Search Warrants for Lawyers' Offices

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Last week, the FBI executed a search warrant at the office of Michael Cohen, a lawyer who has worked for President Trump. The *Washington Post* reports that Cohen is being "investigated for possible bank and wire fraud," perhaps in connection with "buy[ing] the silence of people who . . . could have damaged Trump's candidacy in 2016." The *New York Times* story on the matter is here. President Trump and others have suggested that the execution of the warrant was inappropriate because it infringes on the attorney-client privilege. Without getting into the politics, what do we know about the law?

A search warrant for privileged material would be improper. Everyone agrees that a search warrant can't target material that falls within the attorney-client privilege. Such material is legally protected and inadmissible and a search warrant for it would be unreasonable under the Fourth Amendment.

Lawyers' offices often contain material that is not privileged. Lawyers' offices typically contain quite a bit of non-privileged material. For example, lawyers may keep personal correspondence in their offices, or employment agreements with their employees, or tax records for their firms. They may hold non-privileged documents provided by clients. A few lawyers even have contraband of various kinds in their offices. The *Post* asserts that in Cohen's case, one issue under investigation is "whether any fraud was committed in connection with Cohen's ownership of taxi medallions." If Cohen committed misrepresentations while acquiring taxi medallions as an investment, that would appear to be conduct committed on his own behalf, not for a client, so nothing about it would be privileged.

Furthermore, even material that consists of, or relates to, attorney-client communications may not be privileged. When a client tells an attorney about the client's past conduct in the course of seeking legal advice, that communication is privileged even if the past conduct is criminal. But if a client reveals plans to commit a future crime or fraud, that communication is not privileged. *See generally United States v. Hoffa*, 349 F.2d 20 (6th Cir. 1965) ("The attorney-client relationship would offer no shield to either client or attorney if the client had been engaged in a plan to commit a crime in the future."). *Cf.* Rule 1.6(b)(2), N.C. Rules of Professional Conduct (lawyer may reveal privileged communications "to prevent the commission of a crime by the client"). Many of the reported cases involving searches of attorneys' offices involve allegations that the attorney was involved in ongoing criminal or fraudulent activity, often with or on behalf of a client. Communications regarding such endeavors are not privileged.

Search warrants should carefully tailor the search. Because lawyers' offices may contain both privileged and non-privileged material, and because investigators are legally entitled only to the latter, search warrants for lawyers' offices should carefully describe the object of the search in order to minimize the risk that privileged material will be seized. A frequently-cited case on this point is *Klitzman, Klitzman, and Gallagher v. Krut*, 744 F.2d 955 (3d Cir. 1984), which began when investigators suspected an attorney of submitting "fraudulent medical reports and inflated medical bills in personal injury cases." The investigators obtained several search warrants for files and other materials at the lawyer's office. Reviewing the matter, the court began by stating that "[a] search of a law office is not . . . per se unreasonable," and that "[c]ourts consistently have upheld searches of law offices where . . . the attorney at issue was the target of a criminal investigation." However, it said, "the correct approach to this issue . . . is not to immunize law offices from searches, but to scrutinize carefully the particularity and breadth of the warrant authorizing the search, the nature and scope of the search, and any resulting seizure." In the case at bar, the court held that the warrants were overbroad

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because they authorized the seizure of items "without regard to whether the materials had any connection to particular alleged crimes or to personal injury cases in general." *Cf. United States v. Oloyede*, 982 F.2d 133 (4th Cir. 1993) (a search warrant for all of an immigration lawyer's files was properly issued where the lawyer was involved in a scheme to present false documents to authorities in connection with clients' citizenship applications; although the warrant was broad, the attorney's immigration practice was "pervasively fraudulent" and immigration was the overwhelming majority of his practice).

Special procedures may be required. If an attorney is thought to be in possession of relevant information but is not suspected of wrongdoing, authorities generally use a subpoena or a similarly non-invasive technique to obtain the material. That may not be legally required, *cf. Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (allowing the use of search warrants rather than subpoenas to obtain evidence from non-suspect third parties, specifically, a newspaper), but it presents the smallest risk of improperly obtaining privileged information, and avoids needlessly aggravating a person who is not a suspect.

If an attorney is thought to be involved in wrongdoing, however, a search warrant may be an appropriate investigative tool given the likelihood of noncompliance with a subpoena and the need to ensure that all relevant evidence is obtained and not destroyed. In such a case, investigators must use care when reviewing the seized material to ensure that privileged material is not inspected. Prosecutors and investigators typically prefer that the seized materials be reviewed by a "taint team" or "filter team" of agents who are walled off from the investigation, and who can deny investigators access to privileged material. Suspects and defendants are frequently skeptical of the integrity of that process, and often ask that the court segregate privileged material, either through an in camera review by a judge or by assigning the job to a special master. Indeed, the ABA Journal reports that a special master is one of the possibilities in the Cohen case.

Further reading. Section 9-13.420 of the United States Attorneys' Manual is entitled *Searches of Premises of Subject Attorneys*, and is a useful reference. A helpful student note is John E. Davis, *Law Office Searches: The Assault on Confidentiality and the Adversary System*, 33 Am. Crim. L. Rev. 1251 (1996). There is also a short section on point in the LaFave treatise. Wayne R. LaFave, et al., 2 Search and Seizure § 4.1(h) (5th ed. 2012).

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