Health Care Enforcement Defense Advisory

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Sanctions Imposed on *Qui Tam* Counsel for Failing to Meet Ethical Standards Relating to the Use of Privileged Documents

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Relators and their counsel are being held accountable for the misuse of *qui tam* defendants' confidential and privileged documents in connection with lawsuits alleging violations of the False Claims Act (FCA).[1] As a January 12, 2012 ruling in *United States ex rel. Jerre Frazier v. IASIS Healthcare Corporation*[2] in the District of Arizona makes clear, attorneys representing either relators or the government risk adverse consequences if they accept potentially privileged documents without taking precautionary steps to avoid use of or exposure to privileged communications.

Sensitive internal documents that whistleblowers use to support their claims may include privileged attorney-client communications. Where defendants have reason to believe that an investigation or *qui tam* lawsuit is based on a whistleblower's misuse of privileged communications, defendants should affirmatively act to enforce their rights. And such defense actions may form the basis for the imposition of sanctions against relators and their counsel if they fail to follow the rules of ethical legal practice in the state where the case was filed.

In this case, Mr. Frazier (the Relator) was the former chief compliance officer of the defendant, IASIS. Although he was a licensed attorney, the Relator's position as compliance officer was structured so that reports made to him were not subject to the attorney-client privilege. Still, the Relator was privy to documents containing privileged communications between IASIS and its counsel. When the Relator left IASIS, he took numerous privileged and non-privileged documents with him, purportedly in connection with a consulting arrangement intended to help the new compliance officer transition into the Relator's former role.

After the conclusion of his consulting relationship, the Relator retained counsel to prepare and file a *qui tam* action alleging that IASIS had violated the FCA. The Relator relied on and provided his counsel with the documents obtained from IASIS, including documents bearing legends indicating that they were subject to the attorney-client privilege. The Relator's counsel segregated the documents marked as attorney-client and did not read or rely on them. But the Relator's counsel did nothing else to ascertain their privileged status or to determine whether they should be returned to IASIS. IASIS did not discover that those marked documents and other potentially privileged documents were in the possession of the Relator's counsel until IASIS was served with the unsealed complaint, two years after it was initially filed. Thereafter, IASIS sought dismissal of the lawsuit and the imposition of sanctions against the Relator and his counsel by virtue of the misuse of IASIS's privileged documents.

The Relator and IASIS entered into a settlement conditioned on the Relator's withdrawal from his suit against IASIS, and his agreement not to be adverse to IASIS, "as a relator or otherwise." The court then entertained a renewed motion for sanctions against the Relator's counsel. Using Arizona State

Bar Ethics Opinions as precedent, the court ruled that the Relator's counsel could not simply accept and segregate documents it believed to be potentially privileged; instead, the Relator's counsel had a duty to apprise IASIS that the Relator was in possession of potentially privileged material. The court acknowledged that counsel could not have so notified IASIS prior to unsealing the *qui tam* complaint, but the court concluded that the Relator's counsel should at least have notified the court of its possession of the documents and tendered the documents to the court pending further disposition. Additionally, upon the complaint being unsealed and served on IASIS, counsel's duty to notify IASIS about the documents was absolute. Thus, the court sanctioned Relator's counsel for failure to notify the court about the potentially privileged documents upon filing the complaint or IASIS once the complaint was unsealed and served. As a penalty, the court ordered the Relator's counsel to pay IASIS's attorneys' fees and costs related to its attempts to retrieve the documents and disqualified the Relator's counsel from "assisting or representing [the Relator] or any other party adverse to IASIS."

The determination by the court in *Frazier* as to the proper handling of facially privileged documents is consistent with the actions taken by the United States Attorney's Office for the Eastern District of Virginia in *United States ex rel. Doe v. X. Corp*.[3] In *Doe*, the relator was a former in-house attorney for the defendant who misappropriated and relied on privileged documents to bring a *qui tam* action against his former client. As required under the FCA, the relator in *Doe* provided his supporting documentation to the government. The government, knowing the *Doe* relator to be a former in-house attorney and recognizing that certain documents constituted facially-privileged communications, immediately tendered those materials to the court to be held pending a disposition of their privileged status.

When the government subsequently intervened in *Doe* for purposes of reaching settlement with the defendant, the court denied the relator's request for the statutory relator's share of the recovery. The court noted that while nothing in the FCA prohibits attorneys from serving as relators, the FCA does not preempt state rules and regulations governing the attorney-client relationship. Since under governing Virginia authority, the relator could not assert a viable claim against the defendant without breaching his ethical duties as a lawyer to his former employer, he was disqualified from serving as a relator.

Doe illustrates the proper course of action by government or relator counsel when a relator tenders a defendant's own facially privileged documents to support a *qui tam* action. In *Doe*, the government was spared any possible sanctions by following state ethical requirements and taking prompt and appropriate action to protect against further disclosure of the defendant's privileged materials; thus only the relator-attorney was subject to sanction. In *Frazier*, the failure of the Relator's counsel to adhere to the state's ethical requirements in handling privileged documents resulted in the imposition of sanctions against counsel; the Relator himself only escaped sanctions by virtue of the release obtained in his settlement with IASIS.

Frazier and *Doe* both highlight the risks to *qui tam* relators that stem from violating defendants' attorney-client privileges. Relators' counsel, defendant companies, and government lawyers need to be familiar with the ethical rules of practice in the state where their cases are pending. Failure to follow those rules in relation to handling potentially privileged documents raises the very real prospect that courts will impose sanctions on the relator and relator's counsel that may impact how the case proceeds.

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Endnotes

1 29 U.S.C. §§ 3729-3733, as amended.

2 Case No.: 2:05-cv-00766-RCJ (D. Ariz. 2011), *available at:* http://url.ie/e0bq.

3 862 F. Supp. 1502 (E.D. Va. 1994).
