News & Publications

Evidence Derived From Violation Of Attorney-Client Privilege Not Subject To Kastigar Taint Hearing Or To Suppression Under Fruit-Of-The-Poisonous Tree Doctrine

Date Posted: Jan 18, 2011
Published On: whitecollarcrime.foxrothschild.com

A recent Sixth Circuit case exposed Enzyte, a widely-promoted male performance-enhancing product, as a fraud (see previous post here). The lead defendant and promoter maintained that government agents improperly acquired thousands of attorney-client communications when they imaged more than 90 computers during a search of his company's offices, and argued that the government should be obliged to prove that its case was untainted by evidence derived from the privileged communications. Having previously suggested that a taint hearing was required when the government derived evidence

from attorney-client communications, the Sixth Circuit -- finding itself alone among the courts of appeal in doing so -- reconsidered and reversed itself, holding that only evidence developed from the exploitation of constitutional privileges is subject to a full-blown Kastigar hearing and risks suppression under the fruit-of-the-poisonous tree analysis.

The district court in *United States v. Warshak*, et als., 2010 WL 5071766 (6th Cir., 12/14/2010) had held what it called a "Kastigar-like" hearing to examine the handling of the attorney-client emails seized by the government and its screening procedures for those materials. The district court found that the government had acted properly in seizing the emails and that its case was not tainted by privileged information, but on appeal the defendant argued that the lower court's procedure was insufficiently searching under *Kastigar v. United States*, 406 U.S. 441 (1972). Under *Kastigar*, when the government compels immunized testimony in the grand jury over the witness's Fifth Amendment privilege, and then prosecutes that witness, it bears the burden of not just negating the taint of that immunized evidence, but of affirmatively showing that its trial evidence was obtained from sources independent of that testimony. Four years earlier and in another case the Sixth Circuit had indeed suggested that *Kastigar* applied to the trial use of seized attorney-client privileged materials or their progeny.

The *Warshak* panel took a look around at the judicial landscape and noticed two things immediately. First, no other court of

appeals had taken up the suggestion that Kastigar is implicated when the government improperly obtains attorney-client materials and generates leads or secondary evidence. Second, no court of appeals had ever held that suppression was an appropriate remedy for evidence derived from a violation of the attorney-client privilege, as fruit-of-the-poisonous tree, since that remedy was limited to violations of constitutional privileges. Under those circumstances, the court deemed it “unwise” to extend *Kastigar* or the suppression remedy to evidence derived from attorney-client privilege violations.