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EXPERT ANALYSIS

Why Lawyers and Whistleblowers Don't Mix — Part 1

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Imagine, if you will, the following hypothetical.

You are the relatively new general counsel for a chain of major hospitals throughout your state. A junior member of the accounting department tells you that the company has been using billing software that appears to apply improper codes to certain routine procedures, possibly resulting in substantial overbilling. You learn that this activity has gone on for years — and that top executives not only know about it but approved it from the start.

You delicately raise the issue to the executives, who begrudgingly agree to examine the practice. They disagree that there is cause for concern but say that in the course of their inquiry, they realized it no longer makes business sense to continue to use the coding software. However, they add that the coding programs will not be updated for six months.

You are convinced that the billing practice is wrong and worry that the company (and you personally) could face civil and criminal liability if changes aren't made immediately. You want to blow the whistle on the company. May you? Should you?

We will address these questions in a two-part series. In Part 1, we primarily address two issues: whether the Model Rules of Professional Conduct permit you, as general counsel, to blow the whistle on your employer/client, and whether it is ever prudent to do so. The short answers are that the ethics rules permit disclosure only in extraordinarily rare situations. Even when those situations arise, it is almost always imprudent to do so. This is because it is very difficult to recognize when disclosure is permitted.

Also, the consequences of a mistaken disclosure are likely to be disastrous for your career and frustrating, costly and embarrassing for your client. To illustrate these potential pitfalls, Part 2 of this series will address mistakes attorneys commonly make when they imprudently blow the whistle. The bottom line: At the start of your legal career, you need to decide whether you want to be a lawyer or a whistleblower — because you can almost never be both.

Attorneys who blow the whistle on their clients travel down a perilous road. At the end of it, the unwary are likely to find themselves without a job, perhaps without a law license, and facing civil damages and even criminal liability. Fortunately, most state ethics rules provide a road map for such situations. Unfortunately for lawyers who prefer to be whistleblowers as well, the ethics rules almost never allow you to do so. But take heart: If he follows the rules carefully, an attorney might be able to extricate himself from a bad situation and force change in an otherwise risky work environment. If this doesn't work, however, the best (and often the only ethical) route is to resign gracefully and move on.

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THE ETHICS RULES

Two ethics rules serve as guideposts for the whistleblowing attorney: the rule on "Organization as Client" (Model Rule of Professional Conduct 1.13) and the rule on "Confidentiality of Information" (MRPC 1.6). Rule 1.13 explains that the client of in-house counsel is "the organization acting through its duly authorized constituents." It also explains what to do if the general counsel knows that "an officer, employee or other person associated with the organization is engaged in action ... that is a violation of a legal obligation to the organization" or that is "a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization."

Rule 1.6 dictates simply that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."

Organization as client

The most striking feature of the organization-as-client rule is its overwhelming preference for resolving issues internally. The first thing Rule 1.13 tells the general counsel of our hypothetical to do is "refer the matter to higher authority in the organization ... including, if warranted, ... the highest authority that can act on behalf of the organization."

In our hypothetical, the general counsel did take the issue to a higher authority — the senior executives — and was not satisfied with the response provided. The next step would be to take the issue to the company's board of directors. But what if there is no board of directors — or the company is so closely held that the board and the senior executive leadership team are essentially the same?

Rule 1.13(c) answers that if there is no higher authority to which the general counsel can appeal, and the action being taken "is clearly a violation of law," and "the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure."

This language creates a significant burden and a trap for the unwary. The general counsel cannot take action if the issue is simply "a violation of a legal obligation to the organization" within the meaning of Rule 1.13(b) or if the general counsel simply has doubts about whether the conduct at issue is legal. The general counsel must identify a "clear" legal violation before blowing the whistle. This is an especially difficult call to make for general counsel who lack experience in the company or the industry. Perhaps they were hired straight from a prosecutorial position, where they spent years investigating similarly ambiguous situations and developing a predisposition to distrust the industry.

Another difficult question for the general counsel is whether the violation "is reasonably certain to result in substantial injury to the organization." What exactly does "substantial injury" mean? Suppose you blow the whistle and the fallout — in the form of criminal and/or civil investigations and shareholder lawsuits — causes the company far more money and aggravation than leaving the billing program in place until year's end. After all, the general counsel may want to end the billing program going *forward*, but blowing the whistle could open up the company to liability for *past* years of improper billing conduct. That injury would almost certainly be more substantial than the harm the general counsel is hoping to avoid.

This is why the exception under Rule 1.13(c) to the general attorney-client confidentiality rule under Rule 1.6 has a limit: "The lawyer may reveal information relating to the representation ... but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization." So even the general counsel in our hypothetical believes that the billing

program may cause substantial injury to the company, he may disclose the client information only in the most limited way possible.

This is another trap for the unwary — whistleblowers frequently disclose far more information than is necessary to achieve their goals, and attorneys who do so risk running afoul of their ethical duties. In fact, this was one of the key issues in the 2nd U.S. Circuit Court of Appeals' opinion in *United States ex rel. Fair Labor Practices Associates v. Quest Diagnostics,* 734 F.3d 154 (2d Cir. 2013). In that case, a company's former general counsel joined two other (non-lawyer) former executives in a *qui tam* suit against their former employer under the False Claims Act.

The trial court found that the former general counsel violated his ethical obligations under the New York Rules of Professional Conduct by participating in the *qui tam* action. It dismissed the complaint and barred the former general counsel, the other two former executives and their outside counsel from bringing any subsequent *qui tam* action.

The 2nd Circuit agreed, noting that while the general counsel could have reasonably believed in his employer's malfeasance, his participation in the suit was not necessary because the suit could have been brought by the non-lawyer former executives. As such, the 2nd Circuit concluded that the general counsel had violated his ethical duties by adding to the *qui tam* complaint confidential information he obtained in the course of his work as general counsel. It therefore affirmed his disqualification from the case, its dismissal and the lower court's bar on the other executives and their collective outside counsel.

The general counsel must identify a "clear" legal violation before blowing the whistle.

Finally, Rule 1.13(d) puts a real bind on whistleblowing attorneys who want to keep their jobs. Under Rule 1.13(d), an attorney may not reveal any "information relating to the [lawyer's] representation of an organization to investigate an alleged violation of law, or to defend the organization ... against a claim arising out of an alleged violation of law." If the general counsel in our hypothetical had conducted an investigation into the billing program (and not simply asked the executives to do so) and learned of information in the course of that investigation, he could not then ethically disclose that information to authorities.

If you are not already nervous about blowing the whistle as the general counsel in our hypothetical, get ready to sweat.

The duty of confidentiality

Rule 1.6's general prohibition on an attorney's disclosure of a client's information is broader than many realize. As the court explained in *Doe v. A Corp.*, 709 F.2d 1043, 1046 (5th Cir. 1983), "[t]he use of the word 'information' in [the Model Rules of Professional Conduct] as opposed to 'confidence' or 'secret' is particularly revealing of the drafters' intent to protect all knowledge acquired from a client ... without regard to whether someone else may be privy to it."

And as the comments to the Model Rules explain, the rule on client-lawyer confidentiality is broader than the attorney-client privilege, which is an evidentiary rule. Comment 3 to Rule 1.6 explains that the rule applies "not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." In fact, as Comment 4 to the same rule further explains, the prohibition "also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person."

Many courts have noted the foundational importance of the rule on client-lawyer confidentiality, but the 5th Circuit has distilled it to this essence:

> Information ... acquired [from a client] is sheltered from use by the attorney against his client by virtue of the existence of the attorney-client relationship. ... The obligation of an attorney not to misuse information acquired in the course of representation serves

> to vindicate the trust and reliance that clients place in their attorneys. A client would feel wronged if an opponent prevailed against him with the aid of an attorney who ... formerly represented the client in the same matter. ... [T]his would undermine public confidence in the legal system as a means for adjudicating disputes.

Brennan's Inc. v. Brennan's Rests., 590 F.2d 168, 172 (5th Cir. 1979) (internal citations omitted).

So as not to make the rule a straightjacket, the Model Rules establish seven narrow exceptions to the confidentiality rule at Rule 1.6(b)(1)-(7). Two of these exceptions are potentially applicable to the general counsel in our hypothetical.

At first glance, the most obvious exception appears to be Rule 1.6(b)(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." Although the first part of this rule might appear to permit disclosure (if we assume that the reporting is done to "prevent" the six months' worth of future criminal billing practices that are likely to occur before the process is shut down), nothing in the hypothetical indicates that the company used or is using the general counsel's services as an attorney to further the improper billing practices. So Rule 1.6(b)(2) does not help.

Whistleblowers frequently disclose far more information than is necessary to achieve their goals, and attorneys who do so risk running afoul of their ethical duties.

Rule 1.6(b)(3) appears to be another candidate. It permits disclosure "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." But again, the problem is that the client did not use the general counsel's services in implementing the billing software.

In fact, the only exception that might apply in our hypothetical is found in Rule 1.6(b)(4), which permits an attorney to seek confidential legal advice about the attorney's personal responsibility to comply with the rules. So, for example, general counsel could discuss the dilemma with another attorney in the context of a confidential discussion about ethical duties.

REQUIRED STEPS FOR A DISCLOSING ATTORNEY

Suppose general counsel consults a trusted legal adviser who agrees that the company's billing practices are improper and even advises that disclosure is permitted under a liberal reading of Rule 1.6(b)(2). Can you blow the whistle at that point? The answer is maybe — though you still could be on the hook if your legal adviser is wrong.

But even if reporting might be allowed, the ethics rules see this step as a last resort. They say that "[w]here practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure." One way to do this is to warn your employer that if the company refuses to change its methods, you will be forced to disclose the company's actions to authorities. But be careful not to say that ethics rules require you to do so — because they do not. Rather, comment 7 to Rule 1.6 provides that "paragraph (b)(2) does not require the lawyer to reveal the client's misconduct."

Another way of seeking to persuade your employer is to threaten to resign. Under Rule 1.16(a)(1), an attorney may withdraw from representing a client if "the representation will result in violation of the rules of professional conduct or other law."

If you cannot persuade your employer to see your side of the story and you do not wish to resign, Rule 1.6(b)(2) may permit disclosure. However, Comment 16 to Rule 1.6 warns that disclosure is allowed "only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified." This restriction on disclosure mirrors the restriction set forth in Rule 1.13. Thus, if you disclose more information than necessary, disclose information

that could be obtained by authorities through other means, or otherwise fail to ensure that the information is kept confidential by authorities, you risk being attacked by your former employer for violating your ethical duties.

Some jurisdictions require more than the Model Rules suggest. In Pennsylvania, for example, Comment 10 to Pennsylvania Rule of Professional Conduct 1.3 provides that "[a] lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter."

The rationale for withdrawal, which is also required in California, is explained as follows in Comment 11 to California Rule of Professional Conduct 3-100: "When a [lawyer] has revealed confidential information under paragraph (B), in all but extraordinary cases the relationship between member and client will have deteriorated so as to make the member's representation of the client impossible."

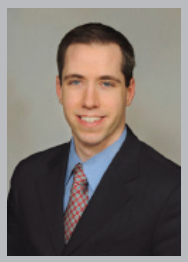
The Pennsylvania rules further state, at Comment 10 to Rule 1.3, that "[a]fter withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6."

CONCLUSION

For attorneys who must choose between whistleblowing and withdrawing (even if noisily), blowing the whistle is almost always the wrong choice. This might seem unfair at first blush, but lawyers should remember that their jobs come with serious confidentiality obligations. These obligations sometimes require them to keep secrets that most other people would want to — and even be required to — disclose.

That is why if you blow the whistle, you will likely face significant negative consequences. These consequences may include ethics charges, disbarment proceedings and even criminal charges if you have taken any documents from the company without authorization. Not only will your legal reputation be dragged through the mud, but there is no guarantee that the authorities will protect you if they believe your integrity has been compromised.

Despite these rules, some lawyers decide to blow the whistle anyway. In the next installment of this two-part series, we will discuss some of the common mistakes those attorneys have made and how courts have dealt with them.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