Inst. on Bankr. Law, Nashville, Tenn.), Apr. 2007, at 7 (noting that current or former

bankruptcy judges often serve as mediators in complex bankruptcy cases).

[37]Bankr. D. Del. Local Rule 9019-5(d).

[38]See Bankr. D. Del. Local Rule 9019-5(d); Bankr. S.D.N.Y Mediation Rule 5.1; S.D. Tex. Local Rule 16.4.J, made applicable by S.D. Tex. Bankruptcy Local Rule 1001-1(b).

[39]Bankr. E.D. Va. Local Rule 9019(J).

[40]Bankr. E.D. Va. Local Rule 9019(J).

[41]Bankr. E.D. Va. Local Rule 9019(J).

[42]FED. R. EVID. 408(a).

[43]FED. R. EVID. 408(b).

[44]See Uniform Act at Prefatory Note, § 3.

[45]See Tyler Lane, Mediation Privilege and Confidentiality: New Local Rules and the Need for National Guidance, American Bankruptcy Institute Journal, V. XLI, No. 5 (May 2022) at 43 ("Without a comprehensive consistent approach to mediation privilege nationwide, parties are left to analyze a patchwork of jurisdiction-specific case law, local rules, state laws and more general privilege protections . . . in determining whether the mediation privilege may apply. As a result, parties will inevitably be guarded in mediation, lessening the likelihood of candid negotiations and, ultimately, the success of mediation.").

[46]See, e.g., Del. Bankr. L.R. 9019-5(d)(i) ("no person may rely on or introduce as evidence in connection with any arbitral, judicial or other proceeding," including any hearing in this Court in connection with the referenced matter, certain mediation communications); Del. Bankr. L.R. 9019-5(d)(ii) (prohibiting participants and mediator from disclosing certain mediation communications "outside the mediation", without exception for discovery in another forum).

[47]See, e.g., 28 U.S.C. § 2701(a) ("The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of *their* business.") (emphasis added). Cf. In re Denture Cream Products Liability Litigation, 2012 WL 13008162 (S.D. Fla. 2012) (holding that a party's listing of an item on a privilege log, as required by one court's local rules, does not waive the right to refrain from listing the item on the privilege log in a separate lawsuit in a separate court with different local rules).

[48]See Eric D. Green, A Heretical View of the Mediation Privilege, 2 OHIO St. J. DISPUTE RESOLUTION 1, 19–26, No. 1 (1986) (advocating for the use of such agreements).

[49]Michael L. Prigoff, Toward Candor or Chaos: The Case of Confidentiality in Mediation, 12 SETON HALL LEGIS. J. 1, 7 (1988) (citing Note, Protecting Confidentiality in Mediation, 98 HARV. L. REV. 441, 451 (1984)).

[50]See, e.g., In re Student Finance Corp., 2007 WL 4643881, at *1 (D. Del. 2007).

[51]In re Wendy's Company Shareholder Derivative Action, 2021 WL 3268841 (S.D. Ohio 2021).

[52]2021 WL 3268841 at, at * 3–4.

[53]Tilton v. MBIA, Inc. (In re Zohar III, Corp., Adv. Pro. No. 19-50390 (KBO), at 55 (Bankr. D. Del. Feb. 22, 2022) (TRANSCRIPT).

[54]Tilton Tr. at 53.

[55]Tilton Tr. at 53–54.

[56]See Tilton Tr. at 56 (denying the motion would "disrupt the expectation of all parties to the mediation").

[57]Tilton Tr. at 54.

[58]Tilton Tr. at 54.

[59]Tilton Tr. at 56.

[60]In re Boy Scouts of America, Case. No. 20-10343 (LSS) (Bankr. D. Del. Oct. 25, 2021) (TRANSCRIPT).

[61]Boy Scouts of America Tr. at 2.

[62]Boy Scouts of America Tr. at 3:2–5.

[63]Boy Scouts of America Tr. at 3–4. The exception, which stated that "[i]f a party puts at issue any good faith finding concerning the mediation [in] any subsequent action concerning insurance coverage the parties right to seek discovery, if any, is preserved," is relevant to the Court's "at issue" analysis described in Section F, infra.

[64]Boy Scouts of America Tr. at 4:12–5:2.

[65]Boy Scouts of America TRANSCRIPT at 10:24–11:5 (citing In re Lake Lotawana Cmty. Improvement Dist., 563 B.R. 909 (2016)).

[66]Boy Scouts of America TRANSCRIPT at 11:24–12:22.

[67]Boy Scouts of America TRANSCRIPT at 12:13–16.

[68]Boy Scouts of America TRANSCRIPT at 13:2–13:8.

[69]Boy Scouts of America Tr. at 11:24–12:2.

[70]Boy Scouts of America Tr. at 15:4–7.

[71]1 Art of Advocacy — Documentary Evidence § 6.11 (2021) ("the attorney-client privilege is a fragile protection that can be easily lost or waived"); In re Grand Jury Proceedings, 727 F.2d 1352, Fed. Sec. L. Rep. (CCH) P 91487, 15 Fed. R. Evid. Serv. 428 (4th Cir. 1984); Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 258–259, 1981-2 Trade Cas. (CCH) ¶ 64358, 8 Fed. R. Evid. Serv. 1466, 32 Fed. R. Serv. 2d 653 (N.D. Ill. 1981).

[72]James P. McLoughlin, Jr. et al., Navigating Implied Waiver of the Attorney-Client Privilege After Adoption of Federal Rule 502 of the Federal Rules of Evidence, Copyright Moore & Van Allen, PLLC., 67 N.Y.U. Ann. Surv. Am. L. 693, 695 (2012); In re Sealed Case, 676 F.2d 793, 809, Fed. Sec. L. Rep. (CCH) P 98647, 82-1 U.S. Tax Cas. (CCH) P 9335, 10 Fed. R. Evid. Serv. 490, 33 Fed. R. Serv. 2d 1778, 50 A.F.T.R.2d 82-5637 (D.C. Cir. 1982).

[73]67 N.Y.U. Ann. Surv. Am. L at 695; Anchondo v. Anderson, Crenshaw & Associates, L.L.C., 256 F.R.D. 661, 669 (D.N.M. 2009).

[74]Richard Mason, Wendy's Offers a Cautionary Tale on US Mediation Privilege, at 3 (August 23, 2021) (quoting In re Wendy's Company Shareholder Derivative Action, 2021 WL 3268841, at *6 (S.D. Ohio 2021)).

[75]Mason, Wendy's Offers a Cautionary Tale at 3.

[76]Tilton Tr., supra n. 54, at 57.

[77]Boy Scouts of America Tr., supra n. 61, at 13.

[78]Boy Scouts of America Tr. at 13.

[79]Boy Scouts of America Tr. at 13.

[80]Boy Scouts of America Tr. at 13–14.