ETHICS: AN IN-HOUSE LAWYER'S PROFESSIONAL DUTIES VS. RIGHTS AS AN EMPLOYEE

Joe Ortego
Nixon Peabody

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA *EX REL* FAIR LABORATORY PRACTICES ASSOCIATES,

Plaintiff,

- against -

QUEST DIAGNOSTICS INCORPORATED, UNILAB CORPORATION, d/b/a QUEST DIAGNOSTICS, and XYZ CORPORATIONS 1-100

Defendants,
----------X

05 Civ. 5393 (RPP)

OPINION AND ORDER

REDACTED

ROBERT P. PATTERSON, JR., U.S.D.J.

I. Introduction

On May 14, 2010, Plaintiff, Fair Laboratory Practices Associates ("Plaintiff", "FLPA" or "relators"), filed a Second Amended Complaint ("SAC") under seal in a *qui tam* action against Defendants Quest Diagnostics Incorporated, Unilab Corporation, d/b/a Quest Diagnostics, and XYZ Corporations 1-100 under the Federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33 and the respective false claims acts of seventeen states and the District of Columbia.[1] Plaintiff alleges that Defendants violated the Federal Health Care Anti-Kickback Act, 42 U.S.C. § 1320a-7b(b) ("Anti-Kickback Statute" or "AKS") in offering medical testing services for managed care patients at a substantial discount or below cost in order to receive referrals of Medicare and Medicaid patients that Defendants could bill directly.

[1] The Original Complaint in this action was filed under seal on June 7, 2005. Subsequently, an Amended Complaint was filed under seal on December 1, 2008. The seal on this Amended Complaint was lifted, and the Amended Complaint disclosed to the Defendants, by a September 16, 2009 Order of this Court. The Second Amendment Complaint, with limited redactions, was produced to the Defendants by August 12, 2010, pursuant to an August 10, 2010 Order of this Court.

Defendants moved to dismiss the SAC by Memorandum of Law filed under seal on October 13, 2010 and an accompanying Declaration by Stephen Gillers ("Gillers Decl."), Professor of Law at New York University School of Law, and based on special discovery pursuant to Court Orders of July 20, August 10, and September 28, 2010.[2] Plaintiff's answering memorandum, filed under seal on November 30, 2010, was accompanied by the Declaration of Andrew M. Perlman ("Perlman Decl."), Professor of Law at Suffolk University Law School. Defendants submitted a reply memorandum, filed under seal on December 10, 2010 and accompanied by the Reply Declaration of Stephen Gillers ("Gillers Reply Decl."). The Court held oral argument on December 15, 2010.

For the following reasons, Defendants' motion to dismiss FLPA's complaint is granted and FLPA, its general partners, and its counsel are disqualified from this action, and any subsequent action based on these facts.[3]

[2] At a conference on July 20, 2010, this Court allowed Defendants to take the depositions of FLPA's three general partners: Mark Bibi, Andrew Baker, and Richard Michaelson. This Court also ordered FLPA to respond to certain interrogatories. By subsequent orders, this Court required FLPA to produce, among other documents, the June 7, 2005 Disclosure Statement submitted by the Relator to the United States; the FLPA partnership agreement; and the engagement letters between FLPA and its counsel.

[3] To date, the United States has not intervened in this 2005 action. By Notice dated November 9, 2009 and Order of November 10, 2009, the Government advised that it had not made its intervention decision but that its investigation of Quest was continuing. (Statement of Interest of the United States in Opp. to Def. Motion at 3.) The dismissal of this complaint filed by FLPA and disqualification of FLPA and its partners from this suit has no effect on the ability of the Government to pursue its prosecution of these Defendants. (See Transcript of December 15, 2010 Hearing ("Tr. 12/15/10") at 105 ("[N]othing that we have suggested here today, including the dismissal of the claims of FLPA, would undercut the United States' ability to move to intervene in this case.")); See also U.S. ex rel Williams v. Bell Helicopter Textron Inc., 417 F.3d 450, 455-56 (5th Cir. 2005) (affirming District Court's dismissal of a relator's *qui tam* complaint on Rule 9(b) grounds but finding that Court erred in also dismissing potential claims by the Government, which had not intervened in the action, on the grounds that dismissal of relator's complaint was not on the merits); U.S. ex rel Laird v. Lockheed Martin Engineering, 336 F.3d 346, 358 (5th Cir. 2003) (asserting that dismissal against one relator may not necessarily preclude another relator from bringing the same suit on behalf the government). In its Statement of Interest, the Government asked for 30 days to decide whether to move to intervene in this matter in the event that Defendants' motion was granted. The Defendants have no objection, (Tr. 12/15/10 at 10), and this Court grants that request.

II. Background

Parties

FLPA is a Delaware general partnership formed by three former senior Unilab executives now employed by Life Sciences Research, Inc. ("LSR") in Hackensack, New Jersey – Andrew Baker, Richard Michaelson, and Mark Bibi – for the sole purpose of prosecuting this *qui tam* action under the FCA. (Deposition of Mark Bibi ("Bibi Dep.") at 9:12-19, 16:7-21, 136:20-22.) As a general partnership, FLPA is not an entity distinct from its partners. The FCA permits private persons, known as "relators," to bring a *qui tam* action on behalf of the United States when private persons have information that the defendant has knowingly submitted or caused the submission of false or fraudulent claims to the United States. The FCA requires that the relator's complaint be filed under seal for a minimum of 60 days (without service on the defendant during that time) to allow the Government time to conduct its own investigation and to determine whether to intervene in the suit. FLPA is the relator in this action. The Government has not yet made its decision on whether or not to intervene.

Baker served as Chairman and Chief Executive Officer ("CEO") of Unilab from 1993 to the end of 1996. (Deposition of Andrew Baker ("Baker Dep.") at 26:9-27:6.) Michaelson served as Unilab's Chief Financial Officer ("CFO") from 1993 until about 1997, and then as a Director of Unilab until 1999. (Deposition of Richard Michaelson ("Michaelson Dep.") at 18:5-19:5.) Bibi served as Unilab's General Counsel from 1993 through spring of 2000. (Bibi Dep. at 29:3-8.) During his seven year tenure at Unilab, Bibi was the sole lawyer employed by the company and was responsible for all of the company's legal affairs. (Bibi Dep. at 29:3-8; 124:8-11.) In his role, Bibi advised the company on matters relating to its contracts with managed care

organization ("MCOs"), managed all litigation against Unilab, and advised the company on compliance with health care fraud and abuse laws, including the AKS and managed care contracting practices. (Id. at 69:12-18, 119:9-12, 125:10-126:12, 126:6-12, 128:22-131:14.) Bibi is only licensed to practice law in the state of New York. (Id. at 118: 4-6.)

Defendant Quest is a publicly-traded Delaware corporation headquartered in Madison, New Jersey, engaged in the business of providing diagnostic testing services to MCOs and independent physician associations ("IPAs") nationwide. (SAC ¶¶ 8-10.) Defendant Unilab was publicly held from 1993 to November 22, 1999. (Id. at ¶¶ 13.) On November 23, 1999, Kelso & Company ("Kelso"), a private equity firm, completed a leveraged buyout of Unilab, making the company private. (Id. at ¶ 14.) In 2001, there was an initial public offering of Unilab. (Id. at ¶ 15.) In February 2003, Quest Diagnostics Newco Inc., a wholly-owned subsidiary of Quest, completed a cash tender offer for Unilab and thereafter Unilab became a wholly-owned subsidiary of Quest. (Id. at ¶ 16.)

The Second Amended Complaint ("SAC")

FLPA alleges, on behalf of the United States and plaintiff states, that from at least January 1, 1996 through present, Defendants violated the AKS, through their operation of an ongoing "pull through" scheme wherein Defendants charged IPAs and MCOs below cost rates for the performance of laboratory tests so as 1) to induce the physicians in the IPAs to refer Medicare and Medicaid-reimbursable tests to the Defendants and 2) to induce the MCOs to arrange or recommend that their in-network physicians send Medicare and Medicaid-reimbursable tests to the Defendants. (Id at ¶ 3.)

The Anti-Kickback Statute

The AKS states in relevant part that anyone

> who knowingly and willfully offers or pays any remuneration (including any kickback, bribe or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person – (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made ... under a Federal health care program...shall be guilty of a felony...

42 U.S.C. § 1320a-7b(b)(2).

The AKS defines "remuneration" as including "transfers of items or services for free or for other than fair market value." 42 U.S.C. § 1320a-7a(i)(6).

The Role of the Relators

Between 1993 and 1996, Plaintiff claims that several of Unilab's officers, [redacted] gradually came to question the legality of the "pull through" scheme employed by the company. (Pla. Opp. Memo at 3.) In 1996, for example, [redacted] Michaelson became aware of an opinion letter dated September 16, 1996 written to the California Clinical Laboratory Association by its counsel W. Bradford Tully, Esq. interpreting the provision of the AKS. (Bibi Dep. at 307:7-308:22.) The letter concluded, in part, that

[redacted]

(Plaintiff's June 7, 2005 Disclosure Statement to the United States ("Disc. Statement"), Ex. 2 at 2.) [4]

[4] Relators were required to file a Notice of Disclosure Statement to the United States pursuant to 31 U.S.C.§ 3730(b)(2) in order to pursue this *qui tam* action.

While the relators were at Unilab, Unilab's prices to its managed care customers were below cost and in many cases only about 50% of cost. (Disc. Statement at 22.) Baker and Michaelson discussed Tully's letter with Bibi, [redacted] Baker and Michaelson became increasingly concerned with their pricing scheme and decided to raise Unilab's prices on testing for MCOs nearer to cost. (Baker Dep. at 152:5-153:3; Michaelson Dep. at 68:22-72:22.) As a result of this increase in costs, "Unilab's customers began to slowly slip away to Unilab's competitors" and Unilab's profitability decreased. (SAC at ¶¶ 93-94.) Baker was ousted as CEO of Unilab in 1997 as a consequence. (Id. at ¶ 95.) David Weavil succeeded Baker as CEO and continued Baker's strategy of increasing contracting prices. (Id. at ¶¶ 97-98.) In November of 1999, Kelso & Co. completed a leveraged buyout of Unilab for $5.85 per share and brought in new management, including Robert Whalen as CEO. It is alleged that Whalen began a more aggressive pursuit of unlawful kickback schemes during his tenure. (Id. at ¶ 103.)

On December 7, 1999, the Office of the Inspector General for the Department of Health and Human Services ("OIG") released Advisory Opinion 99-13, which indicated that if the prices offered to MCOs were below-cost, which the opinion stated as meaning below "total cost,"[5] the OIG would infer that such pricing was offered for the purpose of inducing fee-for service pull-through business in violation of the AKS. (Disc. Statement, Ex.7.) Bibi [redacted] called D. McCarty Thornton, Chief Counsel to the OIG and author of Advisory Opinion 99-13, [redacted] (Bibi Dep. at 46:8-47:6; 256:20-257:8.)

[5] Advisory Opinion 99-13 stated: "In determining whether a discount is below cost, we look, for example, at the total of all costs including labor, overhead, equipment, etc.) divided by the total number of laboratory tests." (Disc. Statement, Ex. 7 at 6.)

[redacted] (Bibi Dep. at 40:2-19.) [redacted] (Id. at 41:9-20). [redacted]

[redacted]

[redacted]

(Id. at 59:21-60:10, 60:17-61:12.)

[redacted]

(Id. at 46:10-47:6.)[6] [redacted]

(Id. at 43:14-22; 45:10-46:3).[7] Bibi then testified as follows:

[redacted]

[6] The OIG subsequently clarified its position by letter dated April 26, 2000 which stated that "discount arrangements below those benchmarks (discussed in 99-13) are not illegal *per se* but only 'suspect' in the sense that they may merit further investigation depending on the facts and circumstances presented." (Declaration of Scott D. Stein, Esq. ("Stein Decl.") at Ex. 12.) In 2004, the OIG again addressed the issue and stated that discount arrangements are "particularly suspect." (Disc. Statement at 48 & Ex. 15.)

[7] Bibi testified at his deposition that he had not previously disclosed to his counsel any of Whalen's comments during this 2000 meeting. (Bibi Dep. at 42:5-43:13; 74:3-76:4.) Bibi also maintained that he did not disclose to Baker and Michaelson the substance of his communications with Whalen regarding Unilab's contracting practices until after he came to the conclusion in September 2004 that he could participate in this lawsuit. (Id. at 174:17-177:11.)

(Id. at 45:19-46:7.)

(Id. at 83:9-84:3.)

(Id. at 225:20-226:12.)

(Id. at 88:11-89:4; 99:16-100:17).[8]

(Id. at 101:19-102:19; Disc. Statement, Ex. 19.)

(Bibi Dep. at 103:8-20.) Shortly after these events, Bibi was "frozen out" and no longer asked for his advice on compliance matters. (Id. at 81:15-82:2, 101:11-102:11). Bibi stayed on as General Counsel until March 2000 to provide transitional assistance to his replacement, David Gee. (Disc. Statement at 31.)

(Id.) While in private practice, Gee had written extensively for

publicly circulated laboratory newsletters specifically referring to the OIG opinions and warning the industry about the dangers of below cost and "pull through" kickbacks. (Id. & Ex. 13, 14; SAC at ¶ 105.) Upon leaving Unilab, Bibi rejoined Baker and Michaelson, and became general counsel of LSR, where Baker was CEO and Michaelson was CFO. (Def. Memo at 5-6.)

Three years later, in 2003, Kelso sold Unilab to Quest for approximately $26.50 per share. Baker subsequently called R. Jeffrey Lanzolatta, the President of Unilab's Southern California Division until Quest's acquisition, and asked him why and how Unilab's stock price had dramatically increased since its acquisition by Kelso in 2000. Baker stated that Lanzolatta told him that Unilab had returned to "pull-through" arrangements and made them very profitable during the Kelso period. Baker stated that Lanzolatta also told him that Quest itself was engaged in the same "pull through" practices on a nationwide scale. (Baker Dep. at 104:13-105:22, 107:17-108:3). Baker then reported to Bibi what Lanzolatta had told him regarding Unilab's continuing use of the "pull through" scheme under Whalen. (Bibi Dep. at 104:4-22). Bibi testified that he then spoke with Lanzolatta directly in a series of meetings in 2004 and 2005 during which time Lanzolatta told Bibi that under Whalen, Unilab expected the IPAs and HMOs to refer 100% of their non-managed care business to Unilab, to instruct their physicians to refer all their fee for service business to Unilab, and to threaten to kick uncooperative physicians out of their network. (Bibi Dep. at 67:4-68:7,181:9-19, 197:7-199:21.)

In 2003 through early 2005, Baker had various discussions with Guy Seay and Jerry Tice, who each owned laboratory companies sold to Quest in 2003. (Disc. Statement at 17-18.) Tice, who was working for Quest in 2004, described Quest's illegal "pull through" practices and how they had been exported to the company he once owned. (Id. at 18-19.) Seay similarly described Quest's practices. (Id.) Finally, the relators retrieved information contained in Unilab's and

Quest's securities filings including Quest's 10-K for 2004, which had been filed on March 10, 2005 and included newly-acquired Unilab. (Dis. Statement at 35-41.) Quest's 10-K stated that "[i]n 2004, we derived approximately 19% of our testing volume and 7% of our net revenues from capitated payment arrangements."[9] (Disc. Statement at 38). FLPA alleges that this disparity between volume and revenue percentages establishes that below cost pricing was the inducement for Quest's capitated arrangements. (Id.)

Based on the totality of this information, Baker initiated the effort to file the instant *qui tam* action. (Bibi Dep. at 147:18-19.) Baker then asked Michaelson and Bibi to join him as relators. (Bibi Dep. at 150:14-19; Michaelson Dep. at 101:17-102:5). Baker told Bibi that having Bibi join as a relator would improve their credibility with the Government. (Bibi Dep. at 156:10-14.) Before deciding to participate in the suit, Bibi reviewed the New York Code of Professional Responsibility[10] and the American Bar Association Model Rules of Professional Conduct to determine whether his participation in the *qui tam* action would be consistent with his ethical obligations as former counsel for Unilab. (Id. at 74:7-76:4.) Bibi testified that because he reasonably believed that Unilab and Quest were continuing to defraud the United States, he concluded that he could rely on exceptions to the ethical rules regarding a lawyer's obligation to maintain client confidences and participate in the action as a relator. (Id. at 74:3-76:4.)

On November 1, 2004, Bibi, Baker and Michaelson entered an agreement to form a litigation partnership, FLPA. The agreement recites that "[t]he Parties have been cooperating and will continue to cooperate to gather, analyze, and synthesize information regarding the

[9] When an arrangement is capitated, the purchaser of services pays a flat amount per-member per-month. If those payments are insufficient to cover the costs of the services provided, the provider must nonetheless provide the contracted-for services without receiving additional payment. (Disc. Statement at 20 n.5.)

[10] On April 1, 2009, the New York Code of Professional Responsibility was replaced by the New York Rules of Professional Conduct.

wrongdoing at Unilab and Quest... for the purpose of preparing, filing, and prosecuting an action under the Federal and/or state False Claims Acts." (Def. Memo at 8.) The FLPA partnership agreement appoints Bibi as the partner "responsible for the day-to-day management of the Partnership business and for the implementation of all decisions of the Partners." (Id.) It further provides that Bibi has a 29% interest in any profits or distributions from FLPA. Baker and Michaelson have a 57% and a 14% interest respectively. (Id.) On June 7, 2005, FLPA filed the Original Complaint in this suit under seal and submitted its Disclosure Statement to the United States under seal pursuant to 31 U.S.C. § 3730(b)(2).

The Motion to Dismiss

Defendants state that FLPA's SAC, Disclosure Statement and Defendant's limited discovery establish that Bibi disclosed Unilab's confidential information to which he was privy as general counsel, to his partners in FLPA, to FLPA's attorneys, and to counsel for the United States. In doing so, Defendants assert Bibi breached his duty of loyalty to his former client to its disadvantage and for his own personal benefit. FLPA does not contest the characterization of some of this information as confidential but claims that because Bibi had knowledge of a continuing crime, his disclosure fit within an exception to his duty of confidentiality.[11] Examples of these disclosures include the following:

- [redacted]

(Disc. Statement at 14.)

[11] Bibi testified at his deposition that while he was initially hesitant about participating in the lawsuit because of his ethical obligations to Unilab, he "got confident" that he could join as a relator once he reviewed New York's and the American Bar Association's Rules of Professional Conduct. (Bibi Dep. at 74:7-21.) After that, he explained, "[I] intellectually...concluded [that] I could spill my guts...and disclose everything." (Id. at 75: 2-14.)

- [redacted] (Id. at 19.)
- [redacted] (Id. at 21.)
- [redacted] (Id. at 31.)
- [redacted] (Id.)
- [redacted]

(Id.)

(Def. Memo at 8-9.)

While Baker and Michaelson may have personal knowledge regarding some subset of Unilab's confidential information, they were no longer employed by Unilab after 1996 and 1999 respectively. Accordingly, Bibi is the sole FLPA partner with any personal knowledge about the Kelso period (post-November 1999). (Def. Memo at 9.) In fact, both Baker and Michaelson concede that Bibi has conveyed to them his confidential communications with Whalen during that period. (Id.; Baker Dep. at 179:9-190:1, Michaelson Dep. 198:1-9, Bibi Dep. 179:14-181:8.)

Defendants maintain that the amended complaint should be dismissed and that neither FLPA nor its general partners should be able to proceed with this suit. (Def. Memo at 1.) Defendants assert that dismissal with prejudice of FLPA's claims "is required because the very reason for Bibi's involvement in this litigation was to procure and take advantage of his breach of his ethical duties to his former client" for his own personal gain. (Id. at 25.)

III. Legal Standard

Applicability of the New York Code of Professional Responsibility

While federal courts may look to the Model Rules of Professional Conduct and state disciplinary rules for guidance, such rules are not binding on this Court. Hempstead Video Inc. v. Incorporated Village of Valley Stream, 409 F.3d 127, 132 (2d Cir. 2005). The "salutary provisions [of the New York rules]" however, "have consistently been relied upon by the courts of this district and circuit in evaluating the ethical conduct of attorneys." Hull v. Celanese Corp., 513 F.2d 568, 571 n.12 (2d Cir. 1975). See Local Civil Rule 1.5(b)(5).

The "choice of law" provision in the New York Code of Professional Responsibility states that "[f]or conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice...the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." DR 1-105(B)(1). Bibi is a member of the New York bar (Bibi Dep. at 118:4-6), and this proceeding is pending in the Southern District. Consequently, the choice of law provision in the New York Code indicates that Bibi's actions should be evaluated under New York's Code of Professional Responsibility – the ethics rules which were in effect at the time of Bibi's disclosures.

The FCA does not preempt state ethical rules: the Court must weigh the federal interests at stake

In applying the New York Code, it is important to note that the Second Circuit has held that if an interpretation of a state ethical rule is "inconsistent with or antithetical to federal interests, a federal court interpreting that rule must do so in a way that balances the varying *federal* interests at stake." Grievance Committee for the S.D.N.Y. v. Simels, 48 F.3d 640, 646 (2d Cir. 1995). In this instance, the federal interests are the government's interests in

encouraging *qui tam* actions under the FCA and the government's interest in preserving the attorney-client privilege.

In U.S. ex rel. Doe v. X. Corp., 862 F.Supp. 1502, 1507 (E.D.Va. 1994), the court found that "[n]othing in the False Claims Act preempts state statues and rules that regulate an attorney's disclosure of client confidences." In the words of that court, the Act does not "immunize a relator for actions taken in pursuance of a *qui tam* action that violate state law...[and] where an attorney's disclosure of client confidences is prohibited by state law in a given circumstance, that attorney risks subjecting himself to corresponding state disciplinary proceedings should he attempt to make the disclosure in a *qui tam* suit." Id. Here, Defendants seek dismissal of the *qui tam* relator's action, not disciplinary action for violation of the Code of Professional Responsibility

Because state ethics rules are not trumped by the FCA, the Court must evaluate Bibi's actions in light of the New York Code of Professional Conduct. Specifically, in evaluating this motion to dismiss, the Court must consider: 1) whether the New York Code precludes Bibi's participation as a member of the relator pursuant to DR 5-108 and 2) whether FLPA can proceed against Defendants without confidential information provided by Bibi and protected by DR 4-101.[12] The Court must also consider whether the interests of the Government, the "real party at interest," are injured if it can only proceed alone against the Defendants.

[12] In its answer to Court ordered interrogatories, FLPA asserted that "virtually all communications by Unilab seeking legal advice regarding the practices alleged in the complaint are subject to the crime fraud exception." (FLPA Answer to Interrogatory No. 4.) In its moving papers, Defendants objected to the contention that the crime fraud exception applied on these facts. (Def. Memo at 13-15.) FLPA has since dropped this argument. Further, FLPA's expert, Andrew Perlman, agrees with Defendants that the doctrine does not apply on these facts. (Perlman Decl. at 133:6-134:9.) As both parties agree that the crime fraud exception is inapplicable in this circumstance, the Court declines to analyze Bibi's action under that exception.

New York Code of Professional Responsibility DR 5-108

Defendants claim, supported by the Declaration of their expert Professor Stephen Gillers, that DR 5-108(A) precludes Bibi from serving as a relator in this qui tam action. DR 5-108 states:

> A. Except as provided in DR 9-101[1200.45] (B) with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:
>
> 1. Thereafter represent 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.
>
> 2. Use any confidences or secrets of the former client except as permitted by DR 4-101 [1200.19] (C) or when the confidence or secret has become generally known.

Plaintiff does not contest that Bibi, in his role as general counsel, advised Unilab on AKS issues that are "substantially related" to those Plaintiff is raising in this case. (Pla. Opp. at 3; Declaration of Andrew M. Perlman "Perlman Decl." ¶ 66.) Further, Plaintiff does not contest, either in its briefing or at oral argument, that this suit is "materially adverse to the interests" of Unilab or that Unilab did not give its consent to Bibi's participation as a relator in this action.[13] (Bibi Dep. at 220:3-7.) The issue raised by Plaintiff in opposing papers is whether a relator in a *qui tam* action is "represent[ing] another person" within the meaning of DR 5-108 such that the provision would preclude Bibi from serving as a *qui tam* relator against the Defendants here.

Plaintiff claims that DR 5-108 is inapplicable on these facts, and that Bibi's actions need not be evaluated under the substantial relationship test because Bibi is not "representing" the

[13] FLPA does assert, however, that Bibi should be able to proceed against Defendant Quest because an action against that Defendant would not be materially adverse to the interests of his former client, Unilab. This argument is not persuasive – an action by Bibi, as a member of FLPA, against Quest alone would still have materially adverse consequences for Unilab. Monetary damages against Quest, for example, would harm its wholly-owned subsidiary, Unilab, such that Bibi's action against Quest would be materially adverse to his former client. (See also Gillers Decl. at ¶ 62; Gillers Reply Decl. at ¶ 49.)

relator *as counsel*. Defendants put forth two arguments in response. First, Defendants maintain that Bibi, as a partner of the relator FLPA, is suing as a representative of the United States subject to DR 5-108 because he is not suing to "vindicate a [personal] right ... or to redress a [personal] injury." (Def. Reply Memo at 3.) Second, Defendants argue that Bibi should not be able to skirt DR 5-108 by suing a client directly, as a party, when the rule makes clear he would be unable to sue a client indirectly, as counsel of record. Id.

a. The *qui tam* plaintiff "represents" the United States within the meaning of DR 5-108

The FCA, 31 U.S.C. 3730(b), states in relevant part:

(1) A person may bring a civil action for a violation of section 3729 *for* the person *and for* the United States Government. The action shall be brought in the name of the Government.

(emphasis added.)

Thus, a *qui tam* action allows a plaintiff to "sue[] on behalf of and in the name of the government" while the "government remains the real party in interest." U.S. ex rel Kriendler & Kreindler v. United Technologies Corp., 985 F.2d 1148, 1154 (2d Cir. 1993). A *qui tam* relator, by function of the statute, sues in a representative capacity. See also U.S. ex rel Rockefeller v. Westinghouse Electric Co., 274 F.Supp.2d 10 (D.D.C. 2003). In Rockefeller, the court held that a *qui tam* relator could not proceed pro se with the suit because "[g]enerally, a lay person cannot represent a party in court," id. at 15, and a relator in a *qui tam* FCA action "while having a stake in the lawsuit, represents the interests of the United States." Id. at 16 (citing United States v. Onan, 190 F.2d 1,4,6 (8th Cir. 1951)). The Rockefeller court analogized *qui tam* actions to class and derivative actions to further support its conclusion and found that "[l]ike a stockholder in a

stockholder derivative suit and a class member in a class action suit, a lay relator in a FCA action needs qualified legal counsel to ensure that the real party at interest, the United States, is adequately represented." Id. at 16. "Because the United States is the real party in interest," the court added, "a judgment obtained by a relator may adversely affect the United States' right to 'bring future actions on the same claim asserted here.'" Id. (internal citation omitted). Accordingly, "[c]onsidering what is at stake of the United States when a relator brings a *qui tam* action, representation by a lay person is inadequate to protect the interests of the United States." Id.

Thus, while the FCA gives a *qui tam* relator the statutory authority to bring suits on behalf of the United States, it is the United States, and not the *qui tam* relator, who is seeking to redress fraud on the public treasury and vindicate a personal right. The *qui tam* relator is a representative of the United States and its interests, and accordingly, counsel serving as a *qui* tam relator may come within the scope of DR 5-108. Here, Bibi, as a member of FLPA, is representing another person, the United States, in a matter substantially related and materially adverse to his former representation of Unilab, without his client's consent. His participation in this action is thus in direct violation of DR 5-108.

b. DR 5-108 does not permit Bibi to do directly, as a party, what he cannot do indirectly, as counsel

Defendants also argue that DR 5-108 must preclude Bibi from participating as a relator because "numerous authorities...agree that a lawyer may not escape the substantial relationship prohibition as set forth in [DR 5-108] by suing a client directly *as a party*, when the lawyer could not do so indirectly as counsel of record." (Def. Reply Memo at 3.)

Ercklentz v. Inverness Management Corp., 1984 WL 8251 (Del. Ch. Oct. 18, 1984) supports Defendants' contention that allowing Bibi to serve as a relator in this action would conflict with the legal maxim that "one cannot do directly that which he cannot do indirectly." See also, Fund of Funds, Ltd. V. Arthur Anderson & Co., 567 F.2d 225, 234 (2d Cir. 1977) (citing Norman v. McKee, 431 F.2d 769, 772 (9th Cir. 1970)).[14] In Ercklentz, plaintiff, who had been a member of the defendant's board of directors and its legal counsel for a period of ten years, brought a derivative action, as representative, against his former client. In disqualifying the former counsel from serving as plaintiff in this suit, the court found that "the same ethical considerations which bar an attorney from acting as counsel against his former client also preclude him from acting as a class or derivative plaintiff against his former client." Ercklentz, 1984 WL 8251 at *4. See also Bakerman v. Sidley Frank Importing Co., Inc., 2006 WL 3927242, at *11 (Del. Ch. Oct. 10, 2006) (same); Khanna v. McMinn, 2006 WL 1388744, at *41 n. 333 (Del. Ch. May 9, 2006) ("The issue of whether [defendant's former general counsel] may serve a representative plaintiff...implicates considerations distinct from affording an attorney the opportunity to vindicate rights *personal to him*.") The same maxim applies here. It is evident that had Bibi appeared in this litigation as counsel for FLPA, rather than as a member of FLPA, his participation would be precluded by DR 5-108 because his current representation would be substantially related, and materially adverse, to his former representation of Unilab. Plaintiff asserts, however, that because Bibi is not FLPA's counsel, but rather, a member of the partnership itself, DR 5-108 does not preclude his participation. This simply cannot be the case. Taking this view, as Professor Gillers explains, would "destroy one of the policies behind the

[14] In Norman, appellee, who had served as appellant's general counsel while the suit was pending, filed a motion to dismiss the appeal. The Court held that appellee did not have standing to appear against the appellant because allowing him to appear through an attorney would "allow him to do indirectly what he cannot do directly." Id. at 772.

[DR 5-108] – to encourage clients to trust and be candid with counsel," a cornerstone of the lawyer-client relationship.

The attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law." Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981) (internal citation omitted). Its purpose is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Id. Narrowly interpreting the term "represent" in DR 5-108 to mean "represent as counsel" as Plaintiff suggests, (Tr. 12/15/10 at 49), 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. Such a reading would allow counsel to skirt the protections afforded to clients under DR 5-108 by simply hiring counsel to represent them in any action substantially related and materially adverse to a former representation.[15]

This analysis further supports the conclusion that Bibi cannot avoid the protection offered by DR 5-108 by appearing as a party rather than as counsel against Unilab. Bibi, as a member of FLPA, is representing the United States in this litigation and his actions are in direct violation of DR 5-108.

[15] The parties cite to a number of cases where counsel was not disqualified pursuant to DR 5-108, or its equivalent, and was able to sue a former client on matters substantially related and materially adverse to the former representation. These cases are all distinguishable, however, because they arise out of scenarios in which counsel had a personal right and/or interest in the litigation against the former client. See e.g., Murphy v. Simmons, 2008 WL 65174, at *17-19 (D.N.J. Jan. 3, 2008) (where court allowed former counsel for defendant to bring his own claim individually against the defendant but prohibited counsel from joining with co-plaintiffs and from using joint counsel, even though the matter was substantially related to a former representation); Doe v. A. Corp., 709 F.2d 1043 (5th Cir. 1983) (where court disqualified former in-house counsel from serving as a class representative because of a presumption that he would share confidential information, but allowed counsel to pursue his own personal pension claim against his former client, independent of the class); Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975) (where court denied counsel's motion to intervene as a plaintiff in a class action against former client but expressly stated that the denial and disqualification was not intended to prohibit the attorney from pursuing her discrimination claim against the defendant separately).

Contrary to Defendants' position, Plaintiff maintains, supported by the declaration of its expert, Professor Andrew Perlman, that Bibi's conduct is permitted by DR 4-101 of the New York Code. Defendants correctly assert, however, that "this exception does not constitute an exception to Rule [DR 5-108]." (Tr. 12/15/10 at 21.) That is, if Bibi is precluded from serving as a relator in this action pursuant to DR 5-108, as this court finds, he cannot then claim that an exception under DR 4-101 permits his action. Nonetheless, this Court assesses Bibi's behavior under DR 4-101, and concludes that even if DR 5-108 did not prevent Bibi from participating as a realtor in this suit, his disclosures have been beyond that permitted by DR 4-101.

New York Code of Professional Responsibility DR 4-101

The rule states in relevant part:

A. "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

B. Except when permitted under DR 4-101 [1200.19] (C), a lawyer shall not knowingly:
   1. Reveal a confidence or secret of a client.
   2. Use a confidence or secret of a client to the disadvantage of the client.
   3. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

C. A lawyer may reveal:
   1. ...
   2. ...
   3. The intention of a client to commit a crime and the information necessary to prevent the crime...

Plaintiff maintains that the information Bibi had at the time of his disclosure "amply supported a reasonable belief that Unilab was continuing in 2005 to violate the AKS" such that his disclosure fit within the "future crime" exception of DR 4-101(C)(3). (Pla. Opp. Memo at 10.) While Bibi may have reasonably believed that Defendants had the intention to commit a

crime in 2005, his disclosure went beyond the scope authorized by DR 4-101(C)(3) such that his actions were in violation of his ethical obligations under that rule.

a. Bibi could have reasonably believed in 2005 that Defendants had the intention to commit a crime

While FLPA concedes that Bibi received confidential information during his tenure at Unilab, it asserts that Bibi's participation in this action as a relator is justified under DR 4-4101(C)(3) because the information Bibi possessed by 2005 supported the belief that Defendants had the intention to violate the AKS. Specifically, Plaintiff asserts that based on the facts that: 1) [redacted] (Bibi Dep. at 43:14-22; 45:10-46:3); 2) Bibi was informed by Baker in 2003 that Unilab, under Whalen, had become very effective in obtaining the pull-through business (Bibi Dep at 104:4-22; Baker Dep. at 107:17-108:8); 3) Bibi spoke directly with Lanzolatta in a series of meetings in 2004 and 2005 during which time he informed Bibi that under Whalen, Unilab expected the IPAs and HMOs to refer 100% of their non-managed care business to Unilab, to instruct their physicians to refer all their fee for service business to Unilab, and to threaten to kick uncooperative physicians out of their network (Bibi Dep. at 67:4-22, 179:8-17, 199:15-21); 4) Bibi had numerous conversations in 2003 through 2005 with Guy Seay and Jerry Tice who described Quest's illegal "pull through" practices (Disc. Statement at 18-19); and 5) Bibi's observations in Unilab's and Quest's securities filings in 2004 and 2005 which stated that the firm received "approximately 19% of [its] testing volume and 7% of [its] net revenues from capitated payment arrangements" (Disc. Statement at 38), Bibi was able to support the belief in 2005 that Quest intended to violate the

AKS such that disclosure of otherwise confidential information was permissible under the future crimes exception of DR 4-101(C)(3).

[redacted] (Bibi Dep. at 41:4-20; 70: 21-71:6), it is reasonable to infer that Bibi believed Quest intended to violate the AKS in 2005, after he obtained this additional information from Lanzolatta and others. DR 4-101(C)(3), however, only permits lawyers to disclose confidences or secrets "necessary to prevent" the commission of a crime. The question then remains whether Bibi's disclosures were beyond this designated scope.

Bibi's disclosure in 2005 was beyond the scope permissible by DR 4-101(C)(3)

The future crime exception of DR 4-101(C)(3) is "strictly construed...and is applied only when a client is planning to commit a crime in the future or is continuing an ongoing criminal scheme." NYC Eth. Op. 2002-1, 2002 WL 1040180, at *2 (Mar. 13, 2002). Accordingly, disclosure pursuant to DR 4-101(C)(3) is limited to information necessary to prevent the continuation, or commission, of a crime. DR 4-101(C)(3) does not give former counsel the ability to disclose client confidences regarding completed conduct which satisfies all elements of a crime. Id. Applying this standard to the facts at hand, it becomes evident that Bibi's disclosure of Unilab's confidences was beyond that necessary to prevent the commission of a crime by the Defendants in 2005. Evidence of the continuing crime in 2005 could be shown by evidence of Quest's pricing agreements with MCOs and IPAs in effect in 2005 and not, for example, [redacted]

The ethical considerations underlying Canon 4 of the Code emphasize that "a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose." EC 4-7. The disclosure of confidential information dating back to 1996 and

during the period in which Baker was CEO of Unilab goes beyond the scope of information that Bibi could have reasonably believed was necessary to prevent a crime in 2005. [redacted] Further, FLPA has not articulated a persuasive reason why disclosure of confidences from the 1990s to March 2000 would be necessary to prevent the commission or continuation of a crime in 2005. In fact, the only reason Plaintiff gives to justify this disclosure is that "the claim [in this litigation] goes back to 1996, when Baker and Michaelson fist recognized that the company was engaged in illegal conduct." (Pla. Opp. Memo at 12.) This is beside the point – the fact that FLPA has supplied information for a complaint alleging criminal activity in the 1990s does not mean that Defendants' former attorney was permitted to disclose confidential information obtained during that period as necessary to prevent a continuing crime in 2005.

Beyond his disclosures in the form of the Complaint and the Amended Complaint, Bibi also recommended specific investigative steps to the United States, including, identifying other former Unilab employees whom he advised as General Counsel. (See e.g., Disc. Statement at 15, 18.) Bibi also "parlayed his information into a financial interest" in another *qui tam* suit against Unilab pending in California. (Def. Memo at 9-10.) FLPA is sharing information with the relators in that case. (Declaration of Vincent DiCarlo, Nov. 9, 2009, at ¶18.)

Bibi's contributions to the Complaint and Amended Complaint and his disclosures to Baker, Michaelson, the United States and the California *qui tam* relators were beyond those reasonably necessary to prevent a crime in 2005, and thus beyond the scope of disclosures permitted by DR 4-101(C)(3).

Thus, the Court concludes that Bibi's actions were in violation of both DR 5-108 and DR 4-101 and that the appropriate remedy in this instance is to dismiss FLPA's complaint and disqualify FLPA, its general partners, and its counsel from this suit and any subsequent suit based on these facts. This remedy has no effect on the ability of the Government to intervene and proceed against these Defendants on the allegations within the SAC. [16] As such, the interests of the Government, the "real party in interest," in proceeding with this *qui tam* action are sufficiently protected.

IV. Remedy

Not all violations of the legal code of ethics require dismissal or disqualification of counsel. Nonetheless, when fashioning a remedy, a "trial judge should primarily assess the possibility of prejudice at trial that might result from the attorneys' unethical act." Papanicolaou v. Chase Manhattan Bank, N.A., 720 F.Supp. 1080, 1083 (S.D.N.Y. 1989). Courts in this District have not hesitated to dismiss claims brought by lawyers in situations similar to those at issue here. In Eckhaus v. Alfa-Laval, Inc., 764 F.Supp. 34 (S.D.N.Y. 1991), for example, the Court granted summary judgment for the defendant in a suit by its former in-house counsel on the grounds that there was a "substantial likelihood" that the former lawyer would use or disclose confidential information in the litigation. The defendants in Eckhaus claimed that the plaintiff's suit was an unabashed violation of the rule that an "attorney may not knowingly reveal any client confidence." Id. at 37. Plaintiff justified his disclosure by relying on DR 4-101(C)(4), an exception to the general rule which permits a lawyer to reveal "[c]onfidences or secrets

[16] See supra, n. 3. Of course, the Government may also decide that it does not want to proceed in this action. There is some indication within the Disclosure Statement that the market for medical testing services for managed care groups changed during the period charged in the SAC and became a buyer's market. MCOs would aggressively negotiate lower prices for capitated testing prices for all members of its group in light of the "pull through" benefits to the seller. (Disc. Statement at 12, 19-20.)

necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct." The court found that Plaintiff "exceeded the scope of DR 4-101(C)(4)" and granted defendant's motion for summary judgment dismissing the claim. Id. (See also Doe v. A. Corp., 330 F.Supp. 1352 (S.D.N.Y. 1971) (where court dismissed complaint as a violation of Canon 4 in a matter where lawyer sought to bring a derivative action against former client); Wise v. Consolidated Edison Co. of New York, Inc., 282 A.D. 2d 335, 335 (N.Y. App. 2001) (granting defendant's motion to dismiss since "permitting the action to go forward would entail the improper disclosure by plaintiff, an attorney who was in-house counsel to defendant...of client confidences.")) Here, Bibi has violated his ethical obligations under both DR 5-108 and DR 4-101(C)(3) and disclosed confidential information obtained in his role as general counsel of Unilab to his partners and counsel, tainting the FLPA partnership. Consequently, FLPA's complaint must be dismissed and FLPA, its general partners and its counsel must be disqualified from this action and any subsequent action arising out of the same facts.

a. Dismissing Bibi alone is insufficient

FLPA maintains that dismissal of the entire FLPA partnership is an excessive remedy. Rather, FLPA argues that in the event that Bibi is found to have violated his ethical obligations, the proper remedy is an order precluding Bibi from either participating in the case or requiring his resignation from FLPA. (Pla. Opp. Memo at 24.) Baker and Michaelson, the Plaintiff argues, should be able to pursue the lawsuit without Bibi. (Id. at 25.)

This approach fails to consider that Bibi has violated the his ethical obligations and would allow Baker and Michaelson to profit from Bibi's breaches of Unilab confidences. Defendants do not and cannot know the full extent of Bibi's disclosures of Unilab's confidential

information. Bibi testified, for example, that he reviewed "a table load" of documents which originated from the LSR's office in anticipation of his deposition. (Bibi Dep. at 14:22-16:8.) LSR's office is in the same building where Bibi's office was located at the time he was employed by Unilab. (Id. at 16:12-14.)[17] Today, that same office is the official address of FLPA. (Stein Decl., Ex. 4 at 12.) Thus, it appears that Bibi has maintained access to Unilab's corporate documents possessed by him as general counsel even after his March 2000 departure from the company. There is no way to comprehensively determine which of those Unilab documents he has shared with Baker, Michaelson and counsel. As far as Defendants are aware, there have been no steps taken to set up any screen between Bibi and the other partners of FLPA. (Tr. 12/15/10 at 39.) Moreover, since Bibi, Baker, and Michaelson formed their partnership in 2004, FLPA has pursued this litigation on the basis that Bibi could "spill his guts" and freely disclose Unilab's confidential information. (Def. Reply Memo at 8.) Thus, simply striking from the pleadings any express references of confidential information presently *known* to have been disclosed by Bibi to Baker and Michaelson would not be sufficient to protect the Defendants from its use against them. The scope of Bibi's disclosure is unknown and because these disclosures have been going on since before the formation of FLPA, (see Stein Decl., Ex. 4), or almost seven years, it would be virtually impossible to identify and distinguish each improper disclosure.

Both Baker and Michaelson concede that Bibi disclosed Unilab confidential information to them, (Baker Dep. at 179:9-190:1, Michaelson Dep. at 198:1-9), and it is undeniable that Baker and Michaelson have been tainted by Bibi's conduct. Allowing Baker and Michaelson to proceed with the suit would allow that taint to proceed into trial. See Papanicolaou v. Chase

[17] At the time Bibi, Baker, and Michaelson worked for Unilab, its principal place of business was in Tarzana, California, which is where Baker and Michaelson worked. (Baker Dep. at 74:2-6; 76:2-9, Michaelson Dep. at 20:22-22:16.) Bibi was headquartered in Hackensack, New Jersey. (Bibi Dep. at 16:9-15, 33:1-2.)

Manhattan Bank, NA, 720 F.Supp. 1080, 1083 (S.D.N.Y. 1989) ("The rationale behind the Second Circuit's [substantial relationship] rule I that violations of Canons 4 and 5, by their very nature, give rise to a high probability that taint of the trial – the real litmus test – *might* occur.") As such, FLPA, and all three of its general partners must be disqualified from this suit.

b. Dismissing Unilab as a defendant is insufficient

FLPA also argues that the Court could dismiss the case against Unilab and allow Baker and Michaelson to pursue only those claims against Quest. Plaintiff argues that because Bibi "never had an attorney-client relationship with Quest [and] never worked with Quest" Bibi would have no ethical obligations to the parent company once it purchased Unilab. (Tr. 12/15/10 at 46.) Again, this approach would be inadequate. When control "of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well." Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 349 (1985). Thus, any obligation Bibi had to Unilab was transferred to Quest upon its purchase. Further, FLPA cannot prevail against Quest without taking legal positions that are directly contrary to Unilab's interests. A financial judgment against Quest would also undoubtedly have effects on Quest's wholly-owned subsidiary, Unilab. (See also, Gillers Decl. at ¶ 62, Gillers Reply Decl. at ¶ 49.) Consequently, simply dismissing Unilab from this action would not fully purge the taint associated with Bibi's unethical disclosures of Unilab confidences. That taint would still exist in a case against Quest brought only by Baker and Michaelson.

c. Disqualification of FLPA's counsel

The disqualification of FLPA's counsel, Troutman Sanders and the Michael Law Group, is also necessary to protect Defendants from the use of their confidential information against them. FLPA's counsel has been privy to Unilab's confidential information for the last seven

years, and have made no effort to screen (or be screened) from Unilab's confidential information. (See FLPA Engagement Letter § 10(b) ("Counsel believe they cannot effectively represent the Relator sand the other Parties in the Lawsuit if information disclosed to Counsel by one Party must be preserved by counsel in confidence from the others."))

In Board of Ed. of City of New York v. Nyquist, 590 F.2d 1241 (2d Cir. 1979), the Second Circuit noted "the power of federal courts to disqualify attorneys in litigation pending before them." Id. at 1245-46. Specifically, the Court highlighted two basic situations in which disqualification had been ordered in the Circuit: "1) where an attorneys' conflict of interest in violation of Canon 5...undermines the court's confidence in the vigor of the attorney's representation of his client...[and] 2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example, in violation of Canons 4 and 9, thus giving his present client an unfair advantage." Id. at 1246 (citing Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d. Cir. 1977); Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973)). Here, counsel clearly fall within this second category. Counsel for FLPA are privy to Unilab's, and therefore Quest's, confidential information and are in a position to use that information to give present or subsequent clients an unfair, and unethical, advantage. As such, FLPA's counsel must be disqualified from this action or any subsequent action based on the allegations found in FLPA's complaint.

V. Conclusion

For the foregoing reasons, Defendants' motion to dismiss is granted and FLPA, its general partners, and its counsel, are disqualified from this suit and any subsequent suit based on these facts. Nothing in this opinion, however, should be deemed as preventing the United States from intervening in this action and from bringing an action against these Defendants.

Copies of this sealed opinion and order were provided only to the Plaintiff and Defendants in this action. Defendants shall provide a redacted copy of this opinion for public filing, and for service on the Government, within ten days of this opinion, and with three days notice to the Plaintiff.

SO ORDERED.

Dated: New York , New York
March 24, 2011

Robert P. Patterson
U.S.D.J.

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CORPORATE CRIME

Lawyers as Whistleblowers

By **Howard W. Goldstein**

Last month, the Internal Revenue Service made the first whistleblower payment in the four-year history of its whistleblower program. [1] While word of the $4.5 million payout spread like wildfire, whistleblower rewards are hardly new. Nearly 150 years ago, Congress enacted the False Claims Act (FCA), in part to incentivize private parties to bring qui tam suits on behalf of the U.S. government for violating the Act. The incentive to those parties, known as relators, was the ability to reap a payment of one half of all monies recovered,[2] an award reduced to a 30 percent maximum (plus reasonable costs and fees) under the 1986 FCA amendments.[3]

Similarly, under the proposed Dodd-Frank Act regulations, whistleblowers will reap up to 30 percent of the damages. But lawyers beware: a recent decision in the Southern District of New York, *United States ex rel. Fair Laboratory Practices Associates v. Quest Diagnostics Incorporated,*[4] makes clear that lawyers, while not specifically barred from being relators, will typically be prohibited from bringing qui tam actions against their former clients.

The Facts

Relator Fair Laboratory Practices Associates (FLPA) commenced a $1 billion qui tam suit in the Southern District in June 2005, alleging that Quest Diagnostics Incorporated and Unilab Corporation violated the Federal Anti-Kickback Act by engaging in a so-called pull-through scheme whereby they charged customers below cost rates in exchange for referrals of Medicare and Medicaid reimbursable lab tests.[5] Andrew Baker, Richard Michaelson and Mark Bibi, all former employees of Unilab, formed FLPA to bring the qui tam action. Baker served as CEO of Unilab from 1993 through 1996; Michaelson was CFO from 1993 to 1996, and then director until 1997; Bibi was Unilab's general counsel from 1993 until Spring 2000 and the only lawyer that Unilab employed.[6]

Around 1997, Unilab raised its below-cost prices nearer to cost, which negatively impacted not only Unilab's customer base and profits, but, ultimately, Baker's tenure as CEO. Nonetheless, Baker's successor continued to raise prices.[7]

In 1999, Kelso & Co. acquired Unilab through a leveraged buyout for $5.85 per share and installed yet another CEO. The new CEO allegedly reinstituted Unilab's former pull-through scheme.[8] lso around this time, the Office of the Inspector General of the Department of Health and Human Services (OIG), issued Advisory Opinion 99-13, which stated that, when companies such as Unilab offered prices below cost, the OIG would infer the existence of a pull-through scheme.[9] Bibi apparently investigated this letter, but was later "frozen out" from giving advice on compliance matters to Unilab. Bibi left Unilab in March 2000 and joined Baker and Michaelson at Life Sciences Research, Incorporated.[10]

New York Code of Professional Responsibility DR 5-108(A) prohibited an attorney from representing "another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the [attorney's] former client," and from using "any confidences of the former client except as permitted by DR 4-101."

In 2003, Kelso sold Unilab to Quest for about $26.50 per share, an over $20 increase since Kelso's 1999 acquisition. The surge in stock price intrigued Baker. In response to his inquiries, he learned that the new CEO had reinstituted the pull-through scheme, which increased profits. Baker and Bibi further confirmed Quest and Unilab's intentions to continue their pull-through schemes with other sources.[11]

Armed with the belief that Unilab and Quest were defrauding the government, Baker asked Michaelson and Bibi to join him as relators.[12] Bibi reviewed the then governing New York Code of Professional Conduct and the American Bar Association (ABA) Model Rules of Professional Conduct and concluded that he could act as a relator in the action against his former client and disclose information learned while he was general counsel of Unilab.[13]

The Court's Opinion

Quest and Unilab moved to dismiss the action, claiming that state ethics rules prohibited both Bibi's participation as a relator and his disclosure of confidential information. The court granted the motion, noting that the FCA did not preempt state ethics rules and holding that Bibi's prior representation of Unilab barred his participation in the qui tam action.[14]

New York Code of Professional Responsibility DR 5-108(A) prohibited an attorney from representing "another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the [attorney's] former client," and from using "any confidences of the former client except as permitted by DR 4-101."[15] In response to the motion to dismiss, FLPA argued that Bibi's client had been Quest's subsidiary, Unilab, and action against Quest alone would not violate DR 5-108(A). Going further, it argued that the rule did not even apply to Bibi, because he was merely a relator and not counsel of record.

The court found neither argument persuasive. Judge Robert P. Patterson dealt with the corporate family conflict issue in a footnote and in a paragraph discussing the remedy. He concluded that a Quest-only action would be materially adverse to Unilab, since monetary damages against Quest would harm Unilab, Quest's wholly-owned subsidiary.[16]

Regarding FLPA's argument that it was not representing another party (and thus did not trigger DR 5-108), the court found that DR 5-108 applied and that a plaintiff in a qui tam action represents the U.S. government. Because DR 5-108 clearly prevented Bibi from serving as counsel of record in the qui tam action, the rule likewise barred him from participating as a relator on behalf of the government.

Judge Patterson noted that a contrary holding "would allow counsel to skirt the protections afforded to clients under DR 5-108 by simply hiring outside counsel to represent them in any action substantially related and materially adverse to a former representation."[17]

The court then addressed Bibi's use of Unilab's confidential information, which the relators justified under the intention to commit a crime exception to maintaining client confidences contained in DR 4-101(c)(3).

That rule permitted (but did not require) an attorney to reveal "[t]he intention of a client to commit a crime and the information necessary to prevent the crime. . . ."[18] The court found that Bibi could have reasonably believed Quest and Unilab intended to commit a crime in 2005, when FLPA instigated the action. But disclosure of client confidences learned prior to that time,

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going back to 1996, were not necessary to prevent the crime in 2005.

Because DR 4-101 applied only to future crimes, it did not allow an attorney to act as a whistleblower for a client's past crimes. Judge Patterson therefore concluded that even if DR 5-108 did not bar Bibi's participation as relator, dismissal was warranted because his disclosures of client confidences were improper.[19]

Finally, Judge Patterson concluded that disqualification of Bibi alone could not guarantee that the remaining relators would not use the wrongly disclosed information in their suit, and that allowing the case to proceed "would allow Baker and Michaelson to profit from Bibi's breaches of Unilab's disclosures."[20]

Indeed, FLPA stood to profit as much as $300 million, or 30 percent of the $1 billion alleged damages.[21] Disqualification of FLPA's counsel was further necessary to shield Quest and Unilab from the improper use of their confidential information.[22]

Preemption?

The first legal question faced by Judge Patterson was whether the FCA's interest in encouraging whistleblowers preempted state ethics rules governing attorneys. Relying on Second Circuit precedent,[23] Judge Patterson noted that when interpretation of a state ethics rule conflicts with federal interests, "a federal court interpreting that rule must do so in a way that balances the varying federal interests at stake."[24]

Judge Patterson identified two federal interests: encouraging qui tam actions and "the government's interest in preserving the attorney-client privilege."[25] He held that neither interest warranted a finding that the state ethics rules governing an attorney's obligation to preserve client confidences were inapplicable, and therefore applied the applicable state rules.

Interestingly, the Securities and Exchange Commission's (SEC) proposed regulations under the Dodd-Frank Act appear to reflect the same deference to the rules governing client confidentiality. Under the SEC's proposed regulations, to avoid conflict between incentivized whistleblowing and the protections for confidential communications, attorneys who learn of a client's violations will not be permitted to bring a private action to avenge the client's wrongdoing,[26] unless the applicable state rules permit disclosure.[27]

This is a markedly different approach to confidentiality than the approach of the SEC's 2003 rules implementing Sarbanes-Oxley, which specifically permitted disclosure of confidential information to the SEC without regard to state ethics rules: "Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with [SEC standards of professional conduct], this part shall govern."[28]

Corporate Family Adversity

Judge Patterson concluded that Bibi, the former general counsel to Unilab, had a disabling conflict because a possible adverse verdict against Quest would have a materially adverse economic impact on Unilab. While this conclusion is not necessarily incorrect, relegation of this issue to a footnote understates the complexity of determining whether adversity to one member of a corporate family creates adversity to other family members.[29]

According to the ABA, "the Model Rules of Professional Conduct do not prohibit a lawyer from representing a party adverse to a particular corporation merely because the lawyer . . . represents, in an unrelated matter, another corporation that . . . is owned by it. . . ."[30]

Not one year ago, in *GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.,* the Second Circuit, deciding a similar issue of first impression, noted: "we agree with the ABA that [corporate] affiliates should not be considered a single entity for conflicts purposes based solely on the fact that one entity is a wholly owned subsidiary of the other. . . ."

In *GSI*, the Second Circuit considered the degree of the subsidiary's reliance on the parent corporation for administrative matters, the sharing of an in-house legal department, the overlap in management control between the two affiliates, and the financial interdependence of the parent and subsidiary. Based on these facts, the court concluded in that case that a law firm, representing a parent corporation in another matter, could not be counsel in a law suit against its subsidiary.[31]

In a 2007 ethics opinion, the New York City Bar Association (City Bar) determined that a "nuanced and fact-specific approach to corporate-family conflicts is necessary." Such approach includes consideration of whether the affiliate is a de facto current client, the risk of the responsibilities to one client materially limiting the representation of the other, and knowledge of client confidences that might preclude representation.

The city bar identified adverse economic impact as just one of many concerns. Like *GSI,* the opinion suggested factors such as sharing of corporate personnel or offices, noting that finding an adverse relationship will depend on how closely the corporate affiliates are intertwined.[32]

The record in *Quest* reveals no examination of operational commonality, administrative matters or any other non-financial factors. Moreover, the financial interdependence between Quest and Unilab seems to have been assumed. At oral argument, relator's counsel contended that Quest and Unilab had "not put in a shred of factual information to support" their claim that a substantial monetary judgment against Quest would adversely affect Unilab.[33] If that in fact was the case, and if the other factors indicated a fair degree of subsidiary independence, the conflict of Bibi pursuing a Quest-only case is not self-evident.

Conclusion

As the *Quest* case suggests, attorneys contemplating disclosure of client confidences should think long and hard about the consequences. While sunlight is generally the best disinfectant, it also burns from time to time. The New York Rules of Professional Conduct are particularly protective of client confidences,[34] and those lawyers practicing in New York should therefore take extra care when deciding whether to disclose, let alone attempt to collect on, client misconduct. .

•••••••••••●●•••••••••••

1. Ashby Jones, "After Four Years, the IRS (Finally!) Makes a Whistleblower Payment, WALL STREET J. L. BLOG, April 8, 2011, "http://blogs.wsj.com/law/2011/04/08/after-four-years-the-irs-finally-makes-a-whistleblower-payment; Daily Mail Reporter, "Encourage Others to Squeal': IRS awards $4.5m to accountant after tip off in first ever whistleblower award, DAILY MAIL ONLINE, April 8, 2011, www."dailymail.co.uk/news/article-1374938/IRS-gives-4-5m-accountant-tip-whistleblower-award.html.

2. S. Rep. 99-345, at 8, 10 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5273, 5275; see 31 U.S.C. § 3730.

3. See 31 U.S.C. § 3730(d).

4. *United States ex rel. Fair Lab. Practices Assocs. v. Quest Diagnostics Inc.*, 05-Civ-5393, 2011 WL 1330542 (S.D.N.Y. Apr. 5, 2011).

5. Id., at *1-*2; see Amended Complaint, Quest, 05-Civ-5393, ¶ 147 (S.D.N.Y. Nov. 18, 2009). The Second Amended Complaint (SAC), which is the subject of Quest and Unilab's motion to dismiss is currently filed under seal, as are the parties' moving papers

6. *Quest*, 2011 WL 1330542, at *1.

7. Id. at *2.

8. Id.

9. Id. at *3; see also Letter from OIG to [Redacted], dated Nov. 30, 1999, regarding "OIG Advisory Opinion No. 99-13," available at http://oig.hhs.gov/fraud/docs/advisoryopinions/1999/ao99_13.htm.

10. See Quest, 2011 WL 1330542, at *3. Because part of the opinion is redacted, Bibi's exact actions are unknown.

11. Id. at *3-*4.

12. Id. at *4.

13. See id.

14. Id. at *5-*7

15. N.Y. Code of Prof'l Responsibility 5-108(A) (2007). The Court, in its opinion, relies on the former New York Code of Professional Responsibility, which was in place when FLPA brought the action and Bibi revealed the confidential information in question. Analysis under the New York Rules of Professional Conduct, enacted April 1, 2009 and amended January 28, 2011, would likely yield similar results. Compare N.Y. Code of Prof'l Responsibility DR 4-101, 5-108 (2007) with N.Y. R. Prof'l Conduct 1.6, 1.9 (2011).

16. *Quest*, 2011 WL 1330542, at *5-*7, *6 n.13.

17. Id. *7-*8

18. N.Y. Code of Prof'l Responsibility 4-101(B)(3).

19. *Quest*, 2011 WL 1330542, at *9-*10.

20. Id. at *12, *14.

21. See 31 U.S.C. § 3730(d)(1), (2).

22. *Quest*, 2011 WL 1330542, at *13

23. See Grievance Comm. For the S.D.N.Y. v. Simels, 48 F.3d 640 (2d. Cir. 1995).

24. *Quest*, 2011 WL 1330542, at *6 (quoting Simels, 48 F.3d 640, 646 (2d. Cir. 1995)).

25. Id. at *6.

26. See Securities & Exchange Commission, Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 20 (November 3, 2010), available at http://www.sec.gov/rules/proposed/2010/34-63237.pdf ("Compliance with the federal securities laws is promoted when individuals, corporate officers, and others consult with counsel about potential violations, and the attorney-client privilege furthers such consultation. This important benefit could be undermined if the whistleblower award program created monetary incentives for counsel to disclose information about potential securities violations that they learned of through privileged communications.").

27. Id. The SEC carves out an exception to this rule, "where the attorney is permitted to disclose the substance of a communication that would be otherwise privileged." Id.

28. 17 C.F.R. § 205.1; see 17 C.F.R. § 205.3(b); (d)(2).

29. See, e.g., *GSI Commerce Solutions Inc. v. BabyCenter, L.L.C.*, 618 F.3d 204 (2d Cir. 2010); *Discotrade v. Wyeth-Ayerst Int'l, Inc.,* 200 F. Supp. 2d 355 (S.D.N.Y. 2002); Ass'n of the Bar of the City of New York Comm. on Prof'l & Judicial Ethics (City Bar), Formal Op. 2007-3 (2007); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-390 (1995).

30. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-390 (1995).

31. GSI Commerce Solutions, Inc., 618 F.3d at 210-12.

32. City Bar, Formal Op. 2007-3.

33. Transcript, *Quest*, 05-Civ-5393, 86:16-20 (S.D.N.Y. Dec. 15, 2010).

34. See, e.g., N.Y. R. Prof'l Conduct 1.13(c).

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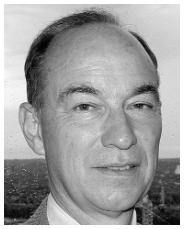
— Commentary —

Lawyer whistleblower ethics issues — a difficult duty

By William Wernz

How should an in-house lawyer's employment rights and duties be balanced with the ethics and fiduciary obligations of confidentiality? In *Kidwell v. Sybaritic* (Minn. June 24, 2010) the plurality opinion provides the civil law answer to this question, leaving the ethics debate to the concurrence and dissent. This question is also addressed in *Nordling v. Northern States Power, Co.*, 478 N.W.2d 498 (Minn. 1991) and in the 2005 amendments to Rules 1.6, 1.13, and 3.3, Minn. R. Prof. Conduct.



William Wernz

Facts

On April 24, 2005, Kidwell, the general counsel of Sybaritic, Inc. sent an e-mail, titled "A Difficult Duty," to Sybaritic's managers. The e-mail stated, "It is my firm conviction that Sybaritic intends to continue to engage in tax evasion, the unauthorized practice of medicine and obstruction of justice. Accordingly, it is my intention to advise the appropriate authorities of these facts." Kidwell sent a copy of the e-mail to his father, a non-lawyer confidante. In May 2005, Sybaritic fired Kidwell. Kidwell brought a whistleblower claim of wrongful termination against Sybaritic. A jury found that Kidwell was fired in retaliation for blowing the whistle, but the appellate courts reversed. A Minnesota Supreme Court plurality found the evidence compelling that Kidwell's purpose was reporting "a potential problem to his client," as part of his assigned duties, rather than blowing a whistle.

Confidentiality

Rule 1.6 generally requires that a lawyer keep client information confidential, where disclosure would be embarrassing, detrimental or unauthorized. For Kidwell's threatened disclosure to be proper, some exception to the general rule would have to apply. The main rules governing an in-house counsel who is thinking of blowing the whistle on an employer's conduct are 1.6(b) (Confidentiality), 1.13(b) (Organization as Client) and 3.3 (Candor to the Tribunal).

Necessity

The 10 sections of Rule 1.6(b) allow disclosures as "necessary" for specified purposes, such as rectifying a fraud in which a lawyer's services were used. None of the 10 sections would have allowed Kidwell to disclose Sybaritic's confidential information to "appropriate authorities." Rule 1.6(b)(8) allowed Kidwell later to make disclosures necessary for his whistleblower claim, but this section does not authorize disclosures to authorities before employment termination. Even when disclosure is authorized, however, only information necessary for the permitted purpose may be disclosed. For example, a whistleblower suit might be served but not filed, to determine whether settlement is feasible. The complaint could meet notice pleading standards but not aver sensitive matters in detail. Permission to seal files might be sought. In short, even lawyers who have been wrongly fired, for whistleblowing, may disclose only as necessary.

Knowledge / Suspicion

Rules 1.13(b) and 3.3 *require* that a lawyer disclose information in certain carefully defined circumstances. Both rules are triggered when a lawyer "knows" of certain improprieties. "Knows" is defined as "actual knowledge." In contrast, the whistleblower statute protects an employee who "in good faith, reports a violation or *suspected* violation." The court repeatedly refers to what Kidwell "suspected," not what he "knew." If Kidwell merely *suspected*, but did not *know*, there was client misconduct, he had no warrant under Rules 1.13 and 3.3 to make or threaten any disclosure outside the company. Even if Kidwell had known of misconduct, Rules 1.13 and 3.3 have other limits on disclosure.

Organization

Minnesota's 2005 amendment to Rule 1.13(b) requires a lawyer for an organization who knows of insider misconduct to try to "proceed as is reasonably necessary in the best interest of the organization." Normal remediation involves reporting "up the ladder," *within the organization.* Minnesota did *not* adopt ABA Model Rule 1.13(c), which allows a company lawyer to disclose insider misconduct to outside authorities, where the misconduct is apt to injure the company substantially. [1]Minnesota's Rule 1.13 does not provide any authority for disclosure of confidential client information to "appropriate authorities" or other outsiders, even where the lawyer has actual knowledge of misconduct.

Tribunal

Rule 3.3 *requires* that a lawyer who *knows* of fraud on a tribunal "shall take

reasonable remedial measures." If remonstrating with the client is ineffective, the lawyer ordinarily must disclose to the tribunal, even where disclosure is of privileged information. Rule 3.3 did not apply here, however, for two reasons. First, Kidwell's suspicion that Sybaritic was "obstructing justice," by withholding discovery responses, fell short of knowledge. Second, the Sybartic litigation was in Estonia, so Estonian rules, not Minnesota Rule 3.3, applied, pursuant to Rule 8.5(b), governing choice of law.

Threat

Kidwell *threatened* to report what he believed to be Sybaritic's misconduct, to "appropriate authorities." The threatened disclosure was not authorized by Rule 1.6, 1.13, 3.3, or any rule. Whether Kidwell's threat was an unlawful "threat to expose a secret," under Minn. Stat. § 609.27, Subd. 1(4), is beyond the scope of this article. The court did not consider the threat, because Sybaritic did not cite the threat as a reason for Kidwell's termination, but the threat presents the most serious issue for ethics analysis.

Rule 1.6. Amendment

The version of Rule 1.6(b)(5) that was in effect from 1985 to 2005 allowed disclosure of confidential information when "necessary to establish or collect a fee," but did *not* allow disclosure to pursue a "claim." In 1991, *Nordling* allowed an in-house counsel to make a wrongful discharge claim, but did not allow confidential information to be disclosed to support the claim. In 2005, Rule 1.6(b)(8) was adopted, allowing disclosures necessary "to establish a claim," including a whistleblower claim, but this amendment did *not* expand a lawyer's permission to disclose client information *before* an employer fired or disciplined a lawyer.

Kidwell On Ethics

The plurality opinion did not address ethics, because it resolved Kidwell's claim by application of statute to facts. The concurrence and dissent debated ethics issues energetically, even though they apparently would not disagree on several fundamental points: (1) Rule 1.6(b)(8) generally permits whistleblower claims. (2) Kidwell's disclosure to his father was not permissible. [2](3) Kidwell's claim would have been impermissible if Rule 1.6(b)(8) had not yet been adopted. (4) Kidwell would have had no claim if the jury found that Kidwell's disclosure to his father was the basis on which Sybaritic fired him.

Court/ Legislature

The concurrence and dissent argue a foundational ethics issue, namely who declares the scope of lawyers' professional obligations. The dissent cites authority that "it is the duty of this court to apply the law as written by the legislature." However, the dissent balances its statement of duty to the Legislature by stating that Rule 1.6(b)(8) permits whistleblower claims. The dissent impliedly invokes the court's traditional right, asserted in *Nordling*, to determine that its confidentiality rules limit the application of legislation to lawyers. The real dispute between dissent and concurrence is how broadly the court's prerogative should be construed.

The court could not simply abdicate to the Legislature. The whistleblower statute is oriented to exposure, while the ethics rules are oriented to confidentiality, with a few, carefully chosen exceptions. The statute protects an employee who in good faith reports a "suspected" violation of law to "any governmental body or law enforcement official." If only the statute governed, in-house counsel, instead of reporting insider misconduct "up the ladder," within the company, could claim a statutory employment protection for reporting, instead or in addition, to the F.B.I.[3] If, as Kidwell threatened, a lawyer reported a client's misconduct to law enforcement, and none of the Rule 1.6 exceptions to confidentiality applied, the lawyer would be subject to severe discipline. The discipline would not depend on whether the lawyer was in-house or outside counsel. It would be anomalous to protect the in-house counsel's employment rights in such circumstances, but the whistleblower statute would do so, unless the court modified the statute as applied to lawyers.[4]If the court were to treat in-house counsel just like other whistleblowers, employers could respond by entrusting their sensitive information only to outside counsel. Put differently, a jurisprudence that aimed at broad whistleblower protection of a small number of in-house counsel could result in a general loss of status and employment for in-house counsel.

The proper balance of lawyer confidentiality and social justice, in various manifestations, has been debated, in the wake of Enron and other corporate scandals, by bar associations, courts, the Securities & Exchange Commission, and the United States Congress. The balance has tipped farther toward disclosure rights and duties than ever before. *Kidwell* provides an occasion for reviewing these developments and for noticing that the circumstances in which the ethics rules permit in-house counsel to disclose confidential information outside the organization remain very limited.

1. Where a lawyer suspects or believes there is misconduct within an organizational client, but does not know of such misconduct, the lawyer will normally communicate information to a client contact, even though the disciplinary threshold is at the higher level of knowledge.
2. The dissent finds the concurring opinion's reading of Rule 1.6(b)(8) "narrow," because "Rule 1.6 specifically contemplates whistleblower claims." Kidwell's disclosure to his father was not, however, a whistleblower report. The concurrence equates a violation of Rule1.6 with a breach of fiduciary duty, but the court has normally found violation of a rule to be at most some evidence of breach of fiduciary duty. Here the point is technical, because Kidwell's disclosure to his father would plainly violate both ethics and fiduciary standards.
3. Because outside counsel is not protected by the whistleblower statute, any broad interpretation to protect in-house counsel who make disclosures outside the organization would presumably be followed by a shift in retention on sensitive matters, from in-house to outside counsel.
4. Holding that statutory "good faith" requires obedience to the Rules of Professional Conduct would be a slight re-characterization of the concurring opinion.

William Wernz is the former executive director of the Office of Lawyers Professional Responsibility and of counsel at the Dorsey & Whitney law firm.

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Jesselyn Radack Biography

Ethics Lawyer, Whistleblower, Defender of Whistleblowers. b. 1970

"Few paths are more treacherous than the one that challenges abuse of power and tries to make a meaningful difference. The principled employees who take career risks to address problems are precisely the kind of people who best serve the public, but they are invariably the first casualties. Whistleblowers should not have to choose their conscience over their careers."

Jesselyn Radack graduated from Yale Law School in 1995 and joined the Justice Department through the Attorney General Honors Program. She practiced constitutional tort litigation for four years before becoming a Legal Adviser to the Professional Responsibility Advisory Office.

Shortly after the terrorist attacks of September 11, 2001, Radack received an inquiry from a Justice Department counter-terrorism prosecutor regarding the ethical propriety of interrogating "American Taliban" John Walker Lindh, a U.S. citizen allegedly fighting on the enemy's side in Afghanistan, without a lawyer being present. Radack was told unambiguously that Lindh's father had retained counsel for his son. Radack responded that interrogating him was not authorized by law, but the FBI proceeded to question Lindh without an attorney despite her advice.

A few days later, the counter-terrorism prosecutor called back Radack, and she advised that Lindh's confession might have to be sealed and only could be used for national security and intelligence-gathering purposes, not criminal prosecution.

Five weeks after the interrogation, Attorney General John Ashcroft announced that a criminal complaint was being filed against Lindh. "The subject here is entitled to choose his own lawyer," Ashcroft said, "and to our knowledge, has not chosen a lawyer at this time." Radack knew that was untrue. Three weeks later, Ashcroft announced Lindh's indictment, saying that his rights "have been carefully, scrupulously honored." This was contradicted by a photograph that was circulating worldwide of Lindh naked, bound to a board with duct tape, and blindfolded with epithets written across it.

On March 7, 2002, the lead prosecutor in the Lindh case e-mailed Radack that there was a court order for all of the Justice Department's internal correspondence about Lindh's interrogation. He said that he had two of her e-mails and wanted to make sure he had everything.

Radack became immediately concerned because the court order had been concealed

from her. Additionally, although she had written more than a dozen relevant e-mails, the Justice Department had turned over only two of them, neither of which reflected her fear that the FBI's actions had been unethical and that Lindh's confession, which formed the basis for the criminal case, might have to be sealed.

Radack checked the hard-copy file and found that it had been purged. With the assistance of technical support, Radack then recovered 14 e-mails from her computer archives, gave them to her boss and resigned. She also took home a copy of the e-mails in case they "disappeared" again.

As the Lindh case proceeded, the Justice Department continued to swear that it knew nothing of the fact that Lindh already had a defense attorney at the time of his interrogation. Radack heard a National Public Radio broadcast stating that the Justice Department had never taken the position that Lindh was entitled to counsel during his interrogation. She did not think the Department would have the temerity to make public statements contradicted by its own court filings if it had indeed turned over her e-mails.

After hearing the broadcast, in accordance with the Whistleblower Protection Act, Radack sent the e-mails to a magazine reporter who had been interviewed in the radio piece. He wrote an article about the missing e-mails.

Three weeks after Radack's disclosure was made public, and on the morning that Lindh's suppression hearing was due to begin, Lindh pleaded guilty to two relatively minor charges. The surprise deal, which startled even the judge, averted the crucial evidentiary hearing that would probe the facts surrounding his interrogation—which Radack had advised against—and whether his statements could be used against him at trial—which she also had advised against. Commentators widely agreed that the Lindh prosecution had "imploded."

In retaliation, the government unleashed the full force of the entire Executive branch against Radack. Among other things, the Justice Department placed her under criminal investigation, though she was never told what charges she was facing. It referred her for discipline to the state bars in which she is licensed to practice law, based on a secret report she was not allowed to see, and it placed her on the "No-Fly List." (It is interesting to note that the Justice Department declined to make similar referrals of the attorneys who wrote the torture memos.)

Eventually, the criminal case closed with no charges ever being brought. The Maryland State Bar Association dismissed the charges against Radack in 2005. She was elected to, and served on, the D.C. Bar Legal Ethics Committee from 2005-2007—despite the fact that the charges against her are still pending in 2011. She currently represents whistleblowers as the director of Homeland Security and Human Rights at the Government Accountability Project.

Will Former Toyota Lawyer Be Whistleblower Amid Safety Mess?

This is a discussion on *Will Former Toyota Lawyer Be Whistleblower Amid Safety Mess?* within the **Attorneys & Legal Ethics** forum, part of the ATTORNEYS, COURTS, LITIGATION category; The tough times continue for Toyota, and the plaintiffs' bar continues to collect fodder . But the news this morning ...

Feb 19th, 2010, 08:22 AM #1

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Will Former Toyota Lawyer Be Whistleblower Amid Safety Mess?

The tough times continue for Toyota, and the plaintiffs' bar continues to collect fodder. But the news this morning caught our eye because of a focus on Dimitrios Biller, former in-house lawyer for the Japanese auto maker.

Congress on Thursday said it subpoenaed documents stemming from a lawsuit Biller filed last year in California, which alleged that Toyota illegally withheld evidence in hundreds of rollover death and injury cases in a "ruthless conspiracy" to avoid scrutiny by federal regulators. Toyota has flatly denied his allegations. Here's the WSJ story and background on the Biller suit from Reuters and CBS, which links to the suit.

Biller, a graduate of Loyola Law School in Los Angeles in 1989, was a partner at Pillsbury Winthrop before joining Toyota, according to Reuters.

He was involved in defending Toyota in cases involving rollover and crushed roof accidents, according to the news agency. He said that after highlighting the issue to his supervisors and making numerous complaints, he was isolated and cut off from others in his group.

In the lawsuit, Biller said he was "surprised and alarmed" to discover that the company was not producing e-mails and other electronically stored information to plaintiffs as he said was required, CBS said. He allegedly repeatedly complained to supervisors that the company was illegally withholding evidence.

Biller signed a severance agreement in 2007 after being told he would be reassigned to an undetermined position within the company, Reuters said.

Biller told Reuters that the current recall at Toyota is an "absolute joke," adding that he believed it was an electronic problem rather than the gas pedal as Toyota claims.

"Toyota can't admit that it's an electronic problem because it would be way too expensive to fix in 20 to 25 million cars," he told Reuters. "The bottom line is that they want to save money."

Quote

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Court Lawyer Whistleblower Fired Over Ethics Breach 'Crusade'

Thomas B. Scheffey Contact All Articles
The Connecticut Law Tribune | December 29, 2004

Mary Ann Mierzwa, fired from her job as a court services officer in juvenile court in Hartford, Conn., is suing the Judicial Branch in federal court under state whistleblower, workplace free speech and federal civil rights laws.

Last April, state Judicial Branch attorney Mary Ann Mierzwa claims she witnessed what seemed to be a breathtakingly audacious breach of lawyer ethics: an assistant attorney general representing the Department of Children and Families altered a judge's order apparently to get the result the AAG was advocating.

When the judge in the case, William Wollenberg, appeared unwilling to vigorously pursue the matter, Mierzwa took matters into her own hands and consulted a West Hartford attorney about her legal rights and ethical duties.

As evidence, she provided the lawyer, Leon Rosenblatt, with a redacted copy of the allegedly altered order -- and was subsequently suspended, then fired for going outside the Judicial Branch "chain of command" and showing Rosenblatt the form without a court order authorizing her to do so. Mierzwa's now suing the Judicial Branch in federal court under state whistleblower, workplace free speech and federal civil rights laws.

THIRD PARTY DISCLOSURE?

As an attorney employed by the Judicial Branch as a court services officer at the Broad Street juvenile matters court in Hartford Mierzwa was negotiating on the day in question with five other lawyers to reach an accord on the specific conditions for a juvenile's release from DCF custody.

According to Mierzwa's Dec. 6 complaint, the unnamed AAG left to make copies of Wollenberg's checklist order. The copies that were later distributed to the lawyers "had been altered in several ways," she alleges.

"Two portions of the judge's ruling," the complaint states, "had been crossed out, and a new requirement had been imposed on the mother of the juvenile [to] make it appear the judge had ordered the 'Specific Steps' which the AAG had advocated."

Three days later, Wollenberg had Mierzwa redraft the original version of his orders, despite further unsuccessful argument from the AAG to change them, Mierzwa claims.

Meanwhile, the complaint alleges, Mierzwa's supervisors "embarked on a course of conduct to cover up what appeared to be misconduct by the AAG," letting Mierzwa know, "explicitly or impliedly, that she would be deemed insubordinate if she spoke to anyone outside the judicial branch and her chain of command about the matter."

The defendants named in the federal suit are: Superior Court Operations Executive Director Joseph D. D'Alesio; Maria R. Kewer, program manager for the court operations division; Cynthia L. Cunningham, chief clerk for juvenile matters; judicial district Chief Clerk Robin C. Smith; and Nancy A. Porter, counsel in the legal services unit of the court operations division.

A Judicial Branch spokeswoman declined comment, while Attorney General Richard Blumenthal said he has found no evidence that his AAG did anything wrong.

In an Oct. 6 memo to D'Alesio, Porter summarized the findings of a pre-disciplinary hearing with Mierzwa, which Porter conducted. Mierzwa was being investigated for disclosure of confidential

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information in violation of C.G.S. Sec. 46b-124 and Practice Book Sec. 30a-8, "use of her Judicial Branch position for personal gain; misrepresenting the Judicial Branch; and failing to follow supervisors' directions."

Porter wrote that Mierzwa met with Rosenblatt on May 25 and brought a copy of the order, redacted so the juvenile's identity would remain obscure. "Mierzwa was incredulous that Court Operations decided not to pursue the matter further."

Porter recounted Mierzwa saying that Wollenberg "did not understand the gravity of what happened," and despite her protests, she felt "he did not want to take it on [and] did not want the matter put in front of him." The memo then quotes Mierzwa claiming her "duty was to the Bar, not management" to act on her own.

Porter probed to find out whether Mierzwa had made a report to the Statewide Grievance Committee or Blumenthal's whistleblower unit. Mierzwa, who was not represented by counsel at the meeting, said she'd have to "ask her attorney if she could respond."

Porter waxed italic, quoting the statute, to emphasize the key charges against Mierzwa. "All records of cases of juvenile matters ¿ shall be confidential and for the use of the court in juvenile matters," she pointed out. Porter also grilled Mierzwa with a series of hypothetical questions, and Mierzwa asserted that attorney-client privilege extended to the redacted order she showed her attorney.

Rosenblatt, in an interview, argued that, within the strictures of the privilege, "showing a document to your lawyer is like showing it to yourself," and really isn't disclosure to a third party.

In Porter's inquiry, Mierzwa explained she brought the order with her as proof. "I felt compelled to see an attorney and I could not go to an attorney without anything," she said. Porter recounted in her memo to D'Alesio that she asked Mierzwa whether she couldn't have described the situation as a hypothetical, in great detail, without disclosing the judge's order. Answering, Mierzwa's "eyes welled up and she said: 'I have an answer, but I am not comfortable answering the question.'"

In her stinging conclusion, Porter found that "Mierzwa used the cloak of professional and ethical obligations to act as a rogue employee." The document disclosure to her lawyer "constitutes a failure to follow the most basic direction of a Judicial Branch supervisor -- uphold and follow Connecticut law," Porter wrote.

Porter concluded, however, that Mierzwa didn't misrepresent the Judicial Branch or use her position for personal gain, other than "whatever personal aggrandizement Mierzwa may have enjoyed as a result of her crusade."

Far from being a "rogue," Rosenblatt said his client's performance reviews show she was a highly praised and competent professional. Her annual review for the period ending in March gives her consistent "very good" marks, except for a "good" in attendance. "Mary Ann conducts herself very professionally in all aspects of her job," states the report, signed by defendant Smith.

Rosenblatt said his client has filed a whistleblower complaint, and that he has spoken with an assistant attorney general in the whistleblower division. AAG Arnold Menchel "didn't make any promises he couldn't keep," and he recognized the delicacy of investigating a serious ethics complaint against a fellow AAG, Rosenblatt said.

"Their employee has rights here, too," added Rosenblatt, who declined to identify the AAG who is the subject of the complaint.

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DR 5-108 [1200.27] Conflict of Interest - Former Client.

A. Except as provided in DR 9-101 [1200.45] (B) with respect to current or former government lawyers, a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:

1. Thereafter represent 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.

2. Use any confidences or secrets of the former client except as permitted by DR 4-101 [1200.19] (C) or when the confidence or secret has become generally known.

B. Except with the consent of the affected client after full disclosure, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

1. Whose interests are materially adverse to that person; and

2. About whom the lawyer had acquired information protected by section DR 4-101 [1200.19] (B) that is material to the matter.

C. Notwithstanding the provisions of DR 5-105 [1200.24] (D), when a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm only if the law firm or any lawyer remaining in the firm has information protected by DR 4-101 [1200.19] (B) that is material to the matter, unless the affected client consents after full disclosure.

DR 4-101 [1200.19] Preservation of Confidences and Secrets of a Client.

A. "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

B. Except when permitted under DR 4-101 [1200.19] (C), a lawyer shall not knowingly:

1. Reveal a confidence or secret of a client.

2. Use a confidence or secret of a client to the disadvantage of the client.

3. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

C. A lawyer may reveal:

1. Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

2. Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

3. The intention of a client to commit a crime and the information necessary to prevent the crime.

4. Confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer or his or her employees or associates against an accusation of wrongful conduct.

5. Confidences or secrets to the extent implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

D. A lawyer shall exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 [1200.19] (C) through an employee.

RULE 1.9:
Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent 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 unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

RULE 1.6:
Confidentiality of Information

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

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Joseph Ortego is a nationally recognized trial attorney with over 30 years of experience. His practice focuses on providing critical litigation and business solutions to publicly traded companies of all sizes. As the Chair of Nixon Peabody's Products: Class Action, Industry & Trade Representation Practice Group, Mr. Ortego has defended cases for major corporations ranging from financial institutions to automotive and chemical companies. These cases also include Fortune 100 commercial, environmental, and toxic tort cases.

Most recently, Mr. Ortego was named Leader of the firm's NP Trial Team, an international team of the firm's most successful and experienced trial lawyers. Overall, Mr. Ortego has tried more than 100 cases to verdict for major privately-held and public corporations ranging from financial institution to petro-chemical companies. He serves as national trial counsel for a number of clients who desire a consistent approach to class action and aggregate litigation matters filed in multiple jurisdictions. He has significant experience in commercial disputes and toxic tort, environmental, employment, intellectual property, products, and insurance matters. Mr. Ortego's clients include; Exxon Mobil, Wal-Mart, Daimler Trucks, Shell, Avis,Varian Medical Systems, Johnson Controls, Eurocopter, The Monsanto Company, Lockheed Martin, Pfizer Inc, and Northrop Grumman.

Mr. Ortego is a member of the American Law Institute, the American Bar Foundation, and the American Board of Trial Advocates. He has earned the Martindale-Hubbell Law Directory's AV rating, the Directory's highest accolade. He has also been recognized in the 2009 edition of New York Super Lawyers for his exceptional standing in the legal community.
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