SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50

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THERESA WARREN, as Administratrix
for the Estate of RICHARD WARREN

Plaintiffs,

-against-

Index No.: 190281/14

MOTION SEQ 003

AMCHEM PRODUCTS, INC., et al

Defendants.

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PETER H. MOULTON

Defendant J-M Manufacturing Company, Inc. ("defendant" or "J-M") moves to vacate the November 1, 2015 Recommendation (the "Recommendation") of Special Master Shelley Rossoff Olsen (the "Special Master") and to seal all briefing related to this motion pursuant to 22 NYCRR 216.1. Defendant asserts that the Special Master erred in applying New York law, and not California law, in determining that J-M waived the attorney-client privilege attached to both the redacted and unredacted versions of a document. Plaintiff disagrees and opposes the motion.

For the foregoing reasons, J-M's motion is denied.

The Special's Master's Recommendation

The Special Master found that an "Internal Correspondence" addressed to J-M's president, dated August 14, 1983 (the "Memo") is subject to the attorney-client privilege in both its redacted and unredacted forms.[1] The Memo is marked "-CONFIDENTIAL-Attorney-Client Privilege." It

[1]The unredacted document includes both typed and handwritten language. The redacted document includes portions of the typed language from the unredacted version, and two barely legible handwritten words from a paragraph at the end of the unredacted version. The redacted version also has different exhibit references.

is prepared for J-M (which is headquartered in California), by defendant's Law Department, is addressed to J-M's president (who resided in California), refers to California law, and renders legal advice. It is undisputable that the Memo is privileged under either California or New York law.[2] While plaintiff cites to the absence of proof regarding where the Memo was written and where it was received, this argument does nothing to refute the Special Master's finding that the Memo is privileged.

As the Special Master noted, the disputed issue is whether defendant has waived the privilege. As to that issue, the Special Master held that under choice of law principles, New York law applies and that under New York law, defendant waived the privilege.

Regarding the choice of law issue,[3] the Special Master found:

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[2]The Special Master stated:

> The Memo, marked CONFIDENTIAL-Attorney Client Privilege, Attorney Work Product in all of its versions, is from JMM's in-house counsel to JMM's president. There is no dispute that the Memo, which I have reviewed in camera in all of its versions, renders legal advice with respect to JMM's asbestos cement pipe business.

[3]The Special Master noted the following conflict between New York and California law:

> [T]he substantive laws of California and New York are different as to which side bears the burden of demonstrating attorney-client privilege and its waiver. In California, the party challenging the privilege has the burden. See, for example, Wellpoint Health Networks v Superior Court, 59 Cal. App. 4th 110 (1997). By contrast, in New York, the party asserting the privilege has the burden of demonstrating that the privilege has not been waived. See, for example, New York Times Newspaper Div of NY Times Co. v Lehrer McGovern Bovis, 300 AD2d 169, 172 (1st Dept. 2002). Moreover, New York further requires a showing by the party asserting the privilege, that "reasonable steps were taken to prevent disclosure". Big Apple Concrete Corp. v Abrams, 103 AD2d 609, 613 (1st Dept. 1984).

> However, as a preliminary matter, and notwithstanding JMM's assertions, New York law applies to this procedural issue. As stated by Professor David Seigel, "Since the scope of the privilege is a matter of the law of evidence and its resolutions are adopted from that realm, it need not detain us here." Siegel, New York Practice, 5th Edition, at page 575.[4]
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> After concluding that New York law governed, the Special Master queried:
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> So the crucial issue in dispute is whether, in numerous instances in which the Memo has been addressed in depositions, affidavits and proceedings in the Courts of numerous States, has that privilege been inadvertently waived for New York purposes?

To determine this issue, the Special Master discussed the relevant history of the Memo starting with its inadvertent disclosure (and clawback) in a 2002 California document production in an asbestos action *Hardcastle v Advocate Mines, Ltd.,* Case Number 830058-2, Superior Court California, Alameda County ("*Hardcastle*"). The Special Master then discussed the many instances where defendant failed to safeguard the Memo a decade later.

She noted the following history:

> In 2011, Weitz and Luxenberg took the deposition of JMM's corporate representative James Reichert in the California venued case of George v Amcord. Therein, plaintiff's counsel showed a redacted version of the Memo to Mr. Reichert. Florence McClain, whose firm had only represented JMM for three years, had never seen the Memo in either form, but allowed Mr. Reichert to testify over objection.
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> In the Washington State case of Dawes v CertainTeed, et al., on March 26, 2012, before Judge John Hickman, then counsel for JMM, David Shaw and Florence McClain, objected to the use of the Memo. Corporate representative James Reichert was about to be questioned by yet a different plaintiff's firm. That firm had produced

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[4]In concluding that New York law applied, the Special Master cited to a New York custody case concerning the admissibility of tapes recorded in Pennsylvania, *I.K. v M.K.* (194 Misc2d 608 [Sup Ct New York County 2003] [issues of admissibility and suppression of evidence are procedural and thus governed by the forum state]). She further cited *Able Cycle Engines v Allstate Ins. Co.* (84 AD2d 140, 146 [2d Dept 1981]), Fisch, New York Evidence § 5 and the Restatement [Second] of Conflict of Laws § 597.

an exhibit list for trial, which contained the redacted version of the Memo. There was no written objection to this exhibit list. One week prior to trial, the exhibit list was updated to contain the unredacted version of the Memo. There was no written objection to this exhibit list.

During oral argument on the record, Ms. McClain & Mr. Shaw maintained that counsel had tried to mislead them by the proverbial bait and switch tactic. In fact, there is no evidence that JMM's counsel ever read the updated exhibit list or realized, prior to Mr. Reichert taking the stand, that a different document was listed. Their shock and outrage at the trial demonstrates this. Accordingly, Ms. McClain chose to object to the unredacted version, with a lukewarm objection to the redacted version. She conceded that the redacted version had been testified to before by Mr. Reichert.

"The document that I know Mr. Reichert has been shown once before is the heavily redacted version... I'm not quite sure where Plaintiff has got that [unredacted version] but it was not proposed in this case. It's not appropriate. It is attorney-client privilege. I would ask if the Court allow them to use the--over objection-- that they use the redacted version versus the unredacted version." Dawes at page 29. The Court allowed the redacted version.

At the April 23, 2012 deposition of Mr. Reichert in the Mendel matter, over a continuing objection, without instruction not to answer, Mr. Reichert answered questions regarding the unredacted memo. Ms. McClain and Mr. Shaw were present on behalf of JMM.

In July 2012, Miss McClain wrote to various plaintiff's counsel, seeking their assistance in confirming that they were not in possession of an unredacted copy of the Memo. See, for example, Plaintiff's memo of law at Exhibit H. "Again, please do not mistake our efforts for an accusation. We have seen reference to this document on exhibit lists but have always understood the reference to be to the redacted version. Our concern is about the unredacted version and we simply seek your assistance and cooperation in protecting our clients privileged documents." Exhibit H at page 3.

On August 1, 2012, a Los Angeles Superior Court judge granted JMM's motion for a protective order against yet another plaintiff's firm in the Paulus v Access Resort & Hotels. Plaintiff's memo of law at Exhibit J. That court, however, denied JMM's motion to seal, because it was not in "proper form". Exhibit J at 16. That record was never sealed and, as a result, the unredacted version of the Memo became publicly

available. It remains publicly available.

On January 3, 2013, in the Uber matter, Ms. McClain wrote to another plaintiff's counsel, asserting a privilege over the Memo. He responded, "Florence, as you well know, we and everybody else have the full memo that has been in the public domain for years and it is not in any way privileged..." Ms. McClain responded, in part, "Just to be clear, I am talking about the unredacted memo-the redacted memo has been produced years ago and been used." Plaintiff's memo of law at Exhibit G.

On January 22, 2013, during the McIntyre trial in Washington State, before Judge Douglass North, Mr. Shaw defended JMM at motions in limine regarding the unredacted Memo. Mr. Shaw admitted to the court that "there's really not very much information about how a plaintiff lawyer got a hold of that memo." Mr. Shaw reiterated bits of hearsay of the Hardcastle attorney's presence at JMM's Stockton, California plant in 2000. "This document had a Bates stamp number on it, but it didn't say Hardcastle. And while we have no proof that it was taken by that lawyer during that document production...And the only thing that we can talk--that we could point to is that the Kasen firm, when they sent--allegedly sent everything back to us, didn't send everything back to us. And somehow that memo got out in the world, and now I'm the first to tell you, it's all over the world..." Plaintiff's memo of law at Exhibit D.

In response to Judge North's questioning regarding the difference between the two versions, Mr. Shaw stated, at page 126, "I couldn't tell you right now as I stand here. All I know is if they want to use the redacted version, have at it. I don't think we have an argument about that."

On February 25, 2013, in the Ornellas matter in open court in California, Ms. McClain responded to the court's inquiry about the Memo listed on the exhibit list of the Lanier firm. "There is a redacted version that you should have. If you have the unredacted version, that would be the subject of a protective order...I do know that typically what is used, there is a 1983 memo from the law department to the president of JM Manufacturing, a redacted version has been produced in discovery, it's been used many times."

After noting this history, and discussing the cases from other jurisdictions which were cited by the parties, the Special Master found that much of defendant's success in obtaining protective

orders was based on an argument that she found untenable. The Special Master explained:

> Instead, it is further submitted, the court focused, as has every other court granting a protective order, on some nebulous and hearsay accusations of alleged misconduct by some or all plaintiffs' counsel. Yet each court is also quick to admit that no one actually knows anything about what really happened with respect to the Memo. No one even knows how, by whom, when or for what purpose the Memo was redacted.
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> The theme of misconduct has continued in the arguments before this court. Current JMM counsel are fine attorneys. But they are in the unfortunate position of having to support the position of prior counsel for JMM, who claim to have been misled every step of the way by one plaintiff's attorney after another. For example, in its supplemental memo of law at 15, JMM's counsel asserts that, "in sum, Mr. Shaw, like Ms. McClain, was bamboozled by plaintiffs' counsels' misrepresentations as well as the Privileged Document's prior use..."
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> This is an untenable argument which fails to take responsibility for JMM's own actions, which have contributed in great part to the dilution of the privilege. It is inconsistent to cry privilege, while allowing that privilege to be abrogated, over and over again. This is particularly crucial with respect to the unredacted version, the substance of which Mr. Reichert was permitted to testify to in the 2012 Mendel deposition.

Thus, the Special Master concluded:

> I find that JMM's current assertion of privilege over both versions of the Memo is incompatible with its numerous disclosures and testimony regarding the statements contained in the Memo. Accordingly, the privilege has been waived as to both versions. Moreover, it defies logic that any privilege should be maintained over the redacted version of the Memo, given the numerous above quotes from Ms. McClain and Mr. Shaw.
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> To summarize, in Dawes, Ms. McClain stated, "I would ask if the Court allow them to use the--over objection-- that they use the redacted version versus the unredacted version." At the April 23, 2012 deposition of Mr. Reichert in the Mendel matter, over a continuing objection, without instruction not to answer, Mr. Reichert answered questions regarding the unredacted memo. Mr. Reichert was represented by Ms. McClain and Mr. Shaw. In July 2012, Miss McClain wrote, "Our concern is about the unredacted version and we simply seek your assistance and cooperation in protecting our clients privileged documents."

> On January 3, 2013, in the Uber matter, Ms. McClain wrote "Just to be clear, I am talking about the unredacted memo-the redacted memo has been produced years ago and been used." On January 22, 2013, during the McIntyre trial in Washington State, Mr. Shaw's "now I'm the first to tell you, it's all over the world...I couldn't tell you right now as I stand here. All I know is if they want to use the redacted version, have at it. I don't think we have an argument about that." On February 25, 2013, in the Ornellas matter, Ms. McClain's "There is a redacted version that you should have...a redacted version has been produced in discovery, it's been used many times."
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> While I agree that the attorney client privilege should have attached to all versions of the Memo, had it been zealously protected, New York law dictates that the privilege has now been waived.[5]

J-M's Moving Arguments

Defendant asserts that the Memo was first inadvertently produced in a very large document production (over 24,000 documents) in the *Hardcastle* action. Defendant claims that plaintiff's counsel misrepresented that they were returning all copies of the Memo and also misrepresented that they had not disseminated it. J-M presumes this to be the case because a redacted version of the Memo appeared ten years later in a California action, *George v Amcord*. J-M cites to its successful efforts to promptly claw back the document in *Hardcastle*, but has more to explain away a decade later. Defendant recites the history of the use of the redacted and unredacted versions of the Memo in *George v Amcord* and 13 other cases. In reciting this history, defendant complains that its defense counsel was hampered by the lack of knowledge of the Memo's origin and by the lack of adequate

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[5]The Special Master further noted that in New York, "a client who voluntarily testifies to a privileged matter, or who publicly discloses such matter or who permits his [for her] attorney to testify regarding the matter is deemed to have impliedly waived the attorney-client privilege. See, for example, NY Times v Lehrer McGovern, supra; Matter of Louden House, 123 AD3d 1409, 1411 (3D Dept 2014)." Additionally, she noted that under New York law that clawback efforts must be reasonable, citing *Big Apple Concrete Corp. v Abrams* (103 AD2d 609, 613 [1st Dept 1984]).

time in briefing the privilege issue. No further steps needed to be taken to safeguard the privilege, J-M argues, because of the pre-trial settlement of many of those cases. Defendant also argues "J-MM and its attorneys were sandbagged at trial and at depositions by the plaintiffs' asbestos bar with an attorney-client privileged document almost a decade after its original, inadvertent disclosure" (Axelrod Affirm at ¶12).[6] Defendant cites *Rico v Mitsubishi Motors Corp.* (42 Cal 4th 807 [2007]) regarding the ethical obligation of California attorneys to refrain from exploiting inadvertently produced privileged materials. Stressing that it was misled and that it "always asserted privilege and objected to the use of the Document" (*id.* at ¶ 13), J-M points to its victory in 12 California cases. Defendant claims that aside from two stray Washington State cases, where it was "handicapped by misrepresentations," it prevailed in every instance where plaintiff's counsel sought to introduce the Memo (*see* Defendant's Memo of Law at 4).

J-M maintains that the Recommendation should be vacated because the Special Master should have applied California law. The Special Master mistakenly applied New York law (the law of the forum), defendant maintains, because she incorrectly found that the issue was procedural, as

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[6]Defendant submits the declaration of California attorney Florence McClain ("McClain") in support of its argument. When representing J-M in *George v Amcord*, she saw a redacted version of the Memo and stated that plaintiff's attorney "gave me the impression that the Privileged Document had been produced by J-MM in a different [case] and that he was permitted to use it" (Axelrod Affirm in Support, Ex F). She further stated "I trusted the representation of a fellow officer of the court and California licensed attorney that he would not, in contravention of clear California ethical canons, retain or attempt to use a document that was designated as "Attorney-Client Privileged" material, unless the document had been produced by J-MM previously in discovery. I was misled into believing-by the Weitz attorney's conduct, and by the fact that it was heavily redacted-that the Privileged Document had previously been redacted and voluntarily produced by J-MM's prior counsel" (*id.*). Defendant further submits affidavit of David Shaw, the attorney in two Washington State cases (*McIntyre* v *3M Company* and *Dawes v Certainteed Corp.*) regarding plaintiff's counsel's alleged misrepresentations (Axelrod Affirm in Support, Ex G).

opposed to substantive. Further, defendant asserts that even if New York law applied, it did not waive the privilege.

J-M submits the affidavit of Professor Patrick Connors, the successor to Professor David Siegal and the current editor of *New York Practice*. Defendant asserts that the Special Master misunderstood Professor Siegal when she quoted *New York Practice* at page 575 to support her conclusion that the privilege issue was procedural. That commentary, defendant maintains, only applies to pretrial disclosure. Instead, the appropriate reference is to Siegal's *Conflicts in a Nutshell* (David D. Siegel and Patrick J. Borchers [3rd ed]). While defendant notes that *Conflicts in a Nutshell* Section 63 provides that "most rules of evidence are strictly procedural and come from the forum alone" J-M notes that Section 63 also states that rules of privilege, and the policies underlying them, "give them an aura of substance sufficient to take them out of the 'mere procedure' realm and involve them in the law-choosing process" (Defendant's Memo of Law at 6).

Thus, J-M asserts that Professor Siegel's opinion "is the polar-opposite of the Special Master's conclusion" (*id.*). The issue is substantive, defendant maintains. J-M asserts that even New York courts hold that the issue of attorney-client privilege is substantive in nature, and cites to several lower court cases. Because the issue is substantive, J-M argues, the court must determine which state has the strongest interest in the resolution of the issue in accordance with *Babcock v Jackson* (12 NY2d 473 [1963]). While New York is admittedly the site of tort, it does not have the strongest interest. Instead, defendant asserts California has the strongest interest "in its privilege law being applied to the Document." And under California law, defendant contends that no waiver occurred because California does not recognize inadvertent disclosure by the attorney (as agent of the client), in light of *State Comp. Ins. Fund v WPS, Inc.* (70 Cal App 4th 644 [1999]). Additionally,

no waiver occurred because defense counsel's actions were induced by the misrepresentations of opposing counsel (*see Rico v Mitsubishi Motors Corp.*, 42 Cal App 4th 807, *supra*),

Alternatively, even if New York law applied, J-M claims that the Special Master erred in finding that defendant waived the privilege. The Special Master confused compelled disclosures disclosures (which are made over the objection of counsel due to a court order) with voluntary disclosures (Defendant's Memo of Law at 28). J-M asserts that compelled disclosures cannot be deemed waivers as a matter of law; only voluntary disclosures can be. Defendant also complains that the Special Master did not know the standard for waiver under New York law because she mentioned defendant's failure to "zealously" protect the privilege. Instead, defendant asserts that the New York standard speaks to "extreme carelessness" and cites to federal court cases from the Southern District of New York. Defendant also takes issue with the Special Master's statement that a party must show that reasonable steps were taken to prevent disclosure because that language was not in the particular case that she cited. Defendant also claims that the case cited by the Special Master, *New York Times Newspaper Div. of New York Times Co. v Lehrer McGovern Bovis* (300 AD2d 169 [1st Dept 2002]) actually supports defendant's position.

Additionally, defendant complains that the Special Master found waiver based on "isolated quotes of J-MM's previous counsel" (Defendant's Memo of Law at 31). J-M further argues that defense counsel's failure to instruct the defense witness James Reichert not to answer deposition questions regarding the Memo in the *George v Amcord* action does not support the Recommendation. That can be explained, defendant argues, because attorney McClain was misinformed by plaintiff's counsel (Weitz & Luxenberg) after she objected to use of the Memo. McClain justifiably relied on plaintiff's counsel's statements because under California ethical

cannons, opposing counsel was barred from using a privileged document unless the document had actually been produced by the party claiming the privilege. Moreover, J-M contends that McClain could not direct the witness not to answer because she did not have a good faith basis to do so in light of opposing counsel's statements regarding J-M's prior production of the Memo. The case also resolved, defendant asserts, so "there was no need to file for a protective order or take immediate action regarding the Privileged Document" (*id.* at 33). The Special Master improperly relied upon the Washington State deposition in *Mendel v Ameron International Corp.* to support her findings because although defense witness James Reichert answered questions regarding the Memo, the attorney placed a "continuing objection" on the record. Attorney McClain's statement in the California action *Ornellas v A. H. Voss Company* is not a basis to find waiver because again, defendant asserts that the attorney was mislead. Nor is defendant's attorney's statement, at oral argument of a motion *in limine* in a Washington State action *McIntyre v 3 M Company,* a basis to support the Recommendation. Defendant acknowledges its counsel's statement to the Judge in that case at argument: "All I know is if they want to used the redacted version, have at it. I don't think we have an argument about that." However, the Special Master should not have relied on this statement in *McIntyre v 3 M Company* because just like attorney McClain, defense counsel was also misled by plaintiff's counsel. Additionally, J-M asserts that its counsel was only assenting to the admission of the redacted Memo "in the alternative" because the court had rejected his pleas.

Defendant maintains that the Special Master also distorted facts when she cited to three letters from attorney McClain inquiring about the unredacted Memo and commenting "the redacted memo has been produced years ago and been used." Again defendant asserts that McClain relied on the affirmative representation made by a Weitz & Luxenberg attorney at a deposition in the

George v Amcord action, so the Special Master had no basis to find a waiver. Additionally, that correspondence only pertained to the unredacted Memo because, at the time, the two pending cases at issue only involved the unredacted Memo. J-M also maintains that the Special Master improperly found that waiver was supported by defendant's failure to follow up on sealing the record in the California case *Paulus v Access Hotels & Resorts* and by defendant's lack of success in convincing two Washington State courts that the privilege was not waived.

Plaintiff's Opposition Arguments

Plaintiff asserts that the Special Master properly applied New York law and correctly found that defendant waived the attorney-client privilege attached to both the redacted and unredacted Memo. Plaintiff further asserts that the Memo contains mixed legal and business advice (the Special Master stated that the Memo contains "what would arguably be classified as business advice, thus it is of mixed content"). Thus, plaintiff claims that certain portions of the Memo regarding the continued sale of asbestos pipe are not privileged. Moreover, plaintiff maintains that handwriting on the bottom of last page of the unredacted Memo is not privileged because it is from non-lawyer sales manager Alan Verplough to defendant's President Richard Chi regarding a business recommendation.[7]

In concluding that the Special Master properly applied New York, instead of California law, plaintiff cites to general cases holding that evidence is a procedural issue and is thus governed by

[7]The Special Master made no ruling on which statements, if any, constituted business advice, as opposed to legal advice. Such a finding was unnecessary in light of her finding of waiver.

the forum state.[8] Plaintiff also cites the statement in *People v Greenburg* (50 AD3d 195 [1st Dept 2008]) that "New York courts routinely apply 'the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding' when deciding privilege issues" (*id.* at 198).

After concluding that the Special Master correctly applied New York law, plaintiff asserts that the Special Master properly found waiver of the attorney-client privilege based on a) defendant's "voluntary production" of the Memo; b) defendant's failure to object to the use of the Memo at depositions; c) defense witness voluntary answers to questions about the Memo at depositions; d) defendant's failure to seek sealing of the Memo when publically available; e) defendant's voluntary disclosure of the redacted Memo; and f) defendant's authorization of plaintiffs use of the redacted Memo.

Furthermore, plaintiff disputes J-M's claim that Weitz & Luxenberg misled J-M. Plaintiff submits the declaration of California attorney Brent Zardorozny to dispute McClain's version of the story (*see* Plaintiff's Affirm and Memo of Law in Opp, Ex 27). Plaintiff also points to McClain's nebulous memory of what she believed was said more than a decade ago. In any event, plaintiff argues that blaming plaintiff for J-M's failures to protect the privilege cannot excuse J-M's conduct.

Plaintiff maintains that even under California law, defendant waived the privilege. Plaintiff notes that in California the attorney-client privilege is statutory.[9] Plaintiff cites to California

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[8]Plaintiff also points to the differences in New York and California law regarding the burden of proof in establishing the privilege and the waiver of it.

[9]However, plaintiff also notes that there can be a non-statutory waiver of the privilege under California's common law, in certain instances (*see Southern California Gas Co. v Public Utilities Comn.*, 50 Cal 3d. 31 [Sup Ct California 1990] [common law waiver of the attorney-

Evidence Code section 912 (a) which provides in relevant part that:

(a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by Section 954 (lawyer-client privilege) . . . is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege.

Accordingly, even under California law, J-M waived the privilege, plaintiff contends, because J-M consented to the disclosure as evidenced by statements made by its defense witness James Reichert regarding J-M's production of the redacted Memo and by J-M's failure to take the necessary steps to guard the privilege.

Plaintiff cites to the following facts to support the Special Master's finding the J-M waived the privilege attached to both versions of the Memo.

A. The Unredacted Memo

Plaintiff maintains that defendant waived the privilege attached to the unredacted Memo because it was not on the privilege log in the *Hardcastle* litigation and was therefore voluntarily produced.[10] Additionally, as the Special Master noted, defendant permitted its corporate witness, James Reichert, to testify at his deposition about that document in *Mendel v Ameron International, Corp.*, an asbestos action filed in Washington State, even though his counsel had originally objected. Plaintiff observes that Washington State court rules provide that "[i]nstructions to the deponent not to answer questions are improper, except when based on privilege" (Plaintiff's Memo of Law at 22). Thus, because defense counsel objected, but then permitted the witness to freely testify about the

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client privilege where legal advice is placed at issue]).

[10]This argument is so weak that it will not be addressed.

Memo, plaintiff contends that the Special Master correctly found that J-M waived the privilege.[11]

Moreover, plaintiff asserts that the privilege was waived because defendant never moved to seal Reichert's deposition in *Mendel v Ameron International, Corp.*. Thus, plaintiff points out that she was able to obtain a copy of the Unredacted Memo from HG Litigation Services. The unredacted Memo is also available in the California court case *Paulus v Crane Co.* Notably, while the Judge granted a protective order in *Paulus v Crane Co.*, the Judge rejected defendant's application to seal the record because it was not in "proper form." Plaintiff observes that there is no evidence that J-M took any further steps to seal the document by filing a motion in proper form. Additionally because key portions of the unredacted Memo appeared in the redacted Memo, plaintiff claims that J-M waived the privilege for the unredacted Memo.[12]

B. The Redacted Memo

Plaintiff asserts that the Special Master correctly found that defendant waived the privilege

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[11]Plaintiff likens this failure to defendant's failures in *Clark-FitzPatrick, Inc. v Long Island R. R. Co.* (162 AD2d 577 [2d Dept 1990]). In that case, the Court held that the privilege was waived because "the LIRR failed to exercise due diligence and reasonable care to protect the confidentiality of these documents by allowing one of them to be utilized during a deposition and the other document to be expressly referred to and quoted from in various litigation papers and briefs filed with the Supreme Court, this court, and the Court of Appeals" (Plaintiff's Memo of Law at 23).

[12]By letter dated February 3, 2016, plaintiff submitted the deposition testimony of Dr. Gerald Markowitz in *Noll v American Biltrite, Inc.*, a Washington State case. By letter dated February 5, 2016, J-M objected to this submission as an impermissible sur-reply. I will consider the deposition transcript however because it was taken in one of J-M's cases and I permitted J-M to respond to the submission. In its response, J-M asserts that its counsel, David Shaw, strategically conducted a limited examination of Dr. Markowitz in order to establish that the Memo was written by an attorney who was qualified only to render a legal opinion and not medical opinion. Defendant stresses that Shaw was directly involved in J-M's efforts to protect the Memo in various states in the summer of 2013. However, such involvement does not change the fact that defense counsel asked Dr. Markowitz two questions regarding the key legal advice discussed in the Memo, further support a conclusion that J-M waived the privilege (Tr at 49-50).

for the redacted Memo by permitting its witness, James Reichert, to testify about it in March 2012 in the *Dawes v Certainteed Corp.* trial in Washington State (Plaintiff's Memo at 39-40; Ex 16 Tr at 37-41). During this trial, Reichert answered in the affirmative to questions regarding whether the Memo considered the benefits of immediate profits as compared to the risks of future lawsuits many years later due to the long latency period of mesothelioma (*id.*). Plaintiff also points out that the redacted Memo was admitted into evidence (*id.*).

Further, like the Special Master, plaintiff points to defense counsel's July 2102 letter, which sought the return of the unredacted Memo, but noted that "[w]e have seen reference to this document on exhibits lists but always understood the reference to be to the redacted version. Our concern is about the unredacted version." As the Special Master did, plaintiff points to defense counsel's January 2013 letter again seeking the unredacted Memo and stating "Just to be clear, I am taking about the unredacted memo-the redacted memo had been produced years ago and been used." Additionally, plaintiff notes that the redacted Memo was used in the California case, *George v Amcord* and although defense counsel objected to certain (but not all) deposition questions, counsel permitted the witness James Reichert to answer questions about the Memo. J-M never moved to seal Reichert's deposition in the *George v Amcord.*

Further, as the Special Master noted, Reichert was deposed in February 2013 about the unredacted Memo, which was marked as a deposition exhibit in *Stephens v AC & S, Inc.*, a California asbestos case. In that deposition, plaintiff points to attorney McClain's statements regarding defendant's production of the redacted Memo for use in litigation. In that same case, plaintiff notes defense attorney Ian P. Dillon's reference to J-M's production of a "highly redacted version" in connection with argument before the court. Plaintiff notes that the court ultimately permitted that

plaintiff to retain the document. In *Ornellas v A.H. Voss Company*, plaintiff points out, defense counsel informed the court on February 25, 2013 that "There is a redacted version that you should have" and "it's been used many times before." Moreover, plaintiff notes that the redacted Memo was used in the Washington State case *McIntyre v 3M* where defense counsel stated "All I know if they want to use the redacted version have, at it. I don't think we have an argument about that."

Defendant's Reply Arguments

J-M reiterates its arguments in reply. Defendant also notes that plaintiff selectively quoted from *People v Greenburg* 50 AD3d 195, *supra*. While *People v Greenburg* held that "New York courts routinely apply 'the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding' when deciding privilege issues" J-M observes that the Court nevertheless applied an interest analysis in concluding that New York law governed, in lieu of Delaware law (*id.*). J-M points to the Court's statements that New York was the place where the privileged communications were made, New York was where the action was filed by a New York attorney general under New York securities law, and that the only connection that Delaware had to the action was that it was the state of incorporation of the entity (AIG) that sought to assert the attorney-client privilege (*id.*).

J-M also cites *Long Is. Light. Co. v Allianz Underwriters Ins. Co.* (301 AD2d 23 [1st Dept 2002]) to support its position that no waiver occurred under New York law. In that case the court found that LILCO did not waive the attorney-client privilege by inadvertently disclosing a report in a federal action *(id.)*. J-M points out that the Court cited to LILCO's attorney's statement that LILCO had always regarded the report as a privileged attorney-client communication, to LILCO's document production screening process, to the fact that the report was among hundreds of thousands

of documents produced and, to LILCO's prompt invocation of the privilege, demand to return the document, and prompt application for a protective order when its demand was refused.

J-M also maintains that the fact that the Memo is publically available in the *Paulus v Crane Co.* and *Mendel v Ameron International Corp.* cases is of no import because even under New York law, public availability does not automatically translate into admissibility, citing *Manufacturers & Traders Trust Co. v Servotronics, Inc.* (132 AD2d at 392 [4th Dept 1987]).[13] Defendant adds that plaintiff's submission of the declaration of Brent Zardorozny to contradict McClain's statements, at best raises a "he-said-she-said" argument (Axelrod Reply Affirm at 22).[14]

Discussion

A. **Choice of Law**

The Special Master correctly applied New York law. Whether the attorney-client privilege is a procedural or substantive one is a difficult question. As J-M notes, Professor Siegel comments that rules of privilege, and the policies underlying them, "give them an aura of substance sufficient to take them out of the 'mere procedure' realm and involve them in the law-choosing process"

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[13]J-M also takes issue with plaintiff's argument that portions of the Memo are not privileged because they pertain to business advice. This is incorrect, defendant asserts, because the entire Memo is predominately of legal character and therefore, protected as a whole, citing *Rossi v Blue Cross & Blue Sheild of Greater N.Y.* (73 NY2d 588, 592 [1989]).

[14]By letter dated June 15, 2016, defendant submitted a decision from the Arizona Superior Court holding that J-M did not inadvertently waive the privilege attached to the Memo under California law. By letter dated June 16, 2016 plaintiff objected to the submission. I will accept the submission as part of the record as plaintiff had the opportunity to explain her objections. I do not find that case persuasive. That case applied California law, based on the Arizona Rules of Evidence. Further, that case rejected the argument that defendant waived the privilege because defendant "immediately and consistently opposed plaintiffs' possession and use of the document." Contrarily, I find that defendant did not immediately and consistently oppose the use of the document but instead, failed to safeguard the privilege on multiple occasions.

(*Conflicts in a Nutshell* § 63).

As defendant correctly notes, *People v Greenburg* (50 AD3d 195, *supra*) held that New York courts routinely apply the law of the place where the evidence will be introduced when deciding privilege issues, but nevertheless applied an interest analysis in concluding that New York law governed in lieu of Delaware law. Moreover, in *Hyatt v State of Cal. Franchise Tax Bd.* (105 AD3d 186 [2d Dept 2013]), the Court found that the lower court correctly applied New York's common interest privilege (an exception to the rule that a third party's presence waives the attorney-client privilege) based on an interest analysis. Thus, although far from clear, J-M appears to be correct in maintaining that the issue is a substantive one.

Choice of law principles apply only where there is a conflict between state laws. Both New York and California protect the attorney-client privilege. For purposes of this decision, I will assume that there is such a conflict although neither party has adequately addressed this issue, other than with respect to a conflict regarding who bears the burden of proof on the issue of waiver.[15]

Assuming that the issue is substantive in nature, J-M incorrectly concludes that California

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[15]While California recognizes the waiver of the privilege, "[b]ased on the language of Evidence Code section 912," *State Comp. Ins. Fund v WPS, Inc.* (70 Cal App 4th 644, 654, *supra*) held "that 'waiver' does not include accidental, inadvertent disclosure of privileged information by the attorney." This holding "is fundamentally based on the importance which the attorney-client privilege holds in the jurisprudence of this state . . . We believe a client should not enter the attorney-client relationship fearful that an inadvertent error by its counsel could result in the waiver of privileged information or the retention of the privileged information by an adversary who might abuse and disseminate the information with impunity" (*id* at 657; *compare Savaglio v Wal-Mart Stores, Inc.*, 149 Cal App 4th 588 [Ct App, 1st App Dist. 2007] [retailer's conduct was so inconsistent with an intent to enforce its rights to seal records as to induce a reasonable belief that it had relinquished and waived that right]). Contrarily, New York rejects "the absolute view that an attorney may never waive the privilege . . . because like any other agent, an attorney may possess authority to bind his client" (*Manufacturers & Traders Trust Co.* 132 AD2d at 400, *supra*).

law should apply in this action. As Professor Siegel notes "[n]o simple 'rule' can govern in choice of law. The elements are too varied" (*Conflicts in a Nutshell* § 77). Accordingly he explains that courts have settled on techniques or approaches (*id.*).

One approach is the "interest analysis" which defendant maintains is the approach used in New York. As Professor Siegel explains, that analysis "requires an examination into competing laws to determine their underlying policies and the strength of the relative interests the competing sovereigns have in the application of their respective laws in the particular situation. The facts will vary and the strength of the relevant policies will wax and wane accordingly" (*id.*).

The Restatement uses the most significant relationship test (Restatement [Second] of Conflict of Laws § 145). As Professor Siegel explains, this approach "parses the issues in each case having multistate elements and applies to each issue the law of the state deemed to have the 'most significant relationship' to the issue." (*Conflicts in a Nutshell* § 77). He further explains that grouping of contacts or center of gravity tests were precursors to, or verbal substitutes for, the most significant relationship test, which is illustrated in *Babcock v Jackson* (12 NY2d 473, *supra*) (*id.*). The significant relationship approach does not merely count the contacts that the respective states have, but tests quality (not quantity) looking not only to the facial instructions of the competing laws, but to the policies and interests underlying the particular issue before the court (*id.* at § 78).[16]

I find that New York, not California, has the greatest interest in application of its law, whether I apply an interest analysis or whether I apply the Restatement. As noted by Professor

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[16]Professor Siegel also explains that "there is scant ground for treatment of 'interested analysis' separate from the 'most significant' test . . .They involve the same ingredients, and, properly applied, they involve the same values and ought to reach the same results" (*id.* at § 79).

Siegel, privileges "impede the truth-finding purpose by making some evidence-and perhaps some very important evidence unavailable" (*id.* at § 63). New York has the strongest interest in having its waiver law applied as New York is the site of the alleged asbestos exposure (*see e.g., Cooney v Osgood Mach.*, 81 NY2d 66 [1993] [where conflicting conduct-regulating laws are at issue, "the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders"]).[17] While J-M asserts that the site of the tort is of no import because it has no nexus to the issues surrounding the creation of the Memo, J-M has cited no cases to support this contention.

I also reach the same result under the Restatement. Under the Restatement, if the foreign state confers a privilege that the forum state does not, the forum will admit the evidence unless there is "some special reason" for deferring to the foreign law (*Conflicts in a Nutshell* § 63). Assuming that California would find that the privilege was not waived (as many California trial courts have found) and assuming that under New York law the privilege is waived, I find no special reason to defer to California law. This is especially true where New York also protects and champions the privilege- - albeit New York does not have an absolute bar as to inadvertent disclosure through the acts of the client's attorney.

B. **Inadvertent Disclosure under New York law**

New York, like California, has codified that attorney-client privilege by statute. CPLR § 4503 provides in relevant part:

(a) 1. Confidential Communication Privileged. Unless the client waives the

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[17]J-M itself cites *Babcock,* 12 NY2d at 484, *supra* which indicates that "it is more than likely that the law of the place of the tort which will be controlling."

> 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.

New York, like California, protects the attorney-client privilege because it "is grounded in the salutary policy of encouraging 'persons needing professional advice to disclose freely the facts in reference to which they seek advice, without fear that such facts will be made public to their disgrace or detriment by their attorney'" (*People v Edney*, 39 NY2d 620, 626 [1976]; *see also Matter of Priest v Hennessy*, 51 NY2d 62, 67-68 [1980] [the purpose of the privilege is "to ensure that one seeking legal advice will be able to confide fully and freely in his attorney, secure in the knowledge that his confidences will not later be exposed to public view to his embarrassment or legal detriment"]). Both New York's and California's statutes permit the holder of the privilege to waive the attorney-client privilege. However, New York rejects the absolute view that an attorney may never waive the privilege for the client (*compare State Comp. Ins. Fund v WPS, Inc.* [70 Cal. App. 4th 644, *supra*] with *Manufacturers & Traders Trust Co.* [132 AD2d at 400, *supra*]).

Under New York law, a privilege is waived when a document is produced, unless the proponent of privilege demonstrates that "the client intended to maintain the confidentiality of the document, that reasonable steps were taken to prevent disclosure, that the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and that the parties who received the documents will not suffer undue prejudice if a protective order against the use of the document is issued" (*see New York Times Newspaper Div. of N.Y. Times Co.*, 300 AD2d 169, *supra* [sewer designer's report analyzing claims for sewer designer which was inadvertently disclosed

to other defendants remained privileged]). Reasonable steps to prevent inadvertent disclosure of documents include having a procedure in place in order to screen for privileged documents (*see e.g., Manufacturers & Traders Trust Co.,* 132 AD2d at 399-400, *supra* [the "error counsel made was in inadequately screening the material before it was delivered to defense counsel. Notwithstanding that error, however, the fact that counsel undertook a screening procedure indicates that he took some precaution to avoid disclosure of privileged material"]).

Whether a party promptly objects is an another consideration in determining whether there has been inadvertent document disclosure (*id.* at 400 [inadvertent document disclosure was established when plaintiff initiated procedures to correct the error within 2 business days after discovering it]; *Koramblyum v Medvedovsky,* 19 A.D.3d 651 [2d Dept 2005] ["assuming that such a privilege existed, it was waived by the defendants' lack of due diligence"]; *AFA Protective Sys., Inc. v City of New York,* 13 AD3d 564 [2d Dept 2004] [City waived any attorney-client privilege because it moved for a protective order prohibiting plaintiff from using or revealing information in a 1994 memorandum four years after it knew that the memorandum had been distributed to third parties who used it and disseminated that information]; *Clark-FitzPatrick, Inc.,* 162 AD2d at 578, *supra* ["although opposing counsel first utilized one of the documents in the latter part of 1985 and the other in 1986, the LIRR did not move for a protective order until 1988. The repeated failure of the LIRR to take any action when the plaintiff quoted from the privileged documents in court papers and its failure to even raise the issue of privilege with respect to one of the documents for approximately 10 months after it had been utilized during a deposition, is indicative of the failure of the LIRR to exercise reasonable care and due diligence, and thus, constituted a waiver of the privilege"]).

Additionally "[a] client who voluntarily testifies to a privileged matter . . . who publicly discloses such matter . . . or who permits his attorney to testify regarding the matter . . . is deemed to have impliedly waived the attorney-client privilege" *(Jakobleff v Cerrato, Sweeney & Cohn*, 97 AD2d 834, 835 [2d Dept 1983] [internal citations omitted]). It is within the discretion of the judge hearing that testimony to determine whether there has been a waiver (including whether there was a timely effort to rectify the inadvertent disclosure) and to determine the appropriate remedy (*see People v De Mauro*, 48 NY2d 892 [1979] ["when the initial witness for the People unexpectedly testified that she had first met defendant when he was serving time in prison with her husband, defense counsel promptly objected. The trial court sustained the objection and instructed the jurors to disregard the testimony and to strike it from their minds"]; *see also People v Williams,* 286 AD2d 620 [1st Dept 2001] [court properly exercised its discretion in denying defendant's mistrial motion following a police witness's inadvertent disclosure of inadmissible uncharged crimes evidence by immediately sustaining an objection and offering to give a curative instruction]*).*

The Special Master correctly found that under New York law, J-M waived the privilege. I agree with the Special Master that defendant's attempt to blame opposing counsel for alleged misrepresentations is untenable. I cannot conclude as a matter of law that these misrepresentations (which are disputed by plaintiff's counsel) ever took place. Even assuming such misrepresentations were made, and while the best defense is sometimes an offense, defense counsel cannot abdicate their responsibility to represent their clients by deferring to statements made by opposing counsel, regardless of any ethical obligations imposed on the latter. Defense counsel's job is to protect their clients, rather than seek protection for themselves from the action of opposing counsel.

The facts cited by the Special Master easily support a finding of waiver under New York law

regarding the redacted Memo. Given the number of times that defense counsel and its witness James Reichert stated/ implied that it was voluntary produced, given Reichert's testimony about the Memo, and given the fact that J-M never demanded its return, the conclusion is inescapable. [18]

A harder question is whether the more limited incidents of defendant's failure to safeguard the unredacted Memo results in a waiver. James Reichert testified about the legal advice discussed in the unredacted Memo at his deposition in *Mendel v Ameron International, Corp.* and J-M failed to move to seal that deposition. Additionally, defendant failed to follow up on the sealing of the unredacted Memo in *Paulus v Access Hotels & Resorts*. While defendant was successful in obtaining a protective order in that case, the judge rejected sealing because the motion was not in proper form. Defendant never bothered to take any further steps to seal the document by filing a motion in proper form, which is especially troubling given that the judge presumably would have granted such a motion.

In addition to these incidents, the title of the redacted Memo and the typed writing on the third/last page of the redacted Memo reveals the key nature of the legal advice discussed in the unredacted Memo, thereby disclosing a significant portion of that advice (which even under California law suffices to waive the privilege). Moreover, James Reichert's deposition and trial testimony touches on the subject matter of both versions of the Memo, further supporting the conclusion that J-M waived the privilege even for the unredacted Memo (*see, e.g.*, *Jakobleff*, 97 AD2d at 835, *supra*).

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[18]J-M's argument that the Special Master cited the incorrect standard for waiver under New York law is unpersuasive. While the Special Master opined that J-M failed to "zealously" guard the privilege, she only used that term descriptively. Her statements regarding the waiver standards under New York law was entirely correct.

J-M's citation to *Long Is. Light. Co.* (301 AD2d 23, *supra*) is to no avail. That case would support J-M's argument that the privilege was not waived by inadvertent production of the document in *Hardcastle*. But it does not support J-M's argument that it did not waive the privilege when the Memo resurfaced a decade later and J-M failed to properly safeguard it. As the Special Master held "[i]t is inconsistent to cry privilege, while allowing that privilege to be abrogated, over and over again." Repeated failures to take action and to exercise reasonable care and due diligence waives the privilege (*see, e.g.*, *Clark-FitzPatrick, Inc.*, 162 AD2d at 578, *supra*).[19]

It is hereby

ORDERED that defendant's motion is denied in its entirety.

Dated: July 14, 2016

ENTER:

HON. PETER H. MOULTON
J.S.C.

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[19]Even assuming that California law applied, I would find that J-M waived the privilege. As previously noted, the California statute provides that the attorney-client is waived if any "holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone" (California Evidence Code section 912 [a]). As noted by plaintiff, James Reichert testified multiple times about the Memo, without coercion. Further, in *Savaglio v Wal-Mart Stores, Inc.*, 149 Cal App 4th 588, *supra*, the Court found that the retailer's conduct was so inconsistent with an intent to enforce its rights to seal records as to induce a reasonable belief that it had relinquished and waived that right. Similarly here, J-M failed to follow up on its motion to seal in *Paulus v Crane Co.*, which was rejected only for form, and defendant never moved to seal Reichert's deposition in *Mendel v Ameron International, Corp.*, all conduct inconsistent with an intent to enforce its rights. J-M's counsels' numerous statements regarding permissive use the redacted Memo, which is similar to the content of the unredacted Memo, also supports a finding of waiver. While I realize that California trial courts have uniformly found in J-M's favor, the few California appellate cases addressing the issue have not dealt with a case such as this one, involving such systemic failures.