DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD OF PROFESSIONAL RESPONSIBILITY

In the Matter of	
M. ADRIANA KOECK,	**Board Docket No. 14-BD-061** **Bar Docket No.2008-D260376**
Respondent,	
An Administratively Suspended Member of the Bar of the District of Columbia Court of Appeals Bar Number: 439928 Date of Admission: December 6, 1993	
And	
LYNNE BERNABEI, ESQUIRE,	**Board Docket No. 14-BD-061** **Bar Docket No. 2012-D376**
Respondent,	
A Member of the Bar of the District of Columbia Court of Appeals Bar Number: 938936 Date of Admission: December 14, 1977	

BRIEF OF *AMICI CURIAE* GOVERNMENT ACCOUNTABILITY PROJECT AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

TABLE OF CONTENTS

INTERESTS OF THE *AMICI CURIAE* **2**

LEGAL BACKGROUND **5**

QUESTIONS PRESENTED **11**

SUMMARY OF ARGUMENT **11**

ARGUMENT **14**

SOX AND THE REGULATIONS THE SEC PROMULGATED TO EFFECT SOX, 17 C.F.R. PART 205, PREEMPT THE RELEVANT D.C. RULES OF PROFESSIONAL CONDUCT.

SIGNATURE **32**

CERTIFICATE OF SERVICE **33**

IDENTITY AND INTERESTS OF THE *AMICI CURIAE*[1]

Disciplinary Counsel has authorized undersigned counsel of record to represent that it consents to the filing of this brief *amicus curiae* by the Government Accountability Project and the National Employment Lawyers Association. Respondent Lynne Bernabei has similarly consented. Undersigned counsel has diligently tried, but repeatedly failed to reach Respondent M. Adriana

[1] *Amici* hereby represent that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *Amici*, its members, or their counsel made any monetary contribution to the preparation or submission of this brief.

Koeck to obtain her consent.

Amicus the **GOVERNMENT ACCOUNTABILITY PROJECT ("GAP")** is a non-partisan, non-profit public interest law firm specializing in legal advocacy on behalf of whistleblowers – government and corporate employees who expose illegality, gross waste and mismanagement, abuse of authority, dangers to public health and safety, or other institutional misconduct undermining the public interest.

GAP has substantial expertise in protecting employees' whistleblower rights. GAP led the successful campaigns of whistleblower organizations seeking enactment of a broad range of relevant federal laws, including both the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. §1514, *et seq*., and the Whistleblower Protection Act of 1989 ("WPA"), 5 U.S.C. 12 § 1201, *et seq*. (as well as the subsequent 1994 and 2012 amendments to the WPA). GAP attorneys have testified before Congress over the last two decades concerning the effectiveness of existing statutory protection, filed numerous amicus curiae briefs on constitutional and statutory issues relevant to whistleblowers, co-authored the model whistleblower protection laws to implement the Organization of American States ("OAS")'s Inter-American Convention Against Corruption.

GAP has published material concerning whistleblower protections and their practical realities. *See, e.g*., Thomas M. Devine, THE WHISTLEBLOWER'S SURVIVAL GUIDE: COURAGE WITHOUT MARTYRDOM (1997); Thomas M. Devine *et al*., *Whistleblowing and the United States: The gap between vision and lessons learned*, in WHISTLEBLOWING AROUND THE WORLD: LAW, CULTURE, AND PRACTICE, (Richard

Calland, ed. 2004); Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L.R. 531 (1999); and Robert G. Vaughn, Thomas M. Devine & Keith Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers,* 35 GEO. WASH. INT'L. L. REV. 857 (2003).

The **NATIONAL EMPLOYMENT LAWYERS ASSOCIATION ("NELA")** is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

As an organization focused on protecting the interests of employees who are treated illegally, NELA has an abiding interest in ensuring that sanctions against such workers and their lawyers are imposed only when it is clear that an egregious violation has taken place. NELA has an active Ethics & Sanctions Committee that counsels and advises employment lawyers about ethical issues in their practices.

The Committee also assists in identifying cases involving sanctions and ethical issues in which NELA's *amicus* participation may help advance the remedial purposes of workplace laws. NELA's interest in this case is to cast light on both the legal issues presented, and assist the Board in determining the broader impact the decision in this case may have on access to the courts for people who have been treated unlawfully, as well as on those attorneys who are – and whom may be asked to be – their advocates.

Attorneys who focus on employment law (like NELA members) and whistleblower law (like GAP's supporters) are needed to vindicate the rights of attorney whistleblowers under SOX, as most corporate attorneys do not practice in this area.

LEGAL BACKGROUND

The Supreme Court recently explained the provenance and important of the Sarbanes–Oxley Act of 2002:

> The Sarbanes–Oxley Act of 2002 (Sarbanes–Oxley or Act) aims to "prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions." S. Rep. No. 107–146, p. 2 (2002) (hereinafter S. Rep.). Of particular concern to Congress was abundant evidence that Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a "corporate code of silence"; that code, Congress found, "discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally." *Id*., at 4–5 (internal quotation marks omitted).

Lawson v. FMR LLC, 571 U.S. ___, 134 S. Ct. 1158, 1162, 188 L.Ed.2d 158 (2014)

(footnote omitted).

If the reason for the enactment of SOX had to be distilled to a single word, that word would be "Enron." As the Supreme Court explained in *Lawson*, "the Enron scandal prompted the Sarbanes–Oxley Act[.]" *Lawson*, 134 S. Ct. at 1162. SOX's legislative history is replete with references to Enron being the catalyst for this Act.[2]

Congress enacted the whistleblower protection to help prosecutors and investors find the witnesses and documents that would reveal fraudulent information filed with the SEC. Thus, the House Committee of the Whole Report on the Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002, *i.e.,* the Sarbanes-Oxley Act, H. Rept. 107-414 (107th Cong. (2001-02) https://www.congress.gov/congressional-report/107th-congress/house-report/414/1?q=%7B%22search%22%3A%5B%22107-414%22%5D%7D (avail. March

---

[2] For example, when Senator Leahy reported on the whistleblower provision, he described it in the context of Enron:

> Look what they were doing on this chart. There is no way we could have known about this without that kind of a whistleblower. . . . The fact is, they were hiding hundreds of millions of dollars of stockholders' money in their pension funds. The provisions Senator Grassley and I worked out in Judiciary Committee make sure whistleblowers are protected. …
>
> As the Andersen case showed, instead of just incorporating the loopholes from existing crimes and raising the penalties, we need tough new provisions that will make sure key documents do not get shredded in the first place.
>
> It only takes a minute to warm up the shredder, but it can take years for prosecutors and victims to prove a case.

148 Cong Rec., S7358 (July 25, 2002).

28, 2017), explained that SOX's paramount purpose is to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws."

Congress enacted SOX because "corporate insiders are the key witnesses that need to be encouraged to report fraud," 148 Cong. Rec. S7358 (July 26, 2002) (Statements of Sen. Leahy), and "whistleblowers in the private sector, like [Enron whistleblower] Sharron Watkins, should be afforded the same protections as government whistleblowers." 148 Cong. Rec. H5472 (July 25, 2002) (Statements of Rep. Jackson-Lee). *See also Lawson*, 134 S. Ct. at 1162. After the enactment of SOX, Senator Leahy stated, "[t]he law was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market." 149 Cong. Rec. S1725 (Jan. 28, 2003). The Supreme Court in *Lawson* evinced special regard for lawyers as essential to deter "retaliation [against corporate employees] by their employers for blowing the whistle on a scheme to defraud the public company's investors … ." *Id.*, 134 S.Ct. at 1168.

The remedial purpose explains why SOX is broadly written, and why an expansive interpretation and application is both necessary and appropriate. Consequently, SOX, like other federal securities laws, must be construed broadly and flexibly to effectuate its remedial purposes. Thus, the Supreme Court has "repeatedly recognized that securities laws combating fraud should be construed 'not technically and restrictively, but flexibly to effectuate [their] remedial

purposes.'" *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386–87 (1983) (quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 195 (1963)).[3]

The employee protection provision of SOX protects those who

> cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders … .

18 U.S.C. § 1514A(a)(1).

The key word in this statute for this case is "cause." Long before Congress considered creating SOX, Congress used this word to encompass the full range of methods employees might use to raise concerns about a host of dangers to the public interest. *See, e.g.*, *Phillips v. Interior Bd. of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938 (1975) (Mine Safety and Health Act protects "a realistically effective channel of communication re health and safety"); *Horton v. Dep't of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995) (Whistleblower Protection Act protects disclosures to media). SOX contains no limitation on how an employee might cause the information to be provided, other than that it must be a lawful act. Senator Leahy implicitly recognized that some public disclosures should not be protected, "since the only acts protected are `lawful' ones, the provision would not protect illegal actions, such as the improper public disclosure of trade

[3] Accord *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 198 (1994); *Superintendent of Insurance v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972). *See Wadler v. Bio–Rad Labs., Inc.*, No. 15-CV-02356-JCS, 2016 WL 7369246 *20 (N.D. Cal. Dec. 20, 2016)).

secret information." 148 Cong. Rec. S7420 (July 26, 2002) (Statements of Sen. Leahy). Since then, Congress has also given whistleblowers who made disclosures to government audiences protection from legal charges that they had wrongfully disclosed even trade secrets. 18 U.S.C. §1833(b) (May 11, 2016).[4]

SOX's remedial purposes would be seriously compromised if the Board were to adopt Disciplinary Counsel's position that preemption is unnecessary because there is no complete and irreconcilable conflict between the D.C. Rules and Part 205. *See* Discip. Counsel Br. at 16-17.[5] If such were to occur, attorney-whistleblowers would be denied a fundamental right to seek legal advice when they are concerned about their employer-client's potentially criminal conduct.

This could create a "lose-lose" dilemma that undermines SOX remedial purpose: either fraud will continue because whistleblowers are chilled from making disclosures without support from counsel; or whistleblowers will go forward with unfounded, irresponsible, or unperfected disclosures that fall outside the law's protection or even improperly prejudice their corporate employers. As the Supreme

---

[4] The Supreme Court has held that limitations on lawful disclosures under the WPA could only be those that were authorized by Congress. *Dept. of Homeland Sec. v. MacLean*, ___ U.S. ___, 135 S. Ct. 913, 919-21, 190 L.Ed.2d 771 (2015).

[5] Disciplinary Counsel urges the Board to do what federal courts often do when faced with two conflicting federal statutes, or what state courts frequently do when faced with conflicting state laws, and what all courts typically do when faced with two conflicting common law provisions: "interpret[]" each law "in harmony" with the other. Discip. Counsel Br. at 17. Disciplinary Counsel fails to appreciate, though, the Supreme Court's admonition that for Supremacy Clause purposes "courts should not strain to find ways to reconcile federal law with seemingly conflicting state law … and should not distort federal law to accommodate conflicting state law." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 622-23 (2011) (emphasis added).

Court held in *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981), effective legal representation requires full and frank communication between a client and attorney and "sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." Importantly, "[t]the purpose of the privilege 'is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" *Adams v. Franklin*, 924 A.2d 993, 998 (D.C. 2007) (quoting *Upjohn* and citing *Wender v. United Servs. Auto. Ass'n*, 434 A.2d 1372, 1373 (D.C. 1981)). Barring attorney-whistleblowers from disclosing privileged information in the course of seeking legal advice would deny them the opportunity to obtain critical guidance about whether they have a duty to report their employer-client's misconduct and what steps they should take to avoid assisting or enabling their employer-client in committing fraud.

Moreover, adopting Disciplinary Counsel's position would chill D.C. attorneys from advising attorney-whistleblowers. The risk of disciplinary sanctions, and an arduous disciplinary process that can span half a decade (or more), would deter D.C. lawyers from choosing to advise, let alone representation of in-house lawyers seeking legal advice about how to stop their employer's criminal conduct. Thus, the Board should find, as did the Hearing Committee, that the SEC Rules implementing SOX pre-empt the applicable D.C. Rules of Professional Conduct.

QUESTIONS PRESENTED

The D.C. Rules of Professional Conduct, like the ABA's Model Rules of Professional Conduct on which they were modeled, generally forbid attorneys from sharing a client's confidences. A federal statute, the Sarbanes-Oxley ("SOX") Act, and the federal regulations the SEC has promulgated to implement SOX, specifically authorize and encourage all persons to exercise their rights under the law to the fullest to prevent financial fraud and chicanery. SOX and the SEC's relevant regulations shield whistleblowers from retaliation for their protected disclosures. The U.S. Constitution's Supremacy Clause mandates that federal law must prevail over any state law that conflicts with or stands as an obstacle to federal law.

The instant case before the Board raises two questions:

1. As a general matter, does SOX and the SEC's regulations preempt conflicting professional conduct rules regarding attorney disclosures of a client's confidences?

2. As a specific matter, are there any legitimate grounds for not applying SOX and SEC preemption of the D.C. Rules in Ms. Bernabei's case?

SUMMARY OF ARGUMENT

Congress passed the Sarbanes-Oxley Act in 2002 to protect our financial markets from frauds and prevent crises such as Enron. Understanding that "corporate insiders are the key witnesses that need to be encouraged to report fraud," Congress included a broad whistleblower protection at 18 U.S.C. §1514A,

and empowered the Securities and Exchange Commission ("SEC") to promulgate implementing regulations. At 17 C.F.R. Part 205, the SEC created responsibilities and rights of whistleblowing corporate employees – including corporate employees who might be whistleblowers – to make certain disclosures in order "[t]o 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" or "[t]o 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)(i) and (iii).

To avoid any confusion, the SEC made its preemption of state standards – including state Rules of Professional Conduct – explicit. Thus, 17 C.F.R. § 205.1 unambiguously provides: "Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern." (Emphasis added).

Corporate employees, including attorneys, who suffer reprisals for their protected activities are entitled to commence and maintain actions against their employers. 18 U.S.C. §1514A; *Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009) (attorneys permitted to make SOX retaliation claims); *Willy v. Admin. Review Bd.*, 423 F.3d 483, 495 (5th Cir. 2005) (same). Such claims further SOX's broad remedial purpose of protecting the public by encouraging disclosures that can help detect and deter frauds.

The Supremacy Clause of the U.S. Constitution obligates states to be bound by federal laws and regulations. When conflicts arise between state and federal law, the federal law prevails. This is so even if the federal law arises from a regulation, and the conflicting state law is enshrined in its constitution.

A recent decision, *Wadler v. Bio–Rad Labs., Inc.*, No. 15-CV-02356-JCS, 2016 WL 7369246 (N.D. Cal. Dec. 20, 2016), summarizes SOX's and the SEC's requirement and also summarizes the case law (such as *Van Asdale* and *Willy*) that has construed and enforced SOX and the SEC's regulations over the last fifteen years. *Wadler's* summary, combined with its holding, make clear that the federal protections for whistleblowers prevail over state disciplinary rules. Significantly, although the Board has not had occasion to consider these issues although the DC Bar had explicitly avoided this issue in Ethics Opinion 363, that Opinion recognized authorities (including *Van Asdale* and *Willy*) supporting the same outcome.

The Disciplinary Counsel's attempts to avoid, reconcile or limit the holding in *Wadler* are unavailing. Federal laws and regulations preempt state law even if a controlling judicial authority has not yet ruled on the issue. The court in *Wadler* considered the applicable federal law, determined what that law is, and held that it does preempt state rules of professional conduct. In doing so, the *Wadler* court contributed to the federal common law, which is binding pursuant to Fed. R. Evid. 501.

Amici respectfully urge this Board to hold explicitly that SOX and its regulations are entitled to preemption, and that any discipline of Ms. Koeck and Ms.

Bernabei is improper as it infringes on federally protected rights and the public interest. *Amici* further submit that a contrary decision in this case position would chill D.C. attorneys from advising attorney-whistleblowers.

ARGUMENT

SOX AND THE REGULATIONS THE SEC PROMULGATED TO EFFECT SOX, 17 C.F.R. PART 205, PREEMPT THE RELEVANT D.C. RULES OF PROFESSIONAL CONDUCT.

Ms. Bernabei devoted a considerable portion of her Post-Hearing Brief to the Ad Hoc Committee (seven pages out 44, total) to her argument that "Federal Law Supplants and Preempts D.C. Rules." Bernabei Post-Hearing Br. (filed Jan. 15, 2016) at 22. *See id*. at 22-28. Ms. Bernabei's brief discussed eight cases on point: one by the Supreme Court, three by federal Courts of Appeals from three different Circuit Courts, three by different federal District Courts, and one by the appellate Administrative Review Board ("ARB") of the U.S. Dept. of Labor.

Significantly, none of these cases were novel, in any sense of that word, as reflected an D.C. Bar Ethics Opinion issued five years ago: *In-House Lawyer's Disclosure or Use of Employer/Client's Confidences or Secrets in Claim Against Employer/Client for Employment Discrimination or Retaliatory Discharge*, D.C. Bar Ethics Opinion 363 (October 2012). Although the D.C. Bar was careful to avoid voicing an "opinion on whether there may be … a statute … dealing with employment discrimination or retaliatory discharge [that] overcomes the prohibitions of D.C. Rule 1.6(a)[.]," the D.C. Bar went out of its way to acknowledge that in *Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009),

– one of the cases Ms. Bernabei cited – the Fifth Circuit expressly held that "Sarbanes-Oxley whistleblower provision preempts attorney-client privilege." D.C. Bar Ethics Opinion 363 at n.11 (emphasis added).

The D.C. Bar also approvingly noted five of the other seven cases Ms. Bernabei relied on for the same proposition. *See id.* (citing "*Willy v. Administrative Review Bd., U.S. Dep't of Labor,* 423 F.3d 483 (5th Cir. 2005) (same; whistleblower provisions of federal environmental laws); *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173 (3rd Cir. 1997) (same; title VII of Civil Rights Act of 1964); *Stinneford v. Spiegel Inc.*, 845 F. Supp. 1243 (N.D. Ill. 1994) (same; Age Discrimination in Employment Act); *Rand v. CF Indus., Inc.*, 797 F. Supp. 643 (N.D. Ill. 1992) (same); *Crews v. Buckman Lab. Int'l, Inc.*, 78 S.W.3d 852 (Tenn. 2002) (same; common–law retaliatory discharge).").

Not surprisingly, Ms. Bernabei referenced the Bar's Ethics Opinion on point in her Post-Hearing Brief, at 22.

Disciplinary Counsel's own Post-Hearing Brief did not controvert the Ethics Opinion nor did Disciplinary Counsel dispute Ms. Bernabei's choice or summary of any of the authorities she relied in support of her preemption argument. To the contrary, Disciplinary Counsel explicitly "agree[d], for purposes of this case only, that [the relevant SEC regulation, 17 C.F.R.] Part 205 preempts the D.C. Rules in limited way." Disciplinary Counsel Post-Hearing Brief (filed Jan. 28, 2016) at 14. *See id.* at 15.

Disciplinary Counsel further explicitly "assume[d], for the purposes of this

litigation only, that 17 CFR §205.3(d)(l) [also] preempts Rule 1.6 in that it allows a lawyer to use client confidences to the extent reasonably necessary to establish a Section 806 whistleblower retaliation suit against an organization-client." *Id*. at 17. *See id*. at 18.

Disciplinary Counsel's most recent filing in this case appears to follow the same path. First, he concedes "that SOX, as a federal law, would prevail ***if*** it conflicts with the D.C. Rules" of Professional Conduct, specifically with Rule 1.6(a)." Discip. Counsel Br. (filed Feb. 21, 2017) in support of his exceptions to the Ad Hoc Committee's Report and Recommendations, at 20 (emphasis added; citing *Wadler v. Bio–Rad Labs., Inc*., No. 15-CV-02356-JCS, 2016 WL 7369246 (N.D. Cal. Dec. 20, 2016)).

As Disciplinary Counsel recognizes, Discip. Counsel Br. at 21, *Wadler* held that "California ethical rules" – which are modeled on but "more stringent than the standards set forth in Model Role of Professional Responsibility 1.6" on the disclosure of privileged and confidential information, *Wadler,* 2016 WL 7369246 at *4 – are "preempted" by 17 C.F.R. Part 205 of the federal regulations that the SEC promulgated to implement the whistleblowing protections Congress enacted through the relevant provisions of SOX, *i.e*., 15 U.S.C. § 7245.[6]

[6] Thus. *Wadler* specifically "f[ound] that to the extent the ethical obligations governing attorneys who practice in California impose stricter limits on the disclosure of privileged and confidential information in this action than are imposed under the Sarbanes–Oxley Act, as reflected in Part 205, the former are preempted." *Wadler, supra,* 2016 WL 7369246, at *21 (emphasis added). *See id*. at *19.

Second, Disciplinary Counsel acknowledges that if this Board were to hold that *Wadler* applied to this case, "a D.C. lawyer, despite [D.C.] Rule [of Professional Conduct] 1.6(e) (3), could use confidential information to advance a SOX retaliatory discharge claims, [*i.e.,* offensively,] and not just defensively." *Id.*

It is a bit of a mystery, though, why Disciplinary Counsel chose to cite *Wadler* but not to mention Ethics Opinion 363, or any of the cases cited in that opinion, or any of the cases Ms. Bernabei cited in her Post-Hearing Brief in support of his "assum[ption]." On the one hand, *Wadler* seems like a fair-minded choice inasmuch as the relevant question before the *Wadler* court paralleled the ones before this tribunal" "Whether California Law is Preempted by the Regulations Promulgated Under the Sarbanes–Oxley Act." 2016 WL 7369246 at *18. That court's answer to the question was unambiguous: it "f[ound] that the California ethical rules cited by [Defendant] Bio–Rad in support of its assertion that [Plaintiff] Wadler may not disclose client confidences in connection with his Sarbanes–Oxley claim are preempted" by federal law. *Id.* at *19.[7] In this case, the Board should adopt the same position the Hearing Committee did below, because *Wadler* is only the most recent case to find SOX pre-emption, and neither the first nor the only one.

Indeed, *Wadler* it is not only the closest and most recent decision on point, but it carefully surveyed existing case law before reaching its conclusion, a

[7] More generally, the court expressly "f[ound] that to the extent the ethical obligations governing attorneys who practice in California impose stricter limits on the disclosure of privileged and confidential information … than are imposed under the Sarbanes–Oxley Act, as reflected in Part 205, the former are preempted." *Wadler*, 2016 WL 7369246, at *21.

conclusion that the Court makes clear is consistent with all precedents. Thus, while *Wadler* recognized that "'[t]here are few federal circuit court cases addressing the rights of in-house counsel to use attorney-client privileged information in a retaliation suit,'" *Wadler*, 2016 WL 7369246, at *12 (quoting *Van Asdale v. International Game Technology*, 577 F.3d 989, 995 (9th Cir. 2009)), *Wadler* took pains to note, "[n]onetheless," that each of those federal appellate "cases that have been decided" – by Courts of Appeals from three different Circuits – independently and collectively "support the conclusion that Wadler's retaliation claim may go forward despite confidentiality concerns and that he may rely on privileged and confidential communications that he reasonably believes are necessary to prove his claims and defenses." *Id.* at *12. *See id.* at *11-14 (discussing, at length, *Van Asdale, supra; Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173 (3d Cir. 1997); and *Willy v. Admin. Review Bd., U.S. Dept. of Labor*, 423 F.3d 483 (5th Cir. 2005)). *See also id.* at *11-14 (discussing *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7 (1st Cir. 1998), and *Doe v. A Corp.*, 709 F.2d 1043 (5th Cir. 1983)).

The *Wadler* court also explained that its decision was further informed by its careful reading of:

> (a) the applicable provisions of the California Rule of Professional Conduct and California Business and Professions Code, *Wadler*, 2016 WL 7369246, at *4, *10 – which, as noted above, are "more stringent than the standards set forth in Model Rule of Professional Responsibility 1.6, which has been adopted by many other" jurisdictions, *id.* at 4, including the District of Columbia;
>
> (b) the text and history of the SOX Act, *id.* at *18-19;
>
> (c) the text and history of the regulations Congress authorized the SEC to promulgate to implement that Act, *id.* at

*19-21;

(d) the text of and case law construing and undergirding Fed.R.Evid. 501, which codifies the "federal common law." Id. at *11-14; and

(e) the SEC's "interpretation of its own regulation in two *amicus* briefs, including one in this action," an "interpretation [that] is entitled to … deference because it is a reasonable reading of Part 205." *Id.* at *20.[8] (For the Board's convenience a complete and correct copy of the *amicus* brief the SEC filed last December in support of the plaintiff in *Wadler* is attached hereto as Ex. A).

In this light, Disciplinary Counsel's single-minded focus on *Wadler* seems quite sensible and fair-minded, especially because he neither disputes *Wadler's* holding nor controverts that court's reasoning.

On the other hand, Disciplinary Counsel's exclusive attention to *Wadler*, to the exclusion of any discussion of any other authority, such as Ethics Opinion 363 and cases cited therein suggests that he regards *Wadler* a useful "strawman," one that he erects solely because it might be easier to strike down.

Hence, while Disciplinary Counsel neither disputes *Wadler's* holding nor controverts its reasoning, he denies the reach of the California federal court's ruling, arguing that neither it or any other decision – nor any statute or rule – provides what he considers "definitive authority that the D.C. Rules are preempted"

[8] *See Wadler*, 2016 WL 7369246, at *20 (citing *Barrientos v. 1801–1825 Morton LLC*, 583 F.3d 1197, 1214 (9th Cir. 2009) ("'[W]hen an agency invokes its authority to issue regulations, which then interpret ambiguous statutory terms, the courts defer to its reasonable interpretations.'") (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 395 (2008) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-4 (1984))).

by SOX or by the implementing regulations Congress authorized the SEC to promulgate to implement that statute. Discip. Counsel Br. at 21 (emphasis added).

Disciplinary Counsel makes three interrelated arguments in an attempt to neutralize *Wadler*:

> [1] Comment 6 to Rule 1.13 provides for preemption only based on "binding judicial authority." ("If a binding judicial determination is made that the disclosure limitations under D.C. Rule 1.13 are preempted by federal law conferring broader authority to disclose client confidences or secrets of certain types of organizational clients, a lawyer may exercise the broader authority granted by federal law.")
>
> [2] At the time Ms. Koeck made her disclosures in 2007 there was no judicial authority.
>
> [3] Even today, only a district court case in California has addressed the issue, holding the California rules were pre-empted.

Discip. Counsel Br. at 21 (emphases added).

For these three reasons, Disciplinary Counsel concludes: "no definitive authority holds the D.C. Rules are preempted. *Id*. (emphasis added).

None of the three strands of Disciplinary Counsel's "no definitive authority" argument survives scrutiny. *Amici* discuss each one in turn.

First, Disciplinary Counsel's general reliance on "Comment 6 to Rule 1.13" – and his particular contention that "federal law" may preempt state law if and only if a "'binding judicial determination'" already exists on the precise question at issue and if only if the "judicial determination" had been rendered by a court that has the jurisdictional power to "bind[]" the tribunal that is charged with resolving the question in a particular case – turns the Supremacy Clause, U.S. Const., Art. VI, cl.

2,[9] on its head and effectively nullifies Congress' power to preempt state law. Even if valid, a literal reading of state bar disciplinary rules cannot preempt the Constitution. The Supremacy Clause pertinently provides that "Judges in every State shall be bound" by "the Laws of the United States … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The "Laws of the United States" that preempt any contrary "Law[] of any State" do not require or depend on a preexisting and "binding judicial determination" by any court, let alone by a state court whose laws are being preempted.

To hold otherwise would doom any preemption challenge to perpetual oblivion as any challenge – including the first one – would have to be rejected for lack of a "binding judicial precedent."

Equally important, the notion that Congress' power to effectively preempt a state law depends on an earlier court's "determination" (or "binding" interpretation) of the law or rule at issue adds a layer of standard-less judicial authority, review, and approbation, a layer never mentioned or contemplated by the Constitution's Framers. Significantly, nothing in the text or history of the Supremacy Clause and nothing in any cases construing and applying that Clause suggest that judicial prior approval by any court, federal or state, is a prerequisite for the Clause's enforcement or the enforcement of any literally "Suprem[e]" federal statute or

[9] The Supremacy Clause provides, in full: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

regulation.[10]

More important still, the idea that the preemptive effect of a federal statute – or any duly authorized and promulgated federal regulation[11] – over a state law could depend on a favorable "judicial determination" by a state court would render "the Laws of the United States" inferior to state laws and not "supreme" over them. Although this idea – popularly described as the doctrine of Interposition and Nullification – first found favor amongst slaveholders in the 19th century and was revived by segregationists following *Brown v. Board of Ed. of Topeka,* 347 U.S. 483 (1954), it never has been sanctioned by the Supreme Court. To the contrary, it was repeatedly rejected by that Court decades before the Civil War,[12] and was unanimously and emphatically repudiated in an opinion signed by all nine Justices

---

[10] "Federal regulations have no less pre-emptive effect than federal statutes" and federal regulations preempt state laws in the same fashion as congressional enactments. *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

[11] Significantly, "[f]ederal regulations have no less pre-emptive effect than federal statutes*." Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta,* 458 U.S. 141, 153 (1982). Indeed, the Supreme Court has admonished lower courts to give "*Chevron* deference" to such regulations. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Thus, "[w]hen the administrator" of the relevant federal agency, such as the SEC, "promulgates regulations intended to pre-empt state law, [a lower] court's inquiry is . . . limited: 'If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *Cuesta,* 458 U.S. at 153 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). *See Wadler*, 2016 WL 7369246, at *20.

[12] *See United States v. Peters*, 9 U.S. (5 Cranch) 115 (1809); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Prigg v. Pennsylvania*, 41 U.S. 539 (1842); and *Ableman v. Booth*, 62 U.S. 506 (1859).

in that Court in *Cooper v. Aaron*, 358 U.S. 1 (1958). As *Cooper* explained, federal constitutional provisions (such as the Fourteenth Amendment), implementing federal legislation (such as the Civil Rights Act of 1866), and federal court decisions construing those provisions and laws, "can neither be nullified openly and directly by state legislators or state executive or judicial officers nor nullified indirectly by them through evasive schemes … ." 358 U.S. at 17 (emphasis added).[13] And they

---

[13] The Supreme Court continues to insist that state judges honor the spirit as well as the letter of Supremacy Clause. Thus, just last year, in *James v. City of Boise, Idaho*, ___U.S. ___, 136 S.Ct. 685, 686, 193 L. Ed. 2d 694 (2016), the Court applied the Supremacy Clause to summarily reverse an attempt by the Idaho Supreme Court to expand the availability of attorney's fee awards for successful defendants in Civil Rights cases. In that case, "the Idaho Supreme Court [had] concluded that it was not bound by this Court's interpretation of [42 U.S.C.] § 1988 in *Hughes*" *v. Rowe*, 449 U.S. 5 (1980) (*per curiam*)." (parallel citations omitted). *James,* 136 S.Ct. at 686. According to the state court, "'[a]lthough the [U.S.] Supreme Court may have the authority to limit the discretion of lower federal courts, it does not have the authority to limit the discretion of state courts where such limitation is not contained in the statute.'" *Id.* (quoting *James v. City of Boise,* 351 P.3d 1171, 1192 (Idaho 2015)).

The U.S. Supreme Court brusquely rejected the Idaho attempt to go rogue: "'It is this Court's responsibility to say what a [federal] statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.'" *James,* 136 S.Ct. at 686 (quoting *Nitro–Lift Technologies, L.L.C. v. Howard,* 568 U.S. ___,133 S.Ct. 500, 503, 184 L.Ed.2d 328 (2012) (*per curiam*) (quoting *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 312, 114 S.Ct. 1510 (1994) (internal quotation marks omitted))). There is good reason for state courts to abide by federal interpretations of federal law. "As Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law,

> "the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable." The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law. The state court erred in concluding otherwise.

certainly are not dependent on favorable "judicial determinations" by state courts.

Ironically, the no-enforcement-without-a-precedent theory that Disciplinary Counsel relies on so heavily is itself not buttressed by any "binding judicial authority" or decision by this Board, by the Court of Appeals, or any court in the nation, state or federal. That is to say, Disciplinary Counsel does not and cannot cite a "binding judicial authority" that interprets, applies, or approves of the Rule 1.13 "binding judicial authority" standard. Hence, by its own standards, this purported prerequisite is neither operative nor "binding."

Disciplinary Counsel also is plainly wrong in the second branch of his no-enforcement-without-a-binding-judicial-theory, i.e., his contention that "[a]t the time Ms. Koeck made her disclosures in 2007 there was no judicial authority" on the legal questions at issue here. As a matter of fact, five of the six cases referenced in Ethics Opinion 363 (and six of the eight cases Ms. Bernabei cited in her Post-Hearing Brief) predated 2007.

Disciplinary Counsel's no-binding-precedent argument further errs as a matter of logic, as his theory would make it impossible for any court to adjudicate a case of first impression (because of the absence of a preexisting "binding judicial determination" exactly on point).

Disciplinary Counsel's argument also presumes that the Board is constrained by whatever "judicial authority" existed "[a]t the time Ms. Koeck made her

---

James, 136 S.Ct. at 686 (emphasis added; quoting *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304, 348 (1816)).

disclosures in 2007 ...." *Id*. But this Board is not so bound. To the contrary, "the Board," like the Court of Appeals, review[s] questions of law ... *de novo*." *In re Martin*, 67 A.3d 1032, 1039 (D.C. 2013) (citing *In re Anderson*, 778 A.2d 330, 339 n. 5 (D.C. 2001)).

Furthermore, although *Wadler* was decided after "Ms. Koeck made her disclosures in 2007," such timing is irrelevant, particularly in civil cases, inasmuch as Congress' enactment of SOX (in 2002) and the SEC's promulgation of SOX's crucial implementing regulation, 17 C.F.R. Part 205 (in 2003), both predate the disclosures at issue in this case. Simply put, *Wadler* only affirmed a right Ms. Koeck already had under federal law.

Courts generally have a duty to apply the law as it exists on the date of decision. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (Supreme Court decisions apply retroactively and prospectively to all cases on direct appeal whenever applied to the litigants before the Court); *Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974) ("a court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."). *See also United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801).

As the Supreme Court has explained:

> For example, in *Ex parte Collett*, 337 U.S. 55, 71, we held that 28 U.S.C. § 1404(a) governed the transfer of an action instituted prior to that statute's enactment. We noted the diminished reliance interests in matters of procedure. 337 U.S., at 71. Because rules of procedure regulate secondary rather than primary conduct, the fact

> that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive. *Cf. McBurney v. Carson*, 99 U.S. 567, 569 (1879).

Landgraf v. USI Film Prod., 511 U.S. 244, 275 (1994) (emphasis added; footnotes and parallel citations omitted). Thus, although the Supreme Court consistently has "strictly construed the *Ex Post Facto* Clause [U.S. Const., Art. I, § 9] to prohibit application of new statutes creating or increasing punishments [or other substantive sanctions] after the fact, [the Court] ha[s] upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case." *Id.* (emphasis added; citations omitted).[14]

More recently, the Supreme Court explained why changes in the rules of evidence or procedure, not to say mere changes in judicial interpretations or "determinations" of existing procedural and evidentiary rules, do not run afoul of anti-retroactivity principles and the *Ex Post Facto* doctrine. Thus, even in a criminal case, where the stakes are at the zenith, not

> every rule that has an effect on whether a defendant can be convicted implicates the *Ex Post Facto* Clause. Ordinary rules of evidence, for example, do not violate the Clause. Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case. More crucially, such rules, by simply permitting evidence to be admitted at trial, do not at all subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption. Therefore, to the

[14] Indeed, even "newly announced rules of constitutional criminal procedure must apply 'retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception.'" *Davis v. United States*, 564 U.S. 229, 243 (2011) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

> extent one may consider changes to such laws as "unfair" or "unjust," they do not implicate the same kind of unfairness implicated by changes in rules setting forth a sufficiency of the evidence standard.

Carmell v. Texas, 529 U.S. 513, 533 n. 23 (2000) (emphasis added; citation omitted).[15] *See Jones v. United States*, 719 A.2d 92, 94-95 (D.C. 1998) (same).

---

[15] As a unanimous Supreme Court explained more than a century ago:

> "It must also be evident that **a right to have one's controversies determined by existing rules of evidence is not a vested right**. These rules pertain to the remedies which the state provides for its citizens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully be made applicable to existing causes of action, even in those states in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective even though some of the controversies upon which it may act were in progress before."

Luria v. United States, 231 U.S. 9, 26-27 (1913) (emphasis in the original; quoting Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION, 524 (7th ed. 1903)). As the Supreme Court more recently explained: "Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. … Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive." *Landgraf,* 511 U.S. at 275 (footnote and citations omitted). *See Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 579 F.2d 856, 862 (4th Cir. 1978) ("There is no vested right in a rule of evidence, and a statute relating solely to procedural law, such as burden of proof and rules of evidence, applies to all proceedings after its effective date even though the transaction occurred prior to its enactment."); *Edwards v. Lateef*, 558 A.2d 1144, 1147 (D.C. 1989) ("'As a general rule statutes relating to remedies and procedure are given retrospective construction'") (citation omitted); *Fulton Waterworks Co. v. Bear Lithia Springs Co.*, 47 App. D.C. 437, 440, 1918 WL 18229, at *1 (D.C. Cir. 1918) ("As a general thing, a person has no vested right in a rule of evidence. (citation omitted)),

In sum, although "the presumption against retroactive *legislation* is deeply rooted in our jurisprudence," *Landgraf,* 511 U.S. at 265, the contrary principle applies regarding *judicial decisions*, which "have had retrospective operation for near a thousand years." *Kuhn v. Fairmont Coal Co.,* 215 U.S. 349, 372 (1910) (Holmes, J., dissenting). In fact, "[a]t common law there was no authority for the proposition that judicial decisions made law only for the future." *Linkletter v. Walker,* 381 U.S. 618, 622 (1965). Following this ancient tradition, the Supreme Court has forbidden federal courts from rendering purely prospective judicial decisions in the criminal arena, *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987), and the Court tolerates the practice in the civil arena only in rare circumstances, *Harper v. Va. Dep't of Taxation,* 509 U.S. 86, 97 (1993), none of which obtains here. *See De Niz Robles v. Lynch*, 803 F.3d 1165, 1169-70 (10th Cir. 2015) (per Gorsuch, J.).

Finally, Disciplinary Counsel implores the Board to disregard *Wadler* for a third reason, *i.e.*, because it was "only a district court case in California" and even then because it merely "h[eld] … the California [ethics] rules were pre-empted" by SOX. Discip. Counsel Br. at 21. As noted above, *Wadler* is not the only case on point. Furthermore, although, as a general rule, "a District Court's opinions are non-precedential and only persuasive authority." *Horn v. Huddle*, 699 F. Supp. 2d

236, 238 (D.D.C. 2010), even within the same federal district court.[16] a federal court ruling, even one rendered by a District Court in another jurisdiction, may provide controlling – and not simply "persuasive" – authority when, as regards *Wadler*, it provides a well-taken summary and persuasive analysis on point concerning the critical question of "federal common law" at issue when adjudicating claims of privilege that arise under a federal statute or regulation.

Thus, as *Wadler* itself explained:

> Under Rule 501 of the Federal Rules of Evidence, federal common law governs claims of attorney-client privilege in a civil case *except* where state law supplies the rule of decision as to a claim or defense, in which case state privilege law applies. Fed. R. Evid. 501. Where evidence relates to both state and federal claims, a federal court applies federal common law to the question of attorney-client privilege. *Wilcox v. Arpaio*, 753 F.3d 872, 876 (9th Cir. 2014). Because of the overlap between Wadler's retaliation claims under state law and federal law, the Court applies federal common law to [Defendant] Bio–Rad's privilege claims.

Wadler, 2016 WL 7369246, at *10 (emphasis added).[17] *See Sosa v. Alvarez-Machain,*

---

[16] *See Lewis v. Hotel and Restaurant Employees Union, Local 25, AFL–CIO*, 727 A.2d 297, 302 (D.C. 1999) ("Superior Court holdings are never binding authority in other cases, even in the Superior Court itself. Thus, apart from whatever persuasive force they may have in their reasoning, they have no real precedential value.").

[17] Fed.R.Evid 501 specifies, in full: "The common law -- as interpreted by United States courts in the light of reason and experience -- governs a claim of privilege unless any of the following provides otherwise: the United States Constitution; a federal statute; or rules prescribed by the Supreme Court. But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." The "United States courts," *id*., obviously includes federal District Courts, and is not limited to appellate courts. See *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 110 (1989); *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 56 (1987); *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 24 n. 26 (1983).

542 U.S. 692, 726 (2004) (it is both necessary and appropriate "to create federal common law rules in interstitial areas of particular federal interest," such as cases involving federal statutory claims, rights, defenses, and remedies). Indeed, as the Supreme Court explained more than a decade before SOX was enacted and nearly a quarter-century before the instant controversy arose: "Questions of [evidentiary] privilege that arise in the course of the adjudication of federal rights are 'governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.' Fed. Rule Evid. 501." *United States v. Zolin*, 491 U.S. 554, 562 (1989).

Any doubts on this question, especially as it pertains to which law controls regarding the scope and proper interpretation of the attorney-client client in the context of SOX adjudications, was put to rest by the Fifth Circuit a dozen years ago.

> The parties first contest whether federal or state law governs our analysis of the attorney-client privilege. We have no difficulty in concluding that federal law applies here. "Questions of privilege that arise in the course of adjudication of federal rights are 'governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.'" As Willy's claims arise under federal law—and are before us on federal question jurisdiction under 28 U.S.C. § 1331—the federal common law of attorney-client privilege governs our analysis.

Willy v. Admin. Review Bd., 423 F.3d 483, 495 (5th Cir. 2005) (footnote omitted; citing *Zolin*, 491 U.S. at 562). So, too, here. Exactly because the underlying claims of Ms. Bernabei's client arose under federal law, *i.e.*, under SOX's anti-retaliation provision, federal common law as to attorney-client privilege plainly applies.

Lastly and most important, as the *Wadler* court carefully explained (but Disciplinary Counsel ignores), its decision not only relied on federal regulations to which it owed "*Chevron* deference" but also is supported by three major and clearly relevant Circuit Court decisions: *Willy, supra; Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009); and *Kachmar v. SunGard Data Systems, Inc.*, 109 F.3d 173 (3d Cir. 1997). *See Wadler*, 2016 WL 7369246, at *11-14. Tellingly, the D.C. Bar has long recognized the validity and importance of these three decisions, among many others, on this subject.[18] In a nutshell, it is not necessary to wait for the D.C. Court of Appeals, the U.S. Court of Appeals for the D.C. Circuit, or the Supreme Court to reaffirm what all other courts date have held: under the Constitution and federal common law, statutory whistleblower rights preempt conflicting restrictions contained in state and local ethical rules.

For all of the foregoing reasons, the Government Accountability Project and the National Employment Lawyers Association, as *amici curiae*, respectfully urge the Board not to impose any sanctions on Ms. Bernabei, to find that Ms. Bernabei

---

[18] Thus, in D.C. Bar Ethics Opinion 363 (October 2012), *In-House Lawyer's Disclosure or Use of Employer/Client's Confidences or Secrets in Claim Against Employer/Client for Employment Discrimination or Retaliatory Discharge,* the Board expressly acknowledged that in *Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009), the Fifth Circuit held that "Sarbanes-Oxley whistleblower provision preempts attorney-client privilege." *Id.* at n.11 (emphasis added). *See id.* (citing *Willy v. Administrative Review Bd., U.S. Dep't of Labor,* 423 F.3d 483 (5th Cir. 2005) (same; whistleblower provisions of federal environmental laws); *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173 (3rd Cir. 1997) (same; title VII of Civil Rights Act of 1964); *Stinneford v. Spiegel Inc.*, 845 F. Supp. 1243 (N.D. Ill. 1994) (same; Age Discrimination in Employment Act); *Rand v. CF Indus., Inc.*, 797 F. Supp. 643 (N.D. Ill. 1992) (same); *Crews v. Buckman Lab. Int'l, Inc.*, 78 S.W.3d 852 (Tenn. 2002) (same; common–law retaliatory discharge)."

has not violated any ethical rule on the two matters that Disciplinary Counsel has appealed, and not to impose any additional penalty on her.

Respectfully submitted,

Ned Miltenberg

Ned Miltenberg, Esq.
Counsel of Record for *Amici Curiae,* the Government Accountability Project and the National Employment Lawyers Association
D.C. Bar No. 415244
National Legal Scholars Law Firm, P.C.
5410 Mohican Road – Suite 200
Bethesda, MD 20816-2162
202/656-4490
NedMiltenberg@gmail.com

Tom Devine, Esq.
Legal Director
Government Accountability Project
1612 K. St. NW – Suite 1100
Washington DC, 20006
(202) 457-0034
TomD@whistleblower.org
Counsel for the Government Accountability Project

Richard R. Renner, Esq.
Kalijarvi, Chuzi, Newman & Fitch, PC
1901 L St. NW – Suite 610
Washington, D.C. 20036
(202) 331-9260
rrenner@kcnlaw.com

Matt Koski, Esq.
Program Director
National Employment Lawyers Association
2201 Broadway, Suite 402
Oakland, CA 94612
(415) 296-7629
mkoski@nelahq.org

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Brief of *Amici Curiae*** was served on the following by Email if so indicated, otherwise by regular mail, this 29th day of March, 2017:

Wallace "Gene" Shipp, Jr., shippw@dcobc.org
Jennifer Lyman, Lymanj@dcobc.org
Hamilton (Phil) Fox III, foxp@dcobc.org
Joseph C. Perry, perryj@dcobc.org
Office of Disciplinary Counsel
515 5th Street, N.W.
Building A, Suite 117
Washington, D.C. 20002

Tom Mason, TMason@hwglaw.com
1919 M Street, N.W., Suite 800
Washington, D.C. 20036

Adriana Koeck
3882 E. Santa Fe Lane
Gilbert, AZ 85297

I also caused the original and three copies to be delivered to:

James T. Phalen
Executive Attorney
Board on Professional Responsibility
Historic Courthouse
430 E Street, N.W., Suite 138
Washington, D.C. 20001

Richard R. Renner