

Defending a Search Warrant for Health Care Providers

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Since Janet Reno, Attorney General of the United States, identified health care fraud as the number two priority of the U.S. Department of Justice after violent crime these words have been heard with growing frequency in the business offices of health services and DME providers throughout the country. The words are sufficient to strike terror in the hearts of health care workers not accustomed to being treated as common criminals. These events are now happening with such frequency that the failure to anticipate and plan for such an event can seriously impact a provider's ability to effectively defend against resulting criminal and civil investigations by regulatory and law enforcement agencies.

Search warrants are usually the result of a preliminary investigation or an "insider" complaint by a disgruntled current or former employee or a dissatisfied patient. In order to apply for a search warrant, the enforcement agency must file an affidavit with a court setting forth facts demonstrating that "probable cause" exists that a crime has been committed. The agency must identify in the warrant the files that it desires to search. The warrant must normally be executed in a reasonable manner during daylight hours. Although great latitude is provided by the courts to the agencies, abusive or unnecessarily oppressive behavior or the filing of false affidavits can have significant consequences in the courts. In a federal action against Home Health and Hospice Care, the 4th Circuit Court of Appeals ordered the return of 5 million documents seized as a result of a recklessly false affidavit filed to obtain the warrant. The company thereafter sued the government to recover approximately \$5,000,000.00 in attorneys fees expended in defense of the action.

While many agents executing the warrant will wait for a brief time while the subject of the warrant contacts its attorney before commencing the search, the officers are under no obligation to do so. Waiting until the FBI or the State Medicaid Fraud Unit has arrived before contacting one's attorney about what to do in the circumstances misses the opportunity for an efficient, orderly and controlled response to what otherwise may be a totally chaotic and dangerous circumstance.

The sudden appearance of federal or state agents can be a frightening prospect. While the FBI normally appears in business dress, they have been known to arrive in battle fatigues with weapons drawn. Having an educated staff with explicit written procedures in place is the best defense to an unexpected search warrant.

Not infrequently company employees are questioned by federal or state investigators prior to a raid. Employees should be advised that such

inquiries and the prospect of a raid is a possibility in any health care enterprise receiving governmental funds and not to be surprised if it occurs. Employees should be encouraged to advise the employer when they are contacted by an agent or investigator and they should be appropriately debriefed as to the areas of questioning. This can provide a useful early warning as to the existence of and area of exploration of a state or federal fraud or abuse investigation.

The employer should advise its employees that they have no obligation to speak with federal investigators, but should in no way interfere with their doing so. Interference in the investigation by the company could lead to it being charged with obstruction of justice. Employees should be encouraged to be polite, but circumspect in their dealing with the agents.

A proactive company (the "Company") will have put in place an Internal Response Program as part of its overall regulatory compliance program. It will have identified an internal response team to deal with the management of a raid or surprise audit. The team will have a Senior Manager appointed as team coordinator, a back-up team coordinator and other members as appropriate, including a MIS person. (Agents have been known to walk away with computer hard drives when there is nobody available to transfer electronic data.)

The Company will have developed and stored for easy access a written internal procedures manual (the "Manual") directing the Company response to a raid or surprise audit. The Manual contains the phone numbers and addresses of all response team, including in-house and outside counsel.

The Manual identifies the rights of the employees and the Company. The Manual advises that the agents executing the warrant be treated courteously and be requested to wait for the arrival of the Company's attorney before commencing the search. In the event that the agents refuse to wait, a member of the response team will read to the agents a brief statement contained in the Manual. The statement contains a warning drafted by the Company's attorney concerning the consequences of violation of the Company's constitutional rights and its privileges that may be violated during the course of the search without counsel's ability to raise an objection during the search.

The Manual advises the team coordinator or senior manager present to examine the warrant and to ask to make a copy of it. The scope of the search delineated in the warrant will be noted and scrupulously observed. Inquiries into private documents of Company employees or other Company documents not identified in the warrant will be politely brought to the agent's attention as being outside the ambit of the court order. Undue and unnecessary Company cooperation by providing files not identified in the warrant can lead to a claim of voluntary expansion of the warrant and later objections to evidence discovered in them may be deemed waived.

The Company's "in-house" and outside counsel will be contacted as soon as possible and asked to speak to the agents. A copy of the warrant and its supporting affidavit, if made available, will be faxed to counsel

immediately.

The response team will be careful not to "consent" to the search. It will cooperate, but not consent. Agents can arrest anyone who impedes the search and can remove people from the site of the search.

The response team present will make a detailed schedule listing the areas searched, the questions asked and the items seized.

The response team will offer to make copies of the documents to be taken in lieu of the originals or at least the opportunity to make copies for the Company's use. Either the originals or the copies retained by the Company will be set aside for later examination by the Company's attorney.

Response team members will try to accompany the agent to every location searched. If possible a videotape will be made of the entire search. If the agents object, the response team will ask for the reasons "on tape." In the absence of a videotape a handheld dictaphone will be used to record all events and impressions.

Privileged documents such as attorney/client communications should be centrally collected and clearly identified as privileged. The location and privileged nature of these documents will be made known to the agents. Locked rooms and cabinets will be opened upon request, otherwise the agents may resort to force to open them. No attempt will be made to move, destroy or otherwise tamper with documents during the course of the search.

Team members will request business cards or the opportunity to make a copy of the identification of all agents engaged in the search, including name, office address, agency and phone number. The response team will request an inventory of the items taken and have the searching agent sign the list. It will request a debriefing by the officers concerning the documents taken and the purpose of the investigation, including the identification of federal or state officers or attorneys involved in the investigation, but not present at the execution of the warrant. The response team will debrief all employees present and the response team present and assemble into a memorandum to outside counsel – marked "Privileged Attorney/Client Communications."

If counsel does not arrive in time to participate in the search on behalf of the Company, he or she will review the Company's documentation of the event and make contact with the investigating agency to obtain the return of any original documents taken and to initiate a course of formal dialogue with the agency concerning the course and direction of the investigation. Counsel will request that all further information requests be directed to he or she to hopefully prevent a reoccurrence of the disruption of another search. Counsel will consider supplementation of additional information to the agency that may place the information seized in a more favorable context. Counsel armed with information gleaned from the response team will be in a better position to participate in the shaping and direction of the investigation as well as influencing the decision whether or not to

prosecute or to resolve the dispute on terms favorable to the Company.

Whether or not a criminal indictment is issued, initial criminal fraud investigations are regularly followed by a referral to state agencies for civil fraud or overpayment recovery claims. In addition to the financial exposure for recovery and civil penalties for "program violations," the Company and senior managers may be at risk for mandatory and other exclusions from future participation in public programs.

Individual states and the federal government agencies frequently communicate with each other and cooperate with one another in searching for documents and exchange of information. Multi-state providers may find themselves the subject of simultaneous or serial investigations in several different states. Single state providers may find themselves subject to a state Medicaid investigation followed by a federal investigation covering the same subject matter. This "Kafkaesque" nightmare can be effectively blunted and controlled by the early and knowledgeable intervention by counsel, who has been the beneficiary of the intelligent and careful procedures of the well-prepared client.

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