

## HOW TO RESPOND TO FEDERAL SEARCH WARRANTS AND SUBPOENAS



### Liles Parker Named Outside General Counsel for the American Medical Billing Association

Liles Parker is pleased to announce that it has been named as outside General Counsel for the American Medical Billing Association (AMBA). Our attorneys have the litigation skills, health care regulatory understanding, and counseling skills necessary to efficiently resolve health care issues before they become a problem. Our attorneys regularly represent a wide variety of health care providers and support organizations in connection with Federal and State health care fraud investigations and cases involving allegations of improper billing. We look forward to working with AMBA and its members.

### Third-Party Billing Companies Issues Remain a Continuing Concern of HHS-OIG

Third-party billing companies remain under considerable scrutiny. The government clearly recognizes that the relationship between billing companies and providers presents risks to the integrity of the Medicare program. Notably, The Department of Health and Human Services, Office of Inspector General (HHS-OIG) has again included "Billing Service Companies" in its annual Work Plan. This makes the third year in a row (2005, 2006 and 2007) that HHS-OIG has chosen to dedicate audit and investigative resources to review business relationships between physicians and billing companies. More often than not, third-party billing companies investigated by the government will learn of the investigation through telephone or written notice. Nevertheless, in some cases, the government may rely on more invasive measures. The purpose of this advisory is to provide a basic outline of actions you may wish to take if your offices are served with a search warrant or subpoena.

### Steps and Considerations when a Federal Search Warrant is Executed

- ◆ Immediately contact your attorney should the government execute a search warrant.
- ◆ Try and identify any action that may jeopardize patient care activities (such as the seizure of medical records for patients



currently receiving care). Typically, law enforcement will be sensitive to these issues. If this is not the case, legal counsel can often work with law enforcement to resolve an unreasonable intrusion.

- ◆ Regarding the search warrant itself, try and note the issuance date of the warrant and the date it was executed.
- ◆ Ask to check the identification of the leading agent handling the search. Also request the identification of any other participating agencies (e.g. IRS, HHS-OIG).
- ◆ Request to see the affidavit upon which the search warrant is based (don't be surprised if it was sealed by the Court and cannot be obtained).
- ◆ If counsel has not yet arrived, call counsel to discuss whether there may be any grounds to object to the search. Should you object, inform the lead agent of your objection. Should the search continue, record the date and time of their arrival and departure.
- ◆ If possible, accompany agents on the search. Try to note which areas were searched and which documents or items were seized.
- ◆ You may have documents that qualify as attorney-client privileged materials. Notify agents if such documents are present.

## CONTINUED: FEDERAL SEARCH WARRANTS AND SUBPOENAS

- ◆ Obtain a receipt from the agents for any items or documents that are seized. When possible, get copies of original documents before they are removed.
- ◆ Avoid taking any actions that could be construed by the government as a breach of the peace of an obstruction to their search. obstruction to their search.

The type of subpoena received can provide legal counsel with considerable insight into the nature of the government's investigation. Unlike a search warrant where documents are immediately taken from the premises, a subpoena permits you to retain control of the document production process.

**When a Federal Search Warrant is executed at your health care facility, you should immediately call legal counsel and ensure that patient care activities are not jeopardized by the government's in-**

### Employee Issues

- ◆ The execution of a search warrant is an extremely stressful situation and creates confusion among an organization's employees. Remain calm and re-assure employees that the situation is under control.
- ◆ A search warrant can be used to seize documents or other items. It cannot be used to force employees to participate in an interrogation.
  - ◇ Do not tell employees that they are not allowed to talk with an agent. It is appropriate to tell employees that they have no obligation to answer any questions.
  - ◇ When possible, send employees home for the day or have them work in another part of the facility.
- ◆ Notify employees that any questions regarding the location of certain records should be directed to a specific management official.

### After the Search

Document retention issues should be carefully handled. We are all familiar with cases where the government has ultimately pursued obstruction charges rather than substantive violations. **It is our view that all document destruction should immediately stop**, even if the activity would be consistent with pre-search document retention policies used by the organization. Once an investigation is initiated, you should diligently work to avoid even an appearance that obstruction of justice may be occurring.

### If a Subpoena is Issued

A subpoena is a Court or agency administrative order requiring the production of classes of documents by a specified date. In the health care context, a provider could receive a Grand Jury subpoena (used in a criminal investigation), an HHS-OIG or state MFCU subpoena (used in criminal or civil investigations), an Authorized Investigative Demand (used in parallel or joint criminal and civil investigations) or a Civil Investigative Demand (used in civil investigations).

### Steps and Considerations when a Federal Subpoena is Received.

- ◆ Contact legal counsel immediately upon the receipt of a subpoena.
- ◆ Review the subpoena to determine the scope of the investigation. Consideration should be given to the type of subpoena used, the scope of the request, the time period at issue, who issued the subpoena, and when the documents must be produced. Fax a copy of the subpoena to legal counsel as soon as possible.
- ◆ Through counsel, law enforcement should be contacted so that additional information regarding the investigation may be learned. Establishing contact with the government also demonstrates your organization's interest in working in a cooperative manner.
- ◆ Once contact is made, legal counsel can work with the government and try to further limit the scope of the subpoena, either by narrowing the responsive dates involved or by convincing the government to limit the types of information produced (e.g. postpone review of materials kept in off-site storage).
- ◆ Explain the subpoena to employees and discuss role in identifying and gathering responsive documents. Designate an individual to coordinate the retrieval of documents. Identify where responsive materials are kept.
- ◆ Counsel will advise as to what actually has to be produced and whether a document may qualify as privileged under the attorney-client, attorney work product, Federal quality assurance, or (if applicable) state peer review privilege.
- ◆ Take the process seriously. Failure to fully comply with a subpoena will only increase the scrutiny of law enforcement officials and may result in criminal liability.

**Should you have questions regarding this advisory, please feel free to contact:**

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***The information discussed in this advisory does not constitute legal advice. Readers with questions may contact Liles Parker, PLLC or contact the attorney with whom they normally consult.***