



304 Roundtable: Surviving Investigations & Raids

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Executive Vice President-Operations
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Senior Vice President and Head of Compliance
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Faculty Biographies

James R. Bucknam

James R. Bucknam is the executive vice president for operations for Kroll Inc., a global risk mitigation firm. His responsibilities include managing all aspects of the company's security services. During more than five years with Kroll, Mr. Bucknam has managed numerous investigations and has, since 1999, served as the Independent Monitor for the Town of Brookhaven, NY.

Prior to joining Kroll, Mr. Bucknam served for more than three years as the senior advisor to former FBI Director Louis J. Freeh. Mr. Bucknam previously had served over six years as an assistant United States attorney for the Southern District of New York, where he prosecuted a wide-range of criminal offenses and served as chief of the Narcotics Unit. After graduating from law school, Mr. Bucknam clerked for the Honorable Lloyd F. MacMahon in the Southern District of New York.

Mr. Bucknam received a BSFS degree from the Georgetown University School of Foreign Service and is a graduate of the Marshall-Wythe School of Law at the College of William and Mary.

Bobbie McGee Gregg

Bobbie Gregg is senior vice president and compliance director of Bank One Corporation. Ms. Gregg manages the regulatory compliance function for all Bank One businesses, including retail and commercial banking, investment management services, retail and commercial brokerage services, credit card, and insurance.

Before joining Bank One, Ms. Gregg was employed by Sears, Roebuck and Co., where she held a number of legal management positions, including chief compliance officer and deputy general counsel. She managed internal investigations and defended grand jury investigations, attorneys general multi-state litigation, consumer class actions, shareholder derivative litigation, and securities fraud class actions. Ms. Gregg also served as an assistant United States attorney in the Northern District of Illinois, serving in the Criminal Division. She began her career as a judicial law clerk for federal judge William J. Bauer of the Seventh Circuit Court of Appeals.

Ms. Gregg earned a JD cum laude from Northwestern University School of Law. She is a member of the Northwestern Law Board, which supports and advises the Dean of the Law School.

Andrea L. Zopp

Andrea L. Zopp is vice president, deputy general counsel in the law department of Sara Lee Corporation in Chicago. She manages senior attorneys at the operating divisions, risk management, environmental services, and safety. She also supervises litigation and provides counseling on strategic issues.

Ms. Zopp came to Sara Lee from the law firm of Sonnenschein Nath & Rosenthal, where she was a partner in the litigation department, specializing in the areas of commercial, employment, and white-collar criminal litigation. Prior to her time at Sonnenschein, Ms. Zopp was the first assistant

state's attorney in the Cook County's State's Attorney office where she was responsible for the day-to-day operations of the nation's second largest prosecutor's office.

Ms. Zopp has substantial trial experience in both federal and state court. She has tried more than 50 cases—41 of those to juries and is a fellow of the American College of Trial Lawyers. She was the lead trial lawyer in the successful, high profile prosecution of U.S. Representative Mel Reynolds. Ms. Zopp is a member and former president of the Chicago Inn of Court and is active in the ABA, where she is a member of the Section of Litigation Council. She is also a member of the Board of Managers of the Chicago Bar Association. Ms. Zopp is a member of the Black Women Lawyer's Association and the Cook County Bar Association. Ms. Zopp was named by Illinois Governor George Ryan to serve on the Commission to Review the Illinois death penalty process. Her civic activities include serving on the board of directors of the Chicago Area Project and the Heartland Alliance. She is also a member of the Leadership Gifts Committee of the Girl Scouts of Chicago 2000 Capital Campaign.

Ms. Zopp received both her bachelors and her JD from Harvard University. She began her legal career as a law clerk to United States District Judge George N. Leighton in the Northern District of Illinois. She has taught federal criminal law and trial practice at the University of Chicago School of Law and trial practice at Harvard Law School and Northwestern University.

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Legal Issues

1. Legal Representation

- a) Who does in-house counsel represent?
- b) When must separate counsel for employees be considered?
- c) What are the corporation's limits of indemnification for attorney's fees?

2. Attorney-Client Privilege

- a) What are the scope and requirements of the privilege?
- b) How is the privilege best preserved?
- c) Who can waive the privilege?
- d) When is a joint-defense agreement appropriate?

3. Attorney Work-Product Doctrine

- a) Will the Government consent to a confidentiality agreement?

Legal Issues

- 4. Obstruction of Justice vs. Cooperation**
 - a) What constitutes obstruction of justice?
 - b) When is it a separate crime?
 - c) When is it considered for sentencing purposes?
 - d) Should the corporation's document destruction policy be suspended?
 - e) What is required for corporate "cooperation" under the Sentencing Guidelines?
- 5. Alerting Regulators**
 - a) In what contexts must regulators be alerted?
 - b) Will failure to alert authorities be considered an obstruction of justice or a failure to cooperate?

Other Issues

- 1. Should an internal investigation be undertaken at the same time as an official investigation?**
 - a) Should in-house counsel or outside counsel conduct it?
 - b) How best can the investigation appear to be, and be, independent and objective?
 - c) How best does the corporation demonstrate a desire to uncover the truth?
- 2. How does the corporation best ensure its ability to continue functioning after the seizure of critical documents and other evidence?**
- 3. What role should counsel play with respect to public relations and crisis communications, especially for publicly traded corporations?**

REGARDING SEARCH BY GOVERNMENT AGENTS

This outline was submitted by Ira Raphaelson, a partner in the White Collar & Regulatory Defense Group of O'Melveny & Myers LLP. This summary is not legal advice and contains the views of the author only except where otherwise noted.

ASK FOR IDENTIFICATION

1. Should state or federal authorities enter your facility with a search warrant, first ask for the following information:
 - a. Ask for their identification.
 - b. Ask for a copy of the Warrant authorizing the search, and any accompanying affidavit.
 - c. Give them designated attorney's number and ask that they wait until lawyers arrive before they conduct the search. They have no obligation to wait, but you should request this in any event.

CALL ATTORNEYS

2. Immediately call designated counsel and fax all papers provided you by the agents to counsel.

DISMISS NON-ESSENTIAL EMPLOYEES

3. Dismiss all non-essential employees for the day or, if possible, the length of the search. Obviously, discretion must be exercised here, to insure that the facility continues to operate at an acceptable level.

DO NOT CONSENT

4. DON'T CONSENT TO THE SEARCH. The authorities may ask you to consent to the search and to sign a form acknowledging your consent. Don't do it. You may jeopardize the ability of your attorneys to challenge the legality of the search at a later time.

READ WARRANT

5. READ THE WARRANT. The Warrant will describe, often in detail, the areas of the facility that the investigators have been authorized to search and the items (documents and the like) that they are authorized to seize. Give them access to those areas in the order in which they wish to see them. If the officers want to inspect an area of the facility not covered by the Warrant or seize a document or object not covered by the Warrant, you cannot prevent them from doing so, and you should not argue with them about the scope of the Warrant.

However, state to the agent that in your view the documents or areas are not covered by the Warrant, and that you are permitting them to search under protest. If the search exceeds the scope of the Warrant, the attorneys for the company may later challenge the legality of the search.

**ANSWER
QUESTIONS**

6. You have no obligation to assist the agents in conducting the search. Should the agents inquire about the location of documents and ask where certain documents are located, answer their questions truthfully, but again, don't sign any "Consent" and don't state that you are "agreeing" to voluntarily provide anything. It is one thing to unlock a file cabinet upon request, but you should not take the agents on a tour of the facility, explain your operations, or the documents they have been authorized to seize. It is their obligation to specify the documents sought, and it is your obligation not to obstruct their access to such documents. Simply provide them with the documents or objects they demand.

**PRIVILEGED
DOCUMENTS**

7. SHOULD THE AGENTS WISH TO SEE "PRIVILEGED DOCUMENTS" — DOCUMENTS GOING TO AND FROM ATTORNEYS — TELL THEM THOSE DOCUMENTS ARE PRIVILEGED AND ASK THEM TO WAIT UNTIL YOUR ATTORNEYS ARRIVE TO SPEAK WITH THEM ABOUT THIS ISSUE.

MONITOR SEARCH

8. MONITOR THE SEARCH. Make a detailed list of the documents removed and ask to copy the documents before they are removed. You do not have the right to stop the search; however, you have the right to observe the search at all times and make a record of everything they do and everything they look at. At least one employee should accompany the agents at all times. As the agents begin reviewing or removing documents, make a record of everything they do and every location searched. If you have access to a video recorder, record the search as best you can without interfering with the agents.

**WARN
EMPLOYEES
ABOUT
INTERVIEWS**

9. All employees should be advised that during the search, questions may be asked of them regarding not only the documents that are seized by the government, but also their and others' duties and responsibilities within the facility. Employees should be advised that the search warrant only authorizes the agents to search for and to seize evidence, not to conduct interviews or speak with employees. The employees are under no obligation to talk to the agents during the execution of the search warrant, though they may do so IF and only IF they want to do so. Moreover, anything that the employees say to the agents can be used against them, and possibly the company, in later criminal or civil proceedings, even if the agents have not advised the employees of their Miranda rights. All general requests for interviews that the agents make should be referred to, and be handled by, legal counsel.

**OBTAIN
INVENTORY OF
RECORDS SEIZED**

10. At the conclusion of the search:
- A. THE AGENTS ARE OBLIGATED TO PROVIDE YOU WITH AN INVENTORY OF ALL DOCUMENTS SEIZED. Such an inventory should immediately be faxed to counsel. Again, however, you should also take notes yourself during the search, and provide that inventory to your lawyers.
- B. An immediate review of potential document retention policies in light of U.S. v. Andersen is needed.

MEDIA INQUIRIES

11. BE PREPARED FOR POSSIBLE MEDIA COVERAGE. Before speaking with the media, please confer first with the Legal Department or those responsible for media relations and/or public communications.

The following should be added to documents going to medical facilities only.

**PATIENT
RECORDS**

12. Should the agents wish to see patient records, please remind them of the confidential nature of those records, and that the retention of those records is required by state and federal law and are essential to the ongoing daily operation of the facility. You should also remind them of the particularly confidential nature of patient records under federally funded substance abuse and dependency programs.

DRAFT**SEARCH WARRANT/REQUEST FOR INTERVIEW POLICY**

The following are procedures to follow in the event law enforcement officers come to your facility to execute a search warrant or request an interview of Company personnel. A more succinct memo is also being provided to you for immediate review should you ever be notified of the presence of law enforcement agents with a search warrant at your location.

1. SEARCH WARRANTS**A. BACKGROUND**

To obtain a search warrant, government agents must demonstrate to a judge, usually through an affidavit, that there is probable cause to believe that a search of a particular place would turn up either (1) property that would be evidence of the commission of a crime or (2) contraband or the fruits of a crime. Once the judge signs the search warrant, the government agents are authorized to conduct that search. The agents must execute the warrant within ten days of signature and, absent special circumstances, must conduct the search between 6:00 a.m. and 10:00 p.m. They are not obligated to provide any advance notice of the search.

Typically the agents will present their identification upon arrival at the location named in the warrant and, upon request, a copy of the warrant. They are not required to wait for a company escort to the particular area(s) to be searched but may proceed there on their own. If the warrant authorizes the seizure of records, the agents can search areas where those records may be kept, such as desk drawers and file cabinets. However, the agents are not authorized to search areas or seize records that are outside the scope of the search as set forth in the warrant. Nor are the agents authorized to search or detain any person without legal cause. Although the agents may question employees, the employees may decline to answer and the agents cannot compel them otherwise. The agents may not remain on-site any longer than necessary to complete the search.

B. PREPARATION

There are two steps that you should take now to prepare for the possible execution of a search warrant at your location.

First, designate a search warrant response coordinator and a backup coordinator in case of absence. The coordinator should be someone familiar with your facility's layout and operation, such as the plant manager. He or she should also be someone who can be firm yet tactful in their interactions with the government officers. The coordinator will be responsible for:

- Calling upon other employees for immediate assistance
- Notifying senior management and Company attorneys of the search warrant
- Verifying identification from the government agents
- Requesting a copy of the search warrant from the agents
- Coordinating the Company's response to all government demands
- Taking detailed notes of the search

A note should be placed in this employee's personnel file, and the file of any back-up coordinator, concerning this responsibility so that, in the event of their departure, a replacement will be selected.

The second step to take now is to provide your security guard or receptionist with instructions to immediately contact the response coordinator upon the arrival of government agents with a warrant and to respectfully ask the agents to await the coordinator before beginning their search. Sample instructions are attached. You should be aware, however, that the agents are not obligated to delay their search until the arrival of the coordinator.

C. HANDLING EXECUTION OF A WARRANT

Upon learning that government agents are on the premises and intend to execute a search warrant, the coordinator should immediately have another employee contact senior management personnel and Company counsel to notify them of the situation. The coordinator should then:

- Meet and check the identification of the agents
- Determine who is the agent in charge of the search warrant execution
- Request a copy of the warrant (and affidavit, if available) and review for basic accuracy (correct company, address, etc.)

- Inquire about the reason for the search
- Advise that all inquires arising during the search should be directed to him or her
- Request that the agents refrain from interviewing any employees until company counsel can be present

Although federal law requires an agent to provide a copy of a federal warrant (as well as a receipt for property taken upon completion of the search), the affidavit for the warrant may have been filed with a judge under seal, which will require later legal action to obtain. Additionally, the agents are not required to explain the suspected criminal activity underlying the warrant, although they may choose to do so.

The search warrant should contain some specificity regarding the location(s) to be searched and item(s) to be seized. To minimize disruption, the coordinator and assisting employees can escort the agents to the areas that the agents seek to search, assuming that the agents have not already made their way there. In either event, the coordinator or assistants should notify all non-essential personnel in the area (and elsewhere, if deemed necessary) to leave the area to minimize contacts between the agents and employees. The government cannot compel anyone to remain on-site absent legal cause to detain that person. Any remaining employees should be told, preferably from a previously prepared statement to avoid misinterpretation, that:

- They should avoid the area of the search
- If they cannot avoid the area, they should not interfere with the search
- They should not volunteer information during the search
- They have the right to decline to be interviewed by the agents
- The agents have no right to compel them to answer questions during the execution of the warrant
- They may agree to be interviewed by the agents or to answer their questions if they so choose
- If they are willing to be interviewed or to answer questions, they have the right to have Company personnel or an attorney present at that time
- The Company recommends, but is not instructing them, to decline agents' requests for interviews or questioning until the Company has a better sense of the investigation and can have counsel present

During the search, the coordinator and those assisting him or her should remain with the agents in all locations and make a detailed record of when the search began, the areas searched and the order of the search, items seized, any agent's statements or questions, their degree of familiarity with the office layout, the name of employees interviewed or attempted to be interviewed, areas or files that most interested the agents, any requests made by the coordinator to the agents and the response, any agent misconduct (e.g., threats, profanity), and the time when the search concluded. The coordinator may lawfully deny agents access to areas not described in the warrant and should inform them if they seize items outside the scope of the warrant or documents covered by the attorney-client privilege. Accordingly, particular attention should be paid to whether the agents confine their search to the areas and items described in the warrant, an overly broad search that goes beyond the scope of the warrant can provide grounds for a later motion to suppress any evidence so seized. The coordinator's notes therefore should be strictly factual since they may later become a part of legal proceedings concerning the search or investigation.

Where a warrant authorizes the seizure of business records, the agents have discretion to search desk drawers and file cabinets where those document may be contained. The coordinator may direct the agents to where targeted records are kept in an effort to confine the search to proper areas; the agents, however, are not required to follow this direction. The agents may also seize evidence in plain view during their execution of the warrant. Where the documents are numerous, the agents may take and review them elsewhere to determine whether particular documents fall within the scope of the warrant. A warrant may also authorize the seizure of computer files. The coordinator should attempt to arrange with the agents an opportunity to copy any essential records or computer files prior to their removal from the premises. If the coordinator cannot reach an arrangement with the agents on site, he or she (or Company counsel) should contact the state or federal prosecutor in charge of the investigation, who should be known to the agents or identified on the warrant, to negotiate an arrangement for copying essential business files.

The agents may not remain on site any longer than necessary to complete the search. While on site, they may not search any person without probable cause to believe some item included within the warrant can be found on that person. If the agents conduct on-site seems especially improper,

Company counsel should contact the prosecutor in charge to discuss the matter. Again, the prosecutor's name may appear on the warrant or should be known to the agent in charge of the search. If the prosecutor is unwilling to intervene, counsel should contact the judge who signed the warrant and request to be heard on the issue.

Once the agents have completed the search, they are to provide a receipt for the items seized. The coordinator should review the receipt for any discrepancy with items actually seized and bring any discrepancy to the attention of the agent in charge. The coordinator should also request a meeting with the agent in charge and attempt to learn more about the investigation, although again the agent has no obligation to provide any information.

After the agents leave, any employees interviewed, should be debriefed by Company counsel, either in person or telephonically about:

- What the agents said and asked and the employee's responses
- What documents the employee was shown or knows were taken and what they contained
- What they might know about any potential wrongdoing
- What they know of the source of the government's belief of wrongdoing at the Company

The employee should understand that any counsel doing the debriefing is acting on behalf of the Company rather than the employee individually.

There should be no meetings with employees interviewed by agents except by Company counsel and, to the extent possible, no formal post-search management meetings about the search in the absence of Company counsel. In both instances, the participation of counsel, either in person or telephonically, may entitle comments and notes made during such meetings to be legally privileged from future disclosure. By this point, if not before, counsel should contact the prosecutor to learn all they can about the investigation and, if necessary, open negotiations for the return of items seized that are

An ancillary consideration is to prepare for press inquiries, which should be directed to the Company's designated public relations personnel.

Finally, the government agents may follow up a business search with attempts to interview key witnesses at their homes (although this may also occur immediately prior to or concurrent with a search). Company counsel should alert the appropriate personnel of this possibility and remind them that they may lawfully decline to be interviewed by the agents altogether or to be interviewed only in the presence of counsel

D. CONCLUSION

The Company's objectives during the execution of a search warrant on its property, are to minimize the disruption of business operations, to ensure that the employees are aware of their rights and that those rights are respected by law enforcement personnel, to seek to confine the search to the lawful scope of the **warrant** by curbing the agents' access to non-responsive or privileged documents while avoiding actions which might appear to be an effort to prevent access to relevant documents, and to gather as much information as possible from the government about the nature of their investigation and the targets and key witnesses and documents in the investigation.

II. GOVERNMENT REQUESTS FOR INTERVIEWS

If your location is visited by a government agent or agents who request an interview with one or more employees on site, your security guard or receptionist should be instructed to ask the agent to be seated while they call a superior and notify them of the agent's arrival. Without a warrant, the agents have no authority to further enter the property. For convenience, you should have your search warrant response coordinator also respond to agent requests for interviews.

Upon being notified of the agent's request, the coordinator should first contact in-house counsel and/or previously identified local counsel. If the coordinator is able to reach counsel, the coordinator should arrange for the agent to speak to counsel, who can then determine the reason for the interview and whether to allow the interview to proceed at that time.

If the coordinator cannot reach counsel, the coordinator should meet with the agent in a private area. The coordinator should ask to see the agent's identification and inquire about the reason for the interview.

If the requested interview involves Company business, the coordinator should advise the agent that it is Company policy to first notify Company counsel of such requests, that the

coordinator has been unable to reach Company counsel and that when the coordinator does reach counsel, he or she will request counsel to contact the agent promptly.

If the requested interview involves the personal or other business of an employee, the coordinator will notify the employee of the agent's request and allow the employee to decide whether to speak to the agent.

(SAMPLE)

RECEPTIONIST RESPONSE TO A SEARCH WARRANT

1. If a government agent or agents announce that they have a search warrant that they plan to execute at the office, be courteous to them and ask them to be seated while you contact someone in management to speak with them.
2. Call (name) _____ . who is the search warrant response coordinator, at ext. _____ and inform that person of the situation. If you cannot reach (name) _____ . call (name) _____ at ext. _____ who is the backup search warrant response coordinator.
3. The agents are not required to refrain from entering the offices even though you have requested that they remain in the reception area. If they do not remain in the reception area, and you are unable to contact the search warrant response coordinator or the backup coordinator, immediately contact the most readily available management person and explain the situation.

(SAMPLE)

RECEPTIONIST RESPONSE TO GOVERNMENT AGENT'S
REQUEST TO INTERVIEW COMPANY PERSONNEL

1. If a government agent or agents request to speak to any employee, be courteous to them and ask them to be seated while you contact someone in management to speak with them.
2. Call (name) _____ at ext. _____ and inform that person of the situation. If you cannot reach (name) _____ call (name) _____ at ext. Either individual will respond to the agent. If **neither person** is available, call an available senior management person, tell them that there is a government agent in the reception area and allow that person to speak further with the agent.

SEARCH WARRANT PROCEDURE

Upon learning that government agents are on the premises and intend to execute a search warrant, you should:

1. Have someone contact the previously designated management personnel and
2. Company counsel to notify them of the situation.
 - Go to wherever the agents are and:
 - ask for the agent in charge and check his identification
 - request a copy of the warrant and affidavit and review for basic accuracy (correct company, address, etc.)
 - inquire about the reason for the search request that all inquiries during the search be directed to yourself
 - request that the agents refrain from interviewing any employees until Company counsel can be present
3. Direct someone to immediately make a copy of the warrant, return it to you and distribute copies to designated management personnel and Company counsel.
4. Personnel on-site should be told to avoid the search area and, if they cannot avoid the area:
 - they should not interfere with the search
 - they should not volunteer information during the search
 - they have a right to decline to be interviewed by the agents
 - **the agents have** no right to compel them to answer questions at this time
 - if they are willing to be interviewed or answer questions, they have the right to have Company personnel or an attorney present
 - the Company recommends, but is not instructing to decline speaking with the agents until the Company has a better sense of the situation and can have counsel present.
5. Make sure you and other employees as necessary stay with all the agents and take detailed notes regarding when the search began and ended, the areas searched and the order of the search, items seized, any agent's statements or questions, the names of employees interviewed or attempted to be interviewed, areas or files that most interested the agents, any requests made of the agents by the coordinator and the response, and any agent misconduct.
6. If the agents search areas or seize items outside the scope of the warrant, ask them to stop but do not otherwise interfere.
7. Ask to copy any essential documents or computer files seized.
8. Compare the agents' inventory of items seized to the items actually taken and the warrant itself Advise the agents of any discrepancies.

9. Meet with the agent in charge before his or her departure to try to gather more information about the investigation.
10. Prepare for press inquiries. Contact the Company's public relations personnel.
11. After the agents depart, only Company counsel should debrief employees interviewed or questioned, and any others as necessary. Also, if possible, delay formal post-search management meetings until counsel can participate either in person or telephonically. In both instances, the participation of counsel may entitle comments and notes made during such meetings to be legally privileged from future disclosure.

Hypothetical #1

Lori Legal, a Deputy General Counsel at Widget World, a Fortune 500 parts manufacturing company, was lying on the beach in an exotic location enjoying her much deserved vacation. Her thoughts drifted to the internal investigation she had started shortly before she had left that she would need to finish when she got back to work.

About three months ago Lori had gotten a call from Susie Sharp, a senior manager in Widget's Finance Department. Susie had asked Lori to meet with her about a matter of great urgency. When they met Susie told Lori that she believed that one of Widget's largest divisions was improperly booking advance sales and also misstating the value of its inventory. Susie said that she believed that the improper accounting practices had been going on at this division for some time and that they were significant enough to potentially cause the company to overstate its earning for the past two years. Susie said that she had attempted to raise this issue with her boss Joe Numeral, the company's CFO on several occasions but Numeral had told her that while he was aware that the division in question was aggressive in its accounting practices, the external auditors have reviewed the books and found nothing wrong. Numeral told Susie that she shouldn't worry about it.

Susie said she left the topic alone until shortly before her meeting with Lori when she learned that another division within the company was adopting similar improper accounting practices. Susie had discussions with several others in the accounting department who shared her concerns about the accounting practices and when she was rebuffed again by Numeral she called Lori.

Lori told Susie that she would immediately look into her concerns. Lori had intended to start an investigation right away but she got busy with other matters. About three weeks before her vacation Susie called and asked what the status of the investigation was. Lori realized that she needed to get going. Lori conducted several interviews of people Susie had suggested that she talk to and Lori reviewed numerous documents. Lori determined that there appeared to be some merit in Susie's allegations and that there was at least a possibility that Numeral was not only aware of the problem but he had condoned and encouraged it. Before Lori had time to dig any further the date of her vacation arrived and she left for a couple of weeks on the beach.

As Lori's thoughts drift over these facts and the potential consequences for Widget her cell phone rings, it is Ed Error the CFO for Widget's division that was engaging in the questionable accounting practices. Ed says the FBI is at the door with a search warrant for the division's offices and with Grand Jury Subpoenas for himself, the division's president and several of his direct reports. What should Lori do?