UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 7
RICHARD A. DiLORETO	:	
Debtor	:	Bankruptcy No. 98-34641F
NEIL D. LEVIN, Superintendent of Insurance of the State of New York, and his successors in office as Superintendent of Insurance of the State of New York, as Liquidator of NASSAU INSURANCE COMPANY	:	
Plaintiff	:	
v.	:	
RICHARD A. DiLORETO	:	
Defendant	:	Adversary No. 99-0206

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MEMORANDUM

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By BRUCE FOX, Chief Bankruptcy Judge:

The plaintiff/Superintendent in the above-captioned adversary proceeding has filed a motion in limine seeking a determination that Aldo A. Trabucchi, Esquire, may testify at the forthcoming trial on the plaintiff's objection to the debtor's discharge under section 727(a). The debtor-defendant opposes such testimony "on the grounds that it would violate the attorney-client privilege." Joint Pretrial Statement, at 2 n.1.

From my consideration of various pleadings, the arguments of counsel, and a review of their respective memoranda, I place the Superintendent's request to call Mr. Trabucchi as a witness, and the debtor's assertion of privilege, in the following context.

I.

A.

Before 1984, Nassau Insurance Company was licensed to do business as an insurer in the State of New York. Mr. Richard A. DiLoreto, the instant chapter 7 debtor and the defendant in this proceeding, was president and chairman of its board of directors. In 1984, Nassau was ordered into rehabilitation, and eventually liquidation, by the appropriate state court. The Superintendent of Insurance of the State of New York, the present plaintiff in this proceeding, was appointed liquidator of Nassau's assets and succeeded to all of its outstanding claims.

Acting on behalf of Nassau, the Superintendent brought suit in New York state court in 1985 against Mr. DiLoreto, his wife, and Ardra Insurance Company, Ltd. In summary, Mr. DiLoreto was sued for allegedly breaching various duties he purportedly owed to Nassau; he was also sued as the "alter ego" of Ardra and thus personally liable for all debts owed by Ardra to Nassau.

Mr. Trabucchi began representing Mr. DiLoreto in this state court litigation not later than 1991 and remained his attorney until 1998. (During some or all

of that time, he also represented Mrs. DiLoreto.) In addition, Mr. Trabucchi represented Mr. DiLoreto in asserting a claim against National Union Fire Insurance Company, based upon a directors and officers insurance policy (which policy had been obtained in connection with Nassau). This insurance claim sought to have the insurer pay Mr. DiLoreto's legal expenses in connection with the Superintendent's lawsuit against him. It is further agreed by the parties that Mr. Trabucchi was counsel to Mr. DiLoreto when the Superintendent brought a contempt action against him during the course of the state court litigation for violating an earlier consent order involving Ardra.

Apparently, Mr. DiLoreto was held in civil contempt and damages were assessed against him. Mr. DiLoreto, in turn, commenced suit in New York state court in 1998 against Mr. Trabucchi (and others) for malpractice. That lawsuit (a copy of the complaint was provided at the hearing on the instant motion) asserts that Mr. DiLoreto was held in contempt because, at the direction of Mr. Trabucchi, the former turned over the insurance proceeds arising from the claim against National Union to Ardra. This transfer violated an earlier consent decree and Mr. DiLoreto alleges in his malpractice action that Mr. Trabucchi should have been aware of terms of that decree.

This malpractice litigation is still pending. The parties to this bankruptcy litigation have informed me that Mr. Trabucchi has not yet filed any responsive pleading.

It is also agreed that Mr. Trabucchi holds an unsecured claim against Mr. DiLoreto in this chapter 7 bankruptcy case for unpaid legal fees accruing during the Superintendent's state court litigation.

B.

The above-captioned adversary proceeding brought by the Superintendent in this court raises, inter alia, three counts which seek to deny Mr. DiLoreto a bankruptcy discharge. As the Third Circuit Court of Appeals has explained, in general, "[p]ursuant to § 727, a court shall grant a debtor a discharge unless the debtor has acted deceptively with respect to property transfers, records, court filings, or explanations as to property loss. 11 U.S.C. § 727(a)(2)-(5)." In re Gioioso, 979 F.2d 956, 958 (3d Cir. 1992). The plaintiff here maintains that three subsections of 727(a) are applicable to the actions of Mr. DiLoreto and thus serve to deny him his discharge. The debtor counters that the Superintendent improperly complains only that he has failed to disclose property interests which do not belong to him; they belong to non-debtor corporate entities.

Based upon discovery taken in connection with the long-pending state court litigation, as well as the evidence offered at the trial in that case (apparently, the Superintendent obtained a judgment against Mr. DiLoreto upon some of his legal theories, including his alter ego theory), the Superintendent already has information regarding many of the transactions purportedly involving Mr. DiLoreto and Ardra and other entities, which form the factual underpinning of his objections to the debtor's bankruptcy discharge. Moreover, while phrased in different ways, the Superintendent's primary contention in this adversary proceeding (as it relates to denial of discharge) is that assets belonging to Ardra (and other entities related to Ardra) are de facto assets of

Mr. DiLoreto, the ownership of which he had a duty to disclose in connection with his present bankruptcy case.

In the present evidentiary motion, the Superintendent seeks leave to obtain testimony from Mr. Trabucchi regarding Mr. DiLoreto's ongoing control of Ardra and related non-bankrupt entities, along with the assets which they own. (While counsel for the Superintendent also hopes that Mr. Trabucchi's testimony will reveal the existence of assets of which he is presently unfamiliar, he offers no basis to believe that such testimony will be given. Further, in light of the extensive information already obtained by the Superintendent, it is unlikely that former counsel will provide such new data.) The Superintendent contends that testimony from Mr. Trabucchi will be relevant to his assertions that the debtor's discharge should be denied.

II.

A.

Mr. DiLoreto maintains that any testimony which might be provided by Mr. Trabucchi relevant to this proceeding is privileged and thus inadmissible.

Fed.R.Bankr.P. 9017 states that the Federal Rules of Evidence apply in all bankruptcy cases. Fed.R.Evid. 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by

> the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

The outcome of this adversary proceeding is determined by federal substantive law, viz. 11 U.S.C. § 727(a). Thus, in objection to discharge litigation a bankruptcy court must apply federal common law to determine if relevant evidence is governed by the existence of some privilege and, if so, whether some exception to the assertion of the privilege is applicable. See, e.g., Swidler & Berlin v. U.S., 524 U.S. 399, 403 (1998) (federal common law applies to federal prosecution); In re Foster, 188 F.3d 1259, 1264 (10th Cir. 1999) (federal common law applies when the trustee seeks information from debtor's former counsel pursuant to 11 U.S.C. § 542(e)); In re Bazemore, 216 B.R. 1020, 1022-23 (Bankr. S.D.Ga. 1998); In re French, 162 B.R. 541, 545 (Bankr. S.D. 1994).

The only evidentiary privilege raised by Mr. DiLoreto concerning the admissibility of testimony from Mr. Trabucchi is the attorney-client privilege. The elements traditionally recognized as establishing the attorney-client privilege under federal common law are well known:

> 1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his or her subordinate, and (b) in connection with this is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 862 (3d Cir. 1994); accord Montgomery County v. MicroVote Corp., 175 F.3d 296, 301 (3d Cir. 1999); Diversified Industries Inc. v. Meredith, 572 F.2d 596, 601-02 (8th Cir. 1977); see generally McLaughlin, 3 Weinstein's Federal Rules of Evidence, § 503.10, at 503-14 (2d ed. 2002):

> In sum, a *client* ... holds a privilege to refuse to disclose, and to prevent any other person from disclosing *confidential communications* ... between the client (or his or her representatives) ... and the client's *lawyer* (or certain representatives of the lawyer) ... when the communications were made to facilitate the rendition of *professional legal services* ... to the client.

(emphasis in original) (internal citations omitted).

Equally well understood is the underlying purpose behind this common law privilege:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. As we stated last Term in Trammel v. United States, 445 U.S. 40, 51 ... (1980): "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." And in Fisher v. United States, 425 U.S. 391, 403 ... (1976), we recognized the purpose of the privilege to be "to encourage clients to make full disclosure to their attorneys." This rationale for the privilege has long been recognized by the Court, see Hunt v. Blackburn, 128 U.S. 464, 470 ... (1888) (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981) (citations omitted); accord Swidler & Berlin v. U.S., 524 U.S. 399, 403 (1998).

From the agreed facts offered in connection with this in limine motion, I conclude (and the Superintendent appears to agree) that the testimony sought by the plaintiff from Mr. Trabucchi does fall within the scope of the federal common law attorney-client privilege. Mr. Trabucchi is an attorney who was representing the debtor for seven years in defending against the lawsuit filed by the Superintendent, as well as in ancillary matters. Given that the state court litigation involved an alter ego claim against Mr. DiLoreto, any information Mr. DiLoreto provided to Mr. Trabucchi concerning the former's control of Ardra and related entities would have been disclosed as part of counsel's representation. Cf. In re Slaven, 74 B.R. 71 (Bankr. S.D.Ohio 1987) (attorney-client privilege precluded testimony of debtors' former counsel in objection to discharge litigation in bankruptcy court).

Unless some exception to the assertion of the privilege applies, testimony by Mr. Trabucchi regarding Mr. DiLoreto's control over Ardra and related entities would be impermissible.[1] As will be discussed, the Superintendent raises four grounds for

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[1]I am aware that not all courts agree that a chapter 7 debtor may assert the attorney-client privilege. Some conclude that the privilege belongs to the chapter 7 debtor; others maintain that the trustee controls the privilege; and still others hold that the trustee controls the privilege for some types of litigation and the debtor for others. Compare Labovitz, Attorney-Client Privilege in Individual Bankruptcy Cases ... An Emerging Oxymoron?, 104 Com. L.J. 301 (Fall, 1999) with Note, Fifteen Years After Weintraub: Who Controls The Individual's Attorney- Client Privilege in Bankruptcy?, 80 B.U. L. Rev. 635 (April, 2000).

Here, the trustee is not party to the present adversary-proceeding and has expressed no position regarding the privilege. Furthermore, the Superintendent has not asserted that Mr. DiLoreto lost his standing to raise the privilege upon filing for bankruptcy. Therefore, without now deciding this issue, I shall assume that an individual debtor retains the

(continued...)

asserting that the privilege either has been waived or is inapplicable. I shall consider them roughly in the order mentioned at oral argument.

B.

The Superintendent first contends that Mr. DiLoreto waived the attorney-client privilege via testimony provided at a federal district court hearing held in October, 1999, which arose in a lawsuit brought by Berger, Stern & Webb, LLP against Mrs. DiLoreto. (A transcript of that hearing is attached to defendant's brief in opposition to the instant motion in limine as Exhibit B.)

The Superintendent represents (and Mr. DiLoreto does not challenge) that Mrs. DiLoreto was sued for unpaid fees by attorneys who had represented her for a period of time in connection with the New York state lawsuit. It is further stated that Mrs. DiLoreto contested that fee claim on the basis that her counsel was hired by Ardra and not by her, so that only Ardra was liable for unpaid fees. Plaintiff's Brief, at 14.

Mr. Trabucchi was subpoenaed to testify in court during that lawsuit. Mrs. DiLoreto was represented at that hearing by Mr. DiLoreto's then (and present) counsel, Pepper Hamilton, LLP (through Mr. Zemaitis).

At one point in the hearing, Mr. Trabucchi was asked by plaintiff's counsel "why Ardra Insurance Company would pay bills for legal services rendered to Mrs.

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[1](...continued)
right to raise attorney-client privilege in an objection to discharge litigation brought by a creditor. Cf. In re Foster, 188 F.3d 1259, 1266 (10th Cir. 1999) (appellate court assumes without deciding that the parties' joint position regarding the right to assert the privilege is correct).

Diloreto." N.T., at 24. Mr. Trabucchi responded that he could answer that question as he represented Mrs. DiLoreto as well as Mr. DiLoreto, but that he was afraid that the response might violate attorney-client privilege. N.T., at 25. The District Judge directed that plaintiff's counsel rephrase his question so as not to violate any privilege. N.T., at 25.

Later in the hearing, upon cross-examination, Mrs. DiLoreto's counsel questioned Mr. Trabucchi. The Superintendent refers to the following series of questions and answers in support of his waiver argument:

> Q. Isn't it true, in the litigation here in New York against Ardra, Mr. DiLoreto and Mrs. DiLoreto, that Mr. DiLoreto spoke for Ardra?
>
> A. There were times that he did and there were times that he did not.
>
> Q. But, as you understood it, if Mr. DiLoreto said Ardra wanted to take this course of action, the attorneys representing Ardra took that course of action, didn't they?
>
> A. I would generally say that whatever Mr. DiLoreto said is what the attorneys did.
>
> Q. And that was for things on behalf of Ardra as well as himself?
>
> A. It was on behalf of himself and — I am afraid, though, if you are — are you representing Mr. DiLoreto in this proceeding as well? Because if you as his counsel are asking me these questions and you are waiving any privilege that exists, I will be happy to answer. But if you are not, then I am concerned about the privilege under this, your Honor, because we are getting into substance of materials that could affect the case that is pending against him.
>
> Q. Your Honor, I am not asking for the substance of any decision; I am merely asking –

> A. No, you are. And in fact if you don't know the facts about the case and you want to put him in the position of directing what Ardra did, which is [sic] maybe considered contrary to all of his testimony in that case for years, then go ahead.
>
> Q. You have answered the question. Let's move on. I won't probe any further. I don't want to make you uncomfortable.

Exhibit B, N.T., at 37-38.

Based upon this testimony, the Superintendent asserts that Mr. DiLoreto, through Mr. Trabucchi's testimony concerning Mr. DiLoreto's ability to "speak" for Ardra, has waived any privilege that otherwise existed regarding information given to his former counsel regarding the debtor's ability to control Ardra, its assets, and those assets of related companies.

The defendant counters that Mr. Trabucchi 'went out of his way to avoid answering any questions that he believed impinged on the attorney-client privilege." Moreover, the defendant maintains, any testimony offered at that hearing was limited to "the retention of counsel by Mr. DiLoreto on his own behalf and on behalf of Ardra Insurance Company." Defendant's Brief, at 11.

As noted above in discussing the elements of the common law attorney-client privilege, this privilege is subject to waiver by the client. "The general rule is that voluntary disclosure of privileged attorney/client communication constitutes waiver of the privilege as to all other such communications on the same subject." Helman v. Murry's Steaks, Inc., 728 F.Supp. 1099, 1103 (D.Del. 1990). Therefore, if a client allows counsel or former counsel to testify, the privilege will be waived as to the subject matter of the testimony:

> [T]he District Court was correct to admit Feldman's testimony, given that calling one's attorney as a fact witness in

> a prior proceeding constitutes a waiver of the attorney-client privilege, at least regarding the subject of the testimony adduced in the prior proceeding.

U.S. v. Titchell, 261 F.3d 348, 352 (3d Cir. 2001); accord Helman v. Murry's Steaks, Inc., 728 F.Supp., at 1103.

In general, attorney-client communications which are revealed by the testimony (or fall squarely within the scope of the testimony) permitted by a client are no longer confidential and the justification for the privilege has ended. See U.S. v. Suarez, 820 F.2d 1158, 1160 (11th Cir. 1987). "[T]he law provides that the privilege is waived [only] with respect to communications relating to the same subject matter." Helman v. Murry's Steaks, Inc., 728 F.Supp., at 1103.

The attorney-client privilege, however, belongs solely to the client. Thus, it may only be waived by the client. See, e.g., In re von Bulow, 828 F.2d 94, 100 (2nd Cir. 1987). Although a client may implicitly waive the privilege, and may even grant his counsel implied authority to waive the privilege, id., at 101, nonetheless, this general principle remains: "[a]n attorney may not waive the privilege without his client's consent." Id., at 100.

In this proceeding, the Superintendent and Mr. DiLoreto contest whether Mr. Trabucchi disclosed any confidential information and, if so, to what extent. While germane to this motion, the parties do not address a more preliminary question: May the attorney-client privilege belonging to Mr. DiLoreto be waived in litigation involving his spouse, to which he is not a party, based upon questions posed to his former attorney by his present attorney, when both the former and present attorney also represented his spouse? That is, if Mr. DiLoreto is not a party to that litigation, how could he explicitly

or implicitly have waived the privilege through the testimony of Mr. Trabucchi in the course of the lawsuit against his wife?

A similar issue arose in Schnell v. Schnall, 550 F.Supp. 650 (S.D.N.Y. 1982). There, a defendant in a civil action sought discovery of a transcript of testimony given by an attorney before the Securities and Exchange Commission, and also sought to depose that attorney. The client, Saxon, (a corporation which was a derivative plaintiff in the litigation) opposed discovery from its attorney on the grounds of attorney-client privilege. The defendant countered that corporate counsel's prior testimony had waived that privilege.

The Schnell court held that the privilege was not waived despite counsel's appearance as a witness before the SEC. It explained:

> In Teachers Insurance, the client made the decision to disclose the information to the SEC. In the present case, the record does not indicate that Saxon was present at the time of its attorney Millstone's testimony before the SEC. Nor does the record indicate that Saxon authorized the waiver of any alleged privilege by way of Millstone's testimony. See Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2nd Cir. 1967) ("[A]n attorney can neither invoke the privilege for his own benefit when his client desires to waive it nor waive the privilege without his client's consent to the waiver.") As the privilege belongs to Saxon, not to its attorney Millstone, we cannot hold that Saxon waived the privilege by the mere fact of its attorney's testimony.

Id., at 653 (footnotes omitted).

In this proceeding, there is no evidence that Mr. DiLoreto explicitly or implicitly authorized the disclosure of confidential information provided by him to Mr. Trabucchi during the course of litigation brought against Mrs. DiLoreto. He appears

not to have been a party to that litigation; nor am I aware that he was present during the examination of Mr. Trabucchi.

While Mr. Trabucchi was questioned by an attorney who was then representing Mr. DiLoreto in the New York state court litigation, that same attorney was also representing Mrs. DiLoreto in the very lawsuit against her for unpaid fees in which the disputed testimony occurred. Thus, on the record made before me, I cannot conclude that such dual representation represents an implicit authority given by Mr. DiLoreto to his counsel to waive his privilege via questioning of Mr. Trabucchi.

Accordingly, I must reject the Superintendent's contention that Mr. DiLoreto waived the attorney-client privilege when Mr. Trabucchi testified in connection with a lawsuit involving Mrs. DiLoreto.[2]

C.

The Superintendent's second contention raises a different waiver issue.

As just described, the attorney-client privilege may be waived by the client by permitting testimony concerning confidential communications. Another method by which this privilege may be waived occurs when the client sues his attorney for malpractice:

> It has long been the law that a client may waive protection of the privilege, either expressly or impliedly. Blackburn v. Crawfords, 70 U.S. (3 Wall.) 175, 194, 18 L.Ed. 186 (1865). One of the circumstances which may support a conclusion of

[2]Thus, I need not address whether such testimony, if permitted by the debtor, would have represented a waiver of the privilege.

> a waiver is an attack by the client upon his attorney's conduct which calls into question the substance of their communications. A client has a privilege to keep his conversations with his attorney confidential, but that privilege is waived when a client attacks his attorney's competence in giving legal advice, puts in issue that advice and ascribes a course of action to his attorney that raises the specter of ineffectiveness or incompetence. Here, the confidentiality of the attorney- client relationship was breached by Tasby. Surely a client is not free to make various allegations of misconduct and incompetence while the attorney's lips are sealed by invocation of the attorney-client privilege. Such an incongruous result would be inconsistent with the object and purpose of the attorney-client privilege and a patent perversion of the rule. When a client calls into public question the competence of his attorney, the privilege is waived.

Tasby v. U. S., 504 F.2d 332, 336 (8th Cir. 1974); see also National Excess Ins. Co. v. Civerolo, Hansen & Wolf, P.A., 139 F.R.D. 398, 400 (D.N.M. 1991) ("when a client sues his attorney for malpractice, documents that would ordinarily be privileged may lose that status if they are relevant to a claim or any defenses"); Allstate Ins. Co. v. LaBrum and Doak, 1989 WL 38666, *2 (E.D.Pa. 1989) ("Generally, a client waives the attorney-client privilege by filing a legal malpractice claim").

The notion that a client may waive his attorney-client privilege by initiating a malpractice action is a subset of the broader principle that "[w]aiver of the privilege can occur ... where a party voluntarily injects an issue into the case, the truthful resolution of which requires an examination of the confidential communications." Jurgensen v. Rolex Watch U.S.A., Inc., 1989 WL 6210, *2 (E.D.Pa. 1989). Thus, the Third Circuit Court of Appeals has explained:

> There is authority for the proposition that a party can waive the attorney client privilege by asserting claims or defenses that put his or her attorney's advice in issue in the litigation. For example, a client may waive the privilege as to certain communications with a lawyer by filing a malpractice action

> against the lawyer.... A defendant may also waive the privilege by asserting reliance on the advice of counsel as an affirmative defense. Chevron Corp. v. Pennzoil Co., 974 F.2d 1156 (9th Cir. 1992) (party's claim that its tax position was reasonable because it was based on advice of counsel puts advice in issue and waives privilege); see also, Hunt v. Blackburn, 128 U.S. at 470 ... (client waives privilege when she alleges as a defense that she was misled by counsel).... In an action for patent infringement, where a party is accused of acting willfully, and where that party asserts as an essential element of its defense that it relied upon the advice of counsel, the party waives the privilege regarding communications pertaining to that advice....
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> In these cases, the client has made the decision and taken the affirmative step in the litigation to place the advice of the attorney in issue. Courts have found that by placing the advice in issue, the client has opened to examination facts relating to that advice. Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.

Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 863 (3d Cir. 1994) (citations omitted).

A waiver of the privilege may arise from a malpractice action in two ways. First, the client - in averments found in the complaint or in other aspects of the litigation - may reveal privileged information. Second, the defendant/attorney is entitled to disclose confidential information to the extent necessary to establish his defense to the malpractice action:

> The revelation of confidential communications, not the institution of suit, determines whether a party waives the attorney-client privilege. Thus, if a complaint against an attorney, or the attorney's response or testimony in the malpractice case, reveals confidential client communications,

> the client waives the privilege as to the subject matter of the disclosed communications.

Industrial Clearinghouse v. Browning Mfg., 953 F.2d 1004, 1007 (5th Cir. 1992); accord, e.g., Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 1995 WL 598971, *7 (S.D.N.Y. 1995).

Therefore, a client's waiver of his attorney-client privilege by suing his former attorney is limited to confidential information related to the determination of malpractice lawsuit. "The mere institution of suit against a lawyer, however, is not a waiver of the privilege for all subsequent proceedings, however unrelated." U.S. v. Ballard, 779 F.2d 287, 292 (5th Cir.), cert. denied, 475 U.S. 1109 (1986).

In this proceeding, the Superintendent unpersuasively argues that Mr. DiLoreto, by suing Mr. Trabucchi for malpractice, has waived his attorney-client privilege thereby allowing his former counsel to testify about information obtained from his client regarding the debtor's control of Ardra (and related entities) in the instant adversary proceeding.

The allegations of the malpractice complaint contain no disclosure of otherwise privileged information. To date, Mr. Trabucchi has not responded to these allegations and so has not revealed any confidential data.[3] Moreover, the substance of the malpractice claim is limited to the contention that Mr. Trabucchi negligently allowed to Mr. DiLoreto to run afoul of a prior consent decree. It is likely that such a claim would

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[3]In his supporting brief, the Superintendent contends that Mr. "Trabucchi ... maintains that DiLoreto's damages - the contempt penalties - stem solely from DiLoreto's refusal to repatriate assets he continued to control." Plaintiff's Brief, at 13. At oral argument, it was agreed that Mr. Trabucchi had filed no response to the malpractice action. Thus, I am unaware of any basis for plaintiff's contention regarding this defense.

be resolved without the necessity to consider Mr. DiLoreto's control, if any, over Ardra or any other related company.

Accordingly, the pendency of a malpractice action against Mr. Trabucchi does not permit him to testify about confidential information in the Superintendent's lawsuit seeking to deny Mr. DiLoreto his bankruptcy discharge.

D.

The third contention posed by the Superintendent is his broadest. He argues:

> [Mr.] DiLoreto's bankruptcy filing itself also constitutes a waiver [of attorney-client privilege] because it created a different adversarial relationship between himself and [Mr.] Trabucchi. Specifically, [Mr.] DiLoreto sought to have his substantial debt to [Mr.] Trabucchi (among others) discharged based upon a petition and schedules that disclose less than all of his assets. If only to collect his fee, [Mr.] Trabucchi is entitled to reveal what he knows about [Mr.] DiLoreto's offshore assets.

Plaintiff's Brief, at 13-14.

It would therefore appear that the Superintendent maintains the following proposition: that a client/debtor may "waive" or lose his attorney-client privilege simply by filing a voluntary bankruptcy petition, so long as a former attorney is among his creditors. No supporting citation is offered by the plaintiff.[4] Given the number of bankruptcy cases filed each year, some of which must involve former counsel as

[4]At oral argument, I afforded counsel for the Superintendent the opportunity to supplement his brief on this point. No such submission has been made.

creditors, one would anticipate that this waiver position, if valid, would have been addressed on a number of occasions.

Although neither party refers to any decisions discussing this issue, my research has uncovered two opinions which address the right of an attorney-creditor to disclose confidential information in bankruptcy litigation based upon his creditor status.

The first decision - which appears to offer the Superintendent some support - is In re Featherworks Corp., 25 B.R. 634 (Bankr. E.D.N.Y. 1982), aff'd, 36 B.R. 460 (E.D. N.Y. 1984). The Featherworks opinion, which involves a chapter 11 debtor in possession, addressed a myriad of motions. One such motion was filed by former counsel to the debtor (which was a general unsecured creditor) to equitably subordinate a secured claim held by Windsor, a corporation related to the debtor and found by the Bankruptcy Court to be an "insider" of the debtor. Id., at 640.

In response to the creditor's subordination motion, the debtor-corporation argued that any testimony to be offered by its former counsel in support of equitable subordination would be based upon information protected by attorney-client privilege. The Bankruptcy Court ultimately disagreed, noting that then New York Disciplinary Rule 4-101(c)(4) permitted an attorney to reveal confidential information "where it is necessary to do so in order to establish or collect his fee." Id., at 644.[5]

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[5]Prior to the adoption of the Model Rules of Professional Conduct in Pennsylvania and other states, attorney ethics in Pennsylvania and other states were governed by the Code of Professional Responsibility. DR 4-101(c)(4) provided:

> C) a lawyer may reveal:
>
> ***
>
> 4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an

(continued...)

In reliance upon this disciplinary rule, the Bankruptcy Court reasoned thusly:

> While this Court originally took a different position, it has now concluded that the attorney-client privilege cannot be invoked by Featherworks to prevent Mr. Kerwin from giving any testimony he deems necessary to establish that any distribution to Windsor, and, likewise, any liens securing Windsor's claims, must be subordinated to the payment of the debtor's general creditors, including his own claim.
>
> As has already been noted, the relevant canon releases an attorney from the obligation of respecting his client's confidences to the extent necessary to establish and collect his fee. While it may be true that the claim owed Kerwin and Elliott is no longer disputed, so that its establishment is not in question, the ability of Kerwin and Elliott to collect on that fee will depend upon what monies there are available for distribution, and who shares in that distribution. By disallowing, or subordinating, Windsor's claims and liens, Kerwin and Elliott enlarge the amount available for distribution to Featherworks' other creditors, including themselves.
>
> Accordingly, the Court has concluded that all the evidence adduced by Kerwin and Elliott was admissible, despite Featherworks' invocation of the attorney- client privilege, because disallowance or subordination of Windsor's claims, or liens, would benefit the general unsecured creditors.

Id., at 645.

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[5](...continued)
accusation of wrongful conduct.

The current Rules of Professional Conduct also permits an attorney to reveal confidential information in certain circumstances. Rule 1.6(c) states, in part:

> (c) A lawyer may reveal information to the extent that the lawyer reasonably believes necessary:
>
> ***
>
> (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client ....

Taken outside its factual context, the above-quoted language could support the Superintendent's third "waiver" position in this proceeding. However, the facts in Featherworks justifying the subordination effort by counsel suggest that "crime-fraud" exception to the privilege, more so than former counsel's status as a creditor, was most germane. Indeed, in affirming the bankruptcy court decision to permit former counsel to testify, the District Court in Featherworks noted;

> The remaining issue is difficult to fathom in light of the record. It appears, however, that the debtor is trying to convert an attorney's obligation not to be an accessory to fraud into a breach of the attorney-client privilege because the purported confidences relate to the attorney's collection of a marginally larger portion of his fee from a bankrupt. This argument ignores the rules of appellate review.
>
> The transcript of the July 27, 1972 hearing discloses that attorney Tom Kerwin, who had represented the debtor, sought to apprise the bankruptcy court of what he believed to be fraud and misconduct perpetrated by Arthur Puro [president of the debtor corporation].

In re Featherworks, 36 B.R., at 465 (emphasis added).[6]

Not only does the injection of the issue of fraud render the Featherworks reasoning unsupportive of the Superintendent's broadest waiver argument, but two other aspects detract from its persuasiveness.

As I noted above, the present Model Rule of Professional Conduct 1.6(c)(3) authorizes a lawyer to reveal confidential information to the extent necessary "to establish a claim ... on behalf of the lawyer in a controversy between the lawyer and the client ...." Pennsylvania has adopted this rule and the Comment provides that a "lawyer entitled to a

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[6]The District Court also stated that no privilege information was ultimately revealed. 36 B.R., at 465.

fee is permitted by paragraph (c)(3) to prove the services rendered in an action to collect it."

In general, however, these ethical rules govern disciplinary actions, but do not necessarily control in court proceedings. See, e.g., United States v. Sindel, 53 F.3d 874, 877 (8th Cir. 1995); United States v. Ballard, 779 F.2d, at 293 ("The attorney-client privilege exists apart from, and is not coextensive with, the ethical confidentiality precepts"); Frieman v. USAir Group, Inc., 1994 WL 675221, *6 (E.D.Pa. 1994); Callahan v. Nystedt, 641 A.2d 58, 62 (R.I. 1994); see also Labovitz, Attorney-Client Privilege in Individual Bankruptcy Cases ... An Emerging Oxymoron?, 104 Com. L.J. 301, 302 (Fall, 1999). The bankruptcy court in Featherworks does not consider this point when it utilizes the former Disciplinary Rule in support of its decision to permit former counsel to testify.

Furthermore, the Featherworks ruling fails to consider whether a chapter 11 debtor in possession - who is a bankruptcy fiduciary with the powers of a trustee, see 11 U.S.C. § 1107(a) - should be permitted to assert a privilege prohibiting supporting testimony in litigation involving an equitable challenge to a secured claim against the debtor. Can it be a proper exercise of fiduciary responsibility for a debtor in possession to invoke the privilege so as to insulate the lien claim of an insider corporation from challenge? If the litigation proves successful, the debtor's estate will benefit because more of its assets would be treated as unencumbered.

To the extent a chapter 11 debtor would breach a fiduciary duty by asserting the privilege, either the "fiduciary exception" to the privilege might apply, see generally In re Long Island Lighting Co., 129 F.3d 268, 271-72 (2nd Cir. 1997) (considering the "fiduciary exception" to the attorney-client privilege), or the bankruptcy court could

appoint a trustee under section 1104(a)(2), which trustee would certainly then waive the privilege. See generally Commodity Futures Trading Com'n v. Weintraub, 471 U.S. 343 (1985).

Accordingly, while it may have been appropriate to permit former counsel to testify in Featherworks in support of equitable subordination of a lien claim held by an insider, I am not persuaded that counsel's ability to disclose confidential information should have been based upon his status as a creditor who might, along with other creditors, benefit from the outcome of the dispute.

The second opinion relevant to this issue is In re Rindlisbacher, 225 B.R. 180 (9th Cir. BAP 1998).

In Rindlisbacher the debtor's former attorney, who was a creditor in his chapter 7 bankruptcy case, brought an adversary proceeding seeking to deny the debtor a discharge. This complaint opposing discharge was based upon the debtors failure to disclose to his creditors and the trustee his receipt of income from rental property. The attorney-creditor knew of the existence of this rental income because of confidential information he obtained from his former client while representing the debtor in a pre-bankruptcy divorce action.

The appellate court acknowledged the existence of the state ethical rule which permits an attorney to disclose confidential information to the extent necessary to establish or collect a fee:

> The exception to the prohibition on disclosure of client confidences is, however, codified in California's privilege rules. The privilege does not apply to any "communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." Cal.Evid.Code § 958. Under this rule, the attorney is released

> from the obligations of secrecy when the disclosure of communications, otherwise privileged, becomes necessary to the protection of the attorney's own rights, such as when the attorney's integrity, good faith, authority or performance of duties is questioned. Arden v. State Bar of Cal., 52 Cal.2d 310, 320, 341 P.2d 6 (1959); Carlson, Collins, Gordon & Bold v. Banducci, 257 Cal.App.2d 212, 227-28, 64 Cal.Rptr. 915 (1967). Thus, an attorney may reveal confidences and secrets where it is necessary to do so to get paid. In re Featherworks Corp., 25 B.R. at 645. According to the California Law Revision Commission, the reason for this exception is that it would be "unjust to permit a client ... to refuse to pay his attorney's fee and invoke the privilege to defeat the attorney's claim." 7 Cal.L.Rev.Comm. Reports 1 (1965).

Id., at 183.

Nevertheless, the appellate court concluded that the ethical rule permitting an attorney to use confidential information to the extent necessary to recover a fee from a client was not applicable to bankruptcy litigation involving an objection to a discharge. The court explained:

> Debtor acknowledges that the purpose of this adversary proceeding to deny debtor a discharge is to enable Dubrow to collect his fees. That does not necessarily mean that the use of the otherwise confidential communication to deny debtor a discharge is the type of use that is allowed under the ethical rules and the privilege. The idea behind the exception to the confidences rule for collection of an attorney's fee is that the client has breached a duty by failing to pay, and the attorney must be able to defend himself against the client's charges of attorney misconduct. In other words, the client puts the attorney's actions in issue and, in fairness, the attorney must be allowed to defend, even if that defense involves the use of communications that the attorney would otherwise be bound to maintain as confidential.
>
> A debtor's pursuit of a discharge is not a breach of the duty to pay; it is a right provided by the Bankruptcy Code. By seeking a discharge the client does not in any way call into question the validity of the attorney's fee or the attorney's actions. He merely seeks to obtain a benefit that the law

> allows. Because there is no breach of duty by the client, and no claim against the attorney which the attorney must in fairness be permitted to defend, the exception to the confidences rule for disclosure of communications necessary to allow the attorney to collect a fee does not apply.

Id., at 183.

The Ninth Circuit Bankruptcy Panel then concludes:

> We hold that, where the attorney obtains information in confidence from the client, the attorney cannot later use that information, whether independently verified or not, as the basis of a proceeding against the client to deny discharge.

Id., at 185.

I find the reasoning in Rindlisbacher more persuasive than that used in Featherworks and germane to this dispute.

Even if an ethical rule - which permits an attorney to reveal confidential information necessary to collect his fee - may permit the "waiver" of the privilege in some litigation - Rindlisbacher concludes that its provisions are inapplicable to this adversary proceeding. The outcome of this bankruptcy litigation will neither establish Mr. Trabucchi's claim nor result in the collection of his fee. The confidential information sought by the Superintendent is not related to the fee claim asserted by Mr. Trabucchi. Cf. Wallace, Saunders, Austin, Brown & Enochs, Chartered v. Louisburg Grain Co., Inc., 250 Kan. 54, 62 (1992) (commence of a complaint to recover an unpaid fee may waive the privilege only to confidential information directly connected to the fee dispute). Indeed, the debtor has challenged his former attorney's entitlement to his fee.

This adversary proceeding is concerned solely with Mr. DiLoreto's entitlement to a bankruptcy discharge. It does not involve the allowance or disallowance of claims by any creditor. If the Superintendent prevails, then all creditors, not just Mr.

Trabucchi, may assert their state court rights, if any, after the bankruptcy case is closed, to fix and execute on their claims. In so doing, such creditors may or may not recover on their claims.

Conversely, if the Superintendent does not prevail, then creditors may be enjoined from post-bankruptcy collection activities. Regardless of the outcome, however, the chapter 7 bankruptcy trustee is free to fix claims, to administer non-exempt estate property (if any), and to distribute the proceeds of such property to allowed creditors, including Mr. Trabucchi.

Although I recognize that Mr. Trabucchi, as a creditor, may conceivably benefit from the successful prosecution of this proceeding, such a potential benefit is not sufficient to trigger the application of fee dispute exception to confidentiality found in the current ethical rules. As such, former counsel's status as a creditor does not, by itself, permit a "waiver" of the attorney-client privilege in the instant litigation. Cf. In re Disciplinary Proceeding Against Boelter, 139 Wash.2d 81, 90-91 (1999) (attorney's threat to disclose confidential information was improper, in part, because such disclosure may not be necessary to recover payment of his fee). Were it otherwise, the implications for bankruptcy cases on the common law privilege would be significant.

There are numerous issues which may arise in a bankruptcy case that could possibly affect the distributions to general creditors: e.g., exemption claims; discharge objections: abandonment of assets; allowance of claims; motions to sell assets; request to incur post-bankruptcy credit; confirmation hearings. The Superintendent's position, if correct, could result in the loss of the attorney-client privilege in almost every bankruptcy case - including involuntary bankruptcy cases - in which former counsel of the debtor is a

creditor. So long as the attorney/creditor believes he has confidential information relevant to the outcome of any bankruptcy dispute which could conceivably result in an increase recovery by general creditors, the Superintendent would argue that former counsel could disclose such confidences.

The plaintiff's position may be persuasive if the debtor objects to former counsel's bankruptcy claim. To the extent confidential information must be revealed by an attorney to oppose this claims objection, then the debtor has placed such confidences at issue. It is, however, not consistent with federal common law to conclude that Mr. Diloreto's bankruptcy filing should result in a loss of his privilege as to confidential information provided to his long-time counsel concerning his control of Ardra, simply because such counsel is a creditor in this case who might (along with other creditors) conceivably benefit from the outcome of litigation (to which counsel is not a party). Accordingly, I cannot agree with the Superintendent that Mr. Trabucchi's status as a creditor in this bankruptcy case allows him to testify in this adversary proceeding against his former client.

E.

The Superintendent's last argument is based upon the long recognized "crime-fraud" exception to the attorney-client privilege. As explained by the Supreme Court:

> The attorney-client privilege is not without its costs....
> "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." Fisher, 425 U.S., at 403 ....

> The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection--the centrality of open client and attorney communication to the proper functioning of our adversary system of justice–"ceas[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing." 8 Wigmore, § 2298, p. 573 (emphasis in original).... It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the "seal of secrecy," ... between lawyer and client does not extend to communications "made for the purpose of getting advice for the commission of a fraud" or crime. O'Rourke v. Darbishire, [1920] A.C. 581, 604 (P.C.).

U.S. v. Zolin, 491 U.S. 554, 562-63 (1989) (citations omitted).

In this proceeding, the Superintendent contends that Mr. "DiLoreto's failure to disclose on his schedules the assets he controls through offshore trusts and corporations is an ongoing crime (18 U.S.C. § 152[7]) and an ongoing fraud upon the Court and upon his creditors. This invokes the crime/fraud exception to the attorney-client privilege ...." Plaintiff's Brief, at 11-12.

The plaintiff is correct that the crime-fraud exception to the privilege may arise in a bankruptcy case. Thus, when a client uses the prepetition services of an attorney to hide assets from creditors and then, in furtherance of his scheme, unsuccessfully attempts to engage the attorney to represent him in a bankruptcy case, that attorney may testify about the hidden assets because the crime-fraud exception to the privilege applies:

> A half century ago, Justice Cardozo wrote: "The [attorney-client] privilege takes flight if the relation is abused.

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[7]This statutory provision makes it a federal crime in a bankruptcy case to "knowingly and fraudulently," inter alia, conceal estate property, make a false oath, or conceal or falsify records relating to the financial affairs of the debtor. See generally United States v. Zehrbach, 47 F.3d 1252 (3d Cir.), cert. denied, 514 U.S. 1067 (1995).

> A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law." .... The admissibility of the evidence does not turn on the lawyer's complicity in the wrongful transaction: "The attorney may be innocent, and still the guilty client must let the truth come out." .... Once the party seeking disclosure makes a prima facie case that the attorney- client relationship was used to promote an intended criminal activity, the confidences within the relationship are no longer shielded.... These precepts have since been applied consistently and have come to be known as the crime or fraud exception to the attorney-client privilege.
>
> Taking either Ballard's or Smith's version of events, a prima facie case of intended illegality is apparent. The conveyance of Ballard's property to Smith and the delivery of part of the money received from Ballard's father-in-law to Ballard's wife were part of a fraudulent scheme to conceal Ballard's property, either from the tax collector or from Ballard's other creditors or both. The later conversations between Smith and Ballard relative to bankruptcy were a continuation of that illicit plan to conceal the assets from the bankruptcy court and the persons who were Ballard's creditors when the petition was filed. Smith's refusal to proceed and Smith's advice concerning the illegality of the plan were presumably the reasons Ballard sought other counsel.

U.S. v. Ballard, 779 F.2d, at 292-93 (footnotes omitted); see, e.g., In re Andrews, 186 B.R. 219, 222 (Bankr. E.D.Va. 1995) (the crime/fraud exception may apply to fraudulent transfers in bankruptcy cases).

The crime-fraud exception, however, does not apply to crimes or frauds already committed by the client prior to the communication of confidential information to his attorney. "The crime-fraud exception applies only to communications about ongoing or future activities. Communications concerning past crimes or frauds are privileged, unless the privilege has otherwise been waived." X Corp. v. Doe, 805 F.Supp. 1298, 1307 n.16 (E.D.Va. 1992), aff'd sub nom., Under Seal v. Under Seal, 17 F.3d 1435 (Table), 1994 WL 52197 (4th Cir. 1994); see e.g., McLaughlin, 3 Weinstein's Federal

Rules of Evidence, § 503.31[2] (2d ed. 2002). As explained by the Third Circuit Court of Appeals:

> But, it bears repeating that-- the reason for that protection--the centrality of open client and attorney communication to the proper functioning of our adversary system of justice-- "ceas[es] to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing." Zolin, 491 U.S. at 562-63.... We must always keep in mind that the purpose of the crime-fraud exception is to assure that the "seal of secrecy" between lawyer and client does not extend to communications from the lawyer to the client made by the lawyer for the purpose of giving advice for the commission of a fraud or crime. The seal is broken when the lawyer's communication is meant to facilitate future wrongdoing by the client. Where the client commits a fraud or crime for reasons completely independent of legitimate advice communicated by the lawyer, the seal is not broken, for the advice is, as the logicians explain, non causa pro causa. The communication condemned and unprotected by the attorney-client privilege is advice that is illicit because it gives direction for the commission of future fraud or crime. The advice must relate to future illicit conduct by the client; it is the causa pro causa, the advice that leads to the deed.

Haines v. Liggett Group Inc., 975 F.2d 81, 90 (3d Cir. 1992) (citation omitted).

Furthermore,

> [t]he crime-fraud exception has "a precise focus: It applies only when the communications between the client and his lawyer further a crime, fraud or other misconduct. It does not suffice that communications may be related to a crime. To subject the attorney-client communications to disclosure, they must actually have been made with an intent to further an unlawful act." White, 887 F.2d at 271.... The exception only applies if communications with counsel were intended in some way to facilitate or conceal the criminal activity....

Frieman v. USAir Group, Inc., 1994 WL 675221, *8 (E.D.Pa., 1994) (citations omitted).

As the Ninth Circuit Court of Appeals similarly noted in a bankruptcy context:

> It is the purpose of the crime-fraud exception ... to assure that the 'seal of secrecy' between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime." United States v. Zolin, 491 U.S. 554, 563 ... (1989) (quotation and citation omitted). "To invoke the crime-fraud exception successfully, the government has the burden of making a prima facie showing that the communications were in furtherance of an intended or present illegality and that there is some relationship between the communications and the illegality." Chen, 99 F.3d at 1503 (quotation omitted). "The test for invoking the crime-fraud exception to the attorney- client privilege is whether there is 'reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme.'" Id. (quoting In re Grand Jury Proceedings, 87 F.3d at 381). The exception applies "even where the attorney is unaware that his advice may further an illegal purpose." Laurins, 857 F.2d at 540.
>
> In this case, there is no reasonable basis for concluding that Rivera's legal advice to Bauer was used by Bauer "in furtherance of" his fraudulent scheme to falsify his bankruptcy petition. Rivera advised Bauer to disclose all of his assets and avoid lying on his bankruptcy petition. Bauer in fact did precisely the opposite. It is impossible to discern a causal connection or functional relationship between the advice given by Rivera and the actions taken by Bauer. Therefore, the crime-fraud exception to the attorney-client privilege does not apply here.

U.S. v. Bauer, 132 F.3d 504, 509-10 (9th Cir.1997).

In order to assist the fact finder in determining whether attorney advice may have been used to further improper activity, the proponent of the crime-fraud exception has the initial burden to make a “prima facie” showing that the exception applies before the attorney will be compelled to disclose confidential information. See, e.g., U.S. v. Zolin, 491 U.S. 554, 572, 574-75 (1989); accord Haines v. Liggett Group, Inc., 975 F.2d,

at 95-96; In re Miller, 247 B.R. 704, 712 (Bankr. N.D.Ohio 2000). The extent of the prima facie showing has been described in a number of similar ways:

> [T]hat a prudent person have a reasonable basis to suspect the perpetration or attempted perpetration of a crime or fraud, and that the communications were in furtherance thereof.
>
> ... that the party seeking discovery must present evidence which, if believed by the fact- finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met.

Haines v. Liggett Group, Inc., 975 F.2d, at 95-96.

Another court described the "prima facie" burden in terms of a two part test:

> First, the government must make a prima facie showing that a sufficiently serious crime or fraud occurred to defeat the privilege; second, the government must establish some relationship between the communication at issue and the prima facie violation.

In re Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir. 1986).

In applying the principles surrounding the crime-fraud exception to this proceeding, I note that Mr. Trabucchi was never engaged by Mr. DiLoreto to represent him in the underlying chapter 7 bankruptcy case. Therefore, this dispute is distinguishable from cases such as United States v. White, 950 F.2d 426, 430 (7th Cir. 1991), which hold that information given to a bankruptcy attorney for the "purpose of assembly into a bankruptcy petition and supporting schedules" is not confidential because the information is intended for disclosure. Accord In re French, 162 B.R. 541, 548

(Bankr. S.D. 1994) (dictum). Contra United States v. Bauer, 132 F.3d 504, 508-09 (9th Cir. 1997).

In addition, Mr. DiLoreto has not suggested in this litigation that any of the conduct at issue in this proceeding was undertaken upon the advice of Mr. Trabucchi. Compare In re Vereen, 1999 WL 33485642, *1 (Bankr. D.S.C. 1999) ("the Debtor contends that the conveyances were made on the advice of his attorney ... for estate planning purposes"); see also In re Miller, 247 B.R. 704, 711-12 (Bankr. N.D.Ohio 2000) (prima facie showing was made to depose former bankruptcy counsel when debtors' admit their failure to turn over estate property to the trustee but deny any culpable intent).

Moreover, the facts surrounding this motion differ from those in In re Andrews, 186 B.R. 219, 223 (Bankr. E.D.Va. 1995), where bankruptcy counsel was ordered to testify about the debtor's prepetition transfer of property, which transfer bore "unrefuted indicia of fraudulent intent" and which occurred during the course of counsel's representation.

Here, the Superintendent has made no such prima facie showing to support his crime-fraud exception.

There is no prima facie evidence to connect any information provided by Mr. DiLoreto to Mr. Trabucchi with legal advice the debtor may have received concerning the asset disclosure information provided on his bankruptcy schedules; nor is there any evidence that Mr. Trabucchi's services were sought in connection with Mr. Diloreto's bankruptcy filing. Thus, there is no initial showing that privileged

communications between these two individuals were made to facilitate some future bankruptcy crime or fraud, nor made in furtherance of a crime or fraud.

In addition, there is no prima facie showing that Mr. Trabucchi's legal advice was connected with any transfer (or actions by the debtor) that may be relevant to this proceeding. Those transfers seem to have occurred, at least in large part, before the representation began. If the transfers were connected to some crime or a fraud, they would have occurred prior to Mr. Trabucchi's representation. And for those transactions which occurred afterwards,[8] there is no prima facie basis to conclude that the legal advice sought from the attorney facilitated or aided in those transactions.[9]

Given the initial burden placed upon the Superintendent to successfully assert the crime-fraud exception, my review of the record made in connection with this motion persuades me that his support is lacking. Accordingly, I cannot sustain this fourth and final basis to trump debtor's privilege.

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[8]At oral argument, the Superintendent referred to a transfer made from Ardra to the "DiLoreto Foundation" in 1994.

[9]Mr. DiLoreto also notes that the Superintendent knew prior to his bankruptcy filing of various assets owned by non-debtor entities, and that the debtor knew of the Superintendent's knowledge of these assets. The debtor therefore posits that an individual would not "knowingly and fraudulently" conceal ownership of assets in a bankruptcy case within the meaning of 18 U.S.C. § 152, when the existence of such assets are already known to one or more creditors. Accordingly, he argues that no crime has been committed, regardless of the outcome of this proceeding, and thus no crime-fraud exception to the attorney-client privilege could be demonstrated. Debtor's Brief, at 8 n.4.

In light of my that the requisite prima facie showing was not made, I need not address this argument.

III.

For the above reasons, I must deny the plaintiff's in limine motion to the extent that he seeks to call Aldo A. Trabucchi, Esquire as a witness in the upcoming objection to discharge trial.

An appropriate order shall be entered.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 7
RICHARD A. DiLORETO	:	
Debtor	:	Bankruptcy No. 98-34641F
NEIL D. LEVIN, Superintendent of Insurance of the State of New York, and his successors in office as Superintendent of Insurance of the State of New York, as Liquidator of NASSAU INSURANCE COMPANY	:	
Plaintiff	:	
v.	:	
RICHARD A. DiLORETO	:	
Defendant	:	Adversary No. 99-0206

.....

ORDER

.....

AND NOW, this 3rd day of May, 2002, for the reasons stated in the accompanying memorandum, it is hereby ordered that the plaintiff's motion in limine, seeking to have Aldo A. Trabucchi, Esquire, testify in this proceeding is denied. The testimony sought to be offered falls within the federal common law attorney client privilege and would therefore would be inadmissible.

BRUCE FOX
Chief Bankruptcy Judge

IN RE:
RICHARD A. DiLORETO
Neil D. Levin
v.
Richard A. DiLoreto

Chapter 7
Bankruptcy No. 98-34364F
Adversary No. 99-0206

Copies of the Bankruptcy Judge's Memorandum and Order dated May 3, 2002, were mailed on said date to the following:

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