

"CRIMINAL" LAWYERS:
THE USE OF ELECTRONIC SURVEILLANCE
AND SEARCH WARRANTS IN THE INVESTIGATION
AND PROSECUTION OF ATTORNEYS
SUSPECTED OF CRIMINAL WRONGDOING

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INTRODUCTION

A license to practice law is not a license to commit crime. When an attorney uses his position to aid an organized crime client in ongoing criminal activity or in running a criminal enterprise, few would disagree that government has the right, indeed the duty, to investigate and prosecute that person to at least the same extent they would his principal.¹ Law enforcement has the obligation not only to stop and punish the criminal conduct at issue, but also to protect the integrity of the criminal justice system itself.

Nonetheless, very real dangers may arise when law enforcement officers investigate attorneys believed to be using their status as attorneys to commit or aid criminal wrongdoing, particularly when the investigative techniques used include the execution of search and electronic surveillance warrants. An intrusion into legitimate attorney-client communications may occur. The knowledge that such investiga-

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While it is the policy of the *University of Pennsylvania Law Review* to use the feminine pronoun, it was the wish of the authors to use the masculine pronoun in this piece.

¹ The Report of the President's Commission on Organized Crime alleges that organized crime syndicates utilize "protectors"—which include attorneys, as well as judges, politicians, and financial advisors,—and various support systems to operate effectively in modern society. See PRESIDENT'S COMMISSION ON ORGANIZED CRIME, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE IMPACT: ORGANIZED CRIME TODAY 29-32 (1986) (hereinafter "REPORT OF THE PRESIDENT'S COMMISSION"). Indeed, according to the Report "[t]he success of organized crime is dependent upon this buffer [of protectors], which helps to protect the criminal group form [sic] both civil and criminal action." *Id.* at 31. The Report thus implies that eliminating the protectors and support systems will cause organized crime to crumble. While the correctness of this conclusion is highly questionable, and while it is too simplistic an answer to the complex problem that organized crime represents, vigorous prosecution of the "protectors," including the corrupt attorney, is clearly a reasonable component of a comprehensive strategy of organized crime control.

tions occur may produce a chilling effect on attorney-client relationships. An appearance of prosecutorial impropriety may arise that will cast doubts on the motives and integrity of the prosecutor. Finally, an adverse impact on the adversary process itself may result,² thereby ironically jeopardizing the existence of the very system that the investigators seek to protect.³

Ultimately then, the issue is not whether attorneys should ever be the subject of investigations, or whether their status as attorneys should be completely ignored. Instead, the question is whether reasonable and adequate safeguards can be designed and implemented to satisfy the competing social interests that inevitably arise when a licensee of the state is suspected of switching allegiance from the court to the mob. Every step in the investigation, from the initial decision to investigate to the decisions of whether and how to execute search warrants or conduct electronic surveillance, must be the product of principled judgments. Such judgments must be guided by the establishment of internal office controls and circumscribed by legally mandated procedures.

What follows is an analysis of the issues and the principles that should form the conceptual framework for the creation of these prosecutorial controls and procedures. Part I will identify the potential illicit roles corrupt attorneys may play in the organized crime area and will more fully explore the dangers and concerns that arise when law enforcement officers investigate such conduct. Part II then will examine the means by which unintended and deleterious consequences of such investigations may be reduced and controlled.

² The danger always exists that investigations of suspects who are attorneys will accidentally uncover legitimate attorney-client communications. Law enforcement officers, therefore, should exercise restraint and caution in any investigation that involves an attorney and take appropriate and adequate measures to ensure that intrusions into privileged matters will be minimized. But the likelihood that such intrusions might take place, along with the concomitant dangers to the integrity of our adversary system, increases when the suspect's status is integral to the crimes he is suspected of committing. This Article addresses the latter situation.

³ Even those who agree with the proposed strategy of the President's Commission on Organized Crime, which stresses the vigorous prosecution of attorneys who act as "protectors" for organized crime, must recognize that, as the Commission itself observed, "[s]pecial care must be taken at each stage of an investigation involving lawyers suspected of criminal activity" in order to reduce the "potential for abuse of such tactics as use of undercover agents and introduction of phony cases into the judicial system in order to detect corrupt lawyers and judges." REPORT OF THE PRESIDENT'S COMMISSION, *supra* note 1, at 272.

I. THE PROBLEM

A. *The Corrupt Attorney*

Although the vast majority of attorneys are legitimate, some actively use their practice for criminal ends.⁴ The President's Commission on Organized Crime, for instance, concluded that a small but important group of attorneys act as "protectors" for organized crime. Through illegal activities and the use and abuse of "the influence and prestige of their office,"⁵ these attorneys work to insulate members of their criminal group from effective civil and criminal prosecution.⁶ According to the Commission, this "protection" distinguishes organized crime from other types of crime, making it a "particular threat to society."⁷

In support of its proposition, the Commission sets forth in its final report five case studies of "Mob-Connected" lawyers.⁸ These studies seek to illustrate how the criminal services that such corrupt attorneys supply to organized crime tend to undermine the integrity of our criminal justice system. On behalf of clients who are the subject of prosecution, these attorneys have suborned perjury, helped intimidate witnesses, and corrupted public officials, including judges, prosecutors, and police officers.⁹ In carrying out these activities, they often have taken orders, not from their putative client-defendants, but from others farther up in the hierarchy of the criminal organization; indeed, as one of their obligations, they have attempted to identify defectors who seek to cooperate with the authorities.¹⁰

When not actually assisting in their clients' defenses, these attorneys also used their legal expertise to help clients launder the proceeds of their crimes,¹¹ counseled them on how best to conceal from the authorities ongoing or contemplated criminal ventures,¹² and allowed them to use their law offices as safe havens for illicit meetings to further those ventures. The offices are used on the assumption that law enforcement officials will be hesitant to subject the law office to physi-

⁴ See *id.* at 221.

⁵ *Id.* at 31.

⁶ See *id.* at 29-31.

⁷ *Id.* at 30.

⁸ See *id.* at 221-49.

⁹ See *id.* at 221-22, 224, 228-29, 242-48.

¹⁰ See *id.* at 224. One mob-connected attorney would go to court when a member of the criminal organization he was representing was arrested in order to see who was representing the accused. If it was Legal Aid or a public defender, "that would be a tip-off that [the accused] might be cooperating." *Id.* at 225 (quoting former attorney Martin Light).

¹¹ See *id.* at 232, 237.

¹² See *id.* at 239.

cal or electronic surveillance.¹³ Some attorneys have even engaged in actual criminal activity such as conveying "hit" orders¹⁴ and transporting drugs.¹⁵

Nor do corrupt attorneys function only in conjunction with traditional organized crime groups. Attorneys have used their positions to commit crimes, either for their own benefit or for that of their clients. For example, in *In re Sealed Case*¹⁶ attorneys for the Synanon Church engaged in a massive and systematic destruction and alteration of documents sought pursuant to civil discovery requests,¹⁷ and in *National City Trading Corp. v. United States*,¹⁸ a lawyer permitted a criminal business to operate out of his law office.¹⁹ These are, unfortunately, not isolated cases.²⁰

B. *No Prohibition to Investigating*

Attorneys who commit these crimes and abuse their positions should be investigated, prosecuted, and punished to whatever degree might be appropriate. Their status as attorneys does not exempt them from the responsibilities and duties of all other citizens, nor should it protect them from the scrutiny of law enforcement officers.

Courts consistently have held that, when the attorney himself is the target of the investigation and is suspected of criminal wrongdoing, intrusive investigative techniques may be employed, albeit with special

¹³ See *id.* at 240.

¹⁴ See *id.* at 246-47.

¹⁵ See *id.* at 222.

¹⁶ 754 F.2d 395 (D.C. Cir. 1985).

¹⁷ See *id.* at 397.

¹⁸ 635 F.2d 1020 (2d Cir. 1980).

¹⁹ See *id.* at 1022.

²⁰ See, e.g., *Andresen v. Maryland*, 427 U.S. 463, 467 (1976) (attorney charged with crime of false pretenses and with fraudulent misappropriation by a fiduciary); *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 957 (3d Cir. 1984) (attorney allegedly conspired to use the United States mail to defraud insurance companies by submitting fraudulent medical reports and inflated medical bills in personal injury actions); *In re John Doe Corp. v. United States*, 675 F.2d 482, 484 (2d Cir. 1982) (corporate counsel allegedly attempted to bribe an administrative official); *In re Doe*, 662 F.2d 1073, 1076 (4th Cir. 1981), *cert. denied* 455 U.S. 1000 (1982) (attorney allegedly advised client to lie during trial and to bribe witnesses and had attempted to procure other false testimony); *United States v. Loftin*, 507 F. Supp. 108, 110 (S.D.N.Y. 1981) (defendant's attorney allegedly involved in defendant's drug trafficking enterprise); *Law Offices of Bernard D. Morley v. MacFarlane*, 647 P.2d 1215, 1217-18 (Colo. 1982) (attorney allegedly involved in forming sham corporations to defraud the liquor licensing authority); *People v. Sanders*, 56 N.Y.2d 51, 63, 436 N.E.2d 480, 485, 451 N.Y.S.2d 30, 35 (1982) (attorney allegedly influenced the outcome of a case for profit); *People v. Salko*, 47 N.Y.2d 230, 236, 391 N.E.2d 976, 980, 417 N.Y.S.2d 894, 897 (1979) (attorney charged with crimes of bribery and bribing a witness).

care.²¹ Indeed, "the fact that a person is an attorney does not render privileged everything he says or does, for or with a client," and therefore he may be subject to court authorized electronic surveillance.²² Similarly, there is nothing per se unreasonable about searching a law office, "if there is reasonable cause to believe that the specific items sought are located on the property to be searched."²³

1. Privileges

The protections afforded by the attorney-client privilege and the attorney work-product doctrine²⁴ impose the main restraint on prosecu-

²¹ See *Andresen*, 427 U.S. at 483-84 (upholding seizure of attorney's business records); *Klitzman*, 744 F.2d at 959 (search of law office not per se unreasonable); *In re Application of the United States for an Order*, 723 F.2d 1022, 1026 (1st Cir. 1983) (allowing electronic surveillance of attorney's law offices during a grand jury investigation); *National City Trading Corp.*, 635 F.2d at 1026 (allowing search because probable cause existed to believe attorney was violating the law).

When the attorney is not the target of the investigation, however, some courts impose safeguards. See, e.g., *Deukmejian v. Superior Court*, 103 Cal. App. 3d 253, 260-61, 162 Cal. Rptr. 857, 862-63 (Cal. Ct. App. 1980) (leaving open the question of investigating documents of attorneys who have not been charged); *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) (holding that the search of an attorney's office is unreasonable if she is not suspected of criminal activity and presents no threat of destroying documents).

Moreover, various statutes and regulations stringently protect the attorney who is not charged with wrongdoing. See, e.g., Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (codified at 42 U.S.C. § 2000aa(a) (1982)) (providing that it is unlawful to search or seize work-product materials unless "there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate" or "there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being"); CAL. PENAL CODE § 1524(c) & (f) (West 1982) (providing that a search warrant for the work-product of any attorney suspected or not charged is unlawful unless certain procedures are followed by investigators); OR. REV. STAT. § 9.695(1) (2) (1987) ("[T]he files, papers, effects or work premises of a lawyer relating to the provision of legal service by the lawyer shall not be subject to search or seizure by any law enforcement officer, either by search warrant or otherwise,]" unless the lawyer has committed or is suspected of committing a crime.); R.I. GEN. LAWS § 12-5.1-4(c) (1956) (prohibiting investigators from intercepting lawyers' wire and oral communications unless investigators demonstrate a "special need"); cf. Department of Justice Guidelines on Methods of Obtaining Documentary Materials Held by Third Parties, 28 C.F.R. § 59.1 (b) (1987) (generally advocating use of a subpoena, administrative summons or, government request rather than a search warrant to investigate a disinterested third party).

²² *Loften*, 507 F. Supp. at 112.

²³ *National City Trading Corp.*, 635 F.2d at 1026; cf. *Zurcher v. Stanford Daily*, 436 U.S. 547, 553-54 (1978) (applying same standard to searches of property held by third parties not implicated in criminal activity).

²⁴ The work-product doctrine, while not a "privilege" in the evidentiary sense, is nonetheless a "qualified privilege." Compare *Hickman v. Taylor*, 329 U.S. 495, 509-510 (1947) (subject matter of work-product was not "privileged or irrelevant, as those concepts are used in [the Federal Rules of Civil Procedure]") with *United States v.*

tors seeking to investigate attorneys. Because this privilege and doctrine help ensure the proper functioning of our legal system and the adversary process,²⁵ courts have given them unique protection.²⁶ They are not, however, absolute, and the courts have held that neither the attorney-client privilege nor the work-product doctrine applies when either is used as a "cloak" for illegal or fraudulent behavior.²⁷

The attorney-client privilege is the oldest confidential communications privilege.²⁸ It protects communications, written or oral, between a client and attorney made in confidence for the purpose of obtaining legal advice.²⁹ The purpose of the privilege is to encourage full disclosure and "full and frank communication between attorneys and their clients."³⁰ The privilege is based on the premise that the advocate or counselor must be fully informed by the client if the "public ends" served by "sound legal advice or advocacy" are to be met.³¹ Thus, the privilege promotes the "broader public interests in the observance of law and administration of justice."³²

Nobles, 422 U.S. 225, 237-38 (1975) (work-product doctrine amounts to a "qualified privilege"). See generally C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 82, at 552-54 (4th ed. 1983) (describing a lawyer's work-product as having "a qualified immunity from discovery").

²⁵ See *In re* Antitrust Grand Jury, 805 F.2d 155, 164 (6th Cir. 1986); *In re* Sealed Case, 676 F.2d 793, 808-809 (D.C. Cir. 1982); *United States v. Hodge & Zweig*, 548 F.2d 1347, 1355 (9th Cir. 1977); 4 J. MOORE, J. LUCAS & G. GROTHEER, *FEDERAL PRACTICE* § 26.60[2] (2d ed. 1987) [hereinafter J. MOORE].

²⁶ See *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 960 (3d Cir. 1984); see also 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2017 (1970) (discussing protection of the attorney-client privilege); Bloom, *The Law Office Search: An Emerging Problem and Some Suggested Solutions*, 69 *Geo. L.J.* 1, 12-18 (1980) (discussing importance of attorney-client privilege and work-product doctrine).

²⁷ See, e.g., *Clark v. United States*, 289 U.S. 1, 15 (1933) ("The privilege takes flight if the relation is abused."); *In re* Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983, 731 F.2d 1032, 1038 (2d Cir. 1984) ("[A]dvice in furtherance of [improper] goals is socially perverse, and . . . not worthy of protection." (citations omitted)); *In re* Application of the United States for an Order, 723 F.2d 1022, 1026 (1st Cir. 1983) ("[C]ommunications between attorney and client which concern illegal activities in progress are not protected by the [attorney-client] privilege." (citation omitted)); *In re* International Systems & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982) (crime-fraud exemption to privilege firmly entrenched in common law); *In re* John Doe Corp. v. United States, 675 F.2d 482, 491-92 (2d Cir. 1982) (same).

²⁸ See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. WIGMORE, *EVIDENCE IN TRIAL AT COMMON LAW* § 2290 (J. McNaughton rev. 1961)).

²⁹ See *Klitzman*, 744 F.2d at 960; 8 J. WIGMORE, *supra* note 28, § 2291.

³⁰ *Upjohn*, 449 U.S. at 389.

³¹ *Id.*; see also *Trammel v. United States*, 445 U.S. 40, 51 (1980) (attorney-client privilege rooted in need for confidence and trust in order to fulfill "professional mission"); *Fisher v. United States*, 425 U.S. 391, 403 (1976) (purpose of privilege is to promote full disclosure). See generally Bloom, *supra* note 26, at 12-14 (discussing function of attorney-client privilege).

³² *Upjohn*, 449 U.S. at 389.

The work-product doctrine, although "closely related" to the attorney-client privilege,³³ is in fact "distinct from and broader than the attorney-client privilege."³⁴ It protects any material, confidential or not, prepared by or for the attorney in anticipation of litigation. It upholds the integrity of the adversary system by ensuring that lawyers can "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."³⁵ The work-product doctrine is premised on the assumption that this type of privacy is "the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests."³⁶ The doctrine is equally applicable in criminal and civil cases,³⁷ but it is not absolute: a showing of "substantial need" for otherwise privileged materials can defeat an assertion of this doctrine's protection.³⁸

³³ *In re Sealed Case*, 676 F.2d 793, 808 (D.C. Cir. 1982).

³⁴ *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975) (citing *Hickman v. Taylor*, 329 U.S. 495, 508 (1947)).

³⁵ *Hickman*, 329 U.S. at 510-11; see *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986); 4 J. MOORE, *supra* note 25, at § 26.64[3.-2].

³⁶ *Hickman*, 329 U.S. at 511. For a thorough discussion of *Hickman* and its impact on discovery, see C. WRIGHT, *supra* note 24, § 82, at 551-560.

³⁷ See, e.g., *Nobles*, 422 U.S. at 236 (Court agreed that work-product doctrine applies to criminal as well as civil cases, but found that it was inappropriate to apply it to the criminal case in this instance); *Sealed Case*, 676 F.2d at 810 (privilege for work-product applicable to criminal discovery); *In re Doe*, 662 F.2d 1073, 1078 (4th Cir. 1981) (work-product principle applies to civil trials, criminal trials, and grand jury proceedings).

³⁸ The cases have distinguished between "opinion" work-product and mere factual work-product and have granted to the former greater, and at times near absolute, protection. The two-tiered model of protection arises from a desire to balance the liberal rules of discovery against the need for confidentiality of attorneys' work. See *Hickman*, 329 U.S. at 510-12; *Antitrust Grand Jury*, 805 F.2d at 163-64; *Sealed Case*, 676 F.2d at 809-810; *Doe*, 662 F.2d at 1078. While some courts will only rarely pierce opinion work-product protection, other courts seem more willing to limit opinion work-product protection in certain circumstances. Compare *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977) (opinion work-product discoverable only in "very rare and extraordinary circumstances") and *In re Grand Jury Investigation*, 412 F. Supp. 943, 949 (E.D. Pa. 1976) (holding that notes on a telephone conversation "are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure") with *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981) (although holding in this instance that work-product based on oral statements was protected, the Court noted that it was "not prepared at this juncture to say that such material is always protected by the work product rule.") and *In re Special Sept. 1978 Grand Jury II*, 640 F.2d 49, 52 (7th Cir. 1980) (*prima facie* showing of fraud precludes invocation of the work-product doctrine) and *In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979) (opinion work-product not absolutely protected but subject to compelled disclosure for good cause).

Courts disagree, however, on whether some heightened protection should apply to the opinion work-product of an attorney acting with criminal intent. Compare *Doe*, 662 F.2d at 1080 ("not only must the government make a *prima facie* showing of fraud, but must show a greater need for the opinion work product material than was necessary in

2. The Crime or Fraud Exception

The attorney-client privilege and the attorney work-product doctrine serve to "encourage the proper functioning of the adversary system."³⁹ They do not further that end, however, when the attorney communicates with his client and generates materials for the purpose of aiding criminal activity.⁴⁰ When a client retains an attorney for illegal ends, "the broader public interest in the administration of justice is being frustrated, not promoted."⁴¹ Indeed, if the goal of an attorney-client relationship is the commission of a crime, that relationship is fundamentally inconsistent with our system of justice.⁴²

Recognizing this problem, courts have created the "crime or fraud exceptions" to the attorney-client privilege and work-product doctrine.⁴³ The exceptions are warranted because, as the Second Circuit explained, "[w]hereas confidentiality of communications and work product facilitates the rendering of sound legal advice, advice in furtherance of a fraudulent or unlawful goal cannot be considered 'sound.' Rather advice in furtherance of such goals is *socially perverse*, and the client's communications seeking such advice are not worthy of protection."⁴⁴ In short, "no privilege applies 'where the relation giving birth

order to obtain the fact work product material") *with Sealed Case*, 676 F.2d at 812 n.74 ("[o]nce a sufficient showing of crime or fraud has been made, the privilege [of the work-product doctrine] vanishes as to all material related to the ongoing violation").

³⁹ *Antitrust Grand Jury*, 805 F.2d at 164.

⁴⁰ *See id.*

⁴¹ *United States v. Dyer*, 722 F.2d 174, 177 (5th Cir. 1983).

⁴² While legal advice about past crimes remains privileged, advice that furthers either ongoing or future crimes is unprotected. *See, e.g.*, *United States v. Horvath*, 731 F.2d 557, 562 (8th Cir. 1984) ("attorney-client communications lose their privileged character when the lawyer is consulted to further a continuing or contemplated criminal or fraudulent scheme, not solely with respect to past wrongdoing"); *Special Sept. 1978 Grand Jury (II)*, 640 F.2d at 59 (same); *In re Berkley & Co.*, 629 F.2d 548, 553 (8th Cir. 1980) (same); *Murphy*, 560 F.2d at 337 (same); *Grieco v. Meachum*, 533 F.2d 713, 718 n.4 (1st Cir.) (same), *cert. denied sub nom. Cassesso v. Meachum*, 429 U.S. 858 (1976); *United States v. King*, 536 F. Supp. 253, 261 (C.D. Cal. 1982) (same).

⁴³ The crime-fraud exception applies to attorney-client communications. *See, e.g.*, *Clark v. United States*, 289 U.S. 1, 15 (1933) (attorney-client privilege gives way if the government makes a prima facie showing that the client consults the attorney for advice that will serve him in commission of a continuing or future crime or fraud); *Dyer*, 722 F.2d at 177 (same); *United States v. Hodge & Zweig*, 548 F.2d 1347, 1354 (9th Cir. 1977) (same); *United States v. Friedman*, 445 F.2d 1076, 1086 (9th Cir. 1971) (same). It also applies to an attorney's work-product. *See, e.g.*, *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982) (work-product immunity gives way if there is probable cause to believe that product was prepared as part of a scheme of ongoing criminality); *Special Sept. 1978 Grand Jury (II)*, 640 F.2d at 63 (same); *In re Grand Jury Proceedings*, 604 F.2d 798, 802-803 (3d Cir. 1979) (same). *See generally* Bloom, *supra* note 26, at 14-15 (discussing the crime-fraud exception).

⁴⁴ *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983* (Marc Rich

to it has been fraudulently begun or fraudulently continued.'"⁴⁵

C. *Dangers and Concerns*

Despite the nationwide alarm over subpoenas directed at attorneys and search warrants granting access to their law offices,⁴⁶ much of the concern is dispelled when the attorney is the target of the investigation or is suspected of criminal wrongdoing.⁴⁷ Real dangers remain, however, even when prosecutors pursue allegedly corrupt attorneys. An attorney subject to an investigation may in fact be innocent of any criminal wrongdoing. Law enforcement agencies are far from infallible. Indeed, the probable cause standard normally associated with the authority to search and seize allows for more than the possibility of error.⁴⁸

Alternatively, a corrupt attorney under investigation may give legitimate privileged legal advice to either organized crime clients or to third parties, innocent or otherwise. Thus, although the law does not protect conversations with clients and work-product in furtherance of ongoing crimes, it does protect the rest, to whatever extent it exists. As a California appellate court has explained, "[a]n attorney suspected of criminal activity should have the same concerns about the confidentiality of files containing privileged matter as an innocent third party attorney who allegedly possesses and controls files containing evidence of criminal conduct."⁴⁹

Intrusions into privileged matters may occur in a number of ways, from accidental and unintentional to reckless and intentional. Officers executing a search warrant may examine or seize privileged documents before the privileged nature of the document is ascertained.⁵⁰ Similarly,

& Co. v. United States), 731 F.2d 1032, 1038 (2d Cir. 1984) (emphasis added).

⁴⁵ *Sealed Case*, 676 F.2d at 812 (quoting *Clark v. United States*, 289 U.S. 1, 14 (1933)); see also *Hodge & Zweig*, 548 F.2d at 1355 ("[A] *quid pro quo* is exacted for the attorney-client confidence: the client must not abuse the confidential relation by using it to further a fraudulent or criminal scheme . . .").

⁴⁶ See Bloom, *supra* note 26, at 18-25.

⁴⁷ See *United States v. Giordano*, 416 U.S. 505, 515 (1974); *United States v. Martinez*, 588 F.2d 1227, 1231-32 (9th Cir. 1978); *United States v. Costello*, 610 F. Supp. 1450, 1464-68 (N.D. Ill. 1985), *aff'd without opinion sub nom.* *United States v. Olson*, 830 F.2d 195 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 708 (1988).

⁴⁸ See, e.g., *Brinegar v. United States*, 338 U.S. 160, 176 (1949) (probable cause standard contemplates mistakes by police officers, but "the mistakes must be those of reasonable men").

⁴⁹ *Deukmejian v. Superior Court*, 103 Cal. App. 3d 253, 260, 162 Cal. Rptr. 857, 862 (Cal. Ct. App. 1980).

⁵⁰ See *United States v. Abrams*, 615 F.2d 541, 548 (1st Cir. 1980) (Campbell, J., concurring) (Some files may contain "a jumble of 'innocent' as well as 'guilty' materials."); *O'Connor v. Johnson*, 287 N.W.2d 400, 404 (Minn. 1979) (A search of law

officers monitoring a wiretap or "bug" may overhear privileged conversations before they realize that the conversation is in fact privileged.⁵¹ These unintentional intrusions may be the result of the conceptual distinction between search and seizure or the inexact nature of the process of minimization.⁵² They also may be the consequence of sloppy minimization procedures, the lack of other adequate safeguards in the execution of the search, inadequate training of the officers executing the search or monitoring the electronic surveillance, or a search that in its very conception was overbroad.⁵³

On the other hand, unwarranted searches may occur because the prosecutor is insensitive to the sanctity of the attorney-client relationship, or because the prosecutor fails to comprehend either the complexity of the issues involved or the ramifications of his actions. In some cases, overreaching may be the product of a vindictiveness or the intentional abuse of the powers of the prosecutor's office. A prosecutor (hopefully a rare one) may target a defense attorney whose vigorous defense of a client in the past embarrassed the prosecutor, or resulted in an undesirable appellate ruling.

Even the appearance of such impropriety can injure the prosecutor's reputation and the apparent fairness of the legal system. Suggestions of overreaching investigations will cast doubt on a prosecutor's judgment, motives and integrity. A prosecutor's ability to carry out effectively the duties and responsibilities of his office depends in large part on his reputation within the legal profession and with the judges before whom he must regularly appear. When that reputation is questioned, the ability to function with the necessary degree of trust or confidence from the courts becomes impaired.⁵⁴ In addition, the confidence

office "of necessity involves a general and exploratory search of all of the attorney's files.").

⁵¹ Title III of the Omnibus Crime Control and Safe Streets Act of 1968 recognizes that *some* privileged matter will be overheard. See 18 U.S.C. § 2517(4) (1982 & Supp. IV 1986) (privileged information that is intercepted remains privileged).

⁵² Minimization is the procedure by which the warrant is executed so as to minimize intrusions into protected materials. See *infra* notes 103-110 and accompanying text.

⁵³ Compare *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 958, 960 (3d Cir. 1984) (warrant overbroad in that it allowed for a search of attorney's files, financial records, file lists, and appointment books with no specifications as to relevant issues or individuals involved) and *Abrams*, 615 F.2d at 544-45 (warrant to search doctor's office "amorphously worded so as to result in an indiscriminate seizure of relevant and nonrelevant material"; search could have been more specific) with *Andresen v. Maryland*, 427 U.S. 463, 484 (1976) (search warrant covered only documents pertaining to parcel of land at issue; all other documents suppressed or returned to law offices) and *National City Trading Corp. v. United States*, 635 F.2d 1020, 1022-24 (2d Cir. 1980) (detailed warrant and memorandum given to agents who searched attorney's office).

⁵⁴ Arguably, the experience of Maurice H. Nadjari, Special State Prosecutor for

of the public in both the fair operation of the office and the adversary system is also shaken.

Possibly the most damaging and immediate effect of an intrusion into privileged materials—or of the fear that such an intrusion may occur—is the potential chilling effect it can cast on the attorney-client relationship and the adversary system. Discussions between an attorney and client may become less than frank and open if either the attorney or client fears that their confidential communications may be subject to future disclosure. If a client believes that “damaging information” will be more easily obtained from his attorney than from himself, then, in the words of the Supreme Court, “the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.”⁵⁵

There is a similar potential chilling effect on an attorney’s generation of work-product in connection with the representation of clients. An attorney litigating against the government, or dealing with clients who might be subject to criminal prosecution, may become reluctant to commit legal and factual analysis to writing.⁵⁶ As a result, “much of what is now put down in writing would remain unwritten. . . . The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.”⁵⁷

Intrusions into the attorney-client relationship may thus weaken the adversary system and even result in a violation of a client’s sixth amendment right to counsel.⁵⁸

II. SAFEGUARDS IN AN INVESTIGATION

The federal eavesdropping statute may provide guidance in devel-

the New York City Criminal Justice System from 1972-76, effectively illustrates these assertions. Following a number of early successes, Nadjari’s office was accused of being overzealous and insensitive to defendants’ constitutional rights, which resulted in a stunning string of dismissals, convictions overturned on appeal, and, ultimately, the end of Nadjari’s otherwise respected prosecutorial career—one that had spanned over two decades.

⁵⁵ Fisher v. United States, 425 U.S. 391, 403 (1976).

⁵⁶ See Bloom, *supra* note 26, at 22.

⁵⁷ Hickman v. Taylor, 329 U.S. 495, 511 (1947).

⁵⁸ See Hoffa v. United States, 385 U.S. 293, 306-307 (1966) (discussing Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951) and Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953)); Bloom, *supra* note 26, at 16-18; *cf.* Weatherford v. Bursey, 429 U.S. 545, 555-59 (1977) (using a sixth amendment right to counsel analysis to reject a per se rule that would forbid an undercover agent from meeting with defendant’s counsel); O’Brien v. United States, 386 U.S. 345, 345 (1967) (per curiam) (conviction overturned because wiretaps included conversations between attorney and client); Black v. United States, 385 U.S. 26, 29 (1966) (per curiam) (defendant had right to new trial to protect himself from “otherwise inadmissible” evidence obtained through wiretap).

oping policies and procedures that will allow for effective investigation and prosecution of corrupt attorneys, while minimizing the dangers and risks outlined above.⁵⁹ Indeed, "minimization" — a practice by which officers executing eavesdropping warrants seek to avoid the interception of non-authorized conversations — has become one of the central and best known features of the statute. The usefulness of the analogy should not be surprising: in formulating the conceptual framework for the eavesdropping statute, Congress dealt with similar issues. On the one hand, it recognized that electronic surveillance was an "indispensable aid" to the successful investigation and prosecution of organized crime.⁶⁰ On the other hand, such surveillance not only constituted a gross invasion of privacy⁶¹ but also had the potential to infringe upon basic constitutional freedom.⁶² Congress therefore authorized use of such an investigative technique only when the process of authorization and execution contained safeguards that would reduce the likelihood of undesirable governmental intrusions.⁶³ The eavesdropping statute thus provides that: (1) a high level, identifiable public official who would be responsible and accountable for the eavesdropping undertaken make the decision to apply for court-authorized eavesdropping;⁶⁴ (2) the applicant for a warrant make detailed, particularized showings in support of the warrant application;⁶⁵ (3) the applicant exhaust normal investigative procedures;⁶⁶ and (4) the surveillance minimize the interception of communications not otherwise subject to interception.⁶⁷

Analogous safeguards can and should be established for investiga-

⁵⁹ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 211 (1968) (codified as amended at 18 U.S.C. §§ 2510-2520 (1982 & Supp. IV 1986)).

⁶⁰ See Pub. L. No. 90-351, § 801(c), 82 Stat. at 211 (codified at 18 U.S.C. § 2510) (1968).

⁶¹ U.S. CONST. amend. IV.

⁶² U.S. CONST. amend. I; H. SCHWARTZ, TAPS, BUGS, AND FOOLING THE PEOPLE 6 (1977) ("Electronic surveillance. . . strikes deeply and. . . often quite deliberately at basic First Amendment rights to dissent and to associate.").

⁶³ See S. REP. NO. 1097, 90th Cong., 2d. Sess. 10-11, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2113, 2153 [hereinafter SENATE REPORT]; see also *Berger v. New York*, 388 U.S. 41, 63-64 (1967) (striking down a New York eavesdropping statute as too broad and without adequate safeguards, in violation of the fourth and fourteenth amendments).

⁶⁴ See 18 U.S.C. § 2516(1), (2) (1982 & Supp. IV 1986); SENATE REPORT, *supra* note 63, at 96-97, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2185.

⁶⁵ See 18 U.S.C. § 2518(1)(b) (1982 & Supp. IV 1986); SENATE REPORT, *supra* note 63 at 101, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2189-90.

⁶⁶ See 18 U.S.C. § 2518(1)(c) (1982); SENATE REPORT, *supra* note 63 at 101, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2190.

⁶⁷ See 18 U.S.C. § 2518(5) (1982 & Supp. IV 1986); SENATE REPORT, *supra* note 63 at 103, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2192.

tions of attorneys suspected of criminal wrongdoing. At the very least, the policies and concerns underlying the federal eavesdropping statute should serve as guideposts in formulating the safeguards that are ultimately instituted.

A. *Centralize the Decision to Investigate*

First, any decision to initiate an investigation into the suspected criminal activities of an attorney should be subject to a formal, centralized review by a high level official within the prosecutor's office. As with eavesdropping, such centralization of responsibility arguably is the most important safeguard against abuse, as it ensures that "[s]hould abuses occur, the lines of responsibility lead to an identifiable person."⁶⁸ Although the Final Report of the President's Commission on Organized Crime urged vigorous investigation and prosecution of corrupt attorneys,⁶⁹ it also recognized that the "[i]nitial authorization of an investigation should be subject to review at a high level of official responsibility."⁷⁰ Centralized oversight not only promotes accountability, but also helps to avoid the appearance of impropriety or vindictiveness by prosecutors. Mandatory review procedures force a prosecutor to stop, consider, and discuss with colleagues and superiors the implications of investigating an attorney suspected of criminal wrongdoing. Such procedures help impress upon the collective conscience of the prosecutors' office the sensitivity of investigating attorneys and potential adversaries.

In addition, as part of the review procedure, the prosecutor's office should authorize an investigation only if there are specific and objective indicia of attorney misconduct. Any decision to investigate an attorney must be based on the recognition that society has given the attorney-client relationship a special status and protection.⁷¹ While rumor or unsupported suspicion of wrongdoing might generally be sufficient to open a preliminary inquiry, more should be required when an attorney is the proposed target. Although there need not be a showing amounting to probable cause that the attorney is engaged in other than lawful behavior, there should be "reasonable suspicion," which is more than

⁶⁸ SENATE REPORT, *supra* note 63, at 96-97, *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS at 2185.

⁶⁹ "[L]aw enforcement authorities should initiate investigations of attorneys involved in organized crime with the same deliberation and commitment shown with any other person suspected of serious wrongdoing." REPORT OF THE PRESIDENT'S COMMISSION, *supra* note 1, at 258.

⁷⁰ *Id.* at 272.

⁷¹ See *supra* notes 24-32 and accompanying text.

an "inchoate and unparticularized suspicion or 'hunch.'" ⁷² One commentator has defined such "reasonable suspicion" as "reasonable grounds to suspect criminal conduct or arguably, a reasonable possibility [thereof]." ⁷³ In whatever manner the standard is articulated, ⁷⁴ prosecutors should require a special showing of potential wrongdoing when the subject of their investigation is an attorney.

This is not to say that attorneys should be given preferential treatment by prosecutors. Indeed, given the need to ensure the integrity of the profession, the opposite might well be true. What is critical, however, is that law enforcement officers recognize the almost inevitable risks attending such investigations and the need to proceed in a cautious and thoughtful manner. ⁷⁵

B. *Exhaust Less Intrusive Techniques First*

Next, the determination of how to conduct the authorized investigation requires the development of an investigative plan. ⁷⁶ To the extent possible, this plan should provide for the use of investigative techniques that are least likely to intrude on privileged matters. ⁷⁷ For example, while the use of pen registers might reveal the identity of an attorney's clients, that information normally is not privileged; ⁷⁸ therefore, their use results in little, if any, intrusion into any privacy inter-

⁷² Terry v. Ohio, 392 U.S. 1, 27 (1968).

⁷³ Clermont, *Procedure's Magical Number Three: Physiological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1124 (1987).

⁷⁴ It has been suggested that there should be a sliding scale of suspicion, with levels of suspicion greater than reasonable suspicion, but less than probable cause. Whatever superficial appeal this suggestion might have, it has been rejected by the Supreme Court. United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985); see generally Clermont, *supra* note 73, at 1124.

⁷⁵ Cf. 18 U.S.C. § 2518 (1982 & Supp. IV 1986) (setting out the comprehensive procedure to be followed, in general, for interception of wire, oral, and electronic communications in order to insure such methods are used only when necessary, and in the least intrusive means possible).

⁷⁶ Such a plan, which law enforcement officers should prepare for any complex investigation, should set forth the specific tactical measures to be implemented in a general, yet realistic, manner that takes into consideration the goals to be attained. The plan should discuss alternatives, identify legal issues that might arise during the course of the investigation, and provide for periodic modification of the plan as circumstances dictate. See G. Blakey, R. Goldstock & C. Rogovin, *Rackets Bureaus: Investigation and Prosecution of Organized Crime 49-51* (Cornell Institute on Organized Crime 1978).

⁷⁷ See *In re* Witness-Attorney Before Grand Jury No. 83-1, 613 F. Supp. 394, 398 (S.D. Fla. 1984).

⁷⁸ See *In re* Grand Jury Proceedings, 680 F.2d 1026, 1027 (5th Cir. Unit A July 1982); United States v. Hodge & Zweig, 548 F.2d 1347, 1353 (9th Cir. 1977); *In re* Grand Jury Investigation, 640 F. Supp. 1047, 1048-49 (S.D. W. Va. 1986); *In re* Witness Attorney, 613 F. Supp. at 398-99.

est.⁷⁹ When, however, more intrusive investigative methods, such as search warrants and eavesdropping are required,⁸⁰ such techniques must be carefully analyzed in advance and incorporated into the plan.⁸¹

Federal law requires that, before a judge issues an eavesdropping warrant, the application for that warrant demonstrate that prosecutors have tried "normal" investigative techniques or found such techniques to be too dangerous, or futile.⁸² Although eavesdropping need not be an absolute "last resort"—with all other available investigative techniques having been employed, no matter how futile, counterproductive, or dangerous—law enforcement officers must not routinely use eavesdropping as an initial step.⁸³ While it has become *de rigueur* and perhaps self-defeating to add this exhaustion requirement to other investigative techniques, such as video surveillance,⁸⁴ prosecutors investigating attorneys should attempt to apply the spirit of this requirement throughout their investigations. In addition, a judge should require that, within applications for search warrants targeting law offices or professional papers, and applications seeking authorization for the electronic surveillance of

⁷⁹ See *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979) (installation of a pen register to record telephone numbers dialed did not violate the fourth amendment, since the phone numbers were voluntarily conveyed to the telephone company when the phone was used, thus defeating any legitimate expectation of privacy.).

⁸⁰ The use of these techniques often cannot be avoided, despite their inherent dangers. Indeed, their use is a necessity in many cases, for it is through their use that law enforcement officers are able to penetrate the secret operations of organized crime. See Pub. L. No. 90-351, § 801(c), 82 Stat. 211 (1968); SENATE REPORT, *supra* note 63, at 89, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS at 2177. For this very reason the Final Report of the President's Commission recommends the aggressive use of electronic surveillance against mob-connected attorneys. See REPORT OF THE PRESIDENT'S COMMISSION, *supra* note 1, at 259. As the report points out, the wrongdoing of these attorneys is "surreptitious." *Id.* at 258. To a great degree, the lawyers rely on the cloak of privacy provided by their status as attorneys and by the attorney-client relationship in an attempt to thwart law enforcement efforts. See *id.* at 272. By penetrating that cloak, however, electronic surveillance, and to a lesser degree the use of search warrants, takes "away from organized crime the safe havens of the lawyer's office and . . . telephone." *Id.* at 274. Without such techniques, as the Commission notes, "the attorney-client privilege would be an impenetrable shield protecting lawyers who engage in [a] wide variety of criminal actions." *Id.* at 272.

⁸¹ This should include not only careful and demanding review by any judge who issues a search warrant or eavesdropping warrant, but also a careful and demanding review within the prosecutor's office in preparing the applications for such warrants. See REPORT OF THE PRESIDENT'S COMMISSION, *supra* note 1, at 274-75.

⁸² See 18 U.S.C. § 2518(1)(c) (1982).

⁸³ See 18 U.S.C. § 2518(1)(c), (3)(c) (1982 & Supp. IV 1986); *United States v. Giordano*, 416 U.S. 505, 515 (1974); *United States v. Martinez*, 588 F.2d 1227, 1231-32 (9th Cir. 1978); *United States v. Costello*, 610 F.Supp. 1450, 1464-68 (N.D. Ill. 1985), *aff'd without opinion sub nom.* *United States v. Olson*, 830 F.2d 195 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 708 (1988).

⁸⁴ See *United States v. Cuevas-Sanchez*, 821 F.2d 248, 251 (5th Cir. 1987) ("The courts that have addressed this issue analyze a request for video surveillance under the statute permitting electronic aural surveillance . . .").

law offices, prosecutors show that they have used, or have reasonably rejected as futile or counterproductive, other investigative techniques or less intrusive searches or eavesdropping.

The risk and potential dangers of an unjustified intrusion into privileged matters will increase as the focus of the investigation moves closer to the attorney's law office. Indeed, within that office there presumably will be the greatest concentration of potentially privileged matters. For instance, if an investigation begins with search warrants directed against, or electronic surveillance of, a non-attorney target, the possibility of uncovering privileged matters exists, but is not particularly great. Obviously, out of all the monitored conversations involving the non-attorney target, only those between the target and attorney involve the risk of investigators overhearing privileged matters. Their conversations may range from discussions about purely business matters or about ongoing criminal ventures, neither of which would be privileged, to legitimate legal advice about a pending charge against the client. Normal minimization rules can easily ensure that interceptions of privileged conversations are infrequent.

The risk of intrusions into privileged materials increases, however, and the task of minimization becomes more difficult, if prosecutors tap the non-office or home telephone of the attorney. Potentially, a far larger number of conversations over that telephone may concern privileged matters. If the investigation then moves to the stage where the attorney's law office is searched, or his office phones are tapped, the potential for intercepting privileged matters increases even more—assuming of course that the attorney's practice, or that of his partners, is to some degree legitimate. In this situation, the job of law enforcement officers becomes more complicated, as their efforts may adversely affect the rights of legitimate, non-criminal clients or the practice of incorrupt legal partners in the same office. And, of course, the possibility still exists that the officers will intercept privileged communications between the targeted client and attorney.

Thus, investigators should consider pursuing some less intrusive use of these more intrusive investigative techniques after exhausting normal investigative techniques, and before turning to electronic surveillance or searches of law offices. If feasible, they should tap non-attorney phones first, then the attorney's phone, and finally, and only after other avenues have been exhausted, the phones of a law office itself. Similarly, with regard to search warrants, investigators should subject the law office or professional files of the attorney to searches

only after other alternatives have been considered, tried, or rejected.⁸⁵

C. *Require Exacting Review of the Warrant Process*

Prosecutors seeking to conduct a search of a law office or employ electronic surveillance against an attorney should also find that court review of their applications is more exacting than it is when a warrant targeting a non-attorney is involved. Although the standard for probable cause to issue a warrant does not change depending on the scope or nature of the search to be conducted,⁸⁶ courts do review more carefully

⁸⁵ While use of a subpoena may be a less intrusive alternative to the use of either electronic surveillance or search warrants, a subpoena used against a target often proves unworkable, including when the target is an attorney. *See* Law Offices of Bernard D. Morley v. MacFarlane, 647 P.2d 1215, 1225-26, 1226 n.1 (Colo. 1982) (Quinn, J., specially concurring) (asserting that a per se rule favoring use of a subpoena as opposed to a search warrant for the office of a lawyer not suspected of criminal wrongdoing risks the loss or destruction of potential evidence); Department of Justice Guidelines on Methods of Obtaining Documentary Materials Held by Third Parties, 28 C.F.R. § 59.4 (1987) (In evaluating the viability of using a subpoena instead of a search warrant, a factor to consider is "[w]hether it appears that the use of a subpoena . . . would be likely to result in the destruction, alteration, concealment, or transfer of the materials sought" from the target.). *But see In re Doe*, 662 F.2d 1073, 1080-81 (4th Cir. 1981) (Where the government could not proceed in its prima facie criminal case against an attorney without evidence contained in the attorney's work-product—and the information could not be obtained elsewhere—"the principles of the work product rule are not served by declining to compel release of these documents" by subpoena.), *cert. denied*, 455 U.S. 1000 (1982).

Professor Bloom argues that a "subpoena preference rule" could promote various goals:

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.

Bloom, *supra* note 26, at 100. This notion of the "ethical" attorney, while most likely accurate in describing the majority of attorneys, breaks down in those instances where corrupt attorneys are involved, as highlighted in the final report of the President's Commission on organized crime. *See supra* notes 4-20 and accompanying text. Moreover, Professor Bloom himself notes that alternatives to subpoenas are available: "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." Bloom, *supra* note 26, at 100.

⁸⁶ *See* United States v. Fury, 554 F.2d 522, 530 (2d Cir. 1977), *cert. denied*, 436

warrant applications seeking authorization for particularly intrusive searches. Courts are often less rigorous, for instance, in their examination of applications for routine search warrants, which are often drafted by non-lawyers who "should not be hobbled by technical rules,"⁸⁷ than they are of applications for eavesdropping warrants, which are highly intrusive of privacy rights; eavesdropping applications must therefore meet "precise and rigorous standard[s]" in order to justify the intrusion.⁸⁸

As the Supreme Court has noted, "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another type of material."⁸⁹ Thus, for example, when materials sought in a search might "be protected by the First Amendment, the requirements of the Fourth Amendment must be applied with 'scrupulous exactitude.'⁹⁰ Similarly, privileged communications or materials, such as those protected by the attorney-client privilege and the work-product doctrine, carry with them an "enhanced" expectation of privacy.⁹¹ Given this status, their seizure should be subjected to the same exacting fourth amendment review.⁹²

Such review will necessarily focus on two areas: first, whether the warrant described with sufficient particularity the documents or conversations to be seized; and second, whether the warrant was executed so as to minimize intrusions upon privileged matters.

U.S. 931 (1978) ("This standard of probable cause is the same as the standard for a regular search warrant."); *United States v. Mutulu Shakur*, Nos. SSS 82 Cr. 312-CSH, 84 Cr. 220-CSH (S.D.N.Y. Apr. 10, 1987) (LEXIS, Genfed library, Dist file) ("The same standard of probable cause applies to applications for authorization to conduct electronic surveillance as to traditional search warrants."); *United States v. Orozco*, 630 F. Supp. 1418, 1522 (S.D. Cal. 1986) ("Courts have applied the standards used to evaluate probable cause for traditional search warrants to electronic surveillance applications.").

⁸⁷ *People v. Johnson*, 66 N.Y.2d 398, 406, 488 N.E.2d 439, 445, 497 N.Y.S.2d 618, 624 (1985); see *Illinois v. Gates*, 462 U.S. 213, 235-36 (1983); *United States v. Ventresca*, 380 U.S. 102, 108-109 (1965).

⁸⁸ *Berger v. New York*, 388 U.S. 41, 69 (1967) (Stewart, J., concurring in the result).

⁸⁹ *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978) (quoting *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973)).

⁹⁰ *Id.* (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)).

⁹¹ See *DeMassa v. Nunez*, 770 F.2d 1505, 1507 (9th Cir. 1985); *Law Offices of Bernard D. Morely v. MacFarlane*, 647 P.2d 1215, 1222 (Colo. 1982).

⁹² An application for a search warrant targeting a law office must be drafted, therefore, with the same care with which an application for eavesdropping is drafted, and with special attention paid to many of the same concerns. An attorney, and not a police officer involved in the heat of the investigation, should prepare the application. The attorney must consider and detail such things as the scope of the search, the necessity for that search, whether other, less intrusive techniques have been exhausted, and exactly what procedures will be employed to minimize unnecessary intrusions. See 18 U.S.C. § 2518 (1982 & Supp. IV 1986).

1. Particularity

The fourth amendment specifies that "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."⁹³ The Supreme Court has explained that "[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another."⁹⁴ The greater the particularity of the description of the articles to be seized, the less likely that the executing officers will examine papers or intercept conversations unrelated to the legitimate scope of the warrant. Overbroad searches are, perhaps, the primary danger to be avoided when officers investigate attorneys, for it is these searches that will result in improper intrusions into privileged matters.

In executing search warrants, there is always the risk that innocent documents will be intercepted along with non-privileged ones, or that in the initial review of documents, privileged matters will be revealed.⁹⁵ An exacting degree of specificity in the warrant as to the types of documents to be seized will help to reduce this risk. Those courts that have reviewed law office searches are unanimous in holding that, because of the nature of the intrusion into possibly privileged matters, these searches must be "precisely limited and restricted,"⁹⁶ and that reviewing courts must "scrutinize carefully the particularity and breadth of the warrant authorizing the search, the nature and scope of the search, and any resulting seizure."⁹⁷ Despite the fact that "[t]here is no special sanctity in papers . . . to render them immune from search and seizure,"⁹⁸ there are nonetheless "grave dangers" inherent in conducting a search of papers.⁹⁹

⁹³ U.S. CONST. amend. IV.

⁹⁴ *Andresen v. Maryland*, 427 U.S. 463, 480 (1976); *See Stanford*, 379 U.S. at 485; *Marron v. United States*, 275 U.S. 192, 196 (1927).

⁹⁵ *Cf. United States v. Abrams*, 615 F.2d 541, 548-49 (1st Cir. 1980) (expressing concern over interception of innocent documents within a doctors' office).

⁹⁶ *Law Offices of Bernard D. Morley v. MacFarlane*, 647 P.2d 1215, 1222 (Colo. 1982).

⁹⁷ *Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 955, 959 (3d Cir. 1984); *see National City Trading Corp. v. United States*, 635 F.2d 1020, 1026 (2d Cir. 1980); *cf. Abrams*, 615 F.2d 541, 547 (1st Cir. 1980) (In a case involving doctors' records, the court held that the "usual method" of obtaining voluminous business records is by subpoena; the government's "only alternative to this procedure . . . is strict compliance with the fourth amendment's requirement of a particularized warrant.")

⁹⁸ *Andresen*, 427 U.S. at 474 (quoting *Gouled v. United States*, 255 U.S. 298, 309 (1921)).

⁹⁹ *Id.* at 482 n.11; *see National City Trading Corp.*, 635 F.2d at 1026.

Thus, the warrant "should describe the material sought with a heightened degree of particularity commensurate with information known to the officer at the time the warrant is sought."¹⁰⁰ The types of documents to be seized should be limited by specifying caption, title, author, recipient, time period, date, or some other identifying characteristics that will limit the scope of the search in a meaningful way. Only when "defining" information is unknown, or is absent from the papers, "should resort be had to such generic descriptions as 'real estate records' or 'income tax records' and, in these instances, the records must be expressly confined to a specified person and transaction."¹⁰¹

A similar heightened attention to the fourth amendment's particularity requirement should also be present when drafting an eavesdropping warrant. The application for the warrant must, of course, establish that there is probable cause to believe that a crime is or will be committed and that incriminating conversations will be made over the specified telephone line.¹⁰² In addition, however, when an attorney's telephone will be tapped, the warrant itself should identify, with heightened specificity, whenever possible, the persons with whom the attorney is expected to have incriminating conversations, and what the expected subjects of the conversations might be. Such specificity, standing alone, will help to narrow the scope of the warrant and limit unwarranted interceptions of conversations with innocent third parties or about irrelevant, but privileged, subject matters.

2. Minimization

A warrant, drafted in conformity with the exacting demands of the fourth amendment, must be executed in a similarly careful manner. The Supreme Court has noted that "responsible officials, including judicial officials, must take care to assure that [searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy."¹⁰³ Indeed, all eavesdropping, constitutionally and by statute, must be conducted in a manner so as to minimize such intrusions.¹⁰⁴ Minimization, however, while perhaps being the most crucial safeguard, is also often

¹⁰⁰ *MacFarlane*, 647 P.2d at 1226 (Quinn, J., specially concurring).

¹⁰¹ *Id.* at 1227 (Quinn, J., specially concurring); *cf. Abrams*, 615 F.2d at 544-45 (involving search of doctors' files); *In re Application of Lafayette Academy, Inc.*, 610 F.2d 1, 5-6 (1st Cir. 1979) (involving investigation of a business that operated a vocational home-study school).

¹⁰² See 18 U.S.C. § 2518(3)(a), (b), (d) (1982 & Supp. IV 1986).

¹⁰³ *Andresen v. Maryland*, 427 U.S. 463, 482 n.11 (1976).

¹⁰⁴ See *Berger v. New York*, 388 U.S. 41, 57 (1967); *People v. Floyd*, 41 N.Y. 2d 245, 249, 360 N.E.2d 935, 940, 392 N.Y.S.2d 257, 261 (1976); 18 U.S.C. § 2518(5) (1982 & Supp. IV 1986).

the most problematic.¹⁰⁵ An important prophylactic measure in this regard is to provide the executing officers with clear, well thought out, and written minimization guidelines.¹⁰⁶ Such guidelines must be sufficiently specific, and workable, so as to effectively limit the executing officers' discretion to the narrow and particularized scope of the warrant itself.

In particular, the guidelines for a search warrant should specify some sort of graded or limited review of seized or intercepted materials. Once in the government's possession, the papers should be sealed pending an in camera review by the issuing judge to determine whether the seized documents are privileged. As one jurist has suggested:

If the papers sought are readily identifiable by a cursory examination of an outside folder or container, the warrant should require the executing officer to seize and seal the papers once located without any further examination of their contents. On the other hand, if the papers sought cannot be identified without examining their contents or the contents of other documents, the warrant should restrict the executing officer to such examination only as necessary to properly identify the papers as within the scope of the warrant and, when so identified, the warrant should require the officer to seize and seal the documents.¹⁰⁷

Such limited examination followed by a sealing and an in camera review by the court will potentially increase the number of documents initially seized, but will drastically reduce the risk of unnecessary intrusions into privileged matters.¹⁰⁸

In executing eavesdropping warrants, however, a sealing is not a viable alternative. The courts must rely on the integrity and intelligence of well-trained monitoring officers, reinforced by clear minimization guidelines that reflect a warrant narrow and particularized in concep-

¹⁰⁵ See *Andresen*, 427 U.S. at 482 n.11.

¹⁰⁶ See *In re Application of the United States for an Order*, 723 F.2d 1022, 1027 (1st Cir. 1983); *National City Trading Corp. v. United States*, 635 F.2d 1020, 1026 (2d Cir. 1980); *United States v. Abrams*, 615 F.2d 541, 544 (1st Cir. 1980); *Law Offices of Bernard D. Morley v. MacFarlane*, 647 P.2d 1215, 1226-27 (Colo. 1982) (Quinn, J., specially concurring).

¹⁰⁷ *MacFarlane*, 647 P.2d at 1227 (Quinn, J., specially concurring).

¹⁰⁸ The risk can be reduced further if the attorney is present and can hand over files within the scope of the warrant, but which contain alleged privileged matters, for immediate sealing, pending an in camera review by the issuing judge. However, the attorney must do so without allowing the executing officers to review the files. See *National City Trading Corp.*, 635 F.2d at 1026.

tion and scope.¹⁰⁹ Following any such monitoring, the court should conduct an exacting judicial review of the procedures employed. Nonetheless, if there will be a substantial amount of unavoidable interceptions of privileged materials, the prosecutor's office might want to consider a centralized review of possibly privileged materials, so as to limit any dissemination of those materials to other law enforcement officials. For example, the report of President's Commission cited a case in which the attorney in charge of the investigation was the only person to review such conversations.¹¹⁰

CONCLUSION

Self-regulation by law enforcement officers is of primary importance in safeguarding privileged communications. It helps eliminate improper or overbroad investigations of attorneys and diminishes the actual number of intrusions into privileged matters. If such self-regulation is based on established central procedures, reflecting a sensitivity to the dangers involved and to the importance of avoiding these dangers, it will also reduce the fear, both within and without the legal profession, that improper or overreaching investigative intrusions may take place. Self-regulation accomplishes this by inspiring a justified confidence in the restraint of the prosecutor's office.

National City Trading Corp. v. United States is a vivid example of prosecutorial restraint.¹¹¹ In this case, the government exercised great "care" in executing a search warrant on a law office, and utilized some of the safeguards discussed in this Article. As a result, the Second Circuit noted "with approval" that "[s]uch self-regulatory care is conduct highly becoming of the Government; some would suggest that these police-made rules go to the heart of the Fourth Amendment. It surely is no way harmful to the Government's position here."¹¹²

While restraint on the part of prosecutors based on objective internal procedures is crucial, the judiciary also must fulfill its role in the regulatory process. The courts must provide meaningful judicial oversight and strict judicial review of the most intrusive investigative techniques. Thus, such oversight and review must focus on the issuance and

¹⁰⁹ See *United States v. Armocide*, 515 F.2d 29, 44 (3d Cir. 1975) (The government must show that "a good faith effort to minimize" the interception of non-pertinent communications was attempted.) *cf.* *People v. Floyd*, 41 N.Y.2d 245, 249-50, 360 N.E.2d 935, 940-41, 392 N.Y.S.2d 257, 262, (1976) (The state must show that "procedures were established to minimize interception of non-pertinent communications and that a conscientious effort was made to follow such procedures.")

¹¹⁰ See REPORT OF THE PRESIDENT'S COMMISSION, *supra* note 1, at 274.

¹¹¹ 635 F.2d 1020 (2d Cir. 1980).

¹¹² *Id.* at 1026-27 (citations omitted).

execution of search warrants targeting law offices and attorneys' papers, as well as on electronic surveillance warrants of attorneys.

There will always be the risk that overreaching or overbroad investigations will create a chilling effect on the attorney-client relationship. But there is also a real and compelling need to ferret out and prosecute corrupt attorneys. They simply cannot be given immunity from prosecution. Indeed, without fervent, yet controlled, prosecutorial activity, these attorneys will continue to act as unassailable black knights for organized crime, doing its bidding in furtherance of its illegal schemes. Creative solutions are required to strike a fair and proper balance between the government's needs and those of the attorney-client relationship. Such solutions do exist, and need only to be implemented by prosecutors and courts.

