

## Whistleblowers

### Who Are They, Why Do They Blow the Whistle, & What Makes a Good Case

2019 HCCA/SCCE BOARD AUDIT COMMITTEE  
COMPLIANCE CONFERENCE  
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## Main Topics of Discussion

- **Whistleblowers:**
  - Who are they?
  - Why do they file Qui Tam cases under the False Claims Act?
  - Evaluating whistleblower cases.
- **Can organizations manage whistleblower risk?**
- **Tips for compliance program effectiveness**

## Impact of FCA Whistleblowers

- Since 1986, DOJ has recovered \$42.5 Billion in FCA suits filed by qui tam whistleblowers
- In last 4 years, whistleblowers have filed 2,664 new FCA lawsuits:
  - 2018 – 645 new matters
  - 2017 – 674 new matters
  - 2016 – 706 new matters
  - 2015 – 639 new matters
- In last 4 years, whistleblowers have received \$1.7 Billion in relator share awards (\$1.47 billion of which came from intervened cases)

## Who are Whistleblowers

- **Your Employees!**
  - Current and Former
- **Competitors**
- **Customers / Patients**
- **Others, including: Consultants, Accountants, Physicians, Nurses**
- **Data miners**
- **FCA permits any “person” to be a whistleblower**

## Only Federal or State Payers?

- **California and Illinois** have also passed legislation that allows whistleblowers to pursue actions to recover funds defrauded from **private health insurers**
- **California** Insurance Fraud Prevention Act (“CIFPA” codified at Cal. Insur. Code § 1871 *et seq.* and;
- **Illinois** Insurance Claims Fraud Prevention Act (“ICFPA”) codified at 740 ILCS 92/1 *et seq*
- These statutes recognize that **the same fraud schemes** that harm the public and give rise to FCA liability that often defraud private insurance payers

## Why do People Become Whistleblowers?

- To “right” a “wrong” (Billing, Patient Safety, other)
- Their concerns are ignored by defendant
- Fear of losing license/being seen as complicit
- Treated poorly by defendant
- No feedback after internal reporting
  - 84% of whistleblowers first reported concern internally (2013 NBE Survey)
  - 82% of those reported concerns to their supervisor
  - Most whistleblowers were fired by their employer
- Other reasons -- money

## Jacqueline Bloink's Whistleblower Story

- In 2014, Carondelet Health Network settled a qui tam suit filed by Jacqueline Bloink by paying the government \$35 million – the largest recovery in Arizona history.
- Jacqueline worked for Carondelet as a corporate responsibility officer between 2010 and 2011.

## What Whistleblower Counsel Look For in Evaluating Cases

- **Ideal Whistleblower:**
  - Detailed knowledge of the fraud (but, does not have to be an insider)
  - Evidence supporting the allegations (How was that evidence obtained?)
  - Credibility
  - Ability to explain the fraud & assist government
  - Bringing the case for the “right” reasons
  - Not personally involved in fraud
  - Stomach to “go the distance” through a lengthy process

## What Whistleblower Counsel Look For in Evaluating Cases

- Clear FCA violation & strong evidence
- What are the potential factual/legal defenses
- Did the relator report internally?
- Must be harm to the government
- Amount at stake, and collectability
- Cases which are important to government
  - Are there safety risks at issue

## Potential Roadblocks

- **First to file: has someone else already filed a case?**
- **Is there a public disclosure concern?**
  - E.g. other cases, government reports, news media
- **Was the relator involved in the fraud?**
  - Potential for little or no recovery under the FCA
  - Relator may need advice from criminal counsel
- **Did relator sign separation agreement?**

## How Government Considers Whistleblower Cases

- Government must evaluate all cases
- Strength of FCA violation (clear guidance)
- Strong evidence / examples of fraud
- Similar cases / repeat offenders
- Contracting agency's view
- Safety issue / potential harm
- Amount at issue
- Resources to pursue

## How Organizations Can Prevent Whistleblowers

- Strong compliance programs
  - Demonstrate importance of program inside and outside organization
  - Be more than a hotline number
  - Clear lines of communication
- Data mining of your own data
- Voluntary repayments
- Follow up with complainants
- Collaboration within organization
- Independent investigations
- Prompt and adequate closure

## How Organizations Can Prevent Whistleblowers

- **Take every complaint seriously:** Even difficult people can raise valid issues
- **Keep open lines of communication (Soft Skills)**
- **Guard against retaliation**
- **Build relationships with regulators and enforcers**

## Questions?

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