



Preparing a Compliance Plan, With Garen Marshall

Episode Summary

McGuireWoods partner and host [Geoff Cockrell](#) welcomes [Garen Marshall](#) from the Government Investigations & White Collar Litigation Group to discuss how healthcare companies should prepare for potential government investigations.

Drawing from his experience as a former federal prosecutor, Garen outlines critical steps healthcare organizations should take before law enforcement contact occurs, including establishing document management practices, developing crisis response protocols and engaging experienced outside counsel.

He provides practical guidance on navigating the delicate balance between cooperation and overextending consent during searches and explains how properly handling subpoenas and search warrants can significantly impact investigation outcomes.

Transcript

Voice over ([00:00](#)):

This is the Corner Series, a McGuireWoods series exploring business and legal issues prevalent in today's private equity industry. Tune in with McGuireWoods partner Geoff Cockrell as he and specialists share real-world insight to help enhance your knowledge.

Geoff Cockrell ([00:19](#)):

Thank you for joining another episode of the Corner Series. I'm your host, Geoff Cockrell, partner at McGuireWoods. Today, I'm joined by one of my colleagues here at McGuireWoods, Garen Marshall. Garen works in the Government Investigations & White Collar Litigation group, has a super interesting background, and we're going to talk a little bit about some of the interactions with healthcare investing. We're going to talk a little bit about some interactions between government investigations and platforms and healthcare companies. But Garen, can you give a quick introduction of yourself and maybe the group before we jump into some more specific discussions?

Garen Marshall ([00:54](#)):

Sure. Thanks for having me on, Geoff. Excited to speak with you today. As you mentioned, I am a member of the Government Investigations & White Collar practice at McGuireWoods. I specialize in government investigations and enforcement over a broad range of industries, including the financial, healthcare, and technology sectors.

(01:14):

Prior to my time with McGuireWoods, I was a federal prosecutor in New York and was also a member of a white collar practice at another international law firm. And something that I like to mention, because I'm very proud of it, is that prior to my legal career, I served for five years on active duty in the US Navy's Special Forces.

Geoff Cockrell (01:35):

Thanks, Garen. So for a healthcare platform, private equity-backed or otherwise, most of them are not dealing with government investigations all the time. If something presents, we might get involved, but why should a business put in time and thought ahead of any interactions with the government into preparing for law enforcement contacts or investigations?

Garen Marshall (01:56):

That's a great question, Geoff. As your listeners know, healthcare is a highly regulated industry. This can mean that healthcare practices and private equity firms, even those that do everything right, can sometimes face government investigation. And a government investigation, whether signaled by law enforcement contact, a subpoena, or a search warrant, can have massive implications for a business. And what that business does leading up to and in the seconds, minutes, hours and days after that law enforcement contact can be critical to the implications and the ultimate outcome of the investigation.

Geoff Cockrell (02:37):

What can that first contact look like? Everyone, I think, has a picture in their mind of a van full of law enforcement officers showing up at the door of either the central office or a location, but what can that look like?

Garen Marshall (02:52):

Sure. And sometimes that is actually what it looks like. I've had clients in the private equity space or healthcare who have had FBI agents show up at their door and they come out in force because of their protocols. And in those instances, it's typically to execute a search because they've obtained court authorized search warrant.

(03:15):

But sometimes the contact can be just one person showing up to serve a subpoena, or it may be just someone reaching out for a conversation to the business or to one of the business's employees. Often, they'll approach an employee when they're not at work to try to gather information related to an investigation.

Geoff Cockrell (03:36):

What should an executive or a board, in advance of that event happening, what should they be doing to prepare for that potential eventuality?

Garen Marshall (03:47):

Well, there are a few things that can be done and should be done ahead of time. The first of which is really the most important, and that is establishing a practice with regard to document management of maintaining clear, organized, and accessible documentation. And that can, one, reduce confusion during a search or a response to a subpoena. But it's also critically important in the area of compliance. It's not just important that the business have a compliance program in place, but often, a compliance program is only seen as being as valuable as the documentation of the work you did in running the compliance program.

(04:30):

In addition, two other things that it's important for a business to do ahead of time. One is establish or develop a written protocol or a crisis response plan outlining who to notify, how to handle communications, and steps to take in the first hours of an investigation. It's really important not to sort of be weighing things or trying to figure this out on the spot.

(04:53):

And relatedly, it's a good idea to identify and really engage with outside counsel ahead of time and in particular outside counsel with experience in government investigations, so that if law enforcement shows about your door, you're not trying to find people to help. And you also have some level of comfort that you've already dealt with this firm or this counsel prior to what can be a very stressful situation.

Geoff Cockrell (05:22):

Garen, how detailed would that kind of crisis response protocol be? Does it give some guidance on how much access an employee should give? How to respond to requests? I can see a number of things that might be covered. Give us a little insight into what that might look like.

Garen Marshall (05:40):

So it can be just part of the other business protocols, written protocols in place for certain events that may occur. Specifically with regard to law enforcement contact, it should lay out who to contact, specifically outside counsel and have that contact information in place. It should also just remind the employees of what steps are important to take and what steps they should avoid taking.

(06:09):

So there are really a few pitfalls to watch out for. One is really overreacting or resisting law enforcement when they show up. So you want to avoid really obstructing the agents or appearing

uncooperative, as that can escalate the situation. But you also should avoid going too far in the other direction. So it should remind the employees to avoid providing unsolicited explanations or providing documents or access beyond what is authorized by, say, a search warrant that's being executed.

(06:44):

But the main thing is really just a reminder to contact outside counsel immediately. If an outside counsel is not involved, you run a much greater risk of making statements or producing documents without legal review, and that can provide law enforcement with what they'd see as some of their best evidence because you've given it to them without their actually having authorization to obtain it.

Geoff Cockrell (07:11):

How should folks think about policing the line between being cooperative and consenting to something that you otherwise wouldn't have to consent to? Because I can imagine being asked, as an employee or an executive, with law enforcement present, asking to see certain things and you don't want to be disruptive or resisting, but how should you respond to a request?

Garen Marshall (07:38):

Well, that can take a couple of forms. One is, as I mentioned, when there's a search warrant. So the search warrant will specifically outline the scope of what the agents are authorized to search, what physical spaces they can enter, what documentation or devices they can access. And that will have to be laid out in the warrant itself and they will provide you with a copy of that. Now, ideally, you, immediately upon law enforcement showing up, contacted outside counsel and they've got involved where they can help you avoid providing unsolicited explanations or giving documents or access beyond what is required by the warrant.

(08:24):

In the event that you receive a subpoena rather than law enforcement showing up with a search warrant, things are a little bit different because you won't be providing information or materials immediately or on the spot like you would be with a search warrant. So in those instances, it's important to act quickly, but it's a little bit more deliberate. So what you do when you're served with a subpoena is promptly review that subpoena with legal counsel. And that is done so that your legal counsel can determine not only the scope of what is requested, but they can also help you identify whether the, based on the content of the subpoena, whether it suggests that the practice is a subject, a target, or a third-party witness to the investigation.

(09:15):

So again, that's a much slower process in some ways than when law enforcement shows up with a search warrant. But again, it's important to bring in legal counsel immediately, to start, so that legal counsel can provide advice as to what it is that you have to provide and what you do not and should not provide.

Geoff Cockrell (09:36):

And within the subpoena, or maybe let's lump subpoena with law enforcement or investigator just showing up, if they just start asking you questions, are those questions you have to answer? Is it better to say no? So if it's not within the boundaries of a warrant, but they're just asking you things, how should an employee or executive respond to that situation?

Garen Marshall (09:59):

So if they show up with a subpoena, it may very well be the case that they try to ask some questions. The best thing you can do at that point is to direct them to your legal counsel. If you've identified legal counsel ahead of time, you can specifically provide them with contact information for legal counsel.

(10:18):

In the instance where you're served with a search warrant rather than a subpoena, the agents are at that point authorized to search the spaces and devices and documents that are outlined in the subpoena. That said, ideally, you direct them to legal counsel and you make a quick call to your counsel that you've established a relationship with ahead of time so that they can intervene. It's much better if legal counsel can get on the phone or get there quickly in person so that they could start communicating directly with law enforcement and you avoid the risk of making statements which could later be used against you or the practice.

Geoff Cockrell (11:00):

Is the correct protocol, if you're standing there and they've handed you a search warrant, is to get very involved with the text of it and kind of ask them, if they're asking you things, is it appropriate to come back and expect them to help show you in the warrant where what they're asking or inquiring about fits within what you're supposed to provide? Is it really interacting with the words in that warrant, live fire is part of the protocol?

Garen Marshall (11:29):

To some extent, it is. But again, ideally, that's a task that you are outsourcing to your legal counsel. The worst-case scenario is where you are in a position that you do have to do some of your own analysis of the search warrant. And in those cases, you really want to just avoid providing any information that is not obviously required by the search warrant. So if the search warrant, for example, provides them with authority to search a specific room or a specific floor of your practice, then you would provide access to that room or your floor. And this is only in the instance where you can't immediately get in touch with legal counsel.

Geoff Cockrell (12:07):

So Garen, the people responding might not be the executive, it might be a lower level employee. Where should the leadership team draw the line between informing employees about their rights and responsibilities and discouraging them from speaking with law enforcement?

Garen Marshall (12:23):

That's a great question, Geoff. And that's often a tricky balance that the business has to walk to some extent. So one, it's really important that in addition to the written protocol that's in place, that there is some communication to employees about their rights and responsibilities with regard to law enforcement contact. They should always be encouraged to speak up about any issues, and it's important to make sure that they feel comfortable, to the extent possible, sharing any concerns internally at the business rather than with external agencies first.

(12:57):

So in the event that there is an investigation or employees are contacted by law enforcement, the business should be cautious about how instructions are delivered. You should make it clear to the employees that while they generally have no obligation to speak with law enforcement, they do have the right to speak with law enforcement if they choose. And you should ensure that no one feels pressured to withhold cooperation.

(13:26):

What you can do to help encourage employees to come to the business with any concerns is to offer them access to the company's leadership or legal counsel, where they can seek advice before engaging with law enforcement. And the goal here is really to help them feel supported without crossing any ethical or legal boundaries.

Geoff Cockrell (13:48):

We've talked about what a company should do. I'm sure you've seen lots of situations where a company responds poorly. Let's maybe tease out a few examples that you've encountered where the response was not correct and what that incorrect response look like and what complications that incorrect response costs.

Garen Marshall (14:07):

Absolutely. So there are two sides to interacting with law enforcement. On one hand, you don't want to be obstructive, but on the other hand, you need to avoid going too far and providing them with anything they're not authorized to access. And this is something that should be communicated to staff as well. They should avoid obstructing law enforcement if they show up or really appearing uncooperative, but also they shouldn't provide unsolicited explanations and they shouldn't provide documents or access to physical spaces or to electronic devices that aren't required by a search warrant.

(14:48):

So issues that I've seen come up, and this is during my time in government as a prosecutor as well as on the defense side, is business owners or employees often feel when law enforcement shows up, they see law enforcement as the good guys. They don't necessarily see them as anyone that they should avoid providing access to or that they should avoid making statements to.

(15:12):

For example, an agent may show up with a search warrant that authorizes access to one room and not another room at the business. And in that case, they cannot go into the other room. But what business owners will do sometimes and... Well, there are two parts to this. What the agents may do, on realizing that there's another room, say, "Can I just go in that room as well?" They may even provide some explanation like, "I can just go get another warrant, but then that's going to take up a bunch of time for you and me. So why don't you just let me go into that room?"

(15:48):

And the inclination for the employee is often to say, "Okay." But at that point, the business has provided the agent with consent to search that room. So any opportunity to later challenge whether the agent was authorized to access that room becomes much more difficult and you provide the agent with materials and information that they otherwise would not have been allowed to access.

Geoff Cockrell (16:14):

Is it fair for an employee, as kind of a matter of course, to ask the agent if what they are being asked to give access to or provide is specifically covered by the warrant versus something that they're separately asking for consent to? Because it would seem helpful if you could just pose that question. If the boundary that you're trying to draw is, I want to give you everything that you're entitled to under this warrant and I probably am not going to give you other things, ask the agent to help delineate the difference, or is that not super feasible?

Garen Marshall (16:45):

So that certainly happens, and one thing that law enforcement agents do is often act very friendly when they're, for example, executing a search warrant so that you let your guard down. So one thing that people are inclined to do sometimes is to actually ask the agent or ask law enforcement, "Are you allowed to go in there? Or is that authorized by the warrant?"

(17:11):

It's often the case that an agent won't answer that. Really, what they should be doing is just referring you back to the warrant. That's an analysis for you or really your legal counsel to make. But also, that's a really perilous road to go down because the agent, often, they're not looking to necessarily violate the law, but they are often looking for access to additional evidence to help their investigation. So they want you to give them consent to go into other rooms, to grab other devices, to go through other documents. So your interests don't align, and looking at them as someone that can provide advice is really dangerous territory to get into.

Geoff Cockrell (17:58):

What are some examples that you've seen of behavior that either was determined to be obstructive or dangerously close to that line? What does that sort of look like?

Garen Marshall (18:11):

So that can often actually come up in responses to subpoenas. Sometimes a business will receive a grand jury subpoena, which calls for you to provide. Sometimes they can require you to testify or provide testimony, but often a subpoena will ask or require, in lieu of testimony, that you provide certain documents or communications.

(18:37):

Where businesses get into trouble is where they don't immediately put in place a document preservation notice for their business. You have to preserve any potentially responsive material when you've got a grand jury subpoena requesting material. So it's important, again, review with legal counsel the subpoena, but then you should issue immediately a legal hold notice to the business to ensure that no relevant documents or emails or messages or other records are altered or destroyed.

(19:11):

And this is where you can get in trouble, in particular with a subpoena. The subpoena will often ask for documents even from a business that doesn't itself necessarily have exposure. The business can be a witness or have relevant records. And even if the business doesn't have exposure, failing to preserve materials that are responsive to a subpoena you've been served with can itself lead to additional exposure, potentially in the area of obstruction.

Geoff Cockrell (19:41):

Garen, we'll probably call it a wrap there. These are certainly topics that no one hopes they're ever confronted with, but especially in healthcare, just so heavily regulated, the possibility that the government is looking at something is a palpably real one. So thank you so much for giving some real live guidance on how to think about and respond to some of these things. This has been a ton of fun.

Garen Marshall (20:06):

It's been a pleasure. Geoff. Thanks for having me on.

Voice over (20:11):

Thank you for joining us on this installment of the Corner Series. To learn more about today's discussion, please email host Geoff Cockrell at gcockrell@mcguirewoods.com. We look forward to hearing from you.

(20:24):

This series was recorded and is being made available by McGuireWoods for informational purposes only. By accessing this series, you acknowledge that McGuireWoods makes no warranty, guarantee, or representation as to the accuracy or sufficiency of the information featured in this installment. The views, information, or opinions expressed are solely those of the individuals involved and do not necessarily reflect those of McGuireWoods. This series should not be used as a substitute for competent legal advice from a licensed professional attorney in your state and should not be construed as an offer to make or consider any investment or course of action.

