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Heidi Kocher, JD, MBA, CHC

On the topic:

Knock, Knock. Who's There? Is this an Audit or an Investigation
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Knock, Knock. Who’s There?

Is this an Audit or an Investigation?

Presented by:
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Agenda

• Enforcement background
• How an investigation begins; who are the players?
• What do you have in front of you?
• What to do right now when you have to deal with an agency
• What to do after you have dealt with an agency
• How to avoid all of this and tips
ENFORCEMENT BACKGROUND

Enforcement Background: Criminal Laws

Criminal
- Anti-kickback Statute (42 U.S.C. § 1320a-7b(b))
- Healthcare Fraud (18 U.S.C § 1347)
- Healthcare False Statements (18 U.S.C § 1035)
- Conspiracy to Commit Healthcare Fraud (18 U.S.C § 1349)
- Mail and Wire Fraud (18 U.S.C. §§ 1341, 1343)
- Fraud (18 U.S.C § 1001)
- Aggravated Identity Theft (18 U.S.C § 1028A)
Enforcement Background:
Civil Laws

Civil
- False Claims Act (31 U.S.C. §§ 3729-3733)
- Physician Self-Referral or “Stark” Law (42 U.S.C. § 1395nn)
- Civil Monetary Penalties
- Exclusion Statute (42 U.S.C. § 1320a-7)

- State laws
- Mini-False Claims Acts, Stark-like or other laws

DOJ Internal Guidance

Thompson memo, 2003 – increased emphasis on cooperation of business organizations; delineates factors to be considered in charging businesses:
1. Nature and seriousness of offense
2. Pervasiveness of wrongdoing within company
3. Company’s history of similar conduct
4. Timely and voluntary disclosure and cooperation in investigation
5. Existence and adequacy of compliance program
6. Company’s remedial actions, including implementing compliance program
7. Collateral consequences
8. Adequacy of prosecution of individuals
9. Adequacy of remedies such as enforcement actions
DOJ Internal Guidance continued

Yates Memo, 2015

- To be eligible for any cooperation credit, company must provide all relevant facts about individuals involved in misconduct
- Both criminal and civil investigations should focus on individuals from the beginning
- Civil and criminal attorneys on investigation should routinely communicate with each other
- No corporate resolution protects individuals from civil or criminal liability, unless there are extraordinary circumstances
- Corporate resolutions must include clear plan to address related individual cases before statute of limitations expires, and declinations regarding individuals must be documented
- Civil attorneys should consistently focus on individuals as well as company and evaluate whether to file lawsuits against individuals based on factors other than ability to pay

HOW AN INVESTIGATION BEGINS. WHO ARE THE PLAYERS?
How an investigation begins

- Whistle blower / qui tam investigation
  - Authorized by False Claims act
- Data analysis by payers (“data mining”)
- Patient or family member complaints
- Employee complaints
- Other agency investigations
- Anonymous tips
- Industry wide investigation
- Competitor
- Doctor, nurse or other healthcare professional unhappy about quality of care
- Other targets or defendants

Who are the players?

- Payers
  - Medicare Administrative Contractors (MACs)
  - Zone Program Integrity Contractors (ZPICs) and Program Safety Contractors (PSCs)
  - Medicaid Fraud Control Units (MFCUs)
  - Unified Program Integrity Contractors (UPICs)
  - Recovery Audit Contractors (RACs)
  - Supplemental Medical Review Contractor (SMRCs)
  - Private Payers & their fraud control units/special investigations units (SIUs)
- HHS Office of Inspector General (OIG)
- Federal Bureau of Investigation (FBI)
- Department of Justice (DOJ)
- Department of Defense (DoD)
- US Postal Service
- Drug Enforcement Agency (DEA)
- State Attorneys General, other state agencies
Hints there may be an investigation

- Extensive document or audit requests
  - Dates
  - Number of patients
- Former employees say they have been interviewed by FBI or other agency
- Referrals dry up

WHAT DO YOU HAVE IN FRONT OF YOU?
Documents, Document Requests

- Civil Investigative Demand or subpoena
- Request for interviews
- Search warrant or raid

“Covert” investigation tactics

- Data analytics, data mining and matching, audits
- Whistleblowers
- Surveillance
- Wiretapping
Other Means

• Witness statements or interviews
• Sting operation
• Dumpster diving
• Competitor information
• News stories

Audits

• Can be mailed, faxed or sent via delivery service like FedEx
• Can be random or targeted
• Will request records to support specific claims
• Will state deadline to produce records
• May disclose reason for audit
• May identify law relating to audit
Subpoena

- Many kinds of subpoenas
- Scope is usually very broad and need not necessarily relate to investigation
- Can be either civil or criminal
- Grand jury subpoena usually criminal, others usually civil
- Similar document is a civil investigative demand

Subpoena continued

- Issued by a court OR agency (without judicial approval)
- Orders provider to either turn over documents and other evidence or appear for testimony, at identified time and place
- Can be for any relevant document including patient records, billing records, telephone records, emails, financial information
- Spider web – can also subpoena other companies that you work with: pharmacies, billing companies, banks, etc.
What A Subpoena Looks Like

Government Interviews

- No court order needed
- May occur at worksite, employee home, government office or by phone
- Can be scheduled in advance or immediate, in person or by telephone
- May be effort to verify information or develop new information
- May ask individual to look at documents
Search Warrant

- Issued by a court
- Indicates there is a criminal investigation
  - Requirement is either reasonable suspicion of criminal activity OR worry about document destruction
  - Can either start investigation or be far down the path already
- Only search warrant permits government to seize original documents
- Usually a concern that documents or evidence being deleted, destroyed
- Authorizes investigators to gather evidence described in warrant
  - But ONLY what is described in warrant.
- Must be executed between 6 am and 10 pm

What A Search Warrant Looks Like
WHAT TO DO RIGHT NOW

For any governmental inquiry

DO NOT DESTROY OR DELETE DOCUMENTS!!!!

- Courts can and will fine companies for improper destruction of documents: 2008 – Qualcomm, $8.5 million for hiding /failing to produce documents
- Stop automatic / scheduled deletion or destruction of documents, even if it is in accordance with retention schedule

DO NOT “FIX” DOCUMENTS!!

DO NOT “FILL IN THE GAPS” IN DOCUMENTATION!!
**Subpoena or Civil Investigative Demand**

- Immediately send to attorney for review and coordination
- Need to determine legal authority for subpoena/CID
- Attorney needs to determine if company is Target, Subject or Witness
- Attorney can address scope and deadline for response
- Attorney can file objections, especially to scope

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**Subpoena or Civil Investigative Demand continued**

- IMMEDIATELY issue document hold notice for all documents potentially covered
- Need to identify which documents are responsive and who has them or where they are
- Gather and segregate relevant documents
- Review documents to ensure they are complete
- Label and number all documents
Mailed Subpoena

- Determine issuing agency
- Note date served
- Write deadline day on calendar in red ink!
  - Develop timeline of what needs to be completed by when in order to comply
- Decide if you will comply
  - Motion to quash
  - 5th Amendment?
  - Other defenses, options
  - Beware of obstruction of justice issues
- Determine scope of documents requested

Mailed Subpoena continued

- If extensive, counsel can usually negotiate extension, rolling production schedule or reduction of scope
- Meet with employees to determine exactly what data is kept where, who is in charge of it, and how to make it available
- Gather and collect the information
- Keep log of information gathered
- Determine if any of the documents are protected by a privilege (attorney-client or attorney work product)
- Make and keep copies of all documents submitted
- Label and number documents before sending – confidential, trade secret, etc.
In Person Subpoena

• Determine agent in charge
• Tell agent in charge you will cooperate but wish to call counsel
• Accept subpoena and determine deadline
• Write deadline on calendar in red ink!
• **CALL COUNSEL!**
• To the extent possible, do all the things you would do for a mailed subpoena

Government Interviews

• Employees should:
  – Ask for identification of agent and contact information
  – Ask for any authorizing document (subpoena, etc.)
  – Be polite and courteous
• Employees have right to refuse request for interview or have counsel present
• Employees can also ask to schedule interview for more convenient time or place
• Can refuse agent entry into home or business unless agent has search warrant
• Employees should immediately report any government contacts or requests to company, which should report the same to company’s attorney
Government Interviews continued

- Be aware that nervous employees can accidentally waive privileges
- Anything employee says can be used against employer
- Agents often approach subjects at home
- Agents not required to give Miranda warning unless interviewee is under arrest
- DO NOT tell employees to not cooperate. Risk: obstruction of justice charge
- Always tell employees that if they choose to speak with agents, they should tell the truth

Search Warrant

**Key sign that there is criminal investigation**

- You are not required to show agents where information is or volunteer information, but don’t interfere or obstruct
  - Question: do you want THEM going through your files?
- Be professional and courteous
Search Warrant continued

• Determine agent in charge
• Tell agent in charge you will cooperate, but don’t consent to search
• Ask agent in charge to wait until you have contacted your attorney
  – But they don’t have to wait
• Request copy of warrant and supporting affidavit
• Write list of all agents, their agency, credentials. Get business cards.

Search Warrant continued

• Send warrant to attorney
• Try to have attorney come on-site
• Agents usually will take identifying and contact information of all employees. May gather employees in one room, away from search.
• Send non-key employees home
• Tell remaining employees to stay calm and cooperate
• Ask agent that all communications with remaining employees go through point person
• Send phones to answering service
• Monitor the search; never leave agents alone
Search Warrant continued

- Ask if agents will permit you to make photocopies of hard documents or back-ups
  - But they don’t have to agree or wait
- Agents will likely take computer equipment
  - Have you backed up your data recently?
- Agents may try to interview employees
  - No obligation to talk, but if you do, be honest and accurate

Search Warrant continued

- Ask agent in charge for copy of inventory list when search is finished
- Compare inventory list with your list of what was taken
- Don’t sign anything until you have had a chance to discuss or review with attorney
WHAT TO DO AFTER

Immediately After

• Debrief with attorney
• Call your insurance carrier
• Review lists of documents, items taken, interviews held
• If computer equipment taken, implement business continuation plan
• Have employees write summaries of their interactions with agents
• Deal with local media
• Prepare press release if needed
Later

• Be prepared to answer questions from other health care providers, community members
• Hold employee meeting
  – Have question and answer, as far as is possible
  – Reassure employees
• Review company’s finances
  – Arrange lines of credit with bank
  – Conserve cash
• Review documents, evidence requested and taken
  – What are commonalities or trends?
  – Can specific issues or patterns be identified?
• Determine if you have a repayment obligation

HOW TO AVOID ALL OF THIS AND TIPS
What to do in Advance

Generally

• Implement compliance program
  – Audit your claims and billing records
• Make sure data is backed up routinely and often
• Develop relationship with healthcare attorney
• Have list of key employee phone numbers off-site
• Ensure you have list of all employees' names, Social Security numbers, and phone numbers, off-site
• Consider how you will deal with media interest – local papers, TV news crews – regardless of what the issue is
• Write a business continuation plan

Specific Preparation

• Identify who is in charge of what information
  – Who has passwords to computer systems?
  – Who knows what data and documents are where?
• Identify a point person who can handle (surprise) governmental interactions and to coordinate response
• Develop a policy on how to respond
• Train/inform staff on how to respond and interact
• Develop a document retention schedule and plan
• Ensure you can access back-up system, especially for critical documents
Document Retention

- Develop and maintain a regular document review, retention and destruction policy and schedule
  - Purge documents according to schedule and document
- When a governmental request occurs, ALL documents must be maintained
- **DO NOT** shred or destroy documents going forward
- **DO NOT** delete emails going forward
- Segregate documents
- With attorney directions, should immediately issue “Document Hold Notice”

Training

- ALL employees generally
  - What can happen and how to respond to help counteract nerves
  - Learn purpose of visit, request
  - Do NOT turn over documents without subpoena
  - Do not volunteer information, but also do not lie
  - Don’t get on social media afterward!
- Front-desk staff, senior managers
  - Specific instructions for dealing with on-site agents and searches
  - Contact information for counsel
What NOT to do

• Hide or destroy documents or evidence
• Tell employees to lie or refuse to talk to agents
• Lie to agents while on site or afterward
• Yell, scream, curse and generally be rude, disruptive or disrespectful
• Complain about the waste of taxpayer dollars
• Threaten agents

HIPAA

• Individual’s authorization not needed to release PHI to comply with court order or court-ordered warrant, a subpoena or summons issued by a judicial officer, or a grand jury subpoena
  – Legal process for obtaining order, warrant or subpoena provides sufficient protection
  – Release only information specifically identified in order, warrant, or subpoena
• May release PHI without authorization to respond to an administrative request, such as an administrative subpoena or investigative demand or other written request IF be accompanied by a written statement that the information requested is relevant and material, specific and limited in scope, and de-identified information cannot be used
• Note – any disclosures must be listed in accounting of disclosures log
Closing Thoughts

• This is the start of a lengthy process, one that might take years, with bursts of activity and then months of no information or contact
• It’s OK to feel fear, anger, depression, and other negative emotions
• Take care of yourself

Contact Information

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hkocher@lilesparker.com
214-952-5169
UNITED STATES DISTRICT COURT
for the

In the Matter of the Search of

(Briefly describe the property to be searched
or identify the person by name and address)

Case No.

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search
of the following person or property located in the District of __________________________
(identify the person or describe the property to be searched and give its location):

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property
described above, and that such search will reveal (identify the person or describe the property to be seized):

YOU ARE COMMANDED to execute this warrant on or before __________________________ (not to exceed 14 days)
☐ in the daytime 6:00 a.m. to 10:00 p.m. ☐ at any time in the day or night because good cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the
person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the
property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory
as required by law and promptly return this warrant and inventory to __________________________

(United States Magistrate Judge)

☐ Pursuant to 18 U.S.C. § 3103a(b), I find that immediate notification may have an adverse result listed in 18 U.S.C.
§ 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose
property, will be searched or seized (check the appropriate box)

☐ for _____ days (not to exceed 30) ☐ until, the facts justifying, the later specific date of __________________________.

Date and time issued: __________________________

Judge’s signature

City and state: __________________________

Printed name and title
# Return

<table>
<thead>
<tr>
<th>Case No.:</th>
<th>Date and time warrant executed:</th>
<th>Copy of warrant and inventory left with:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Inventory made in the presence of:

Inventory of the property taken and name of any person(s) seized:

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## Certification

I declare under penalty of perjury that this inventory is correct and was returned along with the original warrant to the designated judge.

Date: ______________________

Executing officer’s signature

____________________________

Printed name and title
To:

(Name of person to whom this subpoena is directed)

☐ **Production:** **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:

<table>
<thead>
<tr>
<th>Place:</th>
<th>Date and Time:</th>
</tr>
</thead>
</table>

☐ **Inspection of Premises:** **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

<table>
<thead>
<tr>
<th>Place:</th>
<th>Date and Time:</th>
</tr>
</thead>
</table>

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: ________________

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney’s signature

The name, address, e-mail address, and telephone number of the attorney representing [(name of party) ________________], who issues or requests this subpoena, are:

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**Notice to the person who issues or requests this subpoena**

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).
Civil Action No.

PROOF OF SERVICE
(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for (name of individual and title, if any) ________________________________ on (date) __________________.

☒ I served the subpoena by delivering a copy to the named person as follows: ________________________________ on (date) __________________; or

☒ I returned the subpoena unexecuted because: ________________________________________________.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day’s attendance, and the mileage allowed by law, in the amount of $ ____________________.

My fees are $ ______________ for travel and $ ____________ for services, for a total of $ 0.00 ____________.

I declare under penalty of perjury that this information is true.

Date: ____________________

_______________________________
Server’s signature

_______________________________
Printed name and title

_______________________________
Server’s address

Additional information regarding attempted service, etc.: 
Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:
(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
   (i) is a party or a party’s officer; or
   (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:
(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney’s fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:
   (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
   (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party’s officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:
   (i) fails to allow a reasonable time to comply;
   (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
   (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
   (iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:
   (i) disclosing a trade secret or other confidential research, development, or commercial information; or
   (ii) disclosing an unretained expert’s opinion or information that does not describe specific occurrences in dispute and results from the expert’s study that was not requested by a party.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:
   (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
   (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:
   (i) expressly make the claim; and
   (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.
PURPOSE:
Government investigators or agents may arrive unannounced at XYZ offices, facilities, or locations or the homes of present or former employees and seek interviews and documentation. This policy is to establish a process for responding to subpoenas served by federal or state law enforcement officers for demand of testimony or disclosure of documents or other information and government investigations or search warrants served for the purposes of searching locations and seizing documents and evidence.

POLICY:
XYZ staff will fully comply with the law and will cooperate with any authorized government investigation or audit, while protecting the rights of the organization and individual staff members. XYZ will assert all protections afforded it by law in any such investigation or audit including the protection of legal rights afforded XYZ staff.

Searches of XYZ premises by law enforcement or government agents (“Agents”) are not allowed unless a valid Search Warrant is presented. XYZ staff may not verbally or otherwise agree to a search in the absence of a valid Search Warrant.

XYZ staff may not conceal, destroy, or alter any documents, computer files or other relevant evidence related to any investigation subpoena or inquiry. XYZ staff will not lie or make intentionally misleading statements to government investigators or other authorized government representatives. XYZ staff may not help with or support any attempt to obstruct any government investigation, provide inaccurate or misleading information or unreasonably delay communication of information or records relating to a possible violation of the law in response to a legally authorized inquiry by a government representative acting within the scope of its authority.

PROCEDURE:
A. Response to a Search Warrant

The following steps shall be taken when presented with a Search Warrant at any XYZ office or facility:

1. Reception or front office staff should greet the agents politely and respectfully.
Tell the agents that someone will be called to assist them.

2. Escort the agents to a conference room or private office in order to minimize disruption to patients, visitors and/or staff members. Make sure there is no confidential or patient information visible or accessible in the conference room or office.

3. Identify the Agent In Charge. Ask for the following:
   a. A badge, credentials or other reliable identification. If there is reason to doubt the individual or the authenticity of the identification, call the agency to confirm. Make a note of this information. (Do not attempt to photocopy the badge or other identification, as that may be a violation of federal law.)
   b. A business card. (If a business card is not available, ask for the name, title, agency, and telephone number of the Agent.)
   c. A copy of the Search Warrant.
   d. A copy of the affidavit submitted to the court to obtain the Search Warrant. (The agent may refuse to provide the affidavit.)
   e. The name and phone number of the prosecutor, if not indicated on the documents provided.

4. Immediately contact the Chief Compliance Officer or XYZ’s Administrator/Office Manager. Do not leave a voice mail or message. Instead, make every possible effort to locate the Chief Compliance Officer and speak with him/her. If the Chief Compliance Officer cannot be located, make every possible effort to contact the Administrator/Office Manager.

5. The Chief Compliance Officer or XYZ’s Administrator/Office Manager will immediately contact XYZ’s attorney of the agents’ arrival and the search warrant.

6. Notify the responsible manager or administrator for the relevant entity, location or department(s) covered by the search warrant that the agents are on the premises and have issued a Search Warrant and that the Compliance Department and XYZ’s attorney have been contacted. The responsible manager or administrator should make every effort to be present at the site for the execution of the search warrant.

7. Inform the agents that the Compliance Department, the responsible manager or administrator and XYZ’s attorney have been notified and are on their way to the location. Politely ask the Agent In Charge not to proceed until the Compliance Officer arrives. **Do not** consent to the search or sign any papers unless instructed to do so by the Chief Compliance Officer or XYZ’s attorney.

8. If the Agent In Charge refuses to wait for the Chief Compliance Officer or XYZ’s attorney to arrive, document the refusal and the Agent’s name. Note the date and time. Reiterate to the Agent that XYZ is willing to cooperate with the search, but that you are not consenting to the search unless instructed to do so
by the Chief Compliance Officer or XYZ’s attorney. Then take the following steps to monitor the search:

a. Carefully read the Search Warrant.
b. Confirm that the Search Warrant is signed by a judge. If there is a discrepancy, notify the Agent In Charge. Note that substance abuse records require a specific court order for seizure.
c. Determine the department, location or area to be searched as noted in the Search Warrant, the type of evidence to be seized, and the time period/expiration. If there is any discrepancy between the scope of the Search Warrant and the search conducted by the agents, notify the Agent In Charge.
d. Try to negotiate a method to the search to minimize business disruptions and to help manage the process, such as the sequence of the search and making copies of all records and items seized. Ask if the agent will accept copies of documents instead of the originals.
e. Only help the agents to locate and retrieve the specific documents that are identified in the search warrant.
f. Identify the essential XYZ staff members that are knowledgeable and can assist in retrieving the documents, computer information, etc. Notify the Agent In Charge that key employees will assist in order to minimize disruption of business, and that other employees will be allowed to leave.
g. Send non-essential staff home.
h. Let the remaining staff know that the Agents may question them. Tell the staff members that it is their choice whether or not they want to speak with an Agent and that they are not required to do so. DO NOT tell staff members they should not speak with or to an agent.
i. Monitor the search, but do not interfere or obstruct the agents in their work.
j. Never leave the agents in a room or department alone, and never leave staff members alone with the agents.
k. Assist the Agents in locating documents or other property as identified in the Search Warrant, but do not volunteer any documentation or information that is not specified in the Search Warrant.
l. If a room or department monitoring staff member is ordered to leave by the agents, the Agent In Charge should be notified. A monitoring staff member should only be ordered to move or leave if they are in the way.
m. Attempt to record in detail all items that are seized, including the location where the items were found.
n. If the Agents assign numbers to the rooms they search, record the numbering scheme.
o. Request back-up copies of all documents, computer media, computer hard drives, etc. before if the agents attempt to seize documents marked as “Attorney-Client Privileged” or “Attorney-Client Work Product” or other documents that appear to be outside the scope of the Search Warrant, notify the Agent In Charge. Ask that the privileged materials be segregated and marked as “privileged.”
p. The Agent In Charge will prepare an inventory of the items seized. Ask for a copy of the inventory before the Agent In Charge leaves. DO NOT sign anything verifying the content or accuracy of the inventory.

q. Ask all staff members, including the ones sent home, not to discuss the Search Warrant or any related events with the press or with other staff members.

B. Response to a Subpoena or Contact By A Government Investigator

It is possible that an Agent may arrive unannounced at an XYZ facility or location or at the homes of XYZ staff members with or without a subpoena to seek interviews or documents. If you are approached by an agent or served with a Subpoena or otherwise requested to participate in an interview with an Agent that relates to business conducted at XYZ, take the following steps:

1. If the agent does not provide a subpoena, ask for that. Review it to see if the subpoena covers interviews

2. Immediately contact the Chief Compliance Officer or XYZ’s Administrator/Office Manager. Do not leave a voice mail or message. Instead, make every possible effort to locate the Chief Compliance Officer and speak with him/her. If the Chief Compliance Officer cannot be located, make every possible effort to contact the Administrator/Office Manager.

3. Review your rights as provided in Exhibit A.

4. If the subpoena covers records as well as an interview, determine if the records are to be produced immediately or at a later date. If the records are to be produced immediately, follow the general steps outlined above in relation to a search warrant. If the documents are to be produced at a later date, follow the general steps outlined below for responding to a subpoena duces tecum.

C. Response to a Subpoena Duces Tecum or Other Information Requests

1. If a Subpoena Duces Tecum or a request for information is received and it relates to business conducted at an XYZ location or facility, immediately contact the Chief Compliance Officer. If not available on the same day that the order was received, continue making attempts to contact the Chief Compliance Office or the facility’s or XYZ’s Administrator/Manager.

2. Determine the response deadline. Calculate backward three (3) business days from the deadline. This will be the internal deadline to respond.

3. Gather the documentation described or covered by the subpoena. Make two (2) sets of copies. Work with the Chief Compliance Officer or XYZ’s attorney to review and label all documents. The two sets of documents should be identical.

4. Do not attempt to “fix” any issues with the records, create new records or
address any other perceived deficiencies with the records.

5. Do not mail, upload or submit any documents or other information in response to a Subpoena without approval from the Chief Compliance Officer or XYZ’s attorney.

D. Search by Investigators without a Search Warrant

1. If an agent arrives at an XYZ office or facility and requests a search of the premises but does not have a valid search warrant, XYZ staff members should:
   a. refuse to allow the search.
   b. immediately contact the Chief Compliance Officer or the most senior manager/administrator on site. This individual will contact XYZ’s attorney.
   c. Request that the agent or investigator obtain a search warrant or, at least, put the request for a search in writing.
   d. Staff members should emphasize that they are willing to cooperate but that a warrant is required.
   e. Only the Chief Compliance Officer or the most senior manager/administrator, after consultation with XYZ’s legal counsel, may consent to a search without a warrant.

REFERENCES:

US Sentencing Guidelines, Chapter 8, Sentencing of Organizations


Memorandum on Individual Accountability for Corporate Wrongdoing, Sally Q. Yates, Deputy Attorney General, US Department of Justice, September 9, 2015 (“Yates Memo”)

REVISION HISTORY

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Exhibit A

Your Rights If Contacted By A Government Investigator

1. A government investigator has the right to contact any employee of a health care organization to request an interview. The investigator has the right to contact you either at home or work.

2. If contacted, you may choose to speak to the investigator, or you may refuse. You are not under any obligation to speak to the investigator. (Note that if you refuse an interview, an agent may request a subpoena ordering you to testify.)

3. If you agree to speak to the investigator, you have the right to end the interview at any time.

4. If you are subpoenaed to speak with a government investigator, this does not give the investigator the legal authority to require you to speak at the time you are given the subpoena. An appointment for an interview can be scheduled for a different date.

5. If you agree to speak to an investigator, no matter who else is present, you must tell the truth. You should state only facts that you know, not rumors, guesses, or speculation. If you do not know the answer to a question, state that you do not know.

6. Any statements you make to an investigator may be considered legal admissions, which can later be used against you and/or XYZ in an administrative, civil, or criminal legal proceeding.

7. If you agree to speak to an investigator, you have the right to confer with an attorney first, and to have an attorney present during the interview. Depending upon the circumstances, you may choose to retain private counsel, or the matter may handled by XYZ’s legal counsel.

8. You have the legal right to tell your supervisor or XYZ’s legal counsel about the government contact. The investigator may suggest that you keep the contact confidential, but there is no law that would prevent you from disclosing any detail of your discussion with the investigator to XYZ or its representatives.
PROCEDURE FOR HANDLING EXECUTION OF A SEARCH WARRANT

This procedure is adapted from one published by Hogan and Hartson, LLP, March 2003.

1. IMMEDIATELY CONTACT COUNSEL

   a. SERVED WITH WARRANT AND ALONE
   If you are alone and served with the warrant, inform the government agents that you want to contact your attorney. If the agents refuse to wait for the attorney to arrive, do not let that stop you from calling counsel. If you need to leave the agents to make your call, do so. MAKE THE CALL!

   b. SERVED WITH WARRANT AND NOT ALONE
   If you are not alone, immediately instruct an employee in the office to contact the attorney while you or the senior employee/manager on-site stays with and attempts to monitor the agents' activities.

   c. INSTRUCTIONS FOR CALLING
   Call each of the individuals identified on the attached list until you reach someone. Tell them that you have been served with a search warrant. If you reach in-house counsel's voice mail, leave an urgent message and then call the next attorney listed, if there is one. If neither attorney is in the office, ask the receptionist to speak to the first available attorney. Repeat the process for the company's outside attorneys. If you are unable to reach any in-house or outside attorneys at their offices, call the attorneys using their cell or home numbers.

2. POLITELY REQUEST THE GOVERNMENT AGENTS TO WAIT UNTIL COUNSEL ARRIVES ON-SITE BEFORE EXECUTING THE WARRANT

Ask the government agents to please wait until the attorney arrives on-site. Please Note: The agents have no obligation to delay their search and will likely refuse your request. If the agents insist on proceeding, tell them you are formally objecting to the search.

Thereafter, use your best efforts to follow the remaining steps detailed below. Make sure that counsel will be able to enter the premises if they are able to arrive before the search is over.

STEP 3. ASK THE AGENTS FOR IDENTIFICATION

You should ask the agents to identify themselves and show you government identification. Seek out the agent in charge and request his/her business card. He/she will most likely be the one to give you a copy of the warrant. Additionally, ask for the business cards of as many of the other agents as you can.

Persons dealing with the agents should be courteous and professional, and should not attempt in any way to obstruct, physically restrain, or interfere with the agents serving the warrant or performing the
search. However, Do NOT sign any forms consenting to the search and tell the agents you do not orally consent to a search. (See step #6).

STEP 4. ASK FOR A COPY OF THE WARRANT
Ask for a copy of the warrant and the affidavit. If a copy of the warrant is not available, ask to make a photocopy of it. The agents are generally required to give you a copy of the warrant, but not the affidavit. Ask for both.

STEP 5. FAX THE WARRANT TO COMPANY’S ATTORNEY
Immediately fax a copy of the search warrant to all in-house and outside attorneys.

STEP 6. DO NOT "CONSENT" TO THE SEARCH
Cooperation does not mean "consenting" to the search. (See step #3 above.). If the agents ask you to consent to the search and to sign a form acknowledging your consent, tell them firmly, but politely, that you DO NOT CONSENT TO THE SEARCH! Also, inform them that no employee has authority to consent to any search of company facilities. Giving consent may likely prejudice the rights of the company at a later date.

STEP 7. MAKE SURE EMPLOYEES & INDEPENDENT CONTRACTORS UNDERSTAND THEIR RIGHTS WITH REGARD TO BEING INTERVIEWED
Instruct the agents that all contact with employees should go through you. Inform employees of the right to not be interviewed. However, if asked, employees must provide agents with their identifying information (name, address, telephone number, etc.). If they choose to be interviewed, employees have the right to have an attorney present during the interview. Employees can request to schedule the interview for another time or place.

If possible, instruct all employees and independent contractors in the area covered by the search to leave the area being searched, except for management employees or those employees who are assisting with or monitoring the search. You may also want to send home non-essential employees and independent contractors for the remainder of the day.

STEP 8. REVIEW WARRANT AND ATTEMPT TO NEGOTIATE TERMS OF THE SEARCH
Review the warrant to determine the area designated to be searched, exactly what is designated to be seized, who issued the warrant, and any time limitations specified in the warrant. Attempt to direct the location of the search in accordance with the parameters of the warrant. If the search is underway, negotiate the narrowing of the areas being searched if outside the scope of the warrant.
STEP 9. DO NOT REMOVE, DISCARD, OR HIDE ANY OBJECTS THAT MIGHT BE THE SUBJECT OF THE
SEARCH WARRANT

You must not attempt to evade the effect of the warrant by removing, hiding, or discarding anything
that might be called for by the warrant. You should allow the agents access and not obstruct their
search.

STEP 10. CAREFULLY MONITOR ANY SEARCH MADE

If the search proceeds without the company's counsel present, you do not have the right to stop or
prevent the agents from seizing items listed in the warrant, but you do have the right to observe them
conduct the search, and document everything they do and look at. To the extent possible, the agents
should be observed at all times and not left unattended while they are on-site. The goal here is not to
engage in conversations with the agents, but rather to simply try to observe the search as it is
conducted.

Whoever is observing the search should attempt to carefully record the conduct, statements, and
questions posed by the agents. The employee should note the items searched, the agent searching the
item, and the time of the search. Upon the arrival of the company's counsel, counsel will debrief the
observers.

STEP 11. ASK THE AGENTS TO PERMIT YOU TO PHOTOCOPY ANY ORIGINAL DOCUMENTS TAKEN IN
THE SEARCH

Ask the agents for permission to copy any documents before they are removed from the premises. If the
agents appear to be removing computers or computer data, request that the agents make copies of the
data rather than remove the computers. At a minimum, request that the company be permitted to
make backup copies of this data. Please Note: The agents are under no obligation to grant your request.

12. OBTAIN A RECEIPT FOR ANY FILES OR PROPERTY

Agents are usually required by law to provide a receipt or inventory for any property taken pursuant to a
warrant. Be sure to request a receipt. If possible, before the conclusion of the search, have someone
supplement this inventory of property with as many details about the nature and prior location of the
documents or materials as possible.

STEP 13. AWAIT COUNSEL AND ADVISE EMPLOYEES

After the agents leave, do not leave the facilities. Instruct other employees who observed the search to
likewise await word before leaving. When counsel arrives, he or she will provide instructions. Until then,
do not conduct any meetings with employees until counsel is present. Rather, instruct employees who
directly monitored the search or had any contact with agents to remain on-site and to resist the
temptation to discuss the search with one another.