AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Plan and Disclosure Statement: Formulation, presentation and confirmation; compliance with the plan confirmation order, related orders and rules; disbursement and case closing activities, except those related to the allowance and objections to allowance of claims.

Relief From Stay Proceedings: Matters relating to termination or continuation of automatic stay under § 362.

The following categories are generally more applicable to accountants and financial advisors, but may be used by all professionals as appropriate.

Accounting/Auditing: Activities related to maintaining and auditing books of account, preparation of financial statements and account analysis.

Business Analysis: Preparation and review of company business plan; development and review of strategies; preparation and review of cash flow forecasts and feasibility studies.

Corporate Finance: Review financial aspects of potential mergers, acquisitions and disposition of company or subsidiaries.

Data Analysis: Management information systems review, installation and analysis, construction, maintenance and reporting of significant case financial data, lease rejection, claims, etc.

Litigation Consulting: Providing consulting and expert witness services relating to various bankruptcy matters such as insolvency, feasibility, avoiding actions, forensic accounting, etc.

Reconstruction Accounting: Reconstructing books and records from past transactions and bringing accounting current.

Tax Issues: Analysis of tax issues and preparation of state and federal tax returns.

Valuation: Appraise or review appraisals of assets.

[61 FR 24890, May 17, 1996]

PART 59—GUIDELINES ON METHODS OF OBTAINING DOCUMENTARY MATERIALS HELD BY THIRD PARTIES

Sec.
59.1 Introduction.
59.2 Definitions.
59.3 Applicability.
59.4 Procedures.
59.5 Functions and authorities of the Deputy Assistant Attorneys General.
59.6 Sanctions.

AUTHORITY: Sec. 201, Pub. L. 96–440, 94 Stat. 1879 (42 U.S.C. 2000aa–11).

SOURCE: Order No. 942–81, 46 FR 22364, Apr. 17, 1981, unless otherwise noted.

§ 59.1 Introduction.

(a) A search for documentary materials necessarily involves intrusions into personal privacy. First, the privacy of a person's home or office may be breached. Second, the execution of such a search may require examination of private papers within the scope of the search warrant, but not themselves subject to seizure. In addition, where such a search involves intrusions into professional, confidential relationships, the privacy interests of other persons are also implicated.

(b) It is the responsibility of federal officers and employees to recognize the importance of these personal privacy interests, and to protect against unnecessary intrusions. Generally, when documentary materials are held by a disinterested third party, a subpoena, administrative summons, or governmental request will be an effective alternative to the use of a search warrant and will be considerably less intrusive. The purpose of the guidelines set forth in this part is to assure that federal officers and employees do not use search and seizure to obtain documentary materials in the possession of disinterested third parties unless reliance on alternative means would substantially jeopardize their availability (*e.g.,* by creating a risk of destruction, etc.) or usefulness (*e.g.,* by detrimentally delaying the investigation, destroying a chain of custody, etc.). Therefore, the guidelines in this part establish certain criteria and procedural requirements which must be met before a search warrant may be used to obtain documentary materials held by disinterested third parties. The guidelines in this part are not intended to inhibit the use of less intrusive means of obtaining documentary materials such as the use of a subpoena, summons, or formal or informal request.

§ 59.2 Definitions.

As used in this part—

(a) The term *attorney for the government* shall have the same meaning as is given that term in Rule 54(c) of the Federal Rules of Criminal Procedure;

(b) The term *disinterested third party* means a person or organization not reasonably believed to be—

(1) A suspect in the criminal offense to which the materials sought under these guidelines relate; or

(2) Related by blood or marriage to such a suspect;

(c) The term *documentary materials* means any materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, films or negatives, audio or video tapes, or materials upon which information is electronically or magnetically recorded, *but does not include* materials which constitute contraband, the fruits or instrumentalities of a crime, or things otherwise criminally possessed;

(d) The term *law enforcement officer* shall have the same meaning as the term ''federal law enforcement officer'' as defined in Rule 41(h) of the Federal Rules of Criminal Procedure; and

(e) The term *supervisory official of the Department of Justice* means the supervising attorney for the section, office, or branch within the Department of Justice which is responsible for the investigation or prosecution of the offense at issue, or any of his superiors.

§ 59.3 Applicability.

(a) The guidelines set forth in this part apply, pursuant to section 201 of the Privacy Protection Act of 1980 (Sec. 201, Pub. L. 96–440, 94 Stat. 1879, (42 U.S.C. 2000aa–11)), to the procedures used by any federal officer or employee, in connection with the investigation or prosecution of a criminal offense, to obtain documentary materials in the private possession of a disinterested third party.

(b) The guidelines set forth in this part do not apply to:

(1) Audits, examinations, or regulatory, compliance, or administrative inspections or searches pursuant to federal statute or the terms of a federal contract;

(2) The conduct of foreign intelligence or counterintelligence activities by a government authority pursuant to otherwise applicable law;

(3) The conduct, pursuant to otherwise applicable law, of searches and seizures at the borders of, or at international points of entry into, the United States in order to enforce the customs laws of the United States;

(4) Governmental access to documentary materials for which valid consent has been obtained; or

(5) Methods of obtaining documentary materials whose location is known but which have been abandoned or which cannot be obtained through subpoena or request because they are in the possession of a person whose identity is unknown and cannot with reasonable effort be ascertained.

(c) The use of search and seizure to obtain documentary materials which are believed to be possessed for the purpose of disseminating to the public a book, newspaper, broadcast, or other form of public communication is subject to title I of the Privacy Protection Act of 1980 (Sec. 101, *et seq.*, Pub. L. 96–440, 94 Stat. 1879 (42 U.S.C. 2000aa, *et seq.*)), which strictly prohibits the use of search and seizure to obtain such materials except under specified circumstances.

(d) These guidelines are not intended to supersede any other statutory, regulatory, or policy limitations on access to, or the use or disclosure of particular types of documentary materials, including, but not limited to, the provisions of the Right to Financial Privacy Act of 1978 (12 U.S.C. 3401, *et seq.*), the Drug Abuse Office and Treatment Act of 1972, as amended (21 U.S.C. 1101, *et seq.*), and the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, as amended (42 U.S.C. 4541, *et seq.*).

§ 59.4 Procedures.[1]

(a) *Provisions governing the use of search warrants generally.* (1) A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party unless it appears that the use of a subpoena, summons, request, or other less intrusive alternative means of obtaining the materials would substantially jeopardize the

[1] Notwithstanding the provisions of this section, any application for a warrant to search for evidence of a criminal tax offense under the jurisdiction of the Tax Division must be specifically approved in advance by the Tax Division pursuant to section 6–2.330 of the U.S. Attorneys' Manual.

availability or usefulness of the materials sought, and the application for the warrant has been authorized as provided in paragraph (a)(2) of this section.

(2) No federal officer or employee shall apply for a warrant to search for and seize documentary materials believed to be in the private possession of a disinterested third party unless the application for the warrant has been authorized by an attorney for the government. Provided, however, that in an emergency situation in which the immediacy of the need to seize the materials does not permit an opportunity to secure the authorization of an attorney for the government, the application may be authorized by a supervisory law enforcement officer in the applicant's department or agency, if the appropriate U.S. Attorney (or where the case is not being handled by a U.S. Attorney's Office, the appropriate supervisory official of the Department of Justice) is notified of the authorization and the basis for justifying such authorization under this part within 24 hours of the authorization.

(b) *Provisions governing the use of search warrants which may intrude upon professional, confidential relationships.* (1) A search warrant should not be used to obtain documentary materials believed to be in the private possession of a disinterested third party physician,[2] lawyer, or clergyman, under circumstances in which the materials sought, or other materials likely to be reviewed during the execution of the warrant, contain confidential information on patients, clients, or parishioners which was furnished or developed for the purposes of professional counseling or treatment, unless—

(i) It appears that the use of a subpoena, summons, request or other less intrusive alternative means of obtaining the materials would substantially jeopardize the availability or usefulness of the materials sought;

(ii) Access to the documentary materials appears to be of substantial importance to the investigation or prosecution for which they are sought; and

(iii) The application for the warrant has been approved as provided in paragraph (b)(2) of this section.

(2) No federal officer or employee shall apply for a warrant to search for and seize documentary materials believed to be in the private possession of a disinterested third party physician, lawyer, or clergyman under the circumstances described in paragraph (b)(1) of this section, unless, upon the recommendation of the U.S. Attorney (or where a case is not being handled by a U.S. Attorney's Office, upon the recommendation of the appropriate supervisory official of the Department of Justice), an appropriate Deputy Assistant Attorney General has authorized the application for the warrant. Provided, however, that in an emergency situation in which the immediacy of the need to seize the materials does not permit an opportunity to secure the authorization of a Deputy Assistant Attorney General, the application may be authorized by the U.S. Attorney (or where the case is not being handled by a U.S. Attorney's Office, by the appropriate supervisory official of the Department of Justice) if an appropriate Deputy Assistant Attorney General is notified of the authorization and the basis for justifying such authorization under this part within 72 hours of the authorization.

(3) Whenever possible, a request for authorization by an appropriate Deputy Assistant Attorney General of a search warrant application pursuant to paragraph (b)(2) of this section shall be made in writing and shall include:

(i) The application for the warrant; and

(ii) A brief description of the facts and circumstances advanced as the basis for recommending authorization of the application under this part.

If a request for authorization of the application is made orally or if, in an emergency situation, the application is authorized by the U.S. Attorney or a supervisory official of the Department of Justice as provided in paragraph (b)(2) of this section, a written record of the request including the materials

[2] Documentary materials created or compiled by a physician, but retained by the physician as a matter of practice at a hospital or clinic shall be deemed to be in the private possession of the physician, unless the clinic or hospital is a suspect in the offense.

specified in paragraphs (b)(3) (i) and (ii) of this section shall be transmitted to an appropriate Deputy Assistant Attorney General within 7 days. The Deputy Assistant Attorneys General shall keep a record of the disposition of all requests for authorizations of search warrant applications made under paragraph (b) of this section.

(4) A search warrant authorized under paragraph (b)(2) of this section shall be executed in such a manner as to minimize, to the greatest extent practicable, scrutiny of confidential materials.

(5) Although it is impossible to define the full range of additional doctor-like therapeutic relationships which involve the furnishing or development of private information, the U.S. Attorney (or where a case is not being handled by a U.S. Attorney's Office, the appropriate supervisory official of the Department of Justice) should determine whether a search for documentary materials held by other disinterested third party professionals involved in such relationships (*e.g.* psychologists or psychiatric social workers or nurses) would implicate the special privacy concerns which are addressed in paragraph (b) of this section. If the U.S. Attorney (or other supervisory official of the Department of Justice) determines that such a search would require review of extremely confidential information furnished or developed for the purposes of professional counseling or treatment, the provisions of this subsection should be applied. Otherwise, at a minimum, the requirements of paragraph (a) of this section must be met.

(c) *Considerations bearing on choice of methods.* In determining whether, as an alternative to the use of a search warrant, the use of a subpoena or other less intrusive means of obtaining documentary materials would substantially jeopardize the availability or usefulness of the materials sought, the following factors, among others, should be considered:

(1) Whether it appears that the use of a subpoena or other alternative which gives advance notice of the government's interest in obtaining the materials would be likely to result in the destruction, alteration, concealment, or transfer of the materials sought; considerations, among others, bearing on this issue may include:

(i) Whether a suspect has access to the materials sought;

(ii) Whether there is a close relationship of friendship, loyalty, or sympathy between the possessor of the materials and a suspect;

(iii) Whether the possessor of the materials is under the domination or control of a suspect;

(iv) Whether the possessor of the materials has an interest in preventing the disclosure of the materials to the government;

(v) Whether the possessor's willingness to comply with a subpoena or request by the government would be likely to subject him to intimidation or threats of reprisal;

(vi) Whether the possessor of the materials has previously acted to obstruct a criminal investigation or judicial proceeding or refused to comply with or acted in defiance of court orders; or

(vii) Whether the possessor has expressed an intent to destroy, conceal, alter, or transfer the materials;

(2) The immediacy of the government's need to obtain the materials; considerations, among others, bearing on this issue may include:

(i) Whether the immediate seizure of the materials is necessary to prevent injury to persons or property;

(ii) Whether the prompt seizure of the materials is necessary to preserve their evidentiary value;

(iii) Whether delay in obtaining the materials would significantly jeopardize an ongoing investigation or prosecution; or

(iv) Whether a legally enforceable form of process, other than a search warrant, is reasonably available as a means of obtaining the materials.

The fact that the disinterested third party possessing the materials may have grounds to challenge a subpoena or other legal process is not in itself a legitimate basis for the use of a search warrant.

§ 59.5 Functions and authorities of the Deputy Assistant Attorneys General.

The functions and authorities of the Deputy Assistant Attorneys General set out in this part may at any time be

exercised by an Assistant Attorney General, the Associate Attorney General, the Deputy Attorney General, or the Attorney General.

§59.6 Sanctions.

(a) Any federal officer or employee violating the guidelines set forth in this part shall be subject to appropriate disciplinary action by the agency or department by which he is employed.

(b) Pursuant to section 202 of the Privacy Protection Act of 1980 (sec. 202, Pub. L. 96–440, 94 Stat. 1879 (42 U.S.C. 2000aa–12)), an issue relating to the compliance, or the failure to comply, with the guidelines set forth in this part may not be litigated, and a court may not entertain such an issue as the basis for the suppression or exclusion of evidence.

PART 60—AUTHORIZATION OF FEDERAL LAW ENFORCEMENT OFFICERS TO REQUEST THE ISSUANCE OF A SEARCH WARRANT

Sec.
60.1 Purpose.
60.2 Authorized categories.
60.3 Agencies with authorized personnel.

AUTHORITY: Rule 41(h), Fed. R. Crim. P (18 U.S.C. appendix).

§60.1 Purpose.

This regulation authorizes certain categories of federal law enforcement officers to request the issuance of search warrants under Rule 41, Fed. R. Crim. P., and lists the agencies whose officers are so authorized. Rule 41(a) provides in part that a search warrant may be issued ''upon the request of a federal law enforcement officer,'' and defines that term in Rule 41(h) as ''any government agent, * * * who is engaged in the enforcement of the criminal laws and is within the category of officers authorized by the Attorney General to request the issuance of a search warrant.'' The publication of the categories and the listing of the agencies is intended to inform the courts of the personnel who are so authorized. It should be noted that only in the very rare and emergent case is the law enforcement officer permitted to seek a search warrant without the concurrence of the appropriate U.S. Attorney's office. Further, in all instances, military agents of the Department of Defense must obtain the concurrence of the appropriate U.S. Attorney's Office before seeking a search warrant.

[Order No. 826–79, 44 FR 21785, Apr. 12, 1979, as amended by Order No. 1026–83, 48 FR 37377, Aug. 18, 1983]

§60.2 Authorized categories.

The following categories of federal law enforcement officers are authorized to request the issuance of a search warrant:

(a) Any person authorized to execute search warrants by a statute of the United States.

(b) Any person who has been authorized to execute search warrants by the head of a department, bureau, or agency (or his delegate, if applicable) pursuant to any statute of the United States.

(c) Any peace officer or customs officer of the Virgin Islands, Guam, or the Canal Zone.

(d) Any officer of the Metropolitan Police Department, District of Columbia.

(e) Any person authorized to execute search warrants by the President of the United States.

(f) Any civilian agent of the Department of Defense not subject to military direction who is authorized by statute or other appropriate authority to enforce the criminal laws of the United States.

(g) Any civilian agent of the Department of Defense who is authorized to enforce the Uniform Code of Military Justice.

(h) Any military agent of the Department of Defense who is authorized to enforce the Uniform Code of Military Justice.

(i) Any special agent of the Office of Inspector General, Department of Transportation.

(j) Any special agent of the Investigations Division of the Office of Inspector General, Small Business Administration.

(k) Any special agent of the Office of Investigations and the Office of Labor Racketeering of the Office of Inspector General, Department of Labor.