

The Department of Justice introduces a new privilege team

May 2020

Introduction

Recently, the Department of Justice's (DOJ) Criminal Division Fraud Section took action that may provide defendants with opportunities to preserve their legal privileges during government investigations. In late 2018, the Fraud Section began posting job opportunities for a privilege team dedicated to assisting prosecutors in resolving legal privilege matters. The formation of a designated team devoted to privilege determinations represents a shift from past practice, by which prosecuting attorneys and agents not involved in an underlying investigation were called in to review materials seized during the investigation for privilege before handing them off to the prosecuting attorneys. This move may be a response by the DOJ to recent judicial opinions and publicity criticizing the ability of these rotating privilege teams, often known as "taint teams," to adequately protect legal privilege. It remains to be seen, however, whether the development of a dedicated privilege team will markedly improve the ability of investigation subjects to protect their privileged material.

The DOJ's historical use of taint teams

The DOJ's Justice Manual, previously known as the U.S. Attorneys' Manual, provides for the creation of ad hoc privilege teams, otherwise known as "taint teams," to review material seized from attorneys' offices for potentially privileged information:

[T]o 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. 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.¹

The Manual also provides that the policy regarding these privilege teams "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." In practice, the DOJ has used such taint teams to conduct privilege reviews of materials seized from both law firms and corporate offices.

The taint teams do not consist of attorneys solely assigned to those teams. Instead, when the DOJ obtains documents by seizure, whether through an e-mail provider or during a raid, prosecutors not involved in the investigation are called upon to join the taint team for the investigation, isolate

¹ Justice Manual § 9-13.420, available at <https://www.justice.gov/jm/jm-9-13000-obtaining-evidence>.

potentially privileged material, and send the remainder of the material to the prosecuting attorneys. The members of the taint teams have historically been prosecutors pulled from their own cases to make privilege determinations on other cases involving different prosecuting attorneys.

Opposition to the use of taint teams

Since the inception of taint teams, defense attorneys and courts have taken issue with use of teams of government prosecutors to evaluate a defendant's potentially privileged documents in lieu of allowing defendants to assert privilege over their own materials. In 2006, the Sixth Circuit summarized objections to the use of taint teams:

[T]aint 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.²

Even where taint teams act carefully and ethically to shield privileged material from the eyes of prosecutors, they are not independent. Taint teams are government prosecutors and yet are evaluating the most sensitive and highly protected documents in a defendant's possession. These teams are ostensibly more likely than defense attorneys to take a narrow view of privilege. In the course of a lengthy investigation, prosecutors and defendants frequently disagree about the scope of legal privileges. In such disputes, courts regularly find that the government's interpretation is too narrow, but without the benefit of defense counsel's review, a defendant may never even know that a taint team has incorrectly released privileged documents to the prosecuting team.

Furthermore, analyzing historical business records for privilege often requires a careful, nuanced analysis with knowledge of the organization. Without certain context and background knowledge about the company's operations, certain documents may not appear to be privileged on their face but may nevertheless contain privileged information. This privilege analysis can be challenging for counsel with a deep knowledge of the company, let alone for a government prosecutor conducting an investigation with minimal background information about the defendant company.

In recent years, high-profile cases and significant errors have led to increased scrutiny of the DOJ's use of taint teams, but even in the most egregious cases, courts have done little beyond reprimanding and criticizing the government. In November 2018, the Southern District of Florida found that the government's "taint protocol" used to seize materials during the investigation of Phillip Esformes had severe deficiencies.³ Search agents placed what they believed to be tainted material into a box to be reviewed by taint team attorneys, but no taint team attorney was actually present during the search. Hundreds of documents marked "privileged and confidential" were provided to the prosecution team. The Court declined to dismiss the case as a result but reprimanded the prosecutors: "Although the prosecution team operated in good faith, their 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."⁴

² *In re Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).

³ *United States v. Esformes*, No. 16-20549-CR, 2018 WL 5919517 (S.D. Fla. Nov. 13, 2018).

⁴ *Id.* at *34.

Similarly, on June 20, 2019, the District of Maryland decided a case in which a prosecuting attorney uploaded to the prosecution team’s Relativity platform a Google drive of unfiltered documents that the prosecution team failed to send to the taint team.⁵ The prosecution team inferred that the drive contained no privileged materials and failed to read an e-mail contradicting that inference. The Court again declined to dismiss the case but stated that the prosecution team committed “a significant error in judgment not justified by a perceived need to meet discovery deadlines.”⁶ “The Court trusts that the Government will take all necessary steps to avoid similar errors in the future and will hold the Government fully accountable for any additional lapses.”⁷

Even more recently, the Fourth Circuit addressed a case in which prosecutors seized client-related materials during a criminal investigation of a law firm’s partner and client.⁸ The law firm sought a temporary restraining order and preliminary injunction enjoining inspection of its privileged attorney-client materials by a taint team that had received *ex parte* approval from a magistrate judge. The Fourth Circuit concluded that the use of a taint team was improper for several reasons, including that it “inappropriately assigned judicial functions to the executive branch”⁹ and “left the government’s fox in charge of guarding the Law Firm’s henhouse.”¹⁰

Perhaps most famously, after the government raided the law offices of President Trump’s attorney, Michael Cohen, on April 9, 2018, prosecutors and Cohen disputed whether a taint team could review for privilege the materials seized. The day after the raid, President Trump tweeted, “Attorney-client privilege is dead!” Cohen, arguing that the raid likely encompassed privileged material, requested that the Court appoint an independent special master to conduct a privilege review. Prosecutors originally advocated for use of a taint team, but later reversed course and agreed to appointment of an independent special master. The raid, as well as President Trump’s tweet, led to increased media and public discussion regarding the limitations of taint teams.

The DOJ begins hiring for designated privilege team

Possibly in response to the recent judicial opinions and high-profile scrutiny surrounding taint teams, in late 2018, the Criminal Division’s Fraud Section Strategy, Policy, and Training (SPT) Unit began hiring for a new privileged team dedicated to identifying privileged materials and overseeing negotiations with defense counsel regarding privilege designations.¹¹ By May 2020, job postings mentioning the privilege team shifted from the SPT to the newly created Special Matters Unit.¹² It appears from these postings the Fraud Section has created a unit that will be solely responsible for privilege determinations, eliminating the need for ad hoc taint teams.

Nevertheless, it remains to be seen whether the creation of a new privilege team will resolve the issues associated with taint teams. On the one hand, a team dedicated to performing privilege reviews may gain sufficient experience to avoid more routine errors caused by rotating attorneys in and out of taint teams. It may also make for more efficient privilege reviews and add a greater appearance of independence to the role. Additionally, maintaining the same attorneys in the role will likely imbue the

⁵ *United States v. Elbaz*, 396 F. Supp. 3d 583 (D. Md. 2019).

⁶ *Id.* at 596.

⁷ *Id.*

⁸ *In re Search Warrant Issued June 13, 2019*, 942 F. 3d 159 (4th Cir. 2019).

⁹ *Id.* at 164.

¹⁰ *Id.* at 178.

¹¹ <https://www.justice.gov/legal-careers/job/trial-attorney-privilege-review>.

¹² <https://www.justice.gov/legal-careers/job/supervisory-trial-attorney-chief-special-matters-unit>.

decision-making process with greater consistency and thereby insulate it from related challenges by defense attorneys.

That said, a designated privilege team will still consist of prosecuting attorneys with the same incentives as those that made up the taint teams. The process at its most fundamental will not change – prosecuting attorneys for the government will review and make privilege determinations about documents that investigation subjects argue they are entitled to review themselves, and those same investigation subjects may never know that privileged materials were incorrectly determined to be non-privileged by these government attorneys. In other words, the greater appearance of independence does not, in fact, mean that this privilege team will be any more independent than an ad hoc taint team. As the Fourth and Sixth Circuits have recognized, filter teams consisting of prosecutors “present inevitable, and reasonably foreseeable, risks to privilege.”¹³ As a result, it is unlikely that the new privilege team will be immune from criticism regarding its independence and ability to adequately protect privilege.

Implications for defense strategy

A dedicated privilege team may provide incremental benefits to defendants. There may be opportunities for defense counsel to influence the development of the standards under which the privilege team will operate. For example, the privilege team may adjust its interpretation of privilege to incorporate arguments and issues raised by defense counsel most frequently. Additionally, greater consistency will allow defense attorneys to anticipate the types of materials that the privilege team will deem to be not privileged. The privilege team may also be more amenable to negotiating with defense counsel because they are not being pulled away from their own cases to make privilege determinations.

However, because the privilege team will still be driven by the same incentives as taint teams, defense counsel should continue to make every effort to protect potentially privileged material seized by the government. Although courts have held that documents seized by the government have been involuntarily disclosed for purposes of waiver, investigation subjects may still waive privilege if they do not act quickly to protect their privileged materials. When privileged material has been involuntarily disclosed, three main factors determine whether protection has been waived: “(1) the specificity with which the defendant identifies the material; (2) the expediency by which the defendant informs the government that it seized protected material; and (3) the expediency by which the defendant seeks judicial action to enforce the protection.”¹⁴

As a result, investigation subjects who believe privileged materials have been seized should object at the time of the seizure and indicate to prosecutors which materials are believed to be privileged. Subjects should also request to review that material before or while it is reviewed by the privilege team. Realistically, however, investigation subjects are often trying to balance efforts to cooperate with government prosecutors to obtain the benefits of such cooperation against efforts to preserve their legal privileges. The early stages of an investigation can set the tone for what may be a years-long process, and prosecutors may perceive the subject’s strategy with respect to privilege to be indicative of its approach to cooperation with the government’s investigation. Defendants therefore must strike a difficult balance between vigorously shielding their privileged materials from disclosure against cooperating with the government’s investigation.

¹³ *In re Grand Jury Subpoenas 04-124-03 and 04-124-05*, 454 F.3d at 153; *In re Search Warrant Issued June 13, 2019*, 942 F. 3d at 177.

¹⁴ *United States v. Ary*, 518 F.3d 775, 783 (10th Cir. 2008).

When necessary, subjects have the option to move for a temporary restraining order to prohibit the privilege team from reviewing the potentially privileged documents and a motion for appointment of a special master to ensure the privilege determination is truly independent.¹⁵ Another potential remedy may be to move for return of the privileged materials under Federal Rule of Criminal Procedure 41(g).¹⁶ In the event that an individual or company is charged, they will have the opportunity to review discovery under Rule 16 and may identify more privileged documents seized by the government, at which time they should take similar measures to protect that material. But all of these measures may be perceived by prosecutors as being uncooperative and may therefore damage the defense's posture when seeking to resolve the matter.

For subjects seeking to preserve their legal privileges while demonstrating extensive cooperation, subjects may seek to reach an agreement with the government pursuant to Federal Rule of Evidence 502(d)¹⁷ to allow defense counsel to review materials for privilege in an expedited manner. Under such an agreement, the parties can stipulate to processes for an expedited privilege review while agreeing that if, as a result of that expedited process, any privileged materials are inadvertently disclosed to the government, such a disclosure does not constitute a waiver of the attorney-client privilege or the work product doctrine, even when privileged materials are not specifically identified by the subject as such.

While it remains possible that the new privilege team will in practice act as a reasonable gatekeeper of privilege and engage in good-faith discussions and negotiations with defense counsel regarding legal privilege, it is more probable that these government attorneys will continue the practices of ad hoc taint teams. Defendants should remain vigilant in protecting their privilege, moving rapidly to assert privilege over seized materials and assuming that the privilege team is likely to take a narrow view of privilege, similar to that of the taint teams.

¹⁵ See *United States v. Gallego*, No. CR1801537001TUCRMBPV, 2018 WL 4257967, at *3 (D. Ariz. Sept. 6, 2018) (“In light of the fact that the materials at issue were seized from a criminal defense attorney’s office, and given the importance of protecting both the interests and appearance of fairness and justice, the Court finds that exceptional circumstances warrant the appointment of a Special Master to review the items seized from Defendant’s law office for privilege and responsiveness to the search warrant.”).

¹⁶ “A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property’s return. The motion must be filed in the district where the property was seized. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.”

¹⁷ “A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court.”

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