

General Counsel Permitted to Use Attorney-Client Privileged Information in Whistleblower Retaliation Case

February 24, 2017 – Governance & Compliance Insider
by Rachel Benedict

In a recent case, *Wadler v. Bio-Rad Laboratories, Inc.* case number [3:15-cv-02356](#) (2016), the federal court in the Northern District of California ruled that the plaintiff and former general counsel of Bio-Rad Laboratories could use attorney-client privileged information to support his claim of whistleblower retaliation. The court determined that the Sarbanes-Oxley Act's whistleblower protections preempt the state ethical rules against disclosure of attorney-client privileged information. In reaching its determination, the court noted that this ruling reflects "a reasonable balancing of conflicting policies to the extent that it protects attorney whistleblowers from retaliation even as it requires them to report violations."

The jury awarded the plaintiff \$8 million, including \$5 million in punitive damages, finding that the plaintiff's report of suspected payments in violation of the Foreign Corrupt Practices Act was a substantial motivating factor in Bio-Rad's decision to terminate him in 2013 after serving as Bio-Rad's general counsel for nearly 25 years. The SEC filed an amicus brief in support of the plaintiff's claim, arguing that the federal whistleblower scheme would be "seriously undermined" if attorney-client privilege prevents attorney-whistleblowers from using their reports of potential violations as evidence in anti-retaliation litigation.

The *Wadler* decision may signal a shift in judicial attitude toward the protections afforded in-house attorneys who act as whistleblowers. Previously, courts have not permitted attorney whistleblowers to use attorney-client privileged materials in litigation against their former employers. For example, in 2013, the Second Circuit Court of Appeals ruled that a former general counsel violated New York Rules of Professional Conduct when he used attorney-client privileged materials as evidence in a whistleblower retaliation suit (*United States ex rel. Fair Laboratory Practices Associates v. Quest Diagnostics Inc.*).

The SEC has indicated a willingness to consider the extent of retaliation that a whistleblower suffers when determining the amount of the whistleblower award. In 2015, the SEC announced a maximum whistleblower award payment of 30% of the amounts

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collected in connection with *In the Matter of Paradigm Capital Management, Inc. and Candace King Weir*, File No. 3-15930 (June 16, 2014) because the whistleblower was retaliated against as a result of reporting to the SEC.

If other courts follow the precedent established in *Wadler*, employees in general, and in-house attorneys in particular, may find it easier to support claims of whistleblower retaliation.