

Commercial Fraud Task Force Committee

The ABI Commercial Fraud Task Force Committee facilitates information sharing, training, and education between ABI members and the public-private sector to combat commercial bankruptcy fraud.



Getting at the Truth: Using the Attorney-Client Privilege Waiver to Gain Access to “Inside” Information

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In any investigation, finding the sources that have the information you need is key to success. Attorneys who represented the target of your investigation would be a valuable resource, except for the attorney-client privilege. For that reason, investigators do not often think of subpoenaing the files and records of attorneys. However, when the attorney represented a corporation or other “inanimate” legal entity now under the control of a liquidator, bankruptcy trustee or even new management, that privilege can be waived by new persons in control. This valuable resource may be easily overlooked. As a trustee in bankruptcy or attorney for such trustees, I have used this tool several times in conducting my investigations, with excellent results. This article will discuss the basis for such a waiver and the circumstances where it can be used.

The attorney client privilege applies where (1) legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, and (3) the communications are made relating to that purpose (4) in confidence (5) by the client. *U.S. v. White*, 950 F.2d 426, 430 (7th Cir. 1991), citing *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir.1983) (citing 8 Wigmore §2292). Such communications are then, at the client’s instance, permanently protected from disclosure by himself or by the legal adviser, except where the protection is waived. *Id.* The privilege covers not only the advice given by the attorney, but information given to the attorney in confidence in connection with such advice. *Trammel v United States*, 445 U.S. 40,51, 100 S.Ct.906 (1980)

In *Commodity Futures Trading Commission vs. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986 (1985), the Supreme Court established the principle that when management and control of the affairs of an inanimate entity such as a corporation passes to new management or a new person in control, that successor controls the privilege and can waive it. In *Weintraub*, the Commodity Futures Trading Commission, as part of an ongoing investigation of a corporation then being liquidated in a chapter 7 bankruptcy, served a subpoena on the debtor corporation’s former counsel seeking testimony about a variety of matters including suspected misappropriation of customer funds by officers and employees. When the attorney refused to answer certain questions, the commission obtained from the chapter 7 bankruptcy trustee a waiver of any privilege possessed by the debtor for such communications. The validity of that waiver ended up

before the Court which held that the trustee, as the party most analogous to the corporation's former management, controlled the privilege and could waive it even over the objections of the original management whose activities were under investigation.

The Court's reasoning in *Weintraub* shows the potential breadth of situations in which this same principle can apply. The Court started with the proposition that "as an inanimate entity, a corporation must act through agents". 471 U.S., at 348, 105 S. Ct., at 1991. Normally, the management, consisting of officers and directors, exercise the attorney-client privilege consistent with their fiduciary duty to act in the best interests of the corporation rather than in their own self interest. *Id.* "New managers installed as a result of a takeover, merger, loss of confidence by shareholders or simply normal succession, may waive the attorney-client privilege with respect to communications made by former officers and directors" *Id.* This can happen even over the objections of the former management. *Id.* Because the corporation was then in a chapter 7 bankruptcy, the Court focused its attention on who could then exercise the privilege. Based on several factors, the Court held, the bankruptcy trustee held the privilege. All corporate property passed to the trustee upon the bankruptcy filing, along with the right to use, sell or lease it. 471 U.S., at 351, 105 S.Ct., at 1992-93. The trustee is directed to investigate the corporation's financial affairs and empowered if necessary to sue its officers or directors or insiders. *Id.* The trustee "assumes control of the business and the debtor's directors are 'completely ousted.'" 105 S.Ct, at 1993. The Court was careful to note that its holding did not apply to individuals, only to inanimate entities. 471 U.S., at 356, 105 S.Ct., at 1995.

The logic of *Weintraub* is not limited to corporations in bankruptcy, and courts have applied it in other situations involving inanimate entities that can act only through agents. Thus, following *Weintraub*, the right to waive the privilege has been extended to bankruptcy trustees of limited partnerships, *United States v Campbell*, 73 F.3d 44,47 (5th Cir. 1996); *Meoli v American Medical Service of San Diego*, 287 B.R. 808, 815-817 (S.D. Cal 2003), and an official liquidator appointed in a foreign involuntary insolvency proceeding. *In re Gold and Appel Transfer S.A.*, 342 B.R. 386 (Bankr. D.C. 2006). Control of the privilege has even extended to assignees or transferees of most if not all of a corporation's assets, so long as these persons retain a degree of control over the business and allowing the waiver will not have adverse practical consequences for the value or operations of an ongoing enterprise. *See American International Specialty Lines Insurance Company v NWI-I Inc.*, 240 F.R.D. 401 (N.D. Ill 2007) and cases cited therein.

It is hardly a stretch to extend the *Weintraub* waiver power to receivers, assignees for the benefit of creditors or new members in control of a limited liability company. We should note, however, that the former managers may still be able to assert the privilege where they can show that the confidential communications sought to be waived were with the former corporate counsel for the purposes of seeking personal advice in their individual capacities, and not concerning matters within the company or its affairs. *Matter of Bevill, Bresler and Schulman Asset Management Corp.*, 805 F. 2d. 120, 123-125 (3rd Cir. 1986). Also, a waiver of the privilege by new management may not be effective where the communications were made in the course or representing multiple parties with a common interest. *See Meoli, supra.*

When the privilege can be waived, a treasure trove of leads and information can await. If the attorney represented the corporation or entity in previous litigation, or sale of assets, the volume

of information may be substantial, if not overwhelming. In any event, disclosure of communications with former management about areas of concern can provide valuable leads what to look for and where to look. Even in the more mundane situation, it is far easier to be allowed to comb through the former attorney's file than to have to ask for information, not knowing what is there. Indeed, the former counsel's workload is reduced, as he or she no longer need examine what may be voluminous documents to find the items that respond to your inquiry.

I have used this technique with some degree of success at the early stages of a corporate chapter 7 case in order to quickly get up to speed. While many attorneys will be cooperative, some are not. My belief is that even where counsel is cooperative, having a subpoena or a court order provides the disclosing attorney some protection against future action by irate clients, and may prevent the attorney from omitting disclosure of important information that should be made available.

Investigators should not overlook the possibility and value of obtaining such a privilege waiver in appropriate situations.