

By Jeff Storey

Neil Getnick

NEIL GETNICK is the managing partner of Getnick & Getnick, a firm of a half-dozen attorneys in Manhattan that has developed an anti-fraud litigation and “business integrity” practice for individual and business clients. Among the services offered by the nearly 30-year-old firm are civil RICO litigation, compliance counseling, internal investigations and independent monitoring. But an increasing share of the firm’s time and effort goes to representing whistleblowers under toughened state and federal false claims acts and programs run by the Internal Revenue Service, the Securities and Exchange Commission and the Commodity Futures Trading Commission (CFTC). Working in tandem with prosecutors, the firm says it has achieved more than \$1 billion in recoveries for government agencies.

A 1975 graduate of Cornell University and a 1978 graduate of its law school, Getnick, 58, worked in the Manhattan District Attorney’s Office before starting his firm in 1983. In addition to his practice, he led an international campaign to free from detention Kenyan human rights activist Koigi wa Wamwere, a Cornell classmate, and continues to work with him on anti-corruption initiatives. Getnick serves as chairman of the Washington, D.C.-based Taxpayers Against Fraud, www.taf.org, an organization that supports whistleblowers.



Q: Describe your practice.

A: We represent individual, corporate and government clients. Our practice includes representing whistleblowers in federal and state False Claims Act qui tam cases, complex fraud investigation and litigation, corporate monitoring and serving as business integrity counsel. Our practice has expanded to focus on whistleblower cases under the IRS, SEC and CFTC whistleblower laws. We are now forming a global anti-fraud and corruption unit, focusing on international whistleblower cases.

Q: How much of your practice is devoted to False Claims Act suits?

A: At least half of our work focuses on our whistleblower practice, and we anticipate that percentage growing with the expansion of whistleblower laws, such as the Dodd-Frank Wall Street Reform and Consumer Protection Act, which includes the SEC and CFTC whistleblower laws, and the increase in state False Claims Act statutes.

Q: Why did you start focusing on False Claims Act suits?

A: We have extensive experience in fighting fraud as former fraud prosecutors. The firm’s goal is to help our

clients achieve a level playing field, where honest business is smart business. Our clients tend to be people who share those values and want to do the right thing and be successful in the business world at the same time. Whistleblower cases under the federal and state False Claims acts and the IRS, SEC and CFTC laws are a natural outgrowth of our larger practice fighting business fraud and corruption.

Q: What distinguishes your law firm in its ability to successfully litigate False Claims Act and other whistleblower cases?

A: In the early days we had clients facing very tough issues: organized crime infiltration of their industries, unfair competition including kickbacks and bribery, and highly sophisticated embezzlement schemes. For years before filing our first False Claims Act case, we had an established record in the narrow and complex area of civil and criminal parallel prosecutions, using fraud statutes, such as civil RICO. It was a natural evolution to then apply our time tested methodologies to False Claims Act cases. Our case against GlaxoSmithKline, for example, resulted in a \$600 million civil settlement as well as a criminal corporate conviction resulting in a \$150 million additional fine.

Q: What is the volume of your False Claim Act practice?

A: We seek to be involved in, at any given time, a limited number of highly significant False Claims Act cases in terms of their complexity, size and structural impact. We have a very aggressive vetting practice. We may look at as many as 100 cases before we file one. That said, as the whistleblower statutes expand by jurisdiction and subject matter—including such areas as non-Medicaid state False Claims Act and tax cases, as well as securities and commodities cases—we are similarly experiencing an increase in the frequency of our filings.

Q: What percentage of your cases have been successful?

A: Almost all of our cases have resulted in recoveries, and everything that we have filed in the past decade has been successful. That's not to say we can achieve a recovery in every conceivable case. But once a case gets through our screening process, we dedicate ourselves to bringing it to a successful conclusion. Our 1997 case against LabCorp led to what at the time was the largest federal False Claims Act recovery in U.S. history and part of a series of cases that restructured the laboratory testing industry. Our 2003 case against Bayer Pharmaceutical was at the time the largest Medicaid recovery in U.S. history and exposed best-price fraud practices that gave rise to Medicaid reform. Our 2010 GlaxoSmithKline case was the first whistleblower case to successfully target pharmaceutical manufacturing practices and resulted in the largest recovery ever by a single whistleblower.

Q: What particular challenges do false claim actions pose for an attorney?

A: First, whistleblower laws are relatively new. The Lincoln-era federal False Claims Act was revitalized 25 years ago and then went through significant amendments in 2010 and 2011. The New York state False Claims Act, and the IRS, SEC, and CFTC whistleblower laws all have taken effect between 2007 and 2010. So the work in this area is often a matter of first impression. Second, whistleblowers are not your average business client. They want to achieve success in their jobs, but are faced with obstacles that threaten to compromise their integrity and potentially harm the public welfare. Third, because of the nature of the cases and the civil and criminal overlays, significant ethical issues are raised that have to be addressed. Fourth, because of the

public-private partnership, it's very important to develop teams with the government based on trust and openness, shared values and shared workload. Finally, as the statutes become better known, more whistleblower cases are being filed, and they can overlap each other. So this is not an easy area of the law.

Q: How closely does the whistleblower's attorney work with the Justice Department?

A: That depends on the case, the whistleblower's attorneys, and the government attorneys. We work closely with the Justice Department and the local U.S. attorney offices. The same is true on the state level. We are there to do everything we can to support the government in developing and pursuing the case. We involve ourselves in the day-to-day work. Often that means becoming a back office and performing essential work such as document review, and legal research and analysis.

Q: Is convincing the government to participate in your suits crucial to a recovery?

A: It is very important. We take on cases that make a difference, and investigate and prepare them so that their significance will be apparent.

Q: Are the skills you learned as a prosecutor useful in your False Claims Act work?

A: The skills that I learned as an assistant district attorney in the Manhattan District Attorney's Office under Robert Morgenthau, in the trial division and the frauds bureau, are highly useful, particularly given the parallel prosecution aspects of these cases. We follow the same approach that I followed then in fighting fraud and racketeering practices: We use multi-disciplinary teams of lawyers, investigators and forensic accountants, together with industry experts, to analyze and pursue complex frauds and crimes.

Q: How are attorneys compensated for their work under False Claims Act and whistleblower laws? Do you get a percentage of the recovery?

A: There are a number of ways attorneys can be compensated in this area, including contingency, hourly and mixed hourly/contingency arrangements. Most typically, there is a contingency fee based on a percentage of the whistleblower's share of the government recovery. In addition, false claims statutes provide for a statutory fee in successful cases paid by the defendants based on hours expended.

Q: How often is your firm contacted by potential whistleblowers?

A: We vet new cases every week.

Q: Have contacts been increasing?

A: Yes. There are several reasons for that. The passage of new laws and the achievement of increasingly high recoveries have contributed to the level of interest by potential whistleblowers. Also, our firm has taken a leadership role in the development of the new laws and advancing whistleblower interests, both through the Washington, D.C., based organization Taxpayers Against Fraud, which I chair, and through the New York State Bar Association. Our firm has also been recognized for our success, particularly in the GlaxoSmithKline and the more recent Orthofix medical device cases.

Q: What motivates the typical whistleblower?

A: We have found that most whistleblowers are dedicated employees who first give their employers the opportunity to do the right thing. They turn to whistleblower laws only after their companies fail to do so. Whistleblowers must be willing to undergo great personal sacrifice and endure a long-term risky venture to defend their core beliefs and change things for the better. Absent those values and motivations, I don't think people

have the staying power to start these types of cases and see them through to the end.

Q: Is the attorney-client relationship with a whistleblower any different than with other types of clients?

A: It is different due to the nature of the cases. Whistleblower representation tends to be more personalized. You engage in a shared fight based on shared values, taking on formidable opponents and at times facing great odds.

Q: Do you specialize in bringing suit against any particular variety of fraud?

A: We were one of the first firms to apply the federal False Claims Act to health care fraud, and we have been doing those cases for nearly 20 years. That said, False Claims acts have a wide variety of applications, including defense contracting, environmental, public construction and utility cases. We have been involved in helping to expand the scope of whistleblower laws, including the IRS, SEC and CFTC whistleblower programs, and the expansion of the New York state False Claims Act to include tax fraud. We pursue cases in all of these areas.

Q: Do you file suits under the state False Claims Act?

A: Yes. The state False Claims Act, as a result of the Fraud Enforcement Recovery Act amendments passed in 2010, has become the most robust FCA in the country. Attorney General Eric Schneiderman sponsored that legislation in his final year as a state senator. Therefore, he understands the significance of that law and has prioritized its enforcement as attorney general, most significantly by creating a Taxpayer Protection Bureau. Also, our national cases include claims under state False Claims acts as well. For example, our \$750 million federal GlaxoSmithKline global settlement included a recovery of more than \$21 million for New York state.

Q: How is the state statute different from the federal version?

A: The most striking distinguishing factor of the New York state False Claims Act is that it is explicitly applicable to tax fraud, an area excluded by the federal act and equivalent statutes in other states. Other features of the New York statute include enhanced provisions concerning the public disclosure bar, pleading requirements, the statute of limitations and anti-retaliation protections for the whistleblower. It is truly a model statute.

Q: As a whistleblower lawyer, do you benefit from being in New York?

A: Yes, we do. On the one hand, the federal False Claims Act and the IRS, SEC and CFTC whistleblower laws are all national statutes, and a majority of states now have state FCAs. On the other hand, New York has emerged as a leader in this area. This is true both on the state and federal level. The Office of the Attorney General in New York State and the offices of the U.S. attorney in the Southern and Eastern districts of New York have all become highly skilled at using these statutes effectively and they embrace the spirit of the public-private partnership essential for their maximum effectiveness. Finally, Cornell Law School this spring will offer the first whistleblower law course focusing on False Claims Act and other citizen initiative whistleblower statutes. My law partner and wife, Margaret Finerty, and I have created a Business Integrity Fund at the law school and, together with our law firm, we are proud to support the course and related activities that will further advance this area of the law.

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