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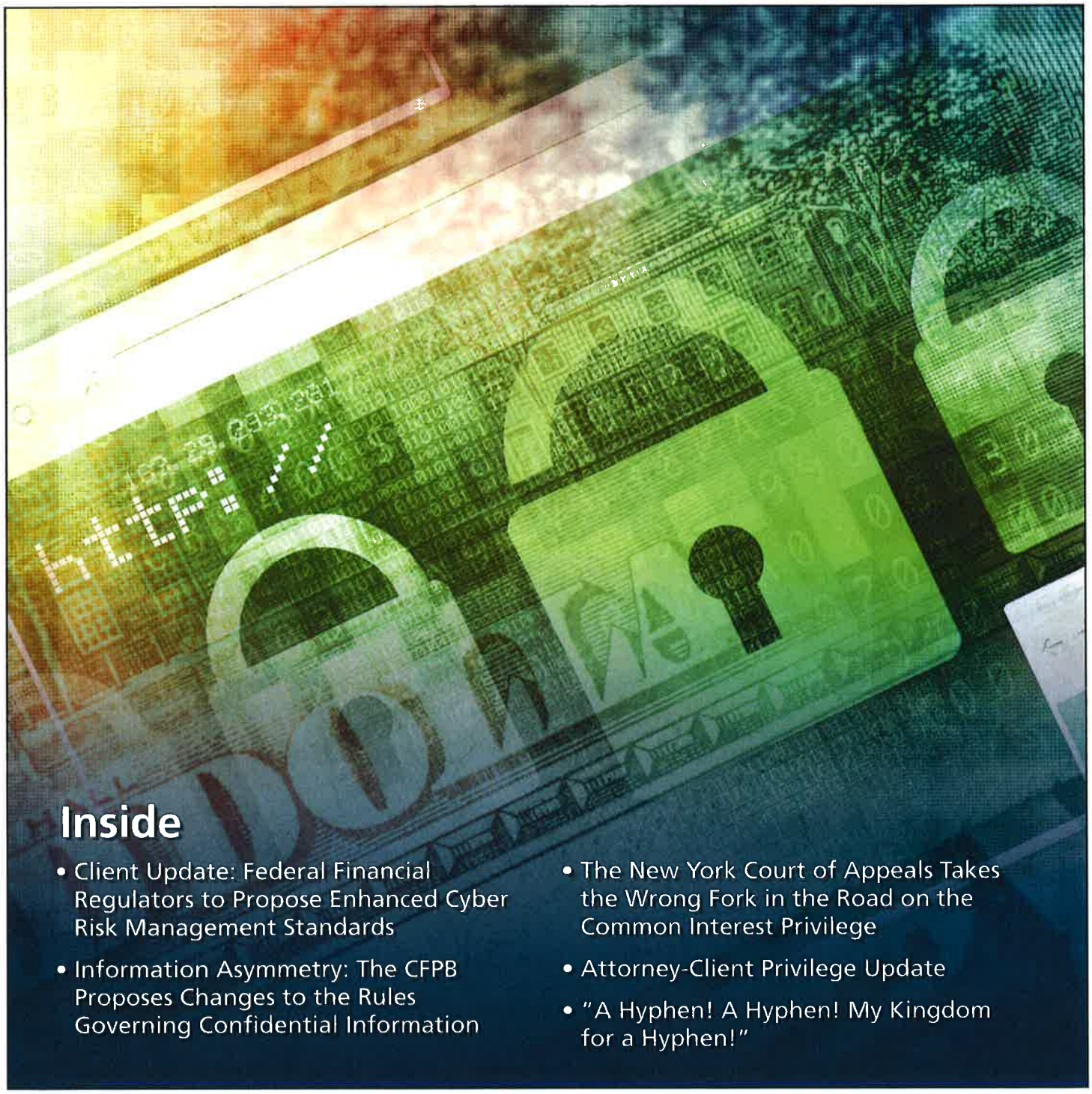

Inside

The New York Court of Appeals Takes the Wrong Fork in the Road on the Common Interest Privilege

By C. Evan Stewart

One of the greatest teen-angst records of the 1960s is undoubtedly Leslie Gore's "It's My Party."[1] At her own birthday party, she discovers that her boyfriend has shown up with Judy "wearing his ring": "It's my party, and I'll cry if I want to,...You would cry too if it happened to you!"[2]

Recently, the New York Court of Appeals tackled the common interest privilege. Because of the Court's excellent past history on matters involving the attorney-client privilege[3] —unlike many other courts,[4]—I had every hope and expectation that the seven judges would do the right thing; indeed, I publicly predicted they would.[5] But I was wrong, and since the Court of Appeals is the court of last resort in New York State my only remedy is to cry at *my* party![6]

I. *Ambac v. Countrywide*

Ambac Assurance Corp. filed suit against Countrywide Home Loans, charging Countrywide with having fraudulently induced it to insure certain residential mortgage backed securities transactions (RMBS); Ambac also alleged that Bank of America should be secondarily liable because of a merger between Bank of America and Countrywide entities. Before those two entities entered into the merger, they executed (*inter alia*) a common interest agreement. One of the benefits of that agreement was that it allowed both entities to share legal advice in order to comply fully with the complex legal and regulatory requirements attendant to the merger.

The "common interest" privilege is not a privilege that stands apart from the attorney-client privilege. Rather, it is an exception to the basic principle that privileged communications with counsel are waived when disclosed to a third party.[7] As recognized by the U.S. Court of Appeals for the Second Circuit, the "common interest" privilege "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel."[8]

Prior to the *Ambac* litigation, New York lawyers attempting to invoke this privilege were faced with an unclear state of affairs: When would the privilege attach? Although the Second Circuit had made it clear it was not required that an "actual litigation [be] in progress for the common interest rule of the attorney-client privilege to apply,"[9] various New York courts had also ruled that the privilege was "limited to where the parties reasonably anticipate, or are currently engaged in litigation."[10]

In the litigation at issue, Ambac sought discovery of hundreds of documents containing the legal advice shared between Countrywide and Bank of America. Ambac contended that such materials were not only directly relevant to Ambac's successor liability claims, but that they also bore on the issue of the Bank of America being on notice of "the prevalence of unreported fraud at Countrywide well after the [merger]." Both the discovery referee and the Supreme Court ruled that Bank of America had to produce these materials, notwithstanding the common interest agreement, on the grounds that there was no pending (or reasonably anticipated) litigation. An unhappy, Bank of America then sought redress in the Appellate Division, First Department.

II. The First Department to the Rescue!

On December 4, 2014, a unanimous First Department decision (per Judge Karla Moskowitz) gave Bank of America the relief it sought—reversing the Supreme Court and holding that the documents at issue were in fact protected from disclosure by the "common interest" privilege.[11]

At the very outset, Judge Moskowitz acknowledged that the First Department had "never squarely decided whether... the communication must affect pending or reasonably anticipated litigation."[12] But drawing upon several decisions by the New York Court of Appeals and the U.S. Supreme Court upholding the attorney-client privilege,[13] the court first (and correctly) noted that the privilege "is not tied to the contemplation of litigation." Not only was that insight fundamental to the resolution of the issue before the First Department, it also highlighted a basic and critical distinction between the attorney-client privilege and the attorney work product doctrine—a critical distinction which courts often misunderstand and which then leads to bad (or worse) results.[14]

Thus, while the work product doctrine has always been keyed to litigation (or the anticipation thereof),[15] the attorney-client privilege has *never* been premised on that notion—except by some courts when addressing the common interest "exception."[16] But "just because" some courts have done so does not mean they were correctly understanding or ruling on the privilege.

Moskowitz did concede that a number of lower courts in New York had required "pending or reasonably anticipated litigation";[17] but in her review of the law elsewhere, she found plenty of encouragement for not embracing that non-binding precedent. The Restatement of the Law Governing Lawyers, for example, expressly

states that the common interest privilege applies "in a litigated or *non*-litigated matter."[18] And a number of federal courts have also so ruled, including the Southern and Northern Districts of New York.[19] The First Department also took great stock in the fact that the state of Delaware has codified the non-litigation standard for purposes of the common interest privilege, observing: "we believe that Delaware presents the better approach."[20]

Case law aside, Moskowitz also looked at this issue from a policy standpoint and, again, reached the correct result:

> [I]mposing a litigation requirement in this scenario discourages parties with a shared legal interest, such as the signed merger agreement here, from seeking and sharing that advice, and would inevitably result instead in the outset of regulatory or private litigation because of the parties' lack of sound guidance from counsel. This outcome *would make poor legal as well as poor business policy*.[21]

Conversely, as Moskowitz also correctly observed, the case law supporting the litigation requirement "undermines the policy underlying [the] attorney-client privilege."[22]

Ambac thereafter sought leave from the First Department to appeal to the Court of Appeals; the petition was granted.

III. The Court of Appeals Cold-Showers the Privilege

On June 9, 2016, a divided Court of Appeals reversed the First Department and reinstated the Supreme Court's ruling that the Bank of America materials were not privileged and had to be produced.[23] Writing for the majority, Associate Judge Eugene Pigott started off with a brief review of the Court's prior jurisprudence on the attorney-client privilege, which has highlighted the importance of the privilege in "obtaining or facilitating legal advice in the course of a professional relationship."[24] At the same time, he observed that, because the privilege in litigation blocks relevant information from discovery, it is to be strictly construed; and if not all of the elements of the privilege are present, then the privilege will not be upheld.[25]

Judge Pigott then reviewed the jurisprudential history of the common interest privilege in New York State; his review, not surprisingly, was consistent with that which was done by Judge Moskowitz. He next looked at the state of play outside New York, correctly noting those state and federal courts that are in line with Judge Moskowitz's decision and those that are not. He then gave the majority's reasons for rejecting Judge Moskowitz's ruling.

The principal reason was Judge Pigott's often invoked (five times, by my count) concern for "misuse/abuse" if the common interest privilege were to apply in the non-litigation context. His authority for that proposition was the following: "At least one commentator has also observed that '[t]he greatest push to expand the common interest privilege comes from corporate attorneys representing multiple clients, often in an antitrust context,' and that it is precisely in this context 'that the potential for abuse is greatest.'"[26] The commentator's only authority/evidence for this proposition comes in turn from Professor Charles Alan Wright's treatise on federal procedure.[27] Upon seeing that, I wondered why Professor Wright had so opined; he was, of course, not an antitrust scholar nor an antitrust practitioner—but it is clear from his treatise that he was anti-common interest privilege in *any* context (litigation and otherwise).[28] And when I checked on the professor's authority/evidence for his antitrust "abuse" proposition, what I found was a completely inapposite reference written in 1974 by a Reporter to the Advisory Committee on the Federal Rules of Evidence, as well as a 1954 article by a student at Yale Law School which has nothing to do with the antitrust laws.[29] Putting that "authority" aside, there is, so far as I know, *no* actual evidence of any "abuse" (attempted or otherwise) in the antitrust context; indeed, Professor Wright even cited to a case where, because "both parties were interested in potential antitrust liability…as it would affect the price they were negotiating, their interests were adverse and the [common interest] privilege did not apply."[30] Thus, at bottom, the "abuse/misuse" concern is simply illusory.[31]

What else did Judge Pigott offer up? Well, related to the "abuse/misuse" concern was Judge Pigott's non-linkable concern regarding the "substantial loss of relevant evidence" for litigation and the fact that the Bank of America presented "no evidence" to the Court that "complex commercial transactions have not occurred in New York because of our State's litigation limitation on the common interest doctrine; nor is there evidence that corporate clients will cease complying with the law." Putting to one side how such evidence could in fact have been presented to the Court of Appeals (especially on a discovery dispute),[32] that is surely a straw man argument; the U.S. Supreme Court did not find the need for such "evidence" when it ruled in *Upjohn* that the attorney-client privilege covers all corporate employees so as to ensure that attorneys have unfettered access to the facts in order to give competent legal advice and thus have their corporate clients comply with the law.[33] Beyond that, there would be *no* substantial loss of evidence, since *no* facts would be sheltered from discovery.[34]

Judge Pigott was similarly unmoved by the argument that limiting the common interest privilege to litigation made no sense because the attorney-client privilege has no such limitation.[35] And his final dismissal

of the expanded doctrine (rooted in Professor Wright's disapproval of the privilege in *all* contexts)[36] was the fact that Proposed Rule 503(b)(3) of the Federal Rules of Evidence—which was put forward in 1972 and, *inter alia*, would have allowed for a common interest privilege in civil and criminal litigation and for purely transactional contexts—was never adopted by Congress.

His last reason, to this author, really underscores Judge Pigott's entire opinion. He, like the authorities he relied upon, simply does not like the common interest privilege—in *any* context.[37] I guess he could not get enough votes to do away with it, and had to be content with cutting it off from use in the non-litigation arena.

The dissent, by Judge Jenny Rivera, was similar to the analysis of Judge Moskowitz (and thus was correct, in my view). She posited, *inter alia*:

- That *Upjohn* and the Court of Appeals' prior precedents supported extending the privilege to the non-litigation context—to ensure corporate "compliance with legal mandates."[38]
- That the attorney-client privilege has nothing to do with litigation; and thus the common interest privilege should not be so limited.
- That numerous states, federal courts, and commentators (including the Restatement, Judge Weinstein, etc.) support the privilege in the non-litigation context.
- That there is no evidence to support the majority's "abuse"/"misuse" concern; in the state and federal courts that have extended the privilege, it has been done "without disastrous results." And, in any event (and as was demonstrated by the discovery process in the *Ambac* litigation), courts have many tools to address "obstruction of proper discovery."
- And finally, that the crime-fraud exception is the ultimate backstop to prevent entities from trying to wrongly use attorneys to prevent the discovery of on-going or future wrongdoing.

Unfortunately, Judge Rivera only got Judge Michael Garcia's vote, so her correct analysis went for naught.

IV. Where Do We Go From Here?

As an initial matter, it is a bit disheartening that New York's highest court has embraced a course that may well discourage business activity in this state—rather than being more user-friendly for modern commerce. Thus, for example, if faced with a choice of venue, which lawyers would counsel their Delaware-chartered clients to do a deal in New York, as opposed to Delaware (which officially sanctions the common interest privilege)?

But even assuming rational lawyers will now do their deals in Delaware, what can be done if subsequent litigation is brought in New York? First off, any such deal should have a choice of law provision mandating that any disputes arising out of the deal be subject to the laws of Delaware; under a conflicts of law analysis, a New York court may well decide that Delaware law should govern on this point.[39] As an added precaution, lawyers to such a deal may wish to segregate pre-litigation materials to the deal from anticipated litigation materials, explicitly documenting the latter group as being both privileged and protected by the attorney work-product doctrine.[40]

One idea I am not keen on—but has been suggested in light of the Court of Appeals decision—is having parties share the same counsel on sensitive matters in corporate deals.[41] Perhaps some people still believe in the old Brandeis notion of "lawyer for the situation," but that is really *not* appropriate in complex corporate transactions as a matter of professional ethics.[42]

What else can be done is to seek help from the New York State legislature. Judge Pigott invited such a course for those who did not like his opinion, and a number of responsible attorneys in our state have already begun the petitioning/lobbying process.[43] Let us hope that works, especially for the sake of making New York State an enticing place to do corporate deals in the future.

Endnotes

1. (Mercury Records) (Herb Wiener–John Gluck–Wally Gold) (Recorded March 30, 1963; released April 1963; U.S. Billboard Hot 100 #1 May 11, 1963). [The lyrics were actually written by Seymour Gottlieb (who gave them to Herb Wiener); Gottlieb's daughter had suffered this actual indignity at her own Sweet Sixteen party!] A demo of the song had originally been sung by Barbara Jean English; legendary producer Phil Spector loved it, planned to have the Crystals record it, and thought it was sure to be a big hit. Unfortunately for Spector and the Crystals, equally legendary producer Quincy Jones had the unknown Gore record the song on March 30, 1963. By serendipity, both men met at a Carnegie Hall concert on that same day, at which time Spector told Jones of his plans. Jones left the concert and went back to the studio to press enough records to thereafter mail them to influential disc jockeys throughout the country. Gore heard it on the radio for the first time several days later, and it was #1 in the country within a month. Ranking right up there with Gore's tear-jerker is The Shangri-Las's "Leader of the Pack" (Red Bird Records) (George "Shadow" Morton–Jeff Barry–Ellie Greenwich) (U.S. Billboard Hot 100 #1 November 28, 1964). Betty ("I met him at the candy store, he turned around and smiled at me, you get the picture?" Back-up singers: "Yes, we see!") must break up with Jimmy (the leader of the pack) because he comes from "the wrong side of town"—a despondent Jimmy then dies in a motorcycle accident. The Detergents later spoofed this classic with their own hit: "Leader of the Laundromat" (Roulette) (Paul Vance–Lee Pockriss) (U.S. Billboard Hot 100 #19 January 1965). The composers of "Leader of the Pack" sued The Detergents for plagiarism; ultimately, the dispute was settled out of court. All three classics are, not surprisingly, in the author's "45s" collection.
2. On her follow-up hit, Gore wreaked her revenge: "Judy's Turn to Cry" (Mercury Records) (Beverly Ross–Edna Lewis) (recorded May 14, 1963; released June 1963; U.S. Billboard Hot #5 July 6, 1963). Besides a number of other pop-chart hits in the 1960s, Gore also portrayed Pussycat on the TV series "Batman."

3. *See, e.g., Rossi v. Blue Cross and Blue Shield of Greater N.Y.*, 73 N.Y.2d 588 (1989); *See also Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371 (1991).

4. *See, e.g., Kellogg Brown & Root*, 756 F.3d 754 (D.C. Cir. 2014); *Eastman Kodak Co. v. Kyocera Corp.*, 2011 WL 1432038 (W.D.N.Y. April 14, 2014); *U.S. v. Textron*, 557 F.3d 21 (1st Cir. 2009); *Georgia Pacific v. GAF. Roofing*, 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. 1996); *In re von Bulow*, 828 F.2d 94 (2d Cir. 1987); *Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir. 1997); *Melworm v. Encompass Indemnity*, 37 Misc. 3d 389, 951 N.Y.S. 2d 829 (Nassau City Sup. Ct. July 16, 2012). See C.E. Stewart, *The D.C. Circuit: Wrong and Wronger!*, NY BUSINESS LAW JOURNAL (Winter 2015).

5. *See, e.g.*, C.E. Stewart, *Judge Gets Common Interest Privilege Spot On*, NEW YORK LAW JOURNAL (April 7, 2015).

6. And, of course, write this article, demonstrating the error of the Court's ways.

7. *See* C.E. Stewart, *The Attorney-Client Privilege: The Best of Times, the Worst of Times*, PROFESSIONAL LAWYER 63 (2000).

8. *U.S. v. Schwimmer*, 899 F.2d 237, 243 (2d Cir. 1989). *See also People v. Osorio*, 75 N.Y. 2d 80 (1989); *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822 (1871).

9. *U.S. v. Schwimmer*, 899 F.2d at 244. *Accord Schaeffler v. U.S.*, 806 F.3d 34, 40 (2d Cir. 2015).

10. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh v. Trans-Canada Energy*, 2013 N.Y. Misc. LEXIS 3735, *10 (Sup. Ct. N.Y. Co. 2013); *Polycast Tech. Corp. v. Uniroyal*, 125 F.R.D. 47, 50 (S.D.N.Y. 1989); *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 192 Misc. 2d 99, 108 (N.Y. Sup. Ct. 2003).

11. 124 A.D.3d 129, 998 N.Y.S. 2d 329 (1st Dept. Dec. 4, 2014).

12. *See id.* at 130.

13. *E.g., Spectrum, supra* note 3; *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

14. *See* C.E. Stewart, *supra* note 7; *see also supra* note 4.

15. *See Hickman v. Taylor*, 329 U.S. 495 (1947); *U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1988).

16. Unfortunately, some judges have on occasion (improperly) superimposed litigation as a condition for the privilege to apply. *See, e.g., Georgia Pacific, supra* note 4.

17. *See supra* note 10.

18. *See* Restatement (Third) of the Law Governing Lawyers §76 (2006) (emphasis added).

19. *See, e.g., Fox News Network v. U.S. Dept. of the Treasury*, 739 F. Supp. 2d 516, 563 (S.D.N.Y. 2010); *LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 958, 965 (N.D. Ill. 2009); *In re Teleglobe Communications Corp.*, 493 F.3d 345, 364 (3d Cir. 2007); *United States v. BDO Seidman*, 492 F.3d 806, 815-16 (7th Cir. 2007); *Lugosch v. Congel*, 219 F.R.D. 220, 238 (N.D.N.Y. 2003); *United States v. United Technologies Corp.*, 979 F. Supp. 108, 112 (D. Conn. 1997); *In re Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996). *Accord see supra* note 9. *See also OXY Res. California v. Superior Court*, 9 Cal. Rptr. 3d 621, 628-27 (2004).

20. 998 N.Y.S. 3d at 336. *See* Del. Uniform R. of Evid. §502(b). *See also 3 Com Corp. v. Diamond II Holding*, 2010 WL 3426, *2 (Del. Ch. March 20, 1986).

21. 998 N.Y.S. 2d at 335 (emphasis added). Earlier, the court (citing *BDO Seidman, supra* note 19) had written that the whole purpose of the privilege is to "serve[s] the public interest by advancing compliance with the law, facilitating the administration of justice and averting litigation." *Accord Upjohn*, 449 U.S. at 389.

22. 998 N.Y.S. 2d at 334-35.

23. 2016 WL 3188989 (N.Y. June 9, 2016). Associate Judge Eugene Pigott wrote the majority opinion; it was joined in by Associate Judges Sheila Abolus-Salaam, Leslie Stein, and Eugene Fahey. The dissenting opinion was authored by Associate Judge Jenny Rivera; it was joined in by Associate Judge Michael Garcia. Chief Judge Janet DiFiore did not participate in the decision.

24. *See supra* notes 3 and 12.

25. He is correct insofar as, for the privilege to exist, there must be "5 Cs:" (i) a client; (2) a communication; (3) confidentiality; (4) counsel (an attorney); and (5) counsel (the giving of legal advice by an attorney). Four out of five Cs is not sufficient; there must be all five for the privilege to exist. *See* C.E. Stewart, *Attorney-Client Privilege: Misunderestimated or Misunderstood?* NEW YORK LAW JOURNAL (October 20, 2014). He is *not* correct insofar as the privilege does *not* block from discovery relevant information (i.e., facts); rather, it blocks from discovery confidential communications between clients and their lawyers. *Id.*

26. Edna S. Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 277 (5th ed. 2007).

27. *See* 24 Charles Alan Wright & Kenneth W. Graham, Federal Practice and Procedure §5493 (1986 Supp. 2003). In his treatise, Professor Wright candidly conceded that he differs from Judge Weinstein on whether the privilege should extend to non-litigation contexts. *See* 2 Weinstein & Berger, Weinstein's Evidence 503-60 (1980); Weinstein Evidence Manual ¶18.03(3)(b) (2015).

28. Although I do not agree with it, there is a respectable academic argument that there should be *no* common interest privilege in *any* context. *See* G. Giesel, "End the Experiment: The Attorney-Client Privilege Should Not Protect Communications in the Allied Lawyer Setting," 95 MARQUETTE L. REV. 475 (2011). Professor Giesel, for example, argues that *Chahoon* (*see supra* note 8) "was in error." *Id.* at 482. Professor Giesel's article was also relied upon by Judge Pigott.

29. *See* E. Cleary, "Article V: Privileges," 33 FED. B.J. 62, 66 (1974) (Professor Cleary was *not* referencing pre-litigation communications; rather, he was referencing the common post-litigation practice of defense attorneys sharing information to defend against antitrust conspiracy claims—a perfectly *appropriate* activity, then and now—*see infra* note 30); Note, "Waiver of Attorney-Client Privilege on Inter-Attorney Exchange of Information," 63 YALE L.J. 1030, 1034 (1954) (at the time the enterprising law student wrote his or her note, there were only a handful of common interest privilege cases, none of which implicated the antitrust laws).

30. *See SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 513 (D. Conn. 1976). *See also In re Santa Fe Intern. Corp.*, 272 F.3d 705, 710 (5th Circuit 2001) (also cited by Professor Wright—for the obvious proposition that the common interest privilege cannot be used as a shield to avoid liability for conspiracy to violate the antitrust laws).

31. Of course, once antitrust litigation has *commenced* the common interest privilege is regularly employed so that counsel for the target entities can share information. The flip side can *never* pass muster: i.e., using the common interest privilege as a means to further/conceal an antitrust conspiracy -- such a ploy would clearly run afoul of the crime-fraud exception to the privilege. *See, e.g., In re: Grand Jury Subpoena Duces Tecum (Rich)*, 731 F. 2d 1032, 1041 (2d Cir. 1984). *See also supra* note 29.

32. The only way any such "evidence" could have been coopered up, I suppose, would have been via the Chamber of Commerce's *amicus curiae* brief (although any factual proffer would not constitute "evidence"). The Chamber's brief apparently focused on the fact that there was no "actual abuse" in the case at hand or in the jurisdictions that do not have a litigation requirement. Judge Pigott was obviously not influenced by that "evidence," being more convinced by the unproven and unquantifiable "potential for abuse."

33. *See supra* note 11. And, as set forth above, it is this same public policy that Judge Moskowitz cited in her decision. *See supra* note 20 and accompanying text.

34. *See supra* note 24.

35. To support this view he cited a footnote from *In re Megan-Racine Assocs., Inc.*, 189 BR 562, 573 n.8 (Bank N.D.N.Y. 1995).

36. As well as Professor Giesel's general disapproval. *See supra* note 28.

37. In fact, Judge Pigott quoted with approval Professor Wright's dismissive comment that the common interest privilege has been "spreading like crabgrass"; it would appear that the Judge hopes by liberally applying weed-killer he will keep the "crabgrass" to a minimum in New York State.

38. *See supra* notes 11, 20 & 32.

39. *See Hyatt v. State Franchise Tax Board*, 105 A.D. 3d 186, 962 N.Y.S. 2d 282 (2d Dept. 2013); D.A. Cohen, *New York Court of Appeals Clarifies the Common Interest Doctrine*, NEW YORK LAW JOURNAL (June 29, 2016).

40. Although Judge Pigott expressly declined to define for common interest privilege purposes what constitutes "anticipation of litigation," the Second Circuit's definition for purposes of the work-product doctrine should be a safe guide for lawyers in this context. *See U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1998); *see also* C.E. Stewart, *Policing the Corporate Beat: One Small Step for Man...*, NEW YORK LAW JOURNAL (May 7, 1998). *See generally* M. Greene, *More Private M&A Deals Are Addressing Ownership of Attorney-Client Privilege*, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 520 (August 24, 2016).

41. *See* M.B. Espana & M.J. Sullivan, *Protecting Communications and Work Product After 'Ambac II,'* NEW YORK JOURNAL (August 21, 2016).

42. *See* G.C. Hazzard, *Lawyer for the Situation*, 39 VALPARISO U.L. REV. 377 (2004).

43. *See* S.D. Aaron, J. Berick & C.D. Cheslak, *Preserving Attorney-Client Privilege in M&A Transactions*, NEW YORK LAW JOURNAL (August 8, 2016).

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