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James J. Hennelly

American University Washington College of Law

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IN THE NEWS

ATTORNEYS AS *QUI TAM* RELATORS: HOW STATE ETHICS RULES TRUMP THE FALSE CLAIMS ACT

James J. Hennelly*

A recent increase in attorneys filing False Claims Act (FCA) cases as *qui tam* relators¹ against their former client healthcare entities raises questions as to whether the FCA bars attorneys from bringing such suits.² The stakes are high: depending on whether the government opts to intervene in an action, a *qui tam* relator stands to earn anywhere from fifteen to thirty percent of the proceeds of the action or settlement, which consistently enter the tens or hundreds of millions of dollars.³ Nothing in the FCA expressly prohibits attorneys from bringing such cases as *qui tam* relators.⁴ Indeed, the primary purpose for the *qui tam* provisions of the FCA is to increase the number of cases brought by turning any employee into a potential whistleblower. An attorney who reveals information subject to the attorney-client privilege, however, almost assuredly would face disbarment or other professional discipline.⁵ Courts faced with these issues typically agree that nothing in the FCA expressly prohibits attorneys from bringing such actions against their former clients. Nevertheless, longstanding judicial precedent indicates that the FCA does not trump a state's ethics rules.⁶

Most recently, a district court disqualified an attorney relator from bringing an FCA claim that was based on information protected by the attorney-client privilege.⁷ The case, *Fair Labor Practices Associates (FLPA) v. Quest Diagnostics, Inc.*, illustrates the challenges courts face in balancing the federal interests in FCA enforcement with state interests in protecting the attorney-client relationship. In this case, one of the *qui tam* relators was the defendant company's general counsel from 1993 through 2000, during which time he became aware of a pricing scheme his client offered for the purpose of inducing

fee-for-service pull-through business in violation of the Anti-Kickback Statute.⁸ The company had suspended the illegal billing scheme before Quest

Diagnostics purchased the company, after which the new CEO reinstated the illegal billing scheme.⁹ Though he no longer served as the general counsel, the relator had knowledge of the defendant's continuation of the illegal scheme.¹⁰

Cases like *FLPA* where attorneys bring *qui tam* actions against former clients implicate several of the Model Rules of Professional Conduct (MRPC). For instance, Rule 1.9(a) prohibits a lawyer who has formerly represented a client from thereafter "represent[ing] another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client"¹¹ In this context, the question becomes whether the attorney "represent[s]" the government as a *qui tam* relator, even though she is not representing the government in the capacity of counsel.¹² The district court in *FLPA* found that narrowly interpreting the term "represent" to mean "represent as counsel" "would stand squarely in conflict with the spirit of the rule and the great federal interest in preserving the sanctity of the attorney-client relationship."¹³ If future courts adopt this same broad interpretation of the term "represent," attorney relators might be barred outright from bringing *qui tam* actions against former clients, especially when the attorney was the former client's general counsel.

An attorney bringing a *qui tam* action against a former client might also violate Rule 1.6 if she reveals information subject to the attorney-client privilege.¹⁴ Attorney relators commonly assert Rule 1.6(b)(3)'s "future crime" exception as a defense. Under this exception, an attorney may reveal protected information "to prevent, mitigate or rectify

* James J. Hennelly is a third year law student at American University Washington College of Law.

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 has used the lawyer's services."¹⁵ This is most common in situations where a former in-house counsel knew her client was engaged in illegal activity while employed by the client, and the counsel believes the client is still engaged in the illegal activity, as is the case in *FLPA*. To assert this exception, the attorney must "reasonably believe" that disclosure is necessary to prevent the crime or fraud that is "in furtherance of which the client has used or is using the lawyer's services."¹⁶ According to the court in *FLPA*, once an attorney is barred from bringing a *qui tam* action against a former client under Rule 1.9(a), she cannot then claim an exception to the attorney-client privilege under Rule 1.6(b).¹⁷ Moreover, the "future crime" exception is limited to information necessary to prevent the continuation or commission of a crime; it does not give former counsel the ability to disclose client confidences regarding past conduct.¹⁸ Accordingly, an attorney bringing a *qui tam* action against a former client likely will not be able to circumvent the "future crime" exception.¹⁹

All of this begs the question of what an appropriate remedy should be when an attorney filing a *qui tam* action discloses information protected by the attorney-client privilege. The *FLPA* court disqualified from the case not only the attorney relator, but also his counsel and the other non-attorney relators.²⁰ *FLPA* is only the latest case to forego allowing an attorney relator to pursue an FCA claim in favor of protecting the inviolability of the attorney-client privilege.²¹ This trend is likely to continue, as it should. Clients might otherwise be less likely to seek advice from their attorneys or might provide their attorneys with incomplete information. Further, the concern that disqualifying such relators would allow alleged fraud to go unpunished is unwarranted; the *FLPA* court did not bar the government from pursuing a FCA action against Quest Diagnostics.²² In this sense, disqualifying attorney relators when they reveal protected information does not necessarily conflict with the underlying purposes of the FCA.

CONCLUSION

Even if an attorney could circumvent Rule 1.9 — either because a court narrowly interprets the term "represent" or because the attorney did not represent the former client in a substantially similar matter — she would still face difficulty pursuing a *qui tam* action against a former client. Attorneys generally will be barred from bringing FCA claims against former clients unless they can do so without revealing information protected by the attorney-client privilege. Notably, meeting the "original source" requirements of the FCA likely would be difficult without revealing at least some information protected by the attorney-client privilege. If the *FLPA* court's approach gains widespread acceptance, attorneys will almost assuredly be barred from bringing *qui tam* cases against former clients in this context.

Given that courts must resort to interpreting ambiguities in the FCA to resolve these issues, a possible legislative solution would be for Congress to add to the FCA a provision that expressly precludes attorneys from filing *qui tam* actions against current or former clients. While in some respects prohibiting attorneys from filing *qui tam* suits is antithetical to the underlying purposes of the *qui tam* provisions, these whistleblower laws should not erode the attorney-client privilege.

¹ The FCA allows private persons, known as "relators," to bring a *qui tam* action on behalf of the United States when those persons have information that a defendant has knowingly submitted or caused the submission of false or fraudulent claims to the United States. See 31 U.S.C. § 3730(b).

² See, e.g., *United States ex rel. Repko v. Guthrie Clinic et al.*, 3:04CV1556, 2011 WL 3875987 (M.D. Pa. Sept. 1, 2011) *aff'd*, 11-3682, 2012 WL 3104883 (3d Cir. Aug. 1, 2012).

³ See 31 U.S.C. § 3730(d)(1)-(2) (2011) (indicating that the *qui tam* relator receives between fifteen and twenty-five percent if the government intervenes and between twenty-five to thirty percent if the government does not proceed with the action).

⁴ See MODEL RULES OF PROF'L CONDUCT § 3730(b) (establishing that "[a] person" may bring a civil action under the FCA); see also *id.* § 3730(e) (setting forth the restrictions on who can bring *qui tam* actions).

⁵ See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2012).

⁶ See *United States ex rel. Doe v. X. Corp.*, 682 F. Supp. 1502, 1507 (E.D. Va. 1994) (“Nothing in the False Claims Act preempts state statutes and rules that regulate an attorney’s disclosure of client confidences.”).

⁷ See *Fair Labor Practices Associates (FLPA) v. Quest Diagnostics, Inc.*, 2011 WL 1330542 (S.D.N.Y. Apr. 5, 2011).

⁸ *Id.* at *1, *3.

⁹ *Id.* at * 3.

¹⁰ *Id.*

¹¹ MODEL RULES OF PROF’L CONDUCT R. 1.9(a) (2012).

¹² *Id.*

¹³ *United States ex rel. Fair Labor Practices Associates (FLPA) v. Quest Diagnostics, Inc.*, 2011 WL 1330542, at *6 (S.D.N.Y. Apr. 5, 2011) (explaining that otherwise attorneys could simply hire counsel to represent them in any action substantially related and materially adverse to a former client).

¹⁴ MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2012) (“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).”).

¹⁵ See *id.* R. 1.6(b)(3) (setting forth the “future crime” exception to the confidentiality rule).

¹⁶ See *id.*

¹⁷ See *FLPA*, 2011 WL 1330542, at *9.

¹⁸ *Id.* at *10.

¹⁹ For an in depth discussion of the applicable ethics rules and exceptions arising in cases involving attorney relators, as well as advice for attorney relators, their counsel, and counsel for the defendants, see generally Kathleen M. Boozang, *The New Relators: In-House Counsel and Compliance Officers*, 6 J. HEALTH & LIFE SCI. L. 16 (2012).

²⁰ See *FLPA*, 2011 WL 1330542, at *13.

²¹ See, e.g., *Bury v. Cmty. Hospitals of Cent. California*, F036667, 2002 WL 968833 (Cal. Ct. App. May 8, 2002) (dismissing a *qui tam* action under the California FCA after the relator, a former in-house counsel of the defendant, disclosed confidential information in violation of the attorney-client privilege); *United States ex rel. Doe v. X Corp.*, 862 F. Supp. 1502 (E.D. Va. 1994) (finding that a former counsel was ineligible to serve as a relator for purposes of determining whether the was entitled to the relator award).

²² See *FLPA*, 2011 WL 1330542, at *14.