In Mafille v. Kaiser-Francis Oil Co., 2009 WL 3219151 (N.D. Okla. July 17, 2019), Magistrate Judge Frank H. McCarthy rejected plaintiffs' claim that an inadvertently produced email was not privileged and rejected their attempt to depose defendant's counsel about the matters addressed in the privileged document.

The subject of this discovery dispute was an inadvertently produced email in a chain by and among defendant's management officials involved in the firing of one of the two plaintiffs. Id. at *1. The email at issue identified defendant's attorney by name and recited her termination recommendation based on the reasons listed in the email. Based on this email's content, plaintiffs then sought to depose defendant's attorney.

Defendant stated that in compliance with Fed. R. Civ. P. 26(b)(5)(B), it notified plaintiffs within three days of production that it was claiming a privilege with respect to the email. As the magistrate judge explained, pursuant to Rule 26(b)(5)(B), a party being so notified must

> promptly return, sequester or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim.

Subsequently, "[p]laintiffs appended the subject email and made reference to its contents in the reply brief in support of [the] Plaintiffs' motion for sanctions." In response, defendant argued that the exhibit and all references to it should be stricken and that plaintiffs should be barred from further use of the exhibit. Plaintiffs then sought to substitute the initial exhibit with another similar exhibit and argued that defendant's attempt to claw back the email was mistaken because the email's content was not subject to the attorney-client privilege.

Magistrate Judge McCarthy began by stating that "Rule 26(b)(5)(B) could not be more clear." Under the rule, regardless of whether the plaintiffs disagreed with the defendant's privilege assertions, "[p]laintiffs were prohibited from making any use of the information, period." Further, that plaintiffs believed defendant had abandoned any privilege claim was immaterial because under the rule, "[t]he onus for presenting the information to the court for a determination of privilege is on the party receiving production." Id.

Magistrate Judge McCarthy also rejected plaintiffs' contention that defendant was at fault for producing the email in question before conducting a full review of every email for privilege. In his view, "[t]he very existence of Fed. R. Civ. P. 26(b)(5)(B) is intended to facilitate the swift production of discovery by providing some comfort to the producing party that privileges are not waived by production in discovery." Id. at *2.

Magistrate Judge McCarthy then turned to plaintiffs' assertion that defendant's privilege assertion was misplaced. From his review of the email at issue, "[i]t is clear from the content of the email string that officials employed by Defendant who were involved with the employment decision for [plaintiff] were awaiting advice from Defendant's attorney" and that "[a]n email communicating the advice was sent to those within the company who could act on it." Under these circumstances,

Magistrate Judge McCarthy concluded, "[t]he email communicating the advice falls squarely within the attorney-client privilege." Id.

Magistrate Judge McCarthy also rejected plaintiffs' assertions that the defendant was attempting to prevent the disclosure of factual information by use of the privilege. Id. at *3. As he stated, "[t]here is no factual information contained in the subject email that has not otherwise been disclosed to Plaintiff[s]" and, further, "[t]here is nothing untoward about Defendant having consulted counsel, about Defendant's decision makers discussing counsel's advice, or about their having taken that advice." Moreover, "[d]efendant has not claimed advice of counsel as a defense, or otherwise taken any action inconsistent with preservation of privilege." Id.

Finally, Magistrate Judge McCarthy rejected plaintiffs' argument that they should be permitted to depose defendant's counsel. Specifically, he rejected plaintiffs' assertion that "there is a dispute as to the basis for [plaintiff's] termination that only [Defendant's counsel] can answer" because in his view, [t]he reasons for [plaintiff's] termination has been communicated to her." "[T]here has been no showing that discovery of any evidence supporting those reasons has been denied to the Plaintiffs under a claim of privilege" and "Plaintiff[s] have not shown that the identity of who fired [plaintiff] has anything what-so-ever to do with establishing liability, damages, or a defense against any claim asserted in this case." Id.

Magistrate Judge McCarthy also noted that "taking the deposition of an opponent's attorney, either trial counsel or general counsel, often encumbers the case with burdensome collateral issues which unnecessarily increase the cost of litigation and delay the progress of the case." After reviewing various cases, Magistrate Judge McCarthy concluded that "depositions of opposing counsel should be limited to circumstances where it has been shown that: 1) no other means exist to obtain information than to depose opposing counsel; 2) the information sought is relevant and nonprivileged; and 3) the information is crucial to the preparation of the case." In this case, he concluded, none of the relevant criteria was met. Id.

Accordingly, Magistrate Judge McCarthy held that plaintiffs were prohibited from making further use of the information gleaned from the privileged and inadvertently produced email. Further, because the contents of the email were not otherwise relevant, Magistrate Judge McCarthy ruled that plaintiffs were to "return or destroy any copies of the subject emails" and required them "to take reasonable steps to retrieve the email if it has been distributed." He also sealed the exhibit containing the privileged email. Id.