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Constitutional Law—Search of an Attorney's Office Held Unreasonable Under the Minnesota Constitution—O'Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979)

Constitutional Law—SEARCH OF AN ATTORNEY'S OFFICE HELD UNREASONABLE UNDER THE MINNESOTA CONSTITUTION—*O'Connor v. Johnson*, 287 N.W.2d 400 (Minn. 1979).

The United States Supreme Court has held that police may search the premises of nonsuspect third parties who possess evidence of the criminal acts of another.[1] These third-party searches, like all searches, must be reasonable within the meaning of the fourth amendment.[2] To date, the Court has not defined the circumstances under which a search of a third party pursuant to a valid warrant would be unreasonable.[3] The Minnesota Supreme Court faced this issue in *O'Connor v. Johnson*.[4] In *O'Connor*, the court held that a warrant for the search of an attorney's office is unreasonable under the Minnesota Constitution[5] when there is no show-

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1. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 554 (1978) ("Under existing law, valid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found." (emphasis in original)).

In *Zurcher*, photographers working for the Stanford Daily newspaper took photographs of a demonstration in which several policemen were assaulted. The newspaper published stories and pictures of the incident. The police obtained a warrant to search the newspaper's office in an effort to identify the attackers from the unpublished photographs. 436 U.S. at 551. With members of the newspaper staff present, a search was made of "photographic laboratories, filing cabinets, desks, and wastepaper baskets." *Id.* No useful materials were found and nothing was removed from the office. *Id.* at 551-52.

Third-party searches are a fairly recent development in the area of search and seizure. Prior to the decision of Warden v. Hayden, 387 U.S. 294 (1967), the Supreme Court had recognized a difference between merely evidentiary materials on the one hand and weapons, contraband, and instrumentalities of a crime on the other. The "mere evidence" could not legally be seized. *See* Harris v. United States, 331 U.S. 145, 154 (1947), *overruled on other grounds*, Chimel v. California, 395 U.S. 752 (1969); United States v. Lefkowitz, 285 U.S. 452, 465-66 (1932). The *Hayden* Court rejected this distinction as a limitation on the scope of permissible searches by stating that "[n]othing in the language of the Fourth Amendment supports the distinction between 'mere evidence' and instrumentalities, fruits of a crime, or contraband. . . . Indeed the distinction is wholly irrational, since, depending on the circumstances, the same 'papers and effects' may be 'mere evidence' in one case and 'instrumentality' in another." 387 U.S. at 301-02. By abandoning the "mere evidence" restriction, the Court exposed a larger group of people to the possibility of a search because totally uninvolved persons could be in possession of evidence of a crime. *See generally id.* at 309.

2. *See, e.g.*, Dalia v. United States, 441 U.S. 238, 258 (1979); Zurcher v. Stanford Daily, 436 U.S. 547, 559-60 (1978); Cady v. Dombrowski, 413 U.S. 433, 439 (1973); Katz v. United States, 389 U.S. 347, 353 (1967); Warden v. Hayden, 387 U.S. 294, 301 (1967); Brett v. United States, 412 F.2d 401, 405-06 (5th Cir. 1969).

3. *See* notes 45-46 *infra* and accompanying text.

4. 287 N.W.2d 400 (Minn. 1979).

5. *See id.* at 405. The language of the Minnesota Constitution and the United States Constitution prohibiting unreasonable searches is identical. *Compare* MINN. CONST. art. 1, § 10 *with* U.S. CONST. amend. IV. This, however, does not prevent the state court from giving the same words a different interpretation, as long as the state interpretation meets the minimum standards set by the United States Supreme Court. *See* notes 42-43 *infra* and accompanying text.

ing that the attorney himself is suspected of criminal activity or that the evidence sought is in danger of being destroyed.[6] In all other circumstances police must resort to a subpoena duces tecum[7] to obtain specified materials.

In *O'Connor*, investigations into liquor establishments led local police to believe false written statements had been made in the applications for liquor licenses of a certain bar. A search warrant for business records thought to be on the premises of the bar was obtained. When the police attempted to carry out the warrant, they were told the records were in the possession of the attorney of the former owners. The police then obtained a second warrant from a district court for a search of the attorney's office.[8]

When the police sought to execute the second warrant at the attorney's office, the attorney refused to permit the search. Gathering all the materials described in the warrant, including his work-product file, the attorney persuaded the police to accompany him to the issuing judge's chambers for a determination of the legality of the search. The judge allowed the attorney to keep the work-product file until he ruled on the validity of the search. Subsequently, the court held the search was valid. The work-product material was ordered into the custody of the county attorney, who would determine if any of the file was privileged. The bar owner's lawyer petitioned the supreme court for a writ of prohibition challenging that part of the judge's order requiring the production of his

6. *See* 287 N.W.2d at 405. If an attorney is implicated in criminal activity, a search warrant will issue regardless of the nature of the premises or the status of the person to be searched. *See* Andresen v. Maryland, 427 U.S. 463 (1976) (attorney convicted of fraud on basis of evidence found in his office pursuant to search). The courts also will not allow a privilege to be used in a manner that is inconsistent with the policy behind the privilege. *See* Fisher v. United States, 425 U.S. 391, 403 (1976) ("However, since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose."); United States v. Pipkins, 528 F.2d 559, 563 (5th Cir.) (communication not intended to be confidential is not within attorney-client privilege), *cert. denied*, 426 U.S. 952 (1976); United States v. Bartlett, 449 F.2d 700, 704 (8th Cir. 1971) (disclosure between client and attorney made in commission of crime or fraud is not privileged), *cert. denied*, 405 U.S. 932 (1972); Minneapolis Star & Tribune Co. v. Housing & Redevelopment Auth., 310 Minn. 313, 322-23, 251 N.W.2d 620, 625 (1976) (privilege allowed if not abused); *cf.* Grant v. United States, 227 U.S. 74, 79 (1913) (documents do not become privileged simply by handing them over to an attorney).

7. In criminal cases a clerk of court may issue a subpoena to compel the appearance of a witness before the court, a grand jury, or at a deposition. Similarly, a subpoena may order a person to produce documentary evidence or objects. *See* MINN. R. CRIM. P. 22; notes 19-20 *infra* and accompanying text.

Traditionally, a subpoena duces tecum orders the appearance of a person and the production of documents and things, whereas a subpoena simply orders the appearance of a person. Today, some courts no longer make this distinction and call all such orders subpoenas.

8. 287 N.W.2d at 401.

work-product material.[9]

While the matter was pending, the district court amended its order so that it, not the county attorney, would determine which documents were protected.[10] On appeal the supreme court refused to rule on the amended order and the actions taken by the police in the actual execution of the warrant.[11] Instead, the court addressed the reasonableness of searching an attorney's office when the attorney has not acted illegally.[12] The court held such searches to be unreasonable.[13] The decision was compelled by the threat searches of attorneys' offices would pose to the attorney-client privilege, client confidentiality, the work-product doctrine and a criminal defendant's constitutional right to counsel.[14]

The attorney-client privilege has long been recognized in Minnesota.[15] Its purpose is to encourage clients to disclose all facts relevant to their case, both favorable and unfavorable.[16] Without complete knowledge of

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9. *Id.*

10. *Id.*

11. When the police originally attempted to execute the search warrant, O'Connor was present at the office and the police were willing to allow him to bring all the affected materials to the judge for a determination of the legality of the warrant prior to any actual seizure. The office was never searched, despite the right of the officers to do so under the warrant. *Id.* at 402. In declining to rule on the legality of the actions actually taken, the court made the following statement:

> [I]t would be relatively easy to find on this record no violation of constitutional rights, the attorney-client privilege, or the work product doctrine, and thus to approve a hybrid procedure—part warrant, part subpoena. This we decline to do. We must instead examine the validity of the search warrant upon which the court's order was based to determine the propriety of that order.

Id. The court may rule on the warrant itself and not be limited to a consideration of its actual execution. *See* United States v. Hinton, 219 F.2d 324, 326-27 (7th Cir. 1955); People v. Royse, 173 Colo. 254, 477 P.2d 380 (1970). *See generally* J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED, *Pre-Trial Rights* § 27 (1972).

12. 287 N.W.2d at 402.

13. *Id.* at 405.

14. *Id.* at 402.

15. *See, e.g.*, Kahl v. Minnesota Wood Specialty, Inc., 277 N.W.2d 395, 398 (Minn. 1979); Schmitt v. Emery, 211 Minn. 547, 552, 2 N.W.2d 413, 416 (1942); State v. Nelson, 91 Minn. 143, 148, 97 N.W. 652, 654 (1903); Struckmeyer v. Lamb, 75 Minn. 366, 77 N.W. 987 (1899).

The privilege also is statutory. *See* MINN. STAT. § 595.02(2) (1980).

16. *See, e.g.*, Prichard v. United States, 181 F.2d 326, 328 (6th Cir.) (allows client to communicate freely with his attorney), *aff'd*, 339 U.S. 974 (1950); Magida v. Continental Can Co., 12 F.R.D. 74, 76 (S.D.N.Y. 1951) (privilege is expression of policy that sacrifices full disclosure for preservation of adequate attorney-client relationship); Holm v. Superior Court, 42 Cal. 2d 500, 506-07, 267 P.2d 1025, 1028 (1954) (purpose of privilege is to encourage client to make full disclosure of all facts without fear of others being informed), *overruled in part on other grounds*, Suezaki v. Superior Court, 58 Cal. 2d 166, 373 P.2d 432, 23 Cal. Rptr. 368 (1962); State *ex rel.* Sowers v. Olwell, 64 Wash. 2d 828, 832, 394 P.2d 681, 684 (1964) ("afford[s] the client freedom from fear of compulsory disclosure after consulting his legal advisor"). *See generally* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2291 (McNaughton rev. 1961); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

the facts, an attorney cannot "effectively fulfill his roles as counselor, intermediary and advocate."[17] If statements to an attorney may be seized under a search warrant, privileged information may be exposed thereby inhibiting full disclosure by a client. To the *O'Connor* court, this result would interfere seriously with the functioning of the adversary system.[18] A subpoena, on the other hand, does not present a similar danger. The subpoena process, unlike the warrant process, allows the attorney to quash a demand for bona fide privileged materials.[19] Therefore, disclosures made to an attorney by the client can remain protected.[20]

Closely related to the attorney-client privilege is the obligation of an attorney to preserve the confidences and secrets of his client.[21] This ethical responsibility is designed to facilitate "the full development of facts essential to the proper representation of the client."[22] The *O'Connor* court regarded the ethical obligation of confidentiality as an interest sep-

17. *See* Kahl v. Minnesota Wood Specialty, Inc., 277 N.W.2d 395, 398 (Minn. 1979).

18. *See* 287 N.W.2d at 403. One commentator has made the following observation about the potentially disruptive effect of invading the attorney-client relation:

> Our adversary system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong sentiment of loyalty attaches to the relationship, and this sentiment would be outraged by an attempt to change our customs so as to make the lawyer amenable to routine examination upon the client's confidential disclosures regarding professional business.

C. MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 87, at 176 (2d ed. E. Cleary 1972).

The Canadian courts also have been struggling with the issue of searching attorneys' offices. In the past, Canadian procedure allowed a client, who had privileged materials seized from his attorney's office, to attempt to exclude the evidence only at trial. This provided very little client protection since there was no mechanism to prevent the search in the first place, before the damage was done. A recent decision, however, held that the attorney-client privilege was more than an evidentiary rule, thereby opening the possibility that third-party searches of attorneys' offices will be restricted in the future. *See Re* B.X. Development Inc., 31 Can. Crim. Cas. 2d 14, 17 (B.C. App. 1976) ("warrant can be quashed when it seizes documents which are plainly subject to the solicitor-client privilege"). *See generally* Comment, *Recent Developments in the Canadian Law of Solicitor-Client Privilege*, 24 MCGILL L.J. 115 (1978); Comment, *Privilege—Solicitor and Client—Whether Applicable to Powers of Search and Seizure*, 7 MANITOBA L.J. 341 (1977).

19. MINN. R. CRIM. P. 22.02 deals with the production of documentary evidence pursuant to a subpoena duces tecum. The rule states in part that "[t]he court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive." *Id.* This provision allows the affected parties to challenge the validity of the subpoena and claim appropriate privileges prior to any actual seizure.

A subpoena duces tecum may be found to be an illegal search and seizure within the meaning of the fourth amendment. *See* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1946) (subpoena may be so indefinite that it does not "particularly describe" what is sought).

20. *See* Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964) (subpoena duces tecum quashed on ground that material sought was protected by attorney-client privilege); *cf.* Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963) (subpoena duces tecum upheld because attorney-client privilege not applicable to material sought).

21. *See* ABA, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1980).

22. *Id.*

arate from the attorney-client privilege that a search of an attorney's office would violate.[23] This may not have been an accurate analysis. The distinction between the attorney-client privilege and client confidentiality is a fine one. The attorney-client privilege prevents other parties from gaining access to certain material through the judicial process.[24] The ethical obligation of confidentiality prevents an attorney from voluntarily disclosing secrets of his client.[25] In *O'Connor*, this difference is of no significance, because the disclosure was involuntary. An attorney does not violate any ethical duty to his client by having his office unwillingly subjected to a search. The court's use of the ethical obligation of confidentiality, however, does reemphasize the negative effect a search would have on the attorney-client relationship and the proper functioning of the adversary system.[26]

Another privilege, the work-product doctrine,[27] also would be affected

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23. *See* 287 N.W.2d at 403.

24. *See, e.g.*, IBM Corp. v. United States, 471 F.2d 507 (2d Cir. 1972), *cert. denied*, 416 U.S. 980, *cert. denied*, 416 U.S. 979 (1974) (cases consolidated on appeal, separate denials of certiorari); Pierson v. United States, 428 F. Supp. 384 (D. Del. 1977); Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975); State v. Lender, 266 Minn. 561, 563-64, 124 N.W.2d 355, 357-58 (1963); Snyker v. Snyker, 245 Minn. 405, 406-07, 72 N.W.2d 357, 358 (1955); MINN. R. CIV. P. 26.02(1) ("[p]arties may obtain discovery regarding any matter, not privileged").

25. *See* ABA, MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1980).

26. The *O'Connor* court stated:

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of the confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system.

287 N.W.2d at 403 (quoting ABA, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1980)).

There is a great deal of controversy currently over the breadth of the ethical obligation of an attorney to preserve the confidences and secrets of a client. *See ATLA Unveils Ethics Code*, Nat'l L.J., June 23, 1980, at 3, col. 2. The American Bar Association recently submitted a proposed revision of the Code of Professional Responsibility. This proposal has come under attack for allegedly "eroding the confidentiality of client confidences" by allowing too great an opportunity for the attorney to disclose information without violating ethical precepts. *Id.* at 8, col. 1. In response, the Association of Trial Lawyers of America formulated their own proposal that would "[p]revent lawyers from disclosing client confidences in virtually all cases, and require such disclosure in none." *Id.* The difference of opinion within the legal profession indicates that while the concept of confidentiality is universally accepted, its parameters are not.

27. An attorney's work product is protected in most instances from discovery in civil and criminal litigation. *See* MINN. R. CIV. P. 26.02(3); MINN. R. CRIM. P. 9.02(3). The criminal rule provides: "Information Not Subject to Disclosure by Defendant; Work Product. Unless otherwise provided by these rules, legal research, records, correspondence, reports or memoranda to the extent they contain opinions, theories or conclusions of the defendant or his counsel or persons participating in the defense are not subject to disclosure." *Id.*

detrimentally by a search according to the *O'Connor* court. The purpose of the work-product privilege is to shield an attorney's opinions and strategies from discovery.[28] The rationale is that an attorney in fear of having his case exposed would be inclined not to document his thoughts thoroughly.[29] This in turn would lessen the effectiveness of an attorney's representation of a client. Once again, the client and the adversary system would suffer.[30]

Finally, the *O'Connor* court viewed a search of the office of an attorney of a criminal defendant as a possible infringement upon a defendant's constitutional right to counsel.[31] The result of such a search would not necessarily deprive the accused of counsel. The adequacy of the attorney's representation, however, through the cumulative effect of a search on the attorney-client privilege and the work-product doctrine, may be reduced below constitutional guarantees.[32]

The *O'Connor* court concluded by expressing its concern that a search of an attorney's office may result in a prohibited general search.[33] The court stated that because of the extensiveness of the warrant there was

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28. *See, e.g.*, Hickman v. Taylor, 329 U.S. 495 (1947); Leiniger v. Swadner, 279 Minn. 251, 256, 156 N.W.2d 254, 258 (1968).

29. In Hickman v. Taylor, 329 U.S. 495 (1947), the Court described the policy of protecting work product as follows:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id. at 511.

30. *See* 287 N.W.2d at 403. The dangers created by work-product disclosure are amplified in criminal cases in which the defendant's liberty is at stake. *See* United States v. Nobles, 422 U.S. 225, 238 (1975) ("Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital."). The *O'Connor* court expressed its agreement with this view by stating: "The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." 287 N.W.2d at 403 (quoting United States v. Nobles, 422 U.S. 225, 238 (1975)).

31. 287 N.W.2d at 404. *See generally* U.S. CONST. amend. VI; MINN. CONST. art. 1, § 6.

32. *See* 287 N.W.2d at 404. The right to counsel is the right to "effective" counsel. *See, e.g.*, White v. Ragen, 324 U.S. 760, 763-64 (1945) (per curiam); Wilson v. Phend, 417 F.2d 1197, 1199-2000 (7th Cir. 1969); United States v. Johnston, 318 F.2d 288, 291 (6th Cir. 1963); Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960); Risher v. State, 523 P.2d 421, 423 (Alaska 1974); People v. Pope, 23 Cal. 3d 412, 424, 590 P.2d 859, 865-66, 152 Cal. Rptr. 732, 738-39 (1979).

33. 287 N.W.2d at 404-05. General "rummaging" in the course of a search is prohibited under the fourth amendment. *See* Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971); State v. Mathison, 263 N.W.2d 61, 63 (Minn. 1978); State v. Streitz, 258 N.W.2d 768, 771-72 (Minn. 1977).

"no way the police officers could be sure that they had found all the items to be seized unless they searched every file in the attorney's office."[34] Thus, the privacy and interests of all the attorney's clients, not just the one against whom the search was directed, would be threatened.[35] No matter how particular the warrant, a search always would expose privileged material to the police, and in many instances, the damage would be irreparable.[36]

Determining constitutional prohibitions against unreasonable searches and seizures requires a balancing of the public's interest in effective law enforcement against the individual's right to be free from overly intrusive police actions.[37] By favoring the subpoena process over a search, the *O'Connor* court brought these conflicting interests into a manageable equilibrium. The client and attorney are able to protect privileged material with judicial proceedings,[38] while the police are still free to obtain all nonprivileged evidence. The police are not absolutely deprived of the use of a search. If the attorney is suspected of criminal wrongdoing or it is shown the evidence is in danger of being destroyed, a search will be

34. 287 N.W.2d at 404.

35. *See id.* If the police were allowed to "search every file in the office," other clients' confidential material would be examined. *See id.* It is possible the material could implicate other clients of the attorney in a crime. An investigation or prosecution could result. The evidence most likely would be admissible under the "plain-view doctrine," even though the documents were not listed in the warrant and relate to a totally different crime. Three criteria must be met before evidence will be admitted under the plain-view doctrine: (1) the evidence must be found pursuant to a legal intrusion; (2) the evidence must be found inadvertently; and (3) the criminal nature of the evidence must be immediately apparent. *See* Coolidge v. New Hampshire, 403 U.S. 443, 466-69 (1971). Since the police would be in the attorney's office under the authority of a warrant, the initial intrusion would be justified. Also, if the police were not *expecting* to find the evidence incriminating another client, the discovery would be inadvertent. *See* United States v. Hare, 589 F.2d 1291, 1293-95 (6th Cir. 1979). While the "immediately apparent" requirement would be more difficult to meet, it would not be impossible. The police obviously would have to scan documents to determine if the warrant included the documents. This is permissible under the plain-view doctrine. *See* Mapp v. Warden, 531 F.2d 1167, 1172 (2d Cir.), *cert. denied*, 429 U.S. 982 (1976). Thus, if a superficial examination gives the police *probable cause* to believe the document indicated criminal activity, the seizure would be valid. *See* United States v. Ochs, 595 F.2d 1247, 1258-59 (2d Cir. 1979), *cert. denied*, 444 U.S. 955 (1980). While the plain-view doctrine will not be allowed to justify general exploratory searches, *see* United States v. Pincus, 450 F. Supp. 66, 69-70 (W.D. Pa. 1978), the *O'Connor* prohibition against searches of attorneys' offices forecloses the possibility of such a result. *See generally* 2 W. LAFAVE, SEARCH AND SEIZURE § 4.11 (1978).

36. *See* 287 N.W.2d at 405; Brown v. St. Paul City Ry., 241 Minn. 15, 31, 62 N.W.2d 688, 699 (1954) (once privileged material is seen, information cannot be erased from adversary's mind).

37. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 653-55 (1979); United States v. Ramsey, 431 U.S. 606, 616-19 (1977); United States v. Martinez-Fuerte, 428 U.S. 543, 554-56 (1976); South Dakota v. Opperman, 428 U.S. 364, 375 (1976); Berger v. New York, 388 U.S. 41, 53 (1967); State v. Ferrise, 269 N.W.2d 888, 890 (Minn. 1978).

38. *See* notes 19-20 *supra* and accompanying text.

allowed.[39] Considering the ultimate effect a search would have on the adversary system, a subpoena duces tecum is an adequate alternative means of gaining evidence in the possession of an attorney.[40]

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39. *See* 287 N.W.2d at 405; note 7 *supra*.

40. In summarizing its requirement that police obtain a subpoena duces tecum, the *O'Connor* court stated:

> Though this may seem as limiting the ability of the police to obtain information in the early stages of an investigation, we find this measure necessary to protect the overriding interest of our society in preserving the attorney-client privilege, client confidentiality, the work product doctrine, and the constitutional right to counsel.

287 N.W.2d at 405. The Supreme Court in Zurcher v. Stanford Daily, 436 U.S. 547 (1978) held an opposite opinion. A subpoena, in the Court's view, would hamper initial police inquiries unjustifiably. *See id.* at 560-62. In Minnesota a subpoena may be issued only by a grand jury or after a criminal complaint has been filed. *See* MINN. R. CRIM. P. 22.01. Therefore, only a subpoena issued by a grand jury could help police in the investigatory stage of a case. In many counties, however, a grand jury does not sit continuously. *See* MINN. R. CRIM. P. 18.01 ("grand jury shall be summoned and convened whenever required by public interest or whenever requested by the county attorney"). Summoning a grand jury for the sole purpose of issuing a subpoena would be very expensive and cumbersome, and represent an inefficient police procedure. Thus, the *O'Connor* court's substitution of a subpoena for a search warrant may be more complicated than is stated.

The *Zurcher* Court also expressed concern that in some cases the third party would ignore the subpoena, or respond so slowly that the evidence could be destroyed by the suspect. *See* 436 U.S. at 560-62. Because attorneys are the third parties called upon to submit to a subpoena under *O'Connor*-type facts, this possibility is minimized. As officers of the court, attorneys are required to respond "faithfully and promptly" to a subpoena. *See* 287 N.W.2d at 405.

While it acknowledged the legitimate public interest in quick and efficient police work, *see id.*, the *O'Connor* court did not believe that warrant searches of nonsuspect-attorneys' offices were the least drastic means to this legitimate end. The standard of "least drastic means" in achieving a valid and substantial end was discussed by the United States Supreme Court in Shelton v. Tucker, 364 U.S. 479 (1960). In *Shelton*, an Arkansas statute required teachers to disclose all the organizations to which they had contributed or belonged in the preceding five years. The Court held that when a less intrusive means exists to achieve the same end, a more intrusive means is unconstitutional under the first amendment. The Court stated:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Id. at 488; *see* Bacon v. United States, 449 F.2d 933, 941-45 (9th Cir. 1971); Stanford Daily v. Zurcher, 353 F. Supp. 124, 131 (N.D. Cal. 1972), *aff'd*, 550 F.2d 464 (9th Cir. 1977) (per curiam), *rev'd*, 436 U.S. 547 (1978); State v. Klinker, 85 Wash. 2d 509, 519-23, 537 P.2d 268, 277-79 (1975) (citing *Zurcher* trial court). The "less drastic means" standard has been incorporated into the recent federal statute controlling the procedures to be used in third-party searches. *See* notes 51-56 *infra* and accompanying text.

A California case, Deukmejian v. Superior Court, 103 Cal. App. 3d 253, 162 Cal. Rptr. 857 (1980), dealt with a factual situation identical to that in *O'Connor*. The *Deukmejian* court, however, did not have to make a ruling on the constitutionality of a search of an attorney's office. While the appeal to quash the warrant was pending, the California Legislature passed a statute regulating searches of attorneys' offices. *Id.* at 259-

It is important that *O'Connor* was decided under the Minnesota Constitution.[41] The states are free to give their citizens greater protection under state law than that provided by the minimum standards established in the United States Constitution, as interpreted by the Supreme Court.[42] In the area of search and seizure, states have not been hesitant to do so.[43]

The use of the Minnesota Constitution provides two closely related advantages in this case. Although the Supreme Court in *Zurcher v. Stanford Daily*[44] indicated that not every third-party search meeting the war-

60, 162 Cal. Rptr. at 861. The statute provides that the affidavit in support of the search must indicate an attorney's office is the target of the search. A special master is appointed to accompany the police. The special master must provide the attorney with an opportunity to voluntarily comply with the warrant. If the attorney refuses, the special master is free to conduct the search. If the attorney raises a claim of privilege to any of the documents, the material is placed in a sealed envelope by the special master. The court then will determine the applicability of any privilege. *See* CAL. PENAL CODE §§ 1523-42 (West Cum. Supp. 1980).

The *Deukmejian* court declined to rule on the constitutionality of the statute until the process was seen against a more developed factual background. 103 Cal. App. 3d at 263, 162 Cal. Rptr. at 863. The statute, in essence, calls for a procedure similar to the search in *O'Connor*—part search and part subpoena. The police can acquire nonprivileged documents immediately. On the other hand, the attorney can protect privileged material in a judicial proceeding, just as in the use of a subpoena. The material that is claimed to be privileged, however, is in the possession of the court prior to any determination. Therefore, any material that is subsequently found to be nonprivileged cannot be destroyed. The statute seems to provide a middle-ground approach, avoiding the extremes of both *Zurcher* and *O'Connor*.

41. Although the *O'Connor* court based its holding on both the federal and state constitutions, the only United States Supreme Court decision addressing the issue of third-party searches does not prohibit as constitutionally unreasonable searches of nonsuspect-attorneys' offices. *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978); note 49 *infra*. Thus, *O'Connor* must be viewed as being based primarily on the Minnesota Supreme Court's interpretation of the Minnesota Constitution. *See* 287 N.W.2d at 405 ("A more important distinction between this case and *Zurcher* is that our decision rests not only on the Fourth Amendment of the United States Constitution but also on Article I, section 10 of the Minnesota Constitution.").

42. *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 719 (1975); Sibron v. New York, 392 U.S. 40, 60-61 (1968); Cooper v. California, 386 U.S. 58, 62 (1967).

Some members of the United States Supreme Court have indirectly encouraged state courts to interpret their state constitutions more broadly than the United States Supreme Court interprets the United States Constitution. *See* Pennsylvania v. Mimms, 434 U.S. 106, 117 (1977) (Stevens, J., dissenting); Michigan v. Moseley, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting). *See also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

43. *See, e.g.*, People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (scope of search for weapons); State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974) (scope of search incident to arrest); People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (warrantless eavesdropping), *cert. denied*, 423 U.S. 878 (1975); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975) (knowledge necessary to consent to search); State v. Opperman, — S.D. —, 247 N.W.2d 673 (1976) (inventory search).

44. 436 U.S. 547 (1978).

rant clause will be reasonable, distinct guidelines were not enunciated by the Court.[45] Therefore, an expansion of *Zurcher* could hold a search of an innocent attorney's office to be constitutional.[46] The *O'Connor* court was not willing to chance such an outcome. In light of the consequences this type of search would have, there was a need for certainty. Basing the *O'Connor* decision on the state constitution allowed the issue to be settled definitely and put the decision beyond Supreme Court reversal.[47] A second, ancillary reason arises from the *Zurcher* Court's refusal to require the use of a subpoena as a general rule in third-party search situations.[48] That decision implies that any determination of the reasonableness of a third-party search necessarily would be on a case-by-case basis.[49] Thus, the constitutionality of searching an attorney's office would have to be examined on the individual facts of each case. The *O'Connor* court, however, required that attorneys be protected as a general class from future, third-party searches. Only by having a broad prohibition against searching attorneys' offices would the integrity of the adversary system be preserved. The *O'Connor* court's interpretation of the Minnesota Constitution secures this goal.

In Minnesota it is clear that attorneys who are not suspected of crimi-

45. *See* 436 U.S. at 559-60. Justice Powell stated that "the reasonableness of every warrant . . . [must be judged] in light of the circumstances of the particular case, carefully considering the description of the evidence sought, the situation of the premises, and the position and interests of the owner or occupant." *Id.* at 570 (Powell, J., concurring). This statement suggests that a search of an attorney's office could be found to be unreasonable even though supported by probable cause and affidavit. Such a determination, however, would depend on a case-by-case analysis of reasonableness. *See* note 49 *supra* and accompanying text.

46. Justice Stevens in his dissent practically prophesized the dangers considered by the *O'Connor* court. He stated:

> Countless law-abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possession that relate to an ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious. The *ex parte* warrant procedure enables the prosecutor to obtain access to privileged documents that could not be examined if advance notice gave the custodian an opportunity to object. The search for the documents described in a warrant may involve the inspection of files containing other private matter.

436 U.S. at 579-80 (Stevens, J., dissenting) (footnotes omitted). *See also* Falk, *Are Law Offices Safe?*, BARRISTER, Spring 1979, at 17; *Minnesota Lawyers Face Threat of Third-Party Searches*, 65 A.B.A.J. 532 (1979); *Search-Warrant Fever Spreads to Calif. Firms*, 65 A.B.A.J. 886 (1979); *Will Lawyers Be Giving Stanford Warnings?*, 64 A.B.A.J. 1211 (1978).

47. The *O'Connor* decision is not subject to reversal, because the result gives more protection to citizens' privacy interests than does *Zurcher*. *See* cases cited note 42 *supra*.

48. *See id.* at 567-68.

49. The reasonableness of a search must be determined on the facts of each case. *See* Chimel v. California, 395 U.S. 752, 765-66 (1969); State v. Gebhard, 272 Minn. 336, 342, 137 N.W.2d 168, 172 (1965); State v. Kinderman, 271 Minn. 405, 411-12, 136 N.W.2d 577, 581-82 (1965), *cert. denied*, 384 U.S. 909 (1966). Without a general rule prohibiting third-party searches, it must be assumed that the determination would be on a case-by-case basis.

nal activity themselves cannot have their offices subjected to searches. *O'Connor*, however, may be limited to attorneys, leaving other Minnesota professionals in possession of privileged materials open to third-party searches.[50] While *Zurcher* provides little in the way of constitutional standards to evaluate the potential scope of third-party searches, recent legislation should clear up much of the confusion, at least in the federal field.[51] This law limits federal and state officials to the use of a subpoena when the material sought is work product under the control of a "newspaper, book, broadcast, or other similar form of public communication."[52] Furthermore, the statute directs the Attorney General to develop procedural guidelines for federal officers who seek access to documents in the possession of innocent third parties,[53] with special consideration given to lawyers, doctors, and clergy.[54] The recently published guidelines indicate that a subpoena generally should be utilized before a search, unless the use of a subpeona would "substantially jeopardize [the document's] availability . . . or usefulness."[55] While the above guidelines will not restrict state officials from using a third-party search for

50. In Minnesota, the privileged communications of clergy and doctors are statutorily protected. *See* MINN. STAT. § 595.02(3)-(4) (1980). These privileges are similar to the attorney-client privilege because certain communications made within the relationship are immune from disclosure in court actions or proceedings. *See, e.g.*, State v. Staat, 291 Minn. 394, 192 N.W.2d 192 (1971) (physician); *In re* Swenson, 183 Minn. 602, 237 N.W. 589 (1931) (priest).

A search exposing doctors' and clergys' confidential materials would not have as broad an impact as that of a search of an attorney's office. For example, the work-product doctrine and the constitutional right to counsel would not be jeopardized. The doctor and clergy privileges, however, do promote the development of important relationships. Therefore, special considerations should be given to the protection of these privileges from overly intrusive police action. *See* notes 54-55 *infra* and accompanying text.

51. *See* Privacy Protection Act of 1980, Pub. L. No. 96-440, 49 U.S.L.W. 185 (Dec. 9, 1980).

52. *See id.* tit. I, § 101, 49 U.S.L.W. 185, 185 (Dec. 9, 1980). A search is allowed only when the person to be searched is suspected of an offense or immediate seizure is necessary to prevent death or serious bodily harm. *See id.* § 101(a)(1)-(2), 49 U.S.L.W. 185, 185 (Dec. 9, 1980). In circumstances in which work product is not sought, a search is allowed for the reasons stated above or if there is a chance the subpoena would be ignored or the evidence is in danger of being destroyed. *See id.* § 101(b)(1)-(4), 49 U.S.L.W. 185, 185 (Dec. 9, 1980).

53. The Act requires that any method proposed by the Attorney General be "the least intrusive method or means . . . which do[es] not substantially jeopardize the availability or usefulness" of the documents. *See id.* tit. II, § 201(a)(2), 49 U.S.L.W. 185, 186 (Dec. 9, 1980).

54. *See id.* § 201(a)(3), 49 U.S.L.W. 185, 186 (Dec. 9, 1980).

55. *See* Guidelines on Methods of Obtaining Documentary Materials Held by Third Parties, 46 Fed. Reg. 1302, 1303 (1981) (to be codified in C.F.R. § 59.1(b)). The guidelines also give procedures to be followed when the material is held by a third-party attorney, doctor, or clergyman and confidential material will be subject to inspection. *See id.* at 1303-04 (to be codified in C.F.R. § 59.4(b)) (search should not be used in most circumstances).

arguably privileged material,[56] state legislatures may be spurred into clarifying the presently uncertain boundaries of third-party searches under state law.

Criminal Law—HYPNOTICALLY-INDUCED TESTIMONY HELD INADMISSIBLE IN CRIMINAL PROCEEDING—*State v. Mack*, 292 N.W.2d 764 (Minn. 1980).

The admissibility of hypnotically-induced testimony was first confronted by the American judicial system in *People v. Ebanks*,[1] an 1897 California case.[2] The *Ebanks* court held that exculpatory statements made by defendant while under hypnosis were inadmissible, indicating that hypnosis could not be used to establish a defense to a crime.[3] Following *Ebanks* and its progeny the issue of hypnotically-induced testimony generally was dormant within the courts[4] until the 1950 North

56. While title I of the Act applies to both federal and state officials, title II, which deals with third parties that are not associated with the dissemination of information to the public, applies only to federal employees. *See* Privacy Protection Act of 1980, Pub. L. No. 96-440, tit. II, § 201, 49 U.S.L.W. 185, 186 (Dec. 9, 1980).

1. 117 Cal. 652, 49 P. 1049 (1897). In *Ebanks*, the defendant sought to call an expert witness to the stand to testify that the defendant was not guilty based on statements made to the hypnotist while the defendant was in a hypnotic trance. *See id.* at 665, 49 P. at 1053. In an earlier case, the California Supreme Court was presented with the defense of hypnotic suggestion but the court did not discuss the legal admissibility of the defense. *See* People v. Worthington, 105 Cal. 166, 38 P. 689 (1894).

2. *See* Note, *Hypnotism and the Law*, 14 VAND. L. REV. 1509, 1519 (1961) (question of whether statements made during hypnosis could be admitted as evidence was first before American courts in 1897 case of *People v. Ebanks*).

In the late 1800's, two European cases were recorded in which hypnotists were charged with "seduction abetted by hypnosis" and a third case involved not only the defense that the crime of murder had been induced by hypnosis but also the use of hypnosis as an investigative tool. *See* Herman, *The Use Of Hypno-Induced Statements In Criminal Cases*, 25 OHIO ST. L.J. 1, 1-2 (1964). These European cases sparked an immediate interest by the American criminal bar and led to attempts by defense lawyers to use hypnosis to acquit their clients. *See id.* at 2. There were a number of early cases involving either the defense of hypnotic suggestion or the admissibility of statements under hypnosis. *See, e.g.*, People v. Ebanks, 117 Cal. 652, 665, 49 P. 1049, 1053 (1897); People v. Worthington, 105 Cal. 166, 172, 38 P. 689, 691 (1894); Austin v. Barker, 110 A.D. 510, 512-17, 96 N.Y.S. 814, 815-19 (1906). These early cases tended to involve sexual crimes perpetrated against hypnotized persons. *See* Ladd, *Legal Aspects of Hypnotism*, 11 YALE L.J. 173, 178 (1902).

3. *See* 117 Cal. at 665, 49 P. at 1053. The California Supreme Court examined the trial court's finding that "[t]he law of the United States does not recognize hypnotism" and that, consequently, the offer by defendant of testimony elicited from him while under hypnosis "would be an illegal defense." *Id.* The supreme court concluded: "We shall not stop to argue the point, and only add the court was right." *Id.*

4. *See* Herman, *supra* note 2, at 2. "[F]rom 1894 to 1915, there were a number of cases involving . . . the admissibility of exculpatory statements made under hypnosis. . . . However, judicial hostility was manifest. . . . [F]rom 1915 until 1950, there was