

False Claims Act

FCA

Ethical Considerations in False Claim Cases

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PRE-FILING INVESTIGATION

Relator Interview with Counsel

- Determine credibility
- Determine motivation - \$\$\$, justice or revenge?
- Involvement of Relator
 - a) If person planned and initiated the violation(s): Court can reduce award
 - b) If convicted criminal conduct from role, bar
- Retaliation for being fired [Investigate reason]
- Employment history, case history, law suits, etc.
- Public disclosure bar information disclosed to public (criminal, civil, administrative hearings, audits, reports, medical, investigations)



Avoid Frivolous Filing

State Bar
discipline
R. 3.01

Reputational
harm

Personal liability

Court sanctions

Disciplinary Rules of Professional Conduct

Texas Disciplinary Rules of Professional Conduct

Rule 3.01 – meritorious claims and contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

Disciplinary Rules of Professional Conduct

ABA Model Rules Professional Conduct Rule 3.1

“Bring or defend a proceeding or assert...an issue...unless there is a basis in law and fact for doing so that is not frivolous...”

Comment to Rule 3.1: That lawyer is “to inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions.”

Federal Rules

Fed. Rule Civ. Proc. 11(b)

By filing a petition, counsel:

“to the best of his/her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

1. it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
2. the claims, defenses, and other legal contentions are warranted by existing law or by a **non-frivolous** argument for extending, modifying, or reversing existing law or for establishing new law;
3. the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
4. the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.”

FCA Provision Title 31 USC §3730 (d)(4)

Should there be no government intervention and Relator moves forward at own risk and loses...

“court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.”

TMFPA Sec. 36.112 Award to Defendant for frivolous action

ON YOUR MARK...GET SET...GO!

“First to File Rule” – Race to Courthouse

- 1st Relator wins
- Consequences: Court lacks subject jurisdiction; case is dismissed.
- **3730(b)(5) Jurisdictional Bar**

If 2nd complaint alleges same “material or essential elements of fraud described in the pending qui tam action, 3730(b)(5)’s Jurisdictional bar applies.”

U.S. ex rel. Branch v. Allstate, 560 F.3d 371 (5th Cir. 2009)



FILE COMPLAINT UNDER SEAL

- Complaint under seal to allow Government to investigate/determine intervention
- FCA = 60 days
TMFPA = 180 days
(Extension based upon good cause)
- Not served on defendants
- Investigation poses ethical challenge – no depositions/subpoenas



Interviews (or wait for Government)

TDRPC 4.02(a)

Model Rule 4.2(b) - Counsel not to communicate with person lawyer knows to be represented by counsel without permission. (Company counsel)

Prior to filing and while complaint is sealed, may not know if employee represented by counsel.

After filing and unsealed, most likely employees represented by counsel.



DOCUMENTS

- Relator to provide Government “copy of complaint and written disclosure of substantially all material evidence and information the person possesses of the allegations.”

31 USC §3730(b)(2)

- Relator protected from retaliation for “lawful acts done...in furtherance of an action under this section, including investigation.”

31 USC §3730(b)



DOCUMENTS

Relator Communications

Never use company email:

No privacy rights even if to counsel. (3rd party websites, Gmail, etc. might be okay but not good practice)

Relator turns over possible privileged documents

If under seal, cannot self-report.

Seal lifted, may have duty to inform defense counsel about privilege documents

Model Rule 4.4(a) – Counsel must not use methods of obtaining evidence. That violates legal rights of any person.

Sanctionable Discovery

- Obtaining internal company documents from contacts still at company
- Acquiring documents after Relator informs Government investigation of Fraud
- Documents gathered outside of normal discovery process



PROPER DOCUMENT DETERMINATION

- 1) Relator has legitimate possession and custody of documents
 - Documents relevant to allegations
 - Received during course of employment
 - No computer access without authorization or exceeds authorization (Computer Fraud and Abuse Act 18 USC 1030)

- 2) Reasonable belief documents have relevance to allegations
 - How documents were obtained
 - To whom documents were produced
 - Contents of documents
 - Why these particular documents were produced

Overall Theme Model Rule 4.4 (a)/TDRPC 404

Respect for Rights of Third Party

- Counsel not to use methods of obtaining evidence that violate a person's legal rights

Take-aways:

- 1) Legal restriction on methods of obtaining evidence from third persons
- 2) Intrusion into privileged material (Attorney-Client)

Confidentiality Agreements

Balance with FCA protecting whistleblower who report fraud against Government.

Provisions that tie hands generally cooperating with Government unenforceable per public policy

Beware of obtaining 3rd party unauthorized, confidential or privileged documents

Severance/Separation Agreements

- Release enforce if signed *after* Government aware of alleged fraudulent conduct.
- Other Courts refuse to enforce releases if limits cooperation with Government
- What if Employees asked to certify that they know no information that company violated FCA
- ABA Model Rule 8.4: Prohibits lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation
- Texas Rule 8.04(a)(1) Misconduct: a lawyer shall not violate these rules, knowingly assist or induce another to do so...

Retainer Agreement

**What if Government
does not intervene;
obligated to proceed?**

- ABA Model Rule 1.16(c): A court may order continued representation. “notwithstanding good cause for terminating the representation”
- TDRPC Rule 1.15(b)(1): “...lawyer shall not withdrawal from representing a client unless: 1) withdrawal can be accomplished without material adverse effect on the interests of the client.”
- Protection: Add to retention agreement, can withdrawal should Government decide to intervene

ETHICAL CONSIDERATIONS

FINANCIAL INCENTIVES TO BRING MEDICARE/MEDICAID FRAUD CASES UNDER FCA/TMFPA

Question:

Do financial incentives distort discretion the same as prosecutors claim self referral fees pose to providers' medical judgment?

Federal Control Account

“monies derived

from the coordinated health care anti-fraud and abuse programs; from the imposition of civil money penalties, fines, forfeitures, and damages assessed in criminal, civil, or administrative health care cases; along with any gifts or bequests would be transferred into the [Control Account.]”

42 USC §1395(K)(2)

Federal

HIPAA Fraud and abuse control program

Shared with HHS, AG, FBI, Medicaid Control Unit (MFCU)

State

Part to discretionary fund

- Expanded over years from billing & coding into arguably medical necessity decisions
- If Government does not intervene, Relator enforces antifraud laws under FCPA/TMFPA without Government exercising primary supervision over claim