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Whistleblower Lawyers Counterattack Against DC Disciplinary Counsel

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The DC Disciplinary Counsel — previously known as the DC Bar Council — is on the attack against whistleblower lawyers.

And whistleblower lawyers are not happy about it. They have launched something of a counterattack.



Tom Devine

The Disciplinary Counsel has filed charges against prominent Washington whistleblower lawyer Lynne Bernabei and former Justice Department attorney Thomas Tamm.

The Disciplinary Counsel brought charges in June 2014 against Bernabei and Notre Dame Law Professor G. Robert Blakey — alleging that the two advised their client — former General

Electric lawyer and whistleblower Adriana Koeck — to go public to reporters and law enforcement officials in the United States with incriminating and alleged confidential information against General Electric.

The case was initiated with a complaint filed by General Electric with the Disciplinary Counsel against Koeck.

In November 2015, Blakey was given the mildest possible sanction in the District — an admonition. The cases against Koeck and Bernabei are pending.

Last month, Tamm was charged with calling a reporter from a pay phone to make public the federal government's program of illegal wiretapping.

Now, the whistleblower bar is organizing to push back at what they see as an ideological attack on whistleblower lawyers.

“We have rolled up our sleeves and we are organizing,” Tom Devine of the Government Accountability Project told *Corporate Crime Reporter* in an interview last week. “We are not going to be passive.”

“These whistleblowers were acting within the legal rights Congress created with the whistleblower statutes,” Devine said. “In the Tamm case, the government didn't even attempt to charge him with misconduct. His activities were legally

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protected. In the Bernabei case, the Department of Labor rejected the same charges when General Electric tried to censor Ms. Bernabei's advocacy for the whistleblower in government proceedings. This is an attack by the DC Bar Counsel on the constitutional authority of Congress and the President to enact the rules of law and for judicial bodies to enforce them. The Bar Counsel is saying that its standards trump and can cancel out the free speech rules that our government has enacted to protect the public against bureaucratic misconduct."

Former Justice Department official and whistleblower lawyer Jesselyn Radack told *Corporate Crime Reporter* that the Disciplinary Counsel "has a nasty history of politically-motivated bar discipline, especially against whistleblowers and attorneys for whistleblowers."

"Like Thomas Tamm, I blew the whistle as a Justice Department attorney," Radack said. "As with Tamm, the federal criminal case against me closed with no charges ever being brought. Afterwards, we both faced charges from the Maryland Bar, which were dismissed in a timely fashion. However, in my case, the DC Bar charges hung like a Sword of Damocles over my head for ten years. We see the exact same pattern with Tamm. The DC Bar is bringing charges 12 years after his revelation of the government's unconstitutional and illegal warrantless wiretapping program."

"If Tamm or I were threats to the public, the Bar would obviously want to pull our licenses as soon as possible — instead, they have taken it upon themselves to act as a retaliatory tool of the Justice Department."

Washington University Law Professor Kathleen Clark said that "Tamm's disclosure of the surveillance program to a Capitol Hill staffer and to the *New York Times* appears to be a quintessential public interest disclosure."

"Tamm — and others within the Office of Intelligence and Policy Review (OIPR) — believed that the program was illegal," Clark said. "Officials at the highest levels of the Justice Department had nonetheless purported to authorize it. Tamm spoke with supervisory lawyers within OIPR about it, and they apparently confirmed its illegality but weren't doing anything about that illegality."

"After the *New York Times* published articles about the program, members of Congress were up in arms about it. Eventually, Attorney General Holder acknowledged that the program was illegal."

"It seems strange that DC's Disciplinary Counsel would bring these charges against Thomas Tamm for his critical role in the disclosure of an illegal government surveillance program. It's even more strange that they decided to do this more than seven years after Tamm's role was made public."

Whistleblower lawyer Jason Zuckerman told *Corporate Crime Reporter* that "as a whistleblower advocate, I am concerned about what appears to be an ideological crusade against whistleblowers and their counsel."

"The ostensible mission of Bar Counsel is to 'protect the public and the courts from unethical conduct by members of the D.C. Bar,'" Zuckerman said. "But despite limited resources and a backlog resulting from receiving approximately hundreds of complaints a year, the highest priority of Bar Counsel appears to be

prosecuting whistleblowers and their attorneys.”

“In the Tamm matter, the conduct occurred in 2004 and in the Bernabei matter, the conduct took place in 2008. And even though the disciplinary process in DC is complaint driven, Bar Counsel chose to prosecute Bernabei without having received any complaint about her conduct in that matter. It seems very suspicious that Bar Counsel is devoting such significant resources to prosecuting Bernabei and Tamm, especially where the alleged conduct appears to fall into a gray area, if there was any violation at all, which makes it very difficult for Bar Counsel to prove by clear and convincing evidence that Bernabei and Tamm knowingly violated the Rules of Professional Conduct.”

“There seems to be a double standard. Has Bar Counsel ever prosecuted any attorneys at corporate firms that help their clients perpetrate fraud? And did Bar Counsel investigate prominent lawyer executives at Fannie Mae who appear to have engaged in actions that led to a multi-billion dollar restatement and left taxpayers footing the bill? Did Bar Counsel prosecute the attorneys that enabled large banks to nearly tank the economy? And has Bar Counsel prosecuted government attorneys that enabled torture and other flagrant unlawful human rights violations? Does Bar Counsel protect the public or does it protect the interests of big corporations and big government?”

“About one week ago, **60 Minutes aired a show in which they caught lawyers**, including a former American Bar Association president, providing advice on how to move suspect money into the United States,” Zuckerman said. “Is it Bar Counsel’s position that lawyers that take steps to combat or oppose fraud should be disbarred and that lawyers that enable corporate fraud are the pinnacle of the profession? I resent that my mandatory bar dues are used to fund an office that is zealously prosecuting corporate and government whistleblowers while apparently ignoring a serious problem in the legal profession of attorneys perpetrating and enabling massive frauds.”

“What is especially odd in the Bernabei matter is that Bar Counsel is taking positions that are contrary to federal law and Supreme Court precedent. Several federal courts and indeed the Supreme Court in *Lawson v. FMR* have held that attorneys can bring Sarbanes-Oxley claims when they suffer retaliation for blowing the whistle. Yet in the Bernabei matter, Bar Counsel appears to claim that federal law does not preempt inconsistent state rules of professional conduct. Advancing this bizarre legal argument is an odd use of Bar Counsel’s limited resources.”

At the center of the storm is Assistant Disciplinary Counsel Hamilton P. Fox III, who is bringing the charges against Bernabei and Tamm.

Fox is a former partner at Sutherland Asbill. He currently teaches a course at Georgetown Law Center titled “Counseling the Corporation in Crisis.”

While at Sutherland Asbill, Fox represented the Israeli spy Jonathan Pollard. And a couple of years ago, he settled a high-profile run in he had with DC police over a parking dispute. Fox says DC wrote him a check for \$80,000 to settle the dispute.

Fox told *Corporate Crime Reporter* that there is no ideological crusade against

whistleblowers.

Fox said that out of the thousands of cases investigated over the past ten years by his office, he knows of only two brought against whistleblower lawyers — the Bernabei cases and the Tamm case.

Fox says that there have been many more brought against corporate lawyers.

“I can think of at least three lawyers in major law firms whom we have disciplined in recent years,” Fox said.

“And it’s simplistic to say that we are trying to trump federal law,” Fox said.

“Federal law does not give lawyers the right to violate attorney-client privilege. If you hired a lawyer and disclosed to him something very bad that you have done, do you want that lawyer to be free to disclose to the public?”

Fox said that his office gets about 500 to 600 complaints about lawyers every year.

“If you go back ten years, that’s about what — 5,000 complaints?” Fox said. “And so far, we have brought two cases against whistleblower lawyers?”

“How is that a crusade?” he asked.

Fox says that if a lawyer hears from a client about activity that poses immediate risk to human health, then they would have a duty to report that to law enforcement and go public with it.

“But that’s different from the kinds of corporate wrongdoing — like misleading advertising — it depends on what the misconduct is,” Fox said.

“If the lawyer hears — I’m going to shoot my wife, you can disclose,” Fox said. “If the lawyer hears — I’m going to divorce my wife, you can’t.”

What about rampant corporate bribery?

“I actually had such a case when I was in practice,” Fox said. “I found out that agents of my client company were bribing people in a foreign country to get licenses. If I have actual knowledge of that, under rules of professional conduct, I’m required to report that up the chain within the company, to the board and to give them the opportunity to correct. If they do not correct it, then I am allowed to report it outside the company, only if to prevent the client from committing the crime or fraud and if it is reasonably certain that substantial financial injury will occur to someone else. If it is simply that some government official in some foreign country is being enriched, I cannot report it.”

“That’s the premise of our profession,” Fox said. “We withhold the secrets of our clients.”

Sarbanes-Oxley imposed a different standard, Fox admits — “probably under SOX I report to the SEC — but overall — this area of law has not yet been settled.” Disciplinary enforcers like Fox don’t have prosecutorial discretion and thus can’t launch vendettas, he says. Every case he brings has to be approved by a superior. But he admits that in most cases, his recommendations are approved.

Devine counters that the DC Disciplinary Counsel has “gone rogue”

“The DC Bar Counsel has gone rogue in a back door attack on the rule of law as established by our Constitution,” Devine said. “It is also ignoring federal preemption. Prior DC Bar Counsel opinions had respected preemption and said they could trump its internal bar rules.”

*[For the complete q/a format Interview with Tom Devine, see page 30 Corporate Crime Reporter 7(14), February 15, 2016, **print edition only.**]*

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