

**NOV 22 2005**

**NOT FOR PUBLICATION**

**HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

6	In re:	)	BAP No.	CC-04-1607-BMaMc
		)		
7	OAKMORE RANCH MANAGEMENT,	)	Bk. No.	LA 94-16755-ER
		)		
8	Debtor.	)	Adv. No.	LA 96-01580-ER
		)		
9	_____	)		
		)		
10	MICHAEL J. WELTHER, III,	)		
		)		
11	Appellant,	)		
		)		
12	v.	)	<b>MEMORANDUM<sup>1</sup></b>	
		)		
13	JAMES H. DONELL; DAVID	)		
	SEROR, Chapter 7 Trustee,	)		
14	Appellees.	)		
		)		
15	_____	)		

Argued and Submitted on September 28, 2005  
at Pasadena, CA

Filed - November 22, 2005

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Ernest M. Robles, Bankruptcy Judge, Presiding

Before: BRANDT, MARLAR, and McMANUS,<sup>2</sup> Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Michael S. McManus, Chief Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 The chapter 7<sup>3</sup> trustee obtained an order appointing a receiver of  
2 appellant's assets in aid of execution of judgment under state law. The  
3 bankruptcy court then granted the receiver's motion for an order  
4 compelling compliance, requiring appellant and his counsel to meet with  
5 the receiver and to turn over documents and information. This appeal  
6 ensued. We conclude that leave to appeal was improvidently granted, and  
7 DISMISS the appeal as interlocutory.

8  
9 **I. FACTS**

10 David Seror, chapter 7 trustee of the Oakmore Ranch Management  
11 bankruptcy case, obtained a \$2.1 million judgment on behalf of the  
12 bankruptcy estate against appellant Michael J. Welther, III on 31 March  
13 1997.

14 In 2004, on trustee's motion, the bankruptcy court entered an order  
15 appointing appellee James H. Donell as receiver in aid of execution over  
16 Welther's assets under California law. A judgment debtor examination of  
17 Welther was conducted on 13 July 2004. After unsuccessful requests for  
18 documentation and attempts by the receiver and his counsel to arrange a  
19 meeting with Welther and his current and former counsel, the receiver  
20 moved to (1) compel compliance with order to appoint receiver in aid of  
21 execution over judgment debtors; (2) to determine the extent, if any, to  
22 which an IRA rollover account is exempt;<sup>4</sup> and (3) to compel judgment  
23 debtor's counsel to produce documents and information.

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<sup>3</sup> Absent contrary indication, all section and chapter  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

28 <sup>4</sup> The exemption issue was the subject of a subsequent order  
and a related appeal, BAP No. CC-05-1068.

1 After a hearing, the bankruptcy court granted the receiver's motions  
2 to compel. Welther timely appealed; the bankruptcy court stayed its  
3 order pending the outcome of this appeal. Our motions panel granted  
4 leave to appeal on 14 April 2005.

## 5 6 **II. JURISDICTION**

7 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and  
8 § 157(b)(1) and (B)(2)(A) and (O). Although we conclude we lack  
9 jurisdiction over this appeal, our jurisdiction over bankruptcy appeals  
10 generally is under 28 U.S.C. § 158(c).

## 11 12 **III. ISSUE**

13 Whether the appeal should be dismissed as interlocutory.  
14

## 15 16 **IV. DISCUSSION**

17 The order on appeal is akin to an order compelling discovery and  
18 thus is not a final order. See Richmark Corp. v. Timber Falling  
19 Consultants, Inc., 937 F.2d 1444, 1449 (9th Cir. 1991) (pre-judgment  
20 orders compelling discovery are not final "and may be appealed only after  
21 issuance of a contempt order for failure to comply.") We have  
22 jurisdiction to hear appeals of final orders and, with leave,  
23 interlocutory appeals. In re Roderick Timber Co., 185 B.R. 601, 604 (9th  
24 Cir. BAP 1995). As noted, our motions panel granted leave to appeal  
25 early on. However, we are not bound by the motions panel. In re  
Wiersma, 324 B.R. 92, 104 n.12 (9th Cir. BAP 2005).

26 Leave to appeal is appropriate where the appeal "involves a  
27 controlling question of law as to which there is substantial ground for  
28 difference of opinion[,] . . . an immediate appeal may materially advance

1 the ultimate termination of the litigation," and "denying leave will  
2 result in wasted litigation and expense." Roderick Timber, 185 B.R. at  
3 604 (citation omitted).

4 The parties (and the bankruptcy court) framed the issue as whether  
5 the Receiver could waive appellant's attorney-client privilege. But  
6 appellant has never established that the information sought is protected  
7 by the privilege. "A party asserting the attorney-client privilege has  
8 the burden of proving both the relationship and the privileged nature of  
9 the communication." U.S. v. Alexander, 287 F.3d 811, 816 (9th Cir.  
10 2002); U.S. v. Blackman, 72 F.3d 1418, 1423-24 (9th Cir. 1995).

11 Welther's counsel merely asserted that the information sought was  
12 protected by the attorney-client privilege. There was no evidence  
13 presented that the information was privileged, or even a log of items  
14 claimed to be privileged. Nor did appellant articulate how the  
15 information sought with respect to property transfers from Welther to  
16 him, or information about them, might be privileged. In short, Welther  
17 did not meet his burden.

18 Any determination we might make as to the Receiver's ability to  
19 waive the privilege would necessarily be premature, and we refrain from  
20 issuing advisory opinions. See U.S. v. Freuhauf, 365 U.S. 146, 157  
21 (1961) (noting that the Supreme Court has consistently refused to provide  
22 "advance expressions of legal judgment upon issues which remain  
23 unfocused").

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1 **V. CONCLUSION**

2 Upon closer examination of the issues, we conclude that leave to  
3 appeal was improvidently granted. Accordingly, we VACATE our motions  
4 panel's prior order granting leave to appeal, and we DISMISS.<sup>5</sup>

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<sup>5</sup> Welther's pending motion to strike portions of the receiver's brief and excerpts is ORDERED DENIED as moot.