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GUIDE FOR RESPONDING TO GOVERNMENTAL INQUIRIES AND INVESTIGATIONS

Winter 2005



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Table of Contents

Introduction	1
Obstruction of Justice/False Statements	1
Effect of Criminal Investigation on Civil Matters	3
Preliminary Measures and Safeguards	3
Document Control	3
Protect Privileged Documents	3
Preserve Relevant Documents	4
Counsel Should Supervise The Client’s Response to a Criminal Investigation	4
The Client Should Conduct an Internal Investigation	4
Counsel Should Supervise Internal Investigation	5
Obtaining Maximum Work Product Protection	8
Choice of In-House or Outside Counsel	10
Instruct Employees How to Respond to Government Investigations	11
Requests for Interviews by Government Investigators	11
Interviews of Employees	12
Subpoenas and Informal Requests for the Production of Documents and Information	13
Procedures Applicable to Both Techniques	13
Privileged Documents	14
Requests for Documents	15
Subpoenas	15
Search Warrants	15
Compliance with the Search Warrant	16
Limiting the Harm Caused by a Search	16
After the Search	20
EXHIBITS	
<i>Exhibit A</i> - Search Warrant Reference Guide for Clients and Counsel	
<i>Exhibit B</i> - General Checklist	
<i>Exhibit C</i> - Interview Guide	
<i>Exhibit D</i> - Client’s Subpoena Reference Guide	
<i>Exhibit E</i> - Counsel’s Guide to Subpoenas and Informal Requests for Production	



Responding to Governmental Inquiries and Investigations

Governmental investigations involve four general investigatory techniques:

- Interviews by government investigators
- Informal requests for documents
- Subpoenas
- Search warrants

Each of these techniques requires a unique response. This Guide summarizes the appropriate response to each of the investigatory techniques in most government investigations.

Introduction

The goal in responding to any criminal investigation is to minimize the risk of harm. Ideally, the client wants to defend against possible criminal sanctions, prevent disruptions that might impact on the client's business and employee morale, and avoid potentially devastating publicity. In attaining these aims, the client must balance its response with a sensitivity to two hazards: the effect of a criminal investigation on civil matters and a criminal charge of obstruction of justice or making a false statement.

Obstruction of Justice/False Statements

In any criminal investigation, the prospect of a charge of obstruction of justice is always present and may give rise to independent criminal liability. See, e.g., 18 U.S.C. §1505 (unlawful to endeavor to influence, obstruct, or impede an investigation by a federal agency); 18 U.S.C. §1510 (unlawful to impede the communication of information about a federal crime to a law enforcement officer); 18 U.S.C. §1512 (unlawful to attempt to influence the



Exhibit E Counsel's Guide to Subpoenas and Informal Requests for Production

- I. Procedures Applicable to Both Techniques.
 - a) Clients should be instructed to immediately forward subpoenas or requests for production to counsel. Clients should not provide government agents access to any documents without prior approval of counsel.
 - b) Counsel should contact the prosecutor to:
 - i) Determine the purpose of the subpoena, or document request, and the identity of the target of the investigation;
 - ii) Clarify and negotiate the scope of the subpoena or document request;
 - iii) Discuss the time and place of the production; and
 - iv) Determine whether the investigators demand to examine the original records, or instead, will accept photocopies.
 - c) Counsel should assert all relevant objections to the subpoena, or document request, including attorney-client privilege and work-product protection.
 - d) Counsel should direct the collection of the responsive documents and assure that privileged materials are not produced and responsive materials are not overlooked or destroyed.



Exhibit D

Client's Subpoena Reference Guide

1. Immediately forward any subpoena, or request for production, to either in-house or outside counsel. Government agents should not be permitted access to any documents before counsel is notified.
2. Counsel should supervise all responses to subpoenas or requests for production.
3. All produced materials should be carefully tracked. Attempt to retain originals and provide investigators with photocopies. If the investigators demand to examine the originals, make the originals available for inspection in a conference room, but object to allowing the originals to be removed from the premises.
4. All documents produced should be numbered and stamped "CONFIDENTIAL" and "SUBJECT TO THE STRICTURES OF 18 U.S.C. § 1905 (or corresponding state statute). Copies should be retained of all documents produced.
5. Under no circumstances should subpoenaed documents be destroyed. Unless excused by a court, subpoenaed documents must be produced. Failure to produce subpoenaed documents may constitute obstruction of justice.
6. Allow counsel to determine whether objections should be made to a subpoena. Counsel will determine whether any applicable privileges apply.



testimony of a witness or to conceal evidence); A.R.S. § 13-2809(A)(1) & (3) (unlawful to intentionally conceal evidence or prevent the production of evidence by an act of deception); A.R.S. § 13-2907.1 (unlawful to knowingly make a false statement or misrepresent a fact for the purpose of interfering with the orderly operation of a law enforcement agency or officer); Fla. Stat. Ann. § 843.02 (unlawful to resist, obstruct, or oppose an officer authorized to execute legal process); 720 Ill. Comp. Stat. Ann. 5/31-4 (person obstructs justice when he knowingly destroys, alters, conceals, or disguises evidence); Wis. Stat. § 946.41 (unlawful to obstruct an officer while officer is in official capacity). Not only would a charge of obstruction of justice severely damage the client's reputation, but if the investigation results in an indictment, evidence of obstructive conduct might be admissible at trial as evidence of culpability.

During a criminal investigation, the client also faces an increased risk of prosecution for the making of a false statement. See 18 U.S.C. § 1001. Federal law prohibits the making of a false statement, concealment of a material fact, or the use of any false writing "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." *Id.* This ban on false statements also extends to the use of a document known to contain a "materially false, fictitious, or fraudulent statement." *Id.* If convicted, the offender faces a prison term of up to five years. *Id.*

Therefore, it is imperative that the client avoid even the appearance that it is attempting to impair an investigation through concealing facts or documents, influencing the testimony of witnesses, making false statements, or otherwise. Immediate contact with outside counsel is recommended to secure proper legal advice.



Effect of Criminal Investigation on Civil Matters

The client must also consider the effect that its response to the criminal investigation will have on it and its employees, civilly. Evidence uncovered during a criminal investigation may give rise to a civil investigation and resulting civil sanctions. Conversely, your client's civil disclosure obligations could be utilized to gather evidence for a criminal investigation. For example, Health & Human Services has been known to threaten exclusion from the Medicare and Medicaid programs in order to force compliance with document requests in a criminal investigation. Accordingly, your client must adopt a protocol that affords compliance with the myriad of civil obligations your client faces, while at the same time minimizing the harm caused by the criminal investigation.

Preliminary Measures and Safeguards

Prior to learning of an incident that might result in an investigation or a government investigation itself, clients should take precautionary measures, such as segregating confidential documents and maintaining off-site backup for computer tapes. These measures may prove critical if an investigation occurs. Outside counsel may be of assistance in this process. Additionally, if clients do learn of a government investigation, or of a rumor that they or their employees have violated the law, they should promptly implement other measures including asking outside counsel to conduct an internal investigation.

Document Control

Protect Privileged Documents

A simple means of ensuring confidentiality of sensitive materials is to segregate them from other documents.



Exhibit C

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. It is recommended that you read this guide 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 an interview. The search warrant entitles them to search the premises. It **does not** entitle them to interview any person.
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.
5. If the investigating officers ask you to grant them an interview, and you would like to do so, it is the Company's preference that corporate counsel be present at the interview. We will make counsel available for that purpose. Please let (senior company official) know if that is the case.



Exhibit B

General Checklist for Responding to Search Warrants

- Obtain a copy of the warrant
- Notify in-house counsel or outside counsel immediately
- Note the time of arrival and departure of agents
- Limit the search to place or location described in the warrant
- Do not consent to a broader search without consulting counsel
- Videotape the search; audio or videotape any interviews
- Record the names and agencies of all agents
- Prepare a complete list of all documents/items seized
- Obtain copies of critical documents
- Request agents download and copy computer data on site
- List all employees interviewed by agents



Materials subject to the attorney-client privilege or work-product protection should be stored separately from non-privileged materials, preferably in the legal department, and clearly labeled “Privileged-Legal Materials.”

Preserve Relevant Documents

Upon learning of a government investigation or an incident involving illegal actions, the client should stay its records destruction procedure regarding materials that might be relevant to the investigation or incident. Do not wait for the subpoena to arrive. Upon receipt of a subpoena or an informal request for documents, the client must ensure that no responsive documents are destroyed or overlooked. Destruction or concealment of responsive documents may lead to a charge of obstruction of justice.

Counsel Should Supervise The Client’s Response to a Criminal Investigation

Due to the severe civil and criminal sanctions for obstruction of justice, coupled with the subtleties of the law of criminal discovery, the client’s response to any criminal investigation should be coordinated and supervised by legal counsel. In-house counsel runs the risk of becoming a target of the investigation when the government is unhappy with document production. So the best prophylactic is outside counsel. Of course, only legal counsel should handle all communications with the government investigators.

The Client Should Conduct an Internal Investigation

Promptly upon learning of an incident or a government investigation, the client should initiate an internal investigation to determine the merits of the allegations. An internal investigation serves



various important functions: 1) An internal investigation enables the client to fully assess the merits of the allegations and determine a proper course of action; and 2) An internal investigation could also result in lessened penalties. See, e.g., U.S. Sentencing Guidelines Manual § 8C2.5(g)(2).

Counsel Should Supervise Internal Investigation

All internal investigations should be supervised by legal counsel, acting at the direction of the client. Use of counsel is critical to ensure that the investigation is cloaked, when appropriate, with attorney-client privilege and work-product protection. To avoid charges of bias and to eliminate exposure for in-house counsel, the investigation should be conducted by outside counsel. If the client regularly uses one law firm for its matters, it may be wise to select another firm to conduct the investigation.

As a preliminary matter to conducting an internal investigation, counsel should establish the requisite documentation to support invocation of the attorney-client privilege and the work-product doctrine. Counsel should obtain a letter from management or the Board instructing counsel to undertake an investigation on behalf of the corporation and further adding that the investigation is to be conducted in anticipation of litigation or criminal charges.

Scope of the Attorney-Client Privilege

Determining the scope of the attorney-client privilege requires a unique analysis when the client is a corporation. The problem exists because the corporation is the client, but the employees of the corporation are not. However, because the corporation is unable to act without employees, courts have been forced to determine which conversations between an employee and the corporate counsel are privileged.



Exhibit A

Search Warrant Reference Guide for Clients and Counsel

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.
3. If you are asked to consent to the search, decline. The government could use any consent given as an alternative basis, in addition to the search warrant, for defending the legality of the search or to expand the search beyond the scope permitted by the search warrant.
4. Instruct your employees of their rights and obligations by reading from the Interview Guide.
5. 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.
6. You may send non-essential employees home. (Otherwise, it is likely the authorities will seek to interview key employees during the search.) Instruct designated employees to observe the search and take notes concerning what is searched and seized. Take duplicate samples in environmental seizures.
7. During the search, you will be asked where certain items can be found. Write down all such questions—they contain valuable information about the government's prior sources of information and possible investigation focus.
8. You are entitled to an inventory of all items seized. Request a detailed inventory.



Exhibits

- Exhibit A* - Search Warrant Reference Guide for Clients and Counsel
- Exhibit B* - General Checklist
- Exhibit C* - Interview Guide
- Exhibit D* - Client's Subpoena Reference Guide
- Exhibit E* - Counsel's Guide to Subpoenas and Informal Requests for Production



The scope of the corporate attorney-client privilege varies by jurisdiction. Some courts utilize extremely broad tests to determine which employee-counsel communications are privileged. Typically, the broader tests, known as “subject matter” tests, focus on the nature of the communications. Several other courts have adopted a more limited test, known as the “control group” test, which focuses on the employee’s position within the corporation. Generally, the control group test only protects those communications between upper management and counsel.

It should be noted that the various approaches used by courts do not affect all communications between corporate employees and counsel. It is universally accepted that communications initiated by an employee to corporate counsel in order to secure legal advice on behalf of the corporation are privileged. See *Samaritan Foundation v. Goodfarb*, 176 Ariz. 497, 501, 862 P.2d 870, 874 (1994). The problems arise when the employee communication is in response to an inquiry by another employee.

Federal Courts

The United States Supreme Court discussed the corporate attorney-client privilege issue in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). In *Upjohn*, the Court rejected the control group test and articulated a broader test for federal courts to consider when determining if a communication is privileged. See *Upjohn*, 449 U.S. at 393. Under the *Upjohn* test, if a communication is made by employees to the employer’s counsel at the direction of corporate superiors in order to secure legal advice, then those communications will be protected against compelled disclosure. *Upjohn*, 449 U.S. at 394.



Arizona

The Arizona Supreme Court adopted a “functional approach” that “focuses on the nature of the communication and not the communicator.” *Samaritan Foundation*, 176 Ariz. at 501, 862 P.2d at 874. Essentially, Arizona courts focus on whether the communicating employee is “the one whose conduct gives rise to potential corporate liability.” *Samaritan Foundation*, 176 Ariz. at 504, 862 P.2d at 877. Employees whose conduct gave rise to the potential liability are considered clients; all others are considered witnesses. *Samaritan Foundation*, 176 Ariz. at 504, 862 P.2d at 877.

Florida

The Florida Supreme Court adopted a five-part test to determine when the attorney-client privilege applies in the corporate setting. See *Southern Bell v. Deason*, 632 So. 2d 1377, 1383 (1994). The test considers the following factors: 1) whether the communication would have been made if there was no contemplation of legal services; 2) whether the employee making the communication did so at the direction of his or her corporate superior; 3) whether the superior made the request as part of the corporation’s effort to secure legal advice or services; 4) whether the content of the communication relates to the legal services being rendered, and whether the subject matter of the communication is within the scope of the employee’s duties; and 5) whether the communication was disseminated beyond those persons who have a need to know. *Southern Bell*, 632 So. 2d at 1383.



take detailed notes of the investigators’ actions, including all places searched, all files searched, and all items seized.

At the end of the search, conduct an exit interview. Requests should be made for copies of all materials seized, although the investigators are not obligated to allow the client to copy the seized materials. The client should also obtain the identities and agency affiliations of the investigators and the prosecutor, and the client should ask probing questions about the nature of the investigation, what the investigators were searching for, and what they found. Finally, the investigators are obligated to provide a written inventory listing all items seized, although the client might not receive the inventory for a few weeks. The client or counsel should ensure that the inventory is specific and exhaustive.

After the Search

The occurrence of the search may reach the attention of the media. Consequently, the client should be prepared to issue a press release promptly following the search. Consult with counsel before doing so. Additionally, following the search, the identities of the investigators, the recordings of the search, and the inventory of seized materials should be examined to obtain a better understanding of the government’s case.



the warrant, advise the investigators that they are beyond the reach of the warrant and create a clear record documenting that the investigators are on notice of this fact. However, do not prevent the investigators from examining materials outside the scope of the warrant — such conduct might bring a charge of obstruction of justice.

Clients should direct the investigators to the materials called for by the warrant. This procedure prevents the investigators from conducting a random search under the guise of locating the subject materials. Additionally, counsel should tell the investigators what materials are confidential or subject to privilege. If the investigators insist on examining or seizing privileged or confidential materials, a clear record should be created documenting that the investigators are on notice of the privileged status of the material. Do not attempt to physically prevent the investigators from examining privileged material.

Typically, the prosecutor does not attend the search but remains available in his or her office during the search. Questions of scope and privilege should be directed to the prosecutor if the on-site officer in charge refuses to observe a claim of privilege or insists on examining or seizing materials outside the scope of the warrant.

Monitoring and Recording the Search

Clients should record the actions of the investigators during the search. Ideally, the search should be video recorded and all interviews of employees should be at least audio recorded. Clients should appoint trustworthy personnel familiar with the items that are the subject of the search to accompany the investigators at all times and monitor their actions. The monitors should



Illinois

Illinois follows the “control group” test. See *Consolidation Coal v. Bucyrus*, 89 Ill. 2d 103, 118, 432 N.E.2d 250, 258 (1982). The control group test protects consultations between counsel and those who are “decision makers” or those “who substantially influence corporate decisions.” *Bucyrus*, 89 Ill. 2d at 118, 432 N.E.2d at 258. The only communications ordinarily protected under this test are those communications made by management making the final decisions, not those employees whose positions are merely advisory. *Bucyrus*, 89 Ill. 2d at 121, 432 N.E.2d at 257.

Wisconsin

Wisconsin courts have yet to directly address the scope of the corporate attorney-client privilege. The relevant Wisconsin statute states that the privilege extends to the client’s “representative” and that it may be claimed by “the successor, trustee, or similar representative of a corporation, association, or other organization. Wis. Stat. § 905.03(2)(3). However, the statute does not clearly define “representative.” See Wis. Stat. § 905.03. The Seventh Circuit, in a manner not inconsistent with *Upjohn*, follows the subject matter test, focusing on whether the subject matter of the communication is the performance of the employee’s duties. See *Harpers & Row Publishers v. Decker*, 423 F.2d 487 (7th Cir. 1970). At a minimum, counsel should expect that communications that satisfy the *Harpers & Row* test will suffice in Wisconsin.

Obtaining Maximum Work Product Protection

The work product rule affords protection to documents, including notes and memoranda, prepared in anticipation of litigation or



for trial. Ariz. R. Civ. P. 26(b)(3); Fla. R. Civ. P. 1.280(b)(3); Ill. Sup. Ct. R. 201(b)(2); Wis. Stat. § 804.01(2)(c)1. However, that protection is limited. Work product material is discoverable upon a showing that the party seeking the material has a substantial need for the material and is unable to obtain the substantial equivalent of the material without undue hardship. *Id.* One caveat is that mental impressions, conclusions, opinions, and legal theories of an attorney are subject to heightened protection (which many courts find to be absolute). *Id.*

To obtain the maximum work product protection, caution must be exercised in conducting internal investigations. Employee interviews should be conducted by an attorney with another member of the legal staff present as a witness. The attorney's notes of the interview will likely be protected by the mental impressions provision of the work product rule. If the interview is not conducted by an attorney, the interviewer should be instructed to limit notes of the interview to the information provided by the interviewee and such other pertinent facts as the date and time of the interview and the identities of all persons present. Any impressions, conclusions, or recommendations of the interviewer should be written in a separate memorandum addressed to the attorney supervising the investigation, prominently bearing the caption "ATTORNEY-CLIENT PRIVILEGED MATERIAL." Interviewers and interviewees should be instructed not to discuss the interview with anyone, unless directed by management or unless required by law.



conversations between the investigators and the client's personnel. As discussed above, employees should be advised that they may refuse an interview. But, if employees do consent to an interview, the client should request that: 1) they allow the presence of a company attorney during the interview; 2) they have the interview recorded; and 3) they be advised that they are entitled to the presence of their own counsel and that the client will provide employees with independent counsel for purposes of the interview. If an interview occurs without the presence of the employer's counsel, counsel should debrief the employee following the interview.

Limiting the Scope of a Search

The search warrant defines the permissible scope of the search. The investigators are obligated to provide a copy of the search warrant. Counsel or the client should locate the officer in charge of the search and demand from the officer identification, proof of authority, and a copy of the search warrant prior to the commencement of the search.³ Additionally, the officer in charge should be asked for a copy of the Affidavit of Probable Cause on which the warrant is based. Although the government is not obligated to produce the Affidavit, the officers may do so.

Warrants are generally drafted broadly. Nevertheless, counsel should ensure that the investigators only review materials specified in the warrant. If the investigators stray beyond the scope of

³ In the unlikely event that the government attempts to engage in a warrantless administrative search, ask the officer in charge whether the search is related to a criminal investigation of the client. If the officer responds affirmatively, the client should refuse to allow a search until a search warrant is presented.



Actions During a Search

During a search, the client should act to limit both the extent of disruption to the business and the extent of harm caused by the search. The client should try to have counsel present during the entire search to monitor the investigators and supervise the actions of its employees.

Employees will probably find the search and the investigators intimidating, and a high degree of excitement and confusion will exist. The intimidation, excitement, and confusion may even be intentionally caused by the investigators in hopes of yielding damaging statements and actions from employees and customers. To alleviate the confusion and potential for harmful employee and customer actions, the client should attempt to control its employees during the search. Supervisors should be instructed to gather their employees promptly on notification of a search. Employees should be instructed not to interfere with the search and to cooperate with the investigators. Customers should be calmed and escorted from the search area, if possible. Employees not needed should be instructed to leave the search area. Removing customers and employees from the search area will decrease the chances of investigators overhearing conversations among employees and will diminish the opportunities for the investigators to attempt to conduct interviews. Additionally, the presence of surplus personnel only increases the likelihood of employees taking well-intentioned, but misguided, efforts to help the client by impeding the search.

The investigators will probably attempt to interview employees during the search. Counsel should observe the investigators and try to attend and record (preferably by audio or video tape) all



Choice of In-House or Outside Counsel

For any internal investigation, or response to a government investigation, the client must decide whether to use in-house counsel or outside counsel. This decision involves two primary sets of considerations. First, in-house counsel only represents the corporation, and not its employees, officers, and board. If in-house counsel's representation of the corporation poses the potential for ethical conflicts during the investigation, outside counsel should be utilized. Second, the client needs to weigh the benefits of using in-house counsel versus outside counsel. Aside from cost, an important advantage of using in-house counsel is that they might be more effective investigators because they are familiar with the corporation's organization, employees, policies and procedures, and operations. Not only will in-house counsel know where to look and who to contact, but employees may be more forthcoming due to the established relationship with in-house counsel. On the other hand, in-house counsel might have little experience with criminal investigations and might not be entirely objective due to their involvement with the company and the influence exerted upon them by management. The advantages of outside counsel are that counsel will likely have established relationships with prosecutors, investigators, and judges; counsel may be more objective than in-house counsel; some employees might feel more comfortable discussing the problem with outside counsel; use of outside counsel might provide stronger attorney-client and work-product protection; and use of outside counsel reduces the risk that in-house counsel becomes involved in the investigation as a target or subject for the matter in which the investigation is conducted.



Instruct Employees How to Respond to Government Investigations

Employees typically believe that they should always cooperate with law enforcement personnel. Investigators often attempt to exploit such cooperation by serving document requests upon non-management employees and through interviews of such employees. To minimize the harm caused by investigator contacts with employees, all employees should be instructed of the proper procedures for dealing with government agents.¹ Employees should be instructed to IMMEDIATELY inform in-house counsel of the presence of investigators or of any contacts by government agents, and all subpoenas, document requests, and search warrants should be immediately directed to in-house counsel. Employees should be further instructed never to allow anyone to examine any corporate records without express authorization from management or counsel.

Requests for Interviews by Government Investigators

During a criminal investigation, the investigators will attempt to interview employees. Do not expect the investigators to announce their presence to management. Rather, expect the investigators to contact employees at home and to attempt to speak with them without prior notice to management. Although such interviews may be damaging, it is imperative that the client neither attempt to dissuade employees from speaking with investigators nor attempt to influence what employees say to the investigators. Employees are free to talk with government agents,

¹ Of course, when instructing employees, care must be given to ensure that the instructions do not lead to a charge of obstruction of justice.



responding to a search warrant are two-fold: (1) comply with the warrant and (2) minimize the harm caused by the search.

Compliance with the Search Warrant

Clients must endeavor not to obstruct the execution of a search warrant. This means that they must not prevent the investigators from examining evidence or speaking with employees. On the other hand, this does not mean that the investigators have free rein. Rather, the client or counsel should ensure that the investigators adhere to their legal obligations and limit their search to the scope of the warrant.

Limiting the Harm Caused by a Search

Clients should take various measures to minimize the possible damage inflicted by a search. These measures include actions prior to a search, during the search, and following the search.

Actions Prior to a Search

Searches often happen unexpectedly. Clients must not be caught off guard. To minimize the harm of a search, the client should take five important actions that will prove invaluable if a search ever occurs. First, the client should implement procedures for responding to a search. At least three people on the premises should be knowledgeable regarding the supervision of a response to a search warrant. This will avoid any delay in securing supervision. Second, the client should segregate all materials subject to the attorney-client privilege or work-product protection from non-privileged materials. Third, all computer tapes should be backed up at an offsite facility. Fourth, keep a video camera and audio recorder available at all times. Fifth, the client should prepare a press release for responding to the contingency of a search in the event of media coverage.



Requests for Documents

A request for production is simply a list of documents requested by the investigators. Even though requests for production are not subject to judicial enforcement, they must be taken seriously.

Incomplete or misleading responses to an informal request can give rise to liability for obstruction of justice. Failure to comply may also increase the investigators' zeal to continue or escalate their investigation.

Subpoenas

A subpoena is a command to produce documents and records to a grand jury or an administrative agency. Unlike an informal document request, a subpoena is obligatory. Unless excused by a court, the client must produce all subpoenaed, non-privileged documents. Any failure to produce may constitute obstruction of justice. If the subpoena is overbroad, such as requesting privileged material, and the prosecutor refuses to narrow its scope, counsel should move to quash it.

Records not protected by the attorney-client privilege, work-product doctrine, or other privileges must be produced pursuant to a subpoena, provided they are relevant to the government's investigation. Counsel should determine whether the requested material is relevant. If the subpoena is overbroad or burdensome, counsel should move to quash the subpoena.

Search Warrants

A search warrant is a document signed by a judicial officer (usually a judge or magistrate) authorizing the search of a house, office, property, or person for items listed in the warrant itself.

The warrant must describe with particularity the place or person to be searched and the items to be seized. The client's goals in



and the decision whether to allow an interview must be left to them. On the other hand, employees are not obligated to speak with government agents. Moreover, employees retain the right to schedule the time of the interview and to be represented by counsel during the interview. The client should inform employees of their right to speak, or not to speak, with government agents and their right to representation by counsel. Furthermore, the client should instruct its employees that the management requests that the company's attorney be present at all interviews.

Interviews of Employees

Although employees are free to speak with government agents, many employees do not realize that they may decline an interview by a government agent, that they have a right to consult with counsel prior to agreeing to an interview, and that they are entitled to be represented by counsel during the interview. The client should inform all employees of these rights.

You should attempt to have counsel present during every employee interview and to record every interview (preferably by audio or video tape). Employees should be instructed to notify in-house counsel of all contacts by government agents. Employees should be advised that they may refuse an interview. If they do consent to an interview, the client should ask the employee to request that the interview be recorded and that counsel for the company be present during the interview. Counsel should advise the employee that counsel represents the company and not the employee and that the employee is entitled to the presence of his or her own independent counsel. In certain circumstances, it may be appropriate to offer to provide the employee with an independent counsel for purposes of the interview.



If an interview occurs without your presence, you should debrief the employee following the interview.

Subpoenas and Informal Requests for the Production of Documents and Information

Investigators use two techniques for obtaining documentary evidence: informal requests for production and subpoenas duces tecum. These techniques require unique responses, which are discussed below. However, certain procedures are applicable to both techniques.

Procedures Applicable to Both Techniques

Employees should be instructed to immediately forward a subpoena or request for production to management, who in turn should immediately forward it to either in-house or outside counsel. Employees should not provide government agents access to any documents without prior approval of management.

A subpoena that calls for immediate production (a “forthwith” request) is usually improper. No production should be made without consultation with counsel.

A company’s response to the subpoena or request for production should be supervised by legal counsel. Counsel has many responsibilities in supervising a document production. First, counsel should contact the prosecutor to: 1) determine the purpose of the subpoena or document request and the identity of the target of the investigation; 2) clarify and negotiate the scope of the subpoena or document request; 3) discuss the time and place of the production; and 4) determine whether the investigators will accept photocopies instead of original documents. Second, counsel should assert all relevant objections to the subpoena or



document request. And third, counsel should direct the collection of the responsive documents and ensure that privileged materials are not produced and responsive materials are not overlooked or destroyed.

Outside counsel or the client should keep careful track of all materials produced. If the investigators demand to examine the originals, the client should make the originals available for inspection in a conference room, but should object to allowing the originals to be removed from the premises. All documents produced by the client should be numbered and stamped confidential and subject to the strictures of 18 U.S.C. §1905 or a state counterpart.² The client should retain copies of all documents it produces.

Privileged Documents

Materials subject to the attorney-client privilege generally are not subject to production. Materials protected by the work-product doctrine or the qualified work-product doctrine are subject to production only upon a proper showing overcoming the protection. Voluntary production of confidential material may waive the applicable protection. Therefore, clients should specifically object to production of this material, whether requested informally or by subpoena. If the government demands production, the client should move to quash the subpoena or for a protective order from a request for production. If necessary, the client should submit the material to a court for in camera review rather than willingly producing it. Business proprietary information may be protectable as well.

² 18 U.S.C. §1905 requires federal agents to maintain the confidentiality of information they obtain in the course of their duties.