Ethics Rules Put the Brakes on Attorney Whistleblowers

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Two recent decisions—one by the U.S. Court of Appeals for the Second Circuit and one by the New York County Lawyers' Association (NYCLA) Committee on Professional Ethics—addressing the interplay between attorney ethical obligations and statutory regimes that provide bounty awards for whistleblowers reached the same conclusion: Professional ethical obligations preclude attorneys from being bounty-seeking whistleblowers against current or former clients. Although the two decisions addressed the New York ethical rules and specific whistleblower bounties available under the False Claims Act (FCA) and Securities and Exchange Commission whistleblower program created by the Dodd-Frank Act, respectively, they likely have broader application.

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DISMISSAL OF QUI TAM SUIT

In 2005, Mark Bibi, a former general counsel (GC) of Unilab, and two other former executives formed Fair Laboratory Practices Associates (FLPA) for the purpose of acting as the relator in FCA qui tam actions against Unilab and its parent company, Quest Diagnostics. In June 2005, FLPA filed suit alleging FCA violations resulting from a "pull-through scheme" involving unreasonable discounts on medical testing services for patients with private insurance to induce use of its services on government health care patients. Defendants moved to dismiss, arguing that the former GC violated the New York ethical rules by disclosing confidential information about Unilab, his former client. The district court granted the defendants' motion.

In affirming the dismissal in *United States Fair Laboratory Practices Assocs. v. Quest Diagnostics*, No. 11-1565 (2d Cir. Oct. 25, 2013), the Second Circuit first determined that the FCA does not preempt state ethical rules because "[n]othing in the False Claims Act evinces a clear legislative intent to preempt state statutes and rules that regulate an attorney's disclosure of client confidences." The Second Circuit then considered an attorney's duty to maintain clients' confidential information and the limited circumstances under New York Rules of Professional Conduct (N.Y. Rule) 1.6(b), in which an attorney may "reveal or use confidential information to the extent that the lawyer reasonably believes necessary," including to "prevent the client from committing a crime." The New York Rules broadly define "confidential information" to include not only information protected by the attorney-client privilege, but also information "likely to be embarrassing or detrimental to the client if disclosed" and "information that the client has requested be kept confidential."

To determine whether N.Y. Rule 1.6 was violated, the Second Circuit engaged in a two-part analysis, considering whether the former general counsel reasonably believed: (1) the defendants intended to commit a crime when he filed the qui tam action; and (2) the disclosures were necessary to prevent the defendants from committing a crime. Without much discussion, the Second Circuit found that the former general counsel could have reasonably believed that Unilab intended to violate the federal Anti-Kickback Statute, 42 U.S.C. §1320a-7b (AKS) in 2005.

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Under the second prong of the analysis, however, the court held that the disclosures were not reasonably necessary to prevent that crime for two reasons: (1) Bibi disclosed information dating back to 1996, which was "greater than reasonably necessary to prevent any alleged ongoing fraudulent scheme in 2005"; and (2) "it was unnecessary for Bibi to participate in this qui tam action at all" given that "FLPA could have brought the qui tam action based on the information that [the other two relators] possessed…or, if necessary, Bibi could have made limited disclosures."

ETHICS OPINION 746

Less than three weeks before the Second Circuit's decision came down, the NYCLA Ethics Committee issued Formal Opinion 746, addressing whether attorneys can participate in the SEC whistleblower program, which provides monetary rewards for voluntarily providing original information that leads to a successful enforcement action resulting in monetary sanctions exceeding $1 million. Similar to the Second Circuit, the ethics committee began its analysis by determining that state ethical rules are not preempted by SEC rules, given the reference therein to the attorney-client privilege and "applicable state attorney conduct rules," which "implicitly assume a side-by-side coexistence" of the two sets of rules. The ethics committee then considered the circumstances under which an attorney may disclose confidential information—including to "prevent the client from committing a crime"—but determined that because "reporting out" is not mandatory, disclosure of confidential information "is not reasonably necessary" as required by N.Y. Rule 1.6(b).

Focusing on the same "reasonably necessary" language as the Second Circuit, the ethics committee "opine[d] that disclosure of confidential information in order to collect a whistleblower bounty is unlikely, in most instances, to be ethically justified…because, under most circumstances disclosure is not reasonably necessary" and therefore would not fall within the enumerated exceptions to N.Y. Rule 1.6(b). The ethics committee also considered the "even more significant ethical issue" of whether collecting a bounty under the SEC whistleblower program creates a conflict of interest in violation of N.Y. Rule 1.7, to which it answered "presumptively yes" when the disclosure is permissive rather than mandatory.

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DIFFERENT OUTCOME?

The Second Circuit's decision can be read as leaving open the possibility that under different circumstances, a future qui tam suit brought by an attorney-relator could proceed—perhaps if there were no other relators with enough information to bring a suit, or if the attorney-relator was more circumspect in his or her disclosures and did not "spill [his] guts…and disclose everything" as the former Unilab GC believed he could do. The court even said, "if necessary, Bibi could have made limited disclosures." The court did not, however, provide any guidance as to when it might be necessary or what disclosures would be considered sufficiently limited so as not to run afoul of an attorney's ethical rules. Tellingly, immediately following this statement, the Second Circuit quoted the ethics opinion holding that there are "few circumstances, if any" in which it would be reasonably necessary for an attorney to collect a bounty as a reward for revealing confidential information.

Critical to the ethics committee's analysis is the fact that although the SEC rules require lawyers to report evidence of violations of the securities laws up the corporate ladder, they only permit—and do not require—an attorney to report outside of the company. Because filing an FCA qui tam suit is never required, it would be difficult to argue that doing so could ever be reasonably necessary, especially because N.Y. Rule 1.13 lays out several actions an attorney can take if he or she is aware of a violation, including reporting up within the organization.

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Even if an attorney could carefully thread the needle and disclose only non-confidential information, as suggested by the Second Circuit, the ethics committee's determination that attorneys cannot seek personal gain at a former client's expense and that collecting a whistleblower bounty creates a conflict of interest with current clients closes the door to this possibility.

Although both decisions interpreted New York ethical rules, the underlying analyses would likely apply in other jurisdictions. The American Bar Association's Model Rules of Professional Conduct, on which many jurisdictions base their professional responsibility rules, are arguably more restrictive than the New York Rules with respect to when an attorney may reveal confidential information. Model Rule 1.6(b)(2) permits an attorney to reveal information to the extent the attorney "reasonably believes necessary…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 and in furtherance of which the client has used or is using the lawyer's services."

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Although Model Rule 1.13 provides an exception to Rule 1.6 and permits (but does not require) an attorney to report out confidential information in limited circumstances, the attorney may do so only to the extent reasonably necessary and, per the Second Circuit and NYCLA ethics committee decisions, filing a qui tam suit would not be reasonably necessary under those circumstances. Likewise, even in jurisdictions that require "noisy withdrawal" when the failure to disclose a material fact to a third person is necessary for the attorney to avoid assisting a client in a crime or fraud, it would be difficult for attorneys to justify availing themselves of whistleblower-bounty provisions because, as the NYCLA ethics committee noted, "preventing wrongdoing is not the same as collecting a bounty."

CONCLUSION

Taken in tandem, these decisions suggest there is likely no situation in which an attorney could act as a bounty-seeking whistleblower against a current or former client without violating countervailing ethical obligations. But of course, this limitation applies only to attorneys. Other company employees (and non-employees) may still seek a whistleblower bounty without limitation. In fact, the absence of any requirement that company employees report up within a company before filing a qui tam suit is a criticism that has been levied against the FCA. In that regard, the SEC whistleblower program, which encourages reporting up for all employees and makes it a requirement for some types of employees, may be a more effective model because it gives companies a chance to investigate concerns and remediate as needed.