

**Does Use of a Filter Team to Search a Law Firm Violate Foundational Principles
that Protect the Attorney-Client Relationship?**

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The Fourth Circuit asked this question in October 2019 and answered it by enjoining a filter team's review of seized documents. *United States v. Under Seal (In re Search Warrant Issued June 13, 2019)*, 942 F.3d 159 (4th Cir. 2019).¹ Long before, the Sixth Circuit reversed a district court's approval of the use of a filter team, mandated the use of a special master, and held that the obvious flaw in the taint team procedure is that the government fox is left in charge of the defendant's henhouse. *In re Grand Jury Subpoenas*, 454 F.3d 511 (6th Cir. 2006). Recently three lower courts have either recognized that the Fourth Circuit's decision may render the use of a filter team unlawful², and/or have appointed a special master instead of permitting a filter team to do the court's work.³

A violation by the government of an attorney-client relationship in order to obtain confidential information may be deemed a violation of a defendant's Sixth Amendment right to effective assistance of counsel. A federal court may exercise its inherent supervisory powers to dismiss an indictment when outrageous government conduct violates a recognized statutory or constitutional right, such as the Sixth Amendment or the Due Process Clause.

In the alternative, a court may suppress evidence gathered as a result of the violation. A district court in Hawaii has held that dismissal of the indictment based upon the violation of a defendant's constitutional rights by the use of a filter team

¹ A District Court in the Ninth Circuit rejected the application of this case on the ground that it applied the test for obtaining an injunction, which requires irreparable harm, instead of an intentional act violating the privilege held by the Ninth Circuit to be required to establish the right to relief. *United States v. Babichenko*, No. 1:18-cr-00258-BLW, 2020 WL 4462497 (D. Idaho Aug. 3, 2020) (finding no intentional act and no use of the privileged information).

² *United States v. Chavez*, 423 F.Supp.3d 194, 207 n.6 (W.D.N.C. 2019).

³ *United States v. Castro*, 2020 WL 241112 (E.D. Mich. Jan. 16, 2020); *Cohen v. United States*, No. 1:18-mj-03161-KMW (S.D.N.Y. 2018).

was not warranted, but granted suppression of documents seized. *United States v. Sullivan*, Cr. No. 17-00104 JMS-KLM, 2020 WL 1815220 (D. Haw. Apr. 9, 2020).⁴

It is important that federal courts in the Second Circuit are made aware of this trend, since the SDNY argued (unsuccessfully) in 2018 in support of the use of a filter team that “case law in this Circuit . . . has repeatedly found that the government’s use of a filter team appropriately protects applicable privileges.” Gov’ts Opp. to Michael Cohen’s Motion for a Temporary Restraining Order, 1, 7, *Cohen v. United States*, No. 1:18-mj-03161-KMW (S.D.N.Y. 2018) (“[t]he use of a designated filter team, like the one in place here, is a ‘common procedure’ in this District” and “the USAO-SDNY currently has numerous pending cases in which it is employing the use of a filter team to screen for potentially privileged material.”).

Judges in this Circuit in fact do not have a history of rubber-stamping the use of filter teams. In 1994, Judge Brieant found that “reliance on the implementation of a [filter team], especially in the context of a criminal prosecution is highly questionable and should be discouraged. The appearance of Justice must be served, as well as the interests of Justice. It is a great leap of faith to expect that members of the general public would believe any such [filter team] would be impenetrable” *In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. 55 (S.D.N.Y. 1994).

This issue is now before the Eleventh Circuit in *United States v. Esformes*, No. No. 19-13838. Esformes received a pardon, but continues to face restitution and forfeiture of many millions as a result of his conviction obtained with the use of documents seized from his attorney.

⁴ See also *United States v. Neill*, 952 F.Supp. 834 (D.D.C. 1997) (dismissal of indictment denied because only those documents for which privilege was not asserted were released to prosecution team).