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### Yikes - They're Searching Your Client's Computer

By David Michael Bigeleisen

It's twenty after nine in the morning. Traffic was heavy and you are bit late getting into the office. You've taken off your coat, and your secretary has just brought you a fresh cup of coffee with milk, just as you like it. You're settling in for a full day of work.

The intercom buzzes. "It's Mr. Pauli, the president of Neutrinos, Inc." your secretary says. "He sounds really upset and he needs to talk to you right away."

"I just spoke to him last night, I said I'd be ready to review the new lease with him right after lunch; can't I have just a little bit of peace in this world?" you reply.

"It's not about the lease," your secretary replies, with just a bit of an edge in her voice. "There are eight special agents in his reception area. He says that they have a warrant to search his company's computer."

You pick up the line and tell Pauli, "I'll be right down."

This article will orient you on how to respond when the authorities attempting to search your client's desktop, laptop or mainframe computer, smartphone, or email information. The law is changing very rapidly in these areas.

On your way to Pauli's office you begin to think about the kinds of things that the government looks for when they search computer data. It could be a fraud, such as a mortgage broker helping people to make phony loan applications. It could be a Medicare provider or a defense contractor suspected of overbilling the government. It might be a tax-fraud case, or insider trading case or a criminal antitrust case. These are all white collar cases.

Unfortunately, people also use their computers to distribute lewd images. Some of these images are of children. The government wants to stop this, and it should. Child pornography is contraband.

I began my practice almost forty years ago. Businesses and individuals kept records on paper. The papers were stored in file cabinets. When the authorities undertook a search, they brought lots of bankers boxes and huge paper bags. They presented a warrant and hauled everything away in a big truck. The agents wore fedoras and grey suits. They had bulges under their arms. The lawyer had to go to a dingy warehouse in a rough neighborhood just to look at the files. If the client needed the files to run his business, he was usually out of luck.

Today's agents have spiked haircuts, but they still wear grey suits and have bulges under their arms. And now businesses keep almost all of their records in computerized form. It's the hard drive and the information on it that the government wants.

When you arrive at the scene of the search, ask to speak with the agent in charge. With some important exceptions, (which I will describe later) the authorities need a warrant to seize Mr. Pauli's computers. Ask to see the warrant.

Ask if you can observe the search, but don't try to interfere. From their point of view, the agents are just doing their jobs.

The agents may want to interview the company's employees. You can tell the employees that they can talk to the agents or not talk to the agents; that is their choice. You can tell them that they have a right to speak with a lawyer before they talk to the agents or while they talk to the agents.

Be careful. At this point you may complicate everyone's life, including your own, if you offer to represent the employees. And don't instruct the employees not to talk to the government agents. On a bad day, this can

be considered obstruction of justice.

The agents will pack up all of the mainframes, desktops, laptops, tablets, hard drives, and thumb drives. They are obligated to provide a receipt for these things.

Mr. Pauli is in shock. "We need our computers and our data to keep our business open. How are we going to fill our orders for neutrinos if we don't have our customer lists? And our hard drives have all of the information on the basic research that we are doing on neutrinos. What can the government want with that?"

"Aha", you say. "I have just read the case of *United States v. Comprehensive Drug Testing, Inc.* 579 F. 3d 989 (9th Circuit 2009)." The comprehensive drug testing case grew out of a baseball game. The government suspected that some of the players were using illegal drugs in order to enhance their performance. The government seized all of the hard drives of the drug testing company.

The hard drives contained some of the information that the government was interested in. But the hard drives also contained very private information about individuals who had nothing to do with the investigation. All of the information was mixed together on the hard drives.

The Ninth Circuit set forth a protocol for these situations.

First, the government's application for a warrant should spell out specifically which items the government is seeking and which are to be excluded. Second, the warrant itself must distinguish the items on the computer which the government is entitled to have and those which are to be excluded. And finally, a neutral person, such as a magistrate, is to go through the computer data and segregate the things that the government is entitled to from those which it is not.

The things that the government is not entitled to must be returned to the owner.

This helps Mr. Pauli.

"Do you think that the government is reading my email?" asks Pauli. "Well, I'm pretty sure the government knows that you and Fermi were at that Solvay conference in Brussels this past fall. Don't you and Fermi have a corner on the neutrino market?"

"We're pretty much it on neutrinos right now," replies Pauli. "Do you think they're going to accuse us of an antitrust violation?"

"Could be," you say, "were you and Fermi exchanging emails about the neutrino market before you went to Brussels?"

"Well sure," replies Pauli. "As you know, we have the market cornered for the time being. A couple of whippersnappers are trying to break-in."

"This is where the Stored Electronic Communications Act comes in," you reply.

The Stored Communications Act, 18 U.S. C.A. §§ 2701, et seq. divides email and other electronic communications into two categories. The first is data and the second is content.

Data consist of email addresses of the sender and the receiver, and the pertinent dates. Content is the message itself, such as "meet me at my office on Universitaetsstrasse in Zurich to discuss fixing prices on neutrinos."

The government needs to make a very shallow showing in order to obtain data alone. It must simply show that the information sought is relevant and material to an ongoing criminal investigation. Of course, if the data reflect correspondence with the modern day equivalent of Meyer Lansky or Bugsy Siegel, you know what will happen next.

In order to obtain content, the government will need a warrant, but most of the time the government either doesn't have to notify the customer, or it can get an order delaying disclosure.

The Stored Communications Act is very complex. To get started, see Kevin S. Bankston. ONLY THE DEPARTMENT OF JUSTICE KNOWS: THE SECRET LAW OF ELECTRONIC SURVEILLANCE. 41 University of San Francisco Law Review 589 (2007) and the sources he cites.

"You are a smart man," you say to Pauli, "have you been using your smart phone to send emails and texts to Mr. Fermi?"

"Of course," he says, "we're up on all of the modern technology. Mr. Von Neumann taught us that." "Well, you'd better be careful," you say, "there is a rapidly changing body of law regarding searches of cell phones incident to arrest."

In *People v. Diaz*, 51 C.4th 84 (2011), the California Supreme Court held that the contents of a cell phone were similar to the contents of a wallet and could be searched incident to a lawful arrest.

But in *United States v. Wurie*, 711 F.3d 1119 (1st Cir. 2013), the United States Court of Appeals for the First Circuit held that the policies underlying warrantless searches incident to arrest did not apply to cell phones. The reasoning was that the cell phones did not pose any danger to police officers; there was no danger that the evidence would disappear; and simply retaining the cell phone was sufficient inventory. The Wurie case held that the authorities would need to get a warrant in order to search a cell phone, just as they would have to do with a desktop computer. The Wurie case presents a nice summary of Fourth Amendment search and seizure law on this point.

This author believes that the *Wurie* case is a better reflection of the law than *Diaz*.

"If they search my computer, they will need my password to get the information they want," says Pauli. "I have put in a very complicated password; they'll never figure it out."

"I think they will," you reply, "they have some pretty smart computer people working for them."

"That's true," Pauli says. "I have that thing locked up tighter than a ..."

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"Not on your life," Pauli says, "I have that thing locked up tighter than Los Alamos."

"In that case, the Fifth Amendment protects you," you say. "The case in point in *United States v. John Doe* 670 F.3d 1335 (11th Circuit 2012).

In Doe's case, the government was pretty sure that Mr. Doe had child pornography on his computer. But they just couldn't break the password. They summoned Doe before the Grand Jury. Mr. Doe refused to testify, citing the Fifth Amendment. The Eleventh Circuit agreed, saying that Mr. Doe's testimony about his password was the final link in the chain to incriminate himself. He did not have to disclose the information. Interestingly, Mr. Doe represented himself in the proceedings.

Finally, you caution Mr. Pauli about his frequent travels between his Bay Area neutrino business and his office in Zurich. Of course he carries his notebook or tablet computer with him. When he re-enters the United States, the government will be interested in his computer. The limitations on the customs officials searching computers are much lower at the border than they are otherwise. "The government's interest in preventing entry of unwanted persons and effects is at its zenith at the border. *United States v. Flores-Montano*, 541 U.S. 145 (2004).

In *United States v. Cotterman* 709 F.3d 952 (9th Cir. 2013) the Ninth Circuit Court of Appeals analogized portable computers to personal diaries or portable offices containing the most intimate details of our lives: financial records, confidential business records, medical records, and private emails.

Mr. Cotterman had a history of convictions of having sex with children. When he re-entered the United States after vacationing in Mexico, the authorities searched his laptop. They found contraband, child pornography. The Ninth Circuit held that the right of the government to search computers at the border is not without limits, but that the government only needs reasonable suspicion to do so. It doesn't have to make a showing of probable cause or obtain a warrant. To Mr. Cotterman's dismay, the 9th Circuit found that the government had reasonable suspicion in his case.

The law concerning searches of computers is changing very rapidly. It may even be different between the time I have written this article and the time it goes to press. Stay tuned for further developments.

#### AUTHOR'S NOTE:

Wolfgang Pauli and Enrico Fermi were titans of nuclear physics. They were pioneers in the discovery of the neutrino, a very tiny elementary particle. The author has taken great liberty with the history of science to illustrate the points of this article. Neither Mr. Pauli, nor Mr. Fermi would have engaged in the shenanigans which are described.

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