

Grace Under Pressure: Fifteen Steps You Should Take to Manage Successfully a Search of Your Client's Office Pursuant to a Federal Warrant

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Introduction

One day you may receive a telephone call from a panicked client telling you that federal agents have entered the client's offices, seized control of the premises, started questioning the employees, and announced that they are executing a search warrant. If you receive that call, what should you do?

This article attempts to answer that question by providing guidance to those confronted with the task of responding to the execution of a search warrant. It is not intended to be a comprehensive examination of the Fourth Amendment, the Federal Rules of Criminal Procedure, or any other federal or state law relating to the execution of search warrants. Although this Article focuses on federal law, many of the principles discussed also apply to searches conducted by state officers. Likewise, although the Article discusses the search of corporate offices, many of the objectives and steps described apply to searches of individual residences.^{[11](#)}

Discussed below are several objectives that you should have in mind as you manage a search of your client's office. Although a defense attorney cannot prevent or completely eliminate the disruption associated with a search, focusing on these objectives should help you to minimize that disruption and to place your client in the best possible legal position following the search. This Article then suggests fifteen steps that you should take before, during, and after a search in order to meet these objectives.

Objectives For Managing a Search

There are several objectives that you should have in mind as you manage a search of your client's office, including:

- *Gain as much control over the flow of information to the government as is legally possible;*
- *Verify that the search is constitutional and lawful;*
- *Protect any privileged documents;*

- *Obtain information from the government concerning the scope of the search, the underlying investigation or circumstances that prompted the search, and your client's status in the investigation;*
- *Minimize the disruption caused by the search; and*
- *Position the client to seek appropriate relief after the search*

Fifteen Steps You Should Take To Achieve These Objectives

Before leaving the office you should:

1. advise your client of his rights and determine the identities of the prosecutor and agent-in-charge ("AIC") of the search;
2. consider contacting a criminal defense lawyer;
3. contact the AIC and ask her to refrain from starting the search and interviewing employees until you arrive, and
4. assemble your team and marshal your legal resources.

After arriving at the scene of the search, you should:

5. introduce yourself to the AIC;
6. advise your client's employees of their rights and determine if there are any privileged documents in the office;
7. ask your client to inform its non-essential employees that they are free to leave if they are not in custody;
8. obtain and review a complete copy of the search warrant;
9. protect privileged documents;
10. negotiate the conditions of the search;
11. obtain information about the agents and the investigation;
12. keep a record of the search; and
13. keep a record of the items seized.

After the search is concluded, you should:

14. assess your client's legal position in light of the search, and
15. consider appropriate motions.

What You Should Do Before You Leave Your Office

Laying the groundwork for a successful response to a search begins before you leave your office. Your principal focus at this stage of the search should be on placing yourself and the client in a position where you will be able to protect your client's interests when you arrive at the scene of the search.

Step 1: Advise The Client of Its Rights and Determine the Identity of the AIC

Before you hang-up the telephone and head to the scene of the search, you should inform your client of his rights.: You should tell your client contact that (i) neither the company nor any of its employees have any obligation to talk with agents or to answer their questions; (ii) he has the right to inform the agents that all questions be directed to the company's counsel; (iii) he has a right to request that the company's counsel be present during any discussions with the agents; and (iv) no employee has any obligation to create any documents or to sign any documents prepared by the agents. But you should caution him that employees cannot destroy, alter, conceal, or remove any company records during or after the search.^[2]

You should also determine whether your client has consented to the search or been asked to consent to the search. The government may attempt to obtain consent for the search even though it also possesses a warrant. This is because consent, if validly obtained, may provide an alternate basis for the search and may, in effect, prevent your client from later challenging the warrant or the seizure of privileged materials.^[3] It may also enable the government to conduct a broader search than the one authorized by the warrant.^[4] Your client is not required to consent to the search and should be advised not to do so.^[5] If your client has already consented to the search, you should advise the client to retract its consent immediately in order to force the government to end the search or to comply strictly with the terms of its warrant.

Once your client understands its rights, you should ask your client to obtain the identities of the prosecutor and the AIC . There may be instances during the search where you need to have discussions with the prosecutor rather than the AIC. You should also ask your client to obtain a mobile telephone number for the AIC. Typically, an AIC will have a mobile telephone number where she can be reached by counsel during the search.

If **your client** has been served with a copy of the search warrant, you should ask **him** to fax the warrant to you immediately. When you receive the warrant, you should make several copies and bring them with you to the search. In addition, you should have another attorney from your firm begin reviewing the warrant to make sure that it complies with all constitutional and statutory requirements.

Step 2: Contact A Criminal Defense Lawyer

If you are not experienced in criminal matters, you should consider contacting a criminal defense attorney to assist you in managing the search.

Step 3: Contact The AIC and Ask Her To Refrain From Starting The Search And Interviewing Employees Until You Arrive

If possible, you should contact the AIC before you leave your office to inform her that you are counsel for the company and that you will be arriving at the scene of the search shortly. You should request that the agents postpone the search until you have arrived at the scene, and have had an opportunity to speak with the employees and to review the warrant. You should also inform the AIC that you would like the government to refrain from conducting any employee interviews until you have arrived, and that you would like to be present during any employee interviews.^[6]

The AIC may not agree to delay the search pending your arrival. In that event, you should explain that the brief delay will allow you to obtain information that will facilitate a proper search, such as whether the client stores privileged documents within the office. You may also want to explain that the exclusionary rule gives the AIC a strong incentive to allow you to review the warrant before the search begins in the event that you discover a defect in the warrant. If these arguments fail to persuade the AIC to delay the search, you should ask to speak to the prosecutor supervising the investigation.

Step 4: Assemble Your Team and Marshall Your Legal Resources

If possible, you should bring another attorney from your firm with you to the search. You should both have mobile telephones. Having another attorney at the scene enables you to effectively coordinate actions and communications with the agents conducting the search and the company's employees. Events often occur at a swift pace during the execution of a search warrant, and it may be necessary to have two or more people at different locations to manage the search effectively.

In addition to a mobile telephone, there is one other item that you should never go to a search without: A synopsis of the Fourth Amendment and the law relating to search warrant procedures.^[7] Once you arrive at the scene, you need to be in a position to determine quickly whether there are any questions as to the legality of the search.

Likewise, if it is possible, you should also have another attorney from your firm standing by to perform tasks as they arise, such as analyzing the constitutionality of the search warrant. During the course of a search, issues may also arise that require immediate legal research. For example, the AIC may press you for

specific legal authority supporting your assertion that the search is improper or is being conducted unreasonably. It may also be necessary to draft and file emergency pleadings with the issuing Magistrate.

What You Should Do At The Scene Of The Search

The scene of a search is often chaotic. When you arrive, you may be confronted with a panicked client and panicked employees. Even worse, you may find that your client's employees are being interviewed by the agents conducting the search. In perhaps the worst case scenario, you may also find your movements restricted by hostile agents who view your presence as an annoyance and who are not willing to provide you with any information. As a result, it is critical that you remain focused on your objectives and that you understand your role at the scene of the search.

Step 5: Introduce Yourself to the AIC

The first thing you should do when you arrive at the search is introduce yourself to the AIC and advise her that you represent the company, if you have not already done so. Likewise, if you have not already done so, you should also obtain the name of the prosecutor who is handling the case.

The rapport you develop with the AIC may be critical to your efforts to manage the search successfully. At the outset, you should inform the AIC that you do not intend to interfere improperly with the search.^[8] Indeed, you should signal your willingness to cooperate on certain matters by informing the AIC that you would like to work with her to minimize the disruption to your client's business and to facilitate the prompt conclusion of the search. Nonetheless, you should also advise the AIC that you intend to protect your client's interests by ensuring the search is lawfully carried out. You should also make it clear that you are prepared to seek emergency relief from the issuing Magistrate,^[9] but that you would prefer to resolve issues that arise during the search without the need for judicial intervention. Discussing these matters with the AIC at the outset will demonstrate that you have a practical and legal understanding of your role in the search process and will signal that negotiation will be the best method for resolving issues that arise during the search.

Step 6: Advise The Client's Employees of Their Rights and Determine If There Are Any Privileged Documents On The Premises

After you meet the AIC, you should speak to all of the client's employees who are present. As a threshold matter, unless the AIC is willing to concede that her agents have taken an employee into "custody," i.e., they are holding an employee in such a manner that the employee is not free to leave,^[10] the AIC has no legal basis for preventing the client's employees from speaking to you as counsel for the company. When you address the employees, you should identify

yourself as an attorney for the company and briefly explain the search warrant process. After describing the process, you should then advise the employees that: (i) they have no obligation to talk with agents or to answer their questions; (ii) they have a right to inform the agents that all questions be directed to the company's counsel; (iii) they have a right to request that the company's counsel be present during any discussions with the agents; (iv) they have no obligation to create any documents or to sign any documents prepared by the agents, and (v) that it is possible for the investigating agents to attempt to interview an employee at his home even after the search has been concluded, but that the employee retains these rights even at a post-search interview. At the same time, you should emphasize that the employees cannot destroy, alter, conceal, or remove any company records during or after the search.^[11]

After advising the employees of their rights and responsibilities, you should ask them not to discuss the search with one another unless counsel for the company is present. This will enable the company to ensure that information about the search is disclosed within the confines of the attorney-client privilege and will allow the company, as the holder of that privilege, to control the dissemination of that information. In addition, you should advise the employees to refer any media inquiries regarding the search to a designated company representative.

Finally, you should ask your client and the employees whether there are any privileged documents – principally attorney-client communications or attorney work product -- stored in the office files or stored as electronic data on the office computer equipment. If there are, you should determine as best you can where those documents are located. You should also ask the client to create a list of in-house and outside counsel for the company. You may want to provide the agents executing the warrant with copies of this list so that they may readily identify privileged documents. Once you have determined that there are privileged materials on site, you should advise the AIC of that fact and ask that the search be suspended until you have agreed to the procedures that will be used to protect the sanctity of the privilege.^[12]

Step 7: Inform The Client's Non-Essential Employees That Are Not In Custody That They Are Free to Leave

There are several reasons why the client should tell its employees who are not in custody that they are free to leave the office. As a practical matter, the agents executing the search will not permit employees to work, at least not until their work areas, computers, and files have been searched. Moreover, even if an employee is permitted to work, it will be very difficult for that employee to be productive given the disruption caused by a search. Consequently, there is little reason for most employees to remain at the office while the search is being conducted.

As a strategic matter, employees at the scene of a search are an additional source of information for the government, either through interviews or observation. Accordingly, after the employees have been advised of their rights, you should discuss with the client whether it is essential for any employee to remain at the scene of the search. If there are employees who are not essential, the client should send them home with instructions that they will be contacted when they should return to office. This will reduce the likelihood that these employees will be pressured into speaking with agents or that they will inadvertently interfere with the search.^[13]

Even if there are no employees needed to carry on work at the office, it may be useful to keep a handful of employees at the scene of the search to assist counsel in working with the agents to complete the search quickly. Moreover, it is important to have employees present during the search so that they may keep a record of the events.^[14] It may also be useful to keep one employee at the office to answer phones and to perform other administrative tasks, if you are able to negotiate this with the AIC.

Step 8: Obtain And Review A Complete Copy Of The Search Warrant

If you did not receive a fax copy of the search warrant before you left your office, you should obtain and carefully review a copy of the search warrant when you arrive at the search. The agents executing the search are required to provide the party being searched with a complete copy of the warrant, including the attachments, before they conduct the search.^[15] Accordingly, your client should already have a copy of the warrant when you arrive at the search. Ideally, the other attorney with you at the search should be reviewing the warrant while you are speaking with the AIC and the company employees. If you are by yourself, you should review the warrant as soon as you have finished speaking to the AIC and the employees.

If the government has not served a complete copy of the warrant by this point in the search, you should immediately demand a copy. You should also inform the AIC that the government has violated Federal Rule of Criminal Procedure 41(d) by not serving a complete copy of the warrant at the outset of the search and that any materials they have already seized pursuant to the warrant (as well as the fruits) will be subject to suppression.^[16] Accordingly, you should demand that the AIC segregate and identify those materials that were seized before the warrant was served.

Once you have obtained a copy of the warrant, you should verify that it is complete. The face of the warrant should identify the issuing Magistrate. The warrant must also contain the attachments setting forth the precise descriptions of the place to be searched and the items to be seized.^[17] Typically, a search warrant is supported by an affidavit that demonstrates to the issuing Magistrate that probable cause for the search exists.^[18] The copy of the warrant that you

are given may not contain the probable cause affidavit. In some instances, the affidavit will be sealed. If you receive a copy of the affidavit, you should study it carefully. The affidavit should help clarify whether your client is a target, subject, or witness of the criminal investigation. Moreover, the affidavit should set forth at least some of the prosecution's theory, which will help you begin to understand the scope of the investigation. Further, the information contained in the affidavit may provide the basis for challenging the search on the grounds that the issuing Magistrate was deceived by the government.^[19] For these reasons, if your probable cause affidavit is filed under seal, you should consider moving to unseal it at the appropriate time.^[20]

Once you have determined that the warrant is complete, you should review it to ensure that it describes with particularity the place to be searched and the items to be seized and that it complies with all other legal requirements.^[21] If there appears to be a defect in the warrant, you should immediately raise the matter with the AIC and demand that the search be suspended.

If the warrant appears to be proper, you should attempt to ensure that it is complied with by monitoring, but not interfering with, the search.^[22] You should object when agents attempt to search premises that are not specifically identified in the warrant or to seize anything that is not specifically described in the warrant. Given the consequences of a tainted search, the government has every incentive to conform its conduct to the law. Nonetheless, the AIC may not cooperate with your oversight efforts. In that event, you should inform the AIC, and perhaps the prosecutor, that Rule 41(d) requires the government to serve a copy of the warrant at the beginning of the search for the express purpose of promoting this type of oversight and that the government has no authority to prevent you from monitoring the search in a manner that does not improperly interfere with the agents executing the search warrant.^[23] If the government does not cooperate, then you should consider seeking relief from the issuing Magistrate.

Step 9: Protect Privileged Documents

If the client has privileged files, computer records, or other documents, you should inform the AIC of the existence of these materials and their locations. This will put the government on notice that there are areas in the office that should not be searched until a procedure for protecting privileged documents has been established. You should also inform the AIC that the company does not waive the attorney-client privilege, attorney work product, or any other applicable privileges.

Once you have informed the AIC about the privileged materials, you should attempt to negotiate with her concerning a mutually acceptable method for protecting the integrity of those materials. These discussions may also involve the prosecutor in charge of the investigation. Although the government may not

agree with your proposals for protecting the privileged documents, it has a strong incentive to work with you on this issue because it has an obligation to protect privileged information when conducting a search.^[24] If the government ignores this obligation and seizes privileged documents without protecting the integrity of the documents, those documents (and their fruits) will likely be suppressed.^[25] In fact, the consequences for the government can be even more severe. In some cases, the seizure of privileged documents has resulted in suppression and the disqualification of the prosecution team^[26] or the dismissal of the indictment.^[27]

Even before you inform the AIC of the existence of privileged documents, the agents carrying out the search should be sealing any documents that they determine to be potentially privileged. Standing alone, however, this procedure is not sufficient to guarantee the integrity of the privileged documents, as it requires government agents to review privileged documents (that they should not be reviewing) to determine if they are privileged. Indeed, the government's reliance on this procedure, even if the agents reviewing privileged documents are part of a "taint team," has been criticized by the federal courts.^[28] Further, you should not rely on the government to identify your client's privileged documents. Accordingly, you should work with the AIC to place yourself and your client in the position of identifying and sealing privileged documents.

With respect to protecting the integrity of the privileged documents and records that you and your client identify, there are a number of different approaches that can be negotiated. The majority of federal courts that have discussed this issue have suggested that the best approach is to seal the privileged documents and then turn them over to a magistrate or special master.^[29]

If the number of privileged documents in your client's office is limited, you should review the documents at the office, seal those that you believe are privileged, create a privilege log, and then make arrangements to have the log and sealed documents turned over to a magistrate or a special master who can resolve any government objections to your privilege determinations. Given the number of responsibilities you have during a search, you should have other attorneys from your firm perform this privilege review if possible.

If there are a large number of privileged or potentially privileged documents, it may be impossible to conduct a meaningful privilege review during the course of the search. Under those circumstances, you should work with your client to identify and seal all potentially privileged documents. You should then make arrangements for the documents to remain sealed until you can conduct a thorough privilege review and create a privilege log following the search. Any records identified on your privilege log should then be turned over to a magistrate or special master.

With respect to privileged records stored on computers or in electronic form, the process for protecting these records is likely to be much more difficult to

negotiate because these records cannot simply be sealed and segregated. The process for protecting computer data is further complicated by the fact that it may not be easy to determine which files, diskettes, or data contain privileged information. Given these circumstances, you should try to negotiate a procedure that allows counsel to review seized data for privilege before it is reviewed by the government. For example, you could negotiate an agreement with the government whereby: (i) the government would agree to make two copies of the seized computer data; (ii) one copy would be sealed and turned over to the magistrate or special master, the other copy would be provided to you as counsel for the company; (iii) the company would be given a relatively short period of time to review the seized data for privilege and to complete a privilege log, thereby minimizing disruption to the government's investigation; and (iv) the magistrate or special master would be required to erase or delete any privileged information from the government's sealed copy of the seized data before returning that copy to the government.^[30] If you are unable to negotiate an agreement that adequately protects your client's privileged computer data, then you should raise the issue with the issuing Magistrate.

Step 10: Negotiate The Conditions Of The Search

In addition to ensuring that the government complies with the Fourth Amendment and protects privileged documents, your role at a search also entails working with the government to minimize the disruption to your client's business and to complete the search as quickly as possible. Accordingly, you should request that the company be allowed to have a certain number of employees on site to answer phones, to receive mail, and to conduct the company's affairs to the maximum extent without impeding the search. In addition, based on the needs of your client and the government's willingness to allow employees to resume work, you should work with the government to identify areas that should be searched as soon as possible so that employees who work in those areas can return to work. In a further effort to minimize disruption to your client's business, you should offer to copy the documents that the agents have decided to seize, if it is practicable to do so. This would allow the company to keep the original documents that it needs to conduct its business. If the agents decline this request, you should request that you be permitted to make a copy of each seized record at the conclusion of the search, if it is practicable to do so. This would enable your client to have a complete record of what was seized and to reconstruct original versions of seized materials.

Step 11: Obtain Information About the Agents and the Investigation

While at your client's office, you should attempt to obtain information concerning the agents executing the search warrant, such as their names, employing agencies, and home office.^[31] Sometimes, agents will voluntarily provide you with this information during informal discussions or will provide you with their business cards. This information may prove useful in the event you file motions

challenging the legality of the search or decide to seek other relief during or after the search. It may also give you a sense of the scope of the investigation.

During your discussions with the prosecutor, AIC, and the agents executing the warrant, you should inquire as to the conduct that is being investigated as well as the identities of those being investigated. You should also ask them whether a grand jury has been convened and whether the company and its employees are targets, subjects, or witnesses of the grand jury's investigation. With respect to the agents carrying out the search, you should engage them in discussions about the information that they received in their meeting concerning the execution of the warrant. Although the government is unlikely to be forthcoming with much of the information you are seeking, you may nonetheless obtain some important information during these discussions.

Step 12: Keep a Record of The Search

From the moment that you receive word of the search, you should begin creating a search log that sets forth every material event relating to the search. Having a record of the events will assist you in litigating matters relating to the search. In addition, you should direct a small number of employees to record their observations of the search in the form of a letter to you, thereby creating a privileged communication detailing the search. It is important to have employees witness the search because you may need them to testify in subsequent litigation.

The log that you create should include, among other things, the name of the prosecutor, the names and agencies of the agents present, the names of all of the company personnel at the site, the times when the search started and when it ended, the locations searched, and a chronology of all of the events that occurred in between, including your efforts to cooperate with the agents. It should also summarize all potentially significant statements made by the prosecutor, AIC, or the agents executing the warrant.^[32]

Step 13: Identify The Items Seized

Although Rule 41(d) requires agents to give you an inventory of items seized, such inventories are often sketchy or replete with indecipherable codes. Having a useful inventory, however, can be critical. To begin with, this record will allow you to determine what information the government has in its possession following the search. In addition, having an accurate inventory will allow you to litigate the issue of whether the search exceeded the scope of the warrant. Finally, an inventory will also assist you and your client in identifying seized materials that should be duplicated or returned by the government in order to minimize the disruption to your client's business. Thus, if you are unable to convince the government to seize copies rather than originals or to permit your client to make

copies of the seized documents, you should work with your client to create an inventory of the items seized.

Working from the government's inventory, you should construct an inventory based on your observations during the search as well as the observations of any employees who were present during the search. In addition, as soon as the search has been completed, the employees should identify the documents and materials that are missing from their desks and files. When these various sources of information are combined, you should have a fairly exhaustive inventory.

What You Should Do Following The Search

After the search has ended, you will have two principal tasks. First, you will need to collect and analyze the information you obtained during the search with an eye towards advising your client of its potential criminal exposure and charting a legal strategy for handling the criminal investigation, which may include pre-indictment litigation concerning the legality of the search. Second, you will need to negotiate with the government to obtain the return of materials that are essential to the operation of your client's business.

Step 14: Assess your Client's Legal Position in Light of the Search

After the conclusion of the search, you should interview the employees to obtain detailed information about their discussions with the agents and their observations of the search.^[33] Among other things, these interviews might reveal the focus of the investigation and the status of the company as a target, subject, or witness. They might also shed light on the government's theory of criminal liability.

You and your client should review the inventory that you created to identify those materials that the client needs in order to conduct its business. As soon as those materials have been identified, you should contact the government to make arrangements to have those materials duplicated or returned. Typically, the prosecutor will at least offer to allow your client to make copies (at your client's expense) of the materials that it needs to conduct its business, provided those materials are specifically identified and relatively easy to locate within the larger collection of seized documents.

Having gathered all of the factual information you can on the search, you need to evaluate this information with an eye toward making five critical assessments. First, you need to determine whether the search was lawfully conducted. Second, you need to determine whether your client is a target, subject, or witness of the investigation. Third, you need to determine the government's theory of the case.^[34] Fourth, you need to work with your client and your inventory records to determine how much information relating to the theory of the

crime the government obtained as a result of the search. Fifth, you need to assimilate this information into an overall assessment of your client's potential criminal exposure and advise your client on his best legal strategy for handling the investigation going forward.

Step 15: Consider Appropriate Motions

If you believe that the search was unconstitutional or unlawful, one pre-indictment remedy is a motion for the return of your client's property pursuant to Federal Rule of Criminal Procedure 41(e). That rule provides: "A person aggrieved by an unlawful search and seizure . . . may move the district court for the district in which the property was seized for the return of the property."^[35] Accordingly, you may bring a Rule 41(e) Motion if the search was unconstitutional, e.g., in violation of the Fourth Amendment, or unlawful, e.g., in violation of Rule 41(d). In addition to providing your client with a method by which it can secure the return of its illegally seized property, a Rule 41(e) Motion also provides your client with an opportunity to lay the groundwork for a successful motion to suppress. A finding that the search was unconstitutional or unlawful will have collateral estoppel effect in the district where an indictment is brought.^[36]

In order to bring a Rule 41(e) Motion on the theory that the issuing Magistrate was deceived by the government, you will need a copy of the probable cause affidavit.^[37] If the affidavit was sealed, you will need to move to unseal it. In the pre-indictment context, it may be quite difficult to prevail on this motion, which is brought before the issuing Magistrate, because the government will undoubtedly claim that unsealing the affidavit would interfere with or jeopardize the ongoing criminal investigation.^[38] Before bringing such a motion, you should consider the potential negative consequences if you prevail. By unsealing the affidavit, you will have made the criminal allegations that it contains a matter of public record.^[39]

If your client is indicted, you can move to suppress the seized evidence (and its fruits) on the ground that it was illegally or unconstitutionally obtained. In preparation for a motion to suppress, you should move to unseal the probable cause affidavit to determine if you are entitled to a *Franks* hearing. If an indictment has issued and it is not under seal, the criminal allegations against your client will already be a matter of public record which would eliminate the publicity downside to unsealing the affidavit one encounters in the pre-indictment context. You may also move to suppress any privileged documents that were seized during the search, regardless of whether the search itself was unconstitutional or illegal. Indeed, if these privileged documents disclosed defense strategies relating to the charges in the indictment, you may be able to convince the court to dismiss the indictment.^[40]

CONCLUSION

Managing a search is a daunting and difficult task. In order to perform this task successfully, you need to understand your objectives during a search and the steps that you should take to achieve those objectives. The fifteen steps outlined in this Article should help put you in that position, thereby enabling you to manage successfully a search of your client's offices.

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[1] Equally beyond the scope of this article is the execution of search warrants in secret (without notice to your client) permissible in certain circumstances delineated in legislation passed in response to the events of September 11, 2001. See 107 P.L. 56, § 213, creating 18 U.S.C. § 3103(b).

[2] See *supra* Step 6.

[3] See 3 Wayne R. LaFare, *Search and Seizure* § 8.2(a) (2d ed. 1987) (discussing the question of whether consent is valid under these circumstances and, if so, the potential consequences of consenting to a search).

[4] See *id.*

[5] Requests to broaden the search are likely to be accompanied by threats to get another warrant if the request is denied. At the risk of the search taking even longer because the premises will remain in the agents' control while the prosecutor secures an additional warrant, it is nonetheless the better choice to withhold consent. See W. Thomas McGough, Jr., "Search and Seizure in the United States: Surviving a Search Warrant," 10 *Antitrust* 6, *8 (Spring, 1996).

[6] Depending on the rules of professional conduct in your state, certain of your client's employees may be viewed as represented by corporate counsel for the purpose of the prohibition on *ex parte* contacts with represented parties. See, e.g., Cal. R. Prof. Conduct 2-100. Accordingly, because these ethical rules apply

to federal prosecutors, 28 U.S.C. § 530(B), it may be improper for government agents, acting at the direction of a prosecutor, to interview certain of your client's employees without first obtaining permission from corporate counsel. See, e.g. Cal. R. Prof. Conduct 1-120 (extending the prohibition against attorneys interviewing represented parties to attorneys directing others to interview represented parties on their behalf). In addition, federal regulations may act as a constraint on federal agents' abilities to question employees. See 28 C.F.R. § 77.5 (1998) ("an attorney for the government may not communicate, or cause another to communicate, with a represented party who the attorney for the government knows is represented . . .")(emphasis added); see also ABA Model Rule of Professional Conduct 4.2.

^[7] See, e.g., 2 Wayne R. LaFave, *Search and Seizure* Ch. 4 (2d ed. 1987); Karoline J. Hinga, *The Warrant Requirement*, 88 Geo. L. J. 895 (May 2000).

^[8] Not every type of interference with a search is improper. For example, contending that the search violates the Fourth Amendment and seeking emergency relief from the issuing Magistrate may interfere with the search, but it is not improper. See *supra* Step 8. Nonetheless, you, your client, and your client's employees need to be aware that physically impeding a search or tampering with property subject to a search warrant are improper forms of interference. See, e.g., 18 U.S.C. § 2231 (making it a crime to forcibly assault, resist, oppose, prevent, impede, intimidate, or interfere with anyone executing a search warrant); 18 U.S.C. § 2232 (making it a crime to break, destroy, or remove property in order to avoid its seizure); 18 U.S.C. § 1503 (making it a crime to obstruct justice).

^[9] In the event that a dispute arises during a search that you do not believe can be successfully negotiated, you should contact the issuing Magistrate's Deputy Court Clerk and inquire as to the procedures that the Magistrate uses to hear requests for *ex parte* relief from the improper execution of a search warrant. Given the rarity of these proceedings, you should be prepared to advise the Deputy Court Clerk that there is authority supporting your position that the magistrate who issues a search warrant is empowered to supervise the manner in which that search warrant is executed. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 567 (1978) (noting that the issuing Magistrate "has ample tools at his disposal to confine warrants to search within reasonable limits"); *McConnell v. Martin*, 896 F.2d 441, 446 n.8 (10th Cir. 1990) ("It is a well-established principle that the magistrate issuing a search warrant controls the manner of its execution."); *United States v. Morales*, 568 F. Supp. 646, 649 (E.D.N.Y. 1983) ("An issuing magistrate has the power to vacate a warrant when he learns that facts do not support it.").

^[10] In certain circumstances, an agent could question an employee in such a manner as to rise to a "custodial interrogation." See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The Court defined a "custodial interrogation" as

"questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." See *id.* In such a situation, under federal Constitutional law, the employee's Miranda rights are triggered. See *id.*

[11] See generally, Steven C. Johnson, "What to do if a Federal Search Warrant is Served on Your Corporate Client," 10 Utah Bar J. 11, 13 and n.13 (April 1997).

[12] See *infra* Step 9.

[13] See generally, Johnson, *supra* note 10, at 13; Steven C. Kowal, "Execution of a Criminal Search Warrant by FDA – Effective Preparation and Response," 52 Food & Drug L.J. 117, 127 (1997).

[14] See *infra* Steps 12 & 13.

[15] See Fed. R. Crim. P. 41(d); *United States v. Gantt*, 194 F.3d 987, 990 & n.7 (9th Cir. 1999).

[16] See *Gantt*, 194 F.3d at 994-95.

[17] See *id.* at 990 & n.7. Knowing what the government is searching for will also enable you to gauge how long the search is likely to last and how disruptive it is likely to be. It may also provide you with information that you and your client can utilize to work with the government to facilitate the completion of the search.

[18] Fed. R. Crim. P. 41(c).

[19] See *Franks v. Delaware*, 438 U.S. 154 (1978). In *Franks*, the Supreme Court ruled that a defendant is entitled to a hearing to challenge the truth of the factual statements in a search warrant affidavit where he makes a "substantial preliminary showing" that the affiant (as opposed to a non-governmental informant) made the statements with either deliberate falsity or with reckless disregard for the truth and that such statements were necessary to a finding of probable cause. 4 Witkin, Cal. Criminal Law (3rd ed. 2000); *Illegal Evid.* § 107, p. 728. If the defendant establishes falsity by a preponderance of the evidence at the veracity hearing, the affected portion of the affidavit must be set aside. *Id.* The warrant will be voided and the fruits of the search will be excluded if the remaining portions of the affidavit are insufficient to support a finding a probable cause. *Id.*

[20] See *infra* Step 15.

[21] Additional legal requirements include: The warrant must be executed within a specified period of time from the date of issue, not to exceed 10 days. Fed. R. Crim. P. 41(c)(1); The warrant must be served in the daytime (defined as from 6:00 a.m. to 10:00 p.m.) unless the warrant explicitly states otherwise. *Id.*

(the issuing judge needs to have authorized a nighttime search based on a showing of reasonable cause); and the investigators must provide notice to the client of their authority and purpose for entering by announcing such, and can only break in, if such entry is denied. 18 U.S.C. § 3109; *Miller v. United States*, 357 U.S. 301, 309 (1958) ("knock and announce" rule).

[22] See Johnson, *supra* note 10, at *12.

[23] See *Gantt*, 194 F.3d at 990-91.

[24] *In re Search of 636 South 66th Terrace*, 835 F. Supp. 1304, 1306 (D. Kan. 1993) ("The attorney-client privilege is clearly applicable in the search warrant context.").

[25] See *United States v. Marshank*, 777 F. Supp. 1507, 1521-22 (N.D. Cal. 1991) (discussing potential remedies).

[26] See *United States v. Horn*, 811 F. Supp. 739, 752 (D.N.H. 1992), *rev'd in part on other grounds*, 29 F.3d 754 (1st Cir. 1994).

[27] See, e.g., *United States v. Levy*, 577 F.2d 200, 210 (3d Cir. 1978); *United States v. Valencia*, 541 F.2d 618, 623 (6th Cir. 1976); *Marshank*, 777 F. Supp. at 1521-22; *United States v. Orman*, 417 F. Supp. 1126, 1138 (D. Colo. 1976); See Richard Marmaro, Peter Morris, "How to Get an Indictment Dismissed After a Tainted Government Search," 6 No. 5 Bus. Crimes Bulletin: Compliance and Litigation (June 1999).

[28] See, e.g., *In re Search of McCorkle*, 972 F. Supp. 1423, 1437 (M.D. Fla. 1997); *United States v. Neill*, 952 F. Supp. 834, 841 n.14 (D.D.C. 1997); *United States v. Abbell*, 914 F. Supp. 519, 521 (S.D. Fla. 1995).

[29] See *DeMassa v. Nunez*, 747 F.2d 1283, 1285 (9th Cir. 1984); *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 962 (3d Cir. 1984); *Neill*, 952 F. Supp. at 841; *United States v. Rivera*, 837 F. Supp. 565, 567 (S.D.N.Y. 1993).

[30] *Cf. Black et al. v. United States*, 172 F.R.D. 511, 516-17 (S.D. Fla. 1997) (holding that even though the government used a taint team to search the computer data containing privileged information, the data was to be sealed until the district court or its designee could review the seized data for privilege); *United States v. Abbell et al.*, 914 F. Supp. 519, 519-20 (S.D. Fla. 1995) (appointing a special master to review seized computer data for the purpose of making privilege determinations).

[31] See Johnson, *supra* note 10, at *12.

[32] You may want to consider videotaping the search in an effort to create the most complete record of events possible. Although there does not appear to be

any prohibition on videotaping a search, there may be practical considerations that counsel against the use of a video camera. For example, bringing a video camera to the scene of the search may result in the AIC being much more aggressive in terms of her willingness to restrict your movements during the search. Moreover, you may find that the AIC and other agents are much less willing to speak with you on camera. This, in turn, could hamper your ability to work with the government to achieve your other objectives during the search. See also, Johnson, *supra* note 10, at *13 (recommending videotaping the search).

[33] You may also want to take this opportunity to remind your client's employees of their rights in the event that agents approach a company employee attempting to conduct a post-search interview. See, *supra*, Step 6.

[34] Documents that may be helpful in articulating the Government's theory of the case include the following: the probable cause affidavit (if it is not sealed), the description of the items to be seized pursuant to the warrant, the items seized, and your employee interview memoranda.

[35] A pre-indictment Rule 41(e) motion is a separate civil proceeding based on a district court's equitable jurisdiction. See, e.g., *Ramsden v. United States*, 2 F.3d 322, 324 (9th Cir. 1993). Accordingly, a district court's decision to hear a pre-indictment Rule 41(e) motion and award relief may, but does not always, turn on a balancing of the equities in the particular case. Compare *id.* at 324-26 (balancing several equitable factors when deciding whether to grant 41(e) motion) with *In re Grand Jury Investigation Concerning Solid State Devices, Inc.*, 130 F.3d 853, 856 (9th Cir. 1997) (holding that a "Rule 41(e) motion . . . should be granted . . . when the movant is aggrieved by an unlawful seizure.").

[36] See, e.g., *United States v. Rosenberger*, 872 F.2d 240, 242 (8th Cir. 1989) (holding that a ruling on a Rule 41(e) motion has preclusive effect in the context of a motion to suppress). Of course, depending on the court's reasoning, if your motion is unsuccessful, there is a risk that you may be collaterally estopped from bringing a motion to suppress on the same grounds if your client is indicted. See *id.*

[37] See *supra*, note 18.

[38] See, e.g., *Breidenbach v. Bolish*, 126 F.3d 1288, 1294 (10th Cir. 1997); *In re Eyecare Physicians of America*, 100 F.3d 514, 519 (7th Cir. 1996); *Lawmaster v. United States*, 993 F.2d 773, 775-76 (10th Cir. 1993).

[39] See McGough, *supra* note 4, at *7.

[40] See *supra*, note 26.

