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THE FOX GUARDING THE HENHOUSE: GOVERNMENT REVIEW OF ATTORNEY-CLIENT PRIVILEGED MATERIAL IN WHITE-COLLAR CASES

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ABSTRACT

Government review of privileged material seized during law-office searches or following the subpoena of an attorney to a grand jury raises genuine concerns that implicate attorney-client privilege, work-product doctrine, and ethical mandates of confidentiality. Currently, the review process may be through a Department of Justice taint or filter team ("taint team"), a court-appointed special master, or a hybrid of these two approaches. When applied to high-profile cases such as Michael Avenatti, Rudy Giuliani, and Michael Cohen, one sees an inconsistent approach that is largely controlled by the government. Problems arise not only from this lack of uniformity, but also from certain inherent deficiencies in using a taint team to review privileged material.

This Article offers a reconfiguration of the government's review process, starting with the government's initial decision to opt for a law-office search as opposed to grand jury subpoenas duces tecum*. This Article calls for an expansion of ethical mandates to increase the neutrality of this review process, as well as instituting procedures to ensure an independent review of privileged documents that does not compromise a defendant's rights to due process and effective assistance of counsel. Although fortifying the judicial role in reviewing privileged materials comes with certain costs, the aggregate benefits provide a more balanced judicial process.*

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INTRODUCTION

Michael Avenatti,[1] Rudy Giuliani,[2] Michael Cohen,[3] and many John and Jane Does[4] have all faced a government search of their law offices. Each of these attorneys have had to squarely confront a government search of what might possibly be client privileged materials. These searches are not a new phenomenon, as the government used this procedure repeatedly against lawyers handling drug cases in the 1980s and 1990s.[5] What is relatively new is the use of law-office searches in white-collar and politicized cases.[6]

In each of these instances, the government deliberately bypassed the use of a subpoena *duces tecum* to request the delivery of materials to a secret grand jury and instead opted for law-office searches conducted by government agents. In some instances, the route of a search, as opposed to a subpoena, is for justifiable reasons, such as fear of the destruction of documents. But the need to preserve the government's case by use of a search warrant raises potential attorney-client privilege issues when the recipient of the warrant is an attorney. Attorney-client

[1] Meghann M. Cuniff, *NY Judge in Avenatti Case Endorses DOJ Taint Teams Despite Mistrial in California*, LAW.COM (Sept. 10, 2021, 10:26 AM), https://www.law.com/therecorder/2021/09/10/ny-judge-in-avenatti-case-endorses-doj-taint-teams-despite-mistrial-in-california/ [https://perma.cc/M3YK-U72W].

[2] William K. Rashbaum, Ben Protess, Maggie Haberman & Kenneth P. Vogel, *F.B.I. Searches Giuliani's Home and Office, Seizing Phones and Computers*, N.Y. TIMES (May 4, 2021), https://www.nytimes.com/2021/04/28/nyregion/rudy-giuliani-trump-ukraine-warrant.html.

[3] Matt Apuzzo, *F.B.I. Raids Office of Trump's Longtime Lawyer Michael Cohen; Trump Calls It 'Disgraceful,'* N.Y. TIMES (Apr. 9, 2018), https://www.nytimes.com/2018/04/09/us/politics/fbi-raids-office-of-trumps-longtime-lawyer-michael-cohen.html.

[4] Typically, the cases are titled by the search warrant and date as opposed to the law firm name. *See, e.g.*, *In re* Impounded Case (L. Firm), 840 F.2d 196, 197-99 (3d Cir. 1988) (discussing law-office search and seizure); *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 164-67 (4th Cir. 2019); *In re* Search Warrant for L. Offs. Executed on March 19, 1992, 153 F.R.D. 55, 56-57 (S.D.N.Y. 1994). *See generally* SARA KROPF, PROTECTING THE PRIVILEGE WHEN THE GOVERNMENT EXECUTES A SEARCH WARRANT (2014) (encouraging attorneys to challenge taint teams, and noting what arguments they may raise); Eric D. McArthur, Comment, *The Search and Seizure of Privileged Attorney-Client Communications*, 72 U. CHI. L. REV. 729 (2005) (discussing issues of attorney-client privilege in law-office searches); John E. Davis, Note, *Law Office Searches: The Assault on Confidentiality and the Adversary System*, 33 AM. CRIM. L. REV. 1251 (1996) (same).

[5] *See* Does I Through IV v. United States (*In re* Grand Jury Subpoenas Dated December 10, 1987), 926 F.2d 847, 851, 855-58 (9th Cir. 1991); DeMassa v. Nunez, 747 F.2d 1283, 1285 (9th Cir. 1984), *on reh'g*, 770 F.2d 1505 (9th Cir. 1985); United States v. Abbell, 963 F. Supp. 1178, 1182-84 (S.D. Fla. 1997) (discussing attorney indicted for drug and other related violations following search of law office); United States v. Hunter, 13 F. Supp. 2d 574, 578-79 (D. Vt. 1998).

[6] This Article is not stating or implying that political motivations caused or instigated any of these law-office searches. There are also recent white-collar cases involving law-office searches with no political connection. *See, e.g.*, United States v. Adams, No. 0:17-cr-00064, 2018 WL 6991106, at *4 (D. Minn. Sept. 17, 2018) (discussing use of law-office search in mail, wire, and tax fraud case).

privilege concerns are not limited to searches, however, but can also be implicated following a government subpoena *duces tecum* of privileged materials. This makes what happens following a government search or subpoena of privileged material all the more important, but, in many of these cases, different and inconsistent approaches are used. It is this disparity that is at the heart of this Article.

In some search cases, the attorneys have been able to go to court and regain control over the privileged material, or at least who will review the material. In other cases, the Department of Justice ("DOJ") has proceeded with using a taint (or filter) team to review the material. These teams are typically comprised of government personnel who are not directly investigating the underlying case involving the searched items.[7] On the other hand, courts have imposed, or granted the government's request, that a special master be appointed to review the potentially privileged material.[8] This alternative method used to scrutinize the attorney's files may seem inconsequential from the government's perspective as the result is the same: the government's focus is on obtaining evidence for their case.

From the eyes of the attorney, however, and the current clients of that attorney who are subjected to the government's search and possible review of privileged material, there are obvious concerns. And the balance of power between the defense, the government, and the judicial process is tested as to who will control the review process of searched or subpoenaed materials. In even more problematic cases, a search occurs, and it is not until discovery, or thereafter, that it comes to light there has been a breach of privileged material. For example, imagine the shock when a codefendant in a case receives discovery that includes confidential information obtained during a law-office search of her codefendant's attorney.

At the heart of this process is not only the continual tension between the defense, the prosecution, and the judiciary, but also the fact that this tension plays out in one of the oldest and most profound privileges of our legal system—the attorney-client privilege.[9] Aspects of the decision-making process as to which procedure is used when dealing with potentially privileged materials include not only who conducts the search, but also who reviews the documents retrieved from the search, including which specific individuals will fill these roles.[10] It also needs to be determined when the review of the materials will occur: is it at the time of the search, following the search in a specified review process, or in a later appellate matter? Likewise, there is a question of who can

[7] *See* U.S. Dep't of Just., Just. Manual § 9-13.4209(F) (2021) [hereinafter Just. Manual], https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.420 [https://perma.cc/C4GQ-SMSQ]. Previously known as the United States Attorneys' Manual, the *Justice Manual* was renamed in 2018.

[8] *See infra* Section II.B.

[9] *See* FED. R. EVID. 502(g)(1) ("'Attorney-client privilege' means the protection that applicable law provides for confidential attorney-client communications . . . .").

[10] *See infra* Part II.

contest the review process of the materials because the attorney, the client, or a third party[11] may be affected by the release of information.

In his seminal article and accompanying survey of prosecution practices, William J. Genego suggested "measures that should be taken to maintain a balance—between preserving legitimate government investigative and adversary tools while providing defense attorneys with sufficient protection so that they can represent their clients vigorously, free from fear of government retaliation."[12] The government review of privileged materials through the use of taint teams as discussed below provides a unique context for considering how best to achieve the appropriate government and defense balance in the criminal justice process.

This Article, however, is limited to instances of existing attorney-client privileged materials being retrieved from a search or subpoena. Without an initial showing that materials from the search are privileged materials, there is no need for either a taint team or special master. Only after marginal claims of attorney-client privilege are resolved, and the privilege is found to exist, can appointment of either a taint team or special master happen.[13]

In a similar regard, the concerns raised in this Article are limited to the attorney-client relationship. While taint teams are employed in various scenarios concerning claims of privilege, the harm described herein is limited to the government's intrusion into attorney-client privilege and is arguably inapplicable to other claims of privilege, such as executive privilege.[14] This

[11] *See* Derek Regensburger, *Bytes, BALCO, and Barry Bonds: An Exploration of the Law Concerning the Search and Seizure of Computer Files and an Analysis of the Ninth Circuit's Decision in* United States v. Comprehensive Drug Testing, Inc., 97 J. CRIM. L. & CRIMINOLOGY 1151, 1205 (2007) (discussing rights and role of third parties who may have interest in items subject to government search).

[12] William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 788 (1988) (including surveys of criminal defense attorneys considering prosecution practices such as use of law-office searches and subpoenas to attorneys in 1970s and 1980s).

[13] Thus, determinations as to whether the materials were subject to attorney-client privilege or, instead, dual-purpose communications (i.e., communications containing both legal and nonlegal analysis) require resolution prior to determining whether there is any need for either a taint team or special master. *See In re* Grand Jury, 23 F.4th 1088, 1090-91 (9th Cir. 2021).

[14] The recent appointment of a special master to review materials seized from former President Donald J. Trump's Mar-a-Lago residence has placed the tension between taint teams and special masters into the public spotlight. *See* Trump v. United States, No. 22-81294-CIV, 2022 WL 4015755, at *9 (S.D. Fla. Sept. 5, 2022), *vacated and remanded*, 54 F.4th 689 (11th Cir. 2022). The executive privilege in that case, however, does not present the same dangers of government review propounded by this Article. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 706 (1974) ("[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad,

Article accordingly leaves the propriety of a taint team in other matters of privilege for another day.

Part I of this Article explores three basic axioms that require consideration when reviewing materials acquired from a law-office search or government subpoena of privileged material. The attorney-client privilege, historically considered a bedrock principle of our judicial system, is at the top of the list.[15] There are also implications to the work-product doctrine in a law-office search.[16] In addition to the attorney-client privilege and work-product doctrine, one also needs to be cognizant of the ethics rules that demand a higher standard than those two legal principles.[17] Confidentiality of client information under ethical standards provides greater breadth than the legal principles. Each of these three considerations that work to preclude access to client material are not free from exemptions that place some materials more easily in the hands of the government, one of which is the attorney-client privilege's crime-fraud exception.[18] Other examples place more strain on the tension between attorney-client privileged material and those items allowed to be seen by the government, including evidence that comes from a client's participation as a co-conspirator. Specific to this example, if the attorney subjected to a law-office search is part of a joint-defense agreement, a common practice in white-collar cases, determining what is protected by the attorney-client privilege can be a complicated issue.[19]

Part II of this Article looks initially at law-office searches and then specifically at current government practice regarding taint teams, the method routinely used by the government to review material obtained following a law-office search.[20] The government outlines this process in its *Justice Manual*, a document that provides internal guidance to employees of the DOJ.[21] Specifically, the *Justice Manual* provides perspectives on how searches should be conducted, the makeup of the teams reviewing the material, the existing remedies for privileged materials, and how issues of attorney-client privilege should be resolved from the government's perspective.[22] The focus in this Part of the Article is on the government's practice following law-office searches,

undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.").

[15] *See infra* Section I.A.

[16] *See infra* Section I.B.

[17] *See infra* Section I.C.

[18] *See infra* Section I.A.

[19] *See infra* Section I.A.

[20] *See infra* Section II.A.

[21] Just. Manual, *supra* note 7, § 9-13.420(D)-(F).

[22] *See infra* Section II.B.

which are conducted without consideration of the perspective of the attorney whose office is being searched.[23]

Part III examines approaches taken by courts that have reviewed government searches and made initial determinations of how to proceed when the government decided not to use a subpoena *duces tecum* and instead used a surprise law-office search.[24] Also noted in Part III are other contexts in which the government may need to review privileged materials, including when a subpoena requests attorney-client privileged material. Considered here are the different positions courts have taken with respect to the use of a special master,[25] a taint team,[26] or a hybrid approach.[27] A hybrid approach uses a combination of government and judicial review.[28] Also highlighted here are the problems that have arisen with the government's preferred use of taint teams for the internal review of materials by a neutral constituency within the DOJ.[29]

This Article concludes by stressing the importance of the Sixth Amendment right to counsel, the need for impartial justice, and the need for oversight in a highly politicized world.[30] This can best be accomplished by placing the judiciary at the helm of this decision-making process and providing an impartial review that is not government controlled. This Article suggests that heightened ethics rules imposed by judges, similar to what currently exists for attorneys issuing subpoenas for client materials, would minimize the use of searches against attorneys.[31] Further, this Article advocates for a neutral-party review of materials retrieved following a law-office search or government subpoena of attorney-client materials, in order to ascertain which items are attorney-client privileged materials, and which documents are beyond that legal construct.[32] Stressed here is the need for courts to provide a process that is not overseen by or comprised of DOJ participants, or, put another way, the courts must not leave the fox guarding the henhouse.[33]

I. ATTORNEY-CLIENT PRIVILEGE AND ACCOMPANYING DOCTRINES

This Part examines three core concepts that define the relationship between an attorney and his or her client: the attorney-client privilege, work-product

[23] *See infra* Section II.B.

[24] *See infra* Part III.

[25] *See infra* Section III.A.1.

[26] *See infra* Section III.A.2.

[27] *See infra* Section III.A.3.

[28] *See infra* Section III.A.3.

[29] *See infra* Section III.B.

[30] *See infra* Part IV.

[31] *See infra* Sections IV.A, IV.B.

[32] *See infra* Section IV.C.

[33] *See In re* Grand Jury Subpoenas, 454 F.3d 511, 523 (6th Cir. 2006) ("[A]n obvious flaw in the taint team procedure: the government's fox is left in charge of the appellants' henhouse . . . .").

doctrine, and ethics mandates on client confidentiality. Each of these raise the most pressing issue that develops when the government searches a law office: how to protect the attorney-client relationship from government intrusion. Although courts have long held that the government may search a law office, it is important to accomplish these searches with "special care" to assure the protection of privileged client materials.[34] This same care is needed in reviewing attorney-client materials subpoenaed for a grand jury.

A. *Attorney-Client Privilege*

There are numerous books, articles, and other scholarly works that explore the many facets of the attorney-client privilege. Issues often arise concerning when the privilege is created, who has the privilege, when is it considered waived, the differences between express and inadvertent waivers, when it can be enlarged through a joint defense, and how the privilege operates in unique settings, such as with corporations.[35] It is important to note that there can be differences depending upon whether one is looking at the attorney-client privilege from the view of the federal system or a specific state.[36] In this regard, a conflict of law raises choice-of-law concerns and federalism issues in resolving the scope of attorney-client privilege.

At the core of the American judicial process is the attorney-client privilege, considered one of the "oldest rule[s] of privilege known to the common law."[37] As noted in *Upjohn Co. v. United States*,[38] the attorney-client privilege "encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice."[39] The attorney-client privilege allows lawyers to provide "sound legal advice" to their clients, something dependent upon the lawyer having full information.[40] As noted in *Fisher v. United States*,[41]

> As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself [or herself] in the absence of disclosure, the client would be

[34] *See* United States v. Mittelman, 999 F.2d 440, 445 (9th Cir. 1993) (requiring "special care" to be exercised when searching law office, but not adding heightened standard for judicial review of that search).

[35] *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. §§ 68-86 (AM. L. INST. 2000) (discussing general rules of attorney-client privilege and exceptions to rules).

[36] *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.3.1, at 250-51 (1986).

[37] *See* United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989); *see also* ELLEN S. PODGOR, PETER J. HENNING, JEROLD H. ISRAEL & NANCY J. KING, WHITE COLLAR CRIME 691 (2d ed. 2018) ("The roots of the privilege can be traced to Roman law, and under the English common law it developed into a client-oriented protection designed to keep the client's secrets from being revealed through the lawyer.").

[38] 449 U.S. 383 (1981).

[39] *Id.* at 389.

[40] *Id.*

[41] 425 U.S. 391 (1976).

> reluctant to confide in his [or her] lawyer and it would be difficult to obtain fully informed legal advice.[42]

The breadth of the attorney-client privilege is highlighted by the fact that it exists pre-representation[43] and both during the life and after the death of one's client.[44]

The attorney-client privilege, with its English history and Roman origins,[45] has long been distinguished from other evidentiary rules in that its purpose is not to assist a court's "fact-finding process or to safeguard its integrity," but rather to shield information or "shut out the light."[46] Yet while keeping information from the government or public is an important function, the attorney-client privilege exists for a higher purpose—the utilitarian goal of providing a fuller and fairer process.[47] Although questioned by some scholars, its basic tenets continually withstand close scrutiny.[48]

Its protection, however, is not without exception.[49] Although the oldest rule of privilege in the common law, as noted by the Second Circuit, it is "[n]arrowly

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[42] *Id.* at 403.

[43] Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978) (noting attorney-client privilege exists when client believes he or she is consulting his or her attorney in a professional capacity).

[44] Swidler & Berlin v. United States, 524 U.S. 399, 407 (1998).

[45] *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 68 (AM. L. INST. 2000) (collecting works on history of attorney-client privilege); *see also* PODGOR ET AL., *supra* note 37, at 691.

[46] ROBERT P. MOSTELLER, KENNETH S. BROUN, GEORGE E. DIX, EDWARD J. IMWINKELRIED, DAVID H. KAYE & ELEANOR SWIFT, MCCORMICK ON EVIDENCE § 72, at 195 (8th ed. 2020); *see also Fisher*, 425 U.S. at 403 ("[S]ince the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose.").

[47] *See* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").

[48] *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 68 (compiling works examining necessity for attorney-client privilege).

[49] *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his [or her] subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id.; *see also* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 68 (stating attorney-client privilege is applicable to "(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client").

defined, riddled with exceptions, and subject to continuing criticism."[50] Client identity and fee information have been exempted in many instances from the privilege, allowing this information to be disclosed.[51] "The attorney-client privilege does not apply to communications between a lawyer and a third party who is not a client, except if the third party is an agent of the attorney or client."[52] Communications made in the presence of third parties typically do not get shielded,[53] and waivers of the privilege can likewise eviscerate its application.[54]

In some instances, the privilege may be expanded, such as when parties enter into a joint-defense agreement for the purpose of shielding the privilege among codefendants, and these parties may hire mutual experts or proceed jointly in the presentation of their defense.[55] It has also been extended beyond the conversations between the attorney and her client to cover reports, expert opinions, and witness statements, which can be enormously helpful in a complicated and expensive white-collar case.[56]

One of the most notable exceptions here is that one cannot shield communications that are part of a crime or fraud. The so-called crime-fraud exception does not cover completed acts for which the client then seeks legal advice[57] or communication only indirectly tied to the illegality.[58] To meet the crime-fraud exception, it is necessary that the communications "containing the privileged materials bear a close relationship to the client's existing or future scheme to commit a crime or fraud."[59] Courts have used a host of different tests to determine whether the quantum of proof is sufficient to meet the crime-fraud exception to the attorney-client privilege.[60] Oftentimes the determination comes following an *in camera* review of the materials by a judge.[61]

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[50] United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989).

[51] PODGOR ET AL., *supra* note 37, at 694-95; *see also* Ellen S. Podgor, *Form 8300: The Demise of Law as a Profession*, 5 GEO. J. LEGAL ETHICS 485, 517 (1992) (discussing how fee information and client identity are not protected as part of attorney-client privilege).

[52] PODGOR ET AL., *supra* note 37, at 696.

[53] *Id.* at 697.

[54] *Id.* at 710-16.

[55] *Id.* at 705.

[56] *See, e.g.*, United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) (extending attorney-client privilege to communications from accountant employed by law firm); *see also* PODGOR ET AL., *supra* note 37, at 697 ("Since *Kovel*, lower courts have found the privilege applicable to communications by clients with paralegals, psychiatrists, investigators, public relations consultants, and patent agents, so long as there was a close nexus to aiding the attorney in rendering legal advice." (footnotes omitted)).

[57] *In re* Fed. Grand Jury Proc. 89-10 (MIA), 938 F.2d 1578, 1581 (11th Cir. 1991).

[58] *See In re* Sealed Case, 107 F.3d 46, 51-52 (D.C. Cir. 1997) (holding memoranda written after alleged offense, and not directly tied to offense, were not discoverable).

[59] *See In re* Grand Jury Proc. #5 Empanelled on January 28, 2004, 401 F.3d 247, 251 (4th Cir. 2005).

[60] PODGOR ET AL., *supra* note 37, at 718-19.

[61] *Id.* at 719.

Equally controversial is the attorney-client privilege's applicability regarding business advice. If the advice given to a client is not legal advice, but rather business advice, the privilege may not come into play.[62] As stated by the court in *United States v. ChevronTexaco Corp.*,[63] "[b]ecause the purported privileged communications involve attorneys who apparently performed the dual role of legal and business advisor, assessing whether a particular communication was made for the purpose of securing legal advice (as opposed to business advice) becomes a difficult task."[64] To make this determination, courts look to the role of the lawyer in determining whether the legal advice was a component of the communication.[65]

Finally, while there can be distinctions between the scope of privilege between state and federal courts, to determine the scope of privilege and its applicability in the federal system, one considers the United States Constitution, federal statutes, and rules prescribed by the Supreme Court.[66] Specifically, regarding the attorney-client privilege, Federal Rule of Evidence 502 provides guidance pertaining to disclosures, the scope of the privilege, inadvertent disclosures, disclosures made in state proceedings, the controlling effect of a court order, and the controlling effect of a party agreement.[67] Equally important for the purposes here is the constitutional right to counsel, which includes effective assistance of counsel. Particularly, a government intrusion into the sphere of attorney-client privilege may violate the accused's Sixth Amendment right to counsel as well as basic due-process rights.[68] At the very least, it most definitely implicates the ability of the attorney to provide effective

[62] *See* Amy L. Weiss, *In-house Counsel Beware: Wearing the Business Hat Could Mean Losing the Privilege*, 11 GEO. J. LEGAL ETHICS 393, 398-403 (1998) (considering how to determine whether in-house counsel is acting as attorney or as business advisor); Dean R. Dietrich, *Not All Counsel from a Lawyer Is 'Legal Advice,'* WIS. LAW., Dec. 2014, at 47, 47.

[63] 241 F. Supp. 2d 1065 (N.D. Cal. 2002).

[64] *Id.* at 1069.

[65] *See* PODGOR ET AL., *supra* note 37, at 698; *see also* First Chi. Int'l v. United Exch. Co., 125 F.R.D. 55, 57 (S.D.N.Y. 1989) ("Any standard developed, therefore, must strike a balance between encouraging corporations to seek legal advice and preventing corporate attorneys from being used as shields to thwart discovery."). In some instances, courts need to ascertain whether the materials have a dual purpose. *See In re* Grand Jury, 23 F.4th 1088, 1092-94 (9th Cir. 2021) (discussing whether primary purpose test is applicable in deciding whether attorney-client privilege applied to dual-purpose communications); *see also* Brief of *Amicus Curiae* American Bar Association in Support of Petitioner at 14-15, *In re* Grand Jury, 143 S. Ct. 543 (2023) (No. 21-1397) (calling for Court to reject primary purpose analysis).

[66] MOSTELLER ET AL., *supra* note 46, § 76.1, at 205.

[67] FED. R. EVID. 502.

[68] In *In re CCA Recordings 2255 Litigation v. United States*, 337 F.R.D. 310 (D. Kan. 2020), federal prisoners challenged government intrusions upon attorney-client privileged communications by the government's collection of audio and video recordings of telephone conversations and meetings occurring at a prison facility. *Id.* 320-21.

representation.[69] Additional concerns have also been raised as to whether the search and seizure of attorney-client privileged material can implicate Fourth Amendment protections.[70]

B. *Work-Product Doctrine*

A law-office search or government subpoena of an attorney's materials can also implicate the work-product doctrine. Claims of violations of the attorney-client privilege and the work-product doctrine are often coupled in arguments to the court. The work-product doctrine is particularly important here in that the government is both the source of the search and the opposing party in criminal matters. As noted in *United States v. AT&T*,[71] "[t]he purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation."[72] Thus, where the attorney-client privilege is focused on full and frank communication between the lawyer and client, the work-product doctrine concerns the lawyer's privacy in properly representing their client. Being related to the litigation process, it is predominantly a civil doctrine, but it also has a clear role in criminal matters. As stated in *United States v. Nobles*,[73] "[a]lthough the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital."[74] Like the attorney-client privilege, there can also be issues of waiver.[75]

Unlike the attorney-client privilege, the work-product doctrine does not date back to English and Roman law, but rather is an outgrowth of the passage of the Federal Rules of Civil Procedure ("FRCP") that were adopted in 1937.[76] In its initial iteration, the FRCP failed to provide discovery limits for work prepared in anticipation of litigation.[77] As a result, on occasion, opposing counsel attempted to obtain this discoverable material.[78]

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[69] *See* Note, *Government Intrusions into the Defense Camp: Undermining the Right to Counsel*, 97 HARV. L. REV. 1143, 1147 (1984).

[70] *See, e.g.*, McArthur, *supra* note 4, 747-49 (discussing need for minimizing government actions during searches).

[71] 642 F.2d 1285 (D.C. Cir. 1980).

[72] *Id.* at 1299.

[73] 422 U.S. 225 (1975).

[74] *Id.* at 238; *see also* PODGOR ET AL., *supra* note 37, at 730 ("The principles in *Hickman v. Taylor* are equally applicable to a criminal case, from the investigation of a potential violation through the conclusion of the prosecution.").

[75] PODGOR ET AL., *supra* note 37, at 735 (assessing implications of waiver for work-product doctrine).

[76] *See* FED. R. CIV. P. 26(b)(3) advisory committee's note to 1970 amendment.

[77] *Id.*

[78] *See* Tague v. Del., L. & W.R. Co., 5 F.R.D. 337, 337 (E.D.N.Y. 1946).

The Supreme Court put a stop to this practice, however, in *Hickman v. Taylor*.[79] The Court limited the FRCP noting that "the protective cloak of [the attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation."[80] Thus, although the FRCP did not carve out an exception for work-product related material, the Court recognized the importance of this discovery limitation. Eventually, this became more than the Court's interpretation of the Rule when Rule 26(b)(3) was enacted, which provides that "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."[81] Although factual information may be disclosed, "opinion" materials may not be subject to discovery for the opposing party.[82] Thus, protected from disclosure are "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."[83]

Key to ascertaining if disclosure is necessary is whether the document or information was prepared in anticipation of litigation.[84] A "because of" test guides this determination.[85] The many other accompanying rules and issues that arise in work-product challenges, albeit important, are tangential to this Article. The one exception to this is when, in reviewing materials after a search, a question arises as to whether the items are covered under the work-product doctrine.[86]

It should be noted that the government itself has argued the importance of the work-product doctrine to protect its own discovery manual. The National Association of Criminal Defense Lawyers filed a Freedom of Information Act ("FOIA") request asking the DOJ to publicly release its *Federal Criminal Discovery Blue Book* ("*Blue Book*"), an internal manual created within its office to advise prosecutors of their discovery obligations.[87] The DOJ refused to

[79] 329 U.S. 495, 511-12 (1947).

[80] *Id.* at 508.

[81] FED. R. CIV. P. 26(b)(3)(A).

[82] FED. R. CIV. P. 26(b)(3)(B).

[83] *Id.*

[84] FED. R. CIV. P. 26 (b)(3)(A).

[85] *See, e.g.*, United States v. Deloitte LLP, 610 F.3d 129, 137 (D.C. Cir. 2010) ("[T]he 'because of' test [requires] asking 'whether . . . the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" (quoting *In re* Sealed Case, 146 F.3d 881, 884 (D.C. Cir. 1998))); *In re* Sealed Case, 146 F.3d at 884 (noting test considers whether attorney "had a subjective belief that litigation was a real possibility" and whether that belief was "objectively reasonable").

[86] *See* RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. §§ 86-93 (AM. L. INST. 2000).

[87] Nat'l Ass'n of Crim. Def. Laws. v. DOJ Exec. Off. for U.S. Att'ys, 844 F.3d 246, 249 (D.C. Cir. 2016); *see also* Louis J. Virelli III & Ellen S. Podgor, *Secret Policies*, 2019 U. ILL. L. REV. 463, 487-88 (discussing historical context of *National Association of Criminal Defense Lawyers*).

provide transparency regarding their internal discovery practices arguing "that the Blue Book fell within the attorney work-product privilege, and therefore Exemption 5" of FOIA because it was work product created in anticipation of cases against defendants.[88] Their arguments centered on the book being "prepared by (and for) attorneys in anticipation of litigation."[89] The D.C. District Court accepted this argument following *in camera* review.[90] The D.C. Circuit Court on review affirmed this decision, although it remanded the case to assess whether the *Blue Book* contained any non-work-product items that could be publicly disclosed.[91] This court noted that "[c]ourts have long recognized that materials prepared by one's attorney in anticipation of litigation are generally privileged from discovery by one's adversary."[92] Citing to Justice Robert H. Jackson's concurring opinion in *Hickman*, the court stated that "[p]rotecting attorney work product from disclosure prevents attorneys from litigating 'on wits borrowed from the adversary.'"[93] Applying this to the DOJ's internal *Blue Book*, the D.C. Circuit noted that it included "information and advice for prosecutors about conducting discovery in their cases, including guidance about the government's various obligations to provide discovery to defendants."[94] Because "[t]he Book does not merely pertain to the subject of litigation in the abstract," and "addresses how attorneys on one side of an adversarial dispute—federal prosecutors—should conduct litigation," the court found that it fell within the purview of work-product materials.[95]

Both the district court and circuit court considered counsel's arguments in the context of there having been *in camera* review of the materials.[96] Thus, in a context involving a government entity, one that some would argue should have heightened transparency,[97] the court protected work product of the

[88] *Nat'l Ass'n of Crim. Def. Laws.*, 844 F.3d at 249.

[89] *Id.*

[90] Nat'l Ass'n of Crim. Def. Laws. v. Exec. Off. for U.S. Att'ys, 75 F. Supp. 3d 552, 557 (D.D.C. 2014).

[91] *Nat'l Ass'n of Crim. Def. Laws.*, 844 F.3d at 257 (ordering district court to conduct "line-by-line" analysis to determine if any of *Blue Book*'s content was discoverable).

[92] *Id.* at 250.

[93] *Id.* at 251 (quoting Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring)).

[94] *Id.* at 249.

[95] *Id.* at 255 ("It describes how to respond to the other side's arguments, which cases to cite, and what material to turn over and when to do so, among numerous other practical and strategic considerations."). The court rejected the National Association of Criminal Defense Lawyers's arguments that, even if prepared in anticipation of litigation, it should be released for three reasons: "(i) the Blue Book was not prepared in anticipation of litigating a specific claim or case; (ii) the Blue Book principally serves a non-adversarial function; and (iii) the Blue Book's content resembles that of a neutral treatise." *Id.* at 252.

[96] *Id.* at 250, 252.

[97] *See* David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 278-79 (2010) (discussing benefits of government transparency).

government.[98] It is important to note here, in contrast to many law-office searches, a neutral district court judge determined whether the items in question were within the confines of the work-product doctrine.[99] Further, the final review to separate non-work-product materials from that which could be exposed was handled by a federal district court judge.[100]

Like those government materials protected by the D.C. Circuit, a law-office search or government subpoena of attorney-client materials may acquire information that includes documents and papers containing attorney impressions and trial strategy, details that may be beneficial to the government and clearly harmful to the defense.[101] Thus, review of such material following disclosure or seizure needs to be handled with care. And, like the attorney-client privilege, the methodology employed for reviewing this information can be crucial to its protection.

C. *Ethical Mandates*

Separate and apart from the attorney-client privilege and the work-product doctrine are ethics rules that provide a broader coverage and require attorneys to keep confidential, attorney-client information.[102] The American Bar Association's Model Rules of Professional Conduct ("Model Rules") Rule 1.6(a) mandates a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by" an explicit exception listed in Rule 1.6(b).[103] The allowed

[98] *Nat'l Ass'n of Crim. Def. Laws.*, 844 F.3d at 258.

[99] *Id.* at 250.

[100] *See* Order at 5, Nat'l Ass'n of Crim. Def. Laws. v. Exec. Off. for U.S. Att'ys, 75 F. Supp. 3d 552 (D.D.C. 2014) (No. 14-269). It should be noted that, even when granting the release of a minimal amount of material from the *Blue Book*, the court did so under seal to allow the defendant-government the option to appeal the release of this material prior to providing it to the plaintiff National Association of Criminal Defense Lawyers. *Id.* The government chose not to appeal, and, in total, eighteen (not even full) pages of the *Blue Book* were released. Defendants' Notice of Decision Not To Appeal at 1, *Nat'l Ass'n of Crim. Def. Laws.*, 75 F. Supp. 3d 552 (No. 14-269). *See generally* Appendix to November 15, 2017 Order, *Nat'l Ass'n of Crim. Def. Laws.*, 75 F. Supp. 3d 552 (No. 14-269).

[101] *See Nat'l Ass'n of Crim. Def. Laws.*, 844 F.3d at 256-57; *In re* Grand Jury, 23 F.4th 1088, 1090-91 (9th Cir. 2021).

[102] States regulate and license attorneys and the rules operating within these states may differ. *See Charts Comparing Professional Conduct Rules*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/policy/charts/ (last visited Feb. 10, 2023). All, however, provide some form of requirement regarding the confidentiality of information provided by a client to his or her attorney. *See id.*; RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. §§ 59-67 (AM. L. INST. 2000) (discussing general rules of confidentiality owed to clients by their legal counsel).

[103] MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2020). Many states previously used the *Model Code of Professional Responsibility*, which provided:

disclosure in Rule 1.6(b) is limited to certain circumstances, such as those that could severely impact the life of others or are necessary to adhere to a court order.[104] Lawyers also "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[105]

Outside of Rule 1.6, one finds references to the importance of confidentiality throughout the Model Rules. Whether it be in resolving issues concerning conflicts of interests,[106] keeping confidential information provided by a prospective client,[107] or keeping confidential the information of a former client,[108] the ethical mandates underscore the sacrosanctity of the attorney-client relationship.

Although the Model Rules are clear that an attorney has a duty to keep client information confidential, these mandates do not directly address the role of prosecutors after they obtain confidential information, such as when they end up reviewing client information obtained from a law-office search. Although the prosecutor is an attorney, the role of the government agent in maintaining the confidentiality of an opposing client's confidences are not directly addressed in these Model Rules.

The Model Rules do, however, recognize the unique role of government attorneys, and they directly speak to the role of prosecutors when obtaining material from an attorney through the use of a subpoena.[109] Per Rule 3.8(e), prosecutors must "not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes" all three elements of the carveout are met.[110] First, prosecutors must reasonably believe "the information sought is not protected from disclosure by any applicable privilege," which would include

> [A] lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person unless the client consents after full disclosure.

MODEL CODE OF PRO. RESP. DR 4-101(B) (AM. BAR ASS'N 1980); *id.* DR 4-101(C) (providing exceptions).

[104] MODEL RULES OF PRO. CONDUCT r. 1.6(b).

[105] *Id.* r. 1.6(c).

[106] *Id.* r. 1.7-1.11.

[107] *Id.* r. 1.18.

[108] *Id.* r. 1.9(c)(1)-(2).

[109] *Id.* r. 3.8(e). The *Model Rules of Professional Conduct* provide that the attorney-client relationship needs to be respected. *See id.* Government interference with that relationship, like speaking with a target without his or her counsel being present, is not allowed. *See id.* r. 4.2; *see also* United States v. Koerber, 966 F. Supp. 2d 1207, 1231-32 (D. Utah 2013) (finding Utah Rule 4.2(a) prohibited prosecutors from "*ex parte* communications with any person known to be represented in the matter 'whether or not the person is a party to a formal legal proceeding'").

[110] MODEL RULES OF PRO. CONDUCT r. 3.8(e).

attorney-client privilege.[111] Second, "the evidence sought [must be] essential to the successful completion of an ongoing investigation or prosecution."[112] Finally, "there [must be] no other feasible alternative to obtain the information."[113] The comment to this rule further notes it "is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship."[114] Thus, although there are limits placed on prosecutors when subpoenaing an attorney regarding his or her client, nothing is said about that role when the government uses a search warrant.

The Model Rules, although adopted in a variety of formats by different states, apply to federal prosecutors.[115] The role of ethics mandates as they applied to federal prosecutors was initially strained, with some challenges as to whether individuals holding federal government positions were subject to these ethics rules.[116] There was also the question of which particular state ethics mandates applied to prosecutors as there are variations of the Model Rules or its predecessor, the Model Code of Professional Responsibility.[117] The passage of the Citizens Protection Act, commonly referred to as the McDade Act, resolved this issue finding that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."[118]

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[111] *Id.* r. 3.8(e)(1).

[112] *Id.* r. 3.8(e)(2).

[113] *Id.* r. 3.8(e)(3).

[114] *Id.* r. 3.8 cmt. 4. In addition, "[t]he prosecutor should not issue a grand jury subpoena to a criminal defense attorney or defense team member, or other witness whose testimony reasonably might be protected by a recognized privilege, without considering the applicable law and rules of professional responsibility in the jurisdiction." AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.6(i) (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ [https://perma.cc/M6TP-3KV6].

[115] *See* Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO J. LEGAL ETHICS 873, 875-76 (2012) (explaining federal courts rely on state courts, which rely on American Bar Association, for "setting standards of professional conduct").

[116] *See* Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355, 378-81 (1996) (discussing issue of preemption and whether federal prosecutors can be mandated by state ethics rules).

[117] *See* Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?*, 64 GEO. WASH. L. REV. 460, 463-64 & n.13 (1996) (explaining "uncertainty and disharmony" of regulation of lawyers in federal court).

[118] 28 U.S.C. § 530B(a); *see also* Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 400-03 (2002) (discussing adoption process of ethics rules for federal courts). The statute also required that the Attorney General "make and amend rules of the Department of Justice to assure compliance with this section." 28 U.S.C. § 530B(b).

II. GOVERNMENT PRACTICE IN LAW-OFFICE SEARCHES

Law-office searches can easily implicate the attorney-client privilege, the work-product doctrine, and ethics rules governing attorneys. The government's use of law-office searches is also not new and has historically raised concerns.[119] This Article, however, is not focused on the propriety of the search, or for that matter, the government discretionary decision to conduct a search as opposed to issuing a subpoena *duces tecum*. Rather, the emphasis here is on the procedural practice following the search, one that has allowed the government to proceed with a taint team in reviewing the seized materials. But in examining this practice, it is important to also look at methods that could minimize the harmful effects of a law-office search, like having the government reconsider its use of a search and instead proceed similarly to when a subpoena is issued that requires an attorney to testify either before a grand jury, at a hearing, or trial. Having the government reflect on the importance of information protected by the attorney-client privilege, work-product doctrine, or ethics considerations could lessen the concerns emanating from a government law-office search.[120]

The DOJ, in its *Justice Manual*, recognizes the unique considerations that accompany the search of a law office, and has established detailed guidelines for these searches.[121] Updated in January 2021, the current provisions provide the scope of the searches, the necessary approvals required prior to conducting the search, and the actual methodology to be employed in conducting the search.[122] Thus, the *Justice Manual* examines when attorneys are subject to this DOJ guidance, who the Assistant United States Attorney ("AUSA") needs to contact prior to conducting the search, and the manner of proceeding with the search.[123] Specifically, for the purposes of this Article, the *Justice Manual* outlines the review procedure to be used once a search has occurred and materials have been retrieved.[124]

Government searches involving attorneys differ in practice from the government use of subpoenas to obtain documents or evidence from a lawyer, evidence that can implicate confidential client information. For example, if the government uses a subpoena asking the attorney to produce information to a grand jury, the guidance differs in providing a less restrictive internal procedure.[125] This is in large part because subpoenas allow the affected party the

[119] *See* McArthur, *supra* note 4, at 742-44 (discussing previous examples of law-office searches); Davis, *supra* note 4, at 1255-56. *But see* KROPF, *supra* note 4, at 1 (explaining law enforcement agencies are rapidly normalizing surprise searches in white-collar criminal investigations).

[120] *See infra* Section IV.A.

[121] Just. Manual, *supra* note 7, § 9-13.420 (recognizing "it is important that close control be exercised over" searches of attorneys' premises because of attorney-client privilege).

[122] *Id.* § 9-13.420(B)-(C), (E).

[123] *Id.*

[124] *Id.* § 9-13.420(F).

[125] *Id.* § 9-13.410.

time and opportunity to petition the court to quash or narrow the scope of materials requested.[126] With a subpoena, the attorney is placed on notice of the requested information and there is ample time to raise issues in court, such as possible attorney-client privilege implications with what he or she is being asked to produce. With a subpoena, the arguments to quash are made prior to the materials being placed in the government's hands.

Searches differ from subpoenas in that they are not conducted in secret, although there is secrecy surrounding the fact that a search is about to happen.[127] A search provides the government the benefit of surprise as the recipient is not warned of the impending search. Surprise can work in the government's favor to curtail the possible destruction or modification of evidence.[128] With a subpoena *duces tecum* for documents or subpoena *ad testificandum* for persons, the material or person being produced is presented to a secret grand jury and the public is unaware that a company or individual is under investigation.[129] Although searches, unlike subpoenas, provide the strong benefits of secrecy to the government, searches are not always the best route on which to proceed. For example, searches require probable cause, and if it is later found to be lacking, the entire case may be dismissed.[130] Searches also offer public awareness of the government's actions, with the press swooping in to watch agents swarm a company[131] or seize documents or other items from a key political figure.[132] In

[126] *See* FED. R. CRIM. P. 17(c).

[127] Searches are not subject to the secrecy surrounding the grand jury process. *See* FED. R. CRIM. P. 6(e) (describing rules regarding recording and disclosing proceedings and secrecy obligations applicable to grand-jury proceedings only); *see, e.g.*, Jonathan Dienst, Joe Valiquette & Rebecca Shabad, *Federal Investigators Search Rudy Giuliani's Apartment and Office*, NBC NEWS (Apr. 28, 2021, 2:49 PM), https://www.nbcnews.com/politics/donald-trump/federal-investigators-search-rudy-giuliani-s-nyc-apartment-n1265675 [https://perma.cc/DW98-H6PX] (publicizing search of attorney's office on same day as search).

[128] This is typically one of the rationales provided by courts permitting prosecutors to use a search as opposed to using the grand jury subpoena process. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 398 (1992) (noting judiciary only interferes with prosecutorial conduct that reaches "demonstrable levels of outrageousness").

[129] *See* FED. R. CRIM. P. 6(e).

[130] *See* Franks v. Delaware, 438 U.S. 154, 156 (1978) (noting reversal is required where search warrant was found to lack probable cause).

[131] *See, e.g.*, Kris Hundley, *FBI Raid Shutters Medicare Insurer*, TAMPA BAY TIMES (Nov. 5, 2007), https://www.tampabay.com/archive/2007/10/25/fbi-raid-shutters-medicare-insurer/ (reporting on healthcare company government search with more than 200 federal and state agents). The openness of a search of a public company can also detrimentally affect its stock prices. *See, e.g.*, George Stahl, *WellCare Stock Plummets Following Raid on Headquarters*, WALL ST. J. (Oct. 25, 2007, 4:33 PM), https://www.wsj.com/articles/SB119332694927171525.

[132] *See, e.g.*, John Bresnahan, *Jefferson Convicted in Freezer Case*, POLITICO (Aug. 6, 2009, 6:18 AM), https://www.politico.com/story/2009/08/jefferson-convicted-in-freezer-case-025850 [https://perma.cc/L5EW-B8NP] (recounting Federal Bureau of Investigation's raid and subsequent arrest of sixty-two year old Louisiana Democrat's home).

contrast, subpoenas issued by a grand jury, a secret body, are subject to Rule 6(e)'s prohibitions on disclosure of information beyond the grand jury room.[133]

While prosecutors routinely weigh the pros and cons of proceeding with a search or subpoena, the decision-making is typically an internal discretionary call within the office.[134] It would appear that there has been an increase in the government's use of searches against companies, and there is little question that concerns regarding law-office searches are more prominent now than in years past.[135] To provide context and some explanation of the mechanics of this process, the following Section examines the government's approach when it proceeds with a law-office search.

A. *Pre-search Procedure*

When the search involves a law office, the government has to consider that the information being sought may contain material covered by attorney-client privilege, work-product doctrine strategies, and confidential information that may be encompassed within the ethics mandates. The government should also consider the role of the attorney subject to the search and whether the client or attorney is the target or subject of the investigation.[136] When the search involves the premises of the attorney who is a "subject" as either a "'suspect, subject or target,' or an attorney who is related by blood or marriage to a suspect, or who is believed to be in possession of contraband or the fruits or instrumentalities of a crime," the government has concerns about protecting the lawyer's clients.[137] The *Justice Manual* guidelines recognize that "[b]ecause of the potential effects of this type of search on legitimate attorney-client relationships and because of the possibility that, during such a search, the government may encounter material protected by a legitimate claim of privilege, it is important that close control be exercised over this type of search."[138] In contrast, a different set of guidelines apply if the attorney is a "disinterested third party."[139] The

[133] FED. R. CRIM. P. 6(e)(2)(b) (stating following persons must not disclose grand jury matters: (1) grand jurors, (2) interpreters, (3) court reporters, (4) recording technicians, (5) transcribers, and (6) government attorneys); *see also* ROGER ANTHONY FAIRFAX, JR., GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 5-7 (2011) (discussing views of grand jurors and judges on grand jury secrecy).

[134] *See* Gershman, *supra* note 128, at 395-96.

[135] *See id.* at 402 (highlighting prosecutors' aggressive investigative tactics against attorneys, including "rising incidence of law office searches").

[136] *See* Just. Manual, *supra* note 7, § 9-13.420.

[137] *Id.*

[138] *Id.*

[139] *Id.* (explaining "[s]earch warrants for 'documentary materials' held by an attorney who is a 'disinterested third party'" are also governed by *Justice Manual* and Code of Federal Regulations). Additionally, 42 U.S.C. § 2000aa-11(a) provides procedures and monitoring of obtaining documentary evidence and how best to protect privacy interests. 42 U.S.C. § 2000aa-11(a). It requires the establishment of procedures by the Attorney General and a

government, however, should not be excused from making these considerations when it is conducting a search or reviewing the seized material.

In addition to contemplating the attorneys that are within the scope of the DOJ guidance, it is also necessary to consider the role of the AUSA in proceeding with the search. First, the government has to reflect on whether an alternative to a search warrant could suffice in the circumstances presented to it.[140] Prosecutors are instructed "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."[141] If there is an alternative source for the evidence, prosecutors are instructed to take that route.[142] The internal guidance for AUSAs essentially views search warrants as instruments of last resort to be used when other "efforts could compromise the criminal investigation or prosecution, or could result in the obstruction or destruction of evidence, or would otherwise be ineffective."[143]

The *Justice Manual* provides a further impediment to the AUSA who simply wishes to proceed with a search, in that it requires certain approvals prior to the issuance of a search warrant. Thus, an individual AUSA cannot haphazardly request a search warrant without these approvals, although the defendant has no remedy for a violation of this tenet because these guidelines are merely internal office policy and do not provide the basis for a claim under the law.[144] The AUSA must initially receive authorization by the United States Attorney, their direct head of the office, or the Assistant Attorney General in the D.C. office.[145] The attorney seeking the search warrant must also consult with "the Criminal Division through the Office of Enforcement Operations, Policy and Statutory

"recognition of the personal privacy interests of the person in possession of such documentary materials." *Id.*

[140] Just. Manual, *supra* note 7, § 9-13.420(A) (instructing prosecutors to consider whether information can be obtained by other means that would not put evidence at risk).

[141] *Id.* This is also mandated by statute. *See* 42 U.S.C. § 2000aa-11(a)(3) (cautioning prosecutors when their search intrudes on "known confidential relationship such as that which may exist between clergyman and parishioner; lawyer and client; or doctor and patient").

[142] Just. Manual, *supra* note 7, § 9-13.420(A).

[143] *Id.*

[144] *See id.* § 9-13.420 ("These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice."); *see also* Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice*,*"* 13 CORNELL J.L. & PUB. POL'Y 167, 169-70 (2004).

[145] Just. Manual, *supra* note 7, § 9-13.420(B) (explaining authorization is appropriate when there exists "strong need for the information or material and less intrusive means have been considered and rejected").

Enforcement Unit."[146] The DOJ, through a December 20, 2020, Memorandum of the Acting Attorney General, provides specific guidance on this consultation requirement.[147]

B. *Conducting the Search & Subsequent Review of Materials*

The *Justice Manual* clearly provides that DOJ attorneys have a responsibility to "safeguard" the privileged material to assure that these "materials are not improperly viewed, seized or retained during the course of the search."[148] This leads to a discussion of the method to be used for conducting the search. The guidance jumps right to having the attorney use a "privilege team" to conduct the search.[149] The term "privilege team" is defined as a team "consisting of agents and lawyers not involved in the underlying investigation."[150] Notably absent is a provision to safeguard against the possibility that the agents or lawyers on the team could be involved in other matters involving that attorney's other clients.

The *Justice Manual* separates those conducting the search and those reviewing the search.[151] It further necessitates that the AUSA consider the review procedure prior to conducting the search.[152] The first item it notes is the AUSA's responsibility to consider "[w]ho will conduct the review, i.e., a privilege team, a judicial officer, or a special master."[153] Of particular import, this procedure is presented as a decision of the prosecuting attorneys within the DOJ, with no mention of a neutral judicial officer being involved in determining

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[146] *Id.* § 9-13.420(C). Absent exigent circumstances that could delay the process, the U.S. Attorney or AUSA

> must provide relevant information about the proposed search along with a draft copy of the proposed search warrant, affidavit in support thereof, and any special instructions to the searching agents regarding search procedures and procedures to be followed to ensure that the prosecution team is not 'tainted' by any privileged material inadvertently seized during the search.

Id.

[147] *See* Memorandum from Jeffrey Rosen, Acting Att'y Gen., U.S. Dep't of Just., to Assistant Att'y Gen., Crim. Div., U.S. Dep't of Just. (Dec. 30, 2020), https://www.justice.gov/oip/page/file/1350126/download [https://perma.cc/2GML-VCZP]. When the search involves a computer, it can also trigger procedures set out in the Searching and Seizing Computers guidance of the Computer Crime and Intellectual Property Section. *See* Just. Manual, *supra* note 7, § 9-48.000.

[148] Just. Manual, *supra* note 7, § 9-13.420(D). It further states that "[w]hile the procedures to be followed should be tailored to the facts of each case and the requirements and judicial preferences and precedents of each district, in all cases a prosecutor must employ adequate precautions to ensure that the materials are reviewed for privilege claims and that any privileged documents are returned to the attorney from whom they were seized." *Id.*

[149] *Id.* § 9-13.420(E).

[150] *Id.*

[151] *See id.* § 9-13.420(E)-(F).

[152] *See id.* § 9-13.420(F).

[153] *Id.*

whether a privilege team, judicial officer, or a special master will be more appropriate.[154] There is also no requirement for the AUSA to obtain any type of approval of his or her identified process prior to proceeding with a law-office search.[155]

Thus, although the *Justice Manual* provides that the process of reviewing documents should be considered, it allows for a unilateral decision to be made within the DOJ on whether the documents retrieved from the search will be "submitted to a judicial officer or special master or only those which a privilege team has determined to be arguably privileged or arguably subject to an exception to the privilege."[156] The remainder of the considerations by the DOJ found in the *Justice Manual* go to whether the attorney will be allowed to have copies of the seized documents and how and where the material will be stored.[157] It also notes considerations for things such as electronic evidence and concerns of innocent clients.[158] But there is again no mention of how this can be accomplished if the attorney has uncharged cases, clients from the jurisdictions of the agents conducting the review, or what input will be provided by the attorney who has had his or her documents seized. Thus, omitted from the *Justice Manual*'s procedure is the fact that the "privilege" or taint team may be unaware of all the client material contained in the law-office documents. Therefore, the taint team cannot properly protect the confidentiality of the information from those who are part of the government structure and could use that information to inform existing or new investigations.

In addition to these provisions in the *Justice Manual*, the Criminal Division's Fraud Section created the Special Matters Unit ("SMU") in 2020.[159] This Unit is comprised of government attorneys solely dedicated to and specializing in "issues related to privilege and legal ethics."[160] This centralized taint team handles litigation related to all privilege disputes, not just those arising from the attorney-client relationship, and eliminates the government's need to create a review team every time one is deemed necessary.[161] In addition to creating this dedicated privilege team, these attorneys also train the Fraud Section's prosecutors on properly collecting evidence, among other things.[162] The timing

[154] *See id.*

[155] *See id.*

[156] *Id.*

[157] *See id.*

[158] *See id.*

[159] FRAUD SECTION, CRIM. DIV., U.S. DEP'T OF JUST., FRAUD SECTION YEAR IN REVIEW, 2020, at 4 (2020) [hereinafter YEAR IN REVIEW], https://www.justice.gov/criminal-fraud/file/1370171/download [https://perma.cc/ZFZ7-9QLB]; Sheena Foye & James R. Wyrsch, *DOJ Creates Special Unit To Handle Privileged Documents*, AM. BAR. ASS'N (Oct. 29, 2020), https://www.americanbar.org/groups/litigation/committees/criminal/practice/2020/doj-creates-special-unit-to-handle-privileged-documents/ [https://perma.cc/RJ4M-2R4Z].

[160] YEAR IN REVIEW, *supra* note 159, at 4.

[161] *See id.*

[162] *See id.*

of the creation of this team is also notable in that it appears to have been done in response to increased judicial scrutiny,[163] much of which will be discussed later in this Article.[164]

III. REVIEW OF RETRIEVED ITEMS FROM A LAW-OFFICE SEARCH OR SUBPOENAED ATTORNEY

A. *Survey of the Courts' Approach*

The saga of the Rudy Giuliani investigation is just one of the most recent examples of the tension between the government's interest in investigating possible criminal activity and a target's legitimate interest in preserving their attorney-client privilege.[165] As discussed previously, following the search of an attorney's office, the government typically has three broad options for reviewing seized materials for privileged information: a taint team, a special master, or a hybrid of the two.[166] In Giuliani's case, he was the target of a federal investigation involving his work in Ukraine on behalf of former President Donald J. Trump.[167] Because Giuliani was an attorney, the government anticipated privilege issues and requested that the court appoint a special master while Giuliani asked that his attorneys be permitted to screen the files before the special master was allowed to conduct their review.[168] He cited a possible lack of probable cause in obtaining the warrant.[169] The United States District Court for the Southern District of New York ultimately sided with the government, stating "[t]he searches here were based on probable cause, and it is precisely to

[163] *See* Harbor Healthcare Sys., L.P., v. United States, 5 F.4th 593, 599 (5th Cir. 2021) (admonishing government for callously disregarding attorney-client privilege in search and retaining privileged documents for years after search); Foye & Wyrsch, *supra* note 159 (describing Fourth Circuit criticism that taint teams violate separation of powers doctrine and unfairly skirt adversarial proceedings).

[164] *See infra* Section III.A.

[165] *See* Dave Simpson, *Attys Not Above Law, US Says in Bid for Giuliani Evidence*, LAW360 (May 21, 2021, 10:56 PM), https://www.law360.com/articles/1387404/attys-not-above-law-us-says-in-bid-for-giuliani-evidence.

[166] *See* Just. Manual, *supra* note 7, § 9-13.420(F). A taint team, sometimes referred to as a privilege or filter team, is usually comprised of law enforcement officers and prosecutors from the executive branch who are not directly involved with the underlying investigation and may also be comprised of paralegals or other administrative personnel. *See In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 165 (4th Cir. 2019). On the other hand, a special master is a disinterested third party and could be anyone including a judicial officer, attorney, law professor, or former attorney for the DOJ. *See, e.g.*, United States v. Gallego, No. CR-18-01537, 2018 WL 4257967, at *3 (D. Ariz. Sept. 6, 2018) (appointing U.S. magistrate judge as special master); Minute Order at 1, *In re* Search Warrants Executed on April 9, 2018, No. 18-MJ-3161 (S.D.N.Y. Apr. 26, 2018) (appointing former judge as special master).

[167] *See* Simpson, *supra* note 165.

[168] *See id.*

[169] *Id.*

avoid 'unnecessary intrusion on attorney-client communications' that the government is seeking appointment of a special master."[170]

While the government in Giuliani's case opted not to pursue a taint team to review the seized materials, this is still an authorized and often requested option in many jurisdictions.[171] The following discussion centers on how courts deal with the tension between the government's investigation and a target's privilege.

1. Appointment of a Special Master

Beginning with those courts that decided the use of a special master was the best option is the seminal case of *In re Search Warrant Issued June 13, 2019*.[172] The Fourth Circuit reversed and remanded the district court's denial of a law firm's motion for a preliminary injunction preventing a taint team's review of documentation seized from an attorney in the firm.[173] In this case, an attorney was suspected of obstructing the investigation of one of his clients.[174] At the same time that the search warrant was issued, the judge also authorized the use of a taint team, meaning the prosecutor's request for the team was made ex parte.[175]

The search warrant was for the attorney's office in Baltimore, Maryland and included all materials related to the firm's representation of the client under investigation.[176] These materials were then meant to be sorted by a taint team that operated out of the U.S. Attorney for the District of Maryland's Greenbelt office rather than the prosecutorial and investigative team's home base in Baltimore.[177] Furthermore, while the team included no prosecutors or agents involved in the underlying case, it was still composed of AUSAs, a legal assistant, and a paralegal from the Greenbelt office; other Internal Revenue

[170] Jack Queen, *Court To Appoint Special Master for Giuliani Privilege Review*, LAW360 (May 28, 2021, 4:08 PM), https://www.law360.com/articles/1389338/court-to-appoint-special-master-for-giuliani-privilege-review?copied=1.

[171] *See* Kara Brockmeyer, Andrew Levine & Douglas Zolkind, *Key Factors for Challenging DOJ 'Taint Team' Procedure*, LAW360 (Dec. 8, 2021, 12:41 PM), https://www.law360.com/articles/1445667/key-factors-for-challenging-doj-taint-team-procedure (describing Fourth Circuit and Eleventh Circuit approaches to taint teams).

[172] 942 F.3d 159, 183 (4th Cir. 2019). Other courts have criticized the use of taint teams prior to this decision. *See, e.g.*, United States v. Neill, 952 F. Supp. 834, 840-41 (D.D.C. 1997) ("While the parties dispute whether courts have sanctioned the Department of Justice's 'taint team' procedures, it is clear that the government's affirmative decision to invoke these procedures constitutes a *per se* intentional intrusion." (footnote omitted)).

[173] *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 183.

[174] *See id.* at 164-65 (discussing government's claim that crime-fraud exception was triggered by target attorney's conduct).

[175] *See id.* at 165.

[176] *Id.*

[177] *See id.*

Service and Drug Enforcement Agency ("DEA") agents; and various forensic examiners.[178]

The primary purpose of the taint team was typical: to identify and separate potentially privileged materials.[179] The team was to separate these documents into three different categories: (1) privileged material, (2) potentially privileged material, and (3) nonprivileged material.[180] For purposes of the team's review, privileged material was defined as "attorney-client information, attorney work product information, and client confidences that have not been waived."[181] If material was deemed to be nonprivileged, it was forwarded directly to the prosecution without further consent or review by the law firm.[182]

If the documentation, however, was considered either privileged or potentially privileged and it was "responsive to the search warrant," the team further filtered the material into three additional categories: (1) privileged and could not be redacted; (2) privileged and could be redacted; and (3) potentially privileged, meaning an exemption like the crime-fraud exception could apply.[183] If the documents fell into one of the latter two categories, the taint team AUSAs sent copies to the target attorney's counsel and would then try to reach an agreement as to whether the material could be sent to the prosecution.[184] If no agreement could be reached, the court would decide if the material was privileged and/or propose redactions.[185] Privileged materials could otherwise be sent to the prosecution directly—without consulting the attorney, the client's lawyer, or the law firm—if a team member contacted the client directly and the client decided to waive privilege.[186]

During the search at issue, 52,000 of the lawyer's emails were seized.[187] Of these, only 116 emails were from the client under investigation, sent to him, or contained his surname.[188] "An extensive portion" of the emails seized concerned other law firm clients who had no connection to the investigation at issue.[189] Importantly, this included clients under investigation or being prosecuted by the

[178] *Id.*

[179] *See id.* at 165-66 (providing in-depth discussion of how taint team was to handle privilege issues).

[180] *Id.* at 165.

[181] *Id.* at 166 (quoting Sealed Joint Appendix at 43, 45, *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159 (No. 19-1730)).

[182] *See id.*

[183] *Id.*

[184] *Id.*

[185] *See id.* (noting taint team attorneys would be responsible for submitting disagreed upon material to court).

[186] *See id.* at 166, 180-81 (discussing how judge granted taint team authority to directly communicate with represented parties without their attorney being present).

[187] *See id.* at 167 (mentioning there were 37,000 emails in target lawyer's inbox and 15,000 in his sent folder).

[188] *See id.*

[189] *Id.*

same U.S. Attorney's Office for the District of Maryland.[190] The government also never disclaimed its intention to use the plain-view doctrine.[191]

The district court denied the law firm's preliminary injunction because it found that the firm had not demonstrated it would suffer irreparable harm absent an injunction.[192] In reversing this decision, the crux of the Fourth Circuit's finding was the tens of thousands of seized emails unrelated to the target.[193] The lower court had failed to "grapple with the harm that is likely to be inflicted on the Law Firm and its clients from the [Taint] Team's review of many of the seized emails."[194] The harm being referred to here is the government's intrusion into the attorney-client relationship,[195] whereby the taint team's mere access to privileged materials could impair the firm's attorneys' ability to fully and frankly communicate with clients.[196]

The court also went on to discuss three other issues with the makeup and function of the taint team. First, the court was concerned that allowing the executive branch, of which the U.S. Attorney's Office and law enforcement agencies are a part, to decide which materials are privileged was an unconstitutional delegation of judicial power.[197] Any decisions about whether the attorney-client privilege or the work-product doctrine attaches is for neutral parties, not those with an interest in the outcome of the case—which is, in essence, the function of the judicial branch.[198]

The second issue was the magistrate's approval of the taint team before the search in an ex parte proceeding.[199] By deciding on whether a taint team was the appropriate review method before the search, a judge is unable to properly decide on the best review technique because he or she does not yet know the

[190] *Id.* The government did request a list of clients from the law firm who were under investigation to confirm that no taint team members were also involved in those cases, but the law firm declined to provide this information. *Id.* at 169.

[191] *Id.* at 183.

[192] *Id.* at 169.

[193] *See id.* at 172.

[194] *Id.*

[195] *Id.* at 175 ("[T]he district court erred as a matter of law by affording insignificant weight to the foregoing principles protecting attorney-client relationships.").

[196] *See id.* at 173-75 (discussing importance of confidentiality in attorney-client relationship and finding firm was irreparably injured). On this point, the court also interestingly analogized the harm requirement in a preliminary injunction to the harm requirement in the standing analysis, stating that the proposition that "lawyers are obliged to protect the attorney-client privilege to the maximum possible extent on behalf of their clients" also "underlies the Law Firm's uncontested standing to pursue the legal positions it advances in this appeal." *See id.* at 173.

[197] *See id.* at 176.

[198] *Id.* ("Put simply, a court is not entitled to delegate its judicial power and related functions to the executive branch, especially when the executive branch is an interested party in the pending dispute.").

[199] *See id.* at 178.

types of materials that will be seized.[200] The judge who issued the search warrant did not know that 99.8% of the emails were unrelated to the underlying investigation.[201] Furthermore, an adversarial proceeding is essential in making this determination because a judge cannot be properly informed about the nature of the materials, the background of the law firm and its clients, and the possible scope of the consequences, unless both sides are present.[202] In this regard, the court pointed to the handling of the government's search of Michael Cohen's office[203] as the model example where the court held an adversarial hearing after the search to determine whether a taint team or special master was more appropriate.[204]

Finally, the court cited the implications of the Sixth Amendment's right to effective assistance of counsel, as well as the attorney-client privilege and the work-product doctrine.[205] The court was concerned about whether a lawyer would be able to communicate openly with their clients and prepare their cases without fear of breaching privilege if the government were to search the lawyer's office for an unrelated case.[206] Furthermore, the court specifically took issue with two aspects of the review process relating to the attorney-client relationship. First, the law firm and its clients were not allowed to be heard in court before the government searched the materials,[207] and, second, members of the taint team were communicating with represented parties about the subject of their representation without their lawyer present.[208] In light of the above and the other injunctive relief factors, the court found the use of a taint team rather than a special master untenable.[209]

The need to consider the appointment of a special master can arise outside the context of material retrieved from a search. For example, the court's use of a special master in *In re Grand Jury Subpoenas*,[210] a case involving the review of material presented to a grand jury, required an examination of the government's

[200] *Id.*

[201] *Id.*

[202] *See id.* at 178-79.

[203] *See* The Government's Opposition to Michael Cohen's Motion for a Temporary Restraining Order at 1, Cohen v. United States, No. 18-mj-03161, 2018 WL 1772209 (S.D.N.Y. Apr. 13, 2018).

[204] *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 179.

[205] *Id.* at 179-80.

[206] *Id.* at 175 n.16.

[207] *See id.* at 178-79.

[208] *Id.* at 180-81.

[209] *Id.* at 181. Other courts have also found that the appointment of a special master is the most effective means of preserving attorney-client privilege. *See, e.g.*, United States v. Gallego, No. CR-18-01537, 2018 WL 4257967, at *1 (D. Ariz. Sept. 5, 2018) (appointing special master); United States v. Stewart, No. 02 CR. 396, 2002 WL 1300059, at *10 (S.D.N.Y. June 11, 2002) (same).

[210] 454 F.3d 511 (6th Cir. 2006).

review of privileged documents.[211] In this case, the Sixth Circuit was considering a district court's approval of a taint team instead of the appellant's proposal to allow its attorneys to do the privilege review.[212] While the background of this case is extensive, and convoluted at times, a brief overview is required to contextualize the relative positions of the parties. The subpoenas at issue stemmed from a federal government investigation of possible Securities and Exchange Commission ("SEC") filing violations by Larry Winget when he was Chairman and Chief Executive Officer ("CEO") of Venture Holdings LLC ("Venture").[213] Winget also controlled or owned seven other companies at the same time, which the court calls the "Affiliated Companies."[214] Soon after Venture filed for bankruptcy in March 2003, Venture removed Winget from his role as CEO.[215] In May 2004, Venture and Winget entered into a Separation Agreement, "whereby Winget agreed to terminate his employment by Venture and resign as officer and director."[216] In exchange, he received monthly payments and was allowed continuing use of his office.[217] Then, two years after filing for bankruptcy, in April 2005, Venture's lenders from before the bankruptcy declaration formed New Venture Holdings LLC ("New Venture") and "agreed to buy the assets and assume the liabilities of (old) Venture and nine other companies owned or controlled by Winget that had filed for [bankruptcy] in May 2004."[218]

During the bankruptcy and leadership changes described above, a grand jury was convened.[219] In the fall of 2004, the grand jury issued several subpoenas *duces tecum*, two of which form the basis for this case.[220] The grand jury directed these two subpoenas to New Venture, which soon agreed to cooperate with the government's investigation and waive both its corporate attorney-client privilege and its work-product privilege in October 2004.[221] While the contents of the subpoenas remain confidential, Winget and the Affiliated Companies argued some documents may be "protected by either Winget's or the Affiliated Companies' attorney-client or work-product privileges."[222]

[211] *Id.* at 512.

[212] *Id.* at 512-13.

[213] *Id.* at 513.

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.* at 514. The Separation Agreement also provided for Winget to receive $50,000 each month that Venture was under Chapter 11 protection. *Id.*

[218] *Id.*

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

By April 2005, Winget and the Affiliated Companies filed to intervene in an attempt to preserve their respective privileges.[223] As part of the motion, Winget asked the district court to approve a procedure "whereby his attorneys would conduct a privilege review of the responsive documents."[224] The government countered, however, stating Winget was attempting to "be the first to screen documents produced" and put himself in the middle of the grand-jury proceedings.[225] As an alternative to the attorney review proposed by Winget, the government proposed the use of a taint team to separate out the privileged materials.[226]

The proposed taint team, which the district court chose as the better option,[227] was to be "composed of government attorneys who [were] not involved in the grand jury investigation" and would be required to return any materials found to be privileged to New Venture, with Winget receiving copies "where appropriate."[228] If the taint team determined that materials were potentially privileged, it would send them to Winget and the district court to make the final determination.[229] If the team, however, deemed any materials to be nonprivileged, it would send them directly to the grand jury without further opportunity for a challenge by Winget.[230]

One of the key components of the Sixth Circuit's opinion is the distinction it draws between the actual privilege determination and *who* gets to make that call.[231] The district court denied Winget's request for relief in part because he was unable to point to the documents that were privileged.[232] The Sixth Circuit, on the other hand, did not see the first issue as one of whether any of the

[223] *Id.* at 514-15. Winget alleged that the subpoenas called for documents "protected by Winget's *personal* attorney-client or work-product privileges even though the documents remained in offices under [New] Venture's control." *Id.* at 514. The Affiliated Companies claimed that the subpoenas sought documents that implicated their corporate attorney-client and work-product privileges. *Id.*

[224] *Id.*

[225] *Id.* at 515.

[226] *Id.*

[227] The district court was especially unpersuaded by Winget's arguments because neither he nor the Affiliated Companies had produced a privilege log with specific documents that they claimed to be privileged. *Id.* However, as the Sixth Circuit discusses, this is axiomatic because none of the parties, including Winget, the Affiliated Companies, and the government, had "yet had any access to the subpoenaed documents" in order to create a log. *Id.* The district court found that Winget and the Affiliated Companies had ultimately "failed to meet their burden of proving that one or more of them held a privilege over the documents." *Id.*

[228] *Id.* This is perhaps one of the most interesting facets of this iteration of a taint team. Even though Winget held the privilege at issue in these documents, the privileged documents were still going to be in the exclusive control of New Venture even after they were determined to contain Winget's privileged information. *See id.*

[229] *Id.*

[230] *Id.*

[231] *See id.* at 517-18.

[232] *Id.*

documents were privileged, but rather, of who should determine whether such documents are confidential.[233] This was especially true where, as here, the subpoenaed documents had not yet revealed any privileged information from the interested parties.[234] While this distinction may seem obvious or even inconsequential, it was an essential one for a court to make because, without already knowing a document contains privileged information, courts have to determine whether a defendant has been harmed in another way.[235] In this case, as in the Fourth Circuit's opinion, it appears that the mere intrusion of the government into the attorney-client relationship was itself considered a harm separate and apart from an actual disclosure of known privileged information.[236]

Also of note is the court's decision to appoint a special master to do the first review of the documents.[237] Appointing the special master was the Sixth Circuit's compromise between the defendant's privilege concerns, the grand jury's need for an efficient review, and the government's "legitimate interest in preventing the [defendants] from themselves reviewing the entire set of subpoenaed documents."[238] While the district court was to decide who the special master was (and any members of their team) on remand, unlike other courts, the Sixth Circuit went further to explain how the special master's review of the documents would work.[239] Upon approval of the list by the district court, the appellants were to first provide a list of words for the special master to use in separating the privileged documents from the unprivileged ones.[240] During the process of sorting the materials, the special master was directed to send copies of those containing any of the identified words to the defendants while

[233] *Id.*

[234] *Id.* at 515.

[235] *Compare id.* at 523 (finding mere possibility of prejudice to defendants made use of government taint team inappropriate, despite no showing that documents sought by taint team actually contained privileged material), *with* United States v. Elbaz, 396 F. Supp. 3d 583, 595 (D. Md. 2019) (finding defendant was not prejudiced where prosecutors had access to privileged information, as only prosecutor who had reviewed information was not member of trial team), *and* United States v. Noriega, 764 F. Supp. 1480, 1482 (S.D. Fla. 1991) (finding defendant was not prejudiced where recorded conversations between defendant and his attorney were turned over to government by prison).

[236] *In re Grand Jury Subpoenas*, 454 F.3d at 523. Although, bewilderingly, the court also saw the government's use of a taint team *after* prosecutors already possessed potentially privileged information to be "respectful of, rather than injurious to, the protection of privilege." *Id.* at 522-23. We would instead argue that, under the Sixth Circuit's reasoning for this distinction, who has physical possession over documents should not impact the level of review of those documents.

[237] *Id.* at 524.

[238] *Id.*

[239] *Id.*; *see also In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 181 (4th Cir. 2019) (explaining scope of special master's review but not detailing precise steps and timeline of review); United States v. Gallego, No. CR-18-01537, 2018 WL 4257967, at *3-4 (D. Ariz. June 6, 2018) (same).

[240] *In re Grand Jury Subpoenas*, 454 F.3d at 524.

returning the originals to New Venture's offices on a rolling basis.[241] Of the documents that did not contain any of the identified words, those were to be sent directly to the grand jury.[242] After receiving such identified documents from the special master, the defendants were then allowed to conduct their own privilege review.[243] Also on a rolling basis, the defendants were to review the documents as they came in and either send them to the grand jury if they were not privileged or assert their privilege through submission of a standard privilege log.[244]

2. Use of Taint Teams

On the other hand, as previously discussed, courts have often condoned the use of taint teams.[245] An example is *United States v. Avenatti*,[246] where the United States District Court for the Southern District of New York considered, among other requests, a motion to suppress evidence that was reviewed by a taint team.[247] Michael Avenatti is an attorney who was hired by Stephanie Clifford, also known as Stormy Daniels, to represent her in matters concerning her previous relationship with former President Trump.[248] Avenatti was later charged with various offenses in multiple districts, but, in this case, he was indicted for a scheme to defraud Clifford.[249] The search warrant at issue was signed ex parte and authorized the government's search of Avenatti's iCloud account and provided for the use of a taint team to review the seized information.[250] Relying on *In re Search Warrant Issued June 13, 2019*, he argued that the search warrant "improperly delegated to the Department of Justice—an interested party—the responsibility of identifying and (presumably) walling off from the prosecution team materials protected by the attorney-client privilege and work-product doctrine."[251] Avenatti further averred that the ex parte nature of the issuance of the warrant deprived him of any opportunity to

[241] *Id.*

[242] *Id.* The court's hope in directing the special master to send potentially privileged documents to the defendants and unprivileged documents to the grand jury as they were reviewing the documents, to the extent practical, was to minimize the delay to the grand jury. *Id.*

[243] *Id.*

[244] *Id.* The privilege log was to "contain summary information, as well as some intelligible explanation of their privilege claims, for each document." *Id.*

[245] *See supra* note 227 and accompanying text.

[246] 559 F. Supp. 3d 274 (S.D.N.Y 2021).

[247] *Id.* at 277, 286 (denying motion to exclude certain evidence and requiring government to produce other evidence, in part, where government's use of taint team was proper and taint team could review defendant's communications if defendant given opportunity to object to privilege determinations).

[248] *Id.* at 278.

[249] *Id.*

[250] *Id.* at 281.

[251] *Id.* (quoting Defendant Michael Avenatti's Pre-trial Motions at 12, *Avenatti*, 559 F. Supp. 3d 274 (No. 19-CR-374-1)).

object and that the warrant "failed to set forth the actual procedures to be used by the '[taint] team' to prevent disclosure of privileged materials."[252] In a separate motion, Avenatti raised the same grounds as reason to prevent the government from searching his iPad.[253]

In denying Avenatti's motion, the court posited two primary arguments. First, the court cited cases from their district that found the use of taint teams adequate in their protection of attorney-client information and reasoned that "where, as here, material is 'already in the government's possession[,] . . . 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.'"[254] Second, the court distinguished *In re Search Warrant Issued June 13, 2019* from Avenatti's case by first providing that "[m]ost notably, Avenatti was not involved in criminal defense work; he was given an opportunity to review all communications before they were turned over to the prosecution team; and, until this motion, he raised zero objections, either to the review procedures or to the [taint] team's conclusions."[255] The court also stated that where the warrant is valid, "the Government should be allowed to make fully informed arguments as to privilege if the public's strong interest in the investigation and prosecution of criminal conduct is to be adequately protected."[256] As to other considerations, the court discussed the administrative burden that would result if magistrates and district judges were required to do privilege reviews in every criminal case in which privilege could be asserted.[257]

The court also opposed the notion that the taint team violated constitutional guarantees. The court first disagreed with the argument that the mere authorization of the executive branch to make privilege determinations, with a court reserving its power to "adjudicate any disputes that may arise," violates the separation of powers doctrine.[258] On this point, the court asserted that under Article III, federal courts "ha[ve] no business even exercising judicial power" when there is no dispute.[259] Moreover, the Fourth Amendment is also not disturbed by the government conducting the initial privilege review as long as the privilege holder "has notice and the opportunity to raise objections with the court before potentially privileged materials are disclosed to members of the prosecution team."[260]

[252] *Id.* (quoting Defendant Michael Avenatti's Pre-trial Motions, *supra* note 251, at 12).

[253] *Id.*

[254] *Id.* (quoting *In re* Grand Jury Subpoenas, 454 F.3d 511, 522-23 (6th Cir. 2006)).

[255] *Id.* at 283.

[256] *Id.* (quoting United States v. Grant, No. 04-CR-207, 2004 WL 1171258, at *2 (S.D.N.Y. May 25, 2004)).

[257] *Id.* at 284.

[258] *Id.*

[259] *Id.*

[260] *Id.*

Finally, the court found that the ex parte grant of the warrant was not problematic, citing Avenatti's recognition that search warrants are routinely granted in this manner.[261] This left only Avenatti's argument that the search warrant should have contained more details about the procedures the taint team would follow and, in addition, Avenatti should have been given the opportunity to be heard before the court's decision on what protocols would be employed.[262] In this regard, the court found that "he had ample opportunity to raise any objections to the review process before any materials were actually disclosed to the prosecution team" and he simply failed to do so.[263] While the court conceded that it would have been "better" if the warrant had contained more detailed procedures, the court again emphasized that Avenatti had the opportunity to object to the review but did not.[264] In keeping with this reasoning, the court overruled Avenatti's objections to the taint team's review of his iPad, but required the prosecution to allow him "reasonable notice and an opportunity to raise with the Court any objections to the [taint] team's privilege determinations."[265] Avenatti was convicted following a jury trial.[266]

Many courts have allowed taint teams to operate without question, finding that it offers a cost-efficient and "expeditious" way to review documents.[267] For example, the Eleventh Circuit approved the use of a taint team in the recent case of *United States v. Korf*.[268] In this case, the government conducted a search of a lawyer's in-house office based on a search warrant issued for the entire business suite of the target corporation.[269] The warrant included both tangible documents and electronic storage relating to the target individuals and companies in various ways.[270] If, *during* the search, the government identified seized privileged communication with an attorney, the warrant provided a protocol to follow, which included a taint team's review of the materials before the investigative team could proceed.[271] Like those teams reviewed above, the taint team would

[261] *Id.*

[262] *Id.* at 284-85.

[263] *Id.*

[264] *Id.* at 285. The court also notes that in his motion to suppress, Mr. Avenatti could not cite any communications that were improperly disclosed to the prosecution or any other deficiencies with the government's review. *Id.*

[265] *Id.*

[266] Avenatti was found guilty of wire fraud and aggravated identity theft. Stewart Bishop, *Avenatti Convicted of Defrauding Stormy Daniels*, LAW360 (Feb. 4, 2022, 3:13 PM), https://www.law360.com/whitecollar/articles/1461574.

[267] *See* Regensburger, *supra* note 11, at 1170.

[268] (*In re* Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means), 11 F.4th 1235, 1252 (11th Cir. 2021) (per curiam), *cert. denied* Korf v. United States, 143 S. Ct. 88 (2022) (mem.).

[269] *Id.* at 1238.

[270] *Id.* at 1239-40.

[271] *Id.* at 1240.

"have no previous or future involvement in the investigation."[272] In this case, however, the characteristic that signaled that the material was privileged was the fact that the document was sent to or from an attorney.[273] If the document did not "involve an attorney," then it was sent to the investigative team directly.[274] Although, if the material did constitute a communication to or from an attorney and the team decided that it was not privileged, then the team was required to get a court order before it could turn the communications over to the investigators.[275]

Like many other challengers, the targets filed for a preliminary injunction to prevent law enforcement from reviewing the material at all and instead requested that the privilege holders be allowed to conduct their own privilege review.[276] One of the primary bases for this motion was that the criteria meant to trigger the taint team review, namely that the communication be to or from an attorney, was underinclusive.[277] At the lower court level, the taint team protocol was modified because the target would be irreparably harmed and, as a result, the balance of harms weighed in favor of enjoining the original protocol.[278] The targets' request, however, was denied to the extent that it would preclude the government from processing any seized materials before the targets got to conduct their own review.[279]

The taint team approach that the lower court, and ultimately the Eleventh Circuit, approved included the government first processing the documents before they were provided to the targets for a privilege review.[280] The government's "processing" meant that, after the government agents determined whether the seized materials were sent to or from an attorney, the government would then copy and scan those materials for the targets.[281] All nonprivileged information would be returned to the investigative team along with a privilege log detailing those the targets considered to be protected.[282] Concerning the composition of the team: (1) no member could be involved in the underlying investigation; (2) no member could share a first level supervisor with anyone

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *Id.* The warrant provided as examples of those documents that were not privileged, communications with third parties and those implicating the crime-fraud exception. *Id.*

[276] *Id.* at 1240-41. The primary concern was that a similar case was filed against the targets for fraud in Delaware, which the targets saw as a "clear risk" of the government being given a "roadmap" to their defense. *Id.* at 1241.

[277] *Id.*

[278] *Id.* at 1242-43.

[279] *Id.* at 1243. Interestingly, the lower court also found that the public's interest weighed in favor of amending the taint team protocol. *Id.*

[280] *Id.* at 1243, 1252. The targets had forty-five days to review the items and send them back to the government. *Id.* at 1243.

[281] *Id.* at 1240-41.

[282] *Id.* at 1243.

involved in the investigation; and (3) any taint team supervisor had to be walled off from the investigation.[283] Of particular curiosity, the court condoned the team's review of any item listed on the privilege log and provided for the government's ability to challenge any such designation.[284] Should the dispute not be resolved, the court or a special master would make the ultimate privilege determination.[285]

Distinct in this opinion was the Eleventh Circuit's focus on the likelihood-of-success prong of the preliminary injunction analysis.[286] While the court cited three reasons, the focus here will only be on the third reason, particularly the court's conclusion that the modified approach did not suffer from any of the fatal infirmities other taint team protocols exhibited.[287] The court specifically addressed the Fourth and Sixth Circuit opinions discussed above, finding that, where those teams were deficient under the recommendations suggested by those courts, the modified team here complied with the other courts' recommendations.[288] While this is correct insofar as there are some factual distinctions between the cases, the court declined to address the commonality between all of them: the injury.[289] The Eleventh Circuit's belief that "there is no possibility here that privileged documents will mistakenly be provided to the investigative team" under the amended protocol is alarming and misses the point of the harm at issue in these cases.[290] No amount of protocol can prevent human error or, of greater import, make any of the search and taint team members forget anything they may see, even if done so inadvertently while copying or scanning a document or skimming it for an attorney's name. The Eleventh Circuit's decision to ground its analysis on the likelihood-of-success prong both underestimates the potential harm defendants and targets face with taint teams and is confusing in that it somehow found that there is settled law concerning the use of these teams.[291]

[283] *Id.*

[284] *Id.* If any item was challenged, the parties were required to confer first to attempt to work it out. *Id.*

[285] *Id.*

[286] *Id.* at 1248-49 (holding district court did not abuse its discretion in finding no injury for those appealing taint team).

[287] *Id.* at 1249-50. The other two reasons were that sister circuits had upheld the use of taint teams and that the targets had failed to provide any case authority to support their request to be the first and only privilege review of the materials. *Id.*

[288] *Id.* at 1250-51.

[289] Among the factual distinctions was the breadth of material at issue in the Fourth Circuit case. *Id.* The materials here were already in the government's possession, and all allegedly privileged documents would be filtered out at the first step of the process. *Id.*

[290] *See id.* at 1250.

[291] *See id.* at 1249. In this regard, the Fourth Circuit held the opposite when finding the targets were likely to succeed on the merits. *In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 181 (4th Cir. 2019).

In a similar vein, courts have also condoned the use of taint teams from the SMU by finding a lack of prejudice to the defendant. In *United States v. Satary*,[292] the United States District Court for the Eastern District of Louisiana endorsed the government's use of a taint team in a criminal fraud investigation.[293] In that case, the government searched the defendant's email account, which contained communications between him and his attorney.[294] The taint team reviewed the seized material, segregating "Potentially Protected Material," which the team thought could be subject to privilege claims.[295] By way of the motion at issue in this case, the taint team asked the court to enter a Discovery Protocol that would allow them to disclose this information to potentially interested third parties and the defendant to allow them to make privilege claims before the documentation was turned over to the prosecution.[296] The defendant objected to the proposed protocol, arguing that it did not afford adequate protections of his privilege.[297]

In discounting the defendant's objection, the court cited the government's representations that it had "produced all the material over which Defendant had standing to assert a privilege (i.e. his email account) . . . . This material was produced in full and contained both potentially privileged, including communications with [the defendant's attorney], and non-potentially privileged items."[298] Because the team had already produced the information to the defendant for review, the court found that the defendant's objection was mooted.[299]

Similarly to *Korf* and other cases discussed herein, the court in *Satary* failed to recognize the harm at the center of the defendant's objection: the taint team's review of the communications in the first place. One facet of the harm to a defendant's privilege is particularly highlighted in this case. With a taint team protocol such as the one in this case, the government is the party initially tasked with determining whether the defendant could have a privilege claim. This process essentially permits the government to make the first privilege determination in deciding whether a document is potentially privileged or not. This approach does not account for the possibility that a taint team erroneously attributes a privileged document as not privileged and turns it over to the government without first allowing the defendant to make his own determination. Because of the risk of this negligence, the fact that the defendant was given all the materials is irrelevant because the harm is already done.

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[292] 504 F. Supp. 3d 544 (E.D. La. 2020).

[293] *Id.* at 547-50; *see also* United States' Motion for a Discovery Protocol Governing Disclosure of Material Subject to Claims of Privilege and Extension of Time To Produce Discovery at 1 n.1, *Satary*, 504 F. Supp. 3d 544 (No. 19-cr-00197).

[294] *See id.* at 545.

[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] *Id.* at 546.

[299] *Id.*

3. Hybrid Approach

It is important to note, however, that some courts have used a hybrid approach, whereby an AUSA, unaffiliated with the case at hand, and a special master were used to conduct a privilege review. In *In re Search Warrant for Law Offices Executed on March 19, 1992*,[300] the Southern District of New York issued such an order following the execution of a search warrant at a law.[301] In this case, a law firm located in White Plains, New York, was the subject of a search warrant issued and executed before the motion at issue was filed.[302] Of particular import, the law firm's client and the client's principals were all subjects of the investigation.[303] The search warrant sought files related to four properties, including mostly records that were available publicly or with other parties and financial information, like "bank account records, ledgers, bank statements and cancelled checks, petty cash records and receipts, accounts payable records and accounts receivable records."[304] The warrant also provided language attempting to provide protection to privileged materials.[305]

Presumably to help carry out the above objective, the warrant also provided a dual-layer review of the evidence beginning with the search.[306] Agents not involved in the underlying investigation would conduct the search of the law firm along with an AUSA who would also be unconnected to the investigation and would be there "to answer any questions regarding privilege which may arise in the course of the search of [the firm's] office."[307] If, during the course of the search, the "AUSA determines that documents in question [were] privileged, they [would] not be seized."[308] Then, the second layer of the taint process required the same AUSA to review all seized documents for privilege before sending them to the investigative team.[309]

By the time the motion to have all seized documents returned to the law firm was filed, an AUSA in the same district as the AUSAs conducting the

[300] 153 F.R.D. 55 (S.D.N.Y. 1994).

[301] *Id.* at 56.

[302] *Id.* There was also a grand jury subpoena *duces tecum* for documents during a longer period of time than was provided for in the search warrant. *Id.*

[303] *Id.*

[304] *Id.* at 57. Also included was a "catchall" request for "the 'fruits and instrumentalities' of certain statutory violations." *Id.*

[305] *Id.* It stated:

> Efforts will be utilized to insure that the search of [the firm's] office does not result in the seizure of privileged documents or documents not related to [client]. Agents will attempt to seize only [client's] documents in [the firm's] possession, and will attempt not to seize any work product, charts or memoranda pertaining to the defense of the Government's investigation.

Id. (alterations in original).

[306] *Id.*

[307] *Id.* (alteration in original).

[308] *Id.*

[309] *Id.*

investigation had already reviewed the seized documents.[310] According to an affidavit, the reviewing AUSA was screening "any privileged documents . . . [by] taking possession of all items seized from the law firm and keeping them separate from the [other] AUSA and government agents then and still involved in a broad criminal investigation of [defendant]."[311] In an affidavit submitted by an attorney at the law firm, however, the majority of the boxes seized by the government contained privileged information concerning the attorney's own investigation of the corporate client for "possible illegal activity within and against" that corporation.[312] Also included in these boxes was information related to confidential interviews the attorney had with the corporate client's employees.[313] Such documents were not all created by the attorney, but were documents received by the attorney from the corporation during the course of his investigation.[314]

In light of all of the facts above, the court determined that, while the documents that came from the corporation were not privileged just by virtue of being physically in the lawyer's office and arranged "in some logical or illogical fashion," the court ordered that those documents that were privileged "before they got to the lawyer, or which were created by the lawyer, should remain privileged."[315] These were to be sent back to the law firm along with any irrelevant items, while the documents the AUSA determined were not privileged or implicated the crime-fraud exception were to be turned over to the AUSA in charge of the prosecution.[316] Those documents falling into the middle ground, namely those in which there was "a good faith dispute" as to whether it was covered by "intrinsic attorney client privilege based solely on the contents of the document," were to be submitted to the court for *in camera* inspection.[317]

[310] *See id.* at 56. The motion was filed to prevent the AUSA from turning over twenty cartons of documents to the prosecution team, including those seized during the search and acquired via the subpoena. *Id.*

[311] *Id.* (second alteration in original).

[312] *Id.* at 57. The firm was hired to conduct this type of investigation following the arrest of one of the corporation's employees by government officials. *Id.*

[313] *Id.* at 57-58.

[314] *Id.* at 58. The court, however, did not buy this argument and instead declined to apply the work-product doctrine "to protect otherwise nonprivileged corporate documents, simply because the lawyer has separated and arranged them in a manner convenient to his intended study for one or more legal problems and which reflects his analysis and thoughts concerning the matters which he was investigating." *Id.*

[315] *Id.*

[316] *Id.*

[317] *Id.* Furthermore, in response to the government's argument that the individual principals of the corporate client lacked standing to even bring an attorney-client-privilege challenge, the court found that, "under the totality of the circumstances," a privileged relationship exists "on the part of the individuals." *Id.* at 59. Although, as discussed previously, this is not always the case when outside counsel is hired to conduct an internal investigation. *See* Upjohn Co. v. United States, 449 U.S. 383, 399-402 (1981) (holding

While the court ultimately allowed the use of the AUSA to filter the materials, it was skeptical and critical of only screening the AUSA from the underlying investigation.[318] The court's principal concern was the seeming impropriety of the appearance of the government conducting the privilege review at all, famously stating that, "[t]he appearance of Justice must be served, as well as the interests of Justice. It is a great leap of faith to expect that members of the general public would believe any such [ethical] wall would be impenetrable."[319] Of particular import to the court was that in similar cases, nonlawyers involvement in the search and review process, however minor, may not be bound by the same ethical considerations as attorneys.[320]

B. *Problems with Taint Teams*

The government's intrusion into the attorney-client relationship causes a multitude of issues and harms for privilege holders. At the highest level, this invasion ultimately undermines a defendant's Sixth Amendment right to effective assistance of counsel.[321] Even where there are no members of the taint team who are directly related to the underlying investigation, the typical taint team member is usually a member of law enforcement or a prosecutor working on cases in the same geographic area or at least the same agency.[322] While the client being investigated may be provided some protection in this regard, there is no consideration of those who may be clients of the same criminal defense firm but the target of a different government investigation. This methodology fails to consider a situation in which a firm's client, who is not yet a target under investigation, becomes a target based on privileged information seen or

corporation may invoke privilege related to conversations between any of its employees who speak with outside counsel during course of internal investigation).

[318] *In re Search Warrant for L. Offs. Executed on March 19, 1992*, 153 F.R.D. at 59.

[319] *Id.*

[320] *Id.* Specifically, the court stated that the AUSA overseeing the taint team required

> physical assistance of agents, laborers, truckmen and others not bound by the ethical considerations which affect a lawyer. Those on the [prosecution team] may well access the same information from other sources, and have difficulty convincing a defendant or the public that the information did not pass over or through the Wall.

Id. But see MODEL RULES OF PRO. CONDUCT r. 5.3(b)-(c) (AM. BAR ASS'N 2020) ("[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer . . . .").

[321] *See* United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981) ("The essence of the Sixth Amendment right to effective assistance of counsel is, indeed, privacy of communication with counsel."); *see also* DeMassa v. Nunez, 770 F.2d 1505, 1506-07 (9th Cir. 1985).

[322] *See In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 165 (4th Cir. 2019).

remembered by an agent.[323] If a defendant's candor with their attorney is limited by fear of the government seizing such privileged information, it cannot be said that they are enjoying effective assistance of counsel.[324]

While permitting a defendant to be heard prior to disclosing potentially privileged information to the prosecution is better than sending the materials directly to the government,[325] it still does not cure these Sixth Amendment and Due Process concerns. Principally, the harm is already done because the taint team has already reviewed the information in enough depth to make a privilege determination. This is information that the taint team members cannot unsee.

The most egregious of the potential constitutional problems, however, is a taint team member leaking confidential information to the prosecution. This problem is not exclusive to the review of evidence following the search of a law office. While it may seem extreme, there have already been documented instances of agents leaking confidential information to prosecutors.[326] While government review of attorney-client communications may be a recent trend in the white-collar crime area, outside government agent and interested third-party review of attorney-client communications has been occurring for decades in drug cases, such as in *United States v. Noriega*.[327] In *Noriega*, the Southern District of Florida was considering Noriega's motion to dismiss his indictment in light of the government's access to and review of attorney-client communications.[328] The vast majority of the defendant's telephone calls from the prison were recorded, including those with his attorney.[329] Following a

[323] *See In re* Sealed Search Warrant & Application for a Warrant, No. 20-MJ-03278, 2020 WL 5658721, at *5 (S.D. Fla. Sept. 23, 2020), *aff'd sub nom. In re* Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means, No. 20-03278, 2020 WL 6689045 (S.D. Fla. Nov. 2, 2020), *aff'd*, 11 F.4th 1235 (11th Cir. 2021). In discussing various cases dealing with the search of attorney's offices, the court identified that a main concern was "that members of the [taint] team might have been involved in or could later become involved in the criminal investigation and or prosecution of other clients." *Id.*

[324] *See* United States v. Zolin, 491 U.S. 554, 556 (1989) (discussing crime-fraud exception as "generally recognized exception to [attorney-client] privilege for communications in furtherance of future illegal conduct").

[325] *See* United States v. Avenatti, 559 F. Supp. 3d 274, 284 (S.D.N.Y. 2021) (determining taint team's review of materials is permitted but nevertheless providing defendant opportunity to be heard before privileged material is turned over to prosecution).

[326] *See In re* Grand Jury Subpoenas, 454 F.3d 511, 523 (6th Cir. 2006) (explaining how taint team attorneys make mistakes or may violate ethical obligations); United States v. Noriega, 764 F. Supp. 1480, 1483-84 (S.D. Fla. 1991) (discussing case where "despite the screening procedures put in place, some of [defendant]'s attorney-client conversations slipped into the hands of the DEA case agents assisting the prosecution"); United States v. Elbaz, 396 F. Supp. 3d 583, 589 (D. Md. 2019) (discussing issue where files on unfiltered Google hard drive were made available to prosecution).

[327] *Noriega*, 764 F. Supp. at 1484.

[328] *See id.* at 1482.

[329] *Id.* at 1482-83. The prison in which Noriega was being held recorded all inmate phone calls, but if someone needed to talk to an attorney, they would use the staff phone. *Id.* at 1485.

subpoena *duces tecum* served on the prison for information about Noriega's telephone calls, the prosecution anticipated the presence of confidential communications, so they initially assigned an outside DEA agent to review the recordings.[330] The agent was to identify privileged communications and either filter those out or, if possible, sanitize the recordings or the transcripts before they were forwarded to the prosecution.[331] The agent, however, only reviewed the initial batch of records from the prison of the three sets of materials that were turned over by the prison.[332] Of the second batch, a government witness against Noriega reviewed twenty-two of the tapes and thirty-one tapes (including those reviewed by this witness) were turned over to the DEA case agent.[333]

The witness's review of the documents was directed and supervised by various DEA agents, and the witness would subsequently brief the agents on the results of his review.[334] Of import, one of the conversations the witness heard was between Noriega and his attorney concerning potential witnesses that Noriega had heard reported in a newspaper story.[335] The substance of this attorney-client conversation was both conveyed by the government witness to "at least one of the DEA agents" and memorialized in a memorandum prepared by the government witness that was conveyed to the lead prosecutor on the case.[336] This prosecutor, while reading the report, stopped when he came to the attorney-client conversation and specifically asked the DEA agent if the memorandum contained any information about an attorney-client conversation to which the agent "erroneously" stated that there was no such privilege in the

The primary inmate phones were connected to a central system that automatically recorded all conversations, so there was no ability to turn the recording system off. *Id.* at 1483. Noriega was, however, physically separated from the other inmates, so he did not have access to either the main phones or the staff phone, so a different phone had to be specifically installed for him. *Id.* While the phone line was not initially recorded because staff also used it, it was later connected to the recording system. *Id.* Noriega was required to tell the guards who he wanted to call, and the guard would dial the number, confirm the identity of the person on the other line, and then pass the phone to the inmate. *Id.* This was the process for all calls, including those with Noriega's representatives. *See id.*

[330] *Id.*

[331] *Id.*

[332] *Id.* While the second batch was not reviewed by the outside agent, at least some may have been screened by a prison staff member. *Id.* at 1483-84.

[333] *Id.* Also included in the second batch were nine other recordings turned over to the DEA case agent along with those reviewed by the government witness. *See id.* at 1484. The DEA agent purportedly only listened to some of the tapes, but it is unclear from the case what the content of those tapes were. *Id.* The third and final batches were simply "obtained by the DEA." *Id.* Reportedly, none of the recordings included in the last batch were reviewed because there was little prosecutorial value in any of the previous batches. *Id.*

[334] *Id.*

[335] *Id.*

[336] *Id.* The DEA agent to whom the conversation was described, to his credit, did not share the privileged information, but it was only purportedly because he viewed the information to be "essentially worthless." *Id.*

document.[337] This was not, however, the only unintentional disclosure of attorney-client communications in this case, there were apparently "a few other" disclosures that the court was able to identify in attachments to the government's submission.[338] Even the court notes that "despite the screening procedures put in place, some of Noriega's attorney-client conversations slipped into the hands of the DEA case agents assisting the prosecution."[339] Perhaps one of the most troubling aspects of this case is that Noriega's knowledge of this confidentiality breach did not come from the prosecutor or anyone else in the government; it came from CNN producers who obtained some of the tapes and informed Noriega's attorney of the breach prior to breaking the story.[340]

Noriega may seem to be an anomaly in its parade of horribles, but this is too reductive. While the court in that case ultimately found that Noriega had not been prejudiced because the taped conversations were "mostly of incomprehensible dialogue, discussions of Panamanian politics, and occasional trivia which contained nothing of value to the prosecution,"[341] what the court omitted in its discussion is that the government's intrusion into the attorney-client relationship constitutes prejudice and injury in and of itself.[342] Although nothing earth-shattering was contained in the recordings sent to the government, not all defendants will be so fortunate.

Additionally, although the court in *Noriega* was concerned about "trial by ambush,"[343] the more pressing concern should have been the ease of access the government had to these attorney-client communications and the laissez-faire approach to them. Not only was Noriega completely unaware of the government's possession of the conversations, nor did he learn about them directly from the government; the government only turned the recordings over

[337] *Id.* It is important to note that the lead prosecutor could have arguably determined that the document did contain attorney-client conversations because the DEA was in possession of the tape. It is an entirely different question, and one outside the scope of this Article, as to what the lead prosecutor would have done had he gotten confirmation of the document's contents.

[338] *Id.*

[339] *Id.*

[340] *Id.* It is unclear whether the government would have ultimately informed Noriega that the government had received and reviewed conversations between him and his attorney.

[341] *Id.* at 1494. This is a factual distinction between this case and *In re Grand Jury Subpoenas* discussed *supra* because, there, neither the parties nor the court knew which documents at issue contained privileged information. *In re* Grand Jury Subpoenas, 454 F.3d 511, 515 (6th Cir. 2006). Even under these facts, the reasoning in *In re Grand Jury Subpoenas* would still find Noriega was prejudiced by the disclosure of his privileged communications because the government had intruded into his relationship with his attorney regardless of whether the government received any of the fruits of its labor. *See id.* at 523.

[342] *Cf. In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 183 (4th Cir. 2019) (finding government's intrusion into attorney-client relationship was prejudicial to defendant).

[343] *Noriega*, 764 F. Supp. at 1494.

under a court order.[344] So, even though the prosecution seems to have had good intentions in its attempts to protect the attorney-client relationship, those intentions proved insufficient. As the Sixth Circuit succinctly put it, "[t]his *Noriega* incident points to an obvious flaw in the taint team procedure: the government's fox is left in charge of the appellants' henhouse, and may err by neglect or malice, as well as by honest differences of opinion."[345]

Furthermore, even where a prosecutorial team has been made aware of the existence of potentially privileged information that has not been filtered out, prosecutors may still have access. For example, in the past, prosecutors have been told via email that documents on a hard drive were potentially privileged and had not been filtered, but the prosecutors accessed them anyway.[346] The attorney simply did not read the email closely enough to glean this information and uploaded the drive for prosecutorial review without the potentially privileged documents being reviewed first.[347] In the government's rush to turn over discovery, it mistakenly uploaded the privileged documents with the universe of evidence accessible and usable by both sides.[348] So, again, even where there is no nefarious purpose, mistakes can and have happened that could be detrimental to a defendant or target's rights.

Nor does the DOJ's creation of a SMU, whose sole role is to review seized documents for privilege, cure any of these concerns. The members are no longer involved in other cases as investigators, but they are still employees of the DOJ. So, the concerns about the appearances of impropriety and the interest in breaching the walls between the team and the prosecutors remain.

The use of a taint team further undermines the appearance of fundamental fairness in judicial proceedings.[349] Even if there had never been egregious issues with the disclosure of confidential information to the government, the optics of the government having access to both sides of the adversarial proceedings would not change. No matter if taint team members remain steadfast in their integrity, following all protocols and procedures, the mere existence of the team undermines this appearance and threatens the integrity of our system.

The intrusion into the attorney-client relationship can also have more practical consequences, where it not only injures the holder of the privilege (including the target and other clients), but also the firm.[350] There are potentially far-reaching publicity implications dissuading new clients from seeking a firm's services who has been reviewed by a taint team, and a high probability that any client, current

[344] *Id.*

[345] *In re Grand Jury Subpoenas*, 454 F.3d at 523.

[346] *See* United States v. Elbaz, 396 F. Supp. 3d 583, 588-89 (D. Md. 2019).

[347] *Id.*

[348] *Id.* at 589.

[349] *See In re* Search Warrant for L. Offs. Executed on March 19, 1992, 153 F.R.D. 55, 59 (S.D.N.Y. 1994) (stating "[i]t is a great leap of faith to expect that members of the general public would believe" that any wall constructed between taint team and prosecutors "would be impenetrable").

[350] *See In re* Search Warrant Issued June 13, 2019, 942 F.3d 159, 175 (4th Cir. 2019).

or new, would no longer feel comfortable candidly communicating with their attorney for fear of the government using it against them.

Similarly, unfettered government access to attorney files could put a chilling effect on corporations conducting their own investigations into wrongdoing.[351] If a corporation could face possible criminal consequences for enlisting the assistance of an outside attorney when it suspects an employee of wrongdoing, corporations are then disincentivized from attempting to prevent or remedy any wrongdoing.

Finally, a taint team can have "a more restrictive view of privilege than [a defendant's] attorneys."[352] With respect to the latter concern, attorneys may only have an opportunity to assert privilege on those documents that a team had already identified as being possibly privileged, so there may not be a check on the government's determinations of nonprivileged documents.[353] In fact, courts have already made changes to a taint team's protocols by narrowly defining "privilege" to prevent any communications from slipping through.[354] Courts examining the use of a taint team in retrospect have noted that "the use of other methods of review would have been better."[355]

IV. RECONFIGURING THE REVIEW PROCESS

While some law-office search cases have the government use a taint team, other cases have an agreement between the government and the subject of the search concerning the appointment of a special master. Still others litigate the review process of materials obtained from a search or subpoena in court. It is apparent that there is a lack of uniformity in this process. This is particularly problematic when the case is high profile or has political implications. Consistency in the process provides cover to allegations of influence and corruption. Offered here are three steps to promote regularity in the review of materials obtained following a law-office search and also provide for a universal neutral decision-making review process.

Looking first at the front end, placing scrutiny on the decision to proceed with a search could serve to block extraneous use of these warrants that might impede the attorney-client privilege, work-product doctrine, or ethical mandates. Second would be to add to ethical mandates the already existing provisions for calling an attorney to the grand jury to discuss client matters. Finally, actually instituting

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[351] *Cf. In re Search Warrant for L. Offs. Executed on March 19, 1992*, 153 F.R.D. at 58.

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

[353] *See id.*

[354] *See* United States v. Korf (*In re* Sealed Search Warrant & Application for a Warrant by Tel. or Other Reliable Elec. Means), 11 F.4th 1235, 1239 (11th Cir. 2021) (per curiam), *cert. denied* Korf v. United States, 143 S. Ct. 88 (2022) (mem.).

[355] United States v. Stewart, No. 02 CR. 396, 2002 WL 1300059, at *6 (S.D.N.Y. June 11, 2002); *see also* United States v. Skeddle, 989 F. Supp. 890, 898 n.6 (N.D. Ohio 1997) ("By hindsight, a safer course would have been to have given notice to the defendants . . . and the lawyers whose offices were searched to show cause within a specified period why the materials should not be released to the government.").

a systematized method for the review of materials obtained following a law-office search, or other matters needing the review of privileged materials, would offer increased fairness in the process.

A. *Expanding Ethics Rules To Minimize the Use of Searches*

The use of a search as opposed to a subpoena may appear warranted in those situations when there is possible destruction of evidence. Obtaining evidence prior to a prospective defendant deleting or confiscating the evidence is important to preserve the item for the prosecution. With regard to electronic evidence, this poses less of a threat, as the ability of law enforcement to recreate emails and restore deleted computer files is relatively strong with current technology.[356] Yet, despite the increased technological advances of government computer specialists, one hears of more and more searches in the white-collar criminal sphere.

On the flip side of the government claiming the possibility of evidence destruction absent the use of a search, is that they have knowledge of the existence of such evidence. This knowledge is required to establish probable cause and obtain a search warrant. The later destruction of this evidence may then have more severe consequences for the defendant. Destroying evidence offers the government the potential to charge the accused with the crime of obstruction of justice, a crime that can often be more easily prosecuted than the initial substantive offense.[357]

Recognizing the pros and cons of obtaining evidence via a search, as opposed to using a subpoena, merits reconsideration of current ethics rules that pertain to information obtained from an attorney in the context of subpoenas, but omit discussion of what occurs when information results from a search. As previously noted, Rule 3.8(e) of the Model Rules of Professional Conduct provides that a prosecutor should "not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client" absent the existence of circumstances such as "the information sought is not protected from disclosure by any applicable privilege," "the evidence sought is essential to the successful completion of an ongoing investigation or prosecution" and, "there is no other feasible alternative to obtain the information."[358] Expanding this rule beyond subpoenas to include other methods of obtaining evidence could assist in making prosecutors rethink their decision to resort to a search when the information may include attorney-client material.

Adding this new category to the rule will strengthen the attorney-client privilege and confidential relationship between lawyers and their clients. It will

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[356] Simon Batt, *How Do Police & Forensic Analysts Recover Deleted Data from Phones?*, MUO (May 13, 2022), https://www.makeuseof.com/tag/forensic-analysts-get-deleted-data-phone/ [https://perma.cc/Z4AR-Z5XE] (discussing different methods used by forensic analysts in recreating files).

[357] *See* Ellen S. Podgor, *White Collar Shortcuts*, 2018 U. ILL. L. REV. 925, 955.

[358] MODEL RULES OF PRO. CONDUCT r. 3.8(e) (AM. BAR ASS'N 2020).

also forge a path to heightening the level of scrutiny when a prosecutor does find it necessary to proceed with a law-office search. Thus, the addition of language to Rule 3.8(e) expanding its current breadth to also include searches offers more forceful guidance to prosecutors that find it necessary to use a search warrant to preserve important evidence.

B. *Expanding Ethics Rules To Provide a Neutral Review Process*

A second addition to the ethics rules that could provide increased consistency and fairness to the review process of materials obtained from a search as well as from subpoenas would be to add language to either the ethics rules, its comments, or the American Bar Association Prosecution Standards providing for a neutral body to review the obtained material. The current guidance of the DOJ is fraught with concerns, as noted by both the Fourth and Sixth Circuit's statement of the obvious flaw in the taint team procedure, namely "the government's fox is left in charge of the appellants' henhouse, and may err by neglect or malice, as well as by honest differences of opinion."[359] Removing the government as a player following the search or subpoena alleviates the concerns raised in these judicial opinions. Although the government has sought to ensure a fair process and protect attorney-client privileged material by establishing taint teams, the very fact that they are creating, overseeing, and receiving the information from these teams cannot by its very nature provide any appearance of neutrality. This will also eliminate the ramifications of a search or review of information that goes beyond what the AUSA was aware of, especially when that material may have unanticipated implications to a case being investigated, handled, or related to a case under the purview of a member of the taint team.

C. *Courts Ensuring an Independent Review*

While there is an argument that the burden could shift to the government if it wants to use a taint team instead of appointing a special master, thus providing some measure of protection to the defendant, this burden-shifting alternative is still fundamentally flawed as it does not provide an initial neutral review.[360] The government team, albeit a team not connected with the lawyer's specific case, would still be observing materials that might be applicable in other cases. It is hard to predict in advance whether the attorney might have clients connected in some way with a member of the taint team. It is also hard to assure that the taint team will be providing an unbiased review as a member of the government. When reviewing this issue in the appellate process, it is a near impossible burden

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

[360] Other remedies have been argued, such as suppression of improperly seized evidence and return of law-office items that were infringing on the attorney-client privilege. *See* Klitzman, Klitzman & Gallagher v. Krut, 744 F.2d 955, 957 (3d Cir. 1984) (requiring return of improperly seized items from law firm); United States v. Adams, No. 17-cr-00064, 2018 WL 6991106, at *1 (D. Minn. Sept. 17, 2018) (suggesting suppresion of materials improperly seized).

for the convicted defendant to show harm, a necessary ingredient for claiming a constitutional violation.[361] It is for this reason that the review process should not be conducted by the government. Independence may not assure complete protection of the attorney-client privilege, but it will at the very least offer a higher level of propriety than the current review process that is completely dominated by the government. This more neutral process does not come without some reservations.

Concerns have been raised about the cost of an independent review, possible delay of the investigation, and the burden it may have on the judiciary.[362] Some may raise concerns that the cost of appointing a magistrate judge or special master to review the material may be prohibitive. For example, in the Michael Cohen case, it is reported that the special master's bill was "approximately $960,000."[363] These costs, however, need to be balanced against the fairness of the review process and the protection of potentially innocent third parties. Costs also need to be balanced against maintaining the attorney-client privilege.

As with any cost, there may be ways to reduce the price while also providing the needed judicial neutrality. For example, courts could consider the possible reduction of expenses by having a designated part-time judicial position created institutionally for matters that require an independent review, such as to handle reviews of the materials emanating from a law-office search.

Currently there are no provisions allowing either party to choose who the special master will be outside of requests made to the court for an appointment.[364] In fact, if the government chooses to use a special master, it usually fails to provide a remedy for breaches of privilege associated with the government conducting the privilege review.[365] Against this backdrop, it stands to reason that, at a minimum, the parties should come to an agreement as to who is appointed as special master. And, ideally, the lawyer or law firm being searched or subject to a privilege review would be able to choose or have input

[361] *See* United States v. Neill, 952 F. Supp. 834, 841 (D.D.C. 1997) ("[B]ased upon the evidence and testimony offered at the evidentiary hearing, including the demeanor and credibility of the witnesses as well as the Court's review of voluminous materials submitted under seal for *in camera* inspection and the entire record in this matter, the Court is satisfied that the government has carried its burden to rebut the presumption of harm.").

[362] *See, e.g.*, Ann E. Marimow, *Investigative Tool Used in Law Firm Searches at Risk, Federal Prosecutors Fear*, WASH. POST (Jan. 10, 2020, 7:00 AM), https://www.washingtonpost.com/local/legal-issues/investigative-tool-used-in-law-firm-searches-at-risk-federal-prosecutors-fear/2020/01/09/fbb42a58-32ea-11ea-9313-6cba89b1b9fb_story.html (quoting formal federal prosecutor Arun Rao as saying, "I suspect that this decision will burden magistrate judges, . . . substantially delay sensitive investigations, and significantly increase costs to the government").

[363] *Id.*

[364] *See* United States v. Gallego, No. CR-18-01537, 2018 WL 4257967, at *3 (D. Ariz. Sept. 6, 2018) (appointing magistrate judge instead of person from defendant's list of preferences). The *Justice Manual*'s guidelines regarding law-office searches offer no choice to the defense. *See* Just. Manual, *supra* note 7, § 9-13.420(D)-(F).

[365] *See* YEAR IN REVIEW, *supra* note 159, at 4.

into the person designated for handling this process. One might argue that having the suspect choosing the special master is absurd as they might select someone who would protect them.[366] This appearance of impropriety is no worse than the government conducting the privilege review, as having the defense involved in the process allows him or her to protect the privileges of those third parties whose information may be contained within the documents. The simplest solution is to allow the lawyer, if they are not also a suspect under investigation, or the law firm that housed the materials subject to the search, to choose or have input into who reviews the seized documentation.

The issue of special master selection also raises the question of what, if any, oversight is provided to the chosen individual. The natural answer would be to have the special master answer to the district judge or magistrate judge assigned to the case. This would of course increase the administrative burden on the judiciary, but should questions or concerns about the privilege determination arise, having the special master report to the prosecution creates the same breach issues as taint team review. While allowing the lawyer or law firm to provide the oversight would alleviate the breach or disclosure concerns, they are still interested parties motivated to influence the privilege determinations. But, however the process is ultimately configured, at the heart of the review should be fairness and protection of attorney-client privileged materials.

At a minimum, a defendant must be afforded the right to assert privilege over any documents that may be sent or obtained by the government. Even though a special master does more to eliminate the biased interest of a taint team member, it does not remedy any discrepancies between the special master's definition of privilege and that of the attorney.[367] This means that even those documents the special master deems are not privileged must first be sent to the attorney for final review with an opportunity to assert privilege if she deems it necessary. While some may claim that this could delay an investigation, checks could be placed on an attorney's attempt to use this review process to stonewall the investigation. Imposing a deadline for the completion of the review may assist here.

[366] There is a longstanding practice of defendants participating in the choice of a monitor under deferred prosecution agreements, nonprosecution agreements, and plea agreements. However, the government maintains veto power if it disapproves of the selected monitor. *See* Memorandum from Brian A. Benczkowski, Assistant Att'y Gen., U.S. Dep't of Just., to All Crim. Div. Pers., U.S. Dep't of Just. 4-7 (Oct. 11, 2018), https://www.justice.gov/opa/speech/file/1100531/download [https://perma.cc/H5BZ-3A89] (expanding on prior guidance related to monitors and describing nomination and approval process of monitor candidates).

[367] *See In re* Grand Jury Subpoenas, 454 F.3d 511, 523-24 (6th Cir. 2006) (noting district court's authority "to adjudicate legitimate disputes that may arise over issues such as, *inter alia,* cost, timing, the identity and makeup of the Special Master's team, and the word lists").

CONCLUSION

The right to counsel is a core value of the U.S. judicial system.[368] It includes an array of accompanying rights, such as the right to hire experts.[369] Government violation of the attorney-client privilege infringes on this basic right. It impedes the ability of counsel to provide conflict-free representation and intrudes on the attorney-client privilege to converse without government intrusion. Exceptions, such as the crime-fraud exception, exist to ameliorate these concerns.

Government searches of law firms place an unusual tension on the attorney's ability to keep secret, client information. Yet, in some instances there is a necessity for such a search. This does not, however, excuse the process and procedure used following this intrusion into a law firm. Measures are warranted to protect the attorney-client relationship, whether they be through redesigning ethical rules or formulating new procedures for court review of produced or seized items. The continued use of taint teams by the government needs to be reconsidered to provide a process that places the right to counsel and the importance of attorney-client confidentiality at the forefront. Moving to a system that offers enhanced neutrality in the review process would prove beneficial to the criminal justice system.

In the white-collar crime sphere this issue is heightened, as the cases are typically high profile, media magnets, and often involve political participants. It is particularly important in this context to assure the public of fairness in the actions between the prosecution and defense. Having a review process that is centrally controlled and operated by the government fails to achieve this goal. It is for this reason that in balancing the government practices and defense rights, neutrality needs to be the centerpiece in the review of privileged materials.

[368] *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[369] *See* Ake v. Oklahoma, 470 U.S. 68, 86-87 (1985) (holding indigent defendant has due process right to experts).