The Assault on the Citadel of Privilege Proceeds Apace: The Unreasonableness of Law Office Searches

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NOTES

THE ASSAULT ON THE CITADEL OF PRIVILEGE
PROCEEDS APACE: THE UNREASONABLENESS
OF LAW OFFICE SEARCHES

INTRODUCTION

At approximately 9:00 a.m. on March 21, 1979, a number of agents from the State Attorney General’s office entered without notice the offices of a California law firm. Armed with a search warrant, the agents sought to secure and seize from the office files documentary evidence of criminal activity by one of the firm’s corporate clients. The warrant permitted the search of “all rooms, lofts, attics, basements, desks, closets, filing cabinets, safes, vaults, and all parts therein” for records covering a five-year period, and referred to four attachments containing nine pages with over seventy related entities, persons, and documents. The agents assembled the attorneys in the reception area until the floor was “secured.” They rummaged through private offices and examined private papers in desks and on tabletops. Despite an agreement to produce the relevant files, the officers continued to inspect the firm’s centralized file catalogue, and required the production of thirty additional files. The search continued for over three hours, terminating when a temporary restraining order was issued by a Superior Court Judge. The agents left without taking any of the material specified in the warrant.

Unfortunately, this account is neither fictionalized nor uncommon. Currently, in only two states, a search warrant may not issue ex parte to authorize the search of an attorney’s office for evidence if the attorney’s client is the subject of a criminal
investigation. Law office searches have been made under the aegis of Zurcher v. Stanford Daily, in which the Supreme Court held that the fourth amendment does not prohibit the use of a search warrant merely because the owner of the place to be searched is an innocent party to the investigation, and a subpoena may be a practical alternative.

Although a literal reading of Zurcher appears to support the constitutionality of law office searches, the Court established that reasonableness is a consideration, separate from particularity and probable cause, for the magistrate issuing a search warrant for a nonsuspect target. Because the quantum of reasonableness inherent in any search may vary depending on the material sought and the area involved, some searches may be unreasonable even though supported by probable cause.

Using the criteria established in Zurcher, this Note argues that law office searches are unreasonable because society’s interest in effective law enforcement does not outweigh its interest in protecting the confidentiality of the attorney-client relationship. The use
of a search warrant to secure information in an attorney's custody circumvents the assertion of the attorney-client privilege and the work product doctrine, thereby exposing normally unobtainable confidential information to the police. Although privileged items can be suppressed after the search, "[o]nce that information is revealed to the police, the privileges are lost, and the information cannot be erased from the minds of the police." The deleterious impact of these searches on the goals of the attorney-client privilege, the work product doctrine, and the fourth and sixth amendment rights of the investigation's target—the client—cannot be gainsaid.

Legislatures have attempted to alleviate this problem by enacting protective legislation. The Zurcher Court specifically invited this type of legislation, indicating that Congress and the states could limit the use of third party search warrants. The Justice Department, pur-
suant to the Privacy Protection Act of 1980, has promulgated guidelines that purportedly regulate federally conducted law office searches. In California, the legislature recently responded to the legal profession's concerns by enacting legislation requiring a procedure that is a compromise between the use of a search warrant and a subpoena for securing information in an attorney's custody. This Note analyzes the Privacy Protection Act of 1980, the Guidelines promulgated by the Justice Department, and the California legislation. In conclusion, this Note suggests alternatives to the search warrant that are less restrictive of the statutory and constitutional rights of the attorney and his client.

I. THE FOURTH AMENDMENT REQUIREMENT OF REASONABLENESS

A. The Zurcher Balance

The primary purpose of the fourth amendment is to protect the individual's reasonable expectation of privacy from unreasonable search. The trend toward broader interpretation of state constitutional provisions equivalent to the fourth amendment has been encouraged in recent Supreme Court decisions. See Pennsylvania v. Mimms, 434 U.S. 106, 116-24 (1977) (Stevens, J., dissenting); South Dakota v. Opperman, 428 U.S. 364, 395-96 (1976) (Marshall, J., dissenting). See also 1 W. Ringel, supra note 11, § 2.6, at 2-16 (2d ed. 1980); Bloom, supra note 9, at 51; Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 498-500 (1977); 4 Hamline L. Rev. 165, 169 (1950).


31. The Attorney General's Office is on record as stating that if they are "investigating a white-collar criminal and need specific documentary evidence of his crime, [they] have no compunctions about getting a search warrant [for the offices of his lawyer], and . . . will." Search-warrant fever spreads to Calif. firms, 65 A.B.A.J. 886-87 (1979).


33. The term "reasonable expectation of privacy" originated in Katz v. United States, 389 U.S. 347 (1967). Justice Harlan stated that a reasonable expectation of privacy is a subjective expectation that society would find reasonable. Id. at 361 (Harlan, J., concurring). This language was subject to varying interpretations. Kitch, Katz v. United States: The Limits of the Fourth Amendment, 1968 Sup. Ct. Rev. 133, 137; Parker, A Definition of Privacy, 27 Rutgers L. Rev. 275, 276 (1974); Stone, The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents and Informers, 1976 Am. B. Foundation Research J. 1193, 1212; Weinreb, Generalities of the Fourth Amendment, 42 U. Chi. L. Rev. 47, 83 (1974). In Rakas v. Illinois, 439 U.S. 128 (1978), the Supreme Court further refined the definition by stating that a privacy expectation is legitimated by "a source outside of the fourth amendment," by reference to property rights, or to understandings that are recognized and permitted by society. Id. at 143-44 n.12. Additional considerations are whether the person has taken precautions customarily taken by one seeking privacy, and has used the place to be searched in the manner of one expecting privacy. Id. at 153 (Powell, J., concurring). The attorney and client's expectation of privacy is legitimated by the sixth amendment and the common-law privileges accorded attorney-client com-
governmental intrusion. The fourth amendment does not make the home or office a sanctuary beyond the reach of the law, but it does guarantee that the government will not search and seize without probable cause or in a procedurally improper manner. The first clause of the fourth amendment institutes a “right . . . to be secure . . . against unreasonable searches and seizures.” The second clause lists specific requisites for the issuance of a valid warrant. The relationship between these clauses has generated an ongoing debate.


37. Id., cl. 2. The manner in which a warrant is executed is mandated by Fed. R. Crim. P. 41(c), (d), comparable state statutes, see Cal. Penal Code §§ 1530-1538 (West 1970 & Supp. 1979); Mich. Comp. Laws Ann. §§ 780.652-656 (West 1968); Wis. Stat. Ann. §§ 968.14-.20 (West 1971 & Supp. 1980), and the “knock and announce” statute, 18 U.S.C. § 3109 (1976). These rules specify the period of the warrant’s validity, the time of day it may be executed, the manner in which the executing officers may enter the premises to be searched, and the ministerial requirements regarding the disposition of the property seized. See Langhome, Formal Requirements For Execution of Search Warrant, 6 Search & Seizure L. Rep., Sept. 1979, at 1. The issuance of a warrant must be based on probable cause, the certainty that the items sought are present in the place to be searched. Probable cause lies between bare suspicion and guilt beyond a reasonable doubt. Armentano, The Standards for Probable Cause Under the Fourth Amendment, 44 Conn. B.J. 137, 144 (1970); see Bacigal, The Fourth Amendment in Flux: The Rise and Fall of Probable Cause, 1979 U. Ill. L.F. 763. The magistrate has a duty to investigate the truthfulness of the material allegations of the affidavit supporting the warrant so that challenges may be properly entertained during suppression hearings. State v. Davenport, 510 P.2d 78, 82 (Alaska 1973). The magistrate must eliminate searches not based on probable cause, and he must ensure that “those searches deemed necessary [are] as limited as possible.” Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).

38. As Justice White has aptly stated, “translation of the abstract prohibition against ‘unreasonable searches and seizures’ into workable guidelines for the decision
The reasonableness clause has generally been the basis of court decisions determining the validity of a warrantless search and seizure.\textsuperscript{39} It is usually assumed that a search is reasonable if the express requirements of the warrant clause, probable cause and particularity, are satisfied.\textsuperscript{40} A second view has been advanced, however, that the warrant clause places procedural requirements on the government's power to search, while the reasonableness clause imposes a substantive limitation.\textsuperscript{41} Thus, all warrants must fulfill the requirements of the warrant clause and must additionally be adjudged reasonable. Inherent in this view is a hierarchy of fourth amendment protection recognizing that the threshold of reasonableness increases as the privacy expectations affected by the search increase.\textsuperscript{42} For example, a warrant "sufficient to support the search of an apartment or an automobile [would not necessarily] be reasonable in supporting the search of a newspaper office."\textsuperscript{43}

Although support for the view that the warrant clause and the reasonableness clause have a concurrent application can be found in prior opinions,\textsuperscript{44} the Court's opinion in \textit{Zurcher} is most supportive of

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\textsuperscript{40} \textit{Camara v. Municipal Court}, 387 U.S. 523, 528 (1967); see \textit{McKenna}, \textit{supra} note 34, at 707, 713.

\textsuperscript{41} McKenna, \textit{supra} note 40, at 81-84. "The two clauses of the fourth amendment are grammatically independent and there is no conceptual obstacle to a holding that the reasonableness requirement 'transcends the procedural safeguards of particularity and probability in the second clause.'" \textit{Id.} at 81 (quoting T. Taylor, Two Studies in Constitutional Interpretation 67 (1969)).


\textsuperscript{44} Relying on an historical analysis of the fourth amendment's drafting, Justice Douglas argued that the fourth amendment clauses operate independently. Warden
this position, at least in the context of a nonsuspect third party search. In Zurcher, the Court was not considering a warrantless search and seizure, for the Stanford Daily’s offices were searched pursuant to a valid warrant. Yet, the Court repeatedly asserted that “reasonableness” is the overriding test of compliance with the Fourth Amendment, and consistently listed reasonableness as a standard separate from the warrant clause requirements.

The Zurcher majority did not specifically articulate a balancing test to assess reasonableness, stating that “[t]he Fourth Amendment has itself struck the balance between privacy and public need.” In effect, however, the Court weighed the Stanford Daily’s interests against the public’s interest in law enforcement and upheld the search because its intrusiveness was properly limited by the warrant requirements of the fourth amendment—“probable cause, specificity, and overall reasonableness.” The Zurcher Court thus applied the balancing test historically required by the Court in fourth amendment cases—the need for the search on the one hand, and the threat of disruption to the occupant on the other.

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46. Id. at 559; see Cady v. Dombrowski, 413 U.S. 433, 439 (1973) (“[t]he ultimate standard set forth in the Fourth Amendment is reasonableness”).

47. The Zurcher Court referred to the magistrate’s responsibility to issue warrants and determine the reasonableness of a search. Zurcher v. Stanford Daily, 436 U.S. 547, 564 (1978). The Court emphasized that “[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.” Id. (quoting Roaden v. Kentucky, 413 U.S. 496, 501 (1973)). The Court listed “probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness” as the preconditions for a warrant. Id. at 565. It also listed “specificity and reasonableness” as requirements to safeguard privacy. Id. at 566. Most significantly, the Court indicated that a search that met the warrant requirements might nevertheless be adjudged unreasonable. Id. at 559-60. In Michigan v. Tyler, 436 U.S. 499 (1978), decided on the same day as Zurcher, the Court directed the magistrate issuing a search warrant for an administrative inspection following a fire “to assure that the proposed search will be reasonable, a determination that requires inquiry into the need for the intrusion on the one hand, and the threat of disruption to the occupant on the other.” Id. at 507; see Blackie’s House of Beef, Inc. v. Castillo, 480 F. Supp. 1078, 1084-86 (D.D.C. 1979).


49. Id. at 565.


LAW OFFICE SEARCHES

Criteria for assessing the disruption threatened by a search of a nonsuspect third party are listed in Justice Powell's concurring opinion in Zurcher. In Justice Powell's view, which he maintained was also that of the majority, the requirement of reasonableness compels the magistrate to consider five factors. These are (1) the description of the evidence sought, its nature and significance; (2) the premises to be searched; (3) the position and interests of the owner or occupant; (4) the magnitude of the proposed search; and (5) the constitutional values affected.

The Zurcher Court underscored the need for the search in its emphasis of the public interest in implementing the criminal law. In the Court's opinion, this need is most effectively served by the use of a warrant because the delay inherent in the use of a subpoena involves hazards to criminal investigation. Warrants are often used early in an investigation when the identities of all suspects are not known. The Court feared that third parties may not always be innocent or may be sympathetic to the culpable parties, and might therefore destroy or conceal the evidence if given advance notice of the prosecution's interest in the information. The recipient of a subpoena may also assert the fifth amendment privilege against self-incrimination and thus frustrate the government's efforts to obtain the

53. Id. (Powell, J., concurring).
54. Id. (Powell, J., concurring).
55. Id. (Powell, J., concurring).
56. Id. at 570 n.2 (Powell, J., concurring).
57. Id. at 570 (Powell, J., concurring). The Zurcher Court indicated that it did not believe that there would be any chilling effect on press access to confidential sources as a result of the search. Therefore, there would be no constitutional violation. Id. at 506. Moreover, the Court has not recognized a newsman's privilege of confidentiality. Branzburg v. Hayes, 408 U.S. 665, 690-91 (1972). Furthermore, much of the information in a newspaper office is intended for publication, and the newspaper cannot claim a fourth amendment expectation of privacy in such information. The Supreme Court has stressed that "[w]hat a person knowingly exposes to the public... is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967); cf. United States v. Miller, 425 U.S. 435, 442 (1976) (no reasonable expectation of privacy in banking records); Couch v. United States, 409 U.S. 322, 335 (1973) (no reasonable expectation of privacy in records given to accountant for tax preparation). See also O'Brien, supra note 34, at 734-36; 26 DePaul L. Rev. 146 (1976).
59. Id. at 561.
60. The Court feared that the custodian of the incriminating material would destroy it or would notify the suspect. The Court also feared that the suspect would have access to the material and might destroy it. Id. The staff of the Stanford Daily had announced a policy of destroying evidence sought by the police in connection with demonstrations. Id. at 568 n.1 (Powell, J., concurring).
61. Id. at 561.
Finally, the Court argued that search warrants are more difficult to obtain than subpoenas. The rational prosecutor, therefore, will not use a search warrant when it is inappropriate.

The Zurcher Court, considering these factors, held that the search of a nonsuspect third party is not unreasonable per se and all third parties do not deserve special fourth amendment protection. This decision emphasizes that no area is inherently private; rather, an individual's actual expectations of privacy are determined to be reasonable and protected by reference to the place searched and the circumstances. Therefore, the Zurcher holding does not preclude a finding that some third parties deserve and require special protection because they may be uniquely situated.

B. Impact On Attorney-Client Interests

Attorneys and their clients may require special protection from search warrants because they are uniquely situated. The attorney-client relationship has been accorded safeguards by society in the interest of the effective functioning of the adversary system, which preserves the dignity of the individual by assuring that he is given protective rights against the power of the state. These safeguards

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62. Id. at 561 n.8. To hold a search and seizure constitutionally permissible under the fourth amendment because the use of a subpoena might lead to the valid invocation of one's fifth amendment privilege against self-incrimination seems anomalous. "If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." Escobedo v. Illinois, 378 U.S. 478, 490 (1964) (footnotes omitted).

63. Zurcher v. Stanford Daily, 436 U.S. at 562-63. The Court failed to recognize that prosecutors may prefer warrants to subpoenas. The use of a warrant avoids litigation prior to the seizure of the evidence. Additionally, a warrant allows the officers to inspect materials themselves without relying on the good faith of the subpoenaed party and to discover undisclosed or otherwise unavailable evidence. See Tarlow, supra note 6, at 15-16; The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57, 207-08 (1978) [hereinafter cited as 1977 Term].


65. Kitch, supra note 33, at 136 ("[i]t is not the nature of the area . . . but the relationship between the area and the person incriminated by the search that is critical").

66. Attorneys have been granted state statutory privileges from revealing the contents of their files. See, e.g., Iowa Code Ann. § 622.10 (West 1980) (attorney not allowed to disclose client's secrets); Neb. Rev. Stat. § 27-503 (1979) (client has privilege to refuse disclosure); Wis. Stat. Ann. § 905.03(2) (West 1975) (same). Fed. R. Evid. 501 establishes a general rule of privilege that makes the common law in the jurisdiction in which the federal court is sitting applicable in federal litigation.


68. See M. Freedman supra note 67, at 2-4. "[T]he Constitution of the United States . . . attempts to preserve the dignity of the individual and to do that guaran-
are provided by the attorney-client privilege, the work product doctrine, and the sixth amendment.

1. The Attorney-Client Privilege

The attorney-client privilege is supportive of the goals of the adversary system. The privilege, "born of the law's own complexity," is designed to encourage clients to consult candidly with their attorneys, thereby facilitating effective representation. The privilege extends to verbal statements, documents, and tangible objects conveyed by both individual and corporate clients to the attorney in confidence for the purpose of obtaining legal advice. Although the privilege
belongs to the client and only he may waive it, the attorney may assert the privilege on the client's behalf.

The attorney's common-law obligation to maintain the secrecy of his communications with his client is made a professional mandate by the Canons of Ethics. The goal of this ethical obligation is to promote the full development of facts essential to effective representation. The attorney is subject to sanctions, and even disbarment, for breaching this obligation of confidentiality, which is broader than the attorney-client privilege.


72. C. McCormick, Law of Evidence § 92, at 192 (2d ed. 1972); see People v. Doyle, 74 Cal. App. 3d 691, 692, 141 Cal. Rptr. 639, 641 (1977) (consent of an attorney to a warrantless search of a client's files was held ineffective as only the client may waive the privilege).

73. C. McCormick, supra note 72, § 92, at 192-94. The client may assert the privilege even though he is not directly involved in the dispute in which the privileged testimony is sought. Id. at 192-93.

74. ABA Code of Professional Responsibility, EC 4-1 (1976). "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed him. A client must feel free to discuss whatever he wishes with his lawyer. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system." Id.

75. Id.

76. Id. DR 4-101(A), (B)(1); e.g., Cal. Bus. & Prof. Code § 6068(e) (West 1974) (attorney required to "maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client"); Minn. Stat. Ann. § 481.06(5) (West 1971) (attorney required to keep inviolate the confidences of his client); Or. Rev. Stat. § 9.460(5) (1979) (same as California statute); see Lawyer Scolded For Airing Client's Perjury Strategy, Nat'l L.J., July 28, 1980, at 3, col. 2 (Attorney revealed to judge client's desire to use perjured testimony and asked to withdraw from the case. The lawyer was not allowed to withdraw and was chastized by the district court and the court of appeals for revealing his client's intentions). But see Frankel, The Search For Truth—An Umpireal View, 30 Rec. A. Bar City N.Y. 14, 15 (1975) ("our adversary system rates truth too low among the values that institutions of justice are meant to serve"). The Kutak Commission, appointed by the A.B.A. to draft a new code of ethics, has suggested a decrease in the confidentiality requirements of the current code. A.B.A.'s Comm'n on Evaluation of Professional Standards, Model Rules of Professional Conduct 14-19 (1980); Kaufman, A Critical First Look at the Model Rules of Professional Conduct, 66 A.B.A.J. 1074, 1077 (1980). See generally, Comment, The Attorney's Obligation of Confidentiality—Its Effect on the Ascertainment of Truth in an Adversary System of Justice, 3 Glendale L. Rev. 81 (1980).

77. The obligation of confidentiality exists without regard to the nature or source of the information or the fact that it is known by others. ABA Code of Professional Responsibility, EC 4-4 (1976).
The results of allowing a search of law offices would be devastating. During a law office search, not only would the attorney-client privilege be violated with respect to the client under investigation, but the rights of other clients represented by the attorney would be violated as the police inspected their files as well. These "fourth parties" have entrusted confidential information to the attorney, and their rights should be respected. Furthermore, "fourth parties" whose rights are violated by a law office search face the severe problem presented by the "plain view" doctrine of the fourth amendment. Under this doctrine, any property that inadvertently comes into view during the course of a legitimate search is subject to warrantless seizure. The necessity of probable cause to believe that papers and effects have evidentiary value is the only limitation on the government's right to seize them. A law office search could thus become a treasure hunt for information unrelated to the specific investigation.

The most serious problem posed by a law office search, however, is its chilling effect on attorney-client communications. A client will be understandably reluctant to reveal potentially damaging information to his attorney if he believes that it may become available to the police. Without complete disclosure of all relevant information, the

78. A client's reasonable expectation of privacy as to information maintained by his attorney in his files is not predicated on whether the material falls within the attorney-client privilege. Couch v. United States, 409 U.S. 322, 350 (1973) (Marshall, J., dissenting); People v. Doyle, 74 Cal. App. 3d 691, 691, 141 Cal. Rptr. 639, 640 (1977). Therefore, a law office search results in a breach of not only the attorney-client privilege, but also of the client's expectations of privacy.


83. Fisher v. United States, 425 U.S. 391, 403 (1976); M. Freedman, supra note 67, at 4-5; Tarlow, supra note 6, at 17. "This 'chilling effect' may lead to the conviction of innocent persons who hesitate to divulge information which, for instance, may be embarrassing, may seem incriminating, or may implicate other persons in crimes." Note, Government Interceptions of Attorney-Client Communications, 49 N.Y.U. L. Rev. 87, 88 (1974) [hereinafter cited as Government Interceptions].
attorney cannot give competent legal advice. Thus, searches will undermine the trust and candor essential to the attorney-client relationship and render nugatory the purpose of the attorney-client privilege.

2. The Work Product Doctrine

The work product doctrine, which is "distinct from and broader than the attorney-client privilege," also advances the goals of the adversary system. The doctrine shelters from opposing counsel the "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and . . . other tangible and intangible" information an attorney assembles in his preparation of a case for trial. The doctrine may encompass documents prepared by or for the attorney, and may be asserted by the attorney and the client, in either civil or criminal cases. The purpose of the doctrine is to

84. United States v. Louisville & Nashville R.R., 236 U.S. 318, 336 (1915). "If such communications were required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance." Id.

85. The work product doctrine was developed as a qualified privilege by the Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947).

86. United States v. Nobles, 422 U.S. 225, 238 n.11 (1975); In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 801 (3d Cir. 1979); In re Murphy, 560 F.2d 326, 337 (8th Cir. 1977).


90. United States v. Nobles, 422 U.S. 225, 238-39 (1975); In re Grand Jury Proceedings (Duffy), 473 F.2d 840, 846 (8th Cir. 1973); see State v. Bowen, 104 Ariz. 138, 144, 449 P.2d 603, 607 (en banc) (defendant is not entitled to examine work product of prosecutor), cert. denied, 396 U.S. 912 (1969); Fisher v. State, 241 Ark. 545, 548-49, 408 S.W.2d 894, 897 (1966) (prosecuting attorney's work product unavailable to the defense), cert. denied, 389 U.S. 821 (1967). The work product doctrine can be asserted both before and during trial and is a valid ground for refusal of a grand jury subpoena. In re Grand Jury Proceedings (Duffy), 473 F.2d 840, 842 (8th Cir. 1973); In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 946 (E.D. Pa. 1976). Work product materials can be discovered in civil cases by showing that the material was not prepared in anticipation of litigation or that there is a substantial
ensure the attorney the privacy essential to the thorough preparation
and presentation of his case for trial. The Supreme Court feared
that without such protection attorneys would leave unwritten much of
the information important to the efficient preparation of a case to the
detriment of the legal profession and the justice system.

During a law office search, the police will inevitably view the attor-
ney's work product materials, including his investigations and defense
plans. This exposure of essential evidence and trial strategy would
circumvent the espoused purpose of the work product doctrine and
would place the defense attorney in the untenable position of being
the unwitting ally of the prosecution. Furthermore, the seizure of
material from the attorney's office could result in his being called as a
witness. Both the Supreme Court and the lower courts have dis-
couraged any practice that forces an attorney to be both litigator and
witness because it impairs his effectiveness at trial. The attorney
might even find it necessary to withdraw from the case, depriving
the client of his choice of counsel. Thus, the violation of the work

need for the information and a substantial equivalent cannot be obtained by other
generally Comment, Discovery of Attorney's Work Product, 12 Gonzaga L. Rev. 284
93. See Henry v. Ferrin, 609 F.2d 1010, 1012 (1st Cir. 1979), cert. denied, 445
U.S. 963 (1980); Tarlow, supra note 6, at 17; Government Interceptions, supra note
83, at 90; cf. United States v. Colacurcio, 499 F.2d 1401, 1404 (9th Cir. 1974)
(lawyer called to testify in grand jury loses privacy essential to defense preparation).
94. The lawyer "cannot but feel the disagreeable inconsistency of being at the
same time the solicitor and the revealer of the secrets of the cause. This double-
minded attitude would create an unhealthy moral state in the practitioner. Its con-
crete impropriety could not be overbalanced by the recollection of its abstract desira-
bility." 8 J. Wigmore, supra note 67, § 2291, at 553.
96. See id. at 252-53. "Every lawyer dislikes to take the witness stand and will do
so only for grave reasons. This is partly because it is not his role; he is almost
invariably a poor witness. But he steps out of professional character to do it. He
regrets it; the profession discourages it." Hickman v. Taylor, 329 U.S. 495, 517
(1947) (Jackson, J., concurring); see In re Terkeltoob, 256 F. Supp. 683, 686
1976). The government's request to call defense counsel before the grand jury was
denied because it would "create the possibility of a conflict of interest between attor-
ney and client, which may lead to [the] suspect's being denied his choice of counsel
by disqualification." Id. The court also noted that the attorney-client relationship
would be impaired by the very presence of the attorney in the grand jury room
because it would raise doubts in the client's mind as to the attorney's devotion to the
client's interests. Id. at 946. The lawyer is professionally required to withdraw if
called on to be a witness. ABA Code of Professional Responsibility, EC 5-9, 5-10,
DR 5-102 (1976).
product doctrine resulting from a law office search inevitably creates conflict between lawyer and client and undercuts the adversarial tension between opposing counsel that is necessary to the effective functioning of the judicial system.98

A law office search hampers the defense attorney’s effectiveness in other ways. Threatened by the spectre of a search, the attorney might feel forced to practice self-censorship or obfuscating techniques that would hinder his ability to assist his client.99 If information essential to trial preparation is seized by the police, the attorney may find it difficult to secure its return100 and would have to prepare his case without the materials.

3. The Sixth Amendment Right To Counsel

The impartial balance essential to the effective functioning of the adversary system is ensured by the constitutional rights accorded the individual.101 Before a state may deprive any person of life, liberty, or property in a criminal proceeding, he must be granted the right to counsel, trial by jury, due process, and the privilege against self-

98. See M. Freedman, supra note 67, at 2-4; cf. Wardius v. Oregon, 412 U.S. 470, 474-77 (1973) (the due process clause of the fourteenth amendment is violated if a defendant is required to divulge the details of his own case while he is subjected to the surprise of the prosecutor’s case); United States v. Wright, 499 F.2d 1181, 1195 (D.C. Cir. 1973) (the defendant has a fifth amendment right to compel the state to investigate and prove its own case; “[t]he defense has no duty to help the prosecution convict the defendant”).

99. Covert methods to limit the intrusiveness of a search, such as abandoning the practice of having a client write a complete account of an incident, using intentional ambiguity in filing, removing and secreting essential documents, will result in inconvenience, inefficiency, and confusion. Tarlow, supra note 6, at 17. See also Note, Legal Ethics and the Destruction of Evidence, 88 Yale L.J. 1665 (1979) [hereinafter cited as Destruction of Evidence].


101. See M. Freedman, supra note 67, at 2-4. The adversary system proceeds on the assumption “that the best way to ascertain the truth is to present to an impartial judge or jury a confrontation between the proponents of conflicting views, assigning to each the task of marshalling and presenting the evidence in as thorough and persuasive a way as possible.” Id. at 4.
incrimination. Of these rights, the right to counsel is the most important because it is essential to the assertion of all rights.

The sixth amendment right to counsel includes the right to confer with one's lawyer. Yet, this right is ineffective "if the client knows

102. In Andresen v. Maryland, 427 U.S. 463 (1976), the Supreme Court held that a search and seizure of incriminating private papers does not violate the search target's fifth amendment right against self-incrimination because the element of compulsion is absent in a search. Id. at 477. Therefore, under a literal reading of Andresen, a client's fifth amendment right against self-incrimination is not violated by a search of his attorney's office because the client has no fifth amendment objection to a search and seizure of his private papers. In reaching its decision that the documents were obtained without compulsion, the Andresen Court emphasized three factors. First, the information was obtained by the police without the defendant's assistance. Second, the incriminating statements were voluntarily committed to paper. Third, the papers were authenticated by a handwriting expert, and thus required no possessory admission by the defendant. In Andresen, therefore, the defendant was not required "to say or to do anything." Id. at 473. An attorney's client is in a different position. Having been placed in an adversarial position by the government, the client is compelled to divulge all possibly relevant information to his attorney to exercise his sixth amendment right to the effective assistance of counsel. Yet, by divulging this incriminating information, the client is subject to its use against him following a search of his attorney's office. To retain his right against self-incrimination, the client must sacrifice full and honest communication with his attorney. The client is thus required to choose between benefits, essentially conditioning the exercise of one constitutional right on the waiver of another. Attorney-Client Privilege, supra note 24, at 485-86. Such forced sacrifice of constitutional rights should not be countenanced. Comment, Search of the Lawyer's Office—Court-Sanctioned Threat to Confidential Communications, 32 Ala. L. Rev. 92, 126 (1990). Information unavailable by subpoena from an attorney's office because of the fifth amendment, see Fisher v. United States, 425 U.S. 391, 405 (1976); Couch v. United States, 409 U.S. 322, 337 (1973) (Brennan, J., concurring), should not become available by the use of a search warrant because the information is essentially "compelled." See Search and Seizure, supra note 82, at 368-75. See generally McKenna, supra note 40; 26 DePaul L. Rev. 848 (1977).

103. Miranda v. Arizona, 384 U.S. 436, 481 (1966) ("the attorney plays a vital role in the administration of criminal justice under our Constitution"); Clark, Fulfilling the Right to the Effective Assistance of Counsel, 19 Washburn L.J. 395, 395 (1980) (sixth amendment right to counsel is essential to the assertion of all constitutional rights). The sixth amendment right to counsel and the fifth amendment right against self-incrimination provide a constitutional basis for the attorney-client privilege. Attorney-Client Privilege, supra note 24, at 485-86.

104. Geders v. United States, 425 U.S. 80, 88-89 (1976); see Gideon v. Wainwright, 372 U.S. 335, 339-44 (1963) (right to court appointed counsel); Reynolds v. Cochran, 365 U.S. 525, 530-31 (1961) (reasonable opportunity for consultation and preparation); Avery v. Alabama, 338 U.S. 444, 446 (1940) (reasonable time to prepare defense); Powell v. Alabama, 287 U.S. 45, 71 (1932) (reasonable time to secure counsel). The right to counsel attaches when the proceeding is at a critical stage of the entire criminal process against the defendant, and after formal adversary proceedings against the accused have commenced. Kirby v. Illinois, 406 U.S. 682, 689-90 (1972). The rule set out in Kirby is accepted in most jurisdictions. In New York, however, the right to counsel attaches when counsel is actually retained, or when the suspect requests counsel. See People v. Cunningham, 49 N.Y.2d 203, 205, 400 N.E.2d 360,
that damaging information could be more readily obtained from the attorney following disclosure than from himself in the absence of disclosure.\textsuperscript{105} Therefore, "the essence of the Sixth Amendment right is . . . privacy of communication with counsel."\textsuperscript{106}

The Supreme Court acknowledged, in \textit{Weatherford v. Bursey},\textsuperscript{107} that the sixth amendment would be violated if the government purposefully intrudes on the defense camp and receives privileged information pertaining to the defense strategy because of the "chilling effect" that inheres if the client knows that his communications with his attorney are available to the government, his adversary in the criminal proceeding.\textsuperscript{108} Purposeful intrusion is most evident in instances of wiretapping and electronic eavesdropping.\textsuperscript{109} In three decisions, the Court ordered a new trial for the defendant because the government had electronically monitored attorney-client conversations.\textsuperscript{110} Even though the police had not given the information to the prosecutor's office in one case, the Court still held that the case had been prejudiced by the police action.\textsuperscript{111}

361, 424 N.Y.S.2d 421, 422 (1980); People v. Hobson, 39 N.Y.2d 479, 481, 348 N.E.2d 894, 896, 384 N.Y.S.2d 419, 420 (1976); I W. Ringel, \textit{supra} note 11, § 31.3 to 31.4(a)(1), at 31-4 to 31-21. Because the meaningful implementation of the sixth amendment right to counsel depends on the privacy of attorney-client communications, the client's sixth amendment right attaches when his attorney's office is searched. \textit{See} Brief of Minn. State Bar Ass'n As Amicus Curiae at 12-13, O'Connor \textit{v.} Johnson, \textit{\textit{---}} Minn. \textit{---}, 287 N.W.2d 400 (1979) (en banc).


108. Id. at 554 n.4.


Because compliance with a search warrant is compelled, the magnitude of the purposeful intrusion is as great as if the government surreptitiously planted monitoring devices. When the police search an attorney’s office and examine his client’s confidential files, the government is purposefully invading the defense camp, and will see privileged information pertaining to the defense strategy. The devastating pragmatic effect of the search is heightened when the target is a criminal law office because, by definition, criminal defense involves litigation in which the government is the adversary. Discovery of confidential information during the search of a criminal defense attorney’s office results in immediate disclosure to an agent of the adverse party. Prejudice, therefore, is inherent in a law office search because of the “subtle benefits” that accrue to the government through the knowledge of defense strategy and the defendant’s state of mind regarding the trial. Such knowledge will help the government agents in structuring their answers to the affirmative defense they anticipate. Moreover, affirmative evidence, or leads to evidence, will be revealed to the police. Such purposeful intrusion taints the entire trial process and produces effects that cannot be isolated and remedied.

C. Application of the Zurcher Balance

The majority in Zurcher v. Stanford Daily posited a situation that the Supreme Court has yet to define explicitly, a search that is un-

112. Henry v. Perrin, 609 F.2d 1010 (1st Cir. 1979), cert. denied, 445 U.S. 963 (1980). In Henry, the court noted that the average attorney’s files contain names of witnesses, statements by witnesses, correspondence between client and attorney, the lawyer’s notes of conversations with the client, lists of things to investigate of both a factual and legal nature, photographs and sketches. It concluded that a review of any of the file’s contents would reveal defense strategy. Id. at 1012; see O’Connor v. Johnson, ___ Minn. ___, 287 N.W.2d 400, 404-05 (1979) (en banc).


116. United States v. Rispo, 460 F.2d 965, 974 (3d Cir. 1972). In Henry v. Perrin, 609 F.2d 1010 (1st Cir. 1979), cert. denied, 445 U.S. 963 (1980), an attorney’s files were searched pursuant to penal security policy as he left the prison in which his client was being held. This search violated the client’s sixth amendment right to counsel because the mere exposure of the attorney’s files prejudiced the case. Id. at 1013-14. “The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.” Id. at 1013 (quoting Glasser v. United States, 315 U.S. 60, 76 (1942)). Similarly, in O’Connor v. Johnson, ___ Minn. ___, 287 N.W.2d 400 (1979) (en banc), the court held that the mere exposure of confidential files to the police violated the sixth amendment. Id. at 405.
reasonable despite the existence of probable cause.\textsuperscript{117} By applying the balancing test delineated in \textit{Zurcher},\textsuperscript{118} the search of a nonsuspect attorney's office appears to be such an inherently unreasonable search. Therefore, because reasonableness, along with probable cause and specificity, is a consideration for the magistrate issuing the search warrant, a warrant should only be available when society's interest in law enforcement outweighs the adverse impact of the search on the attorney-client privilege, the work product doctrine, and the client's sixth amendment rights.

To assess the impact of a law office search on the attorney-client relationship, the effects of the search must be considered in light of the criteria established by Justice Powell in \textit{Zurcher}. First, although the evidence sought may be unprivileged, to find it the police will inevitably view privileged materials. Moreover, the information sought may in fact be privileged.\textsuperscript{119} The preliminary determination of its status should be made by a court, not by the police in the law office.\textsuperscript{120}

Second, the premises searched are an attorney's office. Consequently, the search will be disruptive of valuable working time.\textsuperscript{121} It will also infringe on the privileges and rights of the attorney's other clients.\textsuperscript{122}

Third, the search will jeopardize the interests and position of both the attorney and the client. The "chilling effect" of the search on attorney-client communications and the exposure to the police of his work product materials will surely affect the attorney's ability as an advocate.\textsuperscript{123} Furthermore, the search may injure the attorney's professional reputation.\textsuperscript{124} The attorney is faced with a dilemma of

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{117} Zurcher v. Stanford Daily, 436 U.S. 547, 559-60 (1978).
  \item \textsuperscript{118} See notes 49-63 supra and accompanying text.
  \item \textsuperscript{119} See O'Connor v. Johnson, - Minn. -, 287 N.W.2d 400, 404-05 (1979) (en banc); \textit{Search and Seizure, supra} note 82, at 378-81.
  \item \textsuperscript{120} See, e.g., Palermo v. United States, 360 U.S. 343, 354-55 (1959) (in camera inspection ordered to determine status of evidence held by government); \textit{In re Fish \& Neave}, 519 F.2d 116, 118 (8th Cir. 1975) (in camera inspection ordered for subpoenaed material); \textit{In re Grand Jury Proceedings Involving Berkley \& Co.}, 466 F. Supp. 863, 868 (D. Minn. 1979) (in camera inspection ordered for seized materials), aff'd as qualified, 629 F.2d 548 (8th Cir. 1980).
  \item \textsuperscript{122} See notes 79-82 supra and accompanying text.
  \item \textsuperscript{123} See notes 83-84, 93-100, 113-16 supra and accompanying text.
  \item \textsuperscript{124} \textit{Search and Seizure, supra} note 82, at 385; see Zurcher v. Stanford Daily, 436 U.S. at 580 (1978) (Stevens, J., dissenting) (third party search may result in unjustified injury to reputation of person searched).
\end{enumerate}
\end{footnotesize}
whether to honor his ethical obligation to his client by resisting the search and risking contempt charges, or allowing the search to proceed, thereby exposing his confidential files and possibly violating a state statute requiring that he assiduously protect the information conveyed to him in confidence by his clients.125

The client's interests are adversely affected because he will not receive effective assistance from his attorney and because the police will have access to information that is normally unavailable.126 Moreover, the client's interests are not protected by the traditional post-search remedies. Neither the client nor the attorney have standing to invoke the exclusionary rule127 to suppress unprivileged material that is seized illegally because the Supreme Court has consistently rejected third party standing.128 Even if standing is given to the


126. See note 21 supra and accompanying text.


128. Both the client and the attorney will have standing to suppress privileged material. In re Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 868 (D. Minn. 1979), aff'd as qualified, 629 F.2d 548 (8th Cir. 1980). Neither may be granted standing, however, to suppress unprivileged material. A nonsuspect attorney whose office is searched may not have standing because "a person whose Fourth Amendment rights were violated by a search or seizure, but who is not a defendant in a criminal action . . . would not have standing." Rakas v. Illinois, 439 U.S. 128, 132 n.2 (1978). The client who is the target of the search might not have standing because "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." Id. at
parties to suppress privileged material,\textsuperscript{129} suppression will not serve to mitigate the "chilling effect" of the search. The prosecution may still prepare responses to defense strategies through their illegally obtained knowledge.\textsuperscript{129} Additionally, if the material is suppressed and the charges dropped, these same documents could be used in a civil action against the client.\textsuperscript{130} Finally, the client will probably not be able to obtain redress through a civil action against the police officers\textsuperscript{131} who conducted the search because the officers can defeat the action by claiming that they acted with a good faith belief that their actions were legal.\textsuperscript{132}

\textsuperscript{134} see Zurcher v. Stanford Daily, 436 U.S. 547, 562 n.9 (1978); Alderman v. United States, 394 U.S. 165, 171-74 (1969). \textit{But} see People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955) (California allows third party standing). \textit{See generally} Kuhns, supra note 127, at 530-39. The attorney and the client, however, both have a legitimate expectation of privacy in the information in the attorney's files, see note 33 \textit{supra}, and therefore should have standing to suppress illegally seized evidence. \textit{See} Rakas v. Illinois, 439 U.S. 128, 143-44 (1978); Mancusi v. DeForte, 392 U.S. 364, 368-69 (1968). The Supreme Court has never expressly addressed the issue of the client's standing to contest a law office search. Dissenting from the Court's denial of certiorari in Granello v. United States, 386 U.S. 1019 (1967), Justice Douglas, however, recognized that attorneys and clients should have standing. In \textit{Granello}, a lawyer's documents were seized in an allegedly illegal search of his premises and introduced against an alleged client in a criminal prosecution. 365 F.2d 990, 995-97 (2d Cir. 1966), \textit{cert. denied}, 386 U.S. 1019 (1967). Justice Douglas wrote that "I cannot . . . believe that if a lawyer-client relation is shown and if the search were held to be illegal, the client is without standing to move for suppression of the evidence. The dimensions of the problem are so great, in the setting of the Fourth Amendment and our enveloping regime of police surveillance . . . ." 386 U.S. at 1019 (Douglas, J., dissenting); \textit{see} United States v. Sander, 615 F.2d 215 (5th Cir.) (per curiam), \textit{cert. denied}, 101 S. Ct. 108 (1980).

\textsuperscript{129} In \textit{re} Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 801-02 (3d Cir. 1979); \textit{In re} Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 868 (D. Minn. 1979), \textit{aff'd as qualified}, 629 F.2d 548 (8th Cir. 1980).

\textsuperscript{130} \textit{See} notes 113-16 \textit{supra} and accompanying text.

\textsuperscript{131} United States v. Janis, 428 U.S. 433 (1976). In \textit{Janis}, federal officials used documents illegally seized by state officials to calculate Janis' tax liability and levied on illegally seized funds as a partial payment of taxes due. \textit{Id.} at 437-38. The Supreme Court upheld the action because the deterrent purposes of the exclusionary rule were achieved by prohibiting state's use of the evidence. \textit{Id.} at 454-60.


\textsuperscript{133} Pierson v. Ray, 386 U.S. 547, 555-58 (1967); Schoneberger v. Hinchcliffe, 28 Crim. L. Rep. (BNA) 2098, 2099 (D. Vt. Sept. 19, 1980); Fritz v. Hackett, 440 F. Supp. 592, 597-99 (W.D. Wis. 1977); \textit{see} United States v. Peltier, 422 U.S. 531 (1975). In \textit{Peltier}, the Court refused to suppress evidence seized in good faith because judicial integrity is "not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if [subsequent] decisions . . . have held that conduct . . . is not permitted by the
By Justice Powell's fourth criterion, the magnitude of the search, a law office search is unreasonable because it unavoidably results in the exposure of privileged materials.\textsuperscript{3} This intrusiveness cannot be cured by the particularity of the warrant because the police will have to search every file and examine every document to see if it is the evidence sought.\textsuperscript{135} Such a search is akin to the exploratory general search that the fourth amendment was originally designed to prevent.\textsuperscript{136}

It is insufficient to argue that a brief perusal of the files by the police is harmless error. A review of the file jacket may reveal the client's identity, which may be confidential information protected by the attorney-client privilege.\textsuperscript{137} To the extent that a file reflects orderly, professional preparation, the mental processes of the attorney may be revealed by a review of the file's captions, index, and location in the file catalog, thereby violating the work product Constitution." \textsuperscript{138}

\textsuperscript{134} O'Connor v. Johnson, --- Minn. ---, 287 N.W.2d 400, 404-405 (1979) (en banc).

\textsuperscript{135} Zurcher v. Stanford Daily, 436 U.S. 547, 573 n.7 (1978) (Stewart, J., dissenting); Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1976); O'Connor v. Johnson, --- Minn. ---, 287 N.W.2d 400, 404-05 (1979) (en banc).

\textsuperscript{136} General warrants are prohibited by the fourth amendment. "[T]he problem [posed by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S 443, 467 (1971); accord, Stanford v. Texas, 379 U.S. 476, 485 (1965); see Warden v. Hayden, 387 U.S. 294, 301 (1967); T. Taylor, supra note 41, at 67-68. The Supreme Court has held that "a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." Terry v. Ohio, 392 U.S. 1, 18 (1968). When the warrant requirement could not mitigate the intrusiveness of the search and constitutional rights were infringed, courts have declared the search to be unreasonable. Henry v. Perrin, 609 F.2d 1010 (1st Cir. 1979) (search of attorney's files declared an unreasonable search), \textit{cert. denied}, 445 U.S. 963 (1980); United States v. Willis, 85 F. Supp. 745 (S.D. Cal. 1949) (stomach pumping constitutes unreasonable search); Adams v. State, 260 Ind. 663, 299 N.E.2d 834 (1973) (a court-ordered surgical operation to remove a bullet from a suspect's body declared unconstitutional as an unreasonable search and seizure), \textit{cert. denied}, 415 U.S. 935 (1974); O'Connor v. Johnson, --- Minn. ---, 287 N.W.2d 400 (1979) (en banc) (search of attorney's office declared unreasonable search); cf. Rochin v. California, 342 U.S. 165, 169, 172 (1952) (unreasonable search of a body by use of a stomach pump violates the due process clause of the fourteenth amendment).

\textsuperscript{137} See, e.g., Tillotson v. Boughner, 350 F.2d 663, 664-65 (7th Cir. 1965) (attorney gave IRS anonymous check for additional taxes and client's identity privileged); Baird v. Koerner, 279 F.2d 623, 633 (9th Cir. 1960) (same); \textit{In re} Kaplan, 8 N.Y.2d 214, 218-20, 168 N.E.2d 660, 661-62, 203 N.Y.S.2d 836, 838-39 (1960) (attorney conveyed anonymous information to the police, and client's identity privileged).
doctrine. Even though the officers may intend to observe the privileges scrupulously, their review of the material constitutes a seizure by sight and irreparably damages the vitality of the attorney-client privilege and the work-product doctrine.

The constitutional interests affected, Justice Powell’s fifth criterion, are the client’s and the attorney’s fourth amendment right to privacy and the client’s sixth amendment right to the effective assistance of counsel. Both these constitutional rights are violated by a law office search. Thus, by Justice Powell’s five criteria the search of a nonsuspect attorney’s law office severely damages the individual’s interests in privacy. To complete the balancing process, however, the state’s interest in law enforcement must be considered.

Prosecutors are concerned that law offices will become “depositories of criminal evidence, private sanctuaries beyond the reach of law and justice.” Their concerns, however, are without foundation. Although an attorney may have a court quash a subpoena for privileged materials by invoking the attorney-client privilege and the


139. O’Connor v. Johnson, ___ Minn. ___, 287 N.W.2d 400, 405 (1979) (en banc); see notes 33-35 supra and accompanying text. "[C]oercive governmental procurement of evidence integrally related to fundamental personal rights or testimonial evidence in which the accused has a privacy interest, but which is not in his possession, should be considered a per se violation of the fourth amendment’s reasonableness clause." Note, Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments, 90 Harv. L. Rev. 945, 990 (1977).

140. O’Connor v. Johnson, ___ Minn. ___, 287 N.W.2d 400, 404-05 (1979) (en banc); see notes 103-16 supra and accompanying text. The sixth amendment right to counsel is violated if the assistance rendered is inadequate. Glasser v. United States, 315 U.S. 60, 76 (1942). The definition of adequacy of counsel is subject to varying interpretations. See W. Ringel, supra note 11, § 68, at 93-100 (1978 Supp.). Defense counsel, to satisfy the adequacy standard, must perform three essential duties: consult fully and immediately with the client to discuss all relevant matters; advise the client regarding his rights, including all actions necessary to preserve them; and conduct a sufficient investigation of the facts and law to insure that all available defenses are raised. Coles v. Peyton, 389 F.2d 224 (4th Cir.), cert. denied, 393 U.S. 849 (1968). These standards follow closely those established by the A.B.A. in its Standards for the Defense Function. W. Ringel, supra note 11, § 68, at 94 (1978 Supp.); see Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am. Crim. L. Rev. 233 (1979). If a defense attorney realistically fears that the contents of his files are subject to discovery by the police, the attorney would find himself limiting the amount of incriminating information he elicits from his client or collects about the case. Such necessary self-censorship would render nugatory the client’s sixth amendment right. See Cowger, Will Lawyers Be Giving Stanford Warnings?, 64 A.B.A.J. 1211 (1978).

141. See notes 50-51, 58-63 supra and accompanying text.

work product doctrine,143 most of the information the prosecutor legitimately needs is unprivileged and thus available by subpoena.144 The attorney-client privilege and the work product doctrine do not apply to pre-existing documents,145 to evidence,146 to non-legal communications,147 to non-confidential communications,148 to com-


143. Fisher v. United States, 425 U.S. 391, 403-05 (1976) (attorney may invoke attorney-client privilege to quash a subpoena); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967) (attorney is duty-bound to assert privilege to protect confidential communications).

144. See Fisher v. United States, 425 U.S. 391, 403-05 (1976); O'Connor v. Johnson, ___ Minn. ___, 287 N.W.2d 400, 405 (1979) (en banc). An attorney must deliver subpoenaed material or he will be held in contempt of court. Chapman v. Pacific Tel. & Tel. Co., 613 F.2d 193, 197-98 (9th Cir. 1979) (attorney held in contempt for refusal to produce written narrative statement of testimony ordered by judge); see United States v. Askew, 584 F.2d 960, 962 (10th Cir. 1978) (defendant held in civil contempt for failure to produce handwriting exemplars ordered by court), cert. denied, 439 U.S. 1132 (1979); Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 552 F.2d 498, 509-12 (3d Cir.) (attorney who refused court order held in contempt; no defense that attorney believed actions to be in client's best interests), cert. denied, 434 U.S. 822 (1977).

145. Material that could be subpoenaed from the client if it were in the client's possession does not become privileged because of a transfer to an attorney. The fifth amendment only applies "when the accused is compelled to make a testimonial communication that is incriminating." Fisher v. United States, 425 U.S. 391, 408 (1976). Pre-existing documents that are nontestimonial can be subpoenaed from an attorney. Id. at 403-04; In re Grand Jury Proceedings (Johanson), 27 Crim. L. Rep. (BNA) 2507, 2508 (3d Cir. August 21, 1980); In re Grand Jury Empanelled Feb. 14, 1978 (Markowitz), 603 F.2d 469, 476-77 (3d Cir. 1979); C. McCormick, supra note 72, § 89, at 185.


147. The privileges do not apply when the attorney acts as a "mere scrivener." C. McCormick, supra note 72, § 88, at 180. The privileges generally do not apply to objectively observable information such as the client's identity, Cannet v. First Nat'l State Bank, 410 F. Supp. 585, 588 (D.N.J.), aff'ed, 546 F.2d 1072 (3d Cir. 1976), cert. denied, 431 U.S. 954 (1977), or the client's demeanor. United States v. Kendrick, 331 F.2d 110, 114 (4th Cir. 1964).

148. See In re Horowitz, 482 F.2d 72, 81 (2d Cir.) (disclosure to third person vitiates privilege), cert. denied, 414 U.S. 867 (1973); United States v. IBM, 66 F.R.D. 206, 212 (S.D.N.Y. 1974) (an exhaustive list of documents ruled not privileged because they did not reveal confidences communicated by the client). Once waived, the privilege cannot be reinstated. In re Penn Cental Comm'1 Paper Litigation, 61 F.R.D. 433, 464 (S.D.N.Y. 1973); see, e.g., Diversified Indust. Inc. v. Meredith, 572 F.2d 606, 609 (8th Cir. 1978) (en banc) (when the client is a corpora-
communications regarding a pre-existing fiduciary obligation,\textsuperscript{149} or to communications in furtherance of a crime, fraud, or tort.\textsuperscript{150} Moreover, the privileges are not "self-operative" because the court must have an opportunity to make an inspection of any allegedly privileged documents.\textsuperscript{151} "[T]he individual citizen may not resolve himself into a court, and himself determine [a question of privilege as to] the contents of . . . papers required to be produced."\textsuperscript{152} Therefore, the prosecutor can expect an impartial resolution of his request for material in an attorney's custody.

Attorneys have a strong incentive to cooperate with the prosecutor's request for information. An attorney is required by law to give evidence to the prosecution and is subject to criminal charges and disbarment if the information is withheld.\textsuperscript{153} Attorneys are further restricted in their activities by the Canons of Ethics.\textsuperscript{154} Moreover,
pursuant to the oath at bar, attorneys are officers of the court, required to preserve and protect the judicial processes. 155

Society's interest in law enforcement is therefore adequately protected by the use of a subpoena for information in a nonsuspect attorney's custody. The hazards to criminal investigation perceived by the Zurcher Court 156 are not threatened by the advance notice and delay a subpoena entails when an attorney is the recipient. 157 Moreover, it is in society's interest to rely on the least intrusive means for securing evidence from an attorney because "[i]f our adversary system is to function according to design, we must assume that an attorney will observe his responsibilities to the legal system, as well as to his client." 158

The purpose of requiring special procedures when evidence is sought from nonsuspect attorneys is not to give them the ultimate option of preventing the government from obtaining the material. There is no doubt that certain material lawfully in an attorney's possession should be made available to the police. Rather, the protections are desirable to ensure that the material is obtained in the least intrusive manner possible, consistent with society's interests in effective law enforcement. The Supreme Court has reiterated, in United States v. Upjohn Co. 159 that the attorney-client privilege is premised on the recognition that "sound legal advice or advocacy serves public ends and that such advice . . . depends upon the lawyer being fully informed by the client." 160 For this full disclosure to be achieved, "the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." 161 Thus, unless some absolute standards are established to protect the attorney-client relationship from law office searches, the benefits that accrue to the judicial system through the attorney-client privilege, the work product doctrine, and the sixth amendment right to counsel, will be lost.

law to reveal . . . . [or] [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent").

156. See notes 59-62 supra and accompanying text.
157. Unlike a newsroom, an attorney's office does contain files of confidential information that are protected from disclosure by law. The majority in Zurcher rejected special fourth amendment protection of third parties because of the difficulty with identifying suspects in the early stages of a criminal investigation. 436 U.S. at 560 (1978). Yet, attorneys are a highly identifiable class and possess potential evidence solely because of the nature of their work. 1977 Term, supra note 63 at 206.
160. Id. at 4094.
161. Id. at 4095.
II. LEGISLATIVE RESPONSES TO LAW OFFICE SEARCHES

In response to the need to give law offices greater protection, legislation has been promulgated in California, \(^{162}\) and on a federal level, by the Justice Department. \(^{163}\) These legislative efforts provide insufficient protection, however, because as worded they allow a very expansive interpretation of the government’s right to secure a search warrant. This could result in the unfettered searching of nonsuspect attorney’s offices. Although a search warrant is undoubtedly the more convenient means for the police to gain information from a law office, considerations of convenience cannot overcome the policies served by the protections accorded the attorney-client relationship. \(^{164}\)

Because the requirement of reasonableness compels the magistrate to invalidate the search of a nonsuspect attorney’s office, the goal of legislators must be to establish a procedure that will enable the prosecutor to obtain the information he needs, while ensuring that innocent people are protected from unnecessarily intrusive searches. Such a procedure should clearly indicate when law enforcement interests override the policies protecting the attorney-client relationship. The search of a law firm, properly limited, would then be reasonable. For example, the use of a search warrant would be appropriate when there is probable cause to believe that the attorney is a criminal suspect, or that the information would be destroyed if advance notice of the prosecution’s interest is given to the attorney.

A. The Justice Department Guidelines

The Justice Department guidelines, promulgated pursuant to the Privacy Protection Act of 1980, \(^{165}\) apply to all nonsuspect third parties, and especially to those with professional, confidential relationships. As originally conceived by many legislators, the Privacy Protection Act limited the use of search warrants against all nonsuspect third parties, including attorneys. \(^{166}\) The Act as passed, however, protects only those people involved in some “form of public communication.” \(^{167}\) The Act, based on the commerce clause, reflects that first amendment values “are fundamental to the work of people who disseminate information in interstate or foreign commerce.” \(^{168}\)

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168. Erburu, supra note 142, at 189. Most of the bills proposed in Congress were based on the enabling clause of the fourteenth amendment. U.S. Const. amend.
Because lawyers and other nonsuspect search targets have a more tenuous effect on interstate commerce and generally do not hold documents for interstate public dissemination, it would have stretched the meaning and scope of the commerce clause to "absurdity" to extend the Act's protection beyond media search targets.\textsuperscript{169}

Attorneys are, therefore, protected only by the provisions of the Justice Department Guidelines, which recommend that a search warrant "not be used" to secure documentary evidence\textsuperscript{170} in an attorney's custody. This requirement has considerably less impact than that of the Privacy Protection Act, which states that "it shall be unlawful" to use a search warrant for media search targets.\textsuperscript{171}

The Guidelines sanction the search of a law office if the attorney is "reasonably believed" to be a suspect in the crime under investigation,\textsuperscript{172} or if he is related by blood or marriage to the suspected client whose files are sought.\textsuperscript{173} The standard established—reason to believe—is less protective of the rights and interests at stake in a search than a standard of probable cause. Although the police must initially establish probable cause as to the client's criminal involvement, to search his attorney's office the police need only
establish that they reasonably believe that the attorney is involved as well. Conversely, the Privacy Protection Act requires that probable cause of the media search target's criminal involvement be established before a search warrant will issue. 174

A search warrant could also issue under the Guidelines if "[i]t appears that the use of a subpoena, summons, request, or other less intrusive alternative means . . . would substantially jeopardize the availability or usefulness of the materials sought." 173 The standard established—"it appears"—is again considerably less protective than the Privacy Protection Act's standard of "reason to believe" that the notice and delay afforded by a subpoena would result in the destruction, alteration, or concealment of the material sought. 176 Moreover, the language of the Guidelines is subject to a very expansive interpretation by prosecutors who want to secure law office search warrants. The phrase, "substantially jeopardize the availability," is defined in the Guidelines to mean creating a risk of "destruction, alteration, concealment, or transfer of the material sought." 177 This standard is essentially equivalent to the terminology of the Privacy Protection Act. 178 The alternative justification for using a search warrant, substantial jeopardy to the "usefulness of the materials sought," is defined by the Guidelines to mean "detrimentally delaying the investigation, destroying a chain of custody, etc." 179 This loosely worded standard would allow a prosecutor to justify the use of a search warrant for an attorney's offices by alleging that using a subpoena will result in a burdensome delay. The potential for misuse of this expansive exception is enormous.

Finally, a search warrant is available for a law office if "[a]ccess to the documentary materials appears to be of substantial importance to the investigation or prosecution for which they are sought." 180 A prosecutor can manipulate this last exception to secure a search warrant in virtually every case because all evidence is potentially of substantial importance. Thus, attorneys are virtually without protection.

The only purported safeguard provided by the Guidelines is in the application procedure for a warrant, which requires that a warrant

177. 46 Fed. Reg. 1302, 1304 (1981) (to be codified in 28 C.F.R. § 59.4 c(i)).
180. Id. at 1303 (1981) (to be codified in 28 C.F.R. § 59.4(b)(1)(ii)).
application be authorized by the Attorney General or his designee.\textsuperscript{181}

Once again, however, the exception vitiates the protection of the rule. A search may be made without such authorization if "the immediacy of the need to seize the materials does not permit an opportunity to secure the authorization."\textsuperscript{182} The immediacy of the government's need to obtain the materials may be established when the seizure is necessary to prevent injury to persons or property or to preserve the material's evidentiary value, or when the "delay in obtaining the materials would significantly jeopardize an ongoing investigation or prosecution."\textsuperscript{183} The immediacy of the government's need is subject to the same vagaries of interpretation as the exceptions for securing a search warrant.

The effectiveness of the Guidelines will depend largely on the interpretation given them by the magistrates issuing warrants. Many commentators suggest that it is unrealistic to assume that a magistrate will give less than the broadest possible interpretation to a warrant request.\textsuperscript{184} The magistrate often has developed a symbiotic relationship with the police after years of working together.\textsuperscript{185} As magistrates are often not lawyers, they may not be able to consider adequately the constitutional issues involved in a search.\textsuperscript{186} For these reasons, it is essential that the standards of protection for a law office be clearly defined and strictly maintained.

A final problem with the proposed Guidelines is the scheme of sanctions provided for enforcement. The Privacy Protection Act pro-

\textsuperscript{181} 46 Fed. Reg. 1302, 1303-04 (1981) (to be codified in 28 C.F.R. § 59.4(b)(2)).
\textsuperscript{182} Id. at 1304 (1981) (to be codified in 28 C.F.R. § 59.4(b)(2)(i)).
\textsuperscript{183} Id. at 1304 (1981) (to be codified in 28 C.F.R. § 59.4(c)(2)(i)(ii)(iii)).
\textsuperscript{184} See Erburu, supra note 142, at 174-75 ("[m]agistrates have a virtual identity of interests with law enforcement"); Spritzer, \textit{Electronic Surveillance By Leave of the Magistrate: The Case in Opposition}, 118 U. Pa. L. Rev. 169, 190-91 (1969) ("[i]t is notoriously easy for prosecutors to obtain search warrants"); Weinreb, supra note 33, at 71-72 (the inadequacy of magistrates taints the entire procedure for obtaining a warrant); 12 Creighton L. Rev. 881, 892-93 (1979) ("[i]n a warrant hearing there is no adversarial input or argument . . . [s]uch a procedure lends itself to the presentation of evidence which only supports the issuance of a warrant. . . .").
\textsuperscript{185} 10 N.M.L. Rev. 443, 454 (1980).
\textsuperscript{186} Id. Moreover, a magistrate can issue a warrant that allows a very extensive search of a law office. Andresen v. Maryland, 427 U.S. 463 (1976). In Andresen, an attorney's office was searched because the attorney was suspected of criminal activity. The Court did not discuss the ramifications of the search for the attorney's clients, nor did the location of the search deter the Court from holding that the expansively worded warrant was valid. Although the warrant concluded with the phrase "together with other fruits, instrumentalities and evidence of crime at this [time] unknown," id. at 479, the Court denied that the warrant was overbroad because they found that the executing officers must have read the phrase in the context of the total warrant. \textit{Id.} at 480-81.
vides a section 1983 action for a person aggrieved by a search and seizure in violation of the Act. The Act further provides that actual damages, reasonable attorney’s fees, and other costs of litigation reasonably incurred can be recovered. A violation of the Act would not, however, be grounds for suppressing otherwise admissible evidence. The Guidelines, on the other hand, provide virtually no enforcement incentives. They do not provide a civil cause of action for the person aggrieved by a search in violation of the Guidelines. The only sanction available is that any federal officer or employee who violates the Guidelines “shall be subject to appropriate administrative disciplinary action by the agency or department by which he is employed.” Such an informal policy provides only an illusory sanction and greatly diminishes the chances of effective deterrence and punishment for violators of the Guidelines.

B. California Penal Code

California has adopted many of the protections essential to the preservation of the attorney-client relationship in recent legislation that serves as a compromise between the use of a search warrant and a subpoena duces tecum. Under the statute, the State Bar Association of California selects special masters who will serve warrants issued for the documents of nonsuspect attorneys. Upon service, the recipient attorney may either surrender the documents voluntarily or assert that the document is privileged or confidential and should not be disclosed. When confidentiality is claimed, the master will, without examination, seal the material in dispute and deliver it to the court for a hearing similar to a proceeding to quash a subpoena. The hearing must be held within seventy-two hours if


189. Id. § 106(f), 94 Stat. 1881.

190. Id. § 106(e), 94 Stat. 1881.


192. Id. at 1304 (to be codified in 28 C.F.R. § 59.5(a)).

193. See Erburu, supra note 142, at 180.

194. Cal. Penal Code § 1524 (West Supp. 1981). The affidavit supporting an application for a search warrant must specify whether the place to be searched is a law office. Id. § 1525.

195. Id. § 1524(d) (West Supp. 1981).


197. Id.

198. Id. § 1524(c)(2) (West Supp. 1981).
practicable, or if not, at the earliest possible time. This procedure protects the client's interests because the attorney's compliance can prevent a search, and the attorney, rather than the police, can gather the information sought. More importantly, it provides an opportunity for prior objection and impartial judicial determination of the material's privileged status.

There are, however, problems with the procedure. One attorney has said that the law is "unhealthy. There is an illusion of protection." Although the opportunity for voluntary compliance or objection may protect the client's rights, the attorney's interests are not protected. The nonsuspect attorney is still subject to the disruptive effect of the search procedure on his office and working day, and to the injury to reputation that may result following even such a limited search.

Moreover, pursuant to the legislation, a full search of a nonsuspect attorney's office conducted by the special master may still occur if the attorney in charge of the materials is unavailable to receive service of the warrant and to comply or object to disclosure of the files. After "reasonable efforts" to locate the attorney, the special master must seal and take to the court any of the information sought that appears to be privileged. This procedure requires the special master to search the attorney's files and read the material so that a preliminary determination of their privileged status may be made. Not only is the privilege lost by this exposure but the special master may neglect to seal materials that are privileged, thereby exposing them to the police.

A special master may also conduct a search if, in his judgment, the attorney has failed to provide the items requested. Thus, situations may exist when an attorney truthfully says that he does not possess the materials sought, and the special master, disbelieving the attorney, conducts a full search. This search would violate the privileges and constitutional rights that protect the attorney-client relationship and would, moreover, be an insult to the integrity of an innocent attorney.

The incidence of searches under the last exceptions will depend on the character of the special master serving the warrant. Because a

199. Id.
201. Search and Seizure, supra note 82, at 387.
202. Id.
204. Id.
205. Id.
206. Erburu, supra note 142, at 183-84.
208. Tarlow, supra note 6, at 30.
special master must be an attorney, he is more likely to feel empathy for the attorney searched. As an attorney, however, he is also likely to be under time constraints, and serving in this capacity without compensation, he is likely to avoid protracted involvement. Moreover, one commentator points out that the State Bar Committee that selects the special masters will probably not contain a sufficient number of criminal defense attorneys and, therefore, may select attorneys without the requisite sensitivity to the "dilemma faced by a criminal lawyer presented with a search warrant." 212

Finally, a full scale search by the police of a nonsuspect attorney's office may ensue regardless of the protections if a special master is not available after reasonable efforts and would not be available within a reasonable period of time. 213 The police executing the warrant would be required to allow the attorney the opportunity to comply voluntarily or to object to disclosure and could not search unless, in their judgment, the attorney failed to provide the items requested. 214 The opportunity to search is present, however, and the dangers inherent in such a search by the police are realistically threatened. 215

One final problem affects both the California legislation and the Justice Department Guidelines. Under either protective scheme, a comprehensive search could be conducted by the police, without an accompanying special master, if the attorney is "reasonably suspected" of criminal activity in relation to the material sought, or if the material sought is contraband, fruits of a crime, or instrumentalities of a crime. 216 Because of the interests adversely affected by the search, a higher standard of probable cause should be required for the attorney's involvement in the alleged crime before a search warrant should be issued. 217 Moreover, because the clients' interest in the privacy of their files does not change when the attorney is suspected of criminal wrongdoing, or when the files of one client contain material subject to search and seizure, requirements should be established that would limit the intrusiveness of a permissi-

210. Id.
211. See Tarlow, supra note 6, at 30.
212. Id. at 30.
214. Id.
215. See notes 133-34 supra and accompanying text.
218. See notes 172-74 supra and accompanying text.
ble law office search to protect the rights of the attorney's other clients who will be adversely affected.\textsuperscript{219}

\textbf{C. Proposed Solutions}

State legislators considering the problem posed by law office searches must avoid the shortcomings of the Justice Department Guidelines and the California legislation. Legislators might consider the model provided by the probable cause requirements for eavesdropping and wiretapping devices found in the Omnibus Crime Control and Safe Streets Act of 1968.\textsuperscript{220} The Act provides that the affidavit for an aural eavesdropping device must establish that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or too dangerous."\textsuperscript{221} A similar standard should be required for "visual" eavesdropping when the police go through the written records of conversations between an attorney and his client.

To comply with the requirement that a law office search be conducted only when reasonable, the guidelines promulgated should be a hybrid of the different schemes considered. The use of a search warrant should be unlawful unless the police have probable cause to believe that (1) the attorney is a criminal suspect with respect to the materials sought,\textsuperscript{222} or (2) the material sought will be lost, altered, destroyed, or concealed during the delay involved with using a

\textsuperscript{219} Deukmejian v. Superior Court, 103 Cal. App. 3d 253, 260, 162 Cal. Rptr. 857, 862 (1980) ("[a]n attorney suspected of criminal activity should have the same concerns about the confidentiality of files containing privileged matter as an innocent third party attorney. . ."). There may also be a problem with defining instrumentalities of a crime too broadly and therefore including contracts, memoranda, and business documentary materials because many white collar crimes involve the use of such materials. \textit{See} Tarlow, \textit{supra} note 6, at 30 n.24.


\textsuperscript{221} \textit{Id.; see} Bekavac, \textit{supra} note 82, at 14.

subpoena,

or (3) a subpoena has been served and the attorney has

failed to comply or respond within a specified time,

and (4) the information cannot be obtained from some alternative source.

Additionally, a search warrant should be available when there is a life-

threatening emergency situation. The search in such a case, however, should not proceed until the police have asked the attorney to give them the information sought voluntarily.

As an alternative to the search warrant, the police should rely on a

subpoena duces tecum, a summons, or a simple request. Legislators concerned with the delay entailed in the use of a subpoena could enact a requirement of a forthwith subpoena, which commands the recipient to deliver the material immediately. Because a forthwith subpoena, like a warrant, is issued ex parte, there is little risk that obtaining a subpoena will disclose to the suspect the police interest in the information. The legislation could provide that the requested materials be delivered to the court for an in camera inspection to determine its status as privileged or unprivileged.

118 Cal. Rptr. 166, 168-69 (1975) (en banc) (attorney suspected of misappropriating client's funds).

223. See Privacy Protection Act of 1980, Pub. L. No. 96-440, § 101(b)(3), 94 Stat. 1879-80; 46 Fed. Reg. 1302, 1303-04 (1981) (to be codified in 28 C.F.R. §§ 59.1(b), 59.4(c)(1)). This standard is consistent with Justice Stevens's view in Zurcher v. Stanford Daily, 436 U.S. 547, (1978) that "[t]he only conceivable justification for an unannounced search of an innocent citizen is the fear that, if notice were given, he would conceal or destroy the object of the search." Id. at 582 (Stevens, J., dissenting).

224. See Privacy Protection Act of 1980, Pub. L. No. 96-440, § 101(b)(4), 94 Stat. 1880. The Act provides that in the event that a warrant is sought for failure to comply with a subpoena the person possessing the material should be afforded "adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure." Id. § 101(c), 94 Stat. 1880. The provision should apply to law office searches as well.

225. See Jack Winter, Inc. v. Koratron Co., 50 F.R.D. 225, 227 (N.D. Cal. 1970) (if the information sought is known to both laymen and lawyers, the laymen should first be examined to avoid the "awkward and undignified procedure of requiring a lawyer to first reveal matters communicated to him by clients"); Bloom, supra note 9, at 61-63.


227. See Bloom, supra note 9, at 77-79. "[T]here is no reason why police officers executing a warrant should not seek the cooperation of the subject party, in order to prevent needless disruption." Zurcher v. Stanford Daily, 436 U.S. 547, 570 n.2 (1978) (Powell, J., concurring).

When a search warrant is used, the police should be required to limit the intrusiveness of the search as much as possible. Thus, the warrant must be exact as to the nature, description, and location of the evidence sought. Additionally, a special master should accompany the police and seal the files that the attorney alleges are privileged or confidential, delivering them to the court for in camera inspection. Furthermore, the plain view doctrine should be made inapplicable to law office searches.

After the search, the police should give the attorney a complete list of the materials removed and the files examined so that he can assess his client's legal position. A hearing should be held at the earliest possible opportunity to ascertain the status of the materials seized. In addition, the attorney should be able to secure the prompt return of materials essential for trial preparation.

Any proposed legislative scheme should also include sanctions for searches conducted in violation of the legislation. Such a scheme should be designed to eliminate undesirable conduct. This can be done by creating deterrence incentives and by clearly articulating the proscribed conduct to educate those who would comply. An effective enforcement scheme additionally should compensate the victim of the improper conduct by giving him an opportunity for redress and by creating some standards for compensation. As under the Privacy Protection Act, a section 1983 action should be available for damages, and the costs of litigation should be recoverable. Furthermore, a provision should be made for sanctions within the agency of the official who violated the guidelines.

These recommended procedures would ensure that a law office search could occur only when reasonable, as defined by Justice Powell's criteria in Zurcher. Maximum protection is accorded to the nonsuspect attorney and his clients by limiting the instances of purposeful intrusion and by clearly defining when a search would be

229. See Zurcher v. Stanford Daily, 436 U.S. 547, 564 (1978) ("[w]here presumptively protected materials are sought to be seized, the warrant requirement should be administered to leave as little as possible to the discretion or whim of the officer in the field"); Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1976) ("[i]n searches for papers, it is certain that some innocuous documents will be examined . . . responsible officials . . . must take care to assure that [searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy"); Bloom, supra note 9, at 66-71 (recommendation that police be required to submit a search plan, and that the warrant be drawn with scrupulous exactitude).
231. See Bloom, supra note 9, at 85-87; notes 80-82 supra and accompanying text.
232. See Bloom, supra note 9, at 87-88.
233. Id. at 88-89; see note 100 supra and accompanying text.
234. Erbunu, supra note 142, at 180.
235. See notes 187-93 supra and accompanying text.
236. See notes 52-57 supra and accompanying text.
allowed. Law enforcement interests are protected by allowing the use of a search warrant when there is probable cause to believe that a less intrusive method would result in the loss of the evidence. The dual interests of society in the effective functioning of the adversary system and in the enforcement of criminal law are thus fullfilled.

CONCLUSION

The idea of a law office search is startling. It cannot be denied, however, that extensive law office searches have occurred and will continue to occur. Indeed, now that the Justice Department Guidelines regulating federally conducted searches have been published, state officials who had not previously considered the law office search as a viable means of securing evidence about a nonsuspect attorney’s client may be seeking ex parte warrants for unannounced searches.

The integrity of the adversary system and the fairness of trials are undermined by the invasion of the prosecutor in the defense attorney’s office. “[I]t cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful. We too readily forget them.”

Pamela Gurfein

237. Attorneys concerned with the safety of their files can do several things. They should initiate discussions in their state bar associations. In California, the protective legislation that was passed was largely the brainchild of the Los Angeles County Bar Association and was enacted through its efforts. Mandel, Law Enforcement Searches of Law Firm Offices, 51 Okla. B.J. 707, 708 (1980). Attorneys should also support by aggressive amicus participation any nonsuspect third party lawyers whose offices are searched. Id. at 709. Attorneys should consider reorganizing their office files because the more carefully itemized a file system is, the more easily the police can conduct their search and avoid rummaging. Id. Finally, attorneys should draft model temporary restraining orders to have available in the event that a search is threatened.