Healthcare Law MCLE Meeting
DCBA Bar Center
Date: October 25, 2017

11:45 AM – Noon
Welcome/Introductions

Grace Daigel, Section Vice Chair

A few words from our lunch sponsor, Dan Pagano, Branch Manager/Senior Mortgage Loan Professional-Wintrust Mortgage

Noon – 1:00 PM
Program

What to Do When the FBI Knocks on your Door and other Horror Stories

Daniel Purdom, Hinshaw & Culbertson, LLP

Speaker’s Bio

Daniel Purdom has extensive trial and investigative experience concerning white-collar federal crimes, such as health care fraud, complex financial fraud, tax fraud, insurance fraud, SEC fraud, international antitrust, official and police corruption, RICO, organized crime, bank embezzlement and bank fraud. He has tried dozens of criminal and commercial cases in numerous states. Mr. Purdom has briefed and argued more than 25 cases to federal and state appellate courts.

In addition to his white-collar criminal practice, Mr. Purdom has extensive trial experience involving health care fraud and abuse, Illinois Attorney Registration and Disciplinary Committee (ARDC) defense, false claim/qui tam actions, commercial litigation, employment and class action lawsuits.

Mr. Purdom has represented numerous medical providers who have been involved in federal, state and regulatory investigations of alleged health
care fraud and related problems. He also handles internal investigations of employee wrongdoing involving embezzlement or internal fraud, and has helped various clients implement and monitor corporate compliance programs. Mr. Purdom has also been involved in a number of false claim/qui tam actions nationally representing health care providers, defense contractors and others.

In 1986, as an Assistant U.S. Attorney in the Northern District of Illinois, Mr. Purdom prosecuted what was then the largest health care fraud in the United States. He secured the dismantling of a $20 million Medicaid fraud scheme, and the conviction of more than 40 individuals, including doctors, pharmacists and others associated with the scheme. Mr. Purdom coordinated the efforts of the U.S. Postal Inspectors, the Illinois Department of Public Aid, the Illinois Department of Registration and Education, the Illinois State Police and the Internal Revenue Service, and gained valuable working knowledge of the health care billing system. During his tenure with the U.S. Attorney’s Office he tried more than 35 jury trials and briefed and argued more than 15 appeals before the Seventh Circuit Court of Appeals.

Mr. Purdom has been appointed a Special Inspector General by the State of Illinois Executive Ethics Commission to conduct several high profile investigations. He has also been appointed as a Special State's Attorney on a number of occasions to conduct internal investigations and to provide professional ethics opinions.

**Publications**

Mr. Purdom was the subject of a profile entitled “Q&A With Hinshaw’s Daniel Purdom,” that appeared on December 20, 2011 on the Law360 website.

Mr. Purdom has written numerous articles, treatises and other works on issues in his areas of practice focus. Examples of his published works include:


**News**

Daniel Purdom Quoted in Mainstreet.com on Medicare Fraud: The Dirty Truth

November 4, 2013
Mainstreet.com

• Daniel Purdom Author's Article, "Recent Amendments Significantly Enhance the Power and Reach of the False Claims Act," in Westlaw Journal

April 1, 2011

**Next Meeting:** 1/24/2018 – Opioid Crisis by Jay Bogdan

**DCBA Events:**

11/9/2017 Veterans Day Lunch-noon @ the ARC

11/16/2017 Happy Hour 5:30 p.m. Granite City, Naperville

11/16/2017 Lawyers’ Lending a Hand - Coat Sorting 5:00 p.m. @ the DCBA Bar Center

12/1/17 & 12/8/17 Basic Skills 1:00 p.m.-5:00 p.m. @ ARC
WHAT TO DO WHEN THE FBI KNOCKS ON YOUR DOOR

Daniel M. Purdom
Hinshaw & Culbertson
Chicago/Lisle, Illinois

INTRODUCTION

Subpoenas and search warrants are a rare occurrence for legitimate healthcare providers. Consequently, legitimate healthcare providers are caught unprepared in the face of a well prepared law enforcement team. This article will hopefully provide practical considerations and steps to take in preparing for the anxious moment when a FBI agent hands you a subpoena or a search warrant.

SUBPOENAS

There are two types of subpoenas, subpoenas to testify (ad testificandum) and for records (duces tecum). Subpoenas can be issued by a grand jury which is controlled by a prosecutor. There are also civil and administrative subpoenas which are controlled by the investigating agencies like Health & Human Services.

A subpoena duces tecum can call for any kind of document. Subpoenas usually call for original documents. Receipt of a subpoena should be followed immediately by a general memo notifying all concerned individuals that a subpoena has been received and that absolutely no record should be deleted, altered, destroyed or changed in any way (post-its and all).

The computer age has drastically changed the landscape concerning records subpoenas. Investigative agencies have computer experts who will locate, access and duplicate computer records. It is important that counsel for the subpoena recipient coordinate with the investigative agencies so that business interruption can be minimized and the healthcare provider can maintain duplicate records to conduct a parallel investigation if that is necessary.

RECEIPT OF SUBPOENA

It is important that procedures are in place prior to receipt of a subpoena so that counsel will be notified immediately and can take steps to insure that no documents are destroyed, altered, discarded or created and that compliance is properly completed.

RULE NUMBER ONE

Rule number one is to immediately contact counsel. In-house counsel should inform the possible recipients of any subpoena that counsel should be contacted immediately upon receipt of a subpoena. These individuals should also be informed that oftentimes creative investigators use the service of a subpoena to obtain additional information. Employees should know their rights with respect to submitting to interviews and providing information to these agents.

The subpoena itself will provide a great deal of information which may shed light on areas of inquiry or the agencies involved in the investigation. Usually the subpoena will identify
the prosecutor and the investigative agency (FBI, OIG, Postal Inspector, etc.). A review of the subpoena may indicate when the Grand Jury was formed, the subject matter of the investigation and the statutes which were possibly violated.

The prosecutor who heads the investigation is usually listed on the face of the subpoena. It is important for knowledgeable counsel to make immediate contact with the prosecutor and determine the parameters of the investigation and any other information which that prosecutor is willing to share with counsel.

NOTIFYING EMPLOYEES

All involved employees should be notified immediately that a subpoena has been served. This type of communication is best done through a written memorandum which carefully sets forth the rights and obligations of the employees with respect to the subpoena. This written instruction should include the fact that no record should be discarded, altered, created or destroyed. The documents described in the subpoena should be identified and instructions should be made for employees to gather responsive documents. Employees should also be instructed not to discuss the subpoena or any aspect of the investigation with other employees. This is done to avoid creating additional, confusing evidence and should be done in conjunction with instruction to take steps to protect the attorney/client privilege whenever possible. Written instruction should inform the employees in the strongest terms possible that destruction or alteration of records can result in obstruction of justice charges.

GATHERING INFORMATION

Subpoenas often cover numerous years and involve voluminous documentation. Failure to properly comply with the subpoena can appear to be an obstruction of justice or an indication of a continuing effort to hide incriminating evidence. For this reason, it is vitally important to insure that employees understand the significance of the subpoena and that knowledgeable individuals take all steps necessary to fully comply with the subpoena. Counsel should identify a point person within the company who will act as the “custodian of records.” The subpoena may identify an individual as custodian or it may be directed to a generic “custodian of records.” The custodian of records must be prepared to testify under oath what steps were taken to gather the information called for in the subpoena.

All responsive documents should be copied and bates stamped. These records should be inventoried and indexed as extensively as possible. Counsel should identify any documents which may be protected by attorney/client privilege, work product privilege or other applicable privileges.

Counsel should attempt to negotiate any aspects of the subpoena. Subpoenas are usually drafted in incredibly broad terms to cover virtually every conceivable document under the sun. A common sense conversation with a prosecutor in which counsel determines exactly what the prosecutor is looking for and suggests alternative ways of providing the information is totally acceptable (that is assuming there is a “reasonable prosecutor,” which some defense attorneys believe is an oxymoron). It is important to open a dialogue and attempt to limit the scope of the subpoena. Prosecutors will usually be reasonable with respect to time constraints for the return of the subpoenaed materials.
INTERNAL INVESTIGATION

Counsel should use the subpoena as a springboard to the conducting of an independent investigation. Individuals unfamiliar with federal investigations sometimes believe that no news is good news. However, the Grand Jury works in secrecy and an attorney who does not take steps to aggressively uncover the extent of any wrongdoing runs the risk of picking up the newspaper and finding out his client was indicted or in today’s world, seeing his white collar client led off in handcuffs. A failure to fully investigate wrongdoing may also expose the provider to a multi million dollar civil whistleblower claim.

WAIVER OF ATTORNEY/CLIENT PRIVILEGE

An important function of outside counsel in conducting any internal investigation is to preserve and protect the attorney/client and work product privileges. Unfortunately, in the healthcare area possible program exclusion and the availability of other devastating penalties give the government a huge bargaining advantage in reaching a favorable disposition of government investigations. This power disparity has led the government to require extensive cooperation from corporate providers who wish to resolve any matter with the government. It is still important to take all steps to protect the attorney/client privilege but be aware that the government may demand a waiver of that privilege.

SEARCH WARRANTS

A search warrant is obtained when a law enforcement official appears before an independent judicial officer (usually a federal magistrate) and submits a search warrant application describing the things to be seized and the location of those items. The independent judicial officer is provided with a sworn affidavit which must provide the judicial officer with probable cause to believe that the fruits of criminal activity are presently located in the place to be searched. Searches can also be authorized: (1) incident to a lawful arrest; (2) when items are in plain view; or (3) pursuant to consent.

DEALING WITH THE SEARCH WARRANT

Execution of a search warrant is an unexpected event. However, by establishing a response team and procedures a business can minimize problems arising out of the execution of a search warrant. The most important step is to insure that counsel is notified immediately. It is vitally important that employees be instructed how to contact in-house counsel, backup in-house counsel, outside counsel and backup outside counsel. Numerous contingency plans should be in place so that a knowledgeable attorney can quickly be notified that a search warrant is being executed.

It is vitally important that no one impede the execution of a search warrant. However, it is also imperative that steps be taken to insure that the client’s interests are protected and agents do not violate attorney/client privilege or other applicable privileges. Clearly, these competing concerns make it very important that experienced counsel be contacted immediately.

Procedures should be in place instructing employees to immediately fax a copy of the search warrant to counsel. Employees should not take any steps to impede the agents executing the warrant. A polite suggestion that the agent seal the described area and await counsel is not unreasonable. However, this is a circumstance that must be played out in a
common sense fashion. Headstrong law enforcement will not look favorably upon interference with the execution of a search warrant.

If counsel is not present, management should obtain a copy of the warrant and request a copy of the affidavit. Requesting the affidavit is usually an empty gesture because affidavits are almost always sealed to protect confidential investigative information. However, if the affidavit is available, it will provide a wealth of background information and should be sought.

INTERVIEWS

Execution of a search warrant is an excellent time for law enforcement to attempt to interview employees. Employees should be aware of their rights and obligations in this setting. Employees have a right to choose to talk to or not talk to investigative agents. However, employees should be informed that counsel would like to be present and that if any employee does speak with an agent he or she must provide truthful information. The issue of separate counsel for employees may need to be addressed. A review of the corporate bylaws and applicable state law may be necessary with respect to the issue of reimbursement of attorney fees for separate counsel.

As stated above, searches can be done pursuant to the consent of a person with authority. Employees should be pre-instructed that they do not have authority to consent to any searches. In this way, the parameters of the search warrant will not be extended by an unwitting employee.

If privileged documents are seized, counsel should take all steps to insure that those documents are sealed and not reviewed until an independent judicial officer has determined that they are not privileged. This kind of dialogue should be conducted with the prosecutor and the telephonic involvement of the issuing magistrate may be necessary.

A search warrant affidavit can contain a wealth of investigative information. Generally, affidavits are sealed to protect the confidential nature of the information. Counsel for a business should carefully consider whether to attempt to unseal an affidavit. The affidavit will provide information to counsel, but it also may provide an incredibly juicy story about your client for the local newspaper.

An inventory of the search warrant should be obtained from the agent in charge. If there are concerns about the need for access to significant medical or other records, this should be addressed with the agent in charge, the prosecutor or even the magistrate.

CONCLUSION

This article is intended to only touch upon areas of concern for healthcare providers who are served with a subpoena or search warrant. By drawing attention to these areas hopefully healthcare practitioners will be able to minimize damage before contacting an experienced white collar practitioner.