When the Attorney Departs: The Terminated Lawyer as Litigant or Whistle Blower, and the Attorney-Client Privilege

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When lawyers lose their jobs, a lot of secrets leave the office with them. Terminated lawyers who want to sue in California about a job loss run into the strictest version of attorney-client confidentiality in the nation. Nevertheless, some lawyers sue their former employers, each of which is a former client.

This paper addresses the attorney-client privilege and the broader duty of confidentiality owed by an attorney to his or her employer in the context of lawsuits based on whistle blowing or unlawful employment termination theories. It sets forth the background of attorney whistle blowing in recent history and applicable law concerning a terminated attorney’s lawsuit, and then sets forth more practical matters involved in bringing and defending lawsuits by attorneys. The application of California law and a state court forum are presumed in this discussion. Federal law and a federal forum lead to outcomes inconsistent with California law because of reliance by federal courts on the American Bar Association Model Rules of Professional Conduct and Model Rules 1.6 and 1.13 (discussed infra) or federal common law.

Whistleblower lawsuits by lawyers tend to create noise. They are also perilous to both sides because of the disclosures accompanying them. But employers generally have economic power in the disputes, and the attorneys may also need to respond to an inquiry by the State Bar of California if they cross a line and disclose any client confidences. These cases make news when the departing lawyers go public with the facts involved in their terminations, especially

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1 Radack, The Government Attorney-Whistleblower And The Rule Of Confidentiality: Compatible At Last, 17 GEO.J.LEGAL ETHICS 125, 141 (2003) [California has “the strictest client confidentiality law in the nation”]; Zacharias, Privilege And Confidentiality In California, 28 U.C.DAVIS L.REV. 367, 372 (1995) [“California’s approach to confidentiality ostensibly is the strictest in the United States.”].

when the former employer contends that they are confidential facts. For example, Toyota Motor Corp. and Toyota Motor Sales, U.S.A. faced allegations by a former in-house lawyer that they were violating laws, obstructing justice, and committing criminal and fraudulent acts. The allegations and documents obtained from the lawyer made news. The case is still making news, though in 2011 the reporting involves efforts by Toyota to collect a multi-million dollar arbitration award against the plaintiff.

The public sector has not been immune from this controversy, and has stirred up the pot of confidentiality over the last 10 years, including multiple attempts to pass legislation. The League of California Cities has long noted the case of Cindy Ossias, in *Whistleblowing and the Duty of Confidentiality*, Chapter 7, Practicing Ethics: A Handbook for Municipal Lawyers. Ms. Ossias is a government attorney for the California Department of Insurance, who was placed on administrative leave after she went public in 2000 with information in confidential internal reports of her department. She was subsequently investigated by the State Bar of California, but no action was taken.

**The Foundations of Strict Confidentiality**

California’s doctrine of strict confidentiality rests on three primary ethical provisions. Business and Professions Code section 6068(e) [Duty of Confidentiality]; Evidence Code section 954 [Attorney-Client Privilege]; and Rule 3-600 of the Rules of Professional Conduct [Organization As Client].

The confidentiality statute imposes upon counsel the duty “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” Despite several efforts to change this statute over the last 10 years, the only change permitted by

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3 *Biller v. Toyota Motor Corporation*, United States District Court, Central District of California, Case No. 09cv5429 [Complaint filed July 24, 2009 (Document 1) at ¶ 40].


7 BUS. & PROF. CODE, § 6068(e)(1).
the legislature took effect in 2004.\(^8\) That change permits, but does not require, the lawyer to reveal confidential information relating to the representation of the client “to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.”\(^9\)

The privilege statute authorizes a client to refuse to disclose, and to prevent others from disclosing, confidential communications between the client and lawyers.\(^10\) “While it is perhaps somewhat of a hyperbole to refer to the attorney-client privilege as ‘sacred,’ it is clearly one which our judicial system has carefully safeguarded with only a few specific exceptions.”\(^11\) The relationship “must be of the highest character.”\(^12\) “So fundamental is this precept that an attorney continues to owe a former client a fiduciary duty even after the termination of the relationship.”\(^13\)

The institutional client rule mandates compliance with the confidentiality statute. Rule 3-600(B) states, in pertinent part:

> “If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e).” (Rules Prof. Conduct, Rule 3-600(B) [emphasis added].)

Rule 3-600 then provides that, *subject to the confidentiality statute*, the lawyer “may take such actions as appear to the member to be in the best lawful interest of the organization”

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\(^8\) STATS. 2003, c. 765 (AB 1101), § 1, effective July 1, 2004.  
\(^9\) BUS. & PROF. CODE, § 6068(e)(2).  
\(^10\) EVID. CODE, § 954.  
\(^13\) *Ibid.*
including (1) urging reconsideration and (2) referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization. California’s Rules of Professional Conduct embody the “minimum ethical standards that distinctively define the lawyer as a professional. . .”

Within this three-way intersection of statutes and rules, there is nothing signaling that a government whistleblower attorney enjoys a dispensation to breach client confidences under the whistleblower statutes. On the contrary, the signals in the last 10 years are just the opposite.

**The California Attorney General Looks at Whistleblower Statutes**

In 2001, the California Attorney General construed three whistleblower statutes — the California Whistleblower Protection Act (Gov. Code, §§ 8547-8547.12), the Whistleblower Protection Act (Gov. Code, §§ 9149.20-9149.23), and the Local Government Disclosure of Information Act (Gov. Code, §§ 53296-53299) — and concluded that the “‘whistleblower’ statutory protections applicable to employees of state and local public entities do not supersede the statutes and rules governing the attorney-client privilege.” The Attorney General’s analysis focused on reconciling these whistleblower statutes with the attorney-client privilege, the duty of confidentiality and Rule 3-600, and began with the proposition that statutes must be harmonized both internally and with each other “in the context of the entire system of which they are a part.”

Textually, the whistleblower statutes evidenced intent not to supersede the privilege. Each of the statutes, while using different language, qualified its disclosure protections to safeguard confidential information. The same can be said of the False Claims Act Whistleblower statute in Government Code section 12653, which requires the employee to have done “lawful” acts.

Second, the Attorney General pointed to the rule that when the Legislature intends to supersede a strong and well-established public policy, it will do so expressly, unequivocally and

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14 RULES PROF. CONDUCT, RULE 3-600(B).
15 General Dynamics v. Superior Court, 7 Cal.4th 1164, 1181 (1994).
17 Id. at 76.
18 Id. at 76-77.
not by mere implication. Given that attorney-client confidentiality is “fundamental” to our legal system, People ex rel. Department of Corporations v. SpeeDee Oil Change Systems, Inc., 20 Cal.4th 1135, 1146 (1999), the Attorney General concluded that the whistleblower statutes do not impliedly impair attorney-client confidentiality.

Third, the Attorney General noted that the fiduciary qualities of mutual trust and confidence underlying the attorney-client relationship can be protected by limiting any impairment to cases “grounded in explicit and unequivocal ethical norms embodied in the Rules of Professional Conduct and statutes. . . .”

While the False Claims Act whistleblower retaliation statute was not exhaustively analyzed in the Attorney General’s opinion, it is specifically mentioned. And as to that statute, the Attorney General thought it so obvious that the privilege applied that he “assumed here that the attorney-client privilege would apply to a publicly employed attorney who discloses the making of a false claim” and that its analysis as to the other statutes would “likewise pertain” to the False Claims Act.

Attempts to Change Strict Confidentiality

There are further indicia that government attorneys must strictly abide by the confidentiality rules even when acting as whistleblowers. In early 2002, the State Bar of California asked the California Supreme Court to amend Rule 3-600 to specifically address government attorney whistleblowers. Echoing the Attorney General’s opinion that “in some respects, rule 3-600 appears designed to meet the concerns of the private sector better than the concerns of public practice,” the State Bar’s proposal was intended to provide guidance to government whistleblower attorneys. Reporting the purported misconduct outside of the agency

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23 Ibid.; see also LABOR CODE, § 1102.5(g).
would be ethically permissible and consistent with the statutory duty of confidentiality provided the report was made to a government official or agency with oversight authority over the particular matter. On May 10, 2002, the California Supreme Court denied the State Bar’s request, expressly noting in its order that the proposed modification to Rule 3-600 conflicted with an attorney’s statutory duty of confidentiality as set forth in Business and Professions Code section 6068, subdivision (e).

Three months after the California Supreme Court refused to relax the confidentiality rules for government whistleblower attorneys, the California Legislature passed Assembly Bill 363. AB 363 would have added section 6068.1 to the Business and Professions Code. In language substantially similar to the State Bar’s proposed amendment to Rule 3-600, the new statute would have permitted a government attorney whistleblower in specified circumstances to refer the matter to law enforcement or to another governmental agency. No violation of the statutory duty of confidentiality would occur in those circumstances. Governor Gray Davis vetoed the bill. In his veto message, Governor Davis observed that “While this bill is well intended, it chips away at the attorney-client relationship which is intended to foster candor between an attorney and client. It is critical that clients know they can disclose in confidence so they can receive appropriate advice from counsel.”

In 2004, a third attempt was made to dilute the confidentiality protections in the context of government attorney whistleblowers. AB 363 was reintroduced as AB 2713 and, like AB 363, it would have added section 6068.1 to the Business and Professions Code and permitted government whistleblower attorneys, in specified circumstances, to refer the matter to law enforcement or to another governmental agency. Again, no violation of the statutory duty of confidentiality would occur in those circumstances. Governor Schwarzenegger vetoed the

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26 PROPOSED AMENDED RULE 3-600(C)(3).
27 State Bar Rule 3-600, S104682, Minutes of the California Supreme Court (May 10, 2002), appearing in Advance Sheets of the California Official Reports, Vol. 16 (June 16, 2002).
30 Ibid.
In his veto message, Governor Schwarzenegger stated that the bill would “condone violations of the attorney-client privilege.”

In 2006, the Legislature again revisited amending the confidentiality statute to permit government attorney whistleblowers to make disclosures outside of their agency in specified circumstances. The Senate rejected the Assembly’s amendment in its entirety and replaced it with an entirely different subject matter. The bill died on the Senate floor.

Most recently, the State Bar overhauled the California Rules of Professional Conduct, after considering the adoption of the ABA Model Rules as much as possible, including numerical structure, to conform California to the Model Rules. California thus considered adopting Model Rules permitting a lawyer’s disclosure of a client’s financial fraud and a lawyer’s reporting of an organizational client outside the organization. The ABA Model Rules contain exceptions to confidentiality in Rule 1.6, subdivisions (b)(2) and (b)(3), that permit an attorney to reveal information 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, or 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, respectively. The California view that a lawyer must remain the one person in whom a client may confide the darkest secrets without fear of judgment or consequence prevailed and the Board of Governors adopted a version of Rule 1.6 that omits the financial fraud exceptions of the Model Rules. In addition, the Board did not adopt a version of ABA Model Rule 1.13, subdivisions (b) and (c), that permits a lawyer’s reporting of information outside the organization that is his or her client. The State Bar’s Comment 15 states that the proposed rule “does not authorize a governmental organization’s lawyer to act as a

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33 Ibid.
36 See http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1601-1650/ab_1612_bill_20061130_history.html.
whistle-blower in violation of Business and Professions Code section 6068, subdivision (e) or [proposed] Rule 1.6...” The proposed California version of 1.13 thus affirms the strict doctrine of confidentiality. These proposed rules await approval by the Supreme Court of California in order to become operative.

**The Practical Effects of Strict Confidentiality**

Based on the state of the law described above, and the proposed rules awaiting approval, the role of an attorney whistleblower is not supported by California law and is not to be desired by a California attorney where there is any possibility for the disclosure of client confidences or secrets. But where does that leave the attorney? There are lawyers who are well situated to discover the basis for a whistleblower lawsuit. And there are terminated lawyers released from private and public employers who must bring lawsuits seeking compensation for their wrongful firing. What do they do? Other than the obvious advice to be careful not to disclose secrets and not to go outside the organization until the path is absolutely clear, there are guidelines for lawyers. After considering these, the attorney and plaintiff also must consider that the former employer may move to dismiss if the employer reasonably establishes that available defenses may not be proven without spilling attorney-client secrets.

In *General Dynamics*, supra, the California Supreme Court in 1994 concluded that “there is no reason inherent in the nature of an attorney’s role as in-house counsel to a corporation that in itself precludes the maintenance of a retaliatory discharge claim, provided it can be established without breaching the attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship.” An in-house counsel’s ability to sue an employer is confined to those “limited circumstances” where nonattorney employees would be permitted to pursue a retaliatory discharge claim “and governing professional rules or statutes expressly remove the requirement of attorney confidentiality.”

Under *General Dynamics*, the in-house attorney’s access to the courts does not turn on the nature of the cause of action. If the action may be prosecuted without disclosing confidences, then it may proceed. (Of course, the attorney formerly employed by a public entity may not

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38 *Id.* at 46.
39 *General Dynamics Corp. v. Superior Court*, supra, 7 Cal.4th at 1169 [original emphasis].
40 *Id.* at 1188 [original emphasis].
assert a general tort claim for wrongful termination in violation of public policy under the holding in Miklosy v. Regents of University of California, 44 Cal.4th 876, 899 (2008).

Because the defense will exploit any perceived violation of confidence by the terminated lawyer, an initial pleading that errs on the side of brevity is recommended. There is a competing practice pointer for an aggressive lawyer litigant, which counsels that the noisier a lawyer becomes, assuming he toes the ethical line, the more likely that his former employer and client will respond with conduct that waives the privilege.41

But if the lawsuit may proceed only with the disclosure of information protected by California’s strict doctrine of confidentiality, then, given the fiduciary duties owed to the client, the starting point for judicial access lies in the professional relationship itself: if, and only if, a statute or ethical rule expressly removes the requirement of confidentiality may the in-house attorney pursue the claim against the former client. The attorney and litigant must identify for the trial court a statute or ethical rule expressly removing the requirement of confidentiality. The statute might be the crime/fraud exception of Evidence Code section 956, which says there is no privilege “if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.” But exceptions to confidentiality are rare in California. As the California Supreme Court stated 17 years ago: “We emphasize the limited scope of our conclusion that in-house counsel may state a cause of action in tort for retaliatory discharge. The lawyer’s high duty of fidelity to the interests of the client work against a tort remedy that is coextensive with that available to the nonattorney employee.”42 Thus, “the in-house attorney who publicly exposes the client’s secrets will usually find no sanctuary in the courts.”43

The California Supreme Court has recently reiterated the importance of the attorney-client privilege, “a hallmark of Anglo-American jurisprudence for almost 400 years,” and emphasized that “benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence.”44 The Costco decision also eliminated the trial court’s ability to order an in camera inspection of the information or

41 See EVID.CODE § 912.
42 General Dynamics Corp. v. Superior Court, supra, 7 Cal.4th at 1189 [emphasis added].
43 Id. at 1190.
documents as to which the client is asserting a privilege in order to determine whether they are privileged.45

The limits placed on an attorney’s whistle-blowing lawsuit or wrongful termination remedy have thus been affirmed for many years in a variety of ways as another cost of the protection of client secrets that is central to the attorney-client relationship, and the cost is paid by the attorney as an added tax, if you will, to maintain a highly valued license.

Under General Dynamics, and in light of the preeminent position in which the attorney-client privilege is held in California, the attorney-plaintiff must first demonstrate to the trial court either that (i) he or she can prove the case without using confidential information or (ii) there is a statute or ethical rule that permits divulging the information over the employer-client’s objection, where proof of the attorney-plaintiff’s claim is known to be highly likely dependent on the introduction of evidence that constitutes confidential information of the client. The General Dynamics’ approach – based on tort claims for retaliatory discharge brought by a private in-house attorney – fits in the context of statutory claims brought by a government attorney as well. The Attorney General, as noted above, when reviewing the whistleblower statutes in the context of a government attorney, specifically drew on General Dynamics.46 In the “more ‘usual’ case,” the privilege may be tested prior to trial.47 An attorney-plaintiff should be able to show – and the client-defendant should force the attorney to show – that the plaintiff’s case-in-chief may be made out “without the use of the confidential information.”48

The defendant in such a case must be proactive, anticipating suit and seeking restraining, injunctive and protective orders as early as possible, before the information finds the light of day. If the client or former client knows the suit is coming, and may claim an anticipatory breach of its confidences, the injunction must be sought immediately. Although an attorney may be able to reveal substantial information or documents no matter what injunctive relief is sought, as Toyota learned in the litigation with its former in-house lawyer in the case noted at the beginning of this

45 Id. at 736-740.
48 Id. at 462.
article, any information disclosed in a dispute will be difficult to seal from public view after it is
out or has “gone viral.”

If a complaint filed by an attorney discloses any confidences, the attorney’s action must
be challenged by demurrer or motion for judgment on the pleadings, without disclosing attorney-
client information in the process, which risks a waiver by the employer. The opponent of the
claim of privilege — in this context, the former employee — has the burden of proof to show
that any attorney-client communication was not confidential, and is placed on the defensive by
the employer’s motions. But if the attorney’s termination case advances, the plaintiff
should seek a pre-trial determination of whether any information intended to be admitted in the case-in-
chief is protected by the privilege, bearing in mind that “[i]n California the privilege has been
held to encompass not only oral or written statements, but additionally actions, signs, or other
means of communication. [Citations omitted.] Furthermore, the privilege covers the
transmission of documents which are available to the public, and not merely information in the
sole possession of the attorney or client.” That approach by the plaintiff will serve the interests
of the profession in protecting the client and will greatly protect any verdict achieved at trial,
while making any State Bar inquiry less threatening later. If the plaintiff does not accept
responsibility and place the confidential information issue before the trial court, the defense,
relying on General Dynamics and Solin, must force the plaintiff to acknowledge no attorney-
client privileged information or otherwise confidential information will be offered, and seek
dismissal of the parts of the case dependent on such information.

In the course of this pretrial activity with the trial court, the issues will be vetted before
the trier of fact gets the case. That is preferred for both parties, and respects the confidences and
privilege of the client. The last thing that should be witnessed is a whistleblower or wrongful
termination case where attorney-client issues are exposed before the trier of fact, tainting its
determination. The Solin case counsels against an attorney’s case-in-chief going forward against
the interests of the former client before it is determined whether the case may be proven without

49 See Biller v. Toyota Motor Corporation, United States District Court, Central District of
California, Case No. 09cv5429 [Order re: Defendants’ Motion for Preliminary Injunction filed
Superior Court Case No. SC100501 (filed November 7, 2008) (restraining order, seal sought on
50 EVID. CODE, § 917(a).
51 Mitchell v. Superior Court, supra, 37 Cal.3d at 600.
The most recent appellate decision regarding “General Dynamics and its progeny” is the San Diego case of Dietz v. Meisenheimer & Herron, 177 Cal.App.4th 771, 792 (2009). Like the Solin case, Dietz is a nonemployment action that involved a defendant arguing that the defendant could not make out a defense to the plaintiff’s case without disclosing attorney-client information and seeking dismissal for that reason. The defendant law firm in Solin obtained a dismissal of a legal malpractice action by a consulting attorney who sought out its advice because the defendant argued it could not defend itself without revealing the intervening joint client’s confidences, and the dismissal was affirmed by the Second District in Los Angeles. Criticizing expansive readings of the Solin case, the Dietz court stated “there are at least four factors that a court must consider” before dismissing a case on the ground that a defendant-attorney’s due process right to present a defense would be violated by the defendant’s inability to disclose a client’s confidential information if the action were allowed to proceed. Those factors are: (1) whether the issue in the case involves a client’s confidential information, which the client wants to remain confidential, (2) whether the confidential information is highly material to a meaningful defense, (3) whether the court may not adequately protect the client’s confidences by ad hoc measures short of dismissal, and (4) whether it would be fundamentally unfair to allow the action to proceed. If the Dietz decision is interpreted as casting doubt on the General Dynamics case or liberalizing the ability of an in-house counsel to state a cause of action in tort for whistle blowing or retaliatory discharge, the interpretation would be unwarranted.

The Dietz decision repeatedly cited General Dynamics in crafting the four factors, and did not affect the claim of an attorney as a plaintiff and former employee. In fact, Dietz in 2009 shows the continuing vitality of General Dynamics because the court incorporated the approach

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53 See also McDermott, Will & Emery v. Superior Court, 83 Cal.App.4th 378, 381 (shareholders may not sue corporation’s outside counsel in derivative action for malpractice because the attorney-client privilege, absent waiver by the client, would prevent counsel from mounting any meaningful defense).
the Supreme Court set out in 1994 and used it to fashion a test for protection of the attorney-client privilege and the client’s confidences even in lawsuits where the client is not a party but its lawyers are quarreling over fees.