is not supposed to characterize you in any way but must write about the information in a generic fashion. This approach is the safest, but makes it harder for the reporter to write a story that will be interesting and specific enough to get published.

Sometimes the facts alone are the functional equivalent of your signature. This is the case, for example, when only a few people (including you) could possibly be aware of the information you have released. In that case, if a reporter uses your information at all, your identity will be revealed. If you want to remain anonymous in such cases, it is wisest to communicate only on "deep background," to educate the reporter on the issue. This agreement generally means that none of your information is to be used, except as a foundation for asking more generalized questions. Of course, this means the information is much less likely ever to be publicly disseminated. It still may prove valuable for an independent investigation of the issue, however. Knowing what questions to ask in pursuing a lead or interviewing a key player can be very useful. Further, the extra knowledge from deep background can facilitate a reporter's ability to judge the veracity or reliability of statements made by witnesses and officials in the reporter's investigation.

Of course, reporters prefer to speak to you on the record and will assume you are on the record unless you specify differently. Be aware, too, that many reporters have different definitions for the above terms, so it is critical that you define your terms—*before* you release your information. Don't expect the reporter to accept retroactive limitations on information you already have shared. Make sure that the terms of your agreement apply to your entire conversation, and clarify whether you expect them to apply to subsequent conversations. Above all, you must weigh your need for protection against the need to tell the reporter enough for him or her to write the story; this is invariably a difficult but important judgment call.

You also need to pin down whether you are offering an "exclusive." This means that you will not talk to other members of the media until your reporter airs or publishes the story. Obviously, it is in the reporter's best interest for you to make that commitment. This can be useful for you, because the reporter will have a motivation to work harder on it. But it can also backfire. The reporter may think that because s/he "owns" the story, there is unlimited time to work on it. Meanwhile, your whistleblowing initiative can wither on the vine or be overtaken by events.

When you meet with reporters, they often will assume that you are working with them exclusively. Ask at the beginning of your meeting whether or not the reporter expects an exclusive arrangement. Most will say yes. To protect yourself, you should then work out the terms before going further. For example, see if the reporter can set a reasonable time limit for your exclusive relationship. The length of time will depend on the nature of the story. In general, you should agree on a timeframe that is long enough to allow the reporter to cover the story thoroughly but does not drag out until the issue becomes stale. Setting a time period may irritate the reporter, so be sure to suggest it in a courteous and reasonable way. Remember that you can always agree to extend the deadline. One approach for a particularly "hot" story is to grant a temporary exclusive while the reporter seeks approval from editors to make a desired commitment, such as front-page publication within a specified period.

Often, you can pursue print and broadcast reporters simultaneously. You must be sure that each knows the other is also doing your story. They may agree to release their stories close together because their audiences are different. This reduces the sense of competition.

Even after you have established clear terms for the working relationship, you are likely to encounter a maze of decisions and stumbling blocks in attempting to use the media effectively as your whistleblowing outlet. Be realistic and avoid false expectations. For example:

Be prepared for the fact that a story may not be published or broadcast, despite a substantial investment of resources. Reporters have to sell their stories to editors and publishers. The more

controversial the issues, the more the managers of the newspaper or television station will get involved. Sometimes owners or key institutional stockholders may be tied in some way to the targets of your whistleblower disclosure, or even be implicated directly. In the absence of a conflict of interest, the owners and managers of newspapers and television stations may feel political and monetary pressures; they may fear a lawsuit, for example. As a general rule, when reporters invest a significant amount of time and resources, it is a good indicator that their employer wants to break a major story. But don't count on it.

If the story is run, do not expect reporters to be crusaders for your cause. Most reporters will resent it or withdraw if you pressure them to editorialize or to act as your advocate. Of course, they will form opinions about the issues, and about who is playing games with them and who is playing it straight. In most cases, however, the professional standard is to let the facts speak for themselves.

Do not expect reporters to locate a lawyer or to contact the government for you—although some will offer to help in order to maintain your loyalty. To maintain objectivity and professional credibility, most want to remain uninvolved in your personal concerns and activities. Their focus is on reporting the relevant factual elements of your case. When your dissent is clearly on behalf of the public, there may be common ground. If reporters believe your information is credible and significant, they may seek more information from attorneys with relevant expertise. They may contact the government to find out what is being done about your allegations. You should not expect reporters to take these steps, however.

Do not assume that since you are working closely with a reporter, s/he is your friend. Part of a reporter's job is to put you at ease so that you are willing to speak openly, and preferably on the record. Keep in mind that work with a reporter is above all a business relationship. A reporter who is gracious and understanding is being a professional. Friendship may evolve, but do not assume it. Be sure to be professional in turn: for example, if you

meet with a reporter at a bar or a restaurant, do not make the mistake of losing good judgment after relaxing. It is not the reporter's fault if you lose your self-control, and many will have less respect for your credibility if you do. As a general guide, it may be wise to stick to tea or coffee and forego alcoholic beverages.

Once you and the reporter have selected each other, the effectiveness of your working relationship—and your whistleblowing—will depend to a significant extent on how you organize and conduct your whistleblowing.

Tips on Working with the Media

Based on our experience, below are twelve suggestions for successful working relationships between whistleblowers and members of the media.

1. Be prepared. It is necessary but not sufficient that the reporter be adequately impressed with your expertise to take you seriously. Have your documents organized in an understandable order, and speak from an outline that you have prepared and practiced, to avoid rambling or taking too long to get to the heart of your story. Try not to tell the story in excessive detail. Open with a basic overview, offering documents as you go, and then go into detail in areas in which the reporter expresses interest. A good rule is to limit introductory summaries to a minute in a phone call, and to ten minutes in a meeting with a reporter. The conversations can go on much longer, but your prepared summary should not.

Practice delivering your message, taking into account the suggestions offered here. While these tips will help you communicate more effectively, in most cases they will not come naturally. Unless you practice until you are comfortable, your delivery may sound stiff or stilted, which may hurt your credibility. Practice is especially useful to help you get over the jitters and allow you to become more familiar with your material. Often, someone from a concerned non-profit group or congressional office can help you prepare for your media interviews—asking you tough questions and giving you feedback on your answers.

This does not mean memorizing or preparing a script, unless you and/or your coach decide that is the best way for you to communicate. Relatively spontaneous, extemporaneous speaking normally is best. It is more credible, sounds more natural and, because it is easier to listen to, is more effective at communicating the point. A good balance can be struck by speaking from an outline, where concepts are listed and reinforced with key facts, punch lines and statistics.

*2. **Provide a timeline.*** A skeletal chronology organized around dates can be a concise, easy-to-understand summary that highlights milestones in your story. The spotlight on dates is particularly useful to identify patterns or causal relationships. Reporters, congressional staff and lawyers alike generally appreciate a timeline to help them organize the facts of your narrative. Prepare the timeline before your initial interview.

*3. **No matter what, keep your cool.*** The calmest person in the room is usually seen as the most credible. The point is not to be emotionless or uncaring, but to stay poised. It leaves the impression of self-confidence. This is extremely hard, since you probably are nervous about being a public figure, opening up to a stranger, and above all, about the public policy and personal issues at stake. But there are few suggestions more important for media interviews—or in other settings in which credibility is essential. Especially when a reporter tries to bait you, strive to stay unruffled and unflappable.

*4. **Don't exaggerate or dramatize.*** Make sure that you never embellish your information. A common mistake by whistleblowers, once they have finally convinced someone to listen to them, is to tell the reporter 110 percent of the story to make their point. The problem is that once the reporter—or another source, such as agency or company officials—detects the ten percent that is embellished, the rest of the story becomes suspect. Depending on the context, it may be best initially to understate or limit your conclusions to those based on facts that cannot be credibly disputed. At the same time, don't shortchange the

significance of your whistleblowing. Identify all the issues and provide leads so the reporter can make his or her own judgment calls on tougher questions. It helps your credibility when investigators conclude for themselves that the situation is really worse than you initially asserted.

Once you have reviewed and prepared the information you wish to present, be sure not to deliver an overly dramatized presentation. High drama erodes the patience of long-time reporters, many of whom may feel that they have "seen it all." Television reporters will be particularly concerned with your delivery if they are trying to judge how credible and articulate you will be on camera.

*5. **Be an advocate for the story, not for yourself.*** Do not try to convince reporters that you are a hero or a martyr. The relevance of your personal stature, or even reprisals against you, will depend on how the reporter evaluates the significance and credibility of your evidence. Do not start your conversation, for example, by reciting all the injustices that you have had to endure. The best way to impress a reporter with your story (and your motivations) is to give the factual information on the misconduct that you witnessed, and let him or her ask about your personal hardships. Only volunteer the personal problems that you have had at the end of the meeting, if the reporter has not asked, and keep your statements brief.

Even if reporters ask you about your personal fight with the organization, try to keep the focus on the subject of your whistleblowing—the threat to public health or safety, or the fraud and abuse you seek to expose. You can discuss incidents of repression by raising questions about why the organization is trying to silence you or others: what is the employer afraid of ? If and when you do discuss retaliation, do not come across as bitter, defensive or paranoid, and do not dwell on the subject.

A reporter may well decide, however, that the harassment is part of the story, so be ready and able to summarize what happened to you—and why people should believe you despite your employer's efforts to discredit you. If you go public, part of the

territory is successfully defending yourself when reprisals have occurred.

*6. **Speak in "sound bites."*** Few things are more precious to a reporter than time and space. If you can't make a point crisply in 15 to 30 seconds, you may lose the opportunity to share it at all with the public. Since this is probably your only chance, practice and prepare "sound-bite" statements. It is a good idea to combine at least one key fact with your most powerful rhetoric. View the sound bite as analogous to the topic sentence in a paragraph, or the lead in an article. In-depth explanations may help educate the reporter, but a detailed discussion seldom will be practical to broadcast or print as is: the reporter will most likely condense and paraphrase that part of the interview. In many cases, all you will be permitted to communicate directly to a public audience is a sound bite or two—so offer several good ones, to provide the reporter with a menu of points you want to make.

*7. **Start with the bottom line.*** When you add up a column, you work toward the bottom line instead of starting with it. Your approach to an interview should be precisely the opposite. In a media interview, it is usually better to start with the conclusion, and then explain its basis. Otherwise, reporters and public audiences may feel you are trying to evade a question, or may get restless waiting for you to get to the point.

*8. **Paint a picture with your words.*** Try to express yourself with words that create a picture in the reader or listener's mind. Creating a mental image is generally more compelling than an abstract or wordy academic approach, even if the audience understands your point. More commonly, your audience may not comprehend the significance of your words, particularly if you are a scientific or technical expert and rely on jargon. Jack Lemmon's frustration at his inability to be understood during the climax of the movie *The China Syndrome* is one shared by many whistleblowing experts. Demystify the jargon. Often an analogy to the principles in common household technologies or personal finances simultaneously can demystify technical language and

create a mental picture.

*9. **Get it right the first time.*** Don't count on a second chance to correct inaccuracies. Don't assume you will have an opportunity to "revise and correct" your mistakes through after-the-fact editing. Be sure of your facts and in command of them, or don't take the risk.

*10. **Be available.*** Within reason, reporters should have ready access whenever they need to reach you. This may take effort. With rare exceptions a government employee, for example, is not free to speak with the press as a private citizen on the taxpayers' time. But there is no barrier beyond inconvenience to returning a call during your first break, or to letting the reporter call you at home. If you are not determined enough to brush aside inconvenience, you probably should not be blowing the whistle.

*11. **Monitor the story, without being pushy.*** This advice applies both before and after the story is completed. During the research and writing phase, it is acceptable etiquette to call with an offer to be helpful and answer any questions that may have accumulated if you have not heard from the reporter for some time. But don't assume that you own the reporter's time, and back off if your offer is not accepted immediately. After the story is written and published, you should keep the reporter informed about how the scandal is progressing, but avoid becoming a pest in his or her eyes. Reporters often are pressured by their editors to move on to the next story. They frequently have to fight for the time and newspaper space for follow-up stories on their exposes.

*12. **Do not attack the reporter if you have to correct a mistake.*** Realistically, reporters must absorb far too much information to get everything absolutely accurate the first time. Often their job is to develop functional expertise about a subject, starting with a zero knowledge base. The most fortunate receive a few months' time; more often they have only a few days or even hours for the whole story. If something is inaccurate or an agreement in your working relationship is breached, assert yourself,

but civilly. There is no rule of journalistic courtesy that says you must silently endure mistakes. A good journalist will want to get it right and appreciate your initiative, so that an inaccuracy is not repeated. But keep the reporter's circumstances in mind. Don't let your criticisms get personal; recognize the overwhelming majority of fresh data that the reporter got right; and respect the hard work that almost all journalists invest in their profession.

As a final note, you should be prepared for what may come *after* you have successfully blown the whistle to the media. If you have been anonymous in your whistleblowing, it is important to remain calm and not do anything that casts suspicion on yourself. Once a story hits the media, your agency or company will begin "damage control." Depending on your position, you may be asked to sit in on meetings to address the issue or even to help plan a cover-up. This may put you in a good position to continue telling the reporter whether the company or the agency is legitimately trying to solve the problem.

If you are going public with your whistleblowing, you may receive more publicity and requests for interviews after the story appears. It is good to take advantage of the extra publicity to shed more light on the subject of your whistleblowing, but approach your new-found status with caution. It becomes quite flattering suddenly to receive all this attention, but remember: one of the ways that a bureaucracy or a company can discredit you to others is by portraying you as a self-glorified publicity-hound. Don't give them any ammunition by letting the publicity go to your head. A little humility can go a long way in making your case.

ADVOCACY ORGANIZATIONS

Non-profit advocacy organizations can be a vital resource for whistleblowers. These groups can provide advice, share their own research and knowledge on issues of concern to you, act as allies, or even serve as your main channel for blowing the whistle. Particularly if the idea of blowing the whistle to a member of Congress, the press or a hotline seem too risky or unpromising—or if

you aren't quite sure yet about going public but do not want to remain silent—consider calling upon advocacy groups.

Ultimately, these organizations are a vital link in the chain of political constituencies that turns your whistleblowing information into power. It often takes a coalition effort to overcome the political clout of large government agencies and private corporations. Most of the success stories in this handbook would not have occurred without solidarity and support from constituencies mobilized by advocacy groups.

This link is a critical element of your defensive as well as offensive strategies: solidarity with affected constituencies is often a key prerequisite for a whistleblower's survival. The resulting political base is the most effective shield available to prevent or resist retaliation, more powerful than legal rights in isolation. A letter of support from a coalition with hundreds of thousands of members can be far more impressive in changing a government official's mind than even the best legal brief an attorney can produce.

There are relatively few experienced organizations that specialize in working directly with whistleblowers. In addition to the Government Accountability Project (GAP), which has a twenty-year track record of work on behalf of whistleblowers, the Project on Government Oversight (POGO) (formerly the Project on Military Procurement) has lent invaluable assistance to whistleblowers for many years. Other groups, such as Public Employees for Environmental Responsibility (PEER), work with whistleblowing employees in specific fields. The American Civil Liberties Union Workplace Rights Project is another knowledgeable resource. To contact these groups, see Appendix B.

GAP, POGO and PEER can help you build a support network of constituency groups and other whistleblowers. These organizations have developed strategies that not only enable you to prepare and bring your dissent to public attention in a professional way, but also offer support and guidance from other whistleblowers. They may produce and release issue reports or "white papers" based on whistleblowers' findings: these reports

are a vehicle for releasing information provided by groups of employees without exposing their identities. A related tactic is to expose bureaucratic bluffs through surveying agency employees on issues raised by whistleblowers' findings.

Beyond these groups, there are a range of advocacy organizations that may not work extensively with whistleblowers but can help nonetheless. These range from issue-oriented public interest groups to labor unions and professional associations. Organizations vary in their approach to whistleblower concerns, and in the type and degree of assistance they have to offer. Generally, advocacy groups tend to team up with whistleblowers when doing so advances a shared agenda. A public interest environmental group may choose to help you fight your battle because you have information critical to exposing bureaucratic or industry wrongdoing. A consumer organization may view your information as important in warning its members against unsafe products, or in mobilizing a political counterattack. A union may work with you because you are a dues-paying member, or because you have information about a corporation that can be used in collective bargaining or an organizing campaign. A professional association or society is likely to be concerned about issues affecting the profession's credibility.

The possibilities for partnership, and political leverage, are numerous. To take one example, both government agencies and multinational corporations repeatedly have blinked when faced with the alliance between whistleblowing meat inspectors and Safe Tables Our Priority (S.T.O.P.), an advocacy and support organization for families of food poisoning victims. This partnership has operated through a coalition of consumer, labor and public interest organizations. The team has issued its message through joint participation in press conferences, solidarity letters, formal public hearings, briefings of agency decisionmakers (including the Secretary of Agriculture), and informal public symposia sponsored by members of Congress.

Although many do admirable and important work, advocacy groups also can be self-serving: their primary loyalties are to their

missions (and occasionally to their own institutional advancement), not to you. You must remember that your disclosures to them are not automatically covered by the attorney-client privilege. That means that unless you work out a confidentiality agreement first, your information becomes theirs to use. You should understand what their agenda is before you put your cards on the table. To do this, you will need to do a little research. Before you go rushing to an organization with your whistleblowing disclosures, do some homework to learn its reputation, and how it has worked with whistleblowers in the past. The most common types of advocacy organizations are summarized below.

Public Interest Groups

Public interest groups cover the spectrum of public concerns—and of ideological positions on these issues. Think through the types of groups that might be concerned about the consequences of the wrongdoing you have witnessed. Be sure that you understand a group's position on an issue, and that it is in line with your own. If you are blowing the whistle on a faulty component of a car engine that could harm people, for example, you may want to contact consumer groups and/or organizations dealing with auto safety. If you are blowing the whistle on a government drug-testing experiment on unwitting patients, you may want to contact health organizations and patient right-to-know groups. Do not be discouraged if you cannot find help right away. Even if a particular group cannot help you, be sure to ask for referrals to other organizations, as well as subject matter experts and *pro bono* lawyers who specialize in your issue.

Once you find an organization interested in your information, you will need to find out if it is willing to help with your case, and if assistance is conditioned on your providing the contents of your whistleblower disclosure. In many cases, a group will respect and admire your courage in speaking out against injustice and want to help. They may have only meager resources and face severe limitations on what they are able to do for you, however. It is also possible that an organization will seize upon your

important information, and unintentionally or not, expose you or put you at risk without your consent in order to advance a larger political goal. This is why it is critical to research an organization well before you approach it, and to clarify the terms of your working relationship.

Some public interest donors or organizations offer awards for courageous individuals who have contributed to their cause. Being nominated for these awards can be helpful, because it increases your visibility and credibility to be publicly honored for your whistleblowing. Sometimes the recognition includes modest cash awards, and almost all of them generate at least some publicity that can put pressure on your bosses not to retaliate.

Ideally, you will be able to establish a mutually beneficial relationship, in which your information helps their cause and vice versa. In order for this to happen, these organizations should be experienced in working with whistleblowers. Their understanding of a whistleblower's needs, such as legal assistance to pursue a wrongful discharge case, will help to avoid or successfully overcome retaliation.

Employee Organizations

Labor unions, employee federations and professional associations are the primary types of employee organizations. All have employee-based memberships and work to further their members' interests. Unlike public interest groups, they are generally not wedded to furthering a particular issue, but rather to serving their members. Therefore, it is likely that you will require membership in order to secure assistance from these organizations.

Unions can be a great resource for whistleblowers. In exchange for paying dues, union members are often entitled to receive certain services. For example, a union may provide legal counsel to members facing employment disputes. Membership in a union may also trigger legal options you would not have otherwise—such as binding arbitration through a hearing in which you have equal say with management in choosing the arbitrator who will decide your case.

As potential allies in your whistleblowing, however, unions vary tremendously. Some can be counted on to stand up for their members who blow the whistle. They may also work in partnership with other groups, to link their whistleblowers with affected constituencies: the union of federal food inspectors is one example of a union that takes this approach. Others are so closely aligned with management that they would be reluctant to challenge your employer. Still others may support you in principle but may make a strategic decision not to push on the ethical issues you are raising, because they are in a protracted battle with management over pay, benefits or other issues of higher priority to the union. Supportive local union leaders, moreover, may not be able to deliver for you if their efforts are vetoed by superiors cozy with management on the national level. As with other groups, you should check out your union's track record on assisting whistleblowers before you approach it for help. Be aware that if the union is unsympathetic to whistleblowers, a union official might alert management to your activities.

> *"There are support systems out there that can keep you from being isolated. Find them early on; I wish I had."*
> *—Local government whistleblower*

Depending on your job, you may also consider approaching a professional association, such as the National Association of Social Workers, the American Academy for the Advancement of Science, the American Society of Marine Biologists and state bar associations for attorneys. These associations vary greatly in size and mission. Most provide dues-paying members with up-to-date information about developments in the profession, through newsletters, invitations to educational events, conferences and job listings. Others will go further in defending the interests of members and the integrity of the profession. Those organizations that are independent and have large memberships can be credible and powerful friends in your battle to tell the truth and keep your career intact.

A note of caution: professional associations often have large budgets, but many acquire some of their funding from industry. Make sure to investigate where the association gets its funding by requesting a copy of its annual report. These reports should list the primary contributors and provide general information about the association's program. Check with your peers to see what they think about the association and its leadership, and if they have ever sought help from it. Often, even the most cautious and conservative associations have a token ethics committee whose members may be kindred spirits.

Employee Support Organizations

There is a unique if rare hybrid that combines the missions of an issue-oriented public interest group and an employee organization. These groups consist of employees from a particular government agency or industry that have joined together to champion a common agenda. Groups such as Public Employees for Environmental Responsibility (PEER), the Association of Forest Service Employees for Environmental Ethics (AFSEEE), and the Center for Women's Economic Alternatives (a self-help group for women working in the poultry industry) have conducted public interest advocacy work. Because they are employee-focused, they are more likely to understand and be sensitive to whistleblower concerns.

If one exists in your field, an employee support organization may be of particular importance because it is able to connect you with other like-minded professionals—including current and former whistleblowers—in your area of expertise. These organizations represent a collective of employees, which can both lend credibility and facilitate anonymity if you wish. Such groups frequently serve as a voice for employees who cannot speak publicly. Like whistleblower support groups and unions, they are natural vehicles to channel, cloak and/or amplify dissent through solidarity tactics, such as surveying other employees on the issues relevant to your dissent, and then publicizing the survey results. Keep in mind that the question of how much control you

have over the public release of your information is something you will want to negotiate in advance. For example, it may be acceptable to you for a group to use your information in framing tough survey questions based on your disclosures, even if you would object to having the organization assert that it knows the answers.

Tips on Approaching Advocacy Organizations

How you approach an advocacy group can be decisive in your working relationship. Never go in with demands. Although your issues are very important, remember that there are a lot of competing issues and priorities for these groups, and you do not want to alienate staff by being too pushy.

The first step is to do your homework. Research potential organizations to make sure they are reputable and will be sympathetic to your cause. If you already have a lawyer, ask him or her for advice about whether it is wise to approach a particular organization.

The second step is to write up the basis of your whistleblowing concerns and the details of your case in a two- to three-page summary. You may use the same basic summary that you prepare for reporters—but tailor it to highlight what you can do for the organization (such as provide information for a public interest group's campaign on food safety, or help a union expose corruption in a company). In this introductory summary, do not include anything that you would not want your employer to know you are disclosing—at least not until there is mutual agreement and a commitment by the group on how your information will be used. After scouting the terrain through introductory telephone inquiries, send your summary, with a short letter of introduction stating what you hope to achieve, to the appropriate contact person at the organization.

As you begin communicating with an organization, keep in mind that protecting your attorney-client privilege is critical if you want your information or identity to remain confidential. Remember that advocacy groups are not automatically covered

by the privilege. Therefore, you may be waiving this legal right unless you talk only through one of the group's lawyers on the condition that s/he maintains your attorney-client privilege. If you fail to protect your attorney-client privilege by disclosing your information to a non-attorney, that person could be required to produce your disclosures in legal proceedings. The safest route is to seek counsel first from your own attorney, who can conduct initial negotiations with the group or its lawyers on how your information will be used. At a minimum, an attorney could negotiate the organization's commitment to legally defend your anonymity through First Amendment freedom of association rights in court, if necessary.

The next step is to make a follow-up call to the contact person to ensure that your information was received and to try to set up an in-person meeting. Be firm and polite in your conversations. If they are not interested, ask for referrals to other organizations.

If the group is concerned and wants to help, make sure to establish clear parameters for defining your relationship. The sooner you communicate your mutual expectations, the less chance there will be for misunderstanding and potentially career-damaging mistakes.

Making an organization a valuable ally takes work and patience. The following are some questions you may want to ask:

- What are your funding sources?
- Have you worked with whistleblowers before? If so, who, and may I contact them about their experience?
- What benefits do you provide to members (if you are speaking to a union or professional association)?
- How will you use my information? What are your goals in using my information? To further what ends?
- Are you willing to protect my identity as the source of the information (if applicable)?
- Will I be able to fact-check public documents you produce to ensure accuracy? (This is especially important if disclosures are of a highly technical nature.)
- Is there one person who will be my primary contact?
- Are you comfortable working with my lawyer (if applicable)?
- What sort of financial commitment, if any, is expected of me?

CHAPTER FOUR

Choosing and Working with an Attorney

It should be clear by now that to blow the whistle safely and effectively, you need help. You need support from groups and constituencies positioned to assist you in exposing the wrongdoing you have discovered. But you also need legal expertise.

A lawyer is an indispensable expert, regardless of whether your whistleblowing experience leads to a lawsuit. A well-informed and sympathetic attorney can offer guidance at every step in the whistleblowing process, and can help you avoid serious missteps. An attorney can help you prevent reprisals from occurring in the first place, through supervising and monitoring your disclosure through the safest channels. If retaliation is inevitable, an attorney can ensure that you are on solid legal ground by screening your whistleblowing disclosure to provide an expert opinion on whether it is "legally-protected speech." Otherwise you may forfeit your rights: if you say too much or do not have enough corroborating evidence, what you intend as whistleblowing may not qualify for protection under the law.

Whether a whistleblower's story has a happy or tragic ending depends to a significant degree on picking the right lawyer and maintaining an effective working relationship with that person.

In the eyes of the law, the attorney and client are as one. The attorney is the client's "mouthpiece," and the client automatically receives both the benefits and the liabilities of the attorney's statements and decisions. Selecting a lawyer is a decision as significant as any other in the whistleblowing cycle.

Unfortunately, many whistleblowers are so anxious to get their cases into the hands of an "expert" that they accept the first lawyer who will take them on affordable terms, without truly knowing the partner upon whom not only their whistleblowing experience but also their professional future may depend. Such an arrangement poses unacceptably high risks to future happiness, financial well-being and legal success.

Ultimately, trust and intuition are as important as a catalogue of "dos" and "don'ts" in selecting and working with an attorney. Like any partnership, to be effective the attorney and client should like each other and have a rapport based on mutual respect, at least within the context of their professional relationship. After all, they must rely on each other in a high-stakes conflict in which they are both "underdogs" by any conventional measure. But the smart whistleblower will follow both intuition and the guidance of a checklist based on the lessons learned by others who have gone through the same experience.

Our advice to whistleblowers who need legal representation is summarized below in two sets of suggestions. The first set focuses on selecting an attorney, the second on maintaining a good working relationship with him or her. Not all of the suggestions may be relevant to your case. More importantly, these tips are not all-inclusive. They represent a composite of experiences shared by those who have been represented by GAP or sought help from similar groups, such as the Project on Government Oversight and Public Employees for Environmental Responsibility. Please let us know if you have items to add to the list. We receive a steady stream of requests from new whistleblowers who could benefit from lessons learned.

Tips on Choosing an Attorney

The following are suggestions on how to locate and select a good attorney.

1. Check with others who have first-hand experience with employment attorneys. Do not overlook referrals from friends who may have had similar experiences and enjoyed good attorney-client relationships. Contact GAP for suggestions. A routine part of our service to whistleblowers is to provide attorney referrals.

2. Contact issue-specific public interest or community organizations. In addition to contacting GAP, you may find it useful to locate an attorney with the help of non-profit organizations that have an interest in the particular issues behind your whistleblowing. You may contact local groups or affiliates, or the Washington offices of national groups. Remember that the principle of confidentiality that seals an attorney-client relationship will not apply during your discussions with lay representatives at such groups, so be careful about how much you say; unless you want to make a whistleblower disclosure to them, you should avoid discussing your allegations. You may simply point out, for example, that you have suffered retaliation for pursuing the same values on the job that reflect their organization's mission in the larger community. Then ask for their help in finding an attorney with a good track record in employment law, the topic of your dissent, or preferably both.

3. Traditional sources such as the local bar association or relevant committees of the American Bar Association can help identify respected specialists. Your local public library also should have a copy of the lawyer's directory, Martindale-Hubbell, which describes the specialties of attorneys under a variety of cross-references. When seeking referrals, ask for attorneys who specialize in wrongful discharge. If that fails to produce an adequate list, broaden the scope to employment law.

4. Get to know each other. One common reason that attorney-client relationships sour is that each entered the partnership with differing expectations. An essential step in deciding on an attorney is to clarify—and then communicate—your own expectations, in as much detail as possible.

5. Before even talking to a prospective lawyer, take time to summarize your story in writing. Be concise: limit yourself if possible to less than two single-spaced, typed pages and certainly less than five. Take your time preparing this document. Keep in mind that you may be able to edit and re-use this statement later as a fact summary for outreach to members of Congress or the media. Prospective attorneys will appreciate the time they save by reading it before meeting with you. They can then get down to asking you the hard questions with some background knowledge of the dispute and its context. Remember that your case summary supplies an attorney's first impression of you and your communications skills. Perhaps more importantly, it allows the attorney to test your credibility, by questioning you to determine whether you tend to exaggerate. Stick to the facts and avoid unnecessary conclusions. Lawyers like to draw their own conclusions.

6. Identify solid candidates as supporting witnesses for your whistleblowing case, and be prepared to describe how their testimony could help. Similarly, prepare a list of relevant documents currently or potentially available. It takes a near-miracle to win without either strong supporting testimony or documentary evidence.

7. Remember that a primary goal of your initial interview is to sell yourself to build the attorney's confidence in your prospects for winning. Prospective lawyers may be wary of someone who immediately cross-examines them on too wide a range of topics; remember that the attorney needs to form an initial overall impression of you. Before you get serious about signing a retainer, however, you will need to know where you both stand on a range of issues—so you will need to ask questions, including some of those discussed below.

8. Find out in advance if there is a fee for the initial consultation with the lawyer, and if so, what it is. If you do not make a point of inquiring, you may find yourself unable to afford up to four-figure composite bills incurred in your effort to make an informed choice.

9. Confirm that the attorney-client privilege applies to what you discuss. Ensure that the information will not be revealed without your consent.

10. Even if you have confirmed the confidentiality of the discussions, check for conflicts of interest. Take the following two steps to learn whether the attorney has any other clients related to your dispute. First, before your introductory meeting, check the list of "representative clients" in Martindale Hubbell. (Old copies may have more complete listings.) Then, if you see any potential conflicts of interest, ask the attorney about them before you disclose confidential information. For example, one whistleblower at a poultry slaughter plant later learned that his powerful lawyer represented the state's poultry trade association. Not surprisingly, the lawyer allowed the statute of limitations to lapse on the whistleblower's case. Also not surprisingly, the employee could not find anyone to take a malpractice case against the lawyer in the state, which was dominated by the poultry industry.

11. Make clear your goals and objectives. This includes not only issues involving the attorney's representation, but also matters concerning the larger public policy issue that triggered your whistleblowing. Some lawyers, for example, will be uncomfortable if you continue to speak out publicly about your whistleblowing allegations during the lawsuit. Other lawyers, who are advocates for the values you were defending with your dissent, will support your efforts to continue your public advocacy. Similarly, one firm may be appropriate for a whistleblower who wishes to settle a dispute quietly, while a different firm would

better serve a whistleblower whose goal is to have his or her day in court. The point is that legal organizations and individual attorneys vary tremendously in their values, priorities and work styles. To illustrate, GAP only accepts clients who first pledge not to accept financial settlements that "gag" them from cooperating with ongoing government investigations into the alleged wrongdoing they exposed through blowing the whistle.

12. Determine the attorney's willingness to work with groups helping to champion your whistleblowing concerns, if you want to keep making a public policy contribution. Some attorneys are unwilling to relinquish control of valuable information they learn from legal depositions or subpoenaed documents until the lawsuit is over. This could mean that evidence may not reach the public realm for years—even if that evidence could prevent needless tragedies or scandals.

The issue is a complex one. There are often valid legal reasons to keep significant evidence secret. The use of secrecy is a necessary tactic in litigation. For example, premature public disclosures may rule out future voluntary cooperation by your former employer or colleagues in pretrial efforts to gather necessary facts for the trial. Alternatively, such disclosures could preclude settlement as an option by forcing your employer to neutralize your attacks by discrediting you in the lawsuit. In some cases, willingness to keep damaging information "under seal" could increase the value of a settlement in your case.

In short, the best way to win a lawsuit is not always the best way to expose and correct the wrongdoing that led you to blow the whistle in the first place. These dilemmas are inherent in whistleblowing; they are tough choices to make, and ultimately, they are your choices. The important point here is that you should pick an attorney who shares your perspective as much as possible, to avoid the possibility of serious conflicts when they would be highly damaging, at a critical point in the case.

13. Work out what your financial burdens and options are. Disgruntlement with a client for failing to keep up with

expected payments is a major reason that lawyers reduce the time and energy they put into a case.

14. Pin down who will handle the case. The lawyer who discusses the case with you initially may not be assigned to your case. Don't make a decision until you meet and have confidence in the specific attorney who will be responsible for defending your rights and interests.

15. Find out how much time the attorney has and will commit to your case. Even the best lawyers are inadequate if they are so burdened by an overextended docket of cases that they cannot give your case the attention it needs. On the other hand, many clients have an entirely unrealistic expectation of how much time truly is needed on a particular case.

16. Determine how much time and effort the attorney expects from you as a participant in preparing your case. Some attorneys prefer their clients to be functional partners, while others view the same client initiatives as interference. Whistleblowers, too, range from those who cannot stay away from their cases to those who prefer to get on with their lives and not be bothered unnecessarily.

17. Get a commitment on how much notice you will receive of developments, information and decisions that make a difference for your case. It can be poison for a working relationship and fatally undermine a client's rights if an attorney withholds key developments from a client. On the other hand, it is unrealistic to expect a lawyer to do his or her job if s/he must review daily developments with each client. Facilitate a relationship of trust that you both can count on by establishing this balance up front.

18. Learn the attorney's track record in handling cases similar to yours, such as win-loss records and significant precedents or benefits obtained for other clients. There is nothing rude about simply asking. Another way to gather this

information is to review public court documents, such as briefs and relevant judicial decisions in similar cases that the attorney has handled.

19. Pin down your role in any potential settlement negotiations. Remember that the great majority of cases settle before trial. You should request advance notice of proposals before they are made or of offers from the other side before any response is issued, and the attorney's willingness to respect your authority as the final decisionmaker in the settlement. A client is in a position of comparative weakness if an attorney threatens to quit unless settlement terms are accepted on the eve of trial. Be careful to remember, though, that your lawyer is the partner on your team who has unique expertise. Most of us have unrealistic expectations of what we deserve to achieve in a settlement, which by definition is a compromise in which both parties will be partially disappointed. From a lawyer's standpoint, a client is being unreasonable if s/he rejects a settlement that is comparable to what s/he would receive if the case were won in court. If the primary motivation for a whistleblower is to have his or her "day in court," the lawyer needs to know this at the outset.

20. When you sign a retainer agreement, remember that it is a contract. Treat this agreement with as much respect as you would any other contract. It may be one of the most important you ever sign. Read the terms carefully to make sure its provisions reflect any informal agreements reached on items listed above or from your own checklist. If you don't understand a term, ask the attorney to explain it and to replace the "legalese" with an English translation you understand. If the attorney balks, that is a warning sign to consider.

Tips on Maintaining a Good Working Relationship

Like any other relationship, the attorney-client version requires regular tending. It is liable to sour if either party takes the other for granted. The suggestions below illustrate ways you can do your share to maintain a healthy partnership.

1. Pay your bills on time. If there is a financial crisis, give your lawyer as much warning as possible and conscientiously try to make alternative arrangements. This is not only a matter of respect for your attorney's financial needs but also a strategy to preclude a common excuse by attorneys for tardiness or unenthusiastic advocacy.

2. Respect your attorney's time burdens and responsibilities to other clients. Do not cry wolf about emergencies or demand instant attention for non-emergencies. When possible, put developments in writing instead of demanding a phone or personal conference with your attorney. Confirm periodically, however, that the lawyer has read, understood and properly filed your written contributions.

3. Be a master of the facts. Your attorney should be able to count on you as the human encyclopedia of the record. Be available to provide complete, reliable information on the facts of your case and disclosure, when your attorney requests it.

4. View your lawyer as a human being who has a family and gets tired like everybody else. Attorneys understandably do not appreciate being seen only as instruments to bring their clients legal success, and may become resentful periodically if they feel that this is your only perception of them. Keep in mind that it is not to your advantage for your champion to resent you.

5. Do not insist on dealing only with the lawyer running the case. Get to know the junior attorney, administrative assistants and law clerks who are important parts of that attorney's team. Work through them whenever necessary. They may in fact be putting in a majority of the actual time invested in your case, and may be more familiar with some of the details.

6. Make sure that you and your lawyer continue to be clear about your comparative responsibilities and divisions of labor. Sometimes adjustments are necessary during the course of a case.

*7. **Do not assume that progress is being made or that nothing has happened if you haven't heard from your attorney for an extended period.*** Communication gaps are often innocent, but they may be damaging lapses.

*8. **Inform your attorney of any initiatives that you may wish to take to advance your whistleblowing or to secure additional help.*** That way you won't surprise your attorney by publicly disclosing information that s/he may have planned to use strategically in court, or end up either duplicating or working at cross purposes with him or her.

The attorney-client partnership unites a whistleblower's values with a lawyer's expertise. Remember, your lawyer is working for you. Feel free to read and research the legal arguments so that you understand the basis for a decision. If necessary, get a second opinion. Be aware, however, that your attorney has only limited time to teach you about the legal process, and will expect respect for professional judgment calls. Although you may be the boss, your attorney is the one with the expertise to lead you through largely unknown and potentially treacherous territory.

CHAPTER FIVE

Understanding Your Legal Protections—And Their Limits

Despite admonitions, warnings and threats you might receive, it is your right under the Constitution and numerous laws to blow the whistle and not to suffer discrimination for doing so. Government employees are protected under the First and Fourteenth Amendments of the Constitution, which prohibit federal, state and local governments from retaliating against workers who express reasonable dissent on matters of public concern. A host of laws reinforce this right. Depending on the information's sensitivity, a federal whistleblower may make disclosures internally or publicly—and still be entitled to the same legal protection. Protection for employees in the private sector, meanwhile, has developed over the past 25 years through statutes and under the common law.

Unfortunately, these protections are neither comprehensive nor well-enforced by government agencies and the courts. Inadequate remedies are the fatal flaw in whistleblower protection law. In some respects, what has evolved is a patchwork of specific employee legal protections covering environmental, health and safety, labor relations, and civil service issues. The following section provides a short introductory guide to your options under

these legal protections, beginning with general whistleblower protection laws, and then moving to more specialized statutes. This brief legislative and political summary confirms what employees who have tried to exercise their rights already know: the laws and institutions created to shield whistleblowers from retaliation are inadequate and often fail to live up to their stated goals. Understanding how whistleblower protection laws and structures have operated—or failed to operate—to protect whistleblowers in the past can help you develop a legal strategy that is realistic and savvy.

As a conclusion to the background discussion of each law, we have summarized the track record of results for those seeking whistleblower protection using the law. Overall, the odds of winning a reprisal lawsuit are not good—but they are improving. A review of published legal decisions reveals that the rate of success for winning a reprisal lawsuit on the merits in administrative hearings for federal whistleblower laws has risen to between 25 and 33 percent in recent years. Only a few years ago, whistleblowers won less than 10 percent of reported decisions under the same laws. It is important to keep in mind, however, that this is only part of the story. Whistleblowers tend to fare worse in decisions that do not make it into the law books. Further, many lawsuits are thrown out on procedural grounds or because of loopholes: whistleblowers lose these cases without having their day in court for a decision on the merits.

THE CIVIL SERVICE REFORM ACT

The foundation for federal employee protection is the Civil Service Reform Act of 1978 (CSRA). That law created a shield for the principles underpinning the civil service, known as the "merit system," by prohibiting eleven personnel practices (5 U.S.C. sec. 2302(b)). Specifically, the CSRA outlaws particular forms of harassment by employers, called adverse personnel actions. These range from failure to hire or promote, to reassignment, loss of duties, demotion and termination. The law prohibits agencies from recommending, threatening to take, or taking listed personnel actions against employees for whistleblowing disclosures, exercise of appeal rights, or off-duty conduct that does not affect job performance. It also bans personnel actions that violate the Constitution or other laws relevant to the merit system, such as the Privacy Act. The CSRA was expanded and strengthened by the Whistleblower Protection Act of 1989 and 1994 amendments, discussed below.

Institutionally, the Civil Service Reform Act erased a perceived conflict of interest within the old Civil Service Commission by separating the tasks of personnel management from the responsibilities for adjudicating employee disputes. The new law created three new agencies—the Office of Personnel Management (OPM) to manage the civil service system; the Merit Systems Protection Board (MSPB) to hear due process administrative appeals of personnel actions, including alleged prohibited personnel practices; and the Office of Special Counsel (OSC) to protect and defend employees who allege prohibited personnel practices. As discussed earlier, the OSC was charged with a parallel duty to screen whistleblowing disclosures and to order agency investigations of those with merit. The system was designed to allow an employee who was dissatisfied with the MSPB's ruling to appeal the decision to the appropriate U.S. Circuit Court of Appeals. When Congress created the U.S. Court of Appeals for the Federal Circuit in 1982, however, it gave the new court a monopoly on MSPB appeals.

Although the Civil Service Reform Act may have been a well-intentioned effort to strengthen employee rights, it has evolved into a system that is inadequate at best—and counterproductive at worst—for civil service employees. Most fundamentally, the law has deprived federal employees of access to the courts and a jury trial to defend their basic constitutional rights. Instead, civil servants have largely been shunted to a bureaucratic agency, the Office of Special Counsel, and an administrative law forum, the Merit Systems Protection Board. Often, employees have virtually no control over their cases. Their protection against reprisals is entirely at the mercy of the Office of Special Counsel.

Previously, federal workers had access to the courts to challenge constitutional violations: they could pursue suits for punitive damages against individual employers in a jury trial before their peers. Although Congress did not state that it was abolishing constitutional remedies for civil servants when it passed the 1978 statute, it also did not take explicit steps to preserve those remedies. Faced with this ambiguity, in 1983 the Supreme Court removed the courts from the process of handling federal employment disputes on constitutional rights. In *Bush v. Lucas*, the Court held that when a Civil Service Reform Act remedy is available, an employee cannot seek damages for constitutional violations. Although the Reform Act's primary congressional sponsors filed a "friend of the court" brief protesting that they had not intended to limit the rights of employees, Congress has not acted to counter the *Bush* ruling. Even employees without access to civil service protections, such as hybrid workers on joint federal-state projects, do not necessarily have access to constitutional remedies; some are restricted to filing internal grievances. The only minimum guaranteed access to the courts is limited judicial review of agency decisions under the Administrative Procedures Act.

"Congress has given us dozens of protected disclosure laws—and no quick way to get into federal court with any of them."
—Justice Department whistleblower

The net result has been a loss for whistleblowers: the record to date shows that a woefully inadequate and often politicized administrative forum, the MSPB, is no substitute for a jury in determining the fate of whistleblowers who claim reprisals for defending the public. In reported MSPB decisions during its almost twelve years of operation before passage of the Whistleblower Protection Act, federal employees seeking to defend themselves as whistleblowers won on the merits only five times. The record of the Federal Circuit Court of Appeals toward those employees who appealed these MSPB rulings was even more abysmal: whistleblower defenses prevailed on the merits only twice in the seven years before passage of the Whistleblower Protection Act.

The cornerstone of the Civil Service Reform Act was the Office of Special Counsel, created as a watchdog to protect the merit system and to champion the rights of reprisal victims. The evolution of the OSC is the key to understanding the failures and limitations of the law. By stripping whistleblowers of the right to defend themselves in court in most cases, the new law left them at the mercy of an agency that—despite its mandate to serve as an advocate for employee rights—quickly emerged into an agency hostile to whistleblowers.

The CSRA gave the Office of Special Counsel a broad mandate and almost total discretion, in large part to defend freedom of speech. But the agency failed to use these powers to serve whistleblowers. At its worst, the OSC served instead as a "legalized plumber's unit," in the words of one Senate staffer—the Executive Branch's most effective weapon to identify and silence dissenters in federal agencies. The record is sobering: for the first decade after its creation, the OSC turned down 99 percent of whistleblower cases without attempting disciplinary or corrective action. Since 1979, the Special Counsel has only pursued litigation through one corrective action hearing to restore a whistleblower's job.

The roots of the problem lie in the political constraints facing government oversight agencies. The Office had an inspired start under H. Patrick Swygert. But after filing a whistleblower suit against the Department of Justice during the Carter Administration, the OSC had its budget rescinded during the next fiscal year, and nearly all of its staff had to be furloughed. The OSC barely survived, and no Special Counsel since has challenged seriously the powerful federal bureaucracies. In fact, the agency became overtly hostile to whistleblowers in many cases.

Although the Office was created to guard against the use of Watergate-era techniques to harass employees out of their jobs, former Special Counsel Alex Kozinski used precisely these tactics during his tenure in the early 1980s. Kozinski orchestrated a

purge that eventually convinced nearly half of his staff to resign, including approximately 70 percent of headquarters attorneys and investigators. The Special Counsel was so intolerant of internal criticism that he ordered employees not to speak with his predecessor, Mary Eastwood, before he attempted to fire her.

Kozinski shared his techniques with other agency managers. Using the OSC's own investigative manual as a guide, he led a course for federal managers that effectively taught them how to fire employees without OSC interference. He tutored then-Secretary of the Interior James Watt's assistants on how to avoid conceding first amendment violations and still fire whistleblower Jack Spadaro for exposing mine safety violations.

Former Special Counsel William O'Connor, who succeeded Kozinski in 1985, was less subtle in his public disdain for whistleblowers. O'Connor branded them as malcontents and compared them to "bag ladies" and mental health patients. He aggressively disclaimed any responsibility for whistleblowers who suffered reprisals. O'Connor explained that his job was to serve the civil service system, not individuals.

Both Special Counsels defended their abysmal track records with the same excuse: neither had met a whistleblower who deserved or needed protection through Civil Service Reform Act hearings. In defending his embarrassing track record, O'Connor said that whistleblowers turned away by the OSC had also failed to successfully make their cases elsewhere. In fact, this assertion was unfounded. Two successful MSPB whistleblower appeals, for example, vindicated employees whom the Special Counsel had turned away, including Spadaro. The case of another OSC reject, Vince Laubach, was so strong that the Department of the Interior settled his grievance with reinstatement, back pay and damages. On balance, whistleblowers prevailed in 17 successful cases of whistleblower litigation through 1988, in many instances through labor-management arbitration—while the OSC remained dormant.

One of the OSC's strategies during the 1980s was to assume a posture of aggressive disinterest. Ernie Fitzgerald, who first

drew national attention for blowing the whistle on military cost overruns, described a pattern in a subsequent case of alleged defense procurement fraud: "I kept trying to give the [OSC] investigators documentary evidence and they kept giving it back to me." Another whistleblower reported calling the office 89 times before anyone would speak with him, and then only to say that his case had been closed.

Worse still were cases in which the OSC turned its investigative powers on the whistleblower, rather than his or her allegations. Senator Carl Levin (D-MI) described the problem in the case of whistleblower Bert Berube at the General Services Administration. The OSC, Levin said, spent more than five times as much time investigating the complainant as it did investigating the complaint.

The OSC also used its closed case files as dossiers to help blacklist whistleblowing employees who sought a fresh start in new jobs. During an Office of Personnel Management background security check, for example, a top investigator for the OSC recommended that former Treasury Department attorney Elaine Mittleman not be hired for a new government job—in part because her superiors suspected that she had leaked documents on alleged misconduct to Congress and the press. What is worse, employees were often unaware of the OSC's conclusions about them, because the agency regularly refused complainants access to their own files under the Privacy Act and the Freedom of Information Act—a practice which continues today.

The Special Counsel who followed O'Connor, Mary Wieseman, introduced a new level of personal courtesy toward whistleblowers. In terms of track record and techniques, however, OSC performance was barely distinguishable from the tenure of the previous two Special Counsels—at least until passage of the Whistleblower Protection Act of 1989. Approximately a year into Wieseman's tenure, she testified that the OSC had formally or informally obtained help for 6 out of 176 government employees. This means that until that time, more than 96 percent of employees seeking aid had not been assisted.

Further, frustrated whistleblowers continued to report that the OSC was failing to serve as an effective investigator or advocate. Among other charges, whistleblowers argued that the OSC channeled evidence of wrongdoing back to the agencies that were the targets of reprisal charges; delegated the investigative authority for key witnesses to the office in the target agency that was responsible for defending the agency against the reprisal charges; failed to create a verifiable record and then misrepresented the position of supporting witnesses; refused to inform the complainant of evidence that had to be rebutted; and generally appeared to invest more resources in investigating the whistleblower and his or her supporters than in investigating the alleged retaliation.

The story of Veterans Administration police officer John Berter captures the experience and frustration of many whistleblowers. Berter was fired after blowing the whistle on police brutality against minorities and veterans. The OSC boasted that the Berter case was one of "the most extended and intensive investigations we've ever done." In fact, the OSC stood by passively until Berter testified in congressional hearings organized by former Representative Pat Schroeder (D-CO). At that point, the OSC went to work. But according to a House Civil Service Subcommittee staff investigation, the OSC's investigation quickly became an attack on Berter's "motives, his allegations, his doctors, his supporters, his witnesses, the victims, his skills, and a prior FBI report that found substance to his charges." Six witnesses submitted affidavits repudiating the OCS's characterization of their testimony. Finally, in a closeout letter that failed to discuss any of the 27 affidavits submitted by Berter from victims or witnesses, the OSC dismissed all of his charges, conceding only some "peripheral" validity.

One result of these failures in the whistleblower protection system was an increase in fear of reprisal among prospective whistleblowers in the early 1980s. In 1980, 19 percent of surveyed federal employees who witnessed but did not report fraud, waste and abuse, cited fear of reprisal as the reason for remaining silent. By 1983, the figure had jumped to 37 percent. In 1985, the MSPB admitted in a press release that "[t]here has been a significant increase in the fear of reprisals, the reason given for not having reported fraud, waste, and abuse." The numbers were a clear indication of the failure to adequately protect government employees from reprisals for speaking out against wrongdoing.

THE WHISTLEBLOWER PROTECTION ACT

After 1982 Congress increasingly recognized that the 1978 Civil Service Reform Act was not living up to its intent—and had even backfired in many cases by providing a channel for increased harassment. In 1982, Special Counsel Alex Kozinski resigned, after public exposure that he had created a course instructing federal managers in how to fire whistleblowers without getting caught. President Reagan subsequently appointed Kozinski as Chief Judge of the Claims Court and then to the Ninth Circuit Court of Appeals—a confirmation he barely survived because of controversy over his record as Special Counsel. Former Representative Pat Schroeder (D-CO) even introduced a bill to abolish the OSC during this period. Although this legislative effort died, Congress did turn its attention once again to the question of federal whistleblower protection, and held a series of hearings on potential new legislation.

In September 1986 the House of Representatives unanimously passed a Whistleblower Protection Act for federal employees. The Senate did not act on the legislation, however, due to time pressure and an administration veto threat. After two more hearings, in October 1988 the House and Senate unanimously passed a nearly identical whistleblower protection bill. President Reagan, however, waited until Congress adjourned and then pocket-vetoed it. Congress did not back down. Congressional negotiators led by Senator Levin and Representative Schroeder persuaded the incoming Bush Administration to accept an even stronger bill, and on March 19, 1989 it passed—again unanimously. The law became effective on July 9. It was one of the few laws that was

passed unanimously twice, and that was strengthened by Congress after a presidential veto.

The Whistleblower Protection Act (5 U.S.C. sec. 1201 note) contains ten major provisions that strengthen the Civil Service Reform Act rights of public servants. Specifically, the Whistleblower Protection Act;

1. *Enforced the Government Employees' Code of Ethics.* The 1989 law forbids agencies from acting against any employee for declining to engage in activity that is illegal. Previously, employees were expected to follow orders, and only had the right to protest after the fact—which effectively meant that they could be fired for refusing to be lawbreakers. The change gives teeth to the principles of the Government Employees' Code of Ethics (see Appendix H).

2. *Closed the loopholes in legally-protected dissent.* The law was changed to specify that "any" whistleblowing disclosure is protected if the contents are significant and reasonable. Prior law lacked clarity on this point, enabling the Office of the Special Counsel, MSPB and Federal Circuit Court of Appeals to impose technicalities creating a series of loopholes disqualifying genuine whistleblowing disclosures from the law's protection. They decided, for example, that a disclosure could be excluded from protection unless the whistleblower: 1) was the first to expose a problem; 2) could prove his or her motives were to help the public, and not self-interest; 3) was accusing specific officials of intentional misconduct; 4) first went through the agency chain-of-command; and 5) phrased the dissent as an accusation rather than a question or request for information. If Congress had not acted, the list of potential bureaucratic loopholes would have been limited only by the imagination.

3. *Defanged the Office of Special Counsel.* The Act requires the OSC to protect whistleblowers and not act contrary to their interests. More specifically, the OSC must: provide status reports to employees seeking help; refrain from giving evidence from or about the complainant to the employer or others during or after the investigation unless the employee consents; refrain from disclosing the identity of an employee making a whistleblowing disclosure without consent, even if the Special Counsel contends violating confidentiality is necessary for the OSC to carry out its duties; refrain from settling a case without including the employee's comments; explain the evidence supporting as well as opposing the employee's reprisal charges in any letter closing out a case; and refrain from intervening in related appeals without the employee's consent. Further, any negative OSC findings cannot be introduced in the subsequent MSPB appeal without the employee's consent. In the reports and speeches that create the law's "legislative history," moreover, Congress has explained that OSC employees who exceed these boundaries on their authority are acting as individuals, not in their capacity as government officials. That means that offending OSC staff can face damage suits for violating a victim's rights. To date, however, there has not been a test case of personal liability for OSC staff.

4. *Gave whistleblowers control of their cases.* Under the 1978 Civil Service Reform Act, whistleblowers facing many common forms of reprisal had only one avenue for relief—the OSC. Since 1989, all federal workers or applicants can act individually to challenge the same personnel actions as the Special Counsel, through an on-the-record, evidentiary hearing at the Merit Systems Protection Board. Employees who use their hearing rights must first file complaints with the Special Counsel for 120 days, but if there is no decision after that time the employee is free to take control of the case by filing an Individual Right of Action (IRA) with the Board. Similarly, if the OSC turns down the complaint, the employee can file for a hearing within 60 days. Further, employees can file their own action to seek temporary relief through an administrative "stay" against a threatened or ongoing whistleblower reprisal. Significantly, there is no statute of limitations to file a whistleblower complaint with the OSC, which can evolve into an IRA. If you are simply appealing a termination or demotion without the reprisal defense, the Board must receive your appeal within 35 days, or you may lose the rights.

5. *Eliminated the legal motives test.* Under prior law,

whistleblowers had to prove that an employer's act against them was in "retaliation" for legally-protected whistleblowing activity. But it is almost impossible to prove that a manager had a hostile state-of-mind—and thus had retaliatory motives—without a confession. Under the 1989 Whistleblower Protection Act, a whistleblower must prove only that the action against him or her occurred "because" of protected whistleblowing, and is explicitly relieved of having to prove that the agency had retaliatory motives.

6. Reformed unrealistic legal burdens of proof. The 1989 law makes two changes in the legal burdens of proof facing employees. First, the law reduces employees' burdens of proof. Before the Act, constitutional law determined that whistleblowers had the burden throughout their legal challenge to prove that reprisal is the substantial or predominant motivating factor for a personnel action against them, by a "preponderance of the evidence." The 1989 legal groundrules shrink an employee's burden to proving that his or her protected whistleblowing disclosures are a "contributing factor." Congressional leaders were careful to define the term broadly: it means "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision."

Second, the Act shifts the burden of proof once an employee establishes an initial *prima facie* case that whistleblowing was a contributing factor in the personnel action. The burden of proof then shifts to the agency to prove by "clear and convincing evidence"—one of the most difficult standards in civil law—that it would have taken the same action anyway, independent of the employee's whistleblowing. The requirement that the agency "would" have acted anyway is particularly significant. Congress repeatedly has emphasized that it is insufficient that an employer "could" have acted on grounds independent of whistleblowing; this would create an unacceptable loophole in the law.

7. Provided interim relief. Under prior law, employees who prevailed at an initial MSPB hearing remained off the job without salary while the agency pursued an appeal to the full Board. Under the 1989 law, whistleblowers or others who win at the initial hearing must be returned to their jobs—or at a minimum, to the payroll—during the appeal.

8. Provided transfer preference. Legal victories for whistleblowers have been hollow when employees were returned to hostile supervisors, who were even more vengeful after being defeated. Repeatedly, employees who won were promptly fired again on new charges. The new law allows victorious whistleblowers to receive placement preference for a new job and a fresh start.

9. Strengthened whistleblower disclosure channels. The Act forbids the Special Counsel from sending a whistleblower's charges back to the relevant agency, unless the OSC has the employee's consent or rules that the dissent is reasonable and orders the agency to investigate and report back. When the report comes in, moreover, the Act requires that the whistleblower's critique be included in all public releases and files—an important provision given the tendency of agency self-investigations to produce self-exonerations.

10. Protected alternative statutory remedies. As discussed above, the *Bush v. Lucas* Supreme Court ruling held that an employee's right to file suit in district court for constitutional violations was canceled by duplicative civil service remedies in the Civil Service Reform Act. In addition to canceling constitutional remedies for civil servants, judges often canceled out parallel statutory remedies as well. The 1989 law explicitly protects all other statutory remedies that could be alternative options to the Whistleblower Protection Act.

1994 AMENDMENTS TO THE WHISTLEBLOWER PROTECTION ACT

The Whistleblower Protection Act, as written, was the strongest free speech law that government employees had ever seen. Unfortunately, it did not live up to its promise. Because it was not adequately enforced, the law too often created a false sense of security for whistleblowers by providing the illusion but not the

reality of protection. At worst, it created new reprisal victims at *a far greater pace than it protected them.*

A 1993 MSPB survey found that the rate of eyewitnesses challenging fraud, waste and abuse had increased from 30 to 50 percent since the last survey in 1983, taken before the passage of the Whistleblower Protection Act. In 1993 the General Accounting Office reported that 60 percent acted within the chain of command instead of outside the system—but 20 percent were harassed within 24 hours of reporting wrongdoing. Overall, the rate of ensuing retaliation increased from 24 percent to 37 percent. Less than ten percent of those who exercised legal remedies received assistance, and 45 percent reported that acting on their rights got them into more trouble. The MSPB survey found that, by a 60-23 margin, employees did not believe their rights would protect them, and fear of reprisal remained as strong an incentive for would-be whistleblowers to remain silent as in 1983.

The reason that the Whistleblower Protection Act had failed to meet its promise was no mystery. Agencies responsible for the Act's implementation were unwilling to enforce it. Whistleblowers' official champion, the OSC, remained unresponsive or worse. Despite the fact that the OSC received 400-500 cases yearly and had the most sympathetic legal standards ever, the Office failed to litigate a single case to restore a whistleblower's job. The GAO concluded that the OSC had not improved on its traditional record of obtaining formal or informal relief for only five percent of complainants. Meanwhile, 59 percent of whistleblowers reported to the GAO that the Office undercut their rights by sending information without permission about their cases back to their employers; 76 percent concluded that the Office of Special Counsel in practice acts to serve agency interests, rather than the civil service merit system.

The MSPB litigation record of the Whistleblower Protection Act was equally bleak. In the first two years after the Act's passage, whistleblowers won approximately 20 percent of decisions on the merits. After fiscal year 1991, however, that rate dropped to five percent.

After four more congressional hearings, two GAO reports and an MSPB study, Congress responded. Just after midnight on October 8, 1994, the last day of the session, lawmakers—led by Senator Pryor (D-AR) and former Representative Frank McCloskey (D-IN) and their staffs—added at least 20 new "teeth" to the Whistleblower Protection Act. The amendments are scattered throughout the Act, but can be found as a package at 140 *Cong. Rec.* S.14668-70, H.11419-22 (Oct. 7, 1994). The bill took effect on October 29. The amendments offer significant improvements, although gaps remain.

Perhaps the most important development was that 65 percent of federal workers covered by collective bargaining agreements now receive state-of-the-art administrative law protection through arbitration hearings. Employees not only have an equal voice in picking the arbitrator who decides their case, but also can seek immediate relief through a legal action to temporarily stop (or "stay") the adverse personnel action. They can counterattack for discipline against managers who attempt reprisals, and they can have their cases governed by the more favorable Whistleblower Protection Act legal standards. Congress also restored normal judicial review for arbitrations. The provision permitting whistleblowers to seek—and arbitrators to impose—disciplinary sanctions on managers was particularly innovative even if controversial.

> *"Learn the legal lay of the land before you blow the whistle."*
> *—Department of Agriculture whistleblower*

Power to sanction agency managers who retaliate against whistleblowers was reinforced through the 1994 amendments. In addition to empowering arbitrators, the amendments require the Merit Systems Protection Board to refer managers for disciplinary investigations whenever there is a finding that reprisal was a contributing factor in a personnel action. For the first time, agency officials stand to lose personally before the MSPB or arbitrators if they choose to retaliate against employees.