

## Diebold's Revenge

Written by CHRISTINE PELISEK

Steve Cooley goes after a whistleblower **What would you call** a well-meaning employee at a law firm handling Diebold's legal strategies who leaks key documents outlining problems with voting machines to the secretary of state and a newspaper reporter?

If you're Steve Cooley, L.A. County's district attorney, you'd call him a thief and charge him with three felonies. If you're an expert in a state law that protects employees who rat out potentially dangerous and illegal conduct, you'd call him a whistleblower.

"The issue is that he shouldn't have been charged at all," said Louis Clark, president of the Government Accountability Project, a nonprofit whistleblower protection organization in Washington, D.C. "It really is against public policy to bring felony charges against a whistleblower who is alleged to have brought forward information about election misconduct."

But Cooley did just that on February 21 when his office charged Stephen Heller, 44, with felony access to computer data, commercial burglary and receiving stolen property. The New York native could face up to three years in prison if convicted.

"This is basically a man who allegedly hacked into private files," said D.A. spokesperson Jane Robison. "We are alleging that he stole computer files. If you are an attorney you have every reason to believe that the information is guarded. Attorney-client privilege is sacrosanct."

Heller became the focus of the District Attorney's Office in 2004 after he allegedly gave the secretary of state and the *Oakland Tribune* memos the law firm Jones Day sent to its client, Diebold, outlining possible state elections law violations of its electronic voting machines.

Heller, an actor by trade, was working as a temporary word processor on a three-month contract with Jones Day when he came across the internal documents exposing irregularities in Diebold's electronic voting machines. He passed the documents along to an intermediary, who has not been identified, who placed them in the hands of Beverly Harris, the founder of a Seattle-based elections-watchdog group called Black Box Voting Inc. Harris then turned over the documents to Heller's intended recipients in Sacramento and Oakland.

The Diebold memos were published on the *Tribune's* Web site in April 2004, a month after voting irregularities surfaced in San Diego and Alameda counties by voters who were turned away at the polls while others had to use paper ballots.

In one memo, the law firm warned Diebold, before the March primary, that its use of uncertified vote-counting software in Alameda County, starting in 2002, violated California election law and broke its \$12.7 million contract. The lawyers also warned that Diebold faced greater culpability if it knowingly violated California election law. According to the memos, Jones Day also looked into whether then-California Secretary of State

Kevin Shelley had the power to investigate the company's practices.

Five months earlier, in November 2003, the Secretary of State's Office discovered that Diebold had installed uncertified software on its voting machines in 17 counties without notifying state officials. Similar allegations became the centerpiece of a civil suit filed by members of Black Box Voting, which was later joined by the state attorney general, accusing Diebold of misleading Alameda County about the legality and security of its touchscreen voting systems. Diebold paid \$2.6 million to settle the lawsuit in 2005.

Harris defends Heller's actions. "He was concerned that he was doing the right thing. If you are a good citizen, what are you supposed to do? Nothing?" said Harris. "If citizens don't stand up when there is something clearly wrong, then we are in deep trouble. We have to depend on our citizens to be responsible and that is what he did. They should be giving him a medal. This is an effort by big, powerful players who want to change the subject from what they did and they also want to discourage anyone else from telling what they know."

The state whistleblower law doesn't protect the employee from criminal prosecution. "There is nothing that can protect him from a prosecutor who decides to prosecute other than a jury and a judge," said Clark. "The district attorney can do something to Mr. Heller that perhaps Diebold couldn't do."

Robison said the District Attorney's Office is not alleging monetary gain.

"If there is no intention to profit from this then I think the charges are outrageous," said Clark. "I would be surprised if any member of the Legislature who put the law on the books had in mind someone who was taking information and making sure it went to government officials in order for them to look at whether a crime had been committed by a company."

Jones Day did not file a civil case against Heller. In August 2004, the San Fernando Valley home Heller shares with his wife, three cats and a dog was searched by D.A. investigators, who confiscated his computer.

"Three felony charges against someone is the same as saying we are going to destroy this person forever," said Clark. "What kind of job is this person going to get if he is convicted of a felony? That is a very, very life-altering event in a person's life."

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## **The Whistleblower Law**

An employer may not make, adopt or enforce any rule, regulation or policy preventing an employee from disclosing information to a government or law-enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

Last Updated ( Wednesday, 01 March 2006 )