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Expert Analysis

Lawyers: Blow the Whistle At Your Own Risk

By
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Over a decade after the IRS's Whistleblower Office was established, whistleblowing is alive and well. According to its annual report to Congress, while the IRS rejected more than 12,000 whistleblower claims in FY 2016, it also paid 418 awards totaling more than $61 million.[1] As the number of claims increases, so does the likelihood that attorneys will find themselves in an ethical tangle as they consider whether they can appropriately pursue monetary awards for reporting malfeasance by their clients. While the IRS's rules do not preclude attorneys from participating, IRS Chief Counsel Notice 2010-004 makes clear that "[u]nder no circumstances is it appropriate" for the IRS to accept information about a taxpayer from an informant who is "that taxpayer's representative in any administrative matter pending before the IRS," and the Internal Revenue manual recognizes that "whistleblower information…subject to a valid claim of privilege, may create risks if used by the IRS."[2]

The possibility of ethical quagmires for putative attorney-whistleblowers is driven home by a recent ruling by the District of Columbia Court of Appeals Board on Professional Responsibility. On Aug. 30, 2017, the board recommended the suspension of former General Electric in-house counsel Adriana Koeck for her disclosure of confidential GE data to multiple authorities and the press as part of purported whistleblowing activity. The sanctions against Koeck are a stark reminder of the risks attorneys face in blowing the whistle on their employers or clients.

'Koeck'

Koeck worked at GE from January 2006 to January 2007. Immediately before a meeting at which her employment was to be terminated, Koeck sent an email to GE's corporate ombudsman claiming that her imminent termination was in retaliation for her discovery and reporting of tax fraud purportedly perpetrated by GE in Brazil. After reporting to the ombudsman, Koeck made a copy of her office hard drive.

After investigating Koeck's allegations and concluding that they were meritless, GE terminated her in January 2007. Koeck subsequently filed a whistleblower complaint and supporting documents with the Occupational Safety and Health Administration (OSHA,which is responsible for hearing Sarbanes-Oxley whistleblower complaints) alleging that she discovered and reported to her superiors that GE representatives in Brazil were "blackmailing" the company by

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requesting additional commissions in exchange for their silence about purported value-added tax fraud. Koeck alleged that her supervisors recommended that the commissions be paid, and that GE terminated Koeck because she had reported the issue internally.

OSHA dismissed Koeck's complaint as time-barred, and while her appeal was pending, Koeck shared confidential GE documents and information regarding the alleged fraud with an assistant U.S. attorney, the Brazilian Public Federal Ministry, and the SEC. Around the same time, Koeck shared confidential GE documents with a reporter from the New York Times, which led to the publication of an article about the alleged fraud in Tax Notes International.

The Office of Disciplinary Counsel filed a specification of charges against Koeck and others[3] in July 2014. The committee that initially heard the case recommended that Koeck only be sanctioned for her disclosure to the press, reasoning that Koeck's disclosures to the Department of Justice (DOJ) and Brazilian authorities were permissible under the crime/fraud exception to D.C. Rules of Professional Responsibility 1.6(d), that the disclosure to OSHA was protected whistleblowing, and that the disclosure to the SEC was permissible because OSHA had previously forwarded Koeck's complaint to the SEC.

Without criticizing the hearing committee's interpretation of the crime-fraud exception, the board rejected the committee's recommendation on evidentiary grounds, concluding that Koeck failed to carry her burden of justifying the application of the crime-fraud exception, because she did not appear at or otherwise participate in the proceedings. The board recommended Koeck be sanctioned for her disclosures to the DOJ, SEC, Brazilian authorities, and press, but did not recommend sanctions for the OSHA complaint, ruling that the Model Rules of Professional Responsibility applied to OSHA proceedings and explicitly permitted the disclosure.

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Opinion 746, 'Quest,' 'Danon'

Although the facts and procedural posture of Koeck's case are unique, the ethical dilemma her story poses is not. From time to time, in-house attorneys and outside counsel handling tax matters may question the legality of their clients' positions, and in extreme cases they may want to evaluate the conditions under which New York's Rules of Professional Conduct would permit them to file a whistleblower claim.

As suggested by *Koeck*, the provision most likely to be relevant to attorney whistleblowing cases is the crime/fraud exception. In New York, that exception is codified at N.Y. R. Prof. Conduct (RPC) 1.6(b)(2), which permits an attorney to disclose client confidences "to the extent that the lawyer reasonably believes necessary … to prevent the client from committing a crime."

On its face, RPC 1.6(b)(2) is quite broad, but unlike the D.C. board, which interpreted a similar provision in *Koeck*, New York ethics authorities and courts have strictly interpreted what it means for an attorney to "reasonably believe" a disclosure is necessary to prevent a client from committing a crime. Thus, the New York County Lawyers' Association's Committee on Professional Ethics has opined that attorneys are not permitted to reveal confidential client information through participation in Dodd-Frank's whistleblowing program. See N.Y. County Lawyers' Assoc.'s Commission on Prof'l Ethics, Op. 746 (2013) (Opinion 746).

In reaching this conclusion, the committee appeared to draw a line between disclosures intended to prevent a client from committing a crime and disclosures intended to reap a financial windfall for the lawyer, stating that "[a]s a general principle, there are few circumstances, if any, in which … it would be reasonably necessary within the meaning of RPC 1.6(b) for a lawyer to pursue the steps necessary to collect a bounty as a reward for revealing confidential material." Id. at 9.

By its terms, Opinion 746 primarily concerns seeking or receiving whistleblowing awards, rather than whistleblowing itself; indeed, much of it could be read to permit whistleblowing where an attorney discloses client confidences but does not seek an award, and perhaps even where the attorney discloses client confidences for another reason, and only subsequently receives an award. Nonetheless, the rule set forth in Opinion 746—prohibiting attorneys from disclosing client confidences to participate in Dodd-Frank's whistleblowing program—is a broad one.[4]

Courts have taken a similarly narrow approach to Rule 1.6(b)(2)'s requirement that an attorney "reasonably believe [the disclosure is] necessary to prevent the client from committing a crime." In *United States v. Quest Diagnostics*, 734 F.3d 154 (2d Cir. 2013), for example, the U.S. Court of Appeals for the Second Circuit affirmed a district court's ruling that dismissal of a False Claims Act complaint was warranted where the defendant's former general counsel, one of a group of relators who brought the suit, violated RPC 1.6(b)(2). The court reasoned that the former general counsel's disclosure of information dating back to the 1990s was not necessary to prevent the defendant from committing or continuing a crime in 2005 (when the complaint was filed), and that the qui tam suit could have been maintained solely based on information provided by the other relators. Id. at 165.

Likewise, in *Danon v. Vanguard Group*, No. 100711/13, 2015 WL 7594570 (N.Y. Sup. Ct. Nov. 16, 2015), the court granted Vanguard's motion to dismiss New York False Claims Act claims brought by an attorney-relator who had previously worked as counsel at Vanguard. The court ruled that Danon's disclosure of confidential information to regulators who could potentially investigate the alleged fraud (the IRS and SEC), undermined a claim that filing a False Claims Act (FCA) suit was "reasonably necessary" to prevent Vanguard from committing a crime, and thus not permissible under RPC 1.6(b)(2). Although *Danon*'s reference to IRS whistleblowing supports the notion that attorneys can disclose client confidences to the IRS without running afoul of RPC 1.6(b)(2), its strict construction of the "reasonably believed necessary" standard to bar whistleblower claims is nonetheless consistent with *Quest* and Opinion 746.

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Conclusion

In the absence of definitive authority in the context of the IRS whistleblower program, attorneys contemplating filing whistleblower claims need to be mindful of the strict interpretation of RPC 1.6(b)(2)'s "reasonably believes necessary" requirement applied in New York. At a minimum, potential attorney-whistleblowers need to appreciate the additional hurdles they face in seeking to profit from their client's malfeasance.

1. The number of awards is a significant increase over prior years: in fiscal years 2010-2015, the IRS paid between 97 and 133 awards annually. The annual amount of awards in that time span ranged between $18.7 million and $125.3 million, with total awards surpassing $50 million each year from 2012-2016.

2. Both the Internal Revenue Manual and Chief Counsel Notice include procedures aimed at insulating agents from information that could taint their examinations or investigations, including information that may be subject to a valid claim of privilege. See IRS Chief Counsel Notice CC-2010-004 (Feb. 27, 2010), at 4; IRM §§25.2.2.4.4.(1)-(2), 25.2.2.5.(4).

3. Disciplinary counsel also charged one of Koeck's former law professors, who she consulted about the issue, and the attorney who represented Koeck following dismissal of her OSHA claim.

4. Whether Opinion 746 governs in the context of Dodd-Frank whistleblowing is questionable: the Standards of Professional Conduct for Attorneys Appearing and Practicing Before the Commission (the SEC Standards) explicitly permit whistleblowing without client consent in certain circumstances; preclude states from disciplining attorneys who comply in good faith with the SEC Standards, notwithstanding conflicting local standards; and direct that the SEC standards "shall govern" when in conflict with local rules. See 17 C.F.R. §§205.1, 205.3, 205.6. By contrast, IRS rules do not specifically authorize attorney whistleblowing, do not prohibit attorney discipline, and are silent as to preemption. See, e.g., 26 C.F.R. § 301.7623–1.