Who Controls the Attorney-Client Privilege in Bankruptcy?

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NOTES

WHO CONTROLS THE ATTORNEY-CLIENT PRIVILEGE IN BANKRUPTCY?

INTRODUCTION

The attorney-client privilege is the oldest and most respected common law privilege for confidential communications. In fact, the privilege has been steadfastly defended by courts for over three centuries. Recently, courts have had to address the issue of how, and to what extent, a debtor’s bankruptcy affects his ability to waive or assert the privilege in connection with pre-bankruptcy communications. Specifically, courts have faced the dilemma of deciding whether the corporate debtor or the bankruptcy trustee controls the corporate debtor’s privilege in bankruptcy proceedings.

Based upon a diverse array of arguments and policies, the majority of courts hold that the trustee can waive the corporate debtor’s privilege, and gain access to confidential information (either oral or documentary) possessed by the corporation’s pre-petition attorneys. The courts generally do not articulate any consistent underlying theory or policy for such holdings, however, and even within the majority, inconsistent and conflicting arguments permeate the reported decisions. More importantly, courts consistently fail to distinguish between pre-petition and post-petition communications. Additionally, some courts confuse the issue of whether the trustee can waive the corporate debtor’s privilege with the issue of whether the trustee can

1. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The attorney-client privilege was apparently applied for the first time in the case of Berd v. Lovelace, Cary, 88, and courts have subsequently held that proper administration of the law requires that clients be encouraged to confide in the attorneys upon whom they rely for legal advice and assistance. People's Bank of Buffalo v. Brown, 112 F. 652, 654 (3d Cir. 1902).
3. See infra notes 29-170 and accompanying text.
4. See infra notes 29, 108.
5. See infra notes 29-170 and accompanying text.
6. See infra notes 45-170 and accompanying text.
waive an individual's attorney-client privilege. These courts fail to recognize that there are sound legal and policy reasons for treating corporate debtors differently from individual debtors with respect to the attorney-client privilege. Thus, decisions concerning a trustee's power to waive a corporate debtor's privilege should not be used as precedent in proceedings where a trustee seeks to waive an individual debtor's privilege.

The Supreme Court's recent decision in Commodity Futures Trading Commission v. Weintraub is illustrative. In Weintraub, a chapter 7 corporate liquidation case, the Court held that the corporate debtor's attorney-client privilege passed to the trustee. The Court left unresolved the issue of who controls the attorney-client privilege in chapters 9, 11 and 13, and the issue of who controls the individual debtor's privilege in chapter 7. The Court stressed that its holding was limited in application to the corporate debtor due to the specialized role that the trustee plays in corporate bankruptcy cases. If an individual's attorney-client privilege passes to the trustee, the Court reasoned, it does so for a reason different from that articulated in the Court's decision regarding corporate debtors.

At the core of the issue of who controls the attorney-client privilege in bankruptcy, in both the individual and corporate debtor situations, is the inexorable tension between the debtor/client's need to have confidential communications with his attorney protected, and the creditor's need for a full and complete disclosure of evidence and information regarding the debtor's affairs and financial status. The issue generally arises as creditors or the trustee begin to investigate the conduct and affairs of the debtor in an effort to uncover fraudulent transfers, preferences, avoidable liens, or any other information relevant to maximizing the debtor's estate. Often, the investigation reveals that the debtor's pre-petition attorney possesses valuable in-

7. See infra notes 184-203 and accompanying text.
9. Id. at 1994.
10. Id. at 1995.
11. Id.
12. See infra notes 29 & 108 and accompanying text. See also 11 U.S.C. § 1103(c) (1982 & Supp. II 1985) (setting out the powers and duties of creditors committees, including the authorization to "investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan"). See also 11 U.S.C. § 343 (Supp. II 1985) and Bankr. R. 2004(d) (Supp. II 1985) (requiring the debtor to appear and submit to an examination under oath). Neither § 343 nor Rule 2004 contain an express exception for attorney-client communications.
formation which the creditors or trustee seek. Subsequently, the debtor’s attorney asserts the privilege as the creditors or trustee seek to compel the attorney to testify or to turn over the desired information. The trustee then executes a waiver of the debtor’s privilege, and tries again to obtain the information. Ultimately, based upon a motion to compel discovery, the court rules on the issue.

Part I of this Note sets forth the purposes, exceptions, and essential elements of the attorney-client privilege. Part II discusses the statutory arguments which have been addressed by courts in an effort to discern at least some degree of congressional guidance for resolving the issue. Part III focuses on the various rationales which have been advanced in the absence of any meaningful statutory authority resolving the issue of who controls the privilege in bankruptcy. Included in Part III is an analysis of the Supreme Court’s decision in Commodity Futures Trading Commission v. Weintraub, a decision articulating the Court’s present position on who controls the attorney-client privilege in a chapter 7 corporate liquidation case. Part IV outlines several potential alternatives and solutions, concluding with the proposal that the significant differences between corporations and individuals in non-bankruptcy attorney-client privilege law should be extended to bankruptcy law. Individual debtors should retain the privilege while corporate debtors should lose the privilege whenever a trustee is appointed. Furthermore, in light of the special problems concerning closely held corporations, such corporations should be treated similarly to individual debtors in connection with the attorney-client privilege in bankruptcy. Finally, in all situations, the trustee should not acquire control of the debtor’s privilege over post-petition communications, as this would significantly deter the debtor from seeking post-petition legal advice. Such deterrence would, in turn, prejudice the debtor’s position during the bankruptcy case and hinder the debtor’s efforts to make an informed and productive fresh start.

I. Purposes and Scope of the Attorney-Client Privilege

The underlying purpose of the attorney-client privilege is to encourage uninhibited communication between a client and his lawyer by removing the client’s apprehension that the attorney may, at some future time, be compelled to divulge sensitive information to third
By fostering and protecting the unhampered flow of information, the privilege allows attorneys to be more fully informed, thereby giving sounder legal advice, advocating the client's case more effectively, and allowing a relationship of trust to develop between the attorney and client. Furthermore, the Supreme Court has noted that encouraging "full and frank communication between attorneys and their clients . . . [will] promote broader public interests in the observance of law and administration of justice."

It is undisputed that the attorney-client privilege applies to litigation in federal courts and in bankruptcy proceedings. Moreover, it is well-established that the privilege attaches regardless of whether the client is a corporation or an individual. As an artificial entity, however, the corporation (unlike the individual) cannot speak


The attorney-client privilege is related conceptually to the attorney work product doctrine in that both rules protect disclosure by an attorney of information and communications relating to the client's legal position. The two doctrines, however, must be differentiated. The attorney-client privilege provides absolute protection from disclosure and is held by the client; the work product privilege is a qualified privilege which is held by the attorney. The work product doctrine protects all documents and materials prepared in anticipation of litigation. Thus, it is often broader than the attorney-client privilege because it covers not only the client's own statements to counsel, but information obtained from witnesses as well. FED. R. CIV. P. 26(b)(3). The work product doctrine may also afford less protection than the attorney-client privilege because, unlike the attorney-client privilege, it is restricted to documents and materials prepared for litigation. Additionally, unlike the absolute protection of the attorney-client privilege, the work product doctrine's protection is qualified and may be lost if the party seeking disclosure can show "substantial need" and "undue hardship." Id.


18. FED. R. EVID. 501, which provides the general rule for privileges in federal proceedings, states that "the privilege of a witness, [or] person . . . 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."

19. See, e.g., In re Blier Cedar Co., 10 Bankr. 993, 997-98 (Bankr. D. Me. 1981) ("A claim of attorney/client privilege arising in a discovery proceeding conducted in a bankruptcy case is governed by Federal Rule of Evidence 501 . . . except in civil actions where state substantive law supplies the rule of decision, in which case privilege is determined in accordance with state law." (citations and footnote omitted)). See also BANKR. R. 7026, 9017, and 9032 (incorporating selected provisions of the Federal Rules of Civil Procedure and Federal Rules of Evidence into the Bankruptcy Rules); FED. R. CIV. P. 26(b)(1) (information not privileged is discoverable in federal courts); FED. R. CIV. P. 26(b)(3) (attorney's "work product" is protected from disclosure unless a "substantial need" and "undue hardship" exist); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 4-5 (1979) ("a lawyer should preserve the confidences and secrets of a client").

for itself, but relies upon its officers and agents to waive or assert the privilege. The corporate client’s ability to exercise the privilege only through its agents was a crucial factor for several courts in determining who is the proper party to assert or waive the privilege in bankruptcy proceedings.

Since the attorney-client privilege achieves its goals either by suppressing evidence or preventing discovery and disclosure of information, courts have established rigid requirements for claims of privilege. The essential elements of a claim of privilege are:

1. The asserted holder of the privilege must have sought legal advice from a professional legal advisor;
2. This legal advisor must have been acting in his professional capacity;
3. The communication must have been made in confidence by the client to the legal advisor;
4. The communication must not involve the commission of a crime or tort; and
5. The privilege must have been affirmatively asserted and not waived by the client.

The scope of the attorney-client privilege is restricted to communications dealing with wrongful acts already committed. Excep-

23. United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). The fact that certain documents or information emanate directly or indirectly from confidential communications between client and counsel is not determinative of a claim of privilege. Generally, “[t]he claim of privilege is confirmed only if the client can convince the court that the subject communication satisfies each element of the privilege and does not come within an exception.” In re Blier Cedar Co., 10 Bankr. 993, 997 (Bankr. D. Me. 1981). Furthermore, the privilege is narrowly construed against the party asserting it, to ensure that as much information as possible is disclosed to the trier of fact. Baird v. Koerner, 279 F.2d 623, 631-32 (9th Cir. 1960); In re Grand Jury Proceedings, 434 F. Supp. 648, 649 (E.D. Mich. 1977), aff’d, 570 F.2d 562 (6th Cir. 1978); In re Grand Jury Subpoena, 391 F. Supp. 1029, 1033 (S.D.N.Y. 1975) (“[T]he privilege has been confined to a narrow and limited enclave . . . [and] is strictly limited in purpose and effect. . . .” (citations omitted)).

tions to the privilege include communications concerning a client's contemplated criminal and tortious acts. Communications made prior to or during the commission of a crime, fraud or tort are not shielded because to do so would allow an attorney to be a principal or accessory to a crime or tort without fear of discovery, and would permit clients to commit wrongful acts with the prior advice of counsel.

Due to the judicial recognition of the importance of the privilege, more than a mere allegation of a subsequent wrongful act is needed to dissolve the protections of the privilege. Rather, a prima facie case establishing the illegality of the underlying conduct is required to trigger the exception to the privilege. In the context of bankruptcy, the wrongful act exception to the privilege includes not only prospective crimes and torts, but also communications about prospective fraudulent transfers or preferences.

II. THE STATUTORY LAW

Although the attorney-client privilege and bankruptcy proceedings have both been an accepted part of American jurisprudence for many years, courts have only recently begun to address the issue of to what extent, if any, a trustee in bankruptcy controls a debtor's

apply if the communication was made for the purpose of committing a crime or tort).


26. Id.

27. See In re Blier Cedar Co., 10 Bankr. 993, 999 (Bankr. D. Me. 1981). See also In re Berkley & Co., 629 F.2d 548, 553 (8th Cir. 1980) (prima facie showing that legal advice was obtained in furtherance of illegal or fraudulent activity is sufficient to secure disclosure).


29. The trustee represents the estate in a bankruptcy case, and has a duty to act in the best interest of the debtor's estate. 11 U.S.C. § 323(a) (1982). See, e.g., In re Washington Group, Inc., 476 F. Supp. 246, 250 (M.D.N.C. 1979), aff'd sub nom. Johnston v. Gilbert, 636 F.2d 1213 (4th Cir. 1980), cert. denied, 452 U.S. 940 (1982); DePinto v. United States, 407 F. Supp. 5, 7 (D. Ariz. 1976), aff'd, 585 F.2d 405 (9th Cir. 1978) ("[trustee] has a duty . . . to realize the maximum profit on the bankruptcy estate" for distribution to creditors); Commercial Credit Corp. v. Skutt, 341 F.2d 177, 181 (8th Cir. 1965) (trustee "has the duty to realize the maximum from the estate for distribution to the creditors").

attorney-client privilege. With respect to applicable statutory authority, the courts have found that neither the Bankruptcy Act of 1898 (the Act) nor the Bankruptcy Reform Act of 1978 (the Code) deals with the issue directly. The Code provision that arguably addresses the issue is section 542(e), which permits a court to order any person holding recorded information relating to the debtor’s property or financial affairs to turn such information over to the trustee. This turn over order is “subject to any applicable privilege.” Some debtors have claimed that section 542(e) is a substantive grant of power for debtors to assert the privilege against trustees. The legislative history of section 542(e), however, indicates that this subsection was designed solely “to deprive accountants and attorneys of the leverage they held under state law liens to receive payment in full ahead of other creditors when the information they

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30. The earliest reported decision appears to be Weck v. District Court of the Second Judicial Dist., 161 Colo. 384, 422 P.2d 46 (1967), which dealt with the trustee’s power to waive Colorado’s statutory accountant-client privilege. The first reported case to directly address the issue of who can exercise the attorney-client privilege in bankruptcy proceedings was Gorman v. Martinez (In re Amjoe, Inc.), 11 COLLIER BANKR. CAS. 45 (Bankr. M.D. Fla. 1976).


33. The Supreme Court noted the lack of statutory authority in Commodity Futures Trading Comm’n v. Weintraub, 105 S. Ct. 1986 (1985): “As might be expected given the conflict among the courts of appeals, the Bankruptcy Code does not explicitly address the question” of the attorney-client privilege in bankruptcy. Id. at 1992.


hold is necessary to the administration of the estate."\textsuperscript{36} Furthermore, the legislative history of section 542(e) states that "the extent to which the attorney-client privilege is valid against the trustee is unclear under current law and is left to be determined by the courts on a case by case basis."\textsuperscript{37} Thus, the bankruptcy statutory scheme is deliberately silent and the issue of the trustee’s power to exercise the privilege is expressly delegated to the courts to decide as a matter of federal common law.\textsuperscript{38}

At least two courts have looked to Proposed Federal Rule of Evidence 503(c) as statutory authority for the trustee’s power to waive the debtor’s privilege.\textsuperscript{39} In both \textit{Citibank v. Andros}\textsuperscript{40} and \textit{In re O.P.M. Leasing Services, Inc.},\textsuperscript{41} the courts noted that Proposed Rule 503(c) allowed the attorney-client privilege to be "claimed by the client . . . trustee or similar representative of a corporation, association, or other organization, whether or not in existence."\textsuperscript{42} Both courts also noted that the Proposed Rule, although not adopted, was a "fairly authoritative source of federal common law."\textsuperscript{43} Relying in part on Proposed Rule of Evidence 503(c), each court then held that the trustee was vested with the power to waive the corporate debtor’s attorney-client privilege. In light of the fact that Congress expressly rejected Proposed Rule of Evidence 503(c) and adopted Federal Rule of Evidence 501 instead,\textsuperscript{44} the \textit{O.P.M.} and \textit{Andros} courts’ reliance on 503(c) appears misplaced.

\textsuperscript{38} The Federal Rules of Evidence and the Federal Rules of Civil Procedure also fail to address directly the issue of who is the proper party to control the attorney-client privilege in bankruptcy. See supra notes 18 and 19.
\textsuperscript{39} See Citibank v. Andros, 666 F.2d 1192, 1195 (8th Cir. 1981); \textit{In re O.P.M. Leasing Servs., Inc.}, 13 Bankr. 64, 69 (S.D.N.Y. 1981).
\textsuperscript{40} 666 F.2d 1192 (8th Cir. 1981).
\textsuperscript{41} 13 Bankr. 64, 69 (S.D.N.Y. 1981).
\textsuperscript{42} Proposed Fed. R. Evid. 503(c) (emphasis added).
\textsuperscript{44} Fed. R. Evid. 501, adopted instead of Proposed Rule 503(c), provides that claims of privilege are "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."
III. The Case Law

In the absence of any meaningful statutory guidance, courts have attempted to define the parameters of the trustee’s power to exercise the debtor’s privilege. The courts have failed to develop any consistent theories, principles or guidelines. Moreover, the Supreme Court’s decision in *Commodity Futures Trading Commission v. Weintraub* resolves this issue solely in the chapter 7 corporate liquidation case. Although a review of the case law reveals a diverse array of holdings, the clear majority of courts, including the Supreme Court, hold that the trustee in bankruptcy has the power to waive or assert the corporate debtor’s attorney-client privilege. Even within the majority, however, there is disagreement about the

46. See infra notes 171-74 and accompanying text.

For cases holding that the trustee does not have the power to waive a corporate debtor’s attorney-client privilege, see *Commodity Futures Trading Comm’n v. Weintraub*, 722 F.2d 338 (7th Cir. 1984), rev’d., 105 S. Ct. 1986 (1985); *Hudtwalker v. Van Nostrand & Martin (In re Vantage Petroleum Corp.*) 40 Bankr. 34 (Bankr. E.D.N.Y. 1984) (trustee cannot waive corporate debtor’s privilege where party asserting privilege proves the corporation has current officers or directors); *Ross v. Popper*, 9 Bankr. 485 (Bankr. S.D.N.Y. 1980); *In re Smith*, 24 Bankr. 3 (Bankr. S.D. Fla. 1982) (trustee can waive individual debtor’s privilege). For cases discussing the trustee’s power to waive the attorney-client privilege when the debtor is an individual, see *Weintraub*, 722 F.2d at 342-43 (dictum) (trustee may not waive individual debtor’s privilege); *In re Butcher*, 38 Bankr. 796, 801 n.9 (Bankr. E.D. Tenn. 1984) (trustee may not waive individual debtor’s privilege); *Silvio de Lindegg*, 24 Bankr. 109 (trustee may waive corporate debtor’s privilege but may not waive individual debtor’s privilege); *In re Smith*, 24 Bankr. 3 (Bankr. S.D. Fla. 1982) (trustee can waive individual debtor’s privilege).

*See also In re Crescent Beach Inn, Inc.*, 40 Bankr. 56, 57 (Bankr. D. Me. 1984) where the bankruptcy court held that as between former officers/directors and a successor in interest of the debtor corporation, the successor is the proper party to control the corporate debtor’s privilege because the successor “is for all practical purpose the only entity involved. . . unlike a trustee, [the debtor’s successor in interest] does ‘replace the corporation as an entity’ ” and thus controls the privilege (quoting *Weintraub*, 722 F.2d at 322).
underlying legal authority for the trustee's ability to control the corporate debtor's privilege.

A. The Privilege as "Property of the Estate"

An argument which has been relied upon by several courts is that the attorney-client privilege is a form of property which passes to the trustee, by operation of law, with all the non-exempt property of the debtor's bankruptcy estate. The legal framework for this argument is found in section 70 of the Act and section 541 of the Code, which govern what constitutes "property of the estate" in bankruptcy proceedings. Under both the Act and the Code, the bankruptcy estate is created by operation of law upon the filing of a voluntary or involuntary petition. Through the creation of a bankruptcy estate, the debtor's property becomes subject to the jurisdiction and administration of the bankruptcy court. The property of the bankruptcy estate under the Code consists of "all legal or equitable interests of the debtor in property as of the commencement of the case," plus certain property acquired within 180 days after commencement, as well as property recovered pursuant to the trustee's powers to avoid preferential transfers, fraudulent conveyances, and various liens. Under the Code, debtors may avail


52. For a detailed discussion of property of the estate in bankruptcy proceedings, see BANKRUPTCY LAW MANUAL, supra note 29, at ch. 4. Neither the Code nor the Act specifically define the word "property."


themselves of either the federal or state exemption scheme,\textsuperscript{58} which provide for the removal of certain designated property from the bankruptcy estate.

Under section 70(a) of the Act and section 541 of the Code, the property interests passing to the bankruptcy estate for administration include both tangible and intangible property.\textsuperscript{59} Furthermore, the bankruptcy estate does not assume greater property rights than the interest held by the debtor. Thus, the bankruptcy estate is compromised of all non-excluded and non-exempt property of the debtor, but only to the same degree of interest held by the debtor under non-bankruptcy law.\textsuperscript{60}

One of the earliest and most important cases holding that the attorney-client privilege passed to the trustee as part of the debtor's bankruptcy estate is \emph{In re Amjoe, Inc.}\textsuperscript{61} In \emph{Amjoe}, the bankruptcy


\textsuperscript{60} For example, a debtor's legal title to property becomes property of the estate, "only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." 11 U.S.C. § 541(d) (Supp. II 1985).

\textsuperscript{61} 11 \textit{Collier Bankr. Cas.} 45, 48-49 (Bankr. M.D. Fla. 1976) (relying on §§ 70(a) and 70(a)(3) governing property of the estate under the old Bankruptcy Act). For cases explicitly adopting the theory that the privilege passes with property of the estate, see Citibank v. Andros, 666 F.2d 1192, 1195 (8th Cir. 1981) ("Because the right to decide whether to waive a corporation's attorney-client privilege belongs to management, the right to assert or waive that privilege passes with the property of the corporate debtor to the trustee."); Turner v. Davis, Gillenwater & Lynch (\textit{In re} Investment Bankers, Inc.), 30 Bankr. 883, 886 (Bankr. D. Colo. 1983); \textit{In re} National Trade Corp., 28 Bankr. 872, 874 (Bankr. N.D. Ill. 1983).
court stated that section 70(a) of the Bankruptcy Act,\textsuperscript{62} vested title to all non-exempt properties of the bankrupt in the trustee. The court recognized that the term "property" under section 70(a) was generally interpreted to include only items subject to lien, levy, transfer or exclusive possession and ownership.\textsuperscript{63} Although the attorney-client privilege did not fit within the established definition of property under section 70(a), the court reasoned that the privilege could be characterized as property under section 70(a)(3), which included as property all "powers which the bankrupt might have exercised for his own benefit."\textsuperscript{64} After finding that the attorney-client privilege was a power within the meaning of section 70(a)(3), the court held that such power passed by operation of law to the trustee along with all of the non-exempt property of the estate.\textsuperscript{65}

Perhaps the most interesting aspect of the \textit{AmJoe} opinion is the argument offered by the court to support its finding that the privilege was within the types of "powers" contemplated by section 70(a)(3). Under section 70(a)(3), "strictly personal" powers do not pass to the trustee.\textsuperscript{66} In concluding that the attorney-client privilege is not a personal power or personal safeguard, the court explained that:

\begin{quote}
[T]he privilege under consideration lacks the characteristics of a personal privilege in the true sense and ... [was designed] only to assist litigants to assert or defend a right and in most instances a property right. ... Thus, since its primary aim is to protect and foster the interests of actual litigants only and not parties who are not involved in and have no recognizable valid legal interest in the outcome of the litigation, the right ... clearly belongs to the Trustee. ... To refuse the Trustee the right to waive the privilege would obviously frustrate ... the very person for whose benefit the
\end{quote}

\begin{itemize}
\item \textsuperscript{63} See Bankruptcy Act of 1898, ch. 541, § 70(a)(5), 30 Stat. 544, 566 (repealed 1978). See, e.g., Gleason v. Thaw, 236 U.S. 558 (1915); Board of Trade v. Johnson, 264 U.S. 1, 11 (1924). See also Lines v. Frederick, 400 U.S. 18, 19 (1970) ("The most important consideration limiting the breadth of the definition of 'property' lies in the basic purpose of the Bankruptcy Act to give the debtor a 'new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'") (citing Local Loan Co. v. Hunt, 292 U.S. 234, 244-45 (citations omitted)).
\item \textsuperscript{64} Bankruptcy Act of 1898, ch. 541, § 70(a)(3), 30 Stat. 544, 566 (repealed 1978).
\item \textsuperscript{65} \textit{AmJoe}, 11 COLLIER BANKR. CAS. at 49.
\item \textsuperscript{66} Id. (citing 4A COLLIER ON BANKRUPTCY § 70.13(2) (15th ed. 1985)).
\end{itemize}
The flaws in the Amjoe court’s reasoning are numerous and substantial. First, contrary to the Amjoe court’s assertion, the Supreme Court has explicitly stated that the attorney-client privilege is more than a mere device “to assist litigants.” Second, the Amjoe court’s notion that the trustee is “the very person for whose benefit the privilege was designed” is unsupported in law or logic. It is simply tortured reasoning to say that the privilege was designed to benefit a bankruptcy trustee rather than the corporate client, especially where the communication in question is a pre-petition communication between the corporation and its attorney. Similarly, the court’s finding that the rights protected by the privilege are “in most instances a property right” is irrelevant because the privilege was designed to protect all disclosures of confidential communications between client and counsel, regardless of whether the information relates to property rights, liberty interests or any other rights of the client. The fact that most of the reported privilege cases involve “property rights” should not be part of the analysis in determining whether the privilege is property of the estate in bankruptcy.

Despite the Amjoe court’s logic, it does not necessarily follow that, since the privilege usually protects property rights, the privilege itself must be “property.” This reasoning is implicit in In re Hy-Gain Electronics Corp., where the district court of Nebraska affirmed a bankruptcy court determination that the trustee could not waive the corporate debtor’s attorney-client privilege. In Hy-Gain, both the bankruptcy court and district court rejected the Amjoe view that the privilege could fall within the purview of property of the estate by classifying it as a non-personal power of the debtor under section

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67. Amjoe, 11 COLLIER BANKR. CAS. at 49.
68. See supra notes 15-28 and accompanying text.
69. Amjoe, 11 COLLIER BANKR. CAS. at 49.
70. See Ross v. Popper, 9 Bankr. 485, 487 (Bankr. S.D.N.Y. 1980). At issue were communications between the debtor and its attorneys prior to bankruptcy. The court stated that “it seems . . . almost axiomatic that the beneficiary of such communications is the bankrupt corporation itself, whose interests are quite obviously adverse to the interests of the trustee in bankruptcy, representing the general creditors.” Id. (emphasis omitted). See also Hudtwalker v. Van Nostand & Martin (In re Vantage Petroleum Corp.), 40 Bankr. 34, 40 (Bankr. E.D.N.Y. 1984) (court relied on Ross, stating that “[t]he right to assert an attorney-client privilege as to pre-petition matters should be, perhaps, one legal right of the debtor to remain unscathed after a trustee has been appointed”).
71. Amjoe, 11 COLLIER BANKR. CAS. at 49.
The district court in *Hy-Gain* failed, however, to articulate what constitutes property of the estate under section 70(a) of the Bankruptcy Act. Instead, the court based its holding on a simplistic "label" argument: "I cannot conclude that the right to waive or claim an attorney-client privilege is a form of property pursuant to section 70. . . . My conclusion is that the right to claim or waive the privilege is a privilege and not a form of property." On appeal, the Eighth Circuit, in *Citibank v. Andros*, reversed, and held that the trustee was vested with the power to waive the corporate debtor's privilege. The Eighth Circuit concluded that, "[b]ecause the right to decide whether to waive a corporation's attorney-client privilege belongs to management, the right to assert or waive the privilege passes with the property of the corporate debtor to the trustee." Like the district court, the Eighth Circuit failed to adequately articulate how the privilege constitutes property of the estate.

A critical flaw with *Andros* and the other cases holding that the attorney-client privilege is property of the estate under section 70, passing to the trustee by operation of law, is that none of these courts analyzed the issue under traditional "property of the estate" tests as set forth by the United States Supreme Court in *Segal v. Rochelle* and *Lines v. Frederick*. In *Segal*, the issue was whether loss-carry-back tax refund claims due a debtor as of the commencement of the bankruptcy case constitute property under section 70(a) of the former Act. Similarly, in *Lines*, the Court addressed whether accrued vacation pay owed to the debtor on the date of bankruptcy was property under section 70(a). In both *Segal* and *Lines*, the Supreme Court emphasized that the term "property" under the Bankruptcy Act is to be defined in relation to the purposes and policies of the Act. The Supreme Court stressed that "[t]he most important consideration limiting the breadth of the definition

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73. *Hy-Gain*, 11 Bankr. at 120. In *Hy-Gain*, the liquidation petitions were filed prior to the effective date of the Bankruptcy Reform Act of 1978; thus *Hy-Gain*, like *Amjoe*, was governed by § 70. See *Citibank v. Andros*, 666 F.2d 1192, 1193, n. 3 (8th Cir. 1981).

74. *Hy-Gain*, 11 Bankr. at 120.

75. 666 F.2d 1192 (8th Cir. 1981).

76. *Id.*

77. *Id.* at 1195. In addition, the Eighth Circuit relied on Proposed FED. R. EVID. 503(c).

See supra notes 39-44 and accompanying text.


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'property' lies in the basic purpose of the Bankruptcy Act to give the debtor a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt. 

The analysis of what constitutes property under section 70(a), according to the Supreme Court, turns upon whether the item in question is needed for the debtor's fresh start, and whether including the item as property of the estate serves to further the policies and purposes of the Bankruptcy Act.

Accordingly, courts interpreting section 70(a) of the Act should focus upon whether the attorney-client privilege as to pre-petition communications is necessary for the debtor's fresh start. Clearly many, if not all, debtors seek legal advice as they prepare to embark upon the path toward a fresh start. If the debtor's attorney can be compelled to disclose the debtor's confidences at a subsequent bankruptcy proceeding, then such communications by the debtor will be "chilled," and an attorney-client relationship based on trust will not be established. The debtor will be reluctant to disclose all necessary information, and the attorney, in turn, will be unable to furnish complete and accurate advice to help guide the debtor toward a fresh start. Such a result would hamper the debtor's ability to make a fresh start and thwart an essential policy of bankruptcy law. Had the courts in Andros and Amjoe applied the appropriate "property of the estate" test as set forth in Segal and Lines, the privilege might not have been found to be property under section 70(a).

Two years after Andros, the Eighth Circuit's argument that the privilege was property of the estate was adopted by two bankruptcy courts, without further analysis, in In re Investment Bankers, and In re National Trade Corp. In Investment Bankers, the bankruptcy court's failure to elaborate on the "property" theory is significant in light of the fact that in the interim between Andros and Investment Bankers, section 70(a), governing property of the estate, was repealed and replaced by section 541 of the Bankruptcy Reform Act.

82. Id. at 19 (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244-45) (citations omitted). In Lines, the Court held that accrued vacation pay due to the debtor as of the date of bankruptcy did not constitute property of the estate under § 70(a). See also Segal, 382 U.S. at 379-80 (holding that the loss-carryback tax refund claims due the creditor on the date of bankruptcy were property of the estate under § 70(a)).

83. It is interesting to note that neither Segal nor Lines is cited by Andros or Amjoe or any other court addressing whether the privilege was property under § 70(a).


85. 28 Bankr. 872 (Bankr. N.D. Ill. 1983).

Unlike section 70(a)(3) of the Act, section 541 of the Code does not contain an express provision including "powers which the bankrupt might have exercised for his own benefit," within property of the estate. Thus, section 70(a)(3), the critical provision for *Andros* and other courts in the formulation of the privilege as property notion, no longer existed at the time *Investment Bankers* was decided. Additionally, the legislative history of the Bankruptcy Reform Act states that the new Code "has the effect of over-ruuling *Lines v. Frederick.*" Since the leading Supreme Court case interpreting property of the estate under section 70(a) was explicitly overruled by Congress prior to the decision in *Investment Bankers*, the time was ripe for a reevaluation of the "privilege as property of the estate" concept. The *Investment Bankers* court failed, however, to address how section 541 of the Code differed from section 70(a) of the Act with respect to property of the estate. Moreover, the court neglected to consider how the *Andros* court's interpretation of section 70(a) was applicable to an interpretation of section 541. Instead, the court disposed of the issue in a perfunctory manner by simply citing *Andros* as authority for the proposition that the privilege was property of the estate and therefore passed to the trustee.

Had the *Investment Bankers* court reexamined whether the privilege was property under the new Code provision, it would have found a more plausible basis for its holding than mere reliance on *Andros*. Under section 541, property of the estate is comprised of all of the property in which the debtor has a legal or equitable interest, as of the date of the commencement of the case. Section 541, unlike section 70, includes exempt property in the estate subject to the debtor's subsequent election to exempt particular items from inclu-

under § 541, see supra notes 48-60 and accompanying text.

Although decided only fifty days earlier than *Investment Bankers*, *National Trade Corp.* was governed by the old Act due to the date of the commencement of the case. In fact, the voluntary chapter 11 petition of the debtor in *National Trade* was filed only one month before the effective date of the new Code.


89. For an example of the importance of § 70(a)(3) in the determination that the attorney-client privilege was property of the estate, see Gorman v. Martinez (*In re Amjoe, Inc.*), 11 COLLIER BANKR. CAS. 45 (Bankr. M.D. Fla. 1976).


91. 30 Bankr. at 886.

sion in the estate. Additionally, while section 70(a)(5) required that property be transferable by the debtor or subject to judicial levy in order to be included in the estate, this requirement is not included in section 541. Finally, unlike section 70, section 541 includes all assets within the property of the estate, even those needed for a fresh start.

The scope of property of the estate under section 541 is therefore significantly broader than it was under section 70 of the former Act. Accordingly, the Investment Bankers court could have avoided reliance on questionable precedent by arguing that, under the expansive reach of section 541, the attorney-client privilege is included as property of the estate.

The crucial flaw in this argument, however, is that it begs the question of whether the privilege is property. Arguing that section 541 includes as much property in the estate as possible does not resolve the issue of whether or not the privilege is in and of itself property. Section 541 solves only the second part of the puzzle, by including all property within the estate; the first part, determining whether the privilege is itself property, remains unresolved because the Code does not define the word property. Moreover, the issue remains unresolved because the Supreme Court, although given the opportunity in the Weintraub case, declined to address the "privilege as property" theory.

Despite the Supreme Court's failure to resolve the issue, lower courts should refrain from adopting the theory that the debtor's attorney-client privilege is a form of property which passes to the trustee pursuant to section 541 of the Code. Such a determination creates severe inequities and adverse consequences. Under the Code,

93. See Bankruptcy Law Manual, supra note 29, at ¶ 4.03.
96. The Act also did not define the word "property" in relation to § 70(a). The Supreme Court in Lines and Segal defined property of the estate under § 70(a) to exclude property needed by the debtor for a fresh start, and to include property which would serve to promote the policies and purposes of the Act. See supra notes 78-83 and accompanying text.
97. The issue of whether the privilege is property of the estate was presented to the Supreme Court at oral arguments in the Weintraub case. See Summary of Arguments Before the Supreme Court, 53 U.S.L.W. 3679 (argued Mar. 19, 1985). The Weintraub decision is discussed infra at notes 108-49 and accompanying text.
98. Despite hearing oral arguments on the "privilege as property" notion, the Weintraub Court's decision was silent on this matter. But see infra notes 139-41 and accompanying text (argument suggesting that the "property" rationale was adopted in Weintraub).
debtors in chapter 7 liquidation proceedings must have a trustee appointed and must surrender all non-exempt property of the estate to the trustee. In chapter 11 reorganization cases, the debtor generally remains in possession, without the appointment of a trustee. Thus, if the attorney-client privilege is property of the estate, all chapter 7 debtors will forfeit their privilege while chapter 11 debtors will not. Similarly, in chapter 13 debt adjustment cases, although a trustee must be appointed, the debtor remains in possession of all property of the estate. Therefore, if the privilege is property of the estate, chapter 13 debtors will never lose the privilege while chapter 7 debtors will always lose the privilege. Such a policy of discrimination against chapter 7 debtors, based solely upon vague property notions, is unwarranted.

Furthermore, in chapter 11 cases, a trustee may be appointed if the debtor in possession is inefficient or incompetent. Accordingly, some chapter 11 debtors who have a trustee appointed will lose the privilege, by operation of law, solely because of poor management skills. This disparate treatment of chapter 11 debtors vis a vis other chapter 11 debtors lacks a sound basis in law or policy. Finally, section 1105 provides that, at any time before confirmation of a plan, the court "may terminate the trustee's appointment and restore the debtor to possession and management" of the property of the estate. If the privilege is property of the estate, some chapter 11 debtors will lose their attorney-client privilege to the trustee, and subsequently regain it pursuant to section 1105. This "ping-pong" treatment of the debtor's attorney-client privilege in chapter 11 cases chills attorney-client communications, creates instability and deni-

100. 11 U.S.C. § 1104(a) (1982). In chapter 11, a trustee is only appointed for cause and after notice and a hearing. Id.
103. See Citibank v. Andros, 666 F.2d 1192, 1194 (8th Cir. 1981). In that case, the debtor argued that the trustee could only control the debtor's privilege in a chapter 11 reorganization case since, in chapter 11, the trustee represents the bankrupt corporation, whereas, in chapter 7 liquidation cases, the trustee represents the interest of creditors. Id. The Eighth Circuit rejected the chapter 7 conflict of interest argument, noting that "[w]e fail to see the significance of appellees' distinction. The trustee in a reorganization or a liquidation has a fiduciary obligation to treat all parties fairly." Id. See also Commodity Futures Trading Comm'n v. Weintraub, 105 S. Ct. 1986, 1994-95 (1985) (no merit to respondent's contention that trustee should not obtain control over the privilege because, unlike management, trustee's loyalty extends to creditors, not shareholders).
The “time honored” and “sacred” attorney-client privilege.

The argument that the privilege is property under section 541 should, therefore, be discarded.

B. The Privilege and the Trustee as “Representative of the Estate”

An argument related to the property theory which has been utilized by several courts is that, since the bankruptcy laws designate the trustee as legal representative of the estate and vest in him extensive powers to manage, conduct and investigate the affairs of the corporate debtor, the privilege must pass to the trustee. According to this view, such a result enables the trustee to function effectively and in accordance with statutory requirements.

106. See supra notes 1-2 and accompanying text.

107. It is interesting to note that the “privilege as property” argument was not set forth as a priority argument by the U.S. Government in Weintraub. In fact, Mr. Bruce Kuhlik, assistant to the Solicitor General, while arguing on behalf of the Commodity Futures Trading Commission, stated to the Supreme Court at oral argument that the privilege as an “asset” or “property” of the estate was not the government’s “preferred position.” See Summary of Arguments Before the Supreme Court, supra note 97.


In *Weintraub*, the Commodity Futures Trading Commission filed a complaint against Chicago Discount Commodity Brokers (CDCB) alleging that it had violated provisions of the Commodity Exchange Act while operating as a discount commodity brokerage house. Subsequently, a voluntary chapter 7 liquidation petition was filed on behalf of CDCB. Thereafter, the Commission served a subpoena upon Gary Weintraub, former attorney for the corporate debtor, seeking information in connection with the Commission's investigation of CDCB. The attorney, however, asserted the debtor's attorney-client privilege. As a result, the Commission moved to compel answers from Weintraub and CDCB's trustee executed a waiver of the corporate debtor's attorney-client privilege. The Commission's motion to compel answers was granted by a United States magistrate and upheld by the district court based upon the trustee's waiver of the debtor's privilege.

On appeal, the Seventh Circuit reversed and held that the corporate debtor retained control of the privilege. The court distinguished *In re O.P.M. Leasing Services, Inc.*, where the Second Circuit held that the trustee can assert or waive the corporate debtor's privilege when there are no remaining officers or directors of the corporate debtor. Since CDCB still had present management, the Seventh Circuit determined that the *O.P.M.* reasoning was not applicable. The Seventh Circuit noted that the attorney-client privilege was vested in CDCB's management, and that the trustee did not "succeed to the positions of the officers and directors of the..."
corporation."\textsuperscript{121}

The Seventh Circuit also rejected the argument that the attorney-client privilege of the debtor passed to the trustee as property of the estate.\textsuperscript{122} More importantly, the court explicitly rejected the argument that the corporate debtor's privilege passed to the trustee pursuant to the broad management powers granted to the trustee under the Code.\textsuperscript{123} The court then proceeded to support its holding in favor of the debtor with four separate arguments.

First, the court stated that the trustee, despite his broad management powers, did not replace the corporation as an entity nor succeed to the position of director or officer of the corporation.\textsuperscript{124} Second, the Seventh Circuit noted that, since the individual debtor's privilege did not pass to the trustee, it would be inequitable to treat corporate debtors differently.\textsuperscript{125} Third, the court found that holding in favor of the trustee would discriminate against corporate debtors solely "on the basis of a change in economic circumstances,"\textsuperscript{126} because corporations would control their own privilege only so long as they remained solvent. Finally, the Seventh Circuit cited the potential chilling effect on attorney-client communications which would result if the attorney-client privilege passed to the trustee, because corporate clients would "be wary of communicating fully with their attorneys for fear that sensitive information could subsequently be disclosed due to bankruptcy."\textsuperscript{127}

The Supreme Court granted certiorari,\textsuperscript{128} reversed the Seventh Circuit,\textsuperscript{129} and adopted the "trustee as representative of the estate" argument. The Court approached the resolution of the privilege issue under the guidelines previously set forth in \textit{Butner v. United States}.\textsuperscript{130} In \textit{Butner}, the Supreme Court held that, unless some federal interest would be impaired, property interests in bankruptcy are

\begin{itemize}
    \item \textsuperscript{121} 722 F.2d at 342.
    \item \textsuperscript{122} Id.
    \item \textsuperscript{123} Id.
    \item \textsuperscript{124} Id.
    \item \textsuperscript{125} Id. The court cited no authority for the proposition that individuals and corporations are or should be treated equally. See infra notes 184-95 and accompanying text for a discussion advocating that corporations and individuals should be treated dissimilarly in bankruptcy since these entities are treated dissimilarly under state law.
    \item \textsuperscript{126} Weintraub, 722 F.2d at 343.
    \item \textsuperscript{127} Id.
    \item \textsuperscript{128} 105 S. Ct. 321 (1984).
    \item \textsuperscript{129} 105 S. Ct. 1986 (1985).
    \item \textsuperscript{130} 440 U.S. 48 (1979).
\end{itemize}
defined pursuant to state law. According to the Court, the application of Butner to the attorney-client privilege issue required a consideration of "the roles played by the various actors of a corporation in bankruptcy to determine which is most analogous to the role played by the management of a solvent corporation."

The Court noted that, outside of bankruptcy, the attorney-client privilege is controlled by the management of a corporation and that, therefore, "the actor whose duties most closely resemble those of management should control the privilege in bankruptcy." By comparing the roles of the chapter 7 trustee and the corporate debtor's board of directors, the Court concluded that the trustee, representing the corporate debtor's estate during bankruptcy, plays a role closely analogous to that of a solvent corporation's management. After finding that no federal interest would be impaired by vesting the privilege in the trustee, the Court held that "the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to prebankruptcy communications."

The Weintraub decision raises as many questions as it answers. Although the Court adopts the "trustee as representative" theory, Weintraub is silent on whether the attorney-client privilege is property of the estate which passes to the trustee upon the filing of the bankruptcy petition. The Weintraub Court's extensive reliance on Butner v. United States, however, implicitly raises this issue. In

131. Id. at 54-55.
133. Id. at 1993.
135. The Court summarized the directors' role in chapter 7 cases as "severely limited" and consisting solely of turning over the corporation's property to the trustee and providing information to the trustee and creditors. Weintraub, 105 S. Ct. at 1993. See also 11 U.S.C. §§ 521 and 343 (Supp. II 1985).
137. Id.
138. Id. at 1996.
139. See supra notes 48-107 and accompanying text.
Butner, the Supreme Court held that property rights were determined in bankruptcy by state law unless some overriding federal interest was present. The reliance on Butner, therefore, may be read as an acknowledgement that the privilege is to be considered a property right. Because the “privilege as property of the estate” theory has numerous logical and legal shortcomings,141 lower courts should refrain from adopting this theory solely on the basis of the Weintraub Court’s reliance on Butner.

A second question raised by Weintraub concerns the present status of the Butner holding. In Butner, only state-created rights were at issue. The attorney-client privilege in bankruptcy, however, is governed by federal law.142 The Weintraub Court’s use of Butner to resolve the privilege issue implies that the Butner rationale is no longer limited solely to determining state property rights in bankruptcy. Alternatively, the application of Butner to the privilege issue may be read as holding that the attorney-client privilege is now to be viewed as a matter of state law rather than federal law. Thus, the Court’s use of Butner to clarify who controls the privilege has cast a shadow of confusion over the status of Butner and the status of the privilege in federal courts as a federal right.

The manner in which Butner was used to support the “trustee as representative of the estate” theory is also suspect. For example, Butner clearly stands for the proposition that property rights should not be “analyzed differently [than under state law] simply because an interested party is involved in a bankruptcy proceeding.”143 Substantive rights should not change solely as a result of the “‘happening of bankruptcy.’”144 The Weintraub Court attempted to adhere to this principle by comparing the role of the trustee with the role of a corporation’s board of directors during bankruptcy, in order to determine which entity was most closely analogous to corporate management outside of bankruptcy.145 The Court failed to consider, however, that the trustee is purely a statutory creation of the Code and, as such, does not exist outside of the context of bankruptcy. In addition, the Court cited numerous powers which are available to the

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141. See supra notes 96-107 and accompanying text for a discussion of the flaws and problems of adopting the theory that the attorney-client privilege is a form of property which passes to the trustee with the debtor’s non-exempt assets.
142. See supra notes 18-19.
143. 440 U.S. at 55.
144. Id. (quoting Lewis v. Manufacturers Nat’l Bank, 364 U.S. 603, 609 (1961)).
trustee, but failed to address these powers in the context of the actual role played by liquidation trustees. In the vast majority of chapter 7 cases, the trustee's role is simply to reduce the corporation's assets to cash for distribution to creditors. Despite the Court's finding that the trustee has "wide-ranging management authority over the debtor," in practice, the trustee's chapter 7 "management" role is extremely limited.

Finally, the attempt to use Butner to resolve the privilege issue by analogy to non-bankruptcy actors and their roles is undermined by the Weintraub Court's own statement that "bankruptcy causes fundamental changes in the nature of corporate relationships." There may be situations where rights are affected merely by the "happenstance of bankruptcy," and, thus, the Butner approach of resolving the issue as it would be done outside of bankruptcy may not always be appropriate. Perhaps the issue of who controls the attorney-client privilege is such a situation. It should be noted that no other court addressing the privilege issue relied on Butner, or even cited Butner. Clearly, the Court could have held that the trustee as representative of the estate controls the corporate debtor's privilege, without relying on Butner. Despite the legal and logical deficiencies of the Weintraub Court's approach, the "trustee as representative of the estate" theory prevails, at least in chapter 7 corporate liquidation cases.

C. Miscellaneous Theories in Favor of the Trustee

1. Code of Professional Responsibility DR 4-101(C)(4). — Aside from the "property" and "trustee as representative" theories, courts have relied, in varying degrees, on a variety of secondary arguments to support a holding that the trustee in bankruptcy can waive or assert the corporate debtor's attorney-client privilege. Usually, these secondary arguments have been asserted in combination with, or as a buttress to, the "property" and/or "trustee as representative" theories. For example, in In re Investment Bankers, a trustee deposed the corporate debtor's former attorneys regarding

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146. Id. at 1993.
147. Id.
148. Id. at 1994.
149. See supra note 109 for a list of courts adopting the "trustee as representative of the estate" argument, without relying on Butner.
$87,517.80 in fees paid to the attorneys.\textsuperscript{151} The trustee also sought production of documents from the attorneys.\textsuperscript{152} The attorneys, asserting the privilege, refused to testify orally regarding the services rendered for the fees at issue and instead submitted brief “summaries” of the nature of the documents sought.\textsuperscript{153} The trustee, alleging that the payment of fees was a preference and a fraudulent transfer, executed a waiver of the corporate debtor’s privilege, and brought a motion in the bankruptcy court to compel discovery.\textsuperscript{154}

The bankruptcy court, quoting from \textit{Citibank v. Andros}, concluded that the privilege passed to the trustee with the property of the corporate estate.\textsuperscript{155} The court also relied extensively on DR 4-101(C)(4) of the Code of Professional Responsibility, which provides that a lawyer may reveal “[c]onfidences or secrets necessary to establish or collect his or her fee or defend himself or his employees or associates against an accusation of wrongful conduct.”\textsuperscript{156} Because the trustee attacked the award of attorneys’ fees and the basis upon which such fees were incurred, it was “necessary for the attorneys to come forward and defend their fees or surrender them.”\textsuperscript{157} Accordingly, the court found the attorneys’ assertion of the privilege to be without merit, by interpreting DR 4-101(C)(4) as specifically releasing attorneys from their bond of secrecy in order to establish a fee or to “‘defend . . . against an accusation of wrongful conduct.’”\textsuperscript{158}

If the \textit{Investment Bankers} interpretation of DR 4-101(C)(4) is correct, much of the debate about who controls the debtor’s privilege is rendered moot. Even if the privilege remains with, and is asserted by, the debtor, DR 4-101(C)(4) will exclude a substantial amount of the corporate client’s communications from protection under the privilege and the trustee often will not need the power to waive the debtor’s privilege.\textsuperscript{159} The \textit{Investment Bankers} court failed to realize,

\begin{itemize}
  \item\textsuperscript{151} Id. at 885.
  \item\textsuperscript{152} Id.
  \item\textsuperscript{153} Id.
  \item\textsuperscript{154} Id.
  \item\textsuperscript{155} Id. at 886.
  \item\textsuperscript{156} Model Code of Professional Responsibility DR 4-101(C)(4) (1979) (footnotes omitted).
  \item\textsuperscript{157} In re Investment Bankers, 30 Bankr. at 886.
  \item\textsuperscript{158} Id. (quoting Model Code of Professional Responsibility DR 4-101(C)(4) (1979)). \textit{See also In re Featherworks Corp.,} 25 Bankr. 634, 643-45. (Bankr. E.D.N.Y. 1982) (DR 4-101(C)(4) similarly utilized to defeat an attorney’s claim of privilege).
  \item\textsuperscript{159} \textit{See, e.g., In re Smith,} 24 Bankr. 3 (Bankr. S.D. Fla. 1982) (creditor deposed debtor to determine whether trustee might have a cause of action for malpractice against debtor’s insurance company attorneys); \textit{In re Investment Bankers,} 30 Bankr. at 885 (trustee
however, that DR 4-101(C)(4) is a permissive, rather than mandatory, disclosure provision. It allows an attorney the discretion to reveal client confidences if necessary to collect a fee from a recalcitrant client, or to defend a malpractice suit or breach of professional ethics claim. \(^{160}\) Contrary to the *Investment Bankers* interpretation, DR 4-101(C)(4) does not make all communications between client and attorney relating to fees "fair game" for disclosure. Such an interpretation would render the attorney-client privilege meaningless since a trustee could waive the debtor's privilege merely by suing the debtor's attorney, and then depose the attorney concerning the fees received and services rendered for the debtor. \(^{161}\)

2. State Corporate Law. — In *In re O.P.M. Leasing Services, Inc.* \(^{162}\), the Second Circuit resolved the issue of who controls the corporate debtor's attorney-client privilege in bankruptcy by looking to state corporate law. The district court in *O.P.M.* relied on the "trustee as legal representative" theory and the "privilege as property" theory to hold that the trustee had the power to waive or assert the chapter 11 corporate debtor's privilege. \(^{163}\) On appeal, the Second
deposed debtor's attorneys seeking information on whether fees paid to attorneys were a fraudulent or preferential transfer; *In re O.P.M. Leasing Servs., Inc.*, 13 Bankr. 64, 66 (Bankr. S.D.N.Y. 1981) (information sought concerned charges of fraud against debtor and all who may have engaged in or aided the fraudulent conduct, including debtor's former attorneys); *In re National Trade Corp.*, 28 Bankr. 872 (Bankr. N.D. Ill. 1983) (trustee sought information regarding $66,000 paid to debtor's attorneys). In all of the foregoing cases, DR 4-101(C)(4) could have been applied since the underlying claims related to "establishing" the attorneys' fees and "accusations" against the attorneys which needed to be "defended." Thus, under the *Investment Bankers* reasoning, the issue of who controls the privilege need not have been addressed because, even if the privilege were asserted, the information sought fell within the scope of discoverable information pursuant to DR 4-101(C)(4) as a "mandatory" discovery device.

\(^{160}\) See *Model Code of Professional Responsibility* DR 4-101(C)(4) (1979) which states that "[a] lawyer may reveal" certain confidences. *Id.* (emphasis added).

\(^{161}\) The flaws in using DR 4-101(C)(4) as a mandatory disclosure device are well illustrated in the area of post-petition attorney-debtor/client communications. The Code and the Bankruptcy Rules have established an elaborate scheme which requires a debtor's post-petition counsel to keep detailed records and books stating the services rendered, time expended and expenses incurred. See, e.g., 11 U.S.C. § 329 (1982 & Supp. II 1985) and BANKR. R. 2014, 2016 and 2017 (Supp. II 1985). Such documents and statements must be presented to the court as part of the debtor's attorney's application for compensation. 11 U.S.C. § 329 (1982 & Supp. II 1985). If DR 4-101(C)(4) was interpreted as compelling disclosure of all attorney-client communications necessary to establish or collect a fee, then a post-petition debtor's privilege would be meaningless since all post-petition services by the debtor's attorney must be recorded and presented to the court, and the attorney could be compelled to reveal all post-petition communications with the debtor concerning such fees.

\(^{162}\) Weissman v. Hassett (*In re O.P.M. Leasing Servs., Inc.*), 670 F.2d 383 (2d Cir. 1982).

\(^{163}\) 13 Bankr. at 64, 67-68.
Circuit affirmed, but specifically declined to decide the issue of whether the privilege was property of the estate or was a necessary element of the trustee's powers and status as legal representative. The Second Circuit, instead, found traditional state corporate law dispositive. After noting "the crucial fact" that no board of directors of O.P.M. was presently in existence, the court narrowed the issue to a choice between vesting the privilege in O.P.M.'s shareholders or the trustee. The court held that "as codified in New York Business Corporation Law Sec. 701... management of a corporation is a function vested in a board of directors, which function may be delegated only to corporate officers. Shareholders have no power to do anything except elect the members of the Board." Accordingly, the court found the privilege must "adhere" to the trustee "by virtue of the nonexistence of any other entity authorized to so act."

Although decided prior to Weintraub, O.P.M.'s reliance on state corporate law is consistent with the Weintraub Court's reliance on Butner v. United States. The O.P.M. reasoning prevents a creditor or the trustee from receiving the windfall of power over the debtor's privilege "merely by reason of the happenstance of bankruptcy." A state law analysis, however, has the potential to encourage forum shopping and inconsistent results, as well as to virtually eliminate any uniformity in case law governing what is a federal, rather than state, right or privilege as defined by Federal Rule of Evidence 501. In short, a federal right should not be decided by each state's particular corporation laws. Finally, in some situations, it may not be necessary for the court to vest the privilege in the trustee simply because no board of directors exists. The court may be able to ad-
IV. PROPOSED ALTERNATIVES AND SOLUTIONS

The Supreme Court's decision in Commodity Futures Trading Commission v. Weintraub does not resolve the issue of who controls the attorney-client privilege in all situations. Clearly, the holding is binding in chapter 7 corporate liquidation cases. It is not clear, however, which other entities in chapter 7 fall within the purview of Weintraub. Similarly, it is unclear whether Weintraub applies to corporations outside of chapter 7. Although the Court spoke in general terms about "corporate debtors" at several points in the opinion, the Court simply was not presented with the issue of who controlled the attorney-client privilege in chapters 9, 11 or 13. With respect to individuals (in all chapters), the Weintraub Court stated that its "holding . . . has no bearing on the problem of individual bankruptcy which we have no reason to address in this case." In light of the Court's own statement that it was addressing a limited issue, the most prudent position for lower courts to adopt is that Weintraub is binding only in chapter 7 corporate liquidation cases. The issue of who controls the privilege, therefore, remains unresolved in all but a limited area.

A. Ex parte Fuller

Despite the incalculable number of situations in which the issue of who controls the attorney-client privilege in bankruptcy may arise, there is at least one potential solution which may be applied to all debtors in all chapters and circumstances. This single solution model entails extending the Supreme Court's holding in Ex parte Fuller to the attorney-client privilege area.

In Fuller, a partnership and the individual partners were in

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172. In addition to individuals and corporations, many other entities are eligible to be debtors in chapter 7, including associations (incorporated or unincorporated), partnerships (general or limited), unincorporated companies, and business trusts. 11 U.S.C. §§ 109(b), 101(8), 101(33) (1982).
173. Even if Weintraub applies to corporations outside of chapter 7, it is unclear which other non-corporate debtors would fall under the Weintraub holding outside of chapter 7. Such debtors include those listed in note 146 supra, as well as municipalities (chapter 9 only), sole proprietorships, and joint ventures.
175. 262 U.S. 91 (1923).
bankruptcy.\textsuperscript{176} The trustee in bankruptcy sought, and was granted, an order directing the debtors, the receiver, and the debtor's attorneys to turn over all of the books, records, and documents of the debtors, both as individuals and as a partnership.\textsuperscript{177} Additionally, the District Attorney of New York County sought the same records for a state court proceeding by serving a subpoena \textit{duces tecum}.\textsuperscript{178} The debtors objected to turning over the books and papers on the grounds that the fourth and fifth amendments protected them from being forced to turn over any incriminating evidence which they owned, possessed or controlled.\textsuperscript{179}

The Supreme Court rejected the debtors' arguments and held that:

A man who becomes bankrupt . . . has no right to delay the legal transfer of the possession and title of any of his property to the officers appointed by law for its custody or for its disposition, on the ground that the transfer of such property will carry with it incriminating evidence against him. His property and its possession pass from him by operation . . . of law, and when control and possession have passed from him, he has no constitutional right to prevent its use for any legitimate purpose.\textsuperscript{180}

In essence, the Supreme Court reasoned that, although the incriminating books of the debtor are in the debtor's (and his attorney's) possession, the title and right to possession passes to the trustee by operation of law. The debtors, therefore, may not assert their constitutional privilege against self-incrimination since the property now constructively resides with the trustee.

\textit{Fuller} may be applied to the attorney-client privilege area as follows: If a constitutional privilege will not prevent the passing of the debtor's books to the trustee (even where incriminating information is contained therein), then surely the debtor's attorney-client

\textsuperscript{176} Id. at 92.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 93.
\textsuperscript{180} Id. \textit{Fuller} has only been cited by three courts faced with the issue of who controls the debtor's attorney-client privilege. See \textit{In re} Boileau, 736 F.2d 503, 506 (9th Cir. 1984) (debtor's attorney ordered to turn over letters to court-appointed examiner in investigation of a fraudulent conveyance); \textit{In re} O.P.M. Leasing Servs., Inc., 13 Bankr. 64, 68-69 (S.D.N.Y. 1981) (trustee's interests in obtaining debtor corporation's information overcomes former manager's claim to the privilege), aff'd \textit{sub nom. on other grounds}, Weissman v. Hassett (\textit{In re} O.P.M. Leasing Servs., Inc.), 670 F.2d 383 (2d Cir. 1982); Gorman v. Martinez (\textit{In re} Amjoe, Inc.), 11 \textit{COLLIER BANKR. CAS.}, 45, 50 (Bankr. M.D. Fla. 1976) (attorney-client privilege does not rise to the level of a constitutional privilege).
privilege, which is not of constitutional or even statutory proportions, cannot prevent the same transfer.\(^1\) Clearly, the \textit{Fuller} rationale will not apply where oral testimony of the debtor's attorney is sought since title or possession of a person's own words do not pass to the trustee.\(^2\) The reported decisions, however, reveal that in almost every case, the production of documents (either alone or together with oral testimony) is sought from the debtor's attorneys. By analogy, \textit{Fuller} would allow the trustee in all cases and in all chapters to procure most, if not all, of the desired information so long as such information was documentary in nature.

It is important to note that \textit{Fuller} does not implicitly adopt the argument that the debtor's constitutional (or attorney-client) privilege passes to the trustee with the property of the estate. Rather, \textit{Fuller} suggests that such privileges remain with the debtor, but are rendered inapplicable due to the legal fiction that the property sought to be retained has already passed to (and been disclosed to) the trustee. Although a flood of Supreme Court cases dealt with the fourth and fifth amendments since the \textit{Fuller} decision in 1923,\(^3\) \textit{Fuller} itself was never explicitly overruled. \textit{Fuller}, therefore, remains a simple across-the-board solution for all cases falling outside the scope of the \textit{Weintraub} holding.

\textbf{B. Separate Solutions for Separate Situations}

An alternative to adopting \textit{Fuller} is to utilize \textit{Weintraub} in developing a system of different rules for different classes of debtors. Such a system focuses on the type of debtor involved and takes into account the inherent and significant distinctions between the classes of debtors, especially as these distinctions bear upon the nature and policies of the attorney-client privilege. For example, as noted in \textit{Weintraub}, corporations and individuals are treated dissimilarly in connection with the privilege under non-bankruptcy law.\(^4\) With respect to corporations, it is well established that the privilege belongs exclusively to the corporation itself, and is exercised only through the corporation's authorized agents.\(^5\) The directors and officers of a corporation have a valid expectation of control over the privilege

\(^{181}\). See cases cited \textit{supra} note 180.

\(^{182}\). See \textit{Amjoe}, 11 Collier Bankr. Cas. at 49.


\(^{184}\). 105 S. Ct. at 1990-91.

\(^{185}\). \textit{Id. See supra} notes 20-21 and accompanying text.
only so long as they remain employed as agents of the corporation. Once the agency relationship terminates, control over the privilege passes to new management, and the former directors and officers assume the risk that the new agents of the corporation will disclose what was once the confidential information of the former management.186

The privilege of an individual, on the other hand, does not depend upon an agency relationship and is treated differently under non-bankruptcy attorney-client privilege law. An individual client, unlike an agent of a corporate client, can never lose his right to assert the privilege unless the communication fits within the established exceptions,187 nor can the individual's control of the privilege be vetoed by third parties.

The application of these Weintraub based rules to non-corporate chapter 7 debtors188 involves a three-step process. First, it must be determined whether, and to what extent, the debtor's management is based upon an agency relationship. Second, state law must be examined to determine whether the debtor's agents can somehow be removed or replaced without terminating the entity. Third, state law should be applied to determine whether the managing agents retain any control over the principal entity's attorney-client privilege after removal. If not, then the appointment of a chapter 7 trustee can be deemed analogous to "new management" of the entity, and, as under non-bankruptcy law, the former managing agents surrender control over the privilege to the new agent.

The application of the Weintraub model to chapter 11 debtors entails a different approach due to the differences between the reorganization process and the liquidation process. Unlike the directors of a chapter 7 corporation who are "completely ousted"189 and retain "virtually no management powers"190 in bankruptcy, the directors of a chapter 11 debtor-in-possession continue to manage, control and operate the corporation.191 A chapter 11 trustee may only be appointed "for cause" and after notice and a hearing.192 Furthermore,

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186. See supra note 185, notes 20-22 and accompanying text.
187. See supra notes 23-28 and accompanying text.
188. This analysis assumes that Weintraub's holding is limited solely to corporate debtors in chapter 7. For a partial list of other possible chapter 7 debtors, see supra note 172.
189. 105 S. Ct. at 1993 (citation omitted).
190. Id.
192. 11 U.S.C. § 1104(a) (1982). In chapter 7, an interim trustee is appointed "promptly after the order for relief" and continues to serve until a permanent trustee is
in chapter 11, a trustee may be removed and the debtor restored to possession and management.\textsuperscript{193} Moreover, the appointment of a chapter 11 trustee does not constitute an automatic ouster of the debtor's management as in chapter 7. Rather, the chapter 11 trustee investigates the debtor's affairs and determines which, if any, of the debtor's management is to be replaced.\textsuperscript{194}

Accordingly, the \textit{Weintraub} Court's use of \textit{Butner v. United States} to resolve the chapter 7 situation is not immediately applicable to the chapter 11 situation, since the actor in reorganization cases most closely analogous to the debtor's management outside of bankruptcy is, in the majority of cases, the debtor's directors, not the trustee.\textsuperscript{195} In order to apply the three-step \textit{Weintraub} model to chapter 11 cases, a fourth step is required. This step entails ascertaining the extent to which the trustee has displaced the debtor's management. If the debtor's management has been retained by the trustee during the bankruptcy case, then the privilege should remain with the management and not pass to the trustee. If the majority of the debtor's management has resigned or been removed by the trustee, the debtor's privilege should vest in the trustee.

A problem arises with the use of \textit{Weintraub}-based models where the debtor is a close corporation.\textsuperscript{196} A key factor in the \textit{Weintraub} decision was that, under non-bankruptcy law, "[d]isplaced managers elected. 11 U.S.C. § 701 (1982). If the creditors fail to elect a trustee, the interim trustee becomes the permanent trustee. 11 U.S.C. § 702(d) (1982 & Supp. II 1985). In chapter 11, on the other hand, a trustee is generally never appointed. See, e.g., 11 U.S.C. §§ 1104 and 1107 (1982 & Supp. II 1985)."


\textsuperscript{196} There is no uniform definition of a private or close corporation. Generally, state corporate laws provide that to qualify as a close corporation the corporate stock must be held by a limited number of shareholders (usually less than 10 shareholders), the issued stock of all classes must be subject to certain restrictions on transfer and the corporation must make no public offering of its stock. Additionally, close corporations are characterized by management vested in the shareholders/owners rather than by centralized management vested in a board of directors and by higher quorum requirements for shareholder and director meetings. \textit{See generally} O'Neal, \textit{Close Corporation Legislation: A Survey and an Evaluation}, 1972 DUKE L.J. 867, 873-85. \textit{See, e.g.,} DEL. CODE ANN. tit. 8, §§ 342, 346, 349, 350, 354 (1983 & Supp. 1983); CALIF. CORP. CODE §§ 158, 300 (West Supp. 1985); N.C. GEN. STATS. §§ 55-1 to 175 (1965); S.C. CODE ANN. §§ 12-11.1 to 31.2 (Supp. 1971). Under Subchapter S of the Internal Revenue Code, in order to merit special tax consideration, close corporations must have only one class of stock and have 10 or less shareholders. I.R.C. §§ 1371-77 (1954).
may not assert the privilege over the wishes of current managers.\textsuperscript{197} With close corporations, however, it makes little sense to refer to managers who are "displaced" by shareholders' vote or by takeovers, since the directors and managers of many close corporations are also the sole or majority shareholders. Moreover, in the typical close corporation with only one or two shareholders, both the corporation and the officers/shareholders generally employ the same legal counsel.\textsuperscript{198} Within a close corporation, therefore, the distinctions between the corporation and its shareholders blur, and the interests and rights of the two entities become difficult to separate. Upon bankruptcy, questions of propriety arise: To which party does the former attorney owe his loyalty and duty not to disclose confidential information? If the attorney is deemed to represent the close corporation, can he use his confidential information from the individual in a suit against the shareholder/officer/director for breach of fiduciary duty? Clearly, the unique circumstances of the close corporation merit individualized analysis.

The dilemma of who controls the privilege with close corporations in bankruptcy was raised in \textit{In re Silvio de Lindegg Ocean Developments of America},\textsuperscript{199} where a close corporation and its sole shareholder were involved in two jointly administered liquidation proceedings. The single trustee for the two debtors sought the testimony of the attorney who had represented both debtors, but the attorney asserted the privilege.\textsuperscript{200} The court held that, since there were essential differences between a corporation and an individual, the trustee could waive only the corporate debtor's privilege.\textsuperscript{201} The court, however, failed to distinguish between publicly held corporations and close corporations, and the court's order reveals the potentially absurd results which can occur by a failure to do so: "Mr. Barron [the attorney] shall not disclose any communication made by . . . [the individual debtor] to him as attorney pertaining to his personal affairs rather than the corporate affairs."\textsuperscript{202} The court's order placed the attorney in the precarious position of deciding which statements and information from his sole shareholder/client related to corporate matters and which related to personal matters. It is ob-

\begin{thebibliography}{1}
\bibitem{197} \textit{Weintraub}, 105 S. Ct. at 1991.
\bibitem{198} \textit{See supra} note 196.
\bibitem{199} 27 Bankr. 28 (Bankr. S.D. Fla. 1982).
\bibitem{200} \textit{Id.}
\bibitem{201} \textit{Id.}
\bibitem{202} \textit{Id.}
\end{thebibliography}
vious that when a sole shareholder is involved, corporate and personal affairs often merge. The *Silvio* decision, accordingly, places an almost impossible burden upon the attorney by failing to take into account the special nature of the close corporation.

In light of *Silvio* and the problems which may arise solely in the close corporation area, it is necessary to distinguish close corporations from larger, publicly-held corporations with respect to the attorney-client privilege. Since the close corporation rarely has more than one or two shareholders (who are also directors and officers), as well as a substantially lesser degree of observation of corporate formalities, it should be treated as an individual debtor in terms of the privilege. This rule is logically consistent with the policy supporting the privilege rule for publicly-held corporations. The trustee of a close corporation debtor cannot be said to become "new" management of a corporation with a single shareholder/officer/director. Furthermore, allowing the trustee to control the close corporation's privilege would significantly chill communications between sole shareholders and their attorneys, since the attorney can be compelled to reveal corporate confidences solely upon changes in the close corporation's economic status. While the same could be said about publicly-held corporations, there is a difference in degree which justifies different rules for close corporations and publicly-held corporations: The board of directors and officers of a large publicly-held corporation often change frequently, while a close corporation's management rarely, if ever, changes. While the appointment of a trustee in bankruptcy can be analogized to a change in management within publicly-held corporations (which are expected to undergo frequent changes in management), the same analogy does not apply as neatly in the close corporation context. Moreover, since former management has no control over the corporate privilege, management of publicly-held corporations, due to a high turnover rate, have a lesser degree of expectation and reliance upon the corporate privilege than does the management of a close corporation. In sum, if different rules are adopted for different classes of debtors, an independent rule should also be formulated for close corporations which parallels the rule applicable to individual debtors.

203. This argument was accepted by the Seventh Circuit in *Weintraub*, 722 F.2d 338, 343 (7th Cir. 1984), where, according to the court, the trustee's interest in investigating the corporate debtor's affairs did not justify an "erosion of the corporation's attorney-client privilege simply on the basis of a change in economic circumstances."
C. Individual Debtors

Although the Weintraub Court expressly declined to extend its holding to individual debtors,\(^{204}\) the Court did not state definitively that individual debtors retain their attorney-client privilege in bankruptcy.\(^{206}\) The Court simply stated that the "trustee as representative of the estate" theory was not applicable because "an individual, in contrast, can act for himself; there is no management that controls a solvent individual's attorney-client privilege."\(^{206}\) The Court left open the possibility that an individual debtor could lose his privilege to the trustee, stating that if "control over that privilege passes to the trustee, it must be under some theory different from the one we embrace in this case."\(^{207}\)

The most likely contender for the "different theory" is clearly the "privilege as property of the estate" theory.\(^{208}\) As previously noted, the argument that the debtor's attorney-client privilege is a form of property which passes to the trustee should be rejected as unsound.\(^{209}\) Furthermore, courts should reject all other theories aimed at depriving the individual debtor of the attorney-client privilege. With regard to corporate clients, the chilling effect of the loss of the privilege is mitigated by the fact that each individual director, officer, and agent of the corporation retains his or her individual privilege.\(^{210}\) With regard to individual debtors, such protection is

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\(^{204}\) 105 S. Ct. at 1995 ("[O]ur holding today has no bearing on the problem of individual bankruptcy, which we have no reason to address in this case.").

\(^{205}\) All courts deciding this issue, with one exception, have held that an individual does not lose control over the privilege to the trustee in bankruptcy. See In re Silvio de Lindegg Ocean Devs. of Am., Inc., 27 Bankr. 28 (Bankr. S.D. Fla. 1982) (trustee can waive corporate debtor's privilege but not individual debtor's privilege); In re Butcher, 38 Bankr. 796, 801 n.9 (Bankr. E.D. Tenn. 1984) (trustee may not waive individual debtor's privilege); Weintraub, 722 F.2d at 342-43 (dictum) (trustee may not waive individual debtor's privilege). But see In re Smith, 24 Bankr. 3 (Bankr. S.D. Fla. 1982) (trustee has power to waive individual debtor's privilege).

\(^{206}\) 105 S. Ct. at 1995.

\(^{207}\) Id.

\(^{208}\) See supra notes 48-107 and accompanying text.

\(^{209}\) See supra notes 96-107 and accompanying text.

\(^{210}\) See, e.g., Weintraub, 105 S. Ct. at 1992 ("an attorney could invoke the personal attorney-client privilege of an individual manager"); Citibank v. Andros, 666 F.2d 1192, 1196 (8th Cir. 1981) (trustee can waive corporate debtor's privilege but corporate officers may assert their individual attorney-client privilege in other proceedings). See also In re Silvio de Lindegg Ocean Devs. of Am., Inc., 27 Bankr. 28 (Bankr. S.D. Fla. 1982) (trustee can waive the corporate debtor's privilege, but not the individual debtor's privilege). In Silvio, the court recognized that corporations and individuals are different entities and are often treated dissimilarly: "An individual can be sent to prison on the testimony of his attorney divulging a confidence. A corporation cannot suffer any penalty greater than the loss of its fiscal assets." Id. It
lacking and the chilling effect is potentially substantial. A rational individual would not divulge sensitive information to an attorney who might be forced to reveal the information if the individual suffers a financial reversal. Accordingly, all courts should decline the Weintraub Court’s invitation to address some theory which would divest the individual of his attorney-client privilege.

D. Breach of Fiduciary Duty

Assuming that a trustee is vested with the power to control the corporate debtor’s attorney-client privilege, the issue arises as to what restraints or standards are imposed upon the trustee in the exercise of that privilege. What remedies are available to debtors affected by the trustee’s waiver or assertion of the privilege? At present, no court has addressed these issues directly.

In Commodity Futures Trading Commission v. Weintraub, the Supreme Court emphasized that the trustee, in essence, becomes a new director of the corporate debtor but, due to the nature of bankruptcy, the trustee-director’s fiduciary duty runs to creditors as well as to shareholders. If the trustee stands in the shoes of the debtor’s directors, then the trustee controls the privilege subject to the same restrictions and limitations imposed on directors of a solvent corporation. Accordingly, the trustee does not have unfettered control over the privilege. The trustee should be able to assert or waive the privilege only when it is in the best interest of the corpo-

should be noted, however, that corporate employees, including management, can be sent to jail on the basis of corporate attorneys divulging information. Thus, the court was correct in noting the distinction between corporations and individuals, but espoused an incorrect distinction in the opinion.

211. The case of In re Smith, 24 Bankr. 3 (Bankr. S.D. Fla. 1982), was, therefore, incorrectly decided. In Smith, the court relied on O.P.M., Andros, and Blier Cedar in holding that the trustee can waive the individual debtor’s attorney-client privilege. Id. at 5. The Smith court failed to distinguish between corporate and individual debtors, and thus incorrectly cited cases concerning the trustee’s waiver of a corporate debtor’s privilege as authority for waiver with individual debtors. The Smith court also failed to realize the effect of its holding: Clients would rarely, if ever, reveal confidences to their attorneys since a mere change in the client’s economic status would be a sufficient basis to require disclosure of the client’s confidences. The analysis of Smith has been rejected by all other courts addressing the trustee’s ability to waive the individual debtor’s privilege. See Weintraub, 722 F.2d at 342-343; In re Silvio de Lindegg Ocean Devs. of Am., Inc., 27 Bankr. 28, 28 (Bankr. S.D. Fla. 1982); In re Butcher, 38 Bankr. 796, 801 (Bankr. E.D. Tenn. 1984).


213. Id. at 1993. The Court noted that “when a trustee is appointed, he assumes control of the business, and the debtor’s directors are ‘completely ousted.’” Id. (citation omitted).

214. Id. at 1994.
rate debtor. In bankruptcy, this is generally synonymous with maximizing the estate for creditors.

A party who determines that the trustee’s exercise of the debtor’s privilege is detrimental to the estate is not without a remedy. In *Weintraub*, the Court stated that “[t]he propriety of the trustee’s waiver of the attorney-client privilege in a particular case can, of course, be challenged in the bankruptcy court on the ground that it violates the trustee’s fiduciary duties.” The affected parties-in-interest may sue the trustee to recover any damages to the estate arising from the trustee’s failure to exercise the privilege consistent with his fiduciary duty to shareholders and creditors. Moreover, if the party desires to act prior to the disclosure of privileged information, such party may bring a proceeding to remove the trustee, or to prevent the waiver of the debtor’s privilege on the ground that such waiver constitutes a breach of fiduciary duty which will be harmful to the estate. Finally, if the trustee does “stand in the shoes” of the directors, aggrieved shareholders may be entitled to sue the trustee in state court in a shareholder derivative action.

In sum, after *Weintraub*, the focus is not on the trustee’s power to waive the privilege, but rather on the propriety of such waiver. This shift in focus is appropriate since the trustee’s exposure to potential liability for hasty or automatic waivers of the privilege should lead to exercises of the privilege which are based upon a thoughtful review of the consequences to the debtor’s estate. Thus, waivers of the privilege will not become an automatic event in corporate bankruptcies. Consequently, the chilling effect of removing the privilege from the debtor may be minimized.

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215. *Id.* at n. 7.

216. See 11 U.S.C. § 322 (1982 & Supp. II 1985), which provides that all trustees must file a bond with the court within 5 days after selection. Although not personally liable, the trustee still may be sued and the bond proceeds used to reimburse the estate or the affected party. *Id.* See also 11 U.S.C. § 323(b) (1982), (providing statutory authorization for suits against a trustee); BANKR. R. 2001(b), 2008, and 2010 (Supp. II 1985) (“[a] proceeding on the trustee's bond may be brought by any party in interest ... for the use of the person injured. ...”) BANKR. R. 2010(d) (Supp. II 1985).


218. See, e.g., DEL. CODE ANN. tit. 8, § 327 (1983). See also *Weintraub*, 105 S. Ct. at 1994 n.7. The *Weintraub* Court did not state whether the bankruptcy court would have exclusive jurisdiction or concurrent jurisdiction with the district court and/or state courts over these matters. Further, it is not clear whether such a proceeding in bankruptcy court would be a "core" proceeding under the Code, enabling the bankruptcy court to enter a final judgment. See 28 U.S.C. §§ 1334, 157 (Supp. II 1985).
E. Pre-petition and Post-petition Communications

Regardless of the solution adopted, it is imperative that courts distinguish between pre-petition and post-petition communications of the debtor-client and its counsel. Courts consistently fail to do so, and the ramifications of this failure are substantial. In situations where the trustee is granted control over the debtor’s privilege, such control must be restricted solely to pre-petition communications, and the debtor should retain the privilege as to post-petition communications. If no distinction is made, and the trustee has access to post-petition communications, the debtor will not confide in counsel during the pendency of the bankruptcy case. Consequently, the debtor will not be adequately represented and will fail to receive the necessary legal advice required for attempting a meaningful fresh start. In short, any benefit from granting the trustee access to post-petition communications is clearly outweighed by the serious chilling effect on debtor-attorney communications, and courts should carefully delineate the limits of their holdings in favor of trustees with respect to pre-petition communications.\(^{219}\)

CONCLUSION

Although the Supreme Court’s decision in Commodity Futures Trading Commission v. Weintraub\(^{220}\) resolved some of the issues concerning the attorney-client privilege in bankruptcy, other important issues remain unresolved.\(^{221}\) The Weintraub decision also raises several issues which may require litigation for resolution.\(^{222}\) Accordingly, the lower courts must continue to address various privilege issues without statutory or case law authority for guidance. Any solution which is ultimately adopted, whether as an across-the-board measure or on a case by case basis, must balance the competing policies of the need for the full disclosure of evidence with the client’s need to have his confidential communications with his attorney protected.\(^{223}\) Furthermore, structuring a solution will require careful

\(^{219}\) While the Supreme Court in Weintraub did not address the distinction between pre-petition and post-petition communications, the Court held “that the trustee of a corporation in bankruptcy has the power to waive the corporation’s attorney-client privilege with respect to prebankruptcy communications.” 105 S. Ct. at 1996. See Shaeffer v. Wagner, 765 F.2d 133, 134 (10th Cir. 1985).
\(^{221}\) See supra notes 171-74 and accompanying text.
\(^{222}\) See supra notes 139-49 and accompanying text.
\(^{223}\) Even if all courts hold that the debtor’s privilege never passes to the trustee, the trustee will be able to procure some attorney-client information due to the following exceptions
analysis of how the proposed solution will affect attorney-client relationships, not just within bankruptcy, but in other areas as well, including post-petition situations. Since traditional non-bankruptcy attorney-client privilege law treats corporate and individual clients differently, bankruptcy courts should follow suit. In this way, clients outside of bankruptcy can predict with confidence the extent to which their communications will be protected. This predictability and stability will, in turn, prevent a chill in attorney-client communications, and preserve the all important attorney-client relationship.

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to the protections of the attorney-client privilege:
(1) The privilege is narrowly construed against the party asserting it. See supra note 23.
(2) The privilege is deemed waived unless timely and affirmatively asserted by the client. See, e.g., Ross v. Popper, 9 Bankr. 485 (Bankr. S.D.N.Y. 1980) (where corporate debtor fails to make “affirmative claim of privilege,” attorneys for corporation must testify regarding confidential corporate matters, despite court’s conclusion that trustee does not control corporate debtor’s privilege).
(3) The privilege does not protect communications concerning prospective or ongoing crimes, frauds, torts, fraudulent transfers and preferences. See supra notes 23-28 and accompanying text.
(4) The Code of Professional Responsibility, in DR 4-101(C)(4), provides that an attorney may reveal a client’s confidences to establish or collect a fee, or to defend himself against any accusations of wrongful conduct. See supra notes 150-58 and accompanying text for a discussion of DR 4-101 and its effect on the privilege.
(5) Fed. R. Civ. P. 26(b)(3) allows discovery of an attorney’s work product in limited cases where “substantial need” and “undue hardship” are present.