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## Government Oversight

# In-House Counsel as Whistleblower: a Rat Without a Remedy?

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MORE THAN 30 YEARS AGO, Simon Rifkind wrote:

"One solution that has been proposed for [the ethical problems faced by lawyers] finds one in loud opposition. That is the attempt to convert the lawyer routinely into an informer against his client.

"When it is stated in this simplistic form, our revulsion is instantaneous, if not instinctive.... The merest suggestion that the lawyer become a stool pigeon against his client fills us with abhorrence...."<sup>1</sup>

Oh, how times have changed, especially for an in-house attorney.

## We've Come a Long Way

The first, most prominent challenge to Judge Rifkind's religion came in *Balla v. Gambro*.<sup>2</sup> Roger Balla was the general counsel of Gambro Inc., an Illinois-based company that was the subsidiary of a Swedish medical-technology company, Gambro AB. In July 1985, Mr. Balla was informed that Gambro's affiliate company in Germany was going to ship dialyzers into the United States which posed very serious health risks and did not comply with Food and Drug Administration (FDA) regulations. Mr. Balla went to the U.S. president and persuaded him to reject the shipment. A week later, however, the president changed his mind and told the German affiliate he would accept shipment.

When Mr. Balla learned of the president's 180 degree flip-flop in August, he promptly confronted the president and told him he would do whatever was necessary to stop the shipment (and subsequent sale) of the non-complying dialyzers. That confrontation led to the president terminating Mr. Balla's employment on Sept. 4. The following day, Mr. Balla made good on his threat, informing the FDA that the dialyzer shipment was coming in from Germany (the FDA subsequently seized the shipment).

In March 1986, Mr. Balla brought suit against Gambro in Illinois state court, asserting a retaliatory discharge (tort) claim and seeking \$22 million. The trial court dismissed the lawsuit, finding no valid, existing cause of action. The intermediate appellate court affirmed that determination. Mr. Balla thereafter sought justice on appeal to the Illinois Supreme Court.

Mr. Balla argued to the Illinois Supreme Court that he should be allowed to interpose a retaliatory discharge claim because he had been facing a "Hobson's Choice"—report on his client's wrongdoing (thereby saving lives, but being fired) or keep quiet (thereby endangering lives, but retaining his job). The Court rejected endorsing a cause of action, and took issue with the "Hobson's Choice" notion. Rather than two unpalatable choices, Mr. Balla (said the Court) was faced with no choice. Under Rule 1.6(b) of the Illinois Rules of Professional Conduct, Mr. Balla was 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 then reasoned that Illinois public policy (i.e., ensuring that the public be kept safe from dangerous products) was protected without the need to create a retaliatory discharge cause of

action for in-house lawyers. Why? Because when lawyers took and passed the Illinois Bar, they had willingly signed on to the requirement of ratting out clients in such circumstances.<sup>3</sup>

The Court, in furtherance of its decision, opined that establishing such a cause of action would be contrary to the policies affirmed by the U.S. Supreme Court in *Upjohn v. United States*,<sup>4</sup> by having corporate clients be less willing to confide in lawyers who might then turn around and not only rat them out but sue them to boot. Finally, the Court did not believe that companies should bear the economic costs or burdens of its attorney(s) adhering to ethical obligations; rather, Illinois attorneys (having, again, willingly chosen to enter their profession) should bear these costs and burdens.

The reaction to *Balla* was swift and almost universally negative. Legal academics denounced the decision as "heartless," and courts faced with similar retaliatory discharge claims seemed to go in other directions. The first leading decision was handed down by the California Supreme Court in *General Dynamics Corp. v. Superior Court*.<sup>5</sup>

Rejecting the approach of *Balla*, the California Supreme Court decided to recognize a retaliatory discharge cause of action for an in-house lawyer who allegedly was fired for giving unwelcome legal advice on several highly sensitive issues. In fact, the Court determined that an in-house lawyer could assert two different causes of action. The Court first endorsed a contract claim. For such a claim (assuming a contract could be proven), an attorney's status was considered no different from any other employee; plus, in so proving a breach of an employment contract there would be no concern about a breach of confidentiality

(or correspondingly, a breach of the attorney-client privilege).

The Court then went on to qualifiedly endorse a tort claim under two alternative scenarios: (i) where the attorney was fired for refusing to violate a mandatory ethical requirement; or (ii) where a non-attorney could also bring such a claim and the claim could be proven without violating the attorney-client privilege.

This tort cause of action (which, after all, is where the real money damages reside) appeared not to be giving the lawyer much in a practical sense, however, since legally and factually his path to recovery was an impossible dream. Why? Because (a) California's ethics rules were diametrically the opposite of Illinois' (i.e., in California, attorneys were ethically proscribed from disclosing client confidences in all circumstances), and (b) the attorney in *General Dynamics* could not prove a retaliatory discharge claim without violating the attorney-client privilege. So much for progress.<sup>6</sup>

## Professional Standards Shift

At the time of the *Balla* and *General Dynamics* decisions, the governing ethical standards for attorney disclosure as to a client's past conduct were relatively clear (if not uniform). In New York and most other jurisdictions, attorneys were not at liberty to make disclosures of such conduct. With respect to future or ongoing conduct, as well as past conduct where a lawyer's services were utilized, however, the disclosure standards were strikingly disparate; as we have seen, for example, California and Illinois were at polar extremes on this issue. In New York, a lawyer had the discretion to violate a client's



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confidence to prevent a client from committing a crime, but could not violate that confidence with respect to a non-criminal act (e.g., a tort, a/k/a a fraud) and similarly could not rat out a client to rectify a client's crime or fraud where the lawyer's services had been used.

Under the ABA's Model Rules (which a number of states followed in whole or in part), a lawyer had the discretion to violate a client's confidence to prevent imminent death or the likelihood of substantial bodily harm; as to a client's non-criminal act, the Model Rules barred disclosure; and as to rectifying crime or fraud where a lawyer's services were used, it is best to say the ABA's position at that time was extremely muddled.<sup>7</sup>

Fast forward through Enron's conflagration, and most of these rules changed, in the main because Congress in the Sarbanes-Oxley legislation empowered the Securities and Exchange Commission (SEC) to federalize lawyer conduct for the first time in U.S. history. Asserting jurisdiction over lawyers who have a capital markets practice and/or appear before the commission, the SEC promulgated permissive disclosure standards whereby lawyers would be permitted to disclose a client's "material violation" (current, prospective, or past) to the SEC; and failure to do so (where, in hindsight, a "reasonable lawyer" should have made the disclosure) would subject lawyers to the entire range of sanctions available pursuant to the Securities Exchange Act of 1934.

Feeling its oats, the SEC went on to "jawbone" the ABA in 2003 so as to bring the Model Rules into line with the SEC's new confidentiality standards. In the five years since the ABA changed the Model Rules, the states have reacted to those changes with striking non-unanimity.

Some states have adopted the ABA's changes without substantive amendment.<sup>8</sup> Others have tinkered with the various disclosure obligations.<sup>9</sup> Another group of states has simply chosen to follow the old version of the Model Rules,<sup>10</sup> while some states have retained their long-standing idiosyncratic views of lawyer disclosure obligations.<sup>11</sup> Finally, some states (most notably New York) have decided not to significantly change lawyers' confidentiality obligations to bring them into line with the Model Rules.<sup>12</sup>

## State of Discharge Claims

In the aftermath of *Balla* and *General Dynamics*, and in response to a "liberalization" in ethics standards allowing for attorneys to rat out clients, most states that have looked at the question of whether an in-house lawyer has a tort claim against her company have decided that issue in favor of allowing such a claim (e.g., Oregon, Montana, Utah, Kansas, Connecticut, Florida, New Jersey, Nevada, Texas, Tennessee, Virginia, Massachusetts),<sup>13</sup> other states that seem amenable to such claims include New York.<sup>14</sup> At the other extreme, there are some states that have not rejected the "harshness" of the *Balla* decision (e.g., North Carolina, Minnesota, Pennsylvania, and, of course, Illinois).<sup>15</sup>

But even with this strong trend, in-house lawyers thinking of ratting out their clients (and expecting a big paycheck to cushion the blow of being fired) need to factor in one of the concerns that the *General Dynamics* court found compelling, i.e., how are you going to prove your case? Some of the jurisdictions that allow a discharge claim also allow for attorneys (now not constrained by ethical considerations) to breach the attorney-client privilege, at least to the extent necessary

to prove their claim(s) (e.g., Tennessee, Montana, Florida, Nevada, Connecticut, Utah, Kansas).<sup>16</sup> A number of other jurisdictions, however, hew to the *General Dynamics* limitation/standard that any discharge claim must be proven without a breach of the privilege (e.g., Oregon, New Jersey, New York, Massachusetts, Texas, Virginia, and, of course, California).<sup>17</sup>



Not only have we loosened our ethical obligations to clients, we have created the means by which we now can sue clients for discharge, using (at least in some jurisdictions) privileged communications against them.

## Conclusion

Notwithstanding my empathy for in-house lawyers put in difficult—or worse—positions by their employer-clients (having been a general counsel once, myself), the *General Dynamics* limitation/standard is clearly the correct approach under these circumstances. Why? Because it is black letter law that the attorney-client privilege is owned exclusively by the client—lawyers have no claim on ownership of said privilege—and the privilege can thus be waived only by the client.<sup>18</sup>

But even with such a limitation/standard in place (at least in some jurisdictions), it is clear our profession has come a long way since Judge Rifkind laid down his religion in 1975. Not only have we loosened our ethical obligations to clients, we have created the means by which we now can sue clients for discharge, using (at least in some jurisdictions) privileged communications against them. This, in my view, is a further slide down the slippery slope on which our profession has been riding—away from the ideals of zealous client representation, based upon the bedrock principle of clients' absolute confidence in their attorneys' duty of confidentiality.<sup>19</sup>



1. See S. Rifkind, "The Lawyer's Role and Responsibility in Modern Society," 30 *The Record* 534, 541 (1975).

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

3. The "Hobson's Choice" argument had a more fundamental flaw: Mr. Balla had a third alternative, one which might well have achieved both his goals (i.e., consumer safety and job retention). What was it? He should have communicated directly with his ultimate client, Gambro AB, about the legal (civil and criminal) risks, the regulatory risks, and the public relations/reputational risks of putting such defective products into commerce.

4. 499 U.S. 383 (1981).

5. 7 Cal. 4th 1164, 32 Cal.Rptr.2d 1, 876 P.2d 487 (1994).

6. At a minimum, the *General Dynamics* court had caught up to the wisdom articulated long ago by William Howard Taft: "Even a rat in a corner will fight." See H. Pringle, "The Life and Times of William Howard Taft," (Vol. 2, p. 783) (New York, 1939).

7. See C.E. Stewart, "Liability for Securities Lawyers in the Post-Enron Era," 35 *Rev. Sec. & Com. Reg.* (Sept. 11, 2002).

8. E.g., Alaska, Arizona, Arkansas, Connecticut, Hawaii, Idaho, Indiana, Iowa, Louisiana, Massachusetts, Nebraska, South Carolina, and Vermont.

9. E.g., District of Columbia, Maryland, Minnesota, North Dakota, Texas, Utah, and Virginia.

10. E.g., Alabama, Colorado, Delaware, Florida, Georgia, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Dakota, West Virginia, Wisconsin, and Wyoming.

11. Both Illinois and New Jersey, for example, require mandatory disclosure in certain circumstances.

12. E.g., Kansas and Ohio.

13. See *Meadows v. Kinder-Care Learning Ctrs. Inc.*, 2004 U.S. Dist. LEXIS 20450 (D. Or. 2004); *Burkhart v. Semitool Inc.*, 5 P.3d 1031 (Mont. 2000); *Spratley v. State Farm Mut. Auto Ins. Co.*, 78 P.3d 603 (Utah 2003); *Heckman v. Zurich Holding Co. of America*, 242 F.R.D. 606 (D. Kan. 2007); *Lewis v. Nationwide Mut. Ins. Co.*, 2003 WL 1746050 (D. Conn. 2003); *Alexander v. Tandem Staffing Solutions Inc.*, 881 So.2d 607 (Fla. Dist. Ct. App. 4th Dist. 2004); *Parker v. M&T Chemicals Inc.*, 566 A.2d 215 (N.J. Super. 1989); *Willy v. Coastal States Mgmt. Co.*, 939 S.W.2d 193 (Tex. Ct. App. 1996); *Van Asdale v. International Game, Technology*, 498 F.Supp.2d 1321 (D. Nev. 2007); *Creus v. Buckman Labs International Inc.*, 78 S.W.3d 852 (Tenn. 2002); *United States ex rel. Doe v. X Corp.*, 862 F.Supp. 1502 (E.D. Va. 1994); *GTE Products Corp. v. Stewart*, 653 N.E.2d 161 (1995). The First, Third, Fifth, and Eleventh Circuits have also recognized this cause of action. See *Siedle v. Putnam Inc. Inc.*, 147 F.3d 7 (1st Cir. 1998); *Kachmar v. Singuard Data Sys. Inc.*, 109 F.3d 173 (3d Cir. 1997); *Willy v. Administrative Review Board*, No. 04-60347 (5th Cir. Aug. 24, 2005) (reported in BNA U.S. Law Week (9/13/05)); *Goffer v. Marbury*, 956 F.2d 1095 (11th Cir. 1992). Section 806 of Sarbanes-Oxley should also offer whistleblower protection to in-house lawyers.

14. See *Wieder v. Skala*, 593 NYS2d 752 (1992).

15. See *Considine v. Compass Group USA Inc.*, No. COA00-843 (N.C. Ct. App. Aug. 7, 2001) (reported in BNA Corporate Counsel Weekly (8/22/01)); *Kidwell v. Sybaratic Inc.*, No. A07-0584 (Minn. Ct. App. June 3, 2008) (reported in ABA/BNA Lawyers' Manual on Professional Conduct (6/11/08)); *McGonagle v. Union Fid. Corp.*, 556 A.2d 878 (Pa. Super. Ct. 1989). In *Kidwell*, the Minnesota Court explicitly declined to follow *Balla*; at the same time, however, the court ruled that in-house lawyers who are fired for reporting legal violations to management in the discharge of their duties have no claim under the state's whistleblower's statute. [This seems like a distinction without a difference.] There is also some authority that Texas state law might not sustain a claim. See *Willy v. Coastal Corp.*, 647 F.Supp. 116 (S.D. Tex. 1986), rev'd in part on other grounds, 845 F.2d 1160 (5th Cir. 1988). Illinois courts continue to follow *Balla*. See *Ausman v. Arthur Andersen, LLP*, 810 N.E.2d 566 (Ill. 1st Dist. 2004).

16. See the state cases cited supra in footnote 14. Curiously, notwithstanding the *McGonagle* decision (see supra n.15), the Philadelphia Bar Association has weighed in in favor of this approach. See Philadelphia Ethics Op. 99-6 (1999). The ABA has also endorsed the concept of giving the attorney the right to waive the attorney-client privilege, to the extent necessary to prove a discharge claim. See ABA Task Force on Corporate Responsibility, Final Report at 43-46 (March 31, 2003); see also ABA Formal Ethics Op. 02-424.

17. In addition to the state cases cited supra in footnote 14, see *Wise v. Consolidated Edison Co. of New York Inc.*, 723 NYS2d 462 (1st Dept. 2001); *O'Brien v. Stolt-Nielsen Transp. Group, Ltd.*, 2004 WL 304318 (Conn. Super. Ct. 2004) (interpreting New York law). California has more recently followed the *General Dynamics* approach. See *Fox Searchlight Pictures Inc. v. Paladino*, 106 Cal.Rptr.2d 906 (2d Dist. 2001). The U.S. Court of Appeals for the Eleventh Circuit has also endorsed this limitation (see supra n.14). Kansas has recently changed its views on this subject. Compare *Cramden v. State*, 897 P.2d 92 (Kan. 1995) with *Heckman*, supra n.14. Oregon's litigated decision (see *Meadows*, supra n.14), moreover, is at odds with an Oregon Bar ethics opinion. See Oregon Ethics Op. 1994-136 (1994).

18. See *In re Grand Jury Proceedings*, 73 F.R.D. 647 (M.D. Fla. 1977); see also C.E. Stewart, "The Attorney-Client Privilege: The Best of Times, the Worst of Times," *Professional Lawyer* 63 (1999).

19. See C.E. Stewart, "This Is a Fine Mess You've Gotten Me Into: The Revolution in the Legal Profession," *NY Business Law Journal* (Summer 2006). Other evidence of this trend is the recent (2007) ethics opinion issued by the New York County Lawyers' Association endorsing an ethical safe harbor for lawyers who employ "dissemblance" in the evidence gathering process. See C.E. Stewart, "When Exceptions Swallow the Rule: The Growing Demise of the 'No-Contact' Rule," *NY Business Law Journal* (Summer 2008).