

# Utilizing a Smart Phone “App” to Protect Companies and Individuals in Critical Law Enforcement Encounters: M&M Defend™

By Steven D. Feldman

White collar defense attorneys are regularly confronted by new clients who seek representation where the client has told some version of his or her story to law enforcement agents before ever meeting with counsel. While *Miranda* warnings, aimed at providing prophylactic cautions to individuals,<sup>1</sup> are ubiquitously disseminated throughout our society, in practice people generally relay an entire story to law enforcement officials without preparation, without prior consultation with counsel, and without being accompanied by a lawyer to protect their interests. Of course, where an individual is not subject to custodial interrogation, there is no obligation for law enforcement agents even to provide *Miranda* warnings.<sup>2</sup>

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Law enforcement agents are aware of our general human nature to be helpful, and know that a lawyer will almost always counsel a client to exercise caution before meeting with law enforcement agents and relating his or her story. The FBI Special Agents and other law enforcement agents use these predilections to their advantage and will often appear at a client’s home early in the morning—often before 7:00 a.m.—to ask questions before attorneys are at the office and available to take calls.<sup>3</sup>

Once these interview sessions begin, they do not end easily. While an agent may initially claim that he or she will only ask a few questions, each question naturally leads to another, and the agents will falsely (but legally) claim to need just one more question answered before the interview is completed.<sup>4</sup> Agents often ask to come into the individual’s home, and the individual complies both to avoid seeming rude and to avoid the spectacle of a law enforcement agent standing on the door step. Once the agent is inside, it is no longer possible to simply shut the front door if the individual wants to end the conversation. Rather, the individual has to prevail upon an armed law enforcement agent to leave the home, all while the agent is trying to convince the individual to answer just a few more questions.

These situations are fraught with risk for the individual, even for those innocent of wrongdoing, as agents may erroneously conclude that an innocent person is lying, and therefore committing a new offense of providing false statements in an official investigation.<sup>5</sup> These can be life changing encounters.

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Similarly, companies and individuals are at risk when law enforcement agents seek to execute search warrants at an office, warehouse, or home. Search warrants are appropriately issued where a magistrate judge finds that there is a fair probability that contraband or evidence of a crime will be found in a particular place.<sup>6</sup> A search warrant often permits law enforcement agents to seize paper documents as well as copy computer hard drives for review off-site in the future.

Once on location, however, law enforcement agents may use their access to an office or warehouse as an opening to obtain voluntary consent to search other locations not covered by the search warrant, or as opportunities to question employees on site. Desiring to be cooperative, and unaware of their rights and the risks inherent in these situations, employees may consent to searches outside the scope of the search warrant, or submit to interviews with law enforcement agents without counsel present. However, armed with guidance about their rights and permissible strategies to respond, individuals and companies can make educated decisions in these stressful circumstances.

It was these and similar situations that provided the impetus for the creation of a free “app” for iPhone and Android smart phone users called “M&M Defend.” The M&M Defend app provides guidelines for critical interactions with law enforcement focusing on: (1) surprise interviews and encounters with law enforcement agents; (2) government execution of search warrants at a warehouse, office or home; and (3) receipt of grand jury subpoenas by a business or individual. It contains bullet points provid-

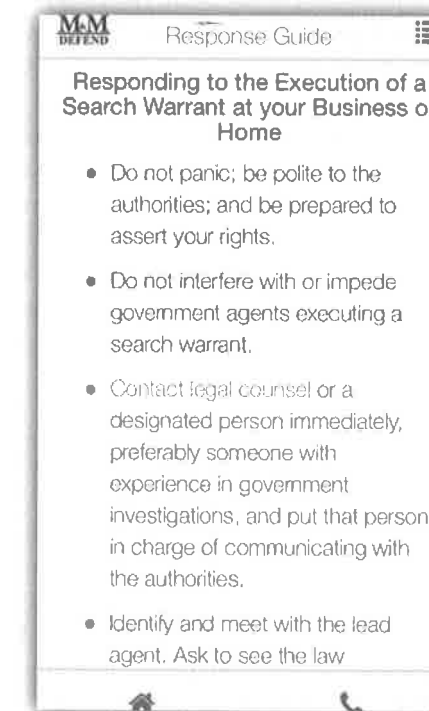
ing guidance on these subjects, along with expandable sub-bullets offering additional insights.



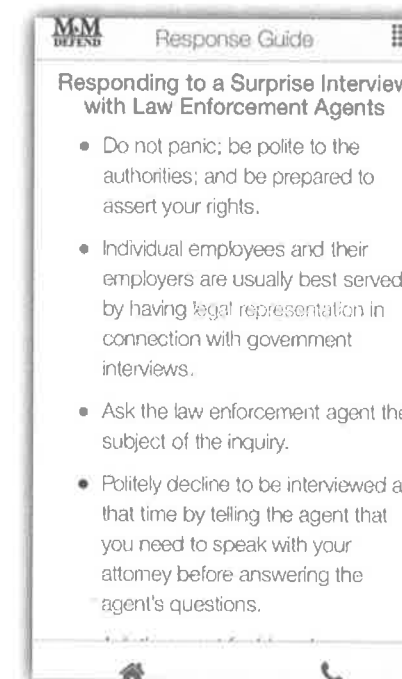
At the critical moment, if law enforcement agents appear at an individual’s home front door or otherwise seek to question the individual while he or she is away from the office, the individual will not have access to information stored on an office computer or in a file cabinet. Similarly, an office or warehouse manager may not easily locate written guidance while facing down law enforcement agents at the doorway demanding to immediately execute a search warrant. While this kind of legal information could be conveyed to clients via traditional means, such as print brochures or handouts, the limitation of the traditional format is that the information is stored in a drawer, file cabinet, or desktop computer – not on a smart phone carried in the employee’s pocket.

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By placing the information literally at the employee’s fingertips via a free app stored on the individual’s smart phone, the individual has access to educational information and generic guidance that informs the individual of his or her rights, and provides general knowledge about



law enforcement practices in these situations. Of course, as the app explains, generic guidelines are no substitute for individualized advice from an attorney. Each situation will differ, and the guidelines recommend that individuals should, as soon as practically possible, seek out the advice of company in-house counsel or appropriate outside legal counsel to guide the individual through these critical encounters. But before it is possible to connect with counsel, the app can provide important guidance that can help prevent the individual from unknowingly waiving crucial rights or unnecessarily consenting to intrusive state action.



The app consists of five sections: (1) an introduction; (2) guidelines to respond to a surprise interview request from law enforcement agents; (3) guidelines to respond to the execution of a search warrant at an office or home; (4) guidelines to respond to a grand jury subpoena; and (5) attorney contact information, including attorney cell phone numbers and email addresses. The app works on both the iPhone and Google Android devices. It is available for free at the Apple iPhone App Store under the name "M&M Defend" and on the Google Play store under the same name. To date, more than 400 people have downloaded the app.

The M&M Defend app was launched as part of a mission to serve clients in new ways as technology fundamentally transforms the way lawyers and their clients do business. Lawyers are exploring new ways to deliver legal services, from proprietary databases to smart phone apps. Through the proprietary databases, lawyers seek to support their legal advice with more than anecdotal experience by leveraging big data analytics. The M&M Defend app was created with these principles in mind.

By providing individuals with this crucial legal information that they can store on their smart phones and access in emergency situations, individuals will be better equipped to make knowing decisions when determining how to interact with law enforcement officials, when to waive their rights, or how to assert their rights.

## Endnotes

1. See *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966).
2. See *Ill. v. Perkins*, 496 U.S. 292, 297 (1990).
3. See, e.g., *United States v. Mittle-Carey*, 493 F.3d 36, 38 (1st Cir. 2007) (noting law enforcement agents arrived at defendant's home at 6:25 am to execute search warrant and question defendant; when asked by defendant whether he should get a lawyer, law enforcement agent told defendant that "if he got an attorney, the attorney was going to tell him not to speak to the FBI").
4. See, e.g., *United States v. Kontry*, 238 F.3d 815, 817 (7th Cir. 2001) ("Trickery, deceit, even impersonation do not render a confession inadmissible, certainly in noncustodial situations and usually in custodial ones as well, unless government agents make threats or promises.").
5. See 18 U.S.C. § 1001.
6. *Ill. v. Gates*, 462 U.S. 213, 238 (1983).

**Steven D. Feldman is a shareholder at Murphy & McGonigle, P.C., a securities litigation firm, and spearheaded the creation of the M&M Defend app. A former federal prosecutor in the Securities & Commodities Fraud Task Force for the U.S. Attorney's Office in Manhattan, Steven focuses his practice on white collar criminal litigation. He represents companies and individuals accused of business crimes, public corruption, securities law violations and fraudulent practices by the U.S. Attorney's Office, State Attorney General, District Attorney, Securities and Exchange Commission, and Commodity Futures Trading Commission. The M&M Defend app is available to download for free for iPhone at the Apple Store and for Android devices at the Google Play app store.**

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