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Employer Monitoring of Employee Email: Attorney-Client Privilege Should Attach to Communications That the Client Believed Were Confidential

Alex DeLisi

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**EMPLOYER MONITORING OF EMPLOYEE
EMAIL: ATTORNEY-CLIENT PRIVILEGE
SHOULD ATTACH TO COMMUNICATIONS THAT
THE CLIENT BELIEVED WERE CONFIDENTIAL**

*Alex DeLisi**

Emails feel like private, confidential communications. But in the workplace, employers often retain the right to monitor every communication sent or received by an employee on an employer-owned device or network. This Note addresses the issue of whether attorney-client privilege should attach to communications made between an employee and her private attorney over a system monitored by her employer. When addressing this issue, most district and state courts apply a test that seeks to determine the reasonableness of the employee’s expectation of confidentiality in the attorney-client communication. However, courts differ in how they apply the expectation of reasonableness test, with nearly every court finding a different fact dispositive. This Note argues that attorneys, employers, and courts should instead use a three-pronged approach: first, attorneys should seek to prevent monitored communications with their clients from occurring in the first place; second, employers should take precautions to prevent their employees’ attorney-client communications from becoming nonconfidential; and third, courts should allow attorney-client privilege to attach to communications that the client believed were confidential. This three-pronged approach is consistent with the doctrine’s other exceptions to a strict confidentiality requirement and realigns attorney-client privilege with its public policy goals.

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* J.D. Candidate, 2014, Fordham University School of Law; B.A., 2008, Middlebury College. I would like to thank Professor Bruce Green for his input, guidance, and general gusto throughout the writing process. I would also like to thank Professor Daniel Capra, Professor James Kainen, and Dean Michael Martin for their comments.

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INTRODUCTION

Emails feel like private conversations. At work, however, employers' internet monitoring policies render personal emails nonprivate.¹ Many employer policies reserve the right to monitor every single email sent or received by employees.² A recent *New York Times* analysis concluded that "no matter what you are trying to hide in your email in-box . . . it is possible that someone will find out."³ This creates a tension between an employee's expectation of privacy in his or her work computer files and emails, and the lack of actual privacy.⁴

In 2003, employees of Asia Global Crossing (AGC), a pan-Asian telecommunications carrier, sent personal emails over AGC's company system to their personal counsel.⁵ AGC filed for bankruptcy protection and the appointed bankruptcy trustee began investigating certain transactions involving the employees.⁶ The trustee brought a motion to compel production of the employees' emails, but the employees resisted on the grounds that the emails were protected by attorney-client privilege.⁷

Drawing on Fourth Amendment case law concerning expectations of privacy, Chief Bankruptcy Judge Stuart Bernstein of the Southern District of New York established a four-factor test that has since become the "most oft-quoted" test⁸ for determining whether an employee's use of a company's email system destroys the attorney-client privilege:

- (1) Does the employer have a policy banning employees' personal use of computers;
- (2) Does the employer monitor employees' computer use;
- (3) Do third parties have a right of access to employees' computers and emails; and
- (4) Were the employees notified or aware of the employer's use and monitoring policy.⁹

In the case of AGC's employees, Judge Bernstein held that because attorney-client privilege would have otherwise attached to their

1. See Matt Villano, *The Workplace: Your Company Monitors Your Personal Email*, N.Y. TIMES (Mar. 5, 2007), <http://www.nytimes.com/2007/03/05/business/worldbusiness/05iht-workcol06.4803648.html>.

2. See *id.*

3. See Nicole Perlroth, *Trying To Keep Your E-mails Secret When the C.I.A. Chief Couldn't*, N.Y. TIMES, Nov. 16, 2012, at B1.

4. See *In re United States*, 665 F. Supp. 2d 1210, 1224 (D. Or. 2009) (discussing "a fundamental misunderstanding of the lack of privacy we all have in our e-mails. Some people seem to think that they are as private as letters, phone calls, or journal entries. The blunt fact is, they are not.").

5. See *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 252 (Bankr. S.D.N.Y. 2005).

6. See *id.* at 252–53.

7. See *id.*

8. Goldstein v. Colborne Acquisition Co., 873 F. Supp. 2d 932, 935 (N.D. Ill. 2012).

9. *Hanson v. First Nat'l Bank*, No. 5:10-0906, 2011 WL 5201430, at *3 (S.D. W. Va. Oct. 31, 2011) (summarizing *Asia Global Crossing's* four-factor test).

communications, the employees' use of the company's email system, without more, did not destroy the privilege.¹⁰

This Note analyzes the circumstances that should be required for attorney-client privilege to attach to electronic communications that are monitored by employers. It argues for a three-pronged approach. First, lawyers should seek to prevent nonconfidential communications from occurring by discussing the degree of confidentiality of their client's workplace systems and how the lack of confidentiality might undermine attorney-client privilege. Second, if employers monitor attorney-client communications, employers should attempt to avoid reading them so that, even though they were technically nonconfidential, courts may still consider them privileged. Third, courts should allow the privilege to attach when the employee believed that her communications with her attorney were confidential. The third prong represents a new exception to the confidentiality requirement of attorney-client privilege doctrine; when an employer monitors an employee's electronic communications with her lawyer, the employee's belief that the communication was confidential should dictate whether the privilege attaches.

This Note proceeds in three parts. Part I offers an overview of attorney-client privilege, including a history of the privilege and an examination of how the privilege functions when a third party, such as an employer, monitors attorney-client communications. Part II explores the approaches that courts use and that commentators have proposed to determine when the privilege attaches to employer-monitored attorney-client communications. Part III argues that the public policy of promoting client candor in attorney-client communications necessitates a three-pronged approach, including the allowance of a new exception to the confidentiality requirement when the client believed that a monitored communication was confidential.

I. ATTORNEY-CLIENT PRIVILEGE AND EMPLOYER MONITORING

This part discusses attorney-client privilege in four subparts: Part I.A offers an overview of attorney-client privilege. Next, Part I.B traces the history of the confidentiality requirement as it evolved to stay consistent with the privilege's public policy goals. Part I.C then examines employer monitoring of employee communications and the impact such monitoring has on the confidentiality of employee communications. Lastly, Part I.D summarizes past scholarship arguing that lawyers or employers should prevent monitored attorney-client communications from occurring.

A. *Overview of Attorney-Client Privilege*

This subpart first considers the history of attorney-client privilege before outlining the four elements of the modern privilege.

10. See *Asia Global Crossing*, 322 B.R. at 265.

1. History of Attorney-Client Privilege

The attorney-client privilege first arose in the sixteenth century and is the oldest of the common law privileges.¹¹ Initially the privilege protected an attorney from testifying against his client, as that was thought to be “dishonorable and ungentlemanly.”¹² In the eighteenth century, the purpose of the privilege evolved to protect the client instead of the attorney, by incorporating the understanding that the nature of the attorney-client relationship required security for the client.¹³

American courts adopted the privilege from English common law, and the U.S. Supreme Court first formally recognized the privilege in 1826.¹⁴ In England, only attorney-client communications made in anticipation of or during a dispute were protected by the privilege.¹⁵ Unlike English common law, early case law in the United States did not require that communications were made in anticipation of litigation.¹⁶

The modern understanding of the privilege is that it facilitates the client’s complete disclosure, which allows the attorney to give accurate and useful legal advice.¹⁷ The Supreme Court has held that attorney-client privilege promotes “public interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”¹⁸

2. Nature of the Privilege: Four Elements

The mere fact that a client communicates with an attorney does not necessarily make the communication privileged.¹⁹ Courts generally follow

11. *See Klitzman v. Krut*, 744 F.2d 955, 960 (3d Cir. 1984); *see also* 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 1:2 (1999).

12. RONALD GOLDFARB, IN CONFIDENCE: WHEN TO PROTECT SECRECY AND WHEN TO REQUIRE DISCLOSURE 60 (2009).

13. *See id.*; *see also* *Pearse v. Pearse*, (1846) 63 Eng. Rep. 950 (H.L.) 957 (“Truth, like all other good things may be loved unwisely—maybe pursued too keenly—may cost too much. And surely the meanness and mischief of prying into a man’s confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, and suspicion and fear, into the communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.”); 1 RICE, *supra* note 11, § 1:3.

14. *See Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826); *see also* 1 RICE, *supra* note 11, § 1:1.

15. *See Minet v. Morgan*, L.R. 8 Ch. App. 361, 363 (1873).

16. *See* 1 RICE, *supra* note 11, § 1:12 (outlining the twenty reported cases in the United States prior to 1820, all of which “show no evidence of the pending or in anticipation of litigation limitation on the privilege” (internal quotation marks omitted)).

17. *See, e.g., Hanson v. First Nat’l Bank*, No. 5:10-0906, 2011 WL 5201430, at *5 (S.D. W. Va. Oct. 31, 2011).

18. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

19. *See* 1 RICE, *supra* note 11, § 2:1; *see also* *United States v. Constanzo*, 625 F.2d 465, 468 (3d Cir. 1980) (“[A] communication is not privileged simply because it is made by or to a person who happens to be a lawyer.” (quoting *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 602 (8th Cir. 1977))).

a variation of Professor Wigmore's eight requirements for a communication to be privileged:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.²⁰

More recent recitations of the attorney-client privilege doctrine reduce its elements to four requirements: (1) a communication (2) made between privileged parties (3) intended to be kept confidential and was kept confidential, (4) that was made for the purpose of obtaining or providing legal advice.²¹ The following four sections address each element in turn.

a. Requirement One: A Communication

The attorney and her client must communicate for the privilege to attach.²² The communication may be oral or written²³ and protects the communication, not the underlying information communicated.²⁴ In other words, a client cannot turn nonprivileged information into privileged information by simply communicating the matter to an attorney.²⁵

20. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (McNaughton rev. ed. 1961).

21. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000) (listing the four elements of attorney-client privilege as "(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance"); see also *In re Cnty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) (listing three elements for the privilege).

22. See 1 RICE, *supra* note 11, § 2:1; see also 1 EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 66 (5th ed. 2007).

23. See EPSTEIN, *supra* note 22, at 66. The mode of communication does not directly affect whether the privilege applies. See *Davenport v. Ind. Masonic Home Found., Inc.*, No. IP 00-1047-CH/G, 2003 WL 1888986, at *1 (S.D. Ind. Mar. 27, 2003) (upholding the privilege for a tape recording); *Lintz v. Am. Gen. Fin., Inc.*, No. Civ.A. 98-2213-JWL, 1999 WL 450197, at *4 (D. Kan. June 24, 1999) (upholding the privilege for a message the client had written on a fax cover sheet). As discussed *infra* in Part I.B., the mode of communication can affect whether the privilege applies insofar as the mode could diminish the communication's confidentiality.

24. See, e.g., *United States v. James*, 708 F.2d 40, 44 n.3 (2d Cir. 1983) ("[T]he privilege attaches not to the information but to the communication of the information." (citation omitted)); *Lynch v. Novant Med. Grp., Inc.*, No. 3:08cv340, 2009 WL 2915039, at *6 (W.D.N.C. Sept. 8, 2009) ("[I]t is the Plaintiff's position that any information that she possesses regarding her case is protected by the attorney-client privilege as she is acting as her own attorney in this matter. This argument is frivolous and has no support in the law. The attorney-client privilege protects only confidential communications between a party and her attorney." (internal citation omitted)).

25. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 396 (1981) ("[The client] may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." (citation omitted)).

b. Requirement Two: Made Between Privileged Persons

The attorney-client privilege applies only to communications between privileged persons.²⁶ The privilege applies to communications made by attorneys and clients, as well as to agents of either party.²⁷ For example, if an attorney retains a consulting firm to assist in representation, the privilege protects the firm's communications with the attorney or client that contain the client's confidential information.²⁸ Moreover, the communication's privileged status is not necessarily lost because the client has communicated the same facts to another party.²⁹

c. Requirement Three: Intended To Be, Reasonably Believed To Be, and in Fact Is, Kept Confidential

A client must intend and reasonably believe that her communication will be confidential at the time the communication is made, and the communication must remain confidential for the privilege to apply.³⁰ Courts determine the reasonableness of the client's belief that her communications are confidential from the circumstances surrounding the communication—specifically, whether the communications occurred in the presence of a third party.³¹ The factual circumstances dictate whether the communication is in the presence of third parties, thereby rendering it

26. See EPSTEIN, *supra* note 22, at 134; 1 RICE, *supra* note 11, §§ 2:1, 2:5, 5:5.

27. See EPSTEIN, *supra* note 22, at 134; 1 RICE, *supra* note 11, §§ 2:1, 2:5, 5:5.

28. See, e.g., *Byrnes v. Empire Blue Cross Blue Shield*, No. 98Civ.8520(BSJ)(MHD), 1999 WL 1006312, at *5 (S.D.N.Y. Nov. 4, 1999) (“The communication by counsel to [the client] seeks assistance by the consultant in preparing a document that consists predominantly of legal advice rendered by the attorney to her client. As such it is covered by the privilege.”); *Att’y Gen. v. Covington & Burling*, 430 F. Supp. 1117, 1121 (D.D.C. 1977) (“[T]he Court has granted the privilege to communications from [the accountants] only to the extent that disclosure would tend to reveal a confidence from the actual client to one of them or to the attorney.”).

29. See, e.g., *United States v. Rakes*, 136 F.3d 1, 5 (1st Cir. 1998) (“[T]he privileged communication and the facts recounted within it are two different things. Thus, a client does not normally lose the privilege as to communications with his attorney merely because he testifies at trial to the same events discussed with his lawyer.” (citation omitted)); *High Tech Commc’ns, Inc. v. Panasonic Co.*, Civ. A. No. 94-1477, 1995 WL 45847, at *5 (E.D. La. Feb. 2, 1995) (“[A] party who merely discloses the facts contained in a privileged communication has not placed the communication at issue.”).

30. See *Upjohn*, 449 U.S. at 395 (upholding the privilege and emphasizing that the documents were intended to be and were kept confidential by the client company). See generally 1 RICE, *supra* note 11, § 6 (discussing the confidentiality requirement).

31. See *United States v. Mejia*, 655 F.3d 126, 133 (2d Cir.) (holding that a prisoner who knew that his calls were recorded could not have a reasonable expectation of privacy), *cert. denied sub nom. Rodriguez v. United States*, 132 S. Ct. 533 (2011); *United States v. Goodapple*, 958 F.2d 1402, 1409 (7th Cir. 1992) (finding that the attorney-client privilege did not attach because the communication was revealed to his attorney and to third persons); *United States v. Steele*, No. 2:10-cr-000148-BLW, 2011 WL 5403076, at *5 (D. Idaho Nov. 8, 2011) (holding that a prisoner has no reasonable expectation of privacy in recorded calls); *Comprehensive Habilitation Servs., Inc. v. Commerce Funding Corp.*, 240 F.R.D. 78, 85 (S.D.N.Y. 2006) (“[T]here was no privileged communication at which the IRS was present.”).

nonconfidential.³² For instance, if a client knows her communications with her attorney are being recorded, courts have held that there can be no reasonable expectation of confidentiality.³³

The confidentiality requirement goes hand in hand with waiver of the privilege.³⁴ Though waiver of the privilege may be express or implied,³⁵ waiver by implication is more common and occurs when the client's conduct is inconsistent with a claim of confidentiality.³⁶ If a client communicates with the attorney with a reasonable expectation of privacy, but then fails to maintain that confidentiality, the client implicitly waives the privilege.³⁷

In other words, a client waives her attorney-client privilege when she discloses confidential information to a third party—regardless of whether the client intentionally waived the privilege.³⁸ However, the client does not

32. See, e.g., *In re Sealed Case*, 737 F.2d 94, 102 (D.C. Cir. 1984) (finding that attorney-client privilege attached where corporate counsel and attorney were seated next to each other in first-class on a plane, because there were no other parties to their conversation, they were talking in low volumes not likely to be overheard, and the conversation itself dealt with legal analysis).

33. See *supra* note 31 and accompanying text; see also *United States v. Hatcher*, 323 F.3d 666, 674 (8th Cir. 2003) (“Because the inmates and their lawyers were aware that their conversations were being recorded, they could not reasonably expect that their conversations would remain private.”); *Cody v. Walter*, No. Civ. 08-4024, 2008 WL 4543042, at *8 (D.S.D. Sept. 18, 2008) (“The presence of the recording device was the functional equivalent of the presence of a third party.”).

34. See *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 327 (N.D. Cal. 1985) (“The confidentiality element and waiver are closely related inasmuch as any voluntary disclosure inconsistent with the confidential nature of the attorney client relationship waives the privilege.”).

35. See *In re Martin Marietta Corp.*, 856 F.2d 619, 622 (4th Cir. 1988) (“Implied waiver nullifies a privilege when disclosure of a privileged communication has vitiated confidentiality.”).

36. See 2 RICE, *supra* note 11, § 9:25.

37. See *Burden-Meeks v. Welch*, 319 F.3d 897, 901 (7th Cir. 2003) (“When [the municipal body] showed the Mayor a copy of the report, it waived any privilege it possesses.”); *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, 827 F. Supp. 2d 242, 257 (S.D.N.Y. 2011) (“Given the extensive and specific evidence produced by plaintiffs showing that the factual information, legal analysis, and legal conclusions in the Memorandum have been disclosed to the public, I find that [Defendant] has failed to meet its burden of proving that confidentiality was maintained.”); *Flo Pac, LLC v. NuTech, LLC*, No. WDQ-09-510, 2010 WL 5125447, at *7 (D. Md. Dec. 9, 2010) (noting that “waiver occurs when a privileged communication is disclosed to a third party at a later date”).

38. See, e.g., *Bowne of N.Y.C., Inc. v. AmBase Corp.*, 150 F.R.D. 465, 480 (S.D.N.Y. 1993) (“[T]he intent of the party and its attorney not to cause an implied waiver is immaterial if they intentionally undertake actions that have the effect of causing such a waiver.”); *United States v. Betinsky*, No. 88-198, 1988 WL 97673, at *3 (E.D. Pa. Sept. 20, 1988) (“Subjective intent is irrelevant if the ‘person fails to take affirmative action and institute reasonable precautions’ to protect confidentiality.” (quoting *Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Grp., Inc.*, 116 F.R.D. 46, 50 (M.D.N.C. 1987)), *aff'd*, 877 F.2d 58 (3d Cir. 1989); *Goldman Sachs & Co. v. Blondis*, 412 F. Supp. 286, 288 (N.D. Ill. 1976) (“[I]t is a uniform rule that when a party's conduct reaches a certain point of disclosure, fairness requires that the privilege cease, whether or not this is the result intended.”).

waive the privilege if: “(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error.”³⁹

In order to determine whether the client took adequate precautions to preserve the confidentiality of the attorney-client communications, courts consider the effect and feasibility of preventing disclosure, such as the standard stated in *Suburban Sew ’N Sweep, Inc. v. Swiss-Bernina, Inc.*:

In determining whether the precautions taken were adequate, two considerations are paramount: (1) the effect on uninhibited consultation between attorney and client of not allowing the privilege in these circumstances; and (2) the ability of the parties to the communication to protect against the disclosures.⁴⁰

Therefore, when a client leaves documents in a place accessible to third parties without taking measures to maintain their confidentiality,⁴¹ or when a client leaves papers in a public hallway⁴² or a table in a hotel room occupied by other people,⁴³ the client has implicitly waived the privilege because the client failed to take available precautions to retain the confidentiality of the written communications.

Involuntary disclosures will not result in a waiver, however, if the responsibility of losing confidentiality lies with someone other than the client—such as when documents have been stolen.⁴⁴ In the criminal context, involuntary disclosure of attorney-client communications via illegal search or seizure does not affect the defendant’s privilege protection, unless the defendant is aware that the communications have been seized.⁴⁵ Once the client knows that the privileged communications have been seized, courts will place the responsibility back with the client to take all reasonable measures to retrieve the communications to retain the privilege.⁴⁶

39. FED. R. EVID. 502(b).

40. *Suburban Sew ’N Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 260 (N.D. Ill. 1981).

41. *See generally In re Horowitz*, 482 F.2d 72 (2d Cir. 1973) (where client had left documents in accountant’s office).

42. *See In re Victor*, 422 F. Supp. 475, 476 (S.D.N.Y. 1976).

43. *See Bower v. Weisman*, 669 F. Supp. 602, 605–06 (S.D.N.Y. 1987).

44. *See, e.g., Sackman v. Liggett Grp., Inc.*, 173 F.R.D. 358, 365 (E.D.N.Y. 1997) (“The assertion of privilege . . . is not waived through public disclosure of a stolen privileged document.”); *see also Suburban Sew ’N Sweep, Inc.*, 91 F.R.D. at 260 (“[R]eview of the cases, and particularly of the evolving rule with respect to eavesdroppers, reveals that the privilege is not simply inapplicable any time that confidentiality is breached, as plaintiffs claim, and that the relevant consideration is the intent of the defendants to maintain the confidentiality of the documents as manifested in the precautions they took.”).

45. *See, e.g., United States v. Ofshe*, 817 F.2d 1508, 1515–16 (11th Cir. 1987); *Bishop v. Rose*, 701 F.2d 1150, 1156–57 (6th Cir. 1983).

46. *Compare In re Grand Jury (Impounded)*, 138 F.3d 978, 983 (3d Cir. 1998) (client did not seek judicial intervention to protect adversary from possessing privileged communication, and the privilege protection was lost), *and United States v. De La Jara*, 973 F.2d 746, 749–50, (9th Cir. 1992) (privilege was waived because the client did not seek judicial intervention to stop the prosecution’s use of the privileged communication), *with*

To determine whether the communication remained confidential in fact, courts consider not only if the communication was made available to third parties but also whether the communications were conducted or created to inform a third party.⁴⁷ Courts must determine whether the client intended to relinquish the confidentiality of the communication, which has the effect of either making the expectation of confidentiality unreasonable or making the communication nonconfidential.⁴⁸

d. Requirement Four: Made for the Purpose of Obtaining Legal Advice

The fourth and final element of attorney-client privilege is that a client's confidential communication to his attorney must be "necessary to obtain informed legal advice."⁴⁹ Courts do not require an express request for legal advice.⁵⁰ While courts consider the lawyer's role to determine whether a communication is comprised of legal advice,⁵¹ ultimately the client's intention to obtain legal advice or assistance controls.⁵²

United States v. Western Titanium, Inc., No. 08-CR-4229-JLS, 2010 WL 3789775, at *6 (S.D. Cal. Sept. 27, 2010) (client took actions to retrieve the privileged documents from the prosecution and consequently the privilege was not waived).

47. See *United States v. Ruehle*, 583 F.3d 600, 609 (9th Cir. 2009); *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983) ("When information is transmitted to an attorney with the intent that the information will be transmitted to a third party . . . such information is not confidential."); *United States v. El Paso Co.*, 682 F.2d 530, 540 (5th Cir. 1982); *United States v. McDonald*, 313 F.2d 832, 835 (2d Cir. 1963) ("Only matters transmitted by the client that are intended to be confidential communications to his attorney are protected.").

48. For example, courts have found no expectation of confidentiality when the attorney-client communication is prepared for public filings or other publicly published materials. See *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1991) (finding that information disclosed for the purpose of assembly into a bankruptcy petition does not have an expectation of confidentiality); *United States v. Jones*, 696 F.2d 1069, 1073 (4th Cir. 1982) ("[A]ppellants not only obtained the tax law opinions for the ultimate use of persons other than themselves, but also publicized portions of the legal opinions in brochures and other printed material.").

49. *Fisher v. United States*, 425 U.S. 391, 403 (1976).

50. See, e.g., *First Heights Bank, FSB v. United States*, 46 Fed. Cl. 312, 315 (2000) ("[I]t is not necessary that the party invoking the privilege expressly request confidential legal assistance when that request is implied.").

51. See *Texaco P.R., Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 884 (1st Cir. 1995) (holding that the privilege did not apply where "counsel ceased to function as lawyers and began to function as regulators. Therefore, [the defendant] could not invoke the attorney-client privilege in connection with the documents at issue."); *SEC v. Credit Bancorp., Ltd.*, 51 Fed. R. Serv. 3d (West) 1429, 1430 (S.D.N.Y. 2002) (holding the privilege did not apply "because the reports, although prepared by attorneys, are prepared as part of the regular business of the company" (internal quotation omitted)); EPSTEIN, *supra* note 22, at 339-40.

52. See *United States v. Richey*, 632 F.3d 559, 567 (9th Cir. 2011) (finding that the district court erred in concluding that the work file was protected by the attorney-client privilege because it was not made for the purpose of providing legal advice); *United States v. Johnston*, 146 F.3d 785, 794 (10th Cir. 1998) (finding communications not privileged because "[t]he defendant does not point us to . . . any credible evidence in the record that demonstrates that the conversations related to legal advice or strategy sought"); *Favors v. Cuomo*, 285 F.R.D. 187, 198 (E.D.N.Y. 2012) (holding that in order for the privilege to apply, "the predominant purpose of the communication must be to render or solicit legal advice" (internal quotations omitted)).

Whether articulated as eight⁵³ or four elements,⁵⁴ the proponent of the privilege must “demonstrate its applicability”;⁵⁵ if successful, the privilege prevents the disclosure of the substance of the communications, continuing beyond the death of the client so long as confidentiality is preserved.⁵⁶ The protection is absolute in that it “cannot be overcome simply by a showing of need.”⁵⁷ In other words, the privilege applies regardless of the adversary’s or the court’s need for the information contained in the communications.⁵⁸ While this may seem like a loss from a truth-seeking standpoint,⁵⁹ some commentators have argued that the communications do not really represent a “loss” of evidence because the client would not have made the communications without the shield of attorney-client privilege.⁶⁰

B. *The Confidentiality Requirement’s Evolution*

This subpart focuses on the confidentiality requirement—first, how it evolved to incorporate exceptions that allow the attorney-client privilege to retain the goal of promoting client candor; and second, how scholars debate confidentiality’s usefulness as a requirement for the privilege to attach.

The attorney-client privilege evolved over time and the requirement of confidentiality has evolved with it.⁶¹ Beginning in the early nineteenth century, courts began denying the privilege when the communication occurred in the presence of third parties.⁶² Paul Rice, the author of the

53. See *supra* note 20 and accompanying text.

54. See *supra* note 21 and accompanying text.

55. *In re Grand Jury Subpoena*, 341 F.3d 331, 335 (4th Cir. 2003); see also *In re Mentor Corp. ObTape Transobturator Sling Prods. Liab. Litig.*, 632 F. Supp. 2d 1370, 1380 (M.D. Ga. 2009) (“Defendant, however, still bears the burden of establishing that the privileged documents have remained confidential.”).

56. See 1 RICE, *supra* note 11, §§ 2:1, 2:2, 2:5.

57. *Martin v. Valley Nat’l Bank of Ariz.*, 140 F.R.D. 291, 306 (S.D.N.Y. 1991); see also *Bank Hapoalim, B.M. v. Am. Home Assurance Co.*, No. 92 Civ. 3561 (KMW), 1993 WL 37506, at *2 (S.D.N.Y. Feb. 8, 1993) (“The attorney-client privilege is an absolute privilege.”).

58. See, e.g., *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 522 (S.D.N.Y. 1992) (“The importance of this principle is underscored by the fact that this privilege, unlike most others, is absolute in the sense that it cannot be overcome merely by a showing that the information would be extremely helpful to the party seeking disclosure.”).

59. See generally *Hickman v. Taylor*, 329 U.S. 495 (1947) (discussing the balance between the search for truth and the need to protect work product or privileged communications).

60. 1 RICE, *supra* note 11, § 2:3; see *Developments in the Law: Privileged Communications*, 98 HARV. L. REV. 1450, 1508 (1985).

61. See *supra* Part I.A.1.

62. See, e.g., *Basye v. State*, 63 N.W. 811, 818 (Neb. 1895) (“Where, at least in the absence of fraud and collusion, a client makes statements to his attorney in the presence of a third party, such person is not prohibited by statute from testifying to such statement.”); *People v. Buchanan*, 39 N.E. 846, 854 (N.Y. 1895) (“A communication intended to be confidential should not be made in the hearing of a third person, unless that person stood in a peculiar relation of confidence The protection extended by the statute to communications between attorney and client is intended to cover those which the relation calls for, and are supposed to be confided to the lawyer to guide him in giving his

“leading treatise”⁶³ on attorney-client privilege, has argued that the confidentiality requirement should be abolished in a return to the early conception of the privilege.⁶⁴ Other commentators have rejected Professor Rice’s proposal and insist that confidentiality is an essential requirement of attorney-client privilege.⁶⁵ This subpart first analyzes how exceptions to the confidentiality requirement emerged over time to allow the privilege to continue to serve its public policy purpose of promoting client candor. Second, the subpart addresses arguments for retaining confidentiality as a requirement for attorney-client privilege, before considering Professor Rice’s position that the confidentiality requirement be abolished.

1. Three Exceptions to the Confidentiality Requirement and How They Promote Client Candor

Though attorney-client privilege generally requires strict confidentiality,⁶⁶ the public policy goals of promoting client candor and effective representation create circumstances where disclosures to third parties do not destroy the privilege.⁶⁷ There are three broad categories of exceptions to the confidentiality requirement: agents of the attorney or client, joint clients, and inadvertent disclosures.⁶⁸ Each exception is addressed below in light of how each promotes the public policy goals of encouraging client candor and effective representation.⁶⁹

The first exception to the confidentiality requirement is third-party agents. Disclosure to agents of the client or attorney who assist in the client’s legal representation does not destroy the privilege.⁷⁰ Agents of attorneys can be either ministerial agents⁷¹ or substantive experts who assist

professional aid and advice. I am not aware of any extension of the rule which would protect the revelation of confidences made to a friend, or to a lawyer in the presence of a friend.”).

63. Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 32 (referring to RICE, *supra* note 11).

64. See generally Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853 (1998) (arguing that confidentiality is an illogical requirement for attorney-client privilege).

65. See Leslie, *supra* note 63, at 33; see also 2 EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: EVIDENTIARY PRIVILEGES* § 6.8 (2d ed. 2010 & Supp. 2013).

66. See *supra* Part I.A.2.c.

67. See 2 RICE, *supra* note 11, § 9:68.

68. See 1 *id.* §§ 3:3, 4:2, 4:31; 2 *id.* § 9:72.

69. See *supra* note 18 and accompanying text.

70. See 1 RICE, *supra* note 11, §§ 3:3, 4:2; see also EPSTEIN, *supra* note 22, at 258.

71. See, e.g., *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1046–47 (E.D.N.Y. 1976) (“Given the complexities of modern existence few, if any, lawyers could as a practical matter represent the interests of their clients without the assistance of a variety of trained legal associates not yet admitted to the bar, clerks, typists, messengers, and similar aides. ‘The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney’s agents.’” (quoting 8 WIGMORE, *supra* note 20, § 2301, at 583)), *aff’d sub nom.*, *Edney v. Smith*, 556 F.2d 556 (2d Cir. 1977).

the attorney in representation.⁷² To qualify as an agent, the relationship must meet the fundamental requirements of agency.⁷³ Attorney-client privilege may attach to a communication made between the agent and the attorney or client, or to a communication made between the attorney or client in the presence of an agent.⁷⁴ By expanding the circle of confidentiality beyond the client and the attorney, courts promote the public policy goal of encouraging effective legal representation; without such an exception for agents, it would be difficult or “occasionally impossible” for a single attorney to render adequate legal representation.⁷⁵ In other words, an expanded concept of confidentiality that encompasses agents of the attorney and client allows a client to communicate candidly with her entire legal representation team; otherwise, the attorney would be forced to personally perform all acts of the representation, curtailing the effectiveness of the representation.⁷⁶ Because attorneys often need agents to assist in representation, clients must trust that their communications with the agents remain privileged, and thus the privilege continues to promote its goal of encouraging client candor.⁷⁷

The second exception to the confidentiality requirement is when multiple clients share a common interest and are represented by the same attorney simultaneously.⁷⁸ Courts have designated this joint client scenario as an “exception”⁷⁹ or an “extension”⁸⁰ of the confidentiality requirement.

72. See *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) (“We cannot regard the privilege as confined to ‘menial or ministerial’ employees. Thus, we can see no significant difference between a case where the attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client’s story”); *United States v. Singhal*, 842 F. Supp. 2d 1, 5 (D.D.C. 2011) (“[T]he attorney-client privilege may be preserved even when confidential communications are disclosed to a third party—such as an investment banker—as long as the third party is serving an ‘interpretive function’ to aid the lawyer in helping the client.”).

73. See *Henderson v. Nat’l R.R. Passenger Corp.*, 113 F.R.D. 502, 509 (N.D. Ill. 1986) (reciting the three requirements of agency as the power to affect legal relations, a fiduciary relationship, and the principle’s right to the control the agent’s conduct).

74. See 1 RICE, *supra* note 11, § 3:3.

75. See *id.*

76. See *Kovel*, 296 F.2d at 922 (“[T]here can be no more virtue in requiring the lawyer to sit by while the client pursues these possibly tedious preliminary conversations with the accountant than in insisting on the lawyer’s physical presence while the client dictates a statement to the lawyer’s secretary or is interviewed by a clerk not yet admitted to practice.”).

77. See *id.* at 923 (finding that the need to determine where the agency line is drawn is necessary “if the privilege is neither to be unduly expanded nor to become a trap”).

78. See *Hanson v. U.S. Agency for Int’l Dev.*, 372 F.3d 286, 292 (4th Cir. 2004) (“Described as an extension of the attorney client privilege, the common interest doctrine applies when two or more parties consult or retain an attorney concerning a legal matter in which they share a common interest.” (citations omitted) (internal quotation marks omitted)).

79. See *Cavallaro v. United States*, 284 F.3d 236, 250 (1st Cir. 2002) (“The common-interest doctrine, like the rule announced in *Kovel*, is not an independent basis for privilege, but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party.” (internal quotation marks omitted)).

80. See, e.g., *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000) (finding that the joint defense privilege is an extension of the attorney-client privilege); *Griffith v. Davis*, 161 F.R.D. 687, 691 (C.D. Cal. 1995) (same).

Similar to the exception for agents, courts began allowing an exception for joint clients because the exception keeps the privilege in line with its public policy goal of promoting client candor.⁸¹ Individuals with shared legal interests can pool information and make disclosures in the presence of their co-clients that they would not have made but for the sake of securing effective legal representation.⁸²

A third exception to the privilege's confidentiality requirement is when a client involuntarily discloses the communication to a third party.⁸³ When a disclosure is inadvertent, courts are reluctant to allow a strict confidentiality requirement to trump the public policy of encouraging open communications between clients and attorneys.⁸⁴ Courts consider fact-specific circumstances such as the precautions the parties took to prevent disclosure, the volume of discovery, the time pressure of discovery, the extent of the disclosures, the time to rectify the disclosures, and overriding issues of fairness.⁸⁵ However, courts "overwhelmingly recognize[]" the privilege when the disclosure was inadvertent.⁸⁶ These courts seek to avoid instilling fear in clients that a mistaken disclosure will mean inadmissibility, because that may chill future attorney-client communications.⁸⁷

In sum, the justification for allowing confidentiality to include third-party agents, joint defense clients, and involuntary disclosures is the same as the goals of attorney-client privilege itself: promoting client candor and effective representation.⁸⁸ The confidentiality requirement, like the privilege itself, has developed pragmatically in response to attempts to find

81. See 1 RICE, *supra* note 11, § 4:30; *supra* note 18 and accompanying text.

82. See *In re Grand Jury Subpoena Duces Tecum* Dated November 16, 1974, 406 F. Supp. 381, 386 (S.D.N.Y. 1975) ("[I]t may reasonably be inferred that resultant disclosures are intended to be insulated from exposure beyond the confines of the group; that inference, supported by a demonstration that the disclosures would not have been made but for the sake of securing, advancing, or supplying legal representation, will give sufficient force to a subsequent claim to the privilege."). In addition to the public policy goal of promoting client candor and effective legal advice, the joint defense exception to confidentiality serves an additional policy goal of saving attorneys' and courts' resources by expediting the trial preparation process. See *United States v. McPartlin*, 595 F.2d 1321, 1337 (7th Cir. 1979) ("Cooperation between defendants in such circumstances is often not only in their own best interests but serves to expedite the trial or, as in the case at bar, the trial preparation.").

83. See *supra* notes 39–43 and accompanying text. Rule 502(b) of the Federal Rules of Evidence codifies the inadvertent disclosure exception that courts recognized at common law:

When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error.

FED. R. EVID. 502(b).

84. See 2 RICE, *supra* note 11, § 9.79.

85. See *id.* § 9.73.

86. Paul R. Rice, *A Bad Idea Dying Hard: A Reply to Professor Leslie's Defense of the Indefensible*, 2001 WIS. L. REV. 187, 196.

87. See 2 RICE, *supra* note 11, § 9.73.

88. See *supra* note 18 and accompanying text.

a balance between truth-seeking and promoting client candor.⁸⁹ In part because courts have curtailed the rigidity of the confidentiality requirement with these exceptions, certain scholars debate whether confidentiality is a “logical imperative” of the privilege at all.⁹⁰ The following subparts explore the two sides of this debate.

2. Arguments for Confidentiality As a Requirement for the Privilege To Attach

When Professor Wigmore first developed the confidentiality requirement around the turn of the nineteenth century,⁹¹ his theory was that there would be no need to provide the incentive of the privilege if the client is otherwise willing to let others know what he has told the lawyer.⁹² More recent proponents of the confidentiality requirement advance two additional arguments: first, that confidentiality serves as a useful limitation on the scope of the privilege, and second, that requiring confidentiality reduces litigation costs.

The primary justification for confidentiality—that confidentiality serves as a limitation to ensure that it applies only to those statements that would not have been made without the privilege—is an extension of Professor Wigmore’s conceptualization of confidentiality⁹³:

The attorney-client privilege does not seek to encourage attorney-client communication at any price. Rather, scholars and courts adjudicating privilege issues have long struggled with the tension between the need for the privilege and the substantial cost of shielding relevant evidence from the fact finder The confidentiality requirement . . . seeks to ensure that the privilege protects only those attorney-client communications that would not have been made absent the privilege.⁹⁴

In other words, the requirement of confidentiality serves as a limiting function that helps to balance the court’s “truth-seeking process” with the privilege’s goal of encouraging client candor.⁹⁵ Confidentiality has thus been characterized as a “useful bright line limitation.”⁹⁶

As Professor Leslie has argued, a secondary argument for keeping confidentiality as a requirement for the privilege is that eliminating the requirement would increase litigation costs.⁹⁷ First, the confidentiality

89. See EPSTEIN, *supra* note 22, at 6–8.

90. See 1 RICE, *supra* note 11, § 6:4 (“Confidentiality is not the logical imperative it has been presumed to be.”).

91. See 8 WIGMORE, *supra* note 20, § 2285, at 531 (“The communications must originate in a confidence that they will not be disclosed.”); Rice, *supra* note 64, at 869–70.

92. 24 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5484, at 176, 318, 343 (1986).

93. See 2 IMWINKELRIED, *supra* note 65, § 6.8.

94. Leslie, *supra* note 63, at 35–36 (emphasis omitted) (citing 8 WIGMORE, *supra* note 20, §§ 2292, 2311).

95. See *id.* at 84.

96. Rice, *supra* note 86, at 187 (internal quotation marks omitted).

97. See Leslie, *supra* note 63, at 77.

requirement allows courts to rule out the privilege in most cases when a third party is present, and without that threshold determination, courts would be forced to expend more resources scrutinizing the content of the privilege.⁹⁸ Second, if abolished, the lack of confidentiality requirement may incentivize clients to hire lawyers to participate in communications in an attempt to attach privilege claims.⁹⁹ Third, abolishing the confidentiality requirement would cause more cases to proceed to trial because the requirement tends to limit the application of the privilege and increase the information each party has about the other's case.¹⁰⁰

Taken together, proponents of maintaining the confidentiality requirement emphasize that it serves as an important limitation on the privilege¹⁰¹ that saves litigation expenses.¹⁰²

3. Arguments for Eliminating Confidentiality As a Requirement for the Privilege

In his treatise on attorney-client privilege, Professor Rice argues that it has “never been satisfactorily explained” why “the law has linked the recognition of this privilege to a confidentiality requirement.”¹⁰³ Rice first notes that no case prior to the end of the eighteenth century contemplated confidentiality as a requirement of attorney-client privilege.¹⁰⁴ Identifying confidentiality as a uniquely twentieth century invention,¹⁰⁵ Rice has formulated several arguments for returning to the privilege's pre-nineteenth century roots by abolishing confidentiality as a privilege requirement.¹⁰⁶

First, Professor Rice argues that confidentiality does not serve the privilege's goal of promoting openness between an attorney and client.¹⁰⁷ Rice argues that the privilege serves a broader purpose even when the client has no intention of confidentiality: if the client does not seek confidentiality, requiring it does not encourage client candor.¹⁰⁸ But if the client does seek confidentiality while communicating with her attorney, the attorney can create a confidential condition per the client's wishes—which does not necessarily mean that every communication with every client should require confidentiality to be privileged.¹⁰⁹

98. *See id.*

99. *See id.*

100. *See id.*

101. *See, e.g.,* United States v. Tellier, 255 F.2d 441, 447 (2d Cir. 1958) (“It is of the essence of the attorney-client privilege that it is limited to those communications which are intended to be confidential.”).

102. Leslie, *supra* note 63, at 84.

103. 1 RICE, *supra* note 11, § 6:1.

104. *See id.* § 6:3.

105. *See* PAUL R. RICE, ELECTRONIC EVIDENCE: LAW AND PRACTICE 196–97 (2004) (explaining how Professor Wigmore invented the confidentiality requirement).

106. *See generally* Rice, *supra* note 64.

107. *See id.* at 857.

108. *See id.* at 860.

109. *See id.* (“The fact that secrecy may be desired is not justification for making it required.”).

Second, Professor Rice argues that because the requirement has never been justified in light of the purpose of the privilege,¹¹⁰ courts have carved out so many exceptions to the requirement that it is no longer useful or relevant.¹¹¹ Due to the exceptions to strict confidentiality,¹¹² Rice argues that confidentiality has complicated the waiver doctrine and lost its meaning.¹¹³

Professor Rice's final argument is identical to one of the proponents' arguments—that abolishing the confidentiality requirement would reduce litigation costs.¹¹⁴ In support of this cost argument, Rice highlights ways in which a court's process for determining confidentiality is "complex."¹¹⁵ First, for each contested communication, the client must produce evidence that he intended the communication to be confidential;¹¹⁶ second, the client must produce evidence that the nature of the relationship of the parties is covered by the expanded confidentiality doctrine;¹¹⁷ and third, the court must determine that confidentiality has been maintained.¹¹⁸ Given these complex and costly evidentiary proceedings, Rice concludes that the cost of continuing to maintain a confidentiality requirement is not justified given that the requirement does not serve the purpose of the privilege.¹¹⁹

In sum, certain privilege scholars debate whether confidentiality should be retained as a requirement for attorney-client privilege to attach to a communication. The next subpart introduces the types of information that employers monitor to understand how such monitoring gives rise to a confidentiality dilemma and therefore an attorney-client privilege problem.

C. Employer Monitoring of Employee Communications

In a time before email, the Supreme Court in *O'Connor v. Ortega* considered an employee's expectation of privacy in the workplace.¹²⁰ The *O'Connor* Court emphasized that the interests of employers to search workplace property must be balanced against the employee's right to privacy in personal items brought to the workplace.¹²¹ Despite holding that the employee had a reasonable expectation of privacy, the Court noted that

110. *See id.* at 859 ("Throughout both English and U.S. history, however, not a single reported decision can be found in which a court has either explicated this reasoning or questioned its logic.").

111. *Id.* at 874–88.

112. *See supra* Part I.B.1 (categorizing three exceptions to a strict confidentiality requirement as agents, joint clients, and inadvertent disclosure).

113. *See Rice, supra* note 86, at 198.

114. *See Leslie, supra* note 63, at 32–33.

115. *See Rice, supra* note 64, at 861, 868.

116. *Id.* at 861–62.

117. *Id.* at 862.

118. *Id.* at 863.

119. *See id.* at 868.

120. 480 U.S. 709, 715–17 (1987) (finding a reasonable expectation of privacy when a doctor's private office was searched by state officials who seized personal items that were later used in disciplinary proceedings).

121. *See id.* at 716.

“employees’ expectations of privacy in their offices, desks, and file cabinets . . . may be reduced by virtue of actual office practices and procedures, or by legitimate regulation.”¹²²

Today, courts face a similar question, but instead of a personal item tucked away in an employer-owned desk, courts grapple with whether an employee has a reasonable expectation of confidentiality in personal emails given “actual office practices and procedures” of employer monitoring.¹²³ Approximately 92 percent of adult internet users use email, 61 percent of whom use email on a typical day.¹²⁴ Now that a majority of employment settings provide employees with access to email,¹²⁵ a majority of employees with internet access spend at least some time during the workday on nonwork-related online activities.¹²⁶ The rise in non-work-related online usage has been accompanied by employers’ monitoring of their employees’ computer use.¹²⁷ Statistics on the prevalence of employer monitoring tend to show that 50 to 75 percent of employers monitor electronic communications transmitted in the workplace.¹²⁸ Though policies differ in scope, some employers monitor every single email sent or received by employees.¹²⁹

Employers can monitor an employee’s computer usage in several ways.¹³⁰ The various monitoring techniques allow employers not only to monitor all incoming and outgoing messages at home and on webmail but

122. *Id.* at 717.

123. *See id.*

124. Kristen Purcell, *Search and Email Still Top the List of Most Popular Online Activities*, PEW INTERNET & AM. LIFE PROJECT, 2 (Aug 9, 2011), http://www.pewinternet.org/~media/Files/Reports/2011/PIP_Search-and-Email.pdf.

125. U.S. GEN. ACCOUNTING OFFICE, *EMPLOYEE PRIVACY: COMPUTER USE MONITORING PRACTICES AND POLICIES OF SELECTED COMPANIES* (Sept. 2002), available at <http://www.gao.gov/new.items/d02717.pdf>.

126. *Websense’s Seventh Annual Web@Work Survey Explores Leading Trends in Employee Computing for 2006*, WEBSense (May 17, 2006), <http://investor.websense.com/common/mobile/iphone/releasedetail.cfm?ReleaseID=285092&CompanyID=WBSN&mobileid=> (finding that the average time spent accessing the internet at work is 12.81 hours per week and the average time accessing nonwork related websites at work is 3.06 hours per week).

127. L. CAMILLE HEBERT, *EMPLOYEE PRIVACY LAW* § 8A:1, at 5 (2006) (“An increasingly common method of electronic monitoring chosen by employers is monitoring of the work of employees through computers.”); Kara R. Williams, *Protecting What You Thought Was Yours: Expanding Employee Privacy To Protect the Attorney-Client Privilege from Employer Computer Monitoring*, 69 OHIO ST. L.J. 347, 350 (2008) (“Employers’ monitoring of their employees’ computer use is extremely common in American businesses.”).

128. Am. Mgmt. Ass’n & the e-Pol’y Inst., *2005 Electronic Monitoring & Surveillance Survey*, E-POL’Y INST., <http://www.epolicyinstitute.com/survey2005Summary.pdf> (last visited Apr. 19, 2013) (reporting that as many as 76 percent of employers monitor their employees’ computer use); Am. Mgmt. Ass’n, *2003 E-mail Rules Policies, and Practice Survey*, E-POL’Y INST. (May 14, 2003), <http://www.epolicyinstitute.com/survey/survey.pdf> (reporting that more than 50 percent of companies monitor employee email).

129. *See Villano, supra* note 1.

130. *See generally* Louise L. Hill, *Gone but Not Forgotten: When Privacy, Policy and Privilege Collide*, 9 NW. J. TECH. & INTELL. PROP. 565 (2011). The technical aspects of employer monitoring are outside the scope of this Note.

can also allow employers to monitor employees' personal passwords and unsent messages by recording employees' keystrokes.¹³¹

Employers are legally permitted to monitor employees' online communications.¹³² Employers monitor emails at work for several reasons¹³³: employers have a right to protect themselves from theft or misuse of the employers' resources;¹³⁴ employers may seek to reduce their legal liability or ensure legal compliance;¹³⁵ and in other instances, employers monitor employee communications to protect their assets and promote employee productivity.¹³⁶ Because employers can legally monitor all communications, this includes communications with private attorneys.¹³⁷ Whatever the employer's reason to justify monitoring, courts have consistently upheld an employer's legal right to monitor its employees' communications.¹³⁸

D. Past Scholarship Has Argued That Lawyers or Employers Should Prevent Monitored Electronic Communications from Losing Privilege Status

As employer monitoring became more prevalent, scholars started to consider how lawyers or employers could reduce the likelihood that

131. For an overview of three ways in which employers monitor employees' email communications, including keystroke monitoring, see Marc A. Sherman, *Webmail at Work: The Case for Protection Against Employer Monitoring*, 23 *TOURO L. REV.* 647, 661–63 (2007).

132. 18 U.S.C. § 2701 makes it a crime to “intentionally access without authorization a facility through which an electronic communication service is provided” except when applied “to conduct authorized . . . by the person or entity providing a wire or electronic communications service.” 18 U.S.C. § 2701 (2006). Because employers provide the electronic communication service, the exception applies to them.

133. See, e.g., *TBG Ins. Servs. Corp. v. Superior Court*, 117 Cal. Rptr. 2d 155, 162 (Ct. App. 2002) (listing reasons companies engage in monitoring practices as including legal compliance, legal liability, performance review, productivity measures, and security concerns).

134. HERBERT, *supra* note 127, § 8A:1, at 5.

135. See Micah Echols, *Striking a Balance Between Employer Business Interests and Employee Privacy: Using Respondeat Superior To Justify the Monitoring of Web-Based, Personal Electronic Mail Accounts of Employees in the Workplace*, 7 *COMP. L. REV. & TECH. J.* 273, 278 (2003); see also *Hanson v. First Nat'l Bank*, No. 5:10-0906, 2011 WL 5201430, at *2 (S.D. W. Va. Oct. 31, 2011) (“First National Bank also needs to be able to respond to proper requests resulting from legal proceedings that call for electronically stored evidence.”).

136. Sherman, *supra* note 131, at 658–60.

137. The use of email among attorneys to communicate with clients is widespread. See Williams, *supra* note 127, at 352. Attorneys have endorsed email technology, and the American Bar Association (ABA) has approved this method of communication as well. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459 (2011) (“[A] lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the [Model Rules of Professional Conduct] . . . because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint.”).

138. See, e.g., *Hanson*, 2011 WL 5201430, at *2 (“First National Bank must, and does, maintain the right and the ability to enter any of these systems and to inspect and review any and all data recorded on those systems.”).

employees communicating with their attorney at work would lose attorney-client privilege. This section summarizes this line of scholarship.

Since the early days of email, scholars and commentators have warned that lawyers must be cautious about communicating with their clients over email because of the risk that the communications are monitored,¹³⁹ and therefore may be nonconfidential and nonprivileged.¹⁴⁰ Scholars who have considered attorney-client privilege in the workplace context argue that lawyers should prevent sensitive, nonprivileged communications from occurring in the first place or that employers should prevent themselves from reading otherwise-privileged communications.

Though commentators differ in how far they think a lawyer must go to prevent potentially nonprivileged communications from occurring; they argue that, at minimum, a lawyer must take reasonable precautions,¹⁴¹ view electronic modes of communication with their clients with heightened scrutiny,¹⁴² or not presume email to be secure.¹⁴³

In 2011, the American Bar Association's (ABA) Standing Committee on Ethics and Professional Responsibility issued a Formal Opinion entitled "Duty to Protect the Confidentiality of E-mail Communications with One's Client."¹⁴⁴ The ABA argued that a lawyer choosing to communicate with a client via electronic means "must warn the client about the risk of sending or receiving electronic communications . . . to which a third party may gain access."¹⁴⁵ Because of the ethical ramifications of the risk that the communications are nonprivileged, the ABA argues that lawyers have a duty to warn the client to prevent nonprivileged communications from

139. See, e.g., Jonathan Rose, *E-mail Security Risks: Taking Hacks at the Attorney-Client Privilege*, 23 RUTGERS COMPUTER & TECH. L.J. 179, 225 (1997) ("[A]ttorneys must address the significant security threat that accompanies e-mail; otherwise, the confidentiality that supports the attorney-client privilege may be destroyed.").

140. See, e.g., John M. Barkett, *The Challenge of Electronic Communications: Privilege, Privacy, and Other Myths*, 38 LITIG., Fall 2011, at 17; Anne Klinefelter, *When To Research Is To Reveal: The Growing Threat to Attorney and Client Confidentiality from Online Tracking*, 16 VA. J.L. & TECH. 1, 22-29 (2011); Megan E. McEnroe, *E-mail in Attorney-Client Communications: A Survey of Significant Developments April 2009-June 2010*, 66 BUS. LAW. 191, 192-93 (2010); Dion Messer, *To: Client@workplace.com: Privilege at Risk?*, 23 J. MARSHALL J. COMPUTER & INFO. L. 75, 92-95 (2004); Williams, *supra* note 137, at 389-90.

141. Klinefelter, *supra* note 140, at 30 (noting that in the online tracking context, "courts should encourage precautions that secure a balance between effectiveness and manageability, and attorneys should take care to identify and implement reasonable precautions"); Messer, *supra* note 140, at 76 ("[A] prudent attorney should consider implementing some precautionary measures to protect his client from losing the privilege and confidentiality of e-mail correspondence.").

142. McEnroe, *supra* note 140, at 196 ("Recent court decisions, spawned by the boundless pace of technology, require that lawyers regard the methods and means for client communication with a heightened sense of scrutiny.").

143. Barkett, *supra* note 140, at 19 ("[Lawyers] should never assume that attorney-client email exchanges from a client's work computer are secure even when communications occur through the client's password-protected personal email account.").

144. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459 (2011).

145. *Id.* at 4.

occurring in the first place.¹⁴⁶ If a client fails to heed the attorney's caution, the ABA instructed that the lawyer's duty requires him or her to cease sending messages to the client.¹⁴⁷ Following an American Law Institute and ABA Continuing Legal Education program, one participant proposed sample language that an attorney should incorporate into his or her representation agreement wherein the client would agree to "NEVER" communicate via company-owned devices.¹⁴⁸

Other commentators have focused not on the lawyers' duty, but instead argue that employers should take precautions not to read employees' communications with their private attorneys after they have been monitored or recorded.¹⁴⁹ The burden would thus be on the employer to limit its review of recorded materials to those that it knows to be nonprivileged; then, the employer should seek outside legal advice or place the communications before a court to decide whether they are in fact privileged.¹⁵⁰ These two arguments—that lawyers should prevent monitored communications and that employers should prevent themselves from reading attorney-client communications—are not mutually exclusive.

Part I of this Note has focused on the history and elements of attorney-client privilege, its confidentiality requirement, and employer monitoring of employee communications. To summarize, past scholarship has argued that lawyers or employers should prevent monitored attorney-client communications from occurring or becoming nonprivileged. But given that attorney-client communications are monitored, courts must determine when the privilege should attach to a communication notwithstanding that the employer monitored the employee's communication. Part II analyzes three different approaches that courts have used or commentators have proposed

146. *See id.* at 3–4.

147. *See id.* at 4 n.7. For an example of a state that has endorsed and adopted the ABA's approach, see Mark M. Iba, *Warning: This Email May Be Monitored or Recorded*, 81 J. KAN. B. ASS'N, March 2012, at 11.

148. Robert B. Fitzpatrick, *Company-Issued Equipment and Waivers of Privilege*, ALI-CLE, 273 (Oct. 17, 2011), http://files.ali-cle.org/thumbs/datastorage/skoobesruoc/pdf/VCT1017_chapter_09_thumb.pdf ("Therefore, you should NEVER communicate by e-mail with your attorney using a company-owned computer or other company-owned electronic device or using your business e-mail address Client should provide Firm with an email address, other than employer's, for communication between the Firm and Client.").

149. *See* Marjorie J. Peerce & Daniel V. Shapiro, *The Increasing Privacy Expectations in Employees' Personal Email*, 13 J. INTERNET L., no. 8, 2010, at 1; John K. Villa, *Emails Between Employees and Their Attorneys Using Company Computers: Are They Still Privileged?*, ACC DOCKET, Apr. 2008, available at [http://www.wc.com/assets/attachments/EP_5\).pdf](http://www.wc.com/assets/attachments/EP_5).pdf).

150. *See* Peerce & Shapiro, *supra* note 149, at 20 ("[A]n employer is on safer ground when it remains within the boundaries of traditionally accepted practice and limits its review to non-privileged material accessible in the memory of the company's computers when its electronic communications policy provides authorization for such action. Even if a company has a novel electronic communications policy that explicitly allows for the use of login information or review of attorney-client communications, it should seek outside legal advice before acting in the present climate of uncertainty."); Villa, *supra* note 149, at 104 ("[O]ne option is to hold onto the emails, not read them, and place the issue before the court for decision.").

to determine whether attorney-client privilege should attach to an employer-monitored communication.

II. COURTS' AND COMMENTATORS' APPROACHES TO WHETHER ATTORNEY-CLIENT PRIVILEGE SHOULD ATTACH TO COMMUNICATIONS MONITORED BY THE CLIENT'S EMPLOYER

Courts have consistently held that an employer can override an employee's expectation of privacy or confidentiality by instituting a policy that e-communications are monitored by the employer.¹⁵¹ However, courts and commentators have diverged in their analyses as to whether clients retain or lose attorney-client privilege by communicating with their attorneys while being monitored by their employer. Part II categorizes the approaches in three sections: in the first approach, the communication is privileged only if the employee's expectation of confidentiality is objectively reasonable; in the second approach, the attorney-client communication is never privileged because the employer monitoring destroys confidentiality; and in the third approach, the attorney-client communication is privileged because confidentiality is not required for the privilege.¹⁵²

A. Approach One: *The Objective Reasonableness of the Employee's Expectation of Confidentiality Dictates Whether the Monitored Communication Is Privileged*

The first approach that courts use to determine whether an employer-monitored communication is privileged is the test derived from the Fourth Amendment expectation of privacy analysis.¹⁵³ The court in *In re Asia Global Crossing* took stock of judicial decisions that discussed the reasonableness of employees' expectation of privacy¹⁵⁴ and produced a four-factor test:

- (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access

151. See *Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002) ("Glenayre had announced that it could inspect the laptops that it furnished for the use of its employees, and this destroyed any reasonable expectation of privacy that Muick might have had . . ."); *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000) ("[E-mail monitoring] policy placed employees on notice that they could not reasonably expect that their Internet activity would be private."); *In re Reserve Fund Sec. & Derivative Litig.*, 275 F.R.D. 154, 163 (S.D.N.Y. 2011) ("[B]ecause RMCI's email policy bans personal use of the RMCI email system, this factor weighs in favor of finding that [the defendant] had no reasonable expectation of privacy in the emails he sent to his wife over that system . . .").

152. Courts sometimes use the word "privacy" interchangeably with "confidentiality." This section adheres to each court's language.

153. See *supra* notes 8–10 and accompanying text.

154. The court drew upon the analysis of five previous decisions that had found no reasonable expectation of privacy and three previous decisions that had found a reasonable expectation of privacy across both state and federal courts. See *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005).

to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?¹⁵⁵

If the answer to some or all of these questions is affirmative, then courts may find that the employer effectively diminished its employees' expectation of privacy—and as a result, there can be no attorney-client privilege because the confidentiality requirement has not been met.¹⁵⁶ This subpart examines cases in which courts held the employee had an objectively reasonable expectation of confidentiality, and then analyzes cases in which courts held that the employee did not have an objectively reasonable expectation of confidentiality.

1. Courts Finding the Privilege Intact Because the Employees Had an Objectively Reasonable Expectation of Confidentiality

A noninsignificant number of courts have concluded that employers' electronic monitoring policies did not destroy the attorney-client privilege. The case that created the objective reasonableness test, *Asia Global Crossing*, is one example where the attorney-client privilege remained intact.¹⁵⁷ Before outlining the four factors, the court established two assumptions: first, the court assumed that the employees' emails would be otherwise privileged if not for an unreasonable expectation of privacy, and relatedly, the court assumed that the employees subjectively intended the communications to be confidential.¹⁵⁸ Turning to its four-factor test, the court first determined that the corporation did maintain a policy banning personal use.¹⁵⁹ Second, the court could not explicitly determine that the employer actually monitored emails.¹⁶⁰ Third, the court determined that the company or anyone with access to the company's email system had access to the employee emails because they were sent and stored on the company's servers.¹⁶¹ Fourth, the court found no convincing evidence that the

155. *See id.*

156. *See supra* Part I.A.2.c.

157. *See supra* notes 8–10 and accompanying text.

158. *In re Asia Global Crossing*, 322 B.R. at 258. (“[T]he Court assumes that the Insider E-mails are otherwise privileged, and further, that the Insiders subjectively intended that they be confidential.”).

159. *Id.* at 260 (“Privacy of these messaging systems is not guaranteed, nor implied. It is the responsibility of every authorized user to be aware of, and comply with, all corporate policy and guidelines while using messaging systems. All data and content on these messaging systems is the property of the Company. No content on these messaging systems shall be withheld from the Company’s authorized security personnel or others specifically authorized by the chief executive officer of the Company.” (emphasis in original)). The court noted that sending a message over the company’s email system was “like placing a copy of that message in the company files.” *Id.* at 259.

160. *See id.* at 260. Each of the Insiders submitted statements that the company did not monitor employee emails. *Id.*

161. *Id.* at 259 (“Asia Global clearly had access to its own servers and any other part of the system where e-mail messages were stored . . .”).

employer had warned the employees of its email policy.¹⁶² Taking these four factors together, the court called the evidence “equivocal” and held that it was “unable to conclude as a matter of law that the [employees’] use of Asia Global’s e-mail system to communicate with their personal attorney eliminated any otherwise existing attorney-client privilege.”¹⁶³ In short, the court paired an initial assumption of the privilege with a novel four-factor expectation of confidentiality test, and held that merely communicating on a monitored work email did not destroy attorney-client privilege.¹⁶⁴

In a case decided concurrently with *Asia Global Crossing*, a California state appellate court found that documents prepared for an attorney in a password-protected folder on an employer-issued laptop were protected by attorney-client privilege because the employee’s expectation of confidentiality was objectively reasonable.¹⁶⁵ In preparation for a rape trial, the prosecutor seized the defendant’s employer-issued laptop and collected all correspondence authored by the defendant pursuant to a subpoena.¹⁶⁶ When the prosecutor found fourteen files in a password-protected folder marked “Attorney,” the prosecutor sought and received the password from the employer.¹⁶⁷ The prosecutor argued that the files left on the laptop with a password known only by the defendant and his wife were “left in, basically, a public area . . . [and] cannot be privileged.”¹⁶⁸ The trial court agreed and held that the documents were not privileged.¹⁶⁹

By stating at the outset that there is a presumption of the privilege,¹⁷⁰ the appellate court began its analysis in a manner similar to *Asia Global Crossing*.¹⁷¹ The court then cited three factors that convinced the court that

162. *See id.* (noting that employees asserted that no policy on use and monitoring was enacted or enforced).

163. *Id.* at 261.

164. *See id.* at 261–62.

165. *People v. Jiang*, 33 Cal. Rptr. 3d 184, 207–08 (Ct. App. 2005).

166. *See id.* at 198 (noting that the prosecutor sought an English language document for the purported purpose of obtaining evidence of the defendant’s ability to communicate in English).

167. *Id.* at 201 (“When [the employer] supplied the prosecutor with the password, [the employer’s] attorney believed that the documents would only be released by court order if they were found not to be privileged.”).

168. *Id.* The prosecutor pointed to the defendant’s company policy, signed by employees, which waived the employee’s expectation of privacy: “I understand that I have no expectation of privacy in the voicemail and electronic mail provided to me by the Company or in any property situated on the Company’s premises and/or owned by the Company, including disks and other storage media, filing cabinets or other work areas. I further understand that such property, including voice mail and electronic mail, is subject to inspection by Company personnel at any time.” *Id.* at 197–98.

169. *Id.* at 201 (quoting the trial court’s decision, which concluded that “the court concludes that the defendant did not have a reasonable expectation of privacy in said documents, any privileges that existed were waived by the defendant’s own conduct”).

170. *See id.* at 203 (“[T]he communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.” (citation omitted)).

171. *See In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 258 (Bankr. S.D.N.Y. 2005) (“[T]he Court assumes that the Insider E-mails are otherwise privileged, and further, that the Insiders subjectively intended that they be confidential.”).

the employee had an objectively reasonable expectation of confidentiality in the files: First, the employment agreement did not suggest that the employer would access files that were “clearly segregated as personal and password-protected.”¹⁷² Second, the purpose of the employer’s policy was not to invade the privacy of its employees, but rather to protect the employer’s intellectual property.¹⁷³ Third, the defendant did not waive the privilege because the defendant could have believed that he had reserved a claim of privilege.¹⁷⁴ Thus, the California state court used an analysis that paralleled the *Asia Global Crossing* test in that it considered the nature and circumstances of the employer’s written monitoring policy; but the California court went further in considering the purpose of the policy.¹⁷⁵ The courts reached similar conclusions between technically nonconfidential emails and technically nonconfidential documents, holding that each employee’s expectation of confidentiality was reasonable in spite of an employer’s ability to monitor such emails and files.¹⁷⁶

The Eastern District of New York reached a similar conclusion in *Curto v. Medical World Communications, Inc.*, where the plaintiff was the former employee and the defendant was the former employer.¹⁷⁷ The employer had an “Email/Computer Privacy Policy” that the employee had signed, stating that “[e]mployees should not have an expectation of privacy in anything they create, store, send, or receive on the computer system.”¹⁷⁸ The employee, who had worked on company-owned computers at home, had deleted personal files prior to returning the computers.¹⁷⁹ However, the former employer hired a forensic consultant that restored portions of the files and emails, including documents that the plaintiff’s attorney contended were covered by attorney-client privilege.¹⁸⁰ The magistrate judge had held that the plaintiff did not waive her attorney-client privilege because the defendant had never enforced its computer usage policy.¹⁸¹ Noting that the *Asia Global Crossing* test recognizes enforcement as a factor to consider, the court concluded that the magistrate judge’s finding of a reasonable

172. *Jiang*, 33 Cal. Rptr. 3d at 205.

173. *See id.* at 205.

174. *See id.* at 207 (“[A] reasonable layperson could have understood the court’s statement to reserve any claim of privilege for later resolution. Therefore, the prosecutor failed to prove that the defendant waived his privilege as to the information in these documents.”).

175. *See id.* at 205 (stating that the purpose was not designed “to invade the privacy of its employees”).

176. *See id.* at 208; *supra* notes 162–63 and accompanying text.

177. No. 03CV6327 (DRH)(MLO), 2006 WL 1318387, at *5–7 (E.D.N.Y. May 15, 2006).

178. *Id.* at *2.

179. *See id.*

180. *See id.* at *1 (“(1) a draft memorandum from Plaintiff to John J. Hennessy, MWC’s Chief Executive Officer, prepared by Plaintiff and her counsel; (2) a ‘chronology of events’ describing events underlying many of Plaintiff’s claims, prepared by Plaintiff and her counsel; (3) drafts of Plaintiff’s EEOC complaint prepared by Plaintiff and her counsel; and (4) various e-mails sent amongst Plaintiff and her counsel.”).

181. *See id.* at *3.

expectation of privacy was not clearly erroneous or contrary to law.¹⁸² Without more evidence of actual monitoring, the court found that the employee's expectation of privacy allowed the attorney-client privilege to attach to the communications.¹⁸³

At least one court has held that the privilege attaches even without a reasonable expectation of privacy. In *Sims v. Lakeside School*, the defendant school brought a motion to compel review of a former employee's laptop hard drive that had been furnished by the defendant school.¹⁸⁴ The Western District of Washington held that the former employee had no reasonable expectation of privacy because the employee signed a policy that limits the use of the laptop to academic and administrative purposes and states that "user accounts are the property of Lakeside Schools."¹⁸⁵ In spite of the employer's policy, the court held that any material created to communicate with his attorney would be protected under attorney-client privilege.¹⁸⁶ The court stated that "public policy" dictated that these materials be protected, implying that the court's overriding consideration was the purpose of the privilege—to promote candid communications between clients and their attorneys.¹⁸⁷

The D.C. District Court found in *Convertino v. U.S. Department of Justice* that an employee's expectation of confidentiality in monitored emails was objectively reasonable.¹⁸⁸ The plaintiff, an Assistant U.S. Attorney, had been the lead trial counsel in a case under investigation by the Department of Justice's (DOJ's) Office of Professional Responsibility.¹⁸⁹ One of the investigators retained private counsel and used his DOJ email address to communicate with the private counsel.¹⁹⁰ During the course of the investigation, an article discussing the investigation was published in the *Detroit Free Press* and the plaintiff, who had been the subject of the investigation, sued the DOJ for leaking information in violation of the Privacy Act.¹⁹¹

The plaintiff moved to compel discovery of the DOJ investigator's emails that were sent from his DOJ account to his personal attorney.¹⁹² The

182. *See id.* at *8. Interestingly, the *Curto* court held that cases considering the expectation of privacy in the workplace are not dispositive of the issue of expectation of confidentiality, but then used *Asia Global Crossing's* four-factor test to determine the expectation of confidentiality (a test which that court had derived from expectation of privacy cases). *See supra* notes 8–10 and accompanying text.

183. *See Curto*, 2006 WL 1318387, at *8–9.

184. No. C06-1412RSM, 2007 WL 2745367, at *1 (W.D. Wash. Sept. 20, 2007).

185. *Id.*

186. *See id.* at *2.

187. *See id.* ("Notwithstanding defendant Lakeside's policy in its employee manual, public policy dictates that such communications shall be protected to preserve the sanctity of communications made in confidence.")

188. 674 F. Supp. 2d 97, 110 (D.D.C. 2009).

189. *See id.* at 100.

190. *See id.* at 108.

191. *See id.* at 100.

192. *See id.*

court cited *Asia Global Crossing's* four-factor test and concluded that, despite the DOJ's policy of monitoring personal emails, the employee's expectation of privacy was reasonable.¹⁹³ The court overlooked that the DOJ had a policy of accessing personal emails, but instead focused on the fourth factor of the *Asia Global Crossing* test: the DOJ employee stated that he was "unaware that they would be regularly accessing and saving e-mail sent from his account."¹⁹⁴ Because of this lack of awareness, the employee's expectation of privacy was held to be reasonable, and the court allowed the privilege to protect the employee's emails.¹⁹⁵

For one final example of a court finding an objectively reasonable expectation of confidentiality in electronic communications despite an employer's monitoring policy, consider *United States v. Nagle*.¹⁹⁶ In this case, a client prepared a chronology of events at the request of his attorney in anticipation of criminal charges and stored the file on a laptop.¹⁹⁷ After the employer fired him, he was not allowed to retrieve files from the laptop, but another employee retrieved the file and emailed it to a different employee who was also facing criminal charges.¹⁹⁸ The document was then turned over by that employee's attorney to the government in discovery, which led the defendant's attorney to assert that attorney-client privilege protected the document.¹⁹⁹

In finding that the client's expectation of confidentiality in a file stored on his work laptop was objectively reasonable, the Middle District of Pennsylvania drew upon two of the factors from *Asia Global Crossing*: first, the client's company had no policy explicitly banning the use of work computers for personal reasons (it simply stated that "email activity is NOT private"); second, there was no evidence that the client's company had ever monitored its employees' use of the computers or email.²⁰⁰ Thus the court concluded that the defendant employee had an objectively reasonable expectation of privacy and therefore the document was protected by attorney-client privilege.²⁰¹

In addition to the previous six examples, other courts have found an employee's expectation of confidentiality to be objectively reasonable under still different circumstances.²⁰² Though each of the courts reached the same conclusion based on the same test, each court's analysis was distinct. For example, none of the courts explicitly stated the two underlying assumptions that the *Asia Global Crossing* court stated at the

193. *See id.* at 110.

194. *Id.*

195. *See id.*

196. No. 1:09-CR-384, 2010 WL 3896200 (M.D. Pa. Sept. 30, 2010).

197. *See id.* at *1.

198. *See id.* at *2.

199. *See id.* at *3.

200. *Id.* at *3-4.

201. *See id.* at *3.

202. *See, e.g.,* *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 255 F.R.D. 98, 108 (S.D.N.Y. 2008).

outset of its analysis.²⁰³ Moreover, each of the courts found different factors to be dispositive: in *Curto*, it was the lack of evidence of actual monitoring; in *Convertino*, it was the employee's lack of awareness that his employer monitored him; in *Nagle*, the court seemed to require that the policy explicitly ban personal use instead of simply stating that emails were not private; and in *Sims*, public policy concerns were enough to override the lack of an objectively reasonable expectation of privacy.²⁰⁴

2. Courts Finding the Employee Waived the Privilege Because the Employee Did Not Have an Objectively Reasonable Expectation of Confidentiality

In contrast to the above cases, some courts have held that attorney-client privilege was implicitly waived by an employee's use of an employer's computer with a monitoring policy. These cases are similar to those analyzed in the previous subpart: like those cases, the courts use an expectation of confidentiality test to determine the reasonableness of the employee's expectation. Whereas those cases held that the employee's expectation of confidentiality was reasonable, the following cases conclude that the communications are not privileged because the employee could not have had a reasonable expectation of confidentiality.

In *Hanson v. First National Bank*, an employee's personal attorney objected to the disclosure of emails sent on the bank's system in preparation for criminal proceedings based on attorney-client privilege.²⁰⁵ The handbook of the bank stated that it "maintain[ed] the right and the ability to enter any [voicemail and electronic mail] systems and to inspect and review any and all data recorded on those systems."²⁰⁶ The court used *Asia Global Crossing's* test and found that the employer's reservation of the right to inspect was sufficient to make employees' expectation of privacy unreasonable; thus the employee had "effectively waived the attorney-client privilege" in using the bank's computing system in communicating with his criminal attorney.²⁰⁷

More recently, the Southern District of Texas reached a similar holding in a bankruptcy proceeding in *In re Royce Homes LP*.²⁰⁸ The bankruptcy trustee moved to compel production of documents from the debtor's owner

203. See *supra* note 158 and accompanying text.

204. The discrepancies in how the objective reasonableness test is applied—even within courts reaching the same conclusion—tends to support the idea that the courts are simply making an outcome determinative calculation that the privilege is too important to be trumped by an employer monitoring policy. See 1 RICE, *supra* note 11, § 6.8 (“[C]ourts may simply conclude that the importance of attorney-client communications is sufficiently great to preclude employers from knowingly violating them, regardless of announced policies.”).

205. No. 5:10-0906, 2011 WL 5201430, at *1 (S.D. W. Va. Oct. 31, 2011).

206. *Id.* at *2.

207. *Id.* at *6.

208. 449 B.R. 709, 732–33 (Bankr. S.D. Tex. 2011), *appeal dismissed*, 466 B.R. 81 (S.D. Tex. 2012).

after the owner asserted attorney-client privilege.²⁰⁹ The documents had been sent and received via the debtor's computer system, which was covered by a policy that allowed monitoring of the communications at any time.²¹⁰ The court adopted *Asia Global Crossing's* four-factor test and found that the employee waived attorney-client privilege by communicating on a system covered by the employer's policy.²¹¹ The court noted that the debtor had failed to introduce sufficient evidence to show either that he was unaware of the policy or that the policy was unenforced.²¹²

The Western District of Oklahoma recently compelled production of attorney-client communications based on the employer's policy that it retained the right to monitor emails.²¹³ The company reported that it did not manage personal email and did not review the contents of the employee's emails, but the court nonetheless found that the policy alone caused the employee to waive any attorney-client privilege he may have had.²¹⁴

The Western District of Washington similarly found that two former employees had waived attorney-client privilege by leaving communications with their attorneys saved on laptops that they later returned to their former employer.²¹⁵ The attorney-client communications had been created prior to their employment, but while employed, they stored the files on the company's laptops.²¹⁶ The company had a far-reaching monitoring policy that applied to "[a]ll resources used for electronic communications," including those stored on the company's systems.²¹⁷ Despite the former employees' claims that they were unaware of the policy, the court

209. *See id.*

210. *See id.* at 733.

211. *See id.* at 733–38 (“Accordingly, the Court finds that [the client] waived the attorney-client privilege as to any e-mails he sent and received via the [employer’s] computer system, as any communications between [the client] and his personal counsel were not confidential After applying *Asia Global* and its progeny, the evidence in this dispute strongly tips in the Trustee’s favor.”).

212. *See id.* at 733 n.14.

213. *See* *Chechele v. Ward*, No. Civ-10-1286-M, 2012 WL 4481439, at *1 (W.D. Okla. Sept. 28, 2012) (The company policy stated, “SandRidge reserves the right to examine, monitor, and regulate e-mail messages, directories and files, as well as any Internet usage”).

214. *See id.* at *2.

215. *See* *Aventa Learning, Inc. v. K12, Inc.*, 830 F. Supp. 2d 1083, 1084 (W.D. Wash. 2011).

216. *See id.* at 1092–93.

217. *Id.* at 1093 (noting that the employer policy stated in part, “KLC reserves the right to access, search, inspect, monitor, record, and disclose any file or stored communication, with or without notice to the employee, at any time for any reason to ensure that such communications are being used for legitimate business reasons. Deleted e-mail messages may also be restored from the system.”). Because of this policy, the court held that the plaintiffs waived any privilege that might have been applicable, and determined that the waiver should encompass all of the materials from any source that were on the company laptops. *See id.* at 1108–09.

concluded that they had waived any privilege.²¹⁸ In reaching this holding, the court used the four-factor analysis from *Asia Global Crossing*, and declined to adopt what it deemed the “no-waiver rule” for webmail, finding that the waiver’s scope covers anything on the former employee’s company-issued laptops.²¹⁹

In a similar fashion, the Supreme Court of Virginia held that a client’s message to his attorney written on an employer-monitored computer was not protected by the privilege due to waiver.²²⁰ The company’s employee handbook prohibited personal use of its computers.²²¹ One of the company’s employees planned to quit and start a competing business and prepared a memorandum for his attorney on the company’s computer summarizing the industry and his planned resignation.²²² The former employee deleted the document from the computer, but a forensic expert retrieved the document.²²³ The Virginia Supreme Court held that the attorney-client privilege was waived because the employee handbook stated that there was no expectation of privacy regarding the company’s computers.²²⁴ The court analogized the former employee’s communication to circumstances where a third party can overhear what is said.²²⁵

Similar to the wide divergence in how courts determined that an employee held an objectively reasonable expectation of confidentiality in Part II.A.1, courts finding objectively unreasonable expectations of confidentiality also widely diverge in their analyses. In *Hanson*, the court seemed to find an unreasonable expectation of confidentiality because of the pervasiveness of the monitoring policy’s language; in *Royce Holmes*, the court found that the evidence was equivocal that the employee was unaware of the policy or that the policy was unenforced (which was dispositive in reaching the opposite conclusion in *Asia Global Crossing*²²⁶); in *Chechele*, the court explicitly overlooked that the employer did not actually monitor to find that the employer’s policy alone caused privilege waiver (which was dispositive in reaching the opposite holding in *Curto*²²⁷); in *Aventa*, the court dismissed the employees’ claims that they were unaware of the policy (which was dispositive of finding the

218. *See id.* at 1106 (“Such waiver would encompass all of the materials he placed or saved from any source onto his KCDL laptop computer. His belated attempt to assert the attorney-client privilege approximately a year and a half later is futile.”).

219. *Id.* at 1109–10.

220. *See Banks v. Mario Indus. of Va., Inc.*, 650 S.E.2d 687, 695–96 (Va. 2007).

221. *See id.* at 690 (“[The e]mployee handbook prohibited: the unauthorized removal of files from the computer and information systems, removing or copying Mario’s documents, removing company property, and personal use of Mario’s computer and information systems that was detrimental to Mario.”).

222. *See id.* at 691.

223. *See id.* at 695.

224. *See id.* at 695–96.

225. *See id.*

226. *See supra* note 163 and accompanying text.

227. *See supra* note 183 and accompanying text.

communication privileged in *Convertino*²²⁸) to hold that the communication was not privileged; in *Banks*, the court found that the employee handbook policy that computer usage was not private was dispositive in finding the communication not privileged (but with nearly identical employee handbook language in *Nagle*, the court there found the communication to be privileged²²⁹).

In short, courts apply the objective reasonableness test from *Asia Global Crossing* in vastly different ways. Because each court has chosen what factual circumstances are dispositive, courts hold that attorney-client communications are privileged in some instances and nonprivileged other instances—even when faced with remarkably similar factual circumstances. As a result, the case law on the objective reasonableness of an employee’s expectation of confidentiality is neither consistent nor predictable.

B. Approach Two: The Privilege Does Not Attach Because the Employer Monitoring Makes the Communication Nonconfidential

While the vast majority of courts use the objective reasonableness test,²³⁰ other courts do not reach the expectation of confidentiality analysis because they take a formalistic approach and focus on the lack of confidentiality.

In *Long v. Marubeni America Corp.*, the defendant, plaintiffs’ former employer, moved to compel disclosure of twenty-five emails between the plaintiffs and their private attorney.²³¹ The plaintiffs had sent the emails on company-issued computers but had used private, password-protected email accounts.²³² The defendant’s employee handbook, which one of the plaintiffs had helped to prepare, stated that “use of the systems for personal purposes are (sic) prohibited” and advised that the company retained the right to monitor any matter ““stored in, created, received, or sent over the e-

228. See *supra* notes 192–95 and accompanying text.

229. See *supra* notes 200–01 and accompanying text.

230. In addition to the cases highlighted in Part II.A.2, see *United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002) (finding that the defendant had no reasonable expectation of privacy in the computer due to a flashed on-screen warning); *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000) (holding that an employee had no reasonable expectation of privacy because of the employer’s computer use policy); *United States v. Bailey*, 272 F. Supp. 2d 822 (D. Neb. 2003) (holding that the defendant had no reasonable expectation of privacy in his work computer because of a flash-screen warning every time he used the computer); *McClaren v. Microsoft Corp.*, No. 05-97-00824-CV, 1999 WL 339015, at *4–5 (Tex. Ct. App. May 28, 1999) (finding that the plaintiff did not have a reasonable expectation of privacy in the contents of a private password-protected email sent from his work computer); *United States v. Monroe*, 50 M.J. 550, 558 (A.F. Ct. Crim. App. 1999) (finding that the defendant had no objectively reasonable expectation of privacy in the email system maintained by the government because that system was “for official business only” and notice was given that the “system was subject to monitoring”); see also *Bohach v. City of Reno*, 932 F. Supp. 1232, 123435 (D. Nev. 1996); *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996).

231. No. 05Civ.639(GEL)(KNF), 2006 WL 2998671, at *1 (S.D.N.Y. Oct. 19, 2006).

232. See *id.*

mail, voice mail, word processing, and/or internet systems provided' by [the defendant]."²³³

The Southern District of New York first found that ten of the twenty-five emails were not covered by the privilege because they were not communications between a client and an attorney for the purpose of obtaining legal advice.²³⁴ The court then held that the remaining fifteen emails were not privileged because "the Court is convinced that [the plaintiffs] knew or should have known of [the employee handbook policy]."²³⁵ Because one of the plaintiffs had helped prepare the employee handbook, and because the company sent annual reminders about its policy, the court found that the employees must have voluntarily disregarded the email monitoring policy.²³⁶ The court expressly refused to apply the inadvertent disclosure doctrine, finding that the plaintiffs would have had to accidentally send the emails to be able to claim inadvertent disclosure—but because the plaintiffs had voluntarily sent the emails to their attorneys, the emails were not confidential in fact, and thus the attorney-client privilege could not attach.²³⁷ In other words, the emails lacked confidentiality at the outset, and thus were immediately ineligible for attorney-client privilege.

Similarly, the court in *Scott v. Beth Israel Medical Center* found that monitoring of attorney-client communications rendered the communications nonconfidential and thus were nonprivileged.²³⁸ In preparation for a dispute between the hospital and a doctor, the doctor corresponded with his private attorney on the hospital's email system.²³⁹ The hospital's counsel sent a letter to the doctor's attorney informing him of the hospital's possession of attorney-client emails and stating that any potential privilege had been waived by the doctor by using the hospital's email system.²⁴⁰ The doctor then filed a motion for a protective order seeking return of the emails.²⁴¹ The court denied the protective order, finding that the employer's handbook policy had the same effect as having the employer looking over the doctor's shoulder as he sent the email.²⁴² The court distinguished cases that upheld the privilege based on the fact

233. *Id.* (alteration in original).

234. *See id.* at *3.

235. *Id.*

236. *See id.* ("[P]laintiffs disregarded the admonishment voluntarily and, as a consequence, have stripped from the e-mail messages referenced above the confidential cloak with which they claim those communications were covered.").

237. *Id.* at *3–4.

238. 847 N.Y.S.2d 436 (Sup. Ct. 2007).

239. *See id.* at 438.

240. *See id.*

241. *See id.*

242. *See id.* at 440 ("In other words, the otherwise privileged communication between [the plaintiff] and [his attorney] would not have been made in confidence because of the [employer] policy.").

that the hospital's email policy banned all personal use—not just certain personal uses.²⁴³

Holmes v. Petrovich Development Co. is a third example of a court holding that email monitoring precluded attorney-client privilege because of the confidentiality requirement.²⁴⁴ A former employee brought an action for sexual harassment and moved for the employer to return emails communicated between her and her attorney from her work computer.²⁴⁵ Unable to reach an agreement about the privileged status of the emails, the parties entered into a stipulated protective order where the defendant would not use any documents without first giving the plaintiff forty-five days' written notice.²⁴⁶ However, the defendant then substituted counsel, and the new counsel used the emails in support of the defendant's motion for summary judgment without giving notice.²⁴⁷ The appellate court affirmed that the emails were not protected by the attorney-client privilege "because they were not private."²⁴⁸ The court emphasized that not only did the company ban computer use for personal matters but the plaintiff also had been advised that her email communications were accessible by her alleged harasser.²⁴⁹ The court did not cite or use *Asia Global Crossing's* four-part test and rejected the plaintiff's argument that the company never actually accessed or audited employee's computers.²⁵⁰ The court called it "immaterial" that the "operational reality" was that the company did not actually monitor the employees' communications.²⁵¹

In *Long, Scott, and Holmes*, the courts found that the employees' communications with their attorneys were not privileged because the communications had been monitored by the employers and thus lacked

243. *See id.* at 441. Though the court concluded that the communications were not confidential, and thus not privileged, the court also analyzed whether the client's expectation of confidentiality was reasonable under the four factors of the *Asia Global Crossing* test and concluded that three of the factors made the expectation of confidentiality unreasonable. The third factor was irrelevant, but the others led the court to conclude that the expectation of confidentiality was unreasonable. *See id.* at 443. Despite analyzing the objective reasonableness of the employee's expectation of confidentiality, the court emphasized that the communications were not confidential in fact. *See id.* at 442–44.

244. 119 Cal. Rptr. 3d 878 (Ct. App. 2011).

245. *See id.* at 893.

246. *See id.* at 894 ("The letter noted, however, that 'by entering into the protective order, neither side is waiving any arguments it may have regarding the appropriate use of the [e-mails].'" (alteration in original)).

247. *See id.*

248. *Id.* at 895.

249. *See id.* at 896 ("This is akin to consulting her attorney in one of defendants' conference rooms, in a loud voice, with the door open, yet unreasonably expecting that the conversation overheard by [her supervisor] would be privileged.").

250. *See id.* at 897. Whether an employer actually monitors an employee's communications is one factor of *Asia Global Crossing's* four-part test. *See supra* notes 8–10 and accompanying text.

251. *Holmes*, 119 Cal. Rptr. 3d at 898 ("Absent a company communication to employees explicitly contradicting the company's warning to them that company computers are monitored to make sure employees are not using them to send personal e-mail, it is immaterial that the 'operational reality' is the company does not actually do so.").

confidentiality. Each of the courts used a more formalistic approach than the courts in Part II.A. Instead of using the reasonableness or unreasonableness of the employee's expectation of confidentiality as justification to reach their holdings, they emphasized that the communications were not confidential in fact.

C. Approach Three: Professor Rice's View—All Attorney-Client Communications Are Privileged Notwithstanding Employer Monitoring Because Confidentiality Should Not Be Required

As outlined in Part I.B.3, Professor Paul Rice argues that confidentiality has no place in attorney-client privilege doctrine.²⁵² Though he never argued for the abolition of the confidentiality requirement specifically in the context of employer-monitored communications,²⁵³ Professor Rice has argued that the privilege should attach to any communication between a lawyer and a client, regardless of whether a third party is present. This presumably includes an employer who electronically monitors employees.²⁵⁴

III. A FOURTH APPROACH: ATTORNEY-CLIENT PRIVILEGE SHOULD ATTACH IF THE EMPLOYEE BELIEVED THE COMMUNICATION WAS CONFIDENTIAL NOTWITHSTANDING THE EMPLOYER'S MONITORING

Part III proposes a fourth approach for analyzing whether the privilege should attach to an employer-monitored attorney-client communication. While courts should adopt previous scholars' proposals that attorneys or employers should limit attorney-client communications from being read by a third party,²⁵⁵ once an employer accesses an otherwise privileged communication, Part III argues that courts should consider only the subjective intent of the employee to keep her attorney communication confidential.

The Supreme Court has stated that

the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.²⁵⁶

Just as the Supreme Court values the public policy underlying the privilege,²⁵⁷ the Court also seeks to promote certainty and predictability in determining whether a communication is privileged. Part II of this Note outlined the divergence in courts' approaches as to whether attorney-client privilege attaches to employer-monitored communications between

252. See *supra* Part I.B.3.

253. See 1 RICE, *supra* note 11, § 6.8.

254. See *supra* Part I.B.3 for a discussion of Professor Rice's argument.

255. See *supra* Part I.D.

256. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

257. See *supra* note 18 and accompanying text.

attorneys and their clients.²⁵⁸ Given the wide divergence in the case law, there is an evident need for a test that satisfies the Court's call for certainty and predictability in attorney-client privilege doctrine. This section first addresses the benefits and limitations of the first three approaches before advocating for a new approach—the subjective belief test.

A. *The Benefits and Limitations of the Three Approaches*

This section discusses the benefits and limitations of each of the three approaches described in Part II: first, the objective reasonableness test; second, the automatically nonprivileged approach; and third, the automatically privileged approach.²⁵⁹

The majority of courts faced with the issue of whether the privilege should attach to an employer-monitored electronic communication consider whether the employee had an objectively reasonable expectation of confidentiality in that communication.²⁶⁰ Courts generally have used similar analyses (derived from *Asia Global Crossing's* four-part test), and this approach has the benefit of giving courts the flexibility to delve into fact-specific circumstances to weigh the factors that tend to make an employee's expectation of confidentiality in his or her communication reasonable or unreasonable. When there are some facts in the record that make the employee's belief seem reasonable and some facts that make it seem unreasonable, this approach allows a court to balance the goal of truth-seeking against the goals of attorney-client privilege.²⁶¹

However, the objective reasonableness approach has many limitations. First, as the divergent case law illustrates, courts that apply the test to similar factual situations veer apart in their conclusions regarding whether an employee's belief in the confidentiality of his or her communication was reasonable.²⁶² This test therefore fails to meet the Supreme Court's mandate that the privilege doctrine should be consistent and predictable so that attorneys and clients can anticipate in advance whether a communication will be privileged.²⁶³ In turn, this could lead clients to be unsure of whether their expectation of confidentiality is reasonable and

258. This divergence in analyses lead to disparate holdings in the face of remarkably similar fact patterns. *See supra* Part II; *see also* Adam C. Losey, *Clicking Away Confidentiality: Workplace Waiver of Attorney-Client Privilege*, 60 FLA. L. REV. 1179, 1202 (2008) (“Some courts have adopted a modern approach to attorney-client privilege in workplace waiver cases. These courts have broadly interpreted the privilege in an attempt to deal with situations where these courts feel the privilege should be upheld. They may do so either for public policy reasons, or because they feel that the traditional approach is unable to cope with issues involving technology. Other courts have adhered to Wigmore's traditional approach. While it is possible that courts adopting the modern, broad approach have done so unwittingly, the difference of breadth has naturally led to inconsistent holdings and will continue to do so until some uniformity is established.”).

259. *See supra* Part II.

260. *See supra* note 230 and accompanying text.

261. *See supra* note 256 and accompanying text.

262. *Compare supra* Part II.A.1, *with supra* Part II.A.2.

263. *See supra* note 256 and accompanying text.

could cause a chilling effect on client candor. Because this approach decreases clients' propensity to speak candidly with their attorneys, it undermines the public policy justification of the privilege.²⁶⁴

Second, the objective reasonableness approach may also be difficult to justify doctrinally because it is derived from the Fourth Amendment expectation of privacy test.²⁶⁵ For example, at least one circuit court has held that the Fourth Amendment's expectation of privacy analysis is distinct from and should not be confounded with the attorney-client privilege analysis.²⁶⁶ Third, the objective reasonableness test requires attorneys to expend resources to determine whether their clients' employers' monitoring policies prohibit private communications. Fourth, courts must also expend resources to conduct complex, fact-specific inquiries to determine whether the client's belief in confidentiality was reasonable.

The second approach—that monitored communications are, by definition, not confidential and thus the privilege cannot attach—also has benefits and limitations. First, it is beneficial because it serves as a bright-line rule that is relatively easy for courts to apply. As long as an employer has access to an employee's communications, those communications cannot be privileged. This approach has the additional benefits of promoting the court's truth-seeking function and promoting fairness for the client's adversary. The adversary only needs to show that a third party had access to the communication to undermine the employee's privilege claim. Therefore, courts following this approach will invariably permit the disclosure of more communications than under the first or third approaches, providing more evidence to the adversary and the court.²⁶⁷

However, this second approach yields a serious drawback. Because people generally believe that their emails are private,²⁶⁸ this approach punishes clients who have a mistaken but honest beliefs that their emails are confidential by stripping their communications of privilege protection. This approach therefore creates a chilling effect that undermines the public policy goal of the privilege. Because they are unable to understand monitoring technology, prudent clients may refrain from communicating with their attorneys due to the chance that some type of electronic monitoring covers their communication—even if their email is strictly confidential. In other words, this approach discourages clients from using even safe channels of communication. Whereas the first approach chills

264. See *supra* note 18 and accompanying text.

265. See *supra* notes 8–10 and accompanying text.

266. See *United States v. DeFonte*, 441 F.3d 92, 94 (2d Cir. 2006) (“It is true that, in the Fourth Amendment context, the law affords considerably less recognition to an inmate’s subjective expectation of privacy. An inmate does not, however, knowingly waive an attorney-client privilege with respect to documents retained in her cell simply because there is no reasonable expectation of privacy in those documents for Fourth Amendment purposes. Rather, the two inquiries are independent of each other.” (citation omitted)).

267. Compare *supra* Part II.A., and Part II.C., with Part II.B.

268. See *supra* notes 1–4 and accompanying text.

client candor because it is unpredictable, this approach chills client candor because it prevents communications over channels that a client merely suspects may be monitored.

The third approach—that confidentiality should not be required so employer monitoring has no effect on privilege—also has benefits and limitations. No court has adopted this approach yet, but like the second approach, it would serve as a bright-line rule that would be relatively easy for courts to apply. A court would only need to consider whether the communication was made between attorneys and clients for the purpose of seeking or obtaining legal advice to determine the communication's privilege status.²⁶⁹ This approach would have the additional benefit of encouraging client candor, though perhaps impermissibly so: it subverts the idea that there is no need to protect communications about which the client is willing to let others know.²⁷⁰ Abolishing the confidentiality requirement would undermine a limiting function that serves the court's truth-seeking process because courts would lose otherwise-admissible evidence that the client never intended to be confidential.²⁷¹ In other words, a court may refuse to admit valuable information to which the fact-finder would otherwise be entitled because of the mere fact that the client had communicated that information to his or her attorney. By limiting potentially valuable evidentiary information, the third approach is the least fair to the client's adversary.

In sum, each of the three approaches has both benefits and limitations. The final part of this Note argues that while attorneys and employers should seek to avoid monitored communications from losing the privilege, once a monitored communication has been intercepted and read, the client's subjective belief that the communication was confidential should govern whether the communication is privileged.

B. The Client's Subjective Belief That the Communication Remained Confidential Should Govern Whether the Monitored Communication Is Privileged

This part argues for a three-pronged approach. First, lawyers should seek to prevent nonconfidential communications from occurring by discussing how a lack of confidentiality in their clients' workplace systems might undermine attorney-client privilege. Second, if attorney-client communications have been monitored, employers should attempt to avoid reading attorney-client communications so that, even though they were technically nonconfidential, courts may still consider them privileged. Third, courts should allow the privilege to attach when the employee believed that her communications with her attorney were confidential.

269. See *supra* notes 114–17 and accompanying text.

270. See *supra* notes 91–92 and accompanying text.

271. See *supra* Part I.B.2.

First, courts should adopt elements of the ABA Formal Opinion and find that lawyers have an ethical duty—and perhaps a constitutional duty in criminal cases under the Sixth Amendment’s right to effective counsel—to inform their clients of the risks of communicating via email.²⁷² Prudent lawyers should protect against the possibility that sensitive information will be communicated in a way that is accessible to any third party.²⁷³ Similarly, courts or legislatures should adopt a rule that employers that monitor employee communications must use a two-tiered recording system, where the employer walls off recorded information until a lawyer or court reviews them for nonprivileged materials.²⁷⁴

Taken together, these two strategies have a few benefits. First, they avoid nonconfidential communications from occurring in the first place, and when such conversations do occur, they prevent them from becoming nonprivileged. Additionally, they encourage client literacy by requiring lawyers to discuss electronic monitoring with their clients. In turn, these strategies promote the privilege’s purpose of encouraging client candor in situations where the client knows that the communication is strictly confidential.²⁷⁵ Finally, these proposals reallocate the risk that the communication is not privileged from the employee to either the lawyer or employer. This risk reallocation protects the client because it allows the court to hold either the client’s lawyer or employer culpable when an attorney-client communication loses its privileged status.²⁷⁶

Once a monitored attorney-client communication has been read by an employer, courts should consider only the subjective belief of the client that the communication was confidential. Such a test is consistent with the privilege doctrine because it is analogous to widely accepted exceptions to confidentiality.²⁷⁷ Like those exceptions, this one would promote the Supreme Court’s stated goals for attorney-client privilege.²⁷⁸ By relying solely on subjective belief, this test serves the privilege’s purpose of promoting client candor. A client will communicate openly because it is

272. *See supra* note 144 and accompanying text.

273. *See supra* note 140 and accompanying text.

274. *See supra* notes 149–50 and accompanying text.

275. *See supra* note 18 and accompanying text.

276. If there were an ethical duty of lawyers to discuss the risks of monitored communications with their clients or a rule that employers must wall off potentially nonprivileged communications, then when lawyers or employers fail to take those precautions, courts could find that the lawyer or employer is culpable and not the client; thus, a court might find it would be illogical to punish the client for communicating on a monitored communication and hold that the communication is privileged.

277. *See supra* Part I.B.1. One of the exceptions to confidentiality, inadvertent disclosure, uses an objective test of reasonableness to determine whether the client took reasonable precautions to maintain confidentiality. The justifications for using an objective test for inadvertent disclosure are not applicable to the present issue because whether the privilege should attach to a communication at the outset is distinct from whether the client acted in such a way that maintained confidentiality. *See, e.g.,* Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal For a Federal Rule of Evidence 502*, 58 S.C.L. REV. 211 (2006).

278. *See supra* notes 18, 256 and accompanying text.

the client's understanding that dictates whether the privilege attaches.²⁷⁹ Additionally, the attorney and the client can accurately predict—even in advance of any litigation—which communications will or will not be privileged.²⁸⁰ Thus, similar to the widely accepted exceptions to strict confidentiality,²⁸¹ the subjective belief test mirrors the Supreme Court's goals of promoting client candor and yielding a consistent, predictable privilege doctrine.

The subjective belief test is not only justifiable based on the expansion of the confidentiality requirement's exceptions, however; the test also yields more benefits and fewer limitations than the other three approaches.²⁸² First, the fact-finding required to determine what is an objectively reasonable expectation not only yields disparate holdings²⁸³ but is also burdensome for both attorneys and courts.²⁸⁴ A test that relies solely on the client's subjective belief that the communications were confidential would not require courts or attorneys to inquire beyond the client's beliefs. This would save attorney and court resources and reduce litigation costs.²⁸⁵

Second, the bright-line rules of the second and third approaches are overbroad in that they either impermissibly punish a client with an honest yet unreasonable expectation of confidentiality in his communication, or burden the court's truth-seeking by privileging communications that the client did not intend to be confidential.²⁸⁶ But the subjective belief test strikes a balance between these extremes. It avoids punishing those clients who had an honest belief in the confidentiality of their email, and it avoids privileging communications that the client did not intend to be confidential.

Third, the subjective belief test is relatively easy for clients to understand because it is based on their internal beliefs and not external factors such as their employers' monitoring policy or complex case law. The goal of promoting the client's understanding of when the privilege attaches should not be underestimated, especially given the current empirical evidence showing that clients do not understand the privilege.²⁸⁷ An easy-to-understand privilege doctrine may have additional social policy benefits,

279. *See supra* note 18 and accompanying text. Moreover, a test that relies solely on subjective belief may increase candor by increasing the frequency of communications between an attorney and client; the objectively reasonable test may prevent a prudent lawyer and prudent client from communicating via email thereby hindering the frequency of their communications.

280. *See supra* note 256 and accompanying text.

281. *See supra* Part I.B.1.

282. *See supra* Part III.A.

283. *Compare supra* Part II.A.1, with Part II.A.2.

284. *See supra* notes 114–19 and accompanying text.

285. *See supra* notes 113–18 and accompanying text.

286. *See supra* Part III.A.

287. Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 383 (1989) (finding that 42 percent of surveyed clients believed confidentiality was absolute, 25 percent believed that confidentiality rules allowed more liberal disclosure, and 32.8 percent correctly believed that lawyers must maintain confidentiality with certain exceptions).

such as preventing clients from fearing or hating their lawyers or employers.

Finally, the subjective belief approach allows for flexibility as new monitoring technologies emerge. Part of the problem with the current case law is that courts have reacted slowly to novel monitoring techniques, and have attempted to graft traditional in-person confidentiality doctrines onto an online context.²⁸⁸ But as monitoring techniques evolve, employees may have an even harder time understanding or identifying when their communications are monitored. Applying the privilege whenever the client believes that his or her communication was confidential allows the privilege to evolve along with advancements in monitoring technologies. Even though an employee's belief may be increasingly unreasonable given the growing pervasiveness of employee monitoring, privilege doctrine should reallocate the risk of nonconfidentiality and not punish those clients who honestly believed that their communication was confidential.

However, this Note's proposal of relying solely on the subjective intent of the client is not without its own limitations. For one, the approach relies on the internal beliefs of the client. Reliance on the internal mental processes of one party creates an evidentiary problem—how can the client prove his subjective belief or his adversary prove the opposite? For example, consider a client who did not read the employee handbook before signing the policy, and thus was unaware of the monitoring policy and honestly believed his communications were confidential. A court may be hesitant to apply the privilege to this employee's communications because such a holding may discourage future employees from reading their employer policies in order to remain ignorant. As another example, consider an employee who is aware of the monitoring policy, but holds an honest but mistaken belief that it is not enforced. Under the proposed subjective belief test, the client holds an honest belief that his communications are confidential and thus the privilege should attach. But a court may be reluctant to apply the privilege to this employee's communications because this could discourage future employees from seeking out information about whether their employer's enforce their monitoring policies. Moreover, situations like these could lead to protracted factual determinations as to whether the client actually held an

288. This Note has focused exclusively on the confidentiality requirement of attorney-client privilege in the context of employer monitoring of employee communications. There are a few reasons why the test for electronic communications should be different from in-person communications: (1) electronic communications are uniquely exposed to third party monitoring in ways that traditional communications are not; (2) because of the rapid pace of technology, people are more likely to have a reasonable but mistaken belief in confidentiality while communicating electronically; and (3) there is comparatively little that a client could do to show the reasonableness of his belief in the confidentiality of electronic communications compared to in-person communications. Future scholarship should consider the soundness of the objective reasonableness test in other contexts beyond employer-monitoring of electronic communications.

honest belief that her communication was confidential. This wastes judicial resources and increases litigation costs.

An additional problem with the subjective intent approach is that it undermines the court's truth-seeking role. Sole reliance on subjective belief potentially allows the client to override his adversary's challenge to his privilege assertion by simply stating that he believed the communication was confidential. Relatedly, the subjective intent approach may lead some clients to commit perjury. It allows clients to swear after-the-fact that they believed that their communication was confidential, due to the lack of evidence to the contrary.

To illustrate how the subjective belief test would alter a court's privilege determination—and in turn yield an outcome more in line with the privilege's public policy goals—consider a recent case from the Eastern District of New York.²⁸⁹ An employee, who had never authorized his attorney to communicate confidential materials through his work email, received a list of his assets as his attorney was preparing his will.²⁹⁰ During an unrelated investigation, the company found the email and discovered that the employee had undisclosed ownership interests in companies owned by his employer's vendors.²⁹¹ The employee “forwarded [the email] to a non-[work] email account, deleted the email from [his] inbox and . . . instructed [his attorney] to send confidential information only to another email address [he] had previously given her and not to [his work] email address.”²⁹² The employee moved for an order precluding the government from introducing the email at trial, and the court used the *Asia Global Crossing* objective reasonableness test to hold that the former employee had no reasonable expectation of privacy in any of the communications made through his email account.²⁹³

Consider how this Note's proposed three-pronged test would lead to a different analysis.²⁹⁴ First, the court did not consider whether the employee's lawyer breached a duty by unilaterally sending a confidential email to his client's monitored email account. The employee contended that he had never authorized the attorney to use that account for confidential uses and that he had only used it for scheduling purposes.²⁹⁵ The first prong of this Note's test would reallocate the culpability for the nonconfidential communication from the client to the attorney because the employee passively, unwillingly received the email.²⁹⁶ Second, the court

289. *United States v. Finazzo*, No. 10-CR-457(RRM)(RML), 2013 WL 619572 (E.D.N.Y. Feb. 19, 2013).

290. *See id.* at *1.

291. *See id.* at *2.

292. *Id.* at *1.

293. *Id.* at *11.

294. The court found an alternative ground (waiver) for finding the email nonprivileged; the opinion discussed the alternative ground after determining that the employee did not have an objectively reasonable expectation of confidentiality in his email. *See id.* at *13.

295. *See id.* at *12.

296. *See id.* at *1.

continued the trend of reaching a privilege determination by emphasizing one or two elements of the *Asia Global Crossing* test.²⁹⁷ For instance, the court downplayed that the CEO used the email system for personal use and that there was no evidence that the company had ever monitored email use before.²⁹⁸ The third prong of this Note's test would supplant this unpredictable, candor-quashing test with a single question: Did the employee subjectively believe his communications were confidential? In *United States v. Finazzo*, the court may well have found that the deletion of the email invalidated the defendant's claim that he believed the communication was confidential. In other words, why would the employee have warned his attorney not to email him on his work account and then have deleted the email if he subjectively believed it was confidential? Skeptics who believe that a subjective test may be abused by *post hoc* claims should note that the determination of subjective belief still relies on a court's finding that such a belief existed at the time of the communication. In short, this Note's three-pronged proposal may have led the court to reach the same holding about the email's privilege status; however, rather than punish the client, this Note's three-pronged approach would have led the court to hold the attorney culpable. This approach will make the privilege doctrine simpler, more predictable, and will better promote future client candor.

CONCLUSION

Lawyers should seek to prevent nonconfidential communications from occurring by discussing the risks of using an employer's electronic systems at the outset of representation. Additionally, employers should do their part by refraining from reading potentially privileged communications until an outside lawyer or court has reviewed them for privilege status. But even with these precautions, employers will nevertheless monitor, record, and read private attorney-client privileged communications. At this point, no perfect solution exists for courts to determine whether attorney-client privilege should attach—each approach has drawbacks and limitations.

However, just because no perfect solution exists does not mean that the attorney-client privilege doctrine should not be improved. This Note has argued that the attorney-client privilege should incorporate a new exception to the confidentiality requirement: when an employer monitors an employee's communication, that communication is not strictly confidential, but if the employee honestly believes that it was, the privilege should attach. In short, the subjective intent approach proposed by this Note is the

297. See *supra* Part II.A.2. and accompanying text.

298. See *Finazzo*, 2013 WL 619572, at *9–10. The lack of actual monitoring was determinative in finding an objectively reasonable expectation of confidentiality in previous cases in the Eastern District of New York. See, e.g., *United States v. Hatfield*, No. 06-CR-0550(JS), 2009 WL 3806300, at *9 (E.D.N.Y. Nov. 13, 2009); *Curto v. Medical World Commc'ns*, No. 03CV6327(DRH)(MLO), 2006 WL 1318387, at *5–7 (E.D.N.Y. May 15, 2006).

least-bad solution because it protects clients who have an honest but unreasonable belief that their email is confidential. As a matter of public policy, courts should refrain from using a test that results in limiting attorney-client privilege to only smart, reasonable clients. Courts should adopt a test that makes the privilege available to unsophisticated or unreasonable, yet honest clients.

Future scholarship should consider the subjective belief approach in other workplace modes of communication or other electronic communications outside of the workplace setting. For instance, should a voicemail that a lawyer leaves on an employee's cellphone without knowing that the phone was employer-owned be privileged? Or should a photocopy made by a client on an employer-owned Xerox machine that automatically stores a copy onto the machine's hard drive be privileged? The subjective intent approach may also have ramifications outside of the workplace context. If an indigent client must use a public library's or internet cafe's computer to send his attorney documents, does the library's or internet cafe's monitoring policy render those materials nonprivileged?

As twenty-first century technologies pose new dilemmas in confidentiality, courts should return to the underlying purpose of the attorney-client privilege. This will ensure that the doctrine evolves and continues to promote client candor and effective representation in a way that is consistent and predictable for attorneys and clients alike.