

# PUBLICATION

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## Whistleblower General Counsel Prevails Through Use of Attorney-Client Privileged Information

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**In a seminal trial court decision, the federal court in the Northern District of California ruled in a whistleblower retaliation case that a fired general counsel of Bio-Rad Laboratories could use as evidence otherwise privileged materials. The Sarbanes-Oxley Act's protection of whistleblowers preempted the attorney-client privilege and provided key evidence leading to an \$8 million jury verdict in plaintiff's favor.**

The former general counsel raised concerns about suspected illegal payments in violation of the Foreign Corrupt Practices Act that led to his termination. After he unsuccessfully reported to management, he went to the audit committee, whose internal investigation concluded no violation had happened.

The uniqueness of the evidentiary ruling may signal a different approach to cases in which former general counsel-turned-whistleblowers previously have been barred from using attorney-client protected materials. The differences may turn on varying state bar ethics rules. See *U.S. ex rel. Fair Lab. Practices Assoc. v. Quest Diagnostics Inc.* (Co-plaintiff general counsel's confidential information not needed to prevent a crime under New York ethics rules and co-plaintiffs already had enough information).

"Who can be a corporate whistleblower?" This standing issue has recently had expanded scope and protection. The Securities and Exchange Commission has fought companies' use of confidentiality agreements to restrict employee reporting of violations. The Department of Labor has also opined that employees performing their duties – as a general counsel would be doing – are not disabled from becoming whistleblowers.

In addition, counsel's duty of loyalty may also play a role in deciding the propriety of whistleblower activity. See *U.S. ex rel. Holmes v. Northrop Grumman Corp.* (Counsel representing counterparty in arbitration against Northrop violated (1) protective order in using documents to file qui tam suit against Northrop and (2) his duty of loyalty to original client by taking a position adverse to his insurer client).

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