

BROAD AND CASSEL
ATTORNEYS AT LAW


Responding to Government Investigations:
What to do when the government comes knocking

Shachi Mankodi, Esq.
Hannah Levinson, Esq.
Broad and Cassel, Fort Lauderdale

HCCA Regional Conference
Orlando, Florida
February 2015

Types of "requests"

- Federal:
 - Search warrant (usually FBI)
 - Civil or Administrative Subpoenas (Office of Inspector General or Dept. of Justice)
 - Civil Investigative Demand (Dept. of Justice)
 - Informal request for information
 - CMS Contractors (RACs, ZPICs, carriers)
- State:
 - Search warrant (AG's Medicaid Fraud Control Unit)
 - Subpoenas (AG's Medicaid Fraud Control Unit)
 - Informal requests for information (Agency for Health Care Administration or Department of Health)




BROAD AND CASSEL
ATTORNEYS AT LAW

Copyright Broad and Cassel 2015

{ 2 }

Triggering Events

- Law enforcement agents in raid jackets burst into your company's offices, brandishing weapons and a search warrant.
- A process server or federal agent shows up with a subpoena for documents, to be produced within days to the U.S. Attorney, the SEC, or other law enforcement or regulatory agency, with a subpoena for testimony, or with a Civil Investigative Demand for documents and/or testimony.
- FBI agents arrive unexpectedly at the office and ask to speak to particular employees, or they show up at the employees' homes.
- A current employee has become a "whistleblower" and has provided confidential information and documents to government agents.




BROAD AND CASSEL
ATTORNEYS AT LAW

Copyright Broad and Cassel 2015

{ 3 }

Federal Authority to Investigate




Copyright Broad and Cassel 2015

[4]

Federal Search Warrants

- 28 U.S.C. s. 533: Gives the FBI authority to investigate ALL federal crimes, including crimes involving health care fraud.
- Search warrants are typically used when the government believes that there is a substantial risk that evidence will be destroyed.
- Search warrants will specify the type of information that falls within its bounds. Do not turn over information that is beyond the scope of the warrant!




Copyright Broad and Cassel 2015

[5]

Federal Authority: Inspector General Act of 1978

- Responsibilities:
 - "Conduct, supervise, and coordinate audits and investigations relating to the programs and operations"
- Power to use subpoenas for documents.
- Special powers of the HHS-OIG:
 - Power to temporarily or permanently exclude a health care provider from participation in a federal health care program (42 C.F.R. Part 1001, 42 C.F.R. 1003.105)
 - Power to impose civil penalties and assessments (42 C.F.R. Part 1003)



Copyright Broad and Cassel 2015

[6]

Federal Authority: OIG Administrative Subpoenas

42 C.F.R. s. 1006.1 – 1006.5

- The Social Security Act gives the Office of Inspector General of the U.S. Dept. of Health and Human Services the authority to require:
 - Attendance and testimony of witnesses
 - Production of any other evidence at an investigation inquiry.
- The subpoena must be "reasonably specific" about the documents and testimony that it is requiring to be produced.
- **Substantive scope:** no showing of relevance required; mostly for civil fraud cases.



Copyright Broad and Cassel 2015

{ 7 }

Federal Authority: Civil Investigative Demands (CID)

31 U.S.C. § 3733(a)(1)

- A compulsory pre-complaint procedure used to obtain:
 - (A) to produce such documentary material for inspection and copying,
 - (B) to answer in writing written interrogatories with respect to such documentary material or information,
 - (C) to give oral testimony concerning such documentary material or information, or
 - (D) to furnish any combination of such material, answers, or testimony.
- Issued by the Civil Division of the DOJ.
- Commonly issued in false claims investigations.
- CIDs given prosecutors nearly all the tools of discovery in a civil litigation matter.
- Responding to CIDs is similar to responding to subpoenas.
- **Substantive scope:** Very broad



Copyright Broad and Cassel 2015

{ 8 }

State Authority to Investigate



Copyright Broad and Cassel 2015

{ 9 }

State Authority to Seek Information

- Florida Attorney General’s Office, Medicaid Fraud Control Unit
- Responsibilities: Fla. Stat. § 409.920
 - Civil and criminal investigations for Medicaid reimbursement fraud
 - Criminal investigation for patient abuse and neglect
 - Criminal investigation relating to misappropriation of patients’ private funds (i.e. exploitation)



Copyright Broad and Cassel 2015

{ 10 }

State Authority to Seek Information

- MFCU may enter upon the premises of any Medicaid participating health care provider to examine accounts and records that may be relevant to the fraud investigation.
- MFCU may also issue search warrants or investigative subpoenas (subpoenas can be issued under the Florida False Claims Act, Fla. Stat. s. 68.0831)
- NOTE – MFCU does NOT have the authority to obtain records of any non-Medicaid patient without the patient’s consent.



Copyright Broad and Cassel 2015

{ 11 }

MFCU Search Warrants: Fla. Stat. §933.04

- A judge or magistrate having jurisdiction may issue a search warrant upon the making of proper affidavits.
- The search warrant must be supported by probable cause and accompanied by an affidavit naming and describing with particularity the person(s), place, or thing to be searched, and particularly describing the property or thing to be searched.
- When the investigator executes the warrant, the investigator shall deliver a copy to the person named or a person in charge of or living on the premises.
- Any seized property shall be noted on the inventory receipt and delivered to the person in possession of the premises or left on the premises if the person is not found.
- After the warrant is served, the investigator shall attach an inventory listing the items seized and verify this by oath.
- Upon request, the inventory form shall be delivered to any claimant or person from whom property has been taken.



Copyright Broad and Cassel 2015

{ 12 }

MFCU Subpoenas: Fla. Stat. 409.920(8)(a)

- MFCU subpoenas are considered investigatory subpoenas and are issued as part of an OAG investigation. Subpoenas may be issued by the MFCU attorney of record to request a witness to bring documents or materials under his or her control.
- Subpoenas can be challenged on two grounds: relevance and/or overbroad. Courts have held that a subpoena will not constitute an unreasonable search and seizure under the Fourth Amendment as long as the subpoena is properly limited in scope, relevant in purpose, and specific in directive, so that compliance will not be unreasonably burdensome. *State v. Tsavaris*, 394 So. 418 (Fla. 1981).



Copyright Broad and Cassel 2015

{ 13 }

Other Requests for Information

- Federal:
 - Recovery Audit Contractor (RAC) Program – entities that contract with CMS to conduct Medicare claims’ audits. Usually involves request for medical records and documentation.
 - Zone Program Integrity Contractors (ZPIC) – CMS contractors that correspond to the Medicare contractor jurisdictions. Their role is to investigate possible fraud, waste and abuse in Medicare Parts A and B. Usually involves request for records, onsite visits and/or interviews.
 - Unofficial request for information from DOJ/OIG – often looks like a subpoena.
- State:
 - Medicaid program integrity audits – AHCA investigators that have jurisdiction over Medicare overpayments. Often involves audits of patient records and claims information

Note – federal and state statutes allow agencies access to a provider’s records and failure to do so can expose the provider to penalties.



Copyright Broad and Cassel 2015

{ 14 }

Responding and Reacting



Copyright Broad and Cassel 2015

{ 15 }

Identify the Point Person

- Organizations often learn of investigations through employees who have been contacted by government agents
 - Identify who in the organization should be the Point Person for contact with government agents
 - General Counsel
 - Chief Compliance Officer
- Prepare employees for government agent interaction
- Communication regarding government contact
 - Limiting email communication; encouraging verbal discussion



Copyright Broad and Cassel 2015

{ 16 }

Prepare Employees

- Government and the organization have equal access to witnesses in an investigation; often those witnesses are the organization's employees
- Prepare employees in training by educating them regarding rights:
 - Employees are free to answer government questions, however they must be truthful
 - Employees may decline a government interview and request a meeting with counsel
 - General counsel must explain to the employee who (s)he represents
 - Upjohn warning
 - Employees should request the government's agent's background and contact information (most importantly, what agency the agent comes from)
 - All inquiries should be handled expeditiously and with courtesy and request



Copyright Broad and Cassel 2015

{ 17 }

Subpoenas

- Rules of responding to subpoena (regardless of whether it is from a state or federal agency):
 1. Provide the subpoena to counsel so that he/she may engage the government attorney and/or investigator directly to determine whether the provider is a target or witness to the investigation.
 2. Preserve documents by initiating litigation hold; turn off all auto-delete programs.
 3. Identify a point-person within the organization that will work with outside counsel in coordinating the response.
 4. Work with counsel to identify custodians of information requested in the subpoena.
 5. Collect documents.
 6. Review production of documents with counsel.
 7. Prepare response.



Copyright Broad and Cassel 2015

{ 18 }

Search Warrants

- Rules of responding to search warrants (regardless of whether it is a state or federal agency executing the warrant):
 - **Immediately** after the investigator enters the premises with a warrant, call your in-house counsel or outside counsel so that the attorney can try to maintain any attorney-client or work product privileges or at least object to seizure of any such materials.
 - Ask for the agent's credentials – determine what agency the agent is from
 - Counsel should request a copy of the affidavit filed in support of the warrant
 - Attempt to compile an inventory of seized property, items seized, and persons investigated.
 - Observe if it appears that the warrant execution is outside the bounds of the warrant.
 - Prevent the seizure of essential records that the client requires. You may request that the investigator obtain copies of any hard drives.



Copyright Broad and Cassel 2015

Search Warrants

- More rules...
 - Explain to employees that they do not have to discuss any matters with investigators. Do not tell them that they should not speak with the investigators.
 - Monitor the agents' actions to determine the purpose of the search and document any abuses.
 - Copy important documents.
 - Ask to have computer discs placed under seal pending review for privilege.
 - De-brief with all employees that have come into contact with investigators
 - **Lastly**, do not obstruct justice by interfering with the search. Object, but do not resist.



Copyright Broad and Cassel 2015

Working with Counsel

- The organization's Point Person should immediately contact in-house counsel and consult outside counsel when he/she is alerted to an investigation
- The Point Person should work with the legal team on the following:
 - Identified privileged documents
 - Working with investigators on narrowing the scope of the inquiry (if applicable)
 - Discuss E-Discovery concerns



Copyright Broad and Cassel 2015

E-Discovery Concerns

- The Organization's Point Person should work with the legal team to appropriately respond to requests for information
- Electronically stored information (ESI) creates the following concerns, which should be discussed and addressed:
 - Identify custodians/departments that may have relevant information
 - Issue a litigation hold/record retention notice to key individuals
 - Determine the preservation time period
 - Create a list of key terms (often in conjunction with government agents)
 - Engage counsel to assess the privileged nature of documents
 - Review with counsel for any HIPAA concerns
 - Understand the form of production requested
 - Engage the IT department early and often
 - Protect metadata



Copyright Broad and Cassel 2015

{ 22 }

Working with Vendors

- Vendors can be key to an organized and efficient document production process
- Engage vendors through counsel; it will preserve attorney/client privilege and foster communication
- Introduce vendors to key organizational employees (examples: custodians of information, IT personnel)
- Discuss metadata preservation concerns if applicable
- Assist vendors in collection of ESI information.
- Counsel will work with vendors to cull through the information and make decisions about responsiveness and privilege issues.



Copyright Broad and Cassel 2015

{ 23 }

Policies and Training

- Have a written response policy in place, identifying the Point Person and back-up Point People in succession.
- Discuss procedures and protocols in employee training
 - Sessions on employee rights, compliance concerns and hotline numbers
- Include relevant work phone numbers and emails (including after hours contacts)



Copyright Broad and Cassel 2015

{ 24 }

Take Away Messages

- Consult counsel BEFORE responding to any government investigation. In criminal cases, the company and its employees have a constitutional right to do so. Counsel can often work with the government to narrow the scope of requests, negotiate with agents, and glean additional insight with discussions with investigators.
- Be truthful and accurate in any statements to the government. Failure to do so could expose the company and its employees to separate criminal liability (See 18 U.S.C. s. 1001).
- DO NOT impede or obstruct a government investigation (i.e. do not delete documents, emails, etc. or alter relevant documents). Any such actions could expose the company to separate criminal liability (See 18 U.S.C. s. 1505).



Copyright Broad and Cassel 2015

Questions?

Broad and Cassel
 Fort Lauderdale, Florida
 954.764.7060

Shachi Mankodi, Esq.
smankodi@broadandcassel.com

Hannah Levinson, Esq.
hlevinson@broadandcassel.com



Copyright Broad and Cassel 2015
