LOSS OF PRIVILEGE

by

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PRESENTATION

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I. BACKGROUND

Attorneys and other professionals deal regularly with governmental entities and often perform filings to governmental entities containing private client information. Clients typically believe, often from socialization and exposure to U.S. entertainment media that the attorney-client privilege applies automatically through attorney confidentiality and more so through the attorney-client relationship. This culturally pervasive idea is false as to the strength and universality of the privilege, and the privilege can be easily lost. It can be lost by many acts, ranging from inadvertent disclosure to a required filing of information to a government agency. This outline explores privilege generally and leads to the latter proposition in the hope of a greater realization by attorneys and their potential clients that filing applications before units of government may result in such a waiver of privilege that in some cases the attorney may be called upon to testify against the client. Given the magnitude of this problem, and depending upon the matter, members of the public may sometimes want to consider proceed pro-se in instances in which any problematic facts would otherwise need to be disclosed to an assisting practitioner.

II. THE PRIVILEGES GENERALLY

The two main privileges are the attorney-client (confidentiality) privilege and the attorney work-product privilege. The attorney-client (confidentiality) privilege protects what the content that the client confidentially communicated to the attorney to obtain legal advice or assistance. The attorney work-product privilege "work- product" doctrine provides protection from discovery of materials prepared in anticipation of litigation.

In fictional media both of these privileges are portrayed as expansive and inviolate, but nothing could be farther from the truth. The privileges have been traditionally narrowly applied and subject to multiple grounds of restriction. In *United States v. Plache*, 913 F.2d 1375, 1379 (9th Cir. 1990), this opinion reminded that "the attorney-client privilege is strictly construed." citing *Weil v. Investment/Indicators, Research Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). In a recent case, *Republic of Ecuador v. Mackay* and *Republic of Ecuador v. Kelsh* (Nos. 12-15572, 12-15848, 2014 WL 341060 (9th Cir. Jan. 31, 2014)), the scope of work-product protection for expert materials was established as very narrow, extending to draft expert reports & communications between experts and attorneys. One of the most eloquent and succinct statements: "It must not be forgotten that the attorney-client privilege, like all evidentiary privileges, stands in derogation of the search for truth so essential to the effective operation of any system of justice: therefore, the privilege must be narrowly construed." appeared in *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000).

Remember also that in general, privilege is an evidentiary rule to prevent compelled discovery in some judicial proceeding of certain confidential matters (either attorney-client privilege information or attorney work-product information relating to a client and lawyer relationship). Rules of privilege do not apply where there is no judicially forced disclosure. In short, it may be more akin to a "rule of evidence" and in fact the rules of evidence and procedure have evolved around these privilege ideas.

In addition, privilege in federal forums is different than privilege in state forums. In the federal courts, the attorney-client privilege is a question of federal common law. See Fed. R. Evid. 501 (to be discussed below); *Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). In a state forum, the privilege is governed by a myriad of different rules associated with particular state laws, with further confusion from choice of forum rule application and the assumptions that may have been made in contract formation.

On the federal side, much of the central outline of guidance for establishment of privilege is found in Federal Rule of Civil Procedure 26 ("Rule 26"), Federal Rules of Criminal Procedure 15 ("Rule 15") & 26.2 ("Rule 26.2") and evidence codes 501 & 502. Detailed guidance is obtained from the federal case holdings especially at the circuit level, with finer details being derived from federal trial court pronouncements. Once a privilege is identified as being properly established, the application of the doctrine of waiver may be applied to test whether actions of either the clients, attorneys or courts have created a waiver of the privilege, and to what extent the waiver will cause privilege to be lost.

Much of the authority for the general theory of privilege, including state law versions of privilege are found in federal rules of evidence section 501:

Rule 501. Privileges in General
The common law -- as interpreted by the United States Courts in 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.

III. ATTORNEY CLIENT CONFIDENTIALITY PRIVILEGE GENERALLY

The privilege protects what the (a) client confidentially communicated (b) to an attorney (c) to obtain legal advice or assistance. The above statement, one of dozens of different ways of stating the privilege, is broken up into three main points. The failure of any one point can increase the chances of a finding of "no privilege". That's not to say that some court may not carve out an exception on any side of the question, but a strong showing in each of these areas (a), (b), & (c) will generally fortify an assertion of the privilege.

The emphasis of the element of subsection (a), above is that it is supposed to be a finding of confidential information obtained from the client, rather than a two-way confidential communication about a topic generally. The source of the information, its relatedness to the client's dilemma, or type of information is usually not pertinent nor relevant to the application of the attorney-client privilege. However, a two-way conversation which was initiated by a confidential communication to the attorney is normally afforded a "derivative privilege protection," especially where it further and suggests confidential communication to the attorney.

The element of subsection (b) emphasizes that the communication must be to the attorney. Communication that occurs through others, or where the communication is made not directly to an attorney in private (confidential surroundings) the claim of privilege can be lost.

The last element of subsection (c) can cause one if the greatest potential for loss of privilege, namely, when the communication is made in preparation for some governmental filing. As a practical matter, if an attorney is consulted in private for advice, and if the attorney takes no further action or otherwise identifies himself or associates herself with the act of governmental filing, the privilege will likely never be discovered, and if discovered will likely have that communication held to be privileged.

In the Ninth Circuit's decision in *United States v. Gonzalez*, 669 F.3d 974 (9th Cir. 2012) it was held that -- even assuming a valid joint defense agreement exists, one joint defendant's claim of privilege must yield to another joint defendant's "ineffective assistance of counsel" claim and its associated waiver of attorney-client privilege. This was true even where the "ineffective assistance of counsel" claim was raised in a 2555 habeas petition.

In *United States v. Flores*, 628 F.2d 521, 526 (9th Cir. 1980). Contempt found for failure to answer questions which would have allowed the judge to determine the privilege: (1) "Was the information given by a client?", (2) "Did Flores give you the information?", (3) "Was the information obtained from another source?", & (4) "Was the other source a client?". (In addition, the identity of a client is not privileged information.) *In re Michaelson*, 511 F.2d 882, 887-89 (9th Cir.), cert. denied, 421 U.S. 978, 95 S.Ct. 1979, 44 L.Ed.2d 469 (1975).

IV. Work-product PRIVILEGE GENERALLY

This privilege is for protecting documents & various other tangible things . . .which are prepared

in anticipation of litigation, trial or controversy. In addition to a close determination on what constitutes "anticipation" in terms of a likelihood of litigation, trial or controversy, courts also make a distinction between factual work as lesser protected factual information relating to litigation, trial or controversy, and opinion work-product that pertains may consist of a thought process such as an attorney's mental impressions, conclusions, opinions, theories, estimations, and computations regarding the process of carrying out a litigation, trial or controversy.

The primary policy behind the work-product privilege is the desire to preserve the effective assistance of attorneys & ancillary persons employed to help in preparing for a litigation, trial or controversy. It is believed that by maintaining the privacy of communications between client, attorney, and others employed in the preparation process, and especially privacy in the development of legal theories, opinions, evaluations & strategies, that effective legal assistance will be enhanced upon which our adversarial system of justice depends. But the courts realize that to achieve fairness in the disposition of litigation, the parties must be allowed to obtain knowledge of the relevant facts through a liberal interpretation of the rules of discovery. In order to accommodate these often divergent and conflicting policy considerations, the courts will give absolute or almost absolute protection to work-product which encompasses the mental impressions, conclusions, opinions, and legal theories concerning the litigation while more liberally allowing discovery of other work-product on a showing of substantial need and undue hardship.

Much of the "official" guidance, treatment and method of claiming work-product privilege is derived from FRCP Rule 26, and puts the issue squarely before a judge:

(b)(5) Claiming Privilege or Protecting Trial-Preparation Materials.

> (A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
>
> > (i) expressly make the claim; and
> >
> > (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(c) Protective Orders.

> (1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:...

How close does the threat of litigation have to be in order to be "trial preparation?" Some courts have held that even investigative facts compiled to make ready for a future even that might be a basis for a claim can be sufficient. Creation of a record that spells out the possibilities for litigation and sprinkled generously through the documents could help embellish such a possibility.

V. CORPORATE V. INDIVIDUAL

Corporate v. Individual needs some exploratory introduction since corporate entities generally have less privilege protection than individuals, and an investigative action done with respect to a corporate entity may discover evidence that can rapidly segue into individual liability. The existence and use of corporate entities and their presumed separate person status can provide some shielding effect where the corporate entity is where most activity takes place. However, corporate entities do not have the benefit of the 5th amendment's privilege against self-incrimination during government investigation stage of proceedings. The tenuous attorney-client privilege and work-product privilege are all that a company has to try to protect itself from probing outside forces.

Where the 5th amendment privilege would have provided an understandable and accepted blanket prohibition on cooperation with the government against the corporate entity's own self-interest, the much narrower attorney-client privilege and work-product privilege provide the only somewhat accepted legitimization for blocking government intrusion. Even so, government expects corporate entities to cooperate with government investigators, remediate any errors, apologize for any shortcomings and cheerfully remit any fines and penalties levied against it.

Corporate investigation can easily lead to individual culpability and criminal charges. Corporate lack of protection from government probing can result in prosecutorial advantage when an individual person is charged after all of the compromising evidence has been turned over during the corporate investigation. Generally, white-collar individual culpability cases are viewed as won or lost in the individual's pre-indictment phase which may correspond to the end of the corporate investigation phase.

During the government investigation, either from a corporate or individual standpoint, it is important to (1) discover what the government is investigating; (2) discover the factual nature of what could be caught up within the charge; (3) limit by legal, lawful, and ethical means, government access to privileged information & evidence; and (4) use logic, projection and persuasion to convince the government to decline prosecution, or in the alternative to prosecute elsewhere.

Complicating corporate investigations further is the need to issue "Upjohn" warnings *(Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981)) to corporate employees that need to understand that the corporate defense team doing the internal interviews in order to keep a step ahead of the government provide no protection for the acts of the employees that can themselves find themselves "hung out to dry" based upon the results of the corporate investigation. The personal 5th amendment right can't be used to block a production request to a corporate entity even if that very information forms the basis of individual liability whether in a corporate or individual capacity.

Even worse, because the corporate entity may be in a business subject to extensive regulation, the crimes that can be charged in white-collar cases springing from those regulatory controls are seemingly limitless and not subject to a finite number of "provable-beyond-a-reasonable-doubt" elements. During corporate investigation, there is no right to counsel until the indictment stage.

The Upjohn warnings that (1) the investigating attorneys represent entity and not the individual, (2) the company's attorney-client privilege protects the confidentiality of the interview for the company only, (3) the company can waive the privilege, and (4) it would be nice if employees kept the interview confidential, are often ignored by employees that desperately want protection of company lawyers, or

ignored by employees that are too naive or too poor to afford their own attorney, or who are afraid that non-cooperation may lead to their firing.

Corporate investigations can involve the extension of "state actor" principles to the attorneys investigating the corporation. Lying to the corporate investigators can, where the investigatory materials are turned over to the government, possibly implicate obstruction of justice charges. Conversely, corporate investigators have to be very careful in how they treat employees whom they interview. In *United States v. Ruehle*, 583 F.3d 600 (9th Cir. Cal. 2009) the criticality of Upjohn warnings was a central issue. In that case, Corporate counsel represented a company in two civil securities actions while also conducting an internal investigation into securities issues. Company Chief Financial Officer, William Ruehle, was supposedly told that the investigation was being done on behalf of the company, and later the company turned over Ruehle's interview statements to the U.S. Attorney, and Ruehle subsequently was indicted on criminal charges. Ruehle claimed that he believed at the time of his interview that counsel represented his personal interests as well as Broadcom's, and that his statements were protected by the attorney-client privilege, AND that he was not warned that the investigating attorneys were the company attorneys and not his attorneys. There was no evidence that the Upjohn warnings were given, and Ruehle stated that he reasonably believed that the firm represented him personally. It is noted that corporate investigations form an unusual mechanism with consideration of a number of imputed rules and principles.

The main ground for opposing a corporate privilege is the fourth amendment reasonableness test set forth in *Hale v. Henkel* 201 U.S. 43, 70 (1906). This "efficiency shield" can be used by a target to ask the courts to either block or modify a subpoena to require that it be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.

VI. WAIVER

The entity who actually holds rights under a privilege can waive that right by voluntarily disclosing the privileged information to another person or entity. It is the revelation of the real substance of the privileged information that can constitute waiver, rather than some vague "affiliated facts or strategies."

The effect of waiver on attorney work-product may differ as to "fact" information work-product and "opinion"or attorney's mental impressions, conclusions, opinions, strategies and theories work-product. Fact type work-product may have a lowered threshold of protection than opinion type work-product, which is predominantly considered inviolate.

Waiver can have a time function. Deliberate disclosure of a attorney-client privilege can occur by the client and at any time after the confidential communication is made. Deliberate work-product privilege waiver can be made before a proceeding, during a proceeding, or afterwards. Waiver may have some advantages such as tactical advantages, or even settlement value.

Waiver can be problematic where it is desired to make only a partial waiver, for example, of part of the facts, or for a part of the strategy. In a so-called "classic" view of privilege, a waiver of some portion of the privileged material causes waiver of all the material. Under a so-called "modern" view, waiver can occur as to one portion of information or work-product without waiver as to other portions.

Both views cause problems that invite a judge to determine the degree of waiver. If facts (a+b) are told to Attorney X, while facts (b+c) are told to attorney Y, would the waiver of fact (a) as to attorney X cause waiver as to attorney Y? Likewise, under the modern view, if strategy (A) were waived, does that mean that related strategy (B) which shares common characteristics with (A) also be waived?

Much of the authority for determining the degree of waiver is found in section 502 of the federal rules of evidence:

Rule 502. Attorney-Client Privilege and Work-product; Limitations on Waiver
The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) **Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;
(2) the disclosed and undisclosed communications or information concern the same subject matter; and
(3) they ought in fairness to be considered together.

(b) **Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;
(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).

(c) **Disclosure Made in a State Proceeding.** When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or
(2) is not a waiver under the law of the state where the disclosure occurred.

(d) **Controlling Effect of a Court Order**. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court — in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) **Controlling Effect of a Party Agreement**. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) **Controlling Effect of this Rule**. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) **Definitions**. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and
(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

The text of 502(a) does a number of things. (1) It provides some guidance to judging partial deliberate disclosures (fairness), (2) sets deliberate disclosures (fairness) apart from inadvertent disclosures (efforts to cure), (3) separates effect of state disclosure waivers from the effect of federal disclosure waivers, and (4) sets a standard for reliance on court orders or party agreements.

Selective Waiver where there is forced disclosure?

To contrast forced disclosure, selective waiver for voluntary disclosure is systemically pervasive, as for example the extent it flows back into the chain of documents. In *United States v. Reyes*, 239 F.R.D. 591, 604 (N.D. Cal. 2006), it was held that any facts which were transmitted in a briefing waived the privilege as to any documents in which those facts were found.

As late as 2005, there was uncertainty in the 9th circuit about whether waiver would be selective or unitary for forced disclosure in some forums, and particularly disclosure under the enticement of a production agreement with the government. *United States v. Bergonzi*, 403 F.3d 1048, 1050 (9th Cir. 2005) (citing back to *Bittaker v. Woodford*, 331 F.3d 715, 720 n.5 (9th Cir.2003)). Bolstering selective waiver where there was a confidentiality agreement and where compulsion was the cause of the forced disclosure. Bergonzi also introduces the privilege evaporation effect that a criminal case may have via Rule 16 of the Federal Rules of Criminal Procedure and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *United States v. Bergonzi et al.*, 216 F.R.D. 487, 494 (N.D.Cal.2003). Privilege will generally not stand against a person's penal interest.

Moreover, in the relatively recent case of *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1127 (9th Cir. 2012) there is a "buy in" to the policy that the corporate investigation mechanism and a wholistic waiver should be a normative course of conduct. Any argument that "selective waiver" would encourage disclosure to government is ignored in favor of an public altruistic conclusion that free disclosure to government should happen anyway.

The backhanded observation, citing , *Westinghouse Elec. Corp.*, 951 F.2d at 1425, that "selective waiver"...does little, if anything, to serve the public good underpinning the attorney-client privilege, and that, "selective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance" does not seem genuine. The misdirection back to simple privilege to then opine that "selective waiver" "merely encourages" voluntary disclosure (which should be done anyway) to government agencies, and that selective waiver would extend the privilege beyond its intended purpose" is a sarcastic way of saying that "corporate investigation is expected to openly yield all facts."

This mis-direction ignored the facts in Pacific in which a party's production to government was under an agreement not to further produce them to other private parties. Is this another way to communicate the idea that government can openly mis-represent the scope of a production agreement that no court will follow after *In re Pacific Pictures Corp.*?

Other district courts have upheld confidentiality agreements with government. *In re McKesson HBOC, Inc.* Sec. Litig., No. C-99-20743 RMW, 2005 U.S. Dist. LEXIS 7098 (N.D. Cal. Mar. 31, 2005); and *Louen v. Twedt*, No. 1:04-CV-6556, 2006 WL 1581901. Others have not. United States v. Reyes, 239 F.R.D. 591, 603 (N.D. Cal. 2006); *In re Syncor ERISA Litig.*, 229 F.R.D. 636, 647-48 (C.D. Cal. 2005). Assuming *In re Pacific Pictures Corp.* remains good law, it may be wise to resist disclosure to government unless you are willing to accept a result in which privilege is waived as to *everything*.

VII. PURPOSE AS A WHOLISTIC LIMITER OF INTENTIONAL DISCLOSURE

Where the disclosure of client confidential information or work-product information are prepared specifically for voluntary disclosure to government, the privilege can be thought of as non-existent ab initio. The predominant view is that if the above types of privileged materials are prepared specifically for submission to government, the otherwise privileged materials were never privileged to begin with. Further, materials prepared and information obtained in the routine and ordinary course of rendering business optimization advice and strategic planning, are also generally not subject to privilege.

Backing away from this position theoretically and slightly, a question should be asked: "what about portions of work-product facts, privileged communications, and work-product opinions which did not make it into the final submission to government, but were held in reserve"? This is a case-by-case open question subject to the "ought in fairness to be considered together" aspect of Federal Rule of Evidence 502, as well as the 9th circuit policy as indicated in the case of *In re Pacific Pictures Corp.* as outlined above. Practitioners will argue that the work-product opinion was separate, not intertwined and held back for the purpose of raising it in future litigation of a different type.

Or does the *In re Pacific Pictures Corp* rejection of partial waiver represent a practical realization that once the information is known, it makes no point to pretend that its still secret? Perhaps it is a policy statement that judicial resources should not be spent trying to define theoretical relationship between which parts should be properly known and which parts should remain unknown and with respect to which parties.

Other examples include: (1) summaries of transactions with the public that contain no confidential communications from a client to an attorney and no work-product are not privileged; *In re Fischel*, 557 F.2d 209, 211-12 (9th Cir. 1977); (2) information as to whether an attorney informed his client of the client's sentencing date does not violate attorney-client privilege; *United States v. Posin*, 996 F.2d. 1229' No. 92-15188, 1993 WL 230270, (9th Cir. June 29, 1993); (3) denying request to limit the use attorney-client & work-product materials produced in federal habeas proceedings only to such habeas proceedings, as it would constitute "unwarranted anticipatory interference with the prerogatives of the state courts." *Anderson v. Calderon*, 232 F.3d 1053, 1099 (9th Cir. 2000) ;

Even intended patent filings are not spared from this doctrine. *In Saxholm AS v. Dynal, Inc.*, 164 F.R.D. 331, 336 (E.D.N.Y. 1996) it was held that a draft patent application prepared for approval of the client was not privileged. This is despite (1) the fact that the application could have been withdrawn from the US PTO and held as a trade secret, (2) that the completed application might have been adjudged to be held back as a trade secret and never filed with the USPTO. Somehow, the argument was made that "there is no expectation of confidentiality in the draft opinion, because the patent attorney serves as a conduit of information to the patent office, [and therefore] the client could not reasonably have an

expectation of confidentiality in his communication to the attorney from which the draft is prepared. This is a terrible and unreasonable characterization of facts leading to a terrible conclusion.

VIII. BANKRUPTCY SUBMISSIONS

Privilege in bankruptcy generally fails on two counts, (1) nearly every fact transmitted to the petition drafter is intended to be transmitted to government in the filing of the application, and (2) the creation of the bankruptcy estate upon filing is controlled by the trustee, and the client privilege is part of the bankruptcy estate. However, and even worse in some instances, after a bankruptcy petition is filed, the attorney-client privilege become the property of another party. Although sometimes the bankruptcy court will consider the policy of untrammeled flow of information to the attorney, and perhaps consider the harm to the debtors interest in successfully passing through the bankruptcy with a real "fresh start," the court must also consider the trustee's duty to maximize the value of the debtor's estate.

These principles were most firmly established in *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 358 (1986). In *Weintraub*, a chapter 7 corporate liquidation case, the Court held that the corporate debtor's attorney-client privilege passed to the trustee on filing. No direction was given to where the final control of the privilege would land. It was generally assumed that passage of the privilege would be restricted to corporate cases, but this turned out not to be.

Nationally, a number of cases followed suit, regardless of whether the case was corporate or individual. The more recent cases have included: *McClarty v. Gudenau*, 166 B.R. 101, 102 (E.D. Mich. 1994); *In re Basler*, (Bankr. D. Neb. July 26, 2011); *In re Bounds*, 443 B.R. 729, 735 (Bankr. W.D. Tex. 2010); In re Eddy, 304 B.R. 591, 599-00 (Bankr. D. Mass. 2004); *Moore v. Eason (In re Bazemore)*, 216 B.R. 1020, 1024-25 (Bankr. S.D. Ga. 1998) ; *In re Pearlman*, 381 B.R. 903, 910 (Bankr. M.D. Fla. 2007); *French v. Miller (In re Miller)*, 247 B.R. 704, 709-10 (Bankr. N.D. Ohio 2000); *In re Cenargo Int'l., PLC*, 294 B.R. 571, 601 n.37 (Bankr. S.D.N.Y. 2003); *Ramette v. Bame (In re Bame)*, 251 B.R. 367, 373 (Bankr. D. Minn. 2000) and *Meoli v. Am. Med. Serv. of San Diego*, 287 B.R. 808, 817 (S.D. Cal. 2003).

Exposure / "Relying on Advice" waiver & Information To Client Not Privileged

As before, any light that the client sheds on the relationship with the attorney, especially in terms of what the client was told, is not privileged. In *United States v. Bauer* 132 F.3d 504, 512 (9th Cir. 1997), the debtor raised a question about whether his attorney informed him that he had a legal obligation to report all of his property in the petition, and that any false statement would constitute perjury. Because the practitioner alleged that he was following the advice of his attorney, the conversation between the debtor and his attorney was put into issue and what scintilla of privilege there might have been in the prepetition relationship was further extinguished.

Adversary Proceedings

It is important to remember that beyond simple bankruptcy filing, there are adversary proceedings which are essentially litigations carried out under the bankruptcy court's umbrella. Attorney work-product is expected to apply to production of documents prepared in anticipation of litigation, as well as attorney-client privilege. Federal Rule of Civil Procedure 26(b)(3) relates to Bankruptcy Rules 2014 and 2004. *In re Financial Corp. of America*, 119 B.R. 728 (Bankr. C.D. Ca. 1990), a trustee moved for

production of documents from claim filers, and the claim filers resisted based upon attorney work-product, as well as the category set up under title 5 U.S.C. §552 B(5) & (8) (Freedom of Information Act- FOIA) categories related to exemption from disclosure based upon litigation documents being exempt from FOIA. As to the use of the FOIA statute, the court stated "*In Kerr v. United States District Court for The Northern District of California*, 511 F.2d 192 (9th Cir.1975), aff'd 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976), the Court of Appeals determined that the exemptions enumerated in Section 552(b) of the Freedom of Information Act did not constitute privileges for civil discovery. The Court observed that a "purpose of this act was to expand the access of the public to official records of federal agencies, subject to stated exceptions." Kerr, 511 F.2d at 197. "They were intended only to permit the withholding of certain types of information from the public generally." Id. at 198."

As to the work-product privilege, the court stated "The Supreme Court first recognized the work-product doctrine in *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). In Hickman, the Court held that to qualify for protection as work-product, the materials sought must have been prepared by another party in anticipation of litigation. Id. The doctrine was eventually codified in Fed.R.Civ.P. 26(b)." The court went on "the Chapter 7 trustee contends that since no adversary action has been commenced in the Bankruptcy Court, the parties objecting to disclosure under the work-product doctrine are not parties to litigation in this Court and are, therefore, unprotected by Rule 26(b)(3)."

The court then held that "The work-product doctrine is applicable to documents prepared in anticipation of litigation with the Chapter 7 Trustee and to materials prepared by Old American, and its successors in interest, in anticipation of litigation or for trial with third parties in related matters relevant to the trustee's investigation of the parties asserting this privilege". The court also indicated that pre-and post petition document generation did not create a divide between what might be work-product and what might not be work-product, stating "A Rule 2004 examination is limited to the financial affairs of the debtor and the administration of the bankruptcy estate. This Court is not persuaded that documents generated after a debtor files his petition cannot be relevant to the debtor's financial condition or the administration of the bankruptcy estate as a matter of law. The FDIC, New West, and ASB cannot withhold this category of relevant documents, therefore, solely on the ground that such documents were generated post-petition."

General Note: Usually the procedural safeguards of the Federal Rules of Civil Procedure generally do not apply to 2004 examinations, and an entity from which discovery is sought may seek a protective order to test the particular documents and things to properly be denied production. Bankruptcy Rule 2004(b) & 9016 relates to Civil Procedural Rule 45 as to bankruptcy cases to further include the unduly burdensome and costly thresholds. Since 2004 examinations are intrusive and likely to generate sensitive information, well crafted protective orders will be the order of the day and will normally include all bases for limitation.

Also generally, the statutory basis for a shift in ownership of the privilege is found in bankruptcy code § 542(e), that enables the bankruptcy court to order turnover of any record information relating to debtors property to the trustee. The order is subject to privilege, not against the trustee, but against creditors, and generally by the trustee. The creation of the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."

IX. TAX SUBMISSIONS

The submission of tax documents to the IRS also involves the same mechanism that will prevent privilege from the very beginning of the activity. Much like the collection of financial affairs in bankruptcy (although not logically like the gathering of technical data to prepare a patent since a patent need never be filed) the gathering and organization of material for a tax filing is even more conduit-like because the filing of taxes is not truly voluntary. To avoid filing tax returns and paying taxes is to commit a crime. As can be seen, the reach of government extends beyond the physical return submitted and extends to data and summaries used to create the return.

In *U.S. v. Richey*, No. 09-35462 (9th Cir. Jan. 21, 2011) the rejected the use of the attorney-client privilege and work-product privilege for appraisal papers that touched upon a determination of tax liability. The tax appraiser "work file," that was formed to support the valuation of an income tax deduction, was neither confidential nor availed of work-product upon the possibility of future litigation. A valuation appraiser (presumably not koveled) and hired by a lawyer to create justifiable approaches to value, is not part of a process of providing legal advice to the taxpayer. In Ritchie, married taxpayers claimed a charitable contribution deduction on their federal income taxes after their lawyer hired a certified tax appraiser to provide valuation services and "tax advice" as to the value of the deduction of a conservation easement (a highly challenged and delicate area of tax law).

The taxpayers submitted the appraisal with their tax return, and it included language that much of the data was not submitted and would be retained in the appraiser's file." Upon an IRS investigation, a summons issued, was quashed and the IRS appealed. Held: reversed; (1) there was no legal advice by the appraiser, (2) there was no communication from the taxpayers to the appraiser, (3) the work was done for the purpose of disclosure to IRS (Rules § 1.170A-13(c)(3)(ii)(G) require that the appraisal must state that it was prepared for income tax purposes), and "would have been required whether there was potential litigation or not," and the (4) admission that there was more data already in existence (upon which they based their submission) was both a signal that there was (a) data lacking in the return submission papers, (b) an express offer to share further information, (c) invitation to discovery of admitted detailed file papers in existence at the time the return was filed, and (d), a waiver to the extent that it implied they were relying on the representation in the appraisal.

As a side note, it can be suspected that the "invitation"/ "indication" of further information is a reflex of helpfulness that might have been routinely included perhaps to discourage IRS' further exploration. Further, I can also see an appraiser including "disclaimers" in the file that may have indicated that deductions of this type are not favored and are risky and perhaps tantamount to "don't do it." In Richie, there was such a level of waiver that the evidence rule 502 "ought in fairness to be considered together." that states that if "the disclosure is made in a Federal proceeding *or to a Federal office or agency* and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: the waiver is intentional; the disclosed and undisclosed communications or information concern the same subject matter; and they ought in fairness to be considered together."

Even internal documentation relating to management estimates of the likely reserves needed in the event that tax positions are not respected are includable with the documents held not to be privileged. In *United States v. El Paso Co.*, 682 F.2d 530, 539 (5th Cir. 1982) an analysis pinpointing the soft spots on the corporation's tax returns complete with likelihoods of challenge and cost, known in the trade as the tax pool analysis, was held not privileged. The taxpayer argued (1) the papers were not prepared to assist in preparing tax returns, (2) tax pool analysis was and is usually undertaken only after the tax return is filed, (3) although the same people may prepare both the return and the tax pool analysis, there is no connection between the two jobs, (4) tax pool analysis is prepared for financial reporting purposes

alone, (5) a tax pool analysis summons is not relevant to any legitimate IRS inquiry, and (6) taxpayer's predictions about the outcome of an audit have no relationship to the correctness of the return as filed. Held: "even though it might not "throw light upon" the correctness of his return, we hold that the tax pool analysis is relevant to an IRS audit".

Further, a taxpayer should minimize estimates for contingent tax liability especially since the IRS has a stated policy on the subject. I.R.M. § 4.10.20 "Requesting Audit, Tax Accrual, or Tax Reconciliation Workpapers" states that IRS's examination power extends to tax accrual workpapers, and that an estimate of a company's tax liabilities may also be referred to as the tax pool analysis, tax liability contingency analysis, tax cushion analysis, or tax contingency reserve analysis. I.R.M. § 4.10.20.2(2).

Other cases relating to privilege include: *Colton v. United States*, 306 F.2d 633, 638–39 (2d Cir. 1962); . *Textron Inc. & Subs v. United States*, 577 F.3d 21 (1st Cir. 2009); & *Deloitte, LLP v. United States*, 610 F.3d 138 (D.C. Cir. 2010).

Information To Client Not Privileged

Ninth circuit cases that emphasize the fact that communication from an attorney to a client do not involve privilege, especially when the attorney is informing his client of independent facts, include: *McKay v. Commissioner*,886 F.2d 1237 (9th Cir. 1989); *United States v. Gray*, 876 F.2d 1411, 1415 (9th Cir. 1989); and *United States v. Freeman*, 519 F.2d 67, 68 (9th Cir. 1975)

Exposure / "Relying on Advice" waiver:

As before, any deliberate action which involves the exposure of the attorney-client relationship, including an action for costs of litigation, opens and waives the privilege as to documents pertaining to the underlying litigation -- in this case, the reasonableness and necessity of actions billed in a litigation. Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162-63 (9th Cir. 1992). Another "opening up" of the privilege occurred in *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) for a tax opinion meant to accompany a private placement investment invitation memo that was to be distributed. Opening up the relationship also occurs in criminal contexts: *United States v. Mendelsohn*, 896 F.2d 1183 (9th Cir. 1990). When defendant states that his attorney had said that the activity is legal, he waives the privilege. Similarly, in *United States v. Plache*, 913 F.2d 1375, 1379–80 (9th Cir. 1990) the defendant testified before the grand jury (asserting that he was tricked) about his counsel's advice to stop selling the ELMAS program which was found to be a ponzi scheme.

X. CONSIDERATIONS FOR MAXIMIZING PRIVILEGE

(1) The filing of taxes should be performed by a non-attorney or a single-use attorney who has very little factual knowledge and no real connection to the main attorney who is maintaining the privilege.

(2) The filing of bankruptcy petitions should be performed by a single-use attorney with whom the client may be honest, but who may not necessarily be privy to larger effects in other areas which result from the filing, and especially where the attorney hired will be at risk of loss for fees earned on other matters. Bankruptcy courts can force a look at the attorneys past relationship with the debtor, including deals, past fees earned and more. In essence, when an attorney holds good

privilege, the filing of a bankruptcy for a long-time client will subject confidential information relating to past business dealings of the client to waiver of such privilege held by the long-time attorney.

(3) In terms of the potential to put a client in trouble over omissions, an offer in compromise can be just as dangerous as a bankruptcy petition due to the level of assets and specificity of holdings required to be stated in order to be eligible for compromise of tax liability.

(4) Fight the greed factor. In recent times attorneys often seek to perform every aspect of a client's needs in order to capture income. Often, it is best to let another professional handle a limited aspect of a client's needs. One example of note is a CPA who handled a client's deals for 20 years; after the client died, the CPA insisted on acting for the estate. All of the CPA's knowledge was thus placed in a direct line of discovery for anyone contesting any part of the estate. Had the CPA had the estate hire an attorney coming in fresh and with no knowledge of the deals of the past, there would have been an empty vessel to direct discovery and a presumption of privilege between the estate and the attorney based upon a much higher likelihood of adversary relationships in representing the estate. In other words, a new attorney would have been couched almost exclusively in a work-product environment.

(5) Plan against voluntary disclosure, and plan to minimize damage by segmenting the smallest unit of damaging disclosure into the mostly likely segment likely to have forced disclosure and loss of privilege.

(6) Because the confidentiality privilege is based upon communication from the client to the attorney, include any discussions or opinions as either a hypothetical that can be completely divorced from the client's identifying facts and circumstances, OR make certain that any sensitive document include a recitation of communication from the client to avoid loss of privilege due to the document being solely a 1-way communication from the attorney to the client.

(7) Because loss of attorney-client privilege and the work-product privilege may be waived by voluntary disclosure, keep sensitive documents together and notify the client and obtain the client's permission with a warning on loss of privilege before making such sensitive documents available.

(8) Take pains to identify, keep and treat separate matters separately so as to minimize the probability that they " ought in fairness to be considered together" should one set of documents or matters lose their privilege.

(9) Try and negotiate the scope of any Information Disclosure Requests from either the IRS or the U.S. Trustee, but knowing full-well that any representation that the client will be protected from further disclosure are completely illusory. Negotiate criminal immunity if possible.

(10) The government's duality in dealing with bankruptcy court and U.S. district court separately is well established in *USA v. Wanland*; No. CR. S-09-008 (E.D. CA 05/03/13) The government can use the bankruptcy level courts to investigate a bankruptcy filing and then turn around and use the main U.S. district court to prosecute the debtor, AND use the fact that bankruptcy court is not an article III court to "compartmentalize" and separate any deals, cooperation or violation of 5th amendment rights. In a separate outline I raised the question as to whether a withdrawal of the bankruptcy court reference and having both the criminal and bankruptcy case in the same court

would have afforded a debtor greater protection. Each case will vary based upon facts. It may be that there are other reasons that fall short of avoiding simultaneous separate court actions (bankruptcy/criminal) that still might make withdrawal of a reference a desirable strategy.

(11) In any audit or request for information, require a greater degree of specificity of the request in an attempt to further compartmentalize and segregate in order to lessen the chances of waiver. The crux of a negotiated deal that you want (outside of criminal immunity) is a deal to limit the scope of the discovery to avoid waiver.

(12) From the very beginning of any course of dealing with a client, set out to the extent possible what records will be kept, will not be kept, as well as the danger of what can occur if the records are not kept confidential. Obtain client acquiescence on the overall strategy. In the tax pool analysis case above, it might have been that the financial statement only needed a dollar amount product as a summation composite each risk magnitude and probability of occurrence. Most probabilities of occurrence (absent large data) are a little more than a guess. Guesses have a bias driven by corporate organizational covering behavior. Thus it may be that the complete tax pool computation data did nothing substantive for the company and served no purpose other than to "read the mind" of the company (regardless of how defective that mind might have been). Every calculation is a two edge sword. If the calculations are perfect, they can cover personal liability if an unexpected disaster occurs. Where the expected occurs, a miscalculation can lead to personal liability. In both events, admitting the orientation of your thought patterns simply provides a trail for your adversaries.

Before creating a document, always consider "*IS IT NECESSARY"?*

(13) Consider whether documents, studies, experiments, technical data & the like rise to the level of a "Trade Secret." Trade secret treatment requires a sequestering of the information, signing in and out of the information, keeping the information in a safe and the like. Then consider whether the data of interest to the company can be characterized as something other than "official documents". The fact that the "Tax Pool Data" represented a "guesstimate" treatment from raw data which was laboriously cranked out from actual financials is an important factor in both its value (questionable) and its discoverability (mostly because it contains data and how it is evaluated). Wouldn't it be better to statistically track variances in tax categories along with industry standard variance, probability of audit variances, dollar adjustment variances, and the like, all as percentages and in comparison with other industry data available in the U.S. and Canada? A simple set of variance-weighted multipliers could be computed mentally to determine the expected value of a tax variance. Potential privilege holders need to ask themselves *"Why am I leaving so many bread crumbs" and "what does all this bread waste cost, anyway?"* Are you paying for accounting time to create a road map for the IRS? Should the IRS be paying for their own maps?

(14) Think about what your privilege log will look like. The purpose of a privilege log is to facilitate the opposing party and the court to evaluate claims of privilege or work-product protection. Will your privilege log look like a list of competitor sensitive industry trade secrets, or will it look like, smell like and feel like a "Tax Pool IRS Data Map"? Aside from monetary issues, is there anything in your papers that looks like "an admission" that could be used against you? (What if the papers include a set aside for likely losses due to an a traffic accident? If the set aside is high, will that constitute an admission of knowledge of guilt? Even if it can't be used in court, it might be a powerful incentive for plaintiffs who come to understand the taxpayer's mind set.)

(15) Much has been written about Schedule UTP of form 1120 in terms of causing taxpayers to "precisely" describe their "Uncertain Tax Positions", especially those that book a reserve. The federaltaxcrimes.blogspot.com web site includes a discussion which asks "is there a reduction in reserves (number and magnitude) due to this policy" and that notes that there does not appear to be a separate, defined penalty associated with a dearth of information on schedule UTP. Further, is there a penalty for scheduling reserves based upon the lack of your own exact map, or can reserves be based upon industry historical data? Or recent case holdings? And finally, can a reserve simply be set aside as a feed-forward safety factor estimation that is essentially an educated guess?

(16) It is known that when the IRS has targeted several parties to a transaction, that a joint defense or common interest agreement can be made to enable the several involved parties to disclose confidential materials to each other related to matters of common interest in terms of being targets. Taxpayers should consider minimizing the shared information and if possible sharing orally and perhaps using percentages, variances, and other measures of information that may be more meaningful to management and more meaningful statistically and perhaps less meaningful as a pixel map for the IRS. Sharing less specific information is a conservative step that contemplates that the common interest doctrine will likely fail if but one of the targeted parties waives its privilege. Waiver might even occur pursuant to an illusory agreement of one target with the IRS (which may be meaningless), or perhaps in exchange for an immunity grant. Again, is there an overriding purpose to create an expensive and tenuous bread trail?

(17) Recall that in a summons action, a related party's assertion of appeal rights tolls several statutes of limitation for a taxpayer. It may be disadvantageous to voluntarily group one's self with someone else that (a) has confidential information, and (b) seeks to assert a privilege with respect to that information. If it is only a single taxpayer as target of a discovery action, that single taxpayer can independently assess the risks and rewards of compliance and can maintain control.

(18) Where bankruptcy filing has reached the adversary proceeding stage, litigants should avail themselves of stipulations (approved by the bankruptcy court) to prevent discovery fishing expeditions. The ultimate stipulation is the one giving up discharge.

(19) Consider restricting sensitive materials to a "sight only" status and have the client initial receipt and keep the acknowledged originals in a file. This technique is especially useful where the client is in custody and any copies would have no distribution security within the custody facility.

(20) IRS put out a chief counsel memorandum (**CC-2009-023**) on August 3, 2009 discussing "new" September 19, 2008 rule of evidence 502 with a detailed discussion of the minutiae of considerations involving this new rule. I submit that the conclusions of this memorandum and similar memoranda be considered likely since it is the circuit courts and the supreme court that will set the law in each case. Since privilege holdings are made for courts and not IRS procedure updates, the IRS is neither expected nor bound to follow its own chief counsel memoranda when the controversy reaches the appeals court stage. Therefore treat any IRS self-restrictive pronouncement as non existent, for safety sake and try to physically limit information that a taxpayer might otherwise consider privileged. Its telling that at the end of the letter it states: "The rule also does not apply to the privilege available under I.R.C. § 7525." This is the civil privilege that is supposed to protect non-criminal communications from discovery.

The "Advisory Committee" (apparently not the FRE 502 advisory committee) notes provide that the rule

is limited to the attorney-client privilege and work-product protection. The rule also does not apply to the privilege available under I.R.C. § 7525.

26 U.S. Code § 7525 - Confidentiality privileges relating to taxpayer communications

(a) Uniform application to taxpayer communications with federally authorized practitioners

(1) General rule

With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner **to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney**.

(2) Limitations

Paragraph (1) may only be asserted in—

(A) any noncriminal tax matter before the Internal Revenue Service; and

(B) any noncriminal tax proceeding in Federal court brought by or against the United States.

(3) Definitions

For purposes of this subsection—

(A) Federally authorized tax practitioner

The term "federally authorized tax practitioner" means any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under section 330 of title 31, United States Code.

(B) Tax advice

The term "tax advice" means advice given by an individual with respect to a matter which is within the scope of the individual's authority to practice described in subparagraph (A).

(b) Section not to apply to communications regarding tax shelters

The privilege under subsection (a) shall not apply to any written communication which is—

(1) between a federally authorized tax practitioner and—

(A) any person,

(B) any director, officer, employee, agent, or representative of the person, or

(C) any other person holding a capital or profits interest in the person, and

(2) in connection with the promotion of the direct or indirect participation of the person in any tax shelter (as defined in section 6662 (d)(2)(C)(ii)).

It is noteworthy that chief counsel memorandum does not appear to follow the tenets of 26 U.S. Code § 7525. In I.R.B. 2010-41, the indicated that some privilege would be respected, but the indication was only with regard to schedule UTP, but even then a disclaimer appears at the end stating that none of the foregoing applies to privilege. IRM 33.1.2.2.3.5 (4-12-2013) states that Chief Counsel Notices will never be withdrawn, even if in error. I have not been able to find a subsequent Chief Counsel Notice dealing with either 26 U.S. Code § 7525 nor FRE 502 that appears after (**CC-2009-023**).

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