

# Evaluating False Claims Act Cases

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# What is the False Claims Act?



# Best Practices for Qui Tam Relators:



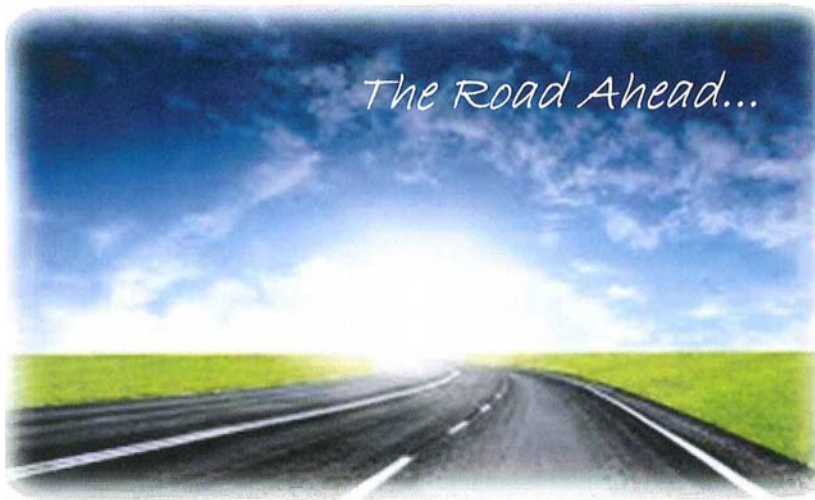
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# Introduction

1. Why you should contact the USAO *before* filing a complaint.
2. Considerations in drafting a complaint.
3. Post-filing tips: what you can do before and during the relator interview.

# Pre-Filing

Reach out to USAO to make a pre-filing disclosure.



# Pre-Filing

1. There could be a substantial reason you may not want to file that case. For example, we might review the facts and determine:
  - Even if the allegations are true, there would be no FCA violation (or the relevant agency might have a lax interpretation of the rule).
  - We don't have jurisdiction (in this District).
  - There isn't any loss to the Government, or not enough loss to justify expenditure of resources.
  - We might already have another *qui tam*.
  - There could be an advantageous reason to file in another District.

## Pre-Filing

\*We would much rather meet with you for a few hours before filing, than have to spend days, weeks, or months of time and money processing, conducting initial investigation, and declining a case that shouldn't have been brought or that we won't be able to intervene on.

# Pre-Filing

2. Your client might have criminal exposure. Let us know early on.

We can work with Criminal to try to get your client a limited debriefing/ immunity letter (“Queen for a day”)

We need to prepare a response for the inevitable credibility, etc., attack by defense counsel.



# Pre-Filing

3. Give us additional time to investigate.
  - It can take weeks to corral investigative agencies and any Plaintiff States; months to get preliminary data, contract files, etc.
  - Judges – in DC and elsewhere – increasingly giving shorter or no extensions.



- Pre-filing disclosure means we can start early and be much further along by the time the first 60 days is up.

# Pre-Filing

BUT:

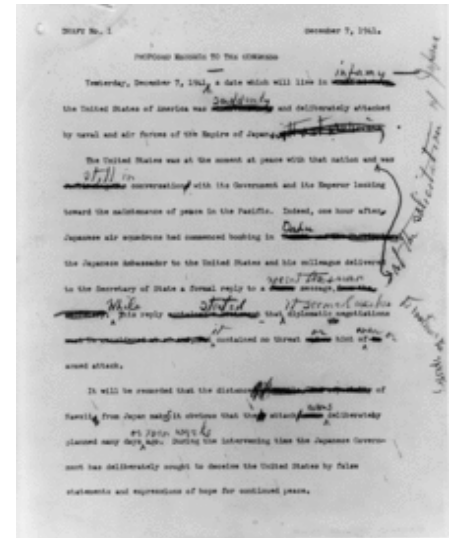
- First-to-file concerns.
- There *may* be a good-faith argument that § 3730(b)(2) preserves first-to-file status even if complaint isn't filed in court.
- However, note potential SOL concerns (§ 3731 allows relation-back of Government complaint so could be *disadvantageous* to delay filing).



# Drafting The Complaint

Just a few pointers for an experienced crowd:

- Make sure the complaint would survive 9(b).
- Are you ready to pursue if we decline?
- Choose defendants carefully. For example, there may be strategic reasons to name individuals, but many won't have the resources to pay a judgment.
- Proof-read it



# Post-Filing: Before The Relator Interview

- ✓ Collect **all** document's in relator's possession.
- ✓ Do a privilege review before tendering us the documents.
- ✓ Flag anything that may be trade secrets.
- ✓ Give us an index of the documents being produced. (Most AUSAs will want e-copies.)
- ✓ Give us non-redacted version of everything.
- ✓ Prepare full list of potential witnesses with contact information.
- ✓ Get us copy of relator resume or c.v.
- ✓ Remember, under § 3732(c) it is permissible to serve Plaintiff-States (better if you know assigned AUSA).

## Post-Filing: The Relator Interview

- We send a copy of each *qui tam* complaint to Criminal; DOJ and Office policy recommend joint intake so don't be surprised if Criminal AUSA is there (and don't read too much into it, either).
- Ditto the FBI.
- Disclose relevant background / potential impeachment material.
- Relators must also be forthright about their role in any fraud.
- Every AUSA handles the interview differently.
- We will explain process to relator ....

# Questions?



# Evaluating Cases From The Relator's Perspective

- Substance of Information – Tapes, emails
- Source of Information
- Corroboration of Information

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# Evaluating Cases From The Relator's Perspective

- Choice of Venue
- Choice of AUSA
- Choice of Investigative Agency



# Evaluating Cases From The Relator's Perspective

- First to File Issues
- 9 (b) Issues
- Public Disclosure Issues
- Original Source Issues

# Considerations in Defending Qui Tam Actions



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# Two Paths

- Two different paths present very different strategic considerations:
  - Government Does Intervene
  - Government Does Not Intervene
- The Government's decision presents defense attorneys with two separate sets of issues

# Defense Involvement Prior To Intervention Decision

- Typically learn of case due to CID or other investigative activity.

# Initial Steps

- Try to manage scope of investigation.
- Try to prevent intervention

# When the Government Decides To Intervene Beforehand

- Usual first step is to approach the government regarding a settlement.
  - What is the government willing to settle this for?
  - Can we get a global release of claims?
  - How is the settlement paid out over time?
  - Need to consider all criminal, civil, and administrative consequences of settlement

# Some Specific Issues When the Government Intervenes

- Ability to Pay Analysis
  - DOJ will consider any financial constraints identified by a provider in determining a fair, reasonable and feasible settlement between the parties.
  - This analysis proceeds through Eileen Zimmer, Senior Financial Analyst at DOJ. DOJ and Zimmer will analyze income statements, balance sheets, cash flow, and other financial indicators to determine whether the company qualifies for a reduced fine under the ability to pay analysis.
  - The process should be considered by any defense attorney representing a company with financial constraints.

# Some Specific Issues

## When the Government Intervenes

- Bankruptcy
  - A settlement with DOJ may result in bankruptcy.
  - Millennium Health. Millennium agreed to pay \$256m to resolve claims it misrepresented the need for procedures and offered gifts to doctors. As a result, the company filed for bankruptcy, turning control of the company over to its lenders.
  - HDL. HDL agreed to pay a \$50 million settlement with DOJ over allegations it improperly paid doctors for blood samples. The settlement, media attention, the resignation of the company's founder and CEO, and certain payer issues and changes in billing practices caused disruption to the business. As a result, HDL filed for bankruptcy. As part of the process, the company was sold to a Texas startup.



# Some Specific Issues

## When the Government Intervenes

- What about the individuals?
  - Yates Memo. The government has issued new guidance outlining the importance of individual accountability in DOJ prosecutions.
  - Indemnification Issues. When settling claims on behalf of the company, need to clarify the extent to which culpable individuals are indemnified by the company. Those individuals need to be included in any settlement

# Some Specific Issues

## When the Government Intervenes

- Handling the Whistleblower
  - Many clients want to unseal the complaint to find the identity of the relator – but keeping the complaint sealed protects against retaliation claims.
  - Dealing with both Government and Relator.
    - How to handle dealing with multiple parties?
  - Attorney Fees.
    - What is our role in sorting out fees?
    - Who is first to file?

# When the Government Doesn't Intervene

- May First Learn of Case When Complaint is Unsealed
- Non-Intervened Case Strategies
  - Judges know that most non-intervention cases are losers – but they are often very deferential to pro se or inexperienced qui tam litigators.
  - Filing an immediate Motion for Summary Judgment: even if you don't win, it can be a useful tool to educate the judge and can establish your credibility

# When the Government Doesn't Intervene

- Non-Intervened Case Strategies
  - Civil counterclaims helpful?
  - There may be potential criminal actions – theft of company property, proprietary information, etc. Can you convince a local prosecutor to bring charges?

# When the Government Doesn't Intervene

- Controlling Discovery
  - Controlling the discovery process is crucial.
  - Relators will often demand extensive discovery. Getting a tight, sequenced, delivery schedule can hamper relators in developing their cases.

**Conclusion**

Questions?