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ATTORNEY-CLIENT PRIVILEGE

Two partners with Venable LLP examine the recent search of the office of Michael Cohen. The authors detail what prosecutors must do to obtain a warrant, the current law, and what counsel can do to oppose such searches.

The Search of Michael Cohen's Law Offices: Attorney-Client Privilege v. Law Enforcement's Prerogative to Conduct Its Investigation

BY KAN M. NAWADAY AND MICHAEL S. BLUME

The recent search of Michael Cohen's law office has brought into the sphere of public debate the narrow question of what happens when a search warrant is executed on a lawyer's office. What are the special processes law enforcement must go through to even obtain such a warrant? What procedures must law enforcement use to ensure that the search does not invade the privileged communications of the lawyer's clients who are not subjects of the government's investigation?

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What can counsel for the defendant-lawyer or privilege-holders do when their law office or the office of their lawyer becomes subject to a search warrant?

Now that the judge in the Cohen matter has appointed a special master to review the seized materials, these issues are all the more interesting. However, practitioners should not read too much into that appointment. The uniquely high profile, high stakes character of the Cohen matter—and the simple fact that prosecutors agreed to the appointment of a special master—likely render the judge's decision "non-precedential." Still the issues raised here will come up again, making it timely to re-examine the practice and the law on these issues.

Not surprisingly, the law in this area is fairly robust given that lawyers at times commit crimes or become the subject of criminal investigations—to state the obvious, lawyers are not immune from prosecution for crimes they've committed. Even though there is ample precedent relating to searches of lawyer's offices, a battleground remains about who should get to make the first-cut of potentially privileged material—a government filter team, a court-appointed special master, or the court?

This article discusses:

(i) the process prosecutors must go through to obtain a search warrant of a lawyer's office,

(ii) the current law on how the search of a lawyer's office is typically conducted to protect privileged materials, and

(iii) what counsel can do to oppose the search, to influence the manner of its execution, or to control the process by which investigators are permitted to view the seized materials.

Department of Justice Guidelines for Seeking and Executing A Search Warrant for a Lawyer's Office

Typically, a federal line-prosecutor need only obtain approval from a direct supervisor before applying for a search warrant from a court. However, before seeking judicial approval for a search warrant of a lawyer's office, the line-prosecutor must comply with additional DOJ mandated protocols. (U.S. Attorney's Manual (USAM) § 9-13.420.) This is so because 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.'' (*Id.*) Accordingly, DOJ Guidelines admonish prosecutors to:

- Consider seeking to obtain the information through means less intrusive than a search warrant, such as through a subpoena, ''unless such efforts could compromise the criminal investigation.'' (USAM § 9-13.420(A));
- Obtain approval of the U.S. Attorney or relevant Assistant Attorney General prior to seeking the search warrant from a court. (*See* USAM § 9-13.420(B) (''No application for such a search warrant may be made to a court without the express approval of the United States Attorney or pertinent Assistant Attorney General.'')); and
- Consult with DOJ's Office of Enforcement Operations, commonly referred to within DOJ as ''OEO'' and housed at ''Main Justice'' in Washington, prior to seeking the search warrant. (*See* USAM § 9-13.420(C)).

Prosecutors must also ensure that the search of the attorney office is conducted in a manner to avoid invading attorney-client privileged material. This is typically accomplished by using a ''privilege review'' team, which is also commonly referred to as a ''taint team'' or ''filter team'' (USAM § 9-13.420(E)). The privilege review team is comprised of one or more prosecutors and agents who are not members of the investigative team. These ''walled'' prosecutors and agents conduct the initial review of the seized materials to determine whether particular documents:

(i) fall within the scope of the search warrant,

(ii) are privileged as attorney-client communications or attorney work product and therefore should not be turned over to the investigating prosecution team; and

(iii) are otherwise privileged but have lost privilege protections because of an exemption to the privilege rule, such as the crime-fraud exception, which provides that privileged material made in furtherance of a crime is not protected. *See United States v Ceglia*, No. 1:12-cr-00876, 2015 BL 97610 (S.D.N.Y. March 8, 2015) (''The crime-fraud exception strips the privilege from only those communications or work product that relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct.'') (internal quotes and citation omitted).

It is common practice across the DOJ not only to have the ''taint team'' in place prior to seeking court approval for the search, but also to describe for the court, in seeking such approval, the steps the ''taint team'' will take to protect any privileged material from disclosure to the prosecution team.

DOJ guidelines also contemplate the possibility, depending on the circumstances of the investigation, that the privilege review or a portion of it will be conducted by a court or a special master. (USAM § 9-13.420(F) (providing that matters such as who will conduct the review, ''i.e., a privilege team, judicial officer, or a special master'' and whether all documents will be submitted to a judicial officer or a special master or only those documents that a privilege team has determined to be arguably privileged or subject to an exception to the privilege)).

Current Law and Practices In Executing a Search of a Law Office

The current weight of the law and practice in the federal system overwhelmingly validates the use of walled prosecutors and agents to conduct the initial privilege review of any seized materials. Examples of courts approving this methodology, where a government filter team conducts the initial review, abound. Those cases include *Ceglia* (noting that the use of a wall AUSA is ''a common procedure for litigating asserted claims of privilege in this District''); *United States v. Grant*, No. 04-cr-207 (BSJ), 2004 WL 1171258 (S.D.N.Y. May 25, 2004) (approving of government privilege team procedure and rejecting defendant request for privilege review by special master or magistrate judge); *United States v. Winters*, No. 1:06-cr-00054, 2006 WL 2789864 (S.D.N.Y. Sept. 27, 2006) (''the Government's proposed employment of a 'wall Assistant' adequately protects the defendant's asserted privilege.''); and *United States v. Liu*, No. 1:12-cr-00 934, 2014 BL 6439 (S.D.N.Y. Jan. 10, 2014) (approval of government filter team in case in which search warrants were executed on two different immigration law firm offices).

The typical process is for the government taint team to identify seized materials that it believes (i) are not privileged material and are within the scope of the warrant and (ii) are privileged material but are subject to an exception to privilege protections. The taint team will then provide the privilege holder—and/or counsel—the opportunity to contest the filter teams' conclusions with the court before any materials are turned over to the prosecution team. (*See, Grant* (noting that the defendant will not be prejudiced by the filter team procedure because she ''will have the opportunity to make objections to the Court before any documents are turned over to the trial team'')).

And while a few courts have voiced concern about the use of a government filter team—*see, e.g., United States v. Hunter*, 13 F. Supp.2d 574, 583 (D. Vt. 1998) (holding that the ''screening procedure designed by the government was an adequate safeguard against the seizure of protected papers'' but also observing that ''[i]t may be preferable for the screening of potentially privileged records to be left not to a prosecutor behind a 'Chinese Wall,' but to a special master or a magistrate judge'')—the overwhelming weight of the cases has validated the process on various bases, including the government's interest in making fully informed arguments as to privilege, the public's interest in the enforcement of criminal laws, and the undue burden and delay that the use of a special master would engender. (*See, e.g., Winters* (noting that the Government ''possess[es] a strong interest in prosecuting crimes''

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and only in permitting the privilege team to review allegedly privileged documents can that team "acquire information necessary to challenge assertions of privilege"); *Grant* ("the Court is also mindful of the burden that magistrates and district court judges would face if they routinely review lawfully-seized documents in every criminal case in which a claim of privilege is asserted."))

Notwithstanding these cases, one case in particular offers daylight for counsel to argue that a special master or court should conduct the privilege review rather than a government privilege team. In *United States v. Stewart*, No. 02-cr-396, 2002 WL 1300059 (S.D.N.Y. June 11, 2002), defendant Lynne Stewart, a criminal defense attorney, was charged with multiple violations of federal criminal law, including providing material support to foreign terrorist organizations. (*Id.* at *1). The government sought, obtained, and executed a search warrant on Stewart's law office, which she shared with other criminal defense attorneys. Judge John G. Koeltl granted Stewart's request that a special master be appointed to conduct the privilege review, and rejected the prosecution's proposal of using a government staffed filter team. The *Stewart* court held that a special master was appropriate because Stewart was a *criminal* defense attorney, rather than a *civil* attorney. Consequently, the search of Stewart's office implicated her criminal defendant clients' Sixth Amendment right to counsel, and therefore a constitutional right, in addition to those clients' attorney-client privilege rights. *Id.* at *6-7). Given these "extraordinary circumstances," Judge Koeltl appointed a special master to conduct the privilege review. (*Id.* at *10).

What Can Counsel for the Lawyer-Defendant Or Privilege Holder Do to Protect Privileged Material Once a Search Warrant Has Been Executed?

So what, if anything, can counsel for a lawyer-defendant or privilege holder (i.e., a client of a lawyer whose offices are the subject of a search warrant) do to contest the search?

First, can counsel seek blanket suppression of the warrant because it will potentially intrude upon privileged materials? The short answer is no. A validly obtained warrant that is authorized by a court and supported by probable cause is not subject to suppression on the basis that the warrant seeks potentially privileged material. Nor does the mere fact that government agents will be reviewing potentially privileged material of a defendant or a privilege holder constitute a waiver of the privilege. (*See Grant* at *2 ("[A] review of the documents by a privileged team of Assistant United States Attorneys would not waive Defendant's attorney-client privilege. A waiver is defined as the intentional relinquishment of a known right.") (citations omitted)). Accordingly, if the government provides an adequate means of culling protected privileged material, such as through a filter team, there is typically no grounds for suppression. That said, if in the execution of that privilege review, otherwise protected material is divulged to the prosecuting team, then counsel may have grounds to suppress those particular materials—*see, e.g., United States v. Patel*, No. 1:16-cr-00798, 2017 BL 275810 (S.D.N.Y. Aug. 8, 2017) (the "general remedy for violation of the attorney-client privilege is to suppress introduction of the privileged information at trial, not to order wholesale suppression") (citing *United States v. Lumiere*, No. 1:16-cr-00483, 2016 BL 428898 (S.D.N.Y. Nov. 28, 2016) (internal quotes omitted)—or move to have members of the prosecuting team recused.

Second, can counsel seek to have defense counsel or the privilege-holder's counsel nominated as the persons who should conduct the privilege review? Of course this is the typical process when a grand jury subpoena is issued to an attorney or law office. The attorney's counsel conducts the privilege review and provides a privilege log to the government with its production. Here, again, the answer is no. Analogizing to the grand jury subpoena procedure, while optically appealing, is unfruitful for the simple reason that a grand jury subpoena is decidedly different than a search warrant. A grand jury has yet to make a determination about probable cause. Conversely, for a court to approve a search warrant, it must make a finding that there is probable cause to believe that evidence of the crime being investigated will be found at the location to be searched. Consequently, we are aware of no written court order validating such a process in the search warrant context. Further, such a process could implicate the defendant's Fifth Amendment right not to incriminate herself. For example, if a grand jury subpoena had been issued instead of a search warrant, counsel may have been well-advised to have the subject of the subpoena refuse to produce any documents on the grounds that the "very act of production" of such documents would inculpate her. (*See Andresen v. Maryland*, 427 U.S. 463, 473-74 (1976)).

Third, the Cohen search warrant litigation highlights the only true battleground—other than seeking to suppress the fruits of the search for lack of probable cause or other defect to the warrant itself—upon which counsel for the defendant and privilege-holder can contest the search. Counsel may argue that a special master or the court should conduct the privilege review instead of a filter team staffed by government agents and prosecutors. Put the law aside for a moment—put aside even the *Stewart* case that accepted the argument or the Cohen case, for that matter. In thinking about the issue from a layperson's perspective, isn't the real question one of fairness (and the appearance of fairness) to the defendant or privilege-holder on such a sensitive issue? Is it fair to have the defendant or privilege holder cede the first review of her privileged material to government agents? Of course there are safeguards to protect the privilege, but are they enough and does the need for the appearance of fairness require more? Will it really take a special master, tasked specifically with the project, any more time to review the material than it would busy agents and prosecutors? Isn't it less burdensome to ask a special master to undertake the review, than it is to ask law enforcement agents and prosecutors to take time and resources away from their own cases to pitch in on a case with which, by definition, they have no involvement? Of course, counsel should expect the government to argue that the weight of the case law and the weight of historical practice are in its favor. And, the government has a significant incentive to prevent the inappropriate sharing of privileged material: namely, the remedy for such sharing could be the

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forced recusal of the prosecuting team from the case or suppression of materials that may otherwise have been admissible. So, while defense counsel may have good faith and by no means frivolous arguments that use of a special master in this context is a practical solution to a potentially difficult problem, these arguments are likely bound to fail.

Conclusion

The Cohen search warrant litigation has brought a very public focus to the intersection of law enforcement interests and the attorney-client privilege—and in particular, to the question of who should be afforded the first opportunity to review potentially privileged material seized during a search. Practitioners have available to them arguments they could employ to help protect potentially privileged material seized in a government search. Although the appointment of a special master in the Cohen matter may not be precedential, it is at least an important guide for defense counsel and others.

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