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Thomas F. O'Neil III
MCI Communications Corporation

Adam H. Charnes
MCI Communications Corporation

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The Embryonic Self-Evaluative Privilege: A Primer for Health Care Lawyers

*Thomas F. O'Neil III**

*Adam H. Charnes***

INTRODUCTION

That health care fraud is the top law enforcement priority of the 1990s is hardly debatable. Not surprisingly, as investigations, lawsuits, and criminal convictions under Medicare fraud and abuse and other laws proliferate, an increasing number of providers, manufacturers, and other entities in the health care field are “cleaning house” before falling under regulatory scrutiny by administrative agencies such as the Department of Justice. Corporate directors, upper-echelon management, and in-house counsel are essentially concluding that it is preferable to identify and address compliance problems before receiving an enforcement subpoena or a coercive demand from a whistleblower. Moreover, such internal audits are encouraged by the corporate provisions of the federal sentencing guidelines,¹ which authorize meaningful reductions in criminal sentences for corporations that have in place a program to prevent and detect violations of the law.

While an internal corporate audit designed to ferret out misconduct quite clearly offers several tactical—to say nothing of

* Thomas O'Neil is Chief Litigation Counsel to MCI Communications Corporation and its affiliates. A 1982 graduate of the Georgetown University Law Center, Mr. O'Neil clerked for the Honorable Alexander Harvey II, United States District Court for the District of Maryland, and was an Assistant United States Attorney for the District of Maryland from 1986 to 1989. Until December 1995, Mr. O'Neil was a partner of Hogan & Hartson L.L.P., where he represented many individuals and corporations in high-profile administrative, grand jury, and congressional investigations of public corruption; production and distribution of drugs and medical devices; and, in particular, health care fraud and abuse.

** Adam Charnes is Associate Litigation Counsel to MCI Communications Corporation and its affiliates. A 1991 graduate of the Harvard Law School, Mr. Charnes clerked for the Honorable J. Harvie Wilkinson III, United States Court of Appeals for the Fourth Circuit, and the Honorable Anthony M. Kennedy, Associate Justice, Supreme Court of the United States. Prior to joining MCI, he was an associate with the Washington, D.C. office of Hogan & Hartson L.L.P.

1. UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL § 8C2.5(f) & (g) (Nov. 1, 1995).

ethical—advantages, it is not risk free. Certainly, the greatest concern is that the information unearthed during the internal audit will fall into hostile hands, thereby becoming a skewer rather than a shield. Under such circumstances, the applicability of various evidentiary privileges that can be used to withhold the production of the analysis is of paramount importance. In the context of internal investigations, counsel often cannot rely with total confidence on the most frequently invoked protections—the attorney-client privilege² and the work product doctrine.³

As a final refuge, litigants seeking to avoid producing internal audit materials are now turning to the self-evaluative privilege (also known, more awkwardly, as the privilege of self-critical analysis). Born in the health care context, this qualified privilege was developed to promote the public interest by encouraging corporate self-policing. To date, the federal courts have recognized this concept only under limited circumstances, and its scope has been restricted. This article provides an explanation of the self-evaluative privilege and assists counsel who are unfamiliar with this still evolving evidentiary barrier as it applies to civil litigation, government subpoenas, grand jury investigations, and *qui tam* actions.

I. THE BIRTH AND DEVELOPMENT OF THE SELF-EVALUATIVE PRIVILEGE

A. *Evidentiary Privileges: An Overview*

Rule 501 of the Federal Rules of Evidence authorizes the federal courts to apply the law of privileges as “governed by the principles of the common law as they may be interpreted by the

2. By way of example, assertions of the attorney-client privilege are likely to fall on deaf judicial ears if the investigation is not conducted by (or perhaps at the direction of) the company’s attorneys, or if the investigators interview persons not employed by the company. See *generally* *Upjohn v. United States*, 449 U.S. 383 (1981).

3. The attorney’s work product is protected only if it is prepared in anticipation of litigation or for trial. See EDNA S. EPSTEIN & MICHAEL M. MARTIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 114-15 (2d ed. 1989). Although the doctrine generally covers materials created before the litigation actually begins, courts differ as to when litigation is sufficiently likely and whether the materials must have been created with an eye toward a specific claim. *Id.* at 118-21. To maximize the likelihood of applicability, at the outset of an internal investigation counsel should, if possible, memorialize in writing the potential litigation in anticipation of which the investigation has been initiated.

courts of the United States in light of reason and experience.”⁴ Although Rule 501 appears on its face to bestow on the federal courts sweeping authority to develop a federal common law of privilege, the Supreme Court has interpreted the rule narrowly.⁵ As the Court has repeatedly explained, “‘the public . . . has a right to every man’s evidence’ . . .”⁶ Privileges contravene this “fundamental principle”⁷ and “are not lightly created nor expansively construed, for they are in derogation of the search for truth.”⁸ In light of these principles, a heavy burden rests on a party seeking judicial recognition or expansion of an evidentiary privilege.

B. *The Scope of the Self-Evaluative Privilege*

The self-evaluative privilege was first formulated in *Bredice v. Doctors Hospital, Inc.*,⁹ a medical malpractice case. The plaintiff there sought discovery of the minutes and reports of hospital boards or committees concerning the death of the plaintiff’s decedent. The staff meetings at issue had been instituted to improve clinical care at the hospital and were required by the Joint Commission on Accreditation of Hospitals.¹⁰ The federal district court held that such material was not discoverable. Noting that confidentiality was essential to the “effective functioning” of the staff meetings, and that, in turn, those discussions were “essential to the continued improvement in the care and treatment of patients,” the court found that such internal deliberations would not occur if subject to the discovery process.¹¹ Based on the “overwhelming public interest” in the continued effective functioning of the hospital staff meetings, the *Bredice*

4. FED. R. EVID. 501. State privilege laws, however, are applicable in civil proceedings with respect to “an element of a claim or defense as to which State law supplies the rule of decision.” *Id.*

5. See *University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990) (“although Rule 501 manifests a congressional desire ‘not to freeze the law of privilege’ but rather to provide the courts with flexibility to develop rules of privilege on a case-by-case basis, we are disinclined to exercise this authority expansively”) (citation omitted).

6. *United States v. Nixon*, 418 U.S. 683, 709 (1974) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972)).

7. *University of Pa.*, 493 U.S. at 189 (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)).

8. *Nixon*, 418 U.S. at 710.

9. 50 F.R.D. 249 (D.D.C. 1970), *aff’d without opinion*, 479 F.2d 920 (D.C. Cir. 1973). At the time of the action, the District of Columbia did not have a statutory privilege to protect the confidentiality of the peer review process. See *infra* note 13.

10. *Id.* at 249-50.

11. *Id.* at 250.

court held that the minutes of these gatherings were not discoverable “[a]bsent evidence of extraordinary circumstances.”¹²

In the wake of *Bredice*, courts have applied the qualified self-evaluative privilege in a host of different contexts.¹³ Courts have applied it to an analysis of an Amtrak accident, and recommendations issued in light of it, in an action for injuries sustained in the accident;¹⁴ studies of injuries caused in products liability cases;¹⁵ an internal review and report on internal quality controls of an accounting firm in securities fraud litigation;¹⁶ retrospective environmental analyses of past conduct and resulting environmental consequences in an action under federal environmental law;¹⁷ a television network’s evaluation of its own preparation of a news program in a libel action;¹⁸ a self-analysis of a company’s pending Food and Drug Administration application for a new drug in patent litigation;¹⁹ and an evaluation of a company’s affirmative action policies.²⁰ Recognition of the privilege, however, is far from uniform. Indeed, there are significant discrepancies in the reception accorded the theory even among federal courts addressing the privilege in similar contexts.²¹ It is impossible, therefore, to generalize about the circumstances in which the privilege will, or will not, be recognized; the law of the jurisdiction in which the litigation occurs must be analyzed thoroughly.²²

12. *Id.* at 251.

13. Certain state legislatures have enacted a version of the privilege; the most common example is for hospital peer review processes, such as that at issue in *Bredice*. See Susan O. Scheutzow & Sylvia L. Gillis, *Confidentiality and Privilege of Peer Review Information: More Imagined Than Real*, 7 J.L. & HEALTH 169, 186-192 (1992/1993); Charles D. Creech, Comment, *The Medical Review Committee Privilege: A Jurisdictional Survey*, 67 N.C. L. REV. 179 (1988). The degree of protection afforded by these statutes obviously differs by state, and, therefore, the applicable state statute (and case law interpreting it) must be carefully reviewed.

14. *Granger v. National R.R. Passenger Corp.*, 116 F.R.D. 507 (E.D. Pa. 1987).

15. *Bradley v. Melroe Co.*, 141 F.R.D. 1 (D.D.C. 1992); *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518, 521-522 (E.D. Tenn. 1977).

16. *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197, 205-06 (E.D.N.Y. 1992).

17. *Reichold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994).

18. *Lasky v. American Broadcasting Co.*, 5 Fed. R. Serv. 3d (Callaghan) 1366 (S.D.N.Y. 1986).

19. *NeoRx Corp. v. Immunomedics, Inc.*, 877 F. Supp. 202 (D.N.J. 1993).

20. *Sheppard v. Consolidated Edison Co. of N.Y.*, 893 F. Supp. 6 (E.D.N.Y. 1995).

21. For example, some federal courts have applied the privilege to a company’s analysis of its affirmative action policies, see, e.g., *Sheppard*, 893 F. Supp. 6, while other federal courts have rejected application of the privilege in precisely the same context, see, e.g., *Tharp v. Sivyver Steel Corp.*, 149 F.R.D. 177 (S.D. Iowa 1993).

22. The unsettled recognition of the privilege and a company’s fear that, sometime in the future, it might be hauled into court both undermine the usefulness of the self-

Generally, courts recognizing the privilege have established the following parameters. First, the information must have *resulted from* a critical self-analysis performed by the party seeking the protection. Second, there must be a strong public interest in promoting the “free flow” or exchange within the entity (for example, the corporation) of the class of information that the party is seeking to protect. Third, the party invoking the privilege must demonstrate that the “flow” would cease if the class of information were discoverable.²³ If all three of these conditions are satisfied and the privilege has not been waived (in other words, the information has not been disclosed to a third party), then the information is entitled to a qualified protection from discovery.

As a qualified privilege, the self-evaluative privilege can be overcome if the party seeking the information demonstrates sufficient need for it.²⁴ The courts disagree about the standards governing such a showing. Some courts follow *Bredice* and require “extraordinary necessity” or “exceptional necessity” before disclosing the privileged information.²⁵ Others, by contrast, apply a more lenient balancing test to determine whether other interests outweigh those underlying the privilege.²⁶ Under this latter approach, courts generally have recognized two rationales. First, some courts have focused on a party’s need for the information at issue—for example, when there is no other source of the information and the party seeking it will be

evaluative privilege as a tool to be used proactively to protect confidential and potentially embarrassing or harmful self-analyses.

23. See, e.g., *Dowling v. American Haw. Cruises, Inc.*, 971 F.2d 423, 425-26 (9th Cir. 1992); *Reichold Chems.*, 157 F.R.D. at 526. This widely accepted formulation derives from Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1086 (1983). Some courts add a fourth requirement: the document was prepared with the expectation that it would remain confidential and that, in fact, it remained confidential. See, e.g., *Dowling*, 971 F.2d at 426. This latter requirement, however, can be conceived merely as a requirement that the privilege not be waived, comparable to the waiver standard to which the attorney-client privilege is subject. See EPSTEIN & MARTIN, *supra* note 3, at 59-82.

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

25. See, e.g., *Mewborn v. Heckler*, 101 F.R.D. 691, 692-93 (D.D.C. 1984) (citations omitted).

26. See, e.g., *Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084, 1100 (D.N.J. 1996); *Wei v. Bodner*, 127 F.R.D. 91, 100-01 (D.N.J. 1989); *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 641-42 (S.D.N.Y. 1987).

prejudiced by its unavailability.²⁷ Second, courts have also held that certain public policies outweigh the interests served by the privilege, most commonly when the evaluative process itself is challenged in the litigation. For example, in *Todd v. South Jersey Hospital System*,²⁸ the plaintiff alleged that the defendant hospital's alleged failure to respond to recommendations by its quality improvement committee constituted "administrative negligence" and resulted in a physician's medical malpractice. The court held that the interest in preserving confidentiality was outweighed by policy interests of shedding light on the defendant's alleged negligence.²⁹ Similarly, discovery was allowed in *Wei v. Bodner*,³⁰ where a physician's Sherman Act claims alleged that the antitrust violation consisted, in part, of the actions of a hospital's quality assurance committee.³¹ Other courts have broadly held that the public policies advanced by the federal antitrust³² and equal employment opportunities³³ laws simply outweigh the interests underlying the privilege.

II. LIMITATIONS ON THE PRIVILEGE

The self-evaluative privilege was initially embraced fervently by defense counsel, who viewed it as a potentially meaningful protection for internal analyses conducted by businesses and their counsel. In circumstances in which the applicability of the attorney-client privilege or the work product doctrine was uncertain or questionable, counsel eagerly turned toward the developing self-evaluative privilege as the saving grace, a way to conduct freely internal investigations and other self-analyses without creating the risk of generating a report or other work product that one day could be used against their client. Subsequent developments, however, have dashed that hope. As explained below, even when the self-evaluative privilege is recognized by the courts—which itself is far from certain—its

27. See, e.g., *Todd v. South Jersey Hosp. Sys.*, 152 F.R.D. 676, 683 (D.N.J. 1993); *Lasky v. American Broadcasting Co.*, 1986 WL 9223, at *2 (S.D.N.Y. Aug. 13, 1986); *McClain v. College Hosp.*, 492 A.2d 991, 993 (N.J. 1985).

28. 152 F.R.D. 676.

29. *Id.* at 683-84.

30. 127 F.R.D. 91.

31. *Id.* at 101. See also *Memorial Hosp. v. Shadur*, 664 F.2d 1058, 1062-63 (7th Cir. 1981) (*per curiam*).

32. See, e.g., *Morgenstern v. Wilson*, 133 F.R.D. 139, 142 & n.3 (D. Neb. 1990).

33. See, e.g., *Tharp v. Sivyer Steel Corp.*, 149 F.R.D. 177, 183-84 (S.D. Iowa 1993); *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431, 433 (E.D. Pa. 1978).

benefits will often be chimerical to health care entities investigating possible violations of law by their employees or agents.

A. *Underlying Facts Are Unprotected*

A majority of courts recognizing the self-evaluative privilege have held that it covers only the analysis and recommendations resulting from self-evaluations and not the underlying facts unearthed during the audit.³⁴ Also unprotected are any documents created independently from the evaluation, but reviewed during the investigation or self-analysis.³⁵ These same principles apply, of course, to other privileges; for example, an otherwise non-privileged, preexisting document cannot be shielded merely because it was reviewed or analyzed by counsel, and a fact told by a client to counsel remains discoverable through other sources. Therefore, in theory, these limitations seem appropriate and logical in the context of the self-evaluative privilege. However, the reason the underlying facts come to light during a self-analysis is vastly different from that during the production of factual information during, or in anticipation of, a controversy among the parties. Self-analysis is an entity's completely voluntary investigation of the facts; discovery, for example, is a required part of the litigation process, and an attorney's evaluation of a claim is necessary as a prelude to litigation. Counsel should stress this distinction and present a solid policy argument when facing a judge.

Counsel must very carefully evaluate the risk of being compelled to present underlying facts and documents before initiating an internal investigation or self-evaluation. Even if frank criticisms of company policy may be withheld from future discovery, those portions of a written report that compile, organize, and present all pertinent underlying facts nonetheless may well be disgorged, providing opposing parties with an easy road map for proving their claims, as well as admissions of a party opponent that are extremely useful during litigation. To avoid this possibility, factual discussions in a written self-evaluative report should be interwoven with analysis and recommendations to the extent possible. (Counsel should consider, however, that a court might refuse to enforce the privilege at all if it believes that

34. See, e.g., *In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197, 205 (E.D.N.Y. 1992); *Todd v. South Jersey Hosp. Sys.*, 152 F.R.D. 676, 682 (D.N.J. 1993); *Wei v. Bodner*, 127 F.R.D. 91, 100 (D.N.J. 1989).

35. See EPSTEIN & MARTIN, *supra* note 3, at 23-24.

counsel intentionally commingled facts and analysis in an effort to expand the coverage of the privilege.) Although obviously reducing the utility of the investigation—perhaps fatally—consideration should also be given to memorializing in writing only the analytical results of the self-analysis, and not the factual compilation. Whether such an approach will be viable depends on the circumstances.

B. Government Subpoenas

The self-evaluative privilege may not be asserted against the United States. This principle has been applied both during the course of civil litigation initiated by the government against the party asserting the privilege³⁶ and in proceedings initiated by administrative agencies to enforce subpoenas resisted on the basis of the privilege.³⁷

Federal courts have advanced two rationales for this counter-intuitive position.³⁸ First, several have viewed Congress' provision of broad investigatory and subpoena powers to the administrative agency in question as a policy determination regarding the scope of discovery that the courts are not free to override.³⁹ These rulings have distinguished the context of civil discovery, "where courts have broad discretion under the Federal Rules of Civil Procedure to apply a particular privilege," from an agency acting pursuant to Congress' specific authorization to use broad subpoena power.⁴⁰ This rationale has been applied in proceedings to enforce subpoenas issued by, among other agencies, the Internal Revenue Service,⁴¹ the Federal Trade Commission,⁴² and the Secretary of Labor.⁴³ There is no

36. See, e.g., *United States v. Dexter Corp.*, 132 F.R.D. 8, 8-10 (D. Conn. 1990).

37. See, e.g., *FTC v. TRW, Inc.*, 628 F.2d 207, 210-11 (D.C. Cir. 1980); *Reich v. Hercules, Inc.*, 857 F. Supp. 367, 371 (D.N.J. 1994). State courts have applied the same principle to reject attempts to use the privilege to withhold information requested by state agencies. See, e.g., *Office of Consumer Counsel v. Department of Pub. Util. Control*, 665 A.2d 921, 925-26 (Conn. Super. Ct. 1994).

38. After all, there is no indication in Federal Rule of Evidence 501, from which all privileges recognized in federal court derive, that the United States is entitled to preferential treatment and may obtain information that would be beyond the reach of private litigants.

39. See, e.g., *TRW, Inc.*, 628 F.2d at 211; *United States v. Noall*, 587 F.2d 123, 126 (2d Cir. 1978) (Friendly, J.), cert. denied, 441 U.S. 923 (1979); *Hercules, Inc.*, 857 F. Supp. at 371.

40. *Hercules, Inc.*, 857 F. Supp. at 371.

41. See *Noall*, 587 F.2d at 126.

42. See *TRW, Inc.*, 628 F.2d at 211.

43. See *Hercules, Inc.*, 857 F. Supp. at 371.

reason to believe that a court would not apply the same principle, for example, to subpoenas issued by the Office of Inspector General of the Department of Health and Human Services or the Food and Drug Administration, given the similarly broad subpoena and investigatory powers accorded those entities by Congress.

Some courts, moreover, have invoked a more sweeping theory. In enacting the federal law that the government seeks to enforce, these courts have reasoned, Congress “declar[ed] what is in the public interest.”⁴⁴ A court would undermine this determination, according to this view, by recognizing the privilege and thereby determining on its own that the public interest demanded that the agency not have access to the very information Congress sought to provide it.⁴⁵ Some courts have also determined that the application of the privilege would undermine “the strong public interest in having administrative investigations proceed expeditiously and without impediment.”⁴⁶

In sum, the courts have refused to permit parties to use the self-evaluative privilege to thwart federal agencies’ ability to obtain documents otherwise within their subpoena power. This restriction obviously severely reduces the utility of the privilege to businesses—such as health care entities—that operate in industries heavily regulated by the federal government.

C. Grand Jury Investigations

That the self-evaluative privilege has no force in the grand jury chamber follows a fortiori from the principle that it is inapplicable against the government in civil litigation or administrative proceedings, and so a federal district court in Maryland held in *In re Grand Jury Proceedings*,⁴⁷ the only currently reported case on point. *In re Grand Jury Proceedings* involved an investigation into a company’s compliance with the Food, Drug, and Cosmetics Act,⁴⁸ possible false statements made by the company to the Food and Drug Administration (FDA), and possible obstruction of FDA inspections. The grand jury issued subpoenas requiring the production of audits of the company’s operations by an outside consultant. The district court rejected the com-

44. *United States v. Dexter Corp.*, 132 F.R.D. 8, 9 (D. Conn. 1990).

45. *Id.*; *TRW, Inc.*, 628 F.2d at 210-11; *Hercules, Inc.*, 857 F. Supp. at 371.

46. *TRW, Inc.*, 628 F.2d at 210.

47. 861 F. Supp. 386 (D. Md. 1994).

48. 21 U.S.C. §§ 301-394 (Supp. IV 1992).

pany's efforts to resist the subpoena on the basis of the self-evaluative privilege.

Noting that courts had refused to apply the privilege to documents sought by a government agency, the district court concluded it should not be recognized in grand jury proceedings. First, the court observed that the United States Supreme Court has refused to exercise "expansively" its authority to formulate new evidentiary privileges, for "[t]he balancing of competing interests" that underlie recognition of a privilege "is particularly a legislative function."⁴⁹ Next, the court discussed the "wide latitude" historically accorded the grand jury,⁵⁰ given that "[g]rand jury proceedings are constitutionally mandated . . . , and [the grand jury's] constitutional prerogatives are rooted in long centuries of Anglo-American history."⁵¹ In light of these considerations, the court held that permitting the self-evaluative privilege to limit the powers of the grand jury would constitute a "usurpation of the 'legislative function.'"⁵²

The court rejected the company's argument that subjecting self-evaluative reports to grand jury subpoenas would have a chilling effect on other health care entities contemplating internal evaluations. While acknowledging the importance of this concern, the court found it insufficient for three reasons. First, there remained sufficient incentives for companies to obtain independent audits even if the results were subject to grand jury subpoena. Second, perhaps the audit would not be admissible at any eventual criminal trial, although the court failed to explain its basis for this suggestion. Third, these policy considerations should be addressed to Congress or the executive branch: "Absent direction from the legislature or the Executive, those concerns should not be permitted to outweigh the broad latitude historically accorded grand jury investigations without more compelling reason than appears to exist in this case at this time."⁵³

The prospect of successfully using the self-evaluative privilege to protect from production materials generated as a result of an internal investigation is slim. Given the serious nature of a

49. 861 F. Supp. at 389 (quoting *University of Pa. v. EEOC*, 493 U.S. 182, 189 (1990)).

50. *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 343-45 (1974)).

51. *Id.* (quoting *Branzburg v. Hayes*, 408 U.S. 665, 687 (1972) (internal quotations omitted)).

52. *Id.* at 390 (quoting *University of Pa.*, 493 U.S. at 189).

53. *Id.*

grand jury proceeding, the inapplicability of the self-evaluative privilege may present the greatest impediment to entities wishing to “clean house.” The courts and legislature may wish to consider the benefits society loses by giving the grand jury this authority.

D. *Qui Tam Actions*

An increasingly common threat to health care entities is qui tam, or whistle blower, litigation under the False Claims Act (FCA).⁵⁴ The FCA provides for treble damages and mandatory civil penalties of between \$5000 and \$10,000 for each false or fraudulent claim filed with the government. Moreover, private parties (known as “relators”) may bring a qui tam action under the FCA on behalf of the United States, and, if successful, these relators may receive a percentage of any sums the United States receives from the defendants in the litigation.⁵⁵ Since the 1986 amendments to the FCA, more than 1100 qui tam cases have been filed, with a total recovery of more than \$1 billion.⁵⁶ Qui tam actions are increasingly targeting health care misconduct and are likely to become a permanent fixture in the fraud and abuse landscape.⁵⁷

In light of the increasing importance to health care lawyers of the FCA and its qui tam provisions, the recent district court decision in the qui tam case of *United States ex rel. Falsetti v. Southern Bell Telephone & Telegraph Co.*,⁵⁸ is particularly noteworthy. The relator alleged that the defendant had billed the government for out-of-service telephone access lines, failed to provide required refunds, and billed the government for services that it had not provided. The qui tam relator sought discovery of documents that were related to any internal investigations or audits the defendant had conducted with respect to an investigation of the defendant by the state’s public service commission. Rejecting the defendant’s claim of privilege, the district court held

54. 31 U.S.C. §§ 3729-3732 (1994).

55. *Id.* § 3730. For more information about qui tam actions under the False Claims Act, see David J. Ryan, *The False Claims Act: An Old Weapon with New Firepower Is Aimed At Health Care Fraud*, 4 ANNALS HEALTH L. 127 (1995).

56. Thomas F. O’Neil III et al., *The Buck Stops Here: Preemption of Third-Party Claims by the False Claims Act*, 12 J. CONTEMP. HEALTH L. & POL’Y 41 (1996).

57. *Id.* at 42-44 & n.5; Ryan, *supra* note 55.

58. 915 F. Supp. 308 (N.D. Fla. 1996).

that the self-evaluative privilege is inapplicable in *qui tam* actions.⁵⁹

The court held that in enacting the FCA, Congress considered and settled the competing policy concerns of disclosure versus protection, foreclosing judicial recognition of the privilege in the *qui tam* context. According to the court, "Congress has provided its own version of a self-critical analysis privilege" in those provisions of the FCA that reduce the penalties applicable to defendants who voluntarily disclose wrongdoing to the government within thirty days of discovering the violation.⁶⁰ Under such circumstances, the court reasoned, judicial recognition of more extensive evidentiary protections would be inappropriate.⁶¹

CONCLUSION

The goal of the self-evaluative privilege is to encourage voluntary, confidential self-analysis. It seems axiomatic that businesses should be encouraged to evaluate the propriety of their policies and practices and the conduct of their employees and agents. Against this laudatory public interest must be balanced the general principle that, in litigation, the litigants and arbiter are entitled to "every man's evidence." The privilege, in this sense, no doubt frustrates important countervailing interests—such as punishing wrongdoers and lawbreakers and entitling victims and other plaintiffs to a fair and full opportunity to prove their cases.

Perhaps because the benefits of the self-evaluative privilege seem to many courts diffuse compared to the very real consequences of nondisclosure in particular cases, it offers only tenuous protection, at best, when counsel's primary concern in determining whether to conduct an internal investigation or other self-analysis is the potential of future disclosure to a federal governmental entity—whether a regulator, the United States as litigant, or a grand jury. In other circumstances, when disclosure to a future private litigant is the primary concern, the privilege may impart some protections, depending, of course, on the nature of the claim, the forum in which it is litigated, and the provisions of state law.

59. *Id.* at 313.

60. *Id.* (citing the False Claims Act, 31 U.S.C. § 3729(a)(1-7)(A-C)).

61. *Id.*