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Knock, Knock, It's the Government (Part II): Responding to Particular Kinds of Investigations

How should health care providers respond to particular kinds of investigations? In addition to the general recommendations in our previous installment, there are some guidelines that are particular to the initial mode of contact with the government:

1. Letters of Inquiry. Far and away, the most common means of notice of a new investigation is a request for information conveyed in writing. Sometimes the letter describes a complaint; in other cases, it asks questions. While there is nothing that mandates a response to such inquiries, it is typically in the provider's best interest to respond, because failing to do so may lead to an escalation of the matter or a more formal investigative process, such as a subpoena (addressed below). More often than not, we counsel providers to err on the side of providing more detail than necessary to demonstrate good faith to investigators. It is always important to pay attention to deadlines and to respond in a timely manner.

2. Subpoenas. Many investigations involve a subpoena, which is a more formal demand for documents and/or an appearance. It is critical to assess the legal enforceability of the particular subpoena; many government agencies issue documents that are entitled "subpoena" but which do not have the force of law. Subpoenas are more series than mere letters of inquiry because the failure to respond may create a risk of sanctions for the non-compliant provider. It is particularly important to review subpoenas with an attorney, because the response may entail protected information. In some cases, there may be a right to challenge the subpoena. In others, the attorney can negotiate the scope or timing of response.

3. Unannounced Visits. Many investigations begin with an unannounced visit. In these cases, it is critical to ascertain the legal authority of the government agents. Some agencies (e.g. the DEA or the Department of Health Care Services) may have the right to review relevant records at any time; others (e.g. the Medical Board) can only do view patient records with patient consent. It pays to contact a knowledgeable attorney immediately to verify the particular government agency's scope of authority and right to access.

4. Search Warrants. Being presented with a search warrant from a law enforcement officer is a scary moment in any business. It means that a criminal investigation is underway, and that a judge has already been presented with sufficient evidence to conclude that there is probable cause to believe a crime has occurred, warranting the immediate seizure of evidence of that crime to prevent its destruction. In some investigations, law enforcement personnel may show up in numbers demanding to enter the designated search area immediately to search for and take with them the documents or other items (e.g. computers, equipment) they want. It is important to balance the prohibition on obstructing the investigation against the right to protect the company. For example, law enforcement officers may be eager to interview everyone onsite before company representatives advise them not to say anything. It is reasonable to send non-essential employees home promptly upon the arrival of law enforcement and to advise them (only if it is true) that they are represented by company counsel, that they are not required to say anything, and that, at a minimum, that the company would prefer that they not say anything without the presence of counsel being present. Ideally, no one should volunteer any information related to the warrant or say anything except to comply strictly with what is required by the warrant. Although no arrests may occur, the presentation of a warrant means that criminal charges are certainly contemplated against someone, who has a constitutional right to remain silent. If patients or visitors were scheduled prior to a search warrant or present onsite during the execution, these visitors shuold also be sent home or called and told not to come. While there is no way to prevent the search in this circumstance, it is more critical than ever to contact an attorney to come immediately to the site and, where permitted, to assert attorney-client privilege. The warrant should be reviewed to ensure that it applies to what is being searched. Finally, if law enforcement are unwilling to provide the full warrant due to an ongoing investigation, it may be valuable to take note of what law enforcement are looking for in order to discern what is at issue.

Tolstoy's famous principle — "Happy families are all alike; every unhappy family is unhappy in its own way" — has a corollary in the health care industry: providers undergoing investigation are, like unhappy families, each in a distinct situation. Nonetheless, the way each investigation begins often provides critical cues as to its seriousness, the issues, and the appropriate response.