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# The Seizure of Attorney-Client Communications: Fighting Back

**By Ronald H. Levine**

The government's seizure of attorney-client communications, a headline event when it involves the President's lawyer Michael Cohen, actually is a recurrent problem in white collar criminal investigations due to the convergence of several trends.

First, the genteel days, when a subpoena sufficed and search warrants were a last recourse absent credible fears of document destruction or flight, are over. Today, many prosecutors see the corporate search warrant as a way to gain immediate access to documents, eliminate tiresome negotiations with defense counsel about the scope and timing of production, and gain the leverage of sending a "shot across the bow" of the corporation.

Second, as corporations expand their in-house legal capacity and bring more matters in-house, and as in-house counsel integrate themselves more fully into business operations, the sheer quantity of legal messages within a corporation has increased.

Third, with the advent of electronically stored information and warrant-authorized wholesale imaging of employee laptops, cell phones and other devices, it is much more likely that attorney-client communications will be sprinkled among the seized texts and in-boxes of many non-lawyer corporate employees.

In short, government seizure of attorney-client communications is not cabined to searches of law firms or even to searches of an in-house counsel's office. It is a potential issue in just about every corporate search.

## DOJ Guidelines and Regulations

The U.S. Department of Justice (DOJ) has promulgated both internal guidelines, which by their terms create no enforceable rights, U.S. Attorney's Manual (U.S.A.M.) at §9-13.420 ("Searches of Premises of Subject Attorneys"), and regulations about attorney searches, which, while not a basis for suppression, at least put government personnel on notice that violations will result in "appropriate disciplinary action." 28 C.F.R. §§59.4(b) (searches of "disinterested third party" lawyers), 59.6 (sanctions for violations). These provide bases for pushing back in the event of attorney searches. *See, e.g., Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 962 (3d Cir. 1984) (affirming judgment ordering the return of seized materials to the appellee law office and noting that regulations had been ignored).

The DOJ's internal guidelines are restricted in two ways:

1. They are limited to searches of an attorney's "premises" — a law firm's or in-house attorney's office and files — and arguably it does not apply to searches of other offices or other computers at a business in which legal materials may be located; and
2. They are limited to searches regarding "subject attorneys," defined as an attorney who is either:
   (i) a "suspect, subject or target";
   (ii) related by blood or marriage to a suspect; or
   (iii) believed to be in possession of contraband or the fruits or instrumentalities of a crime. U.S.A.M. at §9-13.420. Search warrants for premises of subject attorneys must be approved by the U.S. Attorney after consultation with the Department of Justice. *Id.* Search

**Ronald H. Levine**, a member of the Editorial Board of *Business Crimes Bulletin,* works out of Philadelphia as a principal in the law firm of Post & Schell, P.C., heading its Internal Investigations and White Collar Defense Group. Levine was previously Chief of the Criminal Division of the U.S. Attorney's Office for the Eastern District of Pennsylvania. He can be reached at rlevine@postschell.com.

warrants regarding attorneys who are not "subject attorneys" but rather "disinterested third parties" require approval by a Deputy Assistant Attorney General. *See*, 28 C.F.R. §59.4(b)(2) (cited in U.S.A.M. at §§9-19.220-221).

Both the DOJ guidelines and the regulations exhort the use of a search warrant as a last resort to be employed if there is no viable, less intrusive means of obtaining the material; and, if deployed, the warrant must be executed in such a manner as to minimize, to the greatest extent practicable, scrutiny of confidential materials. *See*, *e.g.*, 28 C.F.R. §59.4(b)(4). Violation of these elastic precepts may not provide a winning basis for suppression, but DOJ's suggested considerations may provide post-search ammunition for a motion for return of documents — or, at least, leverage to litigate how the seized documents are to be handled and reviewed.

Boiled down, the factors recommended by DOJ for prosecutors to consider in deciding whether to employ a search warrant versus a less intrusive means of obtaining documentary materials from attorneys include:

1. Whether the advance notice provided by a subpoena would likely result in the destruction, alteration, concealment or transfer of the materials sought because the suspect has direct control over, or indirect access to, the materials sought (via friendship with, loyalty to, or sympathy for, the possessor of the materials); and
2. Whether the immediate seizure of the materials is necessary to prevent injury to persons or property or to preserve their evidentiary value and/or to prevent delay in obtaining the materials, which delay would significantly jeopardize an ongoing investigation or prosecution.

28 C.F.R. §59.4(c)(1)-(2). (Note: the fact a disinterested third party lawyer possessing the materials may have grounds to challenge a subpoena or other legal process is not in itself a legitimate basis to deploy a search warrant as opposed to a less intrusive measure. *Id.*)

The DOJ guidelines direct the creation and training of a "privilege team" (also sometimes called a "taint team" or a "clean team") to seize and review documents in the first instance so that the front line prosecutors and agents do not come into contact with potentially privileged materials. The guidelines note that the search warrant affidavit should attach the instructions provided to the privilege team or, at least, inform the federal magistrate judge of the intent to employ such a process. *See*, *e.g.*, *Carpenter v. Comm'r., IRS*, 2018 U.S. Dist. Lexis 66455, 9, n.8 (D.Conn. filed April 20, 2018) (government drew up written Search Warrant Plan). Importantly, the guidelines also allow for:

1. Review of either all seized materials, or of just those materials thought arguably to be privileged, by a judicial officer or special master;
2. The provision of a copy of seized materials to the defense attorney; and
3. Defense attorney input to the court regarding disputes over the seizure of privileged documents.

U.S.A.M. at §9-13.420.

## Pushing Back

Upon notice that a corporate search warrant is being executed, certain prophylactic measures can be taken. These include notifying the lead agent on site and the AUSA supervising the search that certain offices, laptops, files and file rooms constitute the "premises" of attorneys, and demanding that such premises not be searched. If such premises are nonetheless to be searched under the warrant, then, if practicable, creating an inventory of seized materials can be invaluable for later litigation. To the extent a privilege or taint team is used to seize, image or review materials, also make clear that the adequacy of that precaution is not conceded. Of course, document all of these interactions.

Failing a negotiated resolution with the government concerning protection for seized materials thought to be privileged, two bases for litigation exist which can be deployed in tandem. First, consider a motion for return of property filed under seal to the same magistrate judge's docket as the initial warrant. Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part that:

> *A person aggrieved* by an unlawful search and seizure of property or *by the deprivation of property may move for the property's return …. The court must receive evidence on any factual issue necessary to decide the motion*. If it grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings.

Fed.R.Crim.P. 41(g) (emphasis added).

The Rule provides relief not only for someone whose property has been unlawfully seized, but also for one whose property has been *lawfully* seized but who is aggrieved by the government's continued possession of it. *See*, Fed.R.Crim. 41, Notes of Advisory Committee on Rules — 1989 Amendment (referring to this provision then denominated subsection

(e)). A warrant-authorized seizure of materials including attorney-client privileged communications seemingly falls within this strike zone.

A Rule 41 motion can at least sensitize the court to the privilege concerns raised by the search and argue that the government's unilateral decision to implement a taint team is no panacea. Indeed, certain courts have limited the circumstances in which prosecutors may employ taint teams during criminal investigations. *See*, *e.g.*, *In re Grand Jury Subpoenas*, 454 F.3d 511, 522 (6th Cir. 2006) ("… 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 … occasionally some taint-team attorneys will make mistakes or violate their ethical obligations."). Plus, a court "always retains the prerogative to require a different method of review in any particular case, such as requiring the use of a special master or reviewing the seized documents *in camera* itself." *In re Fattah*, 802 F.3d 516, 530, n.53 (3d Cir. 2015) (citations omitted).

Second, an alternate basis for relief exists under the court's equitable power to order the return of seized materials. *United States v. Singleton*, 867 F. Supp. 2d 564, 568-69 (D.Del. 2012). When "the motion is filed by a party against whom no criminal charges have been brought, such motion is in fact a petition that the district court invoke its civil equitable jurisdiction." *Id.*; *Gmach Shefa Chaim v. United States*, 692 F. Supp. 2d 461, 468-69 (D.N.J. 2010).

When determining whether to exercise its equitable jurisdiction, courts look to four factors:

1. Whether the government displayed a callous disregard for the rights of the movant;
2. Whether the movant has an individual interest in and need for the property he wants returned;
3. Whether the movant would be irreparably injured by denying return of the property; and
4. Whether the movant has an adequate remedy at law for the redress of his grievance.

*United States v. Singleton*, 867 F. Supp. at 568-69 (citations omitted); *accord Klitzman, Klitzman & Gallagher v. Krut*, 591 F. Supp. 258, 265-66 (D.N.J.) ("Where, as here, plaintiff institutes an independent action for such return, there is no question but that courts may utilize their equitable power to order pre-indictment relief," upholding preliminary injunction against federal officers ordering return of seized documents), *aff'd*, 744 F.2d 955 (3d Cir. 1984).

Under either basis for relief, to the extent it can be established that the government did not follow its internal and/or regulatory guidance regarding the need to employ a search, or provide notice to the magistrate judge in the warrant affidavit regarding the potential retrieval of privileged materials and how that will be handled in executing the warrant, this is further fodder for the motion.

Short of actually gaining the immediate return of privileged material — a long shot to be sure — to the extent particular files can be identified as harboring privileged materials, or to the extent that a universe of potentially privileged materials can be isolated by word searches for attorneys' and law firms' names, push for review of such materials in the first instance by defense counsel, by the court *in camera*, or at least by an appointed special master. *See*, *e.g.*, *United States v. Jimenez,* 2017 U.S. Dist. Lexis 135276, 4-5 (S.D.Ala. field Aug. 17, 2017) (*in camera* review by court); *United States v. Sperow*, 2015 U.S. Dist. Lexis 42453, 41-42 (D.Id. filed March 30, 2015) (special master to screen for privilege, rather than government agents or attorneys, however allegedly "clean"). In this regard, in the case of the Michael Cohen search, Judge Kimba Wood of the U.S. District Court for the Southern District of New York appointed a special master to assess in the first instance whether the seized documents include any confidential communications between Cohen and his legal clients.

## Conclusion

Many white collar corporate searches can implicate the seizure of potentially privileged materials. The government may be less sensitive to this if the search is not *specifically* directed at in-house or outside counsel. While achieving the outright return of privileged material on Rule 41 or equitable grounds may be a long shot, vigorous post-search negotiation and advocacy may achieve additional court-ordered and court-supervised measures designed to shield privileged materials from government view.

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