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WHISTLE-BLOWER PROTECTION DEPENDS ON WHO HEARS WHISTLE

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Stephen Heller, a temporary worker for Jones Day in Los Angeles, was alarmed by what he heard on an audiotape he was assigned to transcribe for a lawyer.

On the tape, attorney Scott Shaw is heard describing how the firm's client, Diebold Election Systems, violated a $12 million contract with the state of California by changing the software in its voting machines. On the tape, Shaw explains how the firm would defend the company if Secretary of State Kevin Shelley discovered the software switch.

After transcribing the tape into a memorandum, Heller, an out-of-work actor, began searching Jones Day's computer archives, downloading and printing anything he found about Diebold - roughly 500 pages - over the next four days in January 2004.

Three months later, in the March 2004 presidential primary, Diebold's voting machines in Alameda County failed. Voters were given paper ballots. San Diego County didn't have a back-up plan when their Diebold machines failed that day. An estimated 40,000 people were unable to vote.

In April, a month after the election called into question Diebold's voting machines, four of the Jones Day memos were posted on the Oakland Tribune's Web site. Heller had given them to a voting-rights activist who gave them to a reporter.

Now, two years later, Los Angeles District Attorney Steve Cooley has charged Heller with three felonies: unlawful access to computer files, commercial burglary, and receiving stolen property. A judge is expected Monday to set a preliminary hearing date in Heller's case.

Heller's supporters say he should not be prosecuted, that he should be protected under whistle-blower law because he made public information of interest to all California voters. The district attorney's office maintains that whistle-blower status does not apply when a person violates attorney-client privilege.

"There is a way if a person wants to provide information of misconduct to authorities," district attorney spokeswoman Sandi Gibbons said, "[but] it doesn't protect them from attorney-client privilege violations."

Michael Kohn, general counsel of the National Whistleblower Center in Wasington, D.C., said Heller was just following in the steps of other courageous whistle-blowers. Exposing wrongdoing to a government agency is not required.

"The press is perfectly acceptable," Kohn said. The "grandfather of all whistle-blowers," Daniel Ellsberg, gave the "Pentagon Papers" to the New York Times, Kohn said.

Charges against Ellsberg, who stole the documents from Santa Monica-based Rand Corp., where he worked, were eventually dropped.

The 1990s case of Dr. Jeffrey Wigand has many similarities to Heller's case. Wigand revealed to the television news magazine "60 Minutes" evidence the tobacco industry manipulated nicotine levels in cigarettes to make them more addictive. Wigand decided to become a whistle-blower after looking at documents smuggled out of law firm Wyatt, Tarrant & Coombs, which represented tobacco company Brown & Williamson. The documents were given to him by a concerned paralegal, Merrell Williams. In June 1994, the New York Times ran long articles based on thousands of documents taken from Brown & Williamson's lawyers. Furthermore, UC San Francisco medical professor Stanton Glantz put the documents on the Internet.

Both federal and state whistle-blower statues protect an employee or former employee from retaliation, legal or otherwise. The laws, however, leave prosecutorial discretion to law enforcement agencies.

In the *Wigand* case, Brown & Williamson hired a public relations firm to pitch news stories that

called into question Wigand's credibility. Wigand sued the tobacco company and won.

When the Diebold memos were made public, Jones Day launched an internal investigation of the firm's word processing department to find the person responsible for leaking sensitive internal documents. A trail of computer access codes, building pass keys, and the word processing department's own computer serial number tracking system led them to Heller. In a detailed letter to Los Angles police detectives Juan Martinez and Brian Collins, Jones Day partner Brian O'Neill outlined the firm's investigative methods and findings. "During our meeting you raised a question of whether copying documents from a computer system such as the Jones Day system would comprise a violation of [the state Penal Code]. Clearly such conduct would violate the statue," O'Neill wrote.

"What we've done here is how you would expect a victim of a crime would react," said Jones Day attorney John Majoras, who brought client Diebold to the firm.

Gibbons said Heller is a thief. To qualify as a whistle-blower, Heller would have had to give the documents to the Los Angeles Police Department or some other government agency, she said.

"But it doesn't make any difference," Gibbons said. "He's not charged with what he did with the documents. He's charged with taking them."

"That makes no sense," Kohn said. "Saying if he turned them over to government he would have been protected - there's no law that provides for that."

Whether the documents were turned over to the government or to the press, the same "crime" was committed, Kohn said. The important part is "the fact that he turned them over with no self-interest. [The district attorney] should refuse to prosecute. They should be protecting someone who shed light on crime."

Gillian Lester, a visiting law professor at Boalt Hall, said the fact Heller was working for Diebold's attorneys limits his ability to be a whistle-blower.

"Attorney-client privilege is sacrosanct," Lester said. "If he were working for Diebold when he took the documents, it would have been different."

Again, Kohn disagrees. Attorney-client privilege is not the cover it used to be, he said. "Attorney-client privilege does not protect clients from perpetrating a fraud."

Under the Sarbanes-Oxley law Congress passed in 2002 to clean up corporate fraud, lawyers are required to expose clients if they are lying to investors or to the Securities and Exchange Commission. And, recently, the 5th U.S. Circuit Court of Appeals in New Orleans allowed attorney-client privileged documents to be used in the defense of an in-house lawyer who blew the whistle on his employer for violating environmental laws.

"[Heller] engaged in what the government considered a criminal act. [But] that doesn't define someone as a whistle-blower," Kohn said. "What does is their loyalty to the truth."

When the Tribune referred to the leaked Diebold memos in an April 2004 story and posted them on its Web site, Jones Day didn't go after Heller. The firm sued the Tribune's parent company, MediaNews Group. Days later, the law firm dropped the suit. MediaNews Group still is trying to get a court to order Jones Day to pay the newspaper's legal fees for defending what the newspaper claims was a frivolous lawsuit.

Majoras said the law firm continues to believe the lawsuit was justified and therefore should not have to pay legal fees.

"The motivation for dropping the suit was because the information was already out in the public," Majoras said. "So litigating to get something back was pretty fruitless."

Federal prosecutors and the state attorney general both looked at the Heller case but did not file charges.

Spokesman Tom Dresslar said Attorney General Bill Lockyer never considered prosecuting Heller. Gibbons said the district attorney took the case "because the crime happened [in Los Angeles County]."

Kohn, who wrote a book on whistle-blower law, said, "The charges are bogus. It's not commercial burglary because [Heller] didn't gain financially by taking the documents. Receiving stolen property is a bogus charge because the law firm and the attorney cannot hold as property evidence of fraud."

Heller accessed the computer files using a pass code given to him by Jones Day.

Kohn said Jones Day had some options to help their client if they knew Diebold had made false statements to California officials. "They can withdraw and not represent them," he said.

The firm also could "convince the client to do the right thing. If they fail to do either of those,

[Heller's] actions were sound and proper because neither the client or these attorneys were seeking redress."

But Majoras said Heller was a firm employee and had a duty to abide by the rules of attorney-client privilege.

"We are constitutionally guaranteed the right to counsel," he said, "and a free and unfettered ability to share information with your counsel. Anything that undercuts attorney-client privilege is something we should be concerned about."

Heller did sign a confidentiality agreement but only after he had worked at Jones Day for six weeks and taken most of the Diedbold documents.

Cindy Cohn, legal director of the Electronic Frontier Foundation, said it was only after the Jones Day memos became public that Diebold faced real consequences for its actions; Shelley decertified the company's voting machines, and Lockyer joined the 2003 whistle-blower suit brought by activists Bev Harris and Jim March.

"Diebold was able to deny that they were violating the law, and had been denying they broke the law in the public debate," Cohn said. The company and its supporters successfully portrayed Harris and a small band of activists upset about the voting machines as fringe elements, she said. After the memos surfaced, "we were able to demonstrate that not only were they not kooks, they were right."

Majoras denied the public release of the memos was a watershed moment.

"Diebold Election Systems was having ongoing contact with various elections officials in California going well back in time," he said. "Whatever this individual did, didn't start any type of contact with Diebold and California officials. To suggest that anything in the Jones Day materials or anything Diebold did amounted to criminal behavior is ludicrous. Secretary of State Shelley asked the attorney general's office if there was anything criminal, and the attorney general's office said no."

Heller gave the Jones Day memos to Harris. She passed them along to the Tribune. She also says the memos were given to a secretary of state elections investigator during public hearings on e-voting. The investigator, Michael Wagaman, said in an interview with the LAPD that he recalled someone giving him a computer disk during the hearings but that he never looked at the files.

Along with giving the memos to the newspaper, Harris posted 15 of them on her Web site.

The attorney general asserted Diebold violated California's False Claims Act. Diebold settled for $2.6 million.

Alameda County spent nearly $12 million in taxpayer money for Diebold machines that failed during the March 2004 presidential primary. San Diego County spent over $30 million on Diebold voting machines that failed.

Electronic voting issues statewide triggered an investigation of Diebold by Shelley.

Asked why Diebold wasn't forced to fully reimburse the counties for the costs of the failed machines, Dresslar said there were other things Diebold promised to do that weren't outlined in the settlement. The company agreed to pay for alternative methods of voting in areas where its machines had failed.

"The people of California owe Stephen Heller a big thank you," Cohn said. "I'm just heartsick that he's being criminally prosecuted for trying to protect our votes. [The district attorney] shouldn't be spending our tax dollars to send him to jail."