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## Securities Fraud

### **Undercover Agents, Wiretaps a Reality For White Collar Investigations, Experts Say**

**A** group of experts speaking at an Oct. 3 Practising Law Institute conference said wiretaps and undercover stings have become common practice in white collar cases.

**“The public nature of a search warrant has a huge impact [on a business]. You can really put a place out of business often by a well-timed search warrant.”**

HARRY SANDICK  
PATTERSON BELKNAP WEBB & TYLER LLP

“Search warrants, wiretaps, the undercover stings, you have to think of all of these techniques together as tools for prosecutors,” Greg Andres, acting deputy director of the Department of Justice’s Criminal Division, said during the PLI’s conference *White Collar Crime 2011* in New York. “They will be used more and more,” he added.

The PLI program consisted of several panel discussions that covered an array of issues related to white collar crime, including sentencing, the Foreign Corrupt Practice Act, securities enforcement, challenges facing defense attorneys, and the government’s use of unconventional investigative techniques.

In a string of recent high-profile cases, these techniques have uncovered devastating evidence that would likely have gone undiscovered without the new methods, moderator Robert Hotz, a partner at the New York office of Akin, Gump, Strauss, Hauer & Feld LLP, said.

**FCPA Case Is Prime Example.** Panelists cited as an example of the use of these techniques a case in federal court in Washington, D.C., involving FCPA violations.

The case involves Patrick Caldwell, former chief executive officer of Protective Products of America Inc., Sunrise, Fla., and an ex-deputy assistant director at the U.S. Secret Service. Caldwell is accused of joining an illegal transaction by agreeing to pay bribes to an FBI agent posing as a representative of the west African country of Gabon, federal prosecutors said in a Jan. 19 press release.

Caldwell’s trial, which began Sept. 28, is the second in a 22-defendant kickback conspiracy case stemming from an undercover sting led by the FBI. A trial of four others arrested in the sting ended in a mistrial in July after a jury failed to agree on a verdict, Andres said.

Andres cited the case as an example of the government’s readiness to use wiretaps and other undercover techniques traditionally used against organized crime to go after white collar criminals.

**Specter of Misuse in the Future.** While use of such techniques has been successful, it raises the specter that they will be misused in the future, Hotz said. Challenges to wiretaps in recent high-profile cases revealed significant failures by the government to comply with legal strictures, he added (6 WCR 278, 4/8/11).

One of the more controversial techniques used is what is often called “sneak and peak,” Hotz said. It allows the government to enter a business and search for evidence without providing notice to the target of the investigation, he said. “So, if I’m a business owner, I may not have any idea that the government had been in searching for 30, 60, or 90 days later,” he added.

According to Marc P. Berger, assistant U.S. attorney for the Southern District of New York, in certain circumstances federal agents may conduct sneak-and-peek or “delayed-notice” searches without providing a copy of the warrant and receipt for the property taken immediately after the search where reasonable cause exists to delay the notice, and approval from the court is obtained.

The benefit to law enforcement is obvious—the target of the investigation does not know that his home or office has been searched and the investigation remains covert, according to Hotz. The rules relating to this type of search warrant are set forth under the USA PATRIOT Act, he said.

### **UNCONVENTIONAL METHODS**

Government investigators are increasingly using the following techniques in white collar cases:

- wiretaps;
- search warrants;
- “sneak and peak”; and
- undercover stings.

**Wiretaps Are Useful Tool.** Wiretaps are another tool that government investigators find useful, Andres said. The Department of Justice is bringing on more and more experienced lawyers to move wiretap applications through the judicial-approval process more quickly and to ensure they are reviewed thoroughly to withstand the scrutiny of judges and defense lawyers, he said.

“Many [federal prosecutors] started in blue-collar crimes or drug crimes, and we are used to using these techniques, then we move into white-collar crimes,” Andres said, explaining how he and other prosecutors are comfortable using covert investigative techniques.

The department uses wiretaps not only for FCPA cases or insider-trading investigations, but also for just about any type of white-collar crimes, including fraudulent bookkeeping and health care fraud.

“These techniques are here to stay because the department is making it clear that whatever the crime . . . we will use whatever techniques work,” he said.

Harry Sandick, counsel at Patterson Belknap Webb & Tyler LLP, New York, said defense attorneys can file wiretap litigation to have evidence suppressed, possibly attacking the warrant on probable cause or necessity.

**Search Warrants Have Downsides.** Wiretaps do not come without potential downsides for prosecutors, Berger said. After four to six months, a wiretap can gen-

erate a lot of discovery material that must be weeded through, he said.

Also, a high volume of material generated, some of which may be irrelevant, can give defense attorneys an argument for suppressing evidence on the grounds that the warrant did not state its target with sufficient particularity, he added.

Search warrants, rather than subpoenas, are also being used by prosecutors against businesses, particularly when the defendant is creating some form of obstruction, such as destruction of evidence, Andres said.

In many white collar cases, executing a search warrant can be a complicated and time-consuming effort, he said. The warrant may return a large amount of information, and much of the information may be privileged, he added.

**I Want My Money Back.** Sandick said the impact of a search warrant on a company can be immense.

“The business may not be able to open for business the next day, it may be deluged by calls from investors wanting their money back,” he said. “This could have a punitive impact. The public nature of a search warrant has a huge impact. You can really put a place out of business often by a well-timed search warrant.”

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