

5.48 Privileged communications; electronic communication thereof (CPLR 4548)

No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication.

Note

This rule restates CPLR 4548. The rule is plainly designed to make clear that a communication of privileged information whether by traditional means or modern electronic means remains privileged, notwithstanding that electronic means may be subject to interception by non-privileged parties.

Further, the “statutory language makes clear that the involvement of a person who plays a *necessary* role in the delivery of the electronic communication does *not* constitute a waiver of privilege.” (*Green v Beer*, 2010 WL 3422723, *4, 2010 US Dist LEXIS 87484, *10 [SD NY, Aug. 24, 2010, No. 06 Civ. 4156 (KMW) (JCF)] [plaintiffs lacked “proficiency in the use of email,” and “their son’s assistance was ‘necessary for the delivery or facilitation’ of counsel’s emailed communications to the (plaintiffs)” (2010 WL 3422723, *5, 2010 US Dist LEXIS 87484, *13)].)

Of course, the communicated message must otherwise conform to the requirements of the privilege. “If a wife, for example, sends her husband an e-mail message with a ‘cc’ to her brother-in-law, or she knows that a business associate is looking over her shoulder when she types the message on her computer screen, no privilege should attach.” (Vincent C. Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 4548.)