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Expert Analysis

WHITE-COLLAR CRIME

Government Searches: The Trouble With Taint Teams

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When the government seizes electronically stored documents by means of a search warrant, it will often seek to set up an internal "taint" team to try to segregate out materials protected by the attorney-client privilege to avoid later claims that it improperly accessed such documents. A typical taint team is made up of colleagues of the government trial team—federal agents and prosecutors—who are not members of the trial team. Over the years, a number of courts and practitioners have criticized this "fox guarding the chicken coop" procedure as inherently ill designed to protect the privilege.

A recent case from the U.S. Court of Appeals for the Eleventh Circuit, *U.S. v. DeLuca,* illustrates just what these skeptical courts and counsel have been concerned about. In that case, privileged information was provided to the trial team without notice to the defendant in violation of the terms of a stipulation providing for a taint team. Despite the unjustified invasion of the defendant's attorney-client privilege, the court affirmed Stephen DeLuca's conviction because it found no prejudice resulted from the violation.

Whether intentional or inadvertent, privilege violations like the one in *DeLuca* are more likely, and more troubling, when a government taint team is at work. Defense attorneys and courts should require more protective procedures, such as the appointment of an independent third party to conduct privilege review or allowing defense counsel to review all of the documents and produce only non-privileged materials, to ensure that an intrusion on the defendant's privilege does not occur. With an amendment to Rule 41 of the Federal Rules of Criminal Procedure that facilitates government searches of remote computers set to go into effect this week, the problem of government review of potentially privileged material will likely only increase.[1]

'United States v. DeLuca'

DeLuca, the president and sole shareholder of Delco Oil, Inc., was charged with defrauding financial institutions in connection with loans made to the company in reliance on false financial statements. During the government's investigation, the Federal Bureau of Investigation seized Delco's computers and hard drives, which included communications between DeLuca and various lawyers.

In an effort to protect its investigation against claims of infringing on DeLuca's attorney-client privilege, the government entered into a stipulation with DeLuca pursuant to which communications to and from a list of attorneys provided by DeLuca were to be segregated for review by a taint team of government lawyers and agents separate from the trial team. If the taint team wished to assert that any such communications were non-privileged, the taint team had to

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first notify DeLuca's attorneys, before providing them to the trial team. Any disputes were to be resolved by a magistrate judge.

Although DeLuca executed the proposed stipulation, the bankruptcy trustee for Delco declined to sign it, instead waiving the privilege on the corporation's behalf. The government nevertheless at first proceeded as if the stipulation was in effect, creating a taint team and segregating potentially privileged documents. But notwithstanding that DeLuca had specifically asserted personal privilege claims, the assistant U.S. attorney supervising the taint team later testified that he believed that the trustee's action effectively waived DeLuca's privilege, and without notifying DeLuca, he provided the trial team 10 attorney communications later found to be privileged. Believing the stipulation to be in place, DeLuca first learned that the prosecution violated the stipulation when the government included one such privileged document on its trial exhibit list.

DeLuca moved to dismiss the indictment based on the government's misconduct, but the government withdrew its request to use the privileged communication at trial, and the trial judge allowed the case to proceed. After the jury returned a guilty verdict, the court conducted an evidentiary hearing and determined that the government had violated DeLuca's privilege by the trial team's accessing the 10 privileged documents.

The court found that the government "disregarded" privilege by actions that "risk undermining" trust in the government: "Attorneys for the government made assurances to defendant and defense counsel that privileged information would not be accessed by the prosecution team, but they accessed it anyway." The trial court nevertheless denied DeLuca's motion to vacate the conviction, finding that there was no prejudice as a result of the violation.[2]

In late October 2016, the Eleventh Circuit affirmed, finding no demonstrable prejudice to the defendant resulting from the government's violation.[3] The circuit rejected DeLuca's argument that where there has been an intentional invasion of attorney-client privilege by the government, courts should apply the standard enunciated by the Supreme Court in *Kastigar v. United States*[4] for cases where the government compels an individual to testify under a Fifth Amendment grant of immunity: that is, that the government bear the burden to prove affirmatively that all evidence in the case was derived from a legitimate source independent of the privilege violation. As the Supreme Court explained in *Kastigar*, when the government intentionally overrides the privilege of an individual it is prosecuting, that person should not be "dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities."

The Second Circuit Standard

In contrast to the Eleventh Circuit in *DeLuca*, the U.S. Court of Appeals for the Second Circuit applied the Kastigar standard in the context of government attorney-client privilege violations in *United States v. Schwimmer*. The ultimate result in that case, however, provides little solace for defendants. Martin Schwimmer served as the investment adviser to four employee benefit plans covering members of Local 38, Sheetmetal Workers International Association. Schwimmer was convicted in the Eastern District of New York for offenses related to the illegal receipt of commissions from financial institutions with which he invested funds from Local 38's plans.

Schwimmer argued that the case against him had been tainted because the government violated his attorney-client privilege by obtaining materials from an accountant retained by defense counsel to advise him and a co-defendant pursuant to a joint defense agreement. After the trial court denied Schwimmer's motion for dismissal, the Second Circuit reversed and remanded, concluding that the trial judge "should have conducted an evidentiary hearing to determine whether the government's case was in any respect derived from a violation of the attorney-client privilege in regard to confidential communications passing from Schwimmer to [the accountant.]"[5]

On remand, the district court found that the government successfully sustained its burden as articulated in *Kastigar*, proving that its case was derived from "legitimate independent sources of proof rather than from the direct or indirect use of privileged information." The Second Circuit affirmed that finding, and rejected Schwimmer's further contention that the government's intentional intrusion into the attorney-client privilege required an automatic reversal of his conviction.[6]

The Problem With Taint Teams

Both *DeLuca* and *Schwimmer* demonstrate the difficulty a defendant may have in obtaining any relief following a government intrusion into the attorney-client privilege, regardless of the legal standard for

demonstrating prejudice applied by the courts. *DeLuca* also provides yet another example illustrating why courts are properly skeptical of relying on teams of FBI agents and government prosecutors to safeguard the defendant's privilege.

A basic structural flaw in the taint team procedure is that it does not prevent the government from accessing privileged information; the procedure simply dictates which government agent sees it first. As stated by a federal district court in the District of Columbia, review by a taint team is a per se intentional intrusion into the privilege that itself may "create an appearance of unfairness."[7]

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More practically, another inherent flaw in the taint team structure is that the government typically makes the initial determination of whether a document should be subject to further review before being turned over to the prosecution's trial team. As the U.S. Court of Appeals for the Sixth Circuit observed in rejecting the use of a taint team: "It is reasonable to presume that the government's taint team might have a more restrictive view of privilege than the appellants' attorneys. But under the taint team procedure, appellants' attorneys would have an opportunity to assert privilege only over those documents which the taint team has identified as being clearly or possibly privileged."[8]

This process creates excessive risk that privileged materials will slip through. Examples are as simple as attorney advice contained in a document in which an attorney is identified only by first name or a nickname, or in an email in which the attorney uses an unidentified email address, resulting in the privileged communication being missed by an electronic search that filters based on the attorney's full name or most common email address. Of course, such mistakes are more likely because the government is simply not motivated to be as careful in its review as a defendant whose privilege, and freedom, is at stake.

Finally, as illustrated by *DeLuca* and other reported cases, another significant source of risk is the predictable and inevitable interaction between the federal prosecutors and agents serving on the taint team and those on the trial team.[9] Even in the best of circumstances such interactions are nearly impossible to police effectively, and as *DeLuca* demonstrates, the best of circumstances do not always prevail.

Conclusion

Even putting aside the fundamental problem that allowing one group of government officials to review privileged documents to prevent their use by another does not prevent government intrusion into attorney-client privacy but only mitigates its consequences, practical experience with taint teams, as illustrated by cases like *DeLuca*, shows that they are too often ineffective.

Especially given the difficulty in obtaining a remedy should a privilege violation occur, defense counsel should make every effort to have privilege review conducted outside government offices. Superior options, supported by applicable case law, include review by an independent third party, such as a special master or magistrate judge, or requiring that a copy of the seized records (or relevant portions thereof) be turned over to defense counsel for review, with only documents as to which no claim of privilege is asserted being available to the government for review. Defense counsel are well advised to steadfastly object to the use of a government taint team, and if a court nevertheless approves one, counsel should do all they can to carefully monitor the taint team's operation.

1. See Congressional Research Service, "Digital Searches and Seizures: Overview of Proposed Amendments to Rule 41 of the Rules of Criminal Procedure," Sept. 8, 2016 (www.fas.org/sgp/crs/misc/R44547.pdf).
2. 2014 WL 3341345 (M.D.Fl. July 8, 2014).
3. 2016 WL 6211820 (11th Cir. Oct. 25, 2016).
4. 406 U.S. 441 (1972).
5. 892 F.2d 237, 245 (2d Cir. 1989).
6. 924 F.2d 443 (2d Cir. 1991).
7. *United States v. Neill*, 952 F.Supp. 834, 840-41 & n. 14 (D.D.C. 1997).
8. *In re: Grand Jury Subpoenas*, 454 F.3d 511, 523 (6th Cir. 2006).
9. See *Crudele v. New York City Police Department*, 2001 WL 1033539, at *4 (SDNY, Sept. 7, 2001) (interactions of "10-15 minutes every day" between attorney on taint team and trial attorney raised "grave concerns about both the possibility of unintentional breaches of client confidences and about the appearance of impropriety").