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PROTECTION OF THE ATTORNEY-CLIENT PRIVILEGE IN CRIMINAL INVESTIGATIONS

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PROTECTION OF THE ATTORNEY-CLIENT PRIVILEGE IN CRIMINAL INVESTIGATIONS[1]

As most practitioners of criminal law are aware, the government has a number of methods it may use to collect evidence in a criminal investigation. This paper discusses these evidence-gathering tools generally and sets forth the limitations imposed or undertaken voluntarily by the government to ensure that the attorney-client privilege is protected when the various investigative tools are used. As its policies, practices, and pronouncements repeatedly demonstrate, the Department of Justice has a meaningful respect for the attorney-client privilege. Attorney General Alberto Gonzales captured and summarized this sentiment last month at the American Bar Association Annual White Collar Crime Conference when he stated, "I know from my own days in private practice the importance of the attorney-client privilege. I believe the McNulty Memo strikes the right balance in this area."[2] Prosecutors and agents, both at headquarter posts and in the field, share this respect as well, and also have powerful professional and practical incentives to respect and preserve the attorney-client privilege.

I. THE GOVERNMENT HAS STRONG INCENTIVES TO PROTECT THE ATTORNEY-CLIENT PRIVILEGE

The federal government is obligated to vigorously enforce the federal criminal laws of the United States. Critics of prosecutorial practices maintain that while this is a noble and appropriate goal, prosecutorial zeal results in the practical result of minimizing the importance of the privilege and a cavalier disregard of the attorney-client privilege as an inconvenient impediment to enforcement obligations. Federal criminal prosecutors, however, have a strong incentive to protect the attorney-client privilege because it is fundamental to the American justice system, consistent with their legal obligations, their professional and ethical duties, and they are subject to rigorous institutional oversight mechanisms.

The Department of Justice's commitment to the protection of the privilege was most recently memorialized in the revised Principles of Federal Prosecution of Business Organizations (the "McNulty Memorandum") in December 2006. The McNulty Memorandum explicitly recognizes that "the attorney-client and work product protections serve an extremely important function in the U.S. legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under U.S. law. *See Upjohn v. United States*, 449 U.S. 383, 389 (1976). As the Supreme Court has stated its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.' *Id*. The work product doctrine also serves similarly important interests."

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1 Nothing in this document is intended to create any substantive or procedural rights, privileges, or benefits enforceable in any administrative, civil or criminal matter.

2 *See* www.usdoj.gov/ag/speeches/2007/ag_speech_070301.html.

Professional obligations and Department of Justice investigatory components ensure that prosecutors, both in word and in practice, are committed to this appreciation for the attorney-client privilege as vital to our system of justice. Upon joining the Department of Justice, attorneys execute a written document that acknowledges their understanding of professional obligations and responsibilities. Each United States Attorney's Office has a Professional Responsibility Officer ("PRO") who is tasked to provide guidance, counsel and training to prosecutors on professional and ethical issues, including those related to privilege. All Department of Justice attorneys are required to have annual training on ethics issues. The Professional Responsibility Advisory Office ("PRAO") is a component at Main Justice in Washington, D.C. that provides definitive advice to Department of Justice attorneys on issues relating to professional conduct, including attorney-client privilege issues. Pursuant to Title 28, United States Code, Section 530B, commonly known as the "McDade Amendment," Department of Justice attorneys are legally bound by State laws and rules, and Federal court rules, governing attorneys. *See* 28 U.S.C. Section 530B ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.").

There are also enforcement and oversight components in the Justice Department that ensure that prosecutors abide by these professional duties and responsibilities. The Office of Professional Responsibility ("OPR") is "responsible for investigating allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when they are related to allegations of attorney misconduct within the jurisdiction of OPR."[3] The Department of Justice's Office of Inspector General "conducts independent investigations, audits, inspections and special reviews of United States Department of Justice personnel and programs to detect and deter waste, fraud, abuse and misconduct and to promote integrity, economy, efficiency and effectiveness in Department of Justice operations."[4] There have also been Congressional oversight hearings in both the Senate and the House of Representatives during the past few months regarding the manner in which the Department of Justice has undertaken its practices regarding the attorney-client privilege. Prosecutors are mindful of these rigorous oversight mechanisms. Pursuant to these professional obligations, as a general proposition, prosecutors take affirmative steps to ensure that the privilege is protected.

As a practical matter, prosecutors also realize that it is often counter-productive to intrude upon the privilege because any intrusion – or even arguable intrusion – will likely result in lengthy pre-trial motion practice that will consume scarce resources and divert attention from the true issue in the case – the guilt or innocence of the defendant. Prosecutors know that issues involving the attorney-client privilege are sensitive and that defense counsel is likely to litigate fully any supposed intrusion on the privilege. The threat of a lengthy pretrial process, including the difficulties associated with *Kastigar*-like evidentiary hearings, focusing upon the actions of government actors rather than the indicted defendants, serves as a strong practical deterrent to government conduct. *See Kastigar v. United States*, 406 U.S. 441 (1972); *In Re Grand Jury Subpoenas*, 454 F.3d 511, 517 (6th Cir. 2006)("Indeed, the government concedes that the leaking of privileged materials to investigators would raise the specter of *Kastigar*-like evidentiary hearings, and argues that it would therefore act conservatively, and err on the side of caution, in assessing the existence of privilege and in screening privileged documents from investigations."). Thus, in addition to professional motivations relating to the importance of the attorney-client privilege, there are practical considerations that motivate prosecutors to respect the attorney-client privilege.

3 *See* www.usdoj.gov/opr ("The objective of OPR is to ensure that Department of Justice attorneys continue to perform their duties in accordance with the high professional standards expected of the Nation's principal law enforcement agency.") OPR publishes an annual report relating to the investigations that were conducted during that year.

4 *See* www.usdoj.gov/oig. The Inspector General publishes its reports, including their findings and recommendations regarding professional conduct.

II. SOME EVIDENCE-GATHERING TECHNIQUES AVAILABLE TO THE GOVERNMENT IN A CRIMINAL INVESTIGATION

Federal criminal law enforcement authorities have many evidence-gathering tools at their disposal when conducting a criminal investigation. These tools include: (1) search warrants, (2) grand jury and administrative subpoenas, (3) wiretaps, (4) consent searches, and (5) voluntary disclosures, as well as others.[5] Which evidence gathering technique a prosecutor chooses to use in a particular criminal investigation is generally governed by the facts and circumstances of the the particular matter, legal limitations, efficiency, and resources, as well as the prosecutor's experience or familiarity with a particular technique.

The use of these various tools, as well as other protective actions such as Special Administrative Measures (SAMs), which are also discussed in this paper, potentially impacts the attorney-client privilege. However, limitations are in place to protect the attorney-client privilege in connection with each of these investigative tools, as well as the use of SAMs. These limitations are judicially imposed in many cases. In some cases, statutory language provides some basis to prevent the collection of privileged information. In others, the Department of Justice has voluntarily enacted guidelines to protect the privilege. These limitations are discussed more fully below.

A. Protection of the Attorney-Client Privilege in Connection with Subpoenas

Subpoenas may seek the production of documents, testimony, or both. If a subpoena seeks testimony, the recipient may generally refuse to answer questions that would require the disclosure of attorney-client communications. This privilege is subject to the crime-fraud exception, which applies if the attorney-client communication is intended to further a crime or a fraud. Under this exception, "the attorney-client privilege is waived when the client used the attorney-client relationship to engage in ongoing fraud rather than to defend against past misconduct." *In re Special September 1978 Grand Jury (II)*, 640 F.2d 49, 59 (7th Cir. 1980). *See also United States v. Zolin*, 491 U.S. 554, 568-570 (1989)(permitting *in camera* review of documents alleged to come within crime-fraud exception to attorney-client privilege); *In Re Grand Jury*, 475 F.3d 1299 (D.C.Cir. 2007)(government established prima facie case that crime-fraud exception applied to any documents claimed to be within attorney-client privilege).

In the case of subpoenas seeking the production of documents, it is well-established that the recipient of the subpoena is entitled to withhold materials covered by the attorney-client privilege and is not required to produce those materials to the grand jury.[6] *See* Fed. R. Evid. 1101(c) ("The rule with respect to privileges applies at all stages of all actions, cases, and proceedings."); *Swidler & Berlin v. United States*, 524 U.S. 399, 410-11 (1998) (holding that attorney-client privilege may be asserted in response to grand jury subpoena even after client has died).[7] Of course, even when the privilege is available, the party asserting the privilege has the burden of making a prima facie showing that the privilege applies and must produce a privilege log that establishes a basis for the assertion of the privilege. *See In re Grand Jury Investigation*, 974 F.2d 1068, 1070-71 (9th Cir. 1992). *See also In re Grand Jury Subpoenas*, 454 F.3d 511, 515 (6th Cir. 2006)(discussing use of logs as a "fairly standard practice" by which law firms conduct privilege reviews).

In addition to these judicially imposed limitations, Department of Justice guidelines prohibit the issuance of a subpoena to an attorney seeking information relating to the representation of a client or the fees paid by such client without the prior approval of the Assistant Attorney General

5 This paper does not address certain issues relating to technological, international, or classified evidence gathering that might also implicate the attorney-client privilege but which are beyond the scope of this paper. This paper also does not address issues emanating from the work product doctrine.

6 Not every fact relating to an attorney-client relationship is privileged. For example, the fact that a lawyer has communicated with his or her attorney is generally not privileged. *In re Walsh*, 623 F.2d 489, 495 (7th Cir. 1980). The specific identity of a client, or his physical characteristics, are generally not privileged either. *Id.; In re Grand Jury Proceedings (United States v. Jones)*, 517 F.2d 666, 670 (5th Cir. 1975).

7 It is also beyond the scope of this document to address whether a government lawyer may assert the privilege to prevent the disclosure of evidence to a grand jury. *Compare In re A Witness Before the Special Grand Jury 2000-2*, 288 F.3d 289, 290 (7th Cir. 2002)(holding that a state lawyer may not "refuse, on the basis of the attorney-client privilege, to disclose communications with a state officeholder when faced with a grand jury subpoena") *with In re Grand Jury Investigation*, 399 F.3d 527, 535 (2d Cir. 2005)(holding that a state governor's office could invoke the attorney-client privilege in response to federal grand jury inquiries into the private conversations between the office's former chief legal counsel and the governor and staff members).

for the Criminal Division, in Washington, D.C. United States Attorneys' Manual ("USAM") 9-143.410. The request must provide, among other things, that: the information sought is not protected by a valid claim of privilege, that all reasonable attempts to obtain the information from alternative sources have proven unsuccessful, that the material is reasonably needed and is not peripheral or speculative, and the subpoena must be narrowly drawn. *Id.*

B. The Protection of the Attorney-Client Privilege in Connection with Electronic Surveillance

In the case of electronic surveillance pursuant to a court-approved order under Title III,[8] the surveillance must "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. 2518(5). Courts have interpreted this limitation to require law enforcement agents to minimize the interception of attorney-client privileged communications, even if those communications might otherwise be within the scope of the surveillance order. *See, e.g., United States v. Harrelson*, 754 F.2d 1153, 1169 (5th Cir. 1985) ("Section 2518(5) requires the government to minimize the interception of privileged communications."); *United States v. Chagra*, 754 F.2d 1181, 1182 (5th Cir. 1985) (same); *United States v. DePalma*, 461 F.Supp. 800, 821 (S.D.N.Y. 1978) (stating that under Title III, "once the parties have been identified and the conversation between them is determined to be nonpertinent or privileged, monitoring of the conversation must cease immediately").

C. Protection of the Attorney-Client Privilege in the Execution of Search Warrants

It has been argued that an evidence-gathering technique that does not have built-in protections for the attorney-client privilege is the execution and review of items seized pursuant to a criminal search warrant. In the execution of a search warrant, agents generally arrive unannounced, secure the premises, and seize potential evidence particularly described in the warrant. Prosecutors frequently resort to the use of search warrants when there is a concern that evidence may be destroyed rather than produced in response to a less-invasive evidence gathering technique. Of course, the use of a search warrant is subject to judicial oversight. The warrant must be presented to a neutral magistrate who determines that there is probable cause for the search. Fed. R. Crim. P. 41(d).

When a search warrant is used in a criminal case, there is arguably potential for agents to seize and review materials that may contain attorney-client privileged information. This is due to the fact that documents are seized without an initial review by the owner or custodian of the documents. In addition, at least some preliminary review by the agents executing the warrant is usually necessary to determine whether the materials are within the scope of the warrant.

When privileged materials are seized by the government (and subject to the discussion below regarding imposition of "taint procedures,"), the courts have generally ordered that the materials be returned forthwith. *Klitzman, Klitzman and Gallagher v. Krut*, 744 F.2d 955, 962 (3d Cir. 1984) (affirming preliminary injunction requiring government to return documents seized from law office). Courts have not held that a search that involves the seizure of privileged information is unconstitutional. *See* Eric D. Mcarthur, "The Search and Seizure of Privileged Attorney-Client Communications," 72 U.Chi. L. Rev. 729, 740 (2005).

Nevertheless, the Department of Justice has voluntarily enacted guidelines and taken measures to ensure the protection of the privilege in the execution of search warrants on a practicing attorney – the situation where potential intrusion upon the privilege is greatest.[9] These guidelines recognize that the execution of a search warrant on an attorney may have a negative impact on the attorney-client relationship. Therefore, the following standards apply. First, prosecutors are expected to use alternative sources to gather the potential evidence, if reasonably available. Second, the United States Attorney in the district or the Assistant Attorney General must authorize the search

8 18 U.S.C. §§ 2510-2522.

9 The search of a client that may result in the seizure of privileged materials would not be subject to these guidelines. However, the client would still be protected by the general requirement that privileged materials be immediately returned and any other prophylactic measures undertaken by agents requesting the search.

and must consult with the Criminal Division in Washington, D.C. Third, procedures should be implemented to ensure that privileged materials are not improperly viewed, seized, or retained during the course of a search. These procedures must include "adequate precautions to ensure that the materials are reviewed for privilege claims and that any privileged documents are returned to the attorney from whom they were seized." Fourth, the warrant should be drawn as specifically as possible. USAM 9-13.420.

In order to comply with these guidelines and to minimize any intrusion upon the attorney-client privilege, criminal prosecutors employ several techniques. The most common is the use of a "taint team" or "privilege team" to participate in the search and review of any potentially privileged materials. The taint or privilege team is comprised of investigators who are not permanently assigned to the case. These agents and prosecutors review any potentially privileged material and separate and return any material that is privileged to the holder. Non-privileged material is passed along to the agents and prosecutors working the case. By using a taint or privilege team, the government ensures that the agents and prosecutors permanently assigned to the case are not exposed to privileged materials that could be used to develop a trial or investigation strategy or to question witnesses even if the privileged materials were actually returned. *See, e.g., United States v. Hunter*, 13 F.Supp2d 574 (D.Vt. 1998)(court approved use of government taint team). *But see In Re Search of the Scranton Housing Authority, No.04 Misc. Nos. 318-322*, 2006 WL 1722565 at *5 (M.D.Pa. June 22, 2206)(citing various cases questioning or rejecting government taint team procedures).

In addition to privilege or taint teams of government agents, criminal prosecutors sometimes apply for judicial review of materials, request appointment of a special master, or work with defense counsel to establish other reasonable review procedures that do not involve the court. *See United States v. Abbell*, 914 F.Supp. 519 (S.D.Fl 1995)(after seizing law firm documents through a search warrant, the government employed a taint team to determine privilege; court appointed special master to review the documents). In those instances, the potentially privileged materials collected and segregated by the taint or privilege team may never be reviewed by the governmental personnel conducting the investigation, as well as the public or non-government personnel.

Moreover, even though these Department of Justice guidelines only apply to searches of attorney-offices, similar procedures are often invoked whenever agents and/or prosecutors believe there is a significant likelihood that privileged materials will fall within the scope of a search warrant. *See generally United States v. SDI Future Health, Inc.*, 464 F.Supp.2d 1027 (D. Nev. 2006)(discussing strengths and weaknesses of government taint teams in criminal investigations).

D. The Protection of the Privilege in Voluntary Disclosures.

Not all investigation techniques require compulsory means such as those discussed above. Criminal investigations often involve voluntary disclosure of information through interviews with witnesses, voluntary production of documents, or consensual monitoring, among others.

In the area of voluntary disclosure, the government has also taken steps to ensure that attorney-client privileged material is protected. Voluntary disclosure for purposes of this paper includes both privileged material produced by an individual or a company without a request from the government and material that is produced in response to a government request, but without compulsory process. In both cases, the production is voluntary because the government has no method to compel disclosure if the holder of the privilege declines to produce the material.

Some may legitimately ask why a company or individual would ever choose to waive the privilege if not compelled to do so. The short answer is that many companies choose to cooperate with a government investigation by turning over privileged materials because the companies realize that this course of action is often the best way to put the entire scenario behind it and to get back to business.

In December 2006, the Department issued the McNulty Memorandum discussed briefly on a previous page. The changes included in the McNulty Memorandum are designed to ensure that voluntary waivers of the privilege by a company are properly rewarded while also ensuring that corporations are not improperly pressured to waive the privilege. The McNulty Memorandum emphasizes that the waiver of the attorney-client privilege is not a prerequisite to a finding that a company has cooperated in the government's investigation. The government has underscored that waivers should not be routinely requested, that if the company desires to cooperate it should inform the government of the facts and the wrongdoers and if the company can undertake cooperation without waiving privilege, then the Justice Department will not seek to request a corporation consider a voluntary waiver. The McNulty Memorandum implements an incremental, narrowly tailored approach to seek to obtain privileged materials only when there is a legitimate need to obtain those materials.

Before formulating a request for privileged materials, a prosecutor must establish a legitimate need for the privileged material. A legitimate need is established by a four-factor test: (1) the likelihood and degree to which the privileged information will benefit the government's investigation; (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) collateral consequences to a corporation of a waiver. This test is significant and the McNulty Memorandum provides that this test is not satisfied if a waiver is "merely desirable or convenient."

If a prosecutor satisfies the legitimate needs test, he or she may request potentially privileged information. The prosecutor must first seek "purely factual information" (which may or may not be privileged). Purely factual information includes information such as copies of key documents, chronologies or organization charts created by counsel, or witness statements containing purely factual information. Any such request must be narrowly tailored, in writing, and be approved by the United States Attorney in consultation with the Assistant Attorney General for the Criminal Division. If purely factual information is insufficient and a legitimate need for attorney advice or opinion is necessary, a prosecutor may request such information only after receiving written authorization from the Deputy Attorney General, the second highest ranking official at the Department of Justice. The only exception to this rule is when the company is asserting an advice of counsel defense or if the crime-fraud exception applies.[10]

However, even if a prosecutor obtains the necessary authorization to request a waiver, the company is never compelled to produce the requested waiver and materials. Moreover, a prosecutor cannot even consider a company's refusal to provide advice or opinion material when deciding whether or not the company should be charged. A prosecutor may consider the company's refusal to provide purely factual information, but this is only one sub-factor in a nine factor test used to determine whether a company should be charged.[11]

E. The Protection of the Privilege in Connection with Special Administrative Measures

The Code of Federal Regulations allows the Bureau of Prisons to issue Special Administrative Measures (SAMs) through which the federal prison may limit some activities such as phone calls, correspondence, visitation, and participation in media interviews. SAMs are potentially permissible when "reasonably necessary to prevent disclosure of classified information" or to "protect persons against the risk of acts of violence or terrorism." 28 C.F.R. §§ 501.2(a), 501.3(a). Usually, even if there is a threat of bodily harm, communications between an inmate and his or her attorneys remain unfettered. However, in very limited circumstances, when the SAMs are intended to protect persons against the risk of acts of violence or terrorism, the Attorney General may also authorize a

10 In those cases, the prosecutor must obtain the level of approval required for purely factual information.

11 The factors articulated in the McNulty Memo that prosecutors must consider in assessing corporate liability include: seriousness of the offense, pervasiveness of wrongdoing in the corporation, including complicity of management, a corporation's history, timely disclosure of wrongdoing, adequacy of an existing compliance program, a corporation's remedial actions, collateral consequences to shareholders and employees, adequacy of prosecuting employees, and adequacy of remedies such as civil or regulatory actions.

warden to "provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege" if reasonable suspicion exists to believe that the inmate may use communications with attorneys to further or facilitate acts of terrorism. *Id*. § 501.3(d).

In these very limited circumstances, the Department follows strict procedures to ensure that the attorney-client privilege is not compromised. First, the Bureau of Prisons must "provide written notice to the inmate and to the attorneys involved, prior to the initiation of any monitoring or review" that all communications between the inmate and attorneys may be monitored. *Id*. § 501.3(d)(2). Second, the Bureau of Prisons must "employ appropriate measures to ensure that all attorney-client communications are reviewed for privileged claims and that any properly privileged materials are not retained during the course of monitoring." *Id*. § 501.3(d)(3). The regulations then state that "[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 shall be designated, consisting of individuals not involved in the underlying investigation. The monitoring shall be conducted pursuant to procedures designed to minimize the intrusion into privileged material or conversations." *Id*. Thus, as in Title III proceedings, the government goes to great lengths to ensure that the attorney-client privilege is protected, even when national security is potentially at risk.

III. CONCLUSION

Prosecutors and agents have a number of investigative tools at their disposal, the use of which may have an impact on the attorney-client privilege. As addressed above, limitations have been imposed by judicial decision or by statutory enactment to protect the attorney-client privilege in connection with the use of most of these tools. In addition, the Department of Justice has established guidelines to direct prosecutors and help ensure that the attorney-client privilege is protected. Prosecutors are fully committed to the ideals reflected by the guidelines and take proactive steps to protect the privilege. By doing so, these prosecutors help ensure that justice is served.