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A Debtor's Communications with Her Attorney Discovered

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One of the primary purposes of the attorney/client privilege is to encourage "full and frank communications between attorneys and their clients."[1] Among other requirements, however, the privilege will only exist if the client makes a confidential communication to his/her attorney, meaning that the client intended for the communication to remain confidential and, based on the circumstances, it was reasonably expected and understood that the communication would be confidential.

Some courts have held that a communication cannot be "confidential" within the meaning of the privilege if the communication is used to prepare documents for public filings. This exception is particularly relevant in a bankruptcy setting, where it is customary for a debtor's attorney to create a client questionnaire, worksheets and other notes to assemble information and communications that are necessary to advise the debtor on what should and should not be included in his/her bankruptcy schedules. Certain courts have held that a debtor has no reasonable expectation that this information will be kept confidential if it must be disclosed in bankruptcy filings. Whether these documents will be discoverable turns on the application of the attorney/client privilege, which must be applied on a case-by-case basis.

This article discusses a debtor's general obligations to provide truthful disclosures and cooperate with the trustee in the administration of the case. Next, it discusses the attorney/client privilege with respect to the preparation of the bankruptcy filings, including the so-called "conduit theory," and highlights a thoughtful decision from the Southern District of Florida. Finally, this article provides recommendations to both debtor's attorneys and trustees for positioning themselves with respect to this dispute.

A Discharge Is a Privilege, Not a Right

Chapter 7 trustees are charged with numerous statutory duties intended to promote the efficient administration of bankruptcy cases and preserve the integrity of the bankruptcy system.[2] Among other things, chapter 7 trustees are charged with investigating the debtor's financial affairs, collecting and reducing to money property of the estate, making distributions to creditors, and closing the estate as expeditiously as is compatible with the best interests of all parties-in-interest.[3] A chapter 7 trustee's investigatory tools include questioning the debtor under oath at the meeting of creditors, where the trustee will verify information from the filings and make preliminary determinations over the extent and value of assets, potential creditors' claims, the extent of any liens against property and other matters potentially impacting the course of the bankruptcy case.[4]

In order for the statutory scheme to properly function and permit chapter 7 trustees to process the tremendous amount of information in each case efficiently, the Bankruptcy Code requires full and accurate disclosures by debtors. Under § 521(a)(1), a debtor is obligated to file, among other things, schedules of assets and liabilities, schedules of income and expenses, and a statement of financial affairs, to be signed under the penalties of perjury.[5] Debtors are further required, by statute, to cooperate with trustees such that trustees can perform their duties under the Code.[6] Indeed, the "fresh-start" policy is premised on the debtor's truthful disclosures and cooperation with the trustee in the bankruptcy process.[7]

The First Circuit has stated, "A bankruptcy court is entitled to insist upon filings and representations made in utmost good faith."[8] As such, debtors are presumed to have read the required documents before signing them and are responsible for their contents.[9] Debtors' attorneys also have a duty to make inquiries into the veracity of the filings.[10] The chapter 7 debtor who fails to heed the demands of full disclosure risks losing the privileges and protections otherwise afforded to honest debtors, including sacrificing the discharge itself.

1 *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985); *see also Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981).
2 *See* 11 U.S.C. § 704.
3 *Id.*
4 11 U.S.C. § 341.
5 11 U.S.C. § 521(a)(1); Fed. R. Bankr. P. 1008. Rule 1008, which references 28 U.S.C. § 1746, requires all debtors to verify under oath or subscribe under pains and penalties of perjury to the truthfulness of "all petitions, lists, schedules, statements and amendments" filed in their bankruptcy cases.
6 11 U.S.C. § 521(a)(3).
7 *See, e.g., In re Rolland*, 317 B.R. 402, 413-14 (Bankr. C.D. Cal. 2004) (gathering cases).
8 *In re Hannigan*, 409 F.3d 480, 483 (1st Cir. 2005) (implied overruling on other grounds recognized by *U.S. v. Ledee*, 772 F.3d 21, 29 (1st Cir. 2014)).
9 *Carpenter v. Fanaras (In re Fanaras)*, 263 B.R. 655, 667 (Bankr. D. Mass. 2001).
10 The provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 requiring additional duties and certifications of attorneys are included primarily in the four subsections of § 707(b)(4)(C)-(D). Subsection (D) provides that "the signature of an attorney on the [bankruptcy] petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information on the schedules filed with such petition is incorrect."

Discovering the Debtor's Communications with the Bankruptcy Attorney

To assist in, among other things, the preparation of the bankruptcy petition, schedules and statements, a debtor's attorney will frequently (if not always) ask his/her client to fill out a questionnaire as to his/her assets and liabilities. For myriad reasons, the substance and contents of the client questionnaire, worksheets and any other notes relating to the preparation of the bankruptcy petition and schedules might become relevant to issues arising in the course of the bankruptcy case. The issues surrounding the discovery of the debtor's communications with his/her bankruptcy attorney will turn on the application of the attorney/client privilege.

Rule 9017 of the Federal Rules of Bankruptcy Procedure makes the Federal Rules of Evidence applicable to bankruptcy cases such that federal law determines the scope of the attorney/client privilege under these circumstances. Regarding a claim of privilege, Federal Rule of Evidence 501 in turn provides:

> 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.

Attorney/Client Privilege

To reiterate, the attorney/client privilege "serves the function of promoting full and frank communications between attorneys and their clients."[11] Although articulated differently among the circuits, three essential elements are necessary to establish the existence of attorney/client privilege. First, it must be shown that an individual made a confidential communication to an attorney. Second, the communication must be made to an attorney in his/her professional capacity. Third, the purpose of the communication must be to secure legal advice or assistance.[12] The burden of proving these elements rests with the party asserting the privilege.[13]

To assert the existence of a confidential communication, generally a "privilege holder must prove the [that] communication was (1) intended to remain confidential and (2) under the circumstances was reasonably expected and understood to be confidential."[14] Whether a debtor can have a reasonable expectation that the information communicated in the preparation of a bankruptcy filing will remain confidential has led to diverging views over the application of the attorney/client privilege.

The Conduit Theory

One of the most frequent circumstances that has led to the denial of the privilege because of an absence of any reasonable expectation of confidentiality has been where a client consults an attorney for the purpose of preparing documents for public filings, particularly in the area of bankruptcy.[15] The seminal case holding that there can be no reasonable expectation of confidentiality was the Seventh Circuit's decision in *U.S. v. White*.[16] Although the *White* court did not (apparently) attempt to create a *per se* rule that the privilege cannot attach to this type of information, the decision is difficult to understand in any other way. One court has cited its holding to support the following understanding:

> In the bankruptcy context, the right to assert the attorney/client privilege is narrowed. In exchange for an automatic stay of creditor collection activity and potential discharge of certain debt, debtors are obligated to disclose all of their assets and liabilities.... A debtor has no reasonable expectation that information will be kept confidential if it must be disclosed in bankruptcy filings and where the Debtor has no reasonable expectation of confidentiality, the attorney/client privilege is unavailable. Thus, it has been previously held that the information disclosed to an attorney for the assembly of a bankruptcy petition and schedules does not fall within the scope of the attorney/client privilege.[17]

[P]rior to actually filing a petition, bankruptcy practitioners should meet again with a client for a review of the "final" petition, schedules and statement.

A True Case-by-Case Approach

In a thoughtful opinion, a bankruptcy court recently observed that blind adherence to the "conduit" theory "would equate an attorney with a bankruptcy petition preparer whose primary responsibility is to transcribe a debtor's financial information onto the Debtor's bankruptcy petition and schedules."[18] Although the debtor's "responses elicited from [a client] questionnaire [could have been] used to prepare the schedules, all of the information contained therein may or may not ultimately be disclosed publicly in such schedules."[19]

In so holding, the bankruptcy court implicitly rejected a *per se* rule that a bankruptcy attorney must turn over any and all information obtained in response to client questionnaires, worksheets and notes that were created for the preparation of a debtor's bankruptcy petition and schedules. The court observed that in utilizing a client questionnaire to fill out bankruptcy schedules, legal advice might be exercised by the debtor's attorney, and therefore, the purpose of the communication may have been to secure legal advice.[20] However,

11 *Commodity Futures Trading Comm'n*, 471 U.S. at 348.
12 *See, e.g., U.S. v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir. 1991).
13 *Id.*
14 *Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003) (citation omitted).
15 *U.S. v. White*, 950 F.2d 426, 430 (7th Cir. 1991) ("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 French*, 162 B.R. 541, 546 (Bankr. D.S.D. 1994) (same); *In re Myers*, 382 B.R. 304, 310-11 (Bankr. S.D. Miss. 2008) (same).
16 *White*, 950 F.2d at 430.
17 *In re Eddy*, 304 B.R. 591, 596 (Bankr. D. Mass. 2004) (citing, among others, *U.S. v. White*, 950 F.2d 426, 430 (7th Cir. 1991)).
18 *In re Stickle*, No. 14-19551-BKC-PGH, 2016 WL 417047, at *5 (Bankr. S.D. Fla. Feb. 2, 2016); *see also In re McDowell*, 483 B.R. 471, 489 (Bankr. S.D. Tex. 2012) (attorney/client privilege-protected questionnaire created by counsel for chapter 7 debtors; questionnaire, or client information worksheet, consisted of written communications made by debtors to their counsel, questionnaire was completed pre-petition in anticipation of debtors' forthcoming bankruptcy filing, and debtors' counsel testified that debtors intended to complete the questionnaire communications in confidence).
19 *In re Stickle*, No. 14-19551-BKC-PGH, 2016 WL 417047, at *3-4 (Bankr. S.D. Fla. Feb. 2, 2016) (citing *In re Stoutamire*, 201 B.R. 592, 596 (Bankr. S.D. Ga. 1996)).
20 *Id.*

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the burden of making this showing still rests with the party resisting discovery, and accordingly, the debtor must provide the court with factual evidence demonstrating that he/she possessed a "subjective and objective expectation" of privacy when he/she answered questions on a client questionnaire provided to the attorney for the purpose of obtaining legal advice.[21] Unless the debtor presents such evidence, the court cannot find that he/she has met her burden of proving the existence of an attorney/client privilege.[22]

An Important Observation

One commentator has observed that "courts must be careful [when applying the "conduit" exception to the attorney/client privilege] to distinguish between two closely related, but factually distinct, situations: (1) those instances where the client communicated information to the attorney for the ultimate purpose of having it communicated to third parties, but only after a final draft is promulgated by the attorney and approved by the client; and (2) those instances where the client relinquished control over the communications — leaving disclosure decisions completely within the discretion of the attorney and thereby making it unreasonable to expect that the attorney will maintain the confidentiality of either the communications or their contents. Only in the latter instance — where the lawyer is expected to serve only as a messenger, go-between or facilitator — is the attorney truly serving as a conduit."[23]

Conclusion

Of course, under this case-by-case approach as to whether these communications are discoverable, there are circumstances whereby even a communication that was intended to be confidential would be discoverable by another exception (*e.g.*, raising advice of counsel as a defense, crime-fraud exception, etc.). Nonetheless, prior to actually filing a petition, bankruptcy practitioners should meet again with a client for a review of the "final" petition, schedules and statements in order to guard against any argument that the client is relinquishing control over the communications, thereby rendering the communications as being discoverable. Likewise, trustees will be well advised to use the meeting of creditors to confirm not only that the debtor signed the schedules and statements, but that the debtor signed them *in advance* of the filing and not simply immediately before the meeting of creditors. If the latter situation in fact does occur, the argument that the client was relinquishing control over the disclosure decisions to his/her bankruptcy attorney is all the stronger. abi

21 *Id.*
22 *Id.*
23 Section 6:10. Conduit Theory, 1 *Attorney-Client Privilege in the U.S.* § 6:10.