

## Client Confidences, Secrets and the Discharged In-House Counsel

by  
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As more lawyers go in-house, eventually more will leave their corporate jobs. Presumably, more also will claim they were wrongfully or constructively discharged. In *Nordling v. Northern States Power, Co.*, 478 N.W.2d 498, 499 (Minn. 1991), the Minnesota Supreme Court held, "[A]n employee who is in-house attorney for his corporate employer is not, by reason of the attorney-client relationship, precluded from making a claim against the employer for wrongful discharge."

Whether an attorney may use her former employer's confidences or secrets to further the claim, however, is not nearly so clear. The Director's advisory opinion service recently opined that a discharged former in-house lawyer seeking to do this should make a motion to the tribunal before which her claim was pending for permission to use that information, and that she should then abide by the tribunal's ruling.

Rule 1.6(d), Minnesota Rules of Professional Conduct (MRPC), defines client confidences and secrets:

(d) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Whether any particular information is a client confidence or secret is a fact-specific question, as is the question of whether the client has waived the confidentiality or secrecy of the information.

Rule 1.6(b), MRPC, governs disclosure of client confidences and secrets. This rule provides:

(b) A lawyer may reveal:

- (1) confidences or secrets with the consent of the client or clients affected, but only after consultation with them;
- (2) confidences or secrets when permitted under the Rules of Professional Conduct or required by law or court order;
- (3) the intention of a client to commit a crime and the information necessary to prevent a crime;
- (4) confidences and secrets necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;

(5) confidences or secrets necessary to establish or collect a fee or to defend the lawyer or employees or associates against an accusation of wrongful conduct;

(6) secrets necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. See Rule 8.3.

There is no provision in Rule 1.6(b), MRPC, which would appear to allow, absent client waiver, disclosure of client confidences or secrets by the lawyer in connection with the lawyer's effort to pursue a claim against a former client, whether or not that former client is also the attorney's former employer. The Director is not aware of any Minnesota or other case law addressing whether pursuant to Rule 1.6(b), MRPC, an attorney employed as an in-house counsel may disclose client confidences or secrets in connection with the attorney's claim against the attorney's former employer.

### **The Model Rule**

Some jurisdictions have adopted rules similar to Model Rule of Professional Conduct 1.6(b). This rule provides:

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) 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. (Emphasis added.)

### **Confidential Disclosures**

The Model Rule has been interpreted to allow an attorney in a wrongful discharge action to disclose confidences and secrets necessary to prosecute that action. *See e.g., Kachnau v. Sunvord Data Systems, Inc.*, 109 F.3d 173 (3<sup>rd</sup> Cir. 1997); Oregon State Bar Legal Ethics Committee Formal Opinion 1994-136. However, Model Rule 1.6(b) differs substantially from Minnesota Rule 1.6(b). The Minnesota rule does not contain the express provision of the Model Rule allowing disclosure when an attorney is making a claim against a client, including a former employer.

Accordingly, through a discovery or other motion, the discharged lawyer should seek permission of the court to use client confidences or secrets in connection with a wrongful discharge claim, and then abide by the court's ruling. The Supreme Court suggested this procedure in *Nordling*, 478 N.W.2d at 503 (footnotes omitted), where it stated, "The trial court will decide whether or not there is a privilege for the data sought to be used, and, if so, whether the privilege has been waived. Obviously, an in-house attorney is not excused from keeping privileged communications confidential just because he is in-house."