

# Compliance & Ethics *Professional*

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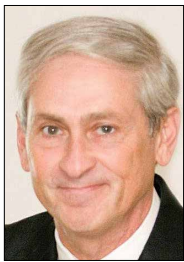
**Built to last: Top 5  
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Amii Barnard-Bahn

by Jeffrey M. Kaplan

# Lawyers as whistleblowers

**B**y preserving the confidentiality of communications with lawyers, the attorney-client privilege encourages individuals and organizations to seek legal advice. As such, the privilege is—in my view—a strong force for promoting compliant and ethical behavioral in the workplace. But are there times when preserving the privilege should give way to other compliance-related interests?



Kaplan

The question of whether to afford corporate attorneys the protections and incentives available to whistleblowers generally presents one aspect of this larger issue. The relevant legal authority is, first, rules promulgated under the Sarbanes-Oxley Act by the Securities and Exchange Commission (SEC) governing attorneys who practice before that body<sup>1</sup> and, second, state bar rules for each of the fifty states. Depending on the state, sometimes the former can conflict with the latter, and there is not yet a consensus on how such conflicts should be resolved.

Earlier this year, in a closely watched case, the former general counsel of Bio-Rad Laboratories was awarded more than \$14 million dollars in back wages, punitive damages, and attorney's fees under the whistleblower protection provisions of the Dodd-Frank and Sarbanes-Oxley acts in connection with his being discharged by the company for raising concerns to its audit committee about a possible Foreign Corrupt Practices Act violation.<sup>2</sup> Prior to the trial, Bio-Rad had asked the judge to exclude evidence protected under California's ethical standards, which have a narrower view of when whistleblowing lawyers can disclose

privileged information than does the applicable SEC rule. However, the court held that the latter preempted the former, thereby permitting the lawyer to use the privileged information to prove his case.

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A different result was reached in 2013 in a federal appeals court in New York, finding that that state's attorney-client privilege rule was not preempted by the federal law at issue in that attorney-whistleblowing case—the False Claims Act.<sup>3</sup>

At some point the law on this issue may become more settled than it is today. But regardless of how the technical issues (such as concerning preemption) are resolved, for compliance professionals, the real story here is that the prospect of attorneys using confidential information in whistleblower cases is likely to be part of the legal landscape for the foreseeable future. \*

1. 15 U.S.C. § 7245.
2. *Wadler v. Bio-Rad Laboratories Inc.*, No. 15-cv-02356 (N.D. Cal.). Information at <http://bit.ly/cleary-gottlieb>
3. *United States v. Quest Diagnostics Inc.*, 734 F.3d 154 (2d Cir. 2013).

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