

Attorney As FCA Whistleblower Remains Treacherous Ground

Law360, New York (June 24, 2015, 11:05 AM ET) -- Whether an attorney should be allowed to file a whistleblower lawsuit against his own client is one of the most controversial subjects arising under the False Claims Act, Dodd-Frank and other whistleblowing statutes. Finding the right answer requires balancing the laws' desire to encourage reporting of wrongdoing with lawyer's obligations of confidentiality and loyalty, which are designed to encourage clients to seek advice and counsel regarding potentially improper conduct. Many are rightly concerned about the prospect that allowing lawyers to turn on their clients will discourage precisely the kind of consultations and advice-seeking that the attorney-client privilege is designed to facilitate, and lead to a breach of the trust between lawyers and their clients.



Scott Stein

In 2013, the Second Circuit dismissed an FCA case brought against a company by its former general counsel, finding that the FCA does not preempt a lawyer's ethical obligations and concluding that filing a qui tam lawsuit against the lawyer's former client violated his ethical obligations to his former client. See *United States ex rel. Fair Laboratory Practices Associates v. Quest Diagnostics Incorporated*. While the court did not impose a blanket prohibition on lawyers as whistleblowers against their own clients, it affirmed that they could do so only to the extent consistent with applicable rules of ethics.

A recent decision from another federal district court extends this holding. In *United States ex rel. Holmes v. Northrop Grumman Corp.*, No. 1:13-cv-00085-HSO-RHW, docket no. 158 (S.D. Miss. June 3, 2015), the court disqualified an attorney whistleblower who sued his client's adversary, holding that even though the target of the attorney's conduct was his client's opponent in other litigation, the attorney's conduct nevertheless violated duties of confidentiality and loyalty to his own client.

The relator, Donald Holmes, was retained as outside counsel by an insurance company to represent it in an arbitration proceeding against [Northrop Grumman](#) ("NG") to resolve a coverage dispute. In connection with these proceedings, Holmes filed a complaint in the U.S. District Court for the District of Columbia seeking to obtain documents from the [U.S. Navy](#) for use in the arbitration proceedings. Holmes eventually obtained the requested documents, subject to a stipulated protective order entered by the court. While the arbitration proceedings and the action to obtain documents were still pending, Holmes filed an FCA complaint seeking over \$2.5 billion in damages against NG alleging that it had violated the FCA by using funds earmarked for Hurricane Katrina relief as reimbursement for cost overruns on unrelated projects.

After the government declined to intervene and the qui tam was unsealed, NG moved to disqualify Holmes from serving as a relator and to dismiss the case arguing that Holmes breached his ethical duties by (1) violating the protective order by using information that was the subject of that order as the basis for his FCA claim, and (2) violating his duties of candor, loyalty and confidentiality to his client in the arbitration, the insurance company. In response, Holmes argued that the protective order did not bar the disclosure of fraud to the government, and that the FCA preempts any ethical rules that would

otherwise have prohibited his actions.

The court soundly rejected Holmes's arguments. As did the Second Circuit, the court rejected the argument that the FCA preempts an attorney's ethical obligations. The court also held that Holmes had violated several ethical rules. In particular, by requesting documents from the U.S. Navy in connection with arbitration proceedings and using that information as the basis for FCA claims in a separate proceeding, Holmes violated his ethical duty to act with candor and to obey court orders, in particular the stipulated protective order. And even though, unlike the relator in the Second Circuit case, Holmes did not sue his former client, the court nevertheless concluded that in suing his client's opponent, NG, Holmes had violated ethical duties owed to his client by using confidential information obtained in his representation of the insurance company in another matter. Moreover, the court held, Holmes had a clear conflict of interest because positions taken by Holmes in the qui tam action conflicted with positions he advocated on behalf of the insurance company in the arbitration.

"[B]ased on the totality of the ethical violations committed by Holmes," the court disqualified Holmes and dismissed the complaint, adding that in this situation, "the Court is not faced with the prospect of disqualifying an innocent party's chosen counsel" but only "preclud[ing Holmes] from receiving the benefits which may otherwise be available to him personally as a relator, such that the social interests in allowing him to continue participating in this case are minimal."

The pace of whistleblower cases being filed has increased steadily over the last two decades, and it will only continue to accelerate as Congress provides more funding for civil FCA enforcement, and the U.S. [Securities and Exchange Commission](#), [Internal Revenue Service](#) and other agencies ramp up their own programs to reward whistleblowers. But the Holmes case serves as a reminder that while the whistleblower laws validate important public policies, they do not override equally valid public policy goals encapsulated in the attorney-client privilege and related ethical rules.

—By Scott D. Stein and Emily Van Wyck, [Sidley Austin LLP](#)

[Scott Stein](#) is a partner and [Emily Van Wyck](#) is an associate in Sidley Austin's Chicago office.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal or tax advice.