

THE COPS JUST SHOWED UP ON YOUR CLIENT'S DOORSTEP: WHAT DO YOU DO NOW?

BY JENNIFER S. FREEL

THERE ARE FEWER THINGS MORE SHOCKING than a knock on the door followed by this type of declaration: “It’s the FBI. We have a search warrant.” After the initial shock, people facing such an ordeal typically call their lawyers. Often times, the lawyers they call are not criminal lawyers, but lawyers the clients already know and can easily contact—attorneys that have helped with business or personal matters. That search warrants are executed without advance notice means clients may not have the time to find a subject-matter expert. This article provides advice for any attorney who receives such a phone call.

A. Search Warrant Basics

Before turning to specific advice, let’s review the principles behind search warrants. The Fourth Amendment of the U.S. Constitution prohibits unreasonable searches and seizures and states that no warrants shall issue “but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. The Texas Constitution sets an analogous standard, prohibiting unreasonable searches and seizures and stating that “no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.” Texas Const. art. 1, § 9.

“Probable cause exists if, under the totality of the circumstances, there is fair probability that contraband or evidence of a crime will be found at a specified location.” *State v. Le*, 463 S.W.3d 872, 878 (Tex. Crim. App. 2015). “It is a flexible, non-demanding standard.” *Id.* “[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.” *Illinois v. Gates*, 462 U.S. 213, 232. (1983).

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Searches conducted without prior approval by a judge “are per se unreasonable,” subject to a few specifically established and well-defined exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). Those exceptions include the automobile exception and exceptions based on exigent circumstances, including that someone is about to be injured or killed or that there is an imminent risk that evidence will be destroyed. For our hypothetical—a client calling to tell you that a search warrant is being executed—the most pertinent exceptions are when consent is provided and when items are in plain view. Consent is elaborated on below. The plain view exception allows for the warrantless seizure of an item if it is in plain view, its incriminating character is immediately apparent, and the officer is lawfully in the place from which the object can be seen. *Horton v. California*, 496 U.S. 128, 137 (1990).

When it comes to law enforcement searches, the nature of an operating business creates specific concerns. First, if a premises is open to the public, officers may enter and look around within the scope of the permission extended to the public generally. *See Milligan v. State*, 554 S.W.2d 1992, 193 (Tex. Crim. App. 1977) (holding officer’s seizure of pistol in plain view at public nightclub was not a Fourth Amendment violation). If the

officer observes contraband in plain view, the item can be seized without a warrant. *Id.* Second, if the right person in the business consents to a search, law enforcement will not need to secure a search warrant. *See United States v. Jenkins*, 46 F3d 447, 454 (5th Cir. 1995) (holding employee of adult bookstore had authority to permit search of store videotapes). An employee or agent of the business has the authority to consent if that person “possess[es] common authority over or other sufficient relationship to the premises or effects sought to be inspected.” *Id.* (citing *United States v. Matlock*, 415 U.S. 164, 171 (1974)). “[O]wnership is not the sine qua non of authority to consent.” *Id.*

No-knock warrants—which allow law enforcement officers to enter a premises without knocking and announcing their presence—have been the subject of recent criticism. See, e.g., Brian Dolan, Note, *To Knock or Not to Knock? No-Knock Warrants and Confrontational Policing*, 93 St. John's L. Rev. 201 (2019). The hypothetical in this article does not involve a no-knock warrant. Yet much of the advice it provides would apply to situations where a no-knock warrant is executed.

B. The Guidance

Turning back to the client who has just called with news that law enforcement officers are executing a search warrant at the client's business—what should the client do and *not* do?

1. Do not talk to the officers.

Other than providing basic identification, no one is required to answer an officer's questions. It is a common practice for officers to try to talk with people present during the execution of a search warrant. Assume the officers are gathering evidence when they speak to anyone. We all know that suspects have the right to remain silent after an arrest. Anyone present when officers are executing a search warrant should also remain silent. This can be hard in practice given the tension created by the presence of law enforcement. Consider suggesting your client blame it on you. Arm them with this statement: "I'm sorry, but my lawyer told me not to talk to you."

2. Ask the agents for identification.

After telling the client *not* to talk to law enforcement, you will instruct them to ask for very specific information from the agents. The client should ask the officers to identify themselves and show their badges. The client should gather business cards from as many agents as possible. It will be a stressful environment, and having the business cards will prevent the client from having to remember this information or to write it down.

3. Get a copy of the warrant and affidavit.

Law enforcement should provide a copy of the warrant that defines the premises to be searched and the items to be seized. Have the client take a photo of or make a copy of the warrant and send it to you. Upon receiving the warrant, you should make sure the agents are at the right location. You also should identify the list of items to be seized so that the client can have the list in mind for other steps on this list.

The client also should ask for a copy of the affidavit that led to the search warrant. This is a great tool to have going forward, as the search warrant itself will not provide much information about the underlying investigation. Agents are

not required to provide copies of affidavits and may deny the request. But it is always a good idea to ask for a copy of both the warrant and affidavit. If the client gets a copy of the affidavit, you should have them take a photo of or make a copy of that document and send it to you.

4. Do not consent to the search or expansion of the search.

One of the exceptions to the presumptive illegality of a warrantless search is consent to search. *Jenkins*, 46 F.3d at 454 (5th Cir. 1995). You should advise the client that no one should consent to the search or an expansion of the search; make officers do their jobs and show probable cause to a neutral magistrate. The client should also tell the agents that no employees have authority to consent to a search.

Knowing what the warrant says will make it easier to avoid expanding a search by consent. For example, if the warrant allows officers to search a company's warehouse, an officer could ask for permission to also search a showroom. The rule to avoid speaking to officers should help in this situation. But it is also important to remind the client not to consent or agree to anything.

5. Do not remove, discard, or hide any objects.

This advice is designed to avoid a situation where "the cover-up is worse than the crime." It may seem obvious that the client should avoid obstructing justice. But remember, again, that the client or its employees on site will be in shock and looking for guidance. They should not interfere with the investigation in any way, even if they believe the officers are acting inappropriately. If they come to that conclusion, as detailed below, they should document what they are seeing. Providing this bit of advice could keep the client out of a lot of trouble.

6. Monitor the search.

The client should watch how the agents conduct the search and make notes about what they do and documents they review. If an agent asks the client to leave an area, however, the client should follow the instruction. Law enforcement could take items that are essential to the company's operations. So the client will want to know what is taken. Also, the client should note if agents take something outside the scope of the warrant. They should also object if the agents are looking at documents that constitute legal advice and would be protected by the attorney/client privilege.

The client can ask the agents for permission to photocopy documents before they are taken from the premises. The agents should take copies of computer data rather than taking

the actual computers. The client can request permission to back up copies of data, but agents may deny the request. Finally, when the agents have completed their search, the client should request a receipt or inventory of the items seized. Agents are required to provide one.

7. Get criminal counsel.

After calming your client and providing these initial nuggets of advice, the next step should be to hand off the matter to experienced criminal counsel. A criminal attorney can review the warrant and consider whether the issuing court, prosecuting authority, and law enforcement agency have jurisdiction over the alleged offense, your client, and the premises being inspected. Ideally, criminal counsel would arrive on the scene and help monitor the search. Even if that is not feasible, in many criminal cases, timing remains crucial as prosecutors often reward actors who quickly cooperate or accept responsibility. Counsel can also determine the scope of the government's interest in your client.

C. Steps for clients who have cause to expect a search warrant.

Sometimes clients have reason to expect that they will be served with a search warrant. Perhaps they're in an industry that is under great scrutiny? Or perhaps they have refused to cooperate in a government investigation? If a business believes a search is probable, it is prudent to secure criminal counsel who can be on standby and provide some guidance before the day (usually the morning) that the agents knock on the door. For example, counsel can prepare written guidance that can be distributed to employees that explains some of the guidance in this article. Counsel can also instruct the client to secure items in closed containers—drawers, filing cabinets—so that there can be no claim that an officer observed something “in plain view.” When officers arrive to execute the expected warrant, the client should immediately call engaged counsel.

Every day, law enforcement officers are knocking on someone's door and announcing that they have a warrant. Getting legal advice before that happens is best. Getting legal advice during the search is often what happens and can provide strong protections for the client's interests.

Jennifer S. Freel, a partner in the Austin Office of Jackson Walker, LLP, is a former Assistant United States Attorney for the Western District of Texas and is board certified in criminal appeals by the Texas Board of Legal Specialization.★