
Limitations Imposed by the Attorney-Client Privilege on In-House and Outside Counsel as “Whistleblowers”

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This article examines a developing and significant Sarbanes-Oxley issue relevant both to employers that employ in-house counsel or that retain outside counsel and to those counsel themselves: the limitations imposed by the attorney-client privilege on attorneys who intend to claim retaliation as whistleblowers in violation of Section 806 of the Sarbanes-Oxley Act.

Following the enactment of the Corporate and Criminal Fraud Accountability Act of 2002, otherwise known as the Sarbanes-Oxley Act,¹ there have been numerous claims filed with the Department of Labor (DOL) by employees, consultants and contractors as purported “whistleblowers,” claiming retaliation under Section 806 of that statute. There have also been many articles about the litigation risks posed by this new statute and the procedures and penalties it imposes on both public and private companies.

This article examines a developing and significant Sarbanes-Oxley issue relevant both to employers that employ in-house counsel or that retain outside counsel and to those counsel themselves: the limitations imposed by the attorney-client privilege on attorneys who intend to claim retaliation as whistleblowers in violation of Section 806. In an environment in which whistleblowing claims are encouraged and, therefore, on the rise, employers do retain a fundamental and established right to prevent the disclosure of privileged information by their counsel. Likewise, in-house and outside counsel, who may feel a conflict between their professional, ethical objections and a good faith responsibility to identify and report wrongdoing, can find guidance in certain bedrock principles of the attorney-client privilege.

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While there have been no specific Sarbanes-Oxley cases on this issue—yet—court and administrative decisions on related or analogous claims are instructive. For example, the DOL's Administrative Review Board, which is charged with reviewing Administrative Law Judge decisions in Sarbanes-Oxley cases, recently held that an in-house lawyer could not use attorney-client privilege material in an offensive manner to claim retaliation under another federal whistleblower statute. The inability to use that evidence proved fatal to the former employee's claim, which was dismissed. In addition, several courts that have considered the claims of in-house and outside counsel in the context of other whistleblower statutes, have reached the same conclusion. Finally, several courts have limited the ability of in-house counsel to bring claims of retaliatory termination for raising public policy concerns at all, due to the limitations of the attorney-client privilege. Most recent judicial decisions, however, are loosening that prohibition. While there is a split among the courts in different jurisdictions on whether such a claim is even available, it is clear that in-house counsel making such a claim may not divulge privileged information, except in the rarest circumstances.

This article, therefore, describes the whistleblower provisions of Sarbanes-Oxley; provides a clear statement of the attorney-client privilege; and gives practical guidance to in-house and outside counsel on their own rights and responsibilities as "whistleblowers" based upon current legal authority.

SARBANES-OXLEY'S "WHISTLEBLOWER" PROTECTION

The Sarbanes-Oxley Act contains broad and substantive protections for corporate whistleblowers. Specifically, Section 806 creates a federal civil claim on behalf of "any officer, employee, contractor, subcontractor or agent"² of a publicly-traded company or the "contractors, subcontractors, or agents" of publicly-traded companies, who believes he has been retaliated against for reporting corporate fraud or accounting abuses. Similarly, Section 1106 allows for the imposition of criminal penalties on any individual or any publicly-traded or privately held company who retaliates against whistleblowers for providing truthful information relating to the commission of (or possible commission of) any federal offense to a law enforcement officer.

Whistleblowers under Sarbanes-Oxley must first file a complaint with the Secretary of Labor, who has delegated responsibility for investigation of complaints to the Occupational Safety and Health Administration. The DOL's Office of Administrative Law Judges (ALJ) is responsible for conducting evidentiary hearings. The ALJ decisions may be appealed to the Administrative Review Board of the DOL. However, if the administrative process is not completed in 180 days, the whistleblowers may file an action in federal court.

The Sarbanes-Oxley Act imposes a heightened burden of proof on the employers in those proceedings. Section 806 requires employers to demonstrate by "clear and convincing evidence" that adverse actions taken against whistleblowers were not retaliatory. In one of the earliest Sarbanes-Oxley cases, the ALJ noted that "[a]lthough there is no precise definition of 'clear and convincing' the Secretary and the courts recognized that this evidentiary standard is a higher burden than a preponderance of the evidence and less than beyond a reasonable doubt."³ It is clear, therefore, that the employer's burden in Sarbanes-Oxley cases exceeds that imposed in other civil retaliation cases.

Given this heightened burden, employers would be even more vulnerable if counsel could use privileged information to make a claim. While there are no decisions to date on the issue of whether an in-house or outside attorney is protected by the Sarbanes-Oxley Act, its broad language, including "contractors" and "agents" as potential whistleblowers, is hard to interpret any other way. Congress did not however, create an exception in the statute to permit an attorney to violate the attorney privilege to bring such claims. The critical issue, therefore, is whether an attorney may use information to be received in that capacity--presumably provided by the client with the understanding that the information is subject to the attorney-client privilege--to pursue a Sarbanes-Oxley claim.

THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law,"⁴ and is recognized in the federal rules of evidence and those in every jurisdiction the United States.⁵ The privilege exists to facilitate effective client service.⁶ The privilege encourages candor, openness and trust between the client and attorney, which results in fulsome sharing of client information. The attorney-client privilege establishes the client's right to prevent his attorney from disclosing any information that the client revealed to the attorney in the process of obtaining legal advice.⁷ In general, a client is defined as a person or an entity receiving legal services from an attorney.⁸ This means that when an attorney represents a corporation, the corporation is the client for the purpose of the evidentiary privilege.⁹ For the purpose of the evidentiary privilege, an attorney is someone who has been admitted to a bar association that is affiliated with a governmental entity.¹⁰

The attorney-client privilege applies to situations in which the client is providing information to its counsel to obtain legal advice, but does not apply when the client is seeking pure business advice.¹¹ The attorney-client privilege also includes the Work Product Doctrine, which arises in connection with litigation or anticipated litigation. It provides a privilege

for "[a]ll documents which are called into existence for the purpose—but not necessarily the sole purpose—of assisting the [client] or his legal advisors in any actual or anticipated litigation."¹²

There are certain established exceptions to the sanctity of the attorney-client privilege. First, the attorney-client privilege does not extend to protect information about "continuing and future client crimes and other wrongs."¹³ That exception is narrow, however, and applies only if the client is acting in bad faith to harm the legally protected interests of another party or attempts to obtain legal advice to achieve an unlawful purpose.¹⁴ Moreover, this exception to the attorney-client privilege does not automatically enable a lawyer to reveal confidential information. Rather, the party seeking disclosure has the burden of making a so-called *prima facie* showing that the communication occurred in the course of a consultation about a continuing or future crime or fraud.¹⁵ Therefore, for this exception to apply, the burden of removing the information from the shelter of the attorney-client privilege lies with the party seeking disclosure. It should be noted that in some states, such as California, the Rules of Evidence have an even broader exception and expressly provide that the attorney-client privilege does not exist where the attorney "reasonably believes that disclosure of any confidential information is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm."¹⁶ The burden of establishing this exception, however, remains on the party seeking disclosure.

Second, the attorney-client privilege can be waived by the client, both explicitly or implicitly.¹⁷ Courts will consider the privilege to have been implicitly waived when the client or the attorney (as the client's authorized agent) has voluntarily revealed information about the communication to a third party.¹⁸ A court will consider an attorney to have waived the attorney-client privilege where "the lawyer's disclosure is within the course of the lawyer's work."¹⁹ However, "[t]hat a lawyer's disclosure was improvident and not in a client's best interests should not, of course, lead a court to conclude that the disclosure was not within the scope of a lawyer's authority."²⁰ Thus, a client's privilege may be destroyed by the inadvertent action of its counsel who is acting in that capacity. Pursuing a claim as a whistleblower, does not, however, fall within the scope of counsel's authority as counsel. This exception provides little support, therefore, for the attorney as whistleblower.

In addition to the well-settled attorney-client privilege found in the law of evidence, attorney-client confidentiality is protected through the rules of professional conduct that govern attorney behavior in each jurisdiction. An attorney's ethical obligations have been summarized in the Model Rules of Professional Conduct, created by the American Bar Association. Most states have adopted the Model Rules or "relied

heavily" on the Model Rules in creating their own state rules of professional conduct.²¹

The Model Rules provide even broader protection for attorney-client confidentiality than the attorney-client privilege. Model Rule 1.6 requires that "[a] lawyer shall not reveal information relating to representation of a client."²² This broad protection is not subject to the requirement found in the rule of evidence that the information come from a communication from the client for the purpose of obtaining legal advice.²³ However, the attorney's obligation of confidentiality is not infinite. Rather, "[M]odel R[ule] 1.6 should be read to prohibit those needless revelations of client information that incur some risk of harm to the client."²⁴

There are two principal exceptions to the attorney's ethical and professional obligation to maintain client confidentiality. First, an attorney may disclose confidential client information to prevent the client from causing death or substantial bodily harm. Model Rule 1.6(b)(1) states that "[a] lawyer may reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."²⁵ On its face, this exception is narrower than the exception to the continuing "and future crimes and other wrongs" to the attorney-client privilege stated above. However, in some states, such as Pennsylvania, an attorney is allowed to disclose confidential information to prevent not only death or substantial bodily harm to third parties, but also "substantial injury to the financial interests or property of another."²⁶ Likewise, the Restatement of the Law Governing Lawyers states that disclosure of confidential information is permissible in order to prevent a client from causing death or substantial bodily harm to a third party as well as to prevent, rectify, or mitigate substantial financial loss to a third party.²⁷ This expansion of the exception based upon potential "financial" injury provides a toehold for attorney whistleblowers. It is, however, only available in limited jurisdictions and is accompanied by a burden on the lawyer to establish that the requisite circumstances exist.

This exception to the attorney's ethical obligation to maintain confidential information is also discretionary, rather than absolute. In most jurisdictions, the attorney has the discretion to disclose client information under these circumstances, but is not obligated to. The commentary to Rule 1.6 states that "[t]he lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question."²⁸ Most states have adopted this permissive approach, including Massachusetts, Texas, and Montana.²⁹ There are, however, some states, such as Illinois and New Jersey, that have adopted a mandatory approach to this question and

have determined that attorneys must disclose confidential client information when it is necessary to prevent death or substantial physical injury to another person.³⁰ California takes a different approach. The California Rules of Evidence state that "[t]here is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client information is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm."³¹

Regardless of whether the right to disclose is permissive or mandatory, it is generally accepted that if an attorney does decide to exercise his or her right to disclose confidential information, "a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose."³² The variance between jurisdictions on the permissive versus mandatory nature of this public-policy based exception clearly affects the ability of a lawyer to use such information on his own behalf in whistleblower claim. Obviously, where disclosure is mandatory, the lawyer's ability to do so is enhanced.

The second exception to the attorney's obligation of confidentiality relates to claims for legal fees or defenses to claims of malpractice. Model Rule 1.6(b)(2), states that "[a] lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . 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 a client."³³ This exception has been recognized in lawsuits brought by clients alleging that the attorney engaged in malpractice, or in motions by the client to set aside criminal verdicts because of ineffective assistance of counsel.³⁴ The exception allows the lawyer to respond fairly and fully to the client's charges. The lawyer, however, is authorized only to breach the privilege defensively.³⁵

The Model Rules and 13 states specifically limit the use of this exception to attorneys involved in fee dispute or malpractice action. However, 37 other states permit the use of the exception more broadly. Certain legal writers have also suggested that this provision should be interpreted on the basis of its plain language, such that it can be expanded to include claims by in-house counsel of retaliatory discharge.³⁶ Moreover, as described below, several courts have expressly expanded this exception to allow an in-house counsel to disclose confidential client information in order to bring a claim of retaliatory discharge.³⁷

The Model Rules also specifically address the responsibilities of an in-house counsel who believes others in the organization are commit-

ting a wrong, which could be imputed to the corporation. Model Rule 1.13(b) provides that an in-house attorney who identifies corporate malfeasance shall "proceed as is reasonably necessary in the best interest of the organization."³⁸ The in-house attorney must act in a way that is "designed to minimize disruption to the organization and his risk of revealing information relating to representation to persons outside the organization."³⁹ Under these circumstances, the in-house attorney's options do not include revealing client confidences or waiving the attorney-client privilege. His recourse is limited to:

1. Requesting reconstruction and a separate legal opinion;
2. Requesting action by a higher authority in the organization; or
3. Resigning his position.

Under the Model Rules, whistle blowing is not an option. Using privileged information to do so or to later claim retaliation, is, therefore, not sanctioned.

Finally, the American Corporate Counsel Association (ACCA) has clearly stated to in-house counsel that they are not permitted to use attorney-client privileged information to blow the whistle on internal illegal activities.⁴⁰ In its Policy Statement on Wrongful Discharge suits filed by in-house counsel adopted on November 6, 1991, the ACCA Board stated that,

A former in-house counsel *may not maintain* a [wrongful discharge suit against a former employer for retaliatory discharge] if (a) the action is taken by the former in-house counsel which gave rise to the termination of employment constituted a violation of the code of professional responsibility of the applicable jurisdiction or (b) in order to maintain such cause of action, the former in-house counsel must introduce in evidence information which is privileged.⁴¹

JUDICIAL VIEWS ON ATTORNEYS AS WHISTLEBLOWERS

As describe above, the rules of evidence and professional conduct, among other sources, strictly limit an attorney's use of confidential client information. Attorneys have, however, attempted to pursue claims of retaliation as whistleblowers or wrongful termination using confidential client information to further that effort. For the most part, they have met with failure.

The Department of Labor has only decided one "whistleblower" case brought by an attorney.⁴² In *Willy v. Coastal Corp.*, an in-house attorney claimed that he was fired from his job with a natural gas production company for writing a report critical of a subsidiary's compliance with environmental law.⁴³ Mr. Willy then attempted to bring a wrongful

