

WHISTLEBLOWERS AS LEADERS

Blowing the Whistle: *A Conversation with Louis Clark*

The consequences of whistleblowing can be harsh. So what motivates people to put themselves in such a perilous position? As Clark explains, “whistleblowers tend to feel personal responsibility for people with whom they identify yet do not know.” Clark also highlights the important role that nonprofits can play in supporting whistleblowers.

Editors’ note: For nearly thirty-five years, the Government Accountability Project (GAP) has handled many of the nation’s most important and high-profile whistleblower cases. GAP helped whistleblowers ensure that Vioxx, an arthritis medication responsible for forty thousand fatal heart attacks in the United States, was pulled from the shelves; aided workers in pulling the plug on inadequately tested nuclear power operations and facilities; and assisted a Marine Corps whistleblower who exposed unnecessary bureaucratic delays in providing safe vehicles for troops.

GAP has witnessed truth tellers assaulted and their personal property vandalized, organizations illegally monitoring and spying upon workers in retaliation for whistleblowing, direct threats and bogus smear campaigns enacted—all of which can result in such all-too-common aftereffects as shunning by once-friendly co-workers, nervous breakdowns, and family unit disintegration.

As GAP president Louis Clark explains, because whistleblowing is such a potentially life-changing affair, GAP never solicits it. When concerned workers go to GAP for help, they are told exactly what they’re in for: their professional careers (and more) are at stake. GAP is clear about the type of retaliation whistleblowers will likely endure. They, and they alone, decide. If they move forward, GAP is there for them. If they choose to remain silent, it is completely understandable.



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Nonprofit Quarterly: *This issue of the Nonprofit Quarterly addresses the risks of leadership. Given the personal risk involved or perceived to be involved in whistleblowing, what is your experience with regards to the motivations of people who choose to blow the whistle?*

Louis Clark: There's probably a broad range of motivations, but I should think most of them fall into the category of concern about the issue that they're raising. They can't let it go, they can't not focus on it, and they want corrective action

Surveys of federal employees have indicated this pretty consistently. On the other hand, there are surveys of corporate employees that indicate that 60 percent or so of the people who see wrongdoing don't do anything about it because they feel nothing will be done. In other words, if they saw whistleblowing as *not* being futile, they would do it; they just assume it *is* futile.

That, of course, can be a rationalization, but still, it's pretty realistic. It has been our experience that once we start dealing with a whistleblower's concerns and begin to make headway on the issue—Congress is interested, the media is interested, there's clearly an investigation going on—additional people come forward because they see that people are paying attention.

So I think that people seeing something "wrong" and wanting something done about it is a strong motivator. It's certainly the most common one.

Now, *why* a person gets concerned probably varies, but in our experience whistleblowers tend to be highly professional people with pretty high standards whom it really bothers to see shoddy work. Most organizations would like to see quality products; here are people whose motivation for blowing the whistle has to do with issues of quality, yet they're turned into pariahs. It's a huge waste of talent.

NPQ: *In those surveys, do people also express fear?*

LC: Yes. They express fear for their jobs, and that fear level tends to be around 40 percent. In other words, 60 percent say that one of the reasons they

don't blow the whistle is that it's futile; 40 percent say that they're afraid.

The Merit Systems Protection Board—the adjudicative agency of the civil service system—just did a huge survey of federal employees. The survey went out to seventy-two thousand employees (and I believe 58 percent responded, so nearly forty-two thousand)—and fear of losing their jobs or having severe personnel problems (for example, transfers or other negative things related to the job) was around 39 percent. That seems to be pretty standard.

So more people do nothing because of a sense of futility than from fear of losing their jobs. But fear of job loss is still pretty high.

NPQ: *It helps to humanize this, because we want people as individuals to think about what's the balance—what's important to him or her when thinking about whistleblowing. . . .*

LC: A professor in Maryland, Fred Alford, did an analysis, and he said that one of the characteristics of whistleblowers was a tendency to have empathy for people they don't know. In other words, when they say they're worried about the taxpayers or the American people who pay their salary, those aren't empty phrases. They really mean it. No one has done testing to my knowledge to see if that's true, but those were Professor Alford's observations: that whistleblowers tend to feel personal responsibility for people with whom they identify yet do not know.

NPQ: *And enough of a connection to actually make them act. . . .*

LC: Absolutely. Remember that peanut butter scandal from two or three years ago? A number of people died because of salmonella in the peanuts, and it got quite a bit of national attention. Kenneth Kendrick was the whistleblower, and because of his whistleblowing, not only did the company go bankrupt but, in the process, the plant was closed—and, as I recall, about three hundred people were put out of work.

Ken lives in a small community in Texas, and he's been targeted with some threats. I don't know

how specific they've been, but I do know that someone actually shot out a streetlight in front of his house. And he's been pretty much shunned by the whole town because all these people have lost their jobs.

I know Ken, and he really was worried about the people who buy peanut butter and might have died or been injured because of that product. He was very strongly motivated by that concern when he wrote letters to the Texas Department of Health, which, of course, ignored him.

NPQ: *That level of concern has got to be pretty much in the soul of every really significant social change leader, I think. But the act of leadership isolates the person.*

LC: An amazing number of whistleblowers believe in the institutions they've joined and actually believe company policy inviting employees to bring any concerns to their attention. They haven't entered their institutions with any cynical baggage that would cause them to see wrongdoing and say, "Well, that's what I expected."

NPQ: *So they're truly outraged?*

LC: Absolutely. And that's what gets them into trouble and is also what singles them out. Corporations are always saying, "I wish you had brought that to us first." Well, they have. It is rare that they have not done that—very, very rare.

I know a lot of people who work for the government who are always leaking stuff. They leak it to us, they leak it to other people, they leak like sieves—typical Washington stuff, too—and that's because people who join those organizations are already jaundiced. Their identity is not really wrapped up in the company; it's wrapped up in the issue. And they know that in order to further the mission they need to go outside normal structures.

On the other hand, it's my opinion—and there is nothing scientific about this, it's totally anecdotal—that whistleblowers just *don't* do that. This changes when they meet people like us, meet other whistleblowers, start having relationships with the media. Plus, they've already been jilted

by their institution. So they develop a different point of view or methodology.

We call the first whistleblowers in a company "granddaddy whistleblowers," and if they stay with the company, all kinds of people go to them with concerns, and they very often have a pipeline outside the company.

But in the beginning they certainly aren't like that—they don't leak, and they raise their concerns the way they are supposed to.

And that's when they get into a lot of trouble. It's why they're identified even if they're leaking anonymously. Everyone knows where the information is coming from.

So when they come to us and we work out a strategy, we tell them that if they leak the information anonymously, the other side will claim that they couldn't have been retaliated against, as no one knew that they had leaked the information or blown the whistle in the first place.

And in that event, there's no protection for the whistleblower. You have to prove that the company had knowledge.

We can still decide to leak anonymously if the whistleblower hasn't raised concerns ahead of time and so can't be identified, but that is so rare. By the time they come to us, they've already discussed their concerns—usually with co-workers.

NPQ: *When you counsel people on the dangers of whistleblowing, what do you tell them are the potential consequences?*

LC: Usually we talk to them about their job situation, which is our area of legal expertise. We tell them the worst-case scenario—except we don't talk about the dangers in terms of physical threat to the whistleblower or the whistleblower's family, because we just don't know what those are, and we wouldn't be able to do much about it even if we did.

All we can tell people to do is call local law enforcement and, in some cases, do a little video surveillance or sweep for bugs. But we don't like to warn about these things because, until people actually get the threat, there's really nothing we can do about it.

An amazing number of whistleblowers believe in the institutions they've joined and actually believe company policy inviting employees to bring any concerns to their attention.

[W]hen people report back that no one wants to have lunch with them anymore—which can be a very lonely situation and is very common—we caution them not to respond to those co-workers as if they are now the enemy or are now on the side of management. And we explain that more likely than not they're worried about their mortgages—they're worried about their jobs.

NPQ: *Would it be fair to say that the consequences of whistleblowing fall on the professional side more often than the personal?*

LC: In our international program, we do come across physical threats, and people can fear for their lives. But here in the United States, what is most common are personnel problems and devastating consequences to people's careers. It's what we tell people they can expect, and it's what we try to diffuse or prevent as best we can.

We also try to determine whether or not we feel they can handle the kinds of things that are going to be thrown at them professionally, because some people don't have the stamina to deal with it. So we do sometimes discourage people from blowing the whistle because we don't think they will be able to cope psychologically.

NPQ: *Can you be a little more explicit about the sorts of characteristics you look for in someone you think would be able to manage his or her way through that kind of thing?*

LC: We rely in part on past performance appraisals and personnel records, both of which give us clues. Because if there is evidence of having been disciplined—for flying off the handle, for example—that would be a red flag for us, because it might mean the person could easily be made to go over the top or to be angry or shout back. In other words, the person could be vulnerable because of his or her own temperament, and that's something we would have to address as far as going forward is concerned. We might look for another way of getting the information out, which we do as a matter of course, anyway, even if he or she has a perfect record.

We also take into account whether or not he or she has significant support within the organization and if that is likely to continue. And when people report back that no one wants to have lunch with them anymore—which can be a very lonely situation and is very common—we caution them not to respond to those co-workers as if they are now the enemy or are now on the side of management. And we explain that more likely than not they're

worried about their mortgages—they're worried about their jobs.

NPQ: *It's got to feel as if a whistleblower has put him- or herself in a position that is just unbelievably lonely and isolated—marginalized.*

LC: There's no avoiding that, but one way that we have tried mitigating it is by matching people with mentors—other whistleblowers who have been through it. For a number of years, we had a group that would meet here at the office twice a month to share experiences and, in the process, develop new relationships that they could rely on to help them with the isolation.

The mentoring has been very helpful. It gives whistleblowers a whole new set of people they can relate to outside of their usual work relationships.

NPQ: *You've been doing this for over thirty-three years. What cases really stand out for you in terms of a whistleblower just not letting go—seeing it through to the end at risk to him- or herself?*

LC: A big one would be the Vioxx case. David Graham, a senior doctor who had become a researcher at the Food and Drug Administration, was working with Kaiser Permanente, which had done a study of ten thousand of their patients. And through that study, Graham's team discovered that there was a higher-than-normal frequency of heart attacks and strokes among the patients taking Vioxx.

When David presented the evidence to his bosses, they said that he couldn't publish his findings. When he expressed his intention to publish his findings with or without their support, they told him he had to change his recommendation, which was to take it off the market.

They wanted him to recommend instead that a heightened black-box warning about the possible heart attacks and strokes be put around the bottle. When he refused, they tried to move him to a job with no oversight responsibility for drugs already on the market.

That's when we went to the Senate and got the hearings. Talking to Congress was primarily a

That's when she started seeing all these phony mortgage applications. Basically, employees were cutting off the signatures of loan applicants who had accurately reported their income and assets, and were putting them on phony applications where they had fudged the income and assets without the applicants' knowledge.

means of protecting David and protecting his job. He was already going to go ahead with publishing his report. So he testified to the Senate, and it made a huge impression.

David is also responsible for raising concerns about Avandia, the diabetes drug that was in the news two or three years ago.

Just like Vioxx, it was a billion-dollar-plus drug, and just like Vioxx the makers were forced to change all the warnings on it. The FDA recommendation now is that if nothing else works, use Avandia, which, of course, has killed the market for it. There are now a number of other drugs for diabetes sufferers that must be tried before going on Avandia.

So David's had a huge impact on the drug industry, and he's given support to other whistleblowers in the industry, which has become very helpful as a peer-review process. He certainly stands out as someone who has had enormous impact—he was tenacious and just refused to back down.

Another example that comes to mind is Eileen Foster, a Bank of America executive we represent who was recently on *60 Minutes*.

Eileen was senior vice president at Countrywide, which was later acquired by Bank of America, and had been put in charge of monitoring and investigating mortgage fraud. She started finding problems in Boston (and subsequently eight or so other major cities across the country), so whenever she went to a branch she would immediately go to the recycle bin and search through it.

That's when she started seeing all these phony mortgage applications. Basically, employees were cutting off the signatures of loan applicants who had accurately reported their income and assets, and were putting them on phony applications where they had fudged the income and assets without the applicants' knowledge. And Eileen blew the whistle on it.

Eileen is a very calm person, very professional, so it was just outrageous when Bank of America subsequently fired her for “unprofessional conduct and perceptions of retaliation.”

Eileen reported to Internal Audit that Employee Relations (ER) conspired with Lending Management to fire whistleblowers who challenged

fraudulent loan origination practices. Instead of investigating Eileen's allegations, Internal Audit colluded with ER and concocted a sham investigation against her.

Eileen's staff reported to management that derogatory characterizations were “jammed down their throat” by ER and they were intimidated into agreement out of fear of retaliation themselves. It just made no sense whatsoever, which is exactly why Bank of America is going to get creamed in the hearing as we move forward.

NPQ: *What's her employment status now?*

LC: She's been fired, and she's fighting back, but the Department of Labor did a huge, two-year investigation, the result of which was to order Bank of America to pay her \$930,000 and reinstate her.

Bank of America is challenging the investigative decision, and so now we're headed to trial. Last month there was a hearing before an administrative law judge—I believe it was an argument on a motion—because they had been trying to identify all the people who had been bringing concerns to Eileen while she was on the job, which started the discovery of the case.

And she said she would drop the case—a case that could potentially bring her a million dollars, if she had to name these people.

We went to the judge and got a protective order so that they couldn't ask her the names and identities of all the people who had raised concerns covered by Sarbanes-Oxley. It's pretty unprecedented that a judge would give us that ruling, but if she didn't get some protection, she was willing to give up her case.

And that's not uncommon among whistleblowers. They are very ethical, and they take stands that are somewhat unusual for the average citizen, I guess. They're willing to give up a lot on principle. Fortunately, we won.

NPQ: *How does your organization work with nonprofits to support whistleblowers? For example, take the case of Eileen Foster. . . .*

LC: In the typical sort of whistleblower situation,

at the beginning there will be one person in an organization within a company or an agency, and—as with Eileen Foster—she will be isolated, being made a pariah, perhaps. She will be raising these concerns, upsetting people, and will be very vulnerable. She's inside the institution, and the whole institution is bearing down on her and putting pressure on her to change her position—to change her behavior, essentially.

What we do as a strategy is very simple. We take the internal concerns the whistleblower has raised, and, if they're significant concerns, we take them outside that institution to law enforcement, Congress, some regulatory body—other public interest groups, very frequently.

And all of a sudden these other institutions and organizations—often nonprofits—are putting pressure on that original institution about the concerns. So it just totally changes the dynamic.

And the nonprofit world is very much a part of that. We always try to have and connect with nonprofit organizations that can make use of the information. And they get it—they're usually really happy to get the information from us.

NPQ: *Can you give an example?*

LC: A good example is the Humane Society. There was a plant up in Vermont where there was horrific, inhumane treatment of animals before they were slaughtered, and the Humane Society was really concerned about that issue.

Our whistleblower was a vet with thirty years of plant experience who worked for the U.S. Department of Agriculture, and one of his responsibilities was seeing that animals were not treated inhumanely in the slaughterhouse. He had identified inhumane treatment in Oklahoma, and when he raised his concerns, the Oklahoma managers for the Department of Agriculture were angry and, essentially, took him off the job.

So he didn't have a job for about a year and a half. I think he was paid . . . I believe they have to pay you, but the regional managers decide on whom they want doing the work—what vets they want in their plants and parts of their regions.

Eventually, he was able to get in the New England region, where he found very similar types

of things going on at the Vermont plant, and he raised his concerns. USDA management didn't believe him and said, "Well, you had this trouble in Oklahoma. . . ." And they decided that they would retrain him.

Thirty-plus years of experience as a vet—a committed, excellent worker, obviously—and they were going to retrain him because they didn't believe him.

And what happened then is that the Humane Society snuck a camera inside the plant and filmed an animal being abused. And I won't describe it—it was horrible. Essentially, they were skinning an animal before it was dead. They captured it on film, and the Department of Agriculture inspector who was present is heard on camera saying, "You'd better be glad that the doctor isn't here." And what he meant was the vet.

The video went viral on the Internet, and the plant threatened to sue the vet, saying that he had snuck the Humane Society people into the plant, which he had not actually done. The Humane Society knew about his concerns, and that's probably why they brought a camera in. But the immediate reaction of the plant owner was to go after this guy and try to get him fired.

Well, it totally boomeranged on them when the story went viral, and all of a sudden everything changed. The story captured the attention of Congress, and they had a hearing. The Department of Agriculture had to back down and admit that this guy not only shouldn't be retrained but also was absolutely right to have the concerns he had. So it was a total vindication of the vet.

And the Vermont plant was closed down by the Department of Agriculture, and the Vermont attorney general brought criminal charges against the plant owner for inhumane treatment of animals. And the Oklahoma plant recently faced administrative actions from the USDA for inhumane treatment of animals.

NPQ: *That is just absolutely heartbreaking.*

LC: It shows exactly where nonprofit organizations and GAP work really well together.

We're concerned with the inhumane treatment of animals, we're concerned with food safety, but

We always try to have and connect with nonprofit organizations that can make use of the information. And they get it—they're usually really happy to get the information from us.

It works a lot better for us to be the broker, I guess, between the whistleblower and the nonprofit world, because we're nonprofit ourselves. We have these relationships that we developed organically, and the nonprofit world won't have to worry about the person's identity or about protecting him or her—or, if the sector has to worry about it, it'll know chapter and verse how to carry out that responsibility.

the cases themselves are not our central focus. What we try to do is take the information to all those organizations that should care about the issue. They will have the resources.

The whistleblower sometimes just starts working with those organizations on a confidential—and usually informal—basis. In the nuclear industry alone, we have taken on over six hundred whistleblowers (mostly in the 80s up until about '91), and we almost always took the information straight to the citizen groups that were raising concerns.

In our early days we set up what we called a “citizens’ clinic” to help nonprofit groups work with whistleblowers—to supply representation or recruit lawyers for them. But it just didn’t work, and probably part of it was that we didn’t have the personnel to make it work. But I think another reason was that it was almost as if we were trying to turn nonprofit groups into little whistleblower support groups.

NPQ: *But in some instances that could be completely appropriate. I guess my question would be that when you're working with whistleblowers, would you say to them that as an option they might try finding some nonprofit groups for whom their concerns would be a central issue?*

LC: We do that in almost every case. Every case that goes public, for sure. But we're the ones who find the groups, because most of the whistleblowers are not connected to the nonprofit world; they don't have the relationships.

And so it's just an array of potential groups out there, and they have no idea whom to trust and whom they can work with. So we tend to do that vetting and making of those connections, and sometimes we just dump documents on groups, while other times it might be more structured and more hands-on.

But very often we just try to get the information out; we try to get the groups to write letters of support if we feel that's needed. Sometimes we try to get them to join in and meet the brief, if it's appropriate.

More likely, though, we try to get them to join the campaign on a piece of legislation that

would help bring whistleblower protection. There are over four hundred groups signed on to the Whistleblower Protection Enhancement Act, of which there are probably around five that deal with whistleblowers. But they all see the need, and they often see the value of whistleblowers in terms of the regulatory process.

So it works a lot better for us to take the information from whistleblowers and get it to the groups that can use it. We can then use their analysis, and, in terms of pressing the issue, it's helpful to us to get their endorsement.

Sometimes it's also helpful to work with the groups in order to get some kind of reading on the importance of the information.

For instance, if it's a nuclear issue, it can help to work with an organization or project that's focused on nuclear power or nuclear weapons, because they will know a lot more about the subject matter than we probably will. So they can give us a sense of the importance of that issue and concern, or they can help open the doors in terms of potential oversight hearings in Congress.

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NPQ: *That is exactly what I felt was missing. I knew there was a lot of activity between nonprofits and whistleblowers, but I didn't know that it was consciously facilitated by GAP.*

LC: It's very much a part of our methodology—no question about it.

NPQ: *What do you think are the real differences between the protections for whistleblowers in nonprofits versus in for-profits or government?*

LC: They're diminished for people in the nonprofit world—not eliminated, but diminished—because

most of the whistleblower statutes are either focused on government (so, government employees), or they're focused on contractors carrying on a government function.

So if the nonprofit is a hospital, it may very well have whistleblower protection around, for example, healthcare legislation. Or, if the nonprofit has a government contract, it could be that it will have protection. It's totally random in a lot of ways, because almost all the statutes have to do with a particular industry or segment of the private sector.

For example, there's a bill on products, so we have the Consumer Product Safety Commission, which reviews thousands of products. But nonprofits don't make products—there are probably not many nonprofits in the manufacturing business—so they're not included in the bill. Then there's the food safety bill, which only covers products that the FDA oversees, so nonprofits aren't in that business.

Congress has not been willing to pass legislation that simply covers everybody. It tends to pass legislation covering a segment of the population that is being regulated.

Corporate bills covering all companies have been introduced, but they have not gone anywhere legislatively, although they're increasingly getting stronger support. I mean, what's silly is that, for example, if someone is blowing the whistle on pizza, you're covered if it's a cheese pizza but you're not covered if it's pepperoni. [Where food safety is concerned,] whistleblower protection does not extend to the poultry and meat industry; it only extends to the industry that the FDA oversees, which is non-meat food products. That's how fickle the legislation is.

NPQ: *So it wouldn't just be nonprofits that are not covered; it would be many odd areas of endeavor?*

LC: That's right. It seems the law is made where there are consumer interest groups that are part of the push for change.

So, for example, there were strong food-safety organizations—mostly public interest groups and some unions—pushing for the passage of

the Food Safety Modernization Act, and those people, as a rule, see whistleblower protection as an important part of the regulatory process. The Food Safety Modernization Act got through in the lame duck session of Congress, but Congress didn't get around to passing legislation to give more money to the FDA to actually regulate. So they greatly expanded the FDA's jurisdiction and responsibility but didn't get money for them, and the Republicans are totally opposing any kind of real money for regulation.

So whistleblowers become a really important part of the regulatory process. And the nonprofit groups and the unions recognize that, and that's why they've also supported whistleblower protection.

Same thing with the Consumer Product Safety Commission: it was being reauthorized, and the people concerned about consumer products saw the need for whistleblower protection, so that was part of their legislative agenda—as, of course, it was ours, because they reached out to us and we worked together and got some really good protections in that legislation.

I think nonprofits are most likely to have whistleblower protection when there are contracts with the government, but right now this is not the case in terms of federal government contracts, except for the stimulus.

The stimulus bill had whistleblower protection. So anyone getting stimulus funds—whether it be nonprofits, whether it be state government, or whether it be private profit-making contractors—got whistleblower protection. And the House version of the Whistleblower Protection Enhancement Act bill that just passed their committee thirty-five to zip has whistleblower protection for federal government contractors, but the Senate bill, which also passed their committee, does not.

Whether the final bill will end up having it or not, I do not know. We certainly hope so. If it does, there will be a significant increase in nonprofits getting whistleblower protection.

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