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# Whistleblower Law: What Rights Do Ratting Lawyers Have?

By
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Disinformation is a vital tool of espionage.[1] In the law business, however, it is not such a good thing. One area where this phenomenon threatens is where in-house lawyers turn whistleblowers and whether they have actionable claims against their former employers. Because of the whistleblower provisions of federal statutes such as Dodd-Frank,[2] recent case law,[3] and various articles written on this subject,[4] there has been a fair amount of disinformation as to whether lawyers are free to rat on their clients and then also profit thereby. This article will tour the landscape of this area and attempt to bring some focus and/or light as to what the right answer is (or, at least, should be).

### Where Were We?

The starting point for this subject is (or must be) *Balla v. Gambro*.[5] In that case, the general counsel (Roger Balla) of Gambro, Inc., an Illinois-based company that was the subsidiary of a Swedish company, Gambro AB, learned that a German affiliate was about to ship dialyzers into the United States which did not comply with Food and Drug Administration (FDA) regulations. Believing that the machines posed possibly life threatening injuries (or worse), Balla went to Gambro's U.S. president and persuaded him to block the shipment. Subsequently, the president changed his mind and green-lighted the dangerous dialyzers. When Balla learned of that latter action, he confronted the president, telling him he would do whatever was necessary to stop the shipment (as well as any sales) of the dialyzers. The president thereupon fired Balla; the next day, Balla ratted on his former company to the FDA.

A year later, Balla filed a retaliatory discharge claim against Gambro in Illinois state court, seeking $22 million. Both the trial court and the intermediate appellate court ruled that he had no valid cause of action. Before the Illinois Supreme Court, Balla argued that the court should sanction a cause of action because he had faced a "Hobson's Choice"—either report his client's wrongdoing (thereby saving lives, but being fired) or keep quiet (thereby letting people be maimed or killed, but keeping his job).

The Illinois Supreme Court not only refused to sanction a cause of action, it rejected the "Hobson Choice" argument. Rather than facing two unpalatable choices, the court observed that Balla, in fact, had no choice: under Rule 1.6(b) of the Illinois Rules of Professional Conduct, attorneys are required to reveal confidential client information when a client is about to commit an act that would result in death or serious bodily injury. The court further opined that Illinois public policy (i.e., keeping the public safe from deadly products) would be protected without creating a retaliatory discharge cause of action for lawyers, reasoning that when lawyers took and passed the Illinois bar exam they had willingly agreed to the requirement of ratting out clients in such circumstances.[6]

Many legal academics criticized the Balla decision; and shortly thereafter the California Supreme Court decided to take another approach in *General Dynamics v. Superior Court*.[7] There, the court determined that a whistleblowing in-house lawyer could assert two different causes of action. The first was a contract action—assuming that a contract could be proven (reasoned the court)—demonstrating a breach thereof would not lead to breaking professional obligations of client confidences (or, correspondingly, breaking the attorney-client privilege).

The court also qualifiedly endorsed a tort claim under two alternative scenarios: (i) where an attorney was fired for refusing to violate a mandatory ethical requirement; or (ii) when a non-attorney could also bring such a claim and the claim could be proven without violating the attorney-client privilege. While initially this seemed like a bold step, it was not. First, because California's ethic rules were diametrically opposed to Illinois's (in California, attorneys were ethically barred from disclosing client confidences). And second, because the attorney in *General Dynamics* could not prove a retaliatory discharge claim without violating the attorney-client privilege.

While a number of jurisdictions followed California's somewhat tepid toe-in-the-water approach,[8] others wanted to go further. Some courts allowed lawyers to bring these claims, while "making every effort practicable to avoid unnecessary disclosure" of client confidences, and imploring the trial courts to be imaginative in utilizing orders to minimize against "unnecessary disclosures."[9]

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In *Willy v. Administrative Review Board*,[10] the U.S. Court of Appeals for the Fifth Circuit went further—a lot further; not only did it recognize the validity of a retaliatory discharge claim, it also ruled that the in-house lawyer could affirmatively use—without limitation—attorney-client privileged materials/communications to prove his claim. The key to the court's ruling was a change by the American Bar Association to Model Rule 1.6. Previously, the rule had allowed for the revealing of client confidences

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"to establish a defense on behalf of the lawyer." The rule was subsequently changed to add the words "claim or" before "defense"—and that change, reasoned the Fifth Circuit, thereby allowed the lawyer in *Willy* to affirmatively breach the attorney-client privilege.[11]

The Fifth Circuit's ruling was subsequently the basis for the U.S. Court of Appeals for the Ninth Circuit allowing retaliatory discharge claims by two in-house attorneys (invoking the whistleblower provisions of Sarbanes-Oxley) to go forward; ultimately, that resulted in a jury verdict with damages in excess of $2 million.[12]

### Where Are We Now?

On Oct. 25, 2013, the U.S. Court of Appeals for the Second Circuit affirmed the district court's 2011 dismissal of a False Claims Act qui tam action by Mark Bibi, a former general counsel of Unilab. Bibi, together with two other, former Unilab executives, had sued Unilab's new owner, Quest Diagnostics, on the ground that the company had engaged in a pervasive kickback scheme. At the district court level, legal academics ethics experts proffered dramatically opposed opinions: Professor Andrew Patterson of Suffolk University Law School opined that Bibi had the right to "spill his guts" because he believed Unilab's actions were criminal; Professor Stephen Gillers of New York University Law School opined that Bibi's disclosure violated his professional obligations to his former client. The district court sided with Gillers, and dismissed the case.[13]

The Second Circuit, in reviewing that dismissal, first took aim at the argument that the False Claims Act preempts New York State's Rules of Professional Conduct. Judge José Cabranes, writing for the panel, expressly rejected that argument: "Nothing in the False Claims Act evinces a clear legislative intent to preempt state statutes and rules that regulate an attorney's disclosure of client confidences."[14] Cabranes then looked at whether Bibi's disclosures were allowed under the terms of Rules 1.9(c) and 1.6(b)(2); per the latter, a lawyer may "reveal or use confidential client information to the extent the lawyer reasonably believes [it] necessary:…to prevent the client from *committing a crime*" (emphasis added).

Recognizing the tension between a federal interest in whistleblowing to prevent harmful conduct and lawyers' ethical duties, Cabranes nonetheless agreed with the district court that there was a causal disconnect between Bibi revealing client confidences from the 1990s and alleged, ongoing/prospective criminal misconduct in 2005 (after Bibi had left the company). Cabranes further agreed with the district court that "it was unnecessary for Bibi to participate in this qui tam action at all, much less to broadly disclose Unilab's confidential information."

In other words, the two non-lawyer, ex-Unilab executives could have brought the case without Bibi making a single disclosure; but having proceeded in this manner, and with the accompanying taint of Bibi's extensive disclosures with respect to past conduct, the entire case had to be dismissed (and the district court's disqualification of the two law firms involved was also upheld).[15]

### Where Do We Go From Here?

Well, first off, we (as ethics- based lawyers) should be pleased with the Second Circuit's opinion. It is clearly well-reasoned and (as important) correct. The temporal distinction between past conduct and future conduct is critical to lawyers' obligations under Rule 1.6. That the opinion is in conflict with precedents of the Fifth and Ninth Circuits is a fact, but that only points to (i) the challenges of multi-jurisdictional practice, and (ii) the further fact that those other courts are wrong.

While it is true that Model Rule 1.6 does contemplate offensive and defensive actions by lawyers, the Fifth and Ninth Circuits have confused client confidentiality—an ethical obligation owed by lawyers to their clients—with the attorney-client privilege—an evidentiary rule, and a privilege owned by the client, not by the lawyer. Thus, even if a lawyer may no longer be ethically obligated to keep client confidences, that has no bearing on whether she can unilaterally breach the attorney-client privilege—and it is extremely unlikely that a former employer would waive the privilege to allow a former attorney to successfully sue her company.[16]

In any event, New York, like many other jurisdictions,[17] has not adopted the "offensive" concept set forth in Model Rule 1.6. That should serve as an important backstop to support the Second Circuit's decision in *Quest Diagnostics* and to help keep lawyers focused on their principal duty: zealous representation of clients' interests.[18]

While being a rat may be appropriate in some limited circumstances,[19] it is not appropriate for lawyers vis-à-vis their clients.

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1. In war, disinformation has a long history. In World War II, for example, Great Britain underwrote Operation Mincemeat, in which a corpse was dressed up in military attire, equipped with fake credentials and invasion plans for Greece and/or Sardinia (but not Sicily), and deposited in the Mediterranean for the Germans to discover (which they did). See B. Macintyre, "Operation Mincemeat" (Harmony 2010); N. Rankin, "A Genius for Deception" (Oxford 2008).

2. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (codified in scattered sections of the U.S. Code).

3. See, e.g., *Van Asdale v. Int'l Game Tech.*, 2011 WL 2118893 (D. Nev. 2011); *Willy v. Admin. Review Bd.*, 423 F.3d 483 (5th Cir. 2005).

4. See, e.g., E. Cohen, "Wrongful Discharge Claims by Former In-House Attorneys Gain Acceptance," ABA/BNA Lawyers' Manual on Professional Conduct 661 (Oct. 9, 2013); B. Temkin, "May Lawyers Collect Whistleblower Bounties Under Dodd-Frank Act?" New York Law Journal (Nov. 6, 2013); M. Roqoff, P. Ramer, D. Liben, "Ethics Rules Put the Brakes on Attorney Whistleblowers," New York Law Journal (Dec. 17, 2013).

5. 584 N.E.2d 104 (Ill. 1991).

6. The Illinois Supreme Court further opined that establishing such a cause of action would be contrary to the policies enunciated by the U.S. Supreme Court in *Upjohn v. United States*, 449 U.S. 383 (1981) (which ruled that the corporate attorney-client privilege applied to all employees, in order to ensure employee cooperation with lawyers, thus resulting in greater law compliance).

7. 7 Cal. 4th 1164, 32 Cal. Reptr. 2d 1, 876 P.2d 487 (1994).

8. See *GTE Prods. Corp. v. Stewart*, 653 N.E.2d 161 (Mass. 1995).

9. See, e.g., *Crews v. Buckman Labs*, 78 S.W.3d 852 (Tenn. 2002); *Spratley v. State Farm*, 78 P.3d 603 (Utah 2003); *Siedle v. Putnam Invc.*, 147 F.3d 7 (1st Cir. 1998); *Kachman v. Sunguard Data Sys.*, 109 F.3d 173 (3d Cir. 1997).

10. 423 F.3d 485 (5th Cir. 2005). See also *Alexander v. Tandem Staffing Solutions*, 881 So.2d 607 (Fla. Dist. Ct. App. 2004).

11. In October 2012, the D.C. Bar issued Opinion 363, which is directly at odds with this approach—per that opinion, DC licensed lawyers may only disclose client confidences in "defensive" cases.

12. See supra note 3 (the 9th Circuit's decision can be found at 577 F.3d 989). See also *Caroll v. California*, No. 2:13-cv-00249 (KJM-KJN) (E.D. Cal. Aug. 19, 2013), reported in ABA/BNA Lawyers' Manual on Professional Conduct (Sept. 11, 2013).

13. *United States ex rel. Fair Lab Practices Assoc. v. Quest Diagnostics*, 2011 WL 1330542, at *11 (S.D.N.Y April 5, 2011), aff'd, No. 11-1565-cv (2d Cir. Oct. 25, 2013).

14. This is an extremely important determination, and not only for this one statute and one case. It gives greater hope on an issue I have previously flagged, and how it will be resolved—whether the Securities and Exchange Commission's regulations promulgated pursuant to Sarbanes-Oxley preempt state-based professional rules of conduct for lawyers. See C.E. Stewart, "New Confidentiality Rules: Traps for the Unwary," New York Law Journal (May 25, 2010); C.E. Stewart, "New York's New Ethics Rules: What You Don't Know Can Hurt You," NY Business Law Journal (Fall 2009). The SEC takes the position that its regulations governing lawyers do in fact preempt state-based regulations of lawyers. I have previously argued that that position is manifestly in error. Id. The Second Circuit's opinion is *Quest Diagnostics* certainly lines up on my side of this issue. Not surprisingly, in this area the SEC wants both to have its cake and to eat it too, having recently utilized New York State's Rules of Professional Conduct to discipline a New York lawyer for impeding an SEC investigation. See *SEC v. Steven Altman*, Securities Act Release No. 34-63306 (Nov. 10, 2010); *Steven Altman v. SEC*, 666 F.3d 1322 (D.C. Cir. 2011).

15. The Second Circuit, in a "cf." citation, referenced a New York County Lawyers' Association, Committee on Professional Ethics Formal Opinion 746 (Oct. 7, 2013), in which that committee opined: "As a general principle, there are *few* circumstances, *if any*, in which…it would be reasonably necessary within the meaning of [Rule] 1.6(b) for a lawyer to pursue the steps necessary to collect a bounty as a reward for revealing confidential material" (emphasis added). The bounty referenced by the committee is that which Congress made available to SEC whistleblowers under Dodd-Frank. Query as to whether the committee's use of the term "few…, if any" is correct, however—Rule 1.6(b)(2) relates to potential crimes, and the SEC has no criminal jurisdiction. And the drafters of New York State's Rules of Professional Conduct were clear in their intent to exclude financial fraud as an exception to lawyers' general duties to protect client confidences. It is also interesting to note that the SEC has taken the view that any attorney disclosures made to the SEC pursuant to Dodd-Frank or Sarbanes-Oxley can be made only if they "are consistent" with ethics rules and the SEC's regulations. See SEC Rule 21F-4(b).

16. Of course, where a client affirmatively puts legal advice as a defense to a claim, it may not then use the privilege as both a "sword" and "shield." See *Apex Municipal Fund v. N-Group Securities*, 841 F.Supp. 1423 (S.D. Tex 1993). And if a communication between the client and lawyer is in furtherance of the client seeking to use her lawyer's advice to commit a crime or fraud, it would then meet the standard of the crime/fraud exception and the communication would not be subject to the protections of the attorney-client privilege. See C.E. Stewart, "The Corporate Attorney-Client Privilege: Is Nothing Sacred?" Corporate Criminal and Constitutional Law Reporter (April 5, 1991); C.E. Stewart, "Discovering Privileged Communications," Case & Comment (5th Issue 1986).

17. See e,g, supra note 11.

18. New York has traditionally been leery of wrongful discharge tort claims for lawyers. See e.g., *Wieder v. Skala*, 593 N.Y.2d 752 (1992).

19. William Howard Taft, when facing the challenge of Theodore Roosevelt to his re-election as president, once famously opined: "Even a rat in a corner will fight." New York Times (May 4, 1912).