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To Inspect or Get a Warrant? That is the Question.

BY SARAH A. BRADLEY, ESQ.

Many Nevada licensing boards have statutes that authorize the board to "inspect the premises" of a licensee to determine whether a violation of the board's statutes or regulations has occurred. See, e.g., NRS 640.050(7). But is a statute like this sufficient to obviate any requirement of the board to obtain a warrant pursuant to the Fourth Amendment of the U.S. Constitution? Most of the time, if the industry is "closely regulated," a warrant is not required for the board or other government agency to perform an inspection. *New York v. Burger,* 482 U.S. 691 (1987).

In *New York v. Burger*, the U.S. Supreme Court determined whether the warrant and probable cause requirements that are generally necessary to make a search "reasonable" under the Fourth Amendment applied to an inspection of a junkyard by New York law enforcement pursuant to a New York statute authorizing warrantless inspections of automobile junkyards. *Id.* The court held that the owner of commercial premises in a closely regulated industry has a reduced expectation of privacy and this situation is a "special need" like in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), "where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened." *Burger*, 482 U.S. at 702.

To determine whether a business is closely regulated, the court looked at the statutory framework governing that business. *Id.* at 704–06. The court discussed two aspects of the statutory scheme at

issue in *Burger* that led it to conclude that automobile junkyards are closely regulated businesses:

(1) the nature and detail provided in the requirements imposed on the business; and
(2) the history of regulation for that particular industry.

In *Burger*, the court found that New York's statutes imposed "extensive" requirements that automobile junkyards had to comply with in order to operate. It also found that the government's history in regulating "junk-related activities" went back for at least 140 years. *Id.* at 706–07. The court also highlighted New York's interest in deterring crime and public protection through regulating automobile junkyards. These factors were sufficient for the court to determine that an automobile junkyard is a closely regulated business. *Id.*

The court then set out a three-part test that must be satisfied in order to ensure that warrantless searches of closely regulated businesses remain reasonable under the Fourth Amendment. First, "there must be a 'substantial' government interest that informs the regulatory scheme to which the inspection is made." *Burger*, 482 U.S. at 702, citing *Donovan v. Dewey*, 452 U.S. 594, 601 (1981). Second, "the warrantless inspections must be 'necessary' to further [the] regulatory scheme." *Burger*, 482 U.S. at 702. Third, "the statute's inspection program, in terms of the certainty and regularity of its application [must] provid[e] a constitutionally adequate substitute for a warrant." *Id.* In other words, the regulatory scheme must advise the owner that the property will be subject to regular searches according to the law and provide the parameter for those searches, as well as limiting the discretion of the inspectors.

Under *Burger*, nearly all Nevada's licensing boards would be permitted to conduct warrantless inspections as long as the board has a statute authorizing such inspections.[1] At the same time, just because a warrant is not required does not mean that a board could not obtain one for clarity or other purpose as recommended by its legal counsel.

While the analysis for a closely regulated business, such as one requiring licensure pursuant to Nevada Revised Statutes Title 54, might be satisfied through a *Burger* analysis, what about other inspections conducted by law enforcement and/or other government agencies of other types of businesses?

In 2015, the U.S. Supreme Court addressed a different situation in *City of Los Angeles v. Patel*, 567 U.S. 409 (2015). Here, a hotel operator challenged a municipal code that required hotel operators to provide police officers with specified information concerning guests upon demand. The court indicated that the municipal code at issue was unconstitutional because it failed "to provide hotel operators with an opportunity for precompliance review." *Id.* at 419. The court did not specifically state that a warrant was necessary but instead that "a hotel owner must be afforded an opportunity to have a neutral decisionmaker review an officer's demand to search the registry before he or she faces penalties for failing to comply." *Id.* at 420. The court also mentions that an "administrative subpoena" may be an option and clarifies that the officers requesting the administrative subpoena do not need to have a "probable cause that a regulation is being infringed." *Id.* at 420.

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The *Patel* court addressed its deviation from *Burger* and indicated that "[o]ver the past 45 years, the court has identified only four industries that 'have such a history of government oversight that no reasonable expectation of privacy … could exist for a proprietor over the stock of such an enterprise.'" *Id.* at 424 citing *Barlow's, Inc.*, 436 U.S. 307, 313 (1978). To date, these recognized industries are liquor sales, firearms dealing, mining, and automobile junkyards.[2] The court stated that if it were to include hotels in this list, the administrative search exception to the Fourth Amendment would allow "a narrow exception to swallow the rule." *Id.* at 424–25. In sum, "[n]othing inherent in the operation of hotels poses a clear and significant risk to public welfare," and requiring hotel owners to provide information about guests to law enforcement without oversight is not appropriate under the Fourth Amendment. *Id.* at 424.

What about other inspections by government officials related to compliance with regulatory laws, fire, health, and housing codes?

This issue was first addressed by the U.S. Supreme Court in *Camara v. Municipal Court*, 387 U.S. 523 (1967). In *Camara*, an inspector from the Department of Public Health attempted to conduct an annual inspection of an apartment building. Camara was using the ground floor as a personal residence and refused to allow the inspector in to inspect the premises. The inspector attempted to inspect multiple times and did not obtain a warrant prior to any of his inspection attempts. Eventually, the inspector filed a criminal complaint against Camara for violating Section 503 of the Housing Code. While "a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime," the court still held that inspections of this nature require a warrant if the occupant asserts his constitutional right that one be obtained. *Camara*, 387 U.S. at 530. To obtain the warrant, probable cause may be satisfied by review of the relevant codes, the long history of judicial and public acceptance for these type of inspections, the public's interest in ensuring that "all dangerous conditions be prevented or abated," and that the purpose of the inspection is not personal to the occupant or about discovery of evidence of a crime. *Id.* at 537.[3]

In Nevada, the Court of Appeals specifically addressed both criminal and administrative warrants in *Palmieri v. Clark County,* 131 Nev. 1028 (Nev. Ct. App. 2016). Like *Camara*, the search at issue was for a person's residence and was being done by a local government official – county animal control officer – but unlike *Camara*, the county animal control officer had a warrant authorizing his search. The question before the

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court was whether the warrant was administrative or criminal in nature because the search resulted in criminal charges against Palmieri for violation of county codes related to health and welfare of animals, and it was later discovered that the informant who provided information that provided a basis for the warrant gave a false identity to the county control officer. The court indicates that both warrant types require probable cause, but criminal search warrants require a "stronger showing of probable cause." *Id*. at 455. The court held that the warrant here was an administrative warrant and it was sufficient authority for the search that was conducted by the animal control officer.

In conclusion, to answer the title question, as long as the business is "closely regulated" and the *Burger* factors are met, inspect.[4]

ENDNOTES:

1. Nearly all of Nevada's Title 54 licensing boards are professions that have been historically licensed, require licensure as a condition for a person to perform that work, and have language in their statutes indicating that the Legislature created that board to protect the public.
2. There are currently no U.S. Supreme Court cases addressing the Fourth Amendment as it relates to licensing boards, but there are many across the country that address these issues with regard to the statutory scheme imposed by various different licensing board and regulatory agencies.
3. In Nevada, there is a similar case decided just two years after *Camara* about inspections of a person's home to check for violations of the city building code: *Owens v. City of North Las Vegas*, 85 Nev. 105 (1969). The U.S. Supreme Court also provided additional guidance regarding the purpose of an inspection and how it affects the warrant requirement in *Michigan v. Clifford*, 464 U.S. 287 (1984).
4. A related doctrine recently adopted by the Nevada Supreme Court is the required records doctrine, which precludes a person from asserting his or her Fifth Amendment right against self-incrimination to refuse to produce records as requested by a regulatory body as long as three criteria are met. *Agwara v. State Bar of Nevada*, 133 Nev. 783 (2017). In addition, if medical records are reviewed in an inspection by a regulatory body, such as a licensing board, that inspection is exempted from the Health Insurance Portability and Accountability Act of 1996 (HIPAA) as an oversight activity pursuant to 45 C.F.R. 164.512(d). *See also* 45 C.F.R. 164.512(a).

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