



STEAMBOAT CLE CONFERENCE  
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Steamboat CLE Conference —

# What to Do When the Enforcer is at Your Door

Presented By

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# Criminal Defense Considerations

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## Access to Site & Seizure of Property

- Fourth Amendment to the United States Constitution
  - “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized.”



## Access to Site & Seizure of Property

- Fourth Amendment to the United States Constitution (Cont'd.)
  - Purpose: to protect individuals from overzealous law enforcement
  - Applies to corporations
  - Touchstone – “reasonable expectation of privacy”
  - No reasonable expectation of privacy:
    - Applies to curtilage, but not necessarily the back forty
    - Trash
    - Items in Plain view



## Access to Site & Seizure of Property

- Warrant allows a “state actor” access to a private site, despite any “reasonable expectation of privacy”
- Must describe items to be seized with reasonable particularity
  - Once on the property all evidence of criminal conduct in plain view is fair game
- Gov’t may search all described property where identified evidence may be found, including “containers”
- Based on “probable cause” affidavit to the court in an ex parte proceeding
- Probable cause facts often result from whistle blower employee



## Access to Site & Seizure of Property

- Legal play to prevent execution of warrant?
  - No. The government has the right to execute the warrant and there is nothing you can do to prevent it
  - Do not try to prevent it
  - Any challenge to the warrant will be made only post-indictment
    - Your best play at the time of execution is to posture for a well founded challenge to the warrant or its execution on a later date
    - This could be months to years after execution of the warrant
    - Another equally important goal: prevent (as much as possible) prejudice to the substantive defenses to the case



# Access to Site & Seizure of Property

- **Warrant Strategies**

- Requires finesse and on the fly decision making
- That said, have a general emergency action plan
- Presence of lawyer and defense investigator
  - Investigator so lawyer does not make himself a witness
- Attempt to determine AUSA or AG involved
  - Agents executing warrant may tell you
  - Attorneys in law enforcement are generally more reasonable and considerate of legal rights than field agents (EPA and FBI)
  - You can negotiate a better end to bad situations with the attorney in charge
  - If no lawyer will claim, pick your best contact





## Access to Site & Seizure of Property

- Warrant Strategies (Cont'd.)
  - Document with specificity the items seized
    - Note: you will not see them again for a long time
  - Document bad behavior of law enforcement
    - Failure to follow the charge of the warrant
    - Destruction (even inadvertent ) of evidence
    - Heavy handedness / discourteous conduct / menacing behavior
  - Investigator(s) should be the documenters



# Access to Site & Seizure of Property

- **Warrant Strategies (Cont'd.)**
  - Do not commit obstruction of justice
    - Obvious: do not destroy files, evidence, etc.
    - Fairly clear: do not move files, hide evidence or engage in conduct calculated to improperly thwart the government's legal rights under the warrant
    - Less obvious: the company may have an affirmative duty to preserve evidence not collected at the time of the execution of the warrant
      - Evidence includes, physical documents **and e-documents**
      - Early privileged litigation hold and follow up are imperative
    - Not obvious: be **very** careful about the issuance of a general advisement to employees that they should not talk to law enforcement about the matter (we will revisit)





## Statements to Law Enforcement

- Notice is not given in advance of the execution of a warrant; when the warrant is executed regular employees of the corporation will typically be present and available for questioning
- So long as the employee is not detained, an agent may ask any question of that employee without first reading to her a Miranda warning
- Her answers may be used against her and (likely) the company in civil or criminal proceedings



# Statements to Law Enforcement

- Strategies
  - Again requires finesse and on the fly decision making
    - Send non-essential employees home
    - Request of the government that all employee interviews be coordinated through corporate counsel
      - One example of how early and direct contact with the government attorney in charge can be beneficial
      - Use Ethical Opinion 69 as leverage
    - Individuals (as distinct from the corporation) have the right to remain silent – i.e. they may decline to engage in conversation with law enforcement
      - However, counsel for the corporation must be very careful about advising individuals of this right (or giving its employees any legal advice)
      - The best approach: advise key employees of their right to consult with independent counsel





# Statements to Law Enforcement

- Strategies (Cont'd.)
  - Provide counsel to key employees
    - Letter to the government that you intend to do so
      - This may prevent government from aggressively pursuing interviews early in the matter
    - Counsel would be independent and represent the employee NOT the corporation
      - Independent means independent
    - Pursuant to an undertaking (must comply with corporate governance documents and law of the state of incorporation)
    - Expensive, but many benefits
      - Can slow the government's investigation
      - Gives the corporation some level of witness predictability and control
      - Disillusions employee from believing (or arguing) that company lawyer represented her as an individual





# Investigation

- While the government is executing, corporation should begin its concurrent internal investigation of the matter
- The internal investigation strategy
  - Preserve evidence
  - Conduct investigation under the veil of attorney-client / work product privileges
  - Reach conclusions
  - Take remedial action
  - Advise the government of your good deeds
  - Hunker down for the civil proceedings





# Investigation

- Inevitably, the investigation starts with interviews of key employees at the time of the execution of a warrant
  - It is imperative that counsel for the corporation (including in house counsel) not lead any individual to believe she is counsel for the individual
  - *Upjohn* Advisement
    - The interview is an effort by the company to assess its rights and liabilities
    - The interview is confidential and the employee is expected to treat the interview as confidential
    - The interview is covered by the attorney-client and work product privileges, but those privileges belong to the company, not the employee
    - Information learned during the interview may be provided to third parties at the discretion of the company, including to law enforcement
    - The attorneys involved represent the company, not the employee
    - The employee is entitled to consult with individual counsel before the interview





# Administrative Search Warrants

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## Lesser Standard for Administrative Search Warrants

- Criminal Context: Probable Cause
- Regulatory Context: “Where reasonable legislative or administrative standards are satisfied.”
  - *Camera v. Municipal Court*, 387 US 523 (1967)



## Legislative Standard

- Under CHWA and CSWDA - whether CDPHE “reasonably believes” that solid or hazardous waste was or is located on the property.  
C.R.S. 25-15-301(3); C.R.S. 30-20-113(6).
- Under CWQA and CAQCA - “upon a proper showing of need” for entry and inspection  
C.R.S. 25-8-306; C.R.S. 25-7-111 (2).



# Statutory Requirements

Generally-

1. Access and inspection necessary to determine compliance with a statute, and
2. Access is “denied” or “not consented to”
  - Exception



# Emergencies





## Access and Inspection Necessary to Determine Compliance

- Subject to routine inspections
- Info from prior inspection or Informant
- Other reasons to believe violations occurred



## Access not Granted

- Unequivocal verbal refusal
- Includes denials to particular areas
- No Outlandish Threats
- “Not Consented to”
  - Absence of authorized personnel
  - Unresponsive



# The Legal Documents

- Affidavit
- Proposed Warrant

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE OF CALIFORNIA,	}	MISDEMEANOR COMPLAINT
VA 03/24/2005		Plaintiff,
vs.		
PAULA ABDUL	}	JOHN A. CLARKE, Clerk Executive Officer/Clerk
V20002A		By _____ Deputy Clerk
	}	Issued by ROCKARD J. DELGADILLO City Attorney
Defendant(s).		By _____ (LT) RICHARD A. SCHMIDT Deputy City Attorney

Comes now the undersigned and states that he is informed and believes, and upon such information and belief declares: That on or about DECEMBER 20, 2004 at and in the City of Los Angeles, in the County of Los Angeles, State of California, a misdemeanor, to wit, violation of Subdivision (a) of Section 20002 of the California Vehicle Code was committed by the above-named defendant(s) (whose true name(s) to affiant is(are) unknown), who at the time and place last aforesaid, was the driver of a vehicle which was involved in an accident resulting in damage to property, including vehicles, who did willfully and unlawfully fail, neglect and refuse to immediately stop the vehicle at the scene of the accident and locate and notify the driver and owner and the person in charge of the property of the name and address of the driver and the owner of the vehicle involved and to present his driver's license and other valid evidences of identification and vehicle registration to said person upon being requested to do so and leave in a conspicuous place on the vehicle and other property damaged a written notice giving the name and address of the driver and the owner of the vehicle involved and a statement of the circumstances thereof and without unnecessary delay forward a similar notice to the police department of the City of Los Angeles.

MCI 20002(A)/29

All of which is contrary to the law and against the peace and dignity of the People of the State of California. Declarant and complainant therefore prays that a warrant may be issued for the arrest of said defendant(s) and that he may be dealt with according to law.

Attached hereto and incorporated by reference as though fully set forth are written statements and reports which constitute the basis upon which I make the within allegations.

A declaration in Support of the Issuance of Such Warrant is Submitted.

Executed at Los Angeles, California, on March 24, 2005.





# The Affidavit

- Inspector's sworn statement that describes
  - the place to be inspected,
  - the purpose of the inspection, and
  - why there is reason to believe a violation existed



## Proposed Warrant

- Judge's mechanism to protect 4th amendment rights
- Sets parameters of inspection (who, where, when, what)
- Records, Samples, Photographs, Employees
- Facility reps may accompany
- Requires peace officer





# Who Issues Administrative Warrants?

- CSWDA and CHWA-district court judge
- CWCA and CAQCA-county or district court judge





# Executing the Warrant

- May seek consent first
- Forced Entry



## If Facility's Attorney Appears...

- Risk being called as witness





## What if ...

- the Inspection uncovers possible criminal activity?





## Parallel Proceedings

- A Civil/Administrative and Criminal case can be brought at the same time
- Information obtained in the ordinary course of a civil case can be used in a criminal case.
- Regulators/Law Enforcement personnel may testify in both cases



# Top 10 Inspection-related Mistakes to Avoid

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## Top 10 List

- Denying an Inspector access when access to inspect is specifically identified as a condition of a permit.
- Providing the wrong facility “escort.”
- Leaving the Inspector alone during a portion of the inspection.



## Top 10 List

(Cont'd.)

- Failing to follow up with the Inspector regarding the inspection.
- Making self-incriminating statements to the Inspector.
- Obstructing an inspection once a warrant is obtained.



## Top 10 List

(Cont'd.)

- Failing to request a Closing Conference to discuss observations during the inspection.
- Failing to prepare for an announced inspection.
- Failing to gather all relevant documentation for a record review.
- Acting hostile, uncooperative, or threatening the Inspector.



# Case Studies

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