

**NACDL ETHICS ADVISORY COMMITTEE**  
Opinion 02-01 (November, 2002)

***Question Presented:***

The NACDL Ethics Advisory Committee has been asked: What are a criminal defense attorney's duties to the client when the attorney learns that jail or prison communications between the attorney and client are subject to official monitoring?

***Digest:***

A criminal defense attorney has an ethical and constitutional duty to take affirmative action to protect the confidentiality of attorney client communications from government surveillance. This includes seeking relief from the jailers, if possible, or judicial review and seeking of protective orders. Defense counsel should argue that the Sixth Amendment right to counsel and a fair trial and the Fifth Amendment right to due process and a fair trial protects attorney-client communications from disclosure to the government.

***Ethical Rules, Statutes, and Constitutional Provisions Involved:***

Model Rules of Professional Conduct, Rule 1.6  
Code of Professional Responsibility, DR 4-101  
California Bus. & Prof. Code § 6068(e)  
New York Code of Professional Responsibility, DR 4-101, 22 N.Y.C.R.R. § 1200.19  
(2002)  
ABA STANDARDS, *The Defense Function* § 4-3.1(b-c) (3d ed. 1991)  
28 C.F.R. § 501.3(d)  
18 U.S.C. §§ 2501-10 (Title III)  
50 U.S.C. § 1801 *et seq.* (Foreign Intelligence Surveillance Act ("FISA"))  
U.S. Const., First, Fourth, Fifth, Sixth, and Fourteenth Amendments

***Opinion:***

**I. INTRODUCTION**

The question presented is one that has arisen for years. Lawyers often discover that communications with their clients in custody are subject to official monitoring, whether during a visit or a telephone call.

This matter recently came to public notoriety in late 2001 with the October 31, 2001 adoption of the Attorney General's regulations governing monitoring attorney-client communications of those suspected of acts of terrorism. 66 Fed. Reg. 55062 (Oct. 31, 2001); 28 C.F.R. § 501.3(d). The Ethics Advisory Committee fielded immediate inquiries under the Attorney General's regulation from criminal defense lawyers who were told their conversations with their clients were subject to monitoring. The Attorney General insisted at the time of the amendment of § 501.3(d) that only 16 persons of the 125,000 in federal custody were subject to the regulation. In the year since its adoption, § 501.3(d) has been cited in three cases, discussed below. Since the adoption of § 501.3(d), there has also been concern that Title III and FISA wiretaps have obtained attorney-client communications.

The issue had previously arisen under state prison regulations or systems where confidentiality was not secure. This formalizes those responses.

#### **A. NACDL's comments on the Attorney General's regulation**

When the proposed regulations were posted in the Federal Register, they were effective the day before; 66 Fed. Reg. at 55062, col. 1; but the Attorney General sought public comment through December 31, 2001.

NACDL President Irwin Schwartz appointed an *ad hoc* committee to draft a response, and it came December 20, 2001. It is posted on the NACDL website.<sup>1</sup>

NACDL's position is that the regulation suffers numerous constitutional infirmities, and it evades the strict requirements of the Title III wiretaps in 18 U.S.C. § 2518.

First, the regulation undermined the First Amendment rights of the detainee because it chilled communication with counsel and the right of access to the courts. Under the standards recognized by the courts, prison regulations had to be "reasonably related to legitimate penological interests"; *Turner v. Safley*, 482 U.S. 78, 89, 97 (1987); and these were not. We were also concerned with the lack of judicial oversight of attorney-client monitoring. The regulation's use of a "privilege team" to attempt to protect attorney-client communications is, in NACDL's view, plainly insufficient. It borrowed the concept from law office searches where the government's burden in initiating the intrusion was much higher, and an independent master would be used to protect the privilege.

Second, the regulation permitted unreasonable searches of attorney-client communications in violation of the Fourth Amendment. While prison inmates have a much lower expectation of privacy, pretrial detainees still have greater rights, subject to institutional

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<sup>1</sup> <http://www.nacdl.org/public.nsf/freeform/Leg-atclientdoc?opendocument>.

security, and the Supreme Court has noted in dicta that intrusions into attorney-client communications in prison would still be unreasonable. *Lanza v. New York*, 370 U.S. 139, 143-44 (1962). The regulation's use of the "reasonable suspicion" standard is also inappropriate. That standard is only applied when immediate police action is required. *Terry v. Ohio*, 392 U.S. 1, 19 (1968). The justification of institutional security, or a wiretap based on probable cause and "oath or affirmation" issued under Title III, were previously required for surveillance of conversations. This regulation thus circumvents Title III, and the Attorney General lacks the power to do so.

Third, the regulation violates the due process requirements of the Fifth and Fourteenth Amendments if applied to accused persons prior to the formal attachment of the right to counsel. Jail inmates are still entitled to the protections of due process.

Fourth, the regulation undermines the Sixth Amendment right to counsel and effective assistance of counsel. The regulation requires written notice of surveillance to both attorney and client. NACDL insists that the chilling effect on open communication between attorney and client will be insurmountable. The foundation of attorney-client confidentiality and privilege is the free exchange of information necessary to effective representation of the accused. Without this free exchange, the right to counsel is seriously impaired. Of the concerns voiced to the Ethics Advisory Committee over application of § 501.3(d) to specific cases,<sup>2</sup> this was by far the greatest concern.

Fifth, the regulation violates separation of powers because it amounts to an executive amendment to Title III and evades judicial review by a "neutral and detached magistrate."

Sixth, the regulation violates the attorney-client and work product privileges which both must be respected as to those in jail. No recognized exception to the privileges applies to monitoring under the regulation.

Seventh, the regulation violates the attorney's duty to protect confidentiality and the presumption that attorneys will not become co-conspirators with their clients.

Eighth, the regulation serves no legitimate investigative function. Accused persons who are told they will be monitored will simply not provide information that the government hopes to learn to prevent terrorism.

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<sup>2</sup> The specifics of those communications otherwise remain confidential as a part of attorney-client confidentiality between the Committee and the NACDL member. Ethics Advisory Committee, Mission Statement ¶ 3(a) (available only to NACDL members on NACDL's website, Ethics Advisory Committee pages).

After a year of operating under the regulation, none of NACDL's concerns have been dispelled. A criminal defense attorney has been creatively indicted for violating an affirmation under the regulation. Significantly, other defense attorneys have avoided having to make such an affirmation because the trial courts refused to indulge in the government's unsupported assumption that attorneys, as officers of the court and advocates guaranteed by the Sixth Amendment will violate the law, even for accused terrorists. On the other hand, the government has not yet been required to disclose whether attorney-client communications are subject to wiretapping or eavesdropping under Title III or FISA during the period of the wiretapping or eavesdropping.

Some of these issues are being litigated in the Southern District of New York and the District of Columbia Circuit, and NACDL members are cautioned to watch for the outcome of those cases.

## **B. Ethics Advisory Committee's summary**

The NACDL Ethics Advisory Committee reaffirms the position NACDL took in 2001 in response to the regulation. The input we have received demonstrates that the chilling effect on attorney-client communications is real, notwithstanding the fact that courts have not yet fully accepted that argument. Attorneys report to the Committee that clients receiving notice under § 501.3(d) are obviously reticent to confide in them, and that the ability of the attorney to provide an adequate defense is thus harmed.

Some have said that this was even the government's intention in adopting the regulation. If so, the government is manipulating the attorney-client relationship to facilitate convictions by hamstringing the attorney, and that is something our constitutional form of government cannot tolerate. Surreptitious Title III and FISA listening could use the conversation after the fact if the government can show it is an unprivileged communication.

In general, when an attorney has reasonable suspicion<sup>3</sup> that his or her communications with clients in custody are being monitored by government officials, it is NACDL's position that the attorney must take affirmative action to safeguard confidential communications. Once either the attorney or client discover that surveillance or monitoring is occurring, the free exchange of information and ideas about the case is immediately chilled,<sup>4</sup> and the Sixth Amendment is violated. Both will fear that confidences have already

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<sup>3</sup> "Reasonable suspicion" is a familiar legal standard that the Supreme Court has told us for years in Fourth Amendment cases is not all that high. It is the same standard the government uses in applying § 501.3(d).

<sup>4</sup> We note that in *United States v. Stewart*, 2002 WL 1836755 \*6-7 (S.D.N.Y. 2002), discussed *infra*, the District Court held that any alleged chilling effect on the attorney-defendant's

been discovered or even seized by the government. Accordingly, the criminal defense lawyer has a duty to seek to end the surveillance,<sup>5</sup> discover the true extent of it, and find a remedy for what has already happened. One cannot simply rely upon *post hoc* use of the exclusionary rule because the harm to the ability of the criminal defense lawyer to adequately defend has already occurred and continues, and it substantially risks infecting the fairness of the trial.

As to surveillance under § 501.3(d), the criminal defense lawyer will presumptively know whether the client is subject to the regulation since the regulation requires written notice to both the lawyer and the client. The government may seek to impose unnecessary requirements on the criminal defense lawyer which should be resisted. Finally, there are serious constitutional difficulties with the regulation, and NACDL has already suggested legal arguments to challenge application of § 501.3(d) to a criminal defense lawyer and client.<sup>6</sup> At least one court has partially limited application of § 501.3(d) to criminal defense lawyers under the Sixth Amendment.

As to surveillance under Title III and FISA, the criminal defense lawyer will not know whether the client is subject to recording because there is no notice to the target or those whose conversations are being recorded until well after the fact.

In analyzing this issue, we first considered the importance of attorney-client confidentiality and privilege, the constitutional considerations involved, the lawyer's duty of loyalty, and the lawyer's duty to assert confidentiality.

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discussions with her attorneys was not reasonable under the circumstances because of the safeguards against use of privileged communications; the communications actually have to be used to the defendant's prejudice. Since the conversations, if recorded, had not yet been used, there was no way to show prejudice.

We adamantly reject this conclusion as unsupported by what criminal defense lawyers know about attorney-client communication. Once the client or the attorney believe that the government is listening, there will be no free exchange of information and the client's defense is harmed. After the fact screening still allows attorney-client conversations to be heard by government agents, and that will still make both the client and the lawyer unwilling to freely talk.

<sup>5</sup> It could be argued that a special master be appointed for review of intercepted communications as would occur in a law office search in lieu of the government's "privilege team." *See infra*.

<sup>6</sup> *See* note 1, *supra*.

## II. THE IMPORTANT IMPLICATIONS OF ATTORNEY-CLIENT CONFIDENTIALITY

### A. Relationship of the Attorney-Client Privilege and Confidentiality

The attorney-client privilege is the oldest privilege of confidential communications in the law. *Swidler & Berlin*, 524 U.S. 399, 403 (1998); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”). It existed in Roman Law ten centuries ago, and, thus, under English common law at least since 1577. Hazard, note 8, *infra*, at 1071; 1 MCCORMICK ON EVIDENCE § 87 (5th ed. 1999); 8 WIGMORE, EVIDENCE § 2290, at 542 n. 1 (McNaughton rev. 1961) (collecting authorities). “The privilege is intended to encourage ‘full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.’” *Swidler & Berlin*, 524 U.S. at 403, quoting *Upjohn*, 449 U.S. at 389.<sup>7</sup>

The attorney-client privilege is evidentiary, and it is the product of litigation.

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<sup>7</sup> *Upjohn* also held, 449 U.S. at 389, 390-91:

As we stated last Term in *Trammel v. United States*, 445 U.S. 40, 51 (1980): “The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.” And in *Fisher v. United States*, 425 U.S. 391, 403 (1976), we recognized the purpose of the privilege to be “to encourage clients to make full disclosure to their attorneys.” This rationale for the privilege has long been recognized by the Court, see *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”).

[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice. See *Trammel*, *supra*, at 51; *Fisher*, *supra*, at 403. The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant. See ABA Code of Professional Responsibility, Ethical Consideration 4-1: . . . [quoted in the text, *infra*].

See also *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). (bracketed material added)

Accordingly, it has developed through judicial interpretation, and it was codified only relatively recently. The ethical requirement of attorney-client confidentiality, however, developed as internal rules of conduct for lawyers, written by lawyers for themselves with the view that states would adopt and formalize them.<sup>8</sup> Both are premised on the same weighty public policy consideration: Attorneys can best serve their clients and represent client interests only with full and frank disclosure between the client and attorney; and freedom from fear of disclosure by the attorney fosters full disclosure by the client.

Confidentiality in ethical rules is thus broader than the privilege because it governs the conduct of lawyers everywhere and all the time, not just in court. As stated in Code of Professional Responsibility, EC 4-1:

Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance. (footnotes omitted)

The broader ethical rules do not govern application of the attorney-client privilege. Model Rules of Professional Conduct, Scope ¶ 7.

## **B. Constitutional Considerations**

The constitutional considerations are well developed in NACDL's December 2001 comments on the regulation, but we elaborate because we are concerned here with the larger question of attorney-client monitoring in jail of any detainee or inmate and the attor-

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<sup>8</sup> See generally Fred C. Zachairas, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69 (1999); Harry Schaffner, *Reconciling Attorney-Client Privilege with the Rules of Professional Conduct*, 81 ILL. B.J. 410 (1993); Susan B. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978).

ney's duty to protect confidentiality.<sup>9</sup>

## 1. Sixth Amendment

It has always been the position of NACDL's Ethics Advisory Committee that maintaining client confidentiality is, in fact, presumptively a Sixth Amendment concern because confidentiality is the foundation of the attorney-client relationship and has always been a fundamental attribute of the right to counsel and the effective assistance of counsel.

The Supreme Court has never expressly held that confidentiality is subsumed within the Sixth Amendment right to counsel, but it has suggested that it might be. *Weatherford v. Bursey*, 429 U.S. 545, 554 n. 4 (1977).

Because confidentiality dates from the common law, it should be a part of the Sixth Amendment right to counsel.<sup>10</sup> Some state courts have held that the attorney-client privilege is a part of the constitutional right to counsel. *State v. Kociolek*, 23 N.J. 400, 413-14, 129 A.2d 417, 424 (1957), citing *In re Seslar*, 15 N.J. 393, 403-06, 105 A.2d 395, 400-03

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<sup>9</sup> Other articles on the subject include: Akil Reed Amar & Vikram David Amar, *Symposium: The New Federal Regulation Allowing Federal Agents to Monitor Attorney-Client Conversations: Why It Threatens Fourth Amendment Values*, 34 CONN. L. REV. 1163 (2002); Sadiq Reza, *Symposium: Privacy and the Post-September 11 Immigration Detainees: The Right Way to a Right (and Other Wrongs)*, 34 CONN. L. REV. 1169 (2002); Mark G. Young, Note, *What Big Eyes and Ears You Have!: A New Regime for Covert Governmental Surveillance*, 70 FORD. L. REV. 1017 (2001); Ronald D. Rotunda, *Monitoring the Conversations of Prisoners*, 13 PROF. LAW. 1 (No. 3, 2002); Paul R. Rice & Benjamin Parlin Saul, *Is the War on Terrorism a War on Attorney-Client Privilege?*, 17 CRIM. JUST. 22 (Summer 2002); John P. Elwood, *Prosecuting the War on Terrorism: The Government's Position on Attorney-Client Monitoring, Detainees, and Military Tribunals*, 17 CRIM. JUST. 30 (Summer 2002); J. Soffiyah Elijah, *The Reality of Political Prisoners in the United States: What September 11 Taught Us About Defending Them*, 18 HARV. BLACK-LETTER L.J. 129 (2002).

<sup>10</sup> In construing the Fourth Amendment, the Supreme Court looks first to the common law as it existed in 1791. *Carroll v. United States*, 267 U.S. 132, 149 (1925); *California v. Hodari D.*, 499 U.S. 621, 624 (1991); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). The due process components of the Fifth and Fourteenth Amendment are viewed under the common law at the time of adoption of the Constitution and the Bill of Rights. *Powell v. Alabama*, 287 U.S. 45, 62-66 (1932). The common law of immunity from suit was impressed into § 1983 litigation. *Imbler v. Pachtman*, 424 U.S. 408, 424-29 (1976).

The Sixth Amendment, however, was expressly designed to overcome common law limits on the right to counsel in felony cases. *United States v. Ash*, 413 U.S. 300, 306-10 (1973); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Powell v. Alabama*, *supra*, 287 U.S. at 60-66.



(1954) (which recites the common law history of the privilege at length).<sup>11</sup> In *State v. Swearingen*, 649 P.2d 1102, 1104 (Colo. 1982), the Colorado Supreme Court stated:

The purpose of the privilege is to encourage full and frank communications between attorneys and their clients which promote the administration of justice and preserve the dignity of the individual. *Law Offices of Bernard D. Morley v. MacFarlane*, 647 P.2d 1215 (Colo.1982) (Quinn, J., concurring). Although the privilege is not explicitly grounded in constitutional protections, the inviolability of the privilege in criminal prosecutions is closely interrelated with the individual's right to immunity from self-incrimination under the Fifth Amendment to the United States Constitution and his right to counsel under the Sixth Amendment, which necessarily includes the right to confer in private with his attorney. *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); *Law Offices of Bernard D. Morley v. MacFarlane*, *supra* (Quinn, J., concurring); *State v. Kociolek*, 23 N.J. 400, 129 A.2d 417 (1957); Note, "The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement," 91 Harv.L.Rev. 464 (1977)<sup>[12]</sup>;

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<sup>11</sup> *Kociolek*, 23 N.J. 413-14, 129 A.2d at 434:

The principle [of full disclosure to counsel] is of the essence of the ancient common law attorney-client privilege, in this country and in England and the continental countries deemed a basic civil right, indispensable to the fulfillment of the constitutional security against self-incrimination and the right to make defense with the aid of counsel skilled in the law. *See In re Seslar*, *supra*. (bracketed material added)

<sup>12</sup> Note, 91 HARV. L. REV. at 485-86:

The fifth amendment to the United States Constitution provides individual criminal defendants with a right against self-incrimination. This right protects such persons from having their own testimony placed in evidence against them through the compulsion of the judicial process. Considered alone, however, the fifth amendment does not entitle defendants to have all their communications privileged; statements volunteered to a third person, for example, can be introduced against a defendant. Nevertheless, the state has no right to demand from the defendant an admission of guilt. A court cannot, through direct coercion, infringe the defendant's personal province of fifth amendment protection.

The Constitution also grants defendants a right to counsel under the sixth amendment. There are, of course, qualifications on that right which the sixth amendment does not foreclose. Defendants are not, for example, guaranteed the shrewdest counsel, or the most experienced, or the most articulate. Nor, under the sixth amendment, are they necessarily guaranteed a privilege for communications with lawyers. Unless legal communications would completely collapse without a

Note, "The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received from his Client," 38 U.Chi.L.Rev. 211 (1970). (footnote added)

Governmental actions intended to intrude into the attorney-client relationship have been held violations of the right to counsel. *See, e.g., Geders v. United States*, 425 U.S. 80, 88-89 (1976) (trial court directive that testifying defendant could not consult with client during overnight recess denied right to counsel; the lawyer needs to be able to consult with the defendant about the events of the day, and vice-versa, to effectively plan for the rest of the trial)<sup>13</sup>; *Bishop v. Rose*, 701 F.2d 1150, 1156-57 (6th Cir. 1983) (state seized 14 page handwritten letter to counsel from defendant's cell and used it at trial; no showing of prejudice required to establish a violation of Sixth Amendment right to counsel); *Shillinger v. Haworth*, 70 F.3d 1132, 1140 (10th Cir. 1996) (deputy sheriff was required to listen in to and report on defendant's meetings with counsel; intentional violation of Sixth Amendment); *Coplon v. United States*, 191 F.2d 749, 756 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 926 (1952) (wiretap of attorney-client communications; "It is well established that an accused does not enjoy the right to effective aid of counsel if he is denied the right of private consultation with him."); decided also as a due process claim); *State v. Garza*, 99 Wash.App. 291, 296, 994 P.2d 868, 871 (Div. 3, 2000), *rev. denied*, 141 Wash.2d 1014, 10 P.3d 1072 (2000) (legal materials seized and read in jail; "Effective representation requires that a criminal defendant be permitted to confer in private with his or her attorney."), *citing State v. Cory*, 62 Wash.2d 371, 373-74, 382 P.2d 1019, 1020-21 (1963) (police detective

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right to privilege, it is hard to see why the absence of the privilege would violate the provisions of the sixth amendment.

But when the fifth and sixth amendments are considered together, the individual accused of crime does seem to have a right to attorney-client privilege. Without a right to privilege, the exercise of either constitutional right would require a waiver of the other. To preserve his right against self-incrimination, the defendant would have to forgo communicating with an attorney, lest the communication be subpoenaed. Similarly, to enjoy even the most minimal use of his right to an attorney, the defendant would have to surrender his testimony to the court. Yet, neither of these restrictions can be permitted. Each conditions a constitutional right upon the waiver of another and thus turns a guarantee into a fiction. A right to attorney-client privilege is the only safeguard against the evisceration of these constitutional rights. The fifth and sixth amendments together must therefore provide individual criminal defendants with a right to prevent the disclosure at trial of their legal communications. (footnotes omitted)

<sup>13</sup> *See also Herring v. New York*, 422 U.S. 853, 857-58 (1975) (denying counsel for the defendant in a court trial summation violates the right to counsel); *Brooks v. Tennessee*, 406 U.S. 605, 613 (1972) (statute requiring defendant to testify first or not at all denied right to counsel to determine trial strategy).

read defense counsel’s legal pad during trial; “It is also obvious that an attorney cannot make a ‘full and complete investigation of both the facts and the law’ unless he has the full and complete confidence of his client, and such conference [confidence?] cannot exist if the client cannot have assurance that his disclosures to his counsel are strictly confidential.” (bracketed material added).<sup>14</sup>

Under these authorities, the Ethics Advisory Committee in informal opinions always urges NACDL members to assert client confidentiality as a Sixth Amendment right of the client to counsel as well as an ethical duty of counsel.

## 2. Fourth Amendment

Many courts have held that the Fourth Amendment rights of clients may be violated by a search of a lawyer’s office. *See, e.g., De Massa v. Nunez*, 770 F.2d 1505, 1507 (9th Cir. 1985); *O’Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979). NACDL believes this rationale can be extended to any confidential communication seized by the government.

The Supreme Court still recognizes the “constitutionally protected area” rationale in defining the “reasonable expectation of privacy.”<sup>15</sup> When an attorney and client are

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<sup>14</sup> In the context of law office searches, *see, e.g., De Massa v. Nunez*, 770 F.2d 1505, 1507 (9th Cir. 1985) (*per curiam*); *United States v. Neill*, 952 F.Supp. 834, 839-40 (D.D.C. 1997); *United States v. Skeddle*, 989 F.Supp. 890, 896-97 (N.D. Ohio. 1997); *United States v. Stewart*, 2002 WL 1300059 \*5 (S.D.N.Y. 2002); *People v. Nash*, 418 Mich. 196, 341 N.W.2d 439, 447 (1983).

Under § 501.3(d), *see United States v. Reid, infra*.

<sup>15</sup> *Kyllo v. United States*, 533 U.S. 27, 34 (2001):

While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences are at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable. To withdraw protection of this minimum expectation would be to permit police technology to erode privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical “intrusion into a constitutionally protected area,” *Silverman*, 365 U.S. at 512, constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained

conferring, even in a jail, an area normally without a “normal” expectation of privacy, the area may still have the attributes of a “constitutionally protected area” if they justifiably believe that their conversation is in secret. *United States v. Van Pouck*, 77 F.3d 285, 291 n. 9 (9th Cir. 1996) (prisoners have an expectation of privacy in a telephone call with their attorney); *People v. A.W.*, 989 P.2d 843, 848-49 (Colo. 1999) (expectation of privacy found where police actively lulled suspect into believing conversation was private).<sup>16</sup>

It is settled that a person in pretrial or post-conviction custody does not have the same expectation of privacy of those not in jail, and every criminal defense lawyer knows it. Accordingly, a detainee may be subjected to searches of his person and belongings without a showing of particularized need, as long as jail security requires it, even if it is a random search. *Bell v. Wolfish*, 441 U.S. 520 (1979) (confinement conditions evaluated under Due Process Clause). Still, this does not justify seizing presumptively confidential and privileged communications.

### **3. Interplay of Sixth, Fourth, and First Amendments in jail communications**

Communications with a lawyer in jail are protected by the First Amendment right of access to courts and the Sixth Amendment right to counsel. *Ex parte Hull*, 312 U.S. 546 (1941). Seizing attorney-client communications would violate the Fourth and Sixth Amendments. *See, e.g., United States v. Van Pouck, supra; Inmates of the San Diego County Jail in Cell Block 3B v. Duffy*, 528 F.2d 943 (9th Cir. 1975); *Palmigiano v. Trivisono*, 317 F.Supp. 776 (D.R.I. 1970); *Coplon v. United States, supra*.

Many conversations with those in custody are surreptitiously recorded. It should be common knowledge by now to criminal defense lawyers that many police stations have interview rooms that are wired for sound and video.<sup>17</sup> Sometimes attorney-client telephone

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by the thermal imager in this case was the product of a search.

We believe this rationale applies to intrusions into the sanctity of the attorney-client relationship, too.

<sup>16</sup> *See also State v. Ferrell*, note 18, *infra*, involving recording of an attorney-client telephone call from a police station which was admitted into evidence at trial in violation of *Miranda*.

<sup>17</sup> *See, e.g., State v. Scheineman*, 77 S.W.3d 810, 812 (Tex. 2002) (co-defendants were put together in an interview room so their conversations could be recorded); *Bell v. State*, 802 So.2d 485, 485 (Fla.App. 3D 2001) (no expectation not to be videotaped without one’s knowledge in interview room); *Belmer v. Commonwealth*, 36 Va.App. 448, 460, 553 S.E.2d 123, 128 (2001) (no expectation of privacy in whispered conversation with mother that was recorded; not unlawful

calls are recorded,<sup>18</sup> and, other times, jailors are required to listen in to attorney client conversations.<sup>19</sup> None of these results in a waiver of the attorney-client privilege.

#### **4. Fifth Amendment**

The Supreme Court has held that the Fifth Amendment is not waived by providing information to an attorney. *Fisher v. United States*, 425 U.S. 391, 403-05 (1976); *United States v. Zolin*, 491 U.S. 554, 562 (1989). *Fisher* can only be read to incorporate the attorney-client privilege into the privilege against self-incrimination so the client can communicate freely with his or her lawyer; *id.*, 425 U.S. at 404; about past wrongdoing. *Id.* at 403; *Zolin*, 491 U.S. at 562-63.

#### **5. Right to a fair trial with effective and informed counsel**

In *Estelle v. Williams*, 425 U.S. 501, 503 (1976), the Supreme Court stated:

The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. Long ago this Court stated:

“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.” *Coffin v. United States*, 156 U.S. 432, 453 (1895).

The right to a fair trial is premised on the right to effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984):

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eavesdropping). *Compare People v. A.W.*, *supra* (expectation of privacy found where police actively lulled suspect into believing conversation was private).

<sup>18</sup> *In re State Police Litigation*, 888 F.Supp. 1235 (D.Conn. 1995), *app. dismissed*, 88 F.3d 111 (2d Cir. 1996) (consolidated civil cases over listening to attorney-client calls, summary judgment for defendants denied; Connecticut State Police indiscriminately recorded telephone conversations to and from state police barracks, and attorney-client calls were recorded; denial of summary judgment on qualified immunity could not be appealed because it would not prevent trial in any event); *State v. Ferrell*, 191 Conn. 37, 44, 463 A.2d 573, 578 (1983) (telephone call to attorney from state police barracks was recorded and admitted into evidence at trial; use of statement violated *Miranda*; conviction reversed: “privacy must be ensured” in calls to attorneys).

<sup>19</sup> *Shillinger v. Haworth*, *supra*.

In a long line of cases that includes *Powell v. Alabama*, 287 U.S. 45 (1932), *Johnson v. Zerbst*, 304 U.S. 458 (1938), and *Gideon v. Wainwright*, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the “ample opportunity to meet the case of the prosecution” to which they are entitled. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276 (1942); see *Powell v. Alabama*, *supra*, 287 U.S. at 68-69.

Effective counsel must also be counsel uninhibited by outside constraints. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). See *Polk County v. Dodson*, *infra*; *Geders v. United States*, *supra* (trial court’s order for attorney and client to not communicate during overnight recess violated right to counsel).

The entire right of the accused to a fair trial is undermined by actions of the government which interfere with the right to counsel. Thus, surreptitious monitoring of attorney-client conversations ultimately interferes with the right to a fair trial. Counsel not armed with the full facts from his or her client is seriously disadvantaged at trial to the prejudice of the client and the “truth-seeking function” of a trial. Uninformed counsel is ineffective counsel, and, if the government is the cause of counsel being uninformed, the accused has been denied his fundamental right to a fair trial.

### III. DUTY OF LOYALTY

Ethical codes have always recognized a duty of loyalty. *See, e.g.*, ABA Canons of Professional Ethics, Canon 15 (1908), quoting, without attribution, SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 78-79 (1896), possibly the earliest American work on professional ethics, published in Philadelphia. Sharswood notes the duty of loyalty in many places in his work; *see, e.g., id.* at 57-58 & 107 (duty of candor to client is part of duty of loyalty); and he noted that the duty of loyalty in the Pennsylvania attorney's oath was prescribed by statute in 1752. *Id.* at 57-58 n. 1, citing Pa. Act of Aug. 22, 1752 ("with all good fidelity, as well to the court as to the client"). The duty of loyalty, like the duty of confidentiality, existed at common law. The two are seemingly one and the same in some common law cases.<sup>20</sup>

Indeed, the duty of loyalty is the foundation of many of the ethical rules,<sup>21</sup> particularly the rules of conflicts of interest. *Holloway v. Arkansas*, 435 U.S. 475, 480-90 (1978). The Supreme Court relied on the duty of loyalty in *Stockton v. Ford*, 52 U.S. (11 How.) 232, 247 (1850), in holding that the prohibition against attorneys having a conflict of interest continues long after the end of the representation because of the importance of the fiduciary relationship between the attorney and client.

The Supreme Court has long held attorneys to stringent standards of loyalty and fairness with respect to their clients. In 1850, the Supreme Court stated:

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<sup>20</sup> *See, e.g., Annesley v. Earl of Anglesea*, 17 How. St. Trials 1139, 1241 (Ireland Ct. Exch. 1743):

That this necessity [of using attorneys to litigate] introduced with it the necessity of what the law had very just established, an inviolable secrecy to be observed by attorneys, in order to render it safe for clients to communicate to their attorneys all proper instructions for carrying on their causes which they found themselves under a necessity of instructing to their case. And if this original principle be kept constantly in view, I think it cannot be difficult to determine either the present question, or any other which may arise from this head: for upon this principle, whatever it is, or by the party concerned can naturally be supposed, necessary to be communicated to the attorney, in order to the carrying on of any suit or prosecution, on which he is retained, that the attorney shall invariably keep the secret. (bracketed material added)

<sup>21</sup> *E.g.*, Model Rules of Professional Conduct, Rules 1.1 (competence), 1.2 (scope of representation), 1.3 (diligence), 1.4 (communication), 1.6 (confidentiality), 1.7-1.10 (conflicts of interest), 1.14 (client under disability), 1.15 (safekeeping property), 2.1 (advisor), and 3.1 (meritorious claims and contentions / requiring prosecution to prove its case).

There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it.

*Stockton v. Ford*, 52 U.S. (11 How.) 232, [247,] 13 L.Ed. 676 (1850).

In the same vein, the Idaho Supreme Court has stated:

The relationship of client and attorney is one of trust, binding an attorney to the utmost good faith in dealing with his client. In the discharge of that trust, an attorney must act with complete fairness, honor, honesty, loyalty, and fidelity in all his dealings with his client. An attorney is held to strict accountability for the performance and observance of those professional duties and for a breach or violation thereof, the client may hold the attorney liable or accountable.

*Beal v. Mars Larsen Ranch Corp., Inc.*, 99 Idaho 662, 667-668, 586 P.2d 1378, 1383-1384 (1978) (citation omitted).

Mindful of the historical importance of the public trust in the attorney-client relationship, we find that just as the attorney-client relationship remains intact for purposes of a continuing duty of confidentiality, so does it remain intact for purposes of a continuing duty of loyalty with respect to matters substantially related to the initial matter of engagement.

*Damron v. Herzog*, 67 F.3d 211, 214 (9th Cir. 1995) (bracketed citation added).

In *Polk County v. Dodson*, 454 U.S. 312, 322 (1981), the Supreme Court found “[i]mplicit in the concept of a ‘guiding hand’ [of counsel] is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.”<sup>22</sup> Wiretapping and eavesdropping on

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<sup>22</sup> The full quote is as follows, 454 U.S. at 321-22:

Second, and equally important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages. This Court’s decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), established



attorney-client communications is state control.

Under the duty of loyalty, whether confidential communications were actually made during the relationship is irrelevant to the analysis; the *mere possibility* of a breach of a confidence is what controls. *Id.* at 214-15, quoting *David Welsh Co. v. Erskin & Tulley*, 203 Cal.App.3d 884, 891, 250 Cal.Rptr. 339, 342 (1988), citing *Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz*, 529 Pa. 241, 254, 602 A.2d 1277, 1283 (1992). Accordingly, even in states having adopted the Model Rules, “[t]he mere appearance of impropriety is just as egregious as any actual or real conflict.” *Lovell v. Winchester*, 941 S.W.2d 466, 469 (Ky.1997).<sup>23</sup> Thus, under the appearance of impropriety standard, the mere appearance that there could be an improper disclosure is sufficient to cause a disqualifying conflict of interest, even if there never was any improper disclosure.

#### IV. LAWYER’S DUTY TO ASSERT CONFIDENTIALITY

When the government seeks information about a client that intrudes upon a client confidence, the lawyer has a fundamental and affirmative duty to act to protect the confidence. *In re Advisory Opinion No. 544*, 103 N.J. 399, 406, 511 A.2d 609, 612 (1986); ABA Formal Op. 94-385 (July 5, 1994). This duty is also recognized in 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 60(1)(b), 63 & *Comment b* (2000).<sup>24</sup>

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the right of state criminal defendants to the ““guiding hand of counsel at every step in the proceedings against [them].”” *Id.*, at 345, quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Implicit in the concept of a “guiding hand” is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate. *See, e. g., Gideon v. Wainwright, supra; Holloway v. Arkansas*, 435 U.S. 475 (1978). (brackets in original)

<sup>23</sup> *See, e.g., First American Carriers, Inc. v. Kroger, Inc.*, 302 Ark. 86, 92, 787 S.W.2d 669, 672 (1990) (appearance of impropriety standard of Canon 9 of the Code of Professional Responsibility states an ethical imperative in relations with clients and conflicts of interest which survives the adoption of the Model Rules of Professional Conduct); *People v. Witty*, 36 P.3d 69, 71 (Colo. 2001).

<sup>24</sup> Section 60(1) provides:

(1) Except as provided in §§ 61-67 [when disclosure permitted], during and after representation of a client:

...

(b) the lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclo-

This duty is also implied in the lawyer's duty of "act[ing] with reasonable diligence and promptness in representing a client" in Model Rule of Professional Conduct, Rule 1.3, and the duty to take prompt action to protect the interests of the accused. ABA STANDARDS, *the Defense Function* § 4-3.6 ("Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. Defense counsel should consider all procedural steps which in good faith may be taken, including . . . moving to suppress illegally obtained evidence . . . .")

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sure by the lawyer's associates or agents that may adversely affect a material interest of the client or otherwise than as instructed by the client. (bracketed material added)

Section 63 provides that "[a] lawyer may use or disclose confidential client information when required by law, after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure." *Comment b* states:

*A lawyer's obligation to invoke available protection.* A lawyer generally is required to raise any reasonably tenable objection to another's attempt to obtain confidential client information (see § 59) from the lawyer if revealing the information would disadvantage the lawyer's client and the client has not consented (see § 62), unless disclosure would serve the client's interest (see § 61). The duty follows from the general requirement that the lawyer safeguard such information (see § 60) and act competently in advancing the client's objectives (see § 16(1)). The duty to object arises when a nonfrivolous argument (see § 110) can be made that the law does not require the lawyer to disclose such information. Such an argument could rest on the attorney-client privilege (see § 86(1)(b)), the work-product immunity (see § 87), or a ground such as the irrelevance of the information or its character as hearsay. When the client is represented by successor counsel, a predecessor lawyer's decision whether to invoke the privilege is appropriately directed by successor counsel or the client.

Whether a lawyer has a duty to appeal from an order requiring disclosure is determined under the general duties of competence (see § 16(2)). A lawyer may be instructed by a client to appeal (see § 21(2)). If a lawyer may obtain precompliance appellate review of a trial-court order directing disclosure only by being held in contempt of court (see § 105), the lawyer may take that extraordinary step but is generally not required to do so by the duty of competent representation. In any event, under § 20 the lawyer should inform the client of an attempt to obtain the client's confidential information if it poses a significant risk to the material interests of the client and when circumstances reasonably permit opportunity to inform the client.

## V. MONITORING JAIL CONVERSATIONS

### A. In general

As stated above, a person in pretrial or post-conviction confinement does not have the same expectation of privacy as the rest of the public. He or she does, however, have a Sixth and Fifth Amendment right to confer with an attorney in private, to not have those conversations overheard, and to have an attorney seek to protect that right.<sup>25</sup>

The Arizona Bar Association dealt with this issue in Ariz. Op. 87-19 (Sept. 18, 1987). There, a public defender learned that communications with a juvenile client in “quiet rooms” at the juvenile detention center were being monitored by detention staff. The public defender advised the court with jurisdiction over the client’s case and ceased further communications under those conditions.

Ariz. Op. 87-19 held that the attorney satisfied the duty of confidentiality under Model Rule 1.6(a) by ceasing further communications under those conditions and apprising the court of the problem. The attorney, however, had a continuing duty to consult with the client, and, thus, had a duty to seek to insure that future communications were in confidence, either by seeking relief from the jailers or from the court. Ariz. Op. 87-12 also noted that effective representation of persons accused of crime is not possible without assurances of absolute confidentiality.<sup>26</sup> As previously stated, NACDL believes that this is a Sixth Amendment concern as well.

Ariz. Op. 87-19 is correct on its analysis of the ethical rules involved, and we follow it. We add that NACDL believes such surveillance violates the First, Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.

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<sup>25</sup> ABA STANDARDS, *The Defense Function* § 4-3.1 (3d ed. 1991):

(b) To ensure the privacy essential for confidential communication between defense counsel and client, adequate facilities should be available for private discussions between counsel and accused in jails, prisons, courthouses, and other places where accused persons must confer with counsel.

(c) Personnel of jails, prisons, and custodial institutions should be prohibited by law or administrative regulations from examining or otherwise interfering with any communication or correspondence between client and defense counsel relating to legal action arising out of the charges or incarceration.

<sup>26</sup> The opinion also discusses the attorney’s duty to former clients whose conversations he believed were compromised by the jailer’s actions since the duty to protect confidentiality continues after the representation ends.

## B. 28 C.F.R. § 501.3(d)

Under 28 C.F.R. § 501.3(d), adopted by the Attorney General on October 31, 2001, *see* note 1, *supra*, the federal government can surreptitiously listen to attorney-client conversations if the government certifies that such “special administrative measures” (SAMs) are required “for the purpose of deterring future acts that could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.” The Director of the Bureau of Prisons must in writing notify the inmate and his or her attorneys that they are subject to monitoring. § 501.3(d)(2). Any conversations actually intercepted will be submitted to a “privilege team,” within the Department of Justice and not connected with the investigation, “to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy.” § 501.3(d)(3). Minimization is required. *Id.*

One attorney has been indicted for allegedly conspiring with her client to provide support for a terrorist organization as a result of such monitored conversations. *United States v. Stewart, supra* (lawyer’s case)<sup>27</sup>; *United States v. Sattar*, 2002 WL 1836755 (S.D.N.Y. 2002) (co-defendant’s case).

Since NACDL’s comments on the unconstitutionality and fundamentally unsound policy of the 2001 regulation, it has been recognized that the government’s control over an inmate under the SAMs is not absolute because of the Fifth Amendment presumption of innocence and the Sixth Amendment right to counsel. *United States v. Reid*, 214 F.Supp.2d 84, 92 (D.Mass. 2002). Accordingly, defense counsel cannot be impeded by imposition of SAMs that hamper the attorney’s ability to represent the client. *Id.* at 94:

The affirmation here unilaterally imposed by the Marshals Service as a condition of the free exercise of Reid’s Sixth Amendment right to consult with his attorneys fundamentally and impermissibly intrudes on the proper role of defense counsel. They are zealously to defend Reid to the best of their professional skill without the necessity of affirming their bona fides to the government. As trusted officers of this Court, in their representation of Reid they are subordinate to the existing laws, rules of court, ethical requirements, and case-specific orders of this Court—and to nothing and no one else. If the government feels the need for specific protective orders applicable to all counsel alike, it may make application to the Court.

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<sup>27</sup> Indictment: <http://news.findlaw.com/hdocs/docs/terrorism/ussattar040902ind.pdf>. The government’s theory is that the lawyer made a false affirmation under SAMs to the government that she would not disclose certain things learned from the client. Indictment ¶s 7 (attorney signed affirmations) & 10 (attorney violated SAMs).

Thus, the court refused to allow the government to arbitrarily put defense counsel in the position Stewart found herself in without a showing of need. *Id.*, citing *United States v. Stewart*, *supra*. The District Court in *Reid* presumed that the accused's public defenders needed unfettered access to the client's information to be able to constitutionally defend him. The government did not press for requiring defense counsel to sign the affirmations that Stewart had to sign, and the court refused to require them to do so without a showing of need from the government.

Defense counsel should thus argue under § 501.3(d) surveillance and *Reid* that the Sixth Amendment guarantees a fully informed and independent criminal defense counsel, and the government cannot assume that defense counsel will violate client confidences or his or her oath as an attorney.

### C. Title III and FISA surveillance in jail

NACDL members have recently reported that they have asked the government whether their attorney-client conversations are under electronic monitoring in jail, and the government's response is that they are "not under surveillance under § 501.3(d)." The government does not answer whether the client is under Title III wiretapping or eavesdropping under 18 U.S.C. §§ 2510-20 or the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.* (FISA). *United States v. Stewart* involved an inquiry about existence of wiretaps under both, and the government was not required to disclose whether it was doing so. There are other cases raising the same issue that are as yet undecided.

Under § 501.3(d), the attorney and client are aware that there are communications are being recorded, but under Title III and FISA they are not told because the statutes require secrecy for effectiveness. Disclosure in these situations would frustrate the purpose of the wiretap which is necessary because other investigative methods have failed or would be unduly dangerous. *Stewart*, 2002 WL 1836755 \*4.

It has been held under Title III that attorney-client communications are not "off limits" because attorneys and clients have been known to conspire and, even if they are not conspiring, the crime-fraud exception to the privilege would make admissible communications with the attorney where the attorney is being used or duped into aiding a crime or fraud.<sup>28</sup> Therefore, subject to Title III's minimization requirements, the government may listen to parts of an attorney-client conversation to determine whether the conversation is covered by the wiretap authorization. *In re Application for an Order Authorizing Interception of Oral Communications (Carreras)*, 723 F.2d 1022, 1025 (1st Cir. 1983) (wiretap on attorney's apartment). Orders authorizing interceptions must take care to protect privileged

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<sup>28</sup> See *United States v. Zolin*, 491 U.S. at 562-63.

communications, and minimizations guidelines should be disclosed on request. *Id.* at 1026. See also *In re Application for an Order Authorizing Interception of Oral Communications (Cintolo)*, 708 F.2d 27 (1st Cir. 1983) (attorney was target of investigation).

Under FISA, the purpose of the monitoring must be to gather foreign intelligence information and not criminal evidence, but criminal evidence that is derived may be used. *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991), *cert. denied*, 506 U.S. 816 (1991) (FISA cannot be used as end run around the Fourth Amendment).

In *Bivens*-type FISA civil cases involving attorney-client interceptions, it has been held that there must be actual prejudice from intentional interception and use of a client communication to state a claim for relief. *ACLU Foundation of Southern California v. Barr*, 952 F.2d 457, 472 (D.C.Cir. 1991); *Briggs v. Goodwin*, 698 F.2d 486 (D.C.Cir. 1983), *vacated on other grounds*, 712 F.2d 144 (D.C.Cir. 1983), *cert. denied*, 464 U.S. 1040 (1994).

Our concern now lies in the fact that it was only recently made public via a report to Congress that the government admitted in September 2000 to the Foreign Intelligence Surveillance Court that it has made at least 75 materially false applications for FISA warrants, and it admitted in March 2001 to having failed to maintain minimization requirements. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 2002 WL 1949263 \*9 (F.I.S. Ct. 2002). We submit, therefore, that these admissions by the government should be used by the defense bar to seek to limit the government's ability to prevent disclosure to the defense about whether it is conducting FISA surveillance in the face of a First, Fourth, Fifth, and Sixth Amendment challenge, and the government must disclose attorney-client monitoring in a pending case when the fairness of an upcoming trial will be at issue. If the government can lie or be recklessly false in warrant applications and refuse to protect attorney-client confidentiality and privilege by failing to minimize without the accused having a remedy, then why should we trust the government to protect the right to a fair trial, too?

Our opinion on this issue is the same as with jail monitoring in general: a criminal defense lawyer must seek disclosure of whether the government is wiretapping or eavesdropping on attorney-client jail communications. As already shown, the government may not directly answer the question, and the implication from such an indirect answer should be that recording is occurring. Counsel should seek relief from the courts to assure confidentiality of attorney-client communications.<sup>29</sup> Counsel should argue that past abuses by

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<sup>29</sup> We caution about waiver, *res judicata*, or collateral estoppel concerns before action is taken or not taken.

Also, it should be noted that exhaustion of administrative remedies likely is required to

the government, coupled with attorney-client confidentiality and privilege under the Sixth Amendment, make secretly wiretapping and eavesdropping on attorney-client communications unconstitutional.

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challenge a SAM even if the BOP has no authority over the matter. *See Yousef v. Reno*, 254 F.3d 1214, 1221-22 (10th Cir. 2001) (pre-October 31 amendment).