KEEPING THE FOX OUT OF THE HENHOUSE: HOW RECENT COURT DECISIONS AND A MID-TRIAL DEBACLE CAN HELP SHIELD PRIVILEGED MATERIAL FROM THE GOVERNMENT

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Businesses that have been forced to sit back as the government makes unreviewable determinations about which of their sensitive documents are privileged can finally start fighting back. Recent U.S. Court of Appeals decisions and a highly publicized mid-trial debacle involving a government "filter team" (or "taint team") have given privilege holders much needed ammunition to tell courts why they should stop rubber-stamping prosecutors' requests to make determinations about a company's assertion of privilege.

In *Harbor Healthcare System LP v. United States of America*, 5 F.4th 593 (5th Cir. 2021) (5th Cir. 2021), a Fifth Circuit panel found that the prosecutors displayed a "callous disregard" of the rights of the targeted company in the way the government's filter team conducted itself. The Fifth Circuit is not alone. The most fervent critic to date, the Fourth Circuit, had previously borrowed the Sixth Circuit's metaphor of likening prosecutor-run filter teams to leaving the "government's fox in charge of guarding the . . . henhouse."[1] Perhaps sensing the tide turning, the government has, in a recent high-profile matter, asked for the appointment of an independent special master to review certain potentially privileged material. It was too late, however, for a Los Angeles prosecution team that, in late August 2021, watched a federal judge declare a mistrial in another prominent case—this one against Michael Avenatti—over a mistake apparently made by the filter team.

This article draws on these recent developments to offer companies (and individuals) concrete steps they can take to protect privileged communications. It also outlines arguments they can make in persuading judges to reject the use of filter teams altogether or, failing that, what relief they can obtain to limit potential harm to their businesses.

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[1] *See e.g., United States of America v. Under Seal*, 942 F.3d 159, 178 (4th Cir. 2019) (quoting *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006)).

Overview:

Department of Justice Taint Teams

The purpose of taint teams is to review seized material and provide a barrier between the privileged material and the prosecutors or investigators handling a matter. The problem, however, is that the taint teams are still comprised of DOJ employees and FBI agents—individuals, who are by no means disinterested parties, even though they supposedly have no connection to the prosecution team.[2] In addition to fundamental issues in leaving the proverbial fox in charge of the henhouse, courts have noted repeated errors in the administration of taint teams, some of which are noted below.

To preempt some of these concerns, in 2020, the United States Department of Justice ("DOJ") created a Special Matters Unit ("SMU") to oversee DOJ taint teams when reviewing seized privilege material.[3] According to the DOJ, the unit was created

> to focus on issues related to privilege and legal ethics, including evidence collection and processing, pre- and post-indictment litigation, and advising and assisting Fraud Section prosecutors on related matters. The SMU: (1) conducts filter reviews to ensure that prosecutors are not exposed to potentially privileged material, (2) litigates privilege-related issues in connection with Fraud Section cases, and (3) provides training and guidance to Fraud Section prosecutors.

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[2] *See, e.g.*, *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006) (summarizing that "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. That is to say, the government taint team may also have an interest in preserving the privilege, but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint team attorneys will make mistakes or violate their ethical obligations. It is thus logical to suppose that taint teams pose a serious risk to holders of the privilege, and this supposition is supported by past experience.").

[3] DOJ Fraud Section Year In Review, 2020, at 4, *available at* https://www.justice.gov/criminal-fraud/file/1370171/download.

In addition, some prosecutors, most notably in high-profile matters in New York, have sought judicial review of potentially privileged material, either in lieu of seeking a search warrant[4] or following the execution of one.[5] The upshot of these developments is that in the vast majority of cases where the DOJ refuses to deviate from its traditional practice of employing taint teams, privilege holders now have precedent on which they can rely to start fighting back. We review some of that precedent below.

Harbor Healthcare System LP v. United States of America, 5 F.4th 593 (5th Cir. 2021).

Harbor Healthcare System identified as privileged almost 4,000 emails seized by the government. The company provided a list of names of all attorneys and law firms it used and made several failed attempts to meet with the head of the taint team to discuss the return of the privileged material. The government had already determined that certain material was privileged but refused to return or destroy it.

Because Harbor Healthcare System was not under indictment, it requested return of those documents under Federal Rule of Criminal Procedure 41(g). The district court denied the request.[6] The Court of Appeals reversed, agreeing with the company that there had not been a process in place to protect Harbor Health's privileged documents and that the "government's ongoing intrusion on Harbor's privacy constitutes an irreparable injury that can be cured only by Rule 41(g) relief."[7] In the court's view, the government showed a "callous disregard" for the company's rights when it failed to seek

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[4] *See, e.g.*, Mathews, Christopher, Wall Street Journal, *Prosecutors Pierced Shkreli, Attorney's Legal Privilege,* https://www.wsj.com/articles/BL-LB-53018 (Jan. 28 2016) (noting that before bringing charges, prosecutors sought a judicial order to obtain unredacted communication from a company).

[5] *See, e.g.*, Hurtado, Patricia, et al., Bloomberg News, *Giuliani Evidence Should Be Reviewed for Privilege*, U.S. Says, https://www.bloomberg.com/news/articles/2021-05-04/u-s-seeks-special-master-to-review-giuliani-raid-materials (May 4, 2021) (noting that federal prosecutors requested an appointment of a special master to determine if documents seized from Giuliani's home and office were privileged).

[6] *Id.* at *2.

[7] *Id* at *6.

approval from a magistrate judge before it seized documents it knew would contain privileged information.[8] The prosecutors, the court continued, "made no attempt to respect Harbor's rights to attorney-client privilege in the initial search."[9] Finally, the government's only proffered reason for failing to return or destroy the privileged documents—its purported need for potential use in a potential future criminal action—meant the government had "no intent to respect Harbor's interest in the privacy of its privileged materials" and the filter team, as a result, "serve[d] no practical effect."[10] Notably, the court left open the possibility of suppression, but disagreed with the government that it was an adequate remedy, in part because it was not clear that Harbor would ever face criminal charges.[11]

United States of America v. Under Seal, 942 F.3d 159 (4th Cir. 2019).

Law Firm (name under seal) was subject to a large seizure by the government resulting from the investigation of Law Firm's dealings with Client A. The seizure resulted in several thousands of emails, 99.8% of which had nothing to do with Client A. Several of those documents contained privileged communications with Law Firm's other clients who were under active but unrelated criminal investigations and prosecutions. In addition, the taint team protocol permitted federal agents and paralegals to designated documents are nonprivileged.

The court criticized the government for allowing non-lawyers to make privilege determinations.[12] Collecting authority, it also leveled useful criticisms that apply to taint teams regardless of how they are staffed. First, "[t]here is the possibility that a filter team — even if composed entirely of trained lawyers — will make errors in privilege determinations and in transmitting seized materials to an investigation or prosecution team."[13] Second, "a filter team's members might have a more restrictive view of

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8 *Id. at* *4-5.

9 *Id.* at *9.

10 *Id.* at *9.

11 *Id.* at *11-12.

12 *United States of America v. Under Seal*, 942 F.3d 159, 164, 177 (4th Cir. 2019).

13 *Id.* at 177.

privilege than the subject of the search, given their prosecutorial interests in pursuing the underlying investigations. That more restrictive view of privilege could cause privileged documents to be misclassified and erroneously provided to an investigation or prosecution team."[14] Third, the *ex parte* proceeding in which the review protocol was authorized (as is almost always the case, if the government seeks authorization at all), in the court's view, ran counter to the general preference for adversarial resolutions.[15] Fourth, any delay to the government's investigation, at least in that case, did not outweigh the harm to the privilege holders.[16] Fifth, there was the appearance of unfairness, because "reasonable members of the public" would find it difficult to believe the filter team agents or prosecutors would ignore privileged information they reviewed.[17] As the court put it, "prosecutors have a responsibility to not only see that justice is done, but to also ensure that justice *appears* to be done," and federal agents and prosecutors "rummaging" through privileged material subverts that goal.[18]

Other precedent

In reaching its conclusions in *Under* Seal (profiled immediately above), the Fourth Circuit praised the "sensible approach" taken by a Southern District of New York judge in the seizure of Michael Cohen's documents.[19] There, after hearing from all sides and before the government reviewed any sensitive material, the magistrate judge rejected the government's taint team

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14 *Id.* (internal quotation marks omitted).

15 *Id.* at 178.

16 *Id.* at 181-82.

17 *Id.* at 182-83.

18 *Id.* at 183 (emphasis in original).

19 *Id.* at 179.

proposal and appointed a special master,[20] just as other courts had done.[21] Although the DOJ resisted the appointment of a special master for Cohen's documents, in April 2021, prosecutors in the same office themselves requested the appointment of a master following the seizure of documents from Rudy Giuliani.[22] To be sure, the request was defensive; it noted that filter teams are "common" and adequately protective of privilege holders' rights, but conceded that it was prudent to use a different method in some "exceptional circumstances."[23] The government's redacted filing emphasized other unusual features of the case, obviously aware that the government's request would be cited against it in cases where it would continue defending the use of taint teams.[24]

Although the Fourth and Fifth Circuit opinions, along with the high-profile cases in the Southern District of New York, have received the most recent attention, privilege holders would do well to educate trial-level courts on the growing body of authority around the country. Other examples include the Third Circuit's 2015 criticism of the use of non-lawyers to make privilege determinations—a common feature of taint teams.[25]

The first high-profile and oft-cited disapproval of taint teams came in 2006, from the Sixth Circuit Court of Appeals.[26] Although no longer the most recent or harshest critic, the Sixth Circuit's opinion offers useful observations. In that case, which arose in the pre-production subpoena context, the court acknowledged that filter team protocols can be "respectful of, rather than

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20 *United States of America v. Under Seal*, 942 F.3D 159, 179 (4th Cir. Oct. 31, 2019).

21 *See, e.g., United States v. Gallego*, 2018 WL 4257967, at *3 (D. Ariz. Sept. 6, 2018) (appointing special master over government's objection advocating for a taint team).

22 *See In re Search Warrant dated April 21 & 28, 2021*, 21-MC-425, Dkt. Entry 1 (JPO) (S.D.N.Y.).

23 *Id.* at 2.

24 *Id.* at 3.

25 *In re Search of Elec. Commc'ns*, 802 F.3d 516, 530 (3d Cir. 2015).

26 *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).

injurious to, the protection of privilege" in situations where the government has no choice but to "sift the wheat from the chaff."[27] But those same procedures were inappropriate, the court wrote, where the "exigency typically underlying the use of taint teams is not present,"[28] such as in cases in which a seizure of potentially privileged material had not yet occurred. Filter teams present "inevitable, and reasonably foreseeable risks, to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors."[29] "[T]he government taint team may have an interest in preserving privilege," the court continued, "but it also possesses a conflicting interest in pursuing the investigation, and, human nature being what it is, occasionally some taint-team attorneys will make mistakes or violate their ethical obligations."[30] The court therefore allowed the subpoenaed party itself to make an initial privilege review because that would guard against the unchecked authority by the government to "make some false negative conclusions, finding validly privileged documents to be otherwise."[31]

Fifteen years later, on August 24, 2021, a federal judge declared a mistrial over a month into a highly publicized trial involving Michael Avenatti.[32] The court blamed the taint team's failure to produce certain information from the server from Avenatti's law firm, which had potential exculpatory value. The judge found no misconduct—just a mistake: "I think the taint team has fairly acknowledged that there may have been some shortcomings in the review process."[33] Notably, the government attempted

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27 *Id.* at 522-23.

28 *Id.* at 523.

29 *Id.*

30 *Id.*

31 *Id.*

32 *See* Clough, Craig, Avenatti Wins Calif. Wire Fraud Mistrial Over Brady Violation (August 24, 2021), *available at https://www.law360.com/whitecollar/articles/1415833/breaking-avenatti-wins-calif-wire-fraud-mistrial-over-brady-violation.*

33 Cuniff, Meghann, Judge Declares Mistrial in Michael Avenatti's Wire Fraud Case Over Missing Financial Data (Aug. 24, 2021), *available at*

to argue that the taint team's possession of any of the exculpatory material should not be imputed onto the prosecution team for purposes of satisfying its *Brady* obligations; the judge rejected that argument and agreed with Avenatti that it was inappropriate for the supposedly neutral representative of the filter team to turn into an advocate on a motion for a mistrial.[34]

The Avenatti trial debacle and the fervor with which a member of the filter team advocated to salvage the trial shows that (1) taint teams, as the Fourth Circuit noted, have, at the very least, the appearance of non-neutrality, and (2) errors related to taint teams can materialize in different and unexpected ways. When special masters or magistrate judges conduct the review, with defendants having access and input, the error rate will necessarily decline or evaporate.

Practical guidance

There are steps that corporations and their attorneys can take today, before any issues with respect to filter teams even arise.

- **Labels**. Corporations should clearly label all materials that are privileged. This would include any documents seeking legal advice and documents prepared in anticipation of litigation. Merely stamping "privilege" on documents or, as is commonly done, just copying attorneys on emails will not automatically make the underlying communications privileged, but it lays the groundwork to put the viewer on notice. When done in good faith (rather than labeling every document privileged), it will make it more difficult for any government agency to ignore the potential privilege issue.

- **Limitations**. Limiting the number of people receiving the privileged information is also beneficial. Quickly identifying custodians is paramount when documents are seized. This allows the entity (and its counsel) to (1) determine what documents they need to protect by filing an emergency motion with a court or (2) compare known sensitive documents to those deemed not privileged by the taint team prior to their delivery to the investigation/prosecution team.

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https://www.law.com/2021/08/24/judge-declares-mistrial-in-michael-avenattis-wire-fraud-case-over-missing-financial-data/

34 *Id.*

- **Localize**. A standard operating procedure on the internal handling of privileged documents, while tedious, would be beneficial for any entity looking to keep privileged materials secure through so-called "localization"—that is, segregating purely business matters from legal advice and establishing policies against forwarding legal advice contained in emails to anyone outside the designated group of individuals. Dual-purpose communications—those made both, to provide legal advice (or in anticipation of litigation) and to serve a business purpose—have led to intense litigation from magistrate courtrooms all the way to appellate courts[35]; demonstrating that access to the disputed communications or documents had been limited would aid in that fight. Relatedly, as part of localizing and labeling, a company should consider segregating, either physically or electronically, the most sensitive privileged documents, so that it could attempt to prevent their seizure by immediately contacting the judge who authorized the warrant.

Arming Privilege Holders for a Fight

When the government seizes or requests to seize potentially privileged information, the company (or individual) must act immediately. The first step depends on whether the government is demanding the material via a subpoena or whether it has already executed a search warrant.

- **Subpoena Requests -** Drawing on the Sixth Circuit's opinion profiled above,[36] the subpoena recipient could argue that no exigency exists to justify the government's invasion of the attorney-client privilege. The privilege holder could volunteer to produce, on a rolling basis, all the material that is clearly not

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35 *See, e.g.*, *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900 (9th Cir.2004) (holding that that documents prepared for both, determining compliance and for potential litigation with the EPA were protected because their "litigation purpose so permeated any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole."); *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (holding that a document created because of the prospect of litigation, "analyzing the likely outcome of that litigation . . . , does not lose protection . . . merely because it is created in order to assist with a business decision").

36 *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).

privileged and provide a privilege log of the rest, just as it is routinely done in civil litigation. In the face of growing criticism by appellate courts reviewed in this article, in these circumstances, a court is less likely to rubber-stamp the filter team protocol.

- **Search Warrants** – Search warrants leave privilege holders in a more precarious position, especially if the searched party had not segregated privileged material as advised above. Once a warrant has been executed, the government has, or will soon have, the subject material and could begin reviewing it. Search warrants are obtained *ex parte*, often under seal, and there is almost always some proffered justification for the ongoing secrecy. Unless there is a relevant indictment already filed and assuming the government is not receptive to the searched party's request to conduct its own privilege review, the privilege holder should file an emergency motion under Rule 41(g) in the district where the material was seized, even if an agency from a different district is conducting the investigation. In that motion, the searched party should demand the return of the seized documents, request to conduct its own privilege review or at least have a special master do so, and, drawing on the authority summarized in this article, make the following arguments:

    - Explain why certain seized documents and communications may be privileged or protected as work product.

    - Provide examples of the types of communications, such as dual-purpose communications discussed above, that to the government may appear not covered by attorney-client privilege or work product protection, but are in fact privileged and could only be properly evaluated by attorneys who understand the nature and purpose of the communications. No matter how well-intentioned, taint team members cannot be expected to consistently spot privileged communications without being steeped in the business.

- Educate the court on evolving precedent criticizing the use of filter teams and the preemptive steps the government has recently taken agreeing to the use of special masters and for judicial intervention.

- Argue that a filter team's review of seized material is itself an invasion into a sacred legal right, a harm that cannot be cured regardless whether the prosecution team receives the material.

- Highlight the recent mistakes committed by filter teams, citing precedent discussed above and in other cases,[37] most recently even causing a mistrial, over a month into a resource-intensive trial. Be mindful, however, that not all courts have disapproved of taint team protocols, though even some of those opinion include helpful observations.[38]

- Note that even seemingly error-free taint team reviews could always lead to a prosecutor or agent learning something that is later indirectly used to develop leads in another investigation. Worse than a bell that cannot be unrung, this harm could remain silent and undetected. As the Sixth Circuit observed, "human nature being what it is,

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[37] *See, e.g.*, *United States v. Sullivan*, No. 17-00104 JMS-KJM, 2020 U.S. Dist. LEXIS 64508, at *24 (D. Haw. Apr. 9, 2020) (noting a "disappoint lack of recognition" of the government's privilege review, but finding dismissal and total suppression as inappropriate remedies; relying on government's submission to find defendant had not been prejudiced, but ordering limited suppression); *United States v. Esformes*, No. 16-20549-CR, 2018 WL 5919517, at *34 (S.D. Fla. Nov. 13, 2018) (noting that "Government's 'taint' protocol was to a large extent inadequate and ineffective" and the government attorneys' and agents' "execution of their duties was often sloppy, careless, clumsy, ineffective, and clouded by their stubborn refusal to be sufficiently sensitive to issues impacting the attorney client privilege").

[38] *See, e.g.*, *In re Sealed Search Warrant*, No. 20-14223 (11th Cir. August 30, 2021) (affirming district court's denial of injunctive relief against a taint team protocol but observing the that it "allows the Intervenors to conduct the initial privilege review. It also requires the Intervenors' permission or court order for any purportedly privileged documents to be released to the investigation team. This means that the filter team cannot inadvertently provide the investigation team with any privileged materials.").

occasionally some taint-team attorneys will make mistakes or violate their ethical obligations."[39]

If the district judge still approves the filter team protocol (or affirms a magistrate judge's order), the company should continue to fight:

- Identify the categories or individual pieces of material that are most sensitive and likely privileged, provide the list to the government, and ask the court that if the government disagrees that those materials are privileged, then they must be reviewed *in camera* before they are passed to the prosecution team.

- Demand the names of the prosecutors and/or agents on the filter team, so that any future defendants who may face these individuals in a related case could request a Kastigar[40]-like hearing, where the government would have the burden to show that its case did not originate—directly or indirectly—from any of the privileged materials.

- Request a set of ground rules from the beginning that go beyond the bare-bone instructions provided in the DOJ Justice Manual[41]:

    - (1) filter team staffing requirements that mandate (a) involvement of experienced attorneys and (b) staffing by an office separate from the one conducting the investigation

    - (2) strict no-contact rules between members of the filter and prosecution teams, on *any* matters, to prevent inadvertent leaks. The only permitted communication should be in writing and preserved, and it should be limited to the underlying matter, so

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39 *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).

40 *See generally Kastigar v. United States,* 406 U.S. 441, 453 (1972).

41 Justice Manual § 9-13.420(E), *available at* https://www.justice.gov/jm/jm-9-13000-obtaining-evidence ("Instructions should be given and thoroughly discussed with the privilege team prior to the search. 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. Privilege team lawyers should be available either on or off-site, to advise the agents during the course of the search, but should not participate in the search itself.").

that the filter team is fully educated on the case and the potential privilege issues

- (3) segregation on government networks that would not permit any member of the prosecution team to inadvertently access potentially privileged material

- (4) process by which material deemed privileged by the filter team is destroyed or returned

- (5) requirement that any exculpatory evidence or any information material to the defense reviewed by the filter team is immediately flagged and produced to the defense to avoid it falling between the filter/prosecution team cracks like in the Avenatti trial

- (6) mandate that the application of the “crime fraud exception”—a common justification by prosecutors to review potentially privileged information—be approved by a judge or independent special master

- (7) request deadlines by when the filter team must finish reviewing seized material

- (8) seek an order similar to the one now required by Rule 5(f) of the Federal Rules of Criminal Procedure, which informs prosecutors of potential sanctions for failing to follow their obligations.