

Buying Silence: Confidentiality Mandates & Whistleblowing Incentives

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Outline

- I. Whistleblowing to Protect the Public Interest
- II. Financial Incentives
- III. Tension between financial incentives and
 - A. Confidentiality
 - B. Professional role
- IV. Analysis

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I. Whistleblowing to Protect the Public Interest

- A. Internal Whistleblowing
 - Enable Organization to Self-Correct
- B. External Whistleblowing
 - Facilitate Civil / Criminal Law Enforcement

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Ways the law encourages whistleblowing:

- 1 – Create mechanisms (e.g., tip lines)
- 2 – Prohibit retaliation
- 3 – Compensate for retaliation
- 4 – Provide financial incentives

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II. Financial Incentives for Whistleblowers

- Drug forfeiture bounties
- IRS tax fraud program
- **False Claims Act (FCA)**
 - claims against federal & state governments
- **Dodd-Frank - SEC – securities fraud**

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False Claims Act:

Liability if filed false claims for payment from government
- Government contractors / healthcare

Private party (*qui tam* “relator”) files civil suit on behalf of government

15-30% of award + attorney fees

> \$3 billion to *qui tam* relators since 1986

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Dodd-Frank (SEC)

Individual gives SEC information re: violation of securities laws

10-30% of “monetary sanctions”* over \$1 million

*“monetary sanctions” =
penalties, disgorgement, interest & “monies deposited into a disgorgement fund”

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Dodd-Frank (SEC)

Enacted in 2010

SEC issued regulations in 2011

Similar to FCA

- Whistleblower awards mandatory
- But agency retains complete control

No awards issued yet

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III. Tension between financial incentives &

- A. confidentiality
- B. professional role

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III.A.

Financial incentives vs. Confidentiality obligations

Sources of confidentiality mandate:

1. Contractual obligations
2. Professional standards - lawyers:

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1. Contractual obligations of confidentiality

- Upon employment
- As part of a termination agreement

Harmonizing:

Whistleblowing > Contractual confidentiality obligation

- except for Wikileaks-like data dumps

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2. Professional confidentiality - lawyers:

Exceptions to confidentiality:

If client used lawyer's services in crime / fraud:

- To mitigate / rectify financial injury

For organizational clients:

- If legal violation likely result in substantial injury to the organization -- after going up the ladder

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Harmonizing Whistleblowing Incentives with Professional Confidential Standards:

False Claims Act

- 4 cases involving in-house lawyers

Dodd-Frank

- SEC regulations

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FCA Cases Involving In-House Lawyers

US ex rel Doe v. X Corp. – ED VA 1994

US ex rel Repko v. Guthrie Clinic – MD PA – 2008, 2011

US ex rel Fair Laboratory Practices Associates v. Quest Diagnostics – SDNY 2011

Bury v. Community Hospital – Ca5thApp-2002

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FCA Cases Involving In-House Lawyers

All involve former clients

Lawyers not *per se* barred

Depends on state confidentiality exception

EDVA:

Attorneys “should be encouraged” to use *qui tam* to expose fraud if state law permits such disclosure

SDNY:

successive COI standard applies

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Dodd Frank – SEC regulations

Excludes Lawyer-client information

unless a confidentiality exception applies from:

- state professional rule
- SEC regulation
- other law

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III.B

Financial incentives vs. professional role

1. Lawyers’ non-confidentiality standards
2. Government employees
3. Compliance function

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III.B

Financial incentives vs. professional role

1. Lawyers’ non-confidentiality standards:
 - a. Lawyers’ role in general
 - no per se bar
 - b. Successive conflicts of interest (SDNY case)
 - c. Loyalty to current clients

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III.B
Financial incentives vs. professional role

2. Government employees

- a. FCA
- b. Dodd Frank

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III.B
Financial incentives vs. professional role

2. Government employees

- a. FCA
 - DOJ's position:
 - No government employees
 - Courts:
 - No government employees *who are required to disclose fraud*
 - ("voluntariness" requirement)

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III.B
Financial incentives vs. professional role

2. Government employees

- b. Dodd Frank excludes employees of:
 - DOJ
 - PCAOB
 - "appropriate regulatory agency"
 - "law enforcement agency"
 - "self-regulatory organizations"

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III.B
Financial incentives vs. professional role

3. Compliance function

Dodd Frank regulations exclude:

- Those whose principal duties are compliance / internal audit
- Those associated with firm hired to conduct investigation / required audit
- High-level insiders who learn information through compliance process

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III. Financial Incentives vs. Confidentiality & Professional Role:

Confidentiality:
Deference to pre-defined exceptions in professional rules, which reflect societal decisions about public interest disclosures

Professional role:
Don't interfere with internal compliance function

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IV. Analysis

Are financial incentives different from other ways of promoting whistleblowing?
Yes – personal conflict of interest

Conclusion

If confidentiality exception applies, lawyers may take advantage of financial incentives regarding *former clients' fraud / crimes.*

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Questions ?

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