

**ETHICAL ISSUES IN
BANKRUPTCY LITIGATION**

Paul W. Bonapfel
United States Bankruptcy Judge
Northern District of Georgia

**ETHICAL ISSUES IN
BANKRUPTCY LITIGATION¹**

TABLE OF CONTENTS

I. Introduction	-1-
II. Duties of Competence, Diligence, and Communication	-4-
III. Duty Not to Participate or Assist in Client Fraud or Crime	-6-
IV. Duties of Candor to Courts and Other Tribunals and Fairness to Other Parties	-9-
A. Meritorious Claims and Contentions	-9-
B. Candor Toward Courts and Other Tribunals	-12-
C. Fairness to Other Parties and Counsel	-19-
D. Duties of Candor In the Bankruptcy Court	-21-
V. The Attorney-Client Privilege	-24-
A. General Principles	-24-
B. The Attorney-Client Privilege in Bankruptcy Litigation	-30-
C. Procedures for Asserting or Challenging the Privilege	-44-
Selected Rules of Professional Responsibility	-65-

¹ These materials were originally created for the Coastal Bankruptcy Law Institute.

ETHICAL ISSUES IN BANKRUPTCY LITIGATION

Paul W. Bonapfel
United States Bankruptcy Judge
Northern District of Georgia²

I. INTRODUCTION

Lawyers find their professional conduct regulated in several ways.³ In *THE LAW OF LAWYERING*,⁴ the authors note that there are three general sources of standards of conduct for lawyers. One set of standards is found in the disciplinary rules that every jurisdiction has adopted in some form.⁵ Although these rules are often thought of as being “ethical” rules, their violation brings sanction by an organ of government. Lawyers who violate these rules face official government sanction — either through monetary or other sanctions imposed by a court before which the lawyer is appearing or through a bar’s disciplinary procedures that could result in a range of consequences from a private reprimand to disbarment. Thus, they go beyond being merely advisory and impose mandatory rules.

A second source of standards is found in general law. This “other law” includes common law, statutory law, and regulations that are applicable to

² The views expressed in this presentation are the view of the author as a continuing legal education program speaker and not as a bankruptcy judge. In the words of the Honorable Barbara J. Houser, a United States Bankruptcy Judge for the Northern District of Texas, do not cite me to me.

³ See G. Hazard & W. Hodes, *THE LAW OF LAWYERING* § 1.3 (3d ed. 2005 Supp.) [hereinafter “*LAW OF LAWYERING*”].

⁴ *LAW OF LAWYERING*, *supra* note 2.

⁵ In *LAW OF LAWYERING*, the authors refer to such rules as “code law.”

everyone.⁶ Among other things, this “other law” encompasses contract law, tort law, and criminal law. Lawyers face civil or criminal liability for wrongful conduct under this “other law.”

Finally, most lawyers subscribe to their own moral code. While these moral standards are less well-defined and their violation does not result in official sanction, they nevertheless are operative and important in guiding the conduct of lawyers.

There are five mechanisms for the enforcement of these standards of conduct.⁷ First, of course, is disciplinary action against lawyers imposed by the governing bar organization. A second enforcement mechanism is private actions for legal malpractice. Third, courts impose direct controls on counsel in litigation that is brought before them. Fourth, lawyers are subject to liability for their actions under “other law,” such as tort law and criminal law. Finally, lawyers and their peers impose self-censorship in some circumstances.

In Georgia, the disciplinary rules are set forth in the GEORGIA RULES OF PROFESSIONAL CONDUCT (the “Georgia Rules” or “Ga. Rule”), which became effective on January 1, 2001.⁸ The Georgia Rules are modeled after the Model Rules of Professional Responsibility (the “Model Rules”) adopted by the American

⁶ LAW OF LAWYERING § 1.3.

⁷ LAW OF LAWYERING § 1.5.

Bar Association.⁹ As of March 1, 2003, the Model Rules had been adopted, with some variations, in 43 states and the District of Columbia.¹⁰

Lawyers practicing in Georgia are governed by the Georgia Rules. Lawyers practicing in the bankruptcy courts for the Middle District of Georgia and the Southern District of Georgia, however, are also subject to the Model Rules as the current standards of responsibility promulgated by the American Bar Association.¹¹

⁸ The GEORGIA RULES OF PROFESSIONAL CONDUCT are set forth in Rule 4-102 of the Rules of the State Bar of Georgia. STATE BAR OF GEORGIA HANDBOOK (2004-2005) H-22 – H-57. The Handbook is available at www.gabar.org/handbook.

⁹ The American Bar Association adopted the Model Rules in August, 1983, at its meeting in Atlanta, Georgia. Substantial amendments were made in 2001 and 2002. In August, 2003, in response to the failures of public companies such as Enron, Rules 1.6 and 1.13 (dealing with confidentiality and responsibilities of corporate counsel) were amended. Only a few states have incorporated the 2002 and 2003 amendments; thus, the version of the Model Rules prior to their amendment in 2002 and 2003 is the version that forms the basis for professional rules in most jurisdictions. See Thomas D. Morgan and Ronald D. Rotunda, 2005 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY v, 1 (Foundation Press 2005).

¹⁰ LAW OF LAWYERING § 1.15. States which had not adopted the Model Rules as of 2003 include California, Iowa, Maine, Nebraska, New York, Ohio, and Oregon. *Id.*, Appendix B.

¹¹ Local Rule 83.2.1 of the Middle District states, “Attorneys practicing before this Court shall be governed by this Court’s Local Rules, by the Rules of Professional Conduct adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court, and, to the extent not inconsistent with the preceding, the American Bar Association Model Rules of Professional Conduct, except as otherwise provided by specific Rule of this Court.”

In the Northern District, Bankruptcy Local Rule 2091-1 makes applicable District Court Local Rules 83.1C and 83.1F. Local Rule 83.1C states, “All lawyers practicing before this court shall be governed by and shall comply with the specific rules of practice adopted by this court and, unless otherwise provided, with the Code of Professional Responsibility and the Standards of Conduct contained in the Rules and Regulations of the State Bar of Georgia and with the decisions of this court interpreting these rules and standards.”

Local Rule 83.5(d) of the Southern District provides, “The standards of professional conduct of attorneys appearing in a case or proceeding, or representing a party in interest in such a case or proceeding are governed by the Georgia Bar Rules of Professional Conduct and the

The Model Rules, as significantly amended in 2002 and 2003, may differ in their emphasis and effect from the Georgia Rules; lawyers practicing before the bankruptcy courts in the Middle and Southern Districts must, therefore, consult the amended Model Rules as well as the Georgia Rules.

This presentation looks at some issues of professional responsibility that arise in the context of bankruptcy litigation. These materials do not purport to provide all or even some of the answers; they may not even ask the right questions.¹² They are intended to serve only as a beginning point for recognition of possible problems and liability exposure and not as an ending point for final answers. Indeed, each issue presented involves complexities and nuances that are well beyond the scope and purpose of these materials. Thus, attorneys who need answers to questions must devote further research and thought to them.¹³

American Bar Association's Model Rules of Professional Conduct. When a conflict arises, the Georgia Bar Rules of Professional Conduct shall control.”

¹² Other disclaimers: Opinions expressed may or may not be those of the author. Caution: May cause drowsiness. Void where prohibited. Do not remove this tag under penalty of law. Objects in the mirror are closer than they appear. ALL SALES ARE FINAL. Viewer discretion advised. Do not exceed recommended dosage. No animals were used in the production of this material. Actual results may vary. Violators will be towed. **THERE IS NO IMPLIED WARRANTY OF MERCHANTABILITY.** Substantial penalty for early withdrawal. The decision of the judges is final. Si non cogitas nimis bonum, non nimis cogita.

¹³ Professor Ayer has written a detailed discussion of professional responsibility issues facing counsel for debtors. *See generally* Ayer, *Professional Responsibility in Bankruptcy Cases*, ALI-ABA Course of Study, Chapter 11 Business Reorganizations, SB37 ALI-ABA 1, 4 (May 8, 1997). Although there have been further developments in the law since the publication of those materials, they are quite useful as a starting point and contain a more detailed discussion of many of the issues presented herein, as well as others. Excellent summaries and analyses of general principles relating to the professional responsibilities of lawyers are found in a treatise,

II. DUTIES OF COMPETENCE, DILIGENCE, AND COMMUNICATION

The lawyer's job is to represent the client. It is not surprising, therefore, that the first ethical duty of a lawyer is to provide competent representation. Georgia Rule 1.1 states:

A lawyer shall provide competent representation to a client. Competent representation as used in this Rule means that a lawyer shall not handle a matter which the lawyer knows or should know to be beyond the lawyer's level of competence without associating another lawyer who the original lawyer reasonably believes to be competent to handle the matter in question. Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.¹⁴

Competent representation includes knowledge of general legal principles, inquiry into and analysis of the factual and legal elements involved in the matter, use of methods and procedures meeting the standards of competent practitioners, knowledge of procedural rules and the rules of the court in which the lawyer practices, and adequate preparation to present the client's position with admissible

THE LAW OF LAWYERING, *supra* note 2, and in the American Law Institute's RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS [hereinafter "RESTATEMENT"].

¹⁴ The text of Model Rule 1.1 differs slightly from the Georgia Rule in that it does not contain the second sentence of the Georgia version.

evidence.¹⁵ Incompetence is not merely a matter of concern for professional liability; it leads to disciplinary action. *In re Farmer*, 263 Kan. 531, 950 P.2d 713 (1997), provides a laundry list of a bankruptcy lawyer's incompetence. The lawyer had repeatedly failed to follow rules concerning noticing of motions; did not understand the difference between secured and unsecured creditors, the fact that unsecured debts are discharged in a chapter 7 bankruptcy, or the 60 month limitation on payments under a chapter 13 plan; filed incomplete papers or papers without required client signatures; and appeared at § 341 meetings unprepared to represent his clients.

There are other fundamental duties related to competence. For example, a lawyer must consult with the client, act with reasonable diligence and promptness, and communicate with the client.¹⁶ The duty of communication encompasses three separate concepts. First, the lawyer must explain a matter so as to permit a client to make informed decisions regarding the matter. Second, the lawyer must keep the client reasonably informed about the status of matters. Finally, the lawyer must promptly comply with reasonable requests for information.¹⁷ Among other things, this requires lawyers to return telephone calls from clients.

III. DUTY NOT TO PARTICIPATE OR ASSIST IN CLIENT FRAUD OR CRIME

¹⁵ Comment to Ga. Rule 1.1, ¶ 5; Comment to Model Rule 1.2, ¶ 5.

¹⁶ Ga. and Model Rules 1.2(a), 1.3, and 1.4. Ga. and Model Rules 1.3 and 1.4 differ in their language, but appear to establish similar duties.

A lawyer's duty to represent a client competently does not authorize the lawyer to utilize any possible means. Thus, a lawyer cannot participate in, or assist a client in, fraudulent or criminal conduct.

Ga. and Model Rule 1.2(d) prohibits participation in a client's criminal or fraudulent conduct or assistance to the client in such conduct and subjects the lawyer to disbarment. Ga. Rule 1.2(d) provides:

A lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, nor knowingly assist a client in such conduct, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Model Rule 1.2(d) is substantially the same.¹⁸

¹⁷ Ga. and Model Rules 1.4.

¹⁸ Model Rule 1.2(d) has slightly different text with regard to the lawyer's assistance to a client. Whereas the Georgia Rule requires that the lawyer not "knowingly assist" such conduct, the Model Rule provides only that the lawyer not "assist a client." The full text of Model Rule 1.2(d) is:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

The Comments to Rule 1.2 of the Rule with regard to “Criminal, Fraudulent, and Prohibited Transactions” provide further explanation. Paragraph 6 of the Comment to Ga. Rule 1.2 states:

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client’s conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct.¹⁹ There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

Paragraph 7 of the Comment to Ga. Rule 1.2(d) continues the discussion with reference to situations where the client’s course of action has already begun:

¹⁹ Paragraph 9 of the Comment to Model Rule 1.2 states:

Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by *Rule 1.6: Confidentiality of Information*. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Paragraph 10 of the Comment to revised Model Rule 1.2 states a somewhat different standard, suggesting that a "noisy withdrawal" or disclosure may be required:

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the

representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. See Rule 4.1.

The Comment to both rules notes, "Where the client is a fiduciary, the lawyer may be charged with special obligations in dealing with a beneficiary."²⁰

Finally, paragraph 9 of the Comment to Ga. Rule 1.2 explains that Rule 1.2(d) is applicable whether or not the defrauded party is a party to a transaction. It then cautions:

Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability.

Paragraph 12 of the comment to Model Rule 1.2 states that a lawyer must not (instead of should not) participate in a sham transaction.

Assisting a client in the commission of a fraud in the bankruptcy court may result in criminal prosecution under 18 U.S.C. § 152. For example, in *United*

²⁰ Comment to Ga. Rule 1.2, ¶ 8; Comment to Model Rule 1.2, ¶ 11.

States v. Parkhill, 775 F.2d 612 (5th Cir. 1985), the court upheld the conviction of an attorney and his client for the fraudulent concealment and transfer of assets of the debtor's estate.

IV. DUTIES OF CANDOR TO COURTS AND OTHER TRIBUNALS AND FAIRNESS TO OTHER PARTIES

The standards of professional responsibility in Part III of the Georgia and Model Rules recognize and impose limitations on the lawyer's duty to advocate for the client in contested matters before a court or other tribunal. They temper the lawyer's duty to the client with duties to courts and other tribunals and to third parties. The idea is that aggressive advocacy is encouraged, but only within the bounds of the rules. In more colloquial terms, "It may be a dog-eat-dog world, but one dog may eat another only according to the rules."²¹

A. Meritorious Claims and Contentions

Rule 3.1 deals with both the content and the conduct of litigation. Ga. Rule 3.1(a) prohibits a lawyer from conducting litigation on behalf of a client in a manner in which the lawyer knows, or when it is obvious to the lawyer, that the course of action would serve merely to harass or injure another. Beyond this type of purposeful misconduct, Ga. Rule 3.1(b) proscribes a lawyer from knowingly advancing a claim or defense that is unwarranted under existing law. Of course, a

²¹ Robert Kutak, *The Adversary System and the Practice of Law*, THE GOOD LAWYER ch. 7 (David Luban ed. 1983), *quoted in* LAW OF LAWYERING, *supra* note 2, § 26.3 at 26-6.

lawyer may advance a position if it can be supported by “a good faith argument for an extension, modification or reversal of existing law.”

Model Rule 3.1 prohibits a lawyer from asserting a position “unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.” The Model Rule thus does not address the purpose or motive of lawyer or client and replaces the Georgia prohibition on advancing a position “unwarranted” by existing law with the requirement that the position have a basis that is “not frivolous.”

Rule 9011(b) of the Federal Rules of Bankruptcy Procedure enforces these concepts and, as a practical matter, resolves any inconsistencies that the different language of the rules might suggest. Under Rule 9011(b), an attorney presenting a paper to the court is certifying, “to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,” that: (1) the paper is not being presented for any improper purpose; (2) the legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and (3) factual contentions have evidentiary support or, if so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Rule 9011(c) authorizes sanctions for violations of subdivision (b).

Rule 9011 is not the only enforcement mechanism in a bankruptcy litigation context. Bankruptcy courts have invoked their power under 11 U.S.C. § 105(a) to prevent abuses of the bankruptcy process to impose sanctions, and federal courts generally have authority under 28 U.S.C. § 1927 to award attorney’s fees incurred because of conduct of a lawyer who “multiplies the proceedings in any case unreasonably and vexatiously.” Finally, certain conduct may be criminal under 18 U.S.C. § 152.²²

The filing of a bankruptcy petition on behalf of a client – which, except for a chapter 12 or 13 petition, is not capable of being voluntarily withdrawn – is subject to these standards. Thus, a “bad faith” filing of a bankruptcy case may result in the imposition of sanctions under Rule 9011,²³ or a judgment requiring the debtor’s lawyer to pay a creditor’s attorney’s fees under 28 U.S.C. § 1927.²⁴ Importantly, the provisions of Rule 9011 that give a potentially offending attorney the opportunity to escape sanctions by withdrawing a paper do not apply to the filing of a bankruptcy petition initiating a bankruptcy case. FED. R. BANKR. P. 9011(c)(1)(A).

²² See *Eastern Diversified Distributors, Inc. v. Matus (In re Matus)*, 303 B.R. 660, 680-684 (Bankr. N.D. Ga. 2004) (noting types of sanctions for attorney misconduct and collecting authorities).

²³ *In re Intercorp International, Ltd.*, 309 B.R. 686 (Bankr. S.D.N.Y. 2004)

²⁴ *In re Stephen’s 350 East 116th St.*, 313 B.R. 161 (Bankr. S.D.N.Y. 2004).

The investigation that Rule 9011 requires prior to filing a complaint must include consideration of whether affirmative defenses bar the relief sought.²⁵ If there are obvious affirmative defenses, sanctions are appropriate, but filing is not sanctionable if there is a colorable argument as to why an otherwise applicable affirmative defense does not apply.²⁶ The Eleventh Circuit has stated that the facts must “unequivocally establish” that the affirmative defense would succeed for the pursuit of a claim to be sanctionable.²⁷

The issue has arisen in the bankruptcy court when a defendant in preference litigation seeks sanctions after prevailing on an affirmative defense such as ordinary course of business or new value. In *In re Excello Press, Inc.*, 967 F.2d 1109, 1115 (7th Cir. 1992), the court held that the pre-filing inquiry required by Rule 9011 is “a brief pre-filing investigation, not pre-filing discovery.” Because the trustee did enough to learn that there was a “colorable preference action, one not defeated by obvious affirmative defenses,” sanctions were not appropriate. *Id.* The court observed that an attorney has a responsibility to examine an ordinary

²⁵ See, e.g., *In re Excello Press, Inc.*, 967 F.2d 1109, 1112-13 (7th Cir. 1992); cf. *Souran v. Travelers Ins. Co.*, 982 F.2d 1497, 1510 (11th Cir. 1993) (discussing analogous FED. R. CIV. P. 11); *White v. General Motors Corp.*, 908 F.2d 675, 682 (10th Cir. 1990) (same); *Brubaker v. City of Richmond*, 943 F.2d 1363, 1383-85 (4th Cir. 1991) (same). These cases thus reject the cases that do not require any pre-filing investigation with regard to affirmative defenses. E.g., *Nolden v. Athearn, Chandler & Hoffman (In re W. Die Casting Co.)*, 106 B.R. 645, 649 (Bankr. N.D. Cal. 1989); *Togut v. Sun Bank/Miami, N.A. (In re Concorde Nopal Agency, Inc.)*, 92 B.R. 956, 958 (Bankr. S.D. Fla. 1988).

²⁶ *White*, *supra* note 24, 908 F.2d at 682.

²⁷ *Souran*, *supra* note 24, 982 F.2d at 1510.

course of business defense if all of the information necessary to establish that defense is in the client's control. *Id.* at 1113.

The court in *Leeds Building Products, Inc. v. Moore-Handley, Inc. (In re Leeds Building Products, Inc.)*, 181 B.R. 1006 (Bankr. N.D. Ga. 1995), declined to find a general requirement that a plaintiff must make a pre-filing investigation into possible affirmative defenses. Rather, the court held, “Rule 9011, and likewise Rule 11, places no affirmative duty upon a plaintiff to conduct an inquiry into possible affirmative defenses, except in those unusual or extreme circumstances where such a defense is obvious and needs no discovery to establish.” *Id.* at 1010. Similarly, the court in *Berger Industries, Inc. v. Artmark Products Corp. (In re Berger Industries, Inc.)*, 298 B.R. 37, 42 (Bankr. E.D.N.Y. 2003), concluded that Rule 9011 sanctions “are not appropriate where, as here, the potential defense is factually complex and all necessary facts are not available to the plaintiff.”

B. Candor Toward Courts and Other Tribunals

Ga. Rule 3.3 and Model Rule 3.3 impose duties of candor toward the court. Although the structure and language of the two versions of the rule differ, they both impose four general obligations that are similar in most respects:

1. A lawyer may not knowingly make a false statement of material fact or law. Ga. Rule 3.3(a)(1); Model Rule 3.3(a)(2).

Model Rule 3.3(a)(1) prohibits a lawyer from making *any* false statement of fact or law; Ga. Rule 3.3(a)(1) prohibits only a false statement that is *material*.

The Model Rule expressly requires the correction of a false statement previously made. Presumably, Georgia’s prohibition on making a false statement implies that a previously made false statement should be corrected upon discovery of the falsity. The Comment to both rules notes, “There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.”²⁸

2. A lawyer must make certain disclosures to the court relating to a client's criminal or fraudulent conduct. Ga. Rule 3.3(a)(2); Model Rule 3.3(b).

Ga. Rule 3.3(a)(2) requires a lawyer to disclose a material fact when necessary to avoid assisting a client's criminal or fraudulent act. Under Model Rule 3.3(b), a lawyer who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct relating to the proceeding must take reasonable remedial measures, including disclosure to the tribunal if necessary.

Paragraph 12 of the Comment to Model Rule 3.3 explains these duties:

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus,

²⁸ Comment to Ga. Rule 3.2, ¶ 2; Comment to Model Rule 3.2, ¶ 3.

paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

3. A lawyer must disclose legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the client's position and not disclosed by opposing counsel. Ga. Rule 3.3(a)(3); Model Rule 3.3(a)(2).

4. A lawyer must not knowingly offer evidence that the lawyer knows to be false. If the lawyer has offered material evidence and comes to know of its falsity, the lawyer must take "reasonable remedial measures." Ga. Rule 3.3(a)(4); Model Rule 3.3(a)(3).

The prohibition on introduction of evidence known to be false requires no explanation. More difficult issues arise when there is a discovery that evidence already presented is false.

The lawyer's first obligation is to attempt to persuade the client to disclose the false character of the evidence. If this is not successful, Model Rule 3.3(a)(3) explicitly requires disclosure. Although Ga. Rule 3.3(a)(4) does not expressly require disclosure, Comment 6 states that the rule generally recognized is that, if necessary to rectify the situation, the lawyer must disclose the existence of the falsity to the court or other party.

With regard to the lawyer's obligations upon discovery that the lawyer has presented false evidence, such as perjured testimony, paragraph 10 of the Comment to Model Rule 3.3 states:

Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer

to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

The rationale for imposing these four obligations is well stated in LAW OF LAWYERING § 29.2, *supra* note 2, and is worth quoting at length:

While other rules require lawyers to play fair with each other and with opposing parties, Rule 3.3 requires lawyers to play fair with the court. It is designed to protect the integrity of the decision making process, and hence the ability of courts to function as courts.

When the adversary system is operating smoothly, opposing counsel police each other. They can generally be relied upon to expose false or misleading representations made by the other side, and to present legal and factual argumentation in a sharp dialectic that will help the court come to a sound decision. But opposing counsel may not always uncover the truth or accurately express the law, perhaps through lack of diligence or because the truth has been effectively concealed. Without rules assuring that lawyers will police themselves, therefore, courts would occasionally make decisions on the basis of evidence that one of the professional participants knows is

false, or apply legal concepts that one of the professional participants knows has already been rejected by a higher court.

The situations treated in Rule 3.3 entail the most severe tension between duties to a client and duties to the tribunal. According to this rule, where there is danger that the tribunal will be misled, a litigating lawyer may be required to forsake his client's immediate and narrow interests in favor of the interests of the administration of justice. In these situations, the conception of lawyer as "officer of the court" is given its maximum force.

Both Ga. Rule 3.3(b) and Model Rule 3.3(c) make it clear that the lawyer's obligations continue to the conclusion of a proceeding and apply even if compliance with them requires disclosure of information otherwise prohibited by the confidentiality provisions of Rule 1.6.

In summary, the rules are designed to prevent a court from going astray if a lawyer is in a position to prevent it.²⁹ These rules, thus, trump other professional standards, particularly the requirements of Rule 1.6 which require the lawyer to keep information confidential.

The duty of candor expressed in Rule 3.3 is particularly important in *ex parte* situations. Georgia Rule 3.3(d) states:

²⁹ See generally LAW OF LAWYERING §§ 29-12 to 29-19, *supra* note 2.

In an *ex parte* proceeding, other than grand jury proceedings, a lawyer shall inform the tribunal of all material facts known to the lawyer that the lawyer reasonably believes are necessary to enable the tribunal to make an informed decision, whether or not the facts are adverse.

The comment states:

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosure of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Model Rule 3.3(d) states the same principle in slightly different language.³⁰

³⁰ Model Rule 3.3(d) states:

An attorney's failure to apprise the court of material facts in connection with an *ex parte* motion may result in vacating of the order as well as the strong condemnation of the appellate court. In *Dinova v. Harris (In re Dinova)*, 212 B.R. 437, 446-47 (B.A.P. 2d Cir. 1997), the trustee had failed to advise the bankruptcy court of facts in connection with his *ex parte* motion to dismiss the debtor's chapter 7 case. Addressing the propriety of the attorney-trustee's professional obligations *sua sponte*, the court found it “reprehensible” and “unacceptable.” The court stated, *id.* at 447 (citations and internal quotations omitted):

Attorneys appearing before a federal court are its officers. As such, they owe a primary duty to the administration of justice. They owe the court and the public duties of good faith and complete candor in dealing with the judiciary. In addition, as officers of the court, they have a duty to protect and preserve the right to a fair trial.

To fulfill such requirements, attorneys must ensure that they bring all conditions and circumstances that are relevant in a given case directly before the court. Candor to the Court, though desirable under any circumstances, is mandated in *ex parte* proceedings, where the Court is deprived of the benefits of the dialectic of the adversary system. Selective omission of

In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

relevant information, therefore, exceeds the bounds of zealous advocacy and is wholly inappropriate.

A lawyer's duties under the rules just discussed may conflict with the lawyer's duties to the client and to the client's expectations concerning the attorney-client relationship. For example, a client may expect all communications with the lawyer to be confidential and protected by the attorney-client privilege when the disciplinary rules or evidence law may permit or require disclosure in certain circumstances.

For this reason, Ga. Rule 1.2(e) requires that the lawyer explain limitations on his conduct that the client may not otherwise understand:

When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

The same principle is set forth in Model Rule 1.2(a)(5).

C. Fairness to Other Parties and Counsel

Ga. Rule 3.4 and its counterpart, Model Rule 3.4, set forth a lawyer's duties of fairness to opposing parties and their counsel. The two rules are similar in some respects and different in others.

Both rules provide that a lawyer shall not “unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other materials having potential evidentiary value” and prohibit a lawyer from counseling or assisting another person to do any such act. Ga. and Model Rule 3.4(a). Both rules also provide that a lawyer shall not falsify evidence or counsel or assist a witness to testify falsely. Ga. Rule 3.4(b)(1), (2); Model Rule 3.4(b).

Model Rule 3.4(b) provides generally that a lawyer shall not “offer an inducement to a witness that is prohibited by law.” The Georgia Rule counterpart, Ga. Rule 3.4(b)(3), does not contain such an arguably unnecessary admonition (it would seem obvious that a lawyer cannot do anything prohibited by law), but it does contain specific provisions dealing with the circumstances under which witnesses may be compensated. Ga. Rule 3.4(b)(3) prohibits the lawyer from paying, offering to pay, or acquiescing in the payment of compensation that is contingent upon the content of the testimony or the outcome of the case. It then states that a lawyer “may advance, guarantee, or acquiesce in the payment of” a witness’ reasonable expenses and compensation for the loss of time in connection with preparation, attending, or testifying, and a reasonable fee for the professional services of an expert witness.

Model Rules 3.4(c), (d), and (e) prescribe rules of conduct of a lawyer during litigation; the Georgia version omits them. Model Rule 3.4(c) prohibits a

lawyer from knowingly disobeying an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists. Model Rule 3.4(d) prohibits a frivolous discovery request or the failure to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party. Model Rule 3.4(e) states that a lawyer shall not, in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a civil litigant. Whether or not the absence of these standards in the Georgia Rules makes them inapplicable to litigation in Georgia bankruptcy courts, the Model Rules' statement of them appears to be an accurate description of the professional standards that govern lawyers practicing in bankruptcy court under the requirements of the Federal Rules of Bankruptcy Procedure and traditional practice in federal courts.

Ga. Rule 3.4(f) and Model Rule 3.4(f) prohibit a lawyer from requesting a person other than the client to refrain from voluntarily giving relevant information to another party unless certain exceptions are applicable. They both recognize an exception for a relative or employee or other agent of a client if the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information; the Georgia Rule also requires that the

request not otherwise be prohibited by law. The Georgia Rule also permits the lawyer to request another to refrain from providing information if it is subject to the assertion of a privilege by the client.

Ga. Rule 3.4(g), which has no Model Rule counterpart, prohibits a lawyer from obtaining evidence that violates the legal rights of the opposing party or counsel. Ga. Rule 3.4(h) also has no Model Rule counterpart; it provides that a lawyer shall not “present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil manner.”

Ga. and Model Rule 4.1 imposes on a lawyer the significant additional requirement of honesty in dealing with third parties. It provides:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [dealing with client confidences].

D. Duties of Candor In the Bankruptcy Court

Facts are presented in bankruptcy matters to the court in various ways. As in ordinary litigation, evidence may be presented in adversary proceedings or other contested matters. Additionally, however, facts are routinely presented at various stages of a bankruptcy case that are not necessarily adversarial. The debtor must file a Statement of Financial Affairs and Schedules of Assets, Liabilities, Income, and Expenses that require information about the value of assets and income and expenses and to provide information about transfers of property.³¹ The debtor must sign these documents and others under penalty of perjury.³² The making of a false oath in a bankruptcy case is a crime³³ and subjects the debtor to denial of the discharge.³⁴ Misstatements of value of assets or misrepresentations of income or expenses fall within these provisions. Omission of an asset that the debtor really owns also subjects the debtor to criminal prosecution or denial of the discharge for hiding or concealing property of the estate.

If the bankruptcy case involves efforts to confirm a Chapter 11 plan, the debtor or other plan proponent must provide a disclosure statement providing “adequate information” to parties in interest entitled to vote on the plan.³⁵ Much of

³¹ 11 U.S.C. § 521(1); FED. R. BANKR. P. 1007(b), 1008, Official Forms 6, 7, and 8.

³² FED. R. BANKR. P. 1008.

³³ 18 U.S.C. § 152.

³⁴ 11 U.S.C. § 727(a).

³⁵ 11 U.S.C. § 1125.

this information will be provided by, or at the direction of, the debtor's top management.

There are limits on the value of assets a debtor may retain as exempt property,³⁶ and a debtor's disposable income sets the minimum amount a debtor must pay to creditors in chapter 13 cases.³⁷ Debtors' assessments of the values of their assets, their income, and their expenses may well change once they have learned, from their lawyer, the consequences of those assessments. For example, debtors proud of themselves for having a house worth \$150,000 with a mortgage of \$100,000 may find that it is more helpful in a bankruptcy case to have a house worth only \$125,000.

Once they have consulted their bankruptcy lawyer, debtors may find that it is even more convenient not to own the antique silver or diamond jewelry that a relative gave them several years ago and has been in the family for generations. If they learn that their exemptions are not sufficient to enable them to retain an asset, they might be tempted to conclude that they really don't own the asset after all.

Lawyers representing individual debtors do not sign the schedules and other documents that debtors file, but they do prepare them. Because a lawyer prepares them, the lawyer necessarily obtains information from the client about them. Beyond the fact that the lawyer prepares them, proper representation of a client

³⁶ O.C.G.A. § 44-13-100.

requires that the lawyer know the facts that the debtor must disclose in these documents.

A disclosure statement in connection with a chapter 11 case is not submitted under penalty of perjury, but the lawyer nevertheless has duties of candor that preclude participation in drafting and presenting a disclosure statement that contains material misrepresentations of fact or law or that fails to state material facts.

A lawyer has a clear duty under Ga. and Model Rule 1.2(d) not to counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent and cannot participate in it. Moreover, a lawyer has a professional obligation not to make a false statement of law or fact to a court and to disclose any misstatement that the client has made under Ga. and Model Rule 3.3. Under these provisions, a lawyer clearly cannot file a statement of financial affairs or schedules for a client in a bankruptcy case with the knowledge that they are false. Furthermore, if a lawyer has filed them thinking they are correct and later learns that they contain material misstatements, the lawyer has a duty to take remedial action to bring the error to the attention of the court and other parties, including disclosure if required, under Ga. and Model Rule 3.3.

³⁷ 11 U.S.C. § 1322(b).

In *In re Eppers*, 311 B.R. 826 (Bankr. D.N.M. 2004), the debtor had scheduled her interest in real estate that she had a right to sell under a divorce agreement as a life estate with a value of \$1.00. After discovery of her rights and the chapter 7 trustee's realization of \$10,000 from the asset, the U.S. Trustee successfully sued to revoke the debtor's discharge. In referring the matter for further investigation of the attorney's conduct, the court noted, *id.* at 834:

Aiding a debtor in presenting information which is clearly incorrect to a court is a violation of counsel's duty to both the court and his client. . . . [When counsel had knowledge of the inaccuracy], he was required to advise his client to amend her schedules to properly reflect her rights in the property.

The advent of electronic case filing presents new temptations to lawyers to engage in fraud on the court: filing a petition electronically without having a signature from the client. Courts addressing this issue have uniformly ruled that such a filing constitutes a violation of Rule 9011 and the rules of the court governing ECF filings and that there is no justification for it, not even a potentially *bona fide* effort to prevent a threatened foreclosure. *E.g.*, *In re Phillips*, 306 B.R. 655, 658 (Bankr. E.D. Mo. 2004); *In re Wenk*, 296 B.R. 719, 728 (Bankr. E.D. Va. 2002).

V. THE ATTORNEY-CLIENT PRIVILEGE

A. General Principles

The attorney-client privilege is a rule of evidence that prevents the use of certain communications between lawyer and client as evidence. The privilege does not apply to everything that is subject to the confidentiality restrictions of the rules of professional conduct. In federal courts, the Federal Rules of Evidence provide that the attorney-client privilege is determined by reference to federal law when federal law supplies the substantive rule of decision and by state law when state law supplies the substantive rule. FED. R. EVID. 501.

Generally, the attorney-client privilege applies to (1) a communication (2) made between the lawyer and the client (3) in confidence (4) for the purpose of obtaining or providing legal advice.³⁸ Communications between the client, the client's lawyer, agents of either who facilitate the communication between them, and agents of the lawyer who facilitate the representation are included within the scope of the privilege.³⁹ Thus, for example, statements made by a client to the lawyer's secretary or legal assistant in the course of the representation and such statements made by a client to an accountant hired by the lawyer to assist the lawyer in the representation are protected by the privilege. In the corporate

³⁸ RESTATEMENT, *supra* note 12, § 68. Another formulation of the attorney-client privilege is set forth in 8 John H. Wigmore, EVIDENCE IN TRIALS § 2292 AT COMMON LAW (McNaughton Rev. 1961), as follows: (1) Where legal advice is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by the client or by the legal adviser, (8) unless the protection is waived.

context, the privilege extends to communications with agents of the corporation with respect to matters of legal interest to the corporation if disclosure is limited to agents who reasonably need to know the information in order to act for the organization.⁴⁰

An important limitation on the privilege is that the information be provided to the attorney for the purpose of obtaining legal advice; information imparted to an attorney for other purposes is not protected by the privilege. For example, information or documents that a client provides to an attorney for the purpose of preparing tax returns – as opposed to seeking legal advice about tax obligations – is not protected by the privilege.⁴¹ Similarly, information provided to an attorney for purposes of disclosure is not subject to the privilege.⁴² Nor does the delivery of documents to an attorney in connection with legal advice protect the documents from production; the fact that an attorney is in possession of documents does not prevent their production unless the client could not be compelled to produce them, such as by invocation of the Fifth Amendment privilege against self-incrimination.⁴³

39 RESTATEMENT § 70.

40 RESTATEMENT § 73.

41 *E.g.*, *United States v. Frederick*, 182 F.3d 496 (7th Cir. 1999).

42 *E.g.*, *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991).

43 *E.g.*, *In re Fairbanks*, 135 B.R. 717, 724-33 (Bankr. D. N. H. 1991) (alternative holding).

The requirement that the communication be in confidence poses problems when more than one client is involved. There are two possible situations. First, a lawyer may have two clients with regard to a matter. Second, two persons may each have a separate lawyer with regard to a matter in which they have common interests and agree to share information to facilitate the representation of both.

In the co-client situation, the attorney-client privilege remains applicable as to third persons with regard to any communications, otherwise privileged, with any of the clients in connection with the representation.⁴⁴ Similarly, in the second situation, often referred to as the common interest or joint defense situation, the privilege applies, as to third persons, to communications of information that clients with separate lawyers have agreed to exchange in connection with their representation in a matter in which they have common interests.⁴⁵ Unless otherwise agreed, the privilege in both situations does not apply in any subsequent adverse proceeding between the clients; however, waiver of the privilege by one client does not effect a waiver of it by another client.⁴⁶

The attorney-client privilege may be waived in certain circumstances. First, of course, the client may waive the privilege. In the corporate context, waiver is

⁴⁴ RESTATEMENT § 75, *supra* note 12.

⁴⁵ RESTATEMENT § 76.

⁴⁶ RESTATEMENT § 75(2); § 76(2). Although the Restatement states that the parties may agree that the privilege will remain applicable in any subsequent litigation between them, comments to these sections acknowledge that there is no authority for giving effect to such

effected by the corporation's responsible agents at the time the privilege is asserted. Thus, if a bankruptcy trustee has been appointed for the corporation, the trustee is entitled to waive the privilege.⁴⁷ The privilege may also be waived through voluntary disclosure of the protected communication in a non-privileged communication.⁴⁸ Waiver also occurs if the client asserts that the client acted on the advice of counsel, that the lawyer's advice was otherwise relevant to the client's conduct, or that the lawyer's assistance was ineffective, negligent, or otherwise wrongful.⁴⁹ A client who uses a recorded communication in testifying waives the privilege; waiver may also occur if the client uses a recorded communication in preparing to testify, and the court determines that disclosure is required in the interests of justice.⁵⁰

There are important exceptions to the attorney-client privilege. It is not applicable to a communication that is relevant and reasonably necessary for a lawyer to use as evidence in a proceeding with regard to the lawyer's compensation or to defend against charges that the lawyer acted wrongfully in the course of representing a client.⁵¹

agreements. For an illustration of the invocation of the common interests privilege by one client after another waived it, see *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989).

⁴⁷ *E.g.*, *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985).

⁴⁸ RESTATEMENT § 79, *supra* note 12.

⁴⁹ RESTATEMENT § 80(1).

⁵⁰ RESTATEMENT § 80(2).

⁵¹ RESTATEMENT § 83.

More substantive are the crime-fraud exception and the exceptions relating to communications involving fiduciaries.

Restatement § 82, note 12 *supra*, summarizes the “crime-fraud” exception. Under this exception, the privilege does not apply to a communication when a client:

(a) consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud or aiding a third person to do so; or

(b) regardless of the client’s purpose at the time of consultation, uses the lawyer’s advice or other services to engage in or assist a crime or fraud.⁵²

The crime-fraud exception arises where the desired legal advice relates not to prior wrongdoing but to future wrongdoing; the purpose of the exception is to assure that the privilege does not apply to communications made for the purpose of getting advice for the commission of a fraud or crime.⁵³ The crime-fraud exception may apply even if the lawyer is not aware of the client's wrongful intent or purpose.⁵⁴ If the lawyer represents the client both before and after the allegedly

⁵² RESTATEMENT § 82.

⁵³ *E.g.*, *United States v. Zolin*, 491 U.S. 554, 563 (1989).

⁵⁴ *E.g.*, *Clark v. United States*, 289 U.S., 1, 15 (1933); *Riggs National Bank v. Andrews*, 186 B.R. 219, 222 (Bankr. E.D. Va. 1995).

wrongful conduct, the exception may not be applicable to communications occurring after the conduct.⁵⁵

Another exception to the attorney-client privilege is the exception for otherwise privileged communications between a trustee of an express trust and the trustee's lawyer in an action brought by a beneficiary charging breach of fiduciary duties. The rationale behind this long standing exception is that the trustee cannot invoke the attorney-client privilege to prevent beneficiaries from introducing evidence of the trustee's communications with a lawyer retained to advise the trustee in carrying out the trustee's fiduciary duties.⁵⁶ Restatement § 84 states the rule as follows:

In a proceeding in which a trustee of an express trust or similar fiduciary is charged with breach of fiduciary duties by a beneficiary, a communication otherwise [within the attorney-client privilege] is nonetheless not privileged if the communication:

- (a) is relevant to the claimed breach; and
- (b) was between the trustee and a lawyer (or [other agents of the lawyer]) who was retained to advise the trustee concerning the administration of the trust.

⁵⁵ *E.g.*, Riggs National Bank v. Andrews (*In re Andrews*), 186 B.R. 219, 223 (Bankr. E.D. Va. 1995).

⁵⁶ RESTATEMENT § 84, *supra* note 12, Comment a, b.

In *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), the court ruled that the principle excepting communications between a trustee and his attorney from the privilege in litigation by beneficiaries against the trustee could be applied in certain circumstances to a corporation's attorney-client privilege in litigation brought against the corporation by shareholders. In reaching this result, the court also relied on the co-client doctrine (which does not permit invocation of the privilege between co-clients), the crime-fraud exception, and the statutory and common-law rights of shareholders to inspect books and records of the corporation.

Based on this and other decisions, the Restatement recognizes an exception to the attorney-client privilege for communications involving a fiduciary within a corporation (and other organizations) in litigation brought by the constituents of the corporation to whom the directors and officers bear fiduciary responsibilities based on a balancing of the need for disclosure and the threat to confidentiality. Restatement § 85 sets forth this exception as follows:

In a proceeding involving a dispute between an organizational client and shareholders, members, or other constituents of the organization toward whom the directors, officers, or similar persons managing the organization bear fiduciary responsibilities, the attorney-client privilege of the organization may be withheld from a communication otherwise [within the attorney-client privilege] if the tribunal finds that:

(a) those managing the organization are charged with breach of their obligations toward the shareholders, members or other constituents or toward the organization itself;

(b) the communication occurred prior to the assertion of the charges and relates directly to those charges; and

(c) the need of the requesting party to discover or introduce the communication is sufficiently compelling and the threat to confidentiality sufficiently confined to justify setting the privilege aside.

B. The Attorney-Client Privilege in Bankruptcy Litigation

The intervention of bankruptcy of the client has significant impact on the attorney-client privilege.

1. Claim of Federal or State Law to Govern Privilege Issues.

An initial question is whether state or federal law relating to the privilege applies. Rule 501 of the Federal Rules of Evidence provides that federal law governs when federal law supplies the substantive rule of decision and that state law governs when state law supplies the substantive rule. For example, federal law governs the privilege in litigation that involves specific rights under the Bankruptcy Code such as the discharge.¹

Rule 2004 of the Federal Rules of Bankruptcy Procedure authorizes examinations and production of documents relating to administration of a

¹ E.g., *French v. Miller (In re Miller)*, 247 B.R. 704, 708 (N.D. Ohio 2000).

bankruptcy estate and the debtor's financial condition, assets, and liabilities. Because Rule 2004 examinations take place pursuant to federal law, courts have ruled that privilege issues arising in such proceedings are governed by federal common law.² Federal law governs the privilege even if the subject matter of a Rule 2004 inquiry relates to a matter governed by state law. An example is *Moore v. Eason (In re Bazemore)*, 216 B.R. 1020 (Bankr. S.D. Ga. 1998). The chapter 7 debtor's attorney had also been engaged by the debtor's insurance carrier to represent the debtor in prepetition litigation arising out of an automobile accident. A judgment in excess of policy limits precipitated the debtor's bankruptcy filing. The chapter 7 trustee desired to investigate the debtor's potential claim for malpractice or wrongful failure to settle the tort litigation and sought to examine the attorney under Rule 2004. The court ruled that federal law governed because the investigation about possible claims of the estate was a matter of federal bankruptcy law.

2. Privilege Not Applicable to Communications of Information For Purpose of Disclosure.

A second issue arises from the debtor's duty to disclose information in the bankruptcy schedules and statement of financial affairs. Because the privilege is not applicable to information provided to an attorney for purposes of disclosure, the court in *United States v. White*, 950 F.2d 426 (7th Cir. 1991), held that the privilege was not applicable to drafts of bankruptcy papers and interview notes of

² See Barry Russell, BANKRUPTCY EVIDENCE MANUAL § 501.3 (2004 ed.).

the debtor's attorney in the absence of specification as to what information the client expected confidentiality. The court stated, *id.* at 430-31:

When information is disclosed for the purpose of assembly into a bankruptcy petition and supporting schedules, there is no intent for the information to be held in confidence because the information is to be disclosed on documents publicly filed with the bankruptcy court. . .

[T]here is no specification as to what information [the client] gave [the attorney] for which [the client] had an expectation of confidentiality. Evidence given to the grand jury was disclosed to [the client] and yet he is unable to point to any specific information in the documents or [the attorney's] testimony to which the attorney-client privilege would attach. [The client] simply alleges that the privilege applies to drafts of the bankruptcy petition and to interview notes used to prepare these drafts. . . . We find no error in the district court's determination that [the client] did not carry his burden of proving that any specified information in the documents was privileged.

The court in *In re Eddy*, 304 B.R. 591 (Bankr. D. Mass. 2004), similarly concluded that communications of information required to be disclosed are not privileged, *id.* at 596 (citations omitted):

A debtor has no reasonable expectation that information will be kept confidential if it must be disclosed in bankruptcy filings, and where the

Debtor has no reasonable expectation of confidentiality, the attorney-client privilege is unavailable.

The court thus ruled that communications between the debtor and the lawyer about retention and compensation, which must be disclosed pursuant to 11 U.S.C. § 329(a), are not subject to the attorney-client privilege.

3. *Bankruptcy Trustee's Right to Waive the Privilege of Corporate Debtor.*

A critical question is the ability of the bankruptcy trustee to waive the debtor's attorney-client privilege. In *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985), the Supreme Court considered whether a bankruptcy trustee had the right to waive the privilege of a corporate debtor. The Court observed that, for a solvent corporation, the power to waive the corporate attorney-client privilege rests with the corporation's management and is normally exercised by its officers and directors, and that when corporate control passes to new management, the authority to assert and waive the corporation's privilege passes as well. *Id.* at 348-9. The Court then noted that the Bankruptcy Code provided no direct guidance on the issue and reasoned, *id.* at 351-52:

Because the attorney-client privilege is controlled, outside of bankruptcy, by a corporation's management, the actor whose duties most closely resemble those of management should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws.

After analyzing the trustee’s powers and duties in a bankruptcy case, the Court concluded that “vesting in the trustee control of the corporation’s attorney-client privilege most closely comports with the allocation of the waiver power to management outside of bankruptcy without in any way obstructing the careful design of the Bankruptcy Code.” *Id.* at 354. Thus, the court held that the trustee had the authority to waive the privilege.³

Importantly, the Court carefully noted that its holding had “no bearing on the problem of individual bankruptcy, which we have no reason to address.” *Id.* at 356.

The Court stated, *id.*:

Under our holding today, this power passes to the trustee because the trustee’s functions are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor’s directors. An individual, in contrast, 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 that we embrace in this case.

The ability of a corporation’s bankruptcy trustee to waive the corporate privilege may pose difficulties for the corporation’s principals. Corporate principals, particularly those of closely held corporations, frequently think that communications with “their” lawyer are privileged. If the attorney represents both the corporation and the principals, the co-client privilege protects privileged

³ Recent illustrative cases applying *Weintraub* are *In re Hechinger Inv. Co. of Delaware*, 285 B.R. 601 (Bankr. D. Del. 2002) and *In re ANR Advance Transportation Co., Inc.*, 288 B.R. 208 (Bankr. E.D. Wisc. 2002).

communications between the lawyer and the principals during the course of the representation of both of them. There are, however, some significant limitations on this privilege. First, the co-client privilege is waivable by either of the clients; the corporation's trustee could thus waive it. The principal would still be able to assert the protections of the privilege as against third parties, but the principal may not be able to assert those protections in litigation brought against the principal by the trustee because the co-client privilege does not ordinarily apply in disputes between the clients. Second, the co-client privilege does not apply with regard to an adverse proceeding between the two clients, unless, perhaps, they have agreed that it does.⁴ Moreover, because the corporation is insolvent and a fiduciary duty is now owed to creditors, it is quite arguable that creditors themselves, in litigation against the corporation or its principals, may be able to obtain disclosure of otherwise privileged information, as beneficiaries of the fiduciary duty, under the principles of Restatement § 85.⁵

Furthermore, because of conflict of interest principles applicable to joint representation of an insolvent corporation and its principals, an attorney usually may not represent both an insolvent corporate entity and its principals. In such a situation, there is no co-client privilege because the attorney represents only the corporation. And if the individual does not have separate representation, the “common interest” rule does not apply either.

⁴ RESTATEMENT § 75(2) states that the clients can agree that the privilege will apply in subsequent disputes. However, the comment indicates that there are no reported cases that have upheld the privilege in this context.

⁵ See *supra* pages 29-30.

A case illustrating these problems is *In re Fidelity Guarantee Mortg. Corp.*, 150 B.R. 864 (Bankr. D. Mass. 1993). There, the two principals of the corporation (its only officers, directors, and shareholders) had contacted counsel about a month prior to the corporation's chapter 11 filing to obtain legal advice relating to business and financial matters of the corporation. They asserted that they had interests in common with the corporation, including the fact that they had guaranteed certain of its obligations, that they believed counsel would be representing their interests, and that they "believed, understood, and intended" that their communications with counsel were privileged and confidential.

Upon filing its chapter 11 petition, the corporation sought and obtained authority to employ counsel in the case. Two weeks later, the corporation voluntarily converted the case to chapter 7, and the bankruptcy trustee promptly sought to obtain testimony pursuant to FED. R. BANKR. P. 2004 from bankruptcy counsel and the other lawyers who had represented the corporation prior to bankruptcy. Personal counsel for the principals invoked the attorney-client privilege with regard to any communications between the principals and corporate counsel, and the trustee moved to compel the testimony, asserting that, as trustee, he had waived the corporation's attorney-client privilege.

The court found no evidence that the principals had ever been clients of the corporation's bankruptcy lawyers, who asserted that they did not provide any legal representation to the principals and that all communications with them had been in their capacities as officers of the debtors. Under these circumstances, the court

ruled that the principals could not invoke the attorney-client privilege. The court did not analyze this issue in terms of the co-client privilege, but the court effectively found that it was not applicable because the principals had not been clients of the lawyers. In reaching this result, the court also rejected the principals' contention that they should not be deprived of their expectations that communications would be privileged in view of the fact that the lawyers had failed to warn them of the power of a bankruptcy trustee to waive the privilege.

The court then addressed the contention of the principals that the communications were privileged under the "common interest" privilege, which the court referred to as the "joint defense" privilege. The principals asserted that their personal counsel had told them to advise corporate bankruptcy counsel about certain past events that were relevant to the debtor and that related to interests they had in common with the debtor, including the personal guarantees. Although the court indicated that this was one part of establishing the joint defense privilege, it ruled that the principals had failed to establish that the communications were made pursuant to a joint defense agreement. In this regard, the court found it significant that personal counsel had objected to a question to corporate counsel, on the ground of attorney-client privilege, as to whether counsel's communications were part of a joint defense effort. In the absence of evidence on this point, the court concluded that the joint defense privilege was not applicable.

The court also considered the privilege with regard to the testimony of the other lawyer who had previously represented the debtor corporation and the

principals in litigation pending at the time of the bankruptcy filing and who had represented the principals in matters unrelated to the debtor. The court ruled that the principals could invoke the privilege as to matters involving representation of them individually but not as to matters involving representation of them in their roles as officers and directors of the corporation. The court did not address this issue in terms of the co-client privilege either, and it is not clear from the opinion whether the court would protect communications relating to both corporate and individual representation.

If a principal desires the protections of the attorney-client privilege, the only possible way to obtain it is for the principal to retain his or her own counsel and for the corporation and the individuals then to enter into a “common interest” agreement that also provides that the privilege will remain in effect with regard to any subsequent litigation between the clients. Under these circumstances, a later waiver by a bankruptcy trustee will not waive the privilege as to communications subject to the common interest agreement as to third parties and, under the rationale of Restatement § 75 and § 76, discussed *supra* at page 26, the privilege will be preserved with regard to any dispute between the trustee and the principal. Even under this arrangement, the principal cannot have complete assurance that the privilege will be applicable. It is possible that a court could decline to uphold an agreement that the privilege be maintained even in connection with litigation between the parties. A court might also apply the principles of Restatement § 84 and § 85, discussed *supra* at pages 28-30, dealing with disclosure of otherwise

privileged information to fiduciaries when a breach of fiduciary duty is asserted, to determine that the privilege should not be applicable.

4. *Bankruptcy Trustee's Right to Waive Privilege of Individual Debtor.*

As stated earlier, *Weintraub* did not deal with the question of the ability of a bankruptcy trustee to waive an individual's attorney-client privilege.⁶ Prior to the *Weintraub* decision, some courts held that an individual debtor's attorney-client privilege passed by operation of law to the bankruptcy trustee, while others ruled that the trustee had no authority to waive the privilege.⁷

The courts continued to take different approaches after *Weintraub*. In *Whyte v. Williams (In re Williams)*, 152 B.R. 123 (Bankr. N.D. Tex. 1992), the court held that a liquidating trustee under an individual debtor's confirmed chapter 11 plan could waive the privilege with regard to avoidance actions to be prosecuted by the trustee under the plan. The court reasoned that, by filing the chapter 11 petition, the debtor became a debtor in possession with fiduciary duties that required him to exercise the attorney-client privilege in a manner consistent with his fiduciary duties and in the best interests of the estate. Because prosecution of avoidance claims had been transferred to the unsecured creditors' committee prior to confirmation of the plan and to the liquidating trustee upon confirmation, the court reasoned that control of the privilege with regard to matters relating to the claims

⁶ See generally William R. Mitchelson, Jr., *Waiver of the Attorney-Client Privilege by the Trustee in Bankruptcy*, 51 U. CHI. L. REV. 1230 (1984).

⁷ E.g., *In re Smith*, 24 B.R. 3 (Bankr. S.D. Fla. 1982) (trustee controls privilege); *In re Silvio de Lindegg Ocean Developments of America, Inc.*, 27 B.R. 28 (Bankr. S.D. Fla. 1982) (trustee does not have authority to waive privilege).

likewise was transferred to the entities authorized to prosecute the claims. *Id.* at 128-29.

The court acknowledged that an individual debtor might suffer adverse effects if someone else controlled the privilege, but found that waiver of the privilege with regard to avoidance actions could have no adverse effect on the debtor. In this regard, the court carefully noted the issue before it, *id.* at 129-30:

The liquidating trustee is not seeking to exercise control over evidentiary privileges pertaining to litigation to avoid a discharge. Nor is this a case where a liquidating trust is purporting to exercise control over any constitutional privilege, such as that preserved for individuals by the Fifth Amendment to the United States Constitution. Rather, this is a case limited to a liquidating trust of an insolvent individual debtor exercising control over evidentiary privileges in connection with avoidance and other causes of action established under Chapter 5 of the Bankruptcy Code, transferred by the fiduciary debtor in possession to the liquidating trustee to act as representative of the estate under a confirmed plan of liquidation.

The court in *In re Fairbanks*, 135 B.R. 717 (Bankr. D.N.H. 1991), held that the trustee could waive the privilege of a chapter 7 debtor in an involuntary chapter 7 case, a lawyer who had left his law firm records with his lawyers and disappeared. When the trustee sought their production, the debtor's lawyers asserted the attorney-client privilege. The court found that the trustee had a clear need for the records in

order to administer the assets and that the debtor's leaving the jurisdiction had left no one who could act on behalf of the estate to either assert the privilege or waive it. The court held that these "unique facts" justified a conclusion that the trustee could waive the attorney-client privilege.⁸

In contrast, the court in *In re Hunt*, 153 B.R. 445 (Bankr. N.D. Tex. 1992), held that a liquidating trustee under a confirmed chapter 11 plan had no power to waive the attorney-client privilege of the individual debtors with regard to avoidance actions transferred to the trustee for prosecution. The court quoted *Weintraub's* observation that, if a bankruptcy trustee were to control an individual's attorney-client privilege, it must be under some theory different from the *Weintraub* rationale. The court could find no other theory that would permit waiver of the privilege.

The *Hunt* court noted that the Supreme Court in *Weintraub* had ruled that a trustee could waive the privilege because the trustee was in a position analogous to new management of a corporation which thereby acquires the ability to control the corporation's privilege. The trustee for an individual, in contrast, acquires no rights of management of the debtor but is more analogous to a purchaser of assets. *Id.* at 453.⁹ The court accordingly found that only the individual debtors could waive the attorney-client privilege, rejecting assertions that the transfer of the claims for

⁸ The court also ruled, alternatively, that the records in question were not subject to the attorney-client or Fifth Amendment privilege of the debtor, who could have been compelled to turn them over if he had been in possession of them. Because the records would not have been privileged in the hands of the debtor, the court reasoned, they would not gain privileged status merely because possession of them had been transferred to the lawyer.

⁹ The court cited William R. Mitchelson, Jr., *Waiver of the Attorney-Client Privilege by the Trustee in Bankruptcy*, 51 U. CHI. L. REV 1230 (1984).

prosecution and the absence of harm to the debtors justified permitting the trustee to waive the privilege.

A number of courts have employed an analysis that balances the trustee's need for information against the interests of the debtor in maintaining the privilege. An example is *Moore v. Eason (In re Bazemore)*, 216 B.R. 1020 (Bankr. S.D. Ga. 1998). After a judgment in automobile accident litigation imposed damages in excess of policy limits, the debtor filed a chapter 7 bankruptcy petition, represented by the attorney who had been engaged by his insurance company to defend the tort claim. The trustee sought to examine the attorney with regard to the representation in the lawsuit for the purpose of determining whether the estate had claims against the attorney and the insurance company for bad faith or malpractice. The debtor, through his attorney, asserted that the attorney-client privilege precluded such examination.

The court ruled that a balancing test governed determination of the question, *id.* at 1023-24 (citations omitted):

Outside of bankruptcy the attorney-client privilege belongs to the client alone. The filing of bankruptcy by an individual debtor requires a determination as to whether anyone else controls the privilege. The inquiry requires balancing the interests of a full and frank discussion in the attorney-client relationship and the harm to the debtor upon a disclosure with the trustee's duty to maximize the value of the debtor's estate and represent the interests of the estate.

The court found that the trustee needed to examine the attorney to investigate potential claims of the estate and determined that waiver of the privilege would not result in any harm to the debtor because the inquiry was aimed at finding claims that the debtor may have, not investigating claims against the debtor. The court thus held that the trustee could waive the privilege, *id.* at 1025:

It is persuasive that an individual debtor should alone hold the attorney-client privilege waiver power when potential harm to or control over his person possibly exists from a disclosure, or communication with an attorney may be chilled. However, as here, when the trustee seeks to determine whether the bankruptcy estate holds a cause of action against an insurance company and the attorney it appointed for potential bad faith in settlement and malpractice during a state court case, which judgment precipitated the debtors' bankruptcy, the trustee holds the right to waive the attorney-client privilege.

The balancing test with regard to a prepetition claim of the debtor came out the other way in *In re Rice*, 224 B.R. 464 (Bankr. D. Ore. 1998). The trustee had objected to the debtor's claim of an exemption in her prepetition personal injury lawsuit and sought to examine her litigation attorney with regard to the claim. The court stated that it was required to analyze the privilege issue based on "the equities of the particular facts and circumstances of [the] case." *Id.* at 469. The court found that the trustee and the debtor had an adversarial relationship because of the dispute

over the extent to which the debtor could claim the exemption, which depended in part on the nature of the damages requested.¹⁰ Because of the adversarial relationship between the trustee and the debtor, the court concluded that the trustee could not control waiver of the privilege.

In *French v. Miller (In re Miller)*, 247 B.R. 704 (Bankr. N.D. Ohio), the court applied the *Bazemore* balancing test in determining that the chapter 7 trustee could not waive the attorney-client privilege of joint debtors with regard to the trustee's allegations of bankruptcy fraud in support of a complaint to revoke their discharge. *Id.* at 708-10. The court noted that, because the sole purpose for seeking to waive the privilege was to use the information against the debtors in the bankruptcy case, the trustee's waiver of the privilege could cause them a great deal of harm. The court also observed that the harm could be even greater because the information could be used against the debtors in criminal prosecutions. In contrast, the court found that the trustee's ability to represent the estate and maximize its value would not be significantly hampered. Thus, the court held that the trustee could not waive the debtors' privilege. *Id.* at 710-11. (The court went on to conclude that the crime-fraud exception might be applicable to require disclosure and ordered an *in camera* review of the communications to determine that issue.)

In *In re Foster*, 188 F.3d 1259 (10th Cir. 1999), the bankruptcy court had applied a balancing test in support of the conclusion that a trustee could waive an

¹⁰ The exemption dispute centered on whether and to what extent the state exemption statute permitted the debtor to exempt recoveries for future earnings, medical and other expenses, and pain and suffering. The outcome of the exemption litigation could depend on the manner in which the award was allocated among these three types of damages.

individual debtor’s privilege with regard to any pre-petition, good-faith, affirmative civil claim against third persons with whom the debtor had conducted prepetition business. The bankruptcy court had determined that the trustee could waive the privilege without conducting an *in camera* review of documents in question or weighing the potential harm to the debtor of disclosure of potentially incriminating confidences. Because the bankruptcy court had not balanced the potential harm to the debtor with the trustee’s need for information under the specific circumstances of the case, the court remanded for the bankruptcy court to examine the contested materials and to “balance pertinent factors, like those derived by the *Bazemore* court from *Weintraub*, with regard to the specific facts of [the debtor’s] case.” *Id.* at 1269, citing *Bazemore, supra*, 216 B.R. at 1024.

Although the *Foster* court thus relied on the *Bazemore* approach in its decision, it expressly noted – twice – that the debtor had not advocated a *per se* rule that a trustee may never control an individual debtor’s privilege. *Foster, supra*, 188 F.3d at 1266, n. 3 & 1267 n. 9. The court observed, *id.* at 1266 n.3:

[W]e do not adopt any rule that courts must balance the factors listed in *Bazemore*. We simply decline to address *sua sponte* the antecedent legal question whether a court should ever allow a bankruptcy trustee to control an individual debtor’s attorney-client privilege. We lack the benefit of any adversarial briefing of the issue.

It would appear, then, at least in the Tenth Circuit, that the ability of a bankruptcy trustee to waive an individual debtor's attorney-client privilege under any circumstances remains an open question.

A different rule may apply with regard to *postpetition* communications between an attorney and an individual who is a debtor in possession in a chapter 11 case.¹¹ In *In re Eddy*, 304 B.R. 591 (Bankr. D. Mass. 2004), the court held that a subsequent chapter 7 trustee could waive the privilege with regard to *postpetition* communications relating to administration of the property of the estate. The court explained that, as a debtor in possession, the debtor had fiduciary duties to the estate as its representative. A chapter 7 trustee upon conversion of the case is “essentially a successor estate representative,” whose powers include “the power to waive the privilege with regard to communications incident to the performance of the duties of the debtor in possession.” *Id.* at 599. The court thus permitted the trustee to waive the privilege with regard to communications that had taken place when the debtor had served as debtor in possession that concerned a *prepetition* malpractice claim listed on the debtor's schedules and with regard to *postpetition* transfers of assets. *Id.* at 600.

Similarly, the court in *In re Bame*, 251 B.R. 367 (Bankr. D. Minn. 2000), held that the chapter 7 trustee could waive the former individual debtor in possession's privilege with regard to communications relating to administration of the estate. The court placed the burden on the debtor to demonstrate which

¹¹ See generally Bruce H. White and William L. Medford, *Privileged Communication Postpetition: Who Owns the Privilege and Who Can Waive It?*, 23 AM. BANKR. INST. J. No. 3, p. 36 (April 2004).

communications related to representation of the debtor as an individual versus as debtor in possession.

C. Procedures for Asserting or Challenging the Privilege

In re Rice, 224 B.R. 464 (Bankr. D. Ore. 1998), sets out a convenient summary of procedures involved in bringing questions of the attorney-client privilege before the bankruptcy court. The initial burden is on the party claiming the privilege to demonstrate that it applies. *Id.* at 469. In this regard, the party claiming the privilege may be required to prepare a privilege log that identifies documents or other information otherwise responsive to a proper request for disclosure. With regard to each document, the privilege log must identify the attorney and client involved, the nature of the document, the persons or entities shown on the document to have received or sent it, all persons or entities known to have been furnished the document or informed of its substance, the date the document was generated, prepared, or dated, and, to the extent possible without violating the alleged privilege, statements as to the subject matter of each document. A party seeking disclosure of the document may contest the privilege by requesting the court to conduct an *in camera* review; the request should include a showing of a factual basis to support a good faith belief by a reasonable person that an *in camera* inspection may reveal evidence that information in the materials is not privileged. *Id.* at 473.

The same procedure might also be applicable where a trustee seeks to waive an individual's privilege and *in camera* review is appropriate to conduct the

Bazemore-type balancing test to determine whether the trustee may control the privilege. See *In re Foster*, 188 F.3d 1259, 1268-69 (10th Cir. 1999).

The Eleventh Circuit in *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir. 1987), established a two part test to determine whether the crime-fraud exception applies to a communication between a lawyer and client. The first test is whether there is *prima facie* evidence showing either (1) that the client was engaged in criminal or fraudulent conduct when the client sought advice of counsel; (2) that the client was planning such conduct when he sought the advice of counsel; or (3) that the client committed a crime or fraud after receiving the benefit of counsel's advice. The second part of the test is that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

Applying this test, the court in *In re Campbell*, 248 B.R. 435 (Bankr. M.D. Fla. 2000), held that the crime-fraud exception was applicable to a creditor's objection to the debtor's exemptions on the ground that he had converted nonexempt assets to exempt assets with the intent to hinder, delay, or defraud creditors. Noting that *prima facie* means, with respect to the crime-fraud exception, a showing which, if unrebutted, would result in a finding of fraud, the court ruled that such a case had been established with evidence that raised a "sufficient inference" that the transfers in question may have been fraudulent. *Id.* at 440. The only evidence referred to in the opinion is that the transfers were made and that the lawyer served as legal counsel in connection with them. *Id.* Other courts have

similarly found the crime-fraud exception to be applicable in fraudulent conveyance litigation upon a showing of one or more “badges of fraud” in connection with the challenged transfer (such as lack of consideration, transfer to a family member, pending or threatened litigation against the transferor, and insolvency or substantial indebtedness of the transferor) and the lawyer’s representation of the client at the time of the transfer.¹²

Campbell and similar cases rule on the applicability of the crime-fraud exception without conducting an *in camera* review and without making a determination as to the debtor’s intent. There is nothing in these cases to indicate that the client invoked the attorney’s assistance in the alleged fraudulent activity other than the attorney’s representation of the client at the time. In effect, they hold that the crime-fraud exception applies in fraudulent conveyance litigation so as to require disclosure of otherwise privileged communications solely upon a showing of appropriate “badges of fraud” and the attorney’s representation of the client when the transfer was made.

If there is no fraudulent intent, there is no fraudulent transfer, and the crime-fraud exception should not apply. Moreover, in the absence of disclosure of the otherwise privileged communications, the court may not be able to determine whether the second part of the exception’s test has been met, *i.e.*, that the attorney’s assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it. Determination of the crime-fraud exception without ruling on

¹² *E.g.*, *Riggs National Bank v. Andrews (In re Andrews)*, 186 B.R. 219 (Bankr. E.D. Va. 1995); *Diamant v. Sheldon L. Pollack Corp. (In re Sheldon L. Pollack Corp.)*, 216 B.R. 589 (Bankr. S.D. Tex. 1995).

the debtor's intent or reviewing the challenged communications *in camera* thus presents the danger of an unwarranted intrusion into the confidential nature of the attorney-client relationship.

The use of *in camera* review to rule on an assertion of the crime-fraud exception under the principles the Supreme Court established in *United States v. Zolin*, 491 U.S. 554 (1989), may be a more appropriate approach. In *Zolin*, the Court held that a federal court could conduct an *in camera* review of privileged communications to determine applicability of the crime-fraud exception based on a showing of “a factual basis adequate to support a good faith belief by a reasonable person that such review may reveal evidence to establish the claim that the crime-fraud exception applies.” *Id.* at 572 (citation and internal quotation omitted). The threshold showing to obtain *in camera* review may be met with any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged. *Id.* The Court thus rejected the rule of some courts that applicability of the crime-fraud exception had to be established by independent evidence, *i.e.*, by evidence other than the contested communications themselves. *Id.* at 556-57.¹³ It is important to note that *Zolin* does not address the *quantum* of proof necessary to establish the applicability of the crime-fraud exception. *Id.* at 563.

French v. Miller (In re Miller), 247 B.R. 704 (Bankr. 2000), illustrates this approach. The chapter 7 trustee sought to revoke the debtors' discharge for fraud and sought testimony from their former counsel, who asserted the attorney-client privilege. The court ruled that the failure of the debtors to disclose a personal

¹³ See generally, LAW OF LAWYERING § 9.10, *supra* note 2.

injury claim on their schedules, their postpetition receipt and use of settlement proceeds despite being advised by the trustee of their obligation to turn them over to the trustee, and their failure to disclose all creditors on their schedules made a *prima facie* showing of bankruptcy fraud, but that, without reviewing the otherwise privileged communications, the court could not determine the existence of a relationship between the *prima facie* fraud and the communications. *Id.* at 712. Applying *Zolin*, however, the court determined that an *in camera* review was appropriate. The court ruled, *id.* at 712:

[S]ufficient evidence exists to conclude that a reasonable person could form a good faith belief that some relationship exists between the communications sought by the Trustee and the violations allegedly at issue. Specifically, the communications made between the Debtors and their former attorney could shed light on the Debtors' state of mind concerning their alleged violations of the United States Bankruptcy Code. Therefore, this Court will conduct an *in camera* review concerning the communications made between the Debtors and their former legal counsel to determine if the second requirement of the crime-fraud exception, as set forth by the Sixth Circuit Court of Appeals in *United States v. Collis*, 128 F.3d 313 (6th Cir. 1997), has been met.¹⁴

¹⁴ The two-part test for the crime-fraud exception as articulated by the Sixth Circuit differs in emphasis from the test established by the Eleventh Circuit in *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir. 1987), discussed in the text. As the bankruptcy court in *Miller* explained, the two-part Sixth Circuit test requires a *prima facie* showing that a

The *Miller* court established a procedure for its *in camera* review of the discussions between the debtors and their former attorney. The court required the trustee to submit proposed questions for the court to ask the lawyer outside the presence of counsel and provided the debtors an opportunity to object to them. The court would then propound the questions it deemed appropriate to the lawyer to determine, on a question by question basis, whether the responses elicited from such questions fell within the purview of the crime-fraud exception. *Id.* at 712-13.

Invocation of the crime-fraud exception or a request for *in camera* review under *Zolin* requires evidence; conclusory allegations that a party engaged in fraudulent activity and used a lawyer to conceal or advance it are insufficient to assert the exception.¹⁵

“sufficiently serious” crime or fraud has occurred and the establishment of some relationship between the communication and the prima facie violation. 247 B.R. at 711.

¹⁵ *In re College Landings Limited Partnership*, 248 B.R. 619, 624 (Bankr. M.D. Fla. 1998).