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The privilege prohibiting disclosure of communications between attorney and client is the oldest recognized evidentiary privilege.[1] The elements necessary to claim the privilege have been clearly identified.[2] The privilege has been expanded to include an attorney's representatives.[3] It has been restricted to communications made outside the presence of third parties,[4] and also excludes communications made for the purpose of committing a crime or a tort.[5]

The attorney-client privilege is based on the public policy belief that sound legal advice serves the public interest by promoting the observance of law and the administration of justice.[6] This goal is necessarily dependent upon full and frank communications between attorneys and their clients.[7] In order to maximize this freedom of consultation, the fear of compelled disclosures must be removed.[8]

Such compelled disclosures may exist, in violation of public policy, if the trustee in bankruptcy can waive the corporate debtor's attorney-client privilege for the benefit of third parties. The bankruptcy trustee is obliged to maximize recovery of the bankrupt estate for the benefit of creditors.[9] In order to discharge this duty, the trustee must investigate the debtor's affairs to determine possible sources of additional recoveries,[10] such as avoidable preferences or fraudulent transfers.[11] The trustee could seek to waive the debtor's attorney-client privilege in order to gain potentially valuable information, not available elsewhere, concerning these sources of recovery. This note will analyze recent conflicting decisions concerning the trustee's power to waive this privilege.[12]

1. 8 WIGMORE ON EVIDENCE § 2290 (McNaughton rev. 1961) *See also* Young v. Taylor, 466 F.2d 1329, 1332 (10th Cir. 1972); sources, *infra* note 13.

2. WIGMORE, *supra* note 1, § 2292.

3. Jarvis, Inc. v. American Tel. & Tel. Co., 84 F.R.D. 286, 289 (D. Colo. 1979); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

4. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

5. *Id.; In re* Grand Jury Proceedings, Vargas, 723 F.2d 1461, 1467 (10th Cir. 1983).

6. Upjohn v. United States, 449 U.S. 383, 389 (1981).

7. *Id.*

8. WIGMORE, *supra* note 1, § 2291.

9. Freeman v. Seligson, 405 F.2d 1326, 1333 (D.C. Cir. 1968) (the trustee is under a duty to maximize the realization on liquidation of the estate); Commercial Credit Corp. v. Skutt, 341 F.2d 177, 181 (8th Cir. 1965) (the trustee is an officer of the court and a representative of all creditors, with the duty to realize the maximum from the estate for distribution to the creditors).

10. See *infra* text accompanying note 38.

11. See *infra* notes 40-43 and accompanying text. *See also* 11 U.S.C. § 547 (1982), which defines avoidable preferences, and 11 U.S.C. § 548 (1982), which defines avoidable fraudulent transfers.

12. Commodity Futures Trading Comm'n v. Weintraub, 722 F.2d 338 (7th Cir. 1984) (disallowed the trustee's waiver based primarily on a "chilling effect" theory); Weissman v. Hassett (*In re* O.P.M. Leasing Serv., Inc.), 670 F.2d 383 (2d Cir. 1982) (allowed the trustee's waiver based on absence of officers and directors of the debtor corporation and limited the holding

Because the Tenth Circuit has not addressed this issue, the note will also explore its opinions on related issues and attempt to provide some indication of how the court may decide this issue.

For the sake of brevity, several presumptions are made throughout this note. The validity of the attorney-client relationship[13] itself and the appointment of the trustee in accordance with applicable law[14] will not be questioned. Any reference to waiver presumes the validity of the waiver in all respects other than who may waive.[15]

Waiver

Waiver, in general, is defined as "the intentional relinquishment or abandonment of a known right or privilege."[16] This definition, however, fails to clarify what actions constitute a relinquishment or abandonment.[17] For policy reasons, waiver of the attorney-client privilege is generally disfavored, absent a clear intent to waive or actions clearly inconsistent with the privilege.[18]

Even if validity of the waiver is presumed, the question of who "owns" the privilege, i.e., *who* may waive it, remains unanswered. In general, the attorney-client privilege belongs to the client[19] and may be asserted or waived either by the client or by the attorney on the client's behalf.[20] The power to waive the privilege may also be exercised by the executor or administrator of a deceased client's estate,[21] or by the assignee of a client's interest,[22] at

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to the specific facts of the case); Citibank, N.A. v. Andros, 666 F.2d 1192 (8th Cir. 1981) (allowed the trustee's waiver based on the theory that the power to assert or waive the privilege passes with the property of the debtor's estate to the trustee); Ross v. Popper, 9 Bankr. 485 (Bankr. S.D.N.Y. 1980) (disallowed waiver based on a conflict of interest theory).

13. *See generally* Upjohn v. United States, 449 U.S. 383 (1981); Gergacz, *Attorney-Corporate Client Privilege: Cases Applying Upjohn, Waiver, Crime-Fraud Exception, and Related Issues*, 38 BUS. LAW. 1653 (1983); Note, *The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn?*, 81 MICH. L. REV. 665 (1983); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV. L. REV. 424 (1970).

14. 11 U.S.C. §§ 702, 1104 (1982) (providing the mechanism by which a Chapter 7 trustee is elected or a Chapter 11 trustee is appointed).

15. See *infra* text accompanying notes 19-29.

16. Johnson v. Zerbst, 304 U.S. 458, 464 (1938); United States v. Dressel, 742 F.2d 1256, 1258 (10th Cir. 1984); United States v. Rich, 589 F.2d 1025, 1032 (10th Cir. 1978).

17. For good general discussions of the acts that may constitute waiver, see Note, *When Does a Limited Waiver of the Attorney-Client Privilege Occur?*, 24 B.C.L. REV. 1283 (1983) and Note, *Corporate Disclosure and Limited Waiver of the Attorney-Client Privilege*, 50 GEO. WASH. L. REV. 812 (1982).

18. *See generally* Note, *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 MICH. L. REV. 598 (1983).

19. WIGMORE, *supra* note 1, § 2321.

20. *Id.* § 2324; *In re* Grand Jury Proceedings, Vargas, 723 F.2d 1461, 1466 (10th Cir. 1983).

21. WIGMORE, *supra* note 1, § 2329; Glover v. Patten, 165 U.S. 394, 407-08 (1897); Doherty v. Fairall, 413 F.2d 381, 382 (D.C. Cir. 1969).

22. WIGMORE, *supra* note 1, § 2328; Weissman v. Hassett (*In re* O.P.M. Leasing Serv., Inc.), 13 Bankr. 54, 59 n.10 (Bankr. S.D.N.Y. 1981); Buuck v. Kruckeberg, 121 Ind. App. 262, 271, 95 N.E.2d 304, 308 (1950).

least to the extent the confidential communications affect the interest of the estate[23] or the realization of the interest transferred from the client to the assignee.[24] Thus, if the bankruptcy trustee is properly characterized as an executor or administrator, or as an assignee of the debtor's interest, it seems clear that the trustee can waive the debtor's attorney-client privilege when it is in the bankrupt estate's best interest.[25]

Supreme Court Standard 503 (Proposed Federal Rule of Evidence 503) specifically addresses this question: "The [attorney-client] privilege may be claimed by the client, his guardian or conservator, the personal representatives of a deceased client, or the *successor, trustee, or similar representative* of a corporation, association, or other organization, whether or not in existence."[26] Although standard 503 has not been enacted by the United States Congress, one court held it to be a "fairly authoritative source of the federal law."[27] On its face, it addresses only the power to *claim* the privilege, not the power to waive it. One court, however, has interpreted standard 503 as encompassing not only the claim of privilege but its waiver as well,[28] and another court used the standard as the rationale for allowing the bankruptcy trustee to waive the debtor's attorney-client privilege.[29] The Supreme Court standard is not sufficiently clear on its face to be dispositive of this question. The standard likewise has not been interpreted consistently and therefore must be viewed in combination with other applicable law.

Proper analysis of the propriety of the bankruptcy trustee's waiver of the debtor's attorney-client privilege must include examination of statutes relating to the trustee's duties and powers. This issue has precipitated court opinions based on a variety of theories that may conflict with the statutory mandates.[30] Therefore, examination of these opinions and their theories is necessary to properly resolve this issue. Similarly, it is helpful to investigate other considerations which have not been articulated by these courts and possible compromise positions.

23. WIGMORE, *supra* note 1, § 2329; Glover v. Patten, 165 U.S. 394, 407 (1897).

24. WIGMORE, *supra* note 1, § 2328; Weissman v. Hassett (*In re* O.P.M. Leasing Serv., Inc.), 13 Bankr. 54, 59 n.10 (Bankr. S.D.N.Y. 1981); Buuck v. Kruckeberg, 121 Ind. App. 262, 266, 95 N.E.2d 304, 308 (1950).

25. The Bankruptcy Code characterizes the trustee as a "representative of the bankrupt estate." 11 U.S.C. § 323(a) (1982).

26. S. CT. STD. 503 (emphasis added). The Supreme Court and the Judicial Conference Advisory Committee on Rules of Evidence originally proposed thirteen rules of privilege to Congress. Congress enacted only an amended version of rule 501, covering privilege in general terms. The remaining twelve rules, covering specific privileges, became Supreme Court Standards, without force of law. However, since the Advisory Committee was basically restating federal law in the standards, they remain a convenient, comprehensive guide to the existing federal law of privileges. *See generally* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 501[03] (1982), for a discussion of the circumstances and rationale surrounding the rejection by Congress of the Supreme Court Standards, as well as their current status. Supreme Court standard 503 is also the text, in part, of Oklahoma's attorney-client privilege. 12 OKLA. STAT. § 2502(c) (1981).

27. United States v. DeLillo, 448 F. Supp. 840, 842 (E.D.N.Y. 1978).

28. *Id.*

29. *In re* Crescent Beach Inn, 37 Bankr. 894 (Bankr. D. Me. 1984).

30. See *supra* note 12.

Trustee's Duties

The Bankruptcy Code[31] imposes upon the trustee in bankruptcy a duty to investigate, examine, and otherwise manage the debtor's estate. A trustee's investigative duties are broad and may be in the nature of a fishing expedition.[32] The court should balance the trustee's function to expose bad faith conduct by the debtor against the possible invasion of the debtor's privacy,[33] and give the trustee greater latitude if questionable conduct is shown.[34] Additional statutory duties include, without limitation, accountability for the property of the estate,[35] investigation of the debtor's financial affairs,[36] and transmission of information regarding the estate to parties in interest.[37]

Proper investigation of the debtor's activities and affairs necessarily requires examination of the debtor's acts, property, and financial condition as provided by the Bankruptcy Code.[38] Bankruptcy rule 2004(b) expressly limits examination to matters concerning the debtor, apparently providing protection to a corporate officer's *individual* privilege, as opposed to the privilege held by the corporation itself,[39] thereby eliminating the danger that the trustee's waiver could be used for a "back door" investigation of a corporate officer's private affairs.

31. 11 U.S.C. §§ 101-1146 (1982). Although the Bankruptcy Code was revised in 1984, no sections discussed herein were affected by the revision.

32. *In re* Vantage Pet. Corp., 34 Bankr. 650, 651 (Bankr. E.D.N.Y. 1983), *See also In re* South State Street Bldg. Corp., 105 F.2d 680, 682 (7th Cir. 1939) (Proper performance of the trustee's duties requires a "comprehensive and searching investigation into all phases of the business affairs and operations of the debtor corporation.").

33. *In re* Vantage Pet. Corp., 34 Bankr. 650, 651 (Bankr. E.D.N.Y. 1983).

34. *Id. See also* Austrian v. Williams, 198 F.2d 697, 702 (2d Cir. 1952) (one purpose of the trustee's investigatory powers is to aid in the exposure of corporate abuses).

35. 11 U.S.C. §§ 704(2), 1106(a)(1) (1982). Section 704(2) provides that "the trustee shall be accountable for all property received." Section 1106(a)(1) makes § 704(2) applicable to Chapter 11 proceedings.

36. 11 U.S.C. §§ 704(3), 1106(a)(3) (1982). Section 704(3) provides that "the trustee shall investigate the financial affairs of the debtor." Section 1106(a)(3) provides that the trustee shall investigate the debtor's affairs, as well as the operation of the debtor's business, the desirability of the business' continuance, and any other matter relevant to the case or to the formulation of a plan.

37. 11 U.S.C. §§ 704(6), 1106(a)(1), 1106(a)(4) (1982). Section 704(6) provides that "the trustee shall, unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest." Section 1106(a)(1) makes § 704(6) applicable to Chapter 11 proceedings. Section 1106(a)(4) provides that the trustee shall file a statement of the results of his investigation, including any findings of irregularities in the management of the debtor's affairs, and shall transmit this statement to various parties in interest.

38. 11 U.S.C. § 343 (1982), which provides: "the debtor shall appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title. Creditors, any indenture trustee, or any trustee or examiner in the case may examiner [sic] the debtor." *See also* BANKR. R. PRAC. & PROC. 2004, which provides that the court may order the examination of any person. This examination may extend only to the debtor's affairs or matters which may affect the administration of the debtor's estate, including, in reorganization cases, matters relating to the operation of the debtor's business or to the formulation of a plan.

39. *See also* 11 U.S.C. § 541(b) (1982), which provides that "property of the estate does not include any power that the debtor may exercise solely for the benefit of an entity other

A variety of situations may arise in which the trustee might seek to discover confidential communications between the debtor and his attorney. For example, the debtor's attorney may be the best, and possibly the only, source of information to determine whether attorney fees constitute a preference or fraudulent transfer,[40] or whether attorney fees paid by a debtor corporation are for the benefit of the corporation or an individual officer.[41] Likewise, the debtor's counsel may hold valuable information concerning the validity of the debtor's counterclaims against a judgment creditor.[42] The attorney's knowledge might also be needed to assist the trustee in the management of the debtor's business in a Chapter 11 proceeding.[43]

While the Code expressly authorizes the court to order production of documents by a debtor's attorney, such order is "subject to any applicable privilege."[44] This provision's stated purpose is to deprive an attorney (or other professional) of the preferential treatment available under state law lien provisions.[45] The extent to which the attorney-client privilege is valid against the trustee is admittedly unclear and is not discussed by the drafters of the Code. While "applicable privilege" is not defined in the Code, the Committee Note accompanying this Code section uses the attorney-client privilege as the only example.[46]

Established Judicial Theories

Waiver of the debtor's attorney-client privilege by an assignee of the debtor was denied in England as early as 1831.[47] The English court gave little rationale for the denial, but it was apparently based on rather vague policy grounds. This issue has since been addressed in both the bankruptcy and district courts in the United States.

Conflict of Interest Theory

Before 1984 there was only one case in which the trustee attempted to waive the debtor's attorney-client privilege, and the court failed to allow the waiver.

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than the debtor." *In re* Tom Woods Used Cars, Inc., 24 Bankr. 529 (Bankr. E.D. Tenn. 1982) (trustee acquires no greater interest than the debtor has in the debtor's property).

40. Turner v. Davis, Gillenwater & Lynch (*In re* Investment Bankers, Inc.), 30 Bankr. 883 (Bankr. D. Colo. 1983). The Code expressly provides for examination of the propriety of attorneys' fees in 11 U.S.C. §§ 329, 502(b)(5) (1982), and BANKR. R. PRAC. & PROC. 2017.

41. *In re* National Trade Corp., 28 Bankr. 872 (Bankr. N.D. Ill. 1983).

42. *Id.*

43. Weissman v. Hassett (*In re* O.P.M. Leasing Serv., Inc.), 670 F.2d 383 (2d Cir. 1982).

44. 11 U.S.C. § 542(e) (1982), which provides: "Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to disclose such recorded information to the trustee."

45. S. REP. No. 989, 95th Cong., 2d Sess. 84, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5870.

46. *Id.*

47. Bowman v. Norton, 172 Eng. Rep. 929 (1831).

The United States District Court for the Southern District of New York disallowed the trustee's waiver in *Ross v. Popper*,[48] based on a conflict of interest theory. The court held that because the trustee represents primarily the general creditors, whose interests are adverse to those of the debtor as well as those of the secured creditors, waiver of the attorney-client privilege by the trustee for the benefit of general creditors could operate to the detriment of the other parties.[49] Because the attorney-client communications sought to be discovered occurred prior to bankruptcy, the beneficiary of the communications was the bankrupt corporation. Thus, waiver of the privilege by one with adverse interests, e.g., the trustee, should not have been allowed.[50] However, the *Ross* court cited no authority in support of this theory. Although the conflict of interest rationale of *Ross* seems to be well reasoned and compelling, the fear of creating unwarranted preferences could be overridden by the trustee's general responsibility to administer the estate in an evenhanded manner. The trustee holds a fiduciary position with an obligation to treat all parties fairly.[51]

Property of the Estate Theory

The issue of whether a trustee may waive a corporate debtor's attorney-client privilege first reached a United States court of appeals in 1981, producing the opinion that generally governed this issue in lower courts until 1984.[52] The Eighth Circuit Court of Appeals allowed the trustee's waiver based primarily on the concept that the power to waive the privilege passes to the trustee with the property of the debtor's estate.[53]

In the trustee's examination of the debtor under rule 205(a) of the Federal Rules of Bankruptcy Procedure,[54] the trustee in *Citibank, N.A. v. Andros*[55] sought to waive the corporate debtor's attorney-client privilege to afford the principal secured creditor access to documents held by the debtor's attorney. The court, in allowing the trustee to waive the privilege, reasoned that because the Bankruptcy Act vests broad powers in the trustee to manage the debtor's affairs, and because the power to waive the corporate attorney-client privilege belongs to the corporate management, the right to assert or waive the privilege passes to the trustee with the property of the corporate debtor.[56]

48. 9 Bankr. 485 (S.D.N.Y. 1980).

49. *Id.* at 487. *Cf. In re* Mori, 1 Bankr. 265 (Bankr. S.D. Fla. 1979) (accountant-client privilege, if allowed, would severely prejudice creditors).

50. Ross v. Popper, 9 Bankr. 485, 487 (S.D.N.Y. 1980).

51. Wolf v. Weinstein, 372 U.S. 633 (1963). *See also* Walker v. Steele, 26 Bankr. 233 (Bankr. W.D. Ky. 1982) (trustee must be "scrupulously impartial").

52. Citibank, N.A. v. Andros, 666 F.2d 1192 (8th Cir. 1981).

53. *Id.* at 1195.

54. Examination of parties is now covered by BANKR. R. PRAC. & PROC. 2004.

55. 666 F.2d 1192 (8th Cir. 1981).

56. *Id.* at 1195. The property of the debtor is now covered by 11 U.S.C. § 541 (1982). The Second Circuit also allowed the trustee's waiver in Weismann v. Hassett (*In re* O.P.M. Leasing Serv., Inc.), 670 F.2d 383 (2d Cir. 1982), but limited its holding to the facts of the case. The court expressly declined to decide whether the attorney-client privilege passes by operation of law to the trustee. Though not critical of *Citibank*, the court failed to expressly adopt its reason-

The court also relied on Supreme Court standard 503(c) as "a source of federal common law" that would clearly allow the waiver.[57] In response to the argument that standard 503(c) does not contemplate a waiver of this nature, the court looked to the legislative history of the Code provision for privilege in general,[58] which indicates that the privilege provision was enacted to prevent attorneys and accountants from withholding documents to obtain priority in bankruptcy,[59] and apparently concluded that section 542(e) was enacted for no other purpose than to eliminate preferences created in favor of attorneys and accountants by state lien statutes. If the *Citibank* court is correct in its apparent assumption that Congress intended only one interpretation for the Code section dealing with privilege,[60] then a broad application of the attorney-client privilege would be unwarranted. It may, however, also be unwarranted to assume that, because Congress stated only one purpose for 542(e), in intended to exclude all others.

Chilling Effect Theory

In early 1984 the Seventh Circuit cast serious doubts on the *Citibank* court's reasoning in *Commodity Futures Trading Commission v. Weintraub*.[61] The court was highly critical of *Citibank* and its lack of supporting authority.[62] The Seventh Circuit declined to follow either of the prior appellate decisions and reversed a district court ruling allowing a trustee's waiver of a debtor's attorney-client privilege. *Commodity Futures* is somewhat more analytical than prior cases on this issue, offering four basic rationales for denying the trustee's waiver.[63]

First, the court reasoned that although the trustee has broad management powers, the bankrupt corporation continues to exist and is still capable of performing many functions. Thus, the trustee does not have absolute control over the corporation's legal rights and does not replace the corporation as an entity.[64] Second, while an individual debtor may assert privileges during the trustee's examination,[65] the trustee's waiver of these privileges would deny the same right to the corporate debtor. This would result in unequal treatment between individual and corporate debtors.[66] As a related consideration,

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ing. In *O.P.M.* where all officers and directors of the debtor corporation had resigned, the power to assert or waive the attorney-client privilege passed to the trustee "by virtue of the non-existence of any other entity authorized to so act." *Id.* at 387. This limitation renders *O.P.M.* virtually useless as precedent applicable to other fact situations.

57. Citibank, N.A. v. Andros, 666 F.2d 1192, 1195 (8th Cir. 1981).

58. See *supra* notes 44-46 and accompanying text.

59. S. REP. No. 989, 95th Cong., 2d Sess. 84, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5870.

60. Citibank, N.A. v. Andros, 666 F.2d 1192, 1195 (8th Cir. 1981).

61. 722 F.2d 338 (7th Cir. 1984).

62. *Id.* at 342.

63. *Id.* at 342-43.

64. *Id.* at 342.

65. See *supra* note 44 and accompanying text.

66. However, § 542(e) does not draw the distinction between individual and corporate debtors in conditioning the production of information upon applicable privilege. This section refers only

the court viewed the "erosion" of the corporation's attorney-client privilege based on the economic status of the corporation as discriminatory. A solvent corporation may freely assert or waive its attorney-client privilege, but upon entering bankruptcy the privilege would be lost to the trustee, thereby discriminating against a corporate debtor solely on the basis of economic status.[67] The final consideration, and the one the Seventh Circuit considered most important, is the potential chilling effect on attorney-client relations.[68] The policy basis for the privilege is poorly served by allowing waiver by the trustee. Corporate clients would be hesitant to communicate openly with their attorneys for fear that the communications would be open to public scrutiny in subsequent bankruptcy proceedings.

Commodity Futures, despite its persuasive discussion of policy, may be flawed in other ways.[69] In discussing the trustee's powers, the court concentrated primarily on the management powers, giving only cursory consideration to the investigative duties of the trustee, which comprise a major portion of the Code sections concerning trustee's duties.[70]

Tenth Circuit Posture

The Tenth Circuit has not yet addressed the specific issue of a bankruptcy trustee's power to waive a debtor's attorney-client privilege. Though the Tenth Circuit certainly recognizes the privilege,[71] it has had few opportunities to explore its intricacies. The court also recognizes that the attorney-client privilege is to be narrowly construed,[72] and there is some evidence of the court's movement toward a more expansive view of what constitutes waiver of the privilege,[73] although questions relating to the ownership of the privilege remain unanswered.

Based on existing law in the Tenth Circuit, the court could allow the trustee's waiver under two distinct theories: (1) the *Citibank* view of the power to waive

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to the *debtor's* property. "Debtor" is defined by the Code to include both individuals and corporations. *See* 11 U.S.C. §§ 101(12), 101(30) (1982).

67. Commodity Futures Trading Comm'n v. Weintraub, 722 F.2d 338, 343 (7th Cir. 1984).

68. *Id.*

69. The unequal treatment and discrimination theories seem somewhat cumulative and appear to be subordinate to the court's reliance on the chilling effect theory.

70. See *supra* text accompanying notes 32-36.

71. Young v. Taylor, 466 F.2d 1329, 1332 (10th Cir. 1972); Wilcoxon v. United States, 231 F.2d 384, 386 (10th Cir.), *cert. denied*, 351 U.S. 943 (1956).

72. *In re* Grand Jury Subpoena Duces Tecum, 697 F.2d 277, 278 (10th Cir. 1983).

73. In Blankenship v. Rowntree, 219 F.2d 597 (10th Cir. 1955), the court took a very restrictive view of waiver, holding that delivery of a document by a client to a third party for subsequent transmission to an attorney did not constitute a waiver of the attorney-client privilege. Twenty-four years later, in United States v. Bump, 605 F.2d 548 (10th Cir. 1979), the court adopted a more expansive (and more traditional) view, holding that the privilege is waived when a client voluntarily reveals otherwise confidential information to a third party, or when the attorney reveals the information to a third party with the client's consent. *See also In re* Grand Jury Proceedings, Vargas, 723 F.2d 1461 (10th Cir. 1983) (an attorney cannot waive the attorney-client privilege without the client's consent, but production of privileged documents under a court order does not necessarily constitute a waiver of the privilege).

passing with the property of the estate to the trustee, or (2) implicit adoption of Supreme Court standard 503 as a rule of evidence. There are apparently no decisions in the Tenth Circuit that indicate its willingness to disallow the trustee's waiver, barring adoption on policy grounds of the *Ross* court's conflict of interest theory or the *Commodity Futures* court's chilling effect theory. There are likewise no decisions evincing the court's movement in this direction.

Allowance of the trustee's waiver under *Citibank*'s property of the debtor theory would be greatly affected by the Tenth Circuit's definition of "property." Both the Supreme Court and the Tenth Circuit have held that the word "property," when used without qualification, may reasonably include obligations, *rights*, and other intangibles, as well as physical things.[74] A logical extension of this concept supports the conclusion that the attorney-client privilege does not merely pass to the trustee *with* the property of the estate, but is in fact property of the estate. If the privilege itself constitutes property of the estate rightfully passing to the trustee, there is no question that the trustee would also possess the right to assert or waive it.

The Tenth Circuit could also allow the trustee's waiver based on an interpretation of Supreme Court standard 503.[75] In 1983 the Tenth Circuit implicitly adopted Proposed Federal Rule of Evidence 512,[76] holding that "although Congress did not enact Rule 512, it still has utility as a standard of law on the privileges that should be applied in federal courts."[77] Although rule 512 is inapplicable to the present discussion, its approval by the Tenth Circuit demonstrates the court's willingness to give the force of law to the proposed rule. This lays a doctrinal foundation for the court's adoption of Supreme Court standard (Proposed Rule) 503. As discussed earlier, standard 503 was used by another court to allow the trustee to waive the debtor's attorney-client privilege.[78]

The issue presented here has been considered only once by a district court within the jurisdiction of the Tenth Circuit. In 1983 the Bankruptcy Court for the District of Colorado reached a compromise position when faced with the trustee's attempted waiver of the debtor's attorney-client privilege.[79] Though the court approved an examination of the purportedly privileged materials and a deposition of the debtor's attorneys, it did so with the recognition that the attorney-client privilege of the individuals is subject to some protection.[80]

74. Fidelity & Deposit Co. of Md. v. Arenz, 290 U.S. 66, 68 (1933); Jones v. Corbyn, 186 F.2d 450, 452 (10th Cir. 1950); Citizens State Bank v. Vidal, 114 F.2d 380, 382-83 (10th Cir. 1940).

75. See *supra* note 26 and accompanying text.

76. FED. R. EVID. 512 (not enacted) provides: "Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege."

77. *In re* Grand Jury Proceedings, Vargas, 723 F.2d 1461, 1466 n.4 (10th Cir. 1983).

78. *In re* Crescent Beach Inn, 37 Bankr. 894 (Bankr. D. Me. 1984), discussed *supra* at text accompanying note 29.

79. Turner v. Davis, Gillenwater, & Lynch (*In re* Investment Bankers, Inc.), 30 Bankr. 883 (Bankr. D. Colo. 1983).

80. *Id.* at 887. While the court relied heavily on *Citibank* to approve the examination, it cited no authority for the confidential manner of production.

The documents and testimony were maintained on a confidential basis, under seal, with access to them limited to the parties and their counsel.

Conclusion

The obvious conflict between statutory mandates and established policy presented by the question of whether the bankruptcy trustee may waive the debtor's attorney-client privilege is not easily resolved. Although the policy considerations advanced by the *Commodity Futures* court are compelling, the failure of the Seventh Circuit to consider the investigatory duties of the bankruptcy trustee remains unexplained. It seems unlikely that Congress would devote such attention to the trustee's investigative duties in bankruptcy[81] with the intent that these duties be curtailed by the single reference to "applicable privilege" in section 542(e) of the Code.[82]

The chilling effect rationale used by the *Commodity Futures* court is a very real concern and is precisely why the law on this issue needs to be settled. The conflict with seemingly established authority created by the *Commodity Futures* opinion will only lead to confusion in those circuits that have not addressed the issue, and could lead to forum shopping by potential debtors. However, from a practical standpoint, it seems unlikely that any real chilling effect will be felt from a fear of disclosure in bankruptcy because few businesses *plan* to become involved in bankruptcy proceedings. Should universal allowance of the trustee's waiver occur, it would, especially in the case of voluntary bankruptcies, be just another consideration when deciding whether and when to file.[83]

The potential value to the trustee of the power to waive the debtor's attorney-client privilege is great, especially in terms of efficiency of administration. The debtor's attorney would often be the best source of information concerning both the debtor's financial affairs and its pre-petition transactions. Furthermore, the failure to afford the trustee access to all necessary information and to allow the debtor to retain control of information could limit the impartiality of administration of the estate and allow concealment of pertinent facts. Retention of the attorney-client privilege by the debtor could seriously encumber complete administration by allowing the debtor alternatively to waive or to assert the privilege when in its best interest, as opposed to the best interest of the estate.

Two other important considerations bear notice. Waiver of the attorney-client privilege by the trustee applies only to the privilege formerly held by the *debtor corporation*, thereby maintaining protection of the privilege held by individual officers and directors.[84] Protection is also afforded the attorney's pecuniary interest because the attorney's retaining lien may not be disturbed by the trustee's investigation.[85] Presumably, the lien would remain intact regardless of the depth of the trustee's investigation. These considerations

81. See *supra* text accompanying notes 32-36.

82. See *supra* note 44.

83. However, the fear of disclosure and its concomitant chilling effect may increase when a corporation encounters financial difficulties and bankruptcy is imminent.

perhaps "soften the blow" to debtors and their attorneys of the apparently well-reasoned conclusion that the power to waive the attorney-client privilege is a proper and necessary tool of the bankruptcy trustee, well supported by statutory authority.

It is possible that an across-the-board allowance of the trustee's waiver could lead in certain cases to a "creditor's bonanza." When utilized in conjunction with the express investigatory powers held by the trustee, it could conceivably lead to larger recoveries by the estate and, consequently, larger recoveries by creditors.

Although existing authority apparently authorizes the trustee's waiver, this does not preclude compromise positions that may accomplish the goals of disclosure while maintaining some degree of confidentiality. Restriction of access to privileged materials, as in *In re Investment Bankers*,[86] is an ideal vehicle by which the trustee may compel maximum disclosure with minimum intrusion into the privilege.

Another approach, not yet considered by any court, could be a requirement that the trustee make some showing of the value of the potential benefit that may be realized by the estate through examination of privileged information held by debtor's counsel. This approach may be opposed on the grounds that it attaches a price tag to the privilege. However, it would certainly prevent intrusion for *de minimis* gains to the estate.[87]

James A. Moomaw

Editor's Note: Subsequent to this note's completion, the United States Supreme Court granted certiorari to review *Commodity Futures*. 105 S. Ct. 321 (1984). On April 29, 1985, a unanimous Court (Powell, J., did not participate) reversed the Second Circuit in Commodity Futures Trading Comm'n v. Weintraub, 105 S. Ct. 1986 (1985), holding that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications. The Court rejected the conflict of interest, discrimination, and chilling effect theories, and based its decision generally on the legislative history of the Bankruptcy Code, the management duties of the trustee, and the trustee's fiduciary capacity. The Court also noted the potential for abuses should the power to assert or waive the privilege remain with the corporation's officers and directors.

84. See *supra* text accompanying note 39.

85. *In re* Life Imaging Corp., 31 Bankr. 101 (Bankr. D. Colo. 1983). *But cf. In re* Beef 'n Burgundy, Inc., 21 Bankr. 69 (Bankr. N.D. Ga. 1982) (where information held by debtor's attorney was essential to the administration of the estate, the debtor's attorney must produce the information pending satisfaction of the attorney's lien).

86. 30 Bankr. 883 (Bankr. D. Colo. 1983). Discussed *supra* at text accompanying note 79.

87. However, the trustee may be required to investigate, regardless of value. See *supra* text accompanying notes 32-34.