By MICHAEL DORE

Privacy Rights after *Carpenter*

Carpenter v. United States supports a renewed respect for attorney-client confidentiality and a check on prosecutorial power

For many years, the federal government has decided what its prosecutors may demand from law firms related to the firms' clients and what potentially privileged documents those prosecutors may see and use in their investigations and trials. Federal courts generally have allowed the Department of Justice (DoJ) to regulate itself, with no independent check on prosecutors' power to insert themselves into the attorney-client relationship. Fortunately, it appears the status quo is changing and that courts are poised to reign in the Government's[1] power to chill the free and unfettered communication between attorney and client. It has been a long time coming.

In 1990, the American Bar Association (ABA) amended its Model Rules of Professional Conduct to require prosecutors to obtain prior judicial approval before they could subpoena a lawyer to present evidence about a past or present client in a grand jury or other criminal proceeding.[2] Model Rule 3.8(f) was intended to assure an "independent determination" that, among other things, the information sought was not protected from disclosure by any applicable privilege.[3] As one federal appeals court noted, "[i]n many ways, the attorney-client relationship is the heart of our adversarial system of justice."[4]

Five years later, however, the ABA "retreated."[5] It removed the judicial preapproval requirement after the Third Circuit struck down a bar rule patterned on Model Rule

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3.8(f) in *Baylson v. Disciplinary Board of the Supreme Court of Pennsylvania*.[6] In *Baylson*, the court held that judicial preapproval was an intrusion on the grand jury process, noting that there was "no case precedent for the district court assuming the role of approving grand jury subpoenas prior to service."[7] "Instead," the *Baylson* court said, "the Supreme Court has been very reluctant to place restraints on the power of the grand jury to issue and serve subpoenas."[8]

In the decades since *Baylson*, the judicial preapproval requirement gradually disappeared from states' rules of professional conduct and district courts' local rules. The absence of such a safeguard left it to prosecutorial agencies to assume for themselves the role of arbiter over whether a prosecutor may issue a grand jury subpoena to a lawyer or law firm. However, the precedent the Third Circuit found lacking in *Baylson* may have arrived in the U.S. Supreme Court's 2018 opinion in *Carpenter v. United States*.[9] *Carpenter* held that while the Government may use subpoenas to acquire records in the overwhelming majority of investigations, "a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party."[10]

With limited exceptions, a lawyer's possession of client information is just such a "rare case." Under California law, for example, unless an attorney believes that disclosure is necessary to prevent a criminal act that is likely to result in death of, or substantial bodily harm to, an individual, the attorney has a statutory duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his client."[11] It is difficult to imagine a more reasonable basis for a client's expectation of privacy in his communications with his attorney. *Carpenter* thus seems to require the Government to obtain judicial approval through a probable cause showing before it may demand any client-related information from an attorney. The judicial preapproval requirement for a lawyer subpoena has a new life, albeit in the form of a warrant requirement.

This interpretation of *Carpenter* is consistent with the emerging trend of courts pushing back on the Government's typical use of "taint teams" or "filter teams" to review documents obtained from lawyers. The Offices of the U.S. Attorneys use these teams of ostensibly disinterested prosecutors, agents, and/or other law enforcement personnel to determine whether documents seized from a lawyer are privileged. The thinking goes that this review will not "taint" the trial team with privileged information and that the taint team can differentiate between the nonprivileged documents they will pass to the trial team and the privileged documents they will withhold.

Late last year, a Fourth Circuit court rejected a magistrate judge's authorization of a taint team to inspect documents seized from a law firm pursuant to a search warrant. In that decision, *In re Search Warrant Issued June 13, 2019*,[12] the court concluded that the magistrate judge had erred in "assigning judicial functions to the executive branch."[13] It viewed the resolution of a dispute about whether a lawyer's communications or a lawyer's documents are protected by the attorney-client privilege or work-product doctrine to be a "judicial function."[14] "Put simply," it held, "a court is not entitled to delegate its judicial power and related functions to the executive branch, especially when the executive branch is an interested party in the pending dispute."[15]

Viewed together, *Carpenter* and *In re Search Warrant* support a renewed respect for attorney-client confidentiality and a check on prosecutors' power. Any inconvenience to prosecutors in making a probable cause showing to a judge, or in having a neutral third party determine whether or not a document is attorney-client privileged or attorney work product, pales in comparison to the importance of the rights of privacy and confidentiality at stake. The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law."[16] A prosecutor seeking a conviction, or who is working in the same office as one, is the wrong person to assess whether there is an appropriate basis to overcome any privilege protection. *Carpenter* and *In re Search Warrant* recognize this distinction and may signify a renewed trend towards judicial review in what otherwise is an exclusively DoJ-controlled process.

Grand Jury Subpoenas

Until the 1980s, "federal prosecutors rarely subpoenaed attorneys to compel testimony relating to their clients."[17] That practice changed as "Congress passed several new federal statutes which, in the eyes of federal prosecutors, ma[de] attorneys fertile ground for eliciting incriminating information about the targets of federal investigations and prosecutions."[18] One Ninth Circuit court later noted that many felt, "and with some justification," that "whatever benefit the government derives from this practice comes at the direct expense of the attorney-client relationship."[19]

In 1985, the DoJ took note of "[t]he government's apparently increasing use of grand jury subpoenas on a target's counsel, both pre- and post-indictment."[20] In response, it issued a new section of the *United States Attorney's Manual* titled "Policy With Regard to the Issuance of Grand Jury or Trial Subpoena to Attorneys for Information Relating to the Representation of Clients."[21] The new guidelines required a prosecutor to obtain the approval of the assistant attorney general in charge of the DoJ's Criminal Division for issuance of all subpoenas served on counsel at any time.[22] They also required that the subpoena seek only information "reasonably needed for the successful completion of the investigation or prosecution," that the prosecutor establish that he had sought alternative sources first, and that the need for the information outweigh the risk that the attorney would be disqualified.[23]

In the five years that followed the DoJ's implementation of its new guidelines for subpoenaing lawyers, "[t]he instances of federal prosecutors subpoenaing attorneys to compel evidence regarding their clients, nevertheless, continued to increase."[24] Yet, once the Third Circuit struck down a bar rule patterned on ABA Model Rule 3.8(f) in *Baylson*,[25] the DoJ guidelines were all that was left to explicitly regulate federal prosecutors' efforts to issue subpoenas to attorneys.

Today, DoJ guidelines for prosecutors seeking to subpoena evidence from a lawyer related to a client representation are found in Section 9-13.410 of the recently renamed *Justice Manual*. With exceptions for "friendly subpoenas" and information the DoJ asserts "does not raise concerns regarding the potential application of the attorney-client privilege or the potential for negative impact upon the attorney-client relationship," such subpoenas must be authorized by the assistant attorney general or a deputy assistant attorney general for the Criminal Division (DAAG).

In evaluating the request to approve the issuance of a subpoena to an attorney for information relating to the representation of a client in a criminal investigation or prosecution, the DAAG applies the following principles:[26]

- "The information sought shall not be protected by a valid claim of privilege."
- "All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful."
- "[T]here must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information."
- "The need for the information must outweigh the potential

adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from the representation of the client as a result of having to testify against the client."
- "The subpoena shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time."

While this procedure and its accompanying principles are reassuring in theory, there are several fundamental weaknesses that nevertheless put attorney-client communications at undue risk. First, of course, the prosecutor who wants the subpoena is the one making the unopposed request. The reviewing assistant attorney general or DAAG only knows what the self-interested prosecutor is disclosing and thus can determine whether a claim of privilege is "valid" based only on limited, unsworn information. This is not to suggest a prosecutor would intentionally mischaracterize any facts in seeking approval; it is simply human nature that a prosecutor seeking subpoena approval and a fellow prosecutor being asked to give it might have a more restrictive view of privilege than the subpoenaed attorney and his or her client.[27]

Once the DoJ approves the lawyer subpoena, the prosecutor can serve it without anyone outside the DoJ having seen it, let alone having evaluated whether it is appropriate. The costly and time-consuming burden then is on the law firm and/or client to move to quash the subpoena in order to protect the client's legitimate privacy interest in what the client understood to be confidential communications.[28]

Even if the prosecutor fails to seek, let alone get, DoJ approval pursuant to its internal policy, this is not a basis to quash the subpoena. Section 9-13.410 is emphatic that the guidelines "are set forth solely for the purpose of internal Department of Justice guidance."[29] They "are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice."[30]

The DoJ thus appears to want it both ways. Courts and litigants should trust the DoJ to regulate its intrusions on attorney-client relationships, but the DoJ cannot be held accountable for its decisions. If *Justice Manual* Section 9-13.410 is merely internal guidance that "may not be relied upon," it does nothing to diminish the need for a court or special master to independently review the Government's inherently intrusive subpoenas to lawyers and law firms.

Carpenter Reopens the Door

While it did not involve a Government subpoena to an attorney for information about a client representation, the Supreme Court's opinion in *Carpenter v. United States*[31] suggests a possible end to Government self-regulation in this area. The issue in *Carpenter* was whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records held by a third party (that is, a wireless carrier) to determine the user's past movements. Specifically, police had obtained cell phone records under the Stored Communications Act[32] for Timothy Carpenter and several other suspects in a string of robberies in Detroit.[33]

Every prosecutor is familiar with the Supreme Court's direction that a federal prosecutor's interest in a prosecution is not that he or she will win a case "but that justice shall be done." The bar, though, is even higher.

The Stored Communications Act, as amended in 1994, allows the Government to compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought are "relevant and material to an ongoing criminal investigation."[34] Federal magistrate judges issued orders directing Carpenter's wireless carriers to disclose cell-cite information for Carpenter's telephone as of the commencement and termination of outgoing calls during the four-month period when the robberies occurred.[35] The wireless carriers complied, and the Government "obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day."[36]

Prior to his trial on robbery and weapons charges, Carpenter moved to suppress the cell-site data provided by the wireless carriers.[37] He argued that the Government's seizure of the cell/site records from the third party wireless carriers violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause.[38] The District Court denied the motion and the Court of Appeals for the Sixth Circuit affirmed, holding, as the Supreme Court summarized, that Carpenter "lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers."[39]

In a 5-4 majority opinion authored by Chief Justice John Roberts, the *Carpenter* Court held that the Government violated the Fourth Amendment when it obtained Carpenter's cell/site records from the wireless carriers without a warrant.[40] In reaching its holding, the Court noted that "[w]hen an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause."[41]

As relevant here, the Court in *Carpenter* addressed the intersection of the warrant requirement and the availability of a subpoena duces tecum. The majority summarized Justice Samuel Alito's contention in his dissent (joined by Justice Clarence Thomas) that the warrant requirement "simply does not apply when the Government acquires records using compulsory process."[42] According to the *Carpenter* majority, Justice

Alito's position was that "the compulsory production of records is not held to the same probable cause standard."[43] In fact, Justice Alito warned that the Court's opinion could "cause upheaval," and wondered "[m]ust every grand jury subpoena duces tecum be supported by probable cause?"[44] He added that while the majority's holding was in the context of the Stored Communications Act, "nothing stop[ped] its logic from sweeping much further."[45] According to Justice Alito, "[t]he Court has offered no meaningful limiting principle, and none is apparent."[46]

Chief Justice Roberts responded to Justice Alito's critique by noting that "this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy."[47] Indeed, "[i]f the choice to proceed by subpoena provided a categorical limitation on Fourth Amendment protection, no type of record would ever be protected by the warrant requirement."[48] This was not to say that a probable cause showing is always required. According to the *Carpenter* majority, "[t]he Government will be able to use subpoenas to acquire records in the overwhelming majority of investigations."[49] It continued, "[w]e hold only that a warrant is required in the rare case where the suspect has a legitimate privacy interest in records held by a third party."[50]

With that one sentence, the Supreme Court seemingly raised the bar for grand jury subpoenas issued by the Government to lawyers in whose client files there exists "a legitimate expectation of privacy."[51] That expectation of privacy has a source "in federal and state statutes, in codes of professional responsibility, under common law, and in the United States Constitution."[52] For California lawyers, one such source is California Business and Professions Code Section 6068(e)(1), which obligates a lawyer "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."[53] So the client's legitimate privacy interest in records held by his lawyer is indisputable.

Prior to *Carpenter*, "the Supreme Court implicitly reaffirmed that subpoenas trigger Fourth Amendment concerns and may be challenged on Fourth Amendment grounds."[54] In doing so, however, at least according to one Ninth Circuit court, the Supreme Court "indicate[d] that a subpoena recipient's ability to 'move to quash [a] subpoena before any search takes place' is sufficient to protect his or her Fourth Amendment rights."[55] Under *Carpenter*, however, the initial burden has shifted. The Government may no longer rely on its unchecked assertion that there is a "reasonable possibility" the subpoena will serve the grand jury's legitimate investigative purpose and force the recipient to be the one to first raise the subpoena with a court.[56] The Government now must obtain a warrant by presenting sworn evidence to a court sufficient to establish probable cause that the lawyer possesses evidence related to a potential crime before it can demand documents from a lawyer related to her representation of a client.[57]

A warrant requirement does not mean that prosecutors can or should send agents to break down lawyers' doors to execute the warrant because a subpoena alone is insufficient. As the Supreme Court has noted, "[n]othing in the language of the Constitution or in this Court's decisions interpreting [the Fourth Amendment] suggests that, in addition to the [place to be searched and the persons or things to be seized], search warrants also must include a specification of the precise manner in which they are to be executed."[58] *Carpenter* held that a prosecutor must get a warrant, not how to execute it.

Instead, the key consequence of *Carpenter* is that the prosecutor must make a showing to a judge—not just his superiors at the DoJ—sufficient to justify the subpoena to a lawyer for information about the client representation. That in itself does not necessarily create greater protection of attorney-client communications and is not the same judicial preapproval contemplated by the defunct ABA Model Rule 3.8(f). The warrant requirement is a probable-cause inquiry after all. *Carpenter*'s warrant requirement, though, significantly raises the bar for a prosecutor seeking to compel an attorney to provide evidence related to a client representation in at least two ways.

First, the prosecutor and the DoJ no longer can decide for themselves whether the subpoena to a lawyer is proper. A prosecutor's failure to satisfy *Carpenter* itself might be a basis to quash the subpoena or to suppress any evidence the Government obtains. Second, and perhaps more important, the rationale underlying the Third Circuit's ruling in *Baylson* that judicial pre-approval would interfere with the grand jury process no longer applies. *Carpenter* expressly contemplates judicial involvement before a prosecutor may issue a grand jury subpoena to a third party for records in which the suspect has a legitimate privacy interest. And the door now may be open to an increased judicial role in Government subpoenas to lawyers more generally. Requirements that better safeguard attorney-client confidentiality like those embodied in ABA Model Rule 3.8(f) thus could—and indeed should—make a comeback. In one key way, they already have.

End of the Taint Team

Government self-regulation in its potential intrusion on attorney-client relationships is not limited to the issuance of grand jury subpoenas. Once the Government actually obtains documents from a lawyer (particularly when seized by executing a search warrant) its typical practice has been to assign to itself the task of determining whether any privilege applies to those douments. An argument in favor of this practice is that investigative needs are at least an equally important interest to safeguarding the attorney client privilege, which must be strictly construed because it "stands in derogation of the public's right to every man's evidence."[59] Interfering with the Government's ability to isolate privileged documents will increase its burdens in investigating criminal conduct, slow down the review process, and significantly increase costs. As with grand jury subpoenas, however, a recent decision limiting the use of taint teams suggests a potential sea change in courts' willingness to allow the DoJ unfettered discretion to threaten "every person's right to confide in counsel free from apprehension of disclosure of confidential communications."[60]

Much like with the issuance of grand jury subpoenas to attorneys, in privilege determinations the DoJ generally takes the "trust us" approach. A team of prosecutors, and sometimes other government personnel (including non-lawyers), is formed to review the materials obtained from a lawyer to determine whether a privilege applies.[61] If the taint team deems a document to be privileged, it withholds the document from the trial team. If the taint team deems the document not to be privileged, it passes the document along to the trial team without the attorney or client having an opportunity to object. The Ninth Circuit has not yet addressed the propriety of government taint teams.[62] As a Fourth Circuit court recently recognized, however, the use of taint teams may improperly assign judicial functions to the executive branch and "contravene[] foundational principles that protect attorney-client relationships."[63]

In re Search Warrant Issued June 13, 2019,[64] involved a Baltimore law firm's challenge to the government's use of a taint team comprised of federal prosecutors and agents to inspect attorney-client materials that the Government seized during the

execution of a search warrant.[65] A magistrate judge authorized the use of the taint team, which the prosecutors had proposed to the judge ex parte as part of the search warrant application.[66] The approved attachment to the search warrant application specified the "Filter Team Practices and Procedures" to be used in the review of materials the Government would seize from the law firm.[67]

Under this protocol, the members of the "filter team," as it was called in *In re Search Warrant*, were not involved in the investigations of the lawyer and client.[68] These "disinterested" prosecutors and agents would review the seized materials and determine whether they reflected attorney-client privileged information or attorney work product.[69] If the filter team decided that neither protection applied, it could forward such materials directly to the prosecution team without the law firm's consent or any court order.[70]

Five days after the magistrate judge issued the search warrant, agents of the Internal Revenue Service and Drug Enforcement Administration (who were members of the filter team) executed the warrant at the law firm's offices and seized "voluminous materials" which included e-mail correspondence between a lawyer the Government was investigating and numerous law firm clients.[71] The law firm sought injunctive relief and the return of the seized property, but the district court denied the law firm's requests.[72] According to the district court, the magistrate judge had 'imposed appropriate and well-established constraints on the [Filter Team] that would be reviewing the seized documents.'"[73]

Noting that "the attorney-client privilege is 'the oldest of the privileges for confidential communications known to the common law,'"[74] the Fourth Circuit court reversed the district court's denial of injunctive relief. "Crucially," it held, the district court "failed to recognize that an adverse party's review of privileged materials seriously injures the privilege holder."[75] The district court thus had failed to recognize that the magistrate judge who approved the filter team protocol had "erred in assigning judicial functions to the Filter Team, approving the Filter Team and its Protocol in ex parte proceedings without first ascertaining what had been seized in the Law Firm search, and disregarding the foundational principles that serve to protect attorney-client relationships."[76]

The Fourth Circuit court recognized that the resolution of a dispute as to whether a lawyer's communications or documents are protected by the attorney-client privilege or work-product doctrine "is a judicial function."[77] Moreover, "a court is not entitled to delegate its judicial power and related functions to the executive branch, especially when the executive branch is an interested party in the pending dispute."[78] Indeed, the magistrate judge had compounded that error when a protocol was permitted that "delegated judicial functions to *non-lawyer* members of the Filter Team."[79] Notably, the DoJ expressly contemplates such a delegation by prescribing the use of "privilege teams" comprised of both "lawyers" and "agents."[80]

Even if the filter team is comprised entirely of lawyers, the *In re Search Warrant* court recognized that there is a possibility the filter team will "make errors in privilege determinations and in transmitting seized materials to an investigation or prosecution team."[81] It cited a 2006 Sixth Circuit decision that had limited the use of filter teams and observed that while a filter team may have an interest in preserving privilege, "it also possesses a conflicting interest in pursuing the investigation." That is, a filter team's members "'might have a more restrictive view of privilege' than the subject of the search given their prosecutorial interests in pursuing the underlying investigations."[82] This points to an "obvious flaw in the [filter] team procedure: *the government's fox is left in charge of the [law firm's] henhouse*, and may err by neglect or malice, as well as by honest differences of opinion."[83] The Fourth Circuit court thus found that the magistrate judge's authorization of the filter team and its protocol was improper.[84]

In considering what the magistrate judge should have done to avoid the "significant problems" of delegating judicial functions to the filter team, the Fourth Circuit in *In re Search Warrant* noted that "sensible procedures" would have included an adversarial proceeding in front of the magistrate judge before the magistrate judge approved the filter team and its protocol. "The judge would then have heard from the Law Firm's counsel, and possibly also from the clients of the Firm through their lawyers, *before* the Filter Team reviewed any seized materials."[85] That surely is a better approach than leaving it to the Government to decide without any external oversight or opposition whether a given document is privileged.

Simply put, the scope and application of attorney-client privilege and attorney work-product protection is complicated and depends greatly on context. Communication among non-lawyers may be necessary to implement legal advice and a simple list of attorneys is not a sufficient guide for a prosecutor in a different section as the trial team, let alone a non-lawyer agent, to properly assess whether a document is protected.

The lawyers participating in the communications and creating the work product are in the best position to raise all material circumstances that would suggest attorney-client privilege and/or the attorney work product doctrine applies. Then it should be up to an independent third party—whether a court or a special master appointed by a judge—to determine whether a privilege objection is well-founded. However, the status quo among many U.S. Attorney's offices—whereby prosecutors with no involvement in a case, little-to-no understanding of the full context for a communication, and at least an unconscious bias in favor of disclosure to the prosecution team make the decisions—cannot be the right answer.

Every prosecutor is familiar with the Supreme Court's direction that a federal prosecutor's interest in a prosecution is not that he or she will win a case "but that justice shall be done."[86] The bar, though, is even higher. As the Fourth Circuit court noted in *In re Search Warrant*, "prosecutors have a responsibility to not only see that justice is done, but to also ensure that justice *appears* to be done."[87] Unchecked Government authority to intrude on attorney-client relationships is fundamentally at odds with the appearance of justice.

A prosecutor's issuance of a grand jury subpoena to an attorney demanding materials related to a client relationship and a prosecution taint team's review of documents obtained from a lawyer thus present similar dangers—which various Courts of Appeals have acknowledged. The "service itself of an attorney-subpoena seeking to compel evidence concerning a client may cause irreparable damage to the attorney-client relationship."[88] Likewise, "taint teams present inevitable, and reasonably foreseeable, risks to privilege."[89] In both circumstances, the Government is encroaching on venerable ground. *Carpenter* and *In re Search Warrant* show that judges and/or opposing counsel must be a part of the process from the outset and that the Government can no longer go it alone.

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[1] In the present context, "Government"refers to acting under authority of the attorney general of the United States.

[2] Whitehouse v. United States Dist. Ct. for Dist. of Rhode Island, 53 F. 3d 1349, 1357 n.11 (1st Cir. 1995) ("[A]lthough they are issued under the district court's name and for the grand jury," grand jury subpoenas "are in fact almost universally instrumentalities of the United States Attorney's office or some other department of

the executive branch.") (quotations omitted).
[3] Stern v. United States Dist. Ct. for Dist. of Mass., 214 F. 3d 4, 8-9 (1st Cir. 2000).
[4] Whitehouse, 53 F. 3d at 1360.
[5] Stern, 213 F. 3d at 9.
[6] *Id.* (citing Baylson v. Disciplinary Bd., 975 F. 2d 102 (3d Cir. 1992)).
[7] Baylson, 975 F. 2d at 109.
[8] *Id.*
[9] Carpenter v. United States, 138 S. Ct. 2206 (2018).
[10] *Id.*
[11] BUS. & PROF. CODE §6068(e).
[12] In re Search Warrant Issued June 13, 2019, 942 F. 3d 159 (4th Cir. 2019).
[13] *Id.* at 176.
[14] *Id.*
[15] *Id.*
[16] Upjohn v. United States, 449 U.S. 383, 389 (1981).
[17] Whitehouse v. United States Dist. Ct. for Dist. of Rhode Island, 53 F. 3d 1349, 1352 (1st Cir. 1995).
[18] *Id.*
[19] United States v. Perry, 857 F. 2d 1346, 1347 (9th Cir. 1988).
[20] *Id.*
[21] *Id.* (citing U.S. ATTORNEYS' MANUAL §9-2.161(a) (July 18, 1985)).
[22] Perry, 857 F. 2d at 1347.
[23] *Id.*
[24] *See* Whitehouse, 53 F. 3d at 1352.
[25] Baylson v. Disciplinary Bd., 975 F. 2d 102, 109 (3d Cir. 1992).
[26] DoJ JUSTICE MANUAL §9-13.410(C).
[27] *See also* Whitehouse, 53 F. 3d at 1362 n.18 (referencing government's argument that a district court's local rule requiring judicial preapproval of a lawyer subpoena is unnecessary in light of the DoJ procedures but noting that "the judges of the federal district court in Rhode Island presumably did not take such a sanguine view of the Justice Department's ability to police its own," and adding that "[i]f so, they would not be alone in this view").
[28] In re Grand Jury Subpoena, 533 F. Supp. 2d 602, 605 n.7 (W.D. N.C. 2007) ("[A] lawyer or law firm may not merely assert that testimony or material is privileged and thereby not comply. Rather, the lawyer or law firm must 'promptly' attempt to quash the subpoena and submit the testimony or the materials to the Court for in camera, ex parte review.") (quoting FED. R. CRIM. P. 17(c)); *see generally* In re Grand Jury Subpoena, 533 F. Supp. 2d at 603 n.3 ("While Fed.R.Crim.P. 6 governs grand jury procedure, Fed.R.Crim.P. 17 governs the issuance of any subpoena, whether grand jury or trial, under the Criminal Rules.").
[29] DoJ JUSTICE MANUAL §9-13.410(E).
[30] *Id.*
[31] Carpenter v. United States, 138 S. Ct. 2206 (2018).
[32] 18 U.S.C. §2703(d).
[33] Carpenter, 138 S. Ct. at 2212.
[34] 18 U.S.C. §2703(d).
[35] Carpenter, 138 S. Ct. at 2212.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at 2213 (citing Carpenter v. United States, 819 F. 3d 880, 888 (6th Cir. 2016)).
[40] Carpenter, 138 S. Ct. at 2222.
[41] *Id.* at 2213 (internal quotations omitted).
[42] *Id.* at 2221.
[43] *Id.*
[44] *Id.* at 2247 (Alito, J., dissenting). Justice Alito also noted that "even if the Fourth Amendment permitted someone to object to the subpoena of a third party's records, the Court cannot explain why that individual should be entitled to *greater* Fourth Amendment protection than the party actually being subpoenaed." *Id.* at 2256 (Alito, J., dissenting) (emphasis in original). According to Justice Alito, under the Court's decision "the Fourth Amendment will extend greater protections to someone else who is not being subpoenaed and does not own the records." *Id.* (Alito, J. dissenting). "That outcome makes no sense, and the Court does not even attempt to defend it." *Id.* (Alito, J., dissenting).
[45] *Id.* at 2256 (Alito, J., dissenting).
[46] *Id.* (Alito, J., dissenting).
[47] *Id.* (Alito, J. dissenting).
[48] *Id.* at 2222.
[49] *Id.*
[50] *Id.*
[51] DeMassa v. Nunez, 770 F. 2d 1505, 1506 (9th Cir. 1985).
[52] *Id.*
[53] California Business & Professions Code Section 6068(e)(2) creates a limited exception in which "an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."
[54] In re Grand Jury Subpoena, JK15-029, 828 F. 3d 1083, 1088 n.1 (9th Cir. 2016) (citing City of Los Angeles v. Patel, 135 S. Ct. 2443, 2453 (2015)).
[55] In re Grand Jury Subpoena, JK15-029, 828 F. 3d at 1088 n.1 (quoting Patel, 135 S. Ct. at 2453).
[56] United States v. R. Enters., Inc., 498 U.S. 292, 300-01 (1991); In re Grand Jury Investigation M.H., 648 F. 3d 1067, 1071 (9th Cir. 2011) ("The Government is not required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of its inquiry is to establish whether probable cause exists ….").
[57] *Carpenter*'s requirement that the Government obtain a warrant where the suspect has a legitimate privacy interest in records held by a third party thus seems at odds with, and to overrule at least with respect to lawyer subpoenas, holdings in cases like United States v. Tivian Labs., Inc. (589 F. 2d 49 (1st Cir. 1978)), which concluded that "[a] subpoena may be issued without first obtaining a court's permission … and may be judicially enforced without a showing that probable, or even reasonable, cause exists to believe that violation of law has occurred." *Id.* at 54. One district court has acknowledged that *Carpenter*'s warrant requirement means that even where a subpoena satisfies Fourth Amendment concerns, "that is not the end of the inquiry." United States DOJ v. Ricco Jonas, No. 18-mc-56-LM, 2018 WL 6718579, at *6 (D.N.H. Nov. 1, 2018).
[58] Dalia v. United States, 441 U.S. 238, 257 (1979).
[59] In re Horowitz, 482 F. 2d 72, 81 (2d Cir. 1973).
[60] In re Horn, 976 F. 2d 1314, 1316 (9th Cir. 1992).
[61] *See, e.g.*, JUSTICE MANUAL §9-13.420(E) (For searches of the premises of "subject" attorneys, "to 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' should be designated, consisting of agents and lawyers not involved in the underlying investigation.").
[62] Courts in the Ninth Circuit have taken varied positions on taint teams. *Compare* United States v. Gallego, No. 4:18-cr-01537, 2018 WL 4257967, at *2 (D. Ariz. Sept. 6, 2018) (rejecting the government's use of a taint team and noting that courts are generally "skeptical" of their use), *and* United States v. SDI Future Health, Inc., 464 F. Supp. 2d 1027, 1037 (D. Nev. 2006) ("Federal courts have taken a skeptical view of the Government's use of 'taint teams' as an appropriate method for determining whether seized or subpoenaed records are protected by the attorney-client privilege.") *with* United States v. Ciancia, No. 2:13-cr-00902, 2015 WL 13798666, at *8 (C.D. Cal. Sept. 24, 2015) (holding that a criminal defendant could not object to the lack of proper screening procedures for privileged information because such procedures were "not required by law"), *and* United States v. Ramirez, no. ED CR 12-00065-VAP, 2013 WL 12221615, at *3 (C.D. Cal. June 18, 2013) (noting that while taint teams in some circumstances might "leak privileged information to prosecutors," there was no evidence of misconduct before the court and thus no reason to reject the government's procedure").
[63] In re Search Warrant Issued June 13, 2019, 942 F. 3d 159, 164 (4th Cir. 2019).
[64] *Id.* at 159.
[65] *Id.* at 164.
[66] *Id.* at 165.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 165-66.
[70] *Id.* at 166.
[71] *Id.*
[72] *Id.* at 169.
[73] *Id.* (quoting In re Search of Under Seal, No. 1:19-mj-02155 at 2 (D. Md. July 11, 2019)) (brackets in Fourth Circuit opinion).
[74] In re Search Warrant Issued June 13, 2019, 942 F. 3d at 172-73 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).
[75] In re Search Warrant Issued June 13, 2019, 942 F. 3d at 175.
[76] *Id.* at 181.
[77] *Id.* at 176.
[78] *Id.*; *see also id.* ("[A] court simply cannot delegate its responsibility to decide privilege issues to another government branch.").
[79] *Id.* (citing In re Search of Elec. Commc'ns, 802 F. 3d 516, 530 & n.54 (3d Cir. 2015) (ruling that non-lawyer federal agents could not make privilege determinations)).
[80] JUSTICE MANUAL §9-13.420(E).
[81] In re Search Warrant Issued June 13, 2019, 942 F. 3d 159, 177 (4th Cir. 2019).
[82] *Id.* at 178.
[83] *Id.* at 177-78 (quoting In re Grand Jury Subpoenas, 454 F. 3d 511, 523 (6th Cir. 2006)) (emphasis and brackets in In re Search Warrant Issued June 13, 2019).
[84] Notably, after the law firm filed its appeal, the district court entered an agreed order modifying the filter team protocol to require that the filter team's forwarding of seized materials to the prosecution team first be approved by the law firm or the court. In a concurring opinion, Judge Allison Jones Rushing noted that the majority opinion (which she joined) did not suggest that the modified protocol "impermissibly usurp[ed] a judicial function." *Id.* at 184 (Rushing, J., concurring). But even that modified protocol did not address the government's failure to disclaim an intention to use the plain-view doctrine if the incriminating character of any document seized from the law firm was apparent on its face. *See id.* at 183.
[85] *Id.* at 178 (emphasis in original).
[86] Berger v. United States, 295 U.S. 78, 88 (1935).
[87] In re Search Warrant Issued June 13, 2019, 942 F. 3d at 183 (emphasis in original).
[88] Whitehouse v. United States Dist. Ct. for Dist. of Rhode Island, 53 F. 3d 1349, 1358 (1st Cir. 1995).
[89] In re Grand Jury Subpoenas, 454 F. 3d at 523; *see also* United States v. Castro, No. 19-20498, 2020 WL 241112, at *2 (E.D. Mich. Jan. 16, 2020) ("The Court rejects the Government's proposal to utilize a U.S. Attorney 'Filter Team' to protect attorney-client information with regard to each defendant's prison calls.")