

## CLIENT ALERT

### Ninth Circuit En Banc Panel Affirms Fourth Amendment Principles But Steps Back From Required Protocol For Computer Search Warrants

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In a September 13, 2010, ruling, the U.S. Court of Appeals for the Ninth Circuit issued an amended opinion that is likely to have a significant influence on the seizure of Electronically Stored Information ("ESI") by the government pursuant to search warrants. The court revisited yet again its prior decisions in *United States v. Comprehensive Drug Testing Inc.* ("CDT"), removing the explicit and controversial restrictions on search warrants that it previously adopted for ESI and instead demoting those rules to the level of suggested guidance in a concurring opinion. *United States v. Comprehensive Drug Testing Inc.*, 9th Cir., No. 05-10067, en banc amended opinion Sept. 13, 2010.

In its amended opinion, the CDT court adhered to its prior ruling in *United States v. Tamura*, a 1982 Ninth Circuit decision, finding that where officers come across relevant documents so intermingled with irrelevant documents that they cannot feasibly be sorted at the site, the officers may seal or hold the documents pending approval by a magistrate of the conditions and limitations on a further search through the documents. The magistrate should then require officers to specify in a warrant which type of files are sought. Importantly, the *Tamura* court concluded that the "essential safeguard required is that wholesale removal must be monitored by the judgment of a neutral, detached magistrate."

CDT resulted from a federal investigation into steroid use by professional baseball players. In 2004, government agents executed search warrants at an independent medical testing laboratory, seeking information about the ten baseball players, who had allegedly obtained steroids from BALCO. During the search, the government made duplicate copies of the lab's computer directories, which included drug testing data for more than 100 other baseball players, as well athletes in other sports. On the basis of the information in these directories, the government obtained additional search warrants relating to the approximately 100 other baseball players who were listed in the database as having tested positive for steroids.

The amended opinion also removed explicit guidelines established by the original en banc panel's opinion in CDT, which were meant to ensure that otherwise lawful warrants authorizing the search and seizure of computers would protect against officers' access to private data that might be intermingled with evidence of a crime:

1. the government must waive reliance on the "plain view" doctrine;
2. the government must wall off forensic experts who search hard drives from the agents investigating the case;
3. the government must explain the "actual risks of destruction of information" they would face if they weren't allowed to seize entire computers;
4. the government must use a search protocol to designate what information they can give to the investigating agents; and
5. the government must destroy or return non-responsive data.

In the amended opinion, these explicit restrictions now appear as guidelines in Chief Judge Kozinski's concurring opinion that was joined by only four of the seven judges who had initially supported the ESI search warrant restrictions, leaving the guidelines

one vote short of a majority decision. These guidelines offer "the government a safe harbor, while protecting the people's right to privacy and property in their papers and effects. District and magistrate judges must exercise their independent judgment in every case, but heeding this guidance will significantly increase the likelihood that the searches and seizures of electronic storage that they authorize will be deemed reasonable and lawful."

*CDT* will obviously have a significant and immediate impact on the handling of ESI search warrants in the Ninth Circuit, but is also likely to have an influence in other jurisdictions as the often-contradictory jurisprudence on application of the Fourth Amendment's requirements in the electronic information age continues to evolve.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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