# Ethics Panel – Federal Bar Association *Qui Tam* Conference 2019

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## I. Overview

The panel discussion will be focused around a fact pattern, which will serve as a centerpiece to explore many common ethics challenges faced in *qui tam* litigation including (1) representing multiple individuals or entities, including those with criminal exposure; (2) the duties of loyalty and confidentiality; (3) collection of evidence, including contact with represented parties; (4) the seal (31 U.S.C. § 3730(b)(2)); and (5) dismissal of the action by the government as a potential remedy for misconduct, pursuant to 31 U.S.C. §3730(c)(2)(A).

The panel envisions that the fact pattern will be contained in written conference materials provided to conference attendees prior to the conference, so that attendees may familiarize themselves with it before the Ethics discussion (Day 2 of the conference).

The PowerPoint poses several ethics questions, in a multiple choice format, addressing the major themes raised in the fact pattern. It is the panel's hope that this format will generate discussion between the conference attendees and the panelists.

## II. The Fact Pattern[1]

This is an off-label drug promotion case that involves the Food, Drug and Cosmetic Act, the Anti-Kickback Act and the False Claims Act. This scenario involves multiple Defendants including **BeautyPill**, a pharmaceutical manufacturing firm, some of its high-level marketing managers, its CEO, and several doctors paid by the company.

**BeautyPill** produces a pill (called **BP**) that benefits a very small group of patients (i.e., 1% of the U.S. population) suffering from a rare disorder that disfigures women in their late 60s. The drug's package insert only encompasses

[1] Ms. Gittens would like give special thanks to the William B. Bryant American Inn of Court for contribution of the basic fact pattern, which we revised for our purposes.

use for this rare disorder and the drug has significant side effects, including leukemia.

**BeautyPill** pays physicians consulting fees to serve on its medical boards, oversee clinical trials, and speak to other physicians about the benefits of BP. BeautyPill's CEO gives away free cruises each year to the top ten prescribing doctors; he pays for these out of his own pocket.

**BeautyPill** learned from communications with these physicians that the pill potentially has significant beneficial results for sleeplessness. Since that time, BeautyPill has purchased print and TV advertisements touting BP's use for sleeplessness and has directed its speakers to discuss their experience using BP for patients who cannot sleep.

The **Relator Firm** is a plaintiffs' litigation firm, specializing in representing relators in *qui tam* actions. It filed this *qui tam* action, under seal, in federal court on behalf of its client, **Relator 2**, who is the former General Counsel to BeautyPill. Relator 2 was involved in many marketing meetings where the plans to promote BP off-label were discussed and she has knowledge of substantial payments to physicians and the CEO's use of personal funds to buy cruises for them, among other things. She tried to stop these practices but was rebuffed by the company. She collected thousands of documents during her tenure at BeautyPill – all of which she had access to as the company's top lawyer -- and provided them to the government with her disclosure statement.

After the filing of the case, the Department of Justice ("**DOJ**") actively investigated the company for three years, issuing multiple CIDS for documents and taking deposition testimony of high-level executives.

The **Defense Firm**, is a large multi-national firm, specializing in defending *qui tam* cases. It represents BeautyPill. At Defense Firm's suggestion, BeautyPill hired other outside counsel to represent individual BeautyPill employees, and the CEO and other named BeautyPill managers are each represented by separate law firms. All defendants produced documents pursuant to CIDs and defended depositions.

All of the Defendants have entered into a written joint defense agreement and the defense lawyers regularly discuss litigation strategy and facts.

The **Defense Firm** is aware that BeautyPill's CEO lied to the FBI about his personal payment for the cruises.

Ultimately, **DOJ** declined to intervene in the *qui tam* case. The Judge has unsealed the case and the parties are litigating.

A few months after the case was unsealed, **Relator 1,** a former BeautyPill sales representative, who worked for Beauty Pill for three months and promoted BP for a week before she was terminated, sued **Relator Firm** for breach of fiduciary duty and breach of confidentiality. **Relator 1** alleges that she contacted **Relator Firm** about a potential case, but **Relator Firm** never followed up, and then used her information to file **Relator 2**s case. **Relator 1** never filed her own case or pursued a case with any other lawyers, but she did talk to the FBI who came to her house one day about two years ago seeking information about BeautyPill's marketing of BP.

The **Defendants** have filed a motion to disqualify **Relator 2** as a relator because they allege the information disclosed to the government, in her case, was protected from disclosure by the attorney-client privilege. In the alternative, Defendants seek an Order precluding **Relator 2** from a bounty if she is successful.

To make matters worse, in light of Defendants' recent filing pertaining to **Relator 2**, **DOJ** is considering dismissal of **Relator 2**s case as a sanction for use of Beauty Pill's attorney-client information to support the case.

III. Outline

**A. Representing Multiple Company Constituents – Defense Firm's representation of Beauty Pill, its officers, and employees**. The fact pattern presents potentially divergent (or even adverse) interests of the company and individuals, including potential criminal liability for both the company and the CEO.

1. These ethics rules should be considered when choosing a course of action, as well as all applicable state bar rules.

a. **ABA Model Rule 1.7**: ***Conflict of Interest: Current Clients*** states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be about to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

b. **ABA Model Rule 1.13**: ***Organization as Client***, *in part*, states:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

* * *

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituent, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

c. **ABA Model Rule 1.6**: ***Confidentiality of Information***, *in part*, states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

* * *

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another in furtherance of which the client has used or is using the lawyer's services.

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client had used the lawyer's services;

(4) secure legal advice about the lawyer's compliance with these rules;

* * *

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information related to the representation of a client.

2. If a conflict arises after representation has been undertaken by Defense Firm, **ABA Model Rule 1.7 (comment 4)** states:

> "[T]he lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of [Rule 1.7] paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client." See Rule 1.9. See also Comments [5] and [29]."

3. Other Considerations for Defendants

a. Joint Defense Agreement. Counsel should consider whether a joint defense/common interest agreement among the corporate constituents is desirable and warranted. If Defense Firm advises the defendants to seek separate counsel, is it possible for the defendants to enter into a joint defense agreement so that they may share litigation strategy and information?

To be protected under the common interest privilege, "shared or jointly created information," or communication between the parties, "must first satisfy the traditional requisites for the attorney-client or work product privilege . . . ." *Glynn v. EDO Corp.*, Civ. No. JFM-07001660, 2010 U.S. Dist. LEXIS 86013 at * 28 (D. Md. August 20, 2010), quoting, *Minebea Co., Ltd. v. Papst*, 228 F.R.D. 13, 16 (D.D.C. 2005)."

Additionally, the party seeking privilege must demonstrate that (1) the communicating parties shared an identical legal interest, (2) the communication was made in the course of and in furtherance of the joint legal effort, and (3) the privilege had not been waived. *Glynn*, 2010 U.S. Dist. LEXIS 86013 at * 28**,** *citing Id.* , citing, *Grand Jury Subpoenas 89-3 and 89-4, John Doe 89-129*, 902 F.2d 244, 248-49 (4th Cir. 1990); *Minebea Co.*, 228 F.R.D. at 16.

b. Mitigating Potential Liability. Counsel should discuss with the client, the possibility of obtaining "cooperation credit"[2] from the

[2] *See* the following guidance:

● U.S. Sentencing Commission's Guidelines Manual, §8B2.1(b)(7). 2. *The Justice Manual*, Section 9-28.300, "Principles of Federal Prosecution of Business Organizations" Available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations

● U.S. Department of Justice: Memorandum from Mark Filip, Deputy Attorney General, Principles of Federal Prosecution of Business Organizations. August 28, 2008. Available at http://bit.ly/2nJ5eCU

● U.S. DOJ: Memorandum from Eric H. Holder, Jr., Deputy Attorney General. June 16, 1999. Available at http://bit.ly/1kyBQWO

● U.S. Department of Justice: Memorandum from Sally Quillian Yates, Deputy Attorney General, Individual Accountability for Corporate Wrongdoing. September 9, 2015. Available at http://bit.ly/2nLMPa4

● U.S. DOJ, Criminal Division, Fraud Section: "Evaluation of Corporate Compliance Programs." Available at http://bit.ly/2lEphmk

● "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance" April 5, 2016. Available at http://bit.ly/2Dr33KL

●The Justice Manual, Section 9-47.120, "FCPA Corporate Enforcement Policy" Available at http://bit.ly/2oSeggM

Government to mitigate damage to the corporation: (i) remediation of allegations of wrongdoing while the company is under investigation by the Government; and (ii) company's preexisting corporate compliance program.

**B. Relator Firm's representation of Relator 2** -- The fact pattern presents the potential for ethics violations and liability for Relator Firm, including breach of fiduciary duty and breach of confidentiality owed to Relator 1, an individual who unsuccessfully sought Relator Firm's representation prior to Relator 2.

1. Breach of Fiduciary Duty. The elements are: (1) fiduciary relationship must exist between the plaintiff [Relator] and defendant [Relator Firm]; (2) defendant breached duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant. *Gillis v. Provost & Umphrey Law Firm, LLP*, 2015 Tex. App. LEXIS 280, *34, No. 05-13-00892-CV, (Court of Appeals of Texas, Fifth Dist., Dallas Jan. 14, 2015) (second filed *qui tam* relator sues firm who filed another case on behalf of another client after meeting); see also *Kulig v. Ungaretti & Harris, LLP*, 2015 IL app (1st) 141430-U at * P55 (App. Court of Ill., first Dist., First. Div. November 16, 2015)(law firm already represented a client in a *qui tam* case against same defendant, declined second potential relator).

a. Duty: Did the attorney-client (i.e., fiduciary) relationship exist? It is a contractual relationship whereby an attorney agrees to render professional services for a client. *Gillis* at *34.

- Fiduciary relationship could be express or implied, but parties must "manifest an intention to create an attorney-client relationship." *Gillis* at *35.

- Objective Standard – Examine the conduct of the parties (actions and statements); it not a subjective standard. *Id*.

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● Recent DOJ Cooperation Policy (post Yates-memo) announced by Deputy Attorney General Rod Rosenstein at the November 29, 2018 ACI 35th International Conference on the Federal Corrupt Practices Act. Available at https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0

- Was there a writing or any other evidence of attorney-client relationship?

- What duty, if any, does the firm owe to prospective clients? **Model Rule 1.18**, ***Duties to Prospective Client*** which states, *in part*:

> **(**a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to the matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

b. Breach – *See Kulig at *P55; See also, Colluci v. Arisohn,* 2009 N.Y. Misc. LEXIS 5464 *22. (Supreme Ct. of N.Y. September 10, 2009).

c. Causation – Was the breach the *proximate cause* of the injury? Proximate cause consists of two elements: "cause in fact and legal cause." *Kulig* at *55. Cause in fact established when defendant's conduct is a "substantial factor and a material element in bringing about injury." *Id*. Legal cause is foreseeability. *Id*. No causation where relator failed to file a case after firm rejected her. *Id. at *P56*.

2. Breach of Confidentiality – **ABA Model Rule 1.6** and applicable state bar rules apply to any information that Relator 1 provided to the firm. ABA Model Rule 1.6 states, *in relevant* part:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
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> * * *
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> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client

**C. Government Contact with Represented Parties in *Qui Tam* Cases**[3] **--** The fact pattern presents potential ethics issues with regard to the FBI's contact with Relator 1 in the context of DOJ's investigation of the *qui tam* case. Relator 1 is no longer employed by the company, but what if she were?

1. **Model Rule 4.2 – *Communication with Person Represented by Counsel*** governs DOJ's decision to have an FBI agent approach Relator 1 for evidence to support the case. The rule states, in *relevant part,* that:

> In 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, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

a. Before Relator files a complaint: there is no "matter," no "representation in the matter" and no prohibition on contact.

b. After Relator files a complaint, but before the Government's intervention decision.

- Are government contacts with current employees "authorized by law?" **ABA Model Rule 4.2 (Comment 5)** states that "[c]ommunications authorized by law may … include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings."

2. Relevant Cases:

- *In Re Amgen, Inc.*, 2011 WL 2442047 (E.D.N.Y. April 6, 2011)(pre-intervention interview did not violate rule)
- *U.S. v. Joseph Binder Schweitzwer Emblem Co.*, 167 F. Supp. 2d 862, 866 (E.D.N.C. 2001)(same). In *Schweitzerwer*, the agent specifically asked the interviewee if she was represented by counsel and she stated she was not. Moreover, the government had not yet formed an adversarial position against defendants – beginning stage of investigation. Specifically, the he case was under seal and government had not intervened.

[3] Of course, this applies to all the parties, but we thought it might be most interesting from DOJ's perspective.

- *U.S. v. Talao*, 222 F.3d 1133, 1138-41 (9th Cir. 2000)(no bright line rule permitting all pre-indictment interviews as "authorized by law").

- Cf. *Carter-Herman v. City of Philadelphia*, 897 F. Supp. 899, 903 (E.D. Pa. 1995)(not appropriate for government attorney to make blanket claim to represent all government employees).

**D. Special Case: Lawyer-Relators --** Lawyer-Relators often face prospect of disqualification and dismissal of the *qui tam*, potential bar charges, and litigation by their client/former clients, especially when the target defendant is a company or individual the Lawyer-Relator once represented. These cases present a difficult balance between importance of full disclosure by clients to lawyers and societal interest in detecting fraud.

1. When lawyers file a *qui ta*m case against their current or former client(s), Model Rules 1.6 (Confidentiality), 1.7 (Loyalty), 1.9 (Duty to Former Clients) may be implicated as well as state bar rules.[4]

2. Relevant Cases:

a. *X Corp. v. John Doe*, 805 F. Supp. 1298 (E.D. Va. 1992) ("X Corp. I") (granting request for injunctive relief to prohibit company's former inside counsel from disclosing documents that he alleged showed FCA violations).

- The duty of confidentiality arose under state code of professional conduct *not* A/C privilege. *Id*. at __. Objective standard for disclosure of client documents.
- The court held it was permissible only where "a reasonable attorney would believe that the disputed documents *clearly establish* the employer-client's fraud." *Id*. at 1310.
- Further the court explains the underlying policy, which "balances the vital need to preserve the integrity of the attorney-client relationship against the need for disclosure in those rare circumstances where the relationship is abused." *Id*. at. 1308.
- Postscript: *X Corp v. Doe*, 862 F. Supp. 1502 (E.D. Va. 1994) ("X Corp. III")

[4] Kathleen Clark & Nancy J. Moore, *Financial Rewards for Whistleblowing Lawyers*, 56 B.C.L. Rev. 1697 at *1711-1741 (2015).

- Court grants X Corp.'s motion to disqualify Doe as a relator because information that Doe disclosed to the Government in his *Qui Tam* complaint was protected by the A/C privilege
- Rejects X Corp.'s argument that there is *per se* bar on lawyers filing FCA cases against former clients
- Lawyers may serve as relators as long as they do not violate state law obligations to maintain client confidences

b. *U.S. ex rel Holmes v. Northrup Grumman*, No. 1:13cv85, 2015 WL 3504525, (S.D. Miss. June 3, 2015), *aff'd*, 2016 WL 1138264, (5th Cir. March 23, 2016)

- Applies reasoning from X. Corp. cases to hold that ethical violations disqualify attorney-relator. While the FCA permits any person . . . to bring a *qui tam* suit, it does not authorize that person to violate state laws in the process" *Holmes* at *3

- Holmes represented, Munich Re – not the target of the *qui tam*, but its insurer.

- The court held that Holmes violated duty of loyalty to Munich Re by taking a position in the *qui tam* that was contrary to Munich Re's interests -- without informed consent by client.

- Used documents to support *qui tam* obtained in discovery by Munich Re, subject to a protective order that limited their use to an arbitration proceeding. The court held that Holmes violated the duty of candor to the tribunal when he appropriated the documents for his *qui tam* case.

- Court rejected argument that because of public interest in preventing fraud against the government, ethical rules do not apply to lawyers bringing FCA cases.

**E. Government Dismissal of Relator's *Qui Tam* Case –** The potential ethical violations by Relator 2 subject the *qui tam* to dismissal by the Government.

1. In a *qui tam* action, "[t]he Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for hearing on the motion." 31 U.S.C. §3730(c)(2)(A).

2. Courts have developed at least two different standards for dismissal pursuant to this FCA section. Under either standard, ethical violations of a lawyer-relator may provide sufficient facts to warrant dismissal.

a. *The Swift* Test: In *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003), the Court of Appeals for the District of Columbia Circuit interpreted 31 U.S.C. §3730(c)(2)(A) to grant the Government "an unfettered right to dismiss" a *qui tam* action. *See Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001)("the government retains the unilateral power to dismiss an action" under section 3730(c)(2)(A))(dicta); *Cf. U.S. ex rel. Nasuti v. Savage Farms, Inc.*, No. 12-30121-GAO, 2014 WL 1327015, at *1(D. Mass. Mar. 27, 2014); ("*Swift* rationale more persuasive"); aff'd on other grounds, No. 14-1362, 2015 WL 9598315 (1st Cir. March12,2015); *U.S. ex rel. Piacentile v. Amgen Inc.*, No. 04 CV 3983, 2013 WL 5460640, at *2-3 (E.D.N.Y. Sept. 30, 2013 (granting the Government's motion to dismiss, finding *Swift* "persuasive reasoning."). *Swift*, 318 F.3d 234, recognizes that dismissal may not be warranted under the statute if its decision is arbitrary and capricious, illegal or fraudulent.

b. Rational-Relation Test: The Ninth Circuit in *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F. 3d 1139, 1145 (9th Cir. 1998), held that in order to dismiss a *qui tam* case pursuant to Section 3730(c)(2)(A), the government must identify a "valid government purpose" and a "rational relation between the dismissal and accomplishment of the purpose." If the government satisfies the two-step test, the burden shifts to the relator to demonstrate the "dismissal is fraudulent, arbitrary and capricious, or illegal." *Ridenour v. Kaiser-Hill Co., L.L.C.*, 397 F.3d 925, 936 (10th Cir. 2005); *U.S. ex rel. Stevens v. State of Vt. Agency of Natural Resources*, 162 F. 3d 195, 201 (2d Cir. 1998)(dicta), *rev'd on other grounds*, 529 U.S. 765 (2000).

3. The seal – The relator files the case under seal pursuant to 31 U.S.C. §3730(b)(2), which requires the court to seal the case for at least sixty days so the government may investigate. The seal is almost always extended by the government, sometimes for years. The extension of the seal is ordered by the district court. Could violation of the seal result in dismissal by the government?