

Government Investigations: A How-to Guide from Ober|Kaler



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PODCAST TRANSCRIPT

How to Respond to a Search Warrant: Ten Practical Steps

Presented by Gina L. Simms and James P. Holloway of Ober|Kaler's Government Investigations and White Collar Defense Group, this podcast provides guidance to health care providers and other corporations on how to respond when the government conducts a search warrant at your premises. Gina and James have extensive experience advising corporate and individual clients faced with civil and criminal government enforcement actions initiated by the Department of Justice, HHS-OIG, and other state and federal government agencies.

Introduction: This is the first in a series of Ober|Kaler podcasts that relate to government investigations. Today's podcast provides guidance to health care providers and other corporations on how to respond when the government conducts a search warrant at your premises.

You will hear excerpts of a conversation between James Holloway and Gina Simms, principals in Ober|Kaler's Government Investigations and White Collar practice group. Gina and James have extensive experience advising corporate and individual clients faced with civil and criminal government enforcement actions initiated by the Department of Justice, HHS-OIG, and other state and federal government agencies. To learn more about Gina and James, go to Ober|Kaler's website, www.ober.com/attorneys, to view their biographies.

James: Hi. I'm James Holloway.

Gina: And my name is Gina Simms.

James: Today, Gina and I will be discussing ten practical tips on how to effectively respond to a search warrant. If you are a business participating in a highly-regulated industry, the chances are fairly high that at some point you will be the subject of a government investigation.

Gina: And what a lot of companies and health care providers don't realize is that they may have been under investigation for months before law enforcement shows up with the search warrant.

James: That's right. For those of you who don't know, a search warrant is signed by a judge and legally empowers the agents to seize paper and electronic records, like computers, smart phones and thumb drives. Gina, should a company receiving a search warrant assume that the warrant relates to a criminal investigation?

Gina: Yes, James, that's a safe working assumption, because in order to get a search warrant, the government had to persuade a judge that probable cause exists to believe a crime has been committed by the company or by somebody working at the company. The search warrant does not necessarily mean that the company is the target of a criminal investigation, but it does indicate that the company may possess information that is relevant to a criminal investigation, so the stakes are high and the company must proceed cautiously.

James: Okay, Gina, say one morning that an FBI agent comes running into the company's building with a search warrant. What should the company do?

Gina: Well, before I discuss my ten specific tips, let me make a general statement about responding to search warrants. Companies must be prepared in advance for the possibility of a search warrant being executed at their businesses. So, I believe that it is really important, even necessary, frankly, for companies and providers to draft a protocol on how employees should respond when law enforcement arrives with a search warrant. These guidelines or procedures empower your employees by making them aware of what they can expect to occur during a search warrant, and also how to respond to the situation. These guidelines should be drafted by counsel who are experienced in dealing with government investigations and law enforcement. This protocol should be distributed to employees as required reading. It should also be kept readily accessible by management personnel so that it can be reviewed immediately if law enforcement shows up at your door.

James: That's a good point. And I imagine that the protocol should be tailored to that company's business?

Gina: Absolutely. Exactly.

James: Okay, now let's discuss your top ten tips for how to respond to a search warrant.

Gina: Okay. Tip Number 1 -- When law enforcement arrives with a search warrant, remain calm. It's not easy, but it really is very important. Tip Number 2 -- The person who has the first contact with law enforcement on the premises should notify the organization's legal department immediately. That legal department should contact experienced criminal counsel. It really is prudent to obtain advice from experienced counsel as quickly as possible. If you don't have a legal department, then the name or contact information for experienced counsel should be posted for the employees to see. If you can't reach an attorney immediately, contact a designated managerial employee who should serve as the point person to interact with law enforcement for the search warrant.

James: Okay, what's next?

Gina: Well, Tip Number 3 -- the company's point person should ask the agents which one of them is in charge of the search and ask to see his or her identification. You should also ask for his or her business card and the cards of all of the other law enforcement agents present. If you can't get business cards, please take notes on who they are, where they're from, etc.

James: Gina, do you encourage clients to try to get the name of the prosecutors working with law enforcement on the investigation?

Gina: Yes, absolutely. This could prove helpful to the attorney that is representing you who might try to contact the prosecutor from the scene, especially if an issue arises as to, for instance, whether law enforcement is authorized to take original patient files, etc. The provider needs to get those files back quickly, as you know, because patients will continue to come to the provider the next day, and the provider relies upon those files to administer care.

James: Okay. What's Tip Number 4?

Gina: The designated managerial employee should ask for a copy of the search warrant and attachment thereto. These documents describe the locations or areas that the agents have the authority to search and the types of documents and items (like computers, iPhones, etc.) that they are authorized to seize. The agents are required by law to give these documents to you. You should read these documents thoroughly.

James: Okay, and how can a company keep track of the documents that are seized by the agents?

Gina: Well, that leads to my Tip Number 5. Because the law usually allows the agents to take original documents, you should make notes of the types of documents and items that the agents have seized so that you can relate this information to counsel later on. It is particularly important for you to make notes of the documents that are essential to running your business and to give that list to experienced counsel.

James: Would that be something like patient files?

Gina: Yes, absolutely. Like the patient files. And while you're at it, make notes of the areas that the agents search: Johnny's file cabinets, credenza in Lisa's office, etc. This is also very helpful information for your counsel.

James: Alright, and what's Tip Number 6?

Gina: It relates to a company's consent to a search beyond the scope of the warrant, and this can be a very, very tricky area if you're not prepared in advance on how to handle it. Basically, agents may attempt to go beyond the physical areas and documents that they're authorized by the judge to search and seize. The way that they do this is to try to get your consent, which is your agreement or your authorization, to search those extra areas. These can be areas like offsite storage site locations, cars, etc.

James: Sounds like that places the company in an awkward situation. So how should that be handled?

Gina: The short answer is to firmly, but courteously, tell the lead agent that you need to talk to an attorney about whether you should consent to the request. Contact counsel immediately. Counsel will talk to the agent and make a decision about whether consent to search additional areas should be given. If you can't reach counsel, don't give consent. Period. Don't worry about appearing non-cooperative or unhelpful. Because under the law, you're not required to give consent to the agents to go beyond what the judge authorized them to do.

James: So when you receive a search warrant, you want to cooperate, but not go too far in helping law enforcement by allowing searches that the law does not require you to accept?

Gina: Absolutely correct. Couldn't have said it better myself. Which is, frankly, the perfect segue to Tip Number 7, which is to always be calm, courteous and professional to law enforcement. Don't physically get in their way. And of course, never, ever destroy any documents, because the warrant authorizes them to use force when necessary to execute the warrant. You do not want to create a situation. You don't want to be arrested for possibly obstructing their efforts. Yet, at the same time, you are NOT required to assist the agents during their search, which means that the law does not require you to tell the agents where the documents are or to explain the content or meaning of any documents that they're examining or seizing.

James: Okay, what's Tip Number 8?

Gina: If possible, send non-essential employees home. Why? Because agents often attempt to interview employees during the execution of the search warrant. The search warrant does not give the agents authority to interview your employees.

James: Okay, Gina, what should a company do if employees can't leave the office during a search?

Gina: Well, if your employees have to remain at work during the execution of a search warrant, make sure that your employees know in advance that they are free to decide whether they want to be interviewed by law enforcement. It's that employee's decision

as to whether he or she wants to talk. A common misconception is that employees can be arrested for refusing to talk to law enforcement. That is simply not true. An employee can agree to be interviewed, and the employee may want to have an attorney present for the interview.

James: Can a company tell employees that they are forbidden from talking to law enforcement during the execution of a warrant?

Gina: No, it cannot, and employees should not be punished if they elect to talk to agents during the execution of a search warrant.

James: And what is your Tip number 9?

Gina: Get a copy of the search warrant inventory and provide it to counsel. The agents are required by law to leave a copy at the premises of the documents and items that they have seized, which, depending on how detailed that inventory is, can help experienced counsel better understand the possible scope of the government's investigation.

James: And finally, what's Tip Number 10?

Gina: Well, don't be alarmed if the agents leave what we call kind of a "clean up" subpoena behind, which can be a grand jury subpoena for documents that the agents were not able to locate on the premises. Provide a copy of that subpoena promptly to experienced counsel.

James: Thank you, Gina, for sharing your expertise with us.

Gina: Thank you, James.

About Ober|Kaler

Ober|Kaler is a national law firm that provides integrated regulatory, transaction and litigation services to financial, health care, construction and other business organizations. The firm has more than 130 attorneys in offices in Baltimore, MD, Washington, DC and Falls Church, VA. For more information, visit www.ober.com.

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