Collecting, Sorting and Segregating Responsive and Privileged Documents

Old Myths and New Realities

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I. The Standards:

A. Rule 26 (b) (1): discovery of "any non-privileged material relevant to any party's claim or defense and ***proportional*** to the needs of the case . . . .

B. Rule 26 (b) (5) withheld information under claim of privilege must expressly make the claim and "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."

Issue: ***How do you collect the "relevant" documents and efficiently segregate privileged from non-privileged documents?***

II. Best Practices for Collection and Sorting of Responsive Documents:

A. Man vs Machine: human review is not as good as Technology-Assisted Review (TAR).

"Statistics clearly show that computerized searches are at least as accurate, if not more so, than manual review." *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 190 (S.D.N.Y. 2012) (Peck, Mag. J.).

Keyword searching not nearly as effective. Studies show lawyers greatly overestimate the effectiveness of their searching. Studies show Boolean search identifies only 24% or 22% of documents.

Concept searching/ Predictive coding/seed sets [use of algorithms to "find more documents like this"] Recognize large number of documents as a cohesive group and code them uniformly.

“Recall” = Fraction of relevant documents actually retrieved

(How complete the search was). Humans miss 20% to 75% of all relevant documents

“Precision” = Fraction of retrieved documents that are, in fact, relevant

(How accurate the search was) 65% for human reviewers

Finding as many responsive documents as possible regardless of cost/time

vs

Finding responsive documents as efficiently as possible, with least number of non-responsive documents.

“Perfect” = the enemy of “good enough)”?

TAR can achieve significantly higher Recall and Precision and enormous cost savings.

1. ***Courts have upheld TAR tools for searching, relevance determinations and privilege reviews.***

Da Silva Moore, supra (leading case has been cited many times by other courts).

Rio Tinto PLC v. Vale S.A., 306 F.R.D. 125 (S.D.N.Y. 2015) (Peck, Mag. J.)

Whether particular document is covered by A/C Privilege or Work Product is often fairly debatable.

See *Graco, Inc. v. PMC Global, Inc*. (Arpert 2011) for a comprehensive discussion of the standards and case law.

2. Needs to be "reasonable." *Da Silva Moore* ("***computer-assisted review is not perfect, [but] the Federal Rules of Civil Procedure do not require perfection***.").

Rule 34 only requires "reasonable efforts to identify and produce responsive, non-privileged documents"

Sedona Principles: "good faith obligation to preserve and produce relevant ESI [can be satisfied] by using electronic tools and processes . . . to *identify data reasonably likely to contain relevant information*."

Rule 34 (b): not required to produce ESI from sources that are "not reasonably accessible because of undue burden or cost." *See also* Rule 26 (c) (permitting a party to seek relief from "undue burden or expense").

Rule 26 (g) : need to make a timely, reasonable and diligent search for all documents responsive to the discovery requests. Certification that "to the best of the attorney's or party's knowledge, information and belief formed after a reasonable inquiry . . ." it is "complete and correct as of the time it was made . . ."

3. Needs to be “defensible”: can it withstand a challenge by the opposing party?

Not all TARs are created equal. Needs to be well thought out with substantial human input on the front end. (Sedona)

Search for ESI may need to be supported by **experts**. Court needs to determine whether the search produced results that are valid and consistent with F.R.C.P.

Whether the particular tool or method has accurately collected or captured responsive documents and ESI. [Sedona]

4. ***Defensibility improves if it has been discussed with adversary counsel***.

Rule 26 (f) and L.Civ.R. 26.1(d): meet and confer requirement.

Consider sharing protocols for “seed sets”/ agreement on search terms.

May be valid work product concerns.

Consequences of unilateral actions may be to redo the work!

ESI formats are important!

B. Risks of Over-Production and Under Production.

1. Cost/Inefficiency. Human reviewers = 50-100 documents per hour;

MB = 50-75 pages; GB = 50,000-75,000 pages. Avg hard drive = 20 GB

2. Waiver of Privilege: *U.S. v. O'Neill*, 619 F. 2d 222, 227 (3d Cir. 1980) ("The indiscriminate claim of privilege may in itself be sufficient reason to deny it.")

3. Use TAR in sorting privileged documents:

Advisory Committee Notes to F.R.E. 502(b): ***a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure."***

4. Discovery Disputes/Motions to Compel. Use experts and detailed certifications from client IT representative to establish reasonableness of search and costs/burdens.

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Navigating Emails, Privilege, and the In-House Counsel

Anthony Argiropoulos

AFBNJ Brown Bag Lunch Program

May 17, 2018

Attorney-Client Privilege

Focus on In-House Counsel and Civil Litigation

1. The Five Ingredients
2. The Primary Purpose
3. Mixed-Purposes
4. Attorney Work Product
5. Waiver and Advice of Counsel Defense
6. You Be The Judge

The Attorney Client Privilege and Discovery

Confidentiality v. Discovery

Model Rule of Professional Conduct 1.6

A lawyer **shall not reveal information** relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by [certain exceptions, and a lawyer **shall make reasonable efforts** to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.]

Fed. Rule of Civil Procedure 26

Parties may obtain discovery regarding any **non-privileged** matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.

Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Five Ingredients For Privilege

The Core Principle is “Primary Purpose”

- To be privileged the **“primary purpose”** of a communication must be to seek or provide legal advice.
- A communication is not privileged if it does not actually:
  - request legal assistance or
  - convey information reasonably related to a request for legal assistance.

Emails: Primary Purpose Versus Mixed Purpose

Emails to or from in-house counsel that seek **both legal and business advice will often <u>not</u>** satisfy that requirement.

- Emails that list an attorney and a non-attorney in the "To" field <u>may</u> not be privileged if they are deemed to be for both a business and a legal purpose.
- Emails that list an in-house attorney in the "To" field and a non-attorney in the "cc" field are only privileged if the non-attorney is copied in order to notify that person that legal advice was sought and what legal advice was rendered.

United States, ex rel. Elin Baklid-Kunz v. Halifax Hospital Medical Center

Halifax is an example of how one District Court analyzed the privilege.

Halifax has generated a lot of headlines, **but it did not make new law.**

There are no bright lines. Privilege is considered on a case-by-case basis.

In *Halifax*, the hospital's former director of physician services brought a False Claims Act case alleging that Halifax:

- Submitted thousands of fraudulent claims to Medicare.
- Paid kickbacks to key referring physicians in order to generate patient referrals to the hospital.
- Entered into financial relationships with physicians that violated Stark.

The United States intervened and alleged the presentation of false claims, use of false statement to get claims paid, and the creation false records.

Potential damages and penalties ranged in the hundreds of millions of dollars.

The case settled → but before that, there were discovery and other legal disputes and motions.

Principles Employed in *Halifax Discovery Ruling*

The privilege protects communications, not facts.
Upjohn Co. v. United States, 449 U.S. 383, 395-96 (1981).

Derivative protection:
The privilege also protects (i) "communications between corporate employees in which prior [legal] advice received is being transmitted to those who have a need to know in the scope of their corporate responsibilities." *In re Vioxx,* 501 F. Supp. 2d at 797; and (ii) communications between corporate counsel and a corporation's employees, made "at the direction of corporate superiors to secure legal advice from counsel." Upjohn Co., 449 U.S. at 394.

Burden:
The proponent of the privilege bears the burden of proving the attorney client relationship and confidentiality of the communication. *In re Seroquel Prod. Liab. Litig.,* No. 6:06-md-1769-Orl-22DAB, 2008 WL 1995058, at *2 (M.D. Fla. May 7, 2008).

Principles Employed in *Halifax Discovery Ruling (cont'd)*

Draft documents:

A draft of a document is:

i. protected by attorney-client privilege if it was "prepared with the assistance of an attorney for the purpose of obtaining legal advice or, after an attorney's advice, contained information a client considered but decided not to include in the final version." In re Seroquel, 2008 WL 1995058, at *3.

ii. not protected "[i]f the ultimate document is purely a business document which would not have received any protection based upon privilege in any event ... " id.

iii. privileged if prepared with the assistance of counsel or for the purposes of obtaining legal advice or contains information not included in the final version.

Compliance advice is not legal advice.

Compliance employees are not acting at the direction of counsel under protection of the privilege just because the compliance department reports to and operates under the supervision and oversight of the legal department.

Non-Privileged Documents and Communications at Issue in *Halifax*

The *Halifax* Court held that based on the record before it **NONE** of the following documents were protected by the attorney-client privilege:

1. compliance referral log
2. certain documents/communications which were not "to" or "from" an attorney
3. documents/communications relating to audits and reviews
4. documents/communications relating to FMV determinations and physician compensation analyses
5. documents produced to the U.S. in response to subpoenas
6. email strings
7. crime fraud exception documents

Core Principles of the Attorney Work Product Doctrine: Is it Privileged? Not Absolutely

The attorney work product doctrine is rooted in the concept that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

A document need not be prepared to aid in the conduct of litigation in order to constitute work product, much less *primarily* or *exclusively* to aid in litigation. Preparing a document in anticipation of litigation is sufficient. *United States v. Aldman*, 134 F.3d 1194, 1198-99 (2d Cir. 1998).

To establish that material is protected by the attorney work product doctrine, a party need only show that, "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Schaeffler v. United States*, 22 F. Supp. 3d. 319, 335 (S.D.N.Y. 2014).

"The protections afforded by the attorney work product doctrine are not absolute." A party may obtain fact work product if it "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(ii).

Attorney Work Product: *In re General Motors LLC Ignition Switch Litig.*

General Motors, LLC ("New GM") recalled certain vehicles due to an ignition switch defect. Following the first recall, New GM retained the law firm Jenner & Block, LLC ("Jenner") and its chairperson Anton Valukas to conduct an internal investigation into the defect and the delays in recalling the vehicles.

The attorneys reviewed numerous documents and interviewed over 200 New GM employees and former employees as well as others. The result was a written report- the "Valukas Report."

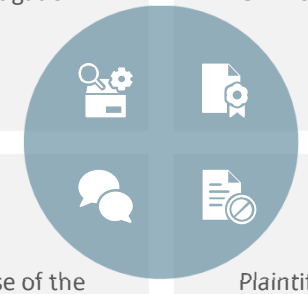
New GM submitted the Valukas Report to Congress, the DOJ and the National Highway Traffic Safety Administration ("NHTSA").

In the pending MDL proceeding New GM submitted the Valukas Report as part of discovery **but** refused to disclose certain materials underlying the report, namely, notes and memoranda relating to the witness interviews conducted by the law firm attorneys.

Attorney Work Product: *In re General Motors LLC Ignition Switch Litig.*

The materials contributing to the Valukas Report were not produced in the ordinary course of business, but instead, the interviews and the related interview materials were prepared because of the pending DOJ investigation and in anticipation of civil litigation.

Considering the factual scenario presented and the nature of the documents the Court determined that it can be said that the materials at issue would not have been created in "essentially similar form" had New GM not been faced with the pending litigation.



All witnesses were informed "that the purpose of the interview[s] was to gather information to assist in providing legal advice to New GM," and as such the interviews were conducted with "an eye towards the goal of "facilitat[ing] [Jenner's] provision of legal advice to New GM.""

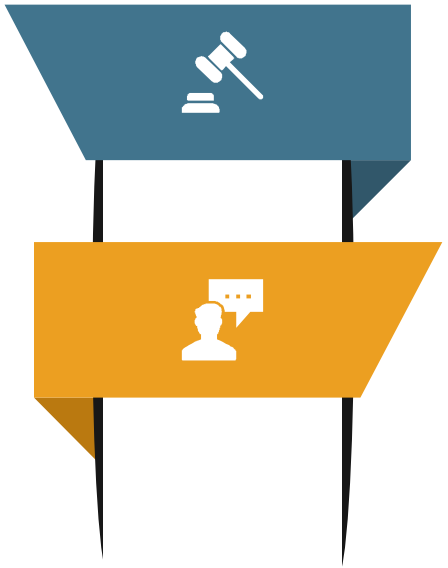
Plaintiffs request for the materials was denied on the basis of attorney work product except Plaintiffs were not precluded from making a future application for particular materials in the event that a witness who was interviewed by the Valukas team becomes unavailable as a result of death, invocation of the Fifth Amendment privilege against self incrimination, etc.

Waiver: *In re General Motors LLC Ignition Switch Litig.*

"[W]hen [a] disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding **only if:**

(1) the waiver is intentional;
(2) the disclosed and undisclosed communications or information concern the same subject matter; and
(3) they ought in fairness to be considered together."

Fed. R. Evid. 502(a) (emphasis added).



"[A] voluntary disclosure in a federal proceeding or to a federal office or agency … generally results in a waiver only of the communication or information disclosed." Fed. R. Evid. 502, Committee Notes (emphasis added).

Inadvertent Disclosure Will Not Necessarily Result in Waiver

1. Generally, voluntary disclosure of a document protected by the attorney-client privilege will waive privilege. However, inadvertent disclosure will not necessarily result in a waiver.
2. "[T]he privilege will not be waived unless the producing party's conduct was so careless as to suggest that it was not concerned with the protection of the asserted privilege." *See Prescient Partners, L.P. v. Fieldcrest Cannon*, 1997 U.S. Dist. LEXIS 18818, *12-13 (S.D.N.Y. Nov. 26, 1997).
3. In looking to the circumstances surrounding the disclosure, courts "consider factors such as the reasonableness of the precautions taken to prevent inadvertent disclosure, the number of inadvertent disclosures, the extent of the disclosure, measures taken to rectify the disclosure, any delay in taking those measures, and whether the overriding interests of justice would or would not be served by relieving a party of its error. " *Berg Elecs., Inc. v. Molex, Inc.*, 875 F. Supp. 261, 262 (D. Del. 1995) .
4. Rule 502(b) of the Federal Rules of Evidence provides that "an inadvertent disclosure of privileged material does not operate as a waiver 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). " *See Paramount Fin. Communs., Inc. v. Broadridge Investor Commun. Solutions, Inc.*, 2016 U.S. Dist. LEXIS 133105, *6 (E.D. Pa. Sep. 28, 2016).

The Consequences of the Advice of Counsel Defense

1. Recently, in *United States v. Berkeley Heartlab*, 2017 U.S. Dist. LEXIS 51691, *11 (D.S.C. April 5, 2017) the court held that assertion of the advice of counsel defense resulted in the waiver of all advice received during the entire course of the alleged misconduct and leading up to and including trial.

2. Since "a party asserting an advice of counsel defense has made the conscious decision to interject the advice of counsel as an issue in the litigation, that party's communications with counsel are generally rendered discoverable." *See Memory Bowl v. N. Pointe Ins. Co.*, 280 F.R.D. 181, 186 (D.N.J. 2012).

3. "When a party asserts an advice of counsel defense, he waives the attorney-client privilege as to the entire subject matter of that defense: Were the law otherwise, the client could selectively disclose fragments helpful to its cause, entomb other (unhelpful) fragments, and in that way kidnap the truth-seeking process." *Berkeley Heartlab.*, 2012 U.S. Dist. LEXIS 51691 at *11; *see also Greene, Tweed of Del., Inc. v. DuPont Dow Elastomers, L.L.C.*, 202 F.R.D. 418, 420 (E.D. Pa. 2001) *("*where a party asserts the advice of counsel as an essential element of its defense, work product immunity, like attorney-client privilege, is waived with respect to the subject of that advice. ").

4. While a defendant may claim to have relied on the advice of one attorney, any relevant advice he received from other attorneys is also subject to disclosure. *Berkeley* Heartlab, 2017 U.S. Dist. LEXIS 51691 at *11-12.

5. The *Berkeley Heartlab* court further determined that the advice of counsel defense also waives the attorney work product doctrine such that all work product, both communicated and uncommunicated work product. *Id.* at *15.

Methods to Protect the Privilege

Make the "Primary Purpose" the Primary Purpose

Clients should ask for legal advice, and lawyers should deliver legal advice:

- If an employee is acting on the advice or instruction of counsel she should expressly say so. "At the instruction of our General Counsel, I am gathering documents relating to . . ."
- "You asked me for legal advice concerning . . ."

Clearly state that the purpose is to provide or to obtain legal advice

Adopt (or Reconsider/Amend) email policy and practice:

- Sever email communications as may be necessary between business role and legal role
- Client: avoid "cc-ing" counsel and non-lawyers
- Counsel: avoid "cc-ing" non-essential personnel
- Avoid or sever email strings
- Train Management on your Email & Privilege Policy!

Methods to Protect the Privilege (cont'd)

Retain outside counsel:

- Communications with outside counsel are cloaked in the presumption of privilege
- Outside counsel should retain consultants to extend privilege
- Outside counsel to conduct or supervise investigations

Always include your impressions and opinions in documents, such as drafts and interviews

Remember that labeling something as privileged or confidential does not make it privileged or confidential

Consider keeping separate files

Document the reasons for conducting an in-house investigation (and the reason for not conducting one)

Narrow the scope of subpoenas to exclude communications: no production, no waiver

Prepare a privilege log in response to every subpoena and document request

You Be the Judge: Privileged or Not?

Attorney is asked to render an opinion regarding the company policy related to marketing needs, public relations and lobbying efforts.

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A. Maybe. What's the Primary Purpose? It is important to make clear which "hat" in-house counsel is wearing. "When an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged." See *NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 126 (N.D.N.Y. 2007).

You Be the Judge: Privileged or Not?

In-house counsel memo contains no legal research, contains certain business advice and also concerns legal rights and obligations pertaining to that advice concerning possible litigation.

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In-house counsel memo contains no legal research, contains certain business advice and also concerns legal rights and obligations pertaining to that advice concerning possible litigation.

A. Privileged. Communication involved imminent litigation and was "predominantly of a legal character." *Rossi v. Blue Cross and Blue Shield,* 73 N.Y.2d 588, 594 (1989*), In re the County of Erie,* 473 F.3d 413, 419-420 (2d Cir. 2007).

You Be the Judge: Privileged or Not?

Attorney, who is both Senior Vice President and Corporate Counsel, is presented with a letter of credit from a third party. She determines that the letter of credit should be honored based on her knowledge of the U.C.P., and sends several emails regarding her decision. These emails are the subject of a discovery demand in a subsequent lawsuit.

You Be the Judge: Privileged or Not?

Attorney, who is both Senior Vice President and Corporate Counsel, is presented with a letter of credit from a third party. She determines that the L/C should be honored, and sends several emails regarding her decision. These emails are the subject of a discovery demand in a subsequent lawsuit.

A. Not Privileged. The Court said that the attorney "evidently relied on her knowledge of commercial practice rather than her expertise in the law." The emails did not contain any legal analysis. *MSF Holding, Ltd. v. Fiduciary Trust Co.* Int'l, 2005 WL 3338510, at *1 (S.D.N.Y. 2005).

You Be the Judge: Privileged or Not?

Business documents sent to in-house counsel for review and comment. In-house counsel sends back comments with handwritten notes on the documents.

You Be the Judge: Privileged or Not?

Business documents sent to in-house counsel for review and comment. In-house counsel sends back comments with handwritten notes on the documents.

A. Not Privileged. Simply providing documents to in-house counsel does not make them privileged; documents must be deemed privileged at time they are created. *Simon v. G.D. Searle & Co.,* 816 F.2d 397, 403-404 (8th Cir. 1987).

You Be the Judge: Privileged or Not?

Draft documents – prepared by employee who is both in-house counsel and corporate secretary – concerning business and legal aspects of ongoing negotiations related to a transaction are sought six months later in connection with a lawsuit arising out of that transaction.

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A. Not Privileged. The court stated that Company failed to show that the documents were "primarily of a legal character." Privilege does not apply where legal advice is merely incidental to business advice. *Cooper-Rutter Assoc. Inc. v. Anchor Nat'l Life Ins. Co.*, 168 A.D.2d 663 (2d Dep't 1990).

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The DOs AND DON'Ts in Asserting and Challenging Privilege and Confidentiality Designations

Brown Bag Lunch Series
May 17, 2018

Consequences of Over Designating Documents as Confidential and Improper Designations or Failure to Designate Attorney Client Privilege/Work Product Doctrine Documents

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Over Designation of Confidential and Privileged Documents

The Applicable Federal Rules of Civil Procedure are 26(c)(3) and 37(a)(5):

- Protective Orders - Award of Expenses
- Motion for an Order Compelling Disclosure or Discovery

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CASE LAW

- Over Designation of "Confidential" Documents Results in Sanctions
  - *Procaps S.A. v. Patheon, Inc.*
  - *Broadspring, Inc. v. Congoo, LLC*

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- Example of Where Over-Designation of "Privileged" Documents Results in Sanctions

  - *N.M. Oncology & Hematology Consultants v. Presbyterian Healthcare Servs.*

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Consequences of Under Designation of - or Failure to Designate as - "Privileged and Work Product" Documents: Waiver of Privilege

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The Applicable Rules of Evidence and Federal Rules of Civil Procedure:

- FRE 502(b)
- FRCP 26(b)(5)(B)

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CASE LAW

- Examples of Findings of Waiver by Failing to Properly Review Documents Prior to Production – Inadvertent Productions

  - *Graco, Inc. v. PMC Global*
  - *D'Onofrio v. Borough of Seaside Park*
  - *Shire, LLC v. Amneal Pharms.*

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- Examples of Failure to Produce a Privilege Log or Production of Inadequate Privilege Log – Results in Waiver of Privilege

  - *Wachtel v. Health Net, Inc.*
  - *Schaeffer v. Tracey*
  - *Aurora Loan Servs. v. Posner*

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Potential Balance Between the Unduly Burdensome Task of Creating a Lengthy, Detailed Privilege Log and Not Waiving Privilege:

The Categorical Privilege Log

- Rule 11-b of § 202.70 of the Civil Rules for the NY Supreme Court
- S.D.N.Y. Local Rule 26.2(c)
  - *Tyco Healthcare Group, LP v. Mutual Pharm. Co., Inc.*
  - *Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J.*

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