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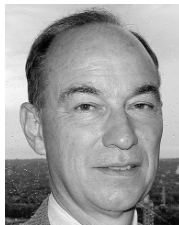
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## — Commentary —

### Lawyer whistleblower ethics issues — a difficult duty

By William Wernz

How should an in-house lawyer's employment rights and duties be balanced with the ethics and fiduciary obligations of confidentiality? In *Kidwell v. Sybaritic* (Minn. June 24, 2010) the plurality opinion provides the civil law answer to this question, leaving the ethics debate to the concurrence and dissent.



William Wernz

This question is also addressed in *Nordling v. Northern States Power, Co.*, 478 N.W.2d 498 (Minn. 1991) and in the 2005 amendments to Rules 1.6, 1.13, and 3.3, Minn. R. Prof. Conduct.

#### Facts

On April 24, 2005, Kidwell, the general counsel of Sybaritic, Inc. sent an e-mail, titled "A Difficult Duty," to Sybaritic's managers. The e-mail stated, "It is my firm conviction that Sybaritic intends to continue to engage in tax evasion, the unauthorized practice of medicine and obstruction of justice. Accordingly, it is my intention to advise the appropriate authorities of these facts." Kidwell sent a copy of the e-mail to his father, a non-lawyer confidante. In May 2005, Sybaritic fired Kidwell. Kidwell brought a whistleblower claim of wrongful termination against Sybaritic. A jury found that Kidwell was fired in retaliation for blowing the whistle, but the appellate courts reversed. A Minnesota Supreme Court plurality found the evidence compelling that Kidwell's purpose was reporting "a potential problem to his

client," as part of his assigned duties, rather than blowing a whistle.

#### Confidentiality

Rule 1.6 generally requires that a lawyer keep client information confidential, where disclosure would be embarrassing, detrimental or unauthorized. For Kidwell's threatened disclosure to be proper, some exception to the general rule would have to apply. The main rules governing an in-house counsel who is thinking of blowing the whistle on an employer's conduct are 1.6(b) (Confidentiality), 1.13(b) (Organization as Client) and 3.3 (Candor to the Tribunal).

#### Necessity

The 10 sections of Rule 1.6(b) allow disclosures as "necessary" for specified purposes, such as rectifying a fraud in which a lawyer's services were used. None of the 10 sections would have allowed Kidwell to disclose Sybaritic's confidential information to "appropriate authorities." Rule 1.6(b)(8) allowed Kidwell later to make disclosures necessary for his whistleblower claim, but this section does not authorize disclosures to authorities before employment termination. Even when disclosure is authorized, however, only information necessary for the permitted purpose may be disclosed. For example, a whistleblower suit might be served but not filed, to determine whether settlement is feasible. The complaint could meet notice pleading standards but not aver sensitive matters in detail. Permission to seal files might be sought. In short, even lawyers who have been wrongly fired, for whistleblowing, may disclose only as necessary.

#### Knowledge / Suspicion

Rules 1.13(b) and 3.3 *require* that a lawyer disclose information in certain carefully defined circumstances. Both rules are triggered when a lawyer "knows" of certain improprieties. "Knows" is defined as "actual knowledge." In contrast, the whistleblower statute protects an employee who "in good faith, reports a violation or *suspected* violation." The court repeatedly refers to what Kidwell "suspected," not what he "knew." If Kidwell merely *suspected*, but did not *know*, there was client misconduct, he had no warrant under Rules 1.13 and 3.3 to make or threaten any disclosure outside the company. Even if Kidwell had known of misconduct, Rules 1.13 and 3.3 have other limits on disclosure.

#### Organization

Minnesota's 2005 amendment to Rule 1.13(b) requires a lawyer for an organization who knows of insider misconduct to try to "proceed as is reasonably necessary in the best interest of the organization." Normal remediation involves reporting "up the ladder," *within the organization*. Minnesota did *not* adopt ABA Model Rule 1.13(c), which allows a company lawyer to disclose insider misconduct to outside authorities, where the misconduct is apt to injure the company substantially. Minnesota's Rule 1.13 does not provide any authority for disclosure of confidential client information to "appropriate authorities" or other outsiders, even where the lawyer has actual knowledge of misconduct.

#### Tribunal

Rule 3.3 *requires* that a lawyer who *knows* of fraud on a tribunal "shall take

reasonable remedial measures.” If remonstrating with the client is ineffective, the lawyer ordinarily must disclose to the tribunal, even where disclosure is of privileged information. Rule 3.3 did not apply here, however, for two reasons. First, Kidwell’s suspicion that Sybaritic was “obstructing justice,” by withholding discovery responses, fell short of knowledge. Second, the Sybartic litigation was in Estonia, so Estonian rules, not Minnesota Rule 3.3, applied, pursuant to Rule 8.5(b), governing choice of law.

### Threat

Kidwell *threatened* to report what he believed to be Sybaritic’s misconduct, to “appropriate authorities.” The threatened disclosure was not authorized by Rule 1.6, 1.13, 3.3, or any rule. Whether Kidwell’s threat was an unlawful “threat to expose a secret,” under Minn. Stat. § 609.27, Subd. 1(4), is beyond the scope of this article. The court did not consider the threat, because Sybaritic did not cite the threat as a reason for Kidwell’s termination, but the threat presents the most serious issue for ethics analysis.

### Rule 1.6. Amendment

The version of Rule 1.6(b)(5) that was in effect from 1985 to 2005 allowed disclosure of confidential information when “necessary to establish or collect a fee,” but did *not* allow disclosure to pursue a “claim.” In 1991, *Nordling* allowed an in-house counsel to make a wrongful discharge claim, but did not allow confidential information to be disclosed to support the claim. In 2005, Rule 1.6(b)(8) was adopted, allowing disclosures necessary “to establish a claim,” including a whistleblower claim, but this amendment did *not* expand a lawyer’s permission to disclose client information *before* an employer fired or disciplined a lawyer.

### Kidwell On Ethics

The plurality opinion did not address ethics, because it resolved Kidwell’s claim by application of statute to facts. The concurrence and dissent debated ethics issues energetically, even though they apparently would not disagree on several fundamental points: (1) Rule 1.6(b)(8) generally permits whistleblower claims. (2) Kidwell’s disclosure to his father was not permissible. (3) Kidwell’s claim would

have been impermissible if Rule 1.6(b)(8) had not yet been adopted. (4) Kidwell would have had no claim if the jury found that Kidwell’s disclosure to his father was the basis on which Sybaritic fired him.

### Court/ Legislature

The concurrence and dissent argue a foundational ethics issue, namely who declares the scope of lawyers’ professional obligations. The dissent cites authority that “it is the duty of this court to apply the law as written by the legislature.” However, the dissent balances its statement of duty to the Legislature by stating that Rule 1.6(b)(8) permits whistleblower claims. The dissent impliedly invokes the court’s traditional right, asserted in *Nordling*, to determine that its confidentiality rules limit the application of legislation to lawyers. The real dispute between dissent and concurrence is how broadly the court’s prerogative should be construed.

The court could not simply abdicate to the Legislature. The whistleblower statute is oriented to exposure, while the ethics rules are oriented to confidentiality, with a few, carefully chosen exceptions. The statute protects an employee who in good faith reports a “suspected” violation of law to “any governmental body or law enforcement official.” If only the statute governed, in-house counsel, instead of reporting insider misconduct “up the ladder,” within the company, could claim a statutory employment protection for reporting, instead or in addition, to the F.B.I.<sup>3</sup> If, as Kidwell threatened, a lawyer reported a client’s misconduct to law enforcement, and none of the Rule 1.6 exceptions to confidentiality applied, the lawyer would be subject to severe discipline. The discipline would not depend on whether the lawyer was in-house or outside counsel. It would be anomalous to protect the in-house counsel’s employment rights in such circumstances, but the whistleblower statute would do so, unless the court modified the statute as applied to lawyers.<sup>4</sup> If the court were to treat in-house counsel just like other whistleblowers, employers could respond by entrusting their sensitive information only to outside counsel. Put differently, a jurisprudence that aimed at broad whistleblower protection of a small number of in-house counsel could

result in a general loss of status and employment for in-house counsel.

The proper balance of lawyer confidentiality and social justice, in various manifestations, has been debated, in the wake of Enron and other corporate scandals, by bar associations, courts, the Securities & Exchange Commission, and the United States Congress. The balance has tipped farther toward disclosure rights and duties than ever before. *Kidwell* provides an occasion for reviewing these developments and for noticing that the circumstances in which the ethics rules permit in-house counsel to disclose confidential information outside the organization remain very limited.

1. Where a lawyer suspects or believes there is misconduct within an organizational client, but does not know of such misconduct, the lawyer will normally communicate information to a client contact, even though the disciplinary threshold is at the higher level of knowledge.
2. The dissent finds the concurring opinion’s reading of Rule 1.6(b)(8) “narrow,” because “Rule 1.6 specifically contemplates whistleblower claims.” Kidwell’s disclosure to his father was not, however, a whistleblower report. The concurrence equates a violation of Rule 1.6 with a breach of fiduciary duty, but the court has normally found violation of a rule to be at most some evidence of breach of fiduciary duty. Here the point is technical, because Kidwell’s disclosure to his father would plainly violate both ethics and fiduciary standards.
3. Because outside counsel is not protected by the whistleblower statute, any broad interpretation to protect in-house counsel who make disclosures outside the organization would presumably be followed by a shift in retention on sensitive matters, from in-house to outside counsel.
4. Holding that statutory “good faith” requires obedience to the Rules of Professional Conduct would be a slight re-characterization of the concurring opinion.



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