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What to Do When You Are Served With a Search Warrant

*By Manny A. Abascal and Robert E. Sims**

Most business executives and officers lack the training and preparation to deal effectively with a search warrant. In order to protect privacy and other rights, this article sets forth the basic principles that should govern preparation for, and response to, a search warrant.

State and federal law enforcement agencies continue to increase their investigation and prosecution of white collar crime, particularly relating to the securities and health-care industries. The search warrant has become a regular method authorities use to obtain evidence. Law enforcement officers executing a warrant typically arrive at corporate offices with no prior notice, armed with a search warrant entitling them to seize original business records, including computer records.

Despite the possibility of law enforcement officers arriving in the administrative suite with search warrant in hand, most business executives and officers lack the training and preparation to deal effectively with a search warrant. As a result, important opportunities to minimize potential criminal or civil liability are missed. In fact, the most valuable evidence gathered during many searches is obtained as a result of managers and employees unknowingly waiving important rights. Unless immediately asserted when a search warrant is presented, these rights can be permanently waived, which can have a lasting impact on the matter's disposition.

The purpose of this article is to set forth the basic principles that should govern preparation for, and response to, a search warrant.

In addition, at the end of this article is a Search Warrant Reference Guide that identifies the immediate actions that may be appropriate when a search warrant is presented at a facility. Additionally, the article contains an Interview Guide setting forth precisely what corporate officers should tell their employees concerning the employees' right to grant, or not to grant, an interview to law enforcement officers.

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MISCONCEPTIONS ABOUT SEARCH WARRANTS

Misconceptions Exist Concerning the Execution of Search Warrants

What is a search warrant? When a judicial officer — a judge or magistrate — issues a search warrant, the judicial officer has found probable cause to believe that a crime has been committed and evidence of the crime will be found within the premises to be searched. This finding is based upon a written affidavit setting forth the evidence alleged to support the warrant's issuance. The affidavit is almost always sealed by the court when the warrant is issued, and will rarely be unsealed until and unless a criminal prosecution actually takes place. Federal and state authorities may also request access to facility records under their administrative authorities, although this does not involve use of a search warrant.

Government Interviews

There is no obligation to talk to a law enforcement officer who is serving a search warrant. The warrant creates a right to search for physical evidence, such as documents and objects, not to interrogate subjects. You must, however, be very careful in communicating such information to your employees. It is improper and may be illegal to instruct or attempt to influence your employees not to talk to government agents.

The following Interview Guide specifies how corporate officers should educate their employees on this sensitive subject. It is preferable to have experienced outside counsel provide such education in light of the risks involved.

Miranda Warnings

If corporate officers or employees do grant the searching officers an interview, all statements may later be used against the speaker, and possibly the corporation, regardless of whether Miranda warnings are given. Unless you are legally in custody, the Miranda requirements are irrelevant to the admissibility of your statements.

Volunteering Information

Many employers and managers assume that a search warrant is based upon a "misunderstanding" that can be "cleared up" through explanation at the time the warrant is presented for execution. On the contrary, there is rarely anything to be gained by making a statement to searching officers. At the time a warrant is executed, company officials are generally unaware of the subject of the investigation, or of possible witnesses (including individuals within the corporation or facility) and evidence against them or the company. Whatever is volunteered cannot be retracted or modified, regardless of whether it is tape recorded. The prosecutor may attempt to use any errors or misstatements to infer criminal intent on the part of the speaker, or even to initiate an investigation and prosecution for obstruction of justice.

PRESENCE OF COUNSEL

In California, counsel for a corporation has a right to be present during interviews of corporate employees. Immediately upon the warrant's execution, the company should inform the government agents that the company wishes counsel to be present at the interviews, and that no interview should occur without corporate counsel present. It has become standard practice for corporations to issue these requests, and so the request will not necessarily be viewed as the company's failure to cooperate.

TRAINING AND PREPARATION

Every company can help prepare itself for the execution of a search warrant by:

- Designating a senior manager, perhaps the corporate compliance officer, as the regulatory affairs (crisis) manager. This individual, and other appropriate company officials, should carefully review this article, and should be responsible for coordinating a facility's response to a search warrant. The designated officer(s) should also be instructed in advance to contact an attorney immediately should a search warrant be presented at the facility. There is no substitute for having an attorney experienced in criminal law matters respond to the premises, or speak with the searching officers by telephone, to appropriately assert a provider's rights without the potential negative implications of company personnel doing so.
- Keep privileged documents (*e.g.*, attorney-client) segregated and clearly marked as such. Otherwise, such documents are likely to be seized along with other non-privileged documents.
- Keep, and periodically update, a duplicate set of any essential business records at an off-site location. Searching officers will take original documents, copies of which may not be made available during the pendency of the investigation, which can last many months.
- As part of your compliance training and education program, include at least a short segment on search warrants so that all corporate officers know what to expect if the unexpected happens.

UNIQUE CONSIDERATIONS FOR ENVIRONMENTAL MATTERS

The search warrant may authorize the agents to take samples on site. Although these samples can form the basis of a later prosecution, the target company might never have meaningful access to the samples. Companies or individuals subjected to a search warrant do not have the right to see the information seized during the warrant until after indictment, which may occur months, if not years, after the warrant is executed. By then, the sample will likely be useless because it may no longer contain the relevant physical characteristics that are at issue (*e.g.*, the pollutant may have dissipated). A

company or its counsel should consider asking the searching agents to provide the company with split samples (*i.e.*, portions of any samples taken) so the company can conduct its own analysis of the samples taken. Agents may be willing to provide split samples because it reduces the risk of evidentiary objections at trial. Of course, for this reason, split samples are somewhat of a double-edged sword as they may limit the company's ability to question the government's analysis of the samples. Nevertheless, split samples are very useful and should be requested because they provide the company with more information about the company's potential exposure to prosecution.

If the agents are unwilling to provide split samples, the company should watch the agents, take careful notes about the location and type of testing the agents conducted, and attempt to take its own samples. If possible, the company should attempt to videotape or photograph the sample site. Be aware, however, that agents may object to being videotaped. The company should hire an environmental consultant (through counsel) to take similar samples immediately, preferably from the same locations at around the same time the government took the samples. A consultant is preferable over a company employee because the consultant will appear to be a more objective witness, and likely will be more experienced with taking samples. Companies may wish to consider having an ongoing relationship with one or more environmental consultants that can be called upon on short notice to come and take samples in the event of a search warrant or government investigation. Company counsel should retain the consultant to help the company assert that the consultant's work should be considered attorney-work product. Even if counsel retains the consultant, a work-product claim may fail because, among other things, the company may have an independent obligation to report certain test results to government agencies. If a consultant is unavailable, the company should take its own samples. The company should ensure that it has one or more employees that are trained to properly take and preserve samples. Upon taking the samples, these employees should have them quickly and properly delivered to a laboratory for preservation and testing.

CONCLUSION

It is important to identify in advance the specific steps that may be appropriate when confronted with a search warrant at your facility, and what you can tell your employees regarding law enforcement requests for interviews. Please review the following Search Warrant Reference Guide and Interview Guide and establish your company's plan before you are faced with this situation.

SEARCH WARRANT REFERENCE GUIDE

1. Identify the lead officer or prosecutor. Ask to see their credentials, and to be provided with their business cards and a copy of the search warrant.

2. Request that as a courtesy the officers delay initiating their search in order for you to contact counsel. Contact your attorney.
3. Request that corporate counsel be present during any interviews of corporate employees.
4. If you are asked to consent to any aspect of the search, discuss the matter with outside counsel before making any decision. Outside counsel will likely advise you not to consent to the search. The company has no obligation to consent to any aspect of the search. Agents are authorized to conduct a search only if they have a warrant or if the party consents to the search. Thus, agents often seek consent as a backup in case the search warrant is later found to be defective. In some instances, agents may ask for consent in order to expand the search beyond the search warrant's permitted scope. The company does not need to decide immediately whether to produce documents voluntarily to the government. After the search is complete, the company can always agree to cooperate and voluntarily provide any requested documents.
5. Ask your outside counsel to instruct your employees of their rights and obligations.
6. Ask for the warrant and affidavit. Review the warrant carefully to identify the precise premises to be searched. The officers are not entitled to search any areas not specified in the warrant. If they do, inform the lead officer of your objection and take detailed notes (or photographs) of the officers' improper conduct.
7. You may send non-essential employees home. (Otherwise, the authorities likely will seek to interview key employees during the search.) Instruct designated employees to observe the search and take notes on what is searched and seized.
8. During the search, you will be asked where certain items can be found. Write down all these questions — they contain valuable information about the government's prior sources of information and possible investigative focus.
9. You are entitled to an inventory of all seized items. Request as detailed an inventory as practical.

INTERVIEW GUIDE

When law enforcement officers serve a search warrant on a facility, they normally will seek to interview corporate officers and employees to gather information for use in their investigation. Corporate officers and employees should be advised as follows under these circumstances. We recommend you read this advisement verbatim, or distribute it, to all employees present at the search location.

1. As you know, the office is being searched by law enforcement officers. I would like to take a moment to inform you of your rights and obligations.
2. First, do not obstruct the search. The officers have a legal right to search the premises and to seize what is designated in the warrant as evidence.

3. The investigating officers may ask you to grant them an interview. You are free to do so, but you are under no legal obligation to grant them an interview. The search warrant entitles them to search the premises. It does not entitle them to interview any person. Company lawyers have requested, and have a right, to be present at any interview with a company employee.
4. If you do grant an interview to the investigating officers, you should be aware that anything you say can be used against you in a criminal prosecution or in a civil enforcement proceeding. This is true regardless of whether the officers give you any so-called Miranda warnings. If you do grant the interview please inform the agents of the company's request for its lawyers to be present at any interview.