

Using Independent Taint Teams to Better Protect Attorney-Client Privilege

By: Richard Gregorie, William Marquardt, and Joseph Spinelli



Richard “Dick” Gregorie is a consultant with J.S. Held’s Global Investigations practice. A former federal prosecutor with the U.S. Department of Justice for more than four decades, he joined the U.S. Attorney’s Office in the Southern District of Florida as Chief of Narcotics. He is best known for the prosecutions of Panamanian General Manuel Noriega and other members of the

Medellin drug cartel.

William “Bill” Marquardt is a Managing Director in J.S. Held’s Global Investigations practice. He has extensive experience in the areas of forensic accounting, compliance, and risk management consulting, with a concentration on the Foreign Corrupt Practices Act (FCPA) and corporate investigations. He has worked with entities and individuals in government investigations involving financial and accounting fraud, insider trading, wire fraud, and other Anti-Money Laundering (AML) issues. Mr. Marquardt also provides clients pre- and post-acquisition due diligence activities, including post-acquisition integration assistance in the areas of finance and accounting, as well as forensic accounting and investigative support for construction projects and involving issues such as contractor fraud, contract evaluations, and construction cost reviews.





Joseph "Joe" Spinelli is a Senior Manager Director in J.S. Held's Global Investigations practice based in New York. He focuses on white-collar crime investigations, anti-bribery and corruption, FCPA, risk management, integrity monitoring, and expert witness testimony. He served as Integrity Monitor overseeing all construction companies following the 9/11 terrorist attacks. A former Special Agent of the FBI, Joe served as the first-ever Inspector General of New York State. He has conducted FCPA and international investigations in Hong Kong, Seoul, the Philippines, Brazil, Budapest, Argentina, and the Isle of Man. He has written numerous FCPA articles and has been featured in many interviews discussing pertinent issues germane to the Foreign Corrupt Practices Act.

THE attorney-client privilege and the attorney work product doctrine are among the oldest protections in the law concerning communications with counsel and legal preparation for a client seeking legal advice. The attorney-client privilege protects communication, not information. The attorney work product doctrine protects legal preparation for litigation, not the existence of evidence. However, these protections cease to exist when attorney-client communications turn to advice on future crimes or fraud.¹

When the government acquires documentation via a search warrant or subpoena, especially

one involving a law firm, there is a high probability that the information obtained may contain attorney-client privileged communications. To avoid the disclosure of attorney-client materials, the government assembles an internal team of experienced government attorneys and criminal investigators who have no interest in the matter to review the documentation in order to protect and preserve the attorney-client privilege. This review team is commonly referred to as a "Taint Team," or a "Filter Team," and its goal is to review the information and segregate privileged material to ensure the prosecuting team doesn't access it.

¹ See *Clark v. United States*, 289 U.S. 1, 15; 53 S.Ct. 465, 469 (1933); *In re Grand Jury*

Subpoena, No. 21-11596 (11th Cir. June. 25, 2021).

While Taint Teams are formed to protect the attorney-client privilege, there are fundamental, structural flaws embedded into the practice of using them. These flaws challenge the neutrality and independence of the review process.

This paper examines the procedural weaknesses of government Taint Teams, argues that Independent Taint Teams (“ITT”) can address those problems, and proposes ways that these independent experts can provide critical support to both defense counsel and the judiciary.

I. Examining the Structural Flaws of Government Taint Teams

One of the structural flaws of government Taint Teams is the fact that the executive branch of the government gets both the first pass at reviewing the materials and chooses which agents participate. This is contrary to constitutional protections that require issues of privilege to be settled by the judiciary. When judges are asked to evaluate the fairness of a Taint

Team, they are likely to approve the team with minimal consideration of existing structural and perceived flaws, which conflicts with the obligation to maintain and preserve privilege as a judicial oversight responsibility.²

Second, the government’s assembled team of prosecutors and agents may have a less expansive view of privilege, given that an assertion of privilege may prevent the government from obtaining evidence critical to their case. There is a risk that the Taint Team will inevitably interact with the prosecution and/or the trial team, creating the appearance of impropriety even if none exists. These interactions could result in the accidental exchange of privileged information.³

Aside from the existing structural flaws and potential prejudicial issues, there are several practical issues that exist when government Taint Teams are constructed that also weigh on the effectiveness of the process. These issues can range from:

² See *United States v. Seal (in re Search Warrant Issued June 13, 2019)*, 942 F.3d 159 (4th Cir. 2019).

³ See *United States v. Stewart*, No. 02 CR 396 (S.D.N.Y. June 11, 2002).

- a lack of available resources necessary to properly assemble and cull the available data using an acceptable eDiscovery application and the associated processes and procedures,
- inadequate supervision of the review team,
- conflicts and shifting priorities that impact the timely review of the information, and
- the limited availability of industry or subject matter experts to provide the appropriate context.

II. Using a Special Master

Judges are constantly overwhelmed by the number of trials and motions on their calendars, and asking the court, by

itself, to review thousands of documents for privilege would only add to the court's burden. Precedent exists where courts have approved the use of a Special Master to review documents and make recommendations as to the application of privilege.⁴

III. Governmental Investigative Techniques

The widespread acceptance of electronic communications using both email and multiple open and encrypted chat, text, and voice communications, as well as the use of these platforms for privileged communications, has become commonplace. As a result, both civil and criminal investigations now necessitate access to electronic as well as paper communications, resulting in necessary updates to the law regarding searching for, and gaining, legal access to communications for evidentiary purposes.⁵

⁴ See *In re Search Warrant for Law Offices Executed on March 19, 1993* 153 F.R.D. 55, 59 (S.D.N.Y. 1994); *United States v. Neill*, 952 F. Supp. 834 n.14 (D. D.C. 1997).

⁵ See *Stored Wire and Electronic Communications and Transactional Records Access*, 18 U.S.C. §§ 2701-2713, as amended in 2002; *and* FEDERAL RULES OF CRIMINAL PROCEDURE 41(e), as amended in 2009.

There are three investigative techniques that may require the use of independent investigators to preserve the attorney-client privilege and work product doctrine. Each raises its own procedural issues, and each of these are best solved by the use of an ITT overseen by the court and/or appointed as a Special Master.

First, when the government seeks a search warrant pursuant to Rule 41 of the Federal Rules of Criminal Procedure, the process is ex-parte in order to preserve the integrity of the search.⁶ The search warrant must explicitly identify the place to be searched and the items to be seized. The description of the items to be seized may be business records described in categories and in generalized terms which are as particular as the available information will allow.⁷ If the documents seized contain communications between attorney and their client which may be privileged, the agents conducting the search will not know that unless and until the documents have been reviewed.

The court may, when issuing a search warrant, add a caveat that

appoints an ITT as a Special Master to review all documents seized for attorney-client privilege, work product doctrine, and the crime fraud exception to both attorney-client and work product doctrine protections. Because the data seized would be in the possession of the seizing agency, the documents would be sealed to be viewed only by the ITT and the court. The return on the warrant would also be sealed until the review of the documents has been completed and the court has finalized a ruling on any documents determined to be privileged or any documents determined to fall within the crime fraud exception.

The second investigative method is the Grand Jury subpoena. The Grand Jury does not fall under any one branch of government, and pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure ("FRCP"), all activity within the Grand Jury's proceedings is secret. Therefore, a party wishing to claim that the Grand Jury has subpoenaed documents protected by attorney-client privilege or work product must file a motion to quash the Grand Jury subpoena, the court may

⁶ See *United States v. Abuhamra*, 389 F.3d 309, 322 n.8 (2nd Cir. 2004).

⁷ See *Andresen v. Maryland*, 427 U.S. 463, 480 n.10 (1976); *United States v. Derman*, 211 F.3d 175, 180-181 (1st Cir. 2000).

appoint an ITT as a Special Master to review the documents requested and provide the court with an inventory of documents to be provided to the Grand Jury free of privilege, but inclusive of any documents that are subject to the crime fraud exception. As long as the documents have not been returned or provided to the Grand Jury, there would be no violation of Grand Jury secrecy for the ITT. If the documents were turned over to the Grand Jury, then the court would have to appoint the ITT as a Special Master authorized as the court's agent to review the documents in question pursuant to Rule 6(e) of the FRCP.

Finally, if a discovery request is made in either a civil or criminal proceeding pursuant to Rule 16 of the FRCP or Rule 46 of the Federal Rules of Civil Procedure requesting documents that may contain attorney-client privilege or work product, the court may appoint an ITT as a Special Master to examine the requested discovery materials and assist the court in finding attorney-client, work product and any crime fraud exceptions.

IV. Crime Fraud Exception to Privilege

When documents are sought using a search warrant, Grand Jury subpoena, or rules of civil procedure, a document-by-document examination must be made in order to determine if attorney-client privilege or work product protections apply. A general assertion of privilege will not suffice.⁸ A court or a court's Special Master must review each document in question to determine if said document contains privileged communications or if that document falls under an exception to privilege. When examining each document, the judge or special master should consider the following:

- First, what communications between a lawyer and his or her client are privileged? The attorney-client privilege attaches only to communications made in confidence to an attorney for the purpose of securing

⁸ *In re Grand Jury Subpoena*, 831 F.2d 225 (11th Cir. 1987).

legal advice or assistance.⁹ The attorney-client privilege protects communications, not information. For example, information provided for the preparation of tax returns¹⁰ or the identity of a client or matters involving the receipt of fees¹¹ from a client are not privileged. Similarly, information contained in real estate closings and information regarding an attorney's trust account are also not privileged. However, the source of the funds may be privileged under certain circumstances.

- Second, the court must determine if evidence exists to show, at the

time of the communication between client and counsel, that the client was involved in or planning to be involved in a crime or fraud. If the communication was in furtherance of that crime or fraud, privilege would not apply.¹² Counsel need not know the intent of the client at the time of the communication for the crime fraud exception to attorney-client and work product privilege to be set aside.¹³

- Finally, the court must determine if a crime fraud exception communication is the "last link" in a chain of testimony or evidence that would connect to a client. Such a "last link"

⁹ See *In re Grand Jury Investigation*, 842 F.2d 1223 (11th Cir. 1987).

¹⁰ See *Couch v. United States*, 409 U.S. 322, 335, 93 S. Ct. 611, 619 (1973); and *United States v. Lawless*, 709 F.2d 485, 487-488 (7th Cir. 1983).

¹¹ See *United States v. Leventhal*, 961 F.2d 936 (11th Cir. 1992); *United States v.*

Goldberger & Dubin P.C., 935 F.2d 501 (2d Cir. 1991).

¹² See *United States v. Zolin* 491 U.S. 554 (1989).

¹³ See *In re Grand Jury*, 845 F.2d 896 (11th Cir. 1988); *In re Grand Jury Subpoena*, *supra* note 1.

communication would remain privileged.¹⁴

V. Greater Judicial Scrutiny of Government Taint Teams

As the above issues continue to be argued before the courts, the use of government Taint Teams is coming under greater scrutiny. While a recent ruling by the Eleventh Circuit affirmed the use of government Taint Teams, other courts have cast a critical eye on the procedure. In 2019, the Fourth Circuit provided additional insight into the use of Taint Teams and the existing protocols in place to protect attorney-client privilege.¹⁵ The court reaffirmed existing defense bar objections to government-resourced Taint Teams, including unintended errors, the government's tendency to adopt a restrictive review of privilege, and the perception of a conflict of interest among the general public, including jurors.

In order to address these issues, in 2020 the Department of Justice created a Special Masters Unit ("SMU"). This unit focuses on issues related to privilege and legal ethics to oversee Taint Teams when

reviewing privileged information. However, the government has had difficulty in building out the SMU team, and the underlying problems with government Taint Teams continue.

VI. Recent Eleventh Circuit Opinion

On July 31, 2020, Chief United States Magistrate Judge John O'Sullivan of the Southern District of Florida issued a search warrant for the offices of the Optima entities. The search warrant contained a review procedure that provided for a government Filter Team to review all documents containing communications between an attorney and the client. The search was executed on August 4, 2020. There were no charges pending at the time of the search, and lawyers for the parties affected by the search moved to prohibit law enforcement's review of the materials seized in the search. The Magistrate Judge then conducted a hearing and added additional Filter Team procedures that included allowing the affected parties (Optima entities) to conduct a review of all seized items and

¹⁴ See *In re Slaughter*, 694 F.2d 1258, 1260 (11th Cir. 1982).

¹⁵ *United States v. Under Seal* Issued June 30, 2019, 942 F.3d 159 (4th Cir. 2019).

provide the government review team with a privilege log.

The government Filter Team reviewed the privilege log and the underlying documents, and only those documents approved by the court could then be turned over to the prosecutors. This review process, which included the review of purported privileged materials, was appealed to the United States Court of Appeals for the Eleventh Circuit.¹⁶ The Eleventh Circuit approved the procedures set forth by Chief United States Magistrate Judge O'Sullivan and the use of a government Filter Team. However, the Eleventh Circuit ruling made clear that in ensuring the proper function of the criminal justice system, an ITT would be preferable.

VII. The Independent Taint Team Provides an Answer

One alternative that is gaining acceptance is the creation of ITTs. ITTs are made up of individuals with the requisite skills to process and review documents on behalf of the judiciary to ensure that attorney-client privilege is protected.

ITTs provide additional protections, including:

- Addressing leaks of confidential information,
- Reinforcing the independence and impartiality of the privileged document review process,
- Offering the latest technology and eDiscovery review platforms to ensure the completeness and accuracy of the review,
- Avoiding the appointment of a Special Master or additional proceedings to attempt to negotiate or monitor the review process in real time,
- Providing a vehicle (web-based eDiscovery platform) to permit secondary review processes (as required), and
- The capability of reviewing other

¹⁶ See *In re Sealed Search Warrant and Application for a Warrant by Telephone or*

Other Reliable Electronic Means, 11 F.4th 1235 (11th Cir. 2021).

documentation as
directed by the court.

ITTs have a financial cost greater than a government-resourced Taint Team, but these costs can be covered by the government agency responsible for the information seizure or as directed by a court. For example, if the case involves defendants already under arrest or indictment, the U.S. Attorney's Office would normally pay for the costs associated with a government Taint Team. If there is no arrest or indictment, the seizing agency, such as the FBI, DEA, or IRS, would be responsible.

such as a prosecutor's office. The use of an ITT can satisfy defense bar demands for independence, the prosecution's need for experience and expertise, and the court's obligation for impartiality and efficiency.

VIII. Conclusion

Despite judicial criticism, Taint Teams will continue to be a part of the prosecution's toolbox. However, courts have made it clear that federal prosecutors cannot disregard attorney-client privilege when a Taint Team reviews seized material. In doing so, courts have noted the significant constitutional issues at stake when a government Taint Team oversteps its boundaries in pursuit of evidence. An ITT enables a court to avoid improperly providing judicial functions to the executive branch