

# Whistleblower Guide

## Understanding Whistleblower or *Qui Tam* Cases

Many clients – and prospective clients – ask us how *qui tam* whistleblower cases work; how long they take; whether they are similar to other types of civil litigation; the role of the government; discovery; and other important, thoughtful questions. This guide is just an overview, and we are happy to discuss the process at greater length with you. But it is important to understand a few key things from the outset. And the most important is that being a whistleblower takes both courage and patience. It is a long process. But if you're successful, there can be significant financial rewards.

### A Few Terms

When you start to explore the possibility of being a whistleblower, you will hear certain terms used, sometimes interchangeably. The first is “**whistleblower**” itself. Almost anyone can be a whistleblower, but it often refers to an “insider” in a company who knows that fraudulent activities are taking place, doesn't like what is going on, and is willing to reveal the wrong-doing. The whistleblower is also referred to as the “**plaintiff**” – the person bringing the legal action – and as the “**relator**,” who relates the fraud to the government. (And thanks to the iPhone's autocorrect, the relator is often called a “realtor”.)

The type of legal action – and it is a civil lawsuit – is known as a “***qui tam***” case. That is a short version of a Latin phrase meaning “who sues on behalf of the king.” Technically, the whistleblower is bringing this legal action on behalf of the government which has been defrauded of money. (In medieval England, such actions were brought on behalf of the king.) Lastly, you will hear the term “**false claims act**.” There is a federal False Claims Act, dating from 1863, under which cases are brought when federal money is at stake. And there are almost identical laws in many states.

### Consultation meetings with an attorney

Most potential whistleblowers want to talk with an attorney before deciding whether to pursue a *qui tam* case. That is a wise decision. Within 24 hours of your contacting us – whether by phone, WhatsApp, email, the form on our website, or any other means, we'll respond and set up a meeting in-person or by Zoom. That conversation is confidential, free, and protected by the attorney-client privilege. During this meeting, we'll listen carefully and gather details about your potential case. It is an opportunity for you to tell your story; and for us to ask you to elaborate on what evidence you have of the alleged fraud. Our attorneys will assess the strength of your case and guide you through the legal process.

One meeting is likely not enough. We will want to have subsequent meetings, either in person or by video, to really learn, understand, and decide how best to pursue your case.

## Getting a Case Off the Ground

Once we have determined that you have a solid foundation to pursue a *qui tam* case, we will prepare three written documents. **These documents marshal the evidence you have and the story we need to tell, and will be sent – or submitted – to the government.** (Which government agency – and which person – depends on the nature of the case.) While separate, these three documents overlap in many ways. The three documents are:

### 1. Pre-Filing Letter

A case officially begins with the filing of a Complaint. But first, our attorney will prepare a document known as a Pre-Filing letter. This document is sent privately to the government and serves several purposes. It notifies the government of the whistleblower's intent to file a Complaint, summarizes key evidence that supports the alleged violations, and includes exhibits documenting the fraud.

We prepare a Pre-Filing Letter for several reasons. First, it alerts the government that a Complaint is soon to follow. Second, it allows us to preview your story. Sometimes the government attorney will respond to the Pre-Filing Letter with specific questions – which is often good feedback about what we need to clarify or expand upon in the Complaint itself. And third, it establishes your place as the source of this important information.

### 2. Complaint

Second, our attorneys will summarize the case into a formal document called the Complaint. This document typically does not have exhibits attached. The Complaint is filed in court, “under seal.” This means that the Complaint and its actual filing are kept secret – typically for several months and often a year – from the defendant, from the public, and from the media. This is very different from traditional civil litigation cases. Neither you nor your attorneys can talk to anyone about the case while it is under seal.

Unlike a normal complaint that is “served” on the defendants – telling them they are being sued – a sealed *qui tam* case is instead served on the government. This gives the government the opportunity to investigate the allegations in the **complaint. The seal – that is, the confidentiality – is normally maintained throughout the period of the government's investigation.**

### 3. Disclosure Statement

Like a Pre-Filing Letter, this document is submitted confidentially and directly to the government. It summarizes key evidence and includes all of the exhibits, often showing the evidence of wrongdoing. In other words, the disclosure statement provides the government with the necessary information to investigate and potentially “intervene” – or join – in a case.

## **The Government’s Investigation**

Once we file the complaint – and submit the disclosure statement – the government has the first opportunity to investigate the case while it is under seal. The government will typically do several things:

### **Government Review of the Allegations and Evidence**

The government conducts a thorough review of the whistleblower’s allegations. This review includes an assessment of the complaint and the evidence presented in the disclosure statement.

### **Extension of Seal Period**

Although a *qui tam* complaint is initially sealed for 60 days – allowing the government to investigate and decide whether to intervene in the case – this 60-day period is almost always extended to provide more time for a comprehensive evaluation. There is no standard time for how long the extended period may last. But in almost all situations where the whistleblower’s evidence is solid, the seal is extended for at least a year, and often for two or three years. As we said above, it is a long process. And potential whistleblowers need to be prepared for a slow pace.

### **Cooperation with Whistleblowers**

Government investigators may reach out to the whistleblower for additional information or clarification during the seal period. Such meetings or correspondence will be *confidential*. This collaboration between the government and the whistleblower strengthens the case and supports the government’s decision-making process about whether to intervene.

### **Formal Investigative Techniques**

The government has a range of tools that it uses to conduct its investigation. Some of these tools are familiar to civil litigants, but some are unique to the government. Typically, the government will utilize:

#### **1. Interviews**

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The government may interview individuals connected to the case. This includes current or former employees, executives, and other relevant parties. Interviews aim to elicit information that may not be apparent in documents or records.

## **2. Subpoenas (CIDs)**

The government may issue subpoenas to compel the production of documents or to secure the attendance of witnesses.

## **3. Depositions / Testimony**

This involves sworn, out-of-court oral testimony by witnesses or parties related to the fraud. Depositions allow the government to gather information under oath and gain insights into the alleged fraudulent activities.

## **4. Expert Analysis**

Bringing in experts such as forensic accountants or industry specialists can be crucial. Their expertise helps in analyzing complex financial transactions or industry-specific practices that may be central to the case.

## **The “Intervention” Decision**

After assessing the merits of the case, the government typically chooses from among four different courses of action:

### **1. Settlement**

If the case is convincing, the government will intervene and unseal the case, notify the defendants that they are the target of an investigation and *qui tam* lawsuit, and inform the defendants that the government is representing the interests of the United States. Facing the prospect of going to trial against the United States government, defendants often – but not always – agree to discuss possible settlement with the government.

Under the False Claims Act, a defendant may be liable for triple damages. That means that if the actual damages of the fraud are \$10 million, the government could collect \$30 million plus additional penalties. Settlement talks aim to reach an agreement – for typically lower damages and a commitment to stop the fraudulent behavior – without going to trial. Settlements can often result in double damages.

The whistleblower is typically awarded between 15% to 25% of the total recovery (which includes the damages multiplier).

## **2. Government Litigation**

If the defendant refuses to settle, the government may choose to intervene and move forward with the legal process by taking the case to trial. The government represents the United States and takes an active role in litigation. The whistleblower and the whistleblower's attorneys are typically kept in the loop, but the heavy lifting of the litigation is handled by the government.

Again, the government can recover up to triple damages, plus penalties. And the whistleblower's reward will range between 15% to 25% of the total recovery.

## **3. Independent (Declined) Litigation**

If the case is convincing but the government declines intervention, our attorneys can represent the interests of the United States in litigation. We too can recover up to triple damages. And in situations where the government declines to intervene and we pursue the litigation, the whistleblower's reward will increase to a range between 25% to 30% of the total recovery.

There are several reasons why the government may decline intervention, even if the case appears strong and well-supported:

- 1. Limited Damages or Low Potential Recovery**

If the potential damages or recoveries in a case are relatively small – compared to the resources required for prosecution – the government may decide not to intervene. The cost-effectiveness of pursuing a case is a significant consideration.

- 2. Public Policy Considerations**

The government could decide to decline if it does not feel that the issue area is sufficiently important. Or perhaps it is an important issue area, but the government recently pursued a case in this exact area.

## **4. Dismissal**

It is rare, but sometimes whistleblowers are just wrong. The government will not proceed with a fundamentally flawed case. And neither will we. If the case is based on an incorrect legal theory – or if the evidence that the whistleblower has is contradicted by stronger evidence that the defendant has given to the government during its investigation – the government will tell us. And the government will recommend to us that we dismiss the case. In fact, even if we disagree with the government's conclusion and want to pursue the case, the government still has the right to dismiss the case.

## Conclusion

We know that coming forward as a whistleblower isn't easy. It's complicated, it can be stressful, and it will take time. We have the skills, experience, and determination to stand by you, protect your rights, and help you get the best result.

We will listen to your story. We will support you and prepare you for what to expect. And we will help you put your best foot forward through every possible step of the process, including case development, government investigations, legal filings, litigation, or settlement.