Presented:
Jay L. Westbrook Bankruptcy Conference
November 17-18, 2011
Austin, Texas

PRIVILEGE ISSUES IN CORPORATE BANKRUPTCY:
The unique challenges of protecting privilege in complex bankruptcy proceedings.

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INTRODUCTION

As the United States Supreme Court has recognized, "attorney-client privilege is the oldest of the privileges for confidential communications known to the common law," and its valuable "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." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The "privilege attaches to corporations as well as to individuals" – in the usual course of business, it is held by the board of directors of a corporation. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985); *see id.* at 348-349 (discussing privileges and duties upon insolvency).[1]

However, despite the privilege's ancient pedigree and widely recognized importance for both individual and corporate clients, invoking the privilege is never easy – and is made all the more difficult in light of the often rough and shifting terrain of corporate restructuring. Successfully protecting privileged documents and conversations requires careful attention on the part of both client and attorney.

On the broadest level, it is crucial to keep in mind several overarching difficulties facing clients who wish to communicate with legal counsel freely and without fear of confidential communications being discovered and misused:

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[1] U.S. District Courts and Bankruptcy Courts follow Federal Rule of Evidence 501, which provides that federal common law governs privilege questions, except for elements of claims or defenses where "[s]tate law supplies the rule of decision." *See* FED. R. EVID. 501; FED. R. BANKR. P. 9017. Thus, aside from state-law based adversary proceedings, privilege issues in bankruptcy proceedings will be determined by reference to federal common law. *See, e.g., Carefree Ranch, Inc. v. Lenard (In re Lenard)*, 849 F.2d 974, 977 (5th Cir. 1988) (applying Louisiana law in avoidance action adversary proceeding). Another Federal Rule of Evidence, Rule 502, which was adopted in 2008 and is touched on *infra*, added protections against waiver, and it merits detailed attention from corporate counsel.

- The privilege is narrowly construed, and applied only "when necessary because it withholds relevant information from the judicial process." *In re Fibermark, Inc.*, 330 B.R. 480 (Bankr. D. Vt. 2005); *see, e.g., United States v. Goldfarb*, 328 F.2d 280, 282 (6th Cir. 1964) ("[Privilege] ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." (quoting 8 WIGMORE, EVIDENCE § 2291, at 554 (McNaughton rev. 1961))).

- The party asserting privilege bears the burden of proof, and the mere assertion that given material is privileged will not suffice to bear that burden. Often, a detailed explanation of each and every privilege assertion is required, and only after submission of a privilege log containing such explanations, as well as verification of the privilege assertions through *in camera* review, will a court sustain assertions of privilege. *See* FED. R. CIV. P. 26(b)(5); *In re Bonanno*, 344 F.2d 830, 833 (2d Cir. 1965).

- The privilege protects only communications, *not* the facts communicated. Thus, for instance, a client remains susceptible to questions about underlying events or decisions, even if they were later the subjects of communication with counsel. *See Upjohn*, 449 U.S. at 395-96.

- The privilege protects only communications made with the goal of facilitating *legal* advice, not *business* communications. Thus, documents cannot be "immunized" from discovery by handing them over to an attorney, nor can facts be shielded from discovery by including an attorney on an e-mail chain or in a meeting. *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (noting that presence of an outside accountant or other non-lawyer does not by itself threaten the privilege, nor does the presence of a lawyer automatically establish privilege; "[w]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer."). Strategic discussions regarding possible corporate governance structures, for instance, have been found not to be privileged. *In re Fibermark*, 330 B.R. at 499-500.

- As will be discussed below, waiver doctrine has shifted somewhat in favor of the would-be claim to privilege. *See* FED. R. EVID. 502. Nonetheless, both unintentional and intentional forms of waiver are serious concerns, particularly in the corporate context. Waiver generally applies when communications are shared with a third party (i.e., someone other than an agent of the lawyer or client), or when the communications in some way become the subject of the dispute – as in a legal malpractice suit, or to support a client's claim of good-faith reliance on legal advice. *See In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000). The more sophisticated transactional or litigation work becomes, the more complicated the issues of waiver that may be faced, as will be seen below.

- Communications that seek to perpetrate or perpetuate a crime or fraud are not protected.

Title search: Privilege Issues in Corporate Bankruptcy: The unique challenges of protecting privilege in complex bankruptcy proceedings.

First appeared as part of the conference materials for the
30th Annual Bankruptcy Conference session
"Privilege Issues and Bankruptcy Litigation"