Former Counsel Violated Ethics Rules by Informing on Client

By Joseph Callanan, American Bar Association, Section of Litigation, Litigation News Associate Editor – January 24, 2014

While the False Claims Act may allow plaintiffs to bring claims in court, the federal statute does not preempt state rules governing attorneys’ duty of confidentiality. Affirming dismissal, the U.S. Court of Appeals for the Second Circuit chose to side with an attorney’s ethical duty of confidentiality over the government’s interest in encouraging “whistleblowers” to disclose unlawful conduct. In Fair Laboratory Practices Assoc. v. Quest Diagnostics, Inc., the appellate court held a former in-house counsel, acting as a relator in a qui tam action, violated Rule 1.9(c) of the New York Rules of Professional Conduct by using confidential client information against his former company.

The Qui Tam Action
The defendants included the parent corporation, Quest Diagnostics, Inc., a subsidiary, Unilab Corporation, and numerous “John Doe” defendant-corporations. The plaintiff-relator was a three-person partnership consisting of Unilab’s former employees, including its former chief executive officer, chief financial officer, and general counsel, whose actions were the main issue on appeal.

In 2005, the plaintiff-relator filed a qui tam action under the federal False Claims Act, 31 U.S.C. §§ 3729–3733 in the U.S. District Court for the Southern District of New York. The relator alleged that for nearly 10 years Unilab violated the federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b)(2), by providing certain below-cost services to health care providers to induce the providers to refer government-paid services to Unilab. None of the relators worked for Unilab when the suit was filed, and the former general counsel had left the company nearly five years earlier.

The defendants filed in 2010 a Rule 12 motion that argued the court should dismiss with prejudice the plaintiff’s entire complaint. The motion sought dismissal on the ground that the former general counsel violated his professional obligations by disclosing confidential client information in the lawsuit. The defendants also argued the court should disqualify the plaintiff organization, its general partners, and its counsel from the action, and any subsequent action based on these facts, because of its former counsel’s breach of confidentiality. The trial court granted the motion in 2011.

Duty of Confidentiality versus Encouraging Whistleblowers
The federal False Claims Act’s qui tam provision allows private plaintiffs, known as relators, to sue on behalf of themselves and the government to recover for false or fraudulent claims against the government. In affirming the district court, the appellate court noted “the tension between an attorney’s ethical duty of confidentiality and the federal interest in encouraging ‘whistleblowers’ to disclose unlawful conduct harmful to the government.” The appellate court explained that “[w]hile the [False Claims Act] permits any person . . . to bring a qui tam suit, it does not authorize that person to violate state laws in the process.” Since the appellate court found no
federal preemption of state attorney ethical rules, the court considered whether the former in-house counsel’s actions were ethical.

The appellate court held the former in-house counsel breached his ethical obligations to his former client by disclosing confidential client information beyond what was “necessary” within the meaning of the rules. As a result, the appellate court affirmed disqualification of the plaintiff, the individual realtors, and their counsel from bringing any future suit on the same basis.

“The attorney involved disclosed more information, including historical information, than what was necessary to prevent the ongoing commission of a crime,” says Stephen J. Siegel, Chicago, IL, cochair of the ABA Section of Litigation’s Commercial & Business Litigation Committee. The plaintiff-relator conceded the other partners possessed sufficient information, and the disclosure by the former in-house counsel was unnecessary. “According to the opinion, the attorney did not have to be involved at all,” or the attorney “could have limited his disclosure to current information sufficient to stop the ongoing commission of a crime,” says Siegel.

**False Claims Act Does Not Give Attorneys Carte Blanche**

Some Section of Litigation leaders believe that such a breach of confidentiality by counsel for personal gain is wholly inconsistent with long-held norms of the profession. If the former in-house counsel truly had a “concern of fraud, well guess what, there are other means to have revealed the information,” says Nathaniel Cade Jr., Milwaukee, WI, cochair of the Section of Litigation’s Health Law Litigation Committee.

“If this lawyer had a problem, he could have gone to the board and said, hey there is fraud going on, and you have got to stop it. And, if you don’t, I am going to reveal it to the extent necessary to stop the fraud,” states Cade. Instead, by being a relator in a *qui tam* action, “there is this element of taint, if you will,” adds Cade.

Although numerous federal statutes encourage whistleblowing, such as the Sarbanes Oxley Act, the Dodd-Frank Act, and the False Claims Act, *Fair Laboratory Practices* signals a clear roadblock to an attorney’s ability to act as a relator in a *qui tam* action against a former client. ABA Model Rule of Professional Conduct 1.6 “already accounts for and balances the government interest in disclosure against the confidentiality obligation of the attorney of confidentiality by permitting disclosure of confidential information only when it’s necessary to prevent the ongoing commission a crime,” says Siegel.

“The rules always apply,” reminds Cade. The government wants “people to whistleblow, but this is not the type of thing that the attorney-client privilege should be discarded with ease,” concludes Cade.

**Keywords:** False Claims Act, Anti-Kickback Statute, attorney-client privilege, duty of confidentiality, crime-fraud exception
Related Resources


- New York State Unified Court System, Rules of Professional Conduct (May 1, 2013).


- Pamela A. Bresnahan, “The Ethics of Lawyer-Client Fallout: Recent Cases Addressing Rule 1.6 Confidentiality Issues,” at 12–66, ABA Section of Litigation Annual Conference, Chicago (April 25, 2013).


