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Recent Federal Cases Signal Increased Scrutiny of Ethical Wall Procedures

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Ethical walls are a necessity when lawyers and prosecutors need to maintain separate teams to review privileged documents or navigate conflicts. In this article, we discuss best practices for effective implementation of ethical walls in light of two recent developments—the decision by the U.S. Attorney's Office for the Southern District of New York (S.D.N.Y.) to proactively seek a special master to review materials seized from Rudy Giuliani's home, and the Department of Justice Antitrust Division's recent request for a federal court to probe the adequacy of an ethical wall at the law firm of Morgan, Lewis & Bockius related to their representation of co-defendants Glenmark and Teva in a price-fixing prosecution pending in the Eastern District of Pennsylvania, which led to Morgan Lewis's withdrawal from the matter.

Background

The Justice Manual instructs DOJ attorneys to take precautions to avoid "impinging on valid attorney-client relationships" while searching the premises of an attorney who is the suspect, subject, or target of an investigation and while reviewing any seized materials. Justice Manual, U.S. Dep't of Justice, §9-13.420. To protect the attorney-client privilege, the Manual recommends searches be conducted by "taint teams," consisting of agents and attorneys not involved in the investigation. The Manual also contemplates the use of a special master to review the seized documents before they are turned over to the investigating prosecutors but does not articulate when a special master should be sought. Id. at §9-13.420(F).

Although using taint teams has long been standard procedure in the DOJ, federal courts have recently articulated concerns about the practice. In *United States v. Gallego*, the court appointed a special master to review materials seized from a criminal defense attorney's office and criticized the use of taint teams as raising Sixth Amendment concerns, "present[ing] inevitable, and reasonably foreseeable, risks to privilege," and "undermin[ing] the *appearance* of justice and fairness." 2018 U.S. Dist. LEXIS 152055, at *6-9 (D. Ariz. Sept. 5, 2018) (emphasis in original).

The U.S. Court of Appeals for the Fourth Circuit recently questioned the validity of taint teams generally when it found that using a taint team

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to review voluminous privileged documents seized from an attorney's office violated the non-delegation doctrine by authorizing the executive branch to perform the uniquely judicial function of deciding privilege issues. *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 176 (4th Cir. 2019). The court also found that the taint team created an appearance of unfairness and "contravene[d] the public interest" because it was comprised of prosecutors employed in the same district where the firm's clients were being prosecuted and investigated. Id.

Finally, there have been recent high-profile cases in which government taint teams have impermissibly disclosed privileged information to the investigative prosecutors, further undermining the practice's viability. See, e.g., *United States v. Esformes*, No. 16-20549-CR, 2018 WL 5919517 (S.D. Fla. Nov. 13, 2018); *United States v. Elbaz*, No. 8:18-cr-00157, slip op. at 4-6 (D. Md. June 20, 2019); *United States v. Sullivan*, No. CR 17-00104 JMS-KJM, 2020 WL

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1815220 (D. Haw. April 9, 2020) (levying sanctions after a DOJ taint team disclosed privileged documents to the prosecution team).

In the law firm context, ethical walls are used to avoid the disqualification of attorneys in situations involving potential conflicts of interest. In the Second Circuit, disqualification of an attorney is called for only when the attorney's conduct "taints" the underlying trial, such as when the "concurrent representation of two clients undermines the court's confidence in the attorney's loyalty to his clients" or when an attorney is in the position to "use privileged information gained from a former client to the advantage of a current client." *Med. Diagnostic Imaging, PLLC v. CareCore Nat.*, 542 F. Supp. 2d 296, 306 (S.D.N.Y. 2008); see also *United States v. Prevezon Holdings Ltd.*, 839 F.3d 227, 241 (2d Cir. 2016). Any conflict is generally imputed to an attorney's firm based on the "presumption that 'associated' attorneys share client confidences." *Hempstead Video v. Inc. Vill. of Valley Stream*, 409 F.3d 127, 133 (2d Cir. 2005).

In the Second Circuit, this presumption may be rebutted where there is a de facto separation or the firm has implemented timely and effective screening procedures that "effectively protect[] against any sharing of confidential information." Id. at 138. The inquiry into the adequacy of ethical screens is fact-intensive, and courts are more likely to approve of screens that are implemented immediately upon discovery of a conflict, and in larger firms. See, e.g., *Energy Intell. Grp. v. Cowen & Co.*, 2016 WL 3920355 (S.D.N.Y. July 15, 2016) (finding ethical screen inadequate because it was implemented three weeks late, and the firm had only nineteen attorneys).

Giuliani Special Master Request

Following the seizure of nearly two dozen electronic devices as part of their probe into Rudy Giuliani's lobbying practices, S.D.N.Y. prosecutors took the relatively unusual step of asking a court to proactively appoint a special master to review the materials for privilege. The more typical practice, as described above, would have been to create a "taint team." S.D.N.Y. made the decision to externalize the review entirely, likely due to the extremely sensitive nature of the investigation.

S.D.N.Y. followed this procedure after a special master was appointed in the similarly high-profile Michael Cohen prosecution in 2018, at Cohen's request. In granting the request, Judge Wood remarked that the special master was necessary to ensure the "perception of fairness, not fairness itself." See *In re Search Warrants Executed on April 9, 2018*, No. 18 Mag. 3161 (KMW) (S.D.N.Y.), Dkt. No. 38 at 8; Dkt. No. 104 at 88.

S.D.N.Y. took the unusual step of requesting the special master in the Giuliani matter, perhaps to head off the possibility of losing a defense motion to appoint one, as occurred in the Cohen case. Recognizing in a letter to the court that such a request is usually based on a defendant's motion or after a criminal case has already been charged, the S.D.N.Y. prosecutors noted that there were no limitations on the government seeking such an appointment in the pre-charge period. The government further explained that, while taint teams are appropriate and necessary to review materials seized covertly—such as those previously taken from Giuliani's email and iCloud accounts—the publicized seizure of devices and sensitive privilege issues weighed in favor of the appointment of a special master in this case. See *In re Search Warrants Executed on April 28, 2021*, 21 MC 425 (JPO) (S.D.N.Y.), Dkt. No. 16, at 2-4.

Challenging the propriety of the warrants themselves, Giuliani's attorneys did not oppose S.D.N.Y.'s request for a special master, but took the aggressive step of asking the court to allow them to review the seized files and warrants underlying the seizures before the special master was appointed, even though no charges had been filed against him. See *In re Search Warrants Executed on April 28, 2021*, 21 MC 425 (JPO) (S.D.N.Y.), Dkt. No. 14, at 2-3. The S.D.N.Y. prosecutors opposed Giuliani's request forcefully, stating that they had gone "above and beyond" by seeking a special master, arguing that no precedent existed for Giuliani's request, and commenting that the mere fact Giuliani is a lawyer "does not mean that [he is] above the law[.]" See *In re Search Warrants Executed on April 28, 2021*, 21 MC 425 (JPO) (S.D.N.Y.), Dkt. No. 18, at 2. The court agreed with S.D.N.Y. in all respects, granting the request for a special master and noting that it knew of no authority for granting Giuliani's request to see the search warrants when no adversarial proceeding was pending. See *In re Search Warrants Executed on April 28, 2021,* 21 MC 425 (JPO) (S.D.N.Y.), Dkt. No. 20, at 4, 7.

S.D.N.Y.'s recent use of special masters in these cases begs the question of whether taint teams will remain a viable option for the government when public searches are at issue. In its request, S.D.N.Y. maintained that taint teams should continue to be used in most cases, and that special masters should only be used in "exceptional" circumstances, such as when executive privilege may be at issue (as in the Giuliani case) or when the files of an attorney with cases adverse to the office are searched. In such cases, according to S.D.N.Y., a special master is appropriate to promote the "perception of fairness." See *In re Search Warrants Executed on April 28, 2021*, 21 MC 425 (JPO) (S.D.N.Y.), Dkt. No. 16, at 2. As an initial point, it is unusual to see the DOJ requesting a procedure simply for perception's sake. More generally, on this theory, a special master would be appropriate in the case of any public search warrant—regardless of the sensitivity. The perception of fairness would seem to be important in all cases, not just high-profile ones.

Morgan Lewis Ethical Wall Probe

The other recent prominent proceeding involving ethical walls stems from a DOJ Antitrust price-fixing prosecution against Glenmark and Teva pending in the Eastern District of Pennsylvania. In that case, in connection with a conflict of interest hearing, the DOJ asked the court to assess the adequacy of ethical walls that the law firm of Morgan, Lewis & Bockius put in place as a result of its current representation of Glenmark and prior representation of Teva in the criminal matter, as well as its current representation of both companies in parallel civil cases.

The DOJ requested that the court ask Morgan Lewis to submit written answers to over 40 questions about the details of its internal ethical wall procedures, including how it is staffing and managing its ethical walls in light of Pennsylvania ethical rules and how it is handling the issue of fee-sharing between attorneys working on both matters. See *United States v. Glenmark Pharmaceuticals, USA*, 2:20 CR 00200 (RBS) (E.D.P.A.), Dkt. No. 80, at 1-3. The government also requested that Glenmark and Teva answer similar sets of questions regarding their understanding of these procedures, including whether each company had consulted with independent counsel. See id. at 3-6. Glenmark initially opposed the government's request, noting that it was prepared to waive any conflict of interest and calling the government's proposed requests unprecedented, "overbroad, intrusive, and entirely unnecessary." Glenmark further argued that the government "seems to be attempting to impose broad restrictions on Glenmark's trial preparation and use of its chosen legal team." See *United States v. Glenmark Pharmaceuticals, USA*, 2:20 CR 00200 (RBS) (E.D.P.A.), Dkt. No. 81, at 1-2.

At a recent hearing about the potential conflict, a representative from Glenmark and two Morgan Lewis attorneys testified, and the Glenmark representative sought to waive any potential conflict of interest, explaining that the company understood the ramifications of any potential conflict and had consulted with independent conflict counsel about the issue. The government was unsatisfied with these representations and pressed for a further hearing, which had been scheduled for June 24—but then, on June 21, Morgan Lewis notified the court that it was withdrawing from its representation of Glenmark in the matter.

This extensive inquiry, especially the questions directed to Morgan Lewis concerning its own internal procedures for implementing ethical walls, went beyond the typical Curcio hearing procedure and signals that firms may have to implement stricter procedures in certain cases to assure the government and courts of their ability to follow ethical rules and guidelines.

Analysis and Best Practices

The DOJ's questioning of the adequacy of Morgan Lewis's ethical wall, like S.D.N.Y.'s request for a special master in the Giuliani matter, signals an increased scrutiny of internal ethical wall procedures in federal courts. Below, we have suggested several items for practitioners to keep in mind when considering these issues.

First, defense attorneys who are concerned about the government's access to and review of potentially privileged materials after public searches should capitalize on S.D.N.Y.'s apparent increased openness to the appointment of special masters, and request them whenever relevant, regardless of the sensitivity of any particular case. Attorneys should point to S.D.N.Y.'s concession that special masters are important to ensure the "perception of fairness," as well as the growing consensus in federal courts that taint teams can be problematic for a variety of reasons. Expanding this concept even further, attorneys who suspect their clients may be under investigation by the government could proactively seek the appointment of special masters if they suspect there has been a seizure that has not yet been publicized, or even in anticipation of a government search. In such cases, the appointment of an independent special master outside the view of the defense would not alert the target, but would address courts' and defense attorneys' concerns regarding the deficiencies of internal taint teams.

Second, the Morgan Lewis matter provides guidance for firms looking to construct ethical walls that will withstand heightened scrutiny. In addition to taking standard precautions such as limiting information-sharing and personnel overlap, firms should consider segregating fees where circumstances may justify taking such steps, and should consider formulating specific procedures to educate and advise clients about the procedures being followed to ensure that no conflicts arise. In such cases, firms may also evaluate whether it is appropriate for clients to consult with independent counsel (as the government suggested was appropriate for Glenmark and Teva to do), and if so, how best to effectuate that process.