ISSUES RELATING TO THE ATTORNEY-CLIENT PRIVILEGE IN BANKRUPTCY CASES

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Olivier H. Reiher and Mark L. Metz
Leverson Lucey & Metz S.C.
3030 West Highland Blvd.
Milwaukee, WI 53208

I. OVERVIEW OF THE ATTORNEY-CLIENT PRIVILEGE.

A. History and Justification.

1. Oldest privilege recognized by Anglo-American jurisprudence. The principles of the testimonial privilege can be traced back to the Roman Republic, and were well established in English law as early as the reign of Elizabeth I in the 16th century. Originally grounded in the concept of honor, the reason for the privilege has evolved.

2. Modern justification for this privilege was summarized in *Jacobi v. Podevels*, 23 Wis. 2d 152, 166 (1964). "One of the fundamental policies of our law, and one which dominates in the absence of a special policy arising in particular types of situations, is that the judicial system and rules of procedure should provide litigants with full access to all reasonable means of determining the truth. Secrecy of communication between one person and his attorney is one of the exceptions. It is based upon recognition of the value of legal advice and assistance based upon full information of the facts and the corollary that full disclosure to counsel will often be unlikely if there is fear that others will be able to compel a breach of the confidence."

3. "The policy underlying this privilege is to ensure full disclosure by the clients in enabling them to feel safe confiding in their attorney." *Lane v. Sharp Packaging Systems, Inc.*, 251 Wis. 2d 68, 90 (2002).

4. *See also Upjohn Co. v. United States*, 449 U.S. 383,389 (1981), stating that the attorney-client privilege serves 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."

B. Where Codified.

1. ***Wis. Stat. § 905.03(1)(d)***. Defines a confidential communication as one "not intended to be disclosed to 3rd persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication."

2. ***Wis. Stat. § 905.03(2).*** Establishes the general rule of lawyer-client privilege as follows:

> 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: between the client or the client's representative and the client's lawyer or the lawyer's representative; or between the client's lawyer and the lawyer's representative; or by the client or the client's lawyer to a lawyer representing another in a matter of common interest; or between representatives of the client or between the client and a representative of the client; or between lawyers representing the client.

3. ***SCR 20:1.6(a).*** Provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) [criminal/fraudulent acts of a client] and (c) [other limited exceptions]."

4. ***FRE 501***. Recognizes federal common-law privileges: "The common law – as interpreted by United States courts in the light of reason and experience – governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."

C. Scope and Limitations.

1. In Wisconsin, once a professional relationship is established, all communications, both oral and written, between attorney and client are privileged from production, excluding those exceptions outlined in the statute. *State ex rel. Dudek v. Circuit Court*, 34 Wis. 2d 559, 580 (1967).

2. Wis. Stat. § 905.03(4) identifies those exceptions. "There is no privilege under this rule:

> (a) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud; or
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> (b) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction; or

(c) Breach of duty by lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to the lawyer's client or by the client to the client's lawyer; or

(d) Document attested by lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(e) Joint clients. As to a communication relevant to a matter of common interest between 2 or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients."

3. Like most jurisdictions, Wisconsin recognizes a ***narrow*** scope to the attorney-client privilege. *Dudek,* at 580. The actual communications, not the facts relevant to the controversy, are shielded by the privilege. *Id.*

4. The privilege does not automatically shield all documents given by a client to his or her attorney. *See Jax v. Jax,* 73 Wis.2d 572, 581 (1976) (stating "a mere showing that the communication was from a client to his attorney is insufficient to warrant a finding that the communication is privileged.")

5. Although the privilege forbids an attorney from revealing facts, the knowledge of which he obtained solely through communication from his client, it does not protect the client from the discovery process, which may force him to disgorge pre-existing documents. *See Dudek,* 34 Wis. 2d at 580.

D. <u>To Whom the Privilege Belongs.</u>

1. Wis. Stat. § 905.03(3) (entitled "Who may claim the privilege") authorizes both the attorney and the client to invoke the privilege: "The privilege may be claimed by the client . . . [and t]he person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client."

2. In keeping with the text of the statute, case law has declared that the attorney-client privilege belongs to the client. *See, e.g., Lane,* 251 Wis. 2d at 68; *Dudek,* 34 Wis. 2d at 605; *Borgwardt v. Redlin,* 196 Wis. 2d 342 (Ct. App. 1995); *Swan Sales Corp. v. Jos. Schlitz Brewing Co.,* 126 Wis. 2d 16 (Ct. App. 1985).

3. While a lawyer can assert the privilege, only the client may waive it. *Harold Sampson Children's Trust v. Linda Gale Sampson 1979 Trust,* 271 Wis. 2d 610 (2004).

E. <u>Inadvertent Waiver.</u>

1. Waiver of the attorney-client privilege can only occur through a voluntary disclosure by the client. Wis. Stat. § 905.11 provides as follows:

> A person upon whom this chapter confers a privilege against disclosure of the confidential matter or communication waives the privilege if the person or his or her predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication.

2. Therefore, in order to waive the privilege, the client must voluntarily disclose a privileged communication, or must voluntarily consent to its disclosure by the attorney.

3. In addition, Wisconsin has a provision that closely mirrors FRE 502, addressing the waiver of the attorney-client privilege by inadvertent disclosure. Under Wis. Stat. § 905.03(5)(a), a disclosure of a communication covered by the privilege does not operate as a forfeiture if all of the following apply:

1) The disclosure is inadvertent.
2) The holder of the privilege or protection took reasonable steps to prevent disclosure.
3) The holder promptly took reasonable steps to rectify the error, including, if applicable, following the procedures in s. 804.01(7).

4. Wis. Stat. § 804.01(7) provides a mechanism for a party to claw back privileged communications that were inadvertently disclosed:

> If information inadvertently produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

5. But note that in bankruptcy court, FRE 502 applies to waiver-by-inadvertent disclosure, even if state privilege law otherwise applies under FRE 501. *See* FRE 502(f).

F. Distinguished from Work-Product Privilege.

1. The attorney work product rule is a common law privilege recognized by the Wisconsin Supreme Court. *See State ex rel. Dudek*, 34 Wis. 2d at 588-91. Generally, writings or other documents will be considered work-product if they reflect the mental impressions, observations, conclusions and legal theories of the investigating attorney. *Id*.

2. The rule recognized in *Dudek* was later codified in Wis. Stat. § 804.01(2)(c)1. This section states:

> Subject to par. (d) [dealing with discovery of facts known and opinions held by experts] a party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an 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 case and that the party seeking discovery 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.

3. Therefore, application of the work-product doctrine requires a three-step analysis. *See Ranft v. Lyons*, 163 Wis. 2d 282 (Ct. App. 1991). First, a party seeking discovery of work-product documents must show that the items are within the scope of Wis. Stat. § 804.01(2)(a). Second, the party opposing discovery of the items must demonstrate that they were "prepared in anticipation of litigation or for trial." If that's the case, the items are protected by the work-product doctrine. Third, if tangible items are work-product, the party seeking discovery must demonstrate a "substantial need of the materials in the preparation of the case" and that it "is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

II. VARYING APPLICATIONS IN BANKRUPTCY CASES.

A. Corporate Debtor – Clear Rules.

1. In *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985), the Supreme Court held that "the actor whose duties most closely resemble those of management should control the [attorney-client] privilege in bankruptcy." *Id*. at 351-52.

2. Concluding that the Chapter 7 trustee "plays the role most closely analogous to that of a solvent corporation's management," the *Weintraub* Court created a bright-line test: "[T]he trustee of a corporation in bankruptcy has the power to waive the [debtor's] attorney-client privilege with respect to prebankruptcy communications." *Id*. at 353, 358.

3. The *Weintraub* Court expressly limited its holding and reasoning to corporate debtors. "An individual, in contrast, 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 theory different from the one that we embrace in this case." *Id.* at 356-57. But there is no reason that the decision would not extend to LLC's.

4. The *Weintraub* holding applies to corporate cases that begin under Chapter 11 and are converted to Chapter 7, or in which a Chapter 11 trustee is appointed. In those situations, the trustee may waive the debtor's privilege even as to post-petition communications

with its lawyers. *See, e.g.*, *In re ANR Advance Transportation Co., Inc.*, 302 B.R. 607 (E.D. Wis. 2003) (Adelman, J.).

5. The attorney-client privilege can even be controlled – and therefore waived – by a "private" trustee appointed to administer a liquidating trust created under a confirmed plan of reorganization. *See In re Hechinger Investment Co. of Delaware*, 285 B.R. 601 (D. Del. 2002).

6. Insiders who have used the debtor company's email system to communicate confidential information to their own lawyer – or who leave behind hard copies of such attorney-client communications at the company – may still invoke the protection against a Chapter 7 trustee. *See In re Asia Global Crossing, Ltd*., 322 B.R. 247 (Bankr. S.D.N.Y. 2005).

B. Individual Chapter 11 – Pretty Clear.

1. If a Chapter 11 trustee is appointed, he or she will control and be able to waive the individual debtor's attorney-client privilege for communications occurring postpetition, while the debtor operated as a debtor-in-possession with all the powers and fiduciary duties of a trustee.

2. If an individual Chapter 11 case is converted to Chapter 7, the appointed trustee "is essentially a successor estate representative" whose powers include the ability "to waive the attorney-client privilege with respect to communications incident to the performance of the duties of the [former] debtor in possession." *In re Eddy*, 304 B.R. 591, 599 (Bankr. D. Mass. 2004). However, the trustee "may not waive the privilege as to any communications that took place after the conversion date." *Id*. at 600.

3. Like a corporation, an individual Chapter 11 debtor can lose control over the privilege if his confirmed plan transfers assets to a liquidating trust. *See In re Bame*, 251 B.R. 367 (Bankr. D. Minn. 2000).

C. Individual Chapter 7 – Unclear.

1. Begin with the Seventh Circuit's decision in *United States v. White*, 950 F.2d 426 (1991). An attorney was compelled to produce his client's draft schedules and testify about them before a grand jury. The court rejected the debtor's post-conviction argument that his attorney-client privilege had been violated.

2. The *White* court used broad language that many lower courts have subsequently accepted as establishing a bright-line rule:

> "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 publicly filed with the bankruptcy court. *In re Feldberg* is not to the contrary.

> While there we noted the difference between expectations about communications and expectations about documents, we still emphasized that '[i]nformation imparted to counsel without any expectation of confidentiality is not privileged.'"
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> *Id.* at 430, *citing In re Feldberg*, 862 F.2d 622, 628 (7th Cir.1988).

3. Note, however, that *White* did not involve the question of whether the Chapter 7 trustee controlled and could waive the privilege. Rather, the Court in *White* seemed to conclude that an individual's communications with his or her lawyer about filing a personal bankruptcy case are unlikely to even be privileged.

4. Over the years, decisions by bankruptcy courts have varied greatly on the issue of whether the Chapter 7 trustee controls an individual debtor's attorney-client privilege for prepetition communications. Here are some examples:

> (a) *In re Smith*, 24 B.R. 3 (Bankr. S.D. Fla. 1982). The debtor declined to answer questions (posed by a creditor) about communications with the lawyers representing him in a wrongful death action. The court ordered the debtor to answer, finding that the attorney-client privilege passed to the Chapter 7 trustee "by operation of law." *Id.* at 5.
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> (b) *McClarty v. Gudenau*, 166 B.R. 101 (E.D. Mich. 1994). Trustee sought production of a file in which he believed legal malpractice may have occurred. The lawyers declined, citing attorney-client privilege. The Magistrate Judge noted the limitations of *Weintraub*, and declined to "inhibit such free and open communication [between client and lawyer]." *Id.* at 102.
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> (c) *In re Bazemore*, 216 B.R. 1020 (Bankr. S.D. Ga. 1998). Analyzes the issue as a matter of balancing competing policies. If no harm will come to the debtor, a Chapter 7 trustee can waive the attorney-client privilege.

5. Excellent recent case: *In re McDowell*, 483 B.R. 471 (Bankr. S.D. Tex. 2012). The court addresses the tension between the expectation of confidentiality versus the need to disclose in bankruptcy cases; explores the various lines of cases; suggest limitations to the seemingly absolute ruling in *White*; and applies a test of whether the debtors subjectively intended different types of communications to be kept confidential (yes as to information filled in on the lawyer's "Questionnaire," but no as to draft schedules).

6. There's a lot at stake. Consider the plight of Leonard Bauer, whose conviction for bankruptcy fraud was overturned by the Ninth Circuit, but not until he had already served 5 months. *See United States v. Bauer*, 132 F.3d 504 (1997). Bauer's attorney testified at trial about advice he gave Bauer concerning disclosure of assets, which undermined Bauer's defense that his omissions were due to ignorance or mistake. That testimony – without which the government could not have proved Bauer's "intent" – violated his attorney-client privilege and should not have been admitted.

7. To the extent that *White* and other cases consider full disclosure and limited confidentiality as the price a debtor pays for seeking a discharge, how does that rationale apply in an *involuntary* case? What if there are criminal implications? *See In re Foster,* 188 F.3d 1259 (10th Cir. 1999).

III. SOME QUESTIONS AND THOUGHTS FOR DISCUSSION.

A. Under *White*, how does a client know that disclosures are mandatory until she has had a full and frank discussion with her bankruptcy lawyer?

B. In the Chapter 7 arena, is everyone "on the same team"?

- Creditors deserve full disclosure.
- The trustee in their stead is entitled to know everything about assets and transfers.
- The debtor is under an obligation to disclose accurately and completely.
- The debtor's attorney cannot assist in fraud, including non-disclosure.

So what is left? What could a debtor tell his lawyer that *should* be protected and wouldn't involve a fraudulent non-disclosure?

C. A standard trustee question at 341 meetings is: "Did you tell your attorney about any assets that are not on your schedules?" If the client answers, is there an implied waiver of the attorney-client privilege? As to which topics and communications?

D. Should bankruptcy lawyers give their new clients an up-front "Miranda" warning to the effect that "Anything you tell me might not be kept confidential"? What does that do for the goal of full and frank communication between clients and their legal counsel?

E. Can a trustee waive the attorney-client privilege for lawyers whom a debtor visited, and to whom confidential information was revealed, but who were not retained for (or were fired prior to) the Chapter 7 filing?