

# Preservation of the Attorney-Client Privilege and the Work Product Doctrine in Bankruptcy

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## I. Introduction

The attorney-client privilege is the oldest of the recognized common-law privileges protecting communications.<sup>1</sup> It serves “to encourage full and frank communication between attorneys and their clients” and thereby promotes broader public interest in the observance of law and administration of justice.<sup>2</sup> Such open communication is necessary to ensure that attorneys have the relevant information to consider when offering a client legal advice. The public policy rationale behind the attorney-client privilege must, however, be balanced against the competing interest of the fair administration of justice through the production of relevant evidence.<sup>3</sup> Accordingly, most courts have construed the various evidentiary privileges, including the attorney-client privilege, narrowly in order to curtail the exclusion of evidence.<sup>4</sup>

The attorney-client privilege applies to corporations as well as individuals. Much like the attorney-client privilege which remains in effect beyond the death of an individual client,<sup>5</sup> it similarly persists into the bankruptcy proceedings of a corporation. The public policy goal of open and frank communication with attorneys is equally relevant in the bankruptcy context as elsewhere. In the ever-changing bankruptcy landscape where the roles of various stakeholders can change drastically throughout a case, attorney-client privilege issues are particularly complicated. Failed negotiations among stakeholders can lead to protracted litigation, which can last years beyond the confirmation of a plan of liquidation or reorganization. In many cases, litigation trusts are created for the prosecution of residual claims maintained by the estate. In this residual litigation, complicated attorney-client privilege issues

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may arise surrounding the various parties that were active during the pendency of the bankruptcy case.

The Bankruptcy Court for the Western District of Texas was faced with such a situation in a 2009 case. In *Osherow v. Vann, et al (In re Hardwood P-G, Inc.)*,<sup>6</sup> the defendants in preference actions brought by a litigation trustee sought the production of two reports prepared by professionals retained during the bankruptcy case by the debtors and counsel to the creditors' committee. The litigation trustee moved the court for a protective order to prevent production of the reports which, he asserted, were protected under the attorney-client privilege and the work product doctrine. The court agreed with the litigation trustee and ruled that the reports were protected by the asserted privilege and doctrine. The litigation trustee was able to assert the attorney-client privilege as successor-in-interest to the debtors and the creditors' committee. The *Hardwood P-G* decision is discussed below in detail.

## II. Case Summary

In *Hardwood P-G*, a litigation trustee charged with the task of prosecuting various causes of action for preferences and fraudulent conveyances sought to assert the attorney-client privilege and the work product doctrine in order to prevent the compelled production of two reports prepared by professionals retained by the debtors and the creditors' committee during the debtors' bankruptcy case. The litigation trustee, as successor-in-interest to the debtors and the creditors' committee, came into possession of two reports prepared during the bankruptcy case by the attorneys of the creditors' committee and by the financial advisors of the debtors respectively. The debtors had hired Alvarez & Marsal, LLC (A&M) as forensic accountants to investigate their potential causes of action for preferential and fraudulent transfers. A&M prepared a report (the A&M Report) that set forth its findings.<sup>7</sup> The creditors' committee retained Haynes and Boone, LLP (H&B) as its counsel. During the course of that representation, H&B prepared a report (the H&B Report) which, together with the A&M Report, outlined the debtors' possible preference and fraudulent conveyance causes of action.<sup>8</sup> Both of the reports were prepared prior to the confirmation of the debtors' joint liquidating plan of reorganization (the Plan), which provided for the establishment of a litigation trust to be administered by the litigation trustee.<sup>9</sup>

In the avoidance proceedings giving rise to the *Hardwood P-G* decision, the litigation trustee moved Judge Leif M. Clark to issue an order declaring that the reports were "confidential, privileged, and not discoverable in this case."<sup>10</sup> The litigation trustee asserted that the reports were

protected by the attorney-client privilege, either directly or under the “common interest” doctrine, and also that they constituted protected attorney work product. His claim was that, as successor-in-interest to the preference and avoidance claims and as transferee of all of the debtors’ assets, he was entitled to assert the attorney-client privilege originally held by both the creditors’ committee and the debtors. Alternatively, he argued that if he was not in fact a successor-in-interest, he could nevertheless assert the attorney-client privilege under the “common interest” doctrine because the litigation trustee shared with the creditors’ committee and the debtors “common legal interests: to pursue and liquidate the estate’s legal claims in order to realize the value of those assets for the benefit of creditors.”<sup>11</sup> Finally, the litigation trustee argued that the reports were protected under the work product doctrine, which is meant to shield from discovery documents that would reveal the mental impressions, legal opinions, or trial strategy of an attorney.<sup>12</sup>

In response to the litigation trustee’s motion, the defendants in the avoidance proceedings at issue argued that the reports were not protected by either the attorney-client privilege or by the work product doctrine. With respect to the H&B Report, the defendants asserted that it was not subject to attorney-client privilege for two reasons: (i) the report was prepared not for the litigation trustee but for the creditors’ committee; and (ii) any privilege was waived when the report was distributed to a number of parties, including various creditors’ committee members and their respective counsel as well as the litigation trustee and his counsel.<sup>13</sup> Further, the defendants argued that the common interest doctrine could not be asserted by co-plaintiffs, rather only by co-defendants, and therefore the litigation trustee could not invoke that doctrine to shield the reports from the defendants.<sup>14</sup> It was also contended that the H&B Report was not prepared in anticipation of the current litigation, so it did not constitute work product for the purposes of this case.<sup>15</sup> Regarding the A&M Report, the defendants contended that, by definition, it could not constitute attorney work product since it had been prepared by an accounting firm and not by an attorney. Moreover, they argued, the fact that the accountants who prepared the report established that the attorney-client privilege with respect to that document had been waived by disclosure. The defendants further asserted that A&M was hired by the debtor and not its counsel, so the accountant’s work could not be privileged under the attorney-client privilege. Finally, the defendants took the position that the court should compel production of the reports because, without access to the reports, the defendants would suffer undue hardship.

### III. The Court's Analysis

In ruling for the litigation trustee, Judge Clark authored a thorough opinion that addressed each of the arguments made by the parties. In so doing, he provided a survey of current law relating to the attorney-client privilege and the work product doctrine in the bankruptcy context. Judge Clark's decision relies heavily on several cases in which the attorney-client privilege was found to be properly asserted by some kind of successor entity. However, in all of those cases, unlike in *Hardwood P-G*, the attorney-client privilege was asserted by the managers of an entity that continued to maintain operating assets received from its predecessor. In *Hardwood P-G*, it would appear that the litigation trust contained nothing more than various claims and perhaps some cash with which to fund the litigation. Accordingly, Judge Clark's extension of the reasoning in the cases that he cites may be vulnerable to scrutiny.

#### A. The Attorney-Client Privilege

##### 1. The court's theory

In his discussion of whether a litigation trustee is the holder of an attorney-client privilege, Judge Clark, citing the reasoning of the U.S. Supreme Court in *Commodity Futures Trading Com'n v. Weintraub*,<sup>16</sup> noted that the assertion of the attorney-client privilege on behalf of a corporation outside of bankruptcy is the domain of the managers of the corporation, and this power can, and does, change hands when control of the company shifts to new managers.<sup>17</sup> In the bankruptcy context, because all of a corporation's property is transferred to the estate, it is the trustee or debtor in possession that succeeds to the role of the prepetition managers and has the authority to assert or waive the attorney-client privilege on behalf of the debtor corporation.<sup>18</sup>

Judge Clark endorsed the pragmatic approach to the transfer of the attorney-client privilege set forth in *Soverain Software LLC v. Gap, Inc.*,<sup>19</sup> a case decided by the District Court for the Eastern District of Texas:

“[W]hether the attorney-client relationship transfers...to the new owners turns on the practical consequences rather than the formalities of the particular transaction.” [citations omitted] If the practical consequences of the transaction result in the transfer of control of the business and the continuation of the business under new management, the authority to assert or waive the attorney-client privilege will follow as well. *See Community [sic] Futures Trading Commn. V. Weintraub*, 471 U.S. 343, 349, 85 L. Ed. 2d 372, 105 S. Ct. 1986 (1985) (“when control of a corporation passes to new

management, the authority to assert and waive the corporation's attorney-client privilege passes as well.")<sup>20</sup>

In applying this approach to the facts of the case before it, the *Hardwood P-G* court found that the litigation trustee, under *Weintraub*, properly became the holder of the debtors' attorney-client privilege. The court relied primarily on the fact that all of the debtors' assets, including the claims that had been asserted on behalf of the debtors' estate by the creditors' committee, were transferred to the litigation trust under the management and control of the litigation trustee.<sup>21</sup>

This ruling supports the underlying purpose of the attorney-client privilege in this context to enable the provision of legal advice and counseling with respect to the particular claims pursued by the estate and later by the litigation trustee. Yet, the analogy Judge Clark relies upon does not necessarily follow. In *Weintraub* and *Sovereign Software*, the successor entities maintained some degree of ongoing business operations while in *Hardwood P-G* the only vestiges remaining of the business are the claims asserted by the litigation trustee. Accordingly, the litigation trustee is not the analogue of the prepetition managers of the business as Judge Clark's reasoning maintains. Therefore, Judge Clark's reliance on this less-than-perfect comparison may not withstand scrutiny by other courts facing similar circumstances.

The *Hardwood P-G* court also determined that the litigation trustee could assert the attorney-client privilege of the creditors' committee in the avoidance proceedings commenced by the creditors' committee.<sup>22</sup> In so ruling, the court discussed the typical role of statutory committees in bankruptcy cases with respect to the prosecution of claims on behalf of the estate. The court noted that committees, in discharging their statutory duties, are entitled to engage their own counsel and that any communications between the committee and its counsel are protected by the attorney-client privilege, unless waived. Disclosure of the reports to members of the committee and to their individual counsel therefore did not waive the privilege. Further, the court discussed the common practice whereby committees often move the bankruptcy court for permission to bring a lawsuit on behalf of the debtor, with any recovered proceeds returned to the estate. In the instant case, just such an arrangement was in place with the creditors' committee, yet the defendants had improperly argued that the claims that had been originally asserted by the creditors' committee no longer belonged to the estate and thereby left the litigation trustee without standing to prosecute them. Because the claims asserted by the creditors' committee were derivative in nature—that is, they were prosecuted by the creditors' committee on behalf of the estate—those actions remained assets of the estate and were properly asserted by the litigation trustee.<sup>23</sup>

## 2. Elements of the attorney-client privilege

Turning to whether the reports themselves were protected by the attorney-client privilege, the court outlined the elements that must be demonstrated by the party asserting the privilege:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made is
  - (a) a member of a bar or a court, or his subordinate, and
  - (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed
  - (a) by his client
  - (b) without the presence of strangers
  - (c) for the purpose of securing primarily either
    - (i) an opinion on law;
    - (ii) legal services; or
    - (iii) assistance in some legal proceeding; and
  - (d) not for the purpose of committing a crime or tort; and
- (4) the privilege has been
  - (a) claimed; and
  - (b) not waived by the client.<sup>24</sup>

## 3. Disclosure to professionals

In addition to the elements listed above, the court noted that the Fifth Circuit Court of Appeals had adopted the so-called *Kovel* exception to the general waiver-by-disclosure rule for accountants and other professionals hired to assist the lawyer in providing legal advice.<sup>25</sup> In *U.S. v. Kovel*, the Second Circuit Court of Appeals held that disclosure of confidential information to professionals hired to assist the lawyer in providing legal advice to clients does not result in waiver of the attorney-client privilege under certain circumstances.<sup>26</sup>

Further, the court noted that the *Kovel* exception to the waiver of the attorney-client privilege applies even when the professional hired to assist in the provision of legal services is technically engaged by a party who is not an attorney, for example, the debtor. This, the court expanded, is especially relevant in the bankruptcy context where third-party pro-

professionals such as financial advisors, “*must* be hired by the bankruptcy estate, or risk not being compensated for their services.”<sup>27</sup> The reasons for the protection of communications to third-party professionals has nothing to do with who hired the third party but rather the nature of that party’s role in the provision of legal services. Accordingly, because the A&M Report was prepared by the debtors’ forensic accountants in order to assist the debtors’ attorneys in providing legal advice to their clients, the court held that the *Kovel* exception to the waiver-by-disclosure rule had been met and that the attorney-client privilege was thus preserved.

#### 4. The common interest doctrine

The court then discussed another exception to the waiver-by-disclosure rule, the common interest doctrine. This doctrine applies “where the parties undertake a joint effort with respect to a common legal interest, and the doctrine is limited strictly to those communications made to further an ongoing enterprise.”<sup>28</sup> Contrary to the defendants’ assertions, the doctrine can apply to plaintiffs as well as defendants.<sup>29</sup> In the Fifth Circuit, as observed in *Hardwood P-G*, for the common interest doctrine to apply, there must be a palpable threat of litigation at the time when the communications are made.<sup>30</sup> For the purposes of delineating privileges, courts, including the *Hardwood P-G* court, have found that “bankruptcy itself constitutes ‘litigation.’”<sup>31</sup>

During the pendency of the *Hardwood P-G* bankruptcy proceedings, the debtors, the creditors’ committee, and the creditors holding secured claims had agreed to work in concert for the ultimate purpose of confirming a liquidating plan of reorganization, which included arrangements for the pursuit of claims held by the estate. In furtherance of that goal, the debtors hired A&M to assist them in analyzing those causes of action, and the report prepared by A&M was shared among the parties. The debtors, the creditors’ committee and the secured lenders worked towards the common legal goal of investigating and recovering the debtors’ assets. These parties, acting in concert, were the only ones to see the A&M report. Therefore, the Court held that the common interest doctrine was properly asserted to protect the A&M Report from disclosure.

#### B. The Work Product Doctrine

The work product doctrine protects from discovery documents prepared by an attorney or his or her representative in anticipation of litigation.<sup>32</sup> Parties seeking the production of such documents must demonstrate a “substantial need” for the documents or must show that they will suffer “undue hardship” if the documents sought are not produced.<sup>33</sup> Something more than a self-serving, broad statement of need is required for the court

to find such harm and justify compelling the production of protected documents. Generally, courts will not compel production of attorney work product when the information sought can be obtained without production of the documents at issue.<sup>34</sup> The court found that both of the reports were protected by the work product doctrine because they were prepared in anticipation of litigation and “constitute both H&B’s and A&M’s mental impressions and strategies with regard to this litigation.”<sup>35</sup>

In *Hardwood P-G*, the court refused to compel the production of the reports, holding that the litigation trustee’s right to assert a work product objection had not been waived by disclosure.<sup>36</sup> The court concluded that even though the debtors and the creditors’ committee for whom the reports were prepared no longer existed at the time that the work product doctrine was asserted, the litigation trustee was the successor-in-interest to those entities, and they had all kept the documents sufficiently confidential. As such, the reports were protected work product regardless of the change of the custodian of the documents. According to the court, “the [r]eports do not cease to be opinion work product simply because a plan has been confirmed.”<sup>37</sup>

In addition to the reports, the litigation trustee, based on the work product doctrine, sought to shield from discovery certain information requested in various interrogatories and requests for admission propounded by the defendants.<sup>38</sup> The contested information related to the identity of persons interviewed by the litigation trustee’s predecessors-in-interest prior to the filing of the complaint and to those witnesses whose testimony he would rely upon at trial. The court, while noting that the work product doctrine does not extend to the underlying facts relative to the litigation,<sup>39</sup> nonetheless ruled that the identity of witnesses is protected.<sup>40</sup> In so doing, the court discussed a split in district court decisions as to “whether the identification of witnesses or persons is protected by work product.”<sup>41</sup> The court adopted the rationale of those courts holding that revealing the identity of persons interviewed and potential witnesses could reveal mental impressions and trial strategy. In this case, the defendants were well aware that the litigation trustee did not interview any witnesses himself. What the defendants really sought was a list of those persons who were interviewed by A&M and H&B while they were preparing the reports for the debtors and the creditors’ committee. That information, the court held, was attorney work product and was, for the reasons stated above, protected from compelled disclosure.

#### IV. Commentary

When the roles of stakeholders in a bankruptcy case are constantly shifting, the borders delineating the attorney-client relationship for the

purpose of privilege can become blurred. The *Hardwood P-G* decision illustrates the complexity of privilege issues arising in the bankruptcy context and offers some answers to what kind of information is privileged. As liquidating plans of reorganization become more prevalent, more parties will be confronted with the attorney-client privilege and work product challenges faced by the *Hardwood P-G* litigation trustee. Accordingly, it is imperative for practitioners to consider the impact of their actions from the outset of an engagement. Decisions made early on in a bankruptcy case can have a substantial impact on litigation that may continue long after the confirmation of a plan. The *Hardwood P-G* decision provides several teaching points that practitioners should consider in their representation of clients in bankruptcy cases.

One of the reports at issue in the *Hardwood P-G* case was prepared by forensic accountants for the debtors' use in developing potential claims to avoid and recover fraudulent and preferential transfers. In virtually all bankruptcies of a sufficient size and complexity, the debtors and other parties in the case will retain accountants, financial advisors, or other consultants to assist in developing and asserting their interests in the case. Often, these third parties will prepare documents containing confidential information or participate in confidential discussions for the purpose of assisting in an attorney's representation of a client. Generally, the participation or mere presence of a third party will result in the waiver of attorney-client privilege. However, under the *Kovel* exception to the waiver-by-disclosure rule, the privilege is not waived when the third party is acting akin to a translator assisting the lawyer in the provision of legal services.<sup>42</sup>

The *Kovel* doctrine was invoked in *Hardwood P-G* to protect the A&M Report from discovery. This example illustrates how important the *Kovel* exception to the waiver-by-disclosure rule is in the bankruptcy context. As cases grow more and more complex, the participation of third-party financial advisors and consultants becomes an absolute necessity for attorneys. Without the *Kovel* exception protecting this information from discovery, attorneys might curtail the use of these third-party advisors to the detriment of their clients' interests. When engaging and working with financial consultants, accountants, and other service providers, practitioners should keep in mind the rationale of the *Kovel* decision as it was applied in the *Hardwood P-G* decision. Any documents describing the scope and purpose of the engagement should note that the third party's role is to facilitate the lawyer in providing legal services to the client. At the same time, practitioners should keep in mind the limits of the doctrine and carefully consider whether the

participation of third parties is appropriate in sensitive discussions with their clients.

Sharing confidential information cannot always be avoided—particularly in the bankruptcy context where parties are regularly negotiating with a view toward the goal of reaching consensual resolutions of important issues in a case. In the interest of reaching a business deal, often in a short timeframe, it can be easy to lose sight of privilege and work product issues that may only arise months or even years later. Moreover, the resolution of litigation claims during the course of a bankruptcy case can have an important effect on the ultimate return to creditors, particularly general unsecured creditors who often receive only cents on the dollar. It may be useful to share privileged information in order to reach an agreement. The common interest doctrine, as employed by the litigation trustee in *Hardwood P-G*, allows parties such as creditors' committees and debtors to share privileged information beyond the attorney-client relationship in an effort to reach a settlement of litigation claims without thereby waiving the privilege. Further, the common interest doctrine obviates the duplication of labor and thereby allows for a level of efficiency that would otherwise be unachievable. The risk that should be considered is that courts may not always extend the common interest doctrine to cover the often-complex and shifting relationships among parties in a bankruptcy case.

Disclosures of privileged information should be made only to those parties with whom a common interest is truly shared. Before disclosing privileged information, the nature of the relationship should be such that a court could find that the parties given access to privileged information do share a particular common interest. Without the common interest doctrine, parties might be less willing or less able to share information and therefore less likely to reach agreements on difficult issues.

In addition to the *Kovel* exception and the common interest doctrine, the *Hardwood P-G* opinion also discussed another important issue relating to the preservation of the attorney-client privilege. The court ruled that the litigation trustee, as the analogue of the prepetition managers of the assets of the corporation, was the successor-in-interest to the debtors and the holder of their attorney-client privilege. The court put particular weight on the fact that all of the assets of the debtors were transferred into the litigation trust. The mere fact that all of the assets left in the debtors' estates were transferred to the litigation trust may not necessarily render the litigation trustee the successor-in-interest to the attorney-client privilege under *Weintraub* and *Soverain Software* as the *Hardwood P-G* opinion holds. Because the litigation trust did not contain any operating assets of the debtors' former business, *Weintraub*

and *Sovereign Software* are arguably distinguishable. Notwithstanding the questionable applicability of these cases to the *Hardwood P-G* facts, Judge Clark reached a conclusion that supports the underlying purpose of the attorney-client privilege. In *Hardwood P-G*, the limited purpose of the attorney-client privilege was to allow the debtors and the committee, and later the litigation trustee, to communicate with their counsel regarding the analysis and prosecution of claims held by the debtors' estates. Judge Clark's ruling ensured that the attorney-client privilege and the work product doctrine continued to operate despite confirmation of the plan. It remains to be seen, however, whether Judge Clark's legal reasoning supporting this ruling will withstand scrutiny as future cases are decided.

## V. Conclusion

The age-old attorney-client privilege is as important in the bankruptcy context as it is in other contexts involving legal disputes. In bankruptcy cases, however, the roles of stakeholders often evolve over the course of the case. At points, it may be beneficial for certain parties to share privileged information in order to facilitate negotiations or to meet other goals of the case in the most efficient manner possible. Unfortunately, any time that privileged information is disclosed beyond the immediate attorney-client relationship, the client risks waiving its right to keep that information from discovery by adverse parties in future disputes. The *Hardwood P-G* decision offers one approach to complex privilege issues in the bankruptcy context. It illustrates that the seeds of privilege disputes are sown early in a case and that practitioners should be vigilant in their representation of clients in bankruptcy cases with an eye towards a range of possible future litigation scenarios.

## NOTES

1. See *Upjohn Co. v. U.S.*, 1981-1 C.B. 591, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584, Fed. Sec. L. Rep. (CCH) P 97817, 1980-81 Trade Cas. (CCH) ¶ 63797, 81-1 U.S. Tax Cas. (CCH) P 9138, 7 Fed. R. Evid. Serv. 785, 30 Fed. R. Serv. 2d 1101, 47 A.F.T.R.2d 81-523 (1981) (citing 8 J. Wigmore, *Evidence* § 2290 (McNaughton rev. ed. 1961) (describing the history of the attorney-client privilege)).

2. *Upjohn*, 1981-1 C.B. 591, 449 U.S. at 389.

3. See, e.g., *Trammel v. U.S.*, 445 U.S. 40, 46, 100 S. Ct. 906, 63 L. Ed. 2d 186, 5 Fed. R. Evid. Serv. 737 (1980) (noting that testimonial privileges contravene the well-established principle that "the public... has a right to every man's evidence" and, therefore, "must be strictly construed and 'accepted only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" (citations omitted)).

4. See *Trammel*, 445 U.S. at 46.

5. See *Swidler & Berlin v. U.S.*, 524 U.S. 399, 401, 118 S. Ct. 2081, 141 L. Ed. 2d 379, 49 Fed. R. Evid. Serv. 1, 40 Fed. R. Serv. 3d 745, 159 A.L.R. Fed. 729 (1998).

6. In re Hardwood P-G, Inc., 403 B.R. 445 (Bankr. W.D. Tex. 2009).
7. Hardwood P-G, 403 B.R. at 450-51.
8. Hardwood P-G, 403 B.R. at 450-51.
9. Hardwood P-G, 403 B.R. at 451.
10. Hardwood P-G, 403 B.R. at 452.
11. Hardwood P-G, 403 B.R. at 452-53.
12. Hardwood P-G, 403 B.R. at 452.
13. Hardwood P-G, 403 B.R. at 454.
14. Hardwood P-G, 403 B.R. at 454.
15. Hardwood P-G, 403 B.R. at 454.
16. Commodity Futures Trading Com'n v. Weintraub, 471 U.S. 343, 105 S. Ct. 1986, 85 L. Ed. 2d 372, 12 Bankr. Ct. Dec. (CRR) 1247, 12 Collier Bankr. Cas. 2d (MB) 651, Bankr. L. Rep. (CCH) P 70360, 17 Fed. R. Evid. Serv. 529, 1 Fed. R. Serv. 3d 417 (1985).
17. Hardwood P-G, 403 B.R. at 455.
18. Hardwood P-G, 403 B.R. at 455, citing Weintraub, 471 U.S. 343.
19. Sovereign Software LLC v. Gap, Inc., 340 F. Supp. 2d 760, 763 (E.D. Tex. 2004).
20. Hardwood P-G, 403 B.R. at 455, citing Sovereign, 340 F. Supp. 2d at 763 (internal citations omitted).
21. Hardwood P-G, 403 B.R. at 456. It should also be noted that the Hardwood P-G Litigation Trust Agreement expressly deemed the litigation trustee to be the successor-in-interest to the creditors' committee and the debtors. While this fact was not mentioned by the court in its analysis of the attorney-client privilege issues, it potentially weighed in favor of the court's ultimate determination.
22. Hardwood P-G, 403 B.R. at 456.
23. Hardwood P-G, 403 B.R. at 457-58.
24. Hardwood P-G, 403 B.R. at 457 (citing Ferko v. National Ass'n for Stock Car Auto Racing, Inc., 218 F.R.D. 125,134 (E.D. Tex. 2003)). It should also be noted that the attorney-client privilege can be asserted to protect communications with prospective clients and counsel. See, e.g., Matter of Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 124 n.1, Bankr. L. Rep. (CCH) P 71525, 22 Fed. R. Evid. Serv. 52 (3d Cir. 1986).
25. Hardwood P-G, 403 B.R. at 458. The court also noted that:  

[I]n defining 'legal advice,' one court explained that [i]t is not easy to frame a definite test for distinguishing legal from nonlegal advice... [T]he most that can be said by way of generalization is that a matter committed to a professional legal adviser is prima facie so committed for the sake of the legal advice which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice.
- Hardwood P-G, 403 B.R. at 458, citing S.E.C. v. Brady, 238 F.R.D. 429, 439, 67 Fed. R. Serv. 3d 26 (N.D. Tex. 2006) (citing Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 610, 1977-2 Trade Cas. (CCH) ¶ 61591, 1978-1 Trade Cas. (CCH) ¶ 61879, 23 Fed. R. Serv. 2d 1473, 24 Fed. R. Serv. 2d 1201 (8th Cir. 1977) (rejected by, Republic of Philippines v. Westinghouse Elec. Corp., 132 F.R.D. 384, 17 Fed. R. Serv. 3d 1476 (D.N.J. 1990)) and (disapproved of by, U.S. v. Massachusetts Institute of Technology, 957 F. Supp. 301, 97-1 U.S. Tax Cas. (CCH) P 50269, 37 Fed. R. Serv. 3d 711, 79 A.F.T.R.2d 97-595 (D. Mass. 1997)) and (rejected by, In re Columbia/HCA Healthcare Corp. Billing Practices Litigation, 293 F.3d 289, 58 Fed. R. Evid. Serv. 1451, 53 Fed. R. Serv. 3d 789, 2002 FED App. 0201P (6th Cir. 2002)), (quoting 8 Wigmore, Evidence § 2296 (McNaughton rev. 1961)).
26. Hardwood P-G, 403 B.R. at 458 n. 5:  

In *United States v. Kovel*, 296 F.2d 918, 921 (2d. Cir. 1961), the court set out four factors that must be met for the attorney-client privilege to extend to third parties: 1) third party

must be an agent of the attorney; 2) third party must facilitate the communication between the attorney and the client for legal advice; 3) communications with the third party must be kept confidential; 4) the privilege must not be waived. *Kovel 296 F.2d at 921*.

27. Hardwood P-G, 403 B.R. at 458 (emphasis in original).

28. Hardwood P-G, 403 B.R. at 459 (citing *U.S. v. BDO Seidman, LLP*, 492 F.3d 806, 815-16, 2007-2 U.S. Tax Cas. (CCH) P 50530, 100 A.F.T.R.2d 2007-5052 (7th Cir. 2007), cert. denied, 552 U.S. 1242, 128 S. Ct. 1471, 170 L. Ed. 2d 296 (2008)).

29. Hardwood P-G, 403 B.R. at 460.

30. Hardwood P-G, 403 B.R. at 459.

31. Hardwood P-G, 403 B.R. at 459 (citing *Brown v. Adams* (In re Fort Worth Osteopathic Hosp., Inc.), 2008 Bankr. LEXIS 3156, at \*44 (Bankr. N.D. Tex. Nov. 14, 2008) (Lynn, J.)); see also *In re Tri State Outdoor Media Group, Inc.*, 283 B.R. 358, 364, 54 Fed. R. Serv. 3d 668 (Bankr. M.D. Ga. 2002) (saying that “[w]hile Bankruptcy is not entirely litigation, it is an adversarial proceeding, particularly when considering the rights of the debtor versus the rights of an unsecured creditor”).

32. The federal work product doctrine, which involves a fact-intensive determination, has been incorporated into the Federal Rule of Civil Procedure 26, which, in turn, is incorporated into bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7026. Fed. R. Civ. P. 26(b) provides:

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if: (i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection against disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.

33. The court noted that, in the Fifth Circuit, a distinction is recognized between opinion work product and regular work product:

Opinion work product, which is the mental impressions, conclusions, opinions, or legal theories of lawyers or other representative of the party that is in litigation, has ‘almost absolute protection...’ *SEC v. Brady*, 238 F.R.D. at 442. Examples of opinion work product include investigatory reports (containing summaries of witness interviews) ‘documents, including business records, that were specifically selected and compiled by a party or its representative in preparation for litigation are opinion work product because the mere acknowledgment of their selection would reveal mental impressions concerning the potential litigation.’ *Id.* If the material sought is opinion work product, the party seeking the materials must establish ‘a compelling need for the information... [which is] nearly an absolute protection of opinion work product.’ *Id.* What constitutes a compelling need is not defined in any case that this court could find. It is clearly something more than either ‘substantial need’ or ‘undue hardship.’ See *SEC v. Brady*, 238 F.R.D. at 443-444; *Simmons Foods, Inc. v. Willis*, 196 F.R.D. at 613.

Hardwood P-G, 403 B.R. at 463-464.

34. See *In re International Systems and Controls Corp. Securities Litigation*, 693 F.2d 1235, 1240, Fed. Sec. L. Rep. (CCH) P 99036, 35 Fed. R. Serv. 2d 732 (5th Cir. 1982).

35. Hardwood P-G, 403 B.R. at 464.

36. Waiver by disclosure under the work product doctrine differs in a subtle but substantial way from waiver of attorney-client privilege. While attorney-client privilege is waived upon

disclosure to any third party outside of the immediate attorney-client relationship, many disclosures of attorney work product will not waive work product protection. Courts generally find that a party has waived the right to assert the work product doctrine “if work-product is disclosed to adversaries or treated in a manner that substantially increases the likelihood that an adversary will come into possession of the material.” *Hardwood P-G*, 403 B.R. at 463 (citing *Ferko v. National Ass’n for Stock Car Auto Racing, Inc.*, 218 F.R.D. at 396).

37. *Hardwood P-G*, 403 B.R. at 465.

38. The requests for admission and interrogatories at issue are reproduced in the *Hardwood P-G* opinion, see *Hardwood P-G*, 403 B.R. at 466-469.

39. *Hardwood P-G*, 403 B.R. at 470.

40. *Hardwood P-G*, 403 B.R. at 470.

41. *Hardwood P-G*, 403 B.R. at 470 (citing *Brody v. Zix Corp.*, 2007 U.S. Dist. LEXIS 38230, at \*4-5 (noting the split and collecting cases)). One line of cases holds disclosure of the identity of interviewees by an adversary reveals that party’s litigation strategy, which is protected under the work product doctrine. See, e.g., *Electronic Data Systems Corp. v. Steingraber*, 2003 WL 21653405 at \*2 (E.D. Tex. 2003) (rejected by, *Hubbard v. Bankatlantic Bancorp, Inc.*, 2009 WL 3856458 (S.D. Fla. 2009)); *In re Ashworth, Inc. Securities Litigation*, 213 F.R.D. 385, 389 (S.D. Cal. 2002) (rejected by, *Hubbard v. Bankatlantic Bancorp, Inc.*, 2009 WL 3856458 (S.D. Fla. 2009)); *Ferruza v. MTI Technology*, 2002 WL 32344347 at \*3 (C.D. Cal. 2002) (rejected by, *Hubbard v. Bankatlantic Bancorp, Inc.*, 2009 WL 3856458 (S.D. Fla. 2009))). The other line of cases finds that the identity of interviewees is not protected work product if those persons have knowledge of relevant facts. See, e.g., *Mazur v. Lampert*, 2007 WL 917271 at \*4 (S.D. Fla. 2007); *Miller v. Ventro Corp.*, 2004 WL 868202 at \*2 (N.D. Cal. 2004); *In re Theragenics Corp. Securities Litigation*, 205 F.R.D. 631, 635-36 (N.D. Ga. 2002); *In re Aetna Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) P 90489, 1999 WL 354527 at \*3 (E.D. Pa. 1999).

42. In *Kovel*, the court analogized the use of an accountant to the use of a foreign language translator, noting that “accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases.” *Kovel*, 296 F.2d at 922.