NEW YORK CITY BAR

COMMITTEE ON STATE COURTS OF SUPERIOR JURISDICTION

ADRIENNE B. KOCH
CHAIR
605 THIRD AVENUE
NEW YORK, NY 10158
PHONE: (212) 716-3225
FAX: (212) 716-3349
AKoch@KatskyKorins.com

JOSEPH WEINER
SECRETARY
605 THIRD AVENUE
NEW YORK, NY 10158
PHONE: (212) 716-3317
FAX: (212) 716-3336
JWeiner@KatskyKorins.com

June 15, 2015

George F. Carpinello, Esq.
Chair, Advisory Committee on Civil Practice
c/o Office of Court Administration Counsel's Office
25 Beaver Street
New York, NY 10004

Re: Harmonizing the Law of Evidence Regarding Inadvertent Waiver of the Attorney-Client Privilege (CPLR 4550)(2015-33)

Dear Mr. Carpinello,

The Committee on State Courts of Superior Jurisdiction of the New York City Bar Association (the "Committee") generally supports the enactment of a new CPLR § 4550 concerning waiver of the attorney-client privilege and work product protection in both civil and criminal litigation (the "Rule") as proposed in the January 2015 Report of the Advisory Committee on Civil Practice. However, the Committee believes that the proposed Rule should be modified in one key respect. We also believe that the Rule should be codified in CPLR Article 31.

Subdivision (b) of the proposed Rule states that a disclosure does not waive privilege if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; (3) the holder of the privilege or protection took reasonable steps to rectify the error; and (4) the party in possession of the disclosure will not be unduly prejudiced. The Committee believes that sub-part (4) requires modification.

A party in possession of inadvertently disclosed material may contend that it would be "prejudicial" to continue to treat the disclosed material as privileged. Therefore, the rule should more clearly describe the prejudice showing necessary to prevent restoration of immunity, as delineated by federal and state courts. The "prejudice factor focuses only on whether the act of restoring immunity to an inadvertently disclosed document would be unfair, not whether the privilege itself deprives parties of pertinent information."[1] As the Appellate Division made clear

[1] *In re Natural Gas Commodity Litigation*, 229 F.R.D. 82, 90 (S.D.N.Y. 2005); *Prescient Partners L.P. v. Fieldcrest Cannon, Inc.*, 1997 WL 736726, at *7 (S.D.N.Y. Nov. 26 1997) ("Absent any prejudice to the defendants caused by restoring immunity to the documents, [i]t would be inappropriate for the client of producing counsel to suffer the waiver of privilege ... due to an isolated, inadvertent error.") (citation and internal quotations omitted; alteration in *Prescient Partners*). *See also United States v. Rigas*, 281 F. Supp. 2d 733, 742 (S.D.N.Y. 2003) ("Defendants were

in *AFA Protective Systems, Inc. v. City of New York*, 13 A.D.3d 564 (2d Dep't 2004), the "prejudice" question turns on whether the receiving party relied on the disclosed information in some material manner before the producing party took steps to restore the immunity.[2]

Therefore, we believe that sub-part (4) of subdivision (b) should be modified, as follows:

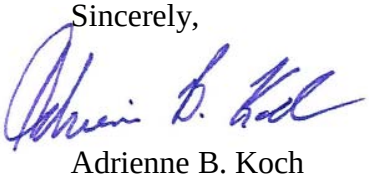
> (4) the party in possession of the disclosure will not <u>suffer prejudice arising from the inadvertent disclosure and subsequent restoration of immunity</u> [be unduly prejudiced].

Further, given that the Advisory Committee's supporting memorandum states that one of the chief goals of this rule is to "harmonize New York State's evidentiary rule concerning the inadvertent waiver of the attorney-client privilege and/or work product protection…with corresponding evidentiary law in federal courts," we believe that this modification is necessary to make clear that CPLR § 4550 follows the corresponding evidentiary law in federal courts on this issue.

Accordingly, we support the proposed rule provided that the import of sub-part (4) of subdivision (b) is clarified, as suggested above. We also believe that this rule is better placed in Article 31 ("Disclosure") as a subdivision of CPLR § 3101, rather than Article 45 ("Evidence").

Thank you for your consideration.

Sincerely,



Adrienne B. Koch

Cc: Hon. John Bonacic, Chair, NYS Senate Judiciary Committee
Hon. Helene Weinstein, Chair, NYS Assembly Judiciary Committee
Holly Lutz, Esq., Counsel to the Advisory Committee on Civil Practice

---

not entitled to the work product [that was inadvertently produced]. By restoring the privilege as to these documents, the Court takes nothing away from Defendants, but rather prevents a 'windfall' to them."); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 223 (S.D.N.Y. 2001) ("Depriving a party of information in an otherwise privileged document is not prejudicial.").

[2] *Id.*, at 566 ("[T]he Supreme Court's grant of the protective order resulted in undue prejudice since the 1994 memo contains information that is relevant to the litigation, and the plaintiffs relied on such information in further support of their pending summary judgment motion.").