ADVICE OF COUNSEL: ERODING CONFIDENTIALITY IN FEDERAL HEALTH CARE LAW

Stuart M. Gerson
*Jennifer E. Gladieux**

The problem here is that a very simple concept, "payment for patients is illegal," became far from simple as Congress, the Executive Branch, and the Courts got more deeply involved. "Remuneration to induce" language invites judicial interpretation as to what these words mean. . . . Judicial catch phrases like "one purpose rule" or "primary purpose rule," the reversals of field by the Inspector General concerning its own interpretation and the position that it would take, the checkered history of the Hanlester[1] case and the reservation by Congress of the safe harbor provision in the Act,[2] the promulgation of regulations concerning which were delayed for a considerable time, all invite lawyers to at-

---

* Stuart M. Gerson, a member of the bars of the District of Columbia and New York and formerly Assistant Attorney General for the Civil Division and Acting Attorney General of the United States, is a partner in the firm of Epstein Becker & Green, P.C. Jennifer E. Gladieux, a member of the Virginia bar, is a staff attorney in the Office of Legislation, Health Care Financing Administration, U.S. Department of Health and Human Services. This article reflects the personal views of the authors alone and not those of any governmental agency.

1. Hanlester Network v. Shalala, 51 F.3d 1390 (9th Cir. 1995)

2. The Federal Anti-kickback Statute, 42 U.S.C. § 1320a-7b(b)(1)(A) (1994 & Supp. III 1997) makes it illegal to:

> knowingly and willfully solicit[] or receive any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, or in kind—(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part . . .

under the Medicare or Medicaid programs. *Id.* Congress made some specific exceptions or "safe harbors" to this general prohibition and permitted the Secretary of the Department of Health and Human Services ("DHHS"), through the Office of Inspector General ("OIG"), to make additional safe harbors for "payment practices specified by the Secretary." 42. U.S.C. § 1320a-7b(3)(e). These safe harbors are in the federal regulations at 42 C.F.R. § 1001.952 (1999). The OIG's ability to create further safe harbor guidance was extended in 1996 legislation "to provide for the modification and establishment of safe harbors and to issue advisory opinions and special fraud alerts pursuant to § 1320a-7(d)." *Id.*

> tempt to devise legal ways for parties to have a relationship which has as a component hoped-for and anticipated referrals.[3]

With those words, a United States district judge, granting a motion for a judgment of acquittal presented on behalf of two attorneys charged along with their clients with health care related crimes, recently described the precarious role of lawyers who give advice on health care matters subject to third party reimbursement.[4] The area in which such lawyers advise is fraught with uncertainty, ambiguity and criminal and civil litigation risk, and their clients clearly require guidance. However, where once the advice given by lawyers was essentially immune from disclosure under the attorney-client privilege and the related attorney work product doctrine and self-evaluation privilege, that advice now is being ordered disclosed by courts or voluntarily disclosed by parties in federal health care matters (and criminal matters generally), and the privilege surrounding it is eroding in a manner that is affecting the quality of the attorney-client relationship as it is also placing attorneys at personal risk.[5]

The *Anderson* case scenario, where attorneys are named as indicted and unindicted co-conspirators, is a very rare one, although it is now on the mind of every health care transactional lawyer and litigator. Of greater practical importance at the moment than the risk of federal indictment is the fact that health lawyers understand that they no longer can remain anonymous advisors. Instead, in providing their advice, they sail between

---

3. Official Transcript of Trial, United States v. Anderson, Nos. CIV.A. 99-MC-205-JWL, 99-MC-207-JWL (D. Kan. May 7, 1999, unsealed June 4, 1999) (statement of the Honorable John W. Livingston).

4. Until recently, federal fraud law was concerned essentially with matters related to reimbursement under federally-financed health care programs such as Medicare and Medicaid that could be addressed under the Federal False Claims Act, 31 U.S.C. § 3729 (1994). While fraud against private payers could be pursued under other statutes (Racketeer Influenced and Corrupt Organization Act ("RICO"), mail fraud, wire fraud), private health care fraud is now addressable under a specific criminal law. *See generally* 18 U.S.C. § 1035 (1994).

5. *In re* Grand Jury Subpoenas, 144 F.3d 653 (10th Cir. 1998), *cert. denied,* Anderson v. United States, 119 S. Ct. 412 (1998). In *Anderson*, Nos. CIV.A. 99-MC-205-JWL, 99-MC-207-JWL, the trial court found that the government violated the due process rights of health care attorneys named as "unindicted co-conspiritors" in that case when it named them publicly in a pretrial motion. This case is discussed further at notes 125-128 *infra* and accompanying text.

the Scylla of zealous federal law enforcement agents and prosecutors who *attack* privilege under the guise of the so-called "crime-fraud" exception and the Charybdis of besieged clients who readily *waive* privilege in an attempt to show that they acted pursuant to the advice of counsel and not with any intent to violate the law or to minimize financial and prosecutorial risk by participating in government voluntary disclosure programs.

Given the clear public mandate for the energetic enforcement of the ever-growing arsenal of federal and state health care anti-fraud laws, there is little chance that the erosion of the attorney-client privilege will end. Indeed, as we shall examine, the privilege is just as much at risk in areas besides health care law, at least by the measure of all reported federal cases. Instead, both lawyer and client must come to recognize the enhanced likelihood that what was a mantle surrounding legal advice will become transparent, often at the instance of the privilege holder. This Article is thus an alarm for preparedness, not a prescription for legal change. Our immediate task, then, is to examine the policy and enforcement imperatives that threaten traditional notions of privilege, then to set out the contours of relevant privileges to assure that clients will have the greatest protection that the law currently allows, and finally to consider how the law is likely to be enforced despite the intentions of the parties to legal advice.[6]

I. LAW ENFORCEMENT TRENDS SINCE THE 1986 AMENDMENTS TO THE FEDERAL FALSE CLAIMS ACT

While strong notions of privilege have been eroding for some time in the law generally, the weakening of privilege in health care litigation is the particular by-product of governmental efforts to strengthen its hand in combating fraud. This impetus has led to a ratcheting up in health care litigation. What once might have been a matter of reimbursement negotiation with a

---

6. For further discussion of governmental fraud initiatives, see U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GEN., HEALTH CARE ANTI-FRAUD, WASTE, AND ABUSE COMMUNITY VOLUNTEER PROGRAM—FIRST YEAR OUTCOMES (1999) (discussing how Medicare beneficiaries have reported fraud); U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GEN., FISCAL INTERMEDIARY FRAUD UNITS (1997).

fiscal intermediary or carrier has become civil litigation; what once might have been a matter for pure civil litigation often becomes criminal in nature.

This ratcheting phenomenon is traceable to two events. The first event is the general politics behind health care policy in the 1990s. While federal health care criminal prosecutions and civil False Claims Act ("FCA") cases (instituted by the Department of Justice ("DOJ"))[7] were pursued with vigor during the Reagan and Bush Administrations, it was the failure of the comprehensive Clinton Administration plan to reform health insurance that led to the politically bipartisan recognition that, if there could be no consensus on fundamental structural reform, the public demand for cost control best (i.e., at the least political risk) could be satisfied by waging a visible prosecutorial war against health care fraud.[8] This recognition was followed by increased coordination among federal, state and local enforcement agencies[9] and significant increases in the personnel of the Federal Bureau of Investigation ("FBI") and the Office of Inspector General ("OIG") of the Department of Health and Human Services ("DHHS"). Congress also substantially augmented the federal legal armamentarium through the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")[10] and the

---

7. 31 U.S.C. § 3729 (1994).

8. *See, e.g., U.S. Dep't of Health & Human Servs., President Announces Health Care Anti-fraud Project: Operation Restore Trust* (visited Sept. 29, 1999) <http://www.hhs.gov/progorg/oig/other/ortpres.txt> (announcing a partnership of federal and state agencies to crack down on Medicare and Medicaid fraud, waste and abuse associated with home health agencies, nursing homes and durable medical equipment suppliers).

9. This coordination was mandated by the HIPAA via the creation of a task force program headed by the DHHS-OIG and the Attorney General's Office. 42 U.S.C. § 1320a-7c (1994). *See also* U.S. DEP'T OF JUSTICE, DEP'T OF JUSTICE HEALTH CARE FRAUD REPORT: FISCAL YEARS 1995 & 1996 (visited Sept. 3, 1999) <http://www.usdoj.gov/dag/ health96.htm> [hereinafter HEALTH CARE FRAUD 1995 & 1996] (discussing the increased enforcement efforts against health care fraud and increased coordination among the U.S. Attorneys' Offices, the Criminal Division, the Civil Division, the FBI and other law enforcement agencies such as the DHHS-OIG, state Medicaid Fraud Control Units and the Defense Criminal Investigative Service).

10. Pub. L. No. 104-191, 110 Stat. 1936 (1996). For further discussion of the government's expanded authority for prosecuting health care fraud under this law, see Colleen M. Faddick, *Health Care Fraud and Abuse: New Weapons, New Penalties, and New Fears for Providers Created by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")*, 6 ANNALS HEALTH L. 77 (1997); Jonathan P. Tomes, *The Health Insurance Portability and Accountability Act of 1996: Understand-*

Balanced Budget Act of 1997 ("BBA").[11] The HIPAA expands the government's ability to prosecute in five ways: (1) educating providers via advisory opinions, special fraud alerts and the establishment of the Healthcare Integrity and Protection Data Bank ("HIPDB"),[12] (2) expanding the scope of the fraud laws beyond just Medicare to encompass all federal health programs except the Federal Employees Health Benefit Plan,[13] (3) establishing the Medicare Integrity Program,[14] (4) increasing the funding for enforcement,[15] and (5) imposing harsher penalties for violations.[16] The BBA created a three-strikes rule for health care fraud, where if a supplier or provider is convicted of criminal fraud or patient abuse, the Secretary *must* then permanently exclude the defendant from federal health care programs.[17] This three-strikes rule counts all instances of previous fraud that occurred before 1997.[18]

The second event causing the ratcheting of health care fraud litigation was the passage of the 1986 amendments to the FCA that substantially enhanced the ability of private parties, known

---

ing the Anti-Kickback Laws, 25 J. HEALTH CARE FIN. 55 (1998).

11. Pub. L. No. 105-33, 111 Stat. 251 (1997). For example, the BBA created a three-strikes rule for health care fraud. *See infra* note 17.

12. 42 U.S.C. § 1320a-7d, -7e (Supp. III 1997). The HIPDB required more actions to be reported by a broader array of entities (not just hospitals) than the National Practitioners Data Bank. *See also* Health Care Fraud and Abuse Collection Program: Reporting of Final Adverse Actions, 63 Fed. Reg. 58,341 (1998).

13. 42 U.S.C. § 1320a-7b(f).

14. *Id.* § 1395ddd.

15. *Id.* §§ 1320a-7c(b), 1395I(k); *see also infra* note 42.

16. The HIPAA established a three year minimum exclusion period for discretionary exclusion decisions made by the Secretary and gave the Secretary the authority to use intermediate sanctions such as stopping payment and enrollment. *Id.* §§ 1320a-7(c)(3), 1395mm(i)(1).

17. The BBA added a mandatory, permanent three-strikes rule to health care fraud:

> (G) In the case of an exclusion of an individual under subsection (a) of this section based on a conviction occurring on or after August 5, 1997 [mandatory exclusion], if the individual has (before, on, or after August 5, 1997) been convicted—
>
> (i) on one previous occasion of one or more offenses for which an exclusion may be effected under such subsection, the period of the exclusion shall be not less than 10 years, or (ii) on 2 or more previous occasions of one or more offenses for which an exclusion may be effected under such subsection, the period of the exclusion shall be permanent.

Id. § 1320a-7(c)(3)(G).

18. *Id.*

as "relators," to institute actions in the name of the United States and to share in any monetary award.[19] The current version of the FCA provides that a person who commits any of several specified violations "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person."[20] Additionally, "[a] person may bring a civil action for a violation of [31 U.S.C. § 3729] for the person and for the United States Government. The action shall be brought in the name of the Government."[21] The "relator" must file his or her complaint under seal and serve it upon the government,[22] which is afforded sixty days from filing (extendable for good cause) to intervene and take over the case.[23] If the government declines to take over the litigation, the relator "shall have the right to conduct the action."[24]

If the government assumes the conduct of the litigation and ultimately secures a monetary award, the relator is entitled to between 15% and 25% of the award, "depending upon the extent to which the person substantially contributed to the prosecution of the action," plus expenses, costs, and attorneys' fees.[25] If the government declines to intervene and the relator successfully conducts the litigation, his or her share is to be between 25% and 30%, plus expenses, costs and fees.[26]

The lure of large monetary awards has produced at least one intended effect: the steady and pronounced increase of relator

---

19. Pub. L. No. 99-562, § 2, 100 Stat. 3153 (1986) (codified at 31 U.S.C. § 3729 (1994)). In health care, violations of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b) (1994 & Supp. III 1997), may be prosecuted as per se violations of the FCA. *See* Kaz Kikkawa, Note, *Medicare Fraud and Abuse and* Qui Tam*: The Dynamic Duo or the Odd Couple?*, 8 HEALTH MATRIX 83 (1998) (discussing whether a per se rule should result from the Texas district court's decision in United States *ex. rel.* Thompson v. Columbia/HCA Healthcare Corp., 938 F. Supp. 399 (S.D. Tex. 1996)); Robert Salcido, *Mixing Oil and Water: The Government's Mistaken Use of the Medicare Anti-Kickback Statute in FCA Prosecutions*, 6 ANNALS OF HEALTH L. 105 (1997) (noting the DOJ's intentions to prosecute anti-kickback violations under the FCA).

20. 31 U.S.C. § 3729(a).

21. *Id.* § 3730(b)(1).

22. *Id.* § 3730(b)(2).

23. *Id.* § 3730(b)(2)-(3).

24. *Id.* § 3730(b)(4)(B).

25. 31 U.S.C. § 3730(d)(1).

26. *Id.* § 3730(d)(2).

filings since the effective date of the 1986 amendments to the *qui tam* provisions of the FCA. Indeed, according to the Justice Department's count, annual filings which started at 33 for fiscal year 1987 almost doubled the following year to 60, and they have increased by significant absolute numbers (though no longer larger percentages) in each successive year until, to date, there have been over 1500 post-amendment suits filed. Annual *qui tam* recoveries, consequently, have grown to the point where they now exceed $250 million and promise to jump substantially higher.[27]

While *qui tam* litigation represents an expanding universe, it is significant to note that the emphasis within that universe has shifted substantially from defense-related cases, which predominated throughout the life of the FCA, to cases involving the health care industry. From the effective date of the 1986 amendments through fiscal year 1992, health care fraud recoveries (as a percentage of total *qui tam* recoveries) never exceeded eight percent. The lion's share of such recoveries was in defense fraud cases. Starting in fiscal year 1993, based upon cases begun during the Bush Administration, the percentage of health care-related recoveries jumped to 40% of the *qui tam* total and since then has not dropped below 35%.[28] Three large health care *qui tam* cases were settled in fiscal year 1997, *Smithkline* for $325 million, *Damon* for $83.7 million and *Labcorp* for $187 million."[29]

Health care-related cases under the FCA cover a broad variety of activities for which claims can be submitted. These activities include billing frauds, such as services not rendered or medically necessary, double billing, upcoding, unbundling and cost fraud.[30] Kickbacks are also a common fraudulent scheme that the Justice Department investigates. The Department has investigated almost every type of health care provider, including physicians, multi-state public companies such as Columbia/HCA, medical equipment dealers, ambulance companies, laboratories, hospi-

---

27. *U.S. Dep't of Justice, Justice Department Recovers More than $2 Billion in FCA Awards and Settlements* (visited Oct. 23, 1998)<http://www.usdoj.gov/opa/pr/1998/October/503_civ.htm>.

28. U.S. DEP'T OF JUSTICE, DEP'T OF JUSTICE HEALTH CARE FRAUD REPORT: FISCAL YEAR 1998 (visited Sept. 3, 1999) <http://www.usdoj.gov/dag/health98.htm> [hereinafter HEALTH CARE FRAUD 1998].

29. HEALTH CARE FRAUD 1998, *supra* note 28, at 14.

30. HEALTH CARE FRAUD 1995 & 1996, *supra* note 9, at 4.

tals, nursing homes and home health agencies.[31] Fraud settlements in such cases have been substantial, with several cases settling in the hundreds of millions of dollars.

While the government takes over a minority of the *qui tam* actions brought by relators, it investigates all of them.[32] Additionally, the Justice Department develops many significant fraud cases on its own, although the FCA's brass ring influences many to pursue cases privately in the first instance, rather than simply reporting suspected fraud to the government. In any event, the FBI, which did not even investigate civil matters before 1995, now investigates hundreds annually. The number of fraud cases, both civil and criminal, on the FBI's annual docket has increased steadily each year since 1992, growing from 591 in that year, to 1878 in 1995, to 2801 in 1998.[33] Annual criminal convictions in federal health care fraud cases, which numbered 90 in 1992, now exceed 300.[34]

Restitutions and fines in federal health care cases vary greatly from year to year because the size of the matters under investi-

---

31. *Id.* at 3; *see also* United States *ex rel.* Public Integrity v. Therapeutic Tech. Inc., 895 F. Supp. 294 (S.D. Ala. 1995); Mikes v. Strauss, 889 F. Supp. 746 (S.D.N.Y. 1995); United States *ex rel.* Wagner v. Allied Clinical Lab., No. C-1-94-092, 1995 WL 254405 (S.D. Ohio Mar. 20, 1995); United States *ex rel.* Dowden v. Metpath, Inc., No. 91-1843, 1993 WL 397770 (C.D. Cal. Sept. 13, 1993); United States *ex rel.* Burr v. Blue Cross & Blue Shield, No. 91-134-CIV-J-16, 1992 WL 521775 (M.D. Fla. July 9, 1992); United States *ex rel.* H. Glass v. Medtronic, Inc., 957 F.2d 605 (8th Cir. 1992); United States *ex rel.* Kalish v. Desnick, No. 1 C 2288, 1992 WL 32185 (N.D. Ill. Feb. 18, 1992); Robbins v. Desnick, No. 90 C 237, 1991 WL 5829 (N.D. Ill. Jan. 15, 1991); United States *ex rel.* Glass v. Medtronics, Inc., No. Civ. 3-88-547, 1990 WL 357536 (D. Minn. Aug. 27, 1990); United States v. Pani, 717 F. Supp. 1013 (S.D.N.Y. 1989); United States *ex rel.* Stinson v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247 (S.D. Fla. 1989); West Allis Mem'l Hosp., Inc. v. Bowen, 852 F.2d 251 (7th Cir. 1988); United States *ex rel.* Woodard v. Country View Care Ctr., Inc., 797 F.2d 888 (10th Cir. 1986); United States *ex rel.* Roy v. Anthony, No. C-1-93-0559, 1994 WL 376271 (S.D. Ohio July 14, 1994).

32. The government may intervene in *qui tam* cases while developing its own fraud cases, often through pilot programs for various types of activities such as those affecting patient harm. HEALTH CARE FRAUD 1998, *supra* note 28, at 16-20.

33. In fiscal year 1992, 119 *qui tam* cases were filed, with 14, or 11%, alleging health care fraud. In 1996, 346 *qui tam* cases were filed, with 176, or 51%, alleging health care fraud. In 1997, 546 *qui tam* cases were filed, with 306, or 56%, alleging health care fraud. HEALTH CARE FRAUD 1998, *supra* note 28.

34. *Id.* Note also that there are many state-initiated health care fraud cases, and frequently, State Medicaid Fraud Control Units work cooperatively with agencies of the federal government. *See id.*

gation varies. Thus, while the total of restitutions and fines in federal health cases rose steadily from the early 1990s through fiscal year 1997, reaching almost $1 billion for that year, the total dropped to $321 million for fiscal year 1998.[35] That figure was still 50% greater than the amount spent on health fraud by the FBI, U.S. Attorneys, Justice Department lawyers and the OIG combined.

Inasmuch as the federal government is the payer of about 40% of the health care dollars spent annually in the United States, no provider of any significance can afford not to participate in federally funded programs such as Medicare and Medicaid.[36] Thus, the greatest intimidatory factor governing the outcomes of federal health care investigations and litigations is the Inspector General's exclusion power, and the OIG is using that power energetically. Indeed, exclusions from federal health programs jumped about 11% from fiscal year 1997 to fiscal year 1998 (even as monetary recoveries lagged for the year), to a total of 3021.[37] The previous year's increase was 93% over the year before.[38] The net of the Inspector General's creditable exclusion threat is that individuals and entities (particularly those who are publicly held and fear not only exclusion but also disaster for the market prices of their shares) rarely litigate cases to conclusion. Instead, they settle, attempting to stave off criminal convictions and mandatory exclusion of core entities. This invariably entails cooperation with the government, including the waiver of the attorney-client privilege and the sharing of internal investigations. Lawyers' advice is frequently disclosed, debated and examined with the government in settling or negotiating the Corporate Integrity Agreements imposed by the Inspector General, requiring forward compliance and reporting.[39]

The by-products of this federal health care fraud litigation boom are noteworthy. First, changes in the law, including budgetary funding mechanisms for federal agencies and percentage-of-proceeds awards to successful *qui tam* relators, have led to

---

35. OFFICE OF INSPECTOR GEN., SEMIANNUAL REP. FOR 1999.

36. Interview with Leslie Norwalk, attorney with Epstein, Becker & Green, P.C., in Washington D.C. (1998).

37. *Id.*

38. *Id.*

39. *Id.*

the creation and expansion of an "incentive" system.[40] This system will necessarily lead to more cases, even as providers funnel increasing resources into compliance programs intended to deter fraud and to obtain benefits provided, *inter alia*, by the Federal Organizational Sentencing Guidelines and the Inspector General of the DHHS. Although health care legal compliance has become a true industry norm (which one might think would lead to fewer cases), note that in fiscal year 1997 alone, the first full year of anti-fraud and abuse funding under the HIPAA, $1.087 billion was collected in criminal fines, civil judgments and settlements.[41] A percentage of this money is siphoned back to the enforcement agencies, where it is used to fund slots dedicated for lawyers and investigators.[42]

Second, particularly from the standpoint of corporate providers of health care goods and services, there is little difference between the effects of civil and criminal litigation. Both portend huge, potentially ruinous financial outcomes, and both bear the risk of exclusion from federal programs. The potential for ruinous financial outcomes can be seen in the *National Health Laboratories, Inc.* ("NHL") case.[43] In December 1992, NHL pled guilty in an investigation brought by the U.S. Assistant Attorney's Office in San Diego to submitting false claims to the

---

40. *Id.*

41. Interview with Leslie Norwalk, *supra* note 36.

42. Under the HIPAA, President Clinton's enforcement initiatives are funded by reinvested monies generated from health care anti-fraud activities into a Health Care Fraud Control Reinvestment Fund. The Fund is sustained by money awarded by the courts in Medicare fraud cases. The HIPAA amendment provides in relevant part:

> (b) Additional Use of Funds by Inspector General.—
>
> (1) Reimbursements for investigations.—The Inspector General of the Department of Health and Human Services is authorized to receive and retain for current use reimbursement for the costs of conducting investigations and audits and for monitoring compliance plans when such costs are ordered by a court, voluntarily agreed to by the payor, or otherwise.
>
> (2) Crediting.—Funds received by the Inspector General under paragraph (1) as reimbursement for costs of conducting investigations shall be deposited to the credit of the appropriation from which initially paid, or to appropriations for similar purposes currently available at the time of deposit, and shall remain available for obligation for 1 year from the date of the deposit of such funds.

42 U.S.C. § 1320a-7c(b) (Supp. III 1997).

43. *In re* National Health Lab., No. CV 92-1949, 1993 WL 331002 (S.D. Cal. July 2, 1993).

government, and it paid a $1 million fine.[44] The President of NHL also pled guilty to two felony counts, served a prison sentence, and paid a $500,000 fine.[45] In a simultaneous civil settlement with the DOJ, NHL agreed to pay $100 million. NHL also reached agreements with thirty-three State Medicaid Fraud Control Units and paid a total of $10.4 million to those states.[46] The NHL case led to Operation LABSCAM, a national initiative exploring laboratory billing across the United States. After the statutory changes made by the BBA, if NHL is ever convicted of criminal fraud or patient abuse again, NHL faces mandatory permanent exclusion from any federal health care program.[47] Such exclusion would likely mean financial ruin for NHL.

Third, the great risk of adverse outcomes in cases where reimbursement law is ambiguous and where novel arrangements are untested and unapproved leads to a situation in which there are relatively few cases with litigated results or definitive interpretations concerning burdens of proof, levels of intent, etc., from the courts of appeal. In examining the governance of Medicare, Tim Jost finds that:

> During the more than three decades that the Medicare program has been in existence, the United States Supreme Court has decided a dozen Medicare cases. While the majority of these decisions pertain to highly specific and technical issues, most share a common trait: deference to HCFA. . . . This deference has been both procedural and substantive. Procedurally, the Court has generally shown a reluctance to interfere with the processes under which Medicare is governed, insisting strictly on exhaustion of administrative remedies and severely restricting judicial review offerred [sic] to HCFA's interpretation both of the statutes that govern Medicare and also of its own regulations.[48]

---

44. *See In re National Health Lab.*, 1993 WL 331002, at *1. The investigation of National Health Laboratories was conducted by the U.S. Assistant Attorney's Office.

45. *See id.* at *3.

46. *Executive Office for U.S. Attorneys*, 45 USA BULL.: HEALTH CARE FRAUD ISSUES 2 (1997).

47. *See In re National Health Lab.*, 1993 WL 331002. The investigation of National Health Laboratories was conducted by the U.S. Assistant Attorney's Office. For further discussion of the impact the BBA has on mandatory, permanent exclusion, see *supra* note 17 and accompanying text.

48. Timothy Stoltzfus Jost, *Governing Medicare*, 51 ADMIN. L. REV. 39, 45-46 (1999) (citations omitted).

Jost finds that the Court is most consistent in deferring to the HCFA's administration of substantive payment policies.[49] Jost also finds that, especially in the 1990s, the lower courts of appeal have declined to interfere in the HCFA's administration of the Medicare program, "preferring instead to defer to administrative adjudicatory as well as regulatory decisions if the decision or policy is at all defensible as rational."[50]

Finally, in the vigorous pursuit of cases by government agents, lawyers and *qui tam* relators, and the almost equally vigorous pursuit of settlements by subject entities and individuals, the attorney-client privilege frequently is attacked on one side and waived on the other. This trend for intensive litigation to control health care fraud will likely continue in the future. Attorney General Reno has noted that health care investigations will be supported "through aggressive detection, investigation and prosecution [that] can be greatly enhanced through greater coordination and communication of information between law enforcement and private health plans."[51] Toward this end, Reno has issued guidelines to encourage private health plans to provide information concerning suspected health care fraud to the DOJ whenever possible.[52]

---

49. *Id.* at 49-50.

50. *Id.* at 64. In a statistical review of cases from 1970 to July 1998, Jost found that the government completely won 68% of cases in the courts of appeals and 55% in the district courts. *Id.* at 56. From 1995 to 1998, the government won 88% and 70% of cases, respectively, while in 1985, the government won only 63% and 32% of cases, respectively. *Id.* These statistics show the lower courts' increasing reluctance to intervene in the highly technical Medicare program.

51. Memorandum from Janet Reno, Attorney General, to all U.S. Attorneys, *The Sharing of Information on Health Care Fraud with Private Health Plans* (1998) (visited Oct. 9, 1998) <http://www.usdoj.gov/. . ./hcarefraud.htm>.

52. U.S. DEP'T OF JUSTICE, STATEMENT OF PRINCIPLES FOR THE SHARING OF HEALTH CARE FRAUD INFORMATION BETWEEN THE DEP'T OF JUSTICE AND PRIVATE HEALTH PLANS (1999) (visited Sept. 3, 1999) <http://www.usdoj.gov/. . . /hcarefraud2.htm>.

II. The Implications of Exceptions and Waivers to Testimonial Privileges for Grand Jury Investigations and Voluntary Disclosure Programs

With the current aggressive enforcement culture against health care fraud, health care providers and suppliers need to avail themselves of the greatest protection that the law currently allows in order to operationalize internal fraud prevention measures. The law provides these protections via testimonial privileges that permit clients to reveal all their potential legal concerns to their attorneys in confidence. However, testimonial privileges such as the attorney-client privilege the work product doctrine and the self-evaluation privilege, never greatly favored in the courts, are subject to ever-expanding exceptions and waivers. As the scope of these privileges diminishes, the litigation costs of proving the confidential relationship and resolving the issues of exceptions and waivers increase dramatically, almost to the point where the traditional objective of privileges, i.e., increased candor between attorney and client, is no longer present.[53]

The diminished scope of conduct protected by testimonial privileges also has placed the litigator in an increasingly complex ethical situation. In the absence of clear evidence of client fraud, attorneys must weigh their duty of client confidentiality against the countervailing requirement of candor to the court. Attorneys in a real sense become their clients' adversaries, seeking to determine their clients' subjective intent for seeking legal advice and recognizing that legal advice initially sought and given in confidence might well be exposed and criticized at a

---

53. Some academic critics of judicial narrowing argue that the requirement of confidentiality underlying the assertion of the attorney-client privilege should be abandoned because of the "costs in the preservation of the secrecy, the proof of that preservation, and the resolution of disputes surrounding it." Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should be Abolished*, 47 DUKE L.J. 853, 861 (1998). Such suggestions address only half the problem (forced disclosure of presumptively privileged advice) in health care litigation. As noted, it is the client who frequently waives the privilege in an attempt at vindication. The *Anderson* case shows how such waivers can misfire, injuring the lawyer bystander. *See In re* Grand Jury Subpoenas, 144 F.3d 653 (10th Cir. 1998).

later time. In areas as complex as federal self-referral law and anti-kickback law, the crime-fraud exception has caused attorneys rendering advice to face potential criminal charges for obstruction of justice. Furthermore, in performing self-evaluations or cooperating with government investigations, clients may waive testimonial privileges and lose whatever claim of confidentiality they might have had.[54]

DOJ prosecutors often challenge the invocation of the crime-fraud exception or the allegation that waiver has occurred.[55] As the client or prospective consumer of legal services perceives the uncertain protection that privileges provide, the underlying policy rationale for privileges disappears. Incentives for health care companies to seek legal advice for their operations and to perform self-evaluative audits diminish as well.

Privilege is unlike other areas of evidence law because the considerations undergirding privilege contradict the usual notion that the admission of probative evidence should be facilitated to enhance the reliability of the fact-finding process. Instead, the attorney-client privilege, the work product doctrine and the self-evaluation privilege sacrifice probative inquiries in the interest of candor between lawyer and client. This sacrifice is made in the hope that if the client (knowing that his or her private affairs will remain private) makes full disclosure, the lawyer might help guide the client along a lawful path.

III. THE RULE 501 REGIME AND THE ATTORNEY-CLIENT PRIVILEGE

Federal courts have the authority to recognize the attorney-client privilege, the work product doctrine and other privileges pursuant to Rule 501 of the Federal Rules of Evidence, which provides:

Except as otherwise required by the Constitution of the United

---

54. *See* Richard L. Marcus, *The Perils of Privilege: Waiver and the Litigator*, 84 MICH. L. REV. 1605 (1986) (noting the increased litigation costs of broad waiver rules).

55. For a discussion of how lawyers use ethical rules as tactical measures, see John Leubsdorf, *Using Legal Ethics to Screw Your Enemies and Clients*, 11 GEO. J. LEGAL ETHICS 831 (1998).

> States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.[56]

Rule 501 is very broad, leaving the nature and scope of all privileges open to federal court interpretation.

In enacting Rule 501, Congress purposefully decided to permit the federal courts to develop the federal law of privilege rather than codifying specific, traditional common law descriptions for attorney-client, psychotherapist-patient, husband-wife and trade secrets privileges because the proposed language proved too controversial.[57] The House and Senate finally agreed that the federal law of privilege should be a "federally developed common law based on modern reason and experience . . . except where the State nature of the issues renders deference to State privilege law the wiser course."[58] In summary, the version of Rule 501 in effect today

> provides that in criminal and Federal question civil cases, federally evolved rules on privilege should apply since it is Federal policy which is being enforced. Conversely, in diversity cases where the litigation in question turns on a substantive question of State law, and is brought in the Federal courts because the parties reside in different States, the committee believes it is clear that State rules of privilege should apply unless the proof is directed at a claim or defense for which Federal law supplies the rule of decision. . . . It is intended that the State rules of privilege should apply equally in original diversity actions and diversity actions removed under 28 U.S.C. § 1441(b).[59]

---

56. FED. R. EVID. 501.

57. S. REP. NO. 93-1277, at 11-13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7058; *see also* H.R. REP. NO. 93-650, at 8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7082.

> The Committee amended Article V to eliminate all of the Court's specific Rules on privileges. Instead, the Committee through a single Rule, 501, left the law of privileges in its present state and further provided that privileges shall be developed by the courts of the United States under a uniform standard applicable both in civil and criminal cases.

Id.

58. *See* S. REP. NO. 93-1277, at 7.

59. *Id.* at 7059 (footnotes omitted).

Federal common law privileges apply in all criminal cases and in civil cases based on non-diversity jurisdiction such as the FCA. Pursuant to Rule 501, the federal courts apply testimonial privileges such as the attorney-client privilege under an evolving specialized federal common law.[60] When federal courts uphold the application of privilege, they typically rely on the underlying policy of encouraging full and frank communication between attorneys and their clients, thereby promoting broader public interests in the observance of the law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.[61]

When the privilege is not upheld, the federal common law typically seeks to promote the broader goal of narrowly construing the attorney-client privilege in favor of encouraging candor to the court.[62] The modern trend is broader disclosure to the judicial system via extensive exceptions and waivers of testimonial privileges.[63] Rule 501 permits the federal courts to apply privileges in "light of reason and experience."[64] The reason and experience are not generally based on the subjective view of the trial judge. Usually this means that the decision of whether a privilege applies or not depends on a case-by-case analysis of what seems to comport with common sense.[65] The federal courts frequently rely upon state cases and statutes,[66] as well

---

60. *See, e.g.*, United States v. Under Seal, 748 F.2d 871, 874 (4th Cir. 1984) (citing United States v. Kendrick, 331 F.2d 110, 113 (4th Cir. 1964)).

61. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

62. Fisher v. United States, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged. . . . [The privilege] protects only those disclosures—necessary to obtain informed legal advice—which might not have been made absent the privilege.") (citations omitted); Great Plains Mut. Ins. Co. v. Mutual Reinsurance Bureau, 150 F.R.D. 193, 196 (D. Kan. 1993) ("The attorney-client privilege . . . is to be extended no more broadly than necessary to effectuate its purpose.").

63. WEINSTEIN'S FEDERAL EVIDENCE § 503.03[2] (2d ed. 1999).

64. FED. R. EVID. 510.

65. *In re* Six Grand Jury Witnesses, 979 F.2d 939, 944 (2d Cir. 1992), *cert. denied*, 509 U.S. 905 (1993); United States v. Talley, 790 F.2d 1468 (9th Cir.), *cert. denied*, 479 U.S. 866 (1986); Ott v. St. Luke Hosp., 522 F. Supp. 706 (E.D. Ky. 1981).

66. Trammel v. United States, 445 U.S. 40, 49-50 (1980); United States v. Crain, 589 F.2d 996, 999 (9th Cir. 1979); *see also In re* Sealed Case, 148 F.3d 1073,

as the draft Supreme Court standards that were suggested to Congress in 1974 but not adopted.[67]

Rule 501, by its very unspecific nature, "did not freeze the law governing privileges at a particular point in our history, but rather directed courts to 'continue the evolutionary development of testimonial privileges.'"[68] This evolution means that privileges are flexible and do not offer certain, bright line rules as to what testimony and documents are protected from discovery. Tension continually exists as courts apply the policy of balancing the right to evidence against the right to privacy. The tension gives prosecutors and private parties a continual opportunity to attempt to shrink the protections offered by privileges.

"The attorney client privilege is one of the oldest recognized privileges for confidential communications,"[69] but Rule 501 also allows the recognition of the closely related work product doctrine as well as the self-evaluation privilege that is greatly relevant to health care cases. The party claiming the attorney-client privilege has the burden of proof of establishing that the privilege attaches to the communication at issue.[70] The party must

---

1076 (D.C. Cir. 1998) (noting that no precise test exists but that application of the attorney-client privilege places "considerable weight upon federal and state precedent"); Sackman v. Liggett Group, Inc., 920 F. Supp. 357 (E.D.N.Y. 1996) (adopting New York law on attorney-client privilege in federal court).

67. United States v. Gillock, 445 U.S. 360, 367-68 (1980); *In re* Lindsey, 148 F.3d 1100 (D.C. Cir. 1998) (relying on proposed Rule 503(a)(1) for the possible existence of a governmental attorney-client privilege); Citibank, N.A. v. Andros, 666 F.2d 1192, 1195 n.6 (8th Cir. 1981) (finding proposed Rule 503(c) "a source for defining the federal common law of attorney-client privilege"); Suburban Sew 'N Sweep, Inc. v. Swiss Bernina, 91 F.R.D. 254, 259-60 (N.D. Ill. 1981) (finding that "the rules proposed by the Supreme Court are considered a comprehensive guide to the law of privileges, providing valuable standards for the courts"); *In re* Grand Jury Proceedings, Detroit, Mich., Aug. 1977, 434 F. Supp. 648, 649 (E.D. Mich. 1977) (finding that the attorney-client privilege "has been fully and adequately expressed in proposed Rule of Evidence 503").

68. Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quoting Trammel v. United States, 445 U.S. 40, 47 (1980)).

69. Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998) (citing Upjohn Co. v. United States, 449 U.S. 383 (1981) and Hunt v. Blackburn, 128 U.S. 464 (1888)). *See generally* David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443 (1986) (historical overview).

70. *See* Town of Norfolk v. U.S. Army Corps. of Eng'rs, 968 F.2d 1438, 1457 (1st Cir. 1992) (citing United States v. Bay State Ambulance and Hosp. Rental Serv., Inc., 874 F.2d 20, 27-28 (1st Cir. 1989)); United States v. Martin, 773 F.2d

prove that:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose,[71] (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.[72]

The federal courts then determine, based on the quantum of proof offered and in "light of reason and experience," whether the attorney-client privilege should apply. As the Supreme Court recently articulated, there is a balancing test for this decision: the policy rationale for protecting the confidential communications in the particular case must be of sufficient importance to outweigh the opposing party's need for probative evidence.[73] The privilege does not protect all communications between attorney and client, only those where legal advice is sought or given. In civil cases, the court should also consider the type of action, the need for the evidence, and the evidence's relevancy.[74]

IV. THE WORK PRODUCT DOCTRINE

An offshoot of the attorney-client privilege and its legal coequal, the work product doctrine protects the materials prepared by an attorney or the attorney's agent in anticipation of litigation or for trial use.[75] The work product doctrine is intended to provide clients with sufficient privacy for their lawyers to conduct a thorough investigation into allegations of wrongdoing and then to make a comprehensive formulation of legal theories.[76] The work product doctrine is embodied within the feder-

---

579, 583-84 (4th Cir. 1985); Nishika, Ltd. v. Fuji Photo Film Co., 181 F.R.D. 465 (D. Nev. 1998) (citing *In re* Grand Jury Subpoenas (Hirsch), 803 F.2d 493, 496 (9th Cir. 1986)); United States v. Pappas, 806 F. Supp. 1, 4 (D.N.H. 1992).

71. 8 WIGMORE ON EVIDENCE § 2292 (McNaughton ed., 1961).

72. *Id.*

73. *Jaffee*, 518 U.S. at 9-10.

74. United States v. Arthur Young & Co., 465 U.S. 805, 816-18 (1984) (denying a qualified work product privilege for accountant's tax papers).

75. Hickman v. Taylor, 329 U.S. 495 (1947).

76. *Hickman*, 329 U.S. at 510-11.

In performing his various duties, however, it is essential that a lawyer work

al discovery rules,[77] and the party asserting the work product doctrine has the burden of demonstrating that it should be applied.[78] Given complicated regulatory environments, among which federal health care reimbursement leads the list, the Court has acknowledged that persons and entities that become aware of potential wrongdoing are in great need of legal advice to conform their operations to the law.[79] To facilitate the development and implementation of compliance with the law, the Court, in *Upjohn Co. v. United States*,[80] expressly approved extending the work product doctrine under Federal Rule of Evidence 501 to attorneys charged with undertaking voluntary internal corporate investigations and compliance measures, at least where there is a significant legal component. In order to predict with some certainty which types of compliance measures will be shielded by the privilege, the Court developed a four-part test for determining whether intracorporate investigations are protected.[81]

First, the communications have to be made by corporate employees to corporate attorneys (whether in-house or outside

---

with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

Id.

77. Federal Rule of Civil Procedure 26(b)(3) provides:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

78. Conoco, Inc. v. United States, 687 F.2d 724, 730 (3d Cir. 1982). The doctrine may apply if the creation of the documents was to aid possible future litigation. United States v. Rockwell Int'l, 897 F.2d 1255, 1266 (3d Cir. 1990); United States v. El Paso Co., 682 F.2d 530, 542-43 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984).

79. *See* Upjohn Co. v. United States, 449 U.S. 383, 384 (1981).

80. 449 U.S. 383 (1981).

81. *Upjohn*, 449 U.S. at 394-95.

counsel) in order to secure or promote the acquisition of legal advice.[82] Second, the board of directors or corporate leadership must direct the inquiry.[83] Third, the information sought must concern matters within the corporate employees' duties, and employees must be aware that the information is being solicited as a predicate for legal advice and action.[84] Fourth, the corporation must treat the communications as confidential from the beginning to the end of the investigation, with interviews being conducted in private and notes memorialized in confidential documents which are circulated to only a minimum number of people.[85]

The number of variables in this formulation provides fertile ground to attack the applicability of the privilege in any case, but the issue of greater importance to health care providers subject to investigations and lawsuits is whether, at an early stage in the investigation, the individual or entity elects to cooperate with the government, in the hope that voluntary disclosure will limit criminal exposure, moderate damages and forestall potential exclusion from federal programs. The lawyer conducting such investigations must be mindful of this possibility developing, even if the outset of a given case is marked by confrontation and pronounced adversity. Given the high probability that any case against the government will be concluded through negotiation, the practitioner must be wary of making any statements to witnesses in the course of an investigation that might be interpreted as suggesting a cover-up or other improper activity that might expand the scope of the government's investigation and implicate the crime-fraud exception. Failure to heed this caution might not only open up premature scrutiny of the investigation itself, but it may also open up attorney-client discussions that preceded the investigation.

---

82. *Id.*

83. *Id.*

84. *Id.* This third element limits the scope of the privilege. If employees are mere witnesses to events, their communications are not protected. *See Hickman*, 329 U.S. at 495.

85. *Upjohn*, 449 U.S. at 395.

V. THE SELF-EVALUATIVE PRIVILEGE

Federal courts are often asked to recognize or expand privileges other than the attorney-client privilege and work product doctrine.[86] Among the novel privileges that the lower federal courts have recognized in the context of private litigation is the self-evaluative or self-critical privilege.[87] However, the Supreme Court, in *University of Pennsylvania v. EEOC*,[88] rejected applying the self-critical privilege in an academic tenure case involving a peer review committee. The Court was reluctant to recognize this privilege in the absence of legislation by Congress.[89]

The self-evaluation privilege holds internal audits of a corporation's analysis of compliance with regulatory schemes confidential and exempt from discovery in litigation. Often non-attorneys, such as accountants or management consultants, perform these audits, and thus, the work product doctrine may not apply because the audit is more operational than legal in scope.[90] For the self-evaluation privilege to apply, if at all, in a

---

86. *See* Jaffee v. Redmond, 518 U.S. 1 (1996) (recognizing and defining the psychotherapist-patient privilege).

87. *See* Dowling v. American Haw. Cruises, Inc., 971 F.2d 423, 426 n.1 (9th Cir. 1992) ("The Supreme Court and the circuit courts have neither definitively denied the existence of such [self-evaluative] privilege, nor accepted it and defined its scope."). This privilege was first developed in Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 749 F.2d 920 (D.C. Cir. 1973), in the context of physician peer review. As a result of this case, many states have codified the self-evaluation privilege in the medical review context. *See* Susan O. Scheutzow, *State Medical Peer Review: High Cost But No Benefit—Is it Time for a Change?*, 25 AM. J. L. & MED. 7 (1999) (discussing reforms to state peer review in order to enhance the benefits of confidential reviews).

88. 493 U.S. 182 (1990).

89. In declining to extend to academic tenure committees the same immunity that medical peer review committees receive under the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. §§ 11101-11152 (1994), by creating a self-evaluation privilege, the Court stated:

> Moreover, although Rule 501 manifests a congressional desire "not to freeze the law of privilege" but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, we are disinclined to exercise this authority expansively. We are especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself. The balancing of conflicting interests of this type is particularly a legislative function.

Id.

90. *See* John F.X. Peloso, *The Privilege for Self-Critical Analysis: Protecting the*

corporate context, three criteria generally must be satisfied.[91] First, the analysis must be based on an expressed intention to achieve legal or regulatory compliance.[92] Second, the public must have a strong interest in seeing that a corporation is operated in a particular manner.[93] Third, the information sought to be protected by the privilege must be of the type that would not be acquired if the self-evaluation privilege did not exist and that would not be protected by the traditional attorney-client privilege.[94] Usually, corporations asserting the privilege must demonstrate an "exceptional need" in order for the self-evaluation privilege to apply.[95] As a general policy matter, federal courts are extremely reluctant to expand on privileges available to litigants, and the self-evaluation privilege is very narrowly construed.[96] Private plaintiffs in labor and employment cases often have established that their discovery needs outweigh the employer's self-evaluation interests.[97] It is generally even easier to prevent the application of this novel privilege in health care matters, especially inasmuch as the self-evaluative privilege is

---

Public by Protecting the Confidentiality of Internal Investigations in the Securities Industry, 18 SEC. REG. L.J. 229 (1990) (discussing situations where the attorney-client and work product doctrine may not protect internal financial audits).

91. *See* Note, *The Privilege of Self-Critical Evaluation*, 96 HARV. L. REV. 1083 (1983). *Bredice*, 50 F.R.D. 249, would require that a privilege for self-critical analysis apply only if internal audits are confidential, evaluative and relevant to an inquiry in the public interest.

92. *The Privilege of Self-Critical Evaluation*, *supra* note 91, at 1089-90.

93. *Id.*

94. *Id.* at 1086.

95. *Id.* at 1097; *see also* Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977) (holding that confidential evaluations of college faculty members were necessary to enable colleges to receive honest student comments, and these cannot be produced at trial).

96. Labor dispute cases usually construe the privilege narrowly. For instance, in *Granger v. National R.R. Passenger Corp.*, 116 F.R.D. 507 (E.D. Pa. 1987), the court applied the privilege to a railroad accident report's analysis and recommendation sections, but not to the factual portions of the report. The court reasoned that the employee could not easily duplicate the information in the railroad's hand, and because the employee-plaintiff must prove negligence, the privilege was secondary to the employee's right of discovery. *Granger*, 116 F.R.D. at 510.

97. *See, e.g.*, Hardy v. New York News, Inc., 114 F.R.D. 633 (S.D.N.Y. 1987) (finding the plaintiff's need for discovery of information on employer's minority hiring practices outweighed the employer's interest in self-evaluation); Roberts v. Carrier Corp., 107 F.R.D. 678 (N.D. Ind. 1985) (holding that the self-evaluation privilege covers only materials prepared for mandatory government reports, not voluntary internal audits).

not generally applied in cases where the United States government is the plaintiff.[98] Furthermore, federal courts have declined to expand the privilege to grand jury proceedings.[99]

VI. CRIME-FRAUD AND OTHER EXCEPTIONS TO TESTIMONIAL PRIVILEGES

The federal health care practitioner must recognize not only that privileges are narrowly construed in the first instance, but a practitioner must also recognize that significant exceptions to the protections offered by testimonial privileges exist as well. For instance, if the client dies, the attorney-client privilege may not apply.[100] In situations where more than one client is jointly represented by a single attorney, neither party may assert a privilege against the other in subsequent litigation.[101] Privileges also do not apply when a lawyer defends himself against a malpractice claim or when an attorney has a compensation claim against a client.[102] In the context of federal health care litigation, the crime-fraud exception has the broadest reach. The crime-fraud exception cancels the applicability of an otherwise available testimonial privilege if the government can show that legal advice was used to facilitate "the commission of contemplated but not yet committed crimes, torts, or frauds."[103]

Whether the crime-fraud exception[104] applies depends on

---

98. *See* United States v. Dexter Corp., 132 F.R.D. 8, 9 (D. Conn. 1980); Federal Trade Comm'n v. TRW, Inc., 628 F.2d 207, 210 (D.C. Cir. 1980).

99. *In re* Grand Jury Proceedings, 861 F. Supp. 386 (D. Md. 1994).

100. *See* Swidler & Berlin v. United States, 524 U.S. 399 (1998) (holding that the attorney-client privilege survives the client's death, but the privilege does not apply after death in will contest cases).

101. *See generally Swidler*, 524 U.S. 399.

102. *See id.*

103. EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 251 (3d ed. 1997).

104. While the crime-fraud exception is typically seen in criminal cases, it is also employed in civil cases. For instance, a number of cases address whether the attorney-client privilege applies when the client contemplates civil fraud rather than criminal fraud. Very early state law cases find that communications between such clients and their attorneys are protected from disclosure. *See, e.g.*, Supplee v. Hall, 52 A. 407 (Conn. 1902); Watson v. Young, 8 S.E. 706 (S.C. 1889) (bankruptcy). However, federal cases indicate that the current federal common law is to not give such communications protection under the attorney-client privilege. *See, e.g.*, Clark v. United States, 289 U.S. 1 (1933); *In re* Antitrust Grand Jury, 805 F.2d 155 (6th Cir.

the subjective intent of the client when he or she seeks advice. Unwitting attorneys who attempt to give advice on the legal implications of certain transactions can be deemed to have constructive knowledge of improper purposes. "Even though the advice has been rendered by counsel in good faith, use of that advice to accomplish an unlawful purpose leaves the communication unprotected."[105] For instance, in *United States v. Skeddle*,[106] the district court found that when the officers of a company approached counsel for advice on certain financial transactions, the officers intended to learn how to legally structure corporate formations to gain profits for themselves through self-dealing.[107] Counsel's unawareness of the officers' purposes did not block application of the exception.[108] The *Anderson* case provides a notable example of how the same thinking can apply in health care fraud cases.

The scope of the crime-fraud exception has broadened significantly in recent years in the wake of expressions of judicial aversion to privilege, the procedural lowering of the evidentiary threshold for establishing the exception, and Congress' creation of additional criminal statutes. In addition, administrative agencies' increased enforcement efforts have fostered increasing *post hoc* reasoning used to determine whether confidential communications were made "in furtherance of a crime." In *United States v. Zolin*,[109] the Supreme Court resolved the issue of

---

1986); Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970); Union Camp Corp. v. Lewis, 385 F.2d 143 (4th Cir. 1967). To guard against mere allegations of fraud, however, the Court states that proponents of the exception in civil fraud cases must present prima facie evidence of fraud before the attorney-client privilege is lifted. *Clark*, 289 U.S. 1. The attorney's knowledge of the client's fraudulent scheme is not necessary to lift the protection, though. Some federal courts apply the crime-fraud exception in cases where the wrongdoing is not even a crime or fraud. *See, e.g., In re* Grand Jury Subpoenas Dated December 18, 1981, 561 F. Supp. 1247 (E.D.N.Y. 1982).

105. United States v. Skeddle, 989 F. Supp. 890, 902 (N.D. Ohio 1997).

106. *Skeddle*, 989 F. Supp. at 902.

107. *Id.*

108. *Id.*

109. 491 U.S. 554 (1989). The circuits were split on the issue of whether independent evidence must be used or whether the privileged testimony may be used to determine whether the crime-fraud exception applies. *Compare* United States v. Shewfelt, 455 F.2d 836 (9th Cir. 1972) (independent evidence standard), *cert. denied*, 406 U.S. 944 (1972), *with In re* Berkley & Co., 629 F.2d 548 (8th Cir. 1980) (review of privileged material appropriate).

whether federal courts may undertake *in camera* inspection of privileged testimony and documents in order to determine whether the crime-fraud exception applies.[110] Instead of creating a bright line rule, the Court simply issued general policy guidelines and left the application of the decision up to the district courts.[111] The Court held that in instances where the attorney-client privilege has been established by the defendant, a three-part question must be answered in determining whether the privilege should be voided by the crime-fraud exception: (1) whether *in camera* review is appropriate to determine if the crime-fraud exception applies; (2) whether some threshold evidentiary showing is required before such review can occur; and (3) whether the type of evidence used to make the ultimate decision may include the privileged evidence.[112]

As to the first issue, the Court concluded "that no express provision of the Federal Rules of Evidence bars such use of *in camera* review, and it would be unwise to prohibit an *in camera* review in all instances as a matter of federal common law."[113] The Court explicitly rejected a *per se* bar against the use of *in camera* inspection and noted that the practice of *in camera* inspection is "well established in the federal courts."[114] The Court concluded that some threshold evidentiary standard must be met before a trial court should conduct an *in camera* inspection in order to prevent proponents of the crime-fraud exception from engaging in "groundless fishing expeditions, with the district courts as their unwitting (and perhaps unwilling) agents."[115] The Court adopted the Colorado Supreme Court's standard for the threshold: "'the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person' that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies."[116] Precisely what this threshold means in a particular case is an open question, and a party's risk is largely

110. *Zolin*, 491 U.S. at 565-73.
111. *Id.* at 565.
112. *Id.* at 569.
113. *Id.* at 565.
114. *Id.* at 569.
115. *Zolin*, 491 U.S. at 571.
116. *Id.* at 572 (citing Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982)).

dependent upon the view of any given trial judge.

With regard to the type of evidence that prosecutors may use to establish the crime-fraud exception, the Court acknowledged that partial transcripts or summaries of the privileged material might be used.[117] Materials obtained from third parties are permissible as well.[118] The Court reasoned that "deterring the aggressive pursuit of relevant information from third-party sources is not sufficiently central to the policies of the attorney-client privilege to require us to adopt the exclusionary rule" of third-party materials.[119]

Zolin has been criticized for expanding the crime-fraud exception to such a level as to almost swallow the attorney-client privilege itself.[120] The discretion district courts have to permit *in camera* inspection effectively shifts the burden as to the crime-fraud exception to the party asserting the attorney-client privilege. As one commentator put it, "[t]he privilege does not become viable until the exception is disproved."[121] In addition to a procedural lowering of the quantum of proof required to establish the crime-fraud exception, the application of the exception has become more prevalent with the "rapid and continuous growth in the federal criminal law, particularly in the proliferation of statutes intended to attack white-collar crime and to enforce administrative regulation schemes."[122] In the health care arena, the lure of large monetary awards to private relators under the FCA is one clear example of this.[123]

Increased white-collar crime enforcement "presents prosecutors with new temptations to make the examination of attorneys an integral part of their investigations (often through use of the grand jury subpoena power), as well as new opportunities to do so."[124] Recent examples of increased governmental enforcement

---

117. *Id.* at 573.

118. *Id.* at 573 n.11.

119. *Id.* at 574.

120. Christopher Paul Galanek, *The Impact of the Zolin Decision on the Crime-Fraud Exception to the Attorney-Client Privilege*, 24 GA. L. REV. 1115, 1137 (1990).

121. *Id.* at 1139.

122. David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 470 (1986).

123. See *supra* notes 19-24 and accompanying text for further discussion of the FCA.

124. Fried, *supra* note 122, at 473. Professor Fried discusses the increased crimi-

where attorneys are required to testify before grand juries include former government attorney Michael Abbell's testimony concerning the Cali drug cartel[125] and President Clinton's impeachment case.[126]

Of all the government's efforts to collapse the attorney-client privilege, however, the Kansas City Medicare self-referral fraud case is the most noteworthy for health care practitioners. In this case, which has become known as the *Anderson*[127] case after it was unsealed, health care attorneys were not only required to give testimony, but they also were indicted and unindicted coconspirators. The Tenth Circuit upheld the district court's finding that attorneys may not assert a Fifth Amendment right against self-incrimination and found that no abuse of discretion occurred in using an *in camera* review to determine whether the crime-fraud exception applied.[128] The court reasoned that be-

---

nal penalties for violations of the Sherman Antitrust Act, the Securities Act of 1933 and the Securities and Exchange Act of 1934, RICO, and for willful tax evasion. *See id.* at 471-72. Professor Fried also notes the enactment of the Foreign Corrupt Practices Act and criminal environmental laws. *See id.* at 471.

125. In a government narcotics prosecution of the former director of the DOJ Criminal Division's Office of International Affairs, *In re* Grand Jury Proceedings, 142 F.3d 1416 (11th Cir. 1998), the Eleventh Circuit reviewed whether a district court properly denied a motion to quash a grand jury subpoena of the former government lawyer concerning his confidential communications with his client, the Cali Drug Cartel. Defendants alleged that the district court's *in camera* review of the testimony in order to determine whether the crime-fraud exception applied denied the cartel due process. *In re Grand Jury Proceedings*, 142 F.3d at 1419. The Eleventh Circuit noted that because the attorney testified before the grand jury prior to the hearing on appeal, the issue of the crime-fraud exception was moot. *Id.* at 1421. The Eleventh Circuit also held that due process rights are not violated by the *in camera* review process in a grand jury context. *Id.* at 1423. Any violation was not redressible by the court because it would have no way to enforce an injunction against the use of the attorney's testimony. *Id.* at 1424. For further discussion of this case, see John J. Woykovsky, *Conflicts of Interest: The Former Government Attorney and the Case of Michael Abbell*, 9 GEO. J. LEGAL ETHICS 165 (1997).

126. The District of Columbia's decision in the Clinton Administration Independent Counsel matter, *In re* Sealed Case, 162 F.3d 670 (D.C. Cir. 1998), shows how the government's crime-fraud exception enforcement efforts have continued to erode the protection offered by the attorney-client privilege. In this case, the district court ordered the attorney for Monica Lewinsky, the President's paramour, to produce all documents that would not violate her Fifth Amendment rights but precluded the attorney from relying on his client's purported privilege, finding that the crime-fraud exception applied. *In re Sealed Case*, 162 F.3d at 675.

127. *In re* Grand Jury Subpoenas, 144 F.3d 653 (10th Cir. 1998), *cert. denied*, Anderson v. United States, 119 S. Ct. 412 (1998).

128. *In re Grand Jury Subpoenas*, 144 F.3d at 653.

cause the attorneys were intervenors in a case brought by the government against a corporation and other individuals, the attorneys had no standing to assert their Fifth Amendment rights.[129] This is a questionable conclusion given the fact that two of the attorneys whose testimony was compelled ended up being indicted as co-conspirators, not advisors. While these lawyers ultimately were acquitted by the court, the precariousness of their position is manifest.

With respect to the quantum of proof necessary for the government to establish the crime-fraud exception, the Tenth Circuit opined that:

> The evidence must show that the client was engaged in or was planning the criminal or fraudulent conduct when it sought the assistance of counsel and that the assistance was obtained in furtherance of the conduct or was closely related to it. The exception does not apply if the assistance is sought only to disclose past wrongdoing, but it does apply if the assistance was used to cover up and perpetuate the crime or fraud.[130]

The Tenth Circuit surveyed other circuit cases to conclude that no bright line rule articulated the minimum level of proof required under federal common law to establish the exception. Thus, no abuse of discretion occurred.[131]

The fundamental problem with the crime-fraud exception is its inherent *post hoc* nature. The difficulty in distinguishing past misconduct from ongoing fraud almost always leads to outcome-determinative results and inconsistency in the law. Focusing on the time that the legal advice was sought, neither attorneys nor the courts can objectively determine what the client's intent was in seeking legal advice. In response to this dilemma, some courts apply the crime-fraud exception to any case where the client abuses the attorney-client relationship.[132] For instance, in

---

129. *Id.* at 663.

130. *Id.* at 660 (showing a trend that courts have recently begun expanding the application of the exception to situations where although the client may not have had a criminal intent at the time he sought advice, future crime still occurred) (citations omitted).

131. *Id.*

132. *See generally* PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 8:10 (1993).

Clinton's impeachment case,[133] the D.C. Circuit held that the exception applies if advice was sought in the furtherance of a "crime, fraud, or other type of misconduct fundamentally inconsistent with the basic premises of the adversary system."[134] That kind of general language signals that the advice of attorneys to clients and the representations that clients make to attorneys in order to gain that advice are subject to exposure, notwithstanding privilege. Attorneys are, in a sense, forced to become their clients' adversaries when forced to justify their advice when questioned by prosecutors.

The larger problem posed by the future crime requirement occurs when the law itself is unclear as to what activity is criminal, as often is the case with federal health care reimbursement. At the time of trial, however, the legality of the activity may be much clearer. This uncertainty was at the heart of both the government's prosecution and the trial court's concern in the *Anderson* case, as the trial court considered whether the attorneys conspired to defraud the government or obstructed justice.[135] The clients' culpability for engaging in kickbacks and unlawful self-referral was clear enough to the court and jury that convicted them, but the lawyers' role in attempting to advise their clients was another matter.[136]

While the court readily sent the case to the jury that found them guilty of having engaged in a scheme to refer Medicare patients to hospitals in exchange for payments disguised as consulting fees, the court noted that the evidence showed "that all the lawyers who dealt with or reviewed these transactions . . . held good faith beliefs that it was possible to facilitate some business relationship that was legal."[137] The court repeatedly noted the uncertain state of the law and the difficulty that fact causes for lawyers who are attempting to guide their clients through the complex and inconsistently interpreted laws and regulations governing health care reimbursement. An instructive

---

133. *In re Sealed Case*, 162 F.3d at 675.

134. *In re* Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982).

135. *See In re* Grand Jury Subpoenas, 144 F.3d 653 (10th Cir. 1998), *cert. denied*, Anderson v. United States, 119 S. Ct. 412 (1998).

136. *See In re Grand Jury Subpoenas*, 144 F.3d at 659-61.

137. Partial Transcript of Trial at 7343, United States v. Anderson, Nos. Civ.A. 99-MC-205-JWL, 99-MC-207-JWL (D. Kan. May 7, 1999, unsealed June 4, 1999).

example of this difficulty can be found in analyzing the federal self-referral law (also commonly referred to as the "Stark Law").[138]

The Stark Law provides that "if a physician (or an immediate family member of such physician) has a financial relationship with an entity . . . then the physician may not make a referral to the entity for the furnishing of clinical laboratory services for which payment otherwise may be made under this subchapter."[139] The difficulty in analyzing a proposed transaction under the Stark Law is that many of the terms set forth in it are not defined in the statute, and until August 14, 1995, there were no final regulations. On August 14, 1995, final rules interpreting the Stark Law statute with a comment period were issued.[140] The Stark I Regulations clarify and add numerous exceptions, or "safe harbors," for certain financial relationships such as the employment exception[141] and the office lease exception.[142] Additional draft regulations on federal self-referrals were issued on January 9, 1998.[143]

During the time period encompassed by the *Anderson* prosecution, it was not possible to get any definitive governmental advice. Many of the arrangements considered by the attorneys over a period of many years were arguably of financial benefit to the government, and only in 1995 did it become entirely clear that the subject arrangement was violative of the law.

VII. WAIVER OF TESTIMONIAL PRIVILEGES

A second major constraint on the protection that privileges may offer a client is waiver. Waiver occurs when the client either purposefully or impliedly discloses information, thereby

---

138. 42 U.S.C. § 1395nn (1994).

139. *Id.* § 1395nn(a)(1)(a).

140. Rules and Regulations of the Department of Health & Human Servs., 60 Fed. Reg. 41,914 (1995) (codified at 42 C.F.R. § 411 (1998)) (the "Stark I Regulations").

141. 42 U.S.C. § 1395nn(e)(2).

142. *Id.* § 1395nn(e)(1)(A); 42 C.F.R. § 411.357(a) (1998).

143. Medicare and Medicaid Programs; Physicians' Referrals to Health Care Entities with Which They Have Financial Relationships, 63 Fed. Reg. 1659 (1998) ("Stark II Regulations").

terminating the right to confidentiality. Waiver of a testimonial privilege may occur in several ways.[144] For instance, in cooperating with a governmental investigation, a client may voluntarily and intentionally waive the privilege. Given both the institution of voluntary disclosure programs by the government and the desire of entities to avoid exclusion by cooperating, the waiver of attorney-client and other privileges has become routine. Less frequently, but as was the case in *Anderson*, the client may defend itself on the theory that it lacked unlawful intent because it acted on the basis of the advice of counsel.

While a client may be compelled by a court to disclose a communication or may choose to do so to help its cause, such as in a settlement negotiation, the client also inadvertently may make a disclosure, either during discovery, a compliance activity or an investigation, that waives a privilege. Voluntary waiver, the "intentional relinquishment or abandonment of a known right or privilege,"[145] of communications or work product generally obviates any protection a privilege provides unless an explicit agreement to the contrary is entered into by the plaintiff and the defendant.[146] This rule applies when information is disclosed pursuant to a subpoena or as a result of self-disclosure.[147] Litigants should note that courts will more likely recognize a limited waiver pursuant to an agreement when disclosure is made to a governmental entity rather than to a private party.[148]

---

144. *See generally* EPSTEIN, *supra* note 103, at 173-233.

145. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

146. *See, e.g.*, United States v. Massachusetts Inst. of Tech., 129 F.3d 681, 684-87 (1st Cir. 1997) (holding that a client cannot later claim confidentiality when IRS seeks production); *In re* Steinhardt Partners, L.P., 9 F.3d 230, 236 (2d Cir. 1993) (holding that a voluntary submission to the Enforcement Division waived the protection of the work product doctrine); Westinghouse Elec., Corp. v. Republic of the Phil., 951 F.2d 1414, 1424 (3d Cir. 1991); Permian Corp. v. United States, 665 F.2d 1214, 1220-21 (D.C. Cir. 1981) (rejecting doctrine of selective waiver).

147. Hartford Fire Ins. v. Pure Air on the Lake Ltd., 154 F.R.D. 202, 211 (N.D. Ind. 1996).

148. Nancy Horton Burke, *The Price of Cooperating with the Government: Possible Waiver of Attorney-Client and Work Product Privileges*, 49 BAYLOR L. REV. 33, 62 (1997) (citing *In re* Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 844, 846-47 (8th Cir. 1988); Bowne, Inc. v. AmBase Corp., 150 F.R.D. 465, 481 (S.D.N.Y. 1993); Khandji v. Keystone Resorts Management, Inc., 140 F.R.D. 697, 699-700 (D. Colo. 1992); Chubb Integrated Sys., Ltd. v. National Bank, 103 F.R.D. 52, 67-68 (D.D.C. 1984)).

There is some precedent for selective or limited waiver in instances when an explicit agreement does not exist.[149] The party claiming the privilege must establish a factual record from the outset of the professional relationship.[150] This factual record should clearly indicate that the client has an expectation of privacy in the materials produced. Steps showing such an expectation include marking documents as privileged and making attempts to reach a confidentiality agreement.[151] A party may impliedly or involuntarily waive a privilege by inadvertently disclosing privileged communications or work-product to the government. This occurs, for example, in pretrial discovery when the target of a prosecution submits documents that are broader in scope than what is required by a subpoena.[152] Inadvertent disclosure may also occur while trying to cooperate with the government voluntarily, such as in response to a request for information.[153] The problem with inadvertent disclosure is that once the disclosure is made, the information cannot be taken back, so waiver tends to become automatic. The subjective intent of the client to maintain privacy is not determinative. Although courts have shied away from a strict approach, in most circumstances clients generally have an affirmative responsibility to protect against inadvertent disclosure.[154] Thus, when any document

---

149. *See* Diversified Indus. Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (en banc).

150. *See* Burke, *supra* note 148, at 60.

151. Burke suggests that a confidentiality agreement should contain the following nine elements: (1) the agreement be written in clear, unambiguous terms in a single document; (2) limit the disclosure to one specific governmental entity or subdivision; (3) the government agrees not to disclose to third parties, including other governmental entities; (4) the government affirmatively recognizes privileged status of information; (5) the government agrees not to assert waiver; (6) the government agrees to enforce the agreement in subsequent litigation; (7) quantify the harm that will result from waiver; (8) have the agreement governed by Eighth Circuit law; and (9) access is not permitted until the agreement is memorialized. Burke, *supra* note 148, at 64-67.

152. *See, e.g.*, Transamerica Computer Co. v. IBM Corp., 573 F.2d 646 (9th Cir. 1978) (using a circumstances test, the court held that although about 5800 pages were inadvertently disclosed, privileges still applied).

153. Some courts find waiver only when production is "voluntary" or in response to a request, not when production is "involuntary" or the result of a subpoena. *See, e.g.*, *In re* Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993); *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1369 (D.C. Cir. 1984).

154. Wesley M. Ayres, *Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege in Inadvertent Disclosure Cases*, 18 PAC. L.J. 59, 74 (1986) (noting that

production occurs, the attorney should oversee the process and create a record that demonstrates care has been taken to prevent the inadvertent disclosure of privileged documents. If any documents are inadvertently disclosed, the attorney should immediately act to protect the privilege by requesting the documents' return and/or making a motion in court.

VIII. VOLUNTARY DISCLOSURE

In cooperating with a governmental entity during a voluntary self-evaluation, a company likely will waive the attorney-client privilege, work product protection and the self-evaluation privilege, although as noted, there is some authority that the waiver can be limited as to third parties. This threat of waiver traditionally has provided a disincentive for companies to engage in self-critical analysis if they know abuses are occurring, or alternatively, to conduct only superficial audits. The threat of potential *qui tam* relators capitalizing on disclosable information also is a credible threat that limits voluntary disclosure.

The DHHS-OIG has issued a policy to encourage health care providers to combat health care fraud proactively by encouraging them to engage in self-disclosure.[155] By undertaking self-disclosure, the OIG submits, providers can ensure integrity in federal health care programs such as Medicare and can work cooperatively with the OIG to minimize the effect of problematic conduct. The self-disclosure protocol is designed to inform health care providers of the methodology for an effective investigative and audit working plan for instances of noncompliance.[156] By

---

the modern trend is away from the strict responsibility approach and more toward a circumstances or intent test); *see also* George A. Davidson & William H. Voth, *Waiver of the Attorney-Client Privilege*, 64 OR. L. REV. 637 (1986) (advocating the limitation of the inadvertent waiver doctrine due to the high litigation costs it imposes and the undercutting of the attorney-client privilege). At least one federal court recognizes the client's subjective intent as the standard for whether implied waiver has occurred as a result of inadvertent disclosure. Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 954-55 (N.D. Ill. 1982).

155. Publication of the OIG's Provider Self-Disclosure Protocol, 63 Fed. Reg. 58,399 (1998).

156. *Id.* at 58,400. A voluntary disclosure must reveal the nature and extent of the practice at issue. The report must identify the cause, the specific incident(s), the organizational part of the provider involved, any impact on the health, safety and

performing a self-disclosure, a provider may reveal everything from simple errors to outright fraud. Good citizenship aside, the real interest of the potential self-discloser of the findings of its audit to the OIG is that any potential liabilities will be mitigated and be reflected in a potential settlement agreement between the provider and the OIG.[157] If a disclosure is made in good faith, "the fact that a disclosing health care provider is already subject to Government inquiry (including investigations, audits or routine oversight activities) will not automatically preclude a disclosure."[158]

The disadvantage of self-disclosure is that providers must develop their own internal investigations or compliance programs to address the self-discovered issues if such a program does not already exist. The OIG also may refer the matter to the Justice Department for prosecution under civil or criminal statutes such as the FCA.[159] In such a case, even if originally prepared at the direction of attorneys and therefore subject to privilege, the testimony of the auditors, their work product and the self-assessment in general is subject to discovery and disclosure.

In any event, the attorney providing health care transactional advice or conducting an internal investigation of suspected fraud must be acutely aware that the ultimate confidentiality of his or her client communications may not be assumed, and this is not just because the government eventually might attempt to force their disclosure. There is an even greater likelihood that the client itself will make a voluntary disclosure.

IX. Can the Threat be Quantified?

The impact of recent prosecutions such as the *Anderson* and *Abbell* cases is pronounced, but the scope of the perceived governmental threat to privilege is still largely anecdotal. One is left with the question, then, of whether these recent cases in

---

welfare of beneficiaries, the time period during which the practice occurred, the corporate officials or other individuals who knew of the practice, and an estimate of the monetary impact on the federal health program. *Id.* at 59,401.

157. *Id.* at 58,400.

158. *Id.*

159. Publication of the OIG's Provider Self-Disclosure Protocol, 63 Fed. Reg. at 58,401.

which the government has exploded privilege with the crime-fraud grenade and then prosecuted lawyers are the vanguard of a great wave of such cases or whether they are more isolated in nature. A survey of reported cases is worthwhile, but it does not answer the ultimate question.

In order to gain what statistical knowledge might be provided by reported cases, we examined three types of cases: (1) cases involving attorneys being called before the grand jury or involving the crime-fraud exception; (2) cases involving health care in which assertions of privilege were decided; and (3) cases involving the advice-of-counsel defense. We conclude that there are enough of these cases to support the concerns of lawyers and clients alike that privilege is at risk, but we also must note that during the period examined through the present, the total number of such cases per year is not rising. At the same time, we note that our statistics cannot overcome anecdote because our universe of case decisions does not include the many decided cases that are unreported and the far larger number of cases that are never decided because they are settled. Nevertheless, the following three tables are instructive.

Table 1 provides data concerning the grand jury appearances of lawyers and the frequency with which assertion of the crime-fraud exception occurs. The data come from a Lexis search performed across the general federal library, GENFED. The NEWER file of GENFED is a comprehensive collection of case law from all federal courts since 1944. The file contains decisions from the Supreme Court, all circuit courts and all district courts. Excluded from the universe of cases in Table 1 are all unpublished opinions, cases not recommended for full-text publication, and decisions without published opinions.

Table 1
Grand Jury Appearances by Lawyers
And Invocation of the Crime Fraud Exception
in Federal Cases

Year	Total Cases	Attorney Testifies Before GJ	Percentage of Total Cases	Crime Fraud Claimed	Percentage of Grand Jury Cases
1998	43,416	51	0.12%	8	38.01%
1997	44,456	44	0.10%	5	11.36%
1996	42,558	35	0.08%	4	11.43%
1995	47,531	48	0.10%	4	8.33%
Total	177,961	178	0.10%	21	11.80%

Table 1 reveals that lawyers who represent clients in governmental investigations are rarely called to testify before grand juries. From 1995 though 1998, less than 0.20% of all federal cases involved lawyers testifying before grand juries. When lawyers' testimony is sought, prosecutors frequently invoke the crime-fraud exception as a reason for the lawyers to testify. On average, from 1995 to 1998, the crime-fraud exception was invoked in 11.80% of cases. The frequency with which prosecutors use the crime-fraud exception appears to have significantly increased in 1998 to 38%, an increase of about 30% from 1995. It is unclear whether this trend will continue in future grand jury investigations.

Table 2 provides data concerning health care fraud cases where a testimonial privilege, such as the attorney-client privilege, was a decided issue. The data result from a Lexis search performed across the federal case law within the HEALTH Lexis library. The search file of FEDCTS within the HEALTH library is a comprehensive collection of health care case law from all federal courts. The file contains decisions from the Supreme Court, all circuit courts and all district courts. The HEALTH library is developed by Lexis in conjunction with the American Health Lawyers Association, and it addresses broad health care issues as they apply to providers, insurers, regulators and suppliers. Excluded from the universe of cases in Table 2 are all unpublished opinions, cases not recommended for full-text publication, and decisions without published opinions.

Table 2
Federal Health Care Fraud Cases
Where Privilege was a Decided Issue

Year	Total Cases	Privilege	Percentage of Total Cases	Fraud Cases	Percentage of Privilege Cases
1998	30,855	3,162	10.25%	487	15.40%
1997	32,188	3,435	10.67%	535	15.57%
1996	30,899	3,316	10.73%	533	16.07%
1995	35,587	3,209	9.01%	531	16.50%
Total	129,539	13,122	10.13%	2086	15.89%

Table 2's data result from an analysis of cases in the FEDCTS file. First, the universe of cases was limited to a specific year such as 1998 and to published cases. This universe was then restricted to cases where privilege was a decided issue, and then it was further restricted to health care cases where fraud, self-referral or kickback was an issue.

Table 3 provides data concerning the invocation of the advice-of-counsel defense or the "self-critical evaluation" privilege and the frequency with which assertion of the defense of privilege occurs. The data result from a Lexis search performed across the general federal library, GENFED, as previously described.

Table 3
Invocation of the Advice of Counsel Defense
in Federal Cases

Year	Total Cases	Advice of Counsel Defense	Percentage of Total Cases
1998	43,416	468	1.08%
1997	44,456	516	1.16%
1996	42,558	461	1.08%
1995	47,531	512	1.08%
Total	177,961	1957	1.10%

Table 3 reveals that the advice-of-counsel defense is not frequently asserted in federal courts. Only 1.10% of cases over the past four years, or 1957 times out of 177,961 total cases, exhibit some form of the defense. Furthermore, the trend over the past four years is flat. The defense is not raised more frequently today than in the past. Congress has responded to the health care industry's concerns about potential prosecutorial abuses by asking the General Accounting Office ("GAO") to review the FCA as applied to claims in federal health care programs and to audit the information that the DOJ and OIG use to bring FCA cases against hospitals in the 72-Hour Window Project and Lab Unbundling Project.[160] In its report, the GAO found that with respect to the 72-Hour Window Project, the DOJ had sent hospitals in Pennsylvania letters of notice of "total potential financial exposure through civil prosecution under the FCA."[161] The DOJ based its decision of which hospitals to target on a general claims data audit performed by the OIG.[162] The DOJ sent additional letters to hospitals throughout the country based on the statistical probability of improper billing, not specific factual findings of knowingly submitting false claims.[163] Rather than face prosecution, most hospitals settled, even though many perceived that the prosecutions were coercive and unfounded. The DOJ conducted the Lab Unbundling Project in a similar manner, with the initial letters going to hospitals in Ohio.[164]

During the GAO's audit, the DOJ issued Guidance to all U.S. Attorneys in order to ensure that the national initiatives did not fail to "recognize the particular facts and circumstances of an individual case."[165] This Guidance instructs prosecutors to verify the accuracy of false claims as well as other evidence establishing the existence of false claims, to conduct investigations including the interviewing of witnesses, and to evaluate

---

160. GENERAL ACCOUNTING OFFICE, MEDICARE: APPLICATION OF THE FCA TO HOSPITAL BILLING PRACTICES (1998).

161. *Id.* at 8.

162. *Id.*

163. *Id.*

164. *Id.* at 10-15.

165. Memorandum from Eric H. Holder, Jr., Deputy Attorney General to all U.S. Attorneys, *Guidance on the Use of the False Claims Act in Civil Health Care Matters* (1998) [hereinafter *Guidance*].

whether the target hospital had knowledge of submitting a false claim.[166] The DOJ established an oversight working committee to ensure that prosecutorial decisions were made consistent with the Guidance. U.S. Attorneys were also instructed to use contact letters in national initiatives to inform target hospitals that they were under investigation.[167] The DOJ issued further memoranda to U.S. Attorneys to emphasize the importance of following the Guidance[168] and of making prosecutorial decisions in a "fair and even-handed manner."[169] After a six-month internal review, the DOJ concluded that the Guidance was "extremely effective" in addressing any ethical concerns and that "major revisions [to the Guidance] are not necessary at this time."[170] In discussing the Guidance before the American Hospital Association, Deputy Attorney General Eric Holder noted that "[w]hile the Attorney General and I expect our prosecutors to be aggressive, we must at all times be fair and even-handed."[171] Mr. Holder also noted that just as the defense industry had sought legislative relief from FCA prosecution in the 1980s and failed to receive it, the hospital industry should not expect Congress to act to curb U.S. Attorneys' prosecutions of health care fraud. Rather, Mr. Holder advised the hospital industry to embrace compliance policies and procedures. Congressional concerns remain, however. In passing the budget for fiscal year 1999, Congress mandated that the GAO monitor the DOJ's and all United States Attorneys' compliance with the June 3, 1998 Guidance.[172] Congress also mandated that the GAO submit reports on such compliance to Congress by February 1, 1999 and again by August 2, 1999. In its August report, the GAO found that while the DOJ had made progress in implementing the Guidance, the "DOJ's process for assessing compliance may be superficial."[173] United States Attorneys continue to make FCA

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Guidance*, *supra* note 165.
171. U.S. Deputy Attorney General Eric H. Holder, Jr., Address to the American Hospital Association (last modified Feb. 1, 1999) <http://www.usdoj.gov/dag/speech/holderahaspeech.htm>.
172. Section 118 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681 (1999).
173. GENERAL ACCOUNTING OFFICE, MEDICARE FRAUD AND ABUSE: DOJ'S IMPLE-

allegations without analyzing claims data to determine if prosecution was warranted.[174] The U.S. Attorneys asked target hospitals to volunteer to conduct self-audits.[175] "When some hospitals did not promptly decide whether to volunteer for self-audits, they were warned that the government would seek the full penalties of the FCA if the office did the audits itself."[176] A year after the investigation commenced, officials determined that approximately one fourth of the hospitals should not have been pursued for FCA violations.[177]

X. ETHICAL IMPLICATIONS

As the *Abbell* and *Anderson* cases show, the threat of the crime-fraud exception often places private attorneys in a position of having to decide whether to breach the duty of confidentiality to their clients in order to respond to grand jury subpoenas.[178] In order to address this dilemma, the Justice Department has adopted internal procedures to approve the use of subpoenas against attorneys.[179] These procedures strive to strike a balance between the fair administration of justice and constitutional rights. These procedures are non-enforceable guidelines, however, and issuing a subpoena is still at a prosecutor's discretion. In the eyes of the court, the *Anderson* case represented an actionable abuse of that discretion by a rogue prosecutor. Furthermore, the procedures apply only to materials considered to be privileged; if a prosecutor can show that the crime-fraud excep-

---

MENTATION OF FCA GUIDANCE IN NAT'L INITIATIVES VARIES 8 (1999); *see also* GENERAL ACCOUNTING OFFICE, MEDICARE FRAUD AND ABUSE: EARLY STATUS OF DOJ'S COMPLIANCE WITH FCA GUIDANCE (1999).

174. DOJ'S IMPLEMENTATION OF FCA GUIDANCE IN NAT'L INITIATIVES VARIES, *supra* note 173, at 11 (discussing the Laboratory Unbundling National Initiative).

175. *Id.* at 13.

176. *Id.*

177. *Id.*

178. Exceptions to the duty of confidentiality exist. Under Model Rule of Professional Conduct 1.6 cmt. 20 (1998), the "lawyer must comply with the final orders of a court or other tribunal . . . requiring the lawyer to give information about the client." The commentary also indicates that a lawyer may be obligated to disclose information about the client. MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 20.

179. EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-2.161(a) (1984).

tion may exist, the procedures do not apply.[180]

To address this uncertainty, the private bar lobbied for the passage of Rule 3.8(f)[181] to the Model Rules of Professional Conduct in 1990. The American Bar Association ("ABA") House of Delegates dropped the rule in 1995, however, in the wake of controversy about attempting to use ethical rules to micro-manage prosecutors.[182] The ABA concluded that the representational dilemma should be solved by either a rule of procedure or by case law.[183]

Similarly, the Supreme Court has taken the position that "[b]ecause the grand jury is an institution separate from the courts," the federal courts should not interfere with the grand jury process and engage in supervision of prosecutors.[184] Furthermore, "Congress is free to prescribe" any duty prosecutors may have to disclose exculpatory evidence to a grand jury or any other prosecutorial duty.[185] Thus, a legislative solution must be found to address any prosecutorial abuses.

---

180. Max D. Stern & David A. Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1817-20 (1988).

181. Model Rule of Professional Conduct 3.8(f) states:

> The prosecutor in a criminal case shall:
> (f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
> (1) the information sought is not protected from disclosure by any applicable privilege;
> (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
> (3) there is no other feasible alternative to obtain the information.

This Model Rule is a less strict version of the voluntary procedures issued by the DOJ in U.S. ATTORNEYS' MANUAL, *supra* note 179, § 9-2.161(a).

182. GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 3.8:701 (2d ed. Supp. 1997).

183. *Id.* Hazard & Hodes note that scholarly commentary has also been unfavorable to Rule 3.8(f) in grand jury proceedings because rules of ethics should not interfere with the grand jury process. *Id. See, e.g.*, Roger Cramton & Lisa Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992); Susan Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992); Fred Zacharias, *A Critical Look at Rules Governing Grand Jury Proceedings of Attorneys*, 76 MINN. L. REV. 917 (1992).

184. United States v. Williams, 504 U.S. 36, 47 (1992).

185. *Williams*, 504 U.S. at 55.

XI. CONCLUSION

Because of the complexity of the laws governing health care reimbursement, the multilayer payer-payee relationships that often lead to confusing and contradictory interpretations of laws and regulations, and the ineluctable governmental mandate to attempt to control health care costs by attacking fraud through investigation and litigation, many health care providers find themselves to be subjects and targets of fraud investigations, prosecutions and *qui tam* actions. The health care attorney is caught in the middle of this complexity and must come to realize that the traditional expectations of near absolute confidentiality of attorney advice and communications no longer are assured. The health care attorney now must operate under the assumption that his or her advisory and investigative conduct will be transparent, either because the government may succeed in forcing its disclosure or, more likely, because the client itself will make voluntary disclosure as a defense in litigation or to mitigate sanctions through cooperation. There are occasions when the attorney and client become virtual or actual adversaries, as was the case in *Anderson*. In some rare cases, even where the attorney stands behind his or her advice in a complex, uncertain area of health care reimbursement law, the attorney may be threatened with prosecution as a co-conspirator with the client or as an obstructer of justice if the attorney does not make negative disclosures about the client's statements and conduct.

Given the nature of the public mandate to fight fraud and court decisions narrowing an already disfavored privilege, there is little chance that the erosion of privilege will be abated. Health care lawyers and other attorneys should act accordingly.