NEW YORK STATE – FEDERAL JUDICIAL COUNCIL ADVISORY COMMITTEE

June 2015 CLE Program on Attorney-Client Privilege

EXPLORING ATTORNEY CLIENT PRIVILEGE, WORK PRODUCT DOCTRINE AND OTHER PRIVILEGES

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By: James M. Wicks[1]

The attorney-client privilege, although easily defined, has always posed challenges in application. Court decisions and rule changes both in federal and state court continue to define the contours of the doctrine. Assertion of the privilege gives rise to not only practical considerations, but may also involve ethics as well.

Below is a summary of some of the more recent privilege decisions from the New York and federal courts. In addition, other privileges are identified and explored below, where there is sometimes overlap between application of various privileges.

I. Attorney-Client Privilege Defined

A. New York State

New York codified the attorney-client privilege in CPLR 4503, which provides:

> Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof.

[1] The assistance of Ryan Sirianni is gratefully acknowledged in the preparation of these materials.

Generally, a party seeking to assert the privilege must show:

1) The existence of an attorney-client relationship; and
2) The communication was confidential, and made to the attorney for the purpose of obtaining legal advice or services.

The burden of establishing privilege lies with the party seeking to assert it, and application of privilege may yield to "strong public policy" in support of disclosure in a particular instance.

See Priest v Hennessy, 51 N.Y.2d 62, 69 1980).

B. Federal

The assertion of attorney-client privilege in the Second Circuit is governed by a similar test. In the Second Circuit, "the attorney-client privilege protects communications:

1) between a client and his or her attorney;

2) that are intended to be, and in fact were, kept confidential;

3) for the purpose of obtaining or providing legal assistance.

Brennan Ctr. for Justice at New York Univ. Sch. of Law v. U.S. Dep't of Justice, 697 F.3d 184, 207 (2d Cir. 2012).

II. Common Interest Privilege

The common interest privilege exists in New York, but is not codified. Instead, the New York courts view the "common interest" privilege as an exception to the attorney-client privilege. This is a different approach than other states, which take the position that the privilege is a distinct privilege, separate and apart from the attorney-client privilege.

A. ABA Section of Litigation re: the Status of New York State Law

- Excerpted from "*The Common Interest Privilege*," by Matthew D. LaBrie, September 30, 2014 (accessible at http://apps.americanbar.org/litigation/committees/trialevidence/articles/fall2014-0914-common-interest-privilege.html)

> New York's recognition of the common interest privilege diverges from that of the Restatement, Massachusetts, and Delaware. Like Delaware, New York has declined to adopt the Restatement but, unlike Delaware, New York has not codified the privilege. Rather, New York courts see the common interest privilege as a narrow "exception" to the "traditional rule that the presence of a third party waives the attorney-client privilege." *Hyatt v. State of Cal. Franchise Tax Bd.*, 962 N.Y.S.2d 282, 295–96 (App. Div. 2013). New York courts already narrowly construe the attorney-client privilege, viewing it as an obstacle to "proper discovery and the use of relevant information." *See Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's London*, 676 N.Y.S.2d 727, 732 (Sup. Ct. 1998). Thus, it follows that any extension of the privilege to a common interest setting would also be narrow.
>
> One way that New York courts have limited the scope of the common interest privilege is to require any shared interest between clients to be "identical (or nearly identical), as opposed to merely similar." *Hyatt*, 962 N.Y.S.2d at 296. While it is clear that communications among codefendants or coplaintiffs and their separate lawyers meet this requirement, New York courts have provided little guidance as to what other factual situations would be considered "nearly identical" for purposes of the privilege. *See, e.g.*, *Arkin Kaplan Rice LLP v. Kaplan*, 967 N.Y.S.2d 63, 64 (App. Div. 2013).
>
> Additionally, New York also requires that, for the common interest privilege to apply, any communications must occur during litigation, or at least when litigation is anticipated. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 980 N.Y.S.2d 274, 274 (Sup. Ct. 2013). Therefore, to remain privileged or protected, communications must be legal in nature, not merely commercial. *Hyatt*, 962 N.Y.S.2d at 296–97. Significantly, business advice is not protected, even if

attorneys are involved in providing the advice. *See Grande Prairie Energy LLC v. Alstom Power, Inc.*, 798 N.Y.S.2d 709, 709 (Sup. Ct. 2004). This limitation perhaps explains why New York courts have failed to provide guidance for what constitutes a "nearly identical" common interest outside a codefendant or coplaintiff scenario. Under New York law, there simply may be no other sufficiently close common interest.

The combination of the narrowly defined "common interest" and the litigation restriction effectively limits the use of the common interest privilege in New York to coordinated litigation prosecutions or defenses.

Finally, like Delaware, although a writing is not required to invoke the common interest privilege in New York, a written or formal agreement is always a best practice. New York courts do note, however, that the mere existence of a written or formal agreement does not create the privilege if the communications do not meet the requirements set out by the New York courts. *See Aetna Cas. & Sur. Co.*, 676 N.Y.S.2d at 733.

B. Illustrative Cases

(i) *New York*

- *Ambac Assur. Corp. v Countrywide Home Loans, Inc*., 124 A.D.3d 129 (1st Dept 2014):

  The Appellate Division, First Department, reverses the lower court's denial of a motion to compel production of documents over which common interest privilege is asserted. Noting that while "New York courts have taken a narrow view of the common-interest privilege holding that it applies only with respect to legal advice in pending or reasonably anticipated litigation," the Court holds "in today's business environment, pending or reasonably anticipated litigation is not a necessary element of the common-interest privilege."

- *Hyatt v State Franchise Tax Bd.*, 105 A.D.3d 186 (2d Dept 2013):

The Appellate Division, Second Department, denies application of the common interest privilege because the party resisting production "had divergent interests in making the deal" with a counterparty to a patent licensing agreement, with whom the party asserted he shared a common interest.

(ii) *U.S. District Court, New York*

- *In re Bank of New York Mellon Corp. Forex Transactions Litig.*, Case No. 11-CV-6969, 2014 WL 5810612 (S.D.N.Y. Nov. 10, 2014):

  Judge Kaplan denies a motion to compel production of a memorandum prepared for the defendant bank with respect to ERISA compliance and "forwarded to some third-party investment managers . . . "that were associated with [bank's] pension plan" on the ground and holds it is protected by the common interest privilege.

- *Cohen v. Cohen*, Case No. 09-cv-10230, 2015 WL 745712 (S.D.N.Y. Jan. 30, 2015):

  Chief Judge Preska denies assertion of common interest privilege over emails between the plaintiff and a non-practicing attorney "litigation funder" concerning "legal strategy, court filings, discovery, and funding for the litigation" because the two do not share a legal interest, and holds that the plaintiff must produce these emails to the defendant ex-husband.

III. Intrafirm Communications Between Lawyer and In-House Counsel to Law Firm

A. NYSBA Materials

- Formal Opinion #789: Consultation with a law firm's in-house counsel on matters of professional ethics involving one or more clients of the law firm.

From the Digest of the Opinion:

> A law firm may form an attorney-client relationship with one or more of its own lawyers to receive advice on matters of professional responsibility concerning ongoing client representation(s), including on matters implicating the client's interests, without thereby creating an impermissible conflict between the law firm and the affected client(s). The law firm's duty to disclose its conclusions will vary with the circumstances of the matter.

B. Illustrative Cases

(i) *New York State*

- *Stock v. Schnader Harrison Segal & Lewis LLP*, 2014 WL 6879923 (Sup Ct, NY County Dec. 8, 2014)

> Justice Schweitzer holds that communications between a named defendant partner to law firm and general counsel of the law firm, to prepare for the partner's deposition in a legal malpractice lawsuit, were not protected by attorney-client privilege. Justice Schweitzer analogizes the relationship between the law firm and the plaintiff former client to that between a fiduciary and beneficiary. Additionally, Justice Schweitzer finds that the named defendant partner did not expect the communications to be confidential as against the former client.

(ii) *U.S. District Court, New York*

- *Bank Brussells Lambert v. Credit Lyonnais (Suisse)*, 220 F. Supp. 2d 283 (S.D.N.Y. 2002)

Magistrate Judge Ellis holds that "a law firm cannot invoke the attorney-client privilege against a current client when performing a conflict check in furtherance of representing that client," and orders the production of such communications.

IV. Spousal Privilege and Attorney-Client Communications

Sometimes the client or "prospective client" arrives for the consultation with his or her spouse. Must the spouse be excused from the meeting? Does the spouse's presence waive the attorney client privilege? Does the "spousal privilege" apply to save a waiver?

A. CPLR

- CPLR 4502(b)

> "**(b) Confidential communication privileged.** A husband or wife shall not be required, or, without consent of the other if living, allowed, to disclose a confidential communication made by one to the other during marriage."

B. Illustrative Cases

(i) *New York State*

- *In re Horowitz*, 16 Misc.3d 1106[A] (Surr. Ct. Nassau County 2007)

> Justice Riordan holds that while "[i]n some states, the presence of a spouse does not negate the confidentiality of an attorney-client communication, on the theory that the marital communications privilege is incorporated into the transaction," this "is not the law in New York." Justice Riordan concludes that "communications between an attorney and client are generally not privileged in New York if the client's spouse is present at the time of the transaction."

- *Matter of Will of Pretino*, 150 Misc. 2d 371 (Surr. Ct. Nassau County 1991)

Justice Raidan holds that "[w]here the disclosure of information protected by the attorney-client privilege is disclosed in a communication which is itself privileged, there is no waiver. Thus, the disclosure to a spouse with the intention of preserving confidentiality does not amount to a waiver of the attorney-client privilege."

(ii) *U.S. District Court, New York*

- *Solomon v Scientific Am., Inc.*, 125 FRD 34 (S.D.N.Y. 1988)

Magistrate Judge Lee holds that where "the only persons to whom the privileged communication was shown to have been disclosed were plaintiff's wife and another of his attorneys," that "[n]either of those disclosures can be deemed a waiver [of privilege], since both were consistent with the maintenance of the confidential attorney-client relationship."

V. Expert Report Drafts

One area that was (at least historically) a minefield for lawyers was whether drafts of expert reports had to be produced. Fortunately, there have been decisions and rule changes in this area providing clarity and guidance to those retaining experts.

A. New York

- CPLR 3101(d)(2)

Materials. Subject to the provisions of paragraph one of this subdivision, materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other

means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

B. Federal Rules

- Federal Rule of Civil Procedure 26(b)(4):

Trial Preparation: Experts.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures*. Rules 26(b)(3)(A) [protecting documents prepared in anticipation of litigation or for trial] and (B) [protecting attorney work product concerning the litigation] protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses*. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

C. Illustrative Cases

(i) *New York*

- *Beller v William Penn Life Ins. Co. of New York*, 15 Misc. 3d 350, 356 (Sup. Ct. Nassau County 2007)

  Justice Warshawsky holds the attorney work product doctrine protects conversations between an expert and counsel to allow the expert to complete his expert report, citing CPLR 3101(d)(2).

(ii) *U.S. District Court, New York*

- *In re Hurricane Sandy Cases*, 303 F.R.D. 17 (E.D.N.Y. 2014)

  Magistrate Judge Brown rejects counsel's efforts to label draft reports concerning insureds' scope of loss under policies as "draft expert reports" in order to protect them from disclosure under FRCP 26(b)(4), finding the reports were not prepared in anticipation of litigation.

VI. Witness Preparation

What can a lawyer do in preparing his or her witness for testifying? Are there pitfalls to avoid? Is there risk in waiving the attorney client privilege?

A. Uniform Rules for New York State Trial Courts

- §221.2 Refusal to answer when objection is made

  A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality . . . . An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 [concerning objections to qualification of person taking deposition, competency, questions and answers] or this subdivision.

B. Illustrative Cases

(i) *New York*

- *Freidman v Fayenson*, 41 Misc. 3d 1236(A) (Sup. Ct. N.Y. County 2013)

Justice Bransten holds improper counsel's stopping his witness from "answering a question about whether he had reviewed any documents in preparation for his deposition, asserting an objection on the basis of attorney/client privilege," as "courts have held that parties are entitled to ask questions regarding what documents [a deponent] reviewed prior to his deposition and when such documents were reviewed."

- *Fields v First Liberty Ins. Corp.*, 38 Misc. 3d 431, 436 (Sup. Ct. Suffolk County 2012)

  Justice Pastoressa holds that a party may properly object on the ground of attorney-client privilege to production of an unredacted version of a document, where its employee witnesses reviewed a redacted (for privilege) version to prepare for deposition, holding that "[a] document protected by an unqualified privilege is not waived by a party merely by allowing its own employee to review the document in preparation for a deposition."

- *Fernekes v Catskill Regional Med. Ctr.*, 75 A.Dd3d 959, 961 (3d Dept 2010)

  The Appellate Division, Third Department, reverses the lower court's order to the defendant hospital to produce a report written by its nurse because the nurse reviewed the report to prepare for her deposition, despite that the report was created pursuant to Public Health Law § 2805-l, which conveys a statutory privilege against disclosure. The Court holds that the nurse's "review of a confidential case file prior to testifying does not constitute a wholesale waiver of the privileges attached to that file."

(ii) *U.S. District Court, New York*

- *Estate of Jaquez ex rel. Pub. Adm'r of Bronx Cnty. v. City of New York*, Case No. 10-cv-2881, 2014 WL 5369091 (S.D.N.Y. Oct. 10, 2014)

  Magistrate Judge Forrest rules that a party may not object, on the ground of attorney-client privilege, to the question, "Did any lawyer since last Thursday ever tell you what [another witness] said in his

deposition; yes or no?" While opposing counsel is not entitled to discover discussions of "legal strategy and anticipated topics" between the witness and her counsel, "[a]n attorney cannot shield from disclosure that he or she has shared the substance of a witness's testimony, which has refreshed the deponent's recollection, simply by reading or summarizing it to the witness instead of having the witness read it him or herself."

- *S.E.C. v. Gupta*, 281 F.R.D. 169 (S.D.N.Y. 2012)

  Judge Rakoff holds that counsel for a party to the litigation may not assert work product doctrine over documents she chooses to show a non-party witness to prepare him for deposition, holding that "[w]hen an attorney discloses work product to prepare a non-party witness for a deposition, and that witness does not share a common interest with the attorney's client, there has been a deliberate, affirmative and selective use of work product that waives the privilege."

Conversations with counsel during deposition breaks.

- *Few v. Yellowpages.com*, Case No. 13-cv-4107, 2014 WL 3507366 (S.D.N.Y. July 14, 2014)

  Magistrate Judge Dolinger holds attorney-client privilege does not apply to conversations between deponent and counsel during break. Judge Dolinger notes that a prior EDNY Local Rule "had incorporated a broader prohibition, barring a deponent's attorney from "initiat[ing] a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted," but "[t]he current rule, which applies both in this district and in the Eastern District, narrows the restriction on counsel to conferencing during the pendency of a question, a change that obviously represents a deliberate decision to alter the scope of the prohibition."

- *Gibbs v. City of New York*, Case No. 06-cv-5112 ILGVVP, 2008 WL 789838 (E.D.N.Y. Mar. 21, 2008)

Magistrate Judge Pohorelsky orders deponent to answer question: "I'm asking you when you walked out the door to go to lunch before you had a conversation with your attorney about the deposition on your own, did it suddenly come to you that you made a mistake and you needed to make a clarification?" and holds that attorney-privilege does not apply to that question.

VII. Privilege Logs

Now that counsel has determined a privilege exists over responsive documents, what next? A privilege log, of course, must be prepared. What should this log look like?

A. New York State Commercial Division Rules (Section 202.70 of the Uniform Rules for Trial Courts)

- Rule 8(b)

  Consultation prior to Preliminary and Compliance Conferences.

  . . .

  (b) Prior to the preliminary conference, counsel shall confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to . . . (vii) identification, redaction, labeling, and logging of privileged or confidential ESI . . . .

- Rule 11-b (Section 202.70 of the Uniform Rules for Trial Courts)

  Privilege Logs.

  (a) Meet and Confer: General. Parties shall meet and confer at the outset of the case, and from time to time thereafter, to discuss the scope of the privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-

document logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order. To the extent that the collection process and parameters are disclosed to the other parties and those parties do not object, that fact may be relevant to the Court when addressing later discovery disputes.

(b) Categorical Approach or Document-By-Document Review.

(1) The preference in the Commercial Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs. The parties are expected to address such considerations in good faith as part of the meet and confer process (see paragraph (a) above) and to agree, where possible, to employ a categorical approach to privilege designations. The parties are encouraged to utilize any reasoned method of organizing the documents that will facilitate an orderly assessment as to the appropriateness of withholding documents in the specified category. For each category of documents that may be established, the producing party shall provide a certification, pursuant to 22 NYCRR § 130-1.1a, setting forth with specificity those facts supporting the privileged or protected status of the information included within the category. The certification shall also describe the steps taken to identify the documents so categorized, including but not limited to whether each document was reviewed or some form of sampling was employed, and if the latter, how the sampling was conducted. The certification shall be signed by the Responsible Attorney, as defined below, or by the party, through an authorized and knowledgeable representative.

(2) In the event the requesting party refuses to permit a categorical approach, and instead insists on a document-by-document listing on the privilege log, then unless the Court deems it appropriate to issue a protective order pursuant to

CPLR 3103 based upon the facts and circumstances before it, the requirements set forth in CPLR 3122 shall be followed. In that circumstance, however, the producing party, upon a showing of good cause, may apply to the court for the allocation of costs, including attorneys' fees, incurred with respect to preparing the document-by-document log. Upon good cause shown, the court may allocate the costs to the requesting party.

(3) To the extent that a party insists upon a document-by-document privilege log as contemplated by CPLR 3122, and absent an order to the contrary, each uninterrupted e-mail chain shall constitute a single entry, and the description accompanying the entry shall include the following: (i) an indication that the e-mails represent an uninterrupted dialogue; (ii) the beginning and ending dates and times (as noted on the e-mails) of the dialogue; (iii) the number of e-mails within the dialogue; and (iv) the names of all authors and recipients – together with sufficient identifying information about each person (e.g., name of employer, job title, role in the case) to allow for a considered assessment of privilege issues.

(c) Special Master. In complex matters likely to raise significant issues regarding privileged and protected material, parties are encouraged to hire a Special Master to help the parties efficiently generate privilege logs, with costs to be shared.

(d) Responsible Attorney. The attorney having supervisory responsibility over the privilege review shall be actively involved in establishing and monitoring the procedures used to collect and review documents to determine that reasonable, good faith efforts are undertaken to ensure that responsive, non-privileged documents are timely produced.

(e) Court Order. Agreements and protocols agreed upon by parties should be memorialized in a court order.

B. Commercial Division Rule and NYSBA Comment

- Commercial Division Advisory Council Proposal, dated April 3, 2014

  "The proposed rule seeks to promote more efficient, cost-effective pretrial disclosure by establishing a 'preference' in the Commercial Division for the use of 'categorical designations' rather than document-by-document logging."

  The Council's proposed Commercial Division Rule is attached as Exhibit A to the Proposal.

- NYSBA Commercial and Federal Litigation Section Report, dated May 14, 2014

  The Commercial and Federal Litigation Section "agrees that the costs and burdens associated with document-by-document privilege logs often outweigh any benefits of such logs to the parties in litigation," and "enthusiastically supports the general framework of the Proposal, subject to some minor suggested revisions," enumerated in the Memorandum.

  - On July 8, 2014, Judge Gail Prudenti adopted Rule 11-b, entitled "Privilege Logs," which took effect on September 2, 2014, which specifically addresses the form, content, and procedure for cataloging claims of privilege within the Commercial Division.

C. Federal Rules

- Federal Rule of Civil Procedure 25(b)(5)(A)

  Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

D. Local Rules of United States District Courts for the Southern and Eastern Districts of New York

- Rule 26.2

Assertion of Claim of Privilege.

(a) Unless otherwise agreed by the parties or directed by the Court, where a claim of privilege is asserted in objecting to any means of discovery or disclosure, including but not limited to a deposition, and an answer is not provided on the basis of such assertion,

(1) The person asserting the privilege shall identify the nature of the privilege (including work product) which is being claimed and, if the privilege is governed by state law, indicate the state's privilege rule being invoked; and

(2) The following information shall be provided in the objection, or (in the case of a deposition) in response to questions by the questioner, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(A) For documents: (i) the type of document, e.g., letter or memorandum; (ii) the general subject matter of the document; (iii) the date of the document; and (iv) the author of the document, the addressees of the document, and any other recipients, and, where not apparent, the relationship of the author, addressees, and recipients to each other;

(B) For oral communications: (i) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (ii) the date and place of communication; and (iii) the general subject matter of the communication.

(b) Where a claim of privilege is asserted in response to discovery or disclosure other than a deposition, and information is not provided on the basis of such assertion, the information set forth in paragraph (a) above shall be furnished in writing at the time of the response to such discovery or disclosure, unless otherwise ordered by the Court.

(c) Efficient means of providing information regarding claims of privilege are encouraged, and parties are encouraged to agree upon measures that further this end. For example, when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category. A party receiving a privilege log that groups documents or otherwise departs from a document-by-document or communication-by-communication listing may not object solely on that basis, but may object if the substantive information required by this rule has not been provided in a comprehensible form.

E. Illustrative Cases

(i) *U.S. District Court, New York*

- *S.E.C. v. Yorkville Advisors, LLC*, 300 F.R.D. 152 (S.D.N.Y. 2014)

  Magistrate Judge Pitman opines on categorical privilege logs (one of which "purports to describe ninety-eight privileged documents, which are grouped into only four log entries"), and holds they "fail[ed] to provide adequate descriptions of the subject matter, authors and recipients of the withheld documents."

- *Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479 (S.D.N.Y. 2013)

  Judge Scheindlin finds inadequate the privilege log before her due to its identification of "communications between departments without providing sufficient information to determine whether the recipients or creators of the documents were attorneys or were providing legal advice."

- *Gross v. Lunduski*, 304 F.R.D. 136 (W.D.N.Y. 2014)

  Magistrate Judge Foschio rejects the defendant's argument that because the plaintiff has not proved that mental health records exist, Defendant was not obligated to serve a privilege log in support of his assertion of psychotherapist-patient privilege, and that Defendant consequently waived the privilege.

VIII. Inadvertent Disclosure

Oops, I produced a document that I shouldn't have. What now?

A. New York State Commercial Division Rules (Section 202.70 of the Uniform Rules for Trial Courts)

- Rule 8(b)

  Consultation prior to Preliminary and Compliance Conferences.

  (b) Prior to the preliminary conference, counsel shall confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to . . . (viii) claw-back or other provisions for privileged or protected ESI . . . .

B. New York Rules of Professional Conduct

- Rule 4.4

Respect for Rights of Third Persons.

> (b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

C. NYSBA Materials

- Formal Opinion 2012-1: Obligations Upon Receiving a Document Not Intended for the Recipient

  From the Digest of the Opinion:

  > A lawyer who receives a letter, fax, e-mail or other communication that the lawyer knows or reasonably should know was transmitted by mistake must promptly notify the sender, pursuant to Rule 4.4(b) of the New York Rules of Professional Conduct, and follow any other applicable law. To the extent that it imposed requirements beyond those set forth in Rule 4.4(b), ABCNY Formal Opinion 2003-04, which addressed the same issue under the New York Code of Professional Responsibility, is withdrawn, but there may be circumstances in which a lawyer may choose to act in conformity with the guidance in Formal Opinion 2003-04 without thereby per se violating Rule 4.4(b).

- NYSBA guide entitled "Best Practices in E-Discovery in New York State and Federal Courts" dated July 2011

  Guideline No. 11:

  > . . . . To avoid the situation in which an inadvertent production of privileged ESI may possibly be deemed a waiver of the privilege, counsel should consider, as appropriate, entering into a non-waiver agreement and having the court incorporate that agreement into a court order.

D. Federal Rules

- Federal Rule of Evidence 502(b):

Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

> (1) the disclosure is inadvertent;
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
> (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).

- Federal Rule of Civil Procedure 26(b)(5)(B):

Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

E. Illustrative Cases

(i) *U.S. District Court, New York*

- *BNP Paribas Mortgage Corp. v. Bank of Am., N.A.*, Case No. 09-cv-9783, 2013 WL 2322678 (S.D.N.Y. May 21, 2013)

> Judge Sweet orders the party receiving an alleged inadvertent disclosure to return or destroy the documents. The court notes that in the Southern District, the "test to determine whether the alleged inadvertent disclosure should result in waiver" was set forth in *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.,* 104 F.R.D. 103 (S.D.N.Y. 1985), and includes the following factors: "(1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time taken

to rectify the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) an overreaching issue of fairness." Noting that "courts have continued to apply the *Lois Sportswear* factors after the enactment of Rule 502(b)," Judge Sweet applies the test and holds that no waiver occurred.