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**CONSTRUCTION DILEMMAS:  
CAUGHT BETWEEN “THE ROCK”  
AND A HARD PLACE**

**False Claims, Liability & Ethical Issues for  
Construction Attorneys**

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## **Introduction**

False claims laws subject contractors on public projects for the federal government to potential liability, and a growing number of states following suit. As a result, attorneys representing those contractors need to be aware of what those laws require. Failing to properly advise one's client about false claims issues may subject an attorney to malpractice claims and, in some instances, lawyers may even face direct liability under the applicable false claims law. Ethical issues arise when attorneys threaten to use these laws to gain leverage in settlement negotiations, and when government attorneys threaten to use them to get contractors to reduce or withdraw construction claims. Other ethical issues are implicated when attorneys themselves bring false claims actions as whistleblowers.

The laws governing false claims continue to evolve, expand and multiply in complexity. This article offers a survey of the laws with a focus on construction projects and the lawyers who represent clients in construction matters. We start with an introduction to the basic laws and then address the malpractice, liability and ethical issues in turn.

## **Federal and State False Claims Statutes**

### *The Federal False Claims Acts*

The United States has both a civil False Claims Act<sup>1</sup> and a criminal False Claims Act.<sup>2</sup> Both have potential applications when construction projects are funded in whole or in part with federal funds.

### *The Civil False Claims Act*

The liability provisions of the civil False Claims Act ("FCA") are found in 31 U.S.C. § 3729(a)(1)-(7). The most commonly invoked provisions impose liability for knowingly submitting or causing another person to submit a false claim for payment ("direct false claims") (§ 3729(a)(1)); making false records or statements to support a false claim (§ 3729(a)(2));

engaging in a conspiracy to get the government to pay a false claim (§ 3729(a)(3)); and making false records or statements to reduce or avoid an obligation to the government (“reverse false claims”) (§ 3729(a)(7)).

A person will be liable under the civil FCA if he (1) submits a "claim," (2) that is false, and (3) does so "knowingly." The civil FCA defines "claims" broadly to include any request for payment of money or property, whether the government actually pays or not.<sup>3</sup> The civil FCA does not limit claims to signed certifications. Bid documents may also constitute claims.<sup>4</sup>

Liability stems from submitting a claim to the government that is false. What is “false” has been fought over in many lawsuits. In some circumstances, falsity is obvious, most notably where a contractor seeks payment for a product it never delivered or work it never performed. But a request for payment is also deemed false if the work for which the contractor seeks payment does not comply with contract specifications, even if the noncompliance results in a product "with the 'same basic performance characteristics' as those" specified in the contract.<sup>5</sup> Somewhat surprisingly, a contractor or supplier can be liable under the civil FCA for requesting payment for a product the government both inspected and accepted.<sup>6</sup>

In many cases, falsity is not so clear. For example, questions of scientific or engineering judgment are neither true nor false.<sup>7</sup> Nor are questions of interpretation of specifications, drawings, or other technical contract requirements.<sup>8</sup> One not so obvious source of liability stems from a variety of laws and regulations that can apply to a contractor’s contract performance, *e.g.*, environmental laws, wage and hour regulations, and OSHA regulations. That is, a contractor could be liable for submitting a false claim if the contractor violated such applicable laws or regulations, but only if the government’s payment of the claim was conditioned upon the contractor’s compliance with the law or regulation at issue.<sup>9</sup>

Most courts have found that an alleged false claim must be material for a defendant to be liable under the civil FCA. That is, the claim's falsity must have been likely to have impacted the government's decision to pay.<sup>10</sup> Again, the issue of materiality can be a hard-fought issue in cases based on the false claims laws.

Although the civil FCA is an anti-fraud statute, liability under the Act is very different from that required for common law fraud. Most notably, there is no requirement that one have an intent to deceive or defraud to be liable under the civil FCA. Instead, the civil FCA imposes liability for "knowing" submissions of false claims to the government.<sup>11</sup> This "scienter" requirement has traps for the unwary – a contractor can be liable if it submits claims knowing they are false, in deliberate ignorance of whether they are true or false, or in reckless disregard of whether they are true or false.<sup>12</sup> A corporation may be liable under the civil FCA for its employees' acts so long as they are within the scope of their authority, even if no management personnel know about the false claims.<sup>13</sup> Finally, a person may be liable under the civil FCA, even if the government has suffered no damage.<sup>14</sup>

Lawsuits to enforce the civil FCA may be brought in either of two ways: (1) the United States Attorney General may bring a civil action under section 3730(a) or (2) a whistleblower, also known as a "*qui tam* relator," may sue under section 3730(b). Relators have a tremendous incentive to sue, as they are entitled to 15-25% of any recovery if the government intervenes in the lawsuit and 25-30% if it does not.<sup>15</sup> In general, anyone can sue as a relator under the civil FCA, including employees, ex-employees, government employees, competitors, subcontractors, suppliers, public interest groups, public entities, and lawyers. Both individuals and corporations may sue under the civil FCA.

The consequences of liability under the civil FCA can be severe. A party found liable will have to pay treble damages, plus civil penalties of \$5,000 - \$10,000 per false claim.<sup>16</sup> Another potential result from a finding of liability is debarment, precluding the liable party from contracting with the government for up to three years.<sup>17</sup> Given the complexity and severity of these laws, contractors would be well advised to educate their employees about the laws and the need for accuracy in fulfilling government contracts.

#### *The Criminal False Claims Act*

The criminal False Claims Act ("FCA"), 18 U.S.C. § 287, provides that a person who presents a false claim to the government knowing it to be false shall be imprisoned up to five years and subject to fines. Like the civil FCA, a person can be liable under the criminal FCA by causing an intermediary to submit a false claim.<sup>18</sup> As shown below, this facet of the law can subject contractors to liability for acts of their subcontractors or suppliers.

The elements of criminal false claims are similar to those for civil false claims with one crucial exception: unlike the civil FCA, under which a person may be liable if he submits a false claim in "deliberate ignorance" or "reckless disregard" of whether it is true or false, the criminal FCA requires that person actually knows the falsity of the claim in order for there to be liability.<sup>19</sup> Another important difference between the two federal acts is that only the Department of Justice can bring an action under the criminal FCA, as opposed to the civil FCA which allows for *qui tam* actions brought by private parties.

#### *State False Claims Laws*

Many states have adopted false claims statutes modeled after the federal civil FCA. Several other states have adopted more limited statutes.

California, Delaware, Florida, the District of Columbia, Hawaii, Illinois, Massachusetts, Nevada, and Virginia have all adopted civil false claims statutes modeled after the federal Act.<sup>20</sup>

These statutes are all similar to the federal civil FCA, but there are some differences. Most notably, the California, Illinois and Nevada statutes all include claims made to local agencies and political subdivisions.<sup>21</sup> California allows local authorities to prosecute.<sup>22</sup> This is significant because local agencies have a much greater incentive to use the threat of a false claims prosecution to get contractors to reduce or even withdraw valid construction claims.

A few states, including Montana, Oklahoma and Texas, have anti-fraud statutes without *qui tam* provisions. Texas has a false claims statute with *qui tam* provisions that is limited to health care fraud,<sup>23</sup> but it is considering proposed legislation to expand its statute to other areas. Many other states, including Alaska, Colorado, Connecticut, Kansas, Maryland, Mississippi, Missouri, New Jersey, New York, and Pennsylvania, have proposals before their legislatures for adoption of false claims statutes similar to the federal civil FCA. The Georgia legislature may also consider proposed false claims act legislation.

### **How False Claims Actions Arise in Construction Projects**

False claims actions can and do arise in construction projects when those projects are funded with federal monies. They can also arise when projects are funded with state or local monies when the projects are in jurisdictions with their own false claims laws. As noted above, such actions may be brought by the government – the Department of Justice in federal cases, or by state or local authorities in cases brought under state or local laws. The government often uses these actions to provide leverage in other disputes with the contractor. This practice is especially prevalent in California, where local public agencies can bring their own false claims actions.

When private individuals (“relators”) bring such suits, they do so on behalf of the government. Relators in construction false claims cases may be current or former contractor employees, labor unions, or even government employees. Disappointed bidders and

subcontractors have also filed such lawsuits, and they may be used in conjunction with bid protests to persuade the government to cancel and reissue its solicitations.

False claims liability can arise in construction projects in many ways. For example, a contractor may be liable under the federal or state false claims laws for any of the following:

- Submitting false bid documents if its bid is accepted and the government's payment on the resulting contract is conditioned on the truth of the bid documents.<sup>24</sup>
- Submitting an invoice or claim that misrepresents the type or amount of work done or the amount due for that work.<sup>25</sup>
- Submitting an invoice or claim that misrepresents that the contractor's work meets contract requirements.<sup>26</sup>
- Submitting an invoice or claim that falsely represents that the work is subject to reimbursement.<sup>27</sup>
- Falsely certifying that it is paying applicable prevailing wages in accordance with the federal Davis-Bacon Act, 40 U.S.C. § 276a, *et seq.*, or applicable state law, when it is not.<sup>28</sup>
- Failing to adhere to certifications that certain types of disadvantaged businesses will perform portions of the work.<sup>29</sup>

### **Construction Attorneys Face Potential Malpractice Liability in Connection with False Claims Laws**

Attorneys for contractors who do public work need to be aware of the false claims laws in the jurisdictions in which their clients work. An attorney retained to advise a client about potential requests for payment on a public project should clarify with the client whether the client wishes advice on false claims laws (which it should) and, if so, should then discuss with

the client the applicable laws and diligence the client should employ to ensure that any "claims" it submits are true.<sup>30</sup> Likewise, such attorneys for subcontractors and suppliers would be wise to counsel their clients about the accuracy of claims they cause prime contractors to submit. These might include not only construction claims but also bids, invoices, certifications and many other documents regularly provided to public owners in connection with construction projects. If construction clients do not understand the importance of these laws, they could be exposed to potential false claims liability, and their attorneys could be exposed to potential liability for malpractice.<sup>31</sup>

In *Information Systems & Networks Corp. v. Berg & Parker*, for example, a general contractor sued its attorneys for malpractice in part due to the contractor's liability under state and federal false claims laws.<sup>32</sup> The contractor had installed an alarm system for the Port of Oakland. Although the contractor lacked the business license required to do the work, the contractor's attorneys counseled the contractor that it could pursue a claim against its supplier. After the supplier asserted the contractor's lack of a license as a defense, the Port sued the contractor for submitting false claims, that is, for requesting payments for work it performed without the required license. The contractor settled with the Port for \$350,000 and sued its attorneys for malpractice. The malpractice claim was dismissed on limitations grounds and so was never adjudicated on the merits.

False claims laws may subject attorneys representing prime contractors to malpractice liability in a second way as well. Many public owners, including the federal government, do not allow subcontractors or suppliers to submit claims directly to the public owner. In projects with those owners, the prime contractor is the only party that can submit a claim. In those situations, the prime contractor must "sponsor" any claims of its subcontractors or suppliers. When

advising a prime contractor client about sponsoring such claims, attorneys should be careful not to create an implied attorney-client relationship with their client's subcontractor or supplier. An attorney may do so, unwittingly, by undertaking responsibility for investigating the facts underlying the claim to determine its merit. If the attorney undertakes such responsibility and advises the prime contractor that it may submit the claim to the public owner, and then the claim turns out to be false, the subcontractor or supplier may also be liable under the applicable false claims law, and they could attempt to sue the attorney for the prime contractor for malpractice. Therefore, the attorney for the prime contractor who must sponsor the others' claims should discuss with her own client – the prime – guidelines for checking the accuracy of such claims, but keep the burden for accuracy where it should lie – on the subcontractor or supplier. Making a written record of this is helpful. It would also be wise for the attorney to expressly disclaim (in writing is preferable) that it is representing the subcontractor or supplier, and, if possible, obtain the subcontractor or supplier's agreement to indemnify and defend the prime and its attorney against any false claims allegations arising out of the sponsored claim.

### **Construction Attorneys Face Potential Direct Liability Under False Claims Statutes**

It is possible that an attorney could be personally liable under federal or state false claims laws if she knowingly submits a false claim or causes another party (for example, her client) to submit one. The federal civil FCA provides that "any person" who commits an act prohibited under section 3729(a) is liable under the Act.<sup>33</sup> State false claims statutes contain similar language. Liability is not limited to contractors because no privity of contract with the government is required,<sup>34</sup> and a party need not seek or obtain any benefit from the false claim to be liable.<sup>35</sup>

Although such cases are rare, lawyers have been sued and found liable under the FCA.<sup>36</sup> In *United States v. Entin*, for example, the United States brought an action under the FCA against

not only its contractor but also the contractor's attorney. The District Court found all defendants, including the contractor's attorney, liable for submitting, causing submission of, and conspiring to submit false contractor claims.<sup>37</sup> In that case, the attorney prepared the false payment application on his client's behalf and attested to its truth.<sup>38</sup> Thus, where an attorney counsels his client to submit a claim to the government, with the knowledge that the claim is false or with reckless disregard as to its truth or falsity, he may be subjecting himself to liability under the FCA.

Cases like *Entin* show that attorneys should avoid certifying requests for payment to the government, especially where they lack firsthand knowledge concerning the truth or falsity of those requests. And, in situations in which an attorney must attest to the truth of a request, she should thoroughly investigate the facts to which she is attesting. Attorneys do not typically become guarantors of the facts, and they should be careful not to. Attorneys handling claims for their clients should always seek to impress upon their clients the need for accuracy, and the attorney's need to rely on the client to provide truthful information. It is helpful if the attorney has a written record of counseling the client on these points.

### **Ethical Issues Implicated by False Claims Statutes**

#### *Threatening a False Claims Action to Gain an Advantage in a Civil Proceeding*

False claims laws are not only a potential source of liability for attorneys and their clients, but they also raise certain ethical issues for attorneys. For example, it has become popular to threaten use of false claims laws as a leverage tool during contract disputes. The following are examples of such tactics:

- 1) the attorney for an unsuccessful bidder may threaten to bring a *qui tam* action against the successful bidder based on alleged false information in the successful bidder's proposal;

- 2) an attorney for a party embroiled in a dispute with a government contractor (such as an employment dispute) may threaten to bring a *qui tam* action against the contractor as leverage in that dispute, even though the dispute is unrelated to the alleged false claim; and
- 3) an attorney for the government may threaten to bring a false claims action when a contractor claims extra compensation.

#### *Threats by Attorneys Representing Private Parties*

The first two examples arise when an attorney represents a private party in a dispute with another private party. If the threatened false claims allegations relate to a federal contract, once the government is put on notice of the alleged false claim, the ensuing investigation could result in criminal charges against the opposing party. This is not the case with state contracts because states generally do not have criminal false claims statutes. Such a result could only occur where the state has a general criminal statute prohibiting similar conduct.

Many jurisdictions have ethical rules prohibiting the threat of criminal prosecution in connection with a civil matter. Depending on the nature of phrasing of the threat, these rules could apply to threats to sue under false claims laws. Such rules were generally modeled after ABA Model Code Disciplinary Rule 7-105, which stated, “[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.”<sup>39</sup>

The ABA replaced the ABA Model Code with the ABA Model Rules in 1983. While the ABA did not adopt a prohibition equivalent to Disciplinary Rule 7-105 when it adopted the Model Rules, a majority of states have adopted professional conduct rules similar to ABA Model Code Disciplinary Rule 7-105 directly prohibiting threats of criminal prosecution.<sup>40</sup> In those states, an attorney would be in violation of such a rule if he or she threatens a false claims action

to gain an advantage for his or her client in a civil matter and threatens also to push for criminal prosecution. But if there is no threat as to *criminal* charges, this rule does not seem to be violated just because the filing of the civil suit itself could unleash a criminal charge.

Many other jurisdictions have adopted rules modeled on the ABA Model Rules. In 1992, the ABA Standing Committee on Ethics and Professional Responsibility issued ABA Formal Ethics Opinion No. 92-363 examining the discrepancy between the ABA Model Code and the ABA Model Rules.<sup>41</sup> The opinion noted that the drafters of the ABA Model Rules deliberately omitted the prohibition on threatening criminal prosecution in a civil matter. The opinion concludes that the ABA Model Rules do not prohibit a lawyer in a civil matter from using the possibility of presenting criminal charges against the opposing party to gain relief for the lawyer's client, provided that three conditions are met:

- 1) the criminal matter is related to the client's civil claim;
- 2) the lawyer has a well-founded belief that both the civil claim and the criminal charges are warranted by the law and the facts; and
- 3) the lawyer does not attempt to exert or suggest improper influence over the criminal process.

The first requirement that the criminal matter be related to the client's civil claim would probably prohibit the type of conduct described in the second example, above, if the attorney threatened not just to bring a *qui tam* action against a contractor in a dispute unrelated to the contractor's contract with the government, but also coupled it with a threat to push for criminal proceedings as well. There are, however, instances in which the civil dispute could be related to the alleged criminal matter (the false claim). For example, an employee may claim her employer wrongfully terminated her when she reported concerns that her employer may have made false

claims to the government. In that case, the threat of criminal proceedings might be permissible if the other two conditions specified in the ethics opinion were met.

In explaining the omission of a counterpart to Model Code DR 7-105 from the Model Rules, the ABA opinion states that the prohibition was designed to prevent the subversion of the criminal process, which is designed for the protection of society as a whole, by threats to use the criminal process to influence civil claims. The prohibition was omitted from the ABA Model Rules because it was overbroad and other, more general, provisions in the Model Rules provide protection from abuse of the criminal process. The three-part test set forth in the opinion is derived from these general rules, including Rules 8.4, 4.4, 4.1, and 3.1. We briefly explore these rules below.

ABA Model Rule 8.4(b) prohibits a lawyer from “commit[ting] a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”<sup>42</sup> Prohibited conduct under this rule includes extortion or conduct that compounds a crime under the criminal law of a given jurisdiction.<sup>43</sup> The ABA ethics opinion states that the first condition of its three-part test – requiring that the alleged criminal offense be related to the civil action – guards against violation of ABA Model Rule 8.4(b), because it is only when the criminal offense is related to the civil action “that a lawyer can defend against charges of compounding a crime (or similar crimes).”<sup>44</sup> A relatedness requirement also promotes policy concerns such as ensuring that negotiations will be focused on the true value of the civil claim, discouraging exploitation of extraneous matters that have nothing to do with evaluating the claim, and preserving the legitimacy of the justice system.<sup>45</sup>

Extortionate behavior may also adversely affect a *qui tam* plaintiff’s protections under the FCA or similar state statute. Section 3730(h) of the FCA protects employees from retaliation by

their employers when the employee files a *qui tam* action against the employer.<sup>46</sup> However, some courts have held that employees seeking protection under whistleblower statutes are not entitled to protection from retaliation when they are acting in bad faith or with extortionate motives.<sup>47</sup>

ABA Model Rule 4.4, “Respect for Rights of Third Persons,” states that a “lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . . .”<sup>48</sup> Opinion 92-363 states that a lawyer who uses even a well-founded threat of criminal charges merely to harass a third person violates Rule 4.4. But one court has held that it is never unethical for a lawyer to threaten to bring a claim that is at least “colorable.”<sup>49</sup>

ABA Model Rule 4.1, “Truthfulness in Statements to Others,” is also potentially applicable to threats to file a false claims action.<sup>50</sup> This rule prohibits a lawyer from knowingly making a false statement of material fact or law to a third person. In its ethics opinion, the ABA concluded that a lawyer who threatens criminal prosecution, without any actual intent to so proceed, violates this rule.<sup>51</sup> This conclusion seems a bit of a reach, because attorneys engaged in settlement negotiations frequently state that their clients will (or won’t) do something that they know is not true, e.g., “my client will file for bankruptcy if . . .” or “we will attempt to pierce the corporate veil if . . .”

Opinion 92-363 also cites ABA Model Rule 3.1, “Meritorious Claims and Contentions,” as a general rule potentially bearing on this issue.<sup>52</sup> The opinion states that this rule prohibits a lawyer from threatening a claim that is not well-founded in law or fact, or threatening such prosecution in furtherance of a civil claim that is not well founded.<sup>53</sup> This coincides with the second requirement in the ABA ethics opinion.

With regard to the third requirement, the ABA’s ethics opinion cites ABA Model Rule 8.4(d) and (e), which provide that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice and to state or imply an ability to influence improperly a government agency or official.<sup>54</sup>

The analysis set forth in the opinion – and the resulting three-part test – are stated in the context of threatening *criminal prosecution*. However, some of the rules the ABA’s opinion relies on could be applicable to threats to bring a civil action. Therefore, an attorney contemplating use of threatening even a *civil* action should be mindful of those rules as well.

#### *Threats by Governmental Entities to Bring FCA Actions*

Where a government attorney threatens to bring criminal charges against a contractor presenting a claim, similar ethical standards arguably should apply. Government attorneys, just like their private counterparts, are subject to general ethics rules.<sup>55</sup> Therefore, although Opinion 92-363 expressly states that it is not intended to apply to situations involving governmental entities, a similar analysis should be applicable to government attorneys involved in civil claims.<sup>56</sup> In jurisdictions that have professional conduct rules similar to DR 7-105 – directly prohibiting threats to present criminal charges to obtain an advantage in a civil matter – those rules may very well be applicable to government attorneys, as well.<sup>57</sup>

There are public policy reasons why government attorneys should be held to standards at least as high as private attorneys. Government attorneys hold positions in which they can more readily carry out a threat of criminal prosecution, so there are good public policy reasons to prevent government attorneys from engaging in extortionate conduct and abuse of the criminal process.<sup>58</sup> Many of the general ethical rules described in the previous section (*e.g.*, Model Rules 8.4, 4.4, 4.1, and 3.1) apply to the conduct of *all* attorneys, including those who work for public entities.

### *Attorneys as Qui Tam Relators*

The federal civil FCA and the state statutes modeled after it do not preclude attorneys or law firms from being *qui tam* relators.<sup>59</sup> There are, however, several serious impediments to their successfully obtaining relief. Serious ethical issues are also implicated when attorneys sue under the false claims laws.

The chief impediment to an attorney's ability to successfully bring *qui tam* actions is the public disclosure bar found in false claims laws. This bar deprives courts of jurisdiction over *qui tam* actions if they are based on the public disclosure of the allegations or transactions alleged to be false claims.<sup>60</sup> The rationale for the public disclosure bar is to prevent "parasitic" *qui tam* actions in which the relator is entitled to a share of the recovery but did nothing to bring the false claim to the government's attention.

There is one notable exception to the public disclosure bar. The bar does not apply if the relator qualifies as an "original source," which is defined as an individual who has direct and independent knowledge of the information on which false claims allegations are based and who voluntarily provides that information to the government before filing any *qui tam* action.<sup>61</sup> Most *qui tam* cases brought by attorneys have been dismissed because (1) the relators based their allegations on public disclosures such as information obtained in civil discovery or government investigations and (2) the relators did not qualify as original sources of the information.<sup>62</sup>

But even if an attorney could successfully sue as a *qui tam* relator, doing so could violate ethical rules governing attorney conduct. The most obvious ethical issues would arise if an attorney were to blow the whistle on his own client or former client. While nothing in the FCA precludes an attorney from doing so, attorneys are still subject to state statutes and ethical rules that protect attorney-client communications, prohibit disclosure of client confidences, and prohibit attorneys from taking positions adverse to current or former clients.<sup>63</sup>

If the information on which the attorney's *qui tam* lawsuit is based was information that the client revealed to the attorney in confidence, that information is privileged.<sup>64</sup> The privilege belongs to the client, not the attorney.<sup>65</sup> In addition, attorneys may not reveal client confidences, even if they are not privileged, under the ethical rules in most, if not all, jurisdictions.<sup>66</sup> Where these constraints apply, the attorney could subject himself to discipline by disclosing his client confidences, and the client could obtain an injunction preventing its attorney from disclosing information to the government, which disclosure is a prerequisite to maintaining a *qui tam* action.<sup>67</sup> However, in some jurisdictions, neither the privilege nor an attorney's broader ethical constraints would prevent disclosure of information concerning ongoing or future false claims where "crime-fraud" exceptions apply.<sup>68</sup>

But even where an attorney could sue her client without breaching her duty of confidentiality,<sup>69</sup> she would still have a duty of loyalty to her current and former clients. It is difficult to imagine a situation in which an attorney could sue his current or former client for false claims without violating this duty.<sup>70</sup>

If an attorney wanted to sue his client's litigation adversary in a separate *qui tam* lawsuit, other ethical issues arise. For example, if an attorney represents a subcontractor in a civil lawsuit against the prime contractor on a federal project and learns, in confidential settlement discussions, that the prime submitted a false claim to the government, the civil FCA would allow the attorney to file a *qui tam* complaint against the prime. This could pose an ethical issue because, by suing the prime, the attorney could become an interested party in the original civil lawsuit.<sup>71</sup> That is, proving his client subcontractor's allegations against the prime could benefit the attorney financially in his separate *qui tam* lawsuit. Further, if the attorney were to retain the proceeds from his *qui tam* lawsuit, he might also breach his ethical duties to the extent that he

used information he gained in the course and scope of his representation of his client for his own (rather than his client's) financial gain.<sup>72</sup> Finally, the attorney could not bring such a false claims action if it would implicate her own client in any wrongdoing, as that would be a breach of the duty of loyalty.

## Conclusion

The law governing false claims is evolving. Attorneys representing construction clients need to be familiar with it or to associate other counsel who are. Attorneys should also examine their own conduct, and that of their opposing counsel, with the ethical rules in mind, for many could be triggered once the threats start flying.

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<sup>1</sup> 31 U.S.C. § 3729, *et seq.*

<sup>2</sup> 18 U.S.C. § 287.

<sup>3</sup> 31 U.S.C. § 3729(c).

<sup>4</sup> *United States v. Farina*, 153 F. Supp. 819, 821 (D.N.J. 1957); *Paradyne Corp. v. United States*, 647 F. Supp. 1228 (D.D.C. 1986).

<sup>5</sup> *Varljen v. Cleveland Gear Co.*, 250 F.3d 426 (6th Cir. 2001).

<sup>6</sup> *Id.*

<sup>7</sup> *See, e.g., United States ex rel. Milam v. Regents of the Univ. of California*, 912 F. Supp. 868, 886 (D.Md. 1995).

<sup>8</sup> *But see United States ex rel. Oliver v. Parsons Co.*, 184 F.3d 1101 (9th Cir. 1999).

<sup>9</sup> *United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co.*, 183 F.3d 1088 (9th Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1019 (7th Cir. 1999); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899 (5th Cir. 1997); *United States ex rel. Berge v. Trustees of Univ. of Alabama*, 104 F.3d 1453 (4th Cir. 1997).

<sup>10</sup> *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1267 (1st Cir. 1992); *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999); *United States ex rel. Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 732-733 (7th Cir. 1999); *but see United States ex rel. Cantekin v. Univ. of Pittsburgh*, 192 F.3d 402, 415 (3rd Cir. 1999) (*dicta*).

<sup>11</sup> 31 U.S.C. § 3729(b)(1)-(3).

<sup>12</sup> *Id.*; *United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co.*, 183 F.3d 1088, 1092 (9th Cir. 1999).

<sup>13</sup> *United States ex rel. Bryant v. Williams Building Corp.*, 158 F. Supp. 2d 1001 (S.D. 2001).

<sup>14</sup> *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899 (5th Cir. 1997); *Varljen v. Cleveland Gear Co.*, 250 F.3d 426, 429 (6th Cir. 2001); *Bly-Magee v. California*, 236 F.3d 1014 (9th Cir. 2001); *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 n. 7 (4th Cir. 1999); *Commercial Contractors, Inc. v.*

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*United States*, 154 F.3d 1357, 1371 (Fed. Cir. 1998); *but see Young-Montenay, Inc. v. United States*, 15 F.3d 1040 (Fed. Cir. 1994).

<sup>15</sup> 31 U.S.C. § 3730(d)(2).

<sup>16</sup> 31 U.S.C. § 3729(a).

<sup>17</sup> F.A.R. 9.406-2 (48 C.F.R. Pt. 9); *see also Stacey & Witbeck, Inc. v. City and County of San Francisco*, 47 Cal. App. 4th 1 (1996) (California FCA).

<sup>18</sup> *United States v. Gumbs*, 283 F.3d 128 (3rd Cir. 2002).

<sup>19</sup> *United States v. Catton*, 89 F.3d 387, 392 (7th Cir. 1996).

<sup>20</sup> (a) *California*: Cal. Gov't. Code § 12650, *et seq.*; (b) *Delaware*: Del. Code Ch. 12 § 1201; (c) *District of Columbia*: D.C. Code Ann. § 1-1188.13-19; (d) *Florida*: Fla. Stat. Ann. § 68.081-68.092; (e) *Hawaii*: H.R.S. § 661-21, *et seq.*; (f) *Illinois*: 740 Ill. Comp. Stat. 175/3, *et seq.*; (g) *Massachusetts*: Mass. Gen. Laws C.12(c); (h) *Nevada*: Nev. Rev. Stat. Ann. § 357.010, *et seq.*; and (i) *Virginia*: Va. Code, Ch. 3, tit. 8.01.

<sup>21</sup> Cal. Gov't. Code § 12652(b)(1)-(2), (c)(5); 740 Ill. Comp. Stat. 175/3; Nev. Rev. Stat. Ann. §357.020(1).

<sup>22</sup> Cal. Gov't. Code § 12652(b)(1)-(2), (c)(5).

<sup>23</sup> Arkansas, Louisiana, Michigan, North Carolina, Tennessee, Utah and Washington also have false claims statutes with *qui tam* provisions that currently are limited to health care fraud.

<sup>24</sup> *See United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co.*, 183 F.3d 1088 (9th Cir. 1999).

<sup>25</sup> *See, e.g., United States ex rel. Mistick PBT v. Housing Authority of the City of Pittsburgh*, 186 F.3d 376 (3rd Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000); *United States ex rel. Eberhardt v. Integrated Design & Construction, Inc.*, 167 F.3d 861 (4th Cir. 1999); *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1371 (Fed. Cir. 1998); *Stacy & Witbeck, Inc. v. City and County of San Francisco*, 47 Cal. App. 4th 1 (1996) (California FCA).

<sup>26</sup> *See, e.g., United States ex rel. Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519 (10th Cir. 2000).

<sup>27</sup> *See, e.g., United States ex rel. Bhatnagar v. Kiewit Pacific Co.*, 2000 U.S. Dist. LEXIS 14400 (N.D. Cal. 9/22/00); *United States ex rel. Wilkins v. North Am. Constr. Corp.*, 101 F. Supp. 2d 500, 504 (S.D. Tex. 2000), *United States v. Schimmels*, 127 F.3d 875 (9th Cir. 1997); *City of Pomona v. Superior Court*, 89 Cal. App. 4th 793 (2001) (California FCA).

<sup>28</sup> *See, e.g., Plumbers & Steamfitters Local Union No. 38, supra*, 183 F.3d 1088; *Schimmels, supra*, 127 F.3d 875; *United States ex rel. Burns v. A.D. Roe Co.*, 186 F.3d 717 (6th Cir. 1999).

<sup>29</sup> *See, e.g., Ab-Tech Constr., Inc. v. United States*, 31 Fed. Cl. 429 (1994).

<sup>30</sup> Attorneys should not be liable for failure to give advice outside the scope of their retention, which is why it is wise to clarify what the scope of retention is. But even so, some states may impose an obligation on attorneys to advise on matters even when the matter is outside the scope of retention if it is tangentially related. *See, e.g., Nichols v. Keller*, 15 Cal. App. 4th 1672, 1684 (1993) (holding expressly limited to facts before court).

<sup>31</sup> *See, e.g., Information Systems & Networks Corp. v. Berg & Parker*, 2003 Cal. App. Unpub. LEXIS 6182 (6/25/03); *see also, Kosowski v. Haliw*, 1999 Mich. App. LEXIS 1779 (1/5/99) (attorney potentially liable for malpractice where failed to advise shareholder that a corporate officer was legally precluded from participating in Medicaid where that officer's subsequent actions subjected the corporation to liability under Michigan's medical false claims law).

<sup>32</sup> 2003 Cal. App. Unpub. LEXIS 6182.

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- <sup>33</sup> 31 U.S.C. § 3729(a).
- <sup>34</sup> *United States v. Bornstein*, 423 U.S. 303 (1976).
- <sup>35</sup> *United States v. Veneziale*, 268 F.2d 504, 505 (3d Cir. 1959) (defendant liable where his false statements led government to guarantee loans to third parties); *Smith v. United States*, 287 F.2d 299, 303 (5th Cir. 1961) (corporation's executive director liable for submitting false reports even though he neither sought nor received any federal funds); *Scolnick v. United States*, 331 F.2d 598, 599 (1st Cir. 1964); *United States v. Samuel Dunkel & Co.*, 61 F. Supp. 697 (D.N.Y. 1945).
- <sup>36</sup> See, e.g., *United States v. Entin*, 750 F. Supp. 512 (S.D. Fla. 1990); see also *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176 (3rd Cir. 2001) (FCA claim dismissed on other grounds); *Matusavage v. Office of the Dist. Attorney of Philadelphia*, 1994 U.S. Dist. LEXIS 16009 (E.D. Pa. 11/7/94) (same).
- <sup>37</sup> 750 F. Supp. 512.
- <sup>38</sup> *Id.* at 514.
- <sup>39</sup> ABA Model Code of Professional Responsibility DR 7-105.
- <sup>40</sup> ABA/BNA Lawyer's Manual on Professional Conduct, 71:601-02 (2003).
- <sup>41</sup> *Id.* at 71:604.
- <sup>42</sup> ABA Model Rules of Professional Conduct Rule 8.4(b).
- <sup>43</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-363 (1992); see also, Restatement (Third) of the Law Governing Lawyers § 98 cmt. f (2001).
- <sup>44</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-363 (1992).
- <sup>45</sup> *Id.*
- <sup>46</sup> 31 U.S.C. § 3730(h).
- <sup>47</sup> See, e.g., *Shallal v. Catholic Social Services*, 455 Mich. 604, 621-22 (1997) (employee not entitled to protection under Michigan whistleblower protection statute when employee extorted employer not to fire her).
- <sup>48</sup> ABA Model Rules of Professional Conduct Rule 4.4(a).
- <sup>49</sup> *Attorney M v. Mississippi Bar*, 621 So. 2d 220 (1992).
- <sup>50</sup> ABA Model Rules of Professional Conduct Rule 4.1.
- <sup>51</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-363 (1992).
- <sup>52</sup> ABA Model Rules of Professional Conduct Rule 3.1.
- <sup>53</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-363 (1992).
- <sup>54</sup> ABA Model Rules of Professional Conduct Rule 8.4 (d), (e).
- <sup>55</sup> ABA/BNA Lawyer's Manual on Professional Conduct, 61:603 (2003).
- <sup>56</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-363, n.1 (1992).
- <sup>57</sup> See, Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 40.4 (3 ed. 2002) (commenting that, under ABA Model Code DR 7-105, government lawyers had to consider whether to discuss civil and criminal sanctions with the opposing party); Vapnek et al., *California Practice Guide: Professional Responsibility* § 8:549 (2003) (commenting that the California rule against threatening criminal charges may be violated by a prosecutor making such threats to gain an advantage in a civil matter).
- <sup>58</sup> Charles W. Wolfram, *Modern Legal Ethics* § 13.5.5 (1986).
- <sup>59</sup> 31 U.S.C. § 3730(b), (e); *United States ex rel. Doe v. X Corp.*, 862 F. Supp. 1502, 1506-7 n.12 (E.D. Va. 1994); *Bury v. Community Hospitals of Central California*, 2002 Cal. App. Unpub. LEXIS 1035 (5/8/02) (California FCA).
- <sup>60</sup> 31 U.S.C. § 3730(e)(4).

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<sup>61</sup> *Id.*

<sup>62</sup> *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2nd Cir. 1993); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2nd Cir. 1992); *United States ex rel. Stinson v. Prudential Ins*, 944 F.2d 1149 (3rd Cir. 1991); *Houck on behalf of United States v. Folding Carton Admin.*, 881 F.2d 494 (7th Cir. 1989).

<sup>63</sup> *United States ex rel. Doe v. X Corp.*, 862 F. Supp. 1502, 1506-7 n.12 (E.D. Va. 1994); *X Corp. v. Doe*, 805 F. Supp. 1298 (E.D. Va. 1992); *Bury*, 2002 Cal. App. Unpub. LEXIS 1035.

<sup>64</sup> *See, e.g.*, Cal. Evid. Code § 954.

<sup>65</sup> *X Corp. v. Doe*, 805 F. Supp. at 1305 n.12.

<sup>66</sup> *See, e.g.*, *X Corp. v. Doe*, 805 F. Supp. at 1307 (citing *Brennan's Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168, 172 (5th Cir. 1979); *Bury*, 2002 Cal. App. Unpub. LEXIS 1035 (citing Cal. Bus. & Prof. Code §6068(e)). An exception would be where a court orders an attorney to reveal client confidences. National Reporter on Legal Ethics and Professional Responsibility, North Carolina 2000 Formal Ethics Opinion 11, Inquiry #3 (1/18/01).

<sup>67</sup> *X Corp. v. Doe*, 805 F. Supp. 1298; *United States ex rel. Doe v. X Corp.*, 862 F. Supp. at 1507-10; *Bury*, 2002 Cal. App. Unpub. LEXIS 1035 at \* 11-12.

<sup>68</sup> *X Corp. v. Doe*, 805 F. Supp. at 1306-7.

<sup>69</sup> *Anderson v. Eaton*, 211 Cal. 113, 116 (1931); *Commercial Standard Title Co. v. Superior Court*, 92 Cal. App. 3d 934, 945 (1979); Cal. Bus. & Prof. Code §6068(e).

<sup>70</sup> *Bury*, 2002 Cal. App. Unpub. LEXIS 1035 at \*11-12.

<sup>71</sup> *See, e.g.*, ABA Model Rules of Professional Conduct 1.7, note 10.

<sup>72</sup> *Id.*