

# THE APPLICABILITY OF PRIVILEGES TO EMPLOYEES' PERSONAL E-MAILS: THE ERRORS CAUSED BY THE CONFUSION BETWEEN PRIVILEGE CONFIDENTIALITY AND OTHER NOTIONS OF PRIVACY

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## INTRODUCTION

Today, electronic communication is pervasive. In particular, e-mail is now one of the most popular means of communication. The

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numbers are staggering. By as early as 2000, the number of regular e-mail users in the United States had exceeded 100 million.<sup>1</sup> Annually, the number of e-mails sent domestically approaches seven trillion.<sup>2</sup>

For their part, American businesses rely heavily on e-mail. Office workers exchange twenty-five billion e-mail messages daily.<sup>3</sup> Businesses send well more than a trillion e-mail messages annually.<sup>4</sup> One company, Microsoft, receives approximately ten million e-mails every day.<sup>5</sup> Businesses depend on e-mail communication so extensively that many businesses give their employees work e-mail accounts:

A work email account is an employer-provided email account furnished to each employee in which the address usually appears as some version of the individual employee's name followed by "@" followed by some variation on the employer's business name. The account uses the employer's technology infrastructure, typically an enterprise software system that operates on the employer's email server. A work email account differs from a personal, password-protected, web-based email account, also known as webmail, which the employee may obtain through Google, Hotmail, or other services.<sup>6</sup>

Since employees spend so many of their daylight hours at work, it was virtually inevitable that they would use their work e-mail accounts for personal, as well as business, purposes.<sup>7</sup> It is not

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1. Patricia Nieuwenhuizen, *E-mail: The Smoking Gun of the Future*, NAT'L L.J., Dec. 11, 2000, at B9.

2. *Id.*

3. *Id.*; see also David M. Remnitz, *Electronic Mail: Key Issues for Corporate Counsel in Discovery*, 72 U.S.L.W. 2339, 2340 (2003) ("[I]t is estimated that more than 2 billion e-mails are sent in America daily . . .").

4. Kristin M. Nimsgar, *Same Game, New Rules: E-Discovery Adds Complexity to Protecting Clients and Disadvantaging Opponents*, LEGAL TIMES, Mar. 11, 2002, at 28 ("In 2000, an estimated 1.4 trillion e-mail messages were sent from businesses in North America, up from 40 billion in 1995."); see also Bruce E. Jameson, *Document Retention and Electronic Discovery*, PRAC. LITIGATOR, Sept. 2004, at 45, 46.

5. *Proposed Rules on E-Discovery Debated; Cost of Discovery Cited as Prod to Settlement*, 73 U.S.L.W. 2405, 2405 (2005) ("Microsoft Corp. received roughly double the amount of e-mail in 2004 than it received in 2003, Greg McCurdy, senior litigation attorney for Microsoft, testified. The company's IT network now receives 250 million to 300 million e-mails a month.")

6. *In re Info. Mgmt. Servs., Inc.*, No. 8168-VCL, 2013 WL 4772670, at \*4 n.1 (Del. Ch. Sept. 5, 2013) (citation omitted).

7. *United States v. Hatfield*, No. 06-CR-0550 (JS), 2009 U.S. Dist. LEXIS 106269, at \*34 n.15 (E.D.N.Y. Nov. 13, 2009) ("[I]t is indisputable that employees

only that employees spend a large number of hours at work. Moreover, their work hours roughly coincide with the work schedule of many kinds of professionals whom the employees have occasion to consult for personal reasons. Thus, in numerous instances, employees have used their work accounts for communicating with confidants such as attorneys<sup>8</sup> and therapists. And, as is to be expected, employees frequently utilize the account to send messages to their spouses.

When employers anticipated or realized that their employees were doing so, employers began regulating the use of work e-mail accounts. In employee handbooks and policy manuals, some employers promulgated policies allowing their employees to put their work account to “[i]ncidental and occasional personal use” during business hours.<sup>9</sup> Other employers permit their employees to utilize their work e-mail account for personal reasons only after business hours.<sup>10</sup> Still other employers purport to completely ban employees’ personal use of the account.<sup>11</sup> Many employers have gone farther. These employers not only prohibit or limit employees’ personal use of the work e-mail account, but they also expressly reserve the right to monitor employees’ e-mails. These employers police employee e-mails not only to ensure that employees are observing restrictions on personal use, but also for “legal compliance, legal liability, performance review, productivity measures, and security concerns.”<sup>12</sup>

The question has arisen of whether these employer restrictions and monitoring policies preclude evidentiary privileges, such as attorney–client<sup>13</sup> and spousal,<sup>14</sup> from attaching to employee e-mails to confidants on the employee’s work account. The number of

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with pressing personal legal affairs (*i.e.*, a divorce, a lawsuit) sometimes feel the need to communicate with their counsel while at work.”).

8. *See, e.g., In re Info. Mgmt. Servs.*, 2013 WL 4772670, at \*1.

9. *Id.* at \*5 n.5 (alteration in original) (quoting *Hanson v. First Nat’l Bank*, No. 5:10-0906, 2011 WL 5201430, at \*2, \*6 (S.D. W. Va. Oct. 31, 2011)).

10. *Id.* at \*6.

11. *Id.* at \*5 n.4 (citing *Thygeson v. U.S. Bancorp*, No. CV-03-467-ST, 2004 WL 2066746, at \*21 (D. Or. Sept. 15, 2004)).

12. *Id.* at \*4 n.2 (citing *TBG Ins. Servs. Corp. v. Superior Court*, 117 Cal. Rptr. 2d 155, 162 (Ct. App. 2002)).

13. *See, e.g., id.* at \*4.

14. *See, e.g., SEC v. Reserve Mgmt. Co. (In re Reserve Fund Sec. & Derivative Litig.)*, 275 F.R.D. 154, 156 (S.D.N.Y. 2011); *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* No. MDL 2179, 2011 WL 1193030, at \*1 (E.D. La. Mar. 28, 2011).

judicial opinions posing this issue is increasing exponentially.<sup>15</sup> Likewise, the volume of legal commentary on the question is growing quickly.<sup>16</sup> In some cases the question has been whether, in later litigation, the employee could assert the privilege against her employer, while in other cases the issue has been whether the employee could claim the privilege against a third party.<sup>17</sup> The litigation has produced splits of authority on several questions, including whether related federal<sup>18</sup> or state<sup>19</sup> statutes override<sup>20</sup> the normal common-law or statutory privilege rules.

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15. See, e.g., *United States v. Finazzo*, No. 10-CR-457 (RRM)(RML), 2013 U.S. Dist. LEXIS 22479 (E.D.N.Y. Feb. 19, 2013); *Reserve Mgmt. Co.*, 275 F.R.D. at 156; *In re Oil Spill*, 2011 WL 1193030, at \*1; *DeGeer v. Gillis*, No. 09 C 6974, 2010 WL 3732132, at \*5-9 (N.D. Ill. Sept. 17, 2010); *Miller v. Blattner*, 676 F. Supp. 2d 485, 497 (E.D. La. 2009); *Leor Exploration & Prod. L.L.C. v. Aguiar*, Nos. 09-60136-CIV, 09-60683-CIV, 2009 WL 3097207, at \*2-4 (S.D. Fla. Sept. 23, 2009); *Curto v. Med. World Commc'ns, Inc.*, No. 03CV6327 (DRH)(MLO), 2006 WL 1318387, at \*1 (E.D.N.Y. May 15, 2006); *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 251 (Bankr. S.D.N.Y. 2005); *In re Info. Mgmt. Servs.*, 2013 WL 4772670, at \*1; *Scott v. Beth Isr. Med. Ctr. Inc.*, 847 N.Y.S.2d 436, 438-39 (Sup. Ct. 2007); 1 EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 6.8.1, at 777 n.51 (Richard D. Friedman ed., 2d ed. 2010 & Supp. 2014) (collecting cases and articles involving the issue of privileged e-mails). Two states, California and New York, have amended their privilege statutes to make it clear that a message is not unprivileged merely because it was sent in electronic form. See CAL. EVID. CODE § 917(b) (West 2014) (“A communication between persons in a relationship listed in subdivision (a) does not lose its privileged character for the sole reason that it is communicated by electronic means . . . .”); N.Y. C.P.L.R. 4548 (McKinney 2014).

16. See, e.g., 1 IMWINKELRIED, *supra* note 15, § 6.8.2, at 806 n.187 (collecting cases and articles involving the issue of privileged employee e-mails); John M. Barkett, *The Challenge of Electronic Communications: Privilege, Privacy, and Other Myths*, LITIGATION, Fall 2013, at 17; John Gergacz, *Employees’ Use of Employer Computers to Communicate with Their Own Attorneys and the Attorney–Client Privilege*, 10 COMPUTER L. REV. & TECH J. 269 (2006); W. William Hodes, *Confidentiality and Privilege in the Workplace: Their Computer, Their Rules*, LAW. USA, Nov. 1, 2011, available at <http://lawyersusaonline.com/blog/2011/11/01/confidentiality-and-privilege-in-the-workplace-their-computer-their-rules/>; Richard L. Marcus, *The Electronic Lawyer*, 58 DEPAUL L. REV. 263 (2009); James W. Martin, *Why You Need an Employee Policy for Electronic Information*, FAM. ADVOC., Fall 2013, at 13; Kelcey Nichols, Note, *Hiding Evidence from the Boss: Attorney–Client Privilege and Company Computers*, 3 SHIDLER J.L. COM. & TECH. 6 (2006); Donald H. Nichols, *Window Peeping in the Workplace: A Look into Employee Privacy in a Technological Era*, 27 WM. MITCHELL L. REV. 1587, 1600-01 (2001).

17. See, e.g., *In re Info. Mgmt. Servs.*, 2013 WL 4772670, at \*12-13.

18. *Id.* at \*9 (discussing the Federal Wiretap Act).

19. *Id.* at \*11 (discussing the Maryland Wiretap Act).

20. *Id.* at \*9.

Although the current body of case law leaves a large number of privilege issues unresolved, this Article focuses on only two of the most important unsettled questions. First, should the same confidentiality standard apply whether the employee's opposing litigant is the employer or a third party? And second, does the employer's issuance of a formal policy banning employee's personal use of the work e-mail account absolutely preclude a privilege such as attorney-client from attaching to an employee's message to a confidant on the work account?

This Article has selected those two questions because the resolution of both questions turns on a proper understanding of the confidentiality concept in privilege law. That concept is the privilege doctrine most directly related to the protection of the private sphere of human activity and "[o]ne of the most venerated and important tenets of [Western] political philosophy since the time of the Greeks has been the dichotomy between the private and public realms."<sup>21</sup> Furthermore, in practice, confidentiality has become the central concept in contemporary privilege doctrine. Litigation over that concept accounts for more than three-quarters of the published opinions dealing with communications privileges.<sup>22</sup> In the words of one court, protecting "[c]onfidentiality . . . is the essence" of contemporary privilege law.<sup>23</sup>

The confidentiality concept not only comes into play in the vast majority of litigated privilege disputes; the concept is also one of the most frequently misapplied. As two of the leading privilege commentators, Professors Robert Mosteller and Ken Broun, have noted, in recent years there has been a growing judicial tendency to confuse the concept of confidentiality in the law of privilege with the concept of privacy in other contexts, such as the Fourth Amendment.<sup>24</sup> In a 2009 article, Professors Mosteller and Broun

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21. RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* 3 (1999); *see also* RICHARD F. HIXSON, *PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT* 118-19 (1987); 1 IMWINKELRIED, *supra* note 15, § 5.3.3, at 360-61.

22. Paul R. Rice, *Our Late Great Secrets?*, *LEGAL TIMES*, June 14, 1999, at 18.

23. *In re Royce Homes, L.P.*, 449 B.R. 709, 723 (Bankr. S.D. Tex. 2011).

24. *See* Robert P. Mosteller & Kenneth S. Broun, *The Danger of Confidential Communications in the Mismatch Between the Fourth Amendment's "Reasonable Expectation of Privacy" and the Confidentiality of Evidentiary Privileges*, 32 *CAMPBELL L. REV.* 147 (2010); *see also* Edward J. Imwinkelried, *The Dangerous Trend Blurring the Distinction Between a Reasonable Expectation of*

demonstrated that by confusing the two concepts, the courts have sometimes reached incorrect results in cases involving privileged communications in the prison setting.<sup>25</sup>

The thesis of this short Article is that the same phenomenon is now spilling over into the employment setting. Like some of the opinions from the prison setting,<sup>26</sup> many of the employee privilege cases now use the expression “expectation of privacy,” borrowed from Fourth Amendment jurisprudence, rather than the classical privilege terminology “expectation of confidentiality.”<sup>27</sup> The first Part of this Article addresses the question of whether the same confidentiality standard should govern whether the litigant opposing the employee is the employer or a third party. Some cases have suggested that the standard differs and indicated that an employee could assert a privilege against a third party even when the employer could defeat the privilege claim. This Part of the Article critiques those cases. Admittedly, the protection of a Fourth Amendment privacy expectation depends on whether the citizen is asserting the expectation against the government rather than a third party. However, Fourth Amendment privacy analysis differs fundamentally

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*Confidentiality in Privilege Law and a Reasonable Expectation of Privacy in Fourth Amendment Jurisprudence*, 57 LOY. L. REV. 1 (2011).

25. See Mosteller & Broun, *supra* note 24 (criticizing *State v. Rollins*, 675 S.E.2d 334 (N.C. 2009)). In *Rollins*, a spousal conversation occurred in a public visiting area of a state prison. 675 S.E.2d at 335. The majority of justices held that the spouses had no reasonable expectation of privacy and, hence, no privilege. *Id.* at 340.

26. See generally Mosteller & Broun, *supra* note 24.

27. See, e.g., *United States v. Finazzo*, No. 10-CR-457 (RRM)(RML), 2013 U.S. Dist. LEXIS 22479 (E.D.N.Y. Feb. 19, 2013); *Goldstein v. Colborne Acquisition Co.*, 873 F. Supp. 2d 932, 935 (N.D. Ill. 2012) (stating that courts, such as *In re Asia Global Crossing, Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005), “looked to Fourth Amendment case law on expectations of privacy in the workplace”); *Hanson v. First Nat’l Bank*, No. 5:10-0906, 2011 U.S. Dist. LEXIS 125935 (S.D. W. Va. Oct. 31, 2011); *In re Royce Homes*, 449 B.R. at 736 (stating that the cases “refer to the Fourth Amendment reasonable expectation of privacy in the workplace cases”); *United States v. Hatfield*, No. 06-CR-0550 (JS), 2009 U.S. Dist. LEXIS 106269, at \*27 n.12 (E.D.N.Y. Nov. 13, 2009); *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* No. MDL 2179, 2011 WL 1193030 (E.D. La. Mar. 28, 2011); *SEC v. Reserve Mgmt. Co.* (*In re Reserve Fund Sec. & Derivative Litig.*), 275 F.R.D. 154 (S.D.N.Y. 2011); *Leor Exploration & Prod. L.L.C. v. Aguiar*, Nos. 09-60136-CIV, 09-60683-CIV, 2009 WL 3097207 (S.D. Fla. Sept. 23, 2009); *Curto v. Med. World Commc’ns, Inc.*, No. 03CV6327 (DRH)(MLO), 2006 WL 1318387 (E.D.N.Y. May 15, 2006); *In re Asia Global Crossing*, 322 B.R. at 256; *In re Info. Mgmt. Servs., Inc.*, No. 8168-VCL, 2013 WL 4772670, at \*4, \*6-9, \*12 (Del. Ch. Sept. 5, 2013); *Scott v. Beth Isr. Med. Ctr. Inc.*, 847 N.Y.S.2d 436, 440 (Sup. Ct. 2007).

from privilege confidentiality analysis. This Article argues that whenever the employee knowingly exposes her communication to anyone outside the attorney–client circle—whether that person is the employer or a third party—the privilege should not attach.

The second Part of the Article turns to the question of whether the employer's promulgation of a formal policy prohibiting employees from making personal use of their work e-mail account dictates the conclusion that the employee has no privilege. There are cases ruling that the existence of such a policy is dispositive and renders the employer's actual monitoring policy irrelevant. These cases state that as a matter of law, the employer policy makes any employee expectation of confidentiality unreasonable. In the Fourth Amendment context, when the court decides whether a defendant citizen's privacy expectation is "reasonable," the court makes a normative judgment as to whether society ought to be prepared to respect the expectation. When a court makes a decision based on a normative judgment, it is defensible to render the decision categorically as a matter of law. In contrast, when the court determines whether a person's confidentiality expectation is reasonable, the court must assess reasonableness in another sense. Rather than making a normative decision, the court must determine whether it was justifiable or factually reasonable for the person to believe that the communication was private and that she can maintain privacy in the future. This Article contends that, while in privilege analysis the existence of an employer policy prohibiting personal use of work e-mail accounts is highly relevant to the court's determination, the policy is not necessarily dispositive; in principle, the court ought to consider the employer's actual monitoring practice.

I. MAY AN EMPLOYEE ASSERT A PRIVILEGE FOR A PERSONAL WORK E-MAIL ACCOUNT MESSAGE TO A CONFIDANT AGAINST A THIRD PARTY EVEN IF THE EMPLOYER CAN DEFEAT THE PRIVILEGE CLAIM?

A. A Description of the Current State of the Law

Some courts purport to apply the same confidentiality standard whether the opponent challenging the privilege claim is a third party or the employer who owns the work e-mail account that the employee used to communicate with a confidant such as an attorney

or spouse.<sup>28</sup> Under this view, if the court finds that the employee lacked a reasonable expectation of confidentiality against the employer, not only can the employer defeat the employee's privilege claim in a lawsuit between employer and employee; a third party could also surmount the claim in litigation that does not in any way involve the employer. Suppose, for example, that a third party has sued the employee for personal injuries. The third party alleges that the employee negligently caused her injuries in an accident that has nothing to do with the employer; the employee was involved in the accident while vacationing in a state in which the employer does not even do business. However, during pretrial discovery, the plaintiff learns that the employee used her work e-mail account to communicate with her attorney or spouse. When the plaintiff seeks production of the e-mails, the defendant employee asserts either attorney-client or spousal privilege. In these jurisdictions, if the court found that the employee did not have a reasonable expectation of confidentiality against the employer, that finding would require the court to reject the privilege claim and permit discovery by the third party.

However, in other jurisdictions the confidentiality standard appears to vary, depending on whether the opponent seeking discovery is the employer or a third-party stranger. In one of the early and still-leading cases, *In re Asia Global Crossing, Ltd.*,<sup>29</sup> the court emphasized that the employer seeking discovery was "the owner of the e-mail system."<sup>30</sup> In a 2013 decision, *In re Information Management Services (IMS)*, the court wrote:

[T]he premise that an employer's access to an employee's work email compromises the attorney-client privilege makes the most sense in litigation between the employer or its successor-in-interest and the employee. . . . Those outside the corporation cannot routinely access work email accounts . . . . The corporation and its employees should be on

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28. See, e.g., *Reserve Mgmt. Co.*, 275 F.R.D. at 156 (explaining that the opponent seeking discovery was the Securities and Exchange Commission rather than the employer); *Finazzo*, 2013 U.S. Dist. LEXIS 22479, at \*14 (the opponent seeking discovery was the government rather than the employer); *In re Oil Spill*, 2011 WL 1193030, at \*1 (one of the opponents seeking discovery was the government).

29. 322 B.R. 247 (Bankr. S.D.N.Y. 2005).

30. *Id.* at 256; see also *Hanson*, 2011 U.S. Dist. LEXIS 125935, at \*9, \*18 (noting that "such materials were the property of the company" and that the company had "ownership of [the] emails"); *In re Royce Homes*, 449 B.R. at 739 (noting that the company's policy provided that "[a]ll electronic communications are the property of the Company").

different and stronger ground when those outside the corporation seek to compel . . . documents that employees have sent using work email. . . . It is not clear to me . . . that the analysis translates so easily when the party trying to overcome the privilege is not the corporation or its successor-in-interest.<sup>31</sup>

As support for his position that there can be confidentiality against a third party even when there is no confidentiality against an employer, the judge analogized to the selective waiver doctrine.<sup>32</sup> In some jurisdictions, that doctrine allows a privilege holder to waive a privilege by making voluntary disclosure to a government agency while preserving the privilege against all third parties.<sup>33</sup> A corporation undergoing a government investigation sometimes invokes the doctrine when the corporation under investigation finds itself in a difficult position.<sup>34</sup> On the one hand, the corporation realizes that, by cooperating with the government authorities, it may persuade the authorities not to file charges or to impose only minor sanctions.<sup>35</sup> On the other hand, if revealing privileged communications to the government waives the privilege as against all third parties, in a later lawsuit filed by a third party, the third-party plaintiff may be able to force the corporation to reveal all the communications previously disclosed to the government.<sup>36</sup> The corporation might have tremendous potential exposure in such a lawsuit. The corporation's fear of that exposure may be so great that the corporation feels compelled to refuse to cooperate with the government investigation. That refusal may impede the government's efforts to protect the public interest. Some courts recognize the selective waiver doctrine in order to eliminate that fear; by virtue of the doctrine, the privilege holder can waive the privilege as to the government while maintaining its ability to assert the privilege against third parties. In the mind of the judge in *IMS*, when, despite an employer's policy banning personal use of work accounts, an employee uses such an account to communicate with a confidant, the employee has foregone any privilege claim against the employer, but possibly retains the claim against third-party outsiders.<sup>37</sup>

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31. 2013 WL 4772670, at \*12.

32. *Id.* at \*14.

33. *Id.*; 2 IMWINKELRIED, *supra* note 15, § 6.12.4, at 1013.

34. 2 IMWINKELRIED, *supra* note 15, § 6.12.4, at 1010-20 (discussing selective waiver).

35. *See In re Info. Mgmt. Servs.*, 2013 WL 4772670, at \*14.

36. *See* 2 IMWINKELRIED, *supra* note 15, § 6.12.4, at 1020.

37. *In re Info. Mgmt. Servs.*, 2013 WL 4772670, at \*14.

## B. A Critical Evaluation of the Current Split of Authority

The courts subscribing to the latter view misconceive the confidentiality requirement in privilege law. To be privileged, a communication must be “confidential.”<sup>38</sup> The party now claiming the privilege must have had a certain state of mind at the time of the communication: she must have believed that her conversation with the confidant was private;<sup>39</sup> and, in addition, she must have had both the intent to and a belief in her ability<sup>40</sup> to maintain confidentiality in the future.<sup>41</sup> As a general proposition, if at the time of the communication she knew that a third party outside of the circle of confidence could hear or read the communication, the requisite confidentiality is lacking.<sup>42</sup> Likewise, even when there was physical privacy at the time of the communication with a confidant such as an attorney, confidentiality is wanting if the claimant realized that the confidant would later publicly disclose the communication, for example, by including the information in a court filing.<sup>43</sup> In certain contexts, the availability of legal protection for privacy depends on the existence of an expectation of privacy against a particular person or entity. As Professors Mosteller and Broun noted, the existence of constitutional protection for privacy under the Fourth Amendment turns on whether the citizen had an expectation of privacy against intrusions by the government.<sup>44</sup> There is a parallel under the work-product protection, which is designed to encourage litigants to prepare diligently; the rationale is that if the litigant knew he had to share all his preparatory materials with his opponent, the litigant would be deterred from thoroughly investigating his case.<sup>45</sup> Given that rationale, the litigant forfeits work-product protection only when

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38. 1 IMWINKELRIED, *supra* note 15, § 6.8, at 765.

39. *Id.* § 6.8.1, at 772-73.

40. Suppose, for example, that the claimant had made a disclosure about child sexual abuse to a person such as a therapist whom the claimant knew was statutorily obliged to report the information to the authorities. *See* 2 IMWINKELRIED, *supra* note 15, § 6.13.2, at 1163-66. The person could hardly claim that he had a reasonable belief that he would be able to maintain the confidentiality of the information.

41. 1 IMWINKELRIED, *supra* note 15, § 6.8.2, at 806.

42. *See id.* § 6.8.1, at 781 n.61 (collecting cases in which confidentiality was lacking).

43. *Id.* § 6.8.2, at 813-15.

44. Mosteller & Broun, *supra* note 24, at 170-78.

45. *See* Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359, 383-84 (1990).

he discloses the information in question to his actual or potential adversary<sup>46</sup> or to someone likely to relay the information to the adversary.<sup>47</sup>

For that matter, the identity of the party resisting the privilege claim may be pertinent if the privilege in question was qualified rather than absolute. It is true that even “absolute” communication privileges, such as attorney–client and spousal, can be waived and are subject to exceptions announced beforehand, such as the crime/fraud exception to the attorney–client privilege.<sup>48</sup> However, unlike qualified privileges, absolute privileges cannot be surmounted by a case-specific, ad hoc showing of a need for the privileged information.<sup>49</sup> The policy justification for categorizing a privilege as absolute in this sense is the assumption that, at the very time she has to decide whether to consult the confidant, the client or spouse must be able to be confident that an opponent will be unable to subsequently persuade a court to override the privilege on the basis

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46. See, e.g., *United States v. Gulf Oil Corp.*, 760 F.2d 292, 295 (Temp. Emer. Ct. App. 1985) (explaining that unlike the attorney–client privilege, the work-product doctrine protects information only from opposing parties); *Great Am. Assurance Co. v. Liberty Surplus Ins. Corp.*, 669 F. Supp. 2d 1084, 1092 (N.D. Cal. 2009) (explaining that “[u]nlike for the attorney–client privilege,” waiver of the work-product protection requires an act that “substantially increases the possibility of an opposing party obtaining the information”); *United States v. Deloitte & Touche USA L.L.P.*, 623 F. Supp. 2d 39, 40-41 (D.D.C. 2009) (holding that the disclosure of work-product to a subpoenaed party, an auditor, did not waive the work-product protection because the auditor was not a potential adversary), *aff’d in part, vacated in part sub nom. United States v. Deloitte L.L.P.*, 610 F.3d 129 (D.C. Cir. 2010); *Nidec Corp. v. Victor Co. of Japan*, No. C-05-0686 SBA (EMC), 2007 U.S. Dist. LEXIS 48841, at \*9 (N.D. Cal. July 3, 2007) (stating that the work-product protection is waived by a disclosure to a third party who discloses the information to an adversary); *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 262-63 (Bankr. S.D.N.Y. 2005); *Meza v. H. Muehlstein & Co.*, 98 Cal. Rptr. 3d 422, 431 (Ct. App. 2009); *Scott v. Beth Isr. Med. Ctr. Inc.*, 847 N.Y.S.2d 436, 443 (Sup. Ct. 2007); see also Michele DeStefano Beardslee, *Taking the Business out of Work Product*, 79 FORDHAM L. REV. 1869, 1898-99 (2011) (“The work product doctrine is generally designed to be less easily waived than is the attorney–client privilege. . . . [M]ost courts hold that waiver occurs only when disclosure enables access to the confidential information by an adversary.”).

47. See, e.g., *Nidec Corp.*, 2007 U.S. Dist. LEXIS 48841, at \*8-9.

48. 1 IMWINKELRIED, *supra* note 15, § 3.2.4, at 167-71.

49. See, e.g., *United States v. Gonzalez*, 669 F.3d 974, 981 (9th Cir. 2012) (stating that “[p]rivilege cannot be overcome by a showing of need” (alteration in original) (quoting *Admiral Ins. Co. v. U.S. Dist. Court for the Dist. of Ariz.*, 881 F.2d 1486, 1494 (9th Cir. 1989))); *Admiral Ins. Co.*, 881 F.2d at 1493-94; *United States v. Grice*, 37 F. Supp. 2d 428, 431 n.13 (D.S.C. 1998).

of a showing of need.<sup>50</sup> In some states and at the lower federal court level, there is a trend toward classifying privileges as qualified, subject to the condition that the opponent may defeat the privilege claim by establishing a compelling, overpowering need for the information.<sup>51</sup> If the employee's attorney-client privilege were qualified, it would be pertinent to note—as the *IMS* court did—that the employer-owner of the e-mail system has a “stronger” claim to the information than a third-party stranger.<sup>52</sup>

However, that consideration is irrelevant when the privilege is absolute, as the attorney-client privilege is. When that is the nature of the privilege in question, as a general proposition confidentiality is initially lacking if, at the time of the communication, the privilege claimant knew that any person outside the circle of confidence could discover the information; and even if the privilege initially attached, the claimant waives the privilege by disclosing to any stranger outside the circle.<sup>53</sup> In the case of the attorney-client privilege, with few exceptions, the circle of confidence includes only the client and her confidant attorney. If the client knows that any other person has access to the communication or that the communication will be disclosed to such a person, confidentiality is lacking.<sup>54</sup> The employer falls outside the circle of confidence shared by the employee and her attorney. Hence, if the employee using a work e-mail account reasonably understands that the employer has access to the

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50. 1 IMWINKELRIED, *supra* note 15, § 3.2.4, at 169-70.

51. *Id.* § 5.4.4(b), at 484-91.

52. See *In re* Info. Mgmt. Servs., Inc., No. 8168-VCL, 2013 WL 4772670, at \*12 (Del. Ch. Sept. 5, 2013).

53. See, e.g., *In re* Chevron Corp., 650 F.3d 276, 287, 289 (3d Cir. 2011) (holding that the attorney-client privilege did not attach because statements were made in front of “strangers”); *United States v. Gordon-Nikkar*, 518 F.2d 972, 975 (5th Cir. 1975) (holding that communications made to “strangers” cannot be considered confidential); *Cafritz v. Koslow*, 167 F.2d 749, 751-52 (D.C. Cir. 1948) (stating that the presence of “a third person . . . generally rebuts the presumption of confidentiality”); *United States v. Finazzo*, No. 10-CR-457 (RRM)(RML), 2013 U.S. Dist. LEXIS 22479, at \*17 (E.D.N.Y. Feb. 19, 2013) (“[A] third party . . . eliminates whatever privilege the communication may have originally possessed.”); *SEC v. Reserve Mgmt. Co. (In re Reserve Fund Sec. & Derivative Litig.)*, 275 F.R.D. 154, 159 (S.D.N.Y. 2011) (using the phrase “a third party”); *People v. Layne*, 677 N.E.2d 469, 475 (Ill. App. Ct. 1997) (using the phrase “a third person”); *In re* Marriage of Johnson, 604 N.E.2d 378, 386 (Ill. App. Ct. 1992) (using the phrase “a third party”); *Matthews v. State*, 598 A.2d 813, 820 (Md. Ct. Spec. App. 1991) (using the phrase “a third party”).

54. 1 IMWINKELRIED, *supra* note 15, § 6.8.1, at 781-82; 2 IMWINKELRIED, *supra* note 15, § 6.12.4, at 996-1093.

communication to her attorney conveyed through the work account, confidentiality is missing; and consequently, the employee cannot assert the privilege against either the employer or a third party.

As the preceding paragraph suggested, there are a few exceptional situations in which the courts have expanded the circle of confidence and will find the requisite confidentiality even when someone other than the attorney and client was privy to the communication. By way of example, if the client is not fluent in English, the presence of an interpreter to facilitate communication with the attorney will not negate confidentiality.<sup>55</sup> The interpreter's presence is necessary to facilitate communication between the attorney and client. Or, if the third party is a person, such as a spouse, with whom the client has a separate privileged relationship, the third party's presence does not prevent the attorney–client privilege from attaching.<sup>56</sup> The most liberal courts tolerate the presence of third parties, such as relatives and close friends, whose attendance furnishes the client with moral support.<sup>57</sup> However, none of those exceptions applies here. The employee does not require the employer to interpret for her or serve as an intermediary with her attorney, the employee does not have a separate privileged relationship with the employer, and the employer does not provide moral support for the employee's interaction with her attorney. The bottomline is that when the employee knows that the employer has access to the employee's communication with the confidant, that knowledge negates confidentiality—whether the employee is asserting the privilege against the employer or a third-party stranger. To hold otherwise is to distort the concept of confidentiality in privilege law by confusing it with the notions of privacy employed in other legal contexts.

Since privileges obstruct the search for truth in the courtroom, they are not favored.<sup>58</sup> Rather, even recognized, existing privileges are narrowly construed,<sup>59</sup> and their scope is confined to situations in

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55. 1 IMWINKELRIED, *supra* note 15, § 6.8.1, at 782-83.

56. *Id.* at 784.

57. *Id.* at 799-802.

58. *See* Herbert v. Lando, 441 U.S. 153, 175 (1979).

59. *See, e.g.,* United States v. Nicholas, 594 F. Supp. 2d 1116, 1123-24 (C.D. Cal. 2008); Lluberes v. Uncommon Prods., L.L.C., 663 F.3d 6, 23-26 (1st Cir. 2011) (stating that the attorney–client privilege is “narrowly” construed); Shaffer v. Am. Med. Ass’n, 662 F.3d 439, 446 (7th Cir. 2011) (stating that the attorney–client privilege is “narrowly” construed); *In re* Royce Homes, L.P., 449 B.R. 709, 726 (Bankr. S.D. Tex. 2011); Arista Records L.L.C. v. Lime Grp. L.L.C., 784 F. Supp. 2d 398, 415 (S.D.N.Y. 2011) (noting that the attorney–client privilege is “narrowly” .

which their application serves their policy justification.<sup>60</sup> The essential policy purpose of absolute communications privileges is to protect the confidentiality of certain intimate social relations such as attorney—client and spousal—special relationships that, in Dean Wigmore’s words, society has decided to “sedulously foster[.]”<sup>61</sup> It does not serve that policy to apply the privilege when the privilege claimant has knowingly or recklessly exposed the content of a communication with a confidant to a third party outside the protected relationship. The claimant has not treated the communication as a confidential one with the confidant, and consequently the law should not extend the privilege to the communication.

### C. The Counterargument Based on the Analogy to Selective Waiver

What about the counterargument based on the analogy to the selective waiver doctrine in the recent *IMS* decision? That analogy is of no avail. Concededly, there is respectable authority supporting the selective waiver doctrine.<sup>62</sup> However, what the *IMS* court neglected to mention is that the overwhelming majority<sup>63</sup> of courts reject the doctrine.<sup>64</sup> According to the First Circuit, there is only “a trace of support for” selective waiver.<sup>65</sup> With the exception of the Eighth

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. . . defined”); *Pampered Chef v. Alexanian*, 737 F. Supp. 2d 958, 964 (N.D. Ill. 2010); *KD ex rel. Dieffenbach v. United States*, 715 F. Supp. 2d 587, 591 (D. Del. 2010).

60. See, e.g., *Solis v. Food Emp’rs Labor Relations Ass’n*, 644 F.3d 221, 226 (4th Cir. 2011) (construing the privilege to the “the narrowest possible limits”); *Goldstein v. Colborne Acquisition Co.*, 873 F. Supp. 2d 932, 934 (N.D. Ill. 2012); *Hanson v. First Nat’l Bank*, No. 5:10-0906, 2011 U.S. Dist. LEXIS 125935, at \*16-17 (S.D. W. Va. Oct. 31, 2011); *United States v. Singhal*, 800 F. Supp. 2d 1, 7-8 (D.D.C. 2011).

61. 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2285 (photo. reprint 2003) (1905).

62. See, e.g., *In re Info. Mgmt. Servs., Inc.*, No. 8168-VCL, 2013 WL 4772670, at \*14 (Del. Ch. Sept. 5, 2013).

63. See *Conference Speakers Highlight Risks Pertaining to Corporate Counsel*, 70 U.S.L.W. 2637 (2002) (stating that “in the ‘vast majority’ of jurisdictions waiver cannot be avoided”).

64. See *Pac. Pictures Corp. v. U.S. Dist. Court for the Cent. Dist. of Cal.* (*In re Pac. Pictures Corp.*), 679 F.3d 1121, 1127-28 (9th Cir. 2012) (declining to adopt the selective waiver doctrine in accordance with the First, Second, Third, Fourth, Sixth, Seventh, Ninth, Tenth, District of Columbia, and Federal circuits); 1 EDNA SELAN EPSTEIN, THE ATTORNEY—CLIENT PRIVILEGE AND THE WORK—PRODUCT DOCTRINE 494-507 (5th ed. 2007) (providing a circuit-by-circuit view of the case law on selective waiver); 2 IMWINKELRIED, *supra* note 15, § 6.12.4, at 1014-18.

65. *United States v. Billmyer*, 57 F.3d 31, 37 (1st Cir. 1995).

Circuit that originally minted the doctrine,<sup>66</sup> every federal circuit that has addressed the issue has refused to permit selective waiver.<sup>67</sup> In the words of one of the leading cases rejecting selective waiver, consistent with the concept of confidentiality, a privilege claimant may not “pick and choose among his opponents.”<sup>68</sup> With the few exceptions mentioned above, the claimant must either disclose the communication to or withhold the communication from all third parties outside the circle of confidence. If the employee–claimant expressly or impliedly consents to disclosure to her employer, she cannot invoke a privilege to withhold a relevant communication from third parties in subsequent litigation. That result follows as a corollary of the elementary confidentiality requirement.

## II. DOES AN EMPLOYER’S PROMULGATION OF A FORMAL POLICY BANNING PERSONAL USE OF EMPLOYEE WORK E-MAIL ACCOUNTS NEGATE CONFIDENTIALITY AND RENDER THE EMPLOYER’S ACTUAL MONITORING PRACTICE IRRELEVANT?

### A. A Description of the Current State of the Law

The published employee privilege opinions have identified several factors that trial judges may consider in deciding whether to uphold the employee’s privilege claim.<sup>69</sup> Two frequently mentioned

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66. See *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1977).

67. See *In re Lupron Mktg. & Sales Practices Litig.*, 313 F. Supp. 2d 8, 12 (D. Mass. 2004); Jerold S. Solovy & Robert L. Byman, *UnWaiver*, NAT’L L.J., Apr. 4, 2005, at 11.

68. *Permian Corp. v. United States*, 665 F.2d 1214, 1221 (D.C. Cir. 1981).

69. *In re Info. Mgmt. Servs., Inc.*, No. 8168-VCL, 2013 WL 4772670, at \*7 (Del. Ch. Sept. 5, 2013) (stating that one consideration is whether the employee took steps to maintain the privacy of the files, “such as password-protection, encryption, or deletion”); *Goldstein v. Colborne Acquisition Co.*, 873 F. Supp. 2d 932, 935-36 (N.D. Ill. 2012); *Hanson v. First Nat’l Bank*, No. 5:10-0906, 2011 U.S. Dist. LEXIS 125935, at \*16-17 (S.D. W. Va. Oct. 31, 2011); *In re Royce Homes, L.P.*, 449 B.R. 709, 735 (Bankr. S.D. Tex. 2011); *United States v. Nagle*, No. 1:09-CR-384, 2010 U.S. Dist. LEXIS 104711, at \*11-12 (M.D. Pa. Sept. 30, 2010); *Scott v. Beth Isr. Med. Ctr. Inc.*, 847 N.Y.S.2d 436, 440 (Sup. Ct. 2007) (distinguishing between *People v. Jiang*, 33 Cal. Rptr. 3d 184, 204 (Ct. App. 2005), where “Jiang ‘made substantial efforts to protect the documents from disclosure by password-protecting them,’” and the instant case); *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005) (“[A] court should consider four factors: (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 to the computer or e-mails, and (4) did the corporation

factors are especially noteworthy: the employer's promulgation of a formal policy banning personal use of work e-mail accounts and the employer's actual monitoring practice.<sup>70</sup> The crucial questions are the relative weight of the two factors and the factors' relationship.<sup>71</sup>

One conceivable approach is to hold that the decision whether to uphold the employee's privilege claim ought to be made on a case-by-case basis.<sup>72</sup> This is a flexible approach enabling the trial judge to weigh all the factors and decide, based on the specific facts of the case, how much weight to assign to each factor. A proponent of this position can point to the myriad of possible wordings of employer work e-mail account policies and the similarly wide range of potential monitoring practices.<sup>73</sup> Given the large number of possible permutations of the two factors, it seems wrong minded to announce rigid rules about the factors' relative importance.

However, a competing line of authority appears to do precisely that—namely, announce that the existence of a formal employer policy banning personal use is dispositive. This line of cases elevates that factor to the status of a litmus test. There is a wealth of authority in this line.<sup>74</sup> These cases hold that, at least as a practical matter, an outright employer ban on personal use of work e-mail accounts “end[s] the privilege inquiry at the start.”<sup>75</sup> When there is such a formal employer policy, these courts “routinely” reject the employee's privilege claim.<sup>76</sup> These courts sometimes assert that in the final analysis, since the employee is using the employer's e-mail system, the employee's message is “the property of” the employer.<sup>77</sup>

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notify the employee, or was the employee aware, of the use and monitoring policies?” (footnote omitted).

70. See *In re Info. Mgmt. Servs.*, 2013 WL 4772670, at \*4-7.

71. See *United States v. Finazzo*, No. 10-CR-457 (RRM)(RML), 2013 U.S. Dist. LEXIS 22479, at \*26-28 (E.D.N.Y. Feb. 19, 2013) (“Courts are not in universal agreement on the matter.”).

72. See *In re Info. Mgmt. Servs.*, 2013 WL 4772670, at \*4-5.

73. See, e.g., *United States v. Hatfield*, No. 06-CR-0550 (JS), 2009 U.S. Dist. LEXIS 106269, at \*31 (E.D.N.Y. Nov. 13, 2009) (holding that the employer's failure to monitor is relevant).

74. See *SEC v. Reserve Mgmt. Co. (In re Reserve Fund Sec. & Derivative Litig.)*, 275 F.R.D. 154, 163 (S.D.N.Y. 2011) (collecting cases regarding formal employer policies and privileged e-mails).

75. *Finazzo*, 2013 U.S. Dist. LEXIS 22479, at \*25.

76. *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 559-60 (S.D.N.Y. 2008).

77. *Miller v. Blattner*, 676 F. Supp. 2d 485, 497 (E.D. La. 2009).

“Most courts have concluded” that the promulgation of the employer policy precludes the employee from making a valid privilege claim.<sup>78</sup>

Since these courts conclude that the factor of the existence of the employer policy is dispositive, logically they dismiss the second factor of the employer’s actual monitoring practice. In their mind, when there is a formal employer policy banning personal use, the employer’s historical<sup>79</sup> monitoring practice is absolutely “immaterial”<sup>80</sup> or “irrelevant.”<sup>81</sup> Thus, the second factor is entitled to no weight at all. If there is a formal employer ban on personal use of work accounts, the trial judge can disregard any testimony about the employer’s actual monitoring practice and without any hesitation overrule the employee’s privilege claim.

### B. A Critical Evaluation of the Current Split of Authority

As the Introduction notes, in recent years there has been a growing judicial tendency to equate a privacy expectation under the Fourth Amendment with a confidentiality expectation under privilege law.<sup>82</sup> There certainly are similarities between the two concepts. Privacy and confidentiality are kindred notions. Moreover, there are obvious linguistic similarities. After the Supreme Court’s landmark decision in *Katz v. United States*,<sup>83</sup> the courts have consistently ruled that a defendant has a cognizable Fourth Amendment claim only if he can demonstrate that he had a reasonable expectation of privacy<sup>84</sup>—the expression that Justice Harlan coined in his famous concurrence in *Katz*.<sup>85</sup> For their part, the

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78. *Finazzo*, 2013 U.S. Dist. LEXIS 22479, at \*26-27; *see also* *Hanson v. First Nat’l Bank*, No. 5:10-0906, 2011 U.S. Dist. LEXIS 125935, at \*21 (S.D. W. Va. Oct. 31, 2011).

79. *In re Info. Mgmt. Servs.*, 2013 WL 4772670, at \*7.

80. *Holmes v. Petrovich Dev. Co.*, 119 Cal. Rptr. 3d 878, 898 (Ct. App. 2011).

81. *In re Info. Mgmt. Servs.*, 2013 WL 4772670, at \*6; *In re Royce Homes, L.P.*, 449 B.R. 709, 739 (Bankr. S.D. Tex. 2011); *United States v. Etkin*, No. 07-CR-913 (KMK), 2008 WL 482281, at \*4 (S.D.N.Y. Feb. 20, 2008).

82. *See generally* *Mosteller & Broun*, *supra* note 24; *see also* *Convertino v. U.S. Dep’t of Justice*, 674 F. Supp. 2d 97, 110 (D.D.C. 2009).

83. 389 U.S. 347 (1967).

84. *See, e.g.*, *United States v. Edelman*, 726 F.3d 305, 310 (2d Cir. 2013); *Flores v. Lackage*, 938 F. Supp. 2d 759, 767 (N.D. Ill. 2013).

85. 389 U.S. at 361 (Harlan, J., concurring).

privilege cases also demand that the privilege claimant establish that she had a reasonable expectation of confidentiality.<sup>86</sup>

Despite these superficial similarities, there are profound differences between a privacy expectation for Fourth Amendment purposes and a confidentiality expectation under privilege law. To begin with, the expectations must exist at different times. Under the Fourth Amendment, the question is whether the defendant had the requisite expectation at the time of the government intrusion.<sup>87</sup> However, under privilege law, the critical time is not when the opponent seeks discovery of the privileged communication; rather, the issue is whether the claimant had the confidentiality expectation earlier at the time of the communication with the confidant.<sup>88</sup> In addition, as Section I.B explains, while the Fourth Amendment requirement is an expectation of privacy from government intrusion, the privilege requirement is a belief and intent with respect to secrecy against all third parties outside the circle of confidence.<sup>89</sup>

However, those distinctions do not exhaust the differences between the two notions. In *Katz*, Justice Harlan stated that to be reasonable, the privacy expectation must “be one that society is prepared to recognize.”<sup>90</sup> In Fourth Amendment jurisprudence, the expectation must be reasonable in a legal or normative sense.<sup>91</sup> Weighing the societal stake in the enforcement of the criminal law the defendant allegedly violated against the magnitude of the defendant’s privacy interest, the judge decides whether the balance should be struck in favor of upholding the privacy interest.<sup>92</sup> The

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86. See, e.g., *SEC v. Reserve Mgmt. Co. (In re Reserve Fund Sec. & Derivative Litig.)*, 275 F.R.D. 154, 159 (S.D.N.Y. 2011); *Hanson v. First Nat’l Bank*, No. 5:10-0906, 2011 U.S. Dist. LEXIS 125935, at \*18 (S.D. W. Va. Oct. 31, 2011); *State v. J.G.*, 990 A.2d 1122, 1131 (N.J. 2010); *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 256-57 (Bankr. S.D.N.Y. 2005); 1 IMWINKELRIED, *supra* note 15, § 6.8.1, at 772-73 nn.35-36, § 6.8.2, at 806 n.187 (collecting cases discussing the reasonable expectation of privacy in communications as well as company e-mails); 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, 27 (2011).

87. Imwinkelried, *supra* note 24, at 12-13.

88. *Id.* at 13-15.

89. See *supra* Section I.B.

90. 389 U.S. at 361 (Harlan, J., concurring); see also *Curto v. Med. World Commc’ns, Inc.*, No. 03CV6327 (DRH)(MLO), 2006 WL 1318387, at \*7 (E.D.N.Y. May 15, 2006); *In re Asia Global Crossing*, 322 B.R. at 257.

91. Mosteller & Broun, *supra* note 24, at 171-72.

92. *Id.* at 170, 179.

decision turns on a value judgment,<sup>93</sup> which can be based on categorical policy norms.<sup>94</sup>

Although, like the Fourth Amendment cases, the privilege decisions use the adjective “reasonable” to describe the claimant’s expectation of confidentiality, the privilege cases employ the adjective in a very different sense.<sup>95</sup> In privilege law, the question is whether the claimant’s belief was reasonable in a factual sense.<sup>96</sup> At the time of the communication, was the claimant objectively justified in believing that no third parties were overhearing or intercepting the communication with the confidant?<sup>97</sup> Again, at that time, was the claimant rationally warranted in intending and believing that, in the future, she would be able to deny access to third parties outside the circle of confidence?<sup>98</sup> Rather than making a normative judgment about the social acceptability of the person’s expectation, in privilege law, the judge assesses whether there was a factual justification or warrant for the claimant’s state of mind.

If in privilege cases the judge was supposed to make an essentially normative judgment, it would make sense to prescribe categorical rules about the weight of factors, such as the existence of a formal employer policy banning personal use of work e-mail accounts. A judge could rationally conclude that whenever the employer has gone to that length, society need not accord legal protection to the employee’s contrary expectation. However, as previously stated, that is not the character of the judgment that the judge must make under privilege law. Instead, the question is the impact of the various factors, including any employer policy, on the employee’s state of mind. When the question is cast in those terms, the wide “variety of work environments”<sup>99</sup> makes it difficult, if not impossible, to defend the enunciation of sweeping, categorical rules.

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93. *Id.* at 172-73; *Oliver v. United States*, 466 U.S. 170, 178 (1984) (holding that the court must examine “our societal understanding” concerning what deserves “protection from government invasion”); 1 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 2.1(d), at 440-43 (4th ed. 2004); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974).

94. Mosteller & Broun, *supra* note 24, at 173.

95. *See* 1 LAFAYE, *supra* note 93, § 2.1(d), at 444 (distinguishing between the two different senses and perspectives on reasonableness).

96. Mosteller & Broun, *supra* note 24, at 171-73.

97. *Id.* at 162, 165, 171-73.

98. *See supra* text accompanying notes 38-41.

99. *SEC v. Reserve Mgmt. Co. (In re Reserve Fund Sec. & Derivative Litig.)*, 275 F.R.D. 154, 159 (S.D.N.Y. 2011) (quoting *O'Connor v. Ortega*, 480

First, consider the employer policy itself. There is no uniform employer “policy” regulating work e-mail accounts. There is no mandatory legislative prescription for the content of employer policies. Research does not even reveal a private national organization that requires all its members to adopt the same employer policy for work accounts.<sup>100</sup> A policy could contain forceful language such as “absolutely prohibited”<sup>101</sup> to forbid personal use of the accounts, or the policy might include much weaker phrasing such as “should” or “discouraged.” Likewise, even if the policy includes some language restricting the personal use of the account, the policy might be silent on or ambiguous about enforcement mechanisms and monitoring. A change in the wording of the policy could have a significant impact on the employee’s belief and state of mind.<sup>102</sup>

Second, although it has a formal policy strongly prohibiting personal use of work e-mail accounts, the employer might make inconsistent statements to the employee in question.<sup>103</sup> By way of example, consider the following plausible scenario. Assume that after several incidents of theft of proprietary trade secrets, an

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U.S. 709, 718 (1987)); *In re Info. Mgmt. Servs., Inc.*, No. 8168-VCL, 2013 WL 4772670, at \*4 (Del. Ch. Sept. 5, 2013) (quoting *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (Bankr. S.D.N.Y. 2005)).

100. For example, neither the United States Chamber of Commerce nor the National Association of Manufacturers appears to have adopted such a mandatory policy. Visits to the websites of both organizations reveal that neither organization has mandated a standard for its members. See U.S. CHAMBER OF COM., <https://www.uschamber.com/> (last visited Mar. 21, 2014); NAT’L ASS’N OF MANUFACTURERS, <http://www.nam.org/> (last visited Mar. 21, 2014).

101. See, e.g., *United States v. Hatfield*, No. 06-CR-0550 (JS), 2009 U.S. Dist. LEXIS 106269, at \*29 (E.D.N.Y. Nov. 13, 2009) (noting that the employer’s policy made several specific activities “strictly prohibited”); see also *In re Royce Homes, L.P.*, 449 B.R. 709, 738-39 (Bankr. S.D. Tex. 2011) (discussing how some employer policies use bolding and capitalized letters to emphasize the point).

102. In *Curto v. Medical World Communications, Inc.*, No. 03CV6327 (DRH)(MLO), 2006 WL 1318387, at \*1 (E.D.N.Y. May 15, 2006), the employer policy stated only that the company “may use human or automated means to monitor use of computer resources.” The court noted that the wording of the policy was ambiguous. *Id.* at \*6; see also *In re Royce Homes*, 449 B.R. at 738-39 (noting the differences between the use of “equivocal” and unequivocal language in a policy).

103. See, e.g., *In re Info. Mgmt. Servs.*, 2013 WL 4772670, at \*6 (“[I]f an employer reserves the right to monitor work email, then whether it actually does so is irrelevant, the employer’s actual conduct with respect to monitoring remains an appropriate factor to consider, particularly if the employer has made specific representations or taken specific actions inconsistent with the [announced] policy . . .”).

employer issues a policy stating in sweeping terms that in the future, it intends to “regularly and aggressively” monitor employee e-mails. On its face, the wording of the policy undeniably cuts against a finding that the employee retains a reasonable expectation of confidentiality in e-mails on the work account. However, shortly after the issuance of the new policy, the employee in question approaches her superior and inquires about the policy. In response, the superior says:

You don't have to worry about it. The boss issued that policy only because he suspects that a couple of the research and development guys accessed some of our trade secrets and sold them to competitors. You don't even have any computer access to that type of data. Your account isn't one of the ones we'll be checking.

It is submitted that in this scenario, notwithstanding the broad wording of the policy, the employee could have a rationally justified confidentiality expectation.

Finally, consider the relevance of the employer's actual monitoring policy. It costs the employer time and money to monitor. Effective monitoring may require expensive “special monitoring software” or the training of monitoring personnel in hacking techniques.<sup>104</sup> Assume *arguendo* that the employer previously issued a formal written policy announcing aggressive monitoring and that no superior has ever assured the employee that her work account will not be monitored. Yet, the employee might discover that the employer is experiencing financial problems and that, as a cost-cutting measure, the employer has quietly discontinued its monitoring program. In this situation, the employer's written policy is not worth the paper that it is written on. Once again, despite the breadth of the wording of the formal policy, the employee could be warranted in believing that the employer will not breach the confidentiality of the employee's communications with her attorney or spouse.<sup>105</sup>

As the preceding paragraphs demonstrate, if the question is the factual reasonableness of the employee's expectation, the single factor of the existence of an employer policy should not be

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104. *Id.* at \*7. The monitoring personnel might have to resort to hacking techniques if the employer in question had used password protection, encryption, or deletion to protect her e-mail to a confidant. *Id.*

105. In *Curto*, the magistrate found that “the lack of enforcement by [the company] of its computer usage policy created a ‘false sense of security’ which ‘lull[ed]’ employees into believing that the policy would not be enforced.” 2006 WL 1318387, at \*3.

dispositive. Other considerations, including an employer's contrary oral statements or actual monitoring policies, could trump that factor and permit the employee to entertain a sufficiently reasonable confidentiality expectation to satisfy privilege law. All of these considerations are part of the totality of circumstances that can impact the objective reasonableness of the employee's expectation.

In the last two hypotheticals, while an employer policy cut in favor of rejecting a privilege claim, other factors countervailed, permitting the employee to nevertheless retain a reasonable confidentiality expectation. However, it would be a mistake to leap to the conclusion that the other factors will always point toward the conclusion that the court should uphold a privilege claim. If all these factors are relevant, but none is automatically dispositive, the end result of the judge's analysis might lead to the contrary conclusion. For example, assume that although the employer did not have a formal policy, the employee realizes that in fact the employer is regularly monitoring a significant percentage of the e-mails on the work accounts. On that assumption, a court might find that the employee lacked the reasonable confidentiality expectation required to sustain a privilege claim. Here, the consideration of the monitoring factor would lead to the denial of the claim. However, it is clear that in the typical case in jurisdictions currently holding that any strongly worded employer policy automatically precludes a privilege claim, the abandonment of that holding will eliminate a rigid barrier to a successful privilege claim.

### C. The Counterargument Based on the Supposed Need for Bright-line Privilege Rules

Before concluding the analysis, though, we must address the counterargument that, since this issue relates to privilege law, it is especially desirable to formulate bright-line standards, such as a holding that any firmly worded employer policy forecloses a privilege claim.<sup>106</sup> American privilege law still reflects the influence of Dean Henry Wigmore.<sup>107</sup> Wigmore believed that the typical layperson, such as a client, was so fearful of later-compelled judicial disclosure of her communications with a confidant that she would

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106. See M. Brett Fulkerson, Note, *One Step Forward, Two Steps Back: The Recognized but Undefined Federal Psychotherapist-Patient Privilege*, 62 MO. L. REV. 401, 421 (1997).

107. 1 IMWINKELRIED, *supra* note 15, § 3.2.2, at 157-58.

not confer with the confidant without the assurance of confidentiality provided by an absolute evidentiary privilege.<sup>108</sup> That is why he strongly advocated stating privilege rules in sharply defined, bright-line terms.<sup>109</sup> Wigmore feared that vaguely worded rules would not provide the firm assurance needed to allay the layperson's fear about later-compelled disclosure.<sup>110</sup> The Supreme Court itself has echoed Wigmore's fear.

A case in point is the Court's decision in *Upjohn Co. v. United States*.<sup>111</sup> When Upjohn Company learned that some of its subsidiaries might have made illegal payments to foreign officials, the corporation tasked its counsel to conduct an internal investigation.<sup>112</sup> During the investigation, corporate counsel interviewed numerous employees.<sup>113</sup> Later, the IRS subpoenaed the corporation's records documenting the interviews.<sup>114</sup> The company resisted the subpoena on privilege grounds.<sup>115</sup>

The *Upjohn* case posed the question of whether and to what extent the attorney-client privilege ought to protect corporate employees' communications with corporate counsel. The very first secondary authority cited in Chief Justice Burger's majority opinion is Wigmore's treatise.<sup>116</sup> The Court voiced the concern that a weak privilege would "discourag[e] the communication of [highly] relevant information [by lower-level] employees . . . to attorneys seeking to render legal advice to the client corporation."<sup>117</sup> Clients need to feel "safe[]" in revealing sensitive information to their counsel.<sup>118</sup> According to the Court, clients "must be able to predict with some degree of certainty whether particular discussions will be protected."<sup>119</sup> The majority then added its oft-quoted assertion that

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108. *Id.* § 3.2.4, at 168, § 5.4.4, at 478; Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 34; Steven R. Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1, 48 (1980).

109. 1 IMWINKELRIED, *supra* note 15, § 3.2.4, at 169.

110. *Id.* § 5.4.4, at 478.

111. 449 U.S. 383 (1981).

112. *Id.* at 386-87.

113. *Id.* at 387.

114. *Id.* at 387-88.

115. *Id.* at 388.

116. *Id.* at 389 (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. ed. 1961)).

117. *Id.* at 392.

118. *Id.* at 389 (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)).

119. *Id.* at 393.

“[a]n uncertain privilege, or one which purports to be certain . . . is little better than no privilege at all.”<sup>120</sup>

In this context, it might be argued that a standard that does not give dispositive weight to employer policies is intolerably uncertain. However, that argument is not unanswerable. To begin with, the empirical studies of privileges do not validate Wigmore’s assumption that, but for the existence of a formal absolute evidentiary privilege, the typical layperson would be unwilling to consult with and disclose to confidants such as attorneys and psychotherapists.<sup>121</sup> Is it really plausible that a patient in excruciating pain would not reveal requested information to a physician attempting to alleviate the pain or save the patient’s life?<sup>122</sup> The world does not revolve around the courtroom to the degree that Wigmore posited. Without the benefit of a clearly worded, absolute privilege, some laypersons would be deterred from consulting, and written communication would likely be more circumspect; but the available data simply does not prove the proposition that, in most cases, the layperson would not communicate absent an absolute privilege.<sup>123</sup>

Moreover, despite the Court’s strong rhetoric, the reality is that the *Upjohn* Court itself did not announce a bright-line, categorical rule. Although the Court upheld the corporation’s privilege claim in that case, the Court stopped short of issuing a categorical rule. Rather, the Court cautioned that it was not establishing a rule “to govern all conceivable future questions in this area.”<sup>124</sup> As one commentator observed:

In *Upjohn* . . . the Court placed heavy emphasis on the ability of the IRS to gather the evidence it needed directly from the corporation’s employees. Indeed, the *Upjohn* Company provided the IRS with a list of the eighty-six persons interviewed by its counsel, and the IRS had already conducted

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120. *Id.*

121. See 1 IMWINKELRIED, *supra* note 15, § 5.2.2, at 324-30 (collecting and reviewing the published empirical studies).

122. See *id.* § 5.2.1, at 297-98 (discussing the common sense doubts about underlying behavioral assumptions).

123. See *id.* § 5.2.2, at 324; Vincent C. Alexander, *The Corporate Attorney–Client Privilege: A Study of the Participants*, 63 ST. JOHN’S L. REV. 191, 264, 370-71, 374 (1989); Edward Imwinkelried, *The Rivalry Between Truth and Privilege: The Weakness of the Supreme Court’s Instrumental Reasoning in Jaffee v. Redmond*, 518 U.S. 1 (1996), 49 HASTINGS L.J. 969, 974-82 (1998); Edward J. Imwinkelried, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. REV. 315, 320-22 (2003).

124. *Upjohn*, 449 U.S. at 386.

twenty-five of its own interviews. . . . The Court's [stated] preference for case-by-case development . . . leave[s] room for a measure of flexibility. . . . [I]f *Upjohn's* employees had proven to be either obstructive or unavailable during the course of discovery, perhaps a different result would have been reached.<sup>125</sup>

The case for a bright-line test is especially weak in this setting. Again, the most famous passage in the *Upjohn* opinion is Chief Justice Burger's declaration that "[a]n uncertain privilege . . . is little better than no privilege at all."<sup>126</sup> The bright-line standard followed by these courts is that the employer's promulgation of a formal policy restricting personal use of work e-mail accounts necessitates the rejection of the employee's privilege claim—resulting in no privilege. The rhetorical flourish in *Upjohn* notwithstanding, the Court does say that an uncertain privilege "is . . . better than no privilege at all."<sup>127</sup> That is the stark choice here, either: (1) treating the issuance of an employer policy as the basis for a bright-line rule barring a privilege claim; or (2) according some weight to other factors, such as the employer's historical monitoring practice. The former approach undeniably yields considerable predictability, but at the cost of eliminating even the faintest possibility of a successful privilege claim by an employee—no matter how factually reasonable the employee's expectation is in the totality of the circumstances. To be sure, the latter approach may produce some uncertainty, but it opens up the possibility of a successful claim by the employee by enabling the judge to consider all the factors that affect the rationality of the employee's expectation.

### III. CONCLUSION

As the Introduction notes, the number of employee e-mails sent annually is massive, easily exceeding one trillion.<sup>128</sup> Given the amount of time that employees spend at work, it is virtually inevitable that employees often put their work e-mail accounts to personal use, including communicating with confidants such as attorneys, psychotherapists, and spouses. In turn, that development made it probable that employers would begin regulating employees' personal use of such accounts. As we have seen, the existence of those regulations gave rise to the question of whether those

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125. Alexander, *supra* note 123, at 378-79 (footnotes omitted).

126. *Upjohn*, 449 U.S. at 393.

127. *Id.*

128. Nimsger, *supra* note 4.

employee e-mails lack the confidentiality needed to qualify for evidentiary privileges. That general question has spawned a large number of judicial splits of authority.<sup>129</sup>

This brief Article discusses only two of those divisions of authority. Part I initially describes the split of authority over the question of whether an employee could assert a privilege against a third-party stranger even if the court found that the employer's access to the content of the employee's e-mail would negate confidentiality in litigation between the employer and employee. Part I argues that that question should be answered in the negative. If the employee could not successfully assert the privilege in litigation with the employer, the employee should not be permitted to do so in litigation with a third party. Part II reviews the division of judicial sentiment over the relation between two key factors relevant to confidentiality: namely, the existence of a formal employer policy restricting personal use and the employer's actual monitoring practice. Part II contends that although the existence of an employer policy is highly relevant, that factor does not automatically deserve the dispositive weight that many courts presently accord it.

Hopefully, this Article has not only exposed the flaws in the two lines of authority critiqued in Parts I and II. At a deeper level, this Article has attempted to demonstrate that in the final analysis, those flaws are attributable to misunderstandings of the fundamental requirement of confidentiality. Part I emphasizes that confidentiality in privilege law differs from kindred privacy notions in other legal settings, such as Fourth Amendment jurisprudence and work-product protection. The Fourth Amendment shields privacy against only government intrusions, and similarly, the purpose of the work-product doctrine is to deny access to adversaries in actual or potential litigation. However, privilege confidentiality is stricter; it is operative against every person or entity outside the inner circle of confidence. Thus, with few exceptions, if the employee knowingly exposes the content of the otherwise-privileged communication to anyone outside that circle—whether that person is the employee's employer or a third-party stranger—confidentiality is lacking.

Part II elaborates on another distinction between a confidentiality expectation in privilege law and a privacy expectation under the Fourth Amendment. It is true that the courts declare that both expectations must be "reasonable," but the meaning of

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129. See *supra* note 16 and accompanying text (reviewing cases and articles involving the issue of privileged e-mails).

reasonableness differs fundamentally in the two settings. In the Fourth Amendment setting, “reasonable” has a normative connotation: As a matter of policy, should society be prepared to respect the expectation? In contrast, in the privilege setting, “reasonable” has a very different, factual connotation: Given all the surrounding circumstances, was the employee rationally, objectively justified in believing that her communication was private at the time and that she would be able to maintain secrecy in the future?<sup>130</sup> In that light, it is wrong minded to embrace the view that the existence of an employer policy always ends the analysis and requires the denial of the privilege claim. As Part II explains, notwithstanding the employer’s formally announced policy, in some cases an employer’s oral statements to the employee or the employer’s historical monitoring practice could lead an employee to form a reasonable expectation of confidentiality. This view can yield some uncertainty, but even the *Upjohn* Court acknowledged that, on occasion, an uncertain privilege is better than no privilege at all.<sup>131</sup>

Of course, the courts should strive to resolve the particular disputes described in Parts I and II in a sensible manner. However, the courts ought to look beyond the microcosm of those individual splits of authority and focus more broadly on the macrocosm. The macrocosm issue is protecting the basic concept of confidentiality from distortion. Confidentiality is the central notion in modern privilege law.<sup>132</sup> As we have seen, the application of the confidentiality requirement is the pivotal issue in more than three quarters of the published privilege opinions.<sup>133</sup> The number of employee privilege cases is skyrocketing, and it is therefore vital to safeguard the integrity of the confidentiality concept in this emerging type of litigation.

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130. See Mosteller & Broun, *supra* note 24, at 162, 165, 171-73.

131. See 449 U.S. at 393; see also Swidler & Berlin v. United States, 524 U.S. 399, 408-09 (1998).

132. See *In re Royce Homes, L.P.*, 449 B.R. 709, 722-23 (Bankr. S.D. Tex. 2011); HIXSON, *supra* note 21, at 7; 1 IMWINKELRIED, *supra* note 15, § 5.3.3, at 360-61.

133. See Rice, *supra* note 22.

