

9-13.410 Guidelines for Issuing Grand Jury or Trial Subpoena to Attorneys for Information Relating to the Representation of Clients

- A. Clearance with the Criminal Division** . Because of the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the attorney's representation of a client, the Department exercises close control over such subpoenas. All such subpoenas (for both criminal and civil matters) must first be authorized by the Assistant Attorney General for the Criminal Division before they may issue.
- B. Preliminary Steps** . When determining whether to issue a subpoena to an attorney for information relating to the attorney's representation of a client, the Assistant United States Attorney must strike a balance between an individual's right to the effective assistance of counsel and the public's interest in the fair administration of justice and effective law enforcement. To that end, all reasonable attempts shall be made to obtain the information from alternative sources before issuing the subpoena to the attorney, unless such efforts would compromise the investigation or case. These attempts shall include reasonable efforts to first obtain the information voluntarily from the attorney, unless such efforts would compromise the investigation or case, or would impair the ability to subpoena the information from the attorney in the event that the attempt to obtain the information voluntarily proves unsuccessful.
- C. Evaluation of the Request** . In considering a request to approve the issuance of a subpoena to an attorney for information relating to the representation of a client, the Assistant Attorney General of the Criminal Division applies the following principles:
- The information sought shall not be protected by a valid claim of privilege.
 - All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful.
 - In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information.
 - In a civil case, there must be reasonable grounds to believe that the information sought is reasonably necessary to the successful completion of the litigation.
 - The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from representation of the client as a result of having to testify against the client.
 - The subpoena shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time.

See also the [Criminal Resource Manual at 263](#) .

- A. Submitting the Request.** Requests for authorization are submitted on a standardized form to the Witness Immunity Unit, Office of Enforcement Operations, Criminal Division. (This form, "Request for Authorization To Issue A Subpoena To An Attorney for Information Relating To Representation of A Client," is set out in the [Criminal Resource Manual at 264](#)). When documents are sought in addition to the testimony of the attorney witness, a draft of the subpoena *duces tecum* must accompany the completed form.

The completed form and draft subpoena may be mailed to the Witness Immunity Unit, 1001 G Street, N.W., Room 945 West, Washington, D.C. 20001, or faxed to [REDACTED]. Because of the sensitive nature of these requests, the Witness Immunity Unit will not accept completed forms and draft subpoenas over e-mail. The Witness Immunity Unit will respond to questions concerning attorney subpoenas by telephone, [REDACTED].

A. **No Rights Created by Guidelines:** These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

13.420 Searches of Premises of Subject Attorneys

NOTE: For purposes of this policy only, "subject" includes an attorney who is a "suspect, subject or target," or an attorney who is related by blood or marriage to a suspect, or who is believed to be in possession of contraband or the fruits or instrumentalities of a crime. This policy also applies to searches of business organizations where such searches involve materials in the possession of individuals serving in the capacity of legal advisor to the organization. Search warrants for "documentary materials" held by an attorney who is a "disinterested third party" (that is, any attorney who is not a subject) are governed by 28 C.F.R. 59.4 and [USAM 9-19.221](#) *et seq.* See also 42 U.S.C. Section 2000aa-11(a)(3).

There are occasions when effective law enforcement may require the issuance of a search warrant for the premises of an attorney who is a subject of an investigation, and who also is or may be engaged in the practice of law on behalf of clients. Because of the potential effects of this type of search on legitimate attorney-client relationships and because of the possibility that, during such a search, the government may encounter material protected by a legitimate claim of privilege, it is important that close control be exercised over this type of search. Therefore, the following guidelines should be followed with respect to such searches:

A. **Alternatives to Search Warrants.** In order to avoid impinging on valid attorney-client relationships, prosecutors are expected to take the least intrusive approach consistent with vigorous and effective law enforcement when evidence is sought from an attorney actively engaged in the practice of law. Consideration should be given to obtaining information from other sources or through the use of a subpoena, unless such efforts could compromise the criminal investigation or prosecution, or could result in the obstruction or destruction of evidence, or would otherwise be ineffective.

NOTE: Prior approval must be obtained from the Assistant Attorney General for the Criminal Division to issue a subpoena to an attorney relating to the representation of a client. See [USAM 9-13.410](#).

A. **Authorization by United States Attorney or Assistant Attorney General.** No application for such a search warrant may be made to a court without the express approval of the United States Attorney or pertinent Assistant Attorney General. Ordinarily, authorization of an application for such a search warrant is appropriate when there is a strong need for the information or material and less intrusive means have been considered and rejected.

B. **Prior Consultation.** In addition to obtaining approval from the United States Attorney or the pertinent Assistant Attorney General, and before seeking judicial authorization for the search warrant, the federal prosecutor must consult with the Criminal Division.

NOTE: Attorneys are encouraged to consult with the Criminal Division as early as possible regarding a possible search of an attorney's office. Telephone No. [REDACTED]; Fax No. [REDACTED].

To facilitate the consultation, the prosecutor should submit the attached form (see [Criminal Resource Manual at 265](#)) containing relevant information about the proposed search along with a draft copy of the proposed search warrant, affidavit in support thereof, and any special instructions to the searching agents regarding search procedures and procedures to be followed to ensure that the prosecution team is not "tainted" by any privileged material inadvertently seized during the search. This information should be submitted to the Criminal Division through the Office of Enforcement Operations. This procedure does not preclude any United States Attorney or Assistant Attorney General from discussing the matter personally with the Assistant Attorney General of the Criminal Division.

If exigent circumstances prevent such prior consultation, the Criminal Division should be notified of the search as promptly as possible. In all cases, the Criminal Division should be provided as promptly as possible with a copy of the judicially authorized search warrant, search warrant affidavit, and any special instructions to the searching agents.

The Criminal Division is committed to ensuring that consultation regarding attorney search warrant requests will not delay investigations. Timely processing will be assisted if the Criminal Division is provided as much information about the search as early as possible. The Criminal Division should also be informed of any deadlines.

A. Safeguarding Procedures and Contents of the Affidavit. Procedures should be designed to ensure that privileged materials are not improperly viewed, seized or retained during the course of the search. While the procedures to be followed should be tailored to the facts of each case and the requirements and judicial preferences and precedents of each district, in all cases a prosecutor must employ adequate precautions to ensure that the materials are reviewed for privilege claims and that any privileged documents are returned to the attorney from whom they were seized.

B. Conducting the Search. The search warrant should be drawn as specifically as possible, consistent with the requirements of the investigation, to minimize the need to search and review privileged material to which no exception applies.

While every effort should be made to avoid viewing privileged material, the search may require limited review of arguably privileged material to ascertain whether the material is covered by the warrant. Therefore, to protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a "privilege team" should be designated, consisting of agents and lawyers not involved in the underlying investigation.

Instructions should be given and thoroughly discussed with the privilege team prior to the search. The instructions should set forth procedures designed to minimize the intrusion into privileged material, and should ensure that the privilege team does not disclose any information to the investigation/prosecution team unless and until so instructed by the attorney in charge of the privilege team. Privilege team lawyers should be available either on or off-site, to advise the agents during the course of the search, but should not participate in the search itself.

The affidavit in support of the search warrant may attach any written instructions or, at a minimum, should generally state the government's intention to employ procedures designed to ensure that attorney-client privileges are not violated.

If it is anticipated that computers will be searched or seized, prosecutors are expected to follow the procedures set forth in *Federal Guidelines for Searching and Seizing Computers* (July 1994), published by the Criminal Division Office of Professional Training and Development.

A. Review Procedures. The following review procedures should be discussed prior to approval of any warrant, consistent with the practice in your district, the circumstances of the investigation and the volume of materials seized.

Who will conduct the review, i.e., a privilege team, a judicial officer, or a special master.

Whether all documents will be submitted to a judicial officer or special master or only those which a privilege team has determined to be arguably privileged or arguably subject to an exception to the privilege.

Whether copies of all seized materials will be provided to the subject attorney (or a legal representative) in order that: a) disruption of the law firm's operation is minimized; and b) the subject is afforded an opportunity to participate in the process of submitting disputed documents to the court by raising specific claims of privilege. To the extent possible, providing copies of seized records is encouraged, where such disclosure will not impede or obstruct the investigation.

Whether appropriate arrangements have been made for storage and handling of electronic evidence and procedures developed for searching computer data (i.e., procedures which recognize the

universal nature of computer seizure and are designed to avoid review of materials implicating the privilege of innocent clients).

These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

See the [Criminal Resource Manual at 265](#) , for an attorney office search warrant form.

263 Common Factual Settings Involving Subpoenas to Attorneys

- A. The Department's policy applies whenever a subpoena will issue for information relating to representation of a client. Accordingly, authorization must be obtained even for the "friendly subpoena" where the attorney witness is willing to provide the information, but requests the formality of a subpoena.

Departmental authorization is not required in every instance in which a subpoena involves an attorney. There are several common situations in which it is not necessary to seek authorization before issuing a subpoena:

- A. A subpoena directed to a bank for the records of an attorney's trust account does not require authorization because the subpoena is not directed to the attorney, and the information maintained at the bank is not a privileged attorney-client communication.
- B. While a subpoena which seeks client billing records requires authorization, a subpoena which seeks internal law office business documents (pay records of law office employees, law firm tax returns, etc.) does not, because it relates to the day-to-day business operations of the law firm, and not to the representation of a client.
- C. A subpoena seeking information regarding the attorney's personal activities, such as his/her purchase of real estate in a personal, and not representative capacity, does not require authorization.
- D. A subpoena which seeks corporate business information, and which is directed to an attorney who serves as a corporate officer, does not require authorization. To make clear that the attorney is being subpoenaed in his/her capacity as a corporate officer, and that no attorney-client information is being sought, the subpoena should be addressed to "John [Jane] Doe, in his/her capacity as secretary of the XYZ Corporation."

264 Form -- Request for Authorization To Issue A Subpoena To An Attorney for Information Relating To Representation of a Client

- A. **Requests for Authorization To Issue A Subpoena
To An Attorney for Information Relating To
The Representation of A Client**

To: [REDACTED], Chief
Witness Immunity Unit
Criminal Division
Room 1216
1301 New York Ave., N.W.
Washington, D.C. 20005
Phone No. [REDACTED]
Telefax No. [REDACTED]

From:

Phone No.
Telefax No.

- 1) Name of Attorney Witness
- 2) District:
- 3) Date by which subpoena needed _____
- 4) Nature of Subpoena: () Trial () Grand Jury
- 5) Name of Case or Investigation:
- 6) Nature of Case:
() Criminal
() Civil _____ Tax _____ Forfeiture

7) (a) Name of Client:

(b) Status of Client:

- Defendant in Criminal Case
- Defendant in Civil Case
- Subject
- Target of Grand Jury Investigation
- Other _____

8) Relationship of attorney witness to subjects or defendants or targets (specifically indicate whether the witness currently represents any defendants or subjects in the matter in which the subpoena is to be issued):

9) Information sought by the subpoena (if subpoena calls for testimony, indicate the nature of the anticipated testimony):

10) Summary of case or proceeding (include a citation to the charges pending or under investigation in a criminal case):

11) Relevancy of the information sought to the case or proceeding:

12) Factual statement of the need for the information to the successful completion of the case or proceeding:

13) Are there alternative sources for the information?

- Yes No

14) If there are alternative sources for the information, have attempts been made to obtain information from them:

- Yes, but with no success.

- Yes, with success. Explain below why the subpoena is necessary.

- No. Explain below why the alternative sources have not been pursued.

15) Statement as to adverse impact on attorney-client relationship:

(a) Has the witness been asked to supply the requested information voluntarily?

- Yes No Explain:

(b) Will witness be disqualified from representation of the client as a result of the subpoena being issued and enforced?

- Yes No Explain:

(c) Is witness a target or subject of any investigation or is there a basis to believe that the witness will become one:

- Yes No If yes, Explain:

16) Basis for belief that information is not privileged:

17) Requestor has considered applicable rules of professional conduct.

() Yes () No

18) Attach copy of subpoena.

Signature of Requestor

Signature of United States Attorney

265 Attorney Search Warrant Form

A. For additional information, including an overview of the law and sample instructions to agents, *see* Chapter 10 of the 1995 Ethics and Professional Responsibility Manual, available on USABook.

When consulting with the Criminal Division's Witness Immunity Unit in the Office of Enforcement Operations, the following Attorney Search Warrant form should be used:

ATTORNEY SEARCH WARRANT

To: Witness Immunity Unit

From: Office of Enforcement Operations (AUSA or Criminal Division DOJ Atty)
Room 945 West, 1001 G St., N.W.
Washington, D.C. 20001

Phone Number [REDACTED]

Facsimile Number [REDACTED]

District:

Anticipated Search Date:

A. (a) Attorney/Firm Name _____

(b) Violations (cite statutes) _____

(c) Brief factual summary _____

A. Premises to be searched:

___ Law Firm ___ Residence ___ Law Office

___ Business or Corporation

___ Other: _____

A. Records, information, and/or objects of the search:

___ Client Files ___ Attorney Business

___ Computer Files

___ Client Financial or Business Records

___ Audio or Video tapes ___ Physical Objects

___ Other: _____

A. Reasons why less intrusive means (e . g . , subpoena) cannot be used and information cannot be obtained from other sources: _____

A. Procedure to be followed to protect privilege and to ensure the prosecution team is not
intended: _____

A. If you anticipate that computers may be searched or seized, please describe how you propose to conduct
the search and what procedures will be followed to minimize intrusion into computerized attorney-
client files _____

A. Please attach copies of the draft affidavit, search warrant, and instructions to agents executing the
warrant.

United States Attorney or AAG