Federal Bar Association

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QUI TAM CONFERENCE

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Interviewing Whistleblowers: Techniques and Rules of the Road

Panelists: Laurie Oberembt, Senior Trial Counsel, DOJ Civil Fraud Section
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Moderator: Gregg Shapiro, Newman & Shapiro

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Legal Issues that May Arise in Dealing with Whistleblowers

- Issues for government and whistleblower lawyers in avoiding breaches of the attorney-client privilege
- Issues for government investigators in dealing with the Fourth Amendment
- Issues for in-house attorneys and investigators in protecting attorney-client privilege

For the government and whistleblower counsel: Be wary of attorney-whistleblowers and potentially privileged documents

In Re Examination of Privilege Claims,
No. MC15-15-JPD, 2016 WL 11164791 (W.D. Wash. May 20, 2016)

- Co-Relator was in-house attorney for defendant corporation.
- One of relators provided a privileged document to relators' counsel.
- Court disqualified co-relator based on Washington Rule of Professional Responsibility 1.9(a), which prohibits side-switching by attorneys against former clients; court also struck first amended complaint that relied on information from co-relator.
  - *See also United States v. Quest Diagnostics Inc.*, 734 F.3d 154 (2d Cir. 2013) (affirming dismissal of *qui tam* complaint filed by group that included former in-house counsel because disclosure statement revealed more than what was "reasonably necessary to prevent any alleged ongoing fraudulent scheme").

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- Shortly after relator interview, relators' counsel realized it had a document that might be privileged.
- Relators' counsel worked with government to address privilege issue, and ultimately sought guidance from the court.
- Defendant sought disqualification of relators' counsel.
- Court considered four factors: (1) prejudice; (2) counsel's fault; (3) counsel's knowledge of claim of privilege; and (4) possible lesser sanctions.

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Prejudice

- "[F]or purposes of disqualification of counsel for access to privileged information, prejudice turns on the significance and materiality of the privileged information to the underlying litigation. Access to inconsequential information does not support disqualification, but review of information material to the underlying litigation weighs in favor of disqualification."
- Court found lack of prejudice because privileged document at issue "is in no way a 'smoking gun' containing privileged information that is significant and material to the underlying litigation."

Counsel's Fault - Court found lack of fault where document was not obviously privileged, and relators' counsel worked with government to address privilege issues and ultimately brought them before the court.

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Counsel's knowledge of claim of privilege

- "If an attorney reviews materials clearly designated as privileged information or continues review once the attorney becomes aware there are claims of privileged information, disqualification may be warranted."
- Court found that relators' counsel did not act inappropriately, crediting assertions of relators' counsel that he "never used [privileged information] in a pleading seeking relief that was contrary to [defendant]'s interests, such as a summary judgment motion, trial brief, motion in limine, or similar pleading," and "did not use the documents to identify potential witnesses, nor did we ever use the documents in interviews o[r] depositions."

Possible Lesser Sanctions – Court noted that first amended complaint was already stricken; that was sufficient sanction.

For the government and whistleblower counsel: Be wary of attorney-whistleblowers and potentially privileged documents

United States ex rel. Hartpence v. Kinetic Concepts, Inc., No. CV 08–1885–GHK, 2013 WL 2278122 (C.D. Cal. May 20, 2013)

- Government had notified relators' counsel that "certain documents would not be considered in the government's investigation because the documents appeared to be privileged."
- "Instead of seeking direction from the Court, Relators' counsel continued to quote in the pleadings (e.g., an amended complaint) portions of privileged documents. . . ."
- Relators' counsel "should have sought guidance from the Court even before transferring such documents to the USAO."
- "Relators' counsel therefore failed to comply with their affirmative duty to take 'reasonable remedial action' after they received privileged documents, and we conclude that disqualification is appropriate."
- "[W]e are not disqualifying counsel merely because they were exposed to privileged materials."

For the government and whistleblower counsel: Be wary of attorney-whistleblowers and potentially privileged documents

UNITED STATES EX REL. FRAZIER V. IASIS HEALTHCARE CORP.,
No. 2:05–cv–766–RCJ, 2013 WL 130332 (D. Ariz. Jan. 10, 2012)

- Relator, "both a licensed attorney and certified public accountant, was the Chief Compliance Officer and Vice President of Ethics and Business Practices of IASIS."
- "The Court finds that Frazier did not have an attorney-client relationship with IASIS. Frazier was a compliance officer for IASIS and was not IASIS's attorney."

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UNITED STATES EX REL. FRAZIER V. IASIS HEALTHCARE CORP.,
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- Relator had taken documents with him when he left company, which had a "code of conduct that stated that employees did not 'disclose confidential business information without proper authorization.'"
- "[T]he Court finds that Frazier stole documents from IASIS without permission and then used those documents against IASIS in the present lawsuit."
  - *But see United States ex rel. Gohil v. Sanofi U.S. Servs. Inc.*, No. 02-2964, 2016 WL 9185141, at *2 n.3 (E.D. Pa. Sept. 12, 2018) (finding that "[e]ven if the documents were 'misappropriated,' [relator]'s actions would not necessarily warrant exclusion of using the documents … [as] [f]ederal courts recognize that there is a strong public policy to allow relators to use corporate documents from the defendant in the prosecution of FCA claims"); *United States ex rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033, 1038 (C.D. Cal. 2012) ("Relators sought to expose a fraud against the government and limited their taking to documents relevant to the alleged fraud. Thus, this taking and publication was not wrongful, even in light of nondisclosure agreements, given the strong public policy in favor of protecting whistleblowers who report fraud against the government.") (quotation omitted).

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UNITED STATES EX REL. FRAZIER V. IASIS HEALTHCARE CORP.,
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- Relator had supplied relator's counsel with "documents which contained legends such as 'attorney-client privilege' or had information on the header indicating that they might contain privileged or attorney work-product information."
- Relator's counsel said that she "did not further review any such documents. She set those documents aside and did not read them. She 'reviewed only those documents from which [she] was confident, from a quick glance, that there could be no claim of attorney-client privilege' by IASIS."
- During the relator interview with the government, relator's counsel "recognized that two of the documents that had been disclosed to the government were potentially privileged."
- Relator's counsel subsequently went through relator's documents again and put the potentially privileged ones in a sealed box.

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United States ex rel. Frazier v. IASIS Healthcare Corp.,
No. 2:05–cv–766–RCJ, 2013 WL 130332 (D. Ariz. Jan. 10, 2012)

- After case was unsealed and served, defense counsel sent letter asserting that defendant had reason to believe relator had taken privileged documents. Defense counsel demanded return of those documents.
- Relator's counsel initially responded without acknowledging possession of privileged documents.
- Relator's counsel ultimately returned segregated documents, but not three documents relator claimed not to be privileged. Court later found these documents to be privileged.
- Defendant moved for sanctions against relator and his counsel

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United States ex rel. Frazier v. IASIS Healthcare Corp.,
No. 2:05–cv–766–RCJ, 2013 WL 130332 (D. Ariz. Jan. 10, 2012)

- Relator settled by agreeing to withdraw case and never to sue defendant again.
- Court found that, because of FCA seal, relator's counsel could not have notified defendant about privileged documents while case was still under seal.
- But, even after seal was lifted, relator's counsel did not promptly notify defendant, and instead "feigned ignorance" when defense counsel first raised the issue.
- Court also suggested that relator's counsel could have sought a ruling from the court about what to do with the privileged documents even while the case was under seal.
- Court found that "[t]he facts presented do not establish extraordinary circumstances of bad faith because Qui Tam Counsel kept the undisputed, privileged documents in a Sealed Box."
- But court still sanctioned relator's counsel with attorney's fees and costs for proceedings related to the privileged documents.

For the government and whistleblower counsel: Be wary of attorney-whistleblowers and potentially privileged documents

State of Delaware ex rel. Rogers v. The Bancorp Bank,
C.A. No. N18C-09-240 PRW, 2023 WL 21331 (Del. Super. Ct. Jan. 3, 2023)

- In interrogatory response, relator disclosed for first time that he had given his work laptop to relator's counsel.
- Relator's counsel had loaded laptop contents onto document review platform.
- One attorney, Fox, had reviewed 59 documents for which defendant claimed privilege.
- "As an initial matter, a relator's counsel's 'mere exposure' to privileged information alone might not warrant disqualification. But access and exposure do require 'reasonable remedial action,' which could include: (1) building proper ethical walls or utilizing a privilege team; (2) seeking immediate and appropriate court guidance, and (3) prompt notification to opposing counsel once the complaint is unsealed."
- Because Fox did none of those, court disqualified him, but not his firm. Court also ordered firm to pay special master fees.

Tips for whistleblower counsel in avoiding privilege issues

- Think long and hard before taking on an attorney as a whistleblower client, even if the attorney was not necessarily acting as an attorney. An attorney as a client presents both side-switching and privilege issues that may be very difficult to avoid.
- Explain clearly and repeatedly to any client or potential client (1) what the attorney-client privilege is, and (2) that the client should not provide you with any privileged documents.
- If your client gives you a document dump (e.g., a company laptop), don't just start looking through it. Consider hiring separate taint counsel or devise some other method designed to prevent viewing of privileged documents.
- If you obtain privileged documents, do not give them to the government, and do not rely on them in building or litigating your case.
- Once the case is out from under seal, promptly work with the defendant and, if necessary, the court to address the privilege issues.

For the government: Do not use relator as *de facto* government agent to conduct investigation that otherwise would require warrant

Gouled v. United States, 255 U.S. 298 (1920)

- Government was investigating Gouled for defrauding the Army through clothing and equipment contracts.
- Army directed a private, who was a business associate of Gouled, "to make a friendly call upon the defendant [to] gain[]admission to his office"
- "[I]n [Gouled's] absence, without warrant of any character, [private] seized and carried away several documents," one of which was subsequently introduced at trial.
- "[W]hether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call . . . any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment."

For the government: Do not use relator as *de facto* government agent to conduct investigation that otherwise would require warrant

Lewis v. United States, 385 U.S. 206 (1966)

- "A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant."
- "[T]his does not mean that, whenever entry is obtained by invitation and the locus is characterized as a place of business, an agent is authorized to conduct a general search for incriminating materials."
- Thus, in general, a relator may collect information that the relator receives in the normal course of business.

For the government: Using a relator to make covert recordings of a represented party

MASSACHUSETTS RULE OF PROFESSIONAL CONDUCT 4.2

- "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

- N.5: "Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings."

For the in-house counsel: Protect the privilege

In *Upjohn v. United States*, 449 U.S. 383 (1981), Court confirmed that communications between corporate counsel and corporate employees were potentially privileged.

- Court reasoned that privilege applied because the "first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant."

For the in-house counsel: Protect the privilege

In-house counsel interviewing a corporate employee typically gives an "*Upjohn*" warning that counsel represents the corporation, not the employee, that the communications are privileged, and that only the corporation may waive the privilege. *See* Model Rule 1.13.

For the in-house counsel: Protect the privilege

***In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (2014)**

- Privilege covers internal investigation conducted by paralegals and others: "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege."
- "[N]othing in *Upjohn* requires a company to use magic words to its employees in order to gain the benefit of the privilege for an internal investigation. And in any event, here as in *Upjohn* employees knew that the company's legal department was conducting an investigation of a sensitive nature and that the information they disclosed would be protected."
- "So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion."

Tips for in-house counsel when interviewing witnesses

- Explain to witnesses that you represent the company and that the content of the conversation cannot be shared without the company's permission.
- If the witness asks if they need counsel, do not provide legal advice.
- Be mindful of waiving privilege when responding to witness questions about an investigation and the results of an investigation.
- Build rapport; witnesses are colleagues and even if disciplined as a result of an investigation may continue to be company employees.
- Be aware of, and comply with, whistleblower protections.
- Establish, and remind witnesses of, a non-retaliation policy.
- Use appropriate markings on documentation memorializing witness interviews and the results of an investigation.