

Ethical & Legal Issues Arising In *Qui Tam* Litigation

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I. Introduction.

With three parties tussling for a different outcome, the False Claims Act creates a tripartite form of litigation that is unique in many ways, including the ethical and legal issues that confront lawyers who litigate *qui tam* actions. The following article addresses some of the interesting ethical and legal issues that are peculiar to *qui tam* cases. The issues are covered in chronological order so that each is addressed in the order that it would arise in a lawyer's everyday practice.

II. Ethical Issues That May Arise Even Before A *Qui Tam* Complaint Is Filed.

It is obvious from the statute that a *qui tam* action is triggered when a relator files its complaint under seal and provides a written disclosure to the Department of Justice.¹ But perhaps less obvious is that counsel for both relators and soon-to-be defendants may face a variety of ethical and legal issues before a *qui tam* complaint is filed. This section addresses some of these pre-complaint concerns.

A. Counsel's duty to avoid filing a frivolous *qui tam* complaint.

Many *qui tam* cases begin when a putative relator approaches a lawyer with accusations that the individual's current or former employer is defrauding the government. But because some of these individuals harbor animosity towards their employer, perhaps thinking that they were passed over for promotion or wrongly terminated, one of the lawyer's first responsibilities is to examine both the person's motives for bringing the suit and the merits of the underlying allegations. It is therefore wise for the lawyer to "determine from the outset whether the individual has a real or imagined grievance, as often the alleged fraud is merely a cover for an exercise in retaliation" against the employer.² Several different ethical and legal considerations should guide the lawyer's decision to file a *qui tam* action.

1. Rule 3.1 of the Model Rules of Professional Conduct.

Every lawyer has a professional obligation to the client, the court, and the adversary to refrain from pursuing meritless claims.³ Before a lawyer may file a *qui tam* complaint, the lawyer must have a basis for ensuring that the allegations are not frivolous. Rule 3.1 of the Model Rules of Professional Conduct, which contains the not-frivolous standard, provides in pertinent part:

A lawyer shall not bring or defend a proceeding or assert . . . an issue . . . **unless there is a basis for doing so that is not frivolous**, which includes a good faith argument for an extension, modification, or reversal of existing law.⁴

Under this rule, the client’s motivation for bringing the *qui tam* action is not the standard by which the merit of the claim is judged. A relator, especially in the case of a former employee, may have two motivations for filing the action – both to punish the employer for poor treatment (real or imagined) and to vindicate a perceived fraud. A lawyer should therefore not avoid a *qui tam* action just because the relator is partially motivated by resentment or worse. As explained in the comments to Rule 3.1, a claim is frivolous “if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.”⁵ An action is “not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.”⁶ To avoid filing a frivolous *qui tam* action, then, a lawyer must understand both the facts of the client’s case and the elements of a cause of action under the FCA, and be able to make a good faith argument in support of the client’s position.

A lawyer who decides to pursue a frivolous claim or who makes a frivolous argument litigating a *qui tam* action risks professional sanctions. In *Attorney Grievance Comm’n v. Zdravkovich*, for example, a lawyer was sanctioned for trying to remove a case to federal court because, the court explained, reading the removal statute “would have made it crystal clear” that the lawyer’s argument was frivolous.⁷ In the context of the FCA, which is an admittedly complex statute, there are many traps for the unwary. Although these traps may take the form of substantive claims, like how to establish that the defendant “knowingly” violated the FCA, they may also be as simple as the procedural requirement that the *qui tam* complaint be filed *in camera* and remain under seal. This is exactly what happened in *United States ex rel. Pilon v. Martin Marietta Corp.*, when the relator’s counsel neglected to file the complaint under seal and “allowed his clients to give a detailed interview to the press concerning both the complaint’s allegations and matters not mentioned in that pleading.”⁸ The Second Circuit not only affirmed the dismissal of the relator’s *qui tam* complaint and did so with prejudice, it noted that the counsel’s actions demonstrated a “lack of good faith.” The Second Circuit’s decision affirming the dismissal of the *qui tam* complaint and its open criticism of the lawyer’s good faith undoubtedly left the lawyer vulnerable to professional sanctions.⁹

2. Rule 1.16 of the Model Rules of Professional Conduct.

From the perspective of the relator’s counsel, the goal in every *qui tam* action is to convince the government to exercise its right to intervene and prosecute the case.¹⁰ As one commentator has explained:

The goal of the relator in a False Claims Act case is to get the case into the hands of the United States Attorney, and to convince the United States Attorney that the case has merit and should be prosecuted. If this is done, the attorney representing the relator can turn over the day-to-day evidence gathering duties to the United

States Attorney, and can offer such help as is required during the pendency of the case. The expenses of the litigation in terms of depositions, travel, and similar out-of-pocket costs, are assumed by the United States Government, and the relator does not have to advance these costs.¹¹

Not only does the government's intervention relieve the lawyer of having to prepare and try the case, an expensive and time consuming effort, it brings a much more formidable friend to the bargaining table. The government's presence alone often leads to quick and discernibly larger settlements, which benefits the lawyer in both time saved and money earned. But more often than not, the government declines to intervene in *qui tam* actions, forcing the relator's counsel into the unenviable David-and-Goliath position of having to litigate a complex case against a well-heeled defendant. If the lawyer has no experience litigating *qui tam* actions, this must be a difficult scenario, made only more difficult by Model Rule 1.16.

Under Rule 1.16, a lawyer may not simply abandon a case that is not going well or for which the lawyer feels too unprepared or inexperienced to handle. Although there are narrow exceptions for when a lawyer may withdraw from representation, such as if the client uses the lawyer's legal services for criminal gain, pursuing a weak case is not one of them. Regardless of the lawyer's good faith and legitimate reasons for wanting to end the representation, a court may always require the lawyer to continue the representation. Section c of the rule, for example, provides that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Once a lawyer agrees to represent a client, in other words, there is an implied obligation that the lawyer will continue that representation until the matter is done.¹² For lawyers contemplating filing a *qui tam* action, Rule 1.16 offers a stark reminder that the lawyer had better be prepared to litigate a complex case to the end – without the help of the government – because there is no obvious escape hatch once the complaint is filed. When a lawyer does not intend to represent the relator if the government does not intervene, it would be wise for the lawyer to include this in the retainer agreement.

3. 31 U.S.C. § 3730(d)(4) of the False Claims Act.

In addition to the ethical rules that are implicated when a lawyer files a *qui tam* complaint, lawyers should also be aware that § 3730(d)(4) of the FCA allows prevailing defendants to recoup their attorneys' fees in some situations. Section 3730(d)(4) provides in pertinent part that:

[A] court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was **clearly frivolous**, clearly vexatious, or brought primarily for purposes of harassment.¹³

Unlike many traditional commercial litigation cases in which there is little risk that the losing party will have to pay the other side's attorneys' fees, there is a risk of this happening in an FCA case. This risk ought to give every lawyer pause before filing a *qui tam* complaint. Not

only is it difficult for the lawyer to withdraw from the representation once the complaint has been filed, but the lawyer is ultimately responsible for ensuring that the client, *i.e.*, the relator, does not end up owing thousands of dollars in attorneys' fees and costs to the defendant. A lawyer that allows the client to proceed with a "clearly frivolous" action has likely shirked the ethical obligations of Model Rule 1.6.

It may seem ironic, but a lawyer who is approached by a putative relator faces an equally pressing concern to file the *qui tam* complaint quickly. Section 3730(b)(5) of the statute, which is commonly referred to as the First-to-File bar, bars a relator from bringing "a related action based on the facts underlying [a] pending action." Under this provision, if a relator's claim has already been filed by another relator, the district court lacks subject matter jurisdiction and must dismiss the action.¹⁴ The Fifth Circuit has explained that "as long as the later-filed complaint alleges the same material or essential elements of fraud described in a pending *qui tam* action, § 3730(b)(5)'s jurisdictional bar applies."¹⁵ A lawyer contemplating filing a *qui tam* action therefore has an incentive to file the *qui tam* complaint quickly – or risk having the case dismissed. The lawyer must therefore try to strike a balance between the competing and seemingly contradictory incentives of the attorneys' fees provision and the first-to-file bar. On one hand, the lawyer must ensure that the relator's claims are not frivolous before initiating the action; but on the other hand, the lawyer must be the first to file the *qui tam* complaint, or risk losing out to another relator.

B. Counsel's Duty To Protect Employee Privacy.

Even before a *qui tam* complaint is filed, corporate counsel may come to suspect that a particular employee, perhaps someone who has raised concerns about the legality or propriety of a company practice, is contemplating initiating an FCA action. It is often tempting in these circumstances for the lawyer to investigate the employee's conduct in an attempt to determine if the company has a potential whistleblower in its midst. One way of evaluating the employee's motives is to mine the employee's email for clues of a possible *qui tam* claim. Of course, reviewing emails increases the viability of the employee's § 3730(h) retaliation claim because it eliminates any defense that the employer did not "know" of the employee's conduct. When reviewing employee email, additionally, the lawyer risks reading privileged communications between the employee and the employee's lawyer, which leads to an obvious question: Is this type of behavior ethical? The answer, as it turns out, is that it often depends on three things: the wording, enforcement, and notoriety of the company's computer monitoring policy.¹⁶

The attorney-client privilege, at its core, protects the sanctity of communications that are made in confidence between a client and an attorney for the purpose of obtaining legal advice.¹⁷ Communications between a client and an attorney are not privileged if they are exchanged in a setting or through a medium where there is no reasonable expectation of confidentiality. When it comes to employee email, then, the "pivotal issue . . . is the element of confidentiality, which requires that the communication be made with the intent that it be confidential and with the reasonable expectation and understanding that, under the circumstances, it will remain confidential."¹⁸ When an employee communicates with an attorney through email, two elements of the attorney-client privilege are threatened: the communication may not have originated in

confidence and, even if it did, the client may not have a reasonable expectation that the communication will remain in confidence.¹⁹

Because the element of confidentiality is a crucial component of the privilege, a company can try to thwart the creation of any privilege over its email system by distributing a robust email policy, as demonstrated by the decision in *Scott v. Beth Israel Medical Center*.²⁰ In that case, Scott sent emails to his lawyers using his employee email address and his employer's email server. When he learned that his employer was in possession of these emails, he sought a protective order requiring his employer to return all such emails, which he claimed were protected from disclosure by the attorney-client privilege. But the court disagreed. It found that the emails were never protected by the attorney-client privilege because Scott did not, when communicating with his lawyers, have a reasonable expectation of privacy when he used the company's email system.

In concluding that the emails were not privileged, the *Scott* court focused on the company's email usage policy and noted that it was "critical to the outcome."²¹ The court noted that the policy was available to all employees on the company's intranet and available in hard copy in Scott's office. The policy stated, in relevant part, that:

This Policy clarifies and codifies the rules for the use and protection of the Medical Center's computer and communications systems. This policy applies to everyone who works at or for the Medical Center including employees, consultants, independent contractors and all other persons who use or have access to these systems.

1. All Medical Center computer systems, telephone systems, voice mail systems, facsimile equipment, electronic mail systems, Internet access systems, related technology systems, and the wired or wireless networks that connect them are the property of the Medical Center and should be used for business purposes only.

2. All information and documents created, received, saved or sent on the Medical Center's computer or communications systems are [the property] of the Medical Center. **Employees have no personal privacy right in any material created, received, saved or sent using Medical Center communication or computer systems. The Medical Center reserves the right to access and disclose such material at any time without prior notice.**²²

Despite that Scott never acknowledged receiving a copy of this policy and denied even knowing about it, the court found that the policy put him on constructive notice that the company was "looking over [his] shoulder each time [he] sent an email."²³ He therefore had no reasonable expectation of privacy when he emailed his lawyers even though the company acknowledged that it did not actually monitor his email. That the company retained the right to monitor all

email was sufficient to defeat any expectation of confidentiality, especially since Scott was constructively on notice of the policy.

Like the *Scott* decision, many courts have concluded that employee emails are not privileged where the employer provides effective notice that it monitors the use of its computer equipment, including any emails that are created or stored on the company's equipment.²⁴ But lawyers must still be careful when dealing with employee emails, because this trend does not necessarily mean that every email that an employee sends from a work computer is not privileged. If an employee sends an email from a work computer, but uses a personal email account from a third-party website, like Yahoo!, Gmail or Hotmail, the email may actually be privileged. This is what a district court concluded in *Curto v. Medical Communications, Inc.*, where the employee used a personal email address from AOL.com to send emails to her attorney.²⁵

Although there is no bright-line test to distinguish privileged emails from non-privileged ones, a careful lawyer tempted to review employee email can ask several questions, the answers to which provide helpful clues as to whether the employee had a reasonable expectation of confidentiality when sending the email. These are the same questions that a court would likely ask to determine whether the email was privileged:

- Does the company have a policy banning employees from using work computers for personal use and monitoring employee email?
- Does the company routinely enforce its no-personal-use policy by monitoring company computers and employee email?
- Can the company demonstrate that employees are actually aware of the company's policy and are not lead into a false sense of security that company emails are somehow confidential?
- Do any third-parties have access to employee emails?²⁶

For in-house counsel and defense counsel, the lesson from these cases is simple: Never assume that employee emails can be accessed and read simply because they were sent through the company's email system or using the company's computer equipment. Lawyers who fail to heed this warning may find themselves disqualified from defending the company,²⁷ or worse—being professionally sanctioned.²⁸ There is also a lesson in these cases for employees (*i.e.*, relators) and their counsel: Never communicate with one another about privileged matters using the employee's work computer or email address, or even using a personal email account from a work computer. The risk that the attorney-client privilege will be waived by doing so is too great.

C. Obtaining an Employee Release Before the *Qui Tam* Complaint Is Filed.

Some company lawyers and outside counsel will try to prevent an employee from being able to file a *qui tam* complaint by having the employee sign a broad release, releasing all claims against the company, at the end of the employment relationship. But what many of these lawyers may not recognize is that courts routinely refuse to enforce employee releases if doing so would

prevent the employee from filing a *qui tam* action.²⁹ Until recently, in fact, courts have generally been reluctant to enforce an employee release that would bar the employee from bringing a False Claims Act action, fearing that doing so would subvert the purpose of the *qui tam* provisions and the Act itself.

In one well-known decision that is frequently cited, *United States ex rel. Green v. Northrop Corp.*, the Ninth Circuit refused to enforce an employee release because it concluded that allowing a relator to forfeit the right to bring a *qui tam* action would “threaten to nullify the incentives” that Congress had added to the Act. The Ninth Circuit was worried, in other words, that if employee releases were enforceable, the government might never learn about the relator’s allegations of fraud.³⁰ A later panel of the Ninth Circuit elaborated on the negative consequences that enforcing employee releases – before the government knows of the relator’s allegations – could have on the *qui tam* framework:

The effect of enforcing releases when the government has no knowledge of the *qui tam* claims would be to encourage relators to settle privately and release their claims, thus retaining 100 percent of the recovery, instead of providing the government with information and retaining at most the 30 percent recovery available in a *qui tam* action.³¹

Although the *Green* court refused to enforce the release, later decisions both in the Ninth Circuit and other circuits have led to a more nuanced approach.³² Rather than adopting a blanket rule that all releases are *per se* unenforceable, courts have begun to apply a standard that the Fourth Circuit aptly coined in *United States ex rel. Radcliffe v. Purdue Pharma*,³³ the “government knowledge rule.”

In *Radcliffe*, the relator signed a broadly-worded release in which he released his employer, Purdue, “from any and all liability.” This language was broad enough to encompass the *qui tam* action that he filed after signing the release. Unlike the relator in *Green*, however, when Radcliffe signed the release the government knew about the same allegations he later raised in his complaint and was actually investigating Purdue although its investigation was not complete. Because the government was aware of the fraudulent conduct underlying Radcliffe’s claims before he filed the release, the Fourth Circuit concluded that the release should be enforced:

When the government is unaware of potential FCA claims the public interest favoring the use of *qui tam* suits to supplement federal enforcement weighs against enforcing pre-filing releases. But when the government is aware of the claims, prior to suit having been filed, public policies supporting the private settlement of suits heavily favor enforcement of a pre-filing release.³⁴

The *Radcliffe* court “therefore agree[d] with the government that ‘[t]he proper focus of the inquiry is whether the allegations of fraud were sufficiently disclosed to the government.’”³⁵

As the *Green* and *Radcliffe* decisions demonstrate, employee releases are not as straightforward as some might hope or believe. To the contrary, the enforceability of any release necessarily depends on the unique circumstances of the employee, the company and, most importantly, the government. Thus, whether you are a lawyer representing a relator or a defendant, considering the following factors – before signing the release – might help predict whether the release will be enforced. The more “yes” answers to these questions, the more likely the release is to be enforced:

- Has the employee already disclosed his claims to the government?
- Has the company disclosed the allegations to the government?
- Even if the employee has not disclosed his claims to the government, does the government already know about the fraudulent conduct?
- Did the government begin investigating the fraudulent conduct before the release was signed?
- Is the release language broad enough to encompass a *qui tam* complaint?
- Has the employee received consideration for the release?
- Has the government’s investigation focused on the same conduct on which the relator’s claims are based?

In addition to having the employee sign a broad release waiving all claims against the company, some lawyers will also ask the employee to sign a statement – or even a sworn affidavit – that the employee knows of no facts or information suggesting that the company violated any law, including the False Claims Act. While this might seem like a strategically sound decision from the point of view of the lawyer, after all it gives the company a powerful impeachment tool should the matter ever go to trial, it raises a significant ethical issue. That is, if the lawyer knows – contrary to what the statement or affidavit may say – that the employee does have information suggesting the company violated a law, the lawyer has just willingly encouraged the employee to sign a document containing a material misrepresentation. Doing so would violate Model Rule 8.4, which provides that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” The lawyer’s zeal for representing the company should be tempered by a general duty to avoid potentially dishonest behavior.

D. Representing Multiple Relators.

It is not uncommon for two or more individuals to approach one lawyer with the idea of filing a *qui tam* complaint jointly.³⁶ Although the idea of having two or more relators may appear to make sound strategic sense, as it presumably gives the lawyer access to more information and evidence in building and presenting the case, it also presents a potential conflict of interest. Model Rule 1.7(b)(2) specifies that a lawyer shall not represent a client if that representation may be materially limited by the lawyer’s responsibilities to another client, and that “[w]hen representation of multiple clients in a single matter is undertaken, the consultation

shall include explanation of the implications of the common representation and the advantages and risks involved.”

Rule 1.7(b) may be implicated when a lawyer represents multiple relators in a few practical situations. For example, the lawyer may have a conflict of interest in determining:

- How the two relators will split any recovery, especially if one of the relator’s knowledge of the fraud is much greater than the other’s.
- Who has the authority to reach a settlement with the defendant.

Given these concerns, the lawyer may well be advised to explain the potential conflict to each client and receive their informed consent before agreeing to the joint representation.

Even if the lawyer is not representing two relators in the same action, the lawyer may still run into conflict-of-interest issues if he regularly brings *qui tam* actions or is simultaneously pursuing two *qui tam* actions for different clients. Because a lawyer must work with government attorneys when pursuing a *qui tam* action, the lawyer has a strong incentive to develop a good working relationship with the government – especially since attorney cooperation is one of the criteria that the government uses to determine the relator’s share of the award.³⁷ In an effort to develop or maintain a good relationship with the government, the attorney may be tempted to temper his zealous representation of one client for fear of harming his relationship with the government and, as a consequence, his ability to represent another client. This is especially likely to present a conflict of interest when the potential recovery for one case is much larger than the other, giving the attorney a financial incentive to sacrifice one client for another.

III. Ethical Issues That May Arise Before The Government Intervenes.

Once a relator files a *qui tam* complaint under seal and provides a disclosure statement to the government, the government has a period of sixty days to intervene, which it usually extends for months if not years. During the sealing period, the government must decide whether it will intervene and conduct the action, decline to intervene and allow the relator to conduct the action, or move to dismiss. Several ethical issues arise during this pre-intervention period.

A. Ethical issues facing government attorneys.

According to 31 U.S.C. § 3730(a), the Attorney General must “diligently” investigate violations of the FCA. Much like the relator’s counsel, then, federal prosecutors have an obligation to investigate the relator’s allegations and to review the evidence of wrongdoing – or obtain such evidence if necessary – before deciding whether to intervene. The FCA gives prosecutors in the Department of Justice and United States Attorneys’ Offices a potent tool to investigate violations of the Act: the civil investigative demand. Using a civil investigative demand, or CID, government attorneys may order defendants to produce documents, respond to written interrogatories and give oral testimony in a deposition-like setting.³⁸

In light of the statutory requirement that the government “diligently” investigate violations of the FCA, and the potent tools available for it to do so, an obvious question arises:

What constitutes a diligent investigation? Although the question may be obvious, the answer is not. In *United States v. Baker-Lockwood Mfg. Co.*,³⁹ the Eight Circuit articulated a useful, albeit vague, standard for prosecutory diligence, noting that “[d]iligence in the enforcement of the false claims statute requires of the Department of Justice the careful and orderly investigation and preparation of the action to be brought, in order that the Government may be able, when the suit is filed, to prosecute it with fairness to the defendants charged as well as to the public.” This standard appears to impose some responsibility on the government to independently investigate the allegations raised in a *qui tam* complaint. But what constitutes a diligent investigation in practice likely varies by prosecutor and by case. Still, it seems certain that the government must do more than rely on the relator’s disclosure statement when deciding whether to intervene.

Assuming the government has diligently investigated the relator’s allegations, an interesting ethical issue arises as to the government’s obligation to share the fruits of its investigation with the defendant. This issue most commonly arises when government attorneys work to negotiate a settlement with the defendant. In criminal cases, federal prosecutors have a duty under both the U.S. Constitution and Model Rule 3.8(d) to provide the defense with any favorable evidence that is material to guilt, punishment or impeachment.⁴⁰ But in the civil context, like FCA cases, it is not clear what duty federal prosecutors have to provide this material to the defense.

An argument can be made, however, given the punitive nature of the Act, that government attorneys have the same duty of disclosure. This would conform with the general understanding that federal prosecutors are more than just advocates, they have a responsibility “to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”⁴¹ In *Berger v. United States*,⁴² the Supreme Court described the unique role that federal prosecutors play, a role that seems equally applicable to both criminal prosecutions and *qui tam* actions:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.⁴³

Accepting the validity of this standard in the context of the FCA supports a number of conclusions. First, it supports the notion that the government has an obligation to provide the defendant with *Brady* material; that is, any favorable evidence that is material to guilt, punishment or impeachment. For example, the government should provide the defendant with a copy of the relator’s disclosure statement, particularly if inconsistencies in the disclosure statement cast the relator’s credibility in doubt. Second, it supports the notion that the government cannot overstate its position – for example, by inflating its potential recovery – while negotiating a settlement with the defendant.⁴⁴

The government attorney's duty to ensure that "justice shall be done" should, in the context of *qui tam* actions, extend even after it has declined to intervene. Unlike many traditional commercial disputes, the relator and the relator's lawyer are *de facto* representatives of the United States. The United States remains the real party in interest in a *qui tam* action. Although the United States is the real party in interest, however, the government rarely moves to dismiss a *qui tam* action even when it declines intervention. The government may argue that its non-intervention has no bearing on the case's merit, but there are undoubtedly circumstances when government attorneys and investigators conclude that the relator's case is not worth pursuing because it is without merit. In this situation, government attorneys can either move to dismiss the case or allow the relator to prosecute the action. Too often, however, the government simply allows the case to go forward because it presumes the defendant will be able to dismiss the case before trial and, relatedly, it does not want to expend its limited resources litigating against relators, as this takes resources away from prosecuting other cases and draws almost certain ire from the relator-bar and Congress.

Though the government's rationale for staying neutral may seem quite sensible from its vantage, there is something inherently troubling when a government attorney chooses to abdicate prosecutorial discretion to a private party motivated mostly by money. This is especially true when, after a full investigation, the government attorney sees no evidence of wrongdoing and truthfully believes the case should be dismissed early to save the defendant from having to litigate a meritless case and before the relator creates bad law. Although federal prosecutors are given near-total discretion in the cases they do and do not prosecute, the notion that a government attorney will cede this discretion to private parties, and perhaps even remain neutral in a case that should be dismissed, raises an interesting question as to whether the government has more of an affirmative obligation to dismiss meritless cases than it is willing to accept. The Executive Branch, after all, is entrusted with the duty to "take Care that the Laws be faithfully executed,"⁴⁵ which it should not shirk for pragmatic reasons.

B. Ethical issues arising while the *qui tam* complaint is under seal.

The filing and service requirements that govern *qui tam* complaints are found in § 3730(b)(2). This section provides that a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government" and that the "complaint shall be filed in camera, [and] shall remain under seal[.]"⁴⁶ Once filed, the complaint remains under seal for 60 days, and is not served on the defendant during this period. Congress created these filing and service requirements – and especially the requirement that the complaint be kept under seal – for a number of related purposes.⁴⁷ The provisions were "adopted primarily to allow the government first to ascertain in private whether it was already investigating the claims stated in the suit and then to consider whether it wished to intervene. The provisions were also designed to prevent alleged wrongdoers from being tipped off that they were under investigation."⁴⁸ Congress also intended for the seal requirement "to rectify a statutory anomaly under which the defendant may be forced to answer the complaint twenty days after being served, without knowing whether his opponent will be a private litigant or the Federal government and to protect the defendant's reputation from unfounded public accusations."⁴⁹

As the Ninth Circuit has explained:

By providing for the seal provision, Congress intended to strike a balance between “the purposes of *qui tam* actions [and] . . . law enforcement needs[.]” The purpose of *qui tam* actions is to encourage more private false claims litigation. The other side of the balance recognizes the need to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene. . . .⁵⁰

The seal requirement attempts to strike an “appropriate balance between these two purposes by allowing the *qui tam* relator to start the judicial wheels in motion and protect his litigative rights, while allowing the government the opportunity to study and evaluate the relator's information for possible intervention in the *qui tam* action or in relation to an overlapping criminal investigation.”⁵¹

Though its purposes may be well-known, the scope of the seal provision is less certain. Nothing in the statute indicates whether the seal applies to all parties in exactly the same way, or whether the seal may be intentionally or inadvertently waived much like a party may waive the attorney-client privilege. Different opinions have formed on this issue. Some have treated the seal provision as the legal equivalent of a gag order, which prevents any person from publicly discussing any of the case's particulars, or even acknowledging that the *qui tam* action exists. With respect to relator and relator's counsel, this interpretation of the seal requirement is almost certainly correct. If relators were allowed to openly talk about a case that was under seal, the purposes of the seal requirement would be defeated: The government would not have an opportunity to privately investigate the matter before deciding whether to intervene, and the defendant would be alerted to the government investigation, sullyng its reputation in the process. There can be no question, then, that the seal provision is a gag order for relators and relator's counsel, which is the reason that a *qui tam* action will be dismissed if the relator fails to file the complaint under seal. But what about defendants and defense counsel – does the seal provision apply with equal force? The answer, as it turns out, is unknown. But there are good reasons to believe that the seal provision does not apply to defendants as it does to relators.

Although the government would likely argue that the seal requirement applies with equal force to defendants, an examination of the primary purpose of the seal provision does not support this position. Its primary purpose, after all, is to keep the defendant ignorant of the suit so that the government can continue its investigation (or open one) without fear that the defendant will interfere. But if the defendant inadvertently learns about the *qui tam* action before it is unsealed – which has happened in the past due to docketing errors – the purposes of the requirement become mostly irrelevant. There is no longer a concern that the government's investigation will be stymied by a disclosure of the *qui tam* allegations because the seal is really meant to prevent the defendant from learning about the investigation. But once the defendant knows about the investigation, further disclosures do not change anything – the cat is out of the bag. There is no question that the seal requirement also protects the defendant's reputation from

being sullied, but the defendant should be able to risk this by making the *qui tam* allegations public if it chooses. Thus, while there are good reasons to believe that the seal requirement effectively acts as a gag order for relators, the same cannot be said for defendants.

Before it decides to intervene, it is common for the government to ask for a court order partially unsealing a *qui tam* complaint for the purpose of negotiating a settlement with the defendant. After obtaining a partial unsealing order, the government will show the complaint to the defendant making the defendant aware of the *qui tam* action and the relator's allegations although the relator's name and identifying information is often redacted.⁵² From the government's perspective, a partial unsealing order is necessary so that it may show the complaint to the defendant and discuss the merits of the relator's allegations for settlement without violating the seal provision. Even though the defendant is made aware of the *qui tam* complaint, however, it still may not access the case docket – the docket remains under seal. The partial unsealing simply allows the government to disclose as much or as little of the complaint as it chooses, which raises a question of whether the government has intentionally waived the seal's protections. In any event, this does not mean that the defendant should be barred from publicly disclosing the allegations, and in certain circumstances, it seems to have a legal obligation to disclose the allegations, for example, if it has an affirmative legal duty to do so under the securities laws, as many publicly-traded corporations do.

IV. Ethical Issues That May Arise Settling A *Qui Tam* Complaint.

More often than not the government declines to intervene in *qui tam* cases, which leaves the relator to prosecute the action alone. Once the government declines to intervene, it does not typically participate in settlement negotiations between the relator and the defendant. Without a government attorney present, the two sides have an incentive to structure the settlement in such a way that the lion's share of the proceeds go to the relator, not the government. This is a win-win situation for the relator and defendant because by reducing the government's share they can lessen the total amount of the settlement (a boon for the defendant) while simultaneously increasing the relator's award. As long as the government does not block the settlement, both lawyers have made a seemingly savvy, client-focused decision. But have they acted ethically? Maybe so.

There are two primary ways in which the parties can structure a settlement to increase the relator's share. The first and most common way that a settlement can be structured to favor the relator, at the government's expense, is only an option when the relator has asserted a retaliation claim in addition to traditional FCA claims, *e.g.*, false claims and false statements.⁵³ This is because when there is a retaliation claim the parties can agree to settle that particular claim for more than its actual value, and either not settle the remaining FCA claims or settle them for less than their actual value. By structuring the agreement this way, the defendant ultimately pays more for the retaliation claim, but much less for the other claims, than it would if the government was a part of the agreement. The reason that this structure works is that the retaliation claim is the only claim that is not shared with the government; it belongs to the relator. The government takes 70% or more of any other claim. By distributing the proceeds to the retaliation claim, the parties avoid paying that 70% or more share to the government.

Structuring the agreement in this fashion raises an ethical dilemma for relator's counsel, however, because that lawyer, by bringing a *qui tam* action, is also effectively representing the United States. While the lawyer may have been retained by the relator, the lawyer nonetheless represents the United States by virtue of the relator's status as a partial assignee of the United States' claim.⁵⁴ This understanding of the lawyer's role is consistent with the structure of the *qui tam* provisions, which were designed to encourage "private attorneys-general" to vindicate the public's interest when the government could not or would not do so.⁵⁵ The lawyer therefore has two client interests to consider, the relator and the public, and therefore has both a duty to his client and a duty – although presumably to a lesser extent – to the public. That the lawyer represents the public's interest, not just the relator's, is supported by the general rule that a relator cannot bring an action *pro se*.⁵⁶ Why? Because courts recognize that while "[t]he relator in a *qui tam* FCA action . . . [has] a stake in the lawsuit, [the relator] represents the interests of the United States."⁵⁷

Given the purpose and structure of the False Claims Act, it is fair to conclude, as one commentator has, that "relators and their counsel owe the government duties of qualified and competent representation and a good faith effort to litigate and settle the case on terms favorable to the public interest."⁵⁸ Although relators prosecute *qui tam* actions for self-interested ends, they and their counsel are nonetheless "limited or quasi-fiduciaries for the government," which means that they "must not deprive the government of the benefit of the action."⁵⁹ By structuring a settlement to deprive the government of its fair share, however, a lawyer representing a relator is elevating the relator's interests over the public's interests, essentially shirking the duty of good faith and fair dealing that is owed to the public. When negotiating settlements, then, lawyers should think twice before agreeing to a settlement that releases significant FCA liability for an amount that is not adequately reflected in the settlement amount apportioned to the government.⁶⁰

The second way that a settlement can be structured to favor the relator, at the government's expense, is to settle for only the lawyer's attorneys' fees and costs and nothing else or to unduly increase the amount of the attorneys' fees. Under this approach, the defendant might agree to provide the relator's lawyer with a large payment, some of which the lawyer could agree to pass through to the relator, for the promise that the relator would simply stop prosecuting the action, allowing it to be dismissed for want of prosecution. This type of settlement raises the same concerns as the first, as it deprives the government of its fair share. But it also creates a conflict of interest between the lawyer and client: Because the lawyer receives a payment for attorneys' fees and costs that is larger than the value of the work performed, the lawyer has a financial incentive to have the relator settle the claims and stop prosecuting the case, even when it may not be in the relator's best interest.

V. Conclusion.

The structure of the False Claims Act, which deputizes private citizens to represent the public interest for purely private gain, creates many interesting ethical and legal issues that are particular to *qui tam* actions. As a consequence, all lawyers that participate in FCA cases – whether they represent the government, relators or defendants – have unique factors to consider when initiating, trying or settling a *qui tam* case. Paying close attention to these issues will keep both clients and bar counsel happy.

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- ¹ 31 U.S.C. § 3730(b)(2) (2010) (“A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure.”).
- ² See Anthony L. Dewitt, *Is The Whistle Clean? An Examination Of The Ethical Duties Of Attorneys In Investigating And Pursuing False Claims Act Lawsuits*, 25 N. Ky. L. Rev. 715, 722 (Summer 1998).
- ³ *Fontaine v. Ryan*, 849 F. Supp. 242, 245 (S.D.N.Y. 1994) (“Even if a client seeks to insist on questionable contentions in a lawsuit, an attorney has the professional obligation to the client, the court and the adversaries to insure that only appropriate steps are taken.”).
- ⁴ American Bar Association Center for Professional Responsibility, *Annotated Model Rules of Prof’l Conduct*, p. 293 (6th ed. 2007) (emphasis added).
- ⁵ *Ann. Model Rules of Prof’l Conduct* R. 3.1, cmt. 2.
- ⁶ *Id.*
- ⁷ *Attorney Grievance Comm’n v. Zdravkovich*, 362 Md. 1, 29 (Md. 2000).
- ⁸ *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 999 (2d Cir. 1995).
- ⁹ *Id.*
- ¹⁰ 31 U.S.C. § 3730(b)(4).
- ¹¹ See Dewitt, *supra* note 2, at 727-28.
- ¹² *Ann. Model Rules of Prof’l Conduct* at 237.
- ¹³ 31 U.S.C. § 3730(d)(4) (emphasis added).
- ¹⁴ *United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371 (5th Cir. 2009).
- ¹⁵ *Id.* at 378.
- ¹⁶ See generally L. Camille Hebert, *Common-Law Restrictions on Electronic Monitoring and Surveillance*, 1 Empl. Privacy Law § 8A:33.50 (2009).
- ¹⁷ See John K. Villa, *Emails Between Employers And Their Attorneys Using Company Computers: Are They Still Privileged?*, 26 No. 3 ACC Docket 102 (2008).
- ¹⁸ *Id.* at 103 (citing *Long v. Marubeni American Corp.*, No. 05-CV-639, 2006 WL 2998671, at *3 (S.D.N.Y. Oct. 19, 2006) (“Confidentiality is an aspect of a communication that must be shown to exist to bring the communication within the attorney-client privilege.”)).
- ¹⁹ Kara R. Williams, *Protecting What You Thought Was Yours: Expanding Employee Privacy To Protect The Attorney-Client Privilege From Employer Computer Monitoring*, 69 Ohio St. L.J. 347, 361-62 (2008).
- ²⁰ *Scott v. Beth Israel Medical Center*, 847 N.Y. Supp. 436 (2007).
- ²¹ *Id.* at 441.
- ²² *Id.* at 439 (emphasis added).
- ²³ *Id.* at 440.

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- ²⁴ See, e.g., *Kaufman v. SunGard Inv. Sys.*, No. 05-CV-1236, 2006 WL 1307882 (D.N.J. May 10, 2006); *Sims v. Lakeside School*, No. C06-1412, 2007 WL 2745367 (W.D. Wash. Sept. 20, 2007); *Banks v. Mario Indus. of Va., Inc.*, 650 S.E.2d 687 (Va. 2007).
- ²⁵ *Curto v. Medical Communications, Inc.*, No. 03-CV-632, 2006 WL 1318387 (E.D.N.Y. May 15, 2006).
- ²⁶ See Villa, *supra* note 17, at 5 (citing *In re Asia Global Crossing, Ltd.*, 322 BR 247 (S.D.N.Y. 2005)).
- ²⁷ *Id.*
- ²⁸ See ABA Formal Op. 94-382, *Unsolicited Receipt of Privileged or Confidential Materials* (1994) (noting that Model Rule 8.4 prohibits a lawyer from “procuring privileged and/or confidential materials from . . . an adverse party.”).
- ²⁹ See *United States ex rel. El-Amin v. George Wash. Univ.*, 522 F. Supp. 2d 135 (2007).
- ³⁰ *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 963 (9th Cir. 1995).
- ³¹ *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 233 (9th Cir. 1997).
- ³² See, e.g., *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1163 (10th Cir. 2009) (enforcing release because “the federal interests served by enforcing releases signed after disclosure to the federal government outweigh the interests served by not enforcing them”).
- ³³ *United States ex rel. Radcliffe v. Purdue Pharma*, --- F.3d ---, 2010 WL 1068229, at *10 (4th Cir. Mar. 24, 2010).
- ³⁴ *Id.* at *11.
- ³⁵ *Id.* (citation omitted).
- ³⁶ John E. Clark, *Ethics Issues in Qui Tam Litigation: Some Thoughts From The Perspective Of A Relator’s Counsel*, American Bar Association, The Civil False Claims Act and Qui Tam Enforcement (2001).
- ³⁷ *Id.*
- ³⁸ 31 U.S.C. § 3733(a)(1)(A)-(D) (2010).
- ³⁹ *United States v. Baker-Lockwood Mfg. Co.*, 138 F.2d 48, 53 (8th Cir 1943).
- ⁴⁰ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).
- ⁴¹ *Ann. Model Rules of Prof’l Conduct* R.3.8 cmt. 1.
- ⁴² *Berger v. United States*, 295 U.S. 78 (1935)
- ⁴³ *Id.* at 88.
- ⁴⁴ Under 31 U.S.C. § 3730(b)(3), the government may, for good cause, move the district court for an order extending the period for which the *qui tam* complaint remains under seal. In most cases, the government will repeatedly petition the court to extend the time in which the complaint remains under seal. In some cases, for example, the complaint has remained under seal for several years after its initial filing. This raises a fundamental issue of fairness because

the defendant is often unaware of the complaint or, at the very least, the specific allegations in the complaint, which will hamper its ability to defend itself once the complaint is unsealed.

⁴⁵ U.S. Const. art. II, § 3.

⁴⁶ 31 U.S.C § 3730(b)(2).

⁴⁷ John T. Boese, *Civil False Claims and Qui Tam Actions* § 4.04[B] (3rd ed. 2007 Suppl.).

⁴⁸ *United States ex rel. Erickson v. Am. Inst. of Biological Sciences*, 716 F. Supp. 908, 912 (E.D. Va. 1989) (citing S. Rep. No. 345, 99th Cong., 2d Sess. 24, reprinted in 1986 U.S. Code Cong. & Admin. News 5266, 5289).

⁴⁹ *Id.* at 912 (internal quotation marks omitted).

⁵⁰ *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995) (citations omitted).

⁵¹ *Id.* at 245.

⁵² See, e.g., *United States ex rel. Herrera v. Bon Secours Cottage Health Services*, 665 F. Supp. 2d 782, 783 (E.D. Mich. 2008) (noting that “Court entered an order partially lifting the seal, allowing the Government to disclose a redacted complaint to Defendant”).

⁵³ 31 U.S.C. 3730(h) (2010).

⁵⁴ See Jonathan H. Gould, *Legal Duties That Qui Tam Relators And Their Counsel Owe To The Government*, Geo. J. Legal Ethics 629, 636 (Summer 2007).

⁵⁵ *Id.* (quoting *United States ex rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208, 1213 (7th Cir. 1995)).

⁵⁶ *Id.* at 646.

⁵⁷ *United States ex rel. Rockefeller v. Westinghouse Elec. Co.*, 274 F. Supp. 2d 10, 16 (D.D.C. 2003) (citing *United States v. Onan*, 190 F.2d 1, 4, 6 (8th Cir. 1951) (holding that a lay person cannot represent the United States in a FCA action)).

⁵⁸ See Gould, *supra* note 54, at 656.

⁵⁹ *Id.*

⁶⁰ *Id.* at 655.