

Avoid Common Mistakes When Responding to Government Notices



The following guide was developed to assist you in responding to inquiries from government officials. It should not be viewed as legal advice. This guide addresses the three primary types of government inquiries:

1. Requests for Interviews
2. Requests for Documents or Access, and
3. Search Warrants.

It is important to note that government notices can be complicated and responding to them incorrectly is usually something you can't take back. Therefore, you should read through this entire guide before you consider responding to any government notice you receive. This includes all written and oral communications from any government agency.

If you have any questions or are unsure in any way, it is crucial that you contact an attorney before responding to ANY government communications.

REQUESTS FOR INTERVIEWS:

Government officials requesting interviews can do so with either the principals of your practice (i.e., administrator, chief executive officer, provider, owner, etc.) or individual employees. Therefore, it is vital that you understand how to respond in both instances.

A. Principals:

As a principal of your practice, if you are ever approached by an agent or investigator for any state or federal agency seeking to speak with you, remember that **they have an agenda**. So, even if an agent or investigator seems friendly and only requests to "*just ask you just a few questions*," don't make the mistake of responding off the cuff.

In fact, you are **under no obligation** to voluntarily speak with any government agency. You are **within your rights to refuse** to do so. However, it is extremely important that you respond to an interview request, even if your response is a refusal to be interviewed.

When you respond to a governmental request for an interview, you should not assume that you know the nature or basis of the inquiry. Even if you think you know why they want to talk to you, making statements without being 100% sure can come back to bite you.

Below are several tips to use should you need to respond to any state or federal request for an interview:

- Ask for a business card from the agent requesting the interview. If a business card isn't available, request and document their contact information (i.e., full name, agency/affiliation, contact information – address, phone number, email address, etc.).
- Maintain an agreeable demeanor. Never be belligerent or confrontational, regardless of how you really feel.

- If you are being represented by counsel:
 - Inform the agent requesting the interview that you would like all communications to be directed to your counsel. Then, provide the agent with your attorney's contact information, or
 - Get the agent's contact information. Then, advise the agent that you'll have your attorney respond. Ask whether you should have your attorney respond directly to the agency or the government's attorney assigned to the matter.

B. Employees:

First, **NEVER advise an employee to refuse to speak to an agent** regarding an investigation. Or worse, **NEVER threaten retaliation** against an employee who agrees to be interviewed. Both options could be construed as obstruction of justice and/or serve as the basis for a civil action against you! This could have an adverse effect on an already sensitive situation.

Consider these response strategies for **employees that you believe will be approached for interview** by a state or federal agent or investigator:

- Identify those employees who you believe may be contacted for an interview.
- With your attorney's assistance and approval, draft a memo to these employees informing them of the following:
 - Their right to speak with counsel before deciding whether to participate in an interview
 - Their right not to participate in an interview.
 - Explain that corporate counsel represents the corporation – this is especially important if you believe the employee's interests may vary from those of the corporation
 - Consider providing separate counsel to key employees
- Arrange for employees who choose to speak with agents to do so in a private, secure environment.
- Instruct employees to refer all media and other inquiries to a designated individual.

Consider these communication tips to **help your employees respond to any state or federal request** for an interview:

- Always be agreeable, even if you choose not to be interviewed.
- Ask your employees to inform you (or someone you identify) immediately upon their receiving an interview request.
- Ask your employees to get a business card from the agent requesting the interview. If a business card isn't available, get the following information from the agent:
 - Name of the agent/investigator
 - Agency affiliation (i.e., Medicaid Fraud Control Unit, FBI, HHS...)
 - Contact information of the agent (i.e., address, phone, fax, email, etc.)

Consider providing the following assistance to **employees scheduled to provide an interview**:

- Provide your employees with advice on how best to communicate during the interview. You are not advising them on what to say, but how to respond to questions (i.e., don't elaborate, be specific, if you don't know, say so, etc.). Your attorney can be helpful in preparing this advice.

- If an employee does choose to retain counsel, consider covering the cost (related to the interview)
- Have the employee's counsel arrange for the interview to take place in a private, secure environment
- Ask the employee to contact you (or someone you identify within your organization) after the interview to debrief on the details
- Advise the employee to answer all questions truthfully

Important Things to Remember When an Interview Has Been Requested:

- ✓ NEVER advise an employee to refuse to speak to an agent regarding an investigation.
- ✓ NEVER threaten retaliation against an employee who agrees to be interviewed.
- ✓ Employees interviewed by agents may communicate the content of the interview to others. Such sharing of information is not illegal or inappropriate.

REQUESTS FOR DOCUMENTS AND ACCESS

A. Oral Requests Without a Search Warrant or Subpoena:

Agents or investigators that show up without a search warrant or subpoena **have no right to copy, review or seize items from your company or home.** If an agent or investigator shows up without a search warrant and asks for documents or access to your location, consider the following responses:

- Ask for a business card from the requesting agent. If a business card isn't available, request and document their contact information (i.e., full name, agency/affiliation, contact information – address, phone number, and email address, etc.).
- Confirm the identity of the agent/investigator. Getting a business card is preferable to asking "to see some identification" or "credentials." Document the information you receive.

Note: Even informal requests to review a company's records (let alone being served with a search warrant) can induce anxiety, which impairs memory. Later, 99 out of 100 persons will say "it was the FBI" that attempted to question them when it is later determined it was actually an agent from some other agency.

- Advise the agent that you will immediately contact your counsel and convey their request.

Tip: Avoid being overly "helpful" in providing information to agents; limit your response to an agreement to notify counsel of the record demand promptly.

If you do choose to allow **"immediate access" to your records without a search warrant and without consulting with your attorney**, at a minimum, consider the following responses:

- Make a photocopy or take a picture of any item you provide to an agent BEFORE they can inspect it.
- As soon as possible, consult your counsel.

Tip: While at your practice, an investigator may ask an employee for information regarding their personal documents. Your employees are NOT under any obligation to provide them. Instead, utilize the above-suggested response items for your employees as a guide.

B. Formal Requests with a Subpoena:

If you receive a subpoena request for documents or information, be sure you communicate precisely how managers and employees should respond. Consider the communication points below:

*Note: There are two types of subpoenas. A subpoena **duces tecum** is for documents, and a subpoena **ad testificandum** is for testimony.*

- **Employee accepting a subpoena for your practice:**
 - Be civil, but not overly friendly.
 - Ask for a business card or the person's contact information if a card is not available.
 - Do NOT engage in any dialogue other than to request a business card or contact information.
 - If asked to do so, sign for receipt of the document.
- **After your practice employee accepts a subpoena:**
 - Employees should be instructed to deliver the subpoena to their supervisor IMMEDIATELY.
 - If their supervisor is not on the premises, your employee should be instructed to:
 - Call the supervisor and inform them that a subpoena has been received.
 - Notify the supervisor to expect a copy of the subpoena.
 - Be specific regarding when the subpoena will be sent and by which medium.
 - Send a copy of the subpoena to their supervisor as indicated; via fax or as a scanned attachment to an email is recommended for speed.
 - Keep a copy of the email and/or fax receipt to show the date and time the subpoena was sent.

Tip: The employee and supervisor should refrain from making statements (either verbally or in writing) regarding any allegations, facts, or documents sought by the subpoena. Remember, all communications can be used in the future as evidence.

 - Employees should not make any statements or provide any documents to the agency when the subpoena is served. The subpoena will provide information regarding the future date, time, and place for producing the documents or testimony.
- **Principals, owners, and upper-level management actions:**
 - Notify Employees:

Upon receipt of a records subpoena (duces tecum), your practice owner and/or their counsel should consider immediately disseminating a memorandum to ALL employees stating the following:

 - Inform your practice employees that you've received a subpoena that requires the production of specific documents, and that you intend to comply with the request fully
 - You have retained counsel to assist with the response to the subpoena, and all employees are urged to cooperate with your attorney in every way possible
 - No documents may be destroyed without the express approval of your practice's counsel

- If contacted by agents regarding the subpoenaed documents, employees should obtain the name and telephone number of the agent and refer the inquiry to practice ownership (management), to their supervisor, or your attorney

Tip: Be sure to provide your employees with contact information for practice ownership, their supervisors, and your attorney so they can comply with your directions.

- **Principal Response:**

As a principal of your practice, upon receipt of a records subpoena, you should:

- Be prepared to fully assume the compliance costs related to the subpoena (i.e., inspecting, assembling, photocopying, etc.).

Note: The government may assume the cost of complying with a subpoena in some circumstances or share them in others. Either way, don't let whoever is responsible for paying stop compliance with the subpoena by delaying the production of the documents.

- Before submitting any documents in compliance with the subpoena, be sure your counsel reviews them.
- Document all employees involved in the duplication or gathering of requested items and provide this information to your counsel.
- Identify any former employees who may have information concerning the requested documents and provide this information to your counsel.

- **Non-Corporate Records:**

If the agent demands copies of personal or non-corporate records (or other documents NOT listed in the subpoena), you should respectfully decline to provide them and ask the agent to have the government's counsel contact your attorney. However, if an agent insists, you may voice your objection to the items being taken but do not get into a confrontation with the agent. Instead, immediately contact your attorney.

Know Your Subpoena Types:

- ✓ **Duces Tecum Subpoena:**

Immediate production of documents generally cannot be compelled by a record subpoena (duces tecum). To immediately gain access to documents/items requires a search warrant. Agents or investigators that show up without a search warrant **have no right** to copy, review or seize items from your company or home.

- ✓ **Ad Testificandum Subpoena:**

You cannot be compelled to immediately respond to questions with a subpoena for **testimony (ad testificandum)**. It merely requires an individual (or corporate representative) to appear and testify at a future date in a judicial or quasi-judicial forum. This future date should be identified in the subpoena.

SEARCH WARRANTS

Hopefully, your practice will never be served with a search warrant. But, if you are, it is essential that you and your staff are prepared to respond correctly.

A search warrant is a court order authorizing agents to search for specific evidence in a particular location. Normally, agents in possession of a search and seizure warrant signed by a court officer are entitled to immediately search for and seize the documents and other items described in the warrant. This is true whether the document they present is the original warrant or a copy.

If agents attempt to execute a search and seizure warrant at your practice, here are some strategies to consider:

A. Questions to Ask Agents:

- **Ask to read the warrant.** The agent is required to give you a copy of the warrant. If your practice is the location described on the face of the warrant as the site to be searched, admit the agents to the premises.
 - Agents may not give you the opportunity to read the warrant before entering and securing the location. If the agents do not allow you to review the warrant before its execution, obtain and read it as soon as possible.
- **Ask for contact information:**
 - Get the name and agency of the person executing the warrant. The best option is to get a business card that provides this information. However, if a business card is unavailable, document the name and affiliation of the agent in charge, along with their contact information.
 - If it is not apparent on the face of the warrant, ask for the name and phone number of the government attorney in charge of the investigation.
- **Ask to call your attorney** — and do so promptly.
 - Send a scan or a picture of the warrant to your attorney immediately.
 - Follow up with a phone call to go over the details of the warrant with your attorney.
- **Ask to change search timelines:**
 - If the warrant is presented during a time when you usually see patients, ask the agent if the search can be postponed until your practice is closed (with proper safeguards against the destruction of evidence, of course).

Note: It is very unlikely that your request to postpone the warrant search will be granted, but it can't hurt to ask.
 - If you believe the search is likely to continue beyond its start date, ask agents to continue through the night to finish (instead of coming back in the morning). It's better to have the agents finish the search in one setting versus coming back the next day. However, if agents refuse to continue their search into the evening, before you let them leave, contact your attorney. Your attorney can help you make a request to Assistant United States Attorney or the Assistant States Attorney handling the investigation to hopefully get the search finished the same day.
- **Ask for documentation:**
 - Request copies/photographs of all documents being seized. At a minimum, get a commitment from the agent that they will return copies of documents as soon as possible. Be sure to document the name of the agent that commits.

Note: In a search where a substantial number of documents are seized, chances are slim that you will be permitted to copy every document being taken.

- If a document is critical to your practice's operation, you may have more of a chance of getting agents to agree to let you make a copy or take a photograph (i.e., appointment book, schedules, current time sheets, medical records for scheduled patients, etc.). As soon as possible after the search begins, identify essential documents and make your request.

*Note: Be sure to create a **detailed list of documents seized** and a notation of the location from which each item was taken. Although the law requires that an inventory of seized property be provided to you, such inventories are often of little assistance with entries as vague as, for example, "box of business records" or "medical records."*

B. Keep Watch:

- If the warrant specifies multiple locations, try to accompany agents to ALL specified locations where identified documents or items requested may be located. Agents may not permit this, but it can't hurt to ask. If they refuse, do not get in the way of them executing the warrant.
- As agents dig through your office, attempt to observe the specific areas being searched and, if possible, the items being scrutinized or seized.
- Under no circumstances should you or any employee attempt to **impede an agent or officer from gaining access to a particular area or location**. If you interfere with agents executing a search warrant, at best you can be detained, and at worst you can be taken into custody and charged criminally.

C. Communicating with Agents:

- Maintain an agreeable demeanor and try to **avoid confrontations**.

Note: Being nice in these situations can be difficult for all involved. Agents may detain you or your employees, which can make everyone feel like they are being treated "like criminals." It is important to remind your staff to remain calm and not take it personally. The agents are there to do a job, and when they are done, they'll leave. Getting angry will most certainly make things worse.

- Be cooperative, but **not too cooperative**:
 - Do not agree if agents ask to expand the search beyond those items described in the warrant.
 - You should not offer any information or answer any substantive questions posed by agents conducting the search. A search warrant is for the purpose of seizing documents and does not obligate anyone to answer questions posed by the agents executing the search warrant.
- Advise employees that they **may speak to an agent if they choose but are not obligated to do so**. It is recommended that non-essential employees be sent home during the execution of a search. However, if agents decide to keep your staff at the office, do not refuse.
- If agents ask you to **sign an affidavit of any kind**, do not comment as to the validity of its contents or sign anything. Instead, explain that you are not authorized to sign any documents prior to review by your counsel.

Important Things to NEVER do during a Warrant Search:

- ✓ **NEVER** destroy or alter any documents (whether stored electronically or on paper).
- ✓ **NEVER** destroy or transfer to a third party any computer, computer hard drive, smart phone, tablet etc.
- ✓ **NEVER** instruct your employees or anyone else how to respond to questions by government agents during a warrant search.
- ✓ **NEVER** instruct employees that they should not talk to government agents (only that they are under no obligation to do so).

ATTORNEY-CLIENT PRIVILEGE DOCUMENTS

Communications can be considered covered by attorney-client privilege when they are:

- **Prepared BY** your attorney,
- **Prepared FOR** your attorney (including from you), or
- Items **FROM** your attorney.

If you believe that any of the documents covered by the search warrant are protected by the attorney-client privilege, tell the agent in charge as soon as possible. Here are some additional things to consider:

- **Identify** the documents and their location as soon as possible.
- **Inform agents** immediately that you believe the identified documents may be subject to attorney-client privilege.
- Make a request to the agent that appropriate procedures be followed to **protect the privilege**.
- Tell the agent that you **object to the seizure** of such privileged documents but will agree to segregate and preserve them until your attorney can confer with the government attorney.
- If the agent insists on removing the documents, **request that they be kept under seal** in a separate file until the court decides the issue.
- Ask for a copy or detailed list of the documents.

Note: Once identified, your attorney should take the necessary steps to ensure that any privileged documents which were seized will be reviewed by the court and/or held by the court until the privilege issue is resolved.



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