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Protecting the Privilege When the Government Executes a Search Warrant

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Government investigative techniques traditionally reserved for "street crime" cases—search warrants and wiretaps—are rapidly becoming the norm in white-collar cases. No longer can a white collar defendant expect the relatively genteel process of having counsel accept service of a grand jury subpoena and then review and produce responsive documents in due course. Instead, it is quite possible that government agents will execute a search warrant at corporate headquarters or an individual's home, seizing documents and hard drives in a surprise visit.

In a drug or violent crime case, a defendant likely did not seek legal advice about his conduct ahead of time. Not so in many white collar cases. A hospital may have sought outside counsel's advice on compliance with a complex health-care regulation; an energy company may have asked for legal advice on remedying an environmental problem; any large corporation may have requested its lawyers weigh in on foreign bribery or tax shelter issues. As a result, when the government executes a search warrant in a white-collar case, it runs a higher than usual risk of seizing documents or electronic information protected by the attorney-client privilege.

The burden to raise concerns about the seizure of privileged material rests squarely on the defendant, and courts have made clear that the failure to raise such concerns both with the government and with the court results in the waiver of the privilege. This article explores what steps counsel should take to protect the privilege when a search warrant has been executed, as well as possible challenges to the procedures used by the government—primarily a "taint team"—to supposedly protect the privilege.

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The Basics of Search Warrant Procedure

A search warrant is a court order, signed by a magistrate or other judge, that allows law enforcement officials to search a specified location for evidence of a crime and then to seize that evidence. Rule 41 of the Federal Rules of Criminal Procedures governs warrants and is worth reviewing any time your client has been the subject of such a search. Rule 41 allows warrants to be issued to search for

> (1) evidence of a crime;
> (2) contraband, fruits of crime, or other items illegally possessed;
> (3) property designed for use, intended for use, or used in committing a crime; or
> (4) a person to be arrested or a person who is unlawfully restrained.[1]

To obtain a warrant, the government must satisfy the magistrate judge that there is probable cause to conduct such a search.[2] This standard is generally met through submission of a sworn affidavit by the investigating agent.

For defense counsel, the contents of the warrant are critical and may offer a reason to challenge its execution down the road. By rule, the warrant "must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned."[3] It must be executed in 14 days, during the day time, and be returned to the magistrate judge after execution.[4] Rule 41 specifically provides for seizure of electronically stored information and for tracking devices.[5]

Any assertion of privilege necessarily requires the defendant to know what was actually seized. Rule 41 requires that an agent "prepare and verify an inventory of any property seized"

[1] Fed. R. Crim. Pro. 41(c).
[2] Fed. R. Crim. Pro. 41(d).
[3] Fed. R. Crim. Pro. 41(e)(2)(A).
[4] Fed. R. Crim. Pro. 41(e)(2)(A).
[5] Fed. R. Crim. Pro. 41(e)(2)(A), (B).

and provide a "receipt" to the person from whom the property was taken.[6] For electronic data, however, the government need not describe what files or documents were seized but only "the physical storage media that were seized or copied."[7]

Rule 41 provides a specific method to challenge the execution of a search warrant. It provides that a "person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return."[8] This motion must be filed in the district where the seized property was located, and the court will receive evidence on any "factual issue necessary to decide the motion."[9]

The rules, of course, do not entirely reflect the reality of search warrant execution. The "inventory" provided by the government agents executing the warrant is seldom very specific, and certainly does not identify by name every file or document seized. The lack of a detailed inventory impairs creation of a privilege log or even a list of the privileged documents seized. In addition, although some warrants may specify how privileged documents will be treated by the law enforcement agents, most warrants will not, particularly when it is not apparent before the search that there will be privileged documents at the location being searched. Added to these concerns is the fact that any interference (real or perceived) with the execution of the search warrant can lead to an obstruction charge.

[6] Fed. R. Crim. Pro. 41(f)(1)(B), (C).
[7] *Id.*
[8] Fed. R. Crim. Pro. 41(g).
[9] *Id*.

The Use of "Taint Teams"

Let's assume that your client, a manufacturing company with its corporate headquarters in Bethesda, Maryland, was searched last evening by government agents pursuant to a warrant. The agents took 20 boxes of documents and three computers. The agents searched not only the offices of the CEO and CFO but also the general counsel, even though the general counsel, who was on site, informed the agents that his office contained privileged information.

The likely next step is for the Assistant United States Attorney to formulate a procedure using a "taint team" to review the seized materials for potentially privileged information. The United States Attorneys' Manual contains a section on how to handle searches of law firms or attorney's offices.[10] According to the USAM, the policy "also applies to searches of business organizations where such searches involve materials in the possession of individuals serving in the capacity of legal advisor to the organization." The policy does not expressly apply to corporate headquarters that may have attorney-client communications. Nonetheless, the USAM provides some guidance as to what procedures will be used; case law helps fill in the blanks.

As an initial matter, the USAM notes that "[i]In order to avoid impinging on valid attorney-client relationships, prosecutors are expected to take the least intrusive approach consistent with vigorous and effective law enforcement when evidence is sought from an attorney actively engaged in the practice of law."[11] In theory, then, the prosecutor should first try to serve a subpoena for documents held by your client's general counsel and resort to a search warrant for those documents only when a subpoena would "compromise" the investigation or a subpoena would be "ineffective." That said, in reality the government will not want to obtain

[10] United States Attorneys Manual § 9-13.420, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm#9-13.420.
[11] *Id*. § 9-13.420(A).

documents possessed by the general counsel and documents possessed by the rest of the company in two ways. One search warrant will be executed and it will be up to defense counsel to protect all of the privilege documents seized.

The USAM instructs prosecutors to design procedures to "ensure that privileged materials are not improperly viewed, seized or retained during the course of the search." It does not define what those procedures are, leaving the targets of searches at the whim of the local U.S. Attorney's Office. The search warrant should be drafted in a way that minimizes the need to search where privileged materials may be located, but if a prosecutor seeks all documents related to a topic, the warrant likely will not define what materials responsive to that topic may be privileged and which may not be. The warrant should, however, include some statement that the prosecutor intends to implement some procedure to protect privilege.

The USAM approves of the use of a "privilege team" or "taint team" to review potentially privileged material. The taint team should "consist of agents and lawyers not involved in the underlying investigation." (This article will refer to the government lawyers and agent involved in the substantive investigation as the "trial team.") The USAM suggests that taint team members be available at the time of the search but that they should not participate in the search itself. The USAM provides some procedures to review potentially privileged documents, though it leaves the exact method to the prosecutor's discretion.

Generally speaking, the taint team will review seized materials and divide them into three groups: not privileged; potentially privileged and privileged. The privileged materials will be returned to the company and the non-privileged materials will be turned over to the trial team. With respect to the potentially privileged documents, some AUSAs have the taint team provide them to defense counsel for review and creation of a privilege log. The claims of privilege will

then be adjudicated by the court. Other AUSAs have the taint team provide them directly to the trial team for use during the investigation.

Scholarly articles have been written about the ethical and practical concerns raised by the use of taint teams. Courts have raised concerns as well. For example, one court noted that "it is reasonable to presume that the government's taint team might have a more restrictive view of privilege than the defendant's attorneys."[12] There have been examples of when a taint team simply has not worked, such as in the *Noriega* case.[13] And, as one court noted, "human nature being what it is," taint teams "may err by neglect or malice, as well as by honest differences of opinion."[14] At least one court has cautioned that the use of taint teams "is highly questionable and should be discouraged."[15]

In response to these concerns, some courts have required the appointment of a special master or magistrate to conduct the initial review of the seized documents.[16] Others have instituted protections such as requiring bates-stamping by the government of all seized documents for better tracking, logging which government agents or attorneys access potentially privileged documents and allowing defense counsel to review all privilege determinations made by the taint team.[17]

Agents may naturally be cautious when they search a lawyer's office. In fact, where the search is of an attorney's office, it "may be incumbent on the Government to have a taint team review of all records before they are reviewed by the investigating agents or the prosecuting

[12] *United States v. SDI Future Health, Inc.*, 464 F. Supp. 1027, 1037 (D. Nev. 2006).
[13] *United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991).
[14] *In re Grand Jury Subpoenas 04-124-03 and 04-124-05*, 454 F.3d 511, 523 (6th Cir. 2006).
[15] *In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994).
[16] *See, e.g., United States v. Stewart*, 2002 WL 1300059 (S.D.N.Y. 2002).
[17] *Heebe v. United States*, 2012 WL 3065445 (E.D. La. July 27, 2012).

team."[18] But consider your manufacturing client. The CEO may have letters, emails or memoranda in his office from the general counsel or outside counsel. If the prosecutor did not anticipate that agents may come across privileged information during the search, then she may not have implemented clear taint team procedures ahead of time. In those situations, defense counsel will have to be even more vigilant to protect the privilege after the search.

The district court in *United States v. Jackson* provides a helpful list of factors that have been considered by courts in deciding whether to allow use of a taint team[19]:

> ***First***, "government taint teams seem to be used primarily in limited, exigent circumstances in which government officials have already obtained the physical control of potentially privileged documents. . . . In such cases, the potentially-privileged documents are already in the government's possession, and so the use of the taint team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious to, the protection of privilege."[20]
>
> ***Second***, use of a government taint team appears to be viewed more favorably when the lawfulness of the acquisition of the documents to be reviewed was not initially challenged. (citations omitted).
>
> ***Third***, courts appear to be more willing to approve the use of government taint teams when there is a more extensive number of documents at issue. (citations omitted)
>
> ***Fourth***, courts have given at least some consideration to the taint team's effect on the "appearance of fairness."[21]

This list is not exhaustive but may help analyze the use of a taint team in your particular case.

It bears noting that most courts permit the use of taint teams. As long as the taint team procedure appears reasonable on its face, courts are likely to approve of it and allow the

[18] *SDI Future Health*, 464 F. Supp. 2d at 1039.
[19] 2007 WL 3230140, *5 (D.D.C. Oct, 30, 2007).
[20] Quoting *In re Grand Jury Subpoenas 04-124-03*, 454 F.3d at 522-23.
[21] Quoting *United States v. Neill*, 952 F. Supp. at 841 n. 14 ("[T]here is no doubt that, at the very least, the 'taint team' procedures create an appearance of unfairness.").

government to review the documents as it sees fit.[22] For example, one court rejected the defendant's proposal that the original computer disks containing seized documents be held by the court while defense counsel reviewed the documents for privilege.[23] Another court refused to appoint a magistrate judge to review the seized documents because it would impose a heavy burden on magistrates "if they were to routinely review lawfully-seized documents in every criminal case in which a claim of privilege was asserted," or might interfere with the grand jury's function.[24] Although it is worth proposing your own procedure by which the government would review seized documents, know that your chances are slim that the court will adopt it.

Possible Challenges to Seizure of Privileged Information

There are a few methods by which defense counsel can challenge the seizure of privileged information. First, Rule 41(g) allows an "aggrieved party" to seek the return of property that has been seized. The challenging party must show that the retention of the property by the government is unreasonable. Many of the cases cited in this article involve Rule 41(g) challenges.

Second, counsel can argue that interference with privilege invades the constitutional guarantee of effective assistance of counsel under the Sixth Amendment. "Where government agents acquire privileged information, but do not communicate that information to the prosecutors, there is no Sixth Amendment violation."[25] However, there is a presumption that information known to agents is conveyed to the trial team; it can be overcome "by showing the

[22] *United States v. Neill*, 952 F. Supp. 834, 840 (1997); *In the Matter of the Search of 5444 Westheimer Road*, 2006 WL 1881370 (S.D. Tex. July 6, 2006); *United States v. Grant*, 2004 WL 1171258 (S.D.N.Y. May 25, 2004); *In re Ingram*, 915 F. Supp. 2d 761 (E.D. La. 2012).
[23] *Ingram*, 915 F. Supp. 2d at 764.
[24] *United States v. Grant*, 2004 WL 1171258 (S.D.N.Y. May 25, 2004).
[25] *United States v. Neill*, 952 F. Supp. 834, 840 (1997).

existence of suitable safeguards."[26] (Some courts have held that because the Sixth Amendment does not attach until indictment, it cannot be raised during the investigative stage.[27]) Courts have applied four factors to determine whether an intrusion into the attorney-client relationship reaches the level of a constitutional violation:

> (1) whether evidence to be used at trial was obtained directly or indirectly by the government intrusion;
>
> (2) whether the intrusion was intentional;
>
> (3) whether the prosecution received otherwise confidential information about trial preparation or defense strategy as a result of the intrusion; and
>
> (4) whether the privileged information was used or will be used to the substantial detriment of the defendants.[28]

Third, the defendant could argue that the intrusion into the privileged material is a violation of substantive due process based on prosecutorial misconduct. Again, this is a heavy burden as the defendant must prove that the government's conduct was "so outrageous as to shock the conscience of the court."[29] At least one court has adopted a standard for a due process violation very similar to the one described above for the Sixth Amendment.[30]

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[26] *Id.*
[27] *SDI Future Health*, 464 F. Supp. 2d at 1048.
[28] *Neill*, 952 F. Supp. at 840.
[29] *United States v. Kentucky*, 225 F.3d 1187, 1194-95 (10th Cir. 2000); *United States v. Voigt*, 89 F.3d 1050, 1064-65 (3d Cir. 1996).
[30] *Voigt*, 89 F.3d at 1067.

How to Avoid Waiver of the Privilege

Courts have uniformly held that documents seized with a warrant have been involuntarily disclosed, for purposes of waiver analysis.[31] But they have not hesitated to find that a defendant has waived the privilege by waiting too long—sometimes weeks, sometimes months or years—before asserting the privilege fully.[32] A defendant must take all reasonable steps to protect the privilege, or risk waiving it.

There are three basic rules when it comes to protecting the privilege after a warrant has been served: (1) be ***quick*** to tell the government that they have seized privilege documents; (2) be ***aggressive*** in seeking court intervention on these issues; (3) be ***careful*** about creating a written record. A court will consider the timing of these efforts, including when counsel first became aware that privileged documents had been seized, when counsel first informed the government that privileged documents had been seized and when counsel sought judicial intervention.

It is impossible to create a list of every step to take, since each case will progress differently. The list below, while certainly not exhaustive, will provide you with some ideas about critical steps in an investigation to assert the privilege and how best to do so. In many ways, defense counsel should treat this process like civil discovery—it is fine to have a phone call about an issue, but always follow up that call with a letter or email summarizing it, so there is no confusion down the road about what happened during the call.

[31] *See, e.g.*, *United States v. Ary*, 518 F.3d 775 (10th Cir. 2008).
[32] *Ary*, 518 F.3d at 778 (waited 6 weeks after Rule 16 discovery review); *United States v. De La Jarra*, 973 F.2d 746 (9th Cir. 1992) (waited 6 months); *In re Grand Jury (Impounded)*, 138 F.3d 978 (3d Cir. 1998) (waited 4 months).

1. At the time of the execution of the search warrant, a company employee should inform the agents that they have seized privileged documents and keep a list, if possible, of privileged documents that are seized. (Employees should be cautious not to obstruct the search in any way, however.)

2. At the time of the execution of the search warrant, obtain an inventory of the documents seized—whether in hard copy or electronic form—from the agents who are on-site during the search. This will allow counsel to assert privilege over specific documents, rather than simply making a general objection to the search.

3. Immediately after the search, counsel should send a letter to the AUSA in charge of the investigation objecting to the search and asserting privilege over documents searched generally, and over any specific documents that you know have been seized.

    - Be as specific as possible, even if means identifying privileged documents by location rather than by their substance or date.

    - If possible, include a document-by-document log of the documents over which you assert privilege.

    - Inquire into what procedures the government will use to protect privilege, such as a taint team.

    - Consider providing the government a list of all inside and outside counsel used by the client so the government cannot claim it did not know that communications with them are potentially privileged.

4. Propose a procedure in writing to review the seized documents, such as by a special master, magistrate or a supervised review by counsel while the documents stay in the custody of the prosecutors or court. At a minimum, request that counsel have a chance to review the documents after the taint team has reviewed them and before ***any*** documents are provided to the trial team.

5. Follow up with the government to get a response to your initial letter and to object to any known taint team procedures implemented by the government. If the government fails to respond quickly or refuses to engage with defense counsel to discuss what procedures are being implemented, file a Rule 41(g) motion and seek an evidentiary hearing.

6. When you have an opportunity to review discovery under Rule 16, document all of the privileged material that was seized by the government. Raise these specific objections in writing to the government to seek return of the documents. If the government does not agree, immediately go to the court to seek return of the materials under Rule 41(g).

7. At each stage of the process, document in writing your concerns with respect to the procedure implemented by the government and be specific as to what documents or electronically stored information is privileged.

Conclusion

The government's use of taint teams should be vigorously challenged by white collar defendants. These team allow the government (rather than an impartial third party or the defendant's legal team) to review known privileged documents under the guise of "protecting" the privilege. It is hard to reconcile the use of taint teams with the ethical rules that prohibit attorneys from reviewing privileged documents that were not voluntarily disclosed and with the practical concerns arising from allowing any government agent to review privileged material.

Nonetheless, it is clear that taint teams are here to stay. As search warrants are more regularly used in white collar cases, counsel representing these defendants must be familiar with Rule 41, the USAM section on searches of attorney's offices and the necessary steps to protect privileged materials. There is no perfect method to avoid waiver of the privilege but case law is clear that defense counsel must take advantage of every opportunity challenge the retention and review of privileged materials.