Federal Whistleblower Protections
A Case Study of the General Counsel As Whistleblower
Wadler v. Bio-Rad Industries, Inc. (© July 14, 2017)

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A. Introduction and Overview[3]

Workplace whistleblowers – those who uncover and expose illegal and improper conditions and practices – serve an important societal function by revealing corporate misconduct that might otherwise go undetected. Whistleblower revelations sometimes reveal ongoing conduct that constitutes violations of law that threaten the public safety, or pose the risk of financial harm to the public or the government.

Whistleblowers often face considerable risk to their livelihoods and to their personal and professional reputations. They sometimes face not only the disdain of their employers, supervisors and professional colleagues, but also retaliation in the workplace, in the form of demotion, isolation and termination.

Federal and state law protects whistleblowers from workplace retaliation in a wide range of industry and employment sectors by providing the opportunity to assert a claim for damages and other relief in court or with an administrative agency, as the case may be.

The case of *Wadler v. Bio-Rad, Industries, Inc*., Case No. 15-cv-02356 (N.D. Cal.) ("*Wadler*") illustrates the scope and operation of the protections afforded to workplace whistleblowers in the real world courtroom arena.[4]

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[3] The purpose of this article is to analyze the *Wadler* case in the broader context of a survey of federal and state laws protecting whistleblowers from workplace retaliation. The article offers a very general overview on the principal issues that arise in this setting, and cites to select, illustrative Court and administrative decisions for the principles cited. These issues have been the subject of extensive judicial assessment involving a wide variety of nuanced and distinct factual scenarios, and scholarly and practical commentary and analysis. This article is therefore not intended as a substitute for legal advice as to any particular case. Sound legal advice can only be given on a case-by-case basis, taking into account the unique circumstances of any given case.

[4] The *Wadler* case generated a number of reported decisions at various stages of the litigation that address the nature and scope of the whistleblower claims at issue. *See, e.g. Wadler v. Bio-Rad Industries, Inc*., 141 F.Supp.3d 1003 (N.D.Cal. 2015) (denying in part and granting in part motion to dismiss Sarbanes-Oxley and Dodd Frank claims); *Wadler v. Bio-Rad Industries, Inc*., 2015 WL 8753292 (N.D.Cal. Dec. 15, 2015) (denying motion for interlocutory appeal of ruling on motion to dismiss); *Wadler v. Bio-Rad Industries, Inc*., 2016 WL 6070530 (N.D.Cal. October 17, 2016)(motion to strike report of plaintiff's rebuttal expert); *Wadler v. Bio-Rad Industries, Inc*., 212 F.Supp.3d 829 (N.D.Cal. 2016) (denying defendants motion *in limine* to exclude plaintiff's evidence on grounds of attorney-client privilege); *Wadler v. Bio-Rad Industries, Inc*., 2017 WL 1910057 (N.D.Cal., May 10, 2017)) (denying defendants' post-trial motions).

Wadler also highlights the unique legal, ethical and practical issues that arise when the terminated whistleblower is the general counsel of (and therefore in an attorney-client relationship with) his former employer. In that setting, a whistleblower retaliation claim potentially involves disclosure of information that counsel learned in the confidential setting of serving as an attorney for his employer. *Wadler* thus offers guidance to practitioners as they undertake to reconcile their clients' rights as workplace whistleblowers, with their professional obligation to maintain client confidences.

The case was tried to a jury in early 2017. In February of 2017, the jury returned a verdict in favor of the plaintiff, Sanford Wadler. The jury found that Mr. Wadler was terminated from his job as General Counsel of Bio-Rad Industries, Inc. ("Bio-Rad" or the "Company"), for investigating and reporting his belief that the Company had violated the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-2, 78ff ("FCPA") by making improper payments to governmental entities in China, and by failing to maintain records and internal controls relating it its Chinese operations, as required by the FCPA.[5]

The jury awarded Wadler $2,960,000 in past economic loss damages (which was doubled under applicable law to $5,920,000), plus an additional $5 million in punitive damages. The Court also awarded Mr. Wadler, as the prevailing plaintiff, attorneys' fees and expenses in the additional amount of $3.5 million. The case turned in large measure upon the Court's critical pretrial ruling, discussed in greater detail below, denying the defendants' motion to preclude Wadler from relying on most of his evidence, which defendants claimed was protected by the attorney-client privilege. *See Wadler*, 212 F.Supp.2d at 829. On June 7, 2017, the defendants (Bio-Rad and certain of its senior most executives) appealed the judgment to the United States Court of Appeals to the Ninth Circuit.

This article analyzes the *Wadler* case, both factually and in the broader context of an analysis of the protections afforded by the law to workplace whistleblowers, as well as the rights and responsibilities of company counsel who suffer workplace retaliation for reporting actions that they consider to be illegal or improper.

B. Background Facts and Contentions Underlying Wadler's Whistleblower Claims

[5] The FCPA requires covered public companies such as Bio-Rad (an issuer of securities subject to regulation under the United States federal securities laws) to devise and maintain a system of internal accounting controls to identify out and prevent improper payments, bribes and kickbacks in order to obtain or retain business. 15 U.S.C. §78dd-1. Independently, the FCPA prohibits a covered company from providing anything of value directly or indirectly to a foreign official to induce the foreign official or his country from favoring the company's business. *Id.* Violations of the FCPA are punishable by civil fines and, in the appropriate case, potential criminal prosecution.

Sanford Wadler served for over 25 years as Bio-Rad's General Counsel. Bio-Rad, whose stock is traded publicly on the New York Stock Exchange, is engaged in the business of manufacturing and selling a range of products and systems used to separate complex chemical and biological materials and to identify, analyze, and purify their components. The Company sells its products to hospitals, universities, clinics, laboratories, medical providers, and others around the world.

Wadler contended that he was abruptly fired in 2013 because he revealed what he believed to be FCPA violations with respect to the Company's operations in China. According to Wadler, Bio-Rad became aware of information that suggested that certain of its employees and agents in Vietnam, Thailand, and Russia may have violated provisions of the FCPA.[6] After an internal investigation conducted by the Company's outside counsel, Bio-Rad reported the matter to the SEC.

Wadler asserted that, because of the FCPA violations that were found to have existed in Russia, Thailand and Vietnam, Bio-Rad officials decided to investigate whether such violations had also occurred in China, where Bio-Rad derived significantly greater sales and revenues than it did in the other countries, and where commercial bribery is reported to be notorious and widespread.

Wadler asserted that he had been concerned about the Company's operations in China, at first because, notwithstanding the hundreds of millions of dollars in revenues the Company derived from China, he could locate relatively few documents relating to those transactions. Wadler claimed to be concerned that the apparent absence of meaningful documents for the Chinese transactions suggested a possible effort to conceal FCPA violations. *Wadler* therefore conducted his own investigation and claimed to have located documents that, in his view, contained "unambiguous evidence of potential bribery" in China. Wadler contended that his efforts to obtain additional evidence were "stonewalled" by senior Company executives. He then reported his concerns to the Audit Committee of the Company's Board of Directors. *See generally Wadler,* 141 F.Supp. 3d at 1008-1010; *Wadler*, 2017 WL 1910057.

The Company engaged the same outside law firm that investigated the earlier claims. Wadler objected, asserting that the law firm was conflicted because it claimed not to have found evidence of FCPA violations relating to China in its earlier investigation. After the law firm

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[6] Wadler's allegations are included in his federal Complaint filed on May 27, 2015 in the United States District Court for the Northern District of California, at *Wadler v. Bio-Rad, Industries, Inc*., Case No. 15-cv-02356 (N.D. Cal.), and summarized in the Court's decision of October 25, 2015 on the defendants' motion to dismiss the Complaint, see *Wadler*, 141 F.Supp.2d at 1005, and in the Court's decision of May of 2017 denying defendants' post trial motions. *Wadle*r, 2017 WL 1910057.

concluded that there was no evidence of improper payments in China, Wadler pressed for additional information, but asserted that he was effectively shut out of further discussions. He was eventually then fired. Wadler asserted that he was fired when he was because Company officials were scheduled shortly to meet with SEC and the DOJ, and they did not want Wadler to be included in that meeting. *Wadler*, 141 F.Supp. 3d at 1008.

Bio-Rad then entered into a non-prosecution agreement with the DOJ and a Consent Decree with the SEC (https://www.sec.gov/litigation/admin/2014/34-73496.pdf) in which it the not contest detailed factual allegations of multiple substantive and record keeping violations on the FCPA in Vietnam, Thailand, and Russia (but not China). The Company agreed to pay a civil fine to the SEC in the amount of $55.1 million, and agreed to implement appropriate therapeutic relief designed to prevent future FCPA violations. *Id*. Wadler alleged that the Company's SEC Form 10-Q (dated November 7, 2014) announcing this settlement also disclosed investigations and fines by several Chinese governmental entities, which Wadler characterized as an acknowledgement that the Company had been investigated, and in some instances fined, for engaging in exactly the type of practice that Wadler had earlier raised questions about. *See generally Wadler,* 141 F.Supp. 3d at 1008.

For its part, Bio-Rad asserted that it terminated Wadler for good cause unrelated to his assertion of FCPA violations in China "immediately after serious deficiencies in his legal judgment had been confirmed and after months of obstructive, irrational, and belligerent behavior that no public company should be forced to tolerate from its General Counsel." *Wadler,* 2017 WL 1910057 at *1. To substantiate these and other criticisms of Wadler, the defendants proffered, among other things, evidence of a negative performance review for Wadler. In denying the defendants' post trial motion, the Court cited to evidence proffered by Wadler to the effect that Bio-Rad senior executives "created a false review to bolster Bio-Rad's explanation for Wadler's termination." *Wadler,* 2017 WL 1910057 at *5.

C. Overview of Federal and State Whistleblower Retaliation Protections

Wadler's claims arose under a subset of various federal[7] and state[8] laws that are designed protect and provide whistleblowers with legal remedies for workplace retaliation in a wide range of industry and employment sectors.

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[7] Federal provides protections for workplace whistleblowers, for persons who report alleged wrongdoing relating to: **environmental offenses** (Clean Air Act - 42 U.S.C. § 7622; Safe Drinking Water - 42 U.S.C. § 300j-9(i); Solid Waste Disposal - 42 U.S.C. § 6971; Superfund - 42 U.S.C. § 9610; Toxic Substances - 15 U.S.C. § 2622; Water Pollution - 33 U.S.C. § 1367; Pipeline Safety Improvement Act – 49 U.S.C. § 60129; Surface Mining Act – 30 U.S.C. § 1293); **workplace safety issues** (Occupational Safety and Health Act (OSHA) Nonretaliation Provision - 29 U.S.C. § 660(c); Mine Health and Safety Act -30 U.S.C. § 815(c); Asbestos School Hazard Detection and Control, Employee Protection Provision - 15 U.S.C. § 2651; Asbestos School Hazard Abatement, Employee Protection Provision - 20 U.S.C. § 4018; Seaman's Protection Act (SPA) **-- 4**6 U.S.C. § 2114; **food safety and contamination issues** (Food Safety Modernization Act of 2010 - 21 U.S.C. § 399d); - health care issues (Patient Protection and Affordable Care Act

These laws create an exception to the "employment-at-will" doctrine, under which an employee working without a contract can be fired or demoted, with or without cause, subject to federal state laws that prohibit discrimination on the grounds of racial, gender, religious, age, sexual preference.

D. Whistleblower Retaliation Claims At Issue In Wadler

The federal whistleblower retaliation claims at issue in the *Wadler* case arose under the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 141 F.Supp. 3d at 1008.1514A ("SOX"), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 78u-6(h)(1)(1)("Dodd-Frank").

- § 1558 of Public Law No. 111-148 29 U.S.C. 218C); **nuclear safety issues** (Atomic Energy Act/Energy Reorganization Act - 42 U.S.C. § 5851; Department of Energy, Defense Activities, Whistleblower Protection Program - 50 U.S.C. § 2702); **consumer protection (**Consumer Financial Protection Act (CFPA) (2010) **--** 12 U.S.C. § 5567; **transportation safety issues** (Public Transportation – National Transit System Security Act – 6 U.S.C. § 1142; Railroad Safety Act – 49 U.S.C. § 20109); (Surface Transportation Assistance Act (STAA) (1982) **--** 49 U.S.C. § 31105; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) (2000) -- 49 U.S.C. § 42121; Section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) (2012) -- 49 U.S.C. § 30171; **discriminatory workplace practices** (Fair Labor Standards Act (FLSA)/Equal Pay Act, Nonretaliation Provisions – 29 U.S.C. § 215(a)(3); **employee benefit protection** (Employment Retirement Income Security Act (ERISA)) – 29 U.S.C. § 1140 and 29 U.S.C. § 1132; f**raud and abuse internally at publicly held companies and their subsidiaries and affiliates** (the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 78u-6(h)(1)(A), and the Sarbanes-Oxley Act of 2002 – 18 U.S.C. § 1514A); **consumer product safety issues** (Consumer Product Safety Act of 2008 – 15 U.S.C. § 2087); **waste, fraud or abuse relating to defense procurement** (Sections 827 and 828 of the 2013 Defense Authorization Act, §§ 827, 28); 141 F.Supp. 3d at 1008.**retaliation against those who initiate *qui tam* claims under the False Claims Act** (31 U.S.C. § 3730(h)); **whistleblowers who work for the U.S. Government and report specified categories of misconduct** (the Whistleblower Protection Act, and the Whistleblower Protection Enhancement Act of 2012, 5 U.S.C. § 2302(b).

[8] State law whistleblower protections include the Pennsylvania Whistleblower Law, 43 P.S. § 1421-28, which protects employees in the public sector (or in private sector companies subsidized by state or local governments), from being fired, disciplined, or otherwise discriminated against because they report illegal or improper practices to their employers or other responsible public officials or agencies. New Jersey's Conscientious Employee Protection Act (sometimes referred to as "CEPA"), N.J.S.A. § 34:19-3 extends such protection to public and private sector employees. Whistleblowers are protected, in varying degrees and job sectors, by laws in most states.

SOX mandates that no entity or person that is covered by the statute[9] may:

> . . . discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee:
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> (1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the [SEC], or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by (A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
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> (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the [SEC], or any provision of Federal law relating to fraud against shareholders.

15 U.S.C. § 1514A (a)(1)(bracketed citations added).[10]

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[9] SOX covers any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*)("Exchange Act"), or that is required to file reports under section 15(d) of the [Exchange Act], including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the [Exchange Act], or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization. *See* 18 U.S.C. § 1514A(a).

[10] Under SOX, a prevailing whistleblower "shall be entitled to all relief necessary to make the employee whole," including: (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination; (B) the amount of back pay, with interest; and (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. *See* 18 U.S.C. § 1514A(c). The "special damages" available under SOX has been interpreted to include damages for emotional distress and loss of professional reputation. *See, e.g., Jones v. Southpeak*

Dodd-Frank provides, in relevant part:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower: (i) in providing information to the [SEC] in accordance with this section; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the [SEC] based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the [SEC].

15 U.S.C. § 78u-6(h)(1)(A). The elements of a retaliation claim under the Dodd–Frank Act are (1) that the plaintiff engaged in a protected activity, (2) that the plaintiff suffered an adverse employment action, and (3) that the adverse action was causally connected to the protected activity. *See* Securities and Exchange Commission, Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34–64545 (May 25, 2011), at 18 n.41.[11]

E. Proceedings Instituted By Wadler

1. Initial Administrative Proceedings

After his termination, Wadler filed a complaint with the United States Department of Labor ("DOL"),[12] alleging that he was fired for investigating and alerting his superiors to

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Interactive Corp. of Delaware, 777 F.3d 658, 672 (4th Cir. 2015) (citations omitted) ("[t]he Department [of Labor] takes the position that the statute countenances emotional distress awards, and indeed the Department's Administrative Review Board has a history of upholding non-pecuniary compensatory damages…"); *Lockheed Martin Corp. v. Administrative Review Board,* 717 F.3d 1121, 1138 (10th Cir. 2013); *Sharkey v. JP Morgan Chase & Co.,* 2017 WL 374735 at *3 (S.D.N.Y. January 26, 2017. *Haliburton, Inc. v. Administrative Review Board,* 771 F.3d 254, 265 (5th Cir. 2014). SOX generally exempts whistleblower retaliation claims from mandatory arbitration. *See* 18 U.S.C. §1514A(e).

[11] Under Dodd-Frank**,** a prevailing whistleblower "shall be entitled to all relief necessary to make the employee whole," including (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination; and (B) double the amount of back pay, with interest. *See* 15 U.S.C. § 78u-6(h)(1)(C). Unlike SOX, Dodd-Frank does not exempt whistleblower retaliation claims from mandatory arbitration.

[12] SOX, and several of the other federal whistleblower protection statutes, requires that initial complaints be filed in the first instance, within 180 days after the alleged violation, with the Occupational Safety and Health Administration ("OSHA") of the DOL. *See* 18 U.S.C. §§

potential FCPA violations in China.[13] He alleged in his DOL complaint that his firing violated the whistleblower retaliation provisions of SOX. Wadler asserted that his reports of FCPA violations were covered by SOX's anti-retaliation provisions because FCPA compliance was required by a "rule or regulation" of the SEC, and because the FCPA itself was enacted by way of an amendment to Securities Exchange Act of 1934. *See* 15 U.S.C. §§78dd-l(a) (FCPA's anti-bribery provisions) and §78m (FCPA's record keeping requirements).

2. Wadler Files Suit In U.S. District Court and Prevails At Trial

After initial administrative proceedings before the DOL, Wadler exercised his right under SOX to file suit, *de novo*, in the United States District Court for the Northern District of California. Wadler's federal Complaint dated May 27, 2015 against Bio-Rad and several of its directors,[14] asserted claims under SOX and Dodd-Frank, California Labor Code §1102,[15]

1514A(b)(1)(A) and 1514A(b)(2)(D). If the matter is not resolved completely with the issuance of a final administrative decision within 180 days after the OSHA filing, the claimant has the right to continue to pursue his claim administratively within the DOL, or file a case, *de novo,* in a properly venued United States District Court, *see* 18 U.S.C. §1514A(b)(1), and has a right to a trial by jury. *Id.* § 1514A(b)(2)(E).

See generally Wadler, 141 F.Supp.3d at 1005 ("Dodd-Frank, in contrast to Sarbanes-Oxley, does not require that a whistleblower exhaust any administrative remedies before bringing an action in federal district court. . . . . In addition, the limitations period for bringing an action under Dodd-Frank is between six and ten years, in contrast to the 180-day limitation period under Sarbanes-Oxley"). *See generally* 15 U.S.C.A. § 78u-6 (h)(1)(B)(iii)(statute of limitations for Dodd-Frank whistleblower claim) is 6 years after the date on which the violation occurred, or 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee, with a statute of repose of 10 years, after which no claim can be brought.).

[13] With respect to initial SOX complaints filed with OSHA (as opposed to a complaint that may later be filed in district court):

> There are no pleading requirements for whistleblower actions. *See* 29 C.F.R. § 1980. Indeed, a whistleblower complaint under Sarbanes-Oxley need not even be in writing but may be made orally, in which case it is reduced to writing by OSHA. 29 C.F.R. § 1980.103(b). Because of the absence of formal pleading requirements, complaints in OSHA administrative proceedings are not expected to meet the standards of pleading that apply to claims filed in federal court under Rule 12(b)(6).

Wadler, 141 F.Supp. 3d at 1020 (citations omitted).

[14] The *Wadler* court held that there is "scant case law" on the question, SOX and Dodd-Frank allow a whistleblower claim against not only the defendant company, but also against corporate directors who also engaged in the retaliatory conduct." *Wadler,* 141 F.3d at 1015-16

California's law of wrongful termination in violation of public policy,[16] and two state law wage related claims.

After extensive pretrial proceedings, discovery and motion practice, Wadler's case was tried to a jury. On February 7, 2017, the jury returned a verdict in favor of Wadler and against Bio-Rad on Wadler's claims under the SOX, Dodd-Frank, and state law wrongful termination claim. The jury awarded $2,960,000 in past economic loss damages (which was later doubled under Dodd-Frank, 15 U.S.C. § 78u-6(h)(1)(c)(2), to $5,920,000) and $5 million in punitive damages. The jury awarded no damages for future economic loss or emotional distress. The Court also awarded Mr. Wadler, as the prevailing plaintiff with respect to the federal whistleblower claims, attorneys' fees and expenses in the additional amount of $3.5 million. On May 10, 2017, the Court denied Bio-Rad's post motion.[17] On June 7, 2017, the defendants (Bio-Rad and certain of its senior most executives) appealed the judgment entered by the Court to the United States Court of Appeals to the Ninth Circuit.

F. The Scope and Applicability of the Attorney-Client Privilege Takes Center Stage in Wadler's Case

At one level, Wadler's case followed the predictable course of a wrongful termination whistleblower case. A terminated employee establishes a prima facie case under the whistleblower protection provisions of SOX by proving that he engaged in protected activity;[18]

("[a]lthough a close call, the Court finds that directors may be held individually liable under Sarbanes-Oxley…"); *Id.* at 1024 ("…Congress intended that Dodd-Frank provide for individual liability that is at least as extensive as Sarbanes-Oxley, and therefore, that directors may be held individually liable for retaliating against whistleblowers under Dodd-Frank.").

[15] This claim, which arose under California Labor Code, prohibits employers from retaliating against employees "for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or non-compliance with a state or federal rule or regulation." *Id.,* § 1102.5(c).

[16] California, the locus of the *Bio-Rad* case, recognizes (as most states do) the state common law claim of wrongful discharge in violation of public policy. *Gantt v. Sentry Insurance,* 1 Cal.4th 1083, 4 Cal.Rptr.2d 874, 824 P.2d 680 (1992)(recognizing an exception to the employment-at-will doctrine where employee is fired or disciplined for: (1) refusing to violate a statute … (2) performing a statutory obligation … (3) exercising a statutory right or privilege … and (4) reporting an alleged violation of a statute of public importance." To support a tort action for wrongful discharge, "the policy in question must involve a matter that affects society at large rather than a purely personal or proprietary interest of the plaintiff or employer," and must be not only "fundamental" and "substantial," but also "well established" at the time of the discharge. *Id*.

[17] *Wadler v. Bio-Rad Industries, Inc*., 2017 WL 1910057j (N.D.Cal. May 10, 2017).

[18] In this setting, the employee need only show that he had a reasonable belief that the conduct complained of violated the law, not that the conduct was in fact fraudulent. *See Wadler*, 2017 WL 1910057 at *3.

that the employer knew of the protected activity;[19] that the employee suffered an unfavorable personnel action, and that the protected activity was a contributing factor[20] to the unfavorable personnel action. If the employee satisfies his burden, the employer must demonstrate, by clear

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[19] The court held that Wadler's Dodd-Frank claim was not precluded because he voiced his concerns only to Company management and the Audit Committee of the Board of Directors and not to the SEC. *See Wadler,* 141 F.Supp. 3d at 1027 ("…the Court rejects Defendants' assertion that Wadler's Dodd-Frank Act claim fails as a matter of law because he did not provide any information or assistance to the SEC") (citing an amicus brief that had been submitted by the SEC).

There is presently a split of authority on the question of whether Dodd-Frank requires an employee-whistleblower to make his reports to the SEC, or whether reporting "up the ladder" within the company suffices. *Compare Somers v. Digital Realty Trust, Inc*., 850 F.3d 1045, 1048 (9th Cir. 2017)(internal reporting suffices), *cert. granted*, No. 16-1276 (U.S., Jun2 27, 2017), with *Asadi v. G.E. Energy (U.S.A.), LLC*, 720 F.3d 620, 621 (5th Cir. 2013)(dismissal of Dodd-Frank claim required where plaintiff did not make his disclosure to the SEC). On June 26, 2017, the United States Supreme Court granted granted *certiorari* on the question of whether "the anti-retaliation provision for 'whistleblowers' in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extends to individuals who have not reported alleged misconduct to the Securities and Exchange Commission and thus fall outside the Act's definition of a 'whistleblower.'" *Digital Realty Trust* v. *Somers*, *cert. granted*, No. 16-1276 (U.S., Jun2 27, 2017).

[20] "This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant', 'motivating', 'substantial', or 'predominant' factor in a personnel action in order to overturn that action." *Marano v. Dep't of Justice,* 2 F.3d 1137, 1140 (Fed.Cir.1993). Under the "contributing factor" standard, "[a] plaintiff need not prove that her protected activity was the primary motivating factor in her termination, or that the employer's articulated reason was pretext in order to prevail." *Barker v. UBS AG,* 888 F.Supp.2d 291, 300 (D.Conn.2012). *See generally Pardy v. Gray,* 2008 WL 2756331 at *5 (S.D.N.Y. July 15, 2008)("[t]he words 'a contributing factor' mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision."); *Wittig v. CSX Transportation, Inc.*, 2017 WL 2177342 at * 4 *(S.D.Ga. May 17, 2017)* ("[t]he plaintiff's protected activity is a "contributing factor" in the unfavorable personnel action if it tended to affect the outcome of the decision."); *Araujo v. N.J. Transit Rail Ops., Inc*., 708 F.3d 152, 157-58 (3d Cir.2013). *See generally Araujo v. New Jersey Transit Rail Operations, Inc*., 708 F.3d 152, 159 (3d Cir. 2013). This element is "broad and forgiving." *Lockheed Martin Corp. v. Administrative Review Bd., U.S. Dept. of Labor*, 717 F.3d 112 (10th Cir. 2013).

"[C]ausation can be inferred from timing alone where an adverse employment action following on the heels of protected activity." *Van Asdale v. International Game Technology*, 577 F.3d 989, 1003 (9th Cir. 2009). *See generally* 29 C.F.R. §§ 1980.104(e)(3).

and convincing evidence,[21] that the employer would have taken the same personnel action had the employee not engaged in the protected activity.[22] Upon a finding of liability, the employer

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[21] "The 'clear and convincing evidence' standard is the intermediate burden of proof, in between 'a preponderance of the evidence' and 'proof beyond a reasonable doubt.' . . . ." To meet the burden, the employer must show that 'the truth of its factual contentions are highly probable.'" *Araujo*, 708 F.3d at 159 (quoting *Colorado v. New Mexico,* 467 U.S. 310, 316 (1984); *Addington v. Texas,* 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)).

The standard "is much more protective of plaintiff-employees than the *McDonnell Douglas* framework" applied in Title VII and other cases. *Araujo v. New Jersey Transit Rail Operations, Inc*., 708 F.3d 152, 158 (3d Cir. 2013).

[22] SOX, like several of the federal whistleblower statutes, incorporates, at 18 U.S.C. 1514A(C)(2), the rules and procedures (including the burdens of proof) applicable to whistleblower actions that are set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR–21"), 49 U.S.C. § 42121(b). The rules of procedure established by the DOL/OSHA with respect to SOX whistleblower claims are set forth at 29 C.F.R. §§ 1980.104(d) and (e). The employee bears the threshold burden of proving that: (1) he"engaged in a protected activity"; (2) the employer "knew or suspected that he engaged in the protected activity; (3) that he "suffered an adverse action"; and (4) "the protected activity was a contributing factor in the adverse action alleged in the complaint." *Id*. If the employee satisfies his burden of producing evidence to support all four elements, the burden shifts to the employer to demonstrate "by clear and convincing evidence" that it would have taken the same adverse action in the absence of the protected activity. *See* 49 U.S.C. §42121(b)(2)(B)(ii); 29 C.F.R. §§ 1980.104(e)(4). *See generally Tides v. Boeing Co.*, 644 F.3d 809, 813-14 (9th Cir. 2011); *Van Asdale v. Int'l Game Tech,* 577 F.3d 989, 996 (9th Cir. 2009) (discussing § 42121(b)(2)(B)(i) in the context of SOX).

The AIR-21 burdens of proof are either incorporated by reference into or are restated in some, but not all, of the federal whistleblower protection statutes. The AIR-21 standards apply in actions under SOX, the Energy Reorganization Act (42 U.S.C. § 5851), and the Federal Rail Safety Act (49 U.S.C. § 20109), the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121, the Consumer Financial Protection Act ("CFPA," 12 U.S.C. § 5567(c)(3)(A)-(C)), the Consumer Products Safety Improvements Act, 15 U.S.C. § 2087(b)(2)(B)(i)-(iv), and the Affordable Care Act, 29 U.S.C. § 218(c)(b)(1).

"It is worth emphasizing that the AIR–21 burden-shifting framework . . . is much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard." *Araujo*, 708 F.2d at 159. *See generally Thomas v. Union Pacific Railroad Company*, 203 F.Supp.3d 1111, 114 (2016) ("[t]he clear and convincing standard is a higher burden of proof than used in many other employment discrimination and retaliation statutes."); *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir.1997) ("[f]or employers, this is a tough standard, and not by accident")

Other federal whistleblower protection claims are governed by the three-step burden-shifting test articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S.

may, in certain extreme instances, rely upon the "after-acquired evidence" doctrine to limit damages.[23]

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792 (1973). Under *McDonnell Douglas, once* a plaintiff must first establish a prima facie case of discrimination, the defendant bears the burden of proving a legitimate, nondiscriminatory reason for its employment action. The plaintiff then may offer evidence to show that the employer's explanation for the job action is pretextual. *See Araujo*, 708 F.2d at 162. "Under *McDonnell Douglas,* the employer need only articulate a legitimate, nondiscriminatory reason for the action." *Id*.

[23] "Under this doctrine, reinstatement or front pay is inappropriate if an employer discovers evidence of misconduct after it has wrongfully terminated an employee if the misconduct, standing alone, would have justified terminating the employee had the employer known the time of discharge. In such an instance, an employer is only liable for back pay from the date of unlawful discharge to the time this new evidence is discovered." *Deltek, Inc. v. Department of Labor Administrative Review Board*, 649 Fed.App. 320, 332, 2016 WL 2946570 at * 7 (4th Cir. May 20, 2016)(citing *McKennon v. Nashville Banner Publ'g Co*., 513 U.S. 352, 115 S.Ct. 879, 130 L.Ed.2d 852 (1995).

"After-acquired evidence" "denotes evidence of the employee's or applicant's misconduct or dishonesty which the employer did not know about at the time it acted adversely to the employee or applicant, but which it discovered at some point prior to, or, more typically, during, subsequent legal proceedings; the employer then tries to capitalize on that evidence to diminish or preclude entirely its liability for otherwise unlawful employment discrimination." *Nesselrotte v. Allegheny Energy, Inc*., 2007 WL 3147038 at * 6-7 (W.D.Pa. Oct. 25, 2007). *See also Orshal v. Bodycote Thermal Processing, Inc.,* 2016 WL 4007610 at *3 (M.D.N.C. July 26, 2016). In order for the after-acquired evidence doctrine to apply, the conduct in use must have occurred before the decision was made to terminate the employee. *See Nesseltotte,* 2007 WL 3147038 at **6-8 (citing *McKennon*, 513 U.S. at 362-63 (doctrine applies only "if the employer had known of it at the time of the discharge.").

"Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon v. Nashville Banner Pub. Co*., 513 U.S. 352, 362-363 (1995). McKennon held that after-acquired evidence does not bar an employee's discrimination suit, but may be used to bar reinstatement and front pay as well as to limit back pay to the period prior to the discovery of this evidence. *Id*. at 362.

The "after acquired evidence" doctrine applies in whistleblower termination actions under AIR-21 statutes, *see Clemmons v. Ameristar Airways, Inc*., ARB No. 08-067, ALJ No. 2004-AIR-011 (ARB Apr. 27, 2012), but has been applied very restrictively. *See e.g*. Deltek, Inc. v. Department of Labor, Administrative Review Bd., 649 Fed.App. at 332, 2016 WL 2946570 at * 7 (in SOX and other whistleblower retaliation cases governed by AIR-21, "[t]o prevail, an employer must show by clear and convincing evidence that it would have terminated the employee when it discovered the misconduct in question.")(citing 49 U.S.C. §

What distinguished the *Wadler* case from most whistleblower retaliation cases was that Wadler was the Company's General Counsel. *Wadler* therefore presents a case study of the intersection between Wadler's rights as a whistleblower, and his obligation as an attorney to maintain client confidentiality. These issues collided in a motion *in limine* that Bio-Rad filed shortly before trial seeking to exclude virtually all of Wadler's evidence. The Court's resolution of this motion, which is reported at *Wadler,* 212 F.Supp.3d at 829, contains an extensive discussion of the privilege issues, and was a critical determinant of the scope of the evidence that would ultimately be admitted at trial.

Bio-Rad sought to preclude, among other things: (i) confidential information Mr. Wadler learned in the course of his role as Bio-Rad's general counsel, (ii) Mr. Wadler's communications with Bio-Rad and with outside counsel; (iii) outside counsel's communications with Bio-Rad and with each other; and (iv) the advice of inside and outside counsel.[24]

The Court rejected most of Bio-Rad's assertions, both procedurally and substantively reasoning that:

> …[t]here are few federal circuit court cases addressing the rights of in house counsel to use attorney-client privileged information in a retaliation suit…. Nonetheless, the cases that have been decided support the conclusion that Wadler's retaliation claim may go forward despite confidentiality concerns and that he may rely on privileged and confidential communications that he reasonably believes are necessary to prove his claims and defenses.

Wadler, 212 F.Supp.3d at 846. (citing *Van Asdale v. International Game Technology,* 577 F.3d 989, 991-95 (9th Cir. 2009) (courts should "balance the needed protection of sensitive information with in house counsel's right to maintain the siuit.") (quoting *Kachman v. Sun Guard Data Systems, Inc.,* 109 F.3d 173, 182 (3d Cir. 1997)).

As a threshold matter, the Court ruled that the Bio-Rad defendants waived the attorney-client privilege by producing documents and detailed factual declarations of its executives to the DOJ and the SEC during the course of their investigation, and by including otherwise privileged information in public court filings and discovery disclosures during the defense of Wadler's case. *Wadler,* 212 F.Supp.3d at 850.

Substantively, the Court acknowledged that California (the locus of the *Wadler* case and the state in which Wadler was professionally licensed), like most states, requires an attorney to "maintain inviolate the confidence, at every peril to himself or herself to preserve the secrets, of

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42121(b)(2)(B)(ii), (iv).

[24] *See* Bio-Rad Defendants' Notice of Motion and Motion to Exclude Protected Information From The Trial of this Action, at p. 7 (October 21, 2016, Docket No. 94).

his or her client." Cal.Bus. & Prof.Code § 6068(e)(1).[25] The court also acknowledged that the Supreme Court of California had applied the lawyer's duty of confidentiality very strictly *particularly* in the context of wrongful termination suits brought by in house counsel. *Wadler,* 212 F.Supp.3d at 845 (citing *General Dynamics Corp. v. The Superior Court of San Bernardino County*, 7 Cal.4th 1164, 32 Cal.Rptr.2d 1, 876 P.2d 487 (1994)).

In *General Dynamics*, the court held that such claims are permitted only where the attorney's claim is "grounded in explicit and unequivocal ethical norms embodied in the Rules of Professional Responsibility and statutes" and can proceed only if the claim can be "fully established without breaching the attorney-client privilege." *Id*. at 1190, 32 Cal.Rptr.2d 1, 876 P.2d 487 (cited at *Wadler,* 212 F.Supp.3d at 845). Conversely, under California state law, "[w]here the elements of a wrongful discharge in violation of fundamental policy claim cannot, for reasons peculiar to the particular case, be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege." *General Dynamics Corp.,* 32 Cal. Rptr. at 18, 876 F.2d at 504.

The *Wadler* court determined that *General Dynamics* was no impediment to Wadler's claim for two reasons.

First, the Court held that, under Rule 501 of the Federal Rules of Evidence, a federal court adjudicating federal causes of action (and state law claims whose predicate facts overlap the federal claims), applies the federal common law of attorney-client privilege, which allows a "retaliation claim to go forward despite confidentiality concerns "and that the general counsel" may rely on privileged and confidential communications that he reasonably believes are necessary to prove his claims or defenses." *Wadler*. 212 F.Supp.2d at 846-47 (citing *Van Asdale v. International Game Technology*, 577 F.3d 989, 991-92 (9th Cir. 2009)).

Under the prevailing federal standard, a "court should 'balanc[e] the needed protection of sensitive information with the in house counsel's right to maintain the suit.'" *Wadler,* 212 F.Supp.2d at 846-47. The court is urged to utilize the case management tools at its disposal (including the requirement that such documents be filed under seal) to minimize the public disclosure of confidential information that is necessary to allow the suit to proceed. 212 F.Supp.3d at 846-48 (citing *Kachmar,* 109 F.3d at 179).[26]

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[25] Like most states, California does allow an exception permitting an attorney to reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily injury to, an individual, and certain matters where the privilege is invoked to shield a crime or fraud, circumstances that were not present in *Wadler*. *See Wadler,* 212 F.Supp.3d at 845.

[26] *Kachmar* was a federal gender discrimination and retaliation action brought by former in house counsel under Title VII in which the court rejected the defendant's argument that the case should be dismissed because the case would require disclosure of privileged communications. The court held that "'[a] lawyer …does not forfeit his rights simply because to prove them he must utilize confidential information." *Id.* at 181. The court further observed that "[i]n

The *Wadler* court thus concluded that the standard set forth 1.6 of the Model Rules of Professional Conduct is the appropriate standard.[27] Under that Model Rule, "[a] lawyer may

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balancing the needed protection of sensitive information with the in house counsel's right to maintain the suit, the district court may use equitable measures at its disposal 'designed to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege," including "the use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings.' " *Id.* The court acknowledged that such as approach would likely "entail more attention by a judicial officer than in most other Title VII actions," but concluded "we are not prepared to say that the trial court, after assessing the sensitivity of the information offered at trial, would not be able to draft a procedure that permits vindicating [the plaintiff's] rights, while preserving the core values underlying the attorney-client relationship." *Id.*

The *Wadler* court applied the rationale of *Kachmar* and similar cases to hold that "the Court may seek to take some special measures when *Wadler* seeks to introduce sensitive communications and to be vigilant in ensuring that such evidence only when plaintiff's belief that it is necessary to prove a claim is reasonable." *Wadler,* 212 F.Supp.3d at 849.

[27] Model Rule 1.6 provides, in relevant part, that:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph; (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; (6) to comply with other law or a court order; or (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client. (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

reveal . . . information [relating to representation of a client] to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." *Wadler*, 212 F.Supp.3d at 848-49.

As the *Wadler* court explained:

> The Model Rules do not prevent an in house lawyer from pursuing a suit for retaliatory discharge when a lawyer was discharged for complying with her ethical obligations. An in house lawyer pursuing a wrongful discharge claim must comply with her duty of confidentiality to her former client and may reveal information to the extent necessary to establish her claim against her employer. The lawyer must take reasonable affirmative steps, however, to avoid unnecessary disclosure and limit the information revealed.

Wadler, 212 F.Supp.3d at 848-49 (citing *Model Rules of Professional Conduct*, Rule 1.6(b)(2) (1983); *American Bar Ass'n Formal Ethics Opinion* 01-424 (Sep. 22, 2001)(a whistleblower retaliation claim is covered by the exception set forth in Model Rule 1.6(b)(5)).[28]

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[28] Unlike California state regulations, which do not recognize this exception to the attorney client privilege embodied in Model Rule 1.6 (b)(5), most states (including Pennsylvania) recognize some variation of the rule that "[a] lawyer may reveal such information to the extent that the lawyer reasonably believes necessary . . . *to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client*, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based on conduct in which the client was involved, *or to respond to allegations in any proceeding concerning the lawyer's representation of the client*."(emphasis added).

Some jurisdictions, such as the District of Columbia, have limited their counterpart to this exception to actions involving a claim by the lawyer for payment of professional fees. *See, e.g., District of Columbia Ethics Opinion 363, In House Lawyer's Disclosure or Use of Employer/client's Confidences or Secrets in Claim Against Employer/Client for Employment Discrimination or Retaliatory Discharge* (October 2012) (under D.C. Bar Rule 1.6).

The court observed that this flexible approach for whistleblower retaliation claims should apply with particular force in SOX and Dodd-Frank whistleblower claims because California's

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However, the ABA Model Rule rejects this limitation. *See Heckman v. ZurichHolding Company of America, Inc.,* 242 F.R.D. 606, 611-13 (D.Kan. 2007)*; Weeks v. McLaughlin*, 2010 WL 11485532 at fn. 9 (D.Kan. March 11, 2000)("when the claim or defense language was added to the confidentiality exception in Model Rule 1.6(b)(2), it enlarged the exception 'to include disclosure of information relating to claims by the lawyer other than for the lawyer's fee.'")(citing ABA Model Rule 1.6, Model Code Comparison (1984). *See generally Kachmar v. SunGuard Data Systems, Inc*., 109 F.3d 173, 177 (3d Cir. 1997), as have most states that have adopted this formulation and interpret it so as to permitted in house attorneys to bring state law wrongful termination claims and to wise privileged information that is reasonably necessary to prosecute such claims.

See generally Heckman v. Zurich Holding Company of America, Inc., 242 F.R.D. 606, 611-13 (D.Kan. 2007) (finding that the "claim or defense" exception under Kansas Rules of Professional Conducty applicable to a former in house lawyer's personal claim against her employer-client, observing that "Rule 1.6 adopts broad language which contemplates disclosure of confidential information in a variety of possible claims by an attorney against her client"); *Spratley v. State Farm Mutual Automobile Insurance Co*., 78 P.3d 603, 608 (Utah 2003) (attorneys' wrongful discharge suit was a "claim" within the meaning of rule 1.6(b)(3), so that the attorneys were permitted to make disclosures "reasonably necessary to that claim," and that great care must be taken to limit disclosures, including use of protective orders); citing *Oregon State Bar Legal Ethics Comm*., Formal Op.1994-136 at 3)("claim or defense" exception to Rule 1.6 permits "disclosure to establish a wrongful discharge claim" by an in house attorney); *Burkhart v. Semitool, Inc*., 300 Mont. 480, 5 P.3d 1031 (2000)(*Burkhart v. Semitool, Inc.*, 5 P.3d 1031, 1042 (Mont. 2000) (in wrongful discharge suit by attorney against former client, court permitted disclosure of confidential information but instructed that plaintiff must make every effort practicable to avoid unnecessary disclosure of information relating to representation, to limit disclosure to those having need to know, and to obtain protective orders or make other arrangements minimizing the risk of disclosure); *Crews v. Buckman Laboratories International, Inc.*, 78 S.W.3d 852, 864 (Tenn. 2002) (citing Rule 1.6, Comment 19, court cautioned former in-house counsel to make every effort practicable to avoid unnecessary disclosure of client confidences and secrets, to limit disclosure to those having need to know, and to obtain protective orders or make other arrangements minimizing the risk of disclosure); *Parker v. M &T Chemicals, Inc*., 566 A.2d 215, 220, 236 N.J.Super. 451, 459 (1989) (holding that employee-attorney may bring a damage suit for wrongful discharge under New Jersey's Conscientious Employee Protection Act, as public policy in favor of whistle-blowing on illegal conduct overrides attorney's duties of confidentiality); *Alexander, Tandem Staffing Solutions, Inc*., 881 So.2d 607 (Fla. 4th DCA, 2004)("Alexander's whistleblower claim was a 'controversy between the lawyer and client' within the meaning of rule 4-1.6(c)(2) and an 'issue of breach of duty . . . by . . . the client to the lawyer' under section 90.502(4)(c)."); *Hoffman v. Baltimore Police Dep't*, 379 F.Supp.2d 778, 782-83 (D.Md. 2005)(applying Maryland Rule of Professional Conduct 1.6 to allow wrongful discharge suit by in house counsel for police department).

State ethical rules were inconsistent with SOX's requirements that the attorney report perceived federal securities law violations.

The Court focused on the provisions of SOX and regulations by the SEC under SOX that *require* an attorney to report wrongdoing in house,[29] and in any setting (including litigation) in which the attorney's compliance with the reporting requirements of SOX is in issue.[30] On that basis, the Court held that "to the extent California's ethical rules allow for more limited disclosures of privileged and confidential communications in connection with Sarbanes–Oxley whistleblower retaliation claims than is permitted under the regulations promulgated by the SEC, there is a direct conflict that gives rise to preemption of California's ethical rules." *Wadler*, 212 F.Supp.3d at 857 ("[t]o the extent that one of the methods Congress chose for achieving that objective was to afford protection from retaliation to those who comply with these reporting requirements, an ethical rule that deprives an attorney of such protection interferes with the methods by which Sarbanes–Oxley was designed to achieve its objective."). *See generally Van Asdale v. International Game Technology,* 577 F.3d 989, 994 (9th Cir. 2009) (Illinois ethical rule and corresponding Illinois Supreme Court decision prohibiting in house counsel from bringing retaliatory discharge claim does not bar SOX retaliation claims, applying Model Rule 1.6(b)(5)).

The Administrative Review Board of the DOL, which adjudicates administrative appeals of whistleblower retaliation claims within the DOL, has similarly sustained a SOX retaliation claim by in house counsel, replying upon ABA Model Rule 1.6(b)(5)'s "claim or defense" exception, and SEC Rule 205.3 (17 C.F.R. § 205.3) that requires attorneys to report "material violations." *See Jordan v. Spring Nextel Corp*., 2006-SOX-41, at **14-15 (ARB Sept. 30, 2009).[31]

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[29] The Court cited to Section 307 of SOX, 15 U.S.C. § 7245, in which Congress instructed the SEC to issue regulations requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty to the chief legal counsel or the chief executive officer of the company, and if the counsel or officer does not appropriately respond, requiring the attorney to report the evidence to the audit committee of the board of directors or to another committee of the board of directors comprised solely of outside directors. *Wadler*, 212 F.Supp.3d at 854-55 (citing 15 U.S.C. § 7245). Under this grant of authority, the SEC has enacted Standards of Professional Conduct for Attorneys, 17 C.F.R. § 205, which requires attorneys to report material violations "up the ladder" and to continue to report up the ladder until the attorney receives an "appropriate response." *Id.* § 205.3(b)

[30] *Wadler*, 212 F.Supp.3d at 854-55 (citing 17 C.F.R. § 205.3(d)(1)(making clear an attorney may use any records the attorney may have made in the course of fulfilling his or her reporting obligations under this part to defend himself or herself against charges of misconduct). The Court analogized this regulation to the ABA's Model Rule and corresponding "self-defense" exceptions to client-confidentiality rules in every state.

[31] In contrast to the wrongful termination setting, there is a dearth of case law on the question of whether an attorney may bring a *qui tam* claim under the False Claims Act, on behalf of the United States, against his employer when the claim is based upon information covered by the attorney client privilege. The few reported decisions have viewed the issue restrictively.

Under any of these formulations, the rules stress that the lawyer must use good faith and not expose any more information that is reasonably necessary to establish their claims. See (the official Comments to Rule 1.6 of the ABA's Model Rules of Professional Conduct state "disclosure adverse to the client's interest should be no greater than the lawyer believes reasonably necessary to accomplish the purpose" of the disclosure, and the disclosure "should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable." *See* Model Rules of Professional Conduct, Rule 1.6, Comment 14 (2007); ABA Formal Ethics Opinion 01-424 (September 1, 2011)(the lawyer "must take reasonable affirmative steps" to avoid unnecessary disclosure and limit the information

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For example, the Court in *United States ex rel. Fair Lab. Practices Assoc. v. Quest Diagnostics, Inc.*, 734 F.3d 154 (2d Cir. 2013) affirmed the dismissal of a FCA, *qui tam* whistleblower suit in which the former general counsel of the subject company served as a relator seeking recovery on the basis of allegations that the company defrauded the United States by paying kickbacks to physicians. The court held that the FCA did not pre-empt state ethical rules that require attorneys not to reveal client confidences, noting that "[n]othing in the FCA evinces a clear legislative intent to preempt state statutes and rules that regulate an attorney's disclosure of client confidences," and that "[w]hile the FCA *permits* any person . . . to bring a *qui tam* suit, it does not authorize that person to violate state laws in the process." *Id*. at 163.

In a similar vein, the court in *United States ex rel. John Doe v. X. Corp*., 862 F.Supp. 1502 (E.D.Va. 1994) ruled that while an in-house attorney for the defendant company is not statutorily precluded from serving as an FCA relator, *id*. at 1508-09, but that the attorney is not immunized by the FCA from the ethical consequences of disclosing privileged information as a *qui tam* relator. *Id.* at 1507-08. The court stated, "[t]he holding of this case follows the general rule that the *qui tam* statute does not exclude lawyers or other members of any particular profession from being relators, nor does it preclude or preempt state law from making certain individuals subject to certain obligations which may, in certain circumstances, have the incidental effect of preventing those individuals from being relators." *Id* at 1508.

Because the attorney/relator had earlier been enjoined from using confidential information (privileged and otherwise) in a lawsuit that had been initiated by his former employer, the *qui tam* case was dismissed because there was no relevant information that the attorney could properly use in his complaint, and his Complaint failed to state a claim under the False Claims Act without that information. *Id*. at 1509.

Neither case appears to preclude the attorney/relator from relying upon information that is not privileged, nor does either case meaningfully address the question of whether the attorney/relator may use privileged information under the "crime/fraud" exceptions to the attorney-client privilege in cases involving potential financial loss. *See generally John Doe*, 862 F.Supp. at 1507-08 ("[t]o the extent that state law permits a disclosure of client confidences, such as to prevent a future crime or fraud, then the attorney's use of the *qui tam* mechanism to expose that fraud should be encouraged and not deterred). There are, accordingly, fair grounds for litigation on either side of the question.

revealed."). *See generally Weeks,* 2010 WL 11485532 at * 4 (citing with approval *Heckman*, *supra*, in which the in house counsel plaintiff "took measures to limit disclosure by filing a redacted version of the complaint and filing the unredacted version under seal," and where "[s]ubsequent disclosures of confidential information occurred only after entry of a protective order.").

Moreover, they should cooperate with defendants to work with the Court and opposing counsel on steps that can be taken to minimize exposure once the case starts, including the use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, *in camera* proceedings.

G. Recurring Issues Not Directly Addressed In *Wadler*

The *Wadler* case highlighted the tension between the important pubic policy interests that are served by encouraging and protecting whistleblowers and the whistleblower attorney's obligation to maintain client confidences. The Court's meticulously reasoned and soundly based rulings struck the appropriate balance between these important and worthy interests.

Wadler, however, did not present the occasion for the Court to address the whistleblower's legitimate rights and the broader question of an employer's interest in preserving the confidentiality of its proprietary commercial information and trade secrets (and related business records), whether privileged or not, and in preventing the unauthorized use and appropriation of such information and records.

This is a significant issue in whistleblower retaliation and FCA cases. Employers, armed with broadly case confidentiality/non-disclosure agreements that they require their employees to sign as a condition of their employment, routinely challenge former employees who rely upon company information that they took from the workplace without permission.

Employers in whistleblower retaliation and False Claims Act cases have become increasingly aggressive about identifying whether and to what extent the former employee/relator took company documents, and if so in seeking monetary and non-monetary redress. Available forensic technology allows these employers to monitor and identify data transfers, and these technologies have now become a routine part of the employer's toolbox when a whistleblower termination or FCA claim arises.

The employer response has taken the form of counterclaims to wrongful termination and FCA lawsuits asserting claims for breach of contract, breach of fiduciary duty, theft of trade secrets, and violations of federal statutes such as Economic Espionage Act of 1996 (18 U.S.C. §§ 1831–1839), and the Computer Fraud and Abuse Act (18 U.S.C. § 1030), or motions to preclude the use of or to compel the return of such documents, attempts to limit damages under the "after acquired evidence" doctrine, and sometimes even for sanctions or referral for criminal prosecution.[32]

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[32] These issues have been the subject of considerable scholarly and practical commentary. *See generally* Stephen M. Payne, *Let's Be Reasonable: Controlling Self-Help Discovery in False Claims Act Suits*, 81 U. Chi. L. Rev. 1297, 1298-99 (2014); Stephen S. Cowen, Christopher C.

The judicial response to these employer efforts has not been uniform, and in some instances has been contradictory and inconsistent. The result is that, while whistleblowers can certainly cite to a number of court decisions that generally support their position, there are no clear and controlling jurisprudential safe harbors from which whistleblowers and their counsel can guaranteed guidance.

Some courts, both in cases involving SOX and Dodd-Frank whistleblowers and FCA relators, have recognized the importance of whistleblowers and FCA relators in uncovering corporate misconduct and their vulnerability to the potential destruction of evidence of wrongdoing.[33] These courts have declined to penalize whistleblowers as a matter of public policy, even where the employee signed a confidentiality agreement as a condition of his employment. *See generally Shmushkovich v. Home Bound Healthcare, Inc.,* 2015 WL 3896947 at *1 (N.D. Ill. June 23, 2015) ("[m]ost federal courts acknowledge the public policy exception").[34]

Burris, and Jessica J-M Hagen, *Transmission of Corporate Documents between the Government and Relators during False Claims Act Investigations and Litigation:Are There Any Limits on "Self Help" Discovery and Government Disclosure of Subpoenaed Materials?,*Civil False Claims and Qui Tam Enforcement *C-11, *C-19 to -24 (ABA-CLE 2010); Michael R. Grimm *et al*., *Courageous Whistleblowers Are Not "Left Out In The Cold": Legitimate Justifications for Collecting Evidence of False Claims Act Violations*, 39 False Claims Act and Qui Tam Q. Rev. 19 (2005). Peter S. Menell, *Tailoring a Public Policy Exception to Trade Secret Protection,* 105 Cal. L. Rev. 1 (Feb. 2017); *Richard Moberly, et al., De Facto Gag Clauses: The Legality of Employment Agreements That Undermine Dodd-Frank's Whistleblower Provisions,* 30 ABA J. Lab. & Empl. Law 87, 87-92 (2014) (describing SEC Rule 21F-17), with Joseph W. Cormier *et al., Intellectual Property Crimes*, 46 Am. Crim. L. Rev. 761, 776 (2009).

[33] SEC Rule 21F-17(a) issued under Dodd-Frank provides, in relevant part:

> No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . (other than agreements dealing with information covered by § 240.21F-4(b)(4)(i) and § 240.21F-4(b)(4)(ii) of this chapter related to the legal representation of a client) with respect to such communications.

17 C.F.R. § 240.21F-17. *See generally In the Matter of BlueLinx Holdings Inc*., SEC Release No. 78528, Administrative Proceedings File No. 3-17371 (August 100, 2016), Order Instituting Cease and Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and A Cease and Desist Order (settling allegations that company violated SEC Rule 21F-17 that purported to limit employees' from reporting SEC violations to the SEC in order to collect a whistleblower award under Dodd-Frank).

[34] By way of illustration, in *Erhart v. BofI Holdings, Inc.,* 2017 WL 588390 (S.D.Cal. Feb. 14, 2017), the employer's counterclaim against a SOX whistleblower was premised upon a broad

The cases in which wrongfully terminated and FCA whistleblowers have been prevailed in this setting have generally involved whistleblower evidence gathering that was targeted and focused and not random, indiscriminate and excessive.[35] As one court has recently observed in this setting:

> . . . . the Court concludes this issue turns on whether it was reasonably necessary for Erhart to disclose this information in his

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confidentiality agreement signed by the employee which forbade the unauthorized disclosure of his employer's "Trade Secrets" and "Confidential Information." *Erhart,* 2017 WL 588390 at *1. The agreement in *Erhart* provided, in relevant part:

> [A]t any time during [his] term of employment or following the termination of [his] employment with BofI, whether voluntary or involuntary, [he] shall not, except as required in the conduct of BofI's business or as authorized in writing by BofI, use, publish or disclose any of BofI's Trade Secrets and/or Confidential Information in any manner whatsoever.
>
> ***
>
> Inform BofI of and deliver to BofI all records, files, electronic data …and the like in [his] possession, custody or control that contain any of BofI's Trade Secrets or Confidential Information which [Erhart] prepared, used, or came in contact with while employed by BofI….

"Confidential Information" was defined as information that is "proprietary and confidential in nature." (*Id.*). "Trade Secrets" was defined as by reference to California Law as "pattern, compilation, program, device, method, technique, or process, that: (1) Derives Independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Cal. Civ. Code § 3426.1(d). *See Erhart.,* 2017 WL 588390 at * 5.

35 *See, e.g. Erhart v. BofI Holdings, Inc*., 2017 WL 588390 at * 13-15 (S.D.Cal. Feb. 14, 2017) (whistleblower termination action under SOX, dismissing employer's counterclaims alleging employee's theft and misappropriation of company documents, reasoning that "[t]he Court, having previously reviewed lists of files taken by [the plaintiff], notes many do appear to be related to his allegations of believed wrongdoing."); *Deltek, Inc. v. Department of Labor Administrative Review Board*, 649 Fed. App. 320, 332, 2016 WL 2946570 (4th Cir. May 20, 2016)(declining to penalize the employee under the "after acquired evidence" defense in a SOX retaliation case where the plaintiff "forwarded to her home account only documents that were relevant to her whistleblowing reports; where "she had a reasonable concern that the documents might be shredded by Deltek employees or otherwise destroyed;" and where the plaintiff's motivation for forwarding the documents was "to support her [Sarbanes–Oxley] allegations." Distinguishing cases . . . in which courts had deemed employees unprotected when they 'indiscriminately misappropriated documents containing proprietary information.'").

> complaint to pursue his whistleblower retaliation claims. Erhart's whistleblower retaliation action relies upon, among others . . . .
>
> Accordingly, Erhart must include factual allegations regarding his believed wrongdoing in his complaint to state a claim for whistleblower retaliation under Sarbanes–Oxley and Dodd–Frank. Yet, the broad provisions in the Confidentiality Agreement appear to apply to much of the information Erhart relies upon for his allegations. In the Court's view, these confidentiality obligations must give way to allow Erhart enough leeway to allege and pursue his whistleblower retaliation claims. At the same time, Erhart should not be able to disclose any of BofI's information in his complaint simply because he is pursuing a whistleblower retaliation claim. Rather, like the approach taken by the Court with Erhart's appropriation of BofI's documents, Erhart should be permitted to disclose BofI's information in his complaint if doing so was "reasonably necessary" to pursue his retaliation claim. . . .
>
> Ultimately, this determination, like Erhart's appropriation of files, turns on issues of fact. BofI argues Erhart disclosed confidential information to inflict maximum damage on the company and "benefit short sellers at the Bank's expense," not simply to pursue his whistleblower retaliation claims. . . . . However, BofI has not met its initial burden of demonstrating there is no genuine issue of material fact as to this conduct. Therefore, summary adjudication of Erhart's whistleblower defenses on this basis is not appropriate.

Erhart., 2017 WL 588390 at *5. *See generally Vannoy v. Celanese Corp.,* 2008-SOX-0064, ARB No. 09-118, 2011 WL 4690624 (ARB Sept. 28, 2011).[36]

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[36] In *Vannoy*, the DOL's Administrative Review Board ("ARB") reversed the Administrative Law Judge's ("ALJ) entry of summary judgment against claimant in SOX whistleblower retaliation action based on employee having forwarded sensitive information about employer's accounting practices to his personal e-mail account and creating and CDs, without company's permission, and then taking and storing information on his home computer. The employee argued that he took and used the information in order to disclosures pursuant to IRS Whistleblower Program, and the Company's Business Conduct Policy, under which employees are allowed to report and investigate in good faith, anonymously and without fear of retaliation, suspected legal or ethical concerns. The ARB reasoned (at p. 16-17) that '[t]he IRS whistleblower bounty program Vannoy used, like the SEC program recently established, reflects Congressional recognition of the notable contributions to law enforcement provided by whistleblowers with non public, inside information. Vannoy's allegations must be viewed in light of these significant enforcement interests. Evidence of record supports Vannoy's allegations that he procured employee data in 2005 and in 2007 as part of his efforts to facilitate his complaint with the IRS as to Celanese's accounting practices." The ARB held that "the crucial question for the ALJ to resolve with a hearing on remand is whether the information that Vannoy

Decisions of similar import have been issued in cases under the False Claims Act, where the law "recognize[s] a public policy that protects whistleblowers from retaliation for actions they take in investigating and reporting fraud to the government." *United States ex rel. Cieszynski v. Lifewatch Services, Inc.,* 2016 WL 2771798 at *4 (N.D. Ill. May 3, 2016). *Cieszyski* held (at *5) that this public policy also extends to information protected by HIPAA, reasoning that "HIPAA regulations themselves contain a safe harbor for employees who disclose protected health information to a government agency or attorney, if such employee has a good faith belief that the HIPAA-covered employee has engaged in unlawful conduct.") (citing 45 C.F.R. § 164.502(j)).[37]

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procured from the company is the kind of 'original information' that Congress intended be protected under either the IRS or SEC whistleblower programs, and whether the manner of the transfer of information was protected activity within the scope of SOX. These are mixed questions of law and fact for the ALJ to determine in the first instance." Id. at pp. 16-17. On remand, the ALJ determined that the employer's adverse action against the employee violated SOX and ordered relief. See*, Vannoy v. Celanese Corp.,* 2008-SOX-0064 (ALJ July 24, 2013) ("Complainant's testimony supports a finding that all such actions were taken in full support of his [Business Conduct Policy] and/or IRS complaints.").

[37] *See, e.g. United States ex rel. Alvord v. Lakeland Regional Medical Center, Inc.,* 2012 WL 12904676 (M.D.Fla. September 14, 2012) (denying sanctions against FCA relator for removing company documents where the "Relator's actions do not constitute surreptitious conduct as she repeatedly reported and discussed the alleged unlawful claims to her superiors and provided all of the documentation she copied to her superiors," citing to a "line of cases holding that [an employee's] confidentiality agreement 'cannot trump the FCA's strong policy of protecting whistleblowers who report fraud against the government," *id*. at *4, and reasoning that "Relator's conduct was aimed at disclosing evidence of an alleged fraud in support of her FCA claim," and "[t]he FCA requires that relators serve upon the United States 'written disclosure of substantially all material evidence and information the person possesses' in order to enable the government's own investigation to proceed expeditiously." *id*. at *4-5); *Siebert v. Gene Security Network*, 2013 WL 5645309 at *8 (N.D.Cal. October 16, 2013)("any alleged obligation by Siebert not to retain or disclose the confidential documents that form the basis of this action is unenforceable as a matter of public policy because it would frustrate Congress' purpose in enacting the [False Claims Act]); *U.S. ex. rel. Grandeauv v. Cancer Trt. Ctrs. of Amer.*, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004) (FCA case where publication of employer's documents in relator's complaint "was not wrongful, even in light of non-disclosure agreements, given 'the strong public policy in favor of protecting whistleblowers who report fraud against the government'"); *U.S. ex. rel. Head v. Kane Co.*, 668 F. Supp. 2d 146, 152 (D.D.C. 2009) ("[e]nforcing a private agreement that requires a *qui tam* plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under investigation would unduly frustrate the purpose of this provision," dismissing employer's breach of contract counterclaim for failure to return an email to employer in violation of a separation agreement as void against public policy); *X Corp. v. Doe*, 805 F. Supp. 1298, n.24 (E.D. Va. 1992) (noting that a confidentiality agreement would be void as against public policy if, when enforced, it would prevent "disclosure of evidence of a fraud on the government"); *U.S. ex rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012) (relators "limited their

"…[I]n deciding whether [the] plaintiff's actions went beyond the scope of what was necessary for his *qui tam* case, [the Court] must balance the need to protect whistleblowers and prevent chilling their attempts to uncover fraud against the government against an employer's legitimate expectations that its confidential information will be protected. *Cieszyski,* 2016 WL at 4. Courts "have focused on the reasonableness and scope of the plaintiff's disclosure in determining whether to permit counterclaims in an FCA action." *Walsh v. Amerisource Bergen Corp.,* 2014 WL 2738215 at *6 (E.D. Pa. June 17, 2014). Thus, as one court has recently observed in rejecting an employer's argument that the employee/relator took more documents than were necessary to support his *qui tam* claim:

> It is unrealistic to impose on a relator the burden of knowing precisely how much information to provide the government when reporting a claim of fraud, with the penalty for providing what in hindsight the defendant views as more than was needed to be exposure to a claim for damages. Given the strong public policy encouraging persons to report claims of fraud on the government, more is required before subjecting relators to damages claims that could chill their willingness to report suspected fraud. And here, LifeWatch fails to allege there is more . . . Relator did not disclose the information to anyone other than the government and his attorney, did not disclose attorney-client information, and did not disclose trade secret information to LifeWatch's competitors. We hold that on these allegations, relator did not go so far that he has exposed himself to defendant's breach of contract action. To allow a counterclaim based on the barest allegation that a relator took more documents than absolutely necessary would gut the strength and purpose of the public policy exception, which protects relators from retaliation by their employers for actions taken by relators "while they are collecting information about a possible fraud, before they have put all of the pieces of the puzzle together."

Cieszynski, 2016 WL 2771798 at * 6 ("LifeWatch has failed to identify a single case that demands relators perfectly predict the exact amount of information that is strictly necessary to bring a False Claims Act case or risk being subject to a counterclaim").[38]

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taking to documents relevant to the alleged fraud," their actions were "not wrongful, even in light of nondisclosure agreements, given 'the strong public policy in favor of protecting whistleblowers who report fraud against the government'").

[38] *See also Erhart,* 2017 WL 588390 at **13-15 (crediting testimony of SOX whistleblower plaintiff that he "was very careful in [selecting] the information [he] accessed and was turned over," that "[e]ach document was specifically related to one of the allegations of wrongdoing [he] had discussed with [his supervisor] and then reported to federal law enforcement," and that

By contrast, other courts have taken an approach that is far more sympathetic to the interests of employers, particularly in those instances where the employee has indiscriminately taken vast amounts of document and data. These courts have rejected the whistleblower's "public policy" defense to and have concluded that the balance of equities favors the employer.[39] *See*

"every document" he used was one he "had properly accessed in the course of performing [his] work as an internal auditor," as directed by his immediate supervisor).

[39] One of the most restrictive decisions is *JDS Uniphase Corp. v. Jennings*, 473 F.Supp.2d 697 (E.D.Va. 1997), a SOX whistleblower retaliation case in which the Court concluded that "Sarbanes-Oxley is not a license to steal documents and break contracts." *Id*. at 703. In granting the employer's motion for summary judgment on its claim that an employee breached his employment agreement by taking company documents when he left, the court reasoned "[b]y no means can the policy fairly be said to authorize disgruntled employees to pilfer a wheelbarrow full of an employer's proprietary documents in violation of their contract merely because it might help them blow the whistle on an employer's violations of law, real or imagined." 473 F.Supp.2d at 703. The court further observed that "[e]ndorsing such theft or conversion would effectively invalidate most confidentiality agreements, as employees would feel free to haul away proprietary documents, computers, or hard drives, in contravention of their confidentiality agreements, knowing they could later argue they needed the documents to pursue suits against employers under a variety of statutes protecting employees from retaliation for publicly reporting wrongdoing," and "for every legitimate whistleblower aided by this rule, many more disgruntled employees would help themselves to company files, computers, disks, or hard drives on their way out the door to use for litigation leverage or for mere spite." 473 F.Supp.2d at 703. The court further reasoned that enforcing such contracts would not "burden legitimate whistleblower activity, as putative whistleblowers would still be free to consult lawyers, pursue and exhaust administrative remedies, and file their whistleblower claims, in the course of which pertinent documents could be obtained via legal process." *Id*.

Other decisions similarly focus on the scope, precision and purpose of the employee's actions in determining the viability of an employer counterclaim against an FCA relator. *See generally Cafasso v. General Dynamics C4 Systems, Inc*., 637 F.3d 1047, 1062-63 (9th Cir. 2011)("[a]lthough we see some merit in the public policy exception that Cafasso proposes, we need not decide whether to adopt it here. Even were we to adopt such an exception, it would not cover Cafasso's conduct given her vast and indiscriminate appropriation of [company] files," observing that Cafasso copied "nearly eleven gigabytes of data" that amounted to "tens of thousands of pages" and did not attempt to copy only information relevant to her FCA claim.); *E.A. Renfroe & Co. v. Moran*, 249 Fed.App.88, 92-92 (11th Cir 2007)(unpublished)(pubic policy of "ferreting out corporate wrongdoing" does not justify breach of employee confidentiality agreement where employees "secretly copied 15,000 documents, shared them with a lawyer, and discussed the alleged fraud on national television"); *United States ex rel. Wildhirt v. AARS Forever, Inc.*, No. 09 C 1215, 2013 WL 5304092, at *6 (N.D. Ill. Sept. 19, 2013)(denying relator's motion to dismiss employer counterclaims where relator took and disclosed an "extremely broad scope of documents and communications" for improper purposes unrelated to bringing a *qui tam* case and relators had disclosed the company's confidential information to the public and to multiple third parties who the company specifically identified in the complaint,"

generally Tides v. Boeing Co., 644 F.3d 809, 811 (9th Cir. 2011) (rejecting SOX whistleblower's argument that disclosures of proprietary information to the media are protected "because reports to the media may eventually 'cause information to be provided' to members of Congress or federal law enforcement or regulatory agencies,'" reasoning "[w]e decline to adopt such a boundless interpretation of the statute.")

State law also demonstrates the struggle in reconciling the sometimes conflicting right of whistleblowers to gather and expose illegal conduct with the rights of employers to secure proprietary business information, and the absence of objectively controlling standards or safe harbors in this area. For example, New Jersey law deals with this issue under a "a flexible, totality of the circumstances approach that rests on consideration of a wide variety of factors." *Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 239, 8 A.3d 209 (2010).

The seven factor test attempts to qualitatively assess: (1) how the employee came to possess the document; (2) "what the employee did with the document"; (3) "the nature and content of the particular document in order to weigh the strength of the employer's interest in keeping the document confidential"; (4) whether the employee violated a "clearly identified company policy" on confidentiality; (5) "the circumstances relating to the disclosure of the document to balance its relevance against considerations about whether its use or disclosure was unduly disruptive to the employer's ordinary business"; (6) "the strength of the employee's expressed reason for copying the document"; and (7) how the court's decision in the particular case "bears upon" the "broad remedial purposes" of [the applicable antidiscrimination law] and "the effect, if any, that either protecting the documents by precluding its use or permitting it to be used will have upon the balance of legitimate rights of both employers and employees." *Quinlan*, at 269–71, 8 *A*.3d 209.[40]

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and that the documents were taken "haphazardly and for no particular purpose." *id.* at *3, and showed the documents not only to their attorney and the government, but also made them public.); *Ruscher v. Omnicare, Inc.*, 2015 WL 4389589, (S.D. Tex., July 15, 2015) (the plaintiff admitted taking a "large variety of documents," some of which were protected by the attorney-client privilege and also of inducing co-workers to take additional documents for her after she was terminated).

[40] With respect to the final factor, the court reasoned:

> . . . . the court should evaluate how its decision in the particular case bears upon two fundamental considerations that are often in conflict in matters such as these. First, the court must be cognizant of the broad remedial purposes the Legislature has advanced through our laws against discrimination, including the [anti-discrimination law in issue, or "LAD"]. Second, the court must consider the effect, if any, that either protecting the document by precluding its use or permitting it to be used will have upon the balance of legitimate rights of both employers and employees. Courts should apply the two parts of this final factor with great care, utilizing them as a supplement rather than a substitute for the multi-factor test we have created. Although in a close case, for example, the broad remedial purposes of the LAD might tip the balance, courts should be vigilant lest

Five years after issuing the Quinlan decision, the New Jersey Supreme Court again addressed the issue when it sustained an indictment of against former employee who took confidential employee documents to use in a state law discrimination/retaliation case she later filed. *See, e.g. State of New Jersey v. Saavedra*, 222 N.J. 39, 117 A.3d 1169 (2015). The dissent in *Saavedra* was critical of Quinlan's seven factor totality-of-the-circumstances test on the ground that it:

> . . . . hardly places a reasonable person on notice of the line demarcating lawful from unlawful conduct. The *Quinlan* factors do not define a clear and understandable claim-of-right defense in civil or criminal cases because the standard is too amorphous, too wide open—too susceptible to various inconsistent outcomes. Employees need standards they can grasp at the time they make decisions rather than later, when a court is passing judgment on their conduct.

> they err by overlooking the myriad considerations that make up the test we today announce.
>
> In making these evaluations, the court must be mindful that both employers and employees have legitimate rights. Employers have the right to operate their businesses within the bounds of the law and legitimately expect that they will have the loyalty of their employees as they do so. Employees have the right to be free of discrimination in their employment and the right to speak out when they are subjected to treatment that they reasonably believe violates that right. Balancing all of those considerations is a difficult and important task.
>
> In establishing this balancing test, we are mindful of the concerns of employers that only a bright line rule that prohibits any employee from ever disclosing a document in pursuit of a discrimination claim and that equally prohibits any attorney from reviewing or considering such documents provided by employees will fairly protect their interests. We are mindful that employers may fear that we have opened the floodgates by granting protected status to such conduct. We, however, do not share the concern that employers will be powerless to discipline employees who take documents when they are not privileged to do so. On the contrary, employees may still be disciplined for that behavior and even under the best of circumstances, run the significant risk that the conduct in which they engage will not be found by a court to fall within the protection our test creates. The risk of self-help is high and the risk that a jury will reject a plaintiff's argument that he or she was fired for using the document, rather than for finding it and taking it in the first place, will serve as an important limitation upon any realization of the fears that the employers have expressed to the Court.

Quinlan, at 269–71, 8 *A*.3d 209.

Saavedra, 222 N.J. at 78, 117 A.2d at 1178.

The lesson to be derived from the case law in this area is that question of whether, and under what circumstances, a whistleblower is justified in taking and publicizing employer information and documents is an evolving issue that potentially raises civil and criminal consequences for the whistleblower, and potentially even ethical questions for the whisteblower's lawyer. There is no general, presumptive "one-size-fits-all" answer to this question, and it is neither prudent nor possible to offer legal advice with respect to this issue in a vacuum. Given the broad divergence of opinion among the courts, this is a question that should be fully vetted by experienced counsel on a case-by-case basis.[41]

H. Lessons Derived From The Wadler Case

There are several takeaways from the *Wadler* case for whistleblowers and their former employers, as well as for attorneys who represent them.

First: *Wadler* demonstrates that are effective protections and remedies for workplace retaliation for those who report fraud and other workplace improprieties. Federal and state laws covering a broad array of private and public sector settings provide robust causes of action, with fair and reasonable burdens of persuasion and proof, for those who are disciplined, fired or otherwise retaliated against for blowing the whistle. These causes of action generally offer a variety of remedies, including where appropriate back pay, and anticipated future lost wages. Certain causes of these causes of action also allow for recovery for emotional distress and punitive damages. Most allow a prevailing plaintiff to recover his or her attorneys' fees and expenses in pursuing their claims. Many of the whistleblower protection laws offer the opportunity for reinstatement, although that is sometimes not feasible or welcomed by either party. As a general matter, the burdens of proof applicable to whistleblower retaliation claims under SOX and several other federal whistleblower causes of action require that the employee establish that his protected conduct was a factor that contributed to the workplace discipline and, upon that showing, the employer must show by "clear and convincing" (the highest and most stringent burden in civil litigation) that the employee was fired for reasons unrelated to the

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[41] Separate ethical issues arise for the lawyer who becomes aware that his or her whistleblower client possesses documents in aid of the whistleblower claim that were taken from the workplace without the employer's permission. These issues raise the question of whether and how it is appropriate for the attorney to review the documents, what steps the attorney can or must take to screen the documents that contain the client's former employer's privileged information, the circumstances under which the attorney should or must counsel the client to return the documents to the employer or produce them in discovery, and how to deal with circumstances where the client refuses to do so. *See generally* Ronald B. Minkoff and Amelia K. Seewan, *Ethics Corner: Putting the Genie Back, What To Do When your Client Has nDocuments*, Media Law Letter (March 25, 2010); *United States ex rel. Frazier v. IASIS Healthcare Corp*., 2012 WL 130332 (D.Ariz. Jan. 10, 2012)

whistleblowing. Other statutes require that the employer satisfy its burden under a preponderance of the evidence standard. Workplace whistleblowers generally have recourse and the possibility for achieving a recovery for the damages they have suffered.

Second. A whistleblower who elects to pursue a retaliation action can usually expect a vigorous defense that not only denies the underlying claim of wrongdoing, but also aggressively challenges the whistleblower's competence, veracity and integrity. Not infrequently, the whistleblower is accused by the employer of orchestrating, or participating in, the wrongful conduct that he reported. In their zeal to demonstrate that the terminated employee's whistleblowing had little or nothing to do with the imposition of workplace discipline or termination, employer defendants usually seek to introduce evidence that there were legitimate and *bona fide* reasons for firing or otherwise disciplining the whistleblower. The summary of the evidence contained in the Court's Opinion denying post-trial motions in *Wadler*, reported at 2017 WL 1910057, demonstrates the extent to which a plaintiff whistleblower can expect to be challenged. *Id*. at *1 (defendants' assertion that Wadler engaged in "obstructive, irrational and belligerent behavior" and "exaggerate[ed] a handful of small workplace issues"). These assertions were countered by the Wadler's contention that certain Bio-Rad executives were "disturbingly . . . forced to admit that a key piece of defense evidence was a forgery, created and backdated after Mr. Wadler's termination," *Id*. at * 2, and that "it is no wonder that the jury disbelieved Bio-Rad's implausible claim that, suddenly after 25 years, Mr. Wadler became a monstrous and abusive coworker, too toxic to endure . . ." *Id*. Needless to say, a careful assessment the proposed whistleblower's personnel file (including contemporaneous written performance reviews) and employment experience is essential to a proper evaluation of the whistleblower claim.

Third. In house attorneys for publicly held companies and their agents and contractors should be mindful of their obligations, and rights, under SOX and Dodd-Frank, and the SEC regulations that have been promulgated under these statutes. If they observe or become aware of workplace improprieties, they should document their concerns carefully and should not delay seeking counsel until they are actually fired. There are interim steps that can -- and in certain instances must -- be taken in connection with their required reports "up the ladder" internally at the company, and if necessary, with the SEC or Department of Justice or other law enforcement authority.

Fourth. In house counsel whistleblowers who work for privately held companies who are not subject to the mandatory reporting requirements of SOX and Dodd-Frank should be aware that they may not have the same leeway as those who work for a SOX regulated public company in relying upon otherwise privileged information in a wrongful termination action. *Wadler* and other cases that have held that *SOX* preempts state ethical requirements of confidentiality are based in some measure upon the mandatory reporting requirements established for attorneys under SOX. Those considerations obviously do not apply where the attorney works for a privately held company that is not governed by SOX. Under those circumstances, the whistleblower, guided by competent ethics counsel, will have to make informed decisions as to whether state ethics rules that allow a lawyer to disclose client confidences under their state's counterpart of Model Rule 1.6, particularly the rules that permit attorneys to utilize privileged information to establish a claim or defense in a dispute with his former employer.

Fifth. The question of whether, when and how the in house attorney can or should publicly disclose facts in furtherance of a whistleblower retaliation claim involves delicate assessments and a careful balancing of interests informed not only by the requirements of SOX and Dodd-Frank, and where applicable any other whistleblower retaliation regimen, but also by the attorney's obligations under the Canons of Professional Responsibility. The determination of whether and how to proceed is not one that should be taken lightly and without the informed advice of ethics counsel who is fully informed of all relevant facts and circumstances.

Sixth. In any case, if it is determined after consultation with experienced ethics counsel that disclosure in furtherance of a whistleblower retaliation claim is appropriate, the whistleblower attorney should work carefully with his counsel to determine the minimal level of disclosure necessary to support his claim or defense, so that their use of such information is measured to the situation at hand, and not misconstrued as gratuitous mudslinging. Under these circumstances, every effort should be made to minimize the disclosure until such time as the parties to the litigation can appear before the Court to be heard about the various judicial management techniques that might be employed to balance the whistleblower's right to bring the whistleblower retaliation, and the corresponding obligation to avoid unnecessary or gratuitous public disclosure, as urged by the courts in *Wadler*, 212 F.Supp.3d at 846-48, and *Kachmar*, 109 F.3d at 179, discussed above.

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