INTERNAL INVESTIGATIONS, GOVERNMENT INVESTIGATIONS, WHISTLEBLOWER CONCERNS: TECHNIQUES TO PROTECT YOUR HEALTH CARE ORGANIZATION

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I. INTRODUCTION

The recent rash of federal and state government-initiated investigations of health care fraud,[1] including those against some of the nation's largest health care providers, has heightened the health care industry's sensitivity to the liabilities associated with participation in federal health care programs. The phenomenon of a health care organization being subjected to the scrutiny of a government investigation is more frequent today than at any time in the past and includes organizations that historically viewed themselves as compliant with federal and state health care fraud and abuse laws. Accordingly, a response and strategy for those organizations subjected to the disruptions and dislocations associated with a government investigation, or the potential for such scrutiny and liability, is very much on the

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1. *See New Medicare Coverage Process Can Help Improve Compliance*, MEDICARE COMPLIANCE, May 6, 1999, at 1.

Year	*Caseload*	*# of Agents*	*# of Indictments*	*# of Convictions*
1992	571	112	409	116
1994	1,500	225	295	311
1996	2,200	290	679	475
1998	2,801	420	619	469

Growth in FBI Health Fraud Enforcement, MEDICARE COMPLIANCE *supra*, at 7 (citing statistics presented at a recent Health Care Compliance Association ("HCCA") conference that detail the significant rise in health care fraud cases).

minds of providers and suppliers in the health care industry. The prospect of an organization conducting a self-evaluative internal investigation of those matters under scrutiny by the government, or those matters which come to the attention of an organization through its corporate compliance program, is a key component of any response strategy to this heightened government scrutiny and liability for violations of the health care fraud and abuse laws.

The initiation of an internal investigation of a health care organization's potential fraud and abuse matters as part of such a strategy, however, does not come without careful consideration, equally well thought-out methods and procedures, and an appreciation of the issues and pitfalls involved in this type of undertaking. There are certain obvious advantages to undertaking an internal investigation of an organization, whether it is after a government investigation has been launched or in response to an internal identification of a potential fraud and abuse matter. If the internal investigation is conducted to examine suspected wrongdoing on behalf of the organization in response to a government inquiry, the company may be able to convince authorities that the internal investigation will be conducted in a credible and objective way. This may result in the government foregoing a full-blown separate government investigation, for the time being, so that the government may review the results of the organization's internal investigation. An internal investigation could mean far less disruption to the organization than if it were subjected to a direct government investigation with search warrants and subpoenas. Another advantage of conducting an internal investigation is that the health care organization has the ability to frame the issues and to define the scope of the investigation. Consequently, the organization may more fully explore and develop any exculpatory evidence that the government may not pursue aggressively in its own investigation. These types of benefits flow from an internal investigation, regardless of whether the investigation is conducted in response to a government investigation or on the organization's own accord.

Many organizations initiate internal investigations pursuant to their corporate compliance programs. Compliance programs for organizations can take many forms, but they are generally

designed to ensure that organizations comply with all applicable laws and regulations and to provide a vehicle by which the organization can learn of, investigate and correct potential violations of those laws and regulations, presumably before such information comes under government scrutiny.[2] The implementation of corporate compliance programs has become more frequent and, in fact, may be a necessity in view of increasing health care fraud liability.

In recent years, health care providers have seen bold initiatives by state and federal governmental agencies to ensure compliance with health care-related regulatory schemes. Such initiatives include requiring organizations to agree to implement a corporate compliance program as part of any settlement with the government of a civil or criminal fraud matter. As a result, health care organizations have responded proactively by developing corporate compliance programs that include a formalized plan for conducting internal investigations.

In addition to identifying and preventing illegal and unethical conduct, the presence of an effective compliance program may influence a prosecutor's determination of whether to file criminal charges against a corporation or proceed with a civil lawsuit against the organization.[3] A corporate compliance pro-

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2. DAVID D. QUEEN & ELIZABETH E. FRASHER, DESIGNING A HEALTH CARE CORPORATE COMPLIANCE PROGRAM 1 (1995).

3. Those organizations which have a compliance plan in place may also receive favorable treatment under the Federal Sentencing Guidelines ("Sentencing Guidelines"). Thomas F. O'Neil III & Adam H. Charnes, *The Embryonic Self-Evaluative Privilege: A Primer for Health Care Lawyers*, 5 ANNALS HEALTH L. 33 (1996); QUEEN & FRASHER, *supra* note 2, at 1-3. The Sentencing Guidelines provide for reductions in the criminal sentence of an organization with a formalized program designed to detect and prevent violations of the law. *Id. See also* U.S. SENTENCING GUIDELINES MANUAL §§ 8C2.5(f), (g) (1996). To receive the benefits of a compliance program, such a program must be designed and implemented to be "effective" as that concept is used in the Sentencing Guidelines for organizations. These Sentencing Guidelines set forth seven standards for effective compliance programs. These standards are: 1) the organization must establish compliance standards and procedures reasonably capable of reducing improper conduct; 2) specific high-level individuals within an organization should be assigned the overall responsibility to oversee compliance by the organization's employees with the standards and procedures; 3) the organization must use due care not to delegate substantial discretionary authority to individuals who have a propensity to engage in illegal activities; 4) the organization must take steps to communicate effectively its standards and procedures to all employees and other agents; 5) the organization must take reasonable steps to achieve compliance with the standards by utilizing monitoring and auditing systems

gram may also reduce the extent to which the government can attribute criminal intent to a corporation. It also constitutes excellent public relations in that it concretely demonstrates to the organization's employees and the community at large the organization's strong commitment to honest and responsible conduct. This, in turn, helps to improve employee morale because employees feel that they are valued within the organization and believe that they are working for an organization that takes compliance seriously.

In addition to the benefits listed above, a corporate compliance plan can also protect a health care corporation's directors from civil liability stemming from a shareholder's derivative lawsuit.[4] In *In re Caremark International*,[5] the shareholders of a publicly traded health care corporation filed a shareholder's derivative action against the corporation's directors to recover losses resulting from health care fraud crimes committed by the corporation.[6] The shareholders alleged that the directors failed to monitor adequately the corporation's activities and that the criminal violations could have been avoided with proper monitoring.[7] When the parties proposed a settlement, the Delaware Chancery Court reviewed the terms of the settlement agreement under Delaware law to ensure fairness for the corporation and its absent shareholders.[8] In its decision, the court noted that "relevant and timely information is an essential predicate for satisfaction of the board's supervisory and monitoring role under . . . Delaware General Corporation Law."[9] After reviewing the history of Delaware law concerning the directors' duty to monitor corporate activities, the court concluded that directors must assure themselves that "information and reporting systems

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and implementing a reporting system whereby employees can report suspect conduct within the organization without fear of retribution; 6) the standards must be consistently enforced with appropriate disciplinary mechanisms; and 7) after an offense has been detected, an organization must take reasonable steps to respond appropriately and to prevent further similar offenses. QUEEN & FRASHER, *supra* note 2, at 1-3.

4. *In re* Caremark Int'l, 698 A.2d 959, 971-72 (Del. Ch. 1996).
5. 698 A.2d 959 (Del. Ch. 1996).
6. *In re Caremark Int'l*, 698 A.2d at 960.
7. *Id.* at 964.
8. *Id.* at 966.
9. *Id.* at 970.

exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance."[10]

Thus, if a corporation's directors do not have a timely information and reporting system, such as one established pursuant to a corporate compliance plan, the directors could be held civilly liable if their corporation suffers financial loss, under the theory that they failed to monitor corporate activities. Consequently, if the threat of criminal liability seems too remote for most corporate directors, perhaps this threat of civil, personal liability is reason enough for an organization to adopt a corporate compliance plan. An effective corporate compliance plan must have the capacity to investigate and evaluate reports of activities which could give rise to liability under the health care fraud and abuse laws.

The following section of this Article is a review of the factors that should be taken into consideration when conducting an internal investigation of an organization related to potential violations of health care fraud and abuse laws. These factors should be considered, regardless of whether there is a government investigation or whether there is reported activity through an organization's compliance program. This section also includes some insights of the author, gained through investigative experiences.

II. MANAGING AN INTERNAL INVESTIGATION

A. Scope and Accountability

Initially, the health care organization must determine who will conduct the internal investigation—whether it will be outside counsel, an independent consulting firm, or a combination of the two. The use of a separate, independent investigation team may help in bolstering the government's confidence that

10. *Id.*

the organization will conduct a credible investigation. Additionally, it is advisable to separate the roles and tasks of those involved in investigating the organization so that those gathering the facts are not the same as those individuals assessing and making legal conclusions regarding those facts. It is important, as well, that those conducting the investigation do not end up in a situation where they are reporting the results to the very individuals within the company whom the government may believe are involved in the suspect activities.

For those charged with conducting the investigation, an initial discussion with the organization is necessary to establish the time frame of the investigation, the resources required to complete the investigation, the level of cooperation by the organization in gathering documents and making employees available for interviews, the types of experts brought in to address the issues, and how much the investigation may disrupt the day-to-day operations of the organization. Typically, these investigations take anywhere from three months to two years to complete, depending on a multitude of factors. Trying to complete an investigation in less time than the organization may prefer may not yield as complete and credible a result as the organization or counsel may want.

The most important initial consideration to be taken into account when directing and conducting an internal investigation of an organization is a clear understanding regarding the scope, method, accountability and reporting among the law firm directing the investigation, the consultants conducting the investigation, and the client organization authorizing the internal investigation. This is particularly important since those conducting an internal investigation will not be the most popular visitors with members of the organization, nor will their task necessarily result in positive findings and recommendations for the organization and/or key individuals in the organization. The issues that should be raised in discussing the scope of the internal investigation should include not only the subject matter to be addressed, but also to whom the law firm and investigative team will be accountable within the client organization.

The investigative team could be responsible for reporting to a special committee of the Board of Directors, the in-house counsel for the organization, and/or selected members of the man-

agement team. This assessment will necessarily require a determination of the degree of independence and control that will be exerted by management over the internal investigation. This choice obviously has implications for the credibility and effectiveness of the internal investigation. The degree of credibility of the internal investigation also could have an extremely important impact on the level of cooperation and credibility which the organization may have with the government entities investigating the potential violations of the health care fraud and abuse laws. Ideally, a separate committee of an organization's Board of Directors should be established to which investigators report their findings.

An additional issue that should be discussed with the organization at the outset is the extent to which the internal investigative team will develop the facts and proffer conclusions based on those facts. At a minimum, an investigation must collect the relevant facts associated with the issues within the scope of the investigation. If the company and the government are conducting simultaneous investigations, the scope of the company's investigation should, to the extent possible, mirror that of the government. Experienced counsel or consultants can get a good idea of the issues the government is focusing on by reviewing search warrants and subpoenas and even having informal conversations with the government investigators. The next question will be whether conclusions of law should be drawn from those facts or whether they should be left to other parties and perhaps even to other outside or inside counsel and/or the management of the organization. This issue can be tricky and is not without risks, particularly because it relates to a strategy with federal or state law enforcement authorities. It should be carefully considered at the outset and constantly reassessed during the course of the internal investigation.

B. Matters of Privilege

The law firm directing the internal investigation needs to set up and document the investigative process to maximize the application of the attorney-client, work product, and self-evaluative privileges in connection with the facts gathered during the investigation. This does not mean that the conduct of the

internal investigation should be utilized to otherwise attempt to cloak documents which were previously not privileged, but it does mean carefully tracking new information that the investigative team gathers and ensuring that it will be privileged and confidential. An internal investigation of this kind also has to take into account the very real possibility that findings and conclusions may be disclosed to the government at a later date in the context of resolution of issues concerning potential violations of the health care fraud and abuse laws. The very fact that such a disclosure may be contemplated requires acknowledging that information gathered during the internal investigation may ultimately be shared with a third-party, which could result in waiver of the attorney-client and work product privileges in other parallel civil or criminal proceedings. The possibility of waiver can be particularly problematic when parallel civil litigation arises, which is often the case when publicly traded companies are involved.

The issue of privilege is also implicated when individuals can be held personally liable for violations of health care fraud and abuse laws alleged against the organization. A decision may have to be made at an early stage of the investigation regarding whether to enter into joint defense arrangements between the organization and such individuals. The decision should also consider how a joint defense agreement may limit discretion on the part of the organization regarding potential disclosure of information gathered during the internal investigation to the government authorities, and it should consider how a joint defense agreement may be viewed by those government authorities.

1. Attorney-Client Privilege.—An important part of an internal investigation is preserving the attorney-client privilege. The attorney-client privilege preserves the confidentiality of communications between the attorney and client, where the purpose of the communications is to provide legal services and where the communications remain confidential.[11] In order for the attor-

11. David W. O'Brien, *Managing A Government Investigation*, INSIGHT, Apr. 3, 1998, at 12 (citing United States v. Lawless, 709 F.2d 485 (7th Cir. 1983); Admiral Ins. v. United States Dist. Court, 881 F.2d 1486 (9th Cir. 1989)).

ney-client privilege to attach, the investigation should be conducted by or at the direction of the organization's attorneys.[12] If the investigation is not conducted by or at the direction of the company's attorneys, or if the persons interviewed are not company employees, whether past or present, the attorney-client privilege is unlikely to attach. Those persons assisting in the investigation should be employed through, or supervised by, the organization's attorneys so that there is not an inadvertent waiver of the privilege.[13]

Accordingly, it is advisable that the legal team receive periodic updates as to the progress of the investigative team. This ensures that the client organization can be kept abreast of the status of the investigation. Frequent updates are recommended for large investigative matters. A formal presentation of facts to the client can be made while the investigation is in progress, or an informal approach can be utilized, depending on the preference of the parties. Whether updates are to be in writing or orally presented may depend on the extent to which such documents are potentially discoverable by third party litigants.[14] The legal team must also make certain decisions for the investigative team, such as whether to have one or two people present during interviews, who should take notes, whether those notes should be memorialized in written interview memoranda, and if so, whether the content of the interview should be summarized or prepared including verbatim statements.

The purpose behind the attorney-client privilege is to allow for unfettered communications between the client and attorney in the rendition of legal services.[15] A consequence of the privilege is that it may withhold potentially relevant information from the fact finder.[16] Because of this, the privilege is limited so that it "does not apply where the client consults an attorney to further a crime or fraud."[17] The purpose behind this "crime-fraud" exception is to "assure that the 'seal of secrecy,' between

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12. *See generally* Upjohn v. United States, 449 U.S. 383 (1981).
13. *Upjohn*, 449 U.S. 383.
14. *See* discussion *supra* p. 8.
15. *In re* Grand Jury Subpoenas, 906 F.2d 1485, 1492 (10th Cir. 1998).
16. United States v. Zolin, 491 U.S. 554, 562 (1989).
17. *In re* Grand Jury Proceedings, 857 F.2d 710, 712 (10th Cir. 1988) (citation omitted).

lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime."[18] The attorney-client privilege must then be forfeited "where the client sought the services of the lawyer to enable or aid the client to commit what the client knew or reasonably should have known to be a crime or fraud."[19] Before the government may invoke the crime-fraud exception, there must be a *prima facie* showing that the lawyer's assistance was sought to enable the client to commit a crime or fraud.[20] The exception does not apply if the assistance is sought only to disclose past wrongdoing,[21] which is necessarily the intent behind an internal investigation: to disclose past wrongdoing and correct the problem. However, the exception "does apply if the [lawyers'] assistance was used to cover up and perpetuate the crime or fraud."[22] The line between counseling a client to stay within the law and assisting in covering up or perpetuating a crime or fraud can be very thin indeed, and therefore, great care and experience should be used in such matters. As a result, counsel assisting in an internal investigation may no longer rely with total confidence on the most frequently invoked protections, the attorney-client privilege and the work product doctrine, particularly in light of *In re Grand Jury Subpoenas*,[23] a recent case which involved the indictment of two Kansas City attorneys who advised their hospital client in connection with a health care transaction.[24]

In *In re Grand Jury Subpoenas*, the Tenth Circuit affirmed the district court's application of the crime-fraud exception to the attorney-client privilege in order to compel the testimony of two attorneys who had allegedly drafted sham consulting con-

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18. United States v. Reeder, 170 F.3d 93, 106 (1st Cir. 1999) (quoting *Zolin*, 491 U.S. at 563).

19. United States v. Rakes, 136 F.3d 1, 4 (1st Cir. 1998).

20. *See Reeder*, 170 F.3d at 106; *In re* Grand Jury Subpoenas, 144 F.3d 653, 660 (10th Cir. 1998); United States v. De La Jara, 973 F.2d 746, 748 (9th Cir. 1992).

21. *Zolin*, 49 U.S. at 562.

22. *In re Grand Jury Subpoenas*, 144 F.3d at 660.

23. 144 F.3d at 653.

24. *In re Grand Jury Subpoenas*, 144 F.3d at 656-57; United States v. Anderson, No. 98-20030-01-JWL, 1999 U.S. Dist. LEXIS 12229, at *6-7 (D. Kan. July 21, 1999).

tracts for their client, a hospital under investigation by a federal grand jury.[25] According to the government, "two physicians referred Medicare patients to the hospital in return for approximately $2.2 million in remuneration under sham consulting contracts."[26] The court found that the government had established a *prima facie* case that the hospital had engaged in criminal or fraudulent conduct, which was furthered by the aid of the attorneys.[27] The two attorneys were subsequently indicted for health care fraud as a result of their work for the hospital.[28] Ultimately, the district judge acquitted the attorneys, based on his findings that they relied in good faith on their client's representations and they used their best efforts to provide sound advice in an ambiguous area of the law.[29]

The indictment of the attorneys in *In re Grand Jury Subpoenas* was unprecedented in the health care field. The danger for health care organizations as a result of *In re Grand Jury Subpoenas* is that documents and communications between the organization and its attorneys concerning an internal investigation, once thought to be protected by the attorney-client and work product privileges, may be subject to subsequent disclosure should the crime-fraud exception be applied.

2. Work Product Privilege.—The work product privilege, set forth in Rule 26 of the Federal Rules of Civil Procedure, protects documents that are prepared "in anticipation of litigation or for trial."[30] These materials are not available through discovery, unless the party seeking the documents demonstrates a "substantial need" for them and cannot obtain their equivalent without "undue hardship."[31] Notes and other documents prepared

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25. *In re Grand Jury Subpoenas*, 144 F.3d at 656.

26. Gabriel L. Imperato, *Fraud Conviction Offers Lessons for Health Care Providers and Counsel*, LEGAL BACKGROUNDER, Sept. 3, 1999, at 1-4 (discussing *Anderson*, 1999 U.S. Dist. LEXIS 12229).

27. *In re Grand Jury Subpoenas*, 144 F.3d at 657.

28. *Anderson*, 1999 U.S. Dist. LEXIS 12229, at * 6-7.

29. Imperato, *supra* note 26; *Anderson*, 1999 U.S. Dist. LEXIS 12229, at *7. *But see In re* Grand Jury Proceedings, 102 F.3d 748, 749-51 (4th Cir. 1996) (applying crime-fraud exception where client used attorneys, without their knowledge, to misrepresent or conceal what the clients had done).

30. FED. R. CIV. P. 26(b)(3).

31. *Id.*

by or for the organization's attorneys as a result of an internal investigation are protected, but only if the work is done in anticipation of litigation.[32] This privilege is important in that it provides protection for the notes of an attorney regarding interviews with the organization's former employees who are not subject to the attorney-client privilege.[33] Such notes have an added element of protection because there is an absolute protection for the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."[34] The key to this protection is that the work must be performed in anticipation of litigation. If the internal investigation is conducted in connection with a government investigation, the privilege may apply, but if it is part of a routine corporate compliance program, the gathering of the facts is arguably not prepared in anticipation of litigation, thereby undermining the application of the privilege.

3. Self-Evaluative Privilege.—The self-evaluative privilege was first recognized in *Bredice v. Doctors Hospital Inc.*,[35] where the court held that minutes of a hospital staff meeting regarding ways to improve patient care were protected from discovery.[36] The purpose behind the privilege is to encourage the parties to "engage in candid self-evaluation without fear that such criticism will later be used against them."[37] The privilege requires that certain criteria be present before it will be recognized:

> First, the information must have *resulted from* a critical self-analysis performed by the party seeking the protection. Second, there must be a strong public interest in promoting the "free flow" or exchange within the entity of the class of information that the party is seeking to protect. Third, the party invoking the privilege must demonstrate that the "flow" would cease if the class of information were discoverable.[38]

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32. *See In re* Grand Jury Subpoena Dated July 13, 1979, 478 F. Supp. 368, 374 (E.D. Wis. 1979) (citations omitted).

33. *In re Grand Jury Subpoena*, 478 F. Supp. at 374.

34. FED. R. CIV. P. 26(b)(3).

35. 50 F.R.D 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

36. *Bredice*, 50 F.R.D at 251.

37. Reich v. Hercules, Inc., 857 F. Supp. 367, 371 (D.N.J. 1994).

38. O'Neil & Charnes, *supra* note 3, at 37 (quoting Dowling v. American Haw. Cruises, Inc., 971 F.2d 423, 425-26 (9th Cir. 1992) (emphasis in original)).

Some courts have added a fourth requirement, that the document(s) was prepared with the expectation that it would remain confidential and that, in fact, it remained confidential.[39] This additional fourth requirement may simply mean that the privilege has not been waived by the party seeking the protection, similar to the waiver standard required under the attorney-client privilege.[40] It is important to note that recognition of the privilege is not uniform. This is true even among federal courts addressing the privilege in similar factual contexts.[41]

In courts where the privilege is recognized, the privilege may be overcome if the party seeking the information can demonstrate sufficient need for the materials.[42] Some courts have required a showing of extraordinary necessity or "exceptional necessity" by the party seeking the information before disclosing the privileged material.[43] Other courts apply a more lenient balancing test to determine whether other interests outweigh those interests underlying the self-evaluative privilege.[44] Under this more lenient approach, courts have recognized three rationales for applying the balancing test. First, some courts focus on a party's need for the information, looking specifically to whether there is any other source for the information and whether the party seeking the information will be prejudiced if the information is not disclosed or available through another source.[45] Second, some courts have held that certain public policies outweigh the interests that are served by the privilege.[46] And third, still other courts have held that the public policies advanced by the

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39. *See, e.g., Dowling*, 971 F.2d at 426.

40. O'Neil & Charnes, *supra* note 3, at 37 (citing EDNA S. EPSTEIN & MICHAEL M. MARTIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE 59-82 (A.B.A. 2d ed. 1989)).

41. O'Neil & Charnes, *supra* note 3, at 36.

42. *See* Robert J. Bush, *Stimulating Corporate Self-regulation—The Corporate Self-Evaluative Privilege: Paradigmatic Preferentialism or Pragmatic Panacea*, 87 NW. U. L. REV. 597, 645 (1993).

43. *See, e.g.*, Mewborn v. Heckler, 101 F.R.D. 691, 692-93 (D.D.C. 1984) (citing Bredice v. Doctors Hosp. Inc., 50 F.R.D. 249, 250 (D.D.C. 1970)).

44. *See, e.g.*, Harding v. Dana Transp. Inc., 914 F. Supp. 1084, 1100 (D.N.J. 1996); Hardy v. New York News, Inc., 114 F.R.D. 633, 641-42 (S.D.N.Y. 1987).

45. *See, e.g.*, Todd v. South Jersey Hosp. Sys., 152 F.R.D. 676, 683 (D.N.J. 1993).

46. *Todd*, 152 F.R.D. at 683.

laws themselves outweigh the interests underlying the privilege.[47] Arguably, the public policy behind the Social Security Act, particularly in providing assistance to the elderly and financially needy through Medicare and Medicaid, may outweigh the interest in protecting the privilege.

As with the attorney-client and work product privileges, it is important to remember that the underlying facts in an internal audit or investigation are not protected by the self-evaluative privilege. The self-evaluative privilege covers only the analysis and recommendations resulting from the internal investigation.[48] Also unprotected are any documents created independently from the evaluation but reviewed during the audit or investigation. To prevent the disclosure of documents, "factual discussions in a written self-evaluative report should be interwoven with analysis and recommendations to the extent possible."[49]

Some courts have held that the privilege may not be asserted against the United States in the course of civil litigation[50] and in administrative proceedings to enforce subpoenas resisted on the basis of the privilege.[51] Such decisions may result in the privilege only being applicable in private causes of action and against a potential whistleblower if the government does not intervene. One court has held, however, that the privilege is not applicable in *qui tam* actions.[52] In short,

> [T]he courts have refused to permit parties to use the self-evaluative privilege to thwart federal agencies' ability to obtain documents otherwise within their subpoena power. This restriction obviously severely reduces the utility of the privilege to

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47. *See, e.g.*, Tharp v. Sivyer Steel Corp., 149 F.R.D. 177, 184 (S.D. Iowa 1993); Morgenstern v. Wilson, 133 F.R.D. 139, 142 n.3 (D. Neb. 1990).

48. *In re* Crazy Eddie Sec. Litig., 792 F. Supp. 197, 205 (E.D.N.Y. 1992).

49. O'Neil & Charnes, *supra* note 3, at 39.

50. Federal Trade Comm'n v. TRW, Inc., 628 F.2d 207, 210 (D.C. Cir. 1980) (citations omitted).

51. Reich v. Hercules, Inc., 857 F. Supp. 367, 371 (D.N.J. 1994) (citations omitted).

52. *See* United States *ex rel.* Falsetti v. Southern Bell Tel. & Tel. Co., 915 F. Supp. 308, 313 (N.D. Fla. 1996).

> businesses—such as health care entities—that operate in industries heavily regulated by the federal government.[53]

Indeed the government has numerous occasions for self-evaluative review in connection with regulatory compliance.

C. Managing the Organization's Expectations Concerning an Internal Investigation

Another critical aspect of any internal investigation is defining the organization's expectations and managing those expectations as the investigation continues. There should be an understanding between the investigative team and the organization about the time frame for completing the investigation and the resources necessary to do so within that time frame. There should also be an understanding about what types of experts may need to be brought in during the course of the investigation, for gathering and/or analyzing facts relevant to any potential violations of the health care fraud and abuse laws. In addition, there should be continual updates on the progress of the investigation and some assurance that the client understands what will unfold as the investigation continues.

The investigative team should also have a good handle on the potential scope of the problems to be addressed and whether the ramifications may include criminal, as well as civil and administrative, liability under the health care fraud and abuse laws. If the internal investigation is being undertaken parallel to a government investigation, it is often useful to communicate to the government what the intentions of the organization are in the self-evaluative internal investigation and also to seek cooperation from the government in either delaying or completing its own investigation in as orderly a manner as possible and with as little disruption to the day-to-day business affairs of the organization as possible. This is not only an important reason for conducting an internal investigation to begin with, but also, depending on the credibility and persuasiveness of an investigative team, it is possible to obtain a level of cooperation from government authorities, who are presumably interested in the

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53. O'Neil & Charnes, *supra* note 3, at 41.

same issues that the internal investigative team may be reviewing. The level of law enforcement interest in the issues which will be addressed during the internal investigation will play a large part in the strategy of the internal investigation and, potentially, in the ultimate issue of self-reporting and voluntary disclosure of the information obtained by the organization in the context of achieving a resolution of the issues with law enforcement authorities.

D. Investigative Methodology

The investigative techniques and methodology should also be discussed thoroughly with the client organization so that a clear understanding can be achieved concerning how the investigation will impact the organization and what level of cooperation can be expected from the organization. The following issues should be addressed before the investigation begins. First, how many current or former employee interviews are likely? Who will be interviewed and where will they be conducted? Who will conduct the interviews? Do the employees to be interviewed have any legal exposure for their own actions and is the client willing to provide them with an attorney at a cost to the organization? What will happen if an employee refuses to cooperate? Second, what documents have to be reviewed? Where are the documents, and have they been secured? How will they be categorized and organized? Who will review these documents? Third, do any computers have to be downloaded and searched? Is there a local area network? A wide area network? Electronic mail? Where are the servers? Can the hardware and software be secured? Fourth, will offices have to be secured and searched? How many offices, where are they located, and will the client be cooperative in such a search? Finally, does the client's company currently have a compliance program? A compliance officer? Has any investigation been conducted prior to the initiation of the internal investigation? If so, what were the findings and was any corrective action taken?

This should not be the last time that the attorney visits the question concerning the organization's compliance program because if there is an eventual settlement of issues with the government, it will likely mandate the imposition of an "effective"

compliance program. The organization will be far better off in many respects by ensuring that its compliance program is "effective" before the government defines its effectiveness through the onerous requirements that have appeared in recent health care fraud and abuse settlement agreements. Furthermore, an effective compliance program can mitigate the fines, penalties and sanctions to which a client organization may be subject in any settlement negotiations with the government. Regardless of a client's line of business, an effective compliance program should mirror the recommended guidelines set forth by the United States Sentencing Commission in the Federal Sentencing Guidelines for Organizations.[54]

If the results of interviews and other investigative methods are to be put into written form, a decision must be made whether the investigative team should retain their original notes or dispose of them after the write-ups are finalized. Furthermore, a standard preamble should be used prior to interviews. The preamble should state that the information gathered is to assist the law firm in providing legal advice to the health care organization and that the memoranda are not verbatim transcripts of the interview. If the employee has already spoken with government investigators, the organization's investigative team will want to learn what, if anything, the employee disclosed to the government. While "[i]t is not uncommon for the government to direct persons who have been interviewed not to disclose the particulars of the interview . . . [the] instruction does not have to be observed and these individuals may provide valuable insights into the government's investigation."[55]

The legal team should brief the investigators who will be conducting the interviews on how the interviewee should be approached and what procedures should be followed to ensure that the interviewee understands that the investigation is being conducted by the organization and that use of information provided during the interview will be determined solely by the organization. This procedure is designed to protect against the waiver of any privilege and subsequent disclosure to third parties. Individuals who are potential subjects or targets of a

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54. *See supra* note 3.
55. O'Brien, *supra* note 11, at 7.

parallel government investigation should also be advised of their right to consult with counsel prior to cooperating with the organization's internal investigation and of the consequences of failing to cooperate with the internal investigation (i.e., status of future employment with the organization). While employees have the right not to speak to the organization's counsel or investigating consultants, they do not have the right to maintain employment with the organization if they do not cooperate in the organization's internal investigation. The organization does not have subpoena power, and it cannot compel process or production of documents. Instead, it must rely on the cooperation of people or whatever means it has to secure cooperation in the internal investigation.

When interviewing employees, whether current or former, it is best to conduct the interviews off the organization's property, as this is less disruptive and will allow the employee to feel comfortable in a setting without peers and colleagues nearby. Interviewing former employees may simply be a shot in the dark, with a success rate of probably no better than fifty percent. If the health care organization has decided to cooperate with the government, or if the results of the investigation may be turned over to the government, a decision must be made as to whether there will be a written or oral presentation of findings. The decision must also take into consideration what impact the presentation will have upon waiver of the attorney-client and work product privileges.

As the parties conducting the investigation begin to gather information, the documents should be stored in a secure location to ensure that no one can tamper with them. Security is important because employees may have individual culpability and may be motivated to locate important, potentially inculpatory documents and transport them off the premises, destroy them, or alter them in some way to conceal their individual liability. When conducting the internal investigation, the organization must be as concerned as the government would be with obstruction issues and alteration or destruction of documents.

E. To Disclose or Not Disclose

Once an internal investigation reveals some form of misconduct, "the organization must consider whether it needs to make a disclosure to the government, to whom it should make the disclosure, and when it should make the disclosure."[56] Federal law makes it unlawful for providers to retain possession of *known* overpayments associated with forms of misconduct when the overpayments are received under a federal health care program. For example, Congress amended the United States False Claims Act ("FCA") in 1986 to broaden its scope and to make it easier for private citizens to sue on behalf of the government to remedy damages the government sustains from false claims.[57] The case law prior to 1986 suggested that an entity could be held liable under the civil False Claims Act (the "Act") for failing to disclose and repay a known overpayment. For example, in one case relators filed a *qui tam* complaint against the defendant hospital for knowingly submitting false claims and retaining overpayments from Medicare.[58] The relators alleged that the defendant learned about the overpayments as early as 1984 but did not do anything about them until several years later.[59] Even though the overpayment was the result of a Medicare miscalculation, the court reasoned that the "mere receipt and deposit of government funds known to have been paid by mistake is a false claim under the Act."[60] When Congress amended the Act in 1986, it added a specific provision which requires providers that discover overpayments to return the money or face liability under the Act.[61] At least one court has held that,

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56. *Investigations: Health Attorneys Outline How, Why Providers Should Conduct Investigations*, 3 Health Care Fraud Rep. (BNA) 281, 320 (1999) (quoting comments made by Jan E. Murray, Vice President and General Counsel of Southwest Community Health Systems, Middleburg Heights, Ohio).

57. 31 U.S.C. § 3729 (1994).

58. Covington v. Sisters of the Third Order of St. Dominick, No. 93-15194, 1995 WL 418311 (9th Cir. July 15, 1995).

59. *Covington*, 1995 WL 418311, at *9.

60. *Id.* (citing United States v. McLeod, 721 F.2d 282, 283 (9th Cir. 1983)).

61. That provision states as follows:

Liability for Certain Acts.—

(a) Any person who . . .

(7) knowingly makes, uses, or causes to be made or used, a false record

under this liability provision, an entity that receives an overpayment has an obligation to pay the money back to the government.[62] Moreover, there is precedent which suggests that the mere deposit of a check issued by the federal government by mistake is a false claim under the Act.[63] Thus, under this liability provision, providers are obligated to return any discovered overpayments to the Medicare program or face potential civil liability under federal law.

Federal law also provides for criminal penalties against individuals who retain overpayments.[64] The relevant statute provides that whoever "having knowledge of the occurrence of any event affecting [ ] his initial or continued right to any such benefit or payment . . . conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized" shall be subject to criminal penalties, including fines and imprisonment.[65] Consequently, if a provider discovers through an internal investigation that it has received an overpayment from a federal health care program and conceals that discovery, the provider could face civil and/or criminal penalties under federal law.

Any disclosure made by the organization must be complete and conform to the government's expectations.[66] In order to encourage organizations to voluntarily disclose suspected wrongdo-

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or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty. . . .

31 U.S.C. § 3729(a)(7).

62. United States *ex rel.* Dunleavy v. County of Delaware, No. 94-7000, 1998 U.S. Dist. LEXIS 4029 (E.D. Pa. July 12, 1998) (holding that county, which retained federal government HUD funds to which it was not entitled, could be held liable under 31 U.S.C. § 3729(a)(7)).

63. United States v. Scolnick, 219 F. Supp. 408 (D. Mass. 1963), *aff'd*, 331 F.2d 598 (1st Cir. 1964).

64. 42 U.S.C. § 1320a-7b (1994 & Supp. III 1997).

65. *Id.* § 1320a-7b(a)(3); *but see* MEDICARE PROVIDER REIMBURSEMENT MANUAL ("PRM") § 2409 (1997) (stating that once the intermediary makes a determination that an overpayment has been made, "the amount so determined is a debt owed to the United States Government." Under this PRM provision, no debt is owed until a "determination" that an overpayment has been made).

66. *Use These Tips To Understand Fraud Investigations*, MEDICARE COMPLIANCE ALERT, Apr. 5, 1999, at 7, 8 (1999) (citing to Stuart Gerson, former U.S. Attorney General).

ing, the Office of the Inspector General ("OIG") recently issued a Provider Self-Disclosure Protocol (the "Protocol").[67] Under the Protocol, the OIG requires that the organization engage in specific self-evaluative steps to ensure that the disclosure is specific and made in good faith.[68] The disclosure must be in writing, with a detailed description of the nature and extent of the matter being disclosed.[69] The organization must advise whether there is a contemporaneous investigation or inquiry by a government agency and if so, the name of such agency.[70] The organization must also provide the departments and names of individuals who may be involved in the wrongdoing, indicate the time period of any such involvement, and explain their role in the matter.[71] Furthermore, the disclosure should describe the potential causes relating to the wrongdoing and identify those officers, employees or agents who knew of the wrongdoing or who should have known, but failed to detect it.[72] The Protocol mandates that the organization provide a detailed chronology of the steps taken during the internal investigation to identify the wrongdoing, including identifying the names of all persons interviewed, with a summary of the interview and a description of all documents reviewed.[73]

There are other alternatives to the OIG's official Protocol for health care fraud and abuse matters, but regardless of to whom the disclosure is made, it will always carry with it a certain risk that must be fully understood by the health care organization prior to disclosure. When to disclose may be just as important as how much to disclose. The organization should not disclose any results of an internal investigation until the organization or independent counsel has determined the level of culpability.[74] This point is particularly important, considering that disclosure under the OIG's Protocol does not protect an organization from

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67. Publication of the OIG's Provider Self-Disclosure Protocol, 63 Fed. Reg. 58,399, 58,400 (1998).

68. *Id.* at 58,401.

69. *Id.*

70. *Id.*

71. *Id.*

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

73. *Id.* at 58,402.

74. *Use These Tips To Understand Fraud Investigations, supra* note 66, at 8.

criminal liability or a civil action under the FCA, and disclosure may only be a mitigating factor in the OIG's recommendation to other prosecuting agencies, such as the Department of Justice ("DOJ").[75] In addition, any disclosure may necessarily involve waiver of the attorney-client privilege,[76] the work product privilege and the self-evaluative privilege. Information once protected under a privilege that is disclosed to one government agency may subsequently be disclosed to a collateral government agency in a separate investigation.[77]

Regardless of the decision on the duty to disclose, the organization does have a duty to discontinue any conduct that violates the law.[78] If the organization does not discontinue the activities revealed as a result of the investigation, that inaction itself becomes fraud.[79] "What was not criminal . . . or fraudulent behavior before, [now] becomes fraudulent behavior."[80]

III. What To Do When the Government Knocks

Internal investigations often take place either immediately before or in the midst of a parallel government investigation of the same conduct. Accordingly, it is important for an organization to be aware of its rights and obligations in the midst of such

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

76. *Use These Tips To Understand Fraud Investigations*, *supra* note 66, at 8.

77. Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981); *cf.* Schnell v. Schnell, 550 F. Supp. 650, 652 (S.D.N.Y. 1982). In *Schnell*, the court recognized three different approaches to waiver of a privilege once disclosure has been made to a government agency. *Schnell*, 550 F. Supp. at 652. Under the first approach, courts hold that a party's prior disclosure to a government agency does not constitute a waiver of privilege in subsequent litigation. *Id.* These courts have reasoned that the waiver requirement would discourage full and fair disclosure if the information could be used in subsequent litigation. *Id.* The second approach holds that a party's previous voluntary disclosure to a government agency constitutes a waiver of a privilege. *Id.* Under the third approach, disclosure to a government agency will be considered a complete waiver unless the right to assert a privilege in subsequent litigation is specifically reserved at the time the disclosure is made. *Id.* at 653.

78. *Investigations: Health Attorneys Outline How, Why Providers Should Conduct Investigations*, *supra* note 56, at 320.

79. *Id.*

80. *Id.* (quoting Jan E. Murray, Vice President and General Counsel of Southwest Community Health Systems, Middleburg Heights, Ohio).

a government investigation. A good understanding of how to respond to a government investigation can be critical for an organization in managing the government's inquiry, while at the same time completing the organization's internal investigation. This balancing can be critical to the organization's ability to survive a government investigation and to ultimately move ahead with its ordinary business.

A. Agencies and Techniques

Agencies with enforcement powers include the Federal Bureau of Investigation ("FBI"), the Office of the Inspector General of the Department of Health and Human Services ("OIG-DHHS"), the Department of Defense ("Champus" or "Tricare"), State Medicaid Fraud Control Units ("MFCU"), and task forces of these agencies. Additional agencies which may be involved include administrative personnel from the Health Care Financing Administration ("HCFA") and "representatives from Medicare carriers and fiscal intermediaries under contract with the government."[81] Investigations may be initiated as a result of a Medicare intermediary or carrier audit, random audits by various government agencies, a competitor complaint, a patient complaint regarding improper billing or treatment, or a whistleblower complaint by a current employee or a disgruntled former employee. Additionally, the government may use informants to obtain information relating to possible health care violations.

The government has the ability to gather further information through the use of subpoenas, electronic surveillance and search warrants.[82] The method used may depend on whether the government seeks to alert the health care organization that it is under investigation.[83] An administrative subpoena duces tecum is broad in scope and generally does not require probable cause.[84] Reasonable particularity is all that is needed, and the

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81. O'Brien, *supra* note 11, at 2.

82. *See* 5 U.S.C. App. § 6 (1994 & Supp. III 1997); 42 C.F.R. § 1006.1 (1998).

83. *See generally* Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 209, 215-16 (1946).

84. *See Oklahoma Press*, 327 U.S. at 209, 215-16.

burden to quash such a subpoena is great.[85] Similar to the administrative subpoena is the grand jury subpoena,[86] which usually requires a relatively prompt response, although the scope and return date are normally negotiable.

If a government agent contacts an agent of an organization, either through formal process (i.e., search warrant or subpoena), or through informal means (i.e., through informal communications without the ability to require a response), the government agent should be referred to the organization's counsel. A policy should be in place at the organization which advises employees to notify the officers or directors immediately if they are approached by government agents.

B. Interviews by the Government

It is important to recognize the rights of the health care organization and its employees during a government investigation. The officers or directors of the organization may decline to speak with agents, acting on the advice of counsel. There is no obligation to voluntarily speak with government agents, and refusing to do so is consistent with an individual's Fifth Amendment privilege against self-incrimination. Further, the organization may develop a team of lawyers to represent individual employees and can advance or pay the costs of employee legal fees.

An organization should develop a protocol for those instances in which the government is investigating the organization. Employees need to be advised of their rights and the techniques the government may attempt to use in an investigation. "Surprise interviews at employees' homes and trying to separate employees from the company lawyer" are just two examples of the techniques the government may employ.[87] Home visits to employees by government investigators are designed to avoid company counsel and obtain the "unvarnished truth before attorneys get a chance to color it and coordinate what other witnesses will say."[88]

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85. *See id.*

86. *See id.* at 216.

87. *Use These Tips To Understand Fraud Investigations*, *supra* note 66, at 8 (citing to Baltimore-based attorney David Queen).

88. *Id.* (citing to Baltimore-based attorney David Queen, quoting from a United

Employees should be advised that they are under no obligation to speak with government agents. However, employees should not be forbidden to speak with agents if they choose to do so, since such conduct could result in serious consequences, including obstruction of justice charges. The organization may request that employees advise the organization if they are approached by an agent or choose to speak with an agent. Employees also have the right to be represented by counsel during any interview. The organization's attorneys may assist employees, but typically they may not represent employees personally due to the potential for a conflict of interest. Employees should be made aware that counsel for the organization represents the organization and not the employees.

C. Subpoenas and Search Warrants

State and federal agencies may inspect records supporting claims for payment. The organization should consult with its attorney to determine which documents support a claim for payment of services. Absent a search warrant, the organization does not have to provide immediate access to the records; only reasonable access is required. In order to assist the organization in determining the scope and extent of the government investigation, a copy or list should be kept of all records and documents inspected by the government. The organization should keep a copy of all such records and documents. The government does not have a right to seize original documents except pursuant to a search warrant. Furthermore, the organization has no obligation to provide copies of non-corporate personal records. If agents should demand such copies, the organization should respectfully decline and refer the agents to their counsel. However, it is important to note that the organization itself does not enjoy a Fifth Amendment privilege against self-incrimination.[89]

If a subpoena duces tecum is issued seeking corporate documents, the organization should accept service and immediately provide a copy of the subpoena to its corporate counsel. Documents should not be provided at the time of service, as the sub-

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States Justice Department Manual on prosecuting health care fraud).

89. Braswell v. United States, 487 U.S. 99, 102 (1988).

poena will always have a future return date for the documents sought by the government. As the subpoena duces tecum is seeking only documents of the organization, it is important not to make any statements at that time to government agents.

If the government agents have a search warrant, then requests for a copy of the warrant and the supporting affidavit should be made. The warrant should be provided to corporate counsel immediately, although the affidavit may be withheld for some time by the government. The warrant should be reviewed carefully because agents may only seize what is listed on the warrant and may search only in those areas listed on the warrant. All employees should be sent home during the search except for a designated Response Coordinator. During the search, the Response Coordinator should not interfere, but he or she should try to make a detailed list of the areas searched, questions asked, and the items seized. There is no requirement, however, that any employee, officer or director speak with the agents or answer any questions during execution of a search warrant. In fact, those questioned should respectfully decline to answer and refer the agents to corporate counsel. The agents should be asked if the organization can make copies of any documents seized, or alternatively, arrangements can be made later through counsel with the government attorney assigned to the case to copy any documents seized by the agents.

During the execution of the search warrant, the Response Coordinator should accompany the agent to any location to be searched. This will allow the Response Coordinator to identify those documents falling within the attorney-client privilege. At the conclusion of the search, the agent may request a signature on a vague inventory of seized items. The Response Coordinator should not sign this form, as the agent must give a description or list of each item taken. Additionally, the Response Coordinator should identify the Agent in Charge, each participating agent, and each agency involved in the search. This information should be provided to the organization's counsel.

IV. WHISTLEBLOWER CONCERNS

A. The Threat of the Civil False Claims Act

Disgruntled or greedy employees can utilize the organization's confidential information for personal gain by bringing a lawsuit under the Act, if such information depicts a potential lack of compliance with applicable laws. The Act was originally known as the "Informer's Act" and the "Lincoln Law," and it was enacted when allegations of fraud, defective weapons, and illegal price-gouging of the Union Army arose during the Civil War.[90] The Act creates civil liability for any person who knowingly presents, or causes to be presented, to the United States government any false or fraudulent claim for payment.[91] The Act has been called the federal government's "primary litigative tool for combatting [sic] fraud."[92] Most courts have concluded that there are at least three essential elements to a violation of the Act. First, the person must present, or cause another person to present, a "claim" for payment or approval to the United States. Second, the claim must be "false or fraudulent." And third, the person must act knowing that the claim is "false or fraudulent."[93]

For many years, lawsuits were brought under the Act to remedy situations where defense contractors or other outside contractors intentionally billed the government for labor that was not performed or should not have been charged to the government.[94] More recently, however, lawsuits have been brought to remedy false or fraudulent claims for reimbursement under Medicare, Medicaid, or other federal health care programs in

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90. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1-3 (1993 & Supp. 1999).

91. 31 U.S.C. § 3729(a)(1) (1994).

92. United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 745 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994) (quoting S. REP. NO. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266).

93. *See, e.g.*, United States *ex rel.* Stinson v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247, 1258-59 (S.D. Fla. 1989).

94. *See, e.g.*, Robertson v. Bell Helicopter Textron, Inc. 32 F.3d 948 (5th Cir. 1994).

record numbers.[95]

The Act is a major threat to organizations that receive payments from the federal government because it allows private citizens to sue on behalf of the government to remedy violations of the Act,[96] and it is actually an independent threat of health care fraud and abuse liability for an organization. The relevant provision, called a *"qui tam"* provision, offers private citizens a bounty, potentially up to as much as 25% of any recovery the government obtains from the lawsuit, as a reward for identifying and reporting fraud against the federal government.[97] The private citizen in a *qui tam* case is called a "relator," and he or she files the lawsuit under seal on behalf of the government.[98] The lawsuit remains sealed for 60 days (and usually much longer) to allow the government time to investigate the claims and determine if it wishes to join as a plaintiff in the case.[99] If the government does join the case, the lawsuit is unsealed and will be served on the defendant.[100] If the government declines to join the lawsuit, however, the relator may proceed alone with his or her case against the defendant in federal court.[101]

The procedural aspects of the Act place health care organizations at risk because any *qui tam* lawsuit filed remains sealed during the government's initial investigation of the whistleblower's allegations.[102] Thus, if a disgruntled employee files a *qui tam* lawsuit, he or she will likely remain an employee

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95. *See, e.g., Stinson*, 721 F. Supp. at 1247.

96. The FCA was amended in 1986 "to increase private citizen involvement in exposing fraud against the government while preventing opportunistic suits by private persons who heard of fraud but played no part in exposing it." Cooper v. Blue Cross & Blue Shield of Fla. Inc., 19 F.3d 562, 565 (11th Cir. 1994). In fact, the federal government has reportedly recovered approximately $2 billion from *qui tam* actions since 1986. *Justice Dep't Recovers More Than $2 Billion in False Claims Act Awards and Settlements* (visited Sept. 6, 1999) <http://www.usdoj.gov/opa/pr/1998/october/503_civ.htm>.

97. 31 U.S.C. § 3730 (1994).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id. But see* United States *ex rel.* Foulds v. Texas Tech. Univ., 171 F.3d 279 (5th Cir. 1999) (dismissing a relator's *qui tam* action brought against a state university where the government elected not to intervene because the Eleventh Amendment bars lawsuits by private citizens against states in federal court), *reh'g denied en banc*, No. 97-11182, 1999 U.S. App. LEXIS 14660 (5th Cir. June 1, 1999).

102. 31 U.S.C. § 3730(b)(2).

of the defendant organization without the organization having any knowledge of the lawsuit. During this time, the employee could continue snooping around the company and shuttling documents to the federal government. The Act encourages such deceptive conduct because the relator's reward correlates to the amount of assistance he or she provides the federal government.[103]

The Act imposes steep penalties against individuals and entities who are found guilty of submitting false claims to the government.[104] First, each false claim subjects the defendant to "a civil penalty of not less than $5,000 and not more than $10,000."[105] Second, the government is entitled to recover three times the amount of the actual damages the government sustains because of the false claim.[106] With respect to health care providers, courts have ruled that each service billed constitutes a claim for purposes of the Act.[107] Because health care providers often submit numerous claims for reimbursement on a daily basis, the Act subjects the providers to enormous potential liability.[108]

The amount of potential liability lurking in the Act underscores the importance of an effective corporate compliance program and a meaningful internal investigation and audit system. First, a corporate compliance program offers employees the option of reporting to the company first before going to the federal government. Second, a meaningful internal investigation and audit system with proper self-disclosure protocols will help a health care organization to rebut any allegation that its claims were intentionally submitted falsely or fraudulently.[109] An organization with an effective corporate compliance program

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103. *See id.* § 3730(c)(1).
104. *Id.* § 3729(a).
105. *Id.*
106. *Id.*
107. *See, e.g.*, United States v. Diamond, 657 F. Supp. 1204 (S.D.N.Y. 1987).
108. *See Diamond*, 657 F. Supp. 1204.
109. The FCA requires the plaintiff to prove that the defendant "knowingly" presented a false claim to the government. 31 U.S.C. § 3729(a) (1994). The FCA defines "knowingly" to include the following: (a) "actual knowledge of the information;" (b) "acts in deliberate ignorance of the truth or falsity of the information;" or (c) "acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." *Id.* § 3729(b).

makes it very difficult for a plaintiff to prove that the organization knowingly submitted false or fraudulent claims because the existence of an effective compliance program demonstrates the organization's desire to comply with the applicable law. Finally, a properly managed internal audit or investigation will often identify potential or actual *qui tam* relators within the organization and assist in developing a defense to such allegations.

B. Dealing with the Employee Who Has Filed or May File a Qui Tam *Action.*

What should an organization do if it learns that one of its employees has filed a *qui tam* lawsuit or that it is at risk of having one filed in the immediate future? Should the organization fire the employee immediately to prevent any further disclosure of the organization's confidential information? While terminating the potential or actual *qui tam* relator may be the most desirable course of conduct, doing so could expose the organization to additional liability for unlawful retaliation.[110] The Act prohibits employers from discharging, demoting, suspending, or discriminating against an employee's terms and conditions of employment because of lawful acts done by the employee in furtherance of a lawsuit under the Act.[111] Any employee who prevails in a wrongful discharge case under the Act is entitled to "all relief necessary to make the employee whole," which includes reinstatement, double damages for back pay plus interest, "and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees."[112]

Courts interpreting this provision have held that in order to

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110. 31 U.S.C.A. § 3730(h) (West Supp. 1999).

111. *Id.* The relevant provision reads, in pertinent part, as follows:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. . . .

Id.

112. *Id.*

maintain a wrongful discharge action under the Act, the plaintiff must demonstrate (1) that he or she engaged in conduct protected under the Act; (2) that the employer was aware of such conduct; and (3) that the plaintiff was terminated or otherwise discriminated against in retaliation for that conduct.[113] Employers who discover a *qui tam* relator within the organization are thus faced with a Hobson's choice: (1) leave the employee in his or her current position and risk further disclosure of confidential business information or (2) terminate or otherwise alter the employment conditions of the employee and risk additional retaliation liability under the Act. Furthermore, most courts have held that a relator does not need to file a suit under the Act to be protected under the wrongful discharge provision.[114] One federal court has even held that the wrongful discharge provision applies to intracorporate complaints of fraud and that the relator need not have complained to the federal government at all in order to be protected under the Act.[115]

If the employee's job responsibility requires him or her to uncover and report fraud, then that employee may have a more difficult burden of proving that the employer had the requisite knowledge to be liable under the wrongful discharge provision.[116] In one such case, a former clinical director of a mental health facility advised her superiors of Medicaid non-compliance issues.[117] The Tenth Circuit held that such reports were insufficient to protect her under the Act, stating as follows:

> [P]laintiff never suggested to defendants that she intended to utilize such noncompliance in furtherance of an FCA action. Plaintiff gave no suggestion that she was going to report such noncompliance to government officials, (citations omitted) nor did she provide any indication that she was contemplating her own *qui tam* action. Rather, [plaintiff's activities] were exactly those activities plaintiff was required to undertake in fulfillment of her

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113. *See, e.g.*, Zahodnick v. International Bus. Machines, 135 F.3d 911, 914 (4th Cir. 1990).

114. *See, e.g.*, United States *ex rel.* Yesudian v. Howard Univ., 153 F.3d 731 (D.C. Cir. 1998); Childree v. UAP/AGGA Chem., Inc., 92 F.3d 1140 (11th Cir. 1996).

115. Neal v. Honeywell , Inc., 33 F.3d 860, 865 (7th Cir. 1994).

116. *See, e.g.*, United States *ex rel.* Ramseyer v. Century HealthCare Corp., 90 F.3d 1514, 1523 (10th Cir. 1996).

117. *Ramseyer*, 90 F.3d at 1523.

> job duties, and plaintiff took no steps to put defendants on notice that she was acting "in furtherance of" an FCA action . . . [118]

Once an employer knows that a relator has filed or intends to file a *qui tam* action under the Act, the employer has the requisite knowledge to be held liable under the wrongful discharge provision if the employer takes action against the terms and conditions of the relator's employment.[119]

An organization subject to a *qui tam* action should consider other potential arguments for avoiding liability under the wrongful discharge provision before deciding what to do with the identified relator. For example, the Fourth Circuit has held that the wrongful discharge provision under the Act does not protect independent contractors.[120] To the extent the organization can argue that the relator was an independent contractor and not an employee, the organization may be able to defeat a wrongful discharge claim under the Act.[121]

Additionally, at least one federal court has held that corporate documents removed by a *qui tam* relator must be returned to the organization because the documents did not demonstrate fraud.[122] Because the wrongful discharge provision only protects a relator's "lawful acts," the organization may prevail in a wrongful discharge action if it demonstrates that it terminated the employee because he or she engaged in illegal conduct such as breaking and entering, illegal wiretapping or theft of corporate property. The most practical course of action when an organization identifies a potential or actual whistleblower is to enter into an agreement with the employee for the employee to take administrative leave from the organization while an investigation of the matter takes place. This will usually mean paid administrative leave in return for a release from liability against a

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118. *Id.*

119. *Compare* Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948 (5th Cir. 1994) (holding that an employee who merely complains of the employer's conduct without voicing an intent to file or assist in the filing of a civil False Claims Act action, or with accusing the employer of fraud, has not provided the employer with adequate notice), *with Yesudian*, 153 F.3d at 743 (holding that there "is no requirement that a plaintiff tell, or threaten, his employer that he will report his allegations to the government—or to anyone outside of the employing institution").

120. Vessell v. DPS Assoc., 148 F.3d 407 (4th Cir. 1998).

121. *Vessell*, 148 F.3d 407.

122. X Corp. v. Doe, 816 F. Supp. 1086 (E.D. Va. 1993).

claim of retaliation. It will also mean that the employee will no longer be in a position to provide information to the government or otherwise disrupt the organization's own internal investigation.

V. CONCLUSION

In the ever-increasing climate of government and private whistleblower enforcement of the health care fraud and abuse laws, a health care organization must develop and maintain a strategy for responding to possible health care violations. Essential to such a strategy is the implementation of an effective compliance plan to provide a vehicle by which complaints may be directed to the organization. Also essential is an internal investigation, conducted appropriately in relation to the potential problem so that the related facts can be determined. These measures are critical in resolving any health care fraud and abuse issues that may arise within an organization, whether they are raised by an internal complaint or by a government investigation. The benefits of conducting an internal investigation are numerous. First, the organization may be able to identify that no fraud has occurred or to correct any wrongdoing that is identified and, in the process, convince the government that a separate investigation is not required, thereby minimizing disruption to the organization. Second, the organization, by directing the investigation, has the ability to control the scope and direction that the investigation will take, as well as who participates in the process. Third, investigations initiated by the organization demonstrate to employees, the community and the government that the organization is committed to complying with federal and state laws and regulations. Finally, a thorough and well-organized investigation may persuade authorities that prosecution is not warranted or, alternatively, that a good faith effort to comply with the law has been made, warranting a reduction in any sentence that may be imposed.

Many issues must be kept in mind when conducting an internal investigation. Who will conduct the investigation? Who will be interviewed, and by whom? How will progress reports be made to the organization, and how often? Will a written report be made of the investigative activities, and if so, will the docu-

ments be covered by a privilege to prevent subsequent disclosure? Will disclosure be made to the government, and if so, when should disclosure be made and in what form? How can measures be taken to prevent disgruntled or opportunistic employees from using information gathered during the internal investigation in an action against the organization? Before decisions are made, health care organizations should ensure that they have competent internal support for such an effort and advice from experienced counsel, well-versed in this area of the law.