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Read, White, and Blue: Prosecutors Reading Inmate Emails and the Attorney-Client Privilege, 48 J. Marshall L. Rev. 1119 (2015)

Danielle Burkhardt

READ, WHITE, AND BLUE: PROSECUTORS READING INMATE EMAILS AND THE ATTORNEY-CLIENT PRIVILEGE

DANIELLE BURKHARDT*

I. "I ACCEPT"?

Syed Imran Ahmed is a medical doctor licensed to practice medicine and conduct surgery in the state of New York.[1] Dr. Ahmed specializes in weight loss surgeries and operates out of a private

* Juris Doctor Candidate 2016, The John Marshall Law School; B.A. 2013, University of Illinois at Chicago. I would like to thank my family for their continued love and support. I would also like to thank Professor Hugh Mundy for introducing me to this topic, as well as for providing constant guidance and encouragement.

[1] Complaint & Affidavit in Support of Application for Arrest & Search Warrants at 5, United States v. Ahmed, No. 14-cr-00277-DLI, (E.D.N.Y. March 24, 2014)[hereinafter *Complaint & Affidavit*].

office located in a New York suburb.[2] Several of Dr. Ahmed's patients use Medicare, a federally funded program that provides medical benefits and payment assistance to persons over sixty-five or persons with certain disabilities.[3] Allegedly, Dr. Ahmed submitted claims for reimbursement to Medicare for surgeries he never performed and treatments he never provided.[4] As Dr. Ahmed sits in prison awaiting trial for his alleged Medicare misconduct, his lawyer, Morris Fodeman, sits in court fighting a very different battle.[5] Mr. Fodeman's struggle concerns the attorney-client privilege and emails sent between Dr. Ahmed and himself.[6] In one hearing Judge Irizarry stated:

> THE COURT: But that's not even what you [the prosecution] say in your letter, because in your letter you indicate that while you are agreeing not to read any of the attorney-client e-mails in this case that were sent prior to the date of your letter, which is June 16, but that you intend to do it moving forward.[7]

Mr. Fodeman received interesting correspondence from the prosecutor working on Dr. Ahmed's case prior to this court hearing.[8] The prosecutor indicated that the government obtained and planned to read emails exchanged between Mr. Fodeman and Dr. Ahmed while Dr. Ahmed remained incarcerated.[9]

The Bureau of Prisons allows Dr. Ahmed, as well as other inmates, to send emails while incarcerated through the TRULINCS email system.[10] The system contains the following warning and requires the inmate to click "I accept" before using the TRULINCS email system:

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[2] *Id.*

[3] *Id.* at 6; *see also* MEDICARE.GOV, www.medicare.gov/ (last visited Jan. 14, 2015) (discussing how the Medicare program works and the proper way to sign up and use it).

[4] Complaint & Affidavit, *supra* note 1, at 9. "Under 18 U.S.C. § 1347, it is illegal to knowingly and willfully execute and attempt to execute a scheme and artifice to defraud Medicare and to obtain and attempt to obtain by means of false and fraudulent pretenses. . ." *Id.* at 5.

[5] Transcript of Criminal Cause for Status Conference Before the Honorable Dora L. Irizarry United States District Judge at 5, United States v. Ahmed, No. 14-cr-00277-DLI (E.D.N.Y. June 27, 2014)[hereinafter Transcript].

[6] *Id.*

[7] *Id.* at 9.

[8] Brief of United States at 5, United States v. Ahmed, No. 14-cr-00277-DLI (E.D.N.Y. June 16, 2014) [hereinafter Brief of United States I].

[9] *Id.*

[10] Brief of United States at 1, United States v. Ahmed, No. 14-cr-00277-DLI (E.D.N.Y. June 26, 2014)[hereinafter Brief of United States II]; *see also TRULINCS FAQs*, FED. BUREAU OF PRISONS, www.2600.wrepp.com/2600/Links/29/3/www.bop.gov/inmate_programs/trulincs_faq.jsp.html (last visited Jan. 14, 2014) (stating that inmate emails are monitored and that inmates must consent to the monitoring before using the email system.)

> The Department may monitor any activity on the system and retrieve any information stored within the system. By accessing and using this computer, I am consenting to such monitoring and information retrieval for law enforcement and other purposes. I have no expectation of privacy as to my communication on or information stored with the system . . . I understand and consent that this provision applies to electronic messages both to and from my attorney or other legal representative, and that such electronic messages will not be treated as privileged communications, and I have alternative methods of conducting privileged legal communications.[11]

Mr. Fodeman argued that the government should not be able to read the emails between him and Dr. Ahmed for four reasons.[12] First, Mr. Fodeman argued the extensive nature of the case and the sheer volume of information provided a need for privileged email communication.[13] Second, he argued that the defendant's lack of resources in comparison to the government's resources make it nearly impossible for him to use other methods of communication besides email.[14] Third, he contended that privileged email communication is a necessity as there are endless documents for each patient that Dr. Ahmed needs to confirm or review while preparing for trial in prison.[15] And lastly, Mr. Fodeman argued that Dr. Ahmed's right to contact counsel would be substantially frustrated without any access to email.[16]

Conversely, the prosecutor argued that the TRULINCS system expressly stated that the communications are not privileged, that Mr. Fodeman can call or visit Dr. Ahmed if he would like privileged communication, and that segregating the attorney-client privileged emails would prove too complicated and costly for the government.[17] The court was not impressed by the prosecutor's position and discussed how difficult it is for attorneys to communicate with inmates in ways other than email due to the many restrictions and scheduling conflicts.[18] Ultimately, Judge Irizarry decided the

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[11] Brief of United States II, *supra* note 10, at 2.

[12] Brief of Morris Fodeman, United States v. Ahmed, No. 14-cr-00277-DLI (E.D.N.Y June 20, 2014).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Transcript, *supra* note 5, at 5-11.

[18] *Id.* at 19-20. The transcript reflects the difficulties of setting up an inmate phone call or in person meeting. *Id.*

> The Court: [B]ut it is not an easy thing to arrange for an unmonitored attorney call. . . And then he [Mr. Fodeman] has to initiate the call. Then the Bureau of Prisons, by the time they feel like it, has to arrange for a private room, arrange for the call. And, again, if a security nightmare happens, that's the end of it, everybody's on lockdown and the call doesn't happen. But I have heard from

attorney-client privilege protected the emails from the prosecutor's eyes.[19] This issue, whether inmate emails are protected under the attorney-client privilege, is creating novel and complex courtroom battles in courts across the country, long before the merits of the case are even discussed.[20]

This Comment addresses whether the attorney-client privilege should extend to emails exchanged between an inmate and his or her attorney over TRULINCS, the prison email system. Section II describes the history of the attorney-client privilege, and compares and contrasts the federal privilege with the New York state privilege in order to directly address Dr. Ahmed's conflict. Section III juxtaposes other forms of privileged attorney-client contact with inmate emailing, and discusses the confidentiality agreement provided through the prison email system, TRULINCS. Finally, Section IV proposes a fiscally responsible, efficient, and convenient solution to the possible extension of the attorney-client privilege to inmate email.

II. THE HISTORY OF THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege originated in England in the sixteenth century; it was first implemented in the United States in the nineteenth century as a way of protecting both the client and

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respected members of the CJA panel that this is not an unusual occurrence.

Id.

[19] *Id.* at 21.

[20] Stephanie Clifford, *Prosecutors Are Reading Emails from Inmates to Lawyers*, N.Y. TIMES (July 22, 2014), www.nytimes.com/2014/07/23/nyregion/us-is-reading-inmates-email-sent-to-lawyers.html; *see also* Editorial Board, *Inmate E-mails to Lawyers Must Be Protected By Attorney-Client Privilege*, WASH. POST (Aug. 31, 2014), www.washingtonpost.com/opinions/inmate-e-mails-to-lawyers-must-be-protected-by-attorney-client-privilege-2014/08/30/2c295bec-143b-11e4-98ee-daea85133bc9_story.html (discussing the opinion of one judge who stated that inmates "had no expectation of privacy," and the opinion of another judge who "wrote that 'the government's policy does not "unreasonably interfere" with …[the] ability to consult counsel'"; The Editorial Board, *Prosecutors Snooping on Legal Mail*, N.Y. TIMES (July 23, 2014), www.nytimes com/2014/07/24/opinion/24thu3.html (explaining the different views judges have developed with regard to prosecutors reading inmate emails). Some federal judges have accepted the government's contention that inmates have other means of communication and separating emails is too costly. *Id.* Meanwhile, other federal judges have ruled against the government, citing the fact that prosecutors have extensive resources as compared to private lawyers. *Id.* This disparity makes it nearly impossible for many private lawyers to use other means to communicate with inmates—such as prison visits or prison phone calls. *Id.* These other means often prove too costly, time-consuming, and unreliable. *Id.*

the administration of justice.[21] This Section discusses the various forms of the attorney-client privilege, including the boundaries of, and exceptions to, the privilege.

A. Common Law

The first United States case dealing with the attorney-client privilege was *Hunt v. Blackburn* in 1888.[22] *Hunt* arose from a property dispute, but ultimately turned on whether a letter between the defendant and her attorney could be introduced as evidence at trial.[23] The court stated that the purpose of the attorney-client privilege is to provide for confidential communications between an attorney and his or her client, which is needed to facilitate a just, efficient, and contemporary legal system.[24] Ultimately, the *Hunt* court found that the defendant waived her attorney-client privilege.[25] Because of the strong public policy that favors protecting client rights, courts often decide difficult or "blurred line" cases in favor of upholding the privilege and protecting the information.[26] The privilege helps to promote honest conversation and full disclosure between an attorney and his or her client, which allows for more open and efficient representation.[27]

Various elements must be satisfied in order to invoke the attorney-client privilege. A defendant is required to show that:

(1) he or she was or sought to be a client of the attorney;

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[21] PAUL RICE, ATTORNEY-CLIENT PRIVILEGE IN THE U.S. § 1:1 (2014), *available at* Westlaw 1 Attorney-Client Privilege in the U.S. § 1:1; *see also* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (discussing that the attorney-client privilege was one of the first common law privileges); *see generally* 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (Colin McNaughton ed., 1961) (explaining the privilege and how it relates to the rules of evidence as well as trial substance and procedure).

[22] Hunt v. Blackburn, 128 U.S. 464, 469 (1888); *see also* Sean M. O'Brien, Note, *Extending The Attorney-Client Privilege: Do Internet E-Mail Communications Warrant a Reasonable Expectation of Privacy?*, 4 SUFFOLK J. TRIAL & APP. ADVOC. 187, 193 (1999) (asserting that the United States common law first identified the attorney-client privilege in 1888).

[23] *Hunt*, 128 U.S. at 471.

[24] *Id.* at 470; *see* AM. BAR ASS'N, MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (1980) (discussing the need for a lawyer to be able to advocate for his or her client and provide sound legal advice and representation).

[25] *Hunt*, 128 U.S. at 471.

[26] *Compare* Lopes v. Vieira, 688 F. Supp. 2d 1050, 1058, 1068 (E.D. Cal. 2010) (taking a more wide-spread and liberal approach to applying the attorney-client privilege, thereby protecting more documents from disclosure), *with* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (suggesting that the privilege should be narrowly construed so that most evidence is disclosed, unless upholding the privilege by not disclosing better advances or protects public policy concerns).

[27] Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985).

(2) that the attorney in connection with the evidence acted as a lawyer;
(3) that the evidence relates to facts communicated for the purpose of securing a legal opinion, legal services or assistance in a legal proceeding; and
(4) that the privilege has not been waived.[28]

The party that wishes to raise the privilege must prove that all of the elements listed above existed at the time the communication took place.[29] The court has discretion in deciding whether the claimant met his or her burden of proving each and every element of the privilege based on a factual determination.[30] A lower court's finding of privilege will not be overturned unless the finding is "clearly erroneous."[31] However, the application of the privilege is a question of law.[32] Therefore, there is a bifurcated standard of review.[33]

The privilege only shields communications that provide or further legal advice between an attorney and his or her client.[34] However, the privilege is not lost if some parts of the communication contain non-legal advice.[35] Conversely, if the communications contain purely non-legal or business advice then they are not protected by the attorney-client privilege.[36] A court looks to the following factors to determine if the communicated information is for purely or predominantly legal advice purposes: "(1) the extent to which the attorney performs legal and non-legal work for the organization, (2) the nature of the communication, and (3) whether or not the attorney had previously provided legal assistance relating

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[28] United States v. Wilson, 798 F.2d 509, 512 (1st Cir. 1986) (citing *United States Shoe Mach, Corp.*, 89 F. Supp. at 358-359; Connelly v. Dun & Bradstreet, Inc., 96 F.R.D. 339, 341 (D. Mass. 1982)).

[29] United States v. Bay State Ambulance & Hosp. Rental Serv., Inc. 874 F.2d 20, 28 (1st Cir. 1989).

[30] *Wilson*, 798 F.2d at 512; *see generally* FED. R. EVID. 104 (explaining how courts deal with finding privilege).

[31] *Wilson*, 798 F.2d at 512.

[32] *See generally* FED. R. EVID. 501 (providing legal rules as to how the attorney-client privilege is established).

[33] *Wilson*, 798 F.2d at 512; *see generally* FED. R. EVID. 501 (discussing the two-tiered standard of review: the first tier being the common law power of courts deciding if the attorney-client privilege exists based on case facts, and the second tier being the legal rules governing how the privilege is to be properly applied).

[34] *United Shoe Mach. Corp.,* 89 F. Supp. at 359.

[35] *Id. See also* United States v. Singhal, 800 F. Supp. 2d 1, 8 (D.D.C 2011) (discussing that when considering communications which contain both legal and non-legal advice the information will be privileged only if the predominant purpose is for providing legal advice); *In re* Grand Jury Subpoena to Kansas City Bd. of Pub. Util., 246 F.R.D. 673, 678 (D. Kan. 2007) (asserting that the privilege only exists to protect legal advice and should be narrowly construed in order to serve this purpose).

[36] *Singhal*, 800 F. Supp. 2d at 8.

to the same matter."[37] However, even when the attorney-client privilege applies, several avenues still remain for dissolving the privilege.

1. Waiver

Once a court finds that the attorney-client privilege applies, one way to seek disclosure of the privileged information is through waiver.[38] Only the client can waive the privilege.[39] For instance, the privilege is waived when the client voluntarily discloses the privileged information to someone other than his or her attorney.[40] For example, in *United States v. Mejia*,[41] the court held that the client waived his privilege when he called his sister from prison and provided her with information meant for his attorney, instead of just calling his attorney directly.[42] The court ruled that because he knew his call was being recorded over the prison phone system and because the information was detailed to his sister rather than to his attorney, the privilege was destroyed.[43] The presence of a third party, however, does not always destroy the privilege.[44] For example, the privilege is not destroyed if the purpose of telling or showing the information to a third party is to aid in clarifying communications between the lawyer and client, such as assisting in translation or helping to overcome some form of communicative disability.[45] In addition to waiver, there is also a crime-fraud exception to the attorney-client privilege.[46]

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[37] *Id. See, e.g.*, *In re* Cty. of Erie, 473 F.3d 413, 422 (2d Cir. 2007) (holding that emails between a lawyer and a client detailing the recommendations by the lawyer for company policy is protected correspondence under the attorney-client privilege).

[38] Martin Marietta Materials, Inc. v. Bedford Reinforced Plastics, Inc., 227 F.R.D. 382, 390 (W.D. Pa. 2005). *See e.g.*, Dealbook, *Another View: The Eroding Attorney-Client Privilege*, N.Y. TIMES (Nov. 2, 2009, 11:00 AM), http://dealbook.nytimes.com/2009/11/02/another-view-the-eroding-attorney-client-privilege/comment-page-1/?_r=0 (providing a current insight into how lawyers, clients, and courts deal with the attorney-client privilege and waiver in a corporate setting). Specifically, the article discusses the viewpoints of the court, the client, and the attorney in regards to Bank of America's waiver of the attorney-client privilege. *Id.*

[39] *Martin*, 227 F.R.D. at 390.

[40] *Id. See*, *e.g., In re* Grand Jury Proceedings, 219 F.3d 175, 185 (2d Cir. 2000) (finding that the attorney-client privilege was waived when a corporate officer provided privileged testimony to a grand jury); Phx. Solutions Inc. v. Wells Fargo Bank, N.A., 254 F.R.D. 568, 576 (N.D. Cal. 2008) (holding that the attorney-client privilege was waived when the client voluntarily submitted privileged documents to another party during a patent application process).

[41] United States v. Mejia, 655 F.3d 126, 133 (2d Cir. 2011).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 134.

[45] *Id.*

[46] *In re* Grand Jury Proceedings, 87 F.3d 377, 381 (9th Cir. 1996); *see also*

2. Crime-Fraud Exception

The attorney-client privilege does not protect criminal plans or criminal acts between an attorney and his client.[47] To invoke the exception, the government need only prove that the client consulted an attorney regarding a crime he was planning to commit, and not that an actual crime occurred or was already in motion.[48] The attorney need not know about the client's plans to engage in criminal activity because it is the client's intentions that are paramount in deciding if the crime-fraud exception applies.[49]

The crime-fraud exception dissolves the attorney-client privilege if "there is reasonable cause to believe that the attorney's services were utilized in furtherance of the ongoing unlawful scheme."[50] For example, in *United States v. Doe*,[51] the Third Circuit ruled that the crime-fraud exception dissolved the attorney-client privilege.[52] This case involved a grand jury investigation of a government agent.[53] Per the investigation, an attorney was subpoenaed to provide documentation that the government agent asked him for assistance to commit a crime—he refused, claiming that the information was privileged.[54] The court acknowledged that there was evidence that the government agent had a criminal intent in speaking with his attorney, because he asked how to invest in a business under his wife's name so that the investment could not be

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Michael W. Glenn, Note, *Principles, Politics and Privilege: How the Crime-Fraud Exception Can Preserve the Strength of the Attorney-Client Privilege for Government Lawyers and Their Clients,* 40 FORDHAM URB. L. J. 1447, 1477 (2013) (discussing the attorney-client privilege, the public policy surrounding it, and how the crime-fraud exception and the attorney-client privilege apply in criminal settings). Furthermore, Michael Glenn's article stresses the importance of the attorney-client privilege for the attorney and his or her client, as well as the public-at-large. *Id.* at 1482.

[47] *In re Grand Jury Proceedings*, 87 F.3d at 381.

[48] *Id.*

[49] United States v. Martin, 278 F.3d 988, 1001 (9th Cir. 2002).

[50] United States v. Chen, 99 F.3d 1495, 1503 (9th Cir. 1996). *See, e.g.*, *In re* Grand Jury Investigation, 445 F.3d 266, 275 (3d Cir. 2006) (waiving the attorney-client privilege because the crime-fraud exception applied when the government produced evidence to show the client was engaged in obstructing justice); United States v. Edwards, 303 F.3d 606, 619 (5th Cir. 2002) (holding the attorney-client privilege should be divested because the client sought counsel to help cover up a fraud scheme); Shahinian v. Tankian, 242 F.R.D. 255, 261 (S.D.N.Y. 2007) (concluding that the client contacted a law firm in order to aid in their fraudulent filings with the IRS, which therefore dissolved the attorney-client privilege due to the crime-fraud exception).

[51] United States v. Doe, 429 F.3d 450, 454 (3d. Cir. 2005).

[52] *Id.* (stating that "[a]lthough broad, the privilege does not allow a client to shield evidence of an intent to use an attorney's advice for criminal purposes").

[53] *Id.* at 452.

[54] *Id.*

traced back to him.[55] Even though the crime was never actually committed, the government established the crime-fraud exception to the attorney-client privilege by introducing evidence of the client's intent.[56]

B. Statutes

The attorney-client privilege is also codified several places in statutory law.[57] For example, the Federal Rules of Evidence provide for the privilege and discuss its application, waiver, and different forms of disclosure.[58] Moreover, different states have crafted their own statutes governing the application and use of the privilege.[59] In particular, Illinois Evidence Rule 502 defines and discusses the attorney-client privilege and waiver.[60] Like the common law, Rule 502 only gives the client the right to waive the privilege, but it also discusses the connection between the privilege and its application in Illinois courts as compared to other jurisdictions.[61]

It is important to note that the privilege is a combination of statutory and common law because it greatly affects, and is affected by, the discovery process at trial.[62] As technology evolves, both the federal and state legislatures have worked to amend their attorney-client privilege statutes to keep trial discovery costs down and trial ease and efficiency up.[63] However, this has created some confusion.[64] The privilege can vary significantly from jurisdiction to

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[55] *Id.* at 454; *see* 18 U.S.C.A. § 208 (West 1994) (discussing the rules a federal officer must follow in regard to an outside financial interest).

[56] *Doe*, 429 F.3d at 455.

[57] FED. R. EVID. 501.

[58] FED. R. EVID. 502.

[59] See, *e.g.,* ILL. R. EVID. 502 (providing the statutory rules for the attorney-client privilege in Illinois); ARIZ. R. EVID. 502 (setting forth the rules of evidence governing the attorney-client privilege in Arizona); TEX. R. EVID. 503 (stating the Texas rules of evidence for the attorney-client privilege); ALA. R. EVID. 503 (providing Alaska's evidentiary statute for the attorney-client privilege).

[60] ILL. R. EVID. 502.

[61] *See id.* (defining and discussing the privilege in regard to how it is applied in Illinois).

[62] Robert A. Brown, Comment, *The Amended Attorney-Client Privilege in Oklahoma: A Misstep in the Right Direction*, 63 OKLA. L. REV. 279, 281 (2011).

[63] *Id.* at 280 (stating "[n]ow confidential information is often stored on the same discrete hard drive as information over which no privilege will be claimed, even if the information is kept in different 'files'").

[64] Steven Bradford, *Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution*, 52 U. PITT. L. REV. 909, 912 (1991) (discussing the choice-of-law doctrine in connection to the attorney-client privilege). The article emphasizes the underlying need for consistency in order for the privilege to have value. *Id.* at 913. However, the article further discusses how the privilege's conflicting application inhibits this value. *Id.* 921-22. The attorney-client privilege is regulated by each state individually to comply with that particular states' interest, which then creates state-to-state inconsistency. *Id.*

jurisdiction,[65] but there is uniformity across some jurisdictions.[66] These variations in the boundaries of the privilege prevent the privilege from working effectively, and make it difficult for attorneys to know when it applies to client correspondence.[67] As electronic discovery and different technological modes of communication become more prevalent, various issues regarding the attorney-client privilege arise and call for amending federal and state statutes, along with the rules of evidence.[68]

C. Federal Law versus State Law

Ordinarily, federal law governs the attorney-client privilege in federal court.[69] However, under the Federal Rule of Evidence 501, a federal district court sitting in diversity should apply the law of privilege of the state in which it sits.[70] Furthermore, state courts can formulate their own laws for the attorney-client privilege, unbound by the federal guidelines of the attorney-client privilege.[71]

1. The Federal Privilege

Federal law provides the minimum amount of attorney-client protection that must be provided to a client.[72] As discussed above,

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[65] *See* O'Brien, *supra* note 22, and accompanying text (identifying that the attorney-client privilege is partly a product of common law and, therefore, each state can handle it differently).

[66] Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 60 (2002); *see also infra* note 91 (discussing the similarities between New York State's attorney-client privilege and the Federal attorney-client privilege).

[67] Glynn, *supra* note 66 at 82-83. "Policy makers therefore should strive to ensure the highest level of certainty achievable, while recognizing that the competing interests at stake will require some doctrinal complexity, and that no legal doctrine, including privilege law, is entirely predictable or without nuances in application." *Id.* at 82.

[68] *See generally* Adjoa Linzy, *The Attorney-Client Privilege and Discovery of Electronically-Stored Information*, 2011 DUKE L. & TECH. REV 1 (2011) (discussing how the evolution of technology used in discovery causes the attorney-client privilege to change positively by making it easier and more efficient to exchange documents and privileged communications, and negatively by blurring the lines of the privilege and document disclosure).

[69] JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, CIVIL PROCEDURE: CASES & MATERIALS 1367, 907 (11th ed. 2013).

[70] *Id.; see also* FED. R. EVID. 501 (explaining that "state law governs privilege regarding a claim or defense for which state law supplies the rule of decision"); Erie R. Co. v. Tompkins, 304 U.S. 64, 72 (1938) (asserting in common law that a federal court sitting in diversity shall apply the substantive law of the state in which it sits).

[71] FED. R. EVID. 501.

[72] *See generally* 3 JACK B. WEINSTEIN, WEINSTEIN'S FEDERAL EVIDENCE § 501.02 (2d ed. 1987), *available at* https://advance.lexis.com/document/?pdmfid=1000516&crid=f357012e-a1ca-4f22-bf8e-

both federal statutes and federal common law work to shape the privilege.[73] For example, Federal Rules of Evidence 501 and 502 define the privilege, discuss the boundaries of the privilege, and introduce the exceptions to the privilege.[74] Federal common law also discusses the attorney-client privilege.[75] For example, in *Fisher v. United States*, the Supreme Court of the United States applied federal common law regarding the attorney-client privilege and held that tax documents were not privileged.[76]

The federal common law also extends the attorney-client privilege to the corporate world.[77] As communication continues to evolve, the federal common law recognizes that several different technological modes of communication, such as phone calls and email are covered under the attorney-client privilege.[78] However, no medium of communication makes the privilege absolute and the court reserves the right to deal with the application of the attorney-client privilege on a case-by-case basis.[79]

2. New York State Privilege

The attorney-client privilege exists in New York State courts

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95595cc5522b&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A51PW-T5R0-R03K-Y3K8-00000-00&pddocid=urn%3AcontentItem%3A51PW-T5R0-R03K-Y3K8-00000-00&pdcontentcomponentid=163736&ecomp=knthk&earg=sr0&prid=11a472bd-e2b1-4ddf-b040-62aa3b47120b.

[73] *See supra* notes 69-70 and accompanying text (discussing that the attorney-client privilege can be found in both statutory law and common law).

[74] FED. R. EVID. 501; FED. R. EVID. 502.

[75] *See* Fisher v. United States, 425 U.S. 391, 393 (1976) (dealing with taxpayers under investigation for civil or criminal misconduct dealing with the Internal Revenue Service). The government summoned the attorneys of those accused for misconduct and asked for the accused's tax records and forms. *Id.* at 394. The attorneys refused to provide the government with the information. *Id.* at 395.

[76] *Id.* at 414.

[77] *Upjohn*, 449 U.S. at 384.

[78] *See* United States v. Danielson, 325 F.3d 1054, 1072-73 (9th Cir. 2003) (stating that the prosecution cannot use a privileged phone call between an attorney and his client); *see also* United States v. Noriega, 764 F. Supp. 1480, 1483 (S.D. Fla. 1991) (stating "[i]f a tape consisted of attorney-client communications, the outside agent was to immediately seal and segregate that tape from the others"). *See In re City of Erie*, 473 F.3d at 422-23 (asserting that emails sent from a client to their attorney had a predominant purpose of legal advice because the client was asking an attorney about policy changes and how to be sure such changes were constitutional.) Therefore, these emails were protected under the attorney-client privilege because they were about purely legal matters. *Id.* However, the client must not have waived the privilege at any point during the correspondence. *Id.*

[79] *Upjohn*, 449 U.S. at 396.

through common law,[80] the New York rules of evidence,[81] and the New York rules of professional responsibility.[82] New York courts require the four elements discussed above to invoke the attorney-client privilege,[83] identifying significant public policy reasons behind the privilege such as full-disclosure and client protection.[84] For example, in *In re Jacqueline F.*,[85] the court ordered an attorney to disclose the whereabouts of a client and a child in her custody even though an argument existed that this information was protected under the New York attorney-client privilege statute.[86] The court ruled that the information must be disclosed as public policy, specifically the best interest of the child, dictates that disclosure is more important in such circumstances than the protection of the attorney-client communication regarding the client's whereabouts.[87] While the privilege is important and provides the necessary protection to foster client honesty and communication, it is by no means an absolute shield.[88]

Federal law and New York state law appear to deal with the attorney-client privilege in a very similar manner.[89] Both recognize

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[80] *See Structure of the Courts*, NYCOURTS.GOV (Feb. 15, 2013), www.nycourts.gov/courts/structure.shtml (providing the basic structure of the New York court system, which differs significantly from other states).

[81] N.Y. C.P.L.R. 4503. (MCKINNEY 2014).

[82] *See* Stacy Lynn Newman, Comment, *The Governmental Attorney-Client Privilege: Whether the Right to Evidence in a State Grand Jury Investigation Pierces the Privilege in New York State*, 70 ALB. L. REV. 741, 744 (2007) (discussing how the rules of evidence and professional responsibility intersect with the attorney-client privilege in New York); *see also* Spectrum Sys. Int'l Corp. v. Chem. Bank, 581 N.E.2d 1055, 1060 (N.Y. 1991) (stating that the attorney-client privilege is limited to communications); People v. Mitchell, 448 N.E.2d 121, 123 (N.Y. 1983) (discussing that the privilege only applies when the client was engaged in receiving legal advice from the attorney); People v. Osorio, 549 N.E.2d 1183, 1185 (N.Y. 1989) (stating the party claiming the attorney-client privilege has the burden of proving all of the elements).

[83] *See Wilson,* 798 F.2d 509 (discussing the elements of the attorney-client privilege).

[84] Newman, *supra* note 82, at 751.

[85] *In re* Jacqueline F., 391 N.E.2d 967 (1979).

[86] *Id.* at 972. *See generally* N.Y. C.P.L.R. § 4503 (2014), *available at* https://advance.lexis.com/document/?pdmfid=1000516&crid=08dddb28-b834-407d-b5bf-acf6fccb8606&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A4YF7-FPK1-NRF4-20BV-00000-00&pdpinpoint=_a&pdcontentcomponentid=9101&pddoctitle=N.Y.+C.P.L.R.+4503%28a%29&ecomp=qk9g&prid=cf9e3bfd-a878-4ddf-a7d9-e41113fe2042 (providing the definition and application of the New York state attorney-client privilege).

[87] *In re Jacqueline F.*, 391 N.E.2d at 972.

[88] *See supra* note 50 and accompanying text.

[89] *See* VT. R. EVID. 510 (2012) (describing the Vermont rule entitled "lawyer-client" privilege, which provides different language than the New York rule); CAL. EVID. CODE § 955 (West 2014) (discussing when the attorney must invoke the privilege, which is different than the New York rule). *But see* IND. R. EVID.

common law and statutory forms and have very similar guidelines.[90] Moreover, because New York follows the federal protections in lockstep, it appears both jurisdictions would rule similarly, if not identically, in a case involving an attorney-client privilege dispute.

III. MEDIUMS OF COMMUNICATION AND THE ATTORNEY-CLIENT PRIVILEGE

This Section explores, analyzes, and reviews the facts, outcome, and rationale employed by several New York state and federal courts in cases involving the attorney-client privilege. This section seeks to ascertain the bounds of the privilege by looking at written, oral, and electronic communications in both prison and civilian contexts.

A. Telephone

The telephone is commonly used by attorneys and clients to communicate easily and effectively under the attorney-client privilege.[91] However, the rapid advancement of telephone technology has caused the application of the attorney-client privilege to telephone conversations to be a regularly litigated issue.[92] Although two people engaged in a telephone conversation may generally expect a reasonable degree of privacy with regard to their conversation,[93] the issue of inadvertent disclosure has lead

501 (2014) (stating the Indiana rule of evidence that discusses the attorney-client privilege, which is very similar to the New York and Federal rules).

[90] *Compare* FED. R. EVID 502 (defining the attorney-client privilege as something that protects privileged communication between an attorney and his or her client, as well as the applicable notions of waiver and application), *with* N.Y. C.P.L.R. § 4503 (discussing how the attorney-client privilege protects clients by allowing them to have privileged information with their attorney, as well as providing for waiver of the privilege by the client and an application similar to Federal law).

[91] Heidi L. McNeil & Robert A. Henry, *Confidential Communication? Cellular and Cordless Telephones and the Attorney-Client Privilege*, 34 ARIZ ATT'Y 20 (1997), *available at* www.myazbar.org/AZAttorney/Archives/Oct97/10-97a3.htm.

[92] *Id.* at 21. "Unfortunately, too many attorneys are embracing these gifts of modern technology without careful consideration of how they *should* be used. By now, everyone knows–or should know—that a cellular or cordless conversation is as private as a chat in the bleachers at Wrigley Field." *Id.* (emphasis in original).

[93] *See generally* Jason D. Lerner, *State Constitutional Law—Privacy—Search and Seizure—Do Individuals Have a Reasonable Expectation of Privacy in Their Cell Phone Conversations? State v. Allen, 241 P.3d 1045 (Mont. 2010),* 43 RUTGERS L. J. 725, 733 (2013) (discussing *State v. Allen*, a case in which the Montana Supreme Court reasoned that two individuals on a phone-call normally have a reasonable expectation of privacy).

various courts to grapple over whether the telephone actually provides such a "reasonable expectation of privacy."[94] The issue of whether such an expectation of privacy is reasonable is further complicated when an inmate is making a phone call to his or her attorney using the prison phone system.[95] Therefore, ascertaining the bounds of the privilege outside of prison is a good place to start.

1. Client Phone Call Not Covered Under the Privilege

In *People v. Fentress,*[96] the New York County Court held that the attorney-client privilege was not applicable to the defendant's phone call.[97] The defendant called his friend, an attorney, and confided in him that he had killed someone and was contemplating committing suicide.[98] After learning this information the attorney called his own mother, who called the defendant herself, before calling the police.[99] The police arrived at the defendant's house and arrested him after they found the body of the victim in the defendant's home.[100] A grand jury indicted the defendant for intentional murder.[101] The defendant argued that the attorney-client privilege applied to his phone call, and absent this breach of the attorney-client privilege no evidence would have existed to charge him with a crime.[102]

The court acknowledged that the defendant called his friend because his friend worked as an attorney and the defendant was seeking legal advice regarding the murder and his desire to commit suicide.[103] However, the court also reasoned that the attorney's legal advice consisted of the defendant calling the police to confess his crime.[104] The court held that the attorney's legal advice of calling the police lowered the defendant's reasonable expectation of confidentiality in the phone call, because the ultimate legal suggestion was to disclose all of the information to the

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[94] *Id.*

[95] *See* Ann Givens & Chris Glorioso, *Attorney-Client Privilege Questioned After Inmate's Call Is Recorded*, NBC NEW YORK (Feb. 4, 2014, 8:51 AM), www.nbcnewyork.com/news/local/Attorney-Client-Privilege-Questioned-After-Inmates-Call-is-Recorded-243407341.html (discussing the blurred lines of whether an inmate should be able to privately speak to his or her attorney over the inmate phone call system).

[96] People v. Fentress, 425 N.Y.S.2d 485, 494 (Cnty. Ct. 1980).

[97] *Id.; see also* People v. Wiesner, 514 N.Y.S.2d 514, 515 (N.Y. App. Div. 1987) (holding that the attorney-client privilege did not apply to the defendant's phone call because they were not seeking legal advice).

[98] *Fentress*, 425 N.Y.S.2d at 487.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 492.

[104] *Id.* at 493.

authorities.[105] Furthermore, when the attorney's mother called the defendant she made no mention that she had spoken to her son, the attorney whom the defendant had called.[106] Accordingly, because the defendant openly disclosed his crime and his want to commit suicide to her, the court ruled that no breach of the attorney-client privilege existed and the defendant's conviction was upheld.[107]

2. Client Phone Call Covered Under the Privilege

Conversely, in *In re Grand Jury Proceedings*,[108] the United States District Court for the Southern District of New York ruled that the phone calls made from a corporation's attorney to an investigator were covered under the attorney-client privilege.[109] The case stemmed from the allegation that a corporation was involved in illegal gun sales.[110] As a result, the corporation hired an investigator to aid the attorney in dealing with the attorney-client privilege invoked by the corporation during discovery.[111] The government argued the attorney-client privilege did not apply to the phone calls between the investigator hired by the corporation and the corporation's attorney because: (1) the phone calls were not meant to be confidential, (2) the investigator may have aided in illegal activities, (3) there was no protection provided under agency theory, and (4) the attorney-client privilege, if applicable, was waived because the information was provided to third parties.[112] Then, the investigator called an Assistant United States Attorney and disclosed information received from phone calls and documents

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[105] *Id.* at 494.

> The conclusion is inescapable, and the court has found as a fact, that [defendant] did not intend to keep the corpus of the crime from the police. His renunciation of confidentiality (as to the fact of the homicide) appeared again when [the attorney's mother] suggested that the police be called, and [defendant] again specifically disavowed any expectation of keeping the fact of homicide from the police.

Id.

[106] *Id.* at 497.

[107] *Id.* at 495.

> Hence, [the attorney's mother] was under no legal or ethical duty to refrain from calling the police. She had not only the defendant's express approval to do so, but her own unilateral and unfettered choice in the matter, just as any person is free to call the police when a friend has confided that he has killed someone and is about to kill himself.

Id.

[108] *In re* Grand Jury Proceedings, No. M-11-189, 2001 U.S. Dist. LEXIS 15646, at *26 (S.D.N.Y. Oct. 3, 2001).

[109] *Id.* at *26.

[110] *Id.* at *1.

[111] *Id.*

[112] *Id.* at *9-10.

with the corporation's counsel.[113]

Because the corporation's counsel told the investigator before engaging in the phone call that all of the information stated over the phone was protected by the attorney-client privilege, the court held the privilege covered the telephone conversations.[114] Additionally, another attorney for the corporation advised the investigator not to speak with the government because the corporation planned to assert the attorney-client privilege over the phone calls.[115] Further, the investigator provided grand jury testimony stating that he did not have the power to waive the attorney-client privilege, and that he knew the attorney-client privilege applied to the conversations with the corporation's counsel.[116] Consequently, the court found that the telephone conversations between the investigator and the corporation's counsel were confidential and therefore were protected by the attorney-client privilege.[117]

These two decisions help to illustrate the boundaries of the attorney-client privilege with regard to telephone calls.[118] The historical rules governing the privilege provide a test to determine whether the telephone call is protected or not: (1) there must be an expectation of privacy, (2) the privilege must not have been waived and the crime-fraud exception must not apply, and (3) the telephone call must have taken place with an attorney for the purpose of seeking legal advice.[119] This basic structure appears to blur, however, when the telephone call is placed from an inmate to his or her attorney.[120]

3. Inmate Phone Calls

Even though phone calls between an attorney and his or her

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[113] *Id.* at *11.

[114] *Id.* at *14.

[115] *Id.*

[116] *Id.* at *18-19. An "[i]nvestigator testified that he believed he was violating all of Doe Corp.'s instructions and the attorney-client privilege or work-product doctrine when he had his discussions with AUSA Finn." *Id.*

[117] *Id.* at 26.

[118] *Compare Fentress* 425 N.Y.S.2d at 487, *with In re* Grand Jury Proceedings, 2001 U.S. Dist. LEXIS 15646, at *26 (showing how the privilege works and how it can be applied to different facts).

[119] *See Fentress*, 425 N.Y.S.2d at 485 (providing the basic structure of analysis that courts use when dealing with telephone conversations in relation to the attorney-client privilege).

[120] *See* Teri Dobbins, *Protecting the Unpopular from the Unreasonable: Warrantless Monitoring of Attorney Client Communications in Federal Prisons*, 53 CATH. U. L. REV. 295, 296 (2004) (discussing the ability of the Bureau of Prisons to monitor inmate contact with their attorney based on federal statutes that seek to prevent an inmate from contacting his or her attorney in order to further or facilitate terrorism).

incarcerated client can be privileged,[121] prisons often have recording or monitoring systems in place to supervise inmate phone calls.[122] A contradictory juxtaposition of privileged conversations and recording devices makes for a confusing and inconsistent application of the attorney-client privilege.[123] The prison recording informs inmates that the call is being monitored, however, the recorded message often does not specifically state that this includes attorney-client phone calls, which leads to a belief that attorney-client phone calls will still be covered under the protection of the attorney-client privilege.[124]

Prisons attempt to deal with this issue by filtering out attorney phone numbers so that a client can call his or her attorney under the privilege.[125] However, this system does not always work properly and has caused issues in regard to prosecutor's obtaining trial strategy.[126] Courts have come down on both sides of the issue

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[121] *See Frequent Questions: Inmate Telephone Access*, S.D. DEP'T OF CORR., http://doc.sd.gov/about/faq/telephone.aspx (last visited Nov. 13, 2014) (discussing that all calls are monitored unless it is being made "to an attorney or an organization known to provide legal services"). However, it is the duty of the inmate to request a confidential call when he or she is contacting his or her attorney. *Id.* The notices of recording and the rules regarding confidential phone calls are posted near inmate telephones. *Id.*

[122] Barry Tarlow, *RICO Report: Warning: Attorney-Client Jailhouse Conversations No Longer Privileged?*, 26 CHAMPION 57, 59 (2002).

[123] *Id.* Most commonly what happens is that a client will call from a phone at the federal detention center or prison and ignores the sign that says telephone calls are monitored. He or she can certainly reasonably believe that the facility has no authority to monitor attorney-client calls. Lawyers often have the same belief. The thought process is either that any recording will be minimized as required under the wiretap statutes or that it is illegal for a guard to eavesdrop on an attorney-client conversation. *Id.* at 59.

[124] *Id.* at 60.

[125] *Recordings Raise Questions About Inmate Rights*, NBCNEWS.COM (Aug. 4, 2008, 6:04 PM), www.nbcnews.com/id/26013015/ns/us_news-crime_and_courts/t/recordings-raise-questions-about-inmate-rights/#.VDny_efFE7A.

[126] *Id.*

"We weren't talking about cursory stuff, what kind of clothes to wear. We were talking trial strategy," [defense attorney] said. "There's no question that these calls are privileged, and we rely on that because the criminal justice system would come to a screeching halt if we had to drive to jail every time we had to talk to our clients."

Id. See also Rebecca Breyer, *Lawyer Says His Calls with Jailed Client Were Being Recorded*, DAILY REPORT (Sept. 11, 2014), www.lexis.com/research/retrieve?_m=8e7882bc69f5b80a3d4049a36d827036&csvc=bl&cform=searchForm&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzk-zSkAW&_md5=65da9c81e7f630b7e80d6330ea01455d (stating that a defense attorney's phone calls with his inmate client were turned over during discovery); Jennifer McMenamin, *Taping Inmate Calls Routine at Many Jails*, THE BALTIMORE SUN (Oct. 16, 2008), http://articles.baltimoresun.com/2008-10-16/news/0810150112_1_baltimore-county-howard-county-department-of-corrections (discussing new procedure that attorney's must write to jails in advance to request that their phone calls remain confidential under the

with regard to the attorney-client privilege and inmate phone calls.[127] For instance, where the prison phone system has a recording stating that the inmate's phone calls will be monitored and recorded, several judges have ruled that an inmate who calls his or her attorney after hearing this message, waives the attorney-client privilege.[128] Inmates and defense attorneys often object to such a ruling, citing the fundamental nature of the privilege and the degree to which a reasonable person would find the idea of inadvertently waiving the privilege in this manner unfathomable.[129]

Likewise, an inmate having to ask about speaking confidentially with his or her attorney appears to create even more confusion. Adoption of such a rule would lead to greater uncertainty between attorneys and their clients regarding how to move forward with privileged conversation because of the lack of uniform prison standards and procedure.[130] The issue is not simply that phone calls are a safer, more convenient, and cost-effective means of communication,[131] but that prisons fail to provide adequate

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attorney-client privilege, otherwise the calls will be monitored and recorded). Prosecutors and jailhouse officials claim this new purpose will prevent criminal activities from taking place inside prison walls. *Id.* However, defense attorneys argue it violates the attorney-client privilege and frustrates an inmate's constitutional right to counsel. *Id.*

[127] *See, e.g.*, United States v. Novak, 531 F.3d 99, 103 (1st Cir. 2008) (holding that the attorney-client privilege did not apply to an inmate's phone call with his attorney because the recording on the phone call told the inmate the call would be recorded, and the inmate failed to ask prison staff whether there was a way to confidentially speak with his attorney); United States v. Lentz, 419 F. Supp. 2d 820, 835 (E.D. Va. 2005) (deciding that the attorney-client privilege did not apply to the phone call between an inmate and his attorney because the detention facility records all inmate calls and if the attorney wanted confidential and privileged contact he could visit or send mail to the inmate). Even though these modes of communication are less convenient, the restriction of privileged contact to mail or in-person visits does not violate the law. *Lentz*, 419 F. Supp. 2d at 835. *But see* United States v. Walker, No. 2:10-186-MHT, 2011 WL 3349365 (M.D. Ala. July 14, 2011) (holding that the attorney-client privilege protected a call between an inmate and his attorney because the recording on the prison phone system provided no indication that calls between an inmate and his or her attorney would be recorded).

[128] *Lentz*, 419 F. Supp. 2d at 828.

[129] *See FAQs*, ICSOLUTIONS, www.icsolutions.com/FriendsFamilyHome/Support/FAQs.aspx (last visited Nov. 13, 2014) (discussing that all phone calls will be monitored except that between an attorney and his or her inmate client); *Inmate Phone Services*, ILL. DEP'T OF CORR., www.illinois.gov/idoc/communityresources/Pages/InmatePhoneServices (last visited Nov. 12, 2014) (stating that all inmate calls are monitored, but this does not include attorney-client phone calls when prior arrangements are made).

[130] *See Novak*, 531 F.3d at 103 (suggesting that an inmate should inquire about how to communicate under the attorney-client privilege with his or her attorney).

[131] *Contra OIG Review of Inmate Telephone Abuse*, JUSTICE.GOV,

scheduling and priority to attorney-client meetings and mail.[132]

Email communication between an attorney and his or her client appears to receive the same treatment with regards to a client calling his or her attorney under the privilege.[133] Similar to inmate phone calls, the issue appears to arise when the lack of confidentiality agreement is included.[134]

B. Email

The creation of the Internet and email changed communication forever. It also further complicated the attorney-client privilege.[135] On one hand, some argue that the attorney-client privilege should not extend to email because of the higher risk of inadvertent disclosure, thus obviating any reasonable expectation of confidentiality.[136] On the other hand, others argue that the attorney-client privilege should apply to email communications because they are no different from other forms of communication that are currently protected.[137] Comparing emailed communications that are covered to those that are not helps to ascertain the bounds of the privilege.

1. Client Email Not Covered Under Privilege

In *Scott v. Beth Israel Medical Center Incorporated*,[138] the

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http://www.justice.gov/oig/special/9908/callsp4.htm (last visited Nov. 14, 2014) (discussing that inmates often use phone calls to engage in illegal activities, violate prison rules, and contact third parties for a reduced cost using a three-way calling feature). Also, discussing that a lot of the monitoring devices are often broken, so most calls go unmonitored. *Id.*

[132] *Compare Lentz*, 419 F. Supp. 2d at 828 (suggesting that even though setting up inmate visits or sending mail are less convenient, it is the appropriate way to invoke the attorney-client privilege), *with* Brief of United States II, *supra* note 10, at 19-20 (discussing how difficult it can be for an attorney to arrange a prison visit, and that the long waits and various circumstances that can cause the visit not to happen make the whole visitation system more than inconvenient, but unreliable.)

[133] *See* Thomas H. Watkins & Kevin L. Leahy, *Avoiding Malpractice at the Speed of Light: Are Your Email Communications Protected and Secure?,* 68 TEX. B. J. 579, 579 (2005) (discussing the various ways to make email communications privileged between an attorney and his or her client).

[134] *See* Joshua L. Colburn, Note, *"Don't Read This If It's Not for You": The Legal Inadequacies of Modern Approaches to E-Mail Privacy*, 91 MINN. L. REV. 241, 245-248 (2006) (discussing the rise of disclaimer and confidentiality agreements in the legal context).

[135] Robert A. Pikowsky, *Privilege and Confidentiality of Attorney-Client Communication Via E-mail*, 51 BAYLOR L. REV. 483, 484 (1999).

[136] *Id.* at 485.

[137] *Id.*

[138] Scott v. Beth Israel Med. Ctr. Inc., 847 N.Y.S.2d 436 (N.Y. Gen. Term 2007).

Supreme Court of New York ruled the attorney-client privilege did not apply to emailed communications between a doctor and his attorney.[139] The case stems from a dispute where a doctor felt that he was terminated from the hospital without cause, and therefore was entitled to a severance payment.[140] The doctor hired a lawyer and subsequently sent emails to his lawyer over the hospital email system.[141] The hospital intercepted the emails and argued that the doctor had waived any attorney-client privilege by using the hospital email system.[142] The doctor disagreed and requested the emails be returned because they were privileged.[143]

The court held that the emails were not protected under the attorney-client privilege because the hospital email system made it clear to all employees that the privilege did not apply.[144] The court reasoned that because of the warning the doctor had no reason to think his communications would be privileged, even if they were correspondence with his attorney.[145] The court further noted that an employer is free to instate a no personal use policy, which is exactly what the hospital did here.[146]

2. Client Email Covered Under Privilege

In *Employers Insurance Co. of Wausau v. Skinner*,[147] the United States District Court for the Eastern District of New York held that emails between an attorney and his client were privileged.[148] The plaintiff and his attorney were preparing to serve the defendant with discovery regarding a case involving the two parties.[149] The plaintiff's counsel created three separate piles for documents: (1) responsive, (2) privileged, and (3) to be reviewed.[150] When the plaintiff dropped off the stack of documents for discovery to the defendant he included a cover sheet that declared any documents involved in the discovery that were inadvertently disclosed did not create a waiver of the attorney-client privilege.[151]

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[139] *Id.* at 437.

[140] *Id.* at 438.

[141] *Id.*

[142] *Id.* at 438-39.

[143] *Id.*

[144] *See id.* at 439 (stating that "[e]mployees have no personal privacy right in any material created, received, saved or sent using Medical Center communication or computer systems [and] [t]he Medical Center Reserves the right to access and disclose such material at any time without prior notice").

[145] *Id.*

[146] *Id.* at 441.

[147] Emp'rs Ins. Co. of Wausau v. Skinner, No. CV 07-735(JS)(AKT), 2008 U.S. Dist. LEXIS 76620, at *1 (E.D.N.Y. Sept. 17, 2008).

[148] *Id.* at *1.

[149] *Id.* at *2.

[150] *Id.* at *2-3.

[151] *Id.*

The plaintiff accidently provided some emails between himself and his attorney to the defendant during the discovery process.[152] The plaintiff then contended that sending these emails constituted an accident, and could not waive the privilege.[153] Additionally, the plaintiff argued that it should be ethically clear to the defendant that this type of information is not discoverable.[154]

The court agreed with the plaintiff and ruled that the emails were protected by the attorney-client privilege.[155] The court pointed out that the confidentiality agreement included on the cover sheet stated that inadvertent disclosure failed to create a waiver, and it was clear from the facts that the attorneys attempted to avoid inadvertent disclosure, as opposed to having behaved recklessly.[156] Moreover, the court concluded that the email remained protected under the attorney-client privilege, and the accidental disclosure by the attorney did not eradicate the privilege.[157]

Thus, email communications, similar to telephone calls, appear to work within the bounds of the privilege the same way as tangible documents would.[158] If the privilege is invoked and not waived, it is usually upheld. However, similar to telephone communications, the lines of the attorney-client privilege as applied to email begin to blur once prisons add monitoring agreements and non-confidentiality clauses into the mix.[159] This suggests that the use of a prison monitoring system is what complicates the privilege, not so much the technology itself.[160]

C. Prison Email Communication

Prisoners are allowed to communicate with people outside the prison, including with their attorney, family members, and loved

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[152] *Id.* at *4.
[153] *Id.* at *8.
[154] *Id.* at *9.
[155] *Id.* at *18.
[156] *Id.* at *24.
[157] *Id.* at *27.
[158] *Id.* at *26-27.
[159] *See* Jennifer A. Mannetta, Note, *The Proper Approach to Prison Mail Regulations: Standards of Review,* 24 NEW ENG. J. CRIM. & CIV. CONFINEMENT 209, 209 (1998) (discussing the need to monitor inmate emails in order to keep the public safe, but also that inmates do not lose their ability to communicate just because they are in prison, so this available communication should extend to email).
[160] *See* Philip Bulman, *Using Technology to Make Prisons and Jails Safer*, NAT'L INST. OF JUST. (March 27, 2009) www.nij.gov/journals/262/Pages/corrections-technology.aspx (discussing how technology can reduce contraband and protect inmates in prison). Accordingly, technological advances have an important place in prison, both for inmates and for the correctional officers. *Id.*

ones,[161] but every form of communication is closely monitored.[162] Now, as technology continues to evolve, prisons are adding more ways for their inmates to communicate, including email.[163] This evolution creates yet another layer to the attorney-client privilege discussion.[164]

TRULINCS stands for "Trust Fund Limited Inmate Computer System," and is operated by the Bureau of Prisons.[165] The Bureau of Prisons introduced email into the prison system because communication via email is efficient, secure, technologically advanced, and helped to decrease the flow of contraband through inmate mail.[166] However, the Bureau of Prisons clearly states that

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[161] *See Products and Solutions*, TELMATE, www.telmate.com/portfolio-item/inmate-phones-2/ (last visited Nov. 8, 2014) (discussing how inmates can make phone calls to keep in touch with their loved ones and families).

[162] *See* Luke A. Beata, Note, *Stateside Guantanamo: Breaking the Silence*, 62 SYRACUSE L. REV. 281, 285-86 (2012) (discussing the close and careful monitoring of inmate communication and how this monitoring remains heightened since September 11th due to "the war on terror" and an attempt to eradicate any terrorist activity taking place in prison); *Stay In Touch*, FEDERAL BUREAU OF PRISONS, www.bop.gov/inmates/communications.jsp (last visited October 12, 2014) (showing how inmates can communicate with the outside world while they are incarcerated: (1) phone calls, (2) e-mails, (3) sending and receiving letters and documents, (4) sending and receiving packages, and (5) sending money into inmate commissary accounts).

[163] *See, e.g.*, *Federal Inmates Eligible to Use Email*, MESHDETECT BLOG, http://prisoncellphones.com/blog/2011/05/31/federal-inmates-eligible-to-use-email/ (last visited October 12, 2014) (providing the information that all federal prisons will now allow their inmates to use email, although it will be recorded and read by *prison* staff). Also, for the most part, the Internet is still restricted from prison with regard to websites, news sources, and entertainment. *Id.*; *see also* Peter Lattman, *You've Got Jail Mail*, N.Y. TIMES, (Dec. 12, 2011), http://dealbook.nytimes.com/2011/12/12/youve-got-jail-mail/?_php=true&_type=blogs&_r=0 (outlining the basics of the prison email system, TRULINCS, and discussing that taxpayer dollars do not fund the email system, but that inmates pay for the access with their own money); *see generally TRULINCS Topics*, FED. BUREAU OF PRISONS, www.bop.gov/inmates/trulincs.jsp (providing basic information with how the TRULINCS system is run, including adding or removing someone from the list of contacts, as well as dealing with technological problems regarding the email system.

[164] *Compare Hunt*, 128 U.S. at 470 (providing the basic form of attorney client-privilege analysis), *with* Sony Elecs., Inc. v. Soundview Techs., Inc., 217 F.R.D. 104, 108 (D. Conn. 2002) (discussing a more complicated analysis of the attorney-client privilege).

[165] U.S. DEP'T OF JUSTICE, No. P5265.13, TRUST FUND LIMITED INMATE COMPUTER SYSTEM (TRULINCS)- ELECTRONIC MESSAGING (2009).

[166] *Id.* at 1; *see also* Clarissa Ramon, *The Price of Communicating From Behind Bars*, PUB. KNOWLEDGE (April 5, 2012), www.publicknowledge.org/news-blog/blogs/the-price-of-communicating-from-behind-bars (discussing the cost it takes to communicate with an inmate and how technology, including email, intersects with cost-efficiency, reliability, and security).

the attorney-client privilege does not apply to inmate emails.[167] The email monitoring system, TRULINCS, works similarly to email, however it is technically not email because each party has to log into the TRULINCS system in order to access or send messages rather than simply logging into one's email provider, such as Gmail.[168] TRULINCS was created to "modernize" the prison communication system and to make it easier by allowing prison officials to view all of the conversations for as long as the emails are retained.[169]

Although the Bureau of Prisons provides several notices that confidentiality is not to be expected, the use of a monitoring system has attorneys challenging whether that assertion is correct.[170] As exemplified in Dr. Ahmed's case,[171] email differs from phone calls in that documents can be sent between the inmate and the lawyer, it is easier to set-up, it is cost efficient, and it allows for a greater amount of communication than a phone call.[172] Although the government commonly argues that the attorney-client privilege is waived through clicking "okay" on the box that states no privilege exists, much like the notice of recording on inmate phone calls, courts have not always agreed with this position.[173] In fact, courts have yet to resolve whether the readily apparent differences between communication mediums behind bars impacts whether the privilege applies.[174]

IV. EXTENDING THE ATTORNEY-CLIENT PRIVILEGE TO INMATE EMAILS

This Section discusses why and how the attorney client-privilege should extend to inmate email. Extending the privilege is

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[167] U.S. Dep't of Justice, *supra* note 165, at 4 (stating in its policies that "[i]nmates may place attorneys, 'special mail' recipients, or other legal representatives on their electronic message contact list, with the acknowledgment that electronic messages exchanged with such individuals will not be treated as privileged communications and will be subject to monitoring").

[168] Christopher Zoukis, *Federal Bureau of Prisons Allows Inmates to Utilize Monitored Email Service*, PRISON RIGHTS NEWS & RES. PRISON LAW BLOG (April 5, 2013), www.prisonlawblog.com/blog/federal-bureau-of-prisons-allows-inmates-to-utilize-monitored-email-service#.VEqYVCgvE21=.

[169] *Id.*

[170] *See supra* notes 5-13 and accompanying text (providing materials from a case challenging the lack of confidentiality in attorney-client inmate emails).

[171] *See* Complaint & Affidavit, *supra* note 1, at 9 (showing that Dr. Ahmed's current litigation is an example of these issues).

[172] *See* Transcript, *supra* note 5, at 13-21 (discussing the arguments made by Mr. Fodeman, as well as the statements made from Judge Irizarray, which promote the need for inmate email).

[173] *See* Brief of United States I, *supra* note 8, at 2 (showing an example of a lack of confidentiality agreement over the TRULINCS inmate email system).

[174] *See* Mannetta, *supra* note 159, at 246 (stating that "it is unclear" whether electronic communications are treated in the same manner as more traditional forms of communication under the attorney-client privilege).

cost-efficient,[175] convenient, and fairly easy to implement through a filtering system.[176] Furthermore, non-confidentiality notices should not disrupt the privilege and should only be used in a manner that makes it clear to attorneys and inmates that their correspondence remains protected and the privilege intact. As the handling of email in the attorney-client privilege context is indistinguishable from other forms of communication, the decision to not extend the privilege to inmate email is arbitrary and unsupported by either logic or case law.

The reasons behind extending the privilege to inmate email are numerous, especially considering that other forms of inmate communication are expensive, unreliable, and inconvenient.[177] For one, email is a quick and easy way to communicate and only costs inmates cents on the dollar to send a message.[178] Further, email makes it easier for attorneys to send documents to their clients, and therefore avoid costly and often-interrupted in-person visits.[179] The Bureau of Prisons can easily separate attorney-inmate client emails through an email filtering system.[180] Moreover, the burden would be on the inmate and his or her attorney to provide the correct email

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[175] *See Regulating the Prison Phone Industry*, PRISON POLICY INITIATIVE, www.prisonpolicy.org/phones/ (last visited Nov. 13, 2014) (discussing the public policy importance behind providing inmates with cost-efficient and effective forms of communication).

[176] *See* Transcript, *supra* note 5, at 12 (stating "The Court: What I'm telling you is that there's no way, technologically speaking, that this system cannot be adjusted and probably adjusted very simply, and I'd be willing to bet that there are undergraduates at MIT who could do it today, who could adjust the program to eliminate this particular issue").

[177] *See* Ken Stier, *The High Cost of Phoning Home: Prisoners Demand Cheaper Connection,* AL JAZEERA AMERICA (June 25, 2014, 05:00 AM), http://america.aljazeera.com/articles/2014/6/25/prison-phone-bills.html (discussing the high cost of prison phone calls and how it disrupts the ability of prisoners to communicate with loved ones and counsel); Editorial*, The High Cost of a Call From Prison*, THE METROWEST DAILY NEWS (Oct. 27, 2014, 11:36 AM), www.metrowestdailynews.com/article/20141027/Opinion/141027018 (detailing that inmates having outside contact lowers recidivism rates, but this is being frustrated because prisons use phone calls to gain revenue).

[178] *Compare* Derek Gilna, *Prison Systems Increasingly Provide Email—For a Price*, PRISON LEGAL NEWS (Nov. 8, 2014), www.prisonlegalnews.org/news/2014/nov/8/prison-systems-increasingly-provide-email-price/ (discussing that in Minnesota prisons the cost of email messages is 30 cents each) *with* Tina McCabe, *Minnesota Prison Phones: High Rates, Dropped Calls, Privatization, and Profits*, TWIN CITIES DAILY PLANET (Nov. 30, 2012), www.tcdailyplanet.net/news/2012/11/30/minnesota-prison-phones-high-rates-dropped-calls-privatization-and-profits (discussing that phone rates are always over 30 cents per minute, and can be even more if made collect).

[179] *See* Transcript, *supra* note 5, at 19 (declaring through Mr. Fodeman that cases often deal with extensive paperwork that needs to be reviewed, and therefore email helps to facilitate that need).

[180] *See* Transcript, *supra* note 5, at 12 (discussing the ease of creating and using a prison email filtering system).

addresses that need to be filtered, thus reducing government time, resources, and liability.[181] This system would still allow for inmate email monitoring, but would stop the monitoring once the emails were between an attorney and his or her client.[182]

A. Filters

The Bureau of Prisons should add email filters into the TRULINCS system to protect attorney-client emails. A simple Google search reveals endless ways to easily implement such a feature, and a Gmail account follows the same general setup of the TRULINCS email system.[183]

An email filter is a way to separate different emails into various folders based on user-created criteria.[184] Therefore, the Bureau of Prisons could create filters that segregate attorney email addresses, once the attorney provided this information, and then the Bureau of Prisons would still have the ability to monitor all other inmate emails.[185] That way, when an email from an inmate's attorney entered into the inbox the filter would separate it from all of the other emails, which keeps it confidential and in its own folder. This system mimics the inmate telephone system, which also uses

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[181] *See* Transcript, *supra* note 5, at 2 (explaining the government fear that a filtered inmate email system may miss protected emails and then these emails would be sent to prosecutors because "their email addresses were unknown to the government").

[182] *See* Brief of United States II, *supra* note 10, at 17.

> Members of the team have no- -I would think in most cases, although it's hard to foresee every eventuality, no interest in reading attorney-client e-mails and would do their best not to read them, I would thing. But under the current system, the government - - THE COURT: That's hogwash. You're going to tell me you don't want to know what your adversary's strategy is? What kind of litigator are you then? Give me a break. Every litigator wants to know what their adversary's strategy is or you spend an awful lot of time trying to figure it out.

Id. at 17.

[183] *See Filters in Yahoo Mail*, YAHOO HELP, https://help.yahoo.com/kb/page-sln3225.html (last visited Nov. 9, 2014) (discussing the steps to adding a filter to Yahoo emails). "Click add, enter a filter name, enter the filter criteria: Sender-the person who sent the email . . . Select a folder to deliver the affected emails in." *Id.; see also* Jack Cola, *How to Set Up Email Filters in Gmail, Hotmail, and Yahoo*, MAKEUSEOF (May 28, 2010), www.makeuseof.com/tag/set-email-filters-gmail-hotmail-yahoo/ (providing steps and directions to set-up email filters).

[184] *See supra* note 183 and accompanying text (discussing how email filters work and their purpose).

[185] *See Managed Email*, PRISONPC, http://www.prisonpc.com/email.html (last visited Nov. 9, 2014) (discussing the filtering already used in the inmate email system).

filtering.[186] Adopting a model akin to the phone system for inmate emails would facilitate a consistent and secure medium of communication protected by the attorney-client privilege in prison and set clear parameters of when the privilege is applicable as both the email and phone systems would be filtered and organized in a uniform matter.[187]

Moreover, such a filtering system would still generate revenue for the prison by continuing the flow of emails, while also protecting the attorney-client privilege. In Dr. Ahmed's case, the government argued it would be too large a burden to hire a "taint team" to review all emails and redact any attorney-client communications.[188] Furthermore, the government claimed that the TRULINCS system lacks the capacity to separate out email addresses.[189] However, this constitutes a ridiculous assertion that can easily be remedied through filtering technology and research.[190] Filtering can be done without any human oversight, save for initially entering the email addresses, which results in a reduction of cost while maintaining efficient and secure communication.[191] The lack of human intervention in sorting inmate emails protects against inadvertent disclosure of trial tactics or confidential information and also protects The Bureau of Prisons against any attorney-client privilege or ethical violation.[192]

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[186] *See supra* notes 98-99 and accompanying text (discussing how attorney-client phone calls are sometimes dealt with in prison and the expectations or privacy, or lack thereof, involved).

[187] *See* Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 900 (2006) (discussing the problems and concerns caused by inconsistent or eroding applications of the attorney-client privilege in a corporate setting). The erosion or confusion in application of the attorney-client privilege causes "ineffective legal representation." *Id.* Clients feel as though they cannot trust their attorney or disclose information, and attorneys may do less diligent work for fear that anything recorded or written may be disclosed. *Id.* at 901.

[188] *See* Transcript, s*upra* note 5, at 10 (discussing that inmate emails come up as one "PDF" and therefore it would be costly to protect the privilege).

[189] Transcript, *supra* note 5, at 10.

[190] *See* Transcript, *supra* note 5, at 11-12.

And I find it very hard to believe that the Department of Justice, with all of the resources that it has with the access to the Department of Homeland Security and NSA, cannot come up with a simple program that segregates identified email addresses . . . any other person who they believe to whom the attorney-client privilege will apply in this particular case, and those e-mails are identified both by the inmate and one of those addresses is identified and programmed very simply into a separate folder. And that can be done mechanically, by a machine, where no human eyes have to see this.

Id.

[191] Transcript, *supra* note 5, at 11-12

[192] *See* Robert P. Mosteller, *Admissibility of Fruits of Breached Evidentiary Privileges: The Importance of Adversarial Fairness, Party Culpability, and Fear of Immunity*, 81 WASH. U. L. Q. 961, 972 (2003) (discussing the complex rules

As discussed above, the issue arises regularly with regard to inmate phone calls.[193] Filtering inmate emails is potentially simpler than filtering phone calls, because there is not a call to set up or a recording to listen to after the communications take place.[194] Email filtering protects attorneys and their clients by keeping their communication privileged, and protects the Bureau of Prisons by keeping cost and staff intervention down.[195] Moreover, the attorney-client privilege would apply to emails in basically the same way it applies to other forms of communication.[196] Extending the privilege to inmate emails is logical after the implementation of inmate phone calls.[197] As more and more discovery is done through electronic means, it only makes sense that the communication between attorney and client follows suit, even if the client is incarcerated.[198] Not implementing such an easy, mutually beneficial solution to the attorney-client privilege problem would be "penny-wise and pound-foolish."[199]

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surrounding privileged evidentiary information both inside and outside of the courtroom).

[193] *See* Readings *supra* notes 126 and 127 and accompanying text (discussing the monitoring system used with regard to inmate phone calls and how this has occasionally caused prosecutors to get a hold of defense trial strategy).

[194] *See* Brief of Morris Fodeman, *supra* note 12, at 3.

> The fact that we cannot even learn, in a timely fashion, how to set up an unmonitored telephone call belies the government's contention that this is a viable alternative to TRULINCS . . . To the contrary, it would appear to be as simple as sorting Dr. Ahmed's emails by sender and recipient—a task that should take a matter of minutes and hardly needs a team of additional Assistant U.S. Attorneys to accomplish.

Id.

[195] *See* Clifford, *supra* note 20 (discussing that the "filter team" was removed because of budget cuts).

[196] *See Scott*, 847 N.Y.S.2d at 438-39 (discussing the emails were not covered under attorney-client privilege because the doctor had no expectation of privacy); *Employers*, 2008 U.S. Dist. LEXIS 76620 at *24 (holding the documents were protected under the attorney-client privilege because the elements of the privilege were met and inadvertent disclosure did not waive the privilege).

[197] *See Jail Adds Email Option After Inmates Complain*, JOURNALSTAR.COM (Aug. 24, 2014, 04:00 PM), http://journalstar.com/news/state-and-regional/nebraska/jail-adds-email-option-after-inmates-complain/article_a91ce76e-7c9e-51b4-b0db-00672ab4e485.html (stating that inmate phone calls cost substantially more than inmate emails). The article also discusses that inmate emails are easier to screen than inmate mail. *Id.; see also Poll: Is Kansas Correct to Give Inmates Limited E-mail Access?*, CJONLINE.COM (May 14, 2009, 02:02PM), http://cjonline.com/news/state/2009-05-14/poll_is_kansas_correct_to_give_inmates_limited_e_mail_access (stating that providing email to inmates is a way to reduce contraband that enters the prison through physical mail).

[198] *See* Brief of United States II, *supra* note 10 at 16 (discussing the document intensive nature of the case).

[199] *See* Transcript, *supra* note 5, at 20 (discussing the government's interest in using such a cheap, easy, and problem eradicating filtering technology for

B. Non-confidentiality Agreements

The TRULINCS system provides a message that must be accepted in order to use the inmate email system.[200] This message notifies inmates and whatever party they are communicating with that the emails are not privileged and there is no expectation of privacy as to the content of the emails.[201] However, inmates do not have a choice but to click "ok" to use the system, and despite such a message many inmates and their attorneys think the attorney-client privilege still applies to the email's contents.[202] Therefore, once a filtering system is implemented, the non-confidentiality agreement should be edited to provide an exception for privileged communications between an inmate and his or her attorney.[203] This helps to reduce any confusion as to the applicability of the attorney-client privilege.[204] Even though the Bureau of Prisons has a right to monitor inmates, this right of monitoring should not invade the inmate's right to the attorney-client privilege.[205]

There is no adequate reason for denying extension of the attorney-client privilege to inmate emails and including this exception in the non-confidentiality agreement on the TRULINCS clickwrap agreement. The government argues in Dr. Ahmed's case that the motive behind non-confidentiality of inmate emails is to "preserve government resources" and has nothing to do with gaining a tactical advantage.[206] However, as discussed above, the financial

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inmate emails).

[200] *See* Brief of United States I, *supra* note 8, at 2 (providing an example of the TRULNICS non-confidentiality message).

[201] Brief of United States I, *supra* note 8, at 2.

[202] *See Novak*, 531 F.3d at 103 (discussing that non-confidentiality agreements lead to greater uncertainty regarding the attorney-client privilege).

[203] *See* Brief of United States II, *supra* note 10, at 2 (discussing that besides an attorney-client privilege issue, the non-confidentiality clause with regard to inmate email also raises a Sixth Amendment right to counsel issue).

[204] *Compare* Brief of United States I, *supra* note 8, at 3-4 *with* Brief of Morris Fodeman, *supra* note 12 at 1-2 (showing how litigation arises out of non-confidentiality agreements when different sides of the litigation characterize the agreements differently).

[205] *See* R. Aubrey Davis III, *Big Brother the Sneak of Big Brother the Sentry: Does a New Bureau of Prisons Regulation Truly Abrogate the Attorney-Client Privilege?*, 27 HAMLINE L. REV. 163, 167 (2004) (discussing that the Bureau of Prisons needs "reasonable suspicion" in order to monitor confidential information). There is also a notice requirement, and such notice must be given before any confidential information can be used in court against a defendant. *Id.* at 180. Therefore, the constitutionality of monitoring the confidential information can be challenged before it is used. *Id.*

[206] *See* Brief of United States I, *supra* note 8, at 4 (arguing that government resources, which are already low, would be wasted separating inmate-attorney emails when the non-confidentiality agreement already states they are not privileged).

expenditure for this technology is minimal.[207] Furthermore, the comparison of TRULINCS monitoring inmates to a company monitoring its employees is inapt, because inmates lack the ability to waive or dispute the non-confidentiality agreement.[208] Unlike the restrictions set forth in the corporate setting, inmates do not have the ability to communicate with counsel over email by any other means.[209] Even though the inmate is clicking "okay," the waiver is completely involuntary in that the inmate has no other option if he or she needs to access the email system.[210] Also, the inmate population has generally low literacy levels, which reduces the ability to understand waiver and non-confidentiality agreements.[211] As the judge discussed in Dr. Ahmed's case:

> Now, in this case, Mr. Fodeman has a client who has a high level of education and so it would be an easy thing for Mr. Fodeman to explain to him, this is the procedure you have to follow, and he likely will be more able to execute that than another inmate like the defendant I had before me this morning who only had a third grade education and doesn't speak English.[212]

Therefore, the application of the attorney-client privilege in relation to inmates has to be looked at in conjunction with the person attempting to invoke the privilege. The client controls the privilege because the privilege is meant to protect the client.[213] Thus, without an understanding of the privilege by the client, or the attorney for that matter, the privilege is rendered useless.

V. CONCLUSION

Currently, the attorney-client privilege does not uniformly apply to inmates' email correspondence with their attorneys. Prison

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[207] *See supra* notes 160, 162 and accompanying text (discussing the ease of email filtering and how it has already been somewhat implemented into prison email systems).

[208] *Supra* notes 160, 162 and accompanying text.

[209] *See Scott*, 847 N.Y.S.2d at 438-39 (detailing that a doctor knew the privilege did not apply, and he could have used a different email and not the hospital email if he wanted the privilege to apply).

[210] *See* Ken M. Zeidner, Note, *Inadvertent Disclosure and the Attorney-Client Privilege: Looking to the Work-Product Doctrine for Guidance*, 22 CARDOZO L. REV. 1315, 1343 (2001) (discussing that under the subjective intent approach "a truly inadvertent disclosure of privileged documents does not waive the attorney-client privilege because the client did not intend to waive it").

[211] *National Assessment of Adult Literacy and Literacy Among Prison Inmates*, 24 ALASKA JUSTICE FORUM 2, (2007), http://justice.uaa.alaska.edu/forum/24/2summer2007/b_literacyinmates.html (discussing that literacy levels of inmates are generally lower than that of the free population).

[212] Brief of United States II, *supra* note 10, at 19.

[213] *Lopes*, 688 F. Supp. 2d at 1058.

communications present some of the most important questions of the attorney-client privilege. The attorney-client privilege needs to evolve with technology in order to survive and provide clients with protection, and therefore must be extended to inmate emails. Extending this privilege to inmate emails is cost efficient, effective, and convenient. Moreover, all of the complexities and confusion can be mended by imposing an inmate email filtering system and a clear agreement preceding each email discussing the confidentiality of attorney-client communications. Although Dr. Ahmed allegedly committed acts of Medicare fraud, he deserves a fair trial and the ability to speak freely and confidentially with his counsel. The interest of justice should always extend inside the prison bars.