

# Whistleblowers and the Relators' Bar

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## What is a qui tam lawsuit?

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- Pursuant to the federal False Claims Act 31 U.S.C § 3729 et seq. (and state ancillary statutes)
- Filed under seal
- Filed on behalf of the United States (or state if brought under a state statute)
- Served on the U.S. Attorney in the district where the case is brought and the U.S. Attorney General in Washington, DC.
- By law, it must remain under seal for at least 60 days. The government may extend the seal with court's permission.
- Government investigates (seeking to keep the case under the seal) and decides whether to "intervene" or "decline."
- New trend to file a "no decision" declination
- Relators' counsel must be prepared to litigate without the government

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## Why do people file qui tam lawsuits?

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Common motivators of clients who contact us seeking representation:

- Strong sense of right and wrong;
- Disenchanted with workplace;
- Financial incentive - 15-25% if the government “intervenes” and up to 30% for recoveries in “declined” cases

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## The Ideal Whistleblower

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- We represent whistleblowers all the way from the C-suite down to fairly low level employees. Ideal whistleblowers share three important characteristics.
- What are they?

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# 1. Firsthand Knowledge of the Scheme

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- We want our clients to know the details of how the scheme works and the financial incentives that drove the scheme.
- We would like to know how the scheme developed but it is not mandatory.
- A fairly low level employee may not know how the scheme came into fruition but can have information on how the scheme works.

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# 2. Access to Documents

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- A former employee who did not take the documents prior to leaving a company is much harder to work with than an employee who took relevant memos, PowerPoint presentations, e-mails, or claims data. It's not impossible to make a case without documents, but they are the exception.
- We do not want or ask for attorney-client privileged documents. If we get them inadvertently then we do not use them and would likely 1) inform the government that we have them, and 2) ask the court to receive them "in camera" while the case was pending.
- We use encrypted technology to receive documents electronically from our clients and are always happy to accept paper.

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### 3. Comfortable with the consequences of filing a qui tam lawsuit and confident in her claims

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- A successful whistleblower comes to terms with the consequences of filing a lawsuit and therefore does not withhold information from us.
- A successful whistleblower welcomes our skepticism and understands that our challenges of her theory/evidence is healthy and beneficial.

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### Other important characteristics our successful clients possess:

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- Credibility – background checks
- The ability to keep a secret
- Patience

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## How do we decide to take a case?

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### Strength of the proof

- Anecdotal evidence versus overarching evidence of a scheme
- Rogue facility versus proof of a system-wide scheme

### Review public data for confirmation if possible

- Is Defendant an outlier?

### Review HHS-OIG for opinions, audits and other related materials

### Search for cases with similar allegations or theories

### Potential damages

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## Once we have determined that the client has a viable claim we are willing to pursue, we do the following:

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- Explain the process in detail
- Discuss the professional consequence of becoming a relator
- Discuss the importance of the seal
- Discuss the possibility of bringing in a co-relator
- Get retained

Then we work as fast as we can to get the case ready and get on file as the goal is to be “first to file.” The challenge is to be thorough, accurate, and efficient.

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## Common reasons we decline to take a case:

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### Weak evidence

- No documents
- Can't corroborate or substantiate
- Not a clear violation

### Small damages

- Exceptions include patient safety, "slam dunks", or particularly interesting matters

### Materiality

Don't mesh well with the client

Unclean hands

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## Working with the government:

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After filing the complaint, a "relator's interview" is usually scheduled within two months.

We approach each case as a collaboration with the government. In some instances, the government puts us to work doing some of the following:

- Drafting Civil Investigative Demands (CIDs)
- Reviewing documents
- Identifying witnesses

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## Retaliation Against Whistleblowers

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- The False Claims Act prohibits an employer from taking any actions against a would-be whistleblower that are intended to punish or dissuade the whistleblower for engaging in protected conduct. 31 U.S.C § 3730(h)
- Retaliation claims belong to the whistleblower not the government, but can be included in the original qui tam lawsuit.
- Retaliation claims are an extra “hook” and we routinely use them.

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## How do whistleblower lawyers get compensated?

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Contingency – percentage of relator’s share

Statutory fees – secondary source of fees

Not for the faint of heart

- Cases take years
- Considerable time and resources are advanced

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## Our client's experience with compliance officials and the impact that has on their motivation and the litigation:

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Many of our clients would not have contacted us or filed a qui tam if:

1. They believed they could have reported the problems internally without fear of retaliation;
2. They hadn't in fact been retaliated against for speaking up; or
3. They could have had meaningful conversations with superiors about their concerns.

It is not uncommon for our clients to contact us, reluctantly, as a last resort.