

CCH-EXP, Health-Comp-Manual, ¶51,260 **Introduction**
Introduction

Given the highly regulated environment in which health care providers operate, virtually all providers should expect that, at some point, they will need to conduct an internal investigation of suspected wrongdoing or errors. The phrase “internal investigation” means a review of the provider’s own programs or activities, conducted by attorneys and/or investigators operating at the provider’s direction. This is not a routine review or audit, but a special effort directed at a particular issue. A provider may choose to disclose the results of its internal investigation to the government, private payors or other third parties, but this is not always the case. A provider may conduct an internal investigation in response to any one of a number of indications of a possible problem, including results of an internal, routine audit, a complaint to a hotline, or a subpoena or inquiry from a government agency.

If the matter under review involves a material amount of money, or serious allegations of illegal behavior, the way in which the provider conducts the internal investigation can have far reaching repercussions for the provider, its employees, and shareholders or investors, if any. How the provider conducts the internal investigation, and how it deals with the government, may have a significant impact on the provider’s routine operations, its finances, and management’s ability to implement both its short-term and long-term plans. How the provider conducts the internal investigation may also have an impact on the employment, careers, and even liberty of individuals.

This chapter outlines the following issues that arise in typical internal investigations:

- Triggers for an Internal Investigation
- Assembling the Investigative Team
- Goals of an Internal Investigation
- Initial Damage Control
- Budget
- Conducting a Privileged Investigation
- Gathering Facts
- Final Reports

Even internal investigations of small matters can raise significant ethical and legal issues. We strongly recommend that providers ensure that the team which conducts the internal investigation include persons with experience in this area and good judgment that they can apply to make highly discretionary decisions during the course of the investigation.

CCH-EXP, Health-Comp-Manual, ¶51,270 **Triggers for an Internal Investigation**
Triggers for an Internal Investigation

There are several potential triggers for an internal investigation. A provider’s ability to recognize these triggers and respond to them at the earliest stage possible is important, because this may allow the provider to control the scale of a problem and shape what goals the investigation can achieve.

Ideally, management will decide to conduct an investigation because of information it gathers through an internal compliance program, such as a hotline tip or audit report. It is significantly easier to conduct an

investigation on a schedule set by the provider than on one set by a government agency or court. Often the first indication that there is a potential problem requiring an investigation comes from a provider's own employees; from contractors working with the provider, such as accountants or other auditors; or from patients, customers or vendors. An effective compliance program that rapidly refers potential issues to a member of management with the authority to commence an internal investigation will often allow a provider to conduct an investigation before potentially adverse parties, including the government, learn that a problem exists.

However, even with an effective compliance program, sometimes management learns about a potential issue only when an outsider takes action, such as when the provider receives a summons or demand letter in a civil suit or contact by a government agent.¹ When the government or a potential plaintiff in a civil suit first raises the issue, it is particularly important that a provider has procedures that provide for a prompt response. If a provider is conducting an internal investigation parallel to a government investigation or civil suit, the provider will likely need to structure or schedule the investigation differently than if the investigation exists in isolation.

¹ In some instances, the provider will learn that the government has targeted one of the provider's competitors over a particular practice. This is an excellent opportunity to review the provider's own operations for similar practices that the government may target next.

CCH-EXP, Health-Comp-Manual, ¶51,280 Assembling the Investigative Team Assembling the Investigative Team

In order to conduct an investigation properly, a provider needs to assemble a team with complementary skills. A typical investigation requires provider contacts for oversight and logistics, legal counsel, and outside consultants.

Provider Contacts for Oversight and Logistics

Determining who within the provider will oversee the investigation and receive both interim reports and the final report can be a complicated issue, particularly for publicly traded companies. If outside counsel is not conducting the investigation, then in-house counsel must conduct it in order to bring the investigation within the protection of the attorney-client privilege. If outside counsel is conducting the investigation, the provider has a range of choices as to who will oversee the investigation. In most instances, it will still be appropriate for in-house counsel or the compliance officer to be in charge. In other instances, a more senior member of management such as the president or Chief Executive Officer ("CEO") may take control. In situations where it is possible that management was personally involved in the problem, or the problem is exceptionally significant, it may be more appropriate for the investigative team to report to the board of directors or trustees, or a board committee such as the audit committee. If no appropriate, independent committee exists, the board should consider forming a special committee to oversee the investigation.

It is imperative that an investigative team have a clearly defined reporting relationship. Outside counsel should have a written engagement letter that specifies its client relationship, such as the provider's management or the audit committee. The provider should clearly define to whom counsel reports. Internal investigations can generate pressures in a provider as to who receives information first, who controls that information, and who directs the investigation. Thus, the provider needs to define the reporting relationship at the outset and designate one point of contact to direct its legal counsel. Obviously, anyone who might be personally involved in the problem should not oversee the investigation, no matter how senior their position in the provider.

Under the Sarbanes-Oxley Act of 2002 and associated requirements that the various stock exchanges have implemented under the Act, publicly-traded companies are subject to additional restrictions that may impact which entity should oversee an internal investigation. If the internal investigation relates to allegations of a material breach of fiduciary duty, material violation of the securities laws, or a similar

material violation of law, the audit committee or qualified legal compliance committee may have a responsibility to oversee the investigation itself. Even in cases where rules do not require the board and its committees to oversee the investigation, board members may ask the investigators to keep the board informed about the investigation's progress as part of the board's general oversight function.

The investigative team will need one or more provider contacts to help it with logistics: gathering documents, identifying witnesses, and unraveling complicated operational and reimbursement practices. Frequently, members of the compliance and audit departments help fill such a role, and become integral members of the investigative team.

Legal Counsel

There are several reasons why providers usually retain lawyers to oversee or direct an investigation. The regulatory and reimbursement issues typically under review arise from legal requirements, and often raise subtle and complicated issues. Investigations also raise legal issues involving ethics, obstruction of justice, and criminal liability. If a lawyer conducts the investigation, the work is subject to the attorney-client privilege and work product protections described below. In order to ensure that the investigation has such protections, it is advisable that the provider retain an outside law firm to conduct the investigation, or instruct in writing an individual or group of individuals to report directly to in-house counsel acting in their role as lawyers for the provider. An example of such a memorandum appears in [Appendix 5-6A](#).

Whether a provider relies on in-house or outside counsel to run the investigation depends on a mix of factors, including budget, and who has the appropriate experience and availability. The likely goals and consequences of the investigation also influence this decision. If it is possible that the government will learn about the investigation, either by the provider's self-reporting or through the government's own investigation, using an outside law firm is often preferable. When an outsider conducts the investigation, the government typically views the investigation as more independent and credible than one conducted by the provider's own employees. No matter how the provider structures the investigation, it is vital that the investigative team consist of individuals with the knowledge, experience and, most importantly judgment, to carry out the task.

There are two types of legal skills particularly useful in investigations. One is the art of conducting investigations, with the requisite abilities to interview witnesses, deal with government investigators, and counsel clients in high stakes decisions. The other is mastery over the substance of health care regulations and reimbursement rules. Providers and government investigators commonly do not have a full understanding of the regulatory scheme, and the investigative team may have to educate both on what the law truly requires.

Consultants

Depending on the nature and scope of an investigation, the investigative team may need to hire additional consultants or experts to assist it in conducting the investigation. Consultants might have expertise in accounting, statistics, public relations, forensic data recovery, medicine, or the provider's business. Frequently, internal investigations require billing or coding consultants, well versed in the complexities of health care reimbursement and statistical sampling. Even if the provider has individuals on staff with the same or superior knowledge and expertise, it is sometimes preferable to use an outside, independent expert's opinion as part of the investigation. This is particularly the case if the provider anticipates that it will disclose the results of the investigation to the government in an effort to dissuade the government from pursuing enforcement action. The opinion and work of outside experts, even paid outside experts, might more easily persuade government regulators than the opinion and work of the provider's employees.

It is advisable that counsel retain any consultants and the consultants report their findings to counsel, rather than to the provider directly, to ensure that the consultants' work falls within the attorney-client privilege. Counsel should document in a letter that the consultant is assisting counsel and that the

consultant is obligated to keep confidential both the information learned and the work produced as part of the engagement. The outside consultant must understand that it has to keep its work product confidential; and if subpoenaed it will immediately inform the provider and produce the material only if the provider approves or a court orders it. An example of a consultant's retention letter is included in [Appendix 5-7A](#).

The investigative team needs to determine the precise legal standards applicable to the issue under investigation, and differentiate them from best practices. Providers may aspire to follow Medicare requirements for all payors, or may set their own higher standards. Counsel needs to determine the applicable legal standard and communicate this to the consultant. Frequently, government investigators and the provider's employees will have misconceptions about billing requirements. If an investigator has thoroughly researched the applicable legal standard, challenging the government's assumptions about the law can be a highly ethical and effective defense.

It is best for an investigation to employ experienced health care reimbursement counsel to determine the legal standard, and then communicate this to the consultant, before the consultant starts its billing review. Reimbursement counsel may need to consult federal and state statutes, regulations, provider manuals, coding books and contracts to discern the applicable rules. For example, government auditors sometimes claim there are mandatory time requirements for evaluation and management codes, when the relevant CPT entries say the times are only what typical providers may experience.

Consultants need to discuss their methodology, standards and reporting format with counsel before, during and after concluding their work, to ensure the proper application of the reimbursement requirements. Counsel should discuss the consultant's methodology with the persons actually performing the work, not just the engagement manager. This will ensure that they completely understand their task and agree with its validity. Consultants should express their conclusions in factual terms, not legal ones. For example, it is perfectly appropriate to note what data is missing from a medical record. The consultant need not say what is "fraud" or an "overpayment." For Medicare and Medicaid billing disputes, it is best to use consultants familiar with the federal government's demanding requirements for statistical sampling and coding reviews. Otherwise, the government may reject any presentations based on the consultants' work.

As with any situation in which a health care provider releases to a third party records that may contain protected health information, a provider conducting an internal investigation must make sure that it complies with the Health Insurance Portability and Accountability Act ("HIPAA").² Although outside counsel and consultants have independent obligations to maintain the confidentiality of information they learn while representing the provider, the provider should confirm that it has complied with its HIPAA policy and any applicable regulations when producing records. A state or federal health care enforcement agency should qualify as a "health oversight agency" under HIPAA, and a provider can produce protected data to it without fear of violating privacy laws. It is prudent to ask the prosecutor to confirm this status in writing. A copy of such a letter appears in [Appendix 5-8A](#).

² [42 U.S.C. § 1320d](#) et seq.

CCH-EXP, Health-Comp-Manual, ¶51,290 **Goals and Strategy of an Internal Investigation**

Goals

At the outset of an internal investigation, it is important for the provider to think about a realistic goal or endpoint for the investigation, and then recalibrate this goal throughout the investigation's course in response to the evidence that develops. Though an internal investigation is an uncompromising search for the truth, that is only part of its role. It is also an instrument to help the provider resolve its problem in the most effective and efficient way possible. Internal investigations can have such typical endpoint goals as:

- (1) Correct any error that occurred, take appropriate disciplinary action, if any, and refund any overpayment to the payor.
- (2) Do (1) above and make a self-disclosure to the Department of Health and Human Services Office of Inspector General (“OIG”), the United States Department of Justice (“DOJ”), the Securities and Exchange Commission, a state Medicaid Fraud Control Unit, or other appropriate enforcement agency.
- (3) Do (1) above and aggressively defend the provider against any allegations of wrongdoing by the government.
- (4) Confirm that an apparently baseless allegation is, in fact, baseless and end the matter without initiating any contact with the government.

An experienced practitioner can help a provider formulate the investigation’s goal early on. This is helpful, as it allows the provider to have a realistic understanding of what is at stake, the minimum level of resources needed for the investigation, and the maximum level of resources it can justify to support the investigation. Depending on what the investigation uncovers, the provider should understand that its goal may change during the investigation, and its original goal may not be achievable.

Once the provider assembles the team to start the internal investigation, as discussed above, the investigative team and provider need to formulate jointly the investigation’s goals. The team is not an independent force that conducts the investigation on its own, but must report on a regular basis to a decision maker within the provider.

In the end, the investigative team truthfully reports its findings, but leaves to the provider all key decision making such as whether to self disclose to the government, refund money to payors, discipline employees, or take other corrective actions. The provider must make such decisions based upon a full and thorough investigation, with due consideration to the with due consideration to the advice of the investigative team.

In order to promote effective communication between the investigative team and the provider, they should schedule periodic meetings or phone calls. In situations involving significant investigations, the provider may expect daily or weekly reports. Investigators usually make such interim reports orally. These reports are only fragmentary updates that lack a definitive or complete statement of what the investigators have uncovered. Their purpose is merely to report the highlights or more sensitive issues that have evolved since the last report. The point of such interim reports is more to promote dialogue with the provider than to offer any conclusions. All documents created during the course of an internal investigation must be written with extreme care so that they are as accurate as possible to correctly memorialize events, and in case the provider waives the privilege and gives such records to its adversaries. It may not be worth the expense and delay to spend significant amounts of time writing numerous interim reports that have only momentary utility.

Investigative Strategy

An experienced investigative team should be able to quickly establish a logical strategy to conduct the investigation. First, it will have to define the problem. By looking at whatever triggered the need for the investigation, and assessing this information with the provider, the team can outline its task. Health care lawyers play a crucial role in this early stage. They should conduct a thorough review to determine the provider’s legal obligations relevant to the issue, and what the government’s position will likely be. The two are not always identical. By clearly defining the legal issues at the outset, the investigators can streamline the fact gathering process. Often, consultants or the provider’s employees participate in determining the precise contours of the provider’s legal obligations.

Second, the team will have to discuss with the provider who, what and where are the sources of

information that the team will need to examine. Who knows about this issue? Who witnessed relevant events? Where are the documents? Does the team need to extract electronic billing data or emails?

CCH-EXP, Health-Comp-Manual, ¶51,300 Stop Questionable Practices Immediately Initial Damage Control

Stop Questionable Practices Immediately

One of the first priorities of an internal investigation should be to stabilize the situation. If the provider and internal investigators believe an error or legal violation has occurred, the provider should stop any further errors or violations immediately. For example, a provider may have a valid defense to a charge of fraudulent billing if it unintentionally submitted incorrect bills, and, therefore, lacked the necessary intent for its actions to qualify as fraud. However, if the provider then receives notice of the problem and continues the questionable billing practice until the internal investigation is complete, the government may argue that the provider has crossed the line and has committed intentional misconduct.

Health care providers are particularly vulnerable to this sort of argument. Much of a provider's revenues come from a high volume of repetitive submissions of the same type of request for reimbursement. Providers bill on a continuing basis. If the provider discovers a billing problem, it must stop submitting possibly flawed bills immediately, and only resume submitting bills when it is confident that it has corrected the flaw. Obviously, the provider need not take such action in response to every allegation it receives. Providers frequently receive speculative allegations that do not appear to have a reasonable basis. A provider may investigate such speculative accusations without disrupting its operations. This, like so many other important aspects of an internal investigation, is a judgment call that the provider should resolve through discussion with experienced counsel.

Do Not Take Actions That the Government May Interpret as Obstruction of Justice

In performing damage control, the investigative team must also ensure that they do not make the situation any worse. Recent DOJ prosecutions illustrate how the government may interpret awkward steps by clients or legal counsel as obstruction of justice, perjury, or witness tampering. In many white-collar criminal cases, issues of obstruction of justice can become as serious as the underlying problem, if not more so. Two areas of particular concern to the government are the destruction of tangible evidence, and suborning false testimony from witnesses. Thus, one of the most important goals of the initial stages of an internal investigation is ensuring that no employees attempt to hide or destroy evidence of a potential crime.

As soon as it is clear that the provider may have a problem, it should take steps to preserve all tangible evidence which typically comes in two main forms: documents and electronic records. In order to preserve documents, management should promptly instruct employees not to destroy documents that may be related to an investigation. The provider should already have an established document retention plan that regulates the type of documents preserved, and the length of time it preserves them. The provider should immediately evaluate this policy to make sure that it is not unintentionally destroying relevant evidence. A provider may need to suspend its document retention plan pending the conclusion of the internal investigation.

If the government sends a written request for documents, the provider should notify, in writing, all employees who potentially have custody of documents within the scope of the request that: (1) the government has made the request; and (2) they have an obligation to preserve all electronic and hard-copy records. Counsel may want to follow-up this written notification with interviews, to ensure that there are no misunderstandings. In the absence of a request from the government, providers have no obligation to incur substantial expense to preserve information where the provider has no reason to believe that the government will request such information in the future or that the information is relevant to a potential crime. However, the government may take the position that the provider has obstructed justice if the provider destroys evidence—even before the government requests that evidence—when the provider

knew that the government was going to request it in the future.

The word “documents” no longer refers solely to pieces of paper. The provider should also preserve all relevant electronic data, such as files for word-processing, spreadsheet, and database programs. Nor may the provider delete relevant electronic mail messages or electronic records of transactions. Ensuring that electronic data is not destroyed, be it willfully, intentionally, or accidentally, will require coordination among management, the provider’s information systems department, and legal counsel. A common issue that arises is preserving back-up storage tapes, and stopping the provider from recycling these tapes. Because preserving large amounts of data can be expensive, but destroying even a small amount of relevant data can be disastrous, a provider who wants to retain neither too much nor too little should err on the side of caution.

With respect to potential witnesses, the provider’s policy must be absolutely clear that no one should punish, demote, transfer, or otherwise retaliate against a whistle blower, i.e., an employee who informed the government about possible wrongdoing. In addition to precipitating potential civil and criminal liability, retaliation reduces the likelihood that employees will cooperate with an internal investigation and furnish the provider with the information it needs.

If the provider is conducting an internal investigation in parallel with a government investigation, the provider should be careful about actions the government could interpret as obstruction of justice. There is a standard and well accepted approach to dealing with witness-employees. If the provider determines that the government will likely contact employees as part of a parallel investigation, it is imperative that the management communicate to its employees:

- No employee is obligated to speak with the government. The choice is the employee’s and neither the provider’s nor the government’s.³
- If an employee decides to speak with the government, the most important thing is to tell the truth. Prosecutors may consider it a crime for a person to knowingly make a materially false statement or provide false documents or evidence to a federal agent conducting an investigation. The government does not need to interview the employee “under oath” in order to successfully prosecute such a matter.
- Although employees are free to speak with government investigators, they may not provide the investigators with the provider’s property, such as documents or computers, or access to the provider’s facilities. Employees should direct such requests to the provider’s legal counsel, who will make sure all responses are complete and accurate.
- The employee may stop an interview at any time. Just because the employee answers some questions does not mean that the employee must answer all questions that the government asks.
- An employee may choose to have a lawyer, either a personal lawyer or the provider’s lawyer, present at any interview.
- The employee may also choose the time and place of an interview and need not respond to the government’s questions when and where the government first approaches the employee. Just because a federal agent knocks on the employee’s door after dinner time, does not mean the employee has to let him into his living room and agree to the interview at that time and location.
- There is no such thing as an “off-the-record” interview with the government. No matter what the government agents say, the government can and will use any statements the employee makes for any purpose including criminal prosecution.

An employee should not tell a co-worker not to speak to government agents, as the government may

interpret this as obstruction. An employee has a right to determine, if subpoenaed, if he or she will testify, seek immunity or some other protection, or assert his Fifth Amendment right against self-incrimination. Witnesses should make these decisions based upon consultation with their own legal counsel, and not the provider's legal counsel as that could generate conflicts of interest. Therefore, it is entirely appropriate for the provider's counsel to tell its employees that they should seek the advice of their own legal counsel, that the provider will pay for such counsel, and that the provider can recommend qualified attorneys for the employees to interview and retain.

When communicating with employees about their rights and responsibilities if contacted by the government, there is nothing improper about the provider taking the opportunity to use employee/government interactions as a means for gathering information about the scope and status of the government's investigation. Providers should encourage employees to report the following to the investigative team: (1) the date and time the government contacted the employee; (2) the names of the government agents and the agency or agencies for which they work; (3) the questions that the agents asked; (4) the answers the employee provided; and (5) how the agents described the employee's role in the investigation.

Depending on the nature of the parallel government investigation and number of employees involved, it may be appropriate for management to issue a written statement to its employees informing them of the government's investigation and communicating the employees' rights and responsibilities. A written document can counter any charges that the provider obstructed justice by attempting to dissuade its employees from speaking with the government. It is sometimes helpful to personally communicate with employees when distributing such memoranda; management or legal counsel can distribute the document at a meeting or series of meetings in which they reassure employees that the provider is handling the government's inquiry appropriately. An example of such a statement appears as [Appendix 5-9A](#).

Communicating With Employees and Others About the Investigation

Internal investigations of even small matters can cause significant anxiety within an organization. Management may see its carefully developed business strategies disrupted if not destroyed. Employees may have concerns about their job security and their own legal liability. In a typical internal investigation, the provider retains the investigative team which has a fiduciary obligation to protect the provider's interests. Thus, it is imperative that the investigative team match its unflinching commitment to a thorough search for the truth with efforts to minimize disruptions to the provider. When contacting employees, requesting documents from them, and interviewing them, the investigative team should operate in a way to minimize employee concerns, not fan them. There is no need to share with employees information that does not further the goals of the investigation. There is also nothing wrong with dispelling false rumors that employees may hear. In some cases, it may be appropriate for management to issue a written communication to employees informing them of the internal investigation. However, a provider should only issue such a widespread communication if the organization plans to inform the government of the internal investigation, and the investigative team reviews the statement before its distribution.

Publicly traded companies face a separate issue with respect to how to communicate to their shareholders and the public markets concerning an investigation. If the matter may have a material adverse effect on the provider's finances, the company will need to inform its outside audit firm about the matter and should coordinate a public disclosure in conjunction with outside securities counsel. The team in charge of the internal investigation should typically defer to the expertise of the audit firm and securities counsel. However, it is strongly advisable for the investigative team to participate in the drafting of any press release or portions of public filings, to ensure that, as far as the investigative team is concerned, all descriptions of its activities are accurate, and not misleading by omission. Generally, such securities-related disclosures undergo multiple layers of review and discussion.

Privately held companies may also have disclosure obligations to shareholders, lenders or other creditors. The investigative team should assist management with a thorough review of management's responsibilities upon learning of a potentially material adverse impact on the provider's finances.

³ Some providers require employees to cooperate with investigators and submit to interviews, as part of the provider's cooperation. This raises delicate issues involving the right against self-incrimination and employment law. A provider should only take this stance after carefully evaluating this issue with advice of legal counsel.

CCH-EXP, Health-Comp-Manual, ¶51,310 **Budget Budget**

If the provider needs to retain outside counsel and/or consultants, the investigation can quickly become costly. Because of the possible consequences that could arise from the problem, and the need for highly skilled, thorough investigators, such costs are inevitable. Nonetheless, providers can take steps to tame the investigation's budget. Among such steps are:

- (1) *Ask outside counsel and consultants for a budget in the beginning and revisit it periodically.* An investigation needs to be thorough, but a provider may still question the necessity and timing of certain efforts. In making these assessments, it is important to remember that the cheap can become expensive. Just because lawyers or outside consultants quote a low hourly rate or offer a discount does not mean they have experience and efficiency that will lead to the lowest overall price and the best result.
- (2) *Provide internal staff who can assist with logistics.* The investigative team will need assistance gathering documents, locating and scheduling witnesses for interviews, and retrieving manuals, regulations and other materials that bear on reimbursement. Employees may find it convenient to let outside consultants handle the distracting logistics of the investigation, but that can quickly become very expensive.
- (3) *Clearly define a point of contact.* If multiple members of the provider demand reports and make requests for work, this will drive up the cost significantly.
- (4) *If the government is involved, be candid with it about the costs and utility of its requests for documents and witnesses.* It may be worthwhile to educate the government about the issue or universe of documents, in return for the government lightening its requests.
- (5) *Read the insurance policies.* Depending on the matter and the policy, there could be insurance coverage. For example, a Director's and Officer's Liability Policy might cover the defense of a DOJ or SEC investigation.

There are also hidden costs to any internal investigation that are difficult to measure and budget. When employees gather documents or answer questions in an interview, they are not working. Unfortunately, internal investigations are at times disruptive and may cost the provider significant amounts in terms of lost productivity. The investigative team must take care that it conduct its investigation in as unobtrusive a way as possible so as to minimize these costs.

CCH-EXP, Health-Comp-Manual, ¶51,320 **The Attorney-Client Privilege and Work Product Doctrine Conducting a Privileged Investigation**

The Attorney-Client Privilege and Work Product Doctrine

Providers are entitled to conduct an internal investigation so as to protect its fruits from disclosure to the government and civil litigants. In order to accomplish this goal, a provider must structure the investigation properly so as not to waive the attorney-client privilege and protection afforded by the work product doctrine. To understand this aspect of internal investigations, one should understand the basic aspects of

these two legal concepts.

Courts are essentially truth-seeking institutions. When a civil or criminal proceeding begins, the law usually mandates disclosure of all information, including documents and testimony, that is relevant to the proceeding. However, the law recognizes that in some limited instances, parties to litigation should be permitted to maintain the confidentiality of communications they have made to obtain legal advice or to prepare for litigation. This promotes a full and honest exchange between a lawyer and his client, and overall promotes the goals of the judicial system. The legal rules governing what documents a provider may withhold from disclosure fall into two main areas; the attorney-client privilege and the work product doctrine.

The attorney-client privilege “protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice.”⁴ The communications must be between a client and his attorney or the attorney’s agent. If the communications occur in the presence of someone who is not reasonably necessary to the attorney’s representation of the client, the communications are not privileged. Courts have recognized that if a lawyer retains private investigators, auditors and public relations specialists to assist the lawyer in rendering legal advice, disclosures to such consultants does not violate the confidentiality requirements. In addition to the communications themselves, the privilege also covers written communications created by the attorney or the client for the purpose of obtaining legal advice.

The attorney-client privilege cannot be used to conceal testimony or documents that exist independently of the attorney-client relationship. For example, a non-privileged document does not become privileged because the client photocopies it and sends it to counsel with a request for legal advice. Only if the author created a document for the purpose of seeking legal advice can it be privileged. Nor does the privilege shield an employee’s knowledge of facts learned independent of counsel simply because an attorney interviews the employee.

Finally, the attorney-client privilege does not apply to communications made in furtherance of a planned future crime or fraud. At one level, this is a straight-forward concept: the privilege will not shield communications made to further obvious misconduct. However, prosecutors have argued that healthcare regulatory counsel who advise clients on how to comply with complex regulations sometimes advise them on how to evade such regulations. Therefore, they try to pierce the privilege and obtain access to such advice under the crime-fraud exception.

The provider can assert the attorney-client privilege for communications with both outside counsel and in-house lawyers. From a practical standpoint, however, it is significantly easier to establish that a communication is privileged if it is with an outside attorney. The burden to establish that the privilege applies rests on the party asserting the privilege. There is an elevated risk that a court will view communications with in-house counsel as being made for the purpose of obtaining business advice rather than for the purpose of obtaining legal advice. This risk increases if the in-house lawyer has non-legal responsibilities. If a court reaches this conclusion, the privilege will not apply. It is advisable, at the start of every internal investigation conducted by counsel, to memorialize in writing the client’s request for legal advice and the purpose of the internal investigation. An example of such a request appears as [Appendix 5-6A](#).

The work product doctrine protects from disclosure materials “prepared in anticipation of litigation,”⁵ which includes materials prepared in anticipation of a government investigation. Documents prepared in the ordinary course of business are not covered. However, if a document is prepared in anticipation of litigation, an attorney need not prepare it for it to fall within the protection of the work product doctrine. Even if a criminal or civil proceeding has not actually begun, the protection may still apply. Different courts have used different standards to determine whether work product protection applies to documents created before litigation begins. Some courts require a “substantial probability” of litigation.⁶ Others require only that there be “more than a remote possibility of litigation.”⁷

Unlike the attorney-client privilege, work product protection is not absolute. A court may order disclosure of some information covered by the work product doctrine if the party seeking disclosure can demonstrate a “substantial need” for the materials and that the materials cannot be obtained in some other way without “undue hardship.”⁸

A provider or its counsel may waive the protections afforded by the attorney-client privilege and the work product doctrine by intentionally or unintentionally disclosing privileged information to a third party. A disclosure to any third party typically waives the attorney-client privilege, but most courts require the disclosure be to a potential litigation adversary before finding a waiver of work product protection. In order to help guard against accidental waiver, it is helpful to mark documents that are subject to one or both of the privileges with a legend such as “CONFIDENTIAL —PRIVILEGED ATTORNEY-CLIENT COMMUNICATION/ATTORNEY WORK PRODUCT.” The provider is well-advised to store such documents in folders and filing cabinets used exclusively for privileged materials. Co-mingling privileged documents with non-privileged documents can result in inadvertent disclosures.

Representation of Employees

“The default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere.”⁹ Therefore, only the provider-client can waive the privilege. A change in management of the provider gives the new management authority to waive the privilege, even for communications that took place before it took control. Similarly, a bankruptcy trustee or receiver who assumes control of a provider can subsequently waive the provider’s privilege.

However, in rare circumstances, courts have allowed an individual employee to assert the attorney-client privilege over communications with the employer’s counsel. Many courts apply the following five-part test:

First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the provider or the general affairs of the provider.¹⁰

Some upper-level executives, because of personal friendships, past practice, or simply misunderstanding the law, view the provider’s in-house counsel as their personal attorneys. The courts typically do not recognize this relationship and it is important that all employees involved in an internal investigation understand the scope of the attorney-client relationship. Lawyers have an ethical obligation to correct misunderstandings about their role with respect to individual employees.¹¹ One reason it is important to explain to employees that the provider’s counsel does not represent them personally, is that otherwise, an employee may try to disqualify the provider’s counsel from representing the provider based on a conflict of interest with the “second client.” Also, the employee may claim the provider cannot disclose the contents of the employee’s interview, as the employee will claim he has his own independent right to assert privilege.

In many cases, it is advisable for employees who may have personal legal exposure to retain their own counsel. Even if the provider pays for the lawyers who represent its employees, each of those lawyers owes an individual duty of loyalty to his employee-client rather than to the provider. These separate lawyers can provide personalized, confidential legal advice to employees.

If a provider decides to pay an employee’s legal fees, it should not reject an employee’s reasonable choice of counsel. However, the provider may, in consultation with its legal counsel, recommend specific attorneys. The provider should advise employees that they should carefully consider the qualifications of an attorney before hiring him, particularly in view of the specialized knowledge and experience that is

necessary to effectively represent the employee with respect to the investigation. If left without guidance, an employee may select an attorney because the attorney is a friend of the family or has handled real estate or estate planning transactions for the employee. This method of choosing a lawyer may result in counsel who will not best serve the employee's interests and who could undermine the effectiveness of the investigation as a whole because of lack of familiarity with the somewhat arcane practice of representing clients in government investigations. Providers should consider paying for counsel for former employees as well. If the former employee has counsel, this will streamline communication and access to information. Organizational bylaws or state law may govern the employee's rights to indemnification for defense costs, including legal fees. Providers typically advance such payments, and ask the employee to sign an "undertaking," which recites the state law or bylaw standard for indemnification and commits the employee to pay back the defense costs if a court subsequently determines he has violated this standard.

Joint Defense Agreements

When employees retain separate counsel, the lawyers typically can and should work cooperatively. Even when the interests of the provider and its employees are not entirely the same, there is usually enough of a common interest that cooperation is beneficial to all involved. Although counsel for the provider typically takes the lead role in an investigation, counsel for individual employees can provide invaluable assistance to the investigation.

In order to share information without waiving any privilege that exists, counsel and their clients may enter into a joint defense agreement ("JDA"). The courts recognize that if two or more parties have a common interest, disclosure of privileged information by one party to the other party's lawyer does not operate as a waiver of the privilege if the disclosure was made to further the common interest. Like the attorney-client privilege, the common interest privilege does not shield documents or information that the provider gathered independently of the joint defense.

Counsel need not write down a JDA in order to maintain the privilege, and many counsel prefer oral agreements. There are, however, benefits to memorializing the JDA in a signed writing. A written JDA will help make certain that all parties have the same expectations when entering into the agreement. Additionally, the requirement that a client take the formal step of signing a document helps ensure that the client gives careful thought to whether the JDA best serves him. Finally, if an adversary challenges the existence of the JDA, it is easier to prove its validity with a previously existing document.

One potential disadvantage of JDAs is that many prosecutors look on them with suspicion. Though the courts have found JDAs to be perfectly ethical, some prosecutors view them in a zero-sum context: because it facilitates a defense, it is bad for the prosecution. The DOJ has supported this view by instructing prosecutors that one factor to consider in deciding whether to charge a business organization with a crime "is whether the corporation appears to be protecting its culpable employees and agents . . . through providing information to the employees about the government's investigation pursuant to a joint defense agreement."¹² Although the government frequently makes use of information sharing and cooperation among investigative agencies, when defense lawyers engage in similar conduct the government is sometimes skeptical.

There is, however, a strong argument that the existence of a JDA is itself privileged information that clients may withhold from the government. The clients' decision that they have a common interest that a JDA would appropriately further reflects the content of legal advice that the various lawyers provided their respective clients. However, the law on this point is not well-established in most jurisdictions. More importantly, it may be necessary to reveal the existence of a JDA in order to assert the common interest privilege to resist discovery. Therefore, when determining whether a JDA is appropriate, one should assume that the government could learn about the JDA's existence at some point.

⁴ XYZ Corp. v. United States (In re Keeper of the Records), 348 F.3d 16, 22 (1st Cir. 2003).

⁵ Fed. R. Civ. P. 26(b)(3).

⁶ *Weil Ceramics & Glass, Inc. v. Work*, 110 F.R.D. 500, 505 (E.D.N.Y. 1986).

⁷ *Fox v. California Sierra Fin. Svcs.*, 120 F.R.D. 520, 524 (N.D. Cal. 1988).

⁸ Fed. R. Civ. P. 26(b)(3).

⁹ *In re Grand Jury Subpoena*, 274 F.3d 563, 571 (1st Cir. 2001).

¹⁰ *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir. 1986).

¹¹ For example, the American Bar Association's Model Rules of Professional Conduct provide that "[w]hen [a] lawyer knows or reasonably should know that [an employee] misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." Model Rules of Prof'l Conduct R. 4.3.

¹² Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys 7-8 (Jan. 20, 2003).

CCH-EXP, Health-Comp-Manual, ¶51,330 **Witness Interviews**
The Investigation

Witness Interviews

Every investigation is different and the investigative team should form a plan tailored to both the provider and the issue. However, in most cases, the investigation should begin by promptly interviewing key personnel. The investigators should simultaneously start to gather and examine the relevant documents. As the investigation proceeds, follow-up interviews may be necessary.

It is important to identify and interview key personnel as soon as possible. This serves several goals. First, it will provide the investigators with important background information about the provider and its business that will influence how they perceive the other information they gather during the investigation. Second, even if the investigative team is familiar with the health care industry generally or the provider specifically, many documents, policies and procedures are truly understood only by those individuals who work with them on a daily basis. Attempting to review documents first, without gleaning a general understanding through interviews of the key employees, may not be efficient. Third, approaching key witnesses immediately means that the investigative team is more likely to interview them before the government does. An investigator should never impede government access to a witness, but is perfectly entitled to interview a witness ahead of the government.

Typically two investigators conduct witness interviews. It is difficult for one investigator to both conduct an interview and take accurate notes. If the witness later disputes the investigator's version of the interview, a second investigator can help resolve any confusion. Additionally, a second interviewer is able to offer a second opinion on a witness's credibility. More than two interviewers may intimidate a witness and reduce the extent to which the witness will cooperate and volunteer information. Once the investigators complete an interview, they typically prepare an interview memorandum that summarizes the information that the witness provided. Investigators should never show the memorandum to a witness, as under the Federal Rules of Evidence, this could lead to a court compelling the provider to disclose it.

A witness interview should begin with an explanation of who the investigator is and his role as an attorney or investigator for the provider. Depending on the particular facts, if the provider's interest is or may become adverse to the witness, an attorney might have an ethical obligation to advise the witness about the

potential conflict and that the attorney represents the provider and not the individual. However, even absent an ethical obligation to inform the witness of the lawyer's role, it is good practice to do so.

The pre-interview explanation, sometimes called a "corporate Miranda warning" or "soft Miranda warning" should include the following:

- The lawyer represents the provider and not the individual personally.
 - The lawyer can and will report what the individual says to management.¹³
 - The conversation is confidential within the provider, but the provider may decide to disclose the conversation to a third party.
 - The provider may choose to disclose the interview to the government. If the witness makes a false statement and the provider reports it to the government, a prosecutor could claim the witness obstructed justice. Therefore it is imperative that the witness be completely candid.
 - In order to maintain the confidentiality of the conversation, the witness should not discuss it with anyone, including other employees.

Some investigators ask witnesses to sign a form acknowledging that they have received such a warning. However, formalizing the warning in this fashion may unnecessarily frighten a witness who would otherwise cooperate and provide valuable information to the investigators. It is sufficient to convey the information to the witness orally and, in a subsequent memorandum drafted by the investigators, memorialize in writing the fact that the interviewer gave the warnings. If the investigators think the witness might become particularly adverse to the provider, a written acknowledgement may be helpful.

Some employees may be hesitant to talk to investigators simply because they are outsiders to the provider, and the provider has conditioned the employees to maintain the confidentiality of the provider's information. The investigative team may ask a supervisor or member of management personally known by the employee to introduce them. This will help ensure cooperation and alleviate any fears that the employee has about talking to the investigators. If there is a chance that the interview will cover subjects that are compartmentalized knowledge within the provider, management should specifically advise the witness that he or she should talk freely about these subjects with the investigators. In some cases, it may be helpful to have a member of management "on-call" to reaffirm the need to cooperate fully in the event that the investigators encounter resistance while conducting an interview.

Employees have a right to refuse interview requests by government agents. However, if an employee refuses an interview request by an investigator working for the provider, the provider may take disciplinary action against the employee, including termination. A provider should impose any discipline in an even-handed manner: the provider should treat alike similar refusals to cooperate with the investigation. It should also consult with an employment lawyer before taking such action.

In the event that a lawyer represents an employee with respect to the subject matter of an investigation, the ethical rules governing the practice of law require the attorney conducting the investigation or someone acting on his behalf to contact the represented employee through his lawyer.

For each witness, it is often helpful to create a witness folder. It should include all significant documents that the witness has seen or that describes things the witness knows about. As the investigators think of relevant questions, they can write them down and add them to the folder. If the investigators have memoranda summarizing other interviews of legal issues relevant to the witness, this too should go in the folder. Thus, when the team prepares to conduct the interview of any particular witness, all of the relevant information is in one location. Often it is helpful to organize topic folders along similar lines, for key topics in the investigation. Interviewers can use such topic folders when speaking with witnesses, and when

discussing the issues with the provider.

Questioning witnesses is an art. The interviewer shall not alter or influence the witness's memory; he should merely capture it. Often, interviewers try to be non-confrontational, asking open-ended questions, to encourage the witness to speak freely and fully. What happened? Why did it happen? Who else witnessed this? Have things changed over time? Why did they change? What documents are helpful to explain this?

Documents

Gathering the relevant documents for an internal investigation can be a burdensome and expensive undertaking. It requires close coordination between the provider and the investigative team. Providers typically appoint an employee to serve as the liaison with the rest of the provider to gather documents and forward them to the investigative team. Outside counsel may still want to speak with employees to explain the expansive reach of a document request and ensure the provider has met its legal obligation to conduct a diligent search. Document collection may need to span several provider sites and, if not handled properly, can disrupt the provider's business.

A provider may retain many documents organized in a standardized format. However, some documents, such as employee calendars and appointment books, may be in locations and formats that vary widely. For example, some employees may keep their calendars on Personal Digital Assistants ("PDAs") that the provider's information systems department does not support. Others may maintain their appointment books at home. Part of the process of interviewing employees should include efforts to make sure that the provider has located all relevant documents.

As the provider locates relevant documents, the investigators will need to sort, catalog and index them. With the exception of investigations in which the number of relevant documents is quite small, the investigators typically assign each document a tracking number. This number, sometimes called a "Bates number" or "Bates stamp," is imprinted on the document itself, either by physically attaching a small label to the document, by feeding the document through a machine that stamps the document, or by creating an electronic image of the document and adding the number to the image electronically. Bates numbers usually consist of a prefix of letters followed by a number with leading zeroes. The prefix typically indicates the source of the document. For example, an investigative team might assign prefixes based on the physical site where the document was located or the department or individual who created or maintained the document.

Often, several copies of a document will exist. For example, if an author sent a memorandum to five recipients, each will possess a copy. It is important for the investigators to obtain all copies of the document as some copies may have hand-written notes or other alterations that others do not have. It is also important for the investigators to keep track of the source of all documents gathered so that if issues arise with respect to a document, the investigators will know who had access to the document and when.

If the government is conducting a parallel investigation, it will often request some or all of the original documents at issue. At times, this request is merely the result of the prosecutor's or investigative agency's general policy. However, sometimes the government will want an original document to conduct ink, handwriting or other forensic analysis. Surrendering control of original documents to anyone, including the government, always carries a risk that the recipient will not return them. In some cases, providers have been able to avoid handing over original documents to the government by making them available for inspection.

Fact Chronology

As the investigative team gathers the relevant documents and interviews witnesses, it will gain a clearer picture of the investigation's subject matter. The investigative team sometimes creates a written chronology of events, supported by documents and witness statements. Putting events in chronological order often

provides insightful explanations and relationships that one might otherwise overlook. The investigators may include such a chronology in the final report discussed in the following section. The drawbacks to preparing chronologies are that they can be expensive to prepare, and adversaries may try to force their disclosure, claiming privilege has been or should be waived.

¹³ If the witness is a part of management and the investigative team is reporting to the board of directors or a committee of the board, the interviewer should modify the warning accordingly.

CCH-EXP, Health-Comp-Manual, ¶51,340 **The Final Report** **The Final Report**

It is customary for the investigators to submit a final report upon completing their investigation. They present this to the person at the provider overseeing the investigation, and other officers or board members, as appropriate. Depending on the scope of the investigation, its outcome, and other factors, the report may be oral or written. Written reports can provide a tangible, comprehensive summary of the issue, but they are expensive to prepare. Though the attorney-client privilege protects a written report, private litigants and the government often demand that the provider disclose it. Thus, sometimes counsel provides only an oral report.

A final report usually details the following elements: the trigger of the investigation; the steps the investigators took; the facts they uncovered and their sources; an analysis of the nature and extent of the provider's potential liability, both civil and criminal; recommendations on how to prevent similar problems in the future; and recommendations on the provider's obligations upon receiving the report.

If the provider is a publicly traded company and the investigation relates to a material breach of fiduciary duty, material violation of the securities laws, or other comparable material violation of law, the law may require the provider to disclose the outcome of the investigation to its auditor and respond appropriately to the evidence presented. Failure to appropriately respond to an internal investigation might trigger an obligation for outside and/or in-house counsel to take actions that will, in effect, notify the Securities and Exchange Commission that an issue exists.

If the investigators structure and perform their work properly, the attorney-client privilege and work product doctrine will cover the final report. Generally, providers should be reticent about disclosing privileged materials. Any disclosure may completely breach the privilege for all materials created during the investigation. Adversaries will use such privilege waivers to their maximum advantage. A provider may decide that it is in its best interests to waive these protections and disclose the outcome of the final report to the government or the public. If the public is aware of the allegations that triggered the internal investigation, and the investigation reveals that the allegations are baseless, disclosing the report may provide desirable reassurance to customers, vendors, investors, and others. A report by outside counsel that no wrongdoing took place may also dissuade the government from pursuing action against the provider.

Even if the internal investigation uncovers some wrongdoing, it may be in the provider's interests to disclose the report, particularly to the government. Since 1999, the Department of Justice has instructed prosecutors that one of the considerations they should weigh when evaluating whether a business organization¹⁴ cooperated with the government 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 and counsel."¹⁵ The Department of Justice adamantly maintains that it does not require waivers of attorney-client privilege as a prerequisite to cooperation.¹⁶ However, the practical effect of the DOJ guidance to the various United States Attorneys' Offices around the country, is that more and more prosecutors are demanding privilege waivers. Prosecutors are also seeking waivers increasingly earlier in an investigation. When a provider waives the privilege and discloses the investigative materials, it will not receive any enforceable promise or benefit. It merely receives the government's promise that it will factor the waiver in as part of its overall consideration as to how it will pursue its case.

The decision whether to waive the privilege is an important one and must be informed by all of the facts of a particular case. If the provider waives the attorney-client privilege and provides information to the government, it may not be able to assert the privilege in future proceedings brought by a third-party. Documents associated with an internal investigation, including witness interview memoranda and the final report, can be an effective road-map for a plaintiff in a civil suit. In one case, a health care provider waived the attorney-client privilege and work product protection and released information to the DOJ and OIG as part of its efforts to settle fraud allegations.¹⁷ The company's efforts were successful and it reached a settlement with the government. Once the government settlement became public knowledge, however, a large number of private insurers and other third parties sued the provider. When the provider asserted the attorney-client privilege and work product doctrine against the plaintiffs in the civil litigation, the courts forced the provider to disclose to the plaintiffs the results of its internal investigation that it had disclosed to the government. Even if a provider discloses only some privileged documents to the government, third parties may take the position that by disclosing some documents the provider has waived the privilege with respect to the entire subject matter of the investigation.

Accordingly, the provider should not decide whether to waive the privilege until it has completed enough of its internal investigation to determine the waiver's implications. Although giving a prosecutor what he asks for when he asks for it may provide significant benefits in the form of reduced risk of indictment or a more favorable settlement agreement, the costs of a waiver can be significant as well.

¹⁴ The original guidance from the Department of Justice referred to corporation only, but, in 2003, the guidance was formally expanded to cover other types of business organizations.

¹⁵ Memorandum from Deputy Attorney General Larry D. Thompson to Heads of Department Components and United States Attorneys 7 (Jan. 20, 2003).

¹⁶ *Interview with United States Attorney James B. Comey Regarding Department of Justice's Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection*, United States Attorneys' Bulletin 1, 2 (Nov. 2003).

¹⁷ *See In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002).

CCH-EXP, Health-Comp-Manual, ¶51,350 **Conclusion**

Before any problem arises, a provider should take steps to prepare itself to conduct an internal investigation. Its compliance plan should routinely evaluate leads that might indicate the need for an investigation. Management and the board should be sufficiently educated so that they know when to initiate an investigation. The board should be sufficiently concerned that it quickly asserts the appropriate level of supervision. Such steps may prevent some problems, and will assuredly minimize any that arise.

CCH-EXP, Health-Comp-Manual, ¶51,352 **Appendix 5-6A**

CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED COMMUNICATION

To: Compliance Officer

From: In-House Counsel

Re: Internal Investigation of Billing Issue

Date: April 1, 2005

I am overseeing Provider's investigation of billing issue, and advising John Smith, CFO, and others on Provider's legal obligations with respect to this issue. I would like your assistance in investigating and analyzing the relevant facts, as part of my rendering legal advice to them. Please keep in mind that all of your work to assist me is protected by the attorney-client privilege and/or the work product doctrine. Thus, please keep all of your work product and communications confidential.

CCH-EXP, Health-Comp-Manual, ¶51,354 **Appendix 5-7A**
Appendix 5-7A

Appendix 5-7A

McDermott Will & Emery

Boston Brussels Chicago Dusseldorf London Los Angeles Miami Milan Munich New York Orange
County Rome San Diego Silicon Valley Washington D.C.

Michael D Kendall Attorney at Law mkendall@mwa.com 617 535 4085

June 25, 2004

PRIVILEGED & CONFIDENTIAL

Re: _____

Dear _____

The Audit Committee of the Board of Directors of _____ has engaged McDermott Will & Emery LLP ("McDermott") to serve as special counsel to the committee to conduct an investigation of allegations of billing improprieties at _____

This letter will confirm _____ engagement by McDermott on behalf of _____ to assist us in the review of documents and in the preparation of certain attorney work product under the direction of McDermott. We request that you examine any materials that you deem necessary in your usual professional manner and provide us with your professional opinions as you develop them in the exercise of your judgment both orally and, only upon request, in writing.

As a consultant, you will have access to confidential and privileged communications between McDermott and _____ personnel and confidential and privileged communications between McDermott and _____. Preservation of the confidential and privileged nature of these communications is of the utmost concern to _____ and McDermott. To that end, we require and expect that you will treat all

documents and communications between your office, _____ and McDermott as confidential work-product and/or attorney-client privileged and that you will not disclose any such communications to any other persons without our prior consent. You should prepare all reports and documents in draft form and send them to my attention so that I can review and comment on these documents as appropriate. No documents should be prepared, and no work should be done, without McDermott's express prior approval. Please mark all documents that you prepare as attorney-client privileged and as attorney work product.

We require and expect that if _____ is subpoenaed by any party, including any government agency or Grand Jury, regarding _____'s work on this engagement, _____ will:

- (a) immediately notify undersigned counsel,
- (b) assert the attorney-client privilege and the attorney work product doctrine, and
- (c) decline production of the subpoenaed persons or records unless otherwise ordered by a court or authorized by McDermott

_____ will pay you reasonable hourly fees for work done in this matter, and will reimburse you for reasonable out of pocket expenses incurred on behalf of _____, subject to McDermott's approval. I understand that your hourly fees are as follows:

Principal

Manager

Coding Professional

Please send your bills to McDermott on a monthly basis for processing. Payment of your fees and expenses will be the sole responsibility of _____ however. Your fees are in no way contingent upon the nature of your findings, or upon the nature of any testimony you may present.

We have not determined whether it will be necessary to ask you to testify on your opinions and the bases for them. Accordingly, we consider that you are a specially-trained expert who is *not* expected to be used as a witness at any hearing or trial. We may, however, ask you to testify at a later time. If we should ask you to testify, this letter shall govern the engagement.

In the event that a dispute arises at any time between _____ and _____ that cannot be resolved through discussion or mediation, the parties agree to submit to binding arbitration under the commercial arbitration rules of the American Arbitration Association. Neither _____ nor _____ may claim or receive any amount as punitive, exemplary, or consequential damages. In no event shall _____'s liability to _____ exceed the fees _____ paid for the services covered by this engagement letter and/or any of its supplements. The decision of the arbitrator shall be binding on _____ and _____. However, if a claim has been made or is anticipated to be made by a third party relating to these services, and that third party does not agree to arbitration, the parties can elect not to arbitrate so that all claims may be decided in one forum.

This Agreement can be terminated upon thirty (30) days written notice by either McDermott or by _____ with or without cause. Notice of termination shall be sent to:

Michael D. Kendall, Esq.

McDermott Will & Emery

28 State Street

Boston, MA 02109

We understand that you will devote your best efforts and independent judgment in carrying out the work required. The results obtained, your recommendations, and any written materials you may provide will reflect your best judgment based upon the information available to you.

If you have any questions, please call me at (617) 535-4085. Please confirm your agreement with the terms of this engagement by signing a copy of this letter and returning it to me. We look forward to working with you.

Sincerely,

Michael Kendall

cc: _____

ACCEPTED AND AGREED:

Date: _____

CCH-EXP, Health-Comp-Manual, ¶51,356 **Appendix 5-8A**
Appendix 5-8A

State of New York

OFFICE OF THE ATTORNEY GENERAL

MEDICAID FRAUD CONTROL UNIT

120 Broadway, 12th Floor, New York, New York 10271-0007

(212) 417-5253 Fax: (212) 417-5314

Appendix 5-8A

ELIOT SPITZER Attorney General

WILLIAM J. COMISKEY Deputy Attorney General
PATRICK E LUPINETTI Director, Special Projects Unit

September 20, 2004

Mr. Michael Kendall
McDermott Will & Emery
28 State Street
Boston, Massachusetts 02109-1775

RE:

Dear Mr. Kendall:

By letter dated August 31, 2004 we requested patient records from _____ authorized by 18 N.Y.C.R.R. 504.3(a). You are advised that this information is sought by the New York State Attorney General's Medicaid Fraud Control Unit in its capacity as a health oversight agency, and this information is necessary to further health oversight activities. Sections 45 C.F.R. 164.512(d); 45 C.F.R. 164.501. Pursuant to these sections of the Health Insurance Portability and Accountability Act of 1996 (HIPPA), the New York State Medicaid Fraud Control Unit is therefore authorized to receive the patient records requested from

If you need any additional information I may be contacted at (212) 417-5253.

Sincerely,

Marie D. Spencer

Special Assistant Attorney General

CCH-EXP, Health-Comp-Manual, ¶51,358 **Appendix 5-9A**
Appendix 5-9A

MEMORANDUM

Confidential Attorney-Client Communication

Appendix 5-9A

Date: April 1, 2005

To: General Counsel of Provider

From: Defense Counsel

Re: *Government Contact of Provider's Employees*

If you decide to inform any Provider's employees that a federal investigator may contact them or other Provider employees, you may instruct them orally or in writing. You may want to inform them that:

1. The federal government is investigating Provider over _____. Thus, the federal government may seek information from Provider's employees. Provider is cooperating with this investigation.

2. If any Provider employee is contacted by the government, that employee should immediately call Lawyer A at the General Counsel's Office at 000-000-0000.

3. Whether an employee chooses to participate in an interview with a government investigator is the employee's own decision, but the employee need not make it without advice of counsel. Every employee is entitled to legal representation prior to agreeing to an interview or answering any questions whatsoever. Every employee is entitled to legal representation in any interview or other contact with the government.

4. Every employee can decide if they want to be represented by a lawyer, and who that lawyer should be. An attorney from the General Counsel's Office is available to represent the employee for his or her interview and all other contacts with the government, if the employee so chooses. If contacted, the employee can simply direct the investigator to Lawyer A in the General Counsel's Office and ask that the investigator arrange the interview for a later time through the General Counsel's Office.

5. Provider is cooperating with the investigation, but such cooperation must be in an orderly fashion and through normal channels. No employee should give a government investigator any access to company property without first consulting with Lawyer A of the General Counsel's Office. This includes access to property as well as equipment or other objects. This also includes all business documents that are Provider's property. No employee should be disclosing any of Provider's documents. As part of Provider's cooperation with the government in this investigation, it will arrange to produce documents through the General Counsel's Office. No one else is authorized to give out any of Provider's documents.

6. Most importantly, employees must be unequivocally told that they are to be truthful and honest in all of their dealings with members of the government. No one should give any information that is false or misleading in any way.