HOT TOPICS IN BANKRUPTCY

Presented by the Bankruptcy Bar Association

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Fact Pattern

Bill Quinn wants to file for Bankruptcy under Chapter 7. He visits Sam Cooper, a bankruptcy lawyer who offers "no money down" fee arrangements. Sam offers to bifurcate his fee for Bill, so Bill has to pay nothing before Sam files. Bill signs a pre-petition retention agreement in which Bill can either pay the filing fee of $338 after the petition is filed OR Sam will pay the filing fee and Bill can reimburse Sam. Pre-petition, Sam will perform the basic services required to file Bill's petition. After his petition is filed, Bill then has the option to have Sam continue to represent him in the case by signing a post-petition retention agreement, in which Bill is responsible for Sam's post-petition fee of $2,750. In Sam's non-bifurcated cases he charges a fee of $2,250. Bill agrees and retains Sam. Sam then sells the receivable from Bill's case to Vulture Funding (a litigation financing company that is also in the business of purchasing uncollected billings from law firms). Bill defaults on the payments he owes for Sam's services, and Vulture Funding files a collection action against Bill.

By charging the bulk of the fees to Bill after Sam files the petition, is Sam in violation of Federal Rule of Bankruptcy Procedure 9011 or Florida Rule of Professional Conduct 4-1.8(e)?

Are there services Sam must provide to Bill at a minimum when representing him in a bankruptcy proceeding, regardless of any fee arrangement? See Local Rule 2090-1(E) and 11 U.S.C. § 521.

Does the sale of Sam's receivable create a conflict of interest? See Florida Rule of Professional Conduct 4-1.8.

Is there an issue with the reasonableness of Sam's bifurcated fee under 11 U.S.C. § 329?

What disclosures does Sam have to make when selling his receivables to Vulture Funding to avoid violating the Bankruptcy Rules or Florida Rules of Professional Conduct? See Florida Rule of Professional Conduct 4-1.8(f) and 4-1.4.

Prestige Cleaning Solutions, LLC, is a small company in Miami, Florida, that offers custodial services to commercial properties. The company recently lost several key clients and is planning to file for bankruptcy under Chapter 11, Subchapter V. Prestige Cleaning hires Sam Cooper to assist it in filing for bankruptcy. By the time the petition is prepared, Prestige Cleaning owes Sam $9,500 in fees. Sam tries to collect his fee from Prestige Cleaning, but the company lacks the funds to pay.

May Sam represent the Debtor?

If yes, does it change if the $9,500 payment was made right before filing?

What issues are raised by the payment?

What if this was not a Subchapter V but rather a non-subchapter V Chapter 11?

Prestige Cleaning Solutions, LLC, is owned (50%/50%) by partners Steve Rosen and Jill Atkins. Steve tells Sam that he is owed several months' salary (approximately $35,000) from the company but does not disclose that in partial satisfaction of the debt, the company made a $17,000 payment to First National Bank of Miami for Steve's mortgage. At the time of filing, Sam discovers the transfer.

What are Sam's obligations after discovering the transfer?

As a result of the pandemic, Circus Cruise Line ("CCL") is filing for bankruptcy under Chapter 11. Bad Faith Bank ("BFB") is CCL's lender and only secured creditor. Prior to filing, BFB abruptly declared that CCL to be in default and froze CCL's access to its line of credit. CCL wants to sue BFB, but it does not have the resources to do so. Vulture Funding has offered to finance CCL's case. The terms of the agreement between CCL and Vulture Funding include a 15% interest rate.

In order to proceed does CCL need approval of the Bankruptcy Court and, if so, what disclosures must be made?

Do the attorneys for CCL owe a duty to Vulture Funding and, if so, is that duty reconcilable with their duties to CCL?

Are communications between the attorneys of CCL and Vulture Funding protected by the attorney-client privilege? See In re Int'l Oil Trading Co., LLC, *548 B.R. 825, (Bankr. S.D. Fla. 2016)*.

Florida Rules of Professional Conduct

RULE 4-1.1 COMPETENCE

- A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
- **COMMENT: Thoroughness and Preparation**
    - Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. The lawyer should consult with the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

- **(a) Lawyer to Abide by Client's Decisions.** Subject to subdivisions (c) and (d), a lawyer must abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, must reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take action on behalf of the client that is impliedly authorized to carry out the representation. A lawyer must abide by a client's decision whether to settle a matter. In a criminal case, the lawyer must abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.
- **(b) No Endorsement of Client's Views or Activities.** A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.
- **(c) Limitation of Objectives and Scope of Representation.** If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.
- **(d) Criminal or Fraudulent Conduct.** A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.
- **COMMENT: Agreements Limiting Scope of Representation**
    - Although this rule affords the lawyer and client substantial latitude to limit the representation if not prohibited by law or rule, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common

and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. In addition, a lawyer and client may agree that the representation will be limited to providing assistance out of court, including providing advice on the operation of the court system and drafting pleadings and responses. If the lawyer assists a pro se litigant by drafting any document to be submitted to a court, the lawyer is not obligated to sign the document. However, the lawyer must indicate "Prepared with the assistance of counsel" on the document to avoid misleading the court, which otherwise might be under the impression that the person, who appears to be proceeding pro se, has received no assistance from a lawyer. If not prohibited by law or rule, a lawyer and client may agree that any in-court representation in a family law proceeding be limited as provided for in Family Law Rule of Procedure 12.040. For example, a lawyer and client may agree that the lawyer will represent the client at a hearing regarding child support and not at the final hearing or in any other hearings. For limited in-court representation in family law proceedings, the attorney shall communicate to the client the specific boundaries and limitations of the representation so that the client is able to give informed consent to the representation.

- Regardless of the circumstances, a lawyer providing limited representation forms an attorney-client relationship with the litigant, and owes the client all attendant ethical obligations and duties imposed by the Rules Regulating The Florida Bar, including, but not limited to, duties of competence, communication, confidentiality, and avoidance of conflicts of interest. Although an agreement for limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See rule 4-1.1.
- An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and law. For example, the client may not be asked to agree to representation so limited in scope as to violate rule 4-1.1 or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

RULE 4-1.3 DILIGENCE

- A lawyer shall act with reasonable diligence and promptness in representing a client.
- **COMMENT:**
  - A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See rule 4-1.2. The lawyer's duty to

act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.
    - A lawyer's workload must be controlled so that each matter can be handled competently.
    - Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.
    - Unless the relationship is terminated as provided in rule 4-1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See rule 4-1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See rule 4-1.2.

RULE 4-1.4 COMMUNICATION

- **(a) Informing Client of Status of Representation.** A lawyer shall:
    - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules;
    - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
    - (3) keep the client reasonably informed about the status of the matter;
    - (4) promptly comply with reasonable requests for information; and
    - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- **(b) Duty to Explain Matters to Client.** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 4-1.5 FEES AND COSTS FOR LEGAL SERVICES

- **(a) Illegal, Prohibited, or Clearly Excessive Fees and Costs.** A lawyer must not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or cost, or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee or cost is clearly excessive when:
    - (1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or the cost exceeds a reasonable fee or cost for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or
    - (2) the fee or cost is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.
- **(b) Factors to Be Considered in Determining Reasonable Fees and Costs.**
    - (1) Factors to be considered as guides in determining a reasonable fee include:
        - (A) the time and labor required, the novelty, complexity, difficulty of the questions involved, and the skill requisite to perform the legal service properly;
        - (B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
        - (C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
        - (D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
        - (E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
        - (F) the nature and length of the professional relationship with the client;
        - (G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
        - (H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.
    - (2) Factors to be considered as guides in determining reasonable costs include:
        - (A) the nature and extent of the disclosure made to the client about the costs;
        - (B) whether a specific agreement exists between the lawyer and client as to the costs a client is expected to pay and how a cost is calculated that is charged to a client;
        - (C) the actual amount charged by third party providers of services to the attorney;
        - (D) whether specific costs can be identified and allocated to an individual client or a reasonable basis exists to estimate the costs charged;

        - (E) the reasonable charges for providing in-house service to a client if the cost is an in-house charge for services; and
        - (F) the relationship and past course of conduct between the lawyer and the client.
- All costs are subject to the test of reasonableness set forth in subdivision (a) above. When the parties have a written contract in which the method is established for charging costs, the costs charged under that contract will be presumed reasonable.
- **(c) Consideration of All Factors.** In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.
- **(d) Enforceability of Fee Contracts.** Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar, prohibited by this rule, or clearly excessive as defined by this rule.
- **(e) Duty to Communicate Basis or Rate of Fee or Costs to Client and Definitions.**
    - (1) *Duty to Communicate.* When the lawyer has not regularly represented the client, the basis or rate of the fee and costs must be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. A fee for legal services that is nonrefundable in any part must be confirmed in writing and must explain the intent of the parties as to the nature and amount of the nonrefundable fee. The test of reasonableness found in subdivision (b), above, applies to all fees for legal services without regard to their characterization by the parties.
    - The fact that a contract may not be in accord with these rules is an issue between the lawyer and client and a matter of professional ethics, but is not the proper basis for an action or defense by an opposing party when fee-shifting litigation is involved.

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

- **(a) Consent Required to Reveal Information.** A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.
- **(b) When Lawyer Must Reveal Information.** A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary:
    - (1) to prevent a client from committing a crime; or
    - (2) to prevent a death or substantial bodily harm to another.
- **(c) When Lawyer May Reveal Information.** A lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary:
    - (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
    - (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

    - (3) to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved;
    - (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client;
    - (5) to comply with the Rules Regulating The Florida Bar; or
    - (6) to detect and resolve conflicts of interest between lawyers in different firms arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- **(d) Exhaustion of Appellate Remedies.** When required by a tribunal to reveal confidential information, a lawyer may first exhaust all appellate remedies.
- **(e) Inadvertent Disclosure of Information.** A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
- **(f) Limitation on Amount of Disclosure.** When disclosure is mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.
- **COMMENT**
    - A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See terminology for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based on experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

- **(a) Representing Adverse Interests.** Except as provided in subdivision (b), a lawyer must not represent a client if:
    - (1) the representation of 1 client will be directly adverse to another client; or
    - (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- **(b) Informed Consent.** Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:
    - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
    - (2) the representation is not prohibited by law;
    - (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and

    - (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.
- **(c) Explanation to Clients.** When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.
- **(d) Lawyers Related by Blood, Adoption, or Marriage.** A lawyer related by blood, adoption, or marriage to another lawyer as parent, child, sibling, or spouse must not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except with the client's informed consent, confirmed in writing or clearly stated on the record at a hearing.
- **(e) Representation of Insureds.** Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.
- **COMMENT: Conflicts in litigation**
    - Subdivision (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co- defendants, is governed by subdivisions (a), (b), and (c). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a
- **COMMENT: Interest of person paying for a lawyer's service**
    - A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS

- **(a) Business Transactions With or Acquiring Interest Adverse to Client.** A lawyer is prohibited from entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

    - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;
    - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
    - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- **(b) Using Information to Disadvantage of Client.** A lawyer is prohibited from using information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.
- **(c) Gifts to Lawyer or Lawyer's Family.** A lawyer is prohibited from soliciting any gift from a client, including a testamentary gift, or preparing on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this subdivision, related persons include a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship.
- **(d) Acquiring Literary or Media Rights.** Prior to the conclusion of representation of a client, a lawyer is prohibited from making or negotiating an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- **(e) Financial Assistance to Client.** A lawyer is prohibited from providing financial assistance to a client in connection with pending or contemplated litigation, except that:
    - (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
    - (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
- **(f) Compensation by Third Party.** A lawyer is prohibited from accepting compensation for representing a client from one other than the client unless:
    - (1) the client gives informed consent;
    - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
    - (3) information relating to representation of a client is protected as required by rule 4-1.6.
- **(g) Settlement of Claims for Multiple Clients.** A lawyer who represents 2 or more clients is prohibited from participating in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure must include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
- **COMMENT: Financial assistance**
    - Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because financial assistance gives lawyers too

great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer advancing a client court costs and litigation expenses, including the expenses of diagnostic medical examination used for litigation purposes and the reasonable costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

- **COMMENT: Person paying for lawyer's services**
    - Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company), or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing these representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also rule 4-5.4(d) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another). Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with rule 4-1.7. The lawyer must also conform to the requirements of rule 4-1.6 concerning confidentiality. Under rule 4-1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under rule 4-1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that subdivision. Under rule 4-1.7(b), the informed consent must be confirmed in writing or clearly stated on the record at a hearing.
- **COMMENT: Acquisition of interest in litigation**
    - Subdivision (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these rules, such as the exception for reasonable contingent fees set forth in rule 4-1.5 and the exception for certain advances of the costs of litigation set forth in subdivision (e). This rule is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

RULE 4-1.13 ORGANIZATION AS A CLIENT

- **(a) Representation of Organization.** A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- **(b) Violations by Officers or Employees of Organization.** If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:
    - (1) asking reconsideration of the matter;
    - (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
    - (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
- **(c) Resignation as Counsel for Organization.** If, despite the lawyer's efforts in accordance with subdivision (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 4-1.16.
- **(d) Identification of Client.** In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- **(e) Representing Directors, Officers, Employees, Members, Shareholders, or Other Constituents of Organization.** A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 4-1.7. If the organization's consent to the dual representation is required by rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.
- **COMMENT: The Entity as the Client**
    - An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. Officers, directors, employees, and shareholders are the constituents of the corporate organizational client. The duties defined in this comment apply equally to unincorporated associations. "Other constituents" as used in this comment means

the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

- When 1 of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by rule 4-1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by rule 4-1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by rule 4-1.6.
- When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.
- The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

RULE 4-2.1 ADVISER

- In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.
- **COMMENT: Offering Advice**
    - In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is

likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under rule 4-1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under rule 4-1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

RULE 4-3.3 CANDOR TOWARD THE TRIBUNAL

- **(a) False Evidence; Duty to Disclose.** A lawyer shall not knowingly:
  - (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
  - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
  - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
  - (4) offer evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- **(b) Criminal or Fraudulent Conduct.** A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- **(c) Ex Parte Proceedings.** In an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.
- **(d) Extent of Lawyer's Duties.** The duties stated in this rule continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6.

RULE 4-5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

- **(a) Sharing Fees with Nonlawyers.** A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
  - (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to 1 or more specified persons;
  - (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;

    - (3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, in accordance with the provisions of rule 4-1.17, pay to the estate or other legally authorized representative of that lawyer the agreed upon purchase price;
    - (4) bonuses may be paid to nonlawyer employees for work performed, and may be based on their extraordinary efforts on a particular case or over a specified time period. Bonus payments shall not be based on cases or clients brought to the lawyer or law firm by the actions of the nonlawyer. A lawyer shall not provide a bonus payment that is calculated as a percentage of legal fees received by the lawyer or law firm; and
    - (5) a lawyer may share court-awarded fees with a nonprofit, pro bono legal services organization that employed, retained, or recommended employment of the lawyer in the matter.
- **(b) Qualified Pension Plans.** A lawyer or law firm may include nonlawyer employees in a qualified pension, profit-sharing, or retirement plan, even though the lawyer's or law firm's contribution to the plan is based in whole or in part on a profit-sharing arrangement.
- **(c) Partnership with Nonlawyer.** A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- **(d) Exercise of Independent Professional Judgment.** A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
- **(e) Nonlawyer Ownership of Authorized Business Entity.** A lawyer shall not practice with or in the form of a business entity authorized to practice law for a profit if:
    - (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or
    - (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
    - (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

RULE 4-8.4 MISCONDUCT

- A lawyer shall not:
- **(a)** violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- **(b)** commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;
- **(c)** engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule;

- **(d)** engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;
- **(e)** state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- **(f)** knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- **(g)** fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency, as defined elsewhere in these rules, when bar counsel or the agency is conducting an investigation into the lawyer's conduct. A written response shall be made:
    - (1) within 15 days of the date of the initial written investigative inquiry by bar counsel, grievance committee, or board of governors;
    - (2) within 10 days of the date of any follow-up written investigative inquiries by bar counsel, grievance committee, or board of governors;
    - (3) within the time stated in any subpoena issued under these Rules Regulating The Florida Bar (without additional time allowed for mailing);
    - (4) as provided in the Florida Rules of Civil Procedure or order of the referee in matters assigned to a referee; and
    - (5) as provided in the Florida Rules of Appellate Procedure or order of the Supreme Court of Florida for matters pending action by that court.
- Except as stated otherwise herein or in the applicable rules, all times for response shall be calculated as provided elsewhere in these Rules Regulating The Florida Bar and may be extended or shortened by bar counsel or the disciplinary agency making the official inquiry upon good cause shown.
- Failure to respond to an official inquiry with no good cause shown may be a matter of contempt and processed in accordance with rule 3-7.11(f) of these Rules Regulating The Florida Bar.
- **(h)** willfully refuse, as determined by a court of competent jurisdiction, to timely pay a child support obligation; or
- **(i)** engage in sexual conduct with a client or a representative of a client that exploits or adversely affects the interests of the client or the lawyer-client relationship.
- If the sexual conduct commenced after the lawyer-client relationship was formed it shall be presumed that the sexual conduct exploits or adversely affects the interests of the client or the lawyer-client relationship. A lawyer may rebut this presumption by proving by a preponderance of the evidence that the sexual conduct did not exploit or adversely affect the interests of the client or the lawyer-client relationship.
- The prohibition and presumption stated in this rule do not apply to a lawyer in the same firm as another lawyer representing the client if the lawyer involved in the sexual conduct does not personally provide legal services to the client and is screened from access to the file concerning the legal representation.

Bankruptcy Court of the Southern District Local Rules

RULE 2090-1: Attorneys

- **(D) Attendance at Hearings Required for Debtor's Counsel.** An attorney who makes an appearance on behalf of a debtor must attend all hearings scheduled in the debtor's case that the debtor is required to attend under any provision of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, or order of the court, unless the court has granted a motion to withdraw pursuant to Local Rule 2091-1.
    - **(1) Attendance at Initial Debtor Interview (IDI) and Meeting of Creditors (341 Meeting**). The attorney attending the IDI or meeting of creditors must be familiar with the facts and schedules and have met and conferred with the client prior to appearing.
    - **(2) Attendance at Hearing Required for Debtor's Counsel**. An attorney who makes an appearance on behalf of a debtor, or a member of his or her firm who is familiar with the client and the file, must attend all hearings scheduled in the debtor's case that the debtor is required to attend under any provision of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, or order of the court, unless the court has granted a motion to withdraw pursuant to Local Rule 2091-1. The attorney may not use appearance counsel for any hearing unless (a) the client consents in advance to the use of the appearance attorney, (b) the client does not incur any additional expense associated with the use of an appearance attorney, (c) the appearance attorney complies with all applicable rules regarding disclosure of any fee sharing arrangements, and (d) appearance counsel is familiar with the debtor's schedules and statement of financial affairs and is otherwise familiar with the facts of the case.
- **(E) Duties of Debtor's Counsel.** Unless the attorney has withdrawn as attorney for the debtor pursuant to Local Rule 2091-1, an attorney who files a petition on behalf of a debtor must advise the debtor of, and assist the debtor in complying with, all duties of a debtor under 11 U.S.C. §521.

Federal Rules of Bankruptcy

RULE 9011: Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

- **(a) Signature.** Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
- **(b) Representations to the Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Statutes

11 U.S.C. § 327: Employment of Professional Persons

- **(a)** Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.
- **(b)** If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.
- **(c)** In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.
- **(d)** The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.
- **(e)** The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.
- **(f)** The trustee may not employ a person that has served as an examiner in the case.

11 U.S.C. § 329: Debtor's Transactions with Attorneys

- **(a)** Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

- **(b)** If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—
    - **(1)** the estate, if the property transferred—
        - **(A)** would have been property of the estate; or
        - **(B)** was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or
    - **(2)** the entity that made such payment.

11 U.S.C. § 341: Meetings of Creditors and Equity Security Holders

- **(a)** Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors.
- **(b)** The United States trustee may convene a meeting of any equity security holders.
- **(c)** The court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors. Notwithstanding any local court rule, provision of a State constitution, any otherwise applicable nonbankruptcy law, or any other requirement that representation at the meeting of creditors under subsection (a) be by an attorney, a creditor holding a consumer debt or any representative of the creditor (which may include an entity or an employee of an entity and may be a representative for more than 1 creditor) shall be permitted to appear at and participate in the meeting of creditors in a case under chapter 7 or 13, either alone or in conjunction with an attorney for the creditor. Nothing in this subsection shall be construed to require any creditor to be represented by an attorney at any meeting of creditors.
- **(d)** Prior to the conclusion of the meeting of creditors or equity security holders, the trustee shall orally examine the debtor to ensure that the debtor in a case under chapter 7 of this title is aware of—
    - **(1)** the potential consequences of seeking a discharge in bankruptcy, including the effects on credit history;
    - **(2)** the debtor's ability to file a petition under a different chapter of this title;
    - **(3)** the effect of receiving a discharge of debts under this title; and
    - **(4)** the effect of reaffirming a debt, including the debtor's knowledge of the provisions of section 524(d) of this title.
- **(e)** Notwithstanding subsections (a) and (b), the court, on the request of a party in interest and after notice and a hearing, for cause may order that the United States trustee not convene a meeting of creditors or equity security holders if the debtor has filed a plan as to which the debtor solicited acceptances prior to the commencement of the case.

11 U.S.C. § 364: Obtaining Credit

- **(a)** If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1183, 1184, 1203, 1204, or 1304of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense.
- **(b)** The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense.

- **(c)** If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt—
    - **(1)** with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
    - **(2)** secured by a lien on property of the estate that is not otherwise subject to a lien; or
    - **(3)** secured by a junior lien on property of the estate that is subject to a lien.
- **(d)**
    - **(1)** The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if—
        - **(A)** the trustee is unable to obtain such credit otherwise; and
        - **(B)** there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.
    - **(2)** In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.
- **(e)** The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal.
- **(f)** Except with respect to an entity that is an underwriter as defined in section 1145(b) of this title, section 5 of the Securities Act of 1933, the Trust Indenture Act of 1939, and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security does not apply to the offer or sale under this section of a security that is not an equity security.

11 U.S.C. § 521: Debtor's Duties

- **(a)** The debtor shall—
    - **(1)** file—
        - **(A)** a list of creditors; and
        - **(B)** unless the court orders otherwise—
            - **(i)** a schedule of assets and liabilities;
            - **(ii)** a schedule of current income and current expenditures;
            - **(iii)** a statement of the debtor's financial affairs and, if section 342(b) applies, a certificate—
                - **(I)** of an attorney whose name is indicated on the petition as the attorney for the debtor, or a bankruptcy petition preparer signing the petition under section 110(b)(1), indicating that such attorney or the bankruptcy petition preparer delivered to the debtor the notice required by section 342(b); or

        - **(II)** if no attorney is so indicated, and no bankruptcy petition preparer signed the petition, of the debtor that such notice was received and read by the debtor;
    - **(iv)** copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor;
    - **(v)** a statement of the amount of monthly net income, itemized to show how the amount is calculated; and
    - **(vi)** a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition.

11 U.S.C. § 547: Preferences

- **(b)**Except as provided in subsections (c) and (i) of this section, the trustee may, based on reasonable due diligence in the circumstances of the case and taking into account a party's known or reasonably knowable affirmative defenses under subsection (c), avoid any transfer of an interest of the debtor in property—
    - **(1)** to or for the benefit of a creditor;
    - **(2)** for or on account of an antecedent debt owed by the debtor before such transfer was made;
    - **(3)** made while the debtor was insolvent;
    - **(4)**made—
        - **(A)** on or within 90 days before the date of the filing of the petition; or
        - **(B)** between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
    - **(5)**that enables such creditor to receive more than such creditor would receive if—
        - **(A)** the case were a case under chapter 7 of this title;
        - **(B)** the transfer had not been made; and
        - **(C)** such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 1195: Transactions with Professionals

- Notwithstanding section 327(a) of this title, a person is not disqualified for employment under section 327 of this title, by a debtor solely because that person holds a claim of less than $10,000 that arose prior to commencement of the case.

Restatement of the Law Governing Lawyers

§ 68: Attorney-Client Privilege

- Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in § 86 with respect to:
    - (1) a communication
    - (2) made between privileged persons
    - (3) in confidence
    - (4) for the purpose of obtaining or providing legal assistance for the client.

§ 69: Attorney-Client Privilege—"Communication"

- A communication within the meaning of § 68 is any expression through which a privileged person, as defined in § 70, undertakes to convey information to another privileged person and any document or other record revealing such an expression.

§ 70: Attorney-Client Privilege—"Privileged Persons"

- Privileged persons within the meaning of § 68 are the client (including a prospective client), the client's lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation.

§ 71: Attorney-Client Privilege—"In Confidence"

- A communication is in confidence within the meaning of § 68 if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person as defined in § 70 or another person with whom communications are protected under a similar privilege.

§ 72: Attorney-Client Privilege—Legal Assistance as the Object of a Privileged Communication

- A communication is made for the purpose of obtaining or providing legal assistance within the meaning of § 68 if it is made to or to assist a person:
    - (1) who is a lawyer or who the client or prospective client reasonably believes to be a lawyer; and
    - (2) whom the client or prospective client consults for the purpose of obtaining legal assistance.

§ 73: The Privilege for an Organizational Client

- When a client is a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, or other for-profit or not-for-profit organization, the attorney-client privilege extends to a communication that:
    - (1) otherwise qualifies as privileged under §§ 68- 72;
    - (2) is between an agent of the organization and a privileged person as defined in § 70;
    - (3) concerns a legal matter of interest to the organization; and
    - (4) is disclosed only to:
        - (a) privileged persons as defined in § 70; and
        - (b) other agents of the organization who reasonably need to know of the communication in order to act for the organization.

In re Donald F. WALTON, United States Trustee for Region 21, Plaintiff,

v.

CLARK & WASHINGTON, P.C., Defendant.

No. 8:09–mp–00010–MGW.

United States Bankruptcy Court, M.D. Florida, Tampa Division.

May 21, 2012.

Background: United States Trustee (UST) filed miscellaneous proceeding against law firm that represented individual debtors in consumer cases under Chapter 7 and Chapter 13, seeking declaration that firm's fee arrangement, which involved firm's receipt and deposit of postdated checks, violated automatic stay and discharge injunction, and also created conflict of interest between firm and its clients. The Bankruptcy Court, Michael G. Williamson, J., 454 B.R. 537, ruled that firm could not accept postdated checks as prepetition retainer for postpetition services in Chapter 7 cases. UST moved to determine whether firm's new practice, under which separate contracts for prepetition and postpetition services were executed, violated prior ruling.

Holding: The Bankruptcy Court, Michael G. Williamson, J., held that new procedure did not violate prior ruling or conflict with Bankruptcy Code or professional conduct rule, warranting its approval, with proposed modifications.

Modified new procedure approved.

1. Bankruptcy ⚿2588, 3170

There is no prohibition against a debtor making postpetition installment payments for postpetition legal services.

2. Attorney and Client ⚿143
Bankruptcy ⚿3200

New two-contract fee procedure employed by law firm in representing Chapter 7 and Chapter 13 debtors in consumer cases did not violate bankruptcy court's prior order barring previous arrangement under which firm had accepted postdated checks as prepetition retainer for postpetition services, and did not conflict with Bankruptcy Code or professional conduct rule, warranting court's approval of procedure, pursuant to which clients executed separate fee agreements for prepetition and postpetition services, prepetition agreement described procedure in detail and identified three options for postpetition legal services, clients received two-week cooling off period in which to select desired option, during which firm continued to provide representation, and firm continued to provide representation, if it was not selected as postpetition counsel, until allowed to withdraw by court order.

Denise E. Barnett, Tampa, FL, for Plaintiff.

Glenn E. Gallagher, Clark & Washington, LLC, Tampa, FL, Richard Thomson, Clark & Washington, P.C., Atlanta, GA, for Defendant.

AMENDED ORDER AND MEMORANDUM OPINION DETERMINING THAT CLARK & WASHINGTON'S TWO–CONTRACT PROCEDURE DOES NOT CONFLICT WITH THE COURT'S JULY 12, 2011 MEMORANDUM OPINION[1]

MICHAEL G. WILLIAMSON, Bankruptcy Judge.

This Court previously ruled in this miscellaneous proceeding that Clark & Wash-

ington was prohibited from accepting postdated checks as a prepetition retainer for postpetition services to be provided to their consumer clients.[2] Clark & Washington now has its clients execute two separate agreements: one for prepetition services and another for postpetition services. The agreement for prepetition services is executed before the petition is filed, and all services provided for under the agreement are completed with the filing of the chapter 7 petition. The relatively small payment for the prepetition services is also made before the petition is filed. The agreement for postpetition services is executed after the petition is filed. Payments under the postpetition retainer agreement are automatically debited from the debtor's bank account. The U.S. Trustee has moved to determine whether this new practice violates the Court's previous ruling.[3] For the reasons discussed below, the Court determines that, with certain modifications, this new practice is acceptable and does not conflict with the Court's previous ruling.

Background

The Defendant, Clark & Washington, P.C., is a law firm based in Atlanta, Georgia, with offices in various cities in the southeastern United States. Clark & Washington limits its practice to representing individual debtors in consumer cases filed under Chapters 7 and 13 of the Bankruptcy Code. The U.S. Trustee originally filed this miscellaneous proceeding seeking a declaration that the prepetition fee agreement Clark & Washington used at the time, which depended upon the use of postdated checks for payment, was impermissible. This Court agreed with the U.S. Trustee's position and entered an order prohibiting Clark & Washington from using postdated checks as part of its fee agreement with clients. The U.S. Trustee now seeks a determination as to whether a new two-contract procedure used by the firm is permissible. To understand whether the new two-contract procedure is permissible, it is helpful to understand how Clark & Washington's original prepetition fee agreement worked and the reason that fee agreement was impermissible.

The Postdated Check Fee Agreement

Before this miscellaneous proceeding was filed in 2009, Clark & Washington regularly entered into fee agreements with its consumer clients under which it would receive a relatively small payment for its prepetition work and postdated checks as a "retainer" for its postpetition work. Typically, the client provided Clark & Washington with four or five postdated checks in equal amounts to pay this retainer. Clark & Washington deposited the checks on the date specified on the checks.

1. This Amended Order and Memorandum Opinion supersedes the Court's April 20, 2012 Order and Memorandum Opinion Determining that Clark & Washington's Two–Contract Procedure Does Not Conflict with the Court's July 22, 2011 Memorandum Opinion (Doc. No. 66). Clark & Washington moved for reconsideration of decretal paragraph 1(d) of the Court's April 20, 2012 Order and Memorandum Opinion (Doc. No. 68). In light of that motion for reconsideration, the Court has amended decretal paragraph 1(d) to clarify the right of Clark & Washington's clients to cancel their postpetition contract. This Amended Order and Memorandum Opinion is otherwise identical in all respects to the April 20, 2012 Order and Memorandum Opinion.

2. *Walton v. Clark & Washington, P.C.,* 454 B.R. 537 (Bankr.M.D.Fla.2011).

3. Doc. No. 49 (the ''Motion'').

The dates specified were always after the petition date, and in some instances, they were after the discharge had been entered.

The U.S. Trustee files this miscellaneous proceeding

The U.S. Trustee objected to that fee arrangement. So he filed this miscellaneous proceeding seeking a declaration that Clark & Washington's fee arrangement: (i) violated Bankruptcy Code § 362's automatic stay (Count I); (ii) violated Bankruptcy Code § 524's discharge injunction (Count II); and (iii) created a conflict of interest between Clark & Washington and its clients (Count III).[4] Clark & Washington moved for entry of summary judgment in its favor on all three counts of the U.S. Trustee's Complaint.[5]

The Court invalidates the Postdated Check Fee Agreement

In its July 12, 2011 Memorandum Opinion, the Court ruled that the postdated checks gave rise to prepetition claims as a matter of law and that depositing the checks after the petition date violated the § 362 automatic stay or the § 524 discharge injunction (depending on when the check was deposited). This Court also ruled that the fee arrangement created a conflict of interest. Accordingly, the Court prohibited Clark & Washington from accepting postdated checks for deposit after the petition date as payment of its fees for chapter 7 cases.

Clark & Washington implements a new two-contract procedure

After the Court's Memorandum Opinion, Clark & Washington modified its fee agreement to remove the provisions that the Court had found to be impermissible. The result was a new two-contract procedure under which the client executes separate fee agreements for prepetition and postpetition services. Under this new procedure, the client first agrees to retain Clark & Washington to prepare and file the chapter 7 petition. After the prepetition retainer agreement is signed, the initial intake is done and the petition and schedules are prepared. The client then comes back for a second appointment to sign the petition and schedules. Clark & Washington files the petition and then immediately prepares a postpetition retainer agreement, which the client executes while at the firm's office. The client also makes arrangements to pay the postpetition fees (generally in the form of automatic debits from the client's bank account) while at the firm's office. Once that is done, the balance of the schedules, statement of financial affairs, and other papers are filed. The fee for the prepetition services is generally $250, while the fee for the postpetition services is generally $1,000.

The U.S. Trustee filed the Motion to determine whether Clark & Washington's new two-contract procedure violates this Court's prior ruling.[6] At the initial hearing on the Motion, the Court expressed two key concerns about the firm's new procedure. First, the transition from the prepetition contract to the postpetition contract appeared to be one continuous process with no time for the client to consciously choose whether to retain the firm for postpetition services. Second, the disclosures in the initial contract did not appear to be sufficient to fully explain the client's options for postpetition services.

Clark & Washington modifies the two-contract procedure

As a result of the Court's comments at the initial hearing, Clark & Washington

4. Doc. No. 1.

5. Doc. Nos. 32 & 33.

6. Doc. No. 49.

modified its two-contract procedure.[7] Under the modified procedure, the prepetition fee agreement describes the two-contract procedure in detail and sets forth the client's three options for postpetition legal services.[8] Those three options are: (i) the client can proceed pro se, (ii) the client can retain Clark & Washington, or (iii) the client can retain another firm.[9] Clark & Washington now gives its clients two weeks to exercise one of those three options; the debtor is no longer required to exercise one of those options on the same day the petition is filed.[10] In effect, Clark & Washington now provides a cooling off period. It is the validity of this modified two-contract procedure that is before the Court. The Court will next consider whether this modified procedure violates the Court's prior ruling or is otherwise legally impermissible.

Conclusions of Law[11]

As the Seventh Circuit recognized in *In re Bethea*, debtors "who cannot pay in full can tender a smaller retainer for prepetition work and later hire and pay counsel once the proceeding begins—for a lawyer's aid is helpful in prosecuting the case as well as in filing it." [12] The Supreme Court has also recognized that a debtor is free to use postpetition funds to pay for postpetition legal services.[13] Put another way, there is nothing inherently wrong with a lawyer giving terms to clients for the payment of legal services. As a consequence, the Court must uphold the validity of the modified two-contract procedure absent some compelling reason not to do so.

The Court, as set forth above, previously expressed two key concerns with the original two-contract procedure. Both of those concerns, however, have been substantially addressed by the modifications Clark & Washington made to its two-contract procedure. To begin with, under the modified two-contract procedure, the prepetition agreement now (i) more fully sets out the costs and fees associated with filing the client's case; and (ii) specifies the client's three options for postpetition legal services. Moreover, Clark & Washington's initial Rule 2016 disclosure statement explicitly specifies that the prepetition fee is $250 and that the contract between the client and the firm does not include postpetition services. Finally, the two-contract procedure contemplates the firm filing a supplemental disclosure that sets out the additional $1,000 fee in the event the client retains Clark & Washington for postpetition services.

That leaves the three concerns raised by the U.S. Trustee.[14] First, the U.S. Trustee contends that, under the modified two-contract procedure, debtors are forced to proceed pro se from the time their petitions are filed until they decide whether to retain Clark & Washington or another firm (or continue proceeding pro se). According to the U.S. Trustee, this could cause problems because the client has to provide information to the chapter 7 trustee and prepare for the meeting of credi-

7. Doc. No. 56.

8. *Id.*

9. *Id.*

10. *Id.*

11. The Court has jurisdiction over this miscellaneous proceeding under section 28 U.S.C. § 1334(b) and 11 U.S.C. §§ 544, 548, and 550. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (H), and (O).

12. *Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125, 1128 (7th Cir.2003).

13. *Lamie v. Trustee*, 540 U.S. 526, 535–36, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004).

14. Doc. No. 57.

tors during this "gap" period, and the client will be left without representation. Making matters worse, creditors, other lawyers, and the chapter 7 trustee will not know the client is proceeding pro se during the gap period. Second, the U.S. Trustee contends that the disclosures contained in Clark & Washington's prepetition and postpetition contracts are insufficient. Third, the U.S. Trustee says the two-contract procedure is simply unnecessary as there are other alternatives.

The first two concerns are valid. But neither of them warrants precluding Clark & Washington from implementing its modified two-contract procedure. To begin with, Clark & Washington has already addressed the U.S. Trustee's concern that clients will be left unrepresented. Under the modified two-contract procedure, the firm agrees to continue representing the client during the two-week "cooling off" period. And if the client opts to retain another firm or continue pro se, Clark & Washington will continue to represent the client until the Court enters an order allowing the firm to withdraw. In order to leave no doubt, the Court will require Clark & Washington to include in its initial Rule 2016 statement that the firm will represent the client until the Court enters an order allowing the firm to withdraw from representation. So that adequately resolves the U.S. Trustee's first concern.

The second concern—inadequate disclosure—is admittedly more problematic. In fact, Clark & Washington concedes the disclosures in its modified two-contract procedure could be improved. For starters, it has agreed—and the Court will require—that the firm move the "Two—Contract Procedure" disclosure from the end of each contract to a separate cover page. In addition, the firm has agreed to have their clients sign and acknowledge that they have received and read the two-contract procedure disclosures. These modifications resolve the U.S. Trustee's second concern.

As for the U.S. Trustee's third concern, the Court is not persuaded that the two-contract procedure is objectionable simply because there may be other alternatives. In this regard, the U.S. Trustee contends that there are other approaches that would allow individuals with modest means to obtain legal representation. Yet the U.S. Trustee does not identify any of those other approaches. And in any event, that is not the standard. Clark & Washington is not precluded from using one fee arrangement simply because other arrangements may exist.

Conclusion

[1, 2] In the end, there is no prohibition against a debtor making postpetition installment payments for postpetition services. The Court concludes that Clark & Washington's two-contract procedure—with the modifications directed by the Court and agreed to by the firm—does not violate the Court's July 12, 2011 Memorandum Opinion. Nor does it conflict with any applicable Bankruptcy Code provision or rule of professional conduct. Accordingly, it is

ORDERED:

1. Clark & Washington's new two-contract procedure set forth in the exhibits attached to its November 28, 2011 Response to the Court [15] is approved with the following modifications:

a. The "two-contract procedure" disclosure currently on pages 4–5 of the prepetition agreement and page 5 of the postpetition agreement must be set forth on a separate cover page.

15. Doc. No. 56.

b. Firm clients must acknowledge that they have received and read the "two-contract procedure" disclosure.

c. The client must execute the prepetition agreement before the bankruptcy case is filed and the postpetition agreement after the bankruptcy case is filed.

d. The postpetition agreement shall contain a provision notifying the client that (i) the client has the right to cancel the postpetition agreement—and all financial obligations arising under that agreement—at any time within 14 days after signing it; and (ii) the client may exercise his or her right to cancel the postpetition agreement by notifying Clark & Washington in writing (at the address designated by the firm) within 14 days after signing the agreement of his or her intent to cancel the agreement.

e. Clark & Washington shall include language in its initial Rule 2016 disclosure stating that the firm will continue to represent the debtor in the case even where the debtor chooses not to retain the firm for postpetition services until the Court enters an order allowing the firm to withdraw from representation.

2. The Court reserves jurisdiction to enforce the terms of this Order.

DONE and **ORDERED.**

Craig PIAZZA, Appellant,

v.

NUETERRA HEALTHCARE PHYSICAL THERAPY, LLC, Appellee.

No. 0:11–cv–62569–KMM.

United States District Court, S.D. Florida.

April 26, 2012.

Background: Judgment creditor moved to dismiss debtor's Chapter 7 case as abuse of provisions of Chapter 7 and for bad faith under "for cause" dismissal provision. The Bankruptcy Court, John K. Olson, J., 451 B.R. 608, granted motion to dismiss, to extent brought under "for cause" provision, and debtor appealed.

Holdings: The District Court, K. Michael Moore, J., held that:

(1) debtor's bad faith in filing Chapter 7 petition can constitute "cause" for dismissal of case under "for cause" dismissal provision, and

(2) Chapter 7 case that was filed, not in response to any sudden financial disaster, but in attempt to frustrate creditor's attempts to collect on large judgment debt that accounted for roughly 55% of debtor's total liabilities, was properly dismissed as filed in "bad faith."

Affirmed.

1. Bankruptcy ⚿3782, 3786

On appeal, district court must accept bankruptcy court's factual findings unless they are clearly erroneous, but reviews bankruptcy court's legal conclusions de novo. Fed.Rules Bankr.Proc.Rule 8013, 11 U.S.C.A.

IN RE: INTERNATIONAL OIL TRADING COMPANY, LLC, Alleged Debtor.

CASE NO.: 15–21596–EPK

United States Bankruptcy Court, S.D. Florida, **West Palm Beach Division**.

Signed April 28, 2016

Background: Judgment creditor filed involuntary petition against alleged debtor, a limited liability company (LLC) with which he had collaborated to procure and execute contracts to transport fuel through Jordan to Iraq on behalf of the United States military. Alleged debtor filed motion to dismiss involuntary proceeding or to abstain. Following denial of the dismissal motion, 545 B.R. 336, the court denied in part alleged debtor's third motion to compel production of documents, finding that judgment creditor had produced a privilege log that complied with the court's prior orders, but set further hearing on alleged debtor's objection to judgment creditor's claims of privilege and work product protection.

Holdings: The Bankruptcy Court, Erik P. Kimball, J., held that:

(1) addressing novel questions of law, under both federal and Florida law, judgment creditor's communications with his litigation funder were protected by the common interest exception to waiver of the attorney-client privilege;

(2) judgment creditor's communications with litigation funder were protected by the agency exception to waiver of the attorney-client privilege;

(3) judgment creditor's communications with litigation funder constituted opinion work product;

(4) judgment creditor's communications with litigation funder were protected by the work product doctrine, notwithstanding alleged debtor's "substantial need" for them and the "undue hardship" it allegedly would suffer if required to obtain the information in another manner; but

(5) alleged debtor demonstrated a substantial need for the fact work product contained within the funding agreement executed by judgment creditor and litigation funder, and so judgment creditor would be required to produce the funding agreement, as redacted.

Motion granted in part and denied in part.

1. Privileged Communications and Confidentiality ⚿1

Existence of a confidentiality agreement typically does not, alone, protect information from discovery.

2. Privileged Communications and Confidentiality ⚿132

Under both federal and Florida law, attorney-client privilege applies only to communications, not to contracts.

3. Privileged Communications and Confidentiality ⚿102

Attorney-client privilege protects confidential disclosures by a client to an attorney made in order to obtain legal assistance.

4. Privileged Communications and Confidentiality ⚿168

Under federal law, a client's disclosure of privileged information to non-attorneys generally constitutes waiver of the privilege, but the general rule does not govern where, for instance, the third party possesses a "common interest" with the client, or the third party is an "agent" of the client.

5. Privileged Communications and Confidentiality ⚿122

Under federal law, "common interest exception" to waiver of the attorney-client privilege is a common law doctrine by which courts uphold attorney-client privilege, in spite of the disclosure of attorney-client communications to a third party, because that third party shares a "common interest" with the client.

See publication Words and Phrases for other judicial constructions and definitions.

6. Privileged Communications and Confidentiality ⚿122

Under federal law, an essential element of the common interest exception to waiver of the attorney-client privilege is that the parties must maintain a reasonable expectation of confidentiality in their communications.

7. Bankruptcy ⚿3047(2)

Under both federal and Florida law, judgment creditor's communications with his litigation funder were protected by the common interest exception to waiver of the attorney-client privilege, for purposes of alleged debtor's motion to compel production of documents; funding agreement executed by judgment creditor and funder contained a confidentiality provision, judgment creditor's disclosures to funder were necessary to obtain informed legal advice, specifically, advice as to how to prosecute a collection action against alleged debtor and how to fund that action, and judgment creditor, his counsel, and funder did not intend to disclose their communications to third parties but, instead, the information exchanged between the parties was for the limited purpose of assisting in their common cause, which was to propound litigation to collect on a claim against alleged debtor.

8. Privileged Communications and Confidentiality ⚿122, 168

Under federal law, there are two approaches to the common interest exception to waiver of the attorney-client privilege: the first is to require that the client and third party have a legal interest in common, as opposed to a merely commercial interest, while the second requires only that the third party and the privilege holder are engaged in some type of common enterprise and that the legal advice relates to the goal of that enterprise.

9. Privileged Communications and Confidentiality ⚿122, 168

Under the more expansive "common enterprise" approach to the common interest exception to waiver of the attorney-client privilege, there are three threshold questions to determine whether the attorney-client and joint-defense privilege, also known as the common interest privilege, should apply: (1) whether the original disclosures were necessary to obtain informed legal advice and might not have been made absent the attorney-client privilege, (2) whether the communication was such that disclosure to third parties was not intended, and (3) whether the information was exchanged between the parties for the limited purpose of assisting in their common cause.

10. Privileged Communications and Confidentiality ⚿159, 168

Clients may engage the services of non-attorney professionals in furtherance of their litigation aims, and the so-called "agency exception" to waiver of the attorney-client privilege protects from discovery the necessary communications with such parties.

11. Privileged Communications and Confidentiality ⚿159, 168

There are two approaches to the agency exception to waiver of the attor-

ney-client privilege: the narrow approach applies the exception only to persons identified as "translators," meaning those who interpret information the client and attorney already possess, such as paralegals, law clerks, secretaries, and language translators, in addition to some non-attorney professionals such as accountants, depending on the tasks performed, whereas the second approach extends the waiver to a broader array of professionals with whom communication may be necessary for the provision of legal advice, including a public relations firm or a psychiatrist.

12. Bankruptcy ⚿3047(2)

Under both federal and Florida law, judgment creditor's communications with his litigation funder were protected by the agency exception to waiver of the attorney-client privilege, for purposes of alleged debtor's motion to compel production of documents; judgment creditor engaged funder in furtherance of the rendition of legal services, as in order to determine whether to lend money to judgment creditor, funder had to assess potential litigation, both at outset and on ongoing basis, using information provided by judgment creditor and his counsel, with that information funder could advise judgment creditor as to cost of pursuing collection, risks involved, and best strategies to pursue, and without funder, judgment creditor might have been "handcuffed," with reduced or no ability to pursue his claims.

13. Bankruptcy ⚿3047(2)

Under federal law, the work product of attorneys, consultants, and other professionals and agents of a party is protected from discovery under most circumstances. Fed. R. Civ. P. 26(b)(3).

14. Bankruptcy ⚿3047(2)

Under federal law, documents prepared in anticipation of litigation are not subject to discovery, unless there is a substantial need shown and the party seeking to discover the information cannot acquire it elsewhere without undue hardship. Fed. R. Civ. P. 26(b)(3).

15. Bankruptcy ⚿3047(2)

Under both federal and Florida law, there is a distinction between work product that consists purely of facts and work product that concerns the mental impressions, conclusions, opinions, or legal theories of an attorney. Fed. R. Civ. P. 26(b)(3); Fla. R. Civ. P. 1.280(b)(4).

16. Bankruptcy ⚿3047(2)

Under both federal and Florida law, judgment creditor's communications with his litigation funder constituted opinion work product, for purposes of alleged debtor's motion to compel production of documents; communications at issue were between client, client's attorney, and funder whose participation depended on assessments of the merits of the litigation, communications concerned mental impressions, conclusions, opinions, or legal theories, and judgment creditor's "primary purpose" in communicating with funder was to facilitate the rendition of legal services by obtaining funds to retain and pay counsel. Fed. R. Civ. P. 26(b)(3); Fla. R. Civ. P. 1.280(b)(4).

17. Bankruptcy ⚿3047(2)

Under federal and Florida law, judgment creditor's communications with his litigation funder were protected by the work product doctrine, notwithstanding alleged debtor's "substantial need" for the communications and the "undue hardship" alleged debtor allegedly would suffer if required to obtain the information in another manner; the subject communications concerned mental impressions, conclusions, opinions, or legal theories, and so constituted rarely-discoverable opinion work product, the discovery at issue was in sup-

port of alleged debtor's request for bankruptcy court to abstain from its involuntary bankruptcy case on grounds that judgment creditor had filed the involuntary petition with improper motivation, involvement of funder was not, in and of itself, indicative of an improper motive or other improper activity, and so alleged debtor failed to show "exceptional" or "rare and extraordinary circumstances" required for court to allow discovery of opinion work product. 11 U.S.C.A. § 305; Fed. R. Civ. P. 26(b)(3)(B); Fla. R. Civ. P. 1.280(b)(4).

18. Bankruptcy ⇨3047(2)

Alleged debtor demonstrated a substantial need for the fact work product contained within funding agreement executed by judgment creditor and his litigation funder, and so judgment creditor would be required to produce the funding agreement, as redacted to conceal terms of payment and any terms that judgment creditor reasonably believed might disclose mental impressions and opinion in relation to his litigation with alleged debtor; funding agreement was central to one of the theories supporting alleged debtor's motion to abstain, namely, alleged debtor's assertion that judgment creditor had transferred some or all of his claim to funder in exchange for litigation financing, and, given complexity of agreement and admitted depth of funder's involvement in the litigation, no other document production, depositions, or other discovery methods would adequately substitute for the original document. 11 U.S.C.A. § 305; Fed. R. Civ. P. 26(b)(3)(B); Fla. R. Civ. P. 1.280(b)(4).

Ryan K. Higgins, Houston, TX, David L. Rosendorf, Esq, Coral Gables, FL, Charles W. Throckmorton, Esq, Miami, FL, for Alleged Debtor.

Gregory S. Grossman, Esq., Miami, FL, for Petitioning Creditor Mohammad Anwar Farid Al-Saleh.

ORDER GRANTING IN PART AND DENYING IN PART THIRD MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM MOHAMMAD AL–SALEH

Erik P. Kimball, Judge, United States Bankruptcy Court

THIS MATTER came before the Court for hearing on March 18, 2016 and April 14, 2016 upon International Oil Trading Company, LLC's Third Motion to Compel Production *of Documents from Mohammad Al–Saleh* [ECF No. 140] (the "Third Motion to Compel") filed by the alleged debtor International Oil Trading Company, LLC ("IOTC USA"). In the Third Motion to Compel, IOTC USA requests that the Court compel Mohammad Al–Saleh to respond to various discovery requests. As provided in more detail below, the Court grants in part the Third Motion to Compel, requiring Mr. Al–Saleh to provide to IOTC USA, through counsel, a copy of his composite funding agreement with Burford Capital, LLC, from which Mr. Al–Saleh may redact all terms of payment and all terms reflecting attorney mental impressions and opinions concerning Mr. Al–Saleh's litigation against IOTC USA, subject to further objection and possible review of the same by the Court *in camera.* All other relief requested in the Third Motion to Compel will be denied.

BACKGROUND

Mr. Al–Saleh is a citizen of the Hashemite Kingdom of Jordan. IOTC USA is a Florida limited liability company. In the mid–2000s, Mr. Al–Saleh and IOTC USA collaborated in procuring and executing contracts to transport fuel across Jordanian territory to Iraq on behalf of the United States military. The parties' relationship soured, and Mr. Al–Saleh sued IOTC

USA and other parties in Florida in 2008. Thereafter, Mr. Al–Saleh entered into a contractual relationship with Burford Capital, LLC ("Burford") to fund his litigation against IOTC USA. Burford has played a near-daily role in Mr. Al–Saleh's litigation efforts, providing funding and assisting with legal and strategic decisions.

Mr. Al–Saleh won a judgment against IOTC USA and the other defendants in the Florida litigation in 2011, and the judgment was upheld on appeal. He has been largely unable to collect, despite numerous collection attempts in various courts. As a result, on June 26, 2015, Mr. Al–Saleh filed the involuntary bankruptcy petition that commenced this case.

IOTC USA responded to the petition with what is now *International Oil Trading Company, LLC's Amended Answer to Involuntary Petition and Motion to Dismiss or Abstain* [ECF No. 90] (the "Motion to Abstain"). The Motion to Abstain contains an answer to the allegations in the involuntary petition, a motion to dismiss under § 303 of the Bankruptcy Code,[1] and a motion to abstain under § 305 of the Bankruptcy Code. *See* ECF Nos. 89, 90 (docketing amended response separately as answer and motions).

In its Order Granting Motion for Summary Judgment, entered on February 8, 2016 [ECF No. 132], the Court denied IOTC USA's motion to dismiss this involuntary proceeding under § 303. The only issue remaining for trial is whether the Court should abstain from exercising jurisdiction over this involuntary bankruptcy proceeding under § 305.

In its Motion to Abstain, among other things, IOTC USA argues that this bankruptcy is essentially a continuation of its two-party dispute with Mr. Al–Saleh and that this bankruptcy case is harmful to IOTC USA and its other creditors. IOTC USA argues that Mr. Al–Saleh has more proper venues for his collection efforts, and that this bankruptcy jeopardizes IOTC USAs efforts in certain valuable litigation and thus IOTC USAs debt to another funder in connection with that litigation. In essence, IOTC USA argues that Mr. Al–Saleh's motivation to file this bankruptcy is improper.

IOTC USA also argues that the Court should abstain because Mr. Al–Saleh is not the "real-party-in-interest" in this case. To that effect, IOTC USA argues that through or along with his funding arrangement with Burford, Mr. Al–Saleh transferred some interest in the judgment debt owed by IOTC USA. If so, IOTC USA argues that Mr. Al–Saleh is not "in the driver's seat" and thus his role as petitioning creditor is not appropriate.

On July 30, 2015, IOTC USA served Mr. Al–Saleh with its First Request for Production of Documents (the "Request," attached as Exh. A to the Third Motion to Compel). In sub-parts 13–15 of the Request, IOTC USA requests that Mr. Al–Saleh produce documents evidencing any sort of transfer of Mr. Al–Saleh's judgment against IOTC USA or the debt represented thereby. In sub-part 16 of the Request, IOTC USA requests that Mr. Al–Saleh produce all documents relating to transfers of funds from Burford to Mr. Al–Saleh. In sub-parts 17–18 of the Request, IOTC USA requests that Mr. Al–Saleh produce all written communications between Mr. Al–Saleh and Burford from January 1, 2011 to the present, as well as all documents relating to such communications (collectively, the "Burford Communications").

1. 11 U.S.C. §§ 101 *et seq.*

[1] On August 17, 2015, Mr. Al–Saleh responded to the Request with a number of general and specific objections to sub-parts 13–18. Most notably, Mr. Al–Saleh objected that all of the responsive documents are subject to attorney-client privilege, common interest/joint defense privilege, and work product protection.[2] Mr. Al–Saleh provided a partial privilege log claiming such protections for all documents responsive to sup-parts 13–16 of the Request, which collectively make up the funding agreement between Mr. Al–Saleh and Burford (the "Funding Agreement"). Mr. Al–Saleh requested additional time to prepare, and guidance from the Court in connection with, a privilege log regarding the Burford Communications, noting that the responsive documents totaled many thousands of pages.

Over the next six months, the Court entertained a number of motions by which IOTC USA sought to compel production of either the Burford Communications or a privilege log describing the documents subject to privilege. Ultimately, on February 19, 2016, IOTC USA filed the Third Motion to Compel, in which it argued that Mr. Al–Saleh had violated this Court's prior orders by failing to tender a privilege log consistent with the Court's direction. IOTC USA requested that the Court compel Mr. Al–Saleh to produce all documents responsive to sub-parts 13–18 of the Request. IOTC USA also objected that, to the extent Mr. Al–Saleh had provided a compliant privilege log, his claims of attorney-client privilege and work product protection were not appropriate to the documents at issue. IOTC USA asked the Court to award sanctions against Mr. Al–Saleh representing IOTC USA's fees and costs in connection with its various efforts to compel production.

On March 29, 2016, the Court issued its *Order Denying in Part and Setting Further Hearing On International Oil Trading Company, LLC's Third Motion to Compel Production of Documents from Mohammad Al–Saleh* [ECF No. 151] (the "Privilege Log Order"). In the Privilege Log Order, the Court ruled that Mr. Al–Saleh had produced a privilege log that complied with the Court's prior orders. The Court denied the Third Motion to Compel except as to IOTC USA's objection to Mr. Al–Saleh's claims of privilege and work product protection.

In the Privilege Log Order, the Court noted that "there remains an outstanding and novel question of law as to whether, under the circumstances of this case, a party's litigation funding agreement and communications with a litigation funder are subject to attorney-client privilege, the work product doctrine, or another type of protection from discovery." The Court observed that, in previous briefs and in oral argument, the parties had focused their attention on the issue of whether Mr. Al–Saleh had furnished a sufficient privilege log. The parties had not, however, addressed in detail the questions of privilege and work product protection. The Court determined to provide the parties with an opportunity for further briefing and oral argument. On April 14, 2016, the Court held a non-evidentiary hearing on the remaining requested relief. The Court now grants in part and denies in part the Third

2. Mr. Al–Saleh's privilege logs also contain claims of "confidentiality" protection. Mr. Al–Saleh later clarified that he merely wished to indicate to the Court, as a component of his attorney-client privilege and work product protection claims, that he and Burford had memorialized their intention to maintain confidentiality in their communications. In this Order, the Court will not consider contractual confidentiality provisions as an independent basis for protection against discovery. The Court notes, however, that the existence of a confidentiality agreement typically does not, alone, protect information from discovery.

Motion to Compel, for the reasons stated below.

ANALYSIS

Choice of Law

The parties cite primarily federal case law presenting federal common law on the issues of attorney-client privilege and the work product doctrine. Although the determination of the remaining issues for trial in this Court presents only matters of federal statutory and case law, communications made in the context of prior litigation in Florida state courts and elsewhere may be relevant to the Court's decision here. There is some concern that such communications may have been made under the appropriate assumption that they were protected from discovery consistent with the law applicable in that prior litigation, but that they might be subject to a different analysis here in the context of this involuntary bankruptcy proceeding, as it is governed solely by federal law. In the present circumstances, such concern is unfounded. In light of the fact that Mr. Al–Saleh's initial claim against IOTC USA was brought largely as a fraud claim under Florida law and judgment was entered in a Florida state court, it appears the state with the most significant relationship to the claims and the parties, as a whole, is Florida. *See Bishop v. Florida Specialty Paint Co.*, 389 So.2d 999 (Fla.1980) (adopting "significant relationship test" for choice of law questions arising in tort). Yet the applicable Florida law on the issues of attorney-client privilege and the work product doctrine is so parallel to the applicable federal common law that it would lead the Court to the same conclusions. For this reason, in addition to reliance on appropriate federal precedent, the Court cites below the similar analyses presented in Florida statutory and case law, which only bolster the Court's ruling here.

Attorney–Client Privilege and Waiver

[2] Mr. Al–Saleh argues that both the Funding Agreement and the Burford Communications are protected from discovery as a result of application of the attorney-client privilege. As a threshold matter, the Funding Agreement is primarily a contract, not a communication. Under both federal and Florida law, attorney-client privilege applies only to communications, not to contracts. The Court thus focuses its privilege analysis on the Burford Communications.

[3, 4] The attorney-client privilege protects confidential disclosures by a client to an attorney made in order to obtain legal assistance. Federal common law presents both a general rule regarding waiver of attorney-client privilege and several exceptions to that rule. Under the general rule, a client's disclosure of privileged information to non-attorneys constitutes waiver of the privilege. But the general rule does not govern where, for instance, the third party possesses a "common interest" with the client, or the third party is an "agent" of the client.

The federal common law "exceptions to waiver" or "rules of non-waiver" are substantially similar to the exceptions explicitly provided in Fla. Stat. § 90.502, which states, in relevant part:

> (c) A communication between lawyer and client is "confidential" if it is not intended to be disclosed to third persons other than:
>
> 1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
>
> 2. Those reasonably necessary for the transmission of the communication.

Burford is not Mr. Al–Saleh's attorney. Under the most simple application of the general rule of waiver, Mr. Al–Saleh waived his attorney-client privilege by

communicating otherwise privileged matters with Burford. The question, then, is whether any existing exception to waiver nevertheless protects the Burford Communications from discovery. In this Court's view, the Burford Communications are protected by both the common interest exception and the agency exception. These conclusions are supported by the better reasoned federal case law, and also by existing law in the State of Florida.

The Common Interest Exception

[5] The common interest exception to waiver is a common law doctrine by which Courts uphold attorney-client privilege, in spite of the disclosure of attorney-client communications to a third party, because that third party shares a "common interest" with the client.

[6, 7] An essential element of the exception is that the parties must maintain a reasonable expectation of confidentiality in their communications. Similarly, Fla. Stat. § 90.502(c) requires that the communications be "not intended to be disclosed." The subjective element of intent is satisfied in this case by the uncontested assertion that the Funding Agreement between Mr. Al–Saleh and Burford contains a confidentiality provision.

[8] Broadly speaking, under federal law there are two approaches to the "common interest" exception. The first is to require that the client and third party have a legal interest in common, as opposed to a merely commercial interest. For instance, in *Leader Technologies, Inc. v. Facebook,* cited by both parties, a federal district court in Delaware denied a claim of attorney-client privilege because the common interest between the claimant and its litigation funder was commercial in nature rather than legal. 719 F.Supp.2d 373 (D.Del.2010). It is worth noting, however, that the *Leader Technologies* decision was issued on appeal from an oral ruling of a bankruptcy court which ruling is now sealed. On appeal, the district court opined only that the bankruptcy court's ruling was not "clearly erroneous," and noted that applicable case law did not consistently support the bankruptcy court's decision. *Id.* at 376–77. Likewise, in *Miller UK Ltd. v. Caterpillar,* a district court in Illinois held that a client's relationship to a litigation funder was merely "a shared rooting interest in the 'successful outcome of a case' " and thus "not a common legal interest." 17 F.Supp.3d 711, 732 (N.D.Ill. 2014).

The second approach to "common interest" requires only that the "third party and the privilege holder are engaged in some type of common enterprise and that the legal advice relates to the goal of that enterprise." *Rembrandt Techs., LP v. Harris Corp.,* 2009 WL 402332 (Del.Super.Ct.2009). In *Rembrandt,* issued by a Delaware state court roughly contemporaneously with *Leader Technologies,* the court found that attorney-client privilege protected communications among a patent holder, his attorney, and a patent enforcement consultant. The parties intended to enforce the patent through litigation, and fully intended their communications to remain confidential and subject to privilege. Several courts have followed similar logic in upholding the attorney-client privilege with regard to litigation funders, citing a "shared common interest in litigation strategy" and "actual cooperation toward a common legal goal" as the bases for the common interest. *See, e.g., Devon IT, Inc. v. IBM Corp.,* 2012 WL 4748160 (E.D.Pa. 2012) (requiring disclosure of communications between client and Burford "would intrude upon attorney-client privilege under the 'common-interest' doctrine"); *Walker Digital, LLC v. Google Inc.,* 2013 WL 9600775 (D.Del.2013) (finding "com-

mon legal interest" between client and patent monetization consultant).

[9] Florida courts, and federal courts applying Florida law, lean toward the more expansive "common enterprise" approach to the "common interest" exception. In fact, the official comment following Fla. Stat. § 90.502 states that "practicality requires that some disclosure outside the immediate lawyer-client circle be allowed without impairing confidentiality." The comment provides specific examples of parties to whom disclosure may be allowed including, without limitation, "business associates." As stated by one federal court applying Florida law, there are three threshold questions to determine whether the attorney-client and joint-defense privilege, also known as the common interest privilege, should apply: (1) whether the original disclosures were necessary to obtain informed legal advice and might not have been made absent the attorney-client privilege; (2) whether the communication was such that disclosure to third parties was not intended; and (3) whether the information was exchanged between the parties for the limited purpose of assisting in their common cause. *Developers Surety & Indemnity Co. v. Harding Village, Ltd.*, 2007 WL 2021939 (S.D.Fla.2007). That cause need not be an identical legal cause, but rather a "common, litigation-related cause." *Infinite Energy, Inc. v. Econnergy Energy Co.*, 2008 WL 2856719 (N.D.Fla.2008).

The Court finds compelling the more expansive "common enterprise" approach to the "common interest" exception presented in *Developers Surety,* and adopts that standard. This approach corresponds to the position articulated by Mr. Al–Saleh.

Mr. Al–Saleh's disclosures to Burford were necessary to obtain informed legal advice, specifically advice as to how to prosecute a collection action against IOTC USA and how to fund that action. Mr. Al–Saleh, his counsel, and Burford did not intend to disclose their communications to third parties. The information exchanged between the parties was for the limited purpose of assisting in their common cause, which was to propound litigation to collect on a claim against IOTC USA.

The Court rules that all communications among Burford, Mr. Al–Saleh, and his counsel are protected from discovery as they are subject to the attorney-client privilege as a result of application of the common interest exception. The Third Motion to Compel is thus subject to denial to the extent it seeks an order directing the delivery of such documents. This basis, alone, is sufficient for such relief.

The Agency Exception

[10] Clients may engage the services of non-attorney professionals in furtherance of their litigation aims. The so-called "agency exception" to waiver of the attorney-client privilege protects from discovery the necessary communications with such parties. Although neither of the parties addressed this issue, it is a legal issue squarely before the Court as a result of Mr. Al–Saleh's blanket claim of attorney-client privilege and IOTC USAs general argument of waiver.

The agency exception to waiver of the attorney-client privilege was first articulated by the Second Circuit in *U.S. v. Kovel,* 296 F.2d 918 (2nd Cir.1961). The Fifth Circuit cited *Kovel* affirmatively in a ruling that remains binding on this Court. In that case, *U.S. v. Pipkins*, the court stated that "[i]n appropriate circumstances the privilege may bar disclosures made by a client to non-lawyers who . . . [have] been employed as agents of an attorney." 528 F.2d 559, 562 (5th Cir.1976). Courts have variously applied the agency exception to

non-attorney professionals such as accountants, non-testifying experts and consultants, and patent agents. *See* Michele DeStefano, *Claim Funders and Commercial Claim Holders: A Common Interest or a Problem?,* 63 DePaul L.Rev. 305, 331–41 (2014).

[11] As with the common interest exception, there are two approaches to the agency exception. The narrow approach applies the exception only to persons identified as "translators," meaning those who interpret information the client and attorney already possess. *See id.* In this category fall paralegals, law clerks, secretaries, and language translators, in addition to some non-attorney professionals such as accountants, depending on the tasks performed. *See, e.g., Young v. Taylor,* 466 F.2d 1329, 1332 (10th Cir.1972) (applying exception to secretaries and law clerks); *In re G–I Holdings Inc.,* 218 F.R.D. 428, 434 (D.N.J.2003) (limiting exception to certain tasks performed by accountants).

The second approach to the agency exception is to extend the waiver to a broader array of professionals with whom communication may be necessary for the provision of legal advice. For example, the Southern District of New York applied the agency exception to communications with a public relations firm in *In re Grand Jury Subpoenas Dated March 24, 2003,* 265 F.Supp.2d 321, 326 (S.D.N.Y. 2003). In that case, the court noted that the firm provided much-needed "outside help" to assist the attorney, and that the firm's assistance "ha[d] a close nexus to the attorney's role in advocating the client's cause before a court or other decision-making body." *Id.* Similarly, the Third Circuit in *U.S. v. Alvarez* protected a client's communications with a psychiatrist because "the effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney [the expert] is assisting." 519 F.2d 1036, 1046 (3rd Cir.1975).

The broader approach to the agency exception also appears to apply under Florida law. For example, in *Royal Bahamian Ass'n, Inc v. QBE Ins. Corp.,* 2010 WL 3637958 (S.D.Fla.2010), a federal district court applied Florida law in ruling that communications at issue "relate[d] to the legal services being rendered" for reasons similar to those cited in *In re Grand Jury Subpoenas* and *U.S. v. Alvarez. Royal Bahamian,* 2010 WL 3637958 at *4. The court noted that the respondent to a discovery motion, an insurer, "would be handcuffed in its ability to evaluate the claim if its field adjuster could not communicate with QBE's outside counsel without waiving the attorney-client privilege." *Id.*

The Court believes the case law applying the broader approach to the "agency exception" is more consistent with the purpose for the exception and thus better reasoned. The broader approach to the "agency exception" is also in agreement with Florida law. Florida Statutes § 90.502(c)(2) protects communications with those "to whom disclosure is in furtherance of the rendition of legal services to the client." This protection is in addition to protection of communications with those "reasonably necessary for the transmission of the communication," a provisions that protects communications shared with secretarial staff and other intermediaries. Read together, it appears these provisions are intended to protect communications with any party who assists the client in obtaining legal services. Litigation funders fall in this category. One would need to assign a hackneyed construction to the statute to reach another conclusion.

[12] In this case, Mr. Al–Saleh possesses a judgment against IOTC USA and is attempting to collect on that judgment. IOTC USA is an entity that has demonstrated an ability and willingness to resist Mr. Al–Saleh's collection efforts. In order to obtain counsel and collect the money he is owed, Mr. Al–Saleh secured outside funding from a lender. In order to determine whether to lend money to Mr. Al–Saleh, the litigation funder must assess the potential litigation, both at the outset and on an ongoing basis, using information provided by Mr. Al–Saleh and his counsel. With that information, the funder may advise Mr. Al–Saleh as to the cost of pursuing collection, the risks involved, and the best strategies to pursue in litigation. The thousands of pages of communications at issue in the Third Motion to Compel imply that the funder's involvement has significant value to Mr. Al–Saleh and is integral to his pursuit of legal advice.

Communications with a litigation funder fall within the agency exception for the very reason that litigation funders exist—because without litigation funders, parties owed money, or otherwise stymied by deep-pocketed judgment debtors, might have reduced or no ability to pursue their claims. Litigation funders may be essential to the provision of legal advice in such cases. Absent the ability to communicate with funders without waiving privilege, potential plaintiffs such as Mr. Al–Saleh might be "handcuffed," as in *Royal Bahamian Association.* *See* 2010 WL 3637958 at *4; *see also In re Cnty. of Erie,* 473 F.3d 413, 420 (2nd Cir.2007) (legal advice includes considerations of "expense, politics, insurance, commerce, morals, and appearances," and careful lawyering entails "follow-through by facilitation"). Mr. Al–Saleh has engaged Burford "in furtherance of the rendition of legal services," and the communication of otherwise privileged information to Burford did not result in waiver of the attorney-client privilege.

The Court finds that all communications among Burford, Mr. Al–Saleh and his counsel are protected from discovery as they are subject to the attorney-client privilege as a result of the agency exception. The Third Motion to Compel is thus subject to denial to the extent it seeks an order directing the delivery of such documents. This basis, alone, is sufficient for such relief.

Work Product Protection—The Burford Communications

[13–15] The work product of attorneys, consultants, and other professionals and agents of a party is protected from discovery under most circumstances. Fed. R.Civ.P. 26(b)(3) provides that documents prepared in anticipation of litigation are not subject to discovery, unless there is a substantial need shown and the party seeking to discover the information cannot acquire it elsewhere without undue hardship. The rule further provides that if the court orders discovery, the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fla. R. Civ. P. 1.280(b)(4) provides similar protections. Consistent with these rules, both the Eleventh Circuit and the Florida Supreme Court have confirmed a distinction between work product that consists purely of facts and work product that concerns the "mental impressions, conclusions, opinions, or legal theories" of an attorney. *See Cox v. Administrator U.S. Steel & Carnegie,* 17 F.3d 1386, 1422 (11th Cir.1994) (citing *In re Murphy,* 560 F.2d 326, 336 (8th Cir.1977)) (stating that opinion work product "enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances"); *Southern Bell Tel. & Tel. Co. v. Deason,* 632 So.2d 1377, 1384 (Fla.1994)

(citing *State v. Rabin*, 495 So.2d 257, 262 (3rd DCA 1986) ("opinion work product is absolutely, or nearly absolutely, privileged")); *see also State v. Mark Marks, P.A.*, 654 So.2d 1184, 1187 (Fla. 4th DCA 1995) ("opinions of a non-witness work product expert are not discoverable absent a showing of exceptional circumstances").

[16] There is little doubt that the communications sought by IOTC USA—the very communications IOTC USA says it is looking for to support one theory under its Motion to Abstain—concern "mental impressions, conclusions, opinions or legal theories". These are communications between a client, the client's attorney, and a litigation funder whose participation depends on assessments of the merits of litigation. If they are work product at all, they are opinion work product.

IOTC USA argues that the Burford Communications are not work product or are not protected for two reasons: first, because the work product doctrine does not apply to communications with litigation funders and, second, because even if the work product doctrine applies IOTC USA has a substantial need for the Burford Communications and would be unable to obtain the same information elsewhere.

IOTC USA argues that work product protection does not apply to the Burford Communications under the so-called "primary purpose" rule. IOTC USA argues that work product protection "extends only to work product made for the purpose of facilitating the rendition of legal services to the client." IOTC USA argues that communications with Burford fail the "primary purpose" test because Mr. Al–Saleh's relationships with Burford "were not for the primary purpose of litigation, but were instead to permit [Mr.] Al–Saleh to borrow money and Burford to monitor the collateral for its loan receivable."

Even if the "primary purpose" test exists in the manner presented by IOTC USA, it is satisfied by the Burford Communications. The question is not the purpose of Burford's involvement in communications with Mr. Al–Saleh and his counsel. It does not matter that Burford's obvious purpose is to obtain a return on its investment, just as it does not matter that counsel's purpose typically is to earn a fee. Only Mr. Al–Saleh's purpose in communicating with Burford matters here. Mr. Al–Saleh is attempting to collect a debt owed by IOTC USA. To do so, Mr. Al–Saleh must continue to litigate with IOTC USA. This requires him to retain counsel and to pay that counsel. Mr. Al–Saleh determined that it was necessary or advantageous for him to seek assistance of Burford to enable him to fund his litigation efforts, meaning to pay his lawyers and other professionals. Each of these actions is a link in the same chain, leading to collection of the debt owed by IOTC USA. Each link in that chain is "in furtherance of rendition of legal services" and so has a "primary purpose" of facilitating rendition of legal services.

In any case, as far as this Court can tell the "primary purpose" test in the form described by IOTC USA has never been adopted by the Eleventh Circuit. The Fifth Circuit espoused a "primary motivating purpose" test in its opinion in *U.S. v. Davis*, 636 F.2d 1028 (5th Cir.1981). Although decisions of the Fifth Circuit from that year typically remain binding in the Eleventh Circuit, it is unclear whether Davis might be controlling law due to contradictory case law in the Fifth and Eleventh Circuits. *See United States v. Adlman*, 134 F.3d 1194, 1198 (2nd Cir.1998) (describing test articulated in *Davis* as "dictum, or in any event a statement going far beyond the issues raised in the case"); *U.S. v. Gericare Med. Supply Co.*, 2000 WE 33156442, *2–3 (S.D.Ala.2000) (describing case law). The test stated in *Davis* is actually much more forgiving than

IOTC USA would lead this Court to believe. The Court in *Davis* held that a communication may be protected by the work product doctrine even where no litigation is pending "as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation." *U.S. v. Davis,* 636 F.2d at 1040. In the present case, litigation was ongoing at all relevant times and, absent such litigation, there would have been no motivation at all for Mr. Al–Saleh and his counsel to communicate with Burford.

The facts of Eleventh Circuit decisions where work product protection was denied bear no resemblance to the facts here. For instance, in *In re Grand Jury Investigation (Harvey)*, also cited by IOTC USA in favor of the "primary purpose" test, the Eleventh Circuit confronted an attorney who had acted as a banker for and business advisor to a party who, five years later, was charged with a crime. 769 F.2d 1485 (11th Cir.1985). At the time of the party's communication with the attorney, which was later the subject of discovery requests, neither the party nor the attorney contemplated litigation. The facts before the Court today could hardly be more different. But for the necessity of suing IOTC USA for the money he is owed, Mr. Al–Saleh would not be communicating with his counsel in this case, much less non-attorney professionals such as Burford.

It may be true that some portion of the communications among Mr. Al–Saleh, his counsel, and Burford address mundane transactional matters. Importantly, in this case, any communication that does not at all concern ongoing litigation, prospective litigation, or the like, would not support IOTC USA's theory that Mr. Al–Saleh is an inappropriately active participant in these bankruptcy proceedings. The Court will not force Mr. Al–Saleh to sort through four years of correspondence, including tens of thousands of e-mails and their attachments, in order to provide IOTC USA with non-relevant information.

Substantial Need and Undue Hardship

[17] The next question is whether the Burford Communications are nevertheless discoverable in light of IOTC USAs "substantial need" and the "undue hardship" that it may suffer if required to obtain the information in another manner. They are not.

There is little doubt that the communications at issue—the very communications IOTC USA says it is looking for to support one theory in its Motion to Abstain—concern "mental impressions, conclusions, opinions or legal theories." They are opinion work product, under both federal and Florida law. Opinion work product is rarely discoverable.

IOTC USA argues that a so-called "pivotal issue doctrine" permits the Court to override the general rule in this circuit, and elsewhere, that opinion work product is almost never discoverable. IOTC USA argues that where the mental impressions of counsel are pivotal or central to the litigation before the court, those mental impressions may not be protected from discovery. To be clear, the Eleventh Circuit has never ruled either way as to whether work product protection should apply when the mental impressions of counsel are the pivotal or central issue in litigation. Decisions from trial courts in this circuit, and from other circuit courts of appeal, are not consistent. For instance, in *Doe v. U.S.,* the district court for the Southern District of Florida compelled discovery under the pivotal issue exception, citing Ninth Circuit precedent. 2015 WL 4077440 (S.D.Fla.2015) (citing *Holmgren v. State Farm Mut. Auto Ins. Co.,* 976 F.2d 573 (9th Cir.1992). But an earlier Southern District of Florida opinion denied application of the pivotal issue exception, citing a Fourth Circuit opinion. *Bd. of Trustees of Leland Stanford Jr.*

Univ. v. Coulter Corp., 118 F.R.D. 532 (S.D.Fla.1987) (citing *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir.1974), *cert. denied*, 420 U.S. 997, 95 S.Ct. 1438, 43 L.Ed.2d 680 (1975)).

Federal court decisions denying work product protection based on the "pivotal issue" doctrine largely concern factual circumstances that indicate bad faith. *See, e.g., Holmgren*, 976 F.2d 573; *see also Allstate Indem. Co. v. Ruiz*, 899 So.2d 1121 (Fla.2005) (permitting discovery of insurance company opinion work product in first-person bad faith claims under Florida law). Indeed, the bulk of the case law permitting discovery comes from bad faith settlement claims against insurers. Those cases, as in *Holmgren*, typically involve an insurance company that repeatedly attempts to settle with a claimant for an amount that is obviously well below the amount warranted. In those rare circumstances, the claimant requires access to the mental impressions of the insurer's agents and counsel, despite the availability of circumstantial evidence of the insurer's culpability. A component of the courts' reasoning is often the fact that the insurer's opinion work product was paid for by and ostensibly developed on behalf of the party now propounding discovery.

It is not necessary for this Court to rule whether the "pivotal issue doctrine" applies here because, even if it does, the facts of this case do not warrant its application. This is not a "rare and extraordinary circumstance," as required by the Eleventh Circuit to override the application of Rule 26(b)(3)(B). *See Cox*, 17 F.3d at 1422. Nor is it an "exceptional circumstance" as required by Florida law to override non-witness opinion work product protection. *See Mark Marks*, 654 So.2d at 1187.

The discovery at issue here is in support of IOTC USA's request for this Court to abstain from its involuntary bankruptcy case. IOTC USA argues that Mr. Al–Saleh filed the involuntary petition with an improper motivation and that his communications with Burford may illuminate this improper motive. The involvement of a litigation funder is not, in and of itself, indicative of an improper motivation. The Court is not aware of any law prohibiting Burford from funding Mr. Al–Saleh's litigation effort. Nor is the fact that Mr. Al–Saleh has been litigating with IOTC USA since 2008, and now files an involuntary bankruptcy petition, on its own indicative of bad faith. Mr. Al–Saleh has been owed a substantial sum for over eight years and, as his other attempts to collect on his debt have failed, he determined to use the present bankruptcy proceedings as a tool for collection. That is not a rare and extraordinary circumstance. Considering just this Court's docket, it is not even unusual. The facts surrounding Mr. Al–Saleh's engagement of and communication with a litigation funder are not in any way indicative of improper activity by those parties. IOTC USA has not met its burden to show "exceptional" or "rare and extraordinary circumstances" such that the Court might allow discovery of opinion work product. So, even if the "pivotal issue doctrine" applies here, which the Court does not determine, the requested discovery will not be permitted.

Work Product Protection—The Funding Agreement

[18] IOTC USA argues that a key fact at issue here is whether Mr. Al–Saleh has transferred some or all of his claim to Burford in exchange for litigation financing. IOTC USA believes that the Funding Agreement may address this question. The Funding Agreement itself is work product as it was entered into with the intent to facilitate litigation. The relevant information that IOTC USA seeks within the Funding Agreement is fact work product not subject to the extraordinary protection discussed above with regard to

opinion work product. Accordingly, the Court must determine whether IOTC USA has demonstrated a substantial need for the Funding Agreement, and whether IOTC USA will suffer an undue burden if it is not able to procure it.

IOTC USA has demonstrated a substantial need for the Funding Agreement because the agreement is central to one theory presented in its Motion to Abstain. Given the apparent complexity of the agreement and the admitted depth of Burford's involvement in the multi-faceted litigation against IOTC USA, no other document production, depositions, or other discovery methods will adequately substitute for the original document. Without access to key portions of the Funding Agreement, IOTC USA cannot hope to support a central component of the Motion to Abstain.

Courts have recently noted, however, that some terms of a litigation funding agreement represent an assessment of risk based on discussions of core opinion work product of the case. *See Carlyle burnt. Management v. Moonmouth Co.*, 2015 WL 778846, *8–9 (Del.Ch.2015); *Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co.*, 2015 WL 1540520, *4 (Del.Super.Ct.2015). Revealing certain terms of the agreement might disclose attorney mental impressions and opinion about the case. Thus, while the Court will require Mr. Al–Saleh to produce the Funding Agreement to IOTC USA, Mr. Al–Saleh may redact the terms of payment and any terms he reasonably believes may disclose mental impressions and opinion in relation to Mr. Al–Saleh's litigation with IOTC USA.

CONCLUSION

For the reasons stated above, the Court ORDERS AND ADJUDGES that:

1. The Third Motion to Compel [ECF No. 140] is GRANTED IN PART to the extent provided herein.

2. No later than April 28, 2016, Mr. Al–Saleh shall provide to IOTC, through counsel, a complete copy of the Funding Agreement. Mr. Al–Saleh may redact from the Funding Agreement all terms of payment and all terms Mr. Al–Saleh reasonably believes may reflect attorney mental impressions and opinions concerning his litigation against IOTC USA.[3]

3. No later than May 5, 2016, IOTC USA may object to Mr. Al–Saleh's redactions and/or request review of the un-redacted Funding Agreement by this Court *in camera*.

4. All remaining relief requested in the Third Motion to Compel is DENIED.

ORDERED in the Southern District of Florida on April 28, 2016.

IN RE: Michael Eugene CLONINGER, Debtor,

William Edward Cloninger, Plaintiff,

v.

Michael Eugene Cloninger, Defendant.

CASE NO. 11–83163–pwb
Adversary No. 12–5343–PWB

United States Bankruptcy Court,
N.D. Georgia, Atlanta Division.

Signed March 17, 2016

Filed March 18, 2016

Background: Brother of Chapter 7 debtor, proceeding pro se, filed adversary

3. Although this Order may be entered after the deadlines provided in paragraphs 2 and 3, the Court's ruling was announced on the record at a hearing held on April 26, 2016 and the parties agreed to be bound by such deadlines.