FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION

Fifth Edition

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(4)—Discoverability of Documents.

A second recurring issue in a *qui tam* proceeding arises because the defendant is usually in possession of most, if not all, of the relevant information forming the basis of the relator's complaint. Preexisting documents are not protected by the attorney-client privilege merely because the client sends them to an attorney. Such documents are protected only if they were actually prepared in anticipation of litigation. Thus, documents prepared for ordinary business purposes, (such as a routine accident report), or prepared for public regulatory purposes, (such as an affirmative action report), will not be protected.[68]

(5)—Sharing Privileged Information Between Government and Relator: The Joint Prosecution Privilege.

Sharing of information between the Government and the relator does not waive either the attorney-client privilege or the work product protections. The courts have long recognized that communication between two parties with a common interest or communications between counsel and such parties in the presence of the other party with a common interest does not waive either the attorney-client privilege or the work product doctrine.[69]

United States ex rel. Burroughs v. DeNardi Corp. states that in False Claims Act cases, "the [relator] and the government essentially stand in the same shoes as against the defendants…For all practical purposes, plaintiff and the government are essentially the same party."[70] The court concluded that relators and the Government have sufficient commonality of interests in FCA cases to assert the joint prosecution privilege.[71] As a result, a relator's disclosure of the documents to the Government of work product documents does not waive the protections afforded such.[72] Similarly, *United States ex rel. Cericola v. Ben Franklin Bank*[73] holds that a relator's sharing of opinion work product memoranda with the Government does not constitute a waiver of privilege from the work product doctrine.

Accordingly, with the agreement of both the Government and the relator to share and treat attorney-client privileged and work product materials as

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[68] *See* § 9-4(b), "Self-Evaluative Privilege in False Claims Act Cases," *infra; see generally,* 4 James W. Moore et al., *Moore's Federal Practice* ¶ 26.01[18] (2d ed. Supp. 1993-94).

[69] *See* Edna S. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 62–63, 206–219 (4th ed. 2001, Supp. 2004 ABA Publishing) (and cases cited therein); *United States ex rel. Cericola v. Ben Franklin Bank*, 2003 U.S. Dist. LEXIS 15451 (N.D. Ill. 2003).

[70] *Burroughs*, 167 F.R.D. 680, 686 (S.D. Cal. 1996).

[71] *Id.*

[72] *Id.*

[73] *Cericola*, 2003 U.S. Dist. LEXIS 15451 *10 (N.D. Ill. 2003).

confidential, these two parties can cooperate to prosecute the action against the defendant without sharing privileged and protected information with the defendant. These same principles have been applied to other actions in which the Government and private plaintiffs share common law enforcement goals.[74]

The United States District Court for the District of Columbia has now expressly ruled that information shared between the relator, his counsel and the United States is protected from discovery by the joint-prosecutorial privilege.[75] The joint-prosecutorial privilege is the Government/relator counterpart to the recognized joint defense or common interest privilege.[76] It is grounded in the language of the False Claims Act itself which empowers the relator to bring the action "in the name of the Government" and awards the relator a percentage of the proceeds recovered by the United States.[77] Such statutory language make clear Congress' intent to align the interest of the Government with that of the relator.[78]

In fact, the unique relationship arising from the statutory requirement that the relator serve upon the United States a "written disclosure of substantially all material evidence and information the person possesses"[79] requires the sharing of work product generated by the relator and his attorney in order for the case to proceed.[80] Such material disclosed to the United States is protected from discovery by the joint-prosecutorial privilege.[81]

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[74] *See, e.g., Castle v. Sangamo Weston, Inc.,* 744 F.2d 1464, 1466–67 (11th Cir. 1984) (no waiver in private plaintiff turning work product over to EEOC while both engaged in preparation for joint trial); *United States v. American Telephone & Telegraph Co.,* 642 F.2d 1285, 1299–1300 (D.C. Cir. 1990) (regarding private plaintiff sharing of work product with DOJ in antitrust litigation).

[75] *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 24–27 (D. D.C. 2002).

[76] *United States ex rel. Purcell v. MWI Corp*., 209 F.R.D. 21, 25–27 (D. D.C. 2002); *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990); *Sedlacek v. Morgan Whitney Trading Group*, 795 F. Supp. 329, 331 (C.D. Cal. 1992).

[77] 31 U.S.C. §§ 3730(b), (d).

[78] *Purcell,* 209 F.R.D. at 26; *United States ex rel. Burroughs v. DeNardi Corp*., 167 F.R.D. 680, 686 (S.D. Cal. 1996) ("[the *qui tam*] plaintiff and the Government essentially stand in the same shoes as against the defendants").

[79] 31 U.S.C. § 3730(b)(2).

[80] *Purcell,* 209 F.R.D. at 27; *United States v. AT&T Co.*, 642 F.2d 1285, 1300 (D.C. Cir. 1980); *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994).

[81] *Purcell,* 209 F.R.D. at 24–27; *contra*, *United States ex rel. Grober v. Summit Medical Group, Inc.*, 2006 U.S. Dist. LEXIS 26898 (W.D. Ky. 2006) (An Assistant United States Attorney voluntarily turned over to the False Claims Act defendant three volumes of relator's disclosure statement memoranda and associated documents after reaching a settlement of the False Claims Act allegations but before resolution of the relator's False Claims Act retaliation claims. All of this was done without notice to relator or his counsel and was then used by the defendant against the relator on his retaliation claim. Relator maintained that the Assistant United States Attorney's unauthorized disclosure of disclosure statement documents to the defendant was designed to punish the relator for objecting to the False Claims Act settlement.).