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cdcbaa

Central District Consumer Bankruptcy Attorney Association

Hon. Judge Peter Carroll, Maggie Bordeaux, Jim King & Christian Cooper presenting the donation to Public Counsel

Jim King & Nancy Clark

Jim King Presenting the Calvin Ashland Judge of the Year award to Judge Sherri Bluebond

From the President

By: Nancy B. Clark
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Dear Members:

As 2015 gets underway, it is time to renew your CDCBAA membership. We have had a wonderful 2014. Our seminars have included the Eighth Annual Review of the Ninth Circuit, When is Conversion Kosher, Who is the US Trustee, Meet the Chapter 13 Trustee's Attorneys, Meet the Judge's Clerks, Ask the Chapter 7 Trustee, and Litigating Contempt. Our first Annual James T. King Bankruptcy Symposium: In Re Bellingham from the Insiders was a great success. As always, the Earle Hagen Golf, Tennis and Poker Tournament was not only a great

success raising a record amount of money for Public Counsel, but it was also a lot of fun. Finally, our Annual Calvin Ashland Award Dinner was well attended by not only our members, but also the judges and trustees and honored our soon to be appointed Chief Judge Sheri Bluebond.

Desmond Hayes has been hard at work on our website and has made a new renewal page for 2015. He has added a slide to the home page. The new page also allows members to pay for other members. There is a link next to the Paypal button that allows members to search for other members to add to their order. See, https://bklawyers.org/renew.

The 2015 CDCBAA Board is already preparing for 2015. Jonathan Hayes will kick off our seminars on January 24, 2015 with the Ninth Annual Review of the Ninth Circuit with Judge Victoria Kaufman and newly appointed Judge Martin Barash. Roksana Moradi is hard at work putting together seminars on HOAs, Drafting Effective Settlement Agreements, and the Unscheduled Lawsuit. Jonathan Hayes is working on the second Annual James T. King Bankruptcy Symposium which will be titled "Dear Congress!" Stella Havkin and Michael Gouveia have edited this Newsletter and will be working on publishing at least two more. And if that were not enough, our listserv is an invaluable opportunity to share interesting issues with fellow members.

Finally, it is my great pleasure to announce that the 2015 CDCBAA Board unanimously voted James T. King the Calvin Ashland Award winner for 2015. Jim has contributed so much to this organization and to the bankruptcy profession. He has been a mentor to many of us in the bankruptcy community. He is so well respected that the United States Bankruptcy Court for the Central District of California presented Jim with a Resolution for his contributions to our community. We are proud to add our list of prior Calvin Ashland Award winners. Congratulations Jim!!!

For all of the reasons listed above, please consider renewing your CDCBAA membership early. For those of you looking for a wonderful gift for a colleague, consider the gift of CDCBAA membership. Moreover, for those loyal members, consider introducing colleagues to the CDCBAA and encourage them sign up for what promises to be a fantastic 2015.

Thank you all!!!

Nancy B. Clark 

Interview with Judge Sheri Bluebond

By: Shannon A. Doyle
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The Honorable Sheri Bluebond sits as Chief Judge on the United States Bankruptcy Court, Central District of California. The Judge is a dynamic figure at most Bar events and revered by colleagues, attorneys and trustees. She even recently presented an award at the home of James T. King, a beloved leader of the bankruptcy community, who became bedridden while battling cancer.

Judge Bluebond's chambers is like a cozy studio loft. It is warm and inviting with eclectic décor of abstract art, history, a classic cartoon, children's paintings, and a myriad of family pictures. As I sat down to start the interview, I immediately felt at ease. The judge was very welcoming, conversational, and captured my attention with her candor, animation and humor. As she spoke, the light from the windows accented her pretty hazel eyes and gave me a glimpse into a genuine person who loves being a judge because she can "do the right thing". I discovered the Judge enjoys beading jewelry, singing, cooking and drinking wine. Although, for the record, the drinking wine is not a hobby but an occasional indulgence. And she is "seriously addicted to Fairway Solitaire" on her phone. Before I knew it, an hour flew by and the Judge reminded me that she had to take the bench. While we could have gone on for hours, it is a good thing we did not. The transcript of the interview is well outside the page limits of this article, so I will do my best to take you beyond the Judge's bio and into the person herself.

1. **Where did you grow up?**

Woodland Hills, I'm a Valley girl but I'd like to point out that I left the Valley before anyone had ever heard of Moon Unit Zappa…

2. What did your parents do?

My parents had an insurance agency, Bluebond Insurance, they sold both commercial lines and personal lines, everything from auto and health and life to professional liability.

3. What inspired you to become a lawyer?

Well when I was about 4, I thought it would be a good job to be president of the United States. I have long since realized that it's a terrible job. They do not pay you nearly enough to do for all the stress involved, and they make fun of you every night on the late night talk shows. So I decided by maybe 8 or 9 that I didn't want to

be president of the United States, but I had been told that most presidents started out as lawyers. So when I first started thinking about what I wanted to be when I grew up, the answer was president, and that meant I had to start as a lawyer. That got stored away somewhere. Then, years later when I started again asking the question, "what do I want to be when I grow up," I went through a phase where I wanted to be a cantor but then I discounted that and reverted to the earlier plan of I guess I'll be a lawyer.

4. Who were your biggest influences growing up?

Definitely my mother, especially when it comes to "why did you become a lawyer". My mother was always a straight "A" student and really tried to do the best job she could at whatever she did. When she decided to make a career out of raising her daughters - she had two of them - I had a sister who was killed in a car accident in 1979 – she read every book that Dr. Spock had ever written on child raising. As a little kid, you always want to know why can't I do this and why can't I do that. Some parents will say "because I said so". My mother would have a reasoned discussion with me and, if I could make a good enough argument for why I should be able to do what I wanted to do, I got to do it. It was a great reward system for training little lawyers. I was a good advocate by the time I was five or six.

My father also had a profound influence on me. He has always been a people person -- very outgoing, able to talk to anyone about any subject. He is very charismatic and has a great sense of humor. His influence, I believe, accounts for the extent to which I became involved in performing arts and have never shied away from public speaking or leadership positions. To the extent that I can feign self-confidence in instances in which self-confidence is required, I have my father to thank. He also taught me the importance of taking the time to thank people who help you along the way and making sure that people you appreciate are aware of your appreciation.

5. Prior to becoming a judge you were a partner at Irell & Manella. What was your primary area of practice at that firm?

Oh bankruptcy, absolutely.

Did you mostly represent creditors?

Irell was somewhat unusual among larger firms in that Irell did the borrowers' side of financial transactions, and they represented startup companies among other things. So they were very reluctant to see me represent creditors. I brought a case with me where my client was JP Morgan and that was controversial because they didn't want to be conflicted out of representing a business when they were going out to do a public offering. So no, I didn't primarily represent creditors. I represented trustees, debtors in possession, a little bit of committee work, a little bit of bankruptcy related litigation. I did a fair amount of assisting in bankruptcy planning in connection with large transactions, and I would look at the transaction and identify bankruptcy risks and ways to structure the transaction in light of that. I did more creditor work at Murphy, Weir & Butler, which is where I was before Irell, and at Gendel, Raskoff, Shaprio & Quittner than I did at Irell.

6. In your private practice, is there any one particular case that gave you greater satisfaction or is more memorable than any others.

Well probably the last very large chapter 11 case that I handled - I met my husband working on that case – so that's probably the most important case to me. But, it was a very interesting, very challenging case and a case that produced a good result. It could have been a disaster for the investors. They were 900 retired people who lived in mobile home parks in Hemet, who had invested much of their life savings in these ventures, and we managed to deliver a pretty good rate of return for them.

7. What was the most significant factor that led you to the bench?

Number of hours in the day. A variety of factors led to my decision to leave private practice. One was that the firm kept upping my hourly rate, which kept making it harder and harder to bring in business, because cases had to be bigger and bigger in order to justify my hourly rate. It was increasingly stressful for me to feel as though I would be able to generate enough business to do justify my salary. I was already trying to bill as many billable hours as I was supposed to bill, was already speaking at as many different places as I could speak, and attending as many bankruptcy-related events as I should attend, and it occurred to me that, if all I am doing is getting up going to work, coming home, going to sleep and getting up to do it all over again, what's the point? Why am I doing this? Not that I didn't enjoy my work. I did. But, I am not living for the sole purpose of being able to work. I did want to get married and have a family, and I didn't see that happening unless I made a change. If you want something

in your life, you have to make room for it to come in. I had thought at some point down the road that I would either want to go in-house or take the bench, but I really hadn't put a whole lot of flesh on those bones. Then, in 2000, Lisa Fenning announced that she was going to retire. Suddenly, there was a vacancy that had not been anticipated, so I thought for the first time, "well, maybe I should do that." It wasn't very long before the deadline that I had made the decision to do it. I didn't talk to anybody about whether I should do it. I didn't solicit any letters of recommendation. I just filled out the application and sent it in. In a sense, it was just something that fell into my lap. I eventually would have gotten around to try and plan my life in such a way to make that happen, but it was convenient timing for me that there was suddenly an opening when I needed it.

8. Do you find that your experiences in private practice impact how you decide cases on the bench?

I don't know that it directly affects how I decide a case, but what it does is gives me a better understanding of what is really going on behind the scenes, or what people aren't telling me, or when something seems strange, or when a lawyer is reluctant to come out and say what he or she is obviously dancing around. I understand better. It takes fewer words to communicate the problem. I like to think that I catch on more quickly than I otherwise would as to what's really going on.

9. What was your first hearing as a judge and what was it like?

I don't remember the first hearing but I do remember heading out the door for my first hearing. I had the robe on and they say "clothes don't make the man," but, boy, the right costume really does help you play the part. I remember thinking about putting on the mantle of solemnity and getting into character and walking into the courtroom, but, from that point on, I never looked back. I have no recollection of any of my first cases. *Laughing, the Judge further stated*, of course, I have no recollection of any of the cases I handled this morning either. *I think we can all relate to that.*

10. A hot topic right now in the Central District California is the unbundling of services for consumer cases, particularly in chapter 7 cases. Do you think attorneys should be able to unbundle their services to accommodate those who cannot afford full service representation?

Our goal in studying this issue is to divine the essential minimum core of duties that a lawyer must perform if he undertakes to represent a client. If you prepare the schedules, must you at least go to the 341a meeting? If the client is sued under section 727 for failure to disclose something on the schedules that you prepared, must you defend the action? If a main purpose of the filing was to avoid a debt that may well be nondischargeable, must you defend the 523 action? Or if you are not going to defend the 523 action, should we come up with a standard disclosure form that could be used to explain to the debtor what they are getting themselves into if they file bankruptcy? It's a thorny issue, and the answer is probably neither that it is ok to ghostwrite schedules, nor that an attorney has to handle every aspect of a case, but a line needs to be drawn somewhere. At present, I have no idea where that line ought to be.

11. As a judge what was the most decisive or path-breaking case that you have been involved in?

Well, it wasn't my case – it was Judge Donovan's case -- but I did sign on to the Ballas and Morales decision. Ballas and Morales was a legally married gay couple. Normally, we try to avoid constitutional issues, but this one was smack dab right there. According to DOMA, they couldn't be considered "spouses" within the meaning of the Bankruptcy Code, but they were legally married. I didn't have much involvement in crafting the decision, but I guess you could say that I was involved, in that I was one of the judges who signed the decision.

12. What would you say is the toughest part about being a judge?

It can be isolating because there are many rules that govern your behavior. So having to think about things that seem innocuous on their face, but might give rise to an

appearance of impropriety, is one of the challenges of this position.

13. What can you advise lawyers appearing in your courtroom for the first time?

Please comply with my deadlines. Or if I set a deadline and you cannot comply with my deadline, consider filing a stipulation to ask me to extend my deadline. And if I ask you to lodge a scheduling order, please lodge the scheduling order. And make it a point, if it is an adversary proceeding, to exchange documents. I rarely sanction attorneys for failing to comply strictly with the early disclosure requirements of FRCP 26, but I do expect the lawyers to talk to one another to figure out what they are arguing about before they sit down to draft a pretrial order.

Oh and please don't ever say "with all due respect." That's really starting to grate on me. I don't think that it is just me. I don't think there is judge out there who doesn't hate that phrase. Find a new phrase: "I'm sorry your honor, but", or, "I don't mean to upset you, your honor, but", or "with apologies," but scrap "with all due respect."

14. What do you think are the most important attributes of a successful bankruptcy practitioner?

Creativity, flexibility, good people skills. The more senior you get in practice, the less what you do has to do with what the law is because you either know that or you have an associate to research it for you. And the facts are what they are and you can't change that. So your job as a bankruptcy practitioner is to take whatever the law is, and whatever the facts are and to manipulate the humans through it in a rational, and hopefully cost effective way. So I think listening to your client and listening to the other side is critical. I think your reputation is important -- a reputation for saying what you mean and meaning what you say. People should be able to rely on the fact that, when you promise something , you are going to do it, and, ideally, that you have a good read on where your client is coming from so that you can accurately predict what he or she will or won't be willing to do. And good writing skills are always important.

15. What common mistakes do you see practitioners make and what remedies would you suggest?

Well, you've got to have good calendaring system, some good way of managing what's going on with your cases, and adequate staffing. I understand there is a reason you want to practice on your own, and that it is very hard to afford someone to work for you, but cases require attention and require time. There are some lawyers that do a great job of bringing in the work but do a terrible job staffing and actually working their cases. So if you happen to be one of those fortunate people who can bring the work in, don't bring in more than you can actually do because the cases are going to tank and you are not going to do anyone any favors. They should call someone like you. That's what you're there for, right? *(Thanks for the plug Your Honor).*

This is a total pet peeve and this only comes up in trial, but I tell everybody this at every pre-trial conference. I do most of my evidentiary hearings with direct testimony by declaration and then have attorneys bring their witnesses for live cross examination. The direct testimony declarations come in with the exhibits attached to them because you need to lay a foundation for the exhibits to come in. What I don't want to have happen is for people to come in with their exhibits books and tab their exhibits as one thing, and when they filed their declarations, they tabbed their exhibits as something entirely different. So we spend two hours at a trial going through what exhibit is what. Pick a letter or number -- and I have instructions in my trial procedures as to who uses letters and who uses numbers -- but assign one letter or number to the exhibit and whenever you use it, call it that. I don't care if you give me a declaration that has exhibits A, F, B, Q in that order. I don't care as long as every time I look at exhibit Q, it is always exhibit Q, and not a different document. This seems really basic but it is a constant problem.

16. What are your goals for Central District California?

To find out what our goals are. I mean, clearly I want us to keep functioning effectively and serving the public well in a diminishing resource environment, and so that's kind of the overarching goal - to do a good job no matter what obstacles may be thrown in our path. But, other than that, in terms of what needs to be done or what isn't working, I don't know what the problems are that need to be fixed yet. I'm out there trying to find out. I encourage people to tell me if there is a problem that they think we need to address. If I'm not the right person to address it, I'll funnel it to the right person.

17. What do you find most rewarding about being a judge?

Well, I know it sounds trite, but having my own bathroom is really nice. That's one of the best things about this job, and it just makes you feel like an important

person when you can say, "I have my own bathroom." *(We laugh)*. But, what is really rewarding about this job is the ability to do what you think the right thing is even if there aren't significant dollars involved, and even if it isn't cost effective for me to do it. I can do the right thing within the constraints of the Bankruptcy Code. Subject to those instances in which there is a clear rule of law for me to follow, I get to do what makes sense to me, and, hopefully, be the one to bring order to the chaos and help move the case forward. I have received thank you notes from debtors or other parties saying, "My life was a disaster when I came and things are so much better now." So, one of the most rewarding things about this job is our ability, on occasion, to make things less bad.

Many thanks to the Judge for her time in giving this interview. 

1 In In Re Balas and Morales, 449 B.R. 567 (Bkrtcy. C.D. Cal. 2011) the debtors were a legally married gay couple under California Senate Bill 54. The U.S. Trustee moved to dismiss the jointly filed chapter 13 because the debtors did not meet the definition of a "spouse" as defined in the Defense of Marriage Act ("DOMA") which stated marriage had to be between a man and a woman. The Bankruptcy Judges for the Central District of California ultimately held that DOMA was unconstitutional and violated the due-process clause of the Fifth Amendment.

Attorney Client and Attorney Work Product Privileges: How to Protect Them and Not to Lose Them

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Attorneys deal regularly with governmental entities and file documents with such entities containing private client information. Clients typically believe, often from socialization and the media that the attorney-client privilege applies automatically through attorney confidentiality and more so through the attorney-client relationship. This culturally pervasive idea is false as to the strength and universality of the privilege, and how the privilege can be easily lost. It can be lost by many acts, ranging from an inadvertent disclosure to a required filing of information with a government agency. This article explores privileges and how filings before units of the government may result in a waiver of privilege so much so that in some cases the attorney may be called upon to testify against the client. Given the magnitude of this problem, and depending upon the matter, the client may sometimes want to proceed pro-se in instances in which any problematic facts would otherwise need to be disclosed to the assisting attorney.

II. THE PRIVILEGES GENERALLY

The two main privileges are the attorney-client (confidentiality) privilege and the attorney work-product privilege. The attorney-client privilege protects the content that the client confidentially communicated to the attorney to obtain legal advice or assistance. The attorney work-product privilege provides protection from discovery of materials prepared in anticipation of litigation.

The privileges have been traditionally narrowly applied and subject to multiple grounds of restriction. In *United States v. Plache*, 913 F.2d 1375, 1379 (9th Cir. 1990); *Weil v. Investment/Indicators, Research Management, Inc.*, 647 F.2d 18, 24 (9th Cir. 1981). In a recent case, *Republic of Ecuador v. Mackay* and *Republic of Ecuador v. Kelsh* (Nos. 12-15572, 12-15848, 2014 WL 341060 (9th Cir. 2014), the scope of work-product protection for expert materials was established as very narrow, extending to draft expert reports and communications between experts and attorneys. "It must not be forgotten that the attorney-client privilege, like all evidentiary privileges, stands in derogation of the search for truth so essential to the effective operation of any system of justice: therefore, the privilege must be narrowly construed." *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000).

Privilege is an evidentiary rule to prevent compelled discovery in some judicial proceeding of certain confidential matters. Rules of privilege do not apply where there is no judicially forced disclosure. It may be more akin to a "rule of evidence." Further, privilege in federal forums is different than privilege in state forums. In Federal courts, the attorney-client privilege is a question of federal common law. Federal Rules of Evidence ("FRE") 501; *Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127, 129 (9th Cir. 1992). In state forums, the privilege is governed by a myriad of different rules associated with particular state laws, with further confusion from choice of forum rule application and the assumptions that may have been made in contract formation.

In Federal courts, much guidance for privileges is contained in Federal Rule of Civil Procedure

("FRCP") 26 ("Rule 26"), Federal Rules of Criminal Procedure 15 and 26.2 and in FRE Rules 501 and 502. Once a privilege is identified as being properly established, the waiver doctrine may be applied to test whether actions of either the client, attorney or court have created a waiver of the privilege, and to what extent the waiver will cause the privilege to be lost.

Much of the authority for the general theory of privilege, including state law versions of privilege are found in FRE Rule 501.

III. ATTORNEY CLIENT CONFIDENTIALITY PRIVILEGE

The privilege protects what the (a) client confidentially communicated (b) to an attorney (c) to obtain legal advice or assistance. The failure of any one point can increase the chances of a finding of "no privilege". That is not to say that some court may not carve out an exception on any side of the question, but a strong showing in each of these areas (a), (b), and (c) will generally fortify an assertion of the privilege.

The emphasis subsection (a) is that it is supposed to be a finding of confidential information obtained from the client, rather than a two-way confidential communication about a topic generally. The source of the information, its relatedness to the client's dilemma, or type of information is usually not pertinent nor relevant to the application of the attorney-client privilege. However, a two-way conversation which was initiated by a confidential communication to the attorney is normally afforded a "derivative privilege protection," especially where it furthers and suggests confidential communication to the attorney.

Subsection (b) emphasizes that the communication must be to the attorney. Communication that occurs through others, or where the communication is made not directly to an attorney in private (confidential surroundings) the claim of privilege can be lost.

Subsection (c) can cause one of the greatest potential for loss of privilege, namely, when the communication is made in preparation for some governmental filing. Practically, if an attorney is consulted in private for advice, and if the attorney takes no further action or otherwise identifies himself or associates with the act of governmental filing, the privilege will likely never be

cdcbaa **Upcoming Calendar**

February 21, 2015
Litigating with HOAs

March 21, 2015
TBD

May 16, 2015
TBD

Meetings to be held at Southwestern Law School. Please check www.bklawyers.org for up to date MCLE meeting information.

discovered, and if discovered will likely have the effect of having the communication held privileged.

Here some seminal cases are: *United States v. Gonzalez*, 669 F.3d 974 (9th Cir. 2012) where it was held that -- even assuming a valid joint defense agreement exists, one joint defendant's claim of privilege must yield to another joint defendant's "ineffective assistance of counsel" claim and its associated waiver of attorney-client privilege. In *United States v. Flores*, 628 F.2d 521, 526 (9th Cir. 1980), contempt was found for failure to answer questions which would have allowed the judge to determine the privilege. In addition, the identity of a client is not privileged information. *In re Michaelson*, 511 F.2d 882, 887-89 (9th Cir.), cert. denied, 421 U.S. 978, 95 S.Ct. 1979, 44 L.Ed.2d 469 (1975).

IV. WORK -PRODUCT PRIVILEGE

This privilege is for protecting documents and various other tangible things which are prepared in anticipation of litigation, trial or controversy. Courts also make a distinction between factual work as lesser protected factual information relating to litigation, trial or controversy, and opinion work-product that pertains to a thought process such as an attorney's mental impressions, conclusions, opinions, theories, estimations, and computations regarding the process of carrying out a litigation, trial or controversy.

The primary policy behind the work-product privilege is the desire to preserve the effective assistance of attorneys and ancillary persons employed to help in preparing for a litigation, trial or controversy. It is believed that by maintaining the privacy of communications between client, attorney, and others employed in the preparation process, and especially privacy in the development of legal theories, opinions, evaluations and strategies, that effective legal assistance will be enhanced upon which our adversarial system of justice depends. However, courts realize that to achieve fairness in the disposition of litigation, the parties must be allowed to obtain knowledge of the relevant facts through a liberal interpretation of the rules of discovery. In order to accommodate these often divergent and conflicting policy considerations, courts give absolute or almost absolute protection to work-product which encompasses the mental impressions, conclusions, opinions, and legal theories concerning the litigation while more liberally allowing discovery of other work-product on a showing of substantial need and undue hardship.

Much of the guidance, treatment and method of claiming work-product privilege is derived from Rule 26, which places the issue squarely before a judge. The claim of privilege must expressly be made by the party seeking the protection describing what the party seeks to protect. Then, pursuant to Rule 26(c), such party must file a motion for a protective order after having attempted to resolve the dispute informally.

V. CORPORATE VERSUS INDIVIDUAL

Corporate entities generally have less privilege protection than individuals, and an investigative action done with respect to a corporate entity may discover evidence that can segue into individual liability. The existence and use of corporate entities and their presumed separate person status can provide some shielding effect where the corporate entity is where most activity takes place. However, corporate entities do not have the benefit of the 5th amendment's privilege against self-incrimination during government investigation stage of proceedings. The tenuous attorney-client privilege and work-product privilege are all that a company has to try to protect itself from probing outside forces. Complicating corporate investigations further is the need to issue "Upjohn" warnings (*Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981)) to corporate employees that need to understand that the corporate defense team doing the internal interviews in order to keep a step ahead of the

government provide no protection for the acts of the employees that can themselves find themselves implicated based upon the results of the corporate investigation. The personal 5th amendment right cannot be used to block a production request to a corporate entity even if that very information forms the basis of individual liability whether in a corporate or individual capacity.

The main ground for opposing a corporate privilege is the fourth amendment reasonableness test set forth in *Hale v. Henkel* 201 U.S. 43, 70 (1906). This "efficiency shield" can be used by a target to ask the courts to either block or modify a subpoena to require that it be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.

VI. WAIVER

The entity who actually holds rights under a privilege can waive that right by voluntarily disclosing the privileged information to another person or entity. It is the revelation of the real substance of the privileged information that can constitute waiver, rather than some vague "affiliated facts or strategies." The effect of waiver on attorney work-product may differ as to "fact" information work-product and "opinion" or attorney's mental impressions, conclusions, opinions, strategies and theories work-product.

Deliberate disclosure of a attorney-client privilege can occur by the client and at any time after the confidential communication is made. Deliberate work-product privilege waiver can be made before a proceeding, during a proceeding, or afterwards.

Waiver can be problematic where it is desired to make only a partial waiver, for example, of part of the facts, or for a part of the strategy. In a so-called "classic" view of privilege, a waiver of some portion of the privileged material causes waiver of all the material. Under a so-called "modern" view, waiver can occur as to one portion of information or work-product without waiver as to other portions. Both views cause problems that invite a judge to determine the degree of waiver.

Much of the authority for determining the degree of waiver is found in FRE Rule 502. Rule 502 examines whether the disclosure was made in a federal proceeding, to a federal office or agency, state proceeding and the nature of waiver. The focus, among others, is on whether the disclosure was intentional or inadvertent, whether the disclosure occurred during litigation. Essentially,

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You do not have to be a Board Member to join a committee. If you are interested in joining a committee, please contact the Chairman. Your participation will be welcome.

Newsletter Layout by Desmond Hayes: dh@desmondhayes.com

Equipping the Debt Relief Warriors

For five years attorneys Dennis McGoldrick and Wesley H. Avery have given of their valuable time to familiarize fellow bankruptcy attorneys with the Bankruptcy Code, Bankruptcy Rules of Procedure, Statutes and relevant Case Law. With their combined fifty six (56) years of bankruptcy experience, they share insight and bring understanding to the often complicated world of bankruptcy law.

You may have taken a bankruptcy course in law school. You may flock to all the latest CEB events. You may be in court all the time. It also may be time to assess your familiarity with bankruptcy basics. The how and why. Seriously, "ask yourself how familiar are you with the different code sections?" Where is that rule that tells you when the plan payment is due after the case converts to 13? What happens to individual debtors discharge when they convert from 11 to 7?

Both Dennis and Wes are valuable resources. First, they give of their time to benefit the group. Think about it – they are improving their competition. Then, they provide the names of books and homework to keep the student on track. How do you eat an elephant? One bite at a time. Also, along with increased personal knowledge, your clients will be better off, increasing the likelihood they receive better services, which reflects well on the bankruptcy attorney group as a whole.

Whether you are qualified to sit for the specialist exam or "not too familiar with bankruptcy law" you and your clients will benefit if you attend and prepare for the classes.

Heartfelt thanks and much gratitude to Wes and Dennis who give their time to benefit others.

Submitted by Catherine Christiansen who can be reached at christiansenlaw@yahoo.com.

Photograph Provided by Keith Higginbotham

Rule 502(a) does a number of things. (1) It provides some guidance to judging partial deliberate disclosures, (2) sets deliberate disclosures apart from inadvertent disclosures, (3) separates effect of state disclosure waivers from the effect of federal disclosure waivers, and (4) sets a standard for reliance on court orders or party agreements.

Selective Waiver:

To contrast forced disclosure, selective waiver for voluntary disclosure is systemically pervasive, as for example the extent it flows back into the chain of documents. In *United States v. Reyes*, 239 F.R.D. 591, 604 (N.D. Cal. 2006), it was held that any facts which were transmitted in a briefing waived the privilege as to any documents in which those facts were found.

As late as 2005, there was uncertainty in the Ninth Circuit about whether waiver would be selective or unitary for forced disclosure in some forums, and particularly disclosure under the enticement of a production agreement with the government. *United States v. Bergonzi*, 403 F.3d 1048, 1050 (9th Cir. 2005) (citing back to *Bittaker v. Woodford*, 331 F.3d 715, 720 n.5 (9th Cir.2003)). Bolstering selective waiver where there was a confidentiality agreement and where compulsion was the cause of the forced disclosure.

Moreover, in the recent case of *In re Pacific Pictures Corp.*, 679 F.3d 1121, 1127 (9th Cir. 2012) the Ninth Circuit affirmed the policy that the corporate investigation mechanism and a wholistic waiver should be a normative course of conduct. Any argument that "selective waiver" would encourage disclosure to government is ignored in favor of a public altruistic conclusion that free disclosure to government should happen anyway.

Other district courts have upheld confidentiality agreements with governmental agencies. *In re McKesson HBOC*, Inc. Sec. Litig., No. C-99-20743 RMW, 2005 U.S. Dist. LEXIS 7098 (N.D. Cal. Mar. 31, 2005); and *Louen v. Twedt*, No. 1:04-CV-6556, 2006 WL 1581901. Others have not. *United States v. Reyes*, 239 F.R.D. 591, 603 (N.D. Cal. 2006); *In re Syncor ERISA Litig.*, 229 F.R.D. 636, 647-48 (C.D. Cal. 2005).

Finally, where the disclosure of client confidential information or work-product information are prepared specifically for voluntary disclosure to the government, the privilege can be thought of as non-existent ab initio. The focus is on "what about portions of work-product facts, privileged communications, and work-product

opinions which did not make it into the final submission to government, but were held in reserve"? This is a case-by-case open question subject to the "ought in fairness to be considered together" aspect of Rule 502, as well as the 9th circuit policy as indicated in the case of *In re Pacific Pictures Corp.*

VII. BANKRUPTCY SUBMISSIONS

Privilege in bankruptcy generally fails on two counts: (1) nearly every fact transmitted to the petition drafter is intended to be transmitted to government in the filing of the application, and (2) the creation of the bankruptcy estate upon filing is controlled by the trustee, and the client privilege is part of the bankruptcy estate. However, after a bankruptcy petition is filed, the attorney-client privilege become the property of another party. Although sometimes the bankruptcy court will consider the policy of untrammeled flow of information to the attorney, and perhaps consider the harm to the debtors' interest in successfully passing through the bankruptcy with a real "fresh start," the court must also consider the trustee's duty to maximize the value of the debtor's estate.

These principles were most firmly established in *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 358 (1986). In *Weintraub*, a chapter 7 corporate liquidation case, the Court held that the corporate debtor's attorney-client privilege passed to the trustee on filing. It was generally assumed that passage of the privilege would be restricted to corporate cases, but this turned out not to be.

Nationally, a number of cases followed suit, regardless of whether the case was corporate or individual. The more recent cases have included: *McClarty v. Gudenau*, 166 B.R. 101, 102 (E.D. Mich. 1994); *In re Basler*, (Bankr. D. Neb. July 26, 2011); *In re Bounds*, 443 B.R. 729, 735 (Bankr. W.D. Tex. 2010); *In re Eddy*, 304 B.R. 591, 599-00 (Bankr. D. Mass. 2004); *Moore v. Eason (In re Bazemore)*, 216 B.R. 1020, 1024-25 (Bankr. S.D. Ga. 1998); *In re Pearlman*, 381 B.R. 903, 910 (Bankr. M.D. Fla. 2007); *French v. Miller (In re Miller)*, 247 B.R. 704, 709-10 (Bankr. N.D. Ohio 2000); *In re Cenargo Int'l., PLC*, 294 B.R. 571, 601 n.37 (Bankr. S.D.N.Y. 2003); *Ramette v. Bame (In re Bame)*, 251 B.R. 367, 373 (Bankr. D. Minn. 2000) and *Meoli v. Am. Med. Serv. of San Diego*, 287 B.R. 808, 817 (S.D. Cal. 2003).

Further, any light that the client sheds on the relationship with the attorney, especially in terms of what the client was told, is not privileged. In *United States v. Bauer* 132 F.3d 504, 512 (9th Cir. 1997), the debtor raised a question about whether his attorney informed him that he had a legal obligation to report all of his property in the petition, and that any false statement would constitute perjury. Because the practitioner alleged that he was following the advice of his attorney, the conversation between the debtor and his attorney was put into issue and what scintilla of privilege there might have been in the pre-petition relationship was further extinguished.

Adversary Proceedings and 2004 Exams

In adversary proceeding, attorney work-product is expected to apply to production of documents prepared in anticipation of litigation, as well as attorney-client privilege. Rule 26(b)(3) relates to Federal Rules of Bankruptcy Procedure Rules 2014 and 2004. *In re Financial Corp. of America*, 119 B.R. 728 (Bankr. C.D. Ca. 1990), a trustee moved for production of documents from claim filers, and the claim filers resisted based upon attorney work-product, as well as the category set up under title 5 U.S.C. §552 B(5) and (8) (Freedom of Information Act- FOIA) categories related to exemption from disclosure based upon litigation documents being exempt from FOIA. As to the use of the FOIA statute, the court stated "*In Kerr v. United States District Court for The Northern District of California*, 511 F.2d 192 (9th Cir.1975), aff'd 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976), the Court of Appeals determined that the exemptions enumerated in Section 552(b) of the Freedom of Information Act did

not constitute privileges for civil discovery. The Court observed that a "purpose of this act was to expand the access of the public to official records of federal agencies, subject to stated exceptions." Kerr, 511 F.2d at 197. "They were intended only to permit the withholding of certain types of information from the public generally." Id. at 198." As to the work-product privilege, the court stated that "the Chapter 7 trustee contends that since no adversary action has been commenced in the Bankruptcy Court, the parties objecting to disclosure under the work-product doctrine are not parties to litigation in this Court and are, therefore, unprotected by Rule 26(b)(3)." The court then held that the work-product doctrine is applicable to documents prepared in anticipation of litigation with the chapter 7 trustee and to materials prepared by in anticipation of litigation or for trial with third parties in related matters relevant to the trustee's investigation of the parties asserting this privilege. The court also indicated that pre and postpetition document generation did not create a divide between what might be work-product and what might not be work-product, stating "A Rule 2004 examination is limited to the financial affairs of the debtor and the administration of the bankruptcy estate. This Court is not persuaded that documents generated after a debtor files his petition cannot be relevant to the debtor's financial condition or the administration of the bankruptcy estate as a matter of law.

Further, usually the procedural safeguards of the FRCP generally do not apply to Bankruptcy Rule 2004 examinations, and an entity from which discovery is sought may seek a protective order to resist production. Bankruptcy Rule 2004(b) and 9016 make FRCP Rule 45 applicable to bankruptcy cases. Since Rule 2004 examinations can be intrusive and likely to generate sensitive information, well crafted protective orders need to be created to include all bases for the limitation.

Also, generally, the statutory basis for a shift in ownership of the privilege is found in 11 U.S.C. §542(e), that enables the bankruptcy court to order turnover of any record information relating to debtor's property to the trustee. The order is subject to privilege, not against the trustee, but against creditors, and generally by the trustee. This is because pursuant to 11 U.S.C. §541, the creation of the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."

cdcbaa
Central District of California Bankruptcy Attorneys' Association

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VIII. CONSIDERATIONS FOR MAXIMIZING PRIVILEGES

(1) The filing of bankruptcy petitions should be performed by a single-use attorney with whom the client may be honest, but who may not necessarily be privy to larger effects in other areas which result from the filing. Bankruptcy courts can force a look at the attorney's past relationship with the debtor, including deals, past fees earned and more. In essence, when an attorney holds privileged information, the filing of a bankruptcy for a long-time client will subject the confidential information relating to past business dealings of the client to waiver of such privilege held by the long-time attorney.

(2) Plan against voluntary disclosure, and plan to minimize damage by segmenting the smallest unit of damaging disclosure into the mostly likely segment likely to have forced disclosure and loss of privilege.

(3) Because the confidentiality privilege is based upon communication from the client to the attorney, include any discussions or opinions as either a hypothetical that can be completely divorced from the client's identifying facts and circumstances, or make certain that any sensitive document include a recitation of communication from the client to avoid loss of privilege due to the document being solely a one way communication from the attorney to the client.

(4) Because loss of attorney-client privilege and the work-product privilege may be waived by voluntary disclosure, keep sensitive documents together and obtain the client's permission with a warning on loss of privilege before making such sensitive documents available.

(5) The government's duality in dealing with bankruptcy court and United States district court separately is well established in *USA v. Wanland*; No. CR. S-09-008 (E.D. CA 05/03/13). The government can use the bankruptcy level courts to investigate a bankruptcy filing, then turn around and use the U.S. District Court to prosecute the debtor, and use the fact that Bankruptcy Courts are not article III courts to "compartmentalize" and separate any agreements, cooperation or violations of 5th amendment rights.

(6) Before creating a document, always consider *"IS IT NECESSARY"?*

(7) Where bankruptcy filing has reached the adversary proceeding stage, litigants should avail themselves of stipulations (approved by the bankruptcy court) to prevent discovery fishing expeditions.

How to Obtain a Stay Pending the Appeal of a Bankruptcy Court Order

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Without a stay, your appeal of an unfavorable Bankruptcy Court order could be rendered moot. However, obtaining a stay pending appeal is not easy and must often be done on an expedited basis. This article will explain the procedures and evidence needed to be successful in the endeavor of obtaining a stay pending appeal of a Bankruptcy Court order.

The Power to Issue a Stay is Exercised by the Bankruptcy Court in the First Instance.

Bankruptcy Rule 8005 is the rule establishing the power of the court to grant a stay pending appeal. *Bankruptcy Rule 8005* provides that a Bankruptcy Court "may suspend or order continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest."

A motion for stay pending appeal will need to be filed first with the Bankruptcy Court in almost every case. *Bankruptcy Rule 8005* provides that a motion for stay of an order pending appeal "must ordinarily be presented to the bankruptcy judge in the first instance."

Bankruptcy Rule 8005 does provide that a motion for a stay pending appeal "*may be* made to the District Court

or the Bankruptcy Appellate Panel", but such a direct motion to the reviewing court "*shall* show why the relief, modification, or termination was not obtained from the bankruptcy judge." The explanation as to why the motion for a stay was not first brought before the Bankruptcy Court must be a good one. Simply stating that you didn't first file the motion for stay with the Bankruptcy Court because you thought the Bankruptcy Judge would deny your request is not enough. The facts in support of the "explanation" must also be presented to the reviewing court through admissible evidence, such as declarations or requests for judicial notice.

While the power to issue a stay resides in the appellate courts, it is usually exercised by the trial court. *In re Wymer*, 5 B.R. 802, 807 (B.A.P. 9th Cir. 1980). Appellate courts generally should not entertain requests for stay "unless it is demonstrated that the trial judge is unavailable or that the request was denied by the trial judge." *Id.*

A Discretionary Stay is Only Issued in Exceptional Situations.

"While the power to maintain the status quo pending appeal should always be exercised when any irremediable injury may result from the effect of the decree as rendered . . . this power should be sparingly employed and reserved for the *exceptional situation.*" *In re Wymer*, 5 B.R.802, 806 (9th Cir., 1980).

Proving an "*exceptional situation*" warranting the imposition of a stay is not an easy task and requires the support of admissible evidence. The motion for stay pending appeal must be accompanied by declarations, under penalty of perjury, introducing the relevant documents and court transcripts of the relevant proceedings. Simply providing your opinion, as an attorney for a party, as to why it is important that the matter be stayed is not sufficient.

The Four *Wymer* Factors Which Must be Meet to Obtain a Stay.

The four factors which must be weighed by the Bankruptcy Court to determine whether to grant a discretionary stay are: (1) whether the appellant is likely to succeed on the appeal;

(2) whether the appellant will suffer irreparable injury; (3) whether other interested parties will be substantial harmed of the stay is issued; and (4) the effect of the stay to the public interest. *In re Wymer,* 5 B.R.802, 806 (9th Cir., 1980).

When addressing the first factor of the likelihood of success on the merits of the appeal, the standard of review on appeal should be taken into consideration. An abuse of discretion standard applies in most appeals and is a very high standard to meet. This portion of the motion for stay will often be extensive and as thoroughly researched as an appellant's opening brief.

An Oral Motion for a Stay Must be Complete and Set a Record.

An oral motion to the Bankruptcy Court for a stay pending appeal at the hearing wherein the ruling which you intend to appeal is rendered is acceptable but must provide the Bankruptcy Court with admissible evidence explaining how the four *Wymer* factors have been satisfied. References to the evidence already admitted into the Bankruptcy Court's record could be made. However, it is rare that all of the necessary evidence is already in the record and oral motions are often denied without prejudice so as to allow the party to come back with a written motion supported by evidence.

Don't just stand up and simply ask the Bankruptcy Judge; "Will you grant a stay pending appeal?" Your inadequate request will be properly and summarily denied and, as explained below, such a denial will be affirmed by the reviewing court, since there is no record as to the discretion utilized by the Bankruptcy Judge in the ruling.

The Reviewing Court Utilizes an Abuse of Discretion Standard in the Review of a Denial of a Stay.

If a Bankruptcy Court denies a motion to stay, the court addressing the appeal may only review the denial for an abuse of discretion. It is well-settled that, where the lower bankruptcy court denies a motion for a stay, the review is limited to whether the lower bankruptcy court abused its discretion. *See, e.g., In re Wymer*, 5 B.R. 802, 807 (9th Cir. BAP, 1980); *In re North Plaza, LLC*, 395 B.R. 113, 119 (Bankr. S.D. Cal., 2008); *In re Irwin*, 338 B.R. 839, 847 (Bankr. E.D. Cal., 2006); *Universal Life Church v. United States*, 191 B.R. 433, 444 (Bankr. E.D. Cal., 1995); *In re Ohanian*, 338 B.R. 839, 844 (Bankr. E.D.Cal., 2006); *In re Hassan Imports Partnership*, 2013 WL 6384647 (Dist. Ct C.D. Cal., 2013).

"Discretion will be found to have been abused when the judicial action is arbitrary, fanciful or unreasonable

which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." *In re Irwin*, 338 B.R. 839, 848 (E.D. Cal., 2006). *See also, In re Wymer*, 5 B.R. 802, 807 (9th Cir. B.A.P., 1980).

In order to evaluate whether or not the Bankruptcy Court abused its discretion, the reviewing court must evaluate the stay motion on the same grounds as the Bankruptcy Court's evaluation of the stay motion. To allow otherwise ""distort[s] the delicate balance between trial and appellate levels and den[ies] recognition of their respective roles, all to the detriment of the judicial system and of those it serves," (*In re Wymer*, 5 B.R. 802, 808 (9th Cir. B.A.P., 1980), unjustly allowing the appellate tribunal to "exercise its own discretion" despite the fact that the lower court is much more familiar with the issues pertaining to the motion. *In re Wymer*, 5 B.R. 802, 807 (9th Cir. B.A.P., 1980).

Establishing a Record in the Bankruptcy Court is Critical.

With an abuse of discretion standard, it is critical that the reviewing court be provided an adequate record as to the discretion utilized by the Bankruptcy Court in a denial of a motion for stay. Without a record before the reviewing court as to the discretion utilized by the Bankruptcy Court in denying a motion, the reviewing court cannot even start its analysis of the lower court's ruling as required by *Bankruptcy Rule 8005*.

Without an adequate record of the discretion utilized by the Bankruptcy Court in denying a motion, the reviewing court will summarily affirm the Bankruptcy Court's ruling. See, *In re North Plaza, LLC*, 395 B.R. 113, 119, fn. 5 (Bankr. S.D. Cal., 2008); ("implicit in *Rule 8005* is a requirement that the moving party provide a record of the bankruptcy court's actions").

If your motion for stay was presented orally to the Bankruptcy Court, it is important that the Bankruptcy Judge be prompted to set a record as to the basis of any denial of a motion for stay. It is your job to provide the reviewing court with an adequate record so make sure that such an adequate is made.

Emergency Request for a Stay Must Provide Evidence of the Basis for the Emergency.

If the stay is sought on an emergency basis, the rules require that a reason or explanation as to why this matter must be addressed on an emergency basis is required. An affidavit stating any reason or explanation for the alleged "emergency" is required by *Bankruptcy Rule 8011(d)*. The declaration must provide an explanation as to what "emergency" exists warranting that the request be addressed on an emergency basis under *Bankruptcy Rule 8011(d)* instead of the normal procedures under *Bankruptcy Rule 8011(a)*.

A Bond Pending Appeal.

Bankruptcy Rule 8005 provides that the filing of a bond or other security may be a condition for the granting of a stay pending appeal. The exact terms of such conditions are usually up for negotiation and compromise. Be prepared at the time of the hearing on the initial request for a stay to be specific with regards to the type of bond or security your client is willing and able to provide.

Summary of Important Points.

Your motion for a stay pending appeal should be brought first to the Bankruptcy Court and provide admissible evidence in support of the four factors stated in the *Wymer* case. Be sure to request an explanation from the Bankruptcy Judge as to the basis for any denial of your motion so as to provide the reviewing court with a record. The reviewing court must have an adequate record to make a determination as to whether the denial of the stay by the Bankruptcy Judge was an abuse of discretion.

Your motion for a stay filed with the reviewing court should provide admissible evidence proving that the matter was brought to the Bankruptcy Court first and a record of the discretion utilized by the Bankruptcy Court in denying the motion for stay. In most instances, the required evidence will be a transcript of the Bankruptcy Court hearing on your motion for stay and any related posted tentative rulings.

In very limited circumstances, the motion can be brought to the reviewing court first but such a motion must provide a good explanation as to why the normal procedure of bringing it first to the Bankruptcy Court was not followed. If the motion is brought on an emergency basis, an explanation as to what the emergency is must be provided. Both of these explanations must be provided in a declaration under penalty of perjury.

Your client may be required to provide a bond or other security to get the stay and you should be prepared for that requirement with terms that your client is able to accept.

cdcbaa

Central District Consumer Bankruptcy Attorneys Association

Advancing the interests of Consumer Bankruptcy Practice in the Central District of California

2015 Membership

I hereby apply for membership in the *cdcbaa*, Central District Consumer Bankruptcy Attorneys Association, a nonprofit association, for calendar year 2014. I understand the basic goals of the organization are to: address issues and concerns which affect consumer bankruptcy attorneys and their clients in the Central District of California; and to provide educational and networking opportunities for attorneys who primarily represent consumer bankruptcy debtors. As a condition of membership, I declare as follows:

1. I am a duly-licensed attorney presently authorized to practice law in the Central District of California; and
2. I am interested in consumer debtor practice; and
3. I support the basic goals of the *cdcbaa* as outlined above.

I understand the *cdcbaa* is incorporated as a 501(c)(6) nonprofit organization and that a portion of my dues will not be deductible as a business expense because *cdcbaa* advocates within California for legislation on behalf of consumer debtors.

The 2014 calendar year membership fee is $250.00, and includes one ticket to the Calvin Ashland Awards Dinner

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