

Ethical and Legal Challenges in the Pre-Unsealing Stages of *Qui Tam* Litigation

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The nature of *qui tam* litigation presents unique ethical and legal challenges at each stage of litigation for the lawyers representing both relators and defendants. This article addresses some of the issues that arise in the early stages of *qui tam* litigation.

I. Ethical Issues that Arise Before a *Qui Tam* Complaint is Filed

A *qui tam* action is initiated when the relator serves a copy of the complaint under seal and written disclosure of all material evidence and information to the Department of Justice.¹ Even before the complaint is filed, a lawyer that is approached by a putative relator must be guided by a multitude of ethical considerations prior to making a decision to take on the representation.

1. Duty to refrain from filing frivolous suits

The vast majority of False Claims Act (“FCA”) cases are initiated by relators who approach a lawyer with allegations that someone or some entity – often their current or former employer – has defrauded the government. The risk that such a putative relator may be motivated by animosity, a financial windfall and/or a desire to seek reprisal against their former employer means that a lawyer must investigate thoroughly whether there is a sound basis for bringing the suit. A lawyer who fails to take heed of the multiple ethical obligations involved in avoiding filing a frivolous suit risks professional discipline, personal liability and/or court-imposed sanctions.

a. Model Rule of Professional Conduct 3.1

Rule 3.1 of the Model Rules provides that every lawyer owes an ethical duty to the client, the court and the adversary not to “bring or defend a proceeding, or assert ... an issue ... unless there is a basis in law and fact for doing so that is not frivolous....”² The fact that the putative relator may harbor motives other than vindicating a perceived fraud does not render the allegations frivolous, and a lawyer need not believe that his client’s position will ultimately prevail in order to determine that it is not frivolous.³ The Comments to the rule make clear that what is required of the lawyer is “to inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions.”⁴

b. Model Rule of Professional Conduct 1.1

A lawyer's success in complying with Rule 3.1 is closely linked to meeting her obligation to provide competent representation under Rule 1.1. Competent representation "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁵ "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem. . . ."⁶

c. Federal Rule of Civil Procedure ("FRCP") 11(b) and 28 U.S.C. § 1927

A third rule that addresses the lawyer's duty to avoid filing frivolous claims lies in Federal Rule of Civil Procedure 11(b). By filing a complaint, the lawyer is certifying that "to the best of [his/her] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information."

The procedural and substantive complexity of FCA litigation sometimes makes the risk of not recognizing a frivolous claim perilous for an attorney who lacks *qui tam* litigation experience. Thus, a lawyer must be aware of and understand not only the facts of the client's case and the elements of a cause of action under the FCA, but also the procedural requirements. Otherwise, he/she risks facing professional discipline for violating the ethics rules, as well as sanction to his/her firm under FRCP 11 for violating or being responsible for violation of the rule.⁷

Moreover, under 28 U.S.C. § 1927, district courts have authority to impose sanctions on attorneys *personally* for costs, expenses and attorneys' fees reasonably incurred because of an attorney who "multiplies the proceedings in any case unreasonably and vexatiously."⁸

A recent case from the United States District Court of the Southern District of Indiana illustrates how prevailing FCA defendants can use these two statutes to recover attorneys' fees from whistleblowers and their counsel who file meritless cases.⁹ In *United States v. ITT Educ. Services, Inc.*,¹⁰ the court granted defendant's motion for attorneys' fees and sanctions against relator's attorneys – individually and against their law firms.¹¹ The whistleblower, Debra Levesky, alleged that ITT falsely certified compliance with statutory eligibility requirements in order to receive Title IV funding under the Higher Education Act.¹² The court dismissed the case on subject matter grounds after finding that Levesky's allegations had been publicly

disclosed and that she was therefore not a proper *qui tam* plaintiff because she was not an “original source” of the allegations.¹³

After dismissal of the case, ITT filed a motion for attorneys’ fees and sanctions totaling over \$4.7 million. The court found that the lawsuit was frivolous within the meaning of FRCP 11 because Levesky and her counsel were aware of a previous similar claim filed against ITT and should have been on notice that their claims were likely to fail, specifically because the allegations in the previous claim were “obviously more than adequate to put the government on notice that ITT was allegedly involved in a fraudulent scheme” and therefore sufficient to negate Levesky’s status as an original source.¹⁴ The court also found that the case was brought for an improper purpose under FRCP 11, namely, “to extract a large settlement from ITT.”¹⁵ The court used 28 U.S.C. § 1927 to award defendant’s attorneys’ fees against relator’s counsel personally and the two law firms involved, jointly and severally, after finding that their conduct was vexatious and that it “unreasonably multiplied the proceedings” when they continued to litigate the action despite their knowledge that it lacked merit.¹⁶

d. 31 U.S.C. § 3730(d)(4)

In addition to the rules outlined above, the *qui tam* provisions of the FCA contain their own deterrent to the filing of frivolous claims. Section 3730(d)(4) provides that if the government does not intervene and the relator conducts the action on his own “[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.”¹⁷ While the FCA does not define “clearly frivolous,” courts have offered varying definitions that suggest that the standard is whether the FCA claims had any objectively reasonable chance of success.¹⁸

Section 3730(d)(4) does not apply to awards against an attorney,¹⁹ but courts have assessed attorneys’ fees against whistleblowers under this provision in a number of cases.²⁰ FCA litigation is thus one of the few commercial litigation areas where there is a risk that the losing party will have to pay the other side’s attorneys’ fees. A lawyer evaluating a client’s FCA claim would therefore be prudent to consider his ethical obligations of competence under Model Rule 1.1 in advising the client of the risk that they could end up owing thousands of dollars in attorneys’ fees and costs to the defendant.

e. Inherent Powers of the Court

Even without express statutory authority, federal courts have inherent powers to impose attorneys’ fees against the losing party “when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”²¹

2. First-to-file rule and Model Rule of Professional Conduct 1.3

One of the challenges facing a lawyer who seeks to ensure that a putative relator’s claim is not frivolous is that he may have limited time to investigate before making the decision to file the *qui tam* complaint. Rule 1.3 of the Model Rules requires that a lawyer act “with reasonable diligence and promptness in representing a client.” Compounding this rule is § 3730(b)(5) of the

FCA, which is commonly referred to as the “first-to-file rule.” Under this provision, if another relator has previously filed an FCA complaint making related allegations based on the same facts, the district court lacks subject matter jurisdiction and must dismiss the action.²² The Fifth Circuit has explained that “as long as the later-filed complaint alleges the same material or essential elements of fraud described in the pending *qui tam* action, § 3730(b)(5)’s jurisdictional bar applies.”²³ Thus, an attorney contemplating initiating a *qui tam* action must balance the ethical duties requiring him to avoid filing a frivolous complaint with the risk that waiting too long to file could mean that his client’s case might be dismissed if another relator beats him to the courthouse.

3. Model Rule of Professional Conduct 1.16

It is commonly understood that the goal for relator’s counsel in every *qui tam* action is to convince the government to intervene and proceed with litigating the case. While § 3730(b) of the FCA allows private citizens to file *qui tam* actions, if the government elects to intervene during the 60-day period or any extension of that period, from that point forward the “action shall be conducted by the Government.”²⁴

Because of the frequency with which the government does not intervene in *qui tam* actions, a lawyer considering whether to take on representation of a relator would be prudent to add Model Rule 1.16 to the list of ethical obligations to consider prior to filing a complaint, particularly if the lawyer lacks experience litigating *qui tam* actions. Rule 1.16 defines the circumstances under which a lawyer can withdraw from representation.²⁵ Even if the lawyer can show that “good cause” for withdrawal exists, Rule 1.16(c) of the rule provides that he may be ordered by a court to continue representation “notwithstanding good cause for terminating the representation.”²⁶ Thus, before filing a complaint in a *qui tam* action, a lawyer should be prepared for the possibility that there may be no easy way out of the representation. A lawyer who knows that he may not want to proceed with the case without government intervention can protect himself by providing in the retention letter that he can withdraw if the government declines to intervene.²⁷

II. Ethical Challenges in Investigating Allegations While the Case is Under Seal

The seal provisions of the FCA add more complexity to these ethical decisions. Like any other attorney, relator’s counsel must conduct an investigation of the facts thorough enough to meet the ethical standard of competence to his client, as well as his duty to the client, court and adversary to avoid filing a frivolous complaint. He must also do so while respecting the rights of third parties. However, relator’s counsel must meet all of these duties while staying within the unique statutory restrictions of a pending action that client and counsel cannot reveal to or discuss with others.

The seal provisions of the FCA are set forth in § 3730(b)(2), which provides that “a copy of the complaint and written disclosure of substantially all material evidence and information” the relator has be served on the Government and that “[t]he complaint shall be filed in camera [and] shall remain under seal for at least 60 days.” Once the complaint is filed, it remains under seal for at least 60 days while the government investigates to determine whether or not it will

intervene in the case. During this seal period, the complaint is not served on the defendant. Relator and his counsel are subject to sanctions by the court if they violate the seal, including dismissal.

1. Duty to respect the rights of third parties

In order to gather evidence beyond a relator's word to support allegations that the elements of the False Claims Act violation are met, counsel often seek company documents and contact with a defendant's employees. Both involve ethical challenges that place the lawyer's duty to provide competent representation in tension with rights owed to third parties, as well as with his obligation to conform with requirements of the statute while the case remains under seal. During the seal period, "the normal methods of gathering evidence prior to trial, including the taking of pre-filing depositions and the gathering of ... records ... are simply not available. [A]bsent smoking gun documents from the relator, the case hinges in large measure on the credibility of the relator and his knowledge of incriminating documents that the United States Attorney might be able to obtain by subpoena."²⁸

a. Contacting witnesses other than the relator –Model Rule of Professional Conduct 4.2

Rule 4.2(b) provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter [concerning the matter], unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." The rule requires that the lawyer have knowledge that the person is, in fact, represented in the matter to be discussed.²⁹ However, knowledge may be inferred from the circumstances.³⁰ In the context of an FCA case, counsel for the company may represent not only the company, but some or all of its employees. As such, under this Rule counsel for the relator (and government attorneys) may have an ethical duty not to contact employees without consent of the company.³¹ However, during the seal period, contacting the company to seek such permission may violate the seal, leaving counsel for relators (and/or the government) to have to wait for the seal to be lifted.

Rule 4.2(b) is another example of a Rule where state ethics codes may differ from the Model Rules. For example, some commentators argue that the District of Columbia version of Rule 4.2(b) is more lenient than the Model Rule.³² D.C. Rule 4.2(b) states that:

"During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of the opposing party without obtaining the consent of that party's lawyer. However, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party with a claim against the employee's employer." (emphasis added).

Under the D.C. Rule, a "party" is identified in 4.2(c) as "any person, including an employee of a party organization, who has the authority to bind a party organization as to the representation to which the communication relates." Thus, the D.C. Rule does not bar contacts with employees of the organization who do not have such authority. In contrast, Model Rule

4.2(b) relates to “persons” without distinguishing among employees, and would allow in-house and defense counsel to argue that contact by opposing counsel is prohibited over a wider group of employees.³³ While this appears to be a major distinction on its face, there is room for ambiguity. If counsel for the company does, in fact, represent a “nonparty” employee [concerning the same matter], and opposing counsel has knowledge of this representation, then opposing counsel would be obligated under D.C. Rule 4.2(a) not to communicate with any such nonparty without the consent of that party’s lawyer.³⁴

Thus, counsel should be aware of state rule variations on Rule 4.2 and other rules of professional conduct in assessing whether the conduct in question meets their ethical obligations. In addition, counsel must keep in mind that a lawyer cannot make a communication prohibited by Rule 4.2 through the acts of another,³⁵ and is subject to discipline for misconduct if he knowingly assists or instructs an agent to violate or attempt to violate any of the Rules of Professional Conduct.³⁶

Finally, even if permission is given, or if permission is not required to communicate with a company’s employee while under investigation under Rule 4.2, a lawyer must not use methods of obtaining documents or evidence that violate the legal rights of the organization under Rule 4.4.³⁷

b. Accepting company documents obtained by the relator – Model Rule of Professional Conduct 4.4

False Claims Act cases typically rely heavily on documentary evidence to support allegations, and because normal discovery channels are unavailable while the case is under seal, counsel must be aware of his ethical obligations in accepting and using unsolicited, unauthorized confidential or privileged documentary evidence obtained from third parties (here, the alleged wrongdoer).

Rule 4.4(a) states that, “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.” Although the Rule does not “catalogue all such rights,” it does note that such rights “include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.”³⁸

There is scarce guidance under the Model Rules and in ethics opinions on this issue, which leaves attorneys guessing as to how to balance their duties of competent representation with the third party rights of the client’s employer.

In 1994, the American Bar Association (“ABA”) initially rendered an opinion characterizing the unauthorized review of privileged or confidential information as misconduct. Basing its reasoning on an opinion related to inadvertent disclosure under Rule 4.4(b),³⁹ the Formal Opinion advised lawyers who “without solicitation, receive materials which are obviously privileged and/or confidential” that he or she has a “professional obligation to notify the adverse party’s lawyer that [he or] she possesses such materials and either follow the instructions of the adversary’s lawyer with respect to the materials, or refrain from using the

materials until a definitive resolution of the proper disposition of the materials is obtained from the court.”⁴⁰ In 2006, the ABA withdrew this opinion without providing guidance as to what professional obligation is owed by an attorney confronted with this scenario, except to say that “[w]hether a lawyer may be required to take any action in such an event is a matter of law beyond the scope of the Rule 4.4(b).”⁴¹

Most recently, in August 2011, the ABA issued a Formal Opinion on a lawyer’s duty under Rule 4.4(b) when, during the course of a lawsuit, he receives copies of a third party’s email communications with counsel that were not inadvertently sent, such as in the hypothetical scenario of an employer who receives copies of an employee’s private communications with counsel after the employee filed a lawsuit against the company, and the emails were located in the employee’s business e-mail file or on the employee’s workspace computer or other device. The Opinion concluded that because such privileged communications were not sent “inadvertently,” Rule 4.4(b) does not apply to this circumstance and therefore does not require notice to opposing counsel other than in the situation that Rule 4.4(b) expressly addresses (inadvertent disclosure).

Thus, the ABA guidance on the issue appears to suggest that if a lawyer receives materials which are privileged and/or confidential (without solicitation), he or she has no ethical obligation under the Rules to notify the adverse party’s lawyer or seek an order from the court on the proper disposition of the materials. The ABA has been careful to note that other laws might exist that prevent the lawyer from retaining and using the materials, and that the fact that the Model Rules do not impose an ethical duty to disclose to opposing counsel receipt of private, potentially privileged e-mail communications between an opposing party and her counsel does not mean that courts cannot or should not impose a disclosure obligation pursuant to their supervisory or other authority.⁴² In addition, lawyers should keep in mind that individual states may have differing interpretations of the rule which dictate different outcomes.

A recent case from the United States District Court for the District of Arizona provides some helpful instruction, particularly in the context of an FCA case that is under seal.⁴³ In that case, a *qui tam* action was filed by a former Chief Compliance Officer who, prior to leaving employment, copied and removed “1,300 pages of documents, emails and other [company] proprietary materials” without authorization.⁴⁴ During the course of reviewing these documents, relator’s counsel came across documents which “contained legends such as ‘attorney client privilege’ or had information on the header indicating that they might contain privileged or attorney work-product information.”⁴⁵ Relator’s counsel argued that they set the documents aside and later had a paralegal segregate them into a sealed box. In addition, they claimed that they had neither read nor relied on any of the documents preparing the complaint. One month after the case was unsealed, counsel for the defendants sent a letter stating that certain documents protected from disclosure and protected by attorney-client and work-product privileges had been misappropriated and demanded they be returned. Relator’s counsel ultimately advised the relator that since the seal was lifted, the documents could be returned. However, the defendants pointed out that relator’s counsel initially responded to the demand letter in a manner that suggested they were not aware that any potentially privileged or confidential documents were in their possession.⁴⁶

After dismissing the case on the merits, defendants sought sanctions and attorneys' fees against relator's counsel, asserting that "Qui Tam Counsel had ethical duties not to review, retain, disclose, or use the privileged material that they received from [relator]" and that they had a duty to notify the defendants of the privileged materials when received and either return them or seek a ruling from the court regarding the materials.⁴⁷ The relator's counsel relied on an Arizona State Bar Ethics Opinion that stated that a lawyer who receives from his or her client copies of documents that belong to the adversary and appear, on their face, to be subject to the attorney client privilege or to be otherwise confidential is obligated to: '(i) to refrain from further examination of the material or from making use of it, (ii) to notify opposing counsel of its receipt, and (iii) either to abide by that counsel's instruction as to its disposition or to seek a ruling from a court as to whether it may be used.'⁴⁸ The Opinion went on to state that "[w]hen no litigation has been brought, and presumably cannot be brought, 'the lawyer should refrain from reviewing or making use of the information in the documents and notify the ex-employer's counsel that they have come into the lawyer's possession.'⁴⁹ The Opinion also noted that Arizona Ethics Rule 1.6 "requires client consent before the lawyer may notify the ex-employer or its attorney that the lawyer has received privileged or confidential material belonging to the ex-employer" and if the client refuses permission, the "lawyer still should refrain from examining the documents or making use of the information in them."⁵⁰

The court found that the Arizona ethics opinion was not directly on point in the FCA context because 31 U.S.C. §3730(b)(1)(2) requires that the complaint be filed under seal for at least 60 days and prohibits the relator from serving the defendant with the complaint until the court so orders. Hence, "upon discovering that they had potentially privileged documents from [the defendant], Qui Tam Counsel could not reveal the potential lawsuit" prior to unsealing the complaint and could therefore not be sanctioned for failing to inform the defendants that they had potentially privileged documents prior to the complaint being unsealed.

However, the court went on to state that the fact that the case was under seal did not relieve relator's counsel from the obligation to seek a ruling from the court as to what to do with the privileged documents. Since the relator's counsel never sought such a ruling on the privileged documents, the court found that "Qui Tam Counsel did breach an ethical duty to seek a ruling from the court about the privileged documents and breached their duty to contact [the company] about the documents after the complaint was unsealed."⁵¹

The holding in *Frazier* suggests that a *qui tam* attorney who receives such documents does not have an obligation to notify the opposing party that it has received the documents while the case is under seal, but it does have an obligation to (1) seek a ruling on what to do with the privileged documents from the court while the case remains under seal and (2) notify opposing counsel once the seal is lifted.

The court in *Frazier* awarded defendants the attorneys' fees and costs associated with the defendant's attempt to get its privileged documents back from relator's counsel, but did not find the facts presented warranted dismissal. It noted that the extraordinary circumstances of bad faith were not shown, particularly in light of the fact that Qui Tam Counsel kept the undisputed, privileged documents in a sealed box.⁵² The defendant also sought sanctions against the relator personally, arguing that in addition to not having authorization to take the documents, his actions

were contrary to the company's code of conduct that prohibited employees from disclosing confidential business information without authorization.⁵³ The court did not reach this issue because a settlement agreement on the separate motion for sanctions against relator personally rendered the issue moot; however, the court did find that the relator "stole the documents" without permission.⁵⁴

"Under its inherent powers, a district court may also sanction a party for wrongfully obtaining property or confidential information of an opposing party."⁵⁵ In *Glynn v. EDO Corp.*, a whistleblower (Glynn) was terminated after notifying a Department of Defense investigator about concerns with a technology the company was developing for the agency. After his termination, Glynn began communicating with a friend and then current employee at IST who shared a "mutual distaste for IST management." The friend began sending internal IST documents and emails to Glynn and his counsel, including privileged communications. Once Glynn filed suit against IST alleging retaliation under the FCA, IST counterclaimed against Glynn with a number of claims, including breach of contract. Although the court noted that its review of a handful of district court opinions outside of the Fourth Circuit suggested that dismissal or default judgment was warranted only in extreme circumstances that were not applicable in this case, it found that imposition of a \$20,000 sanction against Glynn's counsel for improperly receiving internal IST documents (and asserting a common interest privilege in bad faith) was warranted.⁵⁶

Notably, the court did not find it necessary to address arguments from the parties as to whether the information was "proprietary, confidential, or protected by the attorney-client or work product privileges."⁵⁷ Instead, the court found it sufficient to state that "it was inappropriate . . . to surreptitiously acquire these internal IST documents outside of the normal discovery channels" and that "those decisions are best resolved through the formal discovery process."⁵⁸

2. Counsel's obligations to protect employee privacy

Defense and in-house counsel face their own ethical challenges with respect to the privacy rights of third parties. While a case remains under seal, defense counsel may come to suspect that a potential whistleblower is employed in their midst even before the complaint is filed. A common instinct may be to review a suspected whistleblower-employee's emails to determine whether that person is preparing a *qui tam* claim. From an ethical perspective, the risk is that the employer will come across privileged communications between the employee-relator and his counsel. This context differs from the situations discussed above in that the documents are not obtained by a third party (inadvertently or otherwise), but rather are communicated through a medium that arguably makes the communication the employer's property. As a result, the ethical obligations to protect employee privacy hinge more on whether the argument can be successfully made that the communication was not privileged at all.

The crux of the attorney-client privilege is the protection of communications that are made in confidence between a client and an attorney for the purpose of obtaining legal advice. For the element of confidentiality to be met, the communication must be made with the intent that it be confidential and with the reasonable expectation that it will remain confidential.⁵⁹

Thus, the most effective tool for a company to thwart the creation of any privilege claim over its email is to design, implement, and publicize a strong computer monitoring policy. Such policies are considered a decisive factor in many court decisions which have rejected employee claims of privilege over work emails. For example, in *Scott v. Beth Israel Medical Center*,⁶⁰ the court denied the plaintiff a protective order demanding that his employer return all emails sent to his lawyer on his work email that were obtained by his employers. The court found that the plaintiff could not have a reasonable expectation of privacy when he transmitted emails to his lawyer over the company's email system and therefore the documents were never protected by the attorney-client privilege.

The availability of the company's usage policy on the company's intranet, and the language of the email usage policy were cited by the court as factors that were "critical to the outcome."⁶¹ The usage policy made clear that it applied "to everyone who works at or for" the company and over an enumerated list of communication mediums, including "electronic mail systems."⁶² In addition, the policy explicitly stated that "*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.*"⁶³ The court further found that notice of the policy need not be actual so long as the policy put the employee on constructive notice that the company retained the right to monitor all email.⁶⁴

Other courts have agreed 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.⁶⁵ However, some courts have come to different conclusions, finding that the emails may actually be privileged if the employee uses a personal email account from a third-party website, like Yahoo!, Gmail or Hotmail, as opposed to their work email.⁶⁶

Thus, defense counsel must be cognizant that not every email sent on a work computer will be deemed privileged. Even where a court finds that a robust email usage policy exists to negate privilege, some emails may still be protected if sent through personal email accounts.

On the flip side, the risk that the privilege will be waived means that counsel for employees (*i.e.*, relators) would be prudent to advise their clients never to use work email (including personal accounts) to make privileged communications.

3. Enforceability of confidentiality agreements

Companies are not completely without recourse to having their confidential, proprietary and potentially privileged documents purloined by whistleblowers, particularly where a confidentiality agreement exists in the employee's contract. Some courts have rejected employer claims of breach of confidentiality agreements, citing the policy argument that confidentiality agreements "cannot trump the FCA's strong policy of protecting whistleblowers who report fraud against the government."⁶⁷ However, recent FCA decisions have rejected the notion that there should be a "public policy exception" that protects whistleblower's from civil liability claims for gathering documents as part of an investigation under the FCA.

In *U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*,⁶⁸ a whistleblower made this argument before the Ninth Circuit after being counterclaimed by her former employer for breach of confidentiality agreement when she copied almost eleven gigabytes of data from company computers in anticipation of filing a *qui tam* action.⁶⁹ The district court granted summary judgment in favor of the defendants, reasoning that “public policy does not immunize Cafasso, [who] confuses protecting whistleblowers from retaliation for lawfully reporting fraud with immunizing whistleblowers for wrongful acts made in the course of looking for evidence of fraud.”⁷⁰ The Ninth Circuit affirmed, concluding that “[s]tatutory incentives encouraging investigation of possible fraud under the FCA do not establish a public policy in favor of violating an employer’s contractual confidentiality and non-disclosure rights.”⁷¹ Although the court noted there was “some merit” in the public policy exception proposed in certain instances, it did not decide the question, and instead noted that such an exception would not cover Cafasso’s conduct – citing in particular the volume and scope of documents taken by Cafasso.⁷² “An exception broad enough to protect the scope of Cafasso’s massive document gather in this case would make all confidentiality agreements unenforceable as long as the employer later files a *qui tam* action.”⁷³

4. Obtaining an employee release before the *qui tam* complaint is filed

Another mechanism through which companies often seek to protect themselves from *qui tam* complaints is to have the employee sign a broad release statement, releasing all claims against the company at the end of the employment relationship. 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.⁷⁴

However, more recent decisions (including in the Ninth Circuit) have begun to follow the so called “government knowledge rule” applied by the Fourth Circuit in *United States ex rel. Radcliffe v. Purdue Pharma*.⁷⁵ There, the court concluded that the release should be enforced because, unlike in *Green*, the relator in *Radcliffe* signed the release *after* the government already knew about the fraudulent conduct underlying the relator’s claims. 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.’”⁷⁶

As with confidentiality agreements, the lessons learned from cases addressing the enforceability of employee release statements are equally relevant to both defense and relator’s counsel. Thus, before signing the release (or relying on it), counsel should consider that the probability of it being enforceable is likely dependent on the following factors:

- Whether the employee’s claims have already been disclosed to the government (by the employee, the company, or by some other channel)
- Whether the government had begun investigating the same underlying fraudulent conduct prior to the release being signed.

- Whether the language of the release is broad enough to encompass a *qui tam* complaint. For example, in *Radcliffe*, the language releasing the relator’s employer “from any and all liability,” was considered broad enough to encompass the *qui tam* action that he filed after signing the release.

A related issue which sometimes arises is when an employer asks the employee to endorse a signed statement or affidavit that the employee knows of no facts or information suggesting that the company violated any law, including the FCA. Though such a statement may prove to be useful in the event that the matter ever goes to trial, if the lawyer knows that the employee does, in fact, have information suggesting that the company violated a law, there is a risk that the lawyer could run afoul of Model Rule 8.4 by engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation.”

III. 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. The early stages of *qui tam* litigation are rife with ethical issues that counsel for both relators and defendants must be aware of in order to avoid running afoul of ethical and professional obligations.

¹ 31 U.S.C. § 3730(b)(2)(2010).

² American Bar Association Center for Professional Responsibility, *Ann. Model Rules of Prof’l Conduct* R. 3.1 (2011).

³ *Id.*, cmt. 1.

⁴ *Id.*

⁵ *Ann. Model Rules of Prof’l Conduct* R. 1.1.

⁶ *Id.*, cmt. 5.

⁷ Fed. R. Civ. P. 11(c)(1).

⁸ 28 U.S.C. §1927(2010).

⁹ Defendants in other FCA cases have also been successful in obtaining awards of attorneys’ fees and sanctions against relator’s counsel using Fed. R. Civ. P 11 and 28 U.S.C. § 1927. *See, e.g., Pentagen Technologies Intern. Ltd.v. U.S.*, 172 F. Supp. 2d 464, 471 (S.D.N.Y. 2001) (granting defendant’s motion for sanctions against plaintiff’s counsel under Rule 11 and 28 U.S.C. § 1927, after finding that plaintiff’s counsel “failed to demonstrate that he made any reasonable inquiry before deciding to sue these particular defendants on the specific grounds chosen.” Specifically with respect to the FCA claims, the court cited, as an example, plaintiff’s counsel’s failure to offer meaningful argument that the government had waived its sovereign immunity in this case despite clear, long-standing precedent establishing this requirement, and noting that plaintiff’s counsel should have known that his *qui tam* action “stood no chance of success on the merits” since his previous two *qui tam* actions had been dismissed and there were no new relevant facts or law to suggest he would prevail in the new claim.).

¹⁰ *United States v. ITT Educ. Services, Inc.*, 1:07-CV-0867-TWP-MJD, 2012 WL 1028794 (S.D. Ind. Mar. 26, 2012).

¹¹ *Id.* at *1.

¹² *Id.* at *3.

¹³ *Id.* at *8.

¹⁴ *Id.* at *11.

¹⁵ *See id.* at *12. The court cited that the genesis of the lawsuit was Matusheski “trolling public dockets and using a private investigator to cold-call ex-employees of for-profit educational institutions who had sued their former employer,” and noted that it was “as unethical as it is unseemly,” particularly citing Model Rule of Professional Conduct 7.3, which prohibits lawyers from soliciting professional employment from a prospective client when a significant motive for doing so is the lawyer’s pecuniary gain.

¹⁶ *ITT Educ. Services, Inc.*, 2012 WL 1028794, at *15.

¹⁷ 31 U.S.C. § 3730(d)(4) (2010).

¹⁸ *See, e.g., U.S. ex rel. Ubl v IIF Data Solutions*, 650 F.3d 445, 459 (4th Cir. 2011), citing *United States ex rel. Rafizadeh v. Continental Common, Inc.*, 553 F.3d 869, 875 (5th Cir.2008) (“An action is not frivolous if existing law or a reasonable suggestion for its extension, modification, or reversal supports the action.”); *Pfingston v. Ronan Eng’g Co.*, 284 F.3d 999, 1006 (9th Cir.2002) (“An action is clearly frivolous when the result is obvious or the appellant’s arguments of error are wholly without merit.” (internal quotation marks omitted)); *Mikes v. Straus*, 274 F.3d 687, 705 (2d Cir. 2001)(“A claim is frivolous when, viewed objectively, it may be said to have no reasonable chance of success, and present no valid argument to modify present law.”); *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038, 1058 (10th Cir.2004) (“[T]he plaintiff’s action must be meritless in the sense that it is groundless or without foundation.” (internal quotation marks omitted)).

¹⁹ *Pfingston v. Ronan Engineering Co.*, 284 F.3d 999, 1006 (9th Cir. 2002)

²⁰ *See, e.g., United States ex rel. Mikes v. Straus*, 98 F. Supp. 2d 517, 529 (S.D.N.Y. 2000) (*qui tam* plaintiff’s MRI claims were vexatious because they were “bereft of any objective factual support.”); *United States ex rel. Bain v. Ga. Gulf Corp.*, 208 F. App’x 280 (5th Cir. 2006) (affirming district court’s award of attorneys’ fees to prevailing FCA defendant); *Pugach v. M&T Mortg. Corp.*, 564 F. Supp. 2d 153 (E.D.N.Y. 2008) (awarding prevailing FCA defendant \$81,303.83 in attorneys’ fees and \$5,537.62 in costs); *United States ex rel. Cooper & Assocs., Inc. v. Bernard Hodes Grp., Inc.*, 422 F. Supp. 2d 225, 239 (D.D.C. 2006) (finding FCA defendant entitled to attorneys’ fees when whistleblower “lodg[ed] claims that fly in the face of the available evidence.”).

²¹ *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258-59 (1975)(internal quotations and citations omitted).

²² *See, e.g., United States ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F. 3d 371 (5th Cir. 2009).

²³ *Id.* at 378.

²⁴ 31 U.S.C. §§ 3730(b)-(c)(2010).

²⁵ *Ann. Model Rules of Prof’l Conduct* R. 1.16(b) provides that, “[e]xcept as stated in paragraph (c), a lawyer may withdraw from representing a client if:(1) withdrawal can be accomplished without material adverse effect on the interests of the client, (2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer’s services to perpetrate a crime or fraud; (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement; (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exists.”

²⁶ *Ann. Model Rules of Prof’l Conduct* R. 1.16(c).

²⁷ *See Ann. Model Rules of Prof’l Conduct* R. 1.2(c).

²⁸ *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, 721 (Summer 1998).

²⁹ *Ann. Model Rules of Prof’l Conduct* R. 4.2, cmt. 8.

³⁰ *Id.*

³¹ Notably, under Rule 4.2, cmt. 7, consent of the organization’s lawyer is not required for communication with a *former* constituent, and if a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of the Rule. In some states, however, communications with certain former employees are treated the same way as communications with current employees.

³² 36 False Cl. Act and Qui Tam Q. Rev. 13 (January 2005).

³³ *Ann. Model Rules of Prof’l Conduct* R. 4.2, cmt. 7 similarly specifies that in the case of a represented organization, the Rule would prohibit communications “with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization...”

³⁴ *D.C. Rules of Prof’l Conduct*, R. 4.2(a) provides that, “[d]uring the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so.”

³⁵ *Ann. Model Rules of Prof’l Conduct* R. 4.2, cmt. 4.

³⁶ *Ann. Model Rules of Prof’l Conduct* R. 8.4, cmt. 1.

³⁷ *See, e.g., Glynn v. EDO Corp.*, JFM-07-01660, 2010 WL 3294347 (D. Md. Aug. 20, 2010)(citing *In re Shell Oil Refinery*, 143 F.R.D. at 108 (“PLC has not just communicated with a Shell employee, but has surreptitiously obtained from this employee proprietary documents belonging to Shell. Regardless of whether the PLC’s communication with the Shell employee was in violation of [Louisiana’s] Rule 4.2, the PLC’s receipt of Shell’s proprietary documents in this manner was inappropriate and contrary to fair play.... The PLC has effectively circumvented the discovery process and prevented Shell from being able to argue against production.”)).

³⁸ *Ann. Model Rules of Prof’l Conduct* R. 4.4, cmt. 1.

³⁹ *Ann. Model Rules of Prof’l Conduct* R. 4.4(b) applies to receipt by a lawyer of *inadvertently* sent privileged materials and states, in pertinent part, “[a] lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.” *See* ABA Formal Op. 92-368, *Inadvertent Disclosure of Confidential Materials*, (Nov. 10, 1992) (withdrawn by ABA Formal Op. 04-437 Oct. 1, 2005).

⁴⁰ ABA Formal Op. 94-382, *Unsolicited Receipt of Privileged or Confidential Materials*, (July 5, 1994).

⁴¹ ABA Formal Op. 06-440, *Unsolicited Receipt of Privileged or Confidential Materials: Withdrawal of Formal Opinion 94-382*, (May 13, 2006).

⁴² ABA Formal Op. 11-460, *Duty When Lawyer Receives Copies of Third Party’s Email Communications With Counsel*, (August 4, 2011).

⁴³ *U.S. ex rel. Frazier v. IASIS Healthcare Corp.*, 2:05-CV-766-RCJ, 2012 WL 130332 (D. Ariz. Jan. 10, 2012)

⁴⁴ *Id.* at *3.

⁴⁵ *Id.* at *5.

⁴⁶ *Id.* at *6-7.

⁴⁷ *Id.* at *13.

⁴⁸ *Id.* at *15 (citing Ariz. Ethics Op. No. 01-04 (Mar. 2001) at 5).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* (emphasis added).

⁵² *Id.*

⁵³ *Id.* at *4.

⁵⁴ *Id.* at *13.

⁵⁵ *Glynn v. EDO Corp.*, JFM-07-01660, 2010 WL 3294347 (D. Md. Aug. 20, 2010) at *3 (internal citations omitted).

⁵⁶ *Id.* at *3, *6. The court found that the misconduct in this case did not warrant the extraordinary sanction of dismissal or default because (1) IST had not proven that it was or would be sufficiently prejudiced “to trump the important public policy of resolving the claims at issue on the merits,” “any documents that were in fact helpful to Glynn would have been disclosed in discovery anyway,” and, to the extent that privileged information was obtained that would not have been revealed through discovery, IST had not explained how it would be prejudiced; (2) the degree of culpability of Glynn and his lawyers was substantially less than in most cases where dismissal was imposed, particularly because IST had not presented conclusive evidence that Glynn or his lawyers “expressly requested” that the documents be acquired and handed over.

⁵⁷ *Id.* at *5.

⁵⁸ *Id.* (citations omitted).

⁵⁹ See John K. Villa, *Emails Between Employers and Their Attorneys Using Company Computers: Are they Still Privileged?*, 26 No. 3 ACC Docket 102, 103 (2008) (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.”)).

⁶⁰ *Scott v. Beth Israel Med. Ctr. Inc.*, 847 N.Y.S.2d 436 (Sup. Ct. 2007).

⁶¹ *Id.* at 441.

⁶² *Id.* at 439.

⁶³ *Id.* (emphasis added).

⁶⁴ *Id.* at 440.

⁶⁵ 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).

⁶⁶ See, e.g., *Curto v. Medical Communications, Inc.*, No. 03-CV-632, 2006 WL 1318387 (E.D.N.Y. May 15, 2006).

⁶⁷ *U.S. v. Cancer Treatment Centers of America*, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004).

⁶⁸ *U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047 (9th Cir. 2011).

⁶⁹ *Id.* at 1062.

⁷⁰ *U.S. ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 2009 WL 1457036, *13 (D. Ariz. May 21, 2009).

⁷¹ 637 F.3d 1047 at 1062.

⁷² *Id.*.

⁷³ *Id.*

⁷⁴ See, e.g., *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 963 (9th Cir. 1995) (refusing to enforce employee release, reasoning 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, namely to bring fraud allegations to the attention to the government that they had no knowledge of).

⁷⁵ --- F.3d ---, 2010 WL 1068229, at *10 (4th Cir. Mar. 24, 2010).

⁷⁶ *Id.* (citation omitted).