Privileges In Bankruptcy

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PRIVILEGES IN BANKRUPTCY

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The Attorney-Client Privilege

I. Function and Rationale

A. Rule: "Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged." Fisher v. United States, 425 U.S. 391, 403 (1976). Communications from attorney to client are often privileged as well. See infra AC Part III.B.


C. Rationale:

1. The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy depends upon the lawyer's being fully informed by the client." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

2. "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reason for seeking representation if the professional mission is to be carried out." Trammel v. United States, 445 U.S. 40, 51 (1980).

3. "The purpose of the privilege is to encourage clients to make full disclosure to their attorneys." Fisher v. United States, 425 U.S. 391, 403 (1976).

D. Strict Construction: Courts do not construe the privilege broadly.
1. "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures -- necessary to obtain informed legal advice -- which might not have been made absent the privilege." Fisher v. United States, 425 U.S. 391, 403 (1976).

2. "Testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.' As such, they must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950) and Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)) (citations omitted).


E. Relationship to Attorneys' Ethical Obligations:

1. In addition to the evidentiary restrictions of the attorney-client privilege, an attorney also has an ethical obligation to maintain the confidentiality of communications with a client. See Model Rules of Professional Conduct Rule 1.6 (1983); Model Code of Professional Responsibility Canon 4 (1981) ("A lawyer should preserve the confidences and secrets of a client."); Model Code of Professional Responsibility EC 4-1 to 4-6 (1981); Model Code of Professional Responsibility DR 4-101 (1981).

2. The ethical obligations protect a broader range of communications than the attorney-client privilege. See, e.g., Doe v. A Corp., 709 F.2d 1043, 1046 (5th Cir. 1983); X Corp. v. Doe, 805 F. Supp. 1298, 1308-10 & nn.19, 21 (E.D. Va. 1992). "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his clients. This ethical precept, unlike the evidentiary privilege,
exists without regard to the nature or source of the information or the fact that others share the knowledge." Model Code of Professional Responsibility EC 4-4 (1981). See also Model Rules of Professional Conduct Rule 1.6 cmt. 5 (1983).

3. Nevertheless, a court may look to the ethical rules "as an appropriate standard to guide the conduct of members of its bar." In re National Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litig., 120 F.R.D. 687, 691 (C.D. Cal. 1988).

II. Establishing the Privilege

A. Formulations of the Privilege:

1. Wigmore Definition: "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." 8 John H. Wigmore, Wigmore on Evidence § 2292 (John T. McNaughton rev. 1961).


2. United Shoe Definition: "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a crime or tort; and
(4) the privilege has been (a) claimed and (b) not waived by the client." United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950) (Wyzanski, J.).


3. Supreme Court "Standard" 503(b): "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself and his representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client."

a. "Standard" 503 was proposed by the Supreme Court as Federal Rule of Evidence 503. Although Congress ultimately rejected this proposal in favor of the open-ended Federal Rule of Evidence 501, see infra AC Part II.C.1, a number of states have adopted rules of evidence patterned after the proposed rule, see infra AC Part II.B.4, and many courts continue to cite it. See Graham C. Lilly, An Introduction to the Law of Evidence 395-96 (2d ed. 1987).

b. "Standard" 503(b) serves "as a source for defining the federal common law of attorney-client privilege." Citibank, N.A. v. Andros, 666 F.2d 1192, 1195 n.6 (8th Cir. 1981).

c. Uniform Rule of Evidence 502 is identical to
this Supreme Court "Standard."


5. **Summary:** If the privilege is affirmatively raised and not waived, four essential elements are required for protection: (1) a communication, (2) made between privileged persons, (3) in confidence, (4) for the purpose of seeking, obtaining, or providing legal assistance for the client. See Restatement of the Law Governing Lawyers § 118 (Tent. Draft No. 1, 1988).

**B. Procedural Requirements:**

1. To invoke the privilege, the party seeking protection must explicitly and affirmatively raise it and prove each element. See, e.g., *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992).

2. Blanket assertions of the privilege are extremely disfavored. See, e.g., *Salas v. United States (In re Grand Jury Witness)*, 695 F.2d 359, 362 (9th Cir. 1982). Thus, a party must assert the privilege on a question-by-question or document-by-document basis. See, e.g., *United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992).

3. A court may conduct *in camera* review of documents in order to determine whether the privilege (or any of its exceptions) applies. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992); *In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 125 n.2 (3d Cir. 1986).

   a. The fact that a document contains some privileged material does not make the entire document immune from discovery. A given document may be examined *in camera* to allow the court to excise the privileged portions. See, e.g., *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 517-18 (D. Conn. 1976) (ordering
disclosure of business advice, protecting patent and antitrust advice).

4. Once the attorney-client privilege attaches to a communication, the communication retains the protection of the privilege even after termination of the attorney-client relationship. See, e.g., United States v. White, 970 F.2d 328, 334 (7th Cir. 1992).

C. Which Law Applies?

1. Federal Rule of Evidence 501: "[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law."


2. Bankruptcy Examples:

a. Federal law applies to issues regarding the financial condition of a debtor, the size of the estate, means of augmenting the estate, and the location, nature, and amount of assets and liabilities. See, e.g., International Horizons, Inc. v. Committee of

b. Federal law applies to issues regarding the turnover of a debtor's property to the trustee. See, e.g., In re Federal Copper, Inc., 19 B.R. 177, 180 (Bankr. M.D. Tenn. 1982).


i. Query whether the same result should occur where the basis for objecting to the claim is grounded in state law pursuant to Bankruptcy Code section 502(b)(1)? Federal Rule of Evidence 501 suggests that the state law of privileges should apply because state law supplies the rule of decision. On the other hand, perhaps the federal law has absorbed the state law as a matter of general federal common law so that the federal law of privileges applies.


III. "Communications" within the Privilege

A. General Rule: The privilege extends to verbal statements, documents, and tangible objects. See,
e.g., Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992).

1. **Client Silence may Constitute Communication.** "[W]hen a person acquiesces in certain statements, he may, under proper circumstances admit the truth of those statements. His silence, then, may be a statement." United States v. Andrus, 775 F.2d 825, 852 (7th Cir. 1985).

B. **Attorney to Client Communications:** In addition to communications from client to attorney, the privilege includes at least some communications from attorney to client. Courts, however, differ regarding the extent to which these communications are privileged:

1. **Broad Standard:** Some courts hold that communications from lawyer to client are always privileged. See, e.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980) (a blanket rule "ensure[s] against inadvertent disclosure, either directly or by implication, of information which the client has previously confided to the attorney's trust"); Moore v. Tri-City Hosp. Auth., 118 F.R.D. 646, 648 (N.D. Ga. 1988).
   
a. Cf. Union Co. v. United States, 449 U.S. 383, 390 (1981) ("[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.").

2. **Narrow Standard:** Other courts hold that communications from lawyer to client are privileged only if they relate to facts previously conveyed to the lawyer by the client. The privilege does not attach to communications which do not reveal, directly or indirectly, the substance of a confidential communication. See, e.g., United States v. Doe (In re Six Grand Jury Witnesses), 979 F.2d 939, 944 (2d Cir. 1992); United States v. Sayan, 968 F.2d 55, 63 (D.C. Cir. 1992).

3. **Advice:** "As long as the narrow view of the privilege prevails . . . lawyers and clients concerned with maintaining confidentiality will be well advised to structure exchange of information in response to client-initiated communications
that can later be pointed to as the applicable underlying request for legal advice." Edna S. Epstein & Michael M. Martin, The Attorney-Client Privilege and the Work-Product Doctrine 19 (2d ed. 1988).

C. **Facts Underlying the Communication are Not Privileged:**
"The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

1. The privilege does not cover facts discovered by an attorney from, or documents originating with, a third party. Such non-privileged communication does not become privileged merely because the attorney subsequently communicates it to the client or because it becomes the predicate of legal advice. See, e.g., *Synalloy Corp. v. Gray*, 142 F.R.D. 266, 268-69 (D. Del. 1992); *Campbell Sixty-Six Express, Inc. v. Empire Bank (In re Campbell Sixty-Six Express, Inc.)*, 84 B.R. 632, 634 (Bankr. W.D. Mo. 1988).

2. Facts about the client that are merely observed by the attorney are not privileged. See, e.g., *In re Grand Jury Proceedings*, 791 F.2d 663, 665 (8th Cir. 1986) ("[M]atters existing in the public eye, such as a person's appearance and handwriting, are generally not confidential communications because they are not exposed on the assumption that others would not learn of them."); *In re Walsh*, 623 F.2d 489, 494-95 (7th Cir.), cert. denied, 449 U.S. 994 (1980).

3. However, a communication does not lose privileged status merely because the underlying facts are available from other sources. See, e.g., *United States v. O'Malley*, 786 F.2d 786, 794 (7th Cir. 1986).

D. **Pre-existing Documents:**

1. "[P]re-existing documents which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976).
2. However, when the client transfers privileged documents to an attorney for the purpose of obtaining legal advice, those documents remain privileged in the possession of the attorney. *Id.* at 404-05.

E. Billing Statements, Time Records, Payment of Fees:

1. General Rule: Billing statements that reveal the identity of the client, the amount of the fee, and the general purpose of the work performed are not privileged. However, bills, statements, and time records that reveal the motive of the client in seeking representation, the litigation strategy, or the specific nature of the services provided (including the researching of particular areas of the law) are privileged. *See, e.g.*, *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992); *Salas v. United States (In re Grand Jury Witness)*, 695 F.2d 359, 361-62 (9th Cir. 1982).

   a. The court may require line-by-line justification for each requested redaction of a time sheet entry and may conduct an in camera review of the billing materials to determine if the privilege applies. *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129-30 (9th Cir. 1992).

   b. No privilege attaches to communications that reveal that third parties have paid the attorney's fees for the client. *See, e.g.*, *United States v. Hirsch (In re Grand Jury Subpoenas)*, 803 F.2d 493, 496-99 (9th Cir. 1986).

2. Bankruptcy Examples: The bankruptcy court may require specific evidence as to the reasonableness of an attorney's fees without violating the attorney-client privilege. *See, e.g.*, *In re Rheuban*, 121 B.R. 368, 385 (Bankr. C.D. Cal. 1990). *See also In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557, 583 & n.29 (Bankr. D. Utah 1985) (time records that "substantially reflect the work performed" do not implicate the attorney-client privilege).

   a. Several Bankruptcy Code sections require that the fees of attorneys involved with the bankruptcy case be "reasonable." *See 11 U.S.C. §§ 328* (*Limitation on compensation of 10*
b. Despite the requirement that the bankruptcy court evaluate the reasonableableness of an attorney's fees, however, a voluntary bankruptcy petition does not automatically waive the privilege for billing information that would otherwise be privileged. See Danning v. Donovan (In re Carter), 62 B.R. 1007, 1014-15 (Bankr. C.D. Cal. 1986). Cf. In re Drexel Burnham Lambert Group, Inc., 133 B.R. 13, 31 (Bankr. S.D.N.Y. 1991) (permitting counsel to excise privileged material from time records but reserving the right to conduct in camera review of the unredacted material).

c. Nevertheless, when fee applications are challenged, "it is necessary that the attorneys come forward and defend their fees or surrender them." Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.), 30 B.R. 883, 886 (Bankr. D. Colo. 1983) (holding that, even if the information is privileged, the attorney may invoke the "self defense" exception, see infra AC Part VII.C, in order to justify the fee application items).

IV. Persons and Entities Within the Privilege

A. Client Control: The client, not the lawyer, owns, controls, and generally invokes the privilege. As such, an attorney usually cannot invoke the privilege against a client. See, e.g., Haines v. Liggett Group, Inc., 975 F.2d 81, 90 (3d Cir. 1992); X Corp. v. Doe, 805 F. Supp. 1298, 1305 n.12 (E.D. Va. 1992). But see the exception to the attorney-client privilege in cases of attorney "self-defense," infra AC Part VII.C. Nevertheless, the attorney has an ethical obligation to raise the privilege when necessary to prevent disclosure of confidential communications. See infra AC Part IV.A.4.

1. The client is the intended beneficiary of legal services, and is defined by the purpose of the legal relationship, not the financial arrangements. A party becomes a client by


3. The privilege protects conversations between prospective clients and counsel as well as communications with retained counsel. See, e.g., In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 124 n.1 (3d Cir. 1986). Protection includes preliminary consultations even where employment of the attorney never actually results. See, e.g., In re Auclair, 961 F.2d 65, 69 (5th Cir. 1992); Westinghouse Elec. Corp. v. Kerr-McCee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978).


   a. "A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client." Model Code of Professional Responsibility EC 4-4 (1981).

   b. Cf. Cal. Bus. & Prof. Code § 6068(e) (West 1990) (a member of the bar is obligated "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client").
B. Corporations and Other Collective Entities:


   a. "The administration of the attorney-client privilege in the case of corporations [and other collective entities], however, presents special problems. As an inanimate entity, a corporation cannot speak directly to its lawyers. Similarly, it cannot directly waive the privilege when disclosure is in its best interest. Each of these actions must necessarily be undertaken by individuals empowered to act on behalf of the corporation." Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985).

2. To Which Corporate Employees does the Privilege Apply? There is no definite rule. In Upjohn Co. v. United States, 449 U.S. 383 (1981), the Supreme Court refused to adopt a bright-line test:

   a. In Upjohn, the Court rejected the "control group" test and adopted a case-by-case analysis. In holding that interviews of corporate employees by counsel were within the scope of the privilege, the Court relied heavily on the factors commonly associated with the "subject matter" test: "Information was needed to supply a basis for legal advice concerning compliance with [various laws] and potential litigation . . . . The communications concerned matters within the scope of the employees corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. . . . [T]he communications were considered highly confidential when made, and have been kept confidential by the company. Consistent with the underlying purposes of the attorney-client privilege, these communications must be protected against compelled disclosure." Id. at 394-95 (emphasis added).
i. Cf. Baxter Travenol Lab. v. Lemay, 89 F.R.D. 410, 414 (S.D. Ohio 1981) ("Upjohn teaches that it is the process of uninhibited client communication in securing legal advice which is deserving of the privilege's protection . . . and that emphasis on either the status of the communicator (under the 'control group' test) or the content of the communication (under the 'subject matter' test) would be misplaced.").


b. In his Upjohn concurrence, Chief Justice Burger urged the Court to formally adopt the subject matter test: "[A] communication is privileged at least when . . . an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment. The attorney must be one authorized by the management to inquire into the subject and must be seeking information to assist counsel in performing any of the following functions: (a) evaluating whether the employee's conduct has bound or would bind the corporation; (b) assessing the legal consequences, if any, of that conduct; or (c) formulating appropriate legal responses to actions that have been or may be taken by others with regard to that conduct." Upjohn Co. v. United States, 449 U.S. 383, 403 (1981) (Burger, C.J., concurring).

i For early formulations of the subject matter test, see Diversified Indus. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (en banc); Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970), aff'd by an equally divided Court, 400 U.S. 348 (1971).

c. Prior to Upjohn, some courts used the narrower control group test, which restricts the privilege to employees "in a position to

i. The Upjohn Court rejected this test: "The control group test . . . frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation. The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy." Upjohn Co. v. United States, 449 U.S. 383, 392 (1981).

ii. Nevertheless, the control group test remains a valid concept for the purposes of determining which corporate employees may waive the privilege. See infra AC Part VI.A.2.

iii. Moreover, some states have retained the control group test as a matter of state law. See, e.g., Consolidation Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250, 258 (Ill. 1982) ("The control-group test . . . strike[s] a reasonable balance by protecting consultations with counsel by those who are the decisionmakers or who substantially influence corporate decisions and by minimizing the amount of relevant factual material which is immune from discovery.").

d. Communications with former employees may also fall within the privilege. These parties need not have been employees when the

3. Who may Assert the Privilege for a Corporation?

a. "[T]he attorney-client privilege is controlled, outside of bankruptcy, by a corporation's management . . . . When control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well." Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 351-52, 349 (1985).

b. Managers must, however, "exercise the privilege in a manner consistent with their fiduciary duty to act in the best interests of the corporation and not of themselves as individuals." Id. at 349.

c. The trustee of a bankrupt corporation may assert or waive the privilege. See, e.g., id. at 349-58. See infra Part VI.H.3 (waiver of the privilege by a bankruptcy trustee).

4. When does a Corporate Attorney Represent Individual Officers, Directors, or Employees?

a. "The fact that an attorney represents a corporation does not thereby make that attorney counsel to the individual officers and directors thereof." Stratton Group, Ltd. v. Sprayregen, 466 F. Supp. 1180, 1184 n.3 (S.D.N.Y. 1979).

b. The subjective belief of a corporate officer or employee that the corporation's counsel also represents the officer or employee personally is insufficient to establish an attorney-client relationship between the officer and the counsel. If corporate officers desire to retain a personal attorney-client privilege, when the officers approach corporate counsel for personal legal advice, they must make clear to counsel that the advice is sought individually.

c. Because of potential conflicts of interest, courts are reluctant to hold that corporate officers and employees have an attorney-client relationship with the corporation's counsel. This is particularly true for companies that have filed for bankruptcy. The individual must intend, and counsel must be willing, to proceed despite the conflict. Moreover, the corporation must consent to, and the bankruptcy court must approve, the dual representation. See, e.g., In re Cumberland Inv. Corp., 120 B.R. 627, 629 n.1 (Bankr. D.R.I. 1990); In re Standard Fin. Management Corp., 77 B.R. 324, 328 (Bankr. D. Mass. 1987).

i. For a description of when it is proper for an attorney to represent both an organization and a director, officer, employee, member, or shareholder of that organization, see Model Rules of Professional Conduct Rule 1.13(e) (1983).

ii. Many bankruptcy courts preclude employment of counsel by a debtor in possession where the counsel represents directors or officers, particularly where derivative actions are pending or are likely to arise. See, e.g., Law Office of J.E. Losavio, Jr. v. Trustee and Creditors' Comm. (In re Neidig Corp.), 113 B.R. 696, 698-99 (D. Colo. 1990) (law firm may not represent a debtor corporation where the firm had previously represented the debtor's president, particularly where there are allegations that the president had breached his fiduciary duty as an officer); Agresti v. Rosenkranz (In re United Utensils Corp.), 141 B.R. 306, 309 (Bankr. W.D. Pa. 1992) ("An attorney who renders legal advice to an
individual associated with the [debtor] corporation upon matters personally concerning that individual, may render himself in a conflict of interest position."). See also W.F. Dev. Corp. v. Office of United States Trustee (In re W.F. Dev. Corp.), 905 F.2d 883, 884 (5th Cir. 1990) (counsel for both the general partner and a limited partner in a bankruptcy proceeding disqualified for conflict of interest); In re Atlanta Sporting Club, 137 B.R. 550, 552-53 (Bankr. N.D. Ga. 1991) (law firm may not represent a limited partnership in bankruptcy where the firm had previously represented the general partner). See generally 11 U.S.C. § 327(a) (a debtor's attorney must "not hold or represent an interest adverse to the estate" and must be "disinterested").

d. Where it does exist, the employee's personal attorney-client privilege does not cover communications regarding the general affairs of the corporation or the employee's role and functions within it. Thus, an employee may not prevent the corporation from waiving the privilege arising from discussions about corporate matters between the employee and corporate counsel. See, e.g., Commodity Futures Trading Comm'n v. Weintraub, 417 U.S. 343, 349 (1985); In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 124-25 (3d Cir. 1986); In re Fidelity Guar. Mortgage Corp., 150 B.R. 864, 869 (Bankr. D. Mass. 1993).

e. See generally Thomas B. Leary, Is There a Conflict in Representing a Corporation and Its Individual Employees, 36 Bus. Law. 591 (1981).

5. **Who does the Attorney for a Partnership Represent?**

There is a conflict in the case law:

a. Some courts hold that limited partners (investors) are clients of the law firm consulted by the general partner (and can therefore waive the privilege of a limited partnership). See, e.g., Roberts v. Hein, 123 F.R.D. 614, 622-25 (N.D. Cal. 1988); McCain v. Phoenix Resources, Inc., 185 Cal.
App. 3d 575, 579-81 (1986) ("absent any restriction by statute or by the partnership agreement, a limited partner has the right to inspect all documents and papers affecting the partnership, including those held by the partnership's attorney").

b. Other courts, however, hold that an attorney for a limited partnership is not the attorney for each limited partner and therefore refuse to permit a limited partner to waive the partnership's privilege. See, e.g., Murseau Corp. v. Florida Penn Oil & Gas, Inc., 638 F. Supp. 259, 262-63 (W.D. Pa. 1986), aff'd sub nom., Murseau Corp. v. Florida Penn Oil & Gas, Inc., 813 F.2d 398 (3d Cir. 1987); Quintel Corp., N.V. v. Citibank, N.A., 589 F. Supp. 1235, 1241-42 (S.D.N.Y. 1984). See also Buford White Lumber Co. v. Octagon Properties, Ltd., 740 F. Supp. 1553, 1561-62 (W.D. Okla. 1989) (counsel for a general partner has no duty under the Uniform Limited Partnership Act to disclose to investing limited partners information received from the general partner in connection with the preparation of an offering memorandum).

c. For a good overview of the application of the attorney-client privilege to partnerships, see ABA Comm. on Ethics and Professional Responsibility Formal Op. 361 (1991). According to the ABA, "[t]here is no logical reason to distinguish partnerships from corporations or other legal entities in determining the client a lawyer represents. . . . [Therefore,] a lawyer who represents a partnership represents the entity rather than the individual partners unless the specific circumstances show otherwise." Id. Information received by a lawyer in the course of representing a limited or general partnership, however, may not be withheld from individual partners except where the attorney represents the partnership in a dispute between the partnership and an individual partner. Id.

i. The existence of an attorney-client relationship between a partnership
attorney and individual partners depends on an analysis of several factors:
"whether the lawyer affirmatively assumed a duty of representation to the individual partner, whether the partner was separately represented by other counsel when the partnership was created or in connection with its affairs, whether the lawyer had represented an individual partner before undertaking to represent the partnership, and whether there was evidence of reliance by the individual partner on the lawyer as his or her separate counsel, or of the partner's expectation of personal representation." Id.

ii. Because "simultaneous representation of partnerships and of individual partners, even on basically unrelated matters, may result in the lawyer possessing confidences of one client that may not be revealed to another, a circumstance which could effectively prevent continued representation of the other client [and force] the lawyer . . . to withdraw from one or both of the representations," partnership counsel should "take care to avoid the creation of an attorney-client relationship with individual partners unless the lawyer is satisfied that it is ethical to do so and intends to create such a relationship." Id. (citing Model Rules of Professional Conduct Rule 1.7(a) (1983)).

iii. Because of these potential conflicts of interest, the ABA suggests the following procedure for partnership lawyers: "If an attorney retained by a partnership explains at the outset of the representation, preferably in writing, his or her role as counsel to the organization and not to the individual partners, and if, when asked to represent an individual partner, the lawyer puts the question before the partnership or its governing body, explains the implications of the dual representation, and obtains the informed consent of both the partnership and the
individual partners, the likelihood of perceived ethical impropriety . . . should be significantly reduced." Id. iv. See W.F. Dev. Corp. v. Office of United States Trustee (In re W.F. Dev. Corp.), 905 F.2d 883, 884 (5th Cir. 1990) ("When one attorney represents both limited and general partners in bankruptcy there will always be a potential for conflict and disqualification [of the attorney] is proper.").

C. Bankruptcy Committees:

1. Communications between Committee Members and a Committee Attorney: Probably fall within the attorney-client privilege. See, e.g., Marcus v. Parker (In re Subpoenas Duces Tecum), 978 F.2d 1159, 1161 (9th Cir. 1992) (the privilege applies at least when the committee is engaged in adversarial litigation); In re Baldwin-United Corp., 38 B.R. 802, 804-05 (Bankr. S.D. Ohio 1984). But see In re Christian Life Ctr., 16 B.R. 35, 37 (Bankr. N.D. Cal. 1981) (a committee does not "need or deserve the attorney-client privilege since they [sic] should make their activities known to the other creditors and to the Court") (disagreed with by Baldwin-United, overruled at least in part sub silentio by Marcus).

a. "Given its duties and responsibilities, a creditors' committee needs competent and effective representation. Counsel for a creditors' committee is best able to serve his or her client if the attorney can engage in 'full and frank communications' [with the committee]." Marcus v. Parker (In re Subpoenas Duces Tecum), 978 F.2d 1159, 1161 (9th Cir. 1992) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389) (1981).

b. "The purposes underlying the privilege have no less applicability to a creditor's [sic] committee than they do to any other entity, at least when disclosure of privileged communications is sought by those who are not represented by the committee, or who stand in an adversarial relationship with it." In re Baldwin-United Corp., 38 B.R. 802, 804-05 (Bankr. S.D. Ohio 1984).
c. The Bankruptcy Code specifically envisions that bankruptcy committees will employ attorneys. See Marcus v. Parker (In re Subpoenas Duces Tecum), 978 F.2d 1159, 1161 n.2 (9th Cir. 1992); 11 U.S.C. § 1103(b).

d. The presence of non-voting, ex-officio creditors' committee members during discussions with the committee's counsel probably will not waive the privilege. See In re Baldwin-United Corp., 38 B.R. 802, 806 (Bankr. S.D. Ohio 1984) (analogizing to Upjohn's rejection of the "control group" test).

i. The committee invitees in Baldwin-United were not appointed by the court or by the U.S. Trustee. Presumably, the same result would occur in cases in which the U.S. Trustee appoints ex-officio committee members.

ii. Query whether the privilege would be waived when disclosure is made to a committee member that is an indenture trustee with a fiduciary duty to provide information to debenture holders. What if the indenture trustee signs a confidentiality agreement? Would that breach the trustee's fiduciary duty to the debenture holders?

e. See also In re Drexel Burnham Lambert Group, Inc., 133 B.R. 13, 31 (Bankr. S.D.N.Y. 1991) (see application of committee counsel need not disclose privileged material); In re Century Glove, Inc., 74 B.R. 952, 957 (Bankr. D. Del. 1987) (letter from committee counsel to committee members assumed to be privileged), aff'd in part sub nom., Century Glove, Inc. v. First Am. Bank, 860 F.2d 94 (3d Cir. 1988).

f. Because the committee's counsel has an attorney-client relationship with committee members, ethical rules governing communications with represented parties probably restrict the debtor (or its counsel) from communicating with committee members without obtaining the approval of committee counsel. See In re Snyder, 51 B.R. 432, 439 (Bankr. D. Utah 1985) ("Where the creditors'
committee has employed an attorney . . . the debtor may not communicate with members of the committee without the prior consent of the committee's attorney or an order of the Court.

i. Regarding the ethical prohibition against contacting a represented person, see Model Rules of Professional Conduct Rule 4.2 (1983) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."); Model Code of Professional Responsibility DR 7-104 (1981).

ii. Query whether Snyder's application of the ethical rules conflicts with Bankruptcy Code section 1103(c)(1), which requires a bankruptcy committee to consult with the trustee or debtor in possession regarding the administration of the case. Perhaps this section makes such a consultation "authorized by law" and thus exempt from Model Rule 4.2. Note also that, in practice, committee members communicate with debtors in possession on a regular basis.

g. Even if the attorney-client privilege does arise for communications between committee members and committee counsel, the committee's non-member constituents probably still have a limited right of access to those communications.

i. Under the Garner doctrine, entities that owe a fiduciary duty to others do not have an unqualified right to assert the attorney-client privilege to prevent access to otherwise privileged communications by the beneficiaries of the fiduciary relationship. See Garner v. Wolfinbarger, 430 F.2d 1093, 1100-04 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971); infra AC Part VII.B.

ii. As such, "[a] narrower construction of
the privilege is required where disclosure is sought by those who are represented by the creditors' committee. In re Baldwin-United Corp., 38 B.R. 802, 805 (Bankr. S.D. Ohio 1984). In Baldwin-United, the court expressly adopted Garner's fiduciary limitation to the privilege. In fact, the court went farther and reversed the burden of persuasion, placing it on the committee. Thus, under Baldwin-United, individual creditors may access otherwise privileged communications between committee members and committee counsel unless the committee can show good cause why the communications should not be disclosed. Id. at 805. See infra AC Part VII.B.4.

2. Communications between Non-member Creditors and a Committee Attorney: An attorney for a bankruptcy committee has at least a fiduciary duty to, and perhaps an attorney-client relationship with, all constituents of the committee. See e.g., Pension Benefit Guar. Corp. v. Pincus, Verlin, Hahn, Reich & Goldstein Professional Corp., 42 B.R. 960, 963 (E.D. Pa. 1984); In re Celotex Corp., 123 B.R. 917, 920 (Bankr. M.D. Fla. 1991). As such, communications between non-member committee constituents and committee counsel should logically fall within the attorney-client privilege, at least where such communications can reasonably be expected to remain confidential.

3. Communications between the Debtor in Possession and a Committee Attorney, Committee Members, or Non-member Creditors.

a. At least one court has held communications between a debtor in possession and a creditors' committee to be privileged on the basis of the "common interest" rule, see infra AC Part VI.B. "Because of the common legal interest of [the debtor] and the unsecured creditors' committee in this litigation, the sharing of information among [the debtor], the Committee and their respective counsel is privileged from discovery." Norfin, Inc. v. AM Int'l, Inc., No. 80-C-6824 (N.D. Ill. June 26, 1984) (Bua, J.) (citing United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979) (a joint defense
case).}

i. See also Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.), 84 B.R. 202, 205 (Bankr. D. Colo. 1988) (debtor in possession and creditors' committee have a common interest in a fraudulent conveyance action).

ii. Query whether the Norfin analysis applies to plan negotiations between a debtor and a committee. Do the two parties share a "common interest?" What if the committee and the debtor are co-proponents of the plan? See infra AC Part VI.B.

b. However, another court held that a debtor's "[c]ommunication with creditors regarding a proposed plan of reorganization is analogous to communicating with an adverse party regarding settlement." In re Snyder, 51 B.R. 432, 438-39 (Bankr. D. Utah 1985) (emphasis added). Such a blanket prohibition would nullify the availability of the common interest rule.

V. "Legal Advice" Within the Privilege

A. General Rule: Legal advice is privileged; business advice is not privileged. See, e.g., United States v. Rockwell Int'l, 897 F.2d 1255, 1264 (3d Cir. 1990) ("The sine qua non of any claim of privilege is that the information sought to be shielded is legal advice."); Diversified Indus. v. Meredith, 576 F.2d 592, 602 (8th Cir. 1978) ("[T]he attorney must have been engaged or consulted by the client for the purpose of obtaining legal services or advice — services or advice that a lawyer may perform or give in his capacity as a lawyer, not in some other capacity. A communication is not privileged simply because it is made by or to a person who happens to be a lawyer.").

B. Corporate In-house Counsel:

1. If the advice rendered is legal in nature, the attorney-client privilege attaches to in-house as well as outside counsel. See, e.g., Upjohn Co. v. United States, 449 U.S. 383 (1981) (applying the privilege to in-house counsel without discussion);

2. The privilege includes special (non-legal) investigations undertaken by an in-house attorney if the investigations form a basis for the attorney's legal advice to the corporation. See Upjohn, 449 U.S. at 394. Compare General Counsel v. United States (In re Grand Jury Subpoena), 599 F.2d 504, 511 (2d Cir. 1979) (participation by counsel in an internal investigation does not automatically cloak the investigation in "legal garb") with Diversified Indus. v. Meredith, 576 F.2d 592, 610 (8th Cir. 1978) (matters committed to an attorney for investigation are presumed to be given for legal advice).

C. Bankruptcy Examples:

1. The preparation of a bankruptcy petition, even if not ultimately filed, is legal advice. Thus, information obtained by the lawyer in order to prepare a petition is generally privileged. See, e.g., Greenberger v. Slaven (In re Slaven), 74 B.R. 71, 73 (Bankr. S.D. Ohio 1987).

2. However, the mere compilation of statistics for accounting and insurance planning purposes is not privileged. See Hillsborough Holdings Corp. v. Celotex Corp. (In re Hillsborough Holdings Corp.), 132 B.R. 478, 480 (Bankr. M.D. Fla. 1991).

3. In general, the line between legal and business advice is very difficult to draw for the workout or chapter 11 lawyer. For example, does a lawyer render legal or business advice in directing the preparation of financial data or business plans to show that a proposed plan of reorganization satisfies the "feasibility" requirement of Bankruptcy Code section 1129(a)(11)? The better answer is that such work is legal advice because it was undertaken in an effort to confirm a plan of reorganization, apparently a legal objective. Moreover, for a determination of feasibility or other financially-based issues, a lawyer will always need to analyze the legal standards by which the financial data will be judged. Such analysis should bring the product of the lawyer's tasks within the privilege.
VI. Confidentiality Required. Waiver of the Privilege.
Only confidential communications receive the protection of the privilege. A failure to maintain confidentiality by either the client or the attorney may result in a waiver of the privilege.


1. The presence of third parties that are not agents of the client or lawyer creates a rebuttable presumption that the communications are not confidential. See, e.g., Pereira v. United States, 347 U.S. 1, 6-7 (1953); In re Grand Jury Investigation, 918 F.2d 374, 385 n.15 (3d Cir. 1990). Agents of the client or attorney, such as accountants, investment bankers, paralegals, and secretaries, are treated as the client or the attorney for purposes of the privilege. See supra AC Part IV.A.2.

2. Disclosure of Privileged Communications within a Corporation.
    a. Dissemination of information within the corporate "control group" does not waive the privilege. See, e.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980); In re Grand Jury 90-1, 758 F. Supp. 1411, 1413 & n.2 (D. Colo. 1991); SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 517-18 (D. Conn. 1976) ("A privileged communication should not lose its protection if an executive relays legal advice to another who shares responsibility for the subject matter underlying the consultation.").

    b. Some courts adopt a "need to know" standard for dissemination to persons outside of the control group. See, e.g., Diversified Indus. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978) (no waiver where "the communication is not disseminated beyond those persons who,
because of the corporate structure, need to know its contents'); Pereira v. Marine Midland Bank (In re Al Nagelberg & Co.), 85 B.R. 711, 712-13 (Bankr. S.D.N.Y. 1988) (no waiver where an interoffice communication that disclosed legal advice was distributed only to supervisory personnel with responsibilities relating to the subject of the advice.)

c. Other courts use a looser, case-by-case analysis. See, e.g., James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 142 (D. Del. 1982) ("[T]he fact that some unauthorized corporate personnel may purposely or inadvertently read a privileged document does not render that document nonconfidential. To hold otherwise would be to require every corporation to maintain . . . a system [of secrecy that] is neither practical nor . . . required by the case law.").

3. Disclosure between Affiliated Corporations:
The basic Upjohn analysis regarding corporate communications should apply. See supra AC Part IV.B.2.a.

a. For example, communications between an attorney for a parent corporation and employees of its subsidiary are privileged if the information is necessary for the representation of the parent and the discussions involve matters within the scope of the employees' employment. See Admiral Ins. Co. v. United States Dist. Ct., 881 F.2d 1486, 1493 n.6 (9th Cir. 1989).

B. Disclosure to Parties with a Common Interest Preserves the Privilege (the Joint-Defense rule).

1. Rule: In order to establish a common interest, the party asserting the privilege must show (1) that the communications were made in the course of a joint-defense effort, (2) the statements were designed to further that effort, and (3) the privilege has not been waived. See, e.g., Haines v. Liggett Group, Inc., 975 F.2d 81, 94 (3d Cir. 1992); In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 126 (3d Cir. 1986).

a. The rule is broadly construed and not limited
to co-defendants. "Whether an action is ongoing or contemplated, whether the jointly represented persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to effectively prosecute or defend their claims." United States v. Under Seal (In re Grand Jury Subpoenas), 902 F.2d 244, 249 (4th Cir. 1990).

b. Courts presume commonality of interest when two or more parties jointly seek consultation with an attorney. See, e.g., In re Auclair, 961 F.2d 65, 70 (5th Cir. 1992).

c. For rules regarding the ethical propriety of an attorney's joint representation of two or more clients, see Model Code of Professional Responsibility DR 5-105(C)(1981).


2. Termination of the Common Interest.


b. However, a party may not disclose documents protected by the common interest rule to outside parties without the consent of all the jointly represented clients. See, e.g., In re Auclair, 961 F.2d 65, 70 (5th Cir. 1992); Keller v. Blinder (In re Blinder Robinson & Co.), 140 B.R. 750, 795 (D. Colo. 1992). The occurrence of such a disclosure does not waive the privilege as to the other parties with a common interest. See, e.g., American Mut. Liab. Ins. Co. v. Superior Ct., 38 Cal. App. 3d 579, 593-96 (1974); 8 John H.

i. Query whether a joint client that discloses privileged communications without authorization may be liable in damages for such a disclosure?

3. **Application to Bankruptcy Proceedings.**

a. The debtor in possession and creditors' committee have a common interest in a fraudulent conveyance action. See *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*, 84 B.R. 202, 205 (Bankr. D. Colo. 1988).

i. Presumably the same result would occur in other instances, such as a preference action or the proposal of a joint plan of reorganization, in which creditors cooperate with a debtor in possession or trustee.

ii. Query whether the same result would occur if the recovery of a fraudulent conveyance or preference action would constitute the cash collateral of a secured creditor pursuant to a debtor in possession borrowing agreement? See 11 U.S.C. §§ 363(a), 364(c)(2).

b. Because parent and subsidiary corporations generally share common financial interests, a bankruptcy trustee may obtain privileged documents prepared by the in-house counsel of the debtor's parent corporation regarding the sale of the debtor to a third party. See *Yorke v. Santa Fe Indus. (In re Santa Fe Trail Transp. Co.)*, 121 B.R. 794, 798-800 (Bankr. N.D. Ill. 1990) (documents were sought for use in a fraudulent conveyance action).

C. **Inadvertent Disclosures of Privileged Information:** Courts take drastically different views about the effect of an inadvertent disclosure of privileged communications by the client or by the attorney.

1. **Bright-line Approach:** Inadvertent disclosure by the client or attorney *always* waives the privilege.
a. Wigmore: "All involuntary disclosures ... are not protected by the privilege ... [The law] leaves to the client and attorney to take measures of caution sufficient to prevent being overheard by third persons. The risk of insufficient precautions is upon the client. This principle applies equally to documents. ... One who overhears [a] communication, whether with or without the client's knowledge, is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy." 8 John H. Wigmore, Wigmore on Evidence §§ 2325-26 (John T. McNaughton rev. 1961) (footnotes omitted).


2. Bright-line Approach: Inadvertent disclosure by the attorney never waives the privilege. Waiver occurs only where a client negligently discloses privileged communications.


b. See also United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987) (delivery of material "was sufficiently involuntary and inadvertent as to be inconsistent with a theory of waiver"), modified on other grounds, 491 U.S. 554 (1989).
3. **Negligence-based, Balancing Approach:** Inadvertent disclosure may, but does not always, waive the privilege.

a. Factors of analysis: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the number of inadvertent disclosures, (3) the extent of the disclosure, (4) any delay and measures taken to rectify the disclosure, and (5) whether the overriding interests of justice would or would not be served by relieving a party of its error. See *In re Grand Jury Investigation*, 142 F.R.D. 276, 278-79 (M.D.N.C. 1992) (no waiver by inadvertent disclosure of 18 documents out of 300,000 pages produced in discovery).


c. See, e.g., *United States v. De la Jara*, 973 F.2d 746, 749-50 (9th Cir. 1992) (failure to attempt to retrieve inadvertently disclosed communication waives the privilege); *FDIC v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 480-84 (E.D. Va. 1991) (insufficient precautions against inadvertent disclosure results in a waiver).

d. Thus, for modern communications devices such as a fax machine, it is wise to include a cover sheet claiming the privilege for the communicated material.

D. **Confidentiality must be Intended by the Parties:** Material prepared for subsequent public dissemination is not privileged. See, e.g., *United States v. Aronson*, 781 F.2d 1580, 1581 (11th Cir. 1986); *Hillsborough Holdings Corp. v. Celotex Corp.* (In re *Hillsborough Holdings Corp.*), 118 B.R. 866, 869-70 (Bankr. M.D. Fla. 1990).

1. **General Examples:**

a. Information given to an attorney to prepare a tax return is not privileged. See, e.g., *United States v. Winfield*, 790 F.2d 576,
579-80 (7th Cir. 1986).

b. Material used to prepare a prospectus for a private placement of limited partnership offerings is not privileged, even where the prospectus is never actually disseminated. See, e.g., In re Grand Jury Proceedings, 727 F.2d 1352, 1357-58 (4th Cir. 1984). Cf. United States v. (Under Seal) (In re Grand Jury 83-2), 748 F.2d 871, 875-76 (4th Cir. 1984) (information given to an attorney to investigate the possibility of a public filing can become privileged if the client later decides not to file and requests confidentiality).

c. Material used to prepare a public bond offering is not privileged, even where the bonds are never actually issued. See, e.g., United States v. Tellier, 255 F.2d 441 (2d Cir.), cert. denied, 358 U.S. 821 (1958).

2. Bankruptcy Petitions: "When information is disclosed 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 filed with the bankruptcy court." United States v. White, 950 F.2d 426, 430 (7th Cir. 1991). See also United States v. White, 970 F.2d 328, 334-35 (7th Cir. 1992).

a. See infra FA Part III (discussing the applicability of the Fifth Amendment privilege against self incrimination to bankruptcy cases and proceedings).

E. Affirmative Reliance on the Advice of Counsel may Waive the Privilege:

1. Rule: When a party relies on the advice of counsel during litigation and attempts to assert the attorney-client privilege with respect to such advice, the opponent cannot fully ascertain the veracity of the client's assertions and is therefore disadvantaged. Accordingly, such testimony by the client waives the privilege protecting the relied-upon advice.

2. Reliance on counsel sufficient to waive the privilege usually occurs through the assertion of a claim or affirmative defense that hinges upon
privileged communications. See, e.g., United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991) (waiver through the assertion of a good faith defense consisting of "I thought my conduct was legal" or "my lawyer told me it was legal to act as I did"); United States v. Moody, 923 F.2d 341, 352-53 (5th Cir. 1991).

a. For example, 'if the chairperson of a creditors' committee is asked why the committee opposes a plan of reorganization and responds that "counsel advised against the plan," the communications between the committee and its counsel regarding opposition to the plan are waived.

3. No waiver occurs, however, until the holder of the privilege injects a new factual or legal issue into the case. Merely denying allegations raised by the opposing party is not sufficient to waive the privilege. See, e.g., Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095, 1098 (7th Cir. 1987).

4. Summary: A client cannot refuse to disclose privileged communications and later seek to use them offensively. The privilege cannot be used as a sword as well as a shield. See, e.g., Clark v. United States, 289 U.S. 1, 15 (1933) ("The privilege takes flight if the relation is abused."); United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991); United States v. Moody, 923 F.2d 341, 352 (5th Cir. 1991).

F. Use of a Privileged Document before or during Witness Testimony may Waive the Privilege:

1. Federal Rule of Evidence 612: An adverse party is entitled to inspect any privileged writing where "a witness uses [the] writing to refresh memory for the purposes of testifying, either — (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice."

2. This rule includes references to a privileged document at a preliminary hearing, see United States v. Suarez, 820 F.2d 1158, 1160 (11th Cir. 1987), or a settlement conference, see R.J. Herley & Son v. Stotler & Co., 87 F.R.D. 358, 359 (N.D. Ill. 1980).

G. Waiver through a Failure to Object: The privilege is
relinquished if privileged communications are admitted at trial without objection. A waiver may occur despite the fact that the client, who normally exercises control over the privilege, is not present at the time the objection should be made. See, e.g., United States v. Moody, 923 F.2d 341, 352-53 (5th Cir. 1991).

H. Who can Waive the Privilege?

1. General Rule: The client, not the lawyer, owns and controls the privilege and can affirmatively relinquish its protection.

2. Solvent Corporations: "[F]or solvent corporations, the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors. . . . When control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well." Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348-49 (1985).

   a. Query whether the release of a privileged document by a corporate director or officer without the permission of the board waives the corporation's privilege? If it does, query whether the disclosing director or officer may be liable in damages for the unauthorized disclosure?

3. Bankruptcy Trustees.


      i. Note that, when a trustee is not appointed, the management of the debtor in possession must exercise control of the privilege "consistently with [its] obligation to treat all parties, not merely the shareholders, fairly." Id. at 356 (dictum).

      ii. If the trustee waives the privilege for prebankruptcy documents prepared in the joint defense of a third party, the waiver is ineffective against any

iii. At the inception of the engagement, a prudent lawyer should advise the debtor corporation of the bankruptcy trustee's ability to waive the corporate attorney-client privilege. A lawyer's failure to make such a warning, however, does not enable those officers and directors to assert the corporation's privilege after a waiver by the trustee. See, e.g., In re Fidelity Guar. Mortgage Corp., 150 B.R. 864, 868 (Bankr. D. Mass. 1993) ("The argument concerning the failure to warn seems to seek the creation of an attorney-client privilege by estoppel, and the Court has been shown no authority for that principle.").

iv. Presumably, the bankruptcy trustee has the same ability to waive the privilege of other non-human debtors, such as a partnership or municipality. Query, however, whether the same occult should occur where a waiver could expose individuals to liability greater than, for example, their partnership contributions?

b. For individual debtors: The law is not settled.

i. The Weintraub Court expressly reserved the question whether a trustee could waive an individual debtor's attorney-client privilege. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 356 (1985). The Court did, however, express reservations about the trustee's ability to do so: "An individual, in contrast [to a corporation], can act for himself; there is no 'management' that controls a solvent individual's attorney-client privilege. If control over that privilege passes to a trustee, it must be under some other theory different from the one" used in the case. Id.
ii. The trustee can waive the privilege in order to recover documents left with an individual debtor's attorney when the individual has fled the jurisdiction. See In re Fairbanks, 135 B.R. 717, 723 (Bankr. D.N.H. 1991) ("Here, there is no individual who can act for himself because he has left the jurisdiction. Thus, he cannot assert the privilege or waive it. . . . [I]n these extraordinary circumstances, the trustee should have the privilege.").

iii. Some courts hold that the trustee cannot waive the privilege for an individual. "An individual can be sent to prison on the testimony of his attorney divulging a confidence. A corporation cannot suffer any penalty greater than the loss of its fiscal assets. [Thus, t]here is no reason why the trustee cannot waive a corporate debtor's attorney-client privilege. There is every reason . . . why the trustee cannot waive an individual debtor's attorney-client privilege." In re Silvio de Lindegg Ocean Devs. of Am., Inc., 27 B.R. 28 (Bankr. S.D. Fla. 1982) (pre-Weintraub).

iv. Other courts, however, hold that the trustee can waive the privilege for an individual. See, e.g., In re Smith, 24 B.R. 3, 5 (Bankr. S.D. Fla. 1982) (pre-Weintraub).

4. Bankruptcy Examiners: One court has held that an examiner with expanded powers (similar to those of a trustee) can waive the privilege for a corporate debtor. See In re Boileau, 736 F.2d 503, 506 (9th Cir. 1984) (pre-Weintraub).

I. Scope of the Waiver:

1. General Rule: Once waived, the privilege is extinguished for all purposes. See, e.g., United States v. Suarez, 820 F.2d 1158, 1160 (11th Cir. 1987). The privilege cannot be selectively waived with respect to some third parties but not others. See, e.g., Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

2. Subject Matter: a waiver generally extends to all
communications on the same subject matter. See John Morrell & Co. v. Local Union 304A, 913 F.2d 544, 556 (8th Cir. 1990); United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982). The rationale for this rule is that it is unfair to selectively disclose documents that portray only one side of an issue.

a. Query what the "same subject matter" is in the context of a chapter 11 reorganization?

3. Modern Trend: Recently, courts have begun to look at the tactical nature of the waiver. See, e.g., Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1426 & n.12 (3d Cir. 1991) (disclosure to government investigatory agencies waives the privilege only with respect to those communications actually disclosed, unless a partial waiver would be unfair to the party's adversary); Von Bulow v. Von Bulow (In re Von Bulow), 828 F.2d 94, 103 (2d Cir. 1987) (a waiver through extrajudicial disclosure that does not prejudice an opposing party is limited to the matters actually revealed); In re Sealed Case, 676 F.2d 793, 809 n.54 (D.C. Cir. 1982) (courts may decide "not to impose a full waiver as to all communications on the same subject matter where the client has merely disclosed a communication to a third party, as opposed to making some use of it"); Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 25 (9th Cir. 1981) (waiver extended only to communications actually disclosed where the disclosure occurred early in the proceedings, was made to opposing counsel rather than the court, and was not prejudicial to other parties).


VII. Exceptions to the Privilege
Once a claim of privilege has been established, the burden of persuasion shifts to the party seeking discovery to prove any applicable exception to the privilege. See, e.g., Hodges, Grant & Kaufmann v. United States, 768 F.2d 719, 721 (5th Cir. 1985); Texaco Inc. v. Louisiana Land & Exploration Co., 805 F. Supp. 385, 387 (M.D. La. 1992).

A. Future Crime/Fraud Exception:
1. **Rule:** "The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection -- the centrality of open client and attorney communication to the proper functioning of our adversary system of justice -- 'ceases[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing.' It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." United States v. Zolin, 491 U.S. 554, 562-63 (1989) (quoting John H. Wigmore, Wigmore on Evidence § 2298 (John T. McNaughton rev. 1961) and O'Rourke v. Darshire, [1920] A.C. 581, 604 (citations omitted).

a. "A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told." Clark v. United States, 289 U.S. 1, 15 (1933).

b. "The privilege is not designed to protect revelation of incriminating matters, only confidential communications between the attorney and client regarding the matter of representation." In re Grand Jury Matter, 969 F.2d 995, 997 (11th Cir. 1992).


2. There must be "some valid relationship" between the requested document and the alleged crime or fraud. See In re Warner, 90 B.R. 532, 536 (Bankr. M.D. Fla. 1988) (quoting Koenig v. International Sys. & Controls Corp. Sec. Litig. (In re International Sys. & Controls Corp. Sec. Litig.), 693 F.2d 1235, 1242 (5th Cir. 1982)).

3. **Procedural Requirements to Invoke the Crime/Fraud Exception.**

a. **Standard of Proof:** A specific standard has not yet been clearly established. See United
States v. Zolin, 491 U.S. 554, 563 n.7 (1989) ("The quantum of proof needed to establish admissibility [pursuant to the exception] remains[] subject to question."). The showing required is probably similar to that needed for a "prima facie" case. See, e.g., Haines v. Liggett Group, Inc., 975 F.2d 81, 95 (3d Cir. 1992); United States v. De la Jara, 973 F.2d 746, 748 (9th Cir. 1992); In re Feldberg, 862 F.2d 622, 625-30 (7th Cir. 1988).

b. However, courts will engage in in camera review upon a lesser showing: "Before engaging in in camera review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis to support a good faith belief by a reasonable person that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applied." United States v. Zolin, 491 U.S. 554, 572 (1989) (quoting Caldwell v. District Ct., 644 P.2d 26, 33 (Colo. 1982)).

4. Bankruptcy Applications:

a. A debtor's attorney-client privilege dissolves upon a prima facie showing that the debtor used counsel's assistance to fraudulently transfer collateral to hinder the enforcement of a security interest. See In re Blier Cedar Co., 10 B.R. 993, 999-1000 & n.14 (Bankr. D. Me. 1981).


d. Query whether a debtor's request for advice on how to convert nonexempt assets into exempt assets falls within the crime/fraud exception?

B. Fiduciary Exception:
1. **Garner Rule:** A corporation does not have an absolute right to assert the privilege against its shareholders. *Garner v. Wolfinbarger*, 430 F.2d 1093, 1100-04 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971). A court must balance competing concerns: management manages for shareholders (not for itself), but a corporation (through its managers) needs to be free to seek legal advice without fear of later disclosure to shareholders. The Garner court suggested an eight factor analysis to determine when shareholders may access privileged communications of the corporation: (1) the number of shareholders involved and the percentage of stock they own; (2) the nature of the claim; (3) the necessity of obtaining the information and its availability from other sources; (4) the potential criminal nature or illegality of the alleged conduct of the corporation; (5) the temporal nature of the communication (did it relate to past [privileged] or future [not privileged] action); (6) whether the communication concerned advice about the litigation itself; (7) the validity of the shareholder's inquiry (was it just a "fishing expedition?"); and (8) the risk of revealing trade secrets and other confidential information. Id. at 1104.

   a. In formulating this rule, the court analogized to both the crime/fraud exception (this was a securities fraud action) and the joint-defense/common-interest rule. Id. at 1102-03.

   b. The court suggested the use of in camera inspection to aid the court in analyzing these factors. Id. at 1104.


   d. Query whether the Garner rule should differ where a corporation is insolvent?

2. Courts have applied the Garner doctrine to stock purchasers who were not yet shareholders, see, e.g., Cohen v. Uniroyal, Inc., 80 F.R.D. 480, 484 (E.D. Pa. 1978), and to former shareholders, see, e.g., Koenig v. International Sys. & Controls Corp. Sec. Litig. (In re International Sys. &
Controls Corp. Sec. Litig.), 693 F.2d 1235, 1239
n.3 (5th Cir. 1982). Moreover, courts have
applied the doctrine even where shareholders bring
suit in their own name rather than on behalf of
the corporation and where the suit is brought
against corporate directors and officers rather
than the corporation itself. See, e.g., Fausek v.
White, 965 F.2d 126, 130-31 (6th Cir. 1992). But
see Weil v. Investment/Indicators, Research &
Management, Inc., 647 F.2d 18, 23 (9th Cir. 1981)
(holding that the Garner doctrine does not apply
to nonderivative claims brought by a former
shareholder).

3. Expansion: the Garner exception has been applied
in cases involving other types of fiduciary
relationships. See, e.g., Sandberg v. Virginia
Bankshares, Inc., 979 F.2d 332, 351-54 (4th Cir.
1992) (minority shareholders seeking information
from majority shareholders); United States v.
Evans, 796 F.2d 264, 265-66 (9th Cir. 1986)
(employee ERISA beneficiaries seeking information
from employer trustee); Aquinaca v. John Morello &
members seeking communications between employer
and union); Quintel Corp., N.V. v. Citibank, N.A.,
purchasers seeking information from lending bank).

4. Does the Garner Doctrine Permit Creditors to
Access Creditors' Committee Communications with
Counsel:

a. Creditors' committees owe a fiduciary duty to
those they represent. See, e.g., Pension
Benefit Guar. Corp. v. Pincus, Verlin, Hahn,
Reich & Goldstein Professional Corp., 42 B.R.
960, 963 (E.D. Pa. 1984); In re Celotex
Corp., 123 B.R. 917, 920 (Bankr. M.D. Fla.
1991); In re Baldwin-United Corp., 38 B.R.

b. The Baldwin-United court expressly adopted
the Garner exception to creditors' committees: "The Garner doctrine strikes the
appropriate balance between the creditors' right to information and the committee's need
for confidentiality . . . . However, because of . . . the creditors' dependence upon the
committee for information, and the underlying purposes of a creditors' committee, . . . the
committee should bear the burden of

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i. However, the court "hasten[ed] to add that there may be sound policy reasons for nondisclosure which do not implicate the attorney/client privilege." Id.


C. Attorney Self Defense and Compensation Exception:

1. Rule: An attorney may disclose privileged information without permission from the client in order to:


c. Collect a fee from the client. See, e.g., Cannon v. U.S. Acoustics Corp., 532 F.2d 1118, 1120 (7th Cir. 1976); Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.), 30 B.R. 883, 886 (Bankr. D. Colo. 1983) (holding that when fee applications are challenged, "it is necessary that the attorneys come forward and defend their fees or surrender them").

i. Note that in bankruptcy cases an attorney may invoke the self-defense exception to justify challenges made to a fee application by a third party. As such, the third party essentially has the ability to force disclosure of some privileged communications even where the
client does not, implicitly or expressly, authorize such disclosure.


The Work-Product Doctrine

I. Generally

A. Function: Permits an attorney to prevent disclosure of work product to an adversary. "[T]he work product doctrine provides a zone of privacy for a lawyer; the doctrine grants counsel an opportunity to think or prepare a client's case without fear of intrusion by an adversary." United States v. Doe (In re Six Grand Jury Witnesses), 979 F.2d 922, 944 (2d Cir. 1992).

1. "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney." Hickman v. Taylor, 329 U.S. 495, 510 (1947).

2. The work-product doctrine "preserves the integrity of the adversarial system." In re Federal Copper, Inc., 19 B.R. 177, 182 (Bankr. M.D. Tenn. 1982).

B. Difference from the Attorney-Client Privilege:

1. The work-product doctrine is a limited evidentiary rule, not a privilege that protects confidential communications. "The doctrine is designed to balance the needs of the adversary system to promote an attorney's preparation in representing a client against the general interest in revealing all true and material facts relevant to the resolution of the dispute. It does not exist to produce a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparation from the discovery attempts of an opponent." In re Grabill
2. The work-product doctrine is broader than the attorney-client privilege, but it is limited to materials prepared in anticipation of litigation. See, e.g., United States v. Nobles, 422 U.S. 225, 238 n.11 (1975); In re Sealed Case, 676 F.2d 793, 808 (D.C. Cir. 1982). As such, the protection of the doctrine may extend to non-communications such as investigative reports, questionnaires, and photographs. See, e.g., Nobles, 422 U.S. at 238-39; In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979); Janiker v. George Washington Univ., 94 F.R.D. 648 (D.D.C. 1982). Moreover, the doctrine also protects financial and economic analysis when prepared in anticipation of litigation. See, e.g., Exxon Corp. v. FTC, 663 F.2d 120, 129 (D.C. Cir. 1980); In re Grand Jury Proceeding, 601 F.2d 162, 171 (5th Cir. 1979). The doctrine does not protect, however, the factual information underlying the protected work product. See infra WP Part III.C.

C. Who can Invoke the Doctrine?


2. Unlike the attorney-client privilege, an attorney has an independent right to assert the work-product doctrine even if the client has waived it. See, e.g., In re Special Sept. 1978 Grand Jury, 640 F.2d 49, 62-63 (7th Cir. 1980); In re Grabill Corp., 103 B.R. 996, 998 (Bankr. N.D. Ill. 1989).


4. A debtor's attorney or co-litigant may not invoke the doctrine to prevent access by a bankruptcy trustee to work product prepared for the debtor.
prior to filing for bankruptcy. See, e.g., In re Michigan Boiler & Eng’g Co., 87 B.R. 465, 468-69 (Bankr. E.D. Mich. 1988); Scroggins v. Powell, Goldstein, Frazer & Murphy (In re Kaleidoscope, Inc.), 15 B.R. 232, 242, 245 (Bankr. N.D. Ga. 1981) ("With respect to ownership of the files created during joint representation, . . . each of the jointly represented clients own [sic] an undivided interest in the legal files created during the course of their joint representation by an attorney, and each client has an equal right to access and possession of those files."). But see In re Grabill Corp., 103 B.R. 996, 998 (Bankr. N.D. Ill. 1989) (holding that a bankruptcy trustee may not recover work product held by the debtor's former counsel).

II. Elements

A. Hickman v. Taylor, 329 U.S. 495 (1947), is the seminal case and, despite partial codification of the work-product doctrine by the Federal Rules of Civil Procedure, continues to guide judicial interpretation. According to the Hickman Court, "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that [the lawyer] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . Were [an attorney's work product to be] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. . . . Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. . . . [T]he interests of the clients and the cause of justice would be poorly served." Id. at 510-11. The Court did not, however, wish to accord absolute protection to work product: "Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had." Id. at 511.

party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

1. *Hickman* continues to be the standard by which courts interpret Rule 26(b)(3) and protect work product when the Rule does not apply.

2. See Fed. R. Bankr. P. 7026(b)(3) (the identical rule for bankruptcy cases and proceedings); Fed. R. Crim. P. 16 (a similar rule that accords absolute protection to an attorney's opinion work product in criminal cases).


1. The burden of persuasion for establishing the elements of the doctrine rests with the party seeking protection. See, e.g., *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 355 (4th Cir. 1992).

2. *In camera* review is appropriate to determine if material falls within the protection of the doctrine. See, e.g., *United States v. Nobles*, 422 U.S. 225, 236-39 (1975); *Federal Sav. & Loan Ins. Corp. v. Ferm*, 909 F.2d 372, 374 (9th Cir. 1990).

III. Protected Work Must Be Prepared in Anticipation of Litigation

A. Broad v. Narrow Approaches: Courts disagree on the breadth of the "anticipation of litigation" requirement. See, e.g., *United States v. Doe (In re Six Grand Jury Witnesses)*, 979 F.2d 939, 944 (2d Cir. 1992) ("The boundaries of the doctrine are far from fixed.").

1. **Loose Test:** Some courts hold that litigation need not be imminent so long as preparation of the material is motivated by the prospect of


B. Scope of Protection:


2. Protection includes work product prepared in anticipation of litigation, even if the litigation never ensures. See, e.g., Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir.), cert. denied, 429 U.S. 920 (1976).

3. Protection does not include documents that were
prepared for purposes other than litigation that are subsequently examined in anticipation of litigation. See, e.g., Petersen v. Douglas County Bank & Trust Co., 967 F.2d 1186, 1189 (8th Cir. 1992); United States v. Rockwell Int'l, 897 F.2d 1255, 1265-66 (3d Cir. 1990).

4. Protection does not extend to materials prepared in the ordinary course of business or pursuant to regulatory requirements. See, e.g., National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992). Protection extends only to those items obtained or produced through professional skill or experience. See, e.g., In re Kelton Motors, Inc., 130 B.R. 183, 184 (Bankr. D. Vt. 1991).

5. Protection does not include any factual information underlying the work product. See, e.g., United States v. Doe (In re Six Grand Jury Witnesses), 979 F.2d 939, 945 (2d Cir. 1992).

6. Protection does not include material generated in compliance with a court-ordered consent decree because such material is not prepared in anticipation of litigation. See, e.g., Metro Wastewater Reclamation v. Continental Casualty Co., 142 F.R.D. 471, 477-78 (D. Colo. 1992).

7. Protection does not include material prepared for settlement discussions, the implementation of settlement agreements, or other conciliatory communications because material is not prepared in anticipation of litigation. See, e.g., Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109, 1119-21 (7th Cir. 1983).

a. Query whether the same result should occur where settlement is subject to bankruptcy court approval and can be contested by parties in interest pursuant to Bankruptcy Rule 9019. See Protective Comm. for Independent Stockholders of TMT Trailer Ferry v. Anderson, 390 U.S. 414, 424-25 (1968); Martin v. Kane (In re A & C Properties), 784 F.2d 1377, 1381-82 (9th Cir. 1986).

b. Material that, although not prepared exclusively for settlement, is disclosed in settlement negotiations probably retains work-product protection. See infra WP Part VI.B.1.
C. Application to Bankruptcy: What counts as "litigation?" Are there differences between adversary proceedings, contested matters, and the case in chief for the purposes of the work-product doctrine?

IV. Entities Whose Work is Protected

A. All Client Representatives: The protection of the work-product doctrine encompasses material created by a representative of a client in litigation, regardless of whether an attorney is involved. This includes work prepared by in-house counsel and other professionals, such as accountants and experts. See, e.g., United States v. Nobles, 422 U.S. 225, 238-39 (1975); National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992).

1. Note that discovery of information known to expert witnesses is treated separately under Federal Rule of Civil Procedure 26(b)(4).

B. Absence of Attorney Participation: Where no attorney is involved in the preparation of materials (at least in a supervisory capacity), courts presume that the materials are prepared in the ordinary course of business and not in anticipation of litigation. See, e.g., Thomas Organ Co. v. Jadranska Slobodna Plovdiva, 54 F.R.D. 367, 372 (N.D. Ill. 1972).

1. Thus, it is prudent for the attorney, and not the client, to hire professionals whose service will be needed for the representation.


V. Limitations on Work-Product Doctrine Protection

A. Protection is Qualified: production of work product may be obtained upon a showing of substantial need and an inability to obtain equivalent information without undue hardship. Both elements are required. See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 401 (1981).

1. "Substantial Need:" "Demonstrating the requisite need and hardship requires more than conclusory
statements or conjecture as to the contents of requested materials. First, the inquiring party must show that the material is relevant to the party's claim or defense. Second, the inquiring party must show prejudice in the absence of discovery due to the relative uniqueness of the material sought." Restatement of the Law Governing Lawyers § 137 cmt. c (Tent. Draft No. 6, 1993).

a. The fact that there is a substantial probability that the material will be disclosed at trial probably creates substantial need for pretrial discovery. See, e.g., Wheeling-Pittsburgh Steel Corp. v. Underwriters Lab., Inc., 81 F.R.D. 8, 12 (N.D. Ill. 1978).

b. The mere possibility that documents could help the adversary in examining or impeaching witnesses does not constitute sufficient need. See, e.g., Stephens Produce Co. v. NLRB, 515 F.2d 1373, 1377 (8th Cir. 1975); United States v. Chatham City Corp., 72 F.R.D. 640, 643 (S.D. Ga. 1976).

c. The desire to make sure that nothing was overlooked in trial preparation does not constitute sufficient need for discovery of work product. See, e.g., Allmont v. United States, 177 F.2d 971, 978 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950).

2. "Inability to Obtain Equivalent Information without Undue Hardship:" "Additional expense or inconvenience necessitated by duplicative discovery or investigation does not ordinarily constitute undue hardship. Immunity may be overcome where equivalent information can be obtained only with the expenditure of cost and effort that is substantially disproportionate to the amounts at stake in the litigation and the value of the information to the claim or defense of the inquiring party." Restatement of the Law Governing Lawyers § 137 cmt. c (Tent. Draft No. 6, 1993).

a. Protection remains if the adversary can undertake its own interviews of a potential witness. See, e.g., In re Grand Jury Subpoena, 599 F.2d 504, 512 (2d Cir. 1979); In re Federal Copper, Inc., 19 B.R. 177, 182
(Bankr. M.D. Tenn. 1982).

b. However, where the witness is unavailable or dead, discovery will be ordered. See, e.g., Copperweld Steel Co. v. Demag-Mannesman-Bohlen, 578 F.2d 953, 963 n.14 (3d Cir. 1978). This rule also applies where the witness is hostile, see, e.g., In re Grand Jury Subpoena, 81 F.R.D. 691, 695 (S.D.N.Y. 1979), or lacks recollection, see, e.g., Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970), aff'd by an equally divided Court, 400 U.S. 348 (1971).

B. Greatest Protection is Given to Opinion Work Product. Federal Rule of Civil Procedure 26(b)(3) emphasizes that protection be given to "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

1. "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements are particularly disfavored because it tends to reveal the attorney's mental processes. . . . Rule 26 accords special protection to work product revealing the attorney's mental processes." Upjohn Co. v. United States, 449 U.S. 363, 399-400 (1981).


4. However, the Court expressly refused to decide the issue in Upjohn: "While we are not prepared at this juncture to say that such material is always protected by the work-product rule, we think a far

5. Other courts permit discovery of opinion work product, at least when mental impressions are at issue in the case and the need for the material is compelling. *See, e.g.*, *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577-78 (9th Cir. 1992) (involving a claim of bad faith against an insurer); *Bio-Rad Lab., Inc. v. Pharmacia, Inc.*, 130 F.R.D. 116, 122 (N.D. Cal. 1990).

VI. Waiver of Work-Product Protection

A. Relationship to Waiver of the Attorney-Client Privilege: Waiver of one does not waive the other. Different, independent policies support each doctrine. *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989); *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980).

B. Disclosure to Third Parties Not Necessarily a Waiver. Only disclosures that are "inconsistent with the adversary system" waive the protection. *See, e.g.*, *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991) ("[T]o waive the protection of the work-product doctrine, the disclosure must enable an adversary to gain access to the information."); *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989); *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982). The reason for this rule is that the work-product doctrine is not based solely on confidentiality.

1. **Common Interest Rule:** As with the attorney-client privilege, disclosure of work product to parties with a common interest preserves the protection. This rule applies for common interests in litigation, *see, e.g.*, *United States v. Under Seal (In re Grand Jury Subpoenas)*, 902 F.2d 244, 249 (4th Cir. 1990); *United States v. American Tel. & Tel.*, 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980), *in business, see, e.g.*, *United States v. Gulf Oil*, 760 F.2d 292, 295-96 (Temp. Emer. Ct. App. 1985) (merging corporate entities), and in settlement negotiations, *see, e.g.*, *Sylgard Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454, 458 (N.D. Ill. 1974), aff'd, 534 F.2d 330 (7th Cir. 1976).
a. Query whether negotiations of a plan of reorganization in bankruptcy fall within the "common interest" rule? See supra AC Part VI.B.3.


3. Application in Bankruptcy: Disclosure by a creditors' committee to the debtor in possession of an accountant's report prepared in anticipation of litigation does not waive the work-product doctrine. The report remains nondiscoverable by the defendant in a fraudulent conveyance suit brought by the debtor. See Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.), 84 B.R. 202, 205-06 (Bankr. D. Colo. 1988).

C. Affirmative Reliance on the Advice of Counsel Waives the Protection: Where a party asserts in a contested matter or adversary proceeding that the party acted on the advice of a lawyer or where the party interjects into such a proceeding an issue concerning the legal effects of a lawyer's advice, a lawyer's acts, or other forms of work product, the protection of the work-product doctrine is waived. See, e.g., United States v. Pollard (In re Martin Marietta Corp.), 856 F.2d 619, 624-25 (4th Cir. 1988); Panter v. Marshall, Field & Co., 80 F.R.D. 718, 725 (N.D. Ill. 1978).

D. Use of a Protected Document Before or During Witness Testimony may Waive the Protection. See, e.g., United States v. Nobles, 422 U.S. 225, 239 & n.14 (1975) (Where "counsel attempts to make a testimonial use of [protected] materials the normal rules of evidence come into play with respect to cross-examination and production of documents."); In re Sealed Case, 676 F.2d 793, 817-18 & n.99 (D.C. Cir. 1982).

1. Federal Rule of Evidence 612: An adverse party is entitled to inspect any protected document where "a witness uses [the] writing to refresh memory for the purposes of testifying, either -- (1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice."

3. Because disclosure is at the court's discretion where a witness uses protected material prior to testifying, courts tend to give greater protection to opinion work product at this stage. See, e.g., Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co., 92 F.R.D. 779, 780-81 (S.D.N.Y. 1982); Joseph Schlitz Brewing Co. v. Muller & Phipps (Hawaii), Ltd., 85 F.R.D. 118, 120 (W.D. Mo. 1980).

E. Scope of the Waiver: Disclosure of some work product does not waive all the work product prepared for the same litigation. Generally, disclosure is limited to the particular documents disclosed or referred to. Waivers are used "in order to ensure fairness in the proceeding in question as it in fact unfolds, not in order to make the material generally available. . . . Waiver . . . as to one item of work product does not necessarily entail waiver as to all related work product. Whether related work product should also be disclosed is governed by the principle of evidence law that a fair and balanced presentation be made to the fact finder." Restatement of the Law Governing Lawyers § 141 cmt. g (Tent. Draft No. 6, 1993). See, e.g., Shield v. Strum, Roger & Co., 864 F.2d 379 (5th Cir. 1989); S & A Painting Co. v. O.W.B. Corp., 103 F.R.D. 407, 409-10 (W.D. Pa. 1984).

VII. Exceptions

A. Crime/Fraud Exception: Work product is not protected where the client consults a lawyer for the purpose of obtaining assistance in engaging in a crime or fraud.

1. This exception is applied in the same manner as the exception to the attorney-client privilege. See, e.g., Koenig v. International Sys. & Controls Corp. Sec. Litig. (In re International Sys. & Controls Corp. Sec. Litig.), 693 F.2d 1235, 1242 (5th Cir. 1982); In re Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982). "The work product privilege is perverted if it is used to further illegal activities as is the attorney-client privilege, and there are no overpowering considerations in either situation that would justify the shielding of evidence that aids continuing or future
criminal activity." In re Grand Jury Proceedings, 604 F.2d 798, 802 (3d Cir. 1979). When the work product is part of a criminal scheme, "all reason for protecting it from judicial examination evaporates." John Doe Corp. v. United States (In re John Doe Corp.), 675 F.2d 482, 492 (2d Cir. 1982).

a. See supra AC Part VII.A (discussing the parameters of the crime/fraud exception and the procedures for invoking it).

2. The fraudulent action of either the client or the attorney does not necessarily deprive the other of the protection of the work-product doctrine. "[T]he ability to protect work product normally extends to both clients and attorneys . . . and the attorney or the client, expressly or by conduct can waive or forfeit it, but only as to himself, and the fraud exception applies to both attorneys and clients." In re Doe, 662 F.2d 1073, 1079 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982). See, e.g., In re Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir. 1986); In re Sealed Case, 676 F.2d 793, 812 n.75 (D.C. Cir. 1982).

B. Attorney Self-Defense Exception: A party waives the protection of the work-product doctrine where the party asserts that its lawyer's assistance "was ineffective, negligent, or for some other reason wrongful, and [where] fairly determining the truth of the assertion requires disclosure of the work product." Restatement of the Law Governing Lawyers § 141(4)(b) (Tent. Draft No. 6, 1993). See, e.g., In re Doe, 662 F.2d 1073, 1080 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982). This exception is applied in the same manner as the self-defense exception to the attorney-client privilege. See supra AC Part VII.C.

C. Fiduciary/Shareholder Exception: Does not exist for the work-product doctrine. See, e.g., Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 355 n.22 (4th Cir. 1992). Thus, in contrast to material protected by the attorney-client privilege, shareholders and other beneficiaries of fiduciary relationships have no special rights of access to the work product of the fiduciary's lawyer. See supra AC Part VII.B.
The Fifth Amendment Privilege Against Self-Incrimination

I. The Fifth Amendment: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.

A. When Applicable: The Fifth Amendment privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." Kastigar v. United States, 406 U.S. 441, 444 (1971). This includes bankruptcy proceedings. See, e.g., McCarthy v. Arndstein, 266 U.S. 34, 40-42 (1924).


2. Bankruptcy Code sections 344, 521(4), and 727(a)(6) all recognize the applicability of the Fifth Amendment privilege in bankruptcy.

II. Nature and Scope of the Privilege

A. Applicable Only to Individuals: The privilege does not apply to collective entities such as corporations or partnerships. See, e.g., Braswell v. United States, 487 U.S. 99, 102 (1988); Bellis v. United States, 417 U.S. 85, 88 (1974).

1. A custodian of corporate records may not invoke the Fifth Amendment privilege in response to a request to produce the records even where such production might be incriminating. The custodian's production of the records is an act of the corporation rather than a personal act. See, e.g., Braswell v. United States, 487 U.S. 99 (1988).

   a. Thus, the officers of a corporate debtor may not use the Fifth Amendment to prevent disclosure of corporate records in bankruptcy.

   b. In a subsequent criminal prosecution of the corporate custodian, however, the government
may not introduce evidence regarding the fact that the custodian individually delivered the incriminating corporate records. See, e.g., Braswell v. United States, 487 U.S. 99, 103-04 (1988).

2. A sole proprietor may invoke the Fifth Amendment privilege if the act of document production would entail testimonial self-incrimination regarding the fact that the records existed, were in his possession, or were authentic. See, e.g., United States v. Doe, 465 U.S. 611 (1984).

B. Limited Scope: The privilege protects only against compelled, incriminating testimony. It does not protect against compelled production of other sorts of incriminating evidence.


   a. Note, however, that the attorney-client privilege may nevertheless protect against the disclosure of such documents. See, e.g., Fisher v. United States, 425 U.S. 391, 401 (1976).

2. Protection does not extend to the compelled production of business records unless the act of producing the documents is incriminating and testimonial (such as when, for example, production "tacitly concedes the existence of the papers demanded and their possession or control" by the person asserting the privilege). Production is not testimonial if the incriminating aspects of the act are a "foregone conclusion." United States v. Doe, 465 U.S. 611, 612-14 & n.11 & n.13 (1984).

   a. Although the bankruptcy system implements a system of disclosure that might, in some cases, create "incidental incriminating effects upon the party required to comply," such required disclosures do not violate the Fifth Amendment because the bankruptcy laws are strictly noncriminal in nature and have general applicability throughout society. In re Fairbanks, 135 B.R. 717, 730 (Bankr. D.N.H. 1991) (citing Baltimore City Dep't of

i. Query whether the "bankruptcy crimes" set forth in 18 U.S.C. § 152 are only "incidentally incriminating?"


4. Persons may not invoke the Fifth Amendment if their testimony has been rendered nonincriminating by a governmental grant of immunity or by the expiration of the relevant criminal statute of limitations. See, e.g., New Jersey v. Portash, 440 U.S. 450, 457 (1978); Kastigar v. United States, 406 U.S. 441, 453 (1971).

a. Bankruptcy Code section 344 specifically authorizes the granting of immunity for testimony in bankruptcy cases and proceedings. This grant of immunity must be made by a District Court judge upon request of the United States attorney for the district. See 18 U.S.C. §§ 6001(4), 6003.

b. The District Court may incarcerate a debtor for civil contempt for refusing to testify after a grant of immunity. The civil contempt order, however, is subject to 28 U.S.C. § 1826, which limits such incarceration to the lesser of eighteen months or the duration of the bankruptcy case. See, e.g., In re Younger, 986 F.2d 1376, 1378 (11th Cir. 1993); Martin-Trigona v. Belford (In re Martin-Trigona), 732 F.2d 170, 172-75 (2d Cir. 1984), cert. denied, 469 U.S. 859.

i. There is considerable doubt whether a bankruptcy judge can incarcerate for civil contempt a debtor or other participants in bankruptcy proceedings. Compare Plastiras v. Idell (In re Sequoia Auto Brokers Ltd.), 827 F.2d 1281, 1283-90 (9th Cir. 1987) (bankruptcy courts do not have jurisdiction to issue civil contempt orders) with Burd v. Walters (In re
Walters), 868 F.2d 665, 669-70 (4th Cir. 1989) (bankruptcy judges may issue civil contempt orders pursuant to Bankruptcy Code section 105(a)).

C. Procedural Requirements

1. **The Client Must Assert the Privilege:** An attorney cannot assert the privilege on behalf of a client. E.g., Fisher v. United States, 425 U.S. 391, 398 (1976); In re Grand Jury Proceedings, 760 F.2d 26, 27 (1st Cir. 1985). An attorney may, however, advise the client to invoke the privilege, and such advice will be covered by the attorney-client privilege when the required elements are satisfied. See, e.g., Maness v. Meyers, 419 U.S. 449 (1975).

   a. Although a criminal defendant may invoke the privilege by refusing to testify at a criminal trial, in all other instances the privilege does not permit a person to avoid being sworn as a witness or being asked questions. Rather, the person must listen and invoke the privilege in response to each question. See 8 John H. Wigmore, Wigmore on Evidence § 2268 (John T. McNaughton rev. 1961 & Supp. 1992).

   b. Thus, in bankruptcy cases or proceedings, the debtor may not refuse to be sworn at a Rule 2004 examination or a section 341 meeting of creditors. See, e.g., In re Hulon, 92 B.R. 670, 675 (Bankr. N.D. Tex. 1988).


3. **Waiver:** A voluntary and intelligent failure to assert the privilege the first time a question is asked thereafter waives the privilege for any incriminating testimony disclosed. See, e.g., Garner v. United States, 424 U.S. 648 (1976). "Disclosure of [an incriminating] fact waives the privilege as to the details" regarding that fact.

III. Application to Bankruptcy Cases and Proceedings

A. Filing a Bankruptcy Petition: Does not automatically waive the Fifth Amendment privilege. See, e.g., McCarthy v. Arndstein, 266 U.S. 34, 40 (1924); In re Hulon, 92 B.R. 670, 671 (Bankr. N.D. Tex. 1988). Although there is no constitutional right to petition for bankruptcy, see, e.g., United States v. Kras, 409 U.S. 434, 446-49 (1973), merely attempting to do so is not a specific enough act to waive the protection of the Fifth Amendment. Cf., e.g., Emspak v. United States, 349 U.S. 190, 198 (1955) (courts are to indulge "every reasonable presumption" against finding a waiver of the Fifth Amendment privilege).

1. Note, however, that the act of attaching incriminating documentation as exhibits to a bankruptcy petition should suffice to waive the Fifth Amendment privilege.

2. Note also that a debtor will waive the Fifth Amendment privilege by making specific incriminating testimony at a Rule 2004 examination or before the bankruptcy court. See In re Mudd, 95 B.R. 426, 430 (Bankr. N.D. Tex. 1989).

B. Turnover of Property: The Fifth Amendment does not protect a debtor from being required to turn over property, such as business records, to the bankruptcy trustee unless the act of production would be both testimonial and incriminating. See supra FA Part II.B.2 (discussing how the production of records may fall within the Fifth Amendment).

1. Bankruptcy Code section 521(4) requires a debtor "to surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate whether or not immunity is granted under section 344." 11 U.S.C. § 521(4) (emphasis added).

a. Cf. Butcher v. Bailey, 753 F.2d 465, 467 (6th Cir. 1985) ("The constitutional [Fifth Amendment] privilege cannot be legislatively nullified, whether in bankruptcy or any other situation.").

b. In Butcher, however, the Sixth Circuit
suggested that "nullification" of the Fifth Amendment privilege would be a difficult thing to achieve. Specifically, in dicta, the court said that it would be permissible for a bankruptcy court to deny the discharge of an involuntary or a voluntary debtor or to dismiss a voluntary proceeding when the debtor has invoked the Fifth Amendment and refused to surrender privileged records. *Butcher v. Bailey*, 753 F.2d 465, 467 n.3 (6th Cir. 1985). Query whether anything other than forcefully removing otherwise privileged records from a debtor would nullify the Fifth Amendment privilege, particularly where the debtor has voluntarily filed a bankruptcy petition and undertaken the duty of section 521(4)?


C. **Time Sheets:** The Fifth Amendment does not prevent discovery of the debtor's attorney's time sheets because such discovery does not entail incriminating testimony for either the client or the attorney. See *Danning v. Donovan (In re Carter)*, 62 B.R. 1007, 1010-11 (Bankr. C.D. Cal. 1986).

1. Query whether the same result would occur if the attorney had committed a bankruptcy crime under 18 U.S.C. §§ 152-155?

D. **Effect on a Bankruptcy Discharge.** Bankruptcy Code section 727(a)(6) provides that a discharge cannot be denied where the debtor has rightfully invoked the Fifth Amendment and has not been offered immunity pursuant to section 344. Discharge will be denied, however, where the debtor refuses to testify after immunity has been offered or where the privilege was not properly invoked.
Other Privileges

I. Generally: By adopting Federal Rule of Evidence 501, see supra AC Part II.C.1, Congress "manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis' and to leave the door open to change." Trammel v. United States, 445 U.S. 40, 47 (1980) (quoting 120 Cong. Rec. 40891 (1974) (statement of Rep. Hungate)).

A. Nevertheless, "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that 'the public... has a right to every man's evidence.'" Trammel, 445 U.S. at 50 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)). As such, "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710 (1974).

B. Thus, "there has been a notable hostility on the part of the judiciary to recognize[e] new privileges." Blauncrga v. Board of Regents (In re Dinnan), 661 F.2d 425, 430 (5th Cir. 1981). Courts "are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself." University of Pa. v. Equal Employment Opportunity Comm'n, 493 U.S. 182, 189 (1990).

II. The "Business Strategy" Privilege: Several federal courts have recognized a limited evidentiary privilege applicable to corporate contests for control. This privilege has come to be known as the "business strategy" or "white knight" privilege.

A. Rule: A Privilege Applicable to Contests for Corporate Control. The privilege protects against the disclosure of strategic business plans, proposals, or alternatives under consideration by one contemplating engaging in, or defending against, a contest for corporate control. See Parsons v. Jefferson-Pilot Corp., 141 F.R.D. 408, 418-20 (M.D.N.C. 1992).

1. The privilege stems from the discretionary ability to control discovery afforded to federal courts under Federal Rules of Civil Procedure 26(b)(1)
and 26(c).


B. When Used: Courts will apply the privilege after engaging in a balancing test. "There are inconsistent yet valid interests to be balanced: on the one hand, the requesting party's need for information in order to fairly prepare for trial; and, on the other, the responding party's need to be able to carry out an ongoing strategy in the context of a corporate takeover or proxy contest." Parsons v. Jefferson-Pilot Corp., 141 F.R.D. 408, 419 (M.D.N.C. 1992).

C. Limited Scope. The privilege lasts only as long as the court determines necessary in light of the balancing test. The limited temporal scope of the privilege necessitates in camera review of the documents to determine the extent to which protection is required. See, e.g., Parsons v. Jefferson-Pilot Corp., 141 F.R.D. 408, 420 (M.D.N.C. 1992). In other words, the party seeking discovery "will not be denied the documents forever." BNS, Inc. v. Koppers Co., 683 F. Supp. 455, 458 (D. Del. 1988).

D. Possible Application to Bankruptcy Cases and Proceedings:

1. Are competing plans of reorganization a "contest for control?"

2. If so, do plan proponents have the same need for secrecy as the subject of a fight for corporate control? If so, would a court be persuaded to forbid discovery of plan materials?

III. The Government/Official Information/State Secrets Privilege
A. General Rule: An evidentiary privilege protects opinions and recommendations contained in intra-governmental documents. Before a court accords protection to such documents, it will balance the interest in nondisclosure against the interest in document production. As such, in camera review is usually required. See, e.g., EPA v. Mink, 410 U.S. 73, 86-88 (1973); In re Financial Corp. of Am., 119 B.R. 728, 735 (Bankr. C.D. Cal. 1990).

1. Once properly invoked, the privilege is absolute and cannot be compromised by any additional showing of need on the part of the party seeking the information. See, e.g., Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 399 (D.C. Cir. 1984); Molerio v. FBI, 749 F.2d 815, 821 (D.C. Cir. 1984).

B. Rationale: The privilege is based on the assumption that "effective and efficient governmental decisionmaking requires a free flow of ideas among governmental officials." In re Verrazano Towers, Inc., 7 B.R. 648, 651 (Bankr. E.D.N.Y. 1980).

C. Scope: The scope of the privilege depends on the nature of the communication. Specifically, courts give absolute protection to military and diplomatic secrets but accord only qualified immunity to information such as policy deliberations and information regarding law enforcement. For a detailed discussion of the varied nature of the privilege, see 1 Charles T. McCormick, McCormick on Evidence § 108 (John W. Strong ed., 4th ed. 1992) and 8 John H. Wigmore, Wigmore on Evidence § 2378 (John T. McNaughton rev. 1961 & Supp. 1992).

D. Procedure: In order to invoke the privilege, "[t]here must be a formal claim of the privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." United States v. Reynolds, 345 U.S. 1, 7-8 (1953). Many courts also require the government to attach an affidavit setting forth the specific reasons for confidentiality and to submit an index specifically designating and describing the documents claimed to be privileged, in sufficient detail to allow a reasoned determination of the privilege (a Vaughn index). See, e.g., In re Meinenzer, 142 B.R. 154, 157 (Bankr. W.D. Tex. 1991) (citing Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975)).

E. Application to U.S. Trustee or Other Entities in a Bankruptcy Case or Proceeding?
1. In proper circumstances, the privilege may apply to the U.S. Trustee. See In re Melenyzer, 142 B.R. 154, 157 (Bankr. W.D. Tex. 1991).

IV. The Accountant-Client Privilege


B. State-Created Accountant-Client Privileges: Do not apply in bankruptcy cases unless the rule of decision is based upon state law.

1. Issues regarding turnover of property to the trustee implicate federal law and therefore the accountant-client privilege does not apply. See, e.g., In re Federal Copper, Inc., 19 B.R. 177, 181 n.3 (Bankr. M.D. Tenn. 1982).


4. However, an action to pierce the corporate veil implicates state law and thus the accountant-client privilege does apply. See Hillsborough Holdings Corp. v. Celotex Corp. (In re Hillsborough Holdings Corp.), 132 B.R. 478, 480-81 (Bankr. M.D. Fla. 1991) (applying Florida state law).

a. Note, however, that a motion for substantive
consolidation may turn this into a federal issue pursuant to Bankruptcy Code section 105.


V. Privileges Not Covered. Because they are unlikely to arise in the context of a bankruptcy case or proceeding, discussion of several additional evidentiary privileges has been omitted. For reference, such privileges include:

A. The marital privilege (for testifying against a spouse and for maintaining the confidentiality of communications between husband and wife). See Unif. R. Evid. 504.

B. The physician- and psychotherapist-patient privilege. See Unif. R. Evid. 503

C. The priest-penitent privilege. See Unif. R. Evid. 505.

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AMERICAN BAR ASSOCIATION

MODEL RULES OF PROFESSIONAL CONDUCT

The Model Rules of Professional Conduct were adopted by the House of Delegates of the American Bar Association on August 2, 1983

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writing the understanding of the parties regarding the fee, particularly when it is
contingent."

[3] There was also no counterpart to paragraph (c) in the Disciplinary Rules
of the Model Code. EC 2-20 provided that "[c]ontingent fee arrangements in
civil cases have long been commonly accepted in the United States," but that "a
lawyer generally should decline to accept employment on a contingent fee basis
by one who is able to pay a reasonable fixed fee . . . ."

[4] With regard to paragraph (d), DR 2-105(C) prohibited "a contingent fee
in a criminal case." EC 2-20 provided that "contingent fee arrangements in
domestic relation cases are rarely justified."

[5] With regard to paragraph (e), DR 2-107(A) permitted division of fees
only if: "(1) The client consents to employment of the other lawyer after a full
disclosure that a division of fees will be made. (2) The division is in proportion to
the services performed and responsibility assumed by each. (3) The total fee
does not exceed clearly reasonable compensation . . . ." Paragraph (e) per-
mits division without regard to the services rendered by each lawyer if they
assume joint responsibility for the representation.

RULE 1.6 Confidentiality of Information *

(a) A lawyer shall not reveal information relating to representa-
tion of a client unless the client consents after consultation, except for
disclosures that are impliedly authorized in order to carry out the
representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer
reasonably believes necessary:

(1) to prevent the client from committing a criminal act that
the lawyer believes is likely to result in imminent death or substan-
tial bodily harm; or

(2) to rectify the consequences of a client’s criminal or fraudulent act in
the furtherance of which the lawyer’s ser-
vices had been used;

(3) to establish a claim or defense on
behalf of the lawyer in a controversy
between the lawyer and the client, or to
establish a defense to a criminal
charge, civil claim or disciplinary com-
paint against the lawyer based upon
conduct in which the client was in-
volved; or

(4) to comply with other law.

* Editors’ Note: As previously proposed by the Kutak Commission, Rule 1.6 (Re-
vised Final Draft, June 30, 1982) read as follows:

RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representa-
tion of a client unless the client consents after consulta-
tion, except for disclosures that are im-
pliedly authorized in order to carry out the
representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably
believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that
the lawyer reasonably believes is likely to result in death or substantial bodily
harm, or in substantial injury to the financial interests or property of anoth-
er;
(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

COMMENT:

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer’s functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[3] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client’s confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[4] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[5] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[6] The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.
Rule 1.6  

**ABA MODEL RULES**

**Authorized Disclosure**

[7] A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

[8] Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

**Disclosure Adverse to Client**

[9] The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

[10] Several situations must be distinguished. First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

[11] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[12] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

[13] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in
question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client’s interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer’s decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

Withdrawal

[14] If the lawyer’s services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

[15] After withdrawal the lawyer is required to refrain from making disclosure of the clients’ confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[16] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning Lawyer’s Conduct

[17] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client’s conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer’s right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer’s ability to establish the defense, the lawyer should advise the client of the third party’s assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[18] If the lawyer is charged with wrongdoing in which the client’s conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a
Rule 1.6  

ABA MODEL RULES

civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

[19] The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Rule 1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

[20] The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client

[21] The duty of confidentiality continues after the client-lawyer relationship has terminated.

MODEL CODE COMPARISON

[1] Rule 1.6 eliminates the two-pronged duty under the Model Code in favor of a single standard protecting all information about a client “relating to the representation.” Under DR 4-101, the requirement applied only to information protected by the attorney-client privilege and to information “gained in” the professional relationship that “the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” EC 4-4 added that the duty differed from the evidentiary privilege in that it existed “without regard to the nature or source of information or the fact that others share the knowledge.” Rule 1.6 imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental.

[2] Paragraph (a) permits a lawyer to disclose information where impliedly authorized to do so in order to carry out the representation. Under DR 4-101(B)
and (C), a lawyer was not permitted to reveal "confidences" unless the client first consented after disclosure.

[3] Paragraph (b) redefines the exceptions to the requirement of confidentiality. Regarding paragraph (b)(1), DR 4-101(C)(3) provided that a lawyer "may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime." This option existed regardless of the seriousness of the proposed crime.

[4] With regard to paragraph (b)(2), DR 4-101(C)(4) provided that a lawyer may reveal "[c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employers or associates against an accusation of wrongful conduct." Paragraph (b)(2) enlarges the exception to include disclosure of information relating to claims by the other lawyer other than for the lawyer's fee; for example, recovery of property from the client.

**RULE 1.7 Conflict of Interest: General Rule**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

**COMMENT:**

Loyalty to a Client

[1] Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest.

[2] If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or,
RULE 1.13 Organization as Client *

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed,

* Editors’ Note: As previously proposed by the Kutak Commission, Rule 1.13 (Revised Final Draft, June 30, 1982) read as follows:

RULE 1.13 Organization as the Client

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer’s representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;
(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) When the organization’s highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that:

(1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interest of the organization; and
(2) revealing the information is necessary in the best interest of the organization.

(d) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstandings on their part.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.
the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of rule 1.7. If the organization's consent to the dual representation is required by rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT:
The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

[2] Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.
[3] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[4] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[5] In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to Other Rules -

[6] The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibi-
Rule 1.13. ABA MODEL RULES

ty under Rules 1.6, 1.8, and 1.16, 3.3 or 4.1. If the lawyer's services are
being used by an organization to further a crime or fraud by the
organization, Rule 1.2(d) can be applicable.

Government Agency

[7] The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a
different balance may be appropriate between maintaining confidentiality
and assuring that the wrongful official act is prevented or rectified,
for public business is involved. In addition, duties of lawyers employed
by the government or lawyers in military service may be defined by
statutes and regulation. Therefore, defining precisely the identity of the
client and prescribing the resulting obligations of such lawyers may be
more difficult in the government context. Although in some circum-
cstances the client may be a specific agency, it is generally the govern-
ment as a whole. For example, if the action or failure to act involves
the head of a bureau, either the department of which the bureau is a part or
the government as a whole may be the client for purpose of this Rule.
Moreover, in a matter involving the conduct of government officials, a
government lawyer may have authority to question such conduct more
extensively than that of a lawyer for a private organization in similar
circumstances. This Rule does not limit that authority. See note on
Scope.

Clarifying the Lawyer's Role

[8] There are times when the organization's interest may be or
become adverse to those of one or more of its constituents. In such
circumstances the lawyer should advise any constituent, whose interest
the lawyer finds adverse to that of the organization of the conflict or
potential conflict of interest, that the lawyer cannot represent such
constituent, and that such person may wish to obtain independent repre-
sentation. Care must be taken to assure that the individual understands
that, when there is such adversity of interest, the lawyer for the
organization cannot provide legal representation for that constituent
individual, and that discussions between the lawyer for the organization
and the individual may not be privileged.

[9] Whether such a warning should be given by the lawyer for the
organization to any constituent individual may turn on the facts of each
case.

Dual Representation

[10] Paragraph (e) recognizes that a lawyer for an organization may
also represent a principal officer or major shareholder.
Derivative Actions

[11] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[12] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

MODEL CODE COMPARISON

There was no counterpart to this Rule in the Disciplinary Rules of the Model Code. EC 5-18 stated that "a lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in his individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present." EC 5-24 stated that although a lawyer "may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman." DR 5-107(B) provided that a lawyer "shall not permit a person who employs him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

RULE 1.14 Client Under a Disability

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.
AMERICAN BAR ASSOCIATION

MODEL CODE OF PROFESSIONAL RESPONSIBILITY

As Amended

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PREAMBLE AND PRELIMINARY STATEMENT

Preamble

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the

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1. Cf. ABA Canons, Preamble.

2. Cf. ABA Canons, 1908, as amended, the Opinions of the ABA Committee on Professional Ethics, and a limited number of other sources; they are not intended to be an annotation of the views taken by the ABA Special Committee on Evaluation of Ethical Standards. Footnotes citing ABA Canons refer to the ABA Canons of Professional Ethics, adopted in 1908, as amended.

3. "No general statement of the responsibilities of the lawyer can encompass all the situations in which the lawyer may be placed. Each position held by him makes its own peculiar demands. These demands the lawyer must clarify for himself in the light of the particular role in which he serves." Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1155, 1218 (1958).


5. "The law and its institutions change as social conditions change. They must change if they are to preserve, much less advance, the political and social values from which they derive their purpose and their life. This is true of the most important of legal institutions, the profession of law. The profession, too, must change when conditions change in order to preserve and advance the social values that are in reason for being." Cheatham, Availability of Legal Services: The Responsibility of the Individual Lawyer and the Organized Bar, 12 U.C.L.A.L.Rev. 438, 440 (1965).
Canon 3  

A lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

(3) A lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement providing such plan does not circumvent another disciplinary rule.16

DR 3–103 Forming a Partnership with a Non-Lawyer.

(A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.17

17. See ABA Canon 33; cf. ABA Opinions 229 (1942) and 201 (1940).

ABA Opinion 316 (1967) states that lawyers licensed in different jurisdictions may, under certain conditions, enter "into an arrangement for the practice of law" and that a lawyer licensed in State A is not, for such purpose, a layman in State B.

1. See ABA Canons 6 and 37 and ABA Opinion 287 (1953). "The reason underlying the rule with respect to confidential communications between attorney and client is well stated in Mechem on Agency, 2d Ed., Vol. 2, § 2237, as follows: 'The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objectives, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged—that the attorney shall not be permitted, without the consent of his client—and much less will he be compelled—to reveal or disclose communications made to him under such circumstances.' ABA Opinion 250 (1943).

"While it is true that complete revelation of relevant facts should be encouraged for trial purposes, nevertheless an attorney's dealings with his client if both are sincere, and if the dealings involve more than mere technical matters, should be immune to discovery proceedings. There must be freedom from fear of revelation of matters disclosed to an attorney because of the peculiarly intimate relationship existing." Ellis v. Union Carbide & Carbon Corp., 159 F. Supp. 917, 919 (D. N. J. 1958).

Cf. ABA Opinions 314 (1965), 274 (1946) and 268 (1945).

2. "While it is the great purpose of law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer." Baird v. Koerner, 279 F. 2d 523, 529–30 (9th Cir. 1960).

Cf. ABA Opinion 150 (1935).

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EC 4–2 The confidences and secrets of a lawyer when his client is sure, when nec-

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tion of the client but also encourages laymen to seek early legal assistance.

EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in making decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscriminate conversations concerning his clients.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another.
and no employment should be accepted that might require such disclosure.

EC 4–6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

DISCIPLINARY RULES

DR 4–101 Preservation of Confidences and Secrets of a Client

(A) "Confidence" refers to information protected by the attorney-client privilege with such client regarding the subject matter of the employment . . . .” ABA Opinion 165 (1936).

8. See ABA Canon 37.

“Confidential communications between an attorney and his client, made because of the relationship and concerning the subject matter of the attorney’s employment, are generally privileged from disclosure without the consent of the client, and this privilege outlasts the attorney’s employment. Canon 37.” ABA Opinion 154 (1938).


10. See ABA Canon 37; cf. ABA Canon 6.

11. “§ 6068 . . . . It is the duty of an attorney . . . .”

12. To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client.” Cal. Business and Professions Code § 6068 (West 1963). Virtually the same provision is found in the Oregon statutes, Ore.Rev.Stat. ch. 9, § 9.460(5).

“Communications between lawyer and client are privileged (Wigmore on Evidence, 3d Ed., Vol. 8, §§ 2290–2299). The modern theory underlying the privilege is subjective and is to give the client freedom of apprehension in consulting his legal advisor (ibid., § 2299, p. 548). The privilege applies to communications made in seeking legal advice for any purpose (ibid., § 2294, p. 553). The college under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4–101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.11

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself 12 or of a third person 13 unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.14

(2) Confidences or secrets when permitted under Disciplinary

mere circumstance that the advice is given without charge therefore does not nullify the privilege (ibid., § 2299).” ABA Opinion 216 (1941).

“It is the duty of an attorney to maintain the confidence and preserve inviolate the secrets of his client . . . .” ABA Opinion 155 (1936).

12. See ABA Canon 11.

“The provision respecting employment is in accord with the general rule announced in the adjudicated cases that a lawyer may not make use of knowledge or information acquired by him through his professional relations with his client, or in the conduct of his client’s business, to his own advantage or profit (C.J.S., § 125, p. 949; Hesley v. Gray, 184 Iowa 111, 168 N.W. 222; Baumgardner v. Hudson, D.C.App., 277 F. 559; Goodrum v. Clement, D.C. App., 277 F. 556.” ABA Opinion 220 (1943).

13. See ABA Opinion 177 (1938).

14. “[A lawyer] may not divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relations, unless he is authorized to do so by the client (People v. Gerold, 265 Ill. 440, 107 N.E. 156, 178; Murphy v. Riggs, 238 Mich. 121, 213 N.W. 110, 112; Opinion of this Committee, No. 91).” ABA Opinion 205 (1940).
MODEL CODE OF PROFESSIONAL RESPONSIBILITY

Canon 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

EC 5-1 The professional judgment of a lawyer should be exercised, within the

16. ABA Opinion 214 (1965) indicates that a lawyer must disclose even the confidences of his clients if “the facts in the attorney’s possession indicate beyond reasonable doubt that a crime will be committed.”

See ABA Opinion 155 (1936).

17. See ABA Opinion 155 (1936).


19. See ABA Opinion 250 (1943) and 19 (1930).

“[T]he adjudicated cases recognize an exception to the rule [that a lawyer shall not reveal the confidences of his client], where disclosure is necessary to protect the attorney’s interests arising out of the relation of attorney and client in which disclosure was made.

“The exception is stated in McGinnis v. Agency, 264 U.S. 221, 44 S. Ct. 286, 68 L. Ed. 773 (1924), as follows: ‘The law can make no exception to the rule that a lawyer may not disclose confidential communications of his client obtained under circumstances that raise the seal of confidentiality, unless such disclosure is necessary to protect the lawyer’s interests arising out of the relation of attorney and client in which disclosure was made.'”

“Mr. Jones, in his Commentaries on Evidence, 2d Ed., Vol. 2, p. 12, states the exception thus: ‘It has frequently been held that the rule as to privileged communications does not apply when litigation arises between attorney and client to the extent that their communications are relevant to the issue. In such cases, if the disclosure of privileged communications becomes necessary to protect the attorney’s rights, he is released from those obligations of secrecy which the law places upon him. He should not, however, disclose more than is necessary for his own protection. It would be a manifest injustice to allow the client to take advantage of the rule of exclusion as to professional confidence to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. In such cases the attorney is exempted from the obligations of secrecy.’” ABA Opinion 250 (1943).
Canon 5

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C). 36

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C). 37

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment.

As amended in 1974.

DR 5-106 Settling Similar Claims of Clients. 38

(A) A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

DR 5-107 Avoiding Influence by Others Than the Client.

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

1. Accept compensation for his legal services from one other than his client.

2. Accept from one other than his client any thing of value related to his representation of or his employment by his client. 39

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his profession.

36. See ABA Canon 6; cf. ABA Opinions 167 (1937), 60 (1931), and 40 (1931).

37. Cf. ABA Opinions 231 (1941) and 169 (1936).

38. Cf. ABA Opinions 243 (1942) and 251 (1941).

39. See ABA Canon 38.

"A lawyer who receives a commission (whether delayed or not) from a title insurance company or guaranty fund for recommending or selling the insurance to his client, or for work done for the client or the company, without either fully disclosing to the client his financial interest in the transaction, or crediting the client's bill with the amount thus received, is guilty of unethical conduct." ABA Opinion 304 (1962).