NY CLS CPLR § 4503

Current through 2025 released Chapters 1-207

New York

Consolidated Laws Service **>**

Civil Practice Law And Rules (Arts. 1 — 100) **>**

Article 45 Evidence (§§ 4501 — 4551)

§ 4503. Attorney.

(a)

1. Confidential Communication Privileged. 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. Personal Representatives.

(A) For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that

capacity, in the absence of an agreement between the attorney and the personal representative to the contrary:

(i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary;

(ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client; and

(iii) The fiduciary's testimony that he or she has relied on the attorney's advice shall not by itself constitute such a waiver.

(B) For purposes of this paragraph, "personal representative" shall mean (i) the administrator, administrator c.t.a., ancillary administrator, executor, preliminary executor, temporary administrator, lifetime trustee or trustee to whom letters have been issued within the meaning of subdivision thirty-four of section one hundred three of the surrogate's court procedure act, and (ii) the guardian of an incapacitated communicant if and to the extent that the order appointing such guardian under subdivision (c) of section 81.16 of the mental hygiene law or any subsequent order of any court expressly provides that the guardian is to be the personal representative of the incapacitated communicant for purposes of this section; "beneficiary" shall have the meaning set forth in subdivision eight of section one hundred three of the surrogate's court procedure act and "estate" shall have the meaning set forth in subdivision nineteen of section one hundred three of the surrogate's court procedure act.

(b) Wills and revocable trusts. In any action involving the probate, validity or construction of a will or, after the grantor's death, a revocable trust, an attorney or his employee shall be required to disclose information as to the preparation, execution or

revocation of any will, revocable trust, or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

History

Add, L 1962, ch 308, eff Sept 1, 1963; amd, L 1977, ch 418, § 1; L 2002, ch 430, § 1, eff Aug 20, 2002; L 2016, ch 262, § 1, effective August 19, 2016; L 2019, ch 529, § 1, effective November 20, 2019.

Annotations

Notes

Prior Law

Earlier statutes: CPA §§ 353, 353–a, 354; CCP §§ 835, 836.

Advisory Committee Notes

This section makes no substantive changes in the former law.

Subd (a). CPA § 353 was amended and a new § 353-a was added in 1958 as a result of Lanza v N.Y.S. Joint Legis. Comm. 3 NY2d 92, 143 NE2d 772 (1957). NY Laws 1958, c. 851; see Report of the Joint Legislative Committee on Privacy of Communications and Licensure of Private Investigators 37–38 (NY Leg Doc No. 9 (1958)); Prashker, 1958 Civil Practice Changes, 30 NYSB Bull 173, 178 (1958). Two changes were made in § 353: addition of the words “disclose, or” and addition of the eavesdropper provision. The beginning of § 353-a (up to but not including the words “nor shall the client”) was identical with the beginning of § 353 as amended, and the only remaining differences were that § 353-a added (1) the phrase “nor shall the client be compelled to disclose”; (2) that § 353-a applied to testimony in the specified nonjudicial proceedings; and (3) that § 353-a contained an additional provision preventing disclosure by the governmental agency. Subd (a) of this section covers both sections as

amended by the 1958 legislation. It includes the words “disclose, or” and the eavesdropper provision that were added to § 353, plus the three additional matters covered by § 353-a.

Subd (b) consists of those portions of former § 354 which affected the attorney-client privilege. Minor language changes have been made but the substance is unaffected. It is clear that former § 353 and those portions of former § 354 embodied in this subdivision must be read together. See In re Matheson’s Will, 283 NY 44, 27 NE2d 427 (1940). Combining them in one section makes this apparent. The phrase “shall be required to disclose information” is substituted for “shall not disqualify . . . from becoming a witness” to make it uniform with the phraseology in former § 352 (“may be required to testify”) and 354 (“may disclose”). The meaning is the same in all instances, viz.: if the testimony is otherwise admissible, the witness may not refuse to answer on the ground of privilege.

Amendment Notes

The 2016 amendment by ch 262, § 1, in (b), added “and revocable trusts” to the section heading, added “or, after the grantor’s death, a revocable trust,” and added “revocable trust.”

The 2019 amendment by ch 529, § 1, added (a)2(A)(iii); added “lifetime trustee” in (a)2(B)(i); and made a related change.

Commentary

PRACTICE INSIGHTS:

DEVELOPMENTS IN THE AREA OF ATTORNEY/CLIENT PRIVILEGE

By Andrew L. Martin, Esq.

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INSIGHT

The rigid application of the attorney/client privilege in estate matters is yielding to a more sensible approach which considers the likelihood of whether the decedent would want the privilege waived under the circumstances and also prevents use of the privilege where the estate has put in issue the very subject matter of the communication. Several recent cases evince the trend.

ANALYSIS

Implied waiver of privilege where fiduciary seeks to set aside deed of conveyance.

The attorney-client privilege was raised by the executor in a SCPA 2103 discovery proceeding which involved title to real property. The decedent had purchased the property in his own name and about two months later executed a deed conveying the property from himself to himself and the respondent as joint tenants with right of survivorship; he died about three years later. The executor contended that the transfer was either the result of undue influence, or, if not, that the respondent had failed to prove the elements of a gift, including donative intent. The estate argued that an affidavit had come from the attorney who consulted with the decedent and prepared the deed and contained privileged communications between the decedent and the attorney. The fiduciary argued that the estate had not waived the privilege and that, therefore, the attorney's affidavit was inadmissible. The court disagreed, holding that the estate had placed the validity of the deed in issue and that where the client places the subject of the privileged communication in issue, it is impliedly waived. *Matter of Puckett*, 9 Misc. 3d 1116A, 808 N.Y.S.2d 920 (Sur. Ct. Nassau County 2005). *See also Matter of DelGatto*, 98 A.D.3d 975, 950 N.Y.S.2d 738 (2d Dep’t 2012), a proceeding where the executor sought to invalidate a lifetime trust agreement on grounds of mental incapacity and undue influence. The executor objected to the trial testimony of the attorney who drafted the instrument, claiming attorney-client privilege. The Appellate Division held that the executor had impliedly waived the attorney-client privilege by putting the validity of the instrument in issue. *See also, Siegel v. Snyder*, 202 A.D.3d 125, 161 N.Y.S.3d 159 (2d Dep’t 2021).

Attorney-in-fact who made gifts to himself may depose attorney who drafted power of attorney.

The decedent's attorney-in-fact, who had made gifts to himself of nearly $1 million dollars of decedent's assets shortly before her death, sought the testimony of the decedent's attorney who had drafted the power of attorney, to prove by extrinsic evidence that the decedent intended to grant such authority to the attorney-in-fact. The Surrogate denied a motion made by the attorney-in-fact to compel the testimony of the attorney who drafted the instrument. The Appellate Division reversed, holding that an attorney-in-fact may overcome any presumption of impropriety regarding use of the power of attorney by a clear showing of the principal's intent. The court held that invasion of the privilege was required to determine the validity of the claim of the attorney-in-fact that the transfers were valid and that application of the privilege would deprive the attorney-in-fact of vital information. *Matter of Maikowski*, 24 A.D.3d 258, 808 N.Y.S.2d 174 (1st Dep't 2005).

Court permits waiver of privilege, finding decedent would have wanted to.

In another SCPA 2103 discovery proceeding, the decedent conveyed certain real property to her son. At trial, the court admitted the testimony of the attorney whom the decedent had consulted regarding the transfer. The court held that the administrator of the decedent's estate could waive the privilege, *citing Mayorga v. Tate*, 302 A.D.2d 11, 752 N.Y.S.2d 353 (2d Dep't 2002). *Matter of Bassin*, 28 A.D.3d 549, 813 N.Y.S.2d 200 (2d Dep’t 2006).

Committee Comments

2019 Recommendations of the Advisory Committee on Surrogate's Court:

CPLR 4503 (a) does not presently extend the attorney-client privilege to lifetime trustees. The omission was an oversight which the Committee’s proposed amendment corrects.

In August 2002, CPLR 4503(a) was amended to protect from disclosure confidential communications between a fiduciary and his or her attorney. The purpose of the amendment

was to overturn a line of cases that had carved out a “fiduciary” exception to the attorney-client privilege. The amendment codified three changes to the attorney-client privilege: (1) that confidential communications between a fiduciary and his or her attorney are protected; (2) that no waiver may be found by virtue of the relationship between the fiduciary and beneficiary(ies); and (3) that absent a retainer, a beneficiary shall not be treated as the client of the fiduciary’s attorney. The amendment references personal representatives as the persons protected, even where preliminary or temporary letters issue, and extends to a guardian appointed for an incapacitated person under MHL Article 81 where the appointing judge has so provided.

Due to an omission, lifetime trustees were not included within the definition of “personal representative.” There was and is no reason to exclude a lifetime trustee from the protection of the attorney-client privilege. Given the increasing use of lifetime trusts by New Yorkers, the need to amend the statute is compelling. The proposal simply includes “lifetime trustees” in the definition of fiduciaries to whom the privilege applies.

Additionally, the proposed measure makes clear that a fiduciary does not waive the privilege by merely asserting he or she relied upon the advice of counsel when acting in such capacity. The effect of asserting the privilege is best left to a court’s determination in light of the facts and circumstances before it.

The measure would amend CPLR 4503(a)(2)(A) and 4503(a)(2)(B) to include lifetime trustees in the definition of fiduciaries to whom the attorney-client privilege applies and to provide that a fiduciary’s assertion of the privilege by itself shall not constitute a waiver.

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I. Under CPLR

A. In General

1. Generally

Attorneys had not established that the questions propounded before the Grand Jury required the divulgence of matter protected by attorney-client privilege; moreover, any issue regarding privilege gave way to an attorney's professional responsibilities because there were reasonable grounds to believe that the laptop computer in question may have been involved in the commission of a crime and was, in fact, an instrumentality of that crime. In re Grand Jury

Subpoena, 770 N.Y.S.2d 568, 1 Misc. 3d 510, 2003 N.Y. Misc. LEXIS 1056 (N.Y. Sup. Ct. 2003).

There was no basis to the attorneys' claim that compelling them to answer questions before the Grand Jury would have required them to reveal attorney work product because the testimony about the location of the laptop computer could not be considered attorney work product since the laptop computer and any of the information or images contained thereon was not prepared in anticipation of litigation but rather, was evidence of what transpired inside the residence where the murder took place. In re Grand Jury Subpoena, 770 N.Y.S.2d 568, 1 Misc. 3d 510, 2003 N.Y. Misc. LEXIS 1056 (N.Y. Sup. Ct. 2003).

Mere fact that a party has obtained a copy of attorney-client privileged documents does not abrogate the protections afforded by the attorney-client privilege where they are obtained by counsel for that party without the knowledge of the client of the client's attorney and where there has been no showing that the client has disclosed the documents to any third parties; under these circumstances, counsel for the party is not to disclose, or be allowed to disclose such communication, in any action. R.G. Egan Equip., Inc. v Polymag Tek, Inc., 195 Misc. 2d 280, 758 N.Y.S.2d 763, 2002 N.Y. Misc. LEXIS 1849 (N.Y. Sup. Ct. 2002).

Because letters from an employer's counsel were protected by the attorney-client privilege in N.Y. C.P.L.R. § 4503 and the un-protected letters immaterial and irrelevant to the remaining issues in the litigation, a referee erred in directing the employer to produce them pursuant to N.Y. C.P.L.R. § 3124; consequently, the trial court should have granted the employer's N.Y. C.P.L.R. § 3101(c) motion to suppress the letters. Surgical Design Corp. v Correa, 21 A.D.3d 409, 799 N.Y.S.2d 584, 2005 N.Y. App. Div. LEXIS 8377 (N.Y. App. Div. 2d Dep't 2005).

Judge should not disclose substance of ex parte communication that is deemed privileged under CLS CPLR § 4503, but should disclose substance of ex parte communication about disputed evidentiary facts, or other information which addresses pending case's merits. Ops Adv Comm Jud Ethics No. 07-192.

2. Attorney files

In divorce action, court will grant defendant's motion to compel plaintiff attorney to produce for examination by defendant's expert plaintiff's outstanding negligence litigation files, list of outstanding cases referred by plaintiff to other counsel, and other billing documentation, which order will be limited to production of files existing on commencement of divorce action and date of termination for acquisition of marital property, since law practice is proper subject for distributive award; however, in order to protect confidentiality of files, order will be amended to provide that examination is to be conducted solely by expert, who shall be attorney who is restrained and permanently enjoined from disclosing any information contained in files beyond that necessary for evaluation of plaintiff's law practice, and from revealing name of any party in any action in which court index number has not been obtained. Frink v Frink, 129 Misc. 2d 739, 494 N.Y.S.2d 271, 1985 N.Y. Misc. LEXIS 2728 (N.Y. Sup. Ct. 1985).

Professional law corporation was not entitled to quash grand jury subpoenas seeking disclosure as to certain of corporation's files despite claim of attorney-client privilege, since there was no showing that communications contained in files were confidential or were not otherwise disclosed to third persons during course of litigation. In re Grand Jury Subpoenas Served upon John Doe, 142 Misc. 2d 229, 536 N.Y.S.2d 926, 1988 N.Y. Misc. LEXIS 811 (N.Y. Sup. Ct. 1988).

Legal bills rendered on behalf of defendant, including attorney's time sheets and descriptions of work performed, were protected from disclosure under CLS CPLR § 3101(b) and (c) and by attorney-client privilege under CLS CPLR § 4503, even though bills themselves did not provide legal advice to defendant, since disclosure would reveal factual investigation and legal work that had been done by defendant's counsel, especially where bills submitted detailed services, conversations and conferences between counsel and others. Licensing Corp. of America v National Hockey League Players Ass'n, 153 Misc. 2d 126, 580 N.Y.S.2d 128, 1992 N.Y. Misc. LEXIS 25 (N.Y. Sup. Ct. 1992).

Clients' claim that private investigators violated attorney-client privilege set forth in CLS CPLR § 4503 by reading and photographing documents in their attorney's office must fail, where nothing in amended complaint indicates that investigators ever disclosed, to anyone, substance of information they obtained from attorney's office, because, other than mental distress, clients have not alleged that they have suffered injury as result of unauthorized examination of documents, and no court in New York has addressed issue of whether client has civil action for invasion of attorney-client privilege under § 4503. Madden v Creative Servs., 872 F. Supp. 1205, 1993 U.S. Dist. LEXIS 20712 (W.D.N.Y. 1993), aff'd, 51 F.3d 11, 1995 U.S. App. LEXIS 5603 (2d Cir. N.Y. 1995).

Under New York law, letters from plaintiff's mother to counsel, notes of counsel, phone message slips, and memoranda to file created as result of mother's contact with counsel were subject to attorney-client privilege, since mother was acting as her son's agent. Hendrick v Avis Rent A Car Sys., 944 F. Supp. 187, 1996 U.S. Dist. LEXIS 17048 (W.D.N.Y. 1996).

3. Attorney for multiple parties

Defendant generally does not enjoy confidential privilege when communicating with counsel in presence of codefendant; if codefendants are mounting common defense, their statements are privileged but, unless exchange is for that purpose, presence of codefendant or his counsel will destroy any expectation of confidentiality between defendant and his attorney. People v Osorio, 75 N.Y.2d 80, 550 N.Y.S.2d 612, 549 N.E.2d 1183, 1989 N.Y. LEXIS 4456 (N.Y. 1989).

Generally, where same lawyer jointly represents 2 clients with respect to same matter, clients have no expectation that their confidences concerning that matter will remain secret from each other, and those confidential communications are not within privilege in subsequent adverse proceedings between co-clients. Tekni-Plex, Inc. v Meyner & Landis, 89 N.Y.2d 123, 651 N.Y.S.2d 954, 674 N.E.2d 663, 1996 N.Y. LEXIS 3154 (N.Y.), reh'g denied, 89 N.Y.2d 917, 653 N.Y.S.2d 921, 676 N.E.2d 503, 1996 N.Y. LEXIS 4457 (N.Y. 1996), reh'g denied, 89 N.Y.2d 917, 653 N.Y.S.2d 921, 676 N.E.2d 503, 1996 N.Y. LEXIS 5310 (N.Y. 1996).

Where one attorney represented both passenger and driver in automobile accident, court could assume that the attorney's retainer followed a full disclosure to his clients of the effects of his multiple representation, and the clients could not have intended that their disclosures would be confidential as to each other, and an account of the accident given by the passenger to the attorney was not privileged from disclosure in subsequent action by the passenger against the driver. If two clients consulted same attorney on a matter of common interest knowing of the joint representation and of their possible adverse positions, then evidence of their conversations with the attorney, even though not in each other's presence, was admissible in subsequent litigation between the two clients when they later became adversaries. Where attorney represented both passenger and driver in automobile accident litigation and where the passenger contended that the driver stayed within his lane of highway prior to accident but maintained the contrary after instituting suit against the driver, court's refusal to hold hearing to determine whether the attorney, who continued to represent the driver, was entitled to elicit the prior statement from the passenger was error and, on retrial, a thorough voir dire record should be made, bearing in mind that the passenger had the burden of justifying exclusion of the evidence. If automobile collision defendant, who was represented by attorney, was present when individual who had been passenger in that automobile and who was a codefendant represented by the same attorney, talked to the attorney regarding the accident, then either the passenger, the attorney, or the defendant could testify as to what was said as the attorney-client privilege had been waived. Finn v Morgan, 46 A.D.2d 229, 362 N.Y.S.2d 292, 1974 N.Y. App. Div. LEXIS 3364 (N.Y. App. Div. 4th Dep't 1974).

Attorney's statement that he represented "purchasers" of marital residence was insufficient to establish existence of attorney-client relationship between attorney and husband's father because it did not demonstrate that father contacted attorney for purpose of obtaining legal advice or services. McCann v McCann, 110 A.D.2d 1069, 488 N.Y.S.2d 927, 1985 N.Y. App. Div. LEXIS 48947 (N.Y. App. Div. 4th Dep't 1985).

The privilege of attorney-client relationship does not apply to case where two or more persons consult an attorney for their mutual benefit, and hence cannot be invoked in any litigation which may thereafter arise between such persons or their decedents, but may be in any litigation between them and strangers. In re Estate of Swantee, 90 Misc. 2d 519, 394 N.Y.S.2d 547, 1977 N.Y. Misc. LEXIS 2099 (N.Y. Sur. Ct. 1977).

The attorney-client privilege applies to communications between an attorney and multiple clients represented for a common purpose, with the result that notes containing factual matter in aid of negotiating commercial ventures, notes intended only for the attorney's own use, and draft partnership agreements and releases that did not contain information conveyed by the clients to their attorneys in confidence were subject to a grand jury's subpoena; however, insofar as the draft agreement contained declarations of fact that could only have been obtained by the attorney from one of the clients it would be a testimonial declaration protected by the privilege against self-incrimination that protects documents written by an attorney on behalf of a client who invokes the privilege. In re Grand Jury Subpoena for Documents in Custody of Bekins Storage Co., 118 Misc. 2d 173, 460 N.Y.S.2d 684, 1983 N.Y. Misc. LEXIS 3287 (N.Y. Sup. Ct.), aff'd, 94 A.D.2d 643, 463 N.Y.S.2d 349, 1983 N.Y. App. Div. LEXIS 18044 (N.Y. App. Div. 1st Dep't 1983).

4. Attorney retainer

Terms of an attorney's retainer agreement are not privileged. Attorney-client privilege did not apply to retainer statement pertaining to corporate client; attorney was properly held in contempt for refusal before grand jury to produce such statement, which was in his possession and which was subject to subpoena duces tecum. People v Belge, 59 A.D.2d 307, 399 N.Y.S.2d 539, 1977 N.Y. App. Div. LEXIS 13566 (N.Y. App. Div. 4th Dep't 1977).

Confidentiality does not apply to terms of attorney's retainer agreement with his client, which is not protected by privilege, to information as to whether attorney had represented any of principals of his client as individuals which did not require him to disclose any communication,

and to names of officers and directors and address of the second concern, which identities were not privileged and which names were known to third parties. Oppenheimer v Oscar Shoes, Inc., 111 A.D.2d 28, 488 N.Y.S.2d 693, 1985 N.Y. App. Div. LEXIS 51179 (N.Y. App. Div. 1st Dep't 1985).

Information concerning amounts which law firm had billed and received for services rendered to client, including, but not limited to, fee arrangements and retainer agreement, which information was sought by grand jury, was not privileged. Although information was not privileged, grand jury subpoena which sought records of amounts billed and received by law firm for services rendered to named clients, “including but not limited to fee arrangements and retainer agreements for the years 1970 through 1975” was too broad because of the inclusion of the words of “but not limited to;” the subpoena would be restricted to records of amounts billed and received for services rendered to the named clients, to fee arrangements, and to retainer agreements. People v Cook, 82 Misc. 2d 875, 372 N.Y.S.2d 10, 1975 N.Y. Misc. LEXIS 2831 (N.Y. County Ct. 1975).

Attorney-client privilege did not shield from discovery copy of retainer agreement or contract between plaintiff bank, seeking to recover money allegedly owed by defendant pursuant to a special agreement, and its attorney, which agreement was sought in connection with affirmative defense and counterclaim that practice of commencing collection actions without any retainer or other “front money” being paid by the bank prior to actual collection imposed additional charges on borrowers not permitted by statute. Also, attorney-client privilege does not limit disclosure of fee arrangements to cases where the underlying theory of the action turns on the fee arrangements and the attorney, for all practical purposes, is one of the parties, especially when the legal propriety of the fee arrangement is drawn into issue by the pleadings. Lincoln First Bank v Miller, 89 Misc. 2d 727, 392 N.Y.S.2d 542, 1977 N.Y. Misc. LEXIS 1968 (N.Y. City Ct. 1977).

Where third party benefactor has paid for legal representation of client, fee information is not privileged, and attorney is under duty to explain to client conflict of interest arising from such fee

arrangement, and potential for subsequent disclosure of fee arrangement and disqualification of attorney. Petitioner attorneys were not entitled to quashing of subpoena requiring their appearance before grand jury, along with production of records of amounts billed for services, including fee arrangement agreements relating to clients under investigation for their alleged involvement in major narcotics organization, notwithstanding contention that fee arrangements were privileged because disclosure would implicate clients in very criminal activity for which legal advice was sought, since attorney-client privilege can not be used as cloak for illegal behavior and does not apply where legal representation was obtained in furtherance of illegal activity. In re Grand Jury Subpoena of Stewart, 144 Misc. 2d 1012, 545 N.Y.S.2d 974, 1989 N.Y. Misc. LEXIS 551 (N.Y. Sup. Ct.), modified, 156 A.D.2d 294, 548 N.Y.S.2d 679, 1989 N.Y. App. Div. LEXIS 15857 (N.Y. App. Div. 1st Dep't 1989).

5. Clients' names and addresses

In action by Brazilian bank against "John Doe" defendants to recover moneys allegedly obtained in fraudulent currency transactions, attorney for "John Doe" defendant would be required to disclose client's true name and address or, if he could not do so consistent with his trust and duty assumed to his client, to withdraw from action. Banco Frances e Brasileiro S. A. v Doe No. 1, 36 N.Y.2d 592, 370 N.Y.S.2d 534, 331 N.E.2d 502, 1975 N.Y. LEXIS 1857 (N.Y.), cert. denied, 423 U.S. 867, 96 S. Ct. 129, 46 L. Ed. 2d 96, 1975 U.S. LEXIS 2778 (U.S. 1975), reh'g denied, 37 N.Y.2d 742, 1975 N.Y. LEXIS 2998 (N.Y. 1975).

An attorney may be compelled on pain of contempt, in a subsequent, collateral proceeding, to disclose the address of his client notwithstanding a claim that such information was the subject of a privileged communication where a court had directed the client to deliver custody of respondents' child to the respondents and, during a stay pending an appeal of that order, the client vacated her home, departed with the child to Puerto Rico and left no forwarding address, inasmuch as the attorney-client privilege, which exists to foster lawful and honest purposes, must yield to the best interests of the child since, given the vital interest of the State as parens

patriae, deliberate attempts to avoid a court mandate concerning custody of a child cannot be permitted where a potential vehicle for the enforcement of the court's judgment lies at hand; it matters little whether the attorney acted for a legitimate purpose inasmuch as a finding of conspiracy is not necessary to defeat the privilege where a calculated intent to frustrate a court mandate exists on the part of a client. In re F. In re Jacqueline F., 47 N.Y.2d 215, 417 N.Y.S.2d 884, 391 N.E.2d 967, 1979 N.Y. LEXIS 2052 (N.Y. 1979).

An order of Special Term, holding an attorney in contempt, for failure to answer questions asked of him by a receiver in foreclosure of a parcel of property who had commenced an action against one of the attorney's clients seeking a judgment for rent, which questions concerned both the attorney's client and another concern which the receiver believed had received substantial assets from the attorney's client and would also be responsible for the judgment debt, was defective for failing to satisfy the requirements of the Judiciary Law requiring express findings that the attorney's refusal to answer was calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of the receiver. However, Special Term correctly rejected the attorney's contention that he was not obliged to answer the questions as they were embraced by the attorney-client privilege, since the questions related to the receipt of money by the attorney, to which confidentiality has been not held to apply, to the terms of the attorney's retainer agreement with his client, which was not protected by privilege, to information as to whether the attorney had represented any of the principals of his client as individuals, which did not require him to disclose any communication, and to the names of the officers and directors and the address of the second concern, which identities were not privileged and which names were known to third parties. Oppenheimer v Oscar Shoes, Inc., 111 A.D.2d 28, 488 N.Y.S.2d 693, 1985 N.Y. App. Div. LEXIS 51179 (N.Y. App. Div. 1st Dep't 1985).

On application under CLS CPLR § 3102(c) for preaction deposition of attorney in connection with fatal hit and run accident, attorney could not be compelled to reveal name of individual who consulted him regarding that individual's possible commission of crime where (1) crime, if any, had already been committed, (2) there was no possibility of further criminal acts occurring if

individual was not identified, and (3) disclosure of identity of individual would subject that individual to possible criminal prosecution; under circumstances, client's identity constituted confidential communication protected by attorney-client privilege. D'Alessio v Gilberg, 205 A.D.2d 8, 617 N.Y.S.2d 484, 1994 N.Y. App. Div. LEXIS 9522 (N.Y. App. Div. 2d Dep't 1994).

Order directing defendant to produce all documents demanded by plaintiff in defendant's possession or control was properly corrected to safeguard defendant's attorney-client privilege by allowing redaction of all material contained in attorney's bills other than number of hours worked and amounts charged. Teich v Teich, 245 A.D.2d 41, 665 N.Y.S.2d 859, 1997 N.Y. App. Div. LEXIS 12517 (N.Y. App. Div. 1st Dep't 1997).

Since neither Domestic Relations Law § 114 nor § 116 contains anything which precludes or prohibits the natural parent from learning the names of adoptive parents, the respondent attorney who had refused to identify his clients on the ground that the information was confidential was ordered to identify the adoptive parents of a child in connection with habeas corpus proceedings brought to obtain custody by the natural mother of the child. Anonymous v Anonymous, 59 Misc. 2d 149, 298 N.Y.S.2d 345, 1969 N.Y. Misc. LEXIS 1832 (N.Y. Sup. Ct. 1969).

Respondent attorney, whose client, the former guardian of an infant who has failed to obey a decree of the Surrogate's Court directing her to forthwith return custody of the child to the natural parents, is directed to disclose all information he has as to the whereabouts of his client and the infant since such information is not protected by the attorney-client privilege (CPLR 4503, subd [a]). Generally, an attorney can be compelled to disclose the name and address of his client on the theory that his knowledge as to these matters did not flow from a confidential communication. An attorney's duty to his client does not extend to aiding and abetting the client to evade the impact of court orders either by acts of commission or omission. Any further delay in effectuating the court's order could result in irreparable harm to the infant and the successful petitioners. In re F., 94 Misc. 2d 96, 404 N.Y.S.2d 790, 1978 N.Y. Misc. LEXIS 2204 (N.Y. Sur.

Ct. 1978), aff'd, In re Jacqueline F., 47 N.Y.2d 215, 417 N.Y.S.2d 884, 391 N.E.2d 967, 1979 N.Y. LEXIS 2052 (N.Y. 1979).

It is only during the pendency of a lawsuit that a party's address is subject to compulsory disclosure, although the lawyer-client privilege is a bar in a proper case; the power of a court to compel an attorney to disclose the address of his client is confined to the proceeding or case in which the attorney appears for his client. Accordingly, although in special circumstances, as in cases involving a child's well-being and her parent's constitutional right to her custody, such information, even if otherwise privileged, must be disclosed, a lawyer may refuse to divulge the address of a client, whom he represents in an unrelated action, to the client's judgment creditor on grounds of the attorney-client privilege, where such information was provided to the attorney confidentially in the course of their professional relationship. Potamkin Cadillac Corp. v Karmgard, 100 Misc. 2d 627, 420 N.Y.S.2d 104, 1979 N.Y. Misc. LEXIS 2518 (N.Y. Civ. Ct. 1979).

Attorney would not be required either to respond to subpoena issued by bank seeking current address of his clients for purpose of obtaining deficiency judgment against them in underlying foreclosure action, or to appear at deposition and divulge address, since information requested was embraced within attorney-client privilege, and bank was aware of clients' previous address between date original foreclosure summons and complaint were prepared and date nearly 5 months later when they departed from state. Civil contempt would not lie to redress attorney's failure to answer subpoena requesting him to divulge current address of his clients who defaulted on mortgage held by petitioner bank since attorney's actions were motivated not by desire to impair, impede or prejudice petitioner's rights but by professional obligation to refrain from disclosing privileged communications. Household Bank, FSB v Ross, 148 Misc. 2d 841, 562 N.Y.S.2d 373, 1990 N.Y. Misc. LEXIS 566 (N.Y. Sup. Ct. 1990).

Administratrix of estate was entitled to conduct preaction examination before trial of attorney pursuant to CLS CPLR § 3102(c) in order to seek information to allow her to bring wrongful death action arising from hit and run accident in which decedent died, and attorney could be

compelled to give full name and address of client who was alleged hit and run driver, since (1) it had not been established that any attorney-client relationship existed, (2) even if attorney-client relationship existed, it would not be appropriate to protect client's identity, and (3) name and address of client did not fall within "protection" exception to revealing such information. In re D'Alessio, 155 Misc. 2d 518, 589 N.Y.S.2d 282, 1992 N.Y. Misc. LEXIS 445 (N.Y. Sup. Ct. 1992), rev'd sub nom. D'Alessio v Gilberg, 205 A.D.2d 8, 617 N.Y.S.2d 484, 1994 N.Y. App. Div. LEXIS 9522 (N.Y. App. Div. 2d Dep't 1994).

6. Manner or form of privilege

Attorney-client privilege applies to corporation's communications with attorneys, whether corporate staff counsel or outside counsel. Rossi v Blue Cross & Blue Shield, 73 N.Y.2d 588, 542 N.Y.S.2d 508, 540 N.E.2d 703, 1989 N.Y. LEXIS 668 (N.Y. 1989).

Attorney-client privilege of CLS CPLR § 4503 extends to attorney's communications to client as well as to communications by client to attorney. Attorney-client privilege is not lost merely by reason of fact that communication also refers to certain nonlegal matters, so long as communication is primarily or predominantly of legal character. Rossi v Blue Cross & Blue Shield, 73 N.Y.2d 588, 542 N.Y.S.2d 508, 540 N.E.2d 703, 1989 N.Y. LEXIS 668 (N.Y. 1989).

Communications made to counsel through hired interpreter, or through one serving as agent of either attorney or client to facilitate communication, generally will be privileged; however, scope of privilege depends on whether client had reasonable expectation of privacy, not on third party's employment or function. Court erroneously prevented defendant from presenting evidence to rebut presumption of weapon possession arising from his presence in automobile where evidence consisted of statements made during conversation between codefendant and his attorney which had been translated by defendant, and neither codefendant nor People established that defendant was agent of codefendant or his counsel, or that relationship between codefendants was such that codefendant had reasonable expectation that statements made in defendant's presence would remain confidential; mere accommodation did not create

agency, and any inference that codefendant expected his remarks to be confidential was overcome by fact that adversarial relationship existed between codefendants. People v Osorio, 75 N.Y.2d 80, 550 N.Y.S.2d 612, 549 N.E.2d 1183, 1989 N.Y. LEXIS 4456 (N.Y. 1989).

While prospect of litigation may be relevant to subject of privileges regarding work product and trial preparation materials, attorney-client privilege is not tied to contemplation of litigation. Fact that investigative report prepared by attorney for client was inconclusive and looked toward future discussion would not in itself place report outside attorney-client privilege since legal advice often begins—and may end—with preliminary evaluation and range of options. Absence of legal research in attorney's communication is not determinative of attorney-client privilege, so long as communication reflects attorney's professional skills and judgments; legal advice may be grounded in experience as well as research. Record may qualify in whole or in part as attorney work product, or even trial preparation material, whether or not it also falls within attorney-client privilege. Spectrum Systems Int'l Corp. v Chemical Bank, 78 N.Y.2d 371, 575 N.Y.S.2d 809, 581 N.E.2d 1055, 1991 N.Y. LEXIS 4218 (N.Y. 1991).

Conversations and agreements between lawyers adverse to each other are not privileged, and must be disclosed if they are material. Stefano v C. P. Ward, Inc., 19 A.D.2d 473, 244 N.Y.S.2d 267, 1963 N.Y. App. Div. LEXIS 2864 (N.Y. App. Div. 3d Dep't 1963).

Communications made to an attorney by a client will not be privileged if the client instructed counsel to convey the communications to others for purposes of negotiation. Once the attorney and client relationship is established, the inquiry in determining whether a client's communication is privileged is whether the communication was made in confidence; if it was, it is privileged, and if it was not the client has waived any claim of privilege. Finn v Morgan, 46 A.D.2d 229, 362 N.Y.S.2d 292, 1974 N.Y. App. Div. LEXIS 3364 (N.Y. App. Div. 4th Dep't 1974).

Party witness, at pretrial examination, could not refuse to answer on ground that answers involved information which he obtained form his attorney, i. e., that information was protected under the attorney-client or work product privileges, since information received by an attorney from other persons and sources while acting on behalf of the client does not come within the

attorney-client privilege and since matter which constitutes work product need not be produced in answering the questions the lawyer for the party being interrogated is assured that his tactics and theory of litigation will not be revealed by the client's answers. Kenford Co. v County of Erie, 55 A.D.2d 466, 390 N.Y.S.2d 715, 1977 N.Y. App. Div. LEXIS 10002 (N.Y. App. Div. 4th Dep't 1977).

Purpose of attorney-client privilege is not concealment of evidence, and fact that allegedly confidential information may operate to client's disadvantage does not operate to extend the privilege to areas where it does not otherwise exist. Arnold Constable Corp. v Chase Manhattan Mortg. & Realty Trust, 59 A.D.2d 666, 398 N.Y.S.2d 422, 1977 N.Y. App. Div. LEXIS 13588 (N.Y. App. Div. 1st Dep't 1977).

A communication made in confidence by a child to his parents, one of whom is an attorney, does not fall within the attorney-client privilege where the parent's professional status is coincidental. In re Application of A. In re A. & M., 61 A.D.2d 426, 403 N.Y.S.2d 375, 1978 N.Y. App. Div. LEXIS 9756 (N.Y. App. Div. 4th Dep't 1978).

In an action to enforce a restrictive covenant contained in an employment agreement, conversations between the individual plaintiff and his counsel were confidential communications protected from disclosure by the attorney-client privilege, even though the defendant was a 40 percent shareholder in the corporate plaintiff, where the plaintiff's claims as well as the defendant's counterclaims were based on the employment agreement and did not represent typical shareholder claims found in derivative suits. Lehman v Piontkowski, 84 A.D.2d 759, 443 N.Y.S.2d 769, 1981 N.Y. App. Div. LEXIS 15941 (N.Y. App. Div. 2d Dep't 1981).

In arbitration proceedings initiated by four civil service employees who had been discharged following an investigation by the county attorney, the trial court properly ordered disclosure of statements that the county attorney had taken from various other employees during the course of his investigation as against the county attorney's claim of attorney-client privilege, since, in order to invoke such privilege, the communication sought to be suppressed must have been made for the purpose of securing legal advice or services, and information received by an

attorney from other persons and sources while acting on behalf of the client does not come within the scope of such privilege. Civil Serv. Emples. Ass'n v Ontario County Health Facility, 103 A.D.2d 1000, 478 N.Y.S.2d 380, 1984 N.Y. App. Div. LEXIS 19674 (N.Y. App. Div. 4th Dep't 1984).

In trust accounting proceeding, trustee's communications with settlor's law firm were protected by attorney-client privilege set forth in CLS CPLR § 4503 since trustee, who was settlor's daughter, had consulted extensively with firm both as her father's trusted agent and as officer of family business; fact that she did not consult with firm on personal matters was immaterial. In re Beiny, 129 A.D.2d 126, 517 N.Y.S.2d 474, 1987 N.Y. App. Div. LEXIS 43671 (N.Y. App. Div. 1st Dep't), reh'g denied, 132 A.D.2d 190, 522 N.Y.S.2d 511, 1987 N.Y. App. Div. LEXIS 51548 (N.Y. App. Div. 1st Dep't 1987).

Memorandum containing legal opinions and interpretations of Public Health Law sent to Department of Health (DOH) Office of Public Health by associate director of DOH's Division of Health Risk Control, who was attorney, was not exempt from public inspection based on attorney-client privilege where sufficient facts were not alleged to permit finding that requisite confidential relationship arose between associate director of Division of Health Risk Control (as client) and attorneys who received copies of his memorandum, or between him (as attorney) and associate director of Office of Public Health. Williams & Connolly v Axelrod, 139 A.D.2d 806, 527 N.Y.S.2d 113, 1988 N.Y. App. Div. LEXIS 3638 (N.Y. App. Div. 3d Dep't 1988).

In action for legal malpractice and breach of contract for defendants' handling of his personal injury action which arose from an accident at a Holiday Inn hotel in India, defendants were not entitled to discovery of correspondence between plaintiff and his lawyers in England regarding plaintiff's lawsuit filed in England (after lawsuit filed in New York by defendants for plaintiff's injuries was dismissed for forum non conveniens) since documents sought to be discovered were privileged communications which plaintiff did not waive by initiation of action against defendants, and disclosure was not necessary in order to enable defendants to assert defenses.

Raphael v Clune White & Nelson, 146 A.D.2d 762, 537 N.Y.S.2d 246, 1989 N.Y. App. Div. LEXIS 858 (N.Y. App. Div. 2d Dep't 1989).

Attorney-client privilege was not violated by trial court's ban on defendant's consulting with counsel during luncheon recess called during defendant's cross-examination where counsel was never asked to disclose anyparticular communication. People v Enrique, 165 A.D.2d 13, 566 N.Y.S.2d 201, 1991 N.Y. App. Div. LEXIS 886 (N.Y. App. Div. 1st Dep't 1991), aff'd, 80 N.Y.2d 869, 587 N.Y.S.2d 598, 600 N.E.2d 229, 1992 N.Y. LEXIS 1605 (N.Y. 1992).

Advice defendant was given by his attorney as to his behavior during psychological stress evidence fell within scope of attorney-client privilege. People v Ackley, 235 A.D.2d 633, 652 N.Y.S.2d 642, 1997 N.Y. App. Div. LEXIS 92 (N.Y. App. Div. 3d Dep't), app. denied, 89 N.Y.2d 983, 656 N.Y.S.2d 742, 678 N.E.2d 1358, 1997 N.Y. LEXIS 837 (N.Y. 1997).

Court properly denied plaintiff's motion to strike letter submitted by defendants in motion papers, even though letter qualified for attorney-client privilege, since letter was not protected by that privilege because it related to client communication in furtherance of fraudulent scheme. Surgical Design Corp. v Correa, 284 A.D.2d 528, 727 N.Y.S.2d 462, 2001 N.Y. App. Div. LEXIS 6795 (N.Y. App. Div. 2d Dep't 2001).

Trial court erred in ordering disclosure of certain emails because they were protected by the attorney-client privilege as each of the emails at issue were communications between counsel in the Governor's Office and New York Department of Transportation employees that contained or referenced factual information relevant to counsel providing legal advice regarding the proposed termination of the sublease. Matter of Gilbert v Office of the Governor of the State of N.Y., 170 A.D.3d 1404, 96 N.Y.S.3d 724, 2019 N.Y. App. Div. LEXIS 2200 (N.Y. App. Div. 3d Dep't 2019).

Letters requested were drafts of the final termination notice that incorporated counsel's recommendations that were circulated in furtherance of the decision-making process prior to a final determination; accordingly, they were exempt from disclosure as inter-agency or intra-agency materials and as attorney work product. Matter of Gilbert v Office of the Governor of the

State of N.Y., 170 A.D.3d 1404, 96 N.Y.S.3d 724, 2019 N.Y. App. Div. LEXIS 2200 (N.Y. App. Div. 3d Dep't 2019).

It is not every communication between attorney and client that is privileged from discovery; it is only the substance of matters communicated to an attorney in professional confidence that comes within the proscription of the attorney-client privilege. Lincoln First Bank v Miller, 89 Misc. 2d 727, 392 N.Y.S.2d 542, 1977 N.Y. Misc. LEXIS 1968 (N.Y. City Ct. 1977).

Petitioner, a Deputy Sheriff Investigator who was suspended from his duties primarily as the result of his refusal to answer the Sheriff's questions about his conversations with Federal officials concerning alleged acts of misconduct by members of the Sheriff's department, had the absolute right to refuse to disclose the contents of his conversations with his attorney concerning the alleged acts of misconduct since all communications with his attorney are privileged and confidential (CPLR 4503, subd [a]). A privileged communication between petitioner and his attorney cannot constitute a violation of departmental rules prohibiting the disclosure of confidential information. Ronayne v Lombard, 92 Misc. 2d 538, 400 N.Y.S.2d 693, 1977 N.Y. Misc. LEXIS 2582 (N.Y. Sup. Ct. 1977).

Whenever the requisite professional relationship exists, the attorney-client privilege extends to all communications relating to matters which are the proper subject of the professional employment (CPLR 4503, subd [a]). Accordingly, the issue of whether a statement is confidential is determined not by its relationship to a subject which the client would usually deem confidential, but solely by whether it was made within the scope of the attorney-client relationship, providing it was not made in the presence of a stranger or made to the attorney with instructions that it be transmitted to another; if the law were otherwise, a client would have to repeatedly preface his statements to counsel with a warning that they are confidential in order to be assured that an attorney or a court might not subsequently deem a communication to be confidential. The exception to the attorney-client privilege set forth in CPLR 4503 (subd [b]), which provides that in any action involving the probate, validity or construction of a will an attorney shall be required to testify about the preparation, execution or revocation of any will or

other relevant instrument where such testimony does not tend to disgrace the memory of the decedent, does not apply to discovery proceedings or to a proceeding to determine the validity of a claim against a decedent's estate. Accordingly, there is no applicable statutory exception to the attorney-client privilege for testimony at a kinship hearing in an accounting proceeding; moreover, where the attorney, who is willing to testify regarding pedigree statements made by decedent to the attorney when she consulted him for the purpose of preparing a will, neither prepared any testamentary instrument, nor supervised the execution or revocation of any such instrument, he could not testify even if it were a will contest or a construction proceeding. In re Estate of Trotta, 99 Misc. 2d 278, 416 N.Y.S.2d 179, 1979 N.Y. Misc. LEXIS 2245 (N.Y. Sur. Ct. 1979).

Inasmuch as the delivery of tangible property to an attorney by his client may constitute a communication subject to the attorney-client privilege, the delivery of an ammunition clip and ammunition believed to have been used in the shooting of a police officer, to an attorney by the defendant client fell within the ambit of such privilege; defendant's attorney, however, would not be permitted to withhold such property from the Grand Jury on the ground of privilege since public policy demands that where reasonable grounds exist to believe that certain tangible property may have been used in the commission of a crime, such property should be made available to the Grand Jury for its investigation. Furthermore the presence of a third party during a communication between an attorney and his client vitiates the attorney-client privilege that would otherwise attach to the communication; thus, the attorney-client privilege was contravened where the defendant client's live-in girlfriend was present during the transfer of the ammunition clip and ammunition. People v Investigation into a Certain Weapon, 113 Misc. 2d 348, 448 N.Y.S.2d 950, 1982 N.Y. Misc. LEXIS 3301 (N.Y. Sup. Ct. 1982).

In negligence action against state, settlement records respecting other claims arising from same incident, submitted to State Comptroller under CLS St Fin § 8, were not protected from disclosure by attorney-client privilege, since requirement under § 8 that Attorney General approve claim (as prerequisite to action by Comptroller) did not result in confidential

communication between attorney and client; material is not covered by attorney-client privilege merely because it was prepared by lawyer. E. B. Metal Industries v State, 138 Misc. 2d 698, 525 N.Y.S.2d 516, 1988 N.Y. Misc. LEXIS 155 (N.Y. Ct. Cl. 1988).

Evidence seized as result of information obtained from defendant's former attorney, who had represented defendant and his wife in purchase of marital home, would not be suppressed as having been obtained in violation of attorney-client privilege where (1) defendant made only conclusory allegations that attorney gave information relating to his state of mind and financial condition, thereby failing to demonstrate that his state of mind or financial condition was subject to privilege, and (2) defendant failed to sufficiently establish that attorney-client privilege existed at time of communications to attorney and that such communications were made for purpose of obtaining legal advice or services. People v Lifrieri, 157 Misc. 2d 598, 597 N.Y.S.2d 580, 1993 N.Y. Misc. LEXIS 151 (N.Y. Sup. Ct. 1993).

Defendants met their burden of showing that they were entitled to a protective order under N.Y. C.P.L.R. 3103(c)(1)(a) to prevent the disclosure of an email string that had been inadvertently included with non-privileged documents produced in response to plaintiff's notice to produce. Defendants demonstrated that the emails were privileged because they contained legal advice to a client, the attorney-client privilege applied to confidential communications between clients and their attorneys that were, as the email string was, made in the course of the attorneys' professional employment under N.Y. C.P.L.R. 4503(a)(1), and such privileged communications, absent waiver, were absolutely immune from discovery pursuant to N.Y. C.P.L.R. 3101(b). Delta Fin. Corp. v Morrison, 819 N.Y.S.2d 425, 12 Misc. 3d 807, 235 N.Y.L.J. 111, 2006 N.Y. Misc. LEXIS 1083 (N.Y. Sup. Ct. 2006).

Because information disclosed in counsel's ex parte communication with a referee did not reveal a confidence or a secret, as contemplated by N.Y. Code Prof. Resp. Canon 4-1 (22 NYCRR § 1200.19), the ex parte communication enjoyed no privilege under N.Y. C.P.L.R. 4503. Matter of Daniel D. v Linda C., 876 N.Y.S.2d 333, 24 Misc. 3d 220, 2009 N.Y. Misc. LEXIS 495 (N.Y. Fam. Ct. 2009).

In a suit between banks for claims arising out of a rogue trading scheme, an international auditor, which was an entity related to plaintiff's U.S. auditor, was not entitled to withhold certain documents, which were subpoenaed by a defendant, under the attorney-client privilege, N.Y. C.P.L.R. § 4503(a)(1), because, except as to a certain document, the communications had multiple recipients, and the auditor failed to establish the applicability of the privilege by explaining the functions of the various recipients. Allied Ir. Banks, P.L.C. v Bank of Am., N.A., 252 F.R.D. 163, 2008 U.S. Dist. LEXIS 23605 (S.D.N.Y. 2008).

In a suit between banks for claims arising out of a rogue trading scheme, an international auditor, which was an entity related to plaintiff's U.S. auditor, was entitled to withhold a certain document (Document # 70), which was subpoenaed by a defendant, under the attorney-client privilege, N.Y. C.P.L.R. § 4503(a)(1), because the auditor identified each recipient of Document 70. and asserted that this document was made so that the auditor could assess and address potential legal claims and reputational/monetary risks arising from plaintiff's fraud. Allied Ir. Banks, P.L.C. v Bank of Am., N.A., 252 F.R.D. 163, 2008 U.S. Dist. LEXIS 23605 (S.D.N.Y. 2008).

In a breach of contract suit against loan guarantors, a lender was entitled to the return of inadvertently produced documents because they were protected by the common interest doctrine under the attorney-client privilege of N.Y. C.P.L.R. § 4503(a)(1) since the documents involved communications between the lender's counsel and non-party lenders. HSH Nordbank AG N.Y. Branch v Swerdlow, 259 F.R.D. 64, 2009 U.S. Dist. LEXIS 63711 (S.D.N.Y. 2009).

7. Pre-trial proceedings

Internal memorandum from corporate staff attorney to corporate officer communicating advice regarding corporate document that was subject of imminent defamation action was protected from disclosure in that action by attorney-client privilege. Neither corporate defendant's alleged massive fraud nor corporate staff counsel's death rose to level of subverting lawful and honest purposes for which attorney-client privilege existed, so as to overcome privilege and permit

discovery of internal corporate memorandum on grounds of “strong public policy considerations,” since protection of memorandum from disclosure was consistent with lawful and honest aims of privilege to foster uninhibited communication between lawyer and client. Rossi v Blue Cross & Blue Shield, 73 N.Y.2d 588, 542 N.Y.S.2d 508, 540 N.E.2d 703, 1989 N.Y. LEXIS 668 (N.Y. 1989).

Pre-trial judicial proceedings are neither confidential nor privileged where they are material. Stefano v C. P. Ward, Inc., 19 A.D.2d 473, 244 N.Y.S.2d 267, 1963 N.Y. App. Div. LEXIS 2864 (N.Y. App. Div. 3d Dep't 1963).

Documents prepared by attorneys and allegedly reflecting analysis and strategy were apparently privileged both as attorneys’ work product and as confidential communication between attorney and client, and client would not be compelled to furnish the same to opponent in response to interrogatories, in absence of examination of the documents by court ex parte to determine whether, they were in fact privileged. Jarai-Scheer Corp. v St. Paul Fire & Marine Ins. Co., 52 A.D.2d 555, 382 N.Y.S.2d 314, 1976 N.Y. App. Div. LEXIS 12115 (N.Y. App. Div. 1st Dep't 1976).

In an equitable action brought by dissenting shareholders to rescind a corporate merger on the ground that it was illegal, fraudulent, and a violation of the corporate management’s fiduciary duty, the trial court erred in failing to balance the competing interests involved prior to ruling that certain communications between the corporation and its attorneys were nondiscoverable by virtue of the attorney-client privilege conferred by CPLR § 4503(a), since the corporate management had the burden to show the existence of circumstances that justified recognition of the privilege, and such recognition should only be accorded if the injury that would result from disclosure is greater than the benefit thereby gained; furthermore, plaintiffs’ initiation of a related proceeding pursuant to Bus Corp Law § 623 to obtain a judicial determination of the value of plaintiffs’ stock would not preclude access to the requested information, since the statute specifically protects the rights of shareholders to bring such equitable actions. Beard v Ames, 96

A.D.2d 119, 468 N.Y.S.2d 253, 1983 N.Y. App. Div. LEXIS 19883 (N.Y. App. Div. 4th Dep't 1983).

In a legal malpractice action by a wife against her former attorneys, in which the attorneys impleaded the wife's present attorney, the present attorney would be entitled to a protective order relieving him of the obligation to take an oral deposition, where the attorneys' inquiry would have encompassed whether the present attorney had advised the wife of possible remedial actions that could have been taken to remedy the attorneys' negligence, whether the present attorney had advised the wife not to proceed with any such actions, or whether the wife, having been advised to proceed with such actions, had refused to do so, where such communications were made between the present attorney and the wife in the course of professional employment for the purpose of obtaining legal advise and therefore fell within the privilege in CPLR § 4503, where such privileged communications were not discoverable unless the privilege has been waived, where the wife had done nothing from which a waiver of the privilege could be inferred, in that by bringing an action against her former attorneys for legal malpractice the wife may have placed her damages in issue but had not placed her privileged communications with her present attorney in issue, where discovery of the privileged communications was not required to enable the attorneys to assert a defense or to prosecute their third-party claim, and where to allow a former attorney such discovery, merely by virtue of the assertion of a third-party claim for contribution against a present attorney, would effectively vitiate the attorney-client privilege in every case. Jakobleff v Cerrato, Sweeney & Cohn, 97 A.D.2d 834, 468 N.Y.S.2d 895, 1983 N.Y. App. Div. LEXIS 20627 (N.Y. App. Div. 2d Dep't 1983).

Correspondence between defendant in personal injury action and its insurer, which was inadvertently turned over to other parties during pretrial discovery as result of insufficient screening procedure, did not fall under attorney-client privilege where correspondence was initiated by insurer to ascertain scope of coverage and to investigate claim, defendant's reply was directed to insurer alone, and neither counsel nor agent of counsel participated in

preparation of correspondence; moreover, to extent that correspondence had been prepared for litigation, qualified privilege was waived by virtue of failure to exercise due diligence during screening procedure. Bras v Atlas Constr. Corp., 153 A.D.2d 914, 545 N.Y.S.2d 723, 1989 N.Y. App. Div. LEXIS 11987 (N.Y. App. Div. 2d Dep't 1989).

In action to recover costs incurred by state in remedying discharge of petroleum products from storage and transfer facilities owned, leased, maintained or operated by various defendants, memoranda from Department of Environmental Conservation spill investigator directed to plaintiff's attorney were properly shielded from disclosure under CLS CPLR § 4503(a) or CLS CPLR § 3101(d)(2). Also, documents used by Department of Environmental Conservation to apportion and allocate liability among various defendants, which were prepared at Attorney General's direction to facilitate preparation of settlement offer, were properly shielded from disclosure under CLS CPLR § 4503(a) and CLS CPLR § 3101(d)(2). State v Sand & Stone Assocs., 282 A.D.2d 954, 723 N.Y.S.2d 725, 2001 N.Y. App. Div. LEXIS 4176 (N.Y. App. Div. 3d Dep't 2001).

Court properly refused to compel defendants to produce documents they claimed were protected under CPLR 4503(a) by the attorney-client privilege, but as the court was not required to accept their characterization of the material as privileged, it erred by not conducting an in camera review of the documents to determine if they were in fact privileged. Optic Plus Enters., Ltd. v Bausch & Lomb Inc., 37 A.D.3d 1185, 829 N.Y.S.2d 797, 2007 N.Y. App. Div. LEXIS 1168 (N.Y. App. Div. 4th Dep't 2007).

In negligence action against city and 49 other defendants, plaintiff would be permitted to ask witnesses who were current or former city employees whether they met with city's attorneys and for how long they met, but witnesses could not be required to disclose substance of those meetings, as attorney-client privilege applied to confidential communications between current and former city employees and city's lawyers when such communications were made in preparation for trial to which city was party; attorney-client privilege attached when employee

was selected as deposition witness and continued until trial. Radovic v City of New York, 168 Misc. 2d 58, 642 N.Y.S.2d 1015, 1996 N.Y. Misc. LEXIS 158 (N.Y. Sup. Ct. 1996).

Trial court's view that a client's communication to its attorney was not privileged because it was not made in response to a written directive from the attorney was overly restrictive, and the appellate court reversed the trial court's judgment that a report prepared by a client in response to an oral request from its attorney was not protected by the attorney-client privilege, and issued a protective order prohibiting other defendants from using the report after it was inadvertently released during pretrial discovery. N.Y. Times Newspaper Div. v Lehrer McGovern Bovis, Inc., 300 A.D.2d 169, 752 N.Y.S.2d 642, 2002 N.Y. App. Div. LEXIS 12839 (N.Y. App. Div. 1st Dep't 2002).

In their trade name infringement and unfair competition action, plaintiffs argument that certain letters were admissible since the appellate court had ruled in their favor by reinstating their claim which had been previously dismissed by summary judgment could not claim the letters were ruled admissible at trial; the admissibility at trial of letters protected by the attorney-client privilege was to be tested by trial evidentiary rules which were more exacting than summary judgment evidentiary rules. R.G. Egan Equip., Inc. v Polymag Tek, Inc., 195 Misc. 2d 280, 758 N.Y.S.2d 763, 2002 N.Y. Misc. LEXIS 1849 (N.Y. Sup. Ct. 2002).

Documents prepared by counsel, and in some cases shared among counsel, were not therefore shielded from discovery by attorney-client privilege where they related to tobacco company's participation in industry program that funded purportedly independent unbiased research into causal nexus between tobacco use and health; counsel was serving not as legal advisor, but in scientific or public relations capacity, and documents did not reveal any confidential legal communications from client or impart any legal advice from counsel. In products liability action against cigarette manufacturer, compelling interest in public health required disclosure of documents claimed to fall within attorney-client privilege; attorney-client privilege is not absolute, and must yield when strong public policy interest mandates disclosure. Crime-fraud exception to attorney-client privilege mandated disclosure of documents concerning defendant's participation

in industry program that funded purportedly independent scientific research for stated purpose of finding whether tobacco products were injurious to public health, as record indicated that real purpose of such research was to develop data that supported tobacco industry's economic interests, and that documents sought to be discovered furthered such fraud. Sackman v Liggett Group, 920 F. Supp. 357, 1996 U.S. Dist. LEXIS 11701 (E.D.N.Y.), vacated, 167 F.R.D. 6, 1996 U.S. Dist. LEXIS 7343 (E.D.N.Y. 1996).

Documents concerning accident investigation and obtaining relevant police reports that involved communications between plaintiff's counsel and plaintiff's mother constituted attorney's work product such that disclosure was not warranted even if mother was not acting in her role as her son's agent, as required for documents to fall within attorney-client privilege, where defendant failed to demonstrate substantial need for documents and that it was unable to obtain substantial equivalent without undue hardship. Under New York law, copy of handwritten notes to mother of plaintiff from county sheriff's department was not protected by work product privilege, since document was not communication to counsel. Hendrick v Avis Rent A Car Sys., 944 F. Supp. 187, 1996 U.S. Dist. LEXIS 17048 (W.D.N.Y. 1996).

8. Waiver of privilege

Criminal defendant who testified on his own behalf did not thereby waive attorney-client privilege, and fact that defendant on cross-examination acknowledged the existence of a prior statement concerning the case, made in a civil action against the arresting officer, did not constitute a waiver of the privilege by implication. People v Moore, 42 A.D.2d 268, 346 N.Y.S.2d 363, 1973 N.Y. App. Div. LEXIS 3723 (N.Y. App. Div. 2d Dep't 1973).

If automobile collision defendant, who was represented by attorney, was present when individual who had been passenger in that automobile and who was a codefendant represented by the same attorney, talked to the attorney regarding the accident, then either the passenger, the attorney, or the defendant could testify as to what was said as the attorney-client privilege had

been waived. Finn v Morgan, 46 A.D.2d 229, 362 N.Y.S.2d 292, 1974 N.Y. App. Div. LEXIS 3364 (N.Y. App. Div. 4th Dep't 1974).

Attorney, a nonparty witness in a matrimonial action, failed to meet his burden of establishing that the information sought to be protected from disclosure was a confidential communication where his client, who was the plaintiff in the action, had given defendant in that action express authorization to examine attorney as to all of plaintiff's financial transactions so that plaintiff had waived any attorney-client privilege as to those matters and had opened the door as to questions relating either directly or indirectly to those concerns. Ostrin v Ostrin, 86 A.D.2d 655, 446 N.Y.S.2d 405, 1982 N.Y. App. Div. LEXIS 15200 (N.Y. App. Div. 2d Dep't 1982).

In an action for legal malpractice in connection with defendant attorneys' representation of plaintiffs in a labor matter, plaintiffs, by commencing the action against their original attorneys and seeking damages for the period during which plaintiffs were represented by third-party defendant attorneys, waived the attorney-client privilege as to the third-party defendants. Finger Lakes Plumbing & Heating, Inc. v O'Dell, 101 A.D.2d 1008, 476 N.Y.S.2d 670, 1984 N.Y. App. Div. LEXIS 18734 (N.Y. App. Div. 4th Dep't 1984).

Even assuming that attorney-client relationship existed, there was no showing that communications between husband's father and attorney were made in confidence since both wife and husband were present during meetings in attorney's office. McCann v McCann, 110 A.D.2d 1069, 488 N.Y.S.2d 927, 1985 N.Y. App. Div. LEXIS 48947 (N.Y. App. Div. 4th Dep't 1985).

In action for specific performance of contract to sell real property, court properly admitted testimony of attorney who represented defendants during transaction since defendants waived any privilege they may have had by testifying at trial that they were ready, willing and able to close on contract, and that they had tried to set up closing through their attorney but were unable to reach him. Erljur Associates v Weissman, 134 A.D.2d 321, 520 N.Y.S.2d 798, 1987 N.Y. App. Div. LEXIS 50504 (N.Y. App. Div. 2d Dep't 1987), app. denied, 71 N.Y.2d 802, 527 N.Y.S.2d 768, 522 N.E.2d 1066, 1988 N.Y. LEXIS 1195 (N.Y. 1988).

Defendant’s attorney-client privilege was not violated by hearing judge’s requirement, in connection with application to vacate judgment on basis of newly discovered evidence, that defense attorney state that defendant did not tell attorney about admission made by defendant’s cousin (to effect that cousin had committed crime) before or during trial, since requirement was material to issue of attorney’s due diligence in discovering such evidence before trial; moreover, defendant, by raising issue, waived privilege. People v Green, 135 A.D.2d 565, 522 N.Y.S.2d 164, 1987 N.Y. App. Div. LEXIS 52509 (N.Y. App. Div. 2d Dep't 1987), app. denied, 71 N.Y.2d 897, 527 N.Y.S.2d 1006, 523 N.E.2d 313, 1988 N.Y. LEXIS 1428 (N.Y. 1988).

In trial for manslaughter, court erred in permitting prosecutor to question defendant regarding substance of conversations with attorney initially consulted by him subsequent to shooting; attorney-client privilege was not waived by attorney who apparently contacted police regarding his client’s anticipated surrender. People v Ali, 146 A.D.2d 636, 536 N.Y.S.2d 541, 1989 N.Y. App. Div. LEXIS 467 (N.Y. App. Div. 2d Dep't 1989).

Defendant waived attorney-client privilege with regard to counsel’s disclosure of defendant’s admission that he acted as lookout during robbery, in light of fact that, during plea proceeding, defendant admitted that he and 2 others forcibly stole wallet from complainant, and since defendant challenged counsel’s representation. People v Dixon, 204 A.D.2d 234, 612 N.Y.S.2d 145, 1994 N.Y. App. Div. LEXIS 5658 (N.Y. App. Div. 1st Dep't), app. denied, 84 N.Y.2d 867, 618 N.Y.S.2d 13, 642 N.E.2d 332, 1994 N.Y. LEXIS 3926 (N.Y. 1994).

Defendants were not entitled to protective order preventing plaintiff creditor from deposing defendants’ former counsel under theory that information sought by plaintiff was protected by attorney-client privilege where plaintiff sought imposition of equitable mortgage on defendants’ property (essential element of which is evidence of clear intent between parties that property in question be held, given or transferred as security in underlying obligation) and individual defendant steadfastly maintained that it was never his intent to create mortgage, thus squarely placing parties’ intent in issue and waiving privilege. New York TRW Title Ins. v Wade's

Canadian Inn & Cocktail Lounge, 225 A.D.2d 863, 638 N.Y.S.2d 800, 1996 N.Y. App. Div. LEXIS 2029 (N.Y. App. Div. 3d Dep't 1996).

Defendant was not entitled, on ground of attorney-client privilege, to stay of present action for legal fees pending completion of 2 other pending civil actions where he waived that privilege by placing subject matter of his attorney's advice in issue by asserting malpractice counterclaim. Schulte Roth & Zabel L.L.P. v Chammah, 251 A.D.2d 132, 672 N.Y.S.2d 736, 1998 N.Y. App. Div. LEXIS 6945 (N.Y. App. Div. 1st Dep't 1998).

Just as under the common law, an executor may waive the attorney-client privilege of his or her decedent; trial court properly denied an attorney's motion to exclude a decedent's file from discovery in an action for legal malpractice where the executor of the estate expressly waived the attorney-client privilege. Mayorga v Tate, 302 A.D.2d 11, 752 N.Y.S.2d 353, 2002 N.Y. App. Div. LEXIS 12397 (N.Y. App. Div. 2d Dep't 2002).

Conversations between attorney and client concerning client's will were admissible in proceedings to admit said will to probate where attorney-client privilege (CPLR 4503, subd a) was waived initially by the presence of a third person during said discussions, and where attorney was required to disclose such conversations under the provisions of CPLR 4503, subd b. In re Will of Dehn, 75 Misc. 2d 85, 347 N.Y.S.2d 821, 1973 N.Y. Misc. LEXIS 1655 (N.Y. Sur. Ct. 1973).

In an action by a tenant seeking damages from the owners of her apartment building and alleging that their negligence and failure to maintain adequate security contributed to an alleged burglary and rape, defendants were entitled to discover the names and addresses of witnesses who may have seen plaintiff and the alleged burglar/rapist together, prior to the events for which the action was brought, from the Legal Aid Society which represented the suspect at his arraignment, where any attorney-client privilege which might have existed concerning the identity of the witnesses had been waived by the disclosure of these identities to the District Attorney and where the names and address did not fall within the work-product privilege, although any statements made by the witnesses would be materials prepared for litigation and

subject to a conditional privilege under CPLR § 3101. Reisch v J & L Holding Corp., 111 Misc. 2d 72, 443 N.Y.S.2d 638, 1981 N.Y. Misc. LEXIS 3227 (N.Y. Sup. Ct. 1981).

In legal malpractice action in which plaintiff alleged that he informed defendant law firm of facts pertaining to possible Labor Law cause of action against community college at which he was injured while working at construction site, interests of justice required disclosure of any revelation by plaintiff to his current lawyer regarding presence or absence of facts pertaining to such cause of action, and when (if ever) such facts were communicated to defendant firm; attorney-client privilege may be overcome where disclosure is required to determine validity of claim and invocation of privilege would deprive defendants of vital information. Bennett v Oot & Assocs., 162 Misc. 2d 160, 616 N.Y.S.2d 163, 1994 N.Y. Misc. LEXIS 348 (N.Y. Sup. Ct. 1994).

Former client had the burden of proving that its loss was causally related to the alleged act of malpractice, the law firm was entitled to disclosure on that question, which was not protected by the attorney-client privilege; the law firm did not seek disclosure from the client's other firm or the client's former general counsel, the information sought was in the client's possession; and disclosure was sought only with respect to the subject matter the client put in issue. IMO Indus. v Anderson Kill & Olick, P.C., 192 Misc. 2d 605, 746 N.Y.S.2d 572, 2002 N.Y. Misc. LEXIS 1042 (N.Y. Sup. Ct. 2002).

Disclosure of a privileged document generally waives the N.Y. C.P.L.R. art. 4503 attorney-client privilege unless the client intends to retain the confidentiality of the printed document and takes reasonable steps to prevent its disclosure. R.G. Egan Equip., Inc. v Polymag Tek, Inc., 195 Misc. 2d 280, 758 N.Y.S.2d 763, 2002 N.Y. Misc. LEXIS 1849 (N.Y. Sup. Ct. 2002).

Employee was not entitled to a protective order under N.Y. C.P.L.R. § 3103 regarding e-mail correspondence with his attorney that was on his employer's computer as any attorney-client privilege under N.Y. C.P.L.R. § 4503 was waived based on the employer's e-mail policy stating that no privacy interest existed in any material sent or received on its computer systems; any expectation of confidentiality under N.Y. C.P.L.R. § 4548 was diminished based on the e-mail

policy. Scott v Beth Israel Med. Ctr., Inc., 847 N.Y.S.2d 436, 17 Misc. 3d 934, 238 N.Y.L.J. 86, 2007 N.Y. Misc. LEXIS 7114 (N.Y. Sup. Ct. 2007).

In a remission action wherein a claimant sought the return of forfeited funds, the district attorney's motion for an order compelling the claimant to produce copies of all communications between him and former counsel was granted because having disclosed the content of certain communications, including divulging counsel's strategic recommendations, he opened the door for the district attorney to pursue further information to refute and/or verify the claims of lack of notice and/or knowledge. Tupi Cambios, S.A. v Morgenthau, 989 N.Y.S.2d 572, 44 Misc. 3d 800, 2014 N.Y. Misc. LEXIS 3155 (N.Y. Sup. Ct. 2014).

Motion to quash the grand jury subpoena was denied because defendant waived the attorney-client privilege when defendant admittedly consented to and permitted his attorney to file a bail modification motion to call to the court's attention reasons why he failed to appear in court at arraignment and thereafter. Matter of Doe, 53 Misc. 3d 1131, 38 N.Y.S.3d 874, 2016 N.Y. Misc. LEXIS 3457 (N.Y. County Ct. 2016).

With respect to discovery motions arising from litigation relating to plaintiffs' efforts to enforce a nearly $10 million money judgment against a hedge fund and its alter ego, the corporate defendant was not protected from responding to discovery based on attorney-client privilege because, in its bankruptcy proceeding, the bankruptcy trustee expressly waived the attorney-client privilege as pertaining to plaintiffs. Knopf v Sanford, 65 Misc. 3d 463, 106 N.Y.S.3d 777, 2019 N.Y. Misc. LEXIS 3886 (N.Y. Sup. Ct. 2019).

In New York, plea of innocence by reason of insanity constitutes complete and effective waiver, by defendant, of any claim of privilege, patient-physician as well as attorney-client, respecting psychiatric evaluations. Noggle v Marshall, 706 F.2d 1408, 1983 U.S. App. LEXIS 28218 (6th Cir. Ohio), cert. denied, 464 U.S. 1010, 104 S. Ct. 530, 78 L. Ed. 2d 712, 1983 U.S. LEXIS 2662 (U.S. 1983).

9. —Effect of client's death

In wrongful death action by deceased's husband against doctors and hospital who had treated deceased for psychiatric problems 2 months prior to her suicide, defendants were entitled to discovery of name and address of attorney representing husband as plaintiff in divorce action pending at time of suicide as well as index number of divorce case and copies of all pleadings filed therein; husband had waived all normal privileges between spouses, attorneys and clients and those granted by CLS Dom Rel § 235 by bringing his tort action and thus putting into issue "whether and to what extent plaintiff's actions aggravated and caused a resurgence of deceased's condition . . . the manner in which plaintiff pursued his divorce proceeding, the grounds he alleged, the claims he made . . . the actions he took . . . the defenses she claimed, and the counterclaims." Janecka v Casey, 121 A.D.2d 28, 508 N.Y.S.2d 451, 1986 N.Y. App. Div. LEXIS 60634 (N.Y. App. Div. 1st Dep't 1986).

Surrogate's court properly denied a petition by the children and grandchildren (jointly, the petitioners, their supplemental petition, claim that the decedent held an ownership interest in a company's stock at the time of his death, and for an adverse inference, because the executor could waive the decedent's attorney-client privilege, the shares had been transferred to the executor well before the father's death in exchange for the continued payment of a salary after the sale and his retirement from the company, and the petitioners did not establish that the executor negligently lost or intentionally destroyed evidence inasmuch as it could not be presumed that the executor was responsible for the disappearance of the corporate book. Matter of Thomas, 179 A.D.3d 98, 113 N.Y.S.3d 447, 2019 N.Y. App. Div. LEXIS 8337 (N.Y. App. Div. 4th Dep't 2019).

The attorney-client privilege is vested in the client and may not be waived by the attorney after the client's death; the willingness of the attorney to testify about privileged communications is immaterial. In re Estate of Trotta, 99 Misc. 2d 278, 416 N.Y.S.2d 179, 1979 N.Y. Misc. LEXIS 2245 (N.Y. Sur. Ct. 1979).

In a contract action against an insurer by the beneficiary of a life insurance policy who sought the double recovery payable under the policy in the event of the insured's accidental death, the

attorney-client privilege permitted by CPLR § 4503(a) would not act to prevent disclosure of communications between the deceased insured and his attorney regarding the insured's mental condition at the time of his death, which were potentially relevant to the issue of whether the insured's death had been a suicide as contended by the insurer, since such privilege as may have existed between the insured and his attorney was waived by the beneficiary's initiation of the action. Martin v John Hancock Mut. Life Ins. Co., 120 Misc. 2d 776, 466 N.Y.S.2d 596, 1983 N.Y. Misc. LEXIS 3794 (N.Y. Sup. Ct. 1983).

In inter vivos trust accounting proceeding, trustee was entitled to suppression of privileged material improperly acquired by attorney for adversarial party, despite facts that material related to close family corporation and both trustee and adversary were officers of corporation, where materials were protected by attorney-client privilege attaching to head of corporation (now deceased) and right or power to waive privilege died with him; privilege was not waived in corporate head's lifetime by allowing trustee (his daughter), as his agent and virtual alter ego in corporate affairs, access to materials, and adversary's status as corporate officer did not give him power to waive privilege, since he was involved in litigation relating to his own rights and assertion of claims adverse to corporation. In re Estate of Weinberg, 133 Misc. 2d 950, 509 N.Y.S.2d 240, 1986 N.Y. Misc. LEXIS 3007 (N.Y. Sur. Ct. 1986), modified in part, aff'd, 129 A.D.2d 126, 517 N.Y.S.2d 474, 1987 N.Y. App. Div. LEXIS 43671 (N.Y. App. Div. 1st Dep't 1987).

Decedent's personal representative, in prosecuting fraud action brought by decedent's CLS Men Hyg Art 81 guardian prior to decedent's death, had right to waive decedent's attorney-client privilege on behalf of his estate, because decedent had right during his lifetime to disclose his communications with his attorney, and it was reasonable to conclude that his personal representative stood in his shoes for same purposes after his death. In re Estate of Colby, 187 Misc. 2d 695, 723 N.Y.S.2d 631, 2001 N.Y. Misc. LEXIS 92 (N.Y. Sur. Ct. 2001).

10. —Waiver re documents

Inadvertent disclosure of documents containing legal advice did not constitute waiver of attorney-client privilege where (1) adversary would not be prejudiced if protective order were granted, (2) client demonstrated its intent to keep documents privileged, (3) client initiated proceedings to correct error within 2 business days of its discovery and did not compound error by eliciting testimony relative to documents in question, (4) there was no evidence that client delegated authority to its counsel to waive privilege, and (5) error in screening procedure was made before documents were delivered to adversary's counsel and screening process was conducted by competent screener (client's counsel). Client did not waive attorney-client privilege regarding documents containing legal advice by placing legal opinions of its counsel in issue through commencement of lawsuit, where client's claims were not grounded on legal opinions and advice contained in documents; client's claims were based on written agreements which contained no condition precedent requiring advice of counsel, and thus client had no need to present evidence contained in privileged documents in order to sustain its cause of action. Plaintiff did not impliedly waive attorney-client privilege as to documents containing legal advice by having communicated with defendant by letter concerning subject matter of documents, since letter, which contained notice of plaintiff's intention to dispose of certain stock, was required under parties' prior agreement; such general communication could not be said to have waived plaintiff's privilege as to all material pertaining to plaintiff's decision to dispose of stock. Manufacturers & Traders Trust Co. v Servotronics, Inc., 132 A.D.2d 392, 522 N.Y.S.2d 999, 1987 N.Y. App. Div. LEXIS 50337 (N.Y. App. Div. 4th Dep't 1987).

Fundamental questions in assessing whether attorney-client privilege was waived are whether client intended to retain confidentiality of privileged materials and whether client took reasonable steps to prevent disclosure; thus, hospital did not waive attorney-client privilege as to 2 reports issued by hospital's law committee since reports were never intentionally placed outside group of management employees affiliated with hospital and involved in investigation, hospital had reasonable expectation that information communicated in reports would remain confidential due to common interest of each recipient in investigation, and hospital immediately asserted privilege after learning that counsel for plaintiff had obtained reports. Recital of facts in legal

opinion does not defeat attorney-client privilege so as to make report discoverable. Kraus v Brandstetter, 185 A.D.2d 300, 586 N.Y.S.2d 270, 1992 N.Y. App. Div. LEXIS 9034 (N.Y. App. Div. 2d Dep't 1992).

Attorney-client privilege was not waived by inadvertent disclosure of attorney's opinion letter. 6340 Transit Rd. v Unigard Sec. Ins. Co., 209 A.D.2d 922, 619 N.Y.S.2d 1015, 1994 N.Y. App. Div. LEXIS 11902 (N.Y. App. Div. 4th Dep't 1994).

In action arising from accident that occurred at service station, oil company that owned service station waived its attorney-client privilege with regard to correspondence and other legal documents prepared in defense of action when it brought cross claim against operator that leased service station for attorney's fees and other expenses associated with defense of action. Forestire v Inter-Stop, 211 A.D.2d 751, 621 N.Y.S.2d 686, 1995 N.Y. App. Div. LEXIS 678 (N.Y. App. Div. 2d Dep't 1995).

Following an automobile accident which occurred when an automobile operated by the deceased collided with an automobile which at the time was being pursued by a vehicle operated by a village policeman, notes made by a private attorney consulted by the policeman concerning the illegal implications of the event would be privileged pursuant to CPLR § 4503, and such privilege would not be waived by communication of the privilege information to a third party, where the notes made by the private attorney were furnished to the attorneys for the village for use in connection with a wrongful death action, in that there is such a unity of interest between the village as employer and the alleged acts of the employee that the communication must be viewed as one which is privileged. Mason v Ravena, 114 Misc. 2d 487, 451 N.Y.S.2d 994, 1982 N.Y. Misc. LEXIS 3502 (N.Y. Sup. Ct. 1982).

A nurse who had been suspended from duty by a county health facility due to her alleged incompetence, and her neglect and abuse of patients, would be entitled to the issuance of a judicial subpoena duces tecum directing the county to produce signed statements by county employees who had testified at an earlier arbitration proceeding regarding the nurse's alleged acts and omissions, since any attorney-client privilege which may have acted to prevent pretrial

disclosure of such statements as information provided by county employees to the County Attorney during an investigation of county matters was waived when the employees testified as witnesses in the arbitration proceeding in that the attorney-client privilege applies to the communication of information to the attorney rather than to the facts known by the client, so that the privilege was waived when such facts were presented and asserted on behalf of the county by the witnesses, and since fundamental fairness would require that any statement which a witness has prepared, read, and approved as accurate be available for use in cross-examination of such witness. Civil Serv. Emples. Ass'n v Ontario County Health Facility, 120 Misc. 2d 582, 466 N.Y.S.2d 240, 1983 N.Y. Misc. LEXIS 3765 (N.Y. Sup. Ct. 1983), aff'd, 103 A.D.2d 1000, 478 N.Y.S.2d 380, 1984 N.Y. App. Div. LEXIS 19674 (N.Y. App. Div. 4th Dep't 1984).

“Internal memorandum” prepared by former attorneys for fiduciaries of decedent’s estate, containing legal analysis of tax treatment available on sale of estate asset, was not document protected by attorney-client privilege as between fiduciaries and estate beneficiary since it was dated 11 days prior to when fiduciaries became aware that beneficiary was contemplating litigation against them and it was not drafted in anticipation of litigation; thus, disclosure of memorandum to beneficiary’s attorneys did not waive attorney-client privilege as to other documents on same subject protected by privilege. In re Estate of Baker, 139 Misc. 2d 573, 528 N.Y.S.2d 470, 1988 N.Y. Misc. LEXIS 234 (N.Y. Sur. Ct. 1988).

Legal clients who filed a legal malpractice action against attorneys, arising from legal advice that the attorneys provided regarding day trading which resulted in the clients becoming targets of civil and criminal investigations, were deemed to have waived their right to assert attorney-client privilege under N.Y. C.P.L.R. 4503(a) and work product under N.Y. C.P.L.R. 3101(b) with respect to documents held by law firms that were representing them through the investigation; the clients put the representation by the law firms at issue, and the attorneys showed a substantial need for the material which would have resulted in an undue hardship if they were not given it, pursuant to Rule 3101(d)(2). Goldberg v Hirschberg, 806 N.Y.S.2d 333, 10 Misc. 3d

292, 234 N.Y.L.J. 49, 2005 N.Y. Misc. LEXIS 2032 (N.Y. Sup. Ct. 2005), app. dismissed, 2005 N.Y. App. Div. LEXIS 11738 (N.Y. App. Div. 1st Dep't Nov. 1, 2005).

In plaintiffs' trade name infringement and unfair competition action, the trial court ruled that certain actions of the author of two letters by the wife of the deceased owner of a business that originally owned the trade name, and who was acting for that business, to the business's attorney did not waive or abandon the attorney-client privilege in the letters. R.G. Egan Equip., Inc. v Polymag Tek, Inc., 195 Misc. 2d 280, 758 N.Y.S.2d 763, 2002 N.Y. Misc. LEXIS 1849 (N.Y. Sup. Ct. 2002).

While most of the documents that the New York State Department of Environmental Conservation refused to disclose pursuant to a request under the New York Freedom of Information Law, N.Y. Pub. Off. Law art. 6, were privileged as they were either attorney work product or attorney-client communications, the privilege was lost as to two documents that the Department did not disclose because they were not confidential as they were revealed to or obtained from third parties. Morgan v N.Y. State Dep't of Envtl. Conservation, 9 A.D.3d 586, 779 N.Y.S.2d 643, 2004 N.Y. App. Div. LEXIS 9106 (N.Y. App. Div. 3d Dep't 2004).

While the city labeled a 1994 memo as a privileged and confidential attorney-client communication and limited its distribution to a finite number of personnel, the city waived the privilege by failing to exercise due diligence because the city knew for approximately four years that the 1994 memo was in the possession of third parties who had the opportunity to make photocopies of it, as well as use and disseminate information contained therein, and took no action to retrieve it. Additionally, the protective order resulted in undue prejudice since the 1994 memo contained information that was relevant to the litigation, and the injured parties relied on such information in further support of their pending summary judgment motion; thus, the trial court erred in granting the city's motion for a protective order. AFA Protective Sys. v City of New York, 13 A.D.3d 564, 788 N.Y.S.2d 128, 2004 N.Y. App. Div. LEXIS 15671 (N.Y. App. Div. 2d Dep't 2004).

As the advice given to a former employee by the former employee's sister and her law firm were covered by the attorney-client privilege in N.Y. C.P.L.R. 4503(a)(1), and as the privilege was not waived as to undisclosed communications under Fed. R. Evid. 502(a), the former employer was not entitled to a Fed. R. Civ. P. 45 motion to compel the documents. Seyler v T-Systems North Am., Inc., 771 F. Supp. 2d 284, 2011 U.S. Dist. LEXIS 6065 (S.D.N.Y. 2011).

In a lawsuit between banks for claims arising from a fraudulent trading scheme by one of plaintiff's traders, even if documents used to generate a report, which was commissioned by plaintiff to investigate the fraud and to recommend improvements to corporate governance, and which was publicly released, were covered by the attorney-client privilege of N.Y. C.P.L.R. 4503(a)(1), plaintiff failed to show that any privilege was not waived since it made no claim that the documents were not shared with the consultant who prepared the report and its personnel, there were no facts to support a claim that the consultant who prepared the report was an agent or employee of plaintiff's law firm, and there was no basis to conclude that the conclude was necessary for the provision of legal advice. Allied Ir. Banks, p.l.c. v Allied Ir. Banks, p.l.c. v Bank of Am., N.A., 240 F.R.D. 96, 2007 U.S. Dist. LEXIS 4247 (S.D.N.Y. 2007).

Plaintiffs' counsel had to produce all non-privileged documents, but for any document plaintiff principal removed from his work computer as to which a privilege was claimed, plaintiffs' counsel was to create a traditional privilege log; because defendant never had ready access to the principal's work computer, the principal's expectation of confidentiality was reasonable even though defendant owned the computer, and there was no waiver of attorney client privilege. Orbit One Communs., Inc. v Numerex Corp., 255 F.R.D. 98, 2008 U.S. Dist. LEXIS 90981 (S.D.N.Y. 2008).

In a breach of contract suit against loan guarantors, a lender was entitled to the return of nine inadvertently produced documents out of a total production of 250,000 pages because they were protected by the attorney-client privilege of N.Y. C.P.L.R. § 4503(a)(1), and the lender did not waive the privilege because its production was not extremely careless, particularly in light of

the number of documents produced. HSH Nordbank AG N.Y. Branch v Swerdlow, 259 F.R.D. 64, 2009 U.S. Dist. LEXIS 63711 (S.D.N.Y. 2009).

11. Who may claim privilege

When ownership of corporation changes hands, and efforts are made to run pre-existing business entity and manage its affairs, successor management stands in shoes of prior management and controls attorney-client privilege with respect to matters concerning company's operations; under such circumstances, prior attorney-client relationship continues with newly formed entity. Mere transfer of assets of corporation with no attempt to continue pre-existing operation generally does not transfer attorney-client relationship. Control of attorney-client privilege with respect to confidential communications between law firm and corporate actors of former corporation concerning business operations passed to management of new corporation, even though former corporation technically ceased to exist, where business of former corporation remained unchanged with same products, clients, suppliers and non-managerial personnel, and new corporation possessed all rights, privileges, liabilities and obligations of former corporation, in addition to its assets. New corporation, which had purchased assets of former corporation (since dissolved) and continued to run former business and manage its affairs, had authority to assert attorney-client privilege to preclude former corporation's law firm from disclosing to former corporation's owner contents of confidential communications between firm and former corporation. However, new corporation, formed to operate business of former corporation which it purchased, had no authority to assert attorney-client privilege to preclude former corporation's law firm from revealing to former corporation's owner (whom it also represented) contents of communications conveyed by former corporation concerning transaction by which former corporation and new corporation merged. Tekni-Plex, Inc. v Meyner & Landis, 89 N.Y.2d 123, 651 N.Y.S.2d 954, 674 N.E.2d 663, 1996 N.Y. LEXIS 3154 (N.Y.), reh'g denied, 89 N.Y.2d 917, 653 N.Y.S.2d 921, 676 N.E.2d 503, 1996 N.Y. LEXIS 4457 (N.Y. 1996), reh'g denied, 89 N.Y.2d 917, 653 N.Y.S.2d 921, 676 N.E.2d 503, 1996 N.Y. LEXIS 5310 (N.Y. 1996).

An attorney is entitled to claim the privilege to which his client is entitled. Kenny v Cleary, 47 A.D.2d 531, 363 N.Y.S.2d 606, 1975 N.Y. App. Div. LEXIS 8591 (N.Y. App. Div. 2d Dep't 1975).

Corporate attorney-client privilege is not available to allow a corporation to funnel its papers and documents into hands of its lawyers for custodial purposes and to thereby avoid disclosure. People v Belge, 59 A.D.2d 307, 399 N.Y.S.2d 539, 1977 N.Y. App. Div. LEXIS 13566 (N.Y. App. Div. 4th Dep't 1977).

Plaintiff’s motion to strike defendant’s answer would be granted unless defendant, by its president, appears for examination and answers all questions relevant to the proceedings under supervision of the presiding justice, since the president of defendant corporation, who is also an attorney, cannot cloak the facts to be revealed by the attorney-client privilege. International Modular Housing, Inc. v Atlanta Shipping Corp., 86 A.D.2d 502, 445 N.Y.S.2d 728, 1982 N.Y. App. Div. LEXIS 15013 (N.Y. App. Div. 1st Dep't 1982).

Mere fact that beneficiary of trust was interested in privileged attorney-client communications involving trustee and trust settlor did not establish his right of access thereto in trust accounting proceeding; generally, one party is entitled to obtain disclosure over other party’s claim of privilege only where they have been jointly represented as to privileged subject matter. In re Beiny, 129 A.D.2d 126, 517 N.Y.S.2d 474, 1987 N.Y. App. Div. LEXIS 43671 (N.Y. App. Div. 1st Dep't), reh'g denied, 132 A.D.2d 190, 522 N.Y.S.2d 511, 1987 N.Y. App. Div. LEXIS 51548 (N.Y. App. Div. 1st Dep't 1987).

Court properly denied petition to compel Acting General Counsel of Department of Insurance to disclose legal opinion rendered to Superintendent of Insurance or his staff as to whether plaintiff’s proposed contract would constitute contract of insurance under CLS Ins § 1101(a)(1), since Acting General Counsel was legal advisor to superintendent and thus his advice and opinion were protected under attorney-client privilege. American Auto. Plan, Inc. v Corcoran, 166 A.D.2d 215, 560 N.Y.S.2d 435, 1990 N.Y. App. Div. LEXIS 11687 (N.Y. App. Div. 1st Dep't 1990).

In action arising from accident which occurred when 76-year-old female defendant lost control of vehicle which hurtled into park and injured several people, defendant vehicle manufacturer was not entitled to question female defendant at deposition concerning her conversations with her attorney, despite contention that attorney-client privilege did not attach because female defendant's daughter was present during those conversations, where (1) daughter selected attorney for female defendant, transported her to attorney's office, and put her sufficiently at ease to communicate effectively with her attorney, and (2) daughter had alighted from vehicle just before it proceeded to accident site and could be called as witness to aid female defendant's memory. Stroh v General Motors Corp., 213 A.D.2d 267, 623 N.Y.S.2d 873, 1995 N.Y. App. Div. LEXIS 3013 (N.Y. App. Div. 1st Dep't 1995).

A corporation may as a client assert the attorney-client privilege. Ford Motor Co. v O. W. Burke Co., 59 Misc. 2d 543, 299 N.Y.S.2d 946, 1969 N.Y. Misc. LEXIS 1581 (N.Y. Sup. Ct. 1969).

Petitioner, who was employed as an assistant administrator of a nursing home while a law student, was a clerk to the counsel for the home after graduation from law school but before admission to the Bar, and who became a member of the law firm representing the nursing home following admission to the Bar, may not, at an appearance before a Grand Jury investigating nursing home abuses, assert the attorney-client privilege regarding information gained as an employee of the nursing home, since he never acted in the capacity of an attorney in that he was not a member of the Bar and there was no evidence that he acted as a client, nor may he assert the privilege regarding information gained as a law student, law graduate or law clerk, since the confidentiality privilege is restricted to a member of the Bar who is licensed to practice law and the privilege has never been extended to quasi-legal fields unless the representatives of these professions have been agents of an attorney. Petitioner's contention that the earlier knowledge gained by him carried over to his present communications or that he is unable to distinguish between past and present facts is rejected, since such a view could insulate all knowledge possessed by an attorney of his client's affairs from any form of public scrutiny and render the privilege meaningless; CPLR 4503, which contains the attorney-client privilege,

demands “evidence of a confidential communication”, and the burden is on one who asserts the privilege to establish the time, date and place, as well as the nature of such communication. In order for petitioner to assert the privilege regarding communications with the nursing home as its counsel, he must establish that the communications relate to a fact of which he was informed by his client, without the presence of strangers, for the purpose of securing primarily either an opinion of law or legal services or assistance in some legal proceeding and not for the purpose of committing a crime or tort, and that the privilege has been claimed and not waived by the client. People v Doe, 99 Misc. 2d 411, 416 N.Y.S.2d 466, 1979 N.Y. Misc. LEXIS 2303 (N.Y. Sup. Ct. 1979).

Where an attorney receives confidential information from a person who, under the circumstances, has a right to believe that the attorney, as an attorney, will respect such confidences, the law will enforce the obligation of confidence irrespective of the absence of a formal attorney-client relationship. Nichols v Village Voice, Inc., 99 Misc. 2d 822, 417 N.Y.S.2d 415, 1979 N.Y. Misc. LEXIS 2343 (N.Y. Sup. Ct. 1979).

Attorney employed by State Republican Committee as director of research could not assert attorney-client privilege as basis for refusing to answer questions from State Board of Elections in connection with investigation of accuracy of committee’s financial disclosure statements since she was not acting in confidential attorney-client relationship with committee or any employee thereof. New York State Bd. of Elections v Fricano, 147 Misc. 2d 597, 558 N.Y.S.2d 464, 1990 N.Y. Misc. LEXIS 332 (N.Y. Sup. Ct. 1990).

Attorney-client privilege did not apply to conversation between defendant, attorney being investigated for criminal wrongdoing, and his employee (who was also attorney) where, inter alia, (1) employee denied existence of such relationship, (2) there was no retainer or fee arrangement, (3) employee had never handled any type of litigation, and (4) defendant had consistently referred all litigated matters to attorneys other than employee. People v Deutsch, 164 Misc. 2d 182, 624 N.Y.S.2d 533, 1994 N.Y. Misc. LEXIS 655 (N.Y. Sup. Ct. 1994).

When a taxpayer sought to quash subpoenas issued by the State of California Franchise Tax Board to nonparties pursuant to N.Y. C.P.L.R. 3119, the taxpayer was not entitled to claim attorney-client privilege under N.Y. C.P.L.R. 4503(a) because the taxpayer's mere assertions that he believed an attorney-client relationship existed between himself and counsel for a New York corporation and his communications with counsel were confidential were insufficient to demonstrate the existence of such a relationship; in the absence of an attorney-client relationship, no common interest privilege attached to the subpoenaed documents. Matter of New York Counsel for State of Cal. Franchise Tax Bd. (U.S. Philips Corp.--Haken--Tamoshunas), 929 N.Y.S.2d 361, 33 Misc. 3d 500, 2011 N.Y. Misc. LEXIS 4211 (N.Y. Sup. Ct. 2011), aff'd, 105 A.D.3d 186, 962 N.Y.S.2d 282, 2013 N.Y. App. Div. LEXIS 1509 (N.Y. App. Div. 2d Dep't 2013).

In products liability action against cigarette manufacturer, documents related to defendant's participation in industry-sponsored research projects relating to medical issues and tobacco use conducted by Council on Tobacco Research (CTR) are not protected by attorney-client privilege in CLS CPLR § 4503, where plaintiffs showed that fraudulent purpose existed in manufacturer's use of CTR and that documents at issue furthered this fraud, because crime-fraud exception to attorney-client privilege applied. Sackman v Liggett Group, 920 F. Supp. 357, 1996 U.S. Dist. LEXIS 11701 (E.D.N.Y.), vacated, 167 F.R.D. 6, 1996 U.S. Dist. LEXIS 7343 (E.D.N.Y. 1996).

Under New York law, parents of injured automobile passenger were acting as agents in seeking counsel for passenger, as required for communications between parents and counsel to be subject to attorney-client privilege. Attorney-client privilege protects 9 redactions from 77-page notebook of father of paralyzed car crash victim, where father used notebook to record daily activities related to accident, because father was forced to act as son's agent due to his serious injuries, and redactions contain snippets of communications between father and counsel concerning son's legal matters. Hendrick v Avis Rent A Car Sys., 944 F. Supp. 187, 1996 U.S. Dist. LEXIS 17048 (W.D.N.Y. 1996).

B. Particular Applications

12. Generally

No attorney-client privilege arises unless an attorney-client relationship has been established, and such a relationship arises only when one contacts an attorney in his capacity as such for the purpose of obtaining legal advice or services (CPLR 4503, subd [a]); in order to make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a "confidential communication" made to the attorney for the purpose of obtaining legal advice or services, and the burden of proving each element of the privilege rests upon the party asserting it. However, even where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure. Priest v Hennessy, 51 N.Y.2d 62, 431 N.Y.S.2d 511, 409 N.E.2d 983, 1980 N.Y. LEXIS 2911 (N.Y. 1980).

A tape recording prepared by petitioner which left his possession but was regained without disclosure of its contents and delivered to petitioner's attorney in order to obtain legal advice was protected from disclosure in a criminal investigation of petitioner since the attorney-client privileges attaches, whatever the tape's initial purpose and intended audience, when it ultimately was uttered only to the attorney by his client outside the presence of any third party in the course of seeking legal advice. In re Vanderbilt, 57 N.Y.2d 66, 453 N.Y.S.2d 662, 439 N.E.2d 378, 1982 N.Y. LEXIS 3577 (N.Y. 1982).

Attorney-client privilege extends only to confidential communications made to attorney for purpose of obtaining legal advice, and questions as to whether attorney was consulted and who paid legal fees do not ordinarily constitute such communications. Hoopes v Carota, 74 N.Y.2d 716, 544 N.Y.S.2d 808, 543 N.E.2d 73, 1989 N.Y. LEXIS 660 (N.Y. 1989).

Investigative report does not become privileged merely because it was sent to attorney, nor is such report privileged merely because investigation was conducted by attorney; attorney's communication is not cloaked with privilege when attorney is hired for business or personal

advice, or to do work of non-lawyer. Although information received from third persons may not itself be privileged, lawyer's communication to client that includes such information in its legal analysis and advice may stand on different footing; critical inquiry is whether, viewing lawyer's communication in its full content and context, it was made in order to render legal advice or services to client. Spectrum Systems Int'l Corp. v Chemical Bank, 78 N.Y.2d 371, 575 N.Y.S.2d 809, 581 N.E.2d 1055, 1991 N.Y. LEXIS 4218 (N.Y. 1991).

Intruder's unauthorized inspection of client's documents in lawyer's office did not give rise to cause of action by client against intruder for violation of attorney-client privilege. Statute codifying attorney-client privilege is to be strictly construed, since it is limitation on truth-seeking process. Madden v Creative Servs., 84 N.Y.2d 738, 622 N.Y.S.2d 478, 646 N.E.2d 780, 1995 N.Y. LEXIS 2 (N.Y. 1995).

For attorney-client privilege to attach, the information must have been given with expectation of confidentiality and for purpose of obtaining legal as opposed to business advice. Generally, attorney-client privilege applies only if: asserted holder of privilege is or sought to become a client; person to whom communication was made is member of bar of a court, or his subordinate and in connection with this communication is acting as a lawyer; communication relates to a fact of which attorney was informed by his client, without the presence of strangers, for purpose of securing primarily either an opinion of law or legal services or assistance in some legal proceeding, and not for purpose of committing a crime or tort; and privilege has been claimed and not waived by client. People v Belge, 59 A.D.2d 307, 399 N.Y.S.2d 539, 1977 N.Y. App. Div. LEXIS 13566 (N.Y. App. Div. 4th Dep't 1977).

Attorney-client privilege is justified because of public policy encouraging full disclosure between a client and his attorney and a need to protect their confidential relationship. Arnold Constable Corp. v Chase Manhattan Mortg. & Realty Trust, 59 A.D.2d 666, 398 N.Y.S.2d 422, 1977 N.Y. App. Div. LEXIS 13588 (N.Y. App. Div. 1st Dep't 1977).

A subpoena would be quashed as to a cover letter prepared by an attorney conveying a proposed agreement for execution in connection with a matter in which he was representing his

client and an unexecuted agreement drafted by an attorney at the request of his client, since both documents constituted confidential communications made to a lawyer in the course of obtaining legal advice or services and thus were privileged. Bekins Record Storage Co. v Morgenthau, 95 A.D.2d 655, 463 N.Y.S.2d 213, 1983 N.Y. App. Div. LEXIS 18555 (N.Y. App. Div. 1st Dep't 1983), modified, In re Grand Jury Subpoena Served upon Bekins Record Storage Co., 62 N.Y.2d 324, 476 N.Y.S.2d 806, 465 N.E.2d 345, 1984 N.Y. LEXIS 4320 (N.Y. 1984).

Prosecutor improperly attempted to invade attorney-client relationship by asking defendant, on cross-examination, whether he had discussed with his attorney idea of wearing sneakers into court, but whatever minimal prejudice might have arisen was cured by court's sustaining of defense counsel's objection before defendant could answer and by court's prompt curative instructions; if defendant believed that curative instructions given were inadequate, he should have immediately sought further or more complete instructions. People v Hale, 122 A.D.2d 162, 505 N.Y.S.2d 1, 1986 N.Y. App. Div. LEXIS 59494 (N.Y. App. Div. 2d Dep't 1986).

At defendant's post-trial competency hearing, attorney-client privilege did not preclude court from compelling trial counsel to testify concerning defendant's ability to communicate with counsel and cooperate in his defense since (1) privilege protects substance of communications from disclosure, but not demeanor and mental capacity of defendant during them, (2) hearing counsel should have been able to frame questions designed to show defendant's inability to communicate, without revealing confidential communications, and (3) possibility that cross-examination might be restricted to some degree by attorney-client privilege did not override compelling interest of all concerned in correct determination of issue of defendant's competency to stand trial. People v Kinder, 126 A.D.2d 60, 512 N.Y.S.2d 597, 1987 N.Y. App. Div. LEXIS 41031 (N.Y. App. Div. 4th Dep't 1987).

Letter from client to attorney concerning waiver of invalid service of process was confidential communication and not admissible in evidence. Bleier v Heschel, 128 A.D.2d 662, 512 N.Y.S.2d 902, 1987 N.Y. App. Div. LEXIS 44353 (N.Y. App. Div. 2d Dep't 1987).

Trial court did not violate defendant's attorney-client privilege by permitting cross-examination regarding communications with his prior attorney or by allowing that attorney to testify on prosecution's rebuttal case where defendant waived that privilege by volunteering his claim that counsel had coerced him to testify falsely at suppression hearing. People v Mendoza, 240 A.D.2d 316, 659 N.Y.S.2d 442, 1997 N.Y. App. Div. LEXIS 6722 (N.Y. App. Div. 1st Dep't), app. denied, 90 N.Y.2d 907, 663 N.Y.S.2d 519, 686 N.E.2d 231, 1997 N.Y. LEXIS 3460 (N.Y. 1997).

Defendants' inadvertently disclosed list of potential interviewees was not protected by attorney-client privilege. Aetna Cas. & Sur. Co. v Certain Underwriters at Lloyd's, 263 A.D.2d 367, 692 N.Y.S.2d 384, 1999 N.Y. App. Div. LEXIS 7800 (N.Y. App. Div. 1st Dep't 1999), app. dismissed, 94 N.Y.2d 875, 705 N.Y.S.2d 6, 726 N.E.2d 483, 2000 N.Y. LEXIS 6 (N.Y. 2000).

In proceedings to obtain testimony of attorney for use in action in Connecticut, although generally law of place where testimony is to be heard governs its admissibility, public policy of this state which deems attorney-client communications confidential will prevail, and such attorney excused from testifying. Application of Walsh, 40 Misc. 2d 413, 243 N.Y.S.2d 325, 1963 N.Y. Misc. LEXIS 1810 (N.Y. Sup. Ct. 1963).

As a studio did not supply the information N.Y. C.P.L.R. § 3122(b) required, either on a privilege log or in an affidavit on personal knowledge and the studio did not satisfy their burden to demonstrate privilege, the studio had to produce a privilege log in conformance with N.Y. C.P.L.R. § 3122(b), specifically identifying the emails the studio claimed were privileged and explaining why. Also the studio had to provide the emails to the court for an in camera review, to confirm that they, too, were confidential communications for purposes of legal services and thus subject to the attorney-client privilege. Batra v Wolf, 922 N.Y.S.2d 735, 32 Misc. 3d 456, 2010 N.Y. Misc. LEXIS 6630 (N.Y. Sup. Ct. 2010).

Court would dismiss claim that defendants violated attorney-client privilege set forth in CLS CPLR § 4503 by reading and photographing documents during break-in into office of plaintiffs' attorney, since nothing in complaint indicated that defendants ever disclosed, to anyone, substance of information they obtained from attorney's office, or that such information was used

in any proceeding contemplated by § 4503; moreover, other than mental distress, plaintiffs failed to allege that they suffered injury as result of unauthorized examination of documents in their attorney's office. Madden v Creative Servs., 872 F. Supp. 1205, 1993 U.S. Dist. LEXIS 20712 (W.D.N.Y. 1993), aff'd, 51 F.3d 11, 1995 U.S. App. LEXIS 5603 (2d Cir. N.Y. 1995).

Under New York law, communications between injured plaintiff's father and counsel were subject to attorney-client privilege where father was acting as plaintiff's agent. Hendrick v Avis Rent A Car Sys., 944 F. Supp. 187, 1996 U.S. Dist. LEXIS 17048 (W.D.N.Y. 1996).

13. Article 78 proceedings

Limitations upon disclosure found in CPLR § 4503 and § 3101 do not apply to disclosure under the Freedom of Information Law. In an Article 78 proceeding to deny disclosure of certain documents prepared by confidential technical consultants to four utility companies which were engaged in an adjudicatory administrative proceeding pending before an administrative law judge regarding permits issued pursuant to the National Pollutant Discharge Elimination System, the disclosure would not be denied where defendants failed to claim a specific exemption, privilege or immunity and to demonstrate that the material sought was within such exemption, privilege or immunity and also failed to demonstrate that the documents in question were exempt from disclosure under any of the eight categories of exemption specified in Pub O Law § 87. Lawler, Matusky & Skelly Engineers v Abrams, 111 Misc. 2d 356, 443 N.Y.S.2d 973, 1981 N.Y. Misc. LEXIS 3276 (N.Y. Sup. Ct. 1981).

In Article 78 proceeding by newspaper reporter who sought description of legal services provided to county by outside law firm in connection with environmental lawsuit, court would conduct in camera inspection of billing records to determine extent to which descriptive material enclosed therein was protected from disclosure under CLS Pub O § 87(2)(a) and CLS CPLR § 4503; attorney-client privilege does not attach to fee statements, except for detailed accounts of legal services provided by counsel. Orange County Publs. v County of Orange, 168 Misc. 2d 346, 637 N.Y.S.2d 596, 1995 N.Y. Misc. LEXIS 617 (N.Y. Sup. Ct. 1995).

14. Banks; banking

In action by private Brazilian bank against “John Doe” defendants who had allegedly defrauded bank and deposited proceeds in code-name accounts in New York banks, Brazilian bank was entitled to discovery and inspection with regard to banks in which such deposits were made. Banco Frances e Brasileiro S. A. v Doe No. 1, 36 N.Y.2d 592, 370 N.Y.S.2d 534, 331 N.E.2d 502, 1975 N.Y. LEXIS 1857 (N.Y.), cert. denied, 423 U.S. 867, 96 S. Ct. 129, 46 L. Ed. 2d 96, 1975 U.S. LEXIS 2778 (U.S. 1975), reh'g denied, 37 N.Y.2d 742, 1975 N.Y. LEXIS 2998 (N.Y. 1975).

Court properly denied motion for preliminary injunction by bank’s chief executive officer (CEO), seeking to enjoin defendant attorneys from disclosing information, obtained from CEO, to committee of bank formed to investigate relationship among CEO, his family, and his former law firm, on ground that such communications were covered by attorney-client privilege where (1) CEO retained attorneys on behalf of bank in connection with bank’s acquisition of savings and loan association, (2) attorneys recommended that they conduct due diligence inquiry, and (3) during inquiry, statements were made by CEO and member of his former law firm, indicating that CEO continued to receive payments from his former law firm; attorneys were retained on behalf of bank, not on behalf of CEO. Doe v Poe, 189 A.D.2d 132, 595 N.Y.S.2d 503, 1993 N.Y. App. Div. LEXIS 2687 (N.Y. App. Div. 2d Dep't), app. denied, 81 N.Y.2d 711, 600 N.Y.S.2d 442, 616 N.E.2d 1104, 1993 N.Y. LEXIS 1804 (N.Y. 1993).

Attorney-client privilege did not protect internal breach analyses prepared by a company that sponsored a securitization of mortgage-backed loans because counsel's involvement in the repurchase reviews did not change the business-function nature of analyses prepared by non-attorney underwriters. The company could not compel production of repurchase communications between the trustee and certificateholders because the common interest exception to waiver of the attorney-client privilege applied. ACE Sec. Corp. v DB Structured

Prods., Inc., 55 Misc. 3d 544, 40 N.Y.S.3d 723, 2016 N.Y. Misc. LEXIS 3691 (N.Y. Sup. Ct. 2016).

15. Corporate matters, generally

Oral or written statements made by a lawyer in an effort to protect the interest of his client in certain funds of a closely held corporation of which the client was a stockholder and which were made to other stockholders of the corporation or to their attorneys were qualifiedly privileged. Kenny v Cleary, 47 A.D.2d 531, 363 N.Y.S.2d 606, 1975 N.Y. App. Div. LEXIS 8591 (N.Y. App. Div. 2d Dep't 1975).

Report prepared by certified public accountant, who was hired by respondents to review corporate petitioner’s books and financial records, was not exempt from disclosure on basis of attorney-client privilege under CLS CPLR § 4503 since report was not communication between respondents and their attorney but was exchange between attorney and third party. Central Buffalo Project Corp. v Rainbow Salads, Inc., 140 A.D.2d 943, 530 N.Y.S.2d 346, 1988 N.Y. App. Div. LEXIS 5769 (N.Y. App. Div. 4th Dep't 1988).

In action alleging that defendant engaged in self-dealing and other misconduct both as trustee of trusts set up to hold and administer voting stock of family corporation, and as officer and director of corporation, court properly overruled defendant’s invocation of attorney-client privilege as to questions propounded in his examination before trial, concerning legal fee arrangements and whether he obtained legal advice (in connection with transactions described in complaint) as trustee or as corporate officer; ordinarily, information as to whether attorney was consulted, fee arrangements, and identity of lawyer or client is not deemed confidential. Court also properly overruled defendant’s invocation of attorney-client privilege as to questions propounded in his examination before trial concerning his communications with attorney regarding transactions described in complaint since (1) defendant was plaintiffs’ fiduciary in both of his capacities and thus was not entitled to shield absolutely his communications with attorney regarding pertinent affairs of corporation, and (2) good cause for disclosure was shown. Hoopes v Carota, 142

A.D.2d 906, 531 N.Y.S.2d 407, 1988 N.Y. App. Div. LEXIS 8046 (N.Y. App. Div. 3d Dep't 1988), aff'd, 74 N.Y.2d 716, 544 N.Y.S.2d 808, 543 N.E.2d 73, 1989 N.Y. LEXIS 660 (N.Y. 1989).

In an action alleging, inter alia, fraud by a corporation and a majority shareholder, the attorney-client privilege under N.Y. C.P.L.R. § 4503(a) did not apply to certain documents because the communications regarding a stock transaction with minority shareholders that were claimed to be privileged were made between a business consultant and the corporation’s attorneys or on behalf of the majority shareholder in his individual capacity. Sieger v Zak, 60 A.D.3d 661, 874 N.Y.S.2d 535, 2009 N.Y. App. Div. LEXIS 1633 (N.Y. App. Div. 2d Dep't 2009).

In a discovery dispute wherein managers of a company and corporate counsel invoked the attorney-client privilege in opposition to document requests by one of the company's investors, the court reversed the order granting plaintiff's motion to compel the production of certain privileged documents because adversity was not a threshold issue in determining whether the fiduciary exception was applicable in a given case, but was one of several factors to consider in making that determination. NAMA Holdings, LLC v Greenberg Traurig LLP, 133 A.D.3d 46, 18 N.Y.S.3d 1, 2015 N.Y. App. Div. LEXIS 7289 (N.Y. App. Div. 1st Dep't 2015).

Adversity is not a threshold issue in determining whether the corporate fiduciary exception is applicable in a given case, but one of several factors to consider in making that determination, and that adversity cannot be determined without a review of the purportedly privileged communications. NAMA Holdings, LLC v Greenberg Traurig LLP, 133 A.D.3d 46, 18 N.Y.S.3d 1, 2015 N.Y. App. Div. LEXIS 7289 (N.Y. App. Div. 1st Dep't 2015).

Garner test remains viable, and it strikes the appropriate balance between respect for the corporate attorney client privilege and the need for disclosure. NAMA Holdings, LLC v Greenberg Traurig LLP, 133 A.D.3d 46, 18 N.Y.S.3d 1, 2015 N.Y. App. Div. LEXIS 7289 (N.Y. App. Div. 1st Dep't 2015).

Adversity is not a threshold inquiry but a component of the broader good-cause inquiry; the Garner factors that pertain to adversity, some will indicate whether the parties are generally

adverse, while others will require a review of the communications in dispute; the relevant factors may weigh against finding good cause to apply the fiduciary exception with respect to those communications that reveal adversity. NAMA Holdings, LLC v Greenberg Traurig LLP, 133 A.D.3d 46, 18 N.Y.S.3d 1, 2015 N.Y. App. Div. LEXIS 7289 (N.Y. App. Div. 1st Dep't 2015).

Whether a particular document is or is not protected under the corporate attorney client privilege is necessarily a fact-specific determination, most often requiring in camera review. NAMA Holdings, LLC v Greenberg Traurig LLP, 133 A.D.3d 46, 18 N.Y.S.3d 1, 2015 N.Y. App. Div. LEXIS 7289 (N.Y. App. Div. 1st Dep't 2015).

The attorney-client privilege (CPLR 4503) may not be invoked to quash an information subpoena (CPLR 5224, subd [a], par 3) served on the attorneys for two corporate judgment debtors seeking information as to whether the attorneys “have any matters pending in their office” on behalf of the judgment debtors since the existence of litigated matters and a description thereof cannot constitute a confidential communication since they involve other persons; if a litigated matter exists, its existence cannot be confidential since its existence is necessarily known to the other party or parties to the litigation and, if a litigated matter is in the public record, its existence cannot constitute a confidential communication. Also, the attorney-client privilege (CPLR 4503) may not be invoked to quash an information subpoena (CPLR 5224, subd [a], par 3) served on the attorneys for two corporate judgment debtors seeking information as to whether anyone besides the attorneys hold any money in escrow on behalf of the judgment debtors since, although the attorneys may have learned of any such escrow money by means of a confidential communication received from their clients, they have not set forth any facts indicating that any such information was received by them “in the course of professional employment” and have thus failed to meet their burden of showing the existence of circumstances justifying the recognition of the privilege; moreover, the judgment creditor would be entitled to a copy of any escrow agreement in any event since the contents of an escrow agreement made among the judgment debtor, escrow agent, and the third party would not constitute a confidential communication and, since the client could be compelled to produce any

such escrow agreement, the attorney may also be compelled to produce it. And further, the attorney-client privilege (CPLR 4503) may not be invoked to quash an information subpoena (CPLR 5224, subd [a], par 3) served on the attorneys for two corporate judgment debtors seeking information as to whether the named attorneys hold any money in escrow on behalf of or in connection with the judgment debtors since the disclosure of whether or not money is being held in escrow does not involve the giving of evidence of “confidential communication” made “in the course of professional employment”; attorneys holding money in escrow on behalf of the judgment debtor are holding such money in trust for at least one party other than the judgment debtor to be delivered upon the happening of some event or the performance of some condition and it is the presence of a third party that deprives the “communication” of protection; attorneys acting as escrow agents for clients may be required to disclose that fact since they are acting as agents for the client in a capacity which is not within the scope of professional employment. While the attorney-client privilege (CPLR 4503), which applies to a corporate client, as well as to others, is clearly inapplicable to set aside a restraining notice (CPLR 5222) served on the attorneys for two corporate judgment debtors since such a notice merely serves the purpose of preventing the garnishee from surrendering the debtor’s assets pending obtaining of a turnover order and does not seek the disclosure of a “confidential communication”, the privilege may apply to an information subpoena (CPLR 5224, subd [a], par 3) since the judgment creditor may be seeking “evidence of a confidential communication” by means of such a subpoena and, since the use of an information subpoena arises out of the action which gave rise to the judgment, it may be regarded, for purposes of the privilege, as an attempt to seek discovery in an “action” within the meaning of CPLR 4503; the fact that the judgment debtor corporations are defunct and no longer functioning or operating does not preclude invocation of the privilege nor need the privilege be raised by the client; the burden of showing the existence of circumstances justifying the recognition of the privilege is upon the party asserting it. Randy International, Ltd. v Automatic Compactor Corp., 97 Misc. 2d 977, 412 N.Y.S.2d 995, 1979 N.Y. Misc. LEXIS 2026 (N.Y. Civ. Ct. 1979).

Information concerning corporate judgment debtor was not subject to attorney-client privilege, and disclosure was required under information subpoena served on debtor's attorney pursuant to CLS CPLR § 5223, where creditor sought to determine whether debtor's attorney was holding debtor's money or property as escrow agent, whether attorney was indebted to debtor, names of debtor's officers and directors, and identification of any documents prepared by attorney for debtor (on assumption that such request referred to executed documents rather than drafts). However, information concerning corporate judgment debtor was subject to attorney-client privilege, and was not subject to disclosure under information subpoena served on debtor's attorney pursuant to CLS CPLR § 5223, where creditor sought to determine (1) home addresses of officers and directors, (2) names and home addresses of debtor's accountant and of all parties known to be indebted to debtor or holding money or property on debtor's behalf, (3) names and addresses of all banks in which debtor had accounts, and (4) identification of all litigation to which debtor was party, to extent that information was communicated in confidence to debtor's attorney for purpose of obtaining legal advice or representation, even though other parties might also know same information. Art Bd., Inc. v Worldwide Business Exchange Corp., 134 Misc. 2d 350, 510 N.Y.S.2d 973, 1986 N.Y. Misc. LEXIS 3108 (N.Y. Civ. Ct. 1986).

Although an automobile manufacturer's "suspension orders" were relevant because they might lead to the production of admissible evidence, they were confidential communications from attorney to client that were protected as attorney-client privileged documents by N.Y. C.P.L.R. 4503. Capitano v Ford Motor Co., 831 N.Y.S.2d 687, 15 Misc. 3d 561, 2007 N.Y. Misc. LEXIS 453 (N.Y. Sup. Ct. 2007).

In their trade name infringement and unfair competition action, plaintiffs, under a settlement agreement, in which plaintiffs released all claims in the original company, could not claim ownership of the attorney-client privilege under their argument that they owned the privilege because they were in partnership with the original company and so they could, by reason of their ownership as partners, waive the privilege. R.G. Egan Equip., Inc. v Polymag Tek, Inc., 195 Misc. 2d 280, 758 N.Y.S.2d 763, 2002 N.Y. Misc. LEXIS 1849 (N.Y. Sup. Ct. 2002).

Mere transfer of assets with no attempt to continue the pre-existing operation generally does not transfer the attorney-client relationship; the practical consequences of the transaction must show that the pre-existing operation of a business entity is continued in order for the attorney-client relationship to transfer to the new owners of the business or the assets. R.G. Egan Equip., Inc. v Polymag Tek, Inc., 195 Misc. 2d 280, 758 N.Y.S.2d 763, 2002 N.Y. Misc. LEXIS 1849 (N.Y. Sup. Ct. 2002).

In their trade name infringement and unfair competition action, plaintiffs, under an agreement which sold them certain of the original business's assets, but not all of that business, could not claim ownership of the attorney-client privilege under their argument that they owned the privilege by reason of their purchase and could waive the privilege. R.G. Egan Equip., Inc. v Polymag Tek, Inc., 195 Misc. 2d 280, 758 N.Y.S.2d 763, 2002 N.Y. Misc. LEXIS 1849 (N.Y. Sup. Ct. 2002).

Corporation was ordered to disclose numerous e-mails and attachments thereto which did not consist of privileged communications between an attorney and client and did not fall under a derivative attorney-client privilege, as they were not communications between an attorney and client and of a primarily or predominantly legal character; but, two documents that met this definition were withheld from disclosure. Delta Fin. Corp. v Morrison, 820 N.Y.S.2d 745, 13 Misc. 3d 441, 2006 N.Y. Misc. LEXIS 2052 (N.Y. Sup. Ct. 2006).

Denial of a motion filed by a CEO and a CFO to compel a corporation to produce legal memoranda was improper because the CEO and the CFO showed that the records sought were necessary to protect their personal responsibility interests in charges brought by the State arising from their conduct as corporate officers, regardless of the corporation's claim of attorney-client privilege; under both New York and Delaware law, the fact that the CEO and the CFO were no longer directors was not fatal to their motion to compel, since their conduct while directors had been called into question and the inspection was needed to prepare their defenses. The corporation, as the proponent, failed to sustain its burden of establishing that the privilege was assertable. People v Greenberg, 50 A.D.3d 195, 851 N.Y.S.2d 196, 2008 N.Y.

App. Div. LEXIS 1395 (N.Y. App. Div. 1st Dep't), app. dismissed, 10 N.Y.3d 894, 861 N.Y.S.2d 266, 891 N.E.2d 299, 2008 N.Y. LEXIS 1515 (N.Y. 2008).

In a lawsuit between banks for claims arising from a fraudulent trading scheme by one of plaintiff's traders, documents used to generate a report, which was commissioned by plaintiff to investigate the fraud and to recommend improvements to corporate governance, and which was publicly released, were not covered by the attorney-client privilege of N.Y. C.P.L.R. 4503(a)(1) because the documents were not prepared primarily to provide legal advice, but to generate the report, which did not provide legal advice. Allied Ir. Banks, p.l.c. v Allied Ir. Banks, p.l.c. v Bank of Am., N.A., 240 F.R.D. 96, 2007 U.S. Dist. LEXIS 4247 (S.D.N.Y. 2007).

In cases involved a series of claims concerning a corporate acquisition gone awry, for purportedly privileged documents, plaintiffs' counsel was to produce a categorical privilege log; because the terms of the principal's employment were a crucial part of the acquisition negotiation and final deal, and counsel's communications with the principal concerning the employment agreement were for obtaining legal advice on the corporation's behalf the attorney-client privilege protected all confidential communications between counsel and the principal concerning his employment agreement. Orbit One Communs., Inc. v Numerex Corp., 255 F.R.D. 98, 2008 U.S. Dist. LEXIS 90981 (S.D.N.Y. 2008).

In cases involved a series of claims concerning a corporate acquisition gone awry, for purportedly privileged documents, plaintiffs' counsel was to produce a categorical privilege log; because defendant could not both pursue the rights of the buyer and simultaneously assume the attorney-client rights of the buyer's adversary (the corporation), the corporation retained ownership of, and continued to control, the attorney-client privilege as to confidential communications with plaintiffs' counsel concerning the acquisition transaction. Orbit One Communs., Inc. v Numerex Corp., 255 F.R.D. 98, 2008 U.S. Dist. LEXIS 90981 (S.D.N.Y. 2008).

16. Criminal prosecutions

In first degree grand larceny trial arising from defendant's forging of mortgage satisfaction which he then used to obtain $1.7 million bank loan, defendant failed to establish that telephone conversation he had with his former attorney in which he acknowledged that he had fraudulently used former attorney's notary stamp without notary's knowledge was protected by attorney-client privilege and was improperly admitted at trial, where defendant failed to satisfy his burden of proving that he contacted his former attorney for purpose of obtaining legal advice. People v Allen, 88 N.Y.2d 831, 644 N.Y.S.2d 478, 666 N.E.2d 1351, 1996 N.Y. LEXIS 681 (N.Y. 1996).

Petitioners, attorneys for several women who testified before a Grand Jury concerning their involvement in prostitution, are required to answer questions before the Grand Jury concerning the nature of the fee arrangements between petitioners, their former clients and any third party who may have retained them to appear for the prostitutes. The fee arrangements between attorney and client do not ordinarily constitute a confidential communication because they have no direct relevance to the legal advice to be given and thus petitioners may not assert a privilege based upon the representation of the prostitutes; nor does the payment of legal fees by a third person, in and of itself, create an attorney-client relationship between the attorney and his client's benefactor sufficient to sustain a claim of privilege. Furthermore, no claim of privilege necessarily arises out of petitioners' characterization of the third party as a client, since the burden of proving the existence of the privilege is upon the party asserting it and the mere statement that the third party was a "client" does not satisfy this burden; moreover, even if petitioners' assertion that the third party had at one time also been a "client" were accepted, this fact alone would not be determinative, since no attorney-client relationship arises out of the payment of another's attorney's fees and the fortuitous circumstance that the attorney had on occasion represented the payor on other matters is of no consequence because such representation has no relation to the confidential communication which is claimed to be privileged. Priest v Hennessy, 51 N.Y.2d 62, 431 N.Y.S.2d 511, 409 N.E.2d 983, 1980 N.Y. LEXIS 2911 (N.Y. 1980).

Defendant’s statements concerning his involvement in crimes, made to his former employees who were associated with law firm which once represented defendant in unrelated matter, were not protected by attorney-client privilege and thus not subject to suppression where there was no evidence from which to conclude that phone calls were made for purpose of obtaining legal advice. People v Wiesner, 129 A.D.2d 753, 514 N.Y.S.2d 514, 1987 N.Y. App. Div. LEXIS 45447 (N.Y. App. Div. 2d Dep't 1987), app. denied, 70 N.Y.2d 658, 518 N.Y.S.2d 1053, 512 N.E.2d 579, 1987 N.Y. LEXIS 17914 (N.Y. 1987), app. dismissed, 71 N.Y.2d 1034, 530 N.Y.S.2d 570, 526 N.E.2d 62, 1988 N.Y. LEXIS 2435 (N.Y. 1988).

When ruling on defendant's motion to vacate the judgment of conviction entered upon his plea of guilty to criminal possession of a forged instrument, the trial court was permitted to consider the affirmation of defendant's trial counsel who averred that he made adjournment requests on defendant's behalf that resulted in more than 100 days of prereadiness delay. Counsel's statements did not constitute privileged information, because an adjournment request made by counsel in open court is not a privileged communication. People v Lydecker, 116 A.D.3d 1160, 983 N.Y.S.2d 675, 2014 N.Y. App. Div. LEXIS 2403 (N.Y. App. Div. 3d Dep't), app. denied, 24 N.Y.3d 962, 996 N.Y.S.2d 222, 20 N.E.3d 1002, 2014 N.Y. LEXIS 3126 (N.Y. 2014).

Trial court did not err in admitting a letter that defendant wrote to his counsel and delivered by a third party because the third party was acting as defendant’s agent, and the trial court’s determination that defendant specifically authorized disclosure of the letter to the third party’s mother established that defendant had no reasonable expectation of confidentiality and, therefore, defeated the attorney-client privilege. People v Henry, 173 A.D.3d 1470, 103 N.Y.S.3d 656, 2019 N.Y. App. Div. LEXIS 5038 (N.Y. App. Div. 3d Dep't), app. denied, 34 N.Y.3d 932, 133 N.E.3d 399, 109 N.Y.S.3d 699, 2019 N.Y. LEXIS 2833 (N.Y. 2019).

Despite prosecutor’s assurance that he would not call informer as witness, where it was defense’s intention to call informer as defense witness if prosecutor declined to avail himself of informer’s testimony, counsel who had previously represented informer should be allowed to

withdraw as attorney for defendant. People v Ayala, 86 Misc. 2d 99, 381 N.Y.S.2d 655, 1976 N.Y. Misc. LEXIS 2402 (N.Y. County Ct. 1976).

Evidentiary rule of exclusion known as “common interest” privilege, which covers confidential communications by one party to attorney for another party when joint defense effort or strategy has been agreed on by parties and their attorneys, applied to defendant’s criminal trial, and court would sustain any objection to testimony covered by that privilege. People v Pennachio, 167 Misc. 2d 114, 637 N.Y.S.2d 633, 1995 N.Y. Misc. LEXIS 647 (N.Y. Sup. Ct. 1995).

Attorney for mother accused of first degree custodial interference for having removed her child from state during ongoing matrimonial action would not be compelled to answer questions before grand jury as to mother’s whereabouts or his contacts and meetings with her, since such information was protected by attorney-client privilege. In re Grand Jury Investigation, 175 Misc. 2d 398, 669 N.Y.S.2d 179, 1998 N.Y. Misc. LEXIS 16 (N.Y. County Ct. 1998).

17. —Homicides

Attorney’s oral, out-of-court statement to police that incriminated his client in murder of his wife should not have been admitted into evidence in People’s case-in-chief, even though attorney is deemed agent of his client, where neither attorney nor defendant testified at trial; such admission would be violation of attorney-client privilege absent waiver by defendant, and agency relationship does not alone equate to waiver. People v Cassas, 84 N.Y.2d 718, 622 N.Y.S.2d 228, 646 N.E.2d 449, 1995 N.Y. LEXIS 4 (N.Y. 1995).

In prosecution for murder of his 6-day-old son, in which defendant’s girlfriend was to be chief prosecution witness, defendant was not entitled to obtain records of attorney who represented his girlfriend in connection with charges of abuse and neglect brought against both of them, despite contention that attorney’s communications with girlfriend could contain statements contrary to her contemplated trial testimony and that denial of access was tantamount to denial of right of confrontation, since (1) disclosure of communications would place girlfriend in jeopardy of incriminating herself and facing possible criminal prosecution, (2) disclosure would

undermine attorney-client privilege in area where its full vitality should be undisturbed, and (3) there was no evidence that girlfriend was accomplice or that she was receiving favorable treatment from district attorney. People v Radtke, 155 Misc. 2d 21, 588 N.Y.S.2d 69, 1992 N.Y. Misc. LEXIS 352 (N.Y. Sup. Ct. 1992), aff'd, 219 A.D.2d 739, 631 N.Y.S.2d 763, 1995 N.Y. App. Div. LEXIS 9567 (N.Y. App. Div. 2d Dep't 1995).

Under either an absolute privilege or a balancing approach for piercing the attorney client privilege, statements which may exonerate a murder suspect must also be admissible to warrant violating the privilege after the declarant's death. People v Vespucci, 192 Misc. 2d 685, 745 N.Y.S.2d 391, 2002 N.Y. Misc. LEXIS 710 (N.Y. County Ct. 2002).

18. Decedents' estates, generally

Subd (b) of this section is based on the notion that the client's wish for confidence comes to an end with his death, save from matters that will disgrace his memory. In re Will of Levinsky, 23 A.D.2d 25, 258 N.Y.S.2d 613, 1965 N.Y. App. Div. LEXIS 4576 (N.Y. App. Div. 2d Dep't 1965).

In proceeding by executrix under CLS SCPA § 2103 to recover contents of decedent's home from decedent's nephew by marriage and his wife, who asserted that decedent made inter vivos gift of property to them, Surrogate's Court did not err in admitting testimony of decedent's former neighbor and attorney that decedent informed him of gift, since no attorney-client relationship existed between witness and decedent at time, and decedent's statement to witness was accordingly admissible under hearsay exception as statement against declarant's proprietary interest. In re Estate of Tremaine, 156 A.D.2d 862, 549 N.Y.S.2d 857, 1989 N.Y. App. Div. LEXIS 15936 (N.Y. App. Div. 3d Dep't 1989).

Decedent's estate was not entitled to invoke the attorney-client privilege to shield disclosure of the decedent's medication log because the medication log was made for the purpose of keeping a medical record rather than as a confidential communication made for the purpose of legal services; there was no indication that the decedent's attorney specifically asked her to draft the

medication log. Wrubleski v Mary Imogene Bassett Hosp., 163 A.D.3d 1248, 81 N.Y.S.3d 606, 2018 N.Y. App. Div. LEXIS 5161 (N.Y. App. Div. 3d Dep't 2018).

Decedent's widow ordered to produce the original copy of her will to the representatives of the decedent's estate, to determine whether certain personal property belonged to her, under evidence that the decedent and his wife both submitted information to the attorney to prepare wills for each of them; that the husband supplied some of the information to the attorney on behalf of his wife and there were some mutual provisions under the widow's will and the will simultaneously executed by the decedent. In re Newton's Will, 62 Misc. 2d 553, 309 N.Y.S.2d 284, 1970 N.Y. Misc. LEXIS 1724 (N.Y. Sur. Ct. 1970).

Conversations between attorney and client concerning client's will were admissible in proceedings to admit said will to probate where attorney-client privilege (CPLR 4503, subd a) was waived initially by the presence of a third person during said discussions, and where attorney was required to disclose such conversations under the provisions of CPLR 4503, subd b. In re Will of Dehn, 75 Misc. 2d 85, 347 N.Y.S.2d 821, 1973 N.Y. Misc. LEXIS 1655 (N.Y. Sur. Ct. 1973).

Executor's former attorney is precluded from petitioning for executor's removal, and his office associate is precluded from acting as counsel on such petition. In re Estate of Howard, 80 Misc. 2d 754, 363 N.Y.S.2d 711, 1975 N.Y. Misc. LEXIS 2254 (N.Y. Sur. Ct. 1975).

In proceeding to determine validity of petitioners' claim against testatrix' estate based on oral agreement between petitioners and testatrix, statutory exception to attorney-client privilege in actions involving probate, validity, or construction of a will was not applicable. Where claimants in a proceeding to determine validity of their claim against decedent's estate based on alleged oral agreement between them and decedent did not state that promise allegedly made by testatrix was made in course of communications when she and her husband jointly consulted attorney, nor that any such joint consultation ever occurred, any statements allegedly made by either the testatrix or her husband to their attorney who prepared her will concerning oral

agreement were privileged attorney-client communications. In re Estate of Swantee, 90 Misc. 2d 519, 394 N.Y.S.2d 547, 1977 N.Y. Misc. LEXIS 2099 (N.Y. Sur. Ct. 1977).

While an attorney will generally not be compelled to testify as to matters revealed to him by his client within the course of his professional employment, there are, however, several exceptions, one of which permits an attorney to disclose information as to the preparation, execution, or revocation of any will or other will of an instrument in an action involving the probate, validity, or construction of a will. In re Estate of Be Gar, 110 Misc. 2d 562, 442 N.Y.S.2d 764, 1981 N.Y. Misc. LEXIS 3122 (N.Y. Sur. Ct. 1981).

Fiduciary of decedent's estate has obligation to disclose to estate beneficiary advice of counsel as to matters affecting estate administration, subject to limitation that fiduciary should have protection of attorney-client privilege when litigation has commenced or is anticipated against him by beneficiary. In re Estate of Baker, 139 Misc. 2d 573, 528 N.Y.S.2d 470, 1988 N.Y. Misc. LEXIS 234 (N.Y. Sur. Ct. 1988).

Diary prepared by objectant at her attorney's direction in connection with contested probate proceeding was privileged communication protected from disclosure under CLS CPLR §§ 3101(b) and 4503, and confidentiality of communication was not waived by objectant's disclosure of it to her husband and mother; when information protected by attorney-client privilege is disclosed in communication which is itself privileged, there is no waiver. In re Estate of Pretino, 150 Misc. 2d 371, 567 N.Y.S.2d 1009, 1991 N.Y. Misc. LEXIS 106 (N.Y. Sur. Ct. 1991).

19. —Attorney as fiduciary

An attorney who, in his capacity as a trustee, issued mortgage participation certificates to a decedent, did so as a business contact of the decedent and not in his professional capacity, and he was not incompetent to testify concerning the transaction under the provisions of subd (a) of this section. In re Will of Levinsky, 23 A.D.2d 25, 258 N.Y.S.2d 613, 1965 N.Y. App. Div. LEXIS 4576 (N.Y. App. Div. 2d Dep't 1965).

Any knowledge gained as result of representing executor as attorney constitutes privileged information. In re Estate of Howard, 80 Misc. 2d 754, 363 N.Y.S.2d 711, 1975 N.Y. Misc. LEXIS 2254 (N.Y. Sur. Ct. 1975).

20. —Attorney as document drafter

Where deceased scrivener of will could have been "required" under CPLR § 4503, subd b to testify as to latent ambiguity in testatrix's devise of "my residence and its contents", testatrix's federal estate tax return, prepared by said scrivener, and which claimed that a farm parcel was an exempt devise to a church, was evidence that testatrix did not treat said parcel as a unity with her separately maintained dwelling plot. In re Estate of Schermerhorn, 31 N.Y.2d 739, 338 N.Y.S.2d 111, 290 N.E.2d 149, 1972 N.Y. LEXIS 1057 (N.Y. 1972).

An attorney who was a witness to a decedent's will and was part scrivener of the instrument drawn by his law partner was competent as a witness to resolve any ambiguity in the instrument, under subd (b) of this section. In re Will of Levinsky, 23 A.D.2d 25, 258 N.Y.S.2d 613, 1965 N.Y. App. Div. LEXIS 4576 (N.Y. App. Div. 2d Dep't 1965).

In a discovery proceeding to compel a widow to turn over three bearer bonds to the executor, testimony by the attorney who drew testator's will that testator told him the bonds had been purchased by testator with his money was inadmissible because it was hearsay and a privileged communication. In re Estate of Fishman, 32 A.D.2d 1063, 303 N.Y.S.2d 905, 1969 N.Y. App. Div. LEXIS 3272 (N.Y. App. Div. 2d Dep't 1969), aff'd, 27 N.Y.2d 809, 315 N.Y.S.2d 866, 264 N.E.2d 356, 1970 N.Y. LEXIS 1046 (N.Y. 1970).

In a probate proceeding, testimony by an attorney, not the attorney who prepared the will and the codicils, of a telephone conversation he had with decedent some three years after the execution of the last codicil was not admissible under CPLR 4503, subdivision [b]. In re Will of Delano, 38 A.D.2d 769, 327 N.Y.S.2d 908, 1972 N.Y. App. Div. LEXIS 5621 (N.Y. App. Div. 3d Dep't 1972).

Administrator waived the attorney-client privilege under N.Y. C.P.L.R. 4503 when he challenged a trust's validity, and the testimony of the decedent's attorney who prepared the trust instrument was admissible. Matter of DelGatto, 98 A.D.3d 975, 950 N.Y.S.2d 738, 2012 N.Y. App. Div. LEXIS 6074 (N.Y. App. Div. 2d Dep't 2012).

Where the court sustained an objection to the testimony of the attorney-draftsman, who was also a residuary legatee, upon the authority of CPLR § 4519, CPLR § 4503 has no application to that ruling. In re Kindermann's Will, 48 Misc. 2d 607, 265 N.Y.S.2d 538, 1965 N.Y. Misc. LEXIS 1234 (N.Y. Sur. Ct. 1965), aff'd, 27 A.D.2d 856, 278 N.Y.S.2d 546, 1967 N.Y. App. Div. LEXIS 4554 (N.Y. App. Div. 2d Dep't 1967).

Mere fact that an attorney is the draftsman of a testator's will does not operate to invoke the statutory exception to the attorney-client privilege in all estate proceedings; the proceeding wherein disclosure is sought must involve the probate, validity, or construction of a will. In re Estate of Swantee, 90 Misc. 2d 519, 394 N.Y.S.2d 547, 1977 N.Y. Misc. LEXIS 2099 (N.Y. Sur. Ct. 1977).

A motion by the preliminary executrices of decedent's estate for a protective order striking a demand for production of any will which decedent's widow, a principal beneficiary of his estate, may have executed either exercising or failing to exercise her limited testamentary power of appointment under decedent's will would be granted; communications relating to the preparation, contents and execution of a will, when made within the scope of the attorney-client relationship, not in the presence of a stranger, and not made to the attorney with the intention that he communicate its contents to someone else constitute privileged communications between attorney and client under CPLR § 4503(a); moreover, the demand for production of a will during the lifetime of a testator does not fall within the exception set forth in CPLR § 4503(b), which has never been held to require the client or attorney to disclose information as to the preparation, execution, contents or revocation of the will of a living person. In re Estate of Johnson, 127 Misc. 2d 1048, 488 N.Y.S.2d 355, 1985 N.Y. Misc. LEXIS 2783 (N.Y. Sur. Ct. 1985).

Crime-fraud exception applied to documents that the romantic partner of an art owner, now deceased, claimed were covered by the attorney-client privilege and the work product privilege because the communications contained in the documents were probative on the question of whether invoices, which could be relevant to the issues regarding ownership of the art, were fraudulently or wrongfully modified and whether there was any wrongdoing intended. Stevens v Cahill, 50 Misc. 3d 918, 19 N.Y.S.3d 863, 2015 N.Y. Misc. LEXIS 4209 (N.Y. Sur. Ct. 2015).

21. Defamation

In defamation action, Supreme Court's direction limiting plaintiff's discovery was too broad where it prevented disclosure of subject and substance of meetings between defendant sheriff and his attorney unless sheriff waived attorney-client privilege, since privilege extends only to communications, not facts or general subjects of discussion, and sheriff, attorney and other witnesses at meeting might have possessed knowledge and facts that would not be privileged and which were properly discoverable. Stanwick v A.R.A. Services, Inc., 124 A.D.2d 1041, 508 N.Y.S.2d 755, 1986 N.Y. App. Div. LEXIS 62396 (N.Y. App. Div. 4th Dep't 1986).

In action brought against hospital for defamation, inter alia, 2 reports issued by hospital's law committee, which were made in order to render legal services or advice to hospital, were protected from disclosure by attorney-client privilege since law committee was comprised entirely of attorneys whose function was not to act as another investigator but to determine whether another committee's findings were based on sufficient evidence, to address issues such as legality of bringing charges against member of hospital staff, and to interpret hospital by-laws. Kraus v Brandstetter, 185 A.D.2d 300, 586 N.Y.S.2d 270, 1992 N.Y. App. Div. LEXIS 9034 (N.Y. App. Div. 2d Dep't 1992).

22. Employment matters

In tort action against board of education brought by principal who had been suspended from his position pending disciplinary hearing under CLS Educ § 3020-a, court properly denied board's

motion to strike certain purportedly privileged letters under CLS CPLR § 4503 and CLS Gen Mun § 805-a, both of which prohibit disclosure of confidential information, since neither statute provides for such relief once documents are made public. Sullivan v Board of Education, 131 A.D.2d 836, 517 N.Y.S.2d 197, 1987 N.Y. App. Div. LEXIS 48280 (N.Y. App. Div. 2d Dep't 1987).

23. Insurance cases

Memorandum prepared by health insurer's associate in-house counsel, addressing possible lawsuit against insurer based on its rejection of claims for services performed by plaintiff doctor, was barred from discovery as privileged under CLS CPLR § 4503 since (1) it was internal, confidential document, (2) nobody outside insurer's company had access to it, (3) document contained counsel's evaluations and legal advice, and (4) document contained information from insurer's employees; moreover, memorandum was immune from discovery as attorney's work product under CLS CPLR § 3101 since it reflected use of attorney's skills in analyzing language used in rejection letters. Rossi v Blue Cross & Blue Shield, 140 A.D.2d 198, 528 N.Y.S.2d 51, 1988 N.Y. App. Div. LEXIS 5108 (N.Y. App. Div. 1st Dep't 1988), aff'd, 73 N.Y.2d 588, 542 N.Y.S.2d 508, 540 N.E.2d 703, 1989 N.Y. LEXIS 668 (N.Y. 1989).

Minutes of Environmental Claims Reinsurance Group, inadvertently disclosed by defendants, were not protected by attorney-client privilege where communications contained in minutes pertained mainly to commercial concerns and were not primarily or predominantly of legal character. Aetna Cas. & Sur. Co. v Certain Underwriters at Lloyd's, 263 A.D.2d 367, 692 N.Y.S.2d 384, 1999 N.Y. App. Div. LEXIS 7800 (N.Y. App. Div. 1st Dep't 1999), app. dismissed, 94 N.Y.2d 875, 705 N.Y.S.2d 6, 726 N.E.2d 483, 2000 N.Y. LEXIS 6 (N.Y. 2000).

In a dispute over insurance coverage in which the parties agreed that New York law applied to the attorney-client privilege, while counsel performed some claims handling functions, the record did not support plaintiffs' allegation that counsel made the ultimate coverage determinations on those claims. As the insurer retained counsel to provide legal advice regarding coverage issues

and lawsuits regarding second-mortgage loans, and the communications between the insurer and counsel were intended to be and actually were kept confidential, the attorney-client privilege applied to documents that reflected counsel's legal opinions and conclusions. Drennen v Certain Underwriters at Lloyd's of London (In re Residential Capital, LLC), 575 B.R. 29, 2017 Bankr. LEXIS 1951 (Bankr. S.D.N.Y. 2017).

24. Landlord and tenant matters

Tenant was not entitled to blanket order barring her former attorney from testifying as to whether he had notified her that judgment had been entered against her in summary proceeding for recovery of real property, since tenant's claim that she had not been notified amounted to possible charge of misconduct against attorney and triggered exception to rule of confidential communications between attorney and client. General Realty Assocs. v Walters, 136 Misc. 2d 1027, 519 N.Y.S.2d 530, 1987 N.Y. Misc. LEXIS 2542 (N.Y. Civ. Ct. 1987).

25. Malpractice

In legal malpractice action in which plaintiff alleged that he informed defendant law firm of facts pertaining to possible Labor Law cause of action against community college at which he was injured while working at construction site, defendant firm was not entitled to depose successor counsel regarding subsequent handling of plaintiff's action against college since such information was not directly relevant to negligence charged (failure to file notice of claim within 90 days). Bennett v Oot & Assocs., 162 Misc. 2d 160, 616 N.Y.S.2d 163, 1994 N.Y. Misc. LEXIS 348 (N.Y. Sup. Ct. 1994).

26. Matrimonial cases

Husband's e-mails with his counsel were privileged under N.Y. C.P.L.R. 4503(a) in a divorce case because the husband met his burden of demonstrating that he and his counsel communicated as an attorney and client and that the information sought to be protected from

disclosure was a “confidential communication” made to the attorney for the purpose of obtaining legal advice or services; leaving a note with his user name and password on the desk in the parties’ common office was not a waiver of the privilege. However, the husband waived the privilege as to one page of one email because, by leaving a hard copy of part of a document on the desk in a room used by multiple people, the husband failed to prove that he took reasonable steps to maintain the confidentiality of that page. Parnes v Parnes, 80 A.D.3d 948, 915 N.Y.S.2d 345, 2011 N.Y. App. Div. LEXIS 156 (N.Y. App. Div. 3d Dep't 2011).

Authenticated and exemplified copy of divorce decree was admissible under CPLR 4543 to establish that defendant ex-husband was not married to patient at the time she incurred hospital expenses for which hospital sought to hold ex-husband liable, irrespective of whether such documentary evidence complied with the provisions of CPLR 4540. Lenox Hill Hospital v Firkal, 74 Misc. 2d 577, 345 N.Y.S.2d 325, 1973 N.Y. Misc. LEXIS 1904 (N.Y. Civ. Ct. 1973).

Attorney for mother accused of first degree custodial interference for having removed her child from state during ongoing matrimonial action would not be compelled to answer questions before grand jury as to mother’s whereabouts or his contacts and meetings with her, since such information was protected by attorney-client privilege. In re Grand Jury Investigation, 175 Misc. 2d 398, 669 N.Y.S.2d 179, 1998 N.Y. Misc. LEXIS 16 (N.Y. County Ct. 1998).

27. Personal injury matters, generally

Documents sought by personal injury plaintiffs were not protected from disclosure by attorney-client privilege or as attorney work product or material prepared for litigation, even though documents were labeled “Litigation Study,” where primary impetus for and predominant purpose of study were to improve safety and design of seating components of defendant’s vehicles, and there was no evidence that study was generated to assist its legal staff in defense of any pending or future litigation. Kellner v GMC, 273 A.D.2d 444, 712 N.Y.S.2d 363, 2000 N.Y. App. Div. LEXIS 7392 (N.Y. App. Div. 2d Dep't 2000).

28. —Automobile accidents

County attorney (CA) was not sheriff's attorney with respect to sheriff's involvement in automobile accident where sheriff never made any affirmative approach to obtaining legal advice from CA and CA was merely conducting investigation on behalf of county into whether sheriff was acting within scope of his authority when accident occurred so as to determine CA's obligation, if any, to defend sheriff; thus, statements made by sheriff to CA during course of investigation did not fall within attorney-client privilege and CA did not violate any ethical rule by disclosing statements to district attorney since they were conceivably indicative of commission of crime by sheriff. Dooley v Boyle, 140 Misc. 2d 177, 531 N.Y.S.2d 161, 1988 N.Y. Misc. LEXIS 358 (N.Y. Sup. Ct. 1988).

29. —Products liability

In diversity products liability action against cigarette manufacturer incorporated in Delaware, New York attorney-client privilege applied to manufacturer's assertion of privilege in response to plaintiffs' discovery request where plaintiffs were New York citizens, manufacturer advertised and sold cigarettes in New York, and plaintiff-smoker resided in New York when she smoked and was allegedly harmed by manufacturer's cigarettes; moreover, documents sought related to entity headquartered in New York and existing under New York law. Sackman v Liggett Group, 920 F. Supp. 357, 1996 U.S. Dist. LEXIS 11701 (E.D.N.Y.), vacated, 167 F.R.D. 6, 1996 U.S. Dist. LEXIS 7343 (E.D.N.Y. 1996).

Internal investigation of truck manufacturer which had been conducted by attorney in private practice, who was retained by manufacturer for purpose of investigating and providing legal advice about manufacturer's handling of certain litigation-related documents, was protected by attorney-client privilege and was not admissible in products liability action against manufacturer based on alleged design defect in truck's fuel system. Ake v GMC, 942 F. Supp. 869, 1996 U.S. Dist. LEXIS 16017 (W.D.N.Y. 1996).

30. Trusts

In action by beneficiaries of trust to remove trustee, beneficiaries, on showing of good cause, could compel trustee to disclose substance of legal advice he had obtained from attorneys whom he consulted, at least in part, in his capacity as trustee. Hoopes v Carota, 74 N.Y.2d 716, 544 N.Y.S.2d 808, 543 N.E.2d 73, 1989 N.Y. LEXIS 660 (N.Y. 1989).

In trust accounting proceeding, law firm which covertly issued subpoenas and employed deceitful means to secure discovery of privileged material from adverse party's former law firm without notifying party, then used improperly obtained information to prejudice of that party, would be disqualified from further participation in proceeding although disqualification would deprive client of its chosen counsel; disqualification was necessary (1) to assure that tainted knowledge would not subtly influence firm's conduct of litigation, and (2) to prevent offending firm from deriving further benefit from information secured in violation of basic ethical precepts and statutory obligations. In re Beiny, 129 A.D.2d 126, 517 N.Y.S.2d 474, 1987 N.Y. App. Div. LEXIS 43671 (N.Y. App. Div. 1st Dep't), reh'g denied, 132 A.D.2d 190, 522 N.Y.S.2d 511, 1987 N.Y. App. Div. LEXIS 51548 (N.Y. App. Div. 1st Dep't 1987).

In action alleging that defendant engaged in self-dealing and other misconduct both as trustee of trusts set up to hold and administer voting stock of family corporation, and as officer and director of corporation, court properly overruled defendant's invocation of attorney-client privilege as to questions propounded in his examination before trial, concerning legal fee arrangements and whether he obtained legal advice (in connection with transactions described in complaint) as trustee or as corporate officer; ordinarily, information as to whether attorney was consulted, fee arrangements, and identity of lawyer or client is not deemed confidential. Court also properly overruled defendant's invocation of attorney-client privilege as to questions propounded in his examination before trial concerning his communications with attorney regarding transactions described in complaint since (1) defendant was plaintiffs' fiduciary in both of his capacities and thus was not entitled to shield absolutely his communications with attorney regarding pertinent affairs of corporation, and (2) good cause for disclosure was shown. Hoopes v Carota, 142

A.D.2d 906, 531 N.Y.S.2d 407, 1988 N.Y. App. Div. LEXIS 8046 (N.Y. App. Div. 3d Dep't 1988), aff'd, 74 N.Y.2d 716, 544 N.Y.S.2d 808, 543 N.E.2d 73, 1989 N.Y. LEXIS 660 (N.Y. 1989).

In testamentary trust accounting proceeding, documents authored by testator's grandson were properly found to be protected by attorney-client privilege where (1) grandson averred that he prepared such documents for purpose of protecting family's legal rights and obtaining legal advice, and that he gave documents to recipient law firms in confidence, and (2) affidavits of testator's daughters confirmed grandson's status as family counsel as well as family's expectations of confidentiality in underlying communications. In re Estate of Saxton, 219 A.D.2d 85, 640 N.Y.S.2d 287, 1996 N.Y. App. Div. LEXIS 2790 (N.Y. App. Div. 3d Dep't 1996), app. dismissed, 245 A.D.2d 733, 665 N.Y.S.2d 742, 1997 N.Y. App. Div. LEXIS 12951 (N.Y. App. Div. 3d Dep't 1997).

In a trust dispute, it was not error to decline to admit the contents of a conversation between a trustee's attorney and another attorney related to the proceedings because (1) the conversation was protected by the attorney-client privilege, and (2) the trustee did not "open the door" during examination of a witness, and (3) any error was harmless, as admitting the conversation would not have changed the result. Matter of Wellington Trusts. JPMorgan Chase Bank, N.A. (Sarah P.), 165 A.D.3d 809, 85 N.Y.S.3d 497, 2018 N.Y. App. Div. LEXIS 6675 (N.Y. App. Div. 2d Dep't 2018).

31. Other and miscellaneous

Plaintiff attorney failed to demonstrate relevant public interest in disclosure of record of accounting against his law firm, and thus court properly granted defendants' motion to seal record (to extent of sealing accounting, objections to accounts, hearing transcript and exhibits, post-hearing briefs and special referee's report), since plaintiff failed to explain why disclosure of financial information concerning firm and its clients was necessary to facilitate public discussion of policy issues such as financing and management of law firms. Dawson v White & Case, 184 A.D.2d 246, 584 N.Y.S.2d 814, 1992 N.Y. App. Div. LEXIS 7707 (N.Y. App. Div. 1st Dep't 1992).

Police association was not entitled to reports it sought from a city under N.Y. Pub. Off. Law § 87(2)(a) of the New York Freedom of Information Law, N.Y. Pub. Off. Law art. 6, because an in camera review of the reports showed that they were privileged attorney-client information under N.Y. C.P.L.R. 4503; they were primarily and predominantly legal in nature and, in their full content and context, were made to render legal advice or services. Matter of Rye Police Assn. v City of Rye, 34 A.D.3d 591, 824 N.Y.S.2d 163, 2006 N.Y. App. Div. LEXIS 13482 (N.Y. App. Div. 2d Dep't 2006).

State superintendent of insurance was entitled to compel various financial entities to disclose all communications with counsel pertaining to a transaction wherein a parent company took a loan from an insurer to repay a debt to the entities that rendered the insurer insolvent as the attorney-client privilege in N.Y. C.P.L.R. § 4503(a) could not be invoked where the client communications might have been in furtherance of a fraudulent scheme. Superintendent of Ins. of State of New York v Chase Manhattan Bank, 43 A.D.3d 514, 840 N.Y.S.2d 479, 2007 N.Y. App. Div. LEXIS 8849 (N.Y. App. Div. 3d Dep't 2007).

Report commissioned by defendant's counsel, and prepared by a consultant regarding third-party defendant's (TPD) management and administration of the workers' compensation claims of defendant's employees was not protected by the attorney-client privilege since: (1) the report was commissioned in order to resolve the parties' impasse over defendant's unpaid assessments; (2) the report did not include any legal advice, legal analysis or discussion of legal issues or disclose confidences of defendant; (3) the report was based almost exclusively on information provided by TPD; and (4) the report was not a confidential communication and any privilege was waived. NYAHSA Servs., Inc., Self-Insurance Trust v People Care Inc., 155 A.D.3d 1208, 64 N.Y.S.3d 725, 2017 N.Y. App. Div. LEXIS 7876 (N.Y. App. Div. 3d Dep't 2017).

The disclosure of a client’s whereabouts, after she had left without permission the hospital where she was receiving psychiatric care, violating her part of a plea bargaining agreement under which her sentencing for manslaughter would be delayed until after her release from the hospital, does not violate the attorney-client privilege (CPLR 4503, subd [a]) since the client’s

disclosure of her whereabouts to her attorney was not a confidence affecting her defense and a confidence received by an attorney in order to advance a criminal or fraudulent purpose is beyond the scope of the privilege; accordingly, the attorney must disclose his client's whereabouts to the Grand Jury. In re Doe, 101 Misc. 2d 388, 420 N.Y.S.2d 996, 1979 N.Y. Misc. LEXIS 2689 (N.Y. Sup. Ct. 1979).

In action against his former client, attorney was required to comply with subpoena which sought information in relation to former client's indebtedness, even if such information was given to him by client during course of his representation, since information relating to finances of attorney's client, including any fee arrangement, is not confidential, and thus attorney would not be violating CLS Code of Prof Respons DR 4-101 by divulging it. Kalimar, Inc. v Camera King, Inc., 137 Misc. 2d 317, 520 N.Y.S.2d 523, 1987 N.Y. Misc. LEXIS 2695 (N.Y. Civ. Ct. 1987).

There is no per se privilege or "blanket privilege" for every communication between members of a litigation committee just based solely upon their membership in a litigation committee; it is essential that the proponents of the privilege set forth facts and evidence to support the invocation of the attorney-client privilege. Notwithstanding that non-lawyers are conducting a conversation; a communication is the subject to the attorney-client privilege if the record is clear that a conversation with counsel is the subject of the communication between the non-lawyers. Delta Fin. Corp. v Morrison, 829 N.Y.S.2d 877, 15 Misc. 3d 308, 2007 N.Y. Misc. LEXIS 230 (N.Y. Sup. Ct. 2007).

Where a witness refused, on the advice of counsel, to answer two deposition questions involving communications among members of a litigation committee outside the direct presence of an attorney, the attorney-client privilege did not apply, because (1) the questions only concerned a defendant's financial resources to fund the litigation and a meeting of the litigation committee, (2) conversations amongst the litigation committee outside the presence of counsel were not protected, and (3) there was no evidence that privileged information was discussed. Delta Fin. Corp. v Morrison, 829 N.Y.S.2d 877, 15 Misc. 3d 308, 2007 N.Y. Misc. LEXIS 230 (N.Y. Sup. Ct. 2007).

In plaintiffs' trade name infringement and unfair competition action, the trial court ruled that two letters by the wife of the deceased owner of a business that originally owned the trade name, and who was acting for that business, to the business's attorney were not admissible just because they might be admissible under hearsay rule exceptions; the attorney-client privilege prevented their admissibility. R.G. Egan Equip., Inc. v Polymag Tek, Inc., 195 Misc. 2d 280, 758 N.Y.S.2d 763, 2002 N.Y. Misc. LEXIS 1849 (N.Y. Sup. Ct. 2002).

Because no retainer was presented with respect to retention of counsel or of an engineer after a sewer backup or of who commissioned the engineer's report and for what purpose, , the report was not privileged under N.Y. C.P.L.R. 4503(a); accordingly, a reclamation district was not entitled to a protective order under N.Y. C.P.L.R. 3101(d) and 3103 or to quash the subpoena served on the engineer. Siewert v Greater Atl. Beach Water Reclamation Dist., 241 N.Y.L.J. 112, 2009 N.Y. Misc. LEXIS 5802 (N.Y. Sup. Ct. 2009), dismissed, 918 N.Y.S.2d 397, 29 Misc. 3d 1219(A), 2010 N.Y. Misc. LEXIS 5390 (N.Y. Sup. Ct. 2010), dismissed, 918 N.Y.S.2d 397, 29 Misc. 3d 1219(A), 2010 N.Y. Misc. LEXIS 5392 (N.Y. Sup. Ct. 2010).

In a Mental Hygiene Law art. 81 guardianship proceeding, the presence of witnesses to the execution of the subject advance directives did not waive the attorney-client privilege since the presence of these third-parties was deemed necessary to enable the attorney client communication and the alleged incapacitated person would have a reasonable expectation that the confidential nature of her communication with her attorney would be maintained. Matter of Nunziata (Nancy K.), 72 Misc. 3d 529, 148 N.Y.S.3d 879, 2021 N.Y. Misc. LEXIS 2619 (N.Y. Sup. Ct. 2021).

Neither the temporary guardian for an alleged incapacitated person (AIP), or court-appointed counsel for the AIP, had waived on behalf of the AIP the attorney-client privilege codified at CPLR § 4503 because neither had affirmatively placed the subject matter of the privileged communications between her former attorney and the AIP in issue. The petition alleged serious improprieties and overreaching by the cross-petitioner, and invoking the attorney-client privilege and cross-examining cross petitioner's witnesses on behalf of an AIP, whose bests interests and

personal civil liberties were at stake, did not constitute the waiver of the attorney-client privilege between the AIP and her prior attorney. Matter of Nunziata (Nancy K.), 72 Misc. 3d 529, 148 N.Y.S.3d 879, 2021 N.Y. Misc. LEXIS 2619 (N.Y. Sup. Ct. 2021).

In a federal suit based on diversity of citizenship wherein both parties were competing to join an Indian Tribe's efforts to develop a casino and the attorney-client and work product privileges analysis arising from the parties' competing motions to compel discovery was informed by New York Law, the court held that documents prepared by various casino related entities (defendants) at the request of its independent auditor, reporting generally on pending litigation, as well as communications between defendants and a law firm engaged in lobbying were shielded from disclosure pursuant to the attorney-client privilege. In turn, a joint alliance agreement between a trust represented by two trustees (plaintiffs) and the Indian Tribe and documents sought relative to formation of the trust were subject to the attorney-client privilege and no waiver of the privilege was made based upon the sharing of those documents with third parties. Vacco v Harrah's Operating Co., 2008 U.S. Dist. LEXIS 88158 (N.D.N.Y. Oct. 29, 2008), dismissed sub nom. Bernstein v Harrah's Operating Co., 661 F. Supp. 2d 186, 2009 U.S. Dist. LEXIS 89172 (N.D.N.Y. 2009).

Nonparty contractor was equated with plaintiff insurance companies for purposes of analyzing the availability of N.Y. C.P.L.R. § 4503(a)'s attorney-client privilege to protect from disclosure communications between the contractor and plaintiffs' counsel because (1) plaintiffs did not have resources to oversee the day-to-day operations of a construction project, (2) the contractor had the authority to make decisions related to the construction project on plaintiffs' behalf, (3) the contractor's involvement in the negotiation of various contracts had clear legal ramifications for plaintiffs, (4) the contractor's services in connection with pursuing payment from defendant nursing home, including articulating positions on behalf of plaintiffs, required consultation with and the receipt of legal advice from plaintiffs' counsel, and (5) the contractor's representatives likely possessed information that was not possessed by anyone else employed by plaintiffs. Am.

Mfrs. Mut. Ins. Co. v Payton Lane Nursing Home, Inc., 2008 U.S. Dist. LEXIS 100080 (E.D.N.Y. Dec. 11, 2008).

In a dispute between a township authority and a developer involving a conflict of law between New York and Pennsylvania, a magistrate judge's order denying the authority's motion to compel production of documents was affirmed, on other grounds, because the law of New York, which controlled in the case, prevented their disclosure but for one document under the attorney-client privilege. Harrisburg Auth. v CIT Capital USA, Inc., 716 F. Supp. 2d 380, 2010 U.S. Dist. LEXIS 122823 (M.D. Pa. 2010).

In a suit between banks for claims arising out of a rogue trading scheme, an international auditor, which was an entity related to plaintiff's U.S. auditor, was not entitled to withhold certain documents, which were communications between the international auditor and personnel of its member firms under the common interest rule branch of the attorney-client privilege, N.Y. C.P.L.R. § 4503(a)(1), because there was no showing that these documents concerned legal advice in pending or reasonably anticipated litigation, particularly as there was no evidence that anyone at the international auditor actual thought that it was threatened with litigation at the time of these communications. Allied Ir. Banks, P.L.C. v Bank of Am., N.A., 252 F.R.D. 163, 2008 U.S. Dist. LEXIS 23605 (S.D.N.Y. 2008).

In a breach of contract suit against loan guarantors, where a lender was entitled to the return of nine inadvertently produced documents out of a total production of 250,000 pages because they were protected by the attorney-client privilege of N.Y. C.P.L.R § 4503(a)(1), the fact that the lender and its counsel discussed the optimum time for filing suit did not establish that the documents were not privileged under the crime/fraud exception. HSH Nordbank AG N.Y. Branch v Swerdlow, 259 F.R.D. 64, 2009 U.S. Dist. LEXIS 63711 (S.D.N.Y. 2009).

II. Under Former Civil Practice Laws

A. In General

32. Generally

It is for the court, and not the attorney, to determine, from the facts appearing, whether the attorney was acting in a professional capacity. In this case, the attorney also kept a liquor shop, and the conversation, which the court decided was privileged, was held therein. Bacon v Frisbie, 80 N.Y. 394, 80 N.Y. (N.Y.S.) 394, 1880 N.Y. LEXIS 110 (N.Y. 1880); see Loveridge v Hill, 96 N.Y. 222, 96 N.Y. (N.Y.S.) 222, 1884 N.Y. LEXIS 485 (N.Y. 1884).

CPA § 353 applied to any examination of person as witness unless waived. New York City Council v Goldwater, 284 N.Y. 296, 31 N.E.2d 31, 284 N.Y. (N.Y.S.) 296, 1940 N.Y. LEXIS 838 (N.Y. 1940).

History and nature of attorney-client privilege discussed. People ex rel. Vogelstein v Warden of County Jail, 270 N.Y.S. 362, 150 Misc. 714, 1934 N.Y. Misc. LEXIS 1164 (N.Y. Sup. Ct. 1934), aff'd, 242 A.D. 611, 271 N.Y.S. 1059, 1934 N.Y. App. Div. LEXIS 6222 (N.Y. App. Div. 1934), limited, In re Kaplan, 8 N.Y.2d 214, 203 N.Y.S.2d 836, 168 N.E.2d 660, 1960 N.Y. LEXIS 1068 (N.Y. 1960).

Preliminary commission may issue to take testimony of attorneys in London, consulted by widow’s deceased husband, to determine if she was present as wife or partner and whether communications were privileged. In re Katz' Estate, 81 N.Y.S.2d 21, 192 Misc. 416, 1948 N.Y. Misc. LEXIS 2692 (N.Y. Sur. Ct. 1948).

CPA § 353 protected confidence reposed in attorney by client, and not reverse. Mutual Life Ins. Co. v Tailored Woman, Inc., 86 N.Y.S.2d 524, 194 Misc. 192, 1949 N.Y. Misc. LEXIS 1789 (N.Y. Sup. Ct.), modified, 275 A.D. 759, 88 N.Y.S.2d 890, 1949 N.Y. App. Div. LEXIS 4344 (N.Y. App. Div. 1949).

Attorney’s motion to vacate on ground of privilege subpoena duces tecum to produce complete file of another action involving same accident and same parties, but in reverse, was denied as

premature, since until disclosure was called for at trial, privilege could not be determined. Pye v Hoehn, 31 Misc. 2d 712, 221 N.Y.S.2d 10, 1961 N.Y. Misc. LEXIS 2284 (N.Y. Sup. Ct. 1961).

Where the refusal of a witness to testify to confidential communications between him and his client was based upon his opinion given under oath that the transaction was such as he was privileged from testifying, he is properly sustained in his refusal. McClure v Goodenough, 12 N.Y.S. 459, 1890 N.Y. Misc. LEXIS 3324 (N.Y. Super. Ct. 1890).

Where testimony objected to as being a professional communication made to the witness as an attorney, also included testimony which was competent, the objection is too broad. Brennan v Hall, 14 N.Y.S. 864, 60 Hun 583, 1891 N.Y. Misc. LEXIS 2535 (N.Y. Sup. Ct. 1891), aff'd, 131 N.Y. 160, 29 N.E. 1009, 131 N.Y. (N.Y.S.) 160, 1892 N.Y. LEXIS 1008 (N.Y. 1892).

Court should have allowed cross-interrogatories to be inserted, under Civil Prac. Rules 126, 130, though answers might have been inadmissible as communications between client and attorney. Percival v Richardson, 165 N.Y.S. 1 (N.Y. Sup. Ct. 1917).

33. Who may claim privilege

Neither client nor counsel may be compelled to produce document having status of privileged communication between attorney and client when privilege is claimed by client. Bloodgood v Lynch, 293 N.Y. 308, 56 N.E.2d 718, 293 N.Y. (N.Y.S.) 308, 1944 N.Y. LEXIS 1316 (N.Y. 1944).

Privilege of nondisclosure of communication between attorney and client belongs to client alone. People v Shapiro, 308 N.Y. 453, 126 N.E.2d 559, 308 N.Y. (N.Y.S.) 453, 1955 N.Y. LEXIS 984 (N.Y. 1955).

Where witnesses, defendant’s present and former attorneys, were served with subpoenas, defendant, upon claim of privilege, being the party principally concerned by the adverse effect of the subpoenas served upon them, and being the party whose rights are invaded by such process, may apply to the court to vacate their subpoenas. Beach v Oil Transfer Corp., 23 Misc. 2d 47, 199 N.Y.S.2d 74, 1960 N.Y. Misc. LEXIS 3320 (N.Y. Sup. Ct. 1960).

The privilege accorded to an attorney is the privilege of the client and not of the attorney, so, where the client had already disclosed the substance of the communication, the attorney could not claim the privilege. In re Fisher, 51 F.2d 424, 1931 U.S. Dist. LEXIS 1520 (D.N.Y. 1931).

34. —Death of client, effect

CPA § 353 was enacted for the protection of the client and his property interest and did not authorize an attorney to refuse to disclose information imparted to him in his professional capacity by a client now deceased, where such information did not tend to disgrace the client's memory and was a benefit to his estate. King v Ashley, 96 A.D. 143, 89 N.Y.S. 482, 1904 N.Y. App. Div. LEXIS 2235 (N.Y. App. Div.), aff'd, 179 N.Y. 281, 72 N.E. 106, 179 N.Y. (N.Y.S.) 281, 1904 N.Y. LEXIS 1096 (N.Y. 1904).

Death of client bars waiver of privileges. In re Williams' Estate, 39 N.Y.S.2d 741, 179 Misc. 805, 1942 N.Y. Misc. LEXIS 2364 (N.Y. Sur. Ct. 1942).

If one who draws a will or advises the testator is employed to contest its probate, he cannot claim privilege against testifying. Sheridan v Houghton, 16 Hun 628 (N.Y.), modified, 84 N.Y. 643, 84 N.Y. (N.Y.S.) 643, 1881 N.Y. LEXIS 448 (N.Y. 1881).

If an attorney or counsel, having drawn a will or advised legatee upon it, accepts a retainer to contest its probate, he cannot claim a privilege from testifying as a witness at the instance of the proponents. Sheridan v Houghton, 16 Hun 628 (N.Y.), modified, 84 N.Y. 643, 84 N.Y. (N.Y.S.) 643, 1881 N.Y. LEXIS 448 (N.Y. 1881).

35. Employees of attorney

CPA § 353 was broad enough to exclude the testimony of a managing clerk of an attorney as to confidential communications between the managing clerk of the attorney and a client, but it was otherwise where such communication was made openly, in the presence of two other persons

and not secretly and confidentially. Lecour v Importers' & Traders' Nat'l Bank, 61 A.D. 163, 70 N.Y.S. 419, 1901 N.Y. App. Div. LEXIS 907 (N.Y. App. Div. 1901).

An attorney's clerk could (former rule) testify as to a transaction between the client and a third party which he saw in the attorney's office. Cooperson v Pollon, 62 N.Y.S. 772, 30 Misc. 619, 1900 N.Y. Misc. LEXIS 125 (N.Y. App. Term 1900).

Testimony of attorney's secretary or stenographer as to preparation or execution of the will, where they are subscribing witnesses, see In re Putnam's Will, 238 N.Y.S. 112, 135 Misc. 311, 1929 N.Y. Misc. LEXIS 998 (N.Y. Sur. Ct. 1929), aff'd, 231 A.D. 707, 245 N.Y.S. 777, 1930 N.Y. App. Div. LEXIS 7059 (N.Y. App. Div. 1930).

Clerk and stenographer of attorney could not testify. Wallace v Wallace, 137 N.Y.S. 43 (N.Y. App. Div. 1911), aff'd, 158 A.D. 273, 143 N.Y.S. 1148, 1913 N.Y. App. Div. LEXIS 8037 (N.Y. App. Div. 2d Dep't 1913).

36. Manner or form of privileged communications generally

The rule prohibiting an attorney from disclosing communications made by a client is not confined to communications made in contemplation of a suit, but extends to any matter which is the proper subject of professional employment. Britton v Lorenz, 45 N.Y. 51, 45 N.Y. (N.Y.S.) 51, 1871 N.Y. LEXIS 99 (N.Y. 1871).

A paper executed between attorney and client and having reference to the action is privileged. Genet v Ketchum, 62 N.Y. 626, 62 N.Y. (N.Y.S.) 626, 1875 N.Y. LEXIS 575 (N.Y. 1875).

Every communication, made by a client to his counsel for the purpose of professional advice or assistance, is privileged, whether it relates to a suit pending or contemplated, or to any other matter proper for such advice or aid; and it makes no difference whether a fee was or was not paid. Bacon v Frisbie, 80 N.Y. 394, 80 N.Y. (N.Y.S.) 394, 1880 N.Y. LEXIS 110 (N.Y. 1880); see Loveridge v Hill, 96 N.Y. 222, 96 N.Y. (N.Y.S.) 222, 1884 N.Y. LEXIS 485 (N.Y. 1884).

So far as an attorney is called upon simply to prove execution and delivery of an instrument, or the contents of that instrument, knowledge of which he had procured by reading it and which was not acquired by a communication from the client to the attorney, is not within the privilege. Schattman v American Credit Indem. Co., 34 A.D. 392, 54 N.Y.S. 225, 1898 N.Y. App. Div. LEXIS 2284 (N.Y. App. Div. 1898).

Except he is an attesting witness to a will, in no case is an attorney permitted to make disclosure in respect to contents of any documents or other information communicated to him in the course of his professional employment by the client. In re Eno's Will, 196 A.D. 131, 187 N.Y.S. 756, 1921 N.Y. App. Div. LEXIS 5495 (N.Y. App. Div. 1921).

A copy of an affidavit by a witness sent by him to his attorney for the purpose of having it exhibited to the defendant’s attorney in negotiations for settlement of other litigation between the witness and the defendant, among others, is not privileged. Hernandez v Brookdale Mills, 201 A.D. 325, 194 N.Y.S. 283, 1922 N.Y. App. Div. LEXIS 6312 (N.Y. App. Div. 1922).

Wire-tap transactions of conversations between wife and her attorneys, showing that her reconciliation with husband was inspired by her lawyers and was part of strategy of lawsuit rather than reflection of spontaneous desire for reconciliation, were admissible in husband’s action for separation against wife. Erlich v Erlich, 278 A.D. 244, 104 N.Y.S.2d 531, 1951 N.Y. App. Div. LEXIS 3785 (N.Y. App. Div. 1951).

Communications made to judges by those standing in a confidential relationship to them are privileged, and surrogate and chief clerk and stenographer stand in a confidential relationship in all matters in the consulting room. In re Cohen's Estate, 174 N.Y.S. 427, 105 Misc. 724, 1919 N.Y. Misc. LEXIS 1139 (N.Y. Sur. Ct. 1919).

A former counsel for a party to a litigation cannot be required to produce papers received from such client, without the client’s consent. Re Estate of Hoyt, 1887 N.Y. Misc. LEXIS 9 (N.Y. Sur. Ct. May 1, 1887).

37. —Letters

A communication by letter is privileged as much as an oral communication directly between the attorney and the client, and the privilege also extends to a letter written to the attorney by one who was the agent of the client for that purpose. Le Long v Siebrecht, 196 A.D. 74, 187 N.Y.S. 150, 1921 N.Y. App. Div. LEXIS 5484 (N.Y. App. Div. 1921).

A communication by letter between attorney and his client or latter's agent is privileged, as much as oral communication between attorney and client. Application of Ryan, 281 A.D. 953, 120 N.Y.S.2d 110, 1953 N.Y. App. Div. LEXIS 3866 (N.Y. App. Div.), app. dismissed, 306 N.Y. 11, 114 N.E.2d 183, 306 N.Y. (N.Y.S.) 11, 1953 N.Y. LEXIS 780 (N.Y. 1953).

A communication by letter between attorney and client is as much privileged as an oral communication. Hollien v Kaye, 87 N.Y.S.2d 782, 194 Misc. 821, 1949 N.Y. Misc. LEXIS 2000 (N.Y. Sup. Ct. 1949).

Letters or communications from a client to his attorney or from attorney to his client are privileged. In re Whitlock, 2 N.Y.S. 683, 1888 N.Y. Misc. LEXIS 736 (N.Y. Sup. Ct. 1888), rev'd, 3 N.Y.S. 855, 51 Hun 351, 1889 N.Y. Misc. LEXIS 115 (N.Y. App. Term 1889).

CPA § 353 did not shield a party from a disclosure by him of the facts relating to his delivery to his attorney of letters which were the legitimate subject of inquiry. Chellis v Chapman, 7 N.Y.S. 78, 52 Hun 613, 1889 N.Y. Misc. LEXIS 938 (N.Y. Sup. Ct. 1889), aff'd, 125 N.Y. 214, 26 N.E. 308, 125 N.Y. (N.Y.S.) 214, 1891 N.Y. LEXIS 1476 (N.Y. 1891).

38. Waiver of privilege

CPA § 353 prohibited an attorney from disclosing a communication from a client in the course of his professional employment, except when expressly waived as provided by CPA § 354. In re Cunnion's Will, 201 N.Y. 123, 94 N.E. 648, 201 N.Y. (N.Y.S.) 123, 1911 N.Y. LEXIS 1223 (N.Y. 1911).

Where defendant took stand in robbery prosecution, he did not waive his privileged communication with his attorneys, and it was error to permit prosecutor to ask witness whether he had ever told his attorney where his girl friend might be found, where defendant claimed that he was in automobile near scene of crime in order to meet her. People v Shapiro, 308 N.Y. 453, 126 N.E.2d 559, 308 N.Y. (N.Y.S.) 453, 1955 N.Y. LEXIS 984 (N.Y. 1955).

Defendants' counsel, on trial of action for personal injuries arising out of automobile accident, used, in conjunction with cross-examination of one of plaintiffs, certain statement signed by said plaintiff and given by him to his insurance company about time of accident, and which contained his version thereof, and then offered statement in evidence and it was so received without objection. Plaintiff, by failing to object to introduction of statement in evidence, waived any privilege which may have existed in regard to statement due to relationship between said plaintiff and his insurance company or its legal department. Cote v Knickerbocker Ice Co., 290 N.Y.S. 483, 160 Misc. 658, 1936 N.Y. Misc. LEXIS 1401 (N.Y. Mun. Ct. 1936).

Defendant claimed attorney-client privilege by moving to vacate subpoenas duces tecum served on his present and former attorneys as witnesses. Beach v Oil Transfer Corp., 23 Misc. 2d 47, 199 N.Y.S.2d 74, 1960 N.Y. Misc. LEXIS 3320 (N.Y. Sup. Ct. 1960).

Where attorney testified in prior action between same parties, such disclosure did not apply to later action. Matison v Matison, 95 N.Y.S.2d 837, 1950 N.Y. Misc. LEXIS 1484 (N.Y. Sup. Ct.), aff'd, 277 A.D. 770, 97 N.Y.S.2d 550, 1950 N.Y. App. Div. LEXIS 3247 (N.Y. App. Div. 1950).

In action for decedent's death at hands of mentally deranged war veteran, privileged character of Veterans' Administration files are shorn of their confidential and privileged overdress when such records are required by process of United States court to be produced in any suit or proceeding therein pending. Fahey v United States, 18 F.R.D. 231, 1955 U.S. Dist. LEXIS 4097 (D.N.Y. 1955).

B. Requisites For Privilege

39. Generally

CPA § 353 did not apply to communications made to attorney outside scope of his professional employment or to matters handled in capacity other than professional. Myles E. Rieser Co. v Loew's, Inc., 81 N.Y.S.2d 861, 194 Misc. 119, 1948 N.Y. Misc. LEXIS 2981 (N.Y. Sup. Ct. 1948).

40. Existence of relation of attorney and client

Before CPA § 353 could apply in any case, a contract relation of attorney and client must have existed based upon an employment by the client. Reinhan v Dennin, 103 N.Y. 573, 9 N.E. 320, 103 N.Y. (N.Y.S.) 573, 4 N.Y. St. 261, 1886 N.Y. LEXIS 1094 (N.Y. 1886).

The relation of attorney and client must be shown to exist before CPA § 353 applied. Rousseau v Bleau, 131 N.Y. 177, 30 N.E. 52, 131 N.Y. (N.Y.S.) 177, 1892 N.Y. LEXIS 1010 (N.Y. 1892).

Admissions made by the defendant to an attorney at law at a time when the attorney was representing other parties and had no professional relations with the defendant, are not privileged. People v Freeman, 133 A.D. 630, 118 N.Y.S. 199, 1909 N.Y. App. Div. LEXIS 2241 (N.Y. App. Div. 1909), rev'd, 203 N.Y. 267, 96 N.E. 413, 203 N.Y. (N.Y.S.) 267, 1911 N.Y. LEXIS 780 (N.Y. 1911).

Where the attorney for defendant, who had never had any professional relations with such witness, obtains possession of papers of a witness, he may examine the witness upon them and offer them in evidence, notwithstanding the witness claims to have communicated such papers to his attorney and that they are privileged. Hernandez v Brookdale Mills, 201 A.D. 325, 194 N.Y.S. 283, 1922 N.Y. App. Div. LEXIS 6312 (N.Y. App. Div. 1922).

Error to exclude testimony tending to show that the relationship of attorney and client did not exist. Joseph v Rosen, 228 A.D. 674, 239 N.Y.S. 603, 1930 N.Y. App. Div. LEXIS 12231 (N.Y. App. Div. 1930).

Questions propounded to a witness, an attorney, did not call for disclosure of client's communications, but were not improper, since he was not attorney for the party to whom the questions referred. Yachnin v Bedford Home Builders, Inc., 228 A.D. 795, 240 N.Y.S. 44, 1930 N.Y. App. Div. LEXIS 13231 (N.Y. App. Div. 1930).

Patent agent, registered and authorized to practice before U. S. Patent Office was not "attorney" within CPA § 353. Kent Jewelry Corp. v Kiefer, 113 N.Y.S.2d 12, 202 Misc. 778, 1952 N.Y. Misc. LEXIS 2724 (N.Y. Sup. Ct. 1952).

Attorney-client relationship was required to be shown by attorney who had been served with subpoena duces tecum to produce his records relating to horse racing in New York. Weil v New York State Com. to Investigate Harness Racing, 128 N.Y.S.2d 874, 205 Misc. 614, 1954 N.Y. Misc. LEXIS 2340 (N.Y. Sup. Ct.), modified, 283 A.D. 808, 128 N.Y.S.2d 409, 1954 N.Y. App. Div. LEXIS 5390 (N.Y. App. Div. 1954).

An attorney who was also surrogate's clerk was permitted to testify to communications made to him by plaintiff as to the claim in suit, when plaintiff endeavored to procure his services in arranging a settlement, it appeared that he declined to act. Held, that the evidence was properly admitted. Avery v Mattice, 9 N.Y.S. 166, 56 Hun 639, 1890 N.Y. Misc. LEXIS 68 (N.Y. Sup. Ct. 1890), aff'd, 132 N.Y. 601, 30 N.E. 1152, 132 N.Y. (N.Y.S.) 601, 1892 N.Y. LEXIS 1274 (N.Y. 1892).

41. —Attorney for both or several parties

CPA § 353 did not apply to a controversy between beneficiaries of mutual wills with regard to communications by husband and wife executing the wills, who appeared together before their attorney. Wallace v Wallace, 216 N.Y. 28, 109 N.E. 872, 216 N.Y. (N.Y.S.) 28, 1915 N.Y. LEXIS 769 (N.Y. 1915).

One who was attorney for two legatees cannot testify, in an action by him as executor of one of such legatees to impress a legacy on the property of the estate, to transactions had by him with

such legatees in which he was acting as their attorney. Appell v Halbe, 207 A.D. 315, 202 N.Y.S. 364, 1923 N.Y. App. Div. LEXIS 5955 (N.Y. App. Div. 1923).

The communication of an assured to his counsel, who was not only counsel for the assured under the insurance contract, but counsel for the insurer as well, prior to the trial of a negligence action, was not privileged, and should have been received in evidence. Shafer v Utica Mut. Ins. Co., 248 A.D. 279, 289 N.Y.S. 577, 1936 N.Y. App. Div. LEXIS 6135 (N.Y. App. Div. 1936).

In an action to recover on a bond accompanying a mortgage on real property, the testimony of the attorney who handled the transaction was properly admitted was not privileged under CPA § 353 where parties on both sides consulted this witness for their mutual benefit. Martin v Slifkin, 249 A.D. 860, 293 N.Y.S. 213, 1937 N.Y. App. Div. LEXIS 10028 (N.Y. App. Div. 1937).

In an action to recover the principal and interest due on a bond by the defendant husband and wife, testimony of an attorney, who represented both the lender and the borrowers, to the effect that the wife told him that the sum of $200 was to be deducted from the loan, was competent both as an admission and as a declaration by the wife against her interest. Such testimony was not inadmissible by reason of the provisions of this section. Gottwald v Medinger, 257 A.D. 107, 12 N.Y.S.2d 241, 1939 N.Y. App. Div. LEXIS 7684 (N.Y. App. Div. 1939).

In action by one of two parties to a chattel mortgage against a third party, testimony of attorney who acted for both of them regarding statements made as to the purpose of the mortgage was incompetent. Jaycox v Busfield, 238 N.Y.S. 121, 135 Misc. 356, 1929 N.Y. Misc. LEXIS 1000 (N.Y. Sup. Ct. 1929).

Where two or more persons consult an attorney for their mutual benefit, the privilege cannot be invoked in litigation between such parties, but can in litigation between them and strangers. In re Kive's Estate, 248 N.Y.S. 677, 139 Misc. 273, 1931 N.Y. Misc. LEXIS 1164 (N.Y. Sur. Ct. 1931).

Conversations between attorney and his clients are not privileged in a subsequent litigation arising between the representatives of such clients. 27 Hun 331.

42. —Communications before subsequently established relation of attorney and client

Attorney for testatrix could testify to conversations with her preceding his employment. Rintelen v Schaefer, 158 A.D. 477, 143 N.Y.S. 631, 1913 N.Y. App. Div. LEXIS 7374 (N.Y. App. Div. 1913).

Statements made by an insured to his own insurance carrier for possible use at a trial by a lawyer to be selected by such carrier to defend the insured is privileged as a work product, and not subject to examination. Schulgasser v Young, 25 Misc. 2d 788, 206 N.Y.S.2d 81, 1960 N.Y. Misc. LEXIS 2362 (N.Y. Sup. Ct. 1960), app. dismissed, 12 A.D.2d 994, 215 N.Y.S.2d 480 (N.Y. App. Div. 4th Dep't 1961).

43. Requirement that communication be connected with professional advice or consultation

Statements made to an attorney for the purpose of enabling him to decide a complaint in his client’s action are privileged. Sibley v Waffle, 16 N.Y. 180, 16 N.Y. (N.Y.S.) 180, 1857 N.Y. LEXIS 57 (N.Y. 1857).

A communication to an attorney in reference to his client’s personal estate, made upon retaining him to draw affidavit to procure a reduction of an assessment of such estate is privileged. Williams v Fitch, 18 N.Y. 546, 18 N.Y. (N.Y.S.) 546, 1859 N.Y. LEXIS 240 (N.Y. 1859).

The information given by a client, from which an attorney drew a complaint, is privileged, although the complaint was not sworn to or read over to the client. Armstrong v People, 70 N.Y. 38, 70 N.Y. (N.Y.S.) 38, 1877 N.Y. LEXIS 583 (N.Y. 1877).

Whenever a communication relates to a matter, so connected with the employment as attorney or counsel, as to afford a presumption that it was the ground of the address by the client, it is privileged, and this even as to a third party, on the ground of public policy. Bacon v Frisbie, 80 N.Y. 394, 80 N.Y. (N.Y.S.) 394, 1880 N.Y. LEXIS 110 (N.Y. 1880); see Loveridge v Hill, 96 N.Y. 222, 96 N.Y. (N.Y.S.) 222, 1884 N.Y. LEXIS 485 (N.Y. 1884).

44. Where communication in course of personal or business relations only

The mere fact that witness happens to be a lawyer does not disqualify him from testifying to conversations had with or advice given to other parties; for such advice may be given in the interest of third parties or because of “friendly interest in the person to whom it is given.” Kitz v Buckmaster, 45 A.D. 283, 61 N.Y.S. 64, 1899 N.Y. App. Div. LEXIS 2562 (N.Y. App. Div. 1899).

When it appears that an alleged contract of sale was made by the defendants’ attorney in their absence, and that he was acting as their business agent rather than in his professional capacity, the privileged secrecy does not obtain. Avery v Lee, 117 A.D. 244, 102 N.Y.S. 12, 1907 N.Y. App. Div. LEXIS 230 (N.Y. App. Div. 1907).

An attorney employed solely to procure a loan for a client acts merely as agent and communications between them in regard to the loan are not privileged. Lifschitz v O'Brien, 143 A.D. 180, 127 N.Y.S. 1091, 1911 N.Y. App. Div. LEXIS 794 (N.Y. App. Div. 1911).

Where, after the claim of a judgment creditor had accrued, the judgment debtor transferred his house, representing nearly all his property, to his wife for one dollar, and she borrowed money on the house and died and by her will made him her sole beneficiary for life, the court held that an attorney for the wife, who had received from her a considerable part of the money she borrowed on the house, must disclose to the unpaid judgment creditor why he received the money and what disposition had been made of it, and this because the attorney, upon receiving the money, became her agent or attorney in fact, and to that extent lost his privilege to refuse to disclose a communication by her. Phoebus v Webster, 82 N.Y.S. 868, 40 Misc. 528, 1903 N.Y. Misc. LEXIS 210 (N.Y. Sup. Ct. 1903).

Attorney who acted in a friendly way, or as a man of business, as well as professionally, could testify to matters not arising out of his professional or confidential relation. In re Campbell's Will, 136 N.Y.S. 1086 (N.Y. Sur. Ct. 1912).

The privilege of an attorney does not extend to the circumstance of a mutual contract between himself and his client—such as a mortgage—when its validity is attacked by creditors. Foster v Wilkinson, 37 Hun 242 (N.Y.).

A communication made to an attorney who had acted as a mutual friend of the parties in an attempted settlement of the claim by defendant, the indorser of the note in suit, relative to the indorsement, is not privileged. Haulenbeek v McGibbon, 14 N.Y.S. 393, 60 Hun 26, 1891 N.Y. Misc. LEXIS 2020 (N.Y. Sup. Ct. 1891).

45. Confidential nature of communications generally

The relation of attorney and client is as a matter of law regarded as highly confidential. In re Smith's Estate, 266 N.Y.S. 666, 148 Misc. 585, 1933 N.Y. Misc. LEXIS 1319 (N.Y. Sur. Ct. 1933), aff'd, 246 A.D. 563, 282 N.Y.S. 845, 1935 N.Y. App. Div. LEXIS 9089 (N.Y. App. Div. 1935).

The purpose of CPA § 353 was merely to prevent the disclosure of communications made by a client to his attorney which were confidential in nature. In re Krup's Will, 18 N.Y.S.2d 427, 173 Misc. 578, 1940 N.Y. Misc. LEXIS 1518 (N.Y. Sur. Ct. 1940).

Written statements by insured to liability insurer as to facts of accident were privileged, whether made to lawyer representative of insurer or to layman representative for transmission to insurer’s attorney when retained. Hollien v Kaye, 87 N.Y.S.2d 782, 194 Misc. 821, 1949 N.Y. Misc. LEXIS 2000 (N.Y. Sup. Ct. 1949).

Statement by client as to child’s legitimacy to member of law firm was privileged. In re Olson's Estate, 73 N.Y.S.2d 876 (N.Y. Sur. Ct. 1947).

Communications by deceased to witnesses, which were neither professional nor confidential, were not privileged. In re Hall's Estate, 120 N.Y.S.2d 886, 1953 N.Y. Misc. LEXIS 1702 (N.Y. Sur. Ct. 1953).

Advice or opinion, given by attorney to trustee in administration of trust, was privileged. In re Prudence-Bonds Corp., 76 F. Supp. 643, 1948 U.S. Dist. LEXIS 2883 (D.N.Y. 1948), aff'd, Prudence-Bonds Corp. v Prudence Realization Corp., 174 F.2d 288, 1949 U.S. App. LEXIS 2193 (2d Cir. N.Y. 1949).

Communications made by client to attorney for purpose of professional advice or assistance are privileged, as are those from attorney to his client which reflect privileged communications from client. Leonia Amusement Corp. v Loew's, Inc., 13 F.R.D. 438, 1952 U.S. Dist. LEXIS 3541 (D.N.Y. 1952).

46. Communications disclosed or to be disclosed to others

An attorney might testify as to the delivery of a deed to him by his client for the purpose of delivery to another; such communication was not within the prohibition of CPA § 353. Rousseau v Bleau, 131 N.Y. 177, 30 N.E. 52, 131 N.Y. (N.Y.S.) 177, 1892 N.Y. LEXIS 1010 (N.Y. 1892).

An attorney may relate communications made to him by his client if the communication is by the client announced to be public. Doheny v Lacy, 42 A.D. 218, 59 N.Y.S. 724, 1899 N.Y. App. Div. LEXIS 1675 (N.Y. App. Div. 1899), aff'd, 168 N.Y. 213, 61 N.E. 255, 168 N.Y. (N.Y.S.) 213, 1901 N.Y. LEXIS 873 (N.Y. 1901).

A complaint in an action is not a confidential communication between an attorney and his client, who was the plaintiff in the action. People v Petersen, 60 A.D. 118, 69 N.Y.S. 941, 1901 N.Y. App. Div. LEXIS 663 (N.Y. App. Div. 1901).

Where testator showed draft of copies of will with notations thereon to his housekeeper this did not take them out of the category of confidential communications. In re Eno's Will, 196 A.D. 131, 187 N.Y.S. 756, 1921 N.Y. App. Div. LEXIS 5495 (N.Y. App. Div. 1921).

In proceeding by daughter of deceased testator to compel executrix to deliver stamp collection to daughter as gift from her father in his lifetime, communication to attorney was not within prohibition of CPA § 353, since purpose was to enable attorney to use information and to impart

it to others after testator’s death. In re Appel's Estate, 2 Misc. 2d 556, 149 N.Y.S.2d 76, 1956 N.Y. Misc. LEXIS 2255 (N.Y. Sur. Ct. 1956).

A communication by plaintiff to his attorney for the purpose of its publication to defend is not privileged. Bartlett v Bunn, 10 N.Y.S. 210, 56 Hun 507, 1890 N.Y. Misc. LEXIS 2037 (N.Y. Sup. Ct. 1890).

A communication made by a client to his attorney, with the request that the attorney impart it to another, is not a privileged communication which the attorney is precluded from disclosing as a witness upon a trial as against the client and without his consent on behalf of the person to whom it was so imparted. Collins v Robinson, 25 N.Y.S. 268, 72 Hun 495 (1893).

Information imparted by client to attorney with understanding that it is to be imparted to third person, is not privileged. Rediker v Warfield, 11 F.R.D. 125, 1951 U.S. Dist. LEXIS 3509 (D.N.Y. 1951).

47. Communications in presence of, to, or through a third party

Communications made in presence of all parties not privileged. Whiting v Barney, 30 N.Y. 330, 30 N.Y. (N.Y.S.) 330, 1864 N.Y. LEXIS 92 (N.Y. 1864); Britton v Lorenz, 45 N.Y. 51, 45 N.Y. (N.Y.S.) 51, 1871 N.Y. LEXIS 99 (N.Y. 1871).

Privilege applied to a case where three persons, having different interests, went together to an attorney, to have him prepare papers to carry out an agreement between them, and the question arose in a litigation between two of them and a stranger. Root v Wright, 84 N.Y. 72, 84 N.Y. (N.Y.S.) 72, 1881 N.Y. LEXIS 376 (N.Y. 1881).

An attorney may testify as to a conversation had in his presence between his client and a third party. Brennan v Hall, 131 N.Y. 160, 29 N.E. 1009, 131 N.Y. (N.Y.S.) 160, 1892 N.Y. LEXIS 1008 (N.Y. 1892).

Communications made to a friend, or to an attorney in the presence of a friend, are not privileged. People v Buchanan, 145 N.Y. 1, 39 N.E. 846, 145 N.Y. (N.Y.S.) 1, 1895 N.Y. LEXIS 783 (N.Y. 1895).

Statements by client to his attorney made in presence of strangers or bystanders, may be testified to by the attorney. Baumann v Steingester, 213 N.Y. 328, 107 N.E. 578, 213 N.Y. (N.Y.S.) 328, 1915 N.Y. LEXIS 1452 (N.Y. 1915).

Effect of presence of housekeeper or other third party on privilege as to instructions by testator to attorney drawing will, see Baumann v Steingester, 213 N.Y. 328, 107 N.E. 578, 213 N.Y. (N.Y.S.) 328, 1915 N.Y. LEXIS 1452 (N.Y. 1915).

A communication made by a client to an attorney at law is not privileged if other persons competent to testify are present at the interview, for the privilege is based upon the secrecy of the communication and exists in order to encourage the client to disclose facts. Myers v Brick, 146 A.D. 197, 130 N.Y.S. 910, 1911 N.Y. App. Div. LEXIS 1853 (N.Y. App. Div. 1911).

Privilege extends to communication made by agent of client, but not to husband of client unless shown to have acted as agent of wife. Le Long v Siebrecht, 196 A.D. 74, 187 N.Y.S. 150, 1921 N.Y. App. Div. LEXIS 5484 (N.Y. App. Div. 1921).

Testimony by an attorney as to what a decedent said in regard to bequeathing a certain amount to plaintiff was admissible in view of a third party being present although that party was the plaintiff. Grundt v Shenk, 222 A.D. 82, 225 N.Y.S. 317, 1927 N.Y. App. Div. LEXIS 7804 (N.Y. App. Div. 1927), aff'd, 248 N.Y. 602, 162 N.E. 541, 248 N.Y. (N.Y.S.) 602, 1928 N.Y. LEXIS 1419 (N.Y. 1928).

Where father and sons were present in attorney’s office when he prepared deed for execution by father to son, attorney’s testimony as to his conversation with father at such time was competent in action by one son to set aside deed. La Barge v La Barge, 284 A.D. 996, 135 N.Y.S.2d 317, 1954 N.Y. App. Div. LEXIS 4353 (N.Y. App. Div. 1954).

The provision forbidding an attorney from disclosing a communication made by his client to him in the course of his professional employment, does not apply to a communication made in the presence of a third person; and such a communication is not privileged. In re Simmons' Estate, 96 N.Y.S. 1103, 48 Misc. 484, 1905 N.Y. Misc. LEXIS 450 (N.Y. Sur. Ct. 1905).

Attorney may testify as to communications made by a client in the presence of third persons. In re King's Will, 154 N.Y.S. 238, 89 Misc. 638, 1915 N.Y. Misc. LEXIS 1179 (N.Y. Sur. Ct. 1915).

An attorney will not be barred from testifying about consultations with a decedent client, occurring in a room with doors open and testified to during decedent’s lifetime with his consent. In re Arnolt's Estate, 217 N.Y.S. 323, 127 Misc. 579, 1926 N.Y. Misc. LEXIS 1094 (N.Y. Sur. Ct. 1926).

The prohibition against the disclosure by an attorney of a communication made by a client during the course of professional employment does not apply where a third person is present at the conference between the attorney and his client unless the third party stands in a peculiar relation of confidence to the client. Lawless v Schoenaker, 264 N.Y.S. 280, 147 Misc. 626, 1933 N.Y. Misc. LEXIS 1138 (N.Y. App. Term 1933).

The purpose of CPA § 353, relating to privileged communications, was merely to prevent the disclosure of communications made by a client to his attorney which were confidential in their nature. Where the subject matter of the communication was known to a third person it was not privileged and the attorney might be permitted or compelled to testify regarding it. In re Krup's Will, 18 N.Y.S.2d 427, 173 Misc. 578, 1940 N.Y. Misc. LEXIS 1518 (N.Y. Sur. Ct. 1940).

Testimony of attorney and his employees as to execution of release and as to transactions occurring in presence of third person held not privileged. Flaherty v Wunsch, 28 N.Y.S.2d 178, 1941 N.Y. Misc. LEXIS 1865 (N.Y. Sup. Ct. 1941).

48. —Communications by a third party

An attorney may testify as to the declarations of a third party to his client in his presence. Brennan v Hall, 131 N.Y. 160, 29 N.E. 1009, 131 N.Y. (N.Y.S.) 160, 1892 N.Y. LEXIS 1008 (N.Y. 1892).

Letters or copies of letters by third parties delivered by a decedent to his attorney are not privileged communications, within the meaning of the statute, and the attorney may testify regarding them in a probate proceeding. In re Krup's Will, 18 N.Y.S.2d 427, 173 Misc. 578, 1940 N.Y. Misc. LEXIS 1518 (N.Y. Sur. Ct. 1940).

The writings, documents, etc., of third persons, even though delivered by a client to his attorney, are not privileged. In re Whitlock, 2 N.Y.S. 683, 1888 N.Y. Misc. LEXIS 736 (N.Y. Sup. Ct. 1888), rev'd, 3 N.Y.S. 855, 51 Hun 351, 1889 N.Y. Misc. LEXIS 115 (N.Y. App. Term 1889).

49. —Communications between attorney and persons mutually interested

Statements made by two persons in the presence of each other to an attorney in relation to matters in which they are mutually interested, may be testified to by the attorney after their death in an action between their personal representatives. Hurlburt v Hurlburt, 128 N.Y. 420, 28 N.E. 651, 128 N.Y. (N.Y.S.) 420, 1891 N.Y. LEXIS 995 (N.Y. 1891).

Attorney was barred from divulging any confidential communications or advice given to client while they conferred as to creation of joint accounts between mother and daughter. In re Creekmore's Estate, 1 N.Y.2d 284, 152 N.Y.S.2d 449, 135 N.E.2d 193, 1956 N.Y. LEXIS 881 (N.Y. 1956).

The testimony of the husband’s attorney and executor as to the facts of a transaction between the husband and the wife, when the latter reconveyed to him upon his promise to provide for her by will, is not excluded by either CPA § 347 (§ 4519 herein) or CPA § 353, nor because the plaintiff in the action to foreclose the land in question, and to whom the wife assigned the mortgage, was not present at the transaction. Mertens v Wakefield, 71 N.Y.S. 1062, 35 Misc. 501, 1901 N.Y. Misc. LEXIS 445 (N.Y. Sup. Ct. 1901).

Where two persons are present at a conference with an attorney, both of whom are interested in the advice sought, CPA § 353 was inapplicable, and in an action between those persons, the attorney might testify as to what was said by either of them. The testimony of the attorney was admissible though only one of such persons was his client. Lawless v Schoenaker, 264 N.Y.S. 280, 147 Misc. 626, 1933 N.Y. Misc. LEXIS 1138 (N.Y. App. Term 1933).

A communication by one interested in an estate as a legatee to the attorney of the executor with reference to a matter connected with the estate, not privileged. Althouse v Wells, 40 Hun 336 (N.Y. 1886).

C. Scope Of Privilege; Particular Testimony Or Evidence

50. Generally

The evidence of an attorney as to transactions and conversations between him and the decedent while the relation of attorney and client existed is inadmissible and should not be received over the defendant’s objection. Downey v Owen, 98 A.D. 411, 90 N.Y.S. 280, 1904 N.Y. App. Div. LEXIS 3572 (N.Y. App. Div. 1904).

An attorney cannot testify to information gained by him through professional relations with a party, nor that he has such information as to create a belief in his mind as to the question at issue. Eastman v Kelly, 1 N.Y.S. 866, 49 Hun 607, 1888 N.Y. Misc. LEXIS 1620 (N.Y. Sup. Ct. 1888).

CPA § 353 applied to testamentary cases. Mason v Williams, 6 N.Y.S. 479, 53 Hun 398, 1889 N.Y. Misc. LEXIS 642 (N.Y. App. Term 1889).

51. Collateral facts

A counsel may testify to handwriting of former client. Holthausen v Pondir, 120 N.Y. 622, 23 N.E. 1152, 120 N.Y. (N.Y.S.) 622, 1890 N.Y. LEXIS 1308 (N.Y. 1890).

The communication to an attorney by his client of the latter's place of abode is wholly collateral to the subject of the attorney's professional employment and is not a privileged communication. Richards v Richards, 119 N.Y.S. 81, 64 Misc. 285, 1909 N.Y. Misc. LEXIS 269 (N.Y. Sup. Ct. 1909), aff'd, 143 A.D. 906, 127 N.Y.S. 1141, 1911 N.Y. App. Div. LEXIS 975 (N.Y. App. Div. 1911).

Where plaintiff sued to recover for engineering investigative services performed on behalf of defendant in connection with prior litigation, he was not entitled to production of all records of communications had between defendant and defendant's attorneys nor to advice given by attorneys in connection with the prior action, but he was entitled to production of pleadings, stipulations, memoranda of law, examinations before trial, depositions, affidavits, correspondence with defendant in prior action, and to all items pertaining to payments made to plaintiff for services rendered, and receipts of all sums of money by defendant in settlement of prior action. Beach v Oil Transfer Corp., 23 Misc. 2d 47, 199 N.Y.S.2d 74, 1960 N.Y. Misc. LEXIS 3320 (N.Y. Sup. Ct. 1960).

An attorney may testify that his client directed him to make, and that he wanted him to make, an assignment of a bond and mortgage—also to directions given by his client for his actions. Brennan v Hall, 14 N.Y.S. 864, 60 Hun 583, 1891 N.Y. Misc. LEXIS 2535 (N.Y. Sup. Ct. 1891), aff'd, 131 N.Y. 160, 29 N.E. 1009, 131 N.Y. (N.Y.S.) 160, 1892 N.Y. LEXIS 1008 (N.Y. 1892).

A direction by a client to his attorney to employ a person in connection with the suit in which they are engaged, was not a communication in the sense in which the word was used in CPA § 353. Martin v Platt, 4 N.Y.S. 359, 51 Hun 429, 1889 N.Y. Misc. LEXIS 325 (N.Y. App. Term 1889).

An attorney is a competent witness to give evidence of the purpose for which such a communication was made to him, as manifested by the direction of the client to him. Collins v Robinson, 25 N.Y.S. 268, 72 Hun 495 (1893).

52. Agency of attorney

Existence of agency not privileged under CPA § 353, and attorney as third party in supplementary proceeding might testify whether as assignee or agent he had in his possession moneys of debtor. L. Michel Plumbing & Heating Corp. v Randall Ave. Theatre Corp., 39 N.Y.S.2d 830, 179 Misc. 998, 1943 N.Y. Misc. LEXIS 1579 (N.Y. City Ct. 1943).

CPA § 353 did not extend to money or property received by or in custody or control of attorney, for he merely became client's agent with respect thereto. In re Feinberg's Estate, 57 N.Y.S.2d 747, 185 Misc. 862, 1945 N.Y. Misc. LEXIS 2333 (N.Y. Sur. Ct. 1945).

CPA § 353 did not extend privilege to money or property of client received by or in custody or control of attorney, as he was acting as agent for his client in respect thereto. Monticello Tobacco Co. v American Tobacco Co., 12 F.R.D. 344, 1952 U.S. Dist. LEXIS 3647 (D.N.Y. 1952).

53. Attorney's retainer

Attorney may not be compelled by hostile litigant to disclose his retainer or nature of transactions to which it related when such information could be made basis of suit against client. Miller v Stern, 262 A.D. 5, 27 N.Y.S.2d 374, 1941 N.Y. App. Div. LEXIS 5268 (N.Y. App. Div. 1941).

In malpractice action against attorney, where plaintiff's present attorney testified on plaintiff's behalf, the terms of the present attorney's retainer, which showed his interest in outcome of case were not privileged, and exclusion of proof thereof, where question of defendant attorney's negligence was a close one, constituted reversible error. Registered Country Home Builders, Inc. v Lanchantin, 10 A.D.2d 721, 198 N.Y.S.2d 767, 1960 N.Y. App. Div. LEXIS 11350 (N.Y. App. Div. 2d Dep't), reh'g denied, 10 A.D.2d 874, 202 N.Y.S.2d 220, 1960 N.Y. App. Div. LEXIS 10588 (N.Y. App. Div. 2d Dep't 1960).

The existence or terms of retainer and services performed thereunder are not privileged, and are subject to testimony by attorney's secretary. Glines v Estate of Baird, 16 A.D.2d 743, 227 N.Y.S.2d 71, 1962 N.Y. App. Div. LEXIS 10399 (N.Y. App. Div. 4th Dep't 1962).

Retainer of counsel, by trustees of inter vivos trust, to whom entire corpus of trust was delivered to secure payment of counsel fees, was held not privileged in supplementary proceedings. Myer v Myer, 71 N.Y.S.2d 530, 189 Misc. 406, 1947 N.Y. Misc. LEXIS 2589 (N.Y. Sup. Ct.), aff'd, 272 A.D. 814, 72 N.Y.S.2d 257, 1947 N.Y. App. Div. LEXIS 3733 (N.Y. App. Div. 1947).

Testimony by an attorney as to fact of his employment not prohibited. Hampton v Boylan, 46 Hun 151, 10 N.Y. St. 788 (N.Y.).

Terms of retainer are within privilege, though existence of retainer is outside of privilege. Magida on behalf of Vulcan Detinning Co. v Continental Can Co., 12 F.R.D. 74, 1951 U.S. Dist. LEXIS 3493 (D.N.Y. 1951).

54. Information developed by attorney himself in preparation of case

Where it appears that the evidence was derived by the attorney from outside sources and not from his deceased client, such is not privileged. King v Ashley, 179 N.Y. 281, 72 N.E. 106, 179 N.Y. (N.Y.S.) 281, 1904 N.Y. LEXIS 1096 (N.Y. 1904).

Information ferreted out by the attorney and his employees, and given by the attorney to the client, is not within this privilege. Mutual Life Ins. Co. v Tailored Woman, Inc., 86 N.Y.S.2d 524, 194 Misc. 192, 1949 N.Y. Misc. LEXIS 1789 (N.Y. Sup. Ct.), modified, 275 A.D. 759, 88 N.Y.S.2d 890, 1949 N.Y. App. Div. LEXIS 4344 (N.Y. App. Div. 1949).

If reports of investigations, examination of which is sought by the claimant against the state, fall within the category of privileged communications since they constitute the work product of the attorney for the defense, access to them must be denied. Castiglione v State, 8 Misc. 2d 932, 169 N.Y.S.2d 145, 1956 N.Y. Misc. LEXIS 1664 (N.Y. Ct. Cl. 1956).

Although not specifically privileged in CPA § 353 the “work product of the lawyer” acquired in connection with a pending litigation was deemed immune from discovery, in so far as such work product contained confidential matter disclosed to the attorney during the course of active litigation, his advice given thereon. Beach v Oil Beach v Oil Transfer Corp., 23 Misc. 2d 47, 199 N.Y.S.2d 74, 1960 N.Y. Misc. LEXIS 3320 (N.Y. Sup. Ct. 1960).

Work product of party’s attorney is privileged, and so not subject to production before trial. Leonia Amusement Corp. v Loew's, Inc., 13 F.R.D. 438, 1952 U.S. Dist. LEXIS 3541 (D.N.Y. 1952).

55. Identification of parties, participants or witnesses; addresses

An attorney should not be obliged to disclose the person whom he represented in a certain transaction, as such testimony would involve the disclosure of confidential communications made by clients in regard to their purposes as to which he was employed and retained. In re Shawmut Min. Co., 94 A.D. 156, 87 N.Y.S. 1059, 1904 N.Y. App. Div. LEXIS 1334 (N.Y. App. Div. 1904).

An attorney not appearing for any party in an action to foreclose a mortgage, may not be required, in order to facilitate service, to disclose the addresses of necessary parties whom he represented in other litigation. Brooklyn Sav. Bank v Park Slope Realty Corp., 260 N.Y.S. 508, 146 Misc. 4, 1932 N.Y. Misc. LEXIS 1614 (N.Y. Sup. Ct. 1932).

The identity of an employer or client of an attorney is not a privileged communication and the attorney is bound on examination before a grand jury to disclose the identity of such person on pain of commitment for contempt. People ex rel. Vogelstein v Warden of County Jail, 270 N.Y.S. 362, 150 Misc. 714, 1934 N.Y. Misc. LEXIS 1164 (N.Y. Sup. Ct. 1934), aff'd, 242 A.D. 611, 271 N.Y.S. 1059, 1934 N.Y. App. Div. LEXIS 6222 (N.Y. App. Div. 1934), limited, In re Kaplan, 8 N.Y.2d 214, 203 N.Y.S.2d 836, 168 N.E.2d 660, 1960 N.Y. LEXIS 1068 (N.Y. 1960).

Defendant’s attorney was required to disclose address or residence of defendant. Falkenhainer v Falkenhainer, 97 N.Y.S.2d 467, 198 Misc. 29, 1950 N.Y. Misc. LEXIS 1659 (N.Y. Sup. Ct. 1950).

56. Financial statements; tax reports

CPA § 353 did not prevent the examination of the income tax reports of, and the record of financial accounts maintained for the fiduciary, an attorney. In re Morrell's Estate, 277 N.Y.S. 262, 154 Misc. 356, 1935 N.Y. Misc. LEXIS 953 (N.Y. Sur. Ct. 1935).

Conversations, letters and communications between testator and his attorney in fact, relative claim of college against testator’s estate on note given for college endowment fund subscription, were not privileged in proceeding to settle executor’s account. In re Borden's Will, 41 N.Y.S.2d 269, 1943 N.Y. Misc. LEXIS 1816 (N.Y. Sur. Ct. 1943), aff'd, 267 A.D. 823, 47 N.Y.S.2d 120 (N.Y. App. Div. 1944).

Information given an accountant for the purpose of making financial statements for his employer was not privileged although the accountant was also a lawyer and might have rendered legal advice in the matter. In re Fisher, 51 F.2d 424, 1931 U.S. Dist. LEXIS 1520 (D.N.Y. 1931).

57. Statements made in preparation of instruments or agreements generally

Counsel cannot be compelled to testify as to proof of claim in bankruptcy. Lockwood v House, 101 N.Y. 647, 5 N.E. 54, 101 N.Y. (N.Y.S.) 647, 1886 N.Y. LEXIS 728 (N.Y. 1886).

An attorney who acted as counsel for a decedent and another person in preparing an agreement between them is not prohibited by this section from testifying in a subsequent litigation between the representatives of the decedent and the other party to communications made by the decedent and the advice he gave. Doheny v Lacy, 168 N.Y. 213, 61 N.E. 255, 168 N.Y. (N.Y.S.) 213, 1901 N.Y. LEXIS 873 (N.Y. 1901).

The testimony of an attorney as to communications made to him by his client connected with the preparation of a mortgage is inadmissible. In re Decker's Estate, 268 N.Y.S. 280, 149 Misc. 364, 1933 N.Y. Misc. LEXIS 1387 (N.Y. Sur. Ct. 1933).

In accounting proceeding involving validity and effect of assignment of interest in estate, attorney for assignor was competent to testify. Estate of Danziger, 145 N.Y.S.2d 381, 208 Misc. 1024, 1955 N.Y. Misc. LEXIS 3345 (N.Y. Sur. Ct. 1955).

An attorney competent to testify to facts which parties to a contract openly stated to each other and requested him to embody in an agreement. Re Hicks, 14 N.Y. St. 320.

Where both parties to the agreement were present at the conversation, as under the common-law rule as to privilege, communications to an attorney were not confidential when both parties were present; the attorney may be allowed to testify to the conversations inquired about. Smith v Crego, 7 N.Y.S. 86, 54 Hun 22, 1889 N.Y. Misc. LEXIS 939 (N.Y. Sup. Ct. 1889).

58. Statements made in preparation of deeds

An attorney employed to draw a deed may testify as to the directions received by him from the parties, and as to the transactions between them at the time. It is not privileged matter. Hebbard v Haughian, 70 N.Y. 54, 70 N.Y. (N.Y.S.) 54, 1877 N.Y. LEXIS 584 (N.Y. 1877).

Testimony of an attorney representing a purchaser of real property in preparing the conveyance as to declarations of his client to the effect that he held the property for the benefit of another, held, inadmissible. McIntyre v Costello, 6 N.Y.S. 397, 53 Hun 636, 1889 N.Y. Misc. LEXIS 599 (N.Y. Sup. Ct. 1889).

In a suit for dower where it was claimed the husband held the property for his sister, held, that evidence of declarations made by the husband to the attorney at interviews with reference to the contract of purchase and deed, prior to the acquisition of title, and of a conversation subsequent to that time in which he spoke of the property as his sister’s and asked the attorney to prepare a

deed to this grantee, is admissible. McIntyre v Costello, 6 N.Y.S. 397, 53 Hun 636, 1889 N.Y. Misc. LEXIS 599 (N.Y. Sup. Ct. 1889).

The attorney who drew plaintiff's deed of the land for which the money in question was received testified to a declaration by testator at the time the deed was drawn, made in presence of plaintiff and relating to the agreement for the investment of the money. Held, that the testimony was not within the exclusion. Sheldon v Sheldon, 11 N.Y.S. 477, 58 Hun 601, 1890 N.Y. Misc. LEXIS 803 (N.Y. Sup. Ct. 1890), rev'd, 133 N.Y. 1, 30 N.E. 730, 133 N.Y. (N.Y.S.) 1, 1892 N.Y. LEXIS 1278 (N.Y. 1892).

An attorney who has been applied to by a party to draw a deed for him and also for counsel in regard to matters relating to the subject matter of a deed, is incompetent to testify to communications made to him in such matter in an action between the grantor and a third person. Barry v Coville, 7 N.Y.S. 36, 53 Hun 620, 1889 N.Y. Misc. LEXIS 919 (N.Y. Sup. Ct. 1889), aff'd, 129 N.Y. 302, 29 N.E. 307, 129 N.Y. (N.Y.S.) 302, 1891 N.Y. LEXIS 1169 (N.Y. 1891).

Where a notary, who was also an attorney, and was employed by plaintiff to draw the deed, testified that it was acknowledged at the grantor's house, this was not a disclosure of the communication made in the course of professional employment as attorney. Mutual L. Ins. Co. v Corey, 7 N.Y.S. 939, 54 Hun 493, 1889 N.Y. Misc. LEXIS 1392 (N.Y. Sup. Ct. 1889), rev'd, 135 N.Y. 326, 31 N.E. 1095, 135 N.Y. (N.Y.S.) 326, 1892 N.Y. LEXIS 1625 (N.Y. 1892).

The testimony of an attorney that he drew a deed for one S and took his acknowledgment, and that the description embraced a certain quantity of land is not a privileged communication, where it appears that the deed was drawn, executed and acknowledged in the presence of the grantee. Greer v Greer, 12 N.Y.S. 778, 58 Hun 251, 1890 N.Y. Misc. LEXIS 2669 (N.Y. Sup. Ct. 1890).

Upon an issue as to whether an assumption clause was inserted in a deed without the knowledge or consent of the grantee, testimony of the attorney who drew the deed as to the

instructions given to him are not incompetent. Van Alstyne v Smith, 31 N.Y.S. 277, 82 Hun 382 (1894).

59. Instructions as to preparation or execution of will

The prohibition includes and applies to instructions given by one proposing to execute a will, to an attorney employed to draw it, and to conversations had with such attorney to enable him to carry out the instructions. In re Coleman's Will, 111 N.Y. 220, 19 N.E. 71, 111 N.Y. (N.Y.S.) 220, 19 N.Y. St. 501, 1888 N.Y. LEXIS 1006 (N.Y. 1888).

It is immaterial that the attorney asks no questions and gives no advice, but simply reduces to writing the instructions given. In re Coleman's Will, 111 N.Y. 220, 19 N.E. 71, 111 N.Y. (N.Y.S.) 220, 19 N.Y. St. 501, 1888 N.Y. LEXIS 1006 (N.Y. 1888).

Instructions to attorney as to drawing of will, made before housekeeper and companion, were not privileged, for purposes of construction. Baumann v Steingester, 213 N.Y. 328, 107 N.E. 578, 213 N.Y. (N.Y.S.) 328, 1915 N.Y. LEXIS 1452 (N.Y. 1915).

In an action to establish a will which has been destroyed, the attorney who prepared it was disqualified from testifying as to its contents, unless the prohibition of CPA § 353 was waived in the manner prescribed. Bethany M. E. Church v Brooks, 143 A.D. 685, 128 N.Y.S. 250, 1911 N.Y. App. Div. LEXIS 902 (N.Y. App. Div. 1911).

Attorney employed to draw will could not testify to communications made to him by testatrix or that she was the only one who gave him data for the will, as bearing on undue influence or mental capacity. Rintelen v Schaefer, 152 A.D. 727, 137 N.Y.S. 527, 1912 N.Y. App. Div. LEXIS 10406, 1912 N.Y. App. Div. LEXIS 8617 (N.Y. App. Div. 1912).

Revocation of will revoked right of attorney to testify to facts concerning execution and preparation. Mead v Herdman, 161 A.D. 177, 146 N.Y.S. 353, 1914 N.Y. App. Div. LEXIS 5313 (N.Y. App. Div. 1914).

Attorney drawing will could testify as to contents thereof where third party was present. In re Bennett's Will, 166 A.D. 637, 152 N.Y.S. 46, 1915 N.Y. App. Div. LEXIS 7307 (N.Y. App. Div. 1915).

A statement made by the wife of a testator since deceased, to a lawyer who drew her husband’s will which she was called in to examine, is privileged. Manhattan Fire-Alarm Co. v Weber, 50 N.Y.S. 42, 22 Misc. 729, 1898 N.Y. Misc. LEXIS 142 (N.Y. App. Term 1898).

An attorney cannot testify to the execution of a will by his client unless he is a subscribing witness. In re Sears' Estate, 68 N.Y.S. 363, 33 Misc. 141, 1900 N.Y. Misc. LEXIS 1004 (N.Y. Sur. Ct. 1900).

An attorney and counselor at law who draws a codicil to a will and its in attendance at the formalities of its execution, but who is not himself one of the attesting witnesses, is forbidden to testify in relation thereto. In re Francis ' Will, 132 N.Y.S. 695, 73 Misc. 148, 1911 N.Y. Misc. LEXIS 491 (N.Y. Sur. Ct. 1911).

Attorney drafting will but not subscribing as a witness could not testify as to facts and circumstances occurring at the signing, publication and execution of the will. In re Seymour's Will, 136 N.Y.S. 942, 76 Misc. 371, 1912 N.Y. Misc. LEXIS 826 (N.Y. Sur. Ct. 1912).

CPA § 353 construed in connection with CPA § 354, on question of competency of attorney who drafted will as witness on probate of same. In re Carter's Will, 204 N.Y.S. 393, 122 Misc. 493, 1924 N.Y. Misc. LEXIS 830 (N.Y. Sur. Ct. 1924).

Testator’s instructions to his attorney about preparing the will were not confidential when given in the presence of persons not employees of the attorney. In re Pedaro's Estate, 246 N.Y.S. 175, 138 Misc. 410, 1930 N.Y. Misc. LEXIS 1662 (N.Y. Sur. Ct. 1930).

The testimony of an attorney as to conversations with a testatrix as to the execution of a will was not prohibited by CPA § 353 and CPA § 354. Chase Nat'l Bank v Chicago Title & Trust Co., 299 N.Y.S. 926, 164 Misc. 508, 1934 N.Y. Misc. LEXIS 2006 (N.Y. Sup. Ct. 1934).

In executor’s discovery proceeding under SCA § 205, attorney who drafted will was incompetent to testify to conversations with testator as to where money was coming from to pay general legacies. In re Duke's Will, 108 N.Y.S.2d 875, 202 Misc. 446, 1951 N.Y. Misc. LEXIS 2609 (N.Y. Sur. Ct. 1951).

Evidence of the attorney who drew the will as to communications made to him by the testator, not in the presence of the subscribing witnesses or any third person, relating to the disposition of testator’s property, is inadmissible in probate proceedings. In re McCarthy's Will, 14 N.Y.S. 2, 59 Hun 626, 1891 N.Y. Misc. LEXIS 1827 (N.Y. Sup. Ct. 1891).

Where there is a contest respecting the probate of a will, the testator’s written instructions to the attorney who drew the will are not privileged. In re Last Will & Testament of Chapman, 27 Hun 573 (N.Y.).

In probate proceedings, proponents offered to prove by draftsman of the will, who was also an attorney and trustee under it, instructions received by him and that they were carried out. The testimony was rejected as incompetent. Held, error. In re Chase, 41 Hun 203, 4 N.Y. St. 195 (N.Y.).

Attorney is a competent witness to prove all acts of a testator connected with the making and execution of a will, which tend to uphold the instrument. In re McCarthy's Will, 8 N.Y.S. 578, 55 Hun 7, 1889 N.Y. Misc. LEXIS 2316 (N.Y. Sup. Ct. 1889).

Evidence of an attorney who drew a will as to declarations of the testator in the presence of the witnesses at the time of its execution in relation to the will, and his satisfaction with its contents is not objectionable. In re Smith's Will, 15 N.Y.S. 425, 61 Hun 101, 1891 N.Y. Misc. LEXIS 3256 (N.Y. Sup. Ct. 1891).

60. —Where attorney or his employee is a subscribing witness

Under CPA § 353 an attorney might not disclose a communication made to him by a client in the course of his professional employment. Two lawyers, each of whom had prepared one of the

prior wills and been a subscribing witness thereto, were improperly permitted to testify as to transactions with testatrix in a proceeding for the probate of an older will. In re McCulloch's Will, 263 N.Y. 408, 189 N.E. 473, 263 N.Y. (N.Y.S.) 408, 1934 N.Y. LEXIS 1289 (N.Y.), reh'g denied, 264 N.Y. 598, 191 N.E. 583, 264 N.Y. (N.Y.S.) 598, 1934 N.Y. LEXIS 1625 (N.Y. 1934).

Where client had retained attorney to pass on certain information to a public investigating body and needed the protection of anonymity to escape reprisals, the attorney-client privilege extended to his name, and his attorney, having communicated the information to the committee could not be held in contempt for failure to disclose his client’s identity. In re Kaplan, 8 N.Y.2d 214, 203 N.Y.S.2d 836, 168 N.E.2d 660, 1960 N.Y. LEXIS 1068 (N.Y. 1960).

Where an attorney acts as a witness to a will, communications between him and the testator are not privileged. In re Williams' Will, 201 N.Y.S. 205, 121 Misc. 243, 1923 N.Y. Misc. LEXIS 1233 (N.Y. Sur. Ct. 1923).

In contested probate proceedings where the attorney who drafted the will was a beneficiary, under CPA § 354, his secretary, a subscribing witness, was competent to testify to the circumstances surrounding execution of the will, including communications made to her by testatrix, while it was in preparation. In re Putnam's Will, 238 N.Y.S. 112, 135 Misc. 311, 1929 N.Y. Misc. LEXIS 998 (N.Y. Sur. Ct. 1929), aff'd, 231 A.D. 707, 245 N.Y.S. 777, 1930 N.Y. App. Div. LEXIS 7059 (N.Y. App. Div. 1930).

In view of this and CPA § 354, an attorney and his stenographer who prepared and witnessed a will were competent witnesses as to its execution. In re Ford's Will, 239 N.Y.S. 252, 135 Misc. 630, 1930 N.Y. Misc. LEXIS 975 (N.Y. Sur. Ct. 1930).

Communications either by word or act of a client to an attorney employed to draw his will upon that subject, or made to others in the attorney’s presence at that time, cannot be disclosed by the attorney on the probate of the will; except where attorney is subscribing witness. In re O'Neil's Estate, 7 N.Y.S. 197, 1889 N.Y. Misc. LEXIS 1006 (N.Y. Sur. Ct. 1889).

D. Actions And Proceedings Within Section

61. Bills and notes

Where in action on a promissory note, after an attorney called as a witness for plaintiff had testified to declarations made by the transferee of the note, it appearing upon cross-examination that said witness was acting as counsel for the transferee at the time such declarations were made, and that they were made to him as such. Held, error to deny motion to strike out the testimony. Loveridge v Hill, 96 N.Y. 222, 96 N.Y. (N.Y.S.) 222, 1884 N.Y. LEXIS 485 (N.Y. 1884).

62. Condemnation

In proceeding by village to acquire realty for park purposes, involving agreement between village and development corporation and its attorneys for sale of such realty, examinations and inspections by village held material and necessary to prosecution of petitioner's claim, and evidence of terms of sale and acceptance by corporation would not be privileged communications between attorney and client. In re Vill. Lawrence, 285 A.D. 823, 137 N.Y.S.2d 106, 1955 N.Y. App. Div. LEXIS 5707 (N.Y. App. Div. 1955).

63. Criminal action or proceedings

The privilege provided by CPA § 353 applies to investigations of grand jury which could not require hospital superintendent to permit inspection by grand jury of all hospital records in abortion cases. Application of Grand Jury of County of Kings, 286 A.D. 270, 143 N.Y.S.2d 501, 1955 N.Y. App. Div. LEXIS 4026 (N.Y. App. Div. 1955).

64. Examination or other proceedings before trial

In view of CPA § 353 a witness could not be compelled, on examination before trial, to disclose confidential communications made to his attorney. Bolt & Co. v Gilmore, 198 N.Y.S. 616, 120 Misc. 116, 1923 N.Y. Misc. LEXIS 831 (N.Y. Sup. Ct. 1923).

The practice of proceeding with an examination before trial and raising the question of privilege at the point where it appears that the witness is about to be asked a question which may disclose a confidential communication has been recognized and approved. Castiglione v State, 8 Misc. 2d 932, 169 N.Y.S.2d 145, 1956 N.Y. Misc. LEXIS 1664 (N.Y. Ct. Cl. 1956).

Where a plaintiff verified a complaint on information and belief and in examination before trial stated that the only information she had was supplied by her husband who is acting as her lawyer and she has asserted attorney-client privilege, motion by defendants to examine plaintiff's husband as witness on grounds special circumstances exist granted and question as to whether examination will offend any confidence left for determination at time of and during taking of deposition. Tharaud v James Bros. Realty Co., 12 Misc. 2d 434, 177 N.Y.S.2d 726, 1958 N.Y. Misc. LEXIS 3544 (N.Y. Sup. Ct. 1958).

65. Executors and administrators

In estate accounting, attorney for decedent is incompetent to testify for claimant as to confidential communications from decedent. In re Cassola's Estate, 47 N.Y.S.2d 90, 183 Misc. 66, 1944 N.Y. Misc. LEXIS 1723 (N.Y. Sur. Ct. 1944).

66. Legislative proceedings or hearings

A legislative committee could make a part of its public records a tape recording and transcript of an alleged private conversation between an attorney and his client. CPA § 353 did not create a right to prevent the disclosure of a confidential communication when neither the attorney nor the client was examined as a witness. Lanza v New York State Joint Legislative Committee, on Government Operations, 3 N.Y.2d 92, 164 N.Y.S.2d 9, 143 N.E.2d 772, 1957 N.Y. LEXIS 980

(N.Y.), cert. denied, 355 U.S. 856, 78 S. Ct. 85, 2 L. Ed. 2d 64, 1957 U.S. LEXIS 298 (U.S. 1957).

67. Municipal corporations

Advice given by corporation counsel of New York to board of assessors and officers of city government is privileged. People ex rel. Updyke v Gilon, 9 N.Y.S. 243, 1889 N.Y. Misc. LEXIS 1500 (N.Y. Sup. Ct. 1889).

E. Actions Involving Wills

i. In General

68. Generally

In a proceeding for the probate of a will, on the trial of issues relating to testamentary capacity and undue influence, it was material error to permit an attorney, who neither directly nor indirectly took part in the preparation or execution of the instrument offered for probate, to give testimony, on the part of the proponent, as to a conversation relating to the testamentary intentions of the decedent which he had held privately with such decedent three days previous to the time the instrument, offered for probate, was signed. The communication was privileged under CPA § 353 and the witness was not one to whom the exception in CPA § 354 applied. In re Matheson's Will, 283 N.Y. 44, 27 N.E.2d 427, 283 N.Y. (N.Y.S.) 44, 1940 N.Y. LEXIS 945 (N.Y. 1940).

A legislative committee could make a part of its records a tape recording and transcript of an alleged private conversation between an attorney and his client since CPA § 354 did not create a right to prevent the disclosure of a confidential communication when neither the attorney nor the client was examined as a witness. Lanza v New York State Joint Legislative Committee, on Government Operations, 3 N.Y.2d 92, 164 N.Y.S.2d 9, 143 N.E.2d 772, 1957 N.Y. LEXIS 980

(N.Y.), cert. denied, 355 U.S. 856, 78 S. Ct. 85, 2 L. Ed. 2d 64, 1957 U.S. LEXIS 298 (U.S. 1957).

Attorney procured by proponent of will to go to hospital could testify that on arrival he decided that testatrix was irrational and refused to draw up a will for her. In re King's Will, 154 N.Y.S. 238, 89 Misc. 638, 1915 N.Y. Misc. LEXIS 1179 (N.Y. Sur. Ct. 1915).

CPA § 354 did not apply to proceeding by executor to discover property of estate under SCA § 205. In re Duke's Will, 108 N.Y.S.2d 875, 202 Misc. 446, 1951 N.Y. Misc. LEXIS 2609 (N.Y. Sur. Ct. 1951).

A memorandum by an attorney for the proponent of a will of a conference between them in preparation for the trial of a contested probate is confidential and privileged. In re Van Gorder's Will, 10 Misc. 2d 648, 176 N.Y.S.2d 1018, 1957 N.Y. Misc. LEXIS 2182 (N.Y. Sur. Ct. 1957).

69. Communications to public officials

Communications to district attorney and fire department officials during an investigation of an explosion on a steamship were not privileged. Egenes v Morse Dry Dock & Repair Co., 226 N.Y.S. 68, 131 Misc. 428, 1925 N.Y. Misc. LEXIS 1223 (N.Y. Sup. Ct. 1925).

ii. Waiver

70. Generally

CPA § 353 (§ 4503(a) herein) prohibited an attorney from disclosing a communication from a client in the course of his professional employment, except when expressly waived as provided by CPA § 354. In re Cunnion's Will, 201 N.Y. 123, 94 N.E. 648, 201 N.Y. (N.Y.S.) 123, 1911 N.Y. LEXIS 1223 (N.Y. 1911).

A waiver to be effective must be on the “trial or examination.” Scher v Metropolitan S. R. Co., 71 A.D. 28, 75 N.Y.S. 625, 11 N.Y. Ann. Cas. 13, 1902 N.Y. App. Div. LEXIS 903 (N.Y. App. Div. 1902).

After an attorney’s privilege concerning confidential communications has been waived, his testimony must only relate directly or indirectly to matters regarding which the door was opened. In the present case the question asked him was too broad. Hamlin v Hamlin, 224 A.D. 168, 230 N.Y.S. 51, 1928 N.Y. App. Div. LEXIS 9956 (N.Y. App. Div. 1928).

Prohibition of CPA § 352 (§ 4504(a), (b) herein) was absolute and remained effective unless provisions were expressly waived on trial by defendant pursuant to CPA § 354. People v Eckert, 142 N.Y.S.2d 657, 208 Misc. 93, 1955 N.Y. Misc. LEXIS 3513 (N.Y. County Ct. 1955), modified, 1 A.D.2d 903, 149 N.Y.S.2d 644, 1956 N.Y. App. Div. LEXIS 6049 (N.Y. App. Div. 2d Dep't 1956).

71. Who may waive privilege generally

Executrix in wrongful death case, though not personal representative of deceased, may waive privilege. Eder v Cashin, 281 A.D. 456, 120 N.Y.S.2d 165, 1953 N.Y. App. Div. LEXIS 3067 (N.Y. App. Div. 1953).

The right of waiver, under CPA § 354 was not limited exclusively to the other persons specifically enumerated therein. In re Ackerman's Estate, 298 N.Y.S. 38, 163 Misc. 624, 1937 N.Y. Misc. LEXIS 1439 (N.Y. Sur. Ct. 1937).

Death of client bars waiver of privilege by attorney. In re Williams' Estate, 39 N.Y.S.2d 741, 179 Misc. 805, 1942 N.Y. Misc. LEXIS 2364 (N.Y. Sur. Ct. 1942).

Privilege in records may be waived by personal representative, or in will contest by named executor or surviving spouse, distributee of deceased, or any other party in interest. In re Ericson's Will, 106 N.Y.S.2d 203, 200 Misc. 1005, 1951 N.Y. Misc. LEXIS 2024 (N.Y. Sur. Ct. 1951).

72. Waiver by or on behalf of incompetent

Attorneys for incompetent had no power to waive provisions of CPA § 354, since incompetent could not have given such authority. In re Application of Lanham, 1 Misc. 2d 264, 144 N.Y.S.2d 401, 1955 N.Y. Misc. LEXIS 2339 (N.Y. Sup. Ct. 1955).

Attorney for committee of incompetent cannot waive privilege attaching to medical records of mental inmate of state hospital. Petition of Maryland Casualty Co., 78 N.Y.S.2d 651, 1947 N.Y. Misc. LEXIS 3760 (N.Y. Sup. Ct. 1947).

73. Manner and form of waiver generally

The waiver need not be made in writing or in any particular form, but it must clearly show the intention to exempt the attorney in such case. In re Coleman's Will, 111 N.Y. 220, 19 N.E. 71, 111 N.Y. (N.Y.S.) 220, 19 N.Y. St. 501, 1888 N.Y. LEXIS 1006 (N.Y. 1888).

An attorney can waive the privilege on the basis of his general authority as the legal representative of his client, whether or not the client is present in court at the time; and the fact that the client prior to trial executed a power of attorney authorizing the attorney to waive will not annul his general authority on the theory that such power of attorney violates the statutory prohibition against pre-trial written waivers, since the instrument was not a waiver but an authorization to waive. In re Will of Frangeline, 14 A.D.2d 420, 222 N.Y.S.2d 39, 1961 N.Y. App. Div. LEXIS 7485 (N.Y. App. Div. 4th Dep't 1961).

74. Waiver in prior action

Where attorney testified in prior action between same parties, such disclosure did not apply to later action. Matison v Matison, 95 N.Y.S.2d 837, 1950 N.Y. Misc. LEXIS 1484 (N.Y. Sup. Ct.), aff'd, 277 A.D. 770, 97 N.Y.S.2d 550, 1950 N.Y. App. Div. LEXIS 3247 (N.Y. App. Div. 1950).

75. Calling attorney

The plaintiff's intestate made a deed to defendant which remained in possession of the attorney who drew it until his death, when he gave it to the grantee, who had never before heard of it. The attorney should have been allowed to testify that he was a mere scrivener, and that he was instructed to and did deliver the deed to the grantee. Rousseau v Bleau, 131 N.Y. 177, 30 N.E. 52, 131 N.Y. (N.Y.S.) 177, 1892 N.Y. LEXIS 1010 (N.Y. 1892).

How far an attorney who is a witness for his client may be cross-examined as to his advice in a certain transaction discussed. Stetson v Brennen, 21 A.D. 552, 48 N.Y.S. 601, 1897 N.Y. App. Div. LEXIS 2067 (N.Y. App. Div. 1897).

An attorney who prepared deed for one since deceased could testify to the contents of such deed after it was shown that the deed was delivered by the decedent, though it afterwards became mutilated. Baxter v Baxter, 156 N.Y.S. 521, 92 Misc. 567, 1915 N.Y. Misc. LEXIS 1130 (N.Y. Sup. Ct. 1915), aff'd, 173 A.D. 998, 159 N.Y.S. 1099, 1916 N.Y. App. Div. LEXIS 6714 (N.Y. App. Div. 1916).

An attorney may testify as to communications made by his client to him, or his advice given thereon, when the same has already been disclosed with the acquiescence or consent of the client or at the latter's direction. In re Reinhardt's Estate, 160 N.Y.S. 828, 95 Misc. 413, 1915 N.Y. Misc. LEXIS 1028 (N.Y. Sur. Ct. 1915).

Where defendant himself examines his counsel as a witness he waives the right to object that the testimony was incompetent. Masterton v Boyce, 6 N.Y.S. 65, 53 Hun 630, 1889 N.Y. Misc. LEXIS 400 (N.Y. Sup. Ct. 1889).

Where the client himself subpoenas his attorney to produce papers received from the former he cannot object, if the papers are produced pursuant to the subpoena, but gives his adversary the right to put those pertinent to the evidence. Re Estate of Hoyt, 1887 N.Y. Misc. LEXIS 9 (N.Y. Sur. Ct. May 1, 1887).

76. Waiver by order or stipulation

Order for bill of particulars modified by provision that attorney for adverse party file waiver of attorney's privilege in favor of other party. Meyers v Campbell, 263 A.D. 1014, 34 N.Y.S.2d 416, 1942 N.Y. App. Div. LEXIS 7894 (N.Y. App. Div. 1942).

iii. Particular Actions, Proceedings, Testimony And Evidence Within Section

77. Application of section to examination before trial or taking of deposition

In action to recover balance due under contract to purchase plaintiff's interest in realty, which balance defendant alleged plaintiff induced him to agree to pay by duress and threats of plaintiff to prevent defendant's purchase of third party's interest, defendant was allowed to examine before trial plaintiff and his witness, both of whom were attorneys, on issue of duress, but said attorneys may not disclose any confidential or private communication between plaintiff and witness as attorney for third party, during course of their professional employment. Levine v Levy, 141 N.Y.S.2d 131, 1955 N.Y. Misc. LEXIS 2483 (N.Y. Sup. Ct. 1955).

78. Preparation and execution of wills

A request by testator that his attorneys sign his will as attesting witnesses is a waiver of the statute. In re Coleman's Will, 111 N.Y. 220, 19 N.E. 71, 111 N.Y. (N.Y.S.) 220, 19 N.Y. St. 501, 1888 N.Y. LEXIS 1006 (N.Y. 1888).

Instructions to attorney as to drawing of will, made before housekeeper and companion, were not privileged. Baumann v Steingester, 213 N.Y. 328, 107 N.E. 578, 213 N.Y. (N.Y.S.) 328, 1915 N.Y. LEXIS 1452 (N.Y. 1915).

A clerk for the lawyer who prepared the will, who was also a subscribing witness was competent to testify to confidential communications. In re Putnam's Will, 257 N.Y. 140, 177 N.E. 399, 257 N.Y. (N.Y.S.) 140, 1931 N.Y. LEXIS 827 (N.Y. 1931).

The provision of CPA § 354, permitting an attorney to testify as to the preparation and execution of a will to which he is a subscribing witness, applied only where that was the will offered for probate. In re McCulloch's Will, 263 N.Y. 408, 189 N.E. 473, 263 N.Y. (N.Y.S.) 408, 1934 N.Y. LEXIS 1289 (N.Y.), reh'g denied, 264 N.Y. 598, 191 N.E. 583, 264 N.Y. (N.Y.S.) 598, 1934 N.Y. LEXIS 1625 (N.Y. 1934).

CPA § 354 did not permit an attorney to testify as to the preparation of a will, where he did not take part, either directly or indirectly, in the preparation of the instrument offered for probate. In re Matheson's Will, 283 N.Y. 44, 27 N.E.2d 427, 283 N.Y. (N.Y.S.) 44, 1940 N.Y. LEXIS 945 (N.Y. 1940).

Attorney preparing will and subscribing as a witness may testify with respect to identity of beneficiary. In re Coughlin, 171 A.D. 662, 157 N.Y.S. 630, 1916 N.Y. App. Div. LEXIS 5322 (N.Y. App. Div. 1916), aff'd, 220 N.Y. 681, 116 N.E. 1041, 220 N.Y. (N.Y.S.) 681, 1917 N.Y. LEXIS 1141 (N.Y. 1917).

Except he is an attesting witness to a will, in no case is an attorney permitted to make disclosure in respect to contents of any documents or other information communicated to him in the course of his professional employment by the client. In re Eno's Will, 196 A.D. 131, 187 N.Y.S. 756, 1921 N.Y. App. Div. LEXIS 5495 (N.Y. App. Div. 1921).

Attorney who drafted will was competent to testify to testator’s intent, where its language admits of two constructions. In re Morrison's Will, 270 A.D. 318, 60 N.Y.S.2d 18, 1946 N.Y. App. Div. LEXIS 3679 (N.Y. App. Div. 1946).

Attorney who drew will revoking prior will is competent to testify concerning it, even though he had not drawn prior will or the codicil thereto, which were being offered for probate. In re Will of Stacer, 13 A.D.2d 164, 214 N.Y.S.2d 746, 1961 N.Y. App. Div. LEXIS 10928 (N.Y. App. Div. 4th Dep't 1961), aff'd, 11 N.Y.2d 780, 227 N.Y.S.2d 26, 181 N.E.2d 769, 1962 N.Y. LEXIS 1346 (N.Y. 1962).

An attorney who drew a will may not testify as to his remembrance of the contents of the will in the absence of proof that the nature of the will was referred to in the presence of others, where he was not a witness to it; and publication of the will in the presence of the attorney is no waiver of the prohibition. In re Cunnion's Will, 115 N.Y.S. 969, 61 Misc. 546, 1908 N.Y. Misc. LEXIS 150 (N.Y. Sur. Ct. 1908), aff'd, 135 A.D. 864, 120 N.Y.S. 266, 1909 N.Y. App. Div. LEXIS 4084 (N.Y. App. Div. 1909).

On the probate of a will the attorney who prepared it, but who was not one of the subscribing witnesses, may testify as to the circumstances and fact of his employment by the testatrix to prepare the will, and whether he prepared the document as introduced in evidence and which purports to be the will of the testatrix; but he may not testify as to what was said and done at the time of the execution of the will, in the presence of the testatrix and the subscribing witness, nor as to any of the contents of the will which he saw on looking over it at the time of its execution. In re Carter's Will, 204 N.Y.S. 393, 122 Misc. 493, 1924 N.Y. Misc. LEXIS 830 (N.Y. Sur. Ct. 1924).

In contested probate proceedings where the attorney who drafted the will was beneficiary, under CPA § 354, his secretary, a subscribing witness, was competent to testify to the circumstances surrounding execution of the will, including communications made to her by testatrix, while it was in preparation. In re Putnam's Will, 238 N.Y.S. 112, 135 Misc. 311, 1929 N.Y. Misc. LEXIS 998 (N.Y. Sur. Ct. 1929), aff'd, 231 A.D. 707, 245 N.Y.S. 777, 1930 N.Y. App. Div. LEXIS 7059 (N.Y. App. Div. 1930).

In view of CPA §§ 353, 354, an attorney and his stenographer who prepared and witnessed a will were competent witnesses as to its execution. In re Ford's Will, 239 N.Y.S. 252, 135 Misc. 630, 1930 N.Y. Misc. LEXIS 975 (N.Y. Sur. Ct. 1930).

Testator’s instructions to his attorney how to make his will, given in the presence of persons not employed by the attorney, were not privileged. In re Pedaro's Estate, 246 N.Y.S. 175, 138 Misc. 410, 1930 N.Y. Misc. LEXIS 1662 (N.Y. Sur. Ct. 1930).

The application of CPA § 354 was not confined to construction of wills in probate proceedings. In re Tinker's Estate, 283 N.Y.S. 151, 157 Misc. 200, 1935 N.Y. Misc. LEXIS 1532 (N.Y. Sur. Ct. 1935).

Testimony of the attorney draftsman of a will with respect to instructions of and communications with the testatrix was competent under CPA § 354. In re Tinker's Estate, 283 N.Y.S. 151, 157 Misc. 200, 1935 N.Y. Misc. LEXIS 1532 (N.Y. Sur. Ct. 1935).

CPA § 354, as amended by chapter 493 of the Laws of 1936, which provided that an attorney or his employees was not disqualified from becoming a witness in any proceeding concerning the validity or construction of a will, was expressly retroactive, was a rule of evidence, and did not take away or impair rights vested under any prior law. In re Casper's Will, 291 N.Y.S. 585, 161 Misc. 199, 1936 N.Y. Misc. LEXIS 1503 (N.Y. Sur. Ct. 1936).

Attorney’s letter to testatrix is competent to show instructions to testatrix as to how will should be executed. In re Thompson's Will, 68 N.Y.S.2d 123, 189 Misc. 873, 1947 N.Y. Misc. LEXIS 2043 (N.Y. Sur. Ct. 1947), aff'd, 274 A.D. 850, 81 N.Y.S.2d 923, 1948 N.Y. App. Div. LEXIS 3636 (N.Y. App. Div. 1948).

On will probate, attorney for alleged testator may testify only to preparation and execution, provided he actually participated in its preparation or execution. In re Alexander's Will, 130 N.Y.S.2d 648, 205 Misc. 894, 1954 N.Y. Misc. LEXIS 2078 (N.Y. Sur. Ct. 1954).

Partner of law firm, who executed holographic will, was examinable before trial on will probate, since he “shares privilege as well as prohibition of attorney.” In re Alexander's Will, 130 N.Y.S.2d 648, 205 Misc. 894, 1954 N.Y. Misc. LEXIS 2078 (N.Y. Sur. Ct. 1954).

A testator by requesting his attorney to act as a witness to his will waives the statutory privilege of secrecy. In re Gagan's Will, 20 N.Y.S. 426 (N.Y. Sur. Ct.), aff'd, 21 N.Y.S. 350, 66 Hun 632 (N.Y. Sup. Ct. 1892).

Lawyer drawing will and his clerk and stenographer could testify to its preparation and execution if they were subscribing witnesses to it. Wallace v Wallace, 137 N.Y.S. 43 (N.Y. App. Div. 1911), aff'd, 158 A.D. 273, 143 N.Y.S. 1148, 1913 N.Y. App. Div. LEXIS 8037 (N.Y. App. Div. 2d Dep't 1913).

Attorney-draftsman of will, where its language does not clearly show testator’s intent, may testify as to testator’s intent and his instructions. In re Menick's Will, 124 N.Y.S.2d 573, 1953 N.Y. Misc. LEXIS 2210 (N.Y. Sur. Ct. 1953).

Where will proponent was attorney to decedent, draftsman and witness to his will, on motion for his pretrial examination in will contest, he could have raised CPA § 354 if it appeared that he was being asked to disclose information of its provisions, though he was required to testify anent preparation and execution of paper. In re Walsh's Will, 154 N.Y.S.2d 987 (N.Y. Sur. Ct. 1956).

The communications of a deceased client to the attorney are inadmissible in evidence upon the trial of an action if not made competent by, and came within, the provisions of CPA § 354. Ball v Dickson, 31 N.Y.S. 990, 83 Hun 344 (1894).

79. —Revoked or destroyed will

In an action to establish a will which has been destroyed, the attorney who prepared it is disqualified from testifying as to its contents, unless the prohibition of the statute be waived in the manner prescribed. Bethany M. E. Church v Brooks, 143 A.D. 685, 128 N.Y.S. 250, 1911 N.Y. App. Div. LEXIS 902 (N.Y. App. Div. 1911).

Revocation of will revoked right of attorney to testify to facts concerning execution and preparation. Mead v Herdman, 161 A.D. 177, 146 N.Y.S. 353, 1914 N.Y. App. Div. LEXIS 5313 (N.Y. App. Div. 1914).

Attorney who drew will revoking prior will is competent to testify concerning it, even though he had not drawn prior will or the codicil thereto which were being offered for probate. In re Will of Stacer, 13 A.D.2d 164, 214 N.Y.S.2d 746, 1961 N.Y. App. Div. LEXIS 10928 (N.Y. App. Div. 4th

Dep't 1961), aff'd, 11 N.Y.2d 780, 227 N.Y.S.2d 26, 181 N.E.2d 769, 1962 N.Y. LEXIS 1346 (N.Y. 1962).

80. Legislative investigations

Privilege provided by CPA § 352 (§ 4504(a), (b) herein) and § 354 applied to legislative investigations. New York City Council v Goldwater, 284 N.Y. 296, 31 N.E.2d 31, 284 N.Y. (N.Y.S.) 296, 1940 N.Y. LEXIS 838 (N.Y. 1940).

81. Probate proceedings

While the term “probate” is commonly used with reference to the formal establishment of a document as the last will of a testator, it also has a broader meaning including all proceedings incident to the administration and settlement of an estate and perhaps also the establishment of the meaning of a will as well as its execution. Chase Nat'l Bank v Chicago Title & Trust Co., 299 N.Y.S. 926, 164 Misc. 508, 1934 N.Y. Misc. LEXIS 2006 (N.Y. Sup. Ct. 1934).

Attorney’s testimony as to statement of deceased that she had lost her will was incompetent to establish that testator’s will had not been revoked. In re Rokofsky's Will, 111 N.Y.S.2d 553, 1952 N.Y. Misc. LEXIS 2543 (N.Y. Sur. Ct. 1952).

Opinion Notes

Agency Opinions

I. Under CPLR

A. In General

1. Attorney retainer

Retainer agreement (contract) would not be subject to attorney-client privilege and would ordinarily be accessible under Freedom of Information Law. Comm on Open Gov't FOIL-AO-12641.

2. Waiver of privilege, generally

Public body may waive attorney-client privilege, but it is unclear whether waiver can only be accomplished by majority of members of body, or whether single member, acting independently, has authority to waive privilege and disclose what otherwise would be confidential. Comm on Open Gov't OML-AO-2377.

B. Particular Applications

3. Generally

Records regarding "dates, times and duration" of legal services rendered by school district attorney in civil rights case must be disclosed; "descriptive" material reflective of "general nature of services rendered," as well as dates, times and duration of services rendered, ordinarily would be beyond coverage of attorney-client or work product privilege. Comm on Open Gov't FOIL-AO-13526.

4. Corporate matters, generally

5. —Utility corporations

Records that might become involved in litigation, which were obtained by Public Service Commission (PSC) from Niagara Mohawk Power Corporation (NMPC) pursuant to PSC order, would be exempted from disclosure under Freedom of Information Law based on NMPC's attempt to preserve attorney-client privilege, insofar as NMPC could properly claim privileges under CPLR concerning its records. Comm on Open Gov't FOIL-AO-9911.

6. Malpractice

Report prepared by town attorney in response to anonymous complaint that dentist was operating his practice in violation of town code was within attorney-client privilege under CLS CPLR § 4503 insofar as it consisted of legal advice provided to client (town); however, to extent that report had been disclosed to dentist, privilege was waived and report was not exempted from disclosure by CLS Pub O § 87(2)(a). Comm on Open Gov't FOIL-AO-9854.

7. Other and miscellaneous

When municipal official or body seeks legal advice from its attorney and attorney renders legal advice, communications of that nature would fall within coverage of attorney-client privilege and would, therefore, be exempt from disclosure under CLS Pub O § 87(2)(a). Comm on Open Gov't FOIL-AO-12641.

Proper assertion of attorney-client privilege involves need to ensure that advantage is not given to adversary; thus, if disclosure of certain items that were deleted in record of litigation would have no such adverse effect, attorney-client privilege could not be properly asserted under Freedom of Information Law. Comm on Open Gov't FOIL-AO-13383.

When attorney-client relationship has been invoked, communications made pursuant to that relationship are considered confidential under CLS CPLR § 4503; thus, when attorney and client establish privileged relationship, communications made pursuant to that relationship are confidential under state law and, therefore, exempt from Open Meetings Law. Comm on Open Gov't OML-AO-2272.

If attorney and client establish privileged relationship, communications made pursuant to that relationship would be confidential under state law and, therefore, exempt from Open Meetings Law. Comm on Open Gov't OML-AO-2396.

Municipal board's privileged relationship with its attorney, for purposes of exemption under CLS Pub O § 108(3), is operable only when board or official seeks legal advice of attorney acting in his or her capacity as attorney and there is no waiver of privilege. Comm on Open Gov't OML-AO-2718.

Closed session of county legislature regarding casino gaming could not validly be held based on assertion of attorney-client privilege where representatives of casinos were also present; presence of “strangers” who are not clients essentially resulted in waiver of privilege. Comm on Open Gov’t OML-AO-3913.

If attorney and client establish privileged relationship, communications made pursuant to that relationship would be confidential under state law and, therefore, exempt from Open Meetings Law. Comm on Open Gov’t OML-AO-3913.

Insofar as public body seeks legal advice from its attorney and attorney renders legal advice, attorney-client privilege may validly be asserted and that communications made within scope of privilege would be outside coverage of Open Meetings Law. Comm on Open Gov’t OML-AO-3913.

Research References & Practice Aids

Cross References:

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Bartel, Drawing negative inferences upon a claim of the attorney-client privilege. 60 Brook. L. Rev. 1355.

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Toward a New York evidence code: some notes on the privileges. 19 N.Y.L. Sch. L. Rev. 791.

Attorney-client privilege and corporate clients. 47 NYSB J 274.

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Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4503, Attorney.

1 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 3.06.; 2 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 31.10.; 3 Carrieri, Lansner, New York Civil Practice: Family Court Proceedings § 42.03.

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3 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶1401.02, 1403.06, 1404.11, 1407.07, 1408.03. 4 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶1706.03, 1707.15.

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1 New York Practice Guide: Domestic Relations §§ 1.01, 12.06.; 2 New York Practice Guide: Domestic Relations § 27.04; 3 New York Practice Guide: Domestic Relations § 37.06.

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Bender's New York Evidence § 160.01. Evidentiary Privileges.

Bender's New York Evidence § 160.02. Attorney-Client Privilege.

Bender's New York Evidence § 160.03. Physician-Patient Privilege.

Warren’s Weed New York Real Property:

Warren’s Weed: New York Real Property § 10.06.

Matthew Bender’s New York Checklists:

Checklist for Evaluating Limitations on Disclosure LexisNexis AnswerGuide New York Civil Litigation § 6.12.

Checklist for Protecting Privileged Communications LexisNexis AnswerGuide New York Civil Litigation § 10.02.

Forms:

Bender’s Forms for the Civil Practice Form No. CPLR 4502-a:1.

LexisNexis Forms FORM 75-CPLR 4503:1.— Waiver of Privileged Communication Made to Attorney.

LexisNexis Forms FORM 75-CPLR 4503:2.— Affidavit in Opposition to Disclosure of Communications Between Plaintiff and Former Attorney.

LexisNexis Forms FORM 75-CPLR 4503:3.— Affidavit in Support of Motion to Hold Attorney in Contempt for Failure to Disclose Financial Information In Matrimonial Proceeding.

LexisNexis Forms FORM 75-CPLR 4503:4.— Affidavit in Support of Protective Order to Vacate Notice of Deposition of Party’s Present Attorney in Legal Malpractice Action.

Texts:

New York Criminal Practice Ch 34.

NY Pattern Jury Instructions 3d, PJI 1:76.

1 New York Trial Guide (Matthew Bender) §§ 7.23, 7.51; 3 New York Trial Guide (Matthew Bender) §§ 51.01, 51.10.

Hierarchy Notes:

NY CLS CPLR, Art. 45