Search Warrant Special Procedures

Adapt yourself to changing circumstances.
—Chinese proverb

There is perhaps no profession that is more susceptible to changing circumstances than law enforcement. Which means that law enforcement officers must know how to adapt. One task in which adaptability is especially important (although frequently overlooked) is the writing of search warrants and affidavits. That is because every search warrant must be customized to fit the unique circumstances of the crime under investigation, the place being searched, the people who live or work in the location, the nature of the evidence being sought, and any difficulties that the search team might encounter.

For instance, officers may have well-founded concerns about their safety or evidence destruction that make it necessary to execute the warrant late at night, or to make a no-knock entry. Officers might also need to keep the contents of the affidavit secret to protect the identity of an informant or to prevent the disclosure of confidential information. Although less common, it is sometimes necessary to obtain a covert warrant or an anticipatory warrant, or a warrant to search something in another county or state, or a warrant to search the confidential files of a lawyer or physician.

All of these things are doable. But because they add to the intrusiveness of the search, they must be authorized by the judge who issues the warrant. And to obtain authorization, officers must know exactly what information judges require and how it must be presented.

Before we discuss these requirements, it should be noted that we have incorporated these and other special procedures into new search warrant forms that officers and prosecutors can download from our website. The address is: http://le.alcoda.org (click on Publications). To receive copies via email in Microsoft Word format, send a request from a departmental email address to POV@acgov.org.

Night Service

Officers are ordinarily prohibited from executing warrants between the hours of 10 P.M. and 7 A.M. That is because late night entries are "particularly intrusive,"[1] especially since officers may need to make a forcible entry if, as is often the case, the occupants are asleep and are thus unable to promptly respond to the officers' announcement. Still, the courts understand there are situations in which the added intrusiveness of night service is offset by other circumstances, usually the need to prevent the destruction of evidence or to protect the search team from violence by catching the occupants by surprise. For this reason, California law permits judges to authorize an entry at any hour of the day or night if there is "good cause."[2]

What is "good cause"? Good cause exists if there is reason to believe that (1) some or all of the evidence on the premises would be destroyed or removed before 7 A.M., (2) night service is necessary for the safety of the search team or others,[3] or (3) there is some other "factual basis for a prudent conclusion that the greater intrusiveness of a nighttime search is justified."[4] Like probable cause, good

[1] *Rogers* v. *Superior Court* (1973) 35 Cal.App.3d 716, 720.
[2] See Pen. Code § 1533; *People* v. *Kimble* (1988) 44 Cal.3d 480, 494 ["a magistrate may authorize nighttime service of a warrant in a particular case for 'good cause'"].
[3] See Pen. Code § 1533; *Tuttle* v. *Superior Court* (1981) 120 Cal.App.3d 320, 329-30 ["Safety of police officers is of extreme importance and is a factor which may be considered in determining cause for night service."]; *People* v. *Kimble* (1988) 44 Cal.3d 480, 495 ["in view of the nature of the homicides that were under investigation, the magistrate could reasonably conclude that there was an exceptionally compelling interest in permitting the police to expedite their investigation"].
[4] *People* v. *Kimble* (1988) 44 Cal.3d 480, 494.

cause must be based on facts contained in the affidavit, or at least reasonable inferences from the facts.[5] "[T]he test to be applied," said the Court of Appeal, "is whether the affidavit read as a whole in a common sense manner reasonably supports a finding that such service will best serve the interests of justice."[6]

Because specific facts are required, good cause to believe that evidence would be destroyed or removed cannot be based on generalizations or unsupported allegations. For example, the courts have rejected arguments that good cause existed merely because the affiant said "the property sought will be disposed of or become nonexistent through sale or transfer to other persons,"[7] or because "drug distributors often utilize the cover of darkness to conceal their transportation and handling of contraband,"[8] or because the warrant authorized a search for evidence (such as drugs) that can be quickly sold or consumed.[9] Accordingly, the court in *People* v. *Mardian* ruled that "an affiant's averment that in his experience (generally) particular types of contraband are easily disposed of does not, in itself, constitute a sufficient showing for the necessity of a nighttime search."[10]

The question, then, is what types of circumstances will suffice? In the case of evidence destruction, the following have been deemed sufficient:

- The suspects were selling drugs or stolen property from the residence at night.[11]
- The suspect had become aware that he was about to be arrested or that a search of his home was imminent, and it was therefore reasonably likely that he would immediately try to move or destroy the evidence.[12]
- The suspect was planning to vacate the premises early the next morning.[13]
- Stolen food, liquor, and cigarettes were consumed at a party in the residence the night before the warrant was executed.[14]
- The suspect had been released on bail in the early evening, the evidence in his house was "small in size and easily disposed of," and the only way to keep him from destroying it would have been to assign "police resources in an all night vigil."[15]
- The warrant authorized a search for valuable stolen property which the suspects had the ability and motive to quickly sell or abandon.[16]

As for officer safety, good cause must also be based on facts, not unsupported assertions. As the Court of Appeal explained, "[A]llegations in an affidavit with respect to safety of officers must inform the magistrate of specific facts showing why

[5] See *People* v. *Watson* (1977) 75 Cal.App.3d 592, 598 ["the affidavit furnished the magistrate must set forth specific facts which show a necessity for [night] service"].

[6] *People* v. *Flores* (1979) 100 Cal.App.3d 221, 234. ALSO SEE *People* v. *McCarter* (1981) 117 Cal.App.3d 894, 906-907.

[7] *People* v. *Lopez* (1985) 173 Cal.App.3d 125, 136. ALSO SEE *In re Donald R.* (1978) 85 Cal.App.3d 23, 25-26 [generalized statement that the stolen property being sought was "primarily perishable items and easily disposed of"].

[8] *Tuttle* v. *Superior Court* (1981) 120 Cal.App.3d 320, 328.

[9] See *People* v. *Watson* (1977) 75 Cal.App.3d 592, 597 [night service "cannot be based solely on the nature of the contraband to be seized or the type of crime involved"]; *People* v. *Flores* (1979) 100 Cal.App.3d 221, 234 ["mere assertion of suspected unlawful drug activities in the place to be searched is insufficient to justify night service"].

[10] (1975) 47 Cal.App.3d 16, 34.

[11] See *People* v. *Watson* (1977) 75 Cal.App.3d 592, 598; *Nunes* v. *Superior Court* (1980) 100 Cal.App.3d 915, 938; *People* v. *Grant* (1969) 1 Cal.App.3d 563, 567-68; *People* v. *Govea* (1965) 235 Cal.App.2d 285, 299.

[12] See *People* v. *Siripongs* (1988) 45 Cal.3d 548, 569-70 [following his arrest, the arrestee made a phone call from jail (speaking in Thai) to the residence in which stolen property was stored]; *People* v. *Cletcher* (1982) 132 Cal.App.3d 878, 883 [there was reason to believe the suspect was aware that artwork he had stolen had just been observed in his home by the victim]; *People* v. *Flores* (1979) 100 Cal.App.3d 221, 234 [warrant to search suspect's motel room was issued after the suspect was arrested in the lobby at 8:30 P.M.]; *Galena* v. *Municipal Court* (1965) 237 Cal.App.2d 581, 592 ["It is common knowledge that those in the possession of contraband or stolen goods make every effort to effectuate its immediate disposition when they learn that persons connected with it have been apprehended by the authorities."].

[13] See *People* v. *Mardian* (1975) 47 Cal.App.3d 16, 35 [the occupants were planning to leave the residence at 6 A.M.].

[14] See *In re Donald R.* (1978) 85 Cal.App.3d 23, 26.

[15] See *People* v. *Lowery* (1983) 145 Cal.App.3d 902, 909-10 ["This is not a question of convenience to the police, but acknowledges the interest of the entire community in efficient use of police personnel."]; *People* v. *Flores* (1979) 100 Cal.App.3d 221, 234.

[16] See *People* v. *Kimble* (1988) 44 Cal.3d 480, 494-95; *People* v. *Lopez* (1985) 173 Cal.App.3d 125, 138 ["The affidavit disclosed that four persons committed the robbery, all of whom, it appeared, had continuing access to the property."].

nighttime service would lessen a possibility of violent confrontation, e.g., that the particular defendant is prepared to use deadly force against officers executing the warrant."[17] Thus, in *Rodriguez* v. *Superior Court* the court ruled that good cause was not shown based merely on a statement that "any time you got people dealing in drugs there's always a danger of being shot or hurt."[18]

One other thing about night service: If officers enter before 10 P.M. they do not need authorization to continue the search after 10 P.M.[19]

HOW TO OBTAIN AUTHORIZATION: There are essentially four things the affiant must do to obtain authorization for night service:

(1) STATE THE FACTS: The affiant must set forth the facts upon which "good cause" is based. Although the affidavit need not contain a separate section for this purpose, it is usually helpful to the judge; e.g., *For the following reasons, I hereby request authorization to execute this warrant at any hour of the day or night . . .*[20]

(2) NOTIFY JUDGE: When submitting the affidavit to the judge, the affiant should notify him or her that he is requesting night service authorization based on facts contained in the affidavit.

(3) JUDGE REVIEWS: As the judge reads the affidavit looking for probable cause, he or she will also look for facts that tend to establish good cause for night service.

(4) AUTHORIZATION GIVEN: If the judge finds that good cause exists, he or she will authorize night service on the face of the warrant,[21] usually by checking an authorization box or by inserting words such as the following: *Good cause having been demonstrated, this warrant may be executed at any hour of the day or night.*

No-Knock Warrants

[Violent knocks on the front door]

"Police with a search warrant! Open the door or we'll kick it in."

Blanca ran into the bathroom and emptied a glassine envelope containing cocaine into the swirling bowl.

"Is that everything?" he said.

"I think so," she said.

That was fiction. It was a scene from the novel *To Live and Die in L.A.* But similar scenes are played out every day in real life when officers knock, give notice, and wait for a "reasonable" amount of time before making a forcible entry. Because this delay provides the occupants with the time they need to destroy evidence or arm themselves, the knock-notice requirement has been a continuing source of friction between the courts and law enforcement. As the Court of Appeal observed:

> [A]lthough one purpose of the [knock-notice] requirement is to prevent startled occupants from using violence against unannounced intruders, the delay caused by the statute might give a forewarned occupant exactly the opportunity necessary to arm himself, causing injury to officers and bystanders. . . . Since one has no right to deny entry to the holder of a search warrant in any event, critics ask, what public policy requires that entry be delayed while police engage in meaningless formalities?[22]

While it is debatable whether the knock-notice requirements are "meaningless," we are concerned here with explaining how officers can, when necessary, obtain authorization to enter without giving notice.[23]

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[17] *Tuttle* v. *Superior Court* (1981) 120 Cal.App.3d 320, 329.
[18] (1988) 199 Cal.App.3d 1453, 1468.
[19] See *People* v. *Zepeda* (1980) 102 Cal.App.3d 1, 7 ["Once that execution began, it was unreasonable to require its cessation merely because the hour reached 10 P.M."]; *People* v. *Maita* (1984) 157 Cal.App.3d 309, 322.
[20] See *People* v. *Cletcher* (1982) 132 Cal.App.3d 878, 882 ["[Pen. Code § 1533] does not require a separate statement of good cause for nighttime service."].
[21] See Pen. Code § 1533 ["Upon a showing of good cause, the magistrate may, in his or her discretion, insert a direction in a search warrant that it may be served at any time of the day or night."].
[22] *People* v. *Gonzalez* (1989) 211 Cal.App.3d 1043, 1048.
[23] **NOTE**: While the United States Supreme Court ruled in 1995 that knock-notice is not an absolute requirement—that the Fourth Amendment requires only that officers enter in a reasonable manner *(Wilson* v. *Arkansas* (1995) 514 U.S. 927, 934)—an unannounced entry is such a serious and dangerous intrusion that knock-notice will ordinarily be required unless there were exigent circumstances. See *United States* v. *Banks* (2003) 540 U.S. 31, 43 ["Absent exigency, the police must knock and receive an actual refusal or wait out the time necessary to infer one."].

A judge who issues a search warrant may authorize a no-knock entry if there was "sufficient cause"[24] or "reasonable grounds". As the United States Supreme Court explained:

> When a warrant applicant gives reasonable grounds to expect futility or to suspect that one or another such exigency already exists or will arise instantly upon knocking, a magistrate judge is acting within the Constitution to authorize a "no-knock" entry.[25]

WHAT ARE "REASONABLE GROUNDS"? Reasonable grounds for a no-knock warrant exist if the affidavit establishes reasonable suspicion to believe that giving notice would (1) be used by the occupants to arm themselves or otherwise engage in violent resistance, (2) be used by the occupants to destroy evidence, or (3) be futile.[26]

Like good cause for night service, grounds for no-knock authorization must be based on facts, not unsupported conclusions or vague generalizations. Thus, in *Richards* v. *Wisconsin*[27] the United States Supreme Court ruled that an affidavit for a warrant to search a drug house was insufficient because it was based solely on the generalization that drugs can be easily destroyed. In contrast, the following circumstances have been deemed adequate:

- The suspect had a history of attempting to destroy evidence, including a "penchant for flushing toilets even when nature did not call."[28]
- The suspect told an informant that, if he knew the police "were around," he would destroy the drugs he was selling and that "he would not get caught again with the evidence."[29]
- The premises, which contained a "large amount" of crack, were protected by a steel door.[30]
- The house was a "virtual fortress."[31]
- The house "was equipped with security cameras and flood lights.[32]
- The suspect displayed a firearm during previous drug sales and had "exhibited abnormal and unpredictable behavior—specifically, answering the door wearing only a pair of socks—while wielding a chambered semi-automatic pistol in a threatening manner."[33]
- The suspect's rap sheet showed "assaultive" behavior in the past, possession of guns, and a prior altercation with an officer.[34]

PROCEDURE FOR OBTAINING AUTHORIZATION: The usual procedure for obtaining a no-knock warrant is as follows:

(1) SET FORTH THE FACTS: The affidavit must include the facts upon which the request is made. Although it need not contain a separate section for this purpose, it will be helpful to the judge; e.g., *I hereby request authorization for a no-knock entry for the following reasons . . .*

(2) NOTIFY JUDGE: When submitting the affidavit to the judge, the affiant should notify him or her that he is requesting no-knock authorization.

(3) JUDGE REVIEWS: As the judge reads the affidavit looking for probable cause, he or she will also look for facts establishing grounds for a no-knock entry.

(4) AUTHORIZATION GIVEN: If the judge determines that grounds for a no-knock warrant exist, he or she will authorize a no-knock entry on the face of the warrant; e.g., *Good cause having been demonstrated in the affidavit herein, the officers who execute this warrant are authorized to make a forcible entry without giving notice unless* a change in circumstances negates the need for non-compliance.

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[24] *Richards* v. *Wisconsin* (1997) 520 U.S. 385, 399, fn.7. **NOTE**: If a no-knock entry is authorized, officers may, if reasonably necessary, make a forcible entry. *United States* v. *Ramirez* (1998) 523 U.S. 65, 71.
[25] *United States* v. *Banks* (2003) 540 U.S. 31, 36.
[26] See *Richards* v. *Wisconsin* (1997) 520 U.S. 385, 394; *United States* v. *Banks* (2003) 540 U.S. 31, 37, fn.3 ["The standard for a no-knock entry stated in *Richards* applies on reasonable suspicion of exigency or futility."].
[27] (1997) 520 U.S. 385.
[28] *People* v. *Alaniz* (1986) 182 Cal.App.3d 903, 906.
[29] *People* v. *Gonzales* (1971) 14 Cal.App.3d 881.
[30] *U.S.* v. *Stowe* (7th Cir. 1996) 100 F.3d 494, 499.
[31] *People* v. *Thompson* (1979) 89 Cal.App.3d 425.
[32] *U.S.* v. *Combs* (9th Cir. 2005) 394 F.3d 739, 745.
[33] *U.S.* v. *Bynum* (9th Cir. 2004) 362 F.3d 574, 581.
[34] *People* v. *Henderson* (1976) 58 Cal.App.3d 349, 356.

Two other things should be noted about no-knock warrants. First, although officers are not required to re-evaluate the circumstances before entering, they are not permitted to make a no-knock entry if, before entering, they become aware of circumstances that eliminated the need for it.[35] Second, if the judge refused to issue a no-knock warrant, officers may nevertheless make an unannounced entry if, upon arrival, they become aware of circumstances that constituted grounds to do so.[36]

Sealing Orders

Search warrants, including their supporting affidavits and any incorporated documents, become a public record when they are returned to the court or, if not executed, ten days after they were issued.[37] But because public disclosure may have serious adverse consequences, the affiant may apply for a sealing order which would require that all or part of the affidavit be kept confidential until further order of the court.[38]

GROUNDS FOR SEALING ORDERS: In most cases, sealing orders are issued for either of the following reasons:

(1) PROTECT INFORMANT'S IDENTITY: If the warrant is based wholly or in part on information from a confidential informant, the judge may seal the parts of the affidavit that would reveal or tend to reveal his identity.[39]

(2) PROTECT "OFFICIAL INFORMATION": An affidavit may be sealed if it tends to disclose "official information," which is defined as confidential information whose disclosure would not be in the public interest; e.g., information obtained in the course of an ongoing criminal investigation; information that would tend to reveal the identity of an undercover officer, a citizen informant, a confidential surveillance site, or the secret location of VIN numbers.[40]

PROCEDURE: To obtain a sealing order, the affiant must do the following:

(1) DETERMINE SCOPE OF ORDER: The first step is to determine whether it is necessary to request the sealing of only certain information, certain documents, or everything.[41]

(2) SEGREGATE CONFIDENTIAL INFORMATION: If the affiant is requesting that only part of the affidavit be sealed, he will present the judge with two affidavits for review: one containing information that may be disclosed; the other containing information that would be subject to the sealing order.[42] The latter affidavit should be clearly

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[35] See *U.S.* v. *Spry* (7th Cir. 1999) 190 F.3d 829, 833.

[36] See *United States* v. *Banks* (2003) 540 U.S. 31, 36-37 ["even when executing a warrant silent about [no-knock authorization], if circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in"]; *Richards* v. *Wisconsin* (1997) 520 U.S. 385, 395-96, fn.7 ["[A] magistrate's decision not to authorize no-knock entry should not be interpreted to remove the officers' authority to exercise independent judgment concerning the wisdom of a no-knock entry at the time the warrant is being executed."]. **NOTE RE MOTORIZED BATTERING RAMS**: The following are the requirements for utilizing a motorized battering ram to make entry: (1) the issuing judge must have authorized the procedure; *and* (2) when the ram was utilized, officers reasonably believed that evidence inside the premises was presently being destroyed, or there was an immediate threat of resistance from the occupants which posed a serious danger to officers. *Langford* v. *Superior Court* (1987) 43 Cal.3d 21, 29-32.

[37] See Pen. Code § 1534; *Oziel* v. *Superior Court* (1990) 223 Cal.App.3d 1284, 1295.

[38] **NOTE**: Although a court may later lift the sealing order, officers and prosecutors retain control over the sealed information because they have the option of incurring sanctions rather than releasing it. See *People* v. *Hobbs* (1994) 7 Cal.4th 948, 959.

[39] See Evid. Code § 1041; *People* v. *Hobbs* (1994) 7 Cal.4th 948, 962 ["[I]f disclosure of the contents of the informant's statement would *tend to disclose* the identity of the informer, the communication itself should come within the privilege."].

[40] See Evid. Code § 1040(a); *County of Orange* v. *Superior Court (Feilong Wu)* (2000) 79 Cal.App.4th 759, 764 ["Evidence gathered by police as part of an ongoing criminal investigation is by its nature confidential."]; *Torres* v. *Superior Court* (2000) 80 Cal.App.4th 867, 872-73 [a person's name may constitute official information; e.g., name of undercover officer]; *PSC Geothermal Services Co.* v. *Superior Court* (1994) 25 Cal.App.4th 1697, 1714 [the "official information" privilege covers "information obtained by a public employee and which, if disclosed, is against the public interest."]; *In re Sergio M.* (1993) 13 Cal.App.4th 809 [nondisclosure of surveillance site]; *In re David W.* (1976) 62 Cal.App.3d 840, 847-48 [confidentiality of secret VIN location].

[41] See *People* v. *Hobbs* (1994) 7 Cal.4th 948, 971 ["all or any part of a search warrant affidavit may be sealed if necessary to . . . protect the identity of a confidential informant"].

[42] See *People* v. *Hobbs* (1994) 7 Cal.4th 948, 962-63 ["the courts have sanctioned a procedure whereby those portions of a search warrant affidavit which, if disclosed to the defense, would effectively reveal the identity of an informant, are redacted, and the resulting 'edited' affidavit furnished to the defendant"].

identified by assigning it an exhibit number or letter, then writing that number or letter in a conspicuous place at the top of the document; e.g., Exhibit A.

(3) Request order: The affiant should state in the affidavit that he is seeking a sealing order; e.g., *For the following reasons, I am hereby requesting that Exhibit A be sealed pending further order of the court . . .*

(4) Proving confidentiality: The affiant must explain why the sealing is reasonably necessary. To prove that the sealed information would tend to disclose the identity of a confidential informant, the affiant should explain why the informant or his family would be in danger if his identity was revealed. To prove that sealed information is covered under the "official information" privilege, the affiant should set forth facts demonstrating that the information was "acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made."[43]

(5) Judge issues order: If the affiant's request is granted, the judge will sign the sealing order. Although the order may be included in the warrant, it is better to incorporate it into a separate document so that it is not disclosed to the people who are served with the warrant. A sealing order is available on our website.

(6) Where sealed documents must be kept: All sealed documents must be retained by the court, unless the judge determines that court security is inadequate.[44] In such cases, the documents may be retained by the affiant if he submits proof that the security precautions within his agency are sufficient, and that his agency has established procedures to ensure that the sealed affidavit is retained for ten years after final disposition of noncapital cases, and permanently in capital cases.[45]

Nondisclosure Orders

Officers will frequently utilize a search warrant to obtain the records of a customer of a financial institution, phone company, or provider of an email or internet service. If, as in most cases, they do not want the customer to learn about it, they may ask the issuing judge for a temporary nondisclosure order. Such an order may ordinarily be issued if the affiant demonstrates that disclosure would seriously jeopardize an ongoing investigation or endanger the life of any person.[46]

A nondisclosure order should appear on the warrant to help ensure that the people who are served with the warrant will be aware of it. The following is an example of such an order: *Pending further order of this court, the employees and agents of the entity served with the warrant] are hereby ordered not to disclose information to any person that would reveal, or tend to reveal, the contents of this warrant or the fact that it was issued.*

Out-of-Jurisdiction Warrants

It is not unusual for officers to develop probable cause to believe that evidence of the crime they are investigating is located in another county or state. If they need a warrant to obtain it, the question arises: Can the warrant be issued by a judge in the officers' county? Or must it be issued by a judge in the county or state in which the evidence is located? The rules pertaining to out-of-jurisdiction warrants are as follows.

Out-of-county warrants: A judge in California may issue a warrant to search a person, place, or thing located in any county in the state if the affidavit establishes probable cause to believe that the evidence listed in the warrant pertains to a crime that was committed in the county in which the judge sits. As the California Supreme Court explained, "[A] magistrate has jurisdiction to issue an out-of-county warrant when he has probable cause to believe that the evidence sought relates to a crime

[43] Evid. Code § 1040(a).
[44] See *People* v. *Galland* (2008) 45 Cal.4th 354, 368 [sealed search warrant affidavits "should ordinarily be part of the court record that is maintained at the court"].
[45] *People* v. *Galland* (2008) 45 Cal.4th 354, 359.
[46] See, for example, Gov. Code § 7475 [financial institutions]; 12 U.S.C. 3409 [financial records]; 18 U.S.C. 3123(b) [phone records].

committed within his county and thus pertains to a present or future prosecution in that county."[47]

For example, in *People* v. *Easley*[48] officers who were investigating a double murder in Modesto (Stanislaus County) obtained a warrant from a local judge to search for evidence of the crimes in Easley's homes and cars in Fresno County. In ruling that the judge had the authority to issue the warrant, the California Supreme Court said:

> [T]he search warrant sought evidence relating to two homicides committed in Stanislaus County. The magistrate had probable cause to believe that evidence relevant to those crimes might be found in defendant's residences and automobiles. He therefore had jurisdiction to issue a warrant for an out-of-county search for that evidence.

Not surprisingly, out-of-county search warrants are especially common in drug trafficking cases because sellers seldom restrict their operations to a single county. Thus, in such cases a warrant may be issued by a judge in any country in which some illegal act pertaining to the enterprise was committed. For example in *People* v. *Fleming*[49] an undercover Santa Barbara County sheriff's deputy bought cocaine from Bryn Martin in Santa Barbara. The deputy later learned that Martin's supplier was Scott Fleming, who lived in Los Angeles County. The deputy then obtained a warrant from a Santa Barbara judge to search Fleming's house, and the search netted drugs and sales paraphernalia.

Fleming, who was tried and convicted in Santa Barbara County, argued that the evidence should have been suppressed, claiming that the judge lacked the authority to issue the warrant. But the California Supreme Court disagreed, pointing out that because both sales were negotiated in Santa Barbara County, and because a person can be prosecuted in any county in which "some act of a continuing crime occurs," the judge "acted within his jurisdiction in issuing the warrant in question."

Two procedural matters. First, an out-of-county warrant must be directed to peace officers employed in the issuing judge's county.[50] For example, a warrant to conduct a search in Santa Clara County issued by a judge in Alameda County should be headed, *The People of the State of California to any peace officer in Alameda County.* Second, although the warrant may be executed by officers in the issuing judge's county, it is standard practice to notify and request assistance from officers in whose jurisdiction the search will occur.[51]

OUT-OF-STATE WARRANTS: California judges do not have the authority to issue warrants to search a person, place, or thing located in another state.[52] Consequently, officers who need an out-of-state warrant must either travel to the other state and apply for it themselves or, more commonly, request assistance from an officer in that state. Because the officers who are requesting assistance should complete as much of the paperwork as possible, they should ordinarily do the following:

(1) Write an affidavit establishing probable cause for the search and sign it under penalty of perjury. (As discussed below, this affidavit will become an attachment to the affidavit signed by the out-of-state officer.)

(2) Write an affidavit for the out-of-state officer's signature in which the out-of-state officer simply states that he is incorporating the California officer's affidavit, and that it was submitted to him by a California officer; e.g., *Attached hereto and incorporated by reference is the affidavit of [name of California officer] who is a law enforcement officer employed by the [name of California officer's agency] in the State of California. I declare under penalty of perjury that the foregoing is true.* (The reason the out-of-state officer must not sign the affidavit establishing probable cause is that will have no personal knowledge of the facts upon which probable cause was based.)

[47] *People* v. *Fleming* (1981) 29 Cal.3d 698, 707. ALSO SEE *People* v. *Galvan* (1992) 5 Cal.App.4th 866, 870; *People* v. *Redman*(1981) 125 Cal.App.3d 317; *People* v. *Dantzler* (1988) 206 Cal.App.3d 289, 293. **NOTE**: In identity theft cases, the warrant may also be issued by a judge in the county in which the victim lives. Pen. Code § 1524(j).

[48] (1983) 34 Cal.3d 858.

[49] (1981) 29 Cal.3d 698.

[50] See Pen. Code § 1528(a); *People* v. *Fleming* (1981) 29 Cal.3d 698, 703; *People* v. *Galvan* (1992) 5 Cal.App.4th 866, 870.

[51] See *People* v. *Fleming* (1981) 29 Cal.3d 698, 704, fn. 4.

[52] See *Calpin* v. *Page* (1873) 85 U.S. 366 ["The tribunals of one State . . . cannot extend their process into other States"].

(3) Attach the California officer's probable-cause affidavit to the out-of-state officer's unsigned affidavit.

(4) In a separate document, write the following:
   (a) Descriptions of the person, place, or thing to be searched.
   (b) Descriptions of the evidence to be seized.
   (c) A suggested court order pertaining to the disposition of seized evidence; e.g., *All evidence seized pursuant to this warrant shall be retained by [name of California officer] of the [name of California officer's agency] in California. Such evidence may thereafter be transferred to the possession of a court of competent jurisdiction in California if it is found to be admissible in a court proceeding.*

(5) Email, fax, or mail all of these documents to the out-of-state officer.

Upon receipt of these documents, the out-of-state officer should do the following:

(1) Prepare a search warrant in accordance with local rules and procedures using the descriptions provided by the California officer, and incorporating the order that all seized evidence be transferred to the California officer.

(2) Take the search warrant and affidavit (to which the California officer's affidavit has been attached) to a local judge.

(3) In the judge's presence, sign the affidavit in which he swears that the incorporated and attached affidavit was submitted to him by a California law enforcement officer.

If the judge issues the warrant, it will be executed by officers in whose jurisdiction the search will occur. Those officers will then give or send the evidence to the California authorities.

Special Master Procedure

A search for documents in the office of a lawyer, physician, or psychotherapist (hereinafter "professional") is touchy because these papers often contain information that is privileged under the law. Still, officers can obtain a warrant to search for them if the search is conducted in accordance with a protocol—known as the "special master procedure"—that was designed to ensure that privileged communications remain confidential.[53]

Before going further, it should be noted that the law in this area has changed. In the past, officers in California were required to implement this procedure only if the suspect was a client or patient of the professional; i.e., the professional was *not* the suspect. In 2001, however, the California Supreme Court essentially ruled that this procedure must be employed in all searches of patient or client files because, even if the professional was the suspect, he or his custodian of records is ethically obligated to assert the confidentiality privilege as to all files that officers intend to read.[54]

As we will now discuss, under the mandated procedure the files must be searched by an independent attorney, called a "special master," who is trained in determining what materials are privileged. Accordingly, officers will ordinarily utilize the following protocol:

(1) **AFFIANT REQUESTS SPECIAL MASTER**: The affiant will state in the affidavit that he believes the search will require the appointment of a special master; e.g., *It appears that the requested search will implicate the confidentially of privileged communications. Accordingly, pursuant to Penal Code section 1524(c) I request that a special master be appointed to conduct the search.*

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[53] See Pen. Code § 1524(c); *Fenwick & West* v. *Superior Court* (1996) 43 Cal.App.4th 1272, 1279. ALSO SEE Evid. Code § 952 ["As used in this article, 'confidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship."]; Evid. Code § 992 [sets forth the physician-patient privilege, essentially the same as Evid. Code § 952].

[54] *People* v. *Superior Court (Laff)* (2001) 25 Cal.4th 703, 713 ["Even if the custodian is suspected of a crime, when privileged materials in the custodian's possession are seized pursuant to a search warrant, he or she still owes a duty to take appropriate steps to protect the interest of the privilege holders in not disclosing the materials to law enforcement authorities or others."]. ALSO SEE *People* v. *Superior Court (Bauman & Rose)* (1995) 37 Cal.App.4th 1757, 1766 ["the attorney is professionally obligated to claim [the privilege] on his client's behalf whenever the opportunity arises unless he has been instructed otherwise by the client"].

(2) **SPECIAL MASTER APPOINTED**: If the warrant is issued, the judge will appoint a special master whom the judge will select from a list of qualified attorneys compiled by the State Bar.

(3) **SPECIAL MASTER EXECUTES WARRANT**: Officers will accompany the special master to the place to be searched. When practical, the warrant must be executed during regular business hours. Upon arrival, the special master will provide the professional (or custodian of records) with a copy of the warrant so that the professional will know exactly what documents the special master is authorized to seize. The special master must then give the professional an opportunity to voluntarily furnish the described documents. If he fails or refuses, the special master—not the officers—will conduct the search while the officers stand by.

(4) **PRIVILEGED DOCUMENTS SEALED**: If the special master finds or is given documents that are described in the warrant, he will determine whether they are confidential. If not confidential, he may give them to the officers. But if they appear to be confidential, or if the professional claims they are, he must (a) seal them (e.g., put them in a sealed container); (b) contact the clerk for the issuing judge and obtain a date and time for a hearing to determine whether any sealed documents are privileged; and (c) notify the professional and the officers of the date, time, and location of the hearing.[55]

Note that if a hearing is scheduled, officers should immediately notify their district attorney's office or city attorney's office so that a prosecutor can, if necessary, attend and represent the officers and their interests.

Search Conducted By An Expert

While most searches are conducted by officers, there are situations in which it is impossible or extremely difficult for officers to do so because the evidence is such that it can best be identified by a person with certain expertise. When this happens the affiant may seek authorization to have an expert in such matters accompany the officers and conduct the search himself.[56] For example, in *People* v. *Superior Court (Moore)*[57] officers were investigating an attempted theft of trade secrets from Intel and, in the course of the investigation, they sought a warrant to search a suspect's business for several items that were highly technical in nature; e.g., "magnetic data base tape containing Intel Mask data or facsimile for product No. 2147 4K Ram." The affiant realized that "he could not identify the property due to its technical nature without expert assistance," so he requested such assistance in the affidavit. The request was granted.

As the Court of Appeal explained, when the warrant was executed "none of the officers present actually did any searching, since none of them knew what the items described in the warrant looked like. Rather, at the direction of the officer in charge, they stood and watched while the experts searched"; and when an expert found any of the listed evidence, he would notify the officers who would then seize it. The court summarily ruled that such a procedure was proper.

Note that if the search will be conducted by *officers*, they do not need authorization to have an expert or other civilian accompany them and watch. And if the civilian sees any seizable property, he will notify the officers who will take it; e.g., burglary victim identifies stolen property.[58]

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[55] See Pen. Code § 1524(i); *People* v. *Superior Court (Laff)* (2001) 25 Cal.4th 703, 720; *People* v. *Superior Court (Bauman and Rose)* (1995) 37 Cal.App.4th 1757, 1765 ["In essence, the special master procedure . . . requires (1) that a search of premises owned or controlled by a nonsuspect privilege holder must be overseen by a special master; (2) that any item as to which the privilege holder asserts the privilege, or gives some other reason precluding disclosure, must be sealed on the spot; and (3) that a hearing must be held within three days of the service of the warrant, or as expeditiously as otherwise possible, on the privilege holder's assertion of the privilege or any issues which may be raised pursuant to [Pen. Code] Section 1538.5."].

[56] **NOTE**: Such authorization is not required under the Fourth Amendment, and may also be unnecessary under California law. See Pen. Code § 1530; *U.S.* v. *Bach* (8th Cir. 2002) 310 F.3d 1063, 1066. It is, however, a good practice if officers know ahead of time that it will be necessary for an expert to conduct the search.

[57] (1980) 104 Cal.App.3d 1001.

[58] See *Wilson* v. *Layne* (1999) 526 U.S. 603, 611-12 ["the presence of third parties for the purpose of identifying the stolen property has long been approved by the Court"]; Pen. Code § 1530 [the search may be conducted by a civilian "in aid of the officer"].

Anticipatory Search Warrants

Most search warrants are issued because officers have probable cause to believe that evidence of a crime is presently located in the place to be searched. There is, however, another type of warrant—known as an "anticipatory" or "contingent" warrant—that is issued *before* the evidence has arrived there. Specifically, an anticipatory search warrant may be issued when officers have probable cause to believe that the evidence—although not currently on the premises—will be there when a "triggering event" occurs.[59] In other words, the occurrence of the triggering event demonstrates that the evidence has arrived and, thus, probable cause now exists. As the Fourth Circuit put it, the triggering event "becomes the final piece of evidence needed to establish probable cause."[60]

The courts permit anticipatory warrants because, as the court noted in *U.S.* v. *Hugoboom*, without them officers "would have to wait until the triggering event occurred; then, if time did not permit a warrant application, they would have to forego a legitimate search, or, more likely, simply conduct the search (justified by exigent circumstances) without any warrant at all."[61]

Although there are no restrictions on the types of evidence that may be sought by means of an anticipatory warrant, most are used in conjunction with controlled deliveries of drugs or other contraband.[62] As the First Circuit observed:

> Anticipatory search warrants are peculiar to property in transit. Such warrants provide a solution to a dilemma that has long vexed law enforcement agencies: whether, on the one hand, to allow the delivery of contraband to be completed before obtaining a search warrant, thus risking the destruction or disbursement of evidence in the ensuring interval, or, on the other hand, seizing the contraband on its arrival without a warrant, thus risking suppression.[63]

Procedure

The procedure for obtaining an anticipatory warrant is essentially the same as that for a conventional warrant, except that the affidavit must also contain the following:

(1) Description of triggering event: The affidavit must contain an "explicit, clear, and narrowly drawn" description of the triggering event;[64] i.e., the description should be "both ascertainable and preordained" so as to "restrict the officers' discretion in detecting the occurrence of the event to almost ministerial proportions."[65]

(2) Triggering event will occur: The affidavit must establish probable cause to believe the triggering event will, in fact, occur; and that it will occur before the warrant expires.[66]

(3) Probable cause will exist: Finally, it must appear from the affidavit that the occurrence of the triggering event will give rise to probable cause to search the premises.[67]

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[59] See *People* v. *Sousa* (1993) 18 Cal.App.4th 549, 557 ["An anticipatory or contingent search warrant is one based on an adequate showing that all the requisites for a valid search will ripen at a specified future time or upon the occurrence of a specified event."].
[60] *U.S.* v. *Andrews* (4th Cir. 2009) 577 F.3d 231, 237.
[61] (10th Cir. 1997) 112 F.3d 1081, 1086. ALSO SEE *People* v. *Sousa* (1993) 18 Cal.App.4th 549, 557 [anticipatory warrants "recognize that the police often must act quickly, especially when dealing with the furtive and transitory activities of persons who traffic in narcotics"]; *U.S.* v. *Garcia* (2nd Cir. 1989) 882 F.2d 699, 703 [without anticipatory warrants, officers might be forced "to go to the scene without a warrant, and, if necessary, proceed under the constraints of the exigent circumstances exception"].
[62] See *People* v. *Sousa* (1993) 18 Cal.App.4th 549, 558 ["It is true that most anticipatory warrant cases involve controlled deliveries of packages containing contraband. None of them, however, holds that anticipatory warrants are improper in other contexts."].
[63] *U.S.* v. *Ricciardelli* (1st Cir. 1993) 998 F.2d 8, 10.
[64] See *U.S.* v. *Gendron* (1st Cir. 1994) 18 F.3d 955, 965; *U.S.* v. *Penney* (6th Cir. 2009) 576 F.3d 297, 310.
[65] *U.S.* v. *Ricciardelli* (1st Cir. 1993) 998 F.2d 8, 12. ALSO SEE *U.S.* v. *Brack* (7th Cir. 1999) 188 F.3d 748, 757.
[66] See *United States* v. *Grubbs* (2006) 547 U.S. 90, 96 [there must be "probable cause to believe the triggering condition *will occur*"]. **NOTE**: The triggering event must also occur before the warrant expires; i.e., within ten days after the warrant was issued. See Pen. Code § 1534(a); *Alvidres* v. *Superior Court* (1970) 12 Cal.App.3d 575, 581 ["This time period, of course, would be subject to the 10-day limitation which is set out in Penal Code section 1534."].
[67] See *United States* v. *Grubbs* (2006) 547 U.S. 90, 94 ["It must be true [that] *if* the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place"]; *U.S.* v. *Elst* (7th Cir. 2009) 579 F.3d 740, 744 [there must be "a fair probability that contraband or evidence of a crime will be found in the place to be searched if the triggering condition occurs"].

WHERE THE DESCRIPTION MUST APPEAR: Although the United States Supreme Court has ruled that the triggering event need not be described on the face of the warrant,[68] the warrant should at least indicate that the judge determined that it may be executed when the triggering event occurs, and not, as in conventional warrants, on any day before the warrant expires. Consequently, language such as the following should be added to the warrant: *Having determined that probable cause for this search will result when the triggering event described in the supporting affidavit occurs; and, furthermore, that there is probable cause to believe that this triggering event will occur; it is ordered that this warrant shall be executed without undue delay when the triggering event occurs.*

CONTROLLED DELIVERIES: As noted, most of the cases in which anticipatory warrants have been utilized involved controlled deliveries of drugs or other contraband, usually to the suspect's home. In these situations, the triggering event will commonly consist of a delivery of the evidence directly to the suspect's residence by the Postal Service, a delivery company such as UPS or FedEx, an undercover officer, or an informant under the supervision of officers.[69] Probable cause may also be found when there was strong circumstantial evidence that the contraband would be delivered to the premises; e.g., undercover officers had previously purchased drugs there,[70] or if intercepted contraband consisted of a quantity of drugs that was "too great an amount to be sent on a whim."[71]

THE "SURE AND IRREVERSIBLE COURSE" RULE: There is one other issue that must be addressed. Some courts have ruled that, when the triggering event is a controlled delivery, it is not sufficient that there is probable cause to believe the triggering event will occur; i.e., that there is a fair probability that the contraband will be taken to the place to be searched. Instead, it must appear that the contraband was on a "sure and irreversible course" to the location. The theoretical justification for this "requirement" is, according to the Seventh Circuit, "to prevent law enforcement authorities or third parties from delivering or causing to be delivered contraband to a residence to create probable cause to search the premises where it otherwise would not exist."[72]

Based on the complete absence of any proof (or even a suggestion) that anyone had actually engaged in such blatantly illegal conduct, it appears the court's concern was based on nothing more than its overwrought imagination. Moreover, the "sure course" requirement is plainly contrary to the Supreme Court's ruling that only probable cause is required; i.e., that grounds for an anticipatory warrant will exist if "it is now probable that contraband, evidence of a crime, or a fugitive will be on the described premises when the warrant is executed."[73] It is therefore likely that, because the "sure and irreversible course" requirement establishes a standard higher than probable cause, it is a nullity.[74]

Furthermore, there has never been a need for a "sure course" requirement because the cases in which it has been applied to invalidate a search

[68] *United States* v. *Grubbs* (2006) 547 U.S. 90, 98 ["[T]he Fourth Amendment does not require that the triggering condition for an anticipatory search warrant be set forth in the warrant itself"].

[69] See *United States* v. *Grubbs* (2006) 547 U.S. 90, 97 [delivery by USPS]; *U.S.* v. *Hugoboom* (10th Cir. 1997) 112 F.3d 1081, 1087 [delivery by undercover postal inspector]; *U.S.* v. *Ruddell* (9th Cir. 1995) 71 F.3d 331, 333 [delivery by undercover postal inspector]; *U.S.* v. *Vesikuru* (9th Cir. 2002) 314 F.3d 1116, 1122 [delivery by police agent posing as a commercial package carrier]; *U.S.* v. *Dennis* (7th Cir. 1997) 115 F.3d 524, 531 ["simply discovering the package in the mail stream and placing it back into the mail stream to effect a controlled delivery should satisfy the sure course requirement"]; *U.S.* v. *Leidner* (7th Cir. 1996) 99 F.3d 1423, 1429 ["the informant would personally deliver the marijuana to Leidner's residence, under the direction and supervision of the government"].

[70] See *U.S.* v. *Brack* (7th Cir. 1999) 188 F.3d 748, 757 ["Brack had been selling drugs out of Room 109"].

[71] See *U.S.* v. *Lawson* (6th Cir. 1993) 999 F.2d 985, 988 [six ounces of cocaine "was too large an amount to be sent on a whim"]; *U.S.* v. *Dennis* (7th Cir. 1997) 115 F.3d 524, 530 [16 ounces of cocaine].

[72] *U.S.* v. *Elst* (7th Cir. 2009) 579 F.3d 740, 745.

[73] *United States* v. *Grubbs* (2006) 547 U.S. 90, 96.

[74] **NOTE**: The "sure course" rule was announced in *U.S.* v. *Ricciardelli* (1st Cir. 1993) 998 F.2d 8. But just one year later, the court explained that, while its earlier opinion might be read as instituting a higher standard than probable cause, that was not the court's intention. Said the court, "But we know of no justification for a *stricter* standard in respect to specificity of time [when probable cause can be said to exist] than in respect to the other two (constitutionally referenced) search parameters. *Ricciardelli*, while stating that contraband must be on a 'sure and irreversible course' to the place to be searched, did not purport to set forth any *special* new rule requiring more specificity where time, rather than, say, place, is at issue." *U.S.* v. *Gendron* (1st Cir. 1994) 18 F.3d 955, 966.

could have been decided without it on grounds that the affidavit simply failed to establish probable cause to believe the evidence would be taken to the place to be searched. In fact, almost all cases in which the courts have invalidated searches based on a "sure course" transgression have involved controlled deliveries in which (1) the evidence was initially delivered to a location other than the suspect's home (e.g., a post office box), or was intercepted before it reached the suspect's home; (2) the affidavit failed to establish probable cause to believe it would be taken to the suspect's home; and (3) there was no independent probable cause linking the suspect's home to the criminal activity under investigation.[75] Thus, in these cases the affidavits would have failed irrespective of the "sure course" deficiency because they did not establish probable cause to believe the evidence would be taken to the place to be searched.

The case of *U.S.* v. *Rowland*[76] demonstrates the uselessness of the "sure course" concoction. In *Rowland*, postal inspectors intercepted child pornography that had been mailed to Rowland's post office box. So they obtained an anticipatory warrant that authorized a search of Rowland's home when the package was picked up and brought inside. The court ruled, however, that the warrant was invalid, not because of a "sure course" violation, but because the affidavit simply lacked facts that established a fair probability that the evidence would, in fact, be taken to Rowland's house. As the court pointed out, "The affidavit stated: 'It is anticipated that [Rowland], after picking up the tapes from the post office box, will go to his place of employment and after work to his residence.' The affidavit contained no information suggesting that Rowland had previously transported contraband from his private post office box to his home or that he had previously stored contraband at his home. Nor, did the affidavit provide any facts linking Rowland's residence to suspected illegal activity."

Warrants to Search Computers

Although computer searches are notoriously complex, the procedure for obtaining a warrant to search a computer is not much different than any other warrant. In fact, there are only three significant differences: (1) the manner of describing the hardware to be searched and the data to be seized (we covered those subjects in the Spring 2011 edition), (2) obtaining authorization for an off-site search, and (3) incorporating search protocols.

Is an off-site search necessary? As a practical matter, it will almost always be necessary to conduct a computer search off-site unless officers plan to conduct only a superficial examination; e.g., they will be trying to locate the listed information by conducting a simple word search or merely looking at the names of directories and files. As the federal courts have observed, because it is "no easy task to search a well-laden hard drive,"[77] the "practical realities of computer investigations preclude on-site searches."[78]

Is off-site authorization necessary? Although some courts have ruled that officers do not need express authorization to conduct the search off site,[79] the better practice is to seek it. This is especially so when, as is usually the case, officers know when they apply for the warrant that an off-site search may be necessary.

How to obtain authorization: To obtain authorization for an off-site search, the affiant must explain why it is necessary.[80] Here's an example:

[75] See, for example, *U.S.* v. *Hendricks* (9th Cir. 1984) 743 F.2d 653, 655; *U.S.* v. *Leidner* (7th Cir. 1996) 99 F.3d 1423, 1428; *U.S.* v. *Loy* (3d Cir. 1999) 191 F.3d 360, 365.
[76] (10th Cir. 1998) 145 F.3d 1194.
[77] *U.S.* v. *Upham* (1st Cir. 1999) 168 F.3d 532, 535. ALSO SEE *U.S.* v. *Brooks* (10th Cir. 2005) 427 F.3d 1246, 1251-52 ["Given the numerous ways information is stored on a computer, openly and surreptitiously, a search can be as much an art as a science."].
[78] *U.S.* v. *Stabile* (3d Cir. 2011) 633 F.3d 219, 234.
[79] See, for example, *U.S.* v. *Horn* (8th Cir. 1999) 187 F.3d 781, 788; *U.S.* v. *Lamb* (N.D.N.Y. 1996) 945 F.Supp. 441, 462.
[80] See *U.S.* v. *Banks* (9th Cir. 2009) 556 F.3d 967, 973 ["[T]he affidavit explained why it was necessary to seize the entire computer system"]; *U.S.* v. *Hill* (9th Cir. 2006) 459 F.3d 966, 976 ["We do not approve of issuing warrants authorizing blanket removal of all computer storage media for later examination when there is no affidavit giving a reasonable explanation . . . as to why a wholesale seizure is necessary."]; *U.S.* v. *Hay* (9th Cir. 2000) 231 F.3d 630, 637 [the affidavit "justified taking the entire system off site because of the time, expertise, and controlled environment required for a proper analysis"].

Request for Off-Site Search Authorization: For the following reasons, I request authorization to remove the listed computers and computer-related equipment from the premises and search them at a secure location:

(1) The amount of data that may be stored digitally is enormous, and I do not know the number or size of the hard drives and removable storage devices on the premises that will have to be searched pursuant to this warrant.

(2) The listed data may be located anywhere on the hard drives and removable storage devices, including hidden files, program files, and "deleted" files that have not been overwritten.

(3) The data may have been encrypted, it may be inaccessible without a password, and it may be protected by self-destruct programming, all of which will take time to detect and bypass.

(4) Because data stored on computers can be easily destroyed or altered, either intentionally or accidentally, the search must be conducted carefully and in a secure environment.

(5) To prevent alteration of data and to ensure the integrity of the search, we plan to make clones of all drives and devices, then search the clones; this, too, will take time and special equipment.

(6) A lengthy search at the scene may pose a severe hardship on all people who [live][work] there, as it would require the presence of law enforcement officers to secure the premises while the search is being conducted.

The affiant should then add some language to the proposed search warrant that would authorize an off-site search; e.g., *Good cause having been established in the affidavit filed herein, the officers who execute this warrant are authorized to remove the computers and computer-related equipment listed in this warrant and search them at a secure location.*

One other thing: If the warrant was executed within ten days after it was issued, officers do not need specific authorization to continue searching after the warrant expires.[81] Officers must, however, conduct the search diligently.

Utilizing protocols: If officers expect to find seizable files intermingled with non-seizable files, they may—but are not required to[82]—seek authorization to conduct the search pursuant to a protocol. Generally speaking, a protocol sets forth the manner in which the search must be conducted so as to minimize examinations and seizures of files that do not constitute evidence. For example, a protocol might require "an analysis of the file structure, next looking for suspicious file folders, then looking for files and types of files most likely to contain the objects of the search by doing keyword searches."[83]

Covert Search Warrants

Covert search warrants, commonly known as "sneak and peek" warrants, authorize officers to enter a home or business when no one is present, search for the listed evidence, then depart—taking nothing and, if all goes well, leaving no clue that they were there. Covert warrants are rarely necessary, but they may be useful if officers need to know whether evidence or some other items are on the premises, but the investigation is continuing and they do not want to alert the suspects that investigators are closing in. Covert warrants may also be helpful to identify the co-conspirators in a criminal enterprise before officers start making arrests.[84]

The "notice" requirement: The main objection to covert warrants is that the people whose homes and offices are searched are not immediately notified that a search has occurred. But the United States Supreme Court has described this objection as "frivolous," pointing out that instant notification is not a

[81] See *People* v. *Zepeda* (1980) 102 Cal.App.3d 1, 7 ["the warrant was actually served when the search began"]; *People* v. *Schroeder* (1979) 96 Cal.App.3d 730, 734 ["When the responding banks immediately indicated that it would take time for them to assemble the voluminous material called for in the warrants, the purpose of the [time limit] was met."]; *People* v. *Superior Court (Nasmeth)* (2007) 151 Cal.App.4th 85, 99.

[82] See *Dalia* v. *United States* (1979) 441 U.S. 238, 257 ["[T]he specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed."]; *U.S.* v. *Hill* (9th Cir. 2006) 459 F.3d 966, 978 ["[W]e look favorably upon the inclusion of a search protocol; but its absence is not fatal."]; *U.S.* v. *Cartier* (8th Cir. 2008) 543 F.3d 442, 447 ["the warrant need not include a search protocol to satisfy the particularity requirement"].

[83] *U.S.* v. *Burgess* (10th Cir. 2009) 576 F.3d 1078, 1094.

[84] See, for example, *U.S.* v. *Villegas* (2nd Cir. 1990) 899 F.2d 1324, 1330; *U.S.* v. *Pangburn* (2nd Cir. 1993) 983 F.2d 449.

constitutional requirement, as demonstrated by the delayed-notice provisions in the federal wiretap law.[85] Still, because notice must be given eventually, some federal courts have required that the occupants of the premise be given notice of the search within seven days of its execution, although extensions may be granted.[86] Note that the Ninth Circuit has ruled that a judge may authorize a delay of over seven days if the affiant makes a "strong showing of necessity."[87] While California courts have not yet ruled on the legality of this procedure, it seems to provide a reasonable solution to the notification concerns.

TO OBTAIN AUTHORIZATION: The following procedure, adapted by the federal courts, should suffice to obtain a covert entry warrant in California:

(1) DEMONSTRATE REASONABLE NECESSITY: In addition to establishing probable cause to search, the affidavit must demonstrate that a covert search is reasonably necessary.[88] Note that reasonable necessity does not exist merely because a covert search would facilitate the investigation or would otherwise be helpful to officers.[89]

(2) ADD SPECIAL INSTRUCTIONS: Instructions, such as the following, should be added to the warrant: *The evidence described in this warrant shall not be removed from the premises. An inventory of all evidence on the premises shall be prepared showing its location when discovered. Said evidence shall also be photographed or videotaped to show its location. Compliance with the receipt requirement of Penal Code § 1535 is excused until ____________ unless an extension is granted by this court. Within two days after this warrant is executed, the following shall be filed with this court: (a) the inventory, and (b) the original or copy of all photographs and/or videotapes.*

Steagald Search Warrants

A *Steagald* warrant is a search warrant that authorizes officers to enter a home, business office, or other structure for the purpose of locating and arresting a person who (1) is the subject of an outstanding arrest warrant, and (2) does not live on the premises. For example, officers would need a *Steagald* warrant to search for the arrestee in the home of a friend or relative.[90] In contrast, only an arrest warrant (a conventional warrant or a *Ramey* warrant) would be necessary to enter the arrestee's home to make the arrest.

The reason that officers need a *Steagald* warrant (or consent or exigent circumstances) to enter a third person's home is that, otherwise, the homes of virtually everyone who knows the arrestee would be subject to search at any time until the arrestee was taken into custody.

As we will now discuss, a judge may issue a *Steagald* warrant if the affidavit demonstrates both probable cause to arrest and search.

PROBABLE CAUSE TO ARREST: There are two ways to establish probable cause to arrest:

(1) WARRANT OUTSTANDING: If a conventional or *Ramey* arrest warrant is outstanding, the affiant can simply attach a copy to the affidavit and incorporate it by reference; e.g., *Attached hereto and incorporated by reference is a copy of the warrant for the arrest of [name of arrestee]. It is marked Exhibit A.*

(2) PROBABLE CAUSE: If an arrest warrant has not yet been issued, the affidavit for the *Steagald* warrant must establish probable cause to arrest, as well as probable cause to search. (In such cases, the *Steagald* warrant serves as both an arrest and search warrant.)

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[85] *Dalia* v. *United States* (1979) 441 U.S. 238, 247-48.
[86] See *U.S.* v. *Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456.
[87] *U.S.* v. *Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456.
[88] See *U.S.* v. *Villegas* (2nd Cir. 1990) 899 F.2d 1324, 1337 ["[T]he court should not allow the officers to dispense with advance or contemporaneous notice of the search unless they have made a showing of reasonable necessity for the delay."]. **NOTE**: Although the Ninth Circuit has indicated that a showing of necessity is not a requirement under the Fourth Amendment (*U.S.* v. *Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456 ["we do not hold that a showing of necessity is constitutionally required") it would seem that the overall reasonableness of the search may depend on whether the delayed notice was necessary. *Wilson* v. *Arkansas* (1995) 514 U.S. 927 982.
[89] See *U.S.* v. *Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456 [the record "merely demonstrates that the search and seizure would facilitate the investigation of Freitas, not that it was necessary"].
[90] See *Steagald* v. *United States* (1981) 451 U.S. 204.

PROBABLE CAUSE TO SEARCH: There are two ways to establish probable cause to search.

(1) ARRESTEE IS INSIDE: Establish probable cause to believe that the arrestee was inside the residence when the warrant was issued and would still be there when the warrant was executed.

(2) ANTICIPATORY SEARCH WARRANT: Establish a fair probability that the arrestee would be inside the residence when a "triggering event" occurs (e.g., when officers see the arrestee enter), and that there is probable cause to believe the triggering event will occur; e.g., the arrestee has been staying in the house for a few days.[91] The subject of anticipatory search warrants was covered earlier in this article.

Email Search Warrants

While most warrant applications are made by submitting hard copies of the affidavit and warrant to the issuing judge, California law has long permitted officers to seek warrants via telephone and fax. More recently, however, officers were given the added option of obtaining search warrants by email. And because the email procedure is so easy (and the others are so cumbersome), phone and fax warrants are now virtually obsolete.

Before setting forth the email procedure, it is necessary to define two terms that have been added to this area of the law:

Digital signature: The term "digital signature" means "an electronic identifier, created by computer, intended by the party using it to have the same force and effect as the use of a manual signature."[92]

Electronic signature: The term "electronic signature" means "an electronic sound, symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record."[93]

The following is the procedure established by California statute that officers must implement to obtain a warrant by email:

(1) **PREPARE AFFIDAVIT AND WARRANT**: Complete the affidavit and search warrant as an email message or in a word processing file that can be attached to an email message.

(2) **PHONE JUDGE**: Notify the on-call judge that an affidavit and search warrant have been prepared for immediate transmission by email.

(3) **OATH**: Before the documents are transmitted, the judge administers the oath to the affiant over the telephone.

(4) **AFFIANT SIGNS**: Having been sworn, the affiant signs the affidavit via digital or electronic signature.

(5) **AFFIANT TRANSMITS DOCUMENTS**: After confirming the judge's email address, the affiant sends the following by email: (a) the affidavit (including any attachments), and (b) the warrant.

(6) **CONFIRMATION**: The judge confirms that all documents were received and are legible. Missing or illegible documents must be re-transmitted. Affiant confirms that the digital or electronic signature on the affidavit is his.

(7) **JUDGE READS AFFIDAVIT**: The judge determines whether the facts contained in the affidavit and any attachments constitute probable cause.

(8) **JUDGE ISSUES WARRANT**: If the judge determines that probable cause to search exists, he or she will do the following: (a) sign the warrant digitally or electronically; (b) note the following on the warrant: (i) the date and time it was signed, and (ii) that the affiant's oath was administered over the telephone; and (c) email the signed warrant to the affiant.

(9) **AFFIANT ACKNOWLEDGES RECEIPT**: The affiant acknowledges that he received the warrant.

(10) **AFFIANT PRINTS HARD COPY**: The affiant prints a hard copy of the warrant.

(11) **DUPLICATE ORIGINAL CREATED**: The judge instructs the affiant over the telephone to write the words "duplicate original" on the hard copy.

(12) **PROCESS COMPLETE**: The duplicate original is a lawful search warrant.[94]

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[91] *See United States* v. *Grubbs* (2006) 547 U.S. 90, 96 [grounds for an anticipatory warrant will exist if "it is now probable that ... a fugitive will be on the described premises when the warrant is executed"].

[92] See Gov. Code § 16.5(d).

[93] See Civ. Code § 1633.2(h).

[94] See Pen. Code § 1526(b)(2).

Warrant Reissuance

A warrant is void if not executed within ten days after it was issued.[95] If the warrant becomes void, a judge cannot simply authorize an extension; instead, the affiant must apply for a new warrant, which includes submitting a new affidavit.[96] The required procedure is, however, relatively simple.

Specifically, if the information in the original affidavit is still accurate, the affiant can incorporate the original affidavit by reference into the new one—but he must explain why he believes the information is still correct;[97] e.g., *Affidavit for Reissuance of Search Warrant: On* [insert date of first warrant] *a warrant (hereinafter Warrant Number One) was issued by* [insert name of judge who issued it] *authorizing a search of* [insert place to be searched]. *A copy of the affidavit upon which Warrant Number One was based is attached hereto, incorporated by reference, and marked "Exhibit A". For the following reasons, Warrant Number One was not executed within 10 days of issuance:* [Explain reasons]. *I am not aware of any information contained in Exhibit A that is no longer accurate or current. Consequently, I believe that the evidence listed in Warrant Number One is still located at the place to be searched, and I am hereby applying for a second search warrant identical in all material respects to Warrant Number One. I declare under penalty of perjury that the foregoing is true and correct.*

If any information in the original affidavit is no longer accurate, it must be deleted. If there have been new developments or circumstances that may have undermined the existence of probable cause, the additional information must be included in the new affidavit.[98] If new developments have strengthened probable cause, officers should ordinarily include them in the new affidavit.

Other Special Procedures

RELEASING SEIZED EVIDENCE: When officers seize evidence pursuant to a search warrant, the evidence is technically in the custody and control of the judge who issued the warrant.[99] Consequently, the officers cannot transfer possession of the evidence to officers from another agency or any other person unless they have obtained a court order to do so. (We have posted such a court order on our website.) If, however, the property was seized by mistake, officers do not need court authorization to return it to the owner.[100]

INSPECTION OF DOCUMENTS BY OTHER AGENCY: If officers from another agency want to make copies of documents seized pursuant to a warrant, they should seek an "Order to Examine and Copy Documents Seized by Search Warrant."[101] (We have also posted a form for this purpose on our website.) This order should be supported by an affidavit establishing probable cause to believe the documents are evidence of a crime that the outside agency is investigating. The order should, if possible, be issued by the judge who issued the warrant.[102]

SUBPOENA DUCES TECUM: Officers have occasionally asked whether they can obtain evidence by means of a subpoena duces tecum instead of a search warrant. Although the subpoena procedure may be quicker, a subpoena duces tecum is not a practical alternative for the following reasons. First, unless the subpoena is issued in conjunction with a criminal investigation conducted by a grand jury,[103] it may be issued only if (1) the defendant had already been charged with the crime under investigation, and (2) the officers are seeking evidence pertaining to that crime. Second, a person who is served with a subpoena must deliver the documents to the court—not to officers.[104] POV

[95] See Pen. Code § 1534(a).
[96] See *Srgo* v. *United States* (1932) 287 U.S. 206, 211; *People* v. *Sanchez* (1972) 24 Cal.App.3d 664, 682 ["[T]here is no statutory authority for the revalidation and reissuance of a search warrant."].
[97] See *Srgo* v. *United States* (1932) 287 U.S. 206, 211.
[98] See *People* v. *Sanchez* (1972) 24 Cal.App.3d 664, 681-82.
[99] See Pen. Code § 1536; *People* v. *Superior Court (Laff)* (2001) 25 Cal.4th 703, 713.
[100] See *Andresen* v. *Maryland* (1976) 427 U.S. 463, 482, fn.11.
[101] See *Oziel* v. *Superior Court* (1990) 223 Cal.App.3d 1284, 1293, 1302.
[102] See Pen. Code § 1536.
[103] Pen. Code § 939.2; *M.B.* v. *Superior Court* (2002) 103 Cal.App.4th 1384, 1388.
[104] Pen. Code §§ 1326 *et seq.*; Evid. Code § 1560.