Great (and Reasonable) Expectations: Fourth Amendment Protection for Attorney-Client Communications

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I. INTRODUCTION

"How much should I tell my attorney?"

Almost every client seeking legal advice for the first time probably asks herself or himself this question. The attorney will likely urge the client to disclose everything, because without complete information the attorney may be unable to give comprehensive and accurate advice. In order to encourage full disclosure, the attorney may assure the client that the attorney-client privilege protects the communication, thereby persuading the client to divulge all relevant information without fear that the communication will be disclosed against the client's wishes. Yet, such assurance may be misleading because application of the privilege to a particular communication may be difficult or impossible for the attorney to predict or control.

The attorney-client privilege is generally understood to protect confidential communications between the client and attorney made for the purpose of giving or receiving legal advice.[1] "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[2] The privilege is the oldest common law confidential communication privilege[3] and is recognized in some form in

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1. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 66 (2003) (noting that the basic elements of the privilege have remained unchanged for more than a century).

2. *Upjohn*, 449 U.S. at 389.

3. *Id.* (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)).

every state and in the federal judicial system.[4] Its universal acceptance reflects the common belief that society as a whole benefits when people have access to sound legal advice, and such advice can only be provided when the attorney is fully informed.[5] Furthermore, clients will only be willing to disclose all relevant information—particularly potentially incriminating or embarrassing information—if the client is confident that the information disclosed to the attorney will not be disclosed to others or used against the client in a criminal prosecution or civil litigation.[6]

While the attorney-client privilege is recognized in every jurisdiction in the United States, the precise contours of the privilege vary from jurisdiction to jurisdiction. Indeed, different privilege rules can apply in the same case, such as when federal claims are joined with state law claims in state court or pendant state claims are attached to federal question claims in federal court.[7] Because it is often impossible to know which jurisdiction's (or jurisdictions') privilege rules will apply in future litigation, the attorney may find it difficult to ensure that all communications will remain protected by the privilege.[8] The problem is rooted in

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4. *See* Paul R. Rice, ATTORNEY CLIENT PRIVILEGE: STATE LAW § 1 (1996); RESTATEMENT (THIRD) OF LAW GOVERNING LAW, ch. 5, topic 2, tit. A, introductory note (2000); Ford Motor Co. v. Leggat, 904 S.W.2d 643, 647 (Tex. 1995) ("Among communications privileges, [the attorney-client privilege] is the only one recognized by every state, even though its scope... may vary.").

5. *Upjohn*, 449 U.S. at 389.

6. *Id.*; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2007):

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

7. *See* Samaritan Found. v. Goodfarb, 862 P.2d 870, 877 (Ariz. 1993) (rejecting the control group test for application of the privilege to entities in part because that test had been rejected by the Supreme Court as a rule of federal common law and because adoption of the control group test by Arizona could result in some communications being admissible as to state claims but not as to federal claims in the same litigation).

8. *See* Glynn, *supra* note 1, at 121 (noting the varying choice of law rules in various jurisdictions and resulting potential for conflict when more than one jurisdiction has an interest in the claimed privilege). For example, a communication made by a client in Texas to an attorney in Louisiana may be sought years later in litigation in Maryland instituted by a Maryland resident concerning a contract governed by the laws of the state of Delaware. Depending upon the type of litigation and the choice of law rules of the forum, the law of any of those jurisdictions may apply to decide whether the communication is protected by the attorney-client privilege. At the time of the communication, the litigation may not have been foreseeable. Consequently, if the rules for establishing or maintaining the privilege vary amongst those jurisdictions, the attorney may not be able to ensure at

the fact that the attorney-client privilege has always been governed by common law, state or federal rules of evidence. Because it has not been recognized as a constitutional right, the protection of the privilege is not guaranteed in any particular jurisdiction. Thus, there is no minimum level of protection upon which attorneys and clients may rely.

Such conflicts between jurisdictions and the related dilemmas are inevitable consequences of the American judicial system. But in the context of attorney-client communications, the conflicts can profoundly affect the relationship between attorneys and clients and the attorney's ability to provide competent legal advice.[9] The Supreme Court observed:

> [I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.[10]

The uncertainty created by varying rules in different jurisdictions leaves attorneys and clients unable to rely upon the protection of the privilege and, therefore, potentially unable to communicate openly and freely.

The far-reaching implications of having conflicting rules has prompted attempts to create a uniform set of privilege rules by enacting a preemptive federal statute, or by revising the choice of law rules to make it easier to predict which jurisdiction's law will apply, but such efforts have not yet been successful.[11] Consequently, alternate solutions and strategies should be explored. This Article proposes looking to an existing preemptive federal law: the Fourth Amendment to United States Constitution.

The Fourth Amendment protects against unreasonable government searches and seizures.[12] The protection extends to communications in which a person or entity has a legitimate and reasonable expectation of

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the time of the initial communication that the communication will be protected (or remain protected) in the subsequent litigation.

9. *Upjohn*, 449 U.S. at 393; *see also* Glynn, *supra* note 1, at 62 (discussing the need for certainty and predictability to promote client candor, foster compliance with the law, and facilitate effective administration of justice).

10. *Upjohn*, 449 U.S. at 393.

11. *See* Glynn, *supra* note 1, at 63–64 (arguing that Congress should adopt a generally applicable attorney-client privilege statute that preempts contrary state law); Steven Bradford, *Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution*, 52 U. PITT. L. REV. 909, 912 (1991) (advocating new choice of law principle that makes the law of the jurisdiction in which the attorney practices applicable for purposes of the attorney-client privilege and arguing that such an approach would increase predictability).

12. U.S. CONST. amend. IV. Made applicable to the States by the 14th Amendment. Payton v. New York, 445 U.S. 573, 576 (1980).

privacy that society is prepared to accept as reasonable.[13] Clients certainly have a legitimate and reasonable expectation of privacy in their confidential communications with their attorneys. Therefore, the Fourth Amendment protects those communications from unreasonable government intrusion, including unreasonable court orders compelling production of attorney-client communications.

This Article does not argue that the Fourth Amendment affords the same protection to all civil discovery requests, or even that it applies to all discovery requests.[14] The expectation of privacy in some types of non-privileged communications and documents may not meet the test for Fourth Amendment protection because either the litigant has no reasonable expectation of privacy or that expectation is not one that society is prepared to recognize as reasonable.[15] Instead, this Article argues that confidential attorney-client communications are different. Even—or perhaps especially—in the litigation context, parties have a reasonable expectation of privacy with respect to those communications, and society is prepared to recognize that expectation as reasonable. Thus, the Fourth Amendment applies and provides protection. When the Fourth Amendment applies, any court order compelling disclosure must be reasonable. Whether disclosure is reasonable in a given set of circumstances would be a constitutional question that must be decided consistently in all jurisdictions. That, in turn, would alleviate at least some of the uncertainty that currently plagues lawyers and clients.

This Article begins by focusing on the elements of a claim under the Fourth Amendment. Part II identifies the elements and subsequent sections address each element in the context of attorney-client communications. Specifically, Part III considers the legitimate expectation of privacy in confidential attorney-client communications. Part IV addresses the search and seizure requirement, explores authority distinguishing between "actual" and "constructive" searches, and concludes that in addition to actual searches, court-ordered production of attorney-client com-

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13. Katz v. United States, 389 U.S. 347, 351–52 (1967).

14. Although the argument is beyond the scope of this Article, it has been persuasively argued that the Fourth Amendment applies and prohibits discovery that is overbroad or that seeks irrelevant documents, or trade secret information. *See, e.g.*, Jordana Cooper, *Beyond Judicial Discretion: Toward a Rights-Based Theory of Civil Discovery and Protective Orders*, 36 RUTGERS L.J. 775 (2005).

15. In the context of litigation, a person may have a legitimate expectation of privacy in certain information, but that information may be relevant to the case in controversy and, therefore, disclosure may be necessary in order to promote the ultimate goal of litigation: truth finding. In other words, in the context of litigation, society will often not recognize the privacy interest as reasonable because the litigation necessitates disclosing information that a person or entity could otherwise expect to keep private. Privileged attorney-client communications are an exception to this general rule.

munications (a "constructive" search and seizure) can implicate the Fourth Amendment. Part V addresses the requirement of government action for a Fourth Amendment claim and analyzes the ways in which government action might exist in criminal and civil cases involving court-ordered disclosure or production of attorney-client communications. Part VI explores the reasonableness requirement of a Fourth Amendment claim and examines when an order compelling disclosure of an attorney-client communication can be unreasonable.

This Article then addresses how Fourth Amendment protection of attorney-client communications can resolve, or render moot, some of the problems created by conflicting privilege rules. Part VII identifies several circumstances in which jurisdictions' privilege rules are inconsistent and explains how Fourth Amendment protection of attorney-client communications in those circumstances could lead to consistent and predictable protection. Finally, Part VIII discusses why recognition of Fourth Amendment protection is a necessary and prudent means of protecting the reasonable expectation of privacy in attorney-client communications.

II. FOURTH AMENDMENT REQUIREMENTS

While the attorney-client privilege is universally recognized in some form in all United States jurisdictions, whether by statute, rule of evidence, or under the common law, "it has not yet been held a constitutional right."[16] It is time to recognize that, in some instances, the Fourth Amendment protects attorney-client communications from court-ordered disclosure.

The Fourth Amendment to the United States Constitution states:

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

Thus, to state a claim for violation of the Fourth Amendment, the claimant must prove that a reasonable expectation of privacy has been violated by a government search or seizure.[17]

Unlike many cases assessing Fourth Amendment applicability, determining whether, and to what extent, the Fourth Amendment protects attorney-client communications requires careful analysis of each part of

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16. Clutchette v. Rushen, 770 F.2d 1469, 1471 (9th Cir. 1985).

17. Smith v. Maryland, 442 U.S. 735, 740 (1979) ("[T]he application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action.").

this test. First, the claimant must prove that he or she has a reasonable expectation of privacy in a communication with his or her attorney. The "reasonable" expectation of privacy has both a subjective and an objective component.[18] The individual must have a subjective expectation of privacy, demonstrated by a showing that he or she "seeks to preserve [something] as private."[19] Additionally, that subjective expectation must be one "that society is prepared to recognize as 'reasonable.'"[20] In other words, the subjective expectation of privacy must be objectively reasonable.[21]

Next, the claimant must prove that government action implicating the Fourth Amendment has occurred. In the criminal context, satisfying this element is often easy: police searches of private premises or seizures of evidence in a criminal investigation are government actions that will always implicate the Fourth Amendment.[22] In the civil discovery context, however, the claimant will need to establish that issuance of an order compelling disclosure is government action triggering application of the Fourth Amendment. Additionally, the claimant must prove that ordering production of privileged materials is a search or seizure for Fourth Amendment purposes. Even if the claimant is successful in establishing that the Fourth Amendment applies and a government search or seizure has occurred, the reasonableness of a challenged order must be evaluated to determine whether rights secured by the Fourth Amendment have been violated. Each element of this test is discussed in the sections below.

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18. *Id.*

19. Katz v. United States, 389 U.S. 347, 351 (1967).

20. *Id.* at 361.

21. *Id.* This understanding of the Fourth Amendment's requirements was first articulated by Justice Harlan in his concurrence in *Katz*: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* Justice Harlan's articulation has become the commonly accepted test and has been widely quoted by subsequent Supreme Court and lower court opinions. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33 (2001) ("As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable."); Minnesota v. Olson, 495 U.S. 91, 95–96 (1990) (citing and quoting Justice Harlan's concurring opinion in describing test for Fourth Amendment protection); *Smith*, 442 U.S. at 740 (same).

22. Whether a violation of the Fourth Amendment occurs will depend upon whether the challenging party had a protected privacy interest in the place or persons searched or seized and the reasonableness of the search or seizure. However, the Fourth Amendment doubtless applies in such situations.

III. THE REASONABLE EXPECTATION OF PRIVACY IN ATTORNEY-CLIENT COMMUNICATIONS

Determining whether an order compelling discovery of attorney-client communications violates the Fourth Amendment requires an inquiry that is fundamentally different from inquiries regarding application of the attorney-client privilege. Instead of asking whether the relevant jurisdiction's privilege rule applies and prevents discovery of the communication, the court must ask whether the party resisting discovery has a reasonable expectation of privacy with respect to the communication that society is prepared to accept as reasonable. An affirmative answer would trigger Fourth Amendment protection.

Clients and attorneys have a subjective expectation of privacy in their communications.[23] The attorney-client privilege is well-known to the public as well as to attorneys and judges. Even if laypersons are unclear about precisely what rights or benefits the privilege confers, most people expect and believe that what they say to their attorney will remain private. For those few clients who are unaware of the privilege, the attorney is likely to make this point clear early in the attorney-client relationship, especially if the attorney suspects that the client is withholding potentially relevant information or is reluctant to speak candidly to the attorney. Consequently, there is ample support for the conclusion that clients have a subjective expectation of privacy in their communications with their attorneys.

Furthermore, society has long indicated its willingness to accept that expectation of privacy as reasonable. The attorney-client privilege is one of the few universally recognized principles of law.[24] Whether its ubiquity is due to its relatively ancient roots in American jurisprudence[25] or to a belief in its necessity for the effective and efficient administration of justice, few have questioned whether the attorney-client privilege continues or should continue to be a cornerstone of the judicial system. This unanimous acceptance coupled with the dearth of opposition indicates the willingness of American society to respect the privacy afforded to communications that are covered by the attorney-client privilege.[26] In

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23. "It is axiomatic that the attorney-client privilege confers upon the client an expectation of privacy in his or her confidential communications with the attorney." DeMassa v. Nunez, 770 F.2d 1505, 1506 (9th Cir. 1985).

24. *See, e.g.*, Rice, *supra* note 4, § 1.

25. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law.") (citing 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961)).

26. *Upjohn*, 449 U.S. at 389. Additionally, in *DeMassa*, the court cited *Rakas v. Illinois*, 439 U.S. 128 (1978):

other words, society is prepared to recognize the expectation of privacy in attorney-client communications as reasonable. The subjective expectation of privacy, coupled with society's demonstrated willingness to recognize this expectation as reasonable, gives rise to Fourth Amendment protection from unreasonable government searches and seizures.[27]

IV. THE SEARCH AND SEIZURE REQUIREMENT

If there is a reasonable expectation of privacy in attorney-client communications, then the Fourth Amendment protects those communications against unreasonable government searches and seizures.[28] The Supreme Court stated that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable."[29] In *Oklahoma Press Publishing Co. v. Walling*, Justice Rutledge divided searches and seizures into two categories: "actual" and "constructive" (or "figurative") searches and seizures.[30] To Justice Rutlege, an "actual" search and seizure is one in which an officer or other person seeks to enter onto another's property "against their will, to search them, or to seize or examine their books, records, or papers without their assent."[31] A "constructive" search or seizure, on the other hand, involves judicial orders requiring production of those documents or records.[32] While courts agree that actual searches and seizures implicate the Fourth Amendment, courts debate whether the Amendment applies to constructive searches and seizures and, if so, under what circumstances a constructive search is unreasonable.

A. The Fourth Amendment Applies to "Actual" Searches or Seizures

Fourth Amendment jurisprudence is most highly developed in the context of actual searches and seizures.[33] The Amendment's protection

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> [T]he Supreme Court held: 'Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.' 439 U.S. at 144 n.12, 99 S. Ct. at 431 n.12. The clients have such a source in federal and state statutes, in codes of professional responsibility, under common law, and in the United States Constitution.

DeMassa, 770 F.2d at 1506.

27. Smith v. Maryland, 442 U.S. 735, 740–41 (1979).

28. *Id.*

29. Kyllo v. United States, 533 U.S. 27, 33 (2001) (citing Justice Harlan's concurrence in *Katz*).

30. Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 202 (1946).

31. *Id.* at 195.

32. *Id.* at 202.

33. The Fourth Amendment is made applicable to the States by the Fourteenth Amendment. *See* Payton v. New York, 445 U.S. 573, 576 (1980).

is clearly triggered when the police conduct a search of, or seize property from, a person suspected of a crime.[34] Furthermore, it is well settled that the Amendment applies when it is a person instead of property that is seized.[35] The privacy interests receive perhaps the greatest protection in the home. Because of the unique privacy interests that a person has in his or her home, the Supreme Court has held that the Fourth Amendment prohibits police from entering a suspect's home without a warrant (or consent) to make a felony arrest.[36] Likewise, seizure of contraband from a suspect's home violates the Fourth Amendment if entry into the home is obtained without a warrant and without the consent of the homeowner.[37] The Fourth Amendment was also held to prohibit unreasonable searches and seizures of automobiles, although the expectation of privacy was held to be diminished.[38] Consequently, a warrant is not always necessary before government officers search or seize an automobile.[39]

B. The Fourth Amendment Applies to "Constructive" Searches and Seizures

For Fourth Amendment purposes, "search and seizure" does not refer solely to physical searches of private spaces or seizure of tangible property. As the Court stated in *Katz v. United States*, "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures."[40] Thus, the Court held that the plaintiff had a reasonable expectation of privacy when he placed a phone call from a public telephone booth, and that a search and seizure occurred when government agents listened to and recorded the conversation without a warrant to obtain evidence of suspected criminal activities.[41]

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34. *Id.* at 585 ("'[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'") (quoting United States v. United States District Court, 407 U.S. 297, 313 (1972)).

35. *Payton*, 445 U.S. at 585 ("[T]he warrantless arrest of a person is a species of seizure required by the [Fourth] Amendment to be reasonable.").

36. *Id.* at 586–89.

37. *Id.* If more than one person has the right to give consent to a search and any one is present and denies consent, any warrantless search of the premises violates the Fourth Amendment. *See, e.g.*, Georgia v. Randolph, 547 U.S. 103, 106 (2006).

38. South Dakota v. Opperman, 428 U.S. 364, 367–68 (1976).

39. *Id.*

40. Katz v. United States, 389 U.S. 347, 353 (1967).

41. *Id.* Prior investigation of Mr. Katz "had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law." *Id.* at 354. The Court further held that the warrantless search and seizure violated the plaintiff's rights under the Fourth Amendment. *Id.* at 353 ("The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.").

Despite *Katz*'s expansion of the concept of search and seizure, Fourth Amendment application to court orders—constructive searches—has been challenged repeatedly. For example, many have argued that production of evidence pursuant to a *subpoena duces tecum* is not a search or seizure under the Fourth Amendment,[42] although early Supreme Court opinions clearly held that the Fourth Amendment applies to such subpoenas.[43] In *Boyd v. United States*, the Court stated that "a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be."[44] This language leaves no doubt that the Supreme Court considered court orders compelling production of private papers to be searches and seizures to which the Fourth Amendment applied.

Subsequent cases made it clear that the holding in *Boyd* should not be understood to prevent compulsory production of private documents in all cases.[45] For example, in *Hale v. Henkel*, the appellant was an agent of a corporation that was being investigated by the grand jury.[46] The grand jury issued a *subpoena duces tecum* instructing the agent to produce certain books and papers of the corporation.[47] He refused to produce the documents arguing, *inter alia*, that the subpoena infringed upon his right under the Fourth Amendment to be free from unreasonable searches and seizures.[48]

After acknowledging the holding in *Boyd*, the *Hale* Court concluded that it was "quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of courts to compel, through a *subpoena duces tecum*, the production, upon a trial in court, of documentary evidence."[49] The Court opined that not *every subpoena duces tecum* ran afoul of the Fourth Amendment; rather, it stated that "an order for the production of books and papers *may* con-

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42. *See, e.g.*, In re Horowitz, 482 F.2d 72, 79 (2d Cir. 1973) (speculating that recent Supreme Court decisions "suggest that the Court may be moving toward the position . . . that restriction on overbroad *subpoenas duces tecum* rests not on the Fourth Amendment but on the less rigid requirements of the due process clause").

43. *See, e.g.*, Hale v. Henkel, 201 U.S. 43, 76 (1906) ("While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd Case*, the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum*, against which the person, be he individual or corporation, is entitled to protection."); Boyd v. United States, 116 U.S. 616, 622 (1886).

44. *Boyd*, 116 U.S. at 622.

45. *Hale*, 201 U.S. at 76–77.

46. *Id.* at 69–70.

47. *Id.* at 70.

48. *Id.* at 70–71.

49. *Id.* at 73.

stitute an unreasonable search and seizure within the Fourth Amendment."[50] The Court held that the subpoena at issue was "far too sweeping in its terms to be regarded as reasonable."[51] Thus, while *Hale* did not prohibit the use of *subpoenas duces tecum*, it reaffirmed that "an order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment."[52] Later Supreme Court cases continued to apply the Fourth Amendment to *subpoenas duces tecum*, mainly in cases in which the respondent alleged that the subpoena was overbroad.[53]

Hale was never expressly overruled, but some state and lower court judges have questioned whether the Fourth Amendment should apply to subpoenas at all.[54]

> Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that . . . the Fourth [Amendment], *if applicable*, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.[55]

Such comments not only read Supreme Court opinions narrowly with respect to Fourth Amendment limits on subpoenas, but also cast doubt on whether the Fourth Amendment should apply to constructive searches at all.

Several decades later, the Supreme Court again addressed a Fourth Amendment challenge to a grand jury subpoena in *United States v. Dionisio*.[56] The Court reviewed the complex history of such cases and noted that a subpoena to appear before a grand jury was not a "seizure" for Fourth Amendment purposes,[57] but reaffirmed that "[t]he Fourth Amendment provides protection against a grand jury *subpoena duces*

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50. *Id.* at 76 (emphasis added).

51. *Id.*

52. *Id.*

53. *See In re* Horowitz, 482 F.2d 72, 76–77 (2d Cir. 1973) (discussing Supreme Court cases applying the Fourth Amendment to *subpoenas duces tecum*).

54. *Id.* at 77 (citing Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 202 (1946)).

55. *Oklahoma Press*, 327 U.S. at 208 (emphasis added).

56. 410 U.S. 1 (1973).

57. *Id.* at 9.

tecum too sweeping in its terms."[58] Even after *Dionisio*, lower courts expressed confusion regarding the state of the law, and the Second Circuit in *In re Horowitz* speculated that the Court "may be moving toward the position . . . that restriction on overbroad *subpoenas duces tecum* rests not on the Fourth Amendment but on the less rigid requirements of the due process clause."[59] Yet, for now, the courts seem to agree that *subpoenas duces tecum* issued by grand juries and administrative agencies are still subject to the Fourth Amendment.[60] Moreover, at least one court expressly found that a court order to produce documents constitutes a search and seizure under the Fourth Amendment. In *Westside Ford v. United States*,[61] a case involving a challenge to an administrative subpoena, the court stated that "[a]n order to produce documents may constitute a constructive 'unreasonable search and seizure' in violation of the Fourth Amendment if it is too indefinite in its demands, . . . or if documents demanded are irrelevant or immaterial to the purpose of the inquiry."[62]

Recognition that the Fourth Amendment applies to subpoenas and other orders to produce documents is consistent with the principles underlying the Fourth Amendment. The privacy interests at stake are the same whether the government seeks to force a party to turn over information or documents under threat of contempt, or if the government searches for or seizes the documents pursuant to a warrant. In both instances, the reasonable expectation of privacy is jeopardized, and the government should be required to act in a reasonable manner.

V. THE GOVERNMENT ACTION REQUIREMENT

The Fourth Amendment only protects against unreasonable searches and seizures by the *government*.[63] The most common context in

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58. *Id.* at 11.

59. *In re Horowitz*, 482 F.2d at 79; *see also* United States v. Int'l Bus. Machs., Corp., 83 F.R.D. 97, 101 (S.D.N.Y. 1979) ("'Decisions have moved with variant direction' when applying fourth amendment protections to 'so-called 'figurative' or 'constructive'' searches conducted pursuant to subpoenas duces tecum.") (quoting *Oklahoma Press*, 327 U.S. at 202).

60. *See, e.g.*, *IBM*, 83 F.R.D. at 101 ("No purpose would be served by once again tracing the often torturous path on which the Supreme Court embarked in *Boyd v. United States*. . . . It is sufficient to emphasize the present posture of that development. Subpoenas duces tecum issued in the course of investigations by grand juries and administrative agencies are subject to the fourth amendment's prohibition against unreasonable search and seizures."); United States v. Barr, 605 F. Supp. 114, 116 (S.D.N.Y. 1985) ("[T]he [F]ourth [A]mendment prohibits the issuance of subpoenas duces tecum which are overbroad . . . .").

61. 206 F.2d 627 (9th Cir. 1953).

62. *Id.* at 631–32 (internal citations omitted).

63. United States v. Jacobsen, 466 U.S. 109, 113 (1984) ("This Court has . . . consistently construed [Fourth Amendment] protection as proscribing only governmental action . . . ."); Smith v. Maryland, 442 U.S. 735, 740 (1979) (stating that whether Fourth Amendment applies "depends on

which Fourth Amendment questions arise is when the government investigates or prosecutes an individual or entity for suspected criminal violations.[64] However, the Supreme Court has held that the Fourth Amendment applies in civil proceedings.[65] Unfortunately, the Court has not clarified precisely what constitutes the requisite government action in civil cases for the purposes of the Fourth Amendment. Government action likely includes instances in which law enforcement officers participate in the search of an opposing party's home or business,[66] or the physical search or restraint of a party.[67] But in the civil discovery context, particularly if the government is not a litigant, government action takes the form of a court order mandating disclosure or production of documents or information. As argued below, those court orders are sufficient government action to trigger the protection of the Fourth Amendment against unreasonable search and seizure.

A. Government Action has been Found in Civil Cases in which the Government Is a Litigant

Government action triggering application of the Fourth Amendment has been found in civil cases in which the government was a party to the litigation. In *Soldal v. Cook County*, the Soldal family brought an action under 28 U.S.C. § 1983 for damages suffered when their trailer home was unlawfully removed from a rented lot in a mobile home park.[68] Several Cook County sheriffs' deputies accompanied the landlord when the trailer home was removed.[69] The deputies' presence was requested to "forestall any possible resistance" from the Soldals.[70] The deputies knew

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whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action"); United States v. Van Poyck, 77 F.3d 285, 290 (9th Cir. 1996) (citing New York v. Class, 475 U.S. 106, 112 (1986)) ("The Fourth Amendment is not triggered unless the *state* intrudes into an area in which a person has a constitutionally protected expectation of privacy.") (emphasis added); Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254, 256 (N.D. Ill. 1981) ("it is elementary that the Fourth Amendment and its accompanying exclusionary rule only apply to conduct of or attributable to the government, and normally do not apply in civil cases . . . .").

64. *See* Coolidge v. New Hampshire, 403 U.S. 443, 498 (1971) ("The Fourth Amendment provides a constitutional means by which the Government can act to obtain evidence to be used in criminal prosecutions.").

65. *See* Soldal v. Cook County, 506 U.S. 56, 67 (1992) (reaffirming that "the [Fourth] Amendment's protection applies in the civil context").

66. *See id.* (finding a seizure under the Fourth Amendment when sheriff's deputies participated in the removal of a trailer from the landlord's property in a civil evictions action).

67. *See* Milner v. Duncklee, 460 F. Supp. 2d 360 (D. Conn. 2006) (finding a Fourth Amendment violation when the defendant was arrested for failure to appear at a child support hearing).

68. *Soldal*, 506 U.S. at 59–60.

69. *Id.* at 58.

70. *Id.*

that the landlord did not have an eviction order and knew that the landlord's actions were unlawful, but nevertheless allowed the removal to take place.[71] The Soldals filed suit against the county and the deputies alleging that the deputy sheriffs conspired with the landlord to remove their trailer home from the lot and that this action violated the Soldals' Fourth and Fourteenth Amendment rights.[72] In reviewing the district court's grant of summary judgment in favor of the defendants, the Seventh Circuit assumed that there was state action, but held that the removal of the trailer was not a seizure for Fourth Amendment purposes.[73]

The Supreme Court disagreed and held that the facts alleged a seizure under the Fourth Amendment.[74] While the Court acknowledged that language in a prior case "cast some doubt on the applicability of the Amendment to noncriminal encounters such as this,"[75] the Court pointed to subsequent cases to confirm that the Fourth Amendment applies to all governmental searches and seizures:

> *Murray's Lessee*'s broad statement that the Fourth Amendment "has no reference to civil proceedings for the recovery of debt" arguably only meant that the warrant requirement did not apply, as was suggested in *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352, 97 S. Ct. 619, 628, 50 L. Ed. 2d 530 (1977). Whatever its proper reading, we reaffirm today our basic understanding that the protection against unreasonable searches and seizures fully applies in the civil context.[76]

While this holding refutes any argument that the Fourth Amendment cannot apply in a civil case, it does not make clear what types of action will qualify as "government action." Presumably, the Fourth Amendment is implicated when police or other government agents are conducting an "actual" search or seizure, regardless of whether the search or seizure occurs in connection with a criminal or civil proceeding.[77]

The correct result is less clear in cases in which the government is a party to a civil proceeding and seeks information as part of routine dis-

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71. *Id.* at 59.

72. *Id.* at 59–60.

73. *Id.* at 60.

74. *Id.* at 72.

75. *Id.* at 67 n.11 (citing Murray's Lessee v. Hoboken Land & Impr. Co., 18 How. 272, 285, 15 L. Ed. 372 (1856)).

76. *Id.* at 67.

77. *See id.*; *see also* O'Connor v. Ortega, 480 U.S. 709, 715 (1987) (noting that "[s]earches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment").

covery.[78] The lack of clear guidance from the Supreme Court has caused lower courts to struggle with this question. In *United States v. International Business Machines, Corp.*, the Southern District of New York initially appeared convinced that the Fourth Amendment should not apply to a subpoena issued by the government in a civil case.[79] The court lamented over the rather "tortuous" path of the Supreme Court's decisions regarding Fourth Amendment application to *subpoenas duces tecum* in criminal investigations,[80] noting that those cases left completely unanswered the question of whether the Fourth Amendment applies to government subpoenas in civil cases.[81] Moreover, very few opinions addressed the issue even indirectly, leaving little precedent or useful analysis to guide the court.[82]

The district court then engaged in its own analysis, beginning by distinguishing between the government's role in criminal cases (investigator) and its role in civil actions (litigant):[83]

> When a subpoena duces tecum in a civil case is challenged, it would appear the protection sought resides in the Federal Rules of Civil Procedure, not the [F]ourth [A]mendment. Moreover, if the [F]ourth [A]mendment applies to a subpoena issued by the government in civil litigation, there may be no escape from the conclusion that in all civil cases, even where the government is not a litigant, the [F]ourth [A]mendment applies to limit discovery requests. *The requisite state action component of a fourth amendment claim in all civil cases, whether the government appears or not, would be the court's involvement in issuing and enforcing the subpoena. It strains common sense and constitutional analysis to conclude that the [F]ourth [A]mendment was meant to protect against unreasonable discovery demands made by a private litigant in the course of civil litigation.*[84]

Despite this strong language, the court went on to acknowledge several arguments in favor of applying the Fourth Amendment.

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78. It is also unclear whether the court would have found state action sufficient to sustain the § 1983 claim if the case had been brought only against the landlord and not the county or the deputies, or if the deputies had not been found to have conspired with the landlord in removing the trailer. *See Soldal*, 506 U.S. at 67; *see also* discussion *infra* Part IV.A.

79. United States v. Int'l Bus. Machs., Corp., 83 F.R.D. 97, 102 (S.D.N.Y. 1979).

80. *Id.* at 101–02.

81. *Id.*

82. *Id.* (finding only three cases in which civil discovery orders were challenged on Fourth Amendment grounds and noting that the opinions in those cases only indirectly or inexplicitly addressing the Fourth Amendment issue).

83. *Id.* at 102.

84. *Id.* (emphasis added).

First, the court noted that the same privacy interest (the protection of reasonable expectations of privacy from unreasonable government intrusion)[85] is at stake regardless of whether the government is investigating or litigating.[86] The court wondered whether the Fourth Amendment's protection should apply equally in each situation.[87] Next, the court noted that refusing to apply the Fourth Amendment to a government-issued subpoena in a civil antitrust action could result in an "incongruous result."[88] Because the government had the right under the antitrust statutes to issue a civil investigative demand ("a process with analogues to both investigative *subpoenas deuces tecum* and civil discovery procedures"[89]) prior to instituting a civil or criminal proceeding, whether the Fourth Amendment applies would depend solely upon the timing of the demand for the documents.[90] Lastly, the court acknowledged that the Supreme Court has applied the Fourth Amendment in civil cases, thus refuting any argument that the mere fact that the litigation is civil in nature makes the Fourth Amendment inapplicable.[91]

Ultimately, the court was "left in doubt whether the analogical 'search and seizure' embodied in a civil discovery subpoena should be susceptible to [F]ourth [A]mendment attack at all."[92] The court assumed, without deciding, that the Fourth Amendment applied and concluded that the Fourth Amendment's reasonableness standard was no more rigorous than the standard imposed by Federal Rule of Civil Procedure 45(b).[93]

Other courts have held that the Fourth Amendment can apply when the government conducts discovery in civil cases,[94] although some have used rather vague language that leaves their assessment of the Fourth Amendment's application and scope unclear.[95] In *United States v. Bell*,[96] the United States brought a civil action against a tax protester. The defendant refused to respond to discovery requests, claiming violations of

85. *Id.*

86. *Id.*

87. *Id.* ("Quaere whether that protection should not remain equally applicable without regard to the particular role played by the government as investigator or litigant.").

88. *Id.* at 102–03.

89. *Id.* at 103 n.8.

90. *Id.* at 102–03.

91. *Id.* at 103.

92. *Id.*

93. *Id.* at 103–04.

94. *See* Westside Ford, Inc. v. United States, 206 F.2d 627, 631–32 (9th Cir. 1953) (In a case involving a challenge to an administrative subpoena, "[a]n order to produce documents may constitute a constructive 'unreasonable search and seizure' in violation of the Fourth Amendment if it is too indefinite in its demands, or if documents demanded are irrelevant or immaterial to the purpose of the inquiry.") (internal citations omitted).

95. *See* United States v. Bell, 217 F.R.D. 335 (M.D. Pa. 2003).

96. *Id.* at 337.

the Fourth and Fifth Amendments.[97] With respect to the Fourth Amendment, the defendant claimed that the discovery requests violated his "right to privacy."[98] The court held that "[t]here is no 'right of privacy' privilege against discovery in civil cases"[99] but noted that an individual's privacy interests *may be considered* "in determining whether a discovery request is oppressive or unreasonable."[100] Concluding that the production of non-privileged materials was not oppressive or unreasonable, the court found "Bell's right of privacy argument unpersuasive."[101] Obviously, the court found no Fourth Amendment *violation*, but it is unclear whether the court believed that the Fourth Amendment applied at all, or, if it did apply, the extent of its protection.

B. Government Action can be Found in Civil Cases Involving Only Private Litigants

If litigation involves only private litigants, then the requisite government action can take the form of government officials acting in concert with, or on behalf of, private parties in conducting actual searches or seizures of a person or property.[102] Government action can also exist if a court authorizes private parties to conduct the search or seizure of property.[103] These scenarios are not the norm in civil cases. Instead, government action generally occurs when the court issues or enforces a subpoena or an order granting a motion to compel a party to produce evidence or disclose information.

Courts have found issuance of orders by judicial officers to be state action in cases alleging First and Fourteenth Amendment violations.[104] The argument has also had some success in civil cases alleging that a

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97. *Id.*

98. *Id.* at 342.

99. *Id.* at 343.

100. *Id.*

101. *Id.*

102. *See, e.g.*, Soldal v. Cook County, 506 U.S. 56, 67 (1992); Milner v. Duncklee, 460 F. Supp. 2d 360 (D. Conn. 2006) (finding Fourth Amendment applied when state court ordered arrest of defendant after he failed to appear at child support hearing).

103. *See, e.g.*, Comcast of Ill. X, LLC v. Till, 293 F. Supp. 2d 936 (E.D. Wis. 2003) (declining to grant *ex parte* order in civil case that would authorize plaintiff's agents to search defendant's home and seize property, noting that the search and seizure would implicate the Fourth Amendment).

104. In a case involving an alleged violation of the First Amendment, the Tenth Circuit stated: "In this case, . . . the magistrate's order compelling discovery and the trial court's enforcement of that order provide the requisite governmental action that invokes First Amendment scrutiny." Grandbouche v. Clancy, 825 F.2d 1463, 1466 (10th Cir. 1987). *See also* Doe v. 2TheMart.com Inc., 140 F. Supp.2d 1088, 1091–92 (W.D. Wash. 2001) (noting in a case involving alleged First Amendment violations that "[a] court order, even when issued at the request of a private party in a civil lawsuit, constitutes state action and as such is subject to constitutional limitations").

court order violates the Fourth Amendment, but in many of those cases the courts rely in whole or in part on state constitutional provisions that are identical to the Fourth Amendment to the United States Constitution.[105]

1. Government Action in Civil Cases Involving Actual Searches or Seizures

At times, government officials have become involved in civil cases in ways that implicate the Fourth Amendment. Several recent cases illustrate that courts are willing to find government action when private parties seek to conduct actual searches and seizures of property in connection with their civil cases. In some cases, the parties sought orders directing government officers to conduct actual searches and seizures. For example, in *Milner v. Duncklee*,[106] the plaintiff brought a civil rights action alleging that his arrest, pursuant to a state court *capias*[107] issued after he failed to appear at a child support hearing, violated his Fourth Amendment right to be free from unreasonable searches and seizures.[108] Both the plaintiff and the defendants moved for summary judgment.[109] The district court rejected the defendants' argument that the Fourth Amendment was inapplicable because the court order was issued in a civil proceeding.[110] The court found that the Fourth Amendment was triggered not by an accusation of criminal wrongdoing but by the seizure itself and held that an arrest pursuant to a *capias* violated the Fourth Amendment.[111]

Similarly, in *Adobe Systems, Inc. v. South Sun Products, Inc.*,[112] computer software manufacturers brought an action against a competing business for copyright infringement.[113] The plaintiff filed an ex parte

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105. *See, e.g.*, Steele v. Superior Court, 9 Cal. Rptr. 14, 20 (Cal. Dist. Ct. App. 1961) ("Petitioner . . . sought to examine transcripts of testimony which certainly must have been largely devoted to matters that were of no concern to petitioner in order to ascertain whether some portion thereof dealt with the subject matter of his own action. To uphold such a procedure would be to erode and leave with little or no effect, insofar as civil actions are concerned, the prohibition against unreasonable searches set forth in our [State] Constitution.").

106. 460 F. Supp. 2d at 362.

107. "Any of various types of writs that require an officer to take a named defendant into custody. A capias is often issued when a respondent fails to appear or when an obligor has failed to pay child support." BLACK'S LAW DICTIONARY 221 (8th ed. 2004).

108. Milner v. Duncklee, 460 F. Supp. 2d 360, 362 (D. Conn. 2006).

109. *Id.* at 363.

110. *Id.* at 367.

111. *Id.* at 375–76. Because it was not established at the time of the plaintiff's arrest whether a facially valid capias authorized a home arrest, however, the court found the defendants had qualified immunity and granted the defendants' motions for summary judgment. *Id.* at 376–78.

112. 187 F.R.D. 636 (S.D. Cal. 1999).

113. *Id.* at 637.

application for a temporary restraining order.[114] The application sought an order directing a U.S. Marshal to enter the defendant's business premises "to search for and seize" the allegedly infringing software.[115] The district court held that the ex parte order was not warranted without a showing that the defendant had destroyed evidence or violated court orders in the past.[116] Since the defendant was unaware that judicial proceedings had been commenced, and since the relief sought "presse[d] uncomfortably against the constitutional boundaries imposed by the Fourth and Fifth Amendments,"[117] the court found a showing that the adverse party would have the opportunity to conceal evidence insufficient to justify the ex parte order.[118]

In each of the above cases, the government was not a litigant in the underlying civil cases, yet the private parties sought to have government officials conduct actual searches of the opposing party's homes or businesses or to seize a person or property. In light of the Supreme Court's affirmation in *Soldal* that the Fourth Amendment applies in civil cases and the obvious government involvement in the desired searches and seizures, the requisite government action is apparent.[119]

The Fourth Amendment was also held to have been violated in a case in which a private litigant sought a court order for an actual search and seizure to be conducted by the private party's agents, not government officials. In *Time Warner Entertainment Co. v. Does Nos. 1-2*,[120] the owner of the copyrights for Looney Tunes cartoon characters filed an action for copyright infringement.[121] The plaintiff sought an ex parte seizure order for allegedly infringing products sold by the defendants.[122] Rather than request that government officials be directed to seize the items, the plaintiff sought an order authorizing a private investigator to break into the residence and the business of the defendants and impound the allegedly infringing products.[123] The district court held that the pro-

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114. *Id.*

115. *Id.* at 638.

116. *Id.* at 641.

117. *Id.* at 639.

118. *Id.* at 641.

119. This conclusion is strengthened by the Supreme Court's refusal in *Soldal* to review the Seventh Circuit's finding that there was evidence of state action in that case sufficient raise an issue of fact. *See* Soldal v. Cook County, 506 U.S. 56, 60 n.6 (1992) ("The Court of Appeals found that because the police prevented Soldal from using reasonable force to protect his home from private action that the officers knew was illegal, there was sufficient evidence of conspiracy between the private parties and the officers to foreclose summary judgment for respondents. We are not inclined to review that holding.").

120. 876 F. Supp. 407, 412 (E.D.N.Y. 1994).

121. *Id.* at 408.

122. *Id.*

123. *Id.*

posed order violated the Fourth Amendment[124] because a private party would conduct the search instead of a U.S. Marshal or law enforcement officer.[125] In this case, the only possible government action was the order authorizing the search.

Plaintiffs have also challenged actual searches and seizures on Fourth Amendment grounds in civil cases brought under 42 U.S.C. § 1983. These cases also raise the issue of government (or "state") action. To sustain a civil rights claim under § 1983, the plaintiff must prove a deprivation of a right under the Constitution or laws of the United States.[126] However, a remedy under this statute is only available if the deprivation occurred "under color of state law."[127] To determine whether a deprivation has occurred under color of state law, the court must first determine whether the deprivation was caused by "the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible."[128] Additionally, the party charged with the deprivation must be "a person who may fairly be said to be a state actor."[129] In other words, the constitutional violation must be the result of state action.

Despite the involvement of members of the sheriff's office in the search and seizure of a private residence, no such state action was found in *Yanaki v. Iomed, Inc.*[130] *Yanaki* involved an employer, Iomed, that filed suit against a former employee, Yanaki, for alleged misappropriation of trade secrets and violation of a non-compete agreement.[131] Soon after the complaint was filed, Iomed's lawyers filed an "Ex Parte Motion for Order to Conduct Immediate Discovery to Prevent the Destruction or Alteration of Evidence."[132] The motion was granted and the Salt Lake County Sheriff's Office, assisted by Iomed, was authorized to conduct a search of Yanaki's residence, to seize all computer hard drives found there, and to "recover" any confidential Iomed files found.[133] When the

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124. The court noted that it was "by now well settled that seizures pursuant to civil actions are subject to Fourth Amendment scrutiny." *Id.* at 412 (citing *Soldal*, 506 U.S. at 61; Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978)).

125. *Id.* The court also found that the plaintiffs "failed to provide sufficient particularity for the premises to be searched or the articles to be seized." *Id.*

126. Lugar v. Edmondson Oil Co., 457 U.S. 922, 924–29 (1982) (analyzing the relationship between the requirement of action "under color of state law" under 42 U.S.C. § 1983 and "state action" under the Fourteenth Amendment and concluding that the requirements are identical and that the petitioner was deprived of his property through state action).

127. *Id.*

128. *Id.* at 937.

129. *Id.*

130. 319 F. Supp. 2d 1261 (D. Utah 2004).

131. *Id.* at 1261–62.

132. *Id.* at 1262.

133. *Id.* at 1263.

sheriff's deputy and Iomed's attorney arrived at Yanaki's residence, Yanaki was not home. The other resident of the home was present but refused to allow the deputy or attorney to enter or search the home.[134] Iomed's attorney then sought and obtained, ex parte, a writ of assistance authorizing the use of "reasonable force" to execute the search order.[135] The deputy, Iomed's attorney, an Iomed employee, and an employee of another defendant were all allowed to search Yanaki's home.[136] Several items were seized and copied.[137] Yanaki and the other resident of the home filed a claim under § 1983 alleging violations of their Fourth Amendment right to be free from unreasonable searches and seizures.[138]

The court concluded that the conduct complained of clearly violated the plaintiff's Fourth Amendment rights, but *only if* state action was involved.[139] Whether such state action was involved presented a more difficult question. The alleged state action was the "[d]efendants' use of state discovery rules to obtain an order from a state court judge permitting the search of their home and the seizure of Yanaki's property."[140] Applying *Lugar*'s two-step approach, the court held that the search and seizure could not fairly be attributed to the state.[141] The court believed that prior Supreme Court and Tenth Circuit opinions "make clear that the mere involvement of a state court or state law enforcement officer in a private matter does not necessarily constitute state action within the meaning of § 1983."[142] Instead, state action necessary to sustain a § 1983 action could be found only if "the state court proceedings may be characterized as a complete nullity" or if the statute under which the state court order was issued was unconstitutional.[143] Since the facts did not support a finding on either of those grounds, the court held that the plain-

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134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 1263–64. They also alleged violations of their due process rights. *Id.*

139. *Id.* at 1264 n.7 ("The invasion of Plaintiff's home, supported only by an ex parte submission of Plaintiffs' opponents in a civil lawsuit, appears to be precisely the type of unreasonable intrusion into a private dwelling that the Fourth Amendment is designed to prevent.").

140. *Id.* at 1265. Interestingly, the plaintiffs did not argue that the sheriff's deputy's participation was sufficient state action to sustain a § 1983 claim. *See* Soldal v. Cook County, 506 U.S. 56, 59–60 (1992). Thus, the court did not address whether an actual seizure by state officials would be state action necessary to support a § 1983 claim.

141. *Yanaki*, 319 F. Supp. 2d at 1265–66.

142. *Id.* at 1265 n.8; *see also* Barnard v. Young, 720 F.2d 1188, 1189 (10th Cir. 1983); Lindley v. Amoco Prod. Co., 639 F.2d 671 (10th Cir. 1981); Torres v. First State Bank of Sierra County, 588 F.2d 1322, 1326–27 (10th Cir. 1978).

143. *Yanaki*, 319 F. Supp. 2d at 1266.

tiffs failed to state a claim under § 1983.[144] Although no state action was found for purposes of § 1983, this does not conclusively establish that court orders compelling production of attorney-client communications are not government action for Fourth Amendment purposes. As discussed below, precedent in First and Fourteenth Amendment cases provide compelling support for the contrary conclusion.

2. Court Orders can be Government Action in Civil Cases

a. Court Orders have been Held to be Government Action in Cases Involving Other Constitutional Provisions: First and Fourteenth Amendment Cases

A long line of opinions from all levels of the federal judiciary have held that a court order can be government action sufficient to support a claim that a party's rights under the First and Fourteenth Amendments to the United States Constitution have been violated.[145] In *NAACP v. Alabama*,[146] the Supreme Court considered allegations that state court orders violated the petitioners' First Amendment rights. The trial court had ordered the NAACP to disclose the names and addresses of all of its members and agents in the state of Alabama.[147] On appeal, the Supreme Court held that the order would likely impose "a substantial restraint upon the exercise by petitioner's members of their right to freedom of association."[148] The violation was found despite the fact that the "repressive effect" of the disclosure would follow from pressure from private individuals and entities, rather than from the state.[149] "The crucial factor is the interplay of governmental and private action, for it is only after the

144. *Id.* The *Yanaki* opinion must be understood in the proper context. Specifically, it involved an attempt to obtain a civil remedy for actions of *private individuals* who were alleged to have acted "under color of state law" and thereby deprived the plaintiffs of their constitutional rights. The court did not directly address the constitutional implications of the actions of government officials or entities. In other words, a finding that a private individual (such as an attorney for a private party in a civil case) was not a state actor for purposes of § 1983 does not preclude a finding of a constitutional violation by a government official, such as the judge issuing an order. Thus, cases dismissing § 1983 claims on grounds that there was no state action may be interpreted to preclude civil recovery from attorneys or other private litigants who take action based upon a court order, but as the cases discussed in the next section demonstrate, those cases do not preclude a finding that issuance of an order is state action that may violate a person's constitutional rights. *See* discussion *infra* Part V.B.2.

145. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 463 (1958); Shelley v. Kraemer, 334 U.S. 1, 14–15 (1948); Grandbouche v. Clancy, 825 F.2d 1463, 1466 (10th Cir. 1987).

146. 357 U.S. 449 (1958).

147. *Id.* at 451.

148. *Id.* at 462.

149. *Id.* at 463.

initial exertion of state power represented by the production order that private action takes hold."[150]

More recently, lower federal courts have held that court orders constituted government action that implicated the parties' constitutional rights. *Doe v. 2TheMart.com, Inc.*[151] was a shareholder derivative action against 2TheMart.com ("TMRT") alleging fraud on the market.[152] TMRT asserted an affirmative defense that "no act or omission by the defendants caused the plaintiffs' injury."[153] In support of this defense, TMRT issued subpoenas to InfoSpace, an Internet company that operated bulletin boards devoted to publicly traded companies, including TMRT. The subpoenas were issued to obtain the identities and subscriber information of persons who anonymously participated in the TMRT message board.[154] One of the users whose identity was sought filed a motion to quash the subpoena on the grounds that it violated his or her First Amendment right to speak anonymously.[155] The court stated that "[a] court order, even when issued at the request of a private party in a civil lawsuit, constitutes state action and as such is subject to constitutional limitations."[156]

The court held that First Amendment protections extend to speech via the Internet.[157] The court then adopted standards for evaluating civil subpoenas seeking the identity of anonymous Internet users who are not parties to the underlying litigation.[158] The court detailed four factors that should be considered: (1) whether the subpoena was issued in good faith and for a proper purpose; (2) whether the information sought relates to a core claim or defense; (3) whether the identifying information is directly and materially relevant to a core claim or defense; and (4) whether information sufficient to establish or to disprove a core claim or defense is available from any other source.[159] The court explained:

> This test provides a flexible framework for balancing the First Amendment rights of anonymous speakers with the right of civil litigants to protect their interests through the litigation discovery process. . . . This Court is mindful that it is imposing a high burden.

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150. *Id.*

151. 140 F. Supp. 2d 1088 (W.D. Wash. 2001).

152. *Id.* at 1089.

153. *Id.* at 1090.

154. *Id.*

155. *Id.* at 1091.

156. *Id.* at 1091–92. *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964); Shelley v. Kraemer, 334 U.S. 1, 14–15 (1948).

157. *2TheMart.com*, 140 F. Supp. at 1092.

158. *Id.* at 1095.

159. *Id.*

> "But the First Amendment requires us to be vigilant in making [these] judgments, to guard against undue hindrances to political conversations and the exchange of ideas."[160]

Likewise, in *Grandbouche v. Clancy*,[161] the Tenth Circuit Court of Appeals recognized that a First Amendment claim was stated in a case involving only private litigants' challenges to discovery orders:[162]

> Although the First Amendment does not normally restrict the actions of purely private individuals, the [A]mendment may be applicable in the context of discovery orders, even if all of the litigants are private entities. In this case, for example, the magistrate's order compelling discovery and the trial court's enforcement of that order provide the requisite governmental action that invokes First Amendment scrutiny.[163]

These cases refute any argument that discovery orders in civil cases cannot be state action sufficient to trigger constitutional protection.

Court orders have also provided the requisite state action in cases involving violations of the Fourteenth Amendment. In *Shelley v. Kraemer*,[164] the Supreme Court considered two cases, each involving racially restrictive covenants entered into by private parties but enforced by the state supreme court (namely, the Supreme Courts of Missouri and Michigan).[165] The petitioners alleged violations of their rights under the Fourteenth Amendment to equal protection of the laws, deprivation of property without due process of law, and denial of privileges and immunities of United States citizens.[166]

The Court acknowledged that the Fourteenth Amendment does not protect parties from discriminatory or wrongful conduct by private parties.[167] Consequently, the restrictive covenants themselves did not violate the petitioners' Fourteenth Amendment rights.[168] However, the Court held that judicial enforcement of those restrictive covenants did violate the petitioners' constitutional rights.[169] Central to this holding was a finding that the judicial enforcement of the private agreements was

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160. *Id.* (quoting Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 192 (1999)).

161. 825 F.2d 1463 (10th Cir. 1987).

162. *Id.* at 1466.

163. *Id.*

164. 334 U.S. 1 (1948).

165. *Id.* at 4–7.

166. *Id.* at 7–8.

167. *Id.* at 13.

168. *Id.*

169. *Id.* at 20 ("We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand.").

state action for purposes of the Fourteenth Amendment.[170] The Court discussed the long line of cases recognizing that action by judicial officers acting in their official capacities was state action within the meaning of the Fourteenth Amendment:[171]

> The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials.[172]

In considering the enforcement of the restrictive covenants by the Missouri and Michigan courts, the Court had "no doubt" that there was state action.[173] The judgments of the state courts prevented the petitioners from purchasing and occupying homes subject to the restrictive covenants.[174] Consequently, the Court held that the States violated the petitioners' Fourteenth Amendment rights.[175]

The cases discussed above held unequivocally that the actions of government officials, including judicial officers, can be state action for purposes of the First and Fourteenth Amendments. Moreover, discovery orders issued and enforced by judicial officers in civil cases constitute government action, even if the litigation involves only private parties. The reasoning and conclusions of the federal appellate courts and the Supreme Court in the First and Fourteenth Amendment cases should apply equally in Fourth Amendment cases.

b. Court Orders may be Government Action that Invoke the Protection of the Fourth Amendment

Few cases have expressly addressed government action with respect to Fourth Amendment claims in civil cases involving only private litigants. Some cases, however, have addressed the issue in a vague or indi-

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170. *Id.* at 14–20.

171. *Id.* at 14–15 (citing, *inter alia*, Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680 (1930); Twining v. New Jersey, 211 U.S. 78, 90–91 (1908); Commonwealth of Virginia v. Rives, 100 U.S. 313, 318 (1880); Ex parte Commonwealth of Virginia, 100 U.S. 339, 347 (1880); Civil Rights Cases, 109 U.S. 3, 11, 17 (1883)). "These cases demonstrate . . . the early recognition by this Court that state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute." *Shelley*, 334 U.S. at 16. Moreover, a violation of the Fourteenth Amendment can occur even if the judicial proceedings comport with "the most rigorous conceptions of procedural due process." *Id.* at 17.

172. *Id.* at 18.

173. *Id.* at 19.

174. *Id.*

175. *Id.* at 23.

rect manner.[176] One such case is *Red Star Laboratories Co. v. Pabst*,[177] a civil suit between two private businesses involving allegations of trademark infringement, unfair competition, and various other business-related violations.[178] The defendant was found guilty of contempt for refusing to obey a court order requiring production of certain documents.[179] The Supreme Court of Illinois held that the order was overbroad because it sought documents that were not relevant to the issues.[180] "It was violative of the constitutional rights of appellant to be secure against unreasonable search and seizure of his papers and effects, as guaranteed him by the Fourth Amendment to the Federal Constitution, and section 6 of article 2 of the State Constitution."[181] Despite finding a Fourth Amendment violation, the court did not address the government action requirement.[182] Thus, one may only infer that the court believed that the production order provided the requisite government action.

In other cases in which a constructive search and seizure Fourth Amendment claim is raised, courts have dismissed the claim with little or no discussion. For example, in *Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc.*,[183] the defendants refused to answer interrogatories related to documents that the plaintiffs had removed from the defendants' trash

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176. At least one district court has held that issuance of a subpoena by a private litigant can be state action. In *Timson v. Weiner*, 395 F. Supp. 1344, 1348–49 (S.D. Ohio 1975), Judge Duncan stated:

> I hold that the issuance of a subpoena of the State Personnel Board of Review is an act of the State of Ohio, and that when such a subpoena is caused to be issued by a private litigant or attorney pursuant to the subpoena privilege granted litigants by the State of Ohio, such action is state action for purposes of the Fourteenth Amendment and action under color of state law for purposes of 42 U.S.C. § 1983. It is not the status of the attorneys defendant herein as attorneys which is determinative; it is the fact that a private person, be he attorney or layman, has under the facts alleged invoked the direct power of the state.

Id. *Timson* was overruled twenty-four years later by the Sixth Circuit in *Hahn v. Star Bank*, 190 F.3d 708, 717 (6th Cir. 1999). The Sixth Circuit agreed with the Tenth Circuit's reasoning in *Barnard v. Young*, 720 F.2d 1188 (10th Cir. 1983), in which the court held that an attorney does not become a state actor under § 1983 by causing a *subpoena duces tecum* to be issued. "Because we are of the opinion that *Timson* was wrongly decided, we now put this circuit on record as holding that a private attorney issuing a subpoena does not become a state actor for the purposes of § 1983. In doing so, we adopt the reasoning set forth in *Barnard*." *Hahn*, 190 F.3d at 717 (citing *Barnard*, 720 F.2d at 1189).

177. 194 N.E. 734 (Ill. 1935).

178. *Id.* at 734.

179. *Id.* at 735.

180. *Id.*

181. *Id.*

182. The court did state that the trial court had no authority to order production of documents that were not relevant to the issues and that the defendant was justified in refusing to comply with the order. *Id.*

183. 91 F.R.D. 254 (N.D. Ill. 1981).

dumpster.[184] The defendants claimed that some of the documents were covered by the attorney-client privilege.[185] The magistrate entered an order requiring the plaintiffs to return the documents to the defendants, sustained the defendants' objections to the interrogatories, and excluded the use of the documents as evidence.[186] The plaintiffs appealed the magistrate's order. The district court addressed the defendants' Fourth Amendment concerns with respect to the non-privileged documents by first noting that there is no reasonable expectation of privacy in property placed in the garbage.[187] Moreover, the court believed that even if the defendants had a reasonable expectation of privacy, "it is elementary that the Fourth Amendment and its accompanying exclusionary rule only apply to conduct of or attributable to the government, and normally do not apply in civil cases."[188]

In *Bowerman v. MacDonald*,[189] the court was similarly dismissive of a Fourth Amendment claim. The defendant argued that a court-ordered blood test in a paternity case violated his Fourth Amendment rights.[190] The court did not analyze the requirements for a Fourth Amendment claim beyond stating that "[t]he defendant has not cited, nor has our research revealed, any cases in which otherwise properly constituted discovery in a civil action has been held to constitute a violation of the Fourth Amendment."[191] Because the court did not discuss the elements of a Fourth Amendment claim, it is unclear why the court held that the order did not violate the Fourth Amendment. Moreover, then the court assumed, without deciding, that the Fourth Amendment was implicated and held that the order was reasonable.[192]

Much of the language that provides the strongest support for Fourth Amendment claims in civil cases involving private litigants can be found in cases from California.[193] However, these cases are of limited use to litigants in other states because it is unclear whether the California courts in those cases were relying on the "search and seizure" provision of the Fourth Amendment to the United States Constitution or on the nearly

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184. *Id.* at 255–56.

185. *Id.* at 256.

186. *Id.*

187. *Id.*

188. *Id.* With respect to the privileged documents, the court held that the privilege was waived when the documents were thrown into the trash. *Id.* at 260–61.

189. 427 N.W.2d 477 (Mich. 1988) (rejecting claim that blood test in a paternity case violated the Fourth Amendment).

190. *Id.* at 485. He claimed that the court order constituted the requisite state action. *Id.*

191. *Id.*

192. *Id.* at 485–86.

193. *See, e.g.*, McClatchy Newspapers v. Superior Court, 159 P.2d 944 (Cal. 1945); Shell Oil Co. v. Superior Court, 292 P. 531 (Cal. Ct. App. 1930);

identical provision in the California constitution,[194] or both.[195] In some cases, such as *Shell Oil Co. v. Superior Court*,[196] the court's reliance on the state constitution seems clear. The court specifically cited to the state constitution in holding that a court order to produce a private litigant's records or documents in a civil case implicates the "constitutional right of the people to 'be secure in their . . . papers and effects, against unreasonable seizures and searches.'"[197]

Subsequent cases, however, are not so clear. For example, in *McClatchy Newspapers v. Superior Court*,[198] the petitioner sought a writ of mandate seeking to set aside a court order that denied his requests for inspection of documents, and quashed and recalled *subpoenas duces tecum* served on nonparty witnesses.[199] The underlying suit involved a libel action filed by Otis D. Babcock against McClatchy Newspapers.[200] In a mandamus action before the California Supreme Court, McClatchy challenged the trial court's denial of a motion for inspection of documents related to certain bank and brokerage accounts and real estate transactions.[201] Babcock objected to the motion on the ground that it was a "fishing expedition" that violated his constitutional rights.[202]

In response, the court affirmed that "[a] party or witness has a constitutional right to be free from unreasonable searches and seizures, and it is therefore incumbent upon the one seeking an inspection to show clearly that he has a right thereto and that the constitutional guaranties [sic] will not be infringed."[203] The court did not cite to any cases or statutes. Thus, it is unclear whether the constitutional right referred to was derived from the state or the federal constitution. The confusion was compounded by later cases that continued to find that the "constitutional"

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194. Article 1 § 13 of the California Constitution (formerly Art. 1 § 19) states:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

CAL. CONST. art. I, § 13.

195. *See McClatchy Newspapers*, 159 P.2d at 950 (affirming party's "constitutional right to be free from unreasonable searches and seizures" without citation to state or federal constitution); Adams v. Superior Court, 317 P.2d 983, 985 (Cal. 1957) (citing *McClatchy Newspapers* and stating that order requiring production of documents in civil case "must not be so broad as to infringe upon the constitutional immunity against unlawful search and seizure").

196. 292 P. 531 (Cal. Dist. Ct. App. 1930).

197. *Id.* at 532 (quoting and citing CAL. CONST. art. I, § 19 (now art. I, § 13)).

198. 159 P.2d 944 (Cal. 1945).

199. *Id.* at 946.

200. *Id.*

201. *Id.*

202. *Id.* at 950.

203. *Id.*

right to be free from unreasonable searches and seizures applied in civil cases, but cited to *McClatchy* as authority for this proposition without citing to either the state or the federal constitution.[204]

Given the United States Supreme Court's unequivocal statement that the Fourth Amendment applies in civil proceedings[205] and the cases holding that court orders are government actions for purposes of finding a violation of other constitutional provisions,[206] there is strong support for the argument that a state court order requiring disclosure of communications protected by the attorney-client privilege implicates the Fourth Amendment to the United States Constitution.

VI. UNREASONABLE SEARCH AND SEIZURE OF ATTORNEY-CLIENT COMMUNICATIONS

If a party has a reasonable expectation of privacy in an attorney-client communication, and if a court order compelling disclosure of that communication is government action, then the communication is protected by the Fourth Amendment. However, that protection does not automatically shield the communication from discovery. The Fourth Amendment does not prohibit all searches or seizures; instead, it prohibits only *unreasonable* searches and seizures.[207] The Amendment "serves to prevent both unjustified and arbitrary interferences with personal security and property."[208] Consequently, in order to avoid disclosure, the resisting party must still prove that the order is unreasonable.[209]

In determining whether an order is reasonable, the court must consider such issues as the means of production (for example, delivery to the

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204. *See* Adams v. Superior Court, 317 P.2d 983, 985 (Cal. 1957) (citing *McClatchy Newspapers* and stating that "[u]nlike the taking of a deposition, an order requiring the production of books, papers, or records is subject to the limitation that the inspection sought must not be so broad as to infringe upon the constitutional immunity against unlawful search and seizure").

205. Soldal v. Cook County, 506 U.S. 56, 67 (1992) ("[W]e reaffirm today our basic understanding that the protection against unreasonable searches and seizures fully applies in the civil context.").

206. *See, e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958) (holding that court order to disclose names and addresses of organization's members would violate the First Amendment); Grandbouche v. Clancy, 825 F.2d 1463 (10th Cir. 1987) (recognizing that court order compelling discovery was government action necessary to trigger First Amendment scrutiny).

207. "The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV (emphasis added).

208. *In re* Search Warrant, 436 F. Supp. 689, 692 (D.D.C. 1977).

209. *See, e.g.*, United States v. Int'l Bus. Machs. Corp., 83 F.R.D. 97, 109 (S.D.N.Y. 1979) (expressing doubt as to whether the Fourth Amendment applied to discovery conducted by private litigants in civil litigation but nonetheless finding *subpoena duces tecum* reasonable under the Fourth Amendment); *see also* Monier v. Chamberlain, 202 N.E.2d 15, 17–18 (Ill. 1964) (finding no violation of constitutional rights where company was required to produce documents relevant to litigation).

court for *in camera* review versus delivery straight to the opposing party), the scope of production (whether the communication must be produced unaltered or with certain portions redacted), and any protective orders that may be in place to limit disclosure beyond the immediate parties to the case.[210] An order compelling discovery may also be unreasonable in light of the substance of the communication. The courts could conclude that *any* compelled disclosure of a particular attorney-client communication is unreasonable. While state and lower federal courts may initially reach disparate conclusions regarding when compelled disclosure is unreasonable in violation of the Fourth Amendment, federal appellate courts (including the Supreme Court) could resolve such disparities—an option that is not available in the absence of a constitutional question.[211] This would ultimately lead to more uniform and predictable rules regarding disclosure of attorney-client communications.

A. Evaluating Whether an Order Requiring Production of Attorney-Client Communications Is Reasonable with Respect to the Means of Production

A search or seizure conducted pursuant to a warrant supported by probable cause is presumptively reasonable for Fourth Amendment purposes,[212] but a warrant is not a necessary prerequisite to a valid search or seizure. Something less burdensome may be sufficient, particularly in

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210. For example, in *New York Times v. Sullivan*, 376 U.S. 254 (1964), an Alabama state court entered a $500,000 judgment against the New York Times in a civil libel action brought by an elected commissioner of the City of Montgomery. *Id.* at 256. The judgment was appealed and affirmed by the Supreme Court of Alabama. *Id.* at 263. The trial court and the Alabama Supreme Court rejected the New York Times' claim that the judgment violated their First and Fourteenth Amendment rights, stating only that "'[t]he First Amendment of the U.S. Constitution does not protect libelous publications,' and '[t]he Fourteenth Amendment is directed against State action and not private action.'" *Id.* at 264 (quoting New York Times Co. v. Sullivan, 144 So.2d 25, 40 (Ala. 1962)). The United States Supreme Court quickly dismissed the contention that the Fourteenth Amendment did not apply in civil lawsuits. *New York Times*, 376 U.S. at 265. "Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press." *Id.* The Court held that the state's rule of law in the civil libel action was "constitutionally deficient" because it failed to provide safeguards adequate to protect the petitioner's rights under the First and Fourteenth Amendments. *Id.* at 264. Similarly, the Court could hold that a state's privilege rules do not adequately protect a litigant's Fourth Amendment rights.

211. The lower federal courts and even the state courts would have jurisdiction to address this issue in the first instance, but they would be required to consult federal appellate and Supreme Court precedent to determine what is required under the Fourth Amendment and whether there has been a violation in the case at issue. As federal appellate courts addressed the issue, their conclusions would be binding in their circuits. Eventually, the Supreme Court would resolve conflicts among the circuits.

212. *See, e.g.*, United States v. Katz, 389 U.S. 347, 357 (1967) (finding that searches conducted without a search warrant "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions").

the context of a civil proceeding.[213] Indeed, if that were not true, all discovery in civil cases would violate the Fourth Amendment. Yet, in most civil cases, it is reasonable for a party to be required to produce and disclose non-privileged information that is relevant to the controversy.[214] If the requested information or documents contain trade secrets, information that would give someone an unfair competitive advantage, or information that would otherwise pose a unique threat to the economic or personal well-being of the party or other non-parties, then the party in receipt of the discovery request may object to it.[215] The court then has several options, including denying the discovery request, ordering the information to be submitted under seal, entering a protective order, or ordering redaction of sensitive information.[216]

Court orders allowing private parties to seize privileged documents from the home or office of the attorney or client (actual searches) most clearly implicate the Fourth Amendment, regardless of whether the underlying case is criminal or civil.[217] In those cases, the only potentially new question for the courts to consider is what is reasonable under those circumstances. For example, it may be unreasonable in criminal cases to allow privileged documents to be seized under a search warrant.[218] Instead, the courts may require the documents to be produced pursuant to a subpoena, which would give the target an opportunity to object and file a

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213. *See, e.g.*, Monier v. Chamberlain, 202 N.E.2d 15, 17–18 (Ill. 1964).

214. *See, e.g.*, Bowerman v. MacDonald, 427 N.W.2d 477, 485 (Mich. 1988).

215. *See, e.g.*, Am. Standard Inc. v. Pfizer Inc., 828 F.2d 734 (Fed. Cir. 1987) (finding protective order for trade secrets and other confidential information sought in discovery properly entered where orthopedic device manufacturer would suffer irreparable economic harm if information was disclosed to competitors).

216. *See, e.g.*, FED. R. CIV. P. 26(c) (2008); *Pfizer*, 828 F.2d at 736 (upholding district court's entry of protective order to limit the scope of discovery and denial in part of motion to compel discovery of trade secret information); The Courier Journal v. Marshall, 828 F.2d 361 (6th Cir. 1987) (upholding protective order specifying that discovery of a list of members of a Ku Klux Klan unit be filed under seal); Hunt v. Windom, 604 So.2d 395 (Ala. 1992) (affirming order for state governor to produce income tax records under seal); T.S. v. Boy Scouts of America, 138 P.3d 1053 (Wash. 2006) (affirming order for defendant's files of past allegations of sexual abuse subject to redaction of the names of alleged victims and perpetrators).

217. *See, e.g.*, Soldal v. Cook County, 506 U.S. 56, 67 (1992) (reaffirming that the Fourth Amendment applies in civil cases); Comcast of Illinois X, LLC v. Till, 293 F. Supp. 2d 936 (E.D. Wis. 2003) (holding in civil case that ex parte order authorizing plaintiff's agents to enter the defendant's home and seize documents and cable decoders implicated Fourth Amendment).

218. *See* Eric D. MacArthur, *The Search and Seizure of Privileged Attorney-Client Communications*, 72 U. CHI. L. REV. 729 (2005). MacArthur argues that the Fourth Amendment is violated by seizure of communications within the attorney-client privilege, even when the search is conducted pursuant to a warrant supported by probable cause. *Id.* at 730, 744–45. "[T]he attorney-client privilege embodies a privacy interest of such magnitude that searches and seizures of privileged attorney-client communications are unreasonable even if likely to produce evidence of a crime." *Id.* at 732.

motion to quash.[219] The court would then decide whether the documents could be seized. This approach is preferable to allowing officers to seize the documents and putting the producing party in the position of trying to secure their return after they may have been viewed by government officials. Alternatively, the government could appoint a "taint team" comprised of officials unconnected with the case to seize and search the documents.[220]

The reasonableness of constructive searches and seizures in civil or criminal cases requires consideration of different issues. In the civil context, a subpoena may not be necessary because litigants have the right to object to discovery requests and to have the matter heard by the court before disclosure is required.[221] However, courts might conclude that the attorney-client communications must first be reviewed *in camera* by the court, or that certain protective orders must be in place before the communications are produced. The necessary precautions may vary widely depending upon the facts of the case, but the courts should eventually reach a consensus with respect to particular circumstances.

B. Evaluating Reasonableness in Terms of the Substance of the Communications to Be Produced

Rather than apply the Fourth Amendment merely to regulate *how* privileged communications should be disclosed, courts could conclude that protecting the privacy interests at stake requires the exemption of certain documents from production or disclosure based on the substance of the communication. Courts—including, ultimately, the Supreme Court—could conclude that it is presumptively unreasonable to compel production of attorney-client communications protected by the Fourth Amendment. As the courts identify categories of communications protected by the Fourth Amendment (specifically, communications in which a party has a reasonable expectation of privacy that society is prepared to accept as reasonable), the presumption would protect those communications from discovery absent extraordinary circumstances.[222] Importantly,

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219. *Id.* at 744–45.

220. *Id.* at 751.

221. *See, e.g.*, FED. R. CIV. P. 26(c) (2008) (authorizing the court to enter a order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense").

222. Such blanket rules exist elsewhere in Fourth Amendment jurisprudence. For example, in the absence of exigent circumstances, police must obtain a warrant to conduct a search of a suspect's home. Katz v. United States, 389 U.S. 347, 357 (1967). However, the warrant will not be issued unless it is supported by probable cause. *Id.* If probable cause does not exist, the warrant will not issue and the search cannot take place. In the context of attorney-client communications, courts may only require disclosure of privileged materials under extraordinary circumstances, or when the client and attorney are in a dispute.

those communications would be protected regardless of whether they are protected by the relevant jurisdiction's privilege rules. Consequently, disparities among jurisdictions with respect to privilege rules would be rendered moot.

VII. FOURTH AMENDMENT PROTECTION OF ATTORNEY-CLIENT COMMUNICATIONS CAN ELIMINATE SOME OF THE PROBLEMS CREATED BY CONFLICTING PRIVILEGE RULES

A few examples of issues on which jurisdictions' current privilege rules are inconsistent include the proper scope of the privilege, when and how it can be waived, and the effect of waiver in certain circumstances. In each of these examples, if the Fourth Amendment is held to apply to the disputed communication, then it could be protected from disclosure even if a jurisdiction does not recognize the communication as privileged. Attorneys and clients would know that the protection exists without regard to where the communication took place or which jurisdiction's privilege rules might apply in the future. The disparate positions of varying jurisdictions will be explored below, followed by a discussion of how the dispute could be resolved by applying Fourth Amendment protection.

A. The Scope of the Privilege

Jurisdictions have varied widely with respect to the scope of the attorney-client privilege. Among the points of disagreement are whether communications from the attorney to the client are protected[223] and what the scope of the privilege is when applied to corporations or other entities.[224] Applying the Fourth Amendment to communications in each of these categories could result in far more uniform and predictable protection.

1. Communications from Attorney to Client

In all of its various forms, the attorney-client privilege protects communications from the client to the attorney, for that is the very es-

223. *See, e.g.*, Sprague v. Thorn Americas, Inc., 129 F.3d 1355, 1370–71 (10th Cir. 1997) (holding communication from attorney to client protected regardless of whether the communication revealed client confidences); Mead Data Cent., Inc. v. U.S. Dep't of Air Force, 566 F.2d 242, 254 (D.C. Cir. 1977) (holding attorney-client privilege only applied to communication from attorney to client if the communication was based on confidential information provided by the client).

224. *See, e.g.*, Samaritan Found. v. Goodfarb, 862 P.2d 870 (Ariz. 1993) (noting diverging tests applied by various courts and jurisdictions with respect to the attorney-client privilege as applied to entities).

sence of the privilege's purpose.[225] Yet, some parties have argued, and some courts have agreed, that it is not necessary to protect all communications *from* the attorney *to* the client in order to fulfill the purpose of the privilege.[226] In *Mead Data Central, Inc. v. United States Department of Air Force*,[227] the plaintiff brought an action for an injunction to require the United States Air Force to disclose documents related to the Air Force's use of copyrighted material.[228] The plaintiff had previously sought the documents under the Freedom of Information Act (FOIA), and the Air Force had provided some documents while withholding others under the attorney-client privilege exemption to the FOIA.[229] The district court held that the documents did not need to be disclosed, and the plaintiff appealed.[230] The court of appeals held that the district court's interpretation of the attorney-client exemption under the FOIA was impermissibly broad.[231] The appellate court found that the federal attorney-client privilege only applies to communications from the attorney to the client if the communication is based on confidential information provided by the client, and that the Air Force had not shown that the information on which the withheld documents were based met this requirement.[232] The action was thus remanded for proceedings under the narrower construction of the attorney-client privilege as outlined by the court.[233]

Other courts have limited the privilege to attorney communications that reveal client confidences or responsive legal advice. In *Olson v. Accessory Controls & Equipment Corp.*,[234] the plaintiff brought an action against his former employer for wrongful discharge.[235] Prior to trial, the defendant moved for a protective order to preclude the plaintiff from disclosing communications between the defendant and an attorney hired by the defendant regarding possible litigation with regulatory authorities over the defendant's waste practices.[236] The court found that the communication was prepared by an environmental company hired by the de-

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225. "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

226. *See* Glynn, *supra* note 1, at 99–101.

227. 566 F.2d 242 (D.C. Cir. 1977).

228. *Id.* at 248–49.

229. *Id.* at 248.

230. *Id.*

231. *Id.*

232. *Id.* at 254.

233. *Id.* at 262–63.

234. 757 A.2d 14 (Conn. 2000).

235. *Id.* at 20.

236. *Id.* at 20–21.

fendant's attorney to assist the attorney in providing the defendant legal advice.[237] The district court granted the defendant's protective order, as well as his subsequent motion *in limine* and motion for summary judgment.[238] The plaintiff appealed, and the Supreme Court of Connecticut agreed that the communication from the defendant's attorney to the defendant was intimately connected to the giving of legal advice and thus fell within the attorney-client privilege.[239]

Other courts have interpreted the privilege more broadly. In *Sprague v. Thorn Americas, Inc.*,[240] the plaintiff brought an action against her employer for gender discrimination and sexual harassment.[241] The United States District Court for the District of Kansas entered summary judgment for the defendant, and the plaintiff appealed.[242] The plaintiff also appealed the district court's denial of her motion to compel discovery of a memorandum from the defendant's general counsel to senior management.[243] The Tenth Circuit Court of Appeals held that the documents were protected by the attorney-client privilege.[244] The court acknowledged that it applied a broader view of the privilege in finding that communications from attorney to client were protected regardless of whether the communications revealed client confidences,[245] but the court found such an approach consistent with its prior rulings and the attorney-client privilege under the law of Kansas.[246] The court affirmed the district court's denial of the motion to compel and affirmed the judgment for the defendant.[247]

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237. *Id.* at 27.
238. *Id.* at 20.
239. *Id.* at 36.
240. 129 F.3d 1355 (10th Cir. 1997).
241. *Id.* at 1359.
242. *Id.*
243. *Id.* at 1367–68.
244. *Id.* at 1370.
245. *Id.*
246. *Id.*
247. *Id.* at 1359. *See also In re* Ford Motor Co., 110 F.3d 954 (3d Cir. 1997). In *In re Ford Motor*, the plaintiff brought a product liability action, claiming design defects in one of the defendant's vehicles. *Id.* at 957. The plaintiff sought discovery of documents related to the development of the vehicle, and the defendant refused by invoking the attorney-client privilege and the work product doctrine. *Id.* The district court ordered production of some of the documents, and the defendant appealed and petitioned for a writ of mandamus. *Id.* The Third Circuit held that the documents claimed confidential under the attorney-client privilege were protected. *Id.* at 964. The court noted that since jurisdiction in the action was based upon diversity of citizenship, state privilege laws governed. *Id.* at 965. The court looked to the law of Pennsylvania, the forum state, and the law of Michigan, the state in which the communication occurred. *Id.* Since the court determined that both states only required that a communication have been made for the purpose of securing legal advice for the communication to be privileged and that both states made no distinction between communications made by a client and those made by an attorney, the court decided it did not need to choose which state's privilege law to apply. *Id.* The court found the documents privileged under either

The Supreme Court could resolve this split in authority by holding that a legitimate expectation of privacy exists in all communications from the attorney to the client and that society is prepared to accept that expectation as reasonable. Furthermore, the Court could hold that ordering production of such communications is unreasonable in violation of the Fourth Amendment. Consequently, courts could not compel production of communications from the attorney to the client even if the communications were not protected by the jurisdiction's privilege rules. This would result in a uniform rule in every jurisdiction.

On the other hand, the Supreme Court could conclude that there is no reasonable expectation of privacy in some or any communications from attorneys to clients, or that orders compelling production of those communications are reasonable. Under either scenario, jurisdictions would be free to protect those communications under their privilege rules, but parties could not rely on Fourth Amendment protection. While disparities among jurisdictions would remain, a finding that the Fourth Amendment did not apply would not create any more uncertainty; it would simply preserve the status quo.

2. Entity Privilege

All jurisdictions agree that communications between an entity (such as a corporation) and its attorney may be protected by the attorney-client privilege.[248] However, an attorney for an entity may communicate with many different employees and agents of the entity on various legal matters. There is disagreement among the jurisdictions about which of those communications is protected by the attorney-client privilege. Most jurisdictions have adopted one of two tests to determine whether the privilege applies to a communication: the control group test or the subject matter test.

The "control group" test was first formulated by a federal district court in Pennsylvania.[249] In *City of Philadelphia v. Westinghouse*,[250] the plaintiffs moved for relief after the defendant corporation refused to an-

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Pennsylvania or Michigan law and reversed the district court's order compelling discovery of the documents. *Id.* at 966.

248. *See* Alexander C. Black, *What Persons or Entities May Assert or Waive Corporation's Attorney-Client Privilege—Modern Cases*, 28 A.L.R.5th 1 (1995); *see also* United States v. Louisville & Nashville R.R. Co., 236 U.S. 318, 336 (1915) (assuming attorney-client privilege applies when the client is a corporate entity).

249. City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom.* General Electric Co. v. Kirkpatrick, 312 F.2d 742 (3rd Cir. 1962).

250. 210 F. Supp. 483.

swer interrogatories.[251] The district court determined that the defendant's claim of privilege with respect to information acquired by the defendant's general counsel in the course of his investigation of facts relating to the pending indictment against the company was without any valid basis.[252] The defendant moved for clarification of the opinion.[253] The district court held that the attorney-client privilege applies in the corporate context if the employee making the communication is in a position to control, or to take a substantial part in a decision about any action for which the corporation may seek an attorney's advice.[254] The district court therefore ordered the corporation to submit full answers to the interrogatories referred to in the motion.[255]

The control group test was ultimately rejected by the United States Supreme Court in *Upjohn v. United States*.[256] In *Upjohn*, the Internal Revenue Service (IRS) filed a petition seeking enforcement of a summons for documents from a pharmaceutical manufacturing corporation relating to an internal investigation of illegal payments.[257] The general counsel had discovered that a foreign subsidiary paid foreign government officials to secure business, and the general counsel had sent out questionnaires requesting full information concerning such payments.[258] The corporation submitted a preliminary report to the IRS, which began its own investigation and filed its petition after the corporation refused to produce the requested documents.[259] The district court adopted the recommendation of a magistrate, who concluded that the summons should be enforced because the attorney-client privilege had been waived under the circumstances.[260] The corporation appealed, and the Sixth Circuit rejected the finding of a waiver.[261] The court remanded the case for a determination of who was within the control group so as to make their communications to the general counsel protected by the attorney-client privilege.[262] The Supreme Court granted certiorari to examine the scope of the attorney-client privilege in the corporate context.[263] The Court held that where corporate superiors directed employees to make commu-

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251. *Id.* at 485–86.
252. *Id.* at 484.
253. *Id.*
254. *Id.* at 485.
255. *Id.* at 486.
256. 449 U.S. 383 (1981).
257. *Id.* at 386–88.
258. *Id.* at 386.
259. *Id.* at 387–88.
260. *Id.* at 388.
261. *Id.* at 388–89.
262. *Id.*
263. *Id.* at 386.

nications so that the corporation could secure legal advice and where the employees were aware that they were being questioned so that the corporation could obtain such advice, those communications were protected by the attorney-client privilege.[264] The Court rejected the application of the control group test in the corporate context, but specified that the Court was deciding only the case before it; the Court was not setting forth a new test to govern questions of corporate attorney-client privilege.[265]

Although the control group test was no longer good federal law after *Upjohn*, the control group test was still adopted by some state courts.[266] For example, in *Consolidated Coal Co. v Bucyrus-Erie Co.*, decided just one year after *Upjohn*, the Illinois Supreme Court rejected the *Upjohn* Court's conclusions.[267] After weighing the various approaches to determine the scope of the attorney-client privilege in the corporate context, the court rejected *Upjohn*'s repudiation of the control group test, instead holding that the control group test was the more reasonable test.[268] The court noted that those ordinarily considered in the control group are those in top management with the ability to make a final decision.[269] The court then expanded the control group to include employees whose advisory role to top management is such that a decision would not normally be made without those employees' advice and whose opinion, in fact, forms the basis for the final decision.[270]

Other jurisdictions adopted what came to be known as the "subject matter" test.[271] In *Diversified Industries, Inc. v. Meredith*,[272] a manufacturer of brass products brought a civil action against a corporation involved in the sale of brass.[273] The plaintiff sought to obtain a memorandum and a written report containing employee interviews that had been prepared for the corporate defendant by a law firm. The defendant objected on the grounds that the materials were protected by the attorney-

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264. *Id.* at 394–95.

265. *Id.* at 396–97.

266. *See* Consolidated Coal Co. v. Bucyrus-Erie Co., 432 N.E.2d 250 (Ill. 1982). The rule adopted by the state will prevail even in federal courts if the case is governed by state law.

267. *Id.* In *Consolidation Coal*, a coal company brought an action in state court against a wheel manufacturer to recover damages from the collapse of a wheel excavator in a mine. *Id.* at 251. The trial court ordered the manufacturer to produce documents that the manufacturer claimed protected under the attorney-client privilege, and the manufacturer appealed. *Id.* at 252. The appellate court affirmed the trial court's decision with modifications, and the Supreme Court of Illinois allowed the defendant leave to appeal. *Id.*

268. *Id.* at 257.

269. *Id.* at 258.

270. *Id.*

271. *See, e.g.*, Diversified Indus., Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977).

272. *Id.*

273. *Id.* at 600.

client and work-product privileges.[274] The district court overruled the defendant's objections and refused to certify an appeal. In response, the defendant petitioned for a writ of mandamus.[275] On appeal, the Eighth Circuit rejected the control group test in favor of a new "subject matter" test:[276]

> [T]he attorney-client privilege is applicable to an employee's communication if (1) the communication was made for the purpose of securing legal advice; (2) the employee making the communication did so at the direction of his corporate superior; (3) the superior made the request so that the corporation could secure legal advice; (4) the subject matter of the communication is within the scope of the employee's corporate duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.[277]

Applying the new test, the court found that the interviews of corporate employees were communications protected by the attorney-client privilege.[278]

Some courts have rejected both the control group test and the subject matter test. In *Samaritan Foundation v. Goldfarb*,[279] the Arizona Supreme Court adopted a functional approach which focused "on the relationship between the communicator and the need for legal services."[280] Today, however, the rule of *Samaritan* is only in force in Arizona criminal cases; one year after *Samaritan* was decided, the Arizona legislature passed a statute[281] that overruled *Samaritan* in civil cases.[282]

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274. *Id.* at 599.

275. *Id.* at 598–99.

276. *Id.* at 609. The Eighth Circuit's test was a modified version of the "Decker test," which had been established by the Seventh Circuit in *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by equally divided court*, 400 U.S. 348 (1971). The Decker test also focused on the subject matter of the communication. *Id.* at 491.

277. *Id.*

278. *Id.* at 611.

279. 862 P.2d 870 (Ariz. 1993).

280. *Id.* at 878. The court held:

> [W]here someone other than the employee initiates the communication, a factual communication by a corporate employee to corporate counsel is within the corporation's privilege if it concerns the employee's own conduct within the scope of his or her employment and is made to assist the lawyer in assessing or responding to the legal consequences of that conduct for the corporate client. This excludes from the privilege communications from those who, but for their status as officers, agents or employees, are witnesses.

Id. at 880.

281. *See* ARIZ. REV. STAT. ANN. § 12-2234 (2008):

> A. In a civil action an attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment. An attorney's paralegal, assistant, secretary, stenog-

Given the various tests for application of the privilege in the corporate context, an attorney for an entity faces serious difficulties when communicating with employees and agents of the corporation because the attorney may not know which rule will apply in later litigation. As a constitutional issue, the courts would have to reach a consensus regarding when court-ordered production of communications between an attorney and the employees or agents of the represented entity is reasonable under the Fourth Amendment. When considering a communication involving an entity, the courts could not simply decide which test to apply; instead, the court would need to ask whether the attorney or the entity has a reasonable expectation of privacy in the communication that society is prepared to accept as reasonable. If so, then the communication would be protected by the Fourth Amendment. If court-ordered disclosure is deemed unreasonable, then any such order would be invalid. Moreover, any disagreement among jurisdictions regarding whether such an expectation of privacy exists would eventually be resolved by the federal appellate courts and potentially the Supreme Court. To the extent that communications are held to be protected by the Fourth Amendment, entities would be able to conduct internal investigations and communicate with counsel without fear that the rules of another jurisdiction will strip them of that protection.

B. Losing the Privilege

Even when there is agreement that the attorney-client privilege applies to a communication, there is disagreement regarding when the protection of the privilege is lost. Rules regarding waiver of the privilege and loss through selective disclosure or inadvertent disclosure vary wide-

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rapher or clerk shall not, without the consent of his employer, be examined concerning any fact the knowledge of which was acquired in such capacity.

B. For purposes of subsection A, any communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity or employer regarding acts or omissions of or information obtained from the employee, agent or member if the communication is either:

1. For the purpose of providing legal advice to the entity or employer or to the employee, agent or member.
2. For the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member.

C. The privilege defined in this section shall not be construed to allow the employee to be relieved of a duty to disclose the facts solely because they have been communicated to an attorney.

282. *See* Roman Catholic Diocese of Phoenix v. Superior Court, 62 P.3d 970 (Ariz. Ct. App. 2003).

ly.[283] Applying Fourth Amendment protection in these circumstances will resolve these differences and provide valuable guidance to attorneys and clients, as demonstrated below.

1. Selective Waiver

One striking example of the split in authority with respect to the attorney-client privilege is the split among the United States Courts of Appeal regarding whether disclosure of privileged information to a government agency waives the privilege in later civil litigation. The Eighth Circuit is one of the few jurisdictions in which parties are allowed to make limited disclosures of privileged communications without waiving the privilege for all purposes. In *Diversified Industries, Inc. v. Meredith*,[284] a brass manufacturer brought a civil action against another corporation.[285] The SEC also began investigating the defendant during this time and brought an action for an injunction against the defendant. A consent decree was entered prior to the disposition of the civil action.[286] During discovery in the civil action, the defendant objected to requests seeking material that the defendant claimed was subject to the attorney-client and work-product privileges.[287] The Eighth Circuit held that employee interviews conducted by a law firm retained by the defendant were subject to the attorney-client privilege.[288] The court found that only a "limited waiver" of the defendant's privilege had occurred because surrendering the interviews to the SEC pursuant to a subpoena had not waived the privilege for purposes of the civil proceeding.[289]

Other federal appellate courts have rejected the limited waiver argument. For example, the Sixth Circuit rejected the limited waiver doctrine in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*.[290] In *In re Columbia*, individual civil actions against a health services provider were consolidated into a single action.[291] The Department of Justice had previously begun an investigation of the defendant for fraud, but the government action was later settled.[292] The defendant refused to produce documents in the civil action that it had previously pro-

283. Jurisdictions also disagree about application or loss of the privilege in the context of joint defense agreements or under the crime-fraud exception.

284. 572 F.2d 596 (8th Cir. 1977).

285. *Id.* at 600.

286. *Id.*

287. *Id.* at 599.

288. *Id.* at 611. *See* discussion *supra* Part VII.A.2.

289. *Diversified Indus.*, 572 F.2d at 611.

290. 293 F.3d 289, 302 (6th Cir. 2002).

291. *Id.* at 292.

292. *Id.* at 291–92.

vided to the government on the grounds of attorney-client and work-product privilege.[293] The district court granted the plaintiffs' motion to compel production.[294] The Sixth Circuit held that the defendant could not selectively waive attorney-client privilege by releasing privileged documents to government agencies while continuing to assert privilege as to other parties.[295] The court went on to reject the doctrine of selective waiver in any form, finding that selective waiver would not help foster frank communication between attorney and client and would instead become a tactical tool for attorneys.[296]

The Tenth Circuit sided with the Sixth Circuit in *In re Qwest Communications Intern, Inc.*[297] In *Qwest*, the plaintiffs' civil suits were consolidated into a federal securities class action against the defendant.[298] Prior to consolidation, the defendant produced documents protected by the attorney-client and work-product privileges to the Securities Exchange Commission and to the Department of Justice in response to agency subpoenas.[299] The production of the documents was done pursuant to confidentiality agreements between the defendant and the agencies, which provided that the defendant did not intend to waive the privileges associated with the documents.[300] After the defendant refused to produce the documents during discovery in the class action, the plaintiffs moved to compel.[301] The magistrate judge granted the plaintiffs' motion, and the district court refused to overrule the decision or to grant an interlocutory appeal.[302] The defendant petitioned for a writ of mandamus.[303] In a case of first impression, the Tenth Circuit held that the defendant had waived its privileges through its disclosures to government agencies and did not adopt the doctrine of selective waiver as an exception to the general rule of waiver upon voluntary disclosure of privileged material.[304] Thus, parties in the Sixth and Tenth Circuits must decide whether to disclose privileged communications, thereby losing their right to assert the privilege in other cases, or whether to refuse to disclose the communication and possibly lose the opportunity to avoid criminal prosecution or negotiate the settlement of a civil claim.

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293. *Id.* at 293.
294. *Id.*
295. *Id.* at 302–03.
296. *Id.*
297. 450 F.3d 1179, 1192 (10th Cir. 2006).
298. *Id.* at 1182.
299. *Id.* at 1181.
300. *Id.*
301. *Id.* at 1182.
302. *Id.*
303. *Id.*
304. *Id.* at 1192.

However, if a Fourth Amendment analysis is applied, then courts could conclude that parties retain a reasonable expectation of privacy in their attorney-client communications after a selective disclosure. Moreover, courts could hold that an order compelling disclosure is unreasonable. Consequently, the Fourth Amendment would protect attorney-client communications even if the relevant jurisdiction holds that the protection of the attorney-client privilege has been waived. Resolution of this split in authority would increase predictability and would allow attorneys to make sound decisions when advising their clients whether to disclose privileged information to government agencies. Even if the courts considering the issue reached the conclusion that parties did not have a reasonable expectation of privacy in communications after voluntary disclosure—a conclusion that would be consistent with the holdings of the courts rejecting the selective waiver theory—this result would leave parties with the same choice that they currently face. Thus, Fourth Amendment analysis has the potential to clarify and simplify the issue with no risk of further complicating matters.

2. Inadvertent Disclosure

Courts also disagree about the effect of an inadvertent disclosure of privileged documents.[305] Some courts take the position that any disclosure, even an inadvertent disclosure, waives the privilege.[306] For example, in *In re Sealed Case*, a company was held in contempt for refusing to comply with a grand jury subpoena directed at six documents for which the company claimed attorney-client privilege.[307] The district court held that the company had waived the protection of the attorney-client privilege as to all six documents by inadvertently disclosing one document to a government auditor.[308] On appeal, the court held that the disclosure constituted a waiver of the privilege, despite being inadvertent, but that the scope of the waiver required remand.[309] The court found that forcing organizations to vigilantly protect confidential communications was essential to curb the freedom with which those organizations may classify a communication with counsel as confidential.[310] The court noted that,

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305. "Courts are divided on whether the attorney-client privilege is lost by accidental or inadvertent disclosure." Elkton Care Ctr. Assocs. v. Quality Care Mgmt. Inc., 805 A.2d 1177, 1183 (Md. Ct. Spec. App. 2002).

306. *See, e.g.*, *In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989).

307. *Id.* at 977.

308. *Id.*

309. *Id.* at 980–81.

310. *Id.* at 980.

short of extraordinary circumstances, it would not distinguish between degrees of "voluntariness" in waivers of the attorney-client privilege.[311]

Contrarily, some courts take the view that inadvertent disclosure (at least by one other than the client) can never waive of the privilege because the privilege is held by the client and not the attorney.[312] But the majority of courts have taken a more flexible, case-by-case approach that considers the circumstances surrounding the disclosure.[313] In *Alldread v. City of Grenada*,[314] city fire fighters filed an action against the city for violating the Fair Labor Standards Act through its refusal to pay for sleep time.[315] On appeal from a judgment in favor of the city, the plaintiffs argued that the district court erred in ordering them to return to the city privileged communications which the city inadvertently produced during discovery.[316] The court of appeals held that the inadvertent disclosure did not waive the attorney-client privilege, finding that the district court correctly applied a five-part test looking at the circumstances surrounding the disclosure to determine that there was no waiver.[317]

In a Fourth Amendment analysis, the courts could conclude that clients retain a reasonable expectation of privacy in their communications with their attorneys despite an attorney's inadvertent disclosure of the communication. The courts could further conclude that society is prepared to recognize that expectation as reasonable and adopt either the case by case approach currently favored by the majority of courts, or hold that it is always unreasonable to order disclosure or privileged communications merely because of inadvertent disclosure by the client's attorney. This would protect the client's legitimate expectations of privacy even in jurisdictions that have adopted the strict approach articu-

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311. *Id.*

312. *See, e.g.*, Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 938 (S.D. Fla. 1991) ("[W]e believe the better reasoned rule is . . . that mere inadvertent production by the attorney does not waive the client's privilege.").

313. Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993) ("The majority of courts . . . while recognizing that inadvertent disclosure *may* result in a waiver of the privilege, have declined to apply this 'strict responsibility' rule of waiver and have opted instead for an approach which takes into account the facts surrounding a particular disclosure.").

314. *Id.*

315. *Id.* at 1427.

316. *Id.* at 1433.

317. The magistrate considered the following factors: "(1) the reasonableness of the precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness." *Id.* at 1433 (citing Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323 (N.D. Cal. 1985)).

lated in *In re Sealed Case.* Such protection would provide uniformity where there is currently inconsistency.[318]

VIII. THE CASE FOR CONSTITUTIONAL PROTECTION

A. Problems Exist Without Fourth Amendment Protection

The problems resulting from the varying privilege rules may not be obvious, but are troubling when illuminated. First, it may be impossible to determine which jurisdiction's privilege rules will apply when a communication is made.[319] As a result, the only safe course of action for attorneys and their clients is to assume that the narrowest possible scope of the privilege will govern and act accordingly. Otherwise, there is a risk that the communication will not be protected and may be used against the client. This may deprive a party of options that would be available if the party was certain which jurisdiction's rules will ultimately apply.

Second, an attorney may not be able to fully advise a client about a current legal problem because the future legal consequences will vary depending on the jurisdiction of the current and potential future controversies. For example, a corporation being investigated by the Department of Justice for potential criminal antitrust liability may contemplate disclosing communications protected by the attorney-client privilege to forestall or bring a swift end to the criminal investigation, but only if the privilege will remain applicable in later civil proceedings. The attorney may not be able to provide useful advice to the client because the answer depends upon which jurisdiction decides the issue in the later civil proceeding. If no civil proceeding has yet been filed and potential civil actions could be litigated in a number of jurisdictions, then there is no clear answer. The client may choose not to disclose the information, thereby losing the opportunity to favorably conclude the criminal investigation because of future civil litigation that may never take place or that may take place in a jurisdiction that recognizes selective waiver.[320]

Finally, if the highest state courts require disclosure of attorney-client communications, then there is no recourse for the litigant. Absent constitutional protection, there is no federal question or grounds for federal judicial review. While this is true of many aspects of the law—particularly issues related to civil discovery—the heightened importance of, and privacy interest in, confidential attorney-client communications

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318. While the courts could hold that there is no legitimate expectation of privacy in communications that have been inadvertently disclosed, as in the prior examples discussed above, this would leave the law in its current state, with no greater confusion than presently exists.

319. *See supra* example accompanying note 8.

320. *See* discussion *supra* Part VII.B.1.

makes them deserving of heightened protection and justifies constitutional protection and the resulting federal involvement.[321]

B. Inconsistent Privilege Rules Affect Every Attorney-Client Communication

The problem of inconsistent privilege rules affects every attorney-client communication, if only indirectly, because of the potential for conflict. Despite this potential for serious harm, the conflict among the various jurisdictions' privilege rules has been debated in scholarly literature more frequently than in court opinions.[322] In some ways it is not surprising. Except in the most compelling circumstances, attorneys may be reluctant to push for disclosure of allegedly privileged materials because they are concerned that if the protection is eroded, their own files and communications may be discoverable.[323] Moreover, the problem is most apparent when the attorney is faced with litigation in an unexpected jurisdiction and the attorney discovers that a communication is not protected by that jurisdiction's privilege rules. However, the attorney is not likely to argue to the court that the jurisdiction's privilege rules should not apply because the attorney did not foresee their application. Such an argument is unlikely to prevail, even if made. While courts have not focused on the problem of inconsistent privilege rules, the problem may become more visible as courts split on high stakes issues such as recognition of limited waiver for disclosure to government entities, in which the effect of the split in authority on the decisions of attorneys and parties is potentially devastating.

C. Recognizing Fourth Amendment Protection Does Not Create New Problems

Recognizing that the Fourth Amendment applies to attorney-client communications will not resolve all privilege conflicts. Indeed, in the short term, state courts will have jurisdiction to decide the Fourth Amendment issue and conflicts among states will initially be resolved by

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321. Indeed, the federal involvement is minimal. Recognition of Fourth Amendment protection will not open the doors of the federal courts to every civil litigant seeking to protect privileged communications. No Fourth Amendment violation will arise until a search or seizure takes place, presumably during discovery. If the case is proceeding in state court, it will continue in state court, with the state court deciding the Fourth Amendment issue. The constitutional issue may give rise to appellate jurisdiction in the Supreme Court, but that Court is not obligated to hear every case.

322. *See, e.g.*, Glynn, *supra* note 1; Bradford, *supra* note 11.

323. This raises unique ethical questions for the lawyer. The lawyer may be reluctant to push for disclosure of privileged materials in one case for fear of establishing a precedent that may result in the disclosure of the attorney's own communications in other cases. This issue, though fascinating, is beyond the scope of this Article.

lower federal courts. Conflicts among federal circuits may be created (and continue) unless and until the conflicts are resolved by the United States Supreme Court. Still, courts will have an incentive to reach a consensus on the Fourth Amendment issue and the total number of conflicts will likely be reduced. Furthermore, there is an opportunity for final resolution by the Supreme Court, which does not exist in the absence of a constitutional question or preemption by federal statute.

Fourth Amendment protection is also unlikely to impose an undue burden on the courts or on the civil discovery system. Attorney-client communications are already protected and a request for such materials is already likely to be challenged. The main variant will be the form of the scrutiny of such requests—the standard by which the request is evaluated. Instead of looking only at the jurisdiction's privilege rules, the court will also need to examine the elements of a Fourth Amendment claim. These elements are familiar to courts and many issues surrounding Fourth Amendment claims, such as whether a discovery order is a government search or seizure, should be resolved fairly quickly.[324]

To the extent that courts conclude that the Fourth Amendment does not apply to a particular communication or situation, the status quo will prevail and inconsistencies may remain. However, if it does apply and compelled disclosure is deemed unreasonable, that rule would apply in every jurisdiction, eliminating any confusion or inconsistent rules. States could then choose to broaden protection, but could not require disclosure under circumstances deemed unreasonable under the Fourth Amendment.

Some may balk at injecting constitutional inquiries into civil discovery disputes. The Supreme Court addressed similar concerns in *Soldal* when it held that the Fourth Amendment applied to a seizure in a civil case:[325]

> Respondents are fearful, as was the Court of Appeals, that applying the Fourth Amendment in this context inevitably will carry it into territory unknown and unforeseen: routine repossessions, negligent actions of public employees that interfere with individuals' right to enjoy their homes, and the like, thereby federalizing areas of law traditionally the concern of the States. For several reasons, we think the risk is exaggerated.[326]

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324. Even if the Supreme Court does not address this issue immediately, the arguments for and against its application are likely to be articulated in early cases, leaving later courts to simply choose among the competing positions. Courts need not begin their analysis from scratch each time the issue is confronted by a new jurisdiction.

325. Soldal v. Cook County, 506 U.S. 56, 71 (1992).

326. *Id.*

Most significant of those reasons was the fact that "reasonableness" was still the standard under the Fourth Amendment, and the court noted that under that standard, most seizures would be found valid under the Fourth Amendment.[327] "Moreover, we doubt that the police will often choose to further an enterprise knowing that it is contrary to the law, or proceed to seize property in the absence of objectively reasonable grounds for doing so."[328] Similarly, if the Fourth Amendment is applied to discovery orders in civil cases, it is not likely to result in a flood of litigation.

The vast majority of discovery practices will be unaffected. The few cases that raise serious questions about the reasonableness of requiring disclosure of attorney-client communications are not likely to wreak havoc on the court system. Moreover, resolution of these issues will provide guidance and breed uniformity and predictability that may reduce litigation in the long term.[329] Regardless, the importance of the issues and interests at stake justify any temporary inconvenience.

IX. CONCLUSION

Recognizing Fourth Amendment protection for communications covered by the attorney-client privilege may not resolve all of the conflicts between jurisdictions. States will still be free to enact or retain privilege rules that provide more protection than that provided by the Fourth Amendment. But the Fourth Amendment would provide a consistent minimum level of protection in every state and federal jurisdiction. Equally important, acknowledging that the Fourth Amendment applies to attorney-client communications respects and validates the unique privacy interests that clients have in their communications with their attorneys and requires court-ordered production of those communications to be reasonable. It provides the protection necessary for clients to feel confident in disclosing all relevant information to their attorneys and for attorneys to feel more confident that they can protect those communications from disclosure. Fourth Amendment protection for attorney-client communications may not be a complete solution, but it is an important step in the right direction.

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327. *Id.*

328. *Id.* at 72.

329. *See* Glynn, *supra* note 1, at 62.