The Law Office Search: An Emerging Problem and Some Suggested Solutions

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A law office search threatens the attorney-client relationship by jeopardizing values protected by the fourth, fifth, and sixth amendments. After reviewing recent developments that underlie the sudden emergence of the law office search, Professor Bloom examines the nature of this threat and suggests that the values of the attorney-client relationship can be reconciled with the needs of law enforcement by requiring the police to use a subpoena rather than a search warrant when seeking documentary evidence from an attorney. Professor Bloom considers whether this "subpoena preference rule" either is required by the fourth amendment or can be implemented by nonconstitutional means. Professor Bloom then describes how, in the absence of such a rule, society nonetheless can accommodate the competing interests of effective law enforcement and effective legal representation.

Table of Contents

I. "Counselor, We Have a Warrant to Search Your Office" 3
II. Emergence of the Law Office Search 7
III. The Threat to the Attorney-Client Relationship 12
   A. Protections of the Attorney-Client Relationship 12
   B. Threats Posed by Law Office Searches 18
      Seizure of Privileged Documents 18
      Rummaging Effect on Nonspecified Documents 19
      Chilling Effect on Client Communication and Trial Preparation 20
      Denial of Effective Assistance of Counsel 23
IV. The Subpoena Preference Rule as an Accommodation of Competing Interests 25
   A. The Subpoena Preference Rule 25
   B. The Threat to Effective Law Enforcement 27
      Potential Loss of Evidence 28
      Assertion of Privilege 35
      Delay 35
      Availability of Subpoenas 37
   C. The Subpoena Preference Rule on Balance 38
   D. Is the Subpoena Preference Rule Constitutionally Required? 39
I. "Counselor, We Have a Warrant to Search Your Office"

The primary effect of the practices advocated here would be on the legal profession itself. But it too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever
changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice as petitioner urges secondarily but certainly.**

On July 25, 1978, three St. Paul, Minnesota, police officers served attorney David O'Connor with a warrant to search his office for various "business records" of a client who was suspected of making false statements in an application for a liquor license. The attorney, who was not considered a suspect, persuaded the officers to permit him to seek a judicial hearing before execution of the warrant. After reviewing a box of business records produced by the attorney, the judge who initially had issued the warrant sustained its validity and held that the attorney had failed to establish that any of the documents were protected by either the attorney-client privilege or the work-product doctrine. The court further ordered the parties to attempt to agree on whether any documents in the "work product file," which the court had allowed the attorney to retain pending its ruling, were privileged. After the attorney sought a writ of prohibition from the Minnesota Supreme Court, the trial court ordered the attorney to produce the "work product file" for in camera review.

In issuing the writ of prohibition, the Minnesota Supreme Court held that the search of an attorney's office is unreasonable under both the fourth amendment to the United States Constitution and an identical provision of the Minnesota Constitution if the attorney is not a criminal suspect and the government has no reason to believe that the attorney will destroy the evidence sought. The court concluded that the search of an attorney's office necessarily poses a serious threat to the attorney-client privilege, the work-product doctrine, the attorney's ethical obligation of confidentiality, and the federal and state constitutional rights to assistance of counsel. The court noted that even if the warrant describes the evidence with particularity, the officers executing it will need to search all the files in the office in order to locate the specified items. In the process, the officers inevitably will examine privileged materials. The court indicated that requiring law enforcement

1. O'Connor v. Johnson, 287 N.W.2d 400, 401 (Minn. 1979) (en banc). Initially, the officers had attempted to execute a search warrant for the specified records at a tavern. The accountant at the establishment informed them that the items belonged to the former owners and were in the possession of O'Connor, their attorney. Id.
2. Id. at 401-02.
3. Id. at 401.
4. Id.
5. Id.
6. U.S. CONST. amend. IV.
7. MINN. CONST. art. I, § 10.
8. O'Connor v. Johnson, 287 N.W.2d at 405. The attorney challenged the trial court's order only with respect to the documents in the work-product file. Id. at 402. Although it did not do so, the Minnesota Supreme Court noted that it could have avoided the constitutional issue because the attorney's office was not searched. Id.
9. Id. at 403-05.
10. Id. at 404.
officials to seek evidence from nonsuspect attorneys by subpoena rather than by search warrant poses no significant risk that evidence will be lost because attorneys are legally and ethically obligated "to preserve and protect the judicial process." Moreover, the absence of precedent for the law office search convinced the court that the subpoena had proven to be an adequate device for obtaining evidence from attorneys in the past. The court declared that even if subpoenas were at times unavailable during the early stages of a criminal investigation, the need to protect the attorney-client privilege, the work-product doctrine, client confidentiality, and the right to counsel outweighed the cost to effective law enforcement.

O'Connor v. Johnson was the first state or federal appellate decision to consider directly whether an attorney's office legally is subject to search. The issue has been litigated recently in other jurisdictions. During March and April of 1979, for example, law enforcement officials searched the offices of three law firms in the Los Angeles area. A court enjoined the search of Kaplan, Livingston, Goodwin, Berkowitz & Selvin, a sixty-lawyer Beverly Hills firm, while the search was still in progress. An attempt to search the Cotton & Bregman firm in Sherman Oaks was averted when the attorney surrendered documents under seal for in camera review; the attorney then convinced the court that the warrant was unconstitutionally general. Finally, law enforcement officers removed numerous documents from another small firm following a seven-hour search that was partially invalidated when a court held that the warrant was overbroad and insufficiently particular.

In response to these incidents, the California legislature amended the California Penal Code in September, 1979, to prohibit a magistrate from issuing a warrant to search for documentary evidence in the possession of an attorney's office.

1. Id. at 405.
2. Id.
3. Id.
4. Deukmejian v. Superior Court, 103 Cal. App. 3d 253, 256, 162 Cal. Rptr. 857, 859-60 (Ct. App. 1980). Although they did not suspect any of the firm's lawyers of complicity in criminal conduct, agents of the California Attorney General's office executed a search warrant on March 21, 1979, at the firm's office pursuant to a medical fraud investigation of one of the firm's clients. Id. at 256, 162 Cal. Rptr. at 859. While the search was still in progress, the firm obtained a temporary restraining order prohibiting removal of any documents. Id. at 256, 162 Cal. Rptr. at 859-60. The order subsequently was replaced by a preliminary injunction. Id. at 256, 162 Cal. Rptr. at 860. A state appellate court then issued an order vacating the injunction or in the alternative modifying it to provide that the firm could be searched in the future only after the trial court approved a search plan containing various protective procedures. Deukmejian v. Superior Court, No. 55977, slip op. at 1 (Ct. App. May 7, 1979).
5. LA Judge Bars Search of Law Firm, Saying Warrant Was Too Broad, Nat'l L.J., June 18, 1979, at 4, col. 1 [hereinafter LA Judge Bars Search]. Law enforcement officials served the firm with a search warrant for medical records pertaining to a homicide investigation focusing on one of the firm's clients. Id. Police had no reason to believe that the attorneys would behave unethically or would remove or destroy the documents. Transcript at 6, In re Law Offices of Bregman, No. SW 15591 (L.A. Mun. Ct. Apr. 24, 1979). The judge who initially had issued the warrant later invalidated it as overbroad. In re Search Warrant No. SW 15591 (L.A. Super. Ct. June 4, 1979). The decision has been appealed. Letter from Theodore G. Bregman to Lackland H. Bloom, Jr. (July 10, 1980) (copy on file at Georgetown Law Journal).
6. Work, Raids: Are Clients' Secrets Safe? Nat'l L.J., Apr. 23, 1979, at 1, 14, cols. 1, 1 [hereinafter Work, Raids]. State investigators searched the office of attorney Edward Masry pursuant to a warrant seeking documents pertaining to a bribery investigation in which the attorney and two of his clients purportedly were implicated. Id. The state subsequently indicted the attorney for bribery. Nat'l L.J., Apr. 21, 1980, at 2, col. 3.
attorney, physician, psychotherapist, or clergyman not reasonably suspected of criminal conduct unless special protective procedures are employed. These procedures include appointing a special master to conduct the search, permitting the subject of the search to be present and to tender the evidence voluntarily, ensuring that purportedly privileged material will be placed under seal for transmission to the court for in camera review, and requiring that an expedited adversary hearing will be available following the search. In considering an appeal from the preliminary injunction in the Kaplan & Livingston case, the Court of Appeals for the Second District of California held that the state attorney general could not resume the search of the firm unless he complied with the new legislation. These cases involve neither the first nor the only searches of lawyers' offices. 


19. Deukmejian v. Superior Court, 103 Cal. App. 3d 253, 262, 162 Cal. Rptr. 857, 863 (Ct. App. 1980). Although the court suggested that the new legislation probably cured most of the problems raised by the bar, it nonetheless declined to pass on the constitutionality or the adequacy of the legislation because an actual search had not been conducted pursuant to it. Id. Before declining to reach the constitutional issue, the court cited O'Connor v. Johnson with approval. Id. at 261, 162 Cal. Rptr. at 862-63.


After law enforcement officers searched two law offices in Los Angeles in 1971, the District Attorney and the Los Angeles County Bar Association agreed upon special procedures for law enforcement officers to follow during a search of a law office. Memo from Joseph P. Busch to all Deputy District Attorneys 1-2 (Dec. 6, 1971) [hereinafter L.A. DA/Bar Guidelines] (copy on file at Georgetown Law Journal).

In the spring of 1978, the police in Arlington, Virginia, obtained a warrant to search an attorney's office for two pawn tickets that allegedly would have incriminated a client. The attorney refused to permit the search and filed suit against the police to enjoin its execution. Arlington J., April 7, 1978, at 1, col. 1. Law office searches in Canada also have increased during the past decade. See Schnoor, Privilege-Solicitor & Client — Whether Applicable to Powers of Search & Seizure, 7 MAN. L.J. 341, 345-48 (1977) (describing increased problem of law office searches).

21. In December, 1978, Lee Chagra, a criminal defense attorney, was shot to death in his El Paso office. Thompson, A Judge is Murdered, Nat'l L.J., June 25, 1979, at 1, 9, cols. 2, 1 [hereinafter Thompson]. Because the murderer apparently slipped unnoticed past the deceased's elaborate security system, he might have been a confidant or a client. Id. Over the protests of Chagra's associates, the police sealed off the office and examined its contents, including approximately 100 client files, over a five-day period in order to find clues to the identity of the murderer. In re Chagra, No. 32771-243, slip op. at 2 (Tex. D. Ct., El Paso County, Feb. 5, 1979). Local police shared the materials seized from the client files with federal investigators. Thompson, supra, at 9. In response to a petition by the El Paso Bar Association, state District Judge Woodrow W. Bean II conducted a court of inquiry and concluded that the search was unreasonable under Mincey v. Arizona, 437 U.S. 385, 395 (1978), that the review of client files violated the attorney-client privilege, and that the conduct of the police violated state statutes prohibiting "official oppression and misconduct." In re Chagra, No. 32771-243, slip. op. at 3-5 (Tex. D. Ct., El Paso County, Feb. 5, 1979). The court referred the matter to the county attorney for a determination of whether prosecutions of those policemen should be brought. Id. at 5.
Oregon also recently have invalidated such searches. Nevertheless, a federal district court in New York, in considering the seizure of materials from an attorney's office by FBI agents, refused to suppress evidence that pertained to illegal activities of a company allegedly operating out of the office. Prior to these cases, the Supreme Court in *Andresen v. Maryland* rejected an attorney's fourth and fifth amendment challenges to a search of his office. In doing so, the Court never suggested that it considered the practice troublesome or unusual. In *Burrows v. Superior Court*, however, the California Supreme Court explicitly recognized that the search of the office of a criminally suspect attorney presented a serious threat to the attorney-client privilege.

This article first will briefly review recent developments under the fourth and fifth amendments that appear to be largely responsible for the recent

22. On October 10, 1979, the police in Portland, Oregon, seized more than 1,000 pages of documents from the office of Milton Stewart, a local attorney, pursuant to a warrant issued during the course of an embezzlement investigation involving one of his clients. *Ore. Judge Orders Police to Return Lawyer's Papers*, Wash. Post, Oct. 18, 1979, at § A, at 14, col. 1, [hereinafter Oregon Search]. The police had no reason to suspect the attorney of criminal conduct. *Hearings on S. 1790 Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 108 (1980) (statement of Professor Stephen Kanter, counsel for Milton Stewart) [hereinafter S. 1790 Hearings]. At the suppression hearing, the police misled the judge who issued the warrant into believing that the attorney would not object to a seizure. *Oregon Search, supra*, at § A, at 14, col. 1. The attorney later testified that he had been under the impression that he would be served with a subpoena rather than a search warrant. *Id.* A week later the Presiding Judge of the District Court for Multnomah County invalidated the search on the grounds that the police had made no showing of probable cause, the warrant failed to describe the premises or items subject to seizure with sufficient particularity, and one of the items seized was subject to the attorney-client privilege and therefore immune from seizure as a matter of law. *In re Stewart*, No. DA-180-730-7910, slip op. at 2-3. (Or. D. Ct., Multnomah County, Dec. 4, 1979) (copy on file at *Georgetown Law Journal*).

23. National City Trading Corp. v. United States, 487 F. Supp. 1332, 1335 (S.D.N.Y. 1980). The court rejected an argument that the warrant was overbroad and, in reliance on Zurcher v. Stanford Daily, 436 U.S. 547 (1978), concluded that the question whether the FBI had probable cause to suspect the attorney of criminal complicity was irrelevant. 487 F. Supp. at 1335. Nonetheless, considering that the FBI had probable cause to believe that an illegal “boiler room” commodity options business was operating out of a suite of offices with only the attorney’s name on the outer door, that the attorney provided the suspect company with free office space, that the attorney’s wife was a one-half owner of the suspect company, and that a room in the suite outfitted with law books appeared to be the center of the “boiler room” activity, it would seem that the FBI agents had reasonable suspicion, if not probable cause, to believe that the attorney was criminally implicated. *Id.* The court, however, found it unnecessary to address the issue. *Id.* The FBI conducted a search in a very similar situation recently in Miami although it turned out that the attorney was not a member of the Florida bar. Letter from Philip B. Heymann, Assistant Attorney General, Criminal Division, to Sen. Birch Bayh (May 2, 1980), reprinted in S. 1790 Hearings, supra note 22, at 68.


25. 427 U.S. at 470-84.


27. *Id.* at 250-51, 529 P.2d at 598, 118 Cal. Rptr. at 174. The court held that the warrant, as interpreted and executed, was impermissibly general under both the United States Constitution and the California Constitution. *Id.* at 249, 529 P.2d at 597, 118 Cal. Rptr. at 173. In *People v. Superior Court*, a California court of appeals sustained a search of an attorney’s office that yielded a letter incriminating a client suspected of murder. 68 Cal. App. 3d 845, 846, 137 Cal. Rptr. 391, 393 (Ct. App.) (1977) (per curiam). Without explanation, however, the California Supreme Court granted an order “decertifying” the opinion, thereby striking it from the official reports and depriving it of any precedential value. *People v. Superior Court*, 19 Cal. 3d 502, 567 P.2d 1162, 140 Cal. Rptr. 442 (1977). *See also People v. Doyle*, 77 Cal. App. 3d 126, 128, 141 Cal. Rptr. 639, 641 (Ct. App. 1977) (invalidating seizure of client files from attorney’s office when attorney consented to search but client did not).
emergence of the law office search. It will then examine the nature of the threat posed by this practice to the attorney-client relationship. The article will suggest that the values of that relationship may be reconciled with the needs of law enforcement by requiring that the police proceed by subpoena rather than search warrant in situations in which they have no probable cause to believe that the attorney either is engaged in criminal conduct or would fail to comply with a court order requiring production of evidence believed to be in the attorney's possession. The article then will consider whether such a "subpoena preference rule" is required by the fourth amendment and, if not, whether it can be implemented by nonconstitutional means. Finally, the article will address the issue whether, in the absence of such a rule, the competing interests of effective legal representation and effective law enforcement nevertheless can be accommodated through adjustments to prevailing search and seizure procedure and, if so, how such modifications should be implemented.

II. THE EMERGENCE OF THE LAW OFFICE SEARCH

Many developments explain the sudden and recent emergence of the law office search. Some would argue that this phenomenon might be part of a campaign of harassment against defense counsel. Others would contend that it is part of an even broader problem—the search of "institutional third parties." Arguably, Watergate contributed to the increase in law office searches by lowering the public esteem of lawyers in particular and by...
increasing skepticism about the wisdom of evidentiary privileges in general. Furthermore, some law enforcement officials apparently have concluded that certain defense attorneys are withholding relevant documentary evidence, especially in white-collar crime cases. Most importantly, recent constitutional developments have spurred the emergence of the law office search. The Supreme Court's rejection of the mere evidence rule along with the demise of the private papers doctrine have contributed to the increase in law office searches.

The Supreme Court initially developed the "private papers doctrine" in Boyd v. United States. In Boyd the Court considered the constitutionality of a statutory procedure which provided that unless the defendant in a forfeiture proceeding produced certain business records requested by the Government, the allegations that the Government intended to prove through the records would be established as true. The Court held that this procedure constituted an unreasonable search and seizure and that the admission of the private records into evidence violated the privilege against self-incrimination. Thirty-five years later in Gouled v. United States the Court held that a search for and seizure of "mere evidence," as opposed to contraband and the

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32. As Professor Friedenthal recently observed, "[w]e're living in an era in which everything is supposed to be done openly and above board, and privileges are coming under a great deal of attack generally." Margolick, N.Y. Court Limits Spouse's Privilege, Nat'l J., Dec. 3, 1979, at 5, col. 1 (quoting Jack Friedenthal, Professor of Law, Stanford University). Similarly, Professor Hazard has pointed out that "the attorney-client privilege...is not only a principle of privacy, but also a device for cover-ups." Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 Calif. L. Rev. 1061, 1062 (1978).

33. See Search Warrant Fever Spreads to Calif. Firms, 65 A.B.A. J. 886-87 (1979) (quoting George Deukmejian, Attorney General of California) (defending his policy of searching law offices to obtain evidence against white-collar criminals) [hereinafter Search Warrant Fever]; Work, Raids, supra note 16, at 14, col. 1 (quoting James Healey, Executive Director, National District Attorneys Ass'n) (expressing concern about lawyers "sitting on white-collar crime records, as co-conspirators"); cf. Hearings on Zurcher v. Stanford Daily Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 171 (1979); (statement of Richard J. Williams, Vice President, National District Attorneys Ass'n) (third parties connected to white-collar crime have "relationship with potential targets which could lead to the ultimate destruction of evidence") [hereinafter Zurcher Hearings].

34. 116 U.S. 616 (1885).

35. Id. at 617.

36. Id. at 634-35. A longstanding debate has developed over whether the Court's fourth and fifth amendment holdings were independent or interdependent. Compare Andresen v. Maryland, 427 U.S. 463, 472 n.6 (1976) (Boyd example of "convergence theory" of fourth and fifth amendments) and Fisher v. United States, 425 U.S. 391, 409 (1976) (compelling production of private papers violated both fourth and fifth amendments) with Andresen v. Maryland, 427 U.S. at 489 (Brennan, J., dissenting) ("seizure of private papers may violate" fifth amendment) and Fisher v. United States, 425 U.S. 391, 421 n.5 (1976) (Brennan, J., concurring) (Boyd fourth and fifth amendment holdings "independent of each other"). See generally 1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 1.1(b), at 7 (1978) (discussing Boyd and its continuing validity) [hereinafter LaFave Treatise]; id. § 4.13(2), at 191 (same).

37. 255 U.S. 298 (1921).
fruits of crime.\textsuperscript{38} was unreasonable per se under the fourth amendment.\textsuperscript{39} Nonetheless, the Court limited and undermined both the private papers doctrine and the mere evidence rule almost from the outset.\textsuperscript{40} The Court discarded the mere evidence rule in 1967 in \textit{Warden v. Hayden}\textsuperscript{41} and largely eviscerated the private papers doctrine in a series of cases\textsuperscript{42} culminating in 1976 with \textit{Fisher v. United States}\textsuperscript{43} and \textit{Andresen v. Maryland}.\textsuperscript{44}

In \textit{Fisher} the Court held that an attorney could not assert his client's privilege against self-incrimination in response to an IRS summons seeking production of the workpapers of the client's accountant that the client recently had transferred to the attorney,\textsuperscript{45} because the privilege is personal and the legal compulsion was directed at the attorney, not the client.\textsuperscript{46} The attorney-client privilege would not preclude production of these preexisting documents unless they otherwise were privileged in the hands of the client and had been transferred to the attorney for the purpose of obtaining legal advice.\textsuperscript{47} In sharp contrast to the "content" focus of the private papers doctrine,\textsuperscript{48} however, the Court concluded that the only arguably relevant

\textsuperscript{38} The Court distinguished contraband and the fruits of crime from papers having only an "evidentiary value" on the basis of the government's superior property interest in the former. \textit{Id.} at 308-10. Subsequently, the Court included instrumentalities used to commit crime among the objects subject to seizure.\textit{ Marron v. United States}, 275 U.S. 192, 199 (1927).

\textsuperscript{39} 255 U.S. at 305-06. The extent to which \textit{Boyd} was a manifestation of the "mere evidence" rule also has been disputed.\textsuperscript{38} Compare \textit{Andresen v. Maryland}, 427 U.S. 463, 472 n.6 (1976) (\textit{Boyd} prohibited seizure of "mere evidence") and \textit{Fisher v. United States}, 425 U.S. 391, 409 (1976) (\textit{Boyd} rule against compelling production of private papers rested in part on "mere evidence" rule) with \textit{Andresen v. Maryland}, 427 U.S. at 490 n.6 (Brennan, J., dissenting) (mere evidence rule was, at most, only one component of private papers doctrine) and \textit{Fisher v. United States}, 425 U.S. at 421 n.5 (Brennan, J., concurring) ("that purely evidentiary material may have been seized" in \textit{Boyd} and progeny not relied upon to establish either fourth or fifth amendment violation).

\textsuperscript{40} See, e.g., \textit{Shapiro v. United States}, 335 U.S. 1, 32-33 (1948) (privilege against self-incrimination cannot be invoked with respect to records that government legitimately requires person to maintain); \textit{United States v. White}, 322 U.S. 694, 701 (1944) (privilege against self-incrimination cannot be invoked with respect to records of unincorporated labor union if it has existence independent of its membership); \textit{Hale v. Henkel}, 201 U.S. 43, 70 (1906) (privilege against self-incrimination cannot be invoked by corporation in response to subpoena for corporate documents).


\textsuperscript{42} See \textit{Bellis v. United States}, 417 U.S. 85, 101 (1974) (partner in dissolved three-member law firm may not invoke personal privilege against self-incrimination to justify refusal to comply with subpoena demanding production of firm's financial records); \textit{Couch v. United States}, 409 U.S. 322, 331 (1973) (taxpayer may not assert privilege against self-incrimination in response to IRS summons served on taxpayer's accountant). In \textit{Bellis} the Court maintained that a sole proprietor still could assert the privilege in response to a subpoena for his business records. \textit{Id.} at 87-88.

\textsuperscript{43} 425 U.S. 391 (1976).

\textsuperscript{44} 427 U.S. 463 (1976).

\textsuperscript{45} 425 U.S. at 396-98.

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.} at 403-04.

\textsuperscript{48} Justice Brennan argued that the privilege against self-incrimination should depend on the private content of the documents because "[i]n individual's books and papers are generally little more than an extension of his person." \textit{Id.} at 420 (Brennan, J., concurring).
privilege, the fifth amendment privilege against self-incrimination, did not apply since any admission of the existence and possession implicit in the “act of producing” the documents was neither testimonial nor incriminating.\footnote{49} In \textit{Andresen} an attorney was convicted of defrauding purchasers of real estate after records seized from his law office pursuant to a search warrant were admitted into evidence against him.\footnote{50} The Court, in rejecting the argument that the search and seizure of the attorney’s private papers violated his privilege against self-incrimination, reasoned that a person “is not required to aid in the discovery, production, or authentication of incriminating evidence”\footnote{51} when his premises are searched and consequently is not subjected to “compulsion” contrary to the protection of the fifth amendment.\footnote{52} In the process, the Court observed that any significant immunity for private papers would hamper law enforcement and would not undermine the policies underlying the privilege against self-incrimination.\footnote{53}

Beyond \textit{Fisher} and \textit{Andresen}, the Supreme Court’s decision in \textit{Zurcher v. Stanford Daily}\footnote{54} is most responsible for the recent emergence of the law office search. In a civil rights action prompted by the search of a college newspaper office, a federal district court held that the fourth amendment prohibited the police from searching the premises of a nonsuspect third party in the absence of proof that he would fail to comply both with a subpoena and a court order prohibiting removal or destruction of the evidence.\footnote{55} Furthermore, the district court held that if the party is a newspaper, the police must make a “clear showing” that important materials would be destroyed or removed.

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49. \textit{Id.} at 409 (opinion of Court). The Court reasoned that inferences concerning the existence and possession of the documents were not testimonial since the Government did not need to rely on the taxpayer to establish either. \textit{Id.} at 409-10. Justice Brennan criticized the Court for deciding the availability of the privilege on the strength of the Government’s case. \textit{Id.} at 429 (Brennan, J., concurring). The Court further determined that the act of production was not incriminating since a taxpayer legally could employ an accountant to prepare workpapers or to deliver them to the taxpayer. \textit{Id.} at 412 (opinion of Court). Finally, it rejected the argument that compelled production would constitute an implicit authentication of the documents. \textit{Id.} at 412-13.

50. 427 U.S. at 467-69.

51. \textit{Id.} at 474.

52. \textit{Id.} at 477. The Court maintained that although the illegality of the \textit{Boyd} search provided the requisite compulsion, the search in \textit{Andresen} was valid. \textit{Id.} at 472 n.6. Justice Brennan disputed the Court’s interpretation of \textit{Boyd} and argued that the compulsion inherent in a seizure pursuant to a warrant is sufficient to violate the fifth amendment because the owner of the premises is not free to resist. \textit{Id.} at 487-89 (Brennan, J., dissenting).

53. \textit{Id.} at 474-75 (opinion of Court). The Court also rejected the argument that the warrant was impermissibly general. \textit{Id.} at 478-82. For all practical purposes, the combination of \textit{Fisher} and \textit{Andresen} precludes any absolute immunity for private papers under the fifth amendment and probably the fourth amendment as well. McKenna, \textit{The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment}, 53 Ind. L.J. 55, 67 (1977); Note, \textit{Constitutionally Protected Privacy}, supra note 40, at 978-79; Note, \textit{Life and Times of Boyd}, supra note 40, at 206-11.


55. Stanford Daily v. Zurcher, 353 F. Supp. 124, 132-33 (N.D. Cal. 1972) (granting plaintiff’s summary judgment motion for declaratory relief), aff’d per curiam, 550 F.2d 464 (9th Cir. 1977) (en banc) (adopting opinion of district court), rev’d, 436 U.S. 547 (1978). The magistrate issued the warrant after law enforcement officers demonstrated that they had probable cause to believe that the \textit{Stanford Daily} possessed photographs of an attack on the police by demonstrators. An extensive search failed to yield the evidence. Shortly thereafter, the paper filed an action for declaratory and injunctive relief under 42 U.S.C. § 1983 (1976) against the law enforcement officials who had conducted the search and the judge who had issued the warrant. 436 U.S. at 551-52.
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from the jurisdiction in spite of a restraining order.\textsuperscript{56} Adopting the district court's opinion, the United States Court of Appeals for the Ninth Circuit affirmed the decision.\textsuperscript{57}

The Supreme Court reversed,\textsuperscript{58} separately addressing the issues of the ordinary nonsuspect third party\textsuperscript{59} and the press.\textsuperscript{60} Initially, it observed that the language and structure of the fourth amendment, precedent, the Federal Rules of Criminal Procedure, and the critical commentary did not support a distinction between suspects and nonsuspects.\textsuperscript{61} Moreover, the Court concluded that the plaintiffs had failed to demonstrate that the district court's rule would not have a significant adverse effect on law enforcement.\textsuperscript{62} The police, for example, might be unable to determine during the early stages of an investigation, when search warrants frequently are employed, whether a seemingly innocent party was in fact a participant in criminal activity.\textsuperscript{63} The Court also observed that the district court's rule might unduly impede law enforcement since the subject of a subpoena, unlike the subject of a search, may assert his fifth amendment privilege against self-incrimination, significantly delaying the investigation, if not effectively precluding access to relevant evidence.\textsuperscript{64} Consequently, the Court held that the Constitution does not require the subpoena preference rule when the police seek evidence from an ordinary nonsuspect third party.\textsuperscript{65}

The Court then considered whether the first amendment mandates a different result when the third party is a newspaper. After observing that the fourth amendment does not explicitly provide any special protection for the press,\textsuperscript{66} the Court concluded that the traditional fourth amendment safeguards of probable cause, specificity, and reasonableness, if properly applied, would adequately protect first amendment values.\textsuperscript{67} Finally, the Court held that since "no realistic threat of prior restraint" existed, a preseizure hearing was not essential.\textsuperscript{68}

\textsuperscript{56} 353 F. Supp. at 135.
\textsuperscript{58} 436 U.S. 547, 568 (1978).
\textsuperscript{59} Id. at 553-63.
\textsuperscript{60} Id. at 563-67. Because it applied this bifurcated analysis, the Court failed to recognize that certain important considerations, such as the status of the third party, were relevant to both questions. Reporters, for example, are no more likely than attorneys to destroy evidence or act as criminal accomplices.
\textsuperscript{61} Id. at 554-59.
\textsuperscript{62} Id. at 561-62. Upon receiving a subpoena, for example, a third party might alert the criminal suspect out of friendship or loyalty or the suspect might learn about the subpoena while a motion to quash was pending. In either event, the evidence might be removed before a court could enforce the subpoena. Id. In drafting legislation to modify Zurcher, this concern has proven particularly troublesome to the Department of Justice. See Privacy Hearings, supra note 20, at 39-40, 344 (testimony of Philip B. Heymann, Assistant Attorney General, Criminal Division) (describing difficulty of determining who are innocent third parties and whether they might destroy evidence).
\textsuperscript{63} 436 U.S. at 561.
\textsuperscript{64} Id. at 561-62 n.8.
\textsuperscript{65} Id. at 562-63 & n.9.
\textsuperscript{66} Id. at 565. The Court found special significance in the absence of any explicit exception for the press in the fourth amendment, particularly because the amendment largely was the product of the eighteenth century struggle between the press and the crown. Id. at 564-65. Justice Powell also stressed the point in his concurring opinion. Id. at 569-70 (Powell, J., concurring).
\textsuperscript{67} Id. at 565-66 (opinion of Court).
\textsuperscript{68} Id. at 567.
Justice Powell concurred, noting that magistrates should take first amendment values into consideration when assessing the reasonableness of a warrant to search press offices. Justice Stewart, joined by Justice Marshall, agreed that the fourth amendment does not bar the search of ordinary nonsuspect third parties, but dissented on the ground that the first amendment requires the police to use a subpoena when seeking evidence from the press. Justice Stevens also dissented, arguing that the search of a nonsuspect third party violates the warrant clause of the fourth amendment unless the police have reason to believe that the person would fail to comply with a subpoena.

To the extent that changes in legal doctrine influence the development of law enforcement practices, the recent outbreak of law office searches probably is attributable to the rejection of the mere evidence rule, the demise of the private papers doctrine and the legitimation of the third party search.

III. THE THREAT TO THE ATTORNEY-CLIENT RELATIONSHIP

The prospect of a law office search is a matter of serious concern because of the threat it poses to the nature of the attorney-client relationship, the legal devices that have evolved to promote and foster it, and the attorney’s role in the administration of justice.

A. PROTECTIONS OF ATTORNEY-CLIENT RELATIONSHIP

The ABA Code of Professional Responsibility emphasizes that “in our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or, defense.” To achieve this ideal,

69. Id. at 568-70 (Powell, J., concurring).
70. Id. at 571 n.1, 576 (Stewart, J., with Marshall, J., dissenting).
71. Id. at 570-71.
72. Id. at 577-81 (Stevens, J., dissenting).
73. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 [hereinafter ABA CODE]. The Preamble to the Code develops the role of the attorney at an even more fundamental level:

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in in the preservation of society.


With certain modifications, every state and the District of Columbia have adopted the Code as the basic standard of legal ethics. M. PRSIG & K. KIRWIN, PROFESSIONAL RESPONSIBILITY 2 (3d ed. 1976). On January 30, 1980, the American Bar Association released a Discussion Draft of the Model Rules of Professional Conduct (ABA Model Rules). If approved by the House of Delegates, the Model Rules will
“every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence”\textsuperscript{74} to assist in “secur[ing] and protect[ing] available legal rights and benefits.”\textsuperscript{75} In the criminal law context, these entitlements flow from the sixth amendment’s guarantee that “the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”\textsuperscript{76} The Code further recognizes, as does the common law, that if this goal is to be realized, “[a] client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by the client.”\textsuperscript{77} To create an atmosphere in which such an interchange is possible, the Code has placed the attorney under an “ethical obligation . . . to hold inviolate the confidences and secrets of his client.”\textsuperscript{78}

To achieve this same objective of free and candid disclosure, the common law long has provided that confidential communications made by a client to an attorney in the course of seeking legal advice are privileged.\textsuperscript{79} If the

replace the Code as the primary statement of the ethical standard of the profession. Many provisions of the Code are retained. Others are clarified, extended, modified, or deleted. Furthermore, certain significant new obligations have been added. The Model Rules probably will be debated heavily during the next year or two. Regardless of whether, or to what extent, they will be adopted, the Model Rules are certain to have a substantial effect on future conceptions about an attorney’s professional responsibility.

\textsuperscript{74} ABA CODE, supra note 73, EC 1-1.

\textsuperscript{75} Id. EC 7-1.

\textsuperscript{76} U.S. CONST. amend. VI.

\textsuperscript{77} ABA CODE, supra note 73, EC 4-1. The Code further emphasizes that

[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. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant.


\textsuperscript{78} ABA CODE, supra note 73, EC 4-1. “Confidence” is defined as “information protected by the attorney-client privilege.” “Secret” is defined as “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” \textit{Id.} DR 4-101(A). A secret would seem to encompass virtually anything arguably of interest to a client’s adversary. Rule 1.7 of the ABA Model Rules also places the attorney under a duty to avoid disclosure of confidential information concerning the client. Although the distinction between “confidences” and “secrets” is dropped, the substituted concept of confidential information concerning the client would seem to be almost as broad. ABA MODEL RULES, supra note 77, rule 1.7(a).

\textsuperscript{79} Wigmore provided the classic definition of the attorney-client privilege:

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

attorney-client privilege is to serve its primary purpose of encouraging client communication,80 substantial certainty about its applicability is essential.81 Consequently, when the privilege applies at all, its protection generally is absolute.82

Although the attorney-client privilege has been criticized as an obstruction to the search for truth, courts have not diluted it significantly.83 Nevertheless, by construing its definitional limitations strictly84 and by adopting certain

358-59 (D. Mass. 1950). The attorney-client privilege is now recognized by common law or statute in every state and in the federal courts. Tarlow, supra note 29, at 341. The scope of the privilege does vary somewhat in different jurisdictions.

Although the purpose of the privilege is to encourage communications from client to attorney, communications from attorney to client also may be privileged, at least to the extent that disclosure would reveal the substance of communications from the client to the attorney. United States v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir. 1980); C. McCormick, McCormick on Evidence § 89, at 182-83 (2d ed. 1972) [hereinafter McCormick].


Additionally, the privilege encourages the attorney to devote his undivided loyalty to his client by precluding him from being compelled simultaneously to assume the conflicting roles of “solictor and the revealer of the secrets of the case.” 8 WIGMORE, supra note 79, § 2291, at 553.

81. In re Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979). See also Note, Attorney-Client Privilege for Corporate Clients: The Control Group Test, 84 HARV. L. REV. 424, 426 (1970) (“ad hoc approach to privilege pursuant to a vague standard achieves the worst of possible worlds”) [hereinafter Note, Control Group Test].

82. Cf. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2001 (1970) (“Communications within the scope of the privilege are zealously protected”) [hereinafter WRIGHT & MILLER]. One student commentator has argued that a more flexible balancing approach should be employed in the corporate area. Note, Attorney-Client Privilege: Balancing, supra note 7’, at 473-74. Since the present definitional standards are somewhat vague and subject to manipulation, however, the courts probably balance competing values in order to define the scope of the privilege in a particular case. Hazard, supra note 32, at 1064; Attorney-Client Privilege: Balancing, supra note 77, at 471-72. The proposed ABA Model Rules apparently would diminish the absolute nature of the attorney-client privilege to a limited extent. See note 157 infra and accompanying text (describing proposed revisions that would require disclosure in a limited instance).

83. Dean McCormick speculates that the staying power of the privilege, to some extent, is attributable to the “sentiment of loyalty” that lawyers and judges attach to the attorney-client relationship. McCormick, supra note 79, § 87, at 176. As one commentator has emphasized, however, “assuming that recognition of the privileges constitutes a perpetual threat to the ascertainment of truth in litigation . . . there are things even more important to human liberty than accurate adjudication. One of them is the right to be left by the state unmolested in certain human relations.” Louisell, supra note 80, at 110. See generally 8 WIGMORE, supra note 79, § 2291, at 554 (recommending retention of privilege as matter of public policy, but arguing it should be construed strictly).

84. See Fisher v. United States, 425 U.S. 391, 403 (1976) (privilege protects only those disclosures necessary to obtain legal advice that might not have been made in absence of privilege); 8 WIGMORE, supra note 79, § 554 (same). For example, communications to an attorney from a third party who is not the agent of the client are not privileged. Hickman v. Taylor, 329 U.S. 495, 504 (1947). Communications made for the purpose of obtaining primarily nonlegal advice also are not privileged. See United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 359-60 (D. Mass. 1950) (communication between attorney and client involving mere business advice not privileged).

In the corporate context, courts disagree about who speaks for the client. The majority of courts extend the privilege to the “control group”—employees in a position to act upon the advice of counsel. Note, Control Group Test, supra note 81, at 424. A minority of courts focus on whether the subject matter of the communication was made by an employee at the direction of his superior in relation to the performance of his employment duties. See Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 491-92 (7th Cir. 1970)
qualifications to serve the demands of competing policies, the courts have attempted to assure that the privilege is not extended beyond its justification. Communications made in the course of furthering a crime or fraud, for example, are beyond the scope of the privilege, as are otherwise non-privileged preexisting documents that have been transferred from a client to his attorney for purposes of obtaining legal assistance.

Quite apart from the attorney-client privilege, the courts have developed the work-product doctrine to protect litigating attorneys against exploitation of their trial preparation by their adversaries. The Supreme Court initially recognized the doctrine in Hickman v. Taylor. Because the Court believed that wide-open discovery of trial preparation not only would cause many attorneys to attempt to rely on the efforts of their adversaries, thereby encouraging inadequate preparation, but also would discourage the commitment of strategic considerations to writing, the Court created something akin to a qualified privilege to protect material prepared "in anticipation of

85. In re Special September 1978 Grand Jury (II), 48 U.S.L.W. 2745, 2745 (7th Cir. Apr. 30 1980); 8 WIGMORE, supra note 79, § 2298, at 572; MCCORMICK, supra note 76, § 95, at 199.

86. Fisher v. United States, 425 U.S. 391, 403-04 (1976); MCCORMICK, supra note 79, § 89, at 184-85. Since the documents could be obtained directly from the client, the Supreme Court has reasoned that the absence of the privilege should not discourage transfer of documents to the attorney. 425 U.S. at 404. 87. For a discussion of the function of the work-product doctrine, see Cooper, Work Product of The Rulesmakers, 53 MINN. L. REV. 1269, 1274-1300 (1969); Developments in the Law Discovery, 74 HARV. L. REV. 940, 1028-29 (1961).

88. 329 U.S. 495 (1947). In Hickman counsel for the plaintiff in a wrongful death action had sought discovery of written statements made by witnesses to the defendant's attorney and the attorney's notes and memoranda of oral witness statements. Id. at 498-500. The trial court cited defense counsel for contempt for refusing to produce the requested items. Id. at 500. The Third Circuit reversed, holding that the material was privileged from discovery because it was part of the "work product of the lawyer." Hickman v. Taylor, 153 F.2d 212, 223 (3d Cir. 1945), aff'd, 329 U.S. 495 (1947). In affirming the court of appeals, the Supreme Court concluded that:

[i]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

Id. at 510-11.

In United States v. Nobles, the Supreme Court reemphasized the point, observing that "[a]t its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." 422 U.S. 225, 238 (1975).

89. 329 U.S. at 511-12.

90. The work-product doctrine generally has not been considered an evidentiary privilege. C. WRIGHT, LAW OF FEDERAL COURTS § 82, at 407 (3d ed. 1976). Indeed, in Hickman the Supreme Court indicated that the subject matter was not "privileged or irrelevant, as those concepts are used in [the Federal Rules of Civil Procedure]." 329 U.S. 495, 509-10 (1947). In United States v. Nobles, however, the Court declared that Hickman had recognized a "qualified privilege." 422 U.S. 275, 337-38 (1975). Furthermore, the Court seemed to indicate that the doctrine would apply in a criminal trial in much the same manner as a standard
To avoid precluding the discovery of evidentiary facts in the possession of opposing counsel, the Court indicated that items such as written witness statements could be obtained on a showing of necessity. The Court, however, suggested that oral statements made by a witness to an attorney should be accorded an extraordinary degree of protection in view of the risk of the attorney's inaccurately recalling the testimony, the danger of transforming the attorney into a witness (perhaps against his own client), and the limited evidentiary value of the testimony.

The principles of Hickman not only have been embodied, clarified, and to some extent broadened by Federal Rule of Civil Procedure 26(b)(3), but also have been adopted widely by the states. Although the work-product doctrine originated in the context of civil discovery, courts have applied it at trial, in criminal proceedings, and in grand jury hearings.

Under the sixth amendment, a criminal defendant is entitled to effective assistance of counsel. Unless a client can frankly and openly communicate evidentiary privilege. See id. at 239-40 (comparing work-product privileges to other privileges). Subsequently, a district court indicated that the Supreme Court must have meant that the work-product doctrine constitutes a “privilege” in the criminal, but not the civil, context. See In re Grand Jury Investigation, 412 F. Supp. 943, 946 n.3 (E.D. Pa. 1976) (stating Nobles “did not overrule Hickman’s position that work product is not itself a privilege when asserted in civil discovery”). For simplicity, this article often will refer to the work-product doctrine as a privilege.

92. 329 U.S. at 512-13. The plaintiff in Hickman was unable to sustain his burden of demonstrating “necessity” with respect to either the written or oral witness statements requested because he sought the items merely to double check his own preparation and also because he could obtain all relevant nonprivileged facts through interrogatories. Id.
93. Id. In the wake of Hickman courts frequently speak of the need to protect an attorney’s “opinion work product.” See Note, Protection of Opinion Work Product Under the Federal Rules of Civil Procedure, 64 VA. L. REV. 333, 333 (1978) (describing information courts have considered “opinion work product”) [hereinafter Note, Opinion Work Product]. The courts, however, do not agree about the degree of protection to be provided under the doctrine. Compare Duplin Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 734 (4th Cir. 1974) (opinion work product immune from discovery), cert. denied, 420 U.S. 997 (1975) with In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979) (interview memoranda discoverable only in rarest circumstances) and In re Subpoena (Murphy), 560 F.2d 326, 336 (8th Cir. 1977) (opinion work product discoverable only in rarest circumstances).
96. See id. at 236 (work-product doctrine applies to both criminal and civil litigation); FED. R. CRIM. P. 16(b)(2) (work-product doctrine prevents defendant from discovering internal Government documents relevant to prosecution of case); Note, “Work Product” in Criminal Discovery, 1966 WASH. U.L.Q. 321, 326-44 (describing rationale behind and application of work-product doctrine in state criminal discovery).
with his lawyer and his lawyer can prepare a defense with some degree of privacy, the lawyer cannot render effective legal assistance. Thus, many courts and commentators have suggested that the sixth amendment right to counsel, perhaps in conjunction with the fifth amendment privilege against self-incrimination, encompasses the attorney-client privilege and the work-product doctrine, or at least a comparable, if not broader, assurance of privacy in communication and preparation. These protections—the attorney-client privilege, the obligation of confidentiality, the work-product doctrine, and the right to counsel—are designed to achieve and maintain conditions that are considered essential to the proper functioning of the attorney-client relationship. In turn, these protections preserve the attorney’s role in the administration of justice. The prospect of the law office search as a legitimate tool of law enforcement poses a severe threat to these doctrines and, more importantly, to the underlying values they promote.

The functions of these rights and privileges are scarcely identical. Nonetheless, the nature of the threat and the impact of the law office search

99. See, e.g., United States v. Levy, 577 F.2d 200, 209 (3d Cir. 1978) (open communication between client and attorney “essential” if professional assistance guaranteed by sixth amendment to be meaningful; for “adversary system to function properly,” advice received after defendant’s disclosures to attorney “must be insulated from the government”); Hazard, supra note 32, at 1062 (without attorney-client privilege, “counsel would become a medium of confession,” thereby impairing accused’s fifth and sixth amendment rights); Note, Attorney-Client Privilege: Balancing, supra note 77, at 485-86 (without attorney-client privilege, exercise of either fifth or sixth amendment right would require waiver of other); Note, The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received from his Client, 38 U. Chi. L. Rev. 211, 225-26 (1970) (in criminal cases, attorney-client privilege “may be necessary to effectuate” fifth and sixth amendment rights) [hereinafter Note, Physical Evidence]. See also R. Lempert & S. Saltzburg, A Modern Approach to Evidence 659 (1977) (fifth amendment should not interfere with attorney-client relationship; sixth amendment right to counsel “may mandate” privilege in criminal cases).

100. See In re Grand Jury Subpoena (Rosenbaum), 401 F. Supp. 807, 808 (S.D.N.Y. 1975) (compelling attorney to disclose conversation with witness violates work-product doctrine, which in criminal context implicates fifth and sixth amendment rights); In re Terkeltoob, 256 F. Supp. 683, 684-85 (S.D.N.Y. 1966) (forcing attorney to disclose conversation with witness effectively deprives client of fifth and sixth amendment rights); A. Amsterdam, TRIAL MANUAL 3 FOR THE DEFENSE OF CRIMINAL CASES, § 274(C), at 1—296.2 (student ed. 1978) (work-product doctrine “doubtless a federal constitutional requirement”) [hereinafter Amsterdam].

101. See, e.g., United States v. Rosner, 485 F.2d 1213, 1224 (2d Cir. 1973) (dictum) (“essence of Sixth Amendment right is, indeed, privacy of communication with counsel”), cert. denied, 417 U.S. 950 (1974); Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960) (right to counsel requires client be free of “apprehension of disclosure”); Barber v. Municipal Court, 24 Cal. 3d 742, 751, 598 P.2d 818, 822, 157 Cal. Rptr. 658, 662 (1979) (“the right to counsel guaranteed by the California Constitution embodies the right to communicate in absolute privacy with one’s attorney”); Cf: Note, Professional Responsibility and In re Ryder: Can an Attorney Serve Two Masters?, 54 Va. L. Rev. 145, 159-60 (1968) (fifth and sixth amendments, working in conjunction, might expand scope of attorney-client privilege) [hereinafter Note, Professional Responsibility].

102. Because the attorney-client privilege and the work-product doctrine have distinct purposes and limitations, their coverage is not coextensive. Unlike the attorney-client privilege, for example, the work-product doctrine does not necessarily require strict confidentiality. WRIGHT & MILLER, supra note 82, § 2024, at 210. The work-product doctrine applies to information obtained from third parties or created by the attorney entirely on his own. Hickman v. Taylor, 329 U.S. 495, 511-13 (1947), and relates only to matter prepared in anticipation of litigation. Fed. R. Civ. P. 26(b)(3). Also, to some extent, the doctrine requires an explicit balancing of competing interests. Hickman v. Taylor, 329 U.S. at 511-13.

Just as they have with the attorney-client privilege, courts apparently will read a “crime or fraud” exception into the work-product doctrine. See, e.g., In re Special Sept. 1978 Grand Jury (II), 48 U.S.L.W. 2743, 2745 (7th Cir. Aprt. 30, 1980) (material received by attorney from client not protected by work-
are sufficiently similar to warrant considering these rights and privileges together. The attorney-client privilege and the attorney’s obligation of confidentiality are intended to promote candid communication. The obligation of confidentiality is significantly broader than the attorney-client privilege since it is not limited to information communicated to the attorney by the client. However, an attorney may not invoke his obligation of confidentiality in order to resist disclosure of nonprivileged material if required by law or court order. Consequently, an analysis of the danger to the attorney-client privilege should apply to the parallel threat to the ethical obligation of confidentiality. Even though an invasion of the attorney-client privilege or the work-product doctrine might not be an absolute prerequisite for establishing a constitutional violation, such an invasion might well constitute the most serious threat to the sixth amendment right to counsel the law office search presents. Accordingly, the danger to the attorney-client relationship may be perceived best by focusing on the threat to the attorney-client privilege and the work-product doctrine.

B. THREATS POSED BY LAW OFFICE SEARCHES

Seizure of Privileged Documents. The courts have not settled the issue of whether third parties may assert an evidentiary privilege in response to a search warrant. Consequently, courts in some jurisdictions might conclude that since the subject of a search has no right to interfere with the execution of a warrant, law enforcement officers simply could ignore an attorney’s assertion that certain documents specified in the warrant were privileged and therefore not subject to examination and seizure. The attorney-client privilege and the work-product doctrine would be undermined seriously if a law product doctrine when ongoing fraud involved); In re Grand Jury Proceedings (FMC Corp.), 604 F.2d 798, 802-03 (3d Cir. 1979) (crime-fraud exception bars assertion of work-product doctrine with respect to alleged illegal activities of client); In re Subpoena (Murphy), 560 F.2d 326, 336 & n.19 (8th Cir. 1977) (dictum) (work product might not be immune if illegal activities by attorney established). Finally, a waiver of the attorney-client privilege is not a waiver of the work-product doctrine. 8 WRIGHT & MILLER, supra note 82, § 2016, at 127-29. 105. The attorney-client privilege is narrower than the lawyer’s ethical obligation of confidentiality since the latter “exists without regard to the nature or source of information or the fact that others share the knowledge.” ABA CODE, supra note 73, EC 4-4. See also ABA MODEL RULES, supra note 77, rule 1.7 & Comment (although based on same policy considerations as attorney-client privilege, confidentiality rule broader since it applies to all information about client, regardless of source).

104. Despite the broad coverage of section DR 4-101(A) & (B), the ABA Code of Professional Responsibility provides that “[a] lawyer may reveal . . . [c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order.” ABA CODE, supra note 73, DR-101(C)(2). Another section of the Code declares that “a lawyer shall not . . . [c]onceal or knowingly fail to disclose that which he is required by law to reveal.” Id. DR 7-102(A)(3). Consequently, the Code seems to contemplate that an attorney’s obligation to disclose pursuant to legal process will be determined by the positive law of the jurisdiction, including applicable rules of privilege. The ethical obligation of confidentiality does not in itself create anything akin to an evidentiary privilege. The ABA Model Rules would strengthen the attorney’s obligation to disclose client confidences when required by law or ethical rules, as provided for in DR-101(C)(2), by substituting “shall” for the Code’s may. ABA MODEL RULES, supra note 77, rule 1.7(b).

105. Falk, supra note 30, at 18 (unclear whether evidentiary privileges bar to third-party searches); cf. Note, Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis, 28 STAN. L. REV. 957, 961 n.28 (1976) (appellate courts have not decided applicability of shield law or most other testimonial privileges to press office searches) [hereinafter Search and Seizure of the Media].
enforcement official armed with a search warrant could readily seize and examine documents otherwise legally unobtainable. Fortunately, this result seems unlikely since the courts that have confronted the issue generally have indicated that law enforcement officials may not seize documents within the scope of these doctrines during the search of a law office.

Rummaging Effect on Nonspecified Documents. Even if protected items are not subject to seizure, the law office search might infringe the rights and privileges necessary for the proper functioning of the attorney-client relationship. In most searches for documentary evidence, the officials executing the warrant will need to examine many more items than are specified in the warrant. This "rummaging" effect becomes especially intrusive when some of the nonspecified documents subject to examination are privileged. If the attorney-client privilege is to serve its purpose of encouraging candid client communication, the attorney must be able to assure his client not only that protected communications never will be admitted into evidence against him, but also that they will remain inaccessible to his adversaries, including the state. Because disclosure invades the privilege, a breach that is largely irreparable, the Minnesota Supreme Court in O'Connor v. Johnson concluded

106. As Superior Court Judge Pacht observed in the course of enjoining the search of the Kaplan & Livingston firm, a warrant such as the one before him "could give agents the power to . . . go through a lawyer's office and absolutely destroy any kind of privilege that existed as to any of their documents . . . ." Luther, Judge Assails Conduct in Search, L.A. Times, Apr. 13, 1979, § II, at 4, col. 1. (quoting Superior Court Judge Pacht). See Zurcher v. Stanford Daily, 436 U.S. 547, 579 (1978) (Stevens, J., dissenting) (under majority's holding innocent third parties have no opportunity to object to search); Privacy Hearings, supra note 20, at 33 (statement of Sen. Mathias) (Zurcher permits government to circumvent confidential privileges without providing affected parties opportunity to object).

107. In O'Connor v. Johnson the Minnesota Supreme Court implicitly held that the search of the office of a nonsuspect attorney would be unconstitutional because of the very risk that the search would infringe the attorney-client privilege and the work-product doctrine. 287 N.W.2d 400, 405 (Minn. 1979) (en banc). In Deukmejian v. Superior Court the California Court of Appeals essentially concluded that the amendments to the California Penal and Evidence Codes effectively would preclude the police from seizing privileged material. 103 Cal. App. 3d 253, 261-62, 162 Cal. Rptr. 857, 862-63 (Ct. App. 1980). An Oregon trial court has held explicitly that material within the attorney-client privilege is not subject to seizure under a search warrant. In re Stewart, No. DA-180-730-7910, slip op. at 3 (Or. D. Ct., Multnomah County, Dec. 4, 1979). The Los Angeles Municipal Court apparently invalidated the warrant to search the office of the Cotton & Bregman law firm as overbroad primarily because of the threat posed to established privileges. Transcript at 4-5. In re Law Offices of Bregman, No. SW 15591 (L.A. Mun. Ct. June 4, 1979). A Texas court invalidated the search of the Chagra law office specifically because the police had examined privileged documents. In re Chagra, No. 32771-243, slip op. at 3 (Tex. D. Ct., El Paso County, Feb. 5, 1979). The court suggested that the conduct of the officers executing the warrant might have been criminal. Id. at 4. In Burrows v. Superior Court the Supreme Court of California indicated that a warrant authorizing the seizure of protected material would violate the attorney-client privilege. 13 Cal. 3d 238, 250-51, 529 P.2d 590, 598, 118 Cal. Rptr. 166, 174 (1974) (en banc) (dictum). And in National Cities Trading Corp. v. United States the court sustained the search of an attorney's office but noted that the evidence sought probably was not privileged. 487 F. Supp. 1332, 1335 (S.D.N.Y. 1980).


109. United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930). Judge Learned Hand argued that "the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about among his effects to secure evidence against him." Id.
that law enforcement officers executing a search warrant at an attorney's office must not be allowed to examine miscellaneous documents while searching for those listed in the warrant.\textsuperscript{110} As the O'Connor court recognized, "once [privileged] information is revealed to the police, the privileges are lost, and the information cannot be erased from the minds of the police."\textsuperscript{111} The consequences of permitting law enforcement officers to examine an attorney's work product while searching for specified documents could prove to be equally severe.\textsuperscript{112} Unless the attorney can be assured that the government will not exploit the revealed information either directly or indirectly, he might feel compelled to alter his strategy in order to nullify any unwarranted advantage that the state, as his adversary, otherwise might gain by possessing the information.\textsuperscript{113} As a result, the client might be deprived of the best available defense (or offense).

Chilling Effect on Client Communication and Trial Preparation. Perhaps the most serious consequence of the law office search stems from the "chilling effect" it is likely to exert on client communications and attorney trial preparation.\textsuperscript{114} The client probably will be less inclined to discuss his legal problems fully and freely with counsel if he is aware that the police, by obtaining a warrant to search his attorney's office, might examine any of his own or his lawyer's communications or thoughts committed to writing. Moreover, the effect scarcely would be restricted to those attorneys whose offices have been or are likely to become the targets of searches since "[i]n the area of searches and seizures, fears are almost as important as realities."\textsuperscript{115}

The potential reaction of clients cannot be demonstrated empirically; but neither can the basic premise of the attorney-client privilege. As Wigmore put it, the "benefits [of the privilege] are all indirect and speculative; its obstruction is plain and concrete."\textsuperscript{116} Even so, the courts have assumed that if

\textsuperscript{110} 287 N.W.2d 400, 405 (Minn. 1979) (en banc).
\textsuperscript{111} Id. (footnote omitted). In the context of the privilege against self-incrimination, Chief Justice Burger similarly summarized the problem from the client's perspective when he succinctly noted that "appellate courts cannot always 'unring the bell' once information has been released." Maness v. Meyers, 419 U.S. 449, 460 (1975).
\textsuperscript{112} See O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979) (en banc) (concluding that search of attorney's office pursuant to otherwise valid warrant might destroy work-product doctrine).
\textsuperscript{113} If courts permit law office searches, they should extend something akin to the "fruit of the poisonous tree" doctrine to invasions of the attorney-client privilege and the work-product doctrine in order to preserve the integrity of these protections. See notes 475-88 infra and accompanying text (discussing need for exclusionary rule and "fruit of the poisonous tree" doctrine to provide direct remedy for invasion of attorney-client privilege and work-product doctrine).
\textsuperscript{114} "Chilling effect," a well-worn metaphor attributable to Justice Frankfurter, often is used in the first amendment realm to describe the inhibition a person feels about exercising a right because of the fear of a state-imposed sanction. See Wieman v. Updegraff, 344 U.S. 183, 195 (1952) ("inhibition of freedom of thought, and of action of thought, . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice"). See generally Schauer, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect," 58 B.U. L. REV. 685 (1978); Note, The Chilling Effect in Constitutional Law, 69 COLUM. L. REV. 808 (1969).
\textsuperscript{115} Privacy Hearings, supra note 20, at 35 (testimony of Philip B. Heymann, Assistant Attorney General, Criminal Division).
\textsuperscript{116} 8 WIGMORE, supra note 79, § 2291 at 554 See also Louisell, supra note 80, at 112 ("sheer speculation" that attorney-client privilege essential for attorney to get all information). Cf. Morgan, Forward to ALI MODEL CODE OF EVIDENCE 27 (1942) (no empirical support for rationale of attorney-client privilege).
the privilege is weakened, client communication will diminish both quantitatively and qualitatively. Indeed, the Supreme Court has stated that

'[as] a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.117

Confronted with this issue, the Supreme Court of Minnesota concluded that the very “fear” that an attorney’s office might be searched could destroy “[t]he indispensable relationship of trust between client and attorney and the adequate functioning of our adversary system of justice . . .”.118

Arguably, the prospect of a law office search would decrease communication only slightly because attorneys would remind their clients that they must reveal confidences to obtain adequate representation.119 Often, though, attorneys have difficulty convincing their clients of the need for full disclosure. McCormick has observed that even when the conversation is fully protected by the attorney-client privilege, “[t]he tendency of the client in giving his story to counsel to omit all that he suspects will make against him, is matter of everyday professional observation. It makes it necessary for the prudent lawyer to cross-examine his client searchingly about possible unfavorable facts.”120 Moreover, an attorney who believes that his office might become the target of a search can no longer reassure his client by stressing the rigorous protection guaranteed by the privilege.121

117. Fisher v. United States, 425 U.S. 391, 403 (1976). The Court has presumed the existence of a similar “chilling effect” in the context of other “disclosural” privileges as well. See, e.g., United States v. Nixon, 418 U.S. 683, 705 (1974) (without presidential privilege, President probably would “temper candor with concern for appearances and for . . . own interest to the detriment of the decisionmaking process”); EPA v. Mink, 410 U.S. 73, 86-87 (1973) (executive privilege indispensable to promotion of “open, frank discussion” between government officials); McCray v. Illinois, 386 U.S. 300, 308 (1967) (informant’s privilege essential to induce informers to come forward). But see Branzburg v. Hayes, 408 U.S. 665, 690-95 (1972) (insufficient showing that constitutional privilege necessary to encourage confidential sources to disclose information to reporters). The Court also has recognized that a “chilling effect” might hamper the judicial process. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979) (grand jury secrecy required to encourage witnesses to appear and testify); Clark v. United States, 289 U.S. 1, 13 (1933) (secrecy of jury deliberations necessary to avoid stifling freedom of debate and independence of thought).


119. See Note, Attorney-Client Privilege: Balancing, supra note 77, at 470. Inroads on the attorney-client privilege might exert less influence on the typical corporate client, who must confer with attorneys as a matter of business necessity, than on the individual criminal defendant, who often is wary of the legal system and fearful of self-incrimination. Id. at 473-74, 477-78. Cf. In re Grand Jury Investigation, 599 F.2d 1224, 1237 (3d Cir. 1979) (because of need to comply with extensive regulations, corporations must rely on attorneys even though not all conversations protected by attorney-client privilege).

120. MCCORMICK, supra note 79, § 87, at 176. See also Paul, The Responsibilities of the Tax Adviser, 63 Harv. L. Rev. 377, 382-83 (1950) (tax clients “experts at forgetting what needs to be remembered and at remembering what needs to be forgotten”).

The effect on work-product preparation might be equally serious. In *Hickman* the Supreme Court explicitly recognized that if an attorney's work product were available to his adversary,

much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.\(^2\)

If law enforcement officials were permitted to examine an attorney's work product during a search, many attorneys litigating against the government might refrain from committing important strategic considerations to writing. The search for truth probably would suffer if attorneys were forced to rely on their memories more than they already do.\(^3\)

Although the chilling effect of a diminished work-product doctrine on trial preparation cannot be proved empirically,\(^4\) many of the courts that have considered the issue since *Hickman* have concluded that if they were to impair the work-product doctrine, they would inhibit the creation of trial preparation material.\(^5\) Even if the prospect of a search does not discourage lawyers from preparing work product, it might still induce the "inefficiency" recognized in *Hickman*\(^6\) by encouraging attorneys to record their notes in code or to store trial preparation material away from their offices.\(^7\)

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1. See also Cowger, *Will Lawyers Be Giving Stanford Warnings?*, 64 A.B.A. J. 1211, 1211 (1978) (suggesting that if law office searches become standard practice, attorneys might have to warn clients that police could discover confidential communications during course of law office search).

2. 329 U.S. at 511 (1947).

3. See *In re Subpoena (Murphy)*, 560 F.2d 326, 333-35 (8th Cir. 1977) (work-product protection improves client representation by encouraging attorney to maintain written records); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 736 (4th Cir. 1974), (if attorney inhibited from recording thoughts "truth . . . will become lost in the murky recesses of memory"), *cert. denied*, 420 U.S. 997 (1975). *But see Cooper, supra note 87, at 1277-79* (arguing that benefits of preserving written trial preparation materials so outweigh threat of discovery that attorneys will not be deterred from creating trial preparation material regardless of existence or scope of work-product doctrine).


5. 329 U.S. at 511.

6. The California Attorneys for Criminal Justice, an association of 1,600 criminal defense attorneys, has argued that attorneys probably will take these types of precautions if their offices are subject to search. The association contends that such practices would not constitute "bad faith" by attorneys but rather would be an attempt to honor their obligations to their clients. Amicus Brief of California Attorneys for
generally, a law office search, as an invasion of the attorney's enclave of privacy, probably would exert the type of demoralizing effect on the bar that both the majority opinion and concurrence sought to avoid in *Hickman.*

**Denial of Effective Assistance of Counsel.** Finally, the search of a law office, particularly the office of a criminal defense attorney, implicates the right to effective assistance of counsel. Even though confidentiality is essential to effective assistance of counsel, not every government intrusion into the attorney-client relationship will necessarily violate the sixth amendment right to counsel. In *Weatherford v. Bursey,* for example, the Supreme Court held that an undercover agent's participation in meetings between an attorney and his client did not deprive the client of his right to counsel. As the Court noted, the agent had been invited by the defense and did not convey any information acquired to the prosecution. The Court implied, however,

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128. See 329 U.S. at 511 (if attorney's thoughts not protected, "[i]ncreased inefficiency, unfairness and sharp practices' would develop in giving of legal advice and preparing cases"); id. at 516 (Jackson, J., concurring) ("no practice more demoralizing to Bar" than forcing attorney to disclose thoughts to adversary). In *Zurcher* the Court considered and rejected the contention that the physical disruption inherent in the search of a newsroom would delay or inhibit the publication of news. 436 U.S. 547, 563-66 (1978). If the police removed many important documents or files, an attorney, like a reporter, might have difficulty meeting his commitments and deadlines. *Cf.* VonderAhe v. Howland, 508 F.2d 364, 367 (9th Cir. 1974) (doctor's practice allegedly disrupted for two weeks after IRS seized business records). This problem could be avoided by requiring the police to return promptly copies of all documents seized. Quite possibly, an attorney's professional reputation might suffer if a well publicized search of his office caused members of the public to conclude erroneously that he is unethical or is implicated in criminal conduct. See *Zurcher* v. Stanford Daily, 436 U.S. at 580 & n.8 (Stevens, J., dissenting) (individuals might suffer injury to reputation as result of search). His reputation might not be injured, however, since many people will recognize that an attorney has legitimate needs for possessing incriminating evidence. Such a concern is irrelevant when the search is legal because the damage to his reputation represents a cost of law enforcement that the attorney, like the ordinary citizen, must bear. When the search is illegal, he should pursue a damage action under federal or state law.

129. In *O'Connor v. Johnson* the Minnesota Supreme Court declared that a court must weigh a client's right to the assistance of counsel guaranteed by both the United States Constitution and the Minnesota Constitution in determining whether the search of an attorney's office is unreasonable. 287 N.W.2d 400, 404 (Minn. 1979) (en banc).


132. *Id.* at 556.

133. *Id.* at 557. In *O'Brien v. United States,* 386 U.S. 345, 345 (1967) (per curiam), and *Black v. United States,* 385 U.S. 26, 29 (1966) (per curiam), the Supreme Court had vacated summarily criminal convictions when the Government confessed that the FBI unlawfully had monitored conversations between attorneys and clients even though the information obtained from the monitorings had not been
that if the Government had planned the intrusion, if the agent had communicated the defense strategy to the prosecution, or if any of the evidence introduced against the defendant had been a direct or indirect product of these meetings, then the sixth amendment might have been violated.\footnote{134}

If law enforcement officials search an attorney’s office and examine or seize privileged or confidential client files, a client might assert in a criminal proceeding that the search deprived him of his right to effective assistance of counsel. To support his assertion, the client would have to prove either that law enforcement officials intended to interfere with the attorney-client relationship or that the prosecutor directly or indirectly used privileged materials against him at trial. The defendant might even support his claim by demonstrating that by examining the privileged documents, these officials chilled future attorney-client communications, thus diminishing his right to effective assistance of counsel.\footnote{135}

used by the prosecutors. In \textit{Weatherford} the Court distinguished \textit{O’Brien} and \textit{Black} on the ground that they involved fourth amendment violations. 429 U.S. at 552. The Court also noted that in \textit{Hoffa} v. United States, 385 U.S. 293 (1966), it did not hold that the sixth amendment right to counsel embodies "a right to be free from intrusion by informers into counsel-client consultations," but merely assumed that a conviction would have been reversed if an informer overheard and reported the client-counsel communications pertaining to the trial. \textit{Id.} at 553.

Dissenting in \textit{Weatherford}, Justice Marshall argued that \textit{O’Brien} and \textit{Black} required that the Court vacate the conviction because the police had intercepted attorney-client consultations. \textit{Id.} at 566-68 (Marshall, J., with Brennan, J., dissenting); see Note, \textit{Government Intrusion Upon Attorney-Client Relationships}—\textit{Weatherford} v. Bursey, 27 DE PAUL L. REV. 203, 206-13 (1977) (agreeing with Justice Marshall’s dissent in \textit{Weatherford}). Justice Marshall further argued that any government intrusion into a criminal defendant’s relationship with his attorney threatens to upset the adversary balance between the state and the accused, permits government witnesses to plan or shade their testimony to meet expected defenses, and chills attorney-client communications by diminishing the right of the client to confidential communication with counsel, a right that derives independently from the sixth amendment. 429 U.S. at 56-64 (Marshall, J., with Brennan, J., dissenting). Moreover, Justice Marshall argued that a defendant would have difficulty proving either that the Government intended to intrude on his attorney-client relationship or that the undercover agent transmitted the information to the prosecution. \textit{Id.} at 565-66.

\textit{Id.} at 558 (opinion of Court); see United States v. Levy, 577 F.2d 200, 209-10 (3d Cir. 1978) (even though no showing of prejudice, actual disclosure of defense strategy requires dismissal of indictment); Barber v. Municipal Court, 24 Cal. 3d 742, 752, 598 P.2d 818, 828, 157 Cal. Rptr. 658, 669 (1979) (charges dismissed because informant intentionally participated in attorney-client meeting and then disclosed defense information to superiors); \textit{Amsterdam, supra} note 100, § 363 (G), at 1—366 (\textit{Weatherford} strongly suggests "Sixth Amendment would be infringed by governmental eavesdropping on lawyer-client conversations"); \textit{C. Whitebread, Criminal Procedure} § 25.02, at 519 (1980) (intrusion probably violates sixth amendment if evidence used at trial).

The Supreme Court recently held in United States v. Henry, 100 S. Ct. 2183 (1980), that government officials violated the defendant's sixth amendment right to counsel by planting an informant in the defendant's jail cell and then using at trial incriminating evidence elicited by the informant. \textit{Id.} at 2189.

\textit{Id.} at 555 n.4; \textit{cf.} Henry v. Perrin, 609 F.2d 1010, 1013 (1st Cir. 1979) (possible disclosure of privileged information obtained during prison inspection of attorney’s case file posed threat to defendant’s right to effective counsel), \textit{cert. denied}, 100 S. Ct. 1652 (1980).
IV. THE SUBPOENA PREFERENCE RULE AS AN ACCOMMODATION OF COMPETING INTERESTS

In view of the destructive potential of the law office search, the question remains whether the legitimate needs of law enforcement can be satisfied without significant sacrifice to the values of the attorney-client relationship.

A. THE SUBPOENA PREFERENCE RULE

The need to obtain evidence from attorneys is not a problem of recent origin. Traditionally, when law enforcement officials have had reason to believe that an attorney possessed incriminating evidence, they have sought production of this evidence by a subpoena duces tecum.\(^\text{136}\) Grand juries and courts occasionally have issued subpoenas duces tecum even when an attorney has been the subject of an investigation.\(^\text{137}\) The subpoena is preferable to the

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136. A subpoena duces tecum has been issued to an attorney in many cases. See, e.g., In re Grand Jury Proceedings (Thompson), 624 F.2d 17, 18 (5th Cir. 1980); In re Grand Jury, 603 F.2d 459, 471-72 (3d Cir. 1979); In re Grand Jury Subpoena, 599 F.2d 504, 506 (2d Cir. 1979); United States v. Duncan, 598 F.2d 839, 868 (4th Cir.), cert. denied, 444 U.S. 871 (1979); In re Subpoena (Lowthian), 575 F.2d 1292, 1293 (9th Cir. 1978) (per curiam); In re Grand Jury Proceedings, 570 F.2d 562, 563 (6th Cir. 1978); Beckler v. Superior Court, 568 F.2d 661, 661 (9th Cir. 1978); In re Subpoena (Murphy), 560 F.2d 326, 330 (8th Cir. 1977); In re Grand Jury, 534 F.2d 719, 721 (7th Cir. 1976); In re Subpoena (Fish & Neave), 519 F.2d 116, 117 (8th Cir. 1975); In re Grand Jury Proceedings, 517 F.2d 666, 668 (5th Cir. 1975); In re Grand Jury Proceedings (Duffy), 473 F.2d 840, 841 (6th Cir. 1973); In re Grand Jury Subpoena, 484 F. Supp 1099, 1101 (S.D.N.Y. 1980); In re Grand Jury Subpoena, 478 F. Supp. 368, 370 (E.D. Wis. 1979); In re Grand Jury Subpoena (Victor), 422 F. Supp. 475, 477 (S.D.N.Y. 1976); In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943, 945 (E.D. Pa. 1976); Attorney General v. Covington & Burling, 411 F. Supp. 371, 372 (D.D.C. 1977); In re Grand Jury Subpoena Duces Tecum, 406 F. Supp. 381, 384 (S.D.N.Y. 1975); In re Grand Jury Subpoena Duces Tecum, 391 F. Supp. 1029, 1031 (S.D.N.Y. 1975); People v. Doe, 59 Ill. App. 3d 627, 628, 375 N.E. 2d 975, 977 (3d Dist. 1978); In re Grand Jury Subpoena Duces Tecum (Levy), 165 N.J. Super. 211, 212, 397 A.2d 1132, 1134 (Sup. Ct. Law Div. (Crim.) 1978); State v. Olwell, 64 Wash. 2d 828, 829, 394 P.2d 681, 682 (1964). The Department of Justice routinely uses subpoenas duces tecum to obtain documentary materials from third party attorneys. Letter from Roger A. Pauley, Director, Office of Legislation, United States Department of Justice, to Lackland H. Bloom, Jr. (Sept. 11, 1979) (copy on file at Georgetown Law Journal).

The Internal Revenue Service also frequently has served summonses on attorneys in an effort to secure documentary evidence. See, e.g., Fisher v. United States, 425 U.S. 391, 394 (1976); United States v. Osborne, 561 F.2d 1334, 1336 (9th Cir. 1977); United States v. Hodgson, 492 F.2d 1175, 1176 (10th Cir. 1974); Colton v. United States, 306 F.2d 633, 634 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); Baird v. Koerner, 279 F.2d 623, 625 (9th Cir. 1960); United States v. Holley, 481 F. Supp. 61, 62 (S.D. Fla. 1979).

Attorneys also have been served with subpoenas ad testificandum when a grand jury was seeking testimonial rather than physical or documentary evidence. See, e.g., In re Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933 (6th Cir. 1980); In re Grand Jury Proceedings, 568 F.2d 555, 556 (4th Cir. 1977), cert. denied, 435 U.S. 978 (1975); In re Grand Jury Appearance of Michaelson, 511 F.2d 882, 885 (9th Cir.), cert. denied, 421 U.S. 978 (1975); United States v. Colacurcio, 499 F.2d 1401, 1403 (9th Cir. 1975); In re Grand Jury Subpoenas (Field), 408 F. Supp. 1169, 1171 (S.D.N.Y. 1976); In re Stolar, 397 F. Supp. 520, 521 (S.D.N.Y. 1975); In re Kinoy, 326 F. Supp. 400, 401 (S.D.N.Y. 1970).

137. See, e.g., Bellis v. United States, 417 U.S. 85, 101 (1973) (Douglas, J., dissenting) (law firm’s records subpoenaed by grand jury investigating possible tax law violations by partner); In re Grand Jury, 529 F.2d 543, 545 (3d Cir.) (law firm’s financial records subpoenaed by grand jury investigating possible tax law violations by firm members), cert. denied, 425 U.S. 992 (1976); Schwimmer v. United States, 322 F.2d 855, 858 (8th Cir.) (same), cert. denied, 352 U.S. 853 (1956); United States v. Mandel, 437 F. Supp. 258, 260-61 (D. Md. 1977) ("day- timer" records of law firm used to contain personal entries and prepare
search warrant as a means of protecting the attorney-client relationship in two significant respects. The subpoena *duces tecum* enables the attorney to gather and produce requested documents, thereby eliminating the threat that law enforcement officers will examine and possibly seize privileged and irrelevant documents in the course of a search authorized by a warrant.\(^\text{138}\)

Moreover, before producing the evidence the attorney may obtain a judicial ruling on the applicability of any relevant privilege by filing a motion to quash.\(^\text{139}\) This approach might diminish substantially any chilling effect on the interests protected by the attorney-client privilege and work-product doctrine because the client and the attorney will be afforded the full extent of protection conferred by these respective privileges.\(^\text{140}\)

Assuming that the subpoena preference rule would adequately protect the attorney-client relationship, the question remains whether it also would accommodate the legitimate needs of law enforcement. The proposed rule is only one of preference for the subpoena. It does not require that the government use a subpoena whenever an attorney possesses evidence. Rather, it accommodates law enforcement needs by allowing the police to search an attorney's office when they have reason to believe that he might destroy, conceal, or otherwise fail to produce nonprivileged material; that he is criminally culpable; or that he will fail to comply with a final judicial enforcement order.\(^\text{141}\) Such a search should be subject to certain protective
procedures designed to diminish the threat to the privileges. Further inquiry is necessary, however, to determine whether this compromise would satisfy the law enforcement need for expeditious access to criminal evidence.

B. THE THREAT TO EFFECTIVE LAW ENFORCEMENT

As the Supreme Court noted in *Zurcher* and as law enforcement spokesmen subsequently have maintained, the subpoena preference rule might frustrate effective law enforcement in many ways. Evidence might be removed, concealed, or destroyed while the validity of the subpoena is litigated on a motion to quash, or it might be rendered inaccessible by a party asserting his privilege against self-incrimination. The delay inherent in the opportunity for precompliance litigation might frustrate criminal investigations. Furthermore, the subpoena *duces tecum* might not be

preference rule for the *Zurcher* holding and requires a showing of probable cause. Pub. L. No. 96-440 (1980). The Act permits law enforcement officials to search only upon establishing "probable cause to believe that the person possessing the materials has committed or is committing the criminal offense for which the materials are sought." Id. §§ 101(a)(1), 101(b)(1). The Act, however, would permit a search when "there is reason to believe that the giving of notice pursuant to a subpoena *duces tecum* would result in the destruction, alteration, or concealment of the materials." Id. § 101(b)(3). The latter exception readily could swallow the former rule. In contrast to the Act the recent California legislation requires special procedural safeguards governing law office searches only if law enforcement officials do not have a "reasonable suspicion" that the attorney is criminally implicated. CAL. PENAL CODE § 1524(c) (West Supp. 1980). This standard appears to be less exacting than the probable cause standard.

In *Zurcher* the Court concluded that law enforcement efforts would be impeded if the courts, before issuing a search warrant, required police to show probable cause supporting their belief that an ordinary nonsuspect third party possessed evidence. 436 U.S. 547, 555-56, 560-62 (1977). A court, however, should not adopt this reasoning if the police believe an attorney possesses the evidence. See notes 149-79 infra and accompanying text (arguing that legal and ethical obligations will lead most attorneys to produce subpoenaed evidence, even if damaging to client). If the probable cause standard was considered too stringent in the context of law office searches, a more lenient standard such as "reasonable suspicion" would be preferable to nothing at all. That standard, however, might prove insufficiently protective and unnecessarily confusing. See Note, Third Party Searches in the Face of *Zurcher* v. Stanford Daily: Toward a Set of Reasonableness Requirements, 11 CONN. L. REV. 660, 679-80 (1979) (despite absence of probable cause, magistrate should consider police suspicion of third party's criminal involvement in determining whether to issue warrant to search premises of nonsuspect third party).

142. See text accompanying notes 296-501 infra (discussing protective procedures).

143. In *United States v. Nixon* the Supreme Court observed that

"[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of facts. The very integrity of the judicial system depends on full disclosure of all the facts, within the framework of the rules of evidence."


144. See notes 62-65 supra and accompanying text (discussing *Zurcher*).

145. S. 1790 Hearings, supra note 22, at 22-23, 31 (statement of Philip B. Heymann, Assistant Attorney General, Criminal Division); Privacy Hearings, supra note 20, at 319 (statement of Paul L. Perito, National District Attorneys Ass'n).

146. S. 1790 Hearings, supra note 22, at 31 (statement of Philip B. Heymann, Assistant Attorney General, Criminal Division).

147. See, e.g., *Zurcher* Hearings, supra note 33, at 157-58 (statement of Richard J. Williams, Vice
available in some jurisdictions during the earlier stages of the investigation.\textsuperscript{148} Although these arguments have some merit when an ordinary nonsuspect third party possesses evidence, they are considerably less persuasive when the Government is seeking evidence from an attorney.

**Potential Loss of Evidence.** After law enforcement officers have served a subpoena on an attorney, a client probably could not readily retrieve evidence from his attorney's office without the attorney's knowledge and consent. The pertinent question then is not whether the client can suppress the evidence, but whether the attorney will. In view of the attorney's obligations as a professional and as an officer of the court, and given the integrity of the bar, law enforcement officials usually will not encounter difficulties in obtaining evidence from attorneys by service of a subpoena \textit{duces tecum}. Although law enforcement officials doubtlessly fear that the average attorney, given his ethical obligations of confidentiality and loyalty, will not produce evidence that adversely affects his client, they should remember that "a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients."\textsuperscript{149} The attorney thus incurs special ethical and legal obligations\textsuperscript{150} that may outweigh his responsibilities to his client.\textsuperscript{151}

The \textit{ABA} Code of Professional Responsibility has attempted to reconcile the attorney's apparently conflicting duties of confidentiality and candor.\textsuperscript{152} The attorney is obligated under the Code to represent the client "zealously"...
but "within the bounds of law." Thus, the attorney may not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal." Moreover, although an attorney may not knowingly reveal a confidence or a secret of his client, he may do so "when required by law or court order." The recently proposed ABA Model Rules clarify and strengthen this duty by providing that the attorney "shall" disclose confidential information about a client to the extent necessary "to prevent the client from committing an act that would result in death or serious bodily harm to another person and to the extent required by law or the rules of professional conduct."

153. ABA Code, supra note 73, Canon 7. Thus, DR 7-102(B) provides that

[a] lawyer who receives information clearly establishing that: (1) His client has, in the course of representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

Id. The scope of the duty set forth in this rule, however, was diminished significantly by ABA Opinion 314, which construed "privileged communications" to include "secrets" as well as "confidences." ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, RECENT ETHICS OPINIONS, NO. 341 (1975); see Kramer, Clients' Fraud and Their Lawyers' Obligations: A Study in Professional Irresponsibility 67 GEO. L.J. 991, 994 (1979) (Opinion 341 rewrote privileged communication exception of DR-7102(B) by providing that disclosure of client fraud required except when information protected by DR 4-101; interpretation swallows rule); But see Gruenbaum, Clients' Frauds and Their Lawyers' Obligations: A Response to Professor Kramer, 68 GEO. L.J. 191, 211-12 (1979) (code, administrative agencies, and courts may impose greater disclosural obligations on attorneys than Professor Kramer assumes).

In contrast to the ABA Code of Professional Responsibility, the new ABA Model Rules require that the attorney correct a manifest misapprehension attributable to false testimony or evidence presented by the attorney. ABA MODEL RULES, supra note 77, rule 3.1(d). Disclosure is required even when the misapprehension results from fraudulent conduct by the client or involves disclosure of a client confidence. Id. rule 3.1(b). This obligation does not apply to criminal defense counsel, however, unless positive law mandates disclosure. Id. rule 3.1(f)(1). The drafters considered and rejected a proposal "requiring the disclosure of facts known to a lawyer which 'would probably have a substantial effect on the determination of a material issue.'" Id. comment to rule 3.1(b).

154. ABA Code, supra note 73, DR 7-102(A)(3). The Disciplinary Rule also declares that a lawyer shall not "(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent. (8) Knowingly engage in other illegal conduct contrary to a Disciplinary Rule." Id. DR 7-102(A)(7), (8). See ABA MODEL RULES, supra note 77, rule 2.3 (attorney generally prohibited from rendering advice when reasonably foreseeable that client will use advice to further an illegal course of conduct); 3.1(d). This obligation does not apply to criminal defense counsel, however, unless positive law mandates disclosure. Id. rule 3.1(f)(1). The drafters considered and rejected a proposal "requiring the disclosure of facts known to a lawyer which 'would probably have a substantial effect on the determination of a material issue.'" Id. comment to rule 3.1(b).

155. ABA Code, supra note 73, DR 4-101(B).

156. Id. DR 4-101(C)(3). Despite the use of the permissive term "may" in the rule, the attorney is not vested with complete discretion to disclose information. If an attorney is required to disclose pursuant to local law or court order and if under the Code he ethically may do so, he must disclose the information as a practical matter to avoid criminal conviction or citation for contempt. The courts therefore can relieve the attorney of this ethical dilemma by finding an independent duty to reveal information under state law. See In re Ryder, 263 F. Supp. 360, 369 (E.D. Va.) (per curiam) (attorney under duty to disclose proceeds of bank robbery and illegal weapon used in robbery received from client), aff'd, 381 F.2d 713 (4th Cir. 1967); Morell v. State, 575 P.2d 1200, 1212 (Alaska 1978) (attorney under duty to reveal evidence received from nonclient third party concerning commission of crime by client). But see Note, Physical Evidence, supra note 99 (disclosural obligation should not depend on existence of independent state law duty). See generally, Note, The Problem of an Attorney in Possession of Evidence Incriminating His Client: The Need for a Predictable Standard, 47 U. CINN. L. REV. 431 (1978).

157. ABA MODEL RULES, supra note 77, rule 1.7(b). This section may be the most controversial
Through an emerging body of case law, courts are attempting to define the attorney's legal, as opposed to ethical, duty to produce evidence in his possession that incriminates his client. The Alaska Supreme Court recently concluded that a criminal defense attorney must turn over to the prosecution real evidence that the attorney obtains from his client. Further, if the evidence is obtained from a non-client third party who is not acting for the client, then the privilege to refuse to testify concerning the manner in which the evidence was obtained is inapplicable. Although this conclusion is perhaps an oversimplification of a complex and controversial problem, it reflects the trend of the relevant case law. The courts strive to reconcile the attorney's legal and ethical duties of confidentiality with the public's need for evidence. To ensure that law offices do not become depositories for criminals, some courts have held that the attorney-client privilege does not apply when the client has transferred "contraband, fruits or instrumentalities" of a crime to his attorney. Other courts deem the

change proposed under the Model Rules. Although the provision addresses the attorney's ethical obligation of confidentiality, it makes no exception for otherwise privileged material. The requirement of disclosure to prevent death or bodily harm is unlikely to have any significant effect unless courts construe it to require disclosure of otherwise privileged information pertaining to potentially dangerous products or business practices.

The meaning of the requirement to disclose information required by law or rules of professional conduct is not immediately clear. Expansively construed, it could destroy the obligation of confidentiality and the attorney-client privilege by permitting the state to apply ordinary disclosure obligations to material that would otherwise be privileged or confidential. Presumably, the requirement is not intended to be so construed. Alternatively, the provision might be read to mean that the attorney is under no obligation to disclose privileged material, at least pursuant to "law," unless the disclosure duty is recognized as an independent exception to the relevant privilege.

The Association of Trial Lawyers of America has drafted an alternative code of legal ethics that would attempt to protect confidentiality to a significantly greater extent than the proposed ABA Model Rules. One commentator has reported that it "would forbid a lawyer to reveal client confidences except to the extent required by law or court order, or to defend himself from formal criminal charges brought by the client." Burke, ATLA Unveils Ethics Code, Nat'L J., June 23, 1980, at 7, col. 2.

See, e.g., In re January Grand Jury (Genson), 534 F.2d 719, 729 (7th Cir. 1976) (attorney must comply with subpoena requesting production of money received from clients shortly after clients allegedly robbed bank); In re Ryder, 263 F. Supp. 360, 369 (E.D. Va.) (per curiam) (attorney suspended from practice for transferring evidence of client's guilt from client's safe deposit box to own with intent to withhold until after trial), aff'd, 381 F.2d 713 (4th Cir. 1967); Morrell v. State, 575 P.2d 1200, 1211-12 (Alaska 1978) (no denial of right to counsel when former attorney assisted defendant's friend in producing for police kidnapping plan discovered in defendant's house and then testified about source of evidence); People v. Lee, 3 Cal. App. 3d 514, 526, 83 Cal. Rptr. 715, 722 (Ct. App. 1970) (proper for attorney to produce shoes received from client's wife that client used to kick victim and to testify about source of evidence); People v. Doe, 59 Ill. App. 3d 627, 633, 375 N.E.2d 975, 980 (Ct. App. 1978) (attorney must produce client's suicide note apparently obtained from another client); State ex rel Sowers v. Olwell, 64 Wash. 2d 828, 833, 394 P.2d 681, 684 (1964) (attorney must produce knife, alleged to be murder weapon). But see New York Ethics Op. No. 479 (Feb. 28, 1978) (attorney acted properly in not divulging that client had revealed location of bodies of two persons he had murdered). Morrell v. State, 575 P.2d 1200, 1210 (Alaska 1978). See generally Note, Professional Responsibility, supra note 101.

See In re January 1976 Grand Jury (Genson), 534 F.2d 719, 728 (7th Cir. 1976) (attorney cannot assert attorney-client privilege as justification for taking possession of possible fruits of violent crime); In re
“communication” within the privilege but limit its traditionally absolute character by balancing the competing interests. Similarly, when an attorney claims that the work-product doctrine protects the relevant evidence, the courts generally balance the policies favoring nondisclosure against the need for evidence.

Despite an evolving duty to produce evidence incriminating their clients, attorneys often will not produce such evidence sua sponte because “[w]hile serving as an advocate, a lawyer should resolve in favor of his clients doubts as to the bounds of law.” Cases indicate that the attorneys who have been

Ryder, 263 F. Supp. 360, 365 (E.D. Va.) (per curiam) (attorney-client privilege inapplicable when attorney took initiative in transferring stolen money and illegal weapon from client’s safe deposit box to own), aff’d, 381 F.2d 713 (4th Cir. 1967). This result is justifiable either on the theory that the transfer was made for the express purpose of secreting the evidence rather than obtaining legal advice or simply as a matter of policy to ensure that the privilege does not provide a shield for withholding evidence in these circumstances. The attorney-client privilege does not permit an attorney to withhold evidence received from a third party. See Morrell v. State, 575 P.2d 1200, 1210 (Alaska 1978) (privilege does not permit attorney to withhold incriminating information about client’s kidnapping plan received from client’s friend); People v. Lee, 3 Cal. App. 3d 514, 527, 83 Cal. Rptr. 715, 723 (Ct. App. 1970) (privilege does not permit attorney to withhold physical evidence received from client’s wife that incriminates client).

The sixth amendment right to effective assistance of counsel and the traditional restrictions on discovery from the criminal defendant both caution against transforming an attorney into an unwilling source of evidence against his client, even when that evidence might not fall within one of the applicable privileges. Cf. In re Terkel, 256 F. Supp. 683, 686 (S.D.N.Y. 1966) (compelling attorney to testify about witness interview would impair counsel’s effectiveness at trial). See generally Seidelson, The Attorney-Client Privilege and the Client’s Constitutional Rights, 6 HOFSTRA L. REV. 693 (1978). The ABA Model Rules recognized the problem and explicitly declined to extend certain of the proposed disclosural obligations into the criminal context, at least to the extent that a duty was not already imposed by positive law. ABA MODEL RULES, supra note 77, rule 1.7(f).

See In re Stolar, 397 F. Supp. 520, 524 (S.D.N.Y. 1975) (attorney-client privilege protects against disclosure of client’s name and address; production not required because privilege policy outweighs government need for evidence); Sepler v. State, 191 So.2d 588, 590-91 (Fla. Ct. App. 1966) (attorney-client privilege protects against disclosure of names of other attorneys; privilege balanced against state’s need for evidence); People v. Belge, 50 A.D.2d 1088, 1088, 376 N.Y.S.2d 771, 771-72 (App. Div. 1975) (per curiam) (attorney-client privilege precludes indictment of defense counsel for failing to report death occurring without medical attendants when client apparently informed counsel of location of bodies of murder victims; privilege balanced against public interest), aff’d, 41 N.Y.2d 60, 359 N.E.2d 377 (1976) (per curiam); State ex rel Sowem v. Olwell, 64 Wash. 2d 828, 833, 394 P.2d 681, 684 (1964) (transfer of murder weapon from client to attorney within attorney-client privilege; production required because of state’s need for evidence and policy against allowing attorney to be depository of criminal evidence outweighs privilege but prosecution prohibited from revealing source of evidence to trier of fact).

See, e.g., United States v. Amerada Hess Corp., 619 F.2d 980, 987-88 (3d Cir. 1980) (law enforcement need outweighs work-product protection of attorney’s list of interviewees not revealing mental processes of attorney); In re Grand Jury Subpoena, 595 F.2d 504, 512 (2d Cir. 1979) (law enforcement need insufficient to outweigh work-product protection of employee questionnaires when company provides all nonwork product requested by Government); United States v. Colacurcio, 499 F.2d 1401, 1404 (9th Cir. 1974) (grand jury may question attorney about preparation of criminal case when subject of questioning collateral to case issues); In re Grand Jury (Duffy), 473 F.2d 840, 849 (8th Cir. 1973) (good cause not shown for production of work product because witnesses known and accessible to grand jury); In re Grand Jury Subpoena, 484 F. Supp. 1099, 1103-05 (S.D.N.Y. 1980) (need for evidence to obtain indictments outweighs work-product protection of attorney’s tape of witness interviews when no alternative source of evidence exists); In re Grand Jury Subpoena Duces Tecum, 406 F. Supp. 381, 393 (S.D.N.Y. 1975) (law enforcement need outweighs work-product protection of attorney’s interview memoranda when witness no longer available).

ABA CODE, supra note 73, EC 7-3; cf. ABA MODEL RULES, supra note 77, comment to rule 1.7 (lawyer ordinarily shall invoke applicable privilege on behalf of client unless client waives). Nevertheless, the attorney’s duty to produce evidence might not depend upon a formal request by the prosecution. Cf.
confronted with this problem conscientiously have attempted to pursue an ethical course of action.\textsuperscript{164} Attorneys frequently will move to quash subpoenas for client files or firm records because a motion to quash is the proper method for obtaining judicial review of claims of privilege and for challenging the validity of a subpoena.\textsuperscript{165} Similarly, an attorney might risk receiving a contempt citation by failing to comply with a trial court order enforcing a subpoena;\textsuperscript{166} in many jurisdictions this is the accepted and often the only method of obtaining precompliance appellate review.\textsuperscript{167} The overwhelming majority of attorneys, however, undoubtedly would comply with a judicial enforcement order once all legitimate avenues of review had been exhaust-

United States v. Duncan, 598 F.2d 839, 868 (4th Cir. 1979) (reversal not required when defense counsel informed prosecutor that they possessed tapes incriminating clients), \textit{cert. denied}, 444 U.S. 871 (1980); State \textit{ex rel} Sowers v. Olwell, 64 Wash. 2d 828, 833, 394 P.2d 681, 684-85 (1964) (attorney bound to produce evidence on own motion). An attorney also might produce evidence pursuant to an informal request by the prosecution; therefore the prosecutor would need neither a search warrant nor a subpoena. See ABA Model Rules, \textit{supra} note 77, comment to rule 3.2 (conscientious lawyer should honor opponent's request for relevant evidence without formal demand unless good reason exists to require demand); \textit{cf.} Department of Justice Policy with regard to the Issuance of Subpoenas to, and the Interrogation, Indictment or Arrest of Members of the News Media, 28 C.F.R. § 50.10(c) \& (d) (1979) [before obtaining subpoena, Department of Justice attorney must attempt to obtain information through negotiation with news media] [hereinafter Justice Media Subpoena Policy].

\textsuperscript{164} The attorneys frequently sought guidance from bar ethics committees or judges. See Morrell \textit{v.} State, 575 P.2d 1200, 1206 (Alaska 1978) (attorney sought advice on production of incriminating evidence from ethics committee); \textit{In re} Ryder, 263 F. Supp. 360, 362, 364 (E.D. Va.) (per curiam) (attorney sought advice from former bar association officer and judge), \textit{aff'd}, 381 F.2d 713 (4th Cir. 1967). Of course, the reported cases probably will involve the ethically insensitive attorney only rarely because his failure to produce evidence seldom will be discovered.

\textsuperscript{165} To determine whether an attorney has asserted an unwarranted claim of privilege, judges can examine the evidence \textit{in camera}.

\textsuperscript{166} \textit{See In re} Grand Jury Subpoena, 599 F.2d 504, 506 (2d Cir. 1979) (attorney held in contempt for failing to comply with trial court order enforcing grand jury subpoena). An attorney may not be held in contempt for failing to comply with a subpoena until the court issues an order enforcing it. Brown \textit{v.} United States, 359 U.S. 41, 49-50 (1959). The court may not enforce the subpoena until after the attorney has had an opportunity to present claims of privilege and challenge the validity of the subpoena in an adversary proceeding. \textit{Id.}

\textsuperscript{167} \textit{See In re} Subpoena (Lowthian), 575 F.2d 1292, 1293 (9th Cir. 1978) (per curiam) (contempt judgment for noncompliance with subpoena orderly and statutory method to seek appellate review of subpoena's validity). In\textit{ Maness v. Meyers} the Supreme Court held that an attorney could not be held in contempt for advising his client not to comply with a trial court order enforcing a subpoena. 419 U.S. 449, 460-63 (1975). The Court based its decision on the client's privilege against self-incrimination. \textit{Id.} Because disclosure pursuant to an erroneous order could have resulted in irreparable injury, the Court considered the attorney's refusal to comply with the trial court order an appropriate method of obtaining judicial review. \textit{Id.} The Court expressly reserved the question of whether the same would be true with respect to a common law or statutory privilege such as the attorney-client privilege. \textit{Id.} at 461.

Nonetheless, the Fifth Circuit recently held, by analogy to \textit{Maness}, that a party may not be cited for criminal contempt if the district court improperly enforced a subpoena requiring the production of material protected by the attorney-client privilege or the work-product doctrine. \textit{In re} Grand Jury Proceedings (McCoy \& Sussman), 601 F.2d 162, 169-72 (5th Cir. 1979); \textit{cf.} \textit{In re} Grand Jury Proceedings (FMC), 604 F.2d 798, 800 (3d Cir. 1979) (party has standing to appeal denial of motion to quash only if initially cited for contempt pending appellate review). See generally \textit{Note, Attorney-Client Privilege—Contempt: The Dilemma in Non-Disclosure of Possibly Privileged Information}, 45 Wash. L. Rev. 181 (1970); \textit{Note, Attorney Client Privilege: The Remedy of Contempt}, 1968 Wis. L. Rev. 1192.
As the Minnesota Supreme Court recognized in *O'Connor v. Johnson*, the attorney's status as an officer of the court should raise a strong presumption that the attorney will comply with a judicial order. In *Geders v. United States*, Justice Marshall similarly observed in a concurring opinion that “[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.” Moreover, the proposed ABA Model Rules explicitly provide that an attorney shall not destroy, conceal, falsify, or obstruct another person's access to evidence.
Despite these pronouncements, not all lawyers will act ethically in every situation. Likewise, no code of ethical precepts, regardless of careful draftsmanship or strict enforcement, can achieve this ideal. Some lawyers violate the ABA Code of Professional Responsibility, and others destroy evidence or unjustifiably refuse to comply with legal process. On the whole, however, most lawyers conscientiously honor the law, their ethical obligations, and the mandates of the courts. The traditional reliance of law enforcement officials on the subpoena as the primary, if not the exclusive method, of obtaining criminal evidence from attorneys, attests to the basic integrity of the bar.

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174. The events commonly known as Watergate are the most celebrated, but not the only, recent instances of criminal behavior by members of the bar. Cf. S. 1790 Hearings, supra note 22, at 35 (statement of Philip B. Heymann, Assistant Attorney General, Criminal Division) (significant number of federal prosecutions involve attorneys as defendants); id. at 69 (statement of Oliver B. Revell, III, Deputy Assistant Director, FBI) (recent federal investigations suggest attorneys may "engineer or serve as conduits for illegal financial transactions"); Berentson, Are Lawyers Honest? Thirteen of Them Are Put to the Test, Am. Law., May, 1980, at 15-18 (five of 13 personal injury attorneys agreed to present claim based on perjured testimony); Wehrwien, Lawyer Loses Appeal on Entrapment, Nat'l L.J., Sept. 15, 1980, at 7, col. 2 (Minnesota Supreme Court affirms conviction of attorney for defrauding insurance company on client's behalf); Lavine, Miami Law Firm Guilty in False Visa Scheme, Nat'l L.J., Dec. 24, 1979, at 1, cols. 3-4 (describing first instance in which law firm convicted of criminal offense).


177. A relatively recent empirical study of the Boston bar concluded that although the bar tended to be both ignorant of ethical considerations and apathetic towards their enforcement, "most lawyers in most situations will conduct themselves properly." Burbank & Duboff, supra note 31, at 106. Moreover, the study found "no gross deviations from standards of behavior established by the canons of ethics and from basic social norms." Id. Consequently, the authors were able to conclude that with respect to their sample, "most attorneys apparently are not unscrupulous." Id. Since that survey was conducted, the ABA has instituted a requirement that all accredited law schools provide instruction in the duties and responsibilities of the legal profession. American Bar Association, Standards for the Approval of Law Schools § 302(a)(iii) (1975). Over time, this requirement should help diminish lawyer ignorance about ethical considerations.

178. See notes 136-37 supra (listing cases demonstrating law enforcement officials' traditional reliance on subpoena).

179. See O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979) (en banc) (absence of reported cases regarding seizure by warrant of client's files from attorney's office indicates subpoena used with satisfactory results).
In summary, although some evidence undoubtedly would be lost by requiring law enforcement officials to proceed by subpoena when seeking items from nonsuspect attorneys, the loss probably would not be substantial. When balanced against the threat to the attorney-client relationship, such a loss cannot justify the search of a law office.

**Assertion of Privilege.** Because the subject of a subpoena may assert the fifth amendment privilege against self-incrimination, he might delay or deny law enforcement officials access to relevant evidence. When law enforcement officials serve a lawyer with a subpoena, his opportunity for asserting his privilege against self-incrimination might be greater than the opportunities available to a third party. In addition to claiming his own privilege, the attorney might preserve his client's privilege against self-incrimination with respect to pre-existing documents by asserting the attorney-client privilege. However, the stringent “act of production” analysis of *Fisher v. United States* substantially diminishes the prospects of an attorney’s prevailing on such a claim. Apart from the privilege against self-incrimination, the attorney could preclude law enforcement access to specified items through assertion of the attorney-client privilege and the work-product doctrine. Nonetheless, a law enforcement practice is scarcely justifiable simply because it facilitates the circumvention of significant rights or privileges.

**Delay.** The delay inherent in a motion to quash a subpoena might represent the most serious obstacle to the subpoena preference rule because it

180. Andresen v. Maryland, 427 U.S. 463, 473-474 (1976). Although Andresen severely limits an attorney's ability to assert the privilege when confronted with a search warrant, it does not eliminate that potential altogether because instances might occur in which the police will need the attorney to perform some affirmative task such as opening a locked file cabinet or retrieving information stored in a computer. See also Teeter & Singer, supra note 127, at 864 (courts overlook problem of searching officer's access to reporter's information stored in newspaper's computer; might be impossible to retrieve information except through specially trained editors or technicians); Privacy Hearings, supra note 20, at 78-82 (statement of Robert Lewis, Society of Professional Journalists) (many newspapers converted to electronic systems with video display terminals and computers to process and store copy); N.Y. Times, July 27, 1980, § 1, at 1, 32, cols. 1, 4 (employees of Boise, Idaho, television station subjected to search refused to operate monitoring equipment that would have permitted police to view tapes). Under the “act of production” analysis of *Fisher v. United States*, however, a court probably would not consider actions of this nature “testimonial.” Thus, the privilege would be inapplicable. See note 49 supra and accompanying text (discussing Fisher's “act of production” analysis).

181. The attorney cannot claim his privilege against self-incrimination in response to a subpoena for firm records unless he is a sole practitioner. See United States v. Mandel, 437 F. Supp. 258, 261 (D. Md. 1977) (attorney cannot assert privilege against self-incrimination with respect to subpoena for calendar supplied by partnership).

182. In *Fisher v. United States* the Supreme Court indicated that the privilege against self-incrimination may not be asserted vicariously. 425 U.S. 391, 397 (1976). An attorney, however, may invoke the attorney-client privilege to protect the client's privilege against self-incrimination with respect to preexisting documents transferred to the attorney for purposes of obtaining legal advice if the documents would have been protected by the client's privilege against self-incrimination while in the client's possession. Id. at 397-405. Recent cases suggest that an attorney confronted with a search warrant ultimately may assert these same privileges. See note 107 supra and accompanying text (listing courts holding that documents within scope of attorney-client privilege and work-product doctrine may not be seized during law office search).


184. See notes 44-49 supra and accompanying text (discussing Fisher).
can derail a criminal investigation.185 If litigation over a motion to quash proceeds at a routine pace, the consequent delay might prove substantial.186 Prosecutors fear the resulting loss of physical evidence and investigatory leads, the fading of memories, and the disappearance or intimidation of witnesses.187 Furthermore, procedural delays might cause statutes of limitations to run or grand jury terms to expire.

Not all of the potential harm attributable to delays inherent in the subpoena process can be overcome. Nevertheless, any harm might be minimized substantially by using a “forthwith” subpoena188 in extreme cases and by applying procedures designed to expedite the litigation of motions to quash in all instances.189 The subpoena preference rule could allow law enforcement officers to conduct a search after a court has issued an enforcement order but before all appellate remedies have been exhausted when the officers demonstrate that further delay would result in a specific and severe injury to the interests of justice.190 Prosecutors might fear that defense

185. The Supreme Court has balked at allowing courts to employ procedures that threaten to delay criminal investigations. See United States v. Calandra, 414 U.S. 338, 349-50 (1974) (extending exclusionary rule to grand jury proceeding would unduly delay criminal investigations); United States v. Dionisio, 410 U.S. 1, 17 (1973) (requiring preliminary showing of reasonableness by grand jury before ordering witness to submit to voice exemplar would frustrate public interest in expeditious administration of criminal law).

186. One law enforcement representative has noted that “[i]n the hands of an innovative and creative defense counsel . . . litigation [involving the validity of a subpoena] can consume months of time. Irrevocable damage to an investigation is almost inevitable.” Privacy Hearings, supra note 20, at 320 (statement of Paul L. Perito, National District Attorneys Ass’n). But see Letter from Sen. Birch Bayh to Members of the Senate Judiciary Committee, at 4 (May 21, 1980) (delay should not pose serious problem in white collar-crime cases because investigations routinely run for months or years and rarely demand emergency action).

187. See Privacy Hearings, supra note 20, at 328 (statement of Paul L. Perito, National District Attorneys Ass’n) (observing that immediate search minimizes hazards of fading memories, loss or destruction of evidence, and intimidation of witnesses).

188. See Bekavac, Third Party Searches, in Searching Law Offices: A Delicate Balance, L.A. L.A.W., Oct., 1979, at 12, 14 (“forthwith” subpoena useful when speed critical to investigation). The “forthwith” subpoena requires the recipient to produce immediately the materials requested by a grand jury, a court, or a prosecutor. The primary purpose of this device is to frustrate the removal, concealment, or destruction of the items sought. See United States v. Re, 313 F. Supp. 442, 446 (S.D.N.Y. 1970) (use of “forthwith” subpoena of accounting files upheld when accountant might allow defendant to tamper with files).


190. The recently enacted Privacy Protection Act of 1980, which generally prohibits the searches or seizures of documentary materials held for public dissemination, does allow for such searches when the materials have not been produced in response to a court order directing compliance with a subpoena ducem tecum and—
(A) all appellate remedies have been exhausted; or
(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice.
attorneys will use the motion to quash as a dilatory tactic to undermine investigations of the defendants. Although an attorney may employ those procedures provided by the adversary system for his client’s protection, the bar has recognized that the manipulation of the legal process for “no substantial purpose other than delay” constitutes improper conduct. Furthermore, the traditional reliance on subpoenas as the standard method of seeking evidence from attorneys suggests that the police and prosecution have adapted to the attendant delay. If the procedures suggested above are employed, the delay inherent in the subpoena preference rule should be reduced to an acceptable level.

Availability of Subpoenas. In some jurisdictions subpoenas are not readily available during the early stages of an investigation. In these jurisdictions, a subpoena preference rule might create a significant problem by banning all law enforcement access to pertinent evidence. Nonetheless, the problem might be solved by maintaining a grand jury on standby status, by permitting a rural prosecutor to obtain a subpoena from a grand jury in another jurisdiction, or by vesting a prosecutor with the limited authority to issue a subpoena for evidence believed to be in the possession of an attorney. The severe threat to the attorney-client relationship justifies placing on the state the burden of developing investigatory procedures less intrusive than the search warrant.

Pub. L. No. 96-440 § 101(b)(4)(A), (B), (1980). This exception is limited by other provisions in the Act. For example, the Act’s exception does not apply to work product held in connection with the public communication of information. Id. § 101(a). Prior to production, the person in possession of the items has the opportunity to submit an affidavit explaining why a seizure should not occur. Id. § 101(c). See S. REP. No. 959, 96th Cong., 2d Sess. 13 (1980) (enumerating factors to be considered in applying interests of justice exception). Despite these protections, the breadth and generality of the exception are matters of concern. Although the exception probably is necessary to accommodate the needs of law enforcement, it could become a significant loophole in the subpoena preference rule. See Privacy Hearings, supra note 20, at 412 (testimony of Richard Gottfried, Assemblyman and Chairman of the Codes Committee, New York State Assembly) (arguing that proposed exception to subpoena preference rule must be tightly drafted to avoid gaping loophole).


192. ABA MODEL RULES, supra note 77, rule 3.3(a). The Model Rules remind each lawyer that he must “make every effort consistent with the legitimate interests of the client to expedite litigation.” Id.; cf. ABA CODE, supra note 73, DR 7-102(A)(1) (attorney shall not take any action on behalf of client that might “serve merely to harass or maliciously injure another”).

193. See Zurcher v. Stanford Daily, 436 U.S. 547, 563 n.10 (1978) (California law and practice may preclude use of subpoena as investigatory technique). Generally, the authority to issue a subpoena is vested in the grand jury but withheld from the prosecutor and the police. See Note, Search and Seizure of the Media, supra note 105, at 984 (states reserve subpoena power to grand jury); cf. Ark. Stat. Ann. § 43-801 (1977) (subpoena power granted to prosecuting attorney to investigate own cases). Outside of urban areas, grand juries do not always sit on an ongoing basis. See Brief of Attorney General of Minnesota as Amicus Curiae at 6 n.9, O’Connor v. Johnson, 287 N.W.2d 400 (Minn. 1980) (en banc) (most counties do not have grand juries that meet on regular basis); Privacy Hearings, supra note 20, at 312 (testimony of James Zagel, National District Attorneys Ass'n) (grand juries sit once every six months in some counties). In some jurisdictions, the subpoena duces tecum may not be available at all. Id. at 319 (testimony of Paul L. Perito, National District Attorneys Ass'n).

194. See Revised Report, Exclusionary Rule, supra note 152, at 9 (recommending that states enact legislation authorizing issuance of subpoenas to attorneys before criminal charges filed or grand jury
C. THE SUBPOENA PREFERENCE RULE ON BALANCE

The subpoena preference rule offers the best practicable accommodation of the interests of the prosecution and the defense.195 The attorney-client relationship is fundamental to our system of judicial administration. The search of a lawyer's office undermines the privilege of confidentiality and thereby threatens the attorney-client relationship.

The objections raised to the subpoena preference rule often are overstated or irrelevant and can be remedied easily. Given the legal and ethical obligations of the bar and its traditional fulfillment of those obligations, attorneys served with subpoenas usually will not either suppress evidence or fail to comply with a final judicial enforcement order. Furthermore, the possibility that defendants might assert constitutional or statutory privileges in response to a subpoena is not a legitimate concern. Any delay in the enforcement process can be minimized substantially through the use of "forthwith subpoenas," the adoption of expedited procedures, and the creation of a carefully defined exception for specific prejudice to significant interests of justice. State legislatures can cure any gap in the ability of law enforcement officials to obtain a subpoena during the early stages of an investigation.

Finally, the rule proposed is only one of preference. When the police have probable cause to believe that an attorney is implicated in criminal activity, would suppress evidence, or would fail to comply with a final judicial enforcement order, a magistrate should issue a search warrant.196 The social benefits achieved by preserving the integrity of the attorney-client relationship, including the benefits to the administration of justice, more than

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195. Cf O'Connor v. Johnson, 287 N.W.2d 400,405 (Minn. 1979) (en bane) (subpoena preference rule limits police ability to obtain information; rule necessary to preserve attorney-client privilege).

196. The ABA Criminal Justice Section Committee on the Exclusionary Rule has argued that a subpoena preference rule will encourage "prosecutors to allege conspiracy between lawyer and client," which in turn will discourage attorneys from representing white-collar criminals. Moreover, it will prove exceedingly difficult to establish that an attorney is likely to destroy evidence in response to a subpoena. Revised Report, Exclusionary Rule, infra note 152, at 2-3.

The Committee apparently holds as low an opinion of prosecutors as it does of the defense bar in that it assumes they would behave improperly by alleging that fellow attorneys are criminally culpable in the absence of adequate evidence. Cf ABA CODE, supra note 73, DR 7-103 (prosecutor should not institute criminal charges when obvious they are not supported by probable cause). There is no reason to believe that the average prosecutor would disregard ethical considerations and tender unsupported allegations to the magistrate. Consequently, there is no reason to believe that this possibility would cause any significant number of attorneys to turn away frequently lucrative white-collar criminal defense work or to violate their professional duty to assist in making legal counsel available to those in need. See ABA CODE, supra note 73, Canon 2 (lawyer should assist legal profession in fulfilling duty to make legal counsel available).

Finally, it may be true that it will often be difficult to prove that a nonsuspect attorney might destroy evidence subject to legal process, but to a large extent the difficulty of proof will be a function of the fact that such misconduct will rarely occur.
outweigh the social costs of slower or less thorough criminal investigations resulting from abuse of the rule. Assuming that the rule is socially desirable, the question arises whether the rule is required by the Constitution or may be implemented through legislation.

D. IS THE SUBPOENA PREFERENCE RULE CONSTITUTIONALLY REQUIRED?

The search of an attorney's office implicates the fourth amendment protection against unreasonable searches and seizures and the sixth amendment right to counsel. The argument that the fourth amendment requires the police to proceed by subpoena when seeking evidence from a nonsuspect attorney is straightforward. The first clause of the amendment establishes "the right of the people to be secure . . . against unreasonable searches and seizures." A court determines the reasonableness of a search by "balancing the need to search against the invasion which the search entails." Consequently, the concept of reasonableness permits the courts to evaluate the constitutionality of search and seizure procedures according to the demands of the situation. Warrantless searches generally are unreasonable per se, and a court might hold that a search pursuant to a warrant is unreasonable if it exceeds the scope of the warrant or is significantly more intrusive than necessary. Arguably, a court should hold that the search of a nonsuspect attorney's office conducted pursuant to a warrant is unreasonable because the evidence sought probably could be obtained with the significantly less intrusive subpoena *duces tecum*. Indeed, the Minnesota Supreme Court adopted this rationale in *O'Connor v. Johnson*. Despite these arguments, recent Supreme Court decisions may have foreclosed the issue. In *Andresen v. Maryland* the Court sustained the search of an attorney's office. Furthermore, in *Zurcher v. Stanford Daily*

197. U.S. CONST. amend. IV.
201. 2 LAFAVE TREATISE, supra note 36, § 4.10(d), at 160-61. In *Zurcher* the Court acknowledged that it was not asserting that "searches, however or whenever executed, may never be unreasonable if supported by a warrant issued on probable cause and properly identifying the place to be searched and the property to be seized." 436 U.S. at 559-60. As a practical matter, however, a court usually will find that a search conducted pursuant to a valid warrant is reasonable. See Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 69-70 (1974) (fourth amendment reasonableness requirement overcome when warrant satisfies probable cause, particularity, and oath requirements).
202. 287 N.W.2d 400, 405 (Minn. 1979) (en banc). The value of this decision as a fourth amendment precedent is limited, however, because the court relied upon both the United States Constitution and the Minnesota Constitution.
204. Id. at 484.
the Court explicitly held that under some circumstances the subpoena preference rule is not mandated constitutionally. To determine whether the subpoena preference rule has been foreclosed by the Supreme Court, these decisions will be analyzed.

**Significance of Andresen v. Maryland.** Although *Andresen v. Maryland* approved the search of an attorney's office, neither the majority opinion nor the dissent suggests that such a search deserves special consideration. The Court's silence on this point might be interpreted as establishing that the subpoena preference rule is not constitutionally required for law office searches. The case, however, can be read more narrowly. The constitutional implications of invading the attorney-client relationship in a law office search pursuant to a warrant were neither presented to the Supreme Court, nor considered by the state court of appeals. Even if the issue had been presented to the Supreme Court, it would have been waived if it had not been presented to the lower courts in a timely manner. Furthermore, as a matter of policy, the Court limits the scope of its review to questions presented in the petition for certiorari. Finally, even though it could have done so, the Court

206. *Id.* at 567-68.

The petition for certiorari as granted was limited to the following questions:

I. May an attorney at law, who is a sole practitioner, invoke his privilege against self-incrimination under Amendment V to the Constitution of the United States, to prevent the introduction of his personal handwritten notes and memoranda, books and records, which were seized from his desk and files in his personal office, under a search warrant held to be otherwise reasonable, into evidence against him at his criminal trial?

II. Was the search of petitioner's offices violative of Amendment IV to the Constitution of the United States?


Although the statement of the issues, particularly issue II, would have permitted the Court to focus on the particular problem posed by a law office search, the questions did not expressly address the issues of confidentiality and privilege. Thus, the Court did not consider these issues. The petitioner's most direct reference to these concerns was his assertion that the "inner sanctum of petitioner's law offices" had been invaded. Brief of Petitioner at 5, *Andresen v. Maryland*, 427 U.S. 463 (1976).

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209. The Maryland Court of Special Appeals reviewed 28 separate points of error, including a laundry list of fourth amendment claims, which were raised by the petitioner. *Andresen v. State*, 24 Md. App. 128, 134-36, 331 A.2d 78, 100 (Ct. Spec. App. 1975), aff'd, 427 U.S. 463 (1976). The list of errors did not include any issues relating to the attorney-client privilege. Apparently, at one point in the state court proceedings, the petitioner asserted that items protected by the attorney-client privilege had been seized. Brief of Respondent at 20, *Andresen v. Maryland*, 427 U.S. 463 (1976). This contention, however, was not addressed by the Maryland Court of Special Appeals. Of course, one might argue that the parties failed to raise, and the courts therefore failed to address, this issue because they assumed that a law office is not entitled to special protection. That point, however, was not obvious, particularly prior to the Supreme Court's decision in *Zurcher*.

210. See *New York ex rel Cohen v. Graves*, 300 U.S. 308, 317 (1937) (Court will not review federal question not raised or considered by state court); R. Stern & E. Gressman, *Supreme Court Practice* § 6.27, at 457 (5th ed. 1978) (Court considers only questions raised, argued, and briefed in lower court); C. Wright, *supra* note 90, § 108, at 552 (Court considers only federal questions properly presented to state courts).

211. See *Sup. Ct. R. 21(1)(a)* (only questions set forth in petition or fairly included therein considered by Court); R. Stern & E. Gressman, *supra* note 210, § 6.27 at 457-58 (same); C. Wright, *supra* note 90, § 108, at 552 (same).
surely would not have resolved sub silentio an issue so important to the legal profession and society.\textsuperscript{212} Conceivably, the factual setting in \textit{Andresen} precluded discussion of both the attorney-client privilege and the subpoena preference rule. It is possible that none of the documents seized was protected by either the attorney-client privilege or the work-product doctrine.\textsuperscript{213} Alternatively, a magistrate could readily have found that officials might have considered a subpoena \textit{duces tecum} impracticable and a warrant necessary because the police suspected that the attorney was involved in criminal conduct.\textsuperscript{214} Because \textit{Andresen} involved a criminally suspect attorney, it presented facts distinguishable from the most of the more recent law office search litigation.\textsuperscript{215}

\textbf{Significance of Zurcher \textit{v. Stanford Daily}.} The Supreme Court held in \textit{Zurcher} that the fourth amendment does not require a subpoena preference rule when police seek evidence in the possession of an ordinary nonsuspect third party.\textsuperscript{216} The Court also held that the first amendment does not require the rule when the third party is a newspaper.\textsuperscript{217} Unless a constitutional distinction exists between attorneys and journalists, the same rule apparently would apply to the search of a law office.

The Court recognized that the rationale of its decision could be extended to the search of a law office. In his dissenting opinion Justice Stevens explicitly observed that the consequences of the Court’s decision could be extensive because “[c]ountless law-abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possession that relate to an ongoing criminal investigation.”\textsuperscript{218} The Court, however, did not explicitly

\begin{itemize}
\item \textsuperscript{212} Cf. Bellis \textit{v. United States}, 417 U.S. 85, 92 n.2 (1974) (Court not bound by prior decision in similar case when issue in controversy had not been raised).
\item \textsuperscript{213} The Supreme Court opinion indicates that many of the documents seized were standard papers that related to real estate transactions. \textit{Andresen v. Maryland}, 427 U.S. 463, 468, 484 (1976); \textit{accord}, \textit{Andresen v. Maryland}, 24 Md. App. 128, 166-167, 178-179, 331 A.2d 78, 102-03, 109-10 (Ct. Spec. App. 1975). Because documents of this nature usually are not prepared in anticipation of litigation, they probably would not be protected by the work-product doctrine. See \textit{WRGrr}, supra note 90, § 82, at 409 (documents prepared in regular course of business not protected by work-product doctrine).
\item Furthermore, the Supreme Court’s reference to the seized papers as “business records” suggests the papers were not protected by the attorney-client privilege. 427 U.S. at 465. To the extent that any documents fell within the protection of the privilege, the privilege might have been waived by its holders. The testimony offered against Andresen by his former clients, 427 U.S. at 465-72, suggests the possibility of such a waiver.
\item \textsuperscript{214} See 427 U.S. at 466 (state officials had probable cause to believe attorney had committed state crime of false pretenses).
\item \textsuperscript{215} See 287 N.W.2d 400, 402 (Minn. 1979) (en bane) (\textit{Andresen} distinguishable because attorney suspected of criminal offense).
\item \textsuperscript{216} 436 U.S. 547, 559 (1978).
\item \textsuperscript{217} Id. at 565-66.
\item \textsuperscript{218} Id. at 579 (Stevens, J., dissenting). The Stanford Daily raised the following hypothetical in its petition for rehearing:
\end{itemize}

A lawyer’s file contains evidence relevant to a criminal investigation of his client. The documents sought are kept in a file room containing files of numerous clients. As would ordinarily be the case with an attorney’s files, the specified documents are in a file surrounded by other documents, not sought by the warrant, protected by the attorney-client privilege. The police have no reason to believe the lawyer, who is believed to be reputable, would
acknowledge these implications. Rather, the Court accorded great weight to the lack of constitutional precedent for applying a subpoena preference rule to searches involving either nonsuspect third parties or the press. Similarly, no authority supports the application of the rule to law office searches.

The subpoena preference rule embodies an application of the least drastic alternative principle often employed in constitutional analysis. This principle provides that a state must use the least drastic, practicable means of achieving its objective when its action threatens to intrude on a fundamental constitutional right. The Court occasionally has declined to apply the least drastic alternative analysis in fourth amendment cases. Indeed, Zurcher might be construed as rejecting the doctrine since the Court refused to prohibit the third party search despite the availability of the less intrusive subpoena preference rule. If Zurcher is so construed, the subpoena preference rule is not constitutionally required in the context of a law office search. Like

 disregard a subpoena or destroy the evidence. They nevertheless obtain a warrant and appear, without warning, and demand immediate access to the file room. The lawyer's request that he be permitted to locate the documents sought by the subpoena is denied, the police explaining that they are entitled to look and select for themselves in accordance with the warrant.


219. See 436 U.S. at 554-59 (opinion of Court) (indicating that neither language of fourth amendment nor precedent supports distinction between suspects and nonsuspects).

220. As Justice Powell noted in his concurring opinion, "[t]here is no authority either in history or in the Constitution itself for exempting certain classes of persons or entities from its reach." Id. at 570 (Powell, J., concurring). Although law enforcement officials are not required under the fourth amendment to use a subpoena when they have probable cause to believe that evidence will be found in a law office, a substantial body of case law confirms that they have done so in the past. See notes 136-37 supra (cases demonstrating frequent use of subpoenas). The Court essentially responded to the suggestion that a prosecutor should use a subpoena by noting that because subpoenas generally are easier to obtain than search warrants, "[w]here . . . subpoenas would suffice, it can be expected that they will be employed by the rational prosecutor." 436 U.S. at 563 (opinion of Court).


223. In rejecting the subpoena preference rule, the Court stressed that

 [t]he Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance by denying the search warrant in the circumstances present here and by insisting that the investigation proceed by subpoena duces tecum, whether on the theory that the latter is a less intrusive alternative or otherwise.

Andresen, however, Zurcher can be read more narrowly. The Court might have declined to apply the doctrine not because it is irrelevant in fourth amendment analysis, but because its proponents failed to establish that it would accomplish the state’s objective of preventing the loss of evidence and avoiding potential delay. To some extent, the crucial fourth amendment concept of reasonableness would seem to embody the least drastic alternative analysis. This result is particularly true when police practice threatens both the fourth amendment right to privacy and other constitutional protections such as the sixth amendment right to counsel. Assuming that Zurcher has not foreclosed the least drastic alternative analysis, the question becomes whether the subpoena preference rule offers prosecutors a means to obtain evidence from attorneys that is substantially as effective as a search. As was noted above, the attorney's ethical obligations as an officer of the court significantly minimize the danger that evidence will be destroyed. In this regard, attorneys can be distinguished from ordinary nonsuspect third parties and, to a lesser extent, from the press. Like attorneys, reporters, as “institutional third parties” may legitimately acquire criminal evidence in the course of their work, and seldom will they be criminal accomplices or participate in or condone the destruction of evidence. Yet in Zurcher the Court declined to consider whether the status of the party believed to be in possession of the evidence was important. There is no reason to believe that the Court would proceed any differently in a case involving an attorney. Legislation can cure the problems of delay and the unavailability of subpoenas during the early stages of an investigation. After Zurcher,
However, there is little room to argue that the fourth amendment requires the states to take such steps.

In *Zurcher* the Stanford Daily contended that the prospect of a newsroom search impaired the freedom of the press by causing physical disruption that could delay publication, by deterring confidential sources from providing information to reporters, by discouraging reporters from recording and preserving their recollections, by inhibiting the processing of news since internal editorial deliberations might be disclosed, and by encouraging the press to engage in self-censorship to conceal information of interest to the police.\(^2\) The law office search similarly threatens the attorney-client relationship. The prospect of a search would inhibit client communication, deter attorneys from creating and preserving work product, encourage inefficient practices designed to keep seizable privileged materials beyond the grasp of the police, and impede compliance with deadlines.\(^3\) The Court concluded in *Zurcher*, however, that the fourth amendment’s procedural safeguards will adequately preserve first amendment values.\(^4\) Unless a constitutional distinction exists between the threat to a free press and the threat to the attorney-client relationship, the same conclusion should follow with respect to the law office search.

The values protected by the attorney-client privilege are at least as fundamental as those protected by the freedom of the press. Although the sixth amendment right to counsel is implicated by the attorney-client relationship, the first amendment specifically guarantees freedom of the press. The law office search differs from the newsroom search in that it threatens a well-established common law privilege. The search of an attorney’s office endangers both the attorney-client privilege and the work-product doctrine. The Court in *Zurcher*, however, did not suggest that privileged material was examined or seized during the search of the Stanford Daily’s office.\(^5\) Thus, the *Zurcher* search is factually distinguishable from the typical search of a law office. This distinction, however, will not always exist. A slight majority of the states now have recognized a reporter’s privilege, which in certain circumstances permits members of the press to withhold the identity of confidential sources or the contents of their communications.\(^6\) Con-

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\(^2\) 436 U.S. at 563-64.

\(^3\) See notes 105-35 supra and accompanying text (discussing *Zurcher*’s potential impact on attorney-client relationship).


\(^5\) See id. at 552 (Stanford Daily did not advise police that areas searched might contain confidential materials); id. at 574 (Stewart, J., dissenting) (Stanford Daily did not claim evidence sought privileged from disclosure).

sequently, in many jurisdictions, the search of a newsroom, like that of a law office, might threaten a recognized evidentiary privilege.

The Supreme Court in *Zurcher* enigmatically remarked that "state shield law objections that might be asserted in opposition to compliance with a subpoena are largely irrelevant to determining the legality of a search warrant under the Fourth Amendment." Presumably, the Court believed that these statutes were intended to apply only in formal testimonial proceedings. If the states that have recognized a reporter's privilege disagree, then they may provide explicitly that the immunity is intended to apply in the search and seizure context. California, for example, enacted such a provision following the Supreme Court’s opinion in *Zurcher*.

Assuming that both law office and newsroom searches threaten evidentiary privileges, the courts still might permit newsroom searches more readily than a law office search. The Supreme Court has observed that although privileges promote important policies and values, they "are not lightly created nor expansively construed, for they are in derogation of the search for truth." The Court’s statement suggests that the attorney-client privilege and, to a lesser extent, the work-product doctrine are distinguishable from the reporter's privilege on the basis of pedigree. The attorney-client privilege is the oldest of the testimonial privileges and currently is recognized in all state and federal courts. Although the Supreme Court did not recognize the work-product doctrine formally until 1947, it is now well established and widely recognized in the states. In contrast, the common law has never recognized a "reporter's privilege." Although many states have either enacted a reporter’s shield statute or adopted a reporter’s privilege judicially, these developments are relatively recent and are not universal. Moreover,
the Supreme Court in *Branzburg v. Hayes*\(^{246}\) declined to derive a qualified reporter's immunity from grand jury subpoenas under the first amendment, despite an alleged threat to free press values.\(^{247}\) Apparently the courts will protect an established privilege more readily than an emerging one.\(^{248}\)

The contrast between the Supreme Court's recent treatment of the attorney-client privilege and the work-product doctrine and its consideration of the asserted constitutionally-based reporter's privilege evidences this judicial inclination. In *Fisher v. United States*,\(^{249}\) for example, the Court accepted the underlying premise of the attorney-client privilege—that clients would be reluctant to confide in their attorneys if they believed that their adversaries had access to the contents of their communications.\(^{250}\) Similarly, in *United States v. Nobles*,\(^{251}\) the Court explicitly reaffirmed the assumption made in *Hickman* that open discovery of an attorney's work-product would inhibit the creation and preservation of trial preparation material.\(^{252}\) In *Branzburg v. Hayes*,\(^{253}\) however, the Court was unwilling to assume that the grand jury power to subpoena a reporter to appear and disclose his sources would cause confidential sources to withhold information from reporters or restrict the dissemination of information to the public.\(^{254}\) In *Zurcher*, the Court observed that, as in *Branzburg v. Hayes*, it was not convinced "that

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\(^{246}\) The Supreme Court's recent decision in *Trammel v. United States*, 100 S. Ct. 906 (1980), does not suggest otherwise. In *Trammel* the Court held that only a witness spouse may invoke the federal privilege against adverse spousal testimony. *Id.* at 914. In the course of its decision, however, the Court distinguished the spousal immunity doctrine from other confidential communications privileges, such as the attorney-client privilege. *Id.* at 913. Indeed, the Court noted that its holding did not disturb the independent privilege for confidential interspousal communications. *Id.* Moreover, the Court observed that because the rationale underlying the privilege against adverse spousal testimony is antiquated, the privilege has been rejected by an increasing number of states. *Id.* at 911-12. The attorney-client privilege, however, continues to serve its purpose and is still retained in all federal and state jurisdictions. Tarlow, *supra* note 29, at 341.

\(^{247}\) *Id.* at 667.


\(^{249}\) *Id.* at 403. In *Fisher*, however, the Supreme Court ultimately decided that the documents were not within the scope of the attorney-client privilege. Thus, the Court did not act on the assumption that a client will hesitate to confide in his attorney if that confidence is available to an adversary.

\(^{250}\) 422 U.S. 225 (1975).

\(^{251}\) *Id.* at 236-38. The acknowledgement, however, was dictum because the Court ultimately held that the work product had not been impermissibly invaded. *Id.* at 239-40.

\(^{252}\) 408 U.S. 665 (1972).

\(^{253}\) 408 U.S. 665 (1972).

\(^{254}\) *Id.* at 690-91, 693. The Court concluded that it had no reason to believe that a large percentage of all confidential news sources were implicated in criminal activity or possessed information of interest to grand juries. *Id.* at 691. Although the Court conceded that some sources might be deterred, it concluded that "[e]stimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative." *Id.* at 693-94. The Court further reasoned that any chilling effect on confidential news sources would be mitigated because the grand jury might never call the reporter, the prosecution might not require a reporter to appear, and the sources might need to publicize their views. *Id.* Moreover, the Court noted that grand jury hearings are conducted in secret and law enforcement officials are experienced at protecting witnesses. *Id.*
confidential sources will disappear and that the press will suppress news because of fears of warranted searches. 255

Considering the inherently speculative nature of this chilling effect, the Court in Branzburg and Zurcher seems to have saddled the press with an all but impossible burden of proof. 256 Indeed, as Wigmore earlier had recognized, attorneys would have difficulty meeting such a standard of proof and demonstrating that candid client communications would decline or that the quality of representation would suffer 257 if the attorney-client privilege or the work-product doctrine were impaired. 258 The courts, however, have accepted the premises of these doctrines on faith. 259 The contrast between this deferential approach to the underpinnings of the attorney-client privilege and the work-product doctrine and the skeptical view of the reporter-source privilege might not be satisfying intellectually. It does suggest, however, that the courts are more willing to protect the attorney-client privilege against infringement. Conversely, the pronounced judicial inclination to construe all evidentiary privileges restrictively 260 might obliterate any such distinction.


256. In his dissent in Branzburg Justice Stewart argued that the evidence in the record did in fact prove the existence of a chilling effect. 408 U.S. 665, 749-51 (1972) (Stewart, J., dissenting). Furthermore, he indicated that "[t]he impairment of the flow of news cannot, of course, be proven with scientific precision, as the Court seems to demand ... ." Id. at 733. See also Zurcher v. Stanford Daily, 436 U.S. at 570, 571-74 (Stewart, J., dissenting) (common sense and journalist's testimony demonstrate chilling effect of newsroom search pursuant to warrant).

257. See generally, 8 WIGMORE, supra note 79, §§ 2290-2329, at 541-641.

258. See notes 116, 124 supra and accompanying text (discussing lack of empirical proof demonstrating benefits of privileges).

259. See, e.g., In re Subpoena (Murphy), 560 F.2d 326, 333-34 (8th Cir. 1977) (assumption that restrictions on access to attorney's files necessary to protect legal profession); Duplan v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 736 (4th Cir. 1974) (assumption that uninhibited attorney-client conversations necessary for justice), cert. denied, 420 U.S. 997 (1975); United States v. Colacurcio, 499 F.2d 1401, 1404 (9th Cir. 1975) (assumption that requiring disclosure of attorney-client confidences will have chilling effect).

In United States v. Nixon, the Supreme Court held that presidential communications are presumptively privileged because disclosure would tend to chill expression of candid opinions by the President and his advisors. 418 U.S. 683, 708 (1974). The Court characterized this as a "broad, undifferentiated claim of public interest in confidentiality," id. at 706, and held that this claim must yield to a "demonstrated, specific need for evidence in a pending criminal trial." Id. at 713. Superficially, this statement suggests that the public interest in obtaining relevant criminal evidence must always prevail over the general interest in encouraging confidential communication whether between president and advisor or attorney and client. The implications of Nixon, however, should not be extended beyond the peculiar facts of the case. See Kurland, United States v. Nixon: Who Killed Cock Robin?, 22 U.C.L.A. L. Rev. 68, 74 (1974) (validity of Nixon Court's reasoning on proper balance between confidential communications privileges and law enforcement needs restricted to that case).

260. See, e.g., Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977) (attorney work-product doctrine strictly construed because of adverse effect on disclosure of truth); In re Ampicillin
Even if the issue remains technically open, Zurcher suggests that no constitutional basis exists for the subpoena preference rule in the law office context. Although the rule attempts to reconcile the competing interests, Zurcher discourages any such judicial accommodation under the rubric of "Fourth Amendment reasonableness." Rather, as the Court stated, the "Fourth Amendment has itself struck the balance." The Court identified legitimate threats to law enforcement, but did not seriously consider the character or dimension of the potential intrusion into the privacy of innocent third parties. Instead, the Court concluded that "the net gain to privacy interests by the District Court's new rule would not be worth the candle." The Court acknowledged the dangers to the press of a newsroom search, but simply failed to consider the institutional character of the press and the interest of the press in preventing the disappearance of evidence.

Although the Court has indicated a willingness to adjust the standards of probable cause and particularity to unique situations, it properly viewed the adoption of the subpoena preference rule as a major modification of standard search and seizure procedure. The Supreme Court indicated in Zurcher that the district court, as a practical matter, had prohibited searches in what could be a significant class of cases. Because the Court viewed the search warrant as a valuable tool of law enforcement, it allocated the all but insurmountable burden of proving the negligible effect of the subpoena preference rule on law enforcement to the rule's proponents. The Court may have had two reasons for concluding that the burden has been sustained. The rationale supporting the rule cannot be proven with certainty; furthermore, if conscientiously applied to all ordinary nonsuspect third parties, the rule would indeed have a significant impact. Although the adverse effect of the subpoena preference rule would be minimal if applied solely to law offices, the bar might not be able to establish this effect. While the facts of Zurcher dealt only with the press, the Supreme Court suggested in its opinion that the

Antitrust Litigation, 81 F.R.D. 377, 384 (D.D.C. 1978) (because work-product doctrine obstacle to truth, it should be construed strictly); Cohen v. Uniroyal, 80 F.R.D. 480, 483 (E.D. Pa. 1978) (because attorney-client privilege obstacle to truth, it should be construed strictly).

261. 426 U.S. 547, 560 (1978); see Note, Searches of Nonsuspect Third Parties, supra note 225, at 226 (Zurcher did not mandate showing of reasonableness if procedural requirements for warrant satisfied).

262. 436 U.S. at 559.

263. See id. at 560-61 (threats to law enforcement inherent in subpoena process include concealment of evidence and misidentification of suspects).

264. Id. at 562; cf. id. at 579-83 (Stevens, J. dissenting) (rule permitting searches of nonsuspect third parties will invade parties' privacy). Because the nonsuspect third party rarely would become a criminal defendant and thus would not have standing to invoke the exclusionary rule, the Court rejected the argument that the extra protection of the subpoena preference rule was necessary in this context. Id. at 562-63 n.9 (opinion of Court).

265. Id. at 563-64.


267. See Zurcher v. Stanford Daily, 436 U.S. 547, 550 (1978) (contrary holding would reconstrue fourth amendment); id. at 554 (no direct authority for district court's sweeping revision of fourth amendment); id. at 567 (no reason to reinterpret fourth amendment).

268. Id. at 553.

269. Id. at 560-62.
subpoena preference rule is not constitutionally required in any context.\footnote{270} Indeed, it might have proven embarrassing for the Court to have created a special exception for attorneys from its seemingly comprehensive holding.\footnote{271} Such a restrictive application would be especially troublesome in the wake of the Court's rejection of similar arguments by its most vociferous critic, the press.\footnote{272}

The Court also might conclude that the law office search is not a sufficiently serious problem to warrant limiting \textit{Zurcher} or to justify extending the fourth amendment. In \textit{Zurcher}, for example, the Court noted that law enforcement officials had searched only a few newsrooms, which "hardly suggests abuse; and if abuse occurs, there will be time enough to deal with it."\footnote{273} No comprehensive count exists of how frequently police have attempted to search attorneys' offices. Although some sources estimate that law enforcement officials have searched more than two dozen law offices in recent years, fewer than half of these searches have been documented in any detail.\footnote{274}

Even if the Supreme Court believed that the problem was sufficiently serious to warrant a response, it probably would follow the reasoning of \textit{Zurcher} and hold that the judiciary can protect the attorney-client relationship through conscientious application of traditional fourth amendment procedural safeguards. Similarly, the Court might conclude that nonconstitutional protections are more than adequate. The California legislature, for example, has enacted provisions designed to minimize significantly the intrusive impact of the search.\footnote{275} The Minnesota Supreme Court, however, interpreted its own state constitution to prohibit the search of a nonsuspect attorney's office in \textit{O'Connor v. Johnson}.\footnote{276}

To the extent that the Minnesota Supreme Court relied on the federal constitution in \textit{O'Connor}, its decision was inconsistent with \textit{Zurcher}. The

\footnote{270. See id. at 560-63 (discussing "remarkable conclusion" of district court requiring subpoena preference rule).}

\footnote{271. Cf. Hickman v. Taylor, 153 F.2d 212, 223 (3d Cir. 1945) (because enunciated and applied by individuals deriving benefit from its application, work-product doctrine open to criticism), aff'd, 329 U.S. 495 (1947).}

\footnote{272. For an example of the outpouring of press rage over \textit{Zurcher}, see \textit{Zurcher Hearings}, supra note 33, at 158-59 (Appendix D to Statement of Reporters' Committee for Freedom of the Press).}

\footnote{273. 436 U.S. at 566. At the time the police searched the \textit{Stanford Daily}, approximately one half dozen newsroom searches had been reported. Amicus Brief of the Reporters' Committee for Freedom of the Press at 11-12, \textit{Zurcher v. Stanford Daily}, 436 U.S. 547 (1978); cf. Note, \textit{Search and Seizure of the Media}, supra note 105, at 957 n.3 (listing searches of newspapers and radio stations in California).

Police searched newsrooms in Boise, Idaho, and Flint, Michigan, recently. These searches are the only two reported instances of newsroom searches since the Supreme Court's decision in \textit{Zurcher}. N.Y. Times, July 27, 1980, § 1, at 1, 32, cols. 1, 4. At one point, the Boise incident raised the possibility of a law office search as well. The police appeared at the office of the television station's attorney after being informed that he was in possession of the originals of the tapes they were seeking. They were informed that he had removed the tapes from his office but would not remove them from the jurisdiction. \textit{Boise Prosecutor Fulfills Fears Created by "Stanford Daily"}, \textit{Broadcasting}, Aug. 4, 1980, at 2. The police also searched the home of an editor of an Albany, Georgia, newspaper recently and seized documentary evidence pertaining to the editor's role in a widely publicized prison escape. \textit{6 Med. L. Rep. News Notes (BNA)} (Aug. 19, 1980).

\footnote{274. See notes 19-27 supra and accompanying text (discussing law office searches in past four years); cf. S. 1790 \textit{Hearings}, supra note 22, at 34 (statement of Philip B. Heymann, Assistant Attorney General, Criminal Division) (no demonstrated pattern of abusive federal searches of professionals).


\footnote{276. See 287 N.W.2d 400, 405 (Minn. 1979) (en bane) (search of nonsuspect attorney's office impermissible under state constitutional provision prohibiting unreasonable searches and seizures).}
O'Connor court, however, purported to distinguish Zurcher on two grounds. First, the court noted that the record in Zurcher indicated that the newspaper had announced that it might intentionally destroy documents of interest to the police.\textsuperscript{277} The court then observed that it had no reason to believe that a typical attorney would assume a similar stance in view of his ethical obligations and the possibility of a contempt citation.\textsuperscript{278} Although this factual distinction is valid, the majority in Zurcher did not cite the Stanford Daily's policy.\textsuperscript{279} Second, the court distinguished Zurcher by basing its holding in part on the Minnesota Constitution.\textsuperscript{280} Thus, the decision is legally justifiable, despite its inconsistency with Zurcher. Although other state courts similarly might attempt to distinguish Zurcher, the Supreme Court's decision effectively has foreclosed the argument that the subpoena preference rule is required by the fourth amendment when law enforcement officials seek evidence possessed by an attorney.\textsuperscript{281}

E. CAN THE SUBPOENA PREFERENCE RULE BE IMPLEMENTED THROUGH NONCONSTITUTIONAL MEANS?

Assuming that the subpoena preference rule represents the best practicable accommodation of the competing interests, various nonconstitutional methods exist for implementing it. Indeed, the Supreme Court acknowledged in Zurcher that "the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish non-constitutional protections against possible abuses of the search warrant procedure . . . ."\textsuperscript{282} The Court also might have noted that the fourth amendment does not preclude judicial efforts to establish such nonconstitutional protections. In recent years, judicial construction of state law, particularly state constitutional provisions, has supplemented the protections of the federal Constitution.\textsuperscript{283} Indeed, the Minnesota Supreme Court's decision in O'Connor v.
Johnson exemplifies this trend. This precedent could be followed in other jurisdictions because all fifty state constitutions contain either a provision analogous if not identical to the fourth amendment or a provision establishing a more generalized right to privacy. Alternatively, state courts might limit law office searches by a broad construction of state constitutional provisions safeguarding the right to counsel or the state's version of attorney-client privilege or the work-product doctrine. In some jurisdictions, the local rules of criminal procedure also might impose restrictive limitations on the issuance of warrants. In addition, because many state supreme courts exercise inherent supervisory power over the administration of criminal justice within their jurisdictions, that power might be used to protect the attorney-client relationship in the context of law office searches.

The prospect of a legislative solution to the law office search problem is promising. Following the searches of three Los Angeles law offices in the spring of 1979, the California legislature amended the state Penal Code to provide significant procedural protection to nonsuspect attorneys, physicians, and clergy who might be subjects of searches for documentary evidence. Although the new legislation does not adopt the subpoena preference rule, it does embody procedures designed to significantly minimize the effect such searches have on on evidentiary privileges. At the federal level, Congress


284. All 50 state constitutions contain provisions that are either virtually identical or are substantially equivalent to the fourth amendment guarantee. E.g., IOWA CONST. art. I, § 8; MO. CONST. art I, § 15; TEX. CONST. art I, § 9. For a complete listing of the 50 state constitutions, see Memo from David Seybold to Lackland H. Bloom, Jr. (copy on file at Georgetown Law Journal).

285. At least nine state constitutions contain general provisions protecting the "right to privacy." ALASKA CONST. art. I § 22; ARIZ. CONST. art II, § 8; CAL. CONST. art I, § 1; HAWAI'I CONST. art I, § 5; ILL. CONST. art I, § 6; LA. CONST. art I, § 5; MONT. CONST. art II, § 10; S.C. CONST. art I, § 10; WASH. CONST. art I, § 7.

286. Cf. Barber v. Municipal Court, 24 Cal. 3d 742, 756, 598 P.2d 818, 826, 157 Cal. Rptr. 658, 666 (1979) (state constitutional right to counsel violated when undercover deputy sheriff present during attorney-client consultation; indictment dismissed). All 50 state constitutions guarantee the right to counsel. E.g., IOWA CONST. art I, § 10; MO. CONST. art I § 18(2); TEX. CONST. art I, § 9. See also Memo from David Seybold to Lackland H. Bloom, Jr. (citing all 50 state constitutions) (copy on file at Georgetown Law Journal).


289. Id. § 1524(c). See notes 492-501 infra and accompanying text (discussing search procedures required under California legislation). Eight states have adopted legislation designed to protect either the press or ordinary nonsuspect third parties. H.R. REP. NO. 1064, 96th Cong., 2d Sess. 4 (1980). See 1979 III. Laws 81-806 (search warrant for press materials issued only if belief exists that evidence will be destroyed...
recently passed the Privacy Protection Act of 1980 which implements the subpoena preference rule in the newsroom context.\textsuperscript{290} Although Congress declined to extend the coverage of the Act to ordinary nonsuspect third parties or privilege-holders,\textsuperscript{291} the Act does require the Attorney General to

or party suspect); \textsc{Tex. Code Crim. Proc. art 18.02 (Vernon 1977 & Supp. 1980)} (search warrant may not authorize seizure of mere evidence from newsroom); \textsc{Neb. Rev. Stat. § 29-813 (Supp. 1979)} (search warrant for press materials issued only if party suspect); \textsc{1980 Wash. Legis. Serv. 52 (West)} (subpoena duces tecum required for press material unless belief that evidence will be destroyed or party suspect); \textsc{1979 Wis. Legis. Serv. 81 (West)} (search warrant for press materials issued only if party suspect). \textit{See also Ariz. H.B. 2333 1980 Sess. (press and privilege-holders not enacted).}

\textbf{290. Privacy Protection Act of 1980, Pub. L. No. 96-440 (1980).} The law extends protection against search and seizure to work-product materials and documentary evidence “possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting . . . commerce.” \textit{Id.} § 101(a). The legislation expresses an implied preference for employment of the subpoena duces tecum. A search for otherwise protected documentary material is permissible if (1) federal law enforcement officials have probable cause to believe the person in possession has committed or is committing a crime, (2) they have reason to believe immediate seizure is necessary to prevent death or serious bodily injury, (3) they have reason to believe that notice pursuant to a subpoena would result in destruction, alteration, or concealment of the evidence, or (4) the materials have not been produced pursuant to a court order enforcing the subpoena and all appellate remedies have been exhausted or the officers have reason to believe that further delay would threaten the interests of justice. \textit{Id.} § 101(b)(1)-(4). Only the first two exceptions apply to work-product materials. \textit{Id.} § 101(b). \textit{See generally Note, Zurcher v. Stanford Daily: The Legislative Debate, 17 Harv. J. Leg. 152 (1980) (discussing various congressional proposals to modify Zurcher) [hereinafter Note, The Legislative Debate].}

All four exceptions could be included in a law office search bill without significantly damaging the attorney-client relationship. Such a bill would be preferable, however, if the third exception, regarding the potential loss of evidence were altered to require a showing of probable cause rather than mere “reason to believe.” Such a change would avoid an undermining of the “committing a crime” exception. \textit{See note 141 supra} (discussing implications of each standard).

The Court in \textit{Zurcher} held that the fourth amendment does not forbid the states from issuing warrants to search for evidence in possession of nonsuspect third parties. 436 U.S. 547, 560 (1977). Commentators disagree about whether section five of the fourteenth amendment provides congressional power to regulate nonsuspect third party searches by state and local authorities. \textit{Compare Privacy Hearings, supra note 20, at 339-41} (statement of Philip B. Heymann, Assistant Attorney General, Criminal Division) (section five of fourteenth amendment does not permit Congress to regulate state searches of nonsuspect third parties) \textit{with id.} at 372-75 (statement of Paul Bender, Professor of Law, University of Pennsylvania Law School) (section five of fourteenth amendment permits Congress to require adversarial hearings before third party searches by state authorities) \textit{and id.} at 375-79 (statement of William Cohen, Professor of Law, Stanford Law School) (section five of fourteenth amendment permits congressional imposition on state authorities of subpoena procedure for obtaining evidence from third parties) \textit{and Zurcher Hearings, supra note 33, at 61-64} (statement of Mark V. Tushnet, Professor of Law, University of Wisconsin Law School) (section five of fourteenth amendment permits Congress to limit press searches if reasonable way of advancing first amendment interests). \textit{See generally Cohen, Congressional Power to Interpret Due Process and Equal Protection, 27 Stan. L. Rev. 603 (1975).} The commerce clause probably provides a sufficient basis for legislation pertaining to searches of the press by state authorities. \textit{Cf. Search Warrants Report, supra note 255, at 8-9} (Congress possibly unable to impose search limitations if no commerce clause relationship). Because the practice of law affects interstate commerce, the commerce clause probably permits Congress to legislate on matters pertaining to law office searches. \textit{But see Privacy Hearings, supra note 20, at 339} (testimony of Philip B. Heymann, Assistant Attorney General, Criminal Division) (question whether practice of law affects commerce more difficult than whether press does).

291. Title II of the original Senate version of the Act would have protected work-product material and documentary evidence held by a person in a jurisdiction that considered these materials privileged. \textit{Id. S. 1790, § 201, 96th Cong., 1st Sess. (1979).} Title III similarly called for protection of such materials held by a nonsuspect third party. \textit{Id.} § 301. H.R. 3486, a parallel House bill, also extended protection to nonsuspect third parties when reported out of the House Committee on the Judiciary. These provisions were deleted as
establish guidelines which would recognize the “special concern for privacy interests in cases in which a search or seizure for . . . documents would intrude upon a known confidential relationship. . . .”

Rulemaking by law enforcement agencies is another method of limiting law office searches, however, law enforcement officers probably will not voluntarily restrict their authority in this manner. In some jurisdictions, law enforcement officers and the local bar association jointly might draft guidelines to implement the subpoena preference rule. Finally, prosecutors, as members of the bar, should recognize the threat to the attorney-client relationship and exercise their influence and authority to discourage law office searches that are not essential to law enforcement needs.

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a result of vigorous opposition by the Department of Justice. See S. 1790 Hearings, supra note 22, at 62-64 (prepared statement of Philip B. Heymann, Assistant Attorney General, Criminal Division) (because proposed restrictions “severe,” Department of Justice unwilling to accept them).

292. Pub. L. No. 96-440 § 201(a)(3) (1980). The Act also requires that the guidelines consider the privacy interests of nonsuspect third parties, and encourage the use of the least intrusive method of obtaining evidence which does not substantially jeopardize its availability or usefulness. Id. § 201(a)(1)-(2). The Act explicitly prohibits the litigation of an issue pertaining to noncompliance with the guidelines. Id. § 202.

293. But see Blumenthal, Prosecutors Move to Curb Abuse of Newsroom Searches, NAT’L J., Sept. 25, 1978, at 30 (United States Attorney for Connecticut adopts guidelines to minimize intrusiveness of press searches). In a memorandum directed to all assistant United States attorneys, Richard Blumenthal, United States Attorney, District of Connecticut, described the guidelines his office would follow in searching news media organizations in an attempt “to allay the potential chilling effect of the Supreme Court’s [Zurcher] decision.” Memorandum from Richard Blumenthal, United States Attorney, District of Connecticut, to all Assistant United States Attorneys, at 1 (June 20, 1978) (copy on file at Georgetown Law Journal). Of particular interest, the guidelines require that “[n]o . . . search warrant should be sought unless there are reasonable grounds to believe that evidence of a crime is in jeopardy of being destroyed, or a subpoena duces tecum would be otherwise impracticable.” Id. at 3. See generally K. DAVIS, POLICE DISCRETION (1975); Amsterdam, Perspectives on the Fourth Amendment, 58 MINN. L. REV. 349, 416-39 (1974) [hereinafter, Amsterdam, Perspectives]; McGowan, Rule Making and the Police, 70 MICH. L. REV. 659 (1972).

294. See L.A. DA/Bar Guidelines, supra note 20 (following meeting with Los Angeles County Bar Association, district attorney developed special procedures for law office searches). In August 1979, the Criminal Justice Section of the American Bar Association recommended that the ABA support federal and state legislation extending the subpoena preference rule to “all innocent third parties.” Section of Criminal Justice, American Bar Association House of Delegates, Reports No. 102, 1 (Aug. 1979). The ABA House of Delegates rejected the recommendation. 65 A.B.A. J. 1289 (1979). The Section of Criminal Justice then directed its Exclusionary Rule Committee to study the law office search problem. The Committee recommended that various adjustments to search and seizure procedure would provide the best practicable accommodation of the competing interests. Report, Exclusionary Rule, supra note 170. See also Lancaster, Searching Lawyers’ Offices: Recommendations from the ABA Criminal Justice Section Exclusionary Rule Committee, Voice for the Defense, May-June 1980, at 45 (setting forth recommendations). At its mid-year meeting in February 1980, the Council of the Criminal Justice Section rejected the Committee’s recommendations, voted to adopt the subpoena preference rule and directed the Committee to redraft its report to that effect. Minutes of the Meeting of the Council of the Criminal Justice Section, Feb. 14, 1980, at 5 (copy on file at Georgetown Law Journal). The Committee declined to adopt the subpoena preference rule, instead submitting a modified version of its initial recommendations. Revised Report, Exclusionary Rule, supra note 152. The Council rejected the report and approved a resolution adopting the subpoena preference rule combined with the Committee’s adjustments to search and seizure procedure when the attorney is a suspect. Minutes of the Meeting of the Council of the Criminal Justice Section, June 3, 1980, at 4 (copy on file at Georgetown Law Journal).

295. See Privacy Hearings, supra note 20, at 312 (testimony of Paul L. Perito, National District Attorneys Ass’n) (subpoena preferred by Justice Department when third party professionals in possession of criminal evidence). S. 1790 Hearings, supra note 22, at 154 (testimony of Richard J. Williams, Vice
The subpoena preference rule offers the best practicable accommodation of the legitimate needs of law enforcement and the important values of the attorney-client relationship. In the wake of Zurcher, courts probably will not hold that the rule is required by the federal Constitution. Therefore, the problem must be resolved either by judicial interpretation or state law or through the legislative or administrative process. Congress has taken important steps toward accommodating the competing interests when a search would pose a threat to first amendment values. To protect the attorney-client relationship, however, greater federal and state efforts are essential.

V. ADJUSTING THE SEARCH AND SEIZURE PROCEDURE TO ACCOMMODATE COMPETING INTERESTS

Even if attorneys do not have the protection of the subpoena preference rule, courts can reconcile the interests of the attorney-client relationship with the needs of law enforcement. The Zurcher Court's refusal to hold that the subpoena preference rule was constitutionally necessary for a free press essentially depended on the Court's belief that "[p]roperly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices."296 If the Court is

President, National District Attorneys Ass'n (prosecutors will hesitate to seek search warrants for attorneys' offices for fear of offending local bar).

A prosecutor could exercise his influence in a white collar crime investigation, which might include a law office search, because he usually directs the investigation from its outset. See Zurcher Hearings, supra note 33, at 178 (testimony for Richard J. Williams, National District Attorneys Ass'n) (prosecutors involved at early stage in financial, white-collar, and organized crime investigations).


there is no reason to believe, for example, that magistrates cannot guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper. Nor, if the requirements of specificity and reasonableness are properly applied, policed, and observed, will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or deter normal editorial and publication decisions.

Id. Likewise, after observing that the magistrate should consider first amendment values before issuing a warrant to search a newsroom, Justice Powell noted in his concurrence that "the magnitude of a proposed search directed at any third party, together with the nature and significance of the material sought, are factors properly considered as bearing on the reasonableness and particularity requirements." Id. at 570 n.2 (Powell, J., concurring) (emphasis in original).

In the same vein, the Court previously had recognized that

there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers that are not necessarily present in executing a warrant to search for physical objects whose relevance is more easily ascertainable. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. Similar dangers, of course, are present in executing a warrant for the "seizure" of telephone conversations. In both kinds of searches, responsible officials, including judicial officials, must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.
correct, perhaps courts might apply traditional fourth amendment procedures in the law office context to protect the attorney-client relationship against abuse by law enforcement officials. Whether the Court’s confidence in the protective capacity of the fourth amendment is justified depends, as the Court seemed to recognize, on how courts apply the amendment. If law enforcement officials follow standard search and seizure procedure without modification when they execute a warrant at a law office, existing safeguards probably cannot protect the attorney-client relationship sufficiently. On the other hand, if courts tailor the procedures to respond to the specific problems presented by this unique kind of search, they might minimize significantly the potential injury. The fourth amendment is not necessarily inadequate because its crucial concept of reasonableness, even if insufficiently elastic to embody a subpoena preference rule, still is capable of adjustment to address the peculiar problems of the law office search.298

Not all of these proposed adjustments comport with existing precedent. In reconstruing the basic concept of reasonableness, courts should differentiate between the kind of search and seizure procedures allowed when law enforcement officers have no reason to believe that privileged documents will be found during a search and the kind of procedures that this article will suggest officers should follow during a law office search. This proposal is not a radical suggestion because the Supreme Court has recognized 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.”299

Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1976). Arguably, the Court only paid lip service in Andresen to this realization. See id. at 492-93 (Brennan, J., dissenting) (criticizing Court for upholding validity of search warrants authorizing police to seize “overwhelming quantity” of material that was suppressed or returned to defendant); 2 LAFAvE TREATISE, supra note 36, § 4.6(d), at 106-07 (criticizing Court for “not . . . hav[ing] been very demanding” in requiring search warrants to describe documents particularly).

297. But see Tarlow & Johnston, supra note 118, at 42-43 Tarlow and Johnston argue that a court cannot reconcile the state’s interest in compelled seizure of documents and the attorney-client interest in preserving constitutional protections and evidentiary privileges by adjusting search and seizure practice. Id. They indicate that a legislature can accommodate these competing interests only by barring law enforcement officials from using warrants to search for documentary evidence and by requiring them to seek such evidence with a subpoena duces tecum. Id.

298. See, e.g., Note, Searches of Nonsuspect Third Parties, supra note 225, at 228, 232 (urging adoption of reasonableness test for searches of nonsuspect third parties that would allow courts to require subpoenas); Note, Search and Seizure of a Third-Party Newspaper: Zurcher, Chief of Police of Palo Alto v. Stanford Daily, 20 B.C. L. REV. 783, 815 (1979) (urging adoption of reasonableness test for searches of nonsuspect newspapers, which would allow courts to require subpoenas or procedure of “informal contact and negotiation”); Note, Third-Party Searches in the Face of Zurcher v. Stanford Daily: Toward a Set of Reasonableness Requirements, 11 CONN. L. REV. 660, 679 (1979) (urging adoption of reasonableness test for searches of nonsuspect third parties that would allow issuance of warrant only upon showing of suspicion of criminal involvement, imminent commission of serious crime, or involvement of particular type of evidence); Note, A Procedural Standard of Reasonableness for Searches of Nonsuspect Third Parties, 64 IOWA L. REV. 367, 380, 384-85 (1979) (urging adoption of “flexible reasonableness” test for searches of nonsuspect third parties that would protect against inspection of documents that warrant fails to specify as well as allow issuance of warrant only upon meeting particularity requirements and upon showing sufficient governmental need).

Since some of the suggested modifications are more susceptible to recognition through constitutional interpretation than others, an attempt will be made here to assess the extent to which each proposal might be embodied within the fourth amendment requirement of reasonableness. As with the subpoena preference rule, nonconstitutional means might more readily effectuate some, if not all, of the recommendations. Because not all of the proposals are equally meritorious, some will be considered but rejected. Other proposals might be viewed as alternative methods of achieving a single objective. A legislative solution that provides for a comprehensive and interdependent procedural framework is most desirable. Several existing legislative and administrative models provide guidance with respect to specific procedures as well as comprehensive plans.300

The following suggested adjustments to search and seizure procedure are not simply alternatives to the subpoena preference rule but also would supplement the rule if it were adopted. The subpoena preference rule would still permit police to search a law office if they have probable cause to believe that the attorney either is criminally culpable or would fail to comply with a final judicial enforcement order. In such a situation the absence of procedural safeguards creates the potential for damage to the attorney-client relationship and its associated privileges. The proposals can be understood best by dividing the search and seizure process into three chronological segments—issuance of the warrant, execution of the warrant, and postseizure proceedings.

A. ISSUANCE OF WARRANTS

Courts rarely will sanction a warrantless search of an attorney’s office since none of the recognized warrant exceptions seems relevant.301 Consequently,

explicitly recognized the application of this principle to attorney-client privilege materials:

Roaden teaches that in determining the reasonableness of the [Security & Exchange Commission’s] possession and use of [a report subject to the attorney-client privilege], this court should consider the value of the attorney-client privilege. . . .

Because documents enjoying the attorney-client privilege have an intrinsic high expecta-
tion of privacy, arguably, a more rigorous fourth amendment standard ought to be applied to their seizures than to seizures of other materials.

Id. at 552.

MENT PROCEDURE §§ 220.5 (Proposed Official Draft, Apr. 15, 1975) (proposal for execution and return of warrants for intermingled documents) [hereinafter ALI MODEL CODE].

301. The warrant requirement exceptions include exigent circumstances, hot pursuit, Terry stops, searches incident to arrest, consent, administrative searches, vehicle searches, plain view, border searches, and inventory searches. For a discussion of these exceptions to the warrant requirement, see Project, Ninth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1978-1979, 68 GEO. L.J. 279, 298-326 (1979) [hereinafter Criminal Procedure Project].
all further discussion in this article will assume that law enforcement officials conduct the search pursuant to a warrant. Adjustments can be made to the procedure for issuing warrants to search law offices that will minimize significantly the potential injury to the attorney-client relationship.

**Limit and Centralize Authority to Apply for Warrants.** Only the chief prosecuting official of a jurisdiction should have the authority to seek a search warrant for an attorney's office because lower-level officials might not assess carefully the degree of law enforcement necessity, the severity of the threat to the attorney-client relationship, and the possibility of less intrusive alternatives.\(^{302}\) Because such an official often will be politically accountable he is less likely to abuse this power. As long as the law office search remains the exception rather than the rule, this requirement should not be unduly burdensome, particularly if the chief prosecuting officer may share the authority with an explicitly designated assistant. Although potentially useful, this procedure is not constitutionally mandated. Nonetheless, the federal eavesdropping law\(^{303}\) and the Connecticut Newsroom Search Guidelines\(^{304}\) provide models for adopting this procedure.

**Vest Authority to Issue Warrants in Courts of General Jurisdiction.** The majority in *Zurcher* placed great faith in the ability of magistrates to protect the press against overly intrusive searches.\(^{305}\) Magistrates, however, might be institutionally incapable of adequately evaluating the subtle and complex constitutional considerations that are implicated when police seek a warrant to search a newsroom.\(^{306}\) This view in part reflects the widespread belief that magistrates do not sufficiently safeguard ordinary fourth amendment privacy interests.\(^{307}\) Just as a magistrate's consideration of the fourth

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302. See O'Neill, Effective Law Enforcement, in Searching Lawyers' Offices: A Delicate Balance, L.A. LAW., Oct., 1979, at 46 (suggesting authority to issue warrant could be vested in "high ranking member of the prosecutorial agency involved"); Revised Report, Exclusionary Rule, supra note 152, at 6 (warrant to search law office may only be issued by chief prosecutor).


304. The United States Attorney for Connecticut adopted guidelines that prohibit law enforcement officials from seeking a warrant for the search of a newsroom without the express approval of both the United States Attorney and the Attorney General of the United States. Blumenthal, supra note 293, at 30, col. 1. The Department of Justice Media Subpoena Policy also provides that no member of the Department of Justice may request the issuance of a subpoena for use against a member of the news media without the express authorization of the Attorney General. 28 C.F.R. § 50.10(d) (1979).

305. See Zurcher v. Stanford Daily, 436 U.S. 547, 566 (1978) (stating there is "no reason to believe... magistrates cannot guard against searches... that would actually interfere with the timely publication of a newspaper").

306. See Cantrell, supra note 189, at 51-52 (magistrates incapable of adequately fashioning scope of warrant because they do not have definitive guidelines, do not receive input from press, do not have sufficient training, and tend to sympathize with police); Teeter & Singer, supra note 127, at 838-59 (magistrates incapable of protecting press because they do not have sufficient training and tend to sympathize with police); Search Warrants Report, supra note 255, at 4 n.8 (magistrates often not lawyers and usually unlikely to protect first amendment interests); cf. Weinreb, supra note 201, at 71-72 (although magistrate "neither detached nor very competent," search warrant procedure useful because it compels police to specify and rationalize scope of search).

307. See, e.g., S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE 58, 126 (1980) ("theoretical
amendment aspects of a newsroom search will be affected by the complexity and sensitivity of first amendment considerations, his assessment of the fourth amendment aspects of a law office search will be complicated by the various privileges of the attorney-client relationship.

In response to this general concern, Professor Sam Dash has observed that "[w]hether we believe that magistrates obey the law, whether we believe they are rubber stamps for prosecutors, they are all we have."[308] In view of the serious threat to the attorney-client relationship, the complexity of the issues, and the exceptional nature of the police practice, however, a court of general jurisdiction should be vested with the exclusive authority to issue a warrant to search a law office.[309] This proposal would ensure that before a magistrate issued a warrant, a truly neutral, detached, and legally-trained judicial officer would have the opportunity to balance carefully the competing interests, to evaluate the threat to recognized privileges, to assess the possibility of alternative sources of evidence, and to assure that the police employ procedures designed to minimize the intrusion.

Because the Supreme Court has reiterated its belief that a magistrate can adequately protect both first and fourth amendment interests, the Court probably will not hold that the fourth amendment requires such a procedure. If some of the proposals set forth below are adopted, then courts of general jurisdiction will not have to replace magistrates in this limited context.[310] magistrate" who protects fourth amendment interests "is largely a myth"); LaFave, Improving Police Performance Through the Exclusionary Rule—Part I: Current Police and Local Court Practices, 30 Mo. L. Rev. 391, 411-13 (1965) (magistrates do not effectively scrutinize police practices); LaFave & Remington, Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions, 63 Mich. L. Rev. 987, 991-93 (1965) (same); Miller & Tiffany, Prosecutor Dominance of the Warrant Decision: A Study of Current Practices, 1964 Wash. U. L.Q. 1, 4-7 (same).

308. Privacy Hearings, supra note 20, at 63 (testimony of Sam Dash, Professor of Law, Georgetown University Law Center).

309. Cf. id. at 300 (Paul L. Perito, National District Attorneys Ass'n) (judge, not magistrate, should issue search warrant particularly for search of newsroom).


311. See Coolidge v. New Hampshire, 403 U.S. 443, 449-50 (1971) (plurality opinion) (stating neutral and detached magistrate protects fourth amendment interests against overzealous police officers); Johnson v. United States, 333 U.S. 10, 13-14 (1948) (same). In Shadwick v. City of Tampa the Supreme Court held that the fourth amendment does not prohibit a nonlegally trained magistrate from issuing arrest warrants for violation of city ordinances provided the magistrate is neutral, detached, and capable of determining whether probable cause exists. 407 U.S. 345, 354 (1972). Arguably, in the typical law office search, in which the substantive crime might be a complex fraud and in which delicate questions of privilege will arise, a nonlegally trained magistrate is incapable of adequately assessing probable cause. Thus, a court might distinguish the Shadwick holding in applying the warrant clause of the fourth amendment to the law office search. See 2 LaFave TREATISE, supra note 36, § 4.2(c), at 34 (nonlegally trained magistrates may not be capable of making complex determinations concerning probable location of specific objects in specific place at specific time). As an alternative to vesting exclusive authority in a court of general jurisdiction, a legislature might prohibit a nonlegally trained magistrate from issuing a warrant for a law office search. See generally Federal Magistrate Act, 28 U.S.C. § 631(b) (1976) (magistrates appointed by federal district court judges must be qualified members of bar unless no such individuals available).

Require Consideration of Potential Invasion of Privileges. In an ex parte hearing before a magistrate, neither the attorney nor his client has an opportunity to assert claims of privileges before the magistrate issues a warrant. To ensure that neither the magistrate nor the officers seeking the warrant will overlook the potential effect of a search on the attorney-client privilege or the work-product doctrine, the officers should establish that they have probable cause to believe that the documents specified in the warrant are unprivileged; the magistrate should make specific findings to that effect.

Since the police are likely to find privileged documents in a law office, this requirement is neither unfair nor unreasonably burdensome. The requirement merely ensures that the items sought legitimately are subject to seizure without violating a privilege. The Supreme Court of California apparently recognized this need in Burrows v. Superior Court when it declared that the attorney-client privilege "was clearly violated by the failure of the warrant to limit the search to material relevant to the charge of misrepresentation."

At the preseizure hearing, police should not be required to establish with any certainty that the documents sought are not privileged because only the attorney and client might have that information. If the officers can describe the evidence with constitutionally sufficient particularity, establish probable cause to believe that the evidence will be found on the premises, and demonstrate a nexus between the criminal activity and the evidence, a court should allow them to demonstrate that the documents probably are unprivileged. Beyond simply showing that the evidence has no relationship to the attorney-client privilege, the police may demonstrate that they have probable cause to believe that the items are not subject to the privilege by establishing that (1) they have reason to believe that the items held by the client are preexisting documents not otherwise privileged, (2) the client made the communications contained in the documents to further a continuing or


314. See Association of the Bar of the City of New York, Committee on Civil Rights, Report on Legislative Response to Zurcher v. Stanford Daily, reprinted in S. 1790 Hearings, supra note 22, at 216 (recommending court be required to make affirmative finding that no probable cause exists to believe that documents subject to seizure privileged before issuing search warrant); Jones, supra note 194, at 20, 22 (suggesting judge make presearch determination that documents not privileged). But cf. In re Walsh, 623 F.2d 489, 493-94 (7th Cir. 1980) (Government need not establish that information and materials sought from attorney nonprivileged before attorney subpoenaed to appear before grand jury because burden of establishing existence of privilege rests on party asserting it).

The recent California legislation and the procedures adopted in 1979 by the Los Angeles District Attorney and County Bar Association require the warrant application to state that an attorney controls the premises the law enforcement officials intend to search. CAL. PENAL CODE § 1525 (West Supp. 1980); L.A. DA/Bar Guidelines, supra note 20, at 1-2. Neither this legislation nor these procedures, however, will ensure that magistrates will not issue warrants authorizing the seizure of privileged material.


316. Id. at 251, 529 P.2d at 598, 118 Cal. Rptr. at 174. Burrows concerned an attorney who allegedly misappropriated a client's funds. Id. at 240, 529 P.2d at 591, 118 Cal. Rptr. at 167. Under an arrangement suggested by the attorney, the client made child support payments to the attorney, who promised to forward them to the court trustee, who in turn would forward them to the child's mother. Id. at 241, 529 P.2d at 592, 118 Cal. Rptr. at 168. The attorney allegedly kept the payments. Id. This financial arrangement presumably did not involve confidential communications between the attorney and client as the court indicated by finding that the warrant authorized seizure only of financial records relevant to the transaction. Id. at 250, 529 P.2d at 598, 118 Cal. Rptr. at 174. Therefore, such evidence would have been beyond the scope of the attorney-client privilege.
future crime or fraud, (3) either the client or the attorney talked to a third party about the documents for purposes unrelated to legal advice, (4) the client did not make the communications embodied in the documents to obtain legal advice, or (5) any other exception to the privilege probably is applicable. 317

Similarly, the police may establish that they have probable cause to believe that the work-product doctrine does not apply by demonstrating that they have reason to believe that (1) the lawyer did not prepare the evidence in anticipation of litigation, (2) the evidence contains purely factual material essential to the prosecution's case that is unavailable from alternative sources, or (3) the lawyer prepared the material to further a continuing or future crime or fraud. 318

Even if the magistrate correctly determines that a document is not privileged, he unwittingly might authorize the seizure of privileged material when either the attorney or his client previously made privileged notations on the otherwise unprotected item. Nevertheless, many protected documents could be excluded from the scope of the warrant if, before issuing the warrant, the magistrate considered the possibility that the police might seize privileged materials. To ensure that this protective function is performed and to provide a means for review, the magistrate should make a record of the Government's showing and his findings.

By analogy, the Supreme Court frequently has emphasized that the police may not seize purportedly obscene material pursuant to a search warrant if there is "no step in the procedure before seizure designed to focus searchingly on the question of obscenity." 319 The Court requires this procedure to decrease the chance that law enforcement officials will remove from circulation materials protected by the first amendment. 320 Comparably sensitive procedures are necessary to minimize the potentially irreparable harm to the policies of attorney-client privilege and the work-product doctrine if an officer examines or seizes materials within their scope. Courts construe the first and fourth amendments together as providing an increased measure of protection when values implicated by the free speech guarantee of the first amendment are threatened by a practice that courts ordinarily would permit under the fourth amendment. 321 Similarly, courts should require the same type of protection under the sixth and fourth amendments when a warranted search

317. See notes 83-86 supra and accompanying text (describing exceptions to attorney-client privilege).
318. If the police demonstrate that the evidence is unlikely to constitute opinion work product and if they establish sufficient necessity to override the qualified immunity of nonopinion work product, the magistrate should issue the warrant. See notes 89-93 supra and accompanying text (describing scope of protection for opinion and nonopinion work product).
endangers the privileges central to the concept of effective assistance of counsel.

**Ensure that No Substantially Equivalent Alternative Source of Evidence Exists.** To render effective representation, an attorney must acquire a significant quantity of nonconfidential as well as confidential information concerning his client's affairs.\(^{322}\) Law enforcement officials might discover that many of the nonprivileged documents held by an attorney also are held by other sources, including clients, accountants, banks, realtors, private investigators, insurance companies, or government agencies.\(^ {323} \) Indeed, many documents an attorney possesses might be nonprivileged and seizable solely because they have been circulated to other parties.

Law enforcement officers might conclude that because an attorney must be a collector of sundry materials, a law office search offers the best opportunity to obtain incriminating evidence. To discourage the police from exploiting the attorney-client relationship, a magistrate should require the officers to search any other location where the police have probable cause to believe the evidence will be found before executing a search warrant at a law office. Alternatively, the magistrate should demand that the police submit an affidavit attesting either that they have no probable cause to believe that the evidence will be found elsewhere or that they have probable cause to believe that the search of another location would risk destruction or removal of the evidence believed to be in the law office. Since the police could discharge their burden by showing an absence of probable cause to believe that the evidence might be found elsewhere, they should not have to search every other conceivable location before directing their attention to an attorney’s office. Rather, the magistrate should be satisfied if the police have conducted a reasonable investigation of potential alternative sources and have concluded that none exists.

Arguably, by imposing a duty of reasonable investigation upon law enforcement officials, a magistrate might interfere with police discretion and unreasonably delay criminal investigations. As a matter of sound investigative practice, however, the police presumably will have tried to determine whether the evidence they hope to find in a law office can be located elsewhere. Furthermore, the magistrate should apply this requirement of reasonable investigation flexibly. Rather than second-guess particular police practices, the magistrate could discharge his responsibility by concluding, based on the description tendered by the officer, that a good faith effort had been made. A court reviewing the search should defer to the magistrate’s conclusion.

Good police practice may dictate that when officers have probable cause to believe that evidence can be found at more than one location, they will search many locations simultaneously to prevent an alerted suspect from destroying

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\(^{322}\) See Barber v. Municipal Court, 24 Cal. 3d 742, 751, 598 P.2d 818, 822, 157 Cal. Rptr. 658, 662 (1979) (right to effective assistance of counsel places defense attorney under duty to “gather as much information as possible about the case”).

\(^{323}\) The warrant for the search of the Kaplan & Livingston firm, for example, authorized the seizure of contracts, letters, and other business documents of the client that the police probably could have found at other locations. Indeed, the warrant authorized simultaneous searches for these documents at six locations in addition to the law firm. Petition of Attorney General for Writ of Mandamus and/or Prohibition and for Stay Order; Memorandum of Points and Authorities, Exhibit 3 (search warrant), Deukmejian v. Superior Court, 103 Cal. App. 3d 253, 255, 162 Cal. Rptr. 857, 859 (Ct. App. 1980).
or removing the evidence. When the police can show that they have probable cause to believe that an attorney is a suspect or that evidence would disappear if they delayed the search, the magistrate should not require them to search other locations first and thereby risk losing the evidence. When the risk of destruction is not as great, the magistrate could issue warrants to search all feasible locations, including the law office, on the condition that the police not search the law office until they had searched the other locations and failed to discover the evidence sought. In some instances, the police will have probable cause to believe that some, but not all, of the documents sought could be found at other locations. Because the police would have no substantially equivalent alternative means of acquiring the remaining evidence, the magistrate should allow them to search the law office immediately. These options represent applications of the least drastic alternative doctrine. Assuming that Zurcher does not foreclose employment of this principle in the fourth amendment area, its use is justified only if the alternative constitutes a substantially equivalent means of achieving the law enforcement objective. Even though the attorney might destroy or remove evidence of interest to the police once he has been notified of a pending search, courts should presume that the attorney can be trusted to preserve the evidence.

Existing statutory and administrative procedures suggest that this proposal would not unduly burden law enforcement. Under federal law, for example, a court may not approve a prosecutor’s request to wiretap or engage in electronic surveillance until he shows and the court finds that “normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous . . . .” Similarly, the Department of Justice will not even consider serving a subpoena on the news media until law enforcement officials have made “all reasonable attempts” to obtain the material from alternative sources. Finally, the Privacy Protection Act of 1980 directs the Attorney General to draft guidelines requiring that in all third party searches federal officers employ the least intrusive

324. Cf. Andersen v. Maryland, 427 U.S. 463, 466 (1976) (suspect’s law and real estate offices searched simultaneously). In both the Kaplan & Livingston and the Masry searches in Los Angeles, the police simultaneously searched the offices of the attorney and his client. See Petition of Attorney General for Writ of Mandamus and/or Prohibition and for Stay Order; Memorandum of Points and Authorities, Exhibit 3 (search warrant), Deukmejian v. Superior Court, 103 Cal. App. 3d 253, 255, 162 Cal. Rptr. 857, 859 (Ct. App. 1980) (both Kaplan & Livingston firm and health clinic searched for financial records); Work, Raids, supra note 16, at 1, col. 2 (police searched both Masry’s office and client’s office for church financial records).

325. See notes 221-26 supra and accompanying text (arguing that Zurcher does not foreclose use of least drastic alternative principle).

326. See notes 149-79 supra and accompanying text (arguing that attorneys unlikely to destroy evidence).


328. Justice Media Subpoena Policy, 28 C.F.R. § 50.10(b) (1979). See also In re Grand Jury Investigation (Sturgis), 412 F. Supp. 943 (E.D. Pa. 1976). In this case the district court noted that it was “disturbed by the practice of calling a lawyer before a grand jury which is investigating his client, especially where the government does not have good grounds for belief that the lawyer possesses unprivileged, relevant evidence that cannot be obtained elsewhere.” Id. at 945 (dictum). But see In re Walsh, 623 F.2d 489, 493 (7th Cir. 1980) (holding that Government need not establish absence of other available source of evidence before serving subpoena on attorney to provide testimony before grand jury that might implicate client).
method of obtaining evidence which does not substantially jeopardize its availability. Like this proposal, each of these examples signifies an attempt to assure that law enforcement officials employ a particularly intrusive law enforcement practice only as a last resort. Even if this requirement causes delay or loss of evidence, it makes sense because as a matter of policy the law should not encourage the police to rely on nonsuspect attorneys as a source of criminal evidence.

Do Not Require that Evidence Be Essential to Investigation. Because of the threat that the law office search poses to the attorney-client relationship, courts might limit its use to only the most compelling circumstances, such as those instances in which law enforcement officials can establish that they have probable cause to believe that evidence essential to a criminal investigation can be found in a law office. This limitation would restrict police action far more than the fourth amendment does; because under current law, a magistrate may issue a warrant only when the law enforcement officials have demonstrated that they have probable cause to believe that any seizable item is on the premises, regardless of its importance. The Department of Justice has suggested this more restrictive policy by refusing to issue a subpoena to law enforcement officials seeking information from the press unless the officials have "reasonable ground to believe that the information sought is essential to a successful investigation—particularly with reference to directly establishing guilt or innocence. The subpoena should not be used to obtain peripheral, non-essential or speculative information." Neither legislatures nor courts should adopt this proposal. Because the restriction is so inconsistent with the prevailing interpretation of the fourth amendment, courts are unlikely to implement it through constitutional interpretation. More importantly, an "essential to the investigation" standard or another standard intended to achieve the same result would prove extremely difficult to apply, might affect law enforcement adversely, and would not protect the attorney-client relationship in a rational manner.

Before an investigation has been completed, the police would have difficulty determining and articulating whether and why an otherwise seizable item of evidence is essential to the investigation. Much evidence might be highly useful, though not essential. Furthermore, the police probably will find documentary evidence in a law office. Thus, even when the police have probable cause, they often will not be able to determine how essential a particular piece of evidence is until they seize it, read it, and compare it with hundreds of other items.

If police are allowed to seize only those items of evidence that initially appear to be essential, one of two results probably will follow. If magistrates

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329. Privacy Protection Act of 1980, Pub. L. No. 96-440, § 201(a)(2). See also Revised Report, Exclusionary Rule, supra note 152, at 6 (prosecutor should be under ethical obligation to use least intrusive method of obtaining information from attorney).


331. Justice Media Subpoena Policy, 28 C.F.R. § 50.10(e)(2) (1979); see Stanford Daily v. Zurcher, 353 F. Supp. 124, 135 (N.D. Cal. 1972) (search warrant for newsroom will issue only upon clear showing that "important materials will be destroyed or removed" despite restraining order) (emphasis in original), aff'd per curiam, 550 F.2d 464 (9th Cir. 1977), rev'd, 436 U.S. 547 (1978).
enforced the limitation strictly, the police often would be precluded from obtaining enough pieces to complete the puzzle. Alternatively, faced with that possibility, magistrates probably would find that virtually all evidence was essential to the investigation until the defense could prove otherwise. An “essential to the investigation” standard would protect the attorney-client relationship in the same way that the “mere evidence” rule protected privacy by diminishing the number of occasions when a magistrate may issue a warrant. Although such a reduction would minimize potential intrusions into the relationship, it would not accommodate the legitimate interests of law enforcement.

Require Submission and Approval of Search Plan. The magistrate's capacity to protect attorneys against searches that threaten recognized privileges would be enhanced significantly if, before issuing a warrant for a law office search, he required the police to submit for his approval a plan designed to minimize the intrusiveness of the search. The search plan need not be complex or detailed. The magistrate should accept the plan if it includes the reasonable safeguards that the circumstances appear to demand. The police, for example, should be required to execute the warrant while the attorney is present, to permit the attorney to assert legitimate privileges, to avoid examining files or documents that, based on caption, size, or location within the office, do not appear likely to fall within the scope of the warrant, and to deliver under seal to the court for in camera review all purportedly privileged documents. The plan also might describe how the


333. In Deukmejian v. Superior Court the California Court of Appeals in a preliminary order directed the Superior Court either to withdraw its preliminary injunction preventing the search or to modify the injunction to ensure the reasonableness of the search. No. 55977, slip op. at 1-2 (Ct. App. May 7, 1979). The Court of Appeals suggested use of a subpoena, id. and also suggested that the Superior Court could assure such reasonableness by providing that the firm could be searched only pursuant to a plan previously approved by the Superior Court. Id. at 2. Although that procedure may have been the appropriate resolution of Deukmejian because the Superior Court was ruling on the validity of the warrant, id. at 1, as a general rule the magistrate who issues the warrant could approve the plan. See also Bekavac, supra note 188, at 15 (suggesting that magistrate require police to conduct law office search pursuant to guidelines designed to minimize intrusion).

334. See notes 382-89 infra and accompanying text (discussing requirement of ensuring attorney's presence during search).

335. See notes 370-75 infra and accompanying text (discussing requirement of providing attorneys with opportunity to assert privileges during search).

336. See notes 424-30 infra and accompanying text (discussing officers' duty to make reasonable efforts to minimize intrusion).

337. See notes 433-38 infra and accompanying text (discussing removal of allegedly privileged documents under seal to court). In its preliminary order in Deukmejian v. Superior Court the California Court of Appeals suggested that the plan should limit the search to those files, identified with the cooperation of the attorney, that were likely to contain materials specified in the warrant and that the attorney should be given the opportunity to remove allegedly privileged documents and present them to the court for in camera review. No. 55977, slip op. at 2 (Ct. App. May 7, 1979).

Assembly Bill 1609, which amended sections 1524-25 of the California Penal Code and section 915 of the Evidence Code to provide attorneys and other privilege-holders with some protection against the abuses of search and seizure, initially provided in part that

[any] search warrant issued . . . for any item . . . in the possession or under the control of any
officers intend to assure that an attorney will not conceal or destroy documents during the search.\textsuperscript{338}

Essentially, a search plan would require law enforcement officials to consider and articulate in advance how they intend to conduct the search in a constitutionally reasonable manner.\textsuperscript{339} The proposal allows the magistrate to guide the police early enough so that they can cure the defects that otherwise might lead a court to invalidate the completed search.\textsuperscript{340} Before a court will issue a wiretap order, for example, the police must provide a detailed, sworn description of the methods they will employ to minimize the intrusiveness of the tap.\textsuperscript{341} Like this requirement, the search plan proposal probably would not hamper law enforcement unduly. At most, the police would have to spend a little more time preparing for the warrant hearing, and the hearing might be lengthened slightly. As a result, however, the interests of both effective law enforcement and the attorney-client relationship would be promoted without significant sacrifice to either.

Since existing fourth amendment jurisprudence offers no clear support for a search plan, such plans might not be constitutionally required with respect to law offices. Indeed, the Supreme Court recently indicated in \textit{Dalia v. United States}\textsuperscript{342} that the fourth amendment does not require the use of search plans. In \textit{Dalia} the Court held that an order authorizing the interception of oral communications was not insufficient even though FBI agents failed to specify that they would execute the order through covert entry.\textsuperscript{343} The Court explained:

\begin{quote}
\textit{Nothing in the language of the Constitution} or in this Court's decisions interpreting that language suggests that . . . search warrants . . . must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant . . . . \textsuperscript{344}
\end{quote}

\textsuperscript{338} See notes 396-400 infra and accompanying text (arguing that officers should seek voluntary cooperation of attorney in producing evidence; as a precaution, however, officers should complete search if they suspect attorney would hide or destroy evidence).

\textsuperscript{339} See supra note 201, at 72 (compelling police to consider reasonableness of search might be most significant function of warrant requirement).

\textsuperscript{340} Cf. Michigan v. Tyler, 436 U.S. 499, 507-08 (1978) (magistrate should assure that proposed search will be reasonable, which requires balancing need for intrusion with threat of disruption to occupant).


\textsuperscript{342} 441 U.S. 238 (1979).

\textsuperscript{343} Id. at 257.

\textsuperscript{344} Id. (emphasis added).
Even if the Constitution does not require a search plan, a legislature or administrative body should incorporate this protection into any proposal for regulating law office searches.

**Insist on a Higher Degree of Particularity.** An attorney's fear that officers executing a search warrant will invade his privacy by unnecessarily rummaging through his office and seizing items that are not specified in the warrant is not peculiar to the law office search. To reduce this threat, the fourth amendment provides that “no Warrants shall issue [unless they]... particularly describe the place to be searched, and the persons or things to be seized.” Beyond limiting the scope of the search, the particularity requirement helps ensure that probable cause to seize the specified items exists, and aids the magistrate in assessing the reasonableness of the proposed search, and restricts after-the-fact justification by ensuring that the police prepare a preseizure record of the items sought.

When the possibility exists that law enforcement officials might examine or seize privileged or otherwise protected material, the need for specificity increases. The majority in *Zurcher* explicitly cited the particularity requirement as a significant measure that protects against an overly intrusive search of the press. The Court also recalled that it had insisted in *Stanford v. Texas* that the requirement “be accorded the most scrupulous exactitude when the ‘things’ are books, and the basis for their seizure is the ideas which they contain.” The *Zurcher* Court concluded that “[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.”

Since privileged material often will be subject to exposure in a law office search, a constitutionally acceptable warrant must describe the items sought

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345. U.S. Const. amend. IV (emphasis added).
346. 2 LAFAVE TREATISE, supra note 36, § 4.6, at 96-97; see United States v. Roche, 614 F.2d 6, 7 (1st Cir. 1980) (holding that lack of particularity in warrant violated probable cause requirements); In re Lafayette Academy, Inc., 610 F.2d 1, 5-6 (1st Cir. 1979) (same).
348. S. SALTZBURG, supra note 307, at 57; see 2 LAFAVE TREATISE, supra note 36, § 4.6, at 95 (particularity requirement prevents seizure of objects upon mistaken assumption that they fall within magistrate's authorization).
351. Id. at 485. In *Stanford v. Texas* the Supreme Court invalidated a search pursuant to a warrant authorizing the seizure of “books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas...” Id. at 486. Fourteen cartons of material were seized, including books by Pope John XXIII and Justice Hugo Black, as well as a marriage certificate, insurance policies, household bills, and personal correspondence. Id. at 479-80. The Court noted, however, that “[a] 'book' which is no more than a ledger of an unlawful enterprise... might stand on a quite different constitutional footing from the books involved in the present case.” Id. at 485 n.16. See United States v. Torch, 609 F.2d 1088, 1090 (4th Cir. 1979) (1980) (warrant insufficiently specific to authorize seizure of obscene materials but sufficiently specific to authorize seizure of business records), cert. denied, 100 S. Ct. 2928 (1980).
352. 436 U.S. at 564.
with a high degree of specificity. Recognizing this requirement, the California Supreme Court and trial courts in Los Angeles, California, and Portland, Oregon, have invalidated searches of law offices, in part at least, because the police used insufficiently particular warrants. The principle is stated simply but not easily applied. Although a magistrate must require the police to be sufficiently specific, he must be careful to assure that the officer executing the warrant can separate the items that are subject to seizure from those that are not. When police describe files and documents by title, date, author, intended recipient, and size, they can minimize the risk that they will examine or seize irrelevant documents. Frequently, however, the documents sought will not bear these identifying characteristics or the officers will be unable to obtain this type of information. Consequently, the police might have to describe documents generically, as they did in Andresen v. Mary-

356. The First Circuit recently invalidated as insufficiently particular a warrant that could be read as authorizing the seizure of all Medicare and Medicaid records located in a doctor's office. United States v. Abrams, 615 F.2d 541, 547 (1st Cir. 1980). In so doing, the court observed:

In a case involving the detailed examination of voluminous business records of a person being investigated for possible criminal activity, the usual method of obtaining such records is by subpoena... We realize that the issue of a subpoena always entails the risk that the records will be tampered with or even destroyed before they are delivered. The government's only alternative to this procedure, however, is strict compliance with the fourth amendment's requirement of a particularized warrant.

Id.

357. Police ordinarily seek documentary evidence from attorneys. In People v. Doyle, however, the police seized a stolen typewriter in addition to client files. 77 Cal. App. 3d 126, 127, 141 Cal. Rptr. 639, 640 (Ct. App. 1977). In another case FBI agents searched an attorney's safe deposit box for money stolen from a bank and for a sawed-off shotgun used to commit the robbery. In re Ryder, 263 F. Supp. 360, 364 (E.D. Va.) (per curiam), aff'd per curiam, 381 F.2d 713, 714 (4th Cir. 1967). Likewise, in the vast majority of cases in which attorneys have been served with subpoenas, the Government sought client files or firm records. In one case, however, FBI agents served an attorney with a subpoena duces tecum requesting production of stolen funds. In re January Grand Jury (Genson), 534 F.2d 719, 721 (7th Cir. 1976). For citations to cases concerning attorneys served with subpoenas duces tecum, see notes 136-37 supra.

358. See, e.g., United States v. Abrams, 615 F.2d 541, 545 (1st Cir. 1980) (invalidating warrant authorizing seizure of doctors' Medicaid files in part because warrant did not incorporate time period for dates of records sought); In re Lafayette Academy, Inc., 610 F.2d 1, 4 n.4 (1st Cir. 1979) (dictum) ("[i]n many instances of warrants authorizing the seizure of documents from a general file efforts... may be required to narrow the documents by category, time periods, and the like"); Pieper v. United States, 604 F.2d 1131, 1134 (8th Cir. 1979) (dicta) ("when a warrant... is issued for the inspection of business records on the basis of one suspected violation, the warrant must express, with some degree of particularity, the dates of the records sought").

In In re Search Warrant the Government not only could describe the documents sought by title, date, size, and content, but also could explain the meaning of particular file captions and indicate where the files could be expected to be found within the office. 572 F.2d 321, 324 (D.C. Cir. 1977) (per curiam), cert. denied, 435 U.S. 925 (1978). The FBI had much of this information because the documents had been stolen from the office of the United States Attorney. Id. at 325. The government also must have obtained information from someone quite familiar with the arrangement of the premises. Although a description of the location of specified files within an office might minimize the scope of the search significantly, law enforcement officials rarely will have information of this nature. Furthermore, the law should not encourage the police to infiltrate a law office in order to obtain this type of data.
Although descriptions such as “title abstracts” or “lender’s instructions for a construction loan” seem overly broad, they might suffice if the officers can assure the magistrate that the search will be limited to one specific area of the attorney’s office or one set of files. Alternatively, generic descriptions might be permissible if the categories of documents specified are limited to particular transactions or persons such as specified clients. Such descriptions, however, might not always be practicable.

The courts regularly have enforced subpoenas directing attorneys to produce all documents pertaining to a particular client or matter. Furthermore, a subpoena, unlike a search warrant, legitimately may sanction a fishing expedition in the subject’s files. However, a court should invalidate

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359. 427 U.S. 463 (1976). For a description of the items specified in the warrant, see id. at 480-81 n.10.

360. Id.

361. See United States v. Torch, 609 F.2d 1088, 1089-90 (4th Cir. 1979) (warrant authorizing search and seizure of “records, documents, and writings related to the transportation . . . of . . . filthy films, including route book, billing invoices, cash sales slips, credit memos, and other similar type documents” sufficiently particular because, inter alia, search was limited to petitioner’s person and van), cert. denied, 100 S. Ct. 2928 (1980).

The Los Angeles Municipal Court invalidated as overbroad the warrant to search the Cotton & Bregman firm because the warrant authorized a search of “[a]ll rooms, cabinets, drawers, safes, closets and other storage facilities therein.” In re Law Offices of Bregman, No. SW 15591, slip op. at 2 (L.A. Mun. Ct. June 4, 1979). The warrant in the Kaplan & Livingston case authorized the search of “[t]he multi-story building . . . including all rooms, lofts, attics, basements, desks, closets, filing cabinets, safes, vaults, and all parts therein . . . storage areas, garages and outbuildings . . . .” Deukmejian v. Superior Court, 103 Cal. App. 3d 253, 255-56, 162 Cal. Rptr. 857, 859 (Ct. App. 1980) (quoting search warrant). Because the officers did not seize any materials, the California Court of Appeals did not consider whether the warrant was overbroad; rather, it permitted the officers to seek another warrant, the issuance of which would be governed by newly-enacted legislation. Id. at 262, 162 Cal. Rptr. at 863.

362. See Andresen v. Maryland, 427 U.S. 463, 479-82 (1976) (upholding generic warrant that linked some evidence to specified individuals and transactions). See also In re Lafayette Academy, Inc., 610 F.2d 1, 5 (1st Cir. 1979) (holding that generic description of documentary evidence will be adequate if sufficiently particular). The First Circuit has observed that most generic descriptions approved by the courts have involved contraband or stolen property, not documentary evidence. United States v. Abrams, 615 F.2d 541, 545 (1st Cir. 1980).

Ordinarily, a generic description suffices if the police have acquired and included all reasonably available descriptive facts in the warrant. See United States v. Cortellesso, 601 F.2d 28, 31 (1st Cir. 1979) (stating that generic description authorizes search of store when inventory consists of stolen and legitimate goods and when evidence establishes “reason to believe that a large collection of similar contraband is present on the premises . . . and . . . explain[s] the method by which the executing agents are to differentiate the contraband from the rest of defendant’s inventory”), cert. denied, 100 S. Ct. 1016 (1980); 2 LAFAVETTE TREATISE, supra note 36, § 4.6(a), at 98 (“greater degree of ambiguity” tolerated in description when police have acquired all reasonably available facts and included them in warrant). See also United States v. Davis, 542 F.2d 743, 745 (8th Cir.) (stating that particularity requirement applied with “practical margin of flexibility”), cert. denied, 429 U.S. 1004 (1976).

363. For a case in which the magistrate could not limit the area to be searched in an attorney’s office, see National City Trading Corp. v. United States, 487 F. Supp. 1332 (S.D.N.Y. 1980). The court rejected the argument that the warrant to search the attorney’s suite was invalid because it “did not delineate with sufficient practical accuracy the area to be searched.” Id. at 1335.

364. See, e.g., In re Grand Jury, 603 F.2d 469, 476-77 (3d Cir. 1979) (attorney req. ired to produce business records of corporate clients); Beckler v. Superior Court, 568 F.2d 651, 652 (9th Cir. 1977) (attorney required to produce client’s business and accounting records); In re Grand Jury, 534 F.2d 719, 730 (7th Cir. 1976) (attorney required to turn over money received from client suspected of bank robbery).

365. See Schwimmer v. United States, 323 F.2d 855, 862-63 (8th Cir.) (“[s]ome exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury”), cert. denied, 352 U.S. 833 (1956). See generally 1 LAFAVETTE TREATISE, supra note 36, § 1.4(d), at 64-65.
a search warrant as overbroad if it authorizes a seizure beyond the probable cause articulated by law enforcement officers. For instance, in *Burrows v. Superior Court* the California Supreme Court held that a warrant authorizing the seizure of "any file or documents" pertaining to certain clients was fatally overbroad because the alleged criminal conduct related solely to the attorney's financial practices with those clients. The court explained that "the information upon which the warrant was based justified a search ... only for financial records . . . ."

Similarly, the courts have upheld subpoenas directing attorneys to produce clients' documents extending back over many years. However, when a magistrate authorizes a search warrant specifying documents that extend back over a lengthy period of time, he is providing the police with an open invitation to examine and seize privileged and irrelevant items. For particularity to provide meaningful protection against abuse of the law office search, the courts must not accept the descriptive standards that would suffice for a subpoena. Although descriptions based on the content of documents might be highly specific, they undermine the particularity requirement by effectively requiring the officer to read every conceivably relevant document in order to identify those specified in the warrant. Unfortunately, the portion of the warrant approved in *Andresen* authorizing the seizure of "documents . . . showing or tending to show a fraudulent intent, and/or knowledge (describing grand jury use of subpoenas *duces tecum*). To the extent that the fourth amendment applies to a subpoena, a grand jury does not need probable cause to support a subpoena. *Id.* at 65. Rather, the subpoena will survive challenge if it is not "opressively overbroad or indefinite." *Amsterdam*, supra note 100, § 163, at 1—151; see Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1946) (noting that in context of agency subpoena ordering corporate production of documents, fourth amendment "at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described".")

366. See 2 *LAFAVE TREATISE*, supra note 36, § 4.6(d), at 108 (when evidence sought described in general terms, probable cause may be insufficient to justify search).


368. *Id.* at 250, 529 P.2d at 598, 118 Cal. Rptr. at 174.

369. *Id.* The court based its decision on both the fourth amendment and the analogous search and seizure provision of the California Constitution. *Id.* at 249, 529 P.2d at 597, 118 Cal. Rptr. at 173.

The warrant that the magistrate issued in *O'Connor v. Johnson* suffered from the same vice. Although the warrant set forth useful generic categories of documents, it authorized the seizure of essentially all of the business records of the specified clients. *See* 287 N.W.2d 400, 404 (Minn. 1979) (en banc) (setting forth items specified in search warrant). Although the Minnesota Supreme Court believed that the description was sufficiently particular, it concluded that no degree of specificity could protect against invasions of privileged material located in a law office. *Id.* at 404-05.

The description in the warrant authorizing the search of the Kaplan & Livingston firm also was quite broad. See *Deukmejian v. Superior Court*, 103 Cal. App. 3d 253, 255-56, 162 Cal. Rptr. 857, 859 (Ct. App. 1980) (warrant authorized search in "all rooms . . . for [inter alia] . . . memorandums . . . notes or other documents indicating [certain] transactions"). Without deciding the issue, the California Court of Appeals suggested that it might agree with the trial court's conclusion that the search warrant was unconstitutionally overbroad. *Id.* at 262, 162 Cal. Rptr. at 863.

370. See *Schwimmer v. United States*, 232 F.2d 855, 859 (8th Cir.) (subpoena that directed attorney to produce all documents relating to affairs of certain client over 10-year period legal), *cert. denied*, 352 U.S. 833 (1956); *cf. In re Grand Jury (Freedman)*, 529 F.2d 543, 549 (3d Cir.), *cert. denied*, 425 U.S. 992 (1976) (subpoena *duces tecum* seeking 26 categories of law firm's financial documents over 10-year period valid only if "most, if not all" items relevant to grand jury's inquiry). The lengthier the time period, the more specific the description should be. Note, *Search Warrants and Journalists' Confidential Information*, 25 Am. U.L. REV. 938, 963 (1976).

371. 2 *LAFAVE TREATISE*, supra note 36, § 4.6(d), at 107.
elements of the crime of false pretenses"\textsuperscript{372} suffered from this vice. Descriptions of this type require the officer not only to read all potentially relevant documents, but also to read them carefully. Consequently, the courts should seldom, if ever, hold that such descriptions are permissible in the law office setting because the irrelevant documents subject to examination might be privileged or highly confidential.

Similarly, for the particularity requirement to impose an effective limitation on the scope of the search, courts must prohibit the use of omnibus or catchall clauses authorizing a search for and seizure of any and all evidence pertaining to a specified crime. Unfortunately, in \textit{Andresen} the Supreme Court explicitly approved just such a clause in a warrant to search an attorney's office.\textsuperscript{373} The omnibus clause approved in \textit{Andresen}, even if clearly limited by the warrant to the specific crime under investigation, seems inconsistent with the particularity requirement since it permitted the police to make relatively unrestricted determinations about whether an unspecified item was relevant and therefore subject to seizure.\textsuperscript{374} When law enforcement officials are likely to find privileged materials on the premises, magistrates should not condone such unchecked discretion.\textsuperscript{375} Moreover, by authorizing a

\textsuperscript{372} Andresen v. Maryland, 427 U.S. 463, 481 n.10 (1976) (citing language in warrant). Similarly, in \textit{People v. Superior Court} (Driscoll), in which the client was accused of murdering her family, the court sustained a warrant authorizing the seizure of "letters, photo albums, books, journals, diaries, and other personal papers . . . tending to show the mental condition of [the client] and her intentions and relationships with her now deceased [family]." 68 Cal. App. 3d 845, 850, 137 Cal. Rptr. 391, 392 (Ct. App.) (per curiam), decertified, 567 P.2d 1162, 140 Cal. Rptr. 442 (1977).

Recently, however, the First Circuit held that a warrant authorizing the seizure of, \textit{inter alia}, "[b]ooks, papers . . . letters . . . documents, [and] memoranda" constituting evidence of a violation of five specified federal fraud and conspiracy statutes was insufficiently particular. \textit{In re Lafayette Academy, Inc.}, 610 F.2d 1, 3, 5 (1st Cir. 1979). \textit{But see United States v. Cortellesso}, 601 F.2d 28, 30, 33 (1st Cir. 1979) (warrant sufficiently particular that authorized seizure of records and "any" documents that were evidence of violation of three sections of federal criminal code).

\textsuperscript{373} 427 U.S. at 480-82. The warrant recited a long list of documents that were subject to seizure "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." \textit{Id}. at 481 n.10. The Court held that the quoted phrase did not render the warrant impermissibly general because it construed the phrase as referring to evidence relating to "the crime of false pretenses with respect to a particular plot of land." \textit{Id}. at 480-81. By emphasizing that the alleged scheme, which involved a complex fraud, be established only "by piecing together many bits of evidence . . . that, taken singly, would show comparatively little," \textit{Id}. at 481 n.10, the majority also rejected the contention that the lengthy list of seemingly innocuous documents was tantamount to a general warrant. Justice Brennan, however, noted that the officers executing the warrant seized an "overwhelming quantity" of documents that were either suppressed or returned to the petitioner because they were unrelated to criminal activity. \textit{Id}. at 493 (Brennan, J., dissenting). For Justice Brennan, this fact proved the "unlawful generality" of the warrant. \textit{Id}.

\textsuperscript{374} See 2 \textsc{Lafave Treatise}, \textit{ supra} note 36, \textsection 4.6(d), at 107 (clause referred to seizable documents in terms of incriminating contents, thereby requiring officers to examine "virtually every document"); S. \textsc{Saltzburg, supra} note 307, at 108 ("total absence of particularity" in clause enabled "wholesale seizure of anything that might in any way touch upon . . . case"); \textsc{McKenna}, \textit{ supra} note 53, at 79-80 (generality of warrant gave too much discretion to officers). Cases decided after \textit{Andresen} indicate that law enforcement officials are employing similar clauses. See \textit{In re Search Warrant}, 572 F.2d 321, 323 (D.C. Cir. 1977) (per curiam) (warrant authorized seizure of "[a]ny and all fruits, instrumentalities, and evidence (at the time unknown) of the crimes of conspiracy, obstruction of justice and theft of government property [sic] in violation of 18 U.S. Code §§ 371, 1503, and 641 which facts recited in the accompanying affidavit make out"), \textit{cert. denied}, 435 U.S. 925 (1978).

\textsuperscript{375} See Burrows v. Superior Court, 13 Cal. 3d 238, 250-51, 529 P.2d 590, 598, 118 Cal. Rptr. 166, 174 (1974) (holding that warrant authorizing seizure of "any file or documents" relating to specified client violates particularity requirement because it permits seizure of privileged materials).
warrant permitting the police to seize "all" files relating to a particular crime, subject, transaction, or client, a magistrate would seriously undermine the utility of any descriptions that individually specify documents subject to seizure under the warrant. Even if the officers have located all the documents particularly described in the warrant, they will not know whether they have discovered all of the items that deal with a specified subject until they have searched every file in the office. \(^376\)

If courts demand a higher degree of particularity, occasionally the situation will arise in which the police have probable cause to believe that criminal evidence is located in a lawyer's office but are unable to describe the items with sufficient specificity to avoid a detailed examination of all materials. If the courts uncritically extended the existing practice to the law office, however, the best efforts of law enforcement officials ordinarily would provide very slight protection against the overly intrusive search. Fortunately, the Supreme Court has recognized that, if properly applied, the constitutionally required safeguard of particularity can serve a very important function. \(^377\) The potential loss of evidence is not too great a cost to incur to preserve the countervailing values of the attorney-client relationship.

The courts cannot provide adequate protection for the legitimate interests of attorneys and their clients through reliance on the particularity requirement alone, even if they apply it scrupulously. As Justice Stewart noted, dissenting in \textit{Zurcher}, "[t]o find a particular document, no matter how specifically it is identified in the warrant, the police will have to search every place where it might be—including, presumably, every file in the office—and to examine each document they find to see if it is the correct one." \(^378\) In \textit{O'Connor v. Johnson} the Minnesota Supreme Court agreed, concluding that "the most particular warrant" would not adequately safeguard the relevant privileges and the right to counsel since the police would still be unable to locate specified items without examining privileged documents. \(^379\) The court's conclusion, however, might be too broad, for great particularity might prove useful, at least when employed in conjunction with other protective devices. By requiring reasonable specification, including file caption and document title, a magistrate can minimize the intrusion by indicating to law enforcement officers that they need not and may not examine unrelated files and documents.

\textbf{Do Not Require Greater Showing of Probable Cause.} Since law office searches pose a serious threat to the attorney-client relationship, the question arises whether courts should require police to demonstrate an enhanced standard of probable cause for the search of a law office. Although commentators have argued that a law enforcement officer should be required to make

\(^376\) See S. \textsc{Saltzburg}, \textit{supra} note 307, at 108 (suggesting no difference between warrant that allows seizure simply of "all . . . evidence" of crime and warrant that specifies items to be seized but allows seizure of all other evidence of crime; each warrant permits general search); \textit{cf.} United States v. Abrams, 615 F.2d 541, 543 (1st Cir. 1980) (warrant authorizing seizure of "certain business and billing and medical records of patients of [named doctors] that evidence a scheme to defraud the United States" unconstitutionally overbroad in that it provided no limitation on officer's discretion).

\(^377\) See note 347 \textit{supra} and accompanying text (describing Supreme Court treatment of particularity requirement).


\(^379\) 287 N.W.2d 400, 405 (Minn. 1979) (en banc).
a greater showing of probable cause whenever seeking authorization for an especially intrusive search, the Supreme Court apparently believes that this approach is unacceptable because it would create unnecessary confusion. Imposing a higher standard of probable cause for law office searches would create similar administrative difficulties because the standard would lack the clarity and familiarity necessary for easy application. Nonetheless, the problem might be less pronounced than in other areas of police investigation since the officer would not need to make an immediate on-the-street evaluation of probable cause.

Because law enforcement officials would search law offices infrequently, courts might justify a higher standard of probable cause for law office searches as a means of providing greater protection to the attorney and his clients. This additional degree of protection, however, might not justify the increased cost that it would impose on law enforcement. The requirement that the police demonstrate the existence of probable cause has not hindered the ability of the police to gather criminal evidence. If the courts demanded a higher standard of probable cause during the early stages of an investigation, however, the police might be unable to establish that relevant evidence could be found in an attorney's office.

In contrast, under the subpoena preference rule, the police need not establish probable cause to demand evidence. If both the subpoena and the search warrant are available alternatives, a court should not require the police to meet a higher standard of probable cause, for to do so would effectively preclude law enforcement officials from using a search warrant in many instances. Because this particular proposal would not accommodate the competing interests of law enforcement and the attorney-client relationship the courts should not adopt it.

B. EXECUTION OF SEARCH WARRANTS

Compared to the issuance of a search warrant, the execution of the warrant presents a more serious threat to the attorney-client relationship and thus a more critical need for safeguards designed to protect that relationship. The following proposals suggest ways to minimize the degree of the intrusion.

Do Not Provide Opportunity for Notice and Prior Adversary Hearing. A prior adversary hearing would provide significant protection to the

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380. See 1 LAFAVE TREATISE, supra note 36, § 3.2(a), at 452 (suggesting adoption of higher standard than probable cause for particularly intrusive searches; McKenna, supra note 53, at 75 (same); cf. Berger v. New York, 388 U.S. 41, 69-70 (1967) (Stewart, J., concurring) (evidence that might have established probable cause for conventional search insufficient to support lengthy and extensive electronic surveillance); Schmerber v. California, 384 U.S. 757, 770 (1966) (there must be "clear indication" evidence will be found to justify intrusion into suspect's body).

381. In Dunaway v. New York the Supreme Court stated that "[a] single, familiar standard [of probable cause to arrest] is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." 442 U.S. 200, 213-14 (1979). See also Amsterdam, Perspectives, supra note 293, at 394 (nonunitary standard counterproductive because inherent uncertainty would lead courts to give greater deference to police).

The Supreme Court has sanctioned a lesser showing than probable cause only in certain limited and well defined areas where the needs of law enforcement are great and the intrusion is minimal. See Terry v. Ohio, 392 U.S. 1, 20 (1968) (stop and frisk); Camara v. Municipal Court, 387 U.S. 523, 534-39 (1967) (administrative search).
attorney-client relationship since it would permit an attorney to present and litigate claims of privilege in a judicial forum before law enforcement officers examined or seized any documents. Requiring a prior adversary hearing, however, is but a thinly disguised version of the subpoena preference rule. From a law enforcement perspective, the primary advantages of the search over the subpoena are surprise and expedition. A prior adversary hearing would sacrifice both. Presumably, if the police were to prevail at the hearing, the court then would permit them to conduct a search and to select the material to be seized. In those instances in which the attorney unsuccessfully contends in court that the documents were privileged, however, he probably would tender the material voluntarily to avoid the disruption of a search. Unless the police doubted the attorney’s good faith, a follow-up search rarely would prove necessary.

The subpoena preference rule more effectively balances the competing interests of law enforcement officers and of attorneys and their clients than does the law office search. The legitimate needs of law enforcement, however, may require law office searches in some circumstances. If so, an adversary hearing should follow rather than precede execution of the warrant.

**Attempt to Ensure the Presence of Attorney.** If the attorney is not a suspect, a magistrate should require law enforcement officials “to make an advance appointment—but not reveal the purpose—to provide for dignified execution of the warrant.” This proposal attempts to ensure that the attorney will be present. Furthermore, it might cushion the shock effect of the search because it lessens the possibility that law enforcement officials will serve the warrant while the attorney is conferring with a client. This practice would be an affordable courtesy, though scarcely a constitutional necessity. When the attorney is a suspect, however, advance notice would diminish the element of surprise and increase the risk that evidence would be lost, even if the purpose of the visit were not disclosed.

Although advance notice might not be essential, the attorney should be present during a search to assert any applicable privileges. Furthermore, the attorney’s presence would help minimize the intrusion by affording him an opportunity to assist the officers in locating documentary items. His presence also would reduce the likelihood of any subsequent disputes.

382. Brief for Respondent at 14-15, O’Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979) (en banc). Law enforcement officials followed this procedure in serving the warrant to search the office of the Cotton & Bregman firm. See Memorandum of Points and Authorities in Opposition to Petition for Writ of Mandate and/or Prohibition at 6, People v. Municipal Court, LASC No. C 204532 (L.A. Sup. Ct. 1979) (police officer, without informing attorney that magistrate had issued warrant, “volunteered” to meet with attorney at law office). The police did provide a Boise, Idaho, television station with thirty minutes advance notice before executing a search warrant recently at the station. N.Y. Times, July 27, 1980, § 1, at 1, 32, cols. 1, 4.

383. This proposal, however, helps only the sole practitioner. In a larger firm, even if one attorney were available to meet with the officers, other attorneys invariably would be meeting with clients at that time. To minimize such an intrusion, the police officers should wear plain clothes.

384. See CAL. PENAL. CODE § 1524(c)(3) (West Supp. 1980) (providing that search warrant “must, whenever practicable, be served during normal business hours” and on party “who appears to have possession or control of the items sought”); Report, Exclusionary Rule, supra note 170 (same). See also Cal. Atty. Gen. Proposal, supra note 300, at 1 (search must be conducted during daylight hours and attorney must be present); L.A. DA/Bar Guidelines, supra note 20, at 102 (attorney has right to be present during search).
regarding the conduct of the search. Finally, the attorney could determine whether any privileged documents had been examined or seized so that he could inform either concerned clients or a court.

An attorney, however, should not have an absolute right to be present during a search of his office. To avoid frustrating an otherwise legitimate search when an attorney continually is unavailable, the officers should only be required to make a reasonable attempt to execute the warrant in the attorney's presence. If the officers conduct the search in the attorney's absence, they should take special precautions to assure that they do not violate any privileges. If an attorney attempts to obstruct a search, he should forfeit his right to remain present for the remainder of the search.

To accommodate the attorney's needs to be present during a search of his office, courts will have to modify prevailing fourth amendment doctrine. Under current law a person has no right to be present during the search of his premises. As a matter of fourth amendment "reasonableness," however, an attorney should have the right to be present during the search of his office. Allowing the attorney's presence would alleviate partially the special dangers inherent in a law office search without substantially sacrificing the interests of law enforcement.

Provide Attorney with Opportunity to Assert Privileges. Under any set of safeguards, the attorney must be permitted to assert any legitimate privilege including the attorney-client privilege or the work-product doctrine during the search. This opportunity would preclude the officers executing the warrant from examining purportedly privileged documents. Unless the attorney has such an opportunity, no search and seizure practice will provide adequate protection for the attorney-client relationship.

Although the attorney may assert relevant privileges during the search, the courts will be the final arbiter. If the police believe that a particular document specified in the warrant legitimately is subject to seizure and if the attorney asserts that it is privileged, the only way of accommodating the interests of both is for the police to transfer the documents under seal to a court for in

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385. Ordinarily, the police could execute the warrant in the attorney's presence either by making an appointment or by engaging in visual surveillance of the office. Unless the attorney observes each aspect of the search, however, his presence would be ineffectual. A team of officers should be allowed to search various parts of an office simultaneously only if an attorney familiar with the files and competent to assert applicable privileges accompanies each officer. If the attorney were a suspect, the police should be permitted to clear all personnel out of the search area to protect against loss of evidence. Nonetheless, the attorney should be allowed to accompany the officers during the search.

386. See Cal. Penal Code § 1524(e)(3) (West Supp. 1980) (providing that search of attorney's office may be conducted in attorney's absence if official serving warrant unable to locate him after making "reasonable efforts").

387. The California legislation provides that the special master authorized to conduct the search "shall seal and return to the court for determination by the court any item or items which appear to be privileged as provided by law." Id.; see notes 433-38 infra and accompanying text (discussing use of in camera review of privileged documents transferred to court under seal).

388. See Payne v. United States, 508 F.2d 1391, 1394 (5th Cir.) (forcible entry into unoccupied premises pursuant to search warrant not per se violation of fourth amendment), cert. denied, 423 U.S. 933 (1975); United States v. Gervato, 474 F.2d 40, 44-45 (3d Cir.) (same), cert. denied, 414 U.S. 864 (1973).

camera review. As long as the police employ this special protective procedure, a magistrate should allow them to seize the evidence immediately.

Although the attorney has a legal right to assert claims of privilege, he should not be permitted to resist the police physically. 390 Instead, an attorney should pursue a remedy for breach through litigation rather than through self-help. If a court recognizes the attorney's right to assert privileges and if law enforcement officials ignore the exercise of the privilege, presumably the courts would invalidate the search and allow for both damages and legal sanctions against the officers. So construed, this crucial safeguard should not frustrate the primary objective of the search—expeditious access to potential criminal evidence.

The threshold issue is not how, but whether, the police should honor a claim of privilege. In Zurcher the Supreme Court noted that “Fifth Amendment and state shield-law objections that might be asserted in opposition to compliance with a subpoena [were] largely irrelevant to determining the legality of a search warrant under the Fourth Amendment.” 391 The irrelevance of the privilege against self-incrimination is easily understood in the wake of Andresen, 392 given the absence of legal compulsion during a search. Presumably, the Court believed that state reporter shield statutes were not intended to apply in the search and seizure context. Conceivably, however, the Court might have been suggesting that no testimonial privilege may ever be raised during a search. If so, the search warrant would provide an easy means of evading the privileges that have been so carefully developed by common law and statute.

If the police legitimately could examine items within the attorney-client privilege and the work-product doctrine simply by obtaining a warrant to search the lawyer's office, both attorney-client communication and written trial preparation would be inhibited. 393 Consequently, many courts seem to

390. Edward Masry, an attorney whose office was searched in Los Angeles, was arrested on charges of assaulting a peace officer when he attempted to resist the search. Nat'l. L.J., Apr. 23, 1979, at 1, cols. 1-2. He later contended that his resistance was justified by the California statutory attorney-client privilege, id. at 14, col. 4, which provides that a lawyer's duty “is [t]o maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client.” CAL. BUS. & PROF. CODE § 6068(e) (West 1974).


393. See notes 114-28 supra and accompanying text (noting that most serious consequence of law office search is “chilling effect” on client communication and trial preparation). The problem is not one of waiver. Rather, the risk is that the objectives of the attorney-client privilege and work-product doctrine will be undermined significantly if law enforcement officials may search and seize privileged documents, even if the prosecution may not use the information against the privilege-holders in formal proceedings. Wigmore argued that the burden of preserving the confidentiality of communications within the scope of the attorney-client privilege rested upon the attorney and his client. Consequently, if a third party breached that confidentiality, even by surreptitious means, the client lost the privilege. 8 WIGMORE, supra note 79, § 2326, at 633-34. Commentators have recognized, however, that “[w]hile it may perhaps have been tolerable in Wigmore's day to penalize a client for failing to achieve secrecy, such a position is outmoded in an era of sophisticated eavesdropping devices against which no easily available protection exists.” J. WEINSTEIN & M. BERGER, supra note 240, § 503(b) [02], at 503-04. See also In re Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 869 (D. Minn. 1979) (privileged status not lost when attorney and client take reasonable precautions to assure confidentiality, but nonetheless overheard by surreptitious eavesdropper). The attorney and his client must take reasonable precautions to maintain the confidentiality of privileged communications. See In re Grand Jury Subpoena (Horowitz), 482 F.2d 72, 82 (2d Cir.) (client
have recognized that the attorney should be allowed to protect privileged materials during the search of his office. Whatever the original legislative intent might have been, the purposes of these privileges would be served poorly if a court limited their invocation to a formal, trial-type "testimonial" setting. Whether the attorney's right to assert the attorney-client privilege or the work-product doctrine during a search is constitutionally necessary to protect either privilege or whether the right is implicit in the privileges, law enforcement officials must provide an attorney with the opportunity to assert either privilege during a search of his office.

Perm Voluntary Cooperation by Attorney. In his concurring opinion in Zurcher Justice Powell observed that "there is no reason why police officers executing a warrant should not seek the cooperation of the subject party in order to prevent needless disruption." When the police execute a warrant at the office of an attorney who is not a suspect, some of the advantages of both the search warrant and the subpoena can be preserved if the officers give the attorney the opportunity to produce the evidence voluntarily. The risk that

must act affirmatively to preserve confidentiality of files possibly containing communication from or to lawyers but to which accountant has access), cert. denied, 414 U.S. 867 (1973). The federal wiretapping law illustrates this change in the law by providing that "[n]o otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character." Title III, Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2517(4) (1976).

Commentators disagree over whether the application of the attorney-client privilege and the work-product doctrine extends beyond such formal contexts. Compare Callan & David, supra note 152, at 340 n.40 (most state courts apparently recognize that attorney-client privilege not limited to formal testimonial setting), with Note, Client Fraud and the Lawyer—An Ethical Analysis, 62 MINN. L. REV. 89, 112 (1977) (attorney-client privilege limited to judicial context).

A party may assert either privilege in response to a discovery request. See FED. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter") (emphasis added); MOORE, supra note 242, P 26.64[4], at 26—452 (work-product doctrine may be asserted in response to any form of discovery request). Indeed, a party may challenge a subpoena duces tecum as an unreasonable search and seizure if it seeks production of documents protected by the attorney-client privilege. Schwimmer v. United States, 232 F.2d 855, 866 (8th Cir.), cert. denied, 352 U.S. 833 (1956).

Two courts of appeals have held that a party may assert the work-product doctrine in response to an IRS summons. See United States v. Amerada Hess Corp., 619 F.2d 980, 987 (3d Cir. 1980) (although party may assert work-product doctrine in resisting IRS summons, when work product of minimal substantive content Government's showing of need comparatively lower); United States v. Brown, 478 F.2d 1038, 1041 (7th Cir. 1973) (although work-product doctrine applies to proceeding for enforcement of IRS summons, strong public interest relevant in considering degree of necessity to be shown by government). The Supreme Court recently granted a writ of certiorari to the Sixth Circuit in a case holding that the doctrine does not apply in this context. United States v. Upjohn Co., 600 F.2d 1223 (6th Cir. 1979), cert. granted, 100 S. Ct. 1310 (1980).

If law enforcement officials have a legal obligation to permit an attorney to participate in the production of the items specified in the warrant, sufficient legal "compulsion" might exist to support an assertion of the attorney's own privilege against self-incrimination, even though Andresen apparently intended effectively to remove that privilege from the search and seizure setting. See Andresen v. Maryland, 427 U.S. 463, 477 (1976) (search, seizure, and introduction into evidence of business records do not violate fifth amendment). The police and quite possibly the courts probably would be unenthusiastic about offering the attorney an opportunity to cooperate if the procedure created a self-incrimination issue. A court, however, could still rely on Andresen to reject such a claim because the attorney would not be "required to say or to do anything under penalty of sanction." Id. at 476. Should the attorney decline to
Evidence will be lost is minimized not only because the officers will preserve the element of surprise, but also because they will be present while the attorney gathers the items sought. At the same time, the procedure would eliminate the rummaging aspect of the search and the consequent examination of privileged documents.

Although the police might fear that the attorney will not be candid in selecting and tendering the documents requested, the attorney need not have unilateral discretion to determine what documents will be examined and seized. If the officers have any reason to doubt the attorney's good faith or to believe that he has failed to tender all of the specified items in his possession, they should be permitted to complete the search, though not in disregard of the attorney's assertion of a privilege. When they conduct such a search and then return the warrant, however, the officers should include a brief written statement, stating how they believe the attorney attempted to thwart the search.

Often an attorney truthfully can assert at the outset that none of the specified items will be found in his office. Once a nonsuspect attorney informs law enforcement officers that he does not possess some or all of the items specified in the warrant, his word as an officer of the court should be accepted and the search for the documents should not be conducted. Law enforcement officials probably will object, however, for they rightfully might consider a search necessary to avoid unlawful suppression of evidence by unscrupulous attorneys. Consequently, the search should be permitted. At other times, an attorney voluntarily might produce everything specified in the warrant, if given the opportunity to do so. Furthermore, an attorney who participates, the officers simply could conduct the search alone. The attorney would face no prospect of being cited for contempt or any other sanction, as he would if he failed to comply with a subpoena. Presumably, had the officers in Andresen merely permitted the attorney to produce the documents voluntarily, the Supreme Court would have reached the same holding. An invitation to help minimize the intrusive impact of an otherwise permissible search therefore need not be confused with fifth amendment compulsion. Even if a court found compulsion, it might not consider the fruits of the compulsion testimonial or incriminating within the "act of production" analysis in Fisher v. United States, 425 U.S. 391 (1976). See notes 43-49 supra and accompanying text (explaining Court's decision in Fisher).

398. See Cal. Atty. Gen. Proposal, supra note 300, at 3 (if attorney resists execution of search warrant, officials conducting search may seize documents without his assistance); cf. CAL. PENAL CODE § 1524(c)(1) (West Supp. 1980) (special master may conduct search if, in his judgment, attorney has not produced items requested); Report, Exclusionary Rule, supra note 170 (officer may accompany attorney to ensure that he is cooperating). In the absence of such a safeguard, law enforcement officials might just as well serve the attorney with a subpoena. The L.A. DA/Bar Guidelines would even grant a criminally suspect attorney the opportunity to tender the requested documents as long as the official conducting the search expects that the attorney will comply and the lawyer is not in custody at the time of the search. L.A. DA/Bar Guidelines, supra note 20, at 1.

399. See CAL. PENAL CODE § 1524(c)(2) (West Supp. 1980) (purportedly privileged documents must be sealed and delivered to court for prompt hearing).


401. Cf. Tarlow & Johnston, supra note 118, at 42 (as a practical matter, officers will be unwilling to accept attorney's assertion that he does not possess items specified).

402. Courts should allow the attorney to waive the work-product doctrine with respect to certain types of materials within the scope of the doctrine. Only the client, however, may waive the attorney-client privilege. See People v. Doyle, 77 Cal. App. 3d 126, 128, 141 Cal. Rptr. 639, 641 (Ct. App. 1977) (state constitution's search and seizure provision precluded attorney from consenting to search of client files).
occasionally will produce documents that the officers would not have discovered on their own because of their inability to recognize them as specified items. Considering the minimal risks to law enforcement interests, these two possibilities alone justify adopting the procedure.403

Alternatively, even if he is not permitted to tender the items sought, the attorney still might be able to minimize the intrusion and assist in effectuating the search. As long as the officers are willing to presume good faith on the attorney's part, he could assist in limiting the scope of the invasion by explaining his filing system and identifying those files that arguably are relevant. Moreover, the attorney should be permitted to segregate all items that he has reason to believe are privileged before the officers examine any documents. Because someone, whether the attorney or some neutral party, must screen the documents initially to protect the client's privileges, the attorney should make that determination since he will be more familiar with the underlying facts on which the applicability of the privileges generally will depend. By explaining file captions and document titles, the attorney may be able to convince the officers that some of the allegedly privileged documents are unrelated to the objects of the search. If he cannot convince the officers, the officers should place the documents under seal and transfer them to the court for in camera review.404

Law enforcement officials employed this procedure in two of the recently reported law office searches,405 one court adopted it to some extent in another search,406 both the Attorney General of California407 and the ABA Criminal

Law enforcement officials in some instances might obtain a waiver of the attorney-client privilege from a client prior to the search, precluding the attorney from raising it. Cf. Schwimmer v. United States, 232 F.2d 855, 864 (8th Cir.) (client's waiver of attorney-client privilege barred attorney from asserting privilege as grounds for noncompliance with grand jury subpoena of client's papers in attorney's possession), cert. denied, 352 U.S. 833 (1956). When served with a search warrant, the attorney occasionally might confer with the client and decide for tactical reasons to waive any relevant privileges.408 Consequently, the voluntary cooperation of the attorney should not be a factor in determining whether a search of an attorney's office is reasonable. Id. Certainly, an attorney should be under no duty to cooperate in breaching privileges and confidences. By cooperating with the officers, however, the attorney might be able to preserve privileges and confidences that otherwise might be invaded.

404. See text accompanying notes 433-38 infra (describing feasible procedures for in camera review of purportedly privileged documents).

405. In both O'Connor v. Johnson and the Cotton & Bregman case, law enforcement officers allowed the attorneys to select the documents specified in the warrant as a result of an on-the-spot agreement, not because of any general policy. See notes 2-4, 15 supra and accompanying text briefly describing cases); cf. Henry v. Perrin, 609 F.2d 1010, 1011 (1st Cir. 1979) (prisoner's attorney refused to permit prison officials to scan his case file but after negotiations with prison officials submitted it to state supreme court justice for examination), cert. denied, 100 S. Ct. 1652 (1980).

406. The modifications of the preliminary injunction suggested by the California Court of Appeals in Deukmejian v. Superior Court would have assured the attorney the right to assist in limiting the scope of the search by removing privileged documents from the files subject to search. Deukmejian v. Superior Court, No. 55977, slip op. at 2 (Ct. App. May 7, 1979).

407. In his brief on appeal in Deukmejian v. Superior Court, the Attorney General of California proposed a more detailed procedure than the one adopted by the Court of Appeals: For each document in an arguably relevant file, the attorney first would indicate its nature without disclosing its contents and then would state whether or not it was privileged. If specified in the warrant and nonprivileged, the
Justice Section Committee on the Exclusionary Rule recommended it, and the recent California legislation incorporated it. These instances suggest that the procedure will not affect law enforcement objectives adversely. Nothing precludes the police from soliciting the assistance of the attorney. By leaving the decision solely to the discretion of the officers executing the warrant, however, courts will breed unpredictability, caprice, and underutilization of an effective minimization technique. Consequently, the officers always should be obligated to seek the assistance of a nonsuspect attorney as long as they do not question his good faith.

Although this procedure makes sense as a matter of policy, cases suggest that the fourth amendment currently does not require it, at least when the subject of the search is not a lawyer. Considering the potential for minimizing the intrusion without significant sacrifice to law enforcement interests, however, courts could interpret fourth amendment reasonableness to require the police to invite and to accept the assistance of the attorney. Alternatively, such an obligation should be implemented legislatively or administratively.

Require that Search be Conducted by Special Master. To protect the attorney-client privilege and the work-product doctrine without sacrificing surprise and expedition, the law should require that an attorney's office be searched by a neutral, legally-trained third party such as a special master. If the person conducting the search is not affiliated with the police or the prosecution, the risk that privileged information might be used against the client diminishes significantly. Furthermore, legal training will ensure that the third party will be better able to comprehend the materials located in a law office and evaluate assertions of privilege. The recent California legislation adopts this approach. Like the California approach, the procedure

document would be seized. If doubt existed, the officer could briefly examine a nonprivileged document to determine whether it had been specified in the warrant. If the officer believed that a document had been specified and the attorney disagreed or asserted a claim of privilege, the document would be placed in a sealed envelope and transferred to the court for in camera review. Cal. Atty. Gen. Proposal, supra note 300, at 3.

408. Report, Exclusionary Rule, supra note 170. Because of this procedure, which provides the attorney with the opportunity to avoid a search by producing all of the specified items voluntarily, the Committee referred to its proposal as a Search Warrant Conditioned on Demand. Even when the officer concludes that it is necessary to conduct the search himself, the proposal ensures that the attorney may accompany him. Id.

409. CAL. PENAL CODE § 1524(c) (West Supp. 1980) (amendment provides that special master will search nonsuspect attorney's office but will give attorney opportunity to produce voluntarily items; allegedly privileged documents must be sealed and delivered to court).

410. See United States v. Beusch, 596 F.2d 871, 876-77 (9th Cir. 1979) (rejecting defendant's argument that failure to permit custodian of bank records to assist in segregating irrelevant documents in single file constituted general search in violation of fourth amendment); United States v. Chadwell, 427 F. Supp. 692, 696 (D. Del. 1977) (rejecting defendant's argument that officer's failure to accept his word about location of evidence constituted unreasonable search in violation of fourth amendment).

411. See 2 LAFAVE TREATISE, supra note 36, § 4.10, at 162 (suggesting that fourth amendment should be construed to place officer under duty to permit subject to assist in minimizing intrusion when no reason exists to doubt his good faith).

412. CAL. PENAL CODE § 1524(e)-(f) (West Supp. 1980). The amendment permits a search by the officer serving the warrant only if "a special master is not available and would not be available within a reasonable amount of time . . . ." Id. § 1524(d). See also Report, Exclusionary Rule, supra note 170 (special
does not have to be complex or burdensome. Upon establishing probable cause to believe that evidence subject to seizure will be found in an attorney's office, law enforcement officials could ask the court to appoint a master pursuant to a special procedure established for that purpose. Law enforcement officials would accompany the master when they executed the warrant, but only the master would search files and review documents. If the master conducts the search, the police should be present to provide guidance about the precise items sought and the attorney should be present to assert claims of privilege. The attorney's role, however, could be broader. To further minimize the intrusion, the master should invite the attorney to tender voluntarily the specified items, provided he does not doubt the attorney's good faith. If he has reason to believe that the attorney has not fully complied with the request, the master should complete the search without further assistance from the attorney.

As long as the master is truly neutral, accountable only to the court and not to law enforcement officials, he could examine allegedly privileged docu-

master may be appointed at discretion of magistrate). The Revised Report of the Exclusionary Rule Committee contemplates a relatively passive role for the master. It specifies that the duties of the master will include advising the attorney of special conditions attached to the execution of the warrant, serving as a neutral witness, serving as a negotiator between the police and the attorney, serving as a neutral verifier of the attorney's claims that particular files are irrelevant and sealing files or areas at the request of the attorney. Revised Report, supra note 152, at 7.

413. If a legislature vested the authority to issue a warrant for the search of a law office in a court of general jurisdiction, the court easily could issue the warrant and appoint the master in the same proceeding. Similarly, a legislature could authorize a magistrate to appoint the masters. Under the California statutory procedure, courts may appoint special masters from a list of attorneys maintained by the State Bar for the purpose of conducting searches. CAL. PENAL CODE § 1524(d) (West Supp. 1980).

414. See id. § 1524(e) (prohibiting officer from participating in search or examining any item without subject's consent).

415. This procedure would help to ensure that the master would be capable of identifying the evidence sought in a complex white-collar crime investigation. But see Minority Objections of Linda Ludlow, Deputy Attorney General of California, to Report, Exclusionary Rule, supra note 170 (master will be unable to identify evidence in complex fraud case).

416. See id. § 1524(a)(4)(e)(1) (requiring that special master give party being searched opportunity to provide items sought).

417. See id. (allowing special master to conduct search if party fails to provide items requested).

418. The California legislation, for example, requires the court to "make every reasonable effort to insure that the [master] has no relationship with any of the parties . . . ." Id. § 1524(d). A lawyer from the Attorney General's office accompanied the state investigators who searched the office of Kaplan & Livingston to aid in assessing the relevance of legal documents as well as questions of privilege. Petition of Attorney General for Writ of Mandamus and/or Prohibition and for Stay Order; Memorandum of Points and Authorities, at 1-2 Exhibit 7 (affidavit of Susan L. Frierson). Upon appeal of the preliminary injunction granted by the superior court, the Attorney General proposed that in any future search of the firm a deputy attorney general accompany the officers and act as their legal adviser. Cal. Atty. Gen. Prop. 300, at 1. The L.A. DA/Bar Guidelines, supra note 20, require that in any search of a suspect attorney's office "[a] deputy district attorney shall accompany the officers . . . . [and] will be charged with the responsibility of seeing that the search is conducted in such a manner as to minimize the possibility of the breach of any confidential communication between attorney and client." Id. at 1. The proposal, however, inadequately responds to the threat because it fails to ensure the protection of the information through the use of a neutral third party. Although a prosecutor might be more capable of recognizing and excluding irrelevant or privileged documents from close scrutiny or seizure than a police officer, the attorney whose office is searched might justifiably believe that a fellow lawyer will be in a better position to appreciate the significance of information gleaned from privileged documents than a less sophisticated investigator. Consequently, such a procedure would increase the risk that privileged information might in some way be used against the client in the future despite the good faith of the officers.
ments during the search since the disclosure would not be significantly greater than that which would occur pursuant to subsequent in camera inspection by the court. The differences would be primarily logistical. In effect, the court would authorize its delegate to conduct a preliminary review during the search so that the court could avoid a subsequent review in chambers.

When an attorney asserts a claim of privilege, the master should request that the attorney develop the factual context in detail. In this manner, an attorney would provide the master with a reasonable basis for ruling on the claim. If the attorney believed that he was able to develop adequate argument in support of his claim of privilege on-the-spot, he could seek an immediate ruling. The attorney and the law enforcement officers could accept the master’s disposition, expediting the proceeding by avoiding the necessity of submitting the items to the court. Either the attorney or the officers, however, should be permitted to object to the master’s initial conclusion. If either objected, the officer should be allowed to seal and transfer the disputed documents to the court for in camera review. If, however, the attorney concluded that he should engage in legal research, develop the facts, or confer with the client in order to present competent argument on questions of privilege, preliminary review would accomplish little. In this instance as well, the officers should seal the disputed documents and transfer them to the court.

This proposal is not novel. In addition to the recent California legislation, courts have employed masters in the past to identify and exclude irrelevant and privileged items pursuant to grand jury subpoenas or discovery requests. The fourth amendment does not require that a neutral, legally-trained third party conduct a law office search. Nonetheless, in view of the threat to the attorney-client privileges, the search of an attorney’s office might be unreasonable unless such a party conducts the search. Requiring a special master to conduct the search would constitute a major modification of search and seizure procedure. Furthermore, other means exist for preserving the integrity of the privileges while executing the warrant. Given some reasonably protective procedure, the courts probably will not hold that this specific alternative is constitutionally required. Rather the courts might infer such a requirement more comfortably from the privileges themselves. Because this proposal can potentially reconcile the competing interests of law enforcement officials and of attorneys and their clients, a legislature or administrative body should incorporate it into any comprehensive plan for regulating law office searches.

419. The recently enacted California procedure does not authorize the special master to make even a preliminary determination of claims of privilege. Instead, once the attorney asserts a privilege, the master must seal the materials and deliver them to the court. CAL. PENAL CODE § 1524(c)(2) (West Supp. 1980).

420. If either the attorney or the client objects to the master’s conclusions, they should be given a copy of the master’s written findings and an opportunity to challenge them before the court. Schwimmer v. United States, 232 F.2d 855, 865 (8th Cir.), cert. denied, 352 U.S. 833 (1956).

421. See, e.g., In re Subpoena (Murphy), 560 F.2d 326, 331 (8th Cir. 1977) (panel of masters appointed to identify documents not discoverable under work-product doctrine by government); Schwimmer v. United States, 232 F.2d 855, 864-65 (8th Cir.) (master appointed to determine documents protected by attorney-client privilege; privileged documents withheld from grand jury), cert. denied, 352 U.S. 833 (1956); Xerox Corp. v. IBM Corp., 64 F.R.D. 367, 374-75 (S.D.N.Y.-1974) (special master employed to consider claims of privilege raised by parties exchanging documents pursuant to civil discovery).
Even if the fourth amendment does not mandate this procedure, the warrant clause does impose certain restrictions on who may conduct a search. For instance, a court or a legislature should not authorize the magistrate who issued the warrant to participate in its execution. In *Lo-Ji Sales, Inc. v. New York* 422 the Supreme Court invalidated the search of an adult book store because the town justice who issued the search warrant failed to show the "neutrality and detachment demanded of a judicial officer . . . [by] allow[ing] himself to become a member, if not the leader of the search party which was essentially a police operation." 423 Although the facts in *Lo-Ji* were extreme, any direct participation by the magistrate in the actual search and seizure appears to be inconsistent with the fourth amendment.

**Impose Duty on Officers to Make Reasonable Efforts to Minimize Intrusion.**

If courts do not allow the attorney to tender the evidence or do not employ a special master to conduct the search, they nonetheless could protect against unnecessary infringement of legitimate privileges by placing the officers executing the warrant under a duty to make reasonable efforts to minimize the intrusion. More specifically, the courts should require the officers to attempt to narrow significantly the number of potentially seizable files or documents before examining any of their contents.

This proposal seems to be a realistic requirement. 424 The officers might not search some files solely because of the location of the files within the office. If the officers were searching for documents pertaining to a securities fraud in the hotel industry, for example, they would have no reason to search the office of a member of the firm who did not engage in a securities practice and did not represent any hotel industry clients. The officers easily could acquire sufficient information to make this type of determination as long as the attorney were present, cooperative, and honest. Similarly, if the officers were authorized to search for evidence pertaining to a securities fraud, they would have no need to examine a client’s will or a witness’ statement in a negligence action.

Occasionally, neither the file captions nor the warrant descriptions will be specific enough to permit the officers to narrow significantly the quantity of documents arguably subject to seizure. 425 In that event, a more thorough

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423. Id. at 326-27. Most of the items seized were not described with particularity until after the search. Id. at 324.
424. See Bekavac, *supra* note 188, at 15 (to minimize invasion of privileged files, officers should design least intrusive measures for conducting search). For instance, in reference to recent searches in Los Angeles, a spokesman for the Attorney General of California commented that state officers executing a warrant to search a law office attempt to limit their examination to file captions. He noted that “[o]ur agents don’t go opening files.” *Search-Warrant Fever, supra* note 33, at 886 (quoting Bob Cooke, Press Officer for the Attorney General of California). See also Cal. Atty. Gen. Proposal, *supra* note 300, at 3 (instructing law enforcement officers to examine folder covers to determine whether they are likely to contain items listed in warrant). However, a press spokesman for the Attorney General has also been quoted as stating that “[i]n order to find what you’re looking for, you have to look in everything.” Levine, *Proposed Legislation, in Searching a Lawyers’ Office: A Delicate Balance, L.A. LAW., Oct., 1979*, at 52 (quoting “attorney general’s spokesman”).
425. As two practicing attorneys have noted, “[w]hile many large firms have computerized catalogues of central filing systems, most lawyers specializing in criminal law are sole practitioners or work in small offices without sophisticated centralized filing systems. Even a cursory search in this context requires examination of all documents in each office of the firm.” Tarlow & Johnston, *supra* note 178, at 42.
review of the documents would seem necessary. Even an examination limited
to file captions, however, might disclose privileged material, especially
protected work product. This situation illustrates the advantage of either
permitting the attorney to tender the evidence or employing a master to
conduct the search. On balance, however, the possibility that brief review of
file captions might infringe upon the privileges would not present an unduly
severe threat; if this type of review were to become standard practice,
attorneys readily could protect against disclosure by labeling their files more
discreetly.

As the Supreme Court recognized in Andresen v. Maryland, the fourth
amendment imposes a duty on officers executing a search warrant for papers
to ensure that they minimize intrusions on privacy in conducting the
search. A procedure under which the officers must attempt to screen out
privileged and irrelevant documents during the search of a law office scarcely
can be considered unreasonable. In addition to the officers' constitutional
duty to minimize the scope of the search, a corresponding statutory obligation
can be devised from existing models. The American Law Institute Model
Code of Pre-Arraignment Procedure, for example, provides that an officer
executing a warrant for the seizure of documentary evidence "shall endeavor
by all appropriate means to search for and identify the documents to be seized
without examining the contents of documents not covered by the warrant." Federal eavesdropping legislation embodies the same principle by requiring
that the court ensure that every order authorizing or extending a wiretap
explicitly provides that the wiretap "shall be conducted in such a way as to
minimize the interception of communications not otherwise subject to
interception . . . ."

Courts must apply a duty to minimize with sufficient flexibility to
guarantee that they will not frustrate the purpose of the search. They should
require an officer conducting the search to make only reasonable efforts to
exclude privileged and irrelevant documents. Under circumstances in which
an officer has no feasible means of making a cursory separation, courts should
exempt the officer from the requirement. As long as the attorney is present
and permitted to assert relevant privileges during a search, the officer's duty

426. See id. (suggesting that "file ... marked 'Client Jones—Entrapment Defense' can disclose an entire
tory of defense'"). In Henry v. Perrin the Court of Appeals for the First Circuit recently expressed
cern that even a cursory review of an attorney's briefcase for textual contraband by prison officials
could reveal privileged and damaging information, especially when the prisoner had been charged with
escape, because the guards might be familiar with the charge. 609 F.2d 1010, 1012 (1st Cir. 1979), cert.
denied, 100 S. Ct. 1652 (1980). The court pointed out that "wholly apart from any special facility in speed
reading, an individual's ordinary perceptions of briefly viewed phenomena, such as stroboscopic images,
can be substantial." Id.


428. Id. at 481 n.11.

429. ALL MODEL CODE, supra note 300, § SS 220.5(1). See also Report, Exclusionary Rule, supra note 170 (person conducting search may look at items only to extent necessary to identify). A critic of this
proposal has characterized it as a "police peek procedure." Minority Objections of Linda Ludlow, Deputy

interpreting this statute, the Supreme Court has indicated that when courts must determine whether the
officer complied with his duty to minimize the interception of nonrelevant communications, they must
make an objective assessment of his actions, not his motives. Scott v. United States, 436 U.S. 128, 137
(1978).
to minimize would not prove to be unduly burdensome. Furthermore, such a duty would help alleviate the threat to the attorney-client relationship presented by the law office search.\textsuperscript{431}

Require Removal of Purportedly Privileged Documents Under Seal for In Camera Review by Court. Whether an attorney, the police, or a master conducts the search, the police should transfer allegedly privileged documents under seal to the court for \textit{in camera} review.\textsuperscript{432} If the attorney has tendered the evidence, no practical difficulty should arise. The attorney can segregate purportedly privileged documents, bring claims of privilege to the attention of the officers, and arrange to have the documents transferred to the court under seal.\textsuperscript{433} If the search has been conducted by a master, he can conduct a preliminary review of claims of privilege on the spot; if either the lawyer or the officer challenges the master's decisions, he can transfer the documents directly to the court for further review.

The problem becomes a little more complicated when law enforcement officers conduct the search since they must not examine the arguably privileged documents in any detail.\textsuperscript{434} While the police are conducting the search, they will encounter the practical problem of identifying the specified items without scrutinizing every document in detail. As long as the attorney is present, permitted to assert privileges, and willing to cooperate, he can indicate which files contain only unprivileged material and hence may be examined. When the police insist on conducting the search (perhaps because the attorney is a criminal suspect) and the attorney asserts that a file or set of files contains privileged items, the police should seal and then submit to the court for \textit{in camera} review all files that they have reason to believe might be subject to seizure.\textsuperscript{435}

\textsuperscript{431} As a corollary to the duty to minimize, the officer conducting the search should be placed under an explicit obligation to maintain the confidentiality of any allegedly privileged material examined during the course of the search until the court rules that the items are not, in fact, privileged. See ABA Section of Criminal Justice, Committee on Ethical Considerations in the Prosecution and Defense of Criminal Cases, Draft Report on the Model Rules of Professional Conduct, at 5 (recommending that prosecutors be placed under obligation of confidentiality) (copy on file at \textit{Georgetown Law Journal}).

\textsuperscript{432} \textit{CAL. PENAL CODE} § 1524(c)(2)(d) (West Supp. 1980) (special master or officer conducting search of law office under obligation to seal privileged material); Report, Exclusionary Rule, \textit{supra} note 170 (same).

\textsuperscript{433} In \textit{O'Connor v. Johnson} the attorney was permitted to retain his work-product file pending \textit{in camera} review by the trial court. 287 N.W.2d 400, 401 (Minn. 1979) (en banc). The law enforcement officers conducting the search at the Cotton & Bregman firm permitted the attorney to gather and then tender the items specified in the warrant to the court for \textit{in camera} review. Transcript at 3, \textit{In re Law Office of Bregman}, No. SW 15591 (L.A. Mun. Ct. Apr. 24, 1979). Once the police place the documents under seal, they must assure that the items are transferred promptly to the court.

\textsuperscript{434} The ALI Model Code of Pre-Arraignment Procedure suggests one possible solution. It provides that whenever the officer cannot identify documentary evidence without also examining the contents of nonspecified documents, he must impound the documents for removal under seal without initially examining them. \textit{ALI MODEL CODE, supra} note 300, § 220.5(2). Although commendable because it protects general interests in privacy and confidentiality, this proposal scarcely is necessary to protect privileged material in an attorney's office. Rather, all purportedly privileged items should be segregated and sealed for \textit{in camera} review. Another recent proposal would extend even further by allowing the attorney to insist that the entire premises be sealed pending a judicial hearing. Report, Exclusionary Rule, \textit{supra} note 170. \textit{But see} Minority Objections of Linda Ludlow, Deputy Attorney General of California, to Report, Exclusionary Rule, \textit{supra} note 170 (sealing premises could prove extremely burdensome both to police and attorney).

\textsuperscript{435} In \textit{United States v. Beusch} the Ninth Circuit rejected the argument that officers must remove
Under this procedure, the quantity of disputed documents occasionally will
be so great that the remedy might be worse than the wrong. Some attorneys
might conclude that the impoundment of a significant portion of their files,
even for a relatively brief period of time, is too steep a price to pay to preserve
the privileged status of a few documents. On occasion, the attorney might
conclude that such a large-scale seizure would be more detrimental to his
practice than a more detailed immediate examination, presumably resulting
in a more limited seizure. Thus, the law should permit an attorney to select
the alternative he considers less intrusive, provided he does not attempt
unilaterally to waive his client's privileges. When the police deliver a
voluminous amount of seized material to a court, a master will often be
appointed to screen out privileged and irrelevant documents. If the master
conducted the search, however, he could eliminate the need to seize docu-
ments not specified in the warrant.

Even so, a court will minimize the intrusion only if it either requires the
court to provide the attorney with copies of all documents seized or expedites
the in camera review and hearing on claims of privilege. When the volume of
documents or administrative considerations preclude either alternative, im-
poundment would be more intrusive than useful.

To accommodate the competing interests, a court might interpret the
fourth amendment requirement of reasonableness as mandating that the
police transfer potentially privileged documents under seal to the court for in
camera review. This procedure, however, flows more readily from the
privileges than from the Constitution. Whether judicially, legislatively, or
administratively developed, this proposal is essential to protect the attorney-
client relationship.

Prohibit Assertion of Plain View Doctrine. The plain view doctrine
permits an officer during the course of a search to seize an item that is not
specified in the warrant if he observes the item from a lawful vantage, if he
discovers it inadvertently, and if he immediately recognizes it as fruits,
contraband, or evidence. If these conditions are met, courts will generally

relevant documents from a single volume or file folder that was within the scope of the warrant rather than
take the entire volume or folder. 596 F.2d 871, 876 (9th Cir. 1979). The Court, however, explicitly noted
that the result might be different if relevant and irrelevant documents were mingled in a set of files rather
than in a single volume or file folder. Id. at 877.

436. Although an obligation to impound and seal a large quantity of documents might seem
burdensome to the police, law enforcement officers have seized large quantities of textual material in the
past. See, e.g., In re Search Warrant (Church of Scientology), [1978-79] 25 CRIM. L. REP. (BNA) 2525,
2525 (D.D.C. Aug. 24, 1979) (search warrant executed by 25 FBI agents); In re Lafayette Academy, Inc.,
610 F.2d 1, 3 (1st Cir. 1979) (four or five truckloads of documents seized from school administrative office);
VonderAhe v. Howland, 508 F.2d 364, 367 (9th Cir. 1974) (small truckload of records and papers seized
from dentist's office); Hill v. Philpott, 445 F.2d 144, 145 (7th Cir.) (truckload of books, records, and papers
seized from doctor's office), cert. denied, 404 U.S. 991 (1971).

437. Cf. United States v. Abrams, 615 F.2d 541, 545 (1st Cir. 1980) (dictum) (when disruptive
procedure necessary to identify documents specified in warrant, subject of search should be given option of
having analysis of privilege performed on premises or having all documents or copies removed for
consideration elsewhere).

438. When the attorney-client privilege is implicated, the attorney should choose the most protective
procedure unless the client consents to an alternative. When only work product is involved, however, the
attorney should have the discretion to decide which procedure the police should follow.

condone the immediate seizure of items discovered in plain view because the incremental intrusion is minimal and the benefits to law enforcement are substantial.440

The balance of interests is quite different, however, when privileged or highly confidential documents fall within the plain view doctrine. Courts should not apply the plain view doctrine to the search of a law office because of its potential for abuse and because of the threat it presents to the attorney-client privilege and the work-product doctrine.441 If courts applied the plain view doctrine, an officer could seize documents of evidentiary interest discovered during the course of the search442 even though he had made no prior showing of probable cause that the documents existed or would be found on the premises. This result could drastically undermine the protective capacity of both the particularity and probable cause requirements of the fourth amendment and provide a significant incentive for a rummaging-type search. Many attorneys, particularly criminal defense specialists, will possess nonprivileged but highly confidential documents pertaining to their clients. These documents, although not incriminating, nonetheless might be of great evidentiary interest to the prosecution. As a practical matter, then, the potential for stumbling upon additional evidence against either the person under investigation or others not currently subject to suspicion could provide an improper incentive to the police for searching a lawyer’s office.

Reconciling the law office search with the attorney-client relationship is difficult, even when the search is conducted pursuant to a highly particularized warrant based on a showing of probable cause. By permitting the seizure of documentary evidence in the absence of such a showing, the courts

reconciled the immediate seizure of items discovered in plain view because the incremental intrusion is minimal and the benefits to law enforcement are substantial.440

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recent developments in the plain view doctrine, see Criminal Procedure Project, supra note 301, at 308-11. Courts and commentators have not agreed on the scope of the “inadvertence” element of the plain view doctrine, but the better position seems to be that a discovery is inadvertent even if the police suspected they would find an item, unless they had probable cause to obtain a warrant to search for it. See, e.g., United States v. Libert, 616 F.2d 34, 37 (2d Cir. 1980) (mere expectation or suspicion that discovery likely does not preclude application of plain view doctrine); United States v. Hare, 589 F.2d 1291, 1294 (6th Cir. 1979) (inadvertence established if police have no probable cause to believe discovery likely); 2 LAFAVÉ TREATISE, supra note 36, § 4.11(d), at 179 (doctrine applicable only if no grounds exist for including discovered objects in warrant); C. WHITEBREAD, supra note 134, § 11.03, at 217-82 (same).

440. Coolidge v. New Hampshire, 403 U.S. 443, 469-70 (1971) (plurality opinion). As long as the officer has a right to be in a position where the evidence may be discovered and seized, he disturbs only an interest in possession, not in privacy, when he seizes items in plain view. Id. As Justice Stewart explained in his plurality opinion in Coolidge, the plain view doctrine does not conflict with the requirement that a search be authorized by a neutral magistrate since it applies only when the officer is legitimately present. Id. at 467. Likewise, the doctrine comports with the policies underlying the requirement that warrants be particular since the seizure of an object in plain view does not convert a limited search into a general one. Id.

441. Cf. Note, Search and Seizure of the Media, supra note 105, at 1000 & n.245 (urging that plain view doctrine not apply to newsroom searches).

442. Arguably, since the incriminating nature of the evidence must be immediately apparent, a document is not in plain view simply because the police see it because its evidentiary value is not necessarily apparent. See Stanley v. Georgia, 394 U.S. 557, 571 (1969) (Stewart, J., concurring) (police with warrant to seize gambling equipment could not rely on plain view doctrine to seize and examine film because they had no reason to believe it was obscene before viewing it). But cf. United States v. Diecidue, 603 F.2d 535, 559 (5th Cir. 1979) (officer with reason to believe others might be implicated in crime may leaf through address book discovered in plain view), cert. denied, 100 S. Ct. 1345 (1980); United States v. Och, 595 F.2d 1247, 1256-59 (2d Cir. 1979) (police with probable cause to believe that documents in plain view are evidence of crime may examine them), cert. denied, 100 S. Ct. 435 (1980); United States v. Hubbard, [1979-80] 26 CRIM. L. REP. (BNA) 2073, 2075 (D.D.C. Sept. 13, 1979) (same).
LAW OFFICE SEARCHES are likely to upset any meaningful accommodation of the competing interests. To ensure that the balance is not unfairly weighted against the prosecution, however, the courts should not immunize from subsequent seizure items inadvertently discovered in plain view during the search of a law office. As long as the police are able to establish probable cause based on a source of information independent of and untainted by the search, the courts should allow them to obtain a warrant authorizing seizure of this evidence.\footnote{443. See also notes 461-88 infra and accompanying text (providing detailed discussion of role of fruit of poisonous tree doctrine in law office search context). Once law enforcement officers have searched an attorney's office, they would bear the burden of establishing an independent source for information justifying a subsequent search. To a certain extent, the plain view doctrine is premised on the assumption that the police would have probable cause upon discovering an item in plain view to obtain a new warrant based on information gleaned from the discovery immediately. Coolidge v. New Hampshire, 403 U.S. 443, 467-68 (1971) (plurality opinion).}

The Supreme Court recently suggested that the plain view doctrine might not necessarily apply to a search for obscene material,\footnote{444. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 & n.5 (1979). The Supreme Court of Louisiana recently held that "[t]here is no plain view doctrine in First Amendment cases." Parish of Jefferson v. Bayou Landing Ltd., Inc., 350 So. 2d 158, 165 (La. 1977).} presumably because it could threaten first amendment values. The Supreme Court did not address the doctrine in \textit{Andresen} and \textit{Zurcher}, but these decisions nevertheless suggest that traditional fourth amendment procedure provides adequate protection against abuse. If so, the plain view doctrine will retain its vitality in law office searches unless legislatures enact statutes or state courts interpret existing state law as foreclosing use of the doctrine. Because of the potential for irreparable harm to the sensitive interests implicated by a law office search, the law should prohibit the police from asserting the plain view doctrine in any such search.

\section*{C. POSTSEIZURE RELIEF}

The injury to the attorney-client relationship might be further minimized if courts employed various procedures after law enforcement officers have completed a law office search.

\textit{Serve Attorney with Specification of Areas Searched.} After completing a law office search, the officers executing the warrant should give the attorney a receipt specifying in reasonable detail not only the documents seized but also the areas of the office searched and the files examined.\footnote{445. After a typical search, the officers must leave a receipt specifying the items seized with the occupant of the premises. \textit{Fed. R. Crim. P. 41(d);} cf. \textit{O'Neill, supra note 302, at 46 (suggesting officers be required to make "strict post-search inventory"). In the Kaplan & Livingston search, an official tape recorded portions of the search in order to make a clear record. Furthermore, secretaries for the firm recorded the title of every document, whether or not seized, that was reviewed by the officers executing the warrant. \textit{Petition of Attorney General for Writ of Mandamus and/or Prohibition and for Stay Order; Memorandum of Points and Authorities, at 12, Exhibit 7 (affidavit of Susan L. Frierson). A similar procedure was followed in \textit{People v. Superior Court \textit{(Driscoll), 68 Cal. App. 3d 845, 850, 137 Cal. Rptr. 391, 393 (Ct. App.)} (per curiam), decertified, 567 P.2d 1162, 140 Cal. Rptr. 442 (1977). The obvious disadvantage with such a procedure is that it significantly increases the amount of time required to search the office. Although this procedure might prove burdensome to the police and might enhance the degree of the intrusion, an attorney nonetheless might conclude that a precise record of the scope of the search is well worth the additional inconvenience.}}

This procedure...
would help the attorney determine whether officers reviewed privileged materials. Although the fourth amendment does not compel such a procedure, a legislature should adopt it as a matter of policy.

**Promptly Return Copies of Seized Documents.** To avoid the severe disruption an attorney's practice and to ensure that he will be able to present reasoned and factually specific arguments on claims of privilege in postseizure proceedings, the attorney should receive either the original or a photocopy of all the seized documents as expeditiously as is practicable. If the police have removed the files under seal, the court should provide appropriate security measures to protect the files while they are being copied. When many documents must be copied, the cost and burden might seem excessive. Nonetheless, society must bear this expense because the more documents that are seized the greater the threat the attorney-client relationship.

In an analogous situation the Supreme Court indicated that when law enforcement officials have seized the only copy of an allegedly obscene film, they promptly must make another copy and return the original to the owner. Admittedly, the constitutional interest might not be as great when officers seize an attorney's files. Nonetheless, his client's sixth amendment right to effective counsel would be denied if the attorney's defense was impeded because he lacked either the original documents or copies of them. Even though an absolute copy-and-return rule probably is not constitutionally required, a legislature should implement it as a matter of policy.

**Provide Prompt Judicial Hearing on Claims of Privilege.** Following the seizure of files, the attorney and his client must receive a reasonably prompt judicial hearing on any claim that privileged materials have been seized. The need for an immediate hearing after a law office search is not so great as in the obscenity context, in which an unlawful seizure might restrain distribution of materials protected by the first amendment. Nonetheless, the attorney and his client have a significant interest in eliminating any uncertainty about the privileged status of documents removed from the attorney's office.

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446. Cf. Consumer Credit Ins. Agency, Inc. v. United States, 599 F.2d 770, 772 (6th Cir. 1979) (noting that district court ordered Government to return originals of documents produced pursuant to subpoenas duces tecum after concluding that plaintiff's business could be impeded), cert. denied, 100 S. Ct. 1078 (1980); Blumenthal, supra note 293, at 30 (describing Connecticut press search guidelines that grant press reasonable opportunity to copy documents seized during newsroom search).


448. See CAL. PENAL CODE § 1524(c)(2) (West Supp. 1980) (providing for judicial hearing on claims of privilege within three days of service of warrant unless impracticable; if impracticable, hearing will be scheduled "at the earliest possible time"); Revised Report, Exclusionary Rule, supra note 152, at 8 (right to hearing within 48 hours). See also ALI MODEL CODE, supra note 300, § 220.5(3) (providing for judicial hearing on legitimacy of any seizure of documentary evidence as soon as after search as interests of justice permit).

As it does in considering an assertion of the attorney-client privilege, the work-product doctrine, or other evidentiary privileges, a court should review the documents taken from an attorney's office in camera to determine whether the claim is justified. Before the court finally resolves the issue, it should serve notice on the attorney and on all identifiable clients whose files might have been examined or seized. Furthermore, the court should give the attorney and these clients the opportunity to appear and present arguments on the legitimacy of their claims. Because the party asserting a

450. See United States v. Osborn, 561 F.2d 1334, 1338-39 (9th Cir. 1977) (court conducted in camera review of sealed financial documents to determine if privileged); Schwimmer v. United States, 232 F.2d 855, 864 (8th Cir.) (court entitled to inspect subpoenaed financial documents to determine if privileged), cert. denied, 352 U.S. 833 (1956). Until recently and contrary to federal practice, California law generally prohibited the court from reviewing allegedly privileged material in camera. See Romo v. Southern Pac. Transp. Co., 71 Cal. App. 3d 909, 922, 139 Cal. Rptr. 787, 795 (Ct. App. 1977) (plaintiff failed to establish lack of confidentiality; court may not require disclosure in camera to rule on claim). The same bill that recently implemented the law office search procedures also amended the Evidence Code to permit in camera review when law enforcement officers seize purportedly privileged documents from an attorney's office if "there is no other feasible means to rule on the validity of such claim [of privilege]." CAL. EVID. CODE § 915(a) (West Supp. 1980).

451. See, e.g., In re Grand Jury Subpoena Dated Dec. 19, 1978, 599 F.2d 504, 513 (2d Cir. 1979) (district court should examine documents to determine if they qualify as work product); In re Subpoena (Murphy), 560 F.2d 326, 332 (8th Cir. 1977) (court ordered in camera review of documents by special master to determine if work product); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 731-32 (4th Cir. 1974) (court reviewed documents to determine if work product), cert. denied, 420 U.S. 997 (1975).


453. Identification of and notice to affected clients may not be possible in the absence of cooperation by the attorney. The attorney should not be required to identify clients if he assures the court that he has consulted with the clients in question and they would prefer not to appear. The attorney would remain obligated to represent their interests at the hearing.

454. The attorney and his client should have standing to assert that privileged documents have been seized or examined. Although the attorney-client privilege belongs to the client, the Supreme Court has noted that the attorney may attempt to preserve it on the client's behalf. Fisher v. United States, 425 U.S. 391, 402 n.8 (1976). Both the attorney and his client have a sufficient interest in material protected by the work-product doctrine to claim its protection and litigate an asserted breach. In re Special Sept. 1978 Grand Jury (II), 48 U.S.L.W. 2745, 2747 (7th Cir. Apr. 30, 1980).

Likewise, both the attorney and his client should have standing to assert that an examination or seizure of privileged materials violated the fourth amendment right each has to be free from an unreasonable search and seizure. A search of an attorney's office necessarily involves an intrusion into the attorney's expectation of privacy. Cf. Mancusi v. DeForte, 392 U.S. 364, 368-69 (1968) (union official has reasonable expectation of freedom from government intrusion in shared, union office). If the documents seized belong to the client, his possessory interest combined with his reasonable expectation that the documents will remain relatively private while in the attorney's possession should permit him to contest their seizure from his attorney's office. See generally 3 LAFAVE TREATISE, supra note 35, § 11.3(c), (d), at 560-61, 578 (bailment arrangement creates expectation of privacy). Even if the documents belong to the attorney, the work-product doctrine should confer standing on the client. To ensure that any person with a legitimate interest in a search and seizure may come forth and object, legislatures should grant standing to any "aggrieved" party. See Report, Exclusionary Rule, supra note 170 (committee split on whether clients should have standing with slight majority favoring client standing).

455. The California Penal Code, for example, provides that a "court shall provide sufficient time for
Privilege generally will bear the burden of establishing the validity of the claim.\textsuperscript{456} The attorney or the privilege-holder must provide the court with whatever factual information is necessary to resolve the question.\textsuperscript{457} If the court sustains the claim, it should promptly return the documents under seal to the attorney.\textsuperscript{458}

The frequent \textit{in camera} review of documents on motions to quash subpoenas for the files and records of attorneys suggests that the procedure is judicially manageable. Because law enforcement officials probably will employ subpoenas more often than search warrants in seeking documentary evidence from attorneys, \textit{in camera} review should not prove burdensome. Courts should require reasonably prompt \textit{in camera} review under the fourth amendment since the procedure is essential to the preservation of the privileges and is consistent with the needs of law enforcement.

**Implement Effective Exclusionary Rule.** Once a court has adjudicated the claims of privilege, the attorney and his client should be able to rely on standard search and seizure remedies. When the prosecution has filed criminal charges, the court should suppress any illegally seized evidence.\textsuperscript{459} If the prosecution has not initiated any proceedings, the court should grant the

\textsuperscript{456} See, e.g., United States v. Mandujano, 425 U.S. 564, 574 (1976) (witness must invoke privilege against being compelled to testify against self); \textit{In re Fischel}, 557 F.2d 209, 212 (9th Cir. 1977) (claimant bears burden of proving attorney-client privilege applicable); United States v. Kovel, 296 F.2d 918, 924 (2d Cir. 1961) (claimant cannot remain silent and expect to assert attorney-client privilege successfully).

\textsuperscript{457} United States v. Osborn, 561 F.2d 1334, 1339 (9th Cir. 1977).

\textsuperscript{458} United States v. Nixon, 418 U.S. 663, 716 (1974); see ALI MODEL CODE, supra note 300, § 220.5(3). A federal district court recently found it necessary to say that the prosecution should not be able to compel the court to surrender documents held by the court for \textit{in camera} review procedures. See United States v. Howell, 466 F. Supp. 835, 836 (D. Or. 1979). In Howell the defendant tendered certain books and documents to the court for \textit{in camera} review of his claim that a subpoena \textit{duces tecum} seeking production of the material violated his privilege against self-incrimination. \textit{Id.} The court found that some of the documents were privileged and others were not. At that point, the prosecutor served the clerk of the court with a search warrant specifying the documents under consideration. \textit{Id.} The court quashed the warrant in order to prevent the very purpose of the \textit{in camera} procedure from being undermined. \textit{Id.} at 837. In addition, it stated that the prosecutor’s announced plan to serve a search warrant for the documents on the defendant as soon as they were returned by the court would violate his privilege against self-incrimination since he would be compelled to aid in the “discovery, production and authentication” of the incriminating documents that he tendered initially in response to the subpoena. \textit{Id.} at 838. Consequently, the court concluded that a prosecutor may choose to employ a subpoena or a search warrant, but not a “‘one-two’ punch.” \textit{Id.}

\textsuperscript{459} See Mapp v. Ohio, 367 U.S. 643, 655 (1961) (evidence obtained by unconstitutional search and seizure inadmissible in both state and federal courts).
attorney's motion for return of the documents. Finally, the courts should allow both the attorney and his client to pursue a civil rights damage action.

Although a postseizure in camera hearing should prove sufficient when law enforcement officers have brought purportedly privileged documents to a court under seal, more is required when the attorney claims that the officers examined privileged material during the course of a search. If a court determines that the search violated the fourth amendment, the exclusionary rule coupled with the "fruit of the poisonous tree" doctrine should preclude the prosecution from directly or indirectly using the information contained in the privileged documents, unless the prosecutor can demonstrate the existence of an independent source for the evidence or sufficient attenuation from the original illegality to purge the taint. The fourth amendment exclusionary rule, however, will not preclude all uses of unconstitutionally obtained privileged information. Evidence obtained in violation of the fourth amendment, for example, may be employed as a basis for obtaining a grand


461. Cf. Monell v. Department of Social Services, 436 U.S. 658, 690-91 (1978) (cause of action available against municipality under 42 U.S.C. § 1983 (1976) based on official policy or custom but not respondeat superior); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971) (cause of action implied under fourth amendment available against federal officers acting under color of authority); Monroe v. Pape, 365 U.S. 167, 172 (1961) (cause of action available against state officers under 42 U.S.C. § 1983 (1976) for depriving citizens' constitutional rights while acting under color of law). Nonetheless, the utility of a civil rights damage action generally will be only theoretical because, as the Supreme Court has indicated, a court will immunize law enforcement officers involved in procuring and executing a warrant if they can establish that they acted in good faith and reasonably believed that their actions were legal. Pierson v. Ray, 386 U.S. 547, 557 (1967). But cf. Owen v. City of Independence, 100 S. Ct. 1398 (1980) (no municipal immunity under § 1983). One of the clients of an attorney whose office was searched, however, recently filed a $10 million damage action alleging that his civil rights had been violated. L.A. Judge Bars Search, supra note 15, at 4, col. 2.

In the rare instance when an attorney has good reason to believe that an illegal search might be repeated, he is entitled to seek declaratory or injunctive relief. Although the district court in Zurcher entered a declaratory judgment ruling that the search of the Stanford Daily's office was illegal, it declined to enter an injunction, assuming that because the first search was declared illegal, another search would not occur. Stanford Daily v. Zurcher, 353 F. Supp. 124, 136 (N.D. Cal. 1972), aff'd per curiam, 550 F.2d 464 (9th Cir. 1977), rev'd, 436 U.S. 547 (1978). As noted earlier, a California trial court enjoined the search of the Kaplan & Livingston firm while it was still in progress. Pending further review, the court of appeals directed the trial court to modify or dissolve the injunction. See note 14 supra and accompanying text (briefly discussing case). Without passing on the prosecution's contention that a California trial court lacks the authority to enjoin the execution of a search warrant, the court of appeals ultimately issued a writ of mandate directing the trial court to vacate the injunction. Deukmejian v. Superior Court, 103 Cal. App. 3d 253, 260, 162 Cal. Rptr. 857, 863 (Ct. App. 1980).


jury indictment, or introduced into evidence in a civil proceeding when the illegal search was conducted by another sovereign, or admitted in a parole or a probation revocation hearing, or relied upon as a basis for criminal sentencing. The policies of the attorney-client privilege and the work-product doctrine, however, might be undermined if clients and attorneys believed that the prosecution could use information gleaned from privileged documents against them. Moreover, if the search and seizure did not violate the fourth amendment, the constitutional exclusionary rule would provide no remedy against police examining privileged documents. Thus, the courts should develop an effective remedy for invasions of privilege that occur during a law office search. Some courts will dismiss the indictment when a criminal defendant's state or federal constitutional right to effective assistance of counsel has been violated by an intentional government intrusion into the attorney-client relationship, at least when privileged communications have been disclosed. Given its deterrent potential, this extreme sanction is defensible when the prosecution deliberately has sought to benefit by invading a privilege or intentionally has declined to abide by established procedures designed to safeguard confidential information. Furthermore, such a remedy might be warranted if the prosecution clearly and irreparably has prejudiced the client's defense. These courts that have adopted this remedy stated that proof of actual prejudice should not be required since the harm can be subtle and therefore difficult, if not impossible, to prove. Automatic dismissal of

468. United States v. Vandemark, 522 F.2d 1019, 1020-21 (9th Cir. 1975).
470. See Barber v. Municipal Court, 24 Cal. 3d 742, 756, 598 P.2d 818, 826, 157 Cal. Rptr. 658, 666 (1979) (dismissing charges because undercover state agent participated in attorney-client meetings contrary to state law guarantee of right to effective counsel). Following the search of the attorney's office invalidated by the Oregon trial court in In re Stewart, see note 22 supra (discussing Stewart), the district attorney voluntarily dismissed 40 criminal cases unrelated to the subject of the search for which confidential defense files had been examined during the search. S. 1790 Hearings, supra note 22, at 109 (statement of Stephen Kanter, Professor of Law, Lewis & Clark Law School).
471. See United States v. Levy, 577 F.2d 200, 210 (3d Cir. 1978) (dismissal of indictment only appropriate remedy when codefendant, government informant, revealed defense strategy to prosecution).
472. In Barber v. Municipal Court the California Supreme Court noted that as a result of the intrusion by a government informant into the attorney-client relationship the defendants "no longer feel they can freely, candidly, and with complete confidence discuss their case with their attorney.... This lack of cooperation, which resulted solely from the intrusion by law enforcement officers in the attorney-client relationship, has resulted in counsel's inability to prepare adequately for trial." 24 Cal. 3d 742, 756, 598 P.2d 818, 826, 157 Cal. Rptr. 658, 666 (1979). In endorsing the dismissal sanction, the court indicated that its decision was not limited to instances of actual prejudice. Id. at 757, 598 P.2d at 826, 157 Cal. Rptr. at 666. The mere assertion of a chilling effect on client communications, however, probably should not automatically require dismissal of the indictment since such an allegation doubtlessly would be made in every case.
In Barber v. Municipal Court the California Supreme Court maintained that an exclusionary remedy
an indictment without any regard for the nature of the information revealed or the circumstances of the case, however, fails to accord any weight to the legitimate interests of the prosecution, especially if a court considers the carefully executed search of an attorney's office proper. Moreover, such a stringent all-or-nothing remedy might prove disadvantageous to the client whose communications have been disclosed; in the absence of clear prejudice, the courts might well strain to avoid penalizing the prosecution so severely.\(^4\)

A rule prohibiting the prosecution from directly or indirectly using in any legal proceeding privileged information obtained pursuant to the search of an attorney's office, regardless of whether a constitutional violation had occurred, would promote better reconciliation of the competing interests.\(^5\) An exclusionary rule and a "fruit of the poisonous tree" doctrine would provide a direct remedy for invasions of the attorney-client privilege and the work-product doctrine.

Although a court might hold that the sixth amendment right to counsel or its state counterpart requires the exclusion of evidence when officers deliberately intrude upon the attorney-client relationship, the prosecution uses evidence derived from the intrusion, or these events prejudice the defendant in any significant respect,\(^6\) a court or legislature should develop a nonconstitutional rule as well because the right to effective assistance of counsel might not be coterminal with the scope of the attorney-client privilege or the work-product doctrine. Moreover, the sixth amendment extends only to criminal prosecutions. The attorney-client privilege and the work-product doctrine, however, still will be undermined if the police can

would be inadequate both because it would require the client to redisclose privileged information in order to prove his case and because it would fail to provide an effective deterrent. The first objection was eviscerated by recent California legislation. See note 450 supra (discussing amendment to California Evidence Code). The second objection could be met by requiring the government to establish an untainted independent source for the evidence.

474. Cf. Amsterdam, Speedy Criminal Trial: Rights and Remedies, 27 Stan. L. Rev. 525, 538-39 (1975) (courts' assumption that dismissal sole remedy for sixth amendment violation causes them to focus on whether defendant's ability to present defense impaired; courts have found long delays do not violate sixth amendment).

475. See Barber v. Municipal Court, 24 Cal. 3d 742, 759-63, 598 P.2d 818, 828-31, 157 Cal. Rptr. 658, 668-71 (1979) (Manual, J., concurring and dissenting) (when state has invaded "defense camp," prosecution must prove beyond reasonable doubt that independent source of evidence exists). See also Note, The Legislative Debate, supra note 290, at 183, 193 (privileged material seized during search should be inadmissible in judicial proceeding). The federal eavesdropping law provides a model for just such a broad exclusionary rule because it prohibits the use of the contents of or any evidence derived from an illegally intercepted conversation "in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof..." Title III, Omnibus Crime Control Act of 1968, 18 U.S.C. § 2515 (1976). The recent Privacy Protection Act of 1980, see notes 290-92 supra, does not provide for the exclusion of evidence seized in violation of its provisions. See Pub. L. No. 96-440 § 106(e) (1980) (providing that "[e]vidence otherwise admissible in a proceeding shall not be excluded on the basis of a violation of this Act"). The legislation has been criticized on this point. See H.R. REP. No. 96-1064, 96th Cong., 2d Sess. 18-20 (1980) (additional views of Rep. Drinan) (section 5 of H.R. 3486, the House version of the Act, should not be read as eliminating use of exclusionary rule; without exclusionary rule, statute's effectiveness undermined). But cf. S. 1790 Hearings, supra note 22, at 55 (statement of Philip B. Heymann, Assistant Attorney General, Criminal Division) (arguing that exclusionary rule neither necessary nor desirable).

476. See notes 134-35 supra and accompanying text (discussing Weatherford criteria for exclusion of evidence).
seize and the government can use protected materials against a client in noncriminal proceedings.

Accordingly, in any type of legal proceeding, a party should be able to make a prima facie showing that tendered evidence, a witness, a question, or an objection may not be introduced or used by establishing that his attorney's office has been searched, that he reasonably believes that privileged materials were examined, and that he reasonably suspects that the evidence or information was obtained or derived from the examination. The party could not rely on unsubstantiated allegations, but would need to offer proof on each element. At that point, the burden would shift to the opposing party to prove by clear and convincing evidence that it obtained the evidence or information from an independent, untainted source.

The burden of rebuttal would not be insurmountable as long as the officials conducting the search employed reasonably protective procedures. If these officials allowed the attorney to tender the documents for in camera review, for example, or if they transferred seized files to the court under seal, or if a special master conducted the search, the prosecution easily could refute an allegation that privileged material had been examined or exploited. Likewise, if law enforcement officials provided the attorney with a detailed specification of the files examined during the search, he at least would know which documents they might have examined. Whatever the procedure, it should require a direct correlation between the potential for exclusion and the precautions employed by the officers executing the search warrant.

Either the courts could derive a remedy directly from the privileges or a legislature could implement one pursuant to a comprehensive legislative approach.

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477. The scope of the exclusionary rule must extend beyond actual evidence since an adversary can benefit from knowledge of privileged information in many other ways. The entire theory of the prosecution's case or its preparation to meet a particular defense, for example, might be based on information obtained through an invasion of a privilege. See Wilson v. Superior Court, 70 Cal. App. 3d 751, 760, 139 Cal. Rptr. 61, 66 (Ct. App. 1977) (when state has eavesdropped on attorney-client conversation, state may not offer rebuttal or cross-examination in criminal proceeding unless it can prove beyond a reasonable doubt evidence not derived from tainted source).

478. The party generally would need to present the privileged documents to the court for in camera inspection in order to prove that the evidence or information could have been derived from them.

479. Considering the severity of the threat to the privileges and in some cases to the sixth amendment right to counsel, something beyond the preponderance of the evidence standard should be required. Justice Manual, concurring and dissenting in Barber v. Municipal Court, endorsed the reasonable doubt standard. 24 Cal. 3d 742, 763, 598 P.2d 818, 831, 157 Cal. Rptr. 685, 670 (1979) (Manual, J., concurring and dissenting in part). Since the question of taint often will be difficult to prove or disprove with any great certainty, the less stringent "clear and convincing evidence" standard would strike a more appropriate balance between the competing interests.

480. This independent source requirement is derived from the fourth amendment "fruit of the poisonous tree doctrine." See Wong Sun v. United States, 371 U.S. 471, 487 (1963) (evidence and information obtained in violation of fourth amendment inadmissible in criminal trial unless knowledge of either independently derived). When a party asserts that a privilege has been breached, however, the party tendering the evidence should not be permitted to rebut a prima facie case by proving sufficient "attenuation" between the illegality and the evidence. Id. Through attenuation analysis, the Court essentially assesses the incremental deterrent effect of excluding evidence from a trial. Brown v. Illinois, 422 U.S. 590, 609-12 (1975) (Powell, J., concurring). Thus, when a court employs an exclusionary remedy to preserve the integrity of the privileges rather than to deter illegal police conduct, it should not apply this analysis.

scheme. Unlike the constitutional exclusionary rule, however, the proposed remedy should not be limited to criminal trials. A court or legislature should prohibit any use of the improperly obtained privileged information because both client communication and trial preparation would suffer if the state could use the material in civil, as well as criminal, trials. Furthermore, even if restricting the rule is justified by negligible deterrence in a fourth amendment context, broader coverage is warranted when the primary purpose is to preserve the integrity of the privileges rather than to deter illegal police conduct.

Courts have provided little guidance on whether the fruit of the poisonous tree doctrine is necessary to preserve the attorney-client privilege and the work-product doctrine. Recently, however, in United States v. Bone, a federal district court declined to employ the doctrine to quash an IRS summons requesting production of leads derived from attorney work product surreptitiously seized and disclosed to the government by a messenger employed by a law firm. The court grounded its decision on five considerations: (1) the investigatory purpose of the summons, (2) the civil-criminal hybrid status of the summons, (3) the improbability that quashing the summons would promote the deterrent purposes of the exclusionary rule since the documents were seized without governmental participation, (4) the improbability that failure to suppress the information would impair the policies of the work-product doctrine or the attorney-client privilege since attorneys ordinarily are able to maintain the security and confidentiality of privileged documents, and (5) the belief, influenced by increasing criticism of exclusionary rules in general, that precluding the use of the information by the Government at the investigatory stage would impose too great a cost on effective enforcement of the revenue laws. In a companion case the court

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483. See United States v. Wolfson, 558 F.2d 59, 66 (2d Cir. 1977) (court unable to find case in which violation of attorney-client privilege resulted in dismissal of indictment or new trial). Since Wolfson, the Third Circuit and the Supreme Court of California have ordered dismissal in cases in which the intrusion constituted a violation of the defendant's right to counsel as well. See notes 470-75 supra and accompanying text (discussing Third Circuit's decision in United States v. Levy and California Supreme Court's decision in Barber v. Municipal Court).


485. Since the document was being transferred from the attorney to the client and did not include the substance of any client communications, the court held that it was not protected by the attorney-client privilege. Id. at 1076-77.

486. Id. at 1079-82. The court relied on SEC v. OKC Corp., 474 F. Supp. 1031 (N.D. Tex. 1979), in which the federal district court refused to apply the exclusionary rule and the fruit of the poisonous tree doctrine to preclude the SEC from basing a subpoena on a privileged report by the defendant's counsel innocently obtained by the SEC. Id. at 1039-40. The court reasoned that as long as the SEC did not act improperly in obtaining the report, precluding the agency from using it would not promote the deterrent purpose of the exclusionary rule. Id. Moreover, a contrary holding would have elevated the attorney-client privilege above the fourth amendment right to privacy. Id. at 1040; cf. Gruzen v. Arkansas, 591 S.W.2d 342, 345 (Ark. 1978) (fruit of poisonous tree doctrine and exclusionary rule do not apply when psychiatrist provided police with information incriminating client in breach of psychiatrist-patient privilege).
denied a motion to quash a grand jury subpoena based on the same purloined document, essentially relying on the conditions set forth above.487

Even if the Bonell decision488 is sustained on appeal, the issues in that case clearly are distinguishable from those raised by a law office search. To promote the policies of the work-product doctrine (or the attorney-client privilege), the court's decision should not have been influenced by the preliminary or hybrid character of the IRS summons. By permitting the government to base a summons on stolen work product, the court might discourage attorneys from preserving or transferring trial preparation material. Furthermore, the case differs from the law office search in terms of the potential effect on the policies of both the fourth amendment and the relevant privileges. Unlike seizure and disclosure by a private messenger, a search or seizure by the police pursuant to a warrant does constitute the type of official conduct that exclusionary rules are designed to govern. More significantly, even if attorneys are able to prevent privileged documents from falling into the hands of an untrustworthy individual, without protection from a court they are relatively powerless to prevent the police from seizing these materials pursuant to a valid warrant, unless of course they commit nothing to writing.

D. A MODEL FOR THE LAW OFFICE SEARCH

Both courts and legislatures easily can modify search and seizure procedures to better accommodate the values of the attorney-client relationship. The following approach attempts to summarize the procedures suggested above—with the exception of the subpoena preference rule—that would reconcile best the competing interests of law enforcement officials and of attorneys and their clients. Preferably, these procedures should be implemented in conjunction with the subpoena preference rule since the police still will have occasion to search attorneys' offices. Because the balance of interests necessarily changes when the attorney is a criminal suspect, the procedures for searching nonsuspect and suspect attorneys will be considered separately.

Searching the Office of a Nonsuspect Attorney. The chief prosecuting official of a jurisdiction should have sole authority to apply for a warrant to search an attorney's office and a court of general jurisdiction should have sole authority to issue the warrant. Before the court may issue the warrant, it should be required to approve a search plan devised by law enforcement officials detailing how they intend to minimize the scope and degree of the intrusion. The court should act only upon a showing that the officers have probable cause to believe that the items specified in the warrant are not protected by either the attorney-client privilege or the work-product doctrine. Furthermore, the court should require police to establish that they have probable cause to believe either that substantially equivalent evidence cannot be obtained from an alternative source or that simultaneous searches are necessary to prevent the loss of the evidence. Finally, the court should issue

488. To expedite review, the district court certified to the Eighth Circuit the question whether the fruit of the poisonous tree doctrine should require quashing the grand jury subpoena. United States v. Bonnell, 483 F. Supp. 1091, 1094 (D. Minn. 1979).
the warrant only if it specifies the objects of the search with a high degree of particularity, avoiding, if at all possible, descriptions based on the content of documents.

A neutral, legally-trained special master should conduct the search in the presence of the accompanying law enforcement officers. Initially, he should provide the attorney with an opportunity to tender the specified items voluntarily. If the attorney is unavailable, uncooperative, or suspected of bad faith, however, the master should proceed without offering the attorney this opportunity. To minimize his intrusion, the master should limit the search to those areas of the office and files where he is likely to find the specified items. When feasible, the master should resolve preliminarily any claims of privilege during the search. If either the police or the attorney disputes the master's conclusions, or if the master cannot resolve the claims practicably, the police should transfer all the allegedly privileged documents under seal to the court. If the police execute the warrant without the assistance of a master, they should make reasonable efforts to assure that the attorney is present and they should give him the opportunity to assert any legitimate privileges, which must respect. The court should not allow either the master or the police to justify seizure of an item under the plain view doctrine.

Following the search, the master should present the attorney with a list of all the items seized, as well as all files and areas searched. As promptly as is feasible, the attorney should receive either a copy or the originals of all the evidence seized. On an expedited basis, the court should permit all interested parties to brief and argue any claim of privilege pertaining to evidence examined, seized, or transferred to the court under seal. If necessary, the court should review the documents in camera to resolve these claims. Expedited appeal should be available to the prosecution, the attorney, and the privilege-holder. If the court sustains the claim of privilege, the documents should be returned to the attorney.489

Finally, in any legal proceeding, a party should be allowed to make a prima facie case that evidence is inadmissible or that information may not be used by establishing that his attorney's office was searched, that he reasonably believes the police examined documents protected by his attorney-client privilege or work product prepared by his attorney on his behalf, and that he reasonably believes that the prosecution directly or indirectly derived the evidence or information from that examination. The party seeking to use the evidence or information could rebut the prima facie case by establishing through clear and convincing evidence an independent, nontainted source.

**Searching the Office of a Criminally Suspect Attorney.** Essentially, the same procedures should be employed when the attorney whose office is subject to search is a criminal suspect since the attorney's culpability will not diminish the basic threat to the attorney-client relationship. A few modifications, however, are warranted in order to protect against potential loss of evidence.

The attorney-client privilege is the client's privilege—not the attorney's. Its ultimate objective is to ensure that clients receive adequate representation.490 When a client attempting to hire a criminal lawyer mistakenly employs a

489. If the court rejects the claim, however, the documents should be delivered to the prosecution.

criminal who is a lawyer, the client should receive the direct and indirect benefits of the privilege as long as he did not seek representation in furtherance of a continuing or future crime or fraud. Furthermore, even if a court holds that the client at whose records the warrant was directed is not entitled to claim any privileges, the court should determine whether other clients, whose files might be examined in the process, are entitled to assert a privilege.

Apart from the possible harm to the clients of the criminally implicated attorney, the policies of the privilege would suffer on a more general level. If clients learn that otherwise privileged communications might be exposed to police scrutiny if probable cause to suspect their attorneys develops, many clients might exercise greater restraint in discussing sensitive matters with counsel. The privilege and the procedures proposed above are designed to discourage such a reaction. The same conclusion might be drawn with regard to the work-product doctrine, which also is intended to enhance the quality of representation. A client involved in litigation should not suffer for his attorney’s misdeeds. Furthermore, the law should not discourage criminally suspect attorneys from committing to writing their trial preparation materials.

When the police have no reason to suspect the attorney, in most instances his professional and legal obligations will provide a sufficient safeguard against loss of evidence. If the attorney is a suspect, however, the presumption of professional integrity necessarily must yield to the law enforcement interest in preserving evidence. Not only may the police substitute a search warrant for a subpoena, but the police also should be allowed to execute it without inviting the lawyer’s assistance. Likewise, a magistrate should not require the police to risk loss of evidence by exhausting alternative sources before searching the law office. These proposed safeguards, however, are the only ones that need be modified in order to protect legitimate law enforcement interests. All of the other procedures recommended in the preceding section should be observed, even when the attorney is a suspect, so that his clients can receive the benefits of their privileges.

*The California Approach.* This article has proposed relatively substantial modifications of search and seizure procedure. Zurcher suggests that the Constitution does not require adjustments of this magnitude. If so, the proposals must be implemented by alternative means. In order to develop the comprehensive and interdependent procedural framework needed, legislation is the most desirable approach.

Legislators should consider the recent amendments to the California Penal Code\(^{492}\) that have been noted throughout this article and that constitute the only attempt to resolve the problem through legislative modification of search and seizure procedure. The California legislation contains many commendable procedures. Essentially, it provides that a special master will execute a warrant to search for documentary evidence in the office of an attorney,

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\(^{491}\) As the Minnesota Supreme Court stated in *O’Connor v. Johnson*, “we must take care to protect not only the rights of the client who is suspected of criminal wrongdoing in the case which prompts the search warrant, but also the rights of all clients of the attorney whose office is being searched.” 287 N.W.2d 400, 404 (Minn. 1979) (en bane) (dictum).

\(^{492}\) CAL. PENAL CODE § 1524 (West Supp. 1980).
physician, psychotherapist, or clergyman not suspected of criminal conduct. The statute requires that a reasonable attempt be made to ensure that the person in possession or control of the documents (presumably the attorney in the law office search) is present when the warrant is executed. The master must provide the subject of the search with the opportunity to produce the evidence voluntarily. If the subject of the search states that a document specified in the warrant is privileged or simply confidential, the master must place the item under seal and deliver it to the court. Although law enforcement officials may accompany the master, only the master may conduct the search itself. When material is returned to the court under seal, a hearing must be conducted within three days if practicable and, if not, at the earliest possible time.

California has adopted many of the protections essential to the preservation of the attorney-client relationship. Significant safeguards, however, have been omitted. The entire scheme, for example, is flawed because the California legislature failed to adopt the subpoena preference rule, which constitutes the best practicable compromise of the competing interests. Beyond that, none of the procedures applies when the police have a reasonable suspicion that the attorney is criminally culpable. Presumably, ordinary search and seizure procedures will govern in that instance. As contended above, limiting special procedures to the non-suspect attorney will not adequately protect the attorney-client relationship. Moreover, the amendments fail to require the submission or approval of a search plan, fail to direct the magistrate or judge issuing the warrant to focus on whether the specified documents might be privileged, fail to require the consideration of alternative sources of evidence, fail to require an enhanced showing of particularity, and fail to provide an exclusionary rule incidental to the privileges. Finally, and quite unfortunately, the legislature deleted prior to passage of the bill a provision requiring that warrants explicitly describe how the intrusion will be minimized and how privileged items will be protected. Nonetheless, the California legislation represents a major improvement over traditional search and seizure procedure. With the modifications suggested in this article, the California approach easily could provide a model legislative response to the law office search problem.

493. Id. § 1524(c)(1), (d). Although this article has focused exclusively on the problems presented by the law office search, the procedures proposed could be extended to protect other privilege-holders or institutional third parties.
494. Id. § 1524(c)(3).
495. Id. § 1524(c)(1).
496. The statute uses the phrase "should not be disclosed." Id. § 1524(c)(2).
497. Id.
498. Id. § 1524(c)(1), (e).
499. Id. § 1524(c)(2).
500. Id. § 1524(c).
501. See note 337 supra (setting forth deleted provision of legislation). This provision essentially would have served the same function as a search plan.
502. But see Minority Objections of Linda Ludlow, Deputy Attorney General of California, to Report, Exclusionary Rule, supra note 170 (arguing that California legislation is "poorly conceived" and should not be used as model for other jurisdictions).
VI. Conclusion

The law office search is with us. At the present time, it is unclear whether the recent incidents are simply chance happenings or precursors of a practice destined to become more common. Past practice suggests that searching an attorney's office scarcely is essential to effective law enforcement. For that reason alone, perhaps law enforcement officials will use this tool most sparingly.

Doubtlessly law enforcement officials will have a continuing and legitimate need to gain access to information and criminal evidence possessed by attorneys. In most cases, this need can be satisfied without damaging the attorney-client relationship if the police serve the attorney with a subpoena, whether or not legally required. Such an approach would probably have a less inhibiting effect on client communications and attorney trial preparation than any possible adjustment to search and seizure procedure. Moreover, quite apart from any direct threat to the privileges, proceeding by subpoena is desirable because its operative premise—that the professional integrity of the bar can be relied upon—should be encouraged. In view of the bar's present efforts to reconcile its duties to the client with its obligations to the administration of justice and society, acknowledging that the attorney is an ethical and conscientious professional has more than symbolic value. As it has in the past, such an acknowledgement should prove to be a self-fulfilling prophecy. Even if the subpoena preference rule is rejected, the competing interests still might be reconciled, though not quite as effectively, by adjusting search and seizure procedures.

Conceivably, either alternative can be implemented judicially, perhaps through constitutional interpretation. A legislative solution, however, is preferable. Unlike the judiciary, legislatures can act before potentially irreparable harm occurs. As the recent California amendments illustrate, an aroused legislature can react more expeditiously and effectively than a passive court. Moreover, the legislature, not restricted to the peculiar and random factual patterns thrust upon the judiciary, can propound a comprehensive solution to a complex problem.

The emergence of the law office search has provoked a controversy because of its threat and novelty. More importantly, however, it presents a challenge to the bar, to law enforcement agencies, to the judiciary, and to legislatures. They must resolve the seemingly sharp conflict between important, competing values. The challenge can be met; the conflict can be resolved without significant sacrifice to the legitimate interests of either effective law enforcement or the attorney-client relationship.

503. Even with, or perhaps because of, the recent California legislation, the California Court of Appeals seems convinced that the law office search is not a passing fancy. In declining to pass on the constitutionality or the effectiveness of the amendments in the abstract, the court noted that "[i]t is not unlikely that these issues will be before the court again . . . ." Deukmejian v. Superior Court, 103 Cal. App. 3d 253, 262, 162 Cal. Rptr. 857, 863 (Ct. App. 1980).