"A nation can survive its fools, and even the ambitious. But it cannot survive treason from within. An enemy at the gates is less formidable, for he is known and carries his banner openly. But the traitor moves amongst those within the gate freely, his sly whispers rustling through all the alleys, heard in the very halls of government itself. For the traitor appears not a traitor; he speaks in accents familiar to his victims, and he wears their face and their arguments, he appeals to the baseness that lies deep in the hearts of all men. He rots the soul of a nation, he works secretly and unknown in the night to undermine the pillars of the city, he infects the body politic so that it can no longer resist. A murderer is less to fear. The traitor is the plague."

Cicero, as imagined in "A Pillar of Iron" by Taylor Caldwell

Embrace The Enemy Inside The Gates:

Gatekeepers as False Claims Act Whistleblowers

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1. Introduction

Whistleblowers are a critically effective tool against fraud, in environmental protection, government contracting, tax and securities scams, corporate crime and even national security.[1] Effective whistleblowers are necessarily insiders, those privy to the relevant information and documents--those who are "inside the gates."

Because internal whistleblowers are so critical to exposing wrongdoing, Congress has enlisted employees in the fight by giving them the right to provide critical documents to government crime fighters.

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[1] *Whistleblower complaint regarding President Trump's communications with Ukrainian President Volodymyr Zelensky*, Washington Post, (Sep. 26, 2019), https://www.washingtonpost.com/context/read-the-whistleblower-complaint-regarding-president-trump-s-communications-with-ukrainian-president-volodymyr-zelensky/4b9e0ca5-3824-467f-b1a3-77f2d4ee16aa/.

Since the 1970's, Congress and the States have enacted federal and state whistleblower statutes to encourage government and private sector employees[2] to come forward with information about wrong, unethical, fraudulent, or unlawful behavior. Most prominent is the federal False Claims Act (FCA) and the 30-plus state and local false claims acts.[3] The Department of Justice describes the FCA as, "the government's most effective civil tool to ferret out fraud and return billions to taxpayer-funded programs."[4] Whistleblowers helped the government recover more than $2.8 billion in 2018.[5]

Nevertheless, whistleblowers face competing obligations to their employers emanating from the common law duty of loyalty. When employees act against their employers' best interests without legal authority, then employers arguably have potential claims against their employees.[6]

Recently, the defense bar and some courts have raised the question as to whether "gatekeepers" are entitled to full whistleblower statutory authorization to provide critical employer documents disclosing the fraud to governmental authorities.[7] Gatekeepers include compliance officers, accountants, and attorneys. These professionals are often responsible for investigating and reporting fraud internally. Gatekeepers are in a position to possess confidential or privileged

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[2] Many whistleblower statutes are not limited to employees. For instance, with respect to the False Claims Act, any person, including a competing corporation, can bring a False Claims Act action.

[3] 31 U.S.C.A. § 3729 et seq.

[4] *Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015*, (December 3, 2015), https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015.

[5] *Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018* (December 21, 2018), https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018.

[6] *See, e.g.*, *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1052 (9th Cir. 2011).

[7] Much of the debate was centered around the rulemaking of Dodd Frank. *See, e.g.*, U.S. Chamber of Commerce et al., "File Number S7-33-10, Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Release No. 34-63237 (Nov. 3, 2010)," letter to Elizabeth Murphy, U.S. Securities and Exchange Commission, December 7, 2010. https://www.sec.gov/comments/s7-33-10/s73310-123.pdf; Daly, Ken, President and CEO of the National Association of Corporate Directors, testimony before the House Subcommittee on Capital Markets and Government Sponsored Enterprises at the hearing "Legislative Proposals to Address the Negative Consequences of the Dodd-Frank Whistleblower Provisions," May 11, 2011. As of June 24, 2011: http://www.sec.gov/comments/s7-33-10/s73310-312.pdf; Rachel S. Taylor, *A Cultural Revolution: The Demise of Corporate Culture Through the Whistleblower Bounty Provisions of the Dodd-Frank Act*, 15 Tenn. J. Bus. L. (2013).

documents, which makes them especially useful to a government investigation, but raises difficult questions about what they may lawfully disclose. They face competing company interests, often have signed nondisclosure agreements, and, in the case of accountants and attorneys, have independent legal obligations to protect client confidences.

Employers argue that gatekeepers should not be offered *qui tam* "bounties" because it would create a disincentive to solve problems internally. Corporations have used strong language, matching that of the Cicero epigraph, contending that whistleblowers are traitors, "enemies inside the gates," creating anarchy in organizations. This paper addresses why insider and "gatekeeper" whistleblowers provide necessary checks on corporate and government misbehavior.

2. The False Claims Act Statutory Scheme Reflects Congress' Expectation That Insiders and Gatekeepers Will Blow the Whistle.

The False Claims Act includes a statutory preference for whistleblower lawsuits that contain allegations not previously disclosed publicly, except where it was done by the whistleblower as an "original source" of the information. 31 U.S.C. § 3730(e)(4)(A). This reflects Congress' recognition that insiders and gatekeepers are the expected whistleblowers in the FCA statutory scheme.

The employer effort to prevent insiders from reporting fraud threatens to squeeze the False Claims Act out of existence. Non-insiders will likely be more vulnerable to charges that they are not "original sources" of the information. Similarly, unless a relator is allowed to disclose employer documents that specify the fraud, a more general complaint will likely be dismissed as insufficiently particular as to "who, what, where, when and why."

The False Claims Act requires relators to serve the Attorney General with "a copy of the complaint and a written disclosure of substantially all material evidence and information" when initiating an FCA *qui tam* action.[8] This written disclosure is known as the **disclosure statement**. There are no regulations governing the written disclosure. The federal Justice Manual (formerly known as the United States Attorneys' Manual) has little guidance on the disclosure format,

[8] 31 U.S.C. § 3730(b)(2).

apart from the statutory language. FCA *qui tam* investigatory practices are largely unwritten and based on course of conduct established between government counsel and relator counsel who are repeat players in the system. This understanding is sustainable in part because a relator may not proceed *pro se* and must have counsel.[9]

In practice, the disclosure statement's function is to provide all material information in the relator's possession, including information not in the relator's complaint. While the complaint may contain as much of the "who, what, where, when, why, and how" as is necessary to meet the heightened pleading standards for pleading fraud, it necessarily omits information useful to an investigation, like identification of witnesses and their likely knowledge. The government's expectation is that employers' emails, voicemails, and text messages, and as many other relevant details and documents in the relator's custody, are included in the disclosure statement.

False Claims Act *qui tam* complaints and whistleblower complaints under other statutes intentionally omit this critical investigatory information. A FCA relator's complaint is filed under seal, however it is likely to become public eventually pending the government's decision on whether to intervene in the lawsuit. Relators therefore refrain from attaching material confidential documents to their complaints. Relators' complaints typically do not contain specific actors' names or otherwise publicly identify individuals who are involved in, but not believed to be culpable in, the wrongdoing. Relators take steps to draft complaints in a way that protects their identity to the extent permitted by the Federal Rules of Civil Procedure and the local rules of the trial court.[10]

Unlike FCA complaints, written disclosures are confidential between the relator and the government. They are far less likely to one day become public. The

[9] Because a qui tam action is brought on behalf of the government, courts have repeatedly held that relators must be represented by counsel because a non-attorney cannot effectively represent the government on their own. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008).

[10] These basic efforts to protect whistleblowers and their identities from the worldwide web's lifetime scrutiny and, thus, future employer retaliation in hiring decisions, sometimes include using a John Doe or Jane Doe filing, using formal names not regularly used in social media, omitting middle names and initials, using maiden names or spouses' last names, omitting any specific residence, age, or other personal information, etc. FCA whistleblowers are aided by the Act's broad venue provisions, allowing case filings in virtually any location where the target entity is doing business, with some practical limits.

written disclosure therefore allows relators to present a complete, "full disclosure" of the legal theory and supporting evidence of the alleged fraud, complete with all the material documents in relators' possession. Additionally, disclosures can be and often are supplemented during the under seal investigation.

Because FCA relator disclosures are confidential and provided under the authority of a federal statute that requires "disclosure of substantially all material evidence and information," False Claims Act relators worry less than other whistleblowers about consequences of disclosing documents that would otherwise be confidential employer property. However, governmental investigations and receipt of confidential documents remain subject to statutory attorney-client privilege protections.

3. Attorneys as Whistleblowers

Competing loyalties to the employer and the government is highlighted when the whistleblower is an attorney. The attorney plays a unique role in our society and is responsible for safeguarding client secrets. The client needs to be able to trust the attorney. At the same time, when clients are engaged in wrongdoing, particularly criminal wrongdoing, and act against the advice of counsel, attorneys should consider broader duties.

For attorneys, the duties of client confidentiality and loyalty are codified in state bar ethics rules, state law, and case law emanating from those authorities. Under the ABA Model Rules of Professional Conduct, attorneys are proscribed from side-switching and representing "another person in the same or substantially related matter in which that person's interests are materially adverse to the former client." MRPC 1.9(b). Attorneys can only disclose confidential communications under narrow exceptions. MRPC 1.6(b). Attorneys likely have unwaivable conflicts of interest when representing an employer while simultaneously pursuing a *qui tam* action against their employer. Attorneys must "reasonably believe" that they can provide "competent and diligent representation to each affected client," a difficult bar when millions of dollars, disbarment from government contracting, and potential criminal liability are implicated. MRPC 1.7.

Although the FCA itself does not mention attorney-client privilege, the Justice Department interprets the FCA and its own ethical responsibilities to require no use or disclosure of any privileged information or documents. Therefore, the government's principal concern when receiving a disclosure statement is typically that it contains no information or material covered by the attorney-client privilege.

Under no circumstances should a relator's attorney disclose or permit disclosure of information that they know or should have known is attorney-client privileged. Relator's counsel should therefore conduct a privilege review of all documents and information being provided to the government, often assisted by the client. Concern for privilege is necessarily heightened when the whistleblowers are gatekeeper-employees, likely to have access to privileged communications and documents and who may base their FCA allegations in part on facts gained in otherwise privileged communications.

The widespread corporate practice of copying corporate counsel on memoranda and emails does not make a document privileged. Legal advice is what is privileged.[11] However, identifying and segregating such documents for the Department of Justice in a FCA disclosure is a wise practice.

Moreover, modern complex institutions often boast numbers of individuals with law degrees, admitted to the practice or not, who act only infrequently, if at all, as lawyers. Instead they are found in corporate compliance departments, risk management, personnel departments, accounting and audit functions, corporate board secretary roles, and even leadership and chief executive officer positions. Whistleblowers often come from these ranks and are not acting as company lawyers when they do not work in any traditional legal department or in-house lawyer roles and are not providing legal advice.

Attorneys acting in a non-legal role are not subject to state board ethical limitations upon practicing attorneys and can bring FCA claims. In an otherwise restrictive interpretation of attorneys' ethical duties in whistleblowing (addressing

[11] *RCHFU, LLC v. Marriott Vacations Worldwide Corp.*, No. 16-CV-1301-PAB-GPG, 2018 WL 3055774, at *3 (D. Colo. May 23, 2018) ("Communications by in-house counsel are privileged only where the communication's primary purpose is to gain or provide legal assistance.") (internal quotation omitted).

whistleblower incentives under the Dodd-Frank Wall Street Reform Act[12]), the New York State Ethics Board carved out a very clear exception for non-practicing attorneys, "[A] lawyer functioning in a non-legal capacity would not be within the scope of this opinion." NYCLA Formal Opinion 746 (2013).

Nor do statutory provisions prevent attorneys acting as whistleblowers. Courts recognize the societal interest in preventing fraud and the FCA conscription of all employees, including attorneys, in that fight, "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." United States *ex rel*. Doe v. X Corp. 862 F. Supp. 1502 (E.D. Va. 1994) (emphasis added).

But courts have restricted attorney whistleblowers when disclosures breach professional ethical duties. *United States v. Quest Diagnostics Inc.*[13] addressed this tension. The Second Circuit in *Quest* recognized that state ethics rules may be "inconsistent with or antithetical to federal interests" of "encourag[ing] private individuals who are aware of fraud being perpetrated against the government to bring such information forward." *Id*. at 163. The solution was to "balance[] the varying *federal* interests at stake. *Id*. (quoting *Grievance Comm. for S.D.N.Y. v. Simels*, 48 F.3d 640, 646 (2d Cir. 1995) (emphasis in original). To balance the federal interest, the court analyzed only whether the relator violated state ethics laws; namely, whether the relator's disclosure of confidential client information was "necessary … (2) to prevent the client from committing a crime." *Id*. at 164 (quoting N.Y. Rule 1.6(b)(2)). Importantly, New York's ethics rules did not allow for disclosure to rectify a past fraud, as a majority of states' ethics rules do. The Second Circuit affirmed dismissal because the relator disclosed more confidential information than authorized by N.Y. Rule 1.6(b)(2) and the complaint did not separate out that information.[14] Subsequently, however, at least one court allowed

[12] 15 U.S.C. § 78a et seq.
[13] 734 F.3d 154 (2d Cir. 2013).
[14] The 2nd Circuit did not rule on an alternative ethics violation that the district court had found. The district court held that the relator additionally violated N.Y. Rule 1.9(a), prohibiting a lawyer who represented a client from "Thereafter represent[ing] 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." *U.S. ex rel. Fair Lab. Practices Assocs. v. Quest Diagnostics Inc.*, No. 05 CIV. 5393 RPP, 2011 WL 1330542, at *6 (S.D.N.Y. Apr. 5, 2011). *See also In re Examination of Privilege Claims*, No. C12-2091-JCC, 2015

attorney whistleblower claims to proceed, although not in the FCA context. *Wadler v. Bio-Rad Labs., Inc.*, 212 F. Supp. 3d 829 (N.D. Cal. 2016).

One need only look to some of the most notorious environmental, corporate and governmental frauds of the last few decades to consider whether attorneys should have been more active in exposing ongoing fraud. Instead, the profession has been marred by participation, if not actionable conspiracy, in corporate, environmental, economic and public health crises and crimes, including examples such as tobacco liability; horrendous sexual harassment; human trafficking practices; discrimination against minorities, women, and LGBT individuals; the mortgage crisis; the wars in Iraq and Afghanistan; Enron, CIA torture and prisoner abuse; global warming; Volkswagen engine fraud; and much more. Lawyers' professional obligations must be balanced with legal, moral, ethical and humanitarian obligations that lend to whistleblowing in appropriate circumstances.

As a practical matter, United States Attorneys' offices, in evaluating False Claims Act cases for purposes of intervention, may look askance at whistleblowers whose fraud disclosures emanate from their role as company counsel giving good-faith advice to a client to obey the laws. That should be a consideration in deciding whether to file such a case. Pre-filing consultation with an ethics expert, bar authorities, the respective U.S. Attorney's Office or other appropriate state agency may be prudent. Countervailing considerations include whether clients failed to heed advice of counsel or whether an attorney was in fact acting as a lawyer or as an operational employee whose law degree was helpful but not a required qualification for the position.

4. The Duties of Other Gatekeepers

Gatekeepers who are not lawyers are also subject to statutory or common law duties to their employer. But courts have not accepted employer arguments that these duties trump the public interest in whistleblowing. Courts have had no

WL 13735797 (W.D. Wash. Dec. 1, 2015) (upholding motion to disqualify an attorney relator for breaching duties of loyalty and confidentiality in violation of the Washington Rules of Professional Conduct). Such a ruling would be prohibitively broad and dramatically undermine an attorney's ability to be a relator.

trouble finding that the federal interest in rooting out fraud readily outweighs traditional duties of loyalty to an employer. For example, courts have allowed a compliance officer,[15] former board of director member,[16] CPA accountant,[17] medical bill coder,[18] and internal auditor,[19] to bring FCA claims. Even an employee hired to identify claims improperly billed to Medicaid was allowed to bring a *qui tam* action for the violations he was hired to discover.[20]

In short, the federal interest in whistleblowing supersedes any duties of loyalty to employers. And it is exactly these species of employees who are able to identify and expose fraud.

5. <u>Documents</u>

To some extent, the FCA overrules state law counterclaims rooted in alleged unauthorized taking of employer documents. For example, *U.S. ex rel. Head v. Kane Co.*[21] voided employer counterclaims on public policy grounds. The court held that, "Enforcing a private agreement that requires a *qui tam* plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under investigation would unduly frustrate the purpose of this provision." *Id*. at 152.

But relators do not enjoy unfettered ability to collect all the documents they desire. *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*,[22] held that a public policy exception did not protect a relator's "vast and indiscriminate appropriation" of employer files. *Id*. at 1062. "Unselective" document collecting was too broad to be protected, so the court authorized only gathering documents deemed to be "reasonably necessary." *Id*.

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[15] *United States ex rel. Anita Silingo v. WellPoint, Inc.*, 904 F.3d 667 (9th Cir. 2018).
[16] *United States ex rel. Riedel v. Bos. Heart Diagnostics Corp.*, 332 F. Supp. 3d 48 (D.D.C. 2018).
[17] *Lawrence v. Int'l Bus. Mach. Corp.*, No. 12CV8433(DLC), 2017 WL 3278917 (S.D.N.Y. Aug. 1, 2017) (dismissed on other grounds).
[18] *United States ex rel. Alvord v. Lakeland Reg'l Med. Ctr., Inc.*, No. 8:10-CV-52-T-17EAJ, 2012 WL 12904676 (M.D. Fla. Sept. 14, 2012); *United States ex rel. Scott v. Arizona Ctr. for Hematology & Oncology PLC*, No. CV16-3703-PHX DGC, 2018 WL 4931757 (D. Ariz. Oct. 11, 2018).
[19] *Erhart v. BofI Holding, Inc.*, No. 15-CV-02287-BAS-NLS, 2017 WL 588390 (S.D. Cal. Feb. 14, 2017).
[20] *Kane ex rel. U.S. v. Healthfirst, Inc.*, 120 F. Supp. 3d 370 (S.D.N.Y. 2015).
[21] 668 F. Supp. 2d 146 (D.D.C. 2009).
[22] 637 F.3d 1047 (9th Cir. 2011).

In defining the line between permissible disclosure of documents for whistleblowing and misappropriation of *bona fide* employer property, *Erhart v. BofI Holding, Inc.*[23] held that the relator-employee had the burden "to justify why removal of the documents was reasonably necessary to support the allegations of wrongdoing."[24] The relator had to show a nexus between the confidential documents and the misconduct alleged. Ultimately, the court denied the motion for summary judgment because the employee carefully selected the information he disclosed to law enforcement and properly accessed all documents in performing his internal auditor job duties.

When the relator is an attorney, there are additional impediments to producing documents: attorney client-privilege and confidentiality. *Quest*, discussed above, held that attorney-relators could only disclose documents that state ethics law permitted, such as under the crime-fraud exception to privilege. Because the attorney-relator failed that test, the case was dismissed. In comparison, *Wadler v. Bio-Rad Labs., Inc*.[25] allowed a whistleblower case based on privileged documents to proceed, with a different interpretation of when professional ethics rules authorized disclosure.[26]

FCA and other Relators facing professional ethics challenges may raise a preemption defense where other law interferes with the federal interest in whistleblowing.[27] This involves more than a "balancing" of competing interests, as in *Quest*. When the disclosure is legal under the FCA, a strong argument can be made that professional ethics rules cannot restrict compliance with the FCA disclosure provisions.

Some employers have argued that the Computer Fraud and Abuse Act (CFAA) applies to an employee accessing her company computer with her own

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[23] No. 15-CV-02287-BAS-NLS, 2017 WL 588390 (S.D. Cal. Feb. 14, 2017).
[24] *Id*. at 12 (internal quotations omitted).
[25] 212 F. Supp. 3d 829 (N.D. Cal. 2016).
[26] See also *Fischman v. Mitsubishi Chem. Holdings Am., Inc.*, No. 18-CV-8188 (JMF), 2019 WL 3034866 (S.D.N.Y. July 11, 2019) (allowing attorney to use privileged documents to support a discrimination claim).
[27] In *Walder*, the court explicitly found California ethical rules to be preempted by Sarbanes-Oxley. The court relied on an SEC regulation, 17 C.F.R. § 205: "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."

password to gather evidence of fraud.[28] The weight of authority is that an employee authorized to access a company computer is not violating the law. However, using a colleague's or a revoked password is considered unauthorized and may be a criminal violation.[29]

Takeaway Principles Regarding Documents
● With respect to False Claims Act cases (and SEC, CFTC, IRS, and similar whistleblower statute cases), there are broad statutory rights to provide relevant documents to the government and use them in court.
● Whistleblowers should not provide company-protected documents to non-governmental entities.
● Whistleblowers should focus upon saving and protecting documents that they see in the normal course of their work. They only should use their own passwords on computers they are authorized to use.
● If the whistleblower case is an employment retaliation case (not a fraud disclosure case), the statutory and case law protections for collecting documentation of employer fraud are more limited. Plaintiffs in employment retaliation matters must abide by different rules in collecting documents for use in their private employment litigation.

8. Conclusion

The public interest is in preventing and prosecuting fraud, not punishing the whistleblower. Experienced practitioners, including government attorneys, concede that corporate fraudsters throwing spitballs at whistleblowers, calling them "disgruntled employees" with "purloined documents," is often a desperate last resort of the guilty. It is a rarely successful smokescreen. Aside from such sideshows, the reality is that successful False Claims Act cases and similar whistleblower bounty claims pivot on the actual law and facts of the corporate wrongdoing, not on the identity or document collection efforts of the employee insider "within the gates."

[28] *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012)(en banc).
[29] *United States v. Nosal*, 844 F.3d 1024 (9th Cir. 2016).

Corporations have an elegant solution to the purported problem of insiders and gatekeepers as whistleblowers and their use of company documents to prove the claims: do not engage in fraud.