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# THE COMPLIANCE OFFICER CONUNDRUM: ASSESSING PRIVILEGE ISSUES IN A HEALTH CARE SETTING

*Greg Radinsky\**

## A BACKGROUND OF OIG'S COMPLIANCE OUTREACH EFFORTS

In 1997, Inspector General June Gibbs Brown invited the nation's health care community to join her in a national campaign to eliminate fraud and abuse from the federal health care programs.<sup>1</sup> The Inspector General advocated a two-pronged approach, built on a strong enforcement effort and on efforts to encourage voluntary compliance with the law.<sup>2</sup> The Office of the Inspector General of the Department of Health and Human Services (OIG) stressed that it wanted to develop a working relationship with the industry to try to resolve fraud and waste problems instead of only relying on enforcement efforts.<sup>3</sup>

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<sup>1</sup>June Gibbs Brown, *An Open Letter to Health Care Providers*, Office of the Inspector General ¶ 1 (Feb. 1997), <http://www.hhs.gov/progorg/oig/modcomp/ltrhcp.html> [hereinafter Brown, *Open Letter* (Feb. 1997)].

<sup>2</sup>*Id.*

<sup>3</sup>*Id.* See also June Gibbs Brown, *An Open Letter to Health Care Providers*, Office of the Inspector General (Mar. 9, 2000), <http://www.hhs.gov/progorg/oig/modcomp/openletter.html>

Only a few years ago, health care “compliance” was a new buzzword. Today, compliance is an expected industry standard. Over the past few years, the health care community has taken affirmative steps toward promoting a high level of ethical and lawful corporate conduct by developing and implementing compliance programs.<sup>4</sup> Accordingly, the design of a health care provider’s internal operating structure has changed. The demand for corporate compliance in the health industry has resulted in the creation of compliance officer positions to oversee compliance efforts. At numerous conferences, the OIG and Department of Justice stressed that providers need to develop an “effective” compliance program, and not one that exists merely for the purpose of trying to cover up existing or potential violations of the law.<sup>5</sup> In that regard, selecting the right person as compliance officer is a key factor in ensuring that a program will be effective<sup>6</sup>

## SELECTING YOUR COMPLIANCE OFFICER

The OIG recommends that the compliance officer be a member of senior management and that he/she be able to directly report to the Chief Executive Officer and the Board of Directors.<sup>7</sup> The OIG also recommends that the position of compliance officer be free standing and not combined with any other key management positions such as general counsel, comptroller, or chief financial officer.<sup>8</sup> Nonetheless, several health care

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[hereinafter Brown, *Open Letter* (Mar. 9, 2000)].

<sup>4</sup>For example, the American Hospital Association (AHA) recently reported that 96% of surveyed hospitals either had a compliance program in effect or were planning to initiate one in 1999. See American Hospital Association, *Compliance Survey* (1999), <http://www.aha.org> (64% of hospitals currently have compliance programs, and 32% plan to initiate one in coming year). See Brown, *Open Letter* (Mar. 9, 2000), *supra* note 3.

<sup>5</sup>See Office of the Inspector General (OIG), *Compliance Guidance for Hospitals* (Feb. 1998), <http://www.hhs.gov/progorg/oig/modcomp/hospital.pdf> [hereinafter *OIG Compliance Guide for Hospitals*]. See also Videotape: *A.B.A. Health Law Update 2000* (on file with the American Bar Association).

<sup>6</sup>See *OIG Compliance Guide for Hospitals*, *supra* note 5. See also Federal Sentencing Guidelines Manual § 8A1.2(k)(2) [hereinafter U.S.S.G.].

<sup>7</sup>See *OIG Compliance Guidance for Hospitals*, *supra* note 5.

<sup>8</sup>See *id.* The OIG does recognize that every organization has a different culture with its own inherent problems. Although the OIG recommends that the compliance officer be a freestanding function, it understands the need for providers to tailor their compliance program to their own

corporations have charged their in-house attorneys with the task of setting up compliance programs and resolving related issues. In some cases, corporations have actually named their in-house counsel as the compliance officer. This practice has sparked an ongoing debate.

Some corporations prefer having this "dual role" arrangement for several reasons. They may select an in-house counsel as compliance officer because of cost considerations. Others may have done so because they feel the in-house attorney is the most knowledgeable about the federal health care program requirements and how their business can comply with them. And some corporations may believe that having an in-house attorney take a proactive role in the corporation's compliance affairs will better protect the corporation and promote overall compliance within itself.

However, the OIG believes that when a free standing compliance function exists, it helps to ensure independent and objective financial analyses of the corporation's compliance efforts.<sup>9</sup> The OIG believes that adding the compliance officer function to a key management position with other significant duties can compromise the goals of the compliance program.<sup>10</sup> For example, a general counsel's foremost concern may be protecting the corporation from prosecution, not rooting out long term fraud. Furthermore, the corporation takes the risk of having its compliance officer/in-house attorney being called as a fact witness during litigation. A corporation may feel uncomfortable having its in-house attorney disclose information about the client's compliance functions during litigation. The loss of attorney-client privilege when the attorney acts in the role of compliance officer could cause a chilling effect on the relationship between counsel and management. Moreover, the dual roles will make it difficult for the corporate counsel to maintain objectivity when providing advice about the deficiencies of the compliance program he/she oversees. The compliance officer/in-house counsel's loss of objectivity may occur so subtly that the individual does not notice it. As

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individual needs. See *id.* at 4-5. For a further discussion on the selection and retention of a qualified compliance officer, see Howard Young, *Preventing Compliance Programs from Becoming a Victim of their Own Success*, J. HEALTH CARE COMPLIANCE, May-June 2000.

<sup>9</sup>See OIG Compliance Guidance for Hospitals, *supra* note 5.

<sup>10</sup>See *id.* at 7-8.

a result, a corporation may not receive sound legal advice in determining whether it has any administrative, civil or criminal liability.

## SELF-DISCLOSURE TO THE GOVERNMENT

To better understand why it is important for the compliance officer position to be separate from the corporate counsel position, it is important to understand the duties and responsibilities of the compliance officer. The compliance officer should be responsible for developing and implementing policies, procedures, and practices designed to ensure compliance with federal health care program requirements.<sup>11</sup> An essential step toward establishing an effective compliance program is for the compliance officer to administer periodic audits to gauge the corporation's current level of compliance.<sup>12</sup> During this process, a corporation may uncover that its coding, billing, and other applicable practices constitute a violation of law.<sup>13</sup> The Inspector General has encouraged corporations to come forward to the government voluntarily when they uncover evidence of fraudulent conduct within their organization.<sup>14</sup> The number of providers self-disclosing potentially abusive conduct to the OIG has increased dramatically over the past year and it is expected that these numbers will only continue to increase.<sup>15</sup>

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<sup>11</sup>See U.S.S.G., *supra* note 6. See also *OIG Compliance Guide for Hospitals*, *supra* note 5, at 7.

<sup>12</sup>See *id.*

<sup>13</sup>See Larry J. Goldberg, *OIG Perspective Issues Should Be Prioritized in an Internal Investigation*, J. HEALTH CARE COMPLIANCE July-August 1999 (discussing how investigations should be conducted to appropriately discover and correct billing problems).

<sup>14</sup>Office of the Inspector General, *Provider Self-Disclosure Protocol*, 63 Fed. Reg. 58,399 (Oct. 30, 1998). See also Press Release, *OIG Issues Guidance on Voluntary Disclosure of Health Care Fraud* (Oct. 21, 1998); Brown, *Open Letter* (Mar. 9, 2000), *supra* note 3; Brown, *Open Letter* (Feb. 1997), *supra* note 1. According to the U.S. Sentencing Guidelines, a corporation may have to turn over the investigative report to the government in order to receive benefits under the Corporate Compliance Guidelines. See U.S.S.G., *supra* note 6, at § 8C2.5(g).

<sup>15</sup>Over 70 health care providers have self-disclosed potentially fraudulent conduct to the OIG which has resulted in millions of dollars already having been returned to the Medicare Trust Fund. See Brown, *Open Letter* (Mar. 9, 2000), *supra* note 3.

## RESPONDING TO INVESTIGATORY SUBPOENAS

Despite providers' compliance efforts, the government plans to continue to crack down on providers who flagrantly disregard the federal health care programs' requirements.<sup>16</sup> However, the terrain in which the government will need to excavate now may have a few more rocks and bumps. Because the government often relies upon the documents it receives pursuant to investigatory subpoenas in developing a False Claims Act<sup>17</sup> or Civil Monetary Penalty<sup>18</sup> action against a provider, the issue of a corporation's attorney also serving as compliance officer becomes even more precarious.<sup>19</sup>

When a health care corporation receives a subpoena, it will need to evaluate whether it is appropriate to claim privilege on many of the

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<sup>16</sup>See Greg Radinsky, *How Health Care Attorneys Can Discern Vernon, Successor Liability and Settlement Issues*, 44 ST. LOUIS U. L.J. 113, 114-117 (Winter 2000) (discussing the government's initiative to minimize fraud, waste, and abuse in the federal health care programs).

<sup>17</sup>Congress enacted the civil False Claims Act, also known as the "Lincoln Law," to deter and detect "rampant fraud" in federal defense contracting during the Civil War. S. Rep. No. 99-345, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5285-86 (explaining the history of the False Claims Act). The False Claims Act was significantly amended in 1986 to combat all forms of government procurement and contracting fraud, including fraud with respect to the federal health care programs. *See generally* S. Rep. No. 99-345. The False Claims Act prohibits the knowing filing of a false or fraudulent claim for payment to the United States, and the knowing use of a false record or statement to obtain payment. Persons violating these provisions of the statute are subject to civil penalties of not less than \$5,000 and not more than \$10,000, plus treble damages, for each such claim filed. 31 U.S.C. §§ 3729-3733 (1994).

<sup>18</sup>The Civil Monetary Penalties Law, enacted in 1981 and modeled on the Civil False Claims Act, authorizes the imposition of civil penalties on providers who defraud the Medicare or Medicaid programs. 42 U.S.C. §§ 1320a-7a(a)(1) (1994 & Supp. III 1997). The False Claims Act and the Civil Monetary Penalties Law only impose penalties on those who "knowingly" participate in the wrongdoing. *See* 31 U.S.C. §§ 3729(a)-(b) (1994); 42 U.S.C. §§ 1320a-7a (1994 & Supp. III 1997) (law regarding Civil Monetary Penalties). The Health Insurance Portability and Accountability Act (HIPAA) clarified the standard of knowledge required to impose liability under the Civil Monetary Penalties Law by adding "knowingly" before "presents," *see* HIPAA § 231(d), 110 Stat. at 2013, and by defining the term "should know" to encompass acting with "deliberate ignorance or reckless disregard" of the truth or falsity of the claims submitted. *Id.* HIPAA also expressly included "no proof of specific intent to defraud is required." *Id.* at 2014. This language reflects the same standard of knowledge required for False Claims Act violations.

<sup>19</sup>The Inspector General Act, 5 U.S.C. § 6(a)(4), authorizes each inspector general: "to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act."

responsive compliance documents. In assessing each document, the health care entity will need to determine the nature of the in-house counsel's role to decide whether he/she was acting as an "attorney" at the time of the communication and thus, whether the communications and/or documents from the investigation are privileged. The role of an attorney as investigator, auditor, or compliance officer may take the attorney outside the role of "legal counsel" and therefore, outside the protections of the attorney-client and work-product privileges.

In some cases, the corporation may already be under a Corporate Integrity Agreement (CIA).<sup>20</sup> Under the CIA, the government has the authority to examine the provider's books, records and other supporting materials as well as conduct on-site reviews of the provider for the purpose of verifying and evaluating the provider's compliance with the terms of the CIA and compliance with the requirements of the federal health care programs.<sup>21</sup> However, a corporation's status under the CIA should neither change how it assesses privilege issues nor how the government views these issues. The government will need to review the provider's compliance policies, hotline complaint log, and other compliance materials in order to assess the effectiveness of the provider's compliance program and whether the provider complied with the terms of its CIA. If the corporation appropriately set up its compliance program, these compliance documents should not include privileged communications

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<sup>20</sup>A CIA is an agreement entered into between a health care provider and the government in conjunction with a civil settlement related to a fraud and abuse investigation. It is a government imposed plan, usually entered into as an alternative to other administrative remedies, such as exclusion from the federal health care programs. *See Criteria for Implementing Permissive Exclusion Authority under Section 1128(b)(7) of the Social Security Act*, 62 Fed. Reg. 67,392, 67,393. CIAs are different from compliance programs. Compliance programs are programs voluntarily designed and implemented by health care providers. They are not government imposed. There are no absolute requirements as to what elements, structure or resources should be incorporated into a voluntarily created compliance plan. However, if the government as part of its investigation examines a compliance plan, proof of its effectiveness by the provider may be a key factor in its acceptability as a mitigating factor. *Id.* at 67,393-94. *See generally* *OIG Compliance Guide for Hospitals*, *supra* note 5; Office of the Inspector General, *Compliance Guidance for Clinical Laboratories* (Aug. 1998); Office of the Inspector General, *Compliance Guidance for Home Health Care Agencies* (Aug. 1998); Office of the Inspector General, *Compliance Program Guidance*, available at <http://www.dhhs.gov/progorg/oig> (containing materials developed by the OIG as part of its effort to identify and curb health care fraud).

<sup>21</sup>*See* Corporate Integrity Agreements (on file with author).

because compliance documents are routine business documents.<sup>22</sup> If a corporation decides to cloak many of these compliance documents as privileged, it will be a red flag to the government to further examine the corporation's compliance program to ensure that the corporation is not trying to conceal any illicit conduct. Thus, it is recommended that a corporation provide as many non-privileged documents to the government as possible in order for the government to effectively assess the corporation's compliance with the federal health care programs requirements. As noted earlier, the government will not tolerate compliance programs designed to cover up existing or potential violations of law. Likewise, the government would likely view the attempted withholding of non-privileged documents negatively.

### EVALUATING ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGES

Federal courts have the authority to recognize the attorney-client, attorney work product and other privileges pursuant to Rule 501 of the Federal Rules of Evidence.<sup>23</sup> In the seminal decision of *Upjohn v. United States*, the Supreme Court upheld the attorney-client privilege in a health care compliance setting.<sup>24</sup> Although the court did not establish any specific rules governing the application of privilege in the corporate setting, it did consider the following factors:

- 1) the communications were made by employees to corporate counsel who were acting as such for purposes of

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<sup>22</sup>See *infra* notes.

<sup>23</sup>FED. R. EVID. 501. This article does not address the self-evaluative privilege because this privilege is generally not applicable in federal enforcement actions. See *United States ex rel. Falsetti v. Southern Bell Tel. & Tel. Co.*, 915 F. Supp. 308 (N.D. Fla. 1996). See also Thomas F. O'Neil III & Adam H. Charnes, *The Embryonic Self-Evaluative Privilege: A Primer for Health Care Lawyers*, 5 ANNALS OF HEALTH LAW 33, 39 (1996).

<sup>24</sup>*Upjohn v. United States*, 449 U.S. 383, 389 (1981). An in-depth discussion of the corporate attorney-client privilege is outside the scope of this article. For a thorough discussion of the corporate attorney-client privilege, see Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191 (1989) and John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443 (1982).

rendering legal advice to the corporation;

- 2) the communications by the employees were made at the specific direction of their corporate superiors;
- 3) the communications concerned matters within the scope of the employees' corporate duties;
- 4) the communications were made by the employees who were made sufficiently aware that they were being questioned by attorneys for the purposes of allowing the corporation to receive legal advice; and
- 5) the communications were at all times treated as highly confidential when made and thereafter kept confidential by the company.<sup>25</sup>

If any of these elements are not met, a court may determine that the attorney-client privilege does not apply and the communications would be subject to discovery. Even though the Supreme Court did not set forth a bright-line test for evaluating the corporate attorney-client privilege, attorneys should look to the *Upjohn* factors in evaluating privilege issues.

Legal professionals often misconceive that they can automatically assert the attorney-client privilege if a document has been through the hands of an attorney.<sup>26</sup> A provider should not arbitrarily designate all documents collected, interviews conducted or facts gathered as falling within a privilege. Reports of compliance audits, meetings, and corporate

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<sup>25</sup>See *Upjohn*, 449 U.S. at 394-95. For a widely cited formulation of the elements of the attorney-client privilege, see *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (1950) (stating that in order for the attorney-client privilege to apply the communication must meet the following requirements:

- (1) [T]he asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
- (4) the privilege has been (a) claimed and (b) not waived by the client.)

<sup>26</sup>See *In re Grand Jury Subpoena v. United States*, 599 F.2d 504, 511-12 (2d Cir. 1979) (stating that the participation of corporation's general counsel does not automatically cloak an internal corporate investigation with legal garb so as to be subject to attorney-client privilege).

compliance committee notes sent to an attorney to keep him/her generally informed cannot be deemed privileged.<sup>27</sup> Also, copying or making a lawyer a recipient of existing documents does not make the document subject to the attorney-client privilege and immune from disclosure.<sup>28</sup> Likewise, the mere presence of an attorney at a meeting does not render discussion notes privileged unless they reflect communications made to obtain an attorney's advice.<sup>29</sup>

Some attorneys also do not fully understand the attorney work product doctrine. In the seminal decision *Hickman v. Taylor*, the Supreme Court recognized the attorney work product privilege.<sup>30</sup> The attorney work

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<sup>27</sup>*See* *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 402-04 (8th Cir.), *cert. denied*, 484 U.S. 917 (1987) (holding risk management documents prepared by nonlawyer corporate officials in an attempt to keep track of, to control, and to anticipate costs of product liability litigation for business-planning purposes were not privileged); *First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 86 F.R.D. 160, 174 (E.D. Wis. 1980) (stating the attorney-client privilege protects only communications pertaining to legal assistance and advice and does not extend to business advice given by an attorney to a client, or to intra-client communications designed to communicate only business or technical data); *Gould Inc. v. Mitsui Mining & Smelting Co. Ltd.*, 825 F.2d 676, 679-80 (2d Cir. 1987) (stating documents received by attorney from clients which would not be privileged if they remained in the clients' hands would not acquire protection merely because they were transferred to the law firm); *Coulton v. United States*, 306 F.2d 633, 639 (2d Cir. 1962) (holding that preexisting documents and financial records not prepared by clients for purpose of communicating with their attorneys in confidence have no special protection under attorney-client privilege because turned over to an attorney).

<sup>28</sup>*See* *United States Postal Service v. Phelps Dodge Refining Corporation*, 852 F.Supp. 156 (E.D.N.Y. 1994) (declaring the mere fact that communication is made directly to attorney, or attorney is copied on a memorandum, does not mean that communication is necessarily privileged under attorney-client privilege). *See also In re Feldberg*, 862 F.2d 622 (7th Cir. 1988) (stating a corporation may not use the expedient of a lawyer to shield documents from grand jury subpoenas); *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 825 F.2d 676 (2d Cir. 1987) (declaring preexisting documents that were not prepared for the purpose of obtaining legal advice do not become invested with the privilege by tendering them to a lawyer).

<sup>29</sup>*Duttle v. Bandler & Kass*, 127 F.R.D. 46, 52 (S.D.N.Y. 1989). *See also* *Scott Paper Co. v. Ceilcote Co., Inc.* 103 F.R.D. 591, 594 (D. Me. 1984) (stating the mere fact an attorney located a particular document while preparing for litigation does not make the document "work product" protection is limited to items obtained or produced by the lawyer which involved his professional skill and experience).

<sup>30</sup>*Hickman v. Taylor*, 329 U.S. 495 (1947). Rule 26(b)(3) of the Federal Rules of Civil Procedure, which codified the attorney work product privilege, states:

[a] party may obtain discovery of documents and tangible things otherwise discoverable...and prepared in anticipation of litigation or for trial by or for another party or by for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon showing that the party seeking discovery has a substantial need of the

product privilege differs from the attorney-client privilege in that it focuses on encouraging careful and thorough preparation by the lawyer instead of focusing on encouraging the client to communicate freely with the attorney.<sup>31</sup>

The doctrine, codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, protects a lawyer's research, analysis, legal theories, mental impressions, and notes and memoranda of witnesses' statements, prepared "in anticipation of litigation or for trial," from disclosure to opposing counsel.<sup>32</sup> Rule 26 does not require that the work product have been prepared by an attorney to be protected; the rule makes specific reference to the "party's representative (including the ... attorney, consultant, surety, indemnitor, insurer, or agent)."<sup>33</sup>

Work product can take one of two forms: (1) "opinion work product," which, in the language of Rule 26(b)(3), consists of the attorney's "mental impressions, conclusions, opinions, or legal theories"; and (2) "ordinary work product" or "factual work product," which consists of all other materials developed in anticipation of trial.<sup>34</sup> "Opinion work product" is protected against disclosure, while "ordinary work product" is protected unless the adversary can demonstrate some necessity or justification for obtaining the materials, such as the unavailability of the information through normal discovery devices.<sup>35</sup>

The Federal Rules do not define "in anticipation of litigation."<sup>36</sup> Accordingly, attorneys sometimes misinterpret how broadly this definition can extend. Courts have decided that certain types of documents would not qualify for immunity. The mere likelihood of litigation in the future

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materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impression, conclusions, opinions, or legal theories of an attorney or other representative concerning the litigation.

<sup>31</sup>*Hickman*, 329 U.S. at 510. The Supreme Court held that "in performing duties...it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id.*

<sup>32</sup>*See* FED. R. CIV. P. 26(b)(3).

<sup>33</sup>*See id.*

<sup>34</sup>*Id.*

<sup>35</sup>*Id.*

<sup>36</sup>*Id.*

is insufficient for invoking the privilege.<sup>37</sup> The probability of litigation must be substantial and the commencement of the litigation imminent.<sup>38</sup> Also, courts have held that documents that are prepared for a purpose other than litigation are discoverable.<sup>39</sup> For all these reasons, routine compliance documents such as monthly audits, compliance policies and training materials should not be claimed as work product.<sup>40</sup> Furthermore, ordinary investigations that a health care corporation conducts into a billing matter may not be accorded work product protection even if there is a small likelihood of litigation.<sup>41</sup> Some courts have even made investigative documents discoverable on the ground that there was a business purpose separate and distinct from the prospect of possible litigation.<sup>42</sup>

Accordingly, attorneys need to carefully assess compliance documents before asserting the work product privilege. When evaluating documents in the health care setting, certain precautionary steps can be

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<sup>37</sup>See, e.g., *Stauffer Chemical Co. v. Monsanto Co.*, 623 F. Supp. 148, 227 (E.D. Mo. 1985); *National Tank Co. v. Brotherton*, 851 S.W.2d 193, 203 (Tex. 1993).

<sup>38</sup>See *Stauffer*, 623 F.Supp. at 227.

<sup>39</sup>See, e.g., *Scott Paper Co. v. Ceilote Co.*, 103 F.R.D. 591, 596 (D.C. Me. 1984) (holding that opinion letters regarding whether the sale of shares without SEC registration might result in liability were prepared as a routine business procedure and were not prepared in contemplation of litigation); *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650-51 (D.D.C. 1982) (stating that the fact that a party may anticipate the contingency of litigation resulting from an event does not automatically qualify an in-house report as work product).

<sup>40</sup>See *Scott*, 103 F.R.D. at 596. See also *Janicker*, 94 F.R.D. at 650-51.

<sup>41</sup>See, e.g., *Garfinkle v. Arcata Nat'l Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974) (holding an attorney's notes of a meeting to discuss a business problem were not prepared in anticipation of litigation because the court found the purpose of the meeting was to prevent a business dispute from leading to legal action); *Hardy v. N.Y. News, Inc.*, 114 F.R.D. 633, 646 (S.D.N.Y. 1987) ("[t]he fact that documents prepared for a business purpose were also determined to be of potential use in pending litigation does not turn these documents into work product or confidential communications between the client and attorney"); *United States v. El Paso Co.*, 682 F.2d 530, 543-44 (5th Cir. 1982), cert. denied, 466 U.S. 944 (1984) (holding a tax pool analysis, which is designed to set forth contingent tax liability of a corporation, was not work product because its primary function was to comply with business requirements, even though there was a possibility that litigation with the IRS might result).

<sup>42</sup>See, e.g., *Janicker*, 94 F.R.D. at 650 (stating a "more or less routine investigation of a possibly resistible claim is not sufficient to immunize an investigative report developed in the ordinary course of business"); *SEC v. Nat'l Student Mktg. Corp.*, 1974 WL 439 \*8-9 (D.D.C. Aug. 23, 1974) (holding that some memoranda prepared by SEC staff in the course of an investigation of defendants were not in anticipation of litigation if they were prepared during the time the agency collected and evaluated factual documents).

taken in advance to prepare a corporation to consistently and appropriately claim privilege on legal documents that may overlap with business and regulatory functions.

## THE DOCUMENT SELECTION PROCESS

As noted above, it is important for the compliance officer position to be separate from the corporate counsel position.<sup>43</sup> However, business reasons may cause a corporation to combine the functions. In that event, it is imperative for the corporation to document why it has chosen to utilize its general counsel to also serve as its compliance officer. This can help the federal government better understand the corporation's selection decision. Moreover, if any privilege disputes ever arise, it will help a court better understand the corporation's decision-making process.

### Differentiate Between Underlying Facts and Communications to and from Attorneys

When an employee communicates facts to an attorney (in-house counsel or outside counsel), the communication, including the facts as stated in the communication, is privileged.<sup>44</sup> The reason for this application of the privilege is that "sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."<sup>45</sup> However, the attorney-client privilege protects only communications between client and attorney, and does not shield facts underlying the communications.<sup>46</sup> Thus, the employee can be questioned about the facts themselves, but she cannot be asked what she wrote to the attorney, nor can her communication to the attorney be obtained.<sup>47</sup> Of course, the advice from the attorney is also privileged.

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<sup>43</sup>See *Janicker*, 94 F.R.D. at 650.

<sup>44</sup>See *Upjohn*, 449 U.S. at 389; *United Shoe Mach. Corp.*, 89 F. Supp. at 359.

<sup>45</sup>See *Upjohn*, 449 U.S. at 389.

<sup>46</sup>See *id.* See also *WLG-TV, Inc. v. Cablevision Sys. Corp.*, 879 F. Supp. 229, 233 (E.D.N.Y. 1994) (stating "[t]he attorney-client privilege protects communications between a client and an attorney but does not shield facts underlying the communications"); *In re Minebea Co., Ltd.*, 143 F.R.D. 494, 501 (S.D.N.Y. 1992) (stating "[t]he privilege attaches only to the communication between the attorney and client, not to the underlying facts or information").

<sup>47</sup>See *Upjohn*, 443 U.S. at 395-96. For example, in the *Upjohn* case, the corporation's attorneys sent a questionnaire to its foreign managers seeking detailed information concerning

### Employees Should Differentiate Between Legal vs. Non-Legal Advice

Depending upon the nature of each corporation's operating structure, the compliance department or individual needs to be clear when it seeks legal advice from the corporation's legal department. Courts have consistently ruled that the attorney-client privilege only attaches to legal, and not business services.<sup>48</sup> For example, compliance training materials, compliance quizzes, monthly compliance audits, hotline complaint telephone log, compliance policies and procedures are compliance documents and not legal in nature. Even if the corporation's attorney made some general comments on some of these documents, the attorney's notes may not be deemed privileged by a court.<sup>49</sup> Courts have held legal advice may not be privileged if it is merely incidental to the business, such as compliance advice.<sup>50</sup>

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questionable payments to foreign government officials. *Id.* The Supreme Court held that the filled-in questionnaires were privileged because they supplied information to the attorneys so that legal advice could be given. *Id.* However, the employees could be questioned by an adversary about the facts underlying the responses to the questionnaires. *Id.* They could not be questioned about the contents of the questionnaires. *Id.*

<sup>48</sup>*See* Aetna Casualty & Surety Co. v. Certain Underwriters at Lloyd's of London, 676 N.Y.S.2d 727, 730 (N.Y. Sup. Ct. 1998) (stating the communication itself must have been primarily or predominately of a legal character); North Am. Mortgage Investors v. First Wisconsin Nat'l Bank, 69 F.R.D. 9, 11 (E.D. Wis. 1975) (stating "[f]or privilege to exist, the lawyer must not only be functioning as an advisor, but the advice given must be predominately legal, as opposed to business, in nature. Thus, when a lawyer who authored a document had been acting primarily as a bank's loan officer and not as legal counsel, the court held that the bank failed to meet its burden of establishing the applicability of the privilege").

<sup>49</sup>*See, e.g.,* United States v. Int'l Bus. Mach. Corp., 66 F.R.D. 206, 212-13 (S.D.N.Y. 1974) (stating legal advice may not be privileged if it is merely incidental to the business advice); *Hardy*, 114 F.R.D. at 643-44 (stating "[w]hen the ultimate corporate decision is based on both a business policy and a legal evaluation, the business aspects of the decision are not protected simply because legal considerations are also involved").

<sup>50</sup>*See Hardy*, 114 F.R.D. at 643-44. However, at least one court has applied a broad view as to what constitutes legal advice when an attorney gave advice on an uncommon business matter. *See* United States Postal Service v. Phelps Dodge Refining Corp., 852 F.Supp. 156, 160 (E.D.N.Y. 1994) (stating "because the transaction was not a routine business matter and required considerable involvement with a state regulatory agency, it is clear that the subject matter was one of particular concern to the client and an area where the expectation of confidentiality arguably is greater. Thus, in situations where advice is rendered or sought to seem to touch upon sensitive issues, I have taken a broad view of legal advice in applying the privilege, in recognition of the unique role that an attorney brings to bear in imparting advice that may incidentally also involve business advice.")

A court may deem the communication legal only if the corporation can show that the communication "would not have been made but for the corporation's need for legal advice or services."<sup>51</sup> For example, formal legal opinions, communications regarding litigation strategy and interviews of witnesses for potential litigation would constitute such advice. Conversely, communications made by or to attorneys for purposes of making business recommendations would constitute business advice. To prevent any discrepancies, the compliance officer/in-house attorney should clearly identify herself as an attorney in all appropriate legal communications.

Also, when a corporation evaluates an internal compliance audit, it needs to focus on the purpose of the audit. The corporation will likely conduct frequent audits to evaluate its billing system as part of its compliance program. This audit is part of the corporation's daily business function and should not qualify either as attorney work product or attorney-client privilege.<sup>52</sup>

## CONCLUSION

If the history of the OIG's efforts to curtail fraud and abuse is an indication of the future, health care entities should plan to have an effective compliance program in place. For any program to be successful it must have at the helm, someone whose main focus is compliance. There are no mandated regulations on a corporation's selection of a compliance officer. However, as we have seen, it is much simpler to select a person whose sole responsibility is compliance than to set up a "dual role" situation. Specifically, adding compliance duties to the general counsel creates a situation that is not ideal. Since the general counsel's main role is to protect the company it can create a paradox for the person because the purpose of a compliance program is to uncover problems and address them, not to minimize the company's liability. The realm of compliance can be quite intricate, so why risk complicating the situation by jeopardizing privileges?

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<sup>51</sup>See *First Chicago Int'l v. United Exchange Co., Ltd.*, 125 F.R.D. 55, 57 (S.D.N.Y. 1989).

<sup>52</sup>See *id.*