New York County Lawyers' Association Issues Ethics Opinion Restricting Attorneys from Claiming Dodd-Frank Bounties

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One of the more well-publicized parts of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) is a whistleblower program that provides bounty payments to individuals who voluntarily provide original information leading to successful SEC enforcement actions. However, according to the New York County Lawyers’ Association (NYCLA) Ethics Opinion No. 746 (Oct. 7, 2013), available here, Dodd-Frank prohibits New York lawyers from collecting whistleblower bounties in exchange for disclosing confidential information about past or present clients because a whistleblower disclosure generally triggers a conflict between the lawyers' interests and those of their clients. As such, the New York Rules of Professional Conduct (N.Y. Rules) do not permit disclosure of confidential information under the Dodd-Frank whistleblower regulations, even when such disclosure is permissible under the SEC rules, if that disclosure does not fit within limited exceptions such as providing reasonably necessary information to rectify client fraud, crime, or false evidence. The NYCLA therefore concluded that New York lawyers "acting as attorneys on behalf of clients" presumptively may not ethically serve as whistleblowers under Dodd-Frank's bounty program. However, the ethics opinion would not apply to the extent that a corporate officer or compliance officer might happen to be a lawyer but is not necessarily representing a client in performing his or her duties. Similarly, in U.S. v. Fair Laboratory Practices Assocs., No. 11-CV-1565 (2d Cir. Oct. 25, 2013), the Second Circuit Court of Appeals held that a former general counsel violated his ethical duties under the N.Y. Rules when he participated in a qui tam action because he used confidential information to the disadvantage of his former employer. In sum, New York attorneys generally may not ethically use confidential information against the interests of their clients or employers, even when such disclosures are apparently authorized under whistleblower statutes.