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Discovery in False Claims Act cases when the government declines to intervene

» Unique secrecy rules make False Claims Act suits particularly hard to defend against, but defendants often overlook discovery rights that exist when the government doesn't intervene.

» Courts often find that materials from a relator to his/her attorney are not privileged (not meant to be kept confidential) and are not attorney work product (because they are largely factual).

» Relators' privilege and work product claims can be tested through requests for *in camera* review and even non-discoverable materials can be sought in redacted form.

» Defendants should seek relators' disclosure statements or even government case materials.

» Bold efforts to acquire discoverable materials can help defendants facing False Act Claims overcome their starting disadvantage—and sometimes even turn the tables.

A *qui tam* action under the False Claims Act presents specific discovery challenges for defendants. The relator's complaint is sealed—and kept that way for an average of 13 months—so a defendant likely won't learn of it before the evidence begins to stale. Meanwhile, the relator has ample time, one-sidedly, to gather evidence and build a case, then to lobby the government to intervene in his/her corner. Beyond the required written complaint and disclosure statement, the relator may also give the government supplementary evidence and communications, all with an eye to maximizing official interest in the case.

But this disadvantage can be counteracted with the right initiative and arguments, for certain documents and communications can be discoverable by the defense, sometimes more than you might think. This article offers practical advice to defendants pursuing discovery in *qui tam* actions after the government declares its lack of interest. Attorney–client privilege and the work-product protection have their limits, even in the False Claims Act context—limits that loom large when the government declines to intervene and which leave discovery ripe for the taking.

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Scope of confidentiality in non-intervention cases

On filing a *qui tam* action, a relator must provide the government with a copy of the complaint and written disclosure of substantially all material evidence and information the person possesses regarding the allegations. The complaint is to remain under seal for

at least 60 days, during which time the government evaluates whether to intervene. During this period (often extended) the defendant has no access to it. Sometimes the complaint is partially unsealed, so that the government can urge the defendant to settle at a stage in the proceeding where the defendant isn't yet entitled to discovery.

The False Claims Act may put the complaint under seal, but it does not (as one court wrote[1]) provide a "cloak of confidentiality" to a relator's disclosures to the government. On the contrary, when the government declines to intervene, there are important limitations imposed by courts as to both attorney–client privilege and work product. You should seize on them.

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Attorney–client privilege

Many defendants are unaware that factual disclosures made by a plaintiff to the government generally are not protected by attorney–client privilege, because these disclosures are almost never made for the purpose of securing legal advice. To the contrary, they are made for purposes of conveying factual allegations and are intended to support a suit on which the plaintiff hopes to recover.[2] Don't let a weak claim of privilege impede your discovery.

True, the privilege normally broken by exposing attorney–client confidences to a third party can be saved by a notable exception in the FCA context: a relator's disclosures to the government have been shielded by courts under the "joint-prosecution privilege." But this is really just the common-interest privilege for plaintiffs and requires compliance with the rigors of attorney–client privilege generally. This privilege (like the better-known joint-defense privilege) allows plaintiffs who "share a common interest in litigation" to "communicate with their respective attorneys and with each other to more effectively prosecute… their claims."[3]

District courts are not entirely clear about how to apply joint-prosecution privilege in *qui tam* actions in which the government does not intervene. Some hold that the privilege survives a decision not to intervene, because even a non-intervening government retains significant power as a "real party in interest": the U.S. is a named plaintiff, it has the right to be served with copies of pleadings and depositions, and it may stay plaintiff's discovery when that discovery hinders another government case. But other courts hold that giving information to the government *waives* privilege, never bothering to discuss joint-prosecution privilege (assuming it was asserted).[4]

Attorney work product

With work product, there are generally two types of documents provided by a relator to the government: (1) material evidence and information recited from the relator to his counsel, and (2) counsel's opinions of the case. Even if a defendant is forced to concede the non-discoverability of the latter, there

still is an opportunity to vigorously seek the former as being non-privileged under Fed. R. Civ. P. 26(b)(1).

Courts often conclude that communications between the relator's counsel and a non-intervening government entity that contain the mental impressions, conclusions, opinions, or legal theories of relator's counsel are a no-go, interesting as it might be to have opposing counsel's assessment of the case.[5] But courts also recognize that under Fed. R. Civ. P. 26(b)(3)(A)(ii) even protected work product can be discoverable if the defendant can show a substantial need for the materials and an inability to obtain their equivalent without undue hardship. For instance, one court found that a defendant qualified for the exception when a plaintiff had not yet provided discovery sufficient to reveal the factual basis for the complaint, trial was approaching, and the disclosure statement represented "the best summary of these facts currently available."[6]

Defendants should also always look for a waiver by the relator. As with work product generally, the protection is waived if the plaintiff discloses the materials in a manner that makes it likely that an opponent in the litigation would gain access to the documents. Finally, at least one court rejected a claim to work-product protection because, as it explained, materials submitted to the government pursuant to § 3730(b)(2) "*should* not contain opinions of an attorney."[7]

Courts generally do not distinguish between pre- and post-*qui tam* communications, suggesting that these communications enjoy similar privilege or work-product protections regardless of whether they come before or after filing.

Discoverability of specific materials

A *qui tam* defendant can seek materials in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Evidence, meaning that a defendant can seek communications, interview notes, presentations, or other materials given to the government in introducing the matter or during the government's evaluation of it, so long as those materials are relevant to a defense and not protected by attorney–client privilege or work-product protection.

Before filing, the relator may contact the government to gauge its interest in the case. Courts generally do not distinguish between pre- and post-*qui tam* communications, suggesting that these communications enjoy similar privilege or work-product protections regardless of whether they come before or after filing. In *U.S. ex rel. Burroughs v. Denardi Corp*, the court found the "defendants' arguments that the joint-prosecution privilege applies only when the government chooses to intervene, is equally unavailing.… Defendants merely indicate authority for the proposition that when the government does not intervene in the action, its rights are more limited than when it does intervene in the action"[8]

In earlier stages, the relator and government are typically more closely aligned than the time when the relator finally urges the government to intervene. Don't be deterred by this. Even if a joint-prosecution privilege arises, pre-complaint

communications likely consist of facts and evidence, which ought to be discoverable.

Relator's disclosure statement
The written disclosure statement contains substantially all the relator's evidence about his/her allegations. It is not filed or generally available to the defendant. But this crucial document can be sought in discovery. Once the demand is made, courts often review the documents *in camera* (i.e., in the judge's private chambers) to determine what is privileged or work product. Generally, however, if the material in the statement is a recitation of "material evidence and information," with the relator's attorney simply acting as a conduit between relator and government, the disclosure statement should be deemed neither privileged nor attorney work product.

Once the demand is made, courts often review the documents *in camera* (i.e., in the judge's private chambers) to determine what is privileged or work product.

Relators' communications to the government are rarely attorney–client privileged, because (as noted) they are typically not made to secure legal advice; they are made to convey facts to aid in the government's decision to intervene in the suit.[9] Of course, attorney work-product protection (covering all materials prepared by attorneys in anticipation of litigation) is broader than attorney–client privilege. Even a summary of facts by an attorney can be work product. And work product protection is waived only if the materials are voluntarily disclosed to third persons where it is likely that an adversary or potential adversary will obtain it.

This is where defendants should concentrate their fire. Seek *in camera review.* One court had no difficulty in finding a disclosure statement was not attorney–client privileged and, after chambers review, found that the statement "contains no mental impressions, conclusions, opinions, or legal theories of an attorney."[10] Another court concluded that a disclosure statement was discoverable "by its very nature," as material evidence—and the defendant got it referred to a magistrate judge over relator counsel's claim that she "included her analysis and opinions of the case" in it.[11] Work product can be broad; one court found work product in a narrative of facts and evidence, since the very selection, organization, and characterization of facts can well reveal an attorney's thinking.[12] But courts might be persuaded to order opinion and analysis that are interlarded with factual materials to be redacted.

Government's case materials
A *qui tam* complaint typically triggers an investigation by the government as it decides whether or not to intervene. In the process, the government may produce its own case materials, including background research, notes from calls and presentations, and chronologies, as well as a case memorandum that discusses facts and law, and any efforts to advise the defendant of the nature of the potential claims, any response provided by the defendant, and settlement efforts to that point.

It is true that these materials could be considered attorney work product. It is also true that non-intervening government officials often seek to avoid becoming a party for purposes of discovery. And it is true, finally, that courts often disallow attempts to seek discovery about the relator's materials from

the government. But there can be potential exceptions and opportunities to expand the discovery rights of False Claims Act defendants, particularly if the discovery involves mere factual summaries by the relator, or non-attorneys acting without legal direction (e.g., investigating agents). It's always something to explore.

Conclusion

A False Claims Act defendant has the keenest interest in getting hold of the relator's disclosures to the government when the government declines to intervene. Such discovery—which a plaintiff often must oppose on his/her own—is essential where a whistleblower and the government took steps to collect evidence and interview witnesses for months as the defendant remained in the dark about specific allegations. But despair not: Once discovery becomes a right, the defendant, if the circumstances recommend it, should seize on the chance to acquire materials. They are well worth the effort when it comes to sizing up the allegations, issuing subpoenas and noticing depositions, developing motions to dismiss or for summary judgment, and finally crafting a defense for trial. You'll find doors opening in unexpected places. ✳

1. *United States ex rel. Stone v. Rockwell Int'l Corp.*, 144 F.R.D. 396, 398 (D. Colo. 1992). Available at http://bit.ly/stone-rockwell
2. *Stone*., 144 F.R.D. at 399; *U.S. ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 683 (S.D. Cal. 1996). Available at http://bit.ly/burroughs-Denardi
3. *In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129, 902 F.2d 244, 249 (4th Cir. 1990).*
4. *See, e.g., United States ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, 558 (C.D. Cal. 2003) Available at http://bit.ly/Bagley-trw; *Burroughs*, 167 F.R.D. at 683; *Stone*, 144 F.R.D. at 399-400.
5. *Burroughs*, 167 F.R.D. at 682-85.
6. *Stone*, 144 F.R.D. at 401; *cf. Burroughs*, 167 F.R.D. at 684
7. *United States ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830, 838-39 (N.D. Ill. 1993). Available at http://bit.ly/leagle-decision
8. *See, e.g., Burroughs*, 167 F.R.D. at 686 n.3.
9. *Stone*, 144 F.R.D. at 399-400.
10. *Stone*, 144 F.R.D. at 401.
11. *Grand ex rel. U.S. v. Northrop Corp.*, 811 F. Supp. 333, 337 (S.D. Ohio 1992). Available at http://bit.ly/grand-northrop
12. *Bagley*, 212 F.R.D. at 563.

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