

Despite Inherent Risks to the Attorney-Client Relationship, Taint Teams Are Here to Stay (for Now)

By Daniel Suleiman and Molly Doggett¹

When the U.S. Department of Justice (“DOJ”) executes a search warrant and seizes potentially privileged files, the fundamental protections offered by the attorney-client privilege, attorney work product protection, and other privileges and protections are put at risk. “Taint teams,” also referred to as filter teams or privilege teams, have often been the government’s answer. Create a team of prosecutors and agents who are screened from the investigation team and ask them to pass along only those communications that are neither privileged nor protected. As the Justice Manual puts it, “[T]o protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a ‘privilege team’ should be designated, consisting of agents and lawyers not involved in the underlying investigation.”²

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² Justice Manual § 9-13.420; *see also id.* § 9-13.400(D)(7) (“In executing a warrant . . . , investigators should use protocols designed to minimize intrusion into potentially protected materials . . . , including but not limited to keyword searches (for electronic searches) and filter teams.”)

There are multiple issues raised by this practice. For example, as white collar practitioners know, privilege calls can be challenging, so a team of prosecutors and agents who lack context for the documents under review are often ill-equipped to make accurate privilege determinations. In addition, non-lawyer agents may not be sufficiently sensitive to the various ways in which a document could be protected from disclosure. Moreover, a prosecutor, albeit one not involved in the underlying investigation, may still be exposed to sensitive privileged material, including potential evidence of criminal wrongdoing, that they would never otherwise have been entitled to review. The list goes on. As the Sixth Circuit has put it, the most “obvious flaw” with the use of a taint team is that the “government’s fox is left in charge of the [defendants’] henhouse” and “may err by neglect or malice, as well as by honest differences of opinion.”³

In 2019, the Fourth Circuit, in *United States v. Under Seal*, cast significant doubt on the government’s ability to continue using taint teams to sort through potentially privileged material. The court invalidated federal prosecutors’ use of a

³ *In re: Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006). As an example of how the use of a taint team can lead to significant errors, in 2018, in an investigation in which the authors represented a different defendant who pleaded guilty and later testified, the prosecution team gained access to thousands of potentially privileged documents for a period of five months after a prosecutor erroneously instructed that these documents be uploaded directly to the prosecution team’s review database, bypassing the taint team. The taint team ultimately determined that members of the prosecution team accessed or presumably accessed 137 potentially privileged documents representing 103 unique communications. The court admonished the government for its “significant error in judgment.” See *United States v. Elbaz*, 396 F.Supp.3d 583, 597 (D. Md. 2019).

taint team after agents executed a search warrant on a Baltimore law firm, sharply criticizing the government’s review process and concluding that the use of the taint team “inappropriately assigned judicial functions to the executive branch.”⁴ The Fourth Circuit’s decision notwithstanding, DOJ policy has continued to permit the use taint teams, and they are regularly deployed.⁵ There is some indication, however, that even though DOJ policy has not undergone significant changes since the Fourth Circuit’s decision in *Under Seal*, additional safeguards are becoming the norm.⁶ In August 2021, the Eleventh Circuit, in *United States v. Korf*, upheld the government’s use of a taint team that had significantly more protections in place than the team at issue in *Under Seal*.

For the moment, therefore, despite some remaining risks to the attorney-client relationship, taint teams appear here to stay. When faced with a taint team, white collar defense practitioners should draw upon *Under Seal* and *Korf* to insist upon strong safeguards, including initial review by the privilege holders, as well as

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

⁵ See Justice Manual § 9-13.420.

⁶ In 2020, DOJ created a Special Matters Unit within the Criminal Division’s Fraud Section “to focus on issues related to privilege and legal ethics.” The unit “(1) conducts filter reviews to ensure that prosecutors are not exposed to potentially privileged material, (2) litigates privilege-related issues in connection with Fraud Section cases, and (3) provides training and guidance to Fraud Section prosecutors.” See U.S. Dep’t of Justice, *Fraud Section Year in Review 2020*, at 4 (Feb. 2021).

judicial review before any potentially privileged materials can be released to the prosecution team.

Fourth Circuit Decision

In *United States v. Under Seal*, the government seized materials from a Baltimore law firm that represented a Maryland attorney who was accused of assisting drug dealers engaged in illicit activities, including money laundering and obstruction. Federal agents declined to apply search terms on the front end, ultimately collecting tens of thousands of emails and documents, 99.8% of which consisted of correspondence unrelated to the law firm client under investigation.

The Fourth Circuit was troubled by the breadth of the search and also took issue with the terms of the taint team's protocol, which had been approved *ex parte*. In addition to the fact that so few of the seized materials related to the investigation at issue, the court in particular highlighted that, in addition to prosecutors, the taint team included non-lawyer agents, a paralegal, a legal assistant, and forensic examiners. The members of the taint team worked in the same U.S. Attorney's Office as the prosecution team, albeit in a different physical location.⁷ The protocol also allowed the taint team to conduct the initial review for

⁷ Both the prosecution team and the filter team worked in the U.S. Attorney's Office for the District of Maryland. The prosecution team came from the Baltimore office, whereas the filter team came from the Greenbelt office. Another fact that troubled the court was that many of the seized communications belonged to clients of the law firm who were being investigated or prosecuted in unrelated matters by the same U.S. Attorney's Office where members of the filter team worked.

privilege and forward documents it deemed non-privileged directly to the prosecution team, without the consent of the law firm or a court order. Regarding documents the taint team deemed privileged or potentially privileged, the protocol established a process for forwarding the documents to the prosecution team by agreement of counsel or upon a court order. In addition, despite professional ethics rules prohibiting a lawyer from contacting a represented party, the protocol allowed the taint team to contact law firm clients directly in order to seek privilege waivers.

In a strongly worded opinion, the Fourth Circuit determined that the government's use of a taint team was improper because it undermined the sanctity of the attorney-client relationship and inappropriately assigned judicial functions to an executive branch agency. While the court did not categorically ban the use of taint teams, it ruled that a magistrate judge or appointed special master, and not a taint team, must perform the privilege review of the seized materials.

The decision in *Under Seal* highlighted many of the problems with the government's use of taint teams, including that privilege analyses are not always straightforward. Attorney-client privilege is implicated not only by communications between a client and attorney, but also by documents involving lawyers' agents, communications between non-lawyers conveying legal advice, and common interest situations, among others. In short, privilege calls are easy to

get wrong, particularly by a taint team that includes non-lawyers who lack context for the communications.

The invasion of privilege by the government's use of taint teams also implicates an individual's Sixth Amendment right to the effective assistance of counsel. The threat of government prosecutors and investigators reviewing and analyzing confidential communications between a client and their attorney risks chilling the full and frank discussions that are often necessary for an attorney to provide sound legal advice.

Eleventh Circuit Decision

The Fourth Circuit opinion raised important questions about whether the use of taint teams should be abandoned altogether. Two years later, however, the Eleventh Circuit, in *United States v. Korf*, upheld a taint team protocol that contained substantially stronger safeguards than those at issue in *Under Seal*. In *Korf*, in connection with an investigation conducted by the U.S. Attorney's Office in Cleveland, the government executed a search warrant on offices belonging to the Optima Family companies in Miami, Florida, resulting in the collection of some purportedly privileged materials.⁸ The subjects of the seizure expressed particular concern with the government's review of privileged materials because they had

⁸ *United States v. Korf*, 11 F.4th 1235 (11th Cir. 2021). On January 19, 2022, the Eleventh Circuit denied a petition for rehearing.

been defending against a bank suit filed in Delaware in 2019 alleging fraudulent activity that purportedly covered “substantively identical” transactions and occurrences as those at issue in the criminal investigation.⁹

Following oral argument on the taint team’s original protocol, a magistrate judge rejected the argument that the use of government taint teams to conduct privilege reviews is *per se* legally flawed, but instructed the government to follow a modified protocol that allowed the privilege holders to conduct the initial privilege review. After the privilege holders produced a privilege log to the government, the taint team then had an opportunity to review documents identified on the privilege log and challenge individual privilege determinations. Critically, the privilege holders were tasked with determining whether a document was non-privileged and could be released to the prosecution team, and the prosecution team was prohibited from receiving any documents identified as privileged unless the defendants consented or upon a court ruling.

Noting several significant factual differences from *Under Seal*, the Eleventh Circuit determined that the modified taint team protocol incorporated safeguards sufficient to protect the attorney-client privilege. The court emphasized that the revised protocol allowed the privilege holders to conduct an initial privilege review and required their permission or a court order to release any privileged documents

⁹ *Id.* at 1241 (internal quotations omitted).

to the investigation team. According to the Eleventh Circuit, those safeguards meant that the “filter team cannot inadvertently provide the investigation team with any privileged materials.”¹⁰

Conclusion

Prosecutors continue to rely on taint teams to sift through potentially privileged material. This practice poses inherent risks to the attorney-client relationship. This is especially true in situations where the holder of the privilege may be unaware that their documents are being searched or there is otherwise no opportunity for judicial review. Even the most well-intentioned fox will run into problems when put in charge of a henhouse. While the Fourth Circuit in *Under Seal* cast some doubt on the continued viability of taint teams, the Eleventh Circuit in *Korf* made clear that with appropriate safeguards in place, taint teams can survive. White collar practitioners should take note of these decisions when their clients’ potentially privileged communications are at risk and insist on strong protective measures, including with respect to the composition of a taint team, the party that conducts the initial review of the potentially privileged materials, and whether judicial review is required before any potentially privileged documents can be released to the prosecution team. Sticking to these protections will not eliminate the risks posed by taint teams, but they will help minimize the harm.

¹⁰ *Id.* at 1249.