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Home > News And The Champion > Champion Magazine

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Protecting the Attorney-Client Privilege When the Government Executes a Search Warrant

By Sara Kropf

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. The opposite is true 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; and 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 defense 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" — that supposedly "protect" the privilege.

The Basics of Search Warrant Procedure

Rule 41 of the Federal Rules of Criminal Procedure governs warrants and is worth reviewing any time a 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 evidence obtained through its execution. 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 within 14 days, during the daytime, 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. This is easier said than done. Rule 41 requires that an agent "prepare and verify an inventory of any property seized" 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]

As is so often the case, the rules do not entirely reflect reality. 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.

The Use of 'Taint Teams'

Let's assume that a defense attorney's newest client, a manufacturing company with its corporate headquarters in Bethesda, Md., 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 (USAM) contains a section on how to handle searches of law firms or attorneys' 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 the 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 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 search warrant permits seizure of 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 indicates 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 make a final determination and then provide the documents the taint team concludes are non-privileged directly to the trial team, without any judicial review.

Although they regularly approve the use of taint teams, courts have voiced some ethical and practical concerns raised by their use. 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, when 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 team."[18] But consider the manufacturing client in Maryland. The CEO

may have letters, emails, or memoranda in his office from the general counsel or from 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 a more extensive number of documents are 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 particular cases.

It bears noting that courts uniformly approve 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 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 not a bad idea for defense counsel to propose a procedure by which the government would review seized documents, counsel should know that chances are slim that the court will adopt it.

In at least one reported decision (from the Sixth Circuit), the court rejected the use of a taint team proposed by the government.[25] However, in that case, the government contended that certain exigent circumstances existed that required the use of a taint team. The Sixth Circuit held that because the records in question had not yet been obtained by the government, no such circumstances existed. The court directed a special master to conduct a key word search on electronic files to identify attorney-related documents that could then be reviewed by the defendant for privilege.

In *United States v. SDI Future Health, Inc.*, the court noted that the government "did not provide or implement any procedure for notifying SDI of the taint attorney's privilege decisions or afford SDI an opportunity to challenge those determinations in court before the documents were provided to the prosecution team."[26] Had SDI challenged the taint team procedure, the court noted, "[i]t is doubtful that the court would have approved the government's taint team procedures."[27] This case makes clear that counsel should challenge the government's proposed taint team

procedure aggressively and suggest alternative procedures.

One issue to consider with respect to the use of a taint team is whether the taint team will determine if the crime-fraud exception to the privilege applies. In *United States v. Neill*, the government allowed its taint team lawyers to determine whether the exception applied.[28] It does not appear that the defendants specifically challenged this part of the procedure. Nonetheless, it is troubling to allow a government taint team lawyer to determine whether the crime-fraud exception applies and then disclose those "non-privileged" documents to the trial team without judicial review. Certainly, a government lawyer will have a radically different view than a defense attorney as to whether this exception applies. If the crime-fraud exception may be applicable, the defense attorney should request that the taint team make a preliminary determination only. Before any documents are disclosed to the trial team, a court should make a final determination of the exception's application.

Possible Challenges to Seizure Of Privileged Information

Defense counsel can employ a few methods to challenge the seizure of privileged information. No matter what challenge defense counsel chooses, the initial question will always be whether the documents at issue are privileged. The burden rests on the party asserting the privilege to show that the documents are privileged. For example, in *In re Advanced Pain Centers Poplar Bluff v. Ware*, the defendant challenged a search warrant as to certain incident reports seized by the government. The court, however, denied the challenge, holding that the documents were not privileged at all.[29]

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.

A second group of challenges are based on constitutional protections. Generally speaking, intrusion into the attorney-client privilege does not equate to a constitutional violation. However, the privilege is a key part of effective assistance of counsel, and the government's intentional interference with it can give rise to prosecutorial misconduct in extreme cases. In *Weatherford v. Bursey*, the Supreme Court held that an intrusion into a defendant's attorney-client privilege can give rise to a constitutional violation if the privileged information is intentionally obtained and the intrusion causes some substantial prejudice to the defendant.[30] Courts have held that when the government uses a taint team to review privileged material, this is a "per se intentional intrusion."[31]

Counsel can argue that interference with the privilege invades the constitutional guarantee of effective assistance of counsel under the Sixth Amendment. Keep in mind that "[w]here government agents acquire privileged information, but do not communicate that information to the prosecutors, there is no Sixth Amendment violation."[32] However, there is a presumption that information known to agents is conveyed to the trial team; it can be overcome "by showing the existence of suitable safeguards."[33] (Some courts have held that because the Sixth Amendment does not attach until indictment, it cannot be raised during the investigative stage.[34]) 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.[35]

A Sixth Amendment challenge is a difficult argument on which to prevail. For example, the defendant in *Portillo v. Adams* argued that the government had violated his Sixth Amendment rights when the police executed a search warrant at his wife's apartment, seized computers and documents belonging to the defendant and then "accidentally provided some of those items to the prosecutor, who admitted that she briefly reviewed them without knowing of their privileged nature."[36] The state court held a hearing to determine what had happened. The prosecutor admitted that she had "skimmed" the documents but "did not recall much detail from them." Not surprisingly, the prosecutor also "denied acting deliberately, and stated that she did not gain any information from the identified records that would be used at trial." The trial court found that the prosecutor's review of the privileged materials was inadvertent. In his federal habeas action, the defendant raised the argument that the review by the prosecutor had violated his Sixth Amendment rights. The federal court rejected the claim, holding that "Petitioner does not advance any evidence to suggest that the government's intrusion on the privilege was intentional or caused any prejudice."

Likewise in *Chittick v. Lafler*, the Sixth Circuit denied the defendant's argument that his Sixth Amendment rights had been violated by the review of privileged material.[37] On appeal, the court concluded that the district court did not err in rejecting this argument because the defendant had failed to establish prejudice. In particular, the defendant "failed to identify any aspect of the trial affected by the breach of the privilege" and "the prosecutor did not introduce any evidence at trial that was improperly obtained."[38]

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 because the defendant must prove that the government's conduct was "so outrageous as to shock the conscience of the court."[39] At least one court has adopted a standard for a due process violation very similar to the one described above for the Sixth Amendment.[40]

Remedies for Government Misconduct

What if the government intentionally violates the taint team procedures ordered by the court? If this happens, defense counsel should not hesitate to ask the court for sanctions or specific injunctive relief to remedy the misconduct. Possible sanctions include dismissing the indictment, granting a continuance, granting a new trial, disqualifying or imposing disciplinary sanctions on the prosecutor, holding the prosecutor in contempt, publicly chastising the prosecutor, and excluding any tainted evidence from trial.

Even if it is unlikely that the court will dismiss the indictment, defense counsel should keep in mind the wide discretion of the trial court to fashion a remedy specific to the misconduct. In *United States v. Horn*,[41] the court imposed several narrowly tailored sanctions for discovery abuses by the lead prosecutor. In that case, the government made available to defense counsel over 10,000 pages of discovery materials obtained through grand jury subpoenas. It made available a copy service to copy the pages requested by defense counsel. Unbeknownst to defense counsel, however, the prosecutor made a second copy for herself of the very small set of documents chosen by defense counsel (22 documents total).

When defense counsel requested the immediate return of the documents and filed a motion to seal the documents, the prosecutor refused to return them, gave misleading explanations of her conduct to the court, and even used the documents to help prepare a witness for trial.

Defense counsel sought dismissal of the indictment based on violations of the defendants' Fifth and Sixth Amendment rights. The court held several *ex parte* hearings with the defense and also sought the government's explanation of the conduct. It found that there was "serious misconduct on the part of the lead prosecutor" and "actual prejudice" to the defendants based on the government's review of defense counsel's work product.[42]

The court, however, refused to dismiss the indictment, holding that the conduct was not sufficiently "outrageous." Ultimately, the court in *Horn* narrowly tailored the sanctions to the misconduct by (1) ordering the government to provide defendants with a written summary of each witness's testimony and what exhibits would be used by the witness; (2) allowing the defense to depose certain government witnesses; (3) removing the lead prosecutor and prohibiting her from any further participation in trial preparation; (4) prohibiting the government's use of the documents at issue; and (5) reimbursement of the defendants' attorney's fees for litigating the government's misconduct.[43]

The *Horn* case is instructive as to the varieties of remedies that can be sought if the government abuses the discovery (or taint team) process. Although dismissal of the indictment may be the ultimate sanction, it is highly unlikely that a court will impose that remedy. Defense counsel should not hesitate to seek lesser remedies that are tailored to the government's misconduct.

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.[44] 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.[45] A defendant must take all reasonable steps to protect the privilege, or risk waiving it.

For example, in *United States v. SDI Future Health*, defense counsel traded letters with the government right after the search warrant, asserting the privilege over certain documents.[46] However, the defendant made only a generalized objection to the remaining documents and did not take advantage of the government's invitation to review the remaining documents over which it had not asserted privilege. The court found that with respect to the documents over which the defendant immediately asserted privilege, the privilege had not been waived. However, waiting three years after the search to seek judicial intervention on the other documents (and not reviewing the documents to make a document-by-document challenge) was a waiver of the privilege.[47] According to the court, a "mere generalized assertion that seized records may contain attorney-client privileged material is, in and of itself, sufficient to preserve the defendant's privilege indefinitely."[48]

Three basic rules must be followed to protect 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; and (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.

Defense counsel must object with specificity to the documents that are privileged; the failure to do so is fatal. For example, in *United States v. Neill*, defense counsel objected to certain hard-copy documents as privileged.[49] However, counsel did not make any objection to computer files that had been seized and therefore waived any challenge to the seizure of those files. As the court stated, "[a]bsent the timely assertion of privilege, the defendants cannot now complain."[50]

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 defense counsel 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 that there is no confusion down the road about what happened during the call.

(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 the attorney knows 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 privilege is being asserted
- Inquire into what procedures the government will use to protect privilege, such as a taint team.
- Find out who will be a member of the taint team and whether the taint team will be agents or attorneys. If they are agents, inquire into the type of training they have received in privilege issues and what kind of attorney supervision they will be subject to during the review.
- Consider providing the government a list of all inside and outside counsel used by the client so that 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) If the government offers to allow defense counsel to review the materials, counsel should accept this invitation and create a document-by-document log of all documents over which counsel will assert privilege.

(6) Follow up with the government to obtain a response to defense counsel's 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.

(7) When the defense has 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).

(8) At each stage of the process, document in writing the defense's concerns with respect to the procedure implemented by the government and be specific as to what documents or electronically stored information is privileged.

Defense counsel needs to keep in mind how critical it is to raise these concerns early and with particularly. For example, in *United States v. Brown*, the defendant requested a hearing to determine whether certain items had been seized pursuant to a search warrant in violation of the privilege.[51] However, the government pointed out that it had already discussed and reached agreement with defense counsel about the privilege review process and a protocol for

the review and noted that the defendant had "failed to identify any seized documents that are subject to the attorney-client privilege." The court denied the request for a hearing, stating that "Defendant presents only a speculative basis in support of her request without any specificity."

Conclusion

The government's use of taint teams should be vigorously challenged by white collar defendants. This team allows 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 attorneys' 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 to challenge the retention and review of privileged materials.

Notes

1. Fed. R. Crim. P. 41(c).
2. Fed. R. Crim. P. 41(d).
3. Fed. R. Crim. P. 41(e)(2)(A).
4. Fed. R. Crim. P. 41(e)(2)(A).
5. Fed. R. Crim. P. 41(e)(2)(A), (B).
6. Fed. R. Crim. P. 41(f)(1)(B), (C).
7. *Id.*
8. Fed. R. Crim. P. 41(g).
9. *Id*.
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).
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).
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.").
22. *Neill*, 952 F. Supp. at 840; *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. *In re Grand Jury Subpoenas 04-124-03 and 04-124-05*, 454 F.3d 511 (6th Cir. 2003).
26. 464 F. Supp. 2d at 1039.
27. *Id*.
28. *Neill*, 952 F. Supp. at 837.
29. *In re Advanced Pain Centers Poplar Bluff v. Ware*, 4:13CV01408AGF, 2014 WL 1315582 (E.D. Mo. Mar. 31, 2014) ("the court concludes that none of the disputed documents are subject to the attorney-client privilege.").
30. 429 U.S. 545, 554 (1977).
31. *Neill*, 952 F. Supp. at 841.
32. *Id.* at 840.
33. *Id.*
34. *SDI Future Health*, 464 F. Supp. 2d at 1048.
35. *Neill*, 952 F. Supp. at 840.
36. *Portillo v. Adams*, CV 09-5630 VAP MRW, 2011 WL 4383648 (C.D. Cal. Aug. 24, 2011) report and recommendation adopted, CV 09-5630 VAP MRW, 2011 WL 4383624 (C.D. Cal. Sept. 20, 2011).
37. 514 F. App'x 614 (6th Cir. 2013).
38. *Chittick v. Lafler*, 514 F. App'x 614, 617 (6th Cir. 2013) (quoting *Chittick*, 2011 WL 2081307, at *10, 2011 U.S. Dist. LEXIS 56342, at *26).
39. *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).
40. *Voigt*, 89 F.3d at 1067.
41. 811 F. Supp. 739 (D.N.H. 1992).
42. *Id*. at 750.
43. On appeal, the First Circuit reversed the grant of monetary sanctions against the United States, holding that there had been no Eleventh Amendment waiver of immunity for such sanctions. *United States v. Horn*, 29 F.3d 754, 767 (1st Cir. 1994).
44. *See, e.g.*, *United States v. Ary*, 518 F.3d 775 (10th Cir. 2008).
45. *Ary*, 518 F.3d at 778 (waited six weeks after Rule 16 discovery review); *United States v. De La Jarra*, 973 F.2d 746 (9th Cir. 1992) (waited six months); *In re Grand Jury (Impounded)*, 138 F.3d 978 (3d Cir. 1998) (waited four months).
46. 464 F. Supp. 2d at 1032.
47. *Id*. at 1046.
48. *Id*.
49. 952 F. Supp. at 842.
50. *Id*.
51. *United States v. Brown*, Criminal Action No. 12-0367, 2013 WL 5508676 (E.D. Pa. Oct. 4, 2013).

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