

Ethics
Waiver of Privilege

This case arose out of a class action challenging the strip-search practices at the Erie County jail and asserting that the written policy of the County Sheriff's Office (requiring an invasive strip search of all detainees) was violative of the Fourth Amendment. During discovery, a magistrate ordered the County to produce ten e-mail communications between the offices of the Erie County Attorney and the County Sheriff, all of which addressed the law concerning strip-searches of detainees, assessed the County's current search policy, recommended alternative policies, and monitored the implementation of these policy changes. The County alleged these were protected by attorney-client privilege. The magistrate held that communications passing between a government attorney without policy-making authority and a public official did not involve legal advice or analysis, but only administration and policy; thus, they were producible. On appeal, the Second Circuit disagreed, finding that the disputed e-mails were "sent for the predominant purpose of soliciting or rendering legal advice....This advice—particularly when viewed in the context in which it was solicited and rendered—does not constitute general policy or political advice unprotected by the privilege." On remand, the district court determined that the defendants had impliedly waived the privilege by "placing the information in those communications at issue in the litigation." In reaching this conclusion, the court referred to the testimony of a jail employee who testified at his deposition that the County Attorney's Office was involved in rewriting the strip-search policy, and cited *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. 24 Wash. 1975) (privilege may implicitly be waived when defendant asserts a claim that in fairness requires examination of protected communications).

On further appeal, the U.S. Court of Appeals for the Second Circuit vacated the district court's order requiring production, finding the *Hearn* test cut "too broadly" and, therefore, the district court erred in applying it in this case. "[I]t seems to us that there is a need for clarification of the scope of the at-issue waiver and the circumstances under which it should be applied." Privileged information could, in some sense, be relevant in any lawsuit, and a "mere indication" of a claim or defense certainly was "insufficient to place legal advice at issue." Citing to an assertion of an "advice-of-counsel" defense as a "quintessential example," the court noted that the key to a finding of implied waiver in the third instance was "some showing by the party arguing for a waiver that the opposing party relies on the privileged communication as a claim or defense or as an element of a claim or defense." Accordingly, the waiver required a showing that a party *actually* relied on privileged advice from his counsel to make his claim or defense. Here, the fact that the individual defendants raised a defense of qualified immunity was insufficient to place the disputed communications in issue, as entitlement to qualified immunity involved an objective, not a subjective, test. Thus, reliance upon the advice of counsel could not be used to support the defense; in fact, in the circumstances, any legal advice rendered by the County Attorney's Office was "irrelevant" to any defense. The district court was directed to enter an order protecting the confidentiality of the privileged communications. *In re the County of Erie*, No. 075702, 2008 WL 4554920 (2d Cir. Oct. 14, 2008).

First Amendment
Denominational Prayers

Both the Cobb County Commission and the Cobb County Planning Commission had a long tradition of opening their meetings with a prayer. The prayers were made by volunteer clergy or others in the community who were invited, on a rotating basis, to offer the prayers, and represented a variety of faiths (e.g., Christianity, Islam, Unitarian Universalism, and Judaism). Oftentimes, the prayers included brief expressions of the specific religious faith and references to "Jesus," "Allah," or "God of Abraham, Isaac, and Jacob." Each commission used a different method to compile a list of those to ask. The County Commission had a staffer who compiled a list of religious organizations in the County using several sources (phone book, the Internet, and business cards). The list was organized by denomination or faith, then by individual congregations. The staff person randomly selected the speaker, but avoided having speakers from the same religious group at consecutive meetings. A majority of the congregations on the list were Christian. The Planning Commission staff person relied mainly on the phone book listings, as well as the list of clergy who volunteered for the police and fire department chaplain program. The evidence suggested that this staff person eliminated Jehovah's Witness, Jewish, and Mormon clergy out of hand. Apart from the invitations, neither commission had any input on the content of the prayers. The County expended some municipal funds, in the form of materials and personnel time, to select, invite, and thank the speakers. Seven county taxpayers filed suit, seeking to enjoin the prayers on the basis that the sectarian references violated the Establishment Clause of the First Amendment. They argued that only nonsectarian prayers were constitutional, alleging that between 1998 and 2005, 96.6 percent of the clergy invited (to the extent their faith was discernable) were Christian. (During the same period, Jewish, Unitarian Universalist, Muslim, and Baha'i faiths were also represented.) The commissions, for their part, asserted that this