



# LEGAL BRIEFS

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## MORE HELP FOR WHISTLEBLOWERS

**Key words:** Employment, Sarbanes-Oxley Act, whistleblower.

The Sarbanes-Oxley Act of 2002 contained a little noticed provision establishing criminal sanctions for those who knowingly retaliate against whistleblowers.

Last summer, the US Congress reacted to the stock market's preoccupation with financial scandals and failures by passing the Sarbanes-Oxley Act of 2002. To a large extent, the Act was a congressional response to the demise of the Arthur Andersen accounting firm, the failure of Enron Corporation, and testimony of the highest officers of companies with financial irregularities that these officers were unaware of the content of the filings on which investors rely.

The Act was intended to increase confidence in financial statements of publicly held companies. It will require certain publicly held companies to create audit committees that will be largely autonomous of management and exercise a fair amount of power in dealing with auditors and handling auditing questions. It requires the chief executive officer and chief financial officer of a company to personally certify that the company's filings with the Securities and Exchange Commission were correct.

One of the areas that received a great deal of press was the role that whistleblowers had played in try-

ing to correct wrongful acts and reports, bringing issues to responsible executives and then, often after being frustrated, trying to bring these scandals to the attention of law enforcement personnel. Because these companies lacked any formal structure to listen to whistleblower complaints or to protect employees brave enough or bothered enough to come forward, many whistleblowers were punished or fired. In retrospect, of course, the whistleblowers turned out to be right. If only the directors or some official group would have listened to them.

Although I am sure that many CRNAs sympathize and identify with the whistleblowers, the Sarbanes-Oxley Act has been portrayed primarily as a law applicable only to financial practices of major corporations and irrelevant to the practice of anesthesia, except as CRNAs may be investors and members of the public. Protecting whistleblowers, however, is of more than average interest to nurse anesthetists. First, most anesthesia is paid for either by the federal Medicaid program or by insurance. Unlike purchases our grandparents made from local grocers or local physicians, payment for healthcare transactions involve payment by people who did not receive the care, such as insurance companies. Clerks at insurance companies do not scrutinize bills the same way you or I might count change when we visit the cleaners. It is easier to fraudulently misrepresent the nature of the service provided to obtain higher reimbursement from Medicare and insurance companies than to fool someone you are dealing with face

to face. While I continue to believe in the innate honesty of the population, Congress and state legislatures have protected the marketplace by establishing criminal laws to prohibit providers from taking advantage of Medicare and insurance companies. Second, reimbursement of anesthesia services can be pretty complicated, even when you are trying to comply with them. Third, historically anesthesia was an area where some providers received large amounts of money even though they were perceived as not doing much work. Thus, at least under Medicare, very complicated rules were created with the intent of not making payments to people who did not do very much work.

At the same time, it was not easy for people who had historically been paid large amounts of money to accept the fact that they were no longer going to be paid large amounts of money unless they did more of the work. There was a story I heard many years ago, perhaps apocryphal, of an anesthesiologist attending a convention where a speaker was explaining the Tax Equity and Fiscal Responsibility Act (TEFRA) rules that required an anesthesiologist to personally participate in certain steps of the anesthesia process to be able to submit a bill at the then higher anesthesiologist rate. The anesthesiologist appeared troubled and confused by the presentation. During the question and answer period he asked, "Under these new rules, how am I supposed to be able to bill if I'm attending this lecture?" And, since a large percentage of payments were received from a federal program, failure to comply with requirements

that certain functions be performed in order to continue billing at the higher rates created an area ripe for fraud. Large amounts of money were involved, very complicated but specific rules applied, and in some areas a large number of people, often CRNAs, began to suspect that they were in the middle of what appeared to be fraud.

The result of all this was what I considered an unusually high degree of interest among CRNAs in some legal topics that usually make peoples' eyes glaze over, such as wrongful termination, whistleblowing, and *qui tam* suits.

### **Wrongful termination**

In the absence of a contract or agreement to the contrary, most employment is "at-will" and can be terminated by the employer or employee at any time and for any or no reason. Beginning with *Peterman v International Brotherhood of Teamsters* (174 Cal. App. 2d 184, 344 P.2d 25), in 1959, courts came to the conclusion that if society was going to force employees to do things their employers might not like, then the courts could not sit back while employers fired employees in retaliation. You could still fire an employee for no reason, but you could not fire an employee for the wrong reason. The doctrine has been applied to protect employees who refused to give false answers to a legislative committee (the *Peterman* case), testified at a malpractice trial, refused to perform activities they did not feel trained to perform, spoke to patient's families about malpractice, wrote articles about doing things against their religious beliefs, responded to subpoenas, and even a case where a nurse claimed she was fired for refusing to participate in a prank that required her to partially disrobe.

Unfortunately, "wrongful termination" is not recognized in every state (the Alabama Supreme Court, for example, in decisions as recent as 1985 claims that it has yet to find a case that would justify adopting it). Moreover, even where it has been adopted, it is sometimes applied so strictly that it provides little protection. In Massachusetts, for example, the courts ruled that the only public policy exceptions that were protected were those contained in constitutional or statutory provisions. So, in Massachusetts, a nurse can be fired with impunity for telling a hospital surveyor about communication problems affecting the quality of patient care (*Wright v Shriners Hospital*, 412 Mass. 469, 589 N.E. 2d 1241, 1992), while in Arizona, a nurse is protected when she refuses to participate in an after-hours prank because it involved "indecent exposure" ("mooning," to be precise) (*Wagonseller v Scottsdale Memorial Hospital*, 147 AZ 370, 710 P.2d 1025). I am not suggesting there is anything wrong with the Arizona decision, but if the purpose of the doctrine is to encourage people to do things that benefit the public, someone with the courage to speak out on patient care should have at least the same protection as someone who refuses to participate in a prank.

### **Qui tam**

"*Qui tam*" suits, or "in the place of the King" have been around since the Civil War and allow ordinary citizens to bring suits against persons who have damaged the federal government. At the time of the Civil War, *qui tam* suits were introduced to encourage ordinary citizens to pursue suppliers of poor materials to the Union Army (the problem was so widespread that a material used as a fabric was

so frequently below the acceptable standard that its name, "Shoddy" has become synonymous with poor workmanship). Suit is brought in the name of the United States and, if successful, permit sharing a recovery (typically 30%). CRNAs are familiar with the *qui tam* suit because it was the basis of the suit brought by the Minnesota Association of Nurse Anesthetists (MANA) against a number of hospital systems in the St Paul/Minneapolis, Minn, area.

Even with a *qui tam* suit, the path to success can be torturous and elusive. To avoid "parasitic *qui tam*" cases, those in which an uninvolved person reads public disclosure of a potential claim and files a *qui tam* suit having done no more work than listen to the evening news, Congress prohibited suits "based on" disclosures already public. But what if the disclosures are public because, as in the case of MANA, the plaintiff had filed an earlier lawsuit? Fortunately, this did not stop MANA's *qui tam*, but it almost did.

### **Whistleblowing statutes**

While some states have enacted statutes that specifically protect whistleblowers, Section 1107 of the Sarbanes-Oxley Act of 2002 will bring the force of federal protection. The Act adds to the criminal code of the United States the following paragraph:

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense shall be fined under this Title or imprisoned not more than 10 years, or both.

Because the Sarbanes-Oxley Act was seen exclusively as an Act dealing with publicly traded corpo-

rations, accounting firms, and financial practices, very few people have noticed that this provision applies to any person who retaliates against any whistleblower, not just a whistleblower concerned with the financial misdeeds of a publicly traded corporation.

Will Sarbanes-Oxley create a brand new day and the protection CRNAs have always hoped for? Probably not. First, it only applies to persons who communicate with law enforcement officers. Most of the whistleblowers I have known have first brought information to hospital officials, not law enforcement officers. If a CRNA is fired for telling the president of the hospital that the hospital is submitting fraudulent charges for anesthesia, Section 1107 of Sarbanes-Oxley will not apply. Thus, unless something happens, the Sarbanes-Oxley Act could affect the way whistleblowers operate. Why run the risk of getting fired for giving your hospital a chance to correct its ways? Would it not be better to dispense with any interim steps and just call the Federal Bureau of Investigation (FBI)? I think some CRNAs will find it difficult to make the first step a call to the FBI. Even more, I suspect that once hospital attorneys figure out that Section 1107 of Sarbanes-Oxley applies to retaliation against any whistleblower, many hospitals will voluntarily amend their personnel policies to prohibit retaliation against whistleblowers just to avoid the risk of forcing whistleblowers to call law enforcement authorities as a first step.

A second problem is that the information given to law enforcement officers must be “truthful.” What could be the problem with that? No act is going to protect someone who provides false infor-

mation. Consider another provision of Sarbanes-Oxley intended to protect whistleblowers of companies traded on securities exchanges. Congress gave these people much more protection. Specifically, they are protected if they reasonably believe that there has been a violation of various antifraud statutes or regulations. There could be a big difference between reasonably believing that fraud is occurring and providing truthful information. The statement: “My boss is never in the office, owns 2 homes, has several expensive cars, and brags that you have to know what you can get away with under Medicare” *may* create a reasonable belief that Medicare fraud is taking place. (This is an example for educational purposes only. Please, do not rely on it as legal advice!) But if your boss is independently wealthy, likes to brag but is *not*, in fact, fraudulently billing Medicare, your boss could fire you without fear of violating the Sarbanes-Oxley Act for telling a law enforcement officer something that turned out not to be truthful—that your boss was fraudulently billing Medicare. For those who, in the future are driven to rely on the statute, please limit statements to matters where you can have truthful information and avoid making conclusions you may not be able to support. While saying anything less than “My boss has got to be stealing from Medicaid” will not impress the FBI, it will not be protected unless, in fact, it is true.

It must relate to a federal offense. That should not be an issue for Medicare fraud, but other areas may not be covered. Defrauding an insurance company may be a state offense, rather than a federal offense.

Finally, note that this “protection” is not very much protection. When it came to financial disclosure, Sarbanes-Oxley knew how to protect whistleblowers. A major company whose securities are listed on a securities exchange cannot fire a whistleblower providing information on fraud or that the securities laws are being violated. But that protection has not been applied to all employees. Section 1107 makes it a crime to take action intending to retaliate against a whistleblower. If you are fired in retaliation for whistleblowing, the person who fired you may be prosecuted but you are still fired. That is some comfort but it is not much “protection.”

### **Section 1107 has some value**

I do not want to leave the impression that Section 1107 is of no or little value. Provisions such as Section 1107 are sometimes interpreted by the courts to create “private rights of action” so that a whistleblower may eventually have the right to sue someone who retaliates against him or her. Second, if my crystal ball is still working, Section 1107 may encourage hospitals and other employers to change their personnel codes. But even if that does not happen, it is now a federal offense to retaliate against whistleblowers, punishable by fines and up to 10 years’ imprisonment. Moreover, it can apply to individuals, not just the institution you work for. Employers, supervisors, and even fellow employees ought to think twice, and then maybe even more, before doing something deemed “retaliation” against a whistleblower.