LITIGATION: EVIDENCE AND ISSUES OF PRIVILEGE IN BANKRUPTCY

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Honorable Margaret A. Mahoney
United States Bankruptcy Judge
Southern District of Alabama

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by Judge Margaret A. Mahoney

This paper will discuss the issues surrounding evidence presentation in bankruptcy courts and cases and how privilege issues may arise and be dealt with in bankruptcy cases.

I. Attorney-client privilege in general

The attorney-client privilege is the right of a client to protect from disclosure communications between himself and his attorney, for the purpose of obtaining or providing legal advice. *See* RESTATEMENT OF THE LAW THIRD, THE LAW GOVERNING LAWYERS § 68 (2000); Christina M. Tchen & Marry S. Hoopes, "Attorney-Client Privilege and Work-Product Doctrine--Protecting the Privilege: What Is It, Who Has It, and What Happens If You Waive It Good-Bye?," 750 PLI/Lit 199, 201 (November 2006) (hereafter, Tchen & Hoopes Article). There is no blanket attorney-client privilege covering all communications between a client and an attorney. Douglas R. Richmond, "The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era," 110 Penn. St. L.Rev. 381, 386 (Fall 2005)(citing *Wesp v. Everson*, 33 P.2d 191, 197 (Colo. 2001)) (hereafter, Richmond Article). The most frequently cited privilege test was set forth in the case of *U.S. v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950). It stated that the privilege applies 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 proceeding, 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."

In re Sunrise Sec. Litig., 130 F.R.D. 560, 595 (E.D. Pa. 1989)(quoting *United Shoe*).

Although the *United Shoe* test implies that the privilege covers only communications from the client to the attorney, that is not the case; confidential communications from an attorney to a client are also privileged. Both clients and lawyers are "privileged persons."

Another source states the test in a different way. Judge Barry Russell, BANKRUPTCY EVIDENCE MANUAL, § 501.5 (West. 2007 ed.) states:

To meet this burden of proof, a party asserting the attorney-client privilege under the federal common law must establish that:

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 or his subordinate and (b) in connection with his 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 (1) an opinion of law, (2) legal services, or (3) assistance in some legal proceeding, (d) and not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed, and (b) not waived by the client. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 601-602 (8th Cir. 1977); *Matter of Modell*, 171 B.R. 510 (Bankr. S.D.N.Y. 1994); *In re Federal Copper of Tennessee, Inc.*, 19 B.R. 177, 181 (Bankr. M.D.Tenn. 1982); *In re Blier Cedar Co., Inc*., 10 B.R. 993 (Bankr. D. Me. 1981).

The attorney-client privilege is a product of federal and state common law in the first instance. There is no federal statutory law as to the privilege so the law at the federal level remains case law based. Some states have enacted statutes codifying their attorney-client privilege. Christopher Scott D'Angelo & Robert P. Blood, "The Scope and Use of the Attorney-Client Privilege in the U.S. and Its Applicability to Communications at Home and Abroad," 73 Def. C. J. 343 (October 2006).

The burden of establishing the attorney-client privilege rests on the party asserting it. *Fisher v. U.S.*, 425 U.S. 391, 403 (1976); *In re American Metrocomm. Corp*., 274 B.R. 641 (Bankr. D. Del. 2002).

The scope of the privilege is limited. Tchen & Hoopes Article, *supra* at 202. "It does not protect the client's demeanor or mental capacity, or facts learned by the attorney from independent sources. See, e.g., *Upjohn v. U.S.*, 449 U.S. 383, 396 (1981); *In re Walsh*, 623 F.3d 489, 494 (7th Cir. 1980)." *Id.* It also does not protect every document created by an attorney. *Nedlog Co. v. ARA Servs., Inc*., 131 F.R.D. 116, 117 (N.D. Ill. 1989). Nor does it protect communications where the attorney is not providing legal advice. See, e.g., *Reino de Espana v. Am. Bureau of Shipping*, No. 3 Civ. 3573, at *6, 2005 U.S. Dist. LEXIS 33337 (S.D.N.Y. Dec. 17, 2005) (emails by general counsel containing nonlegal business issues not privileged).

II. To whom does the privilege belong?

There has been a lot written about who "owns" the attorney-client privilege in particular situations. The importance of who owns the privilege is the right to enforce it or waive it. This paper discusses below who holds the privilege in various situations.

A. Corporations and Partnerships-Prebankruptcy

Corporations and partnerships may assert the privilege. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) (corporation); *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994) (partnership). *See also* Richmond Article, *supra* at 387. The problem is who is entitled to claim it for the entity. Courts have used three different tests to determine who may

claim the privilege--the subject matter test, the control group test, and a test that is similar to the subject matter test.

The control group test looks at the status of the person in the organization to determine whether they can validly invoke the privilege. The person must be in a position "to control or take a substantial part in the determination of corporate action in response to legal advice" for the privilege to attach. Edna S. Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 100 (4th Ed. 2001); *Burlington N. & Santa Fe Ry. Co.*, 323 Ill. App. 3d 474, 752 N.E. 2d 479 (Ill. 1st Dist. 2001) (includes top management and any employee "whose advisory role to top management in a particular area is such that a decision would not normally be made without his advice or opinion, and whose opinion in fact forms the basis of any final decision by those with actual authority."). This test is still used in a few jurisdictions, including Illinois, but the test has been severely criticized because it is not clear who can invoke the privilege and thus it chills communication with counsel.

The majority rule is the subject matter test which applies to any employee of any rank if he communicates with counsel (1) for the purpose of securing legal advice for the corporation, (2) is communicating at his superior's request or direction, and (3) his responsibilities include the subject matter of the communication. *Upjohn Co. v. U.S.*, 449 U.S. 383, 391-93 (1981). This test involves a case by case analysis of the specific facts and context of the communications. *In re Grand Jury Proceedings*, 219 F.3d 174, 183 (2nd Cir. 2000).

The third test is very similar to the subject matter test. It has been used most frequently in the 7th and 8th Circuits. The test is as follows:

> The attorney-client privilege is applicable to an employee's communications if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

In re Bieter Co., 16 F.3d 929, 936 (8th Cir. 1994) (quoting *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977).

> The modified [test] was crafted as an alternative to the subject matter test in order to focus on why the attorney was consulted and to prevent the routine routing of information through the attorney to prevent subsequent disclosure.

So. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377, 1383 n.10 (Fla. 1994) (internal quotations omitted).

For partnerships, the general rule is that all partners are considered to be the client for purposes of the attorney-client privilege. Employees of the partnership are judged under the control or subject matter tests.

Communications among employees of a corporation or partnership may or may not be privileged. If management of a company shares legal advice from counsel among themselves, the advice remains privileged. *McCook Metals L.L.C. v. Alcoa Inc*., 192 F.R.D. 242, 254 (N.D. Ill. 2000). If employees speak with attorneys about corporate issues while employed those discussions are privileged. *Hunt v. Merck-Medco Managed Care, LLC*, 340 F. Supp. 2d 554, 558 (E.D. Pa. 2004). However, if counsel communicates with employees after they are not employed at the company anymore, the communications are not privileged unless the former employee has a continuing duty to the company or the communication has another reason to be privileged. *Verschoth v. Time Warner, Inc.*, 2001 U.S. Dist. LEXIS 3174, at *8 (S.D.N.Y. 2001); *Miramar Constr. Co. v. Home Depot, Inc.*, 167 F. Supp. 2d 182 (D.P.R. 2001).

A board of directors may have its own privilege if it retains separate counsel. That privilege belongs solely to the board and may not be waived by the corporation. *In re BCE West, L.P.*, 2000 U.S. Dist. LEXIS 12590 (S.D.N.Y. 2000). As to the corporation's own privilege, courts have ruled that it can be waived by disclosure to the full board of the corporate attorney's advice. *In re OM Group Secs. Litig.*, 226 F.R.D. 579 (N.D. Ohio 2005). Other cases hold that disclosure to the board is not a waiver. *Washington Bancorporation v. Said*, 1989 U.S. Dist. LEXIS 5135, at *6 (D.D.C. 1989).

B. Corporations and Partnerships - After a bankruptcy filing

The privilege of a corporation that has filed a chapter 7 case is controlled by the chapter 7 trustee. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985). The theory upon which the Supreme Court based its ruling is that the trustee is, in essence, new management for a company. Management of a company controls the privilege outside of bankruptcy. So, as the management of the debtor, the trustee controls the privilege inside a bankruptcy case. *U.S. v. Campbell*, 73 F.3d 44 (5th Cir. 1996) (partnership privilege); *Meoli v. American Medical Service of San Diego*, 287 B.R. 808 (S.D. Cal. 2003); *In re ANR Advance Transp. Co., Inc.*, 288 B.R. 208 (Bankr. E.D. Wis. 2002). A chapter 11 trustee has the same right. *In re Subpoena Issued to Friedman*, 286 B.R. 505 (S.D.N.Y. 2002).

An examiner's powers are usually more limited than those of a trustee. Courts have been reluctant to hold that examiners own or hold the privilege claim of debtors. "The expandable powers bestowed upon examiners, however, are far from unfettered, as some courts have expressly rejected the notion of expanding an examiner's powers to include powers normally reserved for bankruptcy trustees (such as the power to waive the debtor's attorney-client privilege)." Jeffery A. Deller, "Examining the Examiner: Waiver of the Attorney-Client Privilege and the Outer Limits of an Examiner's Powers in Bankruptcy," 43 DUQ. L. REV. 187, 218 (Winter 2005). *See also In re Boileau*, 736 F.2d 503 (9th Cir. 1984).

C. Individuals - Prebankruptcy

Prior to a bankruptcy filing, an individual owns his or her own right to claim an attorney-client privilege even after his or her death. *Swindler & Berlin v. U.S.*, 524 U.S. 399, 405 (1999). The only difficult issue arises when an individual files bankruptcy. That issue will be discussed below.

D. Individuals - After a bankruptcy filing

As explained above, the U.S. Supreme Court has ruled on who holds or owns the right to assert or waive the attorney-client privilege for a corporation when the corporation has filed a chapter 7 case. The right belongs to the trustee. *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985). There has been no ruling by the Supreme Court on the issue of who may assert or waive the privilege of an individual who has filed bankruptcy under any chapter.

The Supreme Court specifically stated in *Weintraub* that "[o]ur holding today has no bearing on the problem of individual bankruptcy, which we have no reason to address in this case . . . [A]n individual . . . can act for himself; there is no 'management' that controls a solvent individual's attorney-client privilege. If control over that privilege passes to a trustee, it must be under some theory different from the one we embrace in this case." *Id.* at 356.

One case, *In re Smith*, 24 B.R. 3 (Bankr, S.D. Fla. 1982) has held that a chapter 7 trustee took over the individual debtor's rights to assert or waive the debtor's privilege when the individual filed a chapter 7 case. Other cases have ruled that the chapter 7 trustee of an individual who files a chapter 7 case does not succeed to the debtor's privilege claim. *In re Miller*, 247 B.R. 704 (Bankr. N.D. Ohio 2000); *McClarty v. Gudenau*, 166 B.R. 101 (E.D. Mich. 1994); *In re Silvio De Lindegg Ocean Developments of America, Inc.*, 27 B.R. 28 (Bankr. S.D. Fla. 1982).

When a debtor was first in a chapter 11 case that was later converted to a chapter 7 case, the courts have held that the trustee of the chapter 7 case can waive the privilege as to advice received during the chapter 11 case, but not as to prepetition advice. *In re Eddy*, 304 B.R. 491 (Bankr. D. Mass. 2004); *In re Bame*, 351 B.R. 367 (Bankr. D. Minn. 2000); *In re Williams*, 152 B.R. 123 (Bankr. N.D. Tex. 1992) (giving liquidating trustee in chapter 11 plan the right to waive the privilege). However, the *In re Hunt* case, 153 B.R. 445 (Bankr. N. D. Tex. 1992) directly contradicts the *Williams* case.

III. Waiver of the Attorney-Client Privilege - Who Gets to Waive and When?

The issue of waiver has come to the forefront in corporate bankruptcy cases in the last few years due to policies of the Department of Justice, Securities and Exchange Commission and the Sentencing Commission. "[O]ver the last several years, cooperation with government investigations--more often than not measured by whether the corporation has waived its attorney-client privilege--has become increasingly critical as law enforcement agencies have sought to restore public confidence in our capital markets. . . [Also] internal investigations conducted by corporate counsel--the results of which are often demanded by the government in exchange for 'credit' for cooperation--now have particular significance." William R. McLucas, et al., "The Decline of the Attorney-Client Privilege in the Corporate Setting," 1569 PLI/Corp 143, 145 (November 2006). The SEC and DOJ both evaluate a company's cooperation in an investigation in determining whether to bring civil enforcement and criminal actions against companies. A company's cooperation also is evaluated in determining what sanctions to seek against a company. The SEC policy is set forth in the Seaboard Report and the DOJ policy was set forth

in a memorandum entitled "Principles of Federal Prosecution of Business Organizations." That memo is known as the "Thompson Memo" due to the name of its author, then Deputy Attorney General Larry Thompson. *Id.* at 155-56. The Thompson Memo tells prosecutors to consider "whether the corporation appears to be protecting its culpable employees and agents." Protection of employees includes "advancing attorneys' fees . . . retaining the employees without sanction for their misconduct . . . providing information to the employees about the government's investigation pursuant to a joint defense agreement, . . .[or] attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty." *Id*. at 156.

After complaints were registered against the policy, it was reiterated and updated in October 2005 in the "McCallum Memo" written by Deputy Attorney General Robert McCallum. The new memo reaffirms the prior policy, but directs districts or other groups to "establish a written waiver review process." *Id.* The McCallum Memo does not require the review policies to be consistent throughout the country.

The U.S. Sentencing Commission recently amended its Organizational Sentencing Guidelines to include a section that states waiver of attorney-client privilege is not necessary to reduce a corporation's culpability score "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." *Id.*

The Federal Rules Advisory Committee has proposed a new rule of evidence - Federal Rule of Evidence 502. It states:

> Rule 502. Attorney-Client Privilege and Work Product; Limitations of Waiver
>
> (a) Scope of waiver. -- In federal proceedings, the waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.
>
> (b) Inadvertent disclosure. -- A disclosure of a communication or information covered by the attorney-client privilege or work product protection does not operate as a waiver in a state or federal proceeding if the disclosure is inadvertent and is made in connection with federal litigation or federal administrative proceedings--and if the holder of the privilege or work product protection took reasonable precautions to prevent disclosure and took reasonably prompt measures, once the holder knew or should have known of the disclosure, to rectify the error, including (if applicable) following the procedures in Fed. R. Civ. P. 26(b)(5)(B).
>
> [(c) Selective waiver. -- In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client privilege or work product protection--when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority--does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities. The effect of disclosure to a state or local government agency, with respect to non-governmental persons or entities, is governed by applicable state law. Nothing in this rule limits or expands the

authority of a government agency to disclose communications or information to other government agencies or as otherwise authorized or required by law.]

(d) Controlling effect of court orders. -- A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court, if the order incorporates the agreement of the parties before the court.

(e) Controlling effect of party agreements. -- An agreement on the effect of disclosure of a communication or information covered by the attorney-client privilege or work product protection is binding on the parties to the agreement, but not on other parties unless the agreement is incorporated into a court order.

(f) Included privilege and protection. -- As used in this rule;

(1) "attorney-client privilege" means the protection provided for confidential attorney-client communications, under applicable law; and

(2) "work product protection" means the protection for materials prepared in anticipation of litigation or for trial, under applicable law.

Fed. R. Evid. 502 (proposed) available at http://www.uscourts.gov/rules/reports/EV05-2006.pdf.

This rule is at present subject to public comment until February 15, 2007. Public hearings will be held about it (and other proposed rules) in Washington, D.C. and New York in the near future. The rule is intended to cut down on the costs and burdens of discovery. "[A]n enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. The Committee (Advisory Committee on Evidence Rules) has determined that the discovery process would be more efficient and less costly if documents could be produced without risking a subject matter waiver of the attorney- client privilege or work product protection." Honorable Jerry E. Smith, Chair, Letter of Advisory Committee on Evidence Rules to Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, May 15, 2006 (Revised June 30, 2006). The Committee placed the section about selective waiver of the privilege in the draft Rule 502 at section (c) in brackets; however, the Committee has not yet decided whether it will send section (c) to Congress for approval. The Rule also provides that parties may seek confidentiality orders from the court to protect against waiver issues and those orders will bind even non-parties in any federal or state court. The Rule also approves the efficacy of confidentiality agreements among the parties to litigation, but recognizes that, in the absence of a court order, these agreements cannot bind non-parties.

Waivers in the nonbankruptcy context must be made by the individual or business entity who holds the privilege. *In re Grand Jury Proceedings*, 219 F.3d 175, 195 (2d Cir. 2000). The attorney who gave the advice to the client has no right to waive the privilege unless authorized to do so by his or her client. *Republic Gear Co. v. Borg-Warner Corp*., 381 F.3d 551, 556 (2d Cir. 1967);*Von Bulow v Von Bulow (In re Von Bulow)*, 828 F.2d 94, 100-01 (2d Cir. 1987). A party implicitly waives the attorney-client privilege when he or she invokes an advice of counsel defense. *In re Snell*, 232 B.R. 684, 685 (Bankr. S.D. Cal. 1999).

Even if a client invokes the privilege, an attorney is not bound to honor the privilege if the communications were made "for the purpose of getting advice for the commission of a fraud or crime." *Jobin v. Bank of Boulder*, 167 B.R. 937 (D.Colo. 1994) (citing *U.S. v. Zolin*, 491 U.S. 554, 563 (1989)); *In re Campbell*, 248 B.R. 435 (Bankr. M.D. Fla. 2000); *Diamant v. Sheldon L. Pollack Corp.*, 216 B.R. 589 (Bankr. S.D. Tex. 1995); *U.S. v. Ballard*, 779 F.2d 287 (5th Cir. 1986).

A. When Does a Waiver Occur?

A waiver occurs when privileged information is disclosed to a third party. *Rockwell Int'l*, 987 F.2d at 1265 (1990). There can be no "partial voluntary waiver." Once a waiver has occurred, the waiver must include the actual disclosed material and "whatever additional communications must be provided to the third party to give that party a fair chance to meet the advantages gained by the privilege holder through the disclosure." 2 Paul R. Rice et al., ATTORNEY CLIENT PRIVILEGE IN THE UNITED STATES § 9,79, at 357-58 (2d ed. 1999). There are exceptions to the waiver rule.

1. If an agent or representative of an attorney whose services are necessary to the representation is present, then there is no waiver. *Cellco Partnership*, 2006 WL 1320067; *In re Grand Jury Investigation*, 918 F.32 374, 384 (3d Cir. 1990).

2. Accountants and Financial Advisors. If the advisor is there solely to explain difficult financial concepts, some courts have held that disclosure in their presence did not waive the privilege. *Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., Ltd.*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005); *U. S. v. Kove*, 296 F.3d 918,922 (2d Cir. 1961); *U.S. v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999). Some courts have looked at the facts of cases involving other experts and analyzed whether it was legal or other expert advice that the client was seeking. *U.S. v. Brown*, 478 F.3d 1038, 1040 (7th Cir. 1973); *In the Matter of Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000). Other courts have looked at whether the client had a reasonable expectation of confidentiality at the meeting. *Ross v. UKI, Ltd.*, 2004 WL 67221, at *3 (S.D.N.Y. Jan. 15, 2004).

3. Outside Auditors. The courts disagree about whether disclosure of an attorney opinion letter to an outside auditor is a waiver of the privilege. *Medinol, Ltd. v. Boston Scientific Corp.* 214 F.R. D. 113., 116 (2002) (finding waiver); *Jaffe*, 2006 WL 1898151, at *6 (2006); *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 2004 WL 2389822 (S.D.N.Y. October 26, 2004).

The courts finding that disclosure of attorney opinions to auditors is a waiver reason that there is no common interest between the company and the auditors. In fact, the auditors must be independent. The courts finding that there is no waiver in disclosure to auditors reason that the auditor's interest is sufficiently similar to the company's in combating fraud that there should be no waiver. Tchen & Hoopes Article, *supra* at 212.

4. Public Relations Consultants. In high profile cases, companies often have media or p.r. specialists to help them handle media issues. Cases have uniformly held that conversations heard or documents reviewed by media consultants are not privileged. *Calvin*

Klein Trademark Trust v. Wachner, 198 F.R.D. 53 (S.D.N.Y. 2000) so held. The Tchen & Hoopes Article states that there are three general conclusions that can be drawn about any extensions of the attorney-client privilege to situations including p.r. specialists. "First, the privilege is more likely to attach where the lawyer hires the public relations consultant . . . Second, for the privilege to apply, there must be a clear nexus between the public relations consultant's work and the attorney's role in representing the client. . . Third, the privilege is more likely to attach where a client does not have in-house public relations capabilities, or the client is a foreign corporation unfamiliar with the United States legal system." Tchen & Hoopes Article, *supra* at 400.

5. Expert Witnesses. A party cannot assert an attorney-client privilege as to materials furnished to an expert witness that the party wishes to have testify. *In re Tri State Outdoor Media Group, Inc.* 283 B.R. 358, 365 (Bankr. M.D. Ga. 2002)

6. Inadvertent Waiver. Waiver of a privilege can occur in some embarrassing ways. *Jasmine Networks, Inc. v. Marvell Semiconductor Inc.*, 12 Cal. Rptr. 3d 131 (Ct. App. 2004) (conversation recorded on voice mail after parties thought they had terminated a call was a waiver). In some jurisdictions, even an inadvertent disclosure of privileged material, oral or written, can result in a waiver. There are three approaches used by courts in determining whether an inadvertent disclosure will result in a privilege loss. The lenient approach requires that the disclosure be knowing before it is a waiver. *Harp v. King*, 835 A.2d 953 (Conn. 2003). The strict approach holds that any communication disclosed whether knowingly or not loses its privilege protection. Under the majority view or middle approach, a court looks at 4 factors--(1) the reasonableness of the precautions taken to prevent disclosure; (2) the volume of documents produced relative to the amount of privileged documents inadvertently produced; (3) the length of time it took the party asserting the privilege to try to remedy the situation; and (4) the fairness of protecting the inadvertent disclosure. *Atronic Int'l v. SAI Semispecialists of America, Inc.*, 232 F.R.D. 160, 161 n.2 (E.D.N.Y. 2005). The proposed Fed. R. Evid. 502 discussed above would adopt the rule that inadvertent disclosure of privileged materials does not constitute a waiver of the privilege.

7. Selective Waiver. Selective waiver, as opposed to partial waiver, is the waiver of the privilege as to a particular entity only. As to all other parties or entities, the privilege is maintained. As discussed above, this has become a timely topic due to the Government's position in investigation of cases against corporations and other business entities. "The typical situation is one in which a company is facing a government inquiry and, as part of that inquiry, either wishes to reveal privileged or immune information to the government, or is arguably compelled to do so. At the same time, the company is facing pending or imminent civil litigation arising out of the same set of facts that spawned the government inquiry. The company believes that it must waive the privilege or work product immunity as to the government; however, the plaintiffs in the civil litigation then will use the information revealed to the government to great advantage." Tchen & Hoopes Article, *supra* at 406-07.

In a recent case, *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002), a federal district court held that Columbia/HCA had waived its attorney-client privilege and work product immunity when it disclosed privileged documents to

DOJ. The waiver, once made, applied to later suits filed by insurance companies and individuals who claimed they had been overbilled. The Court ruled that there could be no selective waiver.

The Court considered Columbia/HCA's argument that it had entered into a confidentiality agreement with DOJ, but it held that the confidentiality agreement did not protect the company. The attorney-client privilege is derived from the common law. "It is not a creature of contract, arranged between parties to suit the whim of the moment." *Id*. at 303. Therefore, entities should assume that when they waive the attorney-client privilege for the Government, the entities waive the privilege as to ALL parties.

Proposed Fed. R. Evid. 502(c) would deal with this problem by creating an ability to have binding confidentiality agreements if approved by court order.

IV. Use and Efficacy of Joint Defense and Common Interest Agreements

To work around the issue of waiver, parties to lawsuits enter into common interest and joint defense agreements to preserve the attorney-client privilege and work product protection. Do these agreements work? The Tchen & Hoopes Article ("Attorney-Client Privilege and Work- Product Doctrine--Protecting the Privilege: What Is It, Who Has It, and What Happens If You Waive It Good-Bye?," 750 PLI/Lit 199 (November 2006)) contains an excellent detailed summary of this issue and how to approach it. The discussion below is a short exposition of the issue that borrows heavily from the Tchen & Hoopes Article.

A common interest agreement arises when multiple defendants "share common interests in their defense of matters, and thus want to coordinate their efforts without destroying the privileged status of their communications with their respective lawyers." *Id*. at 414. The common interest doctrine is an exception to the general rule that disclosure of privileged information to any third party is a waiver of the privilege. The cases state that "sharing of privileged information that otherwise would constitute a wavier does not relinquish the protections of the privilege so long as the parties maintain the confidentiality of the shared information." *Id.* A common interest agreement does not create a new privilege. The protected information must be subject to the attorney-client privilege in the first place. The intent of such an agreement is to preserve the privilege even with disclosure. *Id.* at 415. Such agreements also typically attempt to shield work-product as well.

Joint defense agreements are essentially common interest agreements. See *In re Grand Jury Subpoena*, 274 F.3d 563, 572 (1st Cir. 2001) (stating that "[b]ecause the privilege sometimes may apply outside the context of actual litigation, what the parties call a 'joint defense' privilege is more aptly termed the 'common interest' rule"). To assert a "joint defense privilege" a party must prove "(1) that the protected communications were made in the course of a joint litigation effort, and (2) that they were designed to further that effort." *Id*. citing *In re Grand Jury Proceedings v. U.S.*, 156 F.3d 1038, 1042-43 (10th Cir. 1998).

The problems that arise with joint defense agreements usually involve client confidences. The cases cited in the Tchen & Hoopes Article discuss situations in which counsel for an employee or officer of a corporation or other business entity had also, in the past, represented the company. If such counsel is later disqualified from representing the employee due to

confidential information obtained from the corporation in the past, potentially all defense counsel who are party to a joint defense agreement will be disqualified from the case. It is presumed that all counsel know the improper information. E.g. *National Medical Enterprises, Inc. v. Godbey*, 924 S.W. 2d 123 (Tex. 1996). The same type of situation arose in *Essex Chemical Corp. v. Hartford Accident & Indemnity Co.*, 993 F. Supp. 241 (D.N.J. 1998), in which Skadden Arps had represented Essex in a takeover attempt in 1988. Several years later, Skadden Arps agreed to represent Hartford in litigation against Essex on other matters. Skadden and other firms entered into a joint defense agreement. Essex sought to disqualify Skadden due to its extensive knowledge of its business and sought to disqualify the other defendants' counsel as well. In a ruling that was interlocutory, the district judge reversed a magistrate judge's ruling that all defense counsel were disqualified. The district judge held that, prior to any disqualification ruling, a hearing had to be held in which the joint defense agreement was reviewed and a balancing of the hardships that would result from the disqualifications should be done.

Another problem arises when one party or more to the joint defense agreement wishes to waive the privilege and another party does not at some point after the agreement has been utilized for some period of time. *In re Grand Jury Subpoena*, 274 F.3d 563 (1st Cir. 2001).

The Tchen & Hoopes Article advises the following in regard to drafting joint defense agreements:

> All joint defense agreements should be written and should include certain essential provisions. First, the agreement should specify that all defense counsel have completed conflict of interest checks and know of no conflicts with the plaintiff. Second, the agreement should state that each law firm represents only its client and that each party will look only to its attorneys for advice. . . Third, the agreement should not provide for the engagement or payment of common counsel, and the joint defense group should not engage common counsel. . . Fourth, the agreement should provide (1) that confidential information will not be revealed to third-parties or used outside the case absent the consent of all group members, (2) that information sharing between group members does not waive privilege or work product protections with respect to third-parties, and (3) that a waiver by one defense group member will not bind other group members. Fifth, the agreement must state that the defendants have a common interest in the defense of the lawsuit, with the agreement being intended to further that interest. Sixth, the agreement should state that the parties agree to share confidential information only in the subject case, and only pursuant to the agreement's terms. Seventh, the agreement should provide for group members' withdrawals, settlements, or dismissals from the case. Finally, the parties themselves should sign the agreement.

Id. at 422-23.

The article also explores the idea of entering into common interest agreements in business transactions in which litigation has not been commenced or even threatened but such litigation is a strong possibility. Such an agreement would allow the parties to exchange information in a sale or joint venture situation without fear of later disclosure. In the case of *OXY Resources*

California LLC v. Superior Court, 9 Cal. Rptr. 3d 621 (Cal. Ct. App. 2004), such an agreement was recognized as one that could preserve the attorney-client privilege as to some documents. However, the case of *In re Grand Jury Subpoena*, 274 F.3d 563, 575 (1st Cir. 2001) held that a joint defense agreement entered into when there was no particular litigation or investigation looming was not valid. "The agreement thereafter remained in effect, Lawyer says, attaching ex propis vigore to all matters subsequently arising (including the current grand jury investigation). The law will not countenance a 'rolling' joint defense agreement of this limitless breadth."

V. Potential Waivers of the Privilege By Submission of Billing Statements for Approval of Fees

When an attorney submits a fee request to a bankruptcy court in order to obtain approval of compensation pursuant to 11 U.S.C. § 503 or seeks approval of any fees under § 506, what can the attorney disclose without waiving the privilege? In the Eleventh Circuit, "matters involving the receipt of fees from a client are not generally privileged." *In re Grand Jury Subpoena of Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982). This is the law in all federal courts. As to who paid the fees, there is one "'limited and rarely available' exception [that] involves situations where the disclosure of fee information would give the identity of a previously undisclosed client/suspect." *Id.*

As to the billing records themselves, as opposed to fee payment information, the attorney- client privilege does not apply unless the billing information contains information that reveals research or litigation strategy. *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999); *Clarke v. American Commerce National Bank,* 974 F.2d 127 (9th Cir. 1992); *U.S. v. Leventhal*, 961 F.2d 936 (11th Cir. 1992); *FTC v. The Cambridge Exchange, Ltd., Inc*., 845 F. Supp. 872 (S.D.Fla. 1993); *Moecker v. Greenspoon, Marder, Hirschfeld, Rafkin, Ross, Berger & Abrams Anton, P.A. (In re Lentek Int'l, Inc.)*, 2006 Bankr. LEXIS 2536, at *9 (Bankr. M.D. Fla. 2006). The burden of proving that the billing statements are privileged is on the claimant. *Clarke, supra*. at 129.

VI. Discoverability of Engagement Letters

Just as fee information and billing statements are discoverable by opposing parties and not protected by attorney-client privilege, the same is true of engagement letters. Edna Selan Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 64 (4th Ed. 2000) "The mere fact that the attorney-client relationship exists is not privileged." *Id.* at 64. If an attorney put litigation strategy in the engagement letter or the letter also contained advice to the client, that part of the letter might be privileged. However, the fact that there is a relationship and the broad parameters of the relationship, including payment terms, will not be protected. In the article, *Lawyers as Witnesses*, Douglas R. Richmond, therefore advocates that, particularly with lawyer expert witnesses, the engagement letter not state that an attorney-client relationship exists between the expert and the client. Otherwise, at trial, opposing counsel will cross-examine the expert about his duty of loyalty to the client and impeach his credibility as an independent expert. Douglas R. Richmond, "*Lawyers as Witnesses,*" 36 N.Mex. L. Rev. 47, 67 n.172 (Winter 2006).

VII. Crime/Fraud Exception to the Attorney-Client Privilege

The crime/fraud exception to the attorney-client privilege requires an attorney to disclose communications made by a client to her before or during the commission of a crime or fraud, to the extent that the communications were made for the purpose of being assisted or helped in the commission of the crime or fraud. 98 CORPUS JURIS SECUNDUM Witnesses § 336 (May 2006). Statements that are not about the crime are not excepted and remain covered.

Before an attorney can be required to testify about disclosures to her by her client that the opposing party asserts are subject to the crime/fraud exception, the opposing party "has the burden of making a prima facie showing that the communications were in furtherance of an intended or present illegality and that there is some relationship between the communications and the illegality." *U.S. v. Bauer*, 132 F.3d 504, 509 (9th Cir. 1997) (quoting *U.S. v. Chen*, 99 F.3d 1495, 1503 (9th Cir. 1996)); *Talenfield v. Siervo (In re Siervo)*, 2006 Bankr. LEXIS 2776 (Bankr. S.D. Fla. 2006); *Enron Broadband Services, L.P. v. Travelers Casualty and Surety Co. of Am. (In re Enron Corp.)*, 349 B.R. 115 (Bankr. S.D.N.Y. 2006); *Brandt v. Nvidia Corp. (In re 3DFX Interactive, Inc.)*, 347 B.R. 386 (Bankr. N.D. Cal. 2006). Case law indicates that an in camera review of the testimony or documents is appropriate to determine how large an intrusion on the privilege is correct. *U.S. v. Zolin*, 491 U.S. 554 (1989).

The exception has become a larger issue in the wake of the corporate scandals where the government, shareholders, and the public felt that someone should have spoken out about the abuses occurring within companies like Enron, Tyco, and Worldcom. See e.g. Colin P. Marks, "Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having At All?," 30 Seat. Univ. L. Rev. 155 (Fall 2006); William W. Horton, "A Transactional Lawyer's Perspective on the Attorney-Client Privilege: A Jeremiad For Upjohn," 61 Bus. Law. 95 (November 2005).

As a result of the corporate problems, Congress passed the Sarbanes-Oxley Act of 2002 and, as noted above, the government continued with its use of the policies stated in the McCallum and Thompson Memoranda. Both the law and the policies significantly impact the attorney- client privilege. Sarbanes-Oxley, through regulations promulgated to implement the Act, established "minimum standards of professional conduct for attorneys." Commodity and Securities Exchanges, 17 C.F.R. § 205.1 (2006). The rules require counsel for a company that must report to the SEC to report evidence of material violations of securities laws by the officers, directors, employees or other agents of a company to the company's chief legal officer or, if the company has one, to the "qualified legal compliance committee" of the board of directors. *Id.* at § 205.3-.7. If the company does not take steps to adopt an "appropriate response" to the issue raised, the attorney must report the problem to the audit committee of the board of directors or the full board of directors. *Id.* If the company does not take appropriate action, the attorney is to make a "noisy withdrawal" based upon "professional considerations" from employment. *Id.* These actions may, of course, bring about an investigation of the company. In turn, the lawyers involved might be asked to testify or turn over documents based upon the crime fraud exception to the attorney-client privilege or a waiver of the privilege might be requested from the company. For a full explanation of this issue, the article by Thomas G. Bost, "Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality," 19 Geo. J. Leg. Ethics 1089 (Fall 2006) is excellent.

These rules resulted in the ABA issuing several new Proposed Model Rules of Professional Conduct on loyalty to clients and confidentiality that dealt with the Sarbanes-Oxley issues. *Id*. at 1111-12. These rules are at odds with the ethics rules of many states.

> - As to a client's intention to commit criminal fraud reasonably certain to result in injury to the financial interest or property of another person (Model Rule 1.6(b)(2)), four jurisdictions require disclosure, thirty-nine permit disclosure (with one jurisdiction proposing that disclosure be mandated), and eight prohibit disclosure.
> - As to a client's intention to commit non-criminal fraud reasonably certain to result in injury to the financial interest or property of another person (Model Rule 1.6(b)(2)), two jurisdictions require disclosure, nineteen permit disclosure, twenty-nine prohibit disclosure (with four jurisdictions proposing that disclosure be permitted), and one requires withdrawal with notice thereof to persons likely to suffer injury.
> - As to a client's prior commission of a crime or fraud resulting in injury to the financial interest or property of another person (Model Rule 1.6(b)(3)), two jurisdictions require disclosure, twenty-five permit disclosure, twenty-three prohibit disclosure (with three jurisdictions proposing that disclosure be permitted), and one requires withdrawal with notice to persons likely to suffer injury.
> - As to a client's ongoing criminal or fraudulent act (Model Rule 4.1(b)), forty-four jurisdictions require disclosure, three permit disclosure, two prohibit disclosure (with one jurisdiction proposing that disclosure be mandated), and one requires withdrawal with notice thereof to persons likely to suffer injury.

Id. at 1125.

It is important to understand the rules of professional conduct for whatever state in which an attorney practices to determine when disclosure might be required.

Always remember that the attorney-client privilege is a common law doctrine that is separate and apart from the duty of an attorney to maintain the confidences of her client.

> The chief difference between the professional duty of confidentiality and the evidentiary attorney-client privilege is that the former applies to virtually all information coming into a lawyer's hands concerning a client, and forbids virtually all disclosures, whereas the latter only applies when the question is whether a lawyer can be compelled to testify about her professional communications with a client.

1 Geoffrey C. Hazard, Jr. & W. William Hodes, THE LAW OF LAWYERING § 9.7, at 9-25 (3d ed. 2001 & Supp. 2005-1).

VIII. Qualifying Expert Witnesses and Rules Governing the Presentation of Expert Witness Reports

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), is a U.S. Supreme Court case that changed the way judges and attorneys look at admission of expert testimony in federal courts. Pre-*Daubert*, the *Frye v. U.S.*, 293 F. 1013 (D.C. Cir. 1923), case provided guidance to the courts on expert evidence issues and said that expert testimony should be admitted if the expert's opinion was based on evidence "generally accepted in the scientific community." *Daubert* stated that attorneys and judges are to look first to Fed. R. Evid. 702 for guidance. It states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This rule applies to both scientific and nonscientific evidence. *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167 (1999). For an excellent review of the law in this area, attorneys should look at the manual that all federal judges have in their library, the MANUAL FOR COMPLEX LITIGATION. Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION, Expert Scientific Testimony, reproduced at SL094 ALI-ABA 189 (February 2006).

A. Factors to Consider

Since *Daubert*, courts can follow a type of checklist in determining whether the testimony of a witness proffered an expert should be allowed into evidence.

(1) **Is the witness truly an expert on the subject he or she is being offered for?** Using the words of Fed. R. Evid 702, does the witness have the "knowledge, skill, experience, training, or education" sufficient to be an aid to the Court in deciding the issues before it?

In bankruptcy court, the usual experts are appraisers, accountants, investment bankers and management consultants. There may be times when these witnesses are truly not qualified to testify as to the opinion they are asked to give, although that will probably be a rare circumstance. More often, once qualified as an expert on one subject, attorneys will let an expert wander into other areas and give opinions without objecting to his or her testimony. For instance, a management consultant might be qualified to give an opinion on the feasibility of a plan as it relates to valuation; but when he wanders into testimony about the propriety of an interest rate, he gives the testimony without challenge even though his resume does not qualify him for this opinion. Qualified for one opinion is not qualified for all. *E.g., Dijo v. Hilton Hotels Corp.*, 351 F.3d 679 (5th Cir. 2003); *Seatrax Inc. v. Soneck Int'l, Inc.*, 200 F.3d 358 (5th Cir. 2000); *In re Canvas Specialty, Inc.*, 261 B.R. 12 (Bankr. C.D.Ca. 2001).

(2) **Is the testimony relevant?** The *Daubert* case calls this element "fit." A recent paper on *Daubert* issues in bankruptcy, *Daubert and Bankruptcy Trials*, Dillon E. Jackson, *VALCON: The Conference on Bankruptcy Valuation, The University of Texas School of Law (2004)*, gave two examples of testimony that was not "fit" or relevant. The first example is from the *Daubert* case. A case has a fact issue as to the amount of light present on a particular night at a particular time. An expert on the phases of the moon is called who testifies on the moon phase and, therefore, the light on that night. However, if the witness is asked to opine on whether a person was apt to behave irrationally on that night due to the moon phase, that testimony would not be relevant or "fit." In the *VALCON* article, Mr. Jackson states that an expert witness on lost profits in a breach of contract case would not be appropriate if the debtor had never had any profits. The testimony would not be relevant. Another example he uses is testimony about the market rate of interest for a 100% loan-to-value commercial loan where there is no established market for such a loan anywhere.

(3) **Does the witness have sufficient facts or data upon which to base an opinion?** This rule needs to be read in conjunction with Fed. R. Evid. 703 which states: "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted."

For instance, in the *In re Canvas Specialty, Inc*., case, 261 B.R. 12, 20 (Bankr. C.D. Ca. 2001), the expert architect was to opine that some canvas canopies were not built according to specifications. However, it was not shown that he knew of oral modifications to the specifications that affected the design. Therefore, his testimony was excluded as not based upon sufficient facts. In another case testimony was excluded because the expert based evidence of a worldwide market for a product on "a handful of informal conversations with consultants from a limited geographic area." *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003 (10th Cir. 2002).

A witness' testimony cannot be excluded, however, just because the witness is relying on disputed facts. *Micro Chemical, Inc. v. Lextron, Inc.*, 317 F.3d 1387 (Fed.Cir. 2003). An attorney can point out to the Court that if the disputed fact is not proven, then the expert's opinion must be disregarded.

(4) **Is the testimony the product of reliable principles and methods?** This is the most written about issue. The courts are to examine this issue carefully, but not be too rigid. Assessing reliability is a "flexible inquiry." *Kumho* at 526 U.S. 137, 119 S.Ct. at 1175 (quoting *Daubert*, 509 U.S. at 594, 113 S.Ct. at 2786). A court should not allow testimony based merely upon "subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 595, 113 S.Ct. 2786. *Daubert* set forth a non-exhaustive list of factors to look at to assess reliability:

(1) "Whether a theory or technique . . . can be (and has been) tested;"

(2) "[W]hether the theory or technique has been subjected to peer review and publication;"

> (3) Whether "the known or potential rate of error" associated with "a particular scientific technique" as well as "the existence and maintenance of standards controlling the technique's operation" are appropriate; and
>
> (4) Whether the scientific theory or technique espoused has gained "general acceptance" in the scientific field of relevance.

Daubert, 509 U.S. 593-94, 113 S.Ct. 2786.

The Sixth and Ninth Circuits also recognize an additional factor. It is

> Whether the experts are proposing to testify about matters growing naturally and directly out of the research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying because the former provides important, objective proof that the research comports with the dictates of good science.

In re Dow Corning Corporation, 237 B.R. 364 (Bankr. E.D.Mich. 1999)(quoting *Smelser v. Norfolk Southern Ry.*, 105 F.3d 299, 303 (6th Cir. 1997)); *Clausen v. N/V New Caressa*, 339 F.3d 1049 (9th Cir. 2003).

Some examples are:

In re Dow Corning Corp., 237 B.R. 364 (Bankr. E.D.Mich. 1999). A CPA was asked to opine upon the sufficiency of a fund to satisfy anticipated breast implant claims against it. This issue affected the best interests of creditors test re the debtor's plan of reorganization. The expert's testimony was not allowed because it was based upon unproven assumptions that affected its reliability.

Frymire-Brinati v. KPMG-Peat Marwick, 2 F.3d 183 (7th Cir. 1993). A CPA used a method of determining the market value of partnerships that was not the "methodology that experts in valuation find essential." The testimony was not admissible.

Zachary v. Bridgestone/Firestone, Inc., 2002 WL 31907241 (S.D. Ind. 2002). Testimony of an injured party's expert was not admissible. He testified that underinflation of a tire caused a vehicle to yaw and roll. His opinion came from testing one tire that was not the tire in the accident nor was it even the same type as the injured party's tire. This testimony was also not admissible under factor 3 above--sufficient facts and data.

In re Shalom Hospitality, Inc., 293 B.R. 211 (Bankr. N.D. Iowa 2003). In a preference case, the judge allowed the testimony of an expert witness who used a "weighted days" methodology to calculate days of delinquencies. The trustee argued that a "calendar days" methodology was the appropriate calculation. The Court held that either methodology assisted the trier of fact in his duties.

Crisomia v. Parkway Mortgage, Inc., et al. (In re Crisomia), 286 B.R. 604 (Bankr. E.D.Pa. 2002). A debtor alleged violations of the Truth in Lending Act in an effort to reduce a

lender's claim. The lender offered a mortgage broker as an expert to opine, inter alia, that an application fee was reasonable, the lender should have viewed the fee as reasonable, the appraisal fee was reasonable, the debtors had misinterpreted the appraisal fee and an assignee of the loan would have concluded that the prepaid finance charges were accurate. The only support for these opinions was the mortgage broker's "professional experience in placing loans for over 12 years." The court ruled that the support was not based upon a reliable method or principle.

In re Westminster Assocs., Ltd., 265 B.R. 329 (Bankr. M.D. Fla. 2001). The debtor sought to recover for termite damage from a pest extermination company. The expert was to opine on the damages and costs of repair. The Court allowed the testimony even though the debtor was able to point out weaknesses in the opinion. The Court concluded that the weaknesses went to the weight of the evidence, not its admissibility.

Atlantic Richfield Co. v. Farm Credit Bank of Wichita, 226 F.3d 1138 (10th Cir. 2000). An expert's economic testimony was based upon a hypothetical model rather than an examination of the actual market. The court rejected the testimony as unreliable.

Children's Broadcasting Corp. v. Walt Disney Co., 245 F.3d 1008 (8th Cir. 2001). An expert's testimony on damages that did not consider a crucial element--competition--was unreliable. "Nothing in . . . *Daubert* . . . requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply *too great an analytical gap between the data and the opinion proffered." Children's Broadcasting*, 245 F. 3d at 1018 *(*quoting *G.E. Co. v Joiner*, 522 U.S. 136, 138, 118 S.Ct. 512 (1997))..

SEC v. Lipson, 46 F. Supp. 2d 758 (N.D. Ill. 1999). A CPA's expert opinion was inadmissible because it did not employ proper methodology and was merely offered to enhance another witness's credibility.

B. Practice Points

1. Write down the opinion being given.

2. Review the expert's qualifications with the opinion in mind. OBJECT under Fed. R. Evid. 702 if the qualifications are insufficient.

3. Review the opinion to see if it is an opinion on a matter of law. If so, OBJECT. For example, contract interpretation is a matter of law for a court to decide. "Unless there is a need to employ specific, technical, or other specialized knowledge to clarify terms of art, science, trade, or other industry-specific language, expert opinion testimony offered to interpret contract language is inadmissible." *Amica Mutual Ins. Comp. v. Moak*, 55 F.3d 1093, 1096 n.5 (5th Cir. 1995); *Cunningham v. Bienfang*, 2002 WL 31553976 (N.D.Tex. 2002).

4. Review the relevance of the opinion to the case. OBJECT if the opinion is not relevant under Fed. R. Evid. 703.

5. Review the facts and data upon which the expert bases her opinion. If the facts are not the exact facts of the case or a similar model, OBJECT under Fed. R. Evid. 702.

6. Review the principles and methods of analysis. If the principles have not been tested, peer reviewed, have a higher than acceptable rate of error, or do not have general acceptance in the field, OBJECT under Fed. R. Evid. 702. If the methods of analysis were derived solely for this opinion and were not developed independent of the lawsuit, OBJECT under Fed. R. Evid. 702 (6th Cir. factor). Finally, if the methods or principles do not appear to be reliable, OBJECT under Fed. R. Evid. 702.

7. Put the objection before the Court in the form of a motion in limine prior to trial. If that is not possible, object at the earliest opportunity at trial. Letting the evidence come in and simply relying upon the Court to weigh the import is unwise.

IX. Use of Judicial Notice

Judicial notice in bankruptcy courts and other federal courts is governed by Fed. R. Evid. 201 which is titled "Judicial Notice of Adjudicative Facts." The rule states:

> (a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.
> (b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
> (c) When Discretionary. A court may take judicial notice, whether requested or not.
> (d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
> (e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
> (f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.
> (g) Instructing Jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Courts are frequently asked to take judicial notice of some fact or another. The evidentiary rule is overused by many practitioners.

A. The Effect of Judicial Notice. The information that the court takes judicial notice of is admitted into evidence. *Marro v. Daniels*, 914 S.W. 2d 16 (CHECK). "Judicial notice is therefore a substitute for formal proof." Judge Barry Russell, BANKRUPTCY EVIDENCE MANUAL § 201.1 at 695 (Thompson/West 2007 ed.).

B. What Can Properly be Judicially Noticed. Only adjudicative facts can be noticed. These are facts about which there can be no reasonable dispute. Listed below are examples of case decisions in bankruptcy cases in which judicial notice has been allowed. This list includes the cases cited by Judge Russell in his BANKRUPTCY EVIDENCE MANUAL. His work provides more in depth review of the cases.

Most cases state that a bankruptcy judge can take notice of the entire case file as well as the documents submitted in connection with a contested matter, e.g. a motion for relief from the stay. *Nantucket Investors II v. California Federal Bank (In re Indian Palms Assoc., Ltd.)*, 6 F.3d 197, 205 (3d. Cir. 1995) (citing 4 other cases that so held). However "[w]e hasten to add that the fact that a document is included in the relevant record does not mean that the bankruptcy judge . . . is entitled to use it for any purpose. . . . One limitation is the rule that each litigant should be given a fair opportunity to rebut and put into perspective the evidence admitted against its position. . . . Another limitation is the rule requiring evidentiary competence. Under this rule, a document cannot be put to a hearsay use for most purposes, and for this reason, a previously filed court document will generally be competent evidence of the truth of the matters asserted therein." *Id.*

Medical facts - *In re Hertzel*, 329 B.R. 221 (6th Cir. BAP 2005) (progressive nature of multiple sclerosis).

Legal facts - *In re Martin*, 97 B.R. 1013 (Bankr. N.D. Ga. 1989) (Foreclosure sales in Georgia take place between 10 a.m. and 4 p.m. on the first Tuesday of each month as provided by statute).

Dates - *In re Holman*, 26 B.R. 110 (Bankr. M.D. Tenn. 1983) (Number of weeks in a period of time); *In re Goetz*, 43 B.R. 849 (Bankr. W.D. Wis. 1984) (same).

Court orders and proceedings - *In re Alexander*, 239 B.R. 911 (8th Cir. BAP 1999) (Order of federal district court); *Matter of American Biomaterials Corp.*, 954 F.3d 919 (3d Cir. 1992) (guilty plea); *In re Joseph*, 208 B.R. 55 (9th Cir. BAP) (dismissal of bankruptcy case); *In re Calder*, 907 F.2d 953 (10th Cir. 1990) (failure to list items in schedules and statement of affairs); *In re H.E. Graf, Inc*., 125 B.R. 604 (Bankr. E.D. Cal. 1991) (filing of secured claim); *In re Snider Farms, Inc*., 125 B.R. 993 (Bankr. N.D. Ind. 1991) (docket entries); *In re Morris*, 115 B.R. 752 (Bankr. E.D. N.Y. 1990) (filing of answer); *Continental Casualty Co. & Am. Casualty Co. v. Burns and Roe Enterprises, Inc. (In re Burns and Roe Enterprises, Inc.)*, 2005 U.S. Dist. LEXIS 26247 (N.J. 2005) (order of settlement); *Sherman v. Rose (In re Sherman)*, 18 Fed. Appx. 718, 721 (10th Cir. 2001) (Balance sheet from bankruptcy case).

Geography - *Boyce Motor Lines v. U.S.*, 342 U.S. 337 (1952).

Mathematical computations -*Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622 (9th Cir. 1982); *Magill v. U.S.*, 2006 WL 1153810 (E.D. Mo. 2006).

Interest rates - *Meilink v. Unemployment Reserves Comm'n of California*, 314 U.S. 564 (1942) (noting that interest rates vary); *U.S. v. Colo. Mufflers Unlimited, Inc*., 2004 WL 256504 (10th Cir. 2004) (noting the short-term interest rates published by the IRS); *Levan v.*

Capital Cities/ABC, Inc., 190 F.3d 1230 (11th Cir. 1999) (noting prime interest rate on specified dates in the past).

Other facts judicially noticed - *In re National Airlines, Inc*., 434 F. Supp. 269, 276 (S.D Fla. 1997) (stating "the court can take judicial notice that in southern Florida, National's flight attendants enjoy a reputation for competence as well as good looks. The court's judicial notice is supplemented by personal experience gained from more than 100 flights aboard National Airlines.").

C. What Cannot Properly Be Judicially Noticed. In bankruptcy court, judges are frequently asked to take judicial notice of the schedules and/or statements of affairs of debtors. What counsel want to use the schedules for is NOT to show that they were filed, or that an item is omitted from the schedules, or that they were filed on a certain date. What counsel want to use the schedules for is to usually to show the value of assets. They want to use the schedules as a shorthand way to get the evidence in without producing a witness who can be examined. As stated in the *Indian Palms* case above, judicial notice cannot be used to circumvent a hearsay problem. Several cases are listed below to show facts that are not amenable to admission by judicial notice.

First class mail is generally delivered overnight. *In re Mora*, 199 F.3d 1024 (9th Cir. 1999).

Documents not submitted to trial court cannot be used on appeal. *In re Environdyne*, 214 B.R. 338 (N.D. Ill. 1997).

Fact found to be true in a prior action. *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074 (7th Cir. 1997).

Medical fact that "asbestos causes cancer." *Hardy v. Johns-Manville Sales Corp*., 681 F.2d 334 (5th Cir. 1982).

D. Practical Pointers.

1. If you want a judge to consider a matter in the court file or record, make sure you ask the court during your case to take notice of the document or fact you wish to have admitted. Do not assume that the court will automatically consider the entire file or the history of the case.

2. Be specific as to exactly what fact you wish to have noticed. Do not simply ask the court to take notice of the file or the schedules.

3. If the fact you wish to have noticed is hearsay, be prepared to have the fact entered into the record in another manner.

4. Oftentimes, judicial notice, incorrectly done, shortens a proceeding considerably. Think about whether the request of opposing counsel really hurts your case. If not, consider letting the evidence be admitted. Also, if the party improperly seeking judicial

notice has no live witness to support his or her judicially noticed fact, you may be able to very effectively rebut the evidence if you have a live witness.

5. Attorneys sometimes use judicial notice to admit a Bluebook or Kelly Book valuation of a vehicle. *In re G.W.C. Financial & Ins. Services, Inc*., 8 B.R. 122 (Bankr. C.D. Cal. 1981). This will oftentimes be unsuccessful because value is not a fact that is not disputable. Be prepared to get the valuation testimony admitted in some other way.

X. Authentication of Documents.

Authentication of documents is dealt with in Fed. R. Evid. 901. Authentication is the requirement of identification of a statement or document prior to its admissibility. Authentication requires that the matter being testified about or the document being proffered is what the offeror claims it is.

How does a party authenticate a document?

1. By having the author testify as to the document. This is the most common authentication in the case of schedules or statements of affairs, letters, memoranda, etc.

2. By offering evidence of the recording or filing of the document in a public record. Fed. R. Evid. 901(7). For any court documents or official documents, certified copies of the documents will provide authentication. Certified copies are "self-authenticating" under Fed. R. Evid. 902(4). However, if a certified copy is not available, a party may offer the testimony of a witness as to the document and its filing in the public record.

3. By offering evidence of its likely truthfulness if it is an "ancient" document. Fed. R. Evid. 901(8). This rule requires evidence that a document "(A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered."

Examples of authentication (utilizing cases from BANKRUPTCY EVIDENCE MANUAL):

Matter of Clifford, 566 F.2d 1023 (5th Cir. 1978). A lien priority dispute arose. At issue was a security deed that was witnessed by two people, one of whom was a notary. However, the notary did not put his seal on the deed which made the deed not recordable. The bankruptcy court refused to allow the deed into evidence on authenticity grounds. The district court and the Fifth Circuit allowed the admission of the deed on the notary's testimony. The notary was able to authenticate the deed and establish it was what the proponent claimed it was.

In re Dougherty, 84 B.R. 653 (9th Cir. BAP 1988). Credit card statements were authenticated by debtor's testimony that he recognized the statements, had received similar statements at his home, the charges were his and the statements offered at trial were the same as the statements he got at home. The credit card bank, although without its own witness to authenticate the records, successfully offered the exhibits with this testimony.

In re Smallwood, 273 B.R. 579 (Bankr. W.D. Ark. 2002). IRS offered a "Certificate of Assessments, Payments, and Other Specified Matters" as evidence of the debtor's failure to pay trust fund taxes. The Certificate was under seal and bore the signature of the Field Director of a Submission Processing Unit. The Court held that this certificate was self-authenticated under Fed. R. Evid. 902(1).

Ball v. A.O. Smith Corp., 321 B.R. 100 (N.D.N.Y. 2005). Bankruptcy court admitted a transcript of a proceeding in the U.S. District Court in Louisiana as a duplicate of the original. The transcript contained a court reporter's signed certification. The court held that this document was self-authenticating under Fed. R. Evid 901 (b)(4). On appeal, the district court affirmed this holding.

XI. Work Product Privilege and the Protection of Appraisals, Consultant Reports, and Other Pre-Litigation Work Product

> The work-product doctrine makes unavailable to opposing counsel
>
> > documents and tangible things otherwise discoverable. . . prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) [unless the requesting party can make] 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.

Fed. R. Civ. P. 26(b)(3) (2006).

The purpose of the work-product doctrine is "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation' free from unnecessary intrusion by his adversaries." *U.S. v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) (quoting *Hickman v. Taylor*, 29 U.S. 495, 510-11 (1947)).

The client and the attorney are holders of the protection, *In re Cendant Corp. Secs. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003), and either can assert it. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 924 n.15 (8th Cir. 1997); *Loeffler et al. v. Lanser (In re ANR Advance Transportation Co., Inc.)*, 302 B.R. 607, 615 (E.D. Wis. 2003) (stating that chapter 7 trustee takes over work-product protection rights of debtor, but attorney has rights to protection too).

There are two types of work-product protection--"tangible" work-product protection and "opinion" work-product protection. Tangible or fact work-product protection covers documents or tangible things prepared by or for a party by an attorney or his agent in anticipation of litigation. "Opinion" work-product is the attorney's conclusions, legal theories, mental impressions, or opinions. Opinion work-product is zealously protected by courts. Richmond

Article, *supra at 391*. As stated in Fed. R. Civ. P. 26(b)(3) above, tangible work-product is discoverable if a party proves (1) that the party has substantial need of the materials, and (2) that the party cannot obtain the substantial equivalent without undue hardship.

Once a person is designated as a testifying expert, any materials he or she used to prepare a report, or upon which an opinion is based is subject to discovery. Parties can discover work-product documents or even privileged documents if the expert used them to prepare his report.

Therefore, how can a party protect an appraisal report or a consultant's report or advice?

1. Rule 26(b)(3) specifically protects the work-product of consultants or agents of a party as well as their attorneys, sureties, indemnitors and insurers. Therefore, so long as the appraiser or other consultant is not designated or determined to be a testifying expert, his or her appraisal or other report is work-product.

2. Attorneys should probably hire the consultant or appraiser so no documents are in the client's files where they can be inadvertently produced.

3. No person should be designated a testifying expert until his or her review of the issues is completed and counsel is aware of what the report of the expert witness will state.

4. Even at the initial stages of engaging a consultant or appraiser, an attorney should be extremely careful about what a consultant is told or shown because if the consultant later becomes a testifying expert, all materials he or she used will be discoverable.