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Whistleblowing Attorney Can Use Privileged Information as Evidence in Retaliation Case, Court Rules

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When an in-house attorney's duty of confidentiality to a company seems to conflict with whistleblower protections, which rules prevail? In a December 2016 decision in *Wadler v. Bio–Rad Laboratories, Inc.*, a California federal district court ruled that, at least under the federal Sarbanes Oxley (SOX) and Dodd-Frank acts, federal whistleblower protections can take precedence. *Wadler* is a long-running case that also produced a noteworthy decision in 2015, when the court ruled that plaintiff Sanford Wadler, former General Counsel for the defendant employer Bio-Rad, could bring SOX and Dodd-Frank claims against individual directors of the company (see our previous coverage here).

Following the 2015 decision, the case proceeded to trial. At the eleventh hour, the defendant Bio-Rad sought to exclude much of Wadler's evidence on the grounds that it falls under the attorney-client privilege. Wadler made several arguments as to why the evidence should not be considered privileged, and the reasoning set out in the court's ruling provides helpful instruction to other attorney whistleblowers who must navigate complicated ethical rules related to disclosures.

State Law vs. Federal Common Law

The first issue the court addressed was whether state law or federal common law on attorney-client obligations applies in Wadler's case. The court noted that "because of the overlap between Wadler's retaliation claims under state law and federal law," federal common law governed the case, as provided by Rule 501 of the Federal Rules of Evidence. Rule 501 simply states that, in the absence of guidance from the Constitution, a federal statute, or "rules prescribed by the Supreme Court," then "[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege…." Although Bio-Rad acknowledged that federal common law applied, the company argued that the court should follow California Supreme Court cases that barred attorneys from relying on privileged information for state law whistleblower claims. The court rejected this argument on the grounds that the controlling case on this question, *Van Asdale v. International Game Technology*, established that state rules concerning attorney-client privilege do not apply to federal whistleblower claims.

Whistleblower Lawyers and Privileged Information

Following *Van Asdale*, the *Wadler* court ultimately determined that the "reason and experience" of federal common law regarding attorney-client privilege permitted Wadler to use evidence for his retaliation claim that would likely have been barred by state law. The court pointed to language in Rule 1.6 of Model Rule of Professional Conduct, cited favorably by several federal courts of appeals, allowing lawyers to reveal confidential or privileged 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…." The court explained that court procedures that protect any kind of confidential information – such as filing evidence under seal so that it is not publicly accessible – are

sufficient “special measures…[to ensure] that such evidence is admitted only when plaintiff’s belief that it is necessary to prove a claim or defense is *reasonable*.”

SOX Preempts State Ethical Rules

For the reasons above, the court in *Wadler* followed precedent from the Ninth, Third, Fifth, and First Circuit Courts of Appeal in ruling that federal common law allows in-house attorneys to use privileged and confidential materials under certain circumstances in support of a whistleblower retaliation claim. In determining that federal rules trump state restrictions on such information, the court also ruled that an SEC regulation implementing SOX preempts state ethical rules for privilege, as well. This regulation, the “Standards of Professional Conduct for Attorneys,” permits an attorney to use her employer’s internal reporting process “in connection with any investigation, proceeding, or litigation in which the attorney’s compliance with [SOX] is in issue,” regardless of whether state ethics rules for attorneys otherwise bar such disclosures.

Takeaways from *Wadler*

Wadler illustrates the unique difficulties and legal hurdles that in-house attorneys face in bringing whistleblower retaliation claims. As the court observed, Wadler’s legal claim survived because it arose under federal law – had he attempted to use the same evidence in support of a California state law whistleblower claim in state court, he may well have been unable to proceed. What privilege law governs in a particular case, and what other laws might apply, varies by state and by federal jurisdiction. In-house attorneys (and their employment lawyers) in retaliation cases should carefully examine the relevant law on this matter to navigate inevitable disputes over privileged information that defendant employers will continue to raise.