St. John's Law Review

Volume 62, Summer 1988, Number 4 Article 10

New York Recognizes an Exception to Waiver of Attorney-Client Privilege for Inadvertent Voluntary Disclosure of Privileged Documents

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attorney-client privilege regarding these documents, in part because there was no evidence of an intent by the bank to waive the privilege.

In *People v. Smith*, the Appellate Division, Second Department, held that a warrantless search of an airline freight package is unconstitutional absent "articulable facts" illustrating "a danger to life or property." Such a finding would constitute an "emergency exception" to the fourth amendment's warrant requirement.

Finally, in *People v. Banville*, the Appellate Division, Second Department, held that CPL section 195.10 permits a criminal defendant to waive a grand jury indictment and proceed by superior court information only if the waiver is exercised prior to the filing of the indictment.

The members of Volume 62 hope that the cases analyzed in *The Survey* will be of interest and value to the bench and bar.

DEVELOPMENTS IN THE LAW

New York recognizes an exception to waiver of attorney-client privilege for inadvertent voluntary disclosure of privileged documents

The attorney-client privilege[1] protects confidential communi-

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[1] *See* 8 WIGMORE ON EVIDENCE § 2292, at 554 (J. McNaughton rev. ed. 1961). Wigmore provides the following definition of the attorney-client privilege:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except if the protection be waived.

Id.; *see also* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (discussing circumstances where privilege is applicable); People v. Belge, 59 App. Div. 2d 307, 309, 399 N.Y.S.2d 539, 540 (4th Dep't 1977) (communication is privileged when made for purpose of obtaining legal advice with expectation of confidentiality). The attorney-client privilege has been expressed both statutorily, *see* CPLR 4503 (McKinney Supp. 1988), and ethically, *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1988). It can also be found in the constitutional right to counsel. *See* U.S. CONST. amend. VI; N.Y. CONST. art. I, § 6. *But see* People v. O'Connor, 85 App. Div. 2d 92, 97, 447 N.Y.S.2d 553, 557 (4th Dep't 1982) (attorney-client privilege not constitutionally guaranteed, but a statutory provision embodying common law rule).

A guiding principle behind the privilege is to encourage the public's use of legal advice. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). "The privilege recognizes that sound legal advice . . . serves public ends." *Id.*; *see also* Hunt v. Blackburn, 128 U.S. 464,

cations between attorneys and clients concerning legal advice.[2] An attorney may rely on this privilege to prevent the discovery of materials that would otherwise be available to an adversary.[3] Traditionally, courts have construed the attorney-client privilege narrowly,[4] holding that not only voluntary,[5] but also unintentional or inadvertent disclosure of protected material through discovery will constitute a waiver of the privilege.[6] Recently, however, in *Manu-*

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470 (1888) (attorney-client privilege removes client's apprehension of disclosure); *United Shoe Mach. Corp.*, 89 F. Supp. at 358 (expert legal advice essential in today's complex society in order to be governed properly within bounds of law). The privilege also encourages consultation between attorney and client by "assur[ing] the client that any statements he makes in seeking legal advice will be kept strictly confidential." *See* Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981). The client may seek legal advice with confidence that his disclosures "will not later be exposed to public view to his embarrassment or legal detriment." Priest v. Hennessy, 51 N.Y.2d 62, 68, 409 N.E.2d 983, 985, 431 N.Y.S.2d 511, 514 (1980); *cf. In re* Grand Jury Subpoena, 62 N.Y.2d 324, 329, 465 N.E.2d 345, 348, 476 N.Y.S.2d 806, 809 (1984) (privileged communication must be made to obtain legal advice). *But see Priest*, 51 N.Y.2d at 67, 409 N.E.2d at 986, 431 N.Y.S.2d at 514 ("even where the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case, where strong public policy requires disclosure"). *See generally* E. CLEARY, MCCORMICK ON EVIDENCE § 72, at 170-72 (3d ed. 1984) [hereinafter MCCORMICK ON EVIDENCE] (purposes of rules of privilege).

[2] *See* United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464 (E.D. Mich. 1954). "The privilege . . . does not extend to every communication between lawyer and client but only to those as to which there is an intention of confidentiality." *Id.* The privilege is applied to communications regarding legal opinions based on information provided by the client in confidence. *See United Shoe Mach. Corp.*, 89 F. Supp. at 358. The attorney-client privilege originated from a "broad value of high-mindedness and honor ostensibly inherent in the business of lawyering." Note, *The Attorney-Client Privilege: Fixed Roles, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 465 (1977).

[3] *See Priest*, 51 N.Y.2d at 68-69, 409 N.E.2d at 986, 431 N.Y.S.2d at 514. Generally, the client alone has the privilege and the power to waive it. *See* MCCORMICK ON EVIDENCE, *supra* note 1, § 93, at 223. However, the client may give his attorney authority to exercise the power. *See id.*

[4] *See* Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir.), *cert. denied*, 375 U.S. 929 (1983); *In re* Jacqueline F., 47 N.Y.2d 215, 223, 391 N.E.2d 967, 972, 417 N.Y.S.2d 884, 889 (1979).

[5] *See, e.g.*, United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1289 (D.C. Cir. 1980) (voluntary disclosure by holder of privilege inconsistent with confidential relationship and waives privilege); *In re* Grand Jury Subpoena, 482 F.2d 72, 81 (2d Cir.) (disclosure to third party by client of communication with attorney eliminates privilege), *cert. denied*, 414 U.S. 867 (1973).

[6] *See, e.g.*, Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d 18, 24 (9th Cir. 1981) (" 'inadvertence' of disclosure does not as a matter of law prevent the occurrence of waiver"); W.R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771, 775 (W.D. Okla. 1976) (privilege waived by production of document); Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546, 549 (D.D.C. 1970) (inadvertent disclosure by counsel chargeable to client); *Kelsey-Hayes Wheel*, 15 F.R.D. at 464 (privilege does not apply when third person surreptitiously obtains document); *see also* 8 WIGMORE ON EVIDENCE, *supra* note 1, §§ 2325-26, at 633. *See generally* Davidson & Voth, *Waiver of the*

facturers & Traders Trust Co. v. Servotronics, Inc.,[7] the Appellate Division, Fourth Department, confronted for the first time the specific problem of inadvertent disclosure in the context of large document productions.[8] In rejecting the traditional approach, the court held that the inadvertent production of six documents by a bank's counsel did not waive the bank's attorney-client privilege with respect to those documents because there was no evidence of the bank's intention to do so.[9]

In *Manufacturers & Traders Trust Co.*, the plaintiff bank brought an action against a debtor to recover delinquent sinking fund payments.[10] The defendant debtor counterclaimed,[11] and demanded that the bank produce voluminous records and documents, including all correspondence, memoranda, and notes pertaining to the underlying dispute.[12] The bank's attorney then reviewed several boxes of files to identify and remove any documents containing privileged materials.[13] Despite utilizing this screening procedure, the bank's attorney subsequently discovered that six documents containing privileged matter were inadvertently included in the files disclosed.[14] The bank promptly moved

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Attorney-Client Privilege, 64 OR. L. REV. 637, 640-46 (1986) (criticism of inadvertent waiver); Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605, 1633-37 (1986) (discussing inadvertent waiver); Note, *Inadvertent Disclosure of Documents Subject to the Attorney-Client Privilege*, 82 MICH. L. REV. 598, 604-05 (1983) ("[I]nadvertent disclosures do not include those which were intended at the time of disclosure but were regretted later.").

[7] 132 App. Div. 2d 392, 522 N.Y.S.2d 999 (4th Dep't 1987).

[8] *Id.* at 398, 522 N.Y.S.2d at 1003-04.

[9] *Id.* at 393, 522 N.Y.S.2d at 1001.

[10] *Id.* at 394, 522 N.Y.S.2d at 1001. The defendant debtor claimed that no payments were required because the plaintiff's interpretation of a debt modification between the parties was incorrect and that, therefore, a deduction was warranted before any sinking fund payments were to be made. *Id.*

[11] *Id.* The parties had executed a "Debt Modification Agreement" under which the defendant agreed to issue shares of its preferred stock in payment of a debt. *Id.* The parties also executed a "Sinking Fund Agreement" in which the defendant was to make payments into a sinking fund to redeem its stock. *Id.* On its counterclaim, the defendant claimed the plaintiff had breached the agreement by not selling its entire preferred stock position by a certain date, thereby rendering both agreements void. *Id.*

[12] *Id.*

[13] *Id.* at 394-95, 522 N.Y.S.2d at 1001-02. When the defendant's counsel requested that certain documents be copied, the bank's counsel "arranged for a paralegal in his office to identify in which box each document was found, to copy the documents and to deliver them." *Id.* at 395, 522 N.Y.S.2d at 1002. "The bank's counsel did not examine any of the requested documents after they had been designated for copying by representatives of the defendant." *Id.*

[14] *Id.* at 395, 522 N.Y.S.2d at 1002.

for a protective order directing the return of the six documents and enjoining the use of the disclosed materials in further proceedings.[15] The Supreme Court, Special Term, Erie County, denied the motion, finding that the bank had waived the attorney-client privilege by failing to preserve it through due diligence.[16]

The Appellate Division, Fourth Department, unanimously reversed the lower court's ruling and granted the plaintiff's motion for a protective order.[17] Writing for the court, Justice Green noted the practical concerns of voluminous discovery in corporate litigation, particularly the inevitability that some privileged documents will be disclosed.[18] The court acknowledged that inadvertent disclosure traditionally waives the attorney-client privilege.[19] However, the court reasoned that the harsh traditional approach rests on the unrealistic assumption that preservation of the secrecy of a communication is always possible and that, in any event, disclosure makes it impossible to achieve the benefits of the privilege.[20] The court further reasoned that although confidentiality can never be restored, a court can repair much of the damage by preventing or restricting use of the privileged information.[21] In concluding that no waiver had occurred, the court determined that the client intended to retain confidentiality[22] and that it had taken reasonable

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[15] *Id.*

[16] *Id.* Special Term, after reviewing the six documents *in camera*, further found that they did not constitute protectable attorney work product. *Id.* Although representing dicta, the Appellate Division disagreed, explaining that "[a]n attorney's work product includes memoranda, correspondence, mental impressions and personal beliefs conducted, prepared or held by the attorney." *Id.* at 396, 522 N.Y.S.2d at 1002 (citing Hickman v. Taylor, 329 U.S. 495, 511 (1946)). The court stated that each of the six privileged documents also happened to be attorney work product immune from disclosure. *Id.*, 522 N.Y.S.2d at 1002-03.

[17] *Id.* at 401, 522 N.Y.S.2d at 1005.

[18] *Id.* at 398, 522 N.Y.S.2d at 1003-04.

[19] *Id.* at 399, 522 N.Y.S.2d at 1004.

[20] *Id.* Other courts applying the traditional rule have assumed that the client has the ability to prevent disclosure. *See, e.g.*, W.R. Grace & Co. v. Pullman, Inc., 446 F. Supp. 771, 775 (W.D. Okla. 1976) (failure to take necessary steps to prevent disclosure justifies waiver); United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954) (risk of insufficient precautions rests with the party claiming the privilege); *see also* Marcus, *supra* note 6, at 1615-16 (discussing how waiver undermines confidence in privilege).

[21] *Manufacturers & Traders Trust Co.*, 132 App. Div. 2d at 398, 522 N.Y.S.2d at 1004; *see also* Note, *supra* note 6, at 608-09 (court can insure inadvertent disclosure does not affect outcome of litigation).

[22] *Manufacturers & Traders Trust Co.*, 132 App. Div. 2d at 399, 522 N.Y.S.2d at 1004. The court declared that "[i]ntent must be the primary component of any waiver test." *Id.* In examining intent, the court found it significant that "the bank's assistant vice-president who had delivered the entire file to counsel stated that he did not intend to disclose privi-

precautions to prevent disclosure as evidenced by its screening process and its prompt objection to the inadvertent disclosure.[23]

Although the Appellate Division correctly held that an inadvertent disclosure of privileged material should not automatically result in a waiver of the attorney-client privilege,[24] it is submitted

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leged material." *Id.* Some courts have increasingly allowed parties to either stipulate by agreement or obtain a court order that inadvertent disclosure of privileged documents during discovery will not waive the privilege. *See, e.g.*, Permian Corp. v. United States, 665 F.2d 1214, 1216 (D.C. Cir. 1981) (stipulation); Transamerica Computer Co. v. International Business Machs. Corp., 573 F.2d 646, 649-50 (9th Cir. 1978) (court order); Western Fuels Ass'n v. Burlington N.R.R., 102 F.R.D. 201, 204 (D. Wyo. 1984) (court order); Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35, 42 (E.D.N.Y. 1973) (court order). *But see W.R. Grace & Co.*, 446 F. Supp. at 775 (general rule is that voluntary production of documents waives privilege).

[23] 132 App. Div. 2d at 399-400, 522 N.Y.S.2d at 1004-05. The court found the rationale of those cases rejecting the traditional view to be persuasive. *Id.* at 398-99, 522 N.Y.S.2d at 1004.

Courts rejecting the traditional view, holding that inadvertent disclosure does not result in waiver, use a reasonable precautions approach. *See* Lois Sportswear, Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985). When the issue is "whether or not the release of the documents was a knowing waiver . . . [t]he elements which go into that determination include the reasonableness of the precautions . . . , the time taken to rectify the error, the scope of the discovery and the extent of the disclosure." *Id.*; *see also* National Helium Corp. v. United States, 219 Ct. Cl. 612, 614 (1979) (precautions used must objectively establish intent not to waive).

In Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254 (N.D. Ill. 1981), the court attempted to discern the privilege-holder's intention where the plaintiffs' employees found privileged documents in a trash dumpster outside the defendants' office. *Id.* at 256. The court reasoned that "the relevant consideration is the intent of the defendants to maintain the confidentiality of the documents as manifested in the precautions they took." *Id.* at 260. By failing to shred the documents the defendants lost the privilege. *Id.* Using a similar analysis, the court in *National Helium Corp.* noted that the plaintiff had subjectively intended to retain the attorney-client privilege. 219 Ct. Cl. at 614. *Id.* However, the court stated that "[t]he only question is whether the procedure followed by plaintiff was so lax, careless, or inadequate that plaintiff must *objectively* be considered as indifferent to disclosure." *Id.* (emphasis added).

The *Manufacturers & Traders Trust Co.* court also considered whether the party claiming waiver would suffer prejudice if a protective order were granted. 132 App. Div. 2d at 400, 522 N.Y.S.2d at 1005.

[24] *Manufacturers & Traders Trust Co.*, 132 App. Div. 2d at 398, 522 N.Y.S.2d at 1004. There are inherent problems in reviewing large numbers of documents. *See* Control Data Corp. v. International Business Machs. Corp., 16 Fed. R. Serv. 2d (Callaghan) 1233, 1235 (D. Minn. 1972). In *Control Data*, IBM utilized an extensive screening procedure to produce substantial numbers of documents within an accelerated discovery period. *Id.* at 1234. Despite these efforts, some privileged documents were disclosed. *Id.* IBM then created the position of an "interceptor" to review documents in the final stage of the process. *Id.* When Control Data objected to the delay caused by this process, the court required removal of the interceptor. *Id.* The court ruled, however, that under the circumstances inadvertent disclosure would not result in waiver. *Id.* at 1237. In *Transamerica Computer Co.*, the court held that production in the *Control Data* case had been in effect "compelled" by court-ordered accelerated discovery proceedings, and that IBM had not waived its privilege in the subse-

that, while recognizing the inherent and practical realities of large, voluminous discovery, the court has provided little guidance to practitioners and the judiciary in defining the objective reasonable precautions that must be taken to show that there was no intention to waive the privilege. In determining whether the screening procedure was a reasonable precaution, the court merely stated that despite the error of disclosure, the screener was a competent attorney who could differentiate between privileged and non-privileged documents.[25] It is suggested that in examining the adequacy of the screening procedure, the court should have adopted a more extensive and definitive reasonable precautions test. In finding the level of screening competence adequate, the court did not look beyond the fact that the screener was an attorney.[26] It is submitted that other factors the court should have considered were the thoroughness of the manner in which the documents were scrutinized,[27]

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quent antitrust action. 573 F.2d at 652. The court explained the inevitability of inadvertent disclosure further:

> There were literally millions of ways for mistakes to be made in the screening process. For example, mistakes could easily occur during any of the millions of purely mechanical steps necessary for successful screening . . . .
>
> The failure to perform so simple a mechanical act as the insertion of a document into a folder would also result in the production of privileged material. In addition to the plethora of opportunities for mechanical blunders, there were inherent in the process numerous opportunities to overlook privileged material resulting from what might be characterized as visual or judgmental mistakes.

Id.; *see also* International Business Machs. Corp. v. United States, 471 F.2d 507, 511 (2d Cir. 1972) (privilege was not waived by inadvertent disclosure during court-ordered acceleration of discovery), *appeal dismissed*, 480 F.2d 293 (2d Cir. 1973) (en banc), *cert. denied*, 416 U.S. 980 (1974).

Other recent inadvertent disclosure cases have recognized the increasing size of document productions. *See, e.g., Permian Corp.*, 665 F.2d at 1215-16 (screening "millions of documents"); *W.R. Grace & Co.*, 446 F. Supp. at 775 ("voluminous amount of discovery").

[25] *Manufacturers & Traders Trust Co.*, 132 App. Div. 2d at 399, 522 N.Y.S.2d at 1004. The court noted that the screening task had not been delegated to someone without legal training. *Id.*

[26] *Id.*, 522 N.Y.S.2d at 1004-05. The court did not inquire as to what level of ability was needed for this particular screening task, *see id.*, nor did the court inquire into whether the screener had expertise or a history of carelessness in reviewing privileged documents. *See id.*

[27] *See* United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 465 (E.D. Mich. 1954). "It is difficult to be persuaded that these documents were intended to remain confidential in the light of the fact that they were indiscriminately mingled with the other routine documents of the corporation and that no special effort to preserve them in segregated files . . . was made." *Id.*

It is submitted that the *Manufacturers & Traders Trust Co.* court could have included such factors as whether the documents were reviewed by the box, by the file, or individually, as well as what criteria were used to determine whether the material was privileged.

whether a multi-tiered screening approach was necessary,[28] and a comparison of the number of documents reviewed, the number that were privileged, and the number that were inadvertently disclosed.[29] As the ratio of inadvertently disclosed documents to privileged documents approaches one, it is suggested that the screening procedure used in discovery would be unreasonable. Additionally, the court should have focused on significant external factors such as time constraints[30] and monetary costs.[31]

Since the factors considered in any reasonable precautions test will, in effect, become a standard of conduct for the bar,[32] it is suggested that the absence of clear guidelines will create a greater burden on attorneys and judges. It is submitted that in order to determine what screening procedure to use, attorneys will now have to engage in a cost-benefit analysis, weighing the cost of screening against the risk of waiver.[33] In larger cases it may be unclear what level of precautions will be sufficient. Additionally, the burden on the judiciary in supervising discovery may also be increased due to blanket privilege claims by overly cautious attorneys.[34]

While the Appellate Division correctly rejected the traditional

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[28] The *Manufacturers & Traders Trust Co.* court considered one attorney's review to be sufficient. 132 App. Div. 2d at 394-95, 522 N.Y.S.2d at 1001-02. It is suggested that a court should examine whether more than one level of screening is appropriate in any given situation, as well as the number of screeners required at each level.

[29] *See* Note, *supra* note 6, at 622.

[30] *See* International Business Machs. Corp. v. United States, 471 F.2d 507, 510 (2d Cir. 1972), *appeal dismissed*, 480 F.2d 293 (2d Cir. 1973) (en banc), *cert. denied*, 416 U.S. 980 (1974); Control Data Corp. v. International Business Machs. Corp., 16 Fed. R. Serv. 2d (Callaghan) 1233, 1235 (D. Minn. 1972).

[31] *See* Levin & Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 229 (1985); Marcus, *supra* note 6, at 1608-13.

[32] *See* Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 555 n.2 (2d Cir. 1967) (rules of privilege should be classified as substantive or quasi-substantive because they affect people's conduct at primary stages of activity).

[33] The *Manufacturers & Traders Trust Co.* court may have caused further confusion with its statement that "reasonable precautions might be required to promote appropriate standards of care in document production," but "there is no reason to apply the harsh traditional approach" if remedying the accidental disclosure would not "cause the adversary any prejudice." 132 App. Div. 2d at 398, 522 N.Y.S.2d at 1004. It is suggested that a court following this edict might issue a protective order even where a screening procedure was unreasonable if the adversary has not relied on the disclosed material.

[34] *See, e.g.*, Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1192 (D.S.C. 1975). In *Duplan*, the court was "saddled with the burden of conducting [an] in-camera examination," *id.*, when one million documents were produced. *Id.* at n.4; *see also In re* Uranium Antitrust Litig., 552 F. Supp. 517, 517 (N.D., Ill. 1982) (parties' request for inspection of 40,000 documents would be equivalent of court wading through one hundred novels).

broad waiver approach to inadvertent disclosure, it is submitted that further judicial guidance is necessary. Although a client may now avoid an automatic waiver of the attorney-client privilege where he utilizes reasonable precautions to prevent an inadvertent disclosure, it remains unclear what standard the New York courts will use to determine whether a screening procedure is reasonable. Hopefully, the Court of Appeals will soon provide appropriate guidelines.

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CRIMINAL PROCEDURE LAW

"Emergency exception" search needs articulable facts leading to the conclusion that a danger exists to be reasonable under the fourth amendment

The fourth amendment[1] requires the police to obtain a warrant before conducting a search and seizure.[2] There are a few "well-delineated exceptions" to this requirement, including the "emergency exception,"[3] which is applied when a situation requires

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[1] U.S. CONST. amend. IV. The fourth amendment provides:

> 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.

Id.

[2] *See* Katz v. United States, 389 U.S. 347, 357 (1967). The Supreme Court has held that warrantless searches are "*per se* unreasonable," subject to several recognized exceptions. *Id.*; *see also* McDonald v. United States, 335 U.S. 451, 453 (1948) (fourth amendment "stays the hands of the police unless they have a search warrant issued by a magistrate"); People v. Vaccaro, 39 N.Y.2d 468, 472, 348 N.E.2d 886, 889, 384 N.Y.S.2d 411, 414 (1976) ("strong judicial preference for search warrants").

The warrant clause of the fourth amendment ensures the protection of the people from "unreasonable government intrusions into their legitimate expectations of privacy." United States v. Chadwick, 433 U.S. 1, 7 (1977). "The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search." Steagald v. United States, 451 U.S. 204, 212 (1981); *cf.* Bloom, *The Supreme Court and its Purported Preference for Search Warrants*, 50 TENN. L. REV. 231 (1983) (criticizing Supreme Court for not adhering to this principle).

[3] *See Katz*, 389 U.S. at 357. Other generally recognized exceptions include: "consent" to be searched, *see* Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); "plain view," *see* Washington v. Chrisman, 455 U.S. 1, 5-6 (1982); "hot pursuit" of a fleeing felon, *see* Warden