Carol A. Valentine

STOP THIEF!

What Happens When A Citizen Takes On The Federal Fraud Machine

by
Carol A. Valentine

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Wherever possible, the incidents and cases cited in this work have been taken from the public record. However, much valuable information gathered by the author is not in the public record. To protect the sources of this information from retaliatory legal action (nuisance or "slap" suits), the names of the whistleblowers involved are withheld.

Caveat

Nothing in this publication should be construed as legal advice. Persons in need of legal advice should consult a qualified attorney. Any advisory statements in the following text should be taken by the reader as points for discussion with an attorney, not as authoritative statements on any point of law, legal precedent, judicial custom, or courtroom procedure. Not withstanding, we hope that reading about the experiences of other whistleblowers will help you succeed in your own efforts to stop fraud and make our country a better place in which to live.

Note that this booklet has not been updated since it was written in 1995.

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Dedication

To Art Williams (1925–1993)
Patriot and qui tam plaintiff:
A man of simple virtue who
told the truth, and died
refusing to bend his knee to
the Corporate State.

and

To Arthur Ernest "Ernie" Fitzgerald (1926–2019)
America's most famous whistleblower and good friend.
See A Tribute to Pentagon Whistleblower Ernest Fitzgerald
https://www.pogo.org/analysis/2019/02/remembering-ernie-fitzgerald/

Foreword

During my twenty years of government service, I have met and come to know many whistleblowers. If I could make a generalization about them, I would describe them this way:

Whistleblowers are over-achievers. They are competent and efficient, the kind of people who are concerned that things be done right. They are also people who have the moral fiber to stand up to corruption.

In almost every case, they became whistleblowers because a moral dilemma, not of their own seeking, was thrust upon them. They were asked to do something immoral and they refused.

Ninety-nine out of a hundred people, when faced with such a dilemma, will hold their nose and remember where their bread is buttered. Or they will convince themselves there is no dilemma.

Most whistleblowers start out doing the right thing thinking that once "upper management" or some figure of authority learns of the situation they will straighten it out. Even after they come to understand that "upper management" is not going to save them, whistleblowers remain unrepentant and even defiant. From that inevitably follows harassment, persecution, and vilification. This is not the path for a malingerer.

Each year taxpayers pay billions of dollars for goods and services ranging from health care and defense to public safety. And each year taxpayers pay millions of dollars to police and prosecute fraud against the public purse.

Yet one whistleblower can frequently accomplish more than a roomful of inspectors or policemen, and costs far less. Whistleblowers know the system, and speak out in a spirit of public service.

> Whistleblowers are precisely the kinds of people we should have in top management of government and industry. It is not the whistleblower who needs protection so much as it is the public that needs the protection of the whistleblower.
> — William Sanjour, US Environmental Protection Agency

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1.

Government Collusion in Fraud and the Role of the Citizen

If you have personal knowledge of fraud committed on the US Treasury by any person or company making false claims, you may be considering a whistleblower or *qui tam* law suit. Authorized by the 1986 False Claims Act (see 31 USC Secs. 3729 and 3730), the *qui tam* provisions allow private citizens to file civil suits to recover money defrauded from the US Treasury and receive a portion of the recovery as a reward.

In the past few years, newspapers and TV networks have carried stories of *qui tam* plaintiffs (called "relators"), painting them as get rich quick artists, who, with little or no effort beyond a mad dash to the courthouse, are turned into millionaires overnight. But potential *qui tam* relators should be warned: *Qui tam* suits are fraught with peril. They are more often booby traps than pots of gold. If you want to correct injustice and stop fraud by filing a *qui tam* suit, chances are good that you will greatly endanger yourself with little or no reward.

This booklet was written to warn whistleblowers who are considering filing a *qui tam* suit about the many dangers and traps awaiting them. It is based on the real life experiences of whistleblowers who have filed such suits.

The stories of *qui tam* suits are largely stories of unexpected and surprising betrayal. *Qui tam* plaintiffs find out they have enemies they don't expect to have. While they might predict attacks from the wrongdoers, they do not predict attacks from their own government, whose legitimate interests they are trying to protect. Attacks from the government on whistleblowers, especially whistleblowers who have worked for the US government, are surprising, virulent, and well financed by the US Treasury. But coming as even more of a surprise to many *qui tam* relators is the treachery of their own attorneys, who all too often place their own interests before those of the client. Under assaults from these quarters, *qui tam* relators have lost their careers, their homes and other assets, their marriages, their health, and even their lives.

What follows here is a partial compendium of the problems awaiting a potential *qui tam* relator. We could not, of course, hope to list all the dangers a *qui tam* relator might meet. But we hope that by being better informed of the experience of others, *qui tam* relators may be better protected and better prepared.

Why *Qui Tam*?

The 1986 *qui tam* revisions were the result of the modern realization that US government personnel charged with investigating and prosecuting fraud against the US Treasury often failed to do its job. In response to this awareness, Congress called in the posse (the citizens) to apprehend the outlaws.

The combined efforts of dishonest government contractors and a government that characteristically aids and abets the commission of fraud (we could call this combine the "federal fraud machine") forms an almost unbeatable combination. Each year hundreds of millions of dollars are funneled from the pockets of the US taxpayers into the pockets of government bureaucrats, corporations, and others who make false claims on the US Treasury.

It is easy to understand why. The fuel of politics is patronage. Corporations depend for their livelihoods on government officials awarding them government contracts, and government officials in turn look forward to lucrative jobs with government contractors after they retire from the government.

Thus, many inside our government have a vested interest in seeing that the patronage system continues, and that fraud against the government goes uncorrected. However, honest persons who work either for the government or a government contractor characteristically want fraud investigated and rigorously prosecuted. These whistleblowers are a threat to the system and are as welcome as a chaperon in a boudoir.

Of course the government sometimes does its job and prosecutes fraud. Veteran whistleblower Ernest Fitzgerald sees it this way: "There is a small chance that the government may take *bona fide* action against government contractors who commit fraud. After all, it is necessary for government investigative and prosecutorial agencies to maintain a patina of legitimacy. In pre-Civil war days, slave states had a code of personnel practices which ostensibly regulated the humane treatment of slaves. Particularly brutal or out-of-

favor slave owners were occasionally prosecuted under this system, imparting a benign and palatable patina to slavery. Today the same method is used. Fraud is prosecuted occasionally. It gives the government's oversight of fraud a patina of authenticity."

History of *Qui Tam*

Qui tam is an abbreviation of "qui tam pro domino rege quam pro seipso," which means "who as much for the king as for himself." *Qui tam* defense attorney John Boese traces the law back as far as the thirteenth century England: Common persons could bring to the king's attention offenses against the crown, and gain part of the penalty assessed against the wrongdoer. *Qui tam* statutes gradually appeared, and were the basis for criminal and civil prosecutions. Boese points out: "The popularity of *qui tam* actions was due to lack of an effective public police force which existed for investigating public wrongs at the time."

According to Boese, American *qui tam* law arose when English statutes were adopted by state legislatures during the period of the American Revolution. " . . . [T]hese actions were popular among legislators due to the same factors which had led to their use in England: lack of an effective public policing force."(Footnote 1) It was upon this foundation that the 1863 False Claims Act (the "Lincoln Law") was passed by Congress at the height of the Civil War, with the expressed intent that informants would help stop fraud against the Union.

The United States Constitution, of course, was not founded on the principle of Divine Right, but the principle of the social contract. The social contract stipulates that legitimate political power arises from the citizens, and is delegated by them to the government to perform specific tasks. In the American context, the phrase is changed from "*qui tam* pro domino rege quam pro seipso" to "*qui tam* pro civile quam pro seipso," or "for the citizens as much as for himself."

The Whistleblower Experience

If the whistleblower who reports the fraud works for a government contractor, the classical scenario is this:

a. Whistleblower reports a scam to federal authorities;
b. Authorities leak the identity of the whistleblower to the contractor;
c. Authorities ignore the substance of the report or make the most cursory investigation possible;
d. Whistleblower is fired and his career ruined; and
e. The fraud continues.

If the whistleblower is a government employee, the classical scenario is somewhat different:

a. Whistleblower learns of documented fraud against the government;
b. Whistleblower asks supervisor to press charges against contractor;
c. Supervisor refuses;
d. Whistleblower is ignored, fired, or sent to administrative no-man's land; and
e. The fraud continues.

The case of former government employee Paul Biddle is illustrative. Biddle, a CPA, became resident representative of the Office of Naval Research at Stanford University in 1988. Shortly after he started, he became aware of questionable billing practices. He made verbal reports to his immediate superior at ONR in October 1988, and followed these with written reports in March, 1989. His reports were ignored, so he sent them again. These reports were also ignored.

At the same time Biddle was reporting improper practices to the agency for whom he worked, that same agency, the Office of Naval Research, was directing Biddle to continue those same improper practices. These requests were accompanied by threats that Biddle would be removed from his post or fired if he did not comply.

During this period, Biddle contacted the Defense Contract Audit Agency (DCAA), Health and Human Services (HHS), NASA, and the Air Force concerning the misuse of their funds at Stanford. He also filed reports on Stanford's mischarging with the US Attorneys Office in Los Angeles and San Francisco, and the District Attorney for Santa Clara County.

In mid-1990, approximately 20 months after Biddle's first report, the Navy appointed a panel of inquiry to look into his charges. It was then that the Navy interviewed Biddle for the first time. Six months later, the Navy had still not taken action to recover taxpayer money.

When the staff of Rep. John D. Dingell (D-Michigan) contacted Biddle on other matters, Biddle informed

them of the situation at Stanford. Rep. Dingell then asked Biddle to testify before Congress.

In early 1991, Biddle told Congress that the US government had overpaid Stanford overhead costs by as much as $300 million over a period of ten years. His figures were corroborated by the Defense Contract Audit Agency in sworn testimony. Among the items charged to the government were several yachts, mountain retreats for the Stanford University Board of Trustees and their families, riding stables, a wedding reception, antique furniture and flowers, an Italian fruitwood commode, silver services, and monthly laundry charges at a French laundry.

In addition, Biddle also speculated that Stanford had mischarged tens of millions of dollars in direct charges, and had failed to calculate offsetting credits that should have reduced government payments to Stanford.

Biddle's testimony drew national press coverage. Yet, even after the national scandal occasioned by the Dingell hearings, it took six months for the government to make its tepid response: Despite the full ten years of mischarging confirmed by Biddle and the DCAA, the Office of Naval Research moved to limit Stanford's liability for the mischarging to two years. This two year cut-off would effectively have allowed Stanford to return 20 cents on each dollar mischarged.

It was then that Biddle decided to file a *qui tam* suit. "I had tried everything else, and it didn't work. Filing a *qui tam* suit was the last resort. It seemed to be the only way to get justice, and to win the taxpayers' money back for the taxpayer," said Biddle.

Biddle filed his *qui tam* suit in September, 1991, almost three years after he first reported the mischarging to the government (Footnote 2). Given approximately $300 million in mischarging and the triple damages allowed under the *qui tam* provisions, Stanford might have been required to pay back as much as $900 million to the US Treasury.

Despite the DCAA's sworn testimony and the potentially huge recovery for the US Treasury, the US Department of Justice (DoJ) declined to intervene in Biddle's *qui tam* suit. Then, on October 18, 1994, in an attempt to invalidate the claim Biddle was making on behalf of the taxpayers, the Navy settled with Stanford for $1.2 million -- just a fraction of a penny on each dollar Stanford mischarged.

Commenting on the hostility of the DoJ to whistleblowers, Sen. Charles Grassley (R-Iowa) cited some $224 million recovered for the US Treasury by just three *qui tam* cases. Grassley said:

> These tax dollars were restored to the Treasury not because of any Justice Department prosecutorial zeal but in spite of the Department's efforts ... the Justice Department has been consistently hostile to whistleblowers. (Footnote 3)

So close has been the collaboration between the Justice Department and government contractors that Bush Administration Attorney General William Barr devoted Justice Department resources to write a memo attacking the constitutionality of the *qui tam* provisions. The memo was leaked to defense contractors, and cited by Boeing and General Dynamics on April 7, 1993 when they argued before the Ninth Circuit Court of Appeals that the *qui tam* provisions were unconstitutional.

Anne Zill, President of the Fund for Constitutional Government, a public interest group in Washington, DC, which was in part responsible for the 1986 *qui tam* provisions, puts it this way:

> When government refuses to enforce laws against fraud and fails to do its job, the responsibility must revert back to the citizens. *Qui tam* has been part of our legal heritage for hundreds of years for a good reason. The need for *qui tam* as a check against corrupt government has been proven time and time again.

Qui Tam **In A Nutshell**

The *qui tam* provision of the False Claims Act can be found at 31 USC Sec. 3730. In brief, the statute stipulates that the plaintiff in a *qui tam* action must be the original source of information on the false claim (i.e., a person cannot file a suit after reading about a scam in a newspaper) and must have voluntarily provided the information to the government before filing the suit. The suit is filed *in camera* in Federal court and a copy sent to the Attorney General. It remains under seal for 60 days or longer while the DoJ investigates the claim. After its investigation, the DoJ can intercede and take the case over, and serve the suit on the defendants. If the DoJ prevails, the whistleblower receives 15-25 percent of the amount recovered. If the DoJ does not intercede, the whistleblower can proceed alone and serve the defendant; if the whistleblower prevails, he or she receives 25-30 percent of the amount recovered. If the Court finds that the relator planned and initiated the false claim, the

Court can reduce the relator's award.

Retaliation against whistleblowers is prohibited by the statute. *Qui tam* relators can file a personal cause of action and can receive special damages if harassed, threatened, demoted, suspended or fired as a result of investigating or filing the suit (Footnote 4). *Qui tam* suits can also be filed against state and county governments when they make false claims on the US Treasury.

Types of False Claims

False claims can be made in a number of ways:

a. Mischarging. A claim is made for goods or services which were not provided in accordance with contract terms;
b. False Negotiation. A false or illegal act is used to inflate the price submitted during bidding or negotiation;
c. False Certification of Entitlement. Someone makes a false statement to become eligible for a benefit;
d. Substandard Product or Service. An inferior product or service was supplied to the government. (Footnote 5)

Now let's look at what a relator might expect on this perilous journey. In the following pages we will discuss how to collect evidence, how to prepare for reprisals from your employer, how to find and retain a lawyer, and a number of other subjects of concern to the prospective *qui tam* relator.

2.

Preparing Your Case

As has already been stated, collusion between government officials and government contractors form a winning combination that wrests billions of dollars from the taxpayers. Yet the 1986 *qui tam* provisions of the False Claim Act require that the whistleblower act as if government officials were honestly attempting to root out corruption. This inherent contradiction has broad practical implications for the whistleblower plaintiff.

When you report government contractor fraud to the proper agency official, your report will set off a chain of events. The *qui tam* relator should do everything possible to control the unfolding of these events, and be prepared for what will happen.

Your Employer Will Find Out

Shortly after you make reports to the government agency with which your company has a contract, you are likely to feel the effects of the collusion between the government and its contractors. Your employer will almost certainly know about your reports. The government agency may either deliberately leak your identity or, if it investigates your report, be wantonly careless about hiding your identity.

Once this happens, you will either be fired or cut off from access to further information. This will lead to several practical difficulties. If you don't have solid evidence, finding a lawyer to handle your *qui tam* suit will be more difficult. Moreover, if you do find a lawyer who will take your case without solid evidence, you both will be forced to rely on (a) the investigation of the government agency to whom you reported, or (b) evidence you obtain during discovery (Footnote 6). As we have already seen, government investigators have a poor track record pursuing fraud; and corporations can and often do destroy or deny evidence during the discovery process. It is therefore to your advantage to collect the evidence yourself, *before* you report the scam to the government agency and the corporation knows what you are doing.

Education

Education is essential for the *qui tam* relator. Here are some suggestions:

- Read the False Claims Act and its *qui tam* provisions at 31 USC Secs. 3729 and 3730.
- Read *False Claims Act & Whistleblower Litigation*, by *qui tam* relator attorneys James C. Helmer, Ann Lugbill and Robert C. Neff, published by the Lexus-Nexus Michie Company, 1994; *Qui Tam*: *Beyond Government Contracts*, 1993, published by the Practicing Law Institute, New York, New York; and *Civil False Claims And Qui Tam Actions*, by *qui tam* defense attorney John Boese (Prentice Hall Law & Business, August, 1993 and 1994 supplement).
- Some law firms subscribe to specialty legal publications which follow *qui tam* court rulings. Publications such as *DOJ Alert* (published by Aspen Law & Business, Englewood Cliffs, New Jersey), *Defense Contract Litigation Reporter* (published by Andrew Publications, Westown, Pennsylvania), and *Federal Contracts Report* (published by Bureau of National Affairs, Washington, DC) are another source of information.
- Learn about federal contract law. Read the American Bar Association's *How To Review A Federal Contract and Research Federal Contract Law* by James F. Nagle. Ask the ABA about other publications it may have on government contract law.
- Study the "Indicators of Fraud" booklets published by the Inspector General's office in the agency for which your company works, and the agency's semi-annual reports documenting past prosecutions for fraud.
- Learn everything you can on your state's whistleblower protection provisions. This is best done by investing in advice from a competent employment lawyer in your state. The person you ultimately select as your *qui tam* attorney may want to file a companion suit for harassment and unjustified dismissal in state court. State law may require that certain tests be met before you have a state claim, and that you follow certain procedures. You need to know what those requirements are.
- Browse through legal encyclopedias to get definitions of all legal terms you meet while pursuing your case. Get background on litigation procedure, including suggestions on how to have your deposition taken.
- Contact these public interest groups for information on whistleblower protection: National Whistleblower Center in Washington, DC (202) 667-7515.
- Government Accountability Project in Washington, DC (202) 408-0034. Request a copy of the Government

Accountability Project publication *Courage Without Martyrdom*.

Remember that *qui tam* actions are tried using civil standards of proof rather than criminal standards. That is, your case will be won by preponderance of the evidence, rather than beyond a reasonable doubt.

Documentation

To repeat: You should gather hard evidence of your charges before you report the scam to the government agency. *You may be fired immediately after you report the fraud or may be otherwise cut off from documentation.* Having solid evidence also makes it more difficult for the government agency to ignore your reports, makes it easier for you to find an attorney, and avoids problems created when contractors destroy or deny documents during the discovery process.

When gathering your documentation, be careful not to take the contractor's only copy of any document. It is not uncommon for *qui tam* plaintiffs to be charged with theft of government or proprietary information on the grounds they had no "right" to documents giving evidence of fraud against the government. Copy the documents at your own expense, and keep the receipts.

Your documentation should be of two types: 1) offensive documentation, which you will use to prove the fraud you will allege in your suit, and 2) defensive documentation, which will show you were a dutiful corporate citizen who took no part in the scam.

Much of the documentation you need will be found in your company's files -- and much of it can be created by you by recording events contemporaneously.

Offensive Documentation

You should have a copy of:

- The government contract you intend to report.
- Any modifications or waivers to this contract.

These documents will give the rules to be followed during contract performance. You will need copies of:

- Evidence of claims, such as timecards, invoices, etc.
- Evidence that the claims were false.
- Memos and correspondence that reveal departures from contract terms.

"You need to show what should have been done, and what was done in reality," says Brad Weiss, a Washington, DC *qui tam* attorney. "And you should try to envision the whole package -- where do the time cards go after they leave your supervisor? If the problem you perceive is not being corrected by a more senior executive, document that too, if you can," says Weiss.

Weiss also recommends learning all you can about your company's computer system and recording the name of its custodian so you can direct government investigators.

Defensive Documentation

At the same time you are collecting offensive material, you must gather defensive material. It is essential that you collect documents showing your exemplary job performance before you make your reports to authorities. Remember that Congress provided special protection and monetary awards for the retaliatory dismissal and harassment of whistleblowers in the False Claims Act. "Your job is to collect evidence that shows complaints about your performance started after you blew the whistle," says *qui tam* attorney Paul Bland of Baltimore, Maryland. You should have:

- A copy of the corporate policies and procedures manual. This manual is in reality a codification of the laws governing corporate behavior. Your behavior, and the behavior of your company, will be measured against this document.
- A complete copy of your personnel record, if possible. At the least, ask to see your personnel record and take notes on its contents. When reviewing the file, bring a witness with you who can sign and date each page of your summary.
- Copies of your past performance appraisal reviews.
- Copies of your work products and your time cards.

- Copies of records showing bonuses or letters of commendation. If your fine work has been memorialized in your company's newsletter, get a copy of the newsletter. Save informal handwritten memos from your supervisors and colleagues congratulating you on your work.

This material can be used to give a snapshot picture of the high regard in which you were held by your employers and colleagues before you blew the whistle.

After you file your suit, the corporation may defend itself by claiming that you took part in the scheme and that it should not be held liable for damages you helped cause. In order to disqualify you from monetary awards, your employer or the DoJ may also try to show that you took part in the scam.

"Often the whistleblower will be accused by the employer of taking too many vacation days, making personal phone calls on long distance lines, etc. Try to predict likely lines of attack, and make sure you secure evidence you will need to defend yourself. Take copies of those telephone logs and attendance records," says Washington, DC investigator Scott Armstrong.

There are other ways to build documentation for your case.

Writing Memos To Record Events

Write memos to appropriate supervisors to record and document events as they occur. By doing so you can build evidence of fraud for your offense, and evidence of your own job performance and history of corporate citizenship for your defense.

Write in a calm and business-like style and follow corporate guidelines. Remember, you are ultimately writing the memos for the judge who will preside over your case.

Delineate the who, what, where, when, how, of the event or issue you are documenting; if senior corporate officers were aware of the situation you are describing, include that information. Follow corporate policy guidelines and when appropriate, quote the policy to show your adherence and your supervisors' violations.

- If you are given a questionable order, write a memo to your supervisor asking clarification.
- If the order is reissued, write another memo: "This will confirm that we spoke of my concerns regarding . . . and that you still wish me to go ahead . . . "
- If you are told to do something you know to be illegal and you can't ignore the order, write a business-like memo to your supervisor declining to take the action and stating your reasons.

One whistleblower had very good results using the memo writing method. Much of the scam she was witnessing was run without benefit of incriminating paperwork -- the executives came to verbal agreements between themselves and issued verbal instructions to the employees. When the whistleblower asked for clarification and confirmation of orders and recorded events *in written memos* and persisted in her methodology, her employers felt forced to respond in writing. The memos they wrote effectively admitted and confirmed events of which the whistleblower complained, and later buttressed the whistleblower's *qui tam* case.

Authenticating Your Memos

When your case goes to trial, your employers will probably deny receipt of those memos you sent documenting the illegal practices and objecting to them. Protect yourself by making several copies of each memo you send. Put one in a self-addressed envelope and send it to yourself at home. Have the envelope date stamped at the Post Office counter. When the envelope arrives, do not open it; simply file it. To keep track of the envelope contents, fasten a second copy of the memo to the unopened envelope.

"The post-marked, unopened envelope will be evidence that you in fact did send the memos, in case you need proof at a later date," says Jeff Ruch of the Government Accountability Project in Washington, DC.

Keep a Diary To Record Events

Buy a bound memo book with pre-printed numbered pages. In your own hand, write contemporaneous notes of events at work. Note when you are given tasks and when you complete them; note unusual events, meetings, or conversations, keeping record of the who, what, where, when, how of the event. Use the book every day as events unfold. It will be a valuable piece of evidence. Be mindful that such a diary is discoverable, and the defendants will have access to it during discovery. Don't use the diary to record personal events.

If you have a lawyer, discuss the diary with the lawyer before you start to keep it. If you keep the diary under

the direction of your lawyer, the diary is protected from discovery by the attorney-client privilege.

Keep Your Evidence Safe

Do not keep any documentation at work. Rent an off-site storage locker. Keep one copy of your evidence in this locker, keep another copy at home for easy reference.

Developing Witnesses

Rely on no one but yourself when developing your case. Stephen Kohn of the National Whistleblower Center in Washington, DC says, "Assume that your coworkers will not testify truthfully about what is occurring in the company -- most people won't want to endanger their jobs or ruin their careers."

Nonetheless, you will be asked for witnesses when you file your case. While on the job, try to ascertain what your colleagues know of the situation, and try to maintain convivial business friendships with all. Should your colleagues no longer work for the company when your suit is filed, they may be willing to testify.

Finally, do not discuss your intended legal action with anyone in the company or associated with it, or otherwise draw unnecessary attention to yourself.

Prepare For Counter Suits

Qui tam relators should be prepared for counter suits, and take immediate steps to protect their assets. Find a competent lawyer in your state who can advise you on asset protection. Aim to be "judgment proof" before you file.

One *qui tam* relator was counter sued, and eventually lost his home paying legal defense fees. You should require that your *qui tam* lawyer defend you against counter suits. See Retainer Agreements.

Unemployment

Go to your local library and get a copy of the unemployment compensation laws and regulations in your state; read and understand them. Know your rights and when you are fired, follow procedures exactly. File for unemployment benefits. Should your employer tell the state employment commission you were fired with cause, you should challenge the employer at the state level.

After you are fired, keep a record of all your job calls, contacts, and resumes sent out. Keep receipts of your expenses. You will need these documents in your law suit to show that you tried to mitigate your damages after your termination.

Independent Consultants

Consider investing in fee-per-hour professionals to help as you prepare and pursue your *qui tam* case. Sound advice from these independent consultants may make your case or save you from disaster.

State Employment Lawyer

As you prepare your case before reporting the fraud to the government, consult an experienced employment lawyer well versed in the employment and whistleblower laws of your state. When you do find a *qui tam* attorney, the attorney will probably want to file a companion state action for harassment and unjustified dismissal. These suits often require that you follow certain procedures when building that state case, and it is important to have set the case up properly.

Government Contracts Lawyer

You may wish to consult with a government contracts attorney. If you are being asked to perform acts you suspect are illegal, the expense is justifiable. Remember that your employer and the government will try to undermine you and your case by charging you took part in the scam you reported. If you know the rules, it is easier to protect yourself.

Attorney-Consultant

As we will discover in the following pages, some *qui tam* attorneys ultimately act to further their own

interests at the expense of the whistleblower. To protect yourself, consider establishing a fee per hour relationship with an astute attorney who is not affiliated in any way with your *qui tam* attorney.

Think of this second attorney as your attorney-consultant. The first task of this attorney-consultant is to advise you on protecting your assets from counter-suits. This attorney-consultant should advise you about a lawyer's duties and responsibilities to clients. He or she should also inform you about Bar rules governing standards of behavior, contingency fees, payout of awards, court deadlines, discovery procedures, and other matters in your jurisdiction.

The final task of the attorney-consultant is to review the entire settlement package your *qui tam* attorney prepares. You may want to insist a certified check for the settlement is in your hands before you officially drop your suit.

Tax Lawyer

You should also have an independent tax lawyer whom you pay on an hourly basis to make sure the settlement agreement is written in language that best protects you from unwarranted IRS problems. This expert will probably tell you that *qui tam* awards are taxable, but awards for pain and suffering allowable under "special damages" in your personal cause of action may be non-taxable. Your tax expert should design your settlement package to give you every possible tax advantage. See "Negotiations And Settlement." When you do file your taxes after settlement, you may want to get a written legal opinion from this expert to include with your returns.

3.

Finding a Lawyer

Finding lawyers who are willing to take on *qui tam* suits is a major problem for whistleblowers. There are a number of reasons for this.

Few lawyers have heard of *qui tam* suits, and fewer have experience with them. There is no organization of *qui tam* lawyers, as there are organizations of trial and criminal lawyers. There are no state bar referral services. The DoJ has refused to release a list of past *qui tam* cases, so it is not possible to cull a list of experienced lawyers via this route (Footnote 7).

Nor is having had *qui tam* experience a guarantee of a good lawyer [See "The Lawyer's Problem and The Problem With Lawyers"]. If you find a lawyer or firm who has handled *qui tam* cases, find out whether they prosecuted or defended the cases, and ask for the names of the cases. You may be able to talk to other *qui tam* plaintiffs to get a reference on the lawyer.

If you find a lawyer with no *qui tam* experience who is aggressive and willing to deal equitably with you on financial matters, consider retaining that lawyer. An inexperienced *qui tam* lawyer may be able to get consultation from a more experienced lawyer in another state who is willing to act as co-counsel.

A library search of popular press and law journal articles on *qui tam* suits will net some names of lawyers who received national publicity for handling famous *qui tam* cases; however, realize that these lawyers may be located thousands of miles from you, or may be too busy to take your case or be unsuitable for a number of other reasons. If you decide to present your case to one of these well-known *qui tam* lawyers, try to talk to plaintiffs he or she has represented. See if they were satisfied with the work done, or otherwise get references. See The Lawyer's Problem and The Problem With Lawyers.

Consider looking for local representation. Proximity is much easier for both you and your lawyer, particularly when you are attempting to focus on complex documentation. There is also the question of expenses. "If your lawyer is half way across the US, you will ultimately pay for the plane trips your lawyer takes to see you, to make court appearances, and to be present with you when Justice Department officials are talking with you during the DoJ investigation," says one *qui tam* relator who is also a lawyer.

There is an obvious exception to this "local representation" rule: If you live in a company town and are going to sue the company, don't use an in-town lawyer -- he or she may be easily intimidated and have conflicts of interest.

Your first step in looking for local representation should be disqualifying some lawyers. Find out which firms represent your employer. Do not approach these, of course, but keep the names of the firms and lawyers; when you do choose your lawyer, he or she will want to know the names of their likely opponents.

The employment lawyer with whom you consulted during the development of your case may be interested in becoming your *qui tam* lawyer. If not, contact members of the employment law bar in your city and state. The National Employment Lawyers Association in San Francisco or the National Whistleblower Center in Washington, DC, may help you with referrals.

You may also wish go to a local law library to browse through articles on whistleblower protection in state employment law newsletters. One of these authors may be the lawyer for whom you are looking.

Another possible source of a *qui tam* lawyer is your local criminal defense bar. Criminal defense lawyers are tough, familiar with fraud and rules of evidence, and are not intimidated by fighting the government (in this case, remember, it is most likely you *will* be fighting acquiescent government agencies and/or the DoJ). Keith Stroup, former director of the National Association of Criminal Defense Lawyers, points out that criminal defense lawyers do not work on a contingency basis, so he advises whistleblowers to seek out firms that practice both criminal defense and personal injury cases. These firms may be able to offer the best of both worlds -- a criminal defense lawyer and a firm set up to handle contingency cases.

Personal injury lawyers are another possibility. They are familiar with handling contingency cases, and often interested in developing new areas of practice.

You may also want to check the *pro bono* sections of "silk stocking" corporate law firms. There may be

something about your case that appeals to the firm, and, given no conflicts with their other clients, the firm may agree to take your case.

Investigator Scott Armstrong of Washington, DC suggests contacting law schools. A law professor may have an interest in *qui tam* law in general, and may take an interest in your case. Law schools often support law clinics. Mr. Armstrong also suggests that whistleblowers contact public interest organizations that are likely to know lawyers of conscience and give good referrals.

You may want to read law review articles on *qui tam* and contact the authors. Perhaps they take *qui tam* cases, or may be able to refer you to others who do.

Another possible source of *qui tam* lawyers is the government contract bar. Martindale-Hubbel, the national directory of lawyers, is available on-line through Nexis at many public and law libraries. Your librarian can search for government contract lawyers in your area. Familiarity with the arcane world of government contracting is an advantage; but use caution. Remember that government contract lawyers make money by representing government contractors. Don't use your own name or the name of your employer when doing your initial screening; even if the firm does not represent your employer, word of your intended suit could get back to your employer quickly. Get the help of a friend or relative, and make initial inquiries using that name. Once you have checked for interest in handling a plaintiff's *qui tam* suit, check the firm's client list. Does the firm represent your subcontractor, or does your company subcontract from one of the firm's clients?

Know that betrayal of the whistleblower is everywhere. In one case a whistleblower working with a Congressional committee on a huge Department of Defense scam arranged a preliminary interview with an experienced *qui tam* lawyer. When setting up the interview, the lawyer asked that his consultant, a former high official with the Defense Contract Audit Agency, be included. The lawyer wanted this consultant to give his expert opinion on the merits of the case; the whistleblower agreed.

During the meeting, however, the "consultant" asked the would-be *qui tam* plaintiff the names of other whistleblowers working with the Congressional committee on uncovering the scam in question. Of course the "consultant" had no need to know this information. This inquiry and several other remarks made the whistleblower suspicious.

After the meeting, the whistleblower checked into the background of the "consultant." She learned that when the consultant had worked for the DCAA, he had attempted to cover up a massive fraud and fire honest auditors who were attempting to have a case prosecuted. Checking further, the whistleblower found that the "consultant" had also recently misrepresented DCAA auditing rules and had given bad technical advice on a *qui tam* case being litigated in another state, damaging the case.

Be business-like and aggressive in looking for lawyers. You may find a number of lawyers who are interested in taking your case. Try to find the best lawyer and the best package.

How To Present Your Case To Attorneys

Once you have located a potential lawyer and have introduced yourself on the phone, ask for a case evaluation. The lawyer will most likely want to see a concise written summary of your case (no more than two pages long), a sampling of documents to support your allegations, and a list of friendly and unfriendly witnesses.

Avoid Extended Evaluation Periods

Establish that the lawyer will evaluate your case free of charge, and get an estimate of how long the evaluation will take. Confirm your verbal understandings with the lawyer in writing. Don't allow your case to get tied up with any one lawyer in a lengthy evaluation.

One whistleblower sent her material to a law firm. The firm indicated it wanted to take the case, and made verbal representations of the terms which would be included in the retainer agreement. During the next 10 months the firm did extensive work on the case, quantifying the damages and preparing papers for filing. However, despite the whistleblower's repeated requests, the firm did not send a written retainer agreement. Finally, when the documents were almost finalized, the firm attempted to persuade the whistleblower to file the case -- without having seen, or signed, a retainer agreement. The whistleblower refused to have the case filed and insisted on seeing the retainer agreement first.

Several days later the retainer agreement arrived in the mail. The whistleblower was stunned -- many of the written terms were contrary to the verbal representations. According to the terms as written, it would have been quite possible for the whistleblower to win the case and still owe the law firm money. When the whistleblower

told the firm she did not want them to represent her, the firm sent a letter threatening to place a lien for 350 of hours of lawyer/investigator/paralegal fees (at top prices) against the case. The firm in effect claimed the work done in the previous 10 months was work for hire.

Putting time limits on the evaluation period will also help curtail attempts the attorney may make to "shop" your case before signing a retainer agreement. See The Lawyer's Problem and the Problem With Lawyers.

Check on Lawyer's Policies

Ask about the lawyer's policy on intervention by the DoJ. You should know whether the lawyer is prepared to stay with you if the DoJ declines to intervene. You may wish to disqualify a lawyer who wants to withdraw in this eventuality, or you may decide that lawyer is still your best choice.

Find a lawyer who is willing to handle both the *qui tam* case and your personal cause of action for harassment and wrongful termination. Some unscrupulous lawyers will want to take only the *qui tam* claim, hoping the DoJ will intervene and they can make a quick profit for little effort, leaving you to fend for yourself on your personal cause of action. Your chances of finding a lawyer who will handle only your personal cause of action will of course be reduced because much of the profitability of the case lies with the award for false claims.

4.

The Lawyers' Problem and the Problem With Lawyers

Qui tam suits are fertile ground for conflicts between *qui tam* plaintiffs and their lawyers. *Qui tam* suits are a problem for plaintiffs' lawyers. They are complex and expensive to litigate.

Economics of *Qui Tam* Suits

Plaintiff *qui tam* cases are taken on contingency; if the DoJ does not intervene, the law firm must use its own resources to proceed with the case. Legal fees, discovery, and court costs (which most firms advance to the client) are reimbursed to the firm when the relator prevails, but many firms cannot invest much money in advance.

On the other hand, lawyers who defend q*ui tam* suits do not take those cases on contingency; they are paid hourly by the corporations they represent. Since most corporations are wealthier than most law firms, the defense tactic is easy to predict: Outspend the plaintiff's lawyer. Thus defense lawyers spend hundreds of hours (for which they are being paid by the corporation) tying the case up in procedural bogs, while the relator's lawyers must respond to each challenge and rely on their own financial resources to underwrite these efforts. Realize that to a relator's *qui tam* lawyer, the *qui tam* suit is a business proposition.

Pressure for DoJ Intervention

Therefore, the relator's lawyer hopes that the DoJ will intervene, finance discovery and court costs, conduct the litigation and win the case. The relator's lawyer will then receive statutory legal fees and other moneys agreed upon (i.e., a split of the triple damages) with little financial investment. The would-be relator must accept this reality.

Consequently, *qui tam* relator's lawyers often want to drop the case when the DoJ decides against intervening because they are unwilling to underwrite the expense of discovery and trial preparation. If the DoJ does not intervene, many firms simply drop the client.

Conflicts Created

When lawyers agree to litigate the case without the DoJ, conflicts between relators and lawyers can still arise. The lawyers will eventually want to settle to cut off rising costs and realize a financial return on whatever work they have already done. The lawyers want to do this at a time that is opportune financially, while, in contrast, the relator will not want to settle until he or she thinks justice has been done.

Similarly, when the DoJ does intervene, conflicts can still occur between a relator and the relator's lawyers. Many lawyers are content to act as a broker between the DoJ and the relator. After DoJ intervention, the relator's lawyer may become disinterested in protecting the relator's interests altogether, and pursue his own interests -- a quick settlement with generous legal fees and a split of the award. The interests of the relator's lawyer may now converge with the interests of the DoJ and the defendant, and be opposed to the interests of the relator.

Unfortunately, lawyers who stop representing their clients and begin to represent themselves do not usually announce the change to the relator, who may find out about it after irreparable harm has been done to the case.

In one case in which the DoJ intervened, the relator had filed a personal cause of action for harassment and wrongful termination. During settlement talks a few weeks prior to trial date, the relator found out her lawyer had dropped key defendants in her personal cause of action, had failed to depose hostile witnesses, and had failed to subpoena company financial records within discovery deadlines. When the relator attempted to find other counsel, she discovered that, given the missed deadlines on discovery, no other lawyers would take the case.

Shortly after this discovery, the relator's lawyers told her the DoJ wanted to settle both causes of action at the same time. The relator's lawyers presented, piecemeal, a settlement package to her, which she discovered had been written by the defendant's lawyers in conjunction with the DoJ. The proposed settlement for the

personal cause of action would have allowed the individuals who perpetrated the fraud against the government and who harassed and fired the relator to sue the relator, and would have waived the relator's rights to counter-sue.

The relator's lawyers demanded that the relator sign the papers. In order to force the relator into accepting the defendant's demands, the relator's lawyers filed a motion to withdraw from representation but asserted rights to legal fees for their work.

The DoJ exerted pressure on the relator by threatening to come to settlement with the defendant immediately if the relator did not accept terms offered on her personal cause of action, saying that the defendant had offered her "enough money."

Because these events transpired just a few weeks before trial was to begin, the relator was forced to settle, but had to hire another law firm on a per hour basis to negotiate a settlement agreement in which there was mutuality of releases.

Shopping The Case

Even before a *qui tam* case is filed, lawyers who have had previous good relationships with either US attorneys or DoJ litigators sometimes will "shop" the relator's case to these contacts. If the contact likes the case, the lawyer and the contact will try to lobby inside the DoJ to have the case accepted and steered to that contact, bypassing the routine DoJ assignment procedures. Shopping the case of course poses a serious risk to the relator, because it increases the chances the defendant may hear about the case before it is filed.

Fee Demands

Qui tam plaintiffs also complain about the avarice of some *qui tam* lawyers, charging that lawyers take unconscionable fee splits. Some lawyers demand the statutory fee award, and, as well, up to 50 per cent of the whistleblower's *qui tam* award.

One focus of controversy centers around premier *qui tam* attorney John Phillips, his former law firm, Hall & Phillips, and a non-profit organization Phillips founded, Taxpayer's Against Fraud (TAF). Phillips and TAF have received much national press for success in winning big awards against government contractors.

One of Phillips's former clients, *qui tam* relator Max Killingsworth of Vista, California, has filed a fraud suit against Phillips, Hall & Phillips, and TAF. According to Killingsworth, Phillips persuaded Killingsworth to donate 50% of Killingsworth's *qui tam* recovery to TAF. The money, Phillips said, would be used to educate the public on *qui tam*. Phillips said his only remuneration as Killingsworth's lawyer would be the attorney fees awarded by the court. Killingsworth alleges that Phillips mislead him -- 70% of the money donated to TAF went to Phillips's law firm, Hall & Phillips. In November, 1992, after the California State Bar investigated a Bar complaint lodged by Killingsworth, Phillips admitted that he had not informed his clients properly, and promised to take remedial steps.

In another case, this time involving whistleblower Chester Walsh and TAF, the US Court of Appeals for the Sixth Circuit has questioned fee arrangements between John Phillips and Taxpayers Against Fraud. (Footnote 8)

5.

Retainer Agreements

As already shown in the previous pages, the potential exists for conflict between you and your lawyer. During these conflicts, there are many ways in which lawyers can take advantage of the whistleblower. Even a well-written retainer agreement will not protect you should your lawyer decide to protect his or her interests before your own. However, certain common-sense precautions apply.

If you find a lawyer you like and the lawyer likes your case, make sure you negotiate and sign a retainer agreement promptly. We have already seen the potential abuse awaiting the whistleblower who fails to do this (See Finding A Lawyer).

Typically, the lawyer presents a first draft of the retainer agreement. It should be clear and written in plain English. Your lawyer probably knows that documents are no less legally binding when they are clearly written. Beware of retainer agreements that are encoded in heavy legalese. Try to envision various settlement scenarios, and make sure your retainer agreement explicitly sets out principles to be used for distributing costs and awards in all eventualities.

Among the provisions you will want to include in your retainer agreement are the following:

Justice Department Intervention

As already mentioned, many lawyers want to withdraw representation if the DoJ declines to intervene. On the other hand, some lawyers want the option of staying with the case even if the DoJ decides not to intervene. If the lawyer feels the case is strong and DoJ refused to intervene for political reasons, he may want to stick with you; if the DoJ convinces him there is some serious flaw in your case, the lawyer will want out.

You should know what your lawyer's policy will be in the event the DoJ decides not to intervene. That policy should be clearly stated in the retainer agreement. If the lawyer intends to withdraw, make sure the retainer agreement states that you will not owe any fees for the work up to that point, and that you will own and be able to use all attorney work products in furtherance of your claim in the future.

Discovery and Other Costs

Firms practicing *qui tam* law usually advance the costs of discovery and court costs. When the final award is made after you win, these costs can be taken off the top before any other moneys are disbursed. As already mentioned, you may want to include your own expenses on the development of the case -- the costs of your employment or government contracts attorney, your copying costs, etc., -- in this cost pool. You might also wish to address how expenses are to be assigned should your case be lost.

Fee/Award Splits

Qui tam cases are unlike other contingency cases because there is a statutory allowance for lawyer fees as well as a triple damages award. *Qui tam* lawyers use different methods for distributing the awards.

Some lawyers have demanded the statutory fee awards and a share of the whistleblower's award. Of those lawyers who have demanded both, many of them have demanded 35% to 50% of the whistleblowers award.

The potential *qui tam* relator should know that on July 18, 1994, the United States District Court, Central District of California in *United States of America ex. rel. Taxpayers Against Fraud, et. al, v. Teledyne Industries, et. al*. ruled that *qui tam* plaintiffs, and not their attorneys, should directly receive the statutory attorney fees. It is not known at this writing what effect this ruling will have on the demands of *qui tam* attorneys for remuneration.

Each state Bar has its regulations on contingency fees -- check to see how these may effect your agreement. Again, imagine various settlement scenarios; make sure the retainer agreement won't allow the lawyer to walk away with millions while you wind up broke.

Finally, if you and your prospective lawyer are considering a straight split, you may wish to propose a sliding scale -- the lawyer receives a lower percentage of the triple damages award if the case settles before litigation.

Counter Suits and Appeals

Your agreement should specify your lawyer will handle any counter-suits or appeals. If your former employer files a suit to harass you or appeals your victory, you should be assured legal representation as part of your *qui tam* package.

Settlement

Make sure your retainer agreement specifies how the decision on settlement is to be reached. Your retainer agreement should specify that you make the settlement decision. Be aware, however, that even if your retainer agreement specifies you make the settlement decision, your lawyer can still force you to settle. He or she can do this by threatening to withdraw from you as counsel and making huge claims against your case for legal fees.

Review of Document

Your retainer agreement should specify that you will have the right to review all documents prior to filing. No matter how scrupulous your lawyer is with detail, you are more familiar with the details of your case. This provision protects you from errors of fact being presented in your filings. After the retainer agreement incorporates this clause, insist that the provision be followed. Examine each draft filing carefully, and ask questions if you do not understand the reason the lawyer has used certain language.

Visit the clerk's office at the courthouse and review your case file from time to time. Ask to see the docket and browse through the filings. If your lawyer has filed anything without showing you the draft first, examine the document. Ask your attorney-consultant and your *qui tam* lawyer about the document.

Lawyers have opportunity to alter the character of a complaint and change the complexion of the case. The relator can discover, after it is too late, that the case has been given away or compromised in filings that the relator did not know about or understand.

Trial Strategy and Deposition Deadlines

Ask that you be shown trial strategy and discovery deadlines. You should know when your lawyer plans to depose critical witnesses and subpoena critical documents. There is no reason your lawyer should not share this information with you.

Hours and Expenses

Periodically, your lawyer should furnish you with regular and detailed accounting of how many hours were spent on preparing your case and an accounting of expenses. Make sure time and expenses on your *qui tam* case are separately accounted from time and expenses on your personal cause of action.

Termination of Representation

Specify the terms under which you and your lawyer can go your separate ways.

Dispute Resolution

You and your lawyer should agree on how disputes between you will be handled should they arise. One possibility is to specify a local dispute resolution firm agreeable to you and your lawyer.

6.
Harassment By Your Employer

Now let's look at what you might expect from the government contractor/government combine, with special focus in this chapter on the government contractor.

Betrayal of Identity

As already stated, shortly after you have made your false claim reports to the government agency, your company will know about your activities. Government agencies either deliberately leak the identity of whistleblowers or are wantonly careless of the whistleblower's identity during investigation.

"In several cases I'm familiar with, the entire government investigation consisted of government investigators going to the company and asking the whistleblower's supervisor if the charges were true. The contractors denied the charges, the investigators closed the cases, and the whistleblowers were fired," says veteran whistleblower A.E. Fitzgerald.

Realize, then, that you may be fired shortly after you make your reports. If not fired immediately, your company will harass you while it builds a case against you to discredit your claims and justify firing you at a later date. For your own protection, you should have your evidence collected, your assets protected, a lawyer chosen, and otherwise be ready to file your *qui tam* case before you make your reports to the government.

Your employer will begin a campaign during which they will try to paint you as an incompetent, a malcontent, and a psychotic. The campaign will be conducted on two fronts: professional and personal.

Professional Harassment

Your job, your office, and your computer may be taken from you; you may be given no work or you may be given impossibly onerous work assignments; you may be transferred to another job, far away from the contract on which you have reported, and far away from any possibility of gaining further knowledge that might prove embarrassing to your employer. You may be given conflicting work orders by your supervisors, who will then complain of your non-compliance. You may be left out of department meetings.

No matter what the provocation, retain an outwardly calm and profession demeanor. Document each incident, as outlined in Preparing Your Case.

Accept impossible assignments cheerfully. To refuse would give the corporation an excuse to fire you for insubordination. Instead of refusing, write a memo saying that, as a team player, you would be happy to try to do the job, but you feel the objective is unrealistic. Cite evidence to show it is unrealistic, and compare your workload with others' in like positions. Cite your concern with best use of the company's resources (you).

Psychological Warfare

Personality will be the issue. You will be told you are not perceived as a team player. Your boss may suggest that you need psychological counseling, psychiatric treatment, or that you should attend intrusive touchie-feelie management training or sensitivity training sessions. You many be called into meetings with managers conducted along the lines Stalinist denunciations sessions, and subjected to shouts and accusations. You may be kept under surveillance and told about it, in an effort to unnerve you. "You were seen at Chili's at 1:45. What did you have for lunch?" Attempts will be made to undermine your confidence, harass you, and enrage you until your social demeanor cracks and you fall over the edge. Don't fall into the traps.

Focusing on your personality rather than the fraud being committed is one of the methods used to destroy a whistleblower's case and the whistleblower's sanity. The injustice you see around you and your own persecution will become the center of your attention. Your anger serves you best when it is disciplined, contained, and directed into practical ends. When you are not working on your case, try to restore a sense of balance and pleasure in life. Deliberately set aside time to do something you have always wanted to do -- take up a hobby or sport, join a gym, listen to opera. Gain a sense of proportion by reading biographies of heroes, saints, innovators, or the Righteous Gentiles of the Third Reich -- people who were out of step with their times, just as you are. Reading about early Christians being fed to the lions gives one the sense that things could be worse; reading about Galileo and Pasteur and the opposition they faced gives one the sense of being in good company.

You may wish to do a library search of articles about other whistleblowers, learn of their experiences, and try

to contact them.

If you do see a counselor, know that your employer will use the information to build a case against you, claiming that you are unbalanced. "I have hardly ever met a whistleblower who sought psychological counseling before suffering harassment," says Dr. Donald Soeken of College Park, Maryland. Dr. Soeken is a former psychiatric social worker with the Public Health Service. When working for the government, Dr. Soeken became familiar with the use of psychological fitness-for-duty exams to rid the system of whistleblowers (Footnote 9). "Whistleblowers have been caused grave emotional pain and suffering as a result of retaliation. The employer should be held liable for that damage; it is a proper part of the lawsuit," says Soeken.

Sometimes whistleblowers are cursed, spat upon, physically assaulted, and their property is vandalized. If this happens, file a complaint with the police to record and document the incident.

How to Handle The Physical Effects of Harassment

Constant on-the-job harassment puts a body under tremendous strain. You may not be able to sleep well at night, have intestinal problems during the day, or suffer from a number of other symptoms. Endocrinologist C. Wayne Callaway of Washington, DC says that "stress hormones" -- adrenaline and cortisol -- cause a person to feel constantly wired and utterly exhausted at the same time. Persons under such stress may also experience rapid pulse rate, changes in appetite and weight, sudden shifts of mood, inappropriate laughter and crying, a short fuse, and may even fall victim to heart attacks. "All of these symptoms are due to hormonal releases from stress. You need to see an empathetic primary care physician who understands the physical effects of stress, and how to manage those effects," says Dr. Callaway. And remember there is a provision for special damages for *qui tam* plaintiffs. Make sure you document any physical difficulties you suffer

7.
Reporting False Claims And Filing Your Suit

Ideally you should make your reports to the government when you have protected your assets, chosen your *qui tam* lawyer, gathered your offensive and defensive material, and planned for a new career.

Give Written Reports and Get Receipts

Always report the false claim to the authorities in writing, explaining the charge clearly and supplying a sampling of documentation. Offer to make available whatever other documentation you have.

State clearly you are stepping forward because it is your responsibility as a citizen and that you expect your identity to be protected. Specify you do not wish to be called at work. Although it seems obvious that you would not want to talk about these matters over the phone while at work, government investigators often try to do this.

Send your reports by certified mail and request a return receipt. Keep copies of your reports and all receipts.

Protection and Harassment

You can send your report directly to the Inspector General of the agency for which your company works, or send it through a Congressional office. Reporting the fraud through Congress hypothetically offers you some protection from harassment, in that it is a federal criminal offense to retaliate against a Congressional witness. Research your chosen congressional member carefully. In truth, the office you contact may be more interested in protecting contractors than whistleblowers.

If you report via Congress, specify you are reporting with the understanding you will have Congressional protection. Get a receipt from the Congressional office and follow up to see to who within the agency the Congressional office forwarded your material.

One whistleblower we know had a signed promise that the Congressional office would protect her identity; when the whistleblower suspected the agency investigators were planning to interview her boss concerning information known only to the whistleblower and the boss, the whistleblower notified the Congressional office. Such an action, of course, would have revealed the whistleblower's identity, and she asked the Congressional office to intervene. But the whistleblower was told: "We can't tell the government how to run their investigations." Be prepared for your Congressional office to betray you.

Tape Recorders and Witnesses

After receiving your report, investigators from the government agency may call to request an interview. Insist on bringing a witness and your tape recorder to this interview and record the conversation. Reporters commonly use tape recorders to record interviews; government investigators should not object. After all, you, not they, will be doing the talking.

"History has proven that investigating agencies often fabricate bizarre and untrue accusations and attribute them to whistleblowers, or deny that the whistleblower has given particular details. You must protect yourself against being set up," says veteran whistleblower Ernest Fitzgerald.

Timing

"The time to file your *qui tam* suit is right after you have made your first report to the government," says Stephen Kohn of the National Whistleblowers Center in Washington, DC "It will take your company some time to find out about you. File your suit quickly, while you are still on the job. That way the record is very clear -- you filed the lawsuit, and were fired; or you filed a lawsuit, and then the harassment started," says Kohn.

"Filing right after you have made your reports to the government agency gives the corporation little chance in building a case against you and possibly clouding issues by claiming you are an incompetent malcontent," says Kohn.

You Can't Please Everyone

Be aware that no matter when you file your suit, your employer and the government may find fault with the timing. Whistleblower Chester Walsh was an executive with General Electric working on site in Israel when he learned that GE's manager of foreign engine sales, Herbert Steindler, had conspired with Israeli General Rami Dotan to divert $27 million in US military funds. This was done by submitting vouchers for goods and services that were never delivered. Some of the $27 million was sent to a Swiss bank account controlled by Steindler and Dotan, and the remainder was sent to support Israeli military programs that did not qualify for funding under US guidelines.

Walsh and Taxpayers Against Fraud, a public interest group founded by *qui tam* attorney John Phillips, filed a *qui tam* suit against GE. The suit was settled out of court whereby GE agreed to pay $59.5 million in civil damages, $9.5 million in criminal fines, and $6,158,301 in restitution, for a total payment of more than $75 million to the US Treasury.

Despite Walsh's recovery for the US, both GE and the DoJ complained about the timing of Walsh's suit. They contended that Walsh should have filed sooner, and that his tardiness was occasioned by his desire to allow the moneys defrauded from the US to accumulate, thus increasing the amount of Walsh's recovery. General Electric also asserted that the company knew nothing of the fraud, and that the company had been victimized by Walsh's suit (Footnote 10). Walsh, on the other hand, who was on site in Israel when he discovered the fraud, contended that he did not report the scheme while in Israel because he feared for his job and life. See further discussion of this case in Harassment By The Government.

The statute, of course, provides a built-in disincentive to delay filing a suit. Invariably, *many* employees of the contractor are aware of the fraud; should the whistleblower delay filing the suit, another employee might file before him and disqualify his claims.

8.

Harassment By The Government

Perhaps the betrayal hardest to comprehend for most citizens is the betrayal of the whistleblower by the DoJ and other government agencies. We have already seen how government investigators may reveal the identity of the whistleblower to the whistleblower's employer, but government harassment can come in many other forms.

Prosecution for "Stolen Documents"

The government threatened to prosecute one government employee *qui tam* relator for theft of government documents when the relator used a government report to verify the fraud. The government took the action against the whistleblower even though the scam he was prosecuting had defrauded the US Treasury of hundreds of millions of dollars, and had probably caused the untimely deaths of many elderly persons.

Leon Weinstein of Surfside, Florida was working as an investigator with the Department of Health and Human Services' Office of Inspector General when he investigated a medical clinic, which was a franchise of a Miami-based health maintenance organization, International Medical Centers. IMC had a "risk" contract with HHS, whereby IMC provided medical services for all Medicare patients enrolled in its clinics. For this service, IMC received approximately $400 a month per patient. IMC was at "risk " in that if it cost more to provide health care for patients IMC would lose money. If it costs less, IMC would keep the difference as profit.

IMC kept approximately $300 per patient per month, and transferred $100 per patient per month to the franchised clinics. However, as well as transferring $100 per patient, IMC transferred the risk to the franchised clinics. In essence, then, the franchised clinics, not IMC, was at risk -- IMC kept most of the money and the clinics took the risk. Under this system -- with only $100 a month per patient -- it was imperative that the clinics enroll only healthy patients (Footnote 11).

IMC pursued an aggressive advertising campaign for new patients, promising many free services at the clinics. When the would-be patients responded to the ads, they were told they needed to have a free complete physical exam before they could be enrolled.

Under Medicare rules, the clinics would not have received reimbursements for routine physicals on healthy patients. So the clinics simply filed reports with HHS stating that the tests were performed on sick patients, and requested payment. Payments for these false claims produced additional income for the clinics.

The physicals also helped the clinics in another way. They allowed the doctors to distinguish healthy persons from those showing signs of serious aliments. The would-be IMC enrollees whose tests showed the probability of serious ailments were not enrolled in the clinics. Nor were they told of the results of the tests. They were simply turned away, and their diseases allowed to develop. In one case, a man's chest x-rays showed spots on the lungs; the man was not enrolled as a patient in the clinic, and not advised of his condition. When he finally learned of his lung cancer, it was far advanced and he died.

On the other hand, the would-be patients whose tests showed no signs of ailments were enrolled in the clinics. Thus, by allowing only healthy patients in the clinics, the clinic would be guaranteed $100 a month per patient for virtually no outlay of medical services.

As an HHS investigator, Weinstein verified the facts and had the owner of one clinic prosecuted for fraud. This doctor went to jail. Weinstein then recommended that all the other franchised medical clinics of IMC be audited because he believed they were all involved in the same scam. When he made the request, Weinstein's supervisor expressed no interest in pursuing the matter.

Because the computer programs for the audits had already been developed, Weinstein considered that running the same program on the other clinics could be done easily and efficiently. He checked with the HHS Division of Audit, and, to his astonishment, he discovered that the audits on the other clinics had already been done. The results verified that all the other clinics had been engaged in the same scam, but the Audit Report classified what was done not as fraud, but as the receipt of "overpayments" by these clinics.

Weinstein asked for a copy of the audit, which the auditors gave to him. The documents bore the notice that the information contained therein was available to the public through the Freedom of Information Act.

Weinstein then confronted his supervisor and insisted that the clinics be prosecuted for fraud. His supervisor refused, stating that HHS would simply ask that the clinics refund the "overpayments" and not prosecute for fraud.

After he retired, Weinstein decided to use his power as a citizen to seek justice. He filed a *qui tam* suit against 13 clinics which he named, claiming damages and civil penalties for an estimated $24 to $46 million. He also filed against 49 "John Doe" clinics, the names of which he hoped to learn during discovery. On these, Weinstein claimed damages and civil penalties for an estimated $38 to $72 million.

As part of the evidence, Weinstein submitted copies of the HHS audits he had been given by the HHS auditors verifying the fraud. It was then that Health and Human Services threatened him with criminal prosecution for the theft of government documents, and made statements to the press that HHS was conducting a criminal investigation of him.

The government documents that Weinstein had "stolen" were those very documents given to Weinstein by the HHS auditors verifying the fraud. The government's reasoning was this: The HHS documents were available through the Freedom of Information Act. Weinstein had not filled out an FOIA request (he had been given the papers by the HHS auditors). Therefore, Weinstein had "stolen" the documents.

Weinstein challenged HHS, and it backed away from its threat to prosecute him for stealing the documents. Sometime later Weinstein filed an FOIA request concerning the HHS report to the newspapers that he was under criminal investigation. He found out that, contrary to what HHS had told the newspapers, he had never been under criminal investigation. The untrue reports damaged his reputation and the business he had established after retiring.

Intervening to Undermine Case

The DoJ intervened in Leon Weinstein's *qui tam* case. The DoJ intervention illustrates another way the power of the government is used to protect those who defraud the US taxpayers: The DoJ can use its powers to intervene and then undermine the case.

Result of intervention: Weinstein's 13 named clinics

Of the 13 clinics Weinstein named, the DoJ dropped six and pursued seven. When rewriting Weinstein's original complaint against the seven named clinics, the DoJ made so many errors the court dismissed the case. Among other things, the DoJ wrote one complaint for the seven clinics, but charged only one clinic with conspiracy. The Court complained that conspiracy was alleged against one defendant only, "and the complaint does not specify with whom he allegedly conspired." The Court gave the DoJ 30 days to amend its complaint (Footnote 12).

When the DoJ did amend the complaint, it filed seven separate complaints, leaving Weinstein's name off each complaint. Nor did DoJ mention conspiracy. DoJ thus avoided the conspiracy issue altogether, effectively turning its back on discovering how the plan was put together and who masterminded it.

The DoJ then hurried into settlement with the clinics for a total amount of $1 million, even though, according to Weinstein's original complaint, the damage and penalties figure stood between $24 and $46 million.

Result of Intervention: 49 John Doe clinics

Despite Weinstein's estimate of damages and civil penalties to the US of between $38 to $72 million, the DoJ refused to prosecute the 49 "John Doe" clinics. DoJ's Stuart E. Schiffer told the court it wanted those cases referred back to HHS for prosecution. HHS was of course the very agency whose refusal to prosecute occasioned Weinstein's *qui tam* suit. Weinstein objected to the DoJ's action, but the court ruled in the DoJ's favor. One year after the DoJ referred the 49 John Doe clinics back to HHS for prosecution, Weinstein made a Freedom of Information request. He discovered that not one clinic had been prosecuted for fraud. Weinstein later learned that HHS eventually received refunds on the "overpayments" made to some of the clinics; the millions of dollars the taxpayers could have received by pursuing false claims actions was lost.

Attempt to Intimidate Relator and Deny Recovery

The DoJ has tried to undermine *qui tam* relators by attempting to deny a share of the recovery to which the relator is by law entitled. Let us return to the case of Leon Weinstein.

We have already seen that after the judge dismissed DoJ's first complaint against the named clinics, DoJ

filed seven amended complaints leaving Weinstein's name off each complaint. That forced Weinstein to file motions with each judge asking to be reinstated as a party in each case. These motions were vigorously opposed by the DoJ. When the district courts ruled in favor of Weinstein, not only reinstating him, but in some cases also awarding him a share of the recovered proceeds, the DoJ filed appeals to the Eleventh Circuit Court of Appeals.

These appeals were also unsuccessful, so the DoJ tried to block the award by going back to the district court and asking the court to impose a "constructive trust" on the award to Weinstein. A constructive trust is a common law remedy used against persons who have acquired property unjustly, whereby that property is seized from the wrongdoer and given back to the rightful owner.

In its arguments, the DoJ cited the Snepp case. Frank Snepp, an ex-CIA employee, was charged by the government with violating his contractual agreement with the CIA and publishing a book divulging classified information that endangered national security and the lives of CIA agents. The US Supreme Court allowed the government to seize the proceeds Mr. Snepp would have received from the sale of this book.

In one motion after another, the DoJ tried to paint Mr. Weinstein as another Mr. Snepp. Every judge who heard the argument rejected it out of hand. This has not deterred the DoJ. At this writing, the DoJ is now asking the Eleventh Circuit Court of Appeals to overturn the district court's ruling and impose a constructive trust on an award of just $6,000 to Weinstein.

Such tactics show the extent to which DoJ will go to attempt to bludgeon relators into submission. After all, DoJ attorneys are not spending their own money pursuing these frivolous actions. They are spending taxpayer money. Weinstein estimates DoJ has already spent hundreds of thousands of dollars in their efforts to prevent him from receiving any relator awards (Footnote 13).

Weinstein says, "The fact that DoJ so far has been unsuccessful is in no small part due to the efforts extended by my attorneys, Robert Barnett and Benedict Kuehne, both of Miami, Florida. They have stood by me throughout this onslaught by DoJ. This illustrates just how critical it is for relators to chose the right attorney."

Another example of DoJ's attempt to deny relators recovery is illustrated in the case of Arthur P. Williams. Williams, an Air Force attorney, served as chief of the Contracts Law Division of the Judge Advocate General's Office at Yokota Air Base in Japan. While at Yokota, Williams uncovered a bid-rigging racket which had been operating for 20 years and which cost the taxpayers millions of dollars a year. Williams made repeated efforts to have the racket stopped, sending repeated reports up his command chain. The Air Force not only refused to move, but the Office of Special Investigations started an investigation of Williams for reporting the scam. As Williams told Congress, he filed his *qui tam* suit because he believed that it "was the only way to ensure that the bid-rigging conspiracy would be properly prosecuted . . . Even though I brought this action on behalf of the United States, the DoJ fought me every step of the way." (Footnote 14)

One DoJ tactic was to refuse to serve the complaint on the defendants for three years after Williams filed his suit *in camera*. The DoJ also argued that Williams was barred from bringing the action because he was a government employee. When it was evident that this argument was going to be rejected by the court, the DoJ hurried into a settlement with the defendant behind Williams' back. Williams challenged the settlement, and it was thrown out by the court. Then the DoJ attempted to thwart Williams's recovery.

Williams's case was dealt a blow when he fell ill with throat cancer. The DoJ then seized upon another tactic -- to stall and block Williams's triple damages recovery until he died, at which point it argued that his case was moot. During his 1992 Congressional testimony, Williams said: "In fact, on two occasions, I have attempted to have my own deposition taken to perpetuate my testimony because of my recent illness. The DoJ has grimly opposed these motions on the grounds that my testimony is irrelevant in the event of my death because my action would die with me. Clearly, the DoJ is hoping that I will die before my case is resolved."

Williams lived until June 30, 1993. The DoJ now is opposing any award to his estate.

Art Williams's *qui tam* suit resulted in $36.7 million being returned to the US Treasury. This money was recovered solely by Williams's actions, and despite the US government.

Damaging and Untrue Information on Relator Given to Defendant

In another *qui tam* case, the DoJ told the relator that it was settling its case with the defendant and that the whistleblower would have to negotiate with the contractor directly for the whistleblower's percentage of recovery. The DoJ then told the defendant that the whistleblower was not the original source of the information of the false claim, with the effect of undermining the whistleblower's position even further.

Blocking Relator's Settlement With Defendant

In another case, relator Max Killingsworth of Vista, California, filed suit against the Northrop Corporation. The suit consisted of two actions -- a false claims cause of action and a personal cause of action. While the suit was officially being investigated and still under seal, the DoJ, without the knowledge and consent of Killingsworth (but with the consent of Killingsworth's attorney) secretly agreed to settle with Northrop for $500,000. When Killingsworth was told of the *sub rosa* deal, he dismissed his attorney and hired another. The DoJ then declined to intervene, and Killingsworth proceeded without the DoJ.

Killingsworth and his new attorney conducted discovery for 17 months. During this time, unbeknownst to Killingsworth, the DoJ was secretly helping Northrop against Killingsworth in his personal cause of action, advising Northrop that Killingsworth might have a statute of limitations problem.

Killingsworth and Northrop reached settlement before trial. Northrop agreed to settle Killingsworth's false claims cause of action for $1.5 million, and his personal cause of action for $2.7 million. The settlement did not please the DoJ. They decided that Killingsworth was getting too much of the award. Even though the DoJ was not a party in the proceedings, DoJ's Howard Daniels challenged the settlement in the Ninth Circuit Court of Appeals. Daniels did this despite the fact that the US Treasury was receiving three times more money from Killingsworth's settlement than it would have received from the settlement the DoJ had arranged with Northrop behind Killingsworth's back (Footnote 15).

Relator's Share Litigation

We have already seen that the DoJ and General Electric were displeased over the timing of the Chester Walsh/Taxpayers Against Fraud suit against GE ("Reporting False Claims and Filing Your Suit"), but that a settlement was reached before trial. While settlement was reached on GE's payment to the US Treasury, however, no settlement was reached between the relators and the DoJ concerning the relators' share of the recovery.

The day after the DoJ/GE settlement was reached, GE issued a press release stating that the relators should receive no recovery, and urged the DoJ to withhold it. The DoJ and Walsh/TAF went to the district court to settle the dispute over the relators' share. While DoJ prepared its case, GE provided active assistance, sending its attorneys to all but one of the pre-hearing depositions, and submitting a 13-page "proffer" to the court that explained why the relators should not receive any recovery. GE even sought to participate as a party in the case and objected when the court would not allow it.

The district court found for the relators, and awarded them 22.5% of the $59 million recovery. In finding for Walsh and TAF, Federal District Judge Carl Rubin wrote in his decision:

> There has never been an assertion in this proceeding that Mr. Walsh personally profited from the fraud. The most that the DoJ can assert is that he 'should have' revealed this information earlier. It is very easy to fall into the trap of 'should have' . . . Whether he moved as expeditiously as possible, whether he should have shared his information earlier, whether he was disloyal to General Electric, really is not before this Court. It is instead the very concept of 'whistleblowers' that is at issue . . . In view of their widespread use, it is worthy of note that the DoJ considered such individuals as adversaries rather than allies . . . Mr. Walsh performed a service to the United States . . .

Judge Rubin awarded Walsh and Taxpayers Against Fraud 22.5% of the US $59 million civil damages recovery. The DoJ then filed a notice of appeal; after negotiation, the relators agreed to accept 19% of the recovery (Footnote 16).

The district court also awarded $1 million against GE in attorneys' fees, legal expenses, and costs that the relators incurred while litigating the DoJ on the relators' share issue. GE then appealed this decision. GE told the US Court of Appeals for the Sixth Circuit that it should not have to pay for litigation between the government and the relator. Despite GE's role in the dispute, the court reversed the award granted to Walsh and TAF by the district court, stating:

"The text of the *qui tam* attorneys' fees provision 31 USC Sec. 3730(d), does not address the question of who pays for the relators' legal fees and expenses incurred during the course of a Relators'-Share Litigation . . . GE chose to minimize its losses by settling its case before the matter even came to trial . . . the defendant here should not be required to pay the costs incurred by the prevailing plaintiffs in the course of their collateral litigation." (Footnote 17)

The possible effects of this ruling can be seen clearly: It will greatly increase DoJ's leverage over the relator.

With this opening, the DoJ may now routinely offer the relator an arbitrary and low recovery, comfortable in the knowledge that it would be impractical for the relator to challenge the offer in court. The costs for such a challenge would come from the relator's share of the recovery. These costs could equal or exceed the total amount of recovery. The ruling could have a particularly chilling effect for suits involving smaller purses.

Breaking or Perverting the Seal

The DoJ may tell the defendant about the relator's case while the case is still under seal, without the consent of the relator. This puts the relator at a disadvantage, because the defendant can then lobby and negotiate with the government without the relator's knowledge, while the relator remains gagged because the case is still "under seal." We have already seen that this happened in Max Killingsworth case against Northrop. But the seal can be perverted in another way.

"Partial" Lifting of Seal: Partial to Whom?

There is no provision in the *qui tam* statute for a "partial" lifting of the seal, but the DoJ often asks the relator for approval. Relators can be misled into agreeing.

One relator filed her case naming as defendants a corporation, its major shareholder, and three Air Force colonels who were former employees of the corporation. The case involved a politically controversial multi-billion dollar defense program. While the case was still under seal, the DoJ told the relator's lawyer that it wanted to inform the defendant of the existence of the *qui tam* suit. This was to be done without officially intervening, without officially lifting the seal, and without serving papers on the defendants. The DoJ claimed that it had already begun settlement talks with the defendant on the basis of the mischarging discovered during the investigation of the relator's charges, and that knowledge of the existence of a *qui tam* plaintiff would speed matters up.

The relator's lawyers recommended the action to the whistleblower. Unwilling to go against the lawyer's recommendations and overcoming her own reluctance, the whistleblower agreed to this.

The defendants were shown the complaint. To the whistleblower's surprise, all talk of settlement stopped immediately. The whistleblower was still prohibited from talking about the case to the press, of course, while the defendants were effectively given extra time to prepare a defense against the charges and lobby the DoJ.

The DoJ finally officially intervened. At that hearing, the defendants requested that the relator's original complaint be kept under seal until the DoJ rewrote the complaint. Then the lawyers for the corporation successfully lobbied the DoJ to drop the three Air Force colonels from its complaint. When the DoJ's amended complaint was presented in court, the lawyers for the corporation rose and asked the judge to seal the relator's complaint forever, on the grounds that the mention of the Air Force colonels in the public record might soil their reputations. The judge agreed that the original complaint be sealed forever. Of course, the Congressional purpose of the seal is to allow the DoJ to investigate, not to protect the defendants.

One person familiar with the DoJ's handling of *qui tam* suits has observed that the DoJ often asks for a partial lifting of the seal so that the DoJ can 1) negotiate a settlement, 2) intervene officially, and 3) persuade the relator to sign the settlement papers.

Using this method, the DoJ can claim a high rate of success in prosecuting cases. It can take full credit for the relator's work, and claim that the Treasury gains little when private persons pursue *qui tam* actions on their own.

The DoJ is free to make these or any other claim, of course, confident that little opposing information can come to the surface. No independent research can be done on the circumstances surrounding the settlement of past cases -- recall that the DoJ refuses to make a list of past *qui tam* cases available. (See Finding A Lawyer) In addition, many settlements include a secrecy provision. The effect of this practice further ensures that the American public never learns the details of the deals made by their government with persons or companies who commit fraud.

Negotiation Behind Whistleblower's Back

Qui tam relator attorney, Phil Benson, of Newport Beach in California explains how the government undermines the *qui tam* statute by negotiating behind the relator's back. The government enters into negotiation after being notified of the suit but before it makes an official decision on intervention, while the case is still under seal. These discussions often result in a *sub rosa* agreement that the DoJ will not intervene in return for the contractor taking remedial steps.

"Sometimes the Government will enter into an administrative agreement under the Contract Disputes Act. The plaintiff often does not know about the agreement, and has no standing to be part of the negotiations. Government and contractor use this administrative procedure to agree on facts; once these facts have been agreed upon by the parties involved, the facts cannot be the subject of litigation by the same parties," says Benson.

"These behind the scenes negotiations take place without the plaintiff being informed," says Benson. Benson said he found out about the practices when he served depositions on the government to discover administrative actions taken on a contractor after the filing of the plaintiff's *qui tam* suit.

Another ruse used by the government is the amendment of terms of the original contract to vitiate the *qui tam* suit. That is, the government may waive crucial articles of the contract in question -- after the fact of fraud comes to light.

9.

Negotiations and Settlement

After your case is filed you should begin to think about the conditions you want in a settlement offer. Get advice from your independent lawyer-consultant and your tax attorney and start to write a draft of the settlement agreement yourself.

"It is important to have your negotiating demands clearly defined in good time because the defendant's lawyer's will try to force a settlement package on you at the eleventh hour, using the pressure of deposition and trial dates. If you are prepared with your demands, you can negotiate in a business-like manner," says lawyer Michael Liebermann of Alexandria, Virginia. Remember that the defendant does not want to go to trial, so don't be strong-armed into signing anything you don't want to sign.

You may also prepare yourself for negotiations by reading *Getting to Yes -- Negotiating Agreement Without Giving In*, by Roger Fisher and William Ury, (2nd edition, Penguin, 1983). This material in the book will demystify negotiating and increase your confidence.

Use the statute as your guide for structuring the award. You should be given a share of the government's recovery and a settlement for your personal cause of action. Your share of the government's recovery should be negotiated directly with the DoJ; your award for your personal cause of action should be negotiated with the defendant. If the DoJ has intervened in your case, it may want to take effective control of your personal cause of action, much to your detriment and the defendant's benefit. See The Lawyer's Problem and The Problem With Lawyers.

Qui tam awards are generally held to be taxable, but awards for pain and suffering, which can be made under the special damages section, may be held to be non-taxable. Make sure each amount is described distinctly as resulting from two separate causes of action to decrease the chances you will be taxed on the entire amount. If the DoJ has intervened in your case, you may find them attempting to structure the settlement language to make the entire amount taxable.

Defendants typically want a gag agreement incorporated into the settlement papers, hoping that they can bury their fraud and get on with business. However, with their new knowledge of how various government agencies sabotage investigation and prosecution of their cases, many relators do not want to sign secrecy agreements. Many wish to keep their First Amendment rights and tell the public what they know.

One possible compromise is to agree to keep secret the terms of the settlement for the personal cause of action, but refuse to keep secret the terms of settlement for the false claims action. This compromise allows the public to have access to what is properly the concern of the public. Whatever your views on gag agreements, make them known from the outset.

Settlement agreements typically include releases from liability of all parties to each other. Make sure any release you sign is mutual. If you release the defendant and his heir and assigns, the defendant and his heirs and assigns should release you and your heirs and assigns. "The language for defendant's release and your release should be parallel. The releases should mirror each other," says Michael Liebermann.

Tactics

During negotiation, every attempt will be made to crush your resistance with overwhelming force. Your opponents will try to win in negotiation what they could not win in court. Intimidation and posturing will be keynotes. This is particularly true if your lawyer has abandoned you and gone over to the other side.

If agreement is reached on one provision, you may find that the other side will deny such an agreement was made, or simply start renegotiating, saying that "nothing is set in stone," and that "everything is negotiable." On the other hand, you may also find that should you wish to change your position during negotiation, you will be accused of operating in bad faith. Likewise, if you want a verbal offer put in writing, you may be accused of pedantry, and criticized for not conducting negotiations based on good faith.

Recognize the negotiating ruses of the bully and hold firm. On rare occasions a defendant may want to go to trial if the company believes the relator's case may be lost on a technicality. In the event, of course, the company will claim that the case was dismissed because it was without merit. But far more often, the company

wants to avoid trial above all.

Again, as part of the package, you may want to ask for your payout in the form of a cashier's check, to be given to you at the time you sign the final papers. This will prevent any of the parties from denying you prompt payment.

Do not be pressured into approving the settlement package piecemeal, one instrument at a time. While you can negotiate various issues separately, do not give even verbal approval of any one instrument in isolation. Insist on seeing the entire package in final form before giving verbal approval. You should make sure this package includes a clear statement of the relator's share of the award and an agreement between you and your lawyer on how proceeds should be divided. Read each instrument in the package carefully.

Finally, before signing anything, show the entire package to your independent lawyer/consultant and your independent tax lawyer. Your interests will be better protected.

10.

Special Word to Those Who Have Worked for the US Government

Government employees are in excellent positions to learn about fraud committed by government contractors, and to observe acquiescence to that fraud by supervisors in government agencies. Possibly this explains why the DoJ has embarked on a campaign to prohibit government employees or former government employees from filing *qui tam* suits.

General Tactics

The DoJ obscures, confuses, and misrepresents the facts, blurring the truth behind a mirage of generalized abstractions. To this end, the DoJ charges a) the relator withheld information about the fraud from the government while employed; b) the relator is now attempting to profit from "inside information" by bringing the suit; and c) because he stands to be awarded a share of the US recovery, the relator has a conflict of interest vis a vis his current or past US employment.

We have already reviewed the experiences of Paul Biddle, Leon Weinstein, and Art Williams. Let us now have a look at the experience of James M. Hagood. The case is important because it forced the Ninth Circuit Court of Appeals to confront squarely the key issue in *qui tam* -- the collusion between the government and government contractors. The case is also worth review because it clearly illustrates the extraordinary steps the government will take to stop former government employee *qui tam* cases from being heard by the courts.

The Hagood Case

James Hagood, now of Denver, Colorado, was assistant district counsel to the San Francisco District of the Army Corps of Engineers in 1982. He was assigned to represent the district counsel to handle the renegotiation of the Warm Springs Dam Water Supply contract with the Sonoma County Water Agency. Hagood concluded the Sonoma County Water Agency was using false information to avoid its full repayment obligations to the US government. Hagood objected to the arrangement, but his supervisor demanded he proceed. He was told to follow orders or "suffer the consequences." Hagood put his objections in writing on March 25, 1982, and shortly thereafter his supervisor told him that he was "no longer considered an attorney in the San Francisco district." In July, Hagood found a job with the Corps in another state. In October 1982, the contract to which Hagood objected was signed. In 1987, Hagood retired from the Corps.

Hagood filed his *qui tam* suit against the Sonoma County Water Agency and two Corps employees in March, 1988.

DoJ Strong-Arm Tactics

While the case was still under seal, the DoJ came to the aid of the two Corps employees Hagood had named as defendants. The DoJ's Vincent Terlep went to court to say that the DoJ did not want to intervene in the case, but wanted Hagood to drop the two Corps employees as defendants, anyway. The DoJ threatened that if Hagood would not drop the two, it would officially intervene in Hagood's case and do it for him. The request and threat were, of course, quite outside DoJ's statutory authority. Possibly because Hagood did not wish to tie his case up in procedural bogs, he dropped the two Corps employees. The DoJ then sent a letter to Hagood declining to intervene in his case, but threatening to take retaliatory actions if he was successful, and warning him that any recovery he might make would be seized.

After he received the declination letter, Hagood served the complaint on the Sonoma County Water Agency and proceeded to the US District Court for the Northern District of California alone. On September 25, 1989, before the case went to trial, the court dismissed Hagood's case.

One reason for the Court's dismissal went to the heart of the government/government collusion issue. US District Court Judge Eugene F. Lynch said that Hagood had "contradicted" himself: On one hand Hagood claimed fraud had been committed by the Sonoma County Water Agency, while on the other hand Hagood said that the Corps officials knew that the facts presented to it were false and signed the contract anyway. Therefore, the Judge said, because the Corps signed the contract with the Sonoma County Water Agency *knowing* the facts in

the contract were false, no false claim had been made against the government.

Thus the court, in effect, recognized collusion as a valid defense to fraud. Hagood appealed.

The Ninth Circuit Court of Appeals then set up a schedule to accept briefs on the matter. Hagood filed his brief arguing that the water agency knowingly presented a false claim, and that the resulting contact with the government was based on false information. On Hagood's side, *qui tam* attorney John Phillips filed an amicus brief, offering the Court his knowledge of government collusion in false claims.

Seeing the enormous implications for other government contractors throughout the US, the US Chamber of Commerce filed an amicus brief in support of the Sonoma County Water Agency. The briefing period was closed on schedule.

DoJ's "Metaphysical" Amicus Brief

Then, three months after the deadline for submitting briefs was over, the DoJ, under the signature of the Director of Civil Litigation of the DoJ, Michael Hertz, filed an amicus brief, ostensibly on Hagood's behalf. But the DoJ used the brief to repeat the threats made in the earlier declination letter and to add a new threat to criminally prosecute Hagood if he continued with his *qui tam* suit. The DoJ also argued that Hagood's case should be thrown out on procedural grounds that not even the defendant had brought up in the trial. Before we examine these arguments, lets have a look at two paragraphs of the statute:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation of from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. Section 3730 (e)(4)(A)

and

> For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information. Section 3730 (e)(4)(B).

The DoJ sought to have Hagood's complaint dismissed in part because it asserted that Hagood learned of the false claim through public disclosure. The way in which the DoJ arrived at this "public disclosure" conclusion, was however, novel. The DoJ argued that Hagood, as a government employee, "disclosed" to himself, as a member of the public, the information on which he based his suit.

Even more surprising than the argument, however, was the fact that Michael Hertz himself flew from Washington, DC to San Francisco to argue the case personally before the Ninth Circuit.

In ruling against the DoJ on this "public disclosure" argument, the Appeals Court said:

> To say that the argument of the United States is tortured is to state the obvious . . . The notion that we should subdivide Hagood into his governmental self and his nongovernmental self is too metaphysical a contention for the interpretation of a plain congressional enactment . . . Hagood does not base his suit on any public disclosure made to him or to anyone else. He bases his suit on information that he acquired in preparing the contract; the information was not publicly disclosed. (Footnote 18)

In later testimony before Congress, Hagood said: "In my action, the DoJ has declined to enter the case. If I do not pursue the action, the Treasury will recover nothing. Yet, the DoJ has actually used public funds to make it more difficult for me to pursue the action. The DoJ's actions are contrary to the public interest and fly in the face of the purpose of the Act . . . What the DoJ seems to be seeking is a license to obstruct *qui tam* actions . . ." (Footnote 19)

Lobbying Congress And Misrepresenting Facts

Chagrined over its the loss in the courts on *Hagood* and a number of other cases involving the right of government employees/former government employees to sue, the US DoJ/government contractor combine began a campaign on the political front.

On November 4, 1991, the DoJ sent "The False Claims Technical Amendment Act" to President of the Senate Dan Quayle. In his cover letter, the DoJ's W. Lee Rawls stated: "The purpose of the bill is to overturn

several Circuit Court decisions . . ." Rawls's slyly worded letter cited several cases, including *Hagood* and *Williams* and inferred the cases were "based on information already in the possession of the government" that the government was already acting upon. As we have already seen, nothing was further from the truth. We have already seen that both the *Hagood* and *Williams* cases were brought by *former* government employees years after the government had ignored their requests for prosecution. Rawls propped up the straw man again by expressing fear that government employees would "rush to the courthouse as soon as they have any information about a criminal or civil investigation involving a loss to the Treasury."

Then, on June 3, 1992, in a letter to Rep. Barney Frank, Stuart Gerson, Assistant Attorney General, complained to Congress about *Hagood* and *Weinstein*. This time Gerson complained that Hagood had notified the DoJ of the problem at the Army Corps of Engineers only one month prior to filing his suit. Gerson said this was not enough time for the DoJ to act. A reading of the *qui tam* provisions reveals Hagood had no obligation to notify the DoJ of anything at all prior to the filing of his suit. He had already notified the US government (in the persona of the Army Corps of Engineers) and the government's response was to sit on Hagood's complaint for six years without taking any action.

Gerson did not mention that when Hagood did file, the DoJ itself held up his suit for 6 months, forced Hagood to drop two defendants, and then refused to intervene. Gerson then went on to tell Rep. Frank that the DoJ would not join the suit because it "had no merit," surely a prejudicial statement about a case under litigation. Gerson did not tell Rep. Frank why taxpayer money was wasted on writing a frivolous amicus brief arguing that Hagood's "public employee" self disclosed material to Hagood's "private citizen" self or why Michael Hertz was flown to San Francisco to make the argument.

Kangaroo Court

The government/government contractor combine also arranged to have hearings held before the Senate on September 9, 1993 to restrict the rights of government employees/former government employees to file *qui tam* suits. The hearings were held before the Senate Committee on the Judiciary, Subcommittee on Courts and Administrative Practice, which was chaired by Senator Howell Heflin (D-Alabama). Representatives of government contractors and *qui tam* defense attorneys were asked to testify, but, not surprisingly, *not one government employee/former government employee or their attorneys were asked to testify before the Subcommittee*. Much of the testimony echoed the previous calumnies, but again, gave not one specific, proven example of abuse by government employee/former government employee relators. Sen. Heflin's subcommittee simply provided a propaganda platform from which the fraud combine could attack mythical relators.

Fine Ruling by Ninth Circuit

Now let's look at another case concerning a former government employee relator (Footnote 20). Harold R. Fine was a manager of the audit office in the US Department of Energy, Office of the Inspector General in Albuquerque, New Mexico. Fine urged the Department of Energy to take action against Chevron, but no action was taken. After Fine retired, he filed suit. Justice did not intervene and Fine proceeded alone. The US District Court for the Northern District of California dismissed the suit, saying, in part, that the Inspector General Act prohibited a person from bringing a *qui tam* action based upon information obtained as part of an IG investigation. Fine appealed. The US Court of Appeals for the Ninth Circuit said:

> The structure of the [False Claims Act] makes it clear that no such prohibition exists.

The district court which dismissed Fine's case also asserted that Fine's disclosure of the fraud was not "voluntary" in that Fine was required to report fraud as part of his job. In response, the Appeals Court went to the legislative history of the 1986 False Claims Act:

> In 1983, the US Merit Systems Protection Board conducted a survey of approximately 5,000 Federal Government employees to determine to what extent observed fraud, waste, and abuse was going unreported. The Merit Systems Board reported that 69 percent of those who believed they had direct knowledge of illegalities failed to report the information. Those employees who chose not to report fraud were then asked why they failed to come forward. The most frequently cited reason given (53 percent) was the belief that nothing would be done to correct the activity even if reported . . . The Committee believes changes are necessary to halt the so-called 'conspiracy of silence' that has allowed fraud against the government to flourish.

The Court went on to say:

> The 1986 False Claims Act amendments were intended to encourage government employees voluntarily to disclose fraud by giving them 'an opportunity to speak up and take action without fear and with some assurance their disclosures will lead to results.' (Footnote 21)

The Eleventh Circuit Court of Appeals, hearing the DoJ argue that former government employee Art Williams had no standing as a *qui tam* relator, stated the case this way:

> It would seem that government employees would be both the most likely class of *qui tam* relators, as well as the most valuable class because of their access to instances of fraud against the government. In light of these observations, it seems that a reading of the False Claims Act which in any way categorically excludes government employees as *qui tam* relators, cannot be supported by the legislative history. (Footnote 22)

11.

Conclusion

In fiscal year 1994 alone, *qui tam* cases recovered $378 million for the US Treasury. Despite the problems *qui tam* relators face, the provisions are providing the taxpayer relief designed by Congress.

The 1986 *qui tam* provisions were a good start. Congress should now strengthen them.

Spurious Objections

As a first step, Congress should disabuse itself of the spurious arguments against *qui tam*. These arguments are easy to penetrate.

Initiation of Fraud

Qui tam relators are sometimes said to initiate fraudulent schemes, then file suits to reap even more personal gain.

The DoJ has not provided the public with a single documented instance of this alleged abuse. Were such an abuse to occur, there is already a remedy. The *qui tam* provisions allow the court to reduce the share of the proceeds awarded to the relator who planned or initiated fraud, or to deny any recovery at all (31 USC Sec. 3730 (d) (3). As the statute already provides a remedy, the complaint rings hollow.

Withholding of evidence

Qui tam plaintiffs are said to withhold evidence of fraud from authorities in order to file a *qui tam* suit and cash in on their knowledge.

The DoJ has not provided the public with a single documented instances of this alleged abuse. Were such an abuse to occur, there is already a remedy. Under 18 USC Sec. 1001:

> Whoever, in any matter within the jurisdiction of any department or agency of the United Sates knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The DoJ should prosecute any one who violates 18 USC Sec. 1001. The overwhelming evidence suggests, of course, that 18 USC Sec. 1001 is not violated by relators, but by those who work for government agencies and the Department of Justice.

The race to the courthouse

It is said that *qui tam* relators race to the courthouse in an attempt to file their suits first, narrowly beating out the DoJ which is also racing to the courthouse to file its suit.

The DoJ has not provided the public with one single documented instance of this alleged abuse. Instead, we see case after case where no action was taken by the government before the relator filed suit. Even if such races to the courthouse were a reality, the DoJ, with all its investigators, lawyers, and financial resources, would surely be able to win races against the private citizen relator easily. Such races would be healthy for the taxpayer.

Profiteering from inside information

It is said that government employees/former government employees are profiting from inside information; they learn of fraud while in government employ, and then cash in on their knowledge by filing *qui tam* suits.

The DoJ has not provided one single documented instance of this alleged abuse. We have seen case after case examples of government employees who have urged their agencies to take action, and we have seen the

refusal of the agencies to take action. Should the government wish to deny their employees the opportunity to file *qui tam* suits, the remedy is simple: The government should investigate, uncover, and prosecute fraud itself. Then the would-be relators would have no case.

The fact the government employees have inside information on the cover-up of fraud is exactly why they should be encouraged to file suits.

Conflict of Interest

It is said that a government employee/former government employee has already been paid to disclose fraud as part of that employee's job. Should that employee be paid again, such payment would be a conflict of interest.

In fact, this is not true. Government employees are paid to do a wide variety of jobs. Paul Biddle was paid to audit books; he did so. James Hagood was paid to see that the Army Corps of Engineers contracts conformed with the law; he did so. Leon Weinstein was paid to discover fraud and recommend prosecution; he did so. It was not within the scope of these federal employees' power to prosecute fraud. That was the job of the agencies for whom they worked, and the DoJ. The government refused to act. Without the *qui tam* statute, the federal employees would have had no standing to bring the fraud to the light of day. The relators in those suits were unwilling to go along with agency acquiescence, and were not paid to file *qui tam* suits as part of their job responsibilities.

Covering up fraud is not part of a government employee's responsibility, but a violation of the public trust. Exposing and prosecuting fraud is a public responsibility. Government employees who refuse to go along with the cover-up and who file *qui tam* suits should be lauded, and rewarded for taking on the risks and the onerous work. Government employees who cover up fraud should be prosecuted under 18 USC Sec. 1001.

Congress Should Take Action

Action is necessary. Just as was the case in other periods of our history, the United States effectively has no honest and competent police and prosecutorial force to protect the common weal. Government agencies have joined the outlaws. Citizen prosecutors must now do the job.

- The doctrine of sovereign immunity should be discarded. There is no basis for sovereign immunity in the Constitution of the United States. The doctrine is being used to protect government employees who engage in criminal activities.
- 18 USC Sec. 1513 makes retaliating against witnesses during the course of an official proceeding a crime, punishable by fines up to $250,000 and up to ten years imprisonment. The HHS official who threatened Leon Weinstein with criminal prosecution for "stealing documents" when Weinstein was attempting to rectify the IMC fraud, and the HHS employee who told the press Weinstein was under criminal investigation were retaliating against Weinstein. The DoJ lawyers who invented and presented the frivolous argument over Hagood's public employee self and private citizen self were retaliating against Hagood. These persons and others who retaliate against *qui tam* relators should be prosecuted under 18 USC Sec. 1513. Citizen prosecutors should be given standing to bring such actions.
- Government officials should be prosecuted under 18 USC Sec. 1001 when they aid, abet, and cover up fraud. Citizen prosecutors should be given standing to bring such actions.
- Freedom from tort action should be granted to government employees only when they are performing the legitimate function of their jobs in a lawful manner. Congress should affirm the personal liability of public employees for the consequences of their illegal acts. When those charged with pursuing fraud fail to do so, or when they persecute honest citizens for blowing the whistle, those government employees should not be protected from claims.
- The DoJ should release a detailed list of all *qui tam* cases filed since the 1986 revisions. The actions of the DoJ should be held up to the light of day and examined.
- The provision that *qui tam* cases be filed under seal should be discarded. The DoJ has repeatedly abused the seal provision, undermined its purpose, and uses the provision to protect the interests of the defendants. While DoJ does this, of course, the relator is denied any protection that may be afforded by public knowledge of the situation. Secret procedures for public matters have always been an invitation for abuse. Such procedures are contrary to the Anglo-Saxon legal tradition of public trials.
- Similarly, secrecy clauses in settlement agreements in *qui tam* suits should be outlawed. There is no good reason for secrecy in a public policy law case. The public has a right to know how government contractors are performing and how scrupulously the government is monitoring that performance.
- DoJ intervention in a case should be made contingent on the relator's personal approval. Relators who

have air-tight evidence of fraud do not need the DoJ to intervene and destroy their cases. The approval should be obtained from the relator himself, not his attorney.

- This country needs more government employee/former government employee whistleblowers. People who have "inside information" about fraud against the citizens are exactly the people we want to encourage to step forward. Congress should find ways of making it more attractive for government employees to step forward.
- DoJ lawyers who break seals, strike secret deals with defendants, intervene in cases and then destroy them, or otherwise harass *qui tam* relators and obstruct justice should be open to suit for abuse of process and disbarred, as appropriate. They should also be personally liable for damages to the relator.
- Government agencies should not be able to forgive fraud after the fact by signing retroactive waivers to contract terms.

No society can function when stealing is a common practice, condoned and protected by the government itself. Any country which permits this situation to exist is on the road to self-destruction.

12.

Whistleblower Checklist

- See an attorney to protect your assets from counter suit.
- Hire independent consultants as needed.
- Prepare to find a new job/new career.
- Educate yourself in *qui tam* law and whistleblower protections.
- Gather your documentation and keep it in a safe place.
- Maintain good relationships with your fellow employees.
- Find a *qui tam* lawyer.
- Negotiate a retainer agreement that protects you.
- Make your reports to the government, and watch for first signs of harassment.
- File your suit.
- Prepare for depositions.
- Draft your settlement agreement.

13.

Notes

1. See *Civil False Claims and Qui Tam Actions*, John T. Boese, Prentice Hall Law & Business, 1994, p 1-8.
2. Shortly after filing his suit, Biddle's attempt to return the taxpayers' money to the US Treasury was attacked by *The Washington Post* (12/26/91). Entitled "Qui Tam Scam" the editorial accused Biddle of conflict of interest, stating that Biddle was already being paid to audit Stanford and used information he gathered during the course of his employment to file his suit. "A policeman, for example, cannot claim a reward for capturing a criminal because that's his job." The *Post* did not point out that while Biddle was paid to audit books, he was not paid to prosecute fraud. Nor did the *Post* tell its readers about the three year history of Biddle's effort to have the fraud prosecuted, and the government's three year refusal to prosecute in the face of the evidence. Instead, the *Post* lamented Biddle's opportunity to prosecute. Biddle's suit, of course, would have been obviated had the government done its job.
3. *The New York Times*, January 16, 1993.
4. Notwithstanding the explicit language of the statute, the DoJ has argued that this provision does not protect relators who are government employees, citing the theory of "sovereign immunity." To date, we do not know any government employee or former government employee who has successfully invoked this section for either protection from harassment or special damages. For further discussion of the special problems faced by government employee or former government employee whistleblowers, see Special Word to Relators Who Have Worked For the US Government.
5. See *Civil False Claims and Qui Tam Actions*, John T. Boese, Prentice Hall Law & Business, 1994, Chapter 3.
6. Discovery is a pre-trial process which enables one party to obtain facts and information about the opponent's case. Discovery tools include written interrogatories, surrender of documents, and depositions taken under oath.
7. *DOJ Alert*, published by Aspen Law & Business, Englewood Cliffs, New Jersey, has compiled its own list of past *qui tam* cases, which it makes available to subscribers.
8. See November 30, 1994 decision of the US Court of Appeals for the Sixth Circuit, electronic citation: 1994 *FED App*. 0396P (6th Cir.).
9. See Dr. Soeken's testimony before Congress: "Forced Retirement and Psychiatric Fitness For Duty Exams," 95th Congress, 2nd Session, House of Representatives Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service, November 3, 1978.
10. Walsh filed his suit under seal in November, 1990. According to GE, just a few weeks later in December, 1990, GE became aware of the scam for the first time and made a voluntary disclosure to the DoJ and the Department of Defense. GE then launched its own internal investigation of its own malfeasance. The GE investigation resulted in disciplinary action against 21 GE employees and the finding that the diversion had occurred because the employees, in a concern for customer satisfaction, had bypassed procedures designed to prevent diversion. See Hearing Before The Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, July 29, 1992, pgs. 1.-25. In June, 1992, the Pentagon suspended the company from receiving future government contacts, but lifted the order five days later. In the week of July 14 alone, GE received $1.2 billion in new Pentagon orders. (See *The Washington Post*, July 23, 1992.)
11. International Medical Centers received almost $1 billion in federal Medicare funds from 1981 to 1989. The founder of International Medical Centers, Miguel Recarey, Jr., fled the US in 1989, shortly after he received an expedited tax refund from the IRS of $2.2 million and while under several felony indictments. See *The Wall Street Journal*, "Paid to Treat Elderly, IMC Moved in Worlds of Spying and Politics," August 9, 1998 and *Sun Sentinel*, "Dade man: US failed to pursue Medicare fraud," March 18, 1990.
12. Stuart M. Gerson, Assistant Attorney General, wrote to Rep. Barney Frank (D. Mass.) on June 3, 1992 and misrepresented what had occurred, telling Rep. Frank that Weinstein's cases had been dismissed on their merits because Weinstein had not stated a fraud case with particularity. A review of the court records reveals that Chief Judge Lawrence King of the US District Court, Southern District of Florida made that ruling of the DoJ's pleading, not Weinstein's. Judge King said of the DoJ's complaint: "... the court cannot glean whether the purported fraud took place in the doctors' own offices, through their billing agency or through IMC ..."
13. Weinstein is the first and only government employee, now retired, to have actually received a relator's award under the False Claims Act. To date, Weinstein has received $7,500 from three cases. Three other

cases are still in litigation because DoJ refuses to settle and continues to insist Weinstein should receive nothing. [Note: during this process, one DoJ staff attorney working on Weinstein's case left DoJ; he is now said to be practicing as a *qui tam* relator's attorney.]

14. *Hearings of the House Subcommittee on Administrative Law and Government Relations, Committee on The Judiciary*, April 1, 1992.
15. The Ninth Circuit ruled that the DoJ did not have absolute veto power over settlements, and the award was allowed to stand; later, the DoJ changed its tack and requested to intervene. Killingsworth agreed to the intervention. The DoJ is now seeking damages of $110 million.
16. Judge Rubin's award to the relators was later challenged by the DoJ and General Electric. See November 30, 1994 decision of US Court of Appeals for the Sixth Circuit, electronic citation: 1994 *FED App*. 0396P (6th Cir.). See further discussion of this case below.
17. In arriving at its decision, the Court commented: "We note that the relator's share is paid from the amount recouped by the government; therefore, the government has an interest in minimizing that share."

    Certainly the fraud lobby has an interest in minimizing the relator's share. The Court seems unfamiliar with the facts. As Congress knows, the government has shown little enough interest in recovering tax payer money on its own initiative; acquiescence of the government in fraud is exactly what the *qui tam* provisions were designed to remedy.

    Congress provided some compensation for the extraordinary hardships involved in pursuing such cases. In fact, it is in the taxpayers' interest to see that the relator is compensated for doing the work the government is failing to do. (Electronic Citation: 1994 *FED. App*. 0396P (6th Cir.); November 30, 1994).
18. See USA ex rel. *James M. Hagood v. Sonoma County Water Agency* 929 F.2d 1416 (Ninth Cir., 1991).
19. Testimony before the House Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, April 1, 1992.
20. See *USA ex. rel. Harold R. Fine v. Chevron*, 1994 WE 595367 Ninth Cir., Cal.
21. Government employees/former government employees who wish to file suit should research the stance taken by the appeals circuit courts in their jurisdictions.
22. *USA ex rel. Williams v. NEC Corp*., 931 F.2d 1493 (11th Cir. 1991)