THE RELATOR'S ROLE IN FALSE CLAIMS ACT INVESTIGATIONS: TOWARDS A NEW PARADIGM[1]

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If you've got a problem, I don't care what it is
If you need a hand, I can assure you this
I can help, I've got two strong arms, I can help
It would sure do me good to do you good,
Let me help

Billy Swan *I Can Help*

Overview

Relators and their counsel have the obligation, ability, and incentive to be active and responsible contributors to the investigation and ultimate success of False Claims Act *qui tam* cases. Until recently, the traditional model was for the Department of Justice (DOJ) (and other law enforcement agencies) to conduct the investigations, with relator and counsel on the periphery (often for years) until an intervention or declination decision was made. In the last few years, a new paradigm has begun to emerge, in which relators and their counsel are, in some cases, more actively involved in the investigations, and even step up to conduct the litigation of the unsealed case while DOJ continues its investigation. The evolution and growth of this new paradigm will be instrumental to the success of the FCA for the remainder of this decade.

The number and complexity of FCA cases has been growing steadily (as have the recoveries), with 2012 shaping up to produce another bumper crop of recoveries.[2] Despite this success, some judges, as well as some members of Congress, the relator's bar, and even the defense bar, have been pushing for shorter seal periods and faster investigations and intervention decisions, albeit perhaps with different motives.[3] While

[1] While this paper focuses on the United States Department of Justice and the federal False Claims Act, much of the content applies as well to state governments seeking to investigate cases under their respective False Claims Acts.

[2] *See* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf (statistics 1987-2011); DOJ Press Release, December 19, 2011 http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html; "Why is Qui Tam Litigation Often so Difficult to Resolve?", Marc S. Raspanti and Meredith S. Auten, AHLA Connections September 2011 (summarizing the current *qui tam* environment and caseload).

[3] *See, e.g.*, http://www.mainjustice.com/2011/07/27/length-of-fraud-probes-frustrating-congress-judges-and-attorneys/ (July 28, 2011) (note that this article understates the amount recovered under the FCA); "Why is Qui Tam Litigation Often so Difficult to Resolve?", Marc S. Raspanti and Meredith S. Auten, AHLA Connections September 2011 (summarizing the current *qui tam* environment and noting that a "sea change" is underway with the "old paradigm" of how *qui tam* cases are handled and litigated "in flux"); "False Claims Act Investigations: Time for a New Approach?", Skadden, Arps, Slate, Meagher & Flom LLP Memorandum (May 12, 2011) (advocating that companies push for earlier unsealing and litigation while acknowledging DOJ's resource limitations). *See also* fn. 7, *infra* (examples of *qui tam* cases where the court has lifted the seal before the investigation is finished and relator has proceeded to litigate).

many FCA defendants can bring vast resources (and institutional knowledge of the facts and the personnel) to their defense, DOJ faces serious budget and resource constraints, and is often understaffed and underfunded in comparison to its opponents.

DOJ has indicated that it too is interested in and committed to moving FCA *qui tam* cases faster, but it must balance that against its obligations to the public, the truth, and to justice. While many *qui tam* cases can be disposed of with minimal resources, the same is not true for many of the filed cases: investigation of complex white collar crimes is a time consuming and expensive proposition if done right, requiring the successful coordination of multiple law enforcement personnel and the civil and criminal sides of DOJ. Encouraging government counsel to expedite review and investigation is admirable, but expecting and accepting greater contributions from relators and their counsel is a key component to meeting this goal. Such an approach would, on a case by case basis, add resources and expertise to strapped government offices, and move cases to intervention, declination, and settlement faster.

Having investigated and litigated *qui tam* cases for over twenty-years, both as a government prosecutor (who worked on parallel investigations with the criminal side) and a relator's counsel, I have some appreciation of the impulses, motivations, reservations, limitations, responsibilities, and challenges on both sides of this unique public private partnership that is a *qui tam* case. Change is never easy, nor does it happen overnight, but the time is ripe for a fresh look at our respective roles. As in any relationship, trust and credibility are the coin of the realm; they must be earned and treasured. So too is constructive communication, with the presumption (until proven otherwise), that everyone is trying their best to be a good team player in difficult and often stressful situations where their interests are aligned, though not always perfectly.

In the twenty-five years since the 1986 amendments to the FCA, the statute has proven to be one of the government's most effective law enforcement tools, returning over $30 billion to the government in civil recoveries (and much more if one counts the fines and other remedies in parallel criminal cases and the state share of Medicaid recoveries). *See* fn. 2, *supra*. Over that time, two-thirds of the recoveries have come in *qui tam* suits initiated by relators, *id.*, and in recent (and coming) years that percentage will likely be even higher. The last ten to fifteen years has seen a large increase in the number and complexity of the cases, *id.*, and with the recent financial crises one can expect this trend to continue.[4] The models that worked to make the FCA so effective for the last twenty-five years cannot be expected to fit this time of increasing cases and complexity and decreasing government budgets and resources.

Relators and DOJ should redouble their efforts to evolve a new paradigm—one with an "early and often" approach—coordinating early in the investigation on roles and assignments, and revisiting that list often, with a common goal of coordinating and cooperating to move these cases forward in a timely and appropriate fashion. To make

[4] The DOJ "FRAUD STATISTICS—OTHER (NON-HHS, NON-DOD)" referenced in fn. 2, *supra*, show a sharp increase in *qui tams* starting around 2007; presumably many of these relate to the financial and mortgage loan/housing crisis. *See also* cases cited in fn. 8, *infra*.

this partnership most effective, relators and their counsel must be vigilant in contributing in a *responsible* way, remembering that DOJ presumptively represents the primary real party in interest, that the interests of the United States and the relator may at times diverge, *see* fn. 5, *infra*, and that inappropriate behavior can slow down or even taint the investigation and undermine the credibility of the relator and his counsel.

The following discussion explores some of the issues that arise with respect to the role of the relator (including his or her counsel) in this evolving paradigm, including: (1) relator's obligations; (2) relator's incentive; (3) the need for the relator's involvement; and (4) the relator's ability to contribute, listing many concrete examples.

The Relator has an Obligation to Make a Responsible Contribution

The relator is *obligated* to assist in the investigation by the language of the False Claims Act, by Congress' intent to form an effective public private partnership, and by the nature of the relator's role in a *qui tam* suit. For starters, the FCA requires the relator to serve on the government a copy of the [filed] complaint "and a written disclosure of substantially all material evidence and information the person possesses … ." 31 U.S.C. § 3730 (b)(2). (Sometimes the relator also provides some sort of prefiling disclosure to the government).

The relator's obligations continue after filing of the *qui tam* action not only because the relator is a party to the lawsuit, but also because he ideally is a key witness for the government. The relator brings valuable information, expertise, knowledge, insight and access (particularly as a current employee). Because of this, counsel must be sure to explore relator's background and motives for any issues that could potentially harm his or her credibility and usefulness to DOJ as a witness; and DOJ should be made aware of any such issues early in the case.

As a representative of the government, standing in the shoes of government as a private attorney general, relator and counsel are obligated to act in the public interest and further the *qui tam* action. This places relator's counsel in the unusual situation (for a lawyer) of representing one client (the relator) yet also having obligations to another; the specter of a potential conflict of interest always exists since the interests of the government and the relator may not always be perfectly aligned.[5] Relator's counsel must not only meet relator's statutory obligations, but also be mindful of the obligation not to threaten or prejudice the government as the primary real party in interest. Ideally, relator's counsel is ready and able to meet the balancing act presented by the practicalities of the first to file and public disclosure bars of the FCA, the obligation to conduct and present to the government as thorough an investigation, complaint, and

[5] For example, the relator and the government can have conflicting interests over relator's share, *see* discussion *infra*, and over the interpretation of certain FCA jurisdictional bars such as first to file and public disclosure. In addition, Congress gave DOJ the power to dismiss or settle cases over the relator's objection, *see* 31 U.S.C. § 3730 (c)(2)(A)-(B).

disclosure as possible, the need to protect the relator from retaliation but not "tip off" the defendant, and the value of protecting the government's interests.

In preparing the complaint and disclosure statement, and in providing continuing assistance and disclosures post filing, relator and counsel must bear in mind various constitutional, statutory, contractual, and ethical restrictions on gathering and/or sharing evidence, and the parameters of the relator's role versus that of the government. Otherwise, the government's investigation may be tainted, delayed, and/or otherwise prejudiced. At the same time, there is a wealth of ways relator and counsel can contribute, as discussed below.

The Relator has the Incentive to Contribute

The relator is *incentivized* to play a meaningful *and* responsible role in the investigation of the case. This includes not by filing a well-developed case, but also by engaging in a continuing effort to assist the government in "making the case".

First, the likelihood of the misconduct being complained of being rectified are much higher, as is the likelihood of a financial recovery, if the government intervenes in the case. But that only happens in about 20%-25% of the cases filed. *See* fn. 2, *supra*. To reach that decision DOJ needs to corroborate the facts through its investigation, and develop and be able to prove a viable legal theory of liability and damages. Relator and counsel have every incentive to influence as much as possible the investigation, and the ultimate decision (as does the defendant, of course).

Second, in the event there is a successful outcome and a recovery (whether after an intervention or a declination), the extent of the relator's contribution is a key determinant of the percentage share of the recovery the relator receives under 31 U.S.C. § 3730(d). This is true based on the text and legislative history of the FCA, guidelines DOJ has issued, and the case law, as discussed next.

FCA Statutory Text

The likelihood that relator or counsel will recover *any* money for their time and efforts hinges in large part on whether the government is able to corroborate the facts and the legal theories, and be prepared to intervene. And, how much money they may recover of the "proceeds of the action or settlement of the claim" depends on "the extent to which the person substantially contributed to the prosecution of the action." 31 U.S.C. § 3730 (d).

FCA Legislative History

In the 1986 amendments to the FCA, Congress enhanced the incentive for relators to come forward and take the risk of whistleblowing. In doing so, both the Senate and the House spoke to the issue of relator's share.

For example, Representative Berman, one of the co-sponsors of the 1986 FCA amendments, expressed his view that:

> If the Government comes into the case, the person is guaranteed a minimum of 15% of the recovery even if that person does nothing more than file the action in federal court. This is in the nature of a 'finder's fee' and is provided to develop incentives for people to bring the information forward. The person need do no more than this to secure an entitlement to a minimum 15%... In those cases where the person carefully develops all the facts and supporting documentation necessary to make the case and presents it in a thorough and detailed fashion to the Justice Department as required by law, and where the person continues to play an active and constructive role in the litigation that leads ultimately to a successful recovery to the United States, the Court should award a percentage *substantially above* 15% and up to 25%.

132 Cong. Rec. H 9382 (Oct. 7, 1986) (Statement of Rep. Berman) (emphasis added).

The Senate Report on those amendments cites three factors that should be taken into account in determining relator's share: the significance of the information provided; the contribution of the person bringing the action to the results obtained; and whether the information which formed the basis for the suit was known to the government. *See* S. Report No. 99-345, at 28, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5293.

DOJ's Relator's Share Guidelines

Typically relator's share of any recovery is negotiated and agreed on between the relator and the DOJ. To that end, DOJ published Relator's Share Guidelines in 1996 for its attorneys to use in such situations. *See* 11 False Claims Act and Qui Tam Quarterly Review at 17-19 (October 1997). These Guidelines refer to the legislative history and recognize that 15% should be considered the floor or minimum to be awarded. The Guidelines list a variety of factors to be considered for a possible *increase* in the share percentage and for a possible *decrease* in the percentage share. Several of these factors involve the contribution of relator and relator's counsel.[6]

[6] "Increasing" factors include: "The relator provided extensive, first-hand details of the fraud to the Government" (no. 6); "The relator provided substantial assistance during the investigation and/or pretrial phases of the case" (no. 8); and "The relator's counsel provided substantial assistance to the Government" (no. 10). "Decreasing" factors include: "The relator, or relator's counsel, did not provide any help after filing the complaint, hampered the Government's efforts in developing the case, or unreasonably opposed the Government's position in litigation" (no. 8); and "The case required a substantial effort by the Government to develop the facts to win the lawsuit" (no. 9).

Case Law

There are times, however, when relator and DOJ cannot agree on an appropriate relator's share. In those instances, the courts have looked to the FCA text and history and to the DOJ Guidelines for direction; however, the courts also recognize that they "possess great discretion in making this award because of the complexities of many of the cases, the great variation in their factual settings, and the desire of the Congress, in enacting the legislation, to reward the relators for their contribution to the success of the case." *United States ex rel. Shea v. Verizon Communications, Inc*., WL 592047 (D.D.C. 2012) *and cases cited* (awarding 20% relator's share, and listing examples of ways the relator and counsel contributed). *See also The False Claims Act: Fraud Against the Government, Claire M. Sylvia (West 2nd ed 2010) at 437 and cases cited.*

The Relator Needs to be Actively Involved in the Investigation

The government and the public *need* the relator and counsel to be active contributors throughout to move cases to faster and better resolutions. Not only is the number and complexity of FCA cases pending and being filed greater, but there is increasing interest by and pressure from the courts, Congress, the defense bar, the relator's bar, and within DOJ to move cases faster. *See* discussion *supra*. Many courts are shortening the seal periods and unsealing cases before DOJ has finished its investigation and is ready to make an intervention (or not) decision, with relator's counsel litigating such cases while the DOJ investigation continues.[7]

At the same time, the government is pressed for resources as budget problems persist and an ever growing numbers of cases are filed and frauds exposed; for example, the financial crisis alone has added another layer of cases and complexity.[8] Leveraging relators' time, money, and expertise increases the likelihood of a faster path to better informed intervention (or declination) decisions.

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[7] *See, e.g., United States ex rel.* [redacted] *v. Amgen, Inc. et al.*, Case 1:06-cv-10972-WGY (USDC D. Mass.) (when court lifted the seal in 2009 before the U.S. investigation was completed, the U.S. filed a notice of not intervening at this time while it continued its civil and criminal investigations; several states intervened and the states and relator proceeded to litigate the case for some two years, resulting in four published court opinions. With trial scheduled to begin in October 2011, Amgen announced that month an agreement in principle to settle criminal and civil investigations and resolve pending whistleblower lawsuits); *United States ex rel. Hutcheson v. Blackstone Medical, Inc*., Case 1:06-cv-11771-WGY (USDC D. Mass.) (when court lifted seal before the U.S. investigation was completed, the U.S. filed a notice of not intervening at this time and relator proceeded to litigate the case for some three years, resulting in two published court opinions; the parties—including the U.S.—recently reached a settlement in principle). *See also* "Why is Qui Tam Litigation Often so Difficult to Resolve?", Raspanti and Auten, AHLA Connections September 2011 (summarizing the current *qui tam* environment, noting that a "sea change" is underway with the "old paradigm" of how *qui tam* cases are handled and litigated, and that "Consortiums of seasoned counsel are banding together to provide relators with expertise and litigation stamina to survive a vigorous defense.").

[8] *See, e.g.*, fn. 4, *supra*; *United States ex rel. Hunt v. Citigroup, Inc., et al*., Case 1:11-cv-05473-VM (USDC S.D.N.Y.); *United States ex rel. Mackler v. Bank of America, et al*., Case 1:11-cv-03270-SLT-RLM (USDC E.D.N.Y.); *United States ex rel. Lagow v. Countrywide Financial Corp, et al*., Case 1:09-cv-02040-RJD-JMA (USDC E.D.N.Y.), all settled as part of the global settlement among the United States, 49 state Attorneys General and certain banks this winter/spring.

Relator's counsel and the government need only use their imaginations and consider the wide array of tasks large defense firms will be undertaking to come up with a laundry list of ways relator and his or her counsel can help. A number of examples are discussed below.

The Relator has the Ability to Make Substantial Contributions

There are many ways in which relator and his counsel have the *ability* to make valuable contributions to the investigation, both pre and post filing. As noted, the ideal relator will have valuable knowledge of the subject matter and the defendant. Relator's counsel is (ideally) ready and able to meet the balancing act presented by the practicalities of the first to file bar of the FCA, the need to conduct and present to the government as thorough an investigation, complaint, and disclosure as possible (but also avoid "tipping off" the defendant, especially if the relator is a current employee and subject to retaliation), and the obligation not to threaten or prejudice the government as the primary real party in interest, for example, by running afoul of ethical rules or statutory or constitutional provisions.

Over the last few years, there have been many instances of relators undertaking greater roles in investigations, and performing many of the types of tasks listed below. The exact role and tasks may vary from case to case and depend in part on whether there is a parallel criminal component to the investigation, and how much trust and credibility there is among the private and public players. (Cases involving relator share, cited *supra*, contain many examples of ways relators have contributed). Certainly cooperation and coordination are needed, for example, to ensure that government privileges are preserved (e.g., law enforcement/investigative and work product), and that statutory, ethical, and constitutional restrictions are met, as discussed below. But hopefully the old adage of "where there is a will, there is a way" will hold true.

Ground Rules

To be of most assistance to the government, relator and counsel must behave in a responsible and competent manner at all times. Issues of trust and control will inevitably arise (or at least be bubbling under the surface), and the lines of communication must be kept open and respectful. Relator's counsel should expect that before any information is shared with relator by the government, the relator and counsel will be required to execute a DOJ Relator Sharing Agreement; in some instances, a Confidentiality and Protective Order may be required.

Relator and counsel must also become well-versed in the notion that a number of ethical rules, statutes, and constitutional provisions affect what they may do, especially once they are standing in the shoes of the government, viewed as a government agent, and receiving information from the government. For example, there are professional ethics rules governing contact with represented persons, handling of privileged and confidential information (e.g., attorney client communications), and not using the threat

of criminal action to leverage a civil result,[9] a myriad of statutes governing the disclosure and handling of information,[10] constitutional provisions such as the Fourth Amendment prohibition on unreasonable searches and seizures, and DOJ policies and practices such as not speaking to the press or confirming or denying the existence of an investigation (which the court seal will also implicate).

Relator's counsel (and the government) must take all necessary steps to protect communications between them from later discovery by the defendant should the case be litigated. In addition to the usual privileges of attorney-client and attorney work-product, communications may be entitled to protection, for example, under the joint-prosecution privilege and the common-legal-interest doctrine. *See, e.g.*, *United States ex rel. Woodard v. DaVita, Inc.*, Civil Action No. 1:05-CV-00227-MAC (Dkt. No. 224, January 30, 2012) *and cases cited* (protecting from discovery by defendant all communications between relator and the government except for media reports and public reports, and the preexisting documents accompanying the disclosure statement; also protecting from discovery communications between counsel for relators with a common legal interest).

Ways to Assist the Government Investigation

Preserving and Producing Evidence

Typically a relator will have access to various types of evidence and information that he or she should preserve and produce to the government with the initial disclosure statement, as well as on an ongoing basis (although sometimes a relator is fired and "escorted out" of the office with no chance to gather or preserve information). The relator should do his or her best to be thorough and to preserve authenticity and chain of custody. In an effort to be complete, the relator should scour the garage, the basement, storage lockers, and closets for copies of materials that he or she may have packed away; and the relator and counsel should preserve electronic and other evidence.

Examples of the types of evidence to preserve include: documents (electronic and hard copies, originals and copies, different iterations); voicemails; emails (and attachments and each string); text messages; social media posts; photographs; tape recordings; and demonstrative evidence (for example, a block of the allegedly defective concrete, the out of spec widget, or the "bullet proof" vest).

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[9] *E.g.*, Model Rules of Professional Conduct Nos. 4.2-4.4, 8.4.

[10] For example, there are laws regarding: classified information and government property (18 U.S.C. § 793 and 18 U.S.C. § 641); trade secrets (18 U.S.C. §§ 1831, *et seq.*); grand jury material (Fed. R. Crim P. Rule 6(e)); privacy (5 U.S.C. § 552a); individually identifiable health information (42 U.S.C. §§ 1301, *et seq.* -- The Health Insurance Portability and Accountability Act of 1996 known as HIPAA--and 45 C.F.R.Part 160, *et seq.*); monitoring and recording of phone calls and conversations (18 U.S.C. §§ 2510, *et seq.*, and summary of state laws at http://www.rcfp.org/can-we-tape); substance and alcohol abuse counseling records (*see* 42 U.S.C. § 290dd.2(g) and 42 C.F.R. §§ 2.4 *et seq.*); drug samples or drug products (Food, Drug and Cosmetic Act and Prescription Drug Marketing Act); and information obtained pursuant to an FCA CID (31 U.S.C. § 3733(a)(1).

Particularly helpful to planning the investigation are: current and past organizational chart(s); current and past personnel directories or rosters (with contact information, including home); and details about the computer system and document retention policies.

Failure to preserve evidence could lead to a later claim by defendant that the relator has prejudiced the company's ability to defend itself (although with most documents there should be redundant copies). It also slows down the government's case.

It is quite common for a relator to be under an employment contract or personnel policy that prohibits the retaining, copying or sharing of documents or other material outside the company. Violating such a policy could be justifiable grounds for termination, clouding any potential retaliation claim the relator may have (*see, e.g.*, 31 U.S.C. § 3730(h)). The better practice may be for relator to "take" or preserve only those documents to which she would have access in the normal course of her position. Once the relator begins to "snoop" around the desks and drawers and computers of co-workers, there is a much higher chance a court will find a breach of the agreement that is not justified by the public policy purpose of whistleblowing. Indeed, after filing, the government will caution relator and counsel that no such activities are to occur and the relator is not a part of the investigatory team (although also now effectively considered an agent of the government).

There will be instances where the relator must carefully analyze whether certain evidence can be shared with the government and with what precautions. *See* discussion *supra* and fns. 9-10. Making the "right call" can be critical to the case: relator's counsel does not want to "taint" or compromise the government team or slow them down (for example, while the government puts a taint team in place). The best approach is usually to let the government know relator is in possession of such information, but is withholding it pending discussion with DOJ on what approach to follow. This paper is not designed to explore this issue in any depth, but as discussed above a number of statutes (federal and state), constitutional rights, and rules regarding privilege, ethics, and professional conduct rules may be relevant to relator's counsel's analysis. The most common examples are materials potentially protected by the attorney-client privilege and medical records, billing records, or other health information protected under federal and state laws. *See* fn. 10, *supra*.

A relator may learn that a company (or an individual) is about to destroy documents—either legitimately under its document retention policy (which may be shorter than the FCA statute of limitations) or with bad motives. An urgent call to the government is in order for guidance and possible action.

Obtaining Documentary Evidence Through the Government

Many investigations kick off with a request for documents through a subpoena or similar device. The sooner the relator can help the government issue this request the better, as defendants typically take a long time to respond.

The government has many ways to obtain documentary evidence. These include: grand jury subpoenas; inspector general (IG) subpoenas; Authorized Investigative Demands under HIPAA (AIDs); subpoenas pursuant to The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (" FIRREA"), 12 U.S.C. §§ 3331, *et seq.*;[11] FCA civil investigative demands (CIDs); and search warrants.

Relator and counsel can help with drafting, and accelerate response time by identifying, for example, key custodians, key search terms (e.g., for electronic data), and specific types of documents. Also, in the case of a search warrant, relator can help explain physical location and layout of the premises to be searched, timing of execution, location of key personnel's offices, etc.

Reviewing Documents

Relator and counsel should carefully review the documents being produced by relator to the government, index them, and screen for privilege, etc. as discussed above. Also helpful are chronologies tied to the documents, Excel spreadsheets by author, subject matter, etc., and other ways to sort. Ideally, the documents should be bates numbered.

In addition, in some cases, the government will give relator access to the documents produced to the government by third parties, including the defendant, and ask relator to assist in the review and analysis. As discussed above, this will be subject to a Relator Sharing Agreement and in certain instances to protective order, and the terms of the authorizing authority (i.e. the FCA CID provision for documents obtained by CID). Relator's counsel may need to invest in discovery management or other software to handle the government's request; relator should be sure to coordinate with the government on which software is preferable for the task.

Locating and Identifying Potential Witnesses

Relator's ability to provide such information can be key to quick, covert activity by the government. It can also be important to overt action by the government such as issuing subpoenas or CIDs, prioritizing production by custodian, and reviewing

[11] Violations of FIRREA may also implicate or form the basis for FCA violations. *See, e.g.,* fn. 8, *supra*.; *U.S. ex rel. Belli v. Americus Mortgage Corporation f/k/a Allied Home Mortgage Capital Corporation*, Case 1:11-cv-05443-VM (USDC SDNY), Amended Complaint in Intervention of the United States (Dkt. No. 17) and DOJ press release dated November 1, 2011; *United States and 49 States v. Bank of America Corporation, et al.*, Case 1:12-cv-00361-RMC (Complaint March 12, 2012 USDC D.C.).

documents, as already discussed. Organizational charts and personnel charts/directories are very helpful. Relators may also have access to private investigators who can locate former employees and see if they may be helpful and willing to speak with the government (or sometimes with relator prefiling).

Obtaining and Assessing Witness Testimony

There are many ways of obtaining witness testimony or statements. Some are available to the relator and the government, while others are available only to the government and may or may not be allowed to be shared with the relator.

Prefiling the relator and counsel can attempt to contact and interview certain former employees or third parties for corroboration, and depending on the jurisdiction and the circumstances, the relator may also attempt to record or tape a conversation with a current or former employee (but see discussion and fn. 10, *supra*). These conversations, interviews, or tapings should be transcribed and provided to the government pursuant to their directions.

In addition, it is possible that a relator who is cooperating with the government prefiling could be asked to wear a wire or monitor phone calls. Later, the government may need relator's assistance in transcribing the tapes or understanding some of the material obtained (e.g., to what an acronym or abbreviation or nickname might refer).

Post filing the government will take the lead on interviewing witnesses, and relator should not attempt to do so absent government concurrence. The government may obtain testimony, etc., either voluntarily or under compulsion, pursuant to a subpoena (*e.g*., a grand jury subpoena or an IG administrative subpoena some of which allow for depositions) or a CID deposition.

Certain testimony cannot be shared with relator (*e.g*., grand jury or proffer pursuant to grand jury subpoena) while other information may be shared in DOJ's discretion, *see* 31 U.S.C. § 3733(a)(1) (allowing CID information to be shared "with any *qui tam* relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation"). Relator can be very helpful in providing insight and background on witnesses and offering suggestions on lines of questioning, or particular documents or events to ask the witness about. Afterwards, the relator can help assess the witness' cooperation and truthfulness.

Again, as in the prefiling context, *supra*, relator may also be asked post filing to monitor and record conversations, "wear a wire", etc. And again the government may need assistance with transcribing or interpreting the material obtained. At any point, DOJ may begin to treat the relator as a confidential informant with the attendant paper work, requirements, etc. Post filing the relator should not seek to record or monitor conversations without DOJ approval.

Drafting CID Interrogatories and Analyzing Answers

As with subpoenas or CID requests for production of documents, relator can assist with drafting interrogatories to be served under the FCA CID provision. Such answers may be shared with the relator, *see* 31 U.S.C. § 3733(a)(1), who can provide feedback on adequacy of responses and further lines of inquiry.

Gathering Routine "Intelligence" About Defendant

The relator who is a current employee and "on the ground" can provide particularly helpful real time inside information. Sometimes a former employee who still has "friends" at the defendant can also be helpful. In any event, relator and counsel must be vigilant about privilege and confidentiality issues, especially post filing.

Examples of inside/internal information a relator may have access to are: activities (e.g., a clinical study to be stopped, a key meeting); corporate or organizational changes, mergers, acquisitions, etc; personnel moves (e.g., former employee may be easier to interview); system changes (e.g., a new computer system for call notes, the risk of loss of documents); internal investigation steps; document retention/destruction; ongoing monitoring of email, conversations, etc.; and spending or diverting of money rendering an ability to pay defense more likely (and maybe requiring the government to take action to obtain security such as a letter of credit).

In addition, there is routine public information any relator (current or former employee, competitor, etc.) can monitor and keep the government informed about as the case progresses. Examples include: SEC filings (showing *e.g.*, compensation, organization, and personnel changes, and other litigation); media and press; other litigation involving the defendant—*e.g.*, through Pacer (lawsuits by former employees or competitors); and the company's website (for updates, etc.).

Doing Legal Research and Drafting

In any case, there is any number of issues to be researched. The basics include theories of recovery, liability, and damages. Beyond that, the issues will vary by case, but some examples include the drug compendia and the underlying studies (e.g., in off-label cases), congressional or FDA hearings, public reports (e.g., government audit reports), and privilege issues.

Commenting on Proposed Rules/Regulations

Sometimes, an agency proposes regulations on a subject arguably relevant to the investigation. Industry and the defense bar can be counted on to provide comments. Consideration should be given to relator (and others) filing comments as well.

Retaining Expert Witnesses and Consultants

DOJ can often look within the government for expertise on program issues in the first instance. However, if relator can locate, vet, and retain outside, independent expert witnesses or consultants, it can be very helpful; it will save the government time and money, and it will lend credibility to the government's discussions with the defendant when the time comes.

Such witnesses may be experts on the subject matter of the case or the industry at issue who can assist with liability (medical, billing or coding, FDA approval, engineering, real estate/mortgage loans) or developing damages models (statistician) or ability to pay analysis (forensic accountant).

Outside experts will be more convincing to defendants than a government employee/program person will be as the government and the defendant begin the intervention and settlement dance. This is particularly so since the defendant will likely have experts (internal or outside/independent) in the background or front and center of their presentations and negotiations. And, the government's expert witnesses will also be able to provide "intelligence" on the defendants' experts and help the government rebut their opinions.

Preparing, Making, and Rebutting Presentations

Relator can assist the government in preparing presentations (*e.g.*, Powerpoints) to defendant on liability and damages. Relator can also critique the arguments and facts defendants will present in their "white papers."

Litigating Pending the Conclusion of the Investigation

Several times in the last few years, a court has unsealed a *qui tam* case before the government is ready to make an intervention decision, and the relator has proceeded to litigate the case while the investigation continues; sometimes DOJ's delay is because there is an ongoing parallel criminal investigation, or because the civil investigation involves multiple *qui tam* cases, not just the one being unsealed, and sometimes the government is just not finished. S*ee, e.g.*, fn. 7, *supra*.

While litigation can open the government up to discovery, it can also provide relator (and hence the government) with additional documents, depositions, and the power of the court to compel discovery and force the production of material the defendant (or third parties) has been withholding on privilege grounds. Litigation can flesh out and test the legal theories starting with motions to dismiss and oppositions. As the evidence develops some witnesses may invoke the Fifth Amendment, expert witnesses will produce reports, be deposed, and be tested through motions to strike or exclude, damages models will emerge, and defenses and trial strategies will be tested through motions *in limine* and proposed jury instructions and charge conferences.

Ultimately, the deadline of a trial looms. The relator pursuing litigation while DOJ pursues and finishes its investigation can be a very effective and successful model. *See, e.g.*, fn. 7, *supra*.

Conclusion

By strengthening the FCA and its *qui tam* provision in 1986, Congress intended to create a unique and powerful public private partnership to fight fraud and recover money for the treasury. By any measure, the FCA has been very successful over the last twenty-five years. Ensuring its continued success requires relators and DOJ to adapt to new circumstances and continue to explore and utilize ways to coordinate for faster and better results.

The government has limited time, money, and resources. Cases are growing in numbers and complexity. Seal periods are shrinking as some courts get restless. The relator has the obligation to contribute and the incentive to "earn" his or her relator's share by making substantial and responsible contributions. The defendant has a head start with deep institutional knowledge, control over employees, access to documents, and the resources to mount a formidable defense.

To best serve the public and fulfill the intent and promise of the FCA, relators and the government should redouble their efforts to mold a new paradigm for investigating FCA cases together.