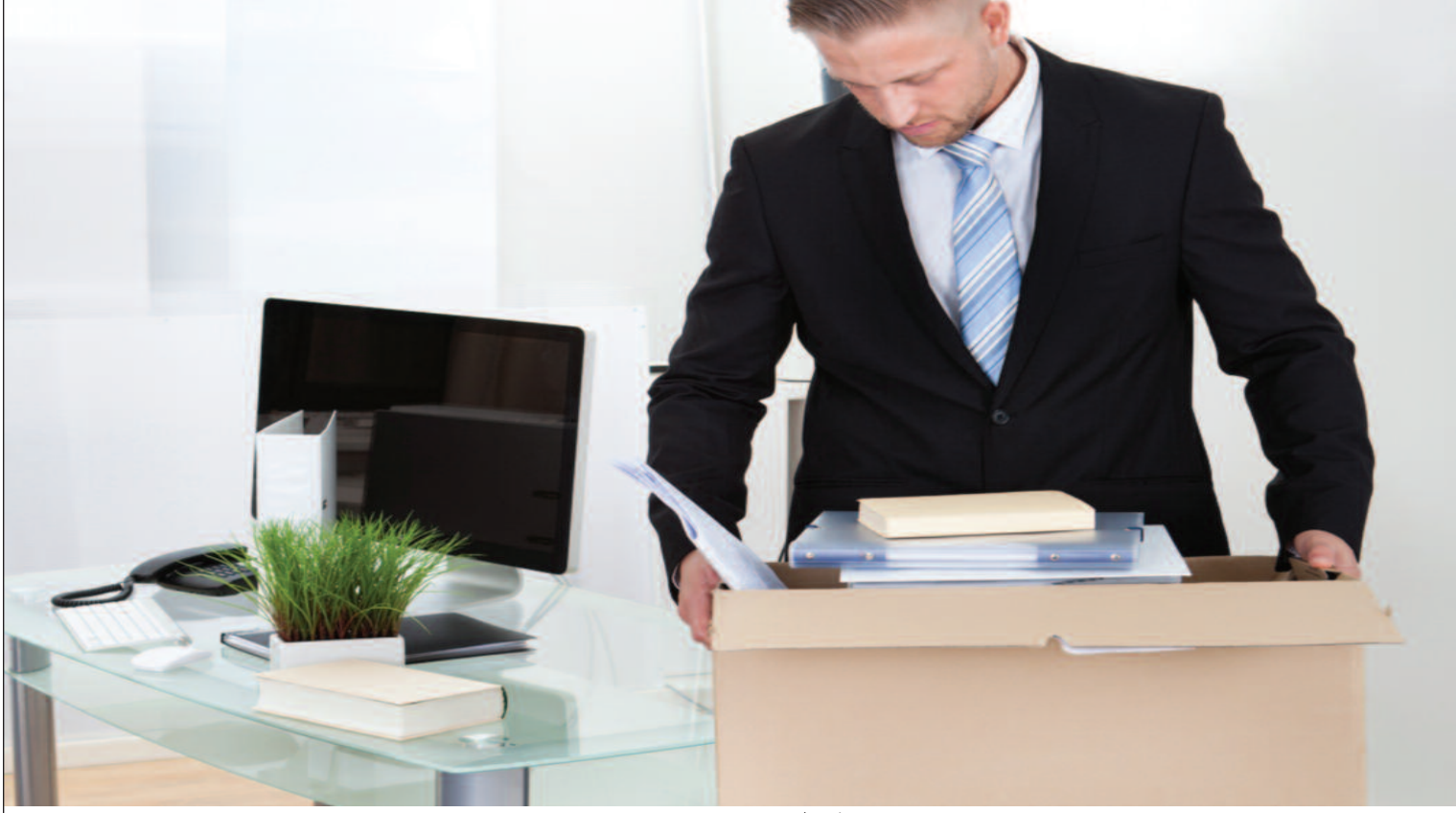

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Responding to Search Warrants in White Collar Criminal Investigations

I. Introduction

An owner of a corporation operating in a highly regulated industry calls counsel's office to inform counsel that FBI agents are executing a search warrant at one of the corporation's facilities and may begin gathering employees in a room for interviews. The corporation and its employees have no experience with responding to or managing search warrants. The owner is present at the facility subject to the search and wants to retain counsel to come to the facility and manage the search.

How should counsel respond to the phone call and what steps should counsel take to minimize the impact of the search?

II. Preliminary Steps

During the initial exchange with the client, counsel should confirm how many agents are present at the site, whether agents are particularly interested in specific areas or divisions of the facility, and whether the agents requested that certain employees consent to interviews. After obtaining this information, counsel might take the following preliminary steps to reasonably assure that the corporation's interests remain protected and that employees on site understand their individual roles, where applicable, during the execution of the search warrant.

Obtain and review the search warrant and request a copy of the search warrant affidavit. Because Federal Rule of Criminal Procedure 41(d) entitles the subject of a search to obtain a complete copy of the search warrant,[1] counsel should advise the client to request a copy of the search warrant to understand the precise scope and nature of the search, the agency conducting the search, and the magistrate to whom the search warrant must be returned. Defects in the warrant should also be identified immediately by reviewing the warrant, including whether the warrant is overly broad with respect to the places to be searched,[2] whether the warrant is stale,[3] or whether the warrant fails to describe with adequate particularity the property to be seized.[4]

There is disagreement among district courts, however, as to exactly *when* the officer is required to provide the corporation with a copy of the warrant, the receipt of the property seized, or the affidavit supporting probable cause.[5] The Supreme Court has also noted, in dicta, that neither the Federal Rules of Criminal Procedure nor the Fourth Amendment imposes a requirement upon the officer executing the search to present the property owner with a copy of the warrant *before* conducting the search.[6]

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This seemingly adverse precedent does not necessarily mean that executing officers will not furnish a copy of the warrant to the corporation before the search as a matter of best practices to avoid future litigation, including evidentiary hearings in connection with motions to suppress or emergency motions for return of property pursuant to Federal Rule of Criminal Procedure 41(g), nor does it mean that an Assistant United States Attorney (AUSA) would not be receptive to such requests. Thus, counsel should instruct the corporation to obtain the warrant and a copy of the probable cause affidavit at the earliest possible time although, generally, courts require the filing of a motion to unseal the search warrant affidavit in order to obtain that affidavit.[7]

Identify the agents on site and contact the agent in charge or the AUSA. A representative of the corporation, or contact person, should obtain the names of the agents on site, including the agent in charge (AIC), and request the name of the individual AUSA responsible for supervising the ongoing investigation.

After someone obtains that information, counsel should contact the AIC, and whenever possible, the AUSA, to inform both of them that counsel represents the corporation. Establishing a rapport with the AUSA is critical since she may provide valuable information with respect to the direction of the ongoing investigation. It will also be in the corporation's best interests to maintain an amicable relationship with the AUSA if the corporation decides to voluntary disclose violations and cooperate with the government.

Communicate ground rules for the search to employees. The client should also assign a representative of the corporation to communicate the following information to employees:[8] (1) the agents are on the premises to conduct a search; (2) the corporation does not know if any of the employees are targets of the search or an ongoing investigation; (3) employees should not engage in any obstructive conduct or alter, delete, or remove any records, equipment, or electronically stored information (ESI) on site; (4) agents may try to interview employees, but the employees are not required to speak to the agents;[9] and (5) employees should not create or sign any documents on behalf of the corporation without first conferring with their appropriate supervisor.

Designate note-takers and begin conducting an internal accounting of the items seized. The corporation should also designate at least one employee to take notes while the search is underway. Note-taking accomplishes significant objectives for the corporation. First, employee observations contained in notes may provide the legal basis for challenging either the government's seizure of corporate property or the legality of the search. Second, notes may provide the corporation with valuable information about the scope and direction of the government's case and, potentially, the government's sources of information. Third, note-taking is especially important in the scenario described above in which the corporation does *not* have a copy of the search warrant prior to its execution.

There is a fundamental difference, however, between taking notes, as observers of the search, and unnecessarily stalking the agents, eavesdropping on conversations between or among agents, or engaging in conduct that may be reasonably viewed as interfering with the search.

Bearing this in mind, as observers of the search, each note-taker should pay attention to where the agents commenced the search, how the search progressed, what locations of the facility were the subject of the search, and whether the agents appeared particularly interested in a specific item of property. Whenever possible, each note-taker should also take note of any of the agents' questions with respect to the location of a specific item of property. In addition, since the attorney-client privilege attaches to "information gathered by corporate employees for transmission to corporate counsel for the rendering of legal advice," each note-taker should address his note — containing his observations during the search — to counsel in order to put those communications under the cloak of the attorney-client privilege.[10]

Finally, the corporation should assign additional employees at the facility to conduct an internal accounting of what the agents seized from the corporation. An internal accounting is a significant step that will preserve the corporation's ability to later challenge any discrepancies between its internal accounting and the inventory return produced by the government.[11]

III. Avoid Common Missteps

There are several common missteps the corporation should avoid during the search. As set forth below, employees of the corporation should not engage in obstructive conduct nor should they supply the government with any additional legal authority to search the facility by either signing a consent to search form or verbally consenting to a search of the facility. Moreover, employees on site should take reasonable measures to identify and safeguard privileged documents, including potentially privileged documents, and documents containing confidential or proprietary information.

Avoid obstructive conduct. Employees should understand that they should refrain from impeding or obstructing the search and should not tamper with, alter, or destroy any documents, equipment, or ESI. Any of those acts may be considered obstruction of justice pursuant to 18 U.S.C. § 1519 or another federal obstruction of justice statute.[12]

Do not consent to search the facility. Agents will frequently attempt to obtain written or verbal consent to search the business premises even if they have a search warrant. This is a significant event because voluntary and knowing consent provides the government with an additional, legal basis for executing the search in the event that the corporation challenges the search warrant based on a defect in the warrant or deficiencies in the probable cause affidavit.[13] To this end, employees should be instructed that they should not sign a consent to search form or permit agents to obtain verbal consent to search the facility. Employees also should not consent to a search of an area of the facility that is outside the scope of the particular *places* to be searched included in the search warrant. A search warrant should be narrowly tailored for its specific purpose; it should not provide the government with free reign to conduct a fishing expedition that auspiciously unearths evidence of a criminal violation.[14]

Importantly, the corporation may also retract its consent when it mistakenly consents to a search of a segment of the facility that exceeds the scope of the search warrant.[15] The sudden retraction may annoy the agents on the scene. Agents may even threaten a noncompliant employee with an obstruction charge or inform the employee that if he does not consent to the search of the area outside the search warrant, they will obtain a warrant that covers that area.[16] Putting the agent's sentiments aside, even if an item is not within the scope of the war-

rant, employees should not act in such a way that they are perceived as undercutting the agents or object to the search in any way that could be viewed as interference. Instead, they should relay any questions with respect to the scope of the search warrant to counsel (either in person or through a contact person on site) in order for counsel to adequately provide advice to the corporation with respect to the search. And, even in close cases, counsel might advise the corporation to retract consent to preserve the objection to the search and require the agents to obtain an additional warrant.

Protect any privileged documents located at the facility. A determination of whether privileged or potentially privileged documents are located at the facility should be made. Documents identified as privileged or potentially privileged should then be sealed, a privilege log should be created, and the sealed documents and the privilege log should then be delivered to a magistrate judge or special master to resolve any government objections to the corporation's privilege determinations.[17]

In the rare circumstance in which the agents begin seizing documents the corporation has identified as privileged or potentially privileged documents, counsel should consider filing an emergency Rule 41(g) motion with the magistrate judge.[18] Rule 41(g) is concerned with those whose property or privacy interests are impaired by the seizure and plainly permits anyone aggrieved by the deprivation of property to seek its return. An unlawful search or seizure is not a precondition to a Rule 41(g) motion.[19]

It is important to note, however, that courts may be reluctant to intervene in this process for several reasons. First, on balance, the corporation's interest in reviewing the *potentially* privileged materials may be substantially outweighed by the government's interest in seizing the materials as long as the government properly employs a "taint team."[20] Second, a magistrate judge may not want to second-guess law enforcement judgments. Third, reviewing voluminous amounts of documents is overly burdensome to the magistrate judge. Fourth, some magistrate judges may admonish the parties for failing to resolve these issues, independently, as professionals. Furthermore, in response to the filing of the Rule 41 motion, there is always a risk that the magistrate judge may issue an order determining that the communications are *not* protected by the attorney-client privilege.

Send nonessential employees home. Essential employees who may be able to assist the agents in locating documents or items specified in the search warrant should remain on site at the facility, whereas employees who are not essential should be informed that they are free to go home for the remainder of the day. By notifying nonessential employees who are not in "custody" that they are free to go home, the corporation has not engaged in any inherently obstructive conduct.[21] A cursory review of the applicable obstruction statute illustrates this point.[22] In fact, the argument that counsel herself has somehow obstructed the agent's investigation in this scenario rests on shaky grounds.[23]

One way to distinguish between essential and nonessential employees might be to determine what segment of the business is subject to the search and identify the employees who are working in that area. Drawing this important distinction may also provide several additional benefits to the corporation. First, it may accelerate the search because employees with the requisite knowledge will be able to redirect the agents to the location of items described in the search warrant. Second, it might minimize the amount of materials seized and will, at the very least, reduce the disruptive effect of the search. After all, the corporation has interests beyond the search, including its reputation and maintaining goodwill with its employees and its contractual partners, and counsel must be mindful of those interests. Third, by reducing the number of employees on site, employees are less likely to make spontaneous statements to the agents that may potentially harm the corporation. Moreover, they are less likely to consent to a search of any places or of any items or materials not specifically included in the search warrant, which may prolong the search or require additional litigation.

Consider filing a Rule 41(g) motion when agents begin seizing documents identified as privileged or potentially privileged.

IV. Employee Interviews

Counsel's strategy with respect to employee interviews should be informed by five substantial considerations: counsel's duty to the corporation, counsel's duty of loyalty, concerns related to communicating with individual employees at the site, obstruction of justice concerns, and practical considerations.

Duty to the corporation. As counsel for the corporation, counsel has a duty to represent and protect the vital interests of the corporation, including its potential exposure to civil or criminal liability.[24] During a search, because employees may be untrained, nervous, unprepared, or a combination thereof, employees are not likely to understand that they may decline agent interviews. This fundamental misunderstanding undeniably has the potential to expose the corporation to both civil and criminal liability because certain employee statements, including potentially incriminating statements, may be imputed to the corporation as nonhearsay statements of an opposing party.[25]

To make matters worse, even though an employee interview conducted during a search is an inherently coercive situation in which the employee, objectively, may not feel free to leave, courts have held that employees are not in "custody" during these interviews, and therefore, employees have no cognizable Fifth Amendment rights during these interviews.[26] Further, even if employees were cloaked with the protections of the Fifth Amendment, the corporation only has standing to challenge the legality of the search and any statements, including employee statements, obtained during an unlawful search as fruits of the poisonous tree.[27] Yet even that doctrine is far from absolute.[28] A court may deny a motion to suppress the statements if the court finds that the taint from the unlawful search had dissipated at the time that the statements were obtained.[29]

Given this venerable jurisprudence, it is incumbent upon counsel for the corporation to fashion appropriate

strategies to protect the corporation's interests. As discussed in greater detail below, one way to protect the corporation's interests and to avoid either obstructing an ongoing investigation or providing advice to employees is to propose reasonable guidelines governing how, when, and where such employee interviews might be conducted. After all, both the government and the corporation should be interested in taking reasonable steps to minimize the risk that employee statements are obtained by agents through coercion, cajoling, or intimidation during the execution of a search warrant. The employee should know that he may decline an interview and obtain counsel.[30]

Duty of loyalty. Because loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent,[31] counsel should not attempt to represent or imply that he represents an employee whose interests are adverse to the interests of the corporation. For example, there may be a reason to believe that an employee is a whistleblower or the employee is a potential government witness armed with incriminating information about the corporation's business activities.[32]

Concerns related to communication with individual employees. Counsel's communication with individual employees raises two principal concerns.

A primary concern is that, by communicating with an employee or by responding to an inquisitive employee's questions about agent interviews, counsel for the corporation might inadvertently form an attorney-client relationship[33] with the employee and, in so doing, might place himself in the awkward and undesirable position of having to rebut a claim that counsel simultaneously represents the employee and the corporation. In fact, even if an attorney-client relationship is never formed, counsel's law firm may still be required to respond to an unsettling (and humiliating) motion to disqualify.[34]

Another significant, related concern is that by communicating with an individual employee about an agent interview, counsel may be required to repudiate allegations, regardless of their merit, that counsel has somehow obstructed the government's investigation.[35]

Accordingly, to avoid these potential pitfalls, counsel for the corporation should avoid communicating with an employee in any way that may be reasonably construed either as providing legal advice to the employee concerning an agent interview or as improperly influencing an employee's decision to agree to an interview.

Obstruction of justice concerns. Counsel should not attempt to terminate, impair, or impede the agents' efforts to interview employees who voluntarily agree to an interview because such interference may be viewed as obstructive conduct. A critical difference exists, however, between informing an employee that he is not required to speak to the agents and instructing or encouraging a particular employee not to agree to an interview with the agents.[36]

Practical considerations. While employee interviews may be standard procedure during the execution of a search warrant, agents have no ancillary legal authority for conducting such interviews. Instead, the search warrant provides the agents with a legal basis to conduct a search and to seize the particular

property named in the search warrant, not to conduct unrestricted employee interviews. Further, attorneys representing the employees may file motions to suppress any statements obtained during employee interviews. For these reasons, counsel for the corporation should communicate to the AUSA that the corporation will assist the agents in locating the items and property named in the search warrant but should also engage in a dialogue with the AUSA to address how, when, and where employee interviews might be conducted.

Understanding that it is nearly impossible to predict how a particular AUSA will respond to counsel's suggestions for conducting employee interviews, counsel should be prepared to present the AUSA with a variety of common-sense options for conducting employee interviews.

1. *Reschedule employee interviews.* Counsel might first propose that the AUSA reschedule employee interviews until the employees have an opportunity to evaluate whether they want separate legal counsel to represent them during the interviews. The interviews could be conducted at a location that is convenient to the government, and this option may also permit the AUSA to avoid the necessity of having to issue grand jury subpoenas for each employee.

2. *Delay employee interviews until counsel arrives.* Assuming the AUSA is unwilling to reschedule interviews, counsel should then propose that the agents delay employee interviews until counsel arrives at the facility or until local counsel arrives at the facility.

3. *Propose reasonable guidelines for conducting employee interviews.* If the AUSA refuses to reschedule or delay employee interviews and counsel cannot locate another qualified attorney within driving distance of the facility to assist with the search, counsel might then propose the following reasonable guidelines[37] for conducting employee interviews: (1) permit a representative of the corporation to inform the employees prior to conducting each interview that they are not required to agree to an interview and that, if they agree to an interview, the corporation is willing to pay for an attorney to be present during the interview; (2) provide each employee with a written consent form in the employee's native language prior to conducting each employee interview to confirm that the employee understands that the employee is free to decline the interview and may have an attorney present during the interview; (3) inform each employee verbally in the employee's native language prior to conducting each interview that employees are free to decline the interview and to leave the facility and that, should she consent to the interview, she may have an attorney present during the interview; or (4) permit in-house counsel (where applicable) to sit in on the interview of each employee provided that the employee has no objection and provided that the employee understands that counsel represents the corporation, not the employee individually.

In sum, while there are no magic words that will convince an AUSA to agree to implement any of the above-mentioned guidelines for conducting employee interviews, counsel has a duty to protect the corporation's interests and to recommend reasonable alternatives to conducting the type of involuntary and uninformed interviews that typically transpire during the execution of a search warrant.

AUSA vs. AIC The possibility always exists that counsel will not be able to identify or contact the AUSA and may wind up negotiating with the AIC with respect to employee interviews. Under these circumstances, counsel should still propose that the AIC reschedule, delay, or implement reasonable guidelines for conducting interviews. Even if the AIC rejects all of counsel's suggestions for conducting employee interviews, counsel should treat this exchange as an opportunity to set up the cross-examination of the agent during which the agent may be required to explain: (1) why the agents were unwilling or unable to agree to reschedule or delay the interviews; (2) why each interview was "noncustodial"; (3) when and how the agents communicated to the employees that they were "free to leave"; (4) why each interview was voluntary; and (5) why the agents were unwilling or unable to agree to any of counsel's proposed guidelines for conducting employee interviews, including why the agents were unable or unwilling to communicate to the employees that they may be represented by counsel during the interview.

V. Final Steps

Prior to the conclusion of the search, the corporation should ensure that it obtains a copy of the receipt of the seized property and requests a copy of the inventory. In addition, when appropriate, the corporation should debrief employees after agents leave the facility.

Obtain a copy of the receipt of the seized property and request a copy of the inventory. The plain language of Rule 41 seems to require that an officer leave a copy of the receipt of the seized property with the corporation before the agents leave the premises.[38] Thus, a copy of the receipt should be requested and reviewed to ensure that the list is accurate. If there are any discrepancies between the property listed in the receipt of the seized property and what the search warrant authorized the agents to seize, then these issues must be addressed immediately. In fact, in this scenario, an emergency Rule 41(g) motion before a magistrate judge may be necessary.

In addition, a copy of the inventory should be requested prior to the conclusion of the search although the plain language of Rule 41 only requires the magistrate judge — not the officer executing the warrant — upon request to give a copy of the inventory to the person from whom the seized property was taken.[39] When such requests are denied, such as when the officers have not completed a copy of the inventory, a request for the copy of the inventory should be made to the magistrate judge as soon as practicable to ensure that the copy is promptly delivered to the corporation.

Debrief employees. After the agents complete the search and leave the facility, employees should be debriefed. The debriefing should focus on determining what materials the agents seized and what segments of the facility were particularly important to the agents. When appropriate, employee interviews should also be conducted to determine what occurred during the search and what may have prompted the search.

Conclusion

As shown, responding to a search in real-time presents uniquely difficult challenges for counsel. A search is a disruptive, unnerving show of force with the potential to shut down a business or cripple its reputation within the community. Armed agents have immediate access to significant documents and essential employees, which the government does not otherwise enjoy when it issues a grand jury subpoena, and there

is also no necessity requirement controlling the government's authority to obtain a search warrant from a magistrate judge.[40] Therefore, counsel for the corporation must react quickly, cautiously, and calmly to minimize the potentially devastating consequences of the search. If a corporation has advance notice that it may be subject to a search, such as receiving a grand jury subpoena or determining that it is particularly susceptible to a search because of the industry within which it operates, then employees should be appropriately trained to manage and respond to search warrants.

Notes

1. *See* FED. R. CRIM. P. 41(f)(1)(C) ("the officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property").

2. *See United States v. Upham,* 168 F.3d 532, 535 (1st Cir. 1999) (other citations omitted) ("The cases on particularity are actually concerned with at least two rather different problems: one is whether the warrant supplies enough information to guide and control the agent's judgment in selecting what to take; and the other is whether the category as specified is too broad in the sense that it includes items that should not be seized.").

3. *See* FED. R. CRIM. P. 41(e)(2)(A)(ii).

4. *See United States v. Zemlyansky,* 945 F. Supp. 2d 438, 454 (S.D.N.Y. 2013) (suppressing all property removed from defendant's business during execution of search warrant in the investigation of wire and health care fraud offenses finding that government failed to comply with the core purposes of the particularity requirement).

5. Several courts have relied on the footnote in *Ramirez v. Groh,* 540 U.S. 551, 562, n.5 (2004), which is dicta to support this point. *See United States v. Hurwitz,* 459 F.3d 463, 471-73 (4th Cir. 2006) (finding that an officer does not need to have a copy of the search warrant in hand during a search nor is the officer required to provide a copy of the search warrant to the property owner following the search); *see United States v. Grubbs,* 547 U.S. 90, 97 (holding that an anticipatory search warrant was valid in the context of a drug bust and noting that showing the arrestee a copy of the warrant 30 minutes after the search began was permissible); *but see United States v. Hector,* 361 F. Supp. 2d 1145, 1152 (C.D. Cal. 2005) ("this was a typical, uneventful search of a small dwelling that presented no circumstances that would reasonably justify the failure to serve the search warrant at the commencement of the search. … There are no considerations present that justify this failure. It is not a case, for example, where law enforcement's need to surreptitiously gather evidence justifies the failure to serve a search warrant. …").

6. *See Ramirez v. Groh,* 540 U.S. 551, 562, n.5 (2004) ("It is true, as petitioner points out, that neither the Fourth Amendment nor Rule 41 of the Federal Rules of Criminal Procedure requires the executing officer to serve the warrant on the owner before commencing the search.").

7. *See In re Search of Up North Plastics, Inc.,* 940 F. Supp. 229, 232 (D. Minn. 1996) (denying government's motion to continue the sealing of the search warrant affidavit); *In re Search Warrants Issued on April 26, 2004,* 353 F. Supp. 2d 584, 591 (D. Md. 2004) (recognizing a search subject's preindictment Fourth Amendment right to inspect the probable cause affidavit.); *See In re Wag-Aero Inc.*, 796 F. Supp. 394 (E.D. Wis. 1992) (the district court rejected the government's assertion that the continued sealing of a search warrant affidavit was justified because of an ongoing investigation and concluded that "the heavy cloak of secrecy had been misapplied" where the government merely opined "that disclosure would enable the target company to obstruct the investigation and might threaten the safety of unnamed witnesses.").

8. Whenever possible, the corporation should communicate this information in writing or email since oral pronouncements may be easily misunderstood or misinterpreted by employees.

9. *See also* ABA Criminal Justice Defense Function Standards, Standard 4-4.3, Comment ("In the event that a witness asks the prosecutor or defense counsel, or a member of their staffs, whether it is proper to submit to an interview by opposing counsel or whether it is obligatory, the witness should be informed that there is no legal obligation to submit to an interview.").

10. *Upjohn v. United States,* 449 U.S. 383, 390 (1981) (rejecting the "control test" adopted by the lower courts and finding that, if the court held that privilege only applies to members of corporation in positions of management, such a holding would discourage "the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation"); *see In re New York Renu with Moistureloc Product Liab. Litig.,* No. 2:06-MN-77777, 2008 WL 2338552, at *10 (D.S.C. May 6, 2008) ("communications

among nonlawyer corporate personnel are protected if the dominant intent is to prepare the information in order to get legal advice from the lawyer"); *see United States ex rel. Baklid-Kunz v. Halifax Hospital Medical Center*, 2012 WL 5415108, No. 09-cv-01002-GAP (M.D. Fla. Nov. 6, 2012), at *3 *citing* 1 EDNA SELAN EPSTEIN, THE ATTORNEY–CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 151–52 (5th ed. 2007) (the privilege may also be extended to protect "information gathered by corporate employees for transmission to corporate counsel for the rendering of legal advice[.]").

11. *See* FED. R. CRIM. P. 41(f)(1)(B)-(C) (requiring that an officer prepare an inventory of the items seized and leave a copy of a receipt of the property seized at the place where the property was seized).

12. *See, e.g.,* 18 U.S.C. §§ 1510, 1512, and 1519.

13. *Illinois v. Rodriguez,* 497 U.S. 177, 181, 185-86 (1990) ("The [Fourth Amendment] prohibition does not apply … to situations in which voluntary consent has been obtained, either from the individual whose property is searched or from a third party who possesses common authority over the premises.").

14. *Fed. Trade Comm'n v. Am. Tobacco Co.,* 264 U.S. 298, 305 (1924) ("Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime.").

15. *See United States v. McFarley*, 991 F.2d 1188 (4th Cir. 1993) ("While consent generally has its limits, a consensual search or seizure within those limits does not implicate constitutional rights. But once consent is withdrawn or its limits exceeded, the conduct of the officials must be measured against the Fourth Amendment principles.").

16. Many cases imply that when law enforcement officers indicate that they will attempt to obtain or are getting a warrant, such a statement cannot serve to vitiate an otherwise consensual search. *See, e.g., People v. Magby*, 37 Il. 2d 197, 226 N.E.2d 33 (1967) (consent valid where officer told defendant: "If you don't care to let us search, we'll get a warrant."); *United States v. Culp,* 472 F.2d 459, 461 n.1 (8th Cir. 1973); *United States v. Savage*, 459 F.2d 60, 61 (5th Cir. 1972) (per curiam) (police said they could get a warrant).

17. *See United States v. Rivera,* 837 F. Supp. 565 (S.D.N.Y. 1993) (noting in dicta that the search warrants executed provided that all client documents and materials that appeared to be attorney-client privileged communications should be sealed and held at the U.S. Attorney's Office until questions of privilege were resolved).

18. *See United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1173 (9th Cir. 2010) ("That Rule 41(g) is broader than the exclusionary rule can no longer be in doubt in light of the 1989 amendments which explicitly authorize a motion to return property on behalf of any 'person aggrieved by an unlawful search and seizure of property *or by the deprivation of property.*' FED. R. CRIM. P. 41(g). This language was designed to expand the rule's coverage to include property lawfully seized.").

19. *See* FED. R. CRIM. P. 41(g).

20. *See United States v. Dupree* 781 F. Supp. 2d 115 (E.D.N.Y. 2011) (finding that the government employed adequate procedures for safeguarding privileged and potentially privileged documents by assembling a taint team and producing any privileged documents to defendants and notifying defendants of any potentially privileged documents they intend to turn over to the prosecution team).

21. An agent might question an employee in such a manner indicating that the employee is not free to leave, and thus, any questioning might constitute "custodial interrogation" triggering that employee's Fifth Amendment rights. *Miranda v. Arizona,* 384 U.S. 436, 444 (1966); *see also* ABA Criminal Justice Standards, Prosecution Function Standard 2.8, "Search Warrants" (noting that the prosecutor should consider "the impact of execution of the warrant on innocent third parties who may be on the premises at the time the warrant is executed").

22. See 18 U.S.C. § 1512 ("Tampering with a witness, victim, or an informant"), the applicable obstruction of justice statute. *See* 18 U.S.C. § 1512(b) (requiring the government to show that the person "knowingly … corruptly persuaded" another person with the intent to delay or prevent a communication to a law enforcement officer regarding a possible violation of the law); *see also* 18 U.S.C. § 1512(d) (requiring the government to show that the person intentionally harassed another person and thereby hindered, prevented, dissuaded, or delayed that person from reporting a possible violation of the law to a law enforcement officer); *see also* 18 U.S.C. § 1512(c)(2) (requiring the government to show that the person "corruptly" … "otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so.").

23. The Supreme Court's discussion of the limitations of the obstruction statute is also particularly instructive. *See Arthur Anderson, LLP v. United States,* 544 U.S. 696, 703-04 (1995) (other citations) (reversing defendant's obstruction of justice conviction pursuant to 18 U.S.C. § 1512(b) and noting that, "[n]or is it necessarily corrupt for an attorney to 'persuad[e]' a client 'with intent to … cause' that client to 'withhold' documents from the government. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), for example, we held that Upjohn was justified in withholding documents that were covered by the attorney-client privilege from the Internal Revenue Service (IRS). No one would suggest that an attorney who 'persuade[d]' Upjohn to take that step acted wrongfully, even though he surely intended that his client keep those documents out of the IRS' hands."); *United States v. Binette,* 828 F. Supp. 2d 402, 405 (D. Mass. 2011) (holding that the SEC's preliminary investigation into defendant's possible insider trading violations was not an "official proceeding" sufficient to sustain defendant's conviction pursuant to § 1512(c) even though defendant lied to SEC investigators and attorneys on a phone call focused on his suspicious trading activity); *but see United States v. Mann,* 685 F.3d 714, 722-23 (8th Cir. 2012) (finding that defendant violated § 1512(c) when she acquiesced to her husband's instructions to remove certain documents from his medical office in anticipation of a search warrant, reasoning that "§ 1512(c)(1) requires only that [defendant] have acted with the intent to impair the documents' availability to an official proceeding. It does not require the government to prove the existence of an official proceeding focusing on [defendant].").

24. *See* MODEL RULES OF PROF'L RESPONSIBILITY R. 1.13(a) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

25. *See* FED. R. EVID. 801(d)(2)(D) (a statement is a nonhearsay statement if the "statement is offered against an opposing party and was made by the party's agent or employee on a matter within the scope of that relationship and while it existed").

26. *See United States v. Burns,* 37 F.3d 276, 281 (7th Cir. 1994) ("[A] suspect who is detained during the execution of a search warrant has not suffered a restraint on freedom of movement of the degree associated with a formal arrest, and is thus not in custody for purposes of *Miranda*."); *see also United States v. Ritchie,* 35 F.3d 1477, 1485-86 (10th Cir. 1994).

27. *Wong Sung v. United States,* 371 U.S. 471, 487-88 (1963) (holding that the fruit of the poisonous tree doctrine bars the admissibility of evidence that the government derivatively obtains from an unconstitutional search or seizure); *United States v. Leary,* 846 F.2d 592, 596 (10th Cir. 1988) ("[A] corporate defendant has standing with respect to

searches of corporate premises."); *see United States v. Hall,* 47 F.3d 1091, 1096 (11th Cir. 1995) ("[T]he owner of commercial property has a reasonable expectation of privacy in those areas immediately surrounding the property only if affirmative steps have been taken to exclude the public.").

28. *Brown v. Illinois,* 422 U.S. 590, 603-04 (1975) (the test for attenuation is whether the evidence sought to be introduced "has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint"). Three factors guide this inquiry: the temporal proximity of the unlawful detention and the emergence of the incriminating evidence at issue, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. *Brown*, 422 U.S. at 603-04.

29. *See* note 27, *supra.*

30. Indeed, in a case holding that the preindictment, noncustodial interview with a former employee of a represented organization was not contrary to the professional rules of conduct and did not warrant suppression of the employee's statements, the agent specifically told the employee prior to conducting the interview that she had the right to have an attorney present, including an attorney retained by the organization. *See In re Disciplinary Proceedings,* 876 F. Supp. 265, 268 (M.D. Fla. 1993).

31. MODEL RULES OF PROF'L RESPONSIBILITY R. 1.7 cmt.

32. *See* MODEL RULES OF PROF'L RESPONSIBILITY R. 1.13 ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.") *see also* MODEL RULES OF PROF'L RESPONSIBILITY R. 1.13 ("In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."); *see* MODEL RULES OF PROF'L RESPONSIBILITY R. 1.7 ("a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if … the representation of one client will be directly adverse to another client.").

33. *See* Restatement (Third) of the Law Governing Lawyers § 14 (2000) (noting that a relationship is formed when a person manifests an intent that a lawyer provide legal services, and the lawyer either (a) manifests consent or (b) fails to manifest lack of consent and knows or reasonably should know the person reasonably relied on the lawyer to provide the services); *see also* Cal. State Bar Formal Op. 2003-161 (outlining the factors for finding that an attorney-client relationship has been formed).

34. *See* Restatement (Third) of the Law Governing Lawyers § 6 cmt. i (2000) (noting that while disqualification is an extreme remedy, "[d]isqualification, where appropriate, ensures that the case is well presented in court, that confidential information of present or former clients is not misused, and that a client's substantial interest in a client's loyalty is protected"); *see Homecare Industries Inc. v. Murray,* 154 F. Supp. 2d 861, 868-69 (D.N.J. 2001) (granting plaintiff's motion for disqualification of law firm from representing a corporation because the company's now-adverse former CEO claimed that he thought law firm was also representing him — and law firm had not adequately explained the nature of its representation).

35. *See* notes 22-23, *supra*.

36. *See United States v. RMI Company,* 467 F. Supp. 915, 923 (W.D. Pa. 1979) (finding that there was a conflict of interest in attorney's dual representation of employers and certain employees when the facts clearly indicated that employees would be called as government witnesses in an anti-trust prosecution and noting that counsel for the corporation could not represent employees of the corporation in grand jury proceedings because such representation was designed "to serve the interests of the financially more important client by concealing violations to the detriment of the witnesses and the public interest in full disclosure of any criminal conduct"); *see also* ABA CRIMINAL JUSTICE DEFENSE FUNCTION STANDARDS Standard 4-4.3 cmt. ("Because witnesses do not "belong" to either party, it is improper for a prosecutor, defense counsel, or anyone acting for either side to suggest to a witness that the witness not submit to an interview by opposing counsel."); *But see* note 9, *supra.*

37. This is not intended to be an exhaustive list of the possible suggestions counsel might make under this scenario.

38. *See* FED. R. CRIM. P. 41(f)(1)(C) ("The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.").

39. FED. R. CRIM. P. 41(f)(1)(D) ("The officer executing the warrant must promptly return it — together with a copy of the inventory — to the magistrate judge designated on the warrant. The officer may do so by reliable electronic means. The judge must, on request, give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.").

40. A prerequisite to obtaining a wiretap is a showing of necessity. *See* 18 U.S.C. § 2518(1)(c). ("To show necessity, the government must set forth "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."). ■

About the Author

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