UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

FRED H. BAME, BKY 99-40683

Debtor.

JAMES E. RAMETTE, TRUSTEE

Plaintiff, ADV 99-4278

-v.-

FRED H. BAME, MEMORANDUM ORDER

Defendant.

At Minneapolis, Minnesota, August 21, 2000.

The above entitled matter came on for hearing on April 26, 2000, on the motion of the Plaintiff, Trustee James E. Ramette ("Trustee") to compel discovery. Randall Seaver appeared for the Trustee; Thomas Miller and Peter Thompson represented the Debtor; David Orenstein appeared on behalf of Attorney Sidney Kaplan. The motion related to two subpoenas issued by the Trustee to law firms regarding their representation of Debtor/Defendant Fred Bame ("Debtor"). This order will address only the motion as it relates to the Attorney Sidney Kaplan and his law firm. Based upon the record before the court and the briefs and arguments of counsel, the court makes the following findings and conclusions.

The Debtor's bankruptcy case was commenced on February 10, 1999, on the filing of an involuntary Chapter 7 petition. On February 16, 1999, the Debtor voluntarily converted the case to one under Chapter 11. On May 19, 1999, the Debtor's case was converted, over the Debtor's objection and at the urging of virtually all his creditors, back to a Chapter 7 proceeding. The Trustee was appointed to serve as the trustee of the Debtor's case.

In the course of administering the estate, the Trustee discovered what he believed to be numerous inconsistencies, errors, and omissions in the Debtor's schedules. In addition, the Trustee discovered that the Debtor had transferred significant assets with what the Trustee believed to be an intent to hinder, delay, or defraud Debtor's creditors. For these and other reasons, the Trustee filed a complaint commencing the present adversary proceeding, which seeks to deny the Debtor his discharge and to recover property of the estate. In response, the Debtor signed a confession of judgment. Based upon the confession of judgment and the agreement of the parties, the court entered judgment on September 27, 1999, denying the Debtor his discharge. The issue of the Trustee's right to a money judgment was reserved pending further discovery.

As part of the discovery in this proceeding, the Trustee issued two subpoenas, which are the subject of the present motion. The subpoena addressed in this order was served upon Attorney Sidney Kaplan ("Kaplan"). Kaplan had represented the Debtor on various estate planning matters, dating back to at least 1981. Although the events relevant to this motion occurred while the Debtor served as the Debtor-in-Possession, at all times Kaplan represented the Debtor individually and not as the Debtor-in-Possession.

The subpoena required Kaplan to appear for a deposition and sought the following documents:

> 1. Any and all billing statements, invoices, or other documents relating to or evidencing fees and the basis therefore which were charged to Fred H. Bame on any matter from February 10, 1999 to date.
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> 2. Copies of any wills, drafts of wills, codicils to wills, drafts of codicils to wills, personal property lists, drafts of personal property lists, contracts, deeds, promissory notes, and any and all other documents relating in any way to the assets or liabilities of Fred H. Bame or JoAnna Bame, and the contemplated or actual transfer, by bequest or otherwise, of any of those assets.
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> 3. Copies of any and all notes, memoranda, or other documents relating to or evidencing the matters discussed at a meeting held on May 10, 1999, which meeting was apparently attended by Sidney Kaplan, Pete Jasper, Fred H. Bame, and JoAnna Bame.
>
> 4. Any and all documents reviewed or discussed at the May 10, 1999 meeting.

Kaplan responded to the subpoena with an assertion that many of the documents requested were subject to the attorney-client privilege or constituted attorney work product.[1] He produced all documents that he believed were not privileged and delivered a privilege log describing in general terms the relevant documents that were not turned over.[2] Kaplan also appeared for his deposition and responded to most of the Trustee's questions. However, he asserted the attorney-client privilege with respect to any information regarding the specific discussions occurring during the May 10, 1999, meeting involving Kaplan, the Debtor, the Debtor's wife JoAnna, and the Debtor's accountant Pete Jasper ("May 10 meeting"). He also refused to answer questions regarding preparation of any wills or trusts for the Debtor.[3]

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[1] The assertion of the work product doctrine was not argued or briefed to the court.

[2] The Trustee subsequently limited the request to documents dated 1994 or later. Accordingly, the privilege log reflects only the 1994 - 1999 time period.

[3] In a letter to the Trustee, the Debtor's wife, JoAnna Bame asserted her separate attorney-client privilege with respect to these matters. Her attorney also appeared at Kaplan's deposition and asserted the attorney-client privilege as to the same questions that the Debtor asserted the privilege. Because JoAnna Bame is not a party to this motion, I cannot make any determination as to the propriety of her claim of privilege or whether she has waived any such privilege.

The Trustee also served Jasper with a subpoena. Jasper has served for a number of years as accountant for the Debtor and several of his business entities. Like Kaplan, Jasper worked for the Debtor as an individual and not as the Debtor-in-Possession. Jasper supplied the Trustee with all of the documents requested and appeared for his deposition. At the deposition, Jasper testified about the May 10 meeting. He indicated that the parties discussed various loans that the Debtor's family still owed to the Debtor. He testified that the Debtor had asked him to be there to give Kaplan a history about what Jasper knew about possible family loans or anything else related to the family. He further testified about the specific loans outstanding.

The Trustee asserts in his briefs that the Debtor was given notice of Jasper's subpoena and the deposition. While no proof of such service appears in the record, no party, including the Debtor and Kaplan, disputes the Trustee's assertions in this respect. Despite apparent knowledge of Jasper's subpoena, the Debtor did not appear or assert any privilege prior to Jasper's testimony or his production of documents.

Because no family loans were disclosed on the Debtor's schedules, the Trustee brought the present motion to compel

Kaplan to produce documents and provide testimony regarding family debts owed to the Debtor which were discussed at the May 10 meeting. Although Kaplan raised the privilege with respect to a number of items, the only issue before the court is the propriety of the assertion of the privilege with respect to the May 10 meeting. The Trustee contends that the communications at the May 10 meeting were not privileged, either because Jasper's attendance destroyed the privilege or because the nature of the communicated information was not confidential. In the alternative, the Trustee asserts that the privilege was waived when Jasper testified about the meeting without any objection by the Debtor.

The Debtor and Kaplan responded that Jasper's presence at the meeting did not destroy the privilege because he was there to aid in giving legal advice. The Debtor further asserted that Jasper's subsequent deposition testimony did not waive the privilege because only the client can waive or assert the privilege.[4] In later briefing, the Debtor also argued that the Fifth Amendment privilege applied.

A trustee in bankruptcy has statutory authority to require turnover of records held by former attorneys, but such

[4] Kaplan took no position on this issue and asked for a ruling by the court.

authority is specifically made "subject to any applicable privilege." 11 U.S.C. § 542(e). Federal Rule of Evidence 501, applicable in bankruptcy courts, provides that, except where state law provides the governing rule in civil proceedings, federal common law governs the assertion of evidentiary privileges. Fed. R. Evid. 501. Thus, federal common law governs control of a debtor's privileges. Foster v. Hill (In re Foster), 188 F.3d 1259, 1264 (10th Cir. 1999); French v. Miller (In re Miller), 247 B.R. 704, 708 (Bankr. N.D. Ohio 2000); Moore v. Eason (In re Bazemore), 216 B.R. 1020, 1022-23 (Bankr. S.D. Ga. 1998).

A. ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. In re Hunt, 153 B.R. 445, 450 (Bankr. N.D. Tex. 1992) (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)). The privilege "encourages full and frank communication between attorneys and their clients and thereby promotes broader public interests in the observance of law and administration of justice." Hunt, 153 B.R. at 450 (quoting Upjohn, 449 U.S. at 389).

The elements of the attorney-client privilege are as follows: (1) Where legal advice of any kind is sought; (2)

from a professional legal adviser in his capacity as such; (3) the communications relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or by the legal adviser; (8) unless the protection is waived. E.g., Reed v. Baxter, 134 F.3d 351, 355-56 (6th Cir. 1998); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977). Courts also frequently rely on Proposed Federal Rule of Evidence 503, which was never enacted but provides an accurate definition of the federal common law of attorney-client privilege. In re Bieter Co., 16 F.3d 929, 935 (8th Cir. 1994). The proposed rule, often referred to as Supreme Court Standard 503, provides as follows:

> (a) Definitions. As used in this rule:
> (1) A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.
> (2) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
> (3) A "representative of the lawyer" is one employed to assist the lawyer in the rendition of professional legal services.
> (4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

> (b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

Supreme Court Standard 503.

The party claiming the privilege carries the burden of demonstrating that: (1) the attorney-client privilege applies; (2) the communications were protected by the privilege; and (3) the privilege was not waived. United States v. Aramony, 88 F.3d 1369, 1389 (4th Cir. 1996); United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 27-28 (1st Cir. 1989); Weil v. Investment/Indicators Research & Management, Inc., 647 F.2d 18, 25 (9th Cir. 1981); United States v. Willis, 565 F.Supp. 1186, 1194 (S.D. Iowa 1983).

The Trustee first contends that the attorney-client privilege does not apply under these circumstances because Jasper’s attendance at the May 10 meeting destroyed any privilege.

The Trustee is correct that, as a general matter, the attorney-client privilege will not shield from disclosure

statements made in the presence of a third party. United States v. Evans, 113 F.3d 1457, 1462 (7th Cir. 1997). However, it is well established that the mere presence of a third party does not necessarily destroy the privilege. U.S. v. Adlman, 68 F.3d 1495, 1499 (2d Cir. 1995); Miller v. Haulmark Transp. Sys., 104 F.R.D. 422, 445 (E.D. Pa. 1984). Persons necessary to the communications between an attorney and his client come under the privilege doctrine. Adlman, 68 F.3d at 1499; United States v. Cote, 456 F.2d 142, 144 (8th Cir. 1972); United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961); United States v. Northern City Nat'l Bank (In re Bretto), 231 F.Supp. 529, 531 (D. Minn. 1964).

The test used in the Eighth Circuit is whether the third party's services were a necessary aid to the rendering of effective legal service to the client. Cote, 456 F.2d at 144. The most common example of a necessary party would be an accountant who assists an attorney by clarifying the client's financial affairs so that the attorney may properly advise his client. Bretto, 231 F.Supp. at 531.

Kaplan's testimony indicates that Jasper was present at the May 10 meeting as "an accountant or financial person" in connection with Kaplan's estate planning services. Due to the Debtor's complicated financial condition, I have no trouble

concluding that Jasper was a necessary aid to the rendering of effective legal service to the client. Cf. United States v. Evans, 113 F.3d 1457 (7th Cir. 1997) (no privilege attached because a third party was present at the meeting between the attorney and the client merely as a friend of the client and to provide emotional support). Accordingly, despite Jasper's presence, the communications made at the May 10 meeting were for the purpose of obtaining legal advice from a professional legal advisor. Thus, at least initially, the privilege applies.

However, the Debtor must also establish that the communications were protected by the privilege. The Trustee asserts that the communications made at the May 10 meeting were not protected by the privilege because the character of the information provided by Jasper was not confidential.

Under federal common law, communications between accountants and their clients generally enjoy no privilege. Adlman, 68 F.3d at 1499 (citing United States v. Arthur Young & Co., 465 U.S. 805, 817 (1984)). However, such communications can be privileged if the client communicates with the accountant for the purpose of obtaining legal advice. This occurs, for instance, when the client communicates with an accountant retained by the attorney as an expert to help

with the client's case or where the client communicates with the accountant for the purpose of subsequent communication of the information by the accountant to the attorney. See Kovel, 296 F.2d at 922 & n.4; Adlman, 68 F.3d at 1500. As noted in the seminal Second Circuit case on this subject, United States v. Kovel, "What is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer. If what it sought is not legal advice but only accounting service, or if the advice sought is the accountant's rather than the lawyer's no privilege exists." Kovel, 296 F.2d at 922 (citations omitted).

In this case, Jasper testified that he was present at the meeting to provide Kaplan with a history of family loans involving the Debtor. This testimony clearly establishes that the Debtor informed Jasper of these loans prior to the May 10 meeting. There is no indication that such communication was made in the first instance for the purpose of obtaining legal advice. Jasper was not employed by Kaplan, and it does not appear that the Debtor initially communicated the information to Jasper so that he could subsequently communicate it to Kaplan. Indeed, there is every indication that the communications between the Debtor and Jasper regarding family

loans prior to the May 10 meeting were merely for the purpose of obtaining accounting services. Accordingly, because the Debtor did not initially impart the information regarding the family loans to Jasper in the course of obtaining legal advice, such information was not privileged or confidential prior to the May 10 meeting. See Kovel, 296 F.2d at 922; Adlman, 68 F.3d at 1500.

Moreover, the mere fact that the Debtor and Jasper subsequently discussed the same information with the Debtor's attorney at the May 10 meeting did not transform that information into privileged or confidential information. Cote, 456 U.S. at 144. In other words, because the Debtor had already disclosed the information in the course of a non-confidential relationship, he could have no expectation of confidentiality even though he later disclosed the same information to an attorney. Without an expectation of confidentiality, the attorney-client privilege does not apply to the communications. See United States v. Robinson, 121 F.3d 971, 976 (5th Cir. 1997); Aramony, 88 F.3d at 1389.

Even assuming, however, that the communications were protected by the privilege, the Debtor must also demonstrate that the privilege was not waived. Generally, the attorney-client privilege belongs solely to the client. Miller, 247

B.R. at 708; Bazemore, 216 B.R. at 1023; Hunt, 153 B.R. at 450. Therefore, generally only the client can decide whether to waive or assert the privilege.[5] A client may waive the protection of the attorney-client privilege either expressly or by implication. United States v. Workman, 138 F.3d 1261, 1263 (8th Cir. 1998); Hollins v. Powell, 773 F.2d 191, 196 (8th Cir. 1985); Sedco Int'l, S.A. v. Cory, 683 F.2d 1201, 1206 (8th Cir. 1982). Disclosure of privileged information is inconsistent with the confidential attorney-client relationship and waives the privilege. Lutheran Medical Center v. Contractors, Laborers, Teamsters and Engineers Health and Welfare Plan, 25 F.3d 616, 622 (8th Cir. 1994).

Assuming the privilege protected the communications at the May 10 meeting, Jasper indisputably disclosed privileged information in the course of his deposition testimony. Not only did he testify regarding the family loans, about which he had prior knowledge, but he also revealed specific information about the meeting. The Debtor's implicit claim in this motion

[5] No one contends that the right to waive or assert the Debtor's privilege belongs to the Trustee in connection with this portion of the Trustee's motion. Although the communications that are the subject of this motion were made while the Debtor served as the Debtor-in-Possession, it is clear that the Debtor sought advice from Kaplan on an individual basis and not as a representative of the estate.

is that any disclosure by Jasper was not disclosure by the client. In other words, it was not a voluntary disclosure but, rather, merely inadvertent. Courts have generally followed one of three distinct approaches to attorney-client privilege waiver based on inadvertent disclosures:[6] (1) the lenient approach; (2) the middle approach; and (3) the strict approach. Gray v. Bicknell, 86 F.3d 1472, 1483 (8th Cir. 1996).

Under the lenient approach, attorney-client privilege must be knowingly waived. The attorney-client privilege exists for the benefit of the client and cannot be waived except by an intentional and knowing relinquishment. Id. (citing Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F.Supp. 936, 938 (S.D. Fla. 1991)).

The Debtor tacitly suggests that the court adopt this approach by stating in its brief that "only the client can waive the privilege by voluntarily disclosing the protected information or consenting to its disclosure." However, the

[6] Although the concept of inadvertent wavier generally arises when privileged documents are produced in the course of extensive document production, I see no reason why the same analysis should not apply to inadvertent disclosures in the context of other types of discovery.

Eighth Circuit rejected this approach.[7] Gray, 86 F.3d at 1483. It found that

> the lenient test creates little incentive for lawyers to maintain tight control over privileged material. While the lenient test remains true to the core principle of attorney-client privilege, which is that it exists to protect the client and must be waived by the client, it ignores the importance of confidentiality. To be privileged, attorney-client communications must remain confidential, and yet, under this test, the lack of confidentiality becomes meaningless so long as it occurred inadvertently.

Id. Accordingly, because the Eighth Circuit has rejected this approach, I cannot use it as the Debtor suggests to mechanically conclude that there was no wavier merely because the Debtor did not make the disclosure himself.

The second approach is known as the strict test and provides that courts "will grant no greater protection to those who assert the privilege than their own precautions merit." Id. (quoting In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989)). Thus, under this approach anything produced, either intentionally or otherwise, loses its privileged status with the exception of situations where all precautions were taken. Id.

[7] Although the Eighth Circuit's decision was made in the context of what the Missouri Supreme Court would decide, it is not a stretch to conclude that the Eighth Circuit would make the same decision had the issues been presented in the context of federal common law.

This second approach is, essentially, the approach argued by the Trustee. However, the Eighth Circuit also rejected this test. Id. The court noted:

> The strict test sacrifices the value of protecting client confidences for the sake of certainty of results. There is an important societal need for people to be able to employ and fully consult with those trained in the law for advice and guidance. The strict test would likely impede the ability of attorneys to fill this need by chilling communications between attorneys and clients.

Id. Again, because the Eighth Circuit has rejected this approach, I cannot automatically conclude that the Debtor waived the privilege simply because the information was disclosed.

Finally, there is the middle test, the one adopted by the Eighth Circuit. This test requires a five part analysis of the inadvertently disclosed information to determine the proper range of privilege to extend: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) the promptness of measures taken to rectify the disclosures; and (5) whether the overriding interest of justice would be served by relieving the party of its error. Id. at 1483-84. The Court determined that:

> [t]his test strikes the appropriate balance between protecting attorney-client privilege and allowing, in certain situations, the unintended release of

> privileged [information] to waive that privilege. The middle test is best suited to achieving a fair result. . . . The middle test provides the most thoughtful approach, leaving the trial court broad discretion as to whether wavier occurred and, if so, the scope of that waiver.

Id. at 1484. I will, thus, apply the "middle test."

I find that the Debtor did not take adequate steps to ensure the confidentiality of the information. The Trustee gave the Debtor notice of Jasper's subpoena and deposition, which included a request for documents related to the May 10 meeting.[8] Thus, it was foreseeable that through document production or testimony, Jasper would reveal information concerning the May 10 meeting. Even though the Debtor asserted the privilege at Kaplan's deposition, he did not take the additional and necessary step of asserting the privilege at Jasper's deposition. Accordingly, most, if not all, of the information discussed at the May 10 meeting was disclosed to the Trustee.

In short, the circumstance of this case are quite unlike the situation where a few documents are inadvertently produced

[8] Although the Trustee has not appended proof that the Debtor received notice, no party has asserted that he did not. As it is the Debtor's burden to prove that the privilege has not been waived, the burden was on him to at least assert that he did not receive notice of Jasper's subpoena if that, in fact, was the reason he did not appear and assert the privilege.

to the opposing party. Rather than inadvertent, the Debtor's and his counsel's actions were careless. Under the middle approach, such carelessness is an indication of wavier. Gray, 86 F.3d at 1484. In light of the relative ease with which the Debtor could have prevented disclosure, I find that he has waived the privilege as to all information related to the May 10 meeting.

B. FIFTH AMENDMENT

The Debtor asserts that, regardless of the application of the attorney-client privilege, disclosure of the information sought from Kaplan would violate his Fifth Amendment privilege against self-incrimination. The Fifth Amendment provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. 5. A proper assertion of the Fifth Amendment privilege requires three elements: (1) a compelled disclosure, (2) found to be testimonial, (3) which is incriminating. In re Hunt, 153 B.R. 445, 452 n.11 (Bankr. N.D. Tex. 1992).

In general, there is no constitutional right not to be incriminated by the testimony of another. Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653, 663 (10th Cir. 1998). The privilege against self-incrimination is solely for the benefit of the witness and is purely a personal

privilege of the witness, not for the protection of other parties. Id. Accordingly, a party incriminated by evidence produced by a third party sustains no violation of his own Fifth Amendment rights. California Bankers Ass'n. v. Shultz, 416 U.S. 21, 55 (1974). Therefore, in this case, compulsion of Debtor's attorney's testimony as to voluntary statements made by the Debtor does not implicate the Fifth Amendment's protection of the Debtor against compulsory self-incrimination. Grand Jury Subpoenas, 144 F.3d at 663; Hunt, 153 B.R. at 452 n.11.

There is one exception to this rule, however. Where an attorney is being compelled to produce documents that the client could personally bar from production under the Fifth Amendment, the attorney to whom they are delivered for the purpose of obtaining legal advice should also be immune from subpoena. In re Grand Jury Proceedings, Subpoenas For Documents, 41 F.3d 377, 379 (8th Cir. 1994); Grand Jury Subpoena, 144 F.3d at 663 (citing Fisher v. United States, 425 U.S. 391, 396 (1976)). Such a scenario occurs only when the act of producing the documents themselves is both incriminating and testimonial. Foster v. Hill (In re Foster), 188 F.3d 1259, 1270 (10th Cir. 1999).

> The act of producing evidence in response to a subpoena . . . has communicative aspect of its own,

> wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by [their owner or the owner's agent]. It also would indicate the [owner or agent's] belief that the papers are those described in the subpoena . . . .

Fisher, 425 U.S. at 410. Thus, the Supreme Court recognized that the act of producing documents can communicate the existence of the documents, possession or control of the documents, or the authenticity of the documents. Id.; Grand Jury Proceedings, 41 F.3d at 379.

> [C]ompulsion [is] clearly present, but the more difficult issues are whether the tacit averments [made by the act of production] are both "testimonial" and "incriminating" . . . . These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof.

Fisher, 425 U.S. at 410; Grand Jury Proceedings, 41 F.3d at 379.

In this case, the Debtor has asserted a blanket claim of the Fifth Amendment privilege. Such an assertion is generally not permissible. In re French, 127 B.R. at 434, 439 (Bankr. D. Minn. 1991). However, Fisher only protects documents that the Debtor could protect under the Fifth Amendment if such documents were "delivered [to an attorney] for the purpose of obtaining legal advice." Fisher, 425 U.S. at 396. No such documents exist in this case. The privilege log supplied by

Kaplan shows no documents delivered to Kaplan by the Debtor. All are documents prepared by Kaplan or other members of his firm. Moreover, both Jasper and Kaplan testified that Jasper did not turn over any documents to Kaplan in connection with the May 10 meeting. Thus, the exception announced in Fisher is inapplicable.

To the extent that the privilege log is incorrect, and the Debtor did, in fact, deliver documents to Kaplan, the Debtor has not asserted a claim of Fifth Amendment privilege as to any particular document. Under these circumstances, the Debtor's blanket assertion of the Fifth Amendment privilege prevents the court from considering the precise facts and circumstances of this case and determining whether the act of producing any such documents would be both testimonial and incriminating. See Foster, 188 F.3d at 1272. Thus, the court cannot made a determination regarding the applicability of the Fifth Amendment privilege until the Debtor claims the Fifth Amendment privilege as to the production of specific documents.

C. CONCLUSION

Based upon the foregoing, I find that the communications at the May 10 meeting were not protected by the attorney-client privilege because the information discussed at that

meeting was not of a confidential nature. However, whether or not the communications at the May 10 meeting were ever protected by the attorney-client privilege, any such privilege was waived by Jasper's subsequent disclosures. Furthermore, the Fifth Amendment offers the Debtor no protection from Kaplan's disclosure of information related to the meeting. Therefore, Kaplan must respond to the Trustee's questions concerning the May 10 meeting and produce any documents relevant thereto.[9] If any documents required to be delivered under the subpoena are documents delivered by the Debtor to Kaplan for the purpose of obtaining legal advice and the production of which would be both incriminating and

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[9] The Debtor also suggests that the Trustee must prove that the information sought from the Kaplan was not otherwise available. See Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986) (requiring that a party seeking to take the deposition of opposing counsel show that (1) no other means exist to obtain the information; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to preparation of the case). However, Shelton involved a situation where one party sought to depose counsel representing an adverse party in the on-going litigation. The court placed strict limitations on such a discovery device. The policy underlying the Shelton decision is not present in this case. Kaplan is not representing the Debtor in the on-going litigation with the Trustee. Moreover, because the Debtor has already been denied his discharge, he is no longer an adverse party to the Trustee. The Trustee is only seeking information, of which Kaplan has first hand knowledge as a fact witness, that will enhance the value of the estate. Therefore, there is no need to meet the three part test set forth in Shelton.

testimonial, the Debtor may assert the Fifth Amendment privilege as to those specific documents prior to their delivery to the Trustee.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. The Trustee's motion to compel discovery is GRANTED;

2. Attorney Sidney Kaplan shall testify concerning all communications at the May 10, 1999, meeting and shall turn over any documents related to such meeting. Prior to delivery of such documents, the Debtor may assert the Fifth Amendment privilege as to specific documents that he delivered to Sidney Kaplan for the purpose of obtaining legal advice and for which the act of production would be both testimonial and incriminating.

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Nancy C. Dreher
United States Bankruptcy Judge