

US Court of Appeals for the Ninth Circuit Establishes Protocols for Searches of Electronically Stored Information

The long-running BALCO steroid investigation that led to the indictment of Major League Baseball (MLB) star Barry Bonds has resulted in a potentially landmark decision related to the manner in which government agents apply for and execute search warrants for electronically stored information (ESI). In *United States v. Comprehensive Drug Testing, Inc.*, No. 15-10067 (9th Cir. Aug. 26, 2009), the *en banc* Ninth Circuit affirmed a lower court ruling ordering the government to return an overbroad set of electronic data seized under a search warrant. This decision will force the Department of Justice to adjust its procedures for using ESI search warrants—a common tool for gathering evidence—in the midst of the government’s recent efforts to step up enforcement of federal laws.

In addition to potentially limiting the effectiveness of search warrants for ESI as an investigative tool, the decision will also be of broader interest to the electronic discovery community, as it represents a rare, detailed foray by a federal appellate court into the difficulties and hazards of handling ESI. The decision even goes so far as to specify protocols to be followed by the government in collecting and reviewing ESI to protect any privacy interests that may be implicated.

While some courts have previously required search protocols, limiting the scope of ESI the government may seize and the manner in which agents could review the seized information, most courts have not imposed such limits. For the most part, courts have permitted the government to gather overbroad quantities of data for later analysis, with no meaningful

mechanism for the court to monitor, or for the impacted business to challenge, that analysis.

The *Comprehensive Drug Testing* decision could halt this routine practice of “grab everything now, look at it later,” and limit the methods the government may use to seize and search ESI. In the decision, the Ninth Circuit opts not only to assert its judicial authority to supervise the execution of search warrants, but also provides guidance regarding protocols that courts in the Ninth Circuit should follow in granting search warrants for ESI and in searching ESI once a warrant has been executed.

Facts of the Case

In 2002, Major League Baseball and the MLB Players’ Association (MLBPA) entered into a collective bargaining agreement that appointed Comprehensive Drug Testing, Inc. (CDT) to administer a suspicionless steroid testing program for the MLBPA. Players were assured that test results would remain anonymous and confidential. Federal agents investigating BALCO learned that 10 MLB players had tested positive for steroid use through this program, and secured a grand jury subpoena in the Northern District of California that sought *all* MLB “drug testing records and specimens” in CDT’s possession.

CDT and the MLBPA moved to quash the subpoena after efforts to negotiate a compliance agreement failed. The day the motion to quash was filed, the government obtained a search warrant in the Central District of California authorizing a search of

CDT's facilities for electronic records related to the 10 players of whom the government was aware. As the warrant was executed, however, the government seized and promptly reviewed the drug testing records of *hundreds* of MLB players and others. The government also obtained a search warrant in the District of Nevada for the records maintained by Quest Diagnostics, Inc. (Quest), which had performed the actual scientific testing and possessed the physical samples.

CDT and the MLBPA moved for the return of the property seized by the government during the execution of the search warrants, because the government had failed to comply with the search procedures specified in the warrant during the execution of the search at CDT. The motion was granted in the district court, and affirmed by the *en banc* Ninth Circuit.

Ninth Circuit's *En Banc* Decision

The Ninth Circuit's *en banc* opinion not only reverses its trend of leaving the particular details of the search of electronic records largely to the government and its agents, but also gives guidance on both the protocol for granting a search warrant for electronically stored records and the protocol for supervising the search once the government has seized the electronic records. While accepting the reality that over-seizure is unavoidable when dealing with ESI, the Ninth Circuit directs courts to be more vigilant and to strike the right balance between law enforcement interests and the rights of individuals to be free from unreasonable searches and seizures. In attempting to find this balance, the decision establishes the following procedures for cases in which the government seeks a search warrant or subpoena for ESI:

- Magistrates should insist that the government waive reliance upon the plain view doctrine as a condition of the warrant—a search warrant listing particular ESI is not a blanket license to search every directory in a company's file system simply because interesting information might be found there.

- Segregation and redaction must be performed either by specialized governmental personnel not otherwise involved in the investigation or by an independent third party, with a presumption in favor of an independent third party in cases where the subpoena recipient and others whose privacy interests may be threatened are not suspected of any crime.
- The theoretical risk of information loss does not support an immediate warrant. A request for a warrant or subpoena on an urgent basis must disclose an *actual* risk of destruction of information as well as prior efforts to seize that information in other judicial fora before the court will permit emergency wholesale seizure. A “lack of candor” in this area will “bear heavily against the government” in any follow-on proceedings.
- The government's search protocol must be designed to uncover *only* the information it has probable cause to seek, and *only* that information may be examined by case agents.
- The government must destroy or return the non-responsive information—including the original physical media seized—and provide the issuing magistrate with a sworn certification that it has destroyed or returned the information required.

While *Comprehensive Drug Testing* is, for now, binding only in the Ninth Circuit, the decision will force government agents to rethink their practice of sweeping up hundreds of thousands of electronic records from businesses for further inspection by the investigating agents. Moreover, in addition to compelling the government to adjust the manner in which it gathers and handles evidence, the Ninth Circuit has strengthened the business community's ability to legally challenge government data sweeps, prior to any charges having been brought, through judicial intervention pursuant to the Federal Rules of Criminal Procedure. *Comprehensive Drug Testing* will permit businesses to protect their constituents' privacy interests where appropriate and to challenge unconstitutional searches and seizures.

For more information about any of the issues raised in this Client Update, please contact your regular Mayer Brown lawyer or any of the following lawyers.

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