ATTORNEY-CLIENT PRIVILEGE AND WAIVER: AN OVERVIEW AND DISCUSSION OF EMERGING AND RELATED ISSUES

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PART ONE

ATTORNEY-CLIENT PRIVILEGE
I. THE PRIVILEGE

A. CPLR 4503(a)(1)

1. CPLR 4503(a)(1) codifies the attorney-client privilege. It provides:

   Unless the client waives the 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. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

2. CPLR 4503(a)(2) abolishes “fiduciary exception” to the attorney-client privilege regarding communications between counsel and personal representative of a decedent’s estate.

3. CPLR 4503(b) creates a statutory exception to the privilege where the confidential communication between a deceased client and the client’s attorney in issue involved the preparation, execution, or revocation of any will of that client or other relevant instrument.
B. Its Application

1. One of the most frequently quoted formulations of the privilege is that of Judge Wyzanki in *United States v. United Shoe Machinery Corp.* (89 F. Supp. 357, 358 [D. Mass. 1950]):

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

2. This formulation is equally applicable to CPLR 4503(a)(1) as construed by the courts.

II. CURRENT CONCERN OF WAIVER OF THE PRIVILEGE

A. Waiver

1. The privilege belongs solely to the client, and ordinarily only the client can waive the privilege.

2. Waiver of the privilege by reason of the attorney’s conduct is an important issue that the courts have struggled with through the years.

B. Waiver By Reason Of:

1. Inadvertent disclosure waiver.

2. Subject matter waiver.
3. Selective disclosure waiver.

C. Federal Developments


   (a) FRE 502 places limits on both subject matter waiver and waiver due to inadvertent disclosure.

2. FRE 502 does not directly address selective waiver.

D. State Developments

1. Several states have adopted by legislation or court rule waiver rules that are patterned on FRE 502. They include Florida, Iowa, Oklahoma and Tennessee.

2. Other states have adopted rules that address waiver but do not follow the model of FRE 502. They include Arkansas, New Hampshire and Texas.

E. Whither New York?

1. Uniformity for the sake of uniformity.

2. Enact a statute that addresses the concerns in a manner suitable for New York.

3. Do nothing.
PART TWO

WAIVER BY DISCLOSURE: FRE 502 LIMITATIONS
I. GENERALLY

A. Two Problems

1. A problematic situation occurs when a party, through the actions of
his/her attorney, inadvertently discloses privileged communications to
an adversary. This can occur in situations where large numbers of
documents are requested in discovery and a privileged document is
included; or through the attachment of the document instead of
another one to an e-mail which is then transmitted.

   (a) Is the privilege waived in those circumstances?

2. A problematic situation occurs when an attorney with the client’s
consent discloses to third-parties a single privileged document in
order to help the client’s cause.

   (a) Is the privilege waived not only as to the disclosed document
   but also to all privileged documents relating to the same
   subject matter as the disclosed document?

B. FRE 502

1. FRE 502 addresses these two situations. Its purpose is to bring
nationwide uniformity and to create predictable outcomes regarding
the waiver of the privilege through “inadvertence”; and in doing so to
reduce the burdens – financial and otherwise – associated with the
production of documents in discovery.

2. FRE 502 and the accompanying commentary are appended to this
paper as Appendix A.

II. APPLICABILITY OF FRE 502

A. Generally

1. FRE 502 must be applied by all federal courts in all federal court
proceedings.
2. FRE 502 applies to communications and information that are subject to the “attorney-client privilege,” as well as the “work-product protection.” Thus, it does not change or otherwise alter federal or state law concerning whether the communications and information are privileged in the first instance.

3. FRE 502 also requires a state court to follow the Rule’s standards if the disclosure of a privileged communication occurred in a federal proceeding or to a federal office or agency, and discovery of that communication is sought in the state court proceeding. (FRE 502[b]).

4. Where the disclosure of the communication is made in a state proceeding and is not subject to a state court order concerning waiver and discovery of that communication is sought in a subsequent federal proceeding, the earlier disclosure is not treated as a waiver in the federal proceeding if the standard for waiver of either the relevant state rule or FRE 502(c) would grant protection.

5. FRE 502 has no application to disclosures that occur solely at the state level.

B. Effective Date

1. FRE 502 is applicable to all cases commenced after September 19, 2008.

2. FRE 502 is also applicable in pending cases “insofar as is just and practicable.”

III. SCOPE OF FRE 502

A. Establishment Of Uniform Standards

1. FRE 502(b) establishes a uniform standard for determining whether a waiver of the privilege results from inadvertent disclosure of an otherwise privileged communication or information made in a federal proceeding or to a federal office or agency.

2. FRE 502(a) establishes a uniform standard for determining the scope of waiver as it relates to undisclosed information when a privilege
communication or information is disclosed in a federal proceeding or to a federal office or agency.

B. Enforceability Of Non-Waiver Agreements

1. FRE 502(d)-(e) makes pre-production non-waiver agreements, *e.g.*, agreements providing that the parties are not waiving the right to claim privilege to privileged documents disclosed by then, enforceable provided they are incorporated into a federal court order.

C. Not Affected

1. FRE 502 does not change or otherwise affect federal or state law as to whether a communication is protected by privilege.

2. FRE 502 does not change applicable case law which places the burden of proving that a privilege exists on the party asserting the privilege. (*See,* *Peterson v. Vernardi,* 262 FRD 424, 427-428 [DNJ 2009]; *Kumar v. Hilton Hotels Corp. *, 2009 WL 1683479, *2 [WD Tenn.]).

3. FRE 502 does not establish rules as to when a waiver is present. It merely provides exceptions to the common law waiver rule.

IV. FRE 502(a): INTENTIONAL DISCLOSURE AND SUBJECT MATTER WAIVER

A. Generally

1. The common law rule provides that when there is a disclosure of a confidential communications a waiver of the privilege is affected as to all related communications regarding the same subject matter. (*See,* *In re Grand Jury Proceedings,* 219 F.3d 175 [2d Cir. 2000]; *In re Sealed Case,* 877 F.2d 976 [D.C. Cir. 1989]).

(a) In New York, there is a dearth of case law discussing the subject matter waiver. Two reported Supreme Court decisions reach opposite conclusions.

(i) In *AMBAC Indemn. Corp. v. Bankers Trust Co.* (151 Misc.2d 334, 340-341, 573 N.Y.S.2d 204, 208 [Sup. Ct. N.Y. Co. 1991]), the common law rule was applied.
(ii) In Charter One Bank v. Midtown Rochester (191 Misc.2d 154, 738 N.Y.S.2d 179 [Sup. Ct. Monroe Co. 2002]), the subject matter waiver rule was rejected, with the court declaring that it was at odds with the purpose of the privilege to encourage the free flow of information between attorney and client.

(iii) See generally, Alexander, Practice Commentaries to CPLR 4502, McKinney’s Cons. Laws of NY, C4503:6(f).

2. FRE 502(a) provides that subject matter waiver occurs only when the partial disclosure of multiple privileged communications is (a) intentional; (b) the disclosed and undisclosed communications concern the same subject matter; and (c) all of the communications in fairness should be considered together.

B. Establishing Waiver

1. While “intentional” is not defined, it seems clear that “intentional” refers to a purpose to deceive or take advantage the adversary. (See, Meyers, An Analysis of FRE 502 and Its Early Application, 55 Wayne L. Rev. 1441, 1455 [2009]).

2. The Commentary states that subject matter waiver is “reserved for those unusual situations” in which fairness requires such further disclosure. (See, United States v. Treacy, 2009 WL 812033, *2 [SDNY][noting the absence of “unusual circumstances]). The Commentary further states that “a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.”

(a) In United States v. Adams (2009 WL 1117392 [D. Idaho]), the court found no subject matter in the absence of any evidence that the partial disclosure in issue was designed to obtain a tactical advantage.

(b) In Silverstein v. Federal Bureau of Prisons (2009 WL 4949959 [D. Colo.]), the court found subject matter waiver on the part of
the government based upon its conclusion that the government had produced a privileged document after it had been logged as privileged to obtain a litigation advantage, noting it had only on the eve of a FRCP 30(b)(6) deposition of its author sought to retrieve it and deny plaintiff discovery regarding the document.

3. In essence, subject matter waiver should be found to exist for remedial and not punitive purposes.

4. Further, the Commentary observes: “It follows that an inadvertent disclosure of protected information can never result in subject matter waiver.” (emphasis added).

5. FRE 502(a) does not change the law regarding whether a voluntary disclosure results in waiver, only the scope of that waiver.

6. Based upon the wording of FRE 502(a) it would appear that the party claiming subject matter waiver would have the burden to show the presence of all three requirements.

C. Application

1. FRE 502(a) by its terms provides that if a disclosure is made at the federal level, its waiver rule governs subsequent state court determinations on the scope of the waiver by that disclosure.

D. Extent of the Waiver

1. In *E.I. DuPont v. Kolon Industries* (2010 WL 3003582 [ED Va.]), the court found subject matter waiver was present upon a press release issued by plaintiff that the court found was based on otherwise privileged communications with the government. However, the court rejected defendant’s argument that the waiver extended to all communications relating to the government’s investigation. Instead, the court concluded that the waiver covered only those communications that provided a basis for a certain statement of plaintiff made in the press release.

V. FRE 502(b): INADVERTENT DISCLOSURE

A. Pre-FRE 502(b)
1. Three distinct approaches can be discerned in the situation where a party through its attorney or by itself inadvertently discloses to the adverse party a privileged document. (See generally, Hopson v. City of Baltimore, 232 F.R.D. 228 [D. Md. 2005]).


3. Another approach is that an inadvertent disclosure cannot affect a waiver of the privilege. (See, e.g., Leibel v. General Motors Corp., 646 N.W.2d 179 [Mich. Ct. App. 2002]; Harold Sampson Trust v. Linda Sampson Trust, 679 N.W.2d 794 [Wisc. 2004]). In the view of these courts, a waiver is present only through the client’s intentional and knowing relinquishment of the privilege. (See, Gray v. Bicknell, 86 F.3d 1472 [8th Cir. 1996]).


B. FRE 502(b)

1. FRE 502(b) provides that a communication retains its protected status if (a) the disclosure was inadvertent; (b) the holder took “reasonable steps to prevent disclosure”; and (c) the holder took “reasonable steps to rectify the error.”

(a) FRE 502(b) adopts the third approach or middle-approach for inadvertent disclosure. The Commentary notes that this approach is in accord “with the majority view.”

(b) While FRE 502(b) does not explicitly codify that approach, the Commentary states that the adopted approach’s multifactor test
for determining whether an inadvertent disclosure operates as a waiver has been “accommodated” through the Rule’s flexibility. These factors, as set forth in the commentary, are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure, and the overriding issue of fairness. (See, Lois Sportswear v. Levi Strauss & Co., 104 F.R.D. 103, 105 [S.D.N.Y. 1985]; Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 232, 332 [N.D. Cal. 1985]).

2. FRE 502(b) is applicable when the claimed inadvertent disclosure occurs outside a discovery context. (See, Multiquip v. Water Management Systems, 2009 WL 4261214, at *4 n. 4 [D. Idaho]).

3. The burden is upon the party seeking return to show that FRE 502(b)’s requirements are present. (See, Peterson v. Bernardi, 2009 WL 2243988 [D. N.J.]).

C. “Inadvertence”

1. FRE 502(b) does not offer a definition of “inadvertence.” The analysis required by FRE 502(b)(1) essentially asks whether the party intended a privileged document to be produced or whether the production was a “mistake.” (See, Multiquip, 2009 WL at *4). In this regard, it is worthwhile to compare FRE 502(a)(1) which discusses a waiver that is “intentional” with FRE 502(b)(1)’s requirement for a waiver to be “inadvertent.”

2. Courts have looked at and considered various factors to determine if the disclosure was in fact inadvertent, including the number of documents reviewed; the review procedure used; the nature of the document itself; and the timeframe for review and production. (See, Multiquip, 2009 WL at *4; Preferred Care Partners Holding Corp. v. Humana, 258 F.R.D. 684 [S.D. Fla. 2009]; Heriot v. Byrne, 257 F.R.D. 645, 655 [N.D. Ill. 2009]; Coburn Group v. Whitecap Advisers, 640 F. Supp.2d 1032, 1038[N.D Ill. 2009]; see also, Oot, The Protective Order, Tool Kit: Protecting Privilege with FRE 502, 10 Sedona Conf. J. 237 [2009]; Owen, “FRE 502, One Year Later,” NYLJ, 10/5/09, p. 54, col. 1.

(a) The courts in New York have held that the uncontested affidavit of counsel stating that at all times the client intended the
disclosed (inadvertently) document to remain confidential is sufficient to satisfy this requirement. (See, New York Times Newspaper Div. v. Lehrer McGovern Bovis, Inc., 300 A.D.2d 169, 172, 752 N.Y.S.2d 642, 645-646 [1st Dep’t 2002]).

D. Reasonable Steps To Prevent Disclosure

1. FRE 502(b) does not specify what steps would satisfy this requirement.

2. The Commentary states that any of the above (C[2], supra) five referenced factors will bear on this statement.

3. The Commentary also states that other pertinent factors would be the number of documents reviewed; time constraints for production; the use of advanced analytical applications and linguistic tools in screening for privilege; and the implementation of an efficient system of records management before litigation. (See, Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 [D. Md. 2008]; Rhoads Indus., Inc. v. Building Materials Corp., 254 F.R.D. 216 [E.D. Pa. 2008]).

4. Review of the decisional law since FRE 502(b)’s enactment shows the courts apply the same factors but weigh them differently. (See, Owen, supra). The cases include Mt. Hawley Ins. Co. v. Felman Prod., 2010 WL 1990555 [SD W. Va.]; Multiquip, supra; Preferred Care Partners, supra; Rhoads Indus., Inc., supra; Victor Stanley, Inc., supra; Coburn Group, supra; Heriot, supra; Global Solutions v. St. Paul Fire & Marine Ins. Co., 2009 WL 2390174 [N.D. Cal.]).

   (a) In Amobi v. District of Columbia Dept. of Corrections (2009 WL 4609593 [D.DC]), the court held the defendant failed to meet its burden, requiring a finding of waiver, where it produced no evidence regarding what steps it had taken to prevent privileged material from being disclosed.

E. Prompt, Reasonable Steps To Rectify Error

1. FRE 502(b) does not specify what steps would satisfy this requirement.
2. Decisional law has emphasized that the relevant time frame is the amount of time that has passed since the inadvertent disclosure was discovered, and not the amount of time that has passed since the disclosure was made. (*See, Coburn Group, supra; Heriot, supra*).

3. A lengthy delay in demanding return will probably preclude the establishment of this requirement. (*See, Clark-Fitzpatrick, Inc. v. LIRR, Co., 556 N.Y.S.2d 763 [A.D. 1990]; compare Clarke v. J.P. Morgan, 2009 WL 970940 [SDNY] [two months was too long]*).

4. The Commentary provides that FRE 502(b) “does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake.” Rather, it requires the producing party “to follow up on any obvious indications that a protected communication or information has been produced inadvertently.”

5. Pertinent decisional law includes *Heriot, supra*; and *Preferred Care, supra*.

**F. General Comments**

1. Three factors appear to be very relevant in the required judicial analysis. They are: (a) use of search software; (b) scope and timing of discovery; and (c) the presence of detrimental reliance by the receiving party upon the disclosure.

2. Given the uncertainty built into FRE 502(b), parties must exercise caution in undertaking a document review and implementing anything less than a substantial review of documents.

3. Before litigation parties should consider and implement a records management program.

4. A poorly executed privilege review can lead to waiver.

**VI. FRE 502(d)-(e): COURT ORDER AND PARTY NON-WAIVER AGREEMENTS**

**A. Court Order**
1. FRE 502(d) provides an alternative means of protecting privileged documents.

2. FRE 502(d) permits the disclosure of privileged documents without waiver of the privilege in the immediate proceeding or any other federal or state proceeding if the disclosure is pursuant to a court order under subdivision (d).

   (a) Such order can be made upon a motion to quash a subpoena seeking privileged material; or arise by reason of an agreement of the parties, or even in the absence of an agreement.

B. Agreements Generally

1. Parties have the ability under present law to enter into pre-disclosure non-waiver agreements as to subsequently disclosed communications irrespective of the care taken by the disclosing party. Such agreements include “claw-back” agreements, which can allow the parties to forego privilege review altogether in favor of an agreement to return privilege documents which were disclosed; and “quick-peek” agreements, where the requesting party reviews and selects documents for copying prior to any review whatsoever by the disclosing party without the disclosing party waiving the privilege and then conducts a privilege review of the selected documents.

2. These agreements are specifically mentioned in the Commentary to FRE 502(d). The intent of FRE 502 is to encourage the use of such agreements as permitted under FRCP 16(b) and FRCP 26(f) as FRE 502 will allow such agreements to be enforced in federal and state proceedings through FRE 502(d)-(e).

3. Furthermore, where such an agreement is incorporated in a court order, it binds pursuant to FRE 502(e) the parties to the agreement and non-signatories in all other state or federal proceedings. (See, Whitaker v. Dart Oil, 2009 WL 464989 [ND Tex.]).

4. No criteria are delineated as to when a non-waiver order should be entered.

C. Claw-Back Agreements
1. In most cases there is little or no reason for parties to forego a claw-back agreement where large numbers of documents are subject to discovery. In other situations where the amount of documents to be reviewed is not overwhelming, an agreement may be advantageous if the risk of a disclosed privileged document being used in other proceedings is substantial.

(a) The use of a claw-back agreement may be of value to the parties where there is need to expedite discovery.

2. Nonetheless, the presence of such an agreement should not lull a party thereto into a sense of complacency.

(a) In *Spieker v. Quest Cherokee* (2009 WL 2168892 [D. Kan.]), the court held that a claw-back agreement would not be enforced unless the parties can first establish they have undertaken a reasonable pre-production privilege review. (*See, Boehning, “Kansas Case Casts Doubt On Usefulness Of Rule 502,” NYLJ, 10/27/09, p. 5, col. 1).*

(b) Additionally, can a party who views the privileged document “forget” about its content?

3. The agreement and order should provide for non-waiver, and not the scope of waiver, *i.e.*, waiver/non-waiver depending upon to whom the disclosure is made; encompass both production and disclosure; require the privileged communication to be returned or destroyed with a specified (short) period; and extend non-waiver to disclosures connected with or related to the pending litigation.

(a) Consideration may also want to be given to whether the claw-back agreement encompasses the “fruit” of a disclosed privileged document.

4. In *Rajala v. McGuire Woods, LLP* (2010 WL 2949582 [D. Kan. 2010]), the court imposed a claw-back agreement upon the parties where the parties could not reach an agreement as to the provisions of such an agreement and the defendant established that such an agreement would be appropriate due to the voluminous amount of electronically stored information. The court cautioned that if the
defendant then engaged in a “document dump,” plaintiff could seek appropriate relief.

D. Quick-Peek Agreements

1. The danger with such agreements is that although the producing party might be able to claim privilege, the documents have already been disclosed.

   (a) As a result, such agreements are rarely appropriate.

2. In Spieker v. Quest Cherokee (2009 WL 2168892 [D. Kan.]), the court granted a motion to compel production of a large group of e-mails. In so ruling, the court rejected a suggestion that the e-mails be produced pursuant to a quick-peek agreement.

VII. “GAPS” IN FRE 502

A. Generally

1. Lawrence Fox has observed and commented that there are four important issues that are not addressed by FRE 502. They are:

   (a) Can opposing counsel read the inadvertently disclosed document and share with the client?

   (b) Does receiving counsel have an obligation to notify the other party of the inadvertent disclosure?

   (c) Is there an obligation on the part of opposing counsel to return them?

   (d) Does the client who is bound by a disclosure of documents not deemed inadvertent have a claim against the attorney who allegedly failed the client?

2. Additionally, FRE 502(d), while addressing disclosure, does not address “use” by a party of the party’s own privileged document; and other waiver situations, such as selective waiver..
PART THREE

MORE WAIVER SITUATIONS
I. SELECTIVE WAIVER

A. Generally

1. It is well established that a voluntary disclosure of a privileged communication to a third-party not within the privilege operates as a waiver of the privilege as to all parties, assuming that there is no common legal interest shared between the client and the third-party. (See, Cavallaro v. United States, 284 F.3d 236, 246-247 [1st Cir. 2002]; Westinghouse Electric Corp. v. Republic of Philippines, 951 F.2d 1414, 1420 [3d Cir. 1991]; Snider et al, Corporate Privileges and Confidential Information §2:06 [collecting cases]).

2. Within this rule is there room for the voluntary disclosure of a privileged communication to a government agency in the context of “damage control” that will not waive the privilege, a so-called selective waiver?

(a) After much debate the Federal Rules of Evidence Advisory Committee determined that the selective waiver proposal was too controversial. In its enacted form, FRE 502 does not contain a selective waive provision. (See generally, Emery, The Death of Selective Waiver: How New Federal Rule of Evidence 502 Ends The Nationalization Debate, 27 J.L. & Com. 521 [2009]).

B. Recognition

1. In an early decision, Diversified Industries, Inc. v. Meredith (572 F.2d 596 [8th Cir. 1977]), the Eighth Circuit held that a limited disclosure to a government agency of a privileged communication would not operate as a waiver.

2. The vast majority of courts reject *Diversified* and the concept of a “selective” or “limited” waiver. (*See, In re Qwest Communications Intl., Inc.,* 450 F.3d 1179 [8th Cir. 2006], cert. den. 127 S. Ct. 584 [2006]; *Westinghouse Elec. Corp., supra; United States v. MIT*, 129 F.3d 681 [1st Cir. 1997]).

3. Some courts have suggested that the privilege may be preserved when the agency and the party enters into a confidentiality and non-waiver agreement. (*See, In re Steinhardt Partners*, 9 F.3d 230, 236 [2d Cir. 1993]; *In re Leslie Fay Co.*, 161 F.R.D. 274, 282-284 [S.D.N.Y. 1995]).

(a) An alternative agreement for sharing privileged information with the government without affecting a waiver may be available to highly regulated companies that the prior production may not be deemed a voluntary waiver and the government is not viewed as an adversary. (*See, Trenchard, Rethinking Selective Waiver, NYLJ, 9/9/10, p. 7, col. 1*).

II. PUBLIC FILING

A. Generally

1. When a privileged document is disclosed to a court voluntarily or involuntarily for *in camera* review, it should be filed under seal. Is there a waiver when it is not?

B. Rule

2. In *Campbell v. Aerospace Products Intern.* (830 N.Y.S.2d 416 [A.D. 2007]), plaintiff filed a motion to preclude defendant’s use of a privileged document obtained by defendant when plaintiff allegedly inadvertently disclosed it to defendant, and attached to the motion as an exhibit the privileged document. The motion was filed as required by state law with the clerk’s office. While defendant argued the privilege was waived, the appellate court affirmed the granting of the motion without any mention of defendant’s argument and the undisputed filing.

### III. USE OF THE PRIVILEGED COMMUNICATION

#### A. Generally

1. FRE 612(2) provides that, subject to 18 USC §3500 and other exceptions, if a witness uses a writing to refresh his recollection either while testifying or before testifying, if the court in its discretion determines that production is necessary in the interests of justice, the adversary is entitled to production of the document, subject to redaction of any material deemed irrelevant to the testimony.

2. Two questions are raised.
   
   (a) If the material provided is a privileged communication, is the privilege waived?

   (b) Does the rule encompass oral discussions between an attorney and the attorney’s client at or before trial/deposition where the privilege would ordinarily attach to the discussions?

#### B. Rule

1. The courts uniformly hold that where privileged document is consulted by or used to refresh the memory of a witness while testifying, any claim of privilege has been waived. (*See, Mueller et al*, Evidence [3d ed] §6.69).

2. Where the witness used the communication to refresh or aid his/her testimony prior to testifying at trial or at a deposition, the court has discretion to order disclosure in the interests of justice. (*See, Mueller
et al, supra; Weinstein et al, Weinstein’s Federal Evidence, ¶612.04). In determining whether disclosure is to be ordered in the circumstances, courts will look at whether the witness’s testimony was based or substantially drew upon the communication and the impact upon cross-examination. (See, Calandra v. Sudexho, 2007 WL 1245317 [D. Conn.]; In re Rivastigmine Patent Litigation, 486 F. Supp. 241 [S.D.N.Y. 2007]; Jos. Shlitz Brewing Co. v. Muller & Phipps, 85 F.R.D. 118 [W.D. Mo. 1980]; Rouse v. County of Greene, 495 N.Y.S.2d 496 [A.D. 1985]). A frequently cited case is James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 [D. Del. 1982]) where the court ordered disclosure of a binder prepared by attorney, consisting of documents culled from defendant company records, which were reviewed by officers and employees of defendant prior to being deposed.

(a) New York law is consistent with federal precedent. (See, Alexander, Practice Commentaries to CPLR 4503, C4503:5[e] [McKinney’s]).


4. Discussions between the client and his/her attorney in preparation for trial or a deposition are protected by the privilege. (See, In re Stratosphere Corp. Securities Lit., 182 F.R.D. 614 [D. Nev. 1998]; Haig, Bus. & Com. Lit. in Federal Courts [2d ed] ¶35:30). However, as discussed supra, questioning regarding documents examined are permitted as well as the amount of “coaching.” (Haig, supra).
IV. IN ISSUE

A. Generally

1. When an attorney advises a client, and the client acts on that advice, are the communications underlying that advice still protected by the privilege?

B. Rule

1. It is well established that express reliance upon counsel’s advice in support of the client’s claim or defense on the merits operates as a waiver of the privilege. (See, Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162-1163 [9th Cir. 1992]; Cruden v. Bank of New York, 957 F.2d 961, 972 [2d Cir. 1992]; Deutsche Bank Trust Co. v. Tri-Links Investment Trust, 43 A.D.3d 56, 837 N.Y.S.2d 15 [1st Dep’t 2007]).

2. Waiver may also occur when a party’s injection of a particular legal or factual issue is deemed as a matter of fairness to entitle the adversary to inquire into the communications. Such fairness has been found to be present whenever privileged information is relevant to a claim or defense. (See, Hearn v. Rhay, 68 F.R.D. 574 [E.D. Wash. 1975]; Snider et al, Corporate Privileges and Confidential Information §2.06[4][collecting cases]). Notably, the Second Circuit has held, repudiating the broad approach to waiver taken in Hearn, that the at issue waiver rule should be restricted to circumstance in which a party actually relies in some way on privilege advice from counsel in making the claim or defense. (In re County of Erie, 546 F.3d 222, 229 [2d Cir. 2008]; see also, Deutsche Bank Trust Co., supra).

3. When the client brings an action against the client’s former attorneys, it has been held that the client’s privileged communications with present counsel are not waived. (See, Lue v. Finkelstein & Partners, 67 A.D.3d 1187, 888 N.Y.S.2d 290 [3d Dep’t 2009]; Raphael v. Clune, White & Nelson, 146 A.D.2d 762, 537 N.Y.S.2d 246 [3d Dep’t 1989]).
V. EMPLOYEE’S USE OF EMPLOYER’S COMPUTER

A. Generally

1. Several recent cases have addressed contentions that email communications between employees and the employees’ attorneys using the employer’s email system are not protected by the attorney-client privilege either because the communications were not “confidential” or the privilege was waived because those communications are accessible to the employer. There are also several cases discussing in general an employee’s privacy rights in this digital age.

2. For excellent discussions of the issues present, see Lazar, Employees’ Privacy Rights in the Digital Age, NYLJ, 4/29/10, p. 4, col. 1; Parker, Employer Monitor, Employees Push Back: Privacy Rights Still Colliding with Business Interests and Obligation, NYLJ, 5/24/10, p. 9, col. 1; Berman, Expectations of Privacy in Email Communications, NYLJ, 7/6/10, p. 5, col. 1; Peerce et al, “The Increasing Privacy Expectations in Employees’ Personal Email,” 13 J. Internet Law 1 [2010]; Gergacz, “Employees’ Use of Employer Computers to Communicate With Their Own Attorneys and the Attorney-Client Privilege, 10 Computer L. Rev. and Tech. J. 269 [2007]; Hebert, Employee Privacy Law §8A:33.50).

B. Employee Email Address Used

1. Most courts hold that the privilege is waived when the communications are sent and received using the employee’s email address at least where the employee had received some notice that the employer would monitor and inspect the employee’s computer use.

2. In Scott v. Beth Israel Med. Ctr. (17 Misc.3d 934, 847 N.Y.S.2d 436 [Sup. Ct. NY Co. 2007][Ramos, J.]), an employment breach of contract action in which plaintiff doctor alleged that he was entitled to severance pay because he was terminated from his position with defendant hospital without cause, the court held plaintiff’s communications with his attorney regarding the litigation, transmitted using defendant’s email server and using plaintiff’s employee email address, were not protected by the attorney-client privilege. Defendant’s “no personal use” email policy combined with
defendant’s stated policy allowing for employer monitoring of the system diminished any reasonable expectation of privacy. Further, plaintiff, as a hospital administrator, had both actual and constructive knowledge of defendant’s email policy. Thus, plaintiff’s use of defendant’s email system to communicate with his attorney in violation of defendant’s email policy rendered any communication not made in confidence, thereby destroying any attorney-client privilege, including a work product privilege. The court also commented that defendant had the right to regulate its workplace including the usage of its computers and resources. (See also, Alamar Ranch, LLC v. County of Boise, 2009 WL 3669741 [D. Mont.]; United States v. Etkin, 2009 WL 482281 [SDNY][log-on notice][marital privilege][collecting cases]; Kaufman v. SunGard Inv. System, 2006 WL 1307882 [D NJ]; Garrity v. John Hancock Mut. Life Ins. Co., 2002 WL 974676, *1, 2002 U.S. Dist. LEXIS 8343 at *2 [D Mass. 2002] [company email policy precluded reasonable expectation of privacy despite employee’s claim that policy was hard to find on company intranet]

3. The failure to provide the employee sufficient notice that the employee’s computer usage will be monitored and/or inspected will defeat a claim of waiver. (See, Conserto v. US Department of Justice, 674 F. Supp.2d 97 [D. DC 2009]; Mason v. ILS Technologies, LLC, 2008 WL 731557 [D NC][evidence “fell short” of showing employer put employee on notice of the lack of privacy]; In re Asia Global Crossing Ltd., 32 B.R. 247 [Bankr. Ct. SDNY 2005][insufficient evidence showing in fact that employer had policy of monitoring emails]; TransOcean Capital, Inc. v. Fontin, 2006 WL 3246401 [Mass. Super. Ct.][insufficient notice given as to employer’s no personal use email policy]).

C. Employee Personal Web-Based Email Account

1. In Curto v. Medical World Communications, Inc. (2006 WL 1318387 [ED NY], the employee worked primarily at home using an employer provided laptop. She used this computer to communicate with her attorney, using her private web-based email account. The employer could not carry out the regular monitoring policy it applied to on-site use. When she returned the computer, she deleted all of her private messages but the employer restored them by the use of a forensic consultant. The court commented that in determining whether an
employee had an expectation of privacy in emails sent and received on his or her employer’s computer or email system, courts should consider the following four factors: (1) does the corporation maintain a policy banning personal or other objectionable use; (2) does the company monitor the use of the employee’s computer or email; (3) do third parties have a right of access to the computer or emails; and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies? The court then held plaintiff had not waived her attorney-client privilege in that plaintiff worked from a home office, her laptops were not connected to defendant’s computer server, defendant had no way of monitoring plaintiff’s activity on her home-based laptops or intercepting her emails, and that as a result, “it was reasonable for her to believe that the emails she sent and the personal document she stored on her laptops were confidential.” The court cautioned, however, that its “holding is limited to the question of whether an employee’s personal use of a company-owned computer in her home waives any applicable attorney-client privilege . . . that may attach to the employee’s computer files and/or emails.”

2. In Stengart v. Loving Care Agency, Inc. (990 A.2d 650 [NJ Sup. Ct. 2010]), plaintiff had filed a discrimination action against her former employer. She sought to require the employer to return all copies of email messages exchanged between herself and her attorneys over a work-issued laptop computer through her personal, password-protected, web-based email account. The employer had hired a forensic computer expert to recover all files stored on the laptop including the emails, which had been automatically saved on the hard drive. The employer asserted that under applicable company policy on electronic communications plaintiff did not have a reasonable expectation of privacy in the emails. That policy provided that (1) the company reserves and exercises the right to review and disclose all matters on the company’s media systems and services at any time, with or without notice; (2) emails, Internet use and communication and computer files are considered part of a company’s business and are not to be considered private or personal to any individual employee; and (3) the principal purpose of email is for company business, but occasional personal use is permitted. The Court held that as to whether the emails were protected by the attorney-client privilege turned on the reasonableness of her expectation of privacy as an employee which in turn would be informed by the adequacy of the notice provided by her employer as well as the public policy concerns
raised by the privilege. Regarding the policy, the Court found it to be unclear as to whether the use of personal, password protected, web-based email accounts via the company owned computer is covered. Thus, the emails were protected by the privilege. Notably, the Court strongly suggests that the policy should have specifically stated that such use was subject to monitoring and the contents of the computer’s hard drive subject to retrieval to allow it to be accessed by the employer; and as well that in the absence of such clear policy even personal non-privileged information is not subject to review. It is also important to note that the attorney for the employer was sanctioned for failing to tell plaintiff’s lawyer that the attorney had the emails before reading them in violation of New Jersey’s Code of Professional Responsibility.

3. In *Pure Power Boot Camp v. Warrior Fitness Boot Camp* (587 F.Supp.2d 548 [SD NY 2008]) the Court rejected a claim of waiver as to emails sent and received by an employee on his private email account based upon the employee accessing some of the messages from that account on his workplace computer. In the circumstances, the Court held the employee retained a reasonable expectation that his communications would remain private and confidential.

D. Government As Employer

1. In *City of Ontario v. Quon* (130 S. Ct. 2619 [2010]), the City acquired pagers able to send and receive text messages. Its contract with its service provider, Arch Wireless, provided for a monthly limit on the number of characters each pager could send or receive, and specified that usage exceeding that number would result in an additional fee. The City issued the pagers to Quon and other officers in its police department (OPD). OPD’s chief sought to determine whether the existing limit was too low, *i.e.*, whether the officers had to pay fees for sending work-related messages or, conversely, whether the overages were for personal messages. After Arch Wireless provided transcripts of Quon’s and another employee’s August and September 2002 text messages, it was discovered that many of Quon’s messages were not work related, and some were sexually explicit. Scharf referred the matter to OPD’s internal affairs division. The investigating officer used Quon’s work schedule to redact from his transcript any messages he sent while off duty, but the transcript showed that few of his on-duty messages related to police business.
Quon was disciplined for violating OPD rules. Subsequently, he commenced an action alleging his constitutional rights were violated by the obtaining and reviewing of his pager messages. The Court, assuming that Quon had a reasonable expectation of privacy in the text messages and that the City’s review of them was a “search,” held that the warrantless search was reasonable here because of the special needs of the public sector workplace, noting there was a legitimate need for the search.

VI. METADATA

A. Generally

1. Metadata, frequently referred to as “data about data,” is electronically stored evidence that describes the “history, tracking, or management of an electronic document” and includes the “hidden text, formatting codes, formulae and other information associated” with an electronic document. (The Sedona Principles: Best Practice Recommendations for Document Production, Cmf. 12a [Sedona Conf. Group Series 2007]). Thus, metadata will include such information as the date the document was created, the author, and the date changes were made to the document. Metadata is generated automatically by software. Most significantly, metadata in an electronic document can be “mined” or simply viewed by a recipient of the document by right-clicking a mouse or selecting “properties” or “show markup” on a Word document.

B. Waiver

1. If privileged material is embedded in the metadata within an e-mail sent to opposing counsel, is the privilege waived?
PART FOUR

ETHICS RELATED ISSUES
I. E-MAIL AND ELECTRONIC COMMUNICATIONS AND TRANSMISSIONS

A. Generally


2. Likewise, the opinions of ethics committees conclude that attorneys may properly communicate with their clients by e-mail, and that such communications need not be encrypted or made with prior client consent. (See, e.g., ABA Formal Ethics Op. No. 99-413 [lawyers do not violate ethics rules by sending clients information in unencrypted e-mail, provided that they take reasonable precautions to guard against disclosure]; Assoc. of the Bar of the City of New York Formal Op. 1998-2 [firm need not encrypt all e-mail containing confidential client information, but should advise clients and prospective clients that communication over the Internet is not as secure as other forms of communication]). However, the ABA Committee has cautioned that “when the lawyer reasonably believes that confidential client information being transmitted is so highly sensitive that extraordinary measures to protect the transmission are warranted, the lawyer should consult the client as to whether another mode of transmission, such as special messenger delivery, is warranted; and that in such circumstances the lawyer must then follow the client’s instructions as to medium of communication. (See also, NY State Bar Ethics Op. 709 [1998]] [lawyers may in ordinary circumstances use unencrypted e-mail to transmit confidential information; however, in circumstances where lawyer on notice for a specific reason that a particular e-mail transmission is a heightened risk of interception or where information is of such extraordinary sensitive nature that it is reasonable to use only a means of communication that is completely under the lawyer’s control, the lawyer must select a more secure means of communication, including courier service]).
II. INADVERTENT DISCLOSURE AND ACQUISITION OF ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS

A. Generally

1. There is no uniform position among bar associations regarding the ethical obligations of an attorney who inadvertently receives a privileged document.

(a) The American Bar Association has taken the position that an attorney who receives a document from another party and knows or reasonably knows that the document was inadvertently sent should promptly notify the sender in an order to allow the sender to take protective measures. (ABA Formal Op. 05-437 [2005]). ABA Model Rule 4.4(b) follows this opinion. Of note, a comment (2) to it, states: “Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.”

(b) In New York, the Association of the Bar of the City of New York concluded in Formal Opinion 2003-04 that an attorney receiving a misdirected communication containing confidences or secrets (1) has obligations to promptly notify the sending attorney, to refrain from review of the communication, and to return or destroy the communication if so requested, but, (2) in limited circumstances, may submit the communication for in camera review by a tribunal, and (3) is not ethically barred from using information gleaned prior to knowing or having reason to know that the communication contains confidences or secrets not intended for the receiving lawyer. The opinion also states it is essential as an ethical matter that the receiving attorney promptly notify the sending attorney of the disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary. The New York County Lawyer Association concluded in Formal Opinion 730 that if the attorney receives information which the
attorney knows or believes was not intended for the attorney and contains secrets, confidences or other privileged matter, the attorney upon recognition of same, shall, without further review or other use thereof, notify the sender and (insofar as it shall have been written or other tangible form) abide by sender’s instructions regarding return or destruction of the information. Of note, the opinion disagrees with the Association’s view that a rule requiring attorneys who receive inadvertently disclosed privileged information without fault or misconduct on their part to refrain from reviewing inadvertently disclosed privileged information is required by DR 1-102(A)(4). In its view, an attorney does not “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation” under such circumstances.

(c) Several ethics opinions from other states have concluded that the attorney receiving the document has no obligation to disclose to the sender or to a court that the attorney possesses the document and the attorney may use the document. (See, e.g., Kentucky Ethics Op. E-374 [1995]; Maine Ethics Op. No. 146 [1984]; Philadelphia Ethics Op. 94-3).

2. Generally, ethics opinions and standards governing an attorney’s conduct are not binding on a court in civil matters but do constitute persuasive authority. (See, People v. Heir, 86 N.Y.2d 638, 642, 635 N.Y.S.2d 159, 160-161 [1995]).

(a) In Galison v. Greenberg (2004 NY Slip Op. 51538[U][Sup. Ct. NY Co.][Cahn, J.]), the court, citing to the ethics opinions from the Association of the Bar of the City of New York and the New York County Lawyers Association, cautioned that if an attorney receives information that the attorney knows or should reasonably know contains privileged information, the attorney must be aware of the ethical obligations and promptly adhere to them “in order to avoid sanctions.” A court would appear to have broad discretion as to the nature of the sanction. (See, generally, Connors and Gleason, “One Lawyer’s Loss Another Lawyer’s Victory? Two Sides of Inadvertent Disclosure,” NYLJ, 5/15/06, p. 3).
(b) In *MNT Sales, LLC v. Acme Television Holdings, LLC* (NYLJ, 4/29/10, p. 42, col. 5 [Sup. Ct. N.Y. Co., Fried, J.]) the attorney for defendant inadvertently sent to plaintiff’s attorney an email that had been attached to an email that had been properly sent to him. Defendant’s attorney asked plaintiff’s attorney to discard that email and all copies of it. The email was not discarded nor was there a response to the request. Court held that the “spirit” of Formal Opinion 2003-04 had been violated and that plaintiff’s counsel belated request that the dispute be submitted to the court for determination was unacceptable. As a sanction, to “remediate the egregious conduct” court denied plaintiff’s motion to allow it to use the email.

(c) In *Matter of Weinberg* (129 A.D.2d 126, 517 N.Y.S.2d 474 [1st Dep’t 1987]), where an attorney acquired privileged information improperly by discovery devices wrongfully employed, the court held the sanction of disqualification must be imposed not only to sanitize the proceeding but to prevent the offending lawyer or firm from deriving any further benefit from the information secured in violation of basic ethical precepts and statutory obligation.

(d) In *Rico v. Mitsubishi Motors Corp.* (42 Cal. 4th 807, 171 P.3d 1092 [2007]), the California Supreme Court held that plaintiffs’ attorney violated ethical duty by using an inadvertently obtained confidential and privileged defense document, containing summary of dialogue among defense attorneys and defense experts and one defense attorney’s thoughts during depositions of defense experts. Although the document was not clearly flagged as confidential, plaintiffs’ attorney admitted that after a minute or two of review, he realized notes related to case and that defense counsel did not intend to reveal them. The Court further held that disqualification of plaintiffs’ counsel and experts was warranted for one attorney’s use of defense document containing privileged work product he had obtained inadvertently as attorney’s unethical conduct in making copies of document and disseminating them to plaintiffs’ experts and other attorneys caused irreversible damage to defendants.
III. METADATA

A. Generally

1. The American Bar Association has taken the position in Formal Opinion 06-442 (2006) that there is no ethical prohibition against an attorney accessing and using metadata embedded in electronic documents. The Opinion further provides that to the extent an attorney is concerned about the disclosure of confidential information in metadata the attorney should employ a “scrubbing” program or other measures to prevent disclosure. However, the attorney must not alter a document when it would be unlawful or unethical to do so. (Accord, Florida Ethics Op. 06-2; Maryland Ethics Op. No. 2007-09; contra, NH Bar Assoc. Ethics Comm. Op. 2008-2009/4 [4/16/09]; compare, DC Bar Ethics Op. 341 [12/07][A receiving attorney is “prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent.”]; see also, Martyn, Metadata and Confidentiality: A Duty To Scrub?, ALI-ABA Course of Study “Evidence Issues and Jury Instructions in Employment Cases”, February 8-9, 2007; Hricik, I Can Tell When You’re Telling Lies: Ethics and Embedded Confidential Information, 30 J. Legal Prof. 70 [2005/2006]).

2. In New York, two opinions are present.

   (a) The New York State Bar Association has taken the position in Opinion 749 (2008) that an attorney may not ethically use available technology to examine electronically transmitted documents. It also provides that where reasonable care under DR 4-101 may require the lawyer to remove metadata (for example, where the lawyer knows that the metadata reflects client confidences and secrets, or that the document is being sent to an aggressive and technologically savvy adversary), in general the level of care required varies with the particular circumstances of the transmission.

   (b) The New York County Lawyers’ Association has concluded in opinion No. 738 (2008) that while attorneys are advised to take due care in sending correspondence, contracts, or other documents electronically to opposing counsel by scrubbing the documents to ensure that they are free of metadata, such as
tracked changes and other documents property information, an adversary may not ethically take advantage of a breach in the attorney’s care by intentionally searching for this metadata. The opinion states that using the metadata is unethical if the recipient’s intent is to investigate opposing counsel’s work product or client confidences or secrets or if the recipient is likely to find opposing counsel’s work product or client confidences or secrets by searching the metadata. Using the metadata is appropriate in circumstances where the adversary has intentionally sent it such as where the lawyers are suing tracked changes to show one another their changes to a document. Without such prior course of conduct to the contrary, however, there is a presumption that disclosure of metadata is inadvertent and would be unethical to view.

3. The Minnesota Bar Association has opined that an attorney’s obligation with respect to safeguarding information relating to the representation of a client against inadvertent or unauthorized disclosure extends to metadata in electronic documents. (Minn. Lawyers Prst. Resp. Bd., Op. No. 22 [3/26/10]). Additionally, the Association opined that if a lawyer received a document which the lawyer knows or reasonably should know inadvertently contains confidential or privileged metadata, the lawyer shall promptly notify the document’s sender as required by Rule 4.4(b), MRPC. (Id.). However, the Association did not address the question of “whether there is an ethical obligation on a receiving lawyer to look or not to look for metadata in an electronic document.”

4. The 2006 amendments to the Federal Rules of Civil Procedure appear to increase significantly the right of a discovering party to insist on the production of metadata. (See, eDiscovery & Digital Evidence §1:5 [collecting cases and commentary]).