“Matters of Privilege”
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“Matters of Privilege”¹

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The Attorney-Client Privilege

I. Statement of the Rule


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). Communications involving an attorney's agent, however, may also be privileged. See infra Section VI.C.3.e.


4. **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.

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); IBJ Whitehall Bank & Trust Co. v. Cory & Assocs., Inc., 1999 U.S. Dist. LEXIS 12440 at 5 (N.D. Ill Aug. 12, 1999).

2. Blanket assertions of the privilege are extremely disfavored. See, e.g., In re Foster, 1999 U.S. App. LEXIS 21490 at 9 (10th Cir. Sept. 8, 1999); 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. 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. Some courts uniformly apply the federal law of privileges in the bankruptcy context. See, e.g., Bazemore v. Eason (In re Bazemore), 216 B.R. 1020, 1023 (Bankr. S.D. Ga. 1998) ("The question of privilege asserted in bankruptcy court is a procedural question and existing federal law is to be used. The impact of privilege is on the method of proof in a case and in comparison any substantive aspect appears tenuous.")


c. 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. What Constitutes "Communications" Within the Privilege?


B. 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).
C. 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.

IV. Communications Involving Bankruptcy Committees and Committee Counsel

A. 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).

1. "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)).

2. "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).


4. 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).

a. 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.

b. 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?


6. 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.").

a. 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).

b. Query whether Snyder's application of the ethical rules conflicts with Bankruptcy Code section 1103(c)(l), which requires a chapter 11 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 without consent of counsel on a regular basis.

7. 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.
a. Under the Garner doctrine (see infra Section VII), 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).

b. 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.

B. Communications Between Non-Member Creditors and a Committee Attorney:


2. As such, communications between non-member committee constituents and committee counsel may fall within the attorney-client privilege, at least where such communications can reasonably be expected to remain confidential.

C. Communications Between the Debtor in Possession and a Committee Attorney, Committee Members, or Non-Member Creditors:

1. 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 Kaiser Steel Corp. v. Frates (In re Kaiser Steel), 84 B.R. 202, 205 (Bankr. D. Colo. 1988). "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)); see infra Section VI.C.

a. 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).

b. 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?

2. 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.


4. The privilege with respect to communications between a debtor and its counsel are not necessarily waived if the counsel subsequently becomes a member of the creditors' committee. See, e.g., In re Bank of Louisiana/Kenwin Shops, Inc. Contract Litig., 1999 U.S. Dist. LEXIS 6395 at 4 (E.D. La. April 27, 1999).

V. Legal Advice Versus Business Advice

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. 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 may be privileged. See, e.g.,
Greenberger v. Slaven (In re Slaven), 74 B.R. 71, 73 (Bankr. S.D. Ohio 1987); compare with United States v. White, 950 F.2d 426, 430 (7th Cir. 1991) (infra Section VI.D.2).

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. Waiver of the Privilege

A. General Rule: 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., Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc. (In re Megan-Racine Assocs., Inc.), 189 B.R. 562, 571 (Bankr. N.D.N.Y. 1995); 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, e.g., In re Grand Jury Proceedings, 947 F.2d 1188 (4th Cir. 1991) (accountant-client relationship protected); compare with Atwood v. Burlington Indus. Equity, Inc., 908 F. Supp. 319, 323 (M.D. N.C. 1995) (presence of union representative at meetings between attorney and client destroyed attorney-client privilege because of insufficient agency relationship).
2. Documents prepared by an accountant at the request of counsel fall within the attorney-client privilege. See, e.g., United States v. Kovel, 296 F.2d 918 (2d Cir. 1961); United States v. Jacobs, 322 F. Supp. 1299, 1303 (C.D. Cal. 1971); Smith v. McCormick, 914 F.2d 1153, 1159 (9th Cir. 1990).

C. Exception to Waiver: Disclosure to Parties With a Common Interest (the Joint-Defense Rule):

1. General 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); Durkin v. Shields (In re Imperial Corp. of America), 179 F.R.D. 286 (S.D. Cal. 1998).

   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. Some courts require that parties asserting a joint defense demonstrate that they had entered into a confidentiality agreement. See, e.g., Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc. (In re Megan-Racine Assocs., Inc.), 189 B.R. 562, 571 (Bankr. N.D.N.Y. 1995).

   d. The common interest doctrine can apply where the parties' interests are not identical, and even where the parties' interests are adversarial in substantial respects, for example where a lawsuit is foreseeable in the future between the parties. See, e.g., Value Property Trust v. Zim Co. (In re Mortgage & Realty Trust), 212 B.R. 649, 653 (1997); Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc. (In re Megan-Racine Assocs., Inc.), 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995).
e. The common interest doctrine can protect communications from one party to another party's lawyer, communications between the parties' respective lawyers, and communications from one party's lawyer to the other parties. The doctrine also can protect communications from one party to an agent of another party's lawyer. Courts disagree, however, on whether the doctrine applies to communications among the non-lawyer parties themselves. Compare, e.g., IBJ Whitehall Bank & Trust Co. v. Cory & Assocs., Inc., 1999 U.S. Dist. LEXIS 12440 at 17 (N.D. Ill. Aug. 12, 1999) with Schachar v. American Academy of Ophthalmology, 106 F.R.D. 187, 191-92 (N.D. Ill. 1985).

2. Termination of the Common Interest:


3. Bankruptcy Examples:

a. In a bankruptcy case, the parties asserting a joint defense privilege must share a common legal (not just commercial) interest. A common legal interest exists where the parties asserting the privilege were co-parties to litigation or reasonably believed that they could be made a party to litigation. See Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc. (In re Megan-Racine Assocs., Inc.), 189 B.R. 562, 573 (Bankr. N.D.N.Y. 1995); In re Subpoena Duces Tecum, 1997 U.S. Dist. LEXIS 14730 at 12 (S.D.N.Y. 1997).

b. A chapter 11 debtor and the creditors' committee share in common the interest of maximizing the debtor's estate. In an

c. The debtor in possession and creditors' committee have a common interest in prosecuting 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. See, e.g., Value Property Trust v. Zim Co. (In re Mortgage & Realty Trust), 212 B.R. 649 (Bankr. C.D. Cal. 1997) (common interest doctrine applied where, pursuant to a plan of reorganization, creditors became the equity owners of the reorganized debtor).

d. In a chapter 11 case, members of the creditors' committee and non-member creditors (e.g. debenture holders) share a common interest—that of receiving some distribution under the plan of reorganization. See S.N. Phelps & Co. v. Circle K Corp. (In re Circle K Corp.), 1997 U.S. Dist. LEXIS 713 at 32 (S.D.N.Y. Jan. 28, 1997).

e. The joint defense privilege does not extend to communications made to representatives of "quasi-legal professions" (e.g. accountants) unless such representatives act as agents for an attorney. See Niagara Mohawk Power Corp. v. Megan-Racine Assocs., Inc. (In re Megan-Racine Assocs., Inc.), 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995); Securities Investor Protection Corp. v. Stratton Oakmont, Inc., 213 B.R. 433, 435-36, citing United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989) (where one party made a confidential disclosure to an accountant hired by another party’s lawyer, that disclosure was privileged because the accountant was retained to serve the joint interests of both parties.)

f. 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 or used in a fraudulent conveyance action).

g. In a discovery dispute between the trustee in a liquidation case and a former principal of the liquidated debtor, the
trustee was deemed to be adverse to the principal for purposes of the joint defense privilege. See Securities Invest. Protection Corp. v. Stratton Oakmont, Inc., 213 B.R. 433, 439-40 (Bankr. S.D.N.Y. 1997). Accordingly, even though the trustee had not yet actually filed a lawsuit against the principal, the trustee was not barred from discovery. Id.

D. Required Intention of Confidentiality:


2. Examples:

a. 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).

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).

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

E. Witness Testimony:

1. General Rule: The use of a privileged document before or during witness testimony may waive the privilege.
2. 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."


5. Courts disagree on whether FRE 612 requires the production of privileged materials used to prepare a witness for a deposition, but not actually used at the deposition itself. See Nutramax Lab., Inc. v. Twin Lab. Inc., 183 F.R.D. 458, 468 (D. Md. 1998).

6. Witness testimony regarding a particular subject matter only waives the privilege with respect to communications regarding the same subject. See, e.g., United States v. Skeddle, 989 F. Supp. 917, 920 (N.D. Ohio 1997) (testimony of a corporation’s general counsel regarding a particular subject matter does not waive the attorney-client privilege regarding other subjects communicated between the client and its counsel); S & A Painting Co. v. O.W.B. Corp., 103 F.R.D. 407, 410 (W.D. Pa. 1984) (witness’ use of a portion of a privileged document to refresh witness’ recollection waives protection only as to that portion of the document).

7. Expert Witnesses:
   a. Rule 26(b)(4)(B) of the Federal Rules of Civil Procedure provides: "A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial... upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."
   b. The designation of an individual as an expert witness in a case may not be tantamount to designating all members of the individual’s firm as experts in the case. Additionally, the offering of expert testimony on a particular issue in a case does not necessarily waive privileged communications with the expert (or members of its firm) regarding any other issues in the case. See, e.g., Marine Petroleum Co. v. Champlin Petroleum Co., 641 F.2d 984, 992 n. 44 (D.C. Cir. 1980); Inspiration Consol. Copper Co. v. Lumbermens Mut.

F. Issue Injection (Subject Matter Waiver):

1. A party waives the attorney-client privilege that attaches to certain communications if that party injects into the case an issue that would require an examination of otherwise privileged communications. See, e.g., Celotex Corp. v. Hillsborough Holdings Corp. (In re Hillsborough Holdings Corp.), 176 B.R. 223, 238-39 (M.D. Fla. 1994).

2. Testimony regarding whether consultation with an attorney occurred does not inject into the case the privileged contents of such consultation. See, e.g., Celotex Corp. v. Hillsborough Holdings Corp. (In re Hillsborough Holdings Corp.), 176 B.R. 223, 242 (M.D. Fla. 1994).

G. 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. Bankruptcy Trustees:


   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. In determining whether a trustee can waive the individual debtor’s attorney-client privilege, no per se rule applies. Rather, many courts engage in a balancing of harms to the debtor with the trustee’s need for information. See, e.g., In re Foster, 1999 U.S. App. LEXIS 21490 at 25 (10th Cir. Sept. 8, 1990); In re Rice, 224 B.R. 464 (Bankr. D. Ore. 1998) (trustee could not waive debtor’s privilege); Yaquinto v. Touchstone, Bernays, Johnston, Beall & Smith, LLP.
3. **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).

**VII. The Fiduciary Exception to the Privilege**

**A. Exceptions In General:**

1. 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).

**B. Garner Rule:**

1. “[W]here the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.” *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-04 (5th Cir. 1970).

2. A corporation does not have an absolute right to assert the privilege against its shareholders. See id. at 1100-04. 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.

3. 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. Int'l Sys. & Controls Corp. Sec. Litig. (In re Int'l 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. Inv./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).


5. Does the Garner Doctrine Permit Creditors to Access Creditors’ Committee Communications with Counsel?


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 establishing good cause for not disclosing privileged information to its
constituent creditors.” In re Baldwin-United Corp., 38 B.R. 802, 805 (Bankr. S.D. Ohio 1984). 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. Despite the committee's fiduciary duty owed to creditors, there exists an "inherent tension" between the committee and its constituents because of the committee's duty to investigate the validity of creditors' claims. See, e.g., In re National Liquidators, Inc., 182 B.R. 186, 192 (S.D. Ohio 1995). However, this tension is "too remote" to render the committee and its constituents adverse. Id.

d. At least one court has noted the "complexity" involved in the case where a creditor seeks to discover privileged communications between the bankruptcy trustee and the trustee's counsel. Although creditors are the beneficiaries of any communications between trustee's counsel and the trustee (counsel's fiduciary), the attorney-client privilege remains intact. See DeHart v. Enos (In re Metro. Metals), 206 B.R. 85, 88 (Bankr. M.D. Pa. 1997).


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 939, 944 (2d Cir. 1992).

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 . . . 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 Corp., 103 B.R. 996, 999 (Bankr. N.D. Ill. 1989). See, e.g., Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1428 (3d Cir. 1991).
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., Nutramax Lab., Inc. v. Twin Lab. Inc., 183 F.R.D. 458, 464 n.10 (D. Md. 1998); 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); In re Foster, 188 F.3d 1259 (10th Cir. 1999). The doctrine also protects financial and economic analyses 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).

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 anticipated litigation involving 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, 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. Establishing the Doctrine

B. **Federal Rule of Civil Procedure 26(b)(3):** In 1970, Congress partially codified the Hickman protection of work product in F.R.C.P. 26(b)(3): "[A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation for trial by or for another 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. 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).

C. **Burden of Proof:**

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). Once a party asserting the doctrine establishes the required elements, the burden then shifts to the party seeking discovery to show substantial need for the material and an inability to obtain an equivalent of the material from another source without undue hardship. See Mount Vernon Fire Ins. Co. v. Try 3 Bldg. Servs., 1998 U.S. Dist. LEXIS 16183 at 11 (S.D.N.Y. Oct. 14, 1998) (infra Section V.A.)

III. **Requirement that Work 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 as long as preparation of the material is motivated by the prospect of litigation. See, e.g., Mount Vernon Fire Ins. Co. v. Try 3 Bldg. Servs., 1998 U.S. Dist. LEXIS 16183 at 14 (S.D.N.Y. Oct. 14, 1998); Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 356 (4th Cir. 1992); National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992). Under this interpretation, the litigation must be identifiable but need not already have

2. Strict Test: Other courts require a greater degree of imminency. "[A] remote prospect of future litigation is not sufficient." In re Special Sept. 1978 Grand Jury, 640 F.2d 49, 65 (7th Cir. 1980) (no protection where materials "were prepared with an eye toward a possible administrative proceeding"). The probability must be substantial and the commencement of litigation must be imminent. See Niagra Mohawk Power Corp. v. Megan-Racine Assocs., Inc. (In re Megan-Racine Assocs., Inc.), 189 B.R. 562, 574 (Bankr. N.D.N.Y. 1995) (party asserting the privilege "must demonstrate that a substantial probability of litigation existed at the time the material sought to be protected was created"); Moore v. Tri-City Hosp. Auth., 118 F.R.D. 646, 649 (N.D. Ga. 1988). "The mere fact that litigation does eventually ensue does not, by itself, cloak materials prepared by an attorney with the protection of the work product privilege." Binks Mfg. Co. v. Nat'l Presto Indus., Inc., 709 F.2d 1109, 1118 (7th Cir. 1983).

B. Scope of Protection:


2. Protection includes work product prepared in anticipation of litigation, even if the litigation never ensues. 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., Niagra Mohawk Power Corp. v. Megan-Racine Assocs., Inc. (In re Megan-Racine Assocs., Inc.), 189 B.R. 562, 574 (Bankr. N.D.N.Y. 1995) (self-serving disclosure of documents to governmental agency charged with enforcing regulatory policy is not protected by the work-product privilege); 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

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, 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 such material is not prepared in anticipation of litigation. See, e.g., Binks Mfg. Co. v. Nat’l 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 Indep. 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 litigation, is disclosed in settlement negotiations probably retains work-product protection.

C. Bankruptcy Examples:

1. The work-product doctrine protects documents prepared in connection with the general bankruptcy case, such as documents pertaining to the formulation of a plan of reorganization. See, e.g., Asbestos Health Claimants’ Committee v. Jasper (In re Celotex), 196 B.R. 596 (Bankr. M.D. Fla. 1996).


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); see supra Section VI.E.7.

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 Plovdba, 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


B. Greatest Protection is Given to Opinion Work Product:

1. 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." Rule 26 accords special protection to work product revealing the attorney's mental processes. See Upjohn Co. v. United States, 449 U.S. 383, 399-400 (1981); United States v. Skeddle, 989 F. Supp. 917, 921 (N.D. Ohio 1997) ("opinion work product materials are more carefully protected than factual work product materials").

2. Some cases hold that the protection given to opinion work is absolute. See, e.g., Director, Office of Thrift Supervision v. Vinson & Elkins, LLP, 124 F.3d 1304, 1307 (D.C. Cir. 1997); Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 355 (4th Cir. 1992);


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) ("To 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.


2. Bankruptcy Examples:

a. 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).
b. Disclosure by counsel for the creditors’ committee to a non-member creditor does not waive the work-product doctrine where the committee does not reasonably foresee the non-member creditor as a future adversary or as a conduit for revealing information to adversaries. Protection of the work product is waived only if the disclosure “substantially increases the opportunity for potential adversaries to obtain the information.” S.N. Phelps & Co. v. Circle K Corp. (In re Circle K Corp.), 1997 U.S. Dist. LEXIS 713 at 31-32 (S.D.N.Y. Jan. 28, 1997). Further, to preserve the protection, there is no requirement that the non-member creditor be instructed to keep the communication confidential. Id. at 35.

C. Witness Testimony:


2. 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."


4. 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-Kowaishan 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).

5. Testimony regarding a particular subject matter does not waive protection as to the other remaining subjects of the work product. See, e.g., United States v. Skeddle, 989 F. Supp. 917, 921 (N.D. Ohio 1997).

Other Privileges
I. **Generally:** By adopting Federal Rule of Evidence 501, 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 new privileges." Blauenergs v. Bd. of Regents (In re Dinnan), 661 F.2d 426, 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

C. **Limited Scope:** The privilege lasts only as long as the court determines it to be 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. Köppers Co., 683 F. Supp. 455, 458 (D. Del. 1988).

1. Only those strategies or plans "still being pursued in good faith" are protected. See, e.g., Ipalco Enters., Inc. v. PSI Resources, Inc., 148 F.R.D. 604 (S.D. Ind. 1993).
2. The court may require a showing of the specific harms to shareholders or others likely to occur if the documents were to be discovered. See, e.g., Ipalco Enters., Inc. v. PSI Resources, Inc., 148 F.R.D. 604 (S.D. Ind. 1993).

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 Accountant-Client Privilege**


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

5. Where the privilege applies, notations and financial analyses written by an accountant on non-privileged documents are privileged, although the documents themselves remain discoverable. The privileged notations may be redacted prior to discovery. See, e.g., Celotex Corp. v. Hillsborough Holdings Corp. (In re Hillsborough Holdings Corp.), 176 B.R. 223, 236 (M.D. Fla. 1994).

6. The public dissemination by an accountant of its client’s financial audit does not waive the attorney-client privilege as to the analyses and draft notes underlying the audit even though the audit itself becomes discoverable through publication. See, e.g., Celotex Corp. v. Hillsborough Holdings Corp. (In re Hillsborough Holdings Corp.), 176 B.R. 223, 236 (M.D. Fla. 1994).


1. In determining that a particular state’s law controls the accountant-client privilege, either the client or the accountant must have ties with that state. See, e.g., In re Bank of Louisiana/Kenwin Shops, Inc. Contract Litig., 1999 U.S. Dist. LEXIS 6395 (E.D. La. April 27, 1999) (Georgia accountant-client privilege applied because the debtor had its principal place of business in Georgia and the debtor’s accounting firm was also a Georgia entity). Compare with Bamco 18 v. Reeves, 685 F. Supp. 414, 416 (S.D.N.Y. 1988) (Maryland accountant-client privilege did not protect communications between a limited partnership located in Maryland and its accountants, where neither the general partner of the limited partnership nor the accounting firm employed by the limited partnership was a Maryland citizen).