

MEMORANDUM

**PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION
ATTORNEY WORK PRODUCT**

TO: Client Counsel
XXXXX Corporation

FROM: Tracy Hester
University of Houston Law Center Environmental Practicum

DATE: April XX, 2020

RE: Key Points re Early Preparations for Criminal Searches

This memorandum outlines some steps that a company can take before the agents show up at the gate with a search warrant. While they cannot protect against the trauma of a search under a broad warrant, these prior steps can help minimize damage to business operations and firewall the company's defenses against inadvertent disclosures or betrayal of confidences.

1. Have a lawyer present. To do so, you should know in advance who you would want to call. Preferably, you should have the information needed to contact them 24 hours a day (i.e., home number and cell).
2. Designate a team of key players. Keep this team as small and high-level as possible. When you select the team members, remember that frequently one of your employees may have already talked with the state. The team should include the company's attorney to assure protection of the company's attorney-client privilege claims.
3. Prepare for press queries. If possible, you should designate in advance a person to handle inquiries from the press, either internally or outside consultant. Obviously, a press liaison should have media training if possible.
4. Forestall panic among your employees. When the agents arrive and execute the warrant, you will need to keep everyone calm and minimize disruptions. To do so, the company should inform employees of their rights to counsel and to decline to speak with the state. Your employees can also refuse to speak unless the corporation's representative or counsel is present, but this tactic will meet strong resistance from the agents. If you don't have a lawyer available to inform the employees of their rights, be sure that you're prepared to convey the same information to them.

5. Know your limits. In addition to knowing what you can do to prepare, know what you can't do: don't take steps that the state could portray as obstruction of justice. You must cooperate fully with a legal and proper search pursuant to a warrant, and barring access to responsive documents or materials can trigger a second criminal action against you individually.
6. Protect your confidential files. You should segregate your files now to clearly mark attorney-client confidential materials or other confidential documents. While you may still have to produce them if they fall within the search warrant's scope, files clearly marked as privileged can be sealed and segregated for separate review by the court or pursuant to agreement with the district attorney or U.S. Attorney. This file review effort should also identify and discard documents as appropriate under the company's existing document retention policy.
7. Prepare to provide counsel to employees. The state will probably seek to interview employees on-site. If so, the company should be prepared to offer counsel immediately. You need to know whether your corporation's by-laws allow -- or require -- the company to indemnify or defend its lower-level employees.
8. Keep your emergency equipment handy. You should have the equipment ready that you might need to respond to agents' requests and to monitor the state's activity. In particular, the company should have either a camera or videotape unit available. It may also be wise to designate either a consultant or in-house technical expert who can observe the state's sampling activities and formally request or obtain split samples.
9. Immediately seek out the state's case. If the search warrant was issued by a Texas district court, you should obtain the affidavit used to support issuance of the warrant ASAP. The affidavit will provide critical information that can help direct your corporate strategy and spell out the state's case. While this step should be taken immediately, unfortunately you can't do much work in advance to seek its issuance.

Of course, the most important preparation for a criminal inquiry is to produce proof of your company's efforts to comply with environmental laws. A credible environmental management system with audits will substantially reduce the risk of noncompliance that might ultimately lead to a criminal investigation.

TDH

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