

# Administrative Search Warrants

## MACA Spring Seminar



LAUBER MUNICIPAL LAW, LLC

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# Welcome to the Todd Show!

- Ⓜ This presentation is an in-depth review of the use of administrative search warrants (ASW's) for code enforcement purposes.
- Ⓜ To 99% of lawyers, this subject is the last footnote in a specialty area of criminal practice, but it is a HUGE deal for cities, should be a major part of any serious code enforcement program.
- Ⓜ 42 slides, yeah I know, its a lot.
- Ⓜ We will be taking breaks
- Ⓜ Ask questions at your whim, I may defer answering them at my whim.

# Topics for Today

- ④ What is an ASW?
- ④ What is the 4<sup>th</sup> Amendment?
- ④ Criminal versus administrative warrants?
- ④ SCOTUS *Camara* decision
- ④ How to get a judge to agree to do ASW's
- ④ Paperwork process
- ④ Executing ASW
- ④ Common mistakes
- ④ Suppression motions/hearings

# Disclaimer

- Ⓜ This presentation is for educational purposes only and is not official attorney-client legal advice.
- Ⓜ If you would like to get official attorney-client legal advice, our firm represents cities across Missouri, let's talk. Seriously.
- Ⓜ Momma Smith ain't here, so there will be colorful language, some war stories, and other lies, anything to keep your attention for *four* hours.

# Who is Todd Smith?

- ④ Why should you listen to me?
- ④ I'm an attorney in Lauber's Jefferson City office.
- ④ I focus on public safety and constitutional law issues.
- ④ Earned 2<sup>nd</sup> law degree in Law and Government.
- ④ Served as an assistant county prosecutor and in the MO Attorney General criminal division; extensive experience with drug taskforce operations and felony search warrants, literally done hundreds of warrants and related hearings.
- ④ Currently assistant municipal prosecutor for the City of Sedalia, routinely use ASW's with CBO Devin Lake and her team.

# What is a Search Warrant?

- Ⓜ A search warrant is a legal document, a court order, allowing the government to search otherwise private property or things and then to seize or take things that can be used as evidence in a criminal prosecution.
- Ⓜ Classic example is a warrant to search a house for drugs.
- Ⓜ Lots of scenarios – search a person via surgery!
- Ⓜ §542.271, RSMo. sets out what a search warrant may be issued for or to do.
- Ⓜ §542.276, RSMo. sets out the requirements for the paperwork and process.

# What's the Constitution say?

- ④ Per the 4<sup>th</sup> 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 persons or things to be seized.”
- ④ Don't need to memorize this language, but it is useful to unpack what all it says.

# Unlocking the 4<sup>th</sup> Amendment

- ④ We have an “expectation of privacy” in our private places such as homes or vehicles or bags.
- ④ That expectation must be reasonable, it is not absolute: what you SAY in a telephone booth is different from what you are DOING in that glass box.
- ④ A [search] warrant gets the government around that privacy shield.
- ④ The executive branch (cops, code folks, prosecutors) must get the judicial branch (judge) to sign off, a layer of protection against random or unjustified searching.
- ④ Warrant must be particular – no general, do whatever you want warrants allowed – address, crime/violation listed.



# Why get a Search Warrant?

- ④ Without a warrant, you can't search the private places without consent (more on that shortly).
- ④ There are more than a dozen exceptions to the warrant requirement for the police, mostly related to real-world law enforcement situations; ex: search incident to arrest, no need for warrant, need to make sure the suspect isn't armed or smuggling drugs into the jail, but for code work, can't count on these exceptions.
- ④ There are good reasons to have a POST "real cop" serve as a code officer or accompany code enforcement folks when executing a search warrant, but those cops must be reminded, the exceptions they use daily likely won't apply with an ASW.

# What if I don't get the warrant?

- Ⓜ The worry is the exclusionary rule, any evidence improperly seized is inadmissible to prove guilt,
- Ⓜ This is a very strong, very harsh rule; you find a beheaded corpse in a closet without a warrant or exception, the jury will NOT hear one word about it at the murder trial.
- Ⓜ Adding insult to injury, if evidence is excluded, it basically means the property owner's constitutional rights were violated, the Court excluding evidence can be used to support a civil lawsuit, called a §1983 claim; you don't want to be in this position<sup>1</sup>

# What about consent?

- Ⓜ A property owner can always consent to a search and seizure.
- Ⓜ Consent must be knowing and voluntary; no tricks.
- Ⓜ Best to get that consent in writing, in a pinch, have them text you “I consent to search of my house at 123 Main Street.”
- Ⓜ Be careful about minors or guests consenting to search stuff they don’t really own, some leeway here.
- Ⓜ If you can’t get consent (or consent is revoked, the property owner is allowed to take it back after giving), then you are going to have to go get an ASW.

# Criminal search warrant process.

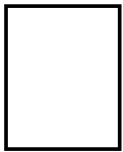
- ④ Police officer prepares a notarized affidavit setting out the facts supporting the belief that evidence of a crime can be found wherever.
- ④ Prosecuting attorney prepares a signed application stating details of the target search.
- ④ Judge signs the actual warrant allowing the search.
- ④ Police officer executes the warrant.
- ④ Officer seizes the materials sought (drugs, guns, etc).
- ④ Officer provides a return (like a receipt) to the court.
- ④ Seized items are admissible at trial to prove guilt.

# What's “Administrative” mean?

- ④ No mention of “Administrative” anything in the Fourth Amendment or anywhere else in the Constitution.
- ④ Basically, lawyers made the whole “Administrative” thing up.
- ④ Out of thin air comes the idea that a search warrant can be used for not only criminal investigations in support of criminal prosecutions but also to enforce administrative codes (building, health, animal, etc) that municipalities use to maintain a good community.

# “Administrative” continued.

- ④ Cops will tell you that administrative search warrants are indescribably boring, they are used for things like building code inspections by unarmed code enforcement officers and part-time municipal prosecutors looking to charge not serious felonies for a small fine.



# ASW's are actually awesome!

- ④ ASW allow cities to make serious progress on nuisances.
  
- ④ You can use an ASW to:
  - Tow away abandoned vehicles.
  - Remove accumulated trash and rubbish.
  - Establish that a structure is statutorily dangerous.
  - Check to see how many dogs really live in the basement.
  - Inspect to see if the business is keeping proper records.
  - Examine a post-fire building to establish its integrity.(All real-world examples).

# ASW's are SCOTUS approved.

- ④ The lawyers who came up with “Administrative” were United States Supreme Court Justices!
- ④ The nation’s highest court has specifically approved the use of ASW’s by municipalities to conduct inspections pursuant to city codes.
- ④ *Camara v. Municipal Court of San Francisco*, 387 U.S. 523 (1967).
- ④ I often cite this case within the body of the ASW application just to make sure anyone new to this type of document has a good place to start if they want to do some checking.



# What's the big deal in *Camara*?

- ④ The threshold standard for obtaining an ASW is lesser than a normal, criminal search warrant, so an ASW is much easier to get.
  - “It has been suggested that so to vary the probable cause test from the standard applied in criminal cases would be to authorize a synthetic search warrant and thereby to lessen the overall protections of the 4th amendment. But we do not agree. The warrant procedures designed to guarantee that the decision to search private property is justified by a reasonable governmental interest. Reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.” *Camara*, 387 U.S. at 538-39. (emphasis added).

# How is it easier?

④ Two metrics

④ Different thresholds for authorization.

- Probable cause that a crime has occurred

versus

- Reasonable suspicion that the building code is being violated

④ Different scope of the search.

- Search the entire contents of the house (anywhere where drugs/powder can physically be concealed, which is literally anywhere inside the residence, drawers, ducts, drywall...)

versus

- Take a quick look around, can't tear the place apart.

# How to actually use ASW?

- ④ The goal is to try and establish a “system” where ASW can be drafted, submitted, and approved efficiently via electronic documents and emails.
- ④ You will need to write a search warrant ordinance based upon §542.276, RSMo. that sets out the contents of the warrant and the process.
- ④ The system requires the cooperation of:
  - Municipal Judge
  - Municipal Court Clerk
  - Municipal Prosecutor
  - Public Notary
  - Code Enforcement Officer

# How to get the Judge to agree?

- ④ Get your judge's blessing first on the idea of ASW
- ④ Get the judge involved with the drafting of templates, you want to make sure the Court is happy with the boilerplate language.
- ④ All judges are different, tailor the process to them.
  - How do normally single orders/warrants?
  - Do they prefer PDF or Word?
  - Do they want to be emailed or called when a warrant has been submitted?
  - Will the judge swear you in or do you need to arrange a notary.
  - Emphasize that unlike felony warrants or 96-hour commitments, no rush for municipal warrants, no urgency, nothing in the middle of the night.

# You will need an ASW Ordinance

- ④ Your municipal judge will want to see the ordinance authorizing the issuance and use of ASW's.
- ④ Model it on §§542.271/276, RSMo.
- ④ Needs to set out the paperwork process (more on this in the next slide)
- ④ Make clear the warrants are the purpose of investigating violation of building, animal, health codes.
- ④ Specifically authorize electronic submission via email.
- ④ Some require you to seek consent first.

# ASW Paperwork Process

- ④ Code officer sees violation.
- ④ Code officer uses template to draft affidavit stating what was observed, emails that to municipal prosecuting attorney (MPA).
- ④ MPA uses template to draft an application, affixes notarized signature, emails that to judge along with affidavit and, if available, pictures from the scene.
- ④ Judge reviews and (hopefully) signs, emails the warrant back to MPA who forwards to code officer and the relevant court clerk.
- ④ Process takes two hours over two days; easily repeatable.
- ④ Can be done very quickly, but no need, increase errors.

# Affidavit (code person piece)

- ④ This is a legal document prepared by the code enforcement officer, it starts the process.
- ④ You can start from scratch, better to use a template.
- ④ Lots of folks don't use a template but rather the affidavit they did, they is okay, but is increase the error rate (chance of the problem).
- ④ What happens when you use the last one is you sometimes forget to change an address or date or other detail from the earlier versions and you get a contradiction in the paperwork.
- ④ Much better to start “fresh” with a template.

# Affidavit template example

## AFFIDAVIT IN SUPPORT OF APPLICATION FOR ADMINISTRATIVE SEARCH WARRANT

I, **NAME**, knowing that false statements in this document are punishable by law under the penalties of perjury, state that the facts contained herein are true to the best of my knowledge.

1. I am a Code Enforcement Officer with the City of **MAYBERRY**
2. I believe that Code Section **XXX** is being violated by **NAME**, the owner or occupant of the property at **ADDRESS** within the city limits of **MAYBERRY**.
3. On **DATE** I investigated a city code violation at **ADDRESS** on **DATE**. I learned/saw ... **TELL THE STORY OF WHY YOU SUSPECT A VIOLATION.**
4. I believe that entry onto the property and into the residence is necessary to inspect for municipal code violations to **EXPLAIN WHAT YOU EXPECT TO FIND.**
5. I have asked the municipal prosecuting attorney to apply for an administrative search warrant so that I may enter onto the property.

Respectfully Submitted,

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**NAME**, Code Enforcement Officer



# Application (prosecutor piece)

- ④ This document is the formal request by the municipality to the court for permission to search the property.
- ④ Document must be completed by an attorney, technically it is a court pleading.
- ④ It sets out exactly where the search will occur, exactly what is being looked for (state precise violation)m and exactly when it was applied for.
- ④ It specifically references the accompanying affidavit, which tells more of the story.

# Application Template example.

## APPLICATION FOR ADMINISTRATIVE SEARCH WARRANT TO TOW VEHICLE

1. I am a city attorney for the City of Sedalia and am authorized to apply for administrative search warrants.
2. The date and time of the making of this application is **DATE** at \_\_\_\_\_ approximately am /pm by electronic submission.
3. Sedalia City Code Section 16-24 authorizes administrative search warrants to search or inspect any property, place, or thing and the seizure, photographing, copying, or recording of property or physical conditions found thereon or therein to determine or prove the existence of violations of any ordinance or Code section of the city relation to the use, condition or occupancy of property or structures located within the City or to enforce the provisions of any such ordinance or Code section.
4. I wish to direct city code enforcement staff to enter onto property located at **ADDRESS**, a location within the city limits of Sedalia, Missouri, to seize evidence of code violation located therein, specifically a **COLOR MAKE MODEL** baring license plate number **XXX XXX / NO PLATE DISPLAYED** that has been parked **WHERE (DRIVEWAY, GRASS)**.
5. I believe the vehicle is in violation of City Code **SECTION # TITLE**.
6. Facts which support the issuance of a search warrant are provided in the accompanying affidavit.

# Warrant (judge piece)

- ④ The ASW itself is a court order signed by the judge.
- ④ Make it easy in them, provide a completed document that just needs a signature.
- ④ It needs all the critical details, address, owner, violations, dates, etc.
- ④ Make sure it is signed. Duh.
- ④ Judge doesn't need a notary, his/her signature is self-authenticating for this purpose.
- ④ Make sure the clerks get a copy of everything.

# Return (last piece)

- ④ This last step is the easiest but the one most often forgotten.
- ④ The code officer needs to file a receipt with the Court listing when the warrant was executed, exactly what was taken, and where that stuff is now.
- ④ Can be sealed, not necessary for most situations.

# Return example (Sedalia tow)

IN THE CIRCUIT COURT OF PETTIS COUNTY

SEDALIA MUNICIPAL DIVISION

STATE OF MISSOURI

RETURN ON ADMINISTRATIVE SEARCH WARRANT TO TOW VEHICLE

1. On **DATE**, the Municipal Judge approved an administrative search warrant to tow a vehicle.
2. That search warrant was executed on **DATE** at **ADDRESS**.
3. The towed vehicle was a **COLOR MAKE MODEL** bearing license plate number **XXX XXX / NO PLATE DISPLAYED** with vehicle identification number **VIN**.
4. The vehicle was towed on that day by **TOW COMPANY** and impounded at the company lot located at **ADDRESS**.

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**YOUR NAME**

Code Enforcement Officer

City of Sedalia

# A word about notaries.

- ④ Surprising how often a public notary is not handy when you are trying to get paperwork together.
- ④ Typically, city clerk is a notary, banks always have them, title and shipping companies often provide notary service (UPS/Fedex).
- ④ Always a good idea to coordinate schedule with a notary to make sure they will be available to watch the affiant sign the paperwork.
- ④ Consider getting someone in your office to become a notary, there is an online test and some fees, but not that bad, no felons, minors, no bankruptcy.

# Notary signature block.

STATE OF MISSOURI )  
 )  
COUNTY OF \_\_\_\_\_ )

SS.

On this \_\_\_\_ day of \_\_\_\_\_ in the year 20\_\_\_\_, before me, a Notary Public in and for said state, personally appeared \_\_\_\_\_, known to me to be the person who executed this sworn document and acknowledged to me that the affiant executed the same for the purposes therein stated.

In Testimony Whereof, I have set my hand and affixed my official seal.

\_\_\_\_\_  
Notary Public

[seal]

# ASW Execution (serving it)

- ④ You must execute the warrant within **10 calendar days** of when the judge signed, void on 11<sup>th</sup> day, no reason to wait, consider dead on the 9<sup>th</sup> day, don't want a debate about how the days are counted.
- ④ Execute during regular business hours (different for criminal warrants, but no need for odd-time execution for ASW, just invite claim of harassment).
- ④ Show up, knock on the door, explain to who answers what is happening, provide a copy to the person.
- ④ If no one is home, leave a copy of the paperwork.



# ASW Execution continued

- ④ If you arrive and find clear evidence of felony crime (dead bodies, drugs/paraphernalia, blood, neglected kids, lots of guns, lots of stolen stuff – who has 20 identical cell phones?), STOP IMMEDIATELY AND CALL DISPATCH FOR POLICE RESPONSE.
- ④ Don't touch anything as you back out of what is now a crime scene.
- ④ Tell the cops who respond about the ASW.
- ④ Strictly this becomes a matter for the police and county prosecutor's office, but they need to secure the scene and get a new, criminal warrant based upon the observations of the code folks.

# Safety issues in ASW Execution

- Ⓜ Strictly speaking, you are allowed to use “force” to execute a warrant, which means restraining a person who is obstructing the search or breaking down a locked door.
- Ⓜ No reason AT ALL a non-POST law enforcement officer shouldn't be doing that, they are trained, insured, and armed; consider bringing them along in the first place or having such an officer be the code person responsible for executing ASW's, use cops for these if at all possible.
- Ⓜ Be careful about unsafe structures, Jeff City code supervisor got injured in the line when the floor gave way, leave a second person outside who can call for help, coordinate a rescue/medic response.

# ASW Timeline.

Ⓜ Here's how it plays out: (approximate time spans)

- Day 1: First contact/complaint, investigate.
- Day 2: Warning/violation letter.
- Day 15: Return visit, no improvement.
- Day 16: Write up affidavit, submit to prosecutor.
- Day 18: Prosecutor prepares other documents, submits to judge.
- Day 20: Judge approves the warrant, 10-day clock starts.
- Day 22: Warrant executed.
- Day 25: Return filed.
- Day 30: Citation issued based upon finding from execution of the ASW.

# Common mistakes.

- ④ The most common mistakes are issues with the paperwork, typically a detail that gets omitted or left over from the last document that got prepared, such as a wrong date or address.
- ④ Would a reasonable person have been confused if they had a read it: address wrong once or through the paperwork.
- ④ While not strictly required, it is a good idea to literally read the warrant aloud.
- ④ So this one time a judge added something to the warrant...

# Missouri cases on ASW

- ④ Just two cases specifically on ASW's.
- ④ *Frech v. City of Columbia*, 693 S.W.2d 813 (Mo. banc 1985) and *State v. Wilson*, 527 S.W.3d 908 (Mo. App. W.D. 2017).
- ④ Both say the same thing: can't use an administrative warrant for criminal investigation.
- ④ Issue arises when drug taskforce needs a way to search a suspected crack house but doesn't have good grounds to get a search warrant, they might try and get a ASW, easier to obtain, this is not allowed, but...

# Suppression motions.

- ④ The suspect/defendant can argue the exclusionary rule should apply and the evidence (typically the observations/photos of the code officer) should be blocked from coming into evidence, that exclusion is called being “suppressed.”
- ④ §542.296, RSMo. is the suppression motion statute; arguably doesn’t apply to ASW’s, I suggest it does, as subsection 2 requires the motions to be writing.
- ④ Basically these motions sets out the legal and factual arguments that the warrant should not been granted or was improperly executed so as to suppress or exclude the damaging evidence from trial.

# Suppression hearing.

- ④ Once the defendant files a suppression motion, the Court should hold a separate hearing on it, some judges prefer to combine them, but better for us to have the, handled separately at different times, lets city re-evaluate if the motion is granted and the evidence is suppressed.
- ④ The hearing is basically a bench trial focused squarely on the search warrant, how it was obtained and executed.
- ④ The burden is on the prosecution to show that the search was okay, defendant doesn't have to argue anything.
- ④ Private criminal defense attorneys make their living winning these hearings, that's how they get the guilty off, expect them to come prepared.

# Surviving a suppression hearing.

- Ⓜ If you find yourself with a veteran defense attorney and a suppression hearing, you should expect the cross-examination to be brutal, the code officer will be asked technical legal questions that they likely cannot answer correctly on the spot; that's the idea.
- Ⓜ Key is to prepare, a typed-outline is a good idea.
- Ⓜ Direct examination happens first, get the story out first, calm down, get comfortable.
- Ⓜ Useful objection: “Objection! Your Honor, this is fact witness, not a legal expert, that question is improper and should be made later during the argument segment.”



# What's the bottom line?

- ④ Administrative search warrants are an extremely powerful tool for any community looking to become aggressive about code enforcement. The hassle involved in developing an authorizing ordinance and paperwork templates may seem daunting, but it is absolutely worth the time and effort.
- ④ Questions???



LAUBER MUNICIPAL LAW, LLC

# Administrative Search Warrants

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