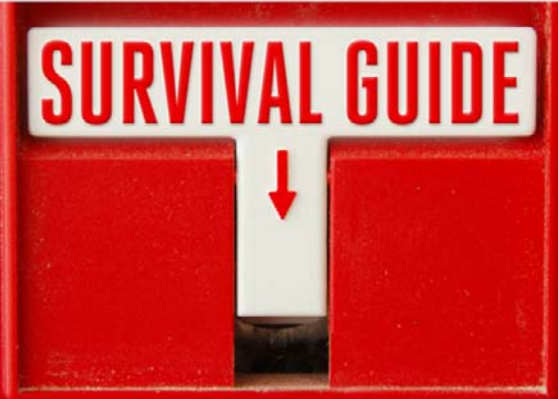


A HANDBOOK FOR COMMITTING THE TRUTH

The
CORPORATE
WHISTLEBLOWER'S



TOM DEVINE *and* **TAREK F. MAASSARANI**

FOREWORD BY DR. JEFFREY WIGAND, SUBJECT OF THE MOVIE, *THE INSIDER*

PUBLISHED IN ASSOCIATION WITH THE
GOVERNMENT ACCOUNTABILITY PROJECT

Praise for *The Corporate Whistleblower's Survival Guide*

“Blowing the whistle is a life-altering experience. Taking the first step is the hardest, knowing that you can never turn back. Harder yet is not taking the step and allowing the consequences of not blowing the whistle to continue, knowing you could have stopped them. Your life will be forever changed; friends and family will question your actions if not your sanity, your peers will shun you, every relationship you treasure will be strained to the breaking point. This handbook is required reading for anyone considering blowing the whistle.”

—**Richard and Donna Parks, Three Mile Island cleanup whistleblower and wife**

“*The Corporate Whistleblower's Survival Guide* will be an immense help! For while there are no one-size-fits-all ‘right answers,’ the authors have effectively translated their decades of actual experience, insights, and resources in this field onto paper. A realistic framework will now exist to help people confronting such difficult situations.”

—**Coleen Rowley, FBI 9/11 whistleblower and a 2002 *Time* Person of the Year**

“Lays out exactly what potential corporate whistleblowers must know to help improve their chances of both surviving whistleblowing and stopping the misconduct they set out to expose. My only hope is that we can help spread the word so that all potential corporate whistleblowers read this book *before* they take their first steps down that lonely road.”

—**Danielle Brian, Executive Director, Project on Government Oversight**

“As commissioner, I relied on whistleblowers like Jeffrey Wigand to learn the inside story about the deceptive practices of the tobacco industry. Later, I became a whistleblower. I was fortunate to have the guidance of the Government Accountability Project and its legal director Tom Devine to traverse this rocky terrain. *The Corporate Whistleblower's Survival Guide* draws on GAP's vast experience to capture what happens when someone blows the whistle, and it distills it in plain English. I highly recommend it.”

—**Dr. David Kessler, former Commissioner, Food and Drug Administration**

“A readable and reliable road map for navigating the rocky shoals of candor in a corporate setting. From construction site to cubicle to boardroom, this compendium is an indispensable resource—don’t leave home without having read it.”

—**Jeff Ruch, Executive Director, Public Employees for Environmental Responsibility**

“*The Corporate Whistleblower’s Survival Guide* can be read as a history of corporate whistleblower protection, as a survey of law and regulations, as an assessment of varying approaches to whistleblower protection, and as a framework for evaluating current debates. In this regard the guide can be of value to corporate officials, to legislators, and to those interested in public policy.”

—**Robert G. Vaughn, A. Allen King Scholar, American University Washington College of Law**

“The only fault I find with this book is that it was published too late to help my case. I encourage all truth tellers, sentinels, and honest and brave soldiers for truth to read this book before they start running the gauntlet of our legal system.”

—**David Welch, bank insider-trading whistleblower, Bank of Floyd, Floyd, Virginia**

“When faced with wrongdoing on the job, making the decision to be a whistleblower is extraordinarily difficult. But ‘committing the truth’ will help many individuals take that step—responsibly and productively and with the support needed to really make a difference. Through guidance on making a decision, bringing the right information to the right people, and dealing with the media constructively, as well as explaining critical legal rights and limitations, Devine and Maassarani have created a guidebook that can make that difference—not just for whistleblowers but also for all of us who benefit from their actions.”

—**Susan Wood, former Director, Food and Drug Administration’s Office of Women’s Health, who resigned to protest politically motivated delays in approving the Plan B “morning-after” pill**

The Corporate Whistleblower's Survival Guide

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The Corporate Whistleblower's Survival Guide

A Handbook for Committing the Truth

Tom Devine

and

Tarek F. Maassarani

Published in Association with the
Government Accountability Project



Berrett-Koehler Publishers, Inc.
San Francisco
a BK Currents book

The Corporate Whistleblower's Survival Guide

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235 Montgomery Street, Suite 650
San Francisco, California 94104-2916
Tel: (415) 288-0260, Fax: (415) 362-2512
www.bkconnection.com

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First Edition

Hardcover print edition ISBN 978-1-60509-985-9

Paperback print edition ISBN 978-1-60509-986-6

PDF e-book ISBN 978-1-60509-987-3

IDPF e-book ISBN 978-1-60509-988-0

2011-1

Cover design by Ian Shimkoviak, The Book Designers.

Interior design and composition by Gary Palmatier, Ideas to Images.

Elizabeth von Radics, copyeditor; Mike Mollett, proofreader; Medea Minnich, indexer.

*This book is dedicated to all the whistleblowers
who have been our teachers, inspiration, and calling.*

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Foreword

by Dr. Jeffrey Wigand

*All that is necessary for the triumph of evil
is that good men do nothing.*

—EDMUND BURKE

There are concepts and then there are the names we use to describe them. One concept that badly needs a new name is *person of conscience*. Currently, the name used to identify this person is *whistleblower*. But the name *whistleblower* needs to be replaced. Why? The term is laden with pejorative connotations, such as *rat*, *tattletale*, *fink*, and *turncoat*. Obviously, these words signify opprobrium rather than approbation. The word we use to describe a person of conscience should be free of negative connotations. Indeed the word should connote courage, strength, virtue, and an overriding concern for the good of humanity. The term *whistleblower* lacks these properties. The fact is, there is no single word that connotes the meaning of *person of conscience*. So, I propose that instead of using the term *whistleblower* to refer to a person of conscience, we call a spade a spade. A person of conscience should be referred to as a *Person of Conscience*. The capitalization signifies the important role that such Persons play in protecting and promoting the human good.

When I was first introduced to this book while it was still in draft form, it immediately rekindled many memories both pleasant and unpleasant of my experiences as a Person of Conscience. It is my strong belief and conviction that Persons of Conscience deliberately put themselves in harm's way for the betterment of others. Persons of Conscience perform selfless acts that merit accolades rather than disparagement.

In 1988 I accepted a job at the Brown & Williamson Tobacco Corporation (B&W) as vice president of research and development after six months of extensive interviews. B&W was part of the world's

second-largest tobacco concern. Why did I join the company? My primary goal was to use the knowledge I had acquired during 20 years of healthcare experience to save lives by developing a “safer” cigarette and to ultimately see Food and Drug Administration (FDA) approval for tobacco products. I was also hired to modernize an organization steeped in empirical scientific methods. During my tenure I observed, witnessed, and learned about many actions that were clearly unethical. What made these actions unethical? The fact that they were performed for the sole purpose of maximizing profits regardless of the lost lives, lost productivity, and exorbitant healthcare costs.

In 1993 I was fired for protesting the company’s continued efforts to conceal the addictive and toxic nature of cigarettes. Sadly, the company eliminated its program to develop a safer product. Why? The program posed a legal liability to the company. If it made a “safer” product, then all the current products were “unsafe.” Lawyers sanitized scientific research and other documents that demonstrated that the company clearly knew that nicotine was addictive and that tobacco products when used as intended killed not only the user but also innocent bystanders and that it knowingly used an additive shown to be a potential human carcinogen. My firing from B&W was the beginning of a deliberate and systematic process of physical and legal intimidation and threats not uncommon to Persons of Conscience (witness the Nixon administration’s notorious “Malek/May Manual”).

In early 1994 I started working with CBS *60 Minutes* on what became a successful investigative report to expose just one piece of the fraud perpetrated by Big Tobacco.

I was motivated by determination and righteous indignation for corporate executives who had a total disregard for human life. I was motivated by righteous indignation for corporate lawyers who treated science as the enemy when it obstructed profits and who had the authority to rewrite research findings, falsify company records, remove evidence of public health hazards, and orchestrate a relentless campaign to increase addiction while exposing the user and innocent bystanders to some 5,000 toxic chemicals and 600 chemical additives used in formulating tobacco products to enhance the addiction process, ease initiation, and maintain the addiction, sometimes more carcinogenic than the nicotine itself.

Cooperating with *60 Minutes* led to my secretly working with the FDA on its investigation of cigarette design, addiction, and additives used in tobacco products to foster youth initiation and sustained use. This began an 18-year journey, which undoubtedly included dark moments. My children's lives were threatened. My marriage ended. I was followed. I was subjected to a multimillion-dollar retaliatory investigation and was sued. I had to live 24/7 with armed security forces to protect my family, start my car, or open my mail. I was threatened with criminal prosecution for revealing the truth. And this is all *after* I was fired! Despite being a high-level insider, I had no idea what I would be subjecting myself to when I exposed the lies concealing an industry's secret, indefensible culture. I knew it was going to be a tsunami of sorts and that the truth would win out in the end. My thoughts in the initial phases were of survival rather than a stellar victory.

What is most gratifying is knowing that my action made a difference. My being a Person of Conscience aided 39 state attorneys general in holding the tobacco industry accountable for its widespread and systematic harm. Our combined efforts stimulated a campaign for the regulation of tobacco products as an addictive drug. It led to congressional hearings, Department of Justice investigations resulting in a racketeering trial of the industry, and finally an Oscar-nominated movie, *The Insider*. The most important thing to me, however, was knowing that I helped mitigate the widespread and systematic harm perpetrated by my employer and its industry. I could not be a bystander, choosing to remain silent when I knew that the knowledge I possessed could make a difference. I am often asked if I would do it again and if it was worth it. My response is always an unequivocal "Yes—and in a New York minute."

My journey did not end in 1999 with *The Insider*, which served as a platform to further disseminate the inner workings of the tobacco industry and was an unexpected but welcome final vindication. Indeed my journey is not yet at its endpoint, as it continues today. The fact is, my decision to become a Person of Conscience has led me to true happiness and enabled me to recognize and fulfill my calling.

The Corporate Whistleblower's Survival Guide contains the Government Accountability Project's combined lessons learned over three decades of working with thousands of Persons of Conscience. Read it

if you are an employee even thinking about becoming such a Person. At a minimum, you need to know what consequences to expect and the nature of your legal rights. Read it if you are an organizational leader wise enough to listen to messengers instead of silencing them. Anyone should read it to understand what it means to challenge abuses of power and what we risk when corporate secrecy and intimidation prevail. That is ample reason to read and digest the real-life experiences relayed in this book.

Four lessons in particular are worth highlighting and incorporating into your decision-making process:

1. Be prepared Being a Person of Conscience will likely be the worst, best, highest-risk, highest-stakes, most inspiring, *and* most disillusioning experience of your life. Your life will never be the same. Do your homework carefully before exposing yourself and have a proactive strategy and plan rather than just being reactive. Share the choices and the decisions with those who will be most affected by them.

2. Don't quit midstream If you are going to do that, don't even start. *You must fully commit to your decision, come what may.* If I had allowed the tobacco industry to silence or defeat me, it would have had greater abusive power. Making a difference requires a marathon commitment. It has taken me 18 years to make some difference, but the more I learn, the greater the challenge and the opportunity to make a continued difference in the world arena. Persons of Conscience have a crucial role in society, and their voices need to be heard. History is replete with lessons that illustrate that listening to a Person of Conscience could have prevented numerous tragedies.

3. Be certain that you have allies No one can challenge an institution alone. I know. I would have been crushed without the committed support of kindred spirits in my family, my students, the public, the media, crusading lawyers, and government officials who actually were dedicated public servants.

4. Do not quit until the truth has been fully exposed Armed with the truth as an individual, you can effectively challenge bureaucratic abuses that are able to continue only if the victims don't know what is being done

to them. This does not contradict the point on alliances. In fact, the truth is the most effective means for building alliances.

If you are faced with the choice of becoming a Person of Conscience, this book will help you make a difference without paying an unnecessary price, as there are many pitfalls in the process that one can avoid. I can assure you that an individual *can* effectively challenge abuses that institutions would prefer remain hidden. Your commitment to the truth will be your most important ally. In the words of W. H. Murray, “The moment that one commits oneself, then Providence moves too.”

—J. S. Wigand, MA, PhD, MAT, ScD

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Introduction: Whistleblowing in Corporate America

The new millennium ushered in a wave of corporate scandals that cheated ordinary shareholders and employees out of billions of dollars in lifetime savings, investments, and pensions. More than two dozen major accounting scandals followed the October 2001 discovery of Enron's sham bookkeeping, bribery, and energy market manipulation. Brought to light by whistleblowers at Enron, WorldCom, and other companies, these revelations seriously strained public confidence in the stock market and set off sweeping congressional reforms.

Legislators moved quickly to pass the Public Company Accounting Reform and Investor Protection Act of 2002—commonly known as Sarbanes-Oxley (SOX). Enforcement actions and criminal convictions continued apace. In 2003 the Securities and Exchange Commission (SEC) entered into a \$1.435 billion settlement with 10 of the United States' largest investment firms over charges that the firms' bankers had inappropriate influence over their own analysts. In 2005 American International Group (AIG), the fourth-largest company in the world, came under investigation for accounting fraud in a scandal that cost the company \$1.64 billion to settle with federal and state authorities and a \$2.7 billion decline in its net worth.¹

Corporate Whistleblowers Who Paved the Way for Reforms in the Twenty-First Century

Although governmental whistleblowers long have made headlines, the events surrounding Enron, WorldCom, and other corporate collapses in the early 2000s increasingly brought corporate whistleblowers into the

limelight. The country became aware of corporate misdeeds occurring on an unprecedented level. Two women stood at the center of these realizations.

At Enron, Vice President of Corporate Development Sherron Watkins realized something was wrong with the company's finances. The numbers didn't add up. She wrote a memo to Enron Chief Executive Officer (CEO) and Chairman Ken Lay, trying to raise awareness of the problems before the company self-destructed. Enron's management chose to seek her removal rather than deal with the issues she raised. When Enron came under scrutiny, Watkins was the key witness in bringing the fraud to light.²

Cynthia Cooper was vice president of internal audits at WorldCom, now MCI. Her audit of the company's finances uncovered suspicious activities. After being told by her supervisor to delay her analysis for a financial quarter, she continued investigating with her team and took her findings directly to WorldCom's board of directors.³ Her efforts exposed the corporate fraud that was occurring at the company, sparked serious corrective action that saved MCI from Enron's fate, and focused attention on the questionable independence of corporate audits—an "oversight" mechanism that had come to enable widespread deception in corporate America.

Both of these women made the difficult choice to jeopardize their professional lives to bring wrongdoings they witnessed to the attention of their supervisors. Like most whistleblowers, they experienced tremendous stress and had difficulty retaining their positions, finding new ones, and maintaining their everyday lives outside of the office.⁴ Unlike many whistleblowers, however, they both made a difference and received the recognition they deserved. In 2002 they, along with Federal Bureau of Investigation (FBI) whistleblower Coleen Rowley, were named *Time* magazine's Persons of the Year.⁵

Post-Enron government action did little to stave off the reckless lending practices that arose from decades of government deregulation of the financial industry. Most notably, mortgage companies had been issuing shaky subprime loans and passing on the risk to investors in the gilded form of securitized mortgage credit. The inevitable financial losses in 2007 exposed other precarious loans and inflated assets and triggered a global financial crisis. On September 15, 2008, Lehman Brothers caved, filing the largest bankruptcy in US history. A panic in the financial markets accompanied sagging stock and housing prices, sending many large investment and commercial banks reeling. Congress and the Federal Reserve spent \$700 billion and \$1.2 trillion, respectively, on bailouts and emergency loans to large corporations, including the scandal-mired,

government-sponsored Fannie Mae and Freddie Mac that owned or guaranteed about half of the country's \$12 trillion mortgage market.

A Whistleblower at Lehman Brothers

As heavy losses pushed Lehman Brothers down the road toward eventual bankruptcy, Senior Vice President Matthew Lee, a 14-year company veteran, sent a letter to senior management in May 2008, warning of accounting irregularities. Lehman's board instructed its auditor, Ernst & Young, to look into the matter. Lee told Ernst & Young investigators that Lehman temporarily moved \$50 billion in assets off its balance sheet to help hide the firm's risks from Wall Street investors and regulators. These concerns faced a dead end when Ernst & Young announced that Lee's allegations were unfounded. In late June, Lee was laid off as part of broader downsizing at the firm, according to Lehman. Lee's concerns were ultimately vindicated by a federal bankruptcy examiner's report released in March 2010.⁶

In March 2009 corporate America again broke records when Wall Street investment adviser Bernard Madoff pled guilty to running the largest Ponzi scheme in history. After nearly two decades, the house of cards finally collapsed—leaving thousands of investors defrauded of \$65 billion and forcing businesses, charities, and foundations around the world to close shop. Sadly, a whistleblower had spent 10 years trying to alert the government, industry, and press about the fraud. Damaged by the 2008–2009 economic implosion, scandals, and bailouts, public trust in corporate America has yet to be regained.

Unfortunately, corporate wrongdoing is not limited to large accounting firms, financial lenders, and publicly traded corporations. Every year thousands of employees from the full range of business organizations witness wrongdoing on the job. These discoveries may jeopardize the physical or financial well-being of others and endanger our shared environment and economy. Whistleblowers may see managers at a nuclear facility violate safety codes, a chemical company dump hazardous waste unlawfully, or a food-processing plant attempt to sell contaminated meat to consumers.

Most employees remain silent, concluding that it is not their concern or that nothing they could do would stop the problem. Often they cannot afford to get themselves into trouble. Remaining an uninvolved bystander,

however, risks serious consequences for all but the tiny circle that profits from the abuse and deceit. Others choose to bear witness and speak out, seeking to make a difference by “blowing the whistle” on unethical conduct in the workplace. This may sound like an elaborate undertaking, but even a simple note or a frank discussion with one’s supervisors can sometimes suffice to bring about real change or spark retaliation.

At the Government Accountability Project (GAP), we define whistleblowers as individuals who use free-speech rights to challenge abuses of power that betray the public trust. Under the Whistleblower Protection Act (WPA), the legal definition of whistleblowing as applied to government workers is disclosing information that an employee reasonably believes is evidence of illegality, gross waste, gross mismanagement, abuse of power, or substantial and specific danger to public health or safety.⁷ Corporate whistleblower rights, including SOX, are generally organized as witness protection clauses in enforcement provisions of selected parent statutes. Whatever the context, whistleblowers typically are insiders who learn of wrongdoing and decide to speak up about what they know—people of conscience who act for the good of the public at great personal risk.

Whistleblowers’ actions have saved the lives of employees, consumers, and the general public, as well as billions of dollars in shareholder and taxpayer funds. Whistleblowers have averted nuclear accidents, exposed large-scale corporate fraud, and reversed the approval of unsafe prescription drugs. But rather than receive praise for their integrity, they are often targeted for retaliatory investigations, harassment, intimidation, demotion, or dismissal and blacklisting. Ernie Fitzgerald, a whistleblower who exposed billions of dollars of cost overruns at the Pentagon, described whistleblowing as “committing the truth,” because employers often react as if speaking the truth about wrongdoing were tantamount to committing a crime.⁸

GAP was created to help employees “commit the truth” and thereby serve the public interest. Since 1977 we have provided legal and advocacy assistance to thousands of employees who have blown the whistle on lawlessness and threats to public health, safety, and the environment. This experience has given GAP attorneys and organizers valuable insights into the strategies and the hazards of whistleblowing.

The Need for This Handbook

In 1977 GAP produced its first whistleblower primer, titled *A Federal Employee's Guide to the Federal Bureaucracy*. Twenty years later GAP distilled the knowledge it had accumulated into a publication titled *The Whistleblower's Survival Guide: Courage without Martyrdom*. Then in 2002 GAP, the Project on Government Oversight (POGO), and Public Employees for Environmental Responsibility (PEER) collaborated to write *The Art of Anonymous Activism: Serving the Public while Surviving Public Service*. Now, with corporate scandals continuing and the development of new private-sector whistleblower protections, we believe it is time to write a handbook tailored to the corporate whistleblower.

The Corporate Whistleblower's Survival Guide draws from prior publications and GAP's experience assisting some 5,000 whistleblowers over the past 33 years. Our goal is to share lessons learned so that potential corporate whistleblowers know what they are getting into and can develop proactive strategies both to make a difference and to survive. We hope that a broad audience including concerned citizens, policymakers, journalists, and public interest groups will find its contents helpful in understanding the difficulties and the social significance of whistleblowing. Nevertheless, this handbook was written primarily with one set of readers in mind: private-sector employees of conscience.

Chapter 1 of this survival guide provides guidance for those who are making the weighty decision whether to blow the whistle. Chapter 2 discusses the dangers that whistleblowers face and should weigh into their decision making. Chapter 3 covers survival strategies for how best to blow the whistle and make a difference. It contains tips on how to go forward, often in the absence of adequate legal safeguards, without sacrificing your career. Chapter 4 discusses where to blow the whistle. Chapter 5 suggests possible allies along the way. Chapter 6 details the legal landscape in which the whistleblower stands. Chapter 7 makes recommendations for legislative and corporate reform, providing a blueprint for government and corporate leaders who recognize that it is bad business to silence or eliminate what is often their only warning signal of impending disaster.

The current patchwork of corporate laws fails to provide a coherent and functional system of legal rights. As a rule, instead of protection, whistleblowers who assert their "rights" attract retaliation. The good

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