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HOW TO HANDLE THE WORST CASE SCENARIO: RESPONDING TO GOVERNMENT INVESTIGATIONS

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No one particularly wants to think about it. The day when an FBI agent shows up at your office with a search warrant asking to be let in to the premises. Or the night when a federal investigator shows up at an employee's home wanting to ask some questions. While your chances of being served with a subpoena or being asked to submit to federal questioning may be relatively small, the consequences of failing to handle such situations properly are enormous. To protect yourself and your employees, you need to define in advance how your office will handle these scenarios and ensure that your employees understand their duties and rights.

The Search Warrant

A search warrant is a court order granting a law enforcement agent the right to enter a location to search for and seize certain items. It is generally issued only after a court or magistrate has made a determination that "probable cause" exists that some criminal activity has occurred. Often, the search warrant will be accompanied by an affidavit, which will detail the facts that support the investigation. Unless the affidavit is "sealed," you have a right to see the document, and should ask for a copy regardless of whether it is presented.

Unfortunately, there is very little you can do at the time a search warrant is served. Any grievances can be raised only by motions before the courts at a later date. While you can make requests to the investigators when served with a search warrant, you cannot compel them to comply. You are entitled to receive from the agent a copy of the search warrant and an inventory and receipt for all items seized. Often, the search warrant will be accompanied by an affidavit, which will detail the facts that support the investigation. Unless the affidavit is "sealed," you have a right to see the document, and should ask for a copy regardless of whether it is presented. You should request that the agents delay beginning the search until outside counsel arrives. However, they are not obligated to do so.

The search warrant should identify the items to be seized with some particularity. If your filing and or computer system is set up in such a way that the items to be seized are separate from other business documents or materials, you should clearly make that point to the agents. While you cannot prohibit them from searching for or seizing items not contained in the subpoena, prior notice that the area or item is non-responsive may be important in a later motion before a court. If this situation occurs, outside counsel should be notified immediately. If the offices have documents which you believe are covered by the attorney-client privilege (or some other privilege), tell the agents that you object to their searching for and seizing such documents. However, do not attempt to interfere with the agents if they still want to seize these records.

Finally, obstruction of a search can itself be a criminal offense. What constitutes obstruction can be in the eyes and discretion of the agents conducting the search. It can be considered obstruction if you refuse permission to enter the premises and make the search. It is also considered obstruction to impede or interfere with the searcher or to destroy or remove any property before, during, or after the search, in order to prevent seizure of the property.

Search Warrant Checklist

- Call outside counsel.
- Attempt to delay the agents until outside counsel arrives or is reached by telephone. However, they are not obligated to delay their search.
- Read the search warrant very carefully (if it is federal, it must be issued by a federal magistrate or a state judge for the judicial district in which the premises to be searched is located); and make a note who issued it.
- Note the area to be searched and try to direct the agents accordingly.
- Obtain and keep a copy of the warrant and the receipt for items seized.
- Record the identity of every agent involved in the search and the agency by which he/she is employed.
- Ask for a copy of the affidavit that supports the warrant. If you are not permitted to review the affidavit, ask why the affidavit is not provided for you (is it under seal?).
- Ask questions about the purpose of the search. While the persons executing the warrant are professionals and are not obligated to respond, they may be willing to provide some information.
- Ask to accompany the agents to help identify the areas described in the warrant. The agents are not, however, required to allow you to accompany them.
- Request the opportunity to tape record the conversation (as to the locations of the property) with the agents executing the search (if this can be done without delay). In any event, make note of any oral request which the agents make. These requests may provide insight as to the purpose of the search.
- Attempt to maintain your own inventory, as complete as possible, of the documents seized. Request that a copy be made on the premises of all documents before they are removed.
- Do not volunteer information to the investigators. You are not required to authenticate documents seized or otherwise respond to any questions except as to the location of documents described in the warrant. Keep in mind that you will not be able to talk the agents out of performing the search or thinking that you and/or the company have done something wrong. They already think this because they have the search warrant, and talking to the agents (other than as to the location of property) may only make things worse.
- Do not do anything which may be interpreted as obstruction. Be courteous, cooperative, and quiet.

The Request for an Interview

In the course of such investigations, agents or investigators may attempt to contact you and/or your employees, either by telephone or in person. Often, they will contact individuals at home to obtain information that might not be readily offered in the work place or to intimidate the potential interviewee. Any individual contacted by an investigator, should be aware of the following:

1. The investigator has a right to contact and to request to speak with any individual.
2. The individual has the right to speak with the investigator as well as a right to refuse to speak with the investigator.
3. The investigator may indicate that if the individual does not agree to an informal interview, he or she can be subpoenaed to a grand jury to testify. While the investigator does not have subpoena power, the United States Attorney does have the power to require attendance at a grand jury, but only if the matter is part of a grand jury investigation rather than merely an agency investigation. Similarly, state authorities may also have certain subpoena power. However, by agreeing to an informal interview, one cannot eliminate the possibility of a grand jury subpoena, and an individual might well be subpoenaed to testify before the grand jury about the matters discussed in the informal interview.

4. If an individual decides that he or she are willing to submit to an informal interview, the person has the right to have the interview at the time and place of his or her own choosing, as well as the right to insist that any such interview be conducted only in the presence of counsel.
5. Under any circumstances, if an individual agrees to be interviewed, he or she should tell the truth, and should be aware that failure to do so may in itself be a violation of law.
6. Under no circumstances should anyone destroy or alter any documents which might be relevant to the investigation. This too may be a violation of the law.
7. If an individual grants an interview, he or she also has the right to request, prior to and as a condition of the interview, a copy of the investigator's notes when the interview is completed.
8. If an individual decides to grant an interview without any counsel present at the interview, he or she still has the right to advise the company or its counsel before and/or after the interview of the interview request, the questions asked and the responses given.

While no one looks forward to the possibility of a subpoena or interview request from the government, if you take the time to prepare now, you and your staff will be much better prepared if the worst does come to pass.