

## **WHAT TO DO WHEN THE GOVERNMENT COMES KNOCKING\***

By Michael R. Gordon of K&L Gates LLP

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Government investigations continue to focus on health care providers. Should the government contact you, here are some potential action steps to consider in consultation with your attorney.

### **1. Doctor and Management of Medical Practice's Rights in Dealing with Government Agents**

There is no obligation to voluntarily speak with government agents (hereinafter "agents").

You have a 5th Amendment right to refuse to speak to agents.

If you are contacted by an agent, respectfully request that the agent contact your attorney.

If contacted by an agent, request the agent's name, place of business, and phone number (as well as the name and phone number of the government attorney involved in the investigation).

### **2. Your Employees' Rights**

Employees are not obligated to speak with agents. However, do not encourage employees not to speak to agents. This could be considered obstruction of justice, which, in and of itself, is illegal. You should simply inform your employees that it is their decision whether they want to speak to an agent.

Regardless of whether the employee decides to be interviewed by an agent, ask that the employee inform you when they are contacted by an agent.

If an employee informs you that they are going to speak to an agent, simply tell the employee to answer all questions truthfully.

Let your employees know that they have the right to be represented by counsel during an interview.

Inform the employee that if they agree to an interview, then your attorney would like to be present for the interview.

### **3. Should an Agent Present a Search Warrant, Do (or Instruct Your Employees to Do) the Following:**

- Request a copy of the warrant and affidavit supporting execution of the warrant. (Please note that the affidavit is often not available, because it is often under seal.)
- Accept the warrant and fax or e-mail a copy to an attorney experienced in this area of law. Politely, ask the agent if they can wait for your attorney to arrive before searching or if you can have some time to discuss the warrant with your attorney before the search begins.
- Send your entire staff home so long as that will not compromise patient care.
- No one is required to talk to an agent. Search warrants are for documents, not testimony.
- Do not interfere with the search as authorized, but do not consent to the search of other areas or other documents except those authorized by the warrant.
- Ask the agent some questions. Try to learn the nature of the investigation and what crimes are suspected.

- Listen to what agents are saying as they search and take notes accordingly. They might say something about the investigation that your attorney will find useful.
- Read the warrant very carefully so that you can determine if the agent is searching the appropriate areas of your practice. Always check to see if the search is being conducted within 10 days of the date the warrant was issued (the law requires this). If the search is being executed before or after business hours, check the warrant to see if this is authorized.
- During the search, identify and determine the agency of each agent present and the agent in charge. (There might be members of more than one agency present during the search.) Get business cards, if they have them.
- Ask the agent if a designated member of the practice can accompany the agent to each searched area.
- Make a detailed list of all of the areas searched and any items seized, along with specific information concerning the location in which the document came.
- With respect to essential documents, ask the agents if they can take copies instead of the originals.
- Ask the agents if you can make copies of any document seized.
- Determine whether any of the documents covered by the warrant may be protected by the attorney/client-privilege (like letters or memoranda from attorneys to you or from you to attorneys). If there are such documents, then:
  - Identify the document and their location;
  - Inform the agents that the documents may be subject to the attorney/client-privilege and insist that the appropriate procedures be followed to protect that privilege;
  - Advise the agents that you object to their seizure of such documents, but you will agree to separate and preserve them until your attorney can speak with the government attorney;
  - If the agents insist on removing the documents, ask them to keep the documents under seal in a separate file until the court resolves this issue;
  - Obtain a copy or list of the documents.
- Refuse to sign any vague inventory of seized items presented by the agents.
- If an agent asks you to sign an affidavit, do not comment as to the validity of its contents and explain that you are not authorized to sign any document prior to its review by your attorney.

#### **4. Subpoenas from the Government**

Get your attorney to review the Subpoena.

An experienced attorney can often limit the burdensome scope of the Subpoena.

An experienced attorney can get some details regarding the investigation and ascertain the legal status of the doctor or practice in connection with the investigation.

### **About K&L Gates LLP**

K&L Gates LLP comprises nearly 2,000 lawyers who practice in 37 offices located on three continents, including North Carolina offices in Raleigh, Research Triangle Park, and Charlotte.

K&L's Health Care group was listed in *Modern Healthcare* as one of the 20 largest dedicated health care practices in the United States in May 2010. The firm's Health Care lawyers assist from start-up enterprises and new ventures and emerging businesses to well-established and leading health care businesses. In addition, our Health Care lawyers work with clients to maintain and improve operations, through expansions and reorganizations, in compliance with existing requirements. For clients who find themselves subject to government audits or the focus of investigations, we provide assistance in responding to those audits or defending against government enforcement actions. As the government imposes new and amended laws, regulations and policies on our clients, we recommend approaches to adapt to the changes. Our lawyers also represent clients through complex restructurings, mergers, acquisitions, spin-offs and dissolutions.

### **About Michael R. Gordon**

Mr. Gordon is a litigator whose practice focuses on white collar criminal defense and investigations, complex civil and commercial litigation, and administrative matters in front of organizations such as the North Carolina Medical Board, North Carolina Board of Nursing, and North Carolina Board of Dental Examiners, among others. Mr. Gordon has represented clients in matters or investigations brought by the U.S. Attorney's Office in the Eastern District, Middle District and Western District of North Carolina, the North Carolina Medicaid Investigations Unit and the Consumer Protection Division of the North Carolina Attorney General's Office, the Office of the Inspector General (OIG), and the Carolinas Center for Medical Excellence.

### **Mr. Gordon's contact information**

Michael R. Gordon

K&L Gates LLP

430 Davis Dr.

Suite 400

Morrisville, N.C. 27560

Phone: (919) 466-1114

Fax: (919) 516-2114

E-mail: [mike.gordon@klgates.com](mailto:mike.gordon@klgates.com)

Bio: <http://www.klgates.com/professionals/detail.aspx?professional=7068>

Website: [www.klgates.com](http://www.klgates.com)