

NYCLA COMMITTEE ON PROFESSIONAL ETHICS
FORMAL OPINION 746
October 7, 2013

TOPIC: Ethical Conflicts Caused by Lawyers as Whistleblowers under the Dodd-Frank Wall Street Reform Act of 2010

DIGEST: New York lawyers who are acting as attorneys on behalf of clients presumptively may not ethically collect whistleblower bounties in exchange for disclosing confidential information about their clients under the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act because doing so generally gives rise to a conflict between the lawyers' interests and those of their clients. New York lawyers, in matters governed by the New York Rules of Professional Conduct, may not disclose confidential information, relating to current or past clients, under the Dodd-Frank whistleblower regulations, except to the extent permissible under the New York Rules of Professional Conduct. This Opinion is limited to New York lawyers who are acting as attorneys on behalf of clients.

RPC: 1.6, 1.7, 1.9

QUESTION: May a New York lawyer ethically participate in the whistleblower bounty program under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 by revealing confidential information about the lawyer's client and then seeking a bounty?

OPINION:

I. Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) authorizes the payment of bounties to whistleblowers who report corporate wrongdoing to the U.S. Securities and Exchange Commission (SEC), Department of Justice, or the Commodity Futures Trading Commission (CFTC). The question arises as to the ethical implications under the New York Rules of Professional Conduct (RPC) if a New York lawyer were to accept a whistleblower bounty in exchange for furnishing information to the SEC or other government agency. This opinion analyzes the duties of New York lawyers under the New York RPC.

In 2002, the Sarbanes-Oxley Act (Sarbanes-Oxley), overwhelmingly passed by both houses, became law. It was a response to major corporate and accounting scandals, such as those involving Enron, Tyco International, Adelphia and WorldCom, that cost investors billions of dollars when the share prices of affected companies collapsed. The SEC adopted Rule 205 as an attorney conduct regulation to implement portions of Sarbanes-Oxley. Rule 205 requires lawyers and others who deal with the SEC to report corporate misdeeds up the corporate ladder and permits, but does not require, reporting outside the corporation if the internal reporting does not solve the problem.¹

In an attempt to regulate the financial markets in order to prevent a recurrence of the financial crisis of 2008-2009, Dodd-Frank was signed into law on July 21, 2010. Building onto Sarbanes-Oxley, section 922 of Dodd-Frank creates a whistleblower bounty program under which individuals, who voluntarily provide original information leading to successful SEC enforcement actions, may receive bounty payments based on penalties assessed against respondents.² Whistleblowers whose “original information”³ results in successful prosecutions netting monetary penalties in excess of \$1 million are entitled, with some exceptions, to bounties

¹ As relevant to attorneys, SEC Rule 205 provides:

An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

- (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
- (ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or
- (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

17 C.F.R. § 205.3(d)(2).

² Bounties are also available to whistleblowers who provide original information to the CFTC and the Department of Justice.

³ “Original information” is defined at 17 C.F.R. § 240.21F-4(b) as deriving from the whistleblower’s “independent knowledge or independent analysis,” and not available from a court or administrative record or the news media, or otherwise known to the Commission.

of 10% to 30% of the amount recovered in the government enforcement actions. Thus, the minimum whistleblower bounty is \$100,000. While, as explained below, lawyers subject to SEC jurisdiction are required to report serious corporate wrongdoing up the corporate ladder, reporting out – and collecting a bounty – is permissible under SEC rules. There are two sets of relevant SEC rules: attorney conduct regulations under Rule 205 (17 C.F.R. § 205); and Rules 240 and 249 (17 C.F.R. §§ 240, 249), promulgated under Dodd-Frank, concerning whistleblowing provisions.

II. Attorneys as Whistleblowers and Bounty Seekers under SEC Rules

SEC whistleblower rules exclude from the definition of "original information" most material that lawyers, in-house or retained, are likely to gain in the course of their professional representation of clients, and thus generally preclude attorneys, in most instances, from receiving a bounty for revealing such information.⁴ SEC Rule 21F-4(b) acknowledges the importance of the attorney-client privilege, as well as state ethics rules, and presumptively excludes the use of privileged or confidential information from the definition of eligible original information under the whistleblower rule.⁵ Indeed, the SEC warns lawyers that there will be no financial benefit to lawyers who disclose such information in violation of the attorney-client privilege or their ethical requirements.⁶

However, the SEC permits attorneys to reveal information obtained as a result of legal

⁴ The categories excluded from whistleblower bounty include: (a) confidential communications subject to the attorney-client privilege; (b) information that came from the legal representation of a client, whatever its source; (c) information that came from persons in a compliance, legal, audit, supervisory or governance role for the entity; and (d) information from the entity's legal, compliance, audit, or related functions for dealing with violations, unless the entity did not disclose the information to the SEC or CFTC within a reasonable time or acted in bad faith. 17 C.F.R. § 240.21F-4(b)(4), *available at* <http://www.law.cornell.edu/cfr/text/17/240.21F-4>.

⁵ *See* Implementation of the Whistleblower Provisions of Section 21F, Exchange Act Release No. 34-64545, at 50-52, 60-66, 249-50 (Aug. 12, 2011) [hereinafter SEC Release No. 34-64545], *available at* <http://www.sec.gov/rules/final/2011/34-64545.pdf>.

⁶ *Id.* at 60-61, 249-50.

representation of a client when such disclosure is permitted by either state ethics rules or SEC Rule 205.3(d)(2), which Rule, as noted above, was promulgated under Sarbanes-Oxley.⁷ Rule 205 allows attorneys practicing before the SEC in the representation of an issuer to reveal confidential information related to the representation when the attorney reasonably believes disclosure is necessary: (a) to prevent the issuer from committing a material violation of securities laws that is likely to cause substantial financial injury to the interests or property of the issuer or investors, (b) to rectify the consequences of a material violation of securities laws in which the attorney's services have been used, or (c) to prevent the issuer from committing or suborning perjury in an SEC proceeding.

Under SEC Rule 205, the disclosure of client confidences outside the organization is a last resort, not a first step. The rule requires lawyers practicing before the Commission to report evidence of material violations of the securities laws to the company's chief legal officer (CLO), who is required to investigate the claim and report back to the lawyer who originally made the report.⁸ In the event that the CLO finds credible evidence of a material violation, she must report the wrongdoing up the corporate ladder, including, if necessary, to the audit committee, qualified legal compliance committee or full board of directors. If all else fails, and if necessary to prevent further harm to the corporation or to investors, the CLO is authorized to disclose client confidences outside the company.⁹ A junior reporting lawyer may report disclosures outside the organization if the CLO fails to act. Thus, under SEC Rule 205, reporting up the corporate ladder is mandatory; reporting out is permissible. However, to the extent that there is an independent violation of the securities laws, a lawyer may be subject to an enforcement action by the SEC for failing to correct or prevent the wrongdoing of a client in which the lawyer was

⁷ 17 C.F.R. § 240.21F-4(b)(4)(i), *available at* <http://www.law.cornell.edu/cfr/text/17/240.21F-4>.

⁸ *Id.* at § 205.3(b), *available at* <http://www.law.cornell.edu/cfr/text/17/205.3>.

⁹ *Id.* at § 205.3(d), *available at* <http://www.law.cornell.edu/cfr/text/17/205.3>.

complicit.¹⁰

The prospect of government-rewarded lawyer whistleblowers poses two ethical questions for New York lawyers: (1) In those limited circumstances in which the New York Rules and SEC Rule 205 diverge, would a New York attorney violate the RPC if she makes a disclosure not authorized by the confidentiality provisions of RPC 1.6 in order to seek a bounty? (2) Would a New York attorney who is representing a client violate the conflict of interest provisions of NY RPC 1.7 by seeking a bounty as a whistleblower with respect to that client by using that client's confidential information?

III. Disclosure of Confidential Information

In addressing the foregoing questions, the Committee begins from the obvious premise that its jurisdiction is limited to interpreting the New York Rules of Professional Conduct, and does not extend to the rules of other states or questions of substantive law. Nor can the Committee anticipate the myriad choice-of-law issues that may arise in different contexts under RPC 8.5, particularly in matters involving nationwide practices and administrative procedure. In addition, there are some circumstances in which state regulations may be preempted by inconsistent federal law.¹¹ Preemption is a question of substantive law, to be applied by the courts to the specific facts of each case, and is beyond this committee's jurisdiction.¹² However,

¹⁰ See *In re Don Hershman*, Securities Act Release No. 33-9180 (Feb. 2, 2011), available at <http://www.sec.gov/litigation/admin/2011/33-9180.pdf>.

¹¹ See, e.g., Giovanni P. Prezioso, *Public Statement by SEC Official: Letter Regarding Washington State Bar Association's Proposed Opinion on the Effect of the SEC's Attorney Conduct Rules* (July 23, 2013), available at <http://www.sec.gov/news/speech/spch072303gpp.htm>.

¹² Compare, *Grievance Comm. v. Simels*, 48 F.3d 640, 646 (2d Cir. 1995) (reversing imposition of discipline against attorney who violated state "no-contact" rule in federal criminal proceeding; finding that "[i]f a particular interpretation of a state ethics rule is inconsistent with or antithetical to federal interests, a federal court interpreting that rule must do so in a way that balances the varying federal interests at stake"), with *Gadda v. Ashcroft*, 377 F.3d 934, 945 (9th Cir. 2004) (state bar has authority to discipline attorney for neglect of federal immigration matters) ("We apply a presumption against federal preemption unless the state attempts to regulate an area in which there is a history of significant federal regulation."), and *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119 (9th

SEC whistleblower rules explicitly reference “attorney-client privilege” and “applicable state attorney conduct rules,” and thereby implicitly assume a side-by-side coexistence of the RPC and Rule 205.¹³ Moreover, the SEC itself has acknowledged the applicability of state ethics rules in its own proceedings.¹⁴

The New York RPC prevent a lawyer generally from disclosing confidential information, but present six categories of exceptions to the general rule in RPC 1.6(b) if the circumstances are such that “the lawyer reasonably believes [disclosure is] necessary.” Of these six exceptions, three are relevant to this discussion: RPC 1.6(b)(2), RPC 1.6(b)(3), and RPC 1.6(b)(6).

RPC 1.6(b)(2) permits an attorney to disclose confidential information to prevent a client from "committing a crime." This exception has some overlap with the "material violation" of the securities laws described in SEC Rule 205; however, not all securities violations rise to the level of a crime. Lawyers have been civilly or administratively sued for registration and record-keeping violations that do not amount to fraud or a crime. For example, in *In re Isselmann*, a general counsel improperly failed to correct his client's misperception of foreign law.¹⁵ In *In re Drummond*, the SEC civilly prosecuted the general counsel of Google for failing to report that a grant of stock options would cause the company to cross a reporting threshold.¹⁶ In both *Isselmann* and *Drummond*, general counsels were prosecuted for securities law violations. However, it is at least arguable that the lawyers' conduct in those cases, even if

Cir. 2005) (California arbitrator ethics rules preempted in FINRA proceedings by FINRA rules approved by SEC), and *Sperry v. State of Florida*, 373 U.S. 379 (1963) (IRS regulations for practice before federal agency preempt inconsistent state rules).

¹³ See 17 C.F.R. § 240.21F-4(b)(4); SEC Release No. 34-64545, *supra* note 5, at 50-52, 250-51.

¹⁴ See, e.g., SEC v. Steven Altman, Securities Act Release No. 34-63306 (Nov. 10, 2010); *Steven Altman v. SEC*, 666 F.3d 1322 (D.C. Cir. 2011) (disciplining lawyer for violations of NY RPC based on extortionate conduct which impeded SEC investigation). See also, 28 U.S.C. § 530B (2006) (The "McDade Amendment") (binding federal prosecutors to follow state ethics rules to the same extent as state lawyers); Lisa G. Lerman & Philip G. Schrag, *Ethical Problems in the Practice of Law* 716-17 (Aspen 2008).

¹⁵ Securities Act Release No. 34-50428 (Sept. 23, 2004), available at <http://www.sec.gov/litigation/admin/34-50428.htm>.

¹⁶ Securities Act Release No. 33-8523 (Jan. 13, 2005), available at <http://www.sec.gov/litigation/admin/33-8523.htm>.

violations of securities law, did not rise to the level of crime or fraud for the purpose of state ethics rules.

To the extent that SEC Rule 205 permits (but does not require) reporting out of client confidences that amount to a material violation of the securities laws, regardless of whether the client's conduct amounts to a crime or whether the lawyer's services were used, it is broader than, and inconsistent with, the New York RPC exceptions to the confidentiality requirement.

Additionally, New York RPC 1.6(b)(3) permits a lawyer to reveal client confidential information where reasonably necessary

to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud.

This exception permits reporting out of client confidences, but only in circumstances in which the lawyer's services have been used, in essence, to perpetrate a crime or fraud. For example, where the lawyer participated in drafting an offering statement that the lawyer later learns to be materially misleading, the New York Rules and SEC Rule 205 are in essential agreement that disclosure is permissible.

The third relevant exception is New York RPC 1.6(b)(6), which permits disclosure of client information "when permitted or required under these Rules or to comply with other law or court order." We do not need to decide here whether or not an administrative regulation, such as SEC Rule 205, is a law or court order within the meaning of the exception of RPC 1.6(b)(6). This is because RPC 1.6(b) explicitly provides that disclosure of client confidential information under its six exceptions – including RPC 1.6(b)(6) – may be made only "to the extent the lawyer reasonably believes necessary." The SEC regulations, as mentioned, only require reporting up the ladder. Reporting out is permissive, not mandatory. Thus, as a general rule, SEC Rule 205,

standing by itself, does not require a lawyer to report out corporate wrongdoing and, therefore, such reporting is not reasonably necessary within the meaning of RPC 1.6(b).¹⁷ The whistleblower rule is permissive as well, and does not mandate reporting out.

Other ethics rules also inform the conduct of corporate lawyers. New York RPC 1.13, “Organization as Client,” which covers the responsibilities of a corporate attorney, requires an attorney aware of corporate misconduct that constitutes a violation of law or of a legal duty to the corporation to take reasonable measures within the organization to prevent harm to the organization, but does not contain independent support for reporting outside the organization if such reporting might result in disclosure of confidential information in violation of Rule 1.6:

If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly in violation of law and is likely to result in a substantial injury to the organization, the lawyer may reveal confidential information only if permitted by Rule 1.6, and may resign in accordance with Rule 1.16.¹⁸

Thus, reporting out is circumscribed under New York law to those instances permitted in RPC 1.6(b).

In addition, in the case of known false evidence, a lawyer is required under RPC 3.3(a) to take reasonable remedial measures, “including, if necessary, disclosure to the tribunal.”

Disclosing client confidences to a tribunal may also be required when the lawyer knows of criminal or fraudulent conduct related to a proceeding in a tribunal.¹⁹

In sum, the New York exceptions permitting disclosure of confidential information are

¹⁷ For the same reason, the state and federal regulatory schemes are not mutually antagonistic. SEC whistleblower regulations do not require reporting out; they permit it, within the exceptions set forth in Rule 205. If federal regulations required reporting out, we might be in a different situation.

¹⁸ NY RPC 1.13(c) (emphasis added). By contrast, American Bar Association Model Rule 1.13 permits outside disclosure if the corporation's board fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law and if the lawyer reasonably believes that the violation is “reasonably certain to result in substantial injury to the organization.” But disclosure is permitted only to the extent necessary to prevent substantial injury to the organization.

¹⁹ NY RPC 3.3(b).

different from the SEC exceptions. Under the SEC rules discussed above, an attorney may collect a bounty in exchange for disclosure of confidential information in situations not permitted under the New York Rules. Even when disclosure is permitted under the New York Rules, for example, when clear corporate wrongdoing rising to the level of crime or fraud has been perpetrated through the use of the lawyer's services, preventing wrongdoing is not the same as collecting a bounty. Even in cases of clear criminal conduct or fraud, the lawyer's disclosure must be limited to reasonably necessary information.²⁰

As a general principle, there are few circumstances, if any, in which, in the Committee's view, it would be reasonably necessary within the meaning of RPC 1.6(b) for a lawyer to pursue the steps necessary to collect a bounty as a reward for revealing confidential material. This point was acknowledged in a recent federal opinion in a *qui tam* whistleblower case decided under the False Claims Act.²¹

Thus, in those circumstances in which the New York Rules apply, this Committee opines that disclosure of confidential information in order to collect a whistleblower bounty is unlikely, in most instances, to be ethically justifiable. This is because, under most circumstances, such disclosure is not reasonably necessary, and does not fit within the enumerated exceptions of RPC 1.6(b).²² RPC 1.6, by its terms, is limited to "information gained during or relating to the representation of a client" Accordingly, this opinion applies only when a lawyer is acting as a legal representative of a client. Thus, a lawyer functioning in a non-legal capacity would not be within the scope of this opinion.

²⁰ See, e.g., NYSBA Comm. on Prof'l Ethics, Op. 837 (lawyer must take reasonable remedial measures under RPC 3.3 to correct client perjury, but may only reveal client confidences to the extent reasonably necessary; "[t]herefore, if there are any reasonable remedial measures short of disclosure, that course must be taken").

²¹ See *United States Ex Rel. Fair Lab. Practices Assocs. v. Quest Diagnostics Inc.*, No. 05-C5393, 2011 WL 1330542, 2011 U.S. Dist. LEXIS 37014 (S.D.N.Y. Mar. 24, 2011) (disclosure of client confidences by former general counsel of corporation was not "reasonably necessary" under former Code of Professional Responsibility to rectify client fraud).

²² See *id.*

Accordingly, New York RPC 1.6 does not permit disclosure of confidential information in order to collect a Dodd-Frank whistleblower bounty, even in compliance with the SEC rules, if that disclosure does not fit within an exception under New York RPC 1.6 or is not necessary to correct a fraud, crime or false evidence within the meaning of RPC 3.3.

IV. Conflicts of Interest Under RPC 1.7

An additional and even more significant ethical issue is presented by the bounty provisions of Dodd-Frank: Is a conflict of interest under RPC 1.7 presented when a corporate lawyer, functioning as a lawyer, seeks to collect a whistleblower bounty? Our answer is presumptively yes. A lawyer confronted with potential corporate wrongdoing must evaluate and consider varying requirements under SEC and state ethics rules and then make some difficult decisions: Is the potential violation material? Is the potential violation criminal? Should the lawyer report the wrongdoing up the corporate ladder? Should the lawyer report the wrongdoing to an outside body, and if so, when?

These complex and potentially inconsistent considerations call for the exercise of objective, dispassionate professional judgment. A lawyer who blows the whistle prematurely could harm the client and be professionally responsible for the precipitous disclosure of client confidences. A lawyer who fails to report credible evidence of corporate wrongdoing up the ladder, if it amounts to an independent violation of the securities laws, could potentially be prosecuted by securities regulators, subject to professional discipline by the SEC, and subject to reciprocal discipline by state bar counsel.²³

Especially under these delicate circumstances, a financial incentive might tend to cloud a

²³ See, e.g., New York City Bar, Report of the Task Force on the Lawyer's Role in Corporate Governance 46 (Nov. 2006) (collecting seventy-four SEC enforcement actions against lawyers), *available at* http://online.wsj.com/public/resources/documents/WSJ-CORP-GOV-FINAL_REPORT.pdf.

lawyer's professional judgment. Yet Dodd-Frank permits the SEC to pay lawyers potential bounties of 10%-30% of collected fines in excess of \$1 million. The potential bounties range from \$100,000 to literally millions of dollars in larger cases. The prospect of financial benefit could place the attorney's personal interests in potential conflict with those of the client.

RPC 1.7(a)(2) precludes representation of a client, absent waiver, where a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." The prospect of a government payment to a whistleblower poses such a risk. While we cannot anticipate all potential circumstances and situations, and do not wish to paint a bright line rule applicable to all cases, it is the opinion of the Committee that the potential payment of an anticipated whistleblower bounty in excess of \$100,000 presumptively gives rise to a conflict of interest between the lawyer's personal interest and that of the client.

We cannot anticipate all potential circumstances and, therefore, our opinion anticipates the overwhelming majority of cases in which the lawyer's professional judgment may be affected by the prospect of a monetary bounty. This opinion is narrowly tailored to an interpretation of permissive whistleblowing, and does not purport to address the rare and exceptional situation in which the lawyer is affirmatively required by law or the rules of professional conduct to report out the client's misconduct, *i.e.*, when reporting out is mandatory.²⁴ Under those rare circumstances (in which reporting out is mandatory), the financial incentive could be less of a factor in determining the existence of a conflict with the lawyer's personal interest.

Further, although Rule 1.7(b) provides for a waiver by a client of the conflict even if there is a "significant risk" that the lawyer's professional judgment or representation will be

²⁴ See, e.g., NY RPC 3.3(b).

adversely affected by the lawyer's personal interest, in some circumstances the whistleblower-bounty conflict may be unwaivable.²⁵

Indeed, where an attorney can hope to claim close to a \$10 million bounty by reporting a securities fraud of \$30 million or more – the same amount that gave rise to an unwaivable conflict in *Schwarz* – the conflict may be unwaivable. Such large sums of money would tend to cloud lawyers' professional judgment, influencing lawyers to report out a violation regardless of their clients' interests.²⁶

V. Former Clients

In our view, some ethical concerns with regard to whistleblower bounties apply to former clients as well. New York RPC 1.9(c) prohibits a lawyer from using client confidential information to the detriment of a former client, unless permitted by Rule 1.6(b). According to RPC 1.9(c):

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

- (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
- (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Thus, Rule 1.9 protects the confidences of former clients, which may not be disclosed to the client's detriment unless pursuant to an exception under RPC 1.6(b). And, as mentioned, the

²⁵ See, e.g., *United States v. Schwarz*, 283 F.3d 76, 95 (2d Cir. 2002) (unwaivable conflict of interest raised by criminal defense lawyer's \$10 million contract with police union where lawyer failed to point finger at union delegates in defense of criminal defendant accused of participating in torture of Abner Louima).

²⁶ This opinion does not deal with circumstances where the attorney's financial interest is less than \$100,000, and is not meant to suggest that no ethical concerns are present in such situations.

exceptions in Rule 1.6(b) permit disclosure of client confidences only "to the extent the lawyer reasonably believes necessary" The lawyer's duty to maintain client confidences has been held to survive the termination of the client-lawyer relationship.²⁷ It is the Committee's view that lawyers of former clients, even those wrongfully discharged in violation of the law, may not seek bounties, although it has been held that they may, under some circumstances, reveal some client confidences in the context of a claim for wrongful termination.²⁸ This is because the confidentiality provisions of RPC 1.9, which apply to former clients, incorporate those of RPC 1.6. Accordingly, a former lawyer for a client may not reveal information that could not have been revealed in the course of the representation.

Moreover, case law has recognized, more generally, the lawyer's duty not to harm a former client. In *Oasis West Realty, LLC v. Goldman*, the California Supreme Court sustained a breach of fiduciary duty claim against a lawyer who was disloyal to a former client when he publicly protested a development permit that he himself had formerly obtained on behalf of the client, at considerable expense.²⁹ The lawyer's interest in free speech did not permit his act of disloyalty to his former client regarding the same matter for which he had been retained.

We believe that a similar analysis applies in the case of a lawyer standing to profit from blowing the whistle on a former client in exchange for a monetary bounty. While in some circumstances a lawyer may be required to take remedial action to prevent or correct client fraud or perjury, such actions should be taken because they are required by the law or the RPC – not because the lawyer seeks personal gain at the former client's expense. Additionally, we believe that attorneys owe a fiduciary duty to former clients to maintain confidentiality, and may not

²⁷ See *Quest Diagnostics*, 2011 U.S. Dist. LEXIS 37014; *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (notes of Vincent Foster's lawyer are confidential even after his death).

²⁸ See, e.g., *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989 (9th Cir. 2009).

²⁹ 51 Cal.4th 811 (2011).

violate that fiduciary duty in order to promote a personal interest.³⁰ Furthermore, there are circumstances in which an attorney may be *permitted* under Rule 1.9 to reveal otherwise confidential information about a former client – for example, when the disclosure is reasonably necessary to prevent the client from committing a crime under Rule 1.6. However, we believe that undertaking this otherwise permissible disclosure in a manner that results in a bounty for the attorney raises a significant risk that the attorney's judgment in determining whether disclosure is "reasonably necessary" will be adversely affected and presents a conflict of interest that is beyond what Rule 1.9 was intended to allow.

VI. The Attorney's Status

While the RPC apply with equal force to lawyers in private practice and in-house counsel, we note that the conflict provisions of RPC 1.7 (and, as mentioned above, RPC 1.6) do not apply to all lawyers at all times, but only to lawyers who are engaging or have engaged in the representation of a client. RPC 1.7(a) specifically says that "a lawyer shall not represent a client" if the lawyer's professional judgment "on behalf of a client" would be affected by a personal interest of the lawyer. Thus, our opinion would not affect or apply to lawyers who are not representing, or did not represent clients. For example, a corporate officer or compliance officer who happens to be a lawyer may not necessarily be representing a client in the performance of his duties, depending on the facts of the individual case. To the extent that the lawyer is not representing a client, our opinion would not apply to that conduct simply because the lawyer happens to be a licensed attorney.

³⁰ See generally *Birnbaum v. Birnbaum*, 73 N.Y.2d 461 (1989) (general duty of fidelity requires avoidance of situations in which personal interests conflict with the interests of those owed a fiduciary duty).

VII. Conclusion

It is the Committee's opinion that New York lawyers who are acting as attorneys on behalf of clients presumptively may not ethically serve as whistleblowers for a bounty against their clients under the Dodd-Frank Wall Street Reform and Consumer Protection Act, because doing so generally gives rise to a conflict between the lawyers' interests and those of their clients. New York lawyers, in matters governed by the New York RPC, may not disclose confidential information under the Dodd-Frank whistleblower regulations, except to the extent permissible under the Rules of Professional Conduct. This conclusion is the same for current and former lawyers, whether in-house or outside counsel. However, this Opinion is limited to New York lawyers who are acting as attorneys on behalf of clients.