NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1287 (10/17/2025)

Topic: Whistleblower using confidential information of former client

Digest: A New York lawyer may not ethically act as a relator in a *qui tam* action under the False Claims Act (31 U.S.C. §§ 3729–3733) against a former client, where the information used to support the claim was obtained during the course of the prior representation, unless disclosure is necessary to prevent the commission of a crime.

Rules: 1.9(c), 1.6(b), 1.13

FACTS:

1. The inquirer is a New York attorney who was formerly employed as general counsel at Corporation X, a federal contractor subject to the requirements of Federal Acquisition Regulation (FAR) 52.203-13, which mandates that contractors establish a written Code of Business Ethics and Conduct and an internal control system to detect and prevent improper conduct in connection with government contracts.

2. During his employment as in-house counsel at Corporation X, the inquirer was responsible for drafting a Code of Business Ethics and Conduct to fulfill the corporation's obligations under FAR 52.203-13. However, despite his remonstrance with corporate leadership, Corporation X did not adopt the attorney's draft, nor did it implement an alternative code or internal compliance system as required by the regulation.

3. Corporation X has continued to bill the federal government under its contracts without having adopted or implemented a compliant ethics code or related internal controls. The inquirer's employment was recently terminated, and the Inquirer now wants to act as a *qui tam* relator alleging that Corporation X submitted false implied certification claims for payment while willfully violating the FAR requirements referenced above. The Inquirer tells us that he would base these allegations on knowledge acquired during his employment with Corporation X.

QUESTION:

4. May an attorney act as a relator in a *qui tam* action under the False Claims Act against a former client where the information used to support the claim was obtained during the course of the prior representation?

OPINION:

5. Under the Federal False Claims Act ("FCA"), a private party may bring a claim alleging that another individual or entity has submitted false claims to the U.S. government. The party initiating the lawsuit, called the "relator," is essentially filing suit on behalf of the U.S. government.

Should the action be successful, the relator is then entitled to a payment taken out of the proceeds of the suit.

6. In the New York Rules of Professional Conduct (the "Rules"), Rule 1.6 (entitled "Confidentiality of Information") defines "confidential information" and limits a lawyer's use of a client's confidential information. A lawyer may not disclose confidential information gained during or relating to the representation of a client unless an exception applies. Rule 1.6 provides, in pertinent part:

> (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:
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> (1) the client gives informed consent, as defined in Rule 1.0 (j):
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> (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).
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> "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:
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> . . .
>
> (2) to prevent the client from committing a crime;

7. As to a lawyer's duty of confidentiality to a former client, Rule 1.9 (entitled "Duties to Former Clients") provides, in pertinent part:

> *(*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.

8. Here, the information that the Inquirer proposes to use is confidential under Rule 1.6(a) and the Inquirer learned it during the course of his prior representation of Corporation X. The proposed use of the information is to the disadvantage of the former client. The only way the Inquirer can ethically use the information is if the information fits into the exception set out in Rule 1.6(b)(2), which is equivalent to the common law "crime/fraud exception" – and even then the Inquirer may disclose confidential information only to the extent necessary to prevent his former client (Corporation X) from committing a future crime. Whether violation of the FCA or the FAR regulations constitutes a "crime" is a question of law that is beyond the scope of our jurisdiction to determine.

9. The Second Circuit addressed a similar issue in *United States ex rel. Fair Laboratory Practices Assocs. v. Quest Diagnostics Inc.*, 734 F.3d 154 (2d Cir. 2013), a case in which a lawyer acted as relator against a corporation (Quest Diagnostics) at which he had previously served as general counsel. The district court dismissed the case. On appeal, the Second Circuit noted that the issues before it arose "out of the tension between an attorney's ethical duty of confidentiality and the federal interest in encouraging 'whistleblowers' to disclose unlawful conduct harmful to the government." *Id.* The Second Circuit agreed with the district court that Rule 1.9(c) governed the Inquirer's conduct, and agreed that the Inquirer could reasonably have believed that his client "had the intention to commit a crime." But the Second Circuit also held that the former general counsel's disclosure of confidential information violated Rule 1.9(c) because it "went beyond what was reasonably necessary to prevent any alleged ongoing crime…when the suit was filed." The Second Circuit condemned the Inquirer's "unrestricted sharing of confidential information," noting that the excessive disclosures "would taint the trial proceedings and prejudice defendants." The Second Circuit therefore affirmed the dismissal of the case.

10. An instructive case in New York State court is *State of N.Y. ex rel Danon v. Vanguard*, 2015 NY Slip Op 3221(U) (2015). There, a court considered whether an attorney/relator's disclosures went beyond what was "necessary" to prevent the attorney's client from committing a crime. The court held that an attorney could ethically disclose a client's allegedly criminal conduct to a governmental agency charged with enforcement (such as a taxing authority), but it was misconduct to disclose the information *publicly* in a qui tam action. The court therefore granted defendants' motion to dismiss the complaint and to disqualify the attorney/relator and his counsel.

11. A similar conclusion was reached in N.Y. County 746 (2013), which addressed whether New York lawyers could ethically collect whistleblower bounties in exchange for disclosing confidential information about their clients under the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. In interpreting the language in Rule 1.6(b)(6) that the lawyer disclosing confidential information "reasonably believes necessary to prevent the client from committing a crime," N.Y. County 746 concluded that, if reporting under a Federal statute is merely *allowed* but not *required*, then reporting is not "reasonably necessary" under Rule 1.6(b)(6). Opinion 746 also said: "As a general principle, there are few circumstances, if any, in which…it would be reasonably necessary within the meaning of RPC 1.6(b) for a lawyer to pursue the steps necessary to collect a bounty as a reward for revealing confidential material." We agree, especially since there are ways to inform the government of criminal conduct other than by filing a *qui tam* action under the False Claims Act.

CONCLUSION:

12. A New York lawyer may not ethically act as a relator in a *qui tam* action under the False Claims Act (31 U.S.C. §§ 3729–3733) against a former client, where the confidential information used to support the claim was obtained during the course of the prior representation, unless disclosure is necessary to prevent the commission of a crime.

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