

## IRS Office of Chief Counsel Search Warrants



Division Counsel / Associate Chief Counsel (Criminal Tax)

2010

## Presenters

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## Topics

- Anatomy of a Search Warrant
- Fed. R. Crim. P. 41
- Probable Cause
- Particularity
- Intrusiveness
- Computer Issues
- Sensitive Search Warrants

## Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## Anatomy of a Search Warrant

- Application for Search Warrant
- Attachment A (Where)
- Attachment B (What)
- Affidavit in Support of Application
- Search Warrant
- Sealing Order
- Inventory Return

Nonresponsive

Nonresponsive

Nonresponsive

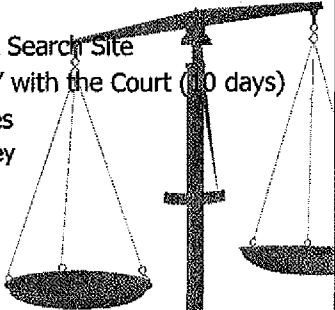
Nonresponsive

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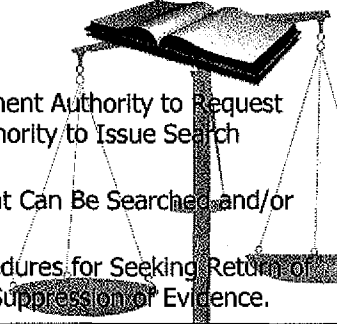
### Inventory Return

- Computerized
- Provide Copy at Search Site
- Filed "promptly" with the Court (10 days)
- Specificity Issues
  - Count the Money
  - CT review



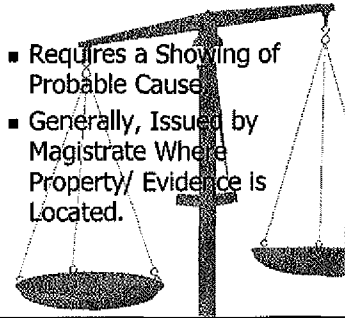
## Federal Rules of Criminal Procedure, Rule 41

- Gives Government Authority to Request and Court Authority to Issue Search Warrants.
- Describes What Can Be Searched and/or Seized.
- Provides Procedures for Seeking Return of Property and Suppression of Evidence.



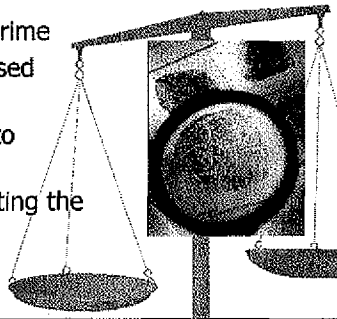
## Authority to Request and Issue Warrant

- Requires a Showing of Probable Cause
- Generally, Issued by Magistrate Where Property/ Evidence Is Located.



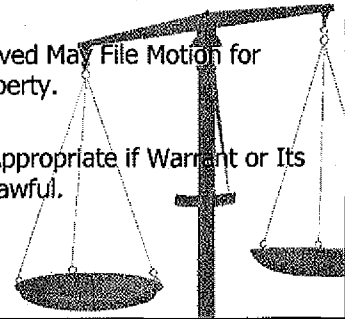
## Persons or Property Subject to Search and/or Seizure

- Evidence of a Crime
- Illegally Possessed Items
- Property Used to Commit Crime
- Person Committing the Crime



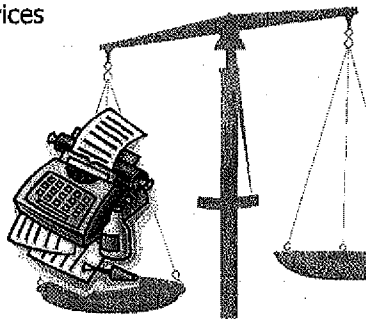
## Return of Property/Motion to Suppress (Rule 41(g) & (h))

- Person Aggrieved May File Motion for Return of Property.
- Suppression Appropriate if Warrant or Its Execution Unlawful.



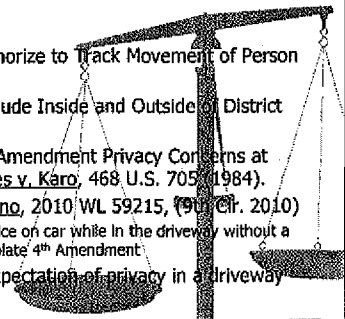
## Recent Amendments

- Tracking Devices
- Computers



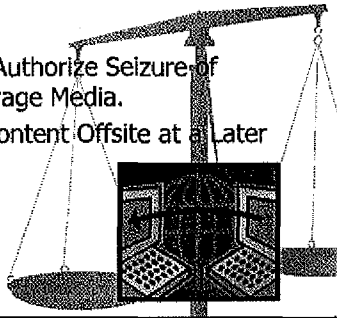
## Tracking Devices Rule 41(b)(4)

- 2006
- Magistrate May Authorize to Track Movement of Person or Property.
- Request Should Include Inside and Outside of District Movement.
- Required When 4<sup>th</sup> Amendment Privacy Concerns at Issue – *United States v. Karo*, 468 U.S. 705 (1984).
- *U.S. v. Pineda-Moreno*, 2010 WL 59215, (9<sup>th</sup> Cir. 2010)
  - placing tracking device on car while in the driveway without a warrant does not violate 4<sup>th</sup> Amendment
  - no reasonable expectation of privacy in a driveway



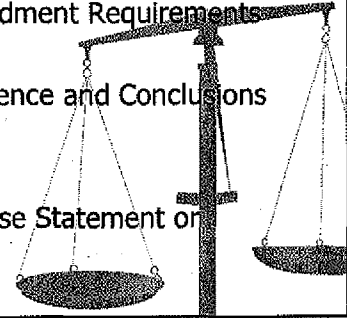
## Computers Rule 41(e)(2)(B)

- 2009
- Warrant May Authorize Seizure of Electronic Storage Media.
- May Review Content Offsite at a Later Date.



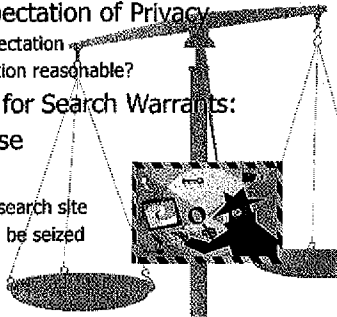
## Probable Cause

- Fourth Amendment Requirements
- Defined
- Agent Experience and Conclusions
- Informants
- Staleness
- Effects of False Statement or Omissions



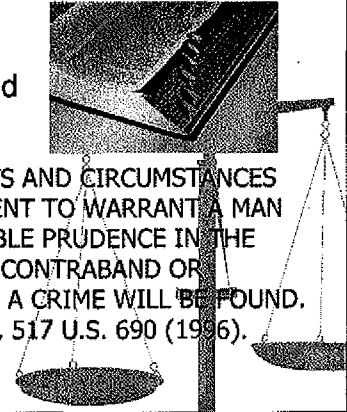
## Fourth Amendment Requirements

- Reasonable Expectation of Privacy
  - Subjective expectation
  - Is the expectation reasonable?
- 2 requirements for Search Warrants:
  - Probable Cause
  - Particularity
    - Description of search site
    - List of items to be seized



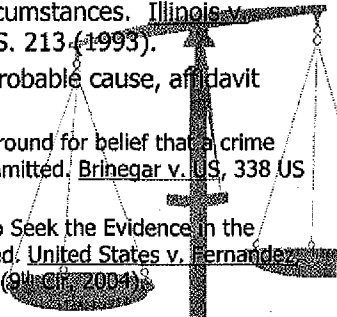
## Probable Cause Defined

- KNOWN FACTS AND CIRCUMSTANCES ARE SUFFICIENT TO WARRANT A MAN OF REASONABLE PRUDENCE IN THE BELIEF THAT CONTRABAND OR EVIDENCE OF A CRIME WILL BE FOUND. Ornelas v. US, 517 U.S. 690 (1996).



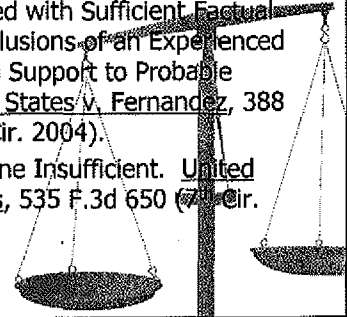
## Standard of Review

- Totality of Circumstances. Illinois v. Gates, 462 U.S. 213 (1993).
- To establish probable cause, affidavit must show:
  - 1) Reasonable ground for belief that a crime has been committed. Brinegar v. US, 338 US 160 (1949)
  - 2) Reasonable to Seek the Evidence in the Place Indicated. United States v. Fernandez, 388 F.3d 199 (9th Cir. 2004).



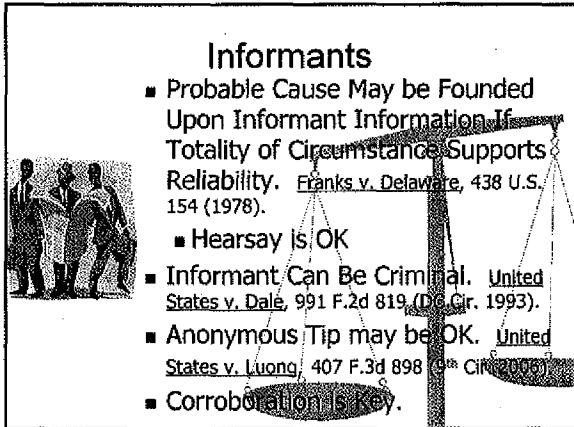
## Agent Experience and Conclusions

- When Combined with Sufficient Factual Showing, Conclusions of an Experienced Agent Can Add Support to Probable Cause. United States v. Fernandez, 388 F.3d 199 (9th Cir. 2004).
- Experience Alone Insufficient. United States v. Watts, 535 F.3d 650 (7th Cir. 2008).



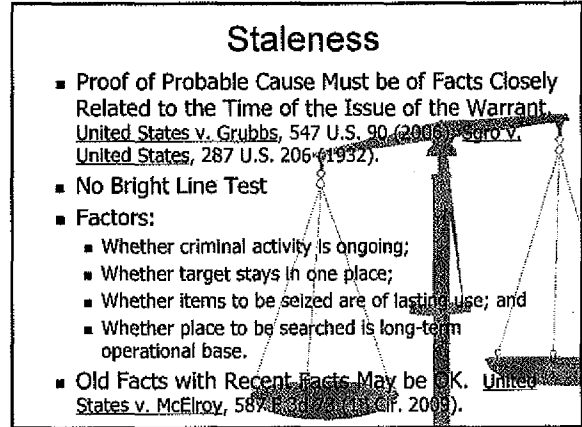
### Informants

- Probable Cause May be Founded Upon Informant Information If Totality of Circumstance Supports Reliability. Franks v. Delaware, 438 U.S. 154 (1978).
  - Hearsay is OK
- Informant Can Be Criminal. United States v. Dale, 991 F.2d 819 (DC Cir. 1993).
- Anonymous Tip may be OK. United States v. Luong, 407 F.3d 898 (9th Cir. 2009)
- Corroboration is Key.



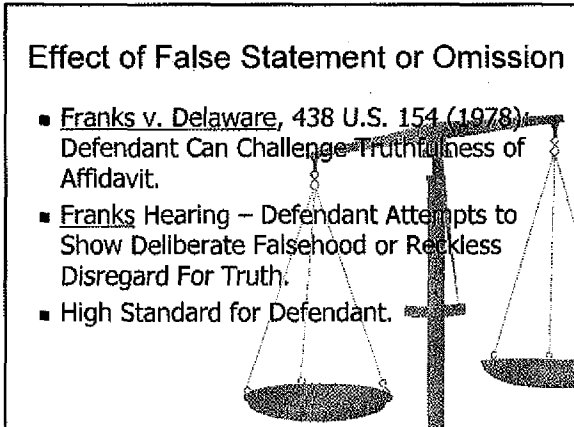
### Staleness

- Proof of Probable Cause Must be of Facts Closely Related to the Time of the Issue of the Warrant. United States v. Grubbs, 547 U.S. 90 (2006); Groh v. United States, 287 U.S. 206 (1932).
- No Bright Line Test
- Factors:
  - Whether criminal activity is ongoing;
  - Whether target stays in one place;
  - Whether items to be seized are of lasting use; and
  - Whether place to be searched is long-term operational base.
- Old Facts with Recent Facts May be OK. United States v. McElroy, 587 F.3d 1001 (9th Cir. 2009).



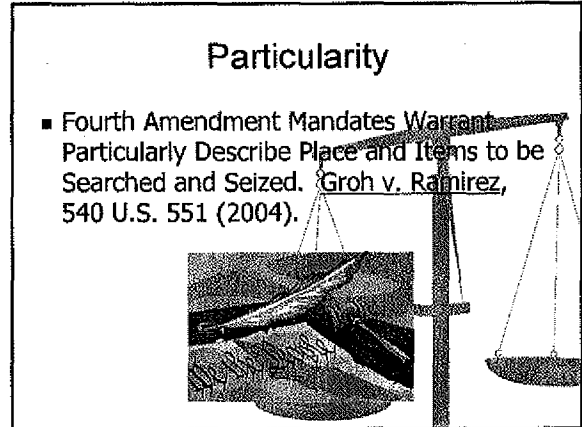
### Effect of False Statement or Omission

- Franks v. Delaware, 438 U.S. 154 (1978): Defendant Can Challenge Truthfulness of Affidavit.
- Franks Hearing – Defendant Attempts to Show Deliberate Falsehood or Reckless Disregard For Truth.
- High Standard for Defendant.



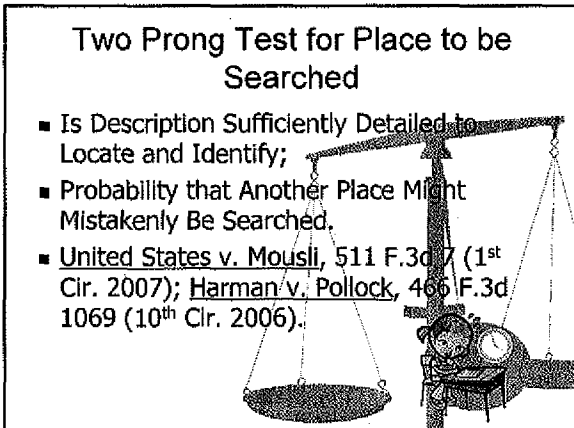
### Particularity

- Fourth Amendment Mandates Warrant Particularly Describe Place and Items to be Searched and Seized. Groh v. Ramirez, 540 U.S. 551 (2004).



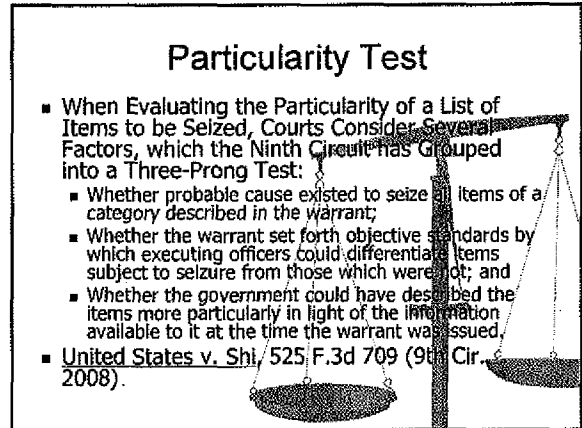
### Two Prong Test for Place to be Searched

- Is Description Sufficiently Detailed to Locate and Identify;
- Probability that Another Place Might Mistakenly Be Searched.
- United States v. Mousli, 511 F.3d 77 (1st Cir. 2007); Harman v. Pollock, 466 F.3d 1069 (10th Cir. 2006).



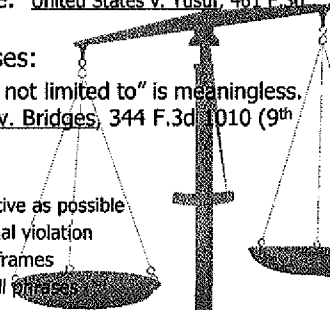
### Particularity Test

- When Evaluating the Particularity of a List of Items to be Seized, Courts Consider Several Factors, which the Ninth Circuit has Grouped into a Three-Prong Test:
  - Whether probable cause existed to seize all items of a category described in the warrant;
  - Whether the warrant set forth objective standards by which executing officers could differentiate items subject to seizure from those which were not; and
  - Whether the government could have described the items more particularly in light of the information available to it at the time the warrant was issued.
- United States v. Shi, 525 F.3d 709 (9th Cir. 2008).



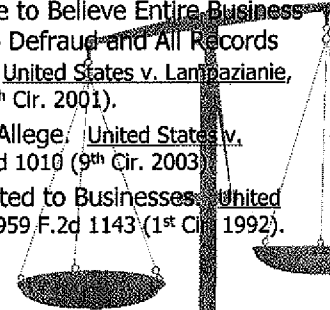
## Overbreadth

- Warrants that Exceed the Scope of Probable Cause. United States v. Yusuf, 461 F.3d 374 (3<sup>rd</sup> Cir. 2006).
- Catch-All Phrases:
  - "Including but not limited to" is meaningless. United States v. Bridges, 344 F.3d 1010 (9<sup>th</sup> Cir. 2003).
- Best Practice:
  - Be as descriptive as possible
  - Specify criminal violation
  - Include time frames
  - Avoid catch-all phrases



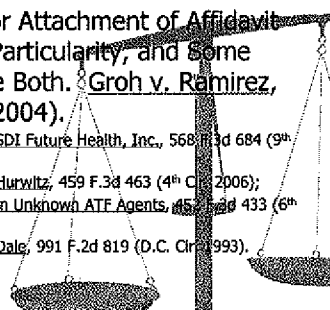
## Permeated With Fraud

- Probable Cause to Believe Entire Business is a Scheme to Defraud and All Records are Evidence. United States v. Lampazianie, 251 F.3d 519 (5<sup>th</sup> Cir. 2001).
- Warrant Must Allege. United States v. Bridges, 344 F.3d 1010 (9<sup>th</sup> Cir. 2003).
- Usually Restricted to Businesses. United States v. Falon, 959 F.2d 1143 (1<sup>st</sup> Cir. 1992).



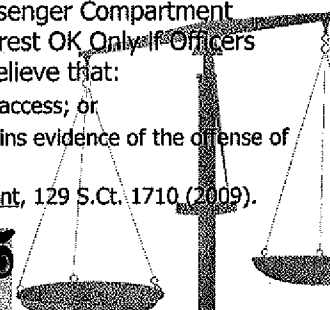
## Incorporate Affidavit By Reference and Attach to Warrant

- Incorporation or Attachment of Affidavit May Establish Particularity, and Some Circuits Require Both. Groh v. Ramirez, 540 U.S. 551 (2004).
  - United States v. SDI Future Health, Inc., 568 F.3d 684 (9<sup>th</sup> Cir. 2009);
  - United States v. Hurwitz, 459 F.3d 463 (4<sup>th</sup> Cir. 2006);
  - Baranski v. Fifteen Unknown ATF Agents, 457 F.3d 433 (6<sup>th</sup> Cir. 2006);
  - United States v. Dale, 991 F.2d 819 (D.C. Cir. 1993).



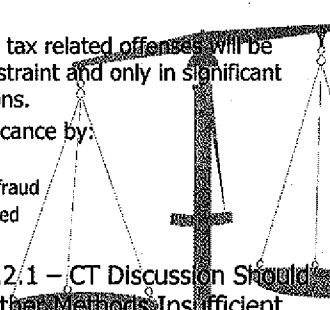
## Cars

- Search of Passenger Compartment Incident to Arrest OK Only if Officers Reasonably Believe that:
  - Arrestee has access; or
  - Vehicle contains evidence of the offense of arrest.
- Arizona v. Gant, 129 S.Ct. 1710 (2009).



## Intrusiveness

- IRM 9.4.9.2(4)
  - SW for tax and tax related offenses will be utilized with restraint and only in significant tax investigations.
  - Evaluate significance by:
    - Tax due
    - Nature of the fraud
    - Evidentiary Need
    - Deterrence
- CCDM 38.1.1.3.2.1 – CT Discussion Should Address Why Other Methods Insufficient.



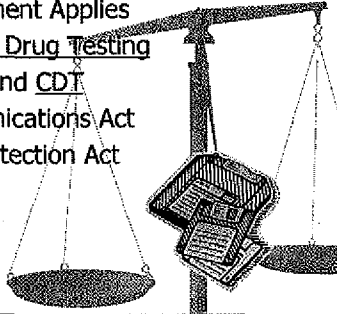
## Other Methods to Consider

- Obtain Evidence from Third Party (Banks).
- Obtain Evidence from Service Center (QRP/RPP).
- Obtain Evidence Through Summons or Subpoena.



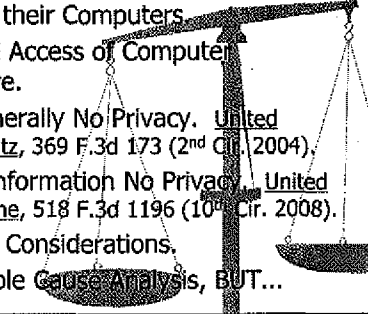
## Computer-Related Issues

- Fourth Amendment Applies
- Comprehensive Drug Testing
- Other Circuits and CDT
- Stored Communications Act
- The Privacy Protection Act



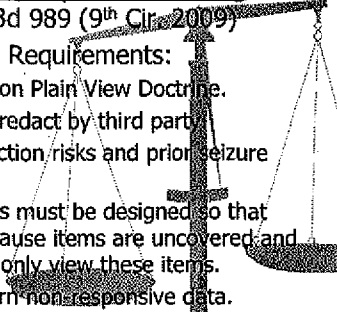
## Fourth Amendment Applies

- People Possess a Reasonable Expectation of Privacy in their Computers
- Location and Access of Computer Determinative.
- Emails – Generally No Privacy. United States v. Lifshitz, 369 F.3d 173 (2<sup>nd</sup> Cir. 2004).
- Subscriber Information No Privacy. United States v. Perrine, 518 F.3d 1196 (10<sup>th</sup> Cir. 2008).
- Overbreadth Considerations.
- Same Probable Cause Analysis, BUT...



## Comprehensive Drug Testing

- United States v. Comprehensive Drug Testing, 579 F.3d 989 (9<sup>th</sup> Cir. 2009)
- New Procedural Requirements:
  - Waive reliance on Plain View Doctrine.
  - Segregate and redact by third party.
  - Disclose destruction risks and prior seizure efforts.
  - Search for items must be designed so that only probable cause items are uncovered and case agent will only view these items.
  - Destroy or return non-responsive data.



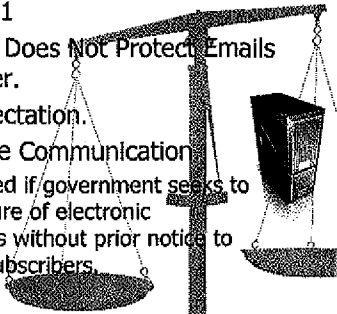
## Other Circuits v. CDT

- 7<sup>th</sup> Circuit rejects: Plain View Doctrine Applies to Computer Searches. United States v. Mann, 592 F.3d 779 (7<sup>th</sup> Cir. 2010).
- 4<sup>th</sup> Circuit rejects: Plain View Doctrine Applies to Computer Searches. United States v. Williams, 592 F.3d 511 (4<sup>th</sup> Cir. 2010).



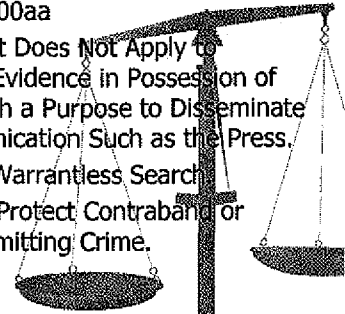
## Stored Communications Act

- 18 U.S.C. § 2701
- 4<sup>th</sup> Amendment Does Not Protect Emails Stored on Server.
- No Privacy Expectation.
- SCA Protects the Communication
  - Warrant required if government seeks to compel disclosure of electronic communications without prior notice to customers or subscribers.



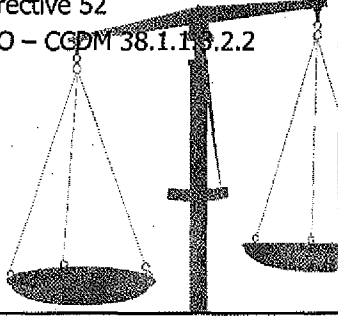
## The Privacy Protection Act

- 42 U.S.C. § 2000aa
- 4<sup>th</sup> Amendment Does Not Apply to Documentary Evidence in Possession of Third Party with a Purpose to Disseminate Public Communication Such as the Press.
- PPA Prohibits Warrantless Search.
- PPA Does Not Protect Contraband or Means of Committing Crime.



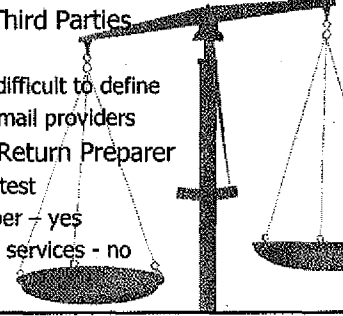
## Sensitive Search Warrants

- IRM 9.4.9.3.3.3
- Tax Division Directive 52
- Reviewed by NO – CGDM 38.1.1.3.2.2
- Includes:
  - Accountant
  - Lawyer
  - Physician
  - Public Official
  - Clergy
  - News Media
  - Labor Union
  - 501(c)(3)



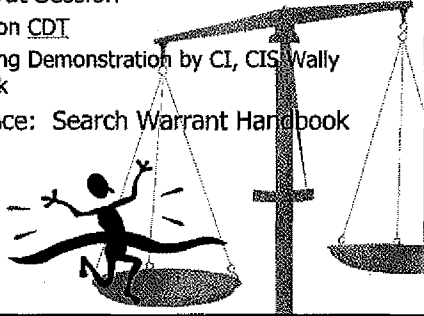
## Sensitive Search Warrants (continued)

- Disinterested Third Parties
  - Sensitive
  - Disinterested difficult to define
  - Exception: E-mail providers
- Accountant v. Return Preparer
  - No bright line test
  - CPA/Bookkeeper – yes
  - No accounting services - no

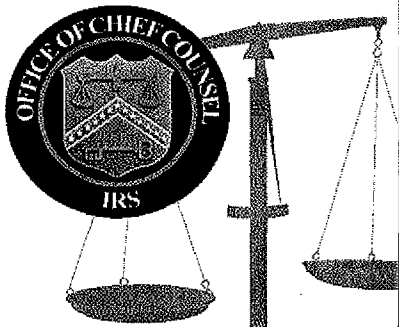


## Conclusion

- Break Out Session
  - More on CDI
  - Imaging Demonstration by CI, CIS Wally Drueck
- Reference: Search Warrant Handbook (2009)



CONGRATULATIONS LORRAINE AND SAL





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Overbreadth – computer searches have the potential for overbreadth

• particularity – computer search warrants must contain sufficient particularity

- US v. Otero, 563 F.3d 1127, 1132 (10th Cir. 2009) – warrants for computer searches must *affirmatively limit* the search to evidence of specific federal crimes or specific types of material
  - “affirmative limitations” include descriptions of specific crimes suspected
- courts do recognize that the government may be unable to search for specific computer files during the execution of a warrant and may need to conduct a wholesale seizure of computers themselves for subsequent searching
- but, to satisfy the particularity requirement, an affidavit must provide facts to support the need for an off-site search (US v. Hill, 459 F.3d 966, 975-76 (9th Cir. 2006))
- another option is imaging a computer's hard drive rather than seizing the computer itself, especially if removal of the computer will make it impossible for the target to continue conducting business (US v. Rayburn House Office Bldg..., 497 F.3d 654, 670 (DC Cir. 2007))
- Probable Cause Analysis – analysis for computer search should be no different from analysis for other searches
  - probable cause analysis should apply to computer searches
    - US v. Giberson 527 F.3d 882, 888-89 (9th Cir. 2008) –  
with respect to a computer search for tax records and

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