BOUNDARIES OF THE ATTORNEY-CLIENT PRIVILEGE IN THE TECH AGE:
How to Ensure Your Multi-Media Communications are Protected

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I. ATTORNEY-CLIENT PRIVILEGE IN OHIO

A. The attorney-client privilege is governed by statute, R.C. 2317.02(A) and, where the statute does not apply, by common law. R.C. 2317.02 provides a testimonial privilege, while common law provides a broad protection against the dissemination of information obtained in the confidential attorney-client relationship. (*Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 533; *State ex rel. Dawson v. Bloom-Carroll Local Sch. Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524).

B. R.C. 2317.02

The following persons shall not testify in certain respects:

(A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily testifies or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

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(2) An attorney, concerning a communication made to the attorney by a client in that relationship or the attorney's advice to a client, except that if the client is an insurance company, the attorney may be compelled to testify, subject to an in camera inspection by a court, about communications made by the client to the attorney or by the attorney to the client that are related to the attorney's aiding or furthering an ongoing or future commission of bad faith by the client, if the party seeking disclosure of the communications has made a prima facie showing of bad faith, fraud, or criminal misconduct by the client.

C. Common Law

1. Prohibits the disclosure of attorney-client communications other than by the compelled testimony of the attorney that is covered by R.C. 2317.02.

II. WHAT IS COVERED BY THE ATTORNEY-CLIENT PRIVILEGE

A. Communications between attorney (or the attorney's agent) and client in the context of the attorney-client relationship.

1. Communications may constitute the following:

a. Attorneys' investigative reports, including factual information contained therein, created within the scope of the services for which the attorney was retained. (*State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Authority*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221).

b. Itemized attorney-fee bills

i. To the extent that they reflect legal strategies, confidential communications, or an attorney's thoughts as to the trajectory of the case.

ii. Basic information contained on simple invoices, such as the amount billed or the name of the attorney performing the work is not protected by the privilege. (*Shell v. Drew & Ward Co., L.P.A.*, 178 Ohio App.3d 163, 2008-Ohio-4474, 897 N.E.2d 201 (1st Dist.)

c. Letters from insurer to insured evaluating or discussing the claim against the insured and the extent to which such claim might be covered by the insured's policy. (*State ex rel. Dawson v. Bloom-Carroll Local School District*, 131 Ohio St.3d 10, 2011-Ohio-6009, 959 N.E.2d 524).

B. Communications are protected both at trial and during discovery. (See *Jackson v. Greger*, 110 Ohio St.3d 488, 2006-Ohio-4968, 854 N.E.2d 487).

C. The attorney-client privilege survives the death of the client. (*Taylor v. Sheldon*, 172 Ohio St. 118, 173 N.E.2d 892 (1961)).

III. EXCEPTIONS TO ATTORNEY-CLIENT PRIVILEGE IN OHIO

A. Crime-Fraud Exception

1. The attorney-client privilege cannot be asserted to conceal an attorney's cooperation with a client's wrongdoing. That is, the privilege does not attach where the advice sought by the client and conveyed by the attorney relates to some future fraudulent or unlawful transaction. (*Lemley v. Kaiser*, 6 Ohio St.3d 258, 452 N.E.2d 1304 (1983); *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 1994-Ohio-324, 635 N.E.2d 331 (1994)). The exception does not apply if a client consults with an attorney to defend against past misconduct. (*Sutton v. Stevens Painton Corp.*, 193 Ohio App. 3d 68, 2011-Ohio-841, 951 N.E.2d 91 (8th Dist.)).

B. Lack of Good Faith Exception

1. Basis for exception: the attorney-client privilege does not apply where a client seeks to abuse the attorney-client relationship. (*Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 1994-Ohio-324, 635 N.E.2d 331 (1994)).

2. Documents showing the lack of a good faith effort to settle by a party or the attorneys acting on behalf of a party are not protected by the attorney-client privilege. (*Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 1994-Ohio-324, 635 N.E.2d 331 (1994)).

3. Attorney-client communications and other file materials showing an insurance company's lack of good faith in denying coverage to a party that were created prior to the denial of coverage are not protected by the attorney-client privilege. (*Boone v. Vanliner Ins. Co.*, 91 Ohio St.3d 209, 2001-Ohio-27, 744 N.E.2d 154 (2001)).

C. Joint-Representation Exception

1. Where one attorney represents two clients in the same litigation, one client cannot invoke the attorney-client privilege against the co-client. (*Emley v. Selepchak*, 76 Ohio App. 257, 63 N.E.2d 919 (9th Dist. 1945); see *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 53).

D. Self-Protection Exception

1. An attorney is permitted to testify concerning attorney-client communications when necessary in order to collect a legal fee or defend against a claim of malpractice or other wrongdoing in litigation against a

current or former client. *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 53.

2. Based upon general common law exception that an attorney may reveal client confidences necessary to defend himself or to vindicate his rights when the attorney is engaged in a legal controversy with a current or former client and the proposition that the attorney-client privilege cannot be used by the client as both a shield and a sword.

3. In *Squire Sanders*, Squire Sanders represented Givaudan in connection with litigation filed by employees and others who allegedly grew ill after inhaling butter flavoring produced by Givaudan to be used on popcorn. Approximately four years later, Givaudan's new vice president for legal affairs was dissatisfied with Squire Sander's legal representation and amount of legal fees, and refused to submit payment of over $1.8 million to Squire Sanders. Squire Sanders then filed suit for breach of contract and money due on an account against Givaudan, and Givaudan counterclaims for breach of contract, legal malpractice, breach of fiduciary duty, fraud, and unjust enrichment. During discovery, Squire Sanders sought the production of documents relating to its legal representation of Givaudan and Givaudan's decision to terminate Squire Sanders' representation. Givaudan objected, asserting the attorney-client privilege and work product doctrine. Givaudan also precluded its current and former vice presidents from responding to questions in their depositions regarding Squire Sanders' staffing of the case, resources devoted to the litigation, the adequacy of trial preparation, and other similar matters on the basis of the attorney-client privilege and work product doctrine.

   a. Procedural History: Squire Sanders moved to compel the production of documents and deposition testimony based upon the self-protection exception to the attorney-client privilege and work product doctrine. The trial court granted the motion. On appeal, the appellate court reversed, holding that R.C. 2317.02(A) provides the exclusive means for a client to waive the attorney-client privilege for testimonial statements and that the implied waiver test applies to non-testimonial statements. Squire Sanders appealed to the Supreme Court of Ohio on the grounds that the common-law self-protection exception to the attorney-client privilege is recognized by both federal and Ohio law, and is incorporated into the attorney-client privilege codified in R.C. 2317.02(A).

   b. Holding: After discussing the application of this exception by both Ohio courts and courts from other jurisdictions, the Supreme Court recognized the self-protection exception to the attorney-client privilege.

c. The Court notes that recognition of the self-protection exception comports with Ohio Rule of Professional Conduct 1.6(b)(5).

i. Prof. Cond. R. 1.6(b)(5):

> A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary
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> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client***.

d. The Court distinguishes a waiver of the attorney-client privilege from an exception to the privilege.

i. A waiver "involves the client's relinquishment of the protections of R.C. 2713.02(A) once they have attached."

ii. An exception "falls into the category of situations in which the privilege does not attach to the communications in the first instance and is therefore excluded from the operation of the statute."

E. All of these exceptions to the attorney-client privilege evolve from common law.

IV. WAIVER OF ATTORNEY-CLIENT PRIVILEGE IN OHIO

A. The client, not the lawyer, "owns" the privilege and only he or she may waive it.

B. R.C. 2317.02:

1. Client expressly consents to the waiver of the privilege; or

2. Client voluntarily testifies on the subject covered by the privilege.

i. Testimony can be in an affidavit, deposition, confession, or other testimony under oath. (*Air-Ride, Inc. v. DHL Express (USA), Inc.*, 12th Dist. No. CA2008-01-001, 2008-Ohio-5669).

ii. To determine if testimony constitutes a waiver of the privilege, courts much look at the facts of the case and the questions asked and answers given to see if the testimony given was voluntary. (*Meyers, Roman, Friedberg & Lewis v. Malm*, 183 Ohio App.3d 195, 2009-Ohio-2577, 916 N.E.2d 832 (8th Dist.)).

3. These are the exclusive ways to waive the statutory privilege. (*Jackson v. Greger*, 110 Ohio St.3d 448, 2006-Ohio-4968, 854 N.E.2d 487).

C. Common Law:

1. Client expressly consents to the waiver of the privilege; or

2. Client engages in conduct that implies a waiver of the privilege. (*Grace v. Mastruserio*, 182 Ohio App.3d 243, 2007-Ohio-3942 (1st Dist.)).

a. Disclosure to third parties that are not agents of the attorney

b. The First District Court of Appeals of Ohio has applied the *Hearn* test to determine whether the common law attorney-client privilege has been impliedly waived in *Grace v. Mastruserio*, 182 Ohio App.3d 243, 2007-Ohio-3942, 912 N.E.2d 608 (1st Dist.).

i. A party impliedly waives the common law attorney-client privilege if:

(a) the assertion of the privilege is the result of an affirmative act by the asserting party;

(b) the party asserting the privilege has placed the protected information at issue by making it relevant to the case through the affirmative act; and

(c) application of the privilege would deny the opposing party access to information that is vital to its defense. (taken from *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975)).

D. If the client is deceased, the surviving spouse is vested with the authority to waive the attorney-client privilege. (R.C. 2317.02; *State v. Doe*, 101 Ohio St.3d 170, 2004-Ohio-705, 803 N.E.2d 777).

E. Once the privilege has been waived, it is lost forever.

V. INTERPLAY BETWEEN TECHNOLOGY AND ATTORNEY-CLIENT PRIVILEGE

A. Do attorney-client privileged communications via e-mail, text messaging, online instant messaging, blogs, social media sites such as Facebook and Twitter, cell phones and on laptops or iPads remain privileged?

1. Case law is still developing so there is not a clear-cut answer. However, applicable ethics rules, such as the Ohio Rules of Professional Conduct, and opinions provide guidance.

    a. Ethical considerations

        i. **Ohio Rule Prof. Cond. 1.6**

        A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.

        ii. **Ohio Rule Prof. Cond. 1.1**

        A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

2. <u>Key determination:</u> Is there a reasonable expectation of privacy?

    a. Case law is still developing, so there is not a clear-cut answer.

    b. E-mail

        i. Generally, attorneys and clients have a reasonable expectation of privacy in their e-mail communications.

            (a) See *U.S. v. Warshak*, 631 F.3d 266 (6th Cir. 2010): holding that an e-mail account holder enjoys a reasonable expectation of privacy in his e-mail communications that are "stored with, or sent or received through, a commercial ISP."

ii. However, the privilege may be waived if attorney-client communications are made using the client's work e-mail address or if the communications are made on the client's personal e-mail address on a work computer.

(a) *Holmes v. Petrovich Development Company, LLC*, 191 Cal. App. 4th 1947 (Jan. 13, 2011):

(1) Facts: an employee used her employer's computer to send e-mails to an attorney to inquire about a possible lawsuit against her employer. Upon advice of her attorney, she deleted the e-mails from the employer's computer system. The employee filed suit, and at trial, the employer showed the jury several e-mails between the employee and her attorney, which the trial court allowed into evidence. After a verdict in favor of the employer, the employee appealed, arguing that the e-mails she sent to her attorney from her employer's computer were privileged.

(2) The Court of Appeals held that the e-mails were not covered by the attorney-client privilege because: 1) the employee knew of the employer's policy that the computers were only to be used for company business and not for personal e-mails; 2) the employee had been warned that the employer would monitor its computers for compliance; and 3) the employee had been explicitly told that she and other employees using the employer's computers for personal information or messages would have no privacy rights in such information or messages.

(3) "Although a communication between persons in an attorney-client relationship does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication, Evid. Code §917, subd. (b),

this does not mean that an electronic communication is privileged (1) when the electronic means used belongs to the defendant; (2) the defendant has advised the plaintiff that communications using electronic means are not private, may be monitored, and may be used only for business purposes; and (3) the plaintiff is aware of and agrees to these conditions. A communication under these circumstances is not a confidential communication between client and lawyer within the meaning of Evid. Code § 952, because it is not transmitted by a means that, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation."

(b) *Fazio v. Temporary Excellence, Inc.*, 2012 N.J. Super. Unpub. LEXIS 216 (Feb. 2, 2012):

(1) Facts: plaintiff used his employer's e-mail system and computer equipment to send and receive e-mails with the attorney that represented him during his attempt to purchase the employer. During litigation with the employer, the plaintiff sought an order compelling the employer to turn over the e-mails and barring the employer from using such e-mails based upon the attorney-client privilege. The trial court denied the request and held that the plaintiff did not have an expectation of privacy in the e-mails because they were sent and received from the employer's computer and server, and were recovered after plaintiff's employment was terminated.

(2) The Court of Appeals affirmed, holding that since the plaintiff failed to take any steps to shield the e-mails with his attorney from his employer and used the employer's computer and server for such communications, he had no "reasonable subjective expectation of privacy."

(c) But see *Stengart v. Loving Care Agency, Inc.*, 408 N.J. Super. 54, 973 A.2d 390 (N.J. Super A.D. 2009): holding that an employee had a reasonable expectation of privacy in her communications with her attorney on her personal web-based e-mail account, which was password protected, that she accessed on her employer's computer, despite the fact that the employer had the ability to monitor the e-mail account while it was opened on the employer's computer.

iii. **ABA Formal Opinion 11-459:** Duty to Protect the Confidentiality of E-mail Communications with One's Client (August 4, 2011)

(a) This Formal Opinion is based upon the ABA Model Rules of Professional Conduct, which are similar to, but not exactly the same as, the Ohio Rules of Professional Conduct

(b) "A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means must ordinarily warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, where there is a significant risk that a third party may gain access."

(c) "In the context of representing an employee, this obligation arises, at the very least, when the lawyer knows or reasonable should know that the client is likely to send or receive substantive client-lawyer communications via e-mail or other electronic means, using a business device or system under circumstances where there is a significant risk that the communications will be read by the employer or another third party."

(1) The ABA recognizes that a client may not be afforded a reasonable expectation of privacy when the client uses its employer's computer to communicate via e-mail with its attorney. It further recognizes that case law is evolving, and courts have reached varying conclusions about whether an employee's

communications with its attorney on an employer's computer are privileged.

(2) If an attorney learns that a client is receiving personal e-mail on an employer's computer or other device owned or controlled by the client's employer, the attorney has a duty to caution the client not to send and receive personal e-mail on such a device. If the client does not follow the attorneys' advice, the attorney has a duty to stop sending e-mails to the client's personal e-mail address.

(d) The opinion is based upon and in accordance with Rule 1.6(a) of the Model Rules, which requires an attorney lawyer to refrain from revealing "information relating to the representation of a client unless the client gives informed consent," and Rule 1.1 of the Model Rules, which requires an attorney to "provide competent representation to a client."

iv. **ABA Formal Opinion 99-413:** Protecting the Confidentiality of Unencrypted E-Mail (March 10, 1999)

(a) An attorney may transmit information relating to a client's representation via unencrypted e-mail sent over the Internet without violating Rule 1.6(a) of the Model Rules of Professional Conduct because "the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint."

(b) "The same privacy accorded U.S. and commercial mail, land-line telephonic transmissions, and facsimiles applies to Internet e-mail."

(1) Rational: "The risk of unauthorized interception and disclosure exists in every medium of communication, including e-mail. It is not, however, reasonable to require that a mode of communicating information must be avoided simply because interception is technologically possible, especially when unauthorized interception or

dissemination of the information is a violation of law."

(c) An attorney should still, however, consult with the client about the mode of transportation and follow the client's instructions as to how the client wants the information transmitted.

c. Cell Phone Communications

i. It is currently unclear whether there is a reasonable expectation of privacy for all cell phone communications.

ii. When cell phones first emerged, certain courts held that cell phone users did not have a reasonable expectation of privacy in their conversations.

(a) In 1999, the ABA issued Formal Opinion 99-413: which states that: "Authority is divided as to whether users have a reasonable expectation of privacy in conversations made over cordless and cellular phones. Some court decisions reached the conclusion that there is no reasonable expectation of privacy in cordless phones in part because the absence, at the time, of federal law equivalent to that which protects traditional telephone communications. After the 1994 amendment to the Wiretap Statute, which extended the same legal protections afforded regular telephone communications to cordless phone conversations, at least one ethics opinion address the advisability of using cordless phones to communicate with clients and concluded that their use does not violate the duty of confidentiality."

(1) The ABA noted that the nature of cell phone technology is more risky than e-mail communication because cell phones are "broadcast" over public airwaves in that they rely on FM and AM radio waves for their signals.

iii. While there has not been recent case law to the contrary, the technology surrounding cell phones has increased dramatically, and it has become much more difficult to intercept cell phone communications. Further, a few cases

have cited to the passing of the Electronic Communication Privacy Act of 1986, 18 U.S.C. 2515, which criminalizes the interception of electronic communications, as an indication that there is a reasonably expectation of privacy in cell phone communications. Therefore, it is likely that courts will find that attorneys and clients have a reasonable expectation of privacy with respect to their cell phone communications with one another.

iv. Courts have held, however, that there is a reasonable expectation of privacy for the information stored on a person's cell phone. (See *State v. Clampitt*, 2011 Mo. App. LEXIS 1741 (Jan. 24, 2011); *United States v. Zavala*, 541 F.3d 562, 577 (5th Cir. 2008)).

d. Social Media: Facebook & MySpace

i. While there is no definitive answer as to whether a person can have a reasonable expectation of privacy in their posts and/or messages on Facebook or MySpace, the few courts that have addressed the issue have indicated that posts will likely not be entitled to a reasonable expectation of privacy. It does not appear that courts have not addressed private messages sent on Facebook or MySpace.

(a) *Tompkins v. Detroit Metropolitan Airport*, E.D. Mich. No.10-10413, 2012 U.S. Dist. LEXIS 5749 (Jan. 18, 2012):

(1) The court was faced with the issue of whether a plaintiff in a slip-and-fall case was required to produce her entire Facebook account to opposing counsel, including those pages that were designated as private.

(2) The court explained that there is no "guiding precedent" from the Sixth Circuit on this issue. Courts from other jurisdictions have reached varied conclusions as to the discoverability of information posted on Facebook and other social networking sites.

(3) The court determined that "material posted on a "private" Facebook page, that is accessible to a selected group of recipients but not available for viewing by the general

public, is generally not privileged, nor is it protected by common law or civil law notions of privacy." It then held that "[n]evertheless, the Defendant does not have a generalized right to rummage at will through information that Plaintiff has limited from public view."

(b) *Romano v. Steelcase Inc.*, 30 Misc.3d 426, 907 N.Y.S.2d 650 (N.Y. 2010): holding that a plaintiff did not have a reasonable expectation of privacy in the information contained or posted on her Facebook and MySpace accounts. The court explained that the very purpose of these sites is to share information with others, and the sites' privacy policies explicitly provide that complete privacy cannot be guaranteed, regardless of the privacy settings selected by the user.

(c) *McMillen v. Hummingbird Speedway, Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. Com. Pl. Sept. 9, 2010): holding that a plaintiff did not have a reasonable expectation of privacy in her posts on Facebook and MySpace pages, as the purpose of such sites is to share information with others and both sites explicitly provide that any posted information may be disclosed to third parties.

(d) *Moreno v. Hanford Sentinel, Inc.*, 172 Cal. App.4th 1125 (1st Dist. 2009): holding that a plaintiff did not have a reasonable expectation of privacy in information that she posted to her MySpace page.

e. Text Messages

i. Recent court decisions hold that a person has a reasonable expectation of privacy in text messages sent or received on a personal device, provided that the messages are not disclosed to a third party.

(a) *State v. Clampitt*, 2011 Mo. App. LEXIS 1741 (Jan. 24, 2011): holding that a defendant has a reasonable expectation of privacy in text messages sent and received on his personal cell phone.

ii. There is not a reasonable expectation of privacy in text messages sent or received on a device owned by a person's employer.

(a) *Ontario v. Quon*, 130 S.Ct. 2619 (2010): holding that a police officer did not have a reasonable expectation of privacy in text messages that were sent and received on a pager that was owned and issued by the police officer's employer.

3. Social Media: Facebook, MySpace, Twitter, Blogs, Instant Messaging

a. Although case law is still developing, current case law shows that the attorney-client privilege can be waived through posts on social media sites or messages on instant messaging programs because of their public nature.

i. *Lentz v. Universal Music Corp.*, N.D. Cal. Case No. 5:07-cv-03783 JF, Order Overruling Objections to Discovery Order (Nov. 17, 2010):

(a) Universal sent a takedown notice to YouTube alleging that a 29-second video of Lentz's toddler dancing to a Prince song infringed upon Universal's copyright. Lentz sued Universal for knowingly making a material misrepresentation in the takedown notice that the video infringed the copyright. Both before and during litigation, Lentz commented on her counsel's strategies and conversations she had with her counsel in e-mails and electronic chats with friends, blog postings, and statements to reporters. For example, she stated in an e-mail to a friend that her counsel "is pretty well salivating over getting their teeth into [Universal Music Group] yet again." In an e-mail to her mother, she stated that counsel was planning a "publicity blitz and/or a lawsuit against Universal." Universal then moved to compel discovery regarding such communications between Lentz and her counsel on the ground that Lentz waived the attorney-client privilege. The court held that Lentz voluntarily waived the attorney-client privilege with respect to communications with her attorney about possible motivations for bringing suit against Universal.

(b) The same thing occurred with respect to specific legal issues involved in the case and as to specific factual allegations involved in the Complaint. For example, Lentz told a friend via chat that her attorney thought Universal was being pushed by Prince to litigate rather than settle. She also posted on a blog about a possible fair use defense. The court held that Lentz voluntarily waived the privilege with respect to these specific legal issues and factual allegations in the Complaint.

B. Other Concerns Regarding Technology and the Attorney-Client Privilege

1. Inadvertent Disclosure

a. Example: Accidentally producing a privileged e-mail to opposing counsel in discovery.

b. Three approaches as to whether the inadvertent disclosure of privileged material constitutes a waiver of the privilege:

i. Per se waiver of privilege.

ii. Does not constitute a waiver of privilege.

iii. Five-factor balancing test:

(a) Reasonableness of the precautions taken to prevent the inadvertent disclosure;
(b) Amount of time taken to rectify the inadvertent disclosure;
(c) Scope of the discovery;
(d) Extent of the inadvertent disclosure; and
(e) "Overriding issue of fairness."

(Air-Ride, Inc. v. DHL Express (USA), Inc., 12th Dist. No. CA2008-01-001, 2008-Ohio-5669).

c. Courts are varied as to which approach to take. Ohio does not have a definitive approach. However, the 3rd, 10th, and 12th district courts of appeals in Ohio follow the five-factor balancing test. *(Air-Ride, Inc. v. DHL Express (USA), Inc.*, 12th Dist. No. CA2008-01-001, 2008-Ohio-5669; *Miles-McClellan Constr. Co. v. Bd. of Educ. Westerville City School Board*, 10th Dist. Nos. 05AP-1112-1115, 2006-Ohio-3439).

i. Application of five-factor balancing test:

(a) *Guider v. American Heritage Homes Corp.*, 3rd Dist. No. 8-07-16, 2008-Ohio-2402:

(1) Two privileged case-analysis letters authored by counsel for American Heritage Homes Corp. ("AAH") were inadvertently produced by the president of AAH to AAH's expert witness. When the plaintiff learned of the produced letters, plaintiff filed a motion to compel the production of the letters.

(2) The privilege as to the letters was deemed waived and AAH was required to produce the letters to opposing counsel because: 1) AAH did nothing to prevent the disclosure of the letters; 2) AAH did nothing to remedy the disclosures. AAH did not file a protective order, nor did it request a hearing before the court on the matter.

2. Stolen, lost or hacked cell phone, Blackberry, iPhone, or other smart phone

a. Although there is little guidance on an attorney's obligation, ethical or otherwise, when a device is stolen, lost, or hacked, the following are recommendations for an attorney to take in the event that such a situation occurs:

i. Ensure that the device can remotely be wiped clean or that the password can be changed remotely

ii. Set up GPS tracking on smartphones

3. Conversations between an attorney and client on cell phones in public

a. There is no guidance in Ohio, and very little guidance from other jurisdictions, as to whether or when conversations between an attorney and client on cell phones in public waive the attorney-client privilege.

b. Delaware State Bar Association Committee on Professional Ethics Opinion 2001-2: The transmission of confidential client information over a cell phone does not violate Rule 1.6, requiring

an attorney to maintain the confidentiality of such information, unless extraordinary circumstances exist, which are circumstances where an attorney should reasonably anticipate the possibility that the communications may be intercepted by a third party.

4. Wireless access for laptop computers and iPads

   a. There is no guidance in Ohio as to whether accessing privileged information on a laptop computer or iPad from a wireless internet connection outside of the attorneys' office waives the attorney-client privilege.

   b. California Bar Formal Opinion No. 2010-179:

      i. Facts: An attorney's law firm provides a laptop computer for his use on client and firm matters. The attorney uses his laptop at a local coffee shop and accesses a public wireless Internet connection to conduct legal research on a matter and e-mail a client, and uses the laptop at home on his personal wireless system to conduct research and e-mail a client.

      ii. Based upon California's Professional Conduct and Evidence Rules, the attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on a client's case because of the lack of security features on many public wireless locations. The attorney will not violate his duties if he takes appropriate precautions, such as using a personal firewall, file encryption, and encryption of wireless transmissions. If the client information is highly sensitive, the attorney may need to avoid using public wireless connections or notify the client of the potential risks of using a public wireless connection, including a possible waiver of the attorney-client privilege.

      iii. Based upon the same Rules, the attorney will not violate his duties of confidentiality and competence by using the wireless system at his home so long as the wireless system has the appropriate security features in place.

      iv. Factors to consider in determining whether the technology being used in the course of representing a client comports with the attorneys' ethical duties:

(a) Level of security, including whether reasonable precautions may be taken to increase the level of security;

(b) Legal ramifications to a third party who accesses, intercepts or exceeds the authorized use of the electronic information;

(c) Degree of sensitivity of the information;

(d) Possible impact of an inadvertent disclosure of privileged or confidential information or work product on the client;

(e) Urgency of the situation; and

(f) Client's instructions and circumstances.

5. Cloud Computing

a. Definition: Services controlled by third parties and accessed over the Internet.

b. Examples: online data storage such as iCloud, internet based e-mail such as Gmail, or software as a service (Saas)

c. Confidentiality issues:

i. Unauthorized access to privileged information by a vendor's employees or by hackers or other security breaches

ii. Storage of privileged information on servers in other countries that have fewer legal protections for electronically stored information

iii. Insufficient data encryption

iv. Strength of passwords

d. Although there is little, if any, case law on cloud computing, the following states have issued ethics opinions on cloud computing and confidential or privileged client information: New York, Oregon, North Carolina, Iowa, Arizona, Maine, and New Jersey.

i. New York State Bar Association Committee on Professional Ethics Opinion 842 (September 10, 2010): an attorney may use a cloud computing system to store client files so long as the attorney takes "reasonable care to ensure that the system is secure and that client confidentiality will be maintained."

ii. Oregon State Bar Association Formal Ethics Opinion No. 2011-188: Information Relating to the Representation of a Client: Third-Party Electronic Storage of Client Materials: "[a] Lawyer may store client materials on a third-party server so long as Lawyer complies with the duties of competence and confidentiality to reasonable keep the client's information secure within a given situation. To do so, the lawyer must take reasonable steps to ensure that the storage company will reliably secure client data and keep information confidential."

e. **ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies issued for comment an "Issues Paper Concerning Client Confidentiality and Lawyers' Use of Technology" on September 20, 2010**

i. Purpose: to examine the impact of technology on the legal profession, including confidentiality-related concerns that arise from the transmission and storing of electronic information and communications and provide guidance to attorneys on such issues

ii. Focus: 1) cloud computing; and 2) devices controlled by attorneys such as laptops, cell phones, and flash drives.