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Establishing Corporate Counsel's Right to Sue for Retaliatory Discharge

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ESTABLISHING CORPORATE COUNSEL'S RIGHT TO SUE FOR RETALIATORY DISCHARGE

I. INTRODUCTION

Today's in-house attorneys can be placed in a difficult situation when confronted with employers' illegal and unethical activities or requests. Consider a situation where an employer asks a faithful company employee to do something that is clearly illegal, such as violate a statute,[1] testify falsely[2] or distort records.[3] The employee refuses to do so and is subsequently fired.[4] Another employee reports to the company or outside officials that the company is engaged in an illegal activity and recommends that the company comply with the law.[5] This reporting employee is also fired.[6] The troublesome question surrounding these situations is whether either employee will be able to sue the employer for retaliatory discharge.[7]

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1. *See, e.g.*, Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (involving an employee discharged for refusing to participate in an illegal scheme to fix retail gasoline prices); Kelsay v. Motorola, 384 N.E.2d 353 (Ill. 1978) (holding that retaliatory discharge of workers' compensation claimant was actionable).

2. *See, e.g.*, Petermann v. International Bhd. of Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959) (involving an employee discharged after refusing to follow his employer's instructions to make certain false and untrue statements in his testimony before a legislative committee); Odell v. Humble Oil & Refining Co., 201 F.2d 123 (10th Cir.) (involving subpoenaed employees who gave testimony detrimental to their employer and were fired as a result), *cert. denied*, 345 U.S. 941 (1953).

3. *See, e.g.*, Trombetta v. Detroit, 265 N.W.2d 385 (Mich. Ct. App. 1978) (involving an employee discharged for refusing to manipulate and adjust sampling results used for pollution control reports).

4. *See supra* notes 1-3 and accompanying text.

5. *See, e.g.*, Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981) (involving an employee discharged for informing a local law enforcement agency that another International Harvester employee might be violating the criminal code); Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978) (involving an employee discharged in retaliation for his efforts to require his employer to operate in compliance with the state and federal consumer credit protection laws); Shaw v. Russell Trucking Line, 542 F. Supp. 776 (W.D. Pa. 1982) (protecting an employee who notified police that his employer's trucks were overloaded in violation of state law); Petrik v. Monarch Printing Corp., 444 N.E.2d 588 (Ill. App. Ct. 1982) (upholding a cause of action for an employee who reported illegal accounting procedures to his superiors).

6. *See supra* note 5 and accompanying text.

7. The cause of action for retaliatory discharge is a narrow exception to the general rule of employment-at-will. It is based on the principle that some reasons for discharging an employee are so contrary to public policy as to be actionable. *See* Mourad v. Automobile Club Ins. Ass'n., 465 N.W.2d 395, 401 (Mich. Ct. App. 1991). The tort attempts to maintain a proper balance between the employer's interest in conducting a business efficiently and profitably, the employee's interest in earning a living, and society's interest in having its public policies carried out. Balla v. Gambro, Inc., 584 N.E.2d 104, 108 (Ill. 1991).

Thirty years ago, virtually no legal protection existed either for any type of whistleblower,[8] or for employees who refused to follow their employer's instructions to violate the law.[9] Under the traditional common law doctrine of employment-at-will,[10] there existed a presumption that an employer or an employee could sever an employment relationship for any reason, or for no reason at all, absent an existing employment contract for a fixed term.[11] Strict application of the at-will employment doctrine leaves employees without a remedy when discharged in retaliation for either blowing the whistle on their employers' illegal conduct, or refusing to follow their employers' illegal requests.[12]

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8. A whistleblower is one who, in good faith, publicizes or discloses the potential harmful conduct of present or past employers, supervisors or co-workers. *See* Robert D. Boyle, *A Review of Whistleblower Protections and Suggestions for Change*, 41 LAB. L.J. 821, 822 (1990); DANIEL P. WESTMAN, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 19 (1991).

The term "whistleblower" is derived from the act of an English bobby blowing his whistle to alert other law enforcement officers of the commission of a crime. *See* Winters v. Houston Chronicle Publishing Co., 795 S.W.2d 723, 727 (Tex. 1990). There have been numerous events where whistleblowing was a factor. "Among the more highly publicized events . . . are Watergate, Love Canal, Three Mile Island and the Challenger shuttle disaster." *Id.* at 729-30. This note will use the term whistleblower to describe not only those who report the wrongdoing of an employer, but also those employees who refuse to violate the law at the suggestion of their employer.

9. *See* WESTMAN, *supra* note 8, at vii.

10. *See generally* Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (explaining theories and application of the traditional common law rule). A detailed discussion of the historical development of the at-will rule is contained in Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976). For further explanation of the employment-at-will doctrine, see Venessa F. Kuhlmann-Macro, *Blowing the Whistle on the Employment At-Will Doctrine*, 41 DRAKE L. REV. 339 (1992); Seymour Moskowitz, *Employment-At-Will & Codes of Ethics: The Professional's Dilemma*, 23 VAL. U. L. REV. 33 (1988); Brian Heshizer, *The New Common Law of Employment: Changes in the Concept of Employment at Will*, 36 LAB. L.J. 95 (1985); Joan M. Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 U. MO.-KAN. CITY L. REV. 189 (1983).

11. Cheryl S. Massingale, *At-Will Employment, Going, Going ...*, 24 U. RICH. L. REV. 187 (1990). *See also* DeMarco v. Publix Super Markets, 384 So. 2d 1253 (Fla. 1980) (affirming the district court's holding that the term of employment is discretionary and either party may terminate the employment at any time for any reason, and therefore, no action may be maintained for breach of the employment contract); Maguire v. American Family Life Insurance Co., 442 So. 2d 321 (Fla. Dist. Ct. App. 1983) (holding that without an employment contract specifically obligating both the employer and the employee to a definite term of employment, the employment is considered indefinite and terminable at the will of either party); Georgia Power Co. v. Busbin, 250 S.E.2d 442 (Ga. 1978) (finding that absent a controlling contract, permanent employment, or employment for life is for an indefinite period, terminable at the will of either party); Harrod v. Wineman, 125 N.W. 812, 813 (Iowa 1910); Martin v. New York Life Ins. Co., 42 N.E. 416 (N.Y. 1895); Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 519-20 (Tenn. 1884) (holding that in the absence of a written contract an employer could discharge an employee at any time for good cause, for no cause or even for a morally wrong cause), *rev'd on other grounds*, Hutton v. Watters, 179 S.W. 134 (Tenn. 1915).

12. *See* Kuhlmann-Macro, *supra* note 10, at 400.

The employment-at-will doctrine has been narrowed considerably in recent years.[13] Courts have gradually eroded the at-will employment doctrine by creating exceptions.[14] The most widely recognized exception to the at-will employment rule is the public policy exception.[15] A cause of action for wrongful discharge,[16] which is actually a subpart of the public policy exception, allows an employee to sue an employer if the employee's discharge was based on a reason that was offensive to public policy.[17]

More than half of the states now recognize the public policy exception to the employment-at-will doctrine.[18] This recognition became widespread in the late 1970s and the 1980s in both courts and legislatures.[19] The trend is toward

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13. *See* Heshizer, *supra* note 10, at 95. "This common law employment-at-will doctrine has been . . . progressively limited in recent years as increasing numbers of discharged employees have successfully challenged the actions of their employers in court." *Id.*

14. *See* Massingale, *supra* note 11, at 188-200. Some of these exceptions include: statutory and judicially created exceptions; the public policy exception; the implied contract exception; and the good faith and fair dealing exception. See *infra* text accompanying notes 69-71 for a further discussion of these exceptions.

15. Moskowitz, *supra* note 10, at 49. Generally, courts will apply the public policy exception when an employee is discharged for exercising a statutory right such as filing a workers' compensation claim, *see, e.g.*, Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988) (applying the public policy exception to employees rightfully exercising a legal duty); Nees v. Hocks, 536 P.2d 512 (Or. 1975) (holding that an employer cannot discharge an employee for serving on a jury), and for refusing to commit unlawful acts, *see, e.g.*, Trombetta v. Detroit, T & I.R.R., 265 N.W.2d 385 (Mich. Ct. App. 1978) (holding employer cannot discharge an employee for refusing to commit unlawful acts).

16. For purposes of this note, the term "wrongful discharge" will be used interchangeably with the term "retaliatory discharge." The term "wrongful discharge" is normally used to describe an employee's unjust termination. "Retaliatory discharge," however, has a much more narrow meaning and describes an employer's retaliation against an employee for the employee's action which negatively affected the employer.

17. The term public policy eludes precise definition. *See* Maryland Casualty Co. v. Fidelity & Casualty Co., 236 P. 210, 212 (Cal. Ct. App. 1925) (stating that "[t]he question, what is public policy in a given case, is as broad as the question of what is fraud"). Another court stated that public policy is "anything which tends to undermine the sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel, is against public policy." Noble v. City of Palo Alto, 264 P. 529, 530 (Cal. Ct. App. 1928). Another statement, sometimes referred to as a definition, is that "whatever contravenes good morals or any established interests of society" is against public policy. Petermann v. International Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Ct. App. 1959).

18. *See* JAMES N. DERTOUZOS ET AL., THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION, Rand Report R-3602-ICJ 13 (1988). By 1985, 37 states recognized the public policy exception, 31 recognized the implied contract exception, and five recognized the covenant of good faith and fair dealing exception. *Id.*

19. The following states adopted the public policy exception in the 1970s: *Idaho*; Jackson v. Minidoka Irrigation Dist., 563 P.2d 54 (Idaho 1977); *Illinois*; Kelsey v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978); *Michigan*; Trombetta v. Detroit, T & I.R.R., 265 N.W.2d 385 (Mich. Ct. App. 1978); *New Hampshire*; Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974); *New Jersey*; Pierce v. Ortho Pharmaceutical Corp., 399 A.2d 1023 (N.J. Super. Ct. App. Div. 1979), *rev'd on*

greater employee protection, and this can be seen in the extension and development of protection for whistleblowers. Presently, federal and state laws

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other grounds, 417 A.2d 505 (N.J. 1980); *Oregon*; Nees v. Hocks, 536 P.2d 512 (Or. 1975); *Pennsylvania*; Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974); *West Virginia*; Harless v. First Nat'l Bank, 246 S.E.2d 270 (W. Va. 1978).

The following states adopted the exception in the 1980s: *Alaska*; Knight v. American Guard & Alert, Inc., 714 P.2d 788 (Alaska 1986); *Arizona*; Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025 (Ariz. 1985); *Arkansas*; M.B.M. Co. v. Counce, 596 S.W.2d 681 (Ark. 1980); *Connecticut*; Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385 (Conn. 1980); Parnar v. Americana Hotels, Inc., 652 P.2d 625 (Haw. 1982); *Indiana*; McClanahan v. Remington Freight Lines, Inc., 517 N.E.2d 390 (Ind. 1988); *Maryland*; Adler v. American Standard Corp., 432 A.2d 464 (Md. 1981), *aff'd in part, rev'd in part on other grounds*, 830 F.2d 1303 (4th Cir. 1987); *Minnesota*; Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569 (Minn. 1987); *Nebraska*; Shriner v. Meginnis Ford Co., 421 N.W.2d 755 (Neb. 1988); *Nevada*; Hansen v. Harrah's, 675 P.2d 394 (Nev. 1984); *New Mexico*; Vigil v. Arzola, 699 P.2d 613 (N.M. Ct. App. 1983), *rev'd on other grounds*, 687 P.2d 1038 (N.M. 1984); *North Carolina*; Sides v. Duke Hosp., 328 S.E.2d 818 (N.C. Ct. App. 1985); *North Dakota*; Krien v. Marion Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987); *Oklahoma*; Burk v. K-Mart Corp., 770 P.2d 24 (Okla. 1989); *Rhode Island*; Cummins v. EG & G Sealol, Inc., 690 F. Supp. 134 (D.R.I. 1988) (applying Rhode Island law); *South Carolina*; Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213 (S.C. 1985); *South Dakota*; Johnson v. Kreiser's, Inc., 433 N.W.2d 225 (S.D. 1988); *Tennessee*; Clanton v. Cain-Sloan, Co., 677 S.W.2d 441 (Tenn. 1984); *Texas*; Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985); *Washington*; Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984); *Wisconsin*; Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834 (Wis. 1983).

In some states, the public policy exception, particularly as it is applied to whistleblowers, has been codified. *See, e.g.*, CONN. GEN. STAT. ANN. § 31-51m (West 1987); ME. REV. STAT. ANN. tit. 26, §§ 831-39 (West 1988); MICH. COMP. LAWS ANN. §§ 15.361 to 15.369 (West 1985); MINN. STAT. ANN. § 181.932 (West Supp. 1992); N.J. STAT. ANN. §§ 34: 19-1 to 34: 19-8 (West 1988); N.Y. LAB. LAW § 740 (McKinney 1988); OHIO REV. CODE ANN. tit. 41, §§ 4113.51 to 4113.53 (Anderson 1991). There has also been some effort by Congress to codify whistleblower protection. *See, e.g.*, Whistleblower Protection Act of 1989, 5 U.S.C. § 1201 (Supp. II 1990) (protecting employees against retaliatory discharge for reporting employer violations); National Labor Relations Act of 1935, 29 U.S.C. § 158(a)(1),(3),(4) (1982) (precluding discharge of employees for union activity, protected concerted activity, filing charges, and testifying under the Act); Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) (1988) (prohibiting discharge on the basis of age); Occupational Health and Safety Act of 1970, § II(c), 29 U.S.C. § 660(c) (1988) (protecting against retaliatory discharge for reporting employer violations); Rehabilitation Act of 1973, 29 U.S.C. § 793(b) (1988) (prohibiting federal contractors from discriminating against disabled); Employee Retirement Income Security Act of 1974, § 510, 29 U.S.C. § 1140 (1988) (protecting against retaliatory discharge for reporting employer violations); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) (1988) (prohibiting discharge on the basis of race, color, religion, sex or national origin, or for exercising rights under the Act); Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (Supp. II 1990) (prohibiting discrimination in the work place on the basis of disability). *See generally* Susan Sauter, *The Employee Health & Safety Whistleblower Protection Act and the Conscientious Employee: The Potential for Federal Statutory Enforcement of the Public Policy Exception to Employment at Will*, 59 U. CIN. L. REV. 513 (1990) (providing further discussion on existing whistleblower protection).

allow employees to sue their employers for retaliatory discharge.[20] These statutes explain the conditions under which whistleblowing is legally protected, how whistleblowers can obtain protection, and the remedies available to whistleblowers.

In most American jurisdictions today, fired employees in the previously described situations can assert a claim of wrongful discharge against their

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20. The trend at both the federal and state level is toward greater legal protection for whistleblowers against the retaliatory acts of employers. At the federal level, anti-retaliation provisions in numerous civil rights laws and labor laws protect whistleblowers who exercise specific rights granted under these statutes. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1988) (prohibiting discrimination based on race, color, sex, religion, or national origin); National Labor Relations Act of 1935, 29 U.S.C. §§ 151-169 (1982) (prohibiting termination of employees due to union activity). In addition, the Civil Reform Act of 1978 created the U.S. Merit System Protection Board to protect federal employees who "blow the whistle" on fraud and waste. *See* Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). See *infra* text accompanying notes 343-54 for further discussion of the Civil Service Reform Act. The Federal Whistleblower Protection Act of 1989 increased the protection available to federal government whistleblowers who disclose governmental waste, fraud, and abuse of power. *See* Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified at 5 U.S.C. 1201) (Supp. II 1989). See *infra* text accompanying notes 346-51 for further discussion of the Whistleblower Protection Act. Public sector whistleblowers also have constitutional protection under the First and Fourteenth Amendments to the U.S. Constitution. See *infra* text accompanying notes 334-36 for a discussion of constitutional protection. *See generally* M. Kohn & M.D. Kohn, *An Overview of Federal and State Whistleblower Protection*, 4 ANTIOCH L.J. 99 (1986).

Many states have also enacted laws designed to protect whistleblowers from the retaliatory actions of employers. The states that have enacted whistleblower protection statutes include: *Alaska*, ALASKA STAT. §§ 39.90.100 to 39.90.150 (1987); *Arizona*, ARIZ. REV. STAT. ANN. §§ 38-531 to 533 (Supp. 1989); *California*, Cal. Labor Code § 1102.5 (West 1984); *Colorado*, COLO. REV. STAT. ANN. §§ 50.5-101 to 50.5-107 (West 1990); *Connecticut*, CONN. GEN. STAT. ANN. § 31-51m (West 1989); *Delaware*, DEL. CODE ANN. tit. 29, § 5115 (1990); *Florida*, FLA. STAT. ANN. §§ 112.3187 to 112.31895 (West 1986); *Hawaii*, HAW. REV. STAT. §§ 378-63 to 378-69 (Supp. 1987); *Illinois*, ILL. ANN. STAT. ch. 5, para. 395/1 (Smith-Hurd 1990); *Indiana*, IND. CODE ANN. § 16-28-9-3 (West 1993); *Iowa*, IOWA CODE ANN. §§ 70A.28 to 29 (West Supp. 1986); *Kansas*, KAN. STAT. ANN. § 75-2973 (1984); *Kentucky*, KY. REV. STAT. ANN. §§ 61.101 to 61.103 (Baldwin 1986); *Louisiana*, LA. REV. STAT. ANN. tit. 17B, § 30: 2027 (West 1991); *Maine*, ME. REV. STAT. ANN. tit. 26, § 831 to 840 (West 1983); *Maryland*, MD. CODE ANN. S.P.P. §§ 3-301 to 3-310 (1993); *Michigan*, MICH. COMP. LAWS ANN. §§ 15.361 to 15.369 (West 1981); *Minnesota*, MINN. STAT ANN. § 181.932 (West Supp. 1992); *Missouri*, MO. REV. STAT. §§ 105.055(1) to 105.055(6) (1987); *Nevada*, NEV. REV. STAT. §§ 281.611 to 281.671 (1993); *New Jersey*, N.J. STAT. ANN. §§ 34: 19-1 to 34: 19-8 (West 1986); *New York*, N.Y. LAB. LAW § 740 (McKinney 1988); *Ohio*, OHIO REV. CODE ANN. tit. 41, §§ 4113.51 to 4113.53 (Anderson 1991); *Oklahoma*, OKLA. STAT. ANN. tit. 75, §§ 309 to 323 (1992); *Oregon*, OR. REV. STAT. §§ 659.505 to 659.545 (1992); *Pennsylvania*, PA. STAT. ANN. tit. 43, §§ 1421 to 1428 (Purdon 1983); *Rhode Island*, R.I. GEN. LAWS §§ 36-15-3 to 36-15-9 (1984); *South Carolina*, S.C. CODE ANN. §§ 8-27-10 to 8-27-50 (1988); *Texas*, TEX. REV. CIV. STAT. ANN. art. 6252-16a (West 1989); *Utah*, UTAH CODE ANN. §§ 67-21-1 to 9 (1985); *Washington*, WASH. REV. CODE. ANN. §§ 42.41.010 to 42.41.900 (West 1992); *West Virginia*, W. VA. CODE §§ 6C-1-1 to 6C-1-8 (1988); and *Wisconsin*, WIS. STAT. ANN. §§ 230.80 to 230.85 (West 1984).

employers.[21] However, if the employee was an in-house attorney,[22] no recourse would be available.[23] Suits brought by in-house attorneys raise different issues from suits by general employees[24] because of the special attorney-client relationship.[25] Most courts have held that an in-house attorney has no cause of action for wrongful discharge against an employer.[26] The two most common reasons supporting these decisions are: (1) the traditional at-will nature of the attorney-client relationship; and (2) the perceived adverse effects

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21. *See* DERTOUZOS, *supra* note 18, at 13. *See also supra* note 19 and accompanying text.

22. The term in-house attorney is one of many names referring to an attorney who is employed solely by a corporation. Other regularly used references include: house counsel, in-house counsel, inside counsel, and corporate counsel. *See* Michael P. Allen, Balla v. Gambro: *Retaliatory Discharge of House Counsel*, 5 GEO. J. LEGAL ETHICS 633, 633 n.4 (1992). The terms in-house counsel, in-house attorney, house counsel, and corporate counsel will be used interchangeably throughout this note. These terms are meant to indicate lawyers who work solely for one employer or client. As defined by Black's Law Dictionary, in-house counsel refers to any "lawyer who acts as an attorney for business though engaged as an employee of that business and not as an independent lawyer." BLACK'S LAW DICTIONARY 740 (6th ed. 1990). The court in *General Dynamics Corp. v. State of California*, No. 93-E010883, 1993 WL 225346 n.1 (Cal. Ct. App. July 8, 1993), used the term to describe "an attorney who provides legal services to a single client, a business entity of relative size and sophistication, in return for a fixed salary." *Id.*

The status of the in-house attorney within the legal community has evolved significantly over the years. Though in-house attorneys have existed in some organizations for decades, historically attorneys at large viewed attorneys in corporate legal departments as lower quality attorneys. *See* C. Barry Schaefer, *Proposed Model Rule 5.4: Is it Necessary for Corporate Staff Counsel?*, 15 CREIGHTON L. REV. 1 (1980). Now many organizations have high-powered in-house legal departments that rival elite law firms in size, qualifications, and expertise. *See* Who Represents Corporate America, NAT'L L.J., July 1991, at S5; MARK C. PUCCETTI, THE LAWYERS STATISTICAL REPORT: A STATISTICAL PROFILE OF THE UNITED STATES LEGAL PROFESSION IN THE 1980S, 19 (1985) (noting a 40% growth in in-house counsel numbers between 1970 and 1980).

23. *See* Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343, 346-47 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987); Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988); McGonagle v. Union Fidelity Corp., 556 A.2d 878 (Pa. Super. Ct. 1989); Nordling v. Northern States Power Co., 465 N.W.2d 81 (Minn. Ct. App. 1991), *rev'd on other grounds*, 478 N.W.2d 498 (Minn. 1991); Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991); Michaelson v. Minnesota Mining & Mfg. Co., 474 N.W.2d 174 (Minn. Ct. App. 1991). See *infra* text accompanying notes 125-68 for further discussion of these cases.

24. The term "general employees" will be used in this note to represent all non-attorney employees.

25. Unlike general employees, attorneys occupy a special position in our society. *See Herbster*, 501 N.E.2d at 346. "In representing clients in civil and criminal matters their authority is extremely broad. The attorney is placed in the unique position of maintaining a close relationship with a client where the attorney receives secrets, disclosures and information that otherwise would not be divulged to intimate friends." *Id.* Mutual trust, exchanges of confidence, reliance on judgment, and the personal nature of the attorney-client relationship are all necessary for the attorney to effectively represent the client, and demonstrate the unique position attorneys occupy in our society. *Id.* at 348. Because of this close relationship and the need for effective legal assistance, the law imposes special obligations upon the attorney.

26. *See supra* note 23 and accompanying text.

on the attorney-client relationship.[27] The purpose behind the attorney-client relationship is to encourage full and candid consultation and to preserve the trust between a client and a legal advisor by removing the fear of disclosure of confidential information.[28] Consequently, the law imposes special obligations on the attorney by virtue of this close relationship.[29]

Currently, there is a growing need for giving in-house attorneys the right to sue for retaliatory discharge.[30] This originates from a recent trend of corporations hiring in-house attorneys, instead of using outside law firms, to resolve their legal problems.[31] Thus, a growing number of in-house attorneys

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27. *Balla*, 584 N.E.2d at 109. The major concern is the adverse effects that granting in-house counsel the right to sue for retaliatory discharge may cause to the attorney-client relationship. *See Herbster*, 501 N.E.2d at 346-47; *Nordling*, 465 N.W.2d at 86. The primary objection to suits by in-house counsel is that they would violate the confidentiality of the attorney-client relationship and destroy the trust necessary for an attorney to serve his client effectively. *Herbster*, 501 N.E.2d at 346-47; *Nordling*, 465 N.W.2d at 86. The argument is that for in-house counsel to support a retaliatory discharge suit, they would have to reveal confidential information obtained in the course of representing the client. Consequently, clients know that their in-house attorneys may later sue them and disclose certain confidential information to support their suits and may hesitate to fully divulge all relevant information to the attorneys. *Balla*, 584 N.E.2d at 109. This result would defeat the primary purposes of the attorney-client relationship, to encourage full consultation and to preserve the trust between a client and the attorney. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

28. *See id.* at 389.

29. *See* Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343, 347 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987). Several factors which make the attorney-client relationship special include: the attorney-client privilege regarding confidential communications, the fiduciary duty an attorney owes to a client, the right of the client to terminate the relationship with or without cause, and the fact that a client has both exclusive control over the subject matter of the litigation and may dismiss or settle a cause of action regardless of the attorney's advice. *Id.* at 346-48. See *infra* notes 220-38 for further discussion of the attorney-client relationship.

30. In 1964, it was estimated that less than one percent of all lawyers practiced in corporate law departments. *See* A.B.A., LAW PRACTICE IN A CORPORATE LAW DEPARTMENT 1 (1964). Studies conducted in the early 1980s indicated that about "50,000 lawyers were on corporate payrolls, a figure double that of 15 years earlier." General Dynamics Corp. v. Superior Ct., 876 P.2d 487, 491 (Cal. 1994). *See also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.7.3 (1986); Grace C. Giesel, *The Ethics or Employment Dilemma of In-House Counsel*, 5 GEO. J. LEGAL ETHICS 535, 540-45 (1990). A recent study indicates that more than 10% of all lawyers in the United States are employed as in-house attorneys by corporations. *General Dynamics Corp.*, 876 P.2d at 491. *See also* ABA YOUNG LAWYERS DIVISION, 1990 THE STATE OF LEGAL PROFESSION 7 [hereinafter ABA YOUNG LAWYERS]. According to some commentators, as law firms continue to grow and legal costs increase, this percentage will continue to rise because corporate clients will bring legal services in house to control legal costs. *See* MARK STEVENS, POWER OF ATTORNEY: THE RISE OF THE GIANT LAW FIRMS 7-9 (1987).

31. The last two decades have seen noticeable growth in the number and professional status of in-house counsel. Large corporations have increasingly turned inside for the procurement of legal services. *See Gen. Dynamics Corp.*, 876 P.2d at 491; *see also* Anne B. Fisher, *How to Cut Your Legal Costs*, FORTUNE, April 23, 1990, at 185. Numerous reasons have been given for this recent development of corporate legal departments, ranging from corporations' attempts to cut the high

will likely be confronted with difficult situations. Courts have held that like other attorneys, in-house counsel are at-will employees and may be terminated at any time with or without cause.[32] However, unlike independent attorneys, in-house attorneys have only one client: the corporation. Typically, when a conflict arises between an attorney and a client, the recommended remedy is withdrawal.[33] Yet attorneys with the corporation as their sole client have found withdrawal to be problematic and sometimes an unfeasible solution.[34] In-house counsel are faced with a dilemma when their ethical obligations come into conflict with their employer's requirements.[35] They must choose between maintaining their professional and ethical obligations and keeping their job and risking reprimand or disbarment.[36] A new path must be created to provide these attorneys with a solution to their dilemma, one that allows them to disclose wrongdoing without the fear of unemployment.

This Note argues that in-house attorneys should have the right to sue for retaliatory discharge and that a model statute should be developed to provide a cause of action. Section II of this Note introduces the law of retaliatory discharge, discusses the details of the law, and explains its application to general employees.[37] Section III discusses retaliatory discharge suits as they relate to in-house counsel. This discussion includes an explanation of recent cases that have dealt with the right of in-house attorneys to sue for retaliatory discharge, the problems of extending the right to in-house counsel, and the justifications for allowing such suits.[38] Section IV briefly examines the present statutory

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costs of using outside law firms, "to the increasing complexity of the regulatory environment, to the programmatic style characteristic of such organizations." *General Dynamics Corp.*, 876 P.2d at 491. *See also* Lad Kuzela, *Building In-House Legal Brigades*, INDUSTRY WEEK, July 7, 1986, at 43.

32. *See* Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343, 347 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987) (upholding the general rule "that a client may terminate the relationship between himself and his attorney with or without cause"); Balla v. Gambro, Inc., 584 N.E.2d 104, 109 (Ill. 1991) (stating that the rule that a client may discharge his attorney at any time, with or without cause, applies equally to in-house counsel and outside counsel).

33. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmts. 14-16 (1990) [hereinafter MODEL RULES]; MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1981) [hereinafter MODEL CODE]. *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.5.3 (1986).

34. Daniel S. Reynolds, *Wrongful Discharge of Employed Counsel*, 1 GEO. J. LEGAL ETHICS 553, 575 (1988). Reynolds states that "[w]ithdrawal is a seriously inadequate option for company counsel, or indeed, any salaried lawyer who is the full-time, and perhaps long-term, employee of a single client." *Id.*

35. *See* Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1408 (1967).

36. *See* Brian D. Forrow, *The Corporate Law Department: Counsel to the Entity*, 34 BUS. LAW. 1797, 1802-03 (1979). *See also In re* Capps, 297 S.E.2d 249 (Ga. 1982) (holding that an in-house attorney was subject to discipline).

37. *See infra* notes 41-117 and accompanying text.

38. *See infra* notes 118-318 and accompanying text.

protection that exists for whistleblowers and discusses the deficiencies of this protection.[39] Finally, Section V proposes a model state statute which extends the right to sue for retaliatory discharge to in-house counsel.[40]

II. BACKGROUND OF RETALIATORY DISCHARGE

Since the late 1950s, legislatures and courts have increasingly permitted suits that limit employers' abilities to discharge employees when the interest of the public or the individual in avoiding discharge is compelling.[41] The retaliatory discharge cause of action is a category of these suits. The law of retaliatory discharge prevents an employer from firing employees because the employees have asserted their rights[42] or have objected to or reported the employer's wrongful conduct.[43] This is achieved by allowing the employee to

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39. *See infra* notes 319-72 and accompanying text.

40. *See infra* notes 373-422 and accompanying text.

41. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1988); Petermann v. International Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Ct. App. 1959) (upholding suit for wrongful discharge). See *supra* notes 19-20 and accompanying text for a complete list of statutes and court decisions allowing retaliatory discharge actions. The main reason that the courts and legislatures have allowed these suits is because of the vast changes that America has gone through in the last century. The fledgling businesses of the 19th century no longer need the protection that was provided by the employment-at-will rule to mature and develop into stable businesses. *See* Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 509 (N.J. 1980). These businesses have matured and developed to become enormous industries. *Id.*

American industry is no longer so delicate that its survival necessitates the subversion of employee rights by the employment-at-will doctrine. Using the employment-at-will rule at the present time can result in harsh treatment and consequences to employees by unscrupulous employers. *See* Madelyn C. Squire, *The Prima Facie Tort Doctrine and a Social Justice Theory: Are They a Response to the Employment At-Will Rule?*, 51 U. PITT. L. REV. 641 (1990). The recognition of the harsh effects that the employment-at-will rule can produce has led many courts and legislatures to grant a cause of action to wrongfully terminated employees. See *also infra* text accompanying notes 64-67 for further details on the changes that have occurred in America.

42. The courts and legislatures are attempting to preserve numerous rights by allowing the retaliatory discharge cause of action. For example, the employee's right to seek compensation under workers' compensation laws for work-related injuries should not be interfered with by the employer. *See, e.g.*, Springer v. Weeks & Leo Co. Inc., 429 N.W.2d 558 (Iowa 1988); Kelsay v. Motorola, 384 N.E.2d 353 (Ill. 1978); Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1973); FLA. STAT. ANN. § 440.205 (West 1991 & Supp. 1994). The right not to participate in the illegal activity or conduct of the employer has been held as a justification for allowing retaliatory discharge suits. *See, e.g.*, Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985); Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980); N.Y. LAB. LAW § 740 (McKinney 1989). The first amendment right to refuse to speak has also been held sufficient to support a retaliatory discharge action. *See, e.g.*, Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983). Serving on a jury has also been found to be a sufficient right of the employee and protected. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 122.001 (Vernon 1986). Joining a union has also been found to be a protected right of employees. *See, e.g.*, LA. REV. STAT. ANN. § 23: 823-24 (West 1985); MINN. STAT. ANN. § 179.10 (West 1966).

43. *See supra* note 5 and accompanying text.

sue the employer for retaliatory discharge. The courts and legislatures permitting this cause of action have determined that such a remedy is necessary both to preserve the employees' ability to assert their rights and to promote the public interest.[44] Courts have looked to statutes,[45] constitutional provisions,[46] the common law,[47] and, in certain instances, to professional codes of ethics[48] to determine if the interests of the public and the employee outweigh the employer's interests.[49]

A. *Employment-At-Will*

One of the original barriers to the recognition of retaliatory discharge suits

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44. The public has many interests which can be protected by allowing employees the ability to sue for retaliatory discharge. The concern for the public safety has been one that the courts and legislatures have regularly wanted to protect. *See, e.g.*, Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. § 3608 (1988) (prohibiting retaliation against those who report asbestos violations); Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1988) (prohibiting retaliation against miners reporting danger, safety, or health violations in mines). The public's interest in preventing illegal activity has also been a concern that has been protected. *See, e.g.*, Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985); N.Y. LAB. LAW § 740 (McKinney 1989); N.J. STAT. ANN. § 34: 19-3(a)-(c) (West 1988).

45. *See* Parker v. M & T Chems., Inc., 566 A.2d 215, 220 (N.J. Super. Ct. App. Div. 1989); Nordling v. Northern States Power Co., 465 N.W.2d 81 (Minn. Ct. App.), *rev'd on other grounds*, 478 N.W.2d 498, 504 (Minn. 1991). The *Parker* court found that the Conscientious Employee Protection Act, N.J.S.A. 34: 19-1 to 34: 19-8, "compels a retaliating employer to pay damages to an employee-attorney who is wrongfully discharged or mistreated for refusing to join a scheme . . . which is violative of the law, fraudulent, criminal, or incompatible with a clear mandate of New Jersey's public policy concerning public health, safety, or welfare." *Parker*, 556 A.2d at 220. The *Nordling* court refused to consider the plaintiff's retaliatory discharge claim because "as a matter of law there was no violation of the [state's] whistleblower statute." *Nordling*, 478 N.W.2d at 504. Legislatures have enacted statutes that expressly grant certain individuals the right to sue for retaliatory discharge. See *supra* notes 19-20 and accompanying text for a list of some of the statutes that have been enacted.

46. The First and Fourteenth Amendments to the United States Constitution prohibit federal, state, and local governments from retaliating against whistleblowers. See *infra* text accompanying notes 334-36 for further discussion of the constitutional issues.

47. The formation of the public policy exception is an example of a common law development that courts have looked to when deciding retaliatory discharge cases. *See, e.g.*, Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981). See *infra* text accompanying notes 81-104 for further discussion of the public policy exception.

48. *See* Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (N.J. 1980) (stating that "[e]mployees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions"); Mourad v. Automobile Club Ins. Ass'n., 465 N.W.2d 395, 397, 403 (Mich. Ct. App. 1991) (upholding a judgment in favor of an in-house attorney who was demoted for refusing to violate the Code of Professional Responsibility); Wielder v. Skala, 609 N.E.2d 105, 108-09 (N.Y. 1992) (finding that the Code of Professional Responsibility placed a duty on an associate of a law firm to report a fellow associate's unethical activities).

49. *See Pierce*, 417 A.2d at 512.

by employees was the rule of law that employees were terminable at-will.[50] Since the end of the nineteenth century, federal and state courts have presumed that employees are terminable at-will,[51] and thus can be fired for proper cause, for no cause, or even for a morally unjust cause, without the employer being liable.[52] At the same time, employees have the right to quit at any time and for any reason.[53] Thus, when the parties in an employment contract have not specified a time period, neither party is bound to continue the employment arrangement once either decides to terminate it.[54]

In theory, the employment-at-will rule was simply a background presumption of contract law that the parties were completely free to modify by specific agreement.[55] The at-will employment rule was justified on the basis of both the freedom of contract[56] and the freedom of enterprise[57] doctrines.[58] This at-will presumption, along with the constitutional protection of the freedom

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50. Until the late 19th century, American courts in situations involving indefinite term employees avoided the issues of employment duration and required notice for discharge. *See* Feinman, *supra* note 10, at 118. In 1877, this confused state of the law was resolved by Horace Gray Wood's analysis of employment in his *Treatise on the Law of Master and Servant*. *See* H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1977). He proposed a rule that has become known as the employment-at-will doctrine. Wood proposed that when an employee was hired for an indefinite period, a hiring at-will was created. *Id.* Wood's rule presumed that where no employment period was specified, either party was free to terminate the employment relationship at any time and for any reason. *Id.* General acceptance of the at-will employment rule was obtained by the turn of the century. The quick acceptance of this rule was primarily based on the changes that had occurred in society at that time. The economic and social circumstances of the nation no longer favored the "paternalistic view that the master should take care of servants." Massingale, *supra* note 11, at 188.

51. *See* Kewey H. Tucker, Note, *Erosion of the Employment-at-Will Doctrine: Recognition of an Employee's Right to Job Security*, 43 WASH. & LEE L. REV. 593, 593 (1986) [hereinafter *Erosion*]; United Elec. Radio & Mach. Workers v. General Elec. Co., 127 F. Supp. 934 (D.D.C. 1954). *See generally* ARTHUR LARSON & LEX K. LARSON, 3A EMPLOYMENT DISCRIMINATION § 117.20 (1991) (providing background on the employment-at-will doctrine).

52. *See* Blades, *supra* note 35, at 1405; Payne v. Western & Atl. R.R. Co., 81 Tenn. 507, 519-20 (Tenn. 1884), *rev'd on other grounds*, Hutton v. Watter, 179 S.W. 134 (Tenn. 1915).

53. *See* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 48 (1990).

54. *See Erosion*, *supra* note 51, at 593.

55. *See* WEILER, *supra* note 53, at 48.

56. The freedom of contract rationale supported the idea that both the employer and employee should be free to create or terminate an employment relationship at any time. *See* Moskowitz, *supra* note 10, at 38-40. The rule was influenced by the idea that "the employee had only such rights as were expressly agreed to in his contract of employment—no more and no less." LARSON & LARSON, *supra* note 51, at § 117.20 26-4.

57. The freedom of enterprise rationale is a 19th century concept, based on the efficiency of the marketplace, which required that employers have the absolute right to fire employees who hindered the employer's ability to produce at a profit. *See* Massingale, *supra* note 11, at 188-89.

58. *See* Alfred W. Blumrosen, *Workers' Rights Against Employers and Unions: Justice Francis—A Judge for Our Season*, 24 RUTGERS L. REV. 480, 481 (1970).

to contract at the beginning of this century,[59] made it nearly impossible for an employee to successfully counter the at-will presumption.[60]

The early adherence of courts to the doctrine of at-will employment allowed few exceptions to the at-will rule.[61] An employer was free to discharge an at-will employee without notice and for virtually any reason. While this termination rule often caused harsh results,[62] it was thought necessary because it promoted economic growth by affording business owners maximum control over the workplace.[63] Today, however, the work environment is very different from that of the late nineteenth and early twentieth centuries. There have been significant changes in the number of people working,[64] the composition of the

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59. *See* Adair v. United States, 208 U.S. 161, 174-75 (1908). The Court reasoned that the freedom to contract allowed an employer to dispense with the services of an employee for union membership, as well as for "reason . . . whim, caprice, prejudice, or malice." *Id.* at 173. *See also* Lochner v. New York, 198 U.S. 45, 64-65 (1905) (striking down maximum hour regulations for bakery employees). The *Adair* decision was effectively overruled in Texas & N.O. R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548 (1930), which accepted Congress' Commerce Clause power to protect workers' rights to organize and bargain collectively, free from the employer's discharge threats.

60. *See* WEILER, *supra* note 53, at 48.

61. The exceptions that were recognized were based on specific violations of statutorily protected rights. One early statute which expressly limited the employer's right to terminate employees was the National Labor Relations Act of 1935, 29 U.S.C. §§ 151-169 (1988). This Act prohibits termination of employees due to union activity. *Id.* §§ 157-158. Unionization and collective bargaining agreements were the first limitations placed on the at-will rule. They limited the employer's ability to terminate employees who were union members and covered by a collective bargaining agreement. *See* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1934 (1983). These union agreements prohibited the firing of unionized employees except for cause. *Id.* Subsequently, laws which created obligations for employers and rights for employees served as a basis for exceptions to the at-will doctrine if the termination was in violation of a statutorily protected right or obligation. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1988) (setting wage and hour standards); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1988) (setting minimum safety standards in the workplace).

62. *See, e.g.*, Comerford v. International Harvester, 178 So. 894, 895-96 (Ala. 1938) (holding that the plaintiff had no cause of action when discharged in revenge for a supervisor's unsuccessful attempts to obtain the affections of the plaintiff's wife); Scroghan v. Kraftco Corp., 551 S.W.2d 811, 812 (Ky. Ct. App. 1977) (holding that the plaintiff had no cause of action when terminated after announcing the intent to attend law school at night).

63. *See* Feinman, *supra* note 10, at 133-34. The common law developed in a laissez-faire climate that encouraged industrial expansion and approved the right of an employer to control his own business, including the right to fire an employee-at-will without cause. *Id.*

64. America has gone through immense changes in the 100 years since Wood's employment-at-will rule was announced. "In 1880 America's labor force consisted of 17,392,000 workers, or 47.3% of the population." Squire, *supra* note 41, at 649. "The employed work force in 1987 was 112,440,000, which accounted for 61.5% of the population." *Id.* Not only has the number of workers increased in the past 100 years, but the average life expectancy has also increased. The average life expectancy before 1900 was under 47 years, while life expectancy is currently over 70 years. *Id.* As a result of these changes, the quality of life has taken on more importance, with the

workforce,[65] and the nature of businesses in our modern environment.[66] The United States of America has become a nation of employees where the job of the modern day worker is the most valuable asset.[67]

The changes that have occurred in the law and work environment have contributed to a current employment environment that has many exceptions to

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issues of job security and workplace dignity becoming greater concerns. *Id.* at 649-50. *See generally* Elliot L. Beitner, *Justice and Dignity: A New Approach to Discipline*, 35 LAB. L.J. 500 (1984).

65. The composition of the nation's work force has also drastically changed. In 1890, employed married women made up 13.9% of the labor force and 4.6% of the female population. *See* Squire, *supra* note 41, at 650. The labor force in 1988 was made up of 59.2% married women and 56.8% of the female population. *Id.* While many reasons exist for women's expanded participation in the work force, the main reason is that two salaries are now needed to meet the economic requirements of the family. *See Employment Increases and Median Earnings in U.S. Families*, LAB. L. REP. (CCH) No. 141, at 4 (August 11, 1989).

66. The fledgling industries of the 1800s have developed from small and medium size companies to become enormous corporations in which the ownership of the organization is separate from management. *See* Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 509 (N.J. 1980); Squire, *supra* note 41, at 650. Previously, in the late nineteenth and early twentieth centuries, there was a clear distinction between employers who were frequently owners of their businesses and employees. *See Pierce*, 417 A.2d at 509. This role of the employer as being in complete control of the business is no longer true. The old employer has been replaced by a superior in the corporate hierarchy who is himself an employee. *Id.* This has lead to a nation of employees.

No longer is there a need to protect the now established business owners from unproductive and troublesome employees; rather, it is the growing number of employees who now need to be protected. *See* Jane P. Mallor, *Punitive Damages for Wrongful Discharge of At Will Employees*, 26 WM. & MARY L. REV. 449, 456 (1985). This "growth in the number of employees has been accompanied by increasing recognition of the need for stability in labor relations." *See Pierce*, 417 A.2d at 509. Congress and state legislatures have responded to both this shifting balance of political power away from corporations, and the need for stability in labor relations, by enacting statutes promoting protective labor legislation for workers. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1988) (prohibiting discrimination against any individual with respect to hiring, discharge, compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin); Age Discrimination Act of 1967, 29 U.S.C. §§ 621-634 (1892 & Supp. V 1987) (promoting employment of older persons based on their ability rather than age and prohibiting arbitrary age discrimination with respect to compensation, terms, conditions, or privileges of employment); WIS. STAT. ANN. § 756.25(1) (West 1984) (prohibiting discharges for activities such as service on a jury); OR. REV. STAT. § 659.410 (1993) (prohibiting discharge based on the filing of workers' compensation claims); PA. STAT. ANN. tit. 18, § 7321(a) (1983) (prohibiting discharge based on refusal to submit to polygraph tests).

67. The recognition of this change in the work environment and the burden that firing a worker has on the worker, led the courts and legislatures to readdress the employment-at-will doctrine. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (recognizing the burden that firing places on the worker); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982 & Supp. V 1987) (imposing a duty on employers to furnish each employee a place of employment free from recognized hazards that are likely to cause death or serious physical harm); Worker Adjustment and Retraining Modification Act of 1989, 29 U.S.C. §§ 2101-2109 (Supp. 1989) (requiring a covered employer to give 60-day advance notice before the employer may close a plant or institute a mass layoff).

the at-will presumption.[68] The three most successful exceptions to the at-will doctrine are the public policy exception,[69] the implied contract exception,[70] and the breach of good faith and fair dealing exception.[71] These exceptions

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68. Since the 1960s, the employment at-will rule has been criticized, and by the 1980s, the majority of states had judicially created exceptions to the employment-at-will doctrine. *See* 82 AM. JUR. 2D *Wrongful Discharge* §7 (1992); Damian Edwards Okasinski, Annotation, *In-House Counsel's Right to Maintain Action for Wrongful Discharge*, 16 A.L.R. 5th 239, 246 (1993). See *infra* notes 69-71 and accompanying text for examples of judicially created exceptions.

69. The public policy exception is based on the theory that the law should not permit an employer to fire an at-will employee for reasons that violate public policy, such as terminating an employee in retaliation for opposing an employer's illegal or unethical activities. *See* Okasinski, *supra* note 68, at 246. "The public policy exception to the at-will doctrine injects into the at-will relationship a shot of legal reality: employers who retaliate against employees for whistleblowing may in some circumstances be subject to tort liability." *See* Kuhlmann-Macro, *supra* note 10, at 440. See *infra* text accompanying notes 81-104 for further discussion of the public policy exception.

70. Several states have recognized exceptions to the at-will doctrine based on contract theories. These contract exceptions are independent of public policy considerations. The implied contract is one contract theory that has been used to challenge terminations of at-will employees. *See* Heshizer, *supra* note 10, at 104. An implied contract may be found in the terms of an employee handbook, policy manual, memorandum, and oral statements made by the employer. *Id.* at 105. Under this theory, courts have found that the circumstances, facts, or certain assertions by the employer have either implied a contract for permanent employment, or modified the existing at-will agreement to one of permanent employment, terminable only for good cause. *Id.* at 104-06

It is well recognized in law that contracts may be implied by circumstances, words or conduct. *See* RESTATEMENT (SECOND) OF CONTACTS § 4 (1986). The rationale for the implied contract exception is based on the premise that statements or acts either indicating that an employee will be terminated only for good cause, or otherwise giving assurance of job security, create in the employee the expectation of permanent employment. A case illustrating breach of implied contract theory is Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880 (Mich. 1980). In *Toussaint*, the employer conducted conversations with the plaintiff-employee prior to the hiring. The defendant-employer stated in these conversations that the plaintiff would be with the company "as long as he did his job." *Id.* at 891. The Michigan Supreme Court found that the oral statements made by the employer when the plaintiff was hired were binding and created an implied contract. *Id.* at 885.

71. The implied covenant of good faith and fair dealing is another contract-based doctrine which has been successfully used by some plaintiffs in employment cases. The implied covenant of good faith and fair dealing is designed to prevent abuses of unfettered discretion inherent in situations of unequal bargaining power. *See* Dare v. Montana Petroleum Mktg. Co., 687 P.2d 1015 (Mont. 1984). The question of whether the "covenant of good faith and fair dealing is implied in a particular case depends upon objective manifestations by the employer giving rise to the employee's reasonable belief that he or she has job security and will be treated fairly." *Id.* at 1020.

Several states have held that the parties to a contract have an implied duty to exercise good faith and fair dealing in the performance of contracts. *See* Fortune v. National Cash Register Co., 364 N.E.2d 1251, 1255-56 (Mass. 1977); Faust & Forden, Inc. v. Greenbaum, 421 S.W.2d 809, 813 (Mo. 1967); Rees v. Bank Bldg. & Equip. Corp., 332 F.2d 548, 552 (7th Cir. 1964). *See generally* Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980). Failure to exercise good faith constitutes bad faith and such conduct may give rise to the application of tort remedies. Many of the jurisdictions that recognize the good faith exception to employment-at-will base the requirement of good faith on the long standing concept that at common law there "exists an implied covenant of good faith and fair dealing" in every contract. *See generally* 1 WILLISTON, A TREATISE ON THE LAW OF CONTRACTS

have been developed on a case-by-case basis and vary widely in acceptance among the states.[72]

In addition to the common law exceptions to the at-will employment doctrine, federal and state legislatures enacted statutes in the 1970s to protect both employees who exercised statutory rights[73] and whistleblowers[74] by allowing them to sue for retaliatory discharge.[75] The degree of protection afforded by these federal and state statutes to employees was, however, limited. Although the federal whistleblower statutes provide broad protection for government employees,[76] they offer limited protection to private employees.[77] The state whistleblower statutes vary in the degrees of protection given to employees fired for refusing to violate the law or for reporting an employer's

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§ 670 (3d ed. 1961).

In a recent Montana case, Stark v. Circle K Corp., 751 P.2d 162 (Mont. 1988), the Montana Supreme Court upheld a sizable award for the plaintiff based on breach of the covenant of good faith and fair dealing. *Id.* at 169. The court stated that Stark experienced objective manifestations reasonably giving rise to a belief of job security. Stark had received several promotions, his wages increased from minimum wage to $20,000 per year, he consistently received positive job evaluations, and he was deemed an asset to the corporation. *Id.* at 166. This case shows the growing acceptance of the good faith and fair dealing exception to the at-will doctrine.

72. *See* Mallor, *supra* note 66, at 456.

73. *See, e.g.*, Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001-2009 (1988) (forbidding discharge of private-sector employees based on their refusal to take polygraph tests or test results); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1988) (prohibiting discharge of private-sector employees for filing complaints or testifying at hearings); TEX. REV. CIV. STAT. ANN. art. 8307c (West 1983) (forbidding discharge for filing workers' compensation claim).

74. *See, e.g.*, Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(8)(A) (1982) (protecting federal employees from discharge for whistleblowing); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(a) (1988) (prohibiting retaliation by employers licensed by the Nuclear Regulatory Commission against whistleblowers); CONN. GEN. STAT. ANN. § 31-51m (West 1987) (allowing employees who are fired for reporting to public officials to sue their employers).

75. The reason for the enactment of these statutes was primarily the changing environment of the workplace. The legislatures started to realize the difficult situation that employees were being placed in by their employers. See *supra* notes 64-67 and accompanying text for further discussion on the changes that have occurred in the workplace.

76. *See* Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(8)(a) (1982) (protecting federal employees from discharge for whistleblowing); Whistleblower Protection Act of 1989, 5 U.S.C. § 1201 (Supp. II 1990) (strengthening protections granted under the CSRA by setting a deadline and requiring the government to withhold witness's identity); WESTMAN, *supra* note 8, at 50-51.

77. *See* Boyle, *supra* note 8, at 822. Federal whistleblower statutes protect private employees primarily from retribution for enforcing only certain public health statutes. *See, e.g.*, Asbestos School Hazard Detection & Control Act of 1980, 20 U.S.C. § 3608 (1988) (prohibiting retaliation against those who report asbestos violations); Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1988) (prohibiting retaliation against miners reporting danger, safety or health violations in mine).

wrongdoing.[78] In fact, twenty-one states protect only public employees,[79] and one state, Montana, has statutorily abolished the employment-at-will doctrine, requiring that all discharges be for cause.[80]

B. *Public Policy Exception*

The public policy exception arises when an employee alleges that the reason for the discharge violates a public policy right that the employee exercised.[81] Federal and state courts have created this exception to provide relief and protection to employees discharged for reasons contrary to a clearly mandated

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78. New Jersey's Conscientious Employee Protection Act (CEPA) is a typical example of a statute providing broad protection for both private and public employees. *See* N.J. STAT. ANN. §§ 34: 19-1 to 34: 19-8 (West 1988). New Jersey prohibits retaliatory action against employees who disclose or threaten to disclose to superiors or a public body that the employer is acting unlawfully, employees who cooperate with a public investigation of the employer's unlawful conduct or employees who refuse to perform acts that are in "violation of a law, . . . fraudulent or criminal, or . . . incompatible with a clear mandate of public policy concerning the public health, safety or welfare." N.J. STAT. ANN. § 34: 19-3(a)-(c) (West 1988). Under the statute, an aggrieved employee may sue for reinstatement, compensation for lost wages and benefits, attorney's fees, and punitive damages. N.J. STAT. ANN. § 34: 19-5 (West 1988). The employer is also subject to a civil fine. *Id.*

None of the existing statutes specifically address the rights of in-house counsel to sue. There has only been one attempt to enact a whistleblower statute that would address the in-house attorney, in Illinois, but this legislation was never passed. *See* Elliott M. Abramson, *Why Not Retaliatory Discharge for Attorneys: A Polemic*, 58 TENN. L. REV. 271, 282 (1991). For the text of the proposed Illinois legislation, see *infra* note 365.

79. *See, e.g.*, ALASKA STAT. § 39.90.100 (1989); COLO. REV. STAT. § 24-50.5-101 (1989); WASH. REV. CODE ANN. §§ 42.40.010 to 42.40.900 (West 1990). For the most up-to-date list of statutes, see 9A Lab. Rel. Rep. (BNA) (1992).

80. MONT. CODE ANN. § 39-2-904 (1991).

81. The public policy exception first appeared as a suspension of the at-will rule for the benefit of an employee who had refused to commit an unlawful act. *See, e.g.*, Petermann v. International Bhd. of Teamsters, 344 P.2d 25 (Cal. 1959). In recognizing a cause of action for the employee, the *Petermann* court reasoned that "[t]o hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and would serve to contaminate the honest administration of public affairs." *Id.* at 27.

A majority of states have adopted this form of the public policy exception, favoring the employee in cases where an employee is discharged for refusing to act in violation of a penal statute. *See generally* Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 59 (1988). Additionally, some state courts have expanded the exception to protect employees who are fired for performing important public obligations, such as jury duty or for exercising statutory rights or privileges, such as applying for workers' compensation benefits. *See, e.g.*, Nees v. Hocks, 536 P.2d 512, 515-16 (Or. 1975); Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978); Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973).

public policy.[82] Courts have required a clear mandate that a particular policy be necessary to protect the public interest.[83] When a discharge contravenes a clearly mandated public policy in any way, the employer has committed a legal wrong and the public policy exception applies. However, "where no clear mandate of public policy is involved," the employer reserves the right to fire employees at-will.[84] The rationale behind the public policy exception is that the employer has a duty to refrain from firing an employee for reasons that contravene fundamental principles of public policy.[85] Courts have developed the tort of retaliatory discharge to further the public policy exception and to restrict management's absolute right to discharge at-will employees.[86] These suits are intended to encourage employees to object to unlawful conduct by their employers and, ultimately, to reduce unlawful conduct by employers.[87]

In applying the public policy exception, courts have attempted to balance the importance of the policy requiring protection against the burden created by

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82. *See* Palmateer v. International Harvester Co., 421 N.E.2d 876, 878-79 (Ill. 1981). There is no exact definition of what constitutes a clearly mandated public policy. "In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. [A] matter must strike at the heart of a citizen's social rights, duties and responsibilities before the tort will be allowed." *Id.* at 878. This clear mandate is usually found through reference to state statutes and constitutional provisions and, when they are silent, in its judicial decisions. *Id.*

Most courts do not attempt to define the term public policy. Instead, they explain that public policy must be determined on a careful, case-by-case basis. *See, e.g.*, Petermann v. International Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. 1959); Palmateer v. International Harvester Co., 421 N.E.2d 876, 878-79 (Ill. 1981). Many courts also state that the exception is to be narrowly construed and cautiously applied only in those situations where the public policy issue is clearly mandated. *See* Burk v. K-Mart Corp., 770 P.2d 24, 29 (Okla. 1989) (stating that "the public policy exception must be tightly circumscribed"); Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 840-41 (Wis. 1983) (explaining that the exception is "limited" and "narrowly circumscribed" and that "[c]ourts should proceed cautiously when making public policy determinations"); Johnson v. Kreiser's, Inc., 433 N.W.2d 225, 227 (S.D. 1988) (stating that the exception is narrow).

83. *See* Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981); Leach v. Lauhoff Grain Co., 366 N.E.2d 1145, 1148 (Ill. App. Ct. 1977); Parnar v. American Hotels, 652 P.2d 625, 631 (Haw. 1982); Pierce v. Ortho Pharmaceutical Corp., 399 A.2d 1023, 1025-26 (N.J. Super. Ct. App. Div. 1979), *rev'd on other grounds*, 417 A.2d 505 (N.J. 1980).

84. *See* Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981) (quoting Leach v. Lauhoff Grain Co., 366 N.E.2d 1145 (Ill. App. Ct. 1977)).

85. *See, e.g.*, Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1335-36 (Cal. 1980) (citing WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 613 (4th ed. 1971)). *See* Reynolds, *supra* note 34, at 559.

86. *See* Heshizer, *supra* note 10, at 103.

87. Allowing employees the right to sue for retaliatory discharge would deter employers from firing workers who "blow the whistle," and this would ultimately reduce the unlawful conduct by employers. *See* Parker v. M & T Chems. Inc., 566 A.2d 215, 220 (N.J. Super. Ct. App. Div. 1989).

the limitations on managerial discretion.[88] Jurisdictions differ as to what constitutes a sufficient public policy to uphold a retaliatory discharge suit.[89] Thus, when determining whether a discharge violates a public policy, courts have looked to a variety of considerations to determine whether a policy is violated and if the policy outweighs the employer's interests.[90]

Several court decisions have discussed the belief that the public's interest in encouraging corporations to obey the law may outweigh the employer's interest in keeping control of the workplace. The Supreme Court of Illinois, in *Joiner v. Benton Community Bank*,[91] stated that public policy prefers the exposure of crime and the cooperation of people having information of such crime.[92] The District Court of Appeals of California, in *Petermann v.*

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88. *See, e.g.*, Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981). The court stated that "it is now recognized that a proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out." *Id.* at 878. The reason for requiring this balance is that the term public policy is difficult, if not impossible, to define. *See also* 9A Lab. Rel. Rep. (BNA) 505: 4.

89. Some courts have also looked to statutory and constitutional rights when determining whether something is a public policy. *See, e.g.*, Watson v. Cleveland Chair Co., 789 S.W. 2d 538 (Tenn. 1989) (stating that the public policy of Tennessee is to be found in its constitution, statutes, judicial decisions, and applicable rules of common law). New York's highest court has interpreted its state whistleblower statute to protect only employees who report violations that endanger public health or safety. *See* Remba v. Federation Employment & Guidance Serv., 149 A.2d 131 (N.Y. App. Div. 1989), *aff'd*, 559 N.E.2d 655, 655-56 (N.Y. 1990). California, on the other hand, has allowed recovery for plaintiffs who refused to commit unlawful acts that did not necessarily constitute crimes. *See, e.g.*, Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1333-37 (Cal. 1980).

90. Although there is no easy way to determine what is and what is not a clear public policy, there are some general principles that can help guide the clear mandate analysis. First, the strongest statements of public policy are those found in statutes or regulations. Courts are more reluctant to derive public policy from constitutional provisions or judicial decisions. *See* Vigil v. Arzola, 699 P.2d 613, 616 (N.M. Ct. App. 1983), *rev'd in part on other grounds*, 687 P.2d 1038 (N.M. 1984). Second, if a statute is susceptible to more than one reasonable interpretation, it probably will not qualify as a clear mandate of public policy. *See* Merck v. Advanced Drainage Sys., Inc., 921 F.2d 549, 555-56 (4th Cir. 1990). Third, the public policy at issue does not have to be expressly stated to be clearly mandated. As one court put it: "Public policy is not concerned with minutiae, but with principles. Seldom does a single clause of a statute establish public policy; policy is discovered from a study of the whole statute, or even a group of statutes. . . ." Warthen v. Toms River Community Memorial Hosp., 488 A.2d 229, 232 (N.J. Super. Ct. App. Div. 1985) (quoting Shaffer v. Federal Trust Co., 28 A.2d 75, 79 (N.J. Ch. 1942)). Courts will look to these considerations when determining whether a discharge violates a public policy and when considering if the public policy outweighs the employer's interest.

91. 411 N.E.2d 229 (Ill. 1980). In *Joiner*, a used car dealer, Joiner, who obtained financing from the Benton Community Bank was indicted for violating an Illinois statute pertaining to theft, selling collateral, and willfully failing to pay proceeds to a secured party. *Id.* at 230-31. Joiner then brought an action against the bank for malicious prosecution. *Id.* at 230.

92. *Id.* at 231.

International Brotherhood of Teamsters,[93] came to a similar conclusion when it held that the law must encourage truthful testimony.[94] The court concluded that courts should create every incentive for employees to uphold the law. It also concluded that by providing employees with an action for whistleblowing, employees were more likely to uphold the law.[95] The courts in both of these cases allowed a cause of action, even though none was statutorily granted by finding that both common law and common sense dictated that the public interest would be served by offering a remedy to employees discharged for upholding the law.[96]

The public interest in reducing corporate wrongdoing is not the public's only interest. The Superior Court of New Jersey, in *Parker v. M & T Chems. Inc.*,[97] held that a public interest also exists in insuring that employees are not coerced into breaking the law.[98] The court stated that by allowing specific statutory protections, a court's holding should discourage employers from inducing employees to participate in illegal schemes and should encourage employees to resist such inducements.[99] If employees were not permitted to sue for retaliatory discharge, employers could force employees to choose

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93. 344 P.2d 25 (Cal. Ct. App. 1959). In *Petermann*, the plaintiff, Petermann, was employed by the defendant union as a business agent. *Id.* at 26. The defendant hired Petermann and specified that the duration of employment was as long as Petermann's work was satisfactory. *Id.* Petermann was then subpoenaed to testify at a legislative hearing. *Id.* Petermann alleged that the defendant instructed him to make certain false statements in his testimony. *Id.* Petermann, however, gave truthful answers to all questions asked. *Id.* The next day Petermann was fired by the defendant. *Id.*

94. *Id.* at 27. The *Petermann* court also stated that the public policy of California required that every impediment, however remote, must be struck down when encountered. *Id.*

95. *Id.*

96. *See Petermann*, 344 P.2d at 27-28; Joiner v. Benton Community Bank, 411 N.E.2d 229, 231-32 (Ill. 1980).

97. 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989). In *Parker*, the former in-house attorney, Parker, brought a retaliatory discharge action under New Jersey's Conscientious Employee Protection Act. *Id.* at 216, 218. *See* N.J. STAT. ANN. § 34: 19-1 to 34: 19-8 (West 1988) (commonly called the Whistleblower Act). Parker claimed that he was fired because he refused to copy documents which contained a competitor's trade secrets. *Parker*, 566 A.2d at 217-18. See *infra* notes 170-72 and accompanying text for a more in-depth analysis of the case as related to in-house counsel.

98. *Parker*, 566 A.2d at 220.

99. *Id.* The court stated that the decision

> compels a retaliating employer to pay damages to an employee-attorney who is wrongfully discharged or mistreated for refusing to join a scheme to cheat a competitor or . . . for any reason which is violative of law, fraudulent, criminal, or incompatible with a clear mandate of New Jersey's public policy concerning public health, safety or welfare. *Id.*

The court did, however, recognize that it is always open for the employer to show that the discharge was justified because the employee was fired for "incompetence, disloyalty, reduction in force, or any other legitimate reason." *Id.* at 220.

between losing their job and violating the law. This has been a justification that several courts have relied on when deciding whether to allow an employee to sue for retaliatory discharge.[100]

Several cases have also recognized that the professional codes of ethics can be a source of public policy sufficient to sustain a cause of action for retaliatory discharge.[101] For example, the Supreme Court of New Jersey, in *Pierce v. Ortho Pharmaceutical Corp.*,[102] stated that employees who are professionals have a special responsibility to follow not only federal and state laws, but also the recognized codes of ethics in their professions.[103] The court added that this duty may compel them to refuse to perform acts ordered by their employers.[104] These cases show a general trend in the courts toward recognizing the public policy exception as a basis for employee actions against their employers.

C. Retaliatory Discharge Action

The right to sue for retaliatory discharge is an exception to the common law rule that employees are terminable at-will.[105] Retaliatory discharge is a tort claim that wrongfully terminated employees can use to sue their ex-employers

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100. *See* Parker v. M & T Chems., Inc., 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989); Balla v. Gambro, Inc., 584 N.E.2d 104, 113 (Ill. 1991) (Freeman, J., dissenting).

101. *See, e.g.*, Kalman v. Grand Union Co., 443 A.2d 728, 730-31 (N.J. Super. Ct App. Div. 1982) (allowing retaliatory discharge suit by pharmacist fired for refusing to violate state regulations consistent with the code of ethics); Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (N.J. 1980); Cisco v. United Parcel Servs., Inc., 476 A.2d 1340, 1343 (Pa. Super. Ct. 1984) (stating that professional ethics may reflect public policy).

102. 417 A.2d 505 (N.J. 1980). In *Pierce*, the employee, Pierce, was a medical doctor who was responsible for research on a new drug. *Id.* at 506. The research team to which Dr. Pierce belonged was faced with the question of whether approval should be sought to test the drug on human subjects. *Id.* at 507. The entire team initially recommended that the company not seek approval because of their fear that the drug might cause cancer. *Id.* The company pressured the team to change its opinion but when Dr. Pierce refused, she was dismissed. *Id.* at 507-08. The court ruled in favor of Pierce because clear issues of public policy were involved, specifically the safety and health of human subjects with a potentially unsafe drug, and Pierce had both responsibility for product safety and the training necessary to make judgments about the drug in question. *Id.* at 512.

103. *Id.* at 512. The court came to this conclusion based on its belief that a professional code of ethics can contain expressions of public policy. *See id.*

104. *Id.* The *Pierce* court, however, rejected the employee's argument in this case because the employee refused to obey her employer based on her personal morals. *Id.*

105. The first case to recognize this exception was Petermann v. International Bhd. of Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959). This exception is actually a subpart of the public policy exception to the employment at-will doctrine.

for monetary damages or possible reinstatement.[106] Because barring such an action would endorse an employer's ability to coerce employees into foregoing their rights, courts have increasingly recognized this tort when dealing with general employees.[107] Most jurisdictions that recognize the public policy exception[108] also recognize retaliatory discharges as applied to general employees. However, most courts have refused to apply the public policy exception and the right to sue for retaliatory discharge to in-house counsel.[109]

The retaliatory discharge cause of action is derived from the public policy exception to at-will employment and is generally recognized when: (1) an employer discharges an employee in retaliation for employee activities; and (2) the discharge contravenes a clearly mandated public policy.[110] However, the scope of the retaliatory discharge cause of action is narrower than the public policy exception in that the employee must be discharged in retaliation for the employee's activities. The public policy exception only requires that the discharge oppose a clearly mandated public policy.[111]

Retaliatory discharge cases based on the public policy exception fall into three general categories. In one group of cases, courts have allowed a cause of action when an employee is fired for exercising statutory or constitutional rights.[112] The second category protects employees discharged for refusing to

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106. *See, e.g.*, Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973) (holding that firing the plaintiff for filing a workmen's compensation claim was in strict defiance of Indiana's Workmen's Compensation Act, IND. CODE § 22-3-2-1 (1971), and was a wrongful, unconscionable act that should be actionable in a court of law); Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1088-89 (Wash. 1984) (en banc) (recognizing a cause of action in tort for wrongful discharge if the discharge of the employee contravenes a clear mandate of public policy).

107. *See Frampton*, 297 N.E.2d at 428.

108. See *supra* note 19 and accompanying text for a list of states that recognize the public policy exception.

109. *See infra* text accompanying notes 129-68.

110. *See* Palmateer v. International Harvester Co., 421 N.E.2d 876, 881 (Ill. 1981); Balla v. Gambro, Inc., 584 N.E.2d 104, 107 (Ill. 1991); Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343, 346 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987).

111. *See* Palmateer v. International Harvester Co., 421 N.E.2d 876, 878 (Ill. 1981). This difference is crucial because an employee suing under the public policy exception need only prove that the discharge was contrary to public policy, whereas an employee suing under the retaliatory discharge theory must also prove that the discharge was in retaliation for his or her actions. See *supra* text accompanying notes 81-104 for further discussion on the public policy exception.

112. *See, e.g.*, Frampton v. Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973). The company, Central Indiana Gas, discharged an employee after she filed and received a settlement on a workers' compensation claim. *Id.* at 426. The Supreme Court of Indiana concluded that

> [i]f employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation . . . [and] the employer

follow management's directives to violate the law.[113] The third category, known as whistleblowing, protects employees who are discharged for reporting the illegal or dangerous practices of their employer.[114] In these whistleblower cases, the courts follow a balancing analysis similar to that used with the public policy exception.[115] The courts attempt to balance the employer's reasonable expectations of employee loyalty against the employee's legitimate concern that company practice violates public policy.[116] The courts and legislatures granting this cause of action have concluded that, given the nature of the work place, such a remedy is necessary to preserve employees' ability to assert their rights and to promote the interests of the public.[117] The use of the retaliatory discharge cause of action involving in-house attorneys, however, has not been readily accepted by the courts and legislators across the country.

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is effectively relieved of his obligation. Since the Act embraces such a fundamental . . . policy, strict employer adherence is required.

Id. at 427. State courts have also protected at-will employees from discharge where the public policy issue concerned the right to serve on a jury, *see, e.g.*, Nees v. Hocks, 536 P.2d 512 (Or. 1975), receive state minimum wages, *see, e.g.*, Montalvo v. Zamora, 86 Cal. Rptr. 401 (Cal. Ct. App. 1970), and protect pension rights, *see, e.g.*, Jackson v. Minidoka Irrigation Dist., 563 P.2d 54 (Idaho 1977).

113. These cases are generally called refusal cases because the employee refuses to do illegal activity. *See* Reynolds, *supra* note 34, at 559-60. *See, e.g.*, Petermann v. International Bhd. of Teamsters, 344 P.2d 25 (Cal. Ct. App. 1959). The *Petermann* case concerned an employee who refused to perjure himself, as his employer had instructed, at a legislative hearing. The court stated that to force an employee to commit perjury to maintain employment "would . . . encourage criminal conduct . . . and . . . serve to contaminate the honest administration of public affairs." *Id.* at 27. Other courts have protected at-will employees discharged for refusing to falsify pollution reports, *see, e.g.*, Trombetta v. Detroit, T & I.R.R., 265 N.W.2d 385 (Mich. 1978), and refusing to participate in price fixing schemes, *see, e.g.*, Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980).

114. These cases are generally known as reporting cases. *See* Reynolds, *supra* note 34, at 562. Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505 (N.J. 1980), illustrates the issues that typically confront employees and employers in this third category. For the facts of the *Pierce* case and the reasoning of the court, see *supra* notes 102-04 and accompanying text. For whistleblowers to receive court protection, they must object to company actions which violate a public policy, and the company must have the responsibility and knowledge to uphold that policy. *See, e.g., id.;* Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974).

115. *See supra* note 88 and accompanying text.

116. *See, e.g.*, Klages v. Sperry Corp., No. 83-3295, 1984 WL 49135, 118 L.R.R.M. (BNA) 2463 (E.D. Pa. 1984). The court conducted a balancing of the social interest involved between the plaintiff's and the defendant's actions. *Id.* at *7. The court decided that the social interest of the plaintiff's activity greatly outweighed any potential social benefit of the defendant's activity. *Id.* at *8. See *infra* text accompanying notes 179-81 for further discussion of the *Klages* case.

117. *See* Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1979). *See also* Abramson, *supra* note 78, at 285.

III. RETALIATORY DISCHARGE SUITS BY IN-HOUSE COUNSEL

Although the doctrine of retaliatory discharge has been expanding to encompass general employees,[118] this expansion has been limited in its application to attorneys. The tort of retaliatory discharge ordinarily applies to general employees when a public policy concern outweighs the employer's normal right to fire an at-will employee.[119] However, cases brought by in-house counsel do not fit the ordinary retaliatory discharge situation. These cases involve two conflicting public policies: the employer's compliance with the law and the client's inherent protection afforded by the attorney-client relationship.[120] The lawyer's duties of loyalty,[121] zealousness,[122] and confidentiality,[123] for example, protect a client against the lawyer's misuse of confidential material or disregard of client goals and decisions. These duties of the attorney minimize the client's inability to oversee and evaluate the lawyer's specialized abilities and professional judgment.[124] The client's right to terminate the attorney is the fundamental method of guaranteeing that lawyers successfully perform their duties.

A. Cases Involving In-House Counsel's Right to Sue

Recently, courts have begun to address the question of whether the modern exceptions to the employment-at-will doctrine also apply to attorneys employed by private corporations such as in-house counsel.[125] Most courts, in the

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118. See *supra* text accompanying notes 105-17 for general discussion of the retaliatory discharge cause of action.

119. *See* Arthur Sternberg, *Preserving Client Trust: The Court Was Right in* Balla, 80 ILL. B.J. 281, 281 (June 1992) (quoting Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978)).

120. *See* Sternberg, *supra* note 119, at 281-82.

121. *See* MODEL RULES, *supra* note 33, Rule 1.7 cmt. 1. Comment 1 of Rule 1.7 states that "[l]oyalty is an essential element in the lawyer's relationship to a client." *Id.*

122. *See* MODEL CODE, *supra* note 33, EC 7-1. Ethical Consideration 7-1 states that "[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law." *Id.*

123. *See* MODEL RULES, *supra* note 33, Preamble para. 3. The preamble of the Model Rules states that "[a] lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law." *Id.*

124. *See* Sternberg, *supra* note 119, at 282.

125. Thus far, in-house counsel have brought only 10 reported retaliatory discharge cases. *See* Herbster v. North Am. Co. for Life and Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987); Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988); McGonagle v. Union Fidelity Corp., 556 A.2d 878 (Pa. Super. Ct. 1989); Nordling v. Northern States Power Co., 465 N.W.2d 81 (Minn. Ct. App.), *rev'd on other grounds*, 478 N.W.2d 498 (Minn. 1991); Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991); Michaelson v. Minnesota Mining & Mfg. Co., 474 N.W.2d 174 (Minn. Ct. App. 1991); Parker v. M & T Chems. Inc., 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989);

retaliatory discharge suits brought by in-house counsel, acknowledge the existence of a public interest in assuring that lawyers follow the Rules of Professional Responsibility.[126] However, not all courts recognize that an in-house counsel's position as an employee complicates adherence to the Model Code and the Model Rules and requires the right to sue for retaliatory discharge.[127] The cases denying a remedy to in-house counsel have also objected to such suits because they contradict the role of an attorney and might require disclosure of privileged or confidential information.[128]

Of the ten cases involving in-house counsel's right to sue for retaliatory discharge, six have refused to extend the retaliatory discharge cause of action to the in-house attorney.[129] For example, in *Herbster v. North American Company for Life and Health Insurance*,[130] an Illinois Appellate Court refused to extend the retaliatory discharge action to in-house attorneys. This refusal occurred despite the court's acknowledgement that the discharge of the in-house attorney violated a clearly mandated public policy of insuring the state's interest in full and complete discovery.[131] The court reasoned that the expansion of the public policy exception to attorneys would seriously impair the mutual trust between an attorney and client, the attorney's loyalty to the client, the attorney-client privilege and confidentiality, and the personal employment nature of the attorney-client relationship.[132] Consequently, the *Herbster* court held that the tort of retaliatory discharge was not available to an attorney, even if the

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Mourad v. Automobile Club Ins. Ass'n, 465 N.W.2d 395 (Mich. Ct. App. 1991); Klages v. Sperry Corp., 118 L.R.R.M. (BNA) 2463 (E.D. Pa. 1984); General Dynamics Corp. v. State 1993 WL 225346 (Cal. App. Ct. June 8, 1993), *aff'd sub nom.*, General Dynamics Corp. v. Superior Ct., 876 P.2d 487 (Cal. 1994). See *infra* text accompanying notes 130-87 for further discussion of these cases.

126. *See, e.g.*, *Balla*, 584 N.E.2d at 109; *Herbster*, 501 N.E.2d at 346-47; *Willy*, 647 F. Supp. at 118; *McGonagle*, 556 A.2d at 881.

127. *See, e.g.*, *Balla*, 584 N.E.2d at 107-08; *Herbster*, 501 N.E.2d at 346-47; *Willy*, 647 F. Supp. at 118; *McGonagle*, 556 A.2d at 885; *Michaelson*, 474 N.W.2d at 178.

128. *See, e.g.*, *Herbster*, 501 N.E.2d at 346-48; *Michaelson*, 464 N.W.2d at 178; *Balla*, 584 N.E.2d at 109.

129. *See Herbster*, 501 N.E.2d at 348; *Willy*, 647 F. Supp. at 118; *McGonagle*, 556 A.2d at 885-86; *Nordling*, 478 N.W.2d at 504; *Balla*, 584 N.E.2d at 109-11; *Michaelson*, 474 N.W.2d at 178.

130. 501 N.E.2d 343 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987). In *Herbster*, the plaintiff, formerly in-house counsel to North American Insurance Company, alleged that he was discharged because he refused to destroy or remove documents from North American's files which had been requested in a pending lawsuit. *Id.* at 344. These documents, which were produced by North American, contained information that would be damaging to the attorney's employer in pending litigation if made available. *Id.* When the plaintiff refused to remove the documents he was discharged by North American. *Id.*

131. *Id.* at 344, 348.

132. *Id.* at 347-48.

discharge was contradictory to public policy interests.[133] Other courts have also refused to allow retaliatory discharge suits by in-house counsel because of the damage such suits would cause to the attorney-client relationship.

The Minnesota Court of Appeals, in *Michaelson v. Minnesota Mining & Manufacturing Co.*,[134] was one court that refused to allow the in-house attorney a cause of action because of the potentially adverse effects that would result to the attorney-client relationship. In *Michaelson*, the court held that an attorney cannot properly bring a lawsuit against the client for events that happened in the course of their attorney-client relationship.[135] The court reasoned that such conduct would subvert the attorney-client privilege and interfere with the power to terminate or modify the relationship, which must remain with the client.[136] The court further reasoned that the evidence Michaelson submitted was not sufficient to support a retaliatory discharge claim.[137]

Other courts have used the individual state codes of professional responsibility as a basis for denying retaliatory discharge suits by in-house counsel. The District Court for the Southern District of Texas, in *Willy v. Coastal Corp.*,[138] refused to allow in-house counsel a retaliatory discharge

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133. *Id.* at 348.

134. 474 N.W.2d 174 (Minn. Ct. App. 1991). In *Michaelson*, an in-house attorney, Michaelson, was employed by Minnesota Mining to work in their office of the general counsel. *Id.* at 176. Michaelson alleged that Minnesota Mining assured him that if he performed his employment well, he could work until retirement. *Id.* Michaelson experienced financial and disciplinary problems during the early years of his tenure with Minnesota Mining. Minnesota Mining thought that these problems were reflecting adversely on its corporation and decided to reassign Michaelson to a new position. *Id.* at 177. Michaelson took exception to this action and brought contract and tort causes of action against Minnesota Mining. *Id.*

135. *Id.* at 178. The court stated that "[a]n attorney cannot properly bring a lawsuit against his client and transform confidential data generated in the course of representation into evidence against his client." *Id.*

136. *Id.* The court further reasoned that since Minnesota Mining could have terminated Michaelson lawfully, Michaelson's transfer to a new position was well within the client's scope of authority. *Id.*

137. *Id.* at 180-81. The court gave several reasons why Michaelson's retaliatory discharge claim was insufficient. *Id.* at 180. First, Michaelson failed to offer any proof of Title VII or Equal Employment Opportunity law violations by Minnesota Mining. *Id.* Second, Michaelson never reported the supposed illegal conduct, but rather gave feedback to his employer regarding proposed business decisions. *Id.* Third, the alleged violations were never reported to any outside authority. *Id.* Fourth, Michaelson offered no proof that the alleged retaliation was caused by his feedback on his employer's actions. *Id.* Fifth, the employer did not fire Michaelson, but simply reassigned him to a new position. *Id.*

138. 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988). In *Willy*, Willy brought a wrongful discharge action against his former employer, Coastal Corporation. *Id.* at 117. Willy was a lawyer who was employed as in-house counsel from May 1981 until he was fired in October 1984. *Id.* Willy claimed that he was fired because he

cause of action on the basis of the state's code of professional responsibility. The *Willy* court held that withdrawal from employment, as provided under the Texas Code of Professional Responsibility,[139] was a sufficient remedy for an attorney who does not want to violate the law.[140] The court reasoned that when an attorney believes that a client is pursuing an unlawful act, the attorney's only option is to voluntarily withdraw from employment.[141] If the attorney decides not to withdraw and does not comply with the client's wishes, it should be no surprise if the client no longer desires the attorney's services.[142] The court perceived no reason to distinguish in-house counsel from regular attorneys when it refused to extend the right to sue for retaliatory discharge to in-house attorneys.[143]

The Supreme Court of Illinois, in *Balla v. Gambro, Inc.*,[144] also refused to extend the retaliatory discharge action to corporate counsel because of the attorney's code of ethics.[145] The *Balla* court came to this conclusion even though it conceded that the attorney was discharged in retaliation for his activity and in contravention of a clearly mandated public policy in protecting lives and property.[146] The court reasoned that a retaliatory discharge cause of action

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insisted that Coastal comply with state and federal environmental and securities laws and because he would not act in violation of those laws. *Id.*

139. TEXAS CODE OF PROF. RESP. DR 2-110(B)(4) (1986) (requiring an attorney to withdraw when discharged by his client); TEXAS CODE OF PROF. RESP. DR 4-101(C)(1) (1986) (requiring an attorney to withdraw if his client intends to pursue an illegal course of action).

140. *Willy*, 647 F. Supp. at 118. *See also* TEXAS CODE OF PROF. RESP. DR 2-110(C)(1)(c) (1986).

141. *Willy*, 647 F. Supp. at 118.

142. Willy v. Coastal Corp., 647 F.Supp. 116, 118 (S.C. Tex. 1986), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988).

143. *Id. See also* Upjohn Co. v. United States, 449 U.S. 383 (1981); Doe v. A. Corp., 709 F.2d 1043, 1048 (5th Cir. 1983) (finding that in-house counsel is subject to the same standards as a self-employed practitioner).

144. 584 N.E.2d 104 (Ill. 1991). In *Balla*, the plaintiff, formerly in-house counsel to Gambro, Inc., a company that distributed medical equipment, informed the president of the company that a shipment of defective kidney dialyzers should be kept off the market because it did not meet FDA regulations. *Id.* at 106. The president ignored Balla's advice and ordered the defective products to be shipped from its affiliate company in Germany. *Id.* at 105-06. Balla reported the violation to the FDA after he was fired by Gambro, Inc. *Id.* at 106. The FDA immediately confiscated the dialyzers and determined that they were in violation of a federal act. *Id.*

145. The *Balla* court held that an in-house attorney has no cause of action for retaliatory discharge. *Id.* at 107-09.

146. *Id.* at 107-08. The court reasoned that "[t]he tort of retaliatory discharge is a limited and narrow exception to the general rule of at-will employment." *Id.* at 108. Moreover, "[t]he foundation of the tort of retaliatory discharge lies in the protection of public policy . . . ." *Id.* (quoting Palmateer v. International Harvester Co., 421 N.E.2d 876, 880 (Ill. 1981)). The court concluded that "[t]he public policy to be protected, that of protecting the lives and property of citizens, is adequately safeguarded without extending the tort of retaliatory discharge to in-house counsel." *Balla*, 584 N.E.2d at 108.

was simply not necessary in the case of in-house counsel because the attorney was ethically obligated to report his employer's wrongdoing under the Illinois Rules of Professional Conduct.[147] The court also stated that extending recognition of retaliatory discharge suits to in-house counsel would adversely affect the attorney-client relationship that exists between the employers and their in-house counsel.[148]

Courts have also looked to state and federal statutes to determine whether a retaliatory discharge claim should be allowed. One of the courts that refused to extend the retaliatory discharge cause of action to in-house counsel after looking at the federal and state statutes was the Minnesota Supreme Court in *Nordling v. Northern States Power Co.*[149] The court affirmed the lower court's dismissal of Nordling's retaliatory discharge claim and stated that there was no violation of the state's whistleblower statute or any other state or federal law.[150] However, the court held that the requirements of the attorney-client

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147. *Id.* at 108-09. Balla argued that not extending the tort of retaliatory discharge to in-house counsel would present attorneys with two possible alternatives: (1) to comply with the client-employer's wishes and risk both the loss of professional license and exposure to criminal sanctions, or (2) to decline to comply with the client-employer's wishes and risk the loss of a full time job and the attendant benefits. *Id.* at 109. The *Balla* court disagreed with Balla's characterization of the situation stating that "[i]n-house counsel do not have a choice of whether to follow their ethical obligations as attorneys licensed to practice law, or follow the illegal and unethical demands of their clients . . . . In-house counsel must abide by the Rules of Professional Conduct." *Id.* The *Balla* court added that in-house attorneys are not like general employees in that in-house attorneys are not forced to choose between violating the law and losing their job because violating the law is not an alternative for those bound by the ethical codes. *Id.*

148. *Id.* at 109-10. The court stated that the general rule is that the client can discharge his in-house counsel at any time, with or without cause. *Id.* This rule recognizes that trust is the basis of the attorney-client relationship and that the client must have confidence in his attorney in order to ensure that the relationship will function properly. *Id.* The court believed that

> if in-house counsel are granted the right to sue their employers for retaliatory discharge, employers might be less willing to be forthright and candid with their in-house counsel. Employers might be hesitant to turn to their in-house counsel for advice regarding potentially questionable corporate conduct knowing that their in-house counsel could use this information in a retaliatory discharge suit.

Id. at 109.

149. 465 N.W.2d 81 (Minn. Ct. App.), *rev'd on other grounds*, 478 N.W.2d 498 (Minn. 1991). In *Nordling*, Nordling, an in-house attorney for Northern States Power Co. (NSP), was informed of a plan to investigate the personal lifestyles of employees at a new company facility. *Id.* at 500. Nordling believed that the plan was illegal and reported this fact to the manager of the project who shelved the plan. *Id.* Shortly thereafter, the vice president of NSP's law department discharged Nordling without warning and without following NSP's employee handbook procedure for dismissing its employees. *Id.* Nordling then filed suit against NSP and its vice president. *Id.*

150. *Id.* at 503-04. The court stated that a retaliatory discharge claim is more likely to involve the attorney-client relationship than a breach of contract discharge, thereby raising issues of revealing clients' confidences and wrongdoings. *Id.* at 504. The Minnesota Supreme Court agreed with the court of appeals' decision not to decide the issue of whether the attorney's dismissal fell within the public policy exception, finding it was unnecessary because the client had an absolute right to fire

relationship were not compromised, and in-house counsel should not be prevented from maintaining an action for breach of a contractual provision[151] contained in an employee handbook.[152] Although the *Nordling* court decided against allowing the retaliatory discharge action,[153] this case is nevertheless important for in-house attorneys because it recognizes a contract based, wrongful discharge action by an in-house counsel against an employer.[154] The case is also important because it suggests that a retaliatory discharge cause of action for in-house attorneys could be successful if a federal or state law is violated.[155]

The Superior Court of Pennsylvania, in *McGonagle v. Union Fidelity Corp.*,[156] also rejected an in-house counsel's retaliatory discharge claim because of the federal and state statutes at issue. In *McGonagle*, the court held that because the insurance statutes at issue were vague, the in-house attorney should have deferred to his employer's judgment as to whether the company had complied with the law.[157] The court reasoned that McGonagle's recited provisions[158] lacked specificity as to what conduct was prohibited.[159] Thus,

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its attorneys. *Id.* at 504. *See Nordling*, 465 N.W.2d at 85-86 n.1.

151. *Nordling*, 478 N.W.2d at 502. The court granted the in-house attorney a wrongful discharge claim based on an implied contract theory. See *supra* note 70 and accompanying text for further explanation of the implied contract theory.

152. *Id.* at 502. The court stated that "[t]he fact remains . . . that the in-house attorney is also a company employee, and we see no reason to deny the job security aspects of the employer-employee relationship if this can be done without violence to the integrity of the attorney-client relationship." *Id.* The court reasoned that the personnel arrangements with in-house counsel differ from the traditional nature of the self-employed attorney representing a client. *Id.* The same administrative personnel supervision is placed over in-house attorneys as other company employees in matters of compensation, promotion, and tenure. *Id.*

153. The *Nordling* court agreed with the trial court's determination that there was no violation of the whistleblower statute and therefore no need to consider a retaliatory discharge action. Nordling v. Northern States Power Co., 478 N.W.2d 498, 504 (Minn. 1991).

154. *Id.* at 503. The court believed that an in-house attorney is essentially an employee like any other and should be provided the same protection by the law. *Id.* at 502.

155. *Id.* at 504. The court stated that "[t]he trouble with Nordling's claim is that he is unable to identify any federal or state law or rule that was violated or suspected of being violated." *Id.*

156. 556 A.2d 878 (Pa. Super. Ct. 1989). In *McGonagle*, an in-house attorney, McGonagle, was informed that the company, Union Fidelity, was not complying with various state insurance regulations. *Id.* at 879. McGonagle determined that the policies that were about to be distributed in Utah did not conform with that state's insurance specifications. *Id.* McGonagle refused to authorize the mailings of the policies in Utah, and was subsequently fired from his position at Union Fidelity. *Id.* 879-80.

157. *Id.* at 885.

158. McGonagle based his claim of wrongful termination on several provisions. *See* 31 PA. CODE § 122.1 (repealed in 1986); 31 PA. CODE §§ 51.4 to 51.7 (1982); 40 PA. STAT. ANN. § 437 (1968); *McGonagle*, 556 A.2d at 882-83.

159. *McGonagle*, 556 A.2d at 885. The court stated that unless the employee identifies a specific expression of public policy violated by his discharge, it will not be labeled as wrongful and within the sphere of public policy. *Id.* Broad general statements of public policy violations do not

the court was left with only McGonagle's opinion that the conduct violated the state's vague insurance laws, an opinion which was opposed by the corporation's opinion that the problems were minor in nature and easily reconciled without contravention of any state insurance requirements.[160] The court concluded that the employer should not be prevented from carrying on its business when a professional's opinion as to legal or ethical issues is open to question.[161]

For corporate counsel, the effect of these decisions is twofold. First, they allow corporate management to coerce in-house attorneys into committing criminal or unethical acts without fear of being punished by retaliatory discharge suits.[162] For example, in *Balla*, the in-house attorney fiercely protested the sale of defective medical equipment and was fired as a consequence.[163] However, since the in-house attorney was not allowed recovery for retaliatory discharge, he was essentially punished for his courageous conduct. Similarly, in *Gambro*, the corporation escaped punishment for its unscrupulous behavior. Courts have, in effect, created an environment where in-house attorneys must decide whether to risk losing their job by resisting their employers' actions or to keep their jobs by blindly following their companys' orders.

Second, by denying corporate counsel recovery from management, courts have essentially permitted lawyers to become pawns in effectuating the obstructions of justice that their employers require.[164] In *Nordling*, for instance, the in-house counsel was ultimately discharged because of his opposition to illegal surveillance of employees in their homes.[165] The lack of a retaliatory discharge action rendered the attorney's opposition to the company's surveillance useless. This second effect can also be seen in *McGonagle*.[166] McGonagle was fired for his refusal to follow the corporation's directions to authorize insurance mailings.[167] The court's failure to grant the in-house attorney a cause of action essentially enabled the company to act without regard to the attorney. The end result of denying in-house

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constitute the "clear mandate of public policy which strikes at the heart of a citizen's social right, duties and responsibilities entitled to the status of nonstatutory cause of action." *Id.*

160. *Id.* at 885. The court found this to be "a difference of opinion and not a request to have the plaintiff perform an 'illegal' or unethical act in furtherance of corporate profits." *Id.*

161. McGonagle v. Union Fidelity Corp., 556 A.2d 878, 885 (Pa. Super. Ct. 1989). The court did acknowledge, however, that a professional's obligations to his or her professional code of ethics may conflict with the employer's wishes, and a refusal to violate a more explicit statutory mandate might justify a retaliatory discharge suit. *Id.*

162. *See* Abramson, *supra* note 78, at 278.

163. *See* Balla v. Gambro, Inc., 584 N.E.2d 104, 106 (Ill. 1991).

164. *See* Abramson, *supra* note 78, at 278.

165. *See* Nordling v. Northern States Power Co., 465 N.W.2d 81 (Minn. Ct. App.), *rev'd on other grounds*, 478 N.W.2d 498, 500 (Minn. 1991).

166. 556 A.2d 878 (Pa. Super. Ct. 1989).

167. *Id.* at 879-80.

counsel's discharge actions under both the public policy exception and the retaliatory discharge doctrine is the protection of scoundrel employers who discharge corporate counsel for upholding both the law and their code of ethics.[168]

Although these courts have taken a hardline position with in-house attorneys, other courts have been more willing to recognize retaliatory discharge actions by in-house counsel against employers. In four other cases, courts have found that the public policy embodied in the Model Code and the Model Rules was sufficient to justify retaliatory discharge suits by in-house counsel.[169] For example, the Superior Court of New Jersey, in *Parker v. M & T Chemicals. Inc.*,[170] found that the in-house counsel was an employee within the meaning of New Jersey's whistleblower statute and held that the statute was not inconsistent with an in-house counsel's claim for monetary damages in a retaliatory discharge suit.[171] The court reasoned that whistleblower suits are necessary to preserve the attorney's freedom to refuse to engage in action that would violate a clear mandate of public policy.[172] The *Parker* case is an important precedent for in-house attorneys attempting to bring a retaliatory discharge cause of action against their employers because the decision recognizes that in-house attorneys are also employees and thus are covered by general whistleblower legislation.

The Michigan Court of Appeals, in *Mourad v. Automobile Club Insurance Association*,[173] similarly approved a wrongful discharge action by an in-house

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168. *Balla*, 584 N.E.2d at 114 (Freeman, J., dissenting).

169. *See* Parker v. M & T Chems., Inc., 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989); Mourad v. Automobile Club Ins. Ass'n, 465 N.W.2d 395 (Mich. Ct. App. 1991); Klages v. Sperry Corp., 118 L.R.R.M. (BNA) 2463 (E.D. Pa. 1984); General Dynamics Corp. v. State, 1993 WL 225346 (Cal. Ct. App. 1993), *aff'd*, General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994).

170. 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989). In *Parker*, the former in-house attorney, Parker, brought a retaliatory discharge action under New Jersey's whistleblower statute. *Id.* at 216, 218. *See* Conscientious Employee Protection Act, N.J. STAT. ANN. §§ 34: 19-1 to 34: 19-8 (West 1988). Parker was told by an M & T employee that confidential documents would be delivered to Parker containing trade secrets of a competitor. *Parker*, 566 A.2d at 217. Parker was instructed to copy the information. *Id.* Parker objected to the activity and suggested that the material not be examined until court approval could be obtained. *Id.* As a result of Parker's objections, M & T's President verbally reprimanded Parker and demoted him. *Id.* at 218. Parker later resigned from his position because of the demotion. *Id.*

171. *Id.* at 222.

172. *Id.* at 218, 219-21. *See also* D'Agostino v. Johnson & Johnson, Inc., 542 A.2d 44 (N.J. Super. Ct. App. Div. 1988), *aff'd*, 559 A.2d 420 (N.J. 1989).

173. 465 N.W.2d 395 (Mich. Ct. App. 1991). In *Mourad*, the Auto Club's former manager, Mourad, brought a wrongful discharge action based on breach of a just-cause employment contract and retaliatory discharge. *Id.* at 397. The Auto Club's claims director, Mourad's direct supervisor, decided that Mourad was unable to implement the Auto Club's policies and lacked the administrative

attorney, although the action was based on a just-cause contract rather than a whistleblower statute. The *Mourad* court upheld a judgment in favor of an in-house attorney who was demoted for refusing to violate the Code of Professional Responsibility by following unethical and illegal orders.[174] The court reasoned that Mourad was covered by an implied just-cause employment contract and that his dismissal violated the contract.[175] The court further reasoned that, although the Code only binds attorneys, Automobile Club indirectly agreed to follow the Code by hiring an attorney and promising not to fire him without just cause.[176] The court also found that the employer waived the right to fire the attorney at will when they entered into the just-cause employment contract.[177]

The first case to recognize the in-house attorney's wrongful discharge cause of action was *Klages v. Sperry Corp.*[178] In *Klages*, a federal district court upheld a suit for wrongful discharge by an in-house attorney, Klages. This decision was based on the public policy exception to the employment-at-will doctrine.[179] The court reasoned that the discharge of Klages interfered not only with his interest in retaining his employment, but also with his interest in performing his duties as general counsel and as an attorney.[180] The court further reasoned that the suit was necessary to encourage compliance with the

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talents necessary to effectively implement cost-containment measures in the legal department. *Id.* Mourad was demoted to the position of executive attorney, a position from which he later resigned before initiating the lawsuit. *Id.* The attorney asserted that he was demoted when he followed the Code of Professional Responsibility and refused to comply with unethical and illegal orders. *Id.*

174. *Id.* at 397, 403.

175. *Id.* The court based this finding on the fact that Mourad provided legal as well as administrative services. *Id.* at 399-400. Mourad's position as an administrator was confirmed by the fact that after Mourad was demoted, he was replaced by a nonlawyer. *Id.* at 400.

176. *Id.*

177. *Id.* at 400. The *Mourad* court declined to address whether an in-house attorney has a retaliatory discharge cause of action and did not raise the issue of attorney-client privilege or confidentiality as a bar to the suit. *Id.*

178. 1984 WL 49135, 118 L.R.R.M. (BNA) 2463 (E.D. Pa. Nov. 9, 1984). In *Klages*, the plaintiff was employed as vice president and general counsel of Computer Systems, an incorporated business group within the Sperry Corporation. *Id.* at *1. As general counsel, Klages was head of the legal department and entrusted with Computer Systems' compliance with federal and state security laws. *Id.* Klages discovered a possible securities violation by the subsidiary's president and conducted an investigation to determine if these self-dealings truly constituted a securities violation. *Id.* Klages reported the potential violation to the general counsel of Sperry Corporation. Klages was subsequently terminated from employment by the president of Computer Systems. *Id.* at *2. Klages claimed that he was discharged in retaliation for his activities in investigating whether self-dealing by the subsidiary's president constituted a securities violation. *Id.*

179. *Id.* at *7.

180. *Id.* at *8.

securities statutes and with the legal code of ethics.[181]

The most recent case recognizing the in-house attorney's right to sue for retaliatory discharge is *General Dynamics Corp. v. State.*[182] In *General Dynamics*, the California Court of Appeals held in favor of the in-house attorney, stating that allowing retaliatory discharge suits promotes objections to, and reports of, public policy violations by the in-house lawyer.[183] The court recognized that an attorney is properly subject to regulation due to his role in society and may be held to a higher standard of ethical conduct in the interest of protecting the client's and the public's confidence.[184] However, the court added that it did not think that the attorney's status with the public warranted special treatment since the attorney was also an employee.[185]

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181. *Id.* at *8. The court balanced the social interests involved between the plaintiff's actions and the defendant's actions. *Id.* at *7. The court decided that the social interest of the plaintiff's activity greatly outweighed any potential social benefit of the defendant's activity. *Id.* at *8. The defendant's action of exercising its powers of discharge would suppress the same public interest that the plaintiff sought to advance. The court also noted that "there is no societal interest in preserving the ability of the employer to use the discharge power for express purposes of harming the employee; society demands that the employee be protected from such a course of conduct." *Id.*

182. 1993 WL 225346 (Cal. Ct. App. June 8, 1993), *aff'd*, General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994). In *General Dynamics*, the plaintiff, Rose, had been employed by General Dynamics Corporation for a number of years and during that time had received regular promotions, salary increases, outstanding performance reviews, and was regularly informed his job was permanent. 1993 WL 225346 at *1. Rose then reported numerous problems within General Dynamic's operation to his supervisors. *Id.* at *1-2. Rose's supervisors were not pleased that the problems were brought into the public eye. *Id.* General Dynamics then fired Rose after an interrogation of the numerous problems. *Id.* at *2. Rose claimed that his discharge constituted a wrongful violation of public policy. *Id.*

183. *Id.* at *10. The *General Dynamics* court compared the cases on this issue and agreed with the *Parker* decision stating that "a rule which makes it safer, as a matter of employment or financial security, for an in-house lawyer to object to or report violations of public policy, serves the public interest." *Id.* The court disagreed with the *Balla* court's approach in that it would deny attorneys the rights provided by law to other employees simply because the state has imposed on the attorney-employee an ethical obligation not shared by general employees. *Id.*

184. *Id.* The court further stated that imposition of these ethical duties is one thing; the deprivation of the attorney's rights as an employee is another. *Id.*

185. *Id.* General Dynamics Corporation appealed this decision to the California Supreme Court. General Dynamics argued that the California Supreme Court's opinion in Fracasse v. Brent, 494 P.2d 9 (Cal. 1972), governed the present case and that it applied to completely "immunize an employer from any liability as a consequence of terminating an attorney-employee." General Dynamics Corp. v. Superior Court, 876 P.2d 487, 495 (Cal. 1994). The California Supreme Court characterized this argument as overbroad and not controlling the issue in question. *Id.* at 492. In *Fracasse*, the court was confronted with a situation involving a private practitioner and his client and the court concluded that the client had both the right and the power at any time to discharge his attorney with or without cause. *Id.* at 492. The court recognized that there were differences between the *Fracasse* case and the one at hand. *Id* at 494-96. The California Supreme Court found that "the interests and expectations of the parties" involved in an in-house counsel "relationship are substantially different from those [it had] found determinative in *Fracasse*." *Id.* at 495.

The impact of these four cases allowing the in-house attorney a cause of action remains uncertain. The indication is that courts are starting to recognize the need for such suits. In *Parker* and *General Dynamics*, the courts reasoned that the in-house attorney is also an employee and should therefore not be treated differently from other employees.[186] In *Mourad*, the court used the just-cause employment contract as a justification for allowing the in-house attorney a cause of action.[187] Overall, the courts are struggling with whether to extend the retaliatory discharge cause of action to in-house counsel. States need to assist the courts in this endeavor by extending whistleblower statutes to in-house attorneys.

B. *Remedies Under the Model Code of Professional Responsibility and Model Rules of Professional Conduct*

Several courts have held that retaliatory discharge suits by in-house counsel are not necessary because attorneys must abide by professional ethics and thus promote the interests of the public.[188] However, in-house attorneys are in a different situation than other attorneys. Unlike independent attorneys, in-house attorneys are faced with questions of who their employer really is and, thus, to whom their loyalty is owed. An in-house counsel represents the corporate

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The California Supreme Court then discussed when the retaliatory discharge cause of action should be permitted for in-house attorneys. The court stated that "in determining whether an in-house attorney has a retaliatory discharge claim against his or her employer, a court must first ask whether the attorney was discharged for following a mandatory ethical obligation prescribed by professional rule or statute." *Id.* at 502. If the answer to this is yes, then the attorney would have a retaliatory discharge cause of action against the employer. "If, on the other hand, the conduct in which the attorney has engaged is merely ethically permissible, but not required by statute or ethical code," then the court must resolve two questions to determine if the attorney has a retaliatory discharge claim against his or her employer. *Id.* at 503. First, the court must determine "whether the employer's conduct is of the kind that would give rise to a retaliatory discharge action by a non attorney employee" and second, "whether some statute or ethical rule . . . permits the attorney to depart from the usual requirement of confidentiality." *Id.* at 503. The California Supreme Court limited its decision on this issue to the "conclusion that in-house counsel may state a cause of action in tort for retaliatory discharge" and remanded the determination of that issue back to the court of appeals. *Id.* at 503.

186. *See* Parker v. M & T Chems., Inc., 566 A.2d 215, 220 (N.J. Super. Ct. App. Div. 1989); General Dynamics Corp. v. State, 1993 WL 225346, *10 (Cal. Ct. App. June 8, 1993); General Dynamics Corp. v. Superior Court, 876 P.2d 487, 490 (Cal. 1994).

187. *See* Mourad v. Automobile Club Ins. Ass'n, 465 N.W.2d 395, 400 (Mich. Ct. App. 1991).

188. *See* Herbster v. North Am. Co. for Life and Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987); Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988); Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991).

organization which acts only through its duly authorized constituents.[189] In complying with Model Rule 1.13,[190] the attorney must pursue the best interests of the client-corporation.[191]

The judicial decisions prohibiting retaliatory discharge suits by in-house counsel have emphasized the adequacy of withdrawal as a remedy for the in-house attorney.[192] When a conflict arises between attorney and client, the Model Rules' and Model Code's recommended remedy is withdrawal.[193] Withdrawal is authorized in a variety of situations and is required when the situation amounts to a negation of the attorney's professional independence.[194]

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189. *See* MODEL RULES, *supra* note 33, Rule 1.13. Model Rule 1.13 explains that the in-house counsel's client is the organization, not the constituents. The rule states that if the attorney knows that a person affiliated with the organization

> intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

MODEL RULES, *supra* note 33, Rule 1.13(b).

The Rule also sets out the factors attorneys should consider in determining what is in the best interest of their corporate client and suggests measures to take such as referring the matter to a higher authority within the organization. MODEL RULES, *supra* note 33, Rule 1.13(b)(1), (2) & (3). The factors that Model Rule 1.13 provide include: the seriousness of the violation; the consequences of the violation; the scope and nature of the representation; the responsibility in the organization of the person involved; the apparent motivation of the person; the policies of the organization concerning such matters; and any other relevant considerations. MODEL RULES, *supra* note 33, Rule 1.13(b).

Rule 1.13 accords with the corporate counsel's fiduciary duty, which is owed to the interests of the corporation as a whole and not to a single director, stockholder, officer or employee of the corporation. *See* Bryan v. Bartlett, 435 F.2d 28, 37 (8th Cir. 1970), *cert. denied*, 402 U.S. 915 (1971) (holding that attorneys for a corporation had the same fiduciary duties as the directors of the corporation); Lane v. Chowning, 610 F.2d 1385, 1389 (8th Cir. 1979) (holding that attorneys for a corporation had the same fiduciary duties as the directors of the corporation); *In re* Capps, 297 S.E.2d 249 (Ga. 1982) (stating that in-house attorneys owe the organizational client the same duties outside attorneys owe their clients).

190. *See* MODEL RULES, *supra* note 33. Rule 1.13 addresses the attorney's duties and responsibilities to an organizational client.

191. *See* MODEL RULES, *supra* note 33, Rule 1.3. Comment One of Rule 1.3 states that "[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." *Id.*

192. An attorney's withdrawal is the favored remedy and this remedy is described in the MODEL RULES, *supra* note 33, Rule 1.16 (1990), MODEL CODE, *supra* note 33, DR 2-110, the ABA CANONS OF PROFESSIONAL ETHICS, Canon 44, and numerous cases. *See, e.g.*, Balla v. Gambro, Inc., 584 N.E.2d 104, 108-09 (Ill. 1991); Willy v. Coastal Corp., 647 F. Supp. 116, 118 (S.D. Tex. 1986). *See generally* WOLFRAM, *supra* note 33, at 542-52.

193. *See* MODEL RULES, *supra* note 33, Rule 1.16(a); MODEL CODE, *supra* note 33, DR 2-110(B). *See generally* WOLFRAM, *supra* note 33, § 9.5.3.

194. *See* Reynolds, *supra* note 34, at 557.

Withdrawal remains the standard response to the question of how a lawyer should respond to a client's continuing or proposed wrongdoing.[195]

The corporate counsel should first try to convince the employer-client not to engage in the wrongful conduct.[196] If the employer-client insists on continuing with the wrongful conduct, in-house attorneys, like all other attorneys, must withdraw from representation if such representation will result in violation of the Rules of Professional Conduct or any other law.[197] If attorneys do not abide by this requirement of withdrawal, they face discipline for violating Model Rule 1.16(a)(1)[198] and potential reprimand or disbarment for violating proper ethical conduct.[199]

Withdrawal may be the appropriate and just solution for non-corporate attorneys.[200] However, attorneys with the corporation as their sole client

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195. *See* MODEL RULES, *supra* note 33, Rule 1.16. Comment 2 of Rule 1.16 describes the circumstances under which mandatory withdrawal is required by the attorney. *Id.* cmt. 2. It states "[a] lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law." *Id.*

196. *See* MODEL RULES, *supra* note 33, Rule 1.16. Rule 1.16 of the Rules of Professional Conduct is consistent with this suggested course of action for the attorney. Comment 2 of Rule 1.16 states that "[t]he lawyer is not obliged to decline or withdraw simply because the client suggest such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation."

197. *See* MODEL RULES, *supra* note 33, Rule 1.16(a); MODEL CODE, *supra* note 33, DR 2-110(B). These rules deal with mandatory withdrawal. The Model Code states that a lawyer must withdraw from a representation if:

> (1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.
>
> (2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

MODEL CODE DR 2-110(B) (1981).

198. *See* MODEL RULES, *supra* note 33, Rule 1.16(a)(1). Rule 1.16(a)(1) states:

> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> (1) the representation will result in violation of the rules of professional conduct or other law;

Id.

199. *See* Forrow, *supra* note 36, at 1799-1802; MODEL RULES, *supra* note 33, Scope; MODEL CODE, *supra* note 33, Preamble and Preliminary Statement, DR 2-110(B), DR 2-110. *See also In re* Capps, 297 S.E.2d 249 (Ga. 1982) (holding in-house attorney subject to discipline).

200. Private practitioners may withdraw from representing their client if they abide by the Rules of Professional Conduct without incurring a total economic loss. The client lost by a private practitioner is generally one of many, and therefore the economic impact of withdrawal is not very severe. *See generally* Kenneth J. Wilbur, *Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility*, 92 DICK. L. REV. 777, 782 (1988).

have found withdrawal to be difficult and sometimes an unfeasible solution.[201] The inadequacies of withdrawal for in-house attorneys stem from the fact that the corporation is their sole client.[202] Thus, in-house counsel are faced with a dilemma when codes of ethics conflict with the requirements of their employers. They must choose between maintaining their professional and ethical obligations and keeping their job.[203]

Even though the Rules and Code provide that an attorney has a duty not to participate in a client's unlawful conduct,[204] the *Herbster* and *Willy* courts held that this policy alone did not justify allowing a cause of action for an in-house attorney.[205] The *Balla* court reasoned that because all attorneys, including in-house, are bound by the Code and Rules not to participate in client misconduct, retaliatory discharge suits are not needed to encourage in-house attorneys to behave ethically.[206] The *Balla* court added that in-house attorneys are not like general employees because in-house attorneys are not forced to choose between violating the law and losing their job, as violating the law is not an alternative for those bound by the ethical codes.[207]

The court in *Herbster* held that in-house counsel do not qualify as employees because they are subject to the codes of professional ethics and

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201. Reynolds, *supra* note 34, at 575 (stating that "[w]ithdrawal is a seriously inadequate option for company counsel, or indeed, any salaried lawyer who is the full-time, and perhaps long term, employee of a single client").

202. See *infra* text accompanying notes 212-16 and 311-15 for further discussion.

203. *See* Blades, *supra* note 35, at 1408.

204. *See* MODEL CODE, *supra* note 33, DR 7-102(A)(7); MODEL RULES, *supra* note 33, Rule 1.2(c).

205. *See* Herbster v. North Am. Co. for Life and Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987); Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988). The courts in *Herbster* and *Willy* indicated that withdrawal from representation, the remedy given under the Code and Rules, was adequate to prevent lawyers from participating in wrongdoing and that a retaliatory suit by in-house counsel was therefore unnecessary. *Herbster*, 501 N.E.2d at 348, *Willy*, 647 F. Supp. at 118.

206. *See* Balla v. Gambro, Inc., 584 N.E.2d 104, 108-09 (Ill. 1991).

207. *Id.* The *Balla* court's attempt to distinguish the general employee's ethical responsibility from the in-house attorney's is unpersuasive. Following the *Balla* court's reasoning on this point to its logical conclusion would suggest that general employees have no duty or responsibility to obey the law. This, however, as the Supreme Court found, is simply not true. Cox v. Louisiana, 379 U.S. 559 (1965). "The law binds all men, and treats kings and paupers alike." *See* City of Chicago v. Weiss, 281 N.E.2d 310 (1972) (quoting Cox v. Louisiana, 379 U.S. 559 (1965)). The Supreme Court, in *Cox*, stated that "[t]here is . . . a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations." *Id.* A lawyer should not be punished simply because he has ethical obligations imposed upon him over and above the universal obligation to obey the law which all men have. Furthermore, corporate employers should not be protected simply because the employee it has discharged for "blowing the whistle" happens to be an attorney.

therefore do not qualify for retaliatory discharge suits.[208] The *Herbster* court based this conclusion on its view that retaliatory discharge suits evolved to redress the relative advantage that employers had over their employees.[209] According to the *Herbster* court, in-house attorneys have a much stronger position than ordinary employees because of their access to confidential information about the company.[210] Therefore, the *Herbster* court found that attorneys can enforce their rights without the court granting them the right to sue.[211]

Although some courts have applied the suggested solution of withdrawal[212] to in-house attorneys, this solution is simply inadequate.[213] These courts have failed to consider the differences that exist between the private practitioner and the in-house attorney when applying the withdrawal remedy.[214] Withdrawal leaves the attorney without income and with little hope of obtaining similar employment.[215] However, a private practitioner's loss of a client is not necessarily as serious an economic loss. The private practitioner usually has many clients, and therefore the economic impact of withdrawal is not as severe.[216] The view that withdrawal is an adequate remedy for in-house attorneys is not the only obstacle confronting them in attempting retaliatory discharge suits.

C. *Obstacles to Suits by In-House Counsel*

Courts have given several other reasons for not allowing in-house counsel the right to sue for retaliatory discharge. First, courts have stated that granting

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208. *Herbster*, 501 N.E.2d at 346.

209. *Id.* at 345.

210. *Id.* at 346-47. Although in-house attorneys do have access to confidential information, this access is not unique. Non-lawyers also have access to confidential information. See *infra* text accompanying notes 282-87 for further discussion of this point.

211. *Herbster*, 501 N.E.2d at 348.

212. *See* MODEL RULES, *supra* note 33, Rules 1.16(a); MODEL CODE, *supra* note 33, DR 2-110(B).

213. *See* Reynolds, *supra* note 34, at 575. There are several cases that have recognized withdrawal as an adequate remedy for the in-house attorney. *See, e.g.*, Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986), *appeal denied*, 508 N.W.2d 728 (Ill. 1986), *cert. denied*, 484 U.S. 850 (1987); Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988); Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991).

214. For further discussion of the differences between the private and the in-house attorney, see *infra* text accompanying notes 276-81.

215. *See* Dennis M. Nolan, Note, Herbster v. North Am. Co. for Life & Health Ins.: *Attorney's Retaliatory Discharge Action Unjustly Dismissed*, 21 J. MARSHALL L. REV. 215, 221 n.44 (1987).

216. *See generally* Wilbur, *supra* note 200, at 782. See *infra* text accompanying notes 311-18 for further discussion of the inadequacies of withdrawal as a solution for in-house attorneys.

corporate counsel a retaliatory discharge cause of action would be contrary to the at-will nature of attorney-client employment.[217] Second, courts maintain that such a cause of action would have an adverse effect on the attorney-client relationship.[218] Third, courts perceive that the professional rules of ethics governing all attorneys are an adequate measure in preventing a client's illegal act.[219] Courts have also opposed suits by in-house counsel because they threaten the attorney's obligations to promote the client's interests and to preserve the client's autonomy.[220]

1. At-Will Nature of the Attorney-Client Relationship

In-house attorneys have a dual relationship with the private corporation.[221] On the one hand, there exists the attorney-client relationship where it is recognized that a client may discharge an attorney at any time, with or without cause.[222] On the other hand, an in-house attorney is also considered to be an at-will employee. As an at-will employee, the attorney would be able to sue his employer for an alleged wrongful discharge, based on the modern exceptions to the at-will doctrine.[223] Generally though, courts have focused on the first position, that clients may discharge their attorney at any time, with or without cause.[224] Thus, the control of termination of the attorney-client relationship

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217. *See Herbster*, 501 N.E.2d at 347; *Balla*, 584 N.E.2d at 109; Nordling v. Northern States Power Co., 465 N.W.2d 81 (Minn. Ct. App.), *rev'd on other grounds*, 478 N.W.2d 498, 501 (Minn. 1991); Anastos v. Chicago Regional Trucking Ass'n., Inc., 618 N.E.2d 1049, 1051 (Ill. App. Ct. 1993).

218. *See* Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343, 347-48 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987); Balla v. Gambro, Inc., 584 N.E.2d 104, 109 (Ill. 1991).

219. *See Herbster*, 501 N.E.2d at 346-47; *Balla*, 584 N.E.2d at 104.

220. *See Herbster*, 501 N.E.2d at 347-48; *Nordling*, 465 N.W.2d at 86.

221. *See* Alicia S. Myara, *An Attorney's Duty to Advise a Corporate Client Concerning Computer Software Copying: The Ethical Considerations*, 2 J.L. & TECH. 81, 87 (1987).

222. *See Herbster*, 501 N.E.2d at 347; *Balla*, 584 N.E.2d at 109; *Nordling*, 478 N.W.2d at 501; Anastos v. Chicago Regional Trucking Ass'n., Inc., 618 N.E.2d 1049, 1051 (Ill. App. Ct. 1993). *See also* 7 AM. JUR. 2D *Attorneys at Law* § 168 (1980).

223. *See Nordling*, 478 N.W.2d at 501. The *Nordling* court stated that "[t]he fact remains . . . that the in-house attorney is also a company employee." *Id.* at 502. For further information on the modern exceptions to the employment-at-will doctrine, see *supra* text accompanying notes 68-80.

224. *See Herbster*, 501 N.E.2d at 346-47; *Balla*, 584 N.E.2d at 109; *Nordling*, 465 N.W.2d at 86; *Anastos*, 618 N.E.2d at 1051.

"The employment of an attorney by a client or the attorney-client relationship is revocable by the client for cause, as in the case of nonperformance by the attorney, failure of the attorney to prosecute the client's claim with reasonable diligence, or unprofessional conduct of the attorney." 7A C.J.S. *Attorney & Client* § 220 (1980). "Moreover, the client has the right to discharge the attorney and terminate the relation even without cause, as where he is dissatisfied with the services of the attorney or has lost confidence in the attorney's integrity, judgment, or capacity." *Id.*

is in the hands of the clients, such that clients have the absolute right to discharge their attorney at-will.[225]

2. Attorney-Client Relationship

The principal roadblock preventing retaliatory discharge suits by in-house counsel has been the concern over the effect such suits would have on the attorney-client relationship and the perceived adequacy of professional ethics rules in preventing a client's illegal act.[226] It is this attorney-client relationship that has played a major role in causing many courts to refuse to extend the retaliatory discharge suits to in-house attorneys.[227] There are several factors that make the attorney-client relationship special. These factors include: the attorney-client privilege and the confidentiality rule regarding communications between the attorney and client,[228] the fiduciary duty that an attorney owes to a client,[229] the right of the client to terminate the relationship with or without cause,[230] and the fact that a client has exclusive control over the subject matter of the litigation and may dismiss or settle a cause of action regardless of the attorney's advice.[231]

a. Attorney's Role

As stated above, attorneys have a special role in their relationship with their clients.[232] The attorney is placed in the unique position of having to maintain a close relationship with a client in which the attorney obtains secrets, disclosures, and information that otherwise would not be disclosed even to the client's most trusted friends.[233] This position of the attorney has been considered by the courts in deciding whether to allow an in-house attorney the

225. See *supra* text accompanying notes 50-80 for further discussion of the employment-at-will doctrine.

226. *See Herbster*, 501 N.E.2d at 347; *Balla*, 584 N.E.2d at 109; *Nordling*, 478 N.W.2d at 501; *Anastos*, 618 N.E.2d at 1051.

227. *See Herbster*, 501 N.E.2d at 347; *Balla*, 584 N.E.2d at 109; *Nordling*, 478 N.W.2d at 501; *Anastos*, 618 N.E.2d at 1051.

228. *See infra* text accompanying notes 240-57.

229. This duty permeates all phases of the attorney-client relationship. Some of the fiduciary duties of an attorney include: not taking advantage of the client trust and informing the client of all material facts affecting his employment. *See Herbster*, 501 N.E.2d at 347.

230. See *supra* text accompanying notes 50-80 for general discussion of the employment-at-will doctrine.

231. *See Herbster*, 501 N.E.2d at 346-48.

232. "[T]he basic [purpose] of the attorney-client relationship . . . is for the attorney to advise the client as to, exactly, what conduct the law requires so that the client can then comply with that advice." Balla v. Gambro, Inc., 584 N.E.2d 104, 113-14 (Ill. 1991).

233. *See Herbster*, 501 N.E.2d at 346.

right to sue.[234]

Courts have opposed suits by in-house counsel because they threaten the attorney's obligations to promote the client's interests and to preserve the client's autonomy.[235] This opposition derives in part from the concern that suits by in-house counsel would interfere with the client's right to make decisions and in part from the concern that lawyers should advocate zealously for their clients rather than for the public interest.[236] The Model Rules and Model Code are consistent with this view in that they describe the role of an attorney as an advisor,[237] while the ultimate responsibility for decision making rests with the client.[238] Thus, opposition to a cause of action by in-house counsel derives both from fear that a cause of action would undermine the client's right to make its own decisions and from the attorney's loyalty to the client.[239]

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234. *Id.* at 346-47; *Balla*, 584 N.E.2d at 108.

235. *See Herbster*, 501 N.E.2d at 347-48; Nordling v. Northern States Power Co., 465 N.W.2d 81, 86 (Minn. App. Ct.), *rev'd on other grounds*, 478 N.W.2d 498 (Minn. 1991). The *Herbster* and *Nordling* courts expressed concern for the client's autonomy. *See Herbster*, 501 N.E.2d at 344-48; *Nordling*, 465 N.W.2d at 86. These courts also opposed the retaliatory discharge cause of action because it would interfere with the client's ability to discharge their attorney at-will. *Herbster*, 501 N.E.2d at 344-48, *Nordling*, 465 N.W.2d at 86. The *Nordling* court stated that to interfere with the client's right to terminate would generate such distrust that the attorney would be unable to serve the client adequately. *Nordling*, 465 N.W.2d at 86.

236. *See* Maureen H. Burke, *The Duty of Confidentiality and Disclosing Corporate Misconduct*, 36 BUS. LAW 239, 265-68 (1981). *See also* MODEL RULES, *supra* note 33, Preamble par. 2.

237. *See* MODEL RULES, *supra* note 33, Rule 2.1. Rule 2.1 states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation." *Id.*

See also MODEL CODE, *supra* note 33, EC 7-8. EC 7-8 states that:

> Advice of a lawyer to his client need not be confined to purely legal considerations. . . . In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.

Id.

238. *See* MODEL CODE, *supra* note 33, EC 7-8. EC 7-8 states that "[i]n the final analysis, however, the . . . decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client." *Id.* The Model Code further suggests that a suit by in-house counsel is contrary to a lawyer's duty to promote the interests of her client. *See* MODEL CODE, *supra* note 33, EC 7-1, DR 7-101.

239. *See generally* Burke, *supra* note 236. *See also Herbster*, 501 N.E.2d at 347-48. The *Herbster* court suggests that, in addition to the question of breach of privilege, a suit by in-house counsel is contrary to a lawyer's duty to promote the interests of her client. *Id.* The *Herbster* court also suggested that lawyers should serve only, or at least primarily, their client's interests, and the court should not encourage lawyers to assert the rights of the public when they conflict with the corporation's desired course of action. *Id.*

b. Attorney-Client Confidentiality and Privilege

An essential requirement of the attorney-client relationship is that the lawyer maintain confidentiality of all information regarding the representation.[240] The principle of confidentiality is dealt with in two related bodies of law: the attorney-client privilege[241] and the rule of confidentiality.[242] These two concepts are distinct, but both can apply to certain fact patterns.[243] Courts believe that suits by in-house counsel encourage breaches of both the attorney-client privilege and the rule of confidentiality.[244] This is based on the belief that the attorney would disclose private information in the process of bringing the retaliatory discharge suit.[245]

The attorney-client privilege is defined by the law of evidence and is a right belonging solely to the client.[246] This privilege prevents the disclosure of information exchanged in confidence between a client and an attorney unless the client waives the privilege.[247] The attorney-client privilege applies in the

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240. *See* MODEL RULES, *supra* note 33, Rule 1.6 cmt. 4. This principle of maintaining confidentiality encourages the client "to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." *Id.*

241. The attorney-client privilege, including the work-product doctrine, is a rule of evidence that prohibits the lawyer from disclosing information communicated by the client to the lawyer in confidence and relating to representation in judicial or other proceedings. *See* MODEL RULES, *supra* note 33, Rules 1.6 cmt. 5; MODEL CODE, *supra* note 33, EC 4-1 to 4-4, DR 4-101. *See also* 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2292 (John T. McNaughton ed. 1961) (describing when the attorney-client privilege applies); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL ¶ 18.03 (1989) (discussing the attorney-client privilege).

242. The rule of confidentiality is a rule of ethics that applies in situations "other than those where evidence is sought from the lawyer through compulsion of law." *See* MODEL RULES, *supra* note 33, Rule 1.6 cmt. 5. The lawyer's duty to keep confidences applies to all information acquired in the course of representation, regardless of the source. *See id.*; MODEL CODE, *supra* note 33, EC 4-1 to 4-6, DR 4-101. *See also* BROOKE WUNNICKE, ETHICS COMPLIANCE FOR BUSINESS LAWYERS 24-25 (1987) (explaining that confidentiality differs from privilege in that it protects a greater scope of information).

243. See *infra* text accompanying notes 246-57 for further discussion of the attorney-client privilege and confidentiality and the differences between the two.

244. *See* Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343, 347-48 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987); Balla v. Gambro, Inc., 584 N.E.2d 104, 109 (Ill. 1991).

245. *See Herbster*, 501 N.E.2d at 347-48; *Balla*, 584 N.E.2d at 109.

246. *See* Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1064-65 (1978).

247. *See* WOLFRAM, *supra* note 33, § 6.3. The attorney-client privilege protects only the narrow right of a client to communicate confidentially with his lawyer about a legal problem. Specifically "[t]he attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client." MODEL RULES, *supra* note 33, Rule 1.6 cmt. 5.

In order to invoke the attorney-client privilege, there are a number of elements that must be

corporate context when: (1) the communication was part of a corporate purpose to obtain legal advice; (2) the communication concerned matters within the scope of the employee's corporate duties; (3) the employee knew that he or she was making a confidential statement as part of a corporate purpose to secure legal advice; and (4) the statements were kept confidential or disclosed in a manner consistent with the privilege.[248] The rationale behind the attorney-client privilege is that it is essential to the attorney's functions as advocate and confidential advisor to have privileged communications.[249] As an advocate and an advisor, the attorney can adequately represent the client only if the client is free to disclose all information, both good and bad.[250] The attorney-client privilege does, however, have several exceptions.[251] The major exception is that the privilege will not apply to attorney-client communications that are made in the furtherance of a crime or fraud.[252]

The scope of the attorney-client confidentiality rule is defined by the

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established. *See* State v. Bulow, 475 A.2d 995, 1004-05 (R.I. 1984). First, the asserted holder of the privilege is, or sought to become, a client. *Id.* Second, the person to whom the communication was made is a member of the bar and, in connection with that communication, is acting as a lawyer. *Id.* Third, the communication relates to a fact of which the attorney was informed by his client without presence of strangers for the purpose of securing primarily either an opinion of law or legal services or assistance in some legal proceeding and not for the purposes of committing a crime or tort. *Id.* Finally, the privilege has been claimed and not waived by the client. *Id.*

248. *See* Upjohn Co. v. United States, 449 U.S. 383, 394-95 (1981). *See also* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE, 2d ed. § 9.9, at 415-16 (West 1987).

249. *See* Hazard, *supra* note 246, at 1061.

250. *Id.* *See* MODEL RULES, *supra* note 33, Rule 1.6 cmt. 4.

251. *See* Proposed FED. R. EVID. 503(d). These exceptions include: furtherance of a crime or fraud; claimants through same deceased client; breach of duty by lawyer or client; documents attested by a lawyer; and joint clients. *See* MODEL RULES, *supra* note 33, Rule 1.6(b)(2). Rule 1.6(b)(2) specifically allows an attorney to reveal privileged and confidential information to the extent the attorney reasonably believes necessary:

> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and 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.

Id.

252. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 90 (1987) [hereinafter THE LAW OF LAWYERING]. Communications within the crime-fraud exception are subject to disclosure upon demand by the court. *Id.* "[T]he client forfeits the privilege when he seeks legal advice to advance an objective that he knew, or should have known, was criminal or fraudulent." LILLY, *supra* note 248, § 9.9, at 417. A common rationale for this exception is that the privilege should only be used as a defense to past wrongdoing within an adversary system and not as an aid to future crime. *See* WOLFRAM, *supra* note 33, § 6.4, at 279 n.44.

professional rules of ethics.[253] The rule of confidentiality is broader than the attorney-client privilege. Confidentiality applies to all information about a client, not merely information received directly from the client.[254] In other words, privileged information is a subset of that which is confidential.

There are several justifications for the rule of mandatory confidentiality. First, the rule discourages attorney abuse of client information by providing for professional disciplinary measures.[255] Second, mandatory confidentiality provides an additional safeguard to the attorney-client privilege when there is doubt as to whether the information is privileged.[256] Finally, the rule incorporates the general law of agency, imposing duties on agents to keep information about their principals confidential.[257] The Model Rules and Model Code, however, both provide an exception to the confidentiality rule.[258] Under the Model Code and Model Rules, an attorney may disclose confidential

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253. *See* MODEL RULES, *supra* note 33, Rule 1.6 cmt. 5. *See also* WOLFRAM, *supra* note 33, § 6.7, at 296. The most influential rules are the Model Rules of Professional Conduct (Model Rules), which have been adopted in some form in 35 states. *See* THE LAW OF LAWYERING, *supra* note 252, § AP4: 101, app. at 1255. The Model Code of Professional Responsibility (Model Code), predecessor to the Model Rules, is followed in some states that have not adopted the Model Rules. *See id.* at n.1. The states that follow the Model Code are Massachusetts, Oregon, Virginia, and New York. *Id.* Both sets of rules prohibit disclosure by an attorney of all information about a client, regardless of when and from whom the information was obtained. *See* WOLFRAM, *supra* note 33, at 296.

254. *See* THE LAW OF LAWYERING, *supra* note 252, at 90.2. The rule of confidentiality basically amounts to mandatory confidentiality. Model Rule 1.6, in comment 5, states that "[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." *See* MODEL RULES, *supra* note 33, Rule 1.6 cmt. 5.

255. *See* WOLFRAM, *supra* note 33, at 300.

256. *Id.*

257. *Id.* at 299-300. The Restatement (Second) of Agency describes agency as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." RESTATEMENT (SECOND) OF AGENCY § 1 (1958). Attorneys are also held to be in an agency relationship with their clients. *Id.* § 1e. For further information on the confidentiality of the agency relationship see generally RESTATEMENT (SECOND) OF AGENCY §§ 281a, 381e, 395(d) cmt. j (1958).

258. *See* MODEL RULES, *supra* note 33, Rule 1.6 cmts. 9-13. The Model Rules permit disclosure of confidential information to the extent that the lawyer reasonably believes is necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." *See* MODEL RULES, *supra* note 33, Rule 1.6(b)(1). The Model Code's exception is broader than that of the Model Rules and allows a lawyer to reveal "[t]he intention of [the] client to commit a crime and the information necessary to prevent the crime." MODEL CODE, *supra* note 33, DR 4-101(c)(3). *See* MODEL RULES, *supra* note 33, Rule 1.6(b)(2).

information when the respective exceptions apply.[259] These exceptions to the attorney-client privilege and confidentiality rule can be used as a basis for allowing retaliatory discharge suits by in-house counsel.[260] In addition, the exceptions to the attorney-client privilege and confidentiality rule should be used because of the new role in-house attorneys have obtained in modern society.

D. Need for Change in Attitudes Toward In-House Counsel

There exists a growing need for granting in-house attorneys the right to sue for retaliatory discharge. This need has grown as more and more corporations continue to develop their own internal legal departments.[261] The main motivation for the development of legal departments in corporations is based

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259. Thus, an attorney is permitted to disclose confidential information but is not required to do so. Nine states have adopted more restrictive confidentiality rules requiring attorneys to report such information about future crimes, on penalty of disbarment for failing to do so. States that have adopted mandatory disclosure rules are Arizona, Connecticut, Florida, Illinois, New Jersey, Nevada, North Dakota, Virginia, and Wisconsin. *See* THE LAW OF LAWYERING, *supra* note 252, § AP4-104, app. at 1262 n.2.

260. The furtherance of a crime or fraud and the Rule 1.6(b)(2) exceptions should apply to in-house attorneys when they reveal confidential and privileged information in their attempt to prove a retaliatory discharge claim. *See* MODEL RULES, *supra* note 33, Rule 1.6(b)(2). Rule 1.6(b)(2) allows an attorney to reveal confidential information to the extent the lawyer believes reasonably necessary:

> (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.

Id.

The in-house attorney should be able to reveal confidential information to establish a defense in a retaliatory discharge controversy between the lawyer and the corporation. Denying the in-house attorney the use of this confidentiality exception in retaliatory discharge situations would not only contradict the Model Rules of Professional Conduct, but it would also, in effect, take a potential course of action for the attorney and give it to the employer as a way to avoid such suits. See *infra* notes 308-11, 413-15 and accompanying text for further discussion on how these exceptions can be used as a justification for allowing retaliatory discharge suits by in-house attorneys.

261. *See* Fisher, *supra* note 31, at 185. Fisher's article addresses the problem of high legal costs to corporations. She suggests several methods for corporations to address this problem including: using in-house counsel whenever possible instead of an outside firm; demanding itemized billings of outside firms and scrutinizing them; asking firms to submit bids for carefully described tasks; knowing exactly what services are being purchased; investing in computers; and avoiding litigation altogether. *Id. See also* STEVENS, *supra* note 30, at 7-9. Stevens describes the emerging importance of corporate counsel in the following way:

> In the new scheme of things, the corporate counsel would earn his stripes not by coddling the outside firms, but by reducing their fees, by shifting more and more of the workload in-house, and by severing relationships built on old school ties in favor of those based on legal expertise and sound economics.

Id. at 9.

strictly on economics.[262] Corporations are concerned and outraged with the skyrocketing costs of using outside law firms for their legal problems.[263] This has led many corporations, in an attempt to cut costs, to develop their own legal departments within the corporation.[264] This expansion of corporate legal departments and in-house attorneys increases the need to establish some form of protection for the growing number of in-house attorneys who may be placed in difficult positions by their corporate employers.

The in-house counsel is put in a uniquely difficult position when an employer discloses a future illegal or unethical act to the attorney, or requests that the counsel participate in such an act. Unlike a private practitioner, an in-house attorney can be both an employee of, and an attorney for, the company.[265] In-house attorneys also depend solely on that employer-client for their livelihood.[266] Attorneys put in this position have a difficult choice to make. They can report the illegal activity and then expect to be fired, as the Model Rules,[267] Model Code,[268] and several cases suggest;[269] or, they can violate the Model Rules and Model Code and keep their job, but risk reprimand or disbarment.[270] Although every attorney is expected to choose the first alternative, in practice, this would be a difficult choice for many to make. The dilemma could be alleviated if a legal avenue was available to allow a cause of

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262. *See* Kuzela, *supra* note 31, at 43. Traditional corporations accepted the idea that controlling the legal costs of outside law firms was impossible. *Id.* This view is changing, and now legal managers are trying to find the most economical way to get their legal work completed. *Id.*

263. Fisher, *supra* note 31, at 185. Law firms made about $52 billion in 1985, while in 1990, the totals were around $90 billion. *Id. See also* Kuzela, *supra* note 31, at 43.

264. *See* Kuzela, *supra* note 31, at 43; Fisher, *supra* note 31, at 185. Fisher states that in-house counsel costs about 40 % less than using outside firms. *Id.*

265. *See* General Dynamics Corp. v. State, 1993 WL 225346, at *10 (Cal. Ct. App. June 8, 1993). The *General Dynamics* court stated that "we do not think that the attorney's status . . . justifies treating him differently than other employees where his status is clearly that of an employee." *Id.* at *9. *See also* Parker v. M & T Chems., Inc., 566 A.2d 215, 220 (N.J. Super. Ct. App. Div. 1989). The *Parker* court extended the state's general whistleblower protection act to in-house attorneys. *Id.* The court stated that "[o]ur affirmance here and our construction of the Act compels a retaliating employer to pay damages to an employee-attorney who was wrongfully discharged." *Id. See also* Nordling v. Northern States Power Co., 465 N.W.2d 81, 87 (Minn. Ct. App.) (Kalitowski, J., concurring in part and dissenting in part), *rev'd on other grounds*, 478 N.W. 2d 498 (Minn. 1991). Judge Kalitowski described the in-house counsel relationship with the corporation as "dual in nature: the relationship is one of attorney-client as well as of employer-employee." *Id.*

266. *Id.* See *infra* text accompanying notes 278-81 for further discussion.

267. MODEL RULES, *supra* note 33, Rule 1.2 cmts. 6-9, Rule 1.6 cmts. 9-16.

268. MODEL CODE, *supra* note 33, EC 7-7.

269. *See* Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991); Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987).

270. *See* Forrow, *supra* note 36, at 1802-03; MODEL RULES, *supra* note 33, Scope; MODEL CODE, *supra* note 33, Preamble and Preliminary Statement, DR 2-110. *See also In re* Capps, 297 S.E.2d 249 (Ga. 1982) (holding in-house attorney subject to discipline).

action for attorneys confronted with such a situation.

E. *Reasons for Adopting the Retaliatory Discharge Exception for In-House Counsel*

There are numerous reasons for extending the retaliatory discharge exception to in-house attorneys. First, in-house counsel are in a similar employment position as general employees and should be afforded equivalent protection.[271] Second, corporate counsel should be rewarded for their ethical behavior and should not, as some cases have required, be punished.[272] Third, allowing retaliatory discharge suits by in-house counsel will not impair the existing attorney-client relationship.[273] Fourth, the confidential communications between the corporate attorney and the client will also not be damaged by allowing such suits.[274] Finally, the present remedies offered by the Model Rules and Model Code provide an inadequate solution.[275]

1. In-House Counsel Should be Afforded Protection Equivalent to General Employees

By dismissing in-house attorneys' suits as unnecessary, the courts have rejected strong arguments concerning how in-house attorneys are in a similar position as general employees.[276] In-house counsel are just as susceptible to employer coercion as general employees, and therefore, they should be entitled to the same rights as general employees.[277] There are several considerations that illustrate the similarities between in-house counsel and general employees. First, in-house attorneys' relationships to their employers are the same as other employees' relationships.[278] In-house attorneys are dependent on their client-

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271. *See infra* text accompanying notes 276-86.

272. *See infra* text accompanying notes 288-94.

273. *See infra* text accompanying notes 295-300.

274. *See infra* text accompanying notes 301-10.

275. *See infra* text accompanying notes 311-18.

276. *See, e.g.*, Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343, 346-47 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987); Nordling v. Northern States Power Co., 465 N.W.2d 81, 86 (Minn. Ct. App.), *rev'd on other grounds*, 478 N.W.2d 498 (Minn. 1991).

277. *See* Parker v. M & T Chems., Inc., 566 A.2d 215, 220 (N.J. Super. Ct. App. Div. 1989); General Dynamics Corp. v. State, 1993 WL 225346, *10 (Cal. Ct. App. June 8, 1993); General Dynamics Corp. v. Superior Court, 876 P.2d 487, 489-92 (Cal. 1994).

278. *See General Dynamics Corp.*, 1993 WL at *10; *General Dynamics Corp.*, 876 P.2d at 489-92; *Parker*, 566 A.2d at 220; *Nordling*, 465 N.W.2d at 87.

employer for their sole income, benefits, and pensions.[279] They are covered by employee handbooks and personnel policies, and they are subject to company-controlled salary levels and promotions.[280] Furthermore, like all other employees of a company, in-house counsel are expected to further company objectives. These similarities suggest that in-house attorneys should be either considered to fall within the definition of employee for statutory and common-law causes of action for retaliatory discharge,[281] or given a separate cause of action.

Second, it is not clear that in-house attorneys are in a more powerful position than other general employees.[282] In-house counsel's access to confidential information is by no means unique. Non-lawyers also have access to extremely sensitive and important information.[283] This fact underlies the existing whistleblower statutes which encourage reporting by employees.[284]

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279. In-house attorneys serve only one client-employer just as the general employees. The in-house attorney is unlike the private practitioner who generally has many clients and where the loss of one client would not be as severe an economic impact. The in-house counsel generally do not enjoy such diversity of clients. *See* Wilbur, *supra* note 200, at 777. The Supreme Court of California stated in a recent case that "[t]he complete economic dependence of in-house attorneys on their employers is indistinguishable from that of nonattorney employees who are entitled to pursue a retaliatory discharge remedy." *General Dynamics Corp.*, 876 P.2d at 490.

280. *See Nordling*, 465 N.W.2d at 87 (Kalitowski, J., concurring in part, dissenting in part). The situation of an in-house counsel is not the same as a private attorney. A key difference is in the fact that the private attorney controls the focus and nature of his or her practice and may decline to represent certain clients. *Id.* The in-house attorney, on the other hand, is subject to control of his or her only client, the corporation. *Id.* The corporation controls the lawyer's salary, hours, and the focus of the in-house counsel's practice. *Id.*

281. The *Parker* court came to such a conclusion when it extended New Jersey's whistleblower act, N.J. STAT. ANN. §§ 34: 19-1 to 34: 19-8 (West 1986), to an in-house attorney. *See Parker*, 566 A.2d at 220.

282. *See* Louis C. Friedman, *Should California House Counsel Be Allowed to Claim Wrongful Termination?*, 14 W. ST. UNIV. L. REV. 431, 437-39 (1987).

283. *See* Palmateer v. International Harvester Co., 421 N.E.2d 876, 880 (Ill. 1981). The *Palmateer* court stated that "[p]ublic policy favors [employee's] conduct in volunteering information to the law-enforcement agency." *Id.* The existence of this public policy strongly suggests that general employees also have access to sensitive information. *See also* ALAN F. WESTIN, CONCLUSION TO WHISTLE BLOWING! LOYALTY AND DISSENT IN THE CORPORATION 133 (1981). Westin discusses the significant role general employees can play in protecting society from corporations. *Id.* He maintains that, given the harm corporations may cause to the public, "[g]reater internal-dissent and error-detection procedures" are needed. *Id. See also Nordling*, 465 N.W.2d at 88 (Kalitowski, J., concurring in part, dissenting in part). Judge Kalitowski stated that the information disclosed by in-house counsel might be no more damaging than if other high-level employees sued. *Id.* All of these sources indicate that general employees should also have access to sensitive and important information.

284. *See, e.g.*, N.J. STAT. ANN. § 34: 19-3 (West 1988 & Supp. 1994), which provides, in part, that:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:

The majority of courts, however, have failed to recognize these similarities.[285] This places the in-house attorney at a major disadvantage because, unlike other employees, attorneys are bound by ethical codes and rules prohibiting the disclosure of information obtained from their client-employer.[286] Therefore, in-house attorneys are left without a remedy while they are at least as vulnerable as other middle and senior level managers who have standing to sue.[287]

2. Corporate Counsel Should Be Rewarded and Not Punished for Their Ethical Behavior

Allowing retaliatory discharge suits by in-house attorneys would encourage ethical behavior by corporate counsel in several ways. First, it would protect honest lawyers and punish dishonest employers.[288] Employers who force lawyers to choose between ethical activity and future employment should be punished. Permitting actions for retaliatory discharge would protect lawyers

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a. Discloses, or threatens to disclose to a superior or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law.

Id.

The language of this section of the New Jersey statute suggests that the employee would be disclosing some sort of sensitive or important information. If the information disclosed by the employees in these situations were not sensitive or important, then there would be no need to protect the employees when they disclose it. *See also* ME. REV. STAT. ANN. tit. 26, § 833 (West 1988); MICH. COMP. LAWS ANN. § 15.362 (West 1985); CONN. GEN. STAT. ANN. § 31-51m (West 1987).

285. *See* Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343, 346-47 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987); Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988), *aff'd*, 503 U.S. 131 (1992); McGonagle v. Union Fidelity Corp., 556 A.2d 878 (Pa. Super. Ct. 1989); *Nordling*, 465 N.W.2d at 81; Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991); Michaelson v. Minnesota Mining & Mfg. Co., 474 N.W.2d 174 (Minn. Ct. App. 1991). See *supra* text accompanying notes 125-87 for further discussion of these cases.

286. *See Herbster*, 501 N.E.2d at 346-47 (discussing attorneys' duty of confidentiality).

287. If courts would recognize the fact that sensitive information is disclosed by both in-house counsel and by general employees, then in-house attorneys would be able to use the existing whistleblower statutes in actions for retaliatory discharge. But since most courts have not recognized this, in-house counsel have been left with no remedy. *See* Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986); Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1988); McGonagle v. Union Fidelity Corp., 556 A.2d 878 (Pa. Super. Ct. 1989); Nordling v. Northern States Power Co., 478 N.W.2d 498 (Minn. 1991); Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991); Michaelson v. Minnesota Mining & Mfg. Co., 474 N.W.2d 174 (Minn. Ct. App. 1991).

288. *See* Michael L. Closen & Mark E. Wojcik, *Lawyers Out in the Cold*, 73 A.B.A. J., Nov. 1987. at 96. "If an employer tells his lawyer to do something unlawful, the lawyer should be encouraged . . . to refuse to do so. If the employer persists, [the employer is] willfully trying to break the law and should not be insulated from a retaliation-discharge suit if he fires an honest lawyer." *Id.*

who comply with professional rules of conduct and other clear public policies.[289] Allowing retaliatory discharge suits would further encourage reporting by those attorneys who would not have otherwise reported their employer's wrongdoing.

Leaving lawyers singularly unprotected for abiding by their ethical responsibilities endangers not only the individual in-house counsel, but also the legal profession as a whole.[290] As professionals, lawyers are entrusted with the public confidence and are required by state licensing programs and their own professional codes to use their unique expertise for the greater good of the public.[291] By providing an exception to the at-will employment doctrine for in-house attorneys, courts would protect corporate counsel from the economic risks of serving only one client and encourage in-house lawyers to act ethically in the face of employer pressure to do otherwise. This ethical behavior is needed to ensure society's faith and trust in the legal system.

Furthermore, there is nothing unique about lawyers' responsibility to follow their ethical rules, and there is also a strong argument that attorneys should be rewarded for following the professional ethics rules that further public policy.[292] To say that the force of the ethical obligations imposed on lawyers is enough to ensure that the obligations will be fulfilled clearly ignores

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289. *See* Stephen E. Kalish, *The Attorney's Role in the Private Organization*, 59 NEB. L. REV. 1, 2 (1980).

290. Alan O. Amos, *Protecting the Wrongdoer Instead of the Watchdog: The Court Was Wrong in* Balla, 80 ILL. B.J. 281, 283 (June 1992).

291. *See* Alfred G. Feliu, *Discharge of Professional Employees: Protecting Against Dismissal for Acts Within a Professional Code of Ethics*, 11 COLUM. HUM. RTS. L. REV. 149, 165 (1979). *See also* Schware v. Board of Bar Examiners, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring). In *Schware*, Justice Frankfurter described the character needed among lawyers in the following way:

> [A lawyer] stands as a 'shield' . . . in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries been compendiously described as 'moral character'.

Id.

292. Amos, *supra* note 290, at 283, 301. The Amos article discusses a New Jersey case, Kalman v. Grand Union Co., 443 A.2d 728 (N.J. Super. Ct. App. Div. 1982), in which a pharmacist who objected to his employer's wrongful activity "was found to have a stronger, rather than a weaker, case for retaliatory discharge based upon the consonance of the Code of Ethics of the American Pharmaceutical Association." Amos, *supra* note 290, at 301. It would, therefore, seem consistent for courts to recognize the Professional Code of Ethics, which binds all attorneys, as a justification supporting retaliatory discharge suits by in-house counsel.

reality.[293] One would like to believe that lawyers will always do the right thing because the law requires lawyers to act ethically. However, one cannot deceive oneself into thinking that the ethical duties[294] of lawyers will ensure that all attorneys will act appropriately. An incentive is necessary to ensure that attorneys will feel free to follow their ethical duties. The retaliatory discharge cause of action is the incentive that will allow in-house attorneys to act ethically and expose the illegal actions of their employer.

3. Retaliatory Discharge Suits by In-house Counsel Will Not Impair the Attorney-Client Relationship

Courts have argued that allowing an in-house attorney a cause of action for retaliatory discharge would discourage corporate clients from communicating with the attorney and would have a chilling effect on the attorney-client relationship.[295] However, recognition of the retaliatory discharge action will not further impair the existing attorney-client relationship or discourage communication. First, the arguments made by courts against the retaliatory discharge action by in-house attorneys are inherently flawed. These arguments presuppose that an employer would discharge the in-house counsel if the attorney disagrees with questionable conduct. Normally, corporations seek advice from in-house counsel to avoid, rather than to commit, illegal activities in their business conduct.[296] Corporate employers that seek legal counsel for the purpose of avoiding illegal acts would thus be receptive to the in-house counsel's advice. It is only the companies that seek to engage in illegal activities that would ignore the in-house counsel's advice.[297]

Second, an in-house attorney's reporting of a clearly illegal act by a

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293. *See* Balla v. Gambro, Inc., 584 N.E.2d 104, 113-14 (Ill. 1991) (Freeman, J., dissenting). "Specifically, it ignores that, as unfortunate for society as it may be, attorneys are no less human than non-attorneys and, thus, no less given to the temptation to either ignore or rationalize away their ethical obligations when complying therewith may render them unable to feed and support their families." *Id.* at 113.

294. An example of the ethical duty is the obligation to withdraw from representing a client when that "representation will result in violation of the rules of professional conduct or other law." MODEL RULES, *supra* note 33, Rule 1.16(a)(1). *See also* MODEL CODE, *supra* note 33, DR 2-110(B).

295. *See* Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343, 346 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987); Balla v. Gambro, Inc., 584 N.E.2d 104, 109 (Ill. 1991).

296. *See Balla*, 584 N.E.2d at 114. Justice Freeman, in his dissenting opinion, stated that the "court is entitled to assume that corporate clients will rarely" decide to act in a particular manner regardless of advice that such conduct is contrary to law. *Id.*

297. *Balla*, 584 N.E.2d at 114 (Freeman, J., dissenting) ("[T]o allow a corporate employer to discharge its in-house counsel under such circumstances, without fear of any sanction, is truly to give the assistance and protection of the courts to scoundrels.").

corporate officer may have no more of an adverse impact on attorney-client communication than when the counsel seeks a reversal of a decision to engage in illegal conduct by resorting to higher authorities within the organization. In the corporate relationship, the in-house counsel serves the corporate organization and not the corporate officers.[298] Thus, when a corporate officer contemplates an illegal act, it is the in-house counsel's duty to prevent that conduct because it is damaging to the corporation, even if this means opposing an officer's illegal conduct or resorting to higher authorities within the corporation.[299] By bringing the illegal acts of corporate officers to the corporation's attention, the corporate counsel is acting in the best interest of the client, the corporation. Allowing in-house attorneys to sue for retaliatory discharge would only chill the attorney-client relationship and discourage free communication between the attorney and corporate client where the employer decides to proceed with the particular conduct, regardless of the attorney's advice that the conduct contradicts the law.[300]

4. The Confidential Communications Between the Corporate Attorney and the Client Will Not Be Damaged

Another justification for allowing the retaliatory discharge action is that it does not damage the sanctity of the confidential communications between the corporate lawyer and the client. Both the evidentiary privilege[301] and the ethical duty of confidentiality[302] contain an exception in cases where a lawyer's services are sought in furtherance of a crime.[303] The policy behind the attorney-client privilege is to enhance the administration of justice. It would be a deviation from this policy to extend these privileges to a client who seeks advice in furtherance of a criminal or unethical scheme.[304]

Some courts have stated that the tort of retaliatory discharge would chill communications between lawyer and client as well as diminish general trust

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298. *See* MODEL RULES, *supra* note 33, Rule 1.13; WOLFRAM, *supra* note 33, § 13.7.2, at 735.

299. *See* MODEL RULES, *supra* note 33, Rule 1.13(b). *See also* WOLFRAM, *supra* note 33, § 13.7.5, at 744. The duty of the in-house attorney to prevent illegal conduct goes to the essence of the attorney-client relationship. "One of the basic purposes of the attorney-client relationship, especially in the corporate client-in-house counsel setting, is for the attorney to advise the client as to, exactly, what conduct the law requires so that the client can then comply with that advice." *Balla*, 584 N.E.2d at 113-14 (Freeman, J., dissenting).

300. *See Balla v. Grambo, Inc.*, 584 N.E.2d 104, 114 (Ill. 1991) (Freeman, J., dissenting).

301. See *supra* text accompanying notes 240-60 for further discussion of attorney-client privilege.

302. See *supra* text accompanying notes 240-60 for further discussion of attorney-client confidentiality.

303. *See* MODEL RULES, *supra* note 33, Rule 1.6; FED R. EVID. 502 (1990).

304. *See* C. MCCORMICK, MCCORMICK ON EVIDENCE § 95, at 229 (3d ed. 1984).

between them.[305] However, at the heart of the evidentiary and ethical privileges is the realization that in certain instances, competing interests will outweigh the interest of confidentiality. Consequently, there are crime and fraud exceptions to the evidentiary privilege.[306] The argument that retaliatory discharge would have a chilling effect is further undermined by the basic notion that clients have no right to expect the assistance of counsel in certain kinds of activities.[307]

Confidentiality exceptions also exist for controversies between lawyer and client under both the evidentiary and ethical privileges.[308] The confidentiality exceptions found in Model Rule 1.6(b)(2) should apply to in-house attorneys when they reveal confidential and privileged information in their attempt to prove retaliatory discharge.[309] Although none of the retaliatory discharge cases involving in-house counsel have applied or acknowledged this exception, the logic behind its application to the in-house counsel is sound. The in-house attorney should be able to reveal confidential information in the retaliatory discharge controversy between the lawyer and the corporation in the attorney's

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305. *See, e.g.*, Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343, 346 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987); *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 109 (Ill. 1991); Nordling v. Northern States Power Co., 465 N.W.2d 81, 85 (Minn. Ct. App.), *rev'd on other grounds*, 478 N.W.2d 498 (Minn. 1991).

306. *See* UNIF. R. EVID. 502(d)(1) (1974). The fraud exception is based on the idea that the attorney-client privilege should only be used as a defense to past wrongdoing within the adversary system and not as an aid to fraudulent acts. *See* WOLFRAM, *supra* note 33, § 6.4.10, at 279 n.44; MODEL RULES, *supra* note 33, Rule 1.6(b)(1). The crime exception allows an attorney to disclose confidential information when the attorney reasonably believes that the disclosure is necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." *Id.*

307. *See* MODEL RULES, *supra* note 33, Rule 1.2(d). Rule 1.2(d) states that:

> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Id.

308. *See* UNIF. R. EVID. 502(d)(3) (1974). The Model Rules of Professional Conduct have also allowed several exceptions to the attorney-client privilege and confidentiality. *See* MODEL RULES, *supra* note 33, Rule 1.6(b)(2). For the text of Rule 1.6(b)(2), see *infra* note 309.

309. *See* MODEL RULES, *supra* note 33, Rule 1.6(b)(1), 1.6(b)(2). Rule 1.6(b)(2) allows an attorney to reveal confidential information to the extent the lawyer believes reasonably necessary:

> (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 allegation in any proceeding concerning the lawyer's representation of the client.

Id.

own defense.[310] Because the in-house attorneys would be revealing the confidential information in defense of themselves in such a situation, the Rule 1.6(b)(2) defense exception should apply. This would eliminate concerns about whether the material was confidential or privileged. Therefore, allowing the disclosure of confidential information in retaliatory discharge suits would not have a chilling effect on the communications between the client and attorney.

5. The Existing Remedies Offered by the Model Rules and Code Are Insufficient

The solution offered by the Model Rules[311] and the Model Code[312]—an attorney's withdrawal—is neither a satisfying nor an adequate solution.[313] When presented with an employer's plan to act criminally or unethically, a corporate counsel may resign, comply, or refuse to comply and face discharge. As an attorney's mobility declines,[314] withdrawal, as well as dismissal, leave the attorney without income and with little chance of obtaining similar employment in the near future.[315] If afforded recovery through retaliatory discharge actions, these in-house attorneys would be compensated for their misfortune. This compensation would support the unemployed counsel during their search for other employment while, at the same time, promote ethical conduct.

The justifications that courts have given for denying the in-house attorney the right to sue for retaliatory discharge are not persuasive. Corporate attorneys are not like private attorneys as some courts have suggested. Rather, in-house attorneys are more like the general corporate employee than the private practitioner.[316] The attorney-client relationship and the principles of confidentiality and privilege are not impaired by allowing in-house attorneys a cause of action.[317] Further, the present remedy offered by the Model Rules

310. *See* MODEL RULES, *supra* note 33, Rule 1.6(b)(2). This application of Rule 1.6(b)(2) comes directly from the Model Rule itself. See *supra* note 309 for the text of Rule 1.6(b)(2).

311. MODEL RULES, *supra* note 33, Rule 1.16(a).

312. MODEL CODE, *supra* note 33, DR 2-110(B).

313. *See* Reynolds, *supra* note 34, at 575.

314. *See* Abramson, *supra* note 78, at 275. Abramson states that "in reality, attorneys have a much harder time finding positions in the job market" than some cases suggest. *Id.* For example, the in-house attorney fired in *Herbster* did not find another job until five months after he was terminated. *Id.* at 276.

315. *See* Nolan, *supra* note 215, at 221 n.44 (quoting NATIONAL ASS'N FOR LAW PLACEMENT, INC., CLASS OF 1983 EMPLOYMENT REPORT AND SALARY SURVEY (10th ed. 1985)) ("[D]espite the glowing nature of a 90.6% employment rate, . . . jobs remain hard to get for the most part, even at the most well known law schools in the country.").

316. *See supra* text accompanying notes 276-87.

317. *See supra* text accompanying notes 295-310.

and Model Code, an attorney's withdrawal, is not an adequate solution.[318] Therefore, the in-house attorney should be allowed the opportunity to sue for retaliatory discharge.

IV. STATUTORY PROTECTION FOR WHISTLEBLOWERS

The federal and state statutory trend is toward greater protection for whistleblowers against the retaliatory acts of their employers.[319] There is a great amount of statutory protection afforded to whistleblowers. However, this protection is limited in who may assert it. At the federal level, anti-retaliation provisions in numerous civil rights laws and labor laws protect whistleblowers who exercise specific rights granted under these statutes.[320] In addition, the Civil Service Reform Act of 1978 and the Federal Whistleblower Protection Act of 1989 have been developed to provide further protection to the federal civil servant who "blows the whistle."[321] Additionally, laws have been enacted at the state level which are designed to protect whistleblowers.[322] The protection afforded to whistleblowers by these federal and state statutes is examined below.

A. Federal Whistleblower Protection

At the federal level, the protection afforded to whistleblowers can be classified into four categories. First, a variety of federal statutes contain provisions protecting employees who exercise their rights and obligations as required under these specific statutes.[323] All employees working for organizations covered by the statutes receive this protection.[324] Second, the First and Fourteenth Amendments to the United States Constitution provide

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318. *See supra* text accompanying notes 212-16, 311-17.

319. This section provides a brief overview of the federal and state statutory whistleblower protection and is not intended to be a detailed and inclusive coverage of all the statutory protection.

320. *See, e.g.*, National Labor Relations Act of 1935, Pub. L. No. 198, §§ 151-169, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (1982)); Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3 (1988); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1988); Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1988); Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1988); Surface Transportation Assistance Act of 1982, 49 U.S.C. § 2305 (1988). *See generally* Kohn, *supra* note 20, at 99.

321. *See* Civil Service Reform Act of 1978, 5 U.S.C. § 2302; Whistleblower Protection Act of 1989, 5 U.S.C. § 1201 (Supp. II 1990). See *infra* text accompanying notes 343-54 for further discussion of these Acts.

322. See *supra* note 20 and accompanying text for a list of states that have enacted whistleblower statutes.

323. *See, e.g.*, Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1988); Clean Air Act of 1955, 42 U.S.C. § 7622 (1988); Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1988).

324. *See, e.g.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-4(a); Water Pollution Control Act of 1948, 33 U.S.C. § 1367(d) (1972).

some protection to whistleblowers.[325] Third, under certain circumstances, whistleblowing activity is protected by provisions of the National Labor Relations Act (NLRA).[326] Fourth, most federal employees who "blow the whistle" on their employer receive the protection of the Civil Service System.[327] Although the general appearance is that the federal government has provided ample protection for the whistleblower, this is not the case. Instead, the protections that do exist are fragmented and leave the private sector employee with little protection and the in-house counsel with no protection.

1. Statutory Protection

An assortment of federal acts, designed to address everything from coal mine safety[328] to atomic energy,[329] contain provisions protecting those who exercise their rights and obligation under the acts. These laws can be broadly grouped into two categories: (1) employment[330] and (2) public health and safety.[331] Although the protection granted by the various federal statutes differs, most of the statutes protect the following types of activities: disclosure of information, refusal to work, and the provision of testimony and other participation in investigations.[332]

These statutes also vary in procedures used to redress the retaliatory discharge.[333] Protections are only available to employees who "blow the whistle" on specific types of employer misconduct. These federal statutes have no real applicability to the in-house attorney. They protect only certain activities specified in the statute, none of which directly apply to in-house attorneys.

2. Constitutional Protection

The First and Fourteenth Amendments to the United States Constitution prohibit federal, state, and local governments from retaliating against

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325. U.S. CONST. amend. I; U.S. CONST. amend. XIV. *See generally* Kohn, *supra* note 20.

326. *See* National Labor Relations Act of 1935, 29 U.S.C. § 158(a)(4) (1988).

327. *See* Civil Service Reform Act of 1978, 5 U.S.C. § 2302 (1988).

328. Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1988).

329. Energy Reorganization Act of 1974, 42 U.S.C. § 5851 (1988).

330. *See, e.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c) (1988).

331. *See, e.g.*, Clean Air Act of 1955, 42 U.S.C. § 7622 (1988); Water Pollution Control Act of 1948, 33 U.S.C. § 1367 (1988).

332. *See* John L. Howard, *Current Developments in Whistleblower Protection*, 39 LAB. L.J. 67, 69-70 (1988).

333. *See* Howard, *supra* note 332, at 70.

whistleblowers for engaging in protected speech.[334] The key element of these amendments is that they only prevent the discharge of government employees when their speech is a matter of public concern.[335] Thus, under the First and Fourteenth Amendments, government bodies are prohibited from retaliating against whistleblowers for exercising their right to free speech. Although there are exceptions, the First and Fourteenth Amendments only extend protection to public sector employees and are of little benefit to the private sector whistleblower. Consequently, the First and Fourteenth Amendments have never extended protection to in-house attorneys.[336]

3. National Labor Relations Act

Another possible avenue of federal whistleblower protection is the National Labor Relations Act (NLRA).[337] One of the NLRA's primary purposes is to facilitate and to protect employees' ability to organize and to take collective action.[338] Specifically, the NLRA requires that labor be free to organize and to bargain collectively on equal terms with employers.[339] The NLRA also provides that it shall be an unfair labor practice for an employer to interfere with an employee's exercise of these rights.[340]

Although the NLRA provides some protection for whistleblowers, the protection is limited in that it does not apply to all employees. Certain employees are excluded from the NLRA's protection through the development

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334. *See* Connick v. Myers, 461 U.S. 138, 143-49 (1983). The Supreme Court in *Connick* prohibited the discharge of government employees if their speech involved a matter of public concern. *Id.* The Court looked to the content, form, and context of the statements to determine if the speech was a matter of public concern. *Id.* at 147-48. *See generally* Kohn, *supra* note 20. A detailed discussion of the issue surrounding *Connick* and the constitutional protections in general are beyond the scope of this note.

335. If the speech is not a matter of public concern, then the First and Fourteenth Amendments provide no protection and the government employee can be discharged for his or her speech. *See Connick*, 461 U.S. at 146.

336. *See* Tim Barnett, *Overview of State Whistleblower Protection Statutes*, 43 LAB L.J. 440, 441 (1992).

337. National Labor Relations Act of 1935, Pub. L. No. 198, §§ 151-169, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169, § 158(a)(4) (1982)).

338. *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (1982) (stating the purpose of the Act). Section 7 of the Act guarantees that "[e]mployees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." *Id.* § 157.

339. Kent F. Murrmann, *The Scanlon Plan Joint Committee and Section 8(a)(2)*, 31 LAB. L.J. 299, 300 (1980).

340. 29 U.S.C. § 158(a)(1) (1982).

of both statutory and judicial exclusions from the NLRA.[341] The judicial exclusions dealing with managerial and confidential employees would effectively eliminate any possibility of protection for the in-house attorney under the NLRA.[342]

4. Civil Service System Protection

The Civil Service Reform Act (CSRA) was the first piece of comprehensive legislation designed to protect the federal civil whistleblower. The CSRA set out protections for employees who disclosed illegal activity or reported government fraud.[343] These statutory protections also extended to federal employees who disclosed substantial and specific dangers to public health or safety.[344] Under the CSRA, a hierarchy of administrative procedures were developed to deal with such federal misconduct. Through the CSRA, Congress balanced whistleblower protection against management's control in such a way that management's control outweighed the protection afforded by the CSRA.[345] This resulted in the CSRA providing only weak whistleblower protection.

The protection afforded to federal employees has recently been increased with the passage of the Whistleblower Protection Act of 1989.[346] This Act substantially strengthens the whistleblower protection available to the public

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341. Supervisors have been statutorily excluded from protection. *See* Labor-Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified as amended at 29 U.S.C. § 152(3) (1982)). This supervisory exclusion was qualified, however, in section 14(a) of the NLRA, by allowing supervisors to organize at the employer's discretion. National Labor Relations Act of 1935 § 14(a), 29 U.S.C. § 164(a) (1982).

In addition to the NLRA's statutory exclusions, courts and the National Labor Relations Board, the agency which enforces the NLRA, have created two exclusions for managerial and confidential employees. *See* Barbara A. Lee, *Collective Bargaining and Employee Participation: An Anomalous Interpretation of the National Labor Relations Act*, 38 LAB. L.J. 274, 274 (1987). Managerial employees are those who exercise independent judgment on behalf of management. The NLRB has never protected these employees. *See id.* at 277 (finding managerial exclusion as early as 1946). Confidential employees, which are employees who have access to confidential information concerning relations between a firm and its employees, have also been excluded from the NLRA's protection. *See* ROBERT A. GORMAN, LABOR LAW - BASIC TEXT 38-39 (1976).

342. See *supra* note 341 for further discussion of the managerial and confidential employee exceptions.

343. *See* Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 17 (1989) (Codified at 5 U.S.C. § 1201 (Supp. V 1993)). *See* Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope for Whistleblowers*, 43 RUTGERS L. REV. 355, 373 (1991).

344. *Id.* In addition to introducing the whistleblower protections, the Civil Service Reform Act also codified general merit principles to guide the civil service.

345. *See* Fisher, *supra* note 343, at 416.

346. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 17 (1989) (codified at 5 U.S.C. § 1201 (Supp. V 1993)).

employee.[347] Despite this increase in protection for federal whistleblowers, the Act still has problems.[348] One significant flaw is its remedial structure. This structure undermines the Act's effectiveness by placing the responsibility of investigating the reported violations with the agency where the "whistle was blown," not an independent agency.[349] This, in effect, results in an opportunity for the agency to dismiss the reported violation. A second shortcoming of the Whistleblower Act is the large number of federal agencies that are exempted from its protections.[350] Although the Whistleblower Act provided added protection to the whistleblower, the amendments to CSRA's whistleblower protections still favor the agency management, not the whistleblower.[351] The most severe limitation on the protection provided by both the Civil Service Reform Act and the Whistleblower Protection Act is that they apply to public sector employees only. Thus, in-house counsel are again provided no protection.

The existing federal protection afforded to whistleblowers is adequate only if the employee works in the public sector. Private sector employees are afforded minimal federal protection,[352] however, they may be able to assert some form of a whistleblower action under one of the federal statutes if they disclose information or engage in sanctioned activities as provided by the

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347. *See* Fisher, *supra* note 343, at 414-15. The Act strengthens the whistleblower's protection as follows:

> by making the Office of Special Counsel independent of the Merit Systems Protection Board, redefining the Office of Special Counsel's prime mission as whistleblower protection rather than Merit System protection, lessening the burden of proof the whistleblower must meet to establish the nexus between whistleblowing and the retaliation needed to prove a whistleblower claim, and giving the whistleblower an independent right to bring his claim should the Special Counsel not champion his cause.

Id.

348. *See* Fisher, *supra* note 343, at 415.

349. *See id.* at 412-13. "The agency head investigates and reports back to the Special Counsel on the merits of the whistleblower's claims." *Id.* at 412. For an agency head to admit that fraud, waste, or abuse took place during the head's control of the agency "would be a black mark on an agency head's career." *Id.* "[T]he incentive is for the head to find rational explanations for the whistleblower's misapprehensions and dismiss the matter" so that it would not reflect adversely on the agency head. *Id.*

350. *See* 5 U.S.C. § 2302(b) (West Supp. 1994). The 1989 Act exempts the following agencies: government corporations, the FBI, the CIA, the Defense Intelligence Agency, the National Security Agency, the General Accounting Office, and any executive agency whose principal function is intelligence or counter-intelligence. *Id.* § 2302(a)-(b); Fisher, *supra* note 343, at 407-08. Although some of the exemptions for intelligence and investigatory agencies can be defended on the grounds of national security, the extension of these exemptions to government corporations is unpersuasive. The implications of these government corporation exemptions to the employees of those corporations and to society in general are "daunting given the suspected corruption and waste alleged to exist in sectors of the economy regulated or operated by such corporations." *Id.* at 409.

351. *See* Fisher, *supra* note 343, at 416.

352. *See* Barnett, *supra* note 336, at 441.

particular statutes.[353] The in-house counsel is not considered in any of the federal whistleblower protection statutes. The only possibility that in-house attorneys have to receive any federal protection is if they happen to fit within the proscribed activity available to private sector employees.[354]

B. State Whistleblower Protection

A majority of states have enacted some sort of statute specifically designed to provide protection for whistleblowers.[355] These whistleblower statutes challenge the acceptability of permitting employers to discharge employees who observe something they consider to be illegal and who take steps to bring it to the attention of a supervisor or some other investigative body.[356] In many instances, unless an employee comes forward with information, unlawful or unethical activities and procedures may never be discovered.[357]

Examination of these whistleblower statutes reveals that they vary considerably from state to state. However, most of these whistleblower statutes only apply to public sector whistleblowers.[358] Few of the statutes extend protection to private sector whistleblowers. Of the thirty-three states with whistleblower statutes, about one-half extend protection to employees in the private sector.[359] Of those states that have enacted whistleblower statutes, Michigan,[360] Connecticut,[361] Maine,[362] and New Jersey[363] have enacted

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353. *See* Howard, *supra* note 332, at 69.

354. *See* Parker v. M & T Chems., Inc., 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989) (recognizing that in-house attorneys are also employees of their employer and thus are covered by the general whistleblower statute). See *supra* text accompanying notes 169-72 for further discussion of the *Parker* case.

355. At least 33 states have general whistleblower statutes. The states that have enacted whistleblower protection statutes include: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Washington, West Virginia, and Wisconsin. See *supra* note 20 and accompanying text for a list of each state's statute.

356. *See* John D. Feerick, *Toward a Model Whistleblowing Law*, 19 FORDHAM URB. L.J. 585, 587 (1992).

357. *Id.*

358. *See* Barnett, *supra* note 336, at 448 table 1.

359. The states that have extended protection to the private sector include: California, Colorado, Connecticut, Florida, Hawaii, Louisiana, Maine, Michigan, Minnesota, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Rhode Island. *See* Barnett, *supra* note 336, at 448, table 2.

360. MICH. COMP. LAWS ANN. §§ 15.361 to 15.369 (West 1994).

361. CONN. GEN. STAT. ANN. § 31-51 (West 1987).

362. ME. REV. STAT. ANN. tit. 26, §§ 831 to 839 (West 1988).

363. N.J. STAT. ANN. §§ 34: 19-1 to 34: 19-8 (West 1988).

the most comprehensive statutes.[364] However, even among the state statutes that extend protection to private sector whistleblowers, none directly address in-house attorneys or the difficulties confronting them.[365]

Although a majority of states have passed legislation to protect the whistleblower, current state protection is insufficient. The fact that a state has a whistleblower statute on its books does not guarantee adequate protection for all whistleblowers and all types of whistleblowing. This can specifically be seen in the case of in-house attorneys, who are left without specific statutory protection. To date, the only way that in-house attorneys have received statutory protection has been when general whistleblower legislation was applied to them.[366]

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364. These statutes are among the most comprehensive because they extend whistleblower protection to state, local, and private sector employees. *See* 9A LAB. REL. REP. (BNA) IERM 505: 23. For further explanation of why these statutes are the most comprehensive and for an examination of the effectiveness of whistleblower statutes on the whole, see generally Terry Morehead Dworkin & Janet P. Near, *Whistleblower Statutes: Are They Working?*, 25 AM. BUS. L.J. 241 (1987). The New Jersey whistleblower statute was held, in Parker v. M & T Chems., Inc., 566 A.2d 215, 222 (N.J. Super. Ct. App. Div. 1989), to extend protection to in-house attorneys. The *Parker* court held that the in-house attorney was included in the statutes' definition of employee. *Id.* See *supra* text accompanying notes 169-72 for further discussion of the *Parker* case.

365. There have been several decisions which have taken a general state whistleblower statute and applied it to an in-house attorney. *See, e.g.*, *Parker*, 566 A.2d at 215; Lepore v. National Tool & Mfg. Co., 540 A.2d 1296 (N.J. Super. Ct. App. Div. 1988), *aff'd*, 557 A.2d 1371 (N.J. 1989). Currently, no state whistleblower statutes explicitly include the in-house attorney. The Illinois General Assembly attempted to enact a specific statute granting in-house counsel the right to sue for retaliatory discharge in 1989. The measure, however, failed to become law. *See* Abramson, *supra* note 78, at 281-83. The proposed legislation stated:

> Section 1. This Act shall be known and may be cited as the "Retaliatory Discharge for In-House Attorneys Act."
>
> Section 2. An attorney employed as an attorney by an employer in a full-time capacity who is discharged by the employer under circumstances described herein shall not be barred from maintaining an action for compensatory damages for the tort of retaliatory discharge. An attorney may prevail in such an action only if the attorney can prove by clear and convincing evidence that the determining factor in the discharge was the attorney's refusal to participate in action in clear violation of statutes or of rules or regulations having the force of law, amounting to fundamental public policy.
>
> Section 3. In any action brought pursuant to Section 2, the complaint shall be filed under seal and, at the discretion of the court, all pretrial proceedings may be conducted in camera. In such an action, the attorney may reveal information obtained in his or her capacity as an attorney for the employer, otherwise privileged, but only to the extent necessary to establish the essential elements of the cause of action.
>
> Section 4. This bill shall take effect upon becoming law.

Senate Bill No. 13, Illinois 86th General Assembly (1989).

366. *See Parker*, 566 A.2d 215. The *Parker* case is the only case where an in-house attorney has received statutory whistleblower protection.

C. *Problems with and Inadequacies of Present Statutory Protection Schemes*

The present statutory protection available for all whistleblowers, both at the federal and state levels, is piecemeal and sketchy. The protection that does exist largely neglects private sector employees and completely ignores in-house counsel.[367] Although a majority of states have passed some sort of legislation to protect whistleblowers, the current state protection for whistleblowers is inadequate. Some states only offer protection to public sector employees.[368] Among those states that offer statutory protection to the private sector whistleblower, the protection and procedures of the statutes differ,[369] but the statutes are similar in that they all fail to address the plight of in-house counsel.

The federal statutes also offer insufficient protection to all whistleblowers. The anti-retaliation provisions found in various federal statutes apply only when whistleblowers allege specific violations under those statutes.[370] The Civil Service Reform Act and the Whistleblowers Protection Act of 1989 also offer insufficient protection because they apply only to federal employees and have other inherent weaknesses.[371] The constitutional guarantees against governmental interference with free speech do not apply in the context of the private sector employer-employee relationship.[372] Thus, although some whistleblowers currently have statutory protection at the federal and state level from the retaliatory acts of employers, in-house attorneys are left without any federal or state statutory protection.

V. PROPOSED MODEL RETALIATORY DISCHARGE STATUTE

Although the preceding sections describe a wide variety of legal measures that are available to protect the whistleblower, the existing protection is inadequate for in-house attorneys.[373] This inadequacy stems primarily from the limited scope and coverage of available protection.[374] Though certain individuals and groups receive whistleblower protection, the in-house counsel has been left with almost no protection at all.

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367. *See supra* notes 346-66 and accompanying text. There has been only one state, Illinois, that has attempted to pass a whistleblower statute that specifically addressed in-house counsel and the problems confronting them. *See supra* note 365 for the text of the proposed statute.

368. *See supra* note 355 and accompanying text.

369. *See generally* Dworkin & Near, *supra* note 364, at 241.

370. *See supra* text accompanying notes 346-51.

371. *See supra* text accompanying notes 343-51; Fisher, *supra* note 343, at 412-16.

372. *See supra* text accompanying notes 334-36.

373. See *supra* text accompanying notes 81-117 and 319-66 for a discussion of the types of protections available to whistleblowers.

374. See *supra* text accompanying notes 367-71 for further discussion of the inadequacies of the available whistleblower protection.

This Note proposes a model whistleblower statute that grants in-house attorneys the right to sue for retaliatory discharge. Retaliatory discharge suits by in-house attorneys should parallel the existing cause of action granted to general employees, with only minor modifications to account for the attorneys' role as professional advisers.[375] In-house attorneys should be allowed to sue when retaliated against for urging their employer to act lawfully or for refusing to violate professional codes of ethics. However, an employer should prevail if other legitimate grounds exist for the action taken against the attorney.[376]

A. *Model Retaliatory Discharge Statute*

SECTION ONE: DEFINITIONS

As used in this act:

a. "Employer" means any individual, partnership, association, or corporation which employs an attorney.[377]

b. "In-house attorney" means a lawyer who acts as an attorney for an employer as though engaged as a full-time employee of that employer.[378]

c. "Retaliatory action" means the discharge, suspension or demotion of an in-house attorney, or any other adverse employment action taken against an in-house attorney in the terms, conditions, location, position, or privileges of employment.[379]

d. "Public Body" means all of the following:

(1) the United States Congress, and state legislatures, or any popularly-elected local governmental body, or any member or employee of such governmental body;

(2) any federal, state, or local judiciary, or any member or employee of the judiciary;

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375. For examples of the existing cause of action for general employees, see, CONN. GEN. STAT. ANN. § 31-51 (West 1987); ME. REV. STAT. ANN. tit. 26, §§ 831 to 839 (West 1988); MICH. COMP. LAWS ANN. §§ 15.361 to 15.369 (West 1991); N.J. STAT. ANN. §§ 34: 19-1 to 34: 19-8 (West 1988).

376. The corporation should be able to defeat the attorney's retaliatory discharge claim if independent grounds for the discharge, such as unsatisfactory work performance, exist. *See, e.g.*, Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). The corporation should also prevail if it addressed the corporate counsel's objection, and counsel merely disagreed with the final policy. *See* Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 513 (N.J. 1980) (denying the employee's cause of action when the employer arguably complied with the public policy, but the employee continued to protest).

377. *See* N.J. STAT. ANN. § 39: 19-2(a) (West 1988); MICH. COMP. LAWS ANN. § 15.361(b) (West 1994); ME. REV. STAT. ANN. tit. 26, § 832(2) (West 1988).

378. *See* BLACK'S LAW DICTIONARY 740 (6th ed. 1990); General Dynamics Corp. v. State 1993 WL 225346 n.1 (Cal. Ct. App. June 8, 1993). This statute could be used to extend protection to attorneys who are associates of law firms or associations. However, this statute is focused primarily on in-house attorneys working for a corporation.

379. *See* N.J. STAT. ANN. § 34: 19-2(e) (West 1988).

(3) any federal, state, or local regulatory, administrative, or public agency or authority, or any member or employee of that body;
(4) any federal, state, or local law enforcement agency or any member or employee of a law enforcement agency;
(5) any federal, state, or local department of an executive branch of government; or
(6) any division, board, bureau, office, or commission or any of the public bodies described in the above paragraphs of this subsection.[380]

SECTION TWO: EMPLOYER RETALIATORY ACTIONS

An in-house attorney shall be allowed to maintain a cause of action for the tort of retaliatory discharge if the employer discharges, demotes, transfers, or threatens to discharge, demote, or transfer, or otherwise retaliates against an in-house attorney regarding the attorney's compensation, terms, conditions, location, position, or privileges of employment because the in-house attorney, acting in good faith, does any of the following:

a. Objects to, or refuses to participate in any activity, policy, or practice which the in-house attorney reasonably believes:
(1) is in violation of a law, or a rule or regulation declared pursuant to the law;
(2) is fraudulent or criminal in nature; or
(3) is incompatible with a clear mandate of public policy.

b. Discloses, or intends to disclose to a supervisor or public body, an activity, policy, or practice of the employer that the attorney reasonably believes:
(1) is in violation of a law, or a rule or regulation declared pursuant to the law;
(2) is fraudulent or criminal in nature; or
(3) is incompatible with a clear mandate of public policy.[381]

SECTION THREE: INITIAL REPORTING TO EMPLOYER REQUIRED

The protection against retaliatory action provided by this statute does not apply to an in-house attorney who makes a disclosure or causes the disclosure of an activity, policy, request, or practice to a public body unless the in-house attorney has first brought the alleged activity, policy, request, or practice, by written notice, to the attention of a person having

380. *See* CONN. GEN. STAT. ANN. § 31-51 (West 1987); ME. REV. STAT. ANN. tit. 26, § 832(4) (West 1988); MICH. COMP. LAWS ANN. § 15.361(d) (West 1994); N.J. STAT. ANN. §§ 34: 19-2(c) (West 1988).

381. *See* CONN. GEN. STAT. ANN. § 31-51 (West 1987); ME. REV. STAT. ANN. tit. 26, § 833 (West 1988); MICH. COMP. LAWS ANN. § 15.362 (West 1994); N.J. STAT. ANN. §§ 34: 19-3 (West 1988).

supervisory authority with the employer and has afforded the employer a reasonable amount of time to correct the activity, policy, request, or practice. Disclosure shall not be required where the in-house attorney is reasonably certain that the alleged activity, policy, request, or practice will result in imminent death or substantial bodily harm to the attorney or to another individual as a result of the disclosure, provided that the situation is an emergency.[382]

SECTION FOUR: BURDEN OF PROOF

The in-house attorney must show by a preponderance of the evidence that the discharge, demotion, transfer, or retaliatory action, whether actual or threatened, was the result of the in-house attorney's:

a. refusal to participate or comply with the employer's activity, policy, request, or practice; or

b. reporting of the alleged activity, policy, request, or practice which was in clear violation of either statutes, rules or regulations having the force of law, or a clearly mandated public policy.[383]

SECTION FIVE: PROCEDURE OF ACTION - ARBITRATION

An in-house attorney who alleges that an activity, policy, request, or practice which is in clear violation of the law or rules or regulations having the force of law, as referred to in Section Two, and who has complied with Sections Three and Four may, within one year, bring a complaint before an arbitrator or arbitration committee for retaliatory discharge.[384] A neutral

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382. *See* ME. REV. STAT. ANN. tit. 26, § 833(2) (West 1988); N.J. STAT. ANN. §§ 34: 19-4 (West 1986); MODEL RULES, *supra* note 33, Rule 1.6(b)(1). This provision is modeled in part after Model Rule 1.6(b)(1). Model Rule 1.6(b)(1) states:

> (b) 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;

Id.

383. See *supra* note 365 for the text of Senate Bill 13 of the Illinois 86th General Assembly (1989).

384. The in-house attorney who brings a retaliatory discharge suit will be required to go through an initial compulsory arbitration hearing. Several objections have been raised as to the constitutionality of compulsory arbitration proceedings. Some courts have declared such proceedings unconstitutional as either depriving the parties of liberty and property without due process of law, *see, e.g.*, Dorchy v. Kansas, 264 U.S. 286 (1924); Charles Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522 (1923), or as depriving parties of their constitutional right to a trial by jury, *see, e.g., In re* Smith, 112 A.2d 625 (Pa. 1955). Compulsory arbitration has, however, been held to be a valid method of dispute resolution in certain situations. A distinction may be drawn between the directly coercive and unconstitutional statutes, which, in effect, close the courts to litigants by compelling resort to arbitrators for final determinations of rights, and statutes designed merely to aid the courts by providing for arbitration in certain cases but reserving a right of appeal in the courts. Statutes of the latter class have generally been held valid. *See, e.g.*, Deibeikis v. Link-Belt

arbitrator must be selected by mutual agreement of the in-house attorney and employer or, in the absence of agreement, as provided in the Uniform Arbitration Act.[385] The arbitration proceeding itself shall be governed by the Uniform Arbitration Act.[386] If there is a conflict between the Uniform Arbitration Act and this Section, this Section shall govern. The arbitrator's award is final and binding, and is subject to review under the provisions of Section Six of this Act.[387]

SECTION SIX: REVIEW OF ARBITRATION PROCEDURE

After exhausting all available arbitration remedies as specified in Section Five, either party may appeal the arbitrator's decision by a petition for judicial review to the appropriate state court. The petition for judicial review of the arbitrator's decision will be held *in camera*, where the judge will make an initial determination of whether the appeal should proceed.[388] If the judge finds that the arbitrator's decision was not clearly erroneous, the decision of the arbitrator will stand and will be binding on both parties.[389] If the judge finds that the arbitrator's decision

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Co., 104 N.E. 211 (Ill. 1914); *In re* Smith, 112 A.2d 625 (Pa. 1955). This model retaliatory discharge statute requires compulsory arbitration to prevent the disclosure of confidential material and allows for later judicial review on appeal. For further discussion of compulsory arbitration, see, e.g., Robert Layton et al., *Using Compulsory Arbitration To Resolve EEO Disputes*, Arbitration and the Law 1991-92, AAA General Counsel's Annual Report, at 118; Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

385. *See* MONT. CODE. ANN. § 39-2-913(2)(a) (1987); UNIFORM ARBITRATION ACT § 3, 7 U.L.A. 96 (1985). Section 3 of the Uniform Arbitration Act, Appointment of Arbitrators by Court, states that:

> [i]f the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

UNIFORM ARBITRATION ACT § 3, 7 U.L.A. 96 (1985).

The Uniform Arbitration Act is a model set of rules dealing with arbitration and has been adopted by a majority of the states. Jurisdictions that have adopted the Uniform Arbitration Act include: Alaska, Arizona, Arkansas, Colorado, Delaware, the District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and Wyoming. *See* UNIFORM ARBITRATION ACT, 7 U.L.A. 1 (Supp. 1993).

386. UNIFORM ARBITRATION ACT §§ 5-7, 7 U.L.A. 99-116 (1985).

387. *See* MONT. CODE. ANN. § 39-2-914 (1989).

388. See *supra* note 365 for the text of Senate Bill 13 of the Illinois 86th General Assembly (1989).

389. The scope of judicial review of an arbitration decision is extremely narrow. *See* Fort Wayne Educ. Ass'n, Inc. v. Board of Sch. Trustees, 569 N.E.2d 672 (Ind. Ct. App. 1991). Courts have held that an arbitrator's decision and findings will not be disturbed unless clearly erroneous.

was clearly erroneous, the case shall proceed to trial in a closed session court.[390] Proper venue and jurisdiction shall be where the violation is alleged to have occurred or where the employer has its principal office.

SECTION SEVEN: DISCLOSURE OF CONFIDENTIAL MATERIAL

In a retaliatory discharge action, as specified in the previous sections, the in-house attorney may reveal information obtained in his or her capacity as an attorney for the employer, which is otherwise confidential or privileged, but only to the extent necessary to establish the essential elements of the cause of action.[391]

SECTION EIGHT: REMEDIES AVAILABLE - ARBITRATION AND COURTS

The arbitrator or court, in rendering a judgment in an action pursuant to this statute, shall order, as considered appropriate, the payment of back wages, actual damages, punitive damages, or any combination of these remedies. The arbitrator or court may also award the complainant all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, if the arbitrator or court determines that the award is appropriate.[392]

SECTION NINE: FALSE REPORTING

An in-house attorney found to have knowingly made a meritless, malicious, fraudulent, or bad faith claim of retaliatory discharge against the employer shall be subject to disciplinary action by the bar disciplinary body

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See, e.g., Grobet File Co. of Am., Inc. v. RTC Sys., Inc., 524 N.E.2d 404 (Mass. App. Ct. 1988); Marciniak v. Amid, 412 N.W.2d 248 (Mich. Ct. App. 1987); Miller v. Swanson, 289 N.W.2d 875 (Mich. Ct. App. 1980); D.M. Ward Const. Co., Inc. v. Electric Corp. of Kansas City, 803 P.2d 593 (Kan. Ct. App. 1990).

390. Discussion of the constitutional issues involving trial in a closed session court are beyond the scope of this note.

391. Allowing the in-house attorney to reveal privileged or confidential information obtained in his or her capacity as a lawyer corresponds with Model Rule 1.6(b). *See* MODEL RULES, *supra* note 33, Rule 1.6(b)(2). Rule 1.6(b)(2) states that:

> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (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.

Id.

This section does not apply to disclosure of company trade secrets. The determination of whether trade secrets can be disclosed by the in-house attorney must be left to the individual state trade secret rules.

392. *See* CONN. GEN. STAT. ANN. § 31-51 (West 1987); ME. REV. STAT. ANN. tit. 26, § 832(4) (West 1988); MICH. COMP. LAWS ANN. § 15.361(d) (West 1994); N.J. STAT. ANN. §§ 34: 19-2(c) (West 1986).

of the appropriate jurisdiction.[393]

B. *Commentary to the Model Retaliatory Discharge Statute*

COMMENTARY TO SECTION TWO:

This section grants in-house attorneys the right to sue for retaliatory discharge if they are able to show several elements. First, the in-house attorneys must show that their actions, objections, refusals, or disclosures, were based on a good faith belief that their employers had committed, or were about to commit, the suspected activities.[394] The in-house attorneys must demonstrate evidence of several factors to establish that they acted in good faith. The attorneys must present evidence of the alleged misconduct, of the attorneys' knowledge of the laws, rules or regulations that the employers allegedly disregarded, and of the efforts made by the attorneys to confirm the accuracy of their perceptions of both their employer's conduct, and the governing legal restrictions.[395] The attorney should also present this evidence within a reasonable time after discovery of such action. Second, the in-house attorney must honestly and reasonably believe that the wrongdoing will occur absent intervention. The term "reasonably believes," as used in this Section, is meant to be an objective standard of what the average in-house attorney would believe if put in the same or a similar situation.

The laws, rules, and regulations referred to in Section Two of the model statute include the applicable code of ethics. An attorney's code of ethics fits under the "rule[s] or regulation[s] declared pursuant to law" language in Section Two.[396] The phrase "incompatible with a clear mandate of public policy" is

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393. *See* CONN. GEN. STAT. ANN. § 31-51m (West 1987); MODEL CODE, *supra* note 33, DR 1-102. DR 1-102 states that:

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonestly, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Id.

394. See Section 2 (a) 1-3 and (b) 1-3 of the Model Retaliatory Discharge Statute, *supra* note 94, for a list of the suspected activities.

395. *See* standard suggested in WESTMAN, *supra* note 8, at 151; *see also* good faith belief requirement in, *e.g.*, N.H. REV. STAT. ANN. § 275-E: 2 (1988); N.Y. LAB. LAW § 740 (McKinney 1988).

396. *See* Section 2(a)(1) and (b)(1) of the Model Retaliatory Discharge Statute, *supra* note 94.

meant to indicate a policy which is required by state statute or regulation.[397] If the statute or regulation is susceptible to more than one reasonable interpretation, then it will not qualify as a clear mandate of public policy.[398] Furthermore, the public policy at issue does not have to be expressly stated to be clearly mandated. It is sufficient if the public policy is apparent from a study of the statute as a whole, or even a group of statutes.[399]

COMMENTARY TO SECTION THREE:

Requiring the in-house attorney to inform the corporation of the suspected violation or misconduct is an attempt to resolve disputes between the in-house attorney and the employer within the corporation and out of the public eye. This will help prevent any violation of attorney-client confidentiality or privilege.[400] This condition corresponds with the Model Rules' requirement of first trying to rectify the problem internally.[401]

Requiring internal disclosure will also ensure that the least damaging measure is taken by the attorney in disclosing or reporting the misconduct.[402]

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397. See *supra* notes 82-90 and accompanying text for a further discussion of clearly mandated public policy.

398. *See* Merck v. Advanced Draining Sys., Inc., 921 F.2d 549, 555-56 (4th Cir. 1990).

399. *See* Warthen v. Toms River Community Memorial Hosp., 488 A.2d 229, 232 (N.J. Super. Ct. App. Div. 1984); Schaffer v. Federal Trust Co., 28 A.2d 75, 79 (N.J. 1942).

400. See *supra* text accompanying notes 240-60 for a further discussion on attorney-client confidentiality and privilege.

401. *See* MODEL RULES, *supra* note 33, Rule 1.13(b)(1) to (3) (1994). Rule 1.13(b) states that:

> [i]f a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

Id.

Rule 1.13(b) (1) through (3) deals with the types of measures that the lawyer should consider taking if confronted with such a situation described in Rule 1.13(b). Such measures the lawyer may take include:

> (1) asking reconsideration of the matter;
>
> (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
>
> (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

MODEL RULES, *supra* note 33, Rule 1.13(b)(1) to (3).

402. Similarly, under the retaliatory discharge statutes of both New York and Maine, the employees are eligible to sue only if they first disclose the violation to a supervisor and give the employer a chance to correct it. *See* ME. REV. STAT. ANN. tit. 26, § 833 (West 1988); N.Y. LAB. LAW § 740 (McKinney 1988). To allow suits by attorneys who report certain activities of the

Only after the employer fails to rectify the problem must it be reported to outside officials.[403] Internal disclosure will also ensure that the in-house counsel's actions do not unnecessarily aggravate the employer's harm and embarrassment which is inherent in the situation. For the attorney to recover at all for the retaliatory actions of the employer, the attorney must have first informed the employer of the alleged misconduct, so that the employer would be aware of any potential harm.[404] This would, therefore, eliminate any chances of the employer being unnecessarily harmed or embarrassed.

There is one very limited exception to the general requirement of initial disclosure to the employer. Only in emergency situations, in which the attorneys believe with reasonable certainty that serious harm will come to themselves or to another individual, will outside disclosure be allowed without prior internal disclosure to the employer.[405] The reasonable certainty standard is to be judged by the standard of the objective in-house attorney, and should be treated as equivalent to the clear and convincing evidence standard. This would help avoid meritless claims against the employer.

COMMENTARY TO SECTION FOUR:

Requiring that the in-house attorney show by a preponderance of the evidence that the retaliatory action of the employer occurred will help to deter false or weak allegations by the in-house attorney. The preponderance of the evidence standard is sufficiently stringent to protect the employer's interests in avoiding groundless allegations, while at the same time being low enough to encourage suits by in-house attorneys who have had retaliatory actions taken against them.

The employer also has several methods which it can use to overcome the attorney's claim of retaliatory discharge. First, if the employer had independent grounds for the discharge of the attorney—such as unsatisfactory work performance—then the retaliatory discharge claim will fail.[406] Second, the

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employer to an outside agency without first reporting internally would encourage attorneys to disclose damaging information without giving the employer a chance to alter its behavior.

403. *See* Wrighten v. Metropolitan Hosp. Inc., 726 F.2d 1346, 1355-56 (9th Cir. 1984) (holding that a press conference was reasonable to improve black patient care when meetings with administrators proved unproductive).

404. *See* Section Three of the Model Retaliatory Discharge Statute.

405. This provision is in conformity with Model Rule 1.6(b)(1). *See* MODEL RULES, *supra* note 33, Rule 1.6(b)(1); see *supra* note 382 for the text of Rule 1.6(b)(1).

406. *See* Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (stating that despite the employee's exercise of protected speech, the employer may fire the employee for independent, legitimate reasons). *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-07 (1973) (stating that, under Title VII of the Civil Rights Act of 1964, once the plaintiff has

corporation will also prevail if it convinces the arbitrator or court that it addressed the corporate counsel's objection, but that counsel disagreed with the final policy.[407] The employer will also prevail if it convinces the arbitrator or court that the danger to the public did not justify the harm to the employer, and, therefore, the right to discharge its attorney should be preserved.

COMMENTARY TO SECTION FIVE:

Initially requiring compulsory arbitration to determine whether a violation occurred would be particularly useful in these types of cases because compulsory arbitration has the effect of protecting the privileged and confidential material. Arbitration is a common way to settle other attorney-client disputes, such as conflicts over fees, and is equally appropriate in the retaliatory discharge context.[408]

Arbitration benefits both the attorney and the employer in retaliatory discharge cases. The employer would be rid of the unpredictability of the jury system and the accompanying potential of extensive compensatory and punitive damages.[409] The employers would also have a forum in which the particulars of managerial performance could be handled more expertly.[410] At the same time, arbitration would be beneficial for attorneys. The arbitration process would offer attorneys the ability to confront their accusers at a hearing and would also provide the attorneys with relatively unrestricted access to a process that would promise timely relief.[411]

COMMENTARY TO SECTION SIX:

Requiring that the initial judicial review of the arbitrator's decision be held *in camera* would further protect the employer's interest in confidentiality. During this judicial review, the judge would determine whether the arbitrator's

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established a prima facie case of discrimination, the employer may rebut with evidence of a legitimate non-discriminatory reason for the adverse action).

407. *See* Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505 (N.J. 1980) (denying an employee's cause of action when the employer arguably complied with the public policy but the employee continued to protest).

408. *See, e.g.*, Guralnick v. Supreme Court, 747 F. Supp. 1109 (D.N.J. 1990) (discussing New Jersey system of fee arbitration, wherein a client challenge to a fee results in mandatory submission of the matter to arbitration).

409. *See* William B. Gould, IV, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMPLOYEE REL. L.J. 404, 415-16 (1987-88).

410. *Id.*

411. *Id.* Although the benefits of arbitration appear to weigh in favor of the employer, the attorney is given the overriding benefit of the opportunity to bring a claim. The benefits that do weigh in the employer's favor are intended to ensure that no confidential material will be exposed to the public.

decision was clearly erroneous or supported by the facts of the case. Numerous court decisions have held that the clearly erroneous standard is the appropriate standard of review of an arbitrator's decision.[412]

In addition, requiring that the arbitrator's decision be clearly erroneous will further prevent confidential and privileged information from being disclosed after the arbitration process. If, during the initial judicial review, the judge determines that substantive errors were made during the arbitration process which led to a clearly erroneous decision, then the claim shall proceed to a review by a closed session court. Requiring that the initial appeal be done through an *in camera* judicial review, and proceeding to a closed session court review only if the arbitration decision was clearly erroneous, also reduces the chances of any unnecessary disclosure of confidential or privileged information.

COMMENTARY TO SECTION SEVEN:

Allowing in-house attorneys to reveal confidential and privileged information obtained while the attorney was the in-house counsel conforms with the Model Rules of Professional Conduct's exception to confidentiality.[413] The in-house attorneys should be allowed to reveal this information in defending themselves against their employers' retaliatory actions.[414] This provision applies to all of the stages of the retaliatory discharge proceeding, including the arbitration, judicial review, and closed session court stages. If attorneys disclose confidential information outside any of these judicial proceedings, they will be subject to disciplinary action as required by the bar association of the applicable jurisdiction.[415] Disclosure by the attorney under Section Seven should not be interpreted as a client's waiver of the attorney-client privilege. Therefore, the attorney will be prevented, by privilege, from testifying against the corporation in any other suits.

COMMENTARY TO SECTION EIGHT:

In order to minimize the intrusion on the corporation's ability to fire its attorneys, the damage awards should generally be limited to compensatory damages. The attorney should not be allowed to collect punitive damages, except in situations involving outrageous and malicious retaliatory conduct by

412. *See supra* note 389.

413. *See* MODEL RULES, *supra* note 33, Rule 1.6(b)(2); see *supra* note 391 for the text of Rule 1.6(b)(2).

414. *See* MODEL RULES, *supra* note 33, Rule 1.6(b)(2). See *supra* text accompanying notes 301-10 for a further discussion of the confidentiality exception.

415. *See* Parker v. M & T Chems., Inc., 566 A.2d 215, 220 (N.J. Super. Ct. App. Div. 1989).

the employer.[416] In these cases, the arbitrator or court may award punitive damages if the arbitrator or court determines that such an award is appropriate. Allowing the attorney compensation for actual damages provides sufficient incentive for in-house counsel to sue when appropriate.[417]

Although some courts have granted reinstatement in retaliatory discharge suits brought by general employees when such relief is specifically authorized by statute,[418] reinstatement would be an unsuitable method of relief in suits under this model statute. Reinstatement has been seen as an inappropriate remedy in cases involving professionals, because a professional employee's effectiveness depends on the trust and cooperation of the employer.[419] Further, reinstatement is not appropriate because of the specialized skills required in professional employment.[420] These same reasons should limit an in-house counsel's remedy to monetary damages. The need for trust in the relationship between the attorney and the client is an essential part of the relationship.[421] The loss of trust after the attorney has successfully sued the employer would significantly interfere with an effective working relationship.

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416. The reason for limiting recovery to compensatory damages and generally not punitive damages is because of the uncertainty and high awards that accompany punitive damages, which generally impinge too greatly on an employer's liberty to terminate counsel. *See* LAWRENCE E. DUBE, JR., MANAGEMENT ON TRIAL: THE LAW OF WRONGFUL DISCHARGE 79 (1987); Gould, *supra* note 409, at 406. Corporations would be less willing to discharge employees if there was a chance that they would be liable for high punitive damage awards.

Some jurisdictions have already declined to impose punitive damages, finding that they interfere too greatly with the employer's ability to fire at will. *See, e.g.*, Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 841 (Wis. 1983) (finding that retaliatory discharge should be based on contract law so as to limit the remedies to making the plaintiff whole). Other jurisdictions have recognized punitive damages as appropriate relief, but have refused to award them in cases arising before the tort cause of action had been recognized. *See, e.g.*, Nees v. Hocks, 536 P.2d 512, 517 (Or. 1975) (en banc).

417. Compensatory damage awards also tend to be large in suits by high level employees alleging loss of salary. *See* Gould, *supra* note 409, at 405 (stating that a private study of jury awards in California from 1982 through 1986 found the average award in retaliatory discharge cases to be $652,100).

418. *See* DUBE, *supra* note 416, at 71-72; Whistleblower Protection Act of 1989, § 3(a)13vi, 5 U.S.C. § 1221 (e) (Supp. I 1989); National Labor Relations Act of 1935, § 10(c), 29 U.S.C. §160(c) (1988); Civil Rights Act of 1964, § 706(g), 42 U.S.C. § 2000e-5(g) (1988).

419. *See* Kurle v. Evangelical Hosp. Ass'n., 411 N.E.2d 326, 332 (Ill. App. Ct. 1980) (denying nurse temporary reinstatement).

420. *See* Zannis v. Lake Shore Radiologists, Ltd., 392 N.E.2d 126, 128 (Ill. App. Ct. 1979) (denying doctor reinstatement).

421. *See* General Dynamics Corp. v. State 1993 WL 225346 (Cal. Ct. App. June 8, 1993). The *General Dynamics* court stated that "[a]t the heart of the attorney-client relationship is the element of trust . . . . The client of an in-house counsel may find it difficult to develop such a relationship of trust and confidence if the attorney, once discharged, may 'turn on' the employer in contesting his termination." *Id.*

COMMENTARY TO SECTION NINE:

The statute should address the possibility of some attorneys bringing malicious, meritless, or bad faith actions against their former employer. Attorneys who file frivolous actions under this model statute should be disciplined for doing so. Hence, this statute would subject the in-house attorney who has brought a malicious, fraudulent, or bad faith retaliatory discharge claim to disciplinary action by the bar association of the attorney's jurisdiction.[422]

VI. CONCLUSION

Retaliatory discharge claims, clearly needed in general employment situations, should also be available to in-house attorneys because of the unique position these attorneys occupy.[423] Their employment situations, subject as they are to the control of the corporate employer, render in-house counsel as vulnerable to arbitrary dismissal as any other at-will employee. In addition, the single-client nature of the in-house counsel's practice distinguishes this job from the traditional attorney-client relationship.[424]

A retaliatory discharge action would protect the in-house counsel from the difficulties of their unique position as well as from incorrigible employers.[425] It would advance the objectives of the legal system without disrupting the ethical duty of confidentiality or the attorney-client privilege. Moreover, the applicability of the tort can be limited so as to not damage the mutual trust central to the attorney-client relationship. Retaliatory discharge also eliminates the inadequacy of the alternative option of withdrawal.[426] For these reasons, recovery in tort for retaliatory discharge should be allowed for corporate counsel.

John Jacob Kobus, Jr.

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422. *See* Parker v. M & T Chems., Inc., 566 A.2d 215, 220 (N.J. Super. Ct. App. Div. 1989). *See also* General Dynamics Corp. v. Superior Court, 876 P.2d 487, 504 (Cal. 1994) (stating that "an attorney who unsuccessfully pursues a retaliatory discharge suit, and in doing so discloses privileged client confidences, may be subject to State Bar disciplinary proceedings").

423. *See supra* text accompanying notes 276-87.

424. *See supra* text accompanying notes 278-79.

425. *See supra* text accompanying notes 162-68.

426. *See supra* text accompanying notes 192-216.