NWC | NATIONAL WHISTLEBLOWER CENTER

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August 27, 2015

Via E-mail: angela.marlaud@calbar.ca.gov

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Re: Public Comment on California State Bar Proposed Opinion 13-0005 as it Relates to Attorney Whistleblower Claims

Dear Ms. Marlaud:

I am writing on behalf of the National Whistleblower Center (NWC) in response to the request for comment on California State Bar Proposed Opinion Number 13-0005 concerning ethical prohibitions on disclosing certain information that, while public, may nevertheless be characterized as "secret." The NWC is a non-profit, non-partisan nation-wide organization dedicated to promoting whistleblower disclosures evidencing waste, fraud, abuse, bribery, and corruption. For more information about the NWC visit www.whistleblowers.org.

The NWC is concerned that adopting the proposed opinion as written can produce unintended consequences that will adversely impact attorney-whistleblowers from disclosing waste, fraud and abuse, bribery and corruption. Instead, the State Bar should (1) clarify that the *reason* for disclosure of information by an attorney is relevant to the analysis of whether it is permissible to disclose such information, (2) state that whether publicly available information is "generally known" is an important factor in the analysis of whether it is truly a "secret," and (3) expressly carve out an exception for attorney-whistleblowers consistent with federal common law and statutory protections. Making these three proposed revisions to the Proposed Opinion is critical to safeguarding the important tort remedies the California Supreme Court provided for attorney-whistleblowers in General Dynamics Corp. v. Superior Court, 7 Cal. 4th 1164, 1174 (1994).

I. Relevant Background Concerning the Proposed Opinion

While the Proposed Opinion addresses three different types of disclosures, the problematic portion is contained within its first fact pattern. In the situation presented, a lawyer forwarded a link to a publicly available blog post to his friends, saying only "interesting reading." (Proposed Opinion 1.) The blog post contained a discussion about a prior settlement that the attorney's client had entered into involving conduct that was legally distinct, but factually similar to, the reason the attorney was currently representing the client. (Id.) The blog

post had been authored by a former litigation adversary of the client, after entering into a settlement agreement with him. (Id.) The blog post described the settlement. (Id.)

In relatively brief fashion, the Proposed Opinion concluded that the attorney's simple forwarding of this blog post to his friends, along with a note that the post was "interesting," violated the attorney's duties to preserve his client's secrets under Business & Professions Code 6068(e)(1). (Id. at 4.) The Proposed Opinion notes that, although this information was not privileged (because it was not a confidential communication between an attorney and client) that it nevertheless constituted the client's "secret" because "it was obtained . . . in the course of Lawyer's representation" of the client and its disclosure would likely be "embarrassing or detrimental" to the client. (Id.) It did not matter that the blog post was publicly available, and the Proposed Opinion is unclear as to how widely known or accessed the blog post was. The Proposed Opinion does not include in its analysis any discussion of the motivation for the attorney's forwarding these statements to his friends, and thus the gratuitous nature of this disclosure did not factor into the Proposed Opinion's analysis.

II. The Proposed Opinion's Conclusion Is Inconsistent with the California Supreme Court's Holding in General Dynamics and would Make Attorney Whistleblower Claims Extremely Difficult

The Proposed Opinion's conclusions regarding the first fact pattern discussed above would have harmful consequences on attorney whistleblowers in particular because of its overly broad interpretation as to what constitutes "secret" client information. The California Supreme Court long ago held in General Dynamics Corp., 7 Cal. 4th 1164, that attorneys can assert wrongful discharge claims against their employers despite their duties to their clients. Accord GTE Prods. Corp. v. Stewart, 653 N.E.2d 161 (Mass. 1995). Indeed, the General Dynamics opinion explains at length how attorneys—and in particular, in-house counsel, have an "*even more* powerful claim to judicial protection than their nonprofessional colleagues" because of their "virtually complete dependence on the good will and confidence of a single employer to provide livelihood and career success" and the fact that their work is "linked by their nature and goals to important values affecting the public interest at large." Id. at 1181-82 (emphasis in original); see also, Van Asdale v. Int'l Game Tech., 577 F.3d 989, 996 (9th Cir. 2009) (attorneys can assert federal whistleblower claims under the Sarbanes Oxley Act despite potential confidentiality or privilege concerns).

Nevertheless, General Dynamics was clear that, because of their countervailing duties to preserve their clients' secrets, such attorneys would not always be able to bring such claims. "[T]he in-house attorney who publicly exposes the client's *secrets* will usually find no sanctuary in the courts. Except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client." Id. at 1190 (emphasis added). Thus, the key question under General Dynamics is: when is an attorney considered to have "publicly expose[d] the client's secrets."

The Proposed Opinion's analysis of what constitutes a "secret" in its first fact pattern regarding the blog post would make it significantly more difficult to assert a potential attorney whistleblower claim because the only two requirements necessary for a finding of the existence of a "secret" are (1) that the information be "embarrassing or detrimental to the client" and (2)

that the information be obtained "during the course of the representation" (which includes obtaining information from public sources during the representation). The problem is that, as a matter of necessity, attorney whistleblower claims can be expected to meet both requirements.

With regard to the first requirement, as General Dynamics itself noted, suing one's employer for wrongful discharge will necessarily disclose information that will be embarrassing or detrimental to the client. Id. at 1185-86 (acknowledging the "harm" that such tort actions potentially cause to the attorney-client relationship). There is no doubt that allegations of corporate fraud or discrimination may be embarrassing or detrimental to corporations. But, because of the important underlying policies at stake, the California Supreme Court held that, on balance, the benefits of rectifying such conduct was worth the potential detriment that exposing it might cause to the attorney-client relationship. Id. at 1186-88; see also Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 309 (2001)("[A]n in-house counsel is an employee and entitled to the same legal protections afforded all employees, including the right not to be discriminated against on the basis of pregnancy, childbirth, or medical conditions related to pregnancy or childbirth."). Other jurisdictions have reached similar conclusions. See, e.g., Crews v. Buckman Laboratories International, 78 S.W.3d 852 (Tenn. 2002) ("we hereby expressly . . . permit in-house counsel to reveal the confidences and secrets of a client when a lawyer reasonably believes that such information is necessary to establish a claim or defense on behalf of the lawyer in a controversy between a lawyer and a client"); accord Burkhart v. Semitool, Inc., 5 P.3d 1031(Mont. 2000); Parker v. M & T Chemicals, Inc., 566 A.2d 215 (N.J. Super. 1989; Alexander v. Tandem Staffing Solutions, Inc., 881 So. 2d 607 (Fla. Dist. Ct. App. 2004); GTE Prods. Corp. v. Stewart, 653 N.E.2d 161 (Mass. 1995); Parker v. M & T Chems., Inc., 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989); Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992); Willy v. Coastal States Mgmt. Co., 939 S.W.2d 193 (Tex. Ct. App. 1996); Spratley v. State Farm Mut. Auto Ins. Co., 78 P.3d 603 (Utah 2003).

Similarly, with regard to the second requirement, any wrongful termination claim will necessarily arise from information the attorney learned "in the course of" the representation, particularly with in-house attorneys. That is because it is clearly through their employment with a company that an in-house attorney learns that he or she has been discriminated against, or that the company has engaged in malfeasance. That is especially true under the broad definition of what constitutes information obtained "in the course of employment" as described under the Proposed Opinion. It includes not only *confidential* information that has been shielded from public view, but also publicly available blog posts (perhaps even those printed in such widely read blogs as the Wall Street Journal) that the attorney happens to access while still representing a client. Precluding the use of such public information, irrespective of how well known or accessed it is will doom whistleblower claims in particular. For example, many times information about corporate fraud (forming the basis of a whistleblower claim) can be demonstrated entirely by reference to public documents—such as SEC filings for public companies. To hold that publicly available information nevertheless constitutes a "secret" would make it impossible for in-house attorneys to bring whistleblowing claims to the attention of the SEC. Such an overly-broad application runs contrary to the protections the SEC chose to afford all attorneys practicing and appearing before it, see 17 C.F.R.§ 205.1, and, as pointed out in Van Asdale, 577 F.3d at 996, would run afoul of the text and structure of Section 1514A(b) of the Sarbanes-Oxley Act.

Thus, as written, the analysis in the Proposed Opinion imprudently ignores the rights whistleblowers are entitled to as a matter of sound public policy and in so doing ignores the California Supreme Court's express holding that attorneys are entitled to raise whistleblower claims even if doing so may reveal confidential or detrimental information of the client. As such, the Proposed Opinion's analysis is flawed, and should be revised.

California is already the most restrictive state in the country regarding when an attorney may blow the whistle, see generally Latham & Watkins LLP, Attorneys as SEC Whistleblowers: Can an Attorney Blow the Whistle on a Client and Get a Monetary Award?, at 2, 10-15 (May 2013).[1] This Proposed Opinion would only serve to further isolate California regarding its treatment of attorney-whistleblowers.

III. The Proposed Opinion Can Be Corrected to Address These Issues

There are several ways to correct the above-identified problem with the Proposed Opinion. First, the Proposed Opinion could carve out a specific exemption in light of the holding of General Dynamics for attorney-whistleblowers, who may disclose information that might otherwise be considered a "secret." It can do so by expressly holding that such disclosures can be made provided that "some statute or ethical rule, such as the statutory exceptions to the attorney-client privilege codified in the Evidence Code [§§ 956-958] specifically permits the attorney to depart from the usual requirement of confidentiality . . ." Id. at 1189. Thus, there would have to be some consideration in the Proposed Opinion of *why* the attorney was making the disclosures. Id.; see also see also Dixon v. State Bar, 32 Cal. 3d 728, 735 (1982) ("*gratuitous*" disclosure about a former client and his sister violated an attorney's duties to preserve his client's secrets.) The currently drafted Proposed Opinion contains no such analysis, and thus ignores the entirely gratuitous nature of the disclosure at issue here (where an attorney merely wanted to impress his friends). As a result, the Proposed Opinion's conclusion's definition of "secret" information sweeps far more broadly than perhaps is intended, making it much more difficult to bring attorney-whistleblower claims.

Second, the Proposed Opinion can include a requirement that publicly accessible information—such as a blog post or prior criminal conviction—can only be considered a "secret" to the extent that it is not widely known. Thus, for example, a little-known personal blog with no readership would be treated differently than widely read blogs of high-profile newspapers such as the San Francisco Chronicle. Other jurisdictions employ similar requirements before disclosure of a public record can be considered to breach an attorney's duty to preserve client secrets. See, e.g., Massachusetts Rule of Professional Conduct 1.6, cmt. 3A ("Confidential information" does not ordinarily include . . . information that is generally known in the legal community or in the trade, field or profession to which the information relates. . . . Information about a client contained in a public record that has received widespread publicity would fall within this category."); Texas Disciplinary Rules of Professional Conduct 1.05(b) (stating that "a

[1] Available at http://lw.com/thoughtLeadership/SEC-Whistleblowers (last visited August 26, 2015) (conducting a 50-state survey and noting that California is the only state to challenge the SEC's position that federal law trumps contradictory state rules of professional ethics related federal claims arising from attorney whistleblowing).

lawyer shall not knowingly . . . [u]se confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation *or the confidential information has become generally known.*" (emphasis added)); DC Bar Rule of Professional Conduct 1.6, cmt. 10 ("[T]he fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about the former client when later representing another client."); see also Restatement (Third) of the Law Governing Lawyers §59 (2001) ("Confidential client information consists of information relating to representation of a client, *other than information that is generally known.*" (emphasis added)). Thus, the Proposed Opinion should be edited to include additional facts regarding how widely known the blog post was, and about whether the underlying information contained within the post was likewise generally known. The Proposed Opinion should then analyze how the relative degree to which the information in the post is generally known affects its status as "secret" information that an attorney cannot ethically disclose. It should also clarify that certain widely distributed public documents, such as SEC filings, should never qualify as "secrets."

Third, the Proposed Opinion should be revised to embrace established federal common law rights applicable to attorney-whistleblowers. See Willy v. Admin. Review Bd., 423 F.3d 483, 500 (5th Cir. 2005) (under the federal environmental and nuclear whistleblower statutes a "lawyer . . . does not forfeit his rights [as an employee] simply because to prove them he must utilize confidential information"); Van Asdale, 577 F.3d at 996 (the "text and structure of the Sarbanes-Oxley Act" allow for attorney-whistleblower claims despite any privilege-related concerns); Siedle v. Putnam Invs., Inc., 147 F.3d 7 (1st Cir. 1998); Kachmar v. Sunguard Data Sys. Inc., 109 F.3d 173 (3d Cir. 1997); Goffer v. Marbury, 956 F.2d 1045 (11th Cir. 1992); Heckman v. Zurich Holding Co. of Am., 242 F.R.D. 606 (D. Kan. 2007); Meadows v. Kindercare Learning Ctrs., U.S. ex rel. Doe v. X Corp., 862 F. Supp. 1502 (E.D. Va. 1994).

IV. CONCLUSION

The Proposed Opinion needs to address and preserve the important remedy of wrongful discharge as applied to attorney-whistleblowers. While the opinion does not explicitly address the attorney-whistleblower context, its publication will have an immediate chilling effect on internal attorney-whistleblower activity because the extension to attorney-whistleblower cases is a foreseeable consequence. Accordingly, consistent with the California Supreme Court's holding in General Dynamics, the Proposed Opinion should be revised to explicitly address and carve out an exception for attorney-whistleblowers and further refined to address and adopt the public policy considerations found in emerging federal common law and federal statutory protections.

Sincerely,

Michael D. Kohn
President