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**FEDERAL TAINT TEAMS AND  
ATTORNEY-CLIENT PRIVILEGE IN  
CORPORATE CRIMINAL INVESTIGATIONS**

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From 1990 to 1997, Mr. Farquhar served as an Assistant U.S. Attorney in the District of Maryland. Prior to working as a federal prosecutor, he was a law clerk for Judge Joseph H. Young in U.S. District Court in Baltimore, then a litigation associate with the Washington, D.C. offices of Hogan & Hartson. Mr. Farquhar co-chairs the annual Enforcement Conference for the Food and Drug Law Institute (FDLI), and has spoken on enforcement and litigation issues at numerous conferences sponsored by FDLI, the Drug Information Association, the Society of Quality Assurance, PDMA, Inc., and the Regulatory Affairs Professionals Society. He authored two chapters, one on seizures, injunctions and consent decrees and one about stolen drug samples, for the FDLI publication, "How to Work with FDA."

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A standing joke among people who work in tightly regulated industries is that government agents entering businesses say, effectively, “I’m from the government, and I’m here to help.” That line always draws a knowing laugh.

Even less credible is the situation addressed by this CONTEMPORARY LEGAL NOTE: where the government is conducting an investigation and shows up (for example, with a search warrant) saying, in essence, “I’m from the government, and I’m here to protect your secrets.” Why less credible? Because the protection offered by the investigators is for the very secrets that may provide exactly what they hope to find: evidence of criminal responsibility.

Yet, when investigators seize records reflecting confidential communications between clients and attorneys, the procedures set up to protect those confidences – so-called government “taint teams” – are frequently the only barrier between government investigators eager to build criminal cases and the secrets they would love to learn.

Not surprisingly, skepticism and controversy surround the use of taint teams, whose members are supposed to determine what is privileged, and to ensure that agents and prosecutors working on the investigation and

prosecution do not gain direct or indirect access to those secrets (usually attorney-client privileged material). Indeed, the use of taint teams has prompted challenges to the legitimacy of seized evidence, protests about the abrogation of attorney-client privilege, and some court decisions expressing nearly as much skepticism as any self-respecting defense attorney could voice. In *U.S. v. Neill*,<sup>1</sup> for example, the judge, although upholding the use of seized materials after review by a taint team, stated that “this Court is critical of the government’s use of the ‘taint team’ procedure,” and “there is no doubt that, at the very least, the ‘taint team’ procedures create an appearance of unfairness.”<sup>2</sup>

First, here’s how a taint team works. Procedures for taint teams are usually triggered in one of two situations: interception of electronic communications (wiretaps on phones and interception of texts or emails pursuant to a warrant); or seizure of documents (usually, but not always, during execution of a search warrant) at a client’s or attorney’s premises. When government agents encounter communications that may be subject to attorney-client privilege or to some other recognized confidentiality protection, these procedures require the agents to stop examining the materials, to segregate those that may be subject to the privilege, and to provide those materials in confidence to a completely independent team. The taint team examines the materials, determines if they are subject to a privilege, and

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<sup>1</sup> 952 F. Supp. 834, 841 n. 14 (D.D.C. 1997).

<sup>2</sup> *Accord U.S. v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1037 (D. Nev. 2006) (“Federal courts have taken a skeptical view of the Government’s use of ‘taint teams.’”).

discloses only unprivileged materials to personnel actively investigating the case. The independent team examining the materials is called a “filter team,” a “privilege team,” or a “taint team,” because the knowledge that members of the team have gained by examining privileged information “taints” them, so that they should have no involvement or input in the course of the investigation or the development of evidence.<sup>3</sup>

Many, if not most, court orders authorizing surveillance – wiretaps and interception of other electronic communications – provide explicit protections for attorney-client communications. These court orders, which run to dozens of pages, generally include routine instructions to listening agents to immediately cut off the interception if a communication is involved between a client and an attorney. Presumably, if one of the exceptions to the attorney-client privilege can be established (such as the crime/fraud exception discussed further below), the agents and prosecutors must ask the authorizing court to alter the prohibition on intercepting attorney-client communications.

Contrarily, search warrants rarely provide explicit instructions to the serving agents about how they should handle documents that are subject to attorney-client privilege. For example, although the search warrant leading to the decision in *SDI Future Health* was altered to address how patients’ confidential medical information would be handled, “[n]o express procedures were set forth in the affidavit or the search warrant for handling attorney-client

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<sup>3</sup> See *Neill*, 952 F. Supp. at 837 (reviewers were “called a ‘taint team,’ meaning that their actions would be ‘walled off’ from the prosecution team thereby ensuring that the prosecution team remained free of the ‘taint’ arising from exposure to potentially privileged material”).

privileged documents.”<sup>4</sup> It is thus imperative that clients whose premises are searched pursuant to warrants take steps to ensure that attorney-client communications are protected when the scope of the search will include these documents (as will also be discussed further below).

The procedures surrounding taint teams are recognized and discussed in the United States Attorneys’ Manual (“USAM”), the handbook for federal prosecutors. One section setting forth the requirements for searches of attorneys’ offices accurately describes a taint team – referred to there as a “privilege team:”

While every effort should be made to avoid viewing privileged material, the search may require limited review of arguably privileged material to ascertain whether the material is covered by the warrant. Therefore, to protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a “privilege team” should be designated, consisting of agents and lawyers not involved in the underlying investigation.<sup>5</sup>

The U.S. Attorneys’ Manual recommends that the privilege team be available for consultation at the time of the search of an attorney’s office, and sets forth, in these circumstances, the pre-search instructions that the privilege team should give to the searching agents:

The instructions should set forth procedures designed to minimize the intrusion into privileged material, and should ensure that the privilege team does not disclose any information to the investigation/prosecution team unless and until so instructed by the attorney in charge of the privilege team.

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<sup>4</sup> 464 F. Supp .2d at 1031.

<sup>5</sup> USAM § 9-13.420(E), *available at* [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/13mcrm.htm#9-13.420](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm#9-13.420).

*Id.* The U.S. Attorneys' Manual requires preparations for searches of attorneys' office that detail the document review procedures, including:

- Who will conduct the review (*e.g.*, privilege team within the Department of Justice, a judicial officer, or a special master);
- Whether a judicial officer or special master will see *all* documents seized from an attorney's office or only those that are "arguably privileged or arguably subject to an exception to the privilege;"
- Whether copies of seized documents will be provided to the attorneys whose offices are being searched, so that the firm can continue its operations and so that relevant attorneys can raise specific claims of privilege or challenge exemptions from the privilege (commendably, the Manual suggests that copies of the records be provided "[t]o the extent possible"); and
- How computer and other electronic data will be handled.<sup>6</sup>

Consistent with these instructions, agents performing the investigation described in *Neill* were required to segregate potential attorney-client materials for review by on-site "Principal Legal Advisers."<sup>7</sup>

These procedures are applicable to the rare instances of searches of attorneys' office. There is no corollary section of the U.S. Attorneys' Manual that establishes similar procedures for searches of other locations where attorney-client privileged materials may be found. Still, based on experience, discussions with other defense counsel and prosecutors, and discussions in court decisions, it seems likely that the same procedures are used when

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<sup>6</sup> *Id.* § 9-13.420(F).

<sup>7</sup> 952 F. Supp. at 837.

attorney-client privileged materials are discovered in other kinds of searches, except that a taint team would not be preselected and available while the search is conducted. For example, when the government seized a half-ton of documents from Guantanamo Bay detainees in connection with an investigation into apparently coordinated suicides, it was the government that sought approval of a taint team to review the records for attorney-client privilege.<sup>8</sup>

Courts have been consistent in describing the critical nature of the attorney-client privilege, leading many lawyers – and their clients – to believe that their confidential communications associated with seeking or providing legal advice will almost certainly never be shared with anyone. Of course, to the extent that any government agent – even one on a taint team with prohibitions on disclosure – reviews that material, the privilege has already been violated. Still, courts have uniformly held that review of *seized* materials by a taint team does not result in waiver of attorney-client privilege.

Another area of concern about attorney-client privileged information and taint teams is the enormous trust that attorneys and their clients must place in federal agents and prosecutors to perform their jobs with the utmost integrity and the most profound respect for the secrecy attaching to attorney-client communications. Even in circumstances where the presence of these

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<sup>8</sup> *Hicks v. Bush*, 452 F. Supp. 2d 88, 94, 97 (D.D.C. 2006) (“Filter Team” will “review and sort” seized materials for “relevance and for privilege;” members of team “will not take part in litigation or other proceedings involving detainees, and . . . will operate under appropriate non-disclosure obligations”).

secret materials is foreseen (such as a search of an attorney's office or interception of electronic communications of individuals who may be consulting attorneys), many would question whether a taint team leader, when communicating to the lead prosecutor what materials must be returned and which may be reviewed, may innocently, deliberately, or inadvertently disclose some piece of information that may lead directly or indirectly to a disclosure of evidence. As the court stated in *In re Grand Jury Subpoenas 04-124-03 and 04-124-05*, "taint teams present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors . . . human nature being what it is."<sup>9</sup> This means that taint teams "may err by neglect or malice, as well as by honest differences of opinion."<sup>10</sup> Without actually disclosing specific contents of attorney-client privileged communications, a taint team member may transmit information gleaned from the material by, for example, a wink and a nod, or a failure to answer a pointed question.

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<sup>9</sup> 454 F.3d 511, 523 (6th Cir. 2006). The Sixth Circuit considered a district court's grant of the government's request that a taint team be permitted to review, in the first instance, documents that were the subject of a grand jury subpoena, as opposed to documents that were already seized pursuant to a search warrant. The Court of Appeals reversed that decision, 454 F.3d at 523, finding that 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 through the exercise of a search warrant." *Id.* Nonetheless, the decision's discussion about how a taint team means that "the government's fox is left in charge of the [target's] henhouse," supported its finding that use of a taint team was inappropriate. *Id.* at 523.

<sup>10</sup> *Id.*

In an era with more frequent revelations of serious prosecutor conduct,<sup>11</sup> defense counsel and courts are left to wonder what prosecutorial misconduct has *not* been discovered or disclosed. Prosecutors tend to work pretty closely together within the Department of Justice, and, although aspersions are not intended to be cast on the vast majority of federal prosecutors, the author and many other defense counsel can recount incidents where prosecutors engaged in ethically questionable conduct to increase the likelihood of a successful prosecution, or to produce pressure to accept an offered plea bargain. Indeed, at least one court has questioned the candor of the government in disclosing activities relating to seized attorney-client communications. In the Guantanamo detainee decision, Judge Robertson noted, in passing, that a “dramatic underestimate of the initial document review” contained in an initial sworn declaration from one of the case agents took “more than a month” to correct, which, the court said, “does not inspire confidence.”<sup>12</sup> Where mistakes by the government which it chooses to disclose curtail confidence, one is left to wonder how seriously undisclosed errors would bolster mistrust of the government agents.

It was these concerns that led the court in *U.S. v. Stewart*<sup>13</sup> to reject the government’s request to appoint a taint team to review documents seized from

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<sup>11</sup> For example, the long-serving U.S. Attorney in New Orleans resigned after two of his deputies, using pseudonyms, apparently posted information online about the target of an investigation. See <http://www.usatoday.com/story/news/nation/2012/12/06/us-attorney-Louisiana-letten/1751153/>.

<sup>12</sup> 452 F. Supp. 2d at 97.

<sup>13</sup> 2002 WL 1300059 (S.D.N.Y. 2002).

a criminal defense attorney's office, and, instead, to appoint a Special Master (as requested by the defendant) to perform the preliminary review. Noting that "at least three courts" that "have allowed for review by a government privilege team have opined, in retrospect, that the use of other methods of review would have been better," the court decided that use of a Special Master was appropriate because "it is important that the procedure adopted in this case not only be fair but also appear to be fair."<sup>14</sup>

In the much more frequent instances where homes or business premises of individuals other than attorneys are searched, this concern is heightened: without the availability of taint teams and careful, specific instructions to searching agents about honoring attorney-client privilege, an enormous level of responsibility is placed on agents to recognize and protect attorney-client privileged information when they stumble upon it. Taint teams cannot be effective if the secret materials are not segregated and transmitted to them. Presumably, most agents receive general training about how to recognize and treat attorney-client privileged materials, but broad participation of federal agents and state law enforcement personnel in the execution of a search warrant can surely lead to problems. In *In the matter of the Search of 636 South 66<sup>th</sup> Terrace*,<sup>15</sup> for example, no taint team was initiated, and the business that was searched was required to file a Motion for Return of Seized Property to recover the seized "attorney-client communications." The judge

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<sup>14</sup> *Id.* at \*6, \*8.

<sup>15</sup> 835 F. Supp. 1304 (D. Kan. 1993).

(overturning a magistrate judge’s report and recommendation to the contrary) determined that “the attorney-client privilege is clearly applicable in the search warrant context,” and that “an invasion of the attorney-client privilege through a search and seizure generates an irreparable injury to the possessor of the privilege.”<sup>16</sup>

Another controversial issue relates to the difficulty of determining whether an attorney-client privilege actually exists, an area that is the subject of vast numbers of court decisions, law review articles, and even treatises.<sup>17</sup> As explicitly recognized in the section of the U.S. Attorneys’ Manual excerpted above, distinguishing which communications are attorney-client privileged from those which are not (even when an attorney is a sender or recipient) can be extremely difficult, and the broad “good faith” exception to suppression of materials illegally seized will shelter those who make close calls in the government’s favor. *SDI Future Health* held that dismissal of the indictment based on intrusion into attorney-client privilege would only be supported if the government knew of the attorney-client relationship, the government deliberately intruded into that relationship, and “actual and substantial prejudice” occurred to the defendant.<sup>18</sup> In the investigation leading to the *Neill* decision, substantial discussion was devoted to whether materials were exempt from the attorney-client privilege because of the “crime-fraud exception,”

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<sup>16</sup> 835 F. Supp. at 1306.

<sup>17</sup> See, e.g., Edna Epstein, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE (5th Ed. 2012).

<sup>18</sup> 464 F. Supp. 2d at 1049.

although the government, with regard to those materials, never actually sought to assert that exception.<sup>19</sup> In *In re Impounded Case (Law Firm)*, the government argued that the “crime-fraud exception to the attorney-client privilege and the work product doctrine” did apply, and the Court of Appeals remanded to permit the law firm from which materials were seized to raise “pertinent privilege challenges and to have them resolved pursuant to established procedures.”<sup>20</sup>

If prosecutors have caused a search warrant to be issued, they have already made a determination – and convinced a judicial officer – that there is probable cause to believe that a crime has been or is being committed, and that materials within the scope of a warrant will serve as evidence of that crime. So there is likely a predisposition of a prosecution taint team to believe that evidence of a crime may be contained within the materials which the team has been asked to review.

Several courts have expressed skepticism that the taint team can provide a fair assessment of whether the privilege applies. In *SDI Future Health*, the court quoted the Sixth Circuit decision cited above for the proposition that “the government’s taint team might have a more restrictive view of privilege than the defendant’s attorneys.”<sup>21</sup> In *U.S. v. Noriega*,<sup>22</sup> a third court noted that the

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<sup>19</sup> 952 F. Supp. at 837, n. 4.

<sup>20</sup> 879 F.2d 1211, 1212, 1214 (3d Cir. 1989).

<sup>21</sup> 464 F. Supp. 2d at 1037 (quoting *In re Grand Jury Subpoenas 04-124-03 and 04-124-05*, 454 F.3d at 523).

<sup>22</sup> 764 F. Supp. 1480, 1484 (S.D.Fla. 1991).

taint agent released information from an attorney-client communication to the prosecution team, and then, when asked to double-check, incorrectly responded that the relevant tape-recorded conversation did not include any attorney-client communications.

A final area of concern relates to the “chilling effect” that allowing government attorneys – even those on a taint team – to review attorney-client communications may have on the openness with which attorneys and clients will communicate. If attorneys and clients know that their communications may be examined – even by a taint team – and know that there is ambiguity surrounding when some of the exceptions to the attorney-client privilege will apply, attorneys will be recalcitrant to venture into areas that may be subject to being revealed. This chilling effect was recognized in the Guantanamo detainees case. Noting that attorneys for the detainees argued that “the proposed Filter Team review will chill attorney-client communications,” Judge Robertson wrote, “Some chill seems likely,” although, he said, “the depth [of the chill] is debatable.”<sup>23</sup> Likewise, the judge deciding *Stewart* said he wanted to protect “the willingness of clients to consult with their attorneys.”<sup>24</sup>

So, what’s a defense attorney to do? First and foremost, when advising clients who may be subjected to a search warrant, it would be prudent to suggest to the client that attorney-client communications should be kept in clearly identified files or, preferably, containers (such as a file drawer). The

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<sup>23</sup> 452 F. Supp. 2d at 103.

<sup>24</sup> 2002 WL 1300059 at \*8.

files and containers should be prominently marked to indicate that they contain attorney-client communications, and, if a search is conducted, the agents executing a search warrant should be informed, with witnesses present, where attorney-client communications are maintained, and told that, if the agents seize the materials and review them in any fashion except after clearance by a taint team, they will be conducting an illegal search. In *SDI Future Health*, the court noted with approval that agents executing a warrant were informed that “attorney-client privileged records were located” in a certain office.<sup>25</sup>

If clients consent to a search, they should likewise refuse to provide access to any attorney-client communications. If agents insist on pursuing attorney-client communications, it would be advisable for the client to refuse to consent to providing the materials (consent may constitute a waiver of the privilege) and to secure the presence of attorneys who can arrange for delivery of the files only pursuant to a court order in such a manner that they will be reviewed by a magistrate judge or special master prior to delivery to the government.

Likewise, clients should be advised to assert the privilege wherever it may be applicable, and, if an attorney is representing a client during a search, he or she must be vigilant in asserting the privilege. For example, if computer files are seized, the privilege must be asserted as to any potentially privileged material within the computer files. Otherwise, the government may argue that

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<sup>25</sup> 464 F. Supp. 2d at 1038.

the privilege has been abandoned.<sup>26</sup>

Finally, attorneys should be diligent in asserting privileges over seized materials if the government does not recognize the privilege, and may even be required to take action in court for return of privileged materials to ensure that no privileges have been waived. “[F]ailure to take earlier judicial action to enforce their privilege” was held against the defendants in *SDI Future Health*,<sup>27</sup> and a “mere generalized assertion that seized records may contain attorney-client privileged materials” is not, “in and of itself, sufficient to preserve the defendant’s privilege indefinitely.”<sup>28</sup> Even if the government refuses to permit counsel to review seized materials in order to determine if they contain privileged materials, defense lawyers may be required to “pursue judicial action to obtain the records so that additional privileged documents could be identified.”<sup>29</sup>

Of course, these procedures cannot guarantee the privilege will be protected. But they will place government agents on notice that, if they do not protect the secrets to which they have access, they do so at their peril. To some extent, these measures will ensure that clients do more than simply trust the government to protect the clients’ secrets.

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<sup>26</sup> *Neill*, 952 F. Supp. at 842 (defendants’ challenge to government access to materials “fails at the outset simply because they have not shown that they asserted the attorney-client privilege with respect to those materials”).

<sup>27</sup> 464 F. Supp. 2d at 1045.

<sup>28</sup> *Id.* at 1046.

<sup>29</sup> *Id.* at 1046-47.