Evidentiary Privileges

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Issues Pertaining to Evidentiary Privileges

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EVIDENTIARY PRIVILEGES IN BANKRUPTCY PRACTICE

I. Source of the Privileges –The source of evidentiary privilege has been codified in Fed. R. Evid. 501.

A. Under Federal Rule of Evidence 501, recognized privileges are established by "the common law, as interpreted by United States Courts in light of reason and experience, unless" the United States Constitution, a federal statute or rules proscribed by the United States Supreme Court provide otherwise. Fed. R. Evid. 501. Currently, there are few privileges which are recognized in federal courts. Specifically, the psychotherapist privilege, the spousal privilege, the attorney client privilege, the physician patient privilege and penitent priest are recognized in federal courts. All of these privileges are premised on the theory that there are situations where the benefit of frank and honest communication outweighs the need for its disclosure. *Jaffe v. Redmond*, 518 U.S. 1, 11 (1966) ("Our cases make clear that an asserted privilege must also serve the public ends."); *Hunt* v. *Blackburn,* 128 U. S. 464, 470 (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

1. Psychotherapist Privilege: As established in *Jaffe v. Redmond*, 518 U.S. 1, 10 (1996), communications concerning counseling or therapy with a licensed psychotherapist, psychologist or social worker are privileged. *Id.* This is because the need to have honest communication with a psychologist promotes mental health and safety. *Id.* at 12-13. ("If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation.").

2. Attorney Client Privilege: The attorney client privilege has been codified in Federal Rule of Evidence 502. The purpose of the attorney client privilege is that it "encourage[s] full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn co. v. United States*, 449 U.S. 383, 389 (1981). The attorney client privilege protects most communications between an attorney and her client so long as they relate to legal representation.

3. Spousal Privilege: Originally, the spousal privilege allowed a non-testifying spouse to preclude her spouse from testifying against her. However, the privilege has been subsequently modified to permit a testifying spouse to choose to testify against the non-testifying spouse. *See Trammel v. United States*, 445 U.S. 40, 53 (1980).

4. Physician Patient Privilege: Although there is currently no federally recognized physician patient privilege, (*see Whalen v. Roe*, 429 U.S. 589, 602n. 28 (1977)), some advocate the recognition of it. *See* Ralph Reubner & Leslie Ann Reis, *Hippocrates to Hippa: A*

Foundation for a Federal Physician-Patient Privilege, 77 Temp. L. Rev. 505, 506 (2004).

B. Pursuant to Federal Rule of Evidence 501, where state law governs the rule of the decision in a civil case, so do that state's rules concerning privilege. Because the state's laws that provide the rule of decision also govern the applicability of privilege, the governing law or choice of law can affect evidentiary issues. To the extent that these evidentiary issues are outcome determinative, they may implicate applicable the choice of law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Hanna v. Plumer*, 380 U.S. 460 (1965).

1. Each state has established different privileges that can affect the outcome of a particular case. For example, if a person is driving drunk, hits a tree and then tells a police officer of that fact as the officer is preparing a crash report, that statement cannot be used against the person in court. *See* Fla. Stat. § 316.066(4). This is because Florida Statute 316.066(4) provides that "any statement made . . . to a law enforcement officer for the purpose of completing a crash report . . . shall be without prejudice to the individual so reporting. Such report or statement may not be used as evidence in any trial, civil or criminal." Fla. Stat. § 316.066(4).

2. Although the Florida Crash Report privilege likely would not affect choice of law, it *could* be outcome determinative.[1] Other privileges may have greater impact on the choice of law. For example, twenty-four states, including Florida, Georgia, Colorado and Arizona, recognize an accountant-client privilege, while, others, including Alabama and New York, do not. *See* Fla. Stat § 90.5055; OCGA 43-3-32; Colo. Rev. Stat. § 13-90-107; Ariz. Rev. Stat. § 32-749. Further, some states, including California and Kentucky, require accountants to maintain confidentiality, unless subpoenaed. *See* Cal. Code Regs. Tit. 16 § 54.1; Ky. Rev. Stat. § 325.440. Other states, including Connecticut and Iowa, except court proceedings from the accountant's duty of confidentiality. *See* Conn. Gen. Stat. Ch. 389, 20-281j; Iowa Code § 542.17.[2]

a. Thus, where a potentially insolvent debtor who is domiciled in California gets advice from an accountant in Florida concerning her insolvency and asset transfers which she later makes in Alabama, the choice of law could affect the outcome of the proceedings. Assuming a creditor later seeks to avoid the transfer under a state's applicable Uniform Fraudulent Transfer Act, and diversity is present, the choice of law and privilege could be outcome determinative. Because whether the accountant may be required to disclose the contents of communications with the debtor will vary based on state law, and the debtor's intent could be determined by the account's testimony, the evidentiary privilege could be outcome determinative.

3. State Constitutional privileges: the constitutions of Alaska, Arizona, California, Florida, Hawaii, Idaho, Illinois, Louisiana, Michigan, Montana, South Carolina, Texas,

1 This statute was only mentioned to serve as an attention grabber. Notwithstanding the likely inapplicability of the Florida Crash Report Privilege in federal court, because Florida Statute § 316.066(4) only applies to communications made in Florida, it is highly unlikely that it could create choice of law issues during litigation.

2 It should be noted that there is a very limited accountant client privilege which is recognized in federal court. *See* 26 U.S.C. § 7525(a). The federal accountant-client privilege only applies to privileged communications as if between a tax-payer and an attorney, and may only be asserted in a noncriminal tax matter before the IRS or in federal court, if it involves the United States. 26 U.S.C. §§ 7525 (a)(1), (2).

Washington, Wisconsin, and Wyoming grant a right of privacy. The right of privacy in some states, such as California and Florida, are more expansive than the right established in others, such as Arizona and Alaska. *Compare* Cali. Const. Art. I, §§ 1, 3, 24 *and* Fla. Const. Art. I, § 23 *with* Ariz. Const. Art. 2, § 8 and Alaska Const. Art. 1 § 22. The constitutions of Alaska and Arizona provide that the right of privacy can be limited through the law, while Florida and California's do not permit such statutory limitations.

II. Fifth Amendment Right Against Self Incrimination.

A. Under the Fifth Amendment to the Constitution, "[n]o person . . . shall be compelled in any case to be a witness against himself[.]" *Miranda v. Arizona*, 384 U.S. 436, 442 (1966) (citing U.S. Const. amend V.). Thus, in both civil and criminal trials, no person is required to make statements that could result in her or his incrimination. *See, e.g.*, *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1087 (5th Cir. 1979) (reversing dismissal of case because trial court made assertion of Fifth Amendment privilege costly.).

B. The Fifth Amendment privilege's protections have likewise been recognized in bankruptcy cases. *See In re Connelly*, 59 BR 421, 432 (Bankr. N.D. Ill. 1986); *Interim Investors Committee v. Jacoby*, 90 B.R. 777, 779-80 (W.D. N.C. 1988) (recognizing the applicability of the Fifth Amendment in Bankruptcy proceedings, but affirming the bankruptcy court's finding of waiver).

C. The Fifth Amendment privilege may be asserted in live testimony – such as during a deposition, an examination pursuant to Rule 2004, Federal Rules of Bankruptcy Procedure, a 11 U.S.C.§ 341(a) meeting of creditors, or a 11 U.S.C. § 343 examination of the debtor. It may also be asserted during trial. *See, e.g.*, *Interm Investors*, 90 B.R. at 779; *In re Ciotti*, 442 B.R. 412, 416 (Bankr. W.D. Penn. 2011) ("The Fifth Amendment Privilege against self-incrimination may be properly asserted by a debtor in a bankruptcy proceeding with the debtor retaining the right to receive a discharge.") (citing *In re Nam*, 245 B.R. 216, 224n. 7 (Bankr. E.D. Pa. 2000); *In re Potter*, 88 B.R. 843, 849 (Bankr. N.D. Ill. 1988)). However, a debtor's right to assert a Fifth Amendment privilege is limited in bankruptcy proceedings. *See Scarfia v. Holiday Bank*, 129 B.R. 671, 675 (M.D. Fla. 1990).

1. To properly invoke a Fifth Amendment privilege, a witness must establish that her or his silence is justified on a question by question basis. *Burt Hill, Inc. v. Hassan*, 2009 WL 4730231, at *2 (Bankr. W.D. Penn. 2009); *In re Vignola*, 2009 WL 241281 at *1 (Bankr. E.D.N.C. 2009). The court must then investigate the legitimacy and scope of the assertion of privilege. *United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980).

D. The Fifth Amendment privilege may also be asserted as it relates to the compelled production of documents. *Fisher v. United* States, 425 U.S. 391, 400 (1976); *United States v. Doe*, 465 U.S. 605 (1986). In *Dier v. Banton,* 262 U.S. 147, 43 S.Ct. 533 (1923); *In Re Fuller,* 262 U.S. 91, (1923), *Johnson v. United States,* 228 U.S. 457, 33 S.Ct. 572, 57 L.Ed. 919 (1913), the United States Supreme Court first and implicitly recognized that the Fifth Amendment privilege allows a bankrupt debtor to refuse to produce incriminating evidence against herself. However, the protection afforded by the Fifth Amendment only applies where the production of documents itself, and not their content, can result in incrimination. Once a debtor turns over such records to a third party, that privilege no longer applies. Despite the foregoing, a debtor may

properly assert his Fifth Amendment privilege in relation to the creation of schedules and other disclosures in bankruptcy cases. *Butcher v. Bailey*, 753 F.2d 465, 470 (6th Cir. 1985).

1. To properly assert his Fifth Amendment privilege on that basis, a debtor must, "at least classify documents and indicate something about why the act of production of each class of documents might be incriminating." *Butcher v. Bailey*, 753 F.2d 465, 470 (6th Cir. 1985). A general assertion of privilege is insufficient. *See In re John Lakis, Inc.*, 228 F.Supp. 918, 920 (S.D. N.Y. 1964). Further, the assertion of privilege in relation to the production of documents is limited in bankruptcy cases, as 11 U.S.C. § 521(4) requires a debtor to surrender all property and documents to the estate.

2. A debtor, however, cannot assert a Fifth Amendment privilege as it relates to the turnover of property of the estate. *See In re Crabtree*, 39 B.R. 718, 726 (Bankr. E.D. Tenn. 1984); *In re Devereaux*, 48 B.R. 644, 646 (Bankr. S.D. Ca. 1985) (citing *In re Harris*, 221 U.S. 274, 279 (1911) ("The question is not of testimony, but of surrender, – not of compelling the bankruptcy to be a witness against himself in a criminal case that he is no longer entitled to keep.").

3. A debtor cannot appeal an order compelling the production of documents because such an order is not a final order for purposes of appellate jurisdiction. *Carpenter v. Mohawk Inds. Inc.*, 541 F.3d 1048 (11th Cir. 2008); *Matter of Int'l Horizons*, 689 F.2d 996, 1001n. 9 (11th Cir. 1982). However, a debtor can fail to comply with such an order, and then appeal a sentence for contempt. *Carpenter v. Mohawk Inds. Inc.*, 541 F.3d 1048 (11th Cir. 2008); *Nat'l Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174 (2d Cir. 1979); *David v. Hooker, Ltd.*, 560 F.2d 412 (9th Cir. 1977).

E. Voluntary bankruptcy proceedings can be dismissed if debtor refuses to surrender such records. This would not violate any asserted privilege. *United States v. Rylander,* 460 U.S. 752, 757 (1983) (party cannot substitute a claim of privilege for burden of production but, rather, must choose between them).

F. "The Fifth Amendment privilege is not self-executing; if not invoked it may be deemed to have been waived, including by litigation conduct short of a 'knowing and intelligent waiver.'" *In re DG Acquisition Corp.*, 151 F.3d 75, 80 (2d Cir. 1998) (citing *Maness v. Meyers*, 419 U.S. 449, 466 (1975); *Garner v. United States*, 424 U.S. 648, 654 n. 9 (1976)) (holding that a debtor's conduct must be construed strictly against waiver). Thus, courts will infer a waiver of the Fifth Amendment privilege only if: (1) the witness' prior statements created a significant likelihood that the finder of fact will be left and prone to rely on the distorted view of the truth; and (2) the witness had reason to know that his prior statements could constitute a waiver. *Klein v. Harris*, 667 F.2d 274, 287 (2d Cir. 1981).

G. If a witness provides incriminating testimony at a proceeding, in most circumstances, she cannot later assert the privilege as it relates to the details of the same subject matter. *Klein v. Harris*, 667 F.2d 274, 287 (2d Cir. 1981).

H. Use immunity – § 344: 11 U.S.C. § 344 authorizes the granting of immunity pursuant to 18 U.S.C. §§ 6001-6005 in bankruptcy cases. The disclosure of private information

may be compelled if immunity removes the risk of incrimination. *Kastigar v. United States*, 406 U.S. 441 (1972). However, where no request for immunity is made under 18 U.S.C. §§ 6001-6005, a debtor may properly assert his Fifth Amendment privilege, and obtain a discharge. *Lefkowitz v. Turley*, 414 U.S. 70, 82-83 (1973).

I. Where a debtor is provided immunity, and refuses to testify thereafter, the debtor can be subject to contempt, and have his discharge denied. *See In re Martin-Trigona*, 732 F.2d 170, 174-4 (2d Cir. 1984); *O'Hagan v. Blythe,* 354 F.2d 83, 84 (2d Cir.1965); *In re Manufacturers Trading Corp.,* 194 F.2d 948, 956 (6th Cir.1952); *Espiefs v. Settle*, 14 B.R. 280, 286 (D.C.N.H.1981) (debtor may be held in contempt for failing to testify despite a grant of immunity); *In re Parr*, 13 B.R. 1010, 1015 (D.C.E.D.N.Y.1981).

J. It is well established, however, that corporations do not enjoy a Fifth Amendment privilege against self-incrimination. *See Braswell v. United States*, 487 U.S. 99, 116-17 (1988); *United States v. Kordel*, 397 U.S. 1, 8n. 9 (1970) (citing cases); *Eagle Hospital Physicians, LLC v. SRG Consulting, Inc.* 561 F.3d 1298, 1303n. 2 (11th Cir. 2009); *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1206-07 (Fed. Cir. 1987). However, individuals who would otherwise assert such a privilege cannot be compelled to testify. Accordingly, in circumstances where a corporation is required to provide testimony, it must designate and prepare an expert witness to testify on its behalf. *Marcelle v. American Nat'l Delivery, Inc.*, 2009 WL 43449985, at *2-3 (M.D. Fla. 2009); *City of Chicago, Ill. v. Wolf*, 1993 U.S. Dist. LEXIS 6810, 1993 WL 177020 (N.D. Ill. 1993); *SEC v. Mut. Benefits Corp.*, 2008 U.S. Dist. LEXIS 6178, at *15, 2008 WL 239167, at *3 (S.D. Fla. 2008); *Martinez v. Majestic Farms, Inc.*, 2008 U.S. Dist. LEXIS 6121, at *7, 2008 WL 239164, at *2 (S.D. Fla. 2008) (holding it is undisputed that a defendant corporation does not have a Fifth Amendment privilege against self-incrimination, and must provide a corporate representative for a deposition). A failure to adequately prepare such a witness could result in the imposition of sanctions. *see Black Horse Lane v. Dow Chemical Corp.*, 228 F. 3d 275, 304 (3d Cir. 2000) ("[I]f a Rule 30(b)(6) witness is unable to give useful information he is no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it."); *see also Resolution Trust Corp. v. Southern Union Co.*, 985 F. 2d 196 (5th Cir. 1993).

III. Attorney Client Privilege

A. The attorney client privilege applies to confidential attorney communications. Fed. R. Evid. 502(g). Confidential communications include the advice given by attorney and the facts given to an attorney that are necessary to render such advice.

B. Limitations: the attorney client privilege generally applies only to the advice of an attorney in securing legal representation, and not to physical evidence. It can only be waived by a client, and it continues after termination of an attorney client relationship. *See Kevlik v. Goldstein*, 724 F.2d 844, 849 (1st Cir. 1984); *United States v. Wilson*, 798 F.2d 509 (1st Cir. 1986). Additionally, an attorney is required to disclose information, where a failure to disclose such information would constitute furtherance of a particular crime or fraud. *United States v. Zolin*, 491 U.S. 554, 563 (1989).

C. The attorney client privilege applies to both individuals and corporations. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981). The power to waive a corporate attorney client privilege rests with the corporation's management. Thus, when the control of a corporation

passes to new management, the authority to assert and waive the corporation's attorney client privilege passes to them. *See Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349 (1985). Accordingly, when control of a corporation passes to a debtor in possession or a trustee, the trustee has the power and authority to waive the attorney client privilege. *Id.*at 353-4. This is because "when a trustee is appointed, he assumes control of the business and the debtor [corporation's] directors are 'completely ousted.' " *Id.* (internal citations omitted.).

D. In *Re TNG Acquisition, Inc.*, a Canadian bankruptcy court found that a Chief Restructuring Officer also holds an attorney-client (or solicitor-client) privilege on behalf of the corporation that the CRO represents. It further limited the applicability of Section 164(1) of the Bankruptcy and Insolvency Act (or Canadian Bankruptcy Code), to the extent that it does not override the attorney client privilege as applied under Canadian Law.[3]

1. In America, however, a Chief Restructuring Officer may not have the same powers as a bankruptcy trustee. *See In re Adelphia Comm'n Corp.*, 336 B.R. 610, 668-68n. 151 (Bankr. S.D. N.Y. 2006) ("[W]hile turnaround specialists have frequently been named as *statutory* trustees, and while the court assumes (without deciding) that turnaround specialists hired by debtors as officers (such as Chief Restructuring Officer) have at least some fiduciary duties, just as ordinary corporate officers do, the Court would not expect any individuals so hired to have the powers of a board of directors, or of a trustee.").

E. *Weintraub*, also recognized that successor officers and directors may waive their attorney client privilege. *Id.* (*Weintraub*, 471 U.S. at 349). However those successors are bound by fiduciary duty, and cannot waive such privilege unless it is in the best interest of the corporation. *Medcom Holding Co. v. Baxter Travenol Labs.*, 689 F. Supp. 841, 843 (N.D. Ill. 1988). This rule also applies to successor trustees or beneficiaries. *In re Bame*, 251 B.R. 367, 374 (Bankr. D. Minn. 2000).

IV. Attorney Work Product Protection Doctrine

A. Federal Rule of Evidence 502(g)(2) defines "work-product" as tangible material (or its intangible equivalent) prepared in anticipation of litigation or trial. The work-product doctrine applies to documents prepared in anticipation of litigation. *FTC v. Grolier Inc.*, 462 U.S. 19, 25 (1983). There are three types of work product: (1) documents that embody communication between an attorney and the client; (2) documents analyzing the law, facts, trial strategy, and that reflect the attorney's mental impressions but were not provided to a client; and (3) documents that discuss a communication between an attorney and a client, the subject matter of the case, but are not themselves to or from the client.

B. Limitations: It does not apply to evidence or documents produced in the ordinary course of business. In order to obtain documents which would otherwise be protected by the work product doctrine, a party must show a substantial need for such documents, and that the party cannot obtain the evidence through other means. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947); *United States v. Nobles*, 422 U.S. 225, 236-40 (1975).

C. Waiver of the work product protection doctrine only extends to factual or non-

3 Section 164(1) of the Bankruptcy and Insolvency Act is analogous to 11 U.S.C. § 521(4).

opinion work product concerning the same subject matter as the disclosed work product. *See In re Echo Star Comm'n Corp.*,448 F.3d 1294, 1302 (Fed. Cir. 2006). The overarching goal of a waiver is to prevent a party from using the advice he received as both a sword by waiving privilege to favorable advice, and a shield, by asserting privilege to unfavorable advice. *Fort James Corp. v. Solo Cup Co.* 412 F.3d 1340, 1349 (Fed. Cir. 2005).

D. Federal Rule of Civil Procedure 26(b)(3) provides that:

> a party may obtain discovery of documents and tangible things...prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative...only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he 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). Thus, Rule 26(b)(3) extends work product protection to not only attorneys, but those persons who are retained by attorneys for the purpose of assisting them in anticipation of litigation, so long as those persons are not expected to testify.

E. While the disclosure of documents may be sufficient to waive the attorney client privilege, it does not constitute a waiver of the work product protection doctrine. *United States v. Am. Tel. and Tel. Co.*, 642 F.2d 1285, 1299-1300 (D.C. App. 1980) ("By contrast, the *work product privilege* does not exist to protect a confidential relationship, but rather *to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent*.") (citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)) (emphasis in original).

V. Joint Privilege

A. Because an in-house counsel for a corporation may represent both individuals and clients, at times both an individual and a corporation may hold a joint attorney client privilege. *See United States v. Gaff*, 610 F.3d 1148, 1158 (9th Cir. 2010).

B. The majority of courts which have addressed the question of whether an officer or employee may assert an individual privilege apart from his employers have adopted a multi-part test established by the Third Circuit in *In the Matter of Bevill*, *Bresler & Schulman Asset Mgmt. Cor.*, 805 F.2d 120, 124 (3d Cir. 1986). *See United States v. Graf,* 610 F.3d 1148 (9th Cir. 2010); *Ross v. City of Memphis,* 423 F.3d 596, 605 (6th Cir. 2004); *In re Grand Jury Subpoena,* 274 F.3d 563, 571 (1st Cir. 2001); *In re Grand Jury Proceedings,* 156 F.3d 1038, 1040-41 (10th Cir. 1998); *United States v. Int'l Bhd. of Teamsters,* 199 F.3d 210, 215 (2d Cir. 1997).

1. The *Bevill* test requires a person to show that: (1) she approached counsel for the purpose of seeking legal advice; (2) when she approached counsel, she made it clear that she was seeking legal advice in an individual capacity; (3) that the counsel found it appropriate to communicate with her in such a capacity, despite a possible conflict; (4) the conversations were

confidential; and (5) the communications did not concern a company's general affairs. *Bevill*, 805 F.2d at 123 (citing *In re Grand Jury Investigation, No. 83-30557*, 575 F.Supp. 777, 780 (N.D. Ga. 1983)).

2. An ex-employee of a corporation cannot waive the corporation's attorney client privilege, any more than an employee. *See In re Richard Roe, Inc.*, 168 F.3d 69, 72 (2d Cir. 1999); *United States v. Int'l Bhd of Teamsters*, 119 F.3d 210, 215 (2d Cir. 1997).

C. The joint privilege has also been extended to protect communications between parties who share a common interest in litigation. *See In re Grand Jury Subpoena: Under Seal*, 415 F.3d 334, 341 (4th Cir. 2005); *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989). The joint defense privilege applies so long as the communication in question was made in confidence, and the client must have reasonably understood it to be so given. *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989). Further, the communication must be made in the course of an ongoing common enterprise, and be intended to further the enterprise. *Eisengberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir. 1985); *see also In re Fundamental Long Term Care Inc.*, 489 B.R. 451, 468 (Bankr. M.D. Fla. 2013) (holding that while a trustee and receiver are adverse in a bankruptcy proceeding, their common interest in another matter renders the joint privilege applicable as it relates to the other matter.)

1. In *In re City of Detroit, Michigan*, the City of Detroit claimed that it was entitled to a joint privilege as it related to communications with the State of Michigan. *See* ECF # 920 in 13-bk-153846. However, a creditor objected to its assertion of privilege and moved to compel testimony. *Id.* at 1. Specifically the creditor argued that (1) the assertion related to communications made prior to the City of Detroit's filing for bankruptcy protection; (2) some communications between the City of Detroit and the state of Michigan did not relate to their joint representation; and (3) the city and state officials waived their right to assert the privilege. *Id.* at 10-12. (quoting *High Point SARL v. Sprint Nextel Corp.*, 2012 WL 234024, at *5 (D. Kan. Jan. 25, 2012) ("[T]he key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial."); *North Am. Rescue Prods., Inc. v. Bound Tree Medical, LLC*, 2010 WL 1873291, at *4 (S.D. Ohio May 10, 2010) (holding that a commercial interest was insufficient to establish a joint privilege); *On Business Solutions Inc. v. Hyundai Motor Am.*, 2011 WL 6957594, at *2 (N.D. Ohio 2011); *In re Megan Racine Assoc., Inc.*, 189 B.R. 562, 573 (Bankr. N.D. N.Y. 1995) ("The Parties asserting privilege must also demonstrate that each communication was made in the course of the joint-defense effort and was designed to further that effort.")).

2. The creditor's motion was granted in part and denied in part. *See* ECF # 956 ("Minute Entry. Hearing Held. Motion granted in part, denied in part."). While ordering an expedited transcript is prohibitively expensive, it is likely that the Court ruled that only those communications which were made in furtherance of the joint defense of the city and state were privileged, but that they could not assert it to the extent that the communications were not made for such purpose.

3. Where an attorney obtains confidential information in the course of a representation, which may put the attorney in a position where the confidential can be used against one client, but not the other, the attorney should withdraw from representation. *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 334, 341 (4th Cir. 2005). Further, the joint defense

privilege is inapplicable during subsequent litigation between joint clients. *FDIC v. Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000).

4. Verbal agreements have little effect on the application of the joint defense privilege, as only the person who made the statement may properly waive the privilege. *In re Grand Jury Subpoena*, 274 F.3d 563, 573 (1st Cir. 2001). However, under Federal Rule of Evidence 502(e), "[a]n 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."

D. Where parties seek to create a joint privilege via written agreement, the agreement may be held void as a matter of public policy. *See In re Ginn-La St. Lucie Ltd.*, 439 B.R. 801, 806 (Bankr. S.D. Fla. 2010); *see also In re Fundamental Long Term Care, Inc.*, 489. B.R. 451, 468 (Bankr. M.D. Fla. 2013). In *Ginn*, the bankruptcy court found that documents that were otherwise discoverable could not be protected under the joint privilege doctrine because of the existence of a joint defense agreement. *Id.* The basis for the court's decision was that the joint defense agreement was contrary to the concept that joint clients may not assert the attorney client privilege against each other in subsequent adverse litigation between them, and their enforcement would "shield wrongdoers at the expense of the debtor's creditors." *Id.* at 805 (citing *In re MMirant Corp.*, 326 B.R. 646, 650 (Bankr. N.D. Tex. 2005); *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103 (5th Cir. 1970)).

1. The court also noted that *Weintraub* is applicable to the joint defense privilege. *Id.* at 804 (citing *Weintraub*, 471 U.S. at 358). It consequently required the disclosure of documents that may have otherwise been protected as work product, while noting that "it is the attorney's burden to rebut [a] presumption of full client access by showing substantial grounds exist to refuse work product to a former client in a represented matter." *Id.* at 806. Like the *Ginn* Court, the court in *In re Fundamental Long Term Care, Inc.*, held that the trustee was entitled to documents which otherwise would have been protected by the work product protection doctrine. 489. B.R. at 473.

E. Limitations: same as the attorney client privilege and work product protection doctrine.