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Update: Sixth Circuit Rejects 'Taint Team'

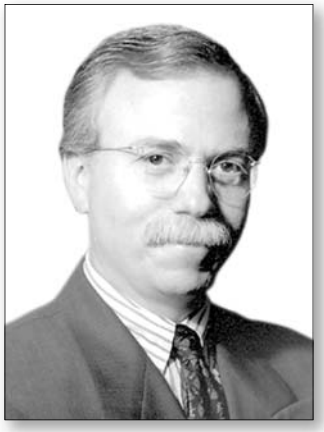
BY HOWARD W. GOLDSTEIN

In September 2004, this column, declaring that "[l]awyers are at risk," examined the means by which privilege can be protected when the government executes a search warrant at the office or home of a lawyer. In particular, the column examined the government's use of so-called "taint teams" and the developing judicial reaction to them. Noting that courts "for the most part, have been sympathetic" to concerns raised by the defense bar about allowing the government access to potentially privileged documents, the column observed that, while some courts have approved of taint teams, courts "more frequently...have either outright rejected or expressed strong disapproval of this approach."[1] Two then-recent Southern District of New York cases were discussed: one in which the court appointed a special master to review potentially privileged documents;[2] and one in which the court, in dictum, explicitly disapproved of "ethical walls" after noting that the wall in that case had been ineffective.[3]

Unpersuaded by the column's logic, the government has continued to use taint teams, and the courts have continued to respond with a variety of approaches. However, the same basic judicial pattern persists: some courts have approved of taint teams; other courts have noted that taint teams tend to get tainted; and most significantly, the Sixth Circuit recently became the first circuit court specifically to reject the use of a taint team.

Taint Teams Approved

In *In the Matter of the Search of 5444 Westheimer Road Suite 1570, Houston, Texas*,[4] the court approved the use of a taint team to review 118 boxes of documents seized pursuant to an FBI search warrant. In that case, the government



segregated eight of the seized boxes as containing potentially privileged material. The government then proposed to have a taint team review all of the seized materials, including the segregated boxes; documents determined to be privileged would be returned, and the party from whom the remaining "non-privileged" documents were seized would be given an opportunity to challenge the "non-privileged" determination before the documents were turned over to the prosecution team. The court rejected the challenge that this procedure was improper per se. Noting that other courts had upheld taint team procedures, the court rejected the suggestion that a special master be appointed. The court stated "that its decision 'is based upon the expectation and presumption that the government's privilege team and the trial prosecutors will conduct themselves with integrity'."[5]

United States v. Valencia-Trujillo,[6] a recent decision in the Middle District of Florida, is an example of the leeway some courts have given to the government in reviewing the propriety of taint teams. In that case, after the defendant's indictment, the government obtained documents and statements from a former defense investigator who approached the government with concerns about ongoing criminal activity. The investigator was interviewed, and documents subsequently obtained by him from the office of one of the defendant's lawyers were turned over to the government and sealed.[7]

The assistant U.S. attorney in charge of the defendant's prosecution then had a taint team appointed to handle the government's investigation of the defense investigator's allegations. The assistant assigned to head the taint team was a member of the same unit as the defendant's prosecutor, and their offices were on the same floor. In fact, the taint team leader had presented the defendant's case to the grand jury and signed the indictment.

After the taint team obtained additional documents, it unsealed all of the documents and conducted an initial privilege review. The documents were not resealed. Copies of the documents were made, and one of the agents assisting in the copying was a DEA agent on the prosecution team.

Based on concerns about the defense investigator's credibility, the investigation into ongoing criminal conduct was terminated. The seized documents were then resealed and returned to the defense team.

On defendant's motion for sanctions and dismissal of the indictment, the magistrate judge framed the question as whether "the procedures set up by the government [were] adequate to protect against an inadvertent or intentional disclosure of privileged information...."[8] On that issue, the prosecutor in charge of the defendant's case testified that he had not been privy to any privileged information. The AUSA in charge of the taint team was recovering from a hospitalization and did not testify. The court, referring to "evidentiary gaps"—such as why a member of the prosecution team assisted in copying documents and whether the taint team assistant locked his office—concluded that "[t]he government's conduct in this case [was] far from exemplary."[9] However, because the defendant did not demonstrate prejudice, his claims were rejected under the "no harm no foul" rule of *Weatherford v. Bursey*.[10] The court acknowledged that it was "not unmindful of the possibility that the prosecution could have been tainted."[11] It nonetheless concluded that prejudice had not been demonstrated by a preponderance of the

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evidence. The court recommended to the district court that taint team members be precluded from future involvement in the prosecution, with no de minimis exceptions, and that the United States Attorney be required to promulgate written taint team procedures.

Taint Teams Questioned

In *In the Matter of the Search of the Scranton Housing Authority*,[12] search warrants were executed at the offices of the Scranton Housing Authority. During the search, counsel for the Housing Authority advised the agents executing the warrant that documents in one office related to pending litigation and were possibly privileged. The agents sealed all of the boxes containing documents from that office and sent them to the U.S. Attorney's Office, where the first assistant reviewed them. Documents determined to be privileged were sealed and turned over to counsel for the Housing Authority. Documents determined not to be privileged were turned over to the agents for use in the investigation, with copies furnished to counsel for the Housing Authority after the fact. The magistrate judge rejected as moot the Housing Authority's request for an order barring review of the documents by a taint team, because the taint team had already concluded its work and the Authority —now in possession of all of the documents—had not identified a single document as privileged. The judge observed, in dictum, that the use of government taint teams "has often been questioned or outright rejected by the courts, at least in the context of criminal prosecutions."[13]

Taint Teams Rejected

In *In re Seizure of All Funds on Deposit in Accounts in the Names of National Electronics, Inc. at JPMorganChase Bank*,[14] the government seized documents and funds pursuant to search warrants issued in the Eastern and Southern Districts of New York and the Southern District of Florida. As to the documents, the claimants sought the appointment of a special master to review the documents and resolve privilege claims. Not surprisingly, the government argued that a "wall" assistant completely screened from the prosecution team would adequately safeguard any privileges. Citing two prior Southern District cases, the court observed that "reliance on a 'wall' Assistant in the context of a criminal prosecution should be avoided when possible." The court concluded that a special master would be appointed if the volume of documents precluded review by the court itself.

Finally, in *In re Grand Jury Subpoenas*,[15] the Sixth Circuit became the first circuit court specifically to reject the use of a taint team. That case arose in a somewhat unusual context. Typically, taint teams are used when search warrants are executed. They are not necessary when grand jury subpoenas are issued, because the subpoenaed party maintains control of the documents and can withhold production of any privileged materials. In *In re Grand Jury Subpoenas*, however, the subpoenaed corporate party, which was prepared to waive its privilege, had in its possession documents as to which its former sole owner and CEO, and certain affiliated companies, asserted separate attorney-client and work product privileges. The former CEO and affiliated companies intervened and demanded the right to conduct their own privilege review. The government opposed the motion and asserted that a privilege review could be conducted by a taint team, which would conduct a privilege review and return any documents it concluded were privileged. Potentially privileged documents would be submitted to the interveners and the district court for adjudication. But documents that the taint team determined were not privileged would be submitted directly to the grand jury. The district court granted the motion to intervene, but sustained the government's position.

> The Sixth Circuit's recent opinion is an acknowledgement that the government, no matter how well intentioned, should not be the protector of first choice of its adversary's privileges.

The Sixth Circuit reversed and ordered the appointment of a special master. Responding to the government's concern that review of the subpoenaed documents would compromise grand jury secrecy and potentially allow the interveners to "reverse engineer" the grand jury investigation, the court concluded that grand jury secrecy did not trump the interveners' privilege concerns, particularly because the risks to grand jury secrecy were minimized by the interveners' offer to create a privilege log and limit their review to documents—segregated by one of their paralegals—authored by, received by, copied to, or mentioning a list of legal personnel who represented them. In the alternative, they proposed the appointment of a special master to conduct the review.

Balanced against this minimal risk to grand jury secrecy was the "great risk to the [interveners'] continued enjoyment of privilege protections."[16] The court noted that "taint teams present inevitable, and reasonably foreseeable, risks to privilege, for they have been implicated in the past in leaks of confidential information to prosecutors."[17] The court pointed to "an obvious flaw" in the taint team procedure: "the government's fox is left in charge of the [interveners'] henhouse, and may err by neglect or malice, as well as by differences of opinion."[18]

Conclusion

In September 2004, this column observed that "the problem with taint teams is that the government simply has no business looking at a party's privileged documents."[19] The law continues to develop in this area, with the Sixth Circuit's recent opinion being an acknowledgment that the government, no matter how well intentioned, should not be the protector of first choice of its adversary's privileges.

1. Howard W. Goldstein, "Taint Teams," NYLJ, p. 5 (Sept. 2, 2004).
2. *United States v. Stewart*, 2002 U.S. Dist. WL 1300059 (S.D.N.Y. June 11, 2002).
3. *United States v. Kaplan*, 02 Cr. 883 (S.D.N.Y. Dec. 5, 2003).
4. *In the Matter of the Search of 5444 Westheimer Road Suite 1570, Houston, Texas*, 2006 WL 1881370 (S.D. Tex. July 6, 2006).
5. Id. at *3, quoting *United States v. Grant*, 2004 WL 1171258 (S.D.N.Y. May 25, 2004) at *3.
6. *United States v. Valencia-Trujillo*, 2006 WL 1793547 (M.D. Fla. June 26, 2006).
7. Documents were also seized from another defense investigator during a border stop. Those documents were also sealed. They were ultimately returned to the defense team with the seals intact.
8. *United States v. Valencia-Trujillo*, supra, n. 6 at *7.
9. Id. at *11.
10. *Weatherford v. Bursey*, 429 U.S. 545 (1977).
11. *United States v. Valencia-Trujillo*, supra, n. 6, at *13.
12. *In the Matter of the Search of the Scranton Housing Authority*, 2006 WL 1722565 (M.D. Pa. June 22, 2006).
13. Id. at *5.
14. *In re Seizure of All Funds on Deposit in Accounts in the Names of National Electronics, Inc. at JPMorganChase Bank*, 2005 WL 2174052 (S.D.N.Y. Sept. 6, 2005).
15. *In re Grand Jury Subpoenas*, 2006 WL 1915386 (6th Cir. July 13, 2006).
16. Id. at *10.
17. Id.
18. Id. The court observed that it was "reasonable to presume that the government's taint team might have a more restrictive view of privilege than [interveners'] attorneys." Id. at *11.
19. Howard W. Goldstein, "Taint Teams," supra, n. 1.

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