

# Analysis

## In-House Counsel

### Lawsuits by In-House Counsel Against Their Employers (Part II)

BY ROY A. GINSBURG

As the *Balla*, *Nordling*, and *General Dynamics* cases, which were discussed in Part I of this article (23 CCW 368, 11/26/08), illustrate, courts have been attempting for some time to resolve the conflict between in-house attorneys' rights to assert legitimate claims against their employers and the confidentiality and fiduciary obligations required of all lawyers. This debate continues to rage.

#### 'Kidwell' Case

In the recent case of *Kidwell v. Sybaritic, Inc.*, 749 N.W.2d 855 (2008), the intermediate appellate court in Minnesota addressed several issues implicated when in-house counsel initiates litigation. Kidwell was the general counsel of the corporate defendant for only about 10 months. Sybaritic terminated his employment a few weeks after he sent an e-mail to top management expressing his concern that the company was engaging in various unlawful conduct. Following termination, Kidwell sued Sybaritic, under Minnesota's whistleblower statute. After the jury trial, which Kidwell won, the company appealed.

The appellate court explored two related issues:

- whether in-house counsel may ever sue their employers under the state's whistleblower statute; and
- whether communications made by in-house counsel relating directly to their job responsibilities fall within the scope of the statute.

Kidwell persuaded the court as to the former issue but not the latter.

With respect to the first issue, the court of appeals noted that some jurisdictions had adopted the "attorney-client defense," i.e., the notion that because in-house counsel would have to reveal information encompassed by the attorney-client privilege to pursue a whistleblower or retaliation claim, such claims are absolutely barred. The court observed, however, that "the majority view . . . appears to reject the attorney-client defense and to permit such claims, though sometimes with the proviso that in-house attorneys may pursue such claims so long as they do not run afoul of the duty of confidentiality . . ." *Id.* at 863-64. The court of appeals elected to follow that "majority" view, holding that a claim under the whistleblower statute is not "per se barred by the so-called attorney-client defense."

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Having concluded that even in-house counsel may avail themselves of the whistleblower statute, the court then evaluated whether Kidwell had presented evidence sufficient to prove that he made a good faith report of a violation of law. Although the appellate court considered several alternative arguments on this issue, the argument that carried the day for the employer was precedent standing for the proposition that "a

former employee may not maintain an action under the Whistleblower Act if the alleged report is a communication that was made to fulfill the employee's job responsibilities." *Id.* at 865. The court observed that if an employee makes a report as part of his or her job duties, rather than to "expose an illegality," the requirements of the whistleblower statute have not been satisfied. Again relying on precedent, the court stressed, "an employee does not engage in protected conduct under the Whistleblower Act if the employee makes a report in fulfillment of the duties of his or her job." *Id.* at 866.

#### 'Nesselrotte' Case

Another recent case, *Nesselrotte v. Allegheny Energy, Inc.*, C.A. No. 06-1390, 2008 WL 2858401 (W.D. Pa. July 22, 2008), also explored whether an in-house counsel may pursue claims against her employer.

In *Nesselrotte*, the in-house counsel who had been fired by her employer, sued for sex discrimination, age discrimination, and retaliation. In the 20-day period between notice of termination and last day of employment, Nesselrotte copied and removed numerous documents from her employer, including many designated as "confidential" or "privileged." Nesselrotte justified her removal of these privileged materials on the basis of Rule 1.6(c)(4) of the Pennsylvania Rules of Professional Conduct, which provides a lawyer the right to reveal information if necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . or to respond to allegations in any proceeding concerning the lawyer's representation of the client."

The court didn't buy Nesselrotte's argument, rejecting the notion that a lawyer may rely on Rule 1.6 to justify removing and/or copying privileged or confidential documents. The court

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emphasized, “[T]he proper avenue for a former employee (even an attorney) to obtain privileged and/or confidential documents in support of his or her claims is through the discovery process, . . . not by self-help.” *Id.* at \*8.

The judge observed, “the Court declines to hold that Rule 1.6(c)(4) of the Pennsylvania Rules of Professional Conduct trumps the attorney-client privilege in the context of this case, where an attorney employed self-help by removing without authorization privileged and confidential documents seemingly in breach of her former employer’s Ethics Code and Confidentiality Agreement.” *Id.* at \*10.

The *Nesselrotte* case is interesting but turned on the imprudent decision of the in-house attorney to steal the documents she felt would benefit her case. Had she instead elected to obtain access to the privileged documents through appropriate discovery mechanisms, the court would have had to resolve the more challenging issue of whether an attorney suing for discrimination and retaliation could obtain access to materials otherwise covered by the attorney-client privilege. Assuming the court permitted access to these materials in discovery, the court then would have to make the more difficult determination regarding how these materials could be used at trial.

The recent holdings of *Kidwell* and *Nesselrotte* should increase companies’ general comfort level regarding critical (and potentially damaging) information entrusted to in-house counsel. As the cases discussed above illustrate, issues abound when an in-house counsel elects to sue, especially if the litigation is based upon a

whistleblower claim or a claim for termination in violation of public policy. Because those causes of action have a high probability of implicating confidential, attorney-client privileged information, courts have struggled to define appropriately the rights of attorney and employer alike.

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Courts in some jurisdictions simply prohibit these kinds of claims, given their risk of harming the attorney-client relationship and the sanctity of attorney-client communications. The majority of jurisdictions, however, permit such claims, so long as adequate protections are adopted to ensure the confidentiality of privileged information.

In situations where the lawsuit could not be pursued without the disclosure of privileged information, courts uniformly reject this type of litigation. In certain jurisdictions, including Minnesota, a whistleblower claim by in-house counsel has been further limited to matters falling outside the scope of the in-house counsel’s job responsibilities.

### **Practical Steps**

Because the stakes associated with litigation by in-house counsel are po-

tentially so high, companies should consider the following practical steps to minimize this type of lawsuit:

1. Utilize contractual provisions at the time in-house counsel are hired to reinforce confidentiality and loyalty obligations.

2. Avoid assigning (if possible) dual roles to in-house counsel, one legal and one non-legal. This should reduce the risk that a lawyer will contend his or her lawsuit is being asserted in a non-legal capacity.

3. Define broadly the scope of in-house counsel’s legal role, to ensure it encompasses the obligation to report to the company any concerns about inappropriate, wrongful, or illegal conduct.

4. If it becomes apparent to the company that its relationship with in-house counsel is strained or may rupture, take proactive steps to remind counsel of his or her responsibilities to preserve the confidentiality of attorney-client privileged information. If the relationship deteriorates further, take proactive steps to protect the company’s critical data to which in-house counsel may have access.

5. If the relationship cannot be salvaged, consider an appropriate separation package that, again, emphasizes the attorney’s obligations to maintain the confidentiality of the company’s information, and to engage in conduct consistent with the duties of loyalty and candor. In connection with any compensation provided to in-house counsel at the time of separation, obtain a comprehensive general release, coupled with a duty of cooperation.

These steps should further reduce the risks to the company following the voluntary or involuntary termination of in-house counsel’s employment.



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