COMMENT

A Guilty Attorney with Innocent Clients: Invocation of the Fourth Amendment to Challenge the Search of Privileged Information

Shelly Mott Diaz

I. INTRODUCTION

Imagine federal agents suspect an attorney, or his or her firm, of illegal activity, and the appropriate official obtains a search warrant authorizing the search of any and all documents and computer storage devices found on the premises. That is precisely what happened in at least one high-profile case in Mississippi in 2007.[1] The feds presumably met the probable cause requirement, making the search of the law firm's premises presumptively reasonable under the Fourth Amendment.[2] But there is at least one glaring problem with this practice. Countless individuals and entities entrusted their private and sensitive information with these lawyers, assuming that information would be safe from further disclosure pursuant to the attorney-client privilege. While courts have recognized the importance of protecting those individuals' privileged information and have granted clients relief in some cases, they have not explicitly framed the inquiry in terms of a Fourth Amendment analysis. This comment argues that these clients have both Fourth Amendment standing to challenge the search and a valid argument that such a search is unreasonable.

This comment begins by providing a brief overview of the role of privacy expectations in Fourth Amendment law, the scope of document searches under the Fourth Amendment, and the law of third-party standing to challenge a search in order to establish the Fourth Amendment parameters that apply to clients' claims. It then summarizes the history, policy, and case law regarding the doctrine of attorney-client privilege. The following section discusses how the privilege conveys upon an attorney's clients a reasonable expectation of privacy in the information held by their attorney, as required to assert standing to object to the search of the attorney's office in the investigation of a crime having nothing to do with them. In addition, the section argues that while the search itself may be permissible, clients may succeed in claiming that the scope of the search, or the manner in which it was conducted, rendered it unreasonable pursuant to the Fourth Amendment. The comment then discusses the procedural options available to minimize the intrusion upon the clients' interests and which of those options best

[1] *See, e.g.,* Motion to Allow Disclosure of Certain Evidence to the Prosecution and Investigative Team and to Require Any Objections to Such Disclosure Be Made Prior to Disclosure, United States v. Scruggs, No. 3:07-cr-00192-NBB-SAA (N.D. Miss. Mar. 14, 2008) (case in which Richard Scruggs, among other attorneys, was indicted for conspiracy to defraud the United States, conversion to his own use property of another, and fraud by wire, radio, or television). For other examples of investigations of attorney wrongdoings in Mississippi, see United States v. Langston, 1:08-cr-00003-MPM-JAD (N.D. Miss. Jan. 7, 2008) (case in which attorney Joseph Langston pled guilty to conspiracy to corruptly influence an elected state official); United States v. Scruggs, 3:09-cr-00002-GHD-SAA-2 (Miss. Jan. 6, 2009) (indictment charging Judge Bobby DeLaughter with conspiracy to defraud the United States, frauds and swindles, and tampering with a witness, victim, or informant).

[2] 79 C.J.S. *Searches* § 312 (2008) (citing Fitzgerald v. State, 837 A.2d 989 (2003); State v. Evers, 815 A.2d 432 (2003)). *See also* U.S. CONST. amend. IV.

meets the requirements of the Fourth Amendment. The next section considers what Congress has done and could do to set a procedural standard under which courts can determine whether innocent clients' interests are protected when their attorney is suspected of wrongdoing. The final section concludes that, in order to institute a rule that can be applied uniformly across jurisdictional lines and eliminate disagreement, the courts should determine the clients' rights pursuant to a Fourth Amendment analysis.

II. THE FOURTH AMENDMENT: THE REASONABLE EXPECTATION OF PRIVACY AND STANDING TO CHALLENGE A SEARCH

A. Privacy Interests

The Fourth Amendment, enacted to prohibit the type of general warrants used by the English permitting "a general, exploratory rummaging in a person's belongings,"[3] provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[4]

Originally, the Supreme Court interpreted the amendment to protect property interests, leading it to decide Fourth Amendment cases in terms of constitutionally protected areas.[5] However, that focus shifted drastically in 1967 when the Court decided *Katz v. United States*.[6] In *Katz*, federal agents connected an electronic transmitting device to a public telephone booth in an attempt to catch Katz transmitting gambling information to his clients.[7] Overruling the Court of Appeals for the Ninth Circuit, the Supreme Court abandoned the need for a physical intrusion upon property and held that the Fourth Amendment was designed to protect privacy rights, not property rights.[8]

Since *Katz*, the courts have evaluated Fourth Amendment challenges on the basis of whether the government action violated the individual's "reasonable expectation of privacy."[9] The test to determine whether this criterion is met requires a two-part inquiry: (1) whether the person exhibited an actual, subjective expectation of privacy and (2) whether society recognizes that expectation as reasonable.[10] In other words, as the Supreme Court has stated, "the application of the Fourth Amendment depends on whether the person invoking its protection can

---

[3] Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).
[4] U.S. CONST. amend. IV.
[5] THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 54 (2008) (citing Lanza v. New York, 370 U.S. 139, 143 (1962)).
[6] 389 U.S. 347 (1967).
[7] *Id.* at 348.
[8] *Id.* at 350. For the seminal case interpreting the Fourth Amendment to protect against physical intrusion of certain areas, see Olmstead v. United States, 277 U.S. 438 (1928).
[9] *Katz*, 389 U.S. at 360 (Harlan, J., concurring).
[10] *Id.* at 361.

claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action."[11]

B. Third Party Standing to Challenge a Search

To claim rights under the Fourth Amendment, an individual must show that he or she had privacy or property interests that were implicated by the search.[12] Courts generally refer to this issue as a question of "standing," even though it is grounded in substantive Fourth Amendment principles rather than mere procedural considerations.[13] Under modern Supreme Court precedent, whether an individual has standing depends upon whether that individual's interest, either a reasonable expectation of privacy or a property interest, has been violated.[14]

In analyzing standing claims the Court has held that it must address two inquiries: "whether the proponent of a particular legal right has alleged 'injury in fact,' and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties."[15] However, the Court has used broad language to describe the scope of "injury in fact" that may motivate an individual to assert his Fourth Amendment rights, even acknowledging that persons other than defendants in the criminal matter may be awarded damages for violation of those rights.[16]

---

[11] Smith v. Maryland, 442 U.S. 735, 740 (1979).

[12] Rakas v. Illinois, 439 U.S. 128 (1978).

[13] *Id.* at 133, 139 (stating that the issue of standing is resolvable only by answering "the substantive question of whether or not the proponent of the motion to suppress has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge" and concluding that "[this] type of standing requirement . . . is more properly subsumed under substantive Fourth Amendment doctrine").

[14] *See*, *e.g.*, Rawlings v. Kentucky, 448 U.S. 98, 104-05 (1980). The main body of law to determine whether an individual has the right to challenge a search grew out of a series of cases involving two different fact patterns, one in which a defendant objected to the warrantless search of the premises (or seizure of property from those premises) in which the defendant claimed an interest, and a second in which a defendant who has turned over his property to another and then wishes to challenge the search or seizure of that property. *See*, *e.g.*, Minnesota v. Olson, 495 U.S. 91, 96-97 (1990) (holding that the warrantless arrest of an overnight guest violated his Fourth Amendment right, as his "status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable"); Couch v. United States, 409 U.S. 322, 335-36 (1973) (holding that there is no legitimate expectation of privacy when records are given to an accountant since an income tax return requires mandatory disclosure of that information).

In both of these scenarios, the available remedy for the defendant is to file in the criminal proceeding a motion to suppress the evidence obtained through the search. 6 WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 113 (4th ed. 2004). Innocent clients whose attorney records have been taken, on the other hand, cannot file a motion to suppress under Federal Rule of Civil Procedure 41(h) because they are not defendants in the action. *Id*. at 113. A party unrelated to the criminal proceeding underway who wishes to challenge the validity of the search and have the property returned instead usually files a motion for return of property or a motion to quash the search warrant. Lord v. Kelley, 223 F. Supp. 684, 687 (D. Mass. 1963). However, a party may also choose to move for injunctive relief, damages, and/or an adversary hearing. Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215, 1222 (Colo. 1982).

[15] *Rakas*, 439 U.S. at 139.

[16] *Id.* at 134 ("Even if such a person is not a defendant in the action, he may be able to recover damages for the violation of his Fourth Amendment rights, or seek redress under state law for invasion of privacy or trespass.") (citation omitted).

The Supreme Court has applied these rules to the issue of whether an individual who has relinquished control of information or possessions to a third party has standing to contest the legality of a search.[17] The general rule in this area is that the owner of property does not have standing to challenge disclosure of information held by a third party, unless he can establish a reasonable expectation of privacy that implicates Fourth Amendment rights.[18] For example, in *United States v. Miller*, the government obtained the bank records of the defendant who was suspected of running a whiskey distiller without a permit.[19] The Court "examine[d] the nature of the particular documents sought to be protected in order to determine whether there is a legitimate 'expectation of privacy' concerning their contents."[20] Reasoning that Miller voluntarily used negotiable interests that would be exposed to the public, the Court held that he surrendered any reasonable expectation of privacy in those records.[21]

C. The Broad Scope of Document Searches

While keeping in mind the high expectation of privacy that individuals have in their private papers, in *Andresen v. Maryland* the Supreme Court set up the framework that courts apply today to broad searches of documents.[22] The local authorities were investigating Peter Andresen, an attorney and sole proprietor of a realty company.[23] After investigators concluded that they had probable cause to suspect Andresen of defrauding the purchasers of one of his lots, they requested a warrant to search for specified documents regarding the sale.[24] Because the warrant contained arguably general language[25] and some documents unrelated to the sale at issue were seized, Andresen moved to suppress.[26] The Court held that the search and seizure did not violate Andresen's Fourth Amendment rights.[27]

The opinion recognized the "grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers."[28] It goes on to explain that "[i]n 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."[29] However, because in complex criminal schemes it is difficult to determine the relevancy of evidence and

---

[17] *See*, *e.g.*, United States v. Miller, 425 U.S. 435, 440-43 (1976).
[18] *Id. See also Couch*, 409 U.S. at 335-36.
[19] *Miller*, 425 U.S. at 436.
[20] *Id.* at 442.
[21] *Id.* at 442-43 (citing Katz v. United States, 389 U.S. 347, 351 ("[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection")).
[22] 427 U.S. 463 (1976).
[23] *Id.* at 466.
[24] *Id.* at 467.
[25] The search warrant contained several "exhaustive list[s]" of documents described in detail, and at the end of each the following phrase was added: "together with other fruits, instrumentalities and evidence of crime at this time unknown." *Id.* at 479.
[26] *Id.* at 465-68. In his motion, Andresen did not raise the attorney-client privilege issue; therefore, the Court did not address it. *Id.*
[27] *Id.* at 484.
[28] *Id*. at 482 n.11.
[29] *Id.*

many pieces of the "jigsaw puzzle" are needed to prove the crime, such a sweeping document search is justified,[30] so long as the government officials in charge of the search "take care to assure that they are conducted in a *manner that minimizes unwarranted intrusions upon privacy*."[31]

Lower courts have applied the principles of *Andresen* to uphold the reasonableness of warrants requiring broad document searches, including both paper and digital searches.[32] Important to the subject matter of this comment, courts have also adopted *Andresen*'s insistence upon the importance of procedures to "minimize[] unwarranted intrusions on privacy" as a requirement for a document search to be reasonable under the Fourth Amendment.[33] In other words, *Andresen* reinforced the rule that two aspects of the warrant must be reasonable to pass Fourth Amendment muster: (1) the decision to issue the warrant and (2) the manner in which that warrant is executed.[34]

The Supreme Court has also addressed the allowable scope of warrants to search the documents of an unrelated third party when First Amendment rights are involved.[35] In *Zurcher v. Stanford Daily*, during the course of an investigation of demonstrators who assaulted police officers, law enforcement executed a warrant on the Stanford University newspaper to obtain pictures or negatives indicating the identities of the offenders.[36] The newspaper and several staff members feared that the search could "inadvertently endanger the anonymity of sources, cause reporters to refrain from keeping notes, and would expose confidential records."[37] The Court rejected the lower court's holding that a warrant cannot issue against a third party unless a subpoena *duces tecum* would be impracticable and that, when First Amendment interests are involved, the search would only be constitutionally permissible "in the rare circumstance where there is a *clear showing* that (1) important materials will be destroyed or removed from the jurisdiction; *and* (2) a restraining order would be futile."[38]

Instead, the Court held that the Fourth Amendment does not prohibit issuance of a warrant to search the documents of a third party not suspected of any wrongdoing.[39] With regard to the relationship between the Fourth Amendment and the First Amendment, the Court opined:

As we see it, no more than [the application of the warrant requirements] is

---

[30] *Id.* at 482 n.10.
[31] *Id.* at 482 n.11 (emphasis added).
[32] Thomas K. Clancy, *The Fourth Amendment Aspects of Computer Searches and Seizures: A Perspective and a Primer*, 75 MISS. L.J. 193, 197 (2005).
[33] *Andresen*, 427 U.S. at 482 n.11.
[34] New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)). *See also Andresen*, 427 U.S. at 482 n.11.
[35] Zurcher v. Stanford Daily, 436 U.S. 547 (1978).
[36] *Id.* at 550.
[37] Elizabeth H. Sillin, Note, *Federal Law*–Citicasters v. McCaskill*: Probing the Privacy Protection Act of 1980*, 20 W. NEW ENG. L. REV. 437, 437-38 (1998).
[38] *Zurcher*, 436 U.S. at 552 (quoting Stanford Daily v. Zurcher, 353 F. Supp. 124, 135 (1972)).
[39] *Id.* at 565.

> required where the warrant requested is for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper. Properly 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.[40]

However, the Court went further to say that when a First Amendment privilege may be involved, the issuing magistrate must ensure that the scope of the search, i.e., the manner in which the warrant is executed, is sufficiently limited and strict so that "the warrant requirement [is] administered to leave as little as possible to the discretion or whim of the officer in the field."[41] In other words, *Zurcher*, while opening non-suspect third parties to searches, also reiterates *Andresen*'s requirement to "minimize unwarranted intrusions on privacy" and points out that the concern is heightened when documents protected by the First Amendment are involved.[42]

III. THE ATTORNEY-CLIENT PRIVILEGE

A. History

Thus far separate from the Fourth Amendment body of law, the common law of attorney-client privilege has developed in American jurisprudence to protect the privacy of information shared between clients and their attorneys. As the Supreme Court has stated, "the attorney-client privilege under federal law [is] 'the oldest of the privileges for confidential communications known to the common law,'"[43] with its roots dating back to Roman times.[44] The modern history of the privilege began in the Elizabethan era, "where the privilege already appears as unquestioned."[45] Originally, the theory behind the privilege was that protecting the information of the client protected the reputation of the attorney, i.e., it was considered to be for the attorney's benefit.[46] In the last quarter of the eighteenth century, however, the attorney-client privilege doctrine underwent a shift in paradigm, and the policy rationale became the protection of the *clients* themselves, as opposed to the attorneys.[47]

After initial confusion as to the application of the privilege,[48] the United States Supreme

---

[40] *Id.*
[41] *Id.* at 564.
[42] *Id.*; Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1976).
[43] United States v. Zolin, 491 U.S. 554, 562 (1989) (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).
[44] United States v. (Under Seal), 748 F.2d 871, 873 (4th Cir. 1984) (citing E. CLEARY, MCCORMICK ON EVIDENCE § 87 (2d ed. 1972)).
[45] 8 JOHN HENRY WIGMORE, EVIDENCE § 2290 (McNaughton Rev. 1961).
[46] *Id.*
[47] *Id.* Because of this late change in the motivating purpose behind the doctrine, the law regarding attorney-client privilege remained (and has continued to remain in some areas) nebulous for quite some time, solidifying itself well after other areas of law in the United States were firmly established. *Id.* This belated development of attorney-client privilege law could explain why its relationship to Fourth Amendment doctrine is still to be determined.
[48] Early American cases regarding the privilege did not define it precisely, except to establish that the privilege was

Court began to play a role in defining it.[49] In 1876 the Supreme Court decided *Connecticut Mutual Life Insurance Co. v. Schaefer*, which dealt with a dispute over a life insurance policy.[50] In that case, the Court included strong language emphasizing the policy interests behind the privilege: "If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance."[51]

The Supreme Court continued to insist upon the importance of the privilege in later cases.[52] For example, in *Hunt v. Blackburn*, the Court stated that

> [the policy behind the privilege was] founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from consequences or the apprehension of disclosure.[53]

These early cases laid down the groundwork for the fundamental importance of the attorney-client privilege in American law, but much work was left to be done in determining how and when the privilege should be applied and what kinds of protections it afforded to both attorneys and clients.[54]

---

available when the attorney-client communication was "related directly to pending or anticipated litigation." *Id.*

[49] Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILL. L. REV. 469, 479 (2003).

[50] 94 U.S. 457 (1876).

[51] *Id.* at 458.

[52] Cole, *supra* note 49, at 479.

[53] 128 U.S. 464, 470 (1888). *See also* Cole, *supra* note 49, at 479-80, in which the author discusses the implications of this statement. He points out that implicit in the Supreme Court's holding is the idea that laypersons unquestionably need lawyers to guide and advise them through the complex legal system, and that they "will not seek out this advice if the system creates impediments to their doing so or if they believe that doing so will have adverse consequences for them." *Id*. at 480. *See also* Tom D. Snyder, Jr., *A Requiem for Client Confidentiality?: An Examination of Recent Foreign and Domestic Events and Their Impact on the Attorney-Client Privilege*, 50 LOY. L. REV. 439, 441-42 (describing the intricacies of the legal system and stating that trial lawyers "'are the translators of the most complex, post industrial society the world has ever seen into the simple, accurate, and understandable terms with which it must be grasped'") (quoting Long L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 384-85 (1978)).

[54] Another major effect on the attorney client privilege doctrine occurred in 1904 when John Henry Wigmore of the Northwestern Law School published a treatise on evidence that contained an extensive discussion of the privilege. *See* Cole, *supra* note 49, at 475. Professor Wigmore, after clearly defining and justifying the policy reasons for the privilege, aimed to define the attorney-client privilege's essential elements and "to group them in natural sequence." *Id.* (citing WIGMORE, *supra* note 45). His efforts led to the classic definition of the privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relevant 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 adviser, (8) except the client waives the protection.

WIGMORE, *supra* note 45, at § 2292.

B. Modern Case Law Regarding Policy[55]

Regardless of the gaps left in the law by the early Supreme Court cases, the policy behind the attorney-client privilege was well-established. Modern cases have succinctly defined the purpose of the attorney-client privilege as "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[56] The ethics rules of the legal profession reflect the importance, insisting that "[a] lawyer shall not reveal information relating to representation of a client."[57]

The Supreme Court has continued to reinforce its intention to protect aggressively the attorney-client privilege in a variety of situations. In *Upjohn Co. v. United States*, the Court held that the client (including a corporate client) must be free to disclose fully and frankly any even remotely pertinent information, for if such disclosure is not permitted, the attorney will not be able to serve the client effectively, and the client will ultimately be less likely to comply with the law.[58] Following *Upjohn*, one could no longer doubt that the Court would continue to stand behind its oft-quoted statement, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[59]

In 1998, the Court again reiterated its firm stance on the sanctity of the attorney-client privilege when it decided *Swidler & Berlin v. United States*.[60] In 1993, while an investigation was underway of the White House Travel Office, Deputy White House Counsel Vincent W. Foster, Jr., sought legal advice from an attorney with the law firm Swidler & Berlin.[61] Foster committed suicide only days later, and subsequently Kenneth Starr subpoenaed the attorney's notes from his meeting with Foster.[62] The law firm challenged the subpoena as a violation of the attorney-client privilege.[63] In its opinion, the Court went so far as to hold that, even posthumously, the attorney-client privilege remains in full force and effect.[64] The Court showed extreme distaste for the idea of "introduc[ing] substantial uncertainty into the privilege's application" and thus eroding its effectiveness to achieve its established purpose.[65] At the same time, the Court expanded the scope of the privilege to include tangential information conveyed

---

[55] While the U.S. Supreme Court and lower federal courts have recognized the attorney-client privilege as universal, the exact definition and extent of the privilege is a creature of state law. Michael Jay Hartman, *Yes, Martha Stewart Can Even Teach Us about the Constitution: Why Constitutional Considerations Warrant an Extension of the Attorney-Client Privilege in High-Profile Criminal Cases*, 10 U. PA. J. CONST. L. 867, 870-71 (2008). Since only the broad doctrine of attorney-client privilege affects the analysis contained in this comment, it does not discuss the differences among the states in the documents and information covered by the privilege.

[56] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); *see also* Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998); Commodity Futures Trading Com'n v. Weintraub, 471 U.S. 343, 348 (U.S. 1985).

[57] MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).

[58] 449 U.S. at 389.

[59] *Id.* at 393.

[60] 524 U.S. 399 (1998).

[61] *Id.* at 401.

[62] *Id.* at 402.

[63] *Id.*

[64] *Id.* at 403.

[65] *Id.* at 409.

by the client to the attorney, such as information regarding family or personal issues.[66] As a result of its emphatic language upholding the privilege in a situation involving high government interests, *Swindler & Berlin* stands out as "the strongest affirmation yet of the value ascribed to attorney-client privilege by the Supreme Court."[67]

IV. REASONABLE EXPECTATIONS OF PRIVACY: THE FOURTH AMENDMENT AND THE ATTORNEY-CLIENT PRIVILEGE INTERSECT

A. Clients' Standing to Bring a Fourth Amendment Challenge

As the Court in *Rakas* noted, "[l]egitimation of expectations of privacy [required for Fourth Amendment standing] by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to *understandings that are recognized and permitted by society*."[68] For innocent clients of attorneys whose records have been seized, that "source" is the attorney-client privilege. As discussed above, the history of the privilege establishes indisputably that this fundamental doctrine lies at the heart of the American legal system.[69] As early as the last quarter of the eighteenth century, it has been understood as a protection of the rights of clients.[70] It is also unchallenged that the privilege is well-known to the general population.[71] In addition, the Supreme Court has stated emphatically that the sanctity of the privilege outweighs the state's interest in solving a crime.[72] Those facts alone lend credence to the conclusion that a client who provides information to an attorney in confidence reasonably expects that such information will remain private.[73] But the analysis need not end there. Decisions regarding searches of attorney's offices provide further justification for the conclusion that the clients' expectation meets the requirement of a recognized privacy interest to establish standing to bring a Fourth Amendment claim.

It is commonplace for courts to recognize the strong interest in protecting the privilege in the Fourth Amendment context when government agents search attorney's offices pursuant to a

---

[66] *Id.* at 408.
[67] Cole, *supra* note 49, at 498. Though not within the scope of this comment, it should also be noted that the Supreme Court has upheld protection of documents created in preparation for litigation, i.e., documents protected by the work product doctrine. *See* Hickman v. Taylor, 329 U.S. 495 (1947). While there are important differences between the two doctrines, the policy asserted in support of each is virtually identical: to promote the effective administration and operation of the American justice system. Cole, *supra* note 49, at 483.
[68] *Rakas*, 439 U.S. at 143, n.12 (emphasis added). Because the most litigated and controversial requirement for standing is the question of whether a reasonable expectation of privacy exists, this factor, as opposed to injury in fact, is emphasized in this comment. Because *Rakas* recognizes that a party other than the defendant could seek damages for violation of his or her Fourth Amendment rights, invasion of privacy, or trespass, it is assumed here that a court would find that the innocent clients have been damaged by the unauthorized search of their private, sensitive information. *Id.* at 133.
[69] *See* discussion *infra* Part III.
[70] WIGMORE, *supra* note 45.
[71] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).
[72] Swidler & Berlin v. United States, 449 U.S. 399, 409 (1998).
[73] *See* discussion *infra* Part III.

warrant,[74] with one federal circuit court holding explicitly that the privilege creates a reasonable expectation of privacy.[75] While the Supreme Court has denied standing to parties who voluntarily relinquished documents to a third party from Fourth Amendment standing, those cases hold that the documents were essentially voluntarily disclosed to the public, eliminating any reasonable expectation of privacy.[76] This comment argues that clients whose attorney's office has been searched not only have an available objection to search warrants for violation of the attorney-client privilege, but also have the right – or standing – to argue that the search of their records was unreasonable pursuant to the Fourth Amendment.

1. Searches of Attorney's Offices When Guilty Clients Are Involved

When individuals suspected of criminal activity have attorneys who may hold information relevant to the investigation, courts generally uphold search warrants of their attorneys' offices, whether or not the attorneys are suspected in the investigation.[77] The permissibility of these searches is based on the Supreme Court's creation of the crime-fraud exception, holding that the protection of the attorney-client privilege "'ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*.'"[78]

---

[74] *See*, *e.g.*, O'Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979).

[75] DeMassa v. Nunez, 770 F.2d 1505 (9th Cir. 1985).

[76] United States v. Miller, 425 U.S. 435, 440-43 (1976). *See also* Couch v. United States, 409 U.S. 322 (1973) (holding that there is no legitimate expectation of privacy when records are given to an accountant, when the individual knows that an income tax return requires mandatory disclosure of that information).

[77] Klitzman, Klitzman & Gallagher v. Krut, 744 F.2d 955, 959 (3rd Cir. 1984).

[78] United States v. Zolin, 491 U.S. 554, 562-63 (1989). The client's intent to further a future crime or fraud determines whether the exception applies. *In re* Grand Jury Proceedings, 43 F.3d 966, 972 (5th Cir. 1994). Lower courts have extended the scope of the exception beyond a conspiracy between attorney and client, holding that it matters not whether the attorney was aware of the client's illicit purpose in obtaining the requested legal advice. *In re* Grand Jury Subpoena to Carter, 1998 U.S. Dist. LEXIS 19497 at *4-5 (D.D.C. Apr. 28, 1998).

The government has also enacted statutes that further erode the attorney-client privilege when criminal activity is involved. For example, in some instances the government may use "Special Administrative Measures," or "SAMs," to wire-tap conversations between inmates and their attorneys. Snyder, *supra* note 53, at 446. In addition, the legislature enacted the Foreign Intelligence Surveillance Act (FISA) in 1978 to permit "the use of court ordered electronic surveillance to listen in on suspected 'foreign agents,' even if the conversation overhead is between the suspect and his attorney so long as the surveillance is for the purpose of gathering *foreign intelligence*." *Id.* The USA PATRIOT Act (in response to the September 11 tragedy) and the Sarbanes-Oxley Act of 2002 (in response to the Enron scandal) are the most recent curtailments of the privilege. *Id.* at 447-52, 452-54. However, these exceptions to the application of attorney-client privilege deal with communications between attorneys and their clients who are suspected criminals and do not affect the rights of third-party clients.

Other exceptions include: (1) *Information Not Protected Generally*. Information is not necessarily covered by the attorney-client privilege simply because a client provided it to an attorney. *Id.* at 443-44. Some courts "look to the services which the attorney has been employed to provide and determine if those services would reasonably be expected to entail [potential disclosure] of the clients' communication." United States v. (Under Seal), 748 F.2d 871, 875 (4th Cir. 1984) (citing United States v. Jones, 696 F.2d 1069, 1072-73 (4th Cir. 1982)) (holding that the attorney-client privilege does not cover information the client disclosed to his attorney in the process of preparing a prospectus to be used to recruit potential investors). If not, the privilege does not apply. *Id.* (2) *Waiver Rules*. In a variety of situations, it may be held that the client and/or attorney has waived the privilege. For example, in a civil or criminal matter, when a party either inadvertently or intentionally reveals privileged information to its opponent, many courts have held that this mistake has the effect of waiving the privilege for some or all privileged documents.

However, while upholding the validity of the searches, the courts still require that certain safeguards be in place to maintain the confidentiality of unrelated privileged material in order to protect the interests of innocent clients and the documents of the suspects unrelated to the crime.[79] For example, in *National City Trading Corp. v. United States*, the court allowed the search based on suspected criminal activity committed in concert by the client and the attorney, but maintained that "a law office search should be executed with special care to avoid unnecessary intrusion on attorney-client communications."[80] Similarly, the Colorado Supreme Court required that minimization procedures be used due to the "enhanced *privacy interest* underlying the attorney-client relationship which warrants a heightened degree of judicial protection and supervision when law offices are the subject of a search for client files or documents."[81] While not stating explicitly that they were respecting the Fourth Amendment rights of the innocent clients, these courts clearly recognized those clients' expectations of privacy and sought to ensure their protection.[82]

2. Searches of Attorney's Offices When All the Clients Are Innocent

Few and far between are cases in which the investigation is not aimed at least partially at a client, but the case most analogous to the hypothetical contemplated in this comment, *DeMassa v. Nunez*, falls in that category.[83] In *DeMassa*, the Ninth Circuit clearly and unequivocally held that "clients of an attorney maintain a legitimate expectation of privacy in their client files."[84] The government "seiz[ed] over 1100 'hard-copy paper' client files from a targeted law firm," and these files pertained to clients who were not the subject of the investigation.[85] The brief opinion[86] argues succinctly that clients' expectation of privacy in their legal files held by their attorney "is the kind of expectation that 'society is prepared to recognize as 'reasonable.'"[87] After citing case law confirming that the courts have understood that clients expect their attorney files to be private, the court pointed out that Congress also has expressly embraced the idea that "privacy interests" are implicated in the search and seizure of attorneys' files.[88]

See, *e.g.*, *In re* Sealed Case, 877 F.2d 976, 977 (D.C. Cir. 1989) (holding that a company waived its attorney-client privilege when it inadvertently produced a privileged document in response to a subpoena). *Cf.* Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 938 (S.D. Fla. 1991) (holding that inadvertent disclosure by the attorney does not waive the attorney-client privilege because the privilege can only be waived by the client).

[79] Nat'l City Trading Corp. v. United States, 635 F.2d 1020, 1026 (2d Cir. 1980).

[80] *Id.* Courts have also applied the same reasoning in cases in which the attorney was the innocent party and the client was the individual being investigated. *See*, *e.g.*, O'Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979). In *O'Connor*, the court found the search of an attorney's office conducted by warrant in the investigation of a client unreasonable, holding that the prosecution should have obtained the records by subpoena to avoid violating the attorney-client privilege where possible. *Id.* at 405. For a discussion of *O'Connor*, *see* Section B.1.

[81] Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215, 1222 (Colo. 1982) (emphasis added). *See also* United States v. Zolin, 491 U.S. 554, 572 (1989); People v. Hearty, 644 P.2d 302, 313 (Colo. 1982) (en banc); *O'Connor*, 287 N.W.2d at 404 (stating that procedures must be in place to keep law enforcement from "rifl[ing] through [the attorney's] files until they found the documents for which they were searching").

[82] Note that although they recognize the need for minimization procedures, the courts do not agree on what those procedures should entail. *See* discussion *infra* Part IV.

[83] 770 F.2d 1505 (9th Cir. 1985). *Compare In re* Impounded Case (Law Firm), 879 F.2d 1211, 1214 (3rd Cir. 1989), in which the Third Circuit disagreed with the *DeMassa* decision for its failure to discuss the application of the crime-fraud exception to facts in which only the attorney (not the clients) was suspected of criminal activity. The Third Circuit failed to address, however, the fact that the privilege belongs to the clients, who are not suspected of a

From the foregoing, it is logical to conclude that clients unrelated to the investigation have a legitimate expectation of privacy, recognized by the courts, society at large, and arguably even Congress.[89] The attorney-client privilege creates both a subjective and objective expectation of privacy. In other words, the clients actually believe that their information is private, and society is prepared to recognize the right to privacy created by the attorney-client privilege as legitimate. Even cases to which the crime-fraud exception applies have held that searches of attorneys' offices require "special care" and implicate a "grave danger" that the sacred attorney-client privilege will be wrongfully violated.[90] In *DeMassa*, the Ninth Circuit put forth the same argument presented in this comment and directly held that the innocent clients have a reasonable expectation of privacy, creating rights under the Fourth Amendment.[91]

B. The Unreasonableness of Blanket Searches of the Documentation of Innocent Clients Under the Fourth Amendment

Unfortunately for the clients, establishing that they have standing to contest the search of their attorney's office is only a small victory. In order to be granted relief, they must prove that the search was unreasonable under the Fourth Amendment. *Andresen* indicates that broad documents searches are a necessary evil so that law enforcement can find the documentation that is responsive to the warrant, the proverbial "needle in a haystack."[92] *Zurcher* holds that the safeguards built into the warrant process are sufficient protection when the documents of

---

crime and have done nothing to waive their right to the privilege or to affect the validity of their reasonable expectation of privacy. *See* KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 92 (6th ed. 2006) (stating that the attorney-client privilege belongs to the client and can only be waived by the client).

[84] *DeMassa*, 770 F.2d at 1506.

[85] Barry Tarlow, *Searching of a Lawyer's 'Virtual' Office: Much More than 'Black' Versus White*, 21 CHAMPION 35, 36 (June 2007). Tarlow represented DeMassa in this suit and filed the action to "prevent[] the government from appointing its own 'taint team' to review the privileged files and requir[e] that a Special Master be appointed to adequately protect the privileged documents" of innocent, unrelated clients. *Id.*

[86] The opinion does not contain the facts giving rise to the search and seizure.

[87] *DeMassa*, 770 F.2d at 1506 (citing Hudson v. Palmer, 468 U.S. 517 (1984) (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

[88] *Id.* at 1507 (citing the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa-11(a)(3) (1981) (stating that the Attorney General must recognize "special concern for *privacy interests* in cases in which a search or seizure for such documents could intrude upon a known confidential relationship such as that which may exist between . . . lawyer and client") (emphasis added)).

[89] *Id.*

[90] Nat'l City Trading Corp. v. United States, 635 F.2d 1020, 1026 (2d Cir. 1980).

[91] *DeMassa*, 770 F.2d at 1506. Interestingly, only one court has cited *DeMassa* since it was handed down in 1985, perhaps indicating that the guilty attorney with innocent clients fact pattern has not presented itself often in the federal courts. However, as prosecutors continue to pursue cases of judicial bribery and other attorney misconduct unrelated to client activity, there may be ample opportunity for courts to address this issue. *See*, *e.g.*, *Ex-Miss. Attorney Appeals Bribery Conviction*, CLARION LEDGER, Apr. 1, 2009, *available at* http://www.clarionledger.com/article/20090401/NEWS/90401028, Richard Fausset, *Legal Legend Dickie Scruggs Pleads Guilty in Bribery*, L.A. TIMES, Mar. 15, 2008, *available at* http://articles.latimes.com/2008/mar/15/nation/na-scruggs15, Adam Nossiter, *Civil Rights Hero, Now a Judge, Is Indicted in a Bribery Case*, N.Y. TIMES, Feb. 13, 2009, at A12, *available at* http://www.nytimes.com/2009/02/14/us/14bribery.html?_r=1.

[92] Andresen v. Maryland, 427 U.S. 463, 482 n.10 (1976). *See* discussion *infra* Part II.C.

innocent, unrelated third parties are searched.[93] Further, "[m]ost courts have interpreted *Zurcher* to mean that the constitutionally demanded standard to search law offices is no different from that of newspapers or any other location."[94]

However, both *Andresen* and *Zurcher* stress the importance of reasonableness in the scope of the search, i.e., the manner in which the search is executed.[95] *Zurcher* also recognizes that, when a specific privilege or constitutional privacy interest is involved, the minimization requirements should be more stringent.[96] Therefore, courts can still declare an otherwise permissible search of an attorney's office unreasonable in *scope* if the manner of execution did not appropriately minimize exposure of privileged material. In addition to the argument that the scope of the search is unreasonable, clients may also be able to claim the search was unreasonable without their consent, citing a 2001 Supreme Court opinion in which the Court held that a hospital's disclosure to the government of confidential medical records without the patients' consent was a violation of the patients' Fourth Amendment rights.[97]

1. Unreasonableness of the Scope of the Search of an Attorney's Office

Although not explicitly based on the Fourth Amendment reasonableness requirement, cases involving searches of attorneys' offices have held searches to be unreasonable due to their impermissibly broad scope and lack of procedures to minimize exposure of privileged material. For example, in *O'Connor v. Johnson*, during an investigation of liquor store owners suspected of falsely representing information in their applications for liquor licenses, the police discovered that an attorney held certain business records of the suspects that were relevant to the investigation.[98] Based on that knowledge, the police were able to obtain a search warrant to look for the documents in the attorney's office.[99] The court held that the search procedure was unreasonable and required the prosecutor's office to instead proceed by subpoena in order to protect the attorney-client privilege.[100] The court restated the importance of "[t]he indispensable relationship of trust between client and attorney and the adequate functioning of our adversary system of justice" and concluded that the preservation of the client's ability to "completely disclose all the facts – favorable and unfavorable – without the fear that the attorney's files will be seized by police officers pursuant to a search warrant" must be considered when determining whether the client's Fourth Amendment rights have been violated.[101]

The Third Circuit in *Klitzman, Klitzman & Gallagher v. Krut* took a similar stance when

[93] Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978).
[94] John E. Davis, *Law Office Searches: The Assault on Confidentiality and the Adversary System*, 33 AM. CRIM. L. REV. 1251, 1262 (1996).
[95] *See* discussion *infra* Part II.C.
[96] *Zurcher*, 436 U.S. at 564.
[97] Ferguson v. City of Charleston, 532 U.S. 67 (2001).
[98] 287 N.W.2d 400, 401 (Minn. 1979).
[99] *Id.*
[100] *Id.* at 405.
[101] *Id.* at 403.

addressing a search of a law office suspected of inflating medical bills in personal injury cases.[102] The government seized all of the firm's personal injury files, among other documents, pursuant to three warrants.[103] The court held that the proper approach was "not to immunize law offices from searches, but to scrutinize carefully the particularity and breadth of the warrant authorizing the search, *the nature and scope of the search*, and any resulting seizure."[104] While in this case the contested feature of the search was the broad scope of the documents listed in the warrant, the court indicated that the need to preserve the attorney-client privilege was so profound that "[the law firm] was likely to succeed on the merits of its claim that the search was overbroad and therefore *constitutionally* infirm."[105]

2. Protection from Disclosure of Confidential Records to the Government

In *Ferguson v. City of Charleston*, the Supreme Court put forth a novel holding one may analogize to the situation of disclosure of confidential client information contained in an attorney's office.[106] Because the use of cocaine by patients receiving prenatal care had increased, the Medical University of South Carolina (MUSC) formulated a plan to cooperate with the City to prosecute mothers whose infants tested positive for drugs during the pregnancy.[107] MUSC conducted urinalyses to test for drugs and turned over the results to the police without the consent of the patients.[108] The mothers challenged MUSC's policy, claiming that warrantless and nonconsensual drug tests obtained for criminal investigatory purposes were unconstitutional searches under the Fourth Amendment.[109]

Rejecting the argument that the government's interest in imposing criminal sanctions on these women constituted a "special need,"[110] the Court held that diagnostic testing conducted by a state hospital to acquire evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search in violation of the Fourth Amendment if the patients did not consent to the procedure.[111] The Court was not willing to permit a hospital to breach the "reasonable expectation of privacy" of its patients by providing information those patients expected to be confidential to law enforcement for the purpose of criminal prosecution.[112]

---

[102] 744 F.2d 955, 960-61 (3d Cir. 1984).
[103] *Id.* at 957.
[104] *Id.* at 959 (emphasis added).
[105] *Id.* at 960 (emphasis added).
[106] 532 U.S. 67 (2001).
[107] *Id.* at 71-72.
[108] *Id.*
[109] *Id.* at 73-74.
[110] Considering the "special needs" exception, Justice Stevens in *Ferguson* stated that a special need is "divorced from the State's general interest in law enforcement," and that if the City is correct, "virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate...purpose." *Id.* at 79, 84. For an explanation of the special needs doctrine, see CLANCY, *supra* note 5, at 501-02.
[111] *Ferguson*, 532 U.S. at 84.
[112] *Id.* at 78 ("The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent.").

While the fact pattern in *Ferguson* may seem very different from a case involving the search of clients' information in their attorneys' offices, there are notable similarities. In both situations, the complaining individual entrusted information or documentation to a third party who has a duty to maintain the confidentiality of the materials. That confidentiality was breached when the third party revealed the individual's confidential information to law enforcement. However, there the parallels end. Completely dissimilar to the attorney-client privilege cases, in *Ferguson* the police had no warrant for the test results; the hospital officials turned them over pursuant to an agreement between the hospital and the police department.[113] Moreover, the Court noted that the hospital in *Ferguson* was a state actor, capable of violating the patients' Fourth Amendment rights through government action.[114] The Court held that the urine tests conducted by the hospital were searches under the Fourth Amendment, and the hospital conducted the searches without the patient's consent.[115]

Still, *Ferguson* remains the only Supreme Court case granting individuals Fourth Amendment rights when they submitted information to a third party with a duty to keep that information confidential. When viewed in that light, there is a possibility that *Ferguson* bolsters the argument that breaking the confidentiality of privileged documents without consent of the client is unreasonable under the Fourth Amendment.

IV. WHAT DO WE DO NOW? INCORPORATING FOURTH AMENDMENT PRINCIPLES INTO THE PROCEDURE OF LAW OFFICE SEARCHES

If the courts accept the argument put forth in this comment, that innocent clients have both standing to challenge a search of their attorneys' records and an argument that the scope of the search is unreasonable, the next hurdle is for courts to decide what minimization procedures are required to render the search of an attorney's office reasonable. The decisions in which courts have discussed this issue vary from requiring that the prosecution subpoena the requested documents[116] to accepting the prosecution's use of a "taint team" on its staff to make an initial review of the materials to screen for privileged and/or unrelated information.[117] To demonstrate the need for courts to adopt a uniform procedure that protects the innocent clients' Fourth Amendment rights, the advantages and disadvantages of the various options presently used by prosecutors are discussed in this section.

A. The Use of Subpoenas

Procedurally, the use of a subpoena gives an attorney the opportunity to review carefully

---

[113] *Id.* at 70.
[114] *Id.* at 76.
[115] *Id.*
[116] *See*, *e.g.*, O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979) (holding that prosecution was required to use subpoena to acquire documents from non-suspect attorney because there was no danger of destruction of evidence and the subpoena gave attorney opportunity to screen for privilege and request judicial review of documents he considered subject to attorney-client privilege).
[117] *See*, *e.g.*, United States v. Hunter, 13 F. Supp. 2d 574, 583 n.2 (D. Vt. 1998) (approving of prosecution's use of taint team but indicating that document review by special master or magistrate judge was preferable).

the responsive documents and ask for judicial review of those he or she believes are subject to attorney-client privilege.[118] Subpoenas also provide affected clients an opportunity to object and request an in camera review by a neutral magistrate or special master before the prosecution has access to the documents.[119] In spite of the subpoena's advantage in protection attorney-client privilege, however, prosecutors and courts have found the use of search warrants necessary in a situation in which the attorney is suspected of criminal activity.[120] While a subpoena gives the attorney full opportunity to protect his or her clients' expectation of privacy, it also gives the attorney full opportunity to destroy, remove, or alter evidence crucial to the prosecution's case.[121] Since the purpose of the attorney-client privilege itself is to foster the efficient administration of justice, use of a subpoena in this situation may do just the opposite and thwart the purpose of the privilege.[122] Further, the Supreme Court rejected the district court's holding in *Zurcher* that prosecutors should be required to use a subpoena instead of a search warrant for documents requested of non-suspect third parties.[123] In addition, search warrants are more efficient for prosecutors, allowing them to acquire quickly the requested documentation and to avoid the lengthy process of subpoena challenges and insufficient responses.[124]

B. Department of Justice Regulations and the Use of "Taint Teams"

Though foregoing the option of a subpoena to obtain an attorney's documents, the government has adopted some self-imposed limitations on its authority to conduct law office searches through a warrant.[125] The Department of Justice has instituted guidelines to protect the attorney-client privilege in the execution of search warrants on an attorney's office, outlining preferred standards for attorney's office searches.[126] However, these guidelines have only a general requirement of "adequate precautions to ensure that the materials are reviewed for privilege claims and that any privileged documents are returned to the attorney from whom they were seized" and a requirement that the prosecutor must draft the warrant with the most specific language possible.[127]

To comply with these vague guidelines, prosecutors generally use a "taint team" of investigators who are not a part of the prosecutor's investigative team to review any potentially privileged materials.[128] The team inspects any possibly privileged material and then returns to

---

[118] *O'Connor*, 287 N.W.2d at 405.
[119] *Id.*
[120] Davis, *supra* note 94, at 1259-60.
[121] *Id.*
[122] *Id.*
[123] Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978).
[124] Davis, *supra* note 94, at 1260.
[125] UNITED STATES ATTORNEYS' MANUAL, § 9-13.420 (2006). First, if possible, prosecutors should use alternative methods to acquire the needed documents. *Id.* Second, the prosecutor must obtain authorization from the U.S. Attorney or the Assistant Attorney General to conduct the search and must consult with the Criminal Division in Washington, D.C. *Id.* Third, procedures should be implemented to ensure that privileged materials are not improperly viewed, seized, or retained during the course of a search. *Id.*
[126] *Id.*
[127] *Id.*
[128] Amy Baron-Evans, *When the Government Seizes and Searches Your Client's Computer*, 27 CHAMPION 18, 22-23

the owner any documents it considers privileged.[129] Prosecutors use this method in an attempt to prevent the investigators and prosecutors assigned to the case from exposure to privileged material.[130] Though courts are split on whether they believe the taint team method is sufficient to protect the privilege,[131] the majority disfavors their use because "the privilege is invaded when any third party reviews privileged communications, the risk of leaks to the 'prosecution team' is unacceptably high, and placing such sensitive decisions in the hands of the government in a criminal case at least appears to be unfair."[132]

C. The Requirement of a Neutral Magistrate

In *Zolin*, the Supreme Court recognized that "disclosure of allegedly privileged materials to the district court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege," and courts have shown a preference for this method in attorney's office searches as a result.[133] The problem with requiring a magistrate to perform this task is the overwhelming volume of documents and the inordinate amount of time necessary for a judge or his staff to review them.[134] However, courts have solved this problem by requiring the appointment of a special master to review the documents at the prosecution's expense.[135]

(June 2003).

[129] *Id.*

[130] *Id.*

[131] *See*, *e.g.*, United States v. Hunter, 13 F. Supp. 2d 574, 583 n.2 (D. Vt. 1998) (approving of the prosecution's use of a taint team but indicating that document review by a special master or magistrate judge was preferable); United States v. Skeddle, 989 F. Supp. 890 (N.D. Ohio 1997). *Cf.* Klitzman, Klitzman & Gallagher v. Krut, 744 F.2d 955, 962 (3d Cir. 1984) (rejecting the permissibility of use of taint teams); *In re* the Seizure of All Funds on Deposit in Accounts in the Names of National Electronics, Inc., at JP Morgan Chase Bank, No. M-18-65(HB), 2005 WL 2174052, at *3 (S.D.N.Y. 2005); United States v. Stewart, No. 02 CR 396 JGK, 2002 WL 1300059, at *3 (S.D.N.Y. 2002); United States v. Neill, 952 F. Supp. 834, 840-41 (D.D.C. 1997); United States v. Abbell, 914 F. Supp. 519, 520 (S.D. Fla. 1995) (appointing special master at the government's expense to review the documents in lieu of government's "taint team"); *In re* Search Warrant for Law Offices, 153 F.R.D. 55 (S.D.N.Y. 1994).

[132] Baron-Evans, *supra* note 128, at 22. *See*, *e.g.*, United States v. Neill, 952 F. Supp. 834, 839-42 (D.D.C.1997) (use of a taint team "constitutes a *per se* intentional intrusion" upon the attorney-client privilege and creates a rebuttable presumption that the prosecution has viewed the privileged information).

[133] U.S. v. Zolin, 491 U.S. 554, 568 (1989). The Supreme Court's interpretation of the Fourth Amendment to require a neutral magistrate to issue the warrant also sheds light on the need for the same requirement in this situation. In stressing its strong preference for searches conducted pursuant to a warrant, the Supreme Court has described the process for obtaining a warrant as one that "'interposes an orderly procedure' involving 'judicial impartiality' whereby a 'neutral and detached magistrate' can make 'informed and deliberate determinations' on the issue of probable cause." 2 LAFAVE, *supra* note 19, at § 4.2 (quoting United States v. Ventresca, 380 U.S. 102 (1965); Aguilar v. Texas, 378 U.S. 108 (1964); United States v. Jeffers, 342 U.S. 48 (1951); Johnson v. United States, 333 U.S. 10 (1948)). While the case law in this area deals with who may issue a search warrant, the policy reasons behind the holdings shed light on how privilege issues should be handled. In *Coolidge v. New Hampshire*, the Court held that a search warrant issued by the attorney general assigned to the case was invalid because the attorney general "was not the neutral and detached magistrate required by the Constitution." 403 U.S. 443, 453 (1971).

[134] *See* Baron-Evans, *supra* note 128, at 22-23. In addition, computer searches require technical expertise not usually possessed by a judge or his staff. *Id.*

[135] Klitzman, Klitzman & Gallagher v. Krut, 744 F.2d 955, 959 (3d Cir. 1984).

Regardless of the burden, confining this task to the judicial branch seems to be the only way to execute a warrant for a broad document search of privileged material in an acceptable manner under *Andresen*. Even if the prosecution assigns a team to the review of seized materials that is not involved in the investigation, "once [privileged] information is revealed to the police, the privileges are lost, and the information cannot be erased from the minds of the police."[136] At that point, the clients' private papers have been unjustly reviewed by the prosecution in violation of their Fourth Amendment rights.[137] Even if not assigned permanently to the case, the "taint team" is part of the prosecution and law enforcement and trained as such.[138] Besides being neutral, judges are accustomed to and skilled at such a review, conducting them often in both civil and criminal cases. There is also no guarantee that the information will not be revealed to the investigators, even if inadvertently, and the clients could suffer further damage if the "taint team" discovers information that leads it to suspect unrelated criminal activity involving them.[139]

D. Should Congress Solve This Problem?

In 1978, the Supreme Court noted in *Zurcher v. Stanford Daily* that "the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure."[140] After the outcry resulting from the *Zurcher* decision, Congress did just that and enacted the Privacy Protection Act of 1980 in order to protect First Amendment rights.[141] The provisions of the Act "provide protections to citizens beyond those offered by the Constitution by requiring police use of subpoenas, rather than search warrants, to effect searches on the premises of non-suspects engaged in First Amendment activities."[142] It requires the Attorney General to issue guidelines for law enforcement procedures for the search of documentary materials of non-suspects to ensure respect of "personal privacy interests" of the possessor of the documents.[143] In addition to requiring that the "least intrusive method" be used, the Act also requires that the guidelines show "a recognition of special concern for privacy interests in cases in which a search or seizure for such documents would intrude upon a known confidential relationship such as that which may exist between clergyman and parishioner; *lawyer and client*; or doctor and patient."[144]

While this language seems to support the position that law enforcement should restrain from using search warrants on attorney's offices except under the most compelling circumstances, prosecutors have not interpreted it to mandate any specific procedures with

---

[136] O'Connor v. Johnson, 287 N.W.2d 400, 405 (Minn. 1979).
[137] *Id.*
[138] Baron-Evans, *supra* note 128, at 22-23.
[139] Courts have held that evidence of child pornography found inadvertently when searching for information on an unrelated crime can be used to prosecute the defendant. By analogy, one could conclude that courts may allow prosecution of a client unrelated to the crime being investigated should it uncover evidence suggesting another crime has been committed. *See*, *e.g.*, United States v. Runyan, 275 F.3d 449, 464-65 (5th Cir. 2001).
[140] 436 U.S. 547, 567 (1978).
[141] Sillin, *supra* note 37, at 437-38.
[142] *Id.*
[143] Privacy Protection Act, 42 U.S.C. § 2000aa-11(a) (2006).
[144] *Id.* (emphasis added).

regard to physical searches of law offices.[145] Further, it does not apply to criminal suspects, which would preclude application to attorneys being investigated for criminal activity.[146] That being said, decisions like *DeMassa* have interpreted the language to indicate the importance Congress places on the privilege.[147] Though the courts are still reluctant to create a Fourth Amendment right for clients of attorneys being investigated, Congress could enact legislation to make its apparent intent clear, that law enforcement must not invade the privacy rights of innocent clients except in the most compelling of circumstances, and to provide specific procedures that prosecution teams and judges must employ to issue and execute a warrant on an attorney's office.[148]

As *Zurcher* points out, congressional enactments do not necessarily make the added requirements for search warrants an application of the Fourth Amendment.[149] However, if courts are willing to grant the non-suspect third-party clients Fourth Amendment standing and then use the congressionally imposed requirements of an attorney's office search to determine reasonableness, it would allow for a practical standard upon which to base their assessment, to create uniform application of clients' rights under the attorney-client privilege, and to eliminate the wide assortment of procedures approved by various jurisdictions across the country.

V. CONCLUSION

So the question now becomes, if the courts are considering the claims of innocent clients as the victims of law office searches and assessing whether the procedures used were proper, why must they use a Fourth Amendment analysis to address their grievances? The answer lies in uniformity. Application of the rules surrounding third-party standing in Fourth Amendment cases is a consistent way for courts to determine which clients have the right to bring a claim, and the history, policy, and case law of the attorney-client privilege provides the legitimate expectation of privacy to establish that standing. When agreeing to hear the claims of clients, courts have applied a wide variety of standards regarding the permissible scope of the search and have spoken in terms of "preferable methods" instead of concrete requirements. Application of Fourth Amendment principles to ascertain constitutionally required minimization procedures would standardize the determination of when these clients should be granted relief. Perhaps more enticing, use of judicially and/or congressionally sanctioned procedures could drastically reduce the challenges to necessary searches of the records of attorneys suspected of a crime. To gain these benefits and to respect the consensus regarding the sanctity of the attorney-client privilege, courts must take the reasoning of available precedent one step further and recognize that the Fourth Amendment protects innocent clients whose privileged information is the subject of a search warrant.

---

[145] *See* Sillin, *supra* note 37, at 437-48.
[146] 42 U.S.C. § 2000aa-11(a)(3) (2006).
[147] DeMassa v. Nunez, 770 F.2d 1505, 1506 (9th Cir. 1985).
[148] *Id.*
[149] Zurcher v. Stanford Daily, 436 U.S. 547, 567 (1978).