

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
CLAYTON S. BAILEY,) CASE NO. 03-63638 JPK
) Chapter 7
Debtor.)
*****)
LANG DISTRIBUTING, INC.,)
)
Plaintiff,)
)
v.) ADVERSARY NO. 03-6302
)
CLAYTON S. BAILEY,)
)
Defendant.)

ORDER ON PLAINTIFF'S MOTION TO COMPEL
DEPOSITION TESTIMONY

In this adversary proceeding, commenced by a complaint filed on December 3, 2003 by Lang Distributing, Inc. ("Lang"), Lang seeks a determination that certain indebtedness which it asserts is owed it by Clayton S. Bailey, the debtor in the Chapter 7 bankruptcy case pending as case number 03-63638 ("Bailey"), is excepted from discharge. Pursuant to the Court's order entered on May 6, 2004, Lang filed an amended complaint on May 12, 2004 asserting the grounds for exception from discharge to be those provided by 11 U.S.C. § 523(a)(2)(A) and 11 U.S.C. § 523(a)(4); Bailey filed his answer to this amended complaint on June 17, 2004.

As stated in the Court's May 6, 2004 order, this adversary proceeding relates solely to the assertions of exception from discharge under 11 U.S.C. § 523(a): by that order, the Court denied Lang's motion for leave to file an amended complain which would have sought to add assertions that Bailey was not entitled to an order of discharge on grounds stated in 11 U.S.C. § 727(a).

The parties conducted extensive discovery and periodically reported to the Court in status conferences as to their progress with respect to discovery. From the inception of the

Court's involvement in this case, counsel for both parties stated that an issue might arise concerning Lang's potential desire to obtain deposition testimony from both Bailey and his attorney Steven W. Handlon as to communications between them which Lang deemed potentially pertinent to the issues raised in its complaint. That desire came to fruition. At the deposition of Attorney Handlon taken on April 23, 2004, he refused to answer certain questions posed to him concerning communications which he had with Bailey, on the grounds of attorney-client privilege. At several sittings of Bailey's deposition, Bailey declined to answer certain questions concerning his communications with Attorney Handlon, also on the grounds of attorney-client privilege. By its order of August 27, 2004, the Court established the procedure by which the parties' discovery dispute concerning the assertion of attorney-client privilege by both Attorney Handlon and Bailey would be presented to the Court. In accordance with that procedure, Lang filed its Plaintiff's Motion to Compel Deposition Testimony on September 24, 2004. Although the August 27, 2004 order required the parties to file a stipulation of facts pertinent to Lang's discovery motion, the parties did not do so. However, Lang filed a memorandum in support of his motion on November 22, 2004 which sets out the facts pertinent to the motion in extensive form, a recitation with which Bailey's replies filed on December 10, 2004 and December 20, 2004 materially agree. On January 12, 2005, the parties presented oral argument to the Court with respect to the issues raised by Lang's motion to compel. The parties advised the Court at that hearing that they were discussing settlement, and they jointly requested that the Court withhold ruling on the motion to compel until their settlement attempts had been exhausted. By order entered on January 20, 2005, the Court directed the procedure by which the parties would advise the Court of whether or not it would be necessary for the Court to determine the motion to compel. After jointly-requested extensions of time, on May 16, 2005, Lang, by its counsel David M. Blaskovich, filed a Status Report as to Settlement which advised the Court that the parties had been unable to settle the case, and that the Court should

enter an order on Lang's motion to compel.

This order sets forth the Court's determination of Lang's September 24, 2004 motion.

In order to establish the foundation for the Court's review of the motion, it is first necessary to set out certain pertinent facts with respect to the transaction which Lang asserts gives rise to its assertions of nondischargeability. As noted above, in order to facilitate the Court's determination of Lang's motion, the Court's August 27, 2004 order required the parties to file a stipulation of facts, which the parties did not do. Instead, both Lang and Bailey have set out their respective recitations of pertinent facts in their respective legal memoranda, and have attached to those memoranda pertinent documents – particularly portions of deposition transcripts – which they each deem to support the factual recitations stated in their memoranda. While the recitations in their respective memoranda as to the operative facts vary in some respects, the "core" of facts which the Court deems necessary for its determination are not in dispute.

Lang is a business which engages in the distribution of auto parts to auto parts jobbers at discounted prices. Bailey entered into a business relationship with Lang, initially as a sole proprietorship, and then later in the form of a corporation of which he was the principal known as B.A.T.S., Inc. ("B.A.T.S."). B.A.T.S. encountered financial difficulties approximately at the beginning of 2002. Bailey and Lang began discussions as to possible arrangements by which Bailey's/B.A.T.S.'s financial obligations to Lang could be resolved. A meeting was held among Bailey, Bill Curtis (Lang's President and Chief Operating Officer) – and perhaps one other individual, a "Mr. Lee" on behalf of Lang – at which a potential resolution of the financial issues between the parties was discussed. That meeting concluded without a resolution, or any agreement between the parties.

Subsequently, Bailey and Bill Curtis met alone to discuss possible arrangements concerning Bailey's obligations to Lang. The primary terms of the parties' discussions are not

at issue for the purposes of Lang's motion to compel, and the parties essentially agree that at this meeting, Bailey and Curtis agreed to the basic structure of an arrangement, as Curtis presented that structure to Bailey on a yellow legal pad. As proposed by Curtis, Lang's terms included an unconditional personal guarantee of certain obligations by Bailey's wife. The parties' respective statements of material facts are consistent in referring to Bailey's deposition testimony as being that at this meeting, Bailey stated to Curtis that there could be a problem with his wife agreeing to the personal guarantee.

At this point, the parties' respective recitations depart somewhat. On pages 8-10 of the Defendant's Brief in Opposition to Plaintiff's Motion to Compel Discovery, Bailey asserts that apart from the discussion at the foregoing meeting, there was no further discussion between Bailey and Curtis regarding Mrs. Bailey's guarantee. On page 3 of its Plaintiff's Memorandum of Law in Support of Motion to Compel Discovery, Lang states that at the above-designated meeting, Curtis had advised Bailey that if Mrs. Bailey did not provide the guarantee, Lang would not agree to the proposed resolution, and that at the end of the meeting, Bailey stated to Curtis that "it looked like something that I could do . . . we'll fly with it . . .". In the context in which it appears on pages 92-93 of Bailey's August 3, 2004 deposition, this statement is responsive to a question about the basic terms of payment, not about the guaranty by Bailey's wife. For the purposes of determining Lang's motion to compel, the Court deems it necessary to go no further than to determine – as both parties agree – that at this meeting Bailey was advised by Curtis that Mrs. Bailey's unconditional guarantee was necessary to Lang, and that during the meeting Bailey expressed reservations about his wife's willingness to provide the guarantee.

Subsequently, Curtis prepared proposed drafts of the documents to be used with respect to the financial arrangements between Bailey and Lang. He delivered these documents to Bailey's place of business by a delivery person; there is nothing in either parties' recitation of the pertinent facts that indicates that Curtis advised Bailey in advance that the documents

would be delivered to him. The parties are in agreement that Bailey did not communicate with any representative of Lang concerning his receipt of the documents, and that no representative of Lang contacted Bailey to confirm his receipt of those documents.

Bailey took the documents which had been delivered to him to Attorney Steven Handlon, who had represented him previously in business matters. Handlon reviewed the documents in a meeting with Bailey and his wife, and Handlon then prepared revised documents, which Mr. Bailey picked up from Attorney Handlon's office. Bailey and his wife signed the revised documents, and Bailey put them in an envelope which Lang's courier picked up from Bailey and delivered to Curtis. The envelope contained only the documents as revised by Attorney Handlon, and no correspondence or memorandum accompanied them. Bailey had no communications with Lang concerning the revised documents, and Lang did not communicate with Bailey regarding those documents.

Upon his receipt of the revised documents, Bill Curtis checked for the signatures of Bailey and his wife, signed the documents and placed them in a file. Several weeks later, he provided a copy of the executed documents to Bailey. Mr. Curtis has testified in his deposition that he assumed that the revised documents were in fact the documents which he had originally caused to be delivered to Bailey, as those documents had been prepared by him. The critical document at issue is the "Guaranty Agreement". In addition to certain other modifications, Bailey's draft of this document contains a substantive change which forms the basis for Lang's adversary proceeding: whereas the Curtis draft had provided for Bailey's wife's unconditional personal guarantee of the financial obligations evidenced by the documents, the revised documents limited her guarantee to the extent of her interest in the corporate assets of B.A.T.S.

In its nondischargeability action, Lang asserts that Bill Curtis would not have signed the documentation memorializing the terms of the arrangement between Lang and Bailey had he known about the revision concerning Mrs. Bailey's personal guarantee. Lang's premise is that

Bailey, perhaps in consortium with his attorney Steven Handlon, pulled a "switcheroo" without advising Curtis of the modifications in the Guaranty Agreement as delivered to Curtis in relation to the Guaranty Agreement which Curtis delivered to Bailey. A principal component of the "switcheroo" theory is that the two Guaranty Agreements are nearly identical in appearance, at least identical enough for that document as he received it from Bailey to be deemed by Bill Curtis to be precisely the document which he had originally tendered to Bailey. By seeking to obtain the deposition testimony of both Bailey and Attorney Handlon as to the conversation between them concerning modification of the documents, Lang hopes to bolster its case that in essence a plot was concocted by Attorney Handlon and his client to cause Curtis to believe that the documents tendered by Bailey to Lang were in fact identical to the documents which Curtis had originally prepared, and to thus obtain Lang's unwitting acceptance of the limited guarantee of Mrs. Bailey in place of the unconditional guarantee in the documents which had been originally tendered to Bailey by Curtis. Lang contends that the circumstances of its case give rise to the Court's ability to suspend the attorney-client privilege between Bailey and Attorney Handlon so that Lang can depose both of them as to their communications concerning the contested documents, following which – having that testimony before it – the Court can then make a determination from *in camera* review of that testimony as to whether the attorney-client privilege can be eviscerated under the crime-fraud exception to that privilege.

As both parties recognize in their respective memoranda, the seminal authority in the context of this discovery dispute is *United States v. Zolin*, 491 U.S. 554, 109 S.Ct. 2619 (1989). In *Zolin*, the Court first outlined the scope of the attorney-client privilege in relation to the assertion of the crime-fraud exception:

Questions of privilege that arise in the course of the adjudication of federal rights are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed.Rule Evid. 501. We have recognized the attorney-client privilege under federal law, as

"the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). Although the underlying rationale for the privilege has changed over time, see 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961), [FN6] courts long have viewed its central concern as one "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S., at 389, 101 S.Ct., at 682. That purpose, of course, requires that clients be free to "make full disclosure to their attorneys" of past wrongdoings, *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), in order that the client may obtain "the aid of persons having knowledge of the law and skilled in its practice," *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888).

FN6. See also Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 Calif.L.Rev. 1061 (1978); Developments in the Law--Privileged Communications, 98 Harv.L.Rev. 1450, 1455-1458 (1985).

The attorney-client privilege is not without its costs. Cf. *Trammel v. United States*, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980). "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." *Fisher*, 425 U.S., at 403, 96 S.Ct., at 1577. The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection--the centrality of open client and attorney communication to the proper functioning of our adversary system of justice--"ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*." 8 Wigmore, § 2298, p. 573 (emphasis in original); see also *Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.Ed. 993 (1933). It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the "seal of secrecy," *ibid.*, between lawyer and client does not extend to communications "made for the purpose of getting advice for the commission of a fraud" or crime. *O'Rourke v. Darbishire*, [1920] A.C. 581, 604 (P.C.).

...

A variety of questions may arise when a party raises the crime-fraud exception. The parties to this case have not been in complete agreement as to which of these questions are presented here. In an effort to clarify the matter, we observe, first, that we need not decide the quantum of proof necessary ultimately to establish the applicability of the crime-fraud exception. Cf. *Clark*,

289 U.S., at 15, 53 S.Ct., at 469, quoting *O'Rourke*; S. Stone & R. Liebman, *Testimonial Privileges* § 1.65, p. 107 (1983). Rather, we are concerned here with the *type* of evidence that may be used to make that ultimate showing. Within that general area of inquiry, the initial question in this case is whether a district court, at the request of the party opposing the privilege, may review the allegedly privileged communications *in camera* to determine whether the crime-fraud exception applies. If such *in camera* review is permitted, the second question we must consider is whether some threshold evidentiary showing is needed before the district court may undertake the requested review. Finally, if a threshold showing is required, we must consider the type of evidence the opposing party may use to meet it: *i.e.*, in this case, whether the partial transcripts the IRS possessed may be used for that purpose. (footnotes omitted)

491 U.S. at 562-65; 109 S.Ct. at 2626-27. The Court addressed in sequence certain issues which arose in relation to review and determination of the applicability of the crime-fraud exception. The Court first determined that a federal court [in *Zolin*, the United States District Court] is not prohibited in all instances from conducting an *in camera* review of the allegedly privileged communications in order to make this determination. The Court concluded by stating in this context:

Once it is clear that *in camera* review does not destroy the privileged nature of the contested communications, the question of the propriety of that review turns on whether the policies underlying the privilege and its exceptions are better fostered by permitting such review or by prohibiting it. In our view, the costs of imposing an absolute bar to consideration of the communications *in camera* for purpose of establishing the crime-fraud exception are intolerably high.

The Court next addressed the extent to which a requested *in camera* review sought by a parties opposing the privilege would be permissible, stating:

We turn to the question whether *in camera* review at the behest of the party asserting the crime-fraud exception is *always* permissible, or, in contrast, whether the party seeking *in camera* review must make some threshold showing that such review is appropriate. In addressing this question, we attend to the detrimental effect, if any, of *in camera* review on the policies underlying the privilege and on the orderly administration of justice in our courts. We conclude that some such showing must be

made.

Our endorsement of the practice of testing proponents' privilege claims through *in camera* review of the allegedly privileged documents has not been without reservation. This Court noted in *United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), a case which presented a delicate question concerning the disclosure of military secrets, that "examination of the evidence, even by the judge alone, in chambers" might in some cases "jeopardize the security which the privilege is meant to protect." *Id.*, at 10, 73 S.Ct., at 533. Analogizing to claims of Fifth Amendment privilege, it observed more generally: "Too much judicial inquiry into the claim of privilege would force disclosure of the thing the privilege was meant to protect, while a complete abandonment of judicial control would lead to intolerable abuses." *Id.*, at 8, 73 S.Ct., at 532.

The Court in *Reynolds* recognized that some compromise must be reached. See also *United States v. Weisman*, 111 F.2d 260, 261-262 (CA2 1940). In *Reynolds*, it declined to "go so far as to say that the court *may automatically require* a complete disclosure to the judge before the claim of privilege will be accepted *in any case*." 345 U.S., at 10, 73 S.Ct., at 533 (emphasis added). We think that much the same result is in order here.

A blanket rule allowing *in camera* review as a tool for determining the applicability of the crime-fraud exception, as *Reynolds* suggests, would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk. There is also reason to be concerned about the possible due process implications of routine use of *in camera* proceedings. See, e.g., *In re John Doe Corp.*, 675 F.2d 482, 489-490 (CA2 1982); *In re Special September 1978 Grand Jury*, 640 F.2d 49, 56-58 (CA7 1980). Finally, we cannot ignore the burdens *in camera* review places upon the district courts, which may well be required to evaluate large evidentiary records without open adversarial guidance by the parties.

There is no reason to permit opponents of the privilege to engage in groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents. Courts of Appeals have suggested that *in camera* review is available to evaluate claims of crime or fraud only "when justified," *In re John Doe Corp.*, 675 F.2d, at 490, or "[i]n appropriate cases," *In re Sealed Case*, 219 U.S.App.D.C. 195, 217, 676 F.2d 793, 815 (1982) (opinion of Wright, J.). Indeed, the Government conceded at oral argument (albeit reluctantly) that a district court would be mistaken if it reviewed documents *in camera* solely because "the government begged it]" to do so, "with no reason to suspect crime or fraud."

Tr. of Oral Arg. 26; see also *id.*, at 60. We agree.

491 U.S. at 570-71; 109 S.Ct. at 2629-30.

The Court next determined the standard by which the reviewing court is to determine when *in camera* review is appropriate, stating:

In fashioning a standard for determining when *in camera* review is appropriate, we begin with the observation that "*in camera* inspection ... is a smaller intrusion upon the confidentiality of the attorney-client relationship than is public disclosure." Fried, Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds, 64 N.C.L.Rev. 443, 467 (1986) . We therefore conclude that a lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege. *Ibid.* The threshold we set, in other words, need not be a stringent one.

We think that the following standard strikes the correct balance. Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, "the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person," *Caldwell v. District Court*, 644 P.2d 26, 33 (Colo.1982), that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.

Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court. The court should make that decision in light of the facts and circumstances of the particular case, including, among other things, the volume of materials the district court has been asked to review, the relative importance to the case of the alleged privileged information, and the likelihood that the evidence produced through *in camera* review, together with other available evidence then before the court, will establish that the crime-fraud exception does apply. The district court is also free to defer its *in camera* review if it concludes that additional evidence in support of the crime-fraud exception may be available that is *not* allegedly privileged, and that production of the additional evidence will not unduly disrupt or delay the proceedings. [emphasis supplied].

491 U.S. at 572; 109 S.Ct. at 2630-31.

Finally, the Court summed up its decision as follows:

In sum, we conclude that a rigid independent evidence

requirement does not comport with "reason and experience," Fed.Rule Evid. 501, and we decline to adopt it as part of the developing federal common law of evidentiary privileges. We hold that *in camera* review may be used to determine whether allegedly privileged attorney-client communications fall within the crime-fraud exception. We further hold, however, that before a district court may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability. **Finally, we hold that the threshold showing to obtain *in camera* review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged.** [emphasis supplied]

491 U.S. at 574-75; 109 S.Ct. at 2632.

This case presents a complication not truly addressed by *Zolin*. As Bailey's memorandum correctly notes, what Lang requests in this case is an *in camera* review of the asserted privileged communications by first having the Court compel the parties to the privileged communications to testify as to those communications themselves. This procedure in essence violates the Supreme Court's directive in *Zolin*, that the "threshold showing to obtain *in camera* review may be met by using any relevant evidence, lawfully obtained, that has not been adjudicated to be privileged", a directive which this Court deems to require Lang to establish the basis for the Court's "suspension" of the privilege with respect to assertedly privileged communications – the factual basis necessary to support a good faith belief by a reasonable person that the crime fraud exception should be implemented – by means of evidence other than the asserted privileged communications themselves.

As noted above, Lang's premise in this adversary proceeding is that Bailey defrauded it by means of a scheme concocted with his attorney Steven Handlon to substitute documents so identical in appearance to those originally tendered by Bill Curtis to Bailey that Curtis would be "taken in" by the substitutes, take them for the identical documents which he submitted to Bailey, and execute an arrangement on behalf of Lang that omitted a material provision – Mrs.

Bailey's unconditional guarantee – which Curtis had initially placed in his tendered version of the documents.

The Court finds that Lang has failed to sustain its preliminary burden. It must be borne in mind that Bill Curtis prepared the initial drafted documents, and thus it is therefore to be presumed that he was familiar with both the content and format of the documents which he caused to be tendered to Bailey. The critical documents are respectively Exhibit "D" and Exhibit "F" attached to Plaintiff's Memorandum of Law in Support of Motion to Compel Discovery: it is in these documents that the difference in the terms of Mrs. Bailey's guaranty appear. The differences between those documents are readily apparent, including the following:

1. The font for the title "GUARANTEE AGREEMENT" differs perceptibly in each document.
2. The font size for the word "WITNESSETH" on the first page of each document differs perceptibly.
3. In the very first sentence after "WITNESSETH", the designation of "BAILEY'S AUTO & TRUCK SUPPLY & B.A.T.S., INC. (the "Debtor")" in the Lang document has been very noticeably changed to "B.A.T.S. INC., an Indiana corporation, and B.A.T.S. II, INC., an Indiana corporation" in the Bailey document.
4. On the very first page of each document, the margin from the bottom of the page to the last printed line differs perceptibly.
5. Throughout the entirety of each respective document, each numbered paragraph in the document submitted by Lang to Bailey has no space between each subsequent paragraph; in the document submitted by Bailey to Lang, each consecutive numbered paragraph is separated by a double space.
6. In the document submitted by Lang to Bailey, paragraph 5 begins on the second page; in the document submitted by Bailey to Lang, paragraph 5 begins on the third page.

7. The designation of the signatory parties is totally, noticeably different, in each document, particularly to a person who prepared the initial document thus knew or should have known the designations of the parties which he placed in his initial draft. The draft prepared by Curtis designates the debtor, underneath a signature line, as "Bailey's Auto & Truck Supply & B.A.T.S, INC.", designates Mr. Bailey as the guarantor as "Scott Bailey", and designates the creditor as "Lang Distributing, Inc. . . . By: William O. Curtis". In the draft tendered by Bailey to Lang, the debtor is designated underneath the provided signature line as "B.A.T.S. INC. and B.A.T.S. II, INC., Indiana Corporations, Clayton Scott Bailey, President"; Mr. Bailey is designated as the guarantor as "Clayton Scott Bailey", and the acceptance by the creditor has no wording above the signature line, and below the signature line states "LANG DISTRIBUTING, INC., Illinois Corporation".

Similarly, the designation of the respective parties is materially and perceptibly different in each party's draft of the Promissory Note, paralleling the differences noted above in that context in the respective Guaranty Agreement drafts. The format of the last page of each note draft is significantly different with respect to the set up of the signature lines for the parties and the designation of the parties on each of those lines. In fact, while the Lang draft of the note contained language by which Nancy Bailey is made a party to the note and a signature line for "Nancy Bailey, Personally", there is no mention of Nancy Bailey whatsoever in the Bailey draft of the note, and no signature line is provided at all for her.

It is undisputed that Bill Curtis signed the "Bailey" draft of the Guaranty Agreement himself. The Court finds that the differences between the format and in fact the very names of the signing parties are so perceptibly different in that document when compared to his original draft that it cannot be validly contended that he should not have noticed the difference between the document he signed and the document he tendered to Bailey.

In support of its position, Lang cites the cases of *Peoples Trust & Savings Bank v.*

Humphrey, Ind. App., 451 N.E.2d 1104 (1983) and *Wright v. Pennamped*, Ind. App., 657 N.E.2d 1223 (1995) as holding that a person drafting an instrument has a duty to bring changes in the instrument to the attention of the party to whom the instrument is to be tendered. Neither of these cases are applicable to the fact circumstance here.

In *Humphrey*, a representative of the bank represented to its customer that the terms of a secured construction loan would include interest at 8 ½ % annually and would be repayable over 20 years, terms to which the customer expressed consent. The transactional document ultimately tendered to the customer by the bank contained a variable rate interest provision that allowed the bank to raise the rate to a ceiling of greater than the 8½% which the parties had discussed, and in addition contained a clause which allowed the bank unilaterally to demand immediate full payment of the obligation. No mention of these additional terms was made when the documents were tendered to the customer, but the customer in reviewing the note discovered the variable rate interest provision and was advised by a bank representative that the bank would probably not raise the rate and that the customer shouldn't worry about it. The customer then signed the note. Subsequently, the bank implemented the variable rate clause by increasing the interest to 9½%, and when the customer through an attorney asserted that the rate should be fixed at 8½%, the bank invoked the demand clause and required immediate payment of the full balance of the debt. Thus, specific discussion was had between the parties as to the original terms of the note, the change in terms was specifically addressed between the parties when the documents were tendered for signature because the customer read the documents and specifically asked about the variable rate provision, and in response the bank represented in essence that the variable rate term would not be enforced. The premise of the case is that the parties arrived at a definite agreement as to the terms of their transaction, which agreement was not only materially altered by the bank's documentation, but also when the change in terms was noted by the customer's review, the bank made an affirmative

representation that the modification didn't count and would not be implemented. In contrast, in this case the evidence is insufficient to establish that there was a definite final agreement as to the inclusion or exclusion of the unconditional guarantee, and no affirmative representation of any kind was made by Bailey to Lang about the inclusion or exclusion of the guaranty in the context of the documents which he tendered to Lang.

Similarly, the factual framework of *Wright v. Pennamped, supra.*, is clearly distinguishable. In that case, the parties discussed the terms of a financial arrangement and the customer signed a proposal for a loan which included a provision which precluded prepayment during the first 12 months of the loan. The customer provided a copy of the proposal to his attorney. Pennamped, an attorney engaged by the bank to draft the loan documents, prepared a draft of the documents and forwarded them to the customer and his attorney. The customer and his attorney reviewed the drafts and found the terms acceptable, including the prepayment provision. Subsequently, an officer of the bank advised Pennamped that the prepayment provision would have to be changed to state a prepayment penalty. Pennamped redrafted the documents with the prepayment penalty provision, but despite his conversations with the customer's attorney following his (Pennamped's) knowledge of the change in terms, nothing was disclosed to the customer or his counsel about the prepayment penalty provision. The customer's attorney was unable to attend the loan closing, but advised Pennamped that the documents which he had reviewed were acceptable – again, no mention of the modification was made to the customer's attorney. The customer attended the closing without his counsel and signed the documents which were tendered to him at the closing without reviewing them. This set of documentation, however, included the prepayment penalty provision which the bank subsequently enforced when the customer obtained a more favorable loan from another lender and paid off the loan. The premise of *Wright* is that a duty arose for both the bank and Pennamped to address the modification of the documents with the customer

and/or his counsel because the documents were changed after they had been specifically reviewed and approved by the customer's counsel *in a conversation directly with the drafting attorney*. In this context, the Court held that Pennamped's and the bank's silence as to the modification constituted fraud, because a duty arose after approval of the originally reviewed documents to disclose that the documents reviewed and approved by the customer's counsel had been modified. Thus, in contrast to the instant case, there was direct communication between the original drafter and the reviewer of that draft, and a very clear affirmation by the former of the terms of the transaction. In the instant case, there was never any communication between or among anyone after the tender of Lang's draft to Bailey – including no affirmation that the unconditional guarantee was acceptable to Bailey – and thus no duty ever arose on the part of either Bailey or Handlon to address the proposed modifications drafted by Handlon.

In this case, neither Bailey nor Attorney Handlon was the drafter of the initial set of transactional documents. This set of documents was never jointly reviewed in a personal meeting between the parties, and no representations of any kind were ever made by Bailey to Curtis that the Lang documents were acceptable as accurately stating the final terms of the parties' underlying agreement. Handlon was not in any manner involved in the negotiations between Lang and Bailey. He had no communications with Curtis at all about any of the terms of the parties' arrangement. What he did was draft a revised set of documents – in essence a counter-offer – and gave them to his client, who in turn delivered them to Lang without any representation, comment or statement whatsoever as to their content. This case is very much akin to the Uniform Commercial Code concept of the “battle of the forms” in which party X tenders an offer to party Y on X's boilerplate form; Y in turn without comment sends an acceptance back to X on Y's boilerplate form; and the two parties then discover that the terms of X's and Y's boilerplate forms materially differ concerning aspects of their contract. Absent an overt affirmative representation by Y that the terms of X's forms are in fact reflective of the

parties' "deal", Y's silent response is in no manner a predicate for, or of, fraud. So it is with this case. Handlon's draft was simply a counteroffer, which Curtis did not review prior to his signing it. As to the contention that the two sets of documents are so substantially identical as to give rise to an inference that an attempt was made to pull the old "switcheroo", as outlined above, the Court finds that the documents are so materially different that this premise of "substantial similarity" cannot be sustained.

Based upon the foregoing, the Court finds that Lang has failed to make a preliminary showing under the principles of *United States v. Zolin, supra.*, sufficient to either overcome the attorney-client privilege asserted by both Clayton Scott Bailey and by Attorney Steven Handlon, or sufficient to cause the Court to grant Lang's motion to compel discovery to even a limited extent to facilitate an *in camera* review of the assertedly privileged communications between Attorney Handlon and his client.

IT IS ORDERED that the Plaintiff's Motion to Compel Deposition Testimony is DENIED.

IT IS FURTHER ORDERED that a status conference will be held on **August 4, 2005, at 10:00 A.M.** to determine the course of further proceedings in this adversary proceeding.

Dated at Hammond, Indiana on June 15, 2005.

/s/ J. Philip Klingeberger
J. Philip Klingeberger
United States Bankruptcy Court

Distribution:
Attorneys of Record