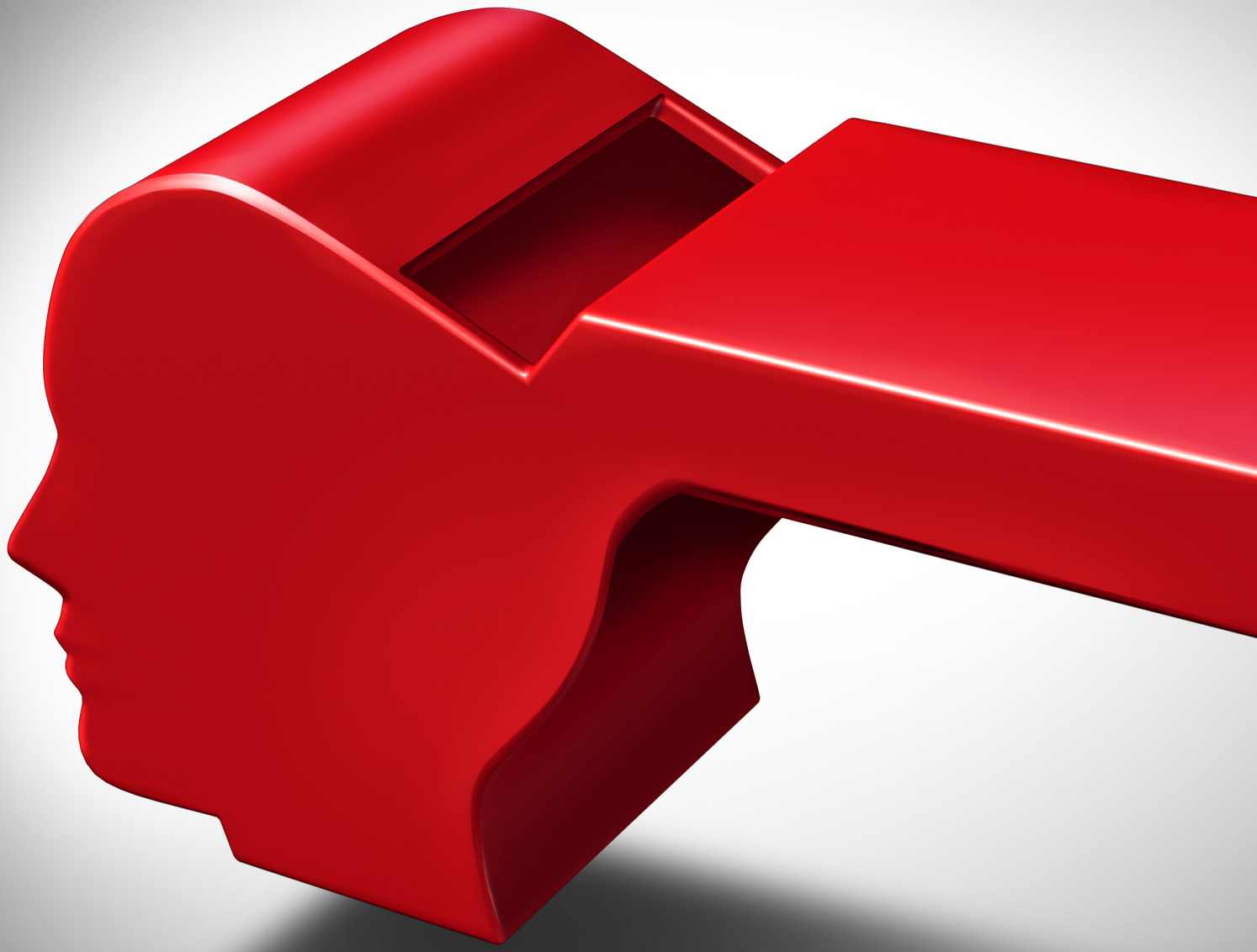

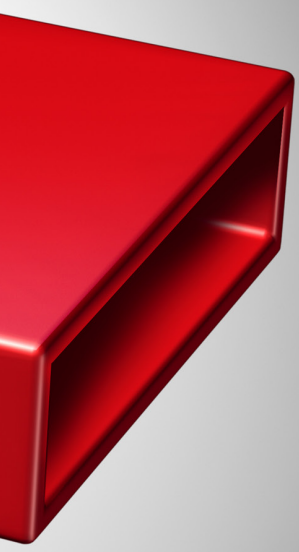

Lawful Search and Seizure Under the False Claims Act

A Zone of Safety in Preserving Evidence of Fraud

JOEL M. ANDROPHY, SAMUEL DORAN, AND REBECCA GIBSON

Whistleblowers or relators are indispensable in the government's fight against fraud. Whistleblowers have helped recover $24 billion since 2010 and would contribute much more if they were dealing with more experienced, supportive, and fearless prosecutors, and not sidetracked by court opinions setting illogical and draconian standards. Most *qui tam* complaints are hundreds of pages in length and require detailed factual information and documentation without the benefit of formal discovery or a grand jury investigative process.

The increased demands to plead with particularity have led to a government-sponsored informal discovery process and search by whistleblowers of company records to support their claims before they are destroyed or hidden during formal discovery. Counterclaims by corporations have been used to chill the increased scrutiny. Defendants ironically call the search for evidence of government fraud a "breach of fiduciary duty," while whistleblowers and the government call the search "preservation of evidence" to avoid a breach of law.

The False Claims Act (FCA) encourages citizens to investigate and gather evidence to prove fraud. This creates a tension between the interests of the public, the government, the whistleblower, and the defendant corporation, particularly the corporation's interest in protecting criminal activity. The interests in gathering potentially relevant evidence generally outweighs a defendant's attempts to keep fraudulent activity private.

A potential whistleblower should ask about the ethical and legal boundaries when searching for evidence. This article attempts to provide some guidance. First and foremost: Expect the government to want everything, but do not expect its support if your retrieval is challenged. Know the importance of following the law, not the government.

There is a strong public policy promoting the disclosure of fraud to the government. Nondisclosure agreements and contractual provisions requiring confidentiality have spawned a recent round of legal decisions that provide general guidance on the parameters of legal taking of documents and generally emphasize this public policy.

Statutory Duty and Protection

Whistleblowers have a statutory duty to collect evidence of fraud to present to the government, and there is a statutory protection for their efforts. Under the FCA, whistleblowers are required to provide

the government a "copy of the complaint and written *disclosure of substantially all material evidence and information the person possesses*."[1] The FCA also protects whistleblowers while they are gathering information about a possible fraud by barring retaliation for "lawful acts done … in furtherance [of a fraud action], including investigation."[2]

Trumping Confidentiality Agreements and Nondisclosure Obligations

The strong public-policy need to uncover fraud outweighs confidentiality agreements. In *United States ex rel. Grandeau v. Cancer Treatment Centers of America*, a district court rejected defense counterclaims based on an alleged confidentiality breach when a whistleblower as custodian of records produced documents to the government in response to a federal subpoena without informing her employer of her actions:

> Relator and the government argue that the confidentiality agreement cannot trump the FCA's strong policy of protecting whistleblowers who report fraud against the government. Their position is correct and Defendant concedes as much. It makes no difference whether we view Defendant's counterclaim to be based on Relator's response to the subpoena or in retaliation to the *qui tam* claim. Relator could have disclosed the documents to the government under any circumstances, without breaching the confidentiality agreement.[3]

This strong public policy was again explained in *United States ex rel. Ruhe v. Masimo Corp*.[4] In that case, the defendant moved to strike materials that the relators admitted had been taken for the government to support their whistleblowing:

> Masimo contends that exhibits A and B to the [first amended complaint] should be struck because they are scandalous and impertinent. Masimo argues that a scandal exists because these exhibits were taken and disclosed by Relators in violation of nondisclosure agreements entered into by each Relator. Masimo also argues that the exhibits are impertinent because they were gratuitously added to the FCA and are wholly unnecessary to the claims. Relators admit that they copied and moved these exhibits from their hard drives after quitting their employment, but did so only for the purpose of providing the exhibits to the government and corroborating their claims of alleged fraud on the part of Masimo.[5]

The court denied the motion, permitting the relators to use the documents, and stated that:

> Relators sought to expose a fraud against the government and limited their taking to documents relevant to the alleged fraud. Thus, this taking and publication was not wrongful, even in light of nondisclosure agreements, given the strong public policy in favor of protecting whistleblowers who report fraud against the government. Obviously, the strong public policy would be thwarted if Masimo could silence whistleblowers and compel them to be complicit in potentially fraudulent conduct. Indeed, the Ninth Circuit has stated that public policy merits finding individuals such as relators to be exempt from liability for violation of their nondisclosure agreement. Such an exemption is necessary given that the FCA requires that a relator turn over all material evidence and information to the government when bringing a *qui tam* action.[6]

Similarly, in *United States ex rel. Head v. Kane Co.*, the defendant counterclaimed against the relator for taking documents in violation of his separation agreement, which had a provision requiring him to return all documents that he had taken from the company.[7] The court looked at Supreme Court precedent and the statutory language of the FCA and determined that:

> Defendant's counterclaim based on [Anthony] Head's ongoing failure to return the Jan. 3, 2000, email to Kane Company is void as against public policy. The FCA requires that relators serve upon the United States "written disclosure of substantially all material evidence and information the person possesses" in order to enable the government's own investigation to proceed expeditiously. Enforcing a private agreement that requires a *qui tam* plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under investigation would unduly frustrate the purpose of this provision. Therefore, Defendant's counterclaim eight (breach of contract—failure to return company property), must be *dismissed* as contrary to public policy.[8]

Most courts recognize that the strong public policy exception to the enforcement of nondisclosure agreements provides that the collected information is related to an FCA case.[9]

A whistleblower should also have some sense that the purpose of his investigation is to report government fraud. The court in *United States ex rel. Ray v. American Fuel Cell & Coated Fabrics Co.* dismissed a whistleblower's retaliation claim because the relator admitted that he emailed himself voluminous records with no intention of bringing a *qui tam* action or approaching the government.[10] Instead, his goal was to collect materials that he could show to prospective employers in case he was fired by the defendant, even if those materials were confidential.[11] The court found that the relator's actions were not protected activity, citing a series of cases holding that a relator must actually be investigating potential fraud for his taking of documents to be proper:

> [T]here should be some evidence that the employee performed the "investigation for" or provided "assistance in" an FCA action. The focus is whether the internal complaint "alleges fraud on the government." "The employee's actions must be aimed at matters demonstrating a 'distinct possibility' of False Claims Act litigation."[12]

Lesson 1: As long as your mission in taking the documents is to file an FCA action and report fraud to the government, a breach of corporate confidentiality or nondisclosure obligations is trumped by public policy.

People must be permitted to speak openly and frankly with the government about potential crimes and frauds. Although not a *qui tam* case, in the ongoing litigation arising out of sexual assault allegations against Bill Cosby, the comedian brought an action against sev-

eral women who had executed confidentiality agreements prohibiting them from speaking with the government:

> Cosby alleges that [Bebe] Kivitz and [Dolores] Troiani breached the [confidentiality and security agreement (CSA)] by voluntarily cooperating with law enforcement agents who were conducting a criminal investigation of Cosby's conduct, because the parties to the CSA agreed "not to disclose to anyone, via written or oral communication or by disclosing a document, in private or public, any aspect of this litigation, including the events or allegations upon which the litigation was based[,]… the information that they learned during the criminal investigation of Cosby or discovery in the content of Cosby's and [Andrea] Constand's depositions in the litigation, and information about Cosby and/or Constand gathered by their agents."[13]

The court rejected Cosby's position, citing *Hurd v. Hodge*, which held that "[w]here the enforcement of private agreements would be violative of [public] policy, it is the obligation of courts to refrain from such exertions of judicial power."[14] After citing many cases to support the position that contracts cannot bar a person from reporting wrongdoing to the authorities,[15] the court dismissed the breach of contract claim.[16] Similar principles apply in the *qui tam* arena as well.

Many courts will only apply the public policy of protection if the whistleblower reports the fraud to the government and brings a substantive claim under the FCA. Just bringing a retaliation claim, even under the FCA, with no potential benefit to the government may not provide protection.

For example, in *Zahodnick v. International Business Machines Corp.*, the relator alleged that he was retaliated against after he reported improper billing to his supervisors.[17] After his resignation, the relator brought a retaliation claim under the FCA and state court claims for abusive discharge and breach of employment contract. The relator supported his claim with documents taken from his employer in violation of two separate confidentiality agreements. His employer counterclaimed for breach of contract.[18] On the issue of taking documents, the Fourth Circuit found that the district court did not err either in ordering the relator to return all confidential materials to Lockheed."[19] The court reasoned that the relator's reporting to his supervisor was insufficient to establish that he was acting "in furtherance" of a *qui tam* action.[20]

Lesson 2: Make sure you only disclose the seized materials to the government with the objective of filing a substantive *qui tam*. Pursuing a retaliation case even under the FCA may not provide adequate insulation.

To provide another example, in *United States ex rel. Cafasso v. General Dynamics C4 Systems Inc.*, the Ninth Circuit refused to apply a broad public policy exception because of the indiscriminate nature of the seizure and affirmed a grant of summary judgment on counterclaims brought based on a relator's taking of documents in violation of her confidentiality agreement.[21]

> Although we see some merit in the public policy exception that Cafasso proposes, we need not decide whether to adopt it here. Even were we to adopt such an exception, it would not cover Cafasso's conduct given her vast and indiscriminate appropriation of GDC4S files. Cafasso copied nearly 11 gigabytes of data—tens of thousands of pages. She decided which GDC4S documents to copy by browsing through folders related to technology and technology development, and, she testified, "if I saw something that I thought actually could apply and should be investigated, *I just grabbed the whole folder*" (emphasis added). Further, she scanned only file names and "did not look at any individual documents at all." Swept up in this unselective taking of documents were attorney-client privileged communications, trade secrets belonging to GDC4S and other contractors, internal research and development information, sensitive government information, and at least one patent application that the Patent Office had placed under a secrecy order.[22]

The court acknowledged—but did not adopt—a broad public policy exception. Instead, the court provided relators with guidance on proper seizures. The court found that, in removing the documents, the whistleblower had exceeded her authority to assist the government in investigating fraud and therefore lost the protections offered to relators who take documents relevant to their actions.[23]

A whistleblower must make a good faith effort in his retrieval and delivery of documents to the government. In *United States ex rel. Cieszyski v. LifeWatch Services Inc.*, the defendant alleged that the relator breached both a confidentiality agreement and a privacy policy because he took and disclosed confidential information to the government.[24] The defendant argued that the relator took and disclosed information that was unrelated to the alleged fraud and unnecessary for the *qui tam* action.[25] Specifically, the defendant argued that because the relator's claim only involved requests to the government for reimbursement, supplying information concerning submissions to private insurers was out of bounds. Adopting a practical approach, the court disagreed with the defendant:

> It is unrealistic to impose on a relator the burden of knowing precisely how much information to provide the government when reporting a claim of fraud, with the penalty for providing what in hindsight the defendant views as more than was needed to be exposure to a claim for damages. Given the strong public policy encouraging persons to report claims of fraud on the government, more is required before subjecting relators to damages claims that could chill their willingness to report suspected fraud.[26]

Lesson 3: Limit your seizure to evidence of fraud. Like law enforcement conducting a search and seizure, be prepared to explain the reasonableness of your search.

Whistleblowers should limit their collection of evidence to materials that are reasonably related to their case.[27] Relevance, unfortunately, is often hard to determine in the initial stages of an investigation. There are many "gray areas" on relevance that are hotly debated in discovery disputes. A whistleblower should refrain from taking documents that have no possible connection to the reported fraud. Err on the side of restraint, especially for documents with marginal relevance. *United States ex rel. Wildhirt v. AARS Forever Inc.* provides a cautionary example. In that case, the court found that the counterclaims asserted were independent of the relator's FCA claim "particularly given the extremely broad scope of documents and communications that relators are alleged to have retained

and disclosed."[28] Specifically, the court found that the counterclaims would not require as an essential element that the defendants were or were not liable under the FCA. The relators admitted to taking home confidential and HIPAA-protected documents "haphazardly and for no particular purpose."[29] The relators had no intention of filing a *qui tam* lawsuit when they took the documents, and they failed to return the documents after they left their jobs.[30] Additionally, the relators disclosed the documents not only to their attorney and the government, but also made them public.[31] Essentially, the scope of document seizure was so broad that the court found its relation to the FCA claim tenuous at best.

Lesson 4: Only take documents supportive of your FCA action and only disclose the documents to your attorney and the government.

Privileged Materials and Privacy Requirements

Relators should be cautious in taking privileged materials, especially those covered by the attorney-client privilege.[32]

Lesson 5: It is often difficult for a lay whistleblower to determine whether documents contain materials subject to the attorney-client privilege. If the whistleblower seizes privileged materials, his counsel should segregate them from other documents seized. If the privileged materials are accidentally submitted as part of an FCA suit, the government will employ an independent taint team to sever the privileged materials from review and consideration.[33]

HIPAA-Related Issues

Other types of privilege issues can also arise, but tend to be less problematic. For example, a court was recently asked to exclude evidence of wrongful billing and payment retention by a hospital, on the grounds that privileged documents were taken in violation of HIPAA privacy requirements.[34] The court rejected the request, validated the seizure, and reiterated the strong public policy in favor of relators disclosing fraud to the government.

Trade Secrets

The Defend Trade Secrets Act of 2016 (DTSA) provides that an individual cannot be held criminally or civilly liable for disclosure of a trade secret made in confidence to a federal, state, or local government official or to an attorney for the sole purpose of reporting or investigating a suspected legal violation.[35] The DTSA also requires employers to give notice of this immunity "in any contract or agreement with an employee that governs the use of a trade secret or other confidential information."[36]

Lesson 6: Again, make sure you only disclose the materials seized to the government.

Kinds of Permissible Seized Evidence

Whistleblowers are not limited in the evidence they can collect. A whistleblower's reliance on a database he used—and continued to use—to report fraud was found to be permissible in *United States ex rel. Ceas v. Chrysler Group*. In that case, the defendant complained that the relator had accessed, and continued to access, a database without authorization.[37] The defendant argued that the relator's unauthorized use of the database violated Model Rule of Professional Conduct 4.2 (adopted by Local Rule 83.5), which prohibits an attorney from communicating about the subject of a lawsuit with another represented party without consent from the represented party's attorney. Essentially, the defendant claimed that the documents in the database were "communications" from the defendant, and that whenever the relator or his attorney's accessed the database, they were communicating with the defendant without permission from its counsel.[38] The court rejected this argument, finding that the relator's accessing the "database is more akin to the 'clearly permissible' investigatory surveillance discussed in [*Hill v. Shell Oil Co.*], where the plaintiffs videotaped otherwise-protected employees as they went about their everyday activities in an effort to expose the defendants' discriminatory business practices."[39] Rather, the court offered a ringing endorsement of a relator's ability to collect documents that relate to a fraud, stating:

> First, Plaintiff notes that even if the documents in question are confidential, and even if Plaintiff's taking of these documents violates his confidentiality agreement with Defendant, the public policies associated with *qui tam* cases trump the terms of that confidentiality agreement. The Seventh Circuit has recognized the policy importance of not discouraging whistleblowers from undertaking investigative efforts that might expose fraud against the government, which extends to the whistleblower's retention of discoverable information in violation of confidentiality agreements. One limitation is that the whistleblower's collection of materials [must be] reasonably related to the formation of a case, but here there is no question that the VIP Summary Reports are relevant to Plaintiff's claims—they are the very basis for those claims.[40]

Lesson 7: There appears to be no limits on the type of documents retrieved as long as they are relevant to the fraud claims. Further, tape recordings are permissible as long as the recording complies with federal and state law.

While not mandatory, some courts suggest that whistleblowers should generally try to obtain copies of employer documents, rather than originals, to avoid any claims of conversion.[41] Although claims for conversion are trumped by the public policy issues discussed above, copies are generally sufficient to prove fraud and preserve evidence against the threat of destruction, while not depriving the employer of the use of their materials.[42]

The public policy exception is generally reserved for disclosing fraud to the government. Relators should work with their counsel to make sure any search and seizure is reasonable and falls within the legal boundaries of the FCA filing venue, but avoid sharing the other fraud documents with third parties for private litigation. ☉

Checklist For Safe Pursuit of FCA

- Take only computer or paper documents that are in your care, custody, and control and only for the purpose of filing an FCA lawsuit.
- Make sure there is a reasonable basis to believe that the documents are evidence of your reported fraud.
- Return documents that have no relevance to the fraud.
- Do not take privileged materials, but, if unsure, separate them from the other documents.
- Share the seized documents with only your attorney and the government.



Joel M. Androphy has a nationwide and diverse trial practice representing individuals and corporations in white collar criminal proceedings and qui tam *civil actions for which he has recovered hundreds of millions of dollars in settlements for his clients and the government. He is the author of several legal books:* White Collar Crime, *a six-volume treatise by Thompson/West, and the* Federal False Claims Act and Qui Tam Litigation *by Law Journal Press. Androphy's cases have appeared in the* N.Y. Times, Wall St. Journal, *and other major news publications. He is the legal commentator for ABC Houston and a frequent commentator for MSNBC, CNBC, and Bloomberg. Androphy has served as an adjunct law school professor at South Texas College of Law and the University of Houston Law School, lecturing on white collar crime and* qui tam *litigation. He is a partner in Berg & Androphy with its principal office in Houston and other offices in New York, Washington D.C., Philadelphia, and Denver. In 2009, the* Houston Press *named Androphy the Best Civil Attorney in the 2009* Best of Houston® *publication. Samuel Doran is an attorney at Berg & Androphy whose practice focuses on plaintiff's* qui tam *litigation and white collar criminal defense. Doran has also worked at two of the largest firms in the nation, where he practiced complex commercial litigation and white collar defense. Doran served as a law clerk to Hon. Curtis Gómez, United States District Court for the Virgin Islands. He graduated from the University of Virginia School of Law, where he served on the Editorial Board of the* Virginia Law Review *and the Senior Editorial Board of the* Journal of Law & Politics. *Doran graduated magna cum laude from Duke University. Rebecca L. Gibson is an associate at Berg & Androphy in Houston. She works on* qui tam, *commercial litigation, and white collar criminal defense matters. Prior to joining Berg & Androphy, Gibson practiced federal workers' compensation law.*

Endnotes

[1]31 U.S.C. § 3730(b)(2).

[2]31 U.S.C. § 3730(h).

[3]*United States ex rel. Grandeau v. Cancer Treatment Ctrs. of Am.*, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004).

[4]*United States ex rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033 (C.D. Cal. 2012).

[5]*Id.* at 1038.

[6]*Id.* at 1039 (citations omitted).

[7]*United States ex rel. Head v. Kane Co.*, 668 F. Supp. 2d 146, 152 (D.D.C. 2009).

[8]*Id.* at 152 (citations omitted) (emphasis in original).

[9]*E.g., Shmushkovich v. Home Bound Healthcare Inc.*, No. 12 C 2924, 2015 WL 3896947, at *1 (N.D. Ill. June 23, 2015).

[10]*United States ex rel. Ray v. American Fuel Cell & Coated Fabrics Co.*, No. 1:09-CV-01016, 2015 WL 874824 (W.D. Ark. Mar. 2, 2015).

[11]*Id.* at *3.

[12]*Id.* at *5 (citations omitted).

[13]*Cosby v. American Media Inc. et al.*, No. 16-508, 2016 WL 3901012, at *4 (E.D.Pa. July 15, 2016).

[14]*Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948). *See also Town of Newton v. Rumery*, 480 U.S. 386 (1987), which considered the validity of a contractual waiver that would have effectively barred the plaintiff in the case from bringing a § 1983 suit. *Id.* at 390-91. The Court held that, when an agreement purports to waive a right to sue conferred by a federal statute, whether the policies underlying the law may render the waiver unenforceable is a question of federal law. *Id.* at 392. The justices described the operative principle as follows: "[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Id.*

[15]"[I]t is a long-standing principle of general contract law that courts will not enforce contracts that purport to bar a party … from reporting another party's alleged misconduct to law enforcement authorities for investigation and possible prosecution." *Fomby-Denson v. Dep't of Army*, 247 F.3d 1366, 1377-78 (Fed. Cir. 2001). *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 696-97 (stating that "[i]t is apparent … that concealment of crime and agreements to do so are not looked upon with favor").

[16]For example, in *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239, 8 A.3d 209 (N.J. 2010), the court, in deciding the appropriateness of an employee taking documents, surveyed federal antidiscrimination law and synthesized a balancing test. These factors were, first, how the employee came to have possession of, or access to, the document. If the employee came upon it innocently, for example, in the ordinary course of his or her duties for the employer, the court ought to favor the employee. Second, what the employee did with the document. If the employee looked at it, copied it and shared it with an attorney for the purpose of evaluating whether the employee had a viable cause of action or of assisting in the prosecution of a claim, the factor will favor the employee. Third, the nature and content of the particular document in order to weigh the strength of the employer's interest in keeping the document confidential. Fourth, whether there is a clearly identified company policy on privacy or confidentiality that the employee's disclosure has violated. Fifth, the circumstances relating to the disclosure of the document to balance its relevance against considerations about whether its use or disclosure was unduly disruptive to the employer's ordinary business. Sixth, the strength of the employee's expressed reason for copying the document rather than, for example, simply describing it or identifying its existence to counsel so that it might be requested in discovery. Seventh, and finally, the importance of antidiscrimination laws and the effect, if any, that either protecting the document by precluding its use or permitting it to be used will have upon the balance of legitimate rights of both employers and employees. *Id.* at 277-83. Although these considerations are different than those before a court considering a whistleblower alleging fraud against the government, and need only be considered in the absence of a blanket public policy permitting whistleblowers to investigate and disclose fraud to the government, the basic principles underlying *Quinlan* indicate that the factors flow from related concerns.

[17]*Zahodnick v International Bus. Machs. Corp.*, 135 F.3d 911 (4th Cir. 1997).

[18]*Id.* at 915.

[19]*Id.*

[20]*Id.* at 914.

[21]*United States ex rel. Cafasso v. General Dynamics C4 Sys. Inc.*, 637 F.3d 1047 (9th Cir. 2011).

[22]*Id.* at 1062.

[23]*Id.* at 1062, n.2 ("Cafasso seeks to excuse her conduct on the grounds that she was in contact with, and providing information to, government investigators. This neither explains nor excuses the

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tion to the likely Supreme Court adjudication of *Grimm*, though as of yet no petition for certiorari has been granted.

In conclusion, a well-developed body of federal law on transgender rights already exists, and the broad thrust of the law over the past approximately 25 years has been toward greater protection against transgender discrimination. Employers who seek to impose restrictions on transgender employees that conflict with their gender identities or who wish to make employment decisions on the basis of an individual's transgender status will expose themselves to potential significant liability. When advising clients, the safest route to take is to recommend that they proceed as if transgender were a protected class. This is the *de facto* status that has been achieved through the *Price Waterhouse* gender stereotyping line of cases, even though transgender is not currently a specifically protected class. However, the *Grimm* case, which appears to be poised for decision by the Supreme Court, will likely have a major impact on future transgender litigation. ⊙

Endnotes

[1]*Holloway v. Arthur Andersen & Co.*, 556 F.2d 659 (9th Cir.1977).
[2]*Sommers v. Budget Mktg. Inc.*, 667 F.2d 748 (8th Cir. 1982).
[3]*Id.* at 750.
[4]*Fabian v. Hospital of Cent. Conn.*, __ F. Supp. 3d __, 2016 WL 1089178, at *7 (D. Conn. Mar. 18, 2016).
[5]*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
[6]*Id.* at 235.
[7]*Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004).
[8]*Id. at 574.*
[9]*Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).
[10]*Id.* at 1314.
[11]*City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 446-47 (1985).
[12]*Glenn,* 663 F.3d at 1318-19.
[13]*Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).
[14]*Glenn,* 663 F.3d at 1320.
[15]*Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007).
[16]*Id.*
[17]*Id.* at 1224.
[18]*Preston v. Commonwealth of Va. ex rel. New River Cmty. Coll.,* 31 F.3d 203 (4th Cir. 1994).
[19]*Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015).
[20]*Grimm v. Gloucester County Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016).
[21]*Johnston*, 97 F. Supp. 3d at 680.
[22]*Id*. at 681.
[23]*Grimm*, 822 F.3d at 715.

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overbreadth of her seizure of documents.").
[24]*United States ex rel. Cieszyski v. LifeWatch Servs. Inc.,* 2016 WL 2771798 (N.D. Ill., May 13, 2016).
[25]*Id.* at *5.
[26]*Id.*
[27]*See Walsh v. Amerisource Bergen Corp.*, No. 11-7584, 2014 WL 2738215, at *6 (E.D. Pa., June 17, 2014) (noting that courts "have focused on the reasonableness and scope of the plaintiff's disclosure in determining whether to permit counterclaims in an FCA action"); *Siebert v. Gene Sec. Network Inc.*, No. 11-CV-01987-JST, 2013 WL 5645309, at *8 (N.D. Cal. Oct. 16, 2013) (recognizing public policy preventing counterclaims based on taking documents, but declining to dismiss counterclaim in that case "because it is possible that Siebert also took confidential documents that bore no relation to his False Claims Act claim").
[28]*United States ex rel. Wildhirt v. AARS Forever Inc.*, No. 09 C 1215, 2013 WL 5304092, at *6 (N.D. Ill. Sept. 19, 2013). Although the issue of dependent and independent claims is not a topic for this article, in discussing a series of Ninth Circuit cases, the court in *U.S. ex rel. Battiata v. Puchalski*, 906 F. Supp. 2d 451 (D.S.C. 2012), held that: "[i]f a defendant's counterclaim is predicated on its own liability, then its claims against the relator typically will allege that the relator … caused the defendant some damage by the act of being a relator, that is, by disclosing the defendant's fraud…. This … kind of action has the same effect of providing contribution or indemnity, with the perverse twist that the relator is not even accused of contributing to the defendant's fraud…. If such suits were allowed, they would punish innocent relators, which would be a significant deterrent to whistleblowing and would imperil the government's ability to detect, punish, and deter fraud." *Id.* at *7.
[29]*Id.* at *3.
[30]*Id.*
[31]*Id.*
[32]*Walsh v. Amerisource Bergen Corp.*, No. Civ.A 11-7584, 2014 WL 2738215, at *7 (E.D. Pa., June 17, 2014) (denying the relator's motion to dismiss counterclaim based on taking documents where the relator "fail[ed] to provide any justification in response to [the] defendants' allegation that he disclosed, to his personal attorneys, information that was protected by the attorney-client privilege").
[33]The crime fraud exception to the attorney-client privilege is not a topic for this article.
[34]*U.S. ex rel. Gaston v. Mount Sinai Hosp.*, No. 13 CIV. 4735 RMB, 2015 WL 7076092, at *5 (S.D.N.Y. Nov. 9, 2015).
[35]18 U.S.C. §§ 1833(b)(1)(A)(i)-(ii) (2016).
[36]18 U.S.C. § 1833(b)(3)(A).
[37]*U.S. ex rel. Ceas v. Chrysler Group*, Case No. 12-cv-2870 (N.D. Ill., June 10, 2016).
[38]*Id.* at *2.
[39]*Id., citing Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876, 879-880 (N.D. Ill. 2002).
[40]*Ceas*, 2016 WL 3221125, at *2.
[41]*See X Corp. v. Doe*, 805 F. Supp. 1298 (E.D. Va. 1992), *aff'd*, 17 F.3d 1435 (4th Cir. 1994).
[42]*See Pearson v. Dodd*, 410 F.2d 701, 706 (D.C. Cir. 1969); *Furash & Co. Inc. v. McClave*, 130 F. Supp. 2d 48, 58 (D.D.C. 2001).