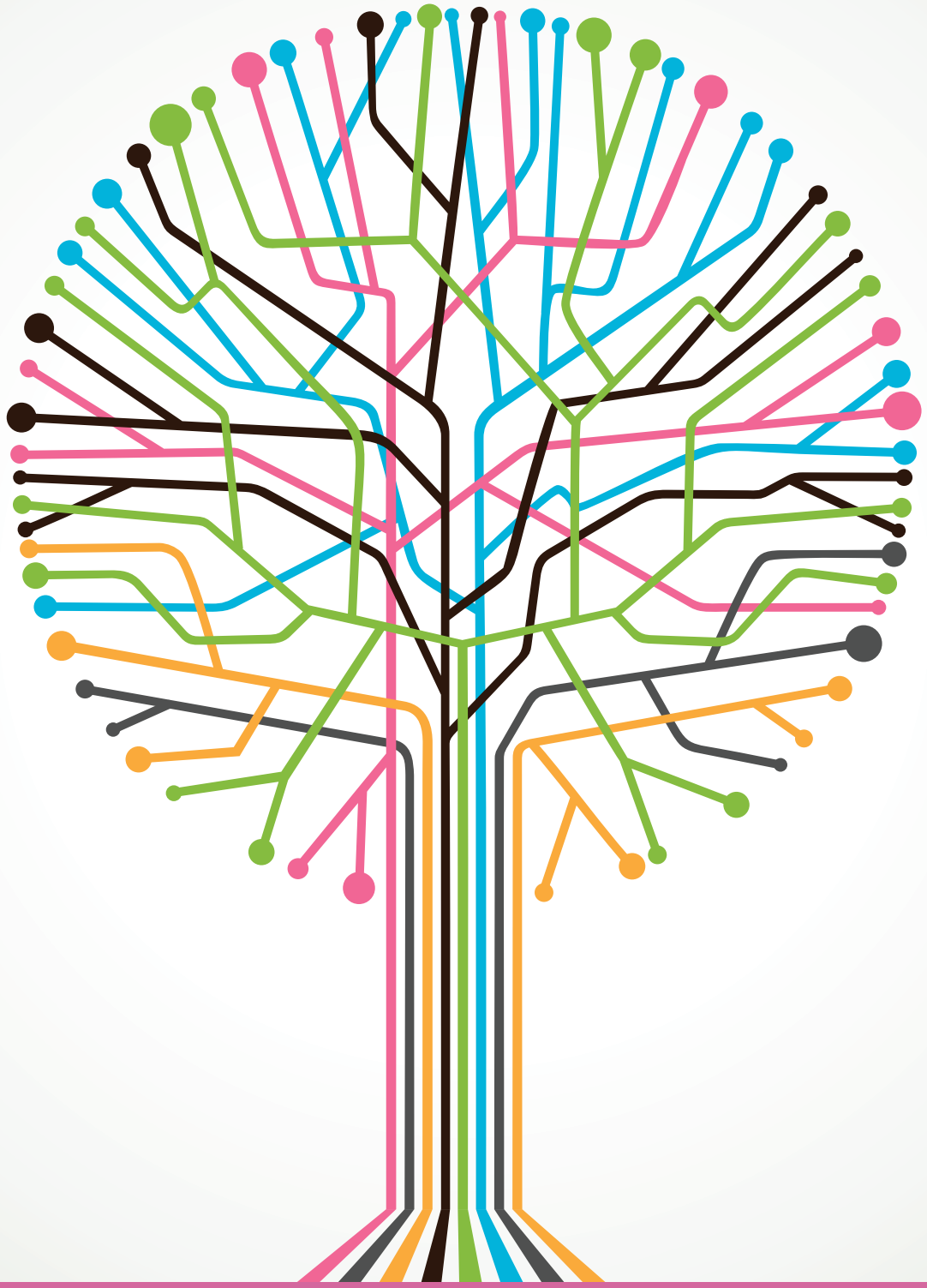


"The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[1]

Time to Evolve the Attorney-Client Privilege to Protect Communications Stored Electronically

VINCENT A. CITRO

The bedrock of the federal criminal justice system is composed, in part, by privileges found in common law. Federal Rule of Evidence 501 requires federal judges to interpret common law privileges "in light of reason and experience." The Supreme Court of the United States (SCOTUS) noted the attorney-client privilege, which may begin before or after a civil or criminal action commences, is the oldest common law privilege in the American judicial system.[2] That privilege protects confidential communications between an attorney and client and, by 1915 was "too well known and … too often recognized by textbooks and courts to need extended comment now."[3]

While Justice William R. Day may have considered the topic well-covered and in need of no further comment, technological advancements and modern practices require us to re-examine the law surrounding the privilege and advise clients on the dangers of electronically storing attorney-client communications that can be accessed without the client's permission. Actors adverse or indifferent to the client's cause commonly take the form of hackers, successors-in-interest who later take over the privilege (usually in the case of a business entity), or government agents. Clients needing to electronically store attorney-client privileged communications must do so as they would store other sensitive, important data.[4] This article addresses when the government intentionally intrudes into the attorney-client privilege and the remedies available. While the law may be clear in certain aspects, SCOTUS has never addressed the rare collision of two federal common law privileges rooted in privacy—when the government intrudes into attorney-client privileged communications and uses the fruits of that intrusion in a secret grand jury investigation to obtain indictments. The purpose of this article is to detail the types of intrusions, remedies available, and suggest a solution to this situation, which has become more prevalent in the era of storing mass amounts of private data on electronic media.

The Right of Privacy in Attorney-Client Communications

In 1947, SCOTUS expressly recognized a right of privacy inherent in the attorney work product doctrine. Obviously, attorneys work on their clients' behalf and create product protected by the doctrine after the attorney-client relationship has been formed. However, SCOTUS has only expressly recognized the right of privacy in the attorney work product doctrine.[5] It has not expressly recognized a right of privacy in the communications that take place between a client and attorney. Of course, it would be inane to find a right of privacy only in the work product doctrine, but not in the attorney-client relationship that must first be formed. The law has long recognized the necessity to protect the communications between a client and attorney before a legal action commenced, and the right to privacy in the communications has been implied. In 1833, Lord Henry Brough-

man, the lord high chancellor of Great Britian, wrote, "If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous."[6] As with any privilege that prohibits individuals from being compelled to tell what they know to ensure the truth is discovered in legal proceedings, the attorney-client privilege is strictly construed.[7]

Having failed to expressly state the obvious, that a client has an inherent right of privacy in attorney-client privileged communications, SCOTUS has often permitted lower courts to frame objections to the government's improper intrusion into privileged communications as fitting within violations of the Sixth Amendment right to counsel. The Sixth Amendment right to counsel only attaches "at or after the time that judicial proceedings have been initiated ... 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'"[8] This approach assumes privileged conversations happen only when "suits begun, or intended, or expected, or apprehended."

Recent technological advancements and practices allow clients to transmit attorney-client communications instantly over vast distances and to subsequently store them electronically, effectively preserving them indefinitely. Federal authorities may seize attorney-client communications and use those communications to structure a criminal investigation. Seizures can occur in real time pursuant to the Wiretap Act, Foreign Intelligence Surveillance Act (FISA), and FISA Amendments Act, or pursuant to search warrants and similar compulsory processes for stored communications. Using these tools, government agents have violated the attorney-client privilege and improperly used the fruits of those invasions, which has largely escaped judicial review.[9]

When Improper Intrusions Into the Attorney-Client Privilege Becomes Known

When the government improperly intrudes into the attorney-client privilege, the court must identify the kind of intrusion that took place and narrowly tailor a remedy.[10] The first step requires the court to determine whether the error was a constitutional or nonconstitutional violation. The second step requires the court to dismiss charges or to deny the government the use of the fruits of a poisonous tree.[11] Generally, the client bears the burden of proving that the intrusion took place and, as a result, he or she suffered prejudice. When the intrusion occurs after an indictment has been returned, denying the government the fruits of the poisonous tree is a fairly easy remedy to fashion. However, when the intrusion occurs before an indictment has been returned—during the grand jury's investigation—identifying the intrusion and fashioning a remedy is a significantly more difficult and burdensome task. The government has always claimed another, in this instance competing, common law institution—the grand jury—and that the secrecy shrouding its proceedings, which resulted in the indictment, is sacrosanct.

Like attorney-client privilege, the grand jury is an institution that existed before the U.S. Constitution. It was given a formal role in the American legal system by the Fifth Amendment.[12] When functioning properly, the grand jury fairly considers evidence to determine whether a person committed a crime and returns an indictment after finding probable cause.[13]

Unlike many state systems, no federal statute or procedural rule requires federal prosecutors to act as legal advisers to the grand jury.[14] Federal Rule of Criminal Procedure 6(d)(1) merely authorizes federal prosecutors to be present while the grand jury is in session. The role of federal prosecutors has evolved to drafting indictments for the grand jury based on the evidence and legal advice that federal prosecutors present to the grand jury. "As a practical matter [the grand jury] must lean heavily upon [federal prosecutors] as its investigator and legal advisor [sic] …."[15] This can lead to inappropriate instruction and abuses of grand jury proceedings.[16]

The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it.[17]

In 1988, Justice Thurgood Marshall wrote in a dissent that the grand jury's strict secrecy requirement means government misconduct, specifically intrusions into the attorney-client privilege, will rarely be exposed.[18] This is significant because constitutional errors in grand jury proceedings permeate the entire criminal process and undermine the integrity of prosecutions. It cannot be said that proper grand jury proceedings would have resulted in the indictment. Constitutional defects that are fundamental to the criminal justice process, like excluding grand jurors based on race, gender, etc., cannot be subject to a harmless error review, and the resulting indictment must be dismissed. As in the case of a defect in the selection process, a stenographer preserves those constitutional errors, so they are readily discernable.

Yet when insidious constitutional errors are pre-indictment intrusions into the attorney-client privilege and the government inappropriately uses the fruits of those intrusions to guide the grand jury's investigation into criminal conduct, the law does not effectively provide a means for the client to discover those proceedings to prove a violation took place. Indeed, testimony before the grand jury rarely reveals the source of every bit of evidence provided to the grand jury. Recording the proceedings proves of little value when attempting to trace whether attorney-client privileged material was used. This is troublesome because the intrusion and improper use of the fruits of the intrusion happen entirely under color of lawful authority and are wholly within the power of the government to conceal or expose.[19] Accordingly, the burden to prove that improperly obtained attorney-client privileged material was used is currently misplaced upon the client, and it should be placed upon the government. This approach is consistent with the Court's historic role in zealously guarding common law privileges.[20]

Improper Grand Jury Conduct in the Bank: the *Nova Scotia* Bank Case

The seminal case on the issue of the government intruding into the attorney-client privilege is *Bank of Nova Scotia v. United States*.[21] In *Nova Scotia*, SCOTUS announced that misconduct before the grand jury that prejudiced the defendant may warrant the dismissal of an indictment subject to the constraints found in Federal Rules of Criminal Procedure 52(a). Rule 52(a) requires courts to disregard harmless errors; that is, those that do not affect substantial rights. The theory behind the rule is that a conviction would still have been obtained had the meaningless error not occurred. In *Nova Scotia*,

government prosecutors improperly used the grand jury to provide civil auditors with evidence, violated secrecy rules, illegally imposed secrecy requirements on witnesses, and violated the Sixth Amendment. Ultimately, the violations were found to be incidental to the grand jury proceedings and harmless. While SCOTUS accepted that the government engaged in misconduct, the misconduct amounted to nonconstitutional errors that were harmless. It was "not faced with a history of prosecutorial misconduct, spanning several cases, that [was] so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process which resulted in the indictment."[22] "Not faced with" does not mean the problem is rare. It may be pervasive but hidden under the veil of grand jury secrecy.

Accordingly, SCOTUS endorsed a view that where a defendant proves a non-constitutional error took place before the grand jury, a dismissal would be appropriate "'if it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from substantial influences of [the] violations." This begs the question; how does a defendant prove the intrusion into the attorney-client privilege substantially influenced the grand jury's decision to indict or that grave doubt exists that the decision to indict was free from substantial influences stemming from the violation? Grand jury proceedings are conducted in secret for a myriad of good reasons.[23] Federal Rule of Criminal Procedure 6(e) provides that the veil of secrecy may only be pierced for specifically enumerated reasons, which do not include allowing a defendant to examine the proceedings to ensure the government did not use the fruits of its unlawful intrusion into privileged communications to obtain an indictment. The overwhelming number of federal prosecutors are scrupulously honest, but abuses have occurred in the distant and no-so-distant past.[24] Blindly trusting federal prosecutors with improperly accessed attorney-client privileged information, especially before an indictment has been returned, is simply foolish. As a federal judge recently opined, when federal prosecutors said they wanted access to attorney-client communications but did not care about the substance of them: "That's hogwash. You're going to tell me you don't want to know what your adversary's strategy is? What kind of a litigator are you then? Give me a break."[25]

The law should require the government to affirmatively prove it made no use of improperly obtained attorney-client privileged information. In short, a *Kastigar* burden would be appropriate in this context.[26] Otherwise, as Justice Sonia Sotomayor observed, the government's unrestrained ability to collect and assemble data remains subject to abuse.[27]

Kastigar v. United States

The Court has always sought to zealously guard federal common law privileges and the values that underlie them.[28] One such privilege, later enshrined in the U.S. Constitution, was the right against self-incrimination.[29] Section 6003 of Title 18 of the U.S. Code permits federal prosecutors to force a witness to disclose what the witness knows, even if the information incriminates the witness. The caveat to this power is that the government must provide the witness with immunity for the information provided to the government. Obtaining that immunity requires approvals from the highest levels of the Department of Justice (DOJ).[30] Once a federal prosecutor obtains final DOJ approval, he or she must also obtain a court order if the witness fails to be persuaded by the DOJ approval. Prosecutions of a witness who previously provided immunized testimony normally requires the "express written authorization of the attorney general."[31]

A prosecution that commences after the grant of immunity cannot be tainted by evidence compelled pursuant to the use immunity order.[32] When there is doubt that the prosecution is free from information derived from the grant of immunity, the court must conduct a *Kastigar* hearing. In *Kastigar*, SCOTUS held that to protect the right against self-incrimination, the prosecution could not use, or derivatively use, immunized testimony. In sum, the witness must be in the same position he or she would have been had he or she not previously testified. A defendant need only prove that he or she testified pursuant to a grant of immunity. Then, the government must affirmatively prove that all evidence it wants to use was derived from sources "wholly independent of the compelled testimony." *Kastigar* hearings can commence at any point during the criminal proceeding.

To illustrate how careful the government must be when using this power, one need only look to *United States v. North*.[33] U.S. Marine Corps Lt. Col. Oliver North testified pursuant to a grant of immunity before Congress during the Iran-Contra hearings, which were televised and of great national importance at the time. In a subsequent prosecution of North, the court concluded that the government had to show that witnesses did not view North's televised and immunized testimony. "When the government puts on witnesses who refresh, supplement, or modify [their testimony] with compelled testimony, the government uses that testimony to indict and convict.... This type of use by witnesses is not only evidentiary in any meaningful sense of the term; it is at the core of the criminal proceeding."[34]

Similarly here, SCOTUS should prohibit the government from affirmatively or derivatively using attorney-client privileged information it improperly obtained in a secret grand jury proceeding. Placing a *Kastigar*-type of burden on the government to ensure it does not use fruits of an intrusion into the attorney-client privilege zealously protects both the attorney-client privilege and the secretive workings of the grand jury. It also comports with the ethical obligations placed upon federal prosecutors.

Enter the McDade Amendment

After a failed prosecution of Rep. Joseph McDade, Congress passed a law that required federal prosecutors to abide by the ethics of their individual licensing jurisdiction and the jurisdiction where they were practicing. Effectively, 28 U.S. Code § 530B is a federal law that incorporates state bar ethics rules. Every state restricts lawyers from communicating with individuals who are represented by counsel about the subject matter of the representation. Some of those restrictions are extended to nonlawyers, like law enforcement agents, working with lawyers. Unlike the Sixth Amendment, these restrictions imposed by ethical rules do not trigger only after an indictment has been returned. American Bar Association (ABA) Model Rule 4.2 prohibits a lawyer from communicating about the subject matters of the representation with a person represented by counsel, "unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order." Lawyers seeking to protect privileged information will not provide consent, and the search warrant does not constitute a court order authorizing the unfettered invasion of privileged material. Indeed, few issuing courts contemplate the government finding attorney-client privileged material and reviewing that material when search warrants are issued. Finally, no law provides a per se right for government agents to intrude upon the right

to privacy inherent in the attorney-client privileged communications. From time to time, government agents executing search warrants will engage in consensual conversations with the targets of the investigation. The commentary to Rule 4.2 notes that that situation does not provide an exception to Rule 4.2. While federal law enforcement agents do not work for federal prosecutors, the commentary makes it clear that federal prosecutors are prohibited from instructing law enforcement agents to do something the prosecutor is prohibited from doing directly. In the federal system, law enforcement agents work with prosecutors to obtain search warrants. Therefore, it cannot be said that the law enforcement agents are not working at the direction and control of prosecutors when search warrants are obtained.

ABA Model Rule 5.3 holds prosecutors accountable for the conduct of agents and requires prosecutors to properly instruct agents about the prosecutors' professional responsibilities. Further, Rule 5.3 requires prosecutors to take remedial action when prosecutors learn of an agent's conduct that would amount to misconduct if the prosecutor had committed the conduct. The ABA has opined that the prosecutor is responsible for an agent's inappropriate conduct if the prosecutor did not take reasonable steps to prevent the inappropriate conduct.[35]

Even if a government agent improperly intrudes upon attorney-client privileged material alone, Rule 5.3(c)(2) prohibits a prosecutor from later ratifying the improper conduct.[36] Courts have often concluded that state ethics rules cannot supersede federal rules of evidence and have refused to suppress evidence obtained in violation of those rules.[37] However, those cases were decided before § 530B was enacted. Regardless of whether suppression is appropriate, the prosecutor has an ethical duty to avoid ratifying the improper conduct and using the information. In sum, an ethical prosecutor already finds himself or herself subject to an ethical equivalent of a *Kastigar* burden. Formally imposing one when the government intentionally intrudes into the attorney-client privilege imposes no greater strain on the government.

Evolutions in the Right to Counsel Support a *Kastigar*-like Burden Upon the Government

The concept of *stare decisis* means that the law will not merely change erratically, but will develop in a principled and intelligible fashion.[38] Just as the Fourth, Fifth, and Sixth Amendments have evolved since being penned, laws protecting the attorney-client privilege should continue to evolve to include the resolution proposed herein. For example, the Fourth Amendment no longer turns solely on whether the government made a physical intrusion upon private property.[39] The Fifth Amendment no longer only offers at trial protections against self-incrimination and assistance of counsel.[40] The Sixth Amendment now guarantees the right to counsel at any criminal trial, even if the defendant is indigent.[41] In the last few years, the Fourth Amendment evolved when it came to protecting smartphones because of the increased privacy interests in the quantity of data stored on those devices.[42] As the laws in these areas evolved in a principled and intelligible fashion, this area of law is ripe to evolve to require the government to prove it did not use any information it obtained in violation of the attorney-client privilege to obtain an indictment.

Conclusion

As with other violations of the law, requiring the government to prove in the context of the secretive grand jury proceedings that it did not use the fruits of its transgression, directly or indirectly, serves public policy and encourages lawful conduct. To rule otherwise "would only invite the very methods deemed inconsistent with ethical standards and destructive of personal liberty.… The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that is shall not be used at all."[43] When it is used, dismissal, despite the significant cost to the public, is warranted. The Third Circuit found dismissal of an indictment for misconduct before the grand jury was a necessary cost to ensure "a sharp improvement in the procedures adopted by United States attorneys to control attorney conduct before the grand jury."[44] Imposing a *Kastigar*-type burden on the government when it invades the attorney-client privilege prior to an indictment allows the law to develop consistent with prosecutors' ethical obligations and the realities of current technology. ☉

Vincent A. Citro is an attorney with the Law Offices of Mark L. Horwitz, P.A., where he focuses on representing individuals, executives, and legal entities in criminal and related civil and administrative matters, including grand jury, Internal Revenue Service, U.S. Securities and Exchange Commission, and internal investigations. Prior to joining the firm, Citro spent almost 14 years as a federal prosecutor with the Department of Justice, both in Washington, D.C., and Florida. He has represented clients in state and federal courts and has extensive experience in complex federal criminal and national security matters.

Endnotes

[1]*Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

[2]*Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

[3]*United States v. Louisville & Nashville R.R. Co.*, 236 U.S. 318, 336 (1915).

[4]Encryption should always be used to store data. Since encryption methods and tools change frequently, it is imperative to update encryption tools as necessary to secure important data. Given that thumbprints lack a Fifth Amendment protection, they should not be used to encrypt data. Use passwords only.

[5]*Hickman v. Taylor,* 329 U.S. 495, 510 (1947).

[6]*Greenough v. Gaskell*, 39 End. Rep. 618, 621 (Ch. 1833).

[7]*United States v. Nixon*, 418 U.S. 683, 710 (1974).

[8]*Fellers v. United States*, 540 U.S. 519, 523 (2004) (citations omitted).

[9]*E.g.*, *United States v. Deluca*, No. 6:11-cr-221-Orl-28KRS, Doc. 252 (M.D. Fla. Jul. 31, 2014) (finding the government improperly invaded the attorney-client privilege after establishing a taint team and agreeing to a specific protocol it later violated); Memorandum Opinion and Order, [REDACTED], No. [REDACTED] at 47-52 (FISA Ct. Nov. 6, 2015) (discussing FBI compliance failures by invading the attorney-client privilege).

[10]*United States v. Morrison*, 449 U.S. 361, 365 (1981).

[11]*Taylor v. Alabama*, 457 U.S. 687 (1982).

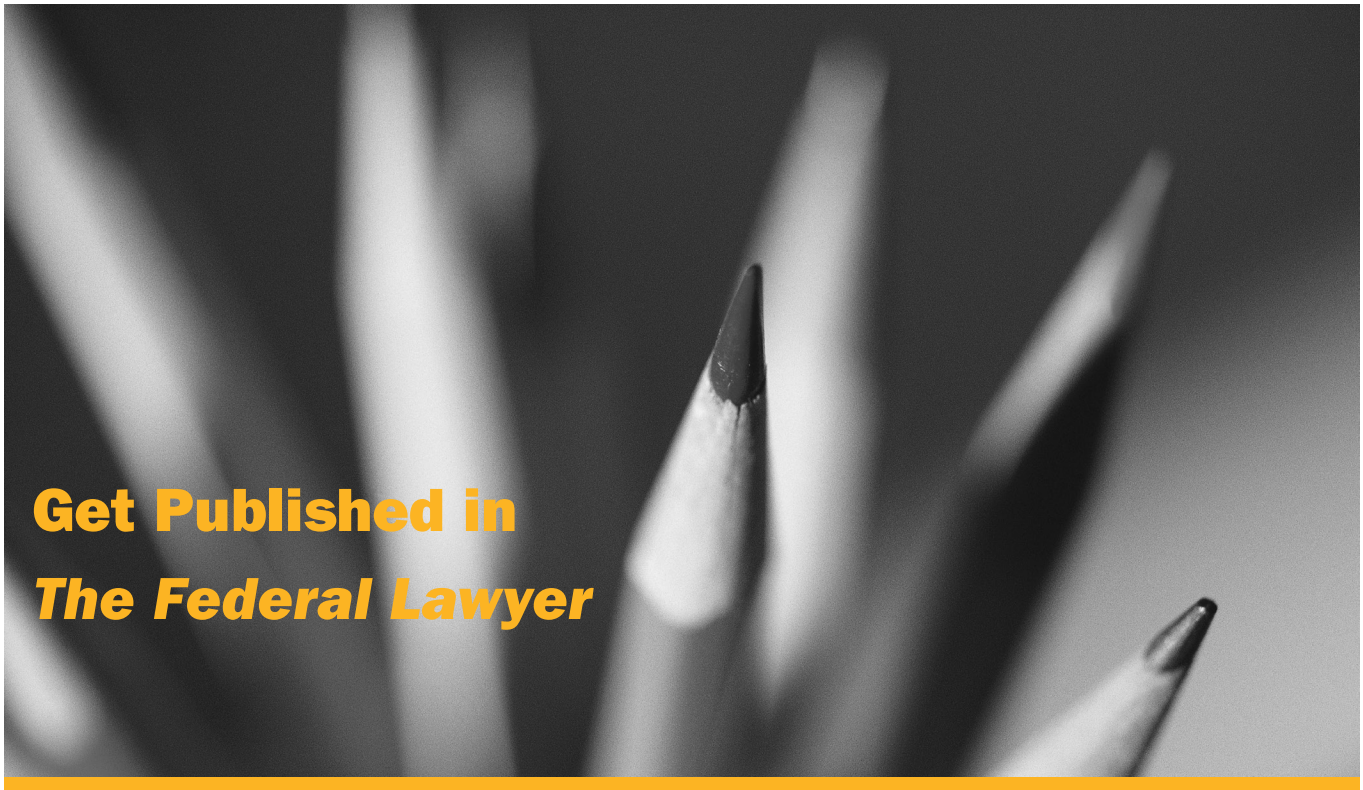
[12]*United States v. Pabian*, 704 F.2d 1533, 1536 (11th Cir. 1983).

[13]*Costello v. United States*, 350 U.S. 359, 362 (1956).

[14]*United States v. Lopez-Lopez*, 282 F.3d 1, 8-9 (1st Cir. 2002).

[15]*United States v. Ciambrone*, 601 F.2d 616, 622 (2d Cir. 1979).

[16]*United States v. Sigma Int'l Inc.*, 244 F.3d 841 (11th Cir. 2001) (ordering the indictment be dismissed for prosecutorial misconduct before the grand jury), *vacated* 287 F.3d 1325 (11th Cir. 2002) (case settled after court agreed to *en banc* rehearing); *see also United States v. Sousley*, 453 F. Supp. 754, 758 n.1 (W.D. Mo. 1978) (admonishing federal prosecutors for failing to give accurate legal advice).
[17]*United States v. Dionisio*, 410 U.S. 1, 17-18 (1973).
[18]*Bank of Nova Scotia v. United States*, 487 U.S. 250, 264 (1988) (Marshall, J., dissenting).
[19]*Vasquez v. Hillery*, 474 U.S. 254, 262-64 (1982).
[20]*Kastigar v. United States*, 406 U.S. 441, 445 (1972).
[21]*Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988).
[22]*Nova Scotia*, 487 U.S. at 259.
[23]*Douglas Oil v. Petrol Stops NW.*, 441 U.S. 211, 218-19 (1979).
[24]Dan Christensen, *Miami U.S. Attorney's Office Accused Again of Spying: A 'Mole' in the Defense Camp?*, Floridabulldog.org (Aug. 31, 2016, 5:16 AM), www.floridabulldog.org/2016/08/miami-u-attorneys-office-accused-again-of-spying-a-mole-in-the-defensecamp..
[25]Stephanie Clifford, *Prosecutors Are Reading Emails From Inmates to Lawyers*, N.Y. Times, July 22, 2014.
[26]*Kastigar*, 406 U.S. 441.
[27]*United States v. Jones*, 565 U.S. 400, 415-16 (2012) (Sotomayor, J., concurring).
[28]*Kastigar*, 406 U.S. at 445.
[29]John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047 (1993-94).
[30]28 C.F.R. § 0.175
[31]U.S. Dep't of Justice, *United States Attorneys' Manual*, § 9-23.400.
[32]*Kastigar*, 406 U.S. at 460.
[33]*United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), opinion withdrawn and superseded in part, 920 F.2d 940 (D.C. Cir. 1990)).
[34]*Id.* at 860.
[35]ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 95-396 (1995); ABA Comm. on Prof'l Ethics and Grievances, Informal Op. 88-1526 (1988).
[36]ABA Op. 95-396, n.55; *see also State v. Miller*, 600 N.W.2d 457 (Minn. 1999) (en banc) (concluding the prosecutor improperly later ratified conduct agents undertook in violation of the Rules without the prosecutor knowing in advance).
[37]*See e.g., United States v. Lowery*, 166 F.3d 1119 (11th Cir. 1999).
[38]*Vasquez*, 474 U.S. at 265.
[39]*United States v. Jones*, 565 U.S. 400, 405-06, (2012).
[40]*Miranda v. Arizona*, 384 U.S. 436, 467 (1966).
[41]*Gideon v. Wainwright*, 372 U.S. 335 (1963).
[42]*Riley v. California*, 134 S. Ct. 2473, 2488-89 (2014).
[43]*Nardone v. United States*, 308 U.S. 338, 340-41 (1939).
[44]*United States v. Serubo*, 604 F.2d 807, 818 (3d Cir. 1979) (collecting cases).



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