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# QUI TAM CONFERENCE

February 28 – March 1  
FHI 360 Conference Center • Washington, D.C.

## Ethics:

### Common Ethical Issues in *Qui Tam* Cases

March 1, 2019



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## Panel Participants

- Kathleen Clark, Professor, Washington University School of Law
- Precious M. Gittens, Partner, Hooper, Lundy & Bookman PC
- David Wiseman, Senior Trial Counsel, Commercial Litigation, U.S. Department of Justice
- Moderator: Traci L. Buschner, Partner, Guttman, Buschner & Brooks PLLC



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## Overview

1. Representing multiple individuals or entities;
2. The duties of loyalty and confidentiality;
3. Contact with represented parties;
4. Dismissal of the action by the government as a remedy for misconduct; and
5. The seal



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## The Fact Pattern

- **BeautyPill** produces a pill (called **BP**) that benefits a very small group of patients suffering from a rare disorder.
- **BP**'s package insert only encompasses use for this rare disorder and has significant side effects, including leukemia.



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### The Fact Pattern (cont.)

- **BeautyPill** pays physicians consulting fees to serve on its medical boards, oversee clinical trials, and speak to other physicians about **BP**.
- **BeautyPill** learned from physicians that **BP** potentially has significant beneficial results for sleeplessness.
- Since that time, **BeautyPill** has purchased ads touting **BP**'s use for sleeplessness and has directed its speakers to discuss **BP** for sleeplessness.



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### The Fact Pattern (cont.)

- The **Relator Firm** filed **Relator 2's** *qui tam* action – she is the former General Counsel to **BeautyPill**.
- **Relator 2** was involved in marketing meetings to promote **BP** off-label and she has knowledge of substantial payments to physicians.
- She unsuccessfully tried to stop these practices.



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### The Fact Pattern (cont.)

- **Relator 2** collected thousands of documents during her tenure at **BeautyPill** and provided them to the government with her disclosure statement.
- **DOJ** actively investigated the company for three years, issuing multiple CIDs and taking deposition testimony of high-level executives.
- **DOJ** declined to intervene in the case.



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### The Fact Pattern (cont.)

- **Defense Firm** represents the company and hired other outside counsel to represent individual employees and the CEO.
- All defendants have entered into a written joint defense agreement.
- The **Defense Firm** is aware that **BeautyPill's** CEO lied to the FBI about providing personal payments to physicians.



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## The Fact Pattern (cont.)

- **Relator 1**, a former **BeautyPill** sales rep, sued **Relator Firm**.
- **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 contacted other lawyers.
- The FBI interviewed **Relator 1** about **BeautyPill's** marketing of **BP** a year after the case was filed.



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### The Fact Pattern (cont.)

- **Defendants** have filed a motion to disqualify **Relator 2** as a relator because they allege the information she disclosed to the government was protected from disclosure by attorney-client privilege.
- **DOJ** is considering dismissal of **Relator 2's** case as a sanction for use of **BeautyPill's** attorney-client information to support the case.



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# Representing Multiple Constituents



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## QUESTION ONE

**Beauty Pill's CEO** has become increasingly unhappy with his current counsel and wants to hire **Defense Firm** to represent him in the *qui tam* case. Can Defense Firm represent the CEO?

- A. Yes, if the company executes a waiver.
- B. Yes, if both the company and CEO execute a waiver.
- C. No, the company has potential counter-claims against CEO.
- D. No, the representation is prohibited by law.



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### **ABA Model Rule 1.7: *Conflict of Interest: Current Clients – General Rule***

(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.



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### ABA Model Rule 1.7: *Conflict of Interest: Current Clients – Exception*

(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 able 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.



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## ABA Model Rule 1.13: *Organization as Client*

(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.



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## **ABA Model Rule 1.6: *Confidentiality of Information - General Rule***

(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).



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## ABA Model Rule 1.6: *Confidentiality of Information - Exception*

(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;



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# What happens if Defense Firm becomes aware of a conflict after litigation commences?

- The 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).
- 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.

ABA Model Rule 1.7 (comment 4)



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## Other Considerations for Defendants

1. Is a joint defense/common interest agreement desirable?
2. To be protected under the common interest privilege:
  - The shared or jointly created information must satisfy the requirements for attorney-client or work product privilege.
  - The proponent of the privilege must demonstrate:
    1. Parties share an identical legal interest;
    2. Communication was made in the course/in furtherance of joint legal effort; and
    3. The privilege has not been waived.



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## Other Considerations for Defendants

- Counsel should discuss the possibility of obtaining “cooperation credit” from the Government to mitigate damage to the corporation, including:
  - Remediation of allegations of wrongdoing while the company is under investigation by the Government; and
  - The company’s preexisting corporate compliance program.



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# **Relator Firm's Representation of Relator 2**



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## QUESTION TWO

**Relator Firm's** paralegal spoke with **Relator 1** on the phone but **Relator 1** did not have any documents and a firm lawyer told paralegal to send a rejection letter to **Relator 1**. Paralegal never sent the letter. Are Relator 1's breach of fiduciary duty claims likely to succeed?

- A. Likely yes - Relator Firm did not send a rejection letter.
- B. Likely no - Relator 1 never sought any other representation and did not file a *qui tam* case.
- C. Likely no - There was no signed representation agreement.
- D. Likely no - Relator 1 had no documents.



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## Breach of Fiduciary Duty Claim

1. Fiduciary relationship must exist between the plaintiff [**Relator 1**] 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.



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### Did the attorney-client relationship exist?

An attorney-client relationship is a contractual relationship.

- may be express or implied
- parties must manifest an intention to create A/C relationship
- objective standard – examine conduct of parties
- was there a writing or other evidence of A/C relationship

*Gillis v. Provost & Umphrey Law Firm, LLP*, 2015 Tex. App. LEXIS 280, No. 05-13-00892-CV (Court of App. Tex., Fifth Dist., Dallas Jan. 14, 2015)



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### Did Relator Firm breach a duty to Relator 1?

The FCA's "first to file" rule presents unique challenges

- Assuming there was a duty, what is the breach?
- Failure to file a claim on behalf of **Relator 1**?
- What if the claim was not meritorious?
- If **Relator 1** files after **Relator 2** is there a breach?



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## Causation:

- Proximate Cause: Defendant's conduct is a "substantial factor and a material element in bringing about injury."
- Legal cause is also known as "foreseeability"
- No causation where Relator failed to file a case after the firm rejected the case.

*Kulig and Colluci v. Arisohn*, 2009 N.Y. Misc. LEXIS 5464 at \*22 (Supreme Ct. of N.Y. September 10, 2009)



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## Confidentiality -- Duties to Prospective Clients ABA Model rule 1.18

- (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.



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## Breach of Confidentiality

- Model Rule 1.6 applies to any information that **Relator 1** provided to the firm. It 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).

\* \* \*

(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.



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# Government Contact With Relator 1



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## QUESTION THREE

An FBI agent was sent by **DOJ** lawyers to interview **Relator 1** about the claims alleged in the *qui tam* before it was unsealed. When questioned, **Relator 1** revealed that she had been recently rehired by the company. Is it appropriate for the agent to question **Relator 1**?

- A. No, she is a current employee.
- B. Yes, if the government has not made an intervention decision and the agent confirms that Relator 1 is not represented by counsel.
- C. No, a *qui tam* has been filed.
- D. Yes, but only if she is not a manager or officer of the company.



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## Government Contact with Represented Parties

- Model Rule 4.2 – *Communication with Person Represented by Counsel:*

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.



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## Government Contact with Represented Parties

- Before Relator files a complaint:
  - There is no “matter,” no “representation in the matter,” and no prohibition on contact.
- After Relator files a complaint but before the Government’s intervention decision:
  - Are Government contacts with current employees “authorized by law?”



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### Government Contact with Represented Parties

“[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.”

ABA Model Rule 4.2 (Comment 5)



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### Government Contact with Represented Parties in *Qui Tam* Cases

- *In Re Amgen, Inc.*, 2011 WL 2442047 (E.D.N.Y. April 6, 2011) (Pre-intervention interview of current employee did not violate N.Y. Rule 4.2 because “authorized by law.”)
- *U.S. v. Joseph Binder Schweitzer Emblem Co.*, 167 F. Supp. 2d 862, 866 (E.D.N.C. 2001) (same)



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### Government Contact with Represented Parties in *Qui Tam* Cases

- *U.S. v. Talao*, 222 F.3d 1133, 1138-41 (9<sup>th</sup> 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).



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## Lawyer-Relators



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## QUESTION FOUR

When **Relator 2** found out the government was paying billions of dollars each year for off-label prescriptions of BP, she felt very guilty. She felt compelled to file her FCA case and convinced **Relator Firm** to take the case. May **Relator 2** bring a *qui tam*?

- A. Yes, only if she does not produce any attorney-client documents to the government.
- B. No
- C. Yes, if she notifies Beauty Pill of her desire to bring a *qui tam* and gets its written consent.
- D. Maybe, depending on a number of factors.



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## Special Case: Lawyer-Relators

- When lawyers file a *qui tam* 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.
- Difficult balance between importance of full disclosure by clients to lawyers and societal interest in detecting fraud.
- Lawyer-Relators face prospect of disqualification and dismissal of the *qui tam*, potential bar charges, and litigation by their client/former clients.



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## Cases

- *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).
- Holding based on duty of confidentiality under state code of professional conduct *not* A/C privilege.



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## *X Corp. I (cont.)*

- Objective standard for disclosure of client documents:
- Permissible only where “a reasonable attorney would believe that the disputed documents *clearly establish* the employer-client’s fraud”



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## *X Corp. I (cont.)*

- Court explains the underlying policy balance:
- “This standard . . . 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.”



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## Postscript: *X Corp. III*

- *X Corp v. Doe*, 862 F. Supp. 1502 (E.D. Va. 1994) (“X Corp. III”)
- 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



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## What if the Relator did not represent the target?

- *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, (5<sup>th</sup> 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



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## *Holmes (cont.)*

- Holmes represented Munich Re in insurance dispute with Northrup Grumman
- 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.



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## *Holmes* (cont.)

- Used documents obtained from NG in discovery as basis to file *qui tam*
- Documents were subject to protective order which strictly limited their use to the arbitration proceeding
- Violated Duty of Candor to the tribunal because had represented to the Court the documents would be used solely for the arbitration



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### *Holmes (cont.)*

- Court rejects argument that because of public interest in preventing fraud against the Government ethical rules do not apply to lawyers in FCA cases.
- Relator's counsel perspective: How do you advise lawyers who want to file FCA cases against former clients?



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# Government Dismissal 31 U.S.C. § 3730(c)(2)(A)



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## QUESTION FIVE

**DOJ** has decided to seek dismissal of **Relator 2**'s case based on Defendants' filing. Defendants' motion fails to provide an affidavit of anyone attesting to any factual allegations demonstrating that **Relator 2** used attorney-client information to file her complaint *and* there are no facts otherwise supporting Defendants' filing. What potential arguments are available to Relator?

- A. She is entitled to an evidentiary hearing under the statute.
- B. The DOJ's decision is arbitrary and capricious and its motion should be denied.
- C. There are none; DOJ has an unfettered right to dismiss her case.
- D. Both A and B.



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## Government Dismissal of Relator's *Qui Tam* Case

The 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)(emphasis added).



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Courts have developed *at least two different standards* for dismissal

- **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. *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003)
- **Ninth Circuit** held that in order to dismiss a *qui tam* case pursuant to §3730(c)(2)(A), the Government must identify a “valid government purpose” and a “rational relation between the dismissal and accomplishment of the purpose.” *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9<sup>th</sup> Cir. 1998),



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## Government Dismissal of Relator's *Qui Tam* Case

- Under *Sequoia Orange*, 151 F.3d at 1145, the government could be precluded from dismissal if the reasons for dismissal were found to be fraudulent, arbitrary and capricious, or illegal.
- *Cf. Swift*, 318 F.3d at 254 (noting relator could provide no evidence that government's decision was arbitrary and capricious, illegal or fraudulent)



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Is Relator entitled to an evidentiary hearing?

- There is no automatic right to an evidentiary hearing, but one should be granted when the qui tam relator shows a “substantial and particularized need” for a hearing.
- Such as a colorable claim that the ... dismissal is unreasonable in light of existing evidence, government did not fully investigate, or decision was based on arbitrary and improper considerations.

*United States ex rel. Nicholson v. Spigelman*, 10 C 23361, 2011 U.S. Dist. LEXIS 74257 at \*9-10 (N.D. Ill. July 8, 2011)(citing Congressional intent).



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## *The Seal*

- Pursuant to 29 U.S.C. § 3730(b)(2), Relator's case must be filed under seal "for at least 60 days"
- The government often seeks extensions of the seal from the court.
- The seal is thus an operation of statute *and* judicial order.
- Is dismissal under Sect. 3730(c)(2)(A) a remedy for a willful violation of the seal by Relator?



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