Lawyers as Rats: An Evolving Paradigm?

By C. Evan Stewart

James Cagney never said: "You dirty rat." What he did say was: "Come out and take it, you dirty, yellow-bellied rat, or I'll give it to you through the door."[1] Of course, regardless of whatever adjectives are used, a "rat" is still a "rat." And that applies to lawyers who rat-out their clients; or does it?

In recent years, there has been a fair amount of public commentary about what rights lawyers have to be a rat.[2] So now would seem to be a good time to revisit this subject and take stock of the historical and current landscapes.

The Good, the Bad, and the Ugly (the Early Years)

The starting point is (or should be) *Balla v. Gambro*.[3] 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 that 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 Balla 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).

In 1991, the Illinois Supreme Court not only refused to sanction a cause of action, it rejected the "Hobson's Choice" argument. Rather than facing two unpalatable choices, the court observed that Balla, in fact, had no choice: under Rule l.6(b) of the Illinois Rules of Professional Conduct, attorneys were *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.[4]

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*.[5] There, the court determined that a whistle-blowing in-house lawyer could assert two different causes of action. The first was a contract action, assuming that a contract could be proven; the court reasoned that demonstrating a breach thereof would not lead to breaching professional obligations of client confidences (or, correspondingly, breaching 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.[6]

A number of jurisdictions followed California's somewhat tepid toe-in-the-water approach,[7] but others wanted to go further. Perhaps emboldened by the 2003 changes to ABA Model Rule 1.6,[8] 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]

In *Willy v. Administrative Review Board*,[10] the U.S. Court of Appeals for the Fifth Circuit in 2005 went farther—a lot farther; 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 specific change by the American Bar Association to part of Model Rule 1.6. Previously, Rule 1.6(b)(5) had allowed for the revealing of client confidences only "to establish

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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 Good, the Bad, and the Ugly (the Later Years)

More recent decisions have continued to reflect different policy choices. Thus, for example, the state courts of Kentucky, Utah, New York, and Minnesota have all said "no" to retaliatory discharge claims by lawyers.[12] And it should be noted that these states, while following the outcome of *Balla*, do not have Illinois' idiosyncratic Rule 1.6; rather, they all have professional responsibility codes somewhat more in line with ABA Model Rule 1.6.[13]

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, sued Unilab's new owner, Quest Diagnostics, on the ground that the company had engaged in a pervasive kickback scheme.[14] At the district court level, legal academic ethics experts proffered dramatically opposing opinions: Professor Andrew Perlman of Suffolk University Law School supported Bibi, testifying that Bibi was entitled 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.

On appeal, the Second Circuit upheld the important ethical obligation that lawyers have in protecting client confidences (under New York's Rule 1.6), and the court refused to sanction the breaching of said confidences (especially to profit thereby).[15]

But before folks start thinking there is a recent trend in one direction, we have to factor in a decision rendered in December 2016 by a federal magistrate judge in California: *Wadler v. Bio-Rad Laboratories*. [16] In that case, Sanford Wadler, the former general counsel of Bio-Rad, sued his former employer after he was fired. Wadler claimed that the termination was in retaliation for his informing the board of directors of purported Foreign Corrupt Practices Act violations. On the eve of trial, Bio-Rad filed a motion in limine to exclude virtually all of Wadler's evidence on the ground that it was covered by the company's attorney-client privilege. Magistrate Judge Joseph Spero ruled against the motion, opining not only that Bio-Rad was untimely in seeking the requested relief, but also that (1) federal common law applied to privilege issues and, as such, Wadler was permitted under ABA Model Rule 1.6 to use privileged communications to establish his claim; and (2) the state of California's restrictive confidentiality obligations were preempted by the SEC's Sarbanes-Oxley rules and regulations governing attorney conduct.[17]

As for federal common law and its interaction with ABA Model Rule 1.6., the magistrate judge followed the lead of the Fifth Circuit in *Willy*.[18] And that ruling led to the admission at trial of a vast array of privileged communications before the jury. The result? An $11 million verdict in favor of the fired general counsel. The verdict is now on appeal.[19]

Unfortunately, there are more than a few problems with what the magistrate judge (and the Fifth Circuit in *Willy*) did: (1) the ABA Model Rules are merely aspirational rules and are not in effect *anywhere*—and, more important, they certainly do *not* constitute federal common law; (2) the change to Model Rule 1.6(b)(5) to add "claim or" has not been adopted by a great number of states (e.g., California -- the state which licensed Wadler; New York; etc.)[20]; and (3) both the *Bio-Rad* and *Willy* decisions equate the attorney-client privilege—an evidentiary concept rooted in law and a privilege owned by the client—with a lawyer's ethical obligation to maintain client confidences; the latter has *no* bearing on whether a lawyer 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 prosecute a lawsuit against her company.[21]

Where Do We Go Now?

Obviously, in light of the foregoing, if a lawyer is thinking about whistleblowing (for potential, personal profit), there are a number of possible options and outcomes—depending upon where a lawsuit could be brought *and* the state in which the lawyer is licensed. That said, for readers of this distinguished journal, most if not all of whom are New York–licensed lawyers, those options and outcomes are not viable ones. For not only is the relevant case law for New Yorkers anti-whistleblower,[22] New York (as noted above) has not adopted the "offensive" concept set forth in ABA Model Rule 1.6(b)(5).[23] Furthermore, New York's highest court three decades ago expressly held that a wrongful discharge tort claim did not exist in New York State for a lawyer; the court also ruled that, for one to be created, it would have to come from the state legislature.[24] Since that time (1992), our elected officials have not said "boo" on this subject.

Endnotes

1. *Taxi* (Warner Bros. 1932) (Loretta Young co-starred). Rats, in fact, are not per se dirty animals; they actually attend to their grooming. *See, e.g., Ratatouille* (Walt Disney/Pixar 2007) (Remy, a French rat, fulfills his dreams and becomes a great Parisian chef.). It is the environment in which rats dwell (in New York City, for example, the subways and the sewers) that infects them with dirt, bacteria, diseases, etc. Rats have even played important roles in American political history. Witness that, when confronted by his mentor's (Theodore Roosevelt)'s challenge to his re-election,

President William Howard Taft responded: "Even a rat in a corner will fight." New York Times (May 4, 1912).

2. *See*, *e.g.*, C.E. Stewart, *Whistleblower Law: What Rights do Ratting Lawyers Have?* New York Law Journal (March 14, 2014); 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).
3. 584 N.E. 2d 104 (Ill. 1991).
4. *Accord Emery v. Northeast Illinois Regional Commuter Railroad Corp.*, No. 1-05-3584 (Ill. App. Ct. 1st Dist. Nov. 30, 2007); *Ausman v. Arthur Andersen LLP*, 348 Ill. App. 3d 781, 810 N.E. 2d 566 (1st Dist. 2004). The Illinois Supreme Court further opined in *Balla* 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). Illinois subsequently changed its Rule 1.6(b) and brought it more into line with the ABA Model Rule. *See infra* note 8. Whether that change (which includes "claim or"—*see infra* note 11 and accompanying text) would now permit Illinois attorneys to bring these types of claims remains (to this author) unknown.
5. 7 Cal. 4th 1164, 32 Cal. Rptr. 2d 1, 876 P.2d 487 (1994).
6. Subsequent California decisions limit in-house lawyers suing former employers to revealing client information *only* to their own lawyers. *See*, *e.g.*, *Fox Searchlight Pictures Inc. v. Paladino*, 89 Cal. App. 4th 294, 106 Cal. Rptr. 906 (Cal. Ct. App. 2001).
7. *See GTE Prods. Corp. v. Stewart*, 653 N.E.2d 161 (Mass. 1995).
8. In 2003, the ABA adopted this version of Model Rule 1.6:

   Rule 1.6 Confidentiality of Information

   (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

   (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

      1. to prevent reasonably certain death or substantial bodily harm;
      2. to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
      3. to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
      4. to secure legal advice about the lawyer's compliance with these Rules;
      5. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
      6. to comply with other law or a court order.
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); *Seidle v. Putnam Invest*., 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).
11. *See supra* note 8. Other courts citing the "offensive" language in Model Rule 1.6 as persuasive have included *Heckman v. Zurich Holding Co. of America*, 242 F.R.D. 606 (D. Kan. 2007); *Hoffman v. Baltimore Police Dep't*, 379 F. Supp. 2d 778 (D. Md. 2005); *Alexander v. Tandem Staffing Solutions*, 881 So.2d 607 (Fla. Dist. Ct. App. 2004).
12. *See Greissman v. Rawlings and Associates*, No 2016-CA-000055 (Kty. Ct. Appls. Aug. 18, 2017); *Pang v. Int'l Documents Servs.* 2015 WL 4724812 (Utah Sup. Ct. 2015); *State ex rel. Danon v. Vanguard Corp., Inc.*, 2015 NY Slip Op 32213 (Sup. Ct. N.Y. Co. Nov. 13, 2015); *Kidwell v. Sybaritic Inc.*, 784 N.W.2d 221 (Minn. 2010).
13. *See supra* note 8; but without the "claim or" language of the Model Rule.
14. *United States ex rel. Fair Lab. Practices Assocs. v. Quest Diagnostics*, 734 F.3d 154 (2d Cir. 2013), *aff'm*, 2011 U.S. District LEXIS 27014 (S.D.N.Y. April 15, 2011).
15. The New York state court judge in *Danon* (*see supra* note 12) was clearly influenced by the *Quest Diagnostics* decision. The lawyer (David Danon) subsequently filed a claim in federal court in the Eastern District of Pennsylvania, asserting whistleblower claims under Sarbanes Oxley, Dodd-Frank, and the Pennsylvania Whistleblower Law. Although the claims were dismissed by the district court, the Third Circuit revived them in 2017. As of the date of this article, the outcome of this litigation is not known.
16. 2016 WL 7369246 (Dec. 20, 2016).
17. The correctness of this second ruling has previously been addressed by me in *The Fork in the Road: The SEC and Preemption,* New York Law Journal (May 10, 2017).
18. *See supra* notes 10 & 11.
19. *See Bio-Rad Wants Verdict Reduced in Fired GC Case*, New York Law Journal (March 8, 2018).
20. Thus, in states that have adopted the "offensive" use language in Rule 1.6(b)(5), courts citing (and applying) that state provision are at least on somewhat sounder ground allowing wrongful discharge claims to proceed. *See*, *e.g.*, *Van Asdale v. International Game, The*, 498 F. Supp. 2d 1321 (D. Nev. 2007); *Hoffman v. Baltimore Police Dep't*, 379 F. Supp. 2d 778 (D. Md. 2005). That said, however, that does not cure the third problem enumerated above. *See infra* note 21 and accompanying text. Moreover, in jurisdictions that have *not* added the "offensive" language to Rule 1.6(b)(5), the bar authorities have been clear in *not* permitting breaches of client communications. *See*, *e.g.*, Nebraska State Bar Op. 12-11; D.C. Bar Opinion 363 (October 2012). *Accord* D.C. Ct. App. Bd. on Prof. Resp. No. 14-BD-061 (August 30, 2017).
21. While courts routinely miss the important distinction between an attorney's ethical duty of confidentiality and the attorney-client privilege (the latter of which is grounded in the law of evidence, and is owned by the client), thankfully at least one court has not. *See Nesselrotte v. Allegheny Energy, Inc.*, 2008 U.S. Dist. LEXIS 55730, at **36-39 (W.D. Pa. July 22, 2008) (rules of Professional Conduct "do not constitute substantive law" and do not trump the attorney-client privilege).
22. *See supra* notes 12-15 and accompanying text; *see also infra* note 24.
23. *See supra* notes 20, 11 & 8.
24. *See Weider v. Skala*, 593 N.Y.S. 2d 752 (1992); *accord Joffe v. King & Spalding LLP*, No. 17-cv-3392 (VEC), 2018 BL 204273 (S.D.N.Y. June 8, 2018); *see also Wise v. Consolidated Edison Co. of N.Y., Inc.*, 723 N.Y.S. 2d 462 (1st Dept. 2000) (attorney wrongful discharge claims "do not fall within the exception permitting an attorney to disclose confidences or secrets necessary to defend 'against an accusation of wrongful conduct'").

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