Someone calls you to report fraud against the government—what does this mean?

A qui tam case is a case that is brought by a whistleblower (also called a “relator”) on behalf of the government for fraud that is committed against the government. Qui tam cases are brought under the federal False Claims Act, or various state false claims acts. Many states, including California and New York, have false claims act statutes that are modeled after the federal False Claims Act. If the case is successful, a whistleblower can receive a substantial reward.

The whistleblower typically receives 15-25% of the recovery if the government intervenes, and up to 30% of the recovery if the government does not intervene. In recent years, whistleblowers have achieved incredible recoveries on behalf of the government. The federal government recovered $3.8 billion under the False Claims Act in 2013—$2.9 billion of the recovery was from qui tam complaints. In 2013, whistleblowers received $345 million in rewards from the federal government. Whistleblowers have played an extremely important role in holding companies accountable for committing fraud against the government.

Although qui tam cases can be very rewarding for whistleblowers, true claims act statutes are full of traps and procedural quirks that can trip up unwary attorneys. For example, a whistleblower must file his or her case under seal and must serve the government with a disclosure statement of all the material evidence the relator has that supports the allegations in the complaint. Because of the many procedural hurdles involved, attorneys who have not filed qui tam cases before should partner with an experienced qui tam attorney before taking on their first qui tam case. Here are some tips and best practices for assessing a whistleblower case and getting a qui tam case on file:

1. Evaluate the Qui Tam Case
   One of the initial necessary steps in deciding whether a client has a qui tam case is to decide whether the fraud actually involves government funds, and how the target government program works. For instance, many qui tam cases involve Medicare and Medicaid claims. Medicare is a federally-funded health program, so any false claims to Medicare would be violations of the federal False Claims Act. Medicaid is a joint state and federal health program, and so false claims to Medicaid could involve violations of the federal False Claims Act, as well as various state false claims acts. There have also been successful cases involving government military contracts, government funds for school tuition, and government mortgage programs. To understand the alleged fraud, attorneys typically need to do a good deal of background research into the particular government program involved.

2. Address Whether Your Prospective Client Has Any Potential Criminal Liability
   Addressing whether your potential client has any potential criminal liability is an important step in conducting an initial case evaluation. It is important to ask the potential client early on what his or her role in the fraud was, particularly if he or she had a high-level position in the company committing fraud. If you have a concern about your client’s potential criminal liability, you should tell your client to consult with a criminal lawyer. Under the False Claims Act, your client could receive a reduced reward if he or she planned or initiated the fraud, and may receive nothing if he or she is convicted of a crime in connection with the fraud. In some cases, it may not be in you or your client’s best interest to bring a qui tam case if the potential client has a big risk of criminal exposure.

3. Gather Documents and Catalog Witnesses
   One of the requirements of the False Claims Act, and of most relevant state false claims acts, is that the relator must provide the government with all the material evidence in his or her possession and serve the government with this evidence along with the complaint. The relator will want to make sure that he or she has gathered together all relevant documents. This will also help the relator’s attorney with evaluating the case. The relator should also prepare a list of potential witnesses and evidence.

1 31 U.S.C. § 3730(d).
3 id.
of witnesses that the attorney can present to the government.

One thing to keep in mind with qui tam cases when it comes to considering contacting potential witnesses is the “first to file” rule. If the relator knows others who may be interested in filing a qui tam case, he or she should be careful about contacting them before filing the case because the other witnesses may attempt to get a case on file first and deny your client the recovery. If there is a witness that the relator feels can be trusted, the relator may consider entering into a co-relator agreement. In a co-relator agreement, your client and the witness would agree to divide any recovery and file a case together. If your client decides to bring in a co-relator, there are careful considerations that go into signing a co-relator agreement, and the attorney must let the relators decide how to split the recovery since the attorney would have a conflict of interest in recommending how the relators split the recovery.

4. Set Client Expectations
It is important in qui tam cases to set client expectations early. The relator should be informed that the case may take a long time to resolve and that the case must be filed under seal. Clients must also understand they are not allowed to talk about the case once it is sealed. It can be difficult for clients to avoid discussing the case, especially when a case may be sealed for a year or more.

Whistleblowers need to be prepared to assist the government’s investigation, but be patient if the government is unable to reveal very much information about the investigation while the case is sealed. Various government offices also take different approaches to working with relators and their counsel. Sometimes relators will be very active in an investigation. For instance, some relators will be asked to wear a wire and record conversations and sometimes plaintiff’s counsel can help the government with document review. At other times, the government attorneys will not share very much information at all with the relator while the case is under seal. Sometimes government attorneys do not reveal very much information because it is office policy. Other times there may be a parallel criminal investigation that prevents the government attorneys from revealing certain information.

Another concern that clients need to be aware of is that, although their names are initially not public record when the case is filed, it is very likely the fact that he or she filed a qui tam case will become public knowledge at some point. There are times that a court will allow a complaint to remain under seal if the relator voluntarily dismisses the allegations; however, there is no guarantee that a court would be willing to keep the seal even if the case is dismissed. When whistleblowers’ names are made public, it is possible they may have trouble finding another job in the same industry. Although not always the case, clients should be aware that staying in a particular industry may be challenging after filing a qui tam case.

5. Make a Pre-Filing Disclosure
Generally, before filing a complaint, it is best to make a pre-filing disclosure to the government of your client’s intent to file a case. The reason that you need to make a pre-filing disclosure statement is because of the public disclosure bar, which states that if there has been a public disclosure of the relator’s allegations, then the case will be dismissed unless the relator qualifies as an “original source.” To qualify as an original source, the relator must disclose the basis of the relator’s allegations to the government before filing the complaint.6 In many cases, it may seem unlikely that there have been any public disclosures of your relator’s allegations; however, it is best to make a pre-filing disclosure because there could be public disclosures in obscure publications that you or your relator may not know about.

Typically, attorneys provide the government a copy of the draft complaint as a pre-filing disclosure. Many firms also will give government attorneys a call to give them a brief overview of the case and to introduce themselves. It is a good idea to contact a government attorney over the phone, particularly if there are multiple federal districts where your case could be filed. For instance, if the United States Attorneys’ Office where you are contemplating filing your case has a very heavy caseload at the moment or is temporarily short-staffed, it may be a good idea to file your case in a different district if you have multiple venue options. If the government office has particular concerns about your case you can also address these concerns before you file the case.

6. File the Qui Tam Case
Filing qui tam cases is a complicated process that is unlike filing any other kind of case. Keep in mind that, when preparing a qui tam case, most false claims act statutes have a “first to file” bar. In other words, the first person to file the case is the only person who can receive a reward. Because of the first to file rule, if there are other potential relators it is important to file your client’s case as soon as possible.

Importantly, under the federal False Claims Act and state false claims act statutes, qui tam cases must be filed under seal, initially, for 60 days while the government decides whether it wants to intervene in the case.7 If the government decides not to intervene in the case, then relators have the option to pursue the case without the government. Cases in which the government intervenes are statistically much more likely to succeed. The government often moves to extend the seal period, since it frequently takes the government much more than 60 days to conduct its investigation. For example, the Northern District of California usually moves to extend the seal to six months. When filing a case under seal it is important to understand the specific procedure of the court where you are filing. The caption of the complaint must be written such that the parties’ names are under seal and the filing should not be placed on PACER. Some federal courts require that you file a motion to seal the case. Other courts will file the case under seal without a motion as long as the complaint is marked as sealed. It is best to file the complaint yourself rather than have a courier or messenger service file the case so that if the clerk has any questions about your authority for filing the case under seal you can explain it to the clerk. A good practice is to contact the clerk of the court where you

\footnotesize{\textsuperscript{6} 31 U.S.C. § 3730(b)(5).}  
\footnotesize{\textsuperscript{7} 31 U.S.C. § 3730(e).}  
\footnotesize{\textsuperscript{8} Id.}  
\footnotesize{\textsuperscript{9} 31 U.S.C. § 3730(b).}
are filing ahead of time to find out how the court expects the complaint to be filed.

After filing the case, you must serve the government a copy of the filed complaint and a copy of a disclosure statement with all of the relators’ material evidence. There are specific procedures that also must be followed when serving a government entity. The government must be served with a copy of the complaint by certified mail. In a federal False Claims Act case you need to serve both the United States Attorneys’ Office in the district where you are filing and the Attorney General in Washington, DC. If there are state false claims act allegations, it is important to check the particular state statutes for any particular rules on serving the complaint. Once you have filed the case, the government will typically set up a time where the attorneys and interested agencies can interview your client.

7. **Consider Unique Challenges: Representing Clients Who Are Past or Current Employees of the Defendant**

   Frequently, whistleblowers are current or past employees of the defendant who is committing the fraud against the government. If the client is a past employee, then it is important to evaluate whether the client has a potential retaliation claim. The federal False Claims Act and various state whistleblower statutes protect whistleblowers from retaliation. Typically, the best strategy is to file the whistleblower’s retaliation claim in the same complaint as the qui tam suit so that the whistleblower is not faced with the dilemma of trying to litigate a retaliation claim without revealing the existence of a qui tam claim.

   Current employees of a company can pose some unique challenges for a qui tam case. Whistleblowers should be aware that they could be retaliated against if their employer discovers that they have filed a claim or if the whistleblower continues to complain about the employer’s fraud. Although there are legal protections from retaliation, it can still be emotionally and financially difficult to be a whistleblower and a current employee. Whistleblowers usually consider finding another job as soon as possible once they decide that they want to file a qui tam case, as they may not want to stay in a job after the company finds out that they have filed a claim against the company when the case is unsealed.

   Whistleblowers may also be placed in a difficult situation if the company attempts to interview them about the fraud when the case is still under seal. It is common that the government will issue subpoenas to a defendant while a qui tam case is still under seal, so it is important that clients know that they cannot reveal the existence of the case while they are still employed at the company.

**Conclusion**

The qui tam provisions under the federal and state false claims act statutes continue to provide an important and effective means of rooting out fraud against the government. There are special procedures that are necessary before considering filing a case, which we have addressed in the six steps above, but in-depth research and experience in filing qui tam cases and representing whistleblowers cannot be overstated. We recommend reaching out to a qui tam attorney if you hear from a whistleblower alleging fraud against the government.