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EXPERT ANALYSIS

Why Lawyers and Whistleblowers Don't Mix — Part 2

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In Part 1 of this series, we asked you to imagine yourself as the relatively new general counsel of a chain of major hospitals throughout your state. In the hypothetical, you learn that your new employer is using a billing program that you are convinced is improper — and could expose you and the company to civil or even criminal liability if it is not immediately discontinued. We asked whether you are permitted to blow the whistle on the company — and if so, whether you should.

In analyzing this problem, we focused on guidelines set by ethics rules that govern the conduct of attorneys. We noted that even in the rare instance when the ethics rules permit lawyers to blow the whistle, they should almost never do so. This is not only because a lawyer's primary function is to preserve the confidentiality of information learned in the scope of a representation, but also because it is so difficult to know when the rules permit whistleblowing. An ill-advised disclosure can be life-altering and career-ending, and it may expose you to criminal and civil liability. In Part 2, we offer cautionary tales of lawyers who attempted to cross the Rubicon despite the risks.

Attorneys commonly make a number of mistakes when they imprudently blow the whistle on their employers. The first is doing so at all. This may sound simplistic, but our profession depends on a client's steadfast ability to rely on his lawyer's ability to keep secrets. Eroding that ability undermines the very notion of what lawyers do.

To make matters worse, in many cases a lawyer's attempt to blow the whistle is completely unnecessary. This is because when a company is doing something wrong, the attorney is usually not the only one who knows about it and is inclined to expose it. In joining the whistleblowing party, the attorney not only risks tainting (and therefore dooming) the party's case but also risks violating his ethical duty of confidentiality. If an attorney is convinced that his employer is engaged in a systematic pattern of wrongdoing, more often the best option is simply to resign.

A second mistake whistleblowing attorneys frequently make is taking documents from the company without permission and exposing them to the public. This is a tempting course to follow in light of the evidentiary needs of the whistleblowing attorney. But it is also outright theft, and courts are rarely sympathetic to such behavior. In addition, privileged and confidential materials are almost never permitted to be used against a client or former client.

Lastly, whistleblowing attorneys frequently look to gain in some way from their efforts — whether through whistleblower bounties or wrongful-termination suits. To put it mildly, such a windfall is unlikely. In most states, ethics rules barring conflicts of interest prohibit attorneys from receiving bounties or other personal rewards for whistleblowing activity..

The following cases are representative of these mistakes.

TAINT THROUGH PARTICIPATION

In *United States v. Quest Diagnostics*, 734 F.3d 154 (2d Cir. 2013), three former executives of clinical laboratory company Unilab formed a partnership to bring a *qui tam* action under the False Claims Act against Quest, which acquired Unilab in 2003. The three executives were Unilab's former chairman and CEO, Unilab's former CFO, and Unilab's former general counsel, Mark Bibi.

Bibi was Unilab's sole in-house counsel between 1993 and 2000. During that time, he became aware of practices at Unilab that he believed were potential violations of federal law. He advised the former CEO of his concerns, and the former CEO ended those practices. However, when Unilab's business began to suffer, a new management team reinstituted the old practices. Bibi was eventually replaced in 2000.

Bibi then agreed to join the former CEO and CFO to form the partnership, Fair Laboratory Practices Associates, and pursue a *qui tam* suit against Quest, but only after he consulted the New York Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct and concluded that he could participate.

The District Court disagreed. It found that he had violated several of New York's rules, including a "side-switching" rule described at N.Y. Rule 1.9(a) and a prohibition against using a former client's confidential information to the disadvantage of the former client. That prohibition is set by N.Y. Rule 1.9(c). The court disqualified Bibi, FLPA and FLPA's outside counsel from the action and any similar action, although it left open the possibility that the government could intervene.

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On appeal, the 2nd U.S. Circuit Court of Appeals honed in on a different point. It found that Bibi's disclosures revealed confidential information "greater than reasonably necessary to prevent any alleged ongoing fraudulent scheme in 2005," because "[b]y FLPA's own admission, it was unnecessary for Bibi to participate in this *qui tam* action at all, much less to broadly disclose Unilab's confidential information." The court noted: "FLPA could have brought the *qui tam* action based on the information that [the ex-CEO and CFO] possessed as former executives of Unilab, or, if necessary, Bibi could have made limited disclosures. Instead, Bibi chose to participate in the action and disclose protected client confidences in violation of N.Y. Rule 1.9(c)."

Having confirmed that Bibi had breached his ethical responsibilities, the 2nd Circuit addressed the appropriateness of the District Court's remedy. First, it recognized the need to "limit[] remedies for ethical violations to those necessary to avoid tainting the underlying trial." With this in mind, the appeals court affirmed the dismissal of the complaint and the disqualification of FLPA because, "in view of Bibi's unrestricted sharing of confidential information with the other individual relators, permitting FLPA or any of its individual relators to proceed with the suit would taint the trial proceedings and prejudice the defendants."

The 2nd Circuit also agreed that FLPA's outside counsel also had to be disqualified. Even though they committed no ethics violations, "by virtue of the confidential information likely revealed to them," they were "in a position to use defendants' confidential information to give present or subsequent clients an unfair, and unethical, advantage."

All this trouble could have been avoided if the former general counsel had simply stayed out of the litigation and permitted the other former executives to pursue the case without him. The fact that neither Bibi nor FLPA's outside counsel realized that his participation could damage FLPA's case is astounding — but this kind of mistake is also all too common.

For example, in *In re Potash Antitrust Litigation*, MDL No. 981, 1993 WL 543013, at *16-17 (D. Minn. Dec. 8, 1993), the court disqualified the plaintiffs' counsel because they had direct contact with the defendants' former in-house counsel. The court noted that outside counsel knew that their association with the former in-house counsel was risky and thus assumed the risk of being disqualified.

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Similarly, in *Ackerman v. National Property Analysts*, 887 F. Supp. 510, 518-19 (S.D.N.Y. 1993), the court dismissed the complaint and disqualified the plaintiffs' counsel because they had solicited corporate secrets from the defendant company's former in-house counsel and used that information in drafting the plaintiffs' allegations.

From these cases, we derive the following easy rule of thumb: A defendant company's current or former in-house counsel should almost never be on the opposite side of the "v." from the defendant. And even in those rare circumstances where a legitimate litigation dispute might arise between in-house counsel and the company, the matter should be sealed and no other plaintiffs should be joined. This will protect any privileged and confidential information that might be exposed in the course of the proceedings.

IMPROPERLY REMOVING COMPANY INFORMATION

In *Nesselrotte v. Allegheny Energy Inc.*, No. 06-01390, 2008 WL 2858401 (W.D. Pa. July 22, 2008), a senior in-house counsel was fired by her employer and was given 20 days until her termination became effective. During that time, she copied hundreds of documents and removed them from her employer's control. She then used the documents to file discrimination and retaliation claims against her former employer. The employer filed counterclaims for breach of fiduciary duty and breach of contract based on the plaintiff's unauthorized removal of confidential, proprietary and attorney-client-privileged information. The focus of the case quickly shifted from the merits of the discrimination and retaliation claims to the nature of the documents.

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The plaintiff argued that Rule 1.6(c)(4) of the Pennsylvania Rules of Professional Conduct permitted her to "use otherwise privileged information to pursue her case of illegal discrimination by defendants." The court put that specific argument to the side and noted instead that "Rule 1.6(c)(4) does not justify the method in which plaintiff removed said document."

"[T]o the extent plaintiff asserts that Rule 1.6(c)(4) allows an in-house attorney to copy and remove privileged and/or confidential documents before his or her last day of employment in order to use the same in future litigation against her former employer, the court finds that such a reading ignores [the fact that] … the privilege belongs to the client, not the attorney," the court said.

It said the "proper avenue for a former employee (even an attorney) to obtain privileged and/or confidential documents in support of his or her claims is through the discovery process …, not by self-help." Thus, the court returned all documents deemed privileged back to the defendants.

This is another all-too-common mistake by attorneys blowing the whistle on their (usually former) employers. For example, in *X Corp. v. Doe*, 862 F. Supp. 1502, 1505 (E.D. Va. 1994), the former in-house counsel took copies of corporate documents with him after he was fired and then disclosed them to the government. The court concluded that such disclosure was improper, removed the documents from the government's possession and returned them to the company.

The urge to hoard documents evidencing an employer's purported transgressions is a natural instinct for any employee who fears repercussions after raising an issue with management. But in-house counsel simply cannot do it. Imagine how bizarre this behavior would be from outside counsel — we all intuitively know that if an outside firm documented its client's misbehavior and then sued the client upon being terminated, it would be the last case the firm ever took on.

In-house counsel should have the same concerns and should avoid overemphasizing their status as employees. They are, first and foremost, counsel to their clients. Even if their employment status is put at risk, they cannot forget their serious and substantial ethical responsibilities.

SEEKING BOUNTIES OR OTHER REWARDS

In 2010 the Dodd-Frank Wall Street Reform and Consumer Protection Act created a whistleblower bounty program. Under the program, individuals who voluntarily provide original information

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leading to a successful Securities and Exchange Commission enforcement action could receive a percentage of any penalty ultimately assessed. The SEC's whistleblower rules, at 17 C.F.R. 240.21F-4, limit an attorney's use of information received in the course of representing a client for whistleblowing purposes. However, there appears to be no blanket rule under the program prohibiting attorneys from seeking a whistleblower bounty.

Moreover, under SEC Rule 205, adopted in 2003, attorneys of issuers are permitted to disclose to the SEC their client's confidential information related to their representation of the client under certain limited circumstances. Together, Rule 205 and the SEC whistleblower bounty program created the possibility that federal law would permit attorneys to seek financial rewards — starting at $100,000 — for betraying their clients' trust.

This troubling development has led the New York County Lawyers Association to issue an opinion precluding attorneys from seeking such bounties, even under the limited circumstances established by SEC regulations. *See* N.Y. County Lawyers Ass'n, Formal Opinion 746 (Oct. 7, 2013). The NYCLA determined that an attorney seeking to collect a whistleblower bounty is presumptively engaged in conduct that violates Rule 1.7 of the New York Rules of Professional Conduct, which relates to conflicts of interest.

The NYCLA opinion notes that Rule 1.7(a)(2) "precludes representation of a client, absent waiver, where a reasonable lawyer would conclude that 'there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.'" The NYCLA concluded that "the potential payment of an anticipated whistleblower bounty in excess of $100,000 presumptively gives rise to a conflict of interest between the lawyer's personal interest and that of the client."

Whistleblowing attorneys frequently look to gain in some way from their efforts — whether through whistleblower bounties or wrongful-termination suits. Such a windfall is unlikely.

Indeed, the NYCLA went further: "[L]awyers of former clients, even those wrongfully discharged in violation of the law, may not seek bounties, although it has been held that they may, under some circumstances, reveal some client confidences in the context of a claim for wrongful termination. This is because the confidentiality provisions of [Rule] 1.9, which apply to former clients, incorporate those of [Rule] 1.6 [('Confidentiality')]." The NYCLA noted that "[w]hile in some circumstances a lawyer may be required to take remedial action to prevent or correct client fraud or perjury, such actions should be taken because they are required by the law or the [ethics rules] — not because the lawyer seeks personal gain at the former client's expense."

The same logic could be and has been used by courts. For example, in the *Quest Diagnostics* case discussed above, the District Court noted that Bibi, the former in-house counsel, had not only violated his ethical duties by joining the *qui tam* suit before the court but had also "'parlayed his information into a financial interest' in another *qui tam* lawsuit against Unilab." *United States ex rel. Fair Lab. Practices Assocs. v. Quest Diagnostics*, No. 05 Civ. 5393, 2011 WL 1330542, at *10 (S.D.N.Y. Apr. 5, 2011).

In the *Ackerman* case, the court dismissed the plaintiffs' actions and disqualified their counsel after concluding that they improperly used information obtained from the defendants' former in-house counsel. The former in-house counsel not only violated his ethical duties by disclosing his former employers' confidential and secret information, but he also billed the plaintiffs $7,000 for "consulting" services and obtained an agreement from the plaintiffs' counsel that they would defend him in subsequent litigation.

Finally, in *Zachair Ltd. v. Driggs*, 965 F. Supp. 741 (D. Md. 1997), counsel for the plaintiff persuaded the defendants' embittered former general counsel to discuss the defendants' conduct with them by offering to indemnify the former general counsel, who was originally named as a defendant in the case. An outrageous seven-hour "informal interview" ensued and ultimately convinced the court to dismiss the plaintiff's case and disqualify its counsel as irrevocably tainted.

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These cases demonstrate what the NYCLA opinion made perfectly clear in the whistleblower context: Attorneys who betray the trust of current and former clients and employers for their own personal gain are acting in breach of their ethical duties — and courts will come down hard on them for doing so.

CONCLUSION

In Part 1 of this series, we made the admittedly bold statement that it is almost always the wrong choice for attorneys to blow the whistle. We then explained the serious confidentiality obligations that come with agreeing to serve as someone's legal counsel. These obligations sometimes require counsel to keep secrets that most other people would want to — and even be required to — disclose. Finally, we noted that the penalties for violating those obligations are severe and can include professional disrepute, disbarment proceedings and even criminal charges.

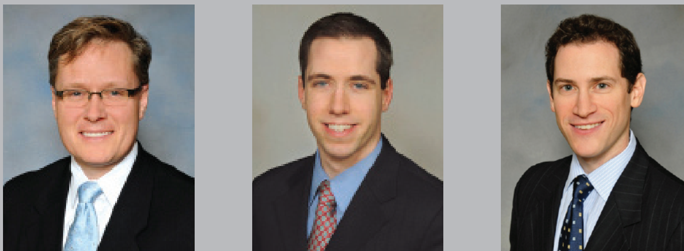
In Part 2, we have shown that these penalties are necessary because, despite these rules, lawyers continue to make the mistake of blowing the whistle anyway. They improperly join or contribute information to lawsuits in a way that irrevocably taints them, requiring dismissal of the case and disqualification of outside counsel; they steal documents from former clients and become immediately discredited; and they frequently seek personal gain in exchange for their disclosures.

If you believe the intent of this two-part series is to deter attorneys from blowing the whistle on clients, you're right. Our profession's survival depends on our ability to demonstrate to clients that they can entrust us with their most closely held confidences and secrets. Attorney whistleblowers destroy that trust.

A defendant company's current or former in-house counsel should almost never be on the opposite side of the "v." from the defendant.

Moreover, attorneys need to protect themselves from the siren song of those who will try to entice them into blowing the whistle. As the NYCLA opinion notes:, "A lawyer who blows the whistle prematurely could harm the client and be professionally responsible for the precipitous disclosure of client confidences. A lawyer who fails to report credible evidence of corporate wrongdoing, ... could potentially be prosecuted by securities regulators."

As the opinion further points out, "these delicate circumstances ... call for the exercise of objective, dispassionate professional judgment." In the heat of the moment, such judgment is difficult to summon. We hope that this series serves as an early inoculation against the rash decision-making that often precedes attorney whistleblower litigation. For our sake and yours, think hard — and read this series twice — before you take the leap.



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