

## A Knock at the Door: Responding to Government Investigations

By Ronald J. Friedman, JD

You are with a patient and there are more waiting to see you in adjacent offices and the reception area. Your staff assistant knocks at the door and says: “Doctor, several law-enforcement officers are here to see our records.” This is a very real event. Not a preferred way to begin a Monday, or any other day of the week, but this type of event is occurring with regularity at doctors’ offices and clinics in the Northwest and beyond.

**Why is this happening?** Regulators and law enforcement are concerned about fraud upon government programs as well as the diversion, inappropriate prescribing, lack of security, and deficient record-keeping practices regarding controlled substances.<sup>1</sup>

There is nothing you can do about these visits. It is not improper for law-enforcement officers and regulators to visit a doctor’s office and attempt to speak voluntarily with any person. Law enforcement serves a legitimate function in the investigation of criminal activity and the protection of the public. Still, the visits can be disruptive of your practice and can indicate that something more serious is going on—that is, that you may be the subject of a criminal or regulatory investigation, and that you face legal risk and exposure.

**Who are the people who may pay you a visit?** They come from a variety of federal and state agencies including the DEA, the FDA, the DHHS, and the state health departments. They may also include members of police departments. Typically, officers and regulators go to a practice after receiving calls from patients regarding your practice, calls from pharmaceutical suppliers regarding drugs ordered into your practice, or reports by state and federal agencies reviewing your paperwork and reimbursement claims. Sometimes, regulators arrive expressing an interest simply to conduct an audit.

**What is the best way to deal with a government investigation?** While most physicians and their employers believe they have done everything right, federal and state law and regulations are often complex and extensive (regarding appropriate doses, appropriate up codes or courses of treatment, etc.), and good doctors can end up making honest mistakes—or to put it more fairly, do things that others adjudge to have been in error. And when a mistake is made, potential legal exposure results. Accordingly, here are some considerations to bear in mind in relation to such law-enforcement encounters:

1. When law-enforcement officers visit, while your inclination is to cooperate fully (which is a healthy and responsible desire), be aware that everything you say can and will be used in favor of or against you by authorities. There are no protections. Things you say that you believe are innocuous may not have the same meaning to law enforcement. In fact, they may be one more link in the chain of evidence that authorities believe establishes your guilt. Further, bear in mind that law-enforcement officers are entitled to use ruses to further their investigations and interview techniques. Everything they may tell you during an interview, including the focus of their investigation and other facts, may or may not be true, and this is generally permissible.<sup>2</sup>
2. Sometimes law enforcement arrives simply wishing to speak. Other times, they arrive requesting you to sign a form consenting to a search of your records,<sup>3</sup> or they arrive with a formal search warrant in hand. If they have a warrant, that is, a formal authorization by a court to conduct a search or inspection of records, you are obliged to stay out of their way and allow them to conduct the search.<sup>4</sup> They, in turn, must leave you with an inventory

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of what was taken and a copy of the search warrant. If they do not have a warrant, then they must obtain your consent in order to review your records or conduct a search. Such consent must be voluntarily obtained or the ensuing search or inspection is invalid. You need not feel pressured to consent. And you need not feel ashamed or threatened as to what will happen should you delay or decline consent. You have every right to seek legal advice so that you can arrive at a responsive course of action that is in your interests. Further, you have every right to have counsel present during any interview of yourself or office staff should you elect to participate in such interviews. It is not a matter of being obstreperous or dilatory; it is a matter of being careful and cooperating in the right way, of seeing to it that your cooperation is properly regarded and understood, and that your rights are honored and respected.

3. There is often a different institutional mindset between regulator and health care provider. You are a medical provider, focused principally upon providing care to others. Your mindset is centered upon the welfare of your patients, which is your highest calling. Law-enforcement officers, on the other hand, have a different mindset and set of objectives. Yes, they want you to do things right, but reasonable minds can differ as to what that means in practice. Moreover, in many instances, regulators may also wish to either fine you or have you adjudged guilty in a court of law for what you did that was wrong in the past. In other words, the regulatory system is not simply forward-looking; it looks both forwards and backwards. It is often consumed with the need to hold someone accountable and assess some penalty, whether it be fine, debarment, deregistration, or criminal conviction and imprisonment—any and all of which has the capacity to destroy your practice and wreak havoc with your life.

**Conclusion.** Having both prosecuted and defended a number of physicians, I am convinced that most, if not all, doctors and medical providers are trying to get it right, and trying to do things correctly. Occasionally mistakes are made. Occasionally a doctor or a staff member gets addicted to a controlled substance and improperly accesses office stock. Occasionally, billing errors occur. Occasionally, record-keeping mistakes and dispensing errors are made. And occasionally we make a mistake in our private lives that can affect our medical practice. Occasionally, our focus as medical providers is simply not as it should be, and criminal and civil exposure results.

The point is to be careful. If you learn that you or your business may be the subject of an ongoing criminal or regulatory investigation, get appropriate advice and make sure you are as prepared as possible. If you receive inquiries or visits from law enforcement at your office, feel free to consult with counsel before proceeding further. Pay utmost attention to such visits and inquiries. It is not a matter of cooperating or not cooperating; it is a matter of making sure you understand your rights and exposure, that your rights and interests are protected, and that you cooperate in the right way—for the benefit of all concerned. By proceeding in this way, you can most likely achieve the most preferred result, and you can protect the viability of your medical license, DEA registration, and practice.

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<sup>1</sup>I write more fully concerning the reasons for increased scrutiny of medical providers and especial risks to pain practitioners, in an article titled “Increased Scrutiny of Medical Providers: A Cause for Reflection and Diligence,” *The Pain Practitioner*, Summer 2010, pp. 26-33.

<sup>2</sup>See *Frazier v. Cupp*, 394 U.S. 731 (1969), in which the United States Supreme Court authorized officers to make misleading statements during interviews and incriminating answers were adjudged fully admissible as statements were “voluntarily” made.

<sup>3</sup>Realize that whenever you voluntarily turn over patient records to law enforcement or regulators, HIPAA’s privacy rules (45 C.F.R. 164) are implicated, and you need to make sure that your disclosure is authorized by law and protected.

<sup>4</sup>Under F.R.Crim.Proc 41, law enforcement is entitled to obtain a search warrant based upon probable cause to believe the search will disclose evidence of criminal activity. Title 21, United States Code, Section 880 authorizes DEA investigators to obtain an administrative inspection warrant simply to verify the “correctness” of your controlled substance records and inventories.