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Financial Rewards for Whistleblowing Lawyers

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FINANCIAL REWARDS FOR WHISTLEBLOWING LAWYERS

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Abstract: The federal government increasingly relies on whistleblowers to ferret out fraud, awarding over $4 billion to whistleblowers under the False Claims Act ("FCA") and the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). May lawyers ethically seek these whistleblower rewards? Several lawyers have tried unsuccessfully to serve as FCA whistleblowers. Additional lawyers may be seeking whistleblower rewards under Dodd-Frank, but the secrecy of the award process prevents us from knowing whether they have sought or received awards. This is the first Article to analyze in-depth the key questions for determining whether a lawyer may seek a federal whistleblower award: (1) When may a lawyer disclose a client's confidential information? (2) When does a lawyer's obligation of loyalty preclude seeking a personal benefit by disclosing a crime or fraud? (3) Do federal whistleblower laws preempt state ethics standards? (4) Which state's ethics law applies when several states have significant contacts with the matter? These questions are enormously complex. Confidentiality exceptions differ widely among states. Lawyers are bound not just by conflict of interest rules, but also by the common-law duty not to profit from a client's confidential information. While several federal courts have summarily rejected FCA preemption of state ethics standards, none of them confronted the fact that the FCA preempts state law fiduciary and contractual duties that would prevent nonlawyer insiders from serving as whistleblowers.

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INTRODUCTION

The federal government increasingly relies on whistleblowers to assist in the enforcement of legal norms. This reliance is reflected not just in statutes promising protection for whistleblowers that experience retaliation, but also in other statutes providing large financial incentives for whistleblowers. The oldest of these statutes is the federal False Claims Act ("FCA"),[1] originally enacted in 1863 to enable whistleblowers (often organizational insiders) to file qui tam lawsuits in the name of the federal government against companies that have made false claims for payment from the gov-

[1] 31 U.S.C. § 3729 (2012).

ernment. These whistleblowers ("relators") have a right to 10–30% of any resulting verdict or settlement, and have been awarded more than $4 billion in the years since Congress strengthened the statute in 1986.[2] Based in part on the FCA's track record, Congress recently expanded the availability of whistleblower financial incentives by enacting the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), which required the Securities and Exchange Commission ("SEC") to give financial awards to whistleblowers who report securities violations to the SEC.[3] If a whistleblower's tip results in sanctions of greater than $1 million, the whistleblower can receive between 10–30% of the sanction amount.[4] The SEC receives thousands of these tips every year, and has issued awards reaching into eight figures.

Lawyers for companies that do business with the government and for publicly traded companies have access to the kind of information that a whistleblower would need to file a qui tam FCA lawsuit or to file a whistleblower tip with the SEC. May lawyers—like other organizational insiders—take advantage of these financial incentives? Neither the FCA nor Dodd-Frank specifically addresses this question. As the government's reliance on whistleblowers has expanded, it is increasingly important to identify when lawyers—like others—may take advantage of these whistleblower incentives.

A handful of lawyers have sued their former clients as qui tam relators under the FCA, although to date none have been successful.[5] Among the obstacles confronting lawyer-relators are their obligations of confidentiality and loyalty under applicable state ethics rules; indeed, three of these lawsuits were dismissed based on findings that the lawyers had violated their ethical duties under state law. Apparently relying on aspects of these FCA cases, the SEC's recently enacted Dodd-Frank whistleblower regulations exclude information learned in the course of a lawyer-client relationship unless a lawyer is permitted to disclose that information under either state confidentiality rules or the regulations that the SEC promulgated under the Sarbanes-Oxley Act ("SOX") of 2002.[6] But the SEC's Dodd-Frank regulations do not address whether lawyers are eligible to receive a whistleblower

[2] CIVIL DIV., U.S. DEP'T OF JUSTICE, FRAUD STATISTICS—OVERVIEW 2 (May 8, 2015), http://www.justice.gov/file/fcastatspdf/download [http://perma.cc/TX4V-L98C]. The government has recovered more than $30 billion through these qui tam suits during the same period. *Id.*

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended at 15 U.S.C. § 78u-6 (2012)).

[4] 15 U.S.C. § 78u-6(b)(1).

[5] *See infra* notes 26–77 and accompanying text. Lawyers have also sued non-client third parties based on information obtained while representing a client. *See infra* notes 170–197.

[6] *See* Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-4(b)(4)(iv) (2011).

award when their conduct violates their loyalty obligations under state conflict of interest rules or fiduciary law.

Should lawyers be permitted to receive financial rewards under the FCA and Dodd-Frank whistleblower programs? There are significant financial disincentives to engaging in whistleblowing. It can result not just in the end of a job, but the end of a career. Whistleblower awards can counteract these disincentives, for lawyers as well as for other insiders. Indeed, the SEC might argue that SOX expanded lawyers' confidentiality exceptions and granted them additional discretion to make whistleblowing disclosures. Yet years after the legislation's enactment, there is little evidence that lawyers have actually made disclosures to prevent, mitigate, or rectify client fraud. Lawyers—like others—may need whistleblower awards to counteract the financial disincentives for blowing the whistle.

But a client-lawyer relationship is, in some respects, different from other relationships. Lawyers can play a critical role in ensuring that clients understand and comply with the law. Some argue that this distinctive role means that we should not grant whistleblower awards to a company's lawyers,[7] particularly when lawyers who would seek such awards may violate duties of confidentiality or loyalty,[8] even if we grant such awards to company employees who violate similar confidentiality or loyalty duties under state law.

Despite the obvious importance of such questions, it is not our purpose to engage in a normative analysis of federal whistleblower rewards to lawyers. Rather, we believe that before the normative question can be properly addressed, we need a more detailed understanding of the complex issues raised when lawyers seek federal whistleblower awards. Our descriptive agenda includes detailing the nuances of both confidentiality and loyalty obligations under state ethics laws, which vary significantly from state to state, particularly with respect to confidentiality exceptions. We also briefly discuss possible federal preemption of state ethics laws and the confounding choice of law issues raised in an era when lawyers perform their work in multiple jurisdictions, often far removed from their state of licensure.

Part I of this Article examines the relevant ethics law in light of the operation of the FCA's unusual qui tam litigation procedures for whistleblowers who sue in the name of the government. Part II does the same with

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[7] *See, e.g.*, Jennifer M. Pacella, *Advocate or Adversary? When Attorneys Act as Whistleblowers*, 28 GEO. J. LEGAL ETHICS 1027, 1054 (2015).

[8] *See id.*; *see also* N.Y. Cnty. Lawyers' Ass'n Comm. on Prof'l Ethics, Formal Op. 746, at 13–15 (2013), https://www.nycla.org/siteFiles/Publications/Publications1647_0.pdf [http://perma.cc/VUU3-EXJW]; Barry R. Temkin & Ben Moskovits, *Lawyers as Whistleblowers Under the Dodd-Frank Wall Street Reform Act*, N.Y. ST. B.A.J. 11, 16–17 (2012).

respect to the Dodd-Frank statute and the SEC regulations for its whistleblower award program. Within each of these sections, we address how lawyers' professional obligations of confidentiality and loyalty may affect their ability to qualify for financial awards. After describing the particulars of the FCA and Dodd-Frank whistleblower reward programs, we begin our ethics analysis with a brief discussion of the few FCA cases that have addressed the confidentiality and loyalty obligations of lawyer-relators. Although these cases address some of the relevant issues applicable under both the FCA and Dodd-Frank,[9] they do not address or fully explore the wide range of ethical issues that we identify as arising under applicable ethics law. We analyze these issues first under the American Bar Association ("ABA") Model Rules of Professional Conduct and then under the significant state variations, which exist primarily with respect to confidentiality. Within each category, we address lawyers' obligations to both current and former clients, not only when the target of the lawyer's disclosure is the client itself, but also when the target is a third party about whom the lawyer acquired information while representing a client.

With respect to the lawyer's obligation of confidentiality, one of the issues we consider is whether it is ever "reasonably necessary" for a lawyer to actively seek a whistleblower reward in order to "prevent, mitigate or rectify" the substantial economic harm that may result from a client's crime or fraud, especially when to do so requires the lawyer to file and actively litigate an FCA lawsuit against a current or former client.[10] We also explore whether and under what circumstances whistleblower rewards are justified in states that permit disclosure solely to prevent future wrongdoing, given that the federal reward programs are based on establishing a company's past wrongdoing. We conclude that, contrary to the apparent view of the courts in the existing FCA cases, it may be difficult for lawyer-whistleblowers to avoid violating state confidentiality rules, even in jurisdictions that permit disclosure to rectify past wrongdoing.

It may be difficult, but not impossible. Thus, we also consider, as did a federal district court in a recent FCA case, whether lawyers' obligations of loyalty affect lawyers seeking whistleblower awards, even when confidentiality rules do not prohibit the requisite disclosure. For example, we consider whether a lawyer may continue to represent a client while seeking a whistleblower award, even on a matter unrelated to the lawyer's ongoing work.

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[9] There are no reported cases involving lawyer-whistleblowers under Dodd-Frank. Although there are some differences in applying applicable ethics law to the two statutory programs, the issues are similar. As a result, the FCA cases are helpful in analyzing the ethical obligations of both FCA and Dodd-Frank whistleblowers.

[10] MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(3) (AM. BAR ASS'N 2015).

We also explore whether former-client conflicts rules or common-law fiduciary duties prevent a lawyer from seeking a whistleblower award, as well as whether and when lawyers are obligated to inform their clients that they have disclosed damaging information to governmental authorities. Here we also conclude that, although there are many open issues, ethics law presents substantial obstacles to lawyers acting in pursuit of their own interests, even when confidentiality rules permit them to disclose for other purposes. This law includes both conflict of interest rules for current clients, which are particularly salient for lawyers seeking to take advantage of the anonymity promised by Dodd-Frank, and a common-law fiduciary duty that prohibits lawyers (and other fiduciaries) from profiting from the use of confidential client information. This common-law duty applies to both current and former representation and also precludes lawyers from pursuing whistleblower awards against non-client third parties without the client's consent, even when doing so will not harm the client.

Part III briefly addresses whether the federal whistleblower incentives under the FCA and Dodd-Frank preempt any aspects of state ethics laws regarding confidentiality and loyalty that would prevent a lawyer from participating in these whistleblower incentive programs. The few FCA decisions that have addressed the lawyer-relator issue agree that there has been no such preemption. But their discussion of the issue is minimal and ignores other FCA cases denying a defendant permission to assert a counterclaim against a nonlawyer-relator for breach of contract or breach of fiduciary duty when the assertion of such claims would undermine the federal government's strong interest in encouraging whistleblowers to come forward. These nonlawyer-relator cases do not explicitly use preemption analysis, but the result nevertheless appears to be that at least some nonlawyer obligations under state law are being preempted by the FCA. We then address whether lawyers' obligations under state standards might be treated differently under the FCA than the obligations of nonlawyers. As for Dodd-Frank, the SEC regulations expressly provide that more restrictive state confidentiality standards are preempted by the preexisting SOX lawyer whistleblower regulations. But the Dodd-Frank regulations do not mention lawyers' loyalty obligations under state conflict of interest rules or fiduciary law. As a result, it is unclear whether and to what extent those obligations are impliedly preempted by the Dodd-Frank whistleblower bounty program.

Assuming that at least some state ethics rules are not preempted by the FCA or Dodd-Frank, Part IV introduces the difficult choice of law issues that may arise as a result of the considerable variation in state confidentiality rules. Both the FCA and the Dodd-Frank award programs involve national companies with multiple offices, as well as in-house lawyers who may not be licensed in the state where they advise the company. As a result, a lawyer is unable to predict with certainty which state's ethics rules govern. Because the SEC's Dodd-Frank regulation apparently preempts state confidentiality rules that are stricter than the SEC's own SOX regulation, and because loyalty provisions do not differ significantly from state to state, we focus our choice of law discussion on the difficult issues that arise when a federal court attempts to determine the ethical propriety of a lawyer-relator's disclosure of confidential client information in bringing a qui tam lawsuit. Several FCA cases have briefly addressed choice of law issues in such a national setting, but we conclude that these decisions do not adequately confront the complexities of determining not only whose choice of law rule controls—the federal district court, the forum state, or some other state—but also whether a litigation or nonlitigation choice of law rule should apply. Although we do not thoroughly explore the choice of law issues raised here, we recommend that federal courts consider developing their own federal common-law choice of law rule for FCA lawsuits, perhaps incorporating existing approaches such as the ABA Model Rules' nonlitigation choice of law provision or the *Restatement (Second) of Conflict of Laws*' agency provisions.

This Article concludes with a summary of our findings. In addition, although we do not address the normative question of whether lawyers *should* be entitled to seek whistleblower rewards, we express concern about whether it is ever appropriate, as is provided under Dodd-Frank, for determinations of lawyer eligibility to be conducted in secret, in a process largely insulated from judicial review.

I. Qui Tam Whistleblower Awards Under the False Claims Act

A. Primer on the FCA

The FCA enables almost anyone to file a lawsuit in the name of the United States to recover monies from someone who made false claims for payment from the government.[11] In an FCA case, the relator files a complaint with the district court under seal and provides the U.S. Department of Justice with the complaint and a "written disclosure of substantially all material evidence and information the person possesses."[12] The defendant does not re-

[11] *See* 31 U.S.C. § 3729; John T. Boese, Civil False Claims and Qui Tam Actions § 4.01[B] (4th ed. 2011) (stating that "virtually anyone can be a *qui tam* relator"). The statute excludes current or former members of the armed forces from serving as a relator if they are suing another member of the armed forces based on that other member's service. 31 U.S.C. § 3730(e)(1)–(2) (2012). The statute also excludes members of Congress, the Judiciary, and "senior executive branch officials" from being named as defendants where the suit is "based on evidence or information known to the Government when the action was brought." *Id.*

[12] 31 U.S.C. § 3730(b)(2).

ceive the complaint until the court lifts the seal.[13] This gives the government an opportunity to investigate the relator's allegations and determine whether to participate in the relator's FCA case (or even to file criminal charges).

Ultimately, the government has four options.[14] It can: (1) ask the court to dismiss the relator's case,[15] (2) settle the case prior to formal intervention,[16] (3) intervene and take over the conduct of the lawsuit,[17] or (4) decline to intervene, allowing the relator to conduct the lawsuit.[18] The government intervenes in only 27% of FCA cases,[19] but intervened cases account for almost all (about 97%) of qui tam recoveries.[20]

Courts generally view FCA suits as sounding in fraud, and therefore impose on FCA complaints the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure,[21] which requires a complaint alleging fraud to "state with particularity the circumstances constituting fraud or mistake."[22] This means that prior to civil discovery, the relator must generally have in hand evidence of the specific false claims for payment to the government, what they were for, and who made them. As a result, the FCA relators who can meet this requirement are generally individuals who had access to and retained copies of specific information about an organization's false claims. In other words, most FCA relators are organizational insiders.

The FCA statute does not require relators to have entirely clean hands. It excludes relators who have been "convicted of criminal conduct arising

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[13] *Id.*

[14] BOESE, *supra* note 11, § 4.05.

[15] 31 U.S.C. § 3730(c)(2)(A).

[16] *Id.* § 3730(c)(2)(B).

[17] *Id.* § 3730(b)(4)(A).

[18] *Id.* § 3730(b)(4)(B). If the government declines to intervene, the relator controls the litigation but, at the government's request, must serve the Justice Department with all filings, enabling the government to monitor the proceedings. *Id.* § 3730(c)(3). In most of the cases where the government has declined to intervene, relators seek voluntary dismissal of the case. *See* David Kwok, *Evidence from the False Claims Act: Does Private Enforcement Attract Excessive Litigation?*, 42 PUB. CONT. L.J. 225, 239–40 (2013) (noting the low success rate, 9%, of non-intervened cases).

[19] David Y. Kwok, The Private Enforcement of Government Interests Under the False Claims Act 18 (Spring 2011) (unpublished Ph.D. dissertation, University of California, Berkeley), http://escholarship.org/uc/item/779978c6 [http://perma.cc/5E2Q-RSKH].

[20] *See* CIVIL DIV., U.S. DEP'T OF JUSTICE, *supra* note 2, at 2 (from 1987 until 2014, the government recovered more than $30 billion through qui tam lawsuits, but only $1 billion came from non-intervened cases).

[21] *See* Kathleen M. Boozang, *The New Relators: In-House Counsel and Compliance Officers*, 6 J. HEALTH & LIFE SCI. L. 16, 18 (2012); *see also* REUBEN A. GUTTMAN & JACOB R. KIRKHAM, GRANT & EISENHOFER, P.A., FRONTLOADING THE CASE: THEME & THEORY IN FALSE CLAIMS AND FRAUD LITIGATION 3 (2012) (on file with authors) ("Although the FCA is not technically a fraud statute, courts have almost unanimously required parties to plead in compliance with Rule 9(b).").

[22] FED. R. CIV. P. 9(b).

from his or her role in" the FCA violation,[23] but that is a relatively low bar. The statute thus implicitly recognizes that some of the individuals most likely to possess the information necessary for an FCA case may have been involved in the FCA violation. As one of the framers of the original statute recognized in 1863, the qui tam provisions "are based upon the idea of 'setting a rogue to catch a rogue.'"[24] Even a "rogue" can be eligible for a whistleblower award.[25]

B. Lawyers' Confidentiality Obligations and the FCA

This section explores whether lawyers' confidentiality obligations restrict their ability to serve as FCA relators. We first examine how courts have addressed this issue in FCA cases involving lawyer-relators, and then discuss the confidentiality standards and exceptions found in the ABA Model Rules of Professional Conduct and in state variations of those rules.

1. FCA Case Law Regarding Lawyer-Relators

Of the nearly ten-thousand qui tam FCA cases filed since 1986,[26] we were unable to find any case in which a lawyer-relator sued a current client. We did, however, identify five cases in which a lawyer-relator sued a former client.[27] In each of those cases, the lawyer alleged that he first expressed concern internally within the client company about the alleged FCA

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[23] 31 U.S.C. § 3730(d)(3).

[24] Mortgages, Inc. v. U.S. Dist. Court, 934 F.2d 209, 213 (9th Cir. 1991) (quoting CONG. GLOBE, 37th Cong., 3d Sess. 955–56 (1863)).

[25] *See id*. This feature of the statute has implications for whether FCA defendants should be able to bring counterclaims against relators. *See infra* notes 302–351 and accompanying text.

[26] *See* CIVIL DIV., U.S. DEP'T OF JUSTICE, *supra* note 2, at 2 (providing that 9960 qui tam cases were filed from Fiscal Years 1987 through 2014).

[27] Four of these cases were filed under the federal False Claims Act. Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765 (2000); United States *ex rel.* Fair Lab. Practices Assocs. v. Quest Diagnostics, Inc. (*FLPA II*), 734 F.3d 154 (2d Cir. 2013); United States *ex rel.* Repko v. Guthrie Clinic, P.C. (*Repko I*), 490 F. App'x 502 (3d Cir. 2012); United States *ex rel.* Doe v. X Corp. (*Doe*), 862 F. Supp. 1502 (E.D. Va. 1994). A fifth was filed under California's False Claims Act. Bury v. Cmty. Hosps. of Cent. Cal., No. F036667, 2002 Cal. App. Unpub. LEXIS 1035 (May 8, 2002). In each of these cases, the lawyer-client relationship ended before the lawyer-relator filed his FCA lawsuit. Additional FCA cases have been brought by licensed lawyers who learned about the alleged fraud while working as compliance officers rather than as lawyers. *See, e.g.*, United States *ex rel.* Frazier v. IASIS Healthcare Corp., No. 2:05-cv-766-RCJ, 2012 U.S. Dist. LEXIS 6896 (D. Az. Jan. 9, 2012). One legal commentator has asserted that such compliance officers are bound by lawyers' professional confidentiality duties, *see* Boozang, *supra* note 21, at 10, but a recent bar ethics opinion concludes that they are not, *see* N.Y. Cnty. Lawyers' Ass'n, *supra* note 8, at 14.

violation and that the client then retaliated against him.[28] The government declined to intervene in any of these cases, and courts dismissed them before trial. Two of the cases were dismissed on grounds unrelated to legal ethics.[29] In the remaining three, courts expressly evaluated how state confidentiality standards applied to the lawyer-relators, dismissing the cases because applicable state ethics rules prohibited the lawyer-relator from disclosing the information necessary to move forward with the FCA lawsuit.[30] None of the courts ruled that lawyers were per se prohibited from serving as relators.[31]

The first FCA case in which a court applied lawyer confidentiality standards to a lawyer-relator was *United States ex rel. Doe v. X Corp.*, in 1994.[32] Lawyer-relator Doe worked in-house for a government contractor and alleged that the contractor violated the FCA by failing to disclose that the computers it sold contained remanufactured (rather than new) components.[33] Before filing the FCA lawsuit, the lawyer raised these concerns internally, and the company disclosed additional information to the federal government.[34] But after the company terminated the lawyer,[35] he threatened

[28] Under Seal v. Under Seal, 17 F.3d 1435 (4th Cir. 1994) (per curiam) (affirming the district court's dismissal of Doe's wrongful termination lawsuit because Virginia's public policy exception to employment at will did not extend to lawyers); X Corp. v. Doe (*X Corp. II*), 816 F. Supp. 1086 (E.D. Va. 1993) (dismissing Doe's 31 U.S.C. § 3730(h) retaliation claim), *aff'd sub nom. Under Seal*, 17 F.3d 1435. Before filing his FCA lawsuit, the lawyer-whistleblower in *Stevens* was fired by the Vermont Agency of Natural Resources after raising his concerns internally. Telephone Interview with Jonathan Stevens (Aug. 2, 2012); *see also Stevens*, 529 U.S. at 770 (noting that Stevens brought the action against his former employer). Bury filed a wrongful termination action against his former client. *Bury*, 2002 Cal. App. Unpub. LEXIS 1035, at *3. Repko's retaliation claim under the FCA was dismissed on statute of limitations grounds. United States *ex rel.* Repko v. Guthrie Clinic, P.C., 557 F. Supp. 2d 522, 528–29 (M.D. Pa. 2008), *aff'd*, 490 F. App'x 502. Bibi alleged that shortly after he raised concerns about the company's practices, he was "'frozen out' by Unilab's management," "no longer asked for advice on compliance matters," and "replaced as General Counsel." *FLPA II*, 734 F.3d at 161.

[29] *Stevens*, 529 U.S. at 784 (dismissed because the Supreme Court found that the defendant, an agency of a state government, could not be sued under the statute); *Repko I*, 490 F. App'x at 503–05 (dismissed because the relator's disclosure was not considered "voluntary," as an earlier plea agreement required him to give the government information about the company's illegal activities).

[30] *FLPA II*, 734 F.3d at 168; *X Corp. II*, 816 F. Supp. at 1095; *Bury*, 2002 Cal. App. Unpub. LEXIS 1035, at *12.

[31] *See FLPA II*, 734 F.3d 154; *X Corp. II*, 816 F. Supp. 1086; *Bury*, 2002 Cal. App. Unpub. LEXIS 1035. *But see* Balla v. Gambro, 584 N.E.2d 104, 113 (Ill. 1991) (holding lawyers per se ineligible for whistleblower protection).

[32] *Doe*, 862 F. Supp. at 1504.

[33] *X Corp. II*, 816 F. Supp. at 1092. The parties filed two other lawsuits related to this FCA case. The company obtained an injunction prohibiting the lawyer from disclosing confidential information, X Corp. v. Doe (*X Corp. I*), 805 F. Supp. 1298 (E.D. Va. 1992), and the lawyer filed a wrongful termination counterclaim against the company, *Under Seal*, 17 F.3d at 1435.

[34] *X Corp. II*, 816 F. Supp. at 1086.

to sue for wrongful termination and provided the company with a copy of his draft complaint.[36] The company preemptively filed a lawsuit against the lawyer, claiming that his planned disclosure of information in his wrongful termination complaint would violate his fiduciary duty and a confidentiality agreement he had signed.[37] Although the company's lawsuit against the lawyer was based on state (rather than federal) law, the company filed its lawsuit in federal court based on diversity jurisdiction.[38] It asked the court for an injunction requiring the lawyer to return allegedly misappropriated documents and prohibiting him from disclosing any confidential information.[39]

A month later, the lawyer filed his FCA lawsuit in that same federal district court.[40] As required under the FCA, he provided a copy of his complaint and supporting documentation to the Justice Department.[41] The Justice Department became concerned that some of the supporting documentation was subject to the company's attorney-client privilege and asked the court to hold the FCA lawsuit in abeyance while the company's lawsuit against the lawyer proceeded.[42]

In the company's lawsuit against the lawyer, the district court applied the Virginia Code of Professional Responsibility. The Code's confidentiality rule allowed lawyers to disclose client fraud only if the evidence "clearly establishe[d]" that fraud.[43] The court found that the disputed information was "arguably suggestive of a regulatory violation," but fell "short of clearly showing fraud."[44] In response to the company's lawsuit, the court issued

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[35] *Id.*

[36] *Id.*

[37] *See X Corp. I*, 805 F. Supp. at 1302.

[38] *See id.*

[39] *Id.* The company also alleged that Doe breached his fiduciary duty to the company by revealing confidences to his own attorney. *Id.* at 1301. The district court rejected the company's claim that Doe's disclosures to his own attorney breached his fiduciary obligation because that "would cripple Doe's ability to defend against X Corp.'s attack on his professional conduct." *Id.* at 1301 n.5.

[40] *See Under Seal*, 17 F.3d at 1435.

[41] *See* 31 U.S.C. § 3730(b)(2). The FCA requires relators to serve the government with a copy of the complaint as well as "written disclosure of substantially all material evidence and information the [relator] possesses." *Id.*

[42] *Under Seal*, 17 F.3d at 1435.

[43] *X Corp. I*, 805 F. Supp. at 1298 (quoting VA. CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (VA. STATE BAR ASS'N 1983)). (The Virginia Code was in effect when the case was decided.) Virginia's confidentiality rule permitted the disclosure of a client's past fraud as long as the evidence "clearly establishe[d]" the fraud. *Id.*

[44] *Id.* The Virginia Code lacked a broad "offensive use" exception analogous to the ABA's Model Rule 1.6(b)(5). *See* MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(5); VA. CODE OF PROF'L RESPONSIBILITY DR 4-101.

an injunction prohibiting the lawyer from disclosing this information.[45] The court eventually dismissed the lawyer-relator's FCA case based on the earlier injunction.[46] While rejecting this particular lawyer-relator's FCA suit, the court nonetheless exhibited solicitude rather than hostility for the concept of a lawyer serving as a relator. It declared: "[T]o the extent that state law permits a disclosure of client confidences, such as to prevent a future or ongoing crime or fraud, then the attorney's use of the *qui tam* mechanism to expose that fraud should be encouraged, not deterred."[47]

A second false claims case addressing lawyer confidentiality, *Bury v. Community Hospitals of Central California*, was decided in 2002.[48] It involved the former General Counsel of a hospital chain, Robert Bury, who sued his former employer under California's (rather than the federal) False Claims Act four months after the hospital chain terminated him.[49] The California False Claims statute, like its federal counterpart, requires a "qui tam plaintiff [to] disclose to the Attorney General, in writing, 'substantially all material evidence and information' the qui tam plaintiff possesses."[50] The court noted the close parallel between this case and *Doe*, and took a similar approach.[51] The issue in this case was whether Bury's "duty of confidentiality and loyalty to his former client preclude[d] his *qui tam* complaint,"[52] because he was unable to "legally disclose sufficient information to form the basis of a valid complaint."[53] The court indicated that Bury could proceed with his California False Claims lawsuit only if he could "demonstrate that under California law . . . [his] duty of loyalty and confidentiality [did not] prevent[] him from legally disclosing sufficient information to support the complaint."[54] California's confidentiality standard is even stricter than Virginia's and lacks any exception for client fraud.[55] Therefore Bury could not pursue his lawsuit; nor, under this logic, could any lawyer subject to California's rules.

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[45] *X Corp. I*, 805 F. Supp. at 1312.

[46] *X Corp. II*, 816 F. Supp. at 1087.

[47] *Doe*, 862 F. Supp. at 1507–08 (footnote omitted).

[48] *Bury*, 2002 Cal. App. Unpub. LEXIS 1035, at *2.

[49] *Id.* Bury's employment ended on October 30, 1998. *Id.* He filed his qui tam action on February 8, 1999. *Id.*

[50] *Id.* at *6 (quoting CAL. GOV'T CODE § 12652(c)(3) (West 2000)).

[51] *Id.* at *7.

[52] *Id.* at *10.

[53] *Id.* at *5.

[54] *Id.* at *8.

[55] *See* CAL. RULES OF PROF'L CONDUCT r. 3-100(B) (STATE BAR OF CAL. 2015) (permitting disclosure of confidential client information to prevent criminal acts likely to result in death or substantial bodily harm).

A third lawyer-relator case applying lawyer confidentiality standards is *United States ex rel. Fair Laboratory Practices Associates v. Quest Diagnostics, Inc.*, which was decided by the Southern District of New York in 2011 ("*FLPA I*") and affirmed by the U.S. Court of Appeals for the Second Circuit in 2013 ("*FLPA II*").[56] This federal FCA case alleged that from 1996 through 2005, the pricing policy adopted by Unilab, a medical testing company, violated the criminal anti-kickback statute.[57] The company's General Counsel, Mark Bibi, raised concerns about the pricing policy within the company in 1996, and the company adjusted its policy in response.[58] But in 1999, new management came in and reinstated the earlier pricing policy.[59] After Bibi again raised concerns internally about the policy's possible illegality, the company removed him as General Counsel.[60]

In 2005, Bibi and two other former Unilab executives created a corporation, Fair Laboratory Practices Associates ("FLPA"), for the purpose of bringing an FCA lawsuit against their former employer based on its alleged violations of the anti-kickback statute.[61] The defendant sought dismissal of the lawsuit, arguing that Bibi violated his confidentiality obligation.[62] Bibi argued that his disclosures were permitted under New York's confidentiality rule,[63] which allows a lawyer to disclose "confidential information to the extent that the lawyer reasonably believes necessary . . . to prevent the client from committing a crime."[64] The issue was therefore whether the disclosures that Bibi made in 2005 were permitted under New York's confidenti-

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[56] United States *ex rel.* Fair Lab. Practices Assocs. v. Quest Diagnostics, Inc. (*FLPA I*), No. 05-Civ.-5393 (RPP), 2011 U.S. Dist. LEXIS 37014 (S.D.N.Y. Mar. 24, 2011), *aff'd*, 734 F.3d 154. The relator was a corporation, Fair Laboratory Practices Associates, owned by three individuals: the former lawyer, former chief financial officer, and chief executive officer of the defendant company. *Id*.

[57] *Id*. at *2 (referring to 42 U.S.C. § 1320a-7b(b) as the "Anti-Kickback Statute").

[58] *Id*. at *10.

[59] *Id*.

[60] *Id*. at *12.

[61] *Id*. at *16.

[62] *Id*. at *17.

[63] *Id*. at *35.

[64] N.Y. RULES OF PROF'L CONDUCT r. 1.6(b)(2) (N.Y. STATE BAR ASS'N 2015). When Bibi worked for Unilab (1993–2000) and when he filed the FCA lawsuit in 2005, New York lawyers were bound by the New York Lawyer's Code of Professional Responsibility, which was based on the ABA Model Code of Professional Responsibility. In 2009, New York adopted its Rules of Professional Conduct, which is based on the ABA Model Rules of Professional Conduct. *See* Roy Simon, *Comparing the New NY Rules of Professional Conduct to the NY Code of Professional Responsibility*, N.Y. PROF'L RESPONSIBILITY REP. (Feb. 1, 2009), *available at* http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26634 [http://perma.cc/9PL6-R9EG] (discussing the drafting and adoption of the new rules and comparing them to the ABA Model Rules). On appeal in 2013, the Second Circuit based its decision on New York's new rules, which it found to be the same in substance as New York's previous code. *See FLPA II*, 734 F.3d at 157 n.1.

ality rule.[65] The court found that it was reasonable for Bibi to believe that the defendant's violations of the anti-kickback statute were ongoing in 2005.[66] But Bibi's disclosures were nonetheless improper because they went beyond what was necessary to prevent the former client from committing a crime. In particular, the court found that Bibi's "disclosure of confidences from the 1990s to March 2000" was not "necessary to prevent the commission or continuation of a crime in 2005."[67] Because New York permits disclosures in order to prevent, but not rectify, client crimes, a lawyer-relator bound by New York rules would be able to reveal information necessary to stop ongoing crimes or prevent future crimes, but not information about past crimes. Nor would a lawyer-relator be free to disclose ongoing or future frauds that were not criminal under state or federal law.

In addition to cases involving lawyer-relators suing former clients, we have identified about a dozen cases where a lawyer-relator used information learned in an earlier representation to sue a non-client third party.[68] Courts dismissed most of these cases at an early stage of the litigation without addressing the lawyers' ethics obligations, usually because the case was based on information that had been publicly disclosed and the relator did not qualify as an "original source."[69] But in one of these cases, *United States ex rel. Holmes v. Northrop Grumman*, decided in 2015, the district court explicitly addressed the lawyer-relator's confidentiality obligation, finding that he used the confidential information of a current client without proof that his client had given informed consent.[70]

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[65] *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *35. The confidentiality exceptions under New York's rule are more limited than those in states that follow the Model Rules. *See infra* notes 78–123 and accompanying text.

[66] *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *33–34 ("Bibi could have reasonably believed in 2005 that [d]efendants had the intention to commit a crime."); *see also FLPA II*, 734 F.3d at 164.

[67] *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *36–37; *see id.* at *36 (finding relators could have shown that there was a "continuing crime in 2005" by providing "evidence of Quest's pricing agreements . . . in effect in 2005"); *see also FLPA II*, 734 F.3d at 165. The district court also ruled that Bibi violated Rule 1.9(a), which prohibits subsequent conflicts of interest. *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *38. Such a ruling, if it were followed, would be the death knell to lawyer-relators suing former clients. But the Second Circuit declined to adopt this reasoning, relying on confidentiality as the basis for dismissal of the suit. *FLPA II*, 734 F.3d at 165.

[68] See *infra* notes 198–241 and accompanying text for a discussion of the loyalty concerns that arise in this context.

[69] *See, e.g.*, United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148 (2d Cir. 1993); *see also* Robert L. Vogel, *The Public Disclosure Bar Against* Qui Tam *Suits*, 24 PUB. CONT. L.J. 477, 517 n.178 (1995) (noting that several of the earliest FCA cases addressing the "public disclosure bar" were brought by lawyer-relators and that "courts may have been concerned with lawyer/client 'parasitism,'" i.e., lawyers inappropriately benefiting from information they learned while representing clients).

[70] United States *ex rel.* Holmes v. Northrop Grumman, No. 1:13cv85-HSO-RHW, 2015 U.S. Dist. LEXIS 71804, at *24–26 (S.D. Miss. June 3, 2015).

Donald Holmes represented Munich Re, an insurer, in an arbitration proceeding with Northrup Grumman Corporation ("NGC"), a government contractor.[71] In connection with that representation, Holmes filed a complaint against NGC in federal district court seeking certain government documents for use in the arbitration.[72] He obtained those documents subject to the court's protective order.[73] He then used the documents in a qui tam FCA lawsuit he filed pro se against NGC alleging that NGC had defrauded the government.[74]

In the FCA lawsuit, the court granted NGC's motion to disqualify Holmes as relator and to dismiss the complaint, finding that Holmes violated not only the protective order, but also the ethical rules on confidentiality, conflicts of interest, candor to a court, and misrepresentation.[75] With respect to confidentiality, the court found that Holmes breached his duty to keep information related to the representation of Munich Re confidential when he revealed and used for his personal benefit the government documents he had obtained on his client's behalf.[76] The court also found that although Munich Re had indicated that it did not object to his decision to report NGC's fraud, Holmes failed to prove that he had obtained Munich Re's informed consent before revealing its confidential information.[77]

2. Lawyer Confidentiality Exceptions: The ABA Model Rules and State Variations

In the cases discussed above where a lawyer-relator sued a former client, the courts relied on the various confidentiality rules adopted in Virginia, California, and New York.[78] The confidentiality rules found in these three states, however, were somewhat idiosyncratic and stand in contrast to the rules adopted by most states, which more closely track the approach found in the ABA Model Rules of Professional Conduct. This subsection examines how Model Rule 1.6 and some state variations would apply in this context, addressing the issues that were raised in the three cases above as well as other issues that those courts did not address.

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[71] *Id*. at *4.
[72] *Id*.
[73] *Id*.
[74] *Id*. at *5.
[75] *Id*. at *33–34.
[76] *Id.* at *26.
[77] *Id*. at *25.
[78] *See, e.g.*, *id*. In *Holmes*, where the lawyer-relator acted pro se in filing an FCA lawsuit against a non-client third party, the Mississippi district court considered the ethics rules adopted in Mississippi and the District of Columbia as well as the ABA Model Rules in deciding to disqualify the lawyer-relator. *See id*.

The obligation of confidentiality defined in the ABA Model Rules and adopted in most states is broad in scope, reaching all "information relating to the representation of a client."[79] But some jurisdictions, including New York, use a narrower formulation based on the earlier ABA Model Code of Professional Responsibility, reaching only information that is subject to the attorney-client privilege ("confidences"), or information that a client has specifically requested to be kept confidential or would be detrimental to the client if revealed ("secrets").[80] Under either formulation, the lawyer's obligation continues even after the lawyer-client relationship has ended.[81]

The Model Rule on confidentiality includes several exceptions that are relevant to FCA lawyer-whistleblowers: two distinct but overlapping exceptions addressing client frauds and crime, and an exception for disputes between lawyer and client.[82] One provision, Model Rule 1.6(b)(2), permits disclosure in order "to *prevent* the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another."[83] A second provision, Model Rule 1.6(b)(3), permits disclosure in order "to *prevent, mitigate or rectify*" such injury, even if the client's crime or fraud has already occurred.[84] Because some states (including New York) permit disclosure to prevent client wrongdoing but not to mitigate or rectify it, we must address these two provisions separately.

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[79] MODEL RULES OF PROF'L CONDUCT r. 1.6(a).

[80] *See, e.g.*, D.C. RULES OF PROF'L CONDUCT r. 1.6(a)–(b) (D.C. BAR ASS'N 2015); N.Y. RULES OF PROF'L CONDUCT r. 1.6(a); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(B)(1) (AM. BAR ASS'N 1983).

[81] *See* MODEL RULES OF PROF'L CONDUCT r. 1.9(c)(1)–(2). ABA Model Rule 1.9(c)(2) prohibits a lawyer from disclosing a former client's information; Model Rule 1.9(c)(1) prohibits a lawyer from using a former client's information to the disadvantage of that former client. *See id.*

[82] *Id.* r. 1.6. Another confidentiality exception that could come into play applies specifically to organizational clients. Under Model Rule 1.13(b), a lawyer for an organization must engage in internal whistleblowing if the lawyer knows that someone within the organization "is engaged in action . . . that is . . . a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization." *Id.* r. 1.13(b). Under Model Rule 1.13(c), if the organization "insists upon . . . an action . . . that is clearly a violation of law," and "the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization," then the lawyer may reveal confidential information even if Rule 1.6 would not permit it. *Id.* r. 1.13(c). But such disclosure is permitted "only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization." *Id.* Because this confidentiality exception applies only where the disclosure is necessary to prevent injury to the organization, it would not apply to the filing of an FCA lawsuit. While the filing of an FCA lawsuit may be necessary in order to prevent or rectify injury to the financial interests of the United States, it would never be necessary in order to prevent injury to the FCA defendant.

[83] *Id.* r. 1.6(b)(2) (emphasis added). While Model Rule 1.6(b)(2) treats crimes and frauds the same, many states distinguish between crimes and non-criminal frauds, permitting disclosure in order to prevent a client's crime but not to prevent a non-criminal fraud.

[84] *Id.* r. 1.6(b)(3) (emphasis added).

To understand how these two exceptions operate, one must consider three distinct time frames for the crimes or frauds: those that will occur entirely in the future, those that are ongoing, and those that occurred entirely in the past. If a client's crime or fraud is entirely in the future (and if other criteria are met), then disclosure is permitted under either of these exceptions. But if an FCA violation has not yet occurred, there is no basis for an FCA lawsuit. If a client's crime or fraud is ongoing (and if other criteria are met), then Rule 1.6(b)(2) permits disclosure to prevent its continuation, and Rule 1.6(b)(3) permits disclosure to mitigate or rectify financial harm that already occurred.[85] If a client's crime or fraud is entirely in the past, then Rule 1.6(b)(2) does not permit disclosure, but Rule 1.6(b)(3) permits disclosure in order to mitigate or rectify financial harm that has already occurred.

For a lawyer who is considering whether to file an FCA suit, a critical question is whether the applicable confidentiality standard permits disclosure in order to mitigate or rectify the financial harm caused by a client's past crime or fraud. The New York confidentiality rule permits disclosure in order to stop an ongoing crime, but not to rectify a past one.[86] In *FLPA II*, the U.S. Court of Appeals for the Second Circuit indicated that the lawyer-relator was allowed to disclose information "necessary to prevent the commission or continuation of a crime in 2005," when he filed the FCA complaint.[87] But it ruled that he violated New York's confidentiality rule because he also disclosed "confidences from the 1990s," disclosures that were not necessary to stop the ongoing crime in 2005.[88] Under the *FLPA II* court's analysis, lawyers in New York and similar states may disclose only information that is necessary to stop ongoing criminal FCA violations.[89] In theory, such a limited disclosure could form the basis for an FCA complaint focusing on ongoing violations. But it is not clear whether an FCA complaint limited to ongoing (rather than past) violations could attract a relator's lawyer, whose compensation is based on the ultimate verdict or settlement, which, in turn, is based on the number and magnitude of the false claims that the defendant filed with the federal government. If there is a company history of filing false claims but the lawyer is ethically prohibited

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[85] *Id.* r. 1.6(b)(2)–(3). Model Rule 1.6(b)(3) also permits disclosure in order to prevent future financial harm that is "reasonably certain to result." *See id.* r. 1.6(b)(3); *see also FLPA II*, 734 F.3d at 164–65 (holding that New York's exception for the prevention of crimes could justify the disclosure of ongoing crimes, but did not justify the disclosure of confidential information about facts that occurred more than five years before FLPA filed the FCA lawsuit).

[86] N.Y. RULES OF PROF'L CONDUCT r. 1.6(b)(2) (permitting disclosure "to prevent the client from committing a crime").

[87] *FLPA II*, 734 F.3d at 165 (quoting *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *36).

[88] *Id.*

[89] *See id.*

from disclosing all but the most recent, then a relator's lawyer may be uninterested in filing a lawsuit that would be so limited in scope.

There is significant variation across states regarding confidentiality exceptions related to client crime or fraud. The Model Rules permit disclosure to prevent a client's crime or fraud only if the client used the lawyer's services in committing that crime or fraud, but twenty-one states permit such disclosure even if the client did not use the lawyer's services in the wrongdoing.[90] Most states permit disclosure both to prevent future crimes or frauds and to mitigate or rectify past ones.[91] If the confidentiality rule in one of these jurisdictions applies, the lawyer-relator will have the most leeway in disclosing a former client's crime or fraud in the FCA lawsuit. Ten states (including New York) permit disclosure to prevent wrongdoing, but not to rectify or mitigate the harm caused by past wrongdoing. If the confidentiality rule in one of these states applies, the lawyer-relator may be limited in the same way the Second Circuit limited lawyer Mark Bibi in *FLPA II*: permitting disclosure only to stop ongoing crimes and frauds.[92] Fourteen states (including New York) permit disclosure to prevent crimes, but not to prevent non-criminal frauds.[93] New Jersey actually requires lawyers to make disclosures that can prevent crimes and frauds as well as illegal acts.[94] Six states (Alabama, California, Kentucky, Missouri, Montana, and Rhode Island) lack any confidentiality exceptions for client fraud and monetary crimes—past, ongoing, or future.[95] If this kind of restrictive confidentiality

[90] MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2); LATHAM & WATKINS, ATTORNEYS AS SEC WHISTLEBLOWERS: CAN AN ATTORNEY BLOW THE WHISTLE ON A CLIENT AND GET A MONETARY AWARD? 23–28 (2013), http://www.lw.com/thoughtLeadership/SEC-whistleblowers [http://perma.cc/X5ER-Z6T3]. Some of those states also permit disclosure to rectify or mitigate a client's past crime or fraud, but only if the client used the lawyer's services in that crime or fraud. As discussed below, disclosure in order to prevent a future fraud is unlikely to form the basis of an FCA lawsuit. *See infra* note 97 and accompanying text.

[91] *See* LATHAM & WATKINS, *supra* note 90, at 23–28 (providing a chart of state ethics rules and permitted disclosures); *see also* ARIZ. RULES OF PROF'L CONDUCT r. 1.6 (STATE BAR OF ARIZ. 2015); HAW. RULES OF PROF'L CONDUCT r. 1.6 (HAW. STATE JUD. 2015); TENN. RULES OF PROF'L CONDUCT r. 1.6 (TENN. BAR ASS'N 2015).

[92] *See FLPA II*, 734 F.3d at 165.

[93] *See, e.g.*, N.Y. RULES OF PROF'L CONDUCT r. 1.6(b)(2). The other states that permit disclosure to prevent crimes but not non-criminal fraud are Georgia, Idaho, Kansas, Michigan, Nebraska, New Hampshire, New Mexico, Ohio, Oregon, West Virginia, and Wyoming. Florida and Virginia require disclosure to prevent crime but prohibit disclosure to prevent non-criminal fraud. LATHAM & WATKINS, *supra* note 90, at 23–28.

[94] N.J. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (N.J. COURTS 2015).

[95] ALA. RULES OF PROF'L CONDUCT r. 1.6 (ALA. COURTS 2015); KY. RULES OF PROF'L CONDUCT r. 3.130(1.6) (KY. BAR ASS'N 2015); MO. RULES OF PROF'L CONDUCT r. 4-1.6 (MO. COURTS 2015); MONT. RULES OF PROF'L CONDUCT r. 1.6 (STATE BAR OF MONT. 2011); R.I. RULES OF PROF'L CONDUCT r. 1.6 (R.I. JUDICIARY 2015). All of these states permit disclosure to prevent client crimes that would result in death or serious bodily injury, but not financial crimes.

rule applies, a lawyer-relator may run up against the same barrier that lawyer Robert Bury faced in his unsuccessful state FCA lawsuit.[96]

Aside from the temporal dimension, additional complications arise in applying the crime- and fraud-related exceptions. If such an exception applies, a lawyer may disclose only "to the extent the lawyer reasonably believes *necessary*" to stop the client's ongoing fraud or crime,[97] or to prevent, mitigate, or rectify injury resulting from the client's past fraud or crime.[98] Some might contend that filing an FCA complaint is never "necessary"—either to stop a client's ongoing fraud or to prevent, mitigate, or rectify a past fraud—because a whistleblower could use other means to pursue those goals, such as simply informing the federal government of the client's alleged fraud. This argument has some force. But in enacting the FCA's qui tam provisions, Congress arguably has determined that protection of the government's interest requires not just that whistleblowers be permitted to *inform* the government of these violations, but also that they be able to pursue an FCA lawsuit on the government's behalf, even where the government chooses not to participate in the suit.[99] If a whistleblower simply informs the government of a violation, there is no guarantee that the government will devote the resources necessary to investigate the tip—let alone pursue an FCA lawsuit based on it.[100]

The qui tam mechanism increases the number of FCA lawsuits by allowing lawyers outside of the Justice Department to bring such suits.[101] It may also increase the quality of information the government receives about FCA

ALA. RULES OF PROF'L CONDUCT r. 1.6; KY. RULES OF PROF'L CONDUCT r. 3.130(1.6); MO. RULES OF PROF'L CONDUCT r. 4-1.6; MONT. RULES OF PROF'L CONDUCT r. 1.6; R.I. RULES OF PROF'L CONDUCT r. 1.6. Alabama, Missouri, and Rhode Island permit "noisy withdrawal," where a lawyer notifies a third party that the lawyer has withdrawn from representation and disaffirms any documents that the lawyer prepared. *See* ALA. RULES OF PROF'L CONDUCT r. 1.6 cmt.; MO. RULES OF PROF'L CONDUCT r. 4-1.6 cmt. 14; R.I. RULES OF PROF'L CONDUCT r. 1.6 cmt. 16.

[96] *See, e.g.*, *Bury*, 2002 Cal. App. Unpub. LEXIS 1035.

[97] MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2) (emphasis added). Although Model Rule 1.6(b)(2) refers to the prevention of a crime or fraud, it also permits disclosure in order to prevent the continuation of an ongoing crime or fraud. An FCA violation that is entirely in the future (rather than ongoing) cannot form the basis for an FCA lawsuit.

[98] *Id.* r. 1.6(b)(3).

[99] 31 U.S.C. § 3730(c)(3).

[100] *See id*. Part of Congress's motivation for the 1986 amendments reviving the qui tam mechanism was concern that the Justice Department was not energetically pursuing FCA lawsuits. *See* U.S. GEN. ACCOUNTING OFFICE, REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES: DEPARTMENT OF JUSTICE SHOULD COORDINATE CRIMINAL AND CIVIL REMEDIES TO EFFECTIVELY PURSUE FRAUD IN FEDERAL PROGRAMS, at i (1979) ("[The Department of] Justice is not making full use of civil remedies to . . . recover losses of program funds due to fraudulent activity.").

[101] *See* CIVIL DIV., U.S. DEP'T OF JUSTICE, *supra* note 2, at 2. In fiscal year 2014, the Justice Department filed 92 FCA lawsuits and qui tam relators filed 713 suits. *Id.*

violations in that relators' lawyers may identify the strongest cases and invest resources in preparing those cases.[102] Most of the money that the government recovers under the FCA comes from qui tam cases rather than government-initiated FCA lawsuits.[103] The client intake function at a relators' law firm—particularly firms that are repeat players with established FCA practices—can serve to identify those cases that are most likely to be financially successful and exclude those that are least likely to result in successful verdicts or settlements.[104] By the time the government reviews qui tam complaints to decide whether to intervene, relators' lawyers already have conducted a review, screening out cases that are least likely to succeed.[105]

If the lawyer is still representing the client, there is an added layer to the "reasonably necessary" analysis. Model Rule 1.4 requires a lawyer to "keep the client reasonably informed about the status of the matter," and to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[106] In light of these obligations, before a lawyer engages in external whistleblowing, he or she must communicate with the client about the risks stemming from the client's violations and how the client can mitigate those risks.[107] If the lawyer is representing an organizational client and knows that someone "associated with the organization is engaged in action, [or] intends to act" in a way "that is a violation of . . . law that reasonably might be imputed to the organiza-

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[102] *See* Kwok, *supra* note 17, at 236–37 (noting that when firms spend more time identifying meritorious cases the Department of Justice is more likely to intervene and win).

[103] *See* CIVIL DIV., U.S. DEP'T OF JUSTICE, *supra* note 2, at 2. Of the $44.7 billion recovered under the FCA, more than two-thirds ($30.3 billion) came from qui tam cases. *Id*.

[104] *See, e.g.*, Robert L. Vogel, *Deciding Whether to File a* Qui Tam *Suit*, VOGEL, SLADE & GOLDSTEIN, LLP (Mar. 2012), http://vsg-law.com/false-claims-act-attorney-legal-guidance/deciding-whether-to-file-a-qui-tam-suit/ [http://perma.cc/C6E4-FCPV].

[105] *See The False Claims Act Correction Act: Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing on S. 2041 Before the S. Judiciary Comm.*, 110th Cong. 412 (2008) (statement of John E. Clark, Of Counsel, Goode, Casseb, Jones, Riklin, Choate & Watson, P.C.) (asserting that relators' lawyers "choose their cases carefully and always try to choose cases that the Government will . . . intervene in"). Two empirical studies found that experienced relators' firms cannot be accurately characterized as "filing mill[s]" that "exercise little discretion" in choosing cases and "simply file anything remotely meritorious." Kwok, *supra* note 19, at 17; *see also* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from* Qui Tam *Litigation*, 112 COLUM. L. REV. 1244, 1317 (2012). The skill of the relators' bar in identifying strong cases may be reflected in the fact that most of the money recovered under the FCA comes from qui tam (rather than Justice Department-initiated) cases. On the other hand, the Justice Department intervenes in only 27% of qui tam cases, and most relators' lawyers voluntarily dismiss cases in which the Justice Department does not intervene. *See* Kwok, *supra* note 17, at 239–40 (discussing the success rates of intervened and non-intervened qui tam cases).

[106] MODEL RULES OF PROF'L CONDUCT r. 1.4(a)(3), (b).

[107] *See id*. Model Rule 1.4 would require a lawyer to inform the client before filing an FCA lawsuit, but the FCA's seal provision prohibits such a disclosure. *See* 31 U.S.C. § 3730(b)(2).

tion, and that is likely to result in substantial injury to" it, then the lawyer must engage in internal whistleblowing, which will ordinarily require the lawyer to "refer the matter to higher authority in the organization."[108] Therefore, before engaging in external whistleblowing to prevent an organizational client from committing—or continuing an ongoing—crime or fraud under Model Rule 1.6(b)(2), the lawyer would first have to engage in internal whistleblowing. If the issue is rectification of an organizational client's *past* crime or fraud under 1.6(b)(3), then Model Rule 1.13(b) does not mandate internal whistleblowing, but the Rule 1.4 obligation to keep the client informed would still apply.[109] On the other hand, if the lawyer no longer represents the client, then neither 1.4 nor 1.13(b) would apply.[110]

In addition, these exceptions apply only in situations involving a fraud or crime, and the FCA does not map perfectly onto this requirement for a fraud or crime. The Model Rules define "fraud" as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive."[111] An FCA violation, on the other hand, can occur even where a defendant did not specifically intend to defraud the government.[112] A violation can be triggered where the defendant had "reckless disregard of the truth or falsity of the information" it submitted to the government.[113] Therefore, only those FCA cases where the defendant had a purpose to deceive will qualify for the fraud-related exception to confidentiality.[114]

Another confidentiality exception, Model Rule 1.6(b)(5), allows a lawyer to disclose information in order "to establish a claim . . . on behalf of

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[108] *See* MODEL RULES OF PROF'L CONDUCT r. 1.13(b).

[109] *See id.* rr. 1.4, 1.6(b)(3), 1.13(b).

[110] *See infra* notes 197–241 and accompanying text.

[111] MODEL RULES OF PROF'L CONDUCT r. 1.0(d).

[112] *See* 31 U.S.C. § 3729(b)(1). *But see* United States v. Slocum, 708 F.2d 587, 596 (11th Cir. 1983) (holding that in a criminal prosecution for filing a false claim under 18 U.S.C. § 287, the government must show that the defendant acted with "specific intent to violate the law or with a consciousness that what he was doing was wrong").

[113] 31 U.S.C. § 3729(b)(1) (defining the term "knowingly" to include "act[ing] in reckless disregard of the truth or falsity of the information"); *see* John T. Boese, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP, Paper Presented at the Tenth National Institute on the Civil False Claims Act and *Qui Tam* Enforcement: Fundamentals of the Civil False Claims Act and Qui Tam Enforcement, at A-11 (June 4, 2014) (discussing the "reckless disregard" standard) (on file with authors).

[114] These confidentiality exceptions apply only in situations involving "substantial injury" to someone's "financial interests." *See* MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2)–(3). This requirement is likely to be met in qui tam lawsuits under the FCA because relators must be represented by counsel who are generally paid on a contingent basis. Relators' counsel are unlikely to take on such representation unless the case has the potential for significant financial returns, so FCA cases will generally satisfy the "substantial injury" requirement of the crime- and fraud-related exceptions.

the lawyer in a controversy between the lawyer and the client."[115] The lawyer-relator's FCA lawsuit against a client is arguably "a controversy between the lawyer and the client," both formally (because the relator is a party to the lawsuit) and in substance (because the U.S. Supreme Court has ruled that the FCA "effect[s] a partial assignment of the Government's damages claim" to the relator[116]). On the other hand, some may view the situation—at least up until the FCA lawsuit is filed—as an inchoate controversy between the government and the company, rather than an actual controversy between the lawyer and the company. It is the filing of the FCA lawsuit that creates the partial assignment. Up until that point, the prospective relator is merely a potential witness to an inchoate dispute between the government and the prospective FCA defendant (rather than a party to a dispute between the government and the FCA defendant). Judges may look skeptically upon a lawyer who tries to use the 1.6(b)(5) confidentiality exception to justify the disclosures necessary for filing an FCA lawsuit. Most states have adopted the current formulation of Model Rule 1.6(b)(5),[117] but three jurisdictions—the District of Columbia, Michigan, and New York—limit a lawyer's ability to use confidential information offensively against a client to situations where the lawyer is attempting to establish or collect unpaid legal fees (rather than pursuing other claims against the client).[118] California lacks any express exception for disputes between lawyers and their clients.

The discussion above focuses on the confidentiality obligations of a lawyer who wishes to sue a current or former client. In a different context—where a lawyer wishes to sue a non-client third party—the confidentiality analysis differs. In that situation, the lawyer's ability to disclose information depends on whether the applicable rule employs the narrower standard, reach-

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[115] MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(5). Lawyer-whistleblowers who have experienced retaliation often invoke this exception when they sue former clients and seek whistleblower protection. *See, e.g.*, Burkhart v. Semitool, Inc., 5 P.3d 1031 (Mont. 2000); ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 01-424 (2001) (opining that a former in-house lawyer may pursue a wrongful discharge claim against a former employer and client as long as client information is properly protected).

[116] *Stevens*, 529 U.S. at 773.

[117] *See* John M. Barkett, Partner, Shook, Hardy & Bacon LLP, Paper Presented at the American Bar Association, Section of Litigation Annual CLE Conference: Lawyer-Client Fallout: Using Privileged Information to Establish a Claim or Defense Against a Client/Employer, at 5 (Apr. 2013), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/38_the_ethics_of_lawyer_client.authcheckdam.pdf [http://perma.cc/4BPK-98KE] (noting that most states have adopted the text of Model Rule 1.6(b)(5)); *see also* MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(5). The earlier ABA Model Code of Professional Responsibility included a similar exception, but it was narrower in scope, permitting disclosure only to establish or collect a fee. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(4).

[118] D.C. RULES OF PROF'L CONDUCT r. 1.6(e)(5); MICH. RULES OF PROF'L CONDUCT r. 1.6(c)(5) (STATE BAR. OF MICH. 2015); N.Y. RULES OF PROF'L CONDUCT r. 1.6(b)(5).

ing only information that is a "confidence" (i.e., the lawyer learned it through a privileged communication from the client) or a "secret" (i.e., the client specifically requested that it be kept confidential or disclosure of it would be detrimental to the client),[119] or the broader standard, reaching all "information relating to the representation of a client."[120] Under the narrow formulation, information about a third party's FCA violation would not even be covered by the confidentiality duty unless the client conveyed the information to the lawyer in a confidential communication, the client specifically requested that it be kept confidential, or disclosure would be detrimental to the client.[121] Under the broader formulation, the information is likely to be covered by the confidentiality duty, and the confidentiality exceptions discussed above for client crimes and frauds and lawyer-client disputes would not apply because it is a third party—rather than a client—that is involved in the crime, fraud, or dispute.[122] The lawyer who wishes to disclose such information in an FCA lawsuit against a non-client third party would need to obtain the client's informed consent before making the disclosure.[123]

C. Lawyers' Loyalty Obligations and the FCA

Until recently, any discussion of ethical restrictions on a lawyer attempting to take advantage of whistleblower bounties under the False Claims Act was confined to the lawyer's duty of confidentiality, with no discussion of the lawyer's duty of loyalty. In *Holmes*, however, a federal district court disqualified a lawyer-relator who took positions in an FCA lawsuit against a non-client third party that were in conflict with positions he was taking on behalf of a current client in separate litigation, despite the client's manifested lack of objection to the lawyer's conduct.[124] And in *FLPA I*, a federal district court held that a partnership that included the company's former General Counsel was barred from serving as a qui tam relator, regardless of whether the former lawyer had impermissibly disclosed confidential client information, because his role in the lawsuit impli-

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[119] *See, e.g.*, N.Y. RULES OF PROF'L CONDUCT r. 1.6(a).

[120] *See, e.g.*, MO. RULES OF PROF'L CONDUCT r. 1.6(a). This would reach information the lawyer learned in the course of representing a client. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. c (AM. LAW INST. 2000).

[121] *See, e.g.*, N.Y. RULES OF PROF'L CONDUCT r. 1.6(a).

[122] *See, e.g.*, MO. RULES OF PROF'L CONDUCT r. 1.6(a). On the other hand, one state, Massachusetts, permits disclosure in order to prevent a criminal or fraudulent act by a non-client. MASS. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (MASS. SUP. JUD. CT. 2015).

[123] *See, e.g.*, *Holmes*, 2015 U.S. Dist. LEXIS 71804, at *25–26. Unlike the confidentiality exceptions relating to client fraud, the exception for client consent does not vary significantly from state to state.

[124] *Id.* at *31–32.

cated him in an impermissible conflict of interest with his former client in violation of the New York Lawyer's Code of Professional Responsibility.[125] We begin by discussing a lawyer's loyalty obligations to current clients and then consider a lawyer's loyalty obligations to former clients. These loyalty obligations include disciplinary rules concerning conflicts of interest and keeping the client informed of developments material to the representation, as well as state fiduciary law that prohibits lawyers from financially profiting as a result of using or disclosing confidential client information, even when the lawyer is ethically permitted to use or disclose the information for some other purpose.

1. Loyalty Obligations to a Current Client

The most glaring risk of a loyalty violation presumably would involve a lawyer-relator filing an FCA lawsuit against a current client. In all of the reported FCA cases involving a lawyer blowing the whistle on a client company, however, the lawyer had left the company before filing a qui tam complaint.[126] It may be unlikely that a lawyer would file a qui tam lawsuit against a current client, particularly an employer: although the complaint is initially filed under seal, the company will learn that the lawyer has filed the complaint as soon as the seal is lifted, making it difficult for the lawyer to continue representing the company.[127] Nevertheless, it is possible that a lawyer could file a qui tam complaint against a current client. Indeed in *Doe*,[128] the lawyer claimed that he was contemplating filing a qui tam action against his employer and that he had clandestinely begun to copy confidential documents before he was terminated, allegedly in response to his activity.[129] Whether or not he would actually have filed the complaint while still employed by the company is unclear; however, it is certainly foreseeable that a lawyer who is planning to leave, or believes that he or she might be terminated, will begin preparing for a subsequent qui tam filing, includ-

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[125] *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *38.

[126] *See id.* at *13; *see also Stevens*, 529 U.S. at 770; *Repko I*, 490 F. App'x at 503–04; *Doe*, 862 F. Supp. at 1504; *cf. Bury*, 2002 Cal. App. Unpub. LEXIS 1035, at *3 (lawsuit brought under the state version of the FCA).

[127] Both state and federal anti-retaliation laws provide lawyers with a basis to argue that they are legally protected against retaliation for engaging in protected whistleblower activity. *See infra* notes 302–351 and accompanying text. The situation is quite different under Dodd-Frank, where the whistleblower is permitted to disclose information to the SEC anonymously, and the SEC may not reveal the whistleblower's identity even after a whistleblower award is made. *See infra* notes 242–301 and accompanying text.

[128] *X Corp. II*, 816 F. Supp. at 1095–96.

[129] *Id*. at 1096. The court rejected the lawyer's retaliation claim and did not discuss any possible conflict of interest. *Id*.

ing locating and copying documents necessary to support the complaint. This preparation activity itself raises a conflicts issue concerning a current client.[130]

Not all FCA cases involving lawyer-relators concern lawsuits against a client—whether current or former. Some involve lawyers who obtained information about a third party while representing a client, typically in a litigation matter, and then used that information as the basis for filing a qui tam lawsuit against the third party.[131] In most of these cases the courts did not mention any potential loyalty issue involving the client. In one case, the court briefly identified a potential conflict of interest, but even then, the reference was merely to indicate that dismissal of the lawyer-relator's case on standing grounds worked "no 'technical' or unfair result."[132] In *Holmes*, the court readily identified a conflict of interest based on inconsistent positions the lawyer was taking in the FCA lawsuit against a third party and in related litigation involving the current client.[133] In that case, the client told the Justice Department that it had no objection to the lawyer's conduct, but the court found no evidence of the client's informed consent.[134] In other cases, the conflict of interest might be more subtle, and even when there is no conflict of interest, clients in future cases might well protest that the lawyer stole an opportunity that should have been presented to the client, thereby acting in violation of applicable ethical standards.

a. Serving as a Qui Tam Relator Against a Current Client

Although it is unusual, lawyers sometimes sue a current client; for example, when a lawyer sues a client for unpaid legal fees[135] or when an in-house lawyer sues his or her employer for violating an anti-discrimination law.[136] Thus, although unlikely, it is not inconceivable that a lawyer will file a qui tam complaint while still employed by the defendant company. Indeed, anti-retaliation laws provide the lawyer with a basis to argue that, as

[130] *See infra* notes 135–169 and accompanying text.

[131] *See* Fed. Recovery Servs., Inc. v. United States, 72 F.3d 447, 448 (5th Cir. 1996); *Kreindler*, 985 F.2d at 1150–52; *Holmes*, 2015 U.S. Dist. LEXIS 71804, at *3–6; United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc. (*BCBS of Ga.*), 755 F. Supp. 1040 (S.D. Ga. 1990); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co. (*Provident I*), 721 F. Supp. 1247 (S.D. Fla. 1989).

[132] *Fed. Recovery Servs.*, 72 F.3d at 453.

[133] *Holmes*, 2015 U.S. Dist. LEXIS 71804, at *14–16.

[134] *Id.*

[135] *See, e.g.*, *In re* Simon, 20 A.3d 421 (N.J. 2011); *In re* Disciplinary Action Against Szymialis, 557 N.W.2d 543 (Minn. 1997).

[136] *See, e.g.*, Jones v. Flagship Int'l, 793 F.2d 714 (5th Cir. 1986); St. John v. Emp't Dev. Dep't, 642 F.2d 273 (9th Cir. 1980).

disloyal as such an act may appear to the company, the lawyer is legally protected against retaliation for having filed the complaint.[137] Does a lawyer who serves as a qui tam relator against a current client have an impermissible conflict of interest under state rules of professional conduct? For the purpose of addressing this question, we will assume that the lawyer has permission under state confidentiality rules to disclose the client's information in serving as a qui tam relator.

Ordinarily, a lawyer-relator will have learned information concerning the client's allegedly illegal conduct as a result of representing the client with respect to the subject matter of the qui tam lawsuit.[138] If that representation is ongoing at the time the lawsuit is filed, then the lawyer almost certainly has a conflict of interest under Model Rule 1.7, in which a concurrent conflict exists whenever "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."[139] Because the prospect of receiving a large sum of money "might tend to cloud a lawyer's professional judgment,"[140] such a risk is clearly present when the lawyer is simultaneously advising the company as to whether it is violating the law, whether the legal violation poses a threat to the company, or whether suspected wrongdoing should be reported to a higher level in the company, including the board of directors.[141] Such a risk is also present when the lawyer is conducting or monitoring a compliance effort. All these activities require both an objective analysis of the company's legal obligations and an objective weighing of alternative courses of action available to the client, and it is difficult to expect objectivity from a lawyer who has filed a lawsuit in which the lawyer's recovery depends on a finding that the client engaged in illegal conduct.[142]

Under Model Rule 1.7(b), lawyers may accept or continue a representation burdened with a conflict of interest if the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation

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[137] *See X Corp. II*, 816 F. Supp. at 1095–96 (citing 31 U.S.C. § 3730(h)).

[138] Under the ABA Model Rules, the lawyer would not be permitted to use or disclose the information to prevent, mitigate, or rectify a client's crime or fraud unless the client has used or is using the lawyer's services in furtherance of the crime or fraud. MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(3); *see supra* notes 26–77 and accompanying text.

[139] MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(2).

[140] N.Y. Cnty. Lawyers' Ass'n, *supra* note 8, at 10–11 (addressing concurrent conflicts under Dodd-Frank).

[141] *Cf.* Temkin & Moskovits, *supra* note 8, at 21 (explaining that a lawyer who prematurely blows the whistle may harm the client because financial incentives place the lawyer's personal interests in conflict with the client's interests).

[142] *Cf. id.* The size of the attorney's recovery may depend on how long the illegal conduct continued, thereby giving the lawyer a financial incentive not to vigorously press the client to stop any illegal conduct.

to [the] client" and the client gives informed consent.[143] If the potential award is large, it is probably unreasonable for the lawyer to believe that he or she would be able to provide "competent and diligent representation."[144] But in any case, a lawyer-relator could not obtain a client's informed consent because the FCA prohibits the relator from disclosing the qui tam lawsuit until the case has been filed, the Justice Department has investigated, and the seal has been lifted.[145] Of course, even if the lawyer could inform the client of the qui tam lawsuit, it is difficult to imagine a client permitting its lawyer to serve as a relator in an FCA lawsuit against the client.

As a result, state conflict of interest rules—which, unlike confidentiality rules, do not vary significantly among jurisdictions—apparently prohibit a currently employed lawyer-relator from continuing to work on a matter that is the subject of the qui tam complaint. But perhaps the lawyer has ceased working on that matter or has requested reassignment after filing the qui tam lawsuit.[146] Or perhaps the lawyer never represented the client on that matter, but learned of the illegality as a result of working on some other matter.[147] Putting aside any possible duty to the employer as a former client (with respect to those matters on which the lawyer previously worked but is no longer working),[148] does a lawyer owe a duty to a current client not to sue it, even in an unrelated matter?

In addition to "material limitation" conflicts, Model Rule 1.7 also provides that a concurrent conflict exists whenever "the representation of one client will be *directly adverse* to another client" even when the matters are entirely unrelated.[149] But this rule expressly applies only when the lawyer will be directly adverse to a client *on behalf of another client*, not on the lawyer's own behalf. Arguably, lawyers should not be permitted to do directly, as parties, what they cannot do indirectly, as counsel for a party.[150] If so, then lawyers would not be permitted to take directly adverse action against a current client on behalf of themselves when they could not do so on behalf of another client. This position is supported by a minority of state

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[143] MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(1).

[144] N.Y. Cnty. Lawyers' Ass'n, *supra* note 8, at 11; Bruce A. Green & Jordan A. Thomas, *Approaching Attorney Whistleblowing Post Dodd-Frank*, LAW360 (Apr. 11, 2012, 11:38 AM), http://www.law360.com/articles/325874/approaching-attorney-whistleblowing-post-dodd-frank [http://perma.cc/4ZEQ-7VEP].

[145] *See supra* notes 11–25 and accompanying text (discussing FCA claim procedures).

[146] *Cf.* Green & Thomas, *supra* note 144.

[147] The ABA Model Rules permit disclosure only if the client had used or was using the lawyer's services in furtherance of the crime or fraud, but some state rules permit disclosure without any such restriction. *See supra* notes 26–77 and accompanying text.

[148] *See infra* notes 197–241 and accompanying text (discussing former-client conflicts).

[149] MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(1) (emphasis added).

[150] *See id.*; *see also FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *30–32.

rules that incorporate the former ABA Model Code's provision that a lawyer may not "intentionally "[p]rejudice or damage his client during the course of the professional relationship [except when expressly permitted to do so]."[151] But that broad proposition was not incorporated into the Model Rules that limit the lawyer's duty of commitment and zeal to those matters for which the lawyer is actively representing the client.[152]

In addition to Rule 1.7, Model Rule 1.8 addresses certain specific conflicts of interest with current clients. Rule 1.8(a) provides that "[a] lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or *other pecuniary interest adverse to a client*" unless certain criteria are met, including obtaining the client's informed consent.[153] The text of this rule would seem to prohibit a lawyer from serving as an FCA relator against a client. By filing an FCA lawsuit, a relator obtains a partial assignment of the government's FCA claim against a defendant,[154] thus arguably acquiring a "pecuniary interest adverse to a client."[155] And the FCA's seal requirement prohibits a relator from obtaining the informed consent of the defendant.[156]

Model Rule 1.8(a) is typically applied, however, to face-to-face transactions between lawyers and their clients, even when the lawyer is not representing the client in that transaction. Indeed, the first comment to Rule 1.8(a) is captioned "Business Transactions Between Client and Lawyer" and indicates that the purpose of the rule is to protect the client against the possibility of overreaching as a result of the "lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client."[157] There is no transaction between lawyer and client when a lawyer

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[151] *See, e.g.*, D.C. RULES OF PROF'L CONDUCT r. 1.3(a)(2).

[152] *See* MODEL RULES OF PROF'L CONDUCT r. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *cf.* 2 GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 55.05 illus. 55-1 (4th ed. 2015) (asserting that a lawyer serving on the board of a legal services organization that voted in favor of filing a class action against a bank represented by the lawyer would not violate Model Rule 1.7, but Model Rule 6.3 requires that lawyer to abstain from discussing or voting on the issue).

[153] MODEL RULES OF PROF'L CONDUCT r. 1.8(a) (emphasis added).

[154] *See Stevens*, 529 U.S. at 765–66.

[155] MODEL RULES OF PROF'L CONDUCT r. 1.8(a). Professor Anthony Sebok suggests that the use of the word "acquires" in the text of the rule would not clearly apply to an FCA relator: although the relator has a pecuniary interest in the success of the qui tam lawsuit, the relator has not "acquired" that interest in the ordinary usage of that word. Anthony Sebok, Professor, Benjamin N. Cardozo Sch. of Law, Comments at the Legal Ethics Scholars' Roundtable (Oct. 31, 2014).

[156] *See* 31 U.S.C. § 3730(b)(2); *supra* notes 143–145 and accompanying text (discussing Model Rule 1.7's informed consent exception).

[157] *See* MODEL RULES OF PROF'L CONDUCT r. 1.8(a) cmt. 1. None of the other comments applicable to 1.8(a) address a situation in which a lawyer acquires a pecuniary interest adverse to a

seeks a whistleblower bounty, and some may argue that the rule should not apply in this situation. If it does not, then lawyer conduct rules might not prohibit lawyers from seeking a whistleblower reward by filing a qui tam lawsuit against a current client, so long as the lawyer is not currently representing the client with respect to the subject matter of the lawsuit.[158]

So far we have been positing a lawyer filing a qui tam lawsuit against a current client. What may be more likely, however, is that a lawyer who is planning to leave the company, either voluntarily or involuntarily, will restrict his or her activity to preparing to file a qui tam lawsuit; for example, by clandestinely gathering evidence of the company's illegal conduct.[159] May a lawyer do so and avoid violating state professional conduct rules by waiting until leaving the company to actually file the complaint?

If the lawyer is representing the client on the matter, then preparing to file a qui tam lawsuit almost certainly involves a conflict of interest for the lawyer, for the same reasons identified when the lawyer has actually filed the lawsuit. But when does the conflict arise? Does it arise when the lawyer begins gathering and copying documents? Would it make a difference if the lawyer is contemplating the filing of a lawsuit but has not yet made the decision to do so, or does the mere contemplation of the filing of such a lawsuit create a material limitation conflict? It is conceivable that a lawyer who has been urging greater compliance efforts, perhaps even advising the client of the possibility of a qui tam lawsuit by other employees, will entertain the thought of filing such a lawsuit him or herself, particularly if the lawyer is concerned that a client is hostile to the lawyer's advice and might fire the lawyer for continuing to press the matter. Must the lawyer then immediately withdraw from the representation or inform the client that he or she has considered the possibility of filing a qui tam lawsuit? We doubt that the mere possibility of the lawyer serving as a qui tam relator will constitute a "*significant* risk of a material limitation,"[160] although the closer the lawyer comes to the decision to file (including a decision to file if and when the

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client in a setting other than a transaction in which the client is involved. Courts have applied the rule to situations other than lawyer-client transactions in a few cases involving facts that support discipline under another rule. For example, ELLEN J. BENNETT ET AL., CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, ANNOTATED MODEL RULES OF PROF'L CONDUCT § 1.8 (8th ed. 2015) (citing cases).

[158] If the lawyer previously represented the client with respect to the subject matter of the FCA lawsuit, then the former-client conflict rule may apply. *See infra* notes 197–241 and accompanying text.

[159] This is precisely what the lawyer did in *Doe*. *See* 862 F. Supp. at 1504 (noting that "Doe took with him approximately 4300 copies of X Corp. documents and files" when he left X Corp.).

[160] *See* MODEL RULES OF PROF'L CONDUCT r. 1.7(a)(1); *supra* notes 135–151 and accompanying text.

lawyer is terminated or voluntarily leaves the company), and the more the lawyer does to prepare for such a filing, the more likely it is that the lawyer will be violating the current conflicts rule.

In addition to conflict of interest rules, Model Rule 1.4 requires lawyers to "keep a client reasonably informed about the status of a matter."[161] As a result, lawyers who currently represent a company in a matter have a duty to inform the company if they are aware that a qui tam action has been or is going to be filed. But the FCA requires that the complaint be filed under seal, which would prohibit a lawyer-relator from either providing the company with a copy of the complaint or informing it of the substance of the complaint. Thus lawyer-relators who comply with the FCA's requirement of maintaining the confidentiality of the qui tam complaint will violate their ethical duties to the company under Model Rule 1.4. If, however, the lawyer never represented the company on a related matter, or has ceased representing the company on that matter, then there may be no obligation to inform the company, and the lawyer could comply with the qui tam seal requirements without violating this rule.[162]

Finally, even when no disciplinary rule is violated, lawyers have common-law fiduciary duties that prohibit disloyalty to both current and former clients. Do lawyers violate their common-law fiduciary duties when they seek to profit from the use or disclosure of client information, even when the disclosure itself is permitted? Section 60(2) of the *Restatement (Third) of the Law Governing Lawyers* prohibits such self-dealing: except with the client's consent, "a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made."[163] Comment j of section 60(2) makes clear that this fiduciary duty is broader than the prohibitions provided in lawyer disciplinary codes and is derived from the law of agency, under which an agent "has a duty to account for any profits made by the use of such [client] information," even when the use "does not harm the princi-

[161] MODEL RULES OF PROF'L CONDUCT r. 1.4.

[162] *See id.* Lawyers are not generally required to keep former clients informed about post-representation developments. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33 cmt. h; *see also* Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 782 (2003). Whether a lawyer has a duty to inform a current client of developments in an unrelated matter depends on "the client's reasonable expectations; the scope, magnitude, and duration of the client-lawyer relationship; the evident significance of the information to the client; the burden on the lawyer in making the disclosure; and the likelihood that the client will receive the information from another source." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 33 cmt. h; *see also* Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455 (2006) (discussing the complex and evolving nature of an attorney-client relationship).

[163] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(2).

pal."[164] Indeed, under the law of agency, the prohibition against self-dealing applies even when the information used "does not relate to the transaction in which he is then employed,"[165] and even when the lawyer's use or disclosure of the information is not itself improper.[166] The purpose of the prohibition is to prevent fiduciary agents from taking personal advantage of client information[167] and to protect against risk to a principal's interest that may arise when an agent pursues material benefits from third parties in connection with actions taken on behalf of the principal.[168] Although the rule is not reflected in states' current disciplinary rules,[169] it appears that in seeking a whistleblower bounty under the FCA, lawyers violate their fiduciary duty not to personally profit at their clients' expense. Indeed, unless the FCA preempts this fiduciary duty, it apparently precludes lawyers from ever serving as qui tam relators against their current or former clients, regardless of the circumstances and regardless of whether they are permitted to disclose adverse information under an exception to the confidentiality rule.

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[164] *Id*. § 60 cmt. j (citing RESTATEMENT (SECOND) OF AGENCY § 388 cmt. c (AM. LAW INST. 1958)). The *Restatement (Third) of the Law Governing Lawyers* provides:

> Subsection (2) prohibits a lawyer from using or disclosing confidential client information for the lawyer's personal enrichment, regardless of lack of risk of prejudice to the affected client. The duty is removed by client consent . . . . The sole remedy of the client for breach of the duty is restitutionary relief in the form of disgorgement of profit (see Restatement Second, Agency § 388, Comment *c*) . . . . The strict confidentiality duty of the Subsection is warranted for prophylactic purposes. A lawyer who acquires confidential client information as the result of a representation should not be tempted by expectation of profit to risk a possibly incorrect assessment of future harm to a client. *There is no important societal interest in permitting lawyers to make unconsented use or revelation of confidential client information for self-enrichment in personal transactions.*

Id. (emphasis added).

[165] RESTATEMENT (SECOND) OF AGENCY § 395; *see also* RESTATEMENT (THIRD) OF AGENCY § 8.02 cmt. b (AM. LAW INST. 2006).

[166] RESTATEMENT (SECOND) OF AGENCY § 395 cmt. e ("Even though the agent properly acquires and uses confidential information concerning his principal's activities in the course of employment, he has a duty to account to the principal for any profits thereby made.").

[167] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(2) cmt. j.

[168] RESTATEMENT (THIRD) OF AGENCY § 8.02 cmt. b (discussing the "ordinary expectation that a person who acts as an agent does so to further the interests of the principal and that it is the principal who should benefit from turns of good fortune that may occur in connection with transactions that the agent undertakes on the principal's behalf").

[169] The failure of the Model Rules and state disciplinary rules to codify all of a lawyer's fiduciary duties is not inadvertent. There are many instances in which rule drafters make a deliberate choice to limit the types of conduct for which lawyers are subject to discipline, understanding that there are other avenues for enforcement of broader legal duties.

b. Serving as a Qui Tam Relator Against a Third Party

Not all FCA cases involving lawyer-relators are lawsuits against either current or former clients. Some arise when lawyers obtain information about a third party while representing a client, typically in a litigation matter, and then use that information as the basis for a qui tam lawsuit against the third party. In only two of these cases did the court even mention a potential conflict of interest involving the client,[170] but we believe that a conflict of interest will often be present in these cases, either because the lawyer's personal interest in a potential qui tam award may affect the lawyer's representation of the current client or because the lawyer has taken advantage of an economic opportunity that should have been presented to the client.

In *Holmes*, the lawyer-relator obtained information about NGC while representing Munich Re, an insurer, in an arbitration proceeding with NGC, its insured.[171] At the same time that Holmes was representing Munich Re in the arbitration, he filed an FCA complaint against NGC in which he alleged that NGC's fraudulent conduct duped the government into paying funds to NGC as compensation for damages during Hurricane Katrina.[172] The court found that this position conflicted with the position he took as counsel for Munich Re in the arbitration, in which Munich Re argued that it did not owe compensation to NGC for Katrina-related losses because the government had previously paid NGC for those losses.[173] The court found a material limitation conflict of interest under ABA Model Rule 1.7, as well as the analogous rules in the District of Columbia and Mississippi.[174] The court also rejected Holmes's claim that he had obtained consent from Munich Re, finding that "the timing of Munich Re's 'consent' [was] questionable and there [was] no evidence the consent was 'informed.'"[175] Although Munich Re was not complaining about Holmes's conduct, NGC raised the conflict of interest as one of several bases for disqualifying Holmes from serving as relator and dismissing the complaint, and the court agreed.[176]

Although the *Holmes* court readily found a conflict of interest based on the conflicting positions Holmes took in two separate proceedings, whether a conflict exists between a current client and a third-party FCA defendant will not always be obvious. To illustrate a more typical case, consider a se-

[170] *See Fed. Recovery Servs.*, 72 F.3d 447; *Holmes*, 2015 U.S. Dist. LEXIS 71804.
[171] *Holmes*, 2015 U.S. Dist. LEXIS 71804, at *3–4.
[172] *Id*. at *4.
[173] *Id*. at *18–19.
[174] *Id.* at * 21.
[175] *Id*.
[176] *Id*. at *17–22.

ries of cases involving a single law firm, Stinson, Lyons, Gerlin & Bustamante ("Stinson") that represented a client who filed a personal injury lawsuit following an automobile accident.[177] In the course of that representation, the law firm came to believe that the defendant's insurance carrier, Provident, was filing claims in violation of federal law.[178] When the insurance carrier filed a declaratory judgment action against Stinson's client, seeking to establish the legality of its claims practices, the law firm obtained information in discovery revealing that other insurance companies were involved in similar claims processing.[179] Ultimately, Stinson filed a series of qui tam lawsuits in six different federal district courts naming five different insurance companies as defendants.

In none of the reported decisions involving the Stinson firm did anyone raise the prospect that the Stinson lawyers may have had a conflict of interest concerning their decision to file as a qui tam relator in lawsuits against insurance companies that were engaged in illegal claims processing.[180] Under Model Rule 1.7, however, there would have been a conflict of interest if the lawyers' personal interest in the qui tam lawsuit—against either Provident or the other insurers—presented a significant risk of materially limiting Stinson's representation of its client. If Stinson filed a qui tam lawsuit against Provident prior to the conclusion of its client's personal injury lawsuit, then there may well have been such a significant risk: Prudential's consent was necessary to settle the lawsuit (including settling the case while any trial judgment was under appeal), and Provident could easily have been so offended by the FCA lawsuit that it would be disinclined to settle the client's personal injury lawsuit against its insured on terms that were favorable to the client (and thereby to the law firm). There is perhaps less risk of material limitation with respect to an FCA lawsuit

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[177] *See* United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co., 811 F. Supp. 346 (E.D. Tenn. 1992); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Pan Am. Life Ins. Co., No. 90-411, 1992 U.S. Dist. LEXIS 7990 (E.D. La. May 22, 1992); United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Pilot Life Ins. Co., No. C-90-29-G, 1991 WL 210855 (M.D.N.C. Aug. 6, 1991); *BCBS of Ga.*, 755 F. Supp. 1040; United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 736 F. Supp. 614 (D.N.J. 1990), *aff'd*, 944 F.2d 1149 (3d Cir. 1991); *Provident I*, 721 F. Supp. 1247. *See generally* Troy D. Chandler, Comment, *Lawyer Turned Plaintiff: Law Firms and Lawyers as Relators Under the False Claims Act*, 35 HOUS. L. REV. 541, 550–54 (1998–1999) (discussing three of the six cases).

[178] *See Provident I*, 721 F. Supp. at 1248.

[179] *See Prudential*, 944 F.2d at 1151.

[180] This was probably because the law firm's client was not a party to any of the lawsuits. It is unclear what a court would or should have done if the conflict had been raised by one of the defendant companies. The primary issue raised in the reported opinions concerning the Stinson lawsuits was whether Stinson was an original source of the information upon which the qui tam complaints were based. *See, e.g.*, Chandler, *supra* note 177, at 550–54.

against the other insurers; however, even those lawsuits posed at least an indirect risk to Provident that could adversely affect the law firm's representation of the personal injury plaintiff.[181] Although it is unclear whether the other insurer defendants in the FCA lawsuit could raise such a conflict,[182] it could certainly be used as the basis for either a subsequent disciplinary action against the lawyer or a subsequent breach of fiduciary duty lawsuit brought by the personal injury client.

Most conflicts arising under Model Rule 1.7 are consentable, and there is no obvious reason why a conflict arising under that rule in cases similar to those involving Holmes and Stinson could not be cured by obtaining the client's informed consent. Does informed consent in such a case necessarily require advising the client that the client could serve as the qui tam relator? Arguably not, because whether the client might take advantage of this business opportunity may have no bearing on any risk to the client of the lawyer continuing the representation with a personal interest conflict. But for the client's "consent" to be "informed," a lawyer must "communicate[] adequate information" not just "about the material risks of . . . the proposed course of conduct," but also "reasonably available alternatives."[183] Perhaps one of those alternatives is that the client could serve as the qui tam relator.[184]

None of the courts deciding these qui tam lawsuits brought by lawyers against third parties has directly addressed a lawyer's obligation to advise the client of the opportunity to serve as a qui tam relator. In 1996, the U.S. Court of Appeals for the Fifth Circuit came close to doing so in *Federal*

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[181] Because Provident used the same allegedly fraudulent claims processing as the other insurers, it could anticipate subsequently being sued by another qui tam relator or by the government itself, even if the law firm had not filed a qui tam lawsuit against Provident. Provident might have been angry with Stinson for publicly airing the fraud allegations and therefore might be disinclined to enter into a favorable settlement with the personal injury client.

[182] The *Holmes* court was not troubled by the fact that it was NGC and not Munich Re that was complaining about the conflict of interest between Holmes and Munich Re, but other courts have refused to disqualify a lawyer when the conflict does not adversely affect the complaining party. *See, e.g.*, Universal City Studios, Inc. v. Reimerdes, 98 F. Supp. 2d 449, 455 (S.D.N.Y. 2000) (denying a motion to disqualify when the plaintiff made no effort to show its interests would be adversely affected by the law firm's conflict); Gilbert v. Knoxville Int'l Energy Exposition, 547 F. Supp. 53, 54 (E.D. Tenn. 1982) (denying a motion to disqualify when the complaining party failed to show any interest that could be adversely affected by the representation).

[183] MODEL RULES OF PROF'L CONDUCT r. 1.0(e).

[184] Model Rule 1.7 may not apply because any risk that the lawyer's personal interest will affect the representation of the client is not significant. MODEL RULES OF PROF'L CONDUCT r. 1.7. Rule 1.4 requires the lawyer to keep the client reasonably informed concerning the representation, but it is unclear whether the scope of the "representation" as to which the client must be informed includes the opportunity to file a qui tam lawsuit against a third party. *See* MODEL RULES OF PROF'L CONDUCT r. 1.4.

Recovery Services, Inc. v. United States.[185] There, the law firm's client, Priority E.M.S., Inc. ("Priority"), initially sued its competitor, Crescent City E.M.S., Inc. ("Crescent City"), for engaging in unfair trade practices by filing fraudulent claims with the federal government for reimbursement for ambulance services.[186] The law firm and the President of Priority, Michael Boatright, incorporated Federal Recovery Services ("FRS") for the express purpose of serving as a qui tam relator in a lawsuit against Crescent City under the FCA.[187] The law firm controlled a majority of the shares of FRS.[188] The government intervened in the FCA case, settled with the defendant, and agreed to pay Boatright ten percent of the settlement as relator's share.[189] But the government refused to pay the law firm any portion of the settlement, and the court refused to award it the attorney fees ordinarily awarded to lawyers of successful relators.[190] The Fifth Circuit affirmed the dismissal of FRS as a relator because the information had been publicly disclosed in earlier litigation; thus, FRS was not the "original source" for that information.[191] Judge Patrick Higginbotham noted that "the attorneys bypassed a suit by Boatright, their client, in favor of an entity they controlled," and characterized their actions as an "overreach," stating that the FCA "did not dispense with the tradition that a lawyer must represent his client's interest, not his own."[192] Judge Higginbotham cited no authority for these statements, however, and did not explain how the law firm violated its obligation of loyalty to its clients.[193]

In addition to Model Rule 1.7, Rule 1.8(b) provides that "[a] lawyer shall not use information relating to the representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."[194] In circumstances in which there is no significant risk that the qui tam lawsuit will harm the client, a lawyer-relator would not be using the information "*to the disadvantage of the client*," unless deprivation of a business opportunity counts as such a disadvantage.[195] Some

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[185] *See Fed. Recovery Servs.*, 72 F.3d 447.

[186] *Id*. at 448.

[187] *Id*.

[188] *Id*.

[189] *Id*. at 450.

[190] *Id*. at 449–50.

[191] *Id.* at 450–52. The court also found that FRS could not "cure [the] jurisdictional defect by including or substituting Boatright" as an additional relator. *Id.* at 453.

[192] *Id*.

[193] *See id*. Judge Higgenbotham's opinion assumes that the law firm represented both Priority and Boatright. *See, e.g.*, *id.* at 452. Thus Priority may also have had an interest in serving as a qui tam relator against Crescent City.

[194] MODEL RULES OF PROF'L CONDUCT r. 1.8(b).

[195] *See id*.

jurisdictions, however, more broadly prohibit use of a client's confidential information to either the client's disadvantage or to the advantage of the lawyer or a third person, except with the client's informed consent.[196] Moreover, even in jurisdictions that follow the narrower Model Rule approach, the lawyer's common-law fiduciary duty not to engage in self-dealing requires the lawyer to account for any profits acquired through the use of client information unless the client has consented to that use.[197] Given that the use of the information will not be to the detriment of the client, and that the lawyer and client can work together to serve as qui tam relators, it is possible that a client will consent both to any conflict of interest and to the lawyer's use of the client's information, thereby permitting the lawyer to serve as an FCA whistleblower against a third party defendant.

2. Loyalty Obligations to Former Clients

In *FLPA I*, a federal district court held that the company's former counsel was barred from serving as a qui tam relator, regardless of whether he had impermissibly disclosed confidential client information.[198] This was because his role in the lawsuit implicated him in an impermissible conflict of interest with his former client, in violation of the New York Lawyer's Code of Professional Responsibility.[199] The then-applicable New York rule, which was essentially the same as Model Rule 1.9(a), provided: "[A] lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure . . . [t]hereafter 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."[200]

FLPA had argued that the rule did not apply because neither FLPA nor the former General Counsel was acting as a lawyer representing a client in the qui tam lawsuit. The district court, however, agreed with the defendant company that it was sufficient for purposes of the conflicts rule that the

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[196] MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(B). The District of Columbia, Michigan, Texas, and Virginia have similar requirements. *See* D.C. RULES OF PROF'L CONDUCT r. 1.6(a)(2)–(3); MICH. RULES OF PROF'L CONDUCT r. 1.6(b)(1)–(3); N.Y. RULES OF PROF'L CONDUCT r. 1.6(a); VA. RULES OF PROF'L CONDUCT r. 1.6(a) (VA. STATE BAR ASS'N 2015).

[197] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(2).

[198] *See FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *40–41.

[199] *See id.*; *see also FLPA II*, 734 F.3d at 167–68. The Second Circuit affirmed the district court's decision that the lawyer-relator had violated state confidentiality rules, but because it did not need to do so, it did not consider whether the lawyer had also violated the former-client conflict rule. *FLPA II*, 734 F.3d at 165.

[200] N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 5-108(A)(1) (N.Y. STATE BAR ASS'N 2007); *see also FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *20–21; MODEL RULES OF PROF'L CONDUCT r. 1.9(a).

former General Counsel, as an FLPA partner, was suing as a representative of the United States and not in his personal capacity.[201]

In so holding, the court accepted two separate arguments made by the defendant. The first argument relied on a literal reading of the rule, which, like the Model Rule, applied to a lawyer "who represents another person" and did not expressly require that the representation be that of a lawyer representing a client. In this regard, the court found that in a qui tam lawsuit, the qui tam relator "represents" the United States, relying both on the language of the FCA and on prior case law holding that a qui tam relator sues as a representative of the United States. The United States "remains the real party in interest."[202]

The second argument accepted by the court was that the rule should not be interpreted in such a manner as to permit a former lawyer "to do directly, as a [representative] party, what he cannot do indirectly, as counsel."[203] Here the court cited decisions holding that, although a lawyer may sue a former client to vindicate personal rights, a lawyer may not bring a shareholder derivative action or serve as a class representative in a lawsuit against a former client (in the same or a substantially related matter), because serving as a representative plaintiff "implicates considerations distinct from affording an attorney the opportunity to vindicate rights *personal to him*."[204] These decisions, according to the court, reflect the view taken by the defendant's expert: that to refuse to apply the former-client conflicts rule to lawyers acting as a representative party would "destroy one of the policies behind the [rule]—to encourage clients to trust and be candid with counsel,"[205] which the court viewed as "a cornerstone of the lawyer-client relationship."[206]

As the relator correctly noted, there was some precedent, contrary to the decisions cited by the court, holding that a lawyer who serves as a party representative does *not* violate the former-client conflicts rule. For example, in 2008, in *Schaefer v. General Electric Co.*, a federal district court in Con-

[201] *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *24–35.

[202] *Id.* at *25 (quoting *Kreindler*, 985 F.2d at 1154); *see also* United States *ex rel.* Rockefeller v. Westinghouse Elec. Co., 274 F. Supp. 2d 10, 15–16 (D.D.C. 2003) (holding that a nonlawyer qui tam relator cannot proceed pro se because "[g]enerally, a lay person cannot represent a party in court," and a qui tam relator "while having a stake in the lawsuit, represents the interests of the United States").

[203] *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *24–35.

[204] *Id.* at *28–29 (quoting Khanna v. McMinn, No. 20545-NC, 2006 Del. Ch. LEXIS 86, *125 n.333 (May 9, 2006).

[205] *Id.* at *29 (quoting Stephen Gillers, Professor of Law at New York University School of Law, who provided a declaration to the court regarding the ethics questions involved in the case).

[206] *Id.*

necticut held that a former in-house lawyer could bring a Title VII sex discrimination claim both in her individual capacity and on behalf of a class of similarly situated female executive employees and attorneys.[207] The court summarily refused to apply the former-client conflicts rule because the plaintiff was not representing a client in the lawsuit.[208] Instead, the court considered whether, under the particular circumstances of that case, it was likely that the lawyer would reveal more client confidences than were necessary to establish her individual claim.[209] Given that her individual allegations were based on non-confidential and non-privileged information, and her class allegations would be proved through the use of statistical and personal information, the court concluded that disqualifying the lawyer from serving as a class representative was unwarranted.[210]

Contrary to *Schaefer*, however, most courts have held that lawyers may *not* serve as a representative party in a shareholder derivative or class action lawsuit if they could not have represented a new client in the lawsuit.[211] Nevertheless, regardless of whether these cases were correctly decided, they are arguably distinguishable from situations in which the former lawyer seeks to serve as a qui tam relator.

Many of the earlier shareholder derivative and class action cases were decided at a time when the disciplinary rules did not have a specific former-client conflicts rule.[212] Instead, courts developed the "substantial relation-

[207] Brief and Special Appendix for Plaintiff-Appellant at 19–22, *FLPA II*, 734 F.3d 154 (No. 11-1565-cv) (citing Schaefer v. Gen. Elec. Co., No. 3:07-CV-0858, 2008 U.S. Dist. LEXIS 5552, *3–4 (D. Conn. Jan. 22, 2008)): *see also* Bakerman v. Sidney Frank Importing Co., No. 1844-N, 2006 Del. Ch. LEXIS 180, *42–43 (Oct. 10, 2006) (allowing a corporation's former chief counsel to serve as a representative plaintiff in a derivative suit because he was actively excluded from the transaction at issue and there were no other co-plaintiffs to prosecute the action).

[208] *Schaefer*, 2008 U.S. Dist. LEXIS 5552, at *36. The court did not address the fact that the rule does not expressly require that type of representation. *See id.*

[209] *Id.*

[210] *Id.* at *17–36.

[211] In addition to the cases cited in the district court's opinion in *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *27–30, there are a significant number of federal circuit court opinions directly on point. *See generally* Doe v. A Corp. (*A Corp. I*), 709 F.2d 1043 (5th Cir. 1983) (barring former in-house counsel for the defendant corporation from prosecuting a class action but holding that he could prosecute the action on his own behalf); Richardson v. Hamilton Int'l Corp., 469 F.2d 1382 (3d Cir. 1972) (disqualifying former counsel for the defendant company from maintaining a class action and shareholder derivative suit against the company and certain officers and directors); Hall v. A Corp., 453 F.2d 1375 (2d Cir. 1972) (disqualifying the defendant's former lawyer from serving as a class representative).

[212] The federal circuit court cases cited above, *supra* note 211, were decided prior to or in the same year that the ABA Model Rules of Professional Conduct were first adopted in 1983; thus none of them relied on Model Rule 1.9(a) or a state counterpart. For a discussion of the absence of a former-client conflict rule prior to the 1983 adoption of the Model Rules, see *infra* notes 215–217 and accompanying text.

ship" test (subsequently codified in Model Rule 1.9(a) and its state counterparts) as part of a common law of lawyer disqualification designed to prevent lawyers from impermissibly disclosing confidential client information of their former clients.[213] With respect to lawyers bringing shareholder derivative actions, there was presumably no confidentiality exception that would have permitted them to disclose confidential information in pursuit of the lawsuit; therefore, it was probably necessary to disqualify these lawyers from acting as party-representatives in order to prevent them from violating their confidentiality obligations.[214] As for lawyers attempting to serve as class action representatives, prior to the adoption of the Model Rules in 1983, there was no confidentiality exception permitting disclosure in pursuit of the lawyer's personal claim against a former client.[215] Therefore, disqualification of the lawyer was similarly necessary to protect the defendant's confidential information. At least one court permitted a lawyer to pursue a personal claim against a former client, because there was no "social interest in allowing [the former client] to deny [the lawyer] . . . rights or . . . benefits if they are legally due him," but nevertheless disqualified the lawyer from serving as a class representative because of the risk that he would disclose more information than was necessary in pursuit of his own claim.[216] Prior to the *FLPA* decisions, no court had decided the disqualification question in the context of a lawyer representative such as a qui tam relator who was authorized to disclose a potentially wide range of client information under confidentiality exceptions designed to prevent or rectify former-client crimes or frauds.[217]

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[213] *See* 1 HAZARD & HODES, *supra* note 152, § 14.07; CHARLES WOLFRAM, MODERN LEGAL ETHICS 363 (1983).

[214] *See, e.g.*, *Richardson*, 469 F.2d at 1385–86 (disqualifying a lawyer from maintaining both a class action and a shareholder derivative suit because he may have acquired information in his prior employment that would be used in the present action).

[215] *See supra* notes 11–25 and accompanying text; *see also A Corp. I*, 709 F.2d at 1047–48 (barring the plaintiff from maintaining a class action but saying he could prosecute an action on his own behalf).

[216] *See, e.g.*, *A. Corp. I*, 709 F.2d at 1050. In contrast, the district court in *Schaefer* found that the lawyer's individual allegations were based on non-confidential and non-privileged information, and that her class action allegations would be proved through the use of statistical and personal information, thereby entailing no significant risk of abuse of the defendant company's confidential information. *See Schaefer*, 2008 U.S. Dist. LEXIS 5552, at *36; *see also Bakerman*, 2006 Del. Ch. LEXIS 180, at *34–35.

[217] In *Bury*, 2002 Cal. App. Unpub. LEXIS 1035, the court disqualified a lawyer from serving as a qui tam relator against his former employer on both confidentiality and conflict of interest grounds; however, unlike most other jurisdictions, California recognizes no exceptions to confidentiality to prevent or rectify merely economic harm. *See* CAL. BUS. & PROF. CODE § 6068(e)(2) (West 2004) (providing that the sole exception is to prevent a criminal act likely to result in death or substantial bodily harm).

In our view, it was not inevitable that the *FLPA II* court would decide that New York's Rule 1.9(a) prohibits a lawyer from serving as an FCA relator against a former client. Prior decisions disqualifying lawyers bringing shareholder derivative and class action lawsuits could have been viewed not as applying a disciplinary rule, but rather as applying a common law of lawyer disqualification,[218] in which the courts were arguably assessing, on a case-by-case basis, the need to disqualify the lawyer to prevent likely breaches of the lawyer's confidentiality obligation.[219]

In support of this argument, the relator could have pointed out that, although the Model Rule on which the New York rule was based was not expressly limited to representation *as a lawyer*, this narrower interpretation may be what the rule drafters had in mind. Thus, the very first sentence in comment 1 of Model Rule 1.9 states that "[a]fter termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent *another client* except in conformity with this Rule."[220] Indeed, the remainder of comment 1 of Model Rule 1.9 apparently assumes that the current representation involves a lawyer-client relationship, and most of the case law interpreting this and similar rules involves lawyers representing current clients in matters adverse to a former client.[221] Moreover, the *Restatement (Third) of the Law Governing Lawyers* specifically provides that, without the consent of both clients, "a lawyer who has represented a client in a matter may not thereafter represent *another client* in the same or a substantially related matter in which the interests of the former client are materially adverse."[222]

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[218] *See generally* Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71 (2014) (analyzing lawyer disqualification cases involving conflict of interest, appearance of impropriety, and misconduct). Even after the ABA promulgated a model former-client conflicts disciplinary rule in 1983, courts did not automatically apply that rule in determining whether to disqualify a lawyer; rather, they further developed the common law of disqualification, taking into account some considerations that do not apply in the disciplinary context. *See id*. at 80.

[219] *See supra* notes 207–210 and accompanying text (referencing *Schaefer* and *Bakerman*, cases in which each court conducted an individual assessment of the likelihood of improper disclosure of confidential information).

[220] MODEL RULES OF PROF'L CONDUCT r. 1.9(a) cmt. 1 (emphasis added). The New York Code referenced in *FLPA I* did not have comments; even the current New York Rules of Professional Conduct, which are based on the ABA Model Rules, do not have official comments. *See* ROY D. SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 2 (2014) (noting that only black-letter rules have been adopted by courts; comments are adopted only by the New York State Bar Association and are therefore explanatory, not binding).

[221] *See* MODEL RULES OF PROF'L CONDUCT r. 1.9(a) cmt. 1; BENNETT ET AL., *supra* note 157, § 1.9 (citing several cases in which a lawyer attempted to represent a new client in a matter adverse to a former client).

[222] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132 (emphasis added).

None of the comments nor the reporter's notes to this *Restatement* provision suggest any awareness that the rule as stated differs from Model Rule 1.9(a).[223]

As courts sometimes acknowledge, rules of professional conduct are not statutes enacted by a legislature. As a result, courts have often felt more at liberty to interpret these rules (unlike statutes) in a way that advances the court's own understanding of the purposes underlying the rules, taking into account other law that is or may be applicable to lawyers. Thus, the *FLPA I* court concluded that the former-client conflict rule *should* be interpreted to apply to any instance in which a lawyer acts in a representative capacity, on the ground that lawyers should not be able to do directly as parties what they cannot do indirectly in representing a client.[224] On the contrary, the relator in *FLPA I* had argued that the spirit of the rules as a whole would *not* be violated if lawyers were permitted to sue as qui tam relators, so long as they do not disclose more information than is necessary to prevent or rectify the former client's crime or fraud.[225] This argument might be rephrased to urge that respect for the federal interests underlying the FCA requires courts to follow the admonition of the federal district court in *Doe* that "to the extent that state law permits a disclosure of client confidences, such as to prevent a future or ongoing crime or fraud, then the attorney's use of the *qui tam* mechanism to expose that fraud should be encouraged, not deterred."[226]

Which view better reflects the differing policies underlying both the rules of professional conduct and the False Claims Act?[227] To answer this question, it is first necessary to understand the policies underlying the former-client conflicts rule under Model Rule 1.9(a) and its state counterparts, as well as the common law of lawyer disqualification, in core cases involving the representation of a new client adverse to a former client in the same or a substantially related matter.

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[223] *See id.* cmts. a–j & reporter's notes.

[224] *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *27–30 (finding that the New York Code equivalent of Model Rule 1.9(a) does not permit a former attorney "to do directly, as a party, what he could not do indirectly, as counsel").

[225] *See* Brief and Special Appendix for Plaintiff-Appellant, *supra* note 207, at 26–31.

[226] *See Doe*, 862 F. Supp. at 1507–08; *supra* note 47 and accompanying text. The company in *Doe* based its argument for disqualification solely on confidentiality and never raised the former-client conflicts rule. *Doe*, 862 F. Supp. at 1503. Virginia had not yet adopted a version of the Model Rules, and its ethics code did not specifically address former-client conflicts. *See generally* VA. CODE OF PROF'L RESPONSIBILITY (VA. STATE BAR ASS'N 1983) (lacking a former-clients conflict rule).

[227] We do not mean here to address the question of federal preemption of state disciplinary codes, which we address in Part III. Rather, what we are suggesting here is that when courts are interpreting a disciplinary code provision, they may and should consider the context in which the interpretive issue is raised.

Although there are some differences in the application of the former-client conflicts rule, it is generally agreed that, in these core cases, lawyers may not avoid disqualification by attempting to establish either that they have no confidential information of the former client that would be of use to the new client or that, even if they have such information, they will not impermissibly disclose it. Rather, courts use the "substantial relationship" test to identify situations in which it is likely that the lawyer had access to confidential information of the former client that would be of use to the new client.[228] In such situations, courts presume that there is a sufficient threat to the impermissible use of confidential client information of the former client that the lawyer must be prevented from undertaking the new representation.[229] This presumption is irrebuttable, because to allow it to be rebutted would force the client to reveal the very information that it wishes to keep confidential and would put the parties in the awkward position of debating whether this particular lawyer is capable of adhering to his or her confidentiality obligations.[230]

The rationale for presumptive disqualification appears to be the need for prophylactic rules that prevent a lawyer from impermissibly using or disclosing a former client's confidential information. Therefore, would-be lawyer-relators will argue that when they are permitted to use or disclose a former client's confidential information in order to prevent or rectify the former client's crime or fraud, there is no reason to prevent them from acting adversely to the former client in a substantially related matter.[231] As a result, the former-client conflicts rule should not be interpreted to apply to such qui tam relators (or, regardless of how the disciplinary rule is interpreted, these lawyers should not be disqualified from serving as qui tam relators).

There are two possible responses to this argument. The first response is that prophylactic disqualification of the lawyer might still be necessary to ensure that the lawyer uses or discloses only that information that is necessary to prevent or rectify the former client's crime or fraud. In other words, although the lawyer might be free to disclose information to the government

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[228] *See, e.g.*, 1 HAZARD & HODES, *supra* note 152, § 14.07.

[229] *See id*.

[230] *See id*. There is an additional concern that a lawyer will be restricted in the representation of a current client. But this concern is relevant to determining the lawyer's obligations under Model Rule 1.7, not under Rule 1.9(a), the latter being designed to protect the interests of the former client. *See* MODEL RULES OF PROF'L CONDUCT rr. 1.7, 1.9(a).

[231] *Cf.* Oasis W. Realty, LLC v. Goldman, 250 P.3d 1115 (Cal. 2011) (sustaining a breach of fiduciary duty claim against a lawyer who in his personal capacity publicly protested a development permit that he himself had formerly obtained on behalf of the client, and declining to limit precedents to situations involving the successive representation of clients).

(without attempting to serve as a qui tam relator), permitting the lawyer to serve as a qui tam relator provides too great an incentive for the lawyer to use or disclose more information than would be permitted under the applicable exception to the confidentiality rule.

This response is weak because it insufficiently acknowledges the existence of important interests other than those of the former client. Even in core cases involving representation of a current client adverse to a former client in a substantially related matter, it is understood that the substantial relationship test is underinclusive and will not identify all cases in which the lawyer has confidential information from the former client that could be useful to the new client in pursuing the current litigation.[232] Nevertheless, neither Model Rule 1.9(a) nor the common law of disqualification prohibits lawyers from representing current clients adverse to their former clients in situations in which there is merely a remote possibility that the lawyer has obtained relevant information.[233] Rather, prophylactic disqualification is limited to the same or a substantially related matter in order to avoid unduly burdening the current client's interest in hiring counsel of choice, as well as the lawyer's legitimate interest in taking on new clients and new matters in furtherance of the lawyer's career.[234] When the matters are not the same or substantially related, courts trust lawyers to adhere to their confidentiality obligations to their former clients by identifying situations in which confidential information is at risk and then either voluntarily declining the new matter or taking care to avoid impermissibly using or disclosing such information in the course of the current representation. Similarly, given that there may be much information that qui tam relators are permitted to disclose in prosecuting the qui tam lawsuit, courts should trust them not to disclose more information than is permitted under the applicable confidentiality exception: to do otherwise would insufficiently acknowledge the federal interest in having insiders with relevant information blow the whistle on companies that have defrauded the federal government. And if the lawyer does disclose information unnecessarily, then the lawyer is still subject to discipline for breaching the obligation of confidentiality.

A second response to arguments favoring a narrow interpretation of Model Rule 1.9(a) is perhaps more compelling. The substantial relationship test is a prophylactic standard aimed primarily at protecting the former cli-

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[232] *See, e.g.*, 1 HAZARD & HODES, *supra* note 152, § 14.07 (stating that it is insufficient that the lawyer for a client in one matter "could have" obtained confidential information about the other).

[233] *See id.*

[234] *Cf. id.* ("It is unfair to the lawyer *and to the lawyer's new client* for a former client to be able to paint an overly broad picture of the prior representation without fear of contradiction.").

ent's confidential information; however, in addressing subsequent adverse representation, some courts have focused not just on this confidentiality concern, but also on the lawyer's *duty of loyalty*.[235] Most courts, however, limit the independent role of loyalty under state versions of Rule 1.9(a) to several narrow situations; for example, those involving an attack on the lawyer's own work for the former client and those involving former clients who were jointly represented, where there is typically no expectation of confidentiality between the clients.[236] In both instances, the purpose of the prohibition on subsequent adverse representation is to prevent the lawyer from acting improperly in the earlier representation. For example, if the former-client conflicts rule did not apply to attacks on a lawyer's own prior work product, then a lawyer might draft documents that are susceptible to a later challenge, thereby creating the potential for lucrative work on behalf of a new client. Even if such traps were laid inadvertently, clients should be assured that the lawyer will not be permitted to exploit them on behalf of a new client.[237] Similarly, and perhaps even more compellingly, if a lawyer is permitted to proceed adversely to a former joint client, then the lawyer would have an incentive to impermissibly favor the other client during the period of the common representation, particularly if the common representation is about to end.[238] In both situations, the purpose of prohibiting subsequent representation is to neutralize the risk of disloyalty during the earlier representation.

With respect to lawyers serving as qui tam relators, it may be necessary or desirable to prevent them from subsequently "representing" the government in matters substantially related to work they performed for their former client in order to ensure against disloyalty *during the period that the lawyer is representing the company*.[239] For example, while employed by the

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[235] *See* Charles W. Wolfram, Symposium, *Former-Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677, 691–712 (1997) (noting that "some courts and commentators also take the position that an analytically separate and important consideration in determining the scope of the former-client conflict rules is that of loyalty"; also criticizing the appeal to loyalty concerns except in several specific instances); *see also Bury*, 2002 Cal. App. Unpub. LEXIS 1035, at *11. In *Bury*, the court stated:

> It is . . . an attorney's duty to protect his or her client in every possible way. An attorney violates this duty of loyalty if he or she assumes a position adverse or antagonistic to a client without the client's free and intelligent consent. The duties of confidentiality and of loyalty are owed to *former* as well as *present* clients.

Bury, 2002 Cal. App. Unpub. LEXIS 1035, at *11 (citations omitted).

[236] Wolfram, *supra* note 235, at 696–712.

[237] *Id.* at 697–98.

[238] *Id.* at 711.

[239] *See* N.Y. Cnty. Lawyers' Ass'n, *supra* note 8, at 13–14. Another rationale was expressed in a recent opinion by the New York County Lawyers' Association's Committee on Professional

company, a lawyer may be advising its officers whether the company is violating its legal obligations to the government, whether a legal violation poses a substantial threat to the company, or whether credible evidence of wrongdoing should be reported to a higher level in the company (such as to the board of directors).[240] A lawyer who has the option of leaving the company (either voluntarily or involuntarily) and then filing a qui tam lawsuit against the company could easily be tempted to act in a manner that would make that lawsuit more likely to succeed. Preventing this from occurring could justify either interpreting the former-client conflicts rule to cover subsequent "representation" by a qui tam relator or disqualifying the lawyer-relator regardless of whether the former-client conflicts rule expressly applies.

If Model Rule 1.9(a) precludes lawyers from filing a qui tam lawsuit against a former client, then other potential loyalty obligations are clearly moot. But there is a good chance that courts will ultimately decide that Rule 1.9(a) does not apply because qui tam relators do not "represent" the government in the sense intended under the rule. In that case, we should also consider whether the lawyer has other applicable loyalty obligations. As we discussed previously, lawyers have a duty under Model Rule 1.4 to keep their current clients informed of significant developments in the representation; however, the rule does not generally apply to former clients.[241] The prohibition on self-dealing, however, continues even after a representation has ended. As with a current client, this common-law duty appears to broadly prohibit a lawyer from serving as a qui tam relator, even against a former client, unless federal law preempts the common-law duty.

Ethics with respect to whistleblower bounties under Dodd-Frank. *Id.* After noting that a disclosure is not permitted under confidentiality exceptions to the New York Rules of Professional Conduct unless it is "reasonably necessary," the Committee concluded that:

> [U]ndertaking this otherwise permissible disclosure in a manner that results in a bounty for the lawyer raises a significant risk that the attorney's judgment in determining whether the disclosure is "reasonably necessary" will be adversely affected and presents a conflict of interest that is beyond what Rule 1.9 was intended to allow.

Id. at 14. Interestingly, the opinion does not mention New York Rule 1.9(a), the former-client conflicts rule that was expressly addressed in the district court's decision in *FLPA I.* It would be difficult to extend the rationale of *FLPA I* to whistleblower bounties under Dodd-Frank because there is no sense in which the Dodd-Frank whistleblower acts in a representative capacity, as is the case under the FCA. *See infra* notes 296–301 and accompanying text.

[240] *See, e.g.*, N.Y. Cnty. Lawyers' Ass'n, *supra* note 8, at 10; Temkin & Moskovits, *supra* note 8, at 14.

[241] *See supra* notes 26–123 and accompanying text.

II. SEC WHISTLEBLOWER AWARDS UNDER DODD-FRANK

A. Primer on Dodd-Frank Whistleblower Awards

Dodd-Frank requires the SEC to give financial awards to whistleblowers who provide it with information that results in successful enforcement actions.[242] Under this statute, if a whistleblower gives the SEC "original information," and the SEC brings an enforcement action that yields monetary sanctions greater than $1 million, then the SEC must pay the whistleblower between 10–30% of the sanction amount.[243] The statute excludes five categories of individuals from these whistleblower awards: (1) employees of certain government agencies; (2) employees of self-regulatory organizations; (3) anyone convicted of a crime related to the enforcement action; (4) anyone who knowingly and willfully provides false information; and (5) anyone who learned the information through the performance of a statutorily required audit.[244]

The SEC's Dodd-Frank whistleblower regulations identify the government agencies and self-regulatory organizations whose employees are excluded from the program.[245] These regulations also identify additional categories of individuals and information that are excluded from the whistleblower award program, including SEC employees' family members, anyone who provides information in response to a subpoena, and anyone who obtained the information by means that a court has determined were unlawful.[246] The regulations permit a person involved with a corporation's compliance function to qualify for a whistleblower award if he or she reported it internally at least 120 days prior to reporting it to the SEC.[247]

The SEC's whistleblower award process has several distinct stages. First, the whistleblower must submit information about the alleged violation

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[242] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended at 15 U.S.C. § 78u-6 (2012)). Dodd-Frank authorized a similar program administered by the U.S. Commodity Futures Trading Commission ("CFTC"). *See id.* § 748, 124 Stat at 1380; 17 C.F.R. § 165.1 (2011). As of this writing, the CFTC has issued two whistleblower awards: one for $240,000 and another for $290,000. Press Release No. 7254-15, U.S. Commodity Futures Trading Comm'n, CFTC to Issue Whistleblower Award of Approximately $290,000 (Sept. 29, 2015), http://www.cftc.gov/PressRoom/PressReleases/pr7254-15 [http://perma.cc/WQK6-JVLZ]; Press Release No. 6933-14, U.S. Commodity Futures Trading Comm'n, CFTC Issues First Whistleblower Award (May 20, 2014), http://www.cftc.gov/PressRoom/PressReleases/pr6933-14 [http://perma.cc/BK5H-AL5H] (announcing first whistleblower award, which was approximately $240,000).

[243] 15 U.S.C. § 78u-6(b)(i).

[244] *Id*. § 78u-6.

[245] Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-8(c)(1) (2011).

[246] *Id.* § 240.21F-8(c)(3)–(7).

[247] *Id.* § 240.21F-4(b)(4)(v)(c).

by filling out a specific form.[248] Second, the SEC investigates the allegation.[249] If that investigation leads to an enforcement action and if that enforcement action results in sanctions over $1 million, then the whistleblower may apply for an award.[250] Every few months, the SEC publishes a list of all of its enforcement actions that have resulted in sanctions over $1 million (including those resulting from whistleblower tips and those resulting from other sources).[251] At that point, a whistleblower has ninety days to claim a whistleblower award by filling out another form, an Application for Award.[252] The SEC determines whether the whistleblower is eligible for an award, and, if eligible, the amount of the award.[253] If the SEC denies an award or grants an award less than the statutory ten percent minimum, then the whistleblower can appeal that determination to a federal circuit court.[254]

The program is still in its infancy because it takes time for a whistleblower case to percolate through the SEC's investigative and administrative processes. In the few years since the SEC issued regulations implementing the statute, the agency has received about 3000 whistleblower tips per year and has paid more than $54 million to twenty-two whistleblowers, including one award for more than $30 million.[255]

Unlike the FCA, which requires whistleblowers to publicly identify themselves and thus risk retaliation, the SEC's Dodd-Frank program allows whistleblowers to keep their identity secret.[256] The statute permits whistleblowers to submit tips anonymously as long as they do so through an attor-

[248] *Id.* § 240.21F-9(a). The form asks questions about the individual's potential eligibility for a whistleblower award, including whether the individual is or was the entity's counsel, and whether any of the information "was obtained from an attorney or in a communication where an attorney was present." *Form TCR: Tip, Complaint or Referral*, SECS. & EXCH. COMM'N (2011), https://www.sec.gov/about/forms/formtcr.pdf [http://perma.cc/6EXG-E7RR] (see questions 5a and 10).

[249] 17 C.F.R. § 240.21F-10(d).

[250] *Id.* § 240.21F-10(a).

[251] *Id.*

[252] *Id.*; *see also id.* § 240.21F-10(b) (referring to "Form WB–APP, Application for Award for Original Information Provided Pursuant to Section 21F of the Securities Exchange Act of 1934").

[253] *Id.* § 240.21F-10(d).

[254] *Id.* § 240.21F-13(a).

[255] SECS. & EXCH. COMM'N, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 10, 20 (2014), http://www.sec.gov/about/offices/owb/annual-report-2014.pdf [http://perma.cc/KLE9-FVD4]; Press Release No. 2015-252, U.S. Secs. & Exch. Comm'n, SEC Announces Whistleblower Award of More Than $325,000 (Nov. 4, 2015), http://www.sec.gov/news/pressrelease/2015-252.html [https://perma.cc/GH6U-N6XQ?type=source].

[256] *See* 15 U.S.C. § 78u-6(h)(2)(A) (stating that "the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower" except in several limited circumstances).

ney.[257] To claim an award, a whistleblower needs to reveal his or her identity to the SEC,[258] but the statute prohibits the SEC from "disclos[ing] any information . . . which could reasonably be expected to reveal the identity of a whistleblower."[259]

When the SEC announces that it has made a whistleblower award, it describes the facts leading to the award in such generic terms that it is usually impossible to identify the company involved (let alone the whistleblower).[260] Thus, in the limited history of the SEC's Dodd-Frank whistleblower program, the SEC has taken seriously its statutory mandate to protect the identity of whistleblowers. Because of the secrecy surrounding the SEC's whistleblower program, we simply do not know whether any of its awards have gone to lawyers.

If a company learned that its current or former lawyer disclosed its alleged wrongdoing to the government and is seeking a financial award for doing so, the company could be expected to object on grounds of confidentiality or loyalty.[261] But under Dodd-Frank, a company may never find out. The entire process takes place in secret within an administrative agency. Although a whistleblower could seek judicial review if the SEC denies an award entirely or grants an award that is less than ten percent of the sanctions, it is not clear that a client company will ever be in a position to seek judicial review of an SEC award to a lawyer-whistleblower (or any other kind of whistleblower, for that matter). Nevertheless, we expect that the SEC will abide by its own mandate not to grant awards where a lawyer's disclosures go beyond that permitted by state confidentiality rules or the SOX regulation.

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[257] *Id.* § 78u-6(d)(2)(A); 17 C.F.R. § 240.21F-7(b) (indicating that the attorney must know the whistleblower's identity).

[258] 15 U.S.C. § 78u-6(d)(2)(B); 17 C.F.R. § 240.21F-7(b)(3).

[259] 15 U.S.C. § 78u-6(h)(2)(A); 17 C.F.R. § 240.21F-7(a).

[260] *See, e.g.*, In the Matter of the Claim for Award in Connection with [Undisclosed Party]: Notice of Covered Action 2012, Exchange Act Release No. 67,699 (Aug. 21, 2012), https://www.sec.gov/rules/other/2012/34-67699.pdf [http://perma.cc/7SXD-XVYH] (denying the claimant's application for a whistleblower award).

[261] In the four FCA cases involving lawyer-relators who blew the whistle on their former private-sector clients, the former clients did object and ultimately prevented the lawyers from collecting a whistleblower award. United States *ex rel.* Repko v. Guthrie Clinic, P.C., 490 F. App'x 502, 503–05 (3d Cir. 2012); United States *ex rel.* Fair Lab. Practices Assocs. v. Quest Diagnostics, Inc. (*FLPA I*), No. 05-Civ.-5393 (RPP), 2011 U.S. Dist. LEXIS 37014 (S.D.N.Y. Mar. 24, 2011), *aff'd*, 734 F.3d 154 (2d Cir. 2013); United States *ex rel.* Doe v. X Corp. (*Doe*), 862 F. Supp. 1502 (E.D. Va. 1994); Bury v. Cmty. Hosps. of Cent. Cal., No. F036667, 2002 Cal. App. Unpub. LEXIS 1035 (May 8, 2002).

B. Lawyers' Confidentiality Obligations and Dodd-Frank Whistleblower Awards

The Dodd-Frank statute indicates that whistleblower awards are available to individuals who provide the SEC with "original information" that leads to a successful enforcement action.[262] Although the statute excludes several classes of individuals from being eligible for these awards,[263] it does not address whether lawyers are eligible or whether lawyers seeking such awards may reveal otherwise confidential information. The SEC regulation defining "original information" does exclude certain types of information from becoming the basis for an award, including information obtained from communications subject to the attorney-client privilege[264] or obtained in connection with legal representation.[265] This regulation would ordinarily prevent lawyers from obtaining whistleblower awards for disclosing their clients' securities violations. But what the regulation takes away with one hand, it partially gives back with another: information that is privileged or obtained in connection with legal representation may nonetheless form the basis of an award if a lawyer would be permitted to disclose that information under applicable state attorney conduct rules, under the SEC's earlier SOX regulation, or otherwise.[266] For lawyers who are potential whistleblowers, this is perhaps the most important feature of the SEC's Dodd-Frank whistleblower program: the fact that it incorporates the SEC's SOX regulation, which creates new confidentiality exceptions for lawyers practicing before the SEC.[267]

In issuing its Dodd-Frank whistleblower regulation, the SEC asserted that the regulation "strikes the right balance because" it is "consistent with the public policy judgments" in its earlier SOX regulation "as to when the benefits of permitting disclosure are justified notwithstanding any potential harm to the attorney-client relationship."[268] Because the SEC's Dodd-Frank whistleblower regulation incorporates the earlier SOX regulation, it is necessary to examine the SOX regulation's confidentiality exceptions in some detail.

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[262] 15 U.S.C. § 78u-6(b)(1).

[263] *Id.* § 78u-6(c)(2). The statute excludes several categories of individuals from receiving whistleblower awards, including employees of the Justice Department and law enforcement organizations. *Id.*

[264] 17 C.F.R. § 240.21F-4(b)(4)(i).

[265] *Id.* § 240.21F-4(b)(4)(ii).

[266] *Id.* § 240.21F-4(b)(4)(i)–(ii).

[267] 17 C.F.R. § 205.3(d)(2) (2003). The SOX regulation also expressly preempted contrary state ethics rules. *See infra* notes 338–351 and accompanying text.

[268] Securities Whistleblower Incentives and Protections, Exchange Act Release No. 64,545, 76 Fed. Reg. 34,300, 34,315 n.133 (June 13, 2011) (codified at 17 C.F.R. pts. 240, 249).

Section 307 of the SOX Act required the SEC to "issue rules . . . setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission."[269] The statute specified that the SEC's regulation must "includ[e] a rule" requiring that lawyers with "evidence of a material violation of securities law or breach of fiduciary duty" must engage in internal whistleblowing, ensuring that a corporation's leadership would be aware of that evidence.[270] In response to that statute, the SEC issued a regulation requiring such a lawyer to engage in internal whistleblowing if the lawyer is aware of "credible evidence" that it is "reasonably likely that a material violation" of securities law or a material breach of a fiduciary duty has occurred, is ongoing, or is about to occur.[271] This mandate for internal whistleblowing is similar to that found in ABA Model Rule 1.13(b), but it has a lower evidentiary trigger: credible evidence of a reasonably likely violation, rather than 1.13(b)'s knowledge of a violation.[272] The regulation also included several additional provisions that were "not explicitly required by Section 307, but which the Commission believe[d] [were] important components of an effective 'up the ladder' reporting system."[273] One of those additional provisions created new confidentiality exceptions for lawyers practicing before the SEC, allowing them to disclose information to the SEC "to the extent the attorney reasonably believes necessary" to "prevent the issuer from committing a material violation" or to "rectify the consequences of" the issuer's past "material violation . . . that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used."[274]

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[269] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 307, 116 Stat. 745, 784 (2002) (codified at 15 U.S.C. § 7245 (2012)).

[270] *Id.*

[271] 17 C.F.R. § 205.2(e) (defining "evidence of a material violation"); *id.* § 205.2(i) (defining "material violation"); *id.* § 205.3(b) (providing the mandate for internal whistleblowing). The proposed rule also included several other provisions that the SEC omitted from its final rule, including provisions requiring lawyers to notify the SEC of a client's material violations. *See, e.g.*, Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8150, Exchange Act Release No. 46,868, Investment Company Act Release No. 25,829, 67 Fed. Reg. 71,670, 71,705 (proposed Dec. 2, 2002) (proposing 17 C.F.R. § 205.3(b)(3), (d)).

[272] *See* MODEL RULES OF PROF'L CONDUCT r. 1.13(b) (AM. BAR ASS'N 2015).

[273] Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71,673.

[274] 17 C.F.R. § 205.3(d)(2)(iii). It is this provision—allowing lawyers to disclose information to rectify a client's fraud—that is likely to be most relevant to lawyers seeking Dodd-Frank whistleblower awards. The evidentiary trigger permitting external whistleblowing is higher than that mandating internal whistleblowing. External whistleblowing is permissible only if the lawyer "reasonably believes" that the disclosure is necessary in order to prevent or rectify a violation—a standard similar to that found in Model Rule 1.6(b)(2) and (b)(3). *Id.*; *see also* MODEL RULES OF PROF'L CON-

The SOX regulation's confidentiality exceptions are, at the highest level of generality, similar to the fraud-related exceptions found in the Model Rules and most states' rules.[275] The confidentiality exceptions in both are triggered if the lawyer "reasonably believes" that disclosure is "necessary" in order to prevent or rectify certain violations.[276] But at a more granular level, the differences are significant and the SOX exceptions are generally broader in scope. Instead of being limited to crimes and frauds, the SOX exceptions reach "material violations" of federal or state securities law and material breaches of fiduciary duty.[277] Unlike Model Rule 1.6, the SOX regulation permits lawyers to disclose in order to prevent a violation even if the lawyer's services were not used in that violation.[278] It permits lawyers to disclose in order to rectify a past violation or breach when their services were used in furtherance of the violation or breach,[279] even if it is the issuer (rather than a third party) that is injured by the violation.[280]

The SEC's SOX regulation does not apply to all lawyers. Instead it applies to (and can be invoked by) lawyers "[a]ppearing and practicing before the" SEC.[281] This phrase—"[a]ppearing and practicing"—reaches not just lawyers who "appear" in the traditional sense of "[r]epresenting an issuer in a Commission administrative proceeding,"[282] but also lawyers who provide advice about whether information must be submitted to the SEC[283] or advice about the adequacy of any document submitted,[284] as well as any lawyer "[t]ransacting any business with the [SEC], including communications in any form."[285] It has been suggested that when a whistleblowing lawyer makes a disclosure to the SEC in order to later qualify for an award, that

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DUCT r. 1.6(b)(2)–(3). Internal whistleblowing is mandated when "it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur." 17 C.F.R. § 205.2(e).

[275] Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8185, Exchange Act Release No. 47,276, Investment Company Act Release No. 25,919, 68 Fed. Reg. 6296, 6311 (Feb. 6, 2003) (codified at 17 C.F.R. pt. 205) (stating that "the vast majority of states already permit (and some even require) disclosure of information in the limited situations covered by" the SOX confidentiality exceptions). *But see* LATHAM & WATKINS, *supra* note 90, at 6, 10–15 (reviewing the rules of all fifty states and the District of Columbia, and characterizing the SEC's statement as "an exaggeration").

[276] 17 C.F.R. § 205.3(d)(2); MODEL RULES OF PROF'L CONDUCT r. 1.6(b).

[277] 17 C.F.R. § 205.2(i).

[278] *Id.* § 205.3(d)(2)(i).

[279] *Id.* § 205.3(d)(2)(iii).

[280] *Id.*; *cf.* MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2)–(3) (referring to "substantial injury to the financial interests or property of another").

[281] 17 C.F.R. § 205.2(a).

[282] *Id.* § 205.2(a)(1)(ii).

[283] *Id.* § 205.2(a)(1)(iv).

[284] *Id.* § 205.2(a)(1)(iii).

[285] *Id.* § 205.2(a)(1)(i).

disclosure constitutes a "communication" that qualifies the lawyer as "appearing and practicing" before the SEC, making broad SOX confidentiality exceptions applicable. But a lawyer's communication with the SEC constitutes "appearing and practicing" only if it occurs "in the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship."[286] If the disclosure is for the purpose of qualifying for a whistleblowing award, it would be outside "the context of providing legal services to an issuer," and therefore this bootstrapping approach would not be available.

In the context of FCA-related disclosures, a lawyer's ability to disclose information largely depends on whether the applicable state confidentiality rule permits disclosure to rectify, mitigate, or prevent client frauds and crimes, or prohibits such disclosures entirely. In the context of Dodd-Frank, any lawyer who appears and practices before the SEC can avail him or herself of the expanded confidentiality exceptions found in the SOX regulation—and therefore may inform the SEC of material securities law violations and material breaches of fiduciary duty even if the applicable state confidentiality rule would prohibit such a disclosure. But the key question under Dodd-Frank is whether the lawyer who wishes to use the SOX exceptions is actually subject to the SOX regulation.

C. Lawyers' Loyalty Obligations and Dodd-Frank Whistleblower Awards

1. Current Clients

No court has yet addressed the issue of the ethical propriety of lawyers seeking whistleblower bounties under the Dodd-Frank legislation. Various commentators[287] and at least one bar ethics committee,[288] however, have addressed the applicability of state confidentiality and/or conflicts rules under the SEC regulations implementing the Dodd-Frank whistleblower bounty provisions. Regarding conflicts of interest, most of the attention has been focused on conflicts with current clients. This is probably because, unlike the FCA, Dodd-Frank permits whistleblowers to remain anonymous, even after the receipt of an award, thereby making it more likely that a lawyer will blow the whistle on a current client.[289]

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[286] *Id.* § 205.2(a)(2)(i).

[287] *See, e.g.*, Pacella, *supra* note 7, at 1040–45; Temkin & Moskovits, *supra* note 8, at 23; Green & Thomas, *supra* note 144; LATHAM & WATKINS, *supra* note 90, at 6–15.

[288] *See generally* N.Y. Cnty. Lawyers' Ass'n, *supra* note 8 (discussing whether a lawyer who is subject to the New York Rules of Professional Conduct may seek a Dodd-Frank whistleblower award).

[289] Under Dodd-Frank, the SEC will ultimately need to learn the whistleblower's identity for an award to be made, but the SEC has a statutory obligation to keep that information confidential.

Those who have addressed the issue agree, as do we, that just like an FCA lawyer-relator, a Dodd-Frank whistleblower-lawyer who is currently representing the company on the subject of the disclosure will likely violate Model Rule 1.7 with respect to "material limitation" conflicts.[290] This is because there is a significant risk that the lawyer's representation will be limited by the lawyer's personal pecuniary interest in obtaining the whistleblower award, which is likely to compromise the lawyer's ability to objectively consider and advise the company concerning such questions as whether the company is violating the law, whether the legal violation poses a threat to the company, and whether suspected wrongdoing should be reported to a higher level in the company.[291] Moreover, such a conflict will be non-consentable if, given the amount of money at stake, the lawyer cannot reasonably believe that he or she can provide diligent and competent representation.[292] More important, as in FCA cases, it is unlikely that a client would consent to permitting its lawyer to be a Dodd-Frank whistleblower.

Other aspects of the lawyer's duty of loyalty under Dodd-Frank have not been as thoroughly discussed, including whether a lawyer may act adversely to a current client by disclosing client information that is not the subject of the current representation. Some commentators have assumed that continued representation of the client on an unrelated matter would be ethically permissible,[293] without addressing whether lawyers are permitted

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See 15 U.S.C. § 78u-6(h)(2)(A); 17 C.F.R. § 240.21F-7(a). Under the FCA, the filing of the complaint is done under seal, but the lawyer-relator's name becomes public once the initial seal is lifted. *See* 31 U.S.C. § 3730(b) (2012).

[290] *See* MODEL RULES OF PROF'L CONDUCT r. 1.7; Pacella, *supra* note 7, at 1048; Temkin & Moskovits, *supra* note 8, at 22–23; Green & Thomas, *supra* note 144.

[291] Temkin & Moskovits, *supra* note 8, at 22–23; *see also* N.Y. Cnty. Lawyers' Ass'n, *supra* note 8, at 11 (noting that "potential bounties range from $100,000 to literally millions of dollars in large cases"). According to the New York County Lawyers' Association ("NYCLA") opinion, an anticipated whistleblower bounty in excess of $100,000 "presumptively gives rise to a conflict of interest between the lawyer's personal interest and that of the client." N.Y. Cnty. Lawyers' Ass'n, *supra* note 8, at 11. The Committee believes that a conflict of interest arises in "the overwhelming majority of cases." *Id*. The Committee does not address in what circumstances such a personal interest would *not* give rise to a conflict, other than to suggest that if the lawyer is *required* to make a disclosure to someone, then "financial incentive could be less of a factor in determining the existence of a conflict with the lawyer's personal interest." *Id*. New York Rule 3.3(b) provides one example of such a required disclosure: when the lawyer "knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to [a proceeding before a tribunal]." N.Y. RULES OF PROF'L CONDUCT r. 3.3(b) (N.Y. STATE BAR ASS'N 2015).

[292] *See* N.Y. Cnty. Lawyers' Ass'n, *supra* note 8, at 11. The NYCLA opinion cautions that "[i]n some circumstances the whistleblower-bounty conflict *may be* unwaiveable," but we believe it is more accurate to say that this will typically be the case. *See id.* at 12 (emphasis added).

[293] *See, e.g.*, Green & Thomas, *supra* note 144 (stating that a lawyer-whistleblower may continue representing a client after submitting information to the SEC unless the representation would

to act adversely to a current client, including whether fiduciary law requires them to avoid self-dealing even in unrelated information and to account for any profits received. Nor has there been any discussion of whether a lawyer must inform a client that the lawyer has disclosed information concerning the client's wrongdoing to the SEC, or whether a lawyer may blow the whistle on a non-client third party without first seeking the client's consent to take advantage of a financial opportunity that may belong to the client. As to all of these issues, we believe that the loyalty analysis under Dodd-Frank is substantially similar to the analysis under the FCA,[294] with the result that, although the disciplinary rules do not clearly prohibit lawyer conduct that is directly adverse to a current client on an unrelated matter, or seeking a financial reward for disclosing information adverse to a non-client third party, fiduciary law continues to broadly prevent the lawyer from receiving a significant financial reward at the client's expense.[295]

2. Former Clients

There is little discussion of former-client conflicts under Dodd-Frank because, unlike the FCA, a lawyer-whistleblower does not act in any form of an arguably representative capacity. As a result, seeking a Dodd-Frank whistleblower award presumably would not violate Model Rule 1.9(a) or its state equivalents.[296]

Nevertheless, a recent opinion of the New York County Lawyers' Association's Committee on Professional Ethics concluded that, even when a lawyer is permitted to disclose information under New York Rule 1.9(c),

> [U]ndertaking this otherwise permissible disclosure in a manner that results in a bounty for the lawyer raises a significant risk that the attorney's judgment in determining whether the disclosure is 'reasonably necessary' will be adversely affected and presents a conflict of interest that is beyond what Rule 1.9 was intended to allow.[297]

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be affected by the attorney's status as a whistleblower; for example, if the lawyer was requested to advise the client how to respond to an SEC inquiry prompted by the lawyer's disclosure).

[294] One difference is that, although Dodd-Frank whistleblowers are taking action directly adverse to their current clients, they are not publicly suing them, as are FCA relators. Whether this difference is a significant one is less clear.

[295] *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(2) (AM. LAW INST. 2000) (stating that a lawyer has a fiduciary duty to report profits made using client information unless the client has given consent for such use); *see also supra* note 197 and accompanying text.

[296] *See* MODEL RULES OF PROF'L CONDUCT r. 1.9(a).

[297] N.Y. Cnty. Lawyers' Ass'n, *supra* note 8, at 14.

We disagree that New York Rule 1.9, which is based on Model Rule 1.9, is properly interpreted to prohibit a lawyer from seeking a whistleblower award. What little authority the Committee cited is clearly distinguishable,[298] and courts should be reluctant to discipline a lawyer when there is no particular rule that can be plausibly interpreted to prohibit the conduct in question.[299] Moreover, given that whistleblowing under Dodd-Frank does not involve litigation, there is no possibility of court disqualification based, not on the disciplinary rules themselves, but rather on the common law of lawyer disqualification.

Even so, we believe that Dodd-Frank lawyer-whistleblowers *do* have a conflict of interest when they blow the whistle on a former client, even when they are ethically permitted to use or disclose that information under applicable rules of professional conduct. Our conclusion is based not on the disciplinary rules themselves, but rather on the existence of common-law fiduciary duties that are broader than the specific fiduciary duties codified in state disciplinary rules. An attorney's fiduciary duty extends to former clients and includes the duty not to engage in self-dealing and to account for profits made with confidential information obtained during the lawyer-client relationship.[300] It may be that such breaches will be difficult to detect, given the anonymity permitted under the Dodd-Frank regulations, but it is at least possible that an actual or potential breach will be detected. Moreo-

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[298] The Committee cited *Oasis West Realty, LLC v. Goldman*, a 2011 California Supreme Court case, as "sustain[ing] a breach of fiduciary duty claim against a lawyer who was disloyal to a former client when he publicly protested a development permit that he himself had formerly obtained on behalf of the client, at considerable expense," but the *Goldman* opinion focused on the lawyer's adverse *use* of confidential client information rather than an impermissible *disclosure*. *Id.* at 13; *see* Oasis W. Realty, LLC v. Goldman, 250 P.3d 1115, 1122 (Cal. 2011). California had no confidentiality exception that would have permitted either the use or disclosure in that case. *See* CAL. RULES OF PROF'L CONDUCT r. 3-100(B) (STATE BAR OF CAL. 2015) (permitting the discretionary disclosure of confidential information only when necessary to prevent a criminal act that is likely to result in substantial bodily injury or death). The Committee cited another case, *Birnbaum v. Birnbaum*, decided by the New York Court of Appeals in 1989, for the broad proposition that a fiduciary's "general duty of fidelity requires avoidance of situations in which personal interests conflict with the interests of those owed a fiduciary duty," involved a nonlawyer fiduciary who engaged in self-dealing while he was a partner in a general partnership, and says nothing about the obligations of a former lawyer who is ethically permitted to use or disclose confidential information under applicable disciplinary rules. N.Y. Cnty. Lawyers' Ass'n, *supra* note 8, at 14 n.30; *see* Birnbaum v. Birnbaum, 539 N.E.2d 574 (N.Y. 1989).

[299] The NYCLA opinion appears to rely on New York Rule 1.9(c), which is based on Model Rule 1.9(c), but the Committee nowhere explains how the language of that provision should be interpreted to prohibit adverse action when the disclosure itself is permitted by a confidentiality exception. *See generally* N.Y. Cnty. Lawyers' Ass'n, *supra* note 8.

[300] *See* RESTATEMENT (THIRD) OF AGENCY § 8.02 (AM. LAW INST. 2006); *see also* Tri-Growth Ctr. City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 265 Cal. Rptr. 330 (Ct. App. 1990).

ver, although disciplinary action is both unlikely and probably unjustified, it may be possible for the company to seek to enjoin the lawyer from either disclosing information to the SEC pursuant to the whistleblower bounty program[301] or collecting a whistleblower bounty. The company could also sue the lawyer to recover any profits received or for any damages attributable to the breach. Finally, if the SEC is convinced that lawyers violate their state law fiduciary duties when they seek a whistleblower bounty based on information obtained in the representation, the SEC may become reluctant to make such awards or to encourage such lawyers to report to them. The SEC might even consider amending its rules to clarify that lawyers who violate their common-law fiduciary duties to their clients are ineligible to participate in the whistleblower bounty programs.

Of course, our conclusions with respect to the existence of an unethical conflict of interest for Dodd-Frank lawyer-whistleblowers, as well as for FCA lawyer-relators, assume that neither state rules of professional conduct nor state common-law fiduciary duties are preempted by federal law, which is the question to which we now briefly turn.

III. Federal Preemption of State Ethics Law

A. The False Claims Act

The three federal FCA cases that address lawyer-relators' ethical duties, *United States ex rel. Doe v. X Corp*. ("*Doe*"), *United States ex rel. Fair Laboratory Practices Associates v. Quest Diagnostics, Inc*. ("*FLPA II*"), and *United States ex rel. Holmes v. Northrop Grumman*, assert that the FCA does not preempt state confidentiality rules.[302] Certainly there is nothing in the text of the FCA statute that could be interpreted as express preemption

[301] A court would not prohibit disclosure of information to the SEC where applicable confidentiality rules permit such disclosure, but could possibly prohibit disclosure in the manner required to trigger eligibility for a whistleblower bounty award. Such a prohibition would likely inhibit many lawyers from disclosing the information at all.

[302] *See* United States *ex rel.* Fair Lab. Practices Assocs. v. Quest Diagnostics, Inc. (*FLPA II*), 734 F.3d 154, 163, 168 (2d Cir. 2013) ("Nothing in the False Claims Act evinces a clear legislative intent to preempt state statutes and rules that regulate an attorney's disclosure of client confidences. . . . The False Claims Act does not preempt state ethical rules governing the disclosure of client confidences . . . ."); United States *ex rel.* Holmes v. Northrop Grumman, No. 1:13cv85-HSO-RHW, 2015 U.S. Dist. LEXIS 71804, at *11 (S.D. Miss. 2015) (the argument that "the FCA preempts the ethical rules . . . is not persuasive"); United States *ex rel.* Doe v. X Corp. (*Doe*), 862 F. Supp. 1502, 1507 n.12 (E.D. Va. 1994) ("Congress expressed no intent in the Act to preempt state laws governing the attorney-client relationship. Nor is such an intent reasonably implied."); *see also* United States *ex rel.* Fair Lab. Practices Assocs. v. Quest Diagnostics, Inc. (*FLPA I*), No. 05-Civ.-5393 (RPP), 2011 U.S. Dist. LEXIS 37014, at *20 (S.D.N.Y. Mar. 24 2011), *aff'd*, 734 F.3d 154 ("The FCA does not preempt state ethical rules . . . .").

of state regulation of attorneys.[303] As for implied preemption, all three courts summarily dismissed this possibility, citing U.S. Supreme Court cases declaring that in areas of traditional state regulation, the presumption against preemption cannot be overcome unless Congress has made such a purpose "clear and manifest."[304]

In *Doe*, the defendant urged the court to interpret the FCA to exclude lawyers from serving as qui tam relators against their own clients.[305] The court found no basis in either the text or the legislative history of the statute to do so.[306] As for the defendant's argument that permitting lawyers to serve as plaintiffs against their own clients "would . . . encourage attorneys to flout their ethical obligations and use their clients' confidential information to their own economic advantage," the court responded that the FCA does not preempt state confidentiality rules, "does not authorize [a relator] to violate state law," and does not "immunize a relator" who violates state law.[307] The court further noted that permitting lawyers to "report their clients' ongoing or planned fraudulent practices against the government" undeniably serves the "Congressional purpose underlying the *qui tam* provisions [which] is 'to enhance the Government's ability to recover losses sustained as a result of fraud against the Government.'"[308] The *Doe* court concluded: "[T]o the extent that state law permits a disclosure of client confidences . . . then the attorney's use of the *qui tam* mechanism to expose that fraud should be encouraged, not deterred."[309]

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[303] *See, e.g.*, *Doe*, 862 F. Supp. at 1507 n.12 ("Congress expressed no intent in the Act to preempt state laws governing the attorney-client relationship.").

[304] *See, e.g.*, *id*. ("[C]ourts must 'start[] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" (latter alterations in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); *see also FLPA II*, 734 F.3d at 163 ("In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest." (quoting Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005))); *Doe*, 862 F. Supp. at 1507 ("Absent clear legislative intent to upset this settled practice, state law regarding the attorney-client relationship cannot be deemed preempted.").

[305] *Doe*, 862 F. Supp. at 1507 ("X Corp. protests that [allowing lawyers to serve as relators] severely impinges upon the common law relationship between attorney and client and could not have been intended by Congress.").

[306] *Id*. at 1506, 1508 ("Congress, in plain language, carefully fashioned specific exclusions to the class of eligible relators, and those exclusions did not include attorneys. . . . [T]he *qui tam* statute does not exclude lawyers or members of any particular profession from being relators . . . .").

[307] *Id*. at 1507 ("[W]here 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.").

[308] *Id*. at 1508 (quoting S. REP. NO. 99-345, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266).

[309] *Id*. at 1507–08 (footnote omitted).

In *FLPA II*, the relator argued for a form of FCA preemption in order to avoid application of a state ethics code that prohibited disclosing confidential client information except when reasonably necessary to prevent future or ongoing crimes or frauds.[310] Although the U.S. Court of Appeals for the Second Circuit quickly concluded that the FCA does not preempt state ethics rules, the court then acknowledged "that the central purpose of the [New York] Rules—to protect client confidences—can be 'inconsistent with or antithetical to federal interests' . . . which under the FCA, are to 'encourage private individuals who are aware of fraud being perpetrated against the [g]overnment to bring such information forward.'"[311] Citing a prior disciplinary case, the court further explained that "[i]n such instances, courts must interpret and apply the [New York] Rules in a manner that 'balances the varying *federal* interests at stake.'"[312]

Looking at the specific facts of the case, the Second Circuit then found that applying New York's confidentiality rule "could not have undermined the *qui tam* action" because the two other partners in FLPA, both nonlawyers, had sufficient information to bring the lawsuit.[313] As a result, applying the New York rule to Bibi, the lawyer who had previously represented the company, "would not affect, much less undermine, the federal interests embodied in the FCA *qui tam* provision."[314] As for the New York rule itself, the Second Circuit found that this particular rule "implicitly accounts for the federal interests at stake in the FCA by permitting disclosure of information 'necessary' to prevent the ongoing commission of a crime."[315]

This "balancing of federal interests" aspect of the *FLPA II* opinion appears to contradict the court's earlier finding that nothing in the FCA preempts state ethics rules. What would the Second Circuit have done if

[310] *FLPA II*, 734 F.3d at 163. Although the relator's brief to the Second Circuit did not use the term "preemption," it attempted to avoid application of the New York Rules by citing federal authority to the effect that "[w]hen state rules of professional conduct governing attorneys would frustrate the purposes of federal law, a federal court should apply the Model Rules." Brief and Special Appendix for Plaintiff-Appellant, *supra* note 207, at 37. The Model Rules permit disclosure of confidential client information not only to prevent future or ongoing crimes or frauds, but also to prevent, mitigate, or rectify the consequences of past crimes or frauds. *See supra* note 90 and accompanying text.

[311] *FLPA II*, 734 F.3d at 163 (quoting Grievance Comm. v. Simels, 48 F.3d 640, 646 (2d Cir. 1995); United States *ex rel.* Dick v. Long Island Lighting Co., 912 F.2d 13, 18 (2d Cir. 1990)).

[312] *Id*. (quoting *Grievance Comm.*, 48 F.3d at 646).

[313] *Id*. at 164–65 ("By FLPA's own admission, it was unnecessary for Bibi to participate in this *qui tam* action at all, much less to broadly disclose Unilab's confidential information. . . . 'Baker and Michaelson each has ample relevant information to bring this case.'" (quoting Brief and Special Appendix for Plaintiff-Appellant, *supra* note 207, at 43)).

[314] *Id*. at 165 & n.16 ("FLPA could have brought the *qui tam* action based on the information that Baker and Michaelson possessed as former executives of Unilab.").

[315] *Id*. at 164; *see* N.Y. RULES OF PROF'L CONDUCT r. 1.9(c) (N.Y. STATE BAR ASS'N 2015).

Bibi's conduct had been governed by a confidentiality rule prohibiting *any* disclosure to prevent future or ongoing client crimes or frauds? In that situation, if the Second Circuit found that the state confidentiality rule did not adequately account for the federal interests at stake in the FCA, then the opinion suggests that the court would not have used such a rule to disqualify the relator, resulting in what looks very much like federal preemption of an otherwise applicable state rule. And with respect to the New York rules themselves, or similar rules, another court might find that a rule that permits disclosure only to *prevent* ongoing or future fraud unduly frustrates the purpose of the FCA, which provides financial incentives for disclosure that can *rectify* past fraud. And what about a lawyer's loyalty obligations under state law? In *FLPA II*, the government took the position that if the Second Circuit agreed with the district court that the former-client conflict rule prevented the relator from filing a qui tam lawsuit, this decision "would drastically and negatively affect the impact of the *qui tam* provisions of the [FCA]."[316] Aside from the former-client conflict rule, state fiduciary law broadly prohibits both lawyers and nonlawyers from profiting from the disclosure of confidential client information, even when the disclosure itself is permitted—law that, if applied, would clearly have a devastating impact on the ability of insiders to serve as qui tam relators.

In *Holmes*, also an FCA lawsuit, the federal district court similarly rejected the relator's argument that the FCA preempts state ethics standards.[317] It quoted the *Doe* court's observation that the FCA "does not authorize [a relator] to violate state laws,"[318] and cited the *FLPA II* court's rejection of federal preemption.[319]

We believe that the possible preemption of at least some aspects of state ethics laws is a more complicated question than the *Doe*, *FLPA II*, or *Holmes* courts acknowledged. Although it is not our purpose to thoroughly explore this question, we must note some of the complicating factors, including, but not limited to, the "balancing of federal interests" test that the Second Circuit invoked in *FLPA II*.[320] Other complicating factors include a

[316] Brief and Special Appendix for Plaintiff-Appellant, *supra* note 207, at 15. The brief quotes the government as further stating: "The faults that Quest finds with Bibi—his close relationship to the company that allegedly engaged in the fraud and his disclosure of his inside knowledge of the fraud—are precisely what makes relators valuable sources of information." *Id.*

[317] *Holmes*, 2015 U.S. Dist. LEXIS 71804, at *11.

[318] *Id.* at *8 (quoting *Doe*, 862 F. Supp. at 1507).

[319] *Id.* at *11 (citing *FLPA II*, 734 F.3d at 163). The *Holmes* court also noted that applying ethics standards to a qui tam relator like Holmes was particularly appropriate because Holmes was acting pro se—an option available to him only because of his status as a lawyer and not available to nonlawyer-relators.

[320] *FLPA II*, 734 F.3d at 163.

number of FCA counterclaim cases involving nonlawyers, in which courts have held that FCA defendants may *not* assert certain state law claims, and a more complicated picture of how obstacle or frustration preemption has fared in the Supreme Court.

The FCA counterclaim cases involve attempts by company defendants to assert state law claims for indemnification and contribution as well as for enforcement of releases and nondisclosure agreements. For example, in 1991, in *Mortgages, Inc. v. U.S. District Court*, the U.S. Court of Appeals for the Ninth Circuit held that the district court should have dismissed seven state law-based counterclaims seeking indemnification and contribution.[321] The Ninth Circuit concluded that the "FCA is in no way intended to ameliorate the liability of wrongdoers by providing defendants with a remedy against a *qui tam* plaintiff with 'unclean hands;'" that there is no *federal* basis for permitting FCA defendants to bring counterclaims for indemnification or contribution; and that there is "no right to assert *state* law counterclaims that, if prevailed on, would end in the same result."[322] Similarly, in 2005, in *United States ex rel. Longhi v. Lithium Power Technologies*, the U.S. Court of Appeals for the Fifth Circuit ruled that a company could not seek to enforce release and indemnification clauses in a contract with the Department of Defense because enforcing such an agreement would "ignore the public policy objectives expressly spelled out by Congress in the FCA [and] provide disincentives to future relators."[323] Courts considering FCA cases have also limited state law counterclaims that are closely analogous to lawyers' confidentiality and loyalty duties, refusing to enforce fiduciary or contractual duties to inform the defendant internally of the alleged violation and limiting the availability of counterclaims based on contractual nondisclosure agreements.[324]

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[321] Mortgages, Inc. v. U.S. Dist. Court, 934 F.2d 209 (9th Cir. 1991).

[322] *Id*. at 214 (emphasis added).

[323] United States *ex rel.* Longhi v. Lithium Power Techs., 575 F.3d 458, 473–74 (5th Cir. 2009).

[324] *See, e.g.*, Siebert v. Gene Sec. Network, No. 11-cv-01987-JST, 2013 U.S. Dist. LEXIS 149145, at *13 (N.D. Cal. Oct. 16, 2013) (dismissing the counterclaim that the relator breached a fiduciary duty by failing to report internally because "[g]enerally speaking, a breach of fiduciary duty claim arising out of a Plaintiff-relator's failure to disclose a False Claims Act violation that subsequently becomes the basis of a *qui tam* claim is barred by the FCA"); United States *ex rel.* Vainer v. Davita, Inc., No. 1:07-CV-2509-CAP, 2013 U.S. Dist. LEXIS 51359, at *15 (N.D. Ga. Feb. 13, 2013) (dismissing the FCA defendant's counterclaim that the relator breached a contractual obligation to report FCA violations internally because such a counterclaim "amounts to a claim for indemnification or contribution"); United States *ex rel.* Head v. Kane Co., 668 F. Supp. 2d 146, 151 (D.D.C. 2009) ("[A] private agreement may not be enforced when its terms . . . would have the effect of preventing individuals from furnishing evidence to the government or making allegations under the FCA, since this would unduly frustrate the Act's purpose."); United States *ex rel.* Grandeau v. Cancer Treatment Ctrs. of Am., 350 F. Supp. 2d 765, 775 (N.D. Ill.

These counterclaim cases do not expressly refer to federal preemption of state law, but rather speak in the language of public policy.[325] Nevertheless, they give preemptive effect to the FCA over conflicting state law obligations, using analysis that is analogous to obstacle or frustration preemption.[326] And this form of implied preemption appears to be far more complex and controversial than the cursory treatment in *Doe* and *FLPA II* suggests.

According to one recent commentary, the presumption against preemption in cases involving the historic police powers of the states is merely a presumption—not a "clear statement rule" requiring the identification of language in the statute declaring the purpose of Congress to preempt state law.[327] Indeed, the same commentary observes that in obstacle preemption cases, "courts have no text dealing with preemption to construe."[328] As a result, courts must evaluate "the degree of tension between state law and

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2004) ("[P]ublic interest in the production of [defendant's] records trumps any fiduciary obligation or any confidentiality agreement.").

[325] *See, e.g.*, United States *ex rel.* Ruhe v. Masimo Corp., 929 F. Supp. 2d 1033 (C.D. Cal. 2012) (denying defendant's motion to strike the relators' exhibits that were allegedly taken in violation of a non-disclosure agreement, and noting that "the strong public policy [of the FCA] would be thwarted if [a defendant] could silence whistleblowers").

[326] At least two court decisions and one article have acknowledged the federal preemption frame for analyzing these counterclaim issues. *Siebert*, 2013 U.S. Dist. LEXIS 149145, at *13 (noting that "[i]t is possible . . . that the holding in *Mortgages* is based on conflict preemption principles"); United States v. Dynamics Research Corp., 441 F. Supp. 2d 259, 269 (D. Mass. 2006) (examining whether counterclaims are preempted by the FCA); Thomas F. O'Neil III et al., *The Buck Stops Here: Preemption of Third-Party Claims by the False Claims Act*, 12 J. CONTEMP. HEALTH L. & POL'Y 41, 51 n.53 (1995) ("Many of the cases [addressing contribution and indemnification] do not specifically discuss the preemption doctrine or explain their holdings in these terms. However, the courts' rationale that state law claims would undermine the FCA amounts to the application of the doctrine sub silentio."). The counterclaim cases could also be characterized as demonstrating preemptive effect of the federal common law. *See* Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1640 (2008) (describing the development of "federal common law rules in cases concerning the rights and obligations of the United States").

[327] Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 271. Professor Young cites and quotes from Justice Scalia's concurring and dissenting opinion in *Cipollone v. Liggett Group, Inc.*, a 1992 Supreme Court case also cited by the *Doe* court:

> See, for example, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 545 (1992) (Scalia, J, concurring in the judgment in part and dissenting in part) ("Though we generally 'assume that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress,' we have traditionally not thought that to require express statutory text.") (quoting *Rice*, 331 U.S. at 230).

Id. at 271 n.85 (alterations in original); *see also Doe*, 862 F. Supp. at 1507 n.12 (citing *Cipollone*, 505 U.S. at 545, as authority for federal preemption inquiries).

[328] *See* Young, *supra* note 327, at 274.

congressional purpose," and the critical question will be "just how much conflict is tolerable."[329] According to another commentary, "so-called 'obstacle preemption' potentially covers not only cases in which state and federal law contradict each other, but also all other cases in which courts think that the effects of state law will hinder accomplishment of the purposes behind federal law."[330] Finally, scholars have noted the Supreme Court's failure to use the presumption in a consistent manner, prompting calls for its explicit abandonment and causing at least one commentator to declare that the Court has "created a presumption *in favor* of preemption."[331] Given the apparent weakening of the presumption against preemption, it is hardly surprising to find that FCA courts in nonlawyer cases have not hesitated to effectively preempt counterclaims based on state law in light of the obstacle such claims present to furthering the purposes of the FCA.

If the FCA counterclaim cases are correct that the FCA preempts some state law obligations based on contract or agency law, then does it also preempt a lawyer's similar obligations, including those based on state attorney conduct rules? Not necessarily. Some commentators have argued that lawyers, together with other independent third parties, play a unique role as "gatekeepers," whose "consent is necessary to allow issuers or investors to proceed with transactions," or as "corporate monitors," who monitor a company's compliance with its legal obligations.[332] Gatekeepers arguably do not need financial incentives because they already have strong "reputational concerns that stem beyond their relationship with the corporation."[333]

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[329] *Id*. at 274–75; *see also* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 729 (2008) ("[T]he key question in most preemption cases entails a discretionary judgment about the permissible degree of tension between federal and state law, a question that typically cannot be answered using the tools of statutory interpretation.").

[330] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 228–29 (2000). Professor Nelson is critical of such a broad use of obstacle preemption, concluding that "the mere fact that federal law serves certain purposes does not automatically mean that it contradicts everything that might get in the way of those purposes." *Id*. at 231–32.

[331] Young, *supra* note 327, at 307 & n.290 (quoting Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 971 (2002)).

[332] *See, e.g.*, Pacella, *supra* note 7, at 1057–58.

[333] *Id.* at 1058. This part of Pacella's argument is more persuasive than her further argument that lawyers in general are "commonly described as 'gatekeepers'" and therefore should also be prohibited from receiving financial incentives. *Id.* While some lawyers serve as gatekeepers, many do not. Pacella also describes lawyers as "corporate monitors," with preexisting duties to the company to intervene to avoid corporate wrongdoing that could harm the company. *Id.* at 1057. As such, she argues that they "should not be incentivized in the same manner to disclose information as the rank-and-file employee," presumably because financial incentives may cost them "their intimate relationship with the corporation." *Id.* at 1058. Given that we do not believe that all corporate lawyers perform the narrow "gatekeeping" role, we suggest that the more general description of lawyers as "corporate monitors" could be used to buttress normative arguments that financial incentives to blow the whistle are incompatible with unique lawyer functions. *See id.* at 1057–58.

As for corporate monitors, their effectiveness depends on a company's willingness to treat them as trustworthy insiders, which may be difficult once the company understands the lawyer's eligibility to receive a whistleblower bounty.[334]

It may also be appropriate to treat lawyers' obligations stemming from a state ethics code differently than obligations arising under general common law, including the law regulating private agreements. For example, as a matter of public policy, there is no reason to think that contractual confidentiality arrangements between two private parties serve the public interest, but a state supreme court's adoption of a professional rule for lawyers does reflect that court's assessment of the competing public interests at stake in a lawyer-client relationship.[335] These include both the interest in protecting the confidentiality expectations of clients and the interest in preventing, mitigating, or rectifying client crimes or frauds.[336] So there may be more reason to defer to a state professional rule than a contractual arrangement between private parties or even a fiduciary's common-law obligation not to profit from a client's confidential information.

In addition, if FCA courts were to routinely enforce nondisclosure agreements against relators who disclose fraud, that could spell the end of qui tam cases because companies can impose such agreements on all of their employees. Similarly, if FCA courts were to routinely enforce an employee-agent's common-law duty not to profit from the employer's confidential information, there would be few insiders in a position to serve as qui tam relators. Court enforcement of lawyer ethics rules, on the other hand, will affect only a narrow slice of possible relators. This excluded group would include lawyers currently representing clients in the same or a substantially related matter and former lawyers for a client where applicable state ethics codes prohibit disclosure under the particular circumstances. Depending on a court's interpretation of the former-client conflict rule, this group could also include former lawyers bringing a qui tam suit against a former client in the same or a substantially related matter; however, under the Second Circuit's "balancing of federal interests" approach in *FLPA II*, such a broad interpretation of an ambiguous ethics rule could fail on the

[334] This normative argument against lawyer eligibility for whistleblower awards would also seem to apply to nonlawyer compliance professionals. In drafting its Dodd-Frank whistleblower regulations, the SEC specifically allows compliance professionals to be eligible for its whistleblower awards, but on terms different from other employees. They must first engage in internal whistleblowing and then wait 120 days before submitting information about violations to the SEC. 17 C.F.R. § 240.21F-4(b)(4)(iii)(B), (iv)(C) (2012).

[335] *See FLPA II*, 734 F.3d at 154.

[336] *See id.*

ground that it does not sufficiently take account of the federal interests under the FCA.[337]

B. Dodd-Frank

Like the FCA, the Dodd-Frank whistleblowing provision is silent on the question of federal preemption of state law, including state laws governing lawyers. Similarly, the SEC's implementing regulations do not use the term "preemption."[338] But those regulations build on the agency's earlier regulation of lawyers under SOX, which created new confidentiality exceptions for lawyers practicing before the SEC,[339] and asserted that it preempts state ethics rules that are "in conflict" with the SOX regulation.[340] When the SEC promulgated the SOX regulation, it argued that contrary state ethics rules would frustrate the purposes of SOX, whereas some elements of the organized bar argued that the SEC lacked the authority to preempt state confidentiality rules.[341] Given that the SOX legislation expressly delegated to the SEC a mandate to set "minimum standards of conduct" for lawyers practicing before the SEC, we find the SEC's arguments largely persuasive.[342] Nevertheless, because the SOX legislation focused on up-the-ladder

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[337] *See id*. In refusing to give an ambiguous state court rule its broadest possible meaning, out of deference to important federal interests, it is unclear whether the district court in *FLPA I* was engaging in the functional equivalent of federal preemption. *See FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *22–32.

[338] On the other hand, the SEC's intention to preempt conflicting state ethics rules in its whistleblower program is clear from the way it defines the "original information" that is eligible for a whistleblower award. 17 C.F.R. § 240.21F-4(b). Ordinarily, information obtained "in connection with the legal representation of a client" cannot form the basis for an award. *Id.* § 240.21F-4(b)(4)(ii). But the SEC permits such information to be the basis for an award if a lawyer may disclose such information pursuant to either the SOX regulation or "the applicable state attorney conduct rules," *id.* § 240.21F-4(b)(4)(iii), and the SOX regulation itself asserts that it preempts conflicting state confidentiality rules, 17 C.F.R. § 205.1 (2003).

[339] 17 C.F.R. § 205.3(d)(2).

[340] *Id.* § 205.1 ("Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern."). The regulation also provides a safe harbor for lawyers facing state bar discipline for making disclosures consistent with the regulation. *Id.* § 205.6 ("An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.").

[341] See Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725 (2004), for an insightful summary of the debate between the SEC, the ABA, and the Washington and California state bars.

[342] 15 U.S.C. § 7245 (2012). The statute directs the SEC to issue "minimum professional standards, including" the specific standards on reporting up within organizations. *Id*. The use of the word "including" indicates that Congress's grant of authority to the SEC is broader than simply the reporting up rules, and the use of the word "minimum" indicates that the SEC regulations

reporting, and did not expressly contemplate lawyers reporting violations outside of the company to the SEC, we acknowledge that the preemptive status of the SEC's SOX regulation is at least questionable.[343]

The issue of SOX preemption was never judicially resolved, perhaps because no lawyers made disclosures that were permitted by that regulation but prohibited under applicable state rules.[344] But now that the SEC has promised financial incentives for individuals—including lawyers—who make whistleblower disclosures under Dodd-Frank, lawyers may (finally) be disclosing information that they have been permitted to disclose since 2003. Even so, it is not clear how a lawyer's disclosure under the Dodd-Frank program will result in a judicial determination of whether SOX preempts more restrictive state confidentiality rules, given that the statute requires the SEC to keep whistleblowers' identities confidential.[345]

The SEC's Dodd-Frank regulations clearly state that lawyers are not precluded from receiving an award if their disclosure was permissible either under state attorney ethics codes or under the SOX regulation.[346] But even if lawyers are ethically permitted to disclose client wrongdoing to the SEC, what about their loyalty obligations under state law? What is the significance of the SEC's failure to even mention lawyers' loyalty obligations under state law?[347] A lawyer-whistleblower might argue that the SEC regulation, read literally, permits a lawyer to receive an award, so long as the disclosure itself is permitted.[348] But it is unclear whether, in drafting the regu-

would displace state rules that fall beneath that minimum standard. Cramton et al., *supra* note 341, at 791–92.

[343] *See, e.g.*, Temkin & Moskovits, *supra* note 8, at 18–22 (arguing that the SOX regulation does not preempt less permissive state confidentiality rules).

[344] *See* Cramton et al., *supra* note 341, at 808 (predicting that "few if any lawyers will exercise discretion to disclose material violations outside the corporation").

[345] 15 U.S.C. § 78u-6(h)(2)(A) (2012). When the SEC announces whistleblower awards, it reveals neither the identity of the whistleblower nor the identity of the company that was sanctioned. *Id.*; *see, e.g.*, In the Matter of the Claim for Award in Connection with [Undisclosed Party], *supra* note 260.

[346] 17 C.F.R. § 240.21F-4(b)(4)(i)–(ii).

[347] These loyalty obligations include the requirement to avoid conflicts of interest and to keep the client informed. MODEL RULES OF PROF'L CONDUCT r. 1.4(a)(3) (AM. BAR ASS'N 2015) (requiring a lawyer to keep a client "reasonably informed about the status" of a matter); *id.* r. 1.7(a)(2) (restricting a lawyer's ability to represent a client where there is a significant risk that the representation will be materially limited by the lawyer's personal interest); *id.* r. 1.8(a)(1) (prohibiting a lawyer from acquiring a pecuniary interest adverse to a client without the client's informed consent); *id.* r. 1.13(b) (requiring a lawyer for an organization who knows of a "violation of law that reasonably might be imputed to the organization" to "refer the matter to higher authority in the organization"); *see also* 17 C.F.R. § 205.3(b) (requiring an attorney who "becomes aware of evidence of a material violation" to "report such evidence to the issuer's chief legal officer").

[348] Nothing in the eligibility provision of the Dodd-Frank regulation prohibits lawyers from receiving a bounty award. 17 C.F.R. § 240.21F-10(d). Indeed, lawyers are not mentioned at all in

lation, the SEC ever considered conflicting ethical obligations other than those found in confidentiality rules,[349] and it is similarly unclear whether it intends to grant an award if it is convinced that the lawyer is violating a state law that is not preempted by the prior SOX regulation.

Here, as with the FCA, if courts clearly confront the preemption question, they will need to seriously consider the possibility that some aspects of the state regulation of lawyers unduly frustrate the objectives of the Dodd-Frank whistleblower program. Once again, some commentators believe that some lawyers might be distinguished from nonlawyers on the basis of their role as "gatekeepers" or "corporate monitors."[350] We believe that lawyer conduct rules can be distinguished from contract and general fiduciary law that applies to lawyers and nonlawyers alike. If so, then the SEC should refuse to reward a lawyer who clandestinely discloses client information in an ongoing representation, given that the lawyer would be violating code provisions prohibiting current client conflicts and requiring keeping the client informed of significant developments.[351] On the other hand, the SEC might conclude that broader state fiduciary law is preempted, because preventing lawyers and other fiduciaries from profiting as a result of their disclosure of client information could eviscerate the whistleblower reward program that Congress has authorized.

IV. Choice of Law

As we have seen, state ethics rules frequently differ, particularly rules governing the disclosure exceptions to the duty of confidentiality.[352] If nei-

that provision. *See id*. Lawyers who acquire information as a result of a client representation are mentioned only in the provision defining "[o]riginal information," and, as previously described, that section clearly treats as "original" any information that a lawyer is ethically permitted to disclose under either state attorney conduct rules or the SOX regulation. *Id.* § 240.21F-4(b); *see supra* note 338 and accompanying text.

[349] The ABA submitted a letter to the SEC arguing that financial incentives for whistleblowing lawyers "create[] an objectionable conflict of interest." Pacella, *supra* note 7, at 1049 n.135 (quoting Letter from Stephen N. Zack, President, Am. Bar Ass'n, to Sec. & Exch. Comm'n (May 20, 2011), http://www.americanbar.org/publications/governmental_affairs_periodicals/washington letter/2011/june/attorneyclientprivilege.html [http://perma.cc/Q65C-29N7]). However, the SEC commentary accompanying both the preliminary and final Dodd-Frank regulation does not mention lawyers' loyalty obligations, including conflicts of interest and keeping the client informed of important developments.

[350] *See id.* at 1057–58.

[351] We refer to current and not former lawyers because unlike the FCA, a Dodd-Frank lawyer-whistleblower is not acting on behalf of another; therefore, a former lawyer is not even arguably violating the former-client conflict rule. Similarly, unlike current lawyers, a former lawyer generally has no obligation to keep the client informed of developments in the subject of the representation.

[352] *See supra* notes 26–123 and accompanying text.

ther the FCA nor Dodd-Frank preempts state ethics rules, then lawyers contemplating blowing the whistle need to know which state's rules apply. Unfortunately, given that these whistleblower programs often involve national companies with multiple offices,[353] as well as in-house lawyers who are not necessarily licensed in either the state where they advise the company or the state where a disclosure may occur,[354] many lawyers will have difficulty predicting which state's ethics rules govern. As with preemption, we do not intend to thoroughly explore the choice of law issues raised in these federal programs. Rather, our more limited purpose is to note the complexity of the problem and the failure of the existing case law to grapple with this complexity. In addition, because the SEC's Dodd-Frank regulation apparently preempts state confidentiality rules that are more strict than the SEC's own SOX regulation, and because loyalty provisions do not differ significantly from state to state, we will focus our discussion on the very difficult choice of law issues that arise when a federal court attempts to determine the ethical propriety of a lawyer-relator's disclosure of confidential client information in bringing a qui tam lawsuit under the FCA.

In the *United States ex rel. Doe v. X Corp*. series of cases, the in-house lawyer who sought to serve as a qui tam relator was licensed in Pennsylvania, but worked for the defendant company in California and in Virginia, where he was terminated.[355] When he informed the company that he was going to file a retaliatory discharge lawsuit, the company filed an action in federal district court in Virginia, seeking the return of documents and a preliminary injunction preventing him from disclosing the company's confidential information.[356]

Doe argued that because he was a member of the Pennsylvania Bar, Pennsylvania ethics code provisions should apply.[357] The court, however,

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[353] *See, e.g.*, Boozang, *supra* note 21, at 15.

[354] *See, e.g.*, X Corp. v. Doe (*X Corp. I*), 805 F. Supp. 1298, 1300, 1304 n.11 (E.D. Va. 1992) (in-house lawyer licensed in Pennsylvania worked for corporation first in California and then in Virginia, where he was residing when he disclosed confidential client information in a qui tam lawsuit filed in a Virginia federal district court); *cf.* Schaefer v. Gen. Elec., No. 307CV00858, 2008 U.S. Dist. LEXIS 5552 (D. Conn. Jan. 22, 2008) (former in-house lawyer filed Title VII class action in Connecticut, where defendant company was headquartered). Schaefer initially worked for the defendant in Ohio, then worked in Wisconsin and Georgia before accepting a position in Pennsylvania, where she appears to have been residing when she last worked for defendant. First Amended Class Action Complaint at 23–25, *Schaefer*, 2008 U.S. Dist. LEXIS 5552 (No. 307CV00858).

[355] *X Corp. I*, 805 F. Supp. at 1298–301.

[356] *Id.* at 1301.

[357] *Id*. at 1304 n.11. Although the court did not state how the Pennsylvania rule differed from the Virginia rule, the Virginia Code of Professional Responsibility in effect at that time was unusual in permitting disclosure only of "[i]nformation which *clearly establishes* that his client has, in the course of the representation, perpetuated [sic] upon a third party a fraud related to the subject

found that "a [federal] court sitting in a diversity case applies the conflicts [of law] rules of the forum state" and that "Virginia applies the substantive law of the place of the wrong," citing a Virginia torts case.[358] Because Doe lived in Virginia at the time of the lawsuit, had taken copies of documents and maintained them there, and because "the confidential disclosures sought to be restrained would presumably be made in or from Virginia," the court applied the Virginia Code of Professional Responsibility[359] and issued the injunction that subsequently prevented Doe from receiving an award from the settlement of the FCA lawsuit he had filed.[360] The district court's findings as to choice of law were upheld without discussion in Doe's appeal to the U.S. Court of Appeals for the Fourth Circuit.[361]

Given that *Doe* was a diversity action and not an FCA lawsuit, the district court understandably relied on conflict of laws rules applied in diversity actions, thereby looking to the forum state's conflict of laws rules.[362] The court did not explain, however, why it chose to look at the conflict of laws rules applied in torts cases, as opposed to disciplinary cases, or the conflict of laws rules applied in contracts, agency, or other lawsuits involving the provision of services.[363] If the Virginia Code of Professional Responsibility had contained a choice of law provision, then perhaps the court would have looked to that provision instead.[364] At that time, however, neither the Virginia Code nor other state attorney codes had a special choice of law provi-

matter of the representation." *Id.* at 1308–09 (alteration in original) (emphasis added) (quoting VA. CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (VA. STATE BAR ASS'N 1983)). Neither the Model Code nor the Model Rules requires that a client crime or fraud be "clearly" established before the lawyer has permission to disclose the information. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2)(3) (AM. BAR ASS'N 2015); MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (AM. BAR ASS'N 1983).

[358] *X Corp. I*, 805 F. Supp. at 1304 n.11 (citing McMillan v. McMillan, 253 S.E.2d 662 (Va. 1979)).

[359] *Id.*

[360] *Id.* at 1312; *see* Under Seal v. Under Seal, 17 F.3d 1435, 1435 (4th Cir. 1994) (per curiam) (affirming the district court's grant of injunctive relief).

[361] *Under Seal*, 17 F.3d at 1435 ("[W]hile John Doe was qualified as a lawyer in Pennsylvania, at the time he was terminated by X Corp. and for some time previously, he was an X Corp. employee in Virginia."). In a subsequent opinion granting summary judgment for X Corp. on its various claims and on Doe's claim for retaliatory discharge, the district court cited its earlier opinion for the proposition that "Virginia law governs here" and that "Doe advances no new or sufficient reason to reconsider this conclusion." X Corp. v. Doe (*X Corp. II*), 816 F. Supp. 1086, 1091 n.8 (E.D. Va. 1993), *aff'd sub nom. Under Seal*, 17 F.3d 1435.

[362] *See, e.g.*, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

[363] *X Corp. I*, 805 F. Supp. at 1304 n.11. In stating that "Virginia applies the substantive law of the place of the wrong," the court cited—without explanation—a case that involved a torts claim. *See id.* (citing *McMillan*, 253 S.E.2d 662).

[364] *See, e.g.*, United States *ex rel.* Fair Lab. Practices Assocs. v. Quest Diagnostics, Inc. (*FLPA II*), 734 F.3d 154 (2d Cir. 2013).

sion.[365] It was only in 1993 that the ABA Model Rules were amended to provide such a provision,[366] and that provision was amended again in 2002.[367] As a result, different state ethics rules now have not only different confidentiality and other substantive provisions, but also different approaches to choice of law for purposes of attorney discipline.[368]

In *United States ex rel. Fair Laboratory Practices Associates v. Quest Diagnostics, Inc.* ("*FLPA I*"), the relator filed a qui tam action under the FCA.[369] The company filed a motion to dismiss the lawsuit and to disqualify the partnership-relator—Fair Laboratory Practices Associates ("FLPA")—as well as its general partners and its counsel on the ground that Bibi, one of the general partners, had violated his ethical obligations as a former in-house lawyer for the company by disclosing confidential information in connection with the lawsuit.[370] Defendant Quest was a publicly traded Delaware corporation headquartered in New Jersey.[371] Bibi was licensed only in New York,[372] but had been employed in New Jersey by defendant Unilab, before Unilab was acquired by Quest,[373] and was still working in New Jersey at the time of the lawsuit.[374] The two other former Unilab executives who joined Bibi to form FLPA were also employed at that time in New Jersey.[375] Shortly after

[365] *See* Geoffrey J. Ritts, *Professional Responsibility and the Conflict of Laws*, 18 J. LEGAL PROF. 17, 20 (1993) (noting that the 1993 amended version of Model Rule 8.5 was the first codified choice of law rule for lawyer conduct).

[366] *Id.*

[367] *See, e.g.*, 2 HAZARD & HODES, *supra* note 152, § 70.05 (discussing the revision of Rule 8.5(b) as part of the ABA's Commission on Multijurisdictional Practice project).

[368] AM. BAR ASS'N, STATE IMPLEMENTATION OF ABA MJP POLICIES (Aug. 24, 2014), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf [http://perma.cc/6P3C-PJ6A] (demonstrating that thirty-five states have adopted the current version of Model Rule 8.5(b) or substantially similar provisions, two states and the District of Columbia have rules based on the 1993 version of Model Rule 8.5(b), and thirteen states have a different rule or no rule at all); CPR POLICY IMPLEMENTATION COMM., AM. BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW (May 4, 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_5.authcheckdam.pdf [http://perma.cc/LJG7-2BUG].

[369] United States *ex rel.* Fair Lab. Practices Assocs. v. Quest Diagnostics, Inc. (*FLPA I*), No. 05-Civ.-5393 (RPP), 2011 U.S. Dist. LEXIS 37014, at *2 (S.D.N.Y. Mar. 24, 2011), *aff'd*, 734 F.3d 154.

[370] *Id.* at *17–19.

[371] *Id.* at *2–4.

[372] *Id.* at *7.

[373] *See* Brief and Special Appendix for Plaintiff-Appellant, *supra* note 207, at 8, 38 n.30.

[374] *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *42. At the time they formed FLPA, Bibi and the other former executives were employed by yet another company, Life Sciences Research, Inc., located in Hackensack, New Jersey. *Id.* at *5.

[375] *Id.*

the partnership was formed, FLPA filed the original qui tam lawsuit in a federal district court in New York.[376]

The federal district court in *FLPA I* took a different approach than the *Doe* court to the choice of law issue, although it ultimately reached the same result of applying the ethics rules of the forum state. It began by noting that "[w]hile 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."[377] It went on, however, to note that "[t]he 'salutary provisions [of the New York rules] . . . have consistently been relied upon by courts of this district and circuit in evaluating the ethical conduct of attorneys.'"[378] The court then looked to the choice of law provision in the New York Lawyer's Code of Professional Responsibility, which stated:

> For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), 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.[379]

Because Bibi was a member of the New York Bar and the FCA lawsuit had been filed in the Southern District of New York, the court concluded that the choice of law provision in the New York Code dictated that Bibi's conduct be evaluated under the relevant provisions of the New York Code.[380] As in *Doe*, the circuit court of appeals upheld the district court's choice of law determination without significant discussion.[381]

FLPA I is arguably more instructive than *Doe* because it involved a lawsuit brought under the FCA. As a result, the court was not bound to ap-

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[376] *Id*. at *17.

[377] *Id*. at *19 (quoting Hull v. Celanese Corp., 513 F.2d 568, 571 n.12 (2d Cir. 1975)).

[378] *Id.*

[379] *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *19–20 (quoting N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 1-105(B)(1) (N.Y. STATE BAR ASS'N 2007)).

[380] *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *19–20.

[381] *FLPA II*, 734 F.3d at 163 (quoting *Hull*, 513 F.2d at 571 n.12) (noting merely, without acknowledging any dispute over choice of which state's laws to apply, that "[a]s a general matter, the 'salutory provisions [of New York's ethical rules] have consistently been relied upon by the courts of this district and circuit in evaluating the ethical conduct of attorneys'"); *see also X Corp. I*, 805 F. Supp. at 1304 n.11. The Second Circuit *FLPA II* opinion noted that the district court had applied the New York Lawyer's Code of Professional Responsibility, which had been replaced by the New York Rules of Professional Conduct after the filing of the lawsuit. *FLPA II*, 734 F.3d at 157 n.1. Because the parties relied on the New York Rules in their briefs, and because the parties agreed that the substantive standards were the same, the Second Circuit's opinion cites the New York Rules throughout its opinion. *Id.* The court did not reference the fact that FLPA had argued in its brief that the New Jersey Rules, not the New York Rules, should apply to Bibi's conduct. *See* Brief and Special Appendix for Plaintiff-Appellant, *supra* note 207, at 38 n.30.

ply the forum state's choice of law rules, as it would be in a diversity action, because state law did not directly apply to the federal question of FLPA's eligibility to serve as a qui tam relator.[382] Although it was not bound to do so, the court looked to the law of the forum state, in this case New York, because New York's professional conduct rules "have been consistently relied upon by courts of this district and circuit in evaluating the ethical conduct of attorneys."[383] Here the court cited both Second Circuit precedent involving disqualification of a lawyer representing one of the parties, and the federal district court's own local rule, which was adopted from the New York Lawyer's Code of Professional Responsibility.[384]

It is true that in ruling on a motion to disqualify a lawyer, many courts more or less automatically choose to apply the rules of the forum or, in the case of federal district courts, the rules of the forum state.[385] But this approach is problematic. The application of the forum's own rules to attorneys representing the parties in a lawsuit is probably justified by courts' inherent authority to regulate the conduct of the lawyers who appear before them, as well as the distinction between procedure and substance, under which "the

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[382] Neither the *Doe* nor the *FLPA I* court was bound to apply the rules of professional conduct of any jurisdiction. These rules are adopted for the purpose of providing a basis for lawyer discipline and are not binding on courts in other proceedings, including claims involving malpractice, breach of fiduciary duty, disqualification, and fee forfeiture. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT scope 20. In other types of proceedings addressing a lawyer's conduct, courts frequently look to rules of professional conduct, but violation of an attorney conduct rule is not necessarily determinative outside the context of a disciplinary proceeding. *See id*. Of course, in *Doe*, a diversity action, the court was bound to apply state law, including state precedent as to the role of disciplinary rules in breach of fiduciary duty actions. *See supra* note 304 and accompanying text. In *FLPA I* and *II*, however, we argue that the courts were not bound to look to state law at all, but rather could rely solely on federal law to determine the eligibility of relators for a financial award under the FCA. *See infra* note 401 and accompanying text. Nevertheless, having chosen to rely on state law, which the courts were free to do, the *FLPA* courts needed to determine *which* state's rules to apply. *Cf. X Corp. I*, 805 F. Supp. at 1304 n.11 (applying choice of law principles in determining which state's law applied to the company's former lawyer in diversity case).

[383] *FLPA II*, 734 F.3d at 154.

[384] *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *19–20 (citing Southern District of New York Local Civil Rule 1.5(b)(5)). The Second Circuit appellate opinion similarly applied the New York ethics rules, but without any discussion of the choice of law issue. *See FLPA II*, 734 F.3d at 163. The district court's local rule governed the discipline of attorneys for conduct "[i]n connection with activities in this Court," Southern District of New York Local Civil Rule 1.5(b)(5), but Bibi was not appearing before the district court as an attorney representing a client; therefore the applicability of the local rule was questionable. *See FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *19–20. Similarly, we argue that the district court's reliance on Second Circuit precedents in attorney disqualification cases was also questionable. *See id.*

[385] Like the Southern District of New York, most federal district courts have adopted local rules for lawyer conduct, and like the Southern District, most local rules adopt the lawyer conduct code of the forum state. *See* Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 10–12 (2005).

forum will apply its own local law to matters of procedure and the otherwise applicable law to matters of substance."[386] But in FCA lawsuits, a lawyer-relator is not appearing before the court as an attorney representing a party,[387] and the ethical propriety of the relator's conduct does not involve matters of judicial administration or related procedural questions for which the "forum has compelling reasons for applying its own rules."[388] Rather, we believe that the ethical conduct of a lawyer-whistleblower under the FCA is best characterized as substantive because it affects the lawyer's eligibility to receive a whistleblower award.[389]

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[386] RESTATEMENT (SECOND) OF CONFLICT OF LAWS, ch. 6, intro. note (AM. LAW INST. 1971); *cf.* Comm. on Prof'l Responsibility, Ass'n of the Bar of the City of N.Y., *Uniform Ethics Rules in Federal Court: Jurisdictional Issues in Professional Regulation*, 50 REC. ASS'N B. CITY N.Y. 842, 870 (1995) (stating that rules for "[l]awyers litigating in federal court should . . . be . . . in harmony with important objectives of the judicial system"). According to the *Restatement (Second) of Conflict of Laws*, the distinction is between issues involving "judicial administration," in which "[t]he forum has compelling reasons for applying its own rules to decide such issues even if the case has foreign contacts and even if many issues in the case will be decided by reference to the local law of another state." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 cmt. a.

[387] In 2015 in *United States ex rel. Holmes v. Northrop Grumman*, the federal district court similarly relied on federal precedent in addressing motions to disqualify a lawyer from representing a client in federal litigation. *See* No. 1:13cv85-HSO-RHW, 2015 U.S. Dist. LEXIS 71804, at *9 (S.D. Miss. June 3, 2015) (citing Fifth Circuit choice of law precedent in disqualification cases). In that case, however, Holmes was appearing pro se, and the court gave as its reason for relying on such precedent that lawyer-relators (and not nonlawyer-relators) are entitled to appear pro se because they have ethical obligations, including obligations of candor to the court, and violations of these obligations "may result in serious consequences to the errant attorney." *Id.* at *5 (quoting United States *ex rel.* Schwartz v. TRW, Inc., 118 F. Supp. 2d 991, 995 (C.D. Cal. 2000)). We believe that most lawyer-relators will choose to be represented by counsel; therefore, federal district courts are likely to rely primarily on *FLPA I* and *II* in addressing choice of law issues. Unlike the Second Circuit and most other circuit courts of appeal, the Fifth Circuit looks not to the ethics rules of either the district court or the forum state, but rather to both "applicable 'local and national ethical' standards." *Id.* at *9 (quoting FDIC v. U.S. Fire Ins. Co., 50 F.3d 1304, 1314 (5th Cir. 1995)). In identifying applicable "local" standards, the Mississippi federal district court looked not only to the Mississippi rules, but also to the D.C. Rules because much of Holmes's conduct occurred while the case was pending in D.C. federal district court. *Id.*

[388] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 cmt. a.

[389] There are also some other settings in which a court could properly apply its local rules to a lawyer-party who seeks to represent others, but not in a lawyer-client relationship, such as when a lawyer-plaintiff seeks to serve as a class representative or to pursue a shareholder derivative action. In those cases, the court must determine whether the lawyer-plaintiff will serve as an adequate representative, therefore, the issue is properly characterized as procedural. *See, e.g.*, FED. R. CIV. P. 23(a)(4) (class action); *id.* r. 23.1(a) (shareholder derivative action). Certainly in federal courts, it is well-settled that ethical issues that arise in the context of applying the Federal Rules of Civil Procedure are best settled under federal procedural law because of the significance of upholding federal law and policy. *See, e.g.*, Boccardo v. Comm'r, 56 F.3d 1016, 1019 (9th Cir. 1995) (holding that the state ethical rule forbidding lawyers from assuming litigation costs conflicted with Rule 23 of the Federal Rules of Civil Procedure and was therefore invalid); Rand v. Monsanto Co., 926 F.2d 596, 600 (7th Cir. 1991) (finding that the local rule limiting advancing of legal costs is trumped by Federal Rules of Civil Procedure because local rules adopting state ethical

Of course, the *FLPA I* court looked initially to the New York Code not for its substantive provisions, but rather for its choice of law rule.[390] But this too was problematic. As with most disciplinary choice of law rules, the New York Code had two provisions: one for litigation and one for non-litigation.[391] The New York litigation choice of law provision looks to the rules of the jurisdiction in which the court sits for lawyer conduct "in connection with a proceeding *in a court before which a lawyer has been admitted to practice* (either generally or for purposes of that proceeding) . . . unless the rules of the court provide otherwise."[392] But there was no indication that Bibi had been admitted to practice before the federal district court where the lawsuit was pending.

Unlike the New York rule cited in *FLPA I*, the Model Rules' litigation choice of law provision applies the rules of the jurisdiction in which a tribunal sits "for conduct in connection with a matter pending before a tribunal," without regard to whether the lawyer has been admitted to practice before that tribunal.[393] Nevertheless, we believe that "conduct in connection with a matter pending before a tribunal" should generally be confined to the conduct of a lawyer representing a party, and not to the conduct of a lawyer-relator.[394] This is because when lawyers are appearing before the tribunal as party-representatives and "officers of the court"[395] the forum has the greatest interest in applying its own rules.[396]

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rules "are valid only to the extent they are consistent with national rules"); *In re* WorldCom, Inc. Secs. Litig., 219 F.R.D. 267, 284–85 (S.D.N.Y. 2003) (holding that a state ethics rule that conflicts with class action provisions in Rule 23 of the Federal Rules of Civil Procedure is invalid).

[390] *FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *19–20.

[391] *See* N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 1-105(B)(1) (litigation choice of law provision); *id.* r. 1-105(B)(2) (non-litigation choice of law provision).

[392] *Id.* r. 1-105(B)(1) (emphasis added); *see also* N.Y. RULES OF PROF'L CONDUCT r. 8.5(b)(1) (N.Y. STATE BAR ASS'N 2015) (same). For a discussion of the non-litigation provision of the New York Code and Rules, see *infra* notes 397–399 and accompanying text.

[393] MODEL RULES OF PROF'L CONDUCT r. 8.5(b)(1). For a discussion of the non-litigation provision of the Model Rules, see *infra* note 400 and accompanying text.

[394] *See* MODEL RULES OF PROF'L CONDUCT r. 8.5(b)(1).

[395] *See, e.g.*, *id.* r. 3.3 cmt. 2 (providing that the rule concerning "Candor Toward the Tribunal" establishes "the special duties" of a lawyer to "act[] as an advocate in an adjudicative proceeding" and to "avoid conduct that undermines the integrity of the adjudicative process").

[396] There is another problem with applying the Model Rules' litigation choice of law provision. Consider a situation in which a lawyer-relator's only connection to the state in which the court sits is that it is where the FCA lawsuit was filed. If the Model Rules' litigation choice of law rule applies, then the lawyer can easily avoid restrictive state confidentiality rules by filing the FCA lawsuit in a state with favorable confidentiality exceptions, even when that state is not where the lawyer is licensed, where the lawyer principally practices, or where any of the pre-litigation conduct occurred. Under the FCA, a relator may bring an action "in any judicial district in which the defendant . . . can be found, resides, transacts business, or in which any act proscribed by [the

In *FLPA I* itself, the court's apparent mistake in applying New York's litigation choice of law provision was immaterial because application of the non-litigation choice of law provision would have achieved the same result: that provision dictates that "[i]f the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state,"[397] and Bibi was licensed only in New York. But what if Bibi was not licensed in New York? Such a situation is simply not contemplated under the New York choice of law rule, which assumes that the lawyer is licensed at least in New York and makes no provision for disciplining a non-New York lawyer, particularly one whose conduct has its predominant effect in a jurisdiction other than one in which he or she is licensed.[398] This approach, which is followed in several other jurisdictions,[399] makes sense in lawyer discipline cases, where the adopting jurisdiction is free to choose not to attempt to discipline non-admitted lawyers. But it makes little sense in other contexts, including federal court determinations of the eligibility of a lawyer-relator as a result of possibly unethical conduct.

The Model Rules' non-litigation choice of law provision does not suffer from this particular problem: indeed, it makes no reference to where the lawyer is licensed to practice. Rather, Model Rule 8.5 provides that, for non-litigation conduct, the rules to be applied are "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct."[400] If this rule had been adopted in New York and applied in *FLPA I*, then the court could have determined that the relevant conduct occurred either in New Jersey (where Bibi had been employed by Unilab and where he had presumably first disclosed confidences to his FLPA partners) or in New York (where Bibi disclosed confidential information in his sealed

statute] occurred." 31 U.S.C. § 3732(a) (2012). Thus, relators may have considerable latitude in choosing among a number of potential jurisdictions in which the qui tam lawsuit could be filed.

[397] N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 1-105(B)(2); *see* N.Y. RULES OF PROF'L CONDUCT r. 8.5(b)(2) (same); *see also FLPA I*, 2011 U.S. Dist. LEXIS 37014, at *19–20 (discussing choice of law provision of DR 1-105(B)(1)).

[398] *See* N.Y. RULES OF PROF'L CONDUCT r. 8.5(a)–(b) (discussing disciplinary authority for lawyers who are licensed to practice within the state).

[399] New York follows the approach of the 1993 version of Model Rule 8.5, which is also followed by the District of Columbia. *See id.*; *see also* D.C. RULES OF PROF'L CONDUCT r. 8.5 (D.C. BAR ASS'N 2015); MODEL RULES OF PROF'L CONDUCT r. 8.5(b) (AM. BAR ASS'N 1993) (failing to include a provision regarding choice of law for a lawyer who is not licensed to practice within the state).

[400] MODEL RULES OF PROF'L CONDUCT r. 8.5(b)(1) ("A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur."). This is another aspect of the disciplinary rules that makes sense in the disciplinary context but not necessarily in other contexts.

complaint to both the court and the government, and where further disclosures in connection with the lawsuit might be anticipated). To the extent that the "predominant effect" of the conduct might have occurred elsewhere, the court might have looked to the state where the defendants were located, which would have been either New Jersey, where Quest was headquartered, or California, where Unilab had been headquartered before becoming a wholly owned subsidiary of Quest.

If a federal court hearing FCA lawsuits is not compelled to look to the choice of law rules of the forum state to determine the ethical propriety of a qui tam relator's conduct—and we believe it is not—then we suggest that the court should then be free to apply whatever choice of law rule it deems is best suited to the issue at hand, as an application of federal common law.[401] Rather than start from scratch, we also suggest that the court adopt as federal law either the Model Rule choice of law provision for non-litigation matters[402] or the "most significant relationship" test adopted by the *Restatement (Second) of Conflict of Laws*.[403] Under the *Restatement*'s provision for identifying the state with the most significant relationship with respect to the rights and duties between agents and their principals,[404] the

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[401] In disqualification cases, federal courts have long had a tendency to create common law and develop responses "largely unconstrained by formal rules." McMorrow, *supra* note 385, at 3; *see also* Eli J. Richardson, *Demystifying the Federal Law of Attorney Ethics*, 29 GA. L. REV. 137, 156–57 (2005) (explaining that even when local district court rules provide for an exclusive source of law for attorney ethics, courts often rely on other standards). For a general discussion of the role of federal common law in filling gaps in federal statutes, see Henry J. Friendly, *In Praise of* Erie*—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

[402] For a discussion of why the Model Rules' non-litigation provision is superior to the litigation provision on the question of the eligibility of an FCA relator to receive an award, see *supra* notes 397–401 and accompanying text.

[403] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6. Under the *Restatement (Second) of Conflict of Laws*, courts are instructed to balance a number of factors in choosing "the applicable rule of law." *Id*. This balancing test is generally described as an attempt to determine the state with "the most significant relationship" to the issue of law in question. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. h (AM. LAW INST. 2000) (providing that the *Restatement (Second) of Conflict of Laws*' general balancing test seeks to determine "the rule with the most significant relationship to the charged offensive conduct," and is similar to the "predominant effect" principle ushered in by revisions to Model Rule 8.5(b) in 1993); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 6 cmt. c (stating that the goal of balancing test is to "state a general principle, such as application of the local law 'of the state of most significant relationship,' which provides some clue to the correct approach but does not furnish precise answers").

[404] Balance-of-factor tests are notoriously unpredictable; however, the *Restatement (Second) of Conflict of Laws* gives more specific guidance in provisions addressing different subject areas in which a dispute may arise, including tort, contract, or agency law. *See supra* note 403 and accompanying text. In our view, agency law best captures the fiduciary nature of the relationship between lawyer and client, and it is precisely the fiduciary nature of the lawyer-client relationship that underlies the rules on confidentiality and loyalty. *See, e.g.*, Ritts, *supra* note 365, at 62–63 (in

court would then look to the substantive ethics rules of the state where the lawyer performed as an agent, or, if the performance occurred in several states, to the state where the lawyer most frequently acted on the client's behalf.[405] The two tests are similar,[406] but the *Restatement* approach may be preferable as it avoids the need to determine whether the "predominant effect" of the lawyer's conduct will be in a jurisdiction other than where the conduct occurred—a determination that is fraught with indeterminacy.

CONCLUSION

Whether lawyers should be permitted to seek financial rewards for blowing the whistle on their clients is a difficult normative question that we have not addressed in this Article. Answering that question will require exploration of the nature of the relationship between the lawyer and the client and consideration of whether lawyers occupy a role that is significantly different than other company insiders, who also owe obligations of confidentiality and loyalty to the company. It will also require having a clear understanding of the extent of the obligations that lawyers owe to their clients under current legal doctrine, including any special obligations to entity clients. This is the descriptive project that we have undertaken.

In this Article, we have explored the four doctrinal questions that are key to determining whether a lawyer may receive a whistleblower award under a federal program without violating state fiduciary law and state rules of professional conduct: (1) Under what circumstances may a lawyer disclose a client's confidential information to others? (2) Under what circumstances does a lawyer's obligation of loyalty preclude acting adversely to a client, including seeking personal benefit when engaging in conduct that is permissible for other purposes, such as to prevent or rectify harm to another? (3) Are any of a lawyer's obligations under state law preempted by federal law that provides for financial incentives for whistleblowers? (4) Which state's law applies to lawyers who move from state to state as they work for national companies?

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applying the *Restatement (Second) of Conflict of Laws* to a matter involving successive representation and a former government lawyer, the "issue could have been cast as one of agency law, with the ethics rules regulating an attorney/agent's fiduciary duties of loyalty and confidentiality"). *But see* White Consol. Indus., Inc. v. Island Kitchens, Inc., 884 F. Supp. 176 (E.D. Pa. 1995) (applying the general provision of *Restatement (Second) of Conflict of Laws* section 6 to a lawyer's professional responsibility question); David A. Barry & William L. Boesch, *Massachusetts Legal Malpractice Cases*, 93 MASS. L. REV. 321, 339–40 (2011) (arguing for the application of the *Restatement (Second) of Conflict of Laws*' provisions on contracts for the rendering of services).

[405] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 291 & cmt. f.

[406] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. h (referring to the 1993 version of Model Rule 8.5(b)).

As the reader has already discerned, these issues turn out to be enormously complex. For example, state confidentiality exceptions differ widely among the states, and it is not clear whether or when disclosures in the course of seeking a financial reward are "reasonably necessary" either to prevent the perpetuation of continuing crimes or frauds or to rectify or mitigate past wrongdoing. State loyalty obligations include not only conflicts of interest rules for current and former clients—rules that may be difficult to apply in the context of FCA and Dodd-Frank whistleblowers—but also a lawyer's common-law fiduciary duty not to profit from a client's confidential information. This fiduciary duty applies to both current and former clients and is so broad that it would appear to prohibit any lawyer from seeking a financial reward for disclosing client information without the client's consent.

Given the potential breadth of a lawyer's confidentiality and loyalty obligations, we question the view of the three court decisions that concluded without much discussion that the FCA does not preempt a lawyer's ethical obligations under state law. None of these courts confronted the fact that federal courts in FCA cases involving nonlawyers have apparently preempted the state law fiduciary or contractual duties of nonlawyers if enforcing their state law obligations would effectively prevent them from serving as FCA relators. If these are indeed preemption cases, as we believe they are, then federal courts will need to distinguish lawyers from nonlawyers if the similar obligations of lawyers are not also to be preempted in at least some situations. Finally, there is no clear choice of law rule that federal courts must apply in determining which state's ethics laws apply to a lawyer-relator when there are several states with significant contacts with the matter. We recommend that federal courts develop their own federal common-law choice of law rule for FCA cases, but we also acknowledge the difficulty of formulating a choice of law rule that is both principled and predictable in its application.

Unfortunately, only a few courts have addressed the issues we discuss in the context of the FCA, and none have done so in the context of Dodd-Frank. Moreover, as a practical matter, it is unlikely that there will be many additional court decisions addressing whether and when lawyers can obtain financial incentives under these statutes. We anticipate few additional FCA suits brought by lawyer-relators against their former clients because the apparent confidentiality and loyalty constraints discussed above make such suits less likely to succeed than those filed by nonlawyers. Because relators' lawyers are generally paid on a contingent basis, a rational relators' lawyer will be less likely to accept and pursue a lawyer-relator's FCA case than one brought by a relator not limited by these ethical constraints. The key gatekeeper for potential lawyer-relators is the relators' bar, and they are likely to recognize the greater risk they would be taking by agreeing to represent a lawyer-relator.

The Dodd-Frank whistleblower program is also unlikely to produce court decisions on these issues. This is because the key decision-maker under this statute is the SEC rather than the judiciary. The SEC will be (and perhaps already is) making its decisions about whether to grant whistleblowing awards to lawyers through a secret proceeding that lacks an adversary presentation of issues and is largely insulated from judicial scrutiny. Thus, a company that might view itself as harmed by a lawyer-whistleblower's disclosure to the SEC may never have an opportunity to contest the lawyer-whistleblower's initial tip or eventual award.[407]

Despite our reluctance to address the normative questions involved in lawyer whistleblowing for financial reward, the ability of a Dodd-Frank whistleblower to maintain anonymity throughout the process leads us to conclude by raising yet another normative question. Even if financial rewards for lawyer-whistleblowers are appropriate in some circumstances, is a secret process, shielded from judicial review, ever appropriate for determining whether a particular lawyer is eligible to receive a whistleblower reward?

It may be appropriate to grant lawyers financial incentives for blowing the whistle on a former client. But Dodd-Frank's process for granting these awards—without an adversary presentation of the issues and without judicial oversight—is a cause for concern. Another government program, asset forfeiture, arguably has similar parameters: a secretive administrative process through which local law enforcement agencies seize property without any adversarial presentation of issues or evidence, with the burden on property-owners to seek judicial review of such seizures.[408] The record of the asset forfeiture program demonstrates both the power of using financial in-

[407] As a formal matter, the SEC's award decisions are subject to judicial review only if the SEC denies an award entirely or grants an award below the 10% statutory minimum. 17 C.F.R. § 240.21F-13(a). As a practical matter, the respondent company may never know that the SEC's investigation was triggered by a whistleblower's tip or the identity of that whistleblower. Even though the SEC issues press releases regarding its whistleblower awards, those releases provide little specific information about the whistleblower, the respondent company, or the securities violations involved. *See* 15 U.S.C. § 78u-6(h)(2)(A); In the Matter of the Claim for Award in Connection with [Undisclosed Party], *supra* note 260. Therefore the administrative process for granting whistleblower awards is unlikely to generate a matter subject to judicial review.

[408] *See* Robert O'Harrow, Jr., *Highway Seizure in Iowa Fuels Debate About Asset-Forfeiture Laws*, WASH. POST (Nov. 10, 2014), http://www.washingtonpost.com/investigations/highway-seizure-in-iowa-fuels-debate-about-asset-forfeiture-laws/2014/11/10/10f725fc-5ec3-11e4-8b9e-2ccdac31a031_story.html [http://perma.cc/8E9U-U8GM].

centives to enforce legal norms and the danger of combining those incentives with a secret administrative process.[409]

[409] In January 2015, Attorney General Eric Holder announced that the U.S. Department of Justice would curtail asset forfeitures. *Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety*, U.S. DEP'T OF JUSTICE (Jan. 16, 2015), http://www.justice.gov/opa/pr/attorney-general-prohibits-federal-agency-adoptions-assets-seized-state-and-local-law [http://perma.cc/DQ5C-6EMX].