

SPECIAL PROCEDURES

“Adapt yourself to changing circumstances.” Chinese proverb.

Criminal investigations seldom go according to plan. Today’s “fact” becomes tomorrow’s hunch-that-didn’t-pay-off. The “key suspect” is cleared, but another one just turned up. A “solid” tip turns out worthless, but a new one looks promising. And so it goes. There are, of course, exceptions. But as a general rule, a good criminal investigator must stay flexible and be ready to adapt to changing circumstances.

It’s the same with search warrants. They, too, must be adjustable to accommodate changing conditions. For example, it may suddenly become necessary to obtain or execute a warrant immediately, or to expedite entry into the premises, or to serve the warrant in another county or even another state. Officers may determine that the affidavit they were about to submit to a magistrate contains information that, if disclosed to the suspect or others, could cause major problems for officers or an informant.

Other twists include the need to search the office of an attorney or physician, search the customer records of phone companies and banks, obtain a warrant to search a place *before* the evidence has arrived, and obtain a warrant authorizing a covert search.

As we will now discuss, there are ways that search warrants can be modified to deal with all of these situations and more.

Night service

Search warrants must ordinarily be executed between 7 A.M. and 10 P.M. But sometimes the evidence won’t wait until 7—it’ll either be gone or destroyed by then. Or waiting until 7 A.M. may increase the risk of violence. In any event, if officers can convince the magistrate there is “good cause” for night service, the warrant may be served at any hour.¹

Technically speaking, “good cause” exists when, (1) there is reason to believe that some or all evidence would be destroyed or removed before 7 A.M.,² or (2) when night service is necessary for the safety of the search team or others.³ In reality, however, “good cause” exists whenever a magistrate determines, for whatever reason, a night search is reasonably necessary.⁴

¹ See Penal Code § 1533; *People v. McCarter* (1981) 117 Cal.App.3d 894, 907; *People v. Cletcher* (1982) 132 Cal.App.3d 878, 882. **NOTES: Entry before 10 P.M.:** If entry is made before 10 P.M., night service authorization is not required to stay and continue the search after 10 P.M. See *People v. Zepeda* (1980) 102 Cal.App.3d 1, 7; *People v. Maita* (1984) 157 Cal.App.3d 309, 322. **Good faith rule applies:** If night service is authorized but a court rules that good cause did not exist, the warrant may be upheld under the “good faith” rationale. See *People v. Swan* (1986) 187 Cal.App.3d 1010, 1017-9; *People v. Lopez* (1985) 173 Cal.App.3d 125, 138-42; *Rodriguez v. Superior Court* (1988) 199 Cal.App.3d 1453, 1467.

² See *People v. Kimble* (1988) 44 Cal.3d 480, 494; *People v. Watson* (1977) 75 Cal.App.3d 592, 597-8; *People v. Mardian* (1975) 47 Cal.App.3d 16, 34-5; *People v. Egan* (1983) 141 Cal.App.3d 798, 806; *Tuttle v. Superior Court* (1981) 120 Cal.App.3d 320, 328; *Nunes v. Superior Court* (1980) 100 Cal.App.3d 915, 938; *People v. Morrongiello* (1983) 145 Cal.App.3d 1, 13; *People v. Cletcher* (1982) 132 Cal.App.3d 878, 884; *People v. Siripongs* (1988) 45 Cal.3d 548, 569-70; *People v. Swan* (1986) 187 Cal.App.3d 1010, 1019; *In re Donald R.* (1978) 85 Cal.App.3d 23, 25-6; *People v. Lopez* (1985) 173 Cal.App.3d 125, 136.

³ See Penal Code § 1533; *People v. Kimble* (1988) 44 Cal.3d 480, 495; *People v. McCarter* (1981) 117 Cal.App.3d 894, 907; *People v. Lowery* (1983) 145 Cal.App.3d 902, 909-10; *People v. Flores* (1979) 100 Cal.App.3d 221, 234.

⁴ See *People v. Kimble* (1988) 44 Cal.3d 480, 494 [“It is difficult to anticipate all the numerous factors that may justify the authorization of a nighttime search.”].

In determining whether “good cause” exists, the magistrate will consider all relevant facts in the affidavit.⁵ Although affiants are not required to list all the “good cause” facts in a separate section,⁶ it’s often a good idea because it will greatly assist the magistrate in determining precisely what facts are being relied upon; e.g., *I hereby request authorization to execute this warrant at any hour of the day or night for the following reasons. . .*

The usual procedure for obtaining night service authorization is as follows: (1) Before the magistrate starts reading the affidavit, the affiant will notify him or her that night service authorization is being requested. Such notice should also appear on the affidavit. (2) As the magistrate reads the affidavit looking for probable cause, he or she will also note the facts establishing good cause for night service. (3) If the magistrate determines that good cause exists, he or she will authorize night service on the face of the warrant.⁷

No-knock warrants

Scene from “To Live and Die in L.A.”:
[Violent knocks on front door] “Police with a search warrant! Open the door!” 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.⁸

It’s common knowledge that compliance with the knock-notice requirements often results in the destruction of evidence and may actually increase the chances of violence as it gives the forewarned occupants an opportunity to arm themselves.⁹ One court even called knock-notice a “meaningless formality.”¹⁰ Still, the U.S. Supreme Court has refused to eliminate the requirement, ruling instead that compliance can be excused only if justified by the particular circumstances surrounding each entry.¹¹

The decision to enter without giving notice is sometimes made at the scene, based on circumstances that were not anticipated. Usually, however, officers will know ahead of time that a no-knock entry may be necessary and will prepare for it during pre-planning or briefing. In those situations, although officers are not *required* to obtain a judge’s authorization to make a no-knock entry, they may *want* to in some situations. For example, they may be unsure whether there are sufficient grounds for a no-knock entry.

The U.S. Supreme Court has authorized no-knock warrants when “sufficient cause to do so can be demonstrated ahead of time.”¹² Consequently, a magistrate may authorize a

⁵ See *People v. Mardian* (1975) 47 Cal.App.3d 16, 35; *In re Donald R.* (1978) 85 Cal.App.3d 23, 26.

⁶ See *People v. Mardian* (1975) 47 Cal.App.3d 16, 35; *In re Donald R.* (1978) 85 Cal.App.3d 23, 26.

⁷ See Penal Code § 1533.

⁸ Reprinted by arrangement with Arbor House Publishing Company. © 1989 by Gerald Petievich.

⁹ See *People v. Gonzalez* (1989) 211 Cal.App.3d 1043, 1048.

¹⁰ *People v. Gonzalez* (1989) 211 Cal.App.3d 1043, 1048.

¹¹ See *Wilson v. Arkansas* (1995) 514 US 927, 934 [whether and to what extent officers knocked and announced their presence before entering is an element of the Fourth Amendment’s “reasonableness” requirement].

¹² See *Richards v. Wisconsin* (1997) 520 US 385, 395-6, fn.7; *United States v. Ramirez* (1998) 523 U.S. 65 [no-knock entry does not require more than reasonable suspicion when property is damaged as result of the entry]. **NOTE:** Even if a magistrate refuses the request, a no-knock entry may be permissible if, upon arrival, the circumstances reasonably indicate a no-knock entry is necessary. See *Richards v. Wisconsin* (1997) 520 US 385, 395-6, fn.7. **NOTE:** In *Parsley v. Superior Court* (1973) 9 Cal.3d 934, 940 the court ruled that magistrates could not pre-authorize a no-knock entry, reasoning that the decision to make a no-knock entry must be based on circumstances existing at the time of entry—not earlier, when the officers were applying for the warrant. The court’s decision makes no sense, however, because pre-authorization can easily be contingent on the officers’ not being aware of a change of circumstances that would have negated

no-knock entry if the affidavit contains information establishing reasonable suspicion to believe that compliance with the knock-notice requirements would, (1) be dangerous or futile, or (2) result in the destruction of evidence or otherwise inhibit the effective investigation of the crime.¹³

The usual procedure for obtaining a no-knock warrant is as follows: (1) Before the magistrate starts reading the affidavit, the affiant will give notice that he is requesting a no-knock warrant. Such notice should also be given in the affidavit. (2) As the magistrate reads the affidavit for probable cause, he or she will also look for facts establishing reasonable suspicion for a no-knock entry. (3) If the magistrate determines that reasonable suspicion exists, he or she will authorize a no-knock entry on the face of the warrant.

Note that even if the magistrate authorizes a no-knock entry, officers may be required to knock and give notice if, at some point before entering, they become aware of facts that reasonably indicated a change in circumstances negating the need for a no-knock entry.¹⁴ Similarly, if the magistrate refuses to issue a no-knock warrant, officers may nevertheless make a no-knock entry if they reasonably believe it was justified by circumstances existing at the time of entry.¹⁵

Telephone, fax, and e-mail warrants

California allows magistrates to issue warrants by means of telephone, fax, and e-mail.¹⁶ Although used extensively in the past, telephonic warrants are now virtually obsolete because the procedure is much more cumbersome and time-consuming than that for fax and e-mail warrants.

There are essentially two reasons for seeking a warrant via telephone, fax or e-mail: speed and convenience. It's faster because the affiant doesn't have to travel to the court or the magistrate's home. It's convenient because changes to the warrant or affidavit required by the magistrate can be made on the affiant's word processor, instead of marking up the warrant and affidavit with additions, deletions, and corrections.

The step-by-step procedure for obtaining a warrant by phone, fax, and e-mail is spelled out in detail in *California Criminal Investigation*.

the need for a no-knock entry. Furthermore, having an impartial judicial officer carefully review the circumstances is much more protective of constitutional rights than leaving it up to the officers in the field. In any event, *Parsley* appears to have been abrogated by *Richards v. Wisconsin* (1997) 520 US 385, 395-6, fn.7 ["The practice of allowing Magistrates to issue no-knock warrants seems entirely reasonable when sufficient cause to do so can be demonstrated ahead of time."]. Also note that the reasoning the supports issuance of anticipatory warrants applies somewhat to no-knock warrants. See *People v. Sousa* (1993) 18 Cal.App.4th 549, 557-8 ["Because anticipatory warrants enable the police to reduce the time that is consumed in obtaining search warrants, their availability encourages police officers to obtain a warrant in advance rather than forcing them to go to the scene without a warrant and there make a decision at the risk of later being second-guessed by the judiciary."].

¹³ See *Wilson v. Arkansas* (1995) 514 US 927, 936; *Richards v. Wisconsin* (1997) 520 US 385, 391.

¹⁴ **NOTE:** In *U.S. v. Spry* (7th Cir. 1999) 190 F.3d 829, 833 the court ruled that officers who have obtained a no-knock warrant are not required, at the time they enter, to reevaluate the reasonableness of entering without knocking and announcing. Nevertheless, it seems likely that such an entry would be declared unlawful if officers were aware of reliable information that negated the need for a no-knock entry. See *Wilson v. Arkansas* (1995) 514 US 927; *United States v. Ramirez* (1998) 523 U.S. 65, 71 ["The general touchstone of reasonableness which governs Fourth Amendment analysis, governs the method of execution of the warrant."].

¹⁵ See *Richards v. Wisconsin* (1997) 520 US 385, 395-6, fn.7.

¹⁶ See Penal Code §1526(b)(2).

Out-of-jurisdiction warrants

Officers will sometimes develop probable cause to believe that evidence of the crime they are investigating is located in another county, or sometimes even another state. The question arises: Who can issue the warrant? A judge in the county or state in which the search will occur? Or a judge in the county or state in which the crime occurred? The answer is as follows:

OUT-OF-COUNTY WARRANTS: A California judge may issue a warrant to search for evidence located anywhere in the state if the evidence pertains to a crime committed in the judge's county.¹⁷ 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 committed within his county and thus pertains to a present or future prosecution in that county.¹⁸

For example, in *People v. Easley*¹⁹ officers in Modesto (Stanislaus County) who were investigating a double murder obtained a warrant from a local judge to search for evidence of the crimes in Easley's homes and cars located in Fresno County. In ruling the magistrate had the authority to issue the warrant, the California Supreme Court observed, "[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."

Two procedural matters. First, the warrant must be directed to peace officers employed by agencies in the issuing magistrate's county.²⁰ For example, a warrant to conduct a search in Ventura County issued by a magistrate in Alameda County should be headed, *The People of the State of California to any peace officer in Alameda County*.

Second, the officers to whom the warrant is directed may execute it even though the search occurs outside their county. This is because California peace officers have statewide authority when they are investigating crimes that occurred in their counties.²¹ For example, in *People v. Fleming*²² an undercover Santa Barbara County sheriff's deputy bought cocaine from Martin in Santa Barbara. Deputies later determined that Martin's supplier was Fleming who lived in Los Angeles County. So the deputies went to a Santa Barbara County judge, obtained a warrant to search Fleming's house, and executed the warrant themselves. In ruling the deputies had authority to execute the warrant in Los Angeles County, the California Supreme Court noted that because the drug sales occurred in Santa Barbara County, "the Santa Barbara officers had statewide authority regarding defendant's participation in the [cocaine sales]."

OUT-OF-STATE WARRANTS: California judges do not have jurisdiction to issue warrants to conduct a search in another state.²³ Consequently, a warrant to conduct an out-of-state search must be signed by a magistrate in the state in which the search will

¹⁷ See *People v. Fleming* (1981) 29 Cal.3d 698, 707; *People v. Easley* (1983) 34 Cal.3d 858, 869-70; *People v. Dantzler* (1988) 206 Cal.App.3d 289, 292; *People v. Redman* (1981) 125 Cal.App.3d 317, 332-2; *People v. Ruiz* (1990) 217 Cal.App.3d 574; *People v. Galvan* (1992) 5 Cal.App.4th 866, 870; *People v. Emanuel* (1978) 87 Cal.App.3d 205, 211.

¹⁸ *People v. Fleming* (1981) 29 Cal.3d 698, 707.

¹⁹ (1983) 34 Cal.3d 858, 870.

²⁰ See Penal Code § 1528(a); *People v. Fleming* (1981) 29 Cal.3d 698, 703; *People v. Galvan* (1992) 5 Cal.App.4th 866, 870.

²¹ See Penal Code § 830.1; *People v. Fleming* (1981) 29 Cal.3d 698, 704, fn.4; *People v. Emanuel* (1978) 87 Cal.App.3d 205, 210-11; *People v. Galvan* (1992) 5 Cal.App.4th 866, 870-1.

²² (1981) 29 Cal.3d 698, 704, fn.4.

²³ See *Galpin v. Page* (1873) 18 Wall. 350, 367 [21 L Ed 959, 963].

occur. A detailed explanation of the procedure for obtaining out-of-state warrants is contained in *California Criminal Investigation* in the chapter entitled Search Warrant Special Procedures.

Steagald search warrants

If an arrest warrant for a suspect is outstanding, officers do not need a warrant to enter the suspect's house for the purpose of arresting him.²⁴ The arrest warrant, itself, is sufficient justification.

If, however, the suspect is inside the home of someone else, such as a friend or relative, a *search* warrant is required unless the entry is consensual or there are exigent circumstances. Such a warrant is known as a *Steagald* search warrant.²⁵ And language authorizing *Steagald* warrants has now been added to the California Penal Code.²⁶

To obtain a *Steagald* warrant, the supporting affidavit must establish two things:

(1) **Probable cause to arrest:** There is probable cause to arrest the suspect. As a practical matter, the same information used to obtain the arrest warrant will be used to meet this requirement. Thus, if a *Ramey* warrant has been issued,²⁷ the affidavit establishing probable cause for the arrest can be incorporated into the *Steagald* affidavit; e.g., "Attached hereto, and incorporated by reference, is the affidavit of . . ."

(2) **Probable cause to search:** There is probable cause to believe the suspect is *presently* located in the residence to be searched and will be there when the warrant is executed. This requirement tends to cause problems because, as the U.S. Supreme Court has pointed out, people are "inherently mobile."²⁸ For this reason, officers will often, instead of seeking a *Steagald* warrant, stake out the house and arrest the suspect when he arrives or leaves.

Covert search warrants

Covert search warrants, more commonly known as "sneak and peek" warrants, authorize officers to enter a home or office when no one is present, conduct a search for certain evidence, usually photograph or videotape it, then leave—taking nothing and, if all goes well, leaving no clue that an entry was made.²⁹ Covert warrants are typically used when officers need to know whether evidence or some other item is on the premises but, for one reason or another, they don't want the people who live or work there to know a search occurred. For example, a covert search may be necessary to determine the scope of a criminal enterprise before committing to a time-consuming and costly criminal investigation.

Although the California courts have not addressed the legality of covert warrants, the federal courts permit them.³⁰ And because their reasons for doing so are sound, it's likely

²⁴ See *People v. Ramey* (1976) 16 Cal.3d 263; *Payton v. New York* (1980) 445 US 573.

²⁵ See *Steagald v. United States* (1981) 451 US 204.

²⁶ Penal Code § 1524(a)(6).

²⁷ See Penal Code § 817.

²⁸ See *Steagald v. United States* (1981) 451 US 204, 221.

²⁹ See *Dalia v. United States*, (1979) 441 US 238, 241, fn2 [discussing covert entries for the purpose of installing surveillance equipment: "As used here, 'covert entry' refers to the physical entry by a law enforcement officer into private premises without the owner's permission or knowledge in order to install bugging equipment. Generally, such an entry will require a breaking and entering."]; *U.S. v. Freitas* (9th Cir. 1986) 800 F.2d 1451, 1455 [covert entry warrants essentially authorize a search for intangible property; i.e., "information"].

³⁰ See *Dalia v. United States*, (1979) 441 US 238, 247 [in the context of a warranted covert entry for the purpose of installing electronic surveillance equipment, the Court said, "[W]e find no basis for a constitutional rule proscribing all covert entries."]; *Dow Chemical Co. v. United States* (1986) 476 US 227, 238 [Court notes a warrant could be issued to conduct surveillance which

that California courts will follow suit,³¹ provided, of course, that the affidavit contains facts demonstrating that a covert search is reasonably necessary.

The main legal objection to covert warrants is that the people whose homes and offices are searched are not immediately notified that a search has occurred. The U.S. Supreme Court has described this objection as “frivolous,” pointing out that instant notification is not a constitutional requirement, as demonstrated by the delayed-notice provisions of the federal wiretap law.³² Thus, the federal courts permit delayed notice for

necessarily would dispense with the notice requirement, at least temporarily]; *United States v. New York Telephone Co.* (1977) 434 US 159, 164, 168; *U.S. v. Villegas* (2nd Cir. 1990) 899 F.2d 1324, 1334-7; *U.S. v. Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456.

³¹ **NOTE:** Decisions of the U.S. Court of Appeals interpreting federal law are not binding on California courts, but may be persuasive and entitled to great weight. See *People v. Williams* (1997) 16 Cal.4th 153, 190; *People v. Wallace* (1992) 9 Cal.App.4th 1515, 1519, fn.3; *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 971, fn.19; *Smith v. County of Los Angeles* (1994) 24 Cal.App.4th 990, 997, fn.2. **PROSECUTORS NOTE:** California’s notice rule, which begins with the words “When the officer takes property . . .” could be interpreted as expressly requiring notice “when” the warrant was executed. On the other hand, it might be interpreted as applying only “when” property is taken, not when property is not removed. This later interpretation seems more reasonable, especially in light of the U.S. Supreme Court’s decision in *West Covina v. Perkins* (1999) 525 US 234, 240 in which the Court noted that the “primary” purpose of the notice requirement is “to give notice that the property has been taken so the owner can pursue available remedies for its return.” In the case of a covert search warrant, however, no property is removed from the premises and there is, therefore, nothing to return. Furthermore, there seems to be a conflict over whether the notice requirement is constitutional. In the opinion of the Second Circuit, it’s a statutory requirement. See *U.S. v. Pangburn* (2nd Cir. 1993) 983 F.2d 449, 455. According to the Ninth Circuit, it’s constitutional, but that the giving of notice within seven days of execution of a covert search warrant satisfies the Fourth Amendment. See *U.S. v. Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456. This is an important issue in California because, although evidence may be suppressed in the federal courts as the result of the violation of a statute (See *U.S. v. Pangburn* (2nd Cir. 1993) 983 F.2d 449, 455; *U.S. v. Johns* (9th Cir. 1991) 948 F.2d 599, 603-4), evidence may be suppressed in California courts only if it was obtained as the result of a violation of the U.S. Constitution. See *People v. Hull* (1995) 34 Cal.App.4th 1448, 1455; *People v. Dyke* (1990) 224 Cal.App.3d 648, 657; *In re Lance W.* (1985) 37 Cal.3d 873. In any event, it seems apparent that a violation of California’s notice requirement (Penal Code § 1535) does not constitute a violation of the Fourth Amendment. See *People v. Guillebeau* (1980) 107 Cal.App.3d 531; *People v. Phillips* (1958) 163 Cal.App.2d 541 [disapproved on other grounds in *People v. Butler* (1966) 64 Cal.2d 842, 845; *People v. Cooks* (1983) 141 Cal.App.3d 224, 292, fn.57; *People v. Head* (1994) 30 Cal.App.4th 954, 958-60. Another thought: Because no property is removed from the premises, the purpose of notification would be limited to informing the suspect that the premises have been searched. Although not directly on point, under California law a magistrate who issues a warrant to search a bank or phone company for a suspect’s records may issue a nondisclosure order; i.e., the customer is not notified that officers have obtained copies of his records. Re phone records see 18 USC § 3123(d); Re bank records see Government Code § 7475. It would certainly seem to support the argument that the giving of notice that a search had occurred is not a constitutional requirement. **ALSO NOTE:**

Independent Source Rule: If a court determines that officers who executed a covert search warrant did not follow the required procedure and violated the Fourth Amendment, evidence obtained later in the same premises pursuant to a conventional search warrant will not be suppressed if the conventional warrant was independent of the covert search warrant. For details see the section entitled “Independent Source Rule” in Chapter 34 MOTIONS TO SUPPRESS EVIDENCE.

³² *Dalia v. United States* (1979) 441 US 238, 247-8. **ALSO SEE** *U.S. v. Villegas* (2nd Cir. 1990) 899 F.2d 1324, 1336; *U.S. v. Pangburn* (2nd Cir. 1993) 983 F.2d 449, 453. **NOTE:** Penal Code § 1535 and Rule 41(d), Federal Rules of Criminal Procedure require that officers leave a receipt for all property taken. Although it is true that officers who execute a covert warrant do not “take” anything, some courts have ruled that the officers are effectively “seizing” intangible property; i.e.,

seven days—even longer if officers can make “a strong showing of necessity”³³ or if extensions are authorized.³⁴

Anticipatory search warrants

“Anticipatory” search warrants are issued *before* the evidence has arrived at the place to be searched.³⁵ Why is this necessary? Usually because officers want to be able to conduct an immediate search when the evidence is taken inside.³⁶ This is often considered a better option than waiting for a warrant (and taking a chance the evidence may be moved or destroyed³⁷), or securing the premises pending issuance of the warrant.³⁸

visual images and information that the evidence exists, its location, and its condition. See *U.S. v. Freitas* (9th Cir. 1986) 800 F.2d 1451, 1455 [“Without a doubt there was a ‘search’ in this case. Its purpose, we hold, was ‘to seize’ intangible, not tangible, property. The intangible property to be ‘seized’ was information regarding the status of the suspected clandestine methamphetamine laboratory.”]; *U.S. v. Villegas* (2nd Cir. 1990) 899 F.2d 1324, 1334-5; *U.S. v. Pangburn* (2nd Cir. 1993) 983 F.2d 449, 454.

³³ See *U.S. v. Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456; *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:** A covert search is not justified merely because it would facilitate an investigation. See *U.S. v. Freitas* (9th Cir. 1986) 800 F.2d 1451, 1456 [“With respect to the necessity requirement . . . [the record] merely demonstrates that the search and seizure would facilitate the investigation of Freitas, not that it was necessary.”]. **NOTE:** 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. But because the overall reasonableness of the search would seem to depend on whether the delayed notice was necessary, a showing of necessity should be made in all cases. See *Wilson v. Arkansas* (1995) 514 US 927 982.

³⁴ See *U.S. v. Villegas* (2nd Cir. 1990) 899 F.2d 1324, 1337 [“For good cause, the issuing court may thereafter extend the period of delay. Such extensions should not be granted solely on the basis of the grounds presented for the first delay; rather, the applicant should be required to make a fresh showing of the need for further delay.”]; *U.S. v. Pangburn* (2nd Cir. 1993) 983 F.2d 449, 453-4. **NOTE:** The court’s ruling is consistent with the U.S. Supreme Court’s ruling that wiretap authorization should not be granted without a new showing of probable cause. *Berger v. New York* (1967) 388 US 41, 59-60.

³⁵ See *U.S. v. Becerra* (2nd Cir. 1996) 97 F.3d 669, 670 [“An anticipatory warrant is a warrant that is perfected upon the occurrence of a specified future event.”]. **NOTE:** In *U.S. v. Ricciardelli* (1st Cir. 1993) 998 F.2d 8, 11 the court aptly observed that anticipatory warrants are similar to wiretap orders that authorize a “search” for conversations which there is probable cause to believe will occur].

³⁶ *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 [“(W)e believe that the purposes of the fourth amendment are best served by permitting government agents to obtain warrants in advance if they can show probable cause to believe that the contraband will be located on the premises at the time the search takes place.”].

³⁷ See *U.S. v. Garcia* (2nd Cir. 1989) 882 F.2d 699, 703 [“(O)ne of the major practical difficulties that confronts law enforcement officials is the time required to obtain a warrant.”].

³⁸ See *People v. Sousa* (1993) 18 Cal.App.4th 549, 557-8 [“Because anticipatory warrants enable the police to reduce the time that is consumed in obtaining search warrants, their availability encourages police officers to obtain a warrant in advance rather than forcing them to go to the scene without a warrant and there make a decision at the risk of later being second-guessed by the judiciary.”]; *Alvidres v. Superior Court* (1970) 12 Cal.App.3d 575, 581; *U.S. v. Garcia* (2nd Cir.

Anticipatory warrants are most commonly used in connection with controlled deliveries of drugs and other contraband.³⁹ For example, officers may discover that a package being mailed or shipped to a certain address contains illegal drugs or weapons. If the package is sent on its way, officers would have probable cause to search the premises when it arrives and is taken inside.⁴⁰ Consequently, an anticipatory warrant would be an option.

At first glance, there might appear to be a serious legal problem. As the courts routinely point out, search warrants may be issued only when there is probable cause to believe that evidence of a crime is *now* located in the place to be searched. They have, however, made an exception to this rule when it is apparent that probable cause will exist when the warrant is executed.⁴¹

The procedure for obtaining anticipatory search warrants is essentially the same as that for conventional warrants except that the affidavit must demonstrate probable cause to believe the evidence will be on the premises when the warrant is executed. To accomplish this, the affidavit must contain the following:

(1) **TRIGGERING EVENT DESCRIBED:** The circumstance that will result in probable cause—known as the “triggering event”—must be described with “reasonable specificity” in the affidavit and in the warrant (usually in an attachment).⁴²

1989) 882 F.2d 699, 703 [courts approve of anticipatory warrants because the alternative is often making a warrantless entry based on exigent circumstances]; *U.S. v. Ricciardelli* (1st Cir. 1993) 998 F.2d 8, 10 [anticipatory warrants protect “privacy rights by requiring advance judicial approval of a planned search while simultaneously satisfying legitimate law enforcement needs.”].

³⁹ See *People v. Sousa* (1993) 18 Cal.App.4th 549, 557-8; *U.S. v. Becerra* (2nd Cir. 1996) 97 F.3d 669, 671 [(T)he fact that a package containing cocaine is sent to a particular address and it, or a substitute, is accepted at that address, establishes probable cause to search those premises.”]. ALSO SEE *Illinois v. Andreas* (1983) 463 US 765, 769 [“The lawful discovery by common carriers or customs officers of contraband in transit presents law enforcement with an opportunity to identify and prosecute the person or persons responsible for the movement of the contraband.”].

⁴⁰ See *U.S. v. Garcia* (2nd Cir. 1989) 882 F.2d 699, 704 [probable cause existed when the triggering event was the delivery to an occupant, not delivery to the suspect]; *U.S. v. Rowland* (10th Cir. 1998) 145 F.3d 1194, 1201 [“Probable cause for anticipatory warrants is contingent on the occurrence of certain expected or ‘triggering’ events, typically the future delivery, sale, or purchase of contraband.”]. ALSO SEE *U.S. v. Goff* (9th Cir. 1982) 681 F.2d 1238 [anticipatory warrant to search drug courier when he arrives at the airport].

⁴¹ See *U.S. v. Lowe* (6th Cir. 1978) 575 F.2d 1193 [“It is not unreasonable for a magistrate to believe that certain controllable events will occur in the near future, e.g., that the Post Office will deliver a package the next day, when responsible officials so advise him.”]; *U.S. v. Goff* (9th Cir. 1982) 681 F.2d 1238, 1240 [anticipatory warrant to search passenger in Seattle who was en route on commercial airplane from Miami]; *U.S. v. Bacerra* (2nd Cir. 1996) 97 F.3d 669, 671 [probable cause remained even after package was later removed from the premises]; *U.S. v. Skaff* (7th Cir. 1969) 418 F.2d 430. **NOTE:** Anticipatory warrants do not represent a significant departure from settled search warrant law. Both conventional and anticipatory warrants are based on a likelihood that the evidence will be present when the warrant is executed. With conventional warrants, there is almost always a chance that the evidence will be removed before the warrant is executed. See *U.S. v. Garcia* (2nd Cir. 1989) 882 F.2d 699, 702 [(E)ven a warrant based on a known presence of contraband at the premises rests also on the expectation that the contraband will remain there until the warrant is executed.”]. With anticipatory warrants, there is almost always a chance that the evidence won’t arrive at the place to be searched. Still, unless the chances of this happening negates probable cause, both types of warrants are lawful.

⁴² See *U.S. v. Gendron* (1st Cir. 1994) 18 F.3d 955, 966 [“Specificity does not lie in writing words that deny all unintended logical possibilities. Rather, it lies in a combination of language and context, which together permit the communication of clear, simple direction.”]; *People v. Sousa* (1993) 18 Cal.App.4th 549, 561; *U.S. v. Rowland* (10th Cir. 1998) 145 F.3d 1194, 1202 [the description should be “explicit, clear, and narrowly drawn so as to avoid misunderstanding or

(2) **TRIGGERING EVENT WILL OCCUR:** The affidavit must establish probable cause to believe the triggering event will occur.⁴³ As a practical matter, this means that officers must have the ability to make it happen, or that it will happen as a matter of course when they take certain action.

For example, in controlled-delivery cases where the triggering event is the delivery of a package containing contraband to the suspect's house, probable cause to believe this will occur usually exists when the contraband will be delivered by an undercover officer or by an informant who is being supervised by officers.⁴⁴ Probable cause will also exist when the package will be delivered as a matter of course after officers return it to the Post Office or shipping company for delivery.⁴⁵

manipulation by government agents.”]; *U.S. v. Garcia* (2nd Cir. 1989) 882 F.2d 699, 703-4; *U.S. v. Ricciardelli* (1st Cir. 1993) 998 F.2d 8, 12 [“The warrant should restrict the officers’ discretion in detecting the occurrence of the event to almost ministerial proportions, similar to a search party’s discretion in locating the place to be searched.”]; *U.S. v. Hotal* (9th Cir. 1998) 143 F.3d 1223, 1226 [“(T)he warrant itself must state the conditions precedent to its execution”]. **NOTE:** The event must occur, at a minimum, within ten days of the issuance of the warrant because warrants are void ten days after they are issued. See Penal Code § 1534(a); *Alvidres v. Superior Court* (1970) 12 Cal.App.3d 575, 581; *U.S. v. Ruddell* (9th Cir. 1995) 71 F.3d 331, 333.

⁴³ See *U.S. v. Loy* (3rd Cir. 1999) 191 F.3d 360, 365 [“(I)t is not enough that the anticipatory search warrant be conditioned on the contraband arriving at the designated place. While such conditions guarantee that there will be probable cause at the time the search is conducted, the warrant must also be supported by probable cause at the time it is issued.”]; *U.S. v. Gendron* (1st Cir. 1994) 18 F.3d 955, 965 [“There is nothing unreasonable about authorizing a search for tomorrow, not today, when reliable information indicates that, say, the marijuana will reach the house, not now, but then.”]; *U.S. v. Rowland* (10th Cir. 1998) 145 F.3d 1194, 1201 [“(B)efore issuing an anticipatory warrant the magistrate must determine, based on the information presented in the warrant application, that there is probable cause to believe the items to be seized will be at the designated place when the search is to take place.”]; *U.S. v. Garcia* (2nd Cir. 1989) 882 F.2d 699, 703 [“(A)ffidavits supporting the application for an anticipatory warrant must show, not only that the agent believes a delivery of contraband is going to occur, but also *how* he has obtained this belief, how reliable his sources are, and what part government agents will play in the delivery.”]; *People v. Sousa* (1993) 18 Cal.App.4th 549, 559-60 [court notes there was a “clear showing” that the triggering event would occur]. **NOTE:** In the case of controlled deliveries, some courts have ruled the triggering event must set the evidence on a “sure course” to the place to be searched. See, for example, *U.S. v. Hendricks* (9th Cir. 1984) 743 F.2d 653, 655; *U.S. v. Ricciardelli* (1st Cir. 1993) 998 F.2d 8, 12-3; *U.S. v. Ruddell* (9th Cir. 1995) 71 F.3d 331, 333. It is questionable whether the “sure course” test applies outside the context of controlled deliveries. See *U.S. v. Rowland* (10th Cir. 1998) 145 F.3d 1194, 1203, fn3; *U.S. v. Brack* (7th Cir. 1999) 188 F.3d 748, 757 [sure course test not applicable when the delivery would be made by the suspect]. **NOTE:** If the triggering event does not occur, the warrant is void. See *U.S. v. Rowland* (10th Cir. 1998) 145 F.3d 1194, 1201.

⁴⁴ See *U.S. v. Leidner* (7th Cir. 1996) 99 F.3d 1423, 1429; *U.S. v. Bieri* (8th Cir. 1994) 513 F.3d 811, 815.

⁴⁵ See *People v. Sloss* (1973) 34 Cal.App.3d 74, 82 [package was delivered by specially selected mail carrier who required a return receipt upon delivery]; *U.S. v. Rowland* (10th Cir. 1998) 145 F.3d 1194, 1202 [“(W)hen the warrant affidavit refers to a controlled delivery of contraband to the place designated for search, the nexus requirement of probable cause is satisfied. . . .” Citing *U.S. v. Hugoboom* (10th Cir. 1997) 112 F.3d 1081, 1086]; *U.S. v. Lowe* (6th Cir. 1978) 575 F.2d 1193; *U.S. v. Dennis* (7th Cir. 1997) 115 F.3d 524, 530 [“(A)ll types of government-controlled deliveries are more likely to reach their destinations than other types of deliveries and that, consequently, a magistrate may conduct a lesser inquiry into the sure course requirement when a request for an anticipatory warrant is based upon a government-controlled delivery.”].

If, however, the suspect will be picking up the package at, for example, a post office or shipping company, an anticipatory warrant to search his home or other place is permitted only if there is probable cause to believe he will be taking it there.⁴⁶

For example, in *U.S. v. Hendricks*⁴⁷ a package shipped by air from Brazil to Tucson was searched by DEA agents who found it contained seven pounds of cocaine. The package was addressed to Hendricks for pick up at the Tucson airport. The agents then learned that Hendricks lived in Tucson where he ran an import business. They were also aware that cocaine had been shipped to Hendricks' business office about six weeks earlier.

The agents then sought an anticipatory warrant to search Hendricks' home—the triggering event being Hendricks' act of picking up the package at the airport and taking it home.

Although probable cause to search the house would have existed when the package was taken inside, the Ninth Circuit ruled there was no reason to believe he would be taking it there. In fact, all indications were he would be taking it to his business—and nowhere else. Said the court:

[T]he business premises were the only place that was linked to past illegal activity, the residence not at all. . . . [T]he agents had no information giving rise to a belief that the package would ever go to Hendricks's home.⁴⁸

(3) **PROBABLE CAUSE TO SEARCH WILL EXIST:** Finally, there must be a fair probability that when the triggering event occurs, probable cause will exist to search the place listed in the warrant.⁴⁹ In other words, anticipatory warrants cannot be issued merely because the triggering event will result in probable cause to *arrest* the suspect or to search *some* location.⁵⁰ Instead, the event must result in probable cause to search the place described in the warrant.

⁴⁶ See *U.S. v. Rowland* (10th Cir. 1998) 145 F.3d 1194, 1203 [“When the delivery of contraband is not completely within the government’s control, or when the delivery is to be made to a place other than the premises designated for search, additional reliable information in the warrant application must indicate that the contraband will be at the designated premises at the time of the search.”].

⁴⁷ (9th Cir. 1984) 743 F.2d 653, 654-5. ALSO SEE *U.S. v. Rowland* (10th Cir. 1998) 145 F.3d 1194, 1201, 1204-5; *People v. Sousa* (1993) 18 Cal.App.4th 549, 559 [“The warrant issued in *Hendricks* was premature because it was based on mere speculation that evidence of a crime might be found at a given location at some future time.”].

⁴⁸ ALSO SEE *U.S. v. Loy* (3rd Cir. 1999) 191 F.3d 360, 366 [anticipatory warrant to search the suspect’s home invalid because the suspect had told an undercover officer that he does not keep his child pornography at his home].

⁴⁹ *U.S. v. Rowland* (10th Cir. 1998) 145 F.3d 1194, 1201 [“(T)he magistrate must also determine the likelihood that, after the triggering events have occurred, the contraband will be at the designated place when searched. As with all warrants, probable cause to support an anticipatory warrant does not exist unless a sufficient nexus between the contraband and the place to be searched exists.”]; *U.S. v. Dennis* (7th Cir. 1997) 115 F.3d 524, 528 [“(A)t the time a court issues an anticipatory warrant, probable cause exists to believe that contraband will be located at the premises to be searched after certain events transpire.”]. **NOTE:** To make sure that probable cause remains, the execution of anticipatory warrants should ordinarily be reasonably contemporaneous with the arrival of probable cause. *U.S. v. Gendron* (1st Cir. 1994) 18 F.3d 955, 966.

⁵⁰ See *U.S. v. Hendricks* (9th Cir. 1984) 743 F.2d 653, 655; *U.S. v. Ricciardelli* (1st Cir. 1993) 998 F.2d 8, 13 [anticipatory warrant to search suspect’s home invalid because the triggering event was the delivery of contraband to the suspect’s person, not his home].

For example, in controlled-delivery cases where the triggering event is the suspect's act of taking the package into his home, the event will necessarily result in probable cause to search the home because, at that point, contraband will be on the premises.⁵¹

Although anticipatory warrants are used mostly in controlled delivery cases, they may be used in other types of cases in which the occurrence of some event will automatically result in probable cause to search a certain place. For example, in *People v. Sousa*⁵² narcotics officers were tipped by an untested informant that Sousa was selling large quantities of marijuana out of his home. And, according to the informant, business was so good that Sousa was actively looking for additional suppliers.

Because uncorroborated information from an untested informant will not ordinarily support a warrant, the officers figured a way to obtain corroboration. Posing as a marijuana grower, an officer arranged to meet with Sousa for the ostensible purpose of selling him ten pounds of marijuana. When the meeting was set, officers obtained an anticipatory warrant to search Sousa's house, the contingency being Sousa's purchase of the marijuana. As explained in the affidavit, the officers theorized that Sousa's purchase of such a large amount of marijuana would corroborate the informant's tip that Sousa was selling marijuana out of his home, thereby establishing probable cause to search the house. This, according to the court, made sense. As the court noted:

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. Instead, they establish that a warrant may issue on a clear showing that the police's right to search . . . will exist within a reasonable time in the future.

Similarly, in *U.S. v. Dennis*,⁵³ Postal Inspectors intercepted a package containing cocaine addressed to Dennis's home. The inspectors learned that Dennis's home was actually a two-story duplex, but the address on the package did not specify whether delivery was to be made to the lower or upper unit. Consequently, the inspectors inserted language in an anticipatory warrant authorizing a search of the first floor apartment "if and only if an occupant of that apartment accepts delivery or opens the package" or the second floor apartment "if and only if an occupant of the second floor accepts delivery or opens the package." The court ruled the warrant was lawful.

Finally, a note about the scope of an anticipatory warrant. If the sole purpose of the search is to find the evidence that is brought to the premises (e.g., cocaine in a container), the warrant must be written rather narrowly, authorizing a search for just that evidence. If, however, the warrant also demonstrates probable cause to search the premises for additional evidence, such as indicia and sales paraphernalia (assuming there is probable cause to believe the recipient is selling⁵⁴), the warrant may authorize a much broader search.

⁵¹ See *People v. Superior Court (Marcil)* (1972) 27 Cal.App.3d 404, 410-11; *People v. Shapiro* (1974) 37 Cal.App.3d 1038, 1041-2; *U.S. v. Loy* (3rd Cir. 1999) 191 F.3d 360, 365 ["Where the warrant application indicates that there will be a controlled delivery of contraband to the place to be searched, the nexus requirement of probable cause is usually satisfied."]; *U.S. v. Bacerra* (2nd Cir. 1996) 97 F.3d 669, 671; *U.S. v. Ruddell* (9th Cir. 1995) 71 F.3d 331, 333; *U.S. v. Skaff* (7th Cir. 1969) 418 F.2d 430, 432 ["Before the police executed the warrant, they consulted with an officer who had been stationed outside petitioner's home for several hours, and had been informed by that officer that the parcel had been delivered."].

⁵² (1993) 18 Cal.App.4th 549. ALSO SEE *People v. Sanchez* (1972) 24 Cal.App.3d 664, 679 [anticipatory warrant when suspect said he expected a shipment of heroin to his home in three days].

⁵³ (7th Cir. 1997) 115 F.3d 524, 528-9.

⁵⁴ See *U.S. v. Garcia* (2nd Cir. 1989) 882 F.2d 699, 703.

Sealing orders

A search warrant affidavit ordinarily becomes public document when the warrant is executed and returned; or, if the warrant was not executed, ten days after it was issued.⁵⁵ In many cases, however, public disclosure would have adverse consequences, such as the murder of informants and the undermining of the investigation. For these reasons, the courts permit the sealing of some or even all documents pertaining to the warrant if the affidavit demonstrates that release of the information would result in either of the following:

- (1) DISCLOSE INFORMANT: Reveal or tend to reveal the identity of a confidential informant.⁵⁶
- (2) DISCLOSE OFFICIAL INFORMATION: Reveal or tend to reveal “official information,” which is defined as information obtained by officers “in confidence,” the disclosure of which would not be in the public interest.⁵⁷ Examples include the location of secret surveillance sites and the secret location of automobile VIN numbers.⁵⁸

Note that although a court may later lift the sealing order, officers and prosecutors always retain control over the sealed information because they have the option of incurring sanctions, including dismissal, rather than releasing it.⁵⁹

PROCEDURE: If the decision is made to seek a sealing order, the affiant must determine whether to request the sealing of only certain information, certain documents, or *all* documents. Although it might be tempting to request that all documents be sealed, the courts won’t do it unless there is no other reasonable option.

What options are available? One is to put all the confidential information in a separate document (e.g., “Exhibit 4”) and request that only this separate document be sealed.⁶⁰ Or, if the confidential information is contained in a certain sentence or paragraph, that sentence or paragraph could be put into a separate document which would could be sealed.⁶¹

Still, the whole affidavit may be sealed if virtually everything discloses or tends to disclose an informant’s identity or official information.⁶²

If the magistrate grants the request to seal all or part of the affidavit, he or she must determine where to store the sealed material. In most cases, the documents will be kept

⁵⁵ See Penal Code § 1534(a).

⁵⁶ See *People v. Hobbs* (1994) 7 Cal.4th 948, 963, 971; *People v. Sanchez* (1972) 24 Cal.App.3d 664, 674, 678; *Swanson v. Superior Court* (1989) 211 Cal.App.3d 332, 339; *People v. Greenstreet* (1990) 218 Cal.App.3d 1516.

⁵⁷ See *PSC Geothermal Services Co. v. Superior Court* (1994) 25 Cal.App.4th 1697, 1713-5; *In re Sergio M.* (1993) 13 Cal.App.4th 809; *People v. Walker* (1991) 230 Cal.App.3d 230; *In re David W.* (1976) 62 Cal.App.3d 840, 847-8; Evidence Code § 1040.

⁵⁸ See *In re Sergio M.* (1993) 13 Cal.App.4th 809, 813 [surveillance site disclosure]; *People v. Walker* (1991) 230 Cal.App.3d 230, 235; *People v. Tockgo* (1983) 145 Cal.App.3d 635, 641 [failure to prove that “coded tax stamp imprints” were “official information”]

⁵⁹ See *People v. Hobbs* (1994) 7 Cal.4th 948, 959. ALSO SEE *PSC Geothermal Services Co. v. Superior Court* (1994) 25 Cal.App.4th 1697, 1715 [“It is the People’s task to tailor their investigation as necessary to minimize or avoid [disclosure or sanctions].”]

⁶⁰ See *People v. Hobbs* (1994) 7 Cal.4th 948, 962-3, 976. ALSO SEE *Swanson v. Superior Court* (1989) 211 Cal.App.3d 332, 339.

⁶¹ See *PSC Geothermal Services Co. v. Superior Court* (1994) 25 Cal.App.4th 1697, 1715; *People v. Greenstreet* (1990) 218 Cal.App.3d 1516, 1520.

⁶² See *People v. Hobbs* (1994) 7 Cal.4th 948, 971.

in a locked and secure place under the supervision of either the court clerk or the affiant.⁶³

Telephone and bank records

A telephone company's business records pertaining to its customers, including unlisted numbers and information from pen registers and trap/trace devices,⁶⁴ are not "private" under the Fourth Amendment.⁶⁵ It's the same with bank records.⁶⁶ Consequently, if a phone company or bank voluntarily turns over its records to officers or prosecutors, the records cannot be suppressed on grounds they were obtained without a warrant.

As a practical matter, however, phone companies and banks will not voluntarily turn over their customer records because of concerns about privacy lawsuits. So they will usually require some sort of legal process, such as a subpoena duces tecum, court order, or search warrant.⁶⁷

If the decision is made to seek a search warrant, the affiant should usually seek a "nondisclosure" order, prohibiting the phone company or bank from notifying the customer that a warrant for his records was executed.⁶⁸ Nondisclosure orders are permitted if the release of the information would compromise an ongoing criminal investigation.⁶⁹

Special master procedure

⁶³ See *People v. Sanchez* (1972) 24 Cal.App.3d 664, 674 [sealed material was ordered held in police evidence locker].

⁶⁴ **NOTE: Pen registers:** A "pen register," also known as a "dialed number recorder" is a device that records the telephone numbers that are dialed on a particular phone as the call is being made. See 18 USC § 3124(a), 3127(3); *Smith v. Maryland* (1979) 442 US 735, 736, fn.1; *People v. Andrino* (1989) 210 Cal.App.3d 1395, 1399, fn.2. **Trap/trace:** A "Phone Trap" or "Trap and Trace Device" is an instrument that compiles a record of the telephone numbers of the phones from which calls to a certain phone were made. See 18 USC §§ 3124(c), 3125(d).

⁶⁵ See *Smith v. Maryland* (1979) 442 US 735, 743 ["This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."]; *People v. Meyer* (1986) 183 Cal.App.3d 1150, 1163; *People v. Blair* (1979) 25 Cal.3d 640, 654; *People v. Larkin* (1987) 194 Cal.App.3d 650, 657; *People v. Martino* (1985) 166 Cal.App.3d 777, 785, fn.3; *People v. Stanley* (1999) 72 Cal.App.4th 1547, 1552; *People v. Lissauer* (1985) 169 Cal.App.3d 413, 419.

⁶⁶ See *United States v. Miller* (1976) 425 US 435, 442; *United States v. Payner* (1980) 447 US 727, 732; *Carlson v. Superior Court* (1976) 58 Cal.App.3d 13, 26.

⁶⁷ See Public Utilities Code § 2891; 18 USC § 3121; *People v. Blair* (1979) 25 Cal.3d 640; *People v. Chapman* (1984) 36 Cal.3d 98. **ALSO SEE:** *People v. Bencomo* (1985) 171 Cal.App.3d 1005, 1014 [Proposition 8 precludes suppression of such evidence]. **NOTE:** There are situations in which banks and phone companies will be exempt from such civil liability. For details, see the chapters on PHONE RECORDS and BANK RECORDS in *California Criminal Investigation*.

⁶⁸ See 18 USC § 3123(d) [phone records]; Government Code § 7475 [financial institutions]. **NOTE: Phone companies:** Pursuant to California PUC regulations, a phone company may be required to immediately notify a customer that it has received legal authorization to release certain information to a law enforcement agency. See, for example, 6 Cal. P.U.C. 2d 421-3; "Pacific Bell is required by law to notify the target of legal process that a request has been made for their records. To avoid this potentially dangerous and embarrassing situation, Pacific Bell must be ordered by the issuing court not to notify the target of your request." Tips for Pacific Bell Response to Legal Process Feb. 14, 1995. **Banks:** The Financial Privacy Act permits the bank to notify the customer that it has received a warrant authorizing the release of information contained in some or all of the customer's records. Government Code § 7475.

⁶⁹ See 18 USC § 3123(d) [phone companies]; Government Code § 7475 [financial institutions].

Officers will sometimes seek a warrant to search for documents in the possession of a lawyer, physician, psychotherapist, or member of the clergy who is not a suspect in the case under investigation; e.g., the suspect is a client of the lawyer. When this happens, the courts want to make sure that privileged information is not disclosed. To accomplish this, they devised the so-called special master procedure whereby a special master, who is an attorney appointed by the court, accompanies officers when they execute the warrant. Upon arrival, the special master notifies the person who is served as to what documents are listed in the warrant. The person is then given an opportunity to voluntarily furnish the documents. If he refuses to do so, the special master—not the officers—will conduct the search. Officers may, however, accompany the special master while he or she does so.

If the person who is served claims that certain documents are privileged, the special master must:

- (1) Seal the documents, and
- (2) Notify the person served of the date, time, and location of a superior court hearing on the issue of what documents may be unsealed.⁷⁰ The hearing must be held within three days of execution of the warrant unless such an expedited hearing is impractical.⁷¹

If the lawyer or other professional is a suspect in the crime under investigation, a special master is not required and, therefore, officers may conduct the search themselves.⁷² The professional may, however, seek an order requiring officers to transfer possession of the seized documents to the superior court pending a hearing on whether some or all of the documents are privileged.⁷³ A detailed explanation of this procedure is contained in *California Criminal Investigation*.

⁷⁰ See *Magill v. Superior Court* (2001) 86 Cal.App.4th 61, 131; *Gordon v. Superior Court* (1997) 55 Cal.App.4th 1546, 1558-60.

⁷¹ See Penal Code § 1524(c)(2).

⁷² See Penal Code § 1524(c).

⁷³ See *People v. Superior Court (Laff)* (2001) 25 Cal.4th 703, 720 [(T)he superior court has an obligation to consider and determine claims that materials seized pursuant to a search warrant, from attorneys suspected of criminal activity and before charges have been filed, are protected by the attorney-client privilege or work-product doctrine and thus should not be inspected by or disclosed to law enforcement authorities.][“Thus, the essential character of a *Bauman & Rose* hearing . . . is to determine whether property seized pursuant to a search warrant, from an individual who has not been charged with a crime, should remain available to law enforcement authorities or be returned to the individual.”]; *People v. Superior Court (Bauman & Rose)* (1995) 37 Cal.App.4th 1757; *Magill v. Superior Court* (2001) 86 Cal.App.4th 61, 131-2.