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THE IMPACT OF THE WAR OVER THE CORPORATE ATTORNEY-CLIENT PRIVILEGE ON THE BUSINESS OF AMERICAN HEALTH CARE

Sarah Helene Duggin*

An intense public debate is raging over the vitality of the corporate attorney-client privilege. This controversy erupted in reaction to policies initiated by the United States Department of Justice (DOJ), the United States Sentencing Commission (USSC), and other federal law enforcement agencies in recent years. These policies have prompted prosecutors and

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The U.S.S.C.’s Organizational Sentencing Guidelines also address the subject of corporate privilege waivers. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2004) [hereinafter USSG MANUAL]. At the time of the symposium that generated this article, the commentary to § 8C2.5 specifically permitted consideration of waiver of privilege protections as a factor in assessing organizational cooperation in federal sentencing proceedings. See id. On April 5, 2006, however, the USSC deleted this provision from
other law enforcement personnel "routinely to pressure companies and other organizations to waive their privileges as a condition of cooperation during investigations." Interestingly, this public dispute is not partisan in nature. The DOJ fired the first salvos in the conflict during the Clinton Administration, and the Bush Administration Justice Department has carried on and expanded the assault on the corporate attorney-client privilege. In response, opposition to the government's controversial measures has steadily gathered momentum, enlisting support from across the political spectrum. The American Bar Association (ABA), the Corporate Counsel Association, and the National Counsel of Defense Lawyers (NACDL), as well as groups from outside the legal profession ranging from the American Civil Liberties Union (ACLU) to the United States Chamber of Commerce, have entered the fray, along with members of Congress and

the commentary to the Organizational Sentencing Guidelines in response to intense public pressure, particularly concerns that the language unduly encouraged organizations to waive attorney-client and work product protections. Unless Congress disproves the amendment, it will take effect on November 1, 2006. See USSC, Notice of Submission to Congress of Amendments to the Sentencing Guidelines Effective Nov. 1, 2006, 71 Fed. Reg. 28,063 (May 15, 2006) at 59-60, http://www.USSC.gov/FEDREG/2006finalnot.pdf [hereinafter USSC Proposed November 2006 Sentencing Guidelines Amendments], and text infra accompanying notes 34-44 and 100-120. Although the symposium presentation that generated this article took place prior to the USSC action, insofar as possible, the text has been amended to reflect this change and subsequent developments. Relevant events continue to occur, however, even as this article goes to press.


4. See Thompson Memorandum, supra note 1.

5. By early 2005, an "informal coalition" (later denominated as the "Coalition to Preserve the Attorney-Client Privilege," see infra note 118) comprised of the American Chemistry Council, American Civil Liberties Union, Association of Corporate Counsel,
prominent ex-DOJ officials. The opposition recently scored a major victory when the USSC voted to eliminate a provision in the commentary to the Organizational Sentencing Guidelines pertaining to consideration of privilege waivers in assessing organizational cooperation as a mitigating factor in sentencing. The battle, however, continues, particularly with

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Business Civil Liberties, Inc., Business Round Table, Frontiers of Freedom, National Association of Manufacturers, U.S. Chamber of Commerce, and Washington Legal Foundation [hereinafter Coalition] had become active in the debate. Letter from Coalition to the Hon. Ricardo H. Hinojosa, Chairman, USSC (Mar. 3, 2005). See infra text accompanying notes 94-96 and 100-110. As A.B.A. Antitrust Section Chair Donald Klawiter pointed out in testimony before the USSC in November 2005, the “remarkable political and philosophical diversity of that coalition... shows just how widespread these concerns have been in the business, legal and public policy communities.” Donald C. Klawiter, Chair, Antitrust, A.B.A., Statement before the United States Sentencing Commission (Nov. 15, 2005) available at http://www.abanet.org/buslaw/attomeyclient/materials/050/050.pdf [hereinafter Klawiter Testimony]. Several professional journals have taken editorial positions or presented bar officials’ opinions on the matter. See, e.g., James E. Heiting, Confidentiality Under Siege, CAL. BAR J. (Mar. 2006) (column by president of California Bar opposing government waiver policies on grounds that “[a]ttorney-client privilege and confidentiality are the foundations of trust and confidence in counsel historically and rightfully recognized as fundamental”); Editorial, NEW JERSEY LAW JOURNAL, Vol. CLXXXIII - No. 4-index 214 (Jan. 23, 2006) (“[A]ny government request for, or consideration of, a waiver is bad policy. We cannot afford to be silent as the government encroaches upon these bedrock principles”); John Caher, Bar Task Force Fights Waivers of Privilege, N.Y.L.J. at 1 (Mar. 28, 2006) (reporting New York Bar Association’s “call[] on the U.S. Sentencing Commission to abandoned a policy that encourages corporate criminal defendants to waive the attorney-client and work product privileges to obtain more lenient sentences”). The issue also has begun to attract attention in the mainstream media. See generally, Gary Fields, Sentencing Panel Adds Hurdle for Companies to Get Leniency, WALL ST. J., Apr. 9, 2004, at B3; Lori P. Cohen, In the Crossfire: Prosecutors’ Tough New Tactics Turn Firms Against Employees; as Sentencing Rules Stiffen KPMG Axes Tax Partners, Won’t Pay Their Legal Costs; What Cooperation Entails, WALL ST. J., June 4, 2004, at A1.


respect to policies that permit privilege waiver demands by DOJ, the SEC, the HHS Inspector General and other federal law enforcement authorities.

Health care providers and medical professionals have a great deal at stake in the debate over attorney-client and work product protections. Few areas of endeavor are steeped so deeply in labyrinthine regulations and convoluted statutory provisions as American health care, and even fewer involve such high stakes—literally life and death—on a daily basis. The ability to consult with counsel in confidence about legal questions pertaining to the provision of medical services is essential to health care entities and to the medical professionals who provide health care services in association with these organizations.

The purpose of this article is to review the current dispute over the corporate attorney-client privilege and work product doctrine and to explore its impact on the provision of health care. The article’s principal thesis is that a strong attorney-client privilege, along with robust work product protection, is critical to the business of health care, the quality of medical services, and the effective enforcement of federal and state health care laws. Part I begins with a brief account of the origins and scope of the conflict between federal law enforcement policies and the corporate attorney-client privilege and work product doctrine in recent years. Part II then turns to a discussion of the intricate web of laws governing health care services and the role of counsel in facilitating understanding of, and adherence to, these laws. Part III explains why the corporate attorney-client privilege is essential to the business of American health care, concluding that health care providers, professionals and counsel need to engage in the debate and exercise constant vigilance to protect the corporate attorney-client privilege.

I. THE BATTLE OVER THE ONGOING VITALITY OF THE CORPORATE ATTORNEY-CLIENT PRIVILEGE

A. The Nature of the Privilege in Organizational Settings

The United States Supreme Court has long recognized that corporate entities, like individuals, are entitled to invoke the protections of the attorney-client privilege. In 1981, in its seminal decision in *Upjohn Co. v. United States*, the Court addressed the scope of the attorney-client privilege and work product doctrine in a corporate setting pursuant to Rule 501 of the...
Federal Rules of Evidence.9 The underlying dispute arose when the Internal Revenue Service (IRS) subpoenaed questionnaires sent by Upjohn's General Counsel to employees in locations around the world in the course of an internal investigation of possible violations of the Foreign Corrupt Practices Act.10 Upjohn moved to quash an IRS administrative subpoena on grounds that it called for materials protected by the attorney-client privilege and work product doctrine.11 Both the District Court and the United States Court of Appeals for the Sixth Circuit ruled against the company.12 The District Court concluded that Upjohn had waived its attorney-client privilege.13 The Second Circuit ruled that the attorney-client privilege protected only exchanges among the corporation's "control group"—Upjohn's counsel and senior executives who had responsibility for the company's responses to the

9. Rule 501 provides:

Except as otherwise required by the Constitution of the United 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. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.


12. Id. (citing United States v. Upjohn Co., 600 F.2d 1223, 1225-27 (2d Cir. 1979)).

relevant legal advice—and held that the work product doctrine was inapplicable to administrative summonses.\textsuperscript{14}

The Supreme Court, however, ruled in favor of Upjohn, focusing on the important policy interests served by the attorney-client privilege and work product protections. With respect to the attorney-client privilege, the majority reasoned that the Second Circuit’s approach “frustrate[d] the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation.”\textsuperscript{15} The Court emphasized that “if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.”\textsuperscript{16} The Court explained that this is particularly true in the corporate setting, for “corporations, unlike most individuals, ‘constantly go to lawyers to find out how to obey the law.’”\textsuperscript{17}

The Court reached similar conclusions in siding with Upjohn with respect to the applicability of the work product doctrine in corporate settings. Emphasizing the importance of permitting lawyers to keep their work confidential, the Court reiterated the policies underlying its original recognition of the work product doctrine in its 1947 decision in \textit{Hickman v. Taylor}.\textsuperscript{18} Noting the subsequent reaffirmation of the \textit{Hickman} rationale in \textit{United States v. Nobles}\textsuperscript{19} and the incorporation of the work product doctrine into Rule 26(b)(3) of the Federal Rules of Civil Procedure,\textsuperscript{20} the Court pointedly observed that “if the discovery of the material sought were permitted ‘much of what is now put down in writing would remain unwritten.’”\textsuperscript{21} “Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.”\textsuperscript{22} These developments, in turn, would demoralize lawyers and adversely affect “the interests of the clients and the cause of justice.”\textsuperscript{23}

In reaching these conclusions, the Court focused particularly on the need for the availability of the attorney-client privilege and work product doctrine in the context of corporate compliance initiatives. It rejected the Second

\textsuperscript{14} \textit{Upjohn Co.}, 449 U.S. at 388 (citing \textit{Upjohn}, 600 F.2d at 1227).

\textsuperscript{15} \textit{Upjohn Co.}, 449 U.S. at 392.

\textsuperscript{16} \textit{Id.} at 393.

\textsuperscript{17} \textit{Id.} at 392 (quoting Bryson P. Burnham, \textit{The Attorney-Client Privilege in the Corporate Arena, 24 Bus. Law} 901, 913 (1969)).

\textsuperscript{18} 329 U.S. 495 (1947).

\textsuperscript{19} 422 U.S. 225 (1975).

\textsuperscript{20} FED. R. CIV. P. 26(b)(3).

\textsuperscript{21} \textit{Upjohn Co.}, 449 U.S. at 398 (quoting 329 U.S. at 511).

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} \textit{Id.}
Circuit’s analysis of the attorney-client privilege, reasoning that the lower court’s approach “not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.”24 The Court specifically disagreed with the government’s contention that corporations would seek legal advice solely because of the risk of liability if they did not do so, opining that the government’s position “ignore[d] the fact that the depth and quality of any investigations to ensure compliance with the law would suffer, even were they undertaken.”25

In the more than thirty years since the Upjohn ruling the Court has continued to affirm the ongoing vitality of the privileges, carving out few exceptions.26 At the same time, the privileges have become increasingly important to organizations in light of expanded criminal prosecution of corporations and other entities27 and the emergence of the internal investigation as a critical tool for companies seeking to keep on the right side of the law in an increasingly complex legal environment.28 In the 1990’s anti-fraud initiatives netted a number of major corporate players, including health care and pharmaceutical companies such as Caremark, SmithKline Beecham and Columbia/HCA.29 Since the subsequent fall of Enron, WorldCom and other corporate giants,30 and the appointment of a Presidential Corporate Fraud Task Force in 2002,31 criminal and civil

24. Id. at 392.
25. Id. at 393 n.2.
26. For general discussion of the operation of the attorney-client privilege and work product doctrine in corporate contexts, as well as exceptions to these protections, see sources cited supra note 9.
27. See Duggin, supra note 3, at 874.
28. See id. at 871-92.
enforcement actions against organizations have become commonplace.\textsuperscript{32} Shareholders' derivative actions and other civil lawsuits seeking to impose personal liability on directors, trustees and officers of troubled entities for failure to satisfy their fiduciary obligations and oversight responsibilities have kept pace with government enforcement actions.\textsuperscript{33}

\textit{B. The Government's Extra-judicial Efforts to Limit Assertion of the Corporate Privilege}

Despite the loss in \textit{Upjohn}, the government did not give up on its efforts to limit the availability of attorney-client and work product protections in connection with enforcement initiatives. Before long the war over the corporate privilege resumed, but this time the principal theaters were outside the courtroom.

\textit{1. The Organizational Sentencing Guidelines}

In 1991, the USSC issued its \textit{Organizational Sentencing Guidelines}.\textsuperscript{34} The \textit{Organizational Guidelines}, like those applicable to individual defendants in criminal proceedings, are designed to assign culpability scores to defendants based on the severity of their offenses and various mitigating and aggravating factors.\textsuperscript{35} A key section of the guidelines provides that an entity may lower its culpability score by demonstrating that it had an effective compliance program in place when the offense occurred,\textsuperscript{36} or that it responded to discovery of a violation by "[s]elf-[r]eporting, [c]ooperation, [t]esting, [m]onitoring".

\textsuperscript{32} See Duggin, supra note 3 at 874-80. See Christopher A. Wray, Asst. Att'y Gen., Crim. Div., DOJ, Remarks at the A.B.A. White Collar Crime Luncheon 3 (Feb. 25, 2005), available at http://www.usdoj.gov/criminal/press_room/speeches/2005_3853 _rmrkCrimLuncheon030205.pdf (stating that in its first two years the President's Corporate Fraud Task Force has "(1) Obtained over 600 corporate fraud convictions; and (2) Charged over 990 defendants—and convicted 77 corporate CEOs and presidents—with some type of corporate fraud crime, in connection with over 480 charged cases").


\textsuperscript{34} USSG MANUAL, supra note 1, at ch. 8, introductory cmt. and § 8A1.1.

\textsuperscript{35} Id. at § 8C2.5.

\textsuperscript{36} Id. at § 8C2.5(f)
and [a]cceptance of [r]esponsibility. While ultimate assessment of these factors rests with the courts in cases that actually proceed to sentencing, these provisions afford prosecutors powerful leverage, particularly with respect to evaluation of an entity’s "cooperation."

In November 2004, the Sentencing Commission enhanced the power of prosecutors to wield this tool when it added a new provision to the commentary to Section 8C2.5 of the guidelines stating: "[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score. . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." While the language of the provision appeared to restrict the use of privilege waiver demands, in practice it served to legitimize frequent, broad-based waiver demands. Consequently, the incorporation of this language into the commentary to the Organizational Sentencing Guidelines sparked heated debate.

In January 2005, the Supreme Court held mandatory imposition of the guidelines unconstitutional in United States v. Booker. The Court ruled, however, that the guidelines could be employed in an advisory capacity without violating the Constitution. Although their application was no longer mandatory, the guidelines continued to exert significant influence on the criminal justice system. Consequently, the November 2004 addition of

37. Id. at § 8C2.5(g)
38. See Duggin, supra note 3, at 899-909; Zornow & Krakaur, supra note 9, at 154-56.
39. USSG MANUAL, supra note 1, at § 8C2.5, application note 12 (emphasis supplied). The USSC has since voted to eliminate this provision. See supra note 1.
40. In February 2005, the A.B.A. wrote to the Chairman of the USSC that the "new privilege waiver amendment, though perhaps well intentioned, will have a number of negative unintended consequences, including the likelihood that companies and other organizations will be forced to waive their attorney-client and work product protections on a routine basis." Letter from Robert D. Evans, Director A.B.A. Gov't Affrs. Ofc. to the Hon. Howard Coble, Chairman, USSC (Feb. 9, 2005) at 2. Subsequent comments on the impact of the new provision echoed this prediction and asserted that it had become a reality. See infra text accompanying notes 101-114.
42. Id. at 226-27.
the waiver language to the Organizational Sentencing Guidelines commentary remained controversial.44

2. DOJ Policy on Privilege Waivers

DOJ’s extra-judicial attack on the corporate attorney-client and work product protections began in earnest in 1999 when Eric Holder, Deputy Attorney General during the latter part of the Clinton Administration, issued a memorandum to United States Attorneys addressing the filing of criminal charges against corporate entities.45 When Deputy Attorney General Larry Thompson took office during the George W. Bush Administration, he reissued the Holder Memorandum with minor changes.46 Shortly thereafter, DOJ incorporated the Thompson Memorandum into the United States Attorneys’ Manual under the heading of Federal Prosecutions of Business Organizations.47 These documents instruct prosecutors that in deciding whether to charge a corporate entity, the “corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate” with the government’s investigation may be relevant factors.48 Most importantly, “[i]n gauging the extent of the corporation’s cooperation, the prosecutor may consider the corporation’s willingness to . . . disclose the complete results of

44a (reporting that since the Supreme Court’s Booker decision, “little has changed. Under the voluntary regime 62% of 46,470 federal criminal sentences remained within the guidelines for the ten months through October [2005] versus 68% the previous four years. In only 8% of cases did judges cite the high court’s decision while departing from the guidelines.”). But see David J. D’Addio, Note, Sentencing After Booker: The Impact of Appellate Review on Defendants’ Rights, 24 YALE L. & POL’Y REV. 173, 174 (2006) (predicting that reasonableness reviews of sentences by federal courts will gradually create new “reasonableness ranges” for offenses raising the same kinds of conceptual Sixth Amendment difficulties that led to the Booker decision).

44. See supra note 7 and infra text accompanying notes 97-120.
45. Holder Memorandum, supra note 1.
46. Thompson Memorandum, supra note 1. The Thompson Memorandum is discussed from a prosecutorial perspective in Mary Beth Buchanan, Effective Cooperation by Business Organizations and the Impact of Privilege Waivers, 39 WAKE FOREST L. REV. 587 (2004). Ms. Buchanan, U.S. Attorney for the Western District of Pennsylvania and Director of the Executive Office for U.S. Attorneys at the time she wrote the article, also defends the government’s waiver policies against commonly advanced criticisms and argues that many of these objections are far less serious than their proponents suggest. See id.
48. Holder Memorandum, supra note 1, at II.A.4.
its internal investigation, and to waive the attorney-client and work-product privileges. The same kinds of factors apply to reporting on corporate cooperation in connection with sentencing. In particular,

one factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees.

When he took office in late 2003, then Deputy Attorney General James Comey endorsed his predecessors' approach. As Richard Janis observed in a 2005 article in the Washington Lawyer, "the government has continued to redefine what it means by 'full cooperation,' with each successful demand acting as the new baseline for what is expected in future cases." One DOJ official noted, "you'll get a lot of credit if you cooperate, and that credit can make the difference between life and death for a corporation."

49. *Id.* at VI.A (emphasis added).

50. *Id.* at VI cmt.


52. Janis, *supra* note 51, at 35. Mr. Janis also quotes Alabama United States Attorney Alice Martin to the effect that "[o]nce one prosecutor has gotten cooperation of a certain level, that level becomes what we all now consider cooperation." *Id.* (quoting Cohen, *supra* note 5). As a senior DOJ official has acknowledged, "[t]o avoid any such disclosures unnecessarily, experienced attorneys will refrain from including mental impressions and strategy in their notes of witness interviews." Buchanan, *supra* note 46, at 596 (citing Comey, *supra* note 51, at 5).

53. Wray, *supra* note 32, at 4. As discussed more fully below, however, Mr. McCallum has instructed all United States Attorneys Offices to create written policies in a concession to concerns of the defense bar, industry and public interest groups. See infra text accompanying notes 97-99. Cf. John Gibeaut, *Junior G-Men, Corporate Lawyers Worry that They're Doing the Government's Bidding While Doing Internal Investigations*, 89 A.B.A. J. 46, June 2003 (defense lawyers expressing view that companies bear the burden of attorney-client privilege waivers); DOJ Enron Task Force leader Leslie Ragon Caldwell has reportedly stated, "[y]ou don't have to waive your attorney-client privilege, but we want you to." (quoted in Gibeaut, *supra* note 53, at 1). See infra text accompanying notes 96-98.
3. Policies Implemented by Other Federal Agencies

A number of federal agencies, including the Officer of the Inspector General of the Department of Health and Human Services (HHS) and the Securities and Exchange Commission (SEC), have approached the attorney-client and work product protections in a similar fashion in connection with voluntary disclosure programs and negotiation of enforcement matters. The SEC has encouraged the production of otherwise privileged materials in a variety of contexts for many years. The Office of the Inspector General of HHS reportedly has successfully implemented this strategy in connection with a number of its anti-fraud initiatives in the health care arena, and other federal agencies reportedly increasingly have begun to follow suit.

54. The SEC specifically has noted:

In some cases, the desire to provide information to the Commission staff may cause companies to consider choosing not to assert the attorney-client privilege, the work product protection and other privileges, protections and exemptions with respect to the Commission. The Commission recognizes that these privileges, protections and exemptions serve important social interests. In this regard, the Commission does not view a company's waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff.

55. See, e.g., Notices, Dep't of Health and Human Servs., Office of Inspector General, Publication of the OIG's Provider Self-Disclosure Protocol, 63 Fed. Reg. 58399-02 (Oct. 30, 1998) at pt. VI (noting that in verifying self-disclosures OIG requires "access to all audit work papers and other supporting documents without the assertion of privileges or limitations on the information produced"). Id. Also, while the protocol mentions that OIG does not ordinarily request production of materials subject to the attorney-client privilege, it may require production of some privileged documents, particularly those otherwise subject to the work product privilege. The protocol goes on to state, however, that “OIG is prepared to discuss with provider's counsel ways to gain access to the underlying information without the need to waive the protections provided by an appropriately asserted claim of privilege.” Id.

As a result, privilege waivers are often a practical prerequisite for resolution of enforcement matters in negotiations with federal agencies. It is difficult for corporations to refuse to comply with government demands for privilege waivers when the government treats a refusal to turn over privileged materials as uncooperative behavior. The results can range from prosecution of a marginal case to representations to a court that a corporate defendant’s culpability score should not be reduced despite helpful actions in a variety of other areas. As Donald Klawiter, Chair of the ABA Antitrust Law Section, recently testified before the USSC, companies have little choice in responding to privilege waiver demands “because the government’s threat to label them ‘uncooperative’ in combating corporate crime would profoundly threaten their public image, stock price, and credit worthiness. In light of the severity of the potential consequences, refusal to agree to privilege waiver demands could arguably constitute fiduciary violations on the part of corporate decision makers. Consequently, the insistence of law enforcement authorities on privilege waivers and the reluctant acquiescence of corporations and other entities in their demands inflamed an existing conflict on a second front—the battle over third-party access to materials disclosed to government agencies.

4. The Secondary Skirmish Over Selective Waiver

The selective waiver conflict pits individuals and entities who have voluntarily disclosed otherwise privileged materials to law enforcement authorities against third-party litigants seeking access to these materials in related civil litigation—e.g., plaintiffs in civil fraud or professional malpractice cases. One of the more widely publicized cases centered on

57. See Mark Robeck, Amy Vazquez & Michael E. Clark, Corporate Cooperation in the Face of Government Investigations, 17 No. 2 H. LAW. 20, 24-25 (2005); Janis, supra note 51, at 34-35.

58. A.B.A. TASK FORCE REPORT, supra note 9, at 15. The report states: “As a practical matter, corporations rarely can resist prosecutorial requests for disclosure, because of the harsh consequences of having to defend against criminal charges, and because, in cases where criminal charges are brought and sustained, corporations depend on the leniency in sentencing that results from providing assistance satisfactory to the prosecution.” Id.

59. Id. at 6.

60. Klawiter Testimony, supra note 5, at 6. See infra text accompanying notes 104-05.

61. Corporate directors and officers have a duty pursuant to state law to act in good faith in the best interests of their corporations. See, e.g., Model Bus. Corp. Code § 8.30(a).

62. See, e.g., Westinghouse Elec. Corp. v. Philippines, 951 F. 2d 1414 (3d Cir. 1992); (holding “that by disclosing documents to the SEC and to the DOJ, Westinghouse
the efforts of fallen health care giant Columbia/HCA to preclude insurance companies and other plaintiffs in private civil actions from gaining access to audit reports the company had produced to DOJ officials pursuant to a written confidentiality agreement.63 Columbia/HCA argued for application of the principle that has come to be known as the “selective waiver doctrine.”64 The United States Court of Appeals for the Eighth Circuit first recognized this principle in Diversified Industries, Inc. v. Meredith65 in holding that voluntary disclosure to government agencies does not necessarily waive attorney-client or work product protections for all purposes.66 Other courts have rejected this approach however.67 The Third Circuit, for example, emphatically stated in its noted decision in Westinghouse Electric Corporation v. Philippines68 that “an exception for disclosures to government agencies is not necessary to further the [work product] doctrine’s purpose; attorneys are still free to prepare their cases without fear of disclosure to an adversary as long as they and their clients refrain from making such disclosures themselves.”69

waived both the attorney-client privilege and the work-product doctrine with respect to those documents”); Permian Corp. v. United States, 665 F.2d 1214, 1220 (D.C. Cir. 1981) (rejecting selective waiver claim on grounds that doctrine does not serve purposes of underlying privilege protections).


65. 572 F.2d 596 (8th Cir. 1978).

66. Id. at 611.

67. See, e.g., In re Columbia/HCA Healthcare Corp. Billing Practices, 293 F.3d 289 (6th Cir. 2002); United States v. Mass. Inst. of Tech., 129 F.3d 681 (1st Cir. 1997); Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414 (3d Cir. 1991); Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981). Most recently, the Tenth Circuit joined the courts that have rejected the selective waiver concept in In re Qwest Communications Int’l, Inc., 450 F.3d 1179 (10th Cir. 2006); see generally Tenth Circuit Rejects Selective Waiver, Finds Privilege Lost by Release to Agencies, 74 U.S. L. Wk. 1772 (2006). See generally A.B.A. TASK FORCE REPORT, supra note 9, at 12-13; Burns, supra note 64, at text accompanying notes 54-67; Okrzesik, supra note 64, at 128-41.

68. 951 F.2d at 1429.

69. Id. at 1429. The court reasoned that:
In the Columbia/HCA matter, the Sixth Circuit held that an entity that provides privileged materials to government regulators, even pursuant to a confidentiality agreement, forfeits attorney-client and work product protections as to all communications on the subject. In the court’s view, “any form of selective waiver... transforms the attorney-client privilege into merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage.” Moreover, because it can be difficult to draw any boundaries once the doctrine is applied; selective waiver invites “a difficult and fretful linedrawing process.” The court also admonished the DOJ for entering into the confidentiality agreement in the first place, stating: “The investigatory agencies of the Government should act to bring to light illegal activities, not to assist wrongdoers in concealing the information from the public domain.”

Nevertheless, some federal agencies, including the SEC, continue to support the concept of selective waiver and to enter into confidentiality agreements with individuals and entities who have agreed to disclose privileged materials in the context of enforcement proceedings.

Only one federal circuit has recognized the selective waiver doctrine. Several circuits agree with the Sixth Circuit that even confidentiality

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70. 293 F.3d at 302-03.
71. Id. at 302-03 (citing In re Steinhardt Partners, L.P., 9 F.3d 230, 253 (2d Cir. 1993).
72. Id. at 303.
73. Id. at 303.
74. For example, in October 2001, the SEC stated:

The Commission recently filed an amicus brief arguing that the provision of privileged information to the Commission staff pursuant to a confidentiality agreement did not necessary waive the privilege as to third parties. . . Moreover, in certain circumstances, the Commission staff has agreed that a witness' production of privileged information would not constitute a subject matter waiver that would entitle the staff to receive further privileged information.

SEC Cooperation Report, supra note 54, at n.3 (citing Brief of SEC as Amicus Curiae, McKesson HBOC, Inc., No. 99-C-7980-3 (Ga. Ct. App., filed May 13, 2001)).
agreements are not dispositive of third-party access rights, ruling that law enforcement officials cannot agree to maintain confidentiality at the expense of third parties once an individual or entity waives attorney-client or work product protections. A bill introduced in Congress in 2004 would have protected documents provided to the SEC pursuant to confidentiality agreements from disclosure to third parties, but the bill died in committee.

The Supreme Court has not yet addressed the selective waiver doctrine, nor is the issue settled in the state courts. In June 2006, however, the U.S. Judicial Conference Adversary Committee on Evidence Rules proposed—with the unanimous support of its members—amending Federal Rule of Evidence 502 to provide that disclosures to federal authorities in the course of "regulatory, investigative or enforcement" proceedings would "not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities." If adopted and subsequently enacted by Congress, this provision could have a major impact on third-party civil litigation related to the subject of federal investigations. Nevertheless, at present, it is impossible to assure that materials disclosed to law enforcement agencies will be protected from disclosure to third parties, even if the disclosure takes place pursuant to a confidentiality agreement. As Judge Boggs noted in his dissent in Columbia/HCA, the absence of a strong selective waiver doctrine "does nothing more than increase the cost of cooperating with the government." The proposed amendment to Rule 502 offers hope, but unless and until it is adopted, the majority of federal courts are likely to continue to reject the selective waiver concept. The refusal of most courts to adopt a selective waiver doctrine raises the stakes for entities

75. Compare Diversified Industries, 572 F.2d 596 (8th Cir. 1978), with cases cited supra note 67. The Tenth Circuit's very recent decision in Qwest Communications offers a survey of earlier precedents and a thoughtful analysis of the relevant issues. See 450 F.3d at 1179.


78. 293 F.3d at 311 (Boggs, J., dissenting). Judge Boggs expressed the view that the "public interest in easing government investigations counsels against holding the attorney-work-product privilege waived when the holder of the privilege discloses privileged information to the government." Id. at 314.
facing federal law enforcement agency demands for waiver of attorney-client privilege and work product protections.

C. Efforts by the Legal Profession and Others to Defend the Corporate Privileges

Not long after its issuance in June 1999, the Holder Memorandum began to impact prosecutorial decisions and enforcement actions across the country. There are good reasons for the government's desire to obtain otherwise privileged materials from corporations and other entities that are defendants or potential defendants in criminal actions or enforcement proceedings. As the Holder and Thompson memoranda suggest, obtaining privileged materials enables government attorneys to gain greater certainty about the legitimacy of an entity's cooperation. Access to this information allays concerns that a defendant may mask particularly egregious conduct by cooperating with respect to matters already unearthed by the government. Insisting on privilege waivers also provides a means of leveraging prosecutorial resources. Waivers allow the government to gather facts rapidly by gaining access to the work of defense attorneys and the fruits of their investigations. Consequently, the government continued to seek to circumvent Upjohn.

Demanding privilege waivers as a precondition to acknowledging corporate "cooperation" proved to be a successful strategy for the government. As David Zornow and Keith Krakaur noted in 2000, "[w]ith this change in prosecutorial attitude, the government effectively [began to] deputiz[e] 'Corporate America' as an arm of law enforcement at the expense of principles that lie at the core of our adversarial system of justice." Before long, other members of the defense bar complained that the attorney-client privilege is "under siege," and that the privilege that "help[ed] to define the role of lawyers in society and the public's perception of the

79. See, e.g., Comey, supra note 51, at 4 (noting that, among other things, "[c]ooperation enables the government to gather the facts before they're stale... fully investigate[e] the wrongdoing and figure[e] out who the wrongdoers are"); Zornow & Krakaur, supra note 9, at 157 (noting that waiver of corporate privilege protections enables the government to "obtain incriminating evidence directly from employees without the need to negotiate promises of immunity or to arrange for a plea to a lesser charge in exchange for information" and "reaps the fruits of interviews while minimizing the risk that the employees will seek to obtain separate counsel who might otherwise have advised them to assert the Fifth Amendment").

80. Zornow & Krakaur, supra note 9, at 147. See also, e.g., Andrew Longstreth, Double Agent: In the New Era of Internal Investigations, Defense Lawyers Have Become Deputy Prosecutors, 27 AM. LAW. No. 2 (Feb. 2005).

fairness with which the legal system operates. . . [were] being irreparably destroyed by the government's successful assault on centuries of tradition." In a similar vein, journalist John Gibeaut reported that "waiver and disclosure [came to be] a lot like voting in Chicago elections: Corporations must do it early and often, or be treated as uncooperative." In response, critics of the government's privilege waiver policies began to stress two key points: (1) the privilege waiver policies of DOJ and other agencies undermine safeguards critical to the American justice system; and (2) in the longer run, these kinds of policies are likely to constrict the flow of information to law enforcement officials.

1. Engagement by the ABA and Other Interested Parties

In September 2004, while government attorneys continued to clash with the defense bar over privilege waivers, the ABA appointed a special task force to address the issue. The Task Force on the Attorney-Client Privilege was charged with the responsibility "to evaluate issues and recommend policy related to the attorney-client privilege and work-product doctrine." The Task Force engaged in extensive research into the matter and conducted hearings. In May 2005 the Task Force published a comprehensive report on its efforts. The report recounted numerous examples of prosecutorial pressure on corporate entities to waive their attorney-client and work product protections, stating: "The Task Force heard from a variety of sources that, whether made overtly or implicitly, these requests, backed by an express or implied threat of harsh treatment for

82. Janis, supra note 51, at 44. See also, e.g., Richard Ben-Veniste & Lee H. Rubin, DOJ Reaffirms and Expands Aggressive Corporate Cooperation Guidelines, LEGAL BACKGROUNDER, Apr. 4, 2003, at 1; Gibeaut, supra note 53 at 48.

83. Id. at 51. See also Richard Ben-Veniste & Raj De, Federal Privilege Waiver Demands Impact Corporate Compliance, LEGAL BACKGROUNDER, Feb. 24, 2003, at 1.


86. A.B.A. TASK FORCE REPORT, supra note 9, at 1.

87. Id. at 2.

88. Id.
refusing, have become increasingly common.” Emphasizing that the attorney-client privilege “fosters the attorney-client relationship,” “encourages client candor,” “fosters voluntary legal compliance,” “promotes efficiency in the legal system,” and “enhances the constitutional right to effective assistance of counsel,” the Task Force concluded that the pressures exerted by DOJ and other federal agencies, as well as the November 2004 amendments to the Commentary to section 8C2.5 of the Organizational Sentencing Guidelines, threatened these important goods. The Task Force agreed with the observations of a California Bar committee that in the longer run “[p]ressure on corporations to waive client confidentiality protections thus creates additional risks of harm to investors and innocent targets of investigation and, even to the public itself.”

In response to the Task Force’s report and recommendations, on August 9, 2005, the ABA’s House of Delegates adopted a resolution opposing “the routine practice [of] government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.”

During the same time period, other interest groups began to engage in attempts to stem the tide of privilege waiver demands. In March 2005, an informal coalition of business and civil liberties groups wrote to the Honorable Ricardo Hinojosa, Chairman of the USSC, to express their view that privilege waiver demands and the November 2004 amendment to the commentary to Section 8C2.5 of the Organizational Guidelines were “weakening the attorney-client privilege between companies and their lawyers,” “undermining internal compliance programs,” and “unfairly

89. Id. at 14. For discussion of federal law enforcement practices with respect to privilege waiver, see id. at 14-16 (prosecutorial policies) and 16-18 (regulatory agency practices).

90. Id. at 7-11.

91. See supra text accompanying notes 40-41.


94. For a list of informal coalition members, see supra note 6.
harm[ing] employees. Both the informal coalition and the ABA reiterated these kinds of concerns in August 2005 letters to Judge Hinojosa.

2. The Government's Response

The first steps toward a possible rapprochement between the government and the critics of its corporate privilege waiver policies came a few months after the ABA's August 2005 resolution and just over a year after the formation of the ABA Task Force. On October 21, 2005, Acting Deputy Attorney General Robert D. McCallum issued a two-paragraph memorandum directing United States Attorneys to establish "review processes for waiver requests that require federal prosecutors to obtain approval from the United States Attorney or other supervisor before seeking a waiver of the attorney-client or work product protection." The McCallum Memorandum received mixed responses. While some members of the legal profession expressed optimism, many viewed its instructions regarding the creation of written policies as "a fairly superficial gesture."


96. Letter from Robert D. Evans, Director, A.B.A. Governmental Affairs Office, to USSC (Aug. 15, 2005) at 3 ("Lawyers for companies and other organizations play a key role in helping these entities and their officials to comply with the law and to act in the entity's best interests. . . . By authorizing routine government demands for waiver of attorney-client and work product protections, the amendment discourages personnel within companies and other organizations from consulting their lawyers. This, in turn, seriously impedes the lawyers' ability to effectively counsel compliance with the law."), available at http://www.abanet.org/buslaw/attorneyclient/materials/049/049.pdf.


98. See, e.g., remarks of Professor Stephen A. Saltzburg to the effect that the Department's new approach should help to achieve four important objectives by ensuring better access to information for persons concerned with the number and scope of waivers requested by federal prosecutors; providing opportunities for consultation among U.S. Attorneys' offices and defense counsel; facilitating comparison of district policies and using this information as a basis to seek changes where appropriate; and to build a foundation for seeking Congressional intervention "if the mainstream appears to intrude
The USSC, however, clearly took privilege waiver policy concerns very seriously. In November 2005, the Commission held a public hearing on the issue.\textsuperscript{100} At the hearing, the Commission heard testimony from five representatives of the informal coalition. Former senior Justice Department officials also testified “about what they perceived as the unintended but potentially deleterious effects on the criminal justice process of this commentary language.”\textsuperscript{101} This testimony recounted a host of problems created by the pressure to waive the attorney-client and work-product privileges arising in part from the government’s focus on waiver as an ingredient of “cooperation” pursuant to the sentencing guidelines. The accompanying recommendations requested amendment of the commentary to Section 82C.5 to clarify that only disclosure of non-privileged materials and information is required to establish thorough cooperation pursuant to the Guidelines.\textsuperscript{102}

Donald Klawiter, Chair of the ABA Antitrust Law Section, testified on behalf of the ABA that the organization’s most significant concerns about the November 2004 amendments to the Sentencing Guidelines centered on the change in the Commentary to Section 8C2.5 because it “authorizes and encourages the government to require entities to waive their attorney-client and work product protections in order to show “thorough” cooperation with the government and thereby qualify for a reduction in the culpability score . . . .”\textsuperscript{103} He also stressed that the privilege waiver amendment and associated policies have undermined trust in both in-house and outside counsel, thereby impeding effective counseling with respect to legal compliance,
undermining companies' internal compliance programs, and harming employees. National Association of Criminal Defense Lawyers ("NACDL") representative Henry Asbill focused on the dilemma of employees facing potential "criminal[] sanction[s] for refusing to talk to [a company's] internal investigators when it is clear, in the current climate, that the fruits of such conversations will be turned over to the government, and yet they cannot assert their Fifth Amendment rights without risking termination or financial ruination." He emphasized that the government's privilege policies have had a chilling effect on communications between corporate personnel and in-house counsel with respect to legal compliance issues and that "erosion of the privilege has diminished the flow and candor" of information from corporate employees to outside counsel conducting internal investigations.

Tina Van Dam, Senior Counsel for the National Association of Manufacturers, also representing the Corporate Counsel Association and the American Chemistry Counsel, testified that "the commentary has greatly complicated in-house counsel's already difficult job of counseling our clients as to ethics, compliance, governance and litigation in a highly complex and increasingly regulated multi-jurisdictional environment." Stanford Anderson, Senior Counsel for the U.S. Chamber of Commerce, emphasized the business community's desire to support prosecution of "[b]ad actors [that] tarnish the entire business community in the eyes of the public, and often inflict as much . . . harm on other companies as they do on consumers or investors." He stressed, however, that essentially "non-voluntary" privilege waivers are "making officers and employees reluctant to involve lawyers in ongoing business activities," thereby "increase[ing] the
risk that those officers and employees will inadvertently violate the law... [and] hobble internal corporate investigations...”110

A few months later, in a January 27, 2006 notice requesting input on a broad variety of subjects, the USSC asked for comments on the privilege waiver language in the commentary to section 8C2.5 of the Organizational Sentencing Guidelines.111 Specifically, as a follow-up to its November 2005 public meeting, the USSC invited input on four questions:

(1) whether this commentary language is having unintended consequences; (2) if so, how specifically has it adversely affected the application of the sentencing guidelines and the administration of justice; (3) whether this commentary language should be deleted or amended; and (4) if it should be amended, in what manner.112

A few days after the USSC issued its notice, ABA President Michael Greco took the extraordinary step of writing directly to bar leaders "to enlist [their] help and support in preserving the attorney-client privilege and work product doctrine and protecting them from federal governmental policies and practices that now seriously threaten to erode these fundamental rights."113 Mr. Greco expressed concern that the McCallum Memorandum would do little to help the situation, suggesting that it "will likely result in numerous different waiver policies throughout the country, many of which may impose only token restraints on the ability of federal prosecutors to demand waiver."114 His letter asked ABA members to establish committees, contact local United States Attorneys and Justice Department officials, and comment on the pending amendments to the USSC’s proposed changes in the organizational guidelines.115

The ABA and other interest groups have also actively engaged in alerting federal legislators to the privilege controversy.116 In response, several members of Congress have weighed in on the issue. Representative Daniel Lungren wrote to the USSC Chairman in August 2005 to express concern that the commentary provision inhibits the ability of lawyers to help corporate clients comply with the law, suggesting that

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110. Id. at 2. Mr. Anderson also noted that the crime/fraud exception to the attorney-client privilege applies to remove the protection afforded by the privilege in instances in which an attorney becomes involved in corporate misconduct. See id. at 4; see generally RICE, supra note 9 at § 8; VILLA, supra note 9 at § 2:16.
111. See USSC Jan. 2006 Notice, supra note 100.
112. Id.
113. Greco Letter, supra note 2, at 1.
114. Id.
115. Id. at 2.
to fulfill this role, lawyers must have the trust and confidence of the entity’s leaders and must be provided with all relevant information necessary to represent the entity effectively, ensure compliance with the law, and quickly remedy any violations. By authorizing the government to demand waiver of attorney-client and work product protections on a routine basis, the amendment discourages entities from consulting their lawyers. This, in turn, impedes the lawyers’ ability to effectively counsel compliance with the law and discourages them from conducting internal investigations designed to quickly detect and remedy misconduct. As a result, companies and the investing public will be harmed.\textsuperscript{117}

On March 7, 2006, the House Judiciary Committee’s Subcommittee on Crime, Terrorism and Homeland Security held hearings on the attorney-client privilege waiver issue. Once again, the ABA, the Coalition, and former DOJ officials testified or submitted testimony echoing themes similar to those previously presented to the USSC. The Coalition also cited the results of recent surveys offering evidence of belief in the potentially chilling effect of law enforcement waiver policies,\textsuperscript{118} emphasizing that

\begin{itemize}
\item[117.] Letter from Rep. Daniel Lungren to the Hon. Ricardo H. Hinojosa (Aug. 15, 2005) at 2 (emphasis in original), available at www.abanet.org/buslaw/attorneyclient/materials/048/048.pdf. Other legislators have also offered views on the controversy in recent months. For example, Senator Arlen Specter, Chairman of the Senate Judiciary Committee stated: “I don’t believe there ought to be any coerced waiver of the attorney-client privilege... I wouldn’t wave my attorney-client privilege if I were you — under any circumstance. [The] Government has the burden of proof... that’s the way it is and the way it should be.” Sen. Arlen Specter, Remarks at the U.S. Chamber of Commerce/ABA/ACLU/NACDL Conference on “Erosion of the Attorney-Client Privilege: What Does the Future Hold,” (Nov. 16, 2005) 1-2, available at http://www.abanet.org/poladv/acpriv_transcriptofspecter11-16-05.pdf.
\end{itemize}
federal prosecutors and agency enforcement personnel were continuing to demand corporate privilege waivers on a routine basis: "‘a culture of waiver’ has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections." The ABA and the Coalition asked Congress to "send a clear message to the federal prosecutors at the Department of Justice and other regulatory agencies that companies and their employees should not be punished for preserving their rights to exercise their attorney-client privileges."

3. The USSC’s Decision to Delete the Waiver Reference from the Commentary to the Organizational Guidelines

Opponents of government policies undermining the corporate attorney-client privilege won a significant victory in April 2006 when the USSC voted to delete the reference to waiver of attorney-client and work product protections from the commentary to section 8C2.5 of the Organizational Sentencing Guidelines because of widespread concern “that the sentence at issue could be interpreted to encourage waivers.” The USSC’s decision to abandon the waiver language added to the guidelines commentary in November 2004 is an important step in restoring the vitality of corporate attorney-client and work product protections. As Susan Hackett, General Counsel of the Association of Corporate Counsel, observed, the USSC’s action does not undo the waiver policies of DOJ or other federal agencies,


119. Coalition Testimony, supra note 118, at 7. See also Evans-Coble Letter, supra, note 119, at 3-4.

120. Coalition Testimony, supra note 118, at 8; Evans-Coble Letter, supra, note 118, at 3 ("[the A.B.A.] urge[s the Subcommittee] to address and remedy the problems created by the privilege waiver amendment as soon as possible," to prohibit privilege or work product waiver demands during investigations, specify the types of factual information prosecutors may request, and clarify that voluntary waiver decisions will not be part of the cooperation calculus.).

121. USSC Proposed November 2006 Sentencing Guidelines Amendments, supra note 1, at 59-60. See also supra note 5.
but it does "take[] away from prosecutors the ability to gain more leverage by saying the waiver is recognized by the sentencing guidelines."\textsuperscript{122} The USSC's willingness to eliminate the waiver language demonstrates that opponents of waiver policies have made a persuasive case for a return to the Upjohn approach and that the intense public pressure they have brought to bear on federal decision makers has begun to produce results. The most important player, however, is DOJ. As evidenced by a Coalition survey, with or without specific language in the guidelines commentary, prosecutors acting pursuant to DOJ policies exert compelling influence on corporate decision makers.\textsuperscript{123}

4. Ongoing Efforts to Eliminate DOJ and Other Federal Privilege Waiver Policies

Shortly after the USSC's April 2006 decision, ABA President Michael Greco again wrote to bar leaders urging continued engagement in efforts "to preserve the attorney-client and work product protections that are so vital to our legal system."\textsuperscript{124} On the same day, Mr. Greco also wrote to Attorney General Alberto Gonzales requesting Mr. Gonzales "to consider modifying the Justice Department's internal waiver policy to stop the increasingly common practice of federal prosecutors requiring organizations to waive their attorney-client and work product protections as a condition for receiving cooperation credit during investigations."\textsuperscript{125} The letter enclosed specific suggestions for revision of the McCallum and Thompson Memoranda to

(1) prevent[] prosecutors from seeking privilege waiver during investigations, (2) specify[] the types of factual, non-privileged information that prosecutors may request from companies as a sign of cooperation, and (3) clarify[] that any voluntary waiver of privilege shall not be considered when assessing whether the entity provided effective cooperation.\textsuperscript{126}

\textsuperscript{122} Carter, supra note 7.
\textsuperscript{123} See Attorney-Client Privilege Waiver Survey, supra note 2, at 9.
\textsuperscript{124} Letter from Michael S. Greco, President, A.B.A., to Members (May 2, 2006) at 3 [hereinafter Greco May 2006 Letter]. Specifically, Mr. Greco called on bar leaders to establish committees, contact DOJ and local U.S. Attorneys, and send op-ed pieces to local media. \textit{id.}
\textsuperscript{125} Letter from Michael S. Greco, President, A.B.A., to Hon. Alberto Gonzales (May 2, 2006) at 1.
\textsuperscript{126} \textit{id.} at 3.
In sum, the battle lines are drawn, and the opposition is making headway. Whether the corporate attorney-client and work product protections will emerge from the conflict alive and well, however, still remains to be seen.

II. THE FALLOUT OF THE PRIVILEGE BATTLE ON THE HEALTH CARE INDUSTRY

The ultimate outcome of the current conflict over attorney-client and work product protections will have a major impact on health care entities and the hundreds of thousands of physicians and other individuals engaged in the provision of health care in the United States. As those who work in this milieu are only too aware, the American health care system operates within a staggeringly complex matrix of legal, socioeconomic, and political factors. This framework is the result of a confluence of factors including: (1) market forces underlying the shift from fee-for-service medicine to managed care and the consolidation of entities into health systems, physicians and other professionals into group practices, and third-party payers into integrated organizations on a regional and national scale; (2) political and fiscal constraints on the nature and shape of government benefit programs and private health insurance; (3) government and private sector efforts to curb soaring health care costs through anti-fraud-and-abuse efforts; and (4) rapidly advancing technologies accompanied by rising public expectations pertaining to health care and its delivery. As Mark Hall has pointed out, "Scholars have long noted that the field of health law lacks cohesion. They speak in terms of the 'pathologies' of health law, or its contradictory and

128. See generally id. at 701-10.
competing 'paradigms,' which constitute a 'chaotic, dysfunctional patchwork.'\textsuperscript{131} The following discussion focuses on the impact of the privilege battle on the business of health care, as well as the implications of a weak attorney-client privilege on the quality and integrity of the health care system.

\textit{A. The Need for Legal Advice Amid the Tangled Web of Federal and State Health Care Laws}

Many senior citizens have had difficulty understanding their options and obligations under Medicare’s new Part D. As one state official reported, “We’ve had calls from people in tears who could not get their medications.”\textsuperscript{132} Another stated, “People are very angry and very upset. They are yelling at us. . . . They feel they cannot trust anything we say about this program.”\textsuperscript{133} Unfortunately, these comments are emblematic of the frustrations that many people -- medical professionals, business managers, patients, and members of the public -- often feel in dealing with the American health care system because of its Gordian nature. The intricacy of the legal framework in which health care providers work virtually guarantees that neither individual health care professionals nor the managers of health care organizations will have the time or expertise to discover, let alone comprehend, all of the relevant laws, regulations and policies governing their work. This is a task necessarily delegated, at least in part, to legal counsel. The work of attorneys in the health law field has always been important, but now, perhaps more than ever before, counsel must deal with issues that affect the fiscal health, reputation, and very survival of health care entities. These issues in turn directly impact the lives of patients, medical professionals and line employees who depend in one way or another on these organizations.\textsuperscript{134} In the current privilege environment, the task of health care attorneys is more difficult than at any time in the past.\textsuperscript{135}
Impact of the War Over the Corporate Attorney-Client Privilege

1. The Dizzying Array of Health Care Laws

Health care entities and medical professionals operate in a world of overlapping and sometimes inconsistent laws, regulations and contractual obligations with the constant threat of medical malpractice litigation looming large. State law governs medical malpractice actions, as well as the licensing of medical professionals and health care entities, the regulation of professional practice, and the operation of health care facilities. State medical boards, along with other professional bodies, administer licensing combined with the need for cost-containment efforts caused "many health care providers to 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." Id. at 204

135. Even lawyers who have devoted many years to health law "sometimes have difficulty providing clients with definitive guidance because the laws and regulations are often ambiguous." BAUMANN, supra note 129, at 2. Health care attorneys also work in an area of legal and ethical landmines. See Gerson & Gladieux, supra note 134, at 164-66; Philip L. Pomerance, Ethical Challenges in Everyday Practice for Healthcare Lawyers, 34 A.H.L.A. J. OF HEALTH L. 1 (2001).

136. See Hall, supra note 131, at 464; Gerson & Gladieux, supra note 134, at 204 (discussing complexity of law and regulation and "multiple payer-payee relationships that often lead to confusing and contradictory interpretation of laws and regulations") and sources cited supra note 128. Myriad other variations exist ranging from scope-of-practice regulations applicable to advanced nursing practitioners to reporting requirements and privacy protections applicable to medical professionals and entities providing care to persons who have advanced immunodeficiency syndrome and other contagious conditions.

137. Concern over medical malpractice liability is a matter of national concern. The Bush Administration has called for reform "to make the medical liability system more fair, predictable, and timely," on grounds that "[s]kyrocketing medical liability insurance rates force physicians to restrict their services or close their practices, [and] often [to] feel compelled to practice "defensive medicine" – ordering unneeded tests and procedures solely to guard against potential malpractice claims." Reforming Health Care for the 21st Century at http://www.whitehouse.gov/stateoftheunion/2006/healthcare/index.html #section10 (last visited Mar. 20, 2006). Many physician groups and policy makers agree with the President's call for reform, see, e.g., Dan Shapiro, A Doctor's Response on Malpractice, N.Y. TIMES at 21 (Oct. 12, 2003); Jane Gordon, Doctors Plan Rally Over Malpractice Bills, N.Y. TIMES 5 (Feb. 16, 2003); Dan Shapiro, Essay: Beyond the Blame: A No-Fault Approach to Malpractice, N.Y. TIMES at F6 (Sept. 23, 2003). Others, however, contend that it is medical practice rather than the professional liability system that requires reform.

requirements and exercise both rule-making and adjudicative functions with respect to qualifications, unauthorized practice, scope of practice, and disciplinary proceedings. State agencies also administer the laws governing the establishment and operation of health care entities and their facilities, enforce reporting provisions and consumer surveys, and implement public health programs. The relevant legal and regulatory frameworks have many similarities, but they also vary in important respects from state to state.

As the nation's largest health care consumer—principally through Medicare and Medicaid—and its largest employer, the federal government is the single most important player on the national health care scene. Federal programs, particularly Medicare and Medicaid, are administered through a complex system of rules and regulations that sometimes bewilder even the experts, particularly when it comes to fraud and abuse. Federal law also operates with respect to patient privacy.

140. See id. at 62-80; Healy, Altman & Fox, supra note 138, at 603-04.
141. See Lawrence O. Gostin, Public Health Law: A Renaissance, 30 J. L. Med. & Ethics 136 (2002). Much of our current framework of state public health law is based on antiquated medical concepts, multiple layers of statutes that are often inconsistent and mandates that frequently lack safeguards for individual rights. Id. at 137.
142. Some states, for example, permit hospitals, health maintenance organizations and other entities to employ physicians, but a minority still prohibit entities from employing physicians on the basis of the venerable common law doctrine against the "corporate practice of medicine" still extant under the common law or statutory provisions of a number of jurisdictions. See infra note 209.
143. Medicare provides health care benefits funded principally by payroll taxes to individuals sixty-five years of age and older and to people of all ages with certain types of disabilities and/or end-stage renal disease requiring dialysis or a kidney transplant. See CMS Medicare Overview, http://www.cms.hhs.gov/MedicareGenInfo/.
144. Medicaid, jointly funded by the federal government and the states, offers health care coverage to individuals with low incomes and very limited financial resources on the basis of specific eligibility criteria set by each state within broad parameters established by federal law. See CMS Medicare Overview, http://www.cms.hhs.gov/MedicaidGenInfo. The State Children's Health Insurance Program (SCHIP) is a related program targeted at needy children. "SCHIP is jointly financed by the Federal and State governments and is administered by the States." CMS SCHIP Overview, http://www.cms.hhs.gov/LowCostHealthInsFamChild/.
146. See Baumann, supra note 129, at 2 (describing increasing complexity of health care fraud and abuse laws).
access to health care facilities, \(^{148}\) the dispensing of drugs and other controlled substances, \(^{149}\) the health and safety of health care workers, \(^{150}\) hazardous waste disposal, \(^{151}\) and in many other areas. \(^{152}\)

In addition to the astounding array of state and federal laws and regulations, health care providers must abide by contractual obligations, payment policies and procedures of third-party payers in the private sector. Accrediting agencies, particularly the Joint Commission on the Accreditation of Healthcare Organizations (JCAHO), also enter into the mix.

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152. Individuals and organizations involved in health care also face innumerable other kinds of legal dilemmas on a daily basis, ranging from questions about the rules promulgated by the United Network for Organ Sharing (UNOS) in keeping with its responsibilities under the National Organ Transplant Act, 42 U.S.C. §§ 273-274g (2000), to legal and ethical issues attendant to experimental gene manipulation therapies. The UNOS issue made the front pages of newspapers across the nation when the United States Government alleged that physicians at the University of Chicago Hospitals had misrepresented the health status of patients as a means of placing them higher on organ donation waiting lists. See Steve Warmbir, UIC Hospital Sued For Medicare Fraud; Facility Accused Of Rigging List Of Patients Awaiting New Livers, CHI. SUN TIMES, July 29, 2003, at 3; Thomas M. Burton & Amy Merrick, U.S. Alleges Liver-Transplant Fraud, WALL ST. J., July 29, 2003, at A3. The legal and ethical issues embedded in experimental gene manipulation therapies also have received significant media coverage. See Alice Dembner, Lawsuits Target Medical Research Patient Safeguards, Oversight Key Issues, BOSTON GLOBE, Aug. 12, 2002, at A1; Patient, 18, Dies at Penn During Gene-Therapy Test. He Was Undergoing Treatment for a Rare Disorder. Some Had Said Research Moved Too Quickly, PHILA. INQUIRER, Sept. 29, 1999, at A1. On a more prosaic but equally important level, legal questions may arise in connection with uncertainties about Occupational Safety and Health Administration safety requirements for health care workers, see supra note 150; hazardous waste disposal regulations, see RCRA, supra note 151; or any of an incalculable number of other types of issues pertaining to every aspect of health care services.
in the important role of setting quality standards and monitoring the operation of thousands of member organizations from a quality-of-care perspective.\textsuperscript{133} JCAHO accreditation is essential from a public relations standpoint, but it also serves as a means of demonstrating compliance with certain Medicare and Medicaid program requirements,\textsuperscript{134} as well as those of private insurers and other third-party payers.\textsuperscript{135} While JCAHO performs a much needed function, its standards, reporting mandates, and other requirements add yet another layer of complexity to federal, state and local law.

2. Anti-Fraud Laws and Other Provisions Pertaining to the Integrity of Charges for Health Care

A number of federal agencies and their state counterparts are actively involved in the ongoing effort to ensure that those who provide health care—physicians, therapists, hospitals, health maintenance organizations, and other medical professionals and entities—do so honestly and in accordance with standards prescribed pursuant to government benefit programs.\textsuperscript{136} The aggressive enforcement of anti-fraud laws in the health care sector began in the early 1990's when Clinton Administration officials declared an all-out campaign against health care fraud.\textsuperscript{137} During this time

The Commission is governed by a board comprised of medical professionals and consumers, and it engages medical professionals to perform its survey functions. See Facts about the Joint Commission on Accreditation of Healthcare Organizations, http://www.jcaho.org/AboutUs/joint_commission_facts.htm. For discussion of the functions of JCAHO, its role in American health care, and critiques of the Commission, see Furrow, et al., supra note 138, § 1-4 at 8-10.

134. Medicare accepts JCAHO accreditation as evidence of satisfaction of most program requirements pursuant to a “deemed” status provision. See 42 U.S.C. §§ 1395x(e) & 1395bb. See generally, Furrow, et al., supra note 138, at 8; Healy, Altman & Fox, supra note 138, at 603-04.


136. In the words of Linda Baumann, for both the government and the private sector, “[h]ealth care fraud and abuse has become a growth industry.” Baumann, supra note 129, at 2. See generally David A. Hyman, Health Care Fraud and Abuse: Market Change, Social Norms, and the Trust “Reposed in the Workmen,” 30 J. LEGAL STUD. 531 at 531-32 (2001) (“there has been a steady upward trend over the past 6 years in civil, criminal, and administrative fraud enforcement”).

period, DOJ and other federal agencies initiated a number of anti-fraud programs, and Attorney General Janet Reno listed health care fraud as her department’s “number two initiative behind violent crime.” The Bush Administration has similarly embraced a commitment to find and punish “those in the health care community who commit fraud against the taxpayers of this country.” In fiscal year 2004, federal authorities obtained more

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158. Some of these programs have catchy names such as “Who Pays? You Pay.” See Kathleen A. Peterson, First Nursing Homes, Next Managed Care: Limiting Liability in Quality of Care Cases Under the False Claims Act, 26 AM. J. L. & MED. 69, 70 (2000). For discussion of a number of Clinton Administration anti-health-care-fraud initiatives, see Russell Hayman, Health Care Fraud and Abuse: How to Navigate the Compliance Process, Dissecting a Health Care Fraud Investigation, 1129 PLI/Corp 223, 238-44 (1999).


160. “Skeptics who predicted the new Bush Administration would prove more sympathetic to the health care industry than its predecessor have seen their hopes dashed in the face of consistent fraud recoveries of close to a billion dollars a year.” Joan H. Krause, Regulating, Guiding, and Enforcing Health Care Fraud, 60 N.Y. Ann. Surv. Am. L. 241, 241 (2004). See, e.g., Comey, supra note 51, at 3. Mr. Comey noted that the Bush Administration’s “commitment to root out and punish corporate wrongdoers” applies to wrongdoers in the health care community “with equal force,” id. at 1, and that “the Attorney General considers health care fraud, like corporate fraud, to be a top priority in the Department’s efforts to tackle white collar crime.” Id. at 3. Mr. Comey also noted that then-Associate Attorney General, later Acting Deputy Attorney General,
than 605 million dollars in health care judgments and settlements; received
1.7 billion dollars in various payments of fines, penalties and restitution;
initiated 1002 new criminal investigations pertaining to suspected health
care fraud and 868 civil fraud investigations; filed criminal charges in 395
cases against 646 defendants; obtained convictions against 459 defendants in
criminal proceedings; and won or settled 269 civil cases.161

Law enforcement authorities utilize a variety of tools in combating health
care fraud.162 These devices range from general mechanisms including the
federal mail and wire fraud statutes,163 the false statements provision,164 the
False Claims Act,165 and Sarbanes-Oxley,166 to statutory vehicles
specifically targeted at the health care industry such as the Ethics in Patient
Referrals Act (more commonly known as the “Stark” Law),167 the Anti-

Robert McCallum had asked all United States Attorneys to make tackling health care fraud atop priority. Id.


162. For discussion of general and targeted enforcement mechanisms utilized by federal and sate law enforcement authorities, see, e.g., Jonathan Cone, Marisa Levinson & Shelley Finlayson, Health Care Fraud, 40 AM. CRIM. L. REV. 713 (2003); Joan H. Krause, Regulating, Guiding, and Enforcing, supra note 160 at 1-21; BAUMANN, supra note 129; Hayman, supra note 158, at 228-37.


Kickback Statute, and the enforcement provisions of the Health Insurance Portability and Accountability Act of 1996. Most states have analogous statutes. Some of these federal and state statutes, most notably the Civil False Claims Act, permit private parties to bring suit on behalf of themselves and the federal or a state government. In addition to criminal

Medicaid patients to health care providers with which the referring physician has a financial relationship." See Joan H. Krause, Regulating, Guiding, and Enforcing, supra note 160, at 243-44 & n.10 (2004).


169. "HIPAA implemented the most sweeping amendments to the federal health care fraud laws to date[,] ... creat[ing] five new federal health care fraud crimes." BAUMANN, supra note 129, at 213). See also Peter A. Winn, Criminal Prosecutions Under HIPAA, 53 U.S. Att'ys' Bull. 21 (2005).


172. The Civil False Claims Act permits individuals to file civil actions for violation of 31 U.S.C. § 3729 in the name of the United States government. 31 U.S.C. § 3730(b) (2000). If the government proceeds with the action, the qui tam plaintiff, known as the "relator," receives from fifteen to twenty-five percent of any recovery. 31 U.S.C. § 3720(d)(2) (2000); BAUMANN, supra note 129, at 21. If the government does not go forward with the action, the relator may still elect to do so with entitlement to between twenty-five and thirty percent of any recovery. Id. The rewards for successful prosecution or settlement of false claims actions can be quite lucrative for relators. See SmithKline Case to Benefit 3 Men, N.Y. Times, Apr. 10, 1998, at D18 ($2 million awarded to 3 relators in False Claims action against SmithKline for Medicare fraud). See also BAUMANN, supra note 129, at 21-22; Joan H. Krause, Medical Error as False Claim, 27 Am. J. L. & Med. 181, 181-82 (2001); Dayna Bowen Matthew, An Economic Model to Analyze the Impact of False Claims Act Cases on Access to Healthcare for the Elderly, Disabled, Rural, and Inner-City Poor, 27 Am. J. L. & Med. 439, 460 (2001); Efrem M. Grail, Qui Tam Insurance & False Claims Settlements, 11 Health Law. 16 (1998). The False Claims Act, a statute dating back to the post-Civil War era, is among the most draconian of these measures. See Krause, Promises to Keep, supra note 161, at 1367. The Civil False Claims Act has become one of the government's most popular tools. Its
and civil monetary sanctions, the threat of debarment from federal contracts is another weapon at the disposal of federal authorities.\footnote{73}

In recent years, the federal government has embarked on a number of initiatives aimed at reigning in various types of billing fraud, casting a net that has caught Caremark, Columbia/HCA, Health South, and other large corporate health care entities, as well as home health care agencies, hospices, hospital outpatient services, physicians and hospitals involved in graduate medical education programs, and testing services at hospitals and independent laboratories, among others.\footnote{174} On several occasions the Department of Health and Human Services has unveiled enforcement campaigns specially designed to focus public attention on health care fraud. Operation Restore Trust, for example, inaugurated anti-fraud efforts in the Clinton Administration,\footnote{175} and the Bush Administration has continued these kinds of campaigns.\footnote{176}

The operative interplay of these anti-fraud mechanisms with substantive health laws and with each other is often difficult to comprehend. The ways in which these laws are enforced, however, makes the task even more daunting. As Joan Krause has pointed out:


175. See generally id.; BAUMANN, supra note 129, at 2-8.


Treble damages provision and statutory penalties of $5,500 to $11,000 per claim—potentially applicable, for example, to each of the many line items on a Medicare patient’s hospital bill—can be catastrophic for health care entities. Id. at 1367, 1413. Federal authorities frequently use the statute as a sword, and it is increasingly common for private parties to file qui tam actions pursuant to the Civil False Claims Act. Id. at 1413 (noting that most cases settle but that “settlement has the effect of removing crucial legal issues from the courtroom.”).
Although at times it may seem that the health care fraud laws are all-encompassing, the meaning of their proscriptions is not self-evident. There are three general pathways through which such information has been conveyed to health care providers. HHS conveys information by regulating health care fraud, HHS offers informal guidance to health care providers. [and] both government prosecutors and qui tam relators convey information about fraud through the types of enforcement actions they pursue.\textsuperscript{177}

As Professor Krause also notes, the degree to which HHS and other agencies rely on informal guidance and enforcement mechanisms rather than more extensive regulation is in part a function of the dynamic nature of the health care sector, particularly in recent years, because rapid changes make it almost impossible to engage in the relatively time-consuming formal regulatory process.\textsuperscript{178} Unfortunately, informal guidance is issued in sporadic fashion, and reliance on informal guidance is never risk-free because it does not legally bind the government.\textsuperscript{179} Post hoc enforcement is even less desirable as a means of achieving cost and quality integrity, yet “[t]he phenomenon of ‘regulation by litigation’ has been recognized as a growing – and at times problematic – trend in American law.”\textsuperscript{180} Thus, the complexity of the anti-fraud laws is compounded by the manner in which participants in the health care sector are regulated and the ways in which federal and state officials enforce the applicable laws. The shifting sands of health care fraud enforcement stand out in a legal system that generally “has developed into a complex and intricate maze not always easy to navigate. . . [with] complexities [that] make it unlikely that clients are able to conduct their legal affairs without fully informed representation by an attorney.”\textsuperscript{181}

The need for lawyers to be intimately involved in the health care sector is unlikely to diminish anytime soon. As James Sheehan, Chief of the Civil Division of the United States Attorney’s Office for the Eastern District of Pennsylvania, recently observed, “Complexity in regulation feeds on itself. . . In health care, there is no politically appealing alternative model (even assuming effectiveness), little political tolerance for risk during any period

\textsuperscript{177} Krause, Regulating, Guiding and Enforcing, supra note 160, at 247. See also Krause, Conceptual Model, supra note 174, at 55.

\textsuperscript{178} Krause, Regulating, Guiding and Enforcing, supra note 160, at 249. As Professor Krause notes, the current regulatory system “fails to generate a key commodity for health care providers: clear directions from those who are charged with interpreting and enforcing the fraud laws.” Id. at 280.


\textsuperscript{180} Krause, Regulating, Guiding and Enforcing, supra note 160, at 272.

\textsuperscript{181} A.B.A. TASK FORCE REPORT, supra note 9, at 7-8.
of change, and little promise of significant benefit; so simplifying reforms are not likely in the foreseeable future.\textsuperscript{182} So long as the legal framework remains intricate, health care entities and medical professionals will continue to need the advice and assistance of counsel to survive and prosper.

III. THE OVERALL IMPACT OF ONGOING UNCERTAINTY REGARDING THE ATTORNEY-CLIENT PRIVILEGE IN THE HEALTH CARE ARENA

Lawyers can be effective counselors and advocates only when their clients consult them. Clients, however, are unlikely to seek legal assistance if there is a significant chance that their communications will not remain confidential. As the Supreme Court recognized in \textit{Upjohn}, "corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law.'\textsuperscript{183} It is not, however, artificial legal persons who seek legal advice, but living, breathing human beings who do so on behalf of these entities. Concern that client and client constituent inquiries and responses may be disclosed severely handicaps lawyers in their ability to guide clients in their efforts to comply with applicable laws.\textsuperscript{184} In health care, this disability is likely to create several types of negative effects. The following discussion highlights four of the most serious: restriction of services that are vulnerable to legal uncertainties, limitation of internal quality reviews, adverse impacts on employees and disruption of provider-professional relationships, and discouragement of internal investigation of potential wrongdoing. Over time, these results are likely to affect the quality of health care, the professional lives of those who work in the industry, and the ability of government authorities to enforce health care laws.

\textsuperscript{182} James G. Sheehan, Book Review Essay, \textit{Health Care Fraud and Abuse: Practical Perspectives}, 24 J. LEGAL MED. 135, 136 (2003) (reviewing \textit{LINDA A. BAUMANN, HEALTH CARE FRAUD AND ABUSE: PRACTICAL PERSPECTIVES} (2002)). Mr. Sheehan notes that many of the legal materials issued by the Department of Health and Human Services "are available on the Internet, and/or computerized legal search engines, but are not easily found unless you know exactly what you are looking for and where to look." \textit{Id}. at 139

\textsuperscript{183} \textit{Upjohn Co. v. United States}, 449 U.S. at 383, 392 (1981). \textit{See supra} text accompanying notes 14-33. \textit{See A.B.A. TASK FORCE REPORT, supra} note 9, at 9 (discussing the importance of "foster[ing] an open dialog between a corporation's management and corporate counsel").

\textsuperscript{184} \textit{See, e.g., Robeck, et al., supra} note 57.
A. Chilling Effects on Services

One of the tragic, albeit unintended, consequences of the complexity of the American health care system is that a lack of understanding of the law can adversely impact the quality of the health care provided by medical professionals and health care entities. As Kristen Schlegel and Sarah Shannon have cogently observed with respect to end-of-life care, "a lack of knowledge of legal guidelines, or perhaps worse yet, a mistaken belief about what is legal may be the most serious impediment to quality of care at the end of life." This is particularly true with respect to medical decisions that carry, or are perceived to carry, a risk of legal liability. A number of articles in legal and medical journals have chronicled the adverse impact that anxiety over the legal consequences of medical decisions can have on health care services. From time to time, these kinds of fears have adversely affected decisions pertaining to hospice care, "do not resuscitate" orders, advance directives, palliative care, home care, termination of life support, and many other subjects that may be colored by both accurate and inaccurate assumptions about applicable legal principles.

Some of the most compelling examples of the impact of uncertainty on the provision of health care services occurred several years ago when physicians across the country hesitated to prescribe adequate pain medication because they were uncertain about the risks of professional sanctions or even prosecution in an environment dominated by an aggressive federal campaign against illegal drugs and illicit use of prescription medications.

In recent years, medical professionals and health care entities frequently have been on the receiving end of law enforcement initiatives. One of the first such programs was the Physicians at Teaching Hospitals (PATH) initiative launched in the early 1990's as part of Operation Restore Trust. As a result of this initiative, several university hospitals paid tens of millions of dollars to the federal government. A number of other health care


186. See, e.g., Kapp, supra note 185, at 114-15. Cf. sources cited infra note 193 (discussing comparative costs and benefits of False Claims Act proceedings with respect to quality of care and access to medical services).

187. See, e.g., Kapp, supra note 185, at 132.

188. See, e.g., Krause, Medical Error, supra note 172, at 196; Ann Alpers, Criminal Act or Palliative Care? Prosecutions Involving the Care of the Dying, 26 J. L. MED. & ETHICS 308 (1998); Sandra H. Johnson, Disciplinary Actions and Pain Relief: Analysis of the Pain Relief Act, 24 J. L. MED. & ETHICS 319, 320 (1996).


providers in the private sector have faced even greater fines and penalties in connection with criminal and civil enforcement proceedings, particularly those initiated pursuant to the Civil False Claims Act.\textsuperscript{191} As noted earlier, law enforcement officials also have utilized the False Claims Act and other tools to challenge not only billing methods but the quality of care furnished by some providers.\textsuperscript{192}

\begin{footnotesize}
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\item See DHHS/DOJ 2004 Report, supra note 161; Krause, Conceptual Model, supra note 174; BAUMANN, supra note 129, at 21-26.
\item See, e.g., Michael Stockman, Note, This May Sting a Bit: Policing Skin Care in Nursing Facilities by Litigating Fraud, 87 CORNELL L. REV. 1041, 1044, 1077 (2002) ("By providing for significant potential liability, the False Claims Act provides a meaningful and aggressive method to prevent pressure ulcers in a large, vulnerable elderly population."); David R. Hoffman, The Role of the Federal Government in Ensuring Quality of Care in Long-Term Facilities, 6 ANNALS OF HEALTH L. 147 (1997) (arguing that False Claims Act proceedings can improve quality of care). Many commentators, however, question the use of the False Claims Act to address health care quality issues, suggesting that this strategy is likely to constrict access to health care for the poor, the elderly and other vulnerable groups, and that it discourages physicians and other professionals from participating fully in quality improvement programs See, e.g., Diane E. Hoffmann & Anita J. Tarzian, Dying in America – an Examination of Policies that Deter Adequate End-of-life Care in Nursing Homes, 33 J. L. MED. & ETHICs 294, 304-05 (2005); Clark, supra note 157, at 12 (discussing potential misuse and associated risks of employing False Claims Act as a tool for achieving quality, especially the need to avoid focusing on overutilization that may discourage utilization of hospital and other services); Matthew, supra note 172, at 463 (suggesting that "over-enforcement of the [False Claims Act] is likely to disproportionately harm access to healthcare for the most underserved populations"); Fabrikant & Solomon, supra note 165, at 106 ("it simply makes no sense for federal prosecutors, no matter how well intentioned or expert, to establish clinical care norms [because] . . . an array of expert federal, state and private authorities are already responsible for monitoring quality of care concerns. . ."); Michael M. Mustokoff, The Government’s Use of the Civil False Claims Act to Enforce Standards of Quality of Care: Ingenuity or the Heavy Hand of the 800-Pound Gorilla, 6 ANNALS OF HEALTH L. 137 (1997); Hyman, supra note 156.

Joan Krause points out that this enforcement approach “may preempt important medical, organizational, and regulatory debates that are crucial to the goal of promoting true quality care,” Krause, Medical Error, supra note 172, at 200. Professor Krause also notes that patients rarely receive direct financial benefits from False Claims Act recoveries. See Joan H. Krause, Healthcare Fraud and Quality of Care: A Patient-Centered Approach, 37 J. HEALTH L. 161 (2004). She points out that quality-related fraud involves two distinct victims: the patients whose care is affected and the federal program that pays for that care. In that context, it is unclear whether recovered funds should be used primarily to remedy injuries to patients or to remedy financial losses suffered by the federal Treasury. Id. at 162.
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These events should make health care managers and medical professionals eager to consult counsel about questions pertaining to the care they provide and the charges they submit for their services. However, if they fear that their inquiries will end up in the hands of law enforcement personnel, there is little reason for managers and medical professionals to seek out corporate counsel, a course of action that may well disproportionately impact the most vulnerable patients. Instead of consulting hospital counsel, for example, a staff physician may choose simply to avoid areas that raise any possibility of legal questions. Similarly, a nursing home’s medical director may transfer an elderly patient near death to an acute care hospital rather than allowing the patient to spend her last days in a more comfortable, less invasive setting in obedience to the maxim: “When in doubt, ship them out. Make the patient the other guy’s problem.”

In addition, without appropriate legal advice, medical professionals and entity employees are far more likely to go astray in the incredibly complicated maze of laws and regulations applicable to health care billing.

B. Deterrents to Internal Quality Assurance Efforts

Internal quality review is essential to providing good health care. However, fear that materials generated in the course of quality reviews will end up in the hands of prosecutors or civil plaintiffs undoubtedly diminishes enthusiasm for the review process. While state peer review statutes generally provide reasonably adequate protection to health care quality review functions in organizational settings, the recent rash of privilege waiver demands by law enforcement authorities, combined with the reluctance of the courts to recognize selective waiver as a legitimate doctrine, threatens to alter the existing balance. Consequently, in health care settings in particular, the absence of a vital attorney-client privilege

193. See, e.g., Hoffmann & Tarzian, supra note 192, at 304-05; Matthew, supra note 172, at 463; Fabrikant & Solomon, supra note 165, at 106; Mustokoff, supra note 192, at 144; Healy, Altman, & Fox, supra note 138, at 600.
194. Kapp, supra note 185, at 119-20.
195. Healy, Altman, & Fox, supra note 138, at 596 (noting that “an important predicate to quality improvement is for providers themselves to identify medical errors and other quality problems through data analysis and the generation of self-critical quality of care information. Once deficient care is identified and analyzed, systemic solutions can be developed to prevent [their] recurrence.”).
196. See, e.g., id. at 597, 600.
197. See generally FURROW ET AL., supra note 138, at §§ 4-26 – 4-28.
198. See discussion supra part I.B.4.
199. FURROW ET AL., supra note 138, at § 4-26. State peer review protections do not generally preclude access by regulatory agencies.
threatens not only "the valuable efforts of corporate counsel to ensure their client's compliance with the law," but also the ability of counsel to assist medical providers with assessment and improvement of the quality of the services they provide. As Jason Healy, William Altman and Thomas Fox have observed,

[...]the ubiquity of false claims actions and other fraud and abuse litigation against health care providers has provided a disincentive for providers to conduct thorough internal reviews of their quality of care practices because of the legitimate fear that documents pertaining to these reviews will be used against them in the courtroom.

Ironically, uncertainty over attorney-client and work product protections has peaked at a time when health care professionals, entities and oversight organizations have implemented significant new approaches to quality-of-care issues in response to the Institute of Medicine's 2000 report To Err Is Human: Building a Safer Health System and the results of other investigations reflecting a relatively high incidence of avoidable errors in the provision of health care services. These studies, along with calls from medical quality experts to incorporate aspects of aviation safety procedures and other successful quality systems, have prompted government officials, accrediting agencies, and the public to demand greater accountability from health care providers. Among the principal means of accomplishing this


201. Healy, Altman, & Fox, supra note 138, at 607.

202. Commission on Quality of Health Care in America, Inst. of Med., To Err Is Human: Building a Safer Health System (Linda T. Kohn, et al., eds.) (2001). ("The twentieth century witnessed a marvelous series of medical and surgical innovations that have vastly increased our ability to cure or relieve . . . . But this marvelous technological accomplishment of American healthcare has brought with it a nearly overwhelming complexity, fragmentation and, as the Institute of Medicine has starkly demonstrated, the ability not just to cure, but also to harm."). Martin D. Merry, Healthcare's Need for Revolutionary Change, 30 Quality Progress 31 (Sept. 2003). See generally Healy, Altman, & Fox, supra note 139, at 596; Michael S. Lawlor, Academic Medicine Under Economic Stress: A Case Study of the Institutional Change Transforming American Health Care, 60 Rev. of Soc. Econ. 435 (2002).


204. See Furrow, et al., supra note 138 at 32-63; see Commission on Quality of Health Care, supra note 202, at 5.
objective is the implementation of reporting mandates such as JCAHO's Sentinel Events Policy,\textsuperscript{205} and encouragement of enhanced internal review procedures.\textsuperscript{206} To a large extent these measures are designed to deter the tendency of medical professionals to rely on a "perfectability" model that focuses on individual error as the cause of adverse outcomes and to concentrate instead on addressing human and technological shortcomings by building in safety mechanisms and by implementing systemic changes.\textsuperscript{207} However, implementing changes, especially the process of identifying and investigating the underlying causes of medical problems, often requires legal assistance. When health care providers cannot depend on the confidentiality of their dealings with counsel, their willingness to involve attorneys in these matters understandably suffers with concomitant impacts on the ability of health care services to evolve and change in the most legally responsible ways. The lack of confidentiality augments the "generalized fear and loathing of anything connected to the law, lawyers, or the legal process [that] is innate among all health care providers."\textsuperscript{208}

C. Adverse Impacts on Individuals and Disruption of Provider-Professional Relationships

As NACDL representative Henry Asbill testified in November 2005 before the USSC, the government's privilege waiver policies have had a devastating impact on employees, particularly in the context of internal investigations. In the course of internal investigative interviews, employees

\textsuperscript{205} See JCAHO Sentinel Events Policy and Procedures, available at http://www.jcaho.org/SentinelEvents/PolicyandProcedures/se_pp.htm

\textsuperscript{206} As one article explains:

[As documented by the IOM and other quality experts, providers who engage in self-critical analysis are more likely to provide quality patient care. This hypothesis is based on the assumption that health care providers, whether for-profit or not-for-profit entities, seek to provide a better "product" (i.e., patient care) to their customers (i.e., patients). As the provider undertakes greater efforts to examine ways in which it can improve the delivery of health care services to patients, the quality of patient care improves, with the added advantage of achieving greater compliance with governmental regulations.]

Healy, Altman & Fox, supra note 138, at 600. In this vein, these authors contend that "[p]rotecting the confidentiality of self-critical quality of care information from disclosure to non-governmental third parties would not interfere with this charge." Id. at 601. An analogous argument could be made in favor of application of the selective waiver doctrine to both quality-of-care and other types of health care data.

\textsuperscript{207} See, e.g., Lucian Leape, Error in Medicine, 272 J.A.M.A. 1851 (1994); Timothy S. Jost, Oversight of the Quality of Medical Care: Regulation, Management, or the Market?, 37 ARIZ. L. REV. 825, 838-39 (1995).

\textsuperscript{208} Kapp, supra note 185, at 122.
and others associated with entities\textsuperscript{209} "must make a Hobson's choice about whether or not to speak with corporate counsel."\textsuperscript{210} They may well lose the protection of the Fifth Amendment if they decide to do so, yet they may lose their jobs if they do not.\textsuperscript{211} At a minimum, they may be embarrassed by certain disclosures, or—and sometimes worse for their career prospects—humiliate superiors even in instances in which no criminal violation is ever uncovered.\textsuperscript{212} Individuals in such situations "cannot communicate candidly and effectively with in-house counsel in order to prevent compliance problems,"\textsuperscript{213} and they "cannot be candid with outside counsel conducting internal investigations."\textsuperscript{214}

This is precisely the situation in which physicians and other medical professionals may find themselves. While members of the medical profession are often familiar with at least some aspects of the law applicable to health care, physicians and other medical professionals may not be aware of the risk that responding to inquiries in the course of an internal investigation may jeopardize their constitutional rights. Medical professionals who work in health care entities are often accustomed to cooperating with counsel and other investigators in quality-of-care inquiries protected by state peer review laws,\textsuperscript{215} as well as in the defense of medical malpractice actions in which attorney-client and work product privileges are generally available.

At a time when many successful organizations—certainly those that most would consider to be humane employers operating good workplaces—put a premium on employee loyalty,\textsuperscript{216} the government's privilege waiver policies are likely to alienate medical professionals and other health care workers from the entities with whom they work.\textsuperscript{217} In the health care environment this is particularly dangerous. Effective health care depends on building

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\item At one time most states prohibited corporations or other entities from employing physicians pursuant to the "corporate practice" doctrine. See FURROW ET AL, supra note 138, at § 5-10. The legacy of this doctrine lingers in that most hospital-physician relationships are still based on a staff model rather than an employment relationship. \textit{Id.} In many academic medical centers the faculty participate in a separate practice plan. Even so, the relationship between provider and professional is often quite similar to an employer-employee relationship.
\item Asbill Testimony, supra note 102, at 4.
\item \textit{Id.}; Duggin, supra note 3, at 907-08 (citations omitted).
\item Duggin, supra note 3, at 909.
\item Asbill Testimony, supra note 102, at 6.
\item \textit{Id.} at 7.
\item See supra text accompanying notes 192-94, 206-08.
\item See Duggin, supra note 3, at 913.
\item See Klawiter Testimony, supra note 5, at 6-77 (discussing how ineffective internal compliance programs may become if corporate privileges are routinely waived).
\end{enumerate}
\end{footnotesize}
trust,\textsuperscript{218} for "[t]rust is the core, defining characteristic of the doctor-patient relationship—the ‘glue’ that holds the relationship together and makes it possible;\textsuperscript{219} When a physician, nurse, therapist, lab attendant or any medical professional is forced to work in an environment in which he or she cannot afford to be—or believes that he or she cannot afford to be—candid with counsel,\textsuperscript{220} the already healthy suspicion that many medical professionals have for lawyers proves well founded. This type of environment is inconsistent with the notion that trust relationships are particularly important in the health care arena, and it puts an almost intolerable burden on the lawyers forced to work in this environment.\textsuperscript{221}

\textbf{D. Disincentives to Conduct Internal Investigations}

The emphasis on internal compliance efforts began with SEC initiatives in the 1970s,\textsuperscript{222} and other federal agencies have implemented a host of amnesty and voluntary disclosure programs in the years since the SEC embarked on its pioneering efforts.\textsuperscript{223} These initiatives are premised on the notion that incentivizing entities to keep their own houses in order is an effective strategy for promoting adherence to the law and leveraging limited government enforcement resources. This logic is inherent in the \textit{Organizational Sentencing Guidelines}' incorporation of compliance and cooperation as mitigating factors for entities facing sentencing.\textsuperscript{224} This

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\item \textsuperscript{218} See Hall, supra note 131, at 470-71 (citations omitted).
\item \textsuperscript{219} See id. at 470 (citing Huw T.O. Davies & Thomas G. Rundall, \textit{Managing Patient Trust in Managed Care}, 78 MILBAQ Q. 609, 612 (2000)).
\item \textsuperscript{220} See supra text accompanying notes 104-11.
\item \textsuperscript{221} In addition, health care attorneys work in an area of legal and ethical landmines. See Gerson & Gladieux, supra note 134, at 164; see also Lisa D. Taylor & Philip L. Pomerance, \textit{Ethical Challenges in Everyday Practice for Healthcare Lawyers}, 34 J. OF HEALTH L. 1 (2001) (presenting numerous ethical situations confronting health care attorneys on a regular basis); Joan H. Krause & Richard S. Saver, \textit{Ethics in the Practice of Health Law}, 32 J.L. MED. & ETHICS 766 (2004) (arguing that health care lawyers increasingly encounter situations in which both legal and ethical conclusions must be drawn).
\item \textsuperscript{222} See Duggin, supra note 3, at 871; \textit{Stephen F. Black, \textit{INTERNAL CORPORATE INVESTIGATIONS} § 1.01, at 1-1 (1998)}.
\item \textsuperscript{223} See supra notes 55-58 and accompanying text.
\item \textsuperscript{224} See USSG Manual, supra note 1, at § 8C2.5; see also supra text accompanying notes 33-43 and 101-21. The USSC's recent decisions to delete the specific reference to waiver of attorney-client and work product protections from the commentary to § 8C2.5 does not alter the guidelines' focus on cooperation or impact the ability of federal prosecutors, the HHS Inspector General or other law enforcement authorities to demand privilege waivers. See, e.g., Carter, supra note 7 (quoting comments from Michael J. Elston, DOJ official and ex-officio member of the USSC, that he "do[es] not understand
strategy has motivated many corporations and other entities to conduct internal investigations and to disclose legal violations, tortious occurrences and various problematic events to government officials and other interested parties.\textsuperscript{225}

The health care sector is particularly well positioned to engage in and benefit from internal investigation strategies in light of the long tradition of ongoing internal quality assessment, a process that is essentially mandatory for providers participating in JCAHO programs or other accrediting processes.\textsuperscript{226} In the current enforcement environment, however, the attractiveness of this tool has diminished, because not only the results, but the entire course of an investigation – including witness statements, the impressions of counsel, and strategic decisions – may well be disclosed to the government, and possibly to the world in light of the aversion of many courts to the selective waiver doctrine.\textsuperscript{227} As the ABA Task Force on the Attorney-Client Privilege has pointed out:

The chilling effect [of prosecutorial and regulatory agency waiver policies] on clients’ comfort level in fully disclosing to attorneys is a significant concern. . . . As corporations become increasingly cognizant of government agencies’ policies and practices, the risk is that corporations will respond with greater reluctance to employ counsel or to confide fully in counsel, thereby undermining the public objectives served by the privilege.\textsuperscript{228}

This is especially likely in an industry where trust is critical,\textsuperscript{229} and key players often harbor a great deal of suspicion for members of the legal community.\textsuperscript{230} Moreover, when internal investigations do proceed, “‘much of what [was once] put down in writing [will] remain unwritten,’”\textsuperscript{231} adversely affecting “‘the interests of clients and the cause of justice.’”\textsuperscript{232}

The current enforcement milieu creates a real risk that prolonging current government privilege waiver policies will ultimately undo much of the good that has been done by the internal compliance initiatives of the last two decades. In the health care sector this risk may also spill over into quality

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\textsuperscript{225} See Duggin, supra note 3 at 884-90.

\textsuperscript{226} See supra text accompanying notes 153-57.

\textsuperscript{227} See supra text accompanying notes 63-79

\textsuperscript{228} A.B.A. TASK FORCE REPORT, supra note 9, at 18-19.

\textsuperscript{229} See supra text accompanying notes 131-34 & 217.

\textsuperscript{230} See supra text accompanying note 208.


\textsuperscript{232} Id.
assurance investigations that have little if anything to do with fraud. If medical professionals find that their fears of participation in investigations are frequently justified, there may well be a concomitant impact on other types of internal inquiries essential to health care quality, thereby exacerbating the very kinds of problems state peer review privileges were designed to combat.

E. The Necessity for Health Care Providers, Professionals and Industry Associations to Engage in Ongoing Efforts to Protect the Corporate Attorney-Client Privilege

Americans attach a great deal of importance to their health as evidenced by the significant portion of the United States economy devoted to medical care. In 2004, the United States spent sixteen percent of its gross domestic product, 1.9 trillion dollars, on health care. In light of the importance of good health to Americans, the magnitude of health care costs, and the political sensitivity of health care issues, it is no wonder that the laws governing the provision of health care are so complex. It is highly unlikely that they will become any less intricate in the foreseeable future. Consequently, in health care—as much or more than in any other political, social or economic arena—entities and the individuals associated with them require the advice of legal counsel, and they need to be able to trust that both query and advice will remain confidential. This is particularly true with respect to requests for advice pertaining to potential wrongdoing or for assistance with investigating suspected legal violations.

Neither providers nor medical professionals can operate effectively in the complex, highly fragmented infrastructure of the American health care system without the assistance of counsel. Thus, any attack on attorney-client or work product protections strikes a particularly serious blow to health care entities and the professionals who provide medical care in association with them. In the long run, health care quality, efficiency of service, and fiscal integrity are very likely to suffer if government policies continue to undermine the attorney-client privilege and work product protections.

Given the importance of this debate, the absence of health care provider and professional associations from much of the exchange over the attorney-client privilege to date is remarkable. Unlike other interest groups (e.g., the ACLU, the U.S. Chamber of Commerce, the Chemistry Council, and the

National Association of Manufacturers), representatives of the health care sector have not been widely visible in proceedings before the USSC, the ABA Task Force, or other efforts to restore and protect a strong attorney-client privilege and robust work product protections. Yet, few groups have so vital an interest in the continuing availability of the corporate privilege or so compelling a story to tell as to why these protections are necessary.

The health care industry—including providers, professionals and their associations—needs to engage in the current debate by taking on the policies of the DOJ and other federal agencies in public fora and assisting in alerting legislators to the problems posed when government policies undermine the vitality of the attorney-client privilege and work product protections. In particular, industry participants need to take advantage of opportunities to address Congress, federal agencies, and other public entities about the damage done by policies that sabotage these protections. Health care providers and medical professionals have a unique story to tell, and they represent perhaps the most important sector of our economy in both human and financial terms. It is essential to the health of the industry itself to protect the corporate attorney-client privilege and exercise continuing vigilance to ensure that it remains alive and well.

CONCLUSION

Health care entities and medical professionals have a great deal at stake in the war over the ongoing vitality of the corporate attorney-client privilege. Without the protections of a strong attorney-client privilege and a robust work product doctrine, the business of health care, the professionals who provide this care, and the quality of health care services are at risk. As the Supreme Court observed in Upjohn, "[a]n uncertain privilege. . . . is little better than no privilege at all." The corporate attorney-client privilege needs resuscitation, and the health care industry is uniquely situated to help save it and restore its vitality. There are few industries with more at stake or more to contribute to the cause.

234. 449 U.S. at 393. See supra text accompanying notes 14-33.