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Learning from a diverse clinical background

an interview with **Lori Strauss**

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EXECUTIVE EDITORS: Gerry Zack, CCEP, CEO, HCCA
gerry.zack@corporatecompliance.org

NEWS AND STORY EDITOR/ADVERTISING: Margaret R. Dragon
781.593.4924, margaret.dragon@corporatecompliance.org

COPY EDITOR: Patricia Mees, CHC, CCEP, 888.580.8373
patricia.mees@corporatecompliance.org

DESIGN & LAYOUT: Pete Swanson, 888.580.8373
pete.swanson@corporatecompliance.org

PROOFREADER: Bill Anholzer, 888.580.8373
bill.anholzer@corporatecompliance.org

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VOLUME 20, ISSUE 11

by Michael A. Morse, Esq., CHC

Understanding whistleblowers: Best practices for compliance professionals

» Any "person" can serve as a *qui tam* whistleblower, and whistleblowers can come from both inside and outside of your organization.

» Common misconceptions about whistleblowers include that they are "only in it for the money," are "disloyal" because they file lawsuits instead of internally reporting, and that they continue to "dig for evidence" after filing their lawsuit.

» Encouraging potential whistleblowers to internally report their compliance concerns depends in large measure on building trust and demonstrating that the Compliance department can "speak the language" used by the organization's specialties and departments.

» Consider providing meaningful feedback to those who report compliance concerns to show that the organization has taken those concerns seriously and has investigated those concerns.

» Understanding that third-party contractors and vendors can be whistleblowers, healthcare organizations should consider sending a strong message encouraging third parties to internally report their compliance concerns.

***Michael A. Morse** (MAM@Pietragallo.com) is a Partner of Pietragallo Gordon Alfano Bosick & Raspanti, LLP in Philadelphia.*

The impact that private-citizen whistleblowers have had on healthcare compliance cannot be understated. Since 1986, when the *qui tam* provisions were added to allow private whistleblowers to file and litigate false claims cases, the DOJ has recovered a whopping $36.4 billion in False Claims Act (FCA) cases involving the healthcare industry.[1,2] Of those recoveries, $30 billion came from lawsuits initiated by private *qui tam* whistleblowers, who received more than $4.9 billion as a reward for bringing those claims.

Morse

Much has been said, both positive and negative, about the *qui tam* whistleblowers whose reporting has led to these astonishing monetary recoveries by the federal government. There are those who say that whistleblowers are courageous people who have taken tremendous personal risk to report fraud on taxpayers and helped improve the quality of healthcare in America. There are others who say that whistleblowers are disloyal to their employers, and are motivated by the money they might make for themselves. Having worked on whistleblower and compliance cases for nearly 20 years, I can truly say that labeling whistleblowers either as "angels" or "devils" is inaccurate.

More importantly, labeling whistleblowers as either "good" or "bad" stands in the way of an effective compliance program. First, such labels demonstrate a lack of understanding as to who whistleblowers are and what their motivations might be. Second, such labels often shape how an organization

treats whistleblowers—either the organization overacts to every potential complaint or it treats those complaints as the musings of disloyal, disgruntled people. Neither reaction is appropriate. Moreover, treating whistleblowers in one of these ways can rob a compliance program of one of its most valuable tools—the ability to learn and correct a potentially unlawful practice before a *qui tam* lawsuit is ever filed. The focus of this article is on understanding whistleblowers, and identifying some best practices for compliance professionals learned from nearly 20 years "in the trenches" working on whistleblower and compliance cases.

Who are the *qui tam* whistleblowers

The federal FCA states that any "person" can serve as a *qui tam* whistleblower and file a civil lawsuit on behalf of the United States against anyone who submits, or causes the submission of, a false claim to the government. Congress intentionally used such broad language to define who can become a whistleblower in order to maximize the number of reports made against those who defrauded the government. In fact, the primary motivation for adding the *qui tam* provisions to the FCA in 1986 was the recognition that the government alone did not possess enough resources to police all federal spending and to identify those who were submitting false claims to government-funded programs, such as Medicare and Medicaid. Therefore, Congress turned to private-citizen whistleblowers to assist the government in going after fraudsters, and in doing so, it broadly defined those who can report false claims.

Due to the broad language in the FCA, whistleblowers can come from any level inside your healthcare organization, including, but not limited to, doctors, nurses, physician extenders, social workers, lab/imaging technicians, hospital administrators and executives, billing and coding staff, auditors, accountants, and even Compliance department staff. Moreover, as is often misunderstood, a whistleblower can come from outside your organization as well, including competitors, third-party contractors, pharmaceutical/device sales representatives, and patients.

Given the wide diversity of potential whistleblowers, it is important not to pre-judge who represents a "real" whistleblower. For example, you should not make the mistake of treating a complaint by an imaging technician or lower-level staff member as less important, because they have less seniority or little information about your organization's overall operations. It is essential that you take all complaints seriously, because anyone can file a whistleblower lawsuit regardless of their position and/or experience with your organization. Moreover, it is important that you treat all potential whistleblowers with respect, regardless of their seniority. Failing to do so will invariably send a strong message throughout the organization that whistleblowers should not report their concerns to the Compliance department, and it will prevent future whistleblowers from reporting their concerns internally before thinking about a *qui tam* lawsuit.

Similarly, you should not assume that persons outside your organization lack the ability to become whistleblowers. First, as mentioned above, such an assumption is legally incorrect. Second, outsiders often know quite a lot about your organization (including contracting and billing practices), especially in the age of email and social media. Many healthcare organizations often overlook the compliance message that they send to outsiders, simply by putting language in a contract stating that it expects third-parties to comply with all applicable laws, or posting the hotline number on their website. These measures alone are not sufficient. There are some simple and effective steps that all compliance professionals should

consider when it comes to interacting with outsiders—steps which can potentially decrease the chance that your organization will face a *qui tam* lawsuit.

Common misconceptions about whistleblowers

Given that the FCA permits such a wide-array of "persons" to become *qui tam* whistleblowers, it is impossible to say that all whistleblowers are the same, and that all share the same motivation when they file a *qui tam* lawsuit. That said, in my experience there are several common misconceptions about the vast majority of whistleblowers who file *qui tam* claims under the federal FCA and state false claims laws.

Whistleblowers are "only in it for the money"

Although whistleblowers are statutorily entitled to recover between 15% and 30% of the government's proceeds from their *qui tam* lawsuit, the refrain that whistleblowers are "only in it for the money" ignores the often harsh reality of the *qui tam* process. Most *qui tam* lawsuits filed do not result in any recovery by the government. Hence most *qui tam* whistleblowers will receive no money for having filed their lawsuit. Experienced *qui tam* lawyers routinely make this clear to prospective whistleblowers, along with advising them that *qui tam* lawsuits frequently take years to complete (in some cases, more than a decade), and often result in the end of the whistleblower's career within their industry. Given these harsh realities, very few whistleblowers decide to risk so much solely for the chance that one day they might recover a share of the government's proceeds.

> ...most qui tam whistleblowers will receive no money for having filed their lawsuit.

Instead, the overwhelming majority of whistleblowers, in my experience, file *qui tam* lawsuits because they: (1) are concerned about the defendant's billing practices and quality of care; and (2) were shot down, and even suffered retaliation, when they attempted to raise their concerns within the organization. The prospect of a financial recovery may be a factor for some whistleblowers, but it is certainly inaccurate to assume that all whistleblowers are "only in it for the money."

Whistleblowers are "disloyal" and "untrustworthy"

Another often repeated misconception is that whistleblowers are "disloyal" to the organization and generally untrustworthy. This misconception often results from the defendant's emotional reaction upon learning that one of its employees or contractors filed a *qui tam* lawsuit, accusing them of having submitted false claims to the government. Although everyone is entitled to their opinion, in my experience, most whistleblowers first report their concerns within the organization (either to their supervisor or to Compliance) before they consider filing a *qui tam* lawsuit. Such actions are the hallmark of loyalty to the organization, and trust by the potential whistleblower that the organization will take their concerns seriously.

As mentioned above, most whistleblowers turn to the *qui tam* process after reporting their concerns inside the organization because: (1) their concerns were ignored; (2) they never received any information as to the status of their internal report or whether their concerns were investigated; and/or (3) they suffered retaliation after reporting their concerns

inside the organization. Therefore, rather than demonizing whistleblowers as "disloyal," organizations are best served by focusing their efforts on encouraging everyone with concerns to report them internally and treating those concerns seriously and respectfully.

Whistleblowers continue "digging for evidence" after filing the *qui tam* lawsuit

Another widely held misconception is that whistleblowers continue "digging around" the defendant's offices for evidence after they file their *qui tam* lawsuit. However, the Department of Justice regularly makes clear to *qui tam* relators that once they have filed their lawsuit and have been interviewed by the government, they should not continue gathering evidence from the defendant. Violating this instruction can jeopardize the whistleblower's case, and certainly can harm the whistleblower's relationship with the DOJ attorneys and investigators working on their case. Therefore, in my experience, whistleblowers do not continue, on their own, to gather evidence after they file their lawsuit. Rather, they follow the lead of government counsel and assist only in ways specifically requested by government counsel.

Severance agreements precluding *qui tam* lawsuits

In the past several years, employers have increasingly added provisions to severance agreements designed to discourage departing employees from filing *qui tam* lawsuits. However, many (but not all) courts find that such release agreements barring *qui tam* lawsuits are unenforceable as a matter of public policy where the government does not have knowledge of the fraud allegations prior to the filing of the *qui tam* lawsuit.[2] That said, there are some circumstances where courts have found that severance agreements can impact the whistleblower's right to recover a statutory share of the government's proceeds from the *qui tam* case. Moreover, even where these severance agreements are unenforceable, they can sometimes deter would-be whistleblowers from filing a *qui tam* lawsuit. As a result, I would expect the use of such severance provisions to continue, despite their limited value in legally prohibiting a *qui tam* lawsuit.

Whistleblower protection under the FCA

The FCA includes broad anti-retaliation protection for whistleblowers.[3,4,5] Similar anti-retaliation provisions exist in the false claims laws enacted by 31 states and the District of Columbia. In particular, 31 U.S.C. § 3730(h) provides that:

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop one or more violations of this subchapter.

The remedies available to the whistleblower under Section 3730(h) include reinstatement with the same seniority, two-times back-pay, interest on the back-pay, compensation for any special damages, and attorneys' fees and litigation costs.

Important aspects of these retaliation claims are worth noting. First, a whistleblower can prove retaliation even where the whistleblower's retaliation claim is not dependent on the success of their fraud allegations. Second, the government is not involved in the whistleblower's retaliation claim; that claim is litigated and resolved between the

whistleblower and the defendant. Third, retaliating against a whistleblower, in violation of Section 3730(h), can cost more than reinstatement and back-pay. It can torpedo the effectiveness of a compliance program by discouraging other employees and contractors from reporting future compliance concerns for fear that they will also suffer retaliation. Thus, although most compliance plans prohibit retaliation, it is essential for compliance professionals to do what they can to ensure that retaliation does not occur when someone reports compliance concerns.

Common-sense best practices regarding whistleblowers

After working for nearly 20 years on whistleblower and compliance matters, there are several common sense best practices I suggest that compliance professionals consider regarding whistleblowers.

It is a mistake to leave the whistleblower in the dark about how the Compliance department addressed their concerns.

Compliance professionals need to be visible to the entire workforce

Compliance professionals need to be visible to the entire workforce, and not simply a name identified in a directory or a compliance policy. Encouraging potential whistleblowers to report their compliance concerns depends in large measure on: (1) building trust; and (2) demonstrating to the workforce that the Compliance department understands the specific billing, coding, medical, administrative, and financial issues faced by all specialties and departments. This is not an easy task and takes time to accomplish.

In terms of building trust, the Compliance department should meet face to face with as many employees/contractors as possible, so that "compliance" is not merely a policy, but it is also people they know and can approach if they have concerns. In these face-to-face meetings, the compliance professionals would best be served by discussing the internal whistleblower process (i.e., how to report concerns), emphasizing that all concerns will be handled seriously, that those who report will not suffer retaliation, and that internal reporting is important to the organization. Also, be careful not to send negative signals about whistleblowers, such as saying that the goal of the internal reporting process is to "prevent" or "avoid" whistleblower or *qui tam* claims.

In terms of building credibility, the Compliance department, in these face-to-face meetings, should try to speak the language of each specialty and department. For example, when speaking to the Anesthesia department, speak about the issues specific to billing, coding, medical, administrative, and financial issues facing that department. This will demonstrate to potential whistleblowers that you "speak their language" and will understand their concerns if they elect to report them in the future.

Provide follow-up to those who report compliance concerns

As noted above, one issue that motivates whistleblowers to file *qui tam* lawsuits is the feeling that their organization did not take their concerns seriously and that their concerns were simply ignored. It is a mistake to leave the whistleblower in the dark about how the Compliance department addressed their concerns. It increases the chances that the whistleblower will turn to the *qui tam* process to address their concerns. Additionally,

it sends a signal to future whistleblowers that the compliance program does not work and that reporting their own concerns will have no impact.

To avoid these issues, consider providing some level of meaningful feedback to those who report compliance concerns. Sometimes attorney-client privilege issues will limit how much information can be shared, but there is always room to provide feedback to the whistleblower. Such feedback can demonstrate to the whistleblower that their concerns have been investigated, provide information on the status of the investigation, and advise them that steps have been taken to remedy the issue (where appropriate). Even where the compliance professional cannot reveal the details of an investigation, they certainly can and should keep up an open dialogue with the person reporting the concern. In those instances where the concern was not substantiated, the compliance professional should consider sharing some information with the whistleblower to help them understand why they may have been mistaken (e.g., perhaps they misunderstood a coding or billing requirement).

Send a strong compliance message to third-party contractors

Understanding that third-party contractors and vendors can be whistleblowers, healthcare organizations should consider sending a strong message encouraging these third parties to report their compliance concerns. To send this message, compliance officers may consider the following common-sense steps:

- Educate third-party contractors and vendors on the healthcare organization's compliance policies;
- Meet face to face with the third-party and its employees, so the Compliance department is more than a name identified in a document or website; and
- Ask the third-party contractor and its staff, on a periodic basis, for any concerns they might have about the healthcare organization.

As is the case with employees, encouraging third-party contractors and vendors to report compliance concerns is, to a large degree, about establishing trust and competence. Additionally, third parties, especially contractors, may be reluctant to report compliance concerns to someone other than their own employer, out of fear that their employer could lose an important contract. The measures discussed above are relatively simple, and they are designed to increase the chances that whistleblowers from outside your organization will report their concerns before contemplating a *qui tam* lawsuit.

Conclusion

Since 1986, *qui tam* whistleblowers have played a substantial role assisting the federal government's recovery of more than $36 billion in FCA cases involving the healthcare industry. Given the success of this public/private partnership, there is little doubt that *qui tam* whistleblowers will continue to play a large role in future FCA cases and in healthcare compliance. Understanding who whistleblowers are, and adopting some common-sense steps designed to encourage internal reporting of compliance concerns, can go a long way to strengthening your compliance program and minimizing your organization's risk of becoming embroiled in a *qui tam* lawsuit.

1. U.S Department of Justice, Civil Division: Fraud Statistics—Overview, October 1, 1987—September 30, 2016. Available at http://bit.ly/2pHNIOP;
2. DOJ press release: "Justice Department Recovers Over $3.7 Billion From False Claims Act Cases in Fiscal Year 2017" December 21, 2017. Available at http://bit.ly/2MV8zIZ
3. *United States ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16 (2nd Cir. 2016)
4. *United States ex rel. Radcliffe v. Purdue Pharma et al.*, 600 F.3d 319 (4th Cir. 2010)
5. *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230 (9th Cir. 1997)