

The Enemy (or Hero) Within

PRACTICAL STEPS TO KEEP (POTENTIAL) WHISTLEBLOWERS FROM
LOSING CONFIDENCE IN YOUR INTERNAL COMPLIANCE PROCESS
(AND CALLING A WHISTLEBLOWER LAWYER)

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Tim McCormack



Tim is a whistleblower lawyer and author of TheWhistleblower.com blog. He has extensive experience representing whistleblowers in “qui tam” lawsuits brought under the Federal and various state False Claims Acts. He is a recognized expert and frequent author and speaker on issues related to health care reimbursement and coding, provider contracting, commercial and government managed care programs, the Stark Law and Anti-Kickback Statute, and the use of data and analytics in the detection and remediation of fraud. He was a pioneer in identifying fraud in the Medicare Managed Care / Medicare Advantage program involving upcoding of patient diagnoses in the risk adjustment / risk scoring program.

Tim’s clients have helped the United States and various state governments recover more than \$550 million through the use of the False Claims Act and other qui tam programs. One of his clients blew the whistle on Alpharma Inc., leading to a \$42.5 million settlement to resolve allegations that the company paid kickbacks to physicians to boost sales of its prescription painkiller, Kadian.

While his primary practice focus is on representing whistleblowers, he also counsels physician practices and related entities on compliance issues, especially issues related to the Anti-Kickback Statute and Stark Law.

Robert Trusiak



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Robert Trusiak represents hospital and physician clients on regulatory, statutory, and enforcement issues. He separately provides complete health care consulting services for physician providers, hospitals, research labs, skilled nursing facilities, pharmaceutical companies, and durable medical equipment entities and counsels clients on a number of state and federal health care regulatory matters, including health care reform, fraud and abuse, the Stark Law, Privacy Law, and health care compliance issues.

Previously, Robert served as Chief Compliance Officer at a large health care provider, caring for over one million patients annually, where he managed the internal Compliance team, litigation teams of outside counsel, litigated administrative and contractual actions, ensured regulatory and statutory compliance, and resolved matters involving accrediting and enforcement entities as well as individual matters.

Robert also served as Assistant United States Attorney, where he prosecuted civil and criminal cases on behalf of the United States of America involving health care fraud, Department of Defense fraud, HUD fraud, grant fraud, VA fraud, ERISA violations, Tax fraud, Securities fraud, Customs violations, USDA violations, and all forms of procurement fraud.

Robert is also an Adjunct Professor, University at Buffalo, SUNY, teaching a graduate level course entitled Health Care Fraud and Abuse.

Objectives:
Begin with
the end in
mind



Common whistleblower
questions and concerns of
whistleblowers



Practical solutions consistent
with your business goals



Bigger, Bolder Possibilities

Common Questions

1. What feedback can (and will) you give me about the progress and results of your investigation?
2. Will I get in trouble if I had some involvement?
3. Who is my point of contact and what role do they play in the investigation?
4. Will you take steps to protect my identity during the process?

What feedback can (and will) you give me about the progress and results of your investigation?

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- ▶ WB often feel ignored / stonewalled
- ▶ Often WB do not understand why you can't share details of your investigation
- ▶ Better to explain that up front to manage expectations
- ▶ Explain that transparency does not mean full disclosure

What feedback can (and will) you give me about the progress and results of your investigation?

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- ▶ Give guidance. I can't tell you:
 - ▶ XXX to protect employee privacy;
 - ▶ YYY (e.g., who else we talk to) to protect you and other WB'ers;
 - ▶ ZZZ to protect our attorney client privilege and legal strategies.
- ▶ Consider providing information about your investigative process, a rough idea of the timeline, and what (if anything) you can tell them at the end

Will I get in trouble if I had some involvement?

- ▶ Establish a policy and explain it re: will they get in trouble for reporting the problem
 - ▶ What if they had some involvement
 - ▶ Likely someone who knows had some involvement
 - ▶ Primary form of retaliation is to try to throw the WB under the bus
 - ▶ That is a big fear anyway
 - ▶ Ensure WB will get, at least, leniency – and won't get any punishment that is worse than what all others get (and that planners / initiators get worst)
 - ▶ What does your policy say about that? Communicate that to potential WB'ers

Will I get in trouble if I had some involvement?

- ▶ Before you reflexively get legalistic – is that how you'd handle it if a non-WB employee did the same thing?
- ▶ Have you enforced that rule that way before?
- ▶ Think of Deflate Gate (Depends on your view of Patriots' past conduct – but what if they were a whistleblower?)

Who is my point of contact and what role do they play in the investigation?

- ▶ Is their role to explain process and help me share information more effectively
- ▶ Are they the adjudicator? Will they have an interest in justifying the outcome?
- ▶ Were they involved in the misconduct?
- ▶ Recommend: Have a different person responsible for answering the WB's questions about process versus doing the investigation

Will you take steps to protect my identity during the process?

- ▶ The obvious
- ▶ But also, take suggestions from WB on how to approach the investigation so as not to immediately out them
- ▶ Before you say “outrageous” – many government agencies will do this

Additional Practical Strategies

1. Consider mediation
2. Risks of zero tolerance policy
3. Policy to encourage colleagues to support whistleblowers

Consider mediation

- ▶ Fact is, whistleblowing is stressful
- ▶ It is very natural for the whole process to be contentious – for the whistleblower and for those on the receiving end of the criticism
- ▶ Lawyers important part of process, outside counsel often plays essential role
- ▶ But reality is, they are typically scary. And even if don't mean to be, are often intimidating (especially former criminal AUSAs, just their style)
- ▶ I once had a client storm out of an interview; I had been about to write a note to the effect of “she loves you” but the client's perception, because of the way the questions were being asked, was that the attorney was being dismissive, critical and hadn't done her homework
- ▶ Mediation makes sense if negotiating severance
- ▶ But also consider a mediated process for just the whistleblowing itself – try to limit escalation of frustration

Risk of “zero tolerance” policy

- ▶ Is it really a zero tolerance policy
- ▶ Selective enforcement
- ▶ Severe consequences lead to high incentive to obfuscate
- ▶ Can be a cudgel

Policy that encourages others to support whistleblowers

- ▶ Beyond general “snitches get stitches” attitude
- ▶ Lack of support from colleagues
- ▶ Isolation
- ▶ How to enforce? Ethical policy of Institute of Chemical Engineers about duty to stand up for colleague

Think Bigger

1. Corporate compliance (whistleblower) reward programs
2. Public recognition of compliance (whistleblower) contributions

Do you offer rewards to whistleblowers?

- ▶ Money would be nice
- ▶ But also boost to performance eval or recognized as employee of the month
- ▶ Respecting confidentiality – How the SEC does it.
- ▶ When and why to use: symbolic rewards v. sizable, substantive rewards



Do you publicize action against retaliators and appreciation for problems fixed by whistleblowers?

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- ▶ Praise whistleblowers
- ▶ But also, within confines of confidentiality – can you publicize situation where a manager was fired or demoted or put on a PIP because of whistleblower retaliation

Questions?



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