Spoken in Your Office, Read in the Courtroom:

What Corporate Officers and Trustees Need to Know About the Waiver of the Attorney-Client Privilege in Bankruptcy

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Introduction

The corporate bankruptcy process, where the roles of various stakeholders and parties in interest can change drastically throughout the case, presents unique challenges for the application of the attorney-client privilege. One of the biggest hazards for a corporation in bankruptcy is the potential for a court to find that the attorney-client privilege has been waived, and that communications between the corporate debtor and its counsel must be produced. When privilege issues are not carefully identified and evaluated before bankruptcy, they can resurface during bankruptcy at the most inopportune time. This Article examines the recurring privilege issues that confront corporate bankruptcy practitioners and trustees alike. Part I provides a brief overview of the attorney-client privilege, discussing its application in the corporate context. Part II examines who controls and directs the attorney-client privilege during a corporation's bankruptcy. Finally, Part III examines recurring attorney-client privilege issues that arise in corporate bankruptcy.

I. General Principles Pertaining to the Attorney-Client Privilege

A. Overview of the Attorney-Client Privilege

The attorney-client privilege is the oldest privilege for confidential communications recognized by Anglo-American jurisprudence. See Upjohn Co. v. United States, 349 U.S. 383, 389 (1981). The privilege may be asserted to prevent disclosure of communications between an attorney and a client, provided that the communication (1) is confidential, (2) was made for the purpose of seeking, obtaining, or providing legal advice, and (3) was made between persons having a privileged relationship. See e.g., Restatement (Third) of Law Governing Lawyers § 68 (2000); In re Baldwin-United Corp, 38 B.R. 802, 804 (Bankr. S.D. Ohio 1984). As the Supreme Court stated in Upjohn, the modern purpose behind the attorney-client privilege is "to encourage

full and frank communication between attorneys and their clients," so that on the one hand, attorneys are more fully informed and can give the client sounder and more effective legal advice, and on the other hand, clients can fully and truthfully confide in their lawyer without fear of disclosure. Upjohn, at 389.

B. Controlling Law

A threshold issue is whether state or federal law governs the application of the attorney-client privilege. Federal Rule of Evidence 501, which is made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 9017, provides the general rule for privileges in federal proceedings: "The common law—as interpreted by United States courts in the light of reason and experience—governs a claim for privilege [. . .]." Fed. R. Evid. 501. Nonetheless, Federal Rule of Evidence 501 also provides that federal courts are to apply state rules of evidentiary privilege "regarding a claim or defense for which state law supplies the rule of decision." Id. In other words, "federal common law of privileges applies when federal law determines the substantive rights of the parties" and "state privilege law controls if the underlying claim or defense is also governed by state law." See In re Asia Global Crossing, Ltd., 322 B.R. 247, 254 (Bankr. S.D.N.Y. 2005) (internal citations omitted).

C. Applying the Attorney-Client Privilege to Corporations

The attorney-client privilege evolved through its application to individual clients, and it was not until the Supreme Court's 1981 decision in Upjohn that the applicability of the privilege was officially recognized as to a corporate client. See Upjohn, 449 U.S. at 389-90. Since the Upjohn decision, courts have applied the attorney-client privilege for business entities other than corporations, including but not limited to, labor organizations, municipalities, and limited partnerships. See e.g. Hopper v. Frank, 16 F.3d 92, 96 (5th Cir. 1994) ("There is no logical

reason to distinguish partnerships from corporations or other legal entities in determining the client a lawyer represents.") (internal quotations omitted).

When the client is an individual, identifying the client is an easy task. But when the client is an artificial, purely legal entity, the definition of client becomes more complex. Four years after the Upjohn decision, the Supreme Court in Weintraub revisited the application of the attorney-client privilege for corporations and stated that "the administration of the attorney-client privilege in the case of corporations [. . .] presents special problems." Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985). Specifically, the Court noted that "[a]s an inanimate entity, a corporation cannot speak directly to its lawyers." Id. Instead, a corporation can only request legal advice through its agents or officers, which makes it difficult to ascertain who exactly is protected by the attorney-client privilege. The fact that corporations tend to have numerous employees and many layers of leadership further complicates the application of the attorney-client privilege. The Supreme Court in Weintraub found that "[t]he power to assert or waive a corporation's attorney-client privilege generally rests with the corporation's management and is exercised by its officers and directors." Id. at 349. As other courts have put it, "any privilege that attaches to communications on corporate matters between corporate employees and corporate counsel belongs to the corporation, not the individual employee" and "employees generally may not prevent a corporation from [asserting or] waiving the attorney-client privilege arising from such communications." MacKenzie-Childs LLC v. MacKenzie-Childs, 262 F.R.D. 241, 248 (W.D.N.Y. 2009) (internal citations omitted). See also King v. Deutsche Bank Ag, No. CV 04-1029-HU, 2005 WL 611954, at *12 (D. Ore. Mar. 8, 2005) ("The power to waive the corporate attorney-client privilege rests with the corporation's management, and is normally executed by its officers and directors.")

Given the importance of who "owns" the attorney-client privilege in the corporate context and who has the right to enforce it or waive it, courts have developed three different tests to determine who may claim the privilege on behalf of a corporation:

The minority view, now relegated to a few jurisdictions (primarily Illinois), is the control group test. The control group test looks at the status of the person in the organization to determine whether that person can validly invoke the attorney-client privilege. In other words, the privilege may be involved only with respect to communications with employees "in a position of control" or who "take a substantial part in the determination of corporate action in response to legal advice." Edna S. Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 142 (5th Ed. 2007). See Hayes v. Burlington N. & Santa Fe R.R.. Co., 323 Ill. App. 3d 474, 477 (2001) ("Our supreme court has described a control group as one that includes those employees 'whose advisory role to top management in a particular area is such that a decision would not normally be made without [their] advice, or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority.'"). This test was severely criticized by the Supreme Court in Upjohn because it "discourag[es] the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." Upjohn, 499 U.S. at 392.

The majority view, which is espoused by the vast number of federal and state jurisdictions, is what is known as the subject matter test. Under this test, the status of the employee in the organization is irrelevant. Instead, a communication with counsel is protected if:

1) The communication was made to secure legal advice from counsel;
2) The employee making the communication must have done so at the direction of a superior;

3) The communication concerned matters within the scope of the employee's corporate duties;
4) The employee was sufficiently aware that he was being questioned in order that the corporation could obtain legal advice; and
5) The communication was considered "highly confidential" when made, and have been kept confidential by the company.

Id. at 394-5.[1]

The third test is very similar to the subject matter test, and it has been most frequently applied by the Seventh and Eighth Circuits. Under this third test, the attorney-client privilege is applicable to an employee's communication if:

1) The communication was made for the purpose of securing legal advice;
2) The employee making the communication did so at the direction of his corporate superior;
3) The superior made the request so that the corporation could secure legal advice;
4) The subject matter of the communication is within the scope of the employee's corporate duties; and
5) The communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

In re Bieter Co., 16 F.3d 929, 936 (8th Cir. 1994) (citing Diversified Indus., Inc. v Meredith, 572 F.2d 596, 609 (8th Cir. 1977)).

The reason for the adoption of a slightly modified subject matter test was "an effort to focus on why the attorney was consulted and to prevent the routine channeling of information

[1] The Upjohn decision expressly refused to adopt another test, leaving the issue for a case-by-case determination. Nonetheless, these were the factors the Supreme Court considered when it analyzed the applicability of the attorney-client privilege in the corporate context.

through the attorney to prevent subsequent disclosure." So. Bell Tel. & Tel. Co. v. Deason, 632 So.2d 1377, 1383 n. 10 (Fla. 1994).

As will be discussed in Section III(c) of this Article, various problems arise when an individual employee or group of employees seek to invoke the attorney-client privilege with respect to counsel consulted on both a personal and corporate basis.

D. Work Product Doctrine Distinguished

The attorney-client privilege is related conceptually to the attorney work product doctrine in that both rules protect disclosure by an attorney of information and communications related to a client's legal position. The two doctrines, however, must be distinguished. The attorney-client privilege prevents disclosure of confidential communications with counsel made for the purpose of providing or obtaining legal advice. The attorney-client privilege is held by the client. In contrast, the work product doctrine shields from production "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." Fed. R. Civ. P. 26(b)(3).[2] The work product protection is held by the attorney, not the client. Thus, the work product doctrine is often broader than the attorney-client privilege because it covers not only the client's own statements to counsel, but also the mental processes of the attorney and materials prepared by the attorney or by others on behalf of the attorney. The work product doctrine, however, may afford less protection than the attorney-client privilege because, unlike the attorney-client privilege, it is restricted to documents and materials prepared in anticipation of litigation. Moreover, the work product doctrine is not absolute, and disclosure of relevant information or documents is possible upon a showing of "substantial need" for the protected materials and an inability to obtain substantially equivalent materials without "undue hardship." Fed. R. Civ. P. 26(b)(3).

[2] Fed. R. Civ. P. 26(b)(3) is incorporated and made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 7026.

II. Who Controls the Attorney-Client Privilege in Corporate Bankruptcy?

The protections afforded by the attorney-client privilege are not eliminated by the commencement of a bankruptcy proceeding. See e.g., In re O.P.M. Leasing Services, Inc., 13 B.R. 64, 67 (S.D.N.Y. 1981) ("It is equally clear that a debtor in bankruptcy is entitled to the benefit of the attorney-client privilege"). The same protections apply within bankruptcy as they do outside of bankruptcy. "The basic issue then is who has the right to waive or assert the privilege on behalf of the debtor [. . .] ." Id.

At the core of the issue of who controls the attorney-client privilege in bankruptcy is the irremediable tension between the need to protect the debtor's/client's confidential communications with his counsel, and the need for a full and complete disclosure of evidence regarding the debtor's affairs and financial status. Attorney-client privilege issues generally arise as creditors or the trustee begin to investigate the debtor's financial affairs in an effort to uncover fraudulent transfers, preferences, avoidable liens, or any other information relevant to maximizing the debtor's estate.[3] Frequently, the investigation reveals that a debtor's pre-petition counsel possesses valuable information that the creditors or the trustee seek. Subsequently, counsel for the debtor asserts the attorney-client privilege as the creditors or trustee seek to compel the attorney to testify or turn over the desired information. The bankruptcy court may then be called to resolve the issue of who controls the attorney-client privilege. This section of the Article will address how bankruptcy courts resolve the issue of who controls the attorney-client privilege in the corporate bankruptcy context.

[3] 11 U.S.C. § 1103(c) sets out the powers and duties of creditor committees, which include, *inter alia*, "investigat[ing] the acts, conduct, assets, liabilities, and financial condition of the debtor [. . .]." Moreover, 11 U.S.C § 704(a)(4) sets out the duties of a Chapter 7 Trustee, which include "investigat[ing] the financial affairs of the debtor."

A. Debtor in Possession

Ordinarily, when a corporate debtor files for relief under chapter 11, it becomes a "debtor in possession" ("DIP"), and the current officers, directors, and managers of the debtor remain in place. Id. at 355. These officers, directors, and managers generally are not displaced as a result of the chapter 11 filing and continue to control the business of the debtor, subject to fiduciary duties imposed by applicable bankruptcy and non-bankruptcy law. See 11 U.S.C. § 1107 (describing the rights, powers, and duties of a DIP). Numerous courts have held that this control extends to the continued right to assert or waive the corporation's attorney-client privilege. See e.g., In re Bame, 251 B.R. 367, 373 (Bankr. D. Minn. 2000) ("A corporate DIP, just like a solvent corporation outside of bankruptcy, is an inanimate entity that must act through agents. While the corporation remains in possession, its management controls the attorney-client privilege."); In re Am. Metrocomm Corp, 274 B.R. 641, 654 (Bankr. D. Del. 2002) ("In this Chapter 11 Case, AMC is a debtor in possession. Therefore, AMC controls the attorney-client privilege with respect to both its pre- and post-petition communications with Defendants."); In re Eddy, 304 B.R. 591, 599 (Bankr. D. Mass. 2004) ("While the debtor in possession retains control over the attorney-client privilege during his/her stewardship, that control must be exercised consistent with the debtor's fiduciary duties."); In re Cenargo Int'l, PLC, 294 B.R. 571, 601 n.37 (Bankr. S.D.N.Y. 2003) ("Relatedly, the attorney-client privilege for a debtor corporation belongs to the debtor in possession, not the estate (which is not a legal entity for this purpose).") (internal citations omitted). Therefore, in a chapter 11 proceeding where no trustee or examiner has been appointed, a court will likely hold the DIP is the holder of the attorney-client privilege and is the only entity capable of waiving such privilege.

The willingness to leave a chapter 11 debtor "in possession" of property of the bankruptcy estate is premised on the assumption that officers, directors, and employees of the debtor can be depended upon to carry out the fiduciary responsibilities of a trustee. Weintraub, 471 U.S. at 355. However, one important fiduciary duty omitted from the duties statutorily imposed by the Bankruptcy Code upon a DIP is the duty of investigating its own acts, conduct, and affairs. See 11 U.S.C. § 1107(a). As a result of this omission, litigation seeking the appointment of a bankruptcy trustee often arises in this context, in which creditors contend that officers, directors, and employees of a DIP have breached their respective fiduciary duties either before or after the bankruptcy filing. See 11 U.S.C. § 1104(a) (setting forth the grounds for appointment of a trustee in a Chapter 11 bankruptcy proceeding).

B. Debtor out of Possession

i. Chapter 7 Case

Unlike the chapter 11 scenario where a corporation remains as DIP, in chapter 7, a trustee is automatically appointed to wind-up and liquidate the affairs of the debtor. See 11 U.S.C. §§ 701 and 702. The appointment of a chapter 7 trustee may result in the debtor losing complete control of its attorney-client privilege. In the seminal case on this issue, Commodity Futures Trading Comm'n v. Weintraub, the Supreme Court held that "the trustee of a corporation in bankruptcy has the power to waive the [debtor's] attorney-client privilege with respect to pre-bankruptcy communications." Weintraub, 471 U.S. at 353, 358. In Weintraub, shortly after the debtor corporation filed its petition for liquidation under chapter 7, the Commodity Futures Trading Commission ("CFTC") subpoenaed the debtor's former counsel seeking testimony regarding suspected misappropriation of customer funds by the debtor. Id. at 345-46. When the attorney asserted the corporation's attorney-client privilege, the CFTC requested the chapter 7

trustee to waive any attorney-client privilege regarding communications on those topics. Id. at 346. The Supreme Court found the waiver was valid because the attorney-client privilege resided in the trustee after the corporation's bankruptcy filing, and therefore, the trustee may waive the attorney-client privilege of the corporate debtor. Id. at 358.

The Supreme Court's rationale behind this decision was that in the context of a chapter 7 bankruptcy, the trustee "plays the role most closely analogous to that of a solvent corporation's management" and "the debtor's directors retain virtually no management powers." Id. at 353. As a result, the debtor's directors "should not exercise the traditional management function of controlling the attorney-client privilege," and that power should be vested to the trustee instead. Id. Moreover, the Supreme Court explained that a trustee in bankruptcy has a duty to investigate the conduct of prior management to uncover and assert causes of action against the debtor's officers and directors. Id. If the former officers and management of the bankrupt corporation continued to control the privilege, "the Code's goal of uncovering insider fraud would be substantially defeated" since they could "effectively thwart an investigation into their own conduct." Id. at 353-54. The Court thus concluded that vesting control of the debtor corporation's attorney-client privilege in the trustee was appropriate and did not in any way conflict with the careful design of the Bankruptcy Code. Id. at 354.

It should be noted that passing control of the attorney-client privilege does not translate into a trustee's unfettered right to waive it. As the Supreme Court in Weintraub noted, "the propriety of the trustee's waiver of the attorney-client privilege in a particular case, can, of course, be challenged in the bankruptcy court on the ground that it violates the trustee's fiduciary duties." Id. at 353, n.7.

ii. Chapter 11 Case

If cause exists for the appointment of a trustee in a chapter 11 case, once appointed, "the powers and duties of the chapter 11 trustee are extensive." Id. at 352. The trustee not only assumes the same fiduciary duties to creditors as a DIP, but he is also directed to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor." See 11 U.S.C. § 1106. Upon the appointment of a chapter 11 trustee, all corporate property passes to an estate represented by the trustee, and the officers, directors, and managers of the debtor are no longer in control of the business operations of the company. See 11 U.S.C. §§ 323, 541, and 1106. Further, the trustee is accountable for all property received and is charged with the duty of maximizing the value of the estate. See 11 U.S.C. §1106. Thus, the trustee is not only directed to investigate the debtor's financial affairs, but he is also empowered to sue officers, directors, and other third-parties to recover fraudulent or preferential transfers of the debtor's property. Id.

While Weintraub did not specifically deal with the waiver of the attorney-client privilege by a trustee in a Chapter 11 setting, the Court's holding was not necessarily limited to a chapter 7 setting. In its holding, the Supreme Court specifically stated that "*the trustee of a corporation in bankruptcy* has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications," and did not differentiate between a chapter 7 or a chapter 11 trustee. Id. at 358 (emphasis added). Since Weintraub, courts have found that an appointed chapter 11 trustee, like a chapter 7 trustee, takes control of the debtor's assets and therefore has authority to assert or waive the corporation's attorney-client privilege and access privileged communications. See e.g., In re Hechinger Investment Co. of Delaware, 285 B.R. 601, 610-11 (D. Del. 2002) (upholding the waiver of the attorney-client privilege by a corporate Chapter 11 trustee); In re Friedman, 286 B.R. 505, 507-08 (S.D.N.Y. 2002) (same).

C. Court-Appointed Examiners

As an alternative to the appointment of a trustee, the Bankruptcy Code authorizes the appointment of an examiner if the court has not ordered the appointment of a trustee. See 11 U.S.C § 1104(c). A court-appointed examiner usually plays a more limited role than that of a trustee.[4] The examiner is a neutral, independent party charged with the duty of investigating "the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan." 11 U.S.C § 1106(b), 1106(a)(3). While § 1106 generally provides for a limited role of an examiner in Chapter 11, § 1106(b) does not contain an absolute express prohibition against expanding an examiner's duties beyond conducting a mere investigation. The plain language of § 1106(b) even contemplates that an examiner shall perform "any other duties of the trustee that the court orders the debtor in possession not to perform." Id. The issue raised by this catch-all provision therefore is whether an examiner's role can be morphed into a quasi-trustee who therefore has the ability to waive a debtor's attorney-client privilege.

In general, courts have been reluctant to hold that examiners own or hold the privilege claim of debtors. However, in certain limited circumstances, courts have expressly expanded the scope of an examiner's duties beyond that of a mere investigator, and have thus concluded that an examiner may assume control over a debtor's attorney-client privilege. One of the most publicized chapter 11 cases involving the scope of an examiner is In re Enron Corporation, in which the United States Bankruptcy Court for the Southern District of New York authorized the

[4] In 11 U.S.C. § 1106(b), the Bankruptcy Code assigns far more limited responsibility to an examiner than a trustee. For example, this section speaks of "duties" as opposed to "powers" assigned to the examiner. Further, the limited role of an examiner is highlighted by the plain language of 11 U.S.C. § 1109(b), which does not include an examiner as a "party-in-interest" in bankruptcy proceedings.

appointment of an examiner to investigate various questionable balance sheet transactions between debtor and its affiliates. In re Enron Corporation, 279 BR 671, 678-80 (Bankr. S.D.N.Y. 2002). To facilitate the examiner's investigation, and to aid the examiner in uncovering claims and causes of action against various parties (including the debtor's officers, attorneys and accountants), the order appointing the examiner vested the examiner with broad investigative authority, going so far as to grant the examiner the power to waive the debtor's attorney-client privilege. Order Pursuant to 11 U.S.C. §§ 1104(c) and 1106(b) Directing Appointment of Enron Corp. Examiner, In re Enron Corp., Case No. 01-16034 (AJG) (Bankr. S.D.N.Y. Apr. 8, 2002), at *3 ("ORDERED that the Examiner shall have the power to waive, on an issue-by-issue basis, the attorney client privilege of the debtors' estates with respect to pre-petition communications relating to matters to be investigated by the Examiner hereunder [. . .]. Such a waiver shall be a limited and not a general waiver [. . .].").

Similarly, in In re Boileau, the Ninth Circuit rejected the debtor's contention that the examiner lacked the authority to waive the attorney-client privilege. In re Boileau, 736 F.2d 503, 506 (9th Cir. 1984). The court was careful to note, however, that an examiner will typically not have the authority to waive the attorney-client privilege on behalf of the debtor. Id. However, where a court has expressly granted trustee-like powers to the examiner, allowing the examiner to "perform a myriad of functions normally carried out by a trustee," those powers may include control over the attorney-client privilege. Id.

D. Litigation/Liquidation Trustees

A litigation trustee may be appointed to pursue a debtor's litigation claims. See e.g., In re Refco, Inc. Sec. Litig., 628 F.Supp. 2d 432, 436 (S.D.N.Y. 2008) (describing the establishment of a litigation trust and the appointment of a litigation trustee to pursue claims). Whether a

litigation trustee controls the attorney-client privilege of a debtor depends on what the bankruptcy plan and/or related agreements specify regarding control of the debtor's bankruptcy estate or the particular claims to which the privilege applies.

In In re Hechinger, the plaintiff, a liquidating trust of a Chapter 11 debtor, initiated an adversary proceeding against, inter alia, the former directors and officers of the debtor. The liquidating trustee wrote to the debtor's former counsel requesting disclosure of all documents in counsel's possession relating to their prior representation of the debtor. In re Hechinger, 285 B.R. at 604. The debtor's former counsel responded contending that all of the documents requested were subject to the attorney-client privilege or were attorney work product, and that only the debtor's former officers and directors (and not the trust) controlled the privilege. Id. The court concluded that the debtor's control over the attorney-client had transferred to the liquidation trust pursuant to the terms of the debtor's confirmed plan of liquidation and liquidation trust agreement. Id. at 605, 613. Under the terms of the plan and liquidation trust agreement, all of the debtor's assets (including those causes of action that had been asserted on behalf of the debtor estate by the liquidation trustee) were transferred to the liquidation trust, and were now under the sole management and control of the liquidation trustee. Id. Therefore, the liquidation trustee had control over any assertable privilege on behalf of the debtor, and was entitled to waive such privilege in connection with litigation of the adversary proceeding against the debtor's officers and directors. Id. at 613-15. Cf. Am. Int'l. Special Lines Ins. Co. v NWI-I, Inc., 240 F.R.D. 401, 407-09 (N.D. Ill. 2007) (finding that because neither a custodial trust nor a liquidating trust emerged from bankruptcy with control over the debtor's successor entity, they did not have the authority to assert or waive the attorney-client privilege).

E. Purchasers/Transferees of Assets

As previously noted, the Supreme Court in Weintraub found that "[t]he power to assert or waive a corporation's attorney-client privilege generally rests with the corporation's management and is exercised by its officers and directors." Weintraub, 471 U.S. at 349. And "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well." Id.

Following the rationale of Weintraub, courts have recognized that assignees or transferees of most, if not all, of a corporation's assets will have the authority to assert or waive the attorney-client privilege. However, "[a] transfer of assets, without more, is not sufficient to effect a transfer of the privileges; control of the entity possessing the privileges must also pass for the privileges to pass." In re Grand Jury Subpoenas, 734 F.Supp. 1207, 1211 n.3 (E.D. Va. 1990), aff'd in part, 902 F.2d 244 (4th Cir. 1990). See e.g., NCL Corp v. Lone Star Bldg. Ctrs., Inc., 144 B.R. 170, 174 (S.D. Fla. 1992) (noting that the right to assert the attorney-client privilege is an incident of control of the corporation, and that a transfer of a lease did not transfer the privilege); Pilates, Inc. v. Georgetown Bodyworks Deep Muscle Massage Ctrs., Inc., Case No. 95-1771, 2000 U.S. Dist. LEXIS 21613, at *8-10 (D.D.C. Apr. 10, 2000) (assignee of trademarks had no right to assert the attorney-client privilege where there was no transfer of control of the corporation); cf. Soverain Software, LLC v. Gap, Inc., 340 F.Supp. 2d 760, 763 (E.D. Texas, 2004) ("If the practical consequences of the transaction result in the transfer of control of the business and the continuation of the business under new management, the authority to assert or waive the attorney-client privilege will follow as well.")

A related issue is whether parties can contractually dictate who will control the attorney-client privilege after a sale or transfer of assets. Courts are split on this issue. See e.g., Zenith

Elecs. Corp. v. WH-TV Broad. Corp., No. 01 C 4366, 2003 U.S. Dist. LEXIS 13816, at *5-6 (N.D. Ill. Aug. 7, 2003) (sale of certain assets did not transfer the right to invoke the attorney-client privilege despite contract provision stating that the privilege transferred with the sale); Am. Int'l. Special Lines Ins. Co. v NWI-I, Inc., 240 F.R.D. 401, 407 (N.D. Ill. 2007) (overruling the parties' attempt to contractually allocate control of some elements of the debtor's attorney-client privilege in an agreement for successor litigation trust); but cf. Postorivo v. AG Paintball Holdings, Inc., Nos. 2991-VCP, 3111-VCP, 2008 Del. Ch. LEXIS 17, at *29 (Del. Ch. Feb. 7, 2008) (rejecting NWI-I, and upholding, under New York law, validity of provisions of asset purchase agreement allocating attorney-client privilege in connection with sale of assets); In re Harwood P-G, Inc., 403 B.R. 445, 455-57 (Bankr. W.D. Tex. 2009) (holding that the plan and implementing trust documents were effective to transfer control of the privilege from the debtor and the committee to litigation trustee established under the plan); In re Hechinger Investment Co. of Delaware, 285 B.R. 601, 610-13 (D. Del. 2002) (same); In re Am. Metrocomm Corp, 274 B.R. 641, 654 n.10 (Bankr. D. Del. 2002) (holding that the debtor's agreement assigning its interests in certain litigation claims to a creditor, including the attorney-client privilege related thereto, was effective to create a shared privilege between the debtor and the assignee that was effective against the debtor's former lawyers).

F. Creditors' Committees

In certain circumstances, creditors' committees may step into the shoes of the debtor to pursue various causes of action on behalf of the estate. See e.g., In re Smart World Techs, LLC, 423 F.3d 166, 176 (2nd Cir. 2005) (noting that creditors have an implied, qualified right to bring suits on behalf of the estate when the debtor in possession has unjustifiably failed to bring suit); 11 U.S.C. § 1103(c)(5) ("A committee [. . .] may perform such other services as are in the

interest of those represented"); 11 U.S.C. § 1109(b) ("A party in interest, including [. . .] a creditors' committee [. . .] may raise and may appear and be heard on any issue in a case under this chapter.").

Nonetheless, in contrast to a bankruptcy trustee, courts have not extended broad control over the debtor's privilege to creditors' committees. See e.g., Official Comm. Of Asbestos Claimants of G-I Holding, Inc. v. Heyman, 342 B.R. 416, 422-23 (S.D.N.Y. 2006) (concluding that a creditors' committee does not have the right to exercise the attorney-client privilege because, unlike a trustee, a committee has no responsibility or authority to operate or mange the debtor corporation).

III. Recurring Attorney-Client Privilege Issues that Arise in Corporate Bankruptcy

As stated at the outset of this Article, the application of the attorney-client privilege can be transformed in business bankruptcy as a result of constantly shifting alliances and party disputes. In order to avoid unpleasant discovery surprises, counsel must always know exactly who is represented by counsel, what alliances or disputes a given party may have with other parties, the interests shared by those parties, and when those interests begin to diverge. This final section addresses recurring issues pertaining to the application of the attorney-client privilege in the business bankruptcy setting.

A. Draft Bankruptcy Filings

A recurring issue is whether documents and information provided to an attorney in anticipation of a bankruptcy filing are protected by the attorney-client privilege and/or work product doctrine. In general, "information and communications imparted from a client to his attorney *for the purpose of their disclosure* in a bankruptcy filing are not privileged because information intended to be disclosed in such a filing by definition is not information provided to

the attorney in confidence." U.S. v. Naegele, 468 F.Supp. 2d 165, 170 (D.D.C. 2007) (emphasis original). See also U.S. v. White, 950 F.2d 426, 430 (7th Cir. 1991) ("When information is disclosed [by a client] for the purpose of assembly into a bankruptcy petition and supporting schedules, there is no intent for the information to be held in confidence because the information is to be disclosed on documents publicly filed with the bankruptcy court."); In re French, 162 B.R. 541, 547-48 (Bankr. D.S.D. 1994) ("There is no expectation that information disclosed for the purpose of assembling a bankruptcy petition and supporting schedules will be held confidential."). Therefore, draft bankruptcy filings, draft versions of bankruptcy forms, and communication of facts intended to be included in bankruptcy filings are not privileged. The foregoing notwithstanding, "any *legal advice* sought or obtained on the basis of confidential communications between a client and his attorney, even in the context of the preparation of a bankruptcy petition, is protected by the attorney-client privilege." Naegele, 468 F.Supp. at 170 (emphasis original) (citations omitted).

Because the bankruptcy process is often adversarial, one recurring question is whether a bankruptcy filing itself is deemed to be "litigation," such that any documents prepared in anticipation of the bankruptcy filing may be protected from disclosure by the work product doctrine. Although the matter is not settled, some courts have upheld work-product protection for pre-filing documents when a bankruptcy case is filed to resolve litigation matters, rather than merely address financial problems. See e.g., In re Quigley Co., Inc., No. 04-15739, 2009 Bankr. LEXIS 1352, at *22-23 (Bankr. S.D.N.Y. Apr. 24, 2009) (upholding work product protection for certain pre-filing documents on the grounds that "this chapter 11 case was filed to resolve mass tort litigation"); In re McDowell, 483 B.R. 471, 494 (Bankr. S.D. Tex. 2012) (holding that work product protection applied to questionnaire and draft schedule prepared by counsel in

anticipation of chapter 7 petition because "the filing of a bankruptcy petition constitutes litigation because the filing of a petition imposes the automatic stay on all creditors—and the automatic stay is nothing more than an injunction; and, injunctions can only be obtained through the filing of a lawsuit.").

B. Joint or Co-Client Privilege

Attorney-client privilege issues often arise in the context of jointly-represented corporate entities, particularly in the form of parent/subsidiary disputes. Before bankruptcy, a parent and a subsidiary will often have aligned interests, overlapping officers and directors, and use the same counsel. After a bankruptcy filing, however, the interests of the parent and subsidiary may sharply diverge, when, for instance, a subsidiary may have causes of action it wishes to file against the parent entity. In these situations, questions arise regarding the existence and application of the attorney-client privilege.

Generally speaking, "the rules of professional conduct allow a lawyer to serve multiple clients on the same matter so long as all clients consent, and there is no substantial risk of the lawyer being unable to fulfill her duties to them all." In re Teleglobe Commc'ns Corp., 493 F.3d 345, 362 (3rd Cir. 2007) (citing Restatement (Third) of the Law Governing Lawyers §§ 128-31). "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." Id. at 363. This rule is often known as the "joint-client privilege."

A caveat to the joint-client privilege is that "it only protects communications from compelled disclosure to parties outside the representation." Id. at 366. "When former co-clients sue one another, the default rule is that all communications made in the course of the joint

representation are discoverable." Id. This is what is known as the "joint representation exception" or the "co-client exception." Stated more succinctly:

> [W]here the same lawyer jointly represents two clients with respect to the same matter, the clients have no expectation that their confidences concerning the joint matter will remain secret from each other, and those confidential communications are not within the privilege in subsequent adverse proceedings between the co-clients.

In re Hechinger Investment Co. of Delaware, 285 B.R. at 612. See also Bass Pub. Ltd. Co. v. Promus Cos. Inc., 868 F.Supp. 615, 620 (S.D.N.Y. 1994) (explaining that "[w]here there is a joint attorney/client privilege, there is no expectation that confidential information will be withheld from joint clients as there is no privilege between them")

In this context, bankruptcy courts have held that communications concerning a common matter made during and within the scope of a joint representation may become discoverable in later bankruptcy litigation because of the co-client exception. In Teleglobe, a non-debtor, parent corporation caused its wholly owned subsidiary (the intermediate entity), and that subsidiary's subsidiaries (the debtors) to incur debt. In re Teleglobe Commc'ns Corp., 493 F.3d at 353-54. When the parent ceased funding the intermediate entity, the intermediate entity and the debtors filed for bankruptcy protection. Id. The debtors then sued the parent entity on various legal theories based on the parent's alleged failure to honor binding commitments to fund the intermediate entity and the debtors. Id. at 354. The debtors sought to compel the production of documents containing legal advice allegedly provided to the parent before the funding termination, which were designated by the parent as privileged. Id. at 354-55. The debtors based their argument on the "common interest" between the parent, the intermediate entity, and the debtors because those parties shared a centralized, in-house legal department. Id. at 355. Engaging in a lengthy discussing of privilege, the Third Circuit rejected the concept of the entire

corporate family as a "single client" because "it fails to respect the corporate form." Id. at 371. The court stated that joint representation "only arises when common attorneys are affirmatively doing legal work for both entities on a matter of common interest" because a "broader rule" would allow the subsidiary to "access all of its former parent's privileged communications." Id. at 379. The court concluded that the parent could only be compelled to produce documents over which it claimed privilege if, on remand, the district court determined that the parent entity and the debtor were "jointly represented by the same attorneys on a matter of common interest that is the subject matter of those documents." Id. at 387. See also Glidden Co. v. Jandernoa, 173 F.R.D. 459, 472 (W.D. Mich. 1997) (holding former subsidiary cannot withhold allegedly privileged communications from former parent pertaining to the time when the parent-subsidiary relationship was ongoing); Bass Pub. Ltd. Co., 868 F.Supp. at 619-20 (S.D.N.Y 1994) (same); In re Fundamental Long Term Care Inc., 489 B.R. 451, 477 (Bankr. M.D. Fla. 2013) (holding chapter 7 trustee could invoke the co-client exception on behalf of a defunct subsidiary to obtain communications between its former corporate parent and the parent's attorneys).

C. Common Interest Privilege

As the foregoing discussion demonstrates, the joint-client privilege extends the protections of the attorney-client privilege to communications and information exchanged between joint clients and joint counsel as to matters of common interest.

Like the joint-client privilege, the common interest privilege extends the protections of the attorney-client privilege to communications and information among *separate clients* and their *separate counsel* "on matters of common legal interest, for the purpose of preparing a joint strategy." Paul R. Rice, Attorney-Client Privilege in the United States § 4:35 (2012 ed.). The common interest privilege applies if "(1) the communication was made by separate parties in the

course of a matter of common interest, (2) the communication was designed to further that effort, and (3) the privilege was not otherwise waived." In re Tribune, No. 08-13141, 2011 Bankr. LEXIS 299, at *13 (Bankr. D. Del. Feb. 3, 2011). Common interest communications are privileged to the extent they would have been privileged if made within a traditional attorney-client relationship. Attorney-Client Privilege in the United States, at § 4:35. Further, the common interest rule also applies to work-product protection. See e.g., In re Leslie Controls, 437 B.R. 493, 496 (Bankr. D. Del. 2010) ("[The common interest rule] expands the reach of the attorney-client privilege and work product doctrine by providing that, under certain circumstance[s], the sharing of privileged communications with third parties does not constitute a waiver of the privilege.")

A frequent issue that arises with regard to the application of common interest privilege is the extent of the "common interest" required between the parties. In order for the common interest privilege to apply, the parties must have a common *legal* interest as opposed to merely a business interest. In re Megan-Racine Assocs. Inc., 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995). As the court in Megan-Racine explained:

> [A]lthough total identity of interest is not necessary, the parties asserting the privilege must have a common *legal* interest. A common *legal* interest exists where the parties asserting the privilege were co-parties to litigation or reasonably believed that they could be made a party to litigation.

Id.

Therefore, the application of the common interest privilege will often hinge on whether the interest between the parties is "legal." The courts that have addressed this issue have concluded the existence of shared commercial interest between the parties will not trump the assertion of a common interest as long as the basis is not solely commercial. See e.g., In re Velo

Holdings, Inc., 473 B.R. 509, 515-16 (Bankr. S.D.N.Y. 2012) (discussing cases and noting that "[w]hile grounded in the parties' commercial relationship [. . .] [the parties] shared a common legal interest in crafting a strategy to prevent the termination of the [. . .] agreements"). But c.f. Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 447 (S.D.N.Y. 1995) (common interest does not encompass "a joint business strategy which happens to include as one of its elements a concern about litigation.").

The common interest privilege is also sometimes referred to as the "joint defense" privilege or rule. Joint defense agreements are essentially common interest agreements between parties. In re Grand Jury Subpoena, 274 F.3d 563, 572 (1st Cir. 2001) (stating that "[b]ecause the privilege sometimes may apply outside the context of actual litigation, what parties call a 'joint defense' privilege is more aptly termed the 'common interest' rule").

The common interest privileges comes into play in bankruptcy most often in the context of protecting privileged information communicated between debtors and creditors' committees. The notion that interests in bankruptcy merge and diverge is particularly true as it relates to communications between the debtor and the creditors' committees. Both parties have fiduciary duties with which they must comply, and both tend to find that cooperation at certain points in the bankruptcy proceeding obtains the best results for both constituents. When these parties' legal interests sufficiently align, they may assert a common interest over certain communications.

For example, in In re Mortgage & Realty Trust, the bankruptcy court was confronted with the issue of whether a conversation between the debtor's executive vice-president, bankruptcy counsel for the debtor, and counsel for the official committee of unsecured creditors was protected by the attorney-client privilege under the common interest doctrine. In re Mortgage &

Realty Trust, 212 B.R. 649, 651 (Bankr. C.D. Cal. 1997). The court recognized that both the debtor and committee "share a duty to maximize the debtor's estate" and that under some circumstances, the debtor "must be able to provide information to the committee free of the risk that the committee may be forced to disgorge such information to adverse third parties." Id. at 653. The court held that the communication at issue was privileged because it dealt with "legal procedures and strategies concerning potential litigation" by the debtor, and the creditors stood to become the equity owners of the reorganized debtor. Id. Therefore, "the debtor and the committee shared a common legal interest" that was furthered by the communication. Id. at 654.

Just as creditors' committees and the debtor may have sufficiently aligned interests to assert a common interest, members of the creditors' committees and unsecured creditors not on the committee may also assert a common interest. In In re Circle K Corp, debenture holders commenced an adversary proceeding against the reorganized debtor to revoke the confirmation order alleging that the order was fraudulently procured. In re Circle K Corp., Nos. 96 Civ. 5801 (JFK), 96 Civ. 6479 (JFK), 1997 U.S. Dist. LEXIS 713, at *4 (S.D.N.Y. Jan. 28, 1997). The defendants then issued a subpoena to counsel to the official committee of unsecured creditors seeking production of certain documents and deposition testimony. Id. at 5-6. The defendants asserted the documents were discoverable because they had been shared with the debenture holders, who were not committee members. Id. at 14. The court held that the privilege had not been waived because the committee and the debenture holders had a common interest in "ensur[ing] that the debenture holders received some distribution under the confirmation plan" and were, therefore, "on the same side of these proceedings." Id. at 33. Interestingly, the court noted that the "[c]ommittee's job was to represent debenture holders such as [the plaintiffs]" and that "parties need not have identical interests to have a common interest." Id. at 32-33. See also

Off. Comm. Of Admin. Claimants v. Bricker, No. 1:05 CV 2158, 2011 U.S. Dist. LEXIS 49504, at *11 (N.D. Ohio May 9, 2011) (holding that the common interest doctrine preserved attorney-client privilege over communications between official committee of unsecured creditors and other creditors' committees because creditors shared common interest in "the monetary pursuit of recovery for the debtor's estate")

D. Personal Claim of Privilege by Corporate Employees

Another privilege issue that frequently arises in corporate bankruptcy is whether and to what extent corporate officers may assert their *personal* attorney-client privilege over matters discussed with counsel. The business or legal problems of an executive are sometimes difficult to distinguish from those of the corporation, and executives "may cooperate with employer-retained counsel in the belief that their communications are protected by [the attorney-client privilege]." United States v. Stein, 463 F.Supp. 2d. 459, 462 (S.D.N.Y. 2006). As a result, executives may reveal sensitive, potentially incriminating information to counsel, only to realize later "the potential personal consequences of cooperating with lawyers hired by their employers." Id. at 463.

In United States v. Stein, the United States District Court for the Southern District of New York described the issue as follows:

> On the one hand, an employee, like any other agent, owes the employer a duty to disclose to the employer any information pertinent to the employment [. . .]. Allowing individual employees to assert personal attorney-client privilege over communications with the employer's counsel could frustrate an employer's ability to act in its own self-interest, perhaps to the detriment of other employees, stockholders, or partners [. . .] Nevertheless, there are weighty considerations on the other side of the scale. Once a government investigation begins, the interests of employees and of the entity may diverge.

Id. at 461 (footnotes omitted).

A split has developed among the federal circuits as to the proper method of determining personal claims of privilege with respect to counsel consulted on a corporate basis. For the First, Second, and Eighth Circuits, "[t]he default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere, and it is the individuals' burden to dispel that presumption." In re Grand Jury Subpoena, 274 F.3d 563, 571 (1st Cir. 2001); See also MacKenzie-Childs LLC v. MacKenzie-Childs, 262 F.R.D. 241, 249 (W.D.N.Y. 2009) ("[C]ourts presume that the corporation owns the privilege—rather than the individual corporate representative, or the individuals and the corporation jointly—and the individuals bear the burden of rebutting the presumption."); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 617 n.5 (8th Cir. 1977) ("Ordinarily, the privilege belongs to the corporation and an employee cannot himself claim the attorney-client privilege and prevent disclosure of communications between himself and the corporation's counsel if the corporation has waived the privilege.").

In the Fourth Circuit, the analysis centers on whether a corporate employee could have "reasonably believed" that a personal attorney-client relationship existed with corporate counsel. In re Grand Jury Subpoena: Under Seal, 415 F.3d 333, 339 (4th Cir. 2005). In In re Grand Jury Subpoena: Under Seal, three former employees of a corporation became targets of a Securities and Exchange Commission ("SEC") investigation, which later turned into a grand jury investigation. Id. at 336-37. The corporation began an internal review of a certain transaction and its inside and outside counsel conducted interviews with the former employees. Id. When the corporation was served with a grand jury subpoena for documents relevant to its internal investigation, the former employees sought to quash the subpoena on grounds that each employee had an individual attorney-client relationship with the investigating attorneys. The district court held, and the Fourth Circuit confirmed, that no individual attorney-client privilege

attached to the employees' communications with corporate counsel. Id. at 339. The court explained that the former employees did not have legitimate claims of attorney-client privilege because they could not have reasonably believed that the attorneys retained to conduct an internal investigation of the company also represented them personally. Id. There was no evidence that the investigating attorneys told the employees that they represented them personally, nor any evidence that the employees themselves asked the attorneys to represent them in an individual capacity. Id. Moreover, there was no evidence that the employees sought personal legal advice from the investigating attorneys, or that such advice was given by the attorneys. Id. Finally, "when the [employees] spoke with the investigating attorneys, they were fully apprised that the information they were giving could be disclosed at the company's discretion." Id.

In the Sixth Circuit, in contrast, the analysis focuses on whether the employee explicitly asked for personal advice or representation. See e.g., Ross v. City of Memphis, 423 F.3d 596, 605 (6th Cir. 2005) ("Our court, like many others, requires that the individual officer seeking a personal privilege *clearly* claim he is seeking legal advice in his individual capacity.") (emphasis original).

Despite the circuit split as to how to determine personal claims of privilege by corporate employees, virtually all courts utilize the same approach to determine whether an individual's assertion of the attorney-client privilege can prevent disclosure of corporate communications with counsel when the corporation's privilege has been waived (for example, in bankruptcy through a trustee waiver of the privilege). The test was first formulated by the Third Circuit in Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3rd Cir. 1986). In Bevill, the principals of a bankrupt asset-management firm wanted to bar discovery of their

communications with counsel on privilege grounds after the trustee had waived the firm's attorney-client privilege. Id. The Court held that a corporate officer must satisfy a five-part test to assert a personal claim of privilege and thus prevent disclosure of corporate communications:

> First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.

Id.

Conclusion

The issues and cases described in this Article illustrate the complexities of applying the attorney-client privilege in the context of bankruptcy proceedings. In short, the unique nature of bankruptcy litigation, with its constantly shifting party alliances and disputes, completely transforms the standard application of the attorney-client privilege. Prior to filing, counsel should be mindful of the risk that changing corporate structures can result in the waiver of the attorney-client privilege in later litigation during the bankruptcy proceeding. After filing, the debtor may find that it has lost the ability to invoke or waive the attorney-client privilege, which instead belongs to a trustee, examiner, or even a creditors' committee. Above all, counsel must remain vigilant during every stage of the proceedings to the relevant parties' interests, the scope of representation of joint clients, and the potential for common interests, and anticipate how these interests can diverge in the future. If not properly considered, these issues can adversely impact a client during a Rule 2004 examination, document request, or bankruptcy-related litigation.