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# The Impact of *General Dynamics Corp.* *v. Superior Court* on the Evolving Tort of Retaliatory Discharge for In-House Attorneys

Chanda R. Coblenz\*

## I. Introduction

After law school, not all attorneys begin their practices in law firms.<sup>1</sup> Approximately ten percent of attorneys pursue legal careers as in-house counsel for corporations.<sup>2</sup> Because corporate attorneys each represent only one client — the corporation — they often face conflicts between their roles as professionals and their roles as corporate employees.<sup>3</sup> This conflict appears most evident when dismissed corporate counsel wish to pursue actions for retaliatory discharge<sup>4</sup> against their former employers.

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1. See Nancy K. Renfer, Comment, *Corporate Counsels' Lack of Retaliatory Discharge Action*, 10 N. ILL. U. L. REV. 89, 89-90 n.5 (1989) (providing statistics that show that 29.8% of attorneys work in fields other than private practice).

2. See Jeff Barge, *For In-House Counsel, Safety in Numbers*, A.B.A. J., Jan. 1995, at 28 (according to Fred Krebs, president of American Corporate Counsel Association) (stating that for past 20 years, in-house counsel have comprised approximately 10% of practicing attorneys). For the purposes of this Note, the terms in-house counsel, in-house attorney, corporate counsel, and corporate attorney are interchangeable.

3. See Grace M. Giesel, *The Ethics or Employment Dilemma of In-House Counsel*, 5 GEO. J. LEGAL ETHICS 535, 535-37 (1992) (discussing conflicts between in-house counsel's loyalty to client and duty to uphold ethical obligations); Raymis H.C. Kim, Note, *In-House Counsel's Wrongful Discharge Action Under the Public Policy Exception and Retaliatory Discharge Doctrine*, 67 WASH. L. REV. 893, 909 (1992) (discussing conflict between in-house attorney's duty to uphold ethical rules and personal desire to retain job); see also Nordling v Northern States Power Co., 478 N.W.2d 498, 501 (Minn. 1991) (recognizing in-house attorney's dual roles of attorney and corporate employee).

4. See *infra* notes 58-62 and accompanying text (defining retaliatory discharge); see also *infra* part III.B (discussing emergence of retaliatory discharge action).

In most jurisdictions, corporate employees who are not attorneys can sue their employers for retaliatory discharge.<sup>5</sup> Some commentators argue that courts should give in-house counsel the same legal options as other corporate employees and should allow corporate attorneys to bring retaliatory discharge tort actions.<sup>6</sup> Several courts, however, have distinguished between in-house attorneys and other corporate employees.<sup>7</sup> Because attorneys are professionals, they have rights and duties that other corporate employees lack.<sup>8</sup> The courts that have considered this issue have declined to extend the retaliatory discharge tort action to in-house counsel because the courts fear that such actions could jeopardize the trust and confidence of the attorney-client relationship.<sup>9</sup> These courts

5. See *infra* note 76 (listing jurisdictions that recognize public policy exception to employment at-will doctrine).

6. See, e.g., Daniel S. Reynolds, *Wrongful Discharge of Employed Counsel*, 1 GEO. J. LEGAL ETHICS 553, 553 (1988) (arguing that courts should extend protection afforded by wrongful discharge action to lawyers); Sara A. Corello, Note, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 COLUM. L. REV. 389, 389 (1992) (asserting that courts should allow in-house counsel to bring retaliatory discharge actions); Kim, *supra* note 3, at 894-95 (same); Renfer, *supra* note 1, at 92 (same).

7 See *Willy v. Coastal Corp.*, 647 F. Supp. 116, 118 (S.D. Tex. 1986) (emphasizing attorneys' ethical responsibilities that other company employees lack), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988); *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 108 (Ill. 1991) (emphasizing attorney's duty of confidentiality and other ethical considerations); *Herbster v. North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343, 346 (Ill. App. Ct. 1986) (stating that attorneys hold special position in society), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987); *Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 504 (Minn. 1991) (stating that breach of attorney-client confidentiality is likely to occur in retaliatory discharge actions, but allowing breach of contract claim); *Michaelson v. Minnesota Mining & Mfg. Co.*, 474 N.W.2d 174, 178 (Minn. Ct. App. 1991) (emphasizing that client has unfettered right to dismiss attorney in order to preserve relationship of trust with attorney), *aff'd*, 479 N.W.2d 58 (Minn. 1992); *McGonagle v. Union Fidelity Corp.*, 556 A.2d 878, 885 (Pa. Super. Ct. 1989) (recognizing obligation of in-house attorney to abide by state laws and ethical rules), *appeal denied*, 575 A.2d 115 (Pa. 1990).

8. See MODEL RULES OF PROFESSIONAL CONDUCT pmb1. (1992) (discussing various responsibilities of attorneys); MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmb1. (1983) (same).

9 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992) (requiring preservation of client confidences); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1983) (same). See generally *Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986) (rejecting retaliatory discharge tort to preserve client confidences), *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) (same); *Herbster v. North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986) (same), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987); *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991) (same).

reason that the tort of retaliatory discharge places client confidences at risk.<sup>10</sup>

## II. A Brief Explanation of the Employment At-Will Doctrine<sup>11</sup>

From the beginning, American employment law borrowed principles from English law.<sup>12</sup> The Statute of Labourers<sup>13</sup> influenced English employment law by giving masters a property interest in their servants.<sup>14</sup> Because of this property interest, employees were required to remain with their employers until the end of the term of employment.<sup>15</sup>

During the nineteenth century, England redefined the concepts of master and servant and developed the presumption in English employment law that employment for an unspecified term lasted one year.<sup>16</sup> This rule sought to provide fairness both to employers and to employees.<sup>17</sup> Inequity would have

10. See cases cited *supra* note 7 (refusing to allow in-house attorneys to bring retaliatory discharge tort actions).

11. See ANDREW D. HILL, "WRONGFUL DISCHARGE" AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE 1-12 (Wharton Industrial Research Unit Labor Relations and Public Policy Series No. 31, 1987) (providing historical discussion of employment at-will doctrine); IRA M. SHEPARD ET AL., WITHOUT JUST CAUSE: AN EMPLOYER'S PRACTICAL AND LEGAL GUIDE ON WRONGFUL DISCHARGE 16-18 (1989) (tracing development of employment at-will doctrine); Joseph DeGiuseppe, Jr., *The Effect of the Employment-at-Will Rule on Employee Rights to Job Security and Fringe Benefits*, 10 FORDHAM URB. L.J. 1, 2-8 (1981) (same); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118-35 (1976) (providing thorough discussion of employment at-will doctrine); Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85, 85-128 (1982) (providing extensive comparison between development of English and American employment law).

12. See Feinman, *supra* note 11, at 118 (discussing development of at-will employment doctrine in United States).

13. See 5 Eliz., ch. 4, § 5 (1562) (Eng.) (stating that no servant could leave employment before end of term), *repealed by* Conspiracy and Protection of Property Act, 38 & 39 Vict., ch. 86, § 17 (1875) (Eng.); Statute of Labourers, 1349, 23 Edw. 3, ch. 2 (Eng.) (stating that government would imprison employee if employee left service of employer without reasonable cause before term of employment ended).

14. See Jacoby, *supra* note 11, at 87 (stating that English statutory law viewed servants as property).

15. See sources cited *supra* note 13 (providing English statutory law on employment termination); see also Jacoby, *supra* note 11, at 87 (stating that government could compel servant, who left master's service before end of term, to complete term of service).

16. 1 WILLIAM BLACKSTONE, COMMENTARIES \*425.

17. *Id.*, see Feinman, *supra* note 11, at 120 (stating that employers and employees derived benefits from each other at different points in employment relationship); Jacoby, *supra* note 11, at 90 (stating that equity, along with labor shortage, led to development of

resulted if employers could have retained workers only during the harvest seasons and then discharged the workers to avoid compensating them during the off-season.<sup>18</sup> Similarly, employers would have suffered financially if employees could have received wages during the winter and then quit their jobs immediately before the busy harvest season.<sup>19</sup> Although the English rule of employment for one year developed originally to protect those involved in harvesting,<sup>20</sup> courts expanded the rule to apply to workers in all employment fields.<sup>21</sup> As the variety of employment opportunities increased, English law began to allow parties to terminate employment relationships after giving adequate notice.<sup>22</sup>

At the end of the nineteenth century, American law departed from the English rule of yearly employment and developed the at-will employment doctrine.<sup>23</sup> Employment at-will arose in the United States as a result of this country's commitment to individual enterprise and to free markets during the Industrial Revolution.<sup>24</sup> As industry in the United States expanded, employ-

yearly hiring).

18. 1 WILLIAM BLACKSTONE, COMMENTARIES \*425; see Feinman, *supra* note 11, at 120 (explaining development of yearly hiring rule in context of harvesting); Jacoby, *supra* note 11, at 90 (discussing need for year-long employment).

19. See sources cited *supra* note 18 (discussing yearly hiring rule).

20. 1 WILLIAM BLACKSTONE, COMMENTARIES \*425; see Feinman, *supra* note 11, at 120 (discussing origins of yearly hiring doctrine).

21. See *Baxter v Nurse*, 134 Eng. Rep. 1171, 1173 (C.P. 1844) (extending rule of employment for one year to editor of literary publication); *Beeston v Collyer*, 130 Eng. Rep. 786, 787-88 (C.P. 1827) (extending rule of employment for one year to clerk of army sergeant); CHARLES M. SMITH, A TREATISE ON THE LAW OF MASTER AND SERVANT 41 (1852) (stating that yearly employment rule extended to domestic workers, clerks, and others); Feinman, *supra* note 11, at 120 (explaining expansion of yearly hiring rule).

22. See *Payzu, Ltd. v Hannaford*, [1918] 2 K.B. 348, 350 (stating that party must give reasonable notice prior to termination of employment); FRANCIS BATT, THE LAW OF MASTER AND SERVANT 63-64 (George J. Webber ed., 5th ed. 1967) (discussing appropriate notice); 1 WILLIAM BLACKSTONE, COMMENTARIES \*425-26 (stating that party could terminate yearly hiring on quarter's notice); DeGiuseppe, *supra* note 11, at 5 (stating that party could terminate employment relationship only by notice in accordance with custom of trade or by reasonable notice); Feinman, *supra* note 11, at 121 (stating that party could terminate service contract upon reasonable notice).

23. See DANIEL M. MACKEY, EMPLOYMENT AT WILL AND EMPLOYER LIABILITY 10 (1986) (stating that changes in American society led to development of employment at-will rule); Feinman, *supra* note 11, at 122 (discussing American divergence from English law); William L. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV 201, 203 (1985) (stating that employment at-will doctrine was departure from English common law).

24. See MACKEY, *supra* note 23, at 10 (discussing impact of Industrial Revolution on

ees wanted the opportunity to seek various employment opportunities,<sup>25</sup> while employers wanted flexibility in structuring their work forces to adapt to the changing economy<sup>26</sup>

The at-will employment doctrine, by definition, allows both employers and employees to terminate the employment relationship at any time and for any reason.<sup>27</sup> The doctrine often applies to a relationship between an em-

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employment at-will doctrine); SHEPARD ET AL., *supra* note 11, at 16 (same); Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 306 (1991) (stating that employment at-will doctrine arose as result of American society's commitment to individual enterprise and free markets); Feinman, *supra* note 11, at 124 (discussing influence of *laissez faire* economic and political doctrine on development of employment at-will); *see also* HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877) (setting forth presumption of employment at-will rule). Horace Wood declared, without adequate foundation, that employment at-will was the American employment rule. *See* Feinman, *supra* note 11, at 126 (stating that Wood failed to cite cases that supported his proposition, misstated other American case law, and incorrectly summarized state of prevailing English rule). Even though Wood's scholarship proved inaccurate, courts across the United States accepted his statement of the employment at-will rule. *Id.*

25. *See* Pitcher v United Oil & Gas Syndicate, Inc., 139 So. 760, 761 (La. 1932) (stating that employee never enters permanent employment contract because employee must retain opportunity to seek better employment); DANIEL P. WESTMAN, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 4 (1991) (providing rationale for employment at-will rule).

26. *See* WESTMAN, *supra* note 25, at 4 (providing rationale for employment at-will rule).

27. *See* Somers v. Cooley Chevrolet Co., 153 A.2d 426, 428 (Conn. 1959) (concluding that indefinite general hiring agreement is terminable at-will by either party); Fisher v Jackson, 118 A.2d 316, 317 (Conn. 1955) (finding that without consideration in addition to services provided, employment is actually indefinite general hiring that is terminable at-will); Pine River State Bank v. Mettelle, 333 N.W.2d 622, 627 (Minn. 1983) (stating that hiring for indefinite term constitutes employment at-will); English v College of Medicine & Dentistry, 372 A.2d 295, 297 (N.J. 1977) (upholding exercise of at-will employment doctrine); Hartbarger v Frank Paxton Co., 857 P.2d 776, 779 (N.M. 1993) (stating that employment for indefinite term is terminable at-will), *cert. denied*, 114 S. Ct. 1068 (1994); Murphy v American Home Prods. Corp., 448 N.E.2d 86, 89 (N.Y. 1983) (stating that employment for indefinite term is presumed to be employment at-will); Martin v New York Life Ins. Co., 42 N.E. 416, 417 (N.Y. 1895) (stating that employment for unspecified term is employment at-will, regardless of agreement to pay salary at specific intervals); Jones v Keogh, 409 A.2d 581, 582 (Vt. 1979) (accepting that employer or employee may terminate at-will employment agreement for any reason); Wilder v Cody Country Chamber of Commerce, 868 P.2d 211, 217 (Wyo. 1994) (allowing either party to terminate at-will employment arrangement for any reason); Lincoln v Wackenhut Corp., 867 P.2d 701, 703 (Wyo. 1994) (same); WESTMAN, *supra* note 25, at 4 (providing overview of at-will employment); *see also* Coelho v Post-Seal Int'l, Inc., 544 A.2d 170, 176 (Conn. 1988) (stating that general rule is that contracts for indefinite term are terminable at-will); Monge v Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (stating that at common law, employment contracts for indefinite term are

ployer and an employee in the absence of a written employment agreement.<sup>28</sup> If an employment agreement does exist, but fails to specify a definite duration, then a presumption arises that the employment exists at-will.<sup>29</sup> An

presumed to be at-will); *Jorgensen v Pennsylvania R.R.*, 138 A.2d 24, 32 (N.J. 1958) (stating that in absence of contract or statute to contrary, employment relationship is terminable at-will); *Schlenk v Lehigh Valley R.R.*, 62 A.2d 380, 381 (N.J. 1948) (same); RESTATEMENT (SECOND) OF AGENCY § 442 & cmt. a (1958) (codifying employment at-will doctrine). Section 442 of the Restatement (Second) of Agency states: "[U]nless otherwise agreed, mutual promises by principal and agent to employ and to serve create obligations to employ and to serve which are terminable upon notice by either party; if neither party terminates the employment, it may terminate by lapse of time or by supervening events." *Id.* § 442.

28. See WESTMAN, *supra* note 25, at 4 (explaining characteristics of employment at-will); Cramton, *supra* note 24, at 306 (affirming that under employment at-will relationship, employers and employees may terminate employment relationship at any time absent express agreement to contrary); see also 9 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1017 at 129-30 (Walter H.E. Jaeger ed., 3d ed. 1967 & Supp. 1994) (stating that if contract does not provide fixed term, either party may terminate contract at-will with no required notice period).

29. See *Somers v. Cooley Chevrolet Co.*, 153 A.2d 426, 428 (Conn. 1959) (concluding that indefinite general hiring agreement is terminable at-will by either party); *Fisher v Jackson*, 118 A.2d 316, 317 (Conn. 1955) (finding that without consideration in addition to services provided, employment is actually indefinite general hiring that is terminable at-will); *Simard v Resolution Trust Corp.*, 639 A.2d 540, 551 (D.C. 1994) (stating that general presumption of at-will employment exists when employment is for indefinite term); *Rood v General Dynamics Corp.*, 507 N.W.2d 591, 597 (Mich. 1993) (finding presumption of at-will employment in contract for indefinite duration); *Pine River State Bank v Mettillie*, 333 N.W.2d 622, 627 (Minn. 1983) (stating that hiring for indefinite term constitutes employment at-will); *English v College of Medicine & Dentistry*, 372 A.2d 295, 297 (N.J. 1977) (upholding exercise of at-will employment doctrine); *Murphy v American Home Prods. Corp.*, 448 N.E.2d 86, 89 (N.Y. 1983) (stating that employment for indefinite term is presumed to be employment at-will); *Martin v New York Life Ins. Co.*, 42 N.E. 416, 417 (N.Y. 1895) (stating that employment for unspecified term is employment at-will, regardless of agreement to pay salary at specific intervals); *Osterman-Levitt v MedQuest, Inc.*, 513 N.W.2d 70, 72 (N.D. 1994) (presuming that employment agreement for indefinite term is terminable at-will); *Halpin v LaSalle Univ.*, 639 A.2d 37, 38 (Pa. Super. Ct. 1994) (stating that presumption of at-will employment exists); WILLISTON, *supra* note 28, § 1017, at 129 (stating that contract for indefinite term is terminable at-will); WOOD, *supra* note 24, § 134 (stating that presumption of at-will employment exists); see also *Coelho v Posi-Seal Int'l, Inc.*, 544 A.2d 170, 176 (Conn. 1988) (stating that general rule is that contracts for indefinite term are terminable at-will); *Monge v Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974) (stating that, at common law, employment contracts for indefinite term are presumed to be at-will); *Jorgensen v Pennsylvania R.R.*, 138 A.2d 24, 32 (N.J. 1958) (stating that in absence of contract or statute to contrary, employment relationship is terminable at-will); *Schlenk v Lehigh Valley R.R.*, 62 A.2d 380, 381 (N.J. 1948) (same); *Jones v Keogh*, 409 A.2d 581, 582 (Vt. 1979) (accepting employment at-will doctrine);

early Tennessee case, *Payne v Western & Atlantic Railroad*,<sup>30</sup> capsulized the employment at-will doctrine. The court stated:

[M]en must be left, without interference to discharge or retain employe[e]s at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employe[e] may exercise in the same way, to the same extent, for the same cause or want of cause as the employer.<sup>31</sup>

In *Adair v United States*,<sup>32</sup> the United States Supreme Court, in 1908, analyzed the constitutional implications of the employment at-will doctrine in situations involving interstate commerce.<sup>33</sup> The Supreme Court examined

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SHEPARD ET AL., *supra* note 11, at 16 (tracing development of employment at-will); WESTMAN, *supra* note 25, at 4 (providing overview of at-will employment). *But cf.* Toussaint v Blue Cross & Blue Shield, 292 N.W.2d 880, 884 (Mich. 1980) (stating that general rule that hirings for indefinite term are terminable at-will is merely rule of construction rather than substantive limitation on enforceability of contract); *supra* note 24 (criticizing Wood's scholarship).

30. 81 Tenn. 507 (1884).

31. *Payne v Western & Atl. R.R.*, 81 Tenn. 507, 518-19 (1884). In *Payne*, the Tennessee Supreme Court considered whether a person or a business may threaten to discharge employees for trading with a particular merchant. *Id.* at 517 *Payne* owned and operated a store that was located at the junction of five railroad lines. *Id.* at 509 Many railroad employees traded with *Payne*. *Id.* *Payne* contended that the defendant railroad conspired to damage his business. *Id.* at 509-10. The railroad allegedly harmed *Payne* by posting an illegal order and commanding company employees not to trade with *Payne*. *Id.* at 510. Among other things, the railroad threatened to discharge any employees who traded with *Payne*. *Id.* at 511. The court explained that the permissibility of the railroad's behavior depended on the types of contracts that the employees possessed. *Id.* at 517 For example, if a railroad employed an employee for a fixed term and discharged the employee prior to the expiration of that term, then the employee could bring an action against the railroad for breach of contract. *Id.* However, if the employment contract was terminable at-will, then the employee could bring no action against the railroad because either party could terminate the employment relationship for any reason. *Id.* The *Payne* court stated further that if the railroad drove away *Payne's* customers and destroyed his business through threats and intimidations, then the railroad was liable to *Payne* in damages. *Id.* at 521. However, the court cautioned that "threats and intimidations" must be understood in their legal sense. *Id.* The court defined a threat as a declaration of an intention to injure a person through an illegal act, while an intimidation causes a person to fear such a declaration. *Id.* Because the act of discharging railroad employees for transacting business with *Payne* was not unlawful, the railroad's threats to take that action were not threats in law and therefore did not give rise to *Payne's* claim. *Id.* Because the railroad committed no legal wrong, the court concluded that *Payne* was not entitled to a remedy for the railroad's acts. *Id.* at 527

32. 208 U.S. 161 (1908).

33. *Adair v. United States*, 208 U.S. 161, 172-76 (1908) (finding that statute prohibiting employer from discharging at-will employees based on labor organization membership



the Fifth Amendment's protection of liberty and determined that the provision allowed individuals to contract freely without government interference.<sup>34</sup> Six years later, in *Coppage v Kansas*,<sup>35</sup> the Supreme Court extended the protection of the employment at-will doctrine to the states by declaring that the Fourteenth Amendment protected the freedom of contract.<sup>36</sup> The Supreme Court, both in *Adair* and in *Coppage*, concluded

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invaded employer's Fifth Amendment liberty and property rights); accord *Coppage v Kansas*, 236 U.S. 111 (1915) (finding that statute prohibiting employer from discharging at-will employees based on labor organization membership invaded employer's Fourteenth Amendment liberty and property rights); see also *Lochner v New York*, 198 U.S. 45, 53 (1905) (interpreting Constitution to support freedom of contract between employer and employee). In *Adair*, the U.S. Supreme Court examined whether Congress could declare it a criminal offense for an agent of an interstate carrier to discharge an employee because of his membership in a labor organization. *Adair*, 208 U.S. at 171. Congress passed a statute that prohibited common carriers from requiring their employees to pledge not to join labor organizations. *Id.* at 168-69. According to the statute, carriers who violated the statute by dismissing employees or by threatening to dismiss employees who joined labor organizations committed a misdemeanor. *Id.* *Adair* worked as an agent of the Louisville and Nashville Railroad while *Coppage* worked as an employee of the railroad. *Id.* at 170. The relationship between the parties thus fell within the congressional statute. *Id.* *Coppage* belonged to a labor organization. *Id.* In contravention of the statute, *Adair* discharged *Coppage* from his employment because of *Coppage's* membership in the labor organization. *Id.* The Court examined whether the Fifth Amendment prohibited the enforcement of this statute. *Id.* at 172. The Court concluded that the statute invaded the personal liberty protected by the Due Process Clause of the Fifth Amendment because this liberty includes the right to make contracts involving one's own labor. *Id.* Employers and employees have reciprocal rights to end their employment relationship. *Id.* at 175. Employees may quit their employment for any reason, just as employers may dismiss employees for any reason, absent specified discharge provisions in the employment contract. *Id.* at 174-75. Thus, the Court held that *Adair*, as an agent for the railroad, could discharge *Coppage* for any reason and that the Fifth Amendment protected *Adair's* conduct. *Id.* at 176.

34. *Adair*, 208 U.S. at 175-76.

35. 236 U.S. 1 (1915).

36. *Coppage v Kansas*, 236 U.S. 1, 11 (1915) (finding that statute prohibiting employer from discharging at-will employees based on labor organization membership invaded employer's Fourteenth Amendment liberty and property rights); accord *Adair v United States*, 28 U.S. 161, 180 (finding that statute prohibiting employer from discharging at-will employees based on labor organization membership invaded employer's Fifth Amendment liberty and property rights); see also *Lochner v New York*, 198 U.S. 45, 53 (1905) (interpreting Constitution to support freedom of contract between employer and employee). In *Coppage*, the U.S. Supreme Court considered the constitutionality of a state statute that declared it a misdemeanor for employers to require employees to give up membership in a labor union or agree not to join a union while working for the employer. *Coppage*, 236 U.S. at 6-7. *Hedges*, a switchman for the St. Louis & San Francisco Railway, belonged to a labor union. *Id.* at 7. *Coppage*, the railway superintendent, asked *Hedges* to sign an agreement to withdraw from the union. *Id.* *Coppage* also stated that if *Hedges*

that either an employer or an employee may terminate an at-will employment relationship at any time and for any reason.<sup>37</sup> Thus, the Supreme Court interpreted the Constitution to support employment at-will and to allow employers and employees great freedom both in contracting for and in terminating their employment relationships.<sup>38</sup>

Over time, courts created exceptions to the at-will employment doctrine.<sup>39</sup> A wrongful discharge plaintiff must fall within one of these exceptions to recover damages for his dismissal.<sup>40</sup> Plaintiffs tend to argue either that their employers breached implied terms of an employment agreement or that their employers discharged them in contravention of an important

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failed to sign the agreement, then the railway would fire Hedges. *Id.* Hedges refused to sign the agreement and the railroad subsequently dismissed him. *Id.* A Kansas statute prohibited the employer's action. *Id.* at 6-7. The Supreme Court, emphasizing the importance of freedom of contract, struck down the statute. *Id.* at 13. The Court included freedom of contract in the bundle of rights of personal liberty and private property guaranteed by the Fourteenth Amendment. *Id.* at 14. Because the Court interpreted the Constitution to allow both the employer and the employee the right to choose whether to contract on one another's terms, the Supreme Court held that the Kansas statute was unconstitutional. *Id.* at 26.

37. *Coppage*, 236 U.S. at 10-11, *Adair*, 208 U.S. at 174-75.

38. *Coppage*, 236 U.S. at 10-11, *Adair*, 208 U.S. at 174-76.

39. See *Pugh v See's Candies, Inc.*, 171 Cal. Rptr. 917, 926 (Ct. App. 1981) (recognizing implied covenant of good faith and fair dealing in employment contract); *Cleary v American Airlines, Inc.*, 168 Cal. Rptr. 722, 728 (Ct. App. 1980) (same); *Borschel v City of Perry*, 512 N.W.2d 565, 566 (Iowa 1994) (stating that two exceptions to employment at-will rule are discharge in violation of public policy and contract implied by terms of employee handbook); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1255-56 (Mass. 1977) (recognizing implied covenant of good faith and fair dealing in employment contract); *Rood v General Dynamics Corp.*, 507 N.W.2d 591, 598 (Mich. 1993) (stating that wrongful discharge plaintiff can bring action either in tort or in contract); *Wilder v Cody Country Chamber of Commerce*, 868 P.2d 211, 220 (Wyo. 1994) (stating that all employment contracts contain covenants of good faith and fair dealing).

40. See cases cited *supra* note 39 (illustrating exceptions to employment at-will doctrine). The available damages for wrongful discharge based in contract differ from damages for retaliatory discharge under the public policy exception to employment at-will. See *Amalgamated Transit Union Local 1324 v Roberts*, 434 S.E.2d 450, 452-53 (Ga. 1993) (stating that wrongful discharge plaintiff recovering under breach of contract theory receives damages for actual loss incurred because of breach); *Kelsay v Motorola, Inc.*, 384 N.E.2d 353, 359-60 (Ill. 1978) (allowing plaintiff in retaliatory discharge tort action to recover punitive damages if employer commits torts with "fraud, actual malice, deliberate violence or oppression or when the defendant acts willfully or with gross negligence as to indicate wanton disregard of the rights of others"); *SHEPARD ET AL.*, *supra* note 11, at 18-19 (stating that retaliatory discharge tort claim allows recovery of compensatory and punitive damages while contract claim is usually limited to lost wages).

public policy<sup>41</sup> Discharged in-house counsel have asserted both types of claims to attempt to avoid the employment at-will rule.<sup>42</sup>

### III. Wrongful Discharge: Exceptions to the Employment At-Will Doctrine

#### A. Implied Contract Theory

Wrongful discharge plaintiffs seeking to avoid the strictures of the employment at-will doctrine sometimes can argue successfully that the employer has forfeited its rights to discharge at-will and instead has agreed to discharge the employee only under certain circumstances.<sup>43</sup> Wrongful discharge cases seldom involve written or express agreements about employment terms.<sup>44</sup> Therefore, wrongful discharge plaintiffs sometimes argue that the courts should imply particular terms into their employment contracts.<sup>45</sup> Discharged employees proceeding under an implied contract theory of wrongful discharge contend that even though the employer did not expressly

41. See *Pugh v See's Candies, Inc.*, 171 Cal. Rptr. 917, 926 (Ct. App. 1981) (recognizing implied covenant of good faith and fair dealing in employment contract); *Cleary v American Airlines, Inc.*, 168 Cal. Rptr. 722, 728 (Ct. App. 1980) (same); *Borschel v City of Perry*, 512 N.W.2d 565, 566 (Iowa 1994) (stating that two exceptions to employment at-will rule are discharge in violation of public policy and contract implied by terms of employee handbook); *Rood v General Dynamics Corp.*, 507 N.W.2d 591, 598 (Mich. 1993) (stating that wrongful discharge plaintiff can bring action either in tort or in contract).

42. See generally *Willy v Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986) (asserting retaliatory discharge claim), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988); *General Dynamics Corp. v Superior Court*, 876 P.2d 487 (Cal. 1994) (en banc) (asserting both breach of contract and retaliatory discharge claims); *Balla v Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991) (asserting retaliatory discharge claim); *Herbster v North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986) (same), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987); *Mourad v Automobile Club Ins. Ass'n*, 465 N.W.2d 395 (Mich. Ct. App.) (asserting breach of contract claim), *appeal denied*, 478 N.W.2d 443 (Mich. 1991); *Nordling v Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991) (asserting both breach of contract and retaliatory discharge claims); *Michaelson v Minnesota Mining & Mfg. Co.*, 474 N.W.2d 174 (Minn. Ct. App. 1991) (same), *aff'd*, 479 N.W.2d 58 (Minn. 1992); *Parker v M & T Chems., Inc.*, 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989) (asserting statutory whistleblower claim); *McGonagle v Union Fidelity Corp.*, 556 A.2d 878 (Pa. Super. Ct. 1989) (asserting retaliatory discharge claim).

43. See RALPH H. BAXTER, JR. & GARY R. SINISCALCO, *MANAGER'S GUIDE TO LAWFUL TERMINATIONS* 17-18 (1983) (explaining breach of contract theory in wrongful discharge actions).

44. See *id.* at 18 (explaining need for implied contract theory in wrongful discharge actions).

45. *Id.*

promise job security or guarantee firing only for cause, the employer's actions and behavior implied such promises.<sup>46</sup>

Courts apply a foreseeability standard to evaluate implied contract claims.<sup>47</sup> First, courts consider whether the employer could have foreseen that the employee reasonably would anticipate job security on the basis of the employer's actions and words.<sup>48</sup> Second, if an employee, as a result of the employer's actions, reasonably expected job security, then the court must determine whether it should incorporate the employee's expectations into the employment agreement through the implied duty of good faith and fair dealing<sup>49</sup> or whether it should enforce the agreement as the employer's implied-in-fact promise.<sup>50</sup> Employees can base their expectations on various aspects of employment practices, including hiring letters,<sup>51</sup> the nature of the job,<sup>52</sup>

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46. *See id.* at 19 (explaining method of establishing implied terms in employment contract); WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, *EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES* 63 (2d ed. 1993) (discussing implied promises of employers).

47. *See* HOLLOWAY & LEECH, *supra* note 46, at 63 (discussing standard for implied employment contracts).

48. *See id.* (explaining test for determining whether implied contract exists).

49. *See id.* (explaining test for determining whether implied contract exists); *see also* Pugh v See's Candies, Inc., 171 Cal. Rptr. 917, 926 (Ct. App. 1981) (recognizing implied covenant of good faith and fair dealing in employment contract); Cleary v American Airlines, Inc., 168 Cal. Rptr. 722, 728 (Ct. App. 1980) (same); Fortune v National Cash Register Co., 364 N.E.2d 1251, 1255-56 (Mass. 1977) (same); Wilder v Cody Country Chamber of Commerce, 868 P.2d 211, 220 (Wyo. 1994) (stating that all employment contracts contain covenants of good faith and fair dealing); RESTATEMENT (SECOND) CONTRACTS § 205 (1979) (stating that "every contract imposes upon each party a duty of good faith and faith dealing"). *But see* Dickens v Snodgrass, Dunlap & Co., 872 P.2d 252, 261 (Kan. 1994) (finding no covenants of good faith and fair dealing in at-will employment contracts); Bass v Happy Rest, Inc., 507 N.W.2d 317, 321 (S.D. 1993) (finding no implied covenant of good faith and fair dealing in employment contracts); *cf.* American Cast Iron Pipe Co. v Williams, 591 So. 2d 854, 857 (Ala. 1991) (determining that employment contract contained implied duty to act in good faith, but stating that breach of that duty did not give rise to bad faith tort action).

50. *See* HOLLOWAY & LEECH, *supra* note 46, at 63 (explaining test for determining whether implied contract exists).

51. *See* Miller v. Community Discount Ctrs., Inc., 228 N.E.2d 113, 115 (Ill. App. Ct. 1967) (implying contract for at least one year of employment from letter stating that employer would pay balance of employee's moving expenses after one year); Costello v Siems-Carey Co., 167 N.W. 551, 552 (Minn. 1918) (finding language in telegram that work "will take about two years to complete" implied contract for two years of employment).

52. *See* Sarusal v Seung, 165 P. 116, 118 (Wash. 1917) (stating that when employment was for duration of particular undertaking, then dismissal without cause before job was completed constituted breach of implied contract); HOLLOWAY & LEECH, *supra* note 46, at 65 (describing implied contracts arising from duration of particular task). "When

the custom of the business or the industry,<sup>53</sup> salary terms,<sup>54</sup> the employee's length of employment,<sup>55</sup> and statements in employee handbooks.<sup>56</sup>

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an employee has to initiate a special operation, inaugurate a new office, or undertake some other job that is reasonably contemplated to last a particular length of time, it is implied that the period of employment will be at least sufficient to complete the assigned duty " *Id.* at 65-66.

53. *See* *Brewster v Martin Marietta Aluminum Sales, Inc.*, 378 N.W.2d 558, 565 (Mich. Ct. App. 1985) (finding that placing employee on probation for problems with job performance was enough to show policy of termination for just cause only); *HOLLOWAY & LEECH*, *supra* note 46, at 69 (stating that to determine whether employers have implied particular termination policies, courts first examine established company practices and if no company policy exists, courts then determine employee's reasonable expectations based on customs and practices of industry).

54. *See* *Mannon v Campbell Soup Co.*, 52 Cal. Rptr. 246, 248 (Dist. Ct. App. 1966) (inferring employment for fixed term based on fixed period of salary payment). *But see* *Fortenberry v Haverty Furniture Cos.*, 335 S.E.2d 460, 460 (Ga. Ct. App. 1985) (determining that written agreement showing annual base pay did not imply contract duration of one year); *Roy v Woonsocket Inst. for Sav.*, 525 A.2d 915, 918 (R.I. 1987) (deciding that statement of employee's salary in annual terms did not imply length of employment).

55. *See* *Foley v Interactive Data Corp.*, 765 P.2d 373, 387-88 (Cal. 1988) (recognizing existence of implied contract from oral assurances of continuing employment and from employee's six years and nine months of service to company); *Cleary v American Airlines*, 168 Cal. Rptr. 722, 729 (Ct. App. 1980) (implying contract guaranteeing job security from employee's 17 years of employment and from policy of fairness); *see also* *Pugh v See's Candies, Inc.*, 171 Cal. Rptr. 917, 927 (Ct. App. 1981) (implying promise that employer would not act arbitrarily in dealing with employee based on "totality of parties' relationship"). *But see* *Breen v. Dakota Gear & Joint Co.*, 433 N.W.2d 221, 223 (S.D. 1988) (upholding at-will employment doctrine even though employee worked for nine and one-half years).

56. *See* *Borschel v City of Perry*, 512 N.W.2d 565, 566 (Iowa 1994) (recognizing implied contract exception to employment at-will from terms of employee handbook); *Toussaint v Blue Cross & Blue Shield*, 292 N.W.2d 880, 885 (Mich. 1980) (holding that express terms of employment agreement or employee's reasonable expectations based on employer's policy statement could imply contractual obligation for employers not to dismiss employees without cause); *Nicosia v Wakefern Food Corp.*, 643 A.2d 554, 558 (N.J. 1994) (emphasizing that court would examine employee's reasonable expectations rather than employer's intentions when determining whether implied contract existed); *Witkowski v Thomas J. Lipton, Inc.*, 643 A.2d 546, 550 (N.J. 1994) (same); *Weiner v McGraw-Hill, Inc.*, 443 N.E.2d 441, 445 (N.Y. 1982) (finding limitation on employer's ability to discharge employee based on language in employee handbook); *Leahy v Starflo Corp.*, 431 S.E.2d 567, 568 (S.C. 1993) (stating that employer was obligated contractually to follow disciplinary procedures outlined in company policy manual); *Kumpf v United Tel. Co.*, 429 S.E.2d 869, 871 (S.C. Ct. App. 1993) (implying terms of handbook into employment agreement); *Niesent v Homestake Min. Co.*, 505 N.W.2d 781, 782 (S.D. 1993) (implying that employer could discharge employee only for cause from terms of employee handbook); *Burnside v Simpson Paper Co.*, 864 P.2d 937, 943 (Wash. 1994) (allowing terms of employee policy manual to

### B. Retaliatory Discharge Tort Theory

A discharged employee may also attempt to avoid the rigid at-will employment rule by bringing a retaliatory discharge tort action.<sup>57</sup> A retaliatory discharge action does not remedy the situation in which an employer fires an employee for a good reason, for no reason, or for an improper reason.<sup>58</sup> Rather, an employee may bring a retaliatory discharge action properly only when the employee's discharge contravened a public policy.<sup>59</sup> In order to sustain a claim of retaliatory discharge, an employee must prove two elements.<sup>60</sup> First, the employee must show that the employer fired or demoted the employee in retaliation for the employee's

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modify employment at-will arrangement); *Bailey v Sewell Coal Co.*, 437 S.E.2d 448, 451 (W Va. 1993) (implying representations made in employee handbook or policy manual into employment agreement); *Wilder v. Cody Country Chamber of Commerce*, 868 P.2d 211, 217 (Wyo. 1994) (recognizing that statements in employee handbooks can imply terms of employment contract). *But see Stopczynski v Ford Motor Co.*, 503 N.W.2d 912, 914 (Mich. Ct. App. 1993) (finding that employment manual with specific procedures for discipline did not alter at-will employment relationship).

57. *See Borschel v City of Perry*, 512 N.W.2d 565, 566 (Iowa 1994) (stating that two exceptions to employment at-will rule are discharge in violation of public policy and contract implied by terms of employee handbook); *Rood v General Dynamics Corp.*, 507 N.W.2d 591, 598 (Mich. 1993) (stating that wrongful discharge plaintiff can bring action either in tort or in contract). In contrast to breach of contract claims, plaintiffs that recover under the retaliatory discharge tort cause of action may receive punitive damages and damages for pain and mental suffering. *See Kelsay v Motorola, Inc.*, 384 N.E.2d 353, 359-60 (Ill. 1978) (permitting recovery of punitive damages in retaliatory discharge action); *see also Hansen v Harrah's*, 675 P.2d 394, 397 (Nev 1984) (permitting recovery of punitive damages in retaliatory discharge cases, but refusing to award punitive damages in particular case).

58. *See HOLLOWAY & LEECH*, *supra* note 46, at 144 (explaining retaliatory discharge); *Kim*, *supra* note 3, at 894 (explaining retaliatory discharge and arguing for its adoption as available cause of action for in-house attorneys). Retaliatory discharge falls within the public policy exception to the at-will employment doctrine. *Kim*, *supra* note 3, at 893-94.

59. *See Keneally v Orgam*, 606 P.2d 127, 129 (Mont. 1980) (stating that unjustified firing does not give rise to wrongful discharge action, but cause of action arises only when discharge violates public policy); *HOLLOWAY & LEECH*, *supra* note 46, at 144 (discussing evolution of retaliatory discharge tort); *Kim*, *supra* note 3, at 894 (explaining retaliatory discharge and arguing for its adoption as available cause of action for in-house attorneys); *see also infra* note 76 (providing list of jurisdictions that recognize public policy exception and sampling of cases recognizing exception).

60. *See Midgett v Sackett-Chicago, Inc.*, 473 N.E.2d 1280, 1285 (Ill. 1984) (naming required elements of retaliatory discharge tort), *cert. denied*, 474 U.S. 909 (1985); *Herbster v. North Am. Co. for Health & Life Ins.*, 501 N.E.2d 343, 344 (Ill. App. Ct. 1986) (same), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987); *see also infra* part IV (discussing *Herbster* decision).

activities or refusal to act.<sup>61</sup> Second, the employee must prove that the dismissal contravened a clearly stated public policy.<sup>62</sup>

In *Petermann v International Brotherhood of Teamsters Local 396*,<sup>63</sup> California became the first state to recognize the retaliatory discharge cause of action. The *Petermann* court recognized the new action in order to address public policy concerns.<sup>64</sup> Other courts have experienced difficulty

61. See *Midgett*, 473 N.E.2d at 1285 (stating that plaintiff must allege that discharge was retaliatory); *Herbster*, 501 N.E.2d at 344 (stating that plaintiff must show that employer discharged employee in retaliation for employee's activities).

62. See *Parnar v Americana Hotels, Inc.*, 652 P.2d 625, 630-31 (Haw. 1982) (requiring clearly mandated public policy to support retaliatory discharge action); *Midgett*, 473 N.E.2d at 1285 (same); *Palmateer v International Harvester Co.*, 421 N.E.2d 876, 879 (Ill. 1981) (stating that retaliatory discharge action is permitted when public policy is clear, but action is denied when it is "equally clear that only private interests are at stake"); *Herbster*, 501 N.E.2d at 344 (requiring clear statement of public policy to support retaliatory discharge action); *Abrisz v Pulley Freight Lines*, 270 N.W.2d 454, 456 (Iowa 1978) (finding that discharge of employee for statements in support of fellow worker's unemployment benefits claim did not contravene clear public policy); *Adler v American Standard Corp.*, 432 A.2d 464, 472-73 (Md. 1981) (requiring clearly mandated public policy to support retaliatory discharge action); *Bourgeois v Horizon Healthcare Corp.*, 872 P.2d 852, 855 (N.M. 1994) (requiring clear mandate of public policy to support retaliatory discharge action); *Campbell v Ford Indus., Inc.*, 546 P.2d 141, 146 (Or. 1976) (stating that shareholder's right to inspect company's records is not clear and compelling statement of public policy and, therefore, fails to support employee/shareholder's retaliatory discharge action); *Jones v Keogh*, 409 A.2d 581, 582 (Vt. 1979) (stating that although "full employment and employer-employee harmony are noble goals to which society aspires," these goals do not indicate clear and compelling public policies that will support retaliatory discharge action); *Thompson v St. Regis Paper Co.*, 685 P.2d 1081, 1088-89 (Wash. 1984) (en banc) (requiring clearly mandated public policy to support retaliatory discharge action). But see *Novosel v Nationwide Ins. Co.*, 721 F.2d 894, 898-99 (3d Cir. 1983) (stating that clear statutory mandate of public policy is unnecessary; plaintiff needs to show only significant and recognized public policy).

63. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

64. *Petermann v International Bhd. of Teamsters Local 396*, 344 P.2d 25, 29 (Cal. Dist. Ct. App. 1959) (holding that employer's discharge of employee for refusing to commit perjury violated public policy and supported cause of action for retaliatory discharge). The *Petermann* court evaluated whether any limits should be imposed on an employer's right to terminate an at-will employee. *Id.* at 27 *Local 396* (the union) employed individuals on an at-will basis. *Id.* at 26. *Petermann* was called to testify before an investigative committee of the California legislature. *Id.* Plaintiff alleged that the union ordered *Petermann* to perjure himself before the committee. *Id.* After *Petermann* refused to perjure himself, the union discharged *Petermann*. *Id.* The *Petermann* court discussed the relationship between employment at-will and public policy. *Id.* at 27 The court concluded that even though an employment contract without a specified duration is usually terminable at-will, an employer's right to dismiss an employee may be limited by overriding public policy concerns. *Id.* The court stated: "To 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

in determining when an employee's discharge violates public policy because of the inherent ambiguity in public policy analysis.<sup>65</sup> Thus, to establish a retaliatory discharge tort claim, a wrongful discharge plaintiff must identify a *clearly stated* public policy that his discharge violates.<sup>66</sup>

In *Palmateer v International Harvester Co.*,<sup>67</sup> for example, the Supreme Court of Illinois attempted to define "public policy" by surveying case law from other jurisdictions.<sup>68</sup> The *Palmateer* court stated that the

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conduct upon the part of both the employee and employer and would serve to contaminate the honest administration of public affairs." *Id.* Therefore, the *Petermann* court held that the union wrongfully discharged Petermann and that Petermann could bring a retaliatory discharge action under the public policy exception. *Id.* at 27-28.

65. See *Gantt v. Sentry Ins.*, 824 P.2d 680, 684, 687 (Cal. 1992) (recognizing difficulty of distinguishing between public policy and normal employer-employee disputes); *Palmateer v International Harvester Co.*, 421 N.E.2d 876, 878-79 (Ill. 1981) (stating that public policy is ambiguous concept).

66. See *Herbster v North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343, 344 (Ill. App. Ct. 1986) (requiring plaintiff to show that discharge violated specific public policy to support retaliatory discharge claim), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987). Courts determine whether employers have violated clear statements of public policy as a matter of law. See *Fineman v New Jersey Dept. of Human Servs.*, 640 A.2d 1161, 1168-69 (N.J. Super. Ct. App. Div. 1994) (stating that trial court identifies public policy as matter of law); *Niesent v Homestake Min. Co.*, 505 N.W.2d 781, 783 (S.D. 1993) (stating that determination of whether employee's termination violates clear public policy is question of law).

67 421 N.E.2d 876 (Ill. 1981).

68. *Palmateer v International Harvester Co.*, 421 N.E.2d 876, 878-79 (Ill. 1981) (finding that employee who was discharged for giving information to law enforcement officers about co-worker's possible criminal violations stated cause of action for retaliatory discharge). The *Palmateer* court sought to determine whether *Palmateer's* disclosure of information to the police about a co-worker's possible violation of the criminal code fell within the public policy exception to the employment at-will doctrine. *Id.* at 880. Ray *Palmateer* worked for International Harvester (IH) as a managerial employee. *Id.* at 877. *Palmateer* alleged that IH fired him because he gave law enforcement agencies information about a fellow employee's possible violations of the state's criminal code and agreed to testify against the co-worker if necessary. *Id.* The court surveyed previous case law about retaliatory discharge to determine the requirements of a public policy that would support the retaliatory discharge claim. *Id.* at 877-79. The *Palmateer* court concluded that IH fired *Palmateer* in violation of an established public policy because the state's criminal code was the most basic form of public policy. *Id.* at 879. Although the court could identify no specific constitutional or statutory provision requiring a citizen to assist in the prosecution of a crime, the court found that public policy encouraged citizen participation in crime-fighting. *Id.* at 880. Because the court found that the state had a clear public policy favoring investigation and subsequent prosecution of crimes and that IH discharged *Palmateer* in contravention of this clear public policy, the court sustained *Palmateer's* retaliatory discharge action. *Id.*



"matter must strike at the heart of a citizen's social rights, duties, and responsibilities" before the court will allow the tort of retaliatory discharge.<sup>69</sup> In order to fall within the public policy exception to the employment at-will doctrine, many jurisdictions require retaliatory discharge plaintiffs to show that their employers violated clearly stated and important public policies by discharging them.<sup>70</sup> In order to be "public," the policy must further a public interest and not merely a private, personal, or professional end.<sup>71</sup> Courts often uphold public policies found in statutes and in constitutions,<sup>72</sup> and

69. *Id.* at 878-79

70. *See* Parnar v Americana Hotels, Inc., 652 P.2d 625, 630-31 (Haw. 1982) (requiring clearly mandated public policy to support retaliatory discharge action); *Palmateer*, 421 N.E.2d at 879 (stating that courts permit retaliatory discharge actions when public policy is clear, but courts deny actions when it is "equally clear that only private interests are at stake"); *Abrisz v Pulley Freight Lines*, 270 N.W.2d 454, 456 (Iowa 1978) (finding that discharge of employee for statements in support of fellow worker's unemployment benefits claim did not contravene clear public policy); *Adler v American Standard Corp.*, 432 A.2d 464, 472-73 (Md. 1981) (requiring clear mandate of public policy to support retaliatory discharge action); *Bourgeois v Horizon Healthcare Corp.*, 872 P.2d 852, 855 (N.M. 1994) (same); *Campbell v Ford Indus., Inc.*, 546 P.2d 141, 146 (Or. 1976) (stating that shareholder's right to inspect company's records is not clear and compelling statement of public policy and, therefore, fails to support employee/shareholder's retaliatory discharge action); *Jones v Keogh*, 409 A.2d 581, 582 (Vt. 1979) (stating that although "full employment and employer-employee harmony are noble goals to which society aspires," these goals do not indicate clear and compelling public policies that will support retaliatory discharge action); *Thompson v St. Regis Paper Co.*, 685 P.2d 1081, 1088-89 (Wash. 1984) (en banc) (requiring clearly mandated public policy to support retaliatory discharge action); *see also* *Jackson v Minidoka Irrigation Dist.*, 563 P.2d 54, 58 (Idaho 1977) (refusing to allow retaliatory discharge action when discharge did not violate public policy); *Scrogan v Kraftco Corp.*, 551 S.W.2d 811, 812 (Ky. Ct. App. 1977) (refusing to allow retaliatory discharge action when employer fired employee for attending night school because school attendance was private concern rather than public policy); *Keneally v Organ*, 606 P.2d 127, 129-30 (Mont. 1980) (refusing to allow retaliatory discharge action when employer discharged employee because of dispute over internal management rather than public policy).

71. *See* *Foley v Interactive Data Corp.*, 765 P.2d 373, 380 (Cal. 1988) (stating that public policy affects society at large rather than personal interest of employer or employee); *Reynolds*, *supra* note 6, at 577 (discussing necessary elements of successful cause of action under public policy exception to employment at-will doctrine).

72. *See* *Antinerella v Rioux*, 642 A.2d 699, 705 (Conn. 1994) (stating that statutory and constitutional provisions contain public policy); *Adams v George W Cochran & Co.*, 597 A.2d 28, 34 (D.C. 1991) (limiting statements of public policy to those found in state statutes or constitution); *Palmateer*, 421 N.E.2d at 878 (surveying origins of public policy); *Smith v Board of Educ.*, 89 N.E.2d 893, 896 (Ill. 1950) (stating that public policy may arise from state statutes and constitutions); *Vagts v Perry Drug Stores, Inc.*, 516 N.W.2d 102, 103 (Mich. Ct. App. 1994) (finding public policy most often exists in explicit statements by legislature); *Boyle v Vista Eyewear, Inc.* 700 S.W.2d 859, 871 (Mo. Ct. App. 1985)

sometimes those found in administrative rules and regulations.<sup>73</sup> Courts also find public policies in the common law.<sup>74</sup> In some cases, professional ethical codes may present an expression of public policy.<sup>75</sup>

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(recognizing public policy stated in state statutes and constitution); *Pierce v Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512 (N.J. 1980) (listing available sources of clear public policy); *Roberts v Adkins*, 444 S.E.2d 725, 729 (W Va. 1994) (finding statements of public policy in state constitution and legislative enactments); *Brockmeyer v Dun & Bradstreet*, 335 N.W.2d 834, 840 (Wis. 1983) (limiting statements of public policy to those found in state statutes or constitution). See generally *Tameny v Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (finding that statute prohibiting price-fixing provided public policy sufficient to support action for retaliatory discharge); *Glenn v Clearman's Golden Cock Inn, Inc.*, 13 Cal. Rptr. 769 (Dist. Ct. App. 1961) (allowing retaliatory discharge action by employee dismissed for engaging in statutorily protected union activities); *Petermann v International Bhd. of Teamsters Local 396*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (allowing retaliatory discharge action by employee who upheld statute by refusing to commit perjury); *Frampton v Central Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973) (permitting workers' compensation statute to provide public policy); *Sventko v Kroger Co.*, 245 N.W.2d 151 (Mich. Ct. App. 1976) (permitting workers' compensation statute to provide public policy); *O'Sullivan v Mallon*, 390 A.2d 149 (N.J. Super. Ct. Law Div. 1978) (finding that statute that prohibited practice of medicine without license provided public policy basis for plaintiff's action); *Nees v Hocks*, 536 P.2d 512 (Or. 1975) (finding that jury duty obligation created public policy sufficient to support retaliatory discharge action); *Reuther v Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. Super. Ct. 1978) (same); *Harless v First Nat'l Bank*, 246 S.E.2d 270 (W Va. 1978) (allowing retaliatory discharge action by employee who refused to violate consumer credit code).

73. See *Parnar v. Americana Hotels, Inc.*, 652 P.2d 625, 631 (Haw. 1982) (recognizing that regulatory provisions can state public policy); *Boyle v Vista Eyewear, Inc.*, 700 S.W.2d 859, 871 (Mo. Ct. App. 1985) (same); *Pierce v Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512 (N.J. 1980) (finding that administrative rules and regulations can express public policy); *Roberts v Adkins*, 444 S.E.2d 725, 729 (W Va. 1994) (recognizing statement of public policy in legislatively approved regulations).

74. See *Antinerella v Rioux*, 642 A.2d 699, 705 (Conn. 1994) (stating that although constitution and statutes provide statements of public policy, courts also develop public policy); *Parnar*, 652 P.2d at 631 (allowing judicial decisions to establish public policy, but urging courts to proceed cautiously when acting without prior legislative expression on issue); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981) (stating that when statutes and constitutions are silent about issue, courts look to judicial decisions for statements of public policy); *Smith v Board of Educ.*, 89 N.E.2d 893, 896 (Ill. 1950) (same); *Pierce*, 417 A.2d at 512 (stating that courts express public policy); *Gutierrez v Sundancer Indian Jewelry, Inc.*, 868 P.2d 1266, 1272-73 (N.M. Ct. App. 1993) (stating that judiciary serves as appropriate source of public policy), *cert. denied*, 869 P.2d 820 (N.M. 1994).

75. See *Boyle*, 700 S.W.2d at 871 (stating that ethical codes can state public policy in certain instances); *Cisco v United Parcel Serv., Inc.*, 476 A.2d 1340, 1343 (Pa. Super. Ct. 1984) (stating that mandates of professional ethics code may define public policy sufficient to support wrongful discharge claim); see also Alfred G. Feliu, Note, *Discharge of Professional Employees: Protecting Against Dismissal for Acts Within a Professional Code*

Currently, most states recognize the retaliatory discharge action.<sup>76</sup>

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*of Ethics*, 11 COLUM. HUM. RTS. L. REV 149, 179 (1979-1980) (arguing that discharge of professional for his compliance with ethical standards of profession should establish *prima facie* case of violation of public policy); *cf. Pierce*, 417 A.2d at 512 (stating that although professional ethical codes could express public policy, such codes would probably not provide clear statements of public policy because ethical codes serve only to guide members of particular professions).

76. See HOLLOWAY & LEECH, *supra* note 46, at 135 (providing summary of states creating public policy exception); *cf. Reynolds*, *supra* note 6, at 559 (pointing out that even though jurisdictions recognize public policy exception, particular facts of case determine outcome). The following jurisdictions recognize the retaliatory discharge cause of action: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. See generally *Lucas v Brown & Root, Inc.*, 736 F.2d 1202 (8th Cir. 1984) (allowing public policy exception to employment at-will doctrine); *Kilpatrick v Delaware County Soc'y for the Prevention of Cruelty to Animals*, 632 F Supp. 542 (E.D. Pa. 1986) (same); *Newman v Legal Servs. Corp.*, 628 F Supp. 535 (D.D.C. 1986) (same); *Winther v DEC Int'l, Inc.*, 625 F Supp. 100 (D. Colo. 1985) (same); *Roberts v Citicorp Diners Club, Inc.*, 597 F Supp. 311 (D. Md. 1984) (same); *Merkel v Scovill, Inc.*, 570 F Supp. 133 (S.D. Ohio 1983) (same); *Knight v American Guard & Alert, Inc.*, 714 P.2d 788 (Alaska 1986) (expressing willingness to recognize public policy exception to employment at-will doctrine, but unable to determine whether theory applied without full record of case); *Wagenseller v Scottsdale Memorial Hosp.*, 710 P.2d 1025 (Ariz. 1985) (allowing public policy exception to employment at-will doctrine); *City of Green Forest v Morse*, 873 S.W.2d 155 (Ark. 1994) (same); *Tameny v Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (same); *Petermann v International Bhd. of Teamsters Local 396*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (creating public policy exception to at-will employment doctrine); *Antinerella v Rioux*, 642 A.2d 699 (Conn. 1994) (allowing public policy exception to employment at-will doctrine); *Magnan v Anaconda Indus., Inc.*, 479 A.2d 781 (Conn. 1984) (same); *Sheets v Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980) (same); *Lebow v American Chem. & Ref. Co.*, No. 112554, 1994 WL 411331 (Conn. Super. Ct. July 29, 1994) (same); *Parnar v Americana Hotels, Inc.*, 652 P.2d 625 (Haw. 1983) (same); *Smith v Chaney Brooks Realty, Inc.*, 865 P.2d 170 (Haw. Ct. App. 1994) (same); *Jackson v Minidoka Irrigation Dist.*, 563 P.2d 54 (Idaho 1977) (same); *Palmateer v International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981) (same); *Kelsey v Motorola, Inc.*, 384 N.E.2d 353 (Ill. 1978) (accepting public policy exception to employment at-will in context of discharge for filing workers' compensation claim); *Frampton v Central Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973) (accepting possibility of public policy exception); *Borschel v City of Perry*, 512 N.W.2d 565 (Iowa 1994) (recognizing availability of public policy exception to employment at-will doctrine, but not applying exception in particular case); *Springer v Weeks & Leo Co.*, 429 N.W.2d 558 (Iowa 1988) (allowing public policy exception to employment at-will doctrine); *Palmer v Brown*, 752 P.2d 685 (Kan. 1988) (same); *Murphy v City of Topeka-Shawnee County Dept. of Labor Servs.*, 630 P.2d 186 (Kan. Ct. App. 1981) (same); *Firestone Textile Co. v Meadows*, 666 S.W.2d 730 (Ky. 1983) (same); *Parl-Mutuel Clerks*

Union Local 541 v Kentucky Jockey Club, 551 S.W.2d 801 (Ky 1977) (same); Hobson v McLean Hosp. Corp., 522 N.E.2d 975 (Mass. 1988) (same); Watassek v Michigan, Dept. of Mental Health, 372 N.W.2d 617 (Mich. Ct. App. 1985) (same); Trombetta v Detroit, T. & I.R.R., 265 N.W.2d 385 (Mich. Ct. App. 1978) (same); Phipps v Clark Oil & Ref. Corp., 408 N.W.2d 569 (Minn. 1987) (same); Boyle v Vista Eyewear, Inc., 700 S.W.2d 859 (Mo. Ct. App. 1985) (same); Henderson v St. Louis Hous. Auth., 605 S.W.2d 800 (Mo. Ct. App. 1978) (same); Keneally v Organ, 606 P.2d 127 (Mont. 1980) (recognizing possibility of public policy exception, but not applying it to facts of particular case); Hansen v Harrah's, 675 P.2d 394 (Nev. 1984) (allowing public policy exception to employment at-will doctrine); Cloutier v. Great Atl. & Pac. Tea Co., 436 A.2d 1140 (N.H. 1981) (same); Monge v Beebe Rubber Co., 316 A.2d 549 (N.H. 1974) (same); Lalley v Copygraphics, 428 A.2d 1317 (N.J. 1981) (same); Pierce v Ortho Pharmaceutical Corp., 417 A.2d 505 (N.J. 1980) (recognizing public policy exception to at-will employment doctrine, but not applying it to particular facts of case); Chavez v Manville Prods. Corp., 777 P.2d 371 (N.M. 1989) (allowing public policy exception to employment at-will doctrine); Daniel v Carolina Sunrock Corp., 430 S.E.2d 306 (N.C. Ct. App.) (same), *rev'd in part*, 436 S.E.2d 835 (N.C. 1993); Sides v Duke Hosp., 328 S.E.2d 818 (N.C. Ct. App.) (same), *review denied*, 333 S.E.2d 490 (N.C.) and 335 S.E.2d 13 (N.C. 1985); Krein v Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987) (same); Burk v K-Mart Corp., 770 P.2d 24 (Okla. 1989) (same); Nees v Hocks, 536 P.2d 512 (Ore. 1975) (en banc) (same); Yaindi v Ingersoll-Rand Co., 422 A.2d 611 (Pa. Super. Ct. 1980) (same); Ludwick v This Minute of Carolina, Inc., 337 S.E.2d 213 (S.C. 1985) (same); Niesent v Homestake Min. Co., 505 N.W.2d 781 (S.D. 1993) (same); Johnson v Kreiser's, Inc., 433 N.W.2d 225 (S.D. 1988) (same); Hodges v S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992) (same); Sabine Pilot Serv., Inc. v Hauck, 687 S.W.2d 733 (Tex. 1985) (same); Hodges v Gibson Prods. Co., 811 P.2d 151 (Utah 1991) (same); Payne v Rozendaal, 520 A.2d 586 (Vt. 1986) (same); Lockhart v Commonwealth Educ. Sys. Corp., 439 S.E.2d 328 (Va. 1994) (same); Bowman v State Bank, 331 S.E.2d 797 (Va. 1985) (same); Thompson v St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984) (same); Roberts v Adkins, 444 S.E.2d 725 (W Va. 1994) (same); Harless v First Nat'l Bank, 246 S.E.2d 270 (W Va. 1978) (same); Brockmeyer v Dun & Bradstreet, 335 N.W.2d 834 (Wis. 1983) (same); Siebken v Town of Wheatland, 700 P.2d 1236 (Wyo. 1985) (same).

The following states fail to recognize retaliatory discharge: Alabama, Florida, Georgia, Louisiana, Mississippi, Nebraska, New York, and Rhode Island. *See generally* Frichter v National Life & Accident Ins. Co., 620 F Supp. 922 (E.D. La. 1985) (refusing to recognize public policy exception to employment at-will doctrine), *aff'd*, 790 F.2d 891 (5th Cir. 1986); Schultheiss v Mobil Oil Exploration & Producing Southeast, Inc., 592 F Supp. 628 (W.D. La. 1984) (same); Hinrichs v Tranquillaire Hosp., 352 So.2d 1130 (Ala. 1977) (same); Hartley v Ocean Reef Club, Inc., 476 So.2d 1327 (Fla. Dist. Ct. App. 1985) (stating that common law action for retaliatory discharge does not exist); Quinn v Cardiovascular Physicians, P.C., 326 S.E.2d 460 (Ga. 1985) (refusing to recognize public policy exception to employment at-will doctrine); Georgia Power Co. v Busbin, 250 S.E.2d 442 (Ga. 1978) (same); Gil v Metal Serv Corp., 412 So. 2d 706 (La. Ct. App.) (same), *cert. denied*, 414 So. 2d 379 (La. 1982); J.C. Kelly v Mississippi Valley Gas Co., 397 So.2d 874 (Miss. 1981) (refusing to recognize public policy exception to employment at-will doctrine and electing to leave decision to legislature); Blair v Physicians Mut. Ins. Co., 496 N.W.2d 483 (Neb. 1993) (refusing to recognize public policy exception to employment at-will doctrine);

Courts, however, have hesitated to allow in-house attorneys to bring retaliatory discharge actions and, as a result, in-house attorneys have alleged retaliatory discharge in only ten reported cases.<sup>77</sup> Furthermore, state supreme courts addressed this issue only in four of these cases.<sup>78</sup> As of June 1994, no state supreme court had allowed an in-house attorney to recover damages under the tort of retaliatory discharge.<sup>79</sup> On July 18, 1994, however, the California Supreme Court held, in *General Dynamics*

Murphy v American Home Prods. Corp., 448 N.E.2d 86 (N.Y. 1983) (same); Volino v General Dynamics, 539 A.2d 531 (R.I. 1988) (same). *But see* Schriener v Meginnis Ford Co., 421 N.W.2d 755, 759 (Neb. 1988) (stating that court would allow limited public policy exception in case in which employee acted in good faith and upon reasonable cause in reporting employer's suspected illegal conduct); Wieder v Skala, 609 N.E.2d 105 (N.Y. 1992) (allowing discharged associate to bring wrongful discharge action against law firm when firm discharged lawyer for his insistence that firm comply with ethical rules).

Delaware and Maine have not taken stances on the retaliatory discharge cause of action. *But see* Hansrote v Amer Indus. Technologies, Inc., 586 F Supp. 113 (W.D. Pa. 1984) (applying Delaware law in federal court to recognize limited public policy exception when employer discharged employee after employee refused to engage in illegal or unethical behavior), *aff'd*, 770 F.2d 1070 (3d Cir. 1985); Larrabee v Penobscot Frozen Foods, Inc., 486 A.2d 97 (Me. 1984) (suggesting that given appropriate case, court would recognize public policy exception); MacDonald v Eastern Fine Paper, Inc., 485 A.2d 228 (Me. 1984) (same).

77 *See* Corello, *supra* note 6, at 399-400 (citing eight reported retaliatory discharge cases by in-house attorneys prior to *General Dynamics* decision). *See generally* Willy v Coastal Corp., 647 F Supp. 116 (S.D. Tex. 1986) (reporting that in-house attorney sued employer and alleged retaliatory discharge), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988); General Dynamics Corp. v Superior Court, 876 P.2d 487 (Cal. 1994) (en banc) (same); Balla v Gambro, Inc., 584 N.E.2d 104 (Ill. 1991) (same); Herbster v North Am. Co. for Life & Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986) (same), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987); GTE Prods. Corp. v Stewart, No. 06749, 1995 WL 457297 (Mass. Aug. 1, 1995); Mourad v Automobile Club Ins. Ass'n, 465 N.W.2d 395 (Mich. Ct. App.) (same), *appeal denied*, 478 N.W.2d 443 (Mich. 1991); Nordling v Northern States Power Co., 478 N.W.2d 498 (Minn. 1991) (same); Michaelson v Minnesota Mining & Mfg. Co., 474 N.W.2d 174 (Minn. Ct. App. 1991) (same), *aff'd*, 479 N.W.2d 58 (Minn. 1992); Parker v M & T Chems., Inc., 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989) (same); McGonagle v Union Fidelity Corp., 556 A.2d 878 (Pa. Super. Ct. 1989) (same).

78. *See generally* General Dynamics Corp. v Superior Court, 876 P.2d 487 (Cal. 1994) (en banc) (evaluating retaliatory discharge cause of action for in-house counsel); Balla v Gambro, Inc., 584 N.E.2d 104 (Ill. 1991) (same); GTE Prods. Corp. v Stewart, No. 06749, 1995 WL 457297 (Mass. Aug. 1, 1995); Nordling v Northern States Power Co., 478 N.W.2d 498 (Minn. 1991) (same).

79. *See* Balla, 584 N.E.2d at 108, 110 (rejecting retaliatory discharge cause of action for general counsel); Nordling, 478 N.W.2d at 504 (rejecting retaliatory discharge cause of action because no violation of whistleblower statute occurred).

*Corp. v Superior Court*,<sup>80</sup> that California would allow in-house attorneys to bring properly pleaded retaliatory discharge causes of action.<sup>81</sup>

#### IV *The Status of the Retaliatory Discharge Tort for In-House Attorneys Before General Dynamics*

A survey of the previous cases that have grappled with the issue of whether to allow corporate counsel to bring retaliatory discharge tort actions provides a better understanding of the climate in which the *General Dynamics* decision occurred. A dismissed in-house attorney brought the first reported retaliatory discharge claim in Texas in 1986.<sup>82</sup> This claim arose shortly after the Texas Supreme Court agreed to recognize a public policy exception to the at-will employment doctrine for dismissed nonattorney employees.<sup>83</sup>

The United States District Court for the Southern District of Texas, in *Willy v Coastal Corp.*,<sup>84</sup> initially addressed the issue of whether courts should permit in-house counsel to assert retaliatory discharge claims against their employers.<sup>85</sup> Donald Willy worked as Coastal Corporation's (Coastal) in-house counsel and provided the company with legal advice about its compliance with federal and state environmental regulations.<sup>86</sup> Willy alleged that Coastal dismissed him because he required the corporation to comply with all of the applicable environmental laws and that the company objected to this strict compliance.<sup>87</sup>

The *Willy* court examined the public policy exception to the employment at-will doctrine under Texas law to determine whether the court should expand the exception to include in-house attorneys' actions for

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80. 876 P.2d 487 (Cal. 1994).

81. *General Dynamics Corp. v Superior Court*, 876 P.2d 487, 505 (Cal. 1994) (en banc).

82. See *Willy v Coastal Corp.*, 647 F Supp. 116, 117 (S.D. Tex. 1986) (declining to expand public policy exception to employment at-will to in-house attorneys), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988).

83. See *Sabine Pilot Serv., Inc. v Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) (creating narrow public policy exception applicable only if employer dismissed employee for refusing to perform illegal act).

84. 647 F Supp. 116 (S.D. Tex. 1986).

85. *Willy v Coastal Corp.*, 647 F Supp. 116, 117 (S.D. Tex. 1986) (declining to expand employment at-will's public policy exception to in-house attorneys), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988).

86. *Id.*

87. *Id.*

retaliatory discharge.<sup>88</sup> The district court interpreted Texas's public policy exception narrowly.<sup>89</sup> The court reasoned that because attorneys must uphold their state's ethical rules, attorneys should and will withdraw from representation if their clients intend to commit illegal acts.<sup>90</sup> Thus, rather than allowing a retaliatory discharge action, the *Willy* court determined that withdrawal from representation remained the attorney's appropriate remedy in this type of situation.<sup>91</sup> The court stated further that if attorneys failed to withdraw, but also refused to honor the wishes of their clients, then they should not be surprised when their employers dismissed them.<sup>92</sup> Therefore, as a result of the professional ethical obligations of in-house attorneys, the *Willy* court declined to expand the public policy exception to allow corporate attorneys to bring retaliatory discharge actions.<sup>93</sup>

Three years later, the Superior Court of Pennsylvania, in *McGonagle v Union Fidelity Corp.*,<sup>94</sup> addressed the same issue as the *Willy* court.<sup>95</sup> The Union Fidelity Corporation (Union Fidelity) hired John McGonagle to work for the company's insurance subsidiary as an associate counsel for legal affairs.<sup>96</sup> Union Fidelity allowed McGonagle to advance quickly to positions of authority in the company.<sup>97</sup> Despite McGonagle's

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88. *Id.* at 118.

89. *Id.* at 118 n.2.

90. *Id.* at 118; see TEX. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1988) (describing situations in which attorney must or may withdraw). When discussing attorneys' ethical obligations to withdraw, the *Willy* court could have been referring to DR 2-110(B)(2), which states that an attorney shall withdraw from employment if: "He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule." *Id.* DR 2-110(B)(2). Permissive withdrawal could also be an appropriate course of action if the client "[p]ersonally seeks to pursue an illegal course of conduct," "[i]nsists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules," or "[i]nsists that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules." *Id.* DR 2-110(C)(1)(b), (c), (e).

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

92. *Id.*

93. *Id.*

94. 556 A.2d 878 (Pa. Super. Ct. 1989).

95. *McGonagle v Union Fidelity Corp.*, 556 A.2d 878, 882 (Pa. Super. Ct. 1989).

96. *Id.* at 879

97. *Id.* Over the course of McGonagle's employment, Union Fidelity promoted McGonagle to the positions of general counsel, vice president of Union Fidelity's life insurance company, a member of the board of directors, and vice president of two of the company's subsidiaries. *Id.*

promotion to vice president of two of the company's insurance subsidiaries, McGonagle's responsibilities remained the same as those that he had exercised previously as Union Fidelity's general counsel.<sup>98</sup> The conflict between McGonagle and Union Fidelity occurred when McGonagle refused to authorize the distribution of insurance policies that he believed violated various state laws.<sup>99</sup> After McGonagle and other company officials discussed the situation, the president of the insurance subsidiaries, John Cooney, requested McGonagle's resignation.<sup>100</sup> Union Fidelity informed McGonagle that the company wanted him to resign because some of the company officers had complained about the quality of his work.<sup>101</sup> Cooney agreed to meet with McGonagle on the following day to discuss the matter.<sup>102</sup> When McGonagle arrived, however, the head of security refused to allow him to enter the premises.<sup>103</sup> Eventually, McGonagle spoke with Cooney, but the parties failed to resolve the matter.<sup>104</sup>

McGonagle sued Union Fidelity and alleged that Union Fidelity had fired him for insisting that the company comply with various state insurance laws.<sup>105</sup> McGonagle alleged further that his dismissal violated clear and compelling public policy, and therefore the discharge was actionable under state law.<sup>106</sup> Upon review of the trial court's decision,<sup>107</sup> the *McGonagle* court acknowledged that Pennsylvania recognized a public policy exception to the employment at-will doctrine.<sup>108</sup> The court then

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98. *Id.*

99. *Id.* McGonagle also declined to take other actions for Union Fidelity. *Id.* at 880. McGonagle refused to issue insurance policies in two states based on applications that he believed that the jurisdiction would classify as illegal. *Id.* McGonagle behaved in this manner even though he recognized that his failure to issue those policies would adversely affect Union Fidelity's financial interests. *Id.* Also, McGonagle disagreed with other company practices, such as refusing to cover CAT scan claims, and decided that this company practice should end. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* McGonagle also had difficulty retrieving his belongings from the premises. *Id.* at 881. Union Fidelity denied McGonagle entry into the office. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* The jury at the trial level rendered a verdict in favor of McGonagle and awarded McGonagle \$30,000 for his wrongful discharge claim and \$32,000 in punitive damages. *Id.*

108. *Id.* at 882; see *Geary v United States Steel Corp.*, 319 A.2d 174, 180 (Pa. 1974)



attempted to determine whether McGonagle's case fell within that exception.<sup>109</sup>

McGonagle relied on the existence of insurance laws as representations of public policy.<sup>110</sup> The *McGonagle* court determined that although no Pennsylvania case directly applied, the trend in this area of law did not support McGonagle's contention that Union Fidelity had violated a well-recognized and significant public policy.<sup>111</sup> The Superior Court of Pennsyl-

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(recognizing possibility of public policy exception to employment at-will); *Yandl v Ingersoll-Rand Co.*, 422 A.2d 611, 617 (Pa. Super. Ct. 1980) (stating that employee may have wrongful discharge claim against employer when discharge of employee at-will threatens public policy).

109. *McGonagle*, 556 A.2d at 882.

110. *Id.*

111. *Id.* at 883. The court made specific reference to *Sheets v Teddy's Frosted Foods* when examining whether McGonagle relied on a well-recognized public policy. *See* *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 387-89 (Conn. 1980) (permitting discharged quality control manager to pursue wrongful discharge claim founded on clear statement of public policy in Connecticut Food, Drug and Cosmetic Act); *see also* CONN. GEN. STAT. §§ 19-213, 19-215, 19-222 (1977) (providing applicable provisions of Connecticut Food, Drug and Cosmetic Act) (current version at CONN. GEN. STAT. §§ 21a-93, 21a-95, 21a-102 (1994)). In *Sheets*, the Supreme Court of Connecticut considered whether to allow a discharged employee to maintain a retaliatory discharge tort action against his former employer. *Sheets*, 427 A.2d at 386. *Sheets* worked for *Teddy's Frosted Foods* (*Frosted Foods*) as the company's quality control director and operations manager. *Id.* at 385-86. *Sheets* noticed that the company began to deviate from the requisite quality control standards by using lower quality vegetables and underweight meat in the company's frozen food products. *Id.* at 386. The alterations in the quality and in the weight of the food items used to make the company's products conflicted with the company's express representations on the products' labels. *Id.* Because the contents differed from the representations of the company's labels, the company's practices violated the Connecticut Food, Drug and Cosmetic Act. *Id.*, *see* CONN. GEN. STAT. §§ 19-213, 19-215, 19-222 (defining misbranded food and stating its consequences under Connecticut Food, Drug and Cosmetic Act) (current version at CONN. GEN. STAT. §§ 21a-93, 21a-95, 21a-102). *Sheets* informed *Frosted Foods* of his concern with the company's substandard practices, but *Frosted Foods* ignored *Sheets*'s suggestions and fired him. *Sheets*, 427 A.2d at 386. *Sheets* contended that the company dismissed him in retaliation for his efforts to promote compliance with Connecticut state laws. *Id.* *Sheets* brought wrongful discharge claims under both contract and tort theories. *Id.* The *Sheets* court first examined *Sheets*'s tort theory of retaliatory discharge. *Id.* The court attempted to balance the need for a company's managerial discretion with the protection of employees who lack the bargaining power necessary to secure employment contracts for a definite term. *Id.* at 387-88. The court determined that the Connecticut Food, Drug and Cosmetic Act applied to *Sheets* and that *Sheets* could have been held criminally liable for violating the act. *Id.* at 388; *see* CONN. GEN. STAT. § 19-215 (discussing penalties of violating statute) (current version at CONN. GEN. STAT. § 21a-95). The court stressed that *Sheets*'s job was to ensure the quality of products for the company and by definition this job involved *Sheets*'s

vania also commented that courts had refused to allow wrongful discharge actions that were premised on alleged violations of public policy that were not clearly stated.<sup>112</sup> The superior court concluded that Pennsylvania courts decide wrongful discharge claims on a case-by-case basis.<sup>113</sup> The *McGonagle* court found this method especially appropriate in cases concerning the actions of professionals.<sup>114</sup> The court accepted the proposition that a professional's dual obligations to follow ethical codes, as well as state laws, could necessitate the professional's refusal to engage in some acts desired by the client.<sup>115</sup>

The *McGonagle* decision ultimately turned on McGonagle's discretionary behavior.<sup>116</sup> McGonagle used his own judgment to arrive at his opinions about the legality of the insurance policies at issue.<sup>117</sup> An employer can override an employee's discretionary decision and proceed in the manner that it wishes if the employer's reasons for the decision have adequate foundation.<sup>118</sup> Because McGonagle provided the court with statutes conveying only general statements of public policy, McGonagle

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discretion. *Sheets*, 427 A.2d at 388. After determining that the Connecticut Food, Drug and Cosmetic Act represented public policy and after reviewing several cases from other jurisdictions discussing the retaliatory discharge cause of action, the court allowed *Sheets*'s retaliatory discharge claim. *Id.* at 389.

112. *McGonagle*, 556 A.2d at 884; see *Callahan v Scott Paper Co.*, 541 F Supp. 550, 563 (E.D. Pa. 1982) (stating that although employees' efforts to stop illegal price discounts and promotional allowances were laudable, public policy on this issue was unclear and employer's interest was paramount); *Lampe v Presbyterian Medical Ctr.*, 590 P.2d 513, 515-16 (Colo. Ct. App. 1978) (finding that statute explaining licensing principles for nurses created no actionable claim); *Adler v American Standard Corp.*, 432 A.2d 464, 471-72 (Md. 1981) (finding criminal code and employees' claims of bribery and falsifying company's records too vague to constitute actionable public policy violation); *Pierce v Ortho Pharmaceutical Corp.*, 417 A.2d 505, 514 (N.J. 1980) (stating that Hippocratic oath did not constitute clear statement of public policy that would support wrongful discharge action); *Yaendl v Ingersoll-Rand Co.*, 422 A.2d 611, 620 (Pa. Super. Ct. 1980) (finding that employee's discharge for informing company of product defect was not in contravention of clearly stated public policy).

113. *McGonagle*, 556 A.2d at 884; see *Rossi v Pennsylvania State Univ.*, 489 A.2d 828, 831-32 (Pa. Super. Ct. 1985) (stating that review of wrongful discharge cases occurs on case-by-case basis).

114. *McGonagle*, 556 A.2d at 884-85.

115. *Id.* at 885; see *Pierce v Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512 (N.J. 1980) (discussing dual roles of professionals).

116. *McGonagle*, 556 A.2d at 885.

117. *Id.*, see *Pierce*, 417 A.2d at 507, 513.

118. *McGonagle*, 556 A.2d at 885.

failed to show a clear enough public policy to support his retaliatory discharge claim.<sup>119</sup> Ultimately, the court refused to recognize McGonagle's cause of action for retaliatory discharge because Union Fidelity had not violated a clearly defined public policy.<sup>120</sup>

*McGonagle* parallels the Supreme Court of New Jersey's reasoning in *Pierce v Ortho Pharmaceutical Corp.*<sup>121</sup> Although *Pierce* involved a medical professional,<sup>122</sup> both the *Pierce* and the *McGonagle* courts refused to

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119. *Id.*

120. *Id.*

121. 417 A.2d 505 (N.J. 1980).

122. *Pierce v Ortho Pharmaceutical Corp.*, 417 A.2d 505, 506 (N.J. 1980) (allowing wrongful discharge cause of action when discharge goes against clearly expressed public policy, but refusing to allow research doctor to bring wrongful discharge action when dismissal occurred due to difference of professional medical judgment); *see also* *Lampe v Presbyterian Medical Ctr.*, 590 P.2d 513, 515-16 (Colo. Ct. App. 1979) (refusing to allow discharged nurse to bring wrongful discharge action because statute stating general principles about licensing of nurses did not state public policy). In *Pierce*, the Supreme Court of New Jersey considered whether a doctor could bring a wrongful discharge action premised upon her refusal to violate the medical code of professional ethics. *Id.* at 513. Dr. Grace Pierce worked for Ortho Pharmaceutical Corporation (Ortho) as the director of one of the three major sections of the medical research department. *Id.* at 506. Dr. Pierce's employment was at-will because she signed no employment contract, nor did she work for a fixed term. *Id.* The incident leading to Dr. Pierce's dismissal arose from a research team's search for a liquid drug to treat diarrhea in children and in the elderly. *Id.* at 506-07. Dr. Pierce opposed the selected formula because it contained a high amount of saccharin and saccharin was potentially dangerous. *Id.* at 507. Dr. Pierce informed her supervisor that she believed that her continued work on the drug containing saccharin would violate the Hippocratic oath. *Id.* After this meeting, Dr. Pierce's supervisor removed Dr. Pierce from the saccharin project and asked her to select other projects. *Id.* Although Dr. Pierce received the same amount of compensation, she believed that Ortho had demoted her. *Id.* Subsequently, Dr. Pierce resigned from her job and initiated a retaliatory discharge action against Ortho under both contract and tort theories. *Id.* at 508. Dr. Pierce alleged that Ortho demanded that she engage in conduct that violated the Hippocratic oath. *Id.* The *Pierce* court examined the history of the employment at-will doctrine and the emergence of exceptions to the rule. *Id.* at 509-11. The Supreme Court of New Jersey emphasized that other courts had refrained from interfering with employers' rights to make business decisions and select appropriate personnel. *Id.* at 510-11. The court concluded that New Jersey law should allow remedies for employees whose employers wrongfully discharge them, but that the courts must balance the interests of employers, employees, and the public in these situations. *Id.* at 511. Although the *Pierce* court recognized that professionals might have to refuse to perform certain acts to comply with professional ethical codes, the court also stated that a violation of personal morals did not give rise to a retaliatory discharge cause of action. *Id.* at 512. The court then listed the possible sources of clear public policy: legislation, administrative rules, administrative regulations, administrative decisions, and judicial decisions. *Id.* In some cases, professional ethics codes may present an expression of public policy, but the *Pierce* court care-

recognize the plaintiffs' causes of action for retaliatory discharge because the individuals' actions involved the exercise of discretion.<sup>123</sup> Additionally, in both cases the courts determined that the plaintiffs failed to prove that their employers' actions violated clearly stated public policies.<sup>124</sup>

*Michaelson v Minnesota Mining & Manufacturing Co.*<sup>125</sup> presented a slightly different question to the Minnesota Court of Appeals. *Michaelson* explored two theories of wrongful discharge: implied contract and retaliatory discharge based on statutory authority.<sup>126</sup> Victor Michaelson worked for the Minnesota Mining and Manufacturing Company (Minnesota Mining) as the company's general counsel and handled primarily equal employment opportunity issues.<sup>127</sup> At various times, Michaelson rendered advice to Minnesota Mining about employment problems and situations.<sup>128</sup> Minnesota Mining sometimes followed Michaelson's advice, while at other times the company disregarded his suggestions.<sup>129</sup>

Michaelson consistently performed better than average, according to company performance evaluations.<sup>130</sup> Michaelson did, however, receive one low performance evaluation.<sup>131</sup> As a result of this evaluation, Minnesota Mining reassigned Michaelson to a job that did not require the preparation of litigation matters.<sup>132</sup> Michaelson viewed his new assignment

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fully noted that a professional code of ethics would probably not provide a clear statement of public policy because the code only serves to guide members of a particular profession. *Id.* The *Pierce* court concluded that the Hippocratic oath failed to assert a clear mandate of public policy and, therefore, the court denied Dr. Pierce's wrongful discharge suit. *Id.* at 514.

123. Compare *McGonagle v Union Fidelity Corp.*, 556 A.2d 878, 885 (Pa. Super. Ct. 1989) (finding that plaintiff's opinion about company's practices fails to meet requirement of clear expression of public policy) with *Pierce v Ortho Pharmaceutical Corp.*, 417 A.2d 505, 507, 513 (N.J. 1980) (stating that difference in medical opinions will not support retaliatory discharge action under public policy exception).

124. *Pierce*, 417 A.2d at 514; *McGonagle*, 556 A.2d at 885.

125. 474 N.W.2d 174 (Minn. Ct. App. 1991).

126. *Michaelson v Minnesota Mining & Mfg. Co.*, 474 N.W.2d 174, 180-81 (Minn. Ct. App. 1991) (determining that corporate counsel failed to state claim of retaliatory discharge), *aff'd*, 479 N.W.2d 58 (Minn. 1992).

127. *Id.* at 176-77

128. *Id.* at 177

129. *Id.*

130. *Id.*

131. *Id.* Minnesota Mining observed that Michaelson exhibited poor time management skills, lack of attention to his cases, and poor communication with management. *Id.*

132. *Id.* Rather than terminating Michaelson's employment, the corporation shifted Michaelson's responsibilities. *Id.*

as a demotion, and therefore informed the company that he found the transition to his new job too difficult, and elected not to continue to work for Minnesota Mining.<sup>133</sup>

Michaelson asserted a variety of claims in his suit against Minnesota Mining, including breach of contract and retaliatory discharge.<sup>134</sup> After the trial court granted Minnesota Mining's summary judgment motion on all of the claims,<sup>135</sup> Michaelson appealed to the Minnesota Court of Appeals.<sup>136</sup> In evaluating Michaelson's claims, the court began by discussing the general principle that clients may discharge attorneys for any reason, and at any time, without being liable for damages for breach of contract.<sup>137</sup> The court based this assertion on both case law<sup>138</sup> and the Minnesota Rules of Professional Conduct.<sup>139</sup> After reviewing the applicable precedent, the court concluded that a client must have the absolute authority to discharge

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133. *Id.*

134. *Id.* In addition to breach of contract and retaliatory discharge claims, Michaelson asserted claims for breach of an implied covenant of good faith and fair dealing, defamation, tortious interference with contract and prospective relations, and intentional infliction of emotional distress. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 178; *see* *Lawler v Dunn*, 176 N.W. 989, 990 (1920) (stating that client may discharge attorney at any time). The court also concluded that the Minnesota Rules of Professional Conduct required withdrawal from representation if the client discharged the attorney. *See* MINN. RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(3) (1993) (requiring attorney withdrawal upon discharge by client). In Minnesota, a lawyer must withdraw from representation if the client demands that the lawyer participate in illegal conduct or in conduct that violates the state's ethical rules or other law. *Id.* Rule 1.16 cmt. 1985.

138. *See* *State v. Smith*, 110 N.W.2d 159, 167 (Minn. 1961) (stating that client must be able to discharge attorney at any time because of need for trust between attorney and client); *Lawler v Dunn*, 176 N.W. 989, 990 (Minn. 1920) (stating that discharge of attorney does not constitute breach of contract); *In re Lachmund's Estate*, 170 P.2d 748, 752 (Or. 1946) (stating that client must be able to discharge attorney at any time because of need for trust between attorney and client); *see also* *Herbster v North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343, 344 (Ill. App. Ct. 1986) (stating that clients generally may discharge attorneys at any time), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987); *Nordling v Northern States Power Co.*, 478 N.W.2d 498, 501 (Minn. 1991) (same); *infra* notes 154-95 and accompanying text (discussing *Herbster* and *Nordling* opinions). The court discussed the *Herbster* and *Nordling* decisions and agreed that "the client must have absolute authority to fire the attorney, especially when a breakdown of trust occurs." *Michaelson*, 474 N.W.2d at 178 (quoting *Nordling v Northern States Power Co.*, 465 N.W.2d 81, 86 (Minn. Ct. App.), *rev'd*, 478 N.W.2d 498 (Minn. 1991)).

139. *Michaelson*, 474 N.W.2d at 178; *see* MINN. RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(3) (1993) (requiring attorney to withdraw upon request of client).

his attorney, especially when the trust between the attorney and the client diminishes.<sup>140</sup> The court determined that a lawyer cannot properly sue a former client and use confidential information gathered during the course of representation as evidence against the former client.<sup>141</sup> This type of action subverts the attorney-client privilege.<sup>142</sup>

In asserting his breach of contract claim, Michaelson stated that Minnesota Mining had promised to employ Michaelson for as long as he performed his job well.<sup>143</sup> Michaelson argued that Minnesota Mining's promise transformed his at-will employment relationship into one that his employer could terminate only for cause.<sup>144</sup> In addition to these assurances, Michaelson provided further support for his contention by showing that he relied on the policies provided in the company's conduct guide, operating manual, and corrective action guide.<sup>145</sup> The court of appeals rejected these arguments and found that no contract existed because Michaelson failed to provide evidence that Minnesota Mining's promise conveyed an offer or manifested an intent to contract.<sup>146</sup> Because the provisions in the conduct guide failed to meet the required level of specificity, the court denied Michaelson's claim that the company's printed materials added terms to Michaelson's contract.<sup>147</sup> In rejecting Michaelson's breach of contract claim, the court of appeals emphasized the potential harm to the attorney-client relationship that could occur if courts permitted discharged attorneys to sue their former clients and to use information learned in the course of the relationship as evidence against the employer.<sup>148</sup>

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140. *Michaelson*, 474 N.W.2d at 178.

141. *Id.*

142. *Id.*, see *infra* notes 393-97 and accompanying text (discussing attorney-client privilege).

143. *Michaelson*, 474 N.W.2d at 176.

144. *Id.*

145. *Id.* at 177; see *Pine River State Bank v Mettelle*, 333 N.W.2d 622, 627 (Minn. 1983) (stating that in order for terms of handbooks and manuals to become part of employment contracts, provisions must meet requirements of unilateral contract); see also *Lewis v Equitable Life Assurance Soc'y*, 389 N.W.2d 876, 883 (Minn. 1986) (requiring specificity of handbook provisions to alter employment contract). To meet the requirements of a unilateral contract, the provision must make a definite offer, the offer must be conveyed to the employee, and the employee must accept the offer. *Mettelle*, 333 N.W.2d at 627

146. *Michaelson*, 474 N.W.2d at 179.

147. *Id.* at 180; see *Lewis*, 389 N.W.2d at 883 (requiring specificity of handbook provisions to alter employment contract); *Mettelle*, 333 N.W.2d at 627 (setting forth test of required specificity of handbook provisions).

148. *Michaelson*, 474 N.W.2d at 180; see MODEL RULES OF PROFESSIONAL CONDUCT

Michaelson brought his retaliatory discharge claim pursuant to a Minnesota statute that authorized such actions.<sup>149</sup> The court offered several reasons why Michaelson's retaliatory discharge claim failed under the applicable statute.<sup>150</sup> The court stated that Michaelson was unable to establish a causal link between his actions and the company's subsequent retaliation.<sup>151</sup> Additionally, instead of discharging Michaelson, Minnesota Mining shifted Michaelson's responsibilities.<sup>152</sup> The Minnesota Court of Appeals rejected Michaelson's remaining claims.<sup>153</sup>

Rule 1.6 (1992) (stating that information gained in course of attorney-client relationship is confidential); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1983) (same).

149 *Michaelson*, 474 N.W.2d at 180; see MINN. STAT. § 181.932(1)(a) (1993) (prohibiting retaliatory discharge). The statute provides:

An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of an employee, in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to any employer or to any governmental body or law enforcement official.

MINN. STAT. § 181.932(1)(a) (1993).

150. *Michaelson*, 474 N.W.2d at 180. First, although Michaelson contended that Minnesota Mining violated Title VII and equal employment opportunity laws, Michaelson offered no proof to support his claim. *Id.*, see also Title VII, 42 U.S.C. § 2000e-2, 3 (1988 & Supp. V 1993) (prohibiting employers from discriminating on basis of race, color, religion, sex, or national origin). Second, Michaelson's behavior fell outside of the behavior protected by the applicable statute because instead of reporting illegal conduct, Michaelson offered Minnesota Mining advice and feedback on particular situations. *Michaelson*, 474 N.W.2d at 180. Third, Michaelson did not report the alleged violation of the statute to any outside authority as required by the statute. *Id.*, see *supra* note 149 (providing language of applicable statute). Fourth, Michaelson failed to prove the necessary causal link between his actions in the company and Minnesota Mining's alleged subsequent retaliation. *Michaelson*, 474 N.W.2d at 180. Finally, Minnesota Mining did not discharge Michaelson. *Id.*

151. *Id.* at 180.

152. *Id.*

153. *Id.* at 181. The Minnesota Court of Appeals relied on state precedent to reject Michaelson's breach of implied covenant of good faith and fair dealing cause of action. *Id.*, see *Hunt v IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 858 (Minn. 1986) (refusing to read implied covenant of good faith and fair dealing into employment contract); *Wild v Rarig*, 234 N.W.2d 775, 790 (Minn. 1975) (same), *cert. denied*, 424 U.S. 902 (1976). The court, instead, classified Michaelson as an at-will employee. *Michaelson*, 474 N.W.2d at 181. With respect to Michaelson's tortious interference claim, the court of appeals declared that Michaelson's co-workers acted within the scope of their job duties when evaluating Michaelson's work performance and when transferring Michaelson to engage in different responsibilities. *Id.* The court also rejected Michaelson's defamation claim arising out of a letter that listed Michaelson's job deficiencies. *Id.* The court failed to address

In *Nordling v Northern States Power Co.*,<sup>154</sup> the Minnesota Supreme Court reached an outcome different from the *Michaelson* decision of the Minnesota Court of Appeals by allowing an in-house attorney to proceed with an action for breach of contract.<sup>155</sup> Gale Nordling worked for the Northern States Power Company (Northern States) as an in-house attorney.<sup>156</sup> Nordling worked primarily with the company's engineering department.<sup>157</sup> The controversy between Nordling and Northern States began when the company constructed a new power facility.<sup>158</sup> Northern States hired a private attorney to advise the company on ways in which the company could show the Public Utility Commission that employees at the new plant did not waste or misappropriate money.<sup>159</sup> Nordling learned that the private attorney had suggested that the company implement a security initiative in which Northern States would monitor the personal lives of employees hired to work at the new plant.<sup>160</sup> Nordling believed that company surveillance of employees in their homes was illegal.<sup>161</sup> Acting upon this belief, Nordling objected to the plan and then reported the proposed security initiative to the general manager.<sup>162</sup> Eventually, the company abandoned the security plan.<sup>163</sup> After this incident, the company discharged Nordling without warning.<sup>164</sup>

Nordling alleged retaliatory discharge under the state's whistleblower statute and breach of contract, as well as several other claims, in his suit against Northern States.<sup>165</sup> The Minnesota Supreme Court first addressed

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Michaelson's intentional infliction of emotional distress claim. *Id.* at 176-82.

154. 478 N.W.2d 498 (Minn. 1991).

155. *Nordling v Northern States Power Co.*, 478 N.W.2d 498, 499 (Minn. 1991) (holding that corporate counsel is not prohibited from bringing wrongful discharge action based on implied contract).

156. *Id.*

157. *Id.*

158. *Id.* at 500.

159. *Nordling v Northern States Power Co.*, 465 N.W.2d 81, 83 (Minn. Ct. App.), *rev'd*, 478 N.W.2d 498 (Minn. 1991).

160. *Nordling*, 478 N.W.2d at 500.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 500; *see* MINN. STAT. § 181.932(1)(a) (1993) (providing whistleblower statute that prohibits retaliatory discharge). In addition to his breach of contract and retaliatory discharge claims, Nordling alleged that Northern States breached its covenant of good faith



Nordling's breach of contract claim.<sup>166</sup> Nordling argued that the court should imply the company's dismissal procedures, contained in the employee handbook, into Nordling's employment agreement.<sup>167</sup> Because Northern States neglected to follow the procedural steps for discharge outlined in the handbook, Nordling asserted that Northern States breached its employment contract with him.<sup>168</sup> The court recognized that an in-house attorney experiences overlapping roles as both an employee and an attorney.<sup>169</sup> The court accepted that, as a general rule, a client may discharge his attorney at any time without being liable for breach of contract damages.<sup>170</sup>

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and fairness. *Id.* The Minnesota Supreme Court failed to clarify whether the state recognizes an action based on a covenant of good faith and fairness implied both in-law and in-fact. *Id.* at 503. However, the court briskly disposed of the issue in this case by stating that, as a matter of law, no covenant could exist in this situation. *Id.* Nordling also asserted a defamation cause of action, but the Minnesota Supreme Court never addressed this claim because the trial court dismissed the claim on a summary judgment motion. *Id.* at 500. Additionally, Nordling alleged that two company employees tortiously interfered with his employment contract. *Id.* The court accepted Nordling's tortious interference claim. *Id.* at 505. The Minnesota Supreme Court stated that a tortious interference cause of action could proceed even if a discharged employee's contractual argument failed and the court classified the person as an at-will employee. *Id.* A tortious interference claim asserts that a third party interfered with the contractual relations between an employer and an employee. *Id.*, see RESTATEMENT (SECOND) OF TORTS § 766 (1979) (stating that one who intentionally interferes with performance of contract between another and third person can be liable for pecuniary loss resulting from third party's failure to perform contract). An attorney-client relationship cannot serve as a defense to a tortious interference claim. *Nordling*, 478 N.W.2d at 505. Attorney-client privilege does not apply in this type of action because the defendants are third parties and are not the attorney's clients. *Id.* Generally, courts hold that a party cannot interfere with his own contract. *Id.*, see *Bouten v Richard Miller Homes, Inc.*, 321 N.W.2d 895, 901 (Minn. 1982) (stating that defendant's breach of his own contract with plaintiff is not actionable). If a corporate employee dismisses a subordinate as part of his company duties, no tortious interference action lies in that conduct. *Nordling*, 478 N.W.2d at 505-06. On the other hand, a discharged employee may maintain an action for tortious interference if the superior acted outside of the scope of his corporate duties. *Id.* at 506; *Bouten*, 321 N.W.2d at 900-01. Essentially, a superior acts outside of his corporate duties when the superior fires another employee as part of a personal vendetta. *Nordling*, 478 N.W.2d at 506. Ultimately, the court dismissed one count of Nordling's claim of tortious interference and remanded the other count to the trial court. *Id.* at 507

166. *Id.* at 500-02; see *supra* part III.A (explaining implied contract claims of wrongful discharge).

167. *Nordling*, 478 N.W.2d at 502.

168. *Id.* at 503.

169. *Id.* at 501.

170. *Id.*, see *Lawler v Dunn*, 176 N.W. 989, 990 (Minn. 1920) (giving clients

Although it recognized the right of a client to discharge counsel,<sup>171</sup> the Minnesota Supreme Court found that the in-house counsel's role as a corporate employee also deserved recognition.<sup>172</sup> As a result, the court reached a compromise decision by allowing in-house attorneys to bring breach of contract actions, based on provisions in employee handbooks, against their former employers, but permitting these claims only when the attorneys would not reveal confidential communications between the attorney and client as evidence in the case.<sup>173</sup> The Minnesota Supreme Court ultimately rejected Nordling's retaliatory discharge claim because Nordling had failed to identify any state or federal rule or law that Northern States had violated by discharging Nordling.<sup>174</sup> Consequently, Nordling's claim did not fall within the protection of the state's whistleblower statute.<sup>175</sup>

In *Herbster v North American Co. for Life & Health Insurance*,<sup>176</sup> the Illinois Appellate Court, like the *Nordling* court, stressed the importance of preserving client confidences.<sup>177</sup> In *Herbster*, the court examined whether an in-house attorney could sue his employer under a retaliatory discharge cause of action after the company dismissed the attorney for refusing to destroy documents requested by discovery motions in pending lawsuits.<sup>178</sup> Robert Herbster worked for the North American Company for Life and Health Insurance (North American) as the company's chief legal officer and as vice president of North American's legal department.<sup>179</sup> North American employed Herbster under an oral employment contract that either party could terminate at-will.<sup>180</sup>

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unfettered right to discharge their attorneys). If a client no longer trusts his attorney, whether for good reasons or not, then the client must be permitted to discharge the attorney. *Nordling*, 478 N.W.2d at 501.

171. *Nordling*, 478 N.W.2d at 501.

172. *Id.* at 502.

173. *Id.*

174. *Id.* at 504.

175. *Id.*, see MINN. STAT. § 181.932(1)(a) (1993) (prohibiting retaliatory discharge); *supra* note 149 (providing text of statute).

176. 501 N.E.2d 343 (Ill. App. Ct. 1986).

177. *Herbster v North Am. Co. for Life & Health Ins.*, 501 N.E. 343, 346 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987).

178. *Id.* at 344.

179. *Id.*

180. *Id.* But see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(b) (1992) (allowing attorney to withdraw only if withdrawal can occur without material adverse effect

Herbster alleged that North American fired him because he refused to destroy documents that parties suing North American sought through discovery.<sup>181</sup> These documents contained damaging information about North American.<sup>182</sup> If he had destroyed the information, Herbster believed that he would have committed a fraud on a federal court and, consequently, would have violated the Illinois Code of Professional Responsibility.<sup>183</sup>

The appellate court explained the appropriate test in retaliatory discharge actions<sup>184</sup> and then examined the development of retaliatory discharge.<sup>185</sup> The court determined that a retaliatory discharge plaintiff must prove that the employer discharged the employee in retaliation for the employee's activities and that the employee's discharge contravened a clearly mandated public policy.<sup>186</sup> The *Herbster* court concluded that Herbster's case provided ample evidence to meet the required public policy considerations.<sup>187</sup> If Herbster had destroyed the documents requested through discovery, he would have violated state supreme court rules,<sup>188</sup>

on interests of client or for other causes listed in rule); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(C) (1983) (disallowing attorney withdrawal from matters pending litigation or from other matters unless client insists on engaging in inappropriate behavior outlined in disciplinary rule).

181. *Herbster*, 501 N.E.2d at 344.

182. *Id.* The information included in the documents supported allegations of fraud in North American's sale of flexible annuities. *Id.*

183. *Id.*, see ILL. CODE OF PROFESSIONAL RESPONSIBILITY Rule 1-102 (1980) (prohibiting attorney from engaging in misconduct, including acts of dishonesty and acts prejudicial to administration of justice), replaced by ILL. RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1993); *id.* Rule 7-102(a)(3) (prohibiting attorney from knowingly concealing information that law requires him to reveal), replaced by ILL. RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1993); *id.* Rule 7-109(a) (prohibiting attorney from suppressing evidence that he is legally required to reveal), replaced by ILL. RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1993).

184. *Herbster*, 501 N.E.2d at 344; see *supra* notes 59-62 and accompanying text (discussing necessary elements of retaliatory discharge action); *supra* part III.B (explaining retaliatory discharge).

185. *Herbster*, 501 N.E.2d at 345.

186. *Id.* at 344.

187. *Id.*

188. *Id.*, see ILL. CODE OF PROFESSIONAL RESPONSIBILITY Rule 1-102 (1980) (prohibiting attorney from engaging in misconduct, including acts of dishonesty and acts prejudicial to administration of justice), replaced by ILL. RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1993); *id.* Rule 7-102(a)(3) (prohibiting attorney from knowingly concealing information that law requires him to reveal), replaced by ILL. RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1993); *id.* Rule 7-109(a) (prohibiting attorney from suppressing evidence that he is legally required to reveal), replaced by ILL. RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1993).

obstructed justice,<sup>189</sup> and undermined state discovery policies.<sup>190</sup> Although the public policy issues concerned the court, the *Herbster* court focused on whether an in-house counsel's status as an attorney precluded him from bringing a retaliatory discharge suit against his former employer.<sup>191</sup>

Herbster attempted to frame his role with North American as that of an employee rather than that of an attorney<sup>192</sup> However, the appellate court refused to separate Herbster's roles and determined that an in-house counsel's roles of employee and attorney are intertwined.<sup>193</sup> Because an in-house attorney must abide by the Illinois Code of Professional Responsibility, the *Herbster* court decided that allowing the retaliatory discharge tort would strain the confidential relationship between an attorney and his client.<sup>194</sup> The court, therefore, declined to recognize the tort of retaliatory discharge for in-house attorneys.<sup>195</sup>

In *Balla v Gambro, Inc.*,<sup>196</sup> the Illinois Supreme Court followed the decision of the *Herbster* court by refusing to allow in-house attorneys to maintain retaliatory discharge actions.<sup>197</sup> Gambro, Inc. (Gambro) distributed various types of medical equipment.<sup>198</sup> Roger Balla worked as an in-house attorney for Gambro.<sup>199</sup> The controversy between Balla and Gambro arose when Balla received a letter from Gambro's foreign manufacturer that stated that a certain shipment of equipment was faulty and might harm patients who used the machines.<sup>200</sup> Because Balla's responsibilities included compliance with federal, state, and local laws and regulations affecting the company's operations and products, Balla informed Gambro's president

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189. *Herbster*, 501 N.E.2d at 344.

190. *Id.*, see *Consolidation Coal Co. v Bucyrus-Erie Co.*, 432 N.E.2d 250, 251-58 (Ill. 1982) (describing discovery process in Illinois and discussing impact of work-product doctrine on discovery materials).

191. *Herbster*, 501 N.E.2d at 344.

192. *Id.* at 346.

193. *Id.*

194. *Id.* at 348.

195. *Id.* at 346.

196. 584 N.E.2d 104 (Ill. 1991).

197. *Balla v Gambro, Inc.*, 584 N.E.2d 104, 108 (Ill. 1991) (declining to recognize retaliatory discharge tort for in-house attorneys)

198. *Id.* at 105. Gambro's distribution of dialyzers was at issue in this case. *Id.* Dialyzers filter toxic substances and excess fluid from the blood of patients who suffer from impaired kidney function. *Id.*

199. *Id.*

200. *Id.* at 106.

that the impending shipment of medical equipment failed to comply with applicable United States Food and Drug Administration (FDA) regulations.<sup>201</sup> Although Balla told Gambro's president to reject the shipment, the president decided to accept the equipment despite the known defect.<sup>202</sup> Shortly after this disagreement, the president fired Balla.<sup>203</sup> Subsequently, Balla informed the FDA about the faulty equipment and the FDA confiscated the shipment.<sup>204</sup>

Balla brought suit against Gambro and alleged that the company had wrongfully discharged him.<sup>205</sup> The court began by stating that Illinois generally allowed employers to discharge employees at-will.<sup>206</sup> The *Balla* court then determined the sufficiency of Balla's retaliatory discharge claim.<sup>207</sup> The court concluded that Gambro had discharged Balla in retal-

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201. *Id.* at 105-06; see Federal Food, Drug, and Cosmetic Act 21 U.S.C. § 331(a)-(c) (1988 & Supp. V 1993) (describing prohibited acts relating to manufacture and sale of medical equipment); 21 C.F.R. §§ 820.150 to 820.198 (1994) (listing applicable rules for manufacture and sale of medical equipment); see also Illinois Food, Drug and Cosmetic Act, ILL. ANN. STAT. ch. 56½, para. 503-503.3 (Smith-Hurd 1985) (describing state prohibition of adulterated devices) (current version at ILL. ANN. STAT. ch. 410, para. 620/3 to 620/3.3 (Smith-Hurd 1993)).

202. *Balla*, 584 N.E.2d at 106.

203. *Id.*

204. *Id.*, see 21 U.S.C. § 334(a)(1) (allowing FDA to seize adulterated device introduced into interstate commerce).

205. *Balla*, 584 N.E.2d at 106. The lower court developed a three-part test to determine whether an attorney had standing to bring a retaliatory discharge action. *Balla v Gambro*, 560 N.E.2d 1043, 1046 (Ill. App. Ct. 1990). First, if the attorney's discharge resulted from information that he gained through his nonlegal tasks, then the discharge would not threaten the attorney-client relationship because the plaintiff would not disclose confidential information at trial. *Id.* The appellate court determined that if an attorney satisfied this prong of the test, he would have standing to sue his employer. *Id.* If a court cannot determine whether an in-house attorney's discharge resulted from information that he gained in his nonattorney role, however, then the court must ask whether the attorney learned the relevant information as part of the attorney-client relationship and whether the information was privileged. *Id.* If the court answers either of these questions negatively, then the attorney has standing to sue his employer. *Id.* However, if the court determines that an attorney-client privilege existed, then the suit may proceed only if the client waived the privilege. *Id.* Finally, even if an attorney learned the relevant information in the course of representation, the information was privileged, and the client did not waive the privilege, the court must determine whether any countervailing public policies favor the disclosure of the information. *Id.*

206. *Balla*, 584 N.E.2d at 107; see *Fellhauer v City of Geneva*, 568 N.E.2d 870, 875 (Ill. 1991) (stating that Illinois generally follows principle that employer may discharge employee at any time and for any reason); *Barr v Kelso-Burnett Co.*, 478 N.E.2d 1354, 1356 (Ill. 1985) (same).

207. *Balla*, 584 N.E.2d at 107

iation for his activities and that this discharge contravened public policy.<sup>208</sup> In examining Balla's retaliatory discharge claim, the court concentrated on the ethical considerations of attorneys and declined to extend the availability of the retaliatory discharge tort to in-house counsel.<sup>209</sup> The court found that protecting the lives and the property of citizens constituted an important public policy.<sup>210</sup> However, the court stated that an in-house counsel's ethical obligations already adequately safeguarded the public policy, and, therefore, the court did not need to extend the tort of retaliatory discharge to in-house counsel to promote public policy.<sup>211</sup> The Illinois Rules of Professional Conduct protected the state's public policy interests because the ethical rules required Balla to report Gambro's conduct to the appropriate authorities.<sup>212</sup> The Supreme Court of Illinois stated that the purpose behind allowing retaliatory discharge actions was to encourage employees to safeguard the public by reporting employer misconduct.<sup>213</sup> Therefore, the *Balla* court refused to extend the public policy exception to allow retaliatory discharge suits by in-house attorneys because Balla's adherence to the ethical rules already satisfied the purpose of retaliatory discharge suits.<sup>214</sup> The court also denied Balla's action because it was concerned that attorneys' retaliatory discharge actions would cause a breakdown of trust in the attorney-client relationship.<sup>215</sup>

The remaining two wrongful discharge cases that in-house attorneys have brought are distinct from those cases previously discussed. The plaintiff in *Mourad v Automobile Club Insurance Ass'n*<sup>216</sup> did not attempt to assert a retaliatory discharge tort claim.<sup>217</sup> Rather, Mourad brought a breach

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208. *Id.*

209. *Id.* at 108.

210. *Id.* at 107-08.

211. *Id.* at 108-09.

212. *Id.* at 109.

213. *Id.* at 108.

214. *Id.*

215. *Id.* at 109-10. The *Balla* court stated that regardless of the economic and emotional strain that an in-house attorney endures when leaving the representation of a corporation, an in-house attorney may not sue his former client for damages in situations where ethical obligations required the attorney to withdraw. *Id.* at 110.

216. 465 N.W.2d 395 (Mich. Ct. App. 1991).

217. *Mourad v Automobile Club Ins. Ass'n*, 465 N.W.2d 395, 397 (Mich. Ct. App.) (allowing in-house attorney to recover against employer under breach of just-cause contract theory), *appeal denied*, 478 N.W.2d 443 (Mich. 1991). Mourad asserted several theories of recovery. *Id.* In his complaint he alleged: breach of a just-cause contract, retalia-

of contract action against his employer.<sup>218</sup> The court distinguished *Mourad* from *Willy, Herbster, and Parker v M & T Chemicals, Inc.*<sup>219</sup> by noting that *Mourad* involved the parties' creation of contractual rights rather than public policy restrictions on employment termination.<sup>220</sup>

In *Mourad*, Roger Mourad supervised the legal department of the Automobile Club Insurance Association (Auto Club) from August 1980 until March 1983.<sup>221</sup> Mourad exercised broad authority both in legal and in administrative areas.<sup>222</sup> In March, Auto Club demoted Mourad to the position of executive attorney in charge of handling first-party catastrophic claims.<sup>223</sup> Mourad's supervisor claimed that he demoted Mourad because Mourad had difficulty implementing Auto Club's policies and could not contain costs effectively in the legal department.<sup>224</sup> A nonattorney assumed the duties of Mourad's former supervisory position.<sup>225</sup> Approximately one year after his demotion, Mourad resigned from his job with Auto Club.<sup>226</sup>

Mourad sued Auto Club and asserted claims of breach of contract, constructive discharge, retaliatory demotion, and intentional infliction of emotional distress.<sup>227</sup> Mourad contended that Auto Club demoted him because he had refused to engage in the illegal and unethical behavior that several nonattorneys in the company had suggested.<sup>228</sup> Mourad argued that Auto Club breached the just-cause employment contract formed between the parties.<sup>229</sup> Auto Club, in turn, asserted that Mourad's status as an attorney precluded his breach of contract claim.<sup>230</sup> The court adopted the

tory demotion and constructive discharge, intentional infliction of emotional distress, and conspiracy to commit retaliatory demotion or intentional infliction of emotional distress. *Id.*

218. *Id.*

219. 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989); *see infra* notes 237-60 and accompanying text (discussing *Parker*).

220. *Mourad*, 465 N.W.2d at 399

221. *Id.* at 397

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* The *Mourad* court's opinion failed to provide examples of the potentially illegal and unethical acts proposed by Auto Club employees. *Id.*

229. *Id.* at 398.

230. *Id.*

theory that an employer's statements of company procedure and policy allowing the company to discharge employees only for cause can create enforceable contract rights.<sup>231</sup> Based on Auto Club's policy manual and pamphlets, the jury in *Mourad* determined that a just-cause contract existed and that Auto Club breached the contract by demoting Mourad for refusing to violate the Michigan Code of Professional Conduct.<sup>232</sup> Thus, the jury found that Auto Club demoted Mourad without just cause and that the company's actions constructively discharged Mourad.<sup>233</sup> The appellate court accepted these findings of the jury and rejected Auto Club's argument that Mourad's status as an attorney should preclude his claim of breach of just-cause contract.<sup>234</sup> Additionally, the *Mourad* court stated that a plaintiff cannot maintain simultaneously wrongful discharge actions in contract and in tort when the actions arise from the same set of facts.<sup>235</sup> In this case, the court permitted Mourad to recover on the just-cause contract theory and declined to decide whether the court would recognize retaliatory discharge actions brought by in-house counsel absent breach of contract claims.<sup>236</sup>

*Parker v M & T Chemicals, Inc.*<sup>237</sup> differs from the other in-house attorney cases because the dismissed in-house attorney brought suit against his former employer under a whistleblower statute, the Conscientious Employee Protection Act (Act),<sup>238</sup> rather than under the common law.<sup>239</sup>

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231. *Id.*, see *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 885 (Mich. 1980) (holding that employee can legally enforce employment contract that employer can terminate only for just cause). A jury decides whether a just-cause contract exists based upon the facts of the case. *Mourad*, 465 N.W.2d at 398.

232. *Mourad*, 465 N.W.2d at 398. See generally MICH. CODE OF PROFESSIONAL CONDUCT (1986) (setting forth standard of conduct for attorneys).

233. *Mourad*, 465 N.W.2d at 398; see *Fischhaber v General Motors Corp.*, 436 N.W.2d 386, 389 (Mich. Ct. App. 1988) (stating that proposed demotion is not same as termination for purposes of wrongful discharge claim), *appeal denied without opinion*, (Mich. 1989). The *Mourad* court explained constructive discharge by stating: "A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or when working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would feel compelled to resign." *Mourad*, 465 N.W.2d at 398.

234. *Mourad*, 465 N.W.2d at 398. Auto Club argued that a client has a right to discharge his attorney with or without cause. *Id.*

235. *Id.* at 401.

236. *Id.*

237. 566 A.2d 215 (N.J. Super. Ct. App. Div 1989).

238. N.J. STAT. ANN. §§ 34:19-1 to 34:19-8 (West 1988 & Supp. 1994).

239. See *Parker v. M & T Chems., Inc.*, 566 A.2d 215, 216, 222 (N.J. Super Ct. App.



M & T Chemicals, Inc. (M & T) developed and sold chemicals for the electronics and other industries.<sup>240</sup> Sheldon Parker worked as the Director of Patents at M & T for seven years.<sup>241</sup> Although Parker contended that he received positive performance evaluations, M & T abruptly demoted him to Assistant General Patent Counsel.<sup>242</sup>

Parker alleged that his demotion occurred in connection with M & T's desire to acquire the technology to manufacture a particular chemical known as a methyltin stabilizer.<sup>243</sup> The incident began when Parker received a telephone call from another M & T employee in which Parker learned that confidential documents containing a competitor's trade secrets about methyltin stabilizer development were being sent to him for M & T's use.<sup>244</sup> Parker discovered that a former M & T employee worked for the competitor and had obtained these documents from a federal district court in which litigation against the competitor was pending.<sup>245</sup> The judge in that case, however, had imposed a protective order that prohibited the release of these documents.<sup>246</sup> Parker expressed his objections about using the competitor's trade secrets in a written memorandum sent to Gordon Andrews, the vice president, secretary, and general counsel of M & T.<sup>247</sup> Parker gave the documents to Andrews without reading them and urged M & T to obtain court approval before using the confidential information.<sup>248</sup> After Parker sent the memorandum to Andrews, M & T retaliated by verbally reprimanding and then demoting Parker.<sup>249</sup> Parker's supervisor indicated that he would fire Parker if Parker "rocked the boat."<sup>250</sup> Eventually, Parker resigned from his job at M & T.<sup>251</sup>

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Div 1989) (allowing in-house attorney to sue employer under whistleblower statute).

240. *Id.* at 216.

241. *Id.*

242. *Id.* at 217

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 217-18.

248. *Id.* at 218.

249. *Id.* Parker alleged that M & T created an "intolerable work environment that exacerbated an existing medical condition and caused plaintiff great anxiety, embarrassment and humiliation." *Id.*

250. *Id.*

251. *Id.*

The New Jersey Superior Court began its analysis by examining the Act.<sup>252</sup> The Act upholds New Jersey's belief in the principle that, although an employer has a right to discharge an employee, an employee has the freedom to decline to perform an act that would constitute a violation of a clear mandate of public policy.<sup>253</sup> Retaliatory action under the whistleblower statute includes the discharge, suspension, or demotion of an employee, or other negative action taken against an employee.<sup>254</sup> If an employer violates the provisions of the whistleblower statute, then the discharged employee may sue the employer and seek injunctive relief, reinstatement, compensation for lost wages, benefits, costs, attorney's fees, punitive damages, and an assessment of civil fines that are payable to the state.<sup>255</sup>

M & T claimed that in-house attorneys could not proceed under the Act because the Act unconstitutionally impinged on the New Jersey Supreme Court's power to regulate the conduct of attorneys and would compromise the attorney-client relationship between Parker and M & T.<sup>256</sup> The New Jersey Superior Court, stating that the Act did not require an exception for in-house attorneys in order to survive a constitutional challenge, rejected M & T's constitutional assertion.<sup>257</sup> The court also stated that an

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252. *Id.*, see Conscientious Employee Protection Act, N.J. STAT. ANN. §§ 34:19-1 to 34:19-8 (1988 & Supp. 1994).

253. *Parker*, 566 A.2d at 218; see N.J. STAT. ANN. §§ 34:19-3(c)(3).

254. *Parker*, 566 A.2d at 219; see N.J. STAT. ANN. § 34:19-2(e) (prohibiting retaliation against employee for reporting illegal acts). The whistleblower statute prohibits retaliatory action against an employee who "[d]iscloses or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law." *Id.* § 34:19-3(a). The statute also forbids retaliatory action against an employee who

objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes: (1) is in violation of law, or a rule or regulation promulgated pursuant to law; (2) is fraudulent or criminal; or (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare.

*Id.* § 34:19-3(c).

255. N.J. STAT. ANN. § 34:19-5. The court alluded that if Parker had sought reinstatement with M & T rather than damages, his cause of action would have been denied. See *Parker*, 566 A.2d at 220 (mentioning that in-house attorney sued for money damages only).

256. *Parker*, 566 A.2d at 219. M & T asserted that employers may discharge attorneys at any time with or without cause. *Id.*, see N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(3) (1991) (requiring attorney to withdraw from representation if discharged by client).

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

employer retained the right to file an ethics complaint against the dismissed attorney if the attorney disclosed client confidences in violation of the New Jersey Rules of Professional Conduct<sup>258</sup> while pursuing his statutory retaliatory discharge action.<sup>259</sup> Therefore, the court refused to dismiss Parker's complaint and determined that in-house counsel could bring wrongful discharge actions under New Jersey's whistleblower statute.<sup>260</sup>

These select cases illustrate courts' reluctance to grant relief to corporate counsel who bring retaliatory discharge tort actions.<sup>261</sup> The overriding reasons for this reluctance are to protect attorney-client confidentiality<sup>262</sup> and to promote trust in the attorney-client relationship.<sup>263</sup> Although a few courts have allowed in-house attorneys to recover from their employers in breach of contract actions<sup>264</sup> or under a state statute,<sup>265</sup> Cali-

258. *Id.*, see N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1991) (prohibiting disclosure of client confidences absent specific circumstances).

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

260. *Id.* at 222.

261. See generally *Willy v Coastal Corp.*, 647 F Supp. 116 (S.D. Tex. 1986) (refusing to allow in-house attorney's retaliatory discharge suit), *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) (same); *Herbster v North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986) (same), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987); *Nordling v Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991) (same); *Michaelson v Minnesota Mining & Mfg. Co.*, 474 N.W.2d 174 (Minn. Ct. App. 1991) (same), *aff'd*, 479 N.W.2d 58 (Minn. 1992); *McGonagle v Union Fidelity Corp.*, 556 A.2d 878 (Pa. Super. Ct. 1989) (same), *appeal denied*, 575 A.2d 115 (1990).

262. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992) (stating that information gained in course of attorney-client relationship is confidential); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1983) (same); Kim, *supra* note 3, at 903 (stating that possible negative effect on attorney-client relationship is primary reason to reject retaliatory discharge action for in-house counsel). See generally *Willy v Coastal Corp.*, 647 F Supp. 116 (S.D. Tex. 1986) (refusing to allow retaliatory discharge tort in order to preserve client confidences), *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) (same); *Herbster v North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986) (same), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987); *Nordling v Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991) (same).

263. See *Balla v Gambro, Inc.*, 584 N.E.2d 104, 110 (Ill. 1991) (stating that permitting retaliatory discharge action for in-house counsel could have undesired chilling effect on communication between attorney and client); *Herbster v North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986) (stating that preserving mutual trust between attorney and client is reason not to expand retaliatory discharge tort), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987).

264. See *Mourad v Automobile Club Ins. Ass'n*, 465 N.W.2d 395, 401 (Mich. Ct. App.) (allowing in-house attorney's breach of contract claim against employer), *appeal*

ifornia became the first state to allow corporate counsel to pursue retaliatory discharge tort actions against employers.<sup>266</sup>

*V The California Supreme Court's Recent Decision  
Allowing the Retaliatory Discharge Tort Cause of Action for  
Dismissed In-House Attorneys*

*A. The Facts of the Case and the Court's Analysis*

In *General Dynamics Corp. v Superior Court*,<sup>267</sup> Andrew Rose, the plaintiff, began his career with the General Dynamics Corporation (General Dynamics) as a contract administrator.<sup>268</sup> Rose received various promotions and commendations throughout his fourteen years of employment with General Dynamics.<sup>269</sup> Rose anticipated becoming a division vice president and general counsel, but General Dynamics suddenly and unexpectedly fired Rose.<sup>270</sup> General Dynamics stated that the corporation dismissed Rose because it lost confidence in Rose's ability to represent the company's interests vigorously.<sup>271</sup> Rose alleged in his complaint, however, that General Dynamics actually fired him because he had headed an investigation into employee drug use that led to the discharge of more than sixty General Dynamics employees,<sup>272</sup> because he had protested the company's refusal to investigate the mysterious "bugging" of the chief of security's office,<sup>273</sup> and because he had contended that the company's salary policy violated the Fair Labor Standards Act.<sup>274</sup>

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*denied*, 478 N.W.2d 443 (Mich. 1991); *Nordling v Northern States Power Co.*, 478 N.W.2d 498, 499 (Minn. 1991) (same).

265. See *Parker v. M & T Chems., Inc.*, 556 A.2d 215, 222 (N.J. Super. Ct. App. Div. 1989) (permitting in-house counsel to recover under state whistleblower statute).

266. See *General Dynamics Corp. v Superior Court*, 876 P.2d 487, 503 (Cal. 1994) (en banc) (recognizing tort of retaliatory discharge as viable cause of action by in-house attorneys).

267. 876 P.2d 487 (Cal. 1994) (en banc).

268. *General Dynamics*, 876 P.2d at 490.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at 490-91.

273. *Id.* at 491. The bugging of the chief of security's office was allegedly a criminal offense. *Id.* Also, because one of the parties was a defense contractor, the action would be considered a breach of national security. *Id.*

274. *Id.*, see Fair Labor Standards Act of 1938 § 15(a)(3), as amended, 29 U.S.C.

Rose's suit against General Dynamics asserted two theories of relief: implied contract and retaliatory discharge.<sup>275</sup> General Dynamics, relying on the California Supreme Court's determination in *Fracasse v Brent*,<sup>276</sup> claimed that Rose could not bring a wrongful discharge action under any theory because a client has an unfettered right to discharge an attorney at any time and for any reason.<sup>277</sup> *The General Dynamics* court responded to

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§§ 213(a)(1), 215(a)(3), 216(b) (1988 & Supp. V 1993) (providing applicable compensation standards for employees).

275. *General Dynamics*, 876 P.2d at 491.

276. 494 P.2d 9 (Cal. 1972).

277 *General Dynamics*, 876 P.2d at 492; see *Fracasse v Brent*, 494 P.2d 9, 13 (Cal. 1972) (stating that client may discharge attorney with or without cause); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 cmt. 4 (1992) (stating that client may discharge attorney at any time with or without cause). In *Fracasse*, Ray Raka Brent hired George Fracasse to represent her in a personal injury action. *Fracasse*, 494 P.2d at 10. The parties entered into a contingency fee agreement that provided Fracasse with 33.33% of any settlement made more than one month prior to trial and 40% of Brent's recovery received after that time. *Id.* Before Brent recovered any compensation, she discharged Fracasse. *Id.* Subsequently, Fracasse filed a declaratory judgment action against Brent, alleging that Fracasse's discharge lacked good cause and that Brent had breached the contingency fee agreement by firing Fracasse. *Id.* The court first asserted that a discharged attorney could not recover on a contingency fee contract prior to plaintiff's recovery in her personal injury action. *Id.* at 11, see *Brown v Connolly*, 83 Cal. Rptr. 158, 161 (1969) (stating that attorney's cause of action to recover fee from contingency agreement cannot arise until happening of contingency). Dismissed attorneys generally recover for their services under *quantum meruit*. *Fracasse*, 494 P.2d at 11. *Quantum meruit* compensates attorneys for the value of their services without subjecting the plaintiff to the possibility of paying two contingency fees upon dismissal of the plaintiff's first attorney. *Id.* at 12; see *Salopek v Schoemann*, 124 P.2d 21, 24 (Cal. 1942) (discussing merits of awarding *quantum meruit* rather than contract price). Although a client may be liable to his dismissed attorney for the value of the attorney's services, a client has an absolute right to discharge an attorney at any time with or without cause. *Fracasse*, 494 P.2d at 13; see *Gage v Atwater*, 68 P 581, 582 (Cal. 1902) (stating that client has absolute right to discharge attorney); see also CAL. CODE CIV. PRO. § 284 (1982 & Supp. 1995) (permitting change of attorneys in action or proceeding upon consent of both client and attorney, or upon court order). Additionally, a client's discharge of an attorney does not constitute a breach of contract because the client's right to discharge the attorney is a basic term of the contract, implied by law because of the relationship between the parties. *Fracasse*, 494 P.2d at 13; see *Martin v Camp*, 114 N.E. 46, 48 (N.Y. 1916) (explaining that client's right to discharge attorney is implied in contract). However, the New York court stated that *quantum meruit* recovery does not apply to attorneys working under general retainer agreements. *Martin*, 114 N.E. at 48. Ultimately, the California Supreme Court developed a special rule of compensation for discharged attorneys who entered contingency fee arrangements with their former clients. *Fracasse*, 494 P.2d at 14. Because the attorney originally agreed to take the chance of recovering no fee if his client lost the case, the court held that a discharged attorney's suit for compensation arises only after the contingency occurs. *Id.* Hence, if the client recovers no judgment with

the corporation's contention by agreeing that a client possesses the right to discharge an attorney.<sup>278</sup> However, the court stated that the client's right to discharge did not release the client from compensating the dismissed attorney.<sup>279</sup> The court distinguished *Fracasse* because *Fracasse* concerned a contingency fee contract.<sup>280</sup> Although a client may not have to compensate a discharged attorney retained under a contingency fee agreement if the client loses his case,<sup>281</sup> the California Supreme Court declined to extend this idea to noncontingency fee representation in the corporate context.<sup>282</sup>

The *General Dynamics* court began its analysis by examining Rose's implied-in-fact contract claim.<sup>283</sup> The court concluded that Rose's complaint showed a pattern of conduct, including several oral representations by the corporation, that created Rose's reasonable expectation that General Dynamics would not terminate him without good cause.<sup>284</sup> Therefore, Rose's pleadings provided enough information to survive General Dynamic's demurrer.<sup>285</sup> The court stated that no policy reason existed to prohibit a corporate attorney from bringing an implied-in-fact contract claim against his former employer.<sup>286</sup> The California Supreme Court emphasized that courts generally hold parties to their bargain and that this situation provided no exception to that general rule.<sup>287</sup> Additionally, the court concluded that an implied-in-fact contract claim does not implicate attorney-client confidentiality concerns and therefore can proceed.<sup>288</sup>

The *General Dynamics* court then addressed Rose's retaliatory discharge claim.<sup>289</sup> Rose alleged that General Dynamics discharged him in

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her new attorney, then the discharged attorney will not recover either. *Id.*

278. *General Dynamics*, 876 P.2d at 494-95.

279. *Id.* at 495. Depending on the type of action pursued, discharged attorneys may recover lost wages and related damages under an implied-in-fact contract claim or tort damages under a retaliatory discharge claim. *Id.* The *General Dynamics* court stated, however, that reinstatement is not an available remedy for a discharged in-house attorney. *Id.*

280. *Id.* at 492-93; *Fracasse*, 494 P.2d at 10.

281. *Fracasse*, 494 P.2d at 14.

282. *General Dynamics*, 876 P.2d at 493.

283. *Id.* at 495.

284. *Id.*, see *Foley v Interactive Data Corp.*, 765 P.2d 373, 383-84 (Cal. 1988) (discussing implied contract terms derived from course of conduct).

285. *General Dynamics*, 876 P.2d at 496.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

violation of constitutional or statutory provisions of state law that expressed the state's fundamental public policy.<sup>290</sup> The court distinguished implied-in-fact contract claims from retaliatory discharge claims by stating that implied-in-fact contract claims arise from the conduct and expectations of the parties in the employment relationship, whereas retaliatory discharge claims based on violations of public policy exist as a matter of law.<sup>291</sup> In retaliatory discharge cases, the employer has a duty implied-in-law to operate the company's business in accord with the state's public policy.<sup>292</sup>

California common law imposes two restraints on retaliatory discharge claims.<sup>293</sup> First, the public policy at issue must be fundamental and firmly established.<sup>294</sup> Second, the employer's conduct must violate a policy that is truly public in nature.<sup>295</sup> True public policy conveys a duty to the benefit of the public at large as opposed to a particular employer or employee.<sup>296</sup> Additionally, the remedy in retaliatory discharge tort actions compensates the individual plaintiff and indirectly vindicates the underlying fundamental public policy itself.<sup>297</sup>

The *General Dynamics* court emphasized the importance of the public rationale because attorneys have duties to both their clients and to their profession.<sup>298</sup> Lawyers are bound to uphold professional ethical rules that distinguish lawyers' work from nonattorneys' work.<sup>299</sup> The California Supreme Court reasoned that the law should permit corporate counsel to claim retaliatory discharge because attorneys' work, by definition, affects

290. *Id.*, see also *Gantt v Sentry Ins.*, 824 P.2d 680, 687 (Cal. 1992) (requiring statutory or constitutional basis for public policy).

291. *General Dynamics*, 876 P.2d at 497

292. *Id.*

293. *Id.*

294. *Id.*, see *Tameny v. Atlantic Richfield*, 610 P.2d 1330, 1331-32 (Cal. 1980) (stating that asserted public policy in retaliatory discharge action must be firmly established and fundamental); see also *Gantt*, 824 P.2d at 684-85 (discussing need for clear statement of public policy); *Foley v Interactive Data Corp.*, 765 P.2d 373, 379 (Cal. 1988) (stating that retaliatory discharge plaintiff must allege that his discharge violated basic public policy).

295. *General Dynamics*, 876 P.2d at 497; see *Gantt v Sentry Ins.*, 824 P.2d 680, 684 (Cal. 1992) (stating that policy at issue must be public); *Foley*, 765 P.2d at 380 & n.12 (stating that retaliatory discharge plaintiff must assert public policy).

296. *General Dynamics*, 876 P.2d at 497; see *Gantt*, 824 P.2d at 684 (stating that public policy affects society rather than individual); *Foley*, 765 P.2d at 380 (stating that when asserted policy serves only private interest of employer, then public policy is not asserted).

297. *General Dynamics*, 876 P.2d at 497

298. *Id.* at 497-98.

299. *Id.*

the public interest, and because in-house attorneys are more likely to experience conflicts between corporate goals and professional norms than their nonattorney colleagues.<sup>300</sup>

The *General Dynamics* court addressed the ethical concerns surrounding the retaliatory discharge tort for in-house attorneys raised by the courts in *Balla*, *Herbster*, and *Willy*.<sup>301</sup> In response to the reasoning in those cases, the court stated:

Granted the priest-like license to receive the most intimate and damning disclosures of the client, granted the sanctity of the professional privilege, granted the uniquely influential position attorneys occupy in our society, it is precisely *because of* that role that attorneys should be accorded a retaliatory discharge remedy in those instances in which *mandatory ethical norms* embodied in the Rules of Professional Conduct *collide with illegitimate demands of the employer* and the attorney insists on *adhering to his or her clear professional duty*.<sup>302</sup>

The *General Dynamics* court asserted that permitting corporate counsel to bring retaliatory discharge claims would advance the public policies that the ethical rules seek to protect.<sup>303</sup> The court determined that allowing retaliatory discharge claims would give attorneys greater incentive to confront their employers' improper business practices rather than remaining silent out of fear for job security.<sup>304</sup> Therefore, the court decided to permit in-house counsel to plead the retaliatory discharge cause of action because the availability of the tort action would help corporate counsel promote the fundamental public policies reflected in the ethical rules.<sup>305</sup>

### *B. The California Supreme Court's Requirements for Retaliatory Discharge Actions Brought by In-House Counsel*

The California Supreme Court developed a multi-tiered test to evaluate the validity of an in-house attorney's claim of retaliatory discharge.<sup>306</sup> To

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300. *Id.*

301. *See supra* part IV (discussing *Balla*, *Herbster*, and *Willy*).

302. *General Dynamics*, 876 P.2d at 501.

303. *Id.*

304. *Id.*

305. *Id.* at 503. The California Supreme Court recognized, and attempted to incorporate into its decision, the concerns about the fiduciary nature of the attorney-client relationship that the Illinois courts expressed in *Balla* and *Herbster*. *See supra* part IV (discussing *Balla* and *Herbster*).

306. *General Dynamics*, 876 P.2d at 502-03.



apply this test, a court must first determine whether a company dismissed its corporate counsel for abiding by a mandatory ethical obligation that a professional rule or a statute prescribes.<sup>307</sup> The court suggested that in most cases an employee's discharge for following a mandatory ethical obligation would support an action for retaliatory discharge.<sup>308</sup>

The next level of the *General Dynamics* test involves ethically permissible conduct rather than ethically mandated behavior.<sup>309</sup> If an in-house attorney has engaged in ethically permissible conduct, then a court must examine two issues.<sup>310</sup> First, the court must decide whether the standards set forth in *Gantt v Sentry Insurance*<sup>311</sup> would allow a nonattorney employee to bring a retaliatory discharge action based on the employer's conduct.<sup>312</sup>

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307 *Id.* at 502.

308. *Id.* at 503.

309. *Id.*

310. *Id.*

311. 824 P.2d 680 (Cal. 1992).

312. *General Dynamics*, 876 P.2d at 503. *See generally* *Gantt v Sentry Ins.*, 824 P.2d 680 (Cal. 1992) (clarifying appropriate standards for retaliatory discharge actions in California). In *Gantt*, the California Supreme Court considered whether an employee whose employer discharged him for supporting a co-worker's sexual harassment claim could bring a retaliatory discharge tort action under the public policy exception to the employment at-will doctrine. *Id.* at 681. The court also determined whether remedies under the state's workers' compensation act preempted *Gantt's* common-law tort claim. *Id.* Vincent *Gantt* worked as a sales manager for a branch office of Sentry Insurance (Sentry). *Id.* at 682. The conflict between *Gantt* and Sentry arose shortly after the company hired Joyce Bruno to serve as a liaison between trade associations and two of Sentry's branch offices. *Id.* *Gantt* and another manager supervised Bruno's work. *Id.* After a short time with the company, Bruno reported to *Gantt* that the manager of the other branch office had sexually harassed her. *Id.* *Gantt* reported the incidents of harassment to the appropriate company personnel. *Id.* Eventually, the company transferred Bruno to a sales representative position and then dismissed her one month later. *Id.* Bruno filed a complaint with the Department of Fair Employment and Housing (DFEH) that alleged sexual harassment and the failure of Sentry management to respond to complaints about her harassment. *Id.* Sentry's in-house counsel conducted an investigation into the matter and urged *Gantt* to retract his statement that supported Bruno's sexual harassment claim. *Id.* at 682-83. An investigator from DFEH interviewed *Gantt* about Bruno's alleged sexual harassment. *Id.* at 683. After *Gantt* failed to alter his story as Sentry's corporate counsel had requested, the lawyer asked the DFEH investigator why he was not also investigating *Gantt* for sexually harassing Bruno. *Id.* The court found the lawyer's statement to be indicative of the pressure that Sentry placed on *Gantt* to retract his statement supporting Bruno. *Id.* Less than two months later, Sentry demoted *Gantt* to the position of sales representative. *Id.* Additionally, the company refused to provide *Gantt* with a listing of existing accounts, which, apparently, was a virtual necessity to perform his new job adequately. *Id.* The following month, *Gantt* accepted employment from another company. *Id.* *Gantt* alleged that Sentry constructively discharged him. *Id.*, *see also infra* note 428

Second, the court must determine whether a statutory basis exists for departing from the requirement of confidentiality between the attorney and client.<sup>313</sup> If the court finds an acceptable exception to confidentiality, the court will allow the retaliatory discharge claim to proceed.<sup>314</sup>

The *General Dynamics* test requires that the applicable ethical code provision or statutory provision clearly establish the ethical requirement.<sup>315</sup>

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(explaining constructive discharge). The California Supreme Court analyzed the facts of *Gantt* in the context of prevailing state precedent about retaliatory discharge. *Gantt*, 824 P.2d at 683. The court recognized the inherent difficulty in determining whether an employee's discharge violated public policy or if the discharge resulted from an ordinary employer-employee dispute. *Id.* at 684. The *Gantt* court affirmed that the policy at issue must affect society and must be fundamental. *Id.* at 684, 687. The court surveyed case law from various jurisdictions to determine whether the state constitution or statutes needed to state the public policy at issue. *Id.* at 684-87. The *Gantt* court concluded that courts evaluating wrongful discharge claims could not declare public policy without a basis in statutory provisions or the state constitution. *Id.* at 687. The court reasoned that this policy struck a balance between the interests of society, the employer, and the employee. *Id.* at 687-88. The court, therefore, upheld the jury's finding that Sentry constructively discharged Gantt in violation of a fundamental public policy in retaliation for his refusal to testify untruthfully at the DFEH interview. *Id.* at 688. The *Gantt* court also concluded that the applicable workers' compensation act did not preempt Gantt's retaliatory discharge claim. *Id.* at 692.

313. *General Dynamics*, 876 P.2d at 503. Statutory exceptions to the attorney-client privilege are acceptable statutory departures from confidentiality. "There is no privilege if the lawyer reasonably believes that disclosure of any confidential communication is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm." CAL. EVID. CODE § 956.5 (West 1994) (emphasis omitted). "Matters involving the commission of a crime or a fraud, or circumstances in which the attorney reasonably believes that disclosure is necessary to prevent the commission of a criminal act likely to result in death or substantial bodily harm, are statutory and well-recognized exceptions to the attorney-client privilege." *General Dynamics*, 876 P.2d at 504. "The privilege takes flight if the relation is abused." *Clark v. United States*, 289 U.S. 1, 15 (1933).

314. *See General Dynamics*, 876 P.2d at 503 (discussing test to determine whether court will permit retaliatory discharge claim by in-house counsel); *see also* CAL. EVID. CODE § 956.5 (West 1994) (providing exception to attorney-client privilege in case of imminent death or substantial bodily harm). The *General Dynamics* court emphasized the importance of preserving the fiduciary relationship between attorneys and clients. *General Dynamics*, 876 P.2d at 503. The court stated:

[T]he fiduciary qualities of mutual trust and confidence — can be protected from the threat of damage by limiting judicial access to claims grounded in *explicit* and *unequivocal ethical norms* embodied in the Rules of Professional Responsibility and *statutes*, and claims which are maintainable by the *nonattorney* employee, under circumstances in which the Legislature has manifested a judgment that the principle of professional confidentiality *does not apply*.

*Id.*

315. *General Dynamics*, 876 P.2d at 504.

A plaintiff cannot bring a retaliatory discharge action based solely on disagreements over policy<sup>316</sup> Additionally, the contested ethical requirement must be one designed to protect the interests of the public at large and not a rule constructed only for the benefit of the attorney or the client.<sup>317</sup> The court will not permit retaliatory discharge claims to proceed unless the employer's acts threatened a *public* policy<sup>318</sup>

The *General Dynamics* test also awards trial courts considerable discretion in deciding whether a retaliatory discharge action brought by an in-house attorney should proceed.<sup>319</sup> The California Supreme Court instructed that trial courts should apply an "array of ad hoc measures from their equitable arsenal" to allow the in-house attorney to present necessary proof while simultaneously protecting client confidences from disclosure.<sup>320</sup> The *General Dynamics* court qualified its decision by stating that retaliatory discharge actions should not proceed if the necessary evidence would breach the attorney-client privilege.<sup>321</sup> If a dismissed in-house attorney can prove retaliatory discharge only by breaching the attorney-client privilege, then the court must dismiss the action.<sup>322</sup>

## VI. *The General Dynamics Test: Is It Effective?*

### A. *Observations About the General Dynamics Test*

In contrast to commentators who have urged the expansion of the retaliatory discharge tort to in-house attorneys with little concern for

316. *Id.* at 504; see *Pierce v Ortho Pharmaceutical Corp.*, 417 A.2d 505, 510 (N.J. 1980) (stating that disputes over discretionary acts do not form basis for public policy exception to at-will employment rule); *McGonagle v Union Fidelity Corp.*, 556 A.2d 878, 883 (Pa. Super. Ct. 1989) (same), *appeal denied*, 575 A.2d 115 (Pa. 1990).

317. *General Dynamics*, 876 P.2d at 504.

318. *Id.*

319. *Id.*

320. *Id.* The *General Dynamics* court provided examples of measures contained in a trial court's "equitable arsenal." *Id.* Appropriate ad hoc measures include: sealing and protective orders, limited admissibility of evidence, limited use of testimony in subsequent proceedings, and *in camera* proceedings. *Id.* Additionally, the *General Dynamics* court encouraged trial courts to take an "aggressive managerial role" in these cases. *Id.*

321. *Id.* at 503-04.

322. *Id.* The court indicated that dismissing an action for breach of attorney-client privilege at the demurrer stage seldom will be appropriate. *Id.* at 504. Rather, the parties will likely litigate whether the attorney-client privilege restricts the attorney's possibility of recovery for retaliatory discharge. *Id.*

preserving client confidences,<sup>323</sup> the California Supreme Court attempted to respect the legitimate confidentiality concerns raised by the *Balla*, *Herbster*, and *Willy* courts.<sup>324</sup> The court developed a test that not only assesses the strength of a retaliatory discharge plaintiff's substantive claim, but also addresses the extent to which an attorney may divulge client confidences.<sup>325</sup> The *General Dynamics* court sought to balance an attorney's compensatory rights with his ethical duties.<sup>326</sup>

The California Supreme Court's test for in-house attorneys discharged for following mandatory ethical obligations presents a relatively low hurdle for plaintiffs.<sup>327</sup> The standard under the first prong of the test has a low threshold because the employer likely has engaged in a high level of misconduct.<sup>328</sup> For example, if an employer ordered its in-house counsel to commit a crime and the attorney refused to engage in that behavior, then the attorney would have followed a mandatory ethical obligation.<sup>329</sup> An in-house attorney whose employer discharged him because of the attorney's refusal to commit a criminal act could successfully bring a retaliatory discharge action against the employer under the *General Dynamics* test.<sup>330</sup> This type of situation should receive protection under the public policy exception because criminal acts violate clearly stated public policies under

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323. See Reynolds, *supra* note 6, at 570 (stating that confidentiality is stressed too much); Corello, *supra* note 6, at 415 (stating that courts should recognize that justifications for absolute confidentiality are less important for in-house counsel than for other attorneys). See generally Feliu, *supra* note 75 (ignoring potential confidentiality problems).

324. See *supra* part IV (discussing *Willy*, *Balla*, and *Herbster* decisions). See generally *Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986) (stating that attorney had ethical obligation to withdraw from representation rather than sue former client), *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) (refusing to allow retaliatory discharge tort because of fear that attorney would disclose client confidences to prove claim); *Herbster v. North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986) (same), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987).

325. See *General Dynamics*, 876 P.2d at 502-04 (presenting pleading test).

326. See *id.* (presenting pleading test).

327. See *id.* at 502-03 (stating that under most circumstances attorney would have viable retaliatory discharge action if company discharged attorney for complying with mandatory ethical rule).

328. See *id.* at 502 (providing example of employer asking attorney to commit crime).

329. *Id.*, see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1992) (prohibiting attorneys from assisting client in criminal or fraudulent conduct); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(3), (4) (1983) (prohibiting attorneys from engaging in fraud, deceit, dishonesty, and illegal conduct involving moral turpitude).

330. *General Dynamics*, 876 P.2d at 503.

both statutes<sup>331</sup> and ethical norms.<sup>332</sup> Many retaliatory discharge plaintiffs, however, will not experience such clear violations of public policy.<sup>333</sup> For those plaintiffs, the *General Dynamics* test becomes much more difficult to apply.<sup>334</sup>

If a corporation discharges an in-house attorney for complying with a permissive ethical standard, the *General Dynamics* test instructs trial courts to evaluate whether nonattorney plaintiffs would have a valid retaliatory discharge cause of action under the standards of *Gantt*.<sup>335</sup> This prong of the test requires trial courts to construct hypothetical situations in which all of the particular facts of the case remain the same except that the court disregards the plaintiff's status as an attorney.<sup>336</sup> The test next examines whether an exception to the attorney-client privilege exists.<sup>337</sup> The most common exceptions that courts have recognized are situations in which the company engages in a fraudulent or a criminal act.<sup>338</sup> If the corporation did not commit a criminal or a fraudulent act, then the plaintiff's case may end

331. See, e.g., CAL. PENAL CODE § 115 (West 1988) (stating that person who offers false or forged records to be filed in public office has committed felony); *id.* § 132 (stating that person who offers false evidence has committed felony); *id.* § 135 (prohibiting destruction of evidence).

332. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1992) (prohibiting attorney from committing criminal act or from engaging in dishonesty, fraud, deceit, or misrepresentation); *id.* Rule 1.2(d) (prohibiting attorney from assisting client in criminal or fraudulent act); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1983) (prohibiting attorney from engaging in dishonesty, fraud, deceit or misrepresentation, or in any other illegal conduct involving moral turpitude).

333. See *General Dynamics*, 876 P.2d at 503 (describing standards for attorneys who follow ethically permissible behavior).

334. See *id.* (stating that inquiry for attorney engaging in ethically permissible conduct is more complex than analysis used for attorney following ethically mandated standards).

335. *Id.*, see *supra* note 312 (providing factual summary of *Gantt*).

336. See *General Dynamics*, 876 P.2d at 503 (instructing trial courts to analyze fact situation under *Gantt* standards).

337. *Id.*

338. *Id.*, see *Clark v United States*, 289 U.S. 1, 15 (1933) (stating that attorney-client privilege does not protect acts of fraud); *United States v United Shoe Mach. Corp.*, 89 F Supp. 357, 358 (D. Mass. 1950) (stating that attorney-client privilege does not apply in cases where client commits crime or tort); *Securities & Exch. Comm'n v Harrison*, 80 F Supp. 226, 230 (D.D.C. 1948) (stating that attorney-client privilege does not protect criminal or fraudulent acts), *aff'd*, 184 F.2d 691 (D.C. Cir. 1950), *vacated as moot*, 340 U.S. 908 (1951); see also MCCORMICK ON EVIDENCE § 95 (Edward W. Cleary ed., 3d ed. 1984) (stating that no privilege applies when services of lawyer obtained to assist in perpetration of crime or of fraud).

at this point in the analysis.<sup>339</sup> The court stated that if the action breaches the attorney-client privilege, then the presiding court should dismiss the attorney's suit.<sup>340</sup>

The California Supreme Court should not be faulted for limiting the use of the retaliatory discharge action by in-house counsel. The court chose to take a policy-based approach that valued the preservation of client confidences.<sup>341</sup> Ultimately, the *General Dynamics* test presents a compromise between two extreme positions.<sup>342</sup>

### B. Applying the General Dynamics Test

One way in which to gauge the effectiveness of the *General Dynamics* test is to apply its standards to the facts of previously discussed retaliatory discharge actions that in-house counsel have brought.<sup>343</sup> *Herbster* provides an example of an in-house attorney ordered to engage in conduct that would violate mandatory ethical obligations.<sup>344</sup> A court would initially evaluate the facts of *Herbster* under the first prong of the *General Dynamics* test.<sup>345</sup> The court would determine whether North American discharged Herbster because he abided by a mandatory ethical obligation set forth in a professional rule or statute.<sup>346</sup>

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339. See *General Dynamics*, 876 P.2d at 503-04 (mandating dismissal of action if no adequate exception to attorney-client privilege exists).

340. *Id.*

341. See *id.* (requiring dismissal of action if attorney would disclose client confidences as means of proof for retaliatory discharge action).

342. Compare *Willy v. Coastal Corp.*, 647 F. Supp. 116, 118 (S.D. Tex. 1986) (stating that attorney had ethical obligation to withdraw from representation rather than sue former client), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988) and *Balla v Gambro, Inc.*, 584 N.E.2d 104, 109-10 (Ill. 1991) (refusing to allow retaliatory discharge tort because of fear that attorney would disclose client confidences to prove claim) and *Herbster v North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343, 346-48 (Ill. App. Ct. 1986) (same), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987) with *Reynolds*, *supra* note 6, at 570 (stating that confidentiality is stressed too much) and *Corello*, *supra* note 6, at 415 (stating that courts should recognize that justifications for absolute confidentiality are less important for in-house counsel than other attorneys) and *Feliu*, *supra* note 75 (ignoring potential confidentiality problems).

343. See *supra* part IV (discussing *Herbster* and *Nordling* cases in which discharged in-house attorneys pursued wrongful discharge actions against their employers).

344. See *supra* notes 176-95 and accompanying text (discussing *Herbster* decision).

345. See *General Dynamics*, 876 P.2d at 502 (stating that first prong of *General Dynamics* test applies to attorneys who engage in mandatory ethical conduct).

346. See *id.* (describing first stage of *General Dynamics* test).

In *Herbster*, North American ordered Herbster to destroy requested discovery documents.<sup>347</sup> The Illinois Code of Professional Responsibility prohibited this type of conduct.<sup>348</sup> Additionally, destroying discovery documents would have violated a state statute by obstructing justice.<sup>349</sup> Under the *General Dynamics* test, Herbster would satisfy the first prong of the analysis because he refused to violate a mandatory ethical norm.<sup>350</sup> Herbster, therefore, could proceed with a retaliatory discharge action against North American.<sup>351</sup>

If an in-house attorney engages in ethically *permissible* conduct, however, the analysis becomes more complex.<sup>352</sup> Applying this portion of the *General Dynamics* test to the *Nordling* facts<sup>353</sup> demonstrates the difficulty of the analysis and the limited application of this part of the test. As a preliminary matter, a court applying the second tier of the *General Dynamics* test must determine whether the discharged attorney has engaged in ethically permissible behavior.<sup>354</sup>

Nordling believed that Northern States planned to engage in illegal conduct by invading the privacy of company employees and he reported this behavior to his superiors in the company.<sup>355</sup> Although Nordling could raise concerns about company policy with which he disagreed, Nordling did

347 *Herbster v North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343, 344 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987).

348. *Id.*, see ILL. CODE OF PROFESSIONAL RESPONSIBILITY Rule 1-102 (1980) (prohibiting attorney from engaging in misconduct, including acts of dishonesty and acts prejudicial to administration of justice), *replaced by* ILL. RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1993); *id.* Rule 7-102(a)(3) (prohibiting attorney from knowingly concealing information that law requires him to reveal), *replaced by* ILL. RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1993); *id.* Rule 7-109(a) (prohibiting attorney from suppressing evidence that he is legally required to reveal), *replaced by* ILL. RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1993).

349. See *Herbster*, 501 N.E.2d at 345 (stating that Herbster would have obstructed justice if he had destroyed requested discovery documents); see also ILL. ANN. STAT. ch. 38, para. 31-4(a) (Smith-Hurd 1977 & Supp. 1992) (stating that destruction of evidence constitutes obstruction of justice) (currently found at ILL. ANN. STAT. ch. 720, para. 5/31-4(a) (Smith-Hurd 1993 & Supp. 1994)).

350. See *General Dynamics*, 876 P.2d at 502-03 (explaining pleading test).

351. See *id.* (stating that under most circumstances attorney who met first prong of test would succeed in retaliatory discharge claim against employer).

352. *Id.*

353. *Nordling v Northern States Power Co.*, 478 N.W.2d 498, 499-500 (Minn. 1991); see *supra* notes 154-75 and accompanying text (discussing *Nordling* decision).

354. *General Dynamics*, 876 P.2d at 503.

355. *Nordling*, 465 N.W.2d at 500.

not act under a mandatory ethical obligation. The *General Dynamics* court stated that the contested ethical requirement must be clearly established and that disagreements over company policy were not actionable.<sup>356</sup> Because Nordling did not rely on a specific ethical provision when attempting to stop Northern States from monitoring employees' private lives, one must speculate about an applicable ethical provision for the purposes of this analysis.

Perhaps a court could find that Rule 1.13 of the Minnesota Rules of Professional Conduct<sup>357</sup> allowed Nordling to inform his superiors about the intended surveillance plan. However, that rule applies only if someone within the organization violates or intends to violate a legal obligation of the organization or to break the law<sup>358</sup>. At the pleading stage, a court may not be able to determine whether a plaintiff's belief was factually correct. If a court accepted Nordling's belief that the conduct at issue was illegal, then Rule 1.13 would seem to provide an ethical obligation to report potentially illegal behavior to a higher authority or to take other reasonable steps to remedy the situation.<sup>359</sup>

If the presiding court determined that Nordling had engaged in ethically permissible conduct, then the court would examine whether Nordling could bring a retaliatory discharge claim under *Gantt* if he were not an attorney<sup>360</sup>. This layer of the test also creates problems under the *Nordling* fact scenario. *Gantt* requires that a retaliatory discharge plaintiff prove that his employer discharged him in retaliation for his activities<sup>361</sup> and that the discharge violated a public policy expressed in the state's constitution or statutes.<sup>362</sup> Although Nordling might be able to show that Northern States discharged him because of his concern about the proposed surveillance plan, Nordling failed to assert any statutory basis for his belief that the company's proposed conduct was illegal or contrary to a stated

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356. *General Dynamics*, 876 P.2d at 504.

357. See MINN. RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1993) (explaining attorney's representation of organization); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (explaining attorney's representation of organization); *infra* part VII (discussing Model Rule 1.13); *infra* note 402 (providing text of Model Rule 1.13).

358. MINN. RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1993).

359. *Id.* Rule 1.13(b).

360. *General Dynamics*, 876 P.2d at 503.

361. *Gantt v Sentry Ins.*, 824 P.2d 680, 684, 687 (Cal. 1988); see *supra* note 312 (providing discussion of *Gantt*).

362. *Gantt*, 824 P.2d at 684, 687; see *supra* note 312 (providing discussion of *Gantt*).



public policy<sup>363</sup> Therefore, Nordling's claim would fail even if Nordling was not an attorney<sup>364</sup>

Assuming that Nordling had identified a public policy prohibiting the company's proposed conduct, a presiding court would then determine whether an exception to the attorney-client privilege would allow Nordling to divulge client confidences in the situation.<sup>365</sup> The facts in *Nordling* preclude Nordling's disclosure of the company's plan as a basis for his retaliatory discharge claim. Nordling does not fall within the exceptions to Minnesota's rules on confidentiality,<sup>366</sup> nor does an applicable exception to the attorney-client privilege exist because Northern States did not commit a fraudulent or illegal act.<sup>367</sup>

The above analysis shows the limits of the *General Dynamics* test. Because the company's conduct did not involve the commission of criminal or fraudulent acts, exceptions to the attorney-client privilege would not apply<sup>368</sup> and Nordling would be unable to proceed with his case.<sup>369</sup> Although an in-house attorney may have a valid cause of action if his conduct implicates a mandatory ethical obligation, the attorney-client privilege will probably preclude retaliatory discharge suits in most other situations, even if a nonattorney employee could successfully bring such an action.<sup>370</sup> The *General Dynamics* court attempted to provide in-house attorneys with a viable recovery mechanism without weakening attorneys' ethical responsibilities.<sup>371</sup>

363. See *Nordling v Northern States Power Co.*, 478 N.W.2d 498, 504 (Minn. 1991) (finding that Nordling failed to assert public policy).

364. See *Gantt*, 824 P.2d at 687 (requiring showing of public policy to support retaliatory discharge action).

365. See *General Dynamics*, 876 P.2d at 503 (stating that attorney-client privilege does not protect criminal and fraudulent acts).

366. See MINN. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1993) (providing list of permissible disclosures of attorney-client confidences).

367. See sources cited *supra* note 338 (providing exceptions to attorney-client privilege).

368. See sources cited *supra* note 338 (providing exceptions to attorney-client privilege).

369. See *General Dynamics*, 876 P.2d at 503-04 (requiring dismissal of action if attorney would disclose confidential information and no exception to attorney-client privilege applied).

370. See *Gantt v Sentry Ins.*, 824 P.2d 680, 687 (allowing nonattorney's retaliatory discharge action to succeed upon showing of employee's discharge in violation of clearly stated public policy).

371. See *General Dynamics*, 876 P.2d at 503-04 (requiring dismissal of action if attorney would disclose confidential information and no exception to attorney-client privilege applied).

*VII. The Impact of Ethical Concerns on In-House Attorneys'  
Retaliatory Discharge Actions*

Ethical considerations constantly surround attorneys' work.<sup>372</sup> The American Bar Association (ABA) attempts to instill a sense of high moral obligation and professionalism<sup>373</sup> in attorneys<sup>374</sup> by urging attorneys to serve both their clients and society<sup>375</sup>. The ABA has developed two sets of ethical standards that states currently use to guide attorneys' behavior.<sup>376</sup> Most states have adopted, with some changes, either the Model Rules of Professional Conduct (Model Rules) or the Model Code of Professional Responsibility (Model Code).<sup>377</sup> Although the Model Rules and the Model

372. See generally MODEL RULES OF PROFESSIONAL CONDUCT (1992) (providing ethical standards for attorneys' conduct); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983) (same).

373. See L. Ray Patterson, *The Fundamentals of Professionalism*, 45 S.C. L. REV. 707, 709 (1994) (defining professionalism as using good judgment and acting with integrity in exercise of power for clients to achieve ultimate goal of justice).

374. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmb. (1983) (promoting important role of attorney in society). The preamble to the Model Code of Professional Responsibility states:

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct.

*Id.* Part VII of this Note discusses the ethical considerations of in-house attorneys in terms of the Model Rules and Model Code for the sake of simplicity because each jurisdiction varies slightly. The term "ethical rules" encompasses both the Model Rules and the Model Code.

375. See MODEL RULES OF PROFESSIONAL CONDUCT pmb. (1992) (describing lawyers' various obligations). But see Patterson, *supra* note 373, at 713 (stating that in practice lawyer acts only in client's best interest because client pays attorney). The preamble to the Model Rules states that a "lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." MODEL RULES OF PROFESSIONAL CONDUCT pmb. (1992).

376. See generally MODEL RULES OF PROFESSIONAL CONDUCT (1992) (originally adopted in 1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983) (originally adopted in 1969).

377. See STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS at x-xi (1994) (describing adoption of Model Rules of Professional Conduct and Model Code of Professional Responsibility in various states); *infra* notes 385-92 and

Code resemble one another in many respects,<sup>378</sup> certain differences can require varied courses of action.<sup>379</sup> If an attorney violates a mandatory provision of either the Model Rules or the Model Code, the supervising bar association may discipline the attorney.<sup>380</sup>

Both the Model Rules and the Model Code require that the information that an attorney learns during the course of representing the client remains confidential.<sup>381</sup> Attorneys must preserve the confidences of clients even

accompanying text (discussing different wording of Model Rules and Model Code with respect to permissible disclosures of client confidences).

378. See GILLERS & SIMON, *supra* note 377, at xi-xii (comparing Model Rules and Model Code). The formats of the Model Rules and the Model Code differ significantly. The Model Code consists of three components: Canons, Ethical Considerations, and Disciplinary Rules. MODEL CODE OF PROFESSIONAL RESPONSIBILITY prelim. statement (1983). The Canons set forth general concepts for attorneys to consider. *Id.* Ethical Considerations represent aspirations and objectives that attorneys should strive to achieve. *Id.* Disciplinary Rules mandate a minimum level of conduct. *Id.* The Model Rules, on the other hand, consist of mandatory rules followed by comments. MODEL RULES OF PROFESSIONAL CONDUCT scope (1992).

379. See GILLERS & SIMON, *supra* note 377, at xi-xii (mentioning variances between Model Rules and Model Code).

380. MODEL RULES OF PROFESSIONAL CONDUCT scope (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY prelim. statement (1983).

381. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992) (requiring attorneys to keep information gathered during course of attorney-client relationship confidential); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1983) (same); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 4 (1992) (stating that lawyer keeps information relating to client's representation confidential in order to encourage client to communicate "fully and frankly" and even to disclose "embarrassing or legally damaging" information to attorney); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 314 (1965) (indicating that attorney must disclose confidences of client if attorney has facts that show beyond reasonable doubt that client will commit crime); ABA Comm. on Professional Ethics and Grievances, Formal Op. 216 (1941) (stating that attorney has duty to preserve confidences and secrets of client); ABA Comm. on Professional Ethics and Grievances, Formal Op. 156 (1936) (stating that client goes against public policy by trying to use attorney-client relationship to protect wrongdoing); ABA Comm. on Professional Ethics and Grievances, Formal Op. 155 (1936) (stating that client's intent to commit future unlawful act is not privileged from disclosure). Model Rule 1.6 provides:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(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

after the representation of those clients ends.<sup>382</sup> The confidentiality requirement raises serious questions about whether an in-house attorney may pursue a wrongful discharge action under applicable ethical rules.<sup>383</sup> Although disclosures of confidential information can occur in limited circumstances, a question arises about whether the use of confidential

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believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992). The Model Code's provision regarding confidentiality states:

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

(B) Except when permitted under DR 4-101 (C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1983).

382. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 21 (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1983).

383. See generally *Willy v. Coastal Corp.*, 647 F Supp. 116 (S.D. Tex. 1986) (refusing to allow in-house attorney's retaliatory discharge suit), *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) (same); *Herbster v. North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986) (same), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987); *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991) (same); *Michaelson v. Minnesota Mining & Mfg. Co.*, 474 N.W.2d 174 (Minn. Ct. App. 1991) (same), *aff'd*, 479 N.W.2d 58 (Minn. 1992); *McGonagle v. Union Fidelity Corp.*, 556 A.2d 878 (Pa. Super. Ct. 1989) (same).

information in a wrongful discharge action against the attorney's former client falls within the permissible confidentiality exceptions.<sup>384</sup>

The difference in the language of the Model Rules and the Model Code is important.<sup>385</sup> Model Rule 1.6 of the Model Rules permits an attorney to disclose confidential information in order to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."<sup>386</sup> The language of Model/Rule 1.6 appears to permit an attorney to reveal client confidences in the context of a lawsuit between the attorney and the client.<sup>387</sup> Whenever an attorney reveals confidences, though, the lawyer must use good judgment and must not disclose confidences unnecessarily.<sup>388</sup>

The language of the Model Code confidentiality provision, on the other hand, does not appear to permit the disclosure of client confidences in a lawsuit against the attorney's former client.<sup>389</sup> DR 4-101, the applicable provision of the Model Code, states that an attorney may reveal "confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."<sup>390</sup> The Model Code does not permit the use of client confidences

384. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992) (allowing disclosure with consent of client, to prevent client from committing criminal act likely to result in substantial bodily harm or death, and to establish claim or defense on lawyer's behalf); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1983) (allowing disclosure with consent of client, when allowed under Disciplinary Rules, when required by law, when mandated by court order, to prevent client from committing crime, to allow attorney to establish defense to wrongful conduct, and to allow attorney to collect fees); see *supra* note 381 (providing text of Model Rule 1.6 and Model Code DR 4-101).

385. See *supra* note 381 (providing text of Model Rule 1.6 and Model Code DR 4-101).

386. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1992); see *supra* note 381 (providing text of Model Rule 1.6). The rule permits disclosure only to the extent that the attorney believes that disclosure is necessary. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1992).

387. *Id.* Rule 1.6(b)(2).

388. See *id.* Rule 1.6(b) (allowing disclosure only to extent necessary); see also *id.* Rule 1.6 cmt. 18 (stating that attorney must "make every effort practicable to avoid unnecessary disclosure of information relating to representation").

389. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1983); accord Theodore Schenyer, *Limited Tenure for Lawyers and the Structure of Lawyer-Client Relations: A Critique of the Lawyer's Proposed Right to Sue for Wrongful Discharge*, 59 NEB. L. REV. 11, 25-26 (1980) (concluding that Model Code DR 4-101 precludes wrongful discharge suits by attorneys). The Model Code, however, specifically allows attorneys to sue former clients for fees. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1983).

390. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1983).

to establish a "claim" as provided by the Model Rules.<sup>391</sup> Rather, the Model Code provision is mostly defensive in nature, only allowing attorneys to initiate suits against their former clients to recover fees.<sup>392</sup>

When analyzing whether an attorney may disclose confidential information at trial, the attorney-client privilege applies in addition to applicable ethical rules such as Model Rule 1.6 or Model Code DR 4-101.<sup>393</sup> The attorney-client privilege applies only during judicial proceedings in which the attorney testifies or produces evidence about the client or when the client testifies.<sup>394</sup> Only communications occurring between the attorney and the client<sup>395</sup> and observations made as a consequence of those communications receive protection from the attorney-client privilege.<sup>396</sup>

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391. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1992) (allowing attorney to use client confidences to assert claim against client); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1983) (allowing attorney to reveal confidences to collect fees and to defend against legal actions).

392. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1983); cf. ABA Comm. on Professional Ethics and Grievances, Formal Op. 250 (1943) (discussing permissible disclosures of client confidences). Opinion 250 states:

But the attorney may disclose information received from the client when it becomes necessary for his own protection, as if the client should bring an action against the attorney for negligence or misconduct, and it became necessary for the attorney to show what his instructions were, or what was the nature of the duty which the client expected him to perform. So if it became necessary for the attorney to bring an action against the client, the client's privilege could not prevent the attorney from disclosing what was essential as a means of obtaining or defending his own rights.

ABA Comm. on Professional Ethics and Grievances, Formal Op. 250 (1943). Although this opinion permits attorneys to reveal confidences when bringing a lawsuit against a former client, the opinion was issued prior to the passage of the Model Code. See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983) (originally adopted in 1969). The opinion applied to the Model Code's predecessor, the ABA's Canons of Professional Ethics, adopted in 1908. See GILLERS & SIMON, *supra* note 377, at x (providing history of ABA ethical guidelines).

393. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 5 (1992) (distinguishing attorney-client privilege from client-lawyer confidentiality under ethical rules).

394. See CAL. EVID. CODE § 954 (West 1966 & Supp. 1995) (stating that person seeking to invoke privilege must establish that confidential communication occurred during course of attorney-client relationship); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 5 (1992) (explaining attorney-client privilege); see also FED. R. EVID. 501 (stating that federal privilege law is governed by principles of common law).

395. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 5 (1992) (explaining attorney-client privilege).

396. See CAL. EVID. CODE § 954 (West 1966 & Supp. 1995) (stating that client has privilege to refuse to disclose and to prevent another from disclosing confidential information

Attorney-client privilege also implicates the work product doctrine.<sup>397</sup> Client-lawyer confidentiality, on the other hand, has a broader scope.<sup>398</sup> Confidentiality under the ethical rules applies outside judicial proceedings and protects not only communications between the attorney and the client, but also any other information that the attorney gathered in the course of representing the client.<sup>399</sup>

In the context of corporate counsel wrongful discharge actions, the client can invoke the attorney-client privilege at trial.<sup>400</sup> However, identifying those representatives of the corporation to whom the privilege and the duty of confidentiality attach poses one of the major difficulties for an in-house attorney.<sup>401</sup> Both the Model Rules and the Model Code classify an in-house attorney's client as the corporate entity itself rather than as the individuals who work for the corporation.<sup>402</sup> However, because the constituents

shared between attorney and client); *People v Meredith*, 631 P.2d 46, 51-52 (Cal. 1981) (finding that privilege extends to protect observations made as consequence of protected communications, but does not protect removed or altered evidence discovered as result of those communications); *State v Olwell*, 394 P.2d 681, 683 (Wash. 1964) (stating that observations are protected by attorney-client privilege if they directly result from communication between attorney and client).

397. See FED. R. CIV. P. 26(b)(3) (codifying work product doctrine). The work product doctrine protects the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.* Discovery before trial usually implicates the work product doctrine. *Id.*

398. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 5 (1992); see Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV 1061, 1064-65 (1978) (stating that attorney-client privilege is narrower than client-lawyer confidentiality).

399. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 5 (1992); see Hazard, *supra* note 398, at 1064-65 (explaining scope of attorney-client privilege).

400. See *United States v United Shoe Mach. Corp.*, 89 F Supp. 357, 358 (D. Mass. 1950) (stating that client must claim privilege); Hazard, *supra* note 398, at 1065 (discussing operation of attorney-client privilege).

401. See GEOFFREY C. HAZARD, JR. & WILLIAM HODES, 1 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.13:102, at 387 (Supp. 1994) (stating that lawyer's first and difficult task is to identify client and to decide to whom attorney owes duty); Corello, *supra* note 6, at 408 (stating difficulty of ascertaining identity and interests of corporate client); Kim, *supra* note 3, at 899 (discussing difficulty of attorney who represents entity).

402. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1983). The applicable text of Model Rule 1.13 states:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

within the organization communicate with the lawyer, the attorney must discern to whom within the organization the duty of confidentiality applies.<sup>403</sup>

The interaction between Model Rules 1.13 and 1.6 has interesting implications for the factual scenarios of typical wrongful discharge cases.

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(b) If 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. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (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 in behalf of the organization as determined by applicable law.
- (c) If despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1992). The applicable Model Code provision provides in part that:

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1983).

403. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. 2 (1992) (identifying constituents of organization as officers, employees, and shareholders); see also *id.* Rule 1.6 (discussing confidentiality). Generally, an attorney representing an organization must hold inviolate information learned from any of the corporation's constituents concerning matters related to the interests of the entity *Id.* Rule 1.6.



Although under the Model Rules in-house counsel may disclose some confidences when pursuing wrongful discharge claims, the rules do not clearly provide for the attorney's disclosure of the client's wrongdoing to an exterior organization.<sup>404</sup> Model Rule 1.13 reads ambiguously. Model Rule 1.13 does not state whether its provisions supersede those of Model Rule 1.6 or whether Model Rule 1.6 contains all of the permissible exceptions to the confidentiality requirement.<sup>405</sup> Model Rule 1.13 does not specifically allow attorneys representing organizations to disclose the entity's wrongful behavior to outside authorities.<sup>406</sup> If a constituent of an organization behaves in a manner contrary to a legal obligation of the organization that will likely bring substantial injury to the entity, then the remedial provisions of Model Rule 1.13 will apply.<sup>407</sup> Rather than providing specific disclosure provisions, Model Rule 1.13 prescribes that "[a]ny measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization."<sup>408</sup> At the same time, however, the rule allows the attorney to "proceed as is reasonably necessary in the best interest of the organization."<sup>409</sup> Conceivably, if a corporation's employee acts unlawfully, reporting the misconduct might best serve the interests of the entity.<sup>410</sup> If the violation goes unreported to the applicable authority and the unlawful behavior becomes imputed to the organization, the entity's reputation would be harmed and the company's financial position would likely suffer.<sup>411</sup>

Model Rule 1.13 does provide attorneys with remedial options other than disclosure.<sup>412</sup> An attorney may ask the wrongdoer to reconsider his action or proposed action.<sup>413</sup> A lawyer certainly should counsel employees engaged in unlawful conduct about the impact or potential impact of their behavior on the organization. Trying to dissuade the corporate officers from

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404. See *supra* note 402 (providing text of Model Rule 1.13).

405. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.6, 1.13 (1992) (observing whether one rule supersedes other).

406. See *id.* Rule 1.13(b) (providing remedial measures that attorney can exercise).

407. *Id.*

408. *Id.*

409. *Id.*

410. See Corello, *supra* note 6, at 409 (stating that in-house counsel must ensure client's compliance with applicable law to prevent harm to corporation).

411. See Corello, *supra* note 6, at 409 (stating that in-house counsel must ensure client's compliance with applicable law to prevent harm to corporation).

412. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b) (1992).

413. *Id.* Rule 1.13(b)(1).

their ill-advised course of conduct can be an important first step. An attorney also can request that someone prepare a separate legal opinion about the matter to present to an authority within the organization.<sup>414</sup> This step could be helpful if the attorney that initially learned about the wrongdoing expresses uncertainty about the illegality of the proposed behavior. Additionally, another opinion can provide greater persuasive force to the authority within the organization who can attempt to alleviate the situation. However, an additional opinion also exposes another person to potential retaliation by the organization.<sup>415</sup> The final option given in Model Rule 1.13 allows referral to a higher authority within the organization.<sup>416</sup> This option can be a beneficial one, especially when the higher authority does not know about the misconduct. However, if the higher authority orchestrated the illegal behavior, then the organization will likely discharge the attorney if he chooses to disclose the wrongdoing to an outside authority. If the higher authority refuses to remedy the situation, Model Rule 1.13 suggests that attorneys may withdraw under the provisions of Model Rule 1.16.<sup>417</sup>

Overall, Model Rule 1.13 encourages the attorney to weigh the violation, its consequences, the involvement of the organization, and the organization's policies about wrongdoing within the organization.<sup>418</sup> The attorney should take progressive steps to stop or to limit the effects of the misconduct.<sup>419</sup> If these steps fail, however, Model Rule 1.13 implicitly allows attorneys to disclose the wrongdoing to an outside authority as long as that course of action is in the best interest of the organization and the

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414. *Id.* Rule 1.13(b)(2).

415. *See* Giesel, *supra* note 3, at 549 (stating that attorney who follows remedial provisions of Model Rule 1.13 may alienate client and subject himself to possible discharge or demotion).

416. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b)(3) (1992).

417. *Id.* Rule 1.16(b)(3) (allowing permissive withdrawal when client "insists upon pursuing an objective that the lawyer considers repugnant or imprudent"); *see id.* Rule 1.16(a)(1) (mandating withdrawal when representation will result in violation of Model Rules of Professional Conduct or other law). Although Model Rule 1.13 frames the attorney's withdrawal as permissive, seemingly in order for the provisions of Model Rule 1.13(b) to apply, the organization must be engaged in unlawful conduct. *Id.* Rule 1.13. If the client continues to break the law, the attorney must withdraw according to the provisions of Rule 1.16(a)(1). *See id.* Rule 1.16(a)(1) (requiring withdrawal if representation of client will result in violation of law).

418. *Id.* Rule 1.13(b).

419. *Id.*

attorney reveals only a minimal amount of confidential information.<sup>420</sup> If the organization participates in illegal conduct, then the attorney must withdraw from representation.<sup>421</sup>

In terms of bringing wrongful discharge actions under the Model Rules, a discharged in-house attorney may disclose client confidences when bringing an action against his former client.<sup>422</sup> The Model Code appears to preclude attorneys from using confidential information as evidence to prove the allegations in their wrongful discharge actions.<sup>423</sup> Additionally, the attorney-client privilege will prohibit the use of communications between the client and the attorney as evidence unless the corporation broke the law.<sup>424</sup> If the organization simply engaged in behavior with which the attorney disapproved, then the attorney-client privilege would bar the use of that information as evidence because the conduct was not a criminal or a fraudulent act.<sup>425</sup> However, the corporate attorneys in those states that have adopted the Model Rules face another problem in bringing wrongful discharge suits. If the organization insists upon pursuing unlawful conduct, then the attorney must withdraw from representation of the client.<sup>426</sup> The employer has not discharged the attorney if the attorney withdraws from representation.<sup>427</sup> Thus, to pursue a retaliatory discharge action, the attorney may face the additional evidentiary hurdle of proving that the company constructively discharged the lawyer.<sup>428</sup>

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420. See *id.* Rule 1.13 (urging caution when disclosing confidences); *supra* notes 404-11 and accompanying text (interpreting operation of Model Rule 1.13).

421. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(1) (1992).

422. *Id.* Rule 1.6(b)(2); see *supra* notes 385-92 and accompanying text (providing analysis of differences between Model Rules and Model Code provisions on confidentiality).

423. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1983) (limiting disclosure of client confidences in court actions to fee disputes and attorney's defense of his own conduct); *supra* notes 381-92 and accompanying text (providing analysis of differences between Model Rules and Model Code provisions on confidentiality).

424. See *supra* notes 396-400 and accompanying text (discussing attorney-client privilege).

425. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 5 (1992) (explaining attorney-client privilege); see also cases cited *supra* note 338 (providing exceptions to attorney-client privilege).

426. MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.13(c), 1.16(a)(1) (1992).

427. See *Beye v Bureau of Nat'l Affairs*, 477 A.2d 1197, 1201 (Md. Ct. Spec. App. 1984) (stating that, normally, employee who resigns is not discharged, and, therefore, has no action for retaliatory discharge).

428. See *Meyer v Brown & Root Constr. Co.*, 661 F.2d 369, 372 (5th Cir. 1981) (stating that constructive discharge occurs when employer makes employee's working

### VIII. Proposed Solutions

Whether courts should permit discharged in-house attorneys to bring retaliatory discharge actions against their employers presents a difficult question because numerous considerations, including serious ethical concerns, affect the resolution of the issue. Any adequate solution to this problem must address the potential ethical conflicts that inure to a retaliatory discharge claim brought by a corporate attorney. Professionals recognize that they experience conflicting obligations to clients and to society.<sup>429</sup> The ABA Commission on Professionalism argues that attorneys need to place greater emphasis on their duties to society.<sup>430</sup> If a conflict exists between an attorney's duty to the client and to the justice system, then the attorney's duty to the justice system must prevail.<sup>431</sup> Thus, an attorney should be able to protect the public by reporting the client's ongoing or planned wrongdoing. All actors in the judicial system, however, must attempt to strike a balance between protecting clients and society.<sup>432</sup> Attorneys should reveal only those confidences necessary to protect society.<sup>433</sup>

Courts have asserted various rationales when deciding whether corporate attorneys may bring wrongful discharge actions.<sup>434</sup> Regardless of the

environment so unreasonable that reasonable person would feel forced to resign); *Neale v Dillon*, 534 F. Supp. 1381, 1390, (E.D.N.Y.) (same), *aff'd*, 714 F.2d 116 (2d Cir. 1982); *Nolan v Cleland*, 482 F. Supp. 668, 672 (N.D. Cal. 1979) (stating that constructive discharge is determined by totality of circumstances and that plaintiff must provide more proof than his subjective opinion); *Laschever v Journal Register Co.*, No. CV-94-0065372, 1994 WL 613427, at \*3 (Conn. Super. Ct. Nov. 1, 1994) (stating that resigning as matter of principle fails to meet constructive discharge requirements); *Beye*, 477 A.2d at 1202 (stating that constructive discharge occurs when reasonable person in employee's situation would have felt compelled to resign).

429. See ABA COMM. ON PROFESSIONALISM, " IN THE SPIRIT OF PUBLIC SERVICE: " A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 29-30 (1986) [hereinafter ABA COMM. ON PROFESSIONALISM] (discussing attorney's conflicting obligations); *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1454 (11th Cir. 1985) (Fay, J., concurring) (same).

430. ABA COMM. ON PROFESSIONALISM, *supra* note 429, at 29-30.

431. *Id.* at 30.

432. See *General Dynamics Corp. v Superior Court*, 876 P.2d 487, 498, 503 (Cal. 1994) (en banc) (providing court's emphasis on vindicating public interest without disclosing client confidences).

433. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1992) (allowing attorney to disclose confidences to prevent criminal act that is likely to result in death or in substantial bodily harm); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (allowing attorney to reveal client's intention to commit crime).

434. See *supra* parts IV, V (discussing cases in which in-house attorneys have asserted wrongful discharge claims). See generally *Willy v Coastal Corp.*, 647 F. Supp. 116 (S.D.

outcome of the previous cases, however, the California Supreme Court, in *General Dynamics*, set forth the first structured test by which a trial court can assess the validity of attorneys' retaliatory discharge claims.<sup>435</sup> Although the test creates some difficulties,<sup>436</sup> other jurisdictions that begin to allow retaliatory discharge tort actions by in-house attorneys can adjust the *General Dynamics* model to address these problems.

The permissibility of retaliatory discharge actions for in-house attorneys depends upon a state's ethical rules.<sup>437</sup> States that have adopted the confidentiality provisions of the Model Code would preclude in-house attorneys from asserting retaliatory discharge claims unless the lawyers can prove their cases without divulging client confidences.<sup>438</sup> The language of the Model Code does not permit attorneys to reveal client confidences in order to sue their former clients for any recovery other than fees.<sup>439</sup>

Those states that have adopted the Model Rules should have greater latitude to allow in-house counsel to bring retaliatory discharge actions.<sup>440</sup> The language of Model Rule 1.6 allows attorneys to bring claims against their former clients and to reveal client confidences.<sup>441</sup> If courts choose to allow these retaliatory discharge actions, states following the Model Rules

Tex. 1986) (reporting that in-house attorney sued employer and alleged wrongful discharge), *rev'd for lack of federal jurisdiction*, 855 F.2d 1160 (5th Cir. 1988); *General Dynamics Corp. v Superior Court*, 876 P.2d 487 (Cal. 1994) (en banc) (same); *Balla v Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991) (same); *Herbster v North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986) (same), *appeal denied*, 508 N.E.2d 728 (Ill.), *cert. denied*, 484 U.S. 850 (1987); *Mourad v Automobile Club Ins. Ass'n*, 465 N.W.2d 395 (Mich. Ct. App.) (same), *appeal denied*, 478 N.W.2d 443 (Mich. 1991); *Nordling v Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991) (same); *Michaelson v. Minnesota Mining & Mfg. Co.*, 474 N.W.2d 174 (Minn. Ct. App. 1991) (same), *aff'd*, 479 N.W.2d 58 (Minn. 1992); *Parker v M & T Chems., Inc.*, 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989) (same); *McGonagle v Union Fidelity Corp.*, 556 A.2d 878 (Pa. Super. Ct. 1989) (same).

435. See *General Dynamics*, 876 P.2d at 502-04 (announcing retaliatory discharge test for corporate counsel).

436. See *supra* part VI (analyzing effectiveness of *General Dynamics* test).

437. See *supra* part VII (discussing effects of differences between Model Rules and Model Code).

438. See Schenyer, *supra* note 389, at 25-26 (concluding that Model Code DR 4-101 precludes wrongful discharge suits by attorneys).

439. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1983); see *supra* part VII (discussing ethical concerns surrounding retaliatory discharge actions by in-house counsel).

440. See *supra* part VII (discussing differences between Model Rules and Model Code).

441. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1992).

can decide whether to allow in-house attorneys to divulge confidential information or to restrict the information's use as the *General Dynamics* court did.<sup>442</sup>

California first created a public policy exception to employment at-will in *Petermann v International Brotherhood of Teamsters Local 396*,<sup>443</sup> and a majority of jurisdictions followed suit.<sup>444</sup> The *General Dynamics* decision could have a similar effect on the allowance of in-house counsel retaliatory discharge actions.<sup>445</sup> For example, on August 1, 1995, in *GTE Products Corp. v Stewart*,<sup>446</sup> the Supreme Judicial Court of Massachusetts followed the *General Dynamics* decision and agreed to recognize retaliatory discharge actions brought by in-house attorneys.<sup>447</sup> As other jurisdictions

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442. See *General Dynamics Corp. v. Superior Court*, 876 P.2d 487, 503-04 (Cal. 1994) (allowing revelation of confidential communications only if information falls within exception to attorney-client privilege).

443. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

444. See *supra* note 76 (listing jurisdictions that recognize public policy exception to employment at-will rule).

445. See *GTE Prods. Corp. v. Stewart*, No. 06749, 1995 WL 457297, at \*3 (Mass. Aug. 1, 1995) (following *General Dynamics* decision and recognizing retaliatory discharge as valid cause of action for dismissed in-house counsel). The *Stewart* decision occurred after the completion of this Note. Therefore, the author could not provide a thorough analysis of the case. See *infra* note 447 (providing factual discussion of *Stewart*).

446. No. 06749, 1995 WL 457297 (Mass. Aug. 1, 1995).

447. See *GTE Prods. Corp. v Stewart*, No. 06749, 1995 WL 457297, at \*3-4 (Mass. Aug. 1, 1995) (allowing dismissed in-house attorneys to bring wrongful discharge actions under limited circumstances). In *Stewart*, the Supreme Judicial Court of Massachusetts considered whether a discharged in-house attorney could proceed with a retaliatory discharge action or whether ethical considerations prohibited the cause of action. *Id.* at \*2. Jefferson Davis Stewart, III, the plaintiff, began working for GTE Products Corporation (GTE) in 1980 as an attorney in GTE's electrical equipment group. *Id.* at \*1. Six years later, GTE promoted Stewart to general counsel of GTE's lighting businesses. *Id.* As general counsel to the lighting businesses, Stewart suggested to the corporate officers and officials that GTE take an aggressive approach toward consumer safety. *Id.* Additionally, Stewart advised GTE that to comply with federal regulations, the company needed to treat fluorescent and incandescent light bulbs as hazardous waste when disposing of them. *Id.* According to Stewart, GTE disregarded his suggestions. *Id.* Throughout his employment at GTE, Stewart consistently had received high performance evaluations. *Id.* However, in 1991, Stewart's supervisor, Rolfe Trevisan, changed Stewart's confidential promotability rating to the lowest level. *Id.* Subsequently, Trevisan informed Stewart that an officer was dissatisfied with Stewart's performance and that unless Stewart's attitude improved, his job was at risk. *Id.* at \*2. Stewart believed that GTE was preparing to discharge him. *Id.* Therefore, Stewart resigned on August 8, 1991. *Id.* Trevisan unsuccessfully attempted to persuade Stewart to return to work. *Id.* The Supreme Judicial Court first decided whether Stewart's status as an in-house attorney precluded his action for wrongful discharge. *Id.* The court evaluated

begin to allow corporate counsel to bring retaliatory discharge actions, those courts should follow California's lead in respecting client confidentiality.<sup>448</sup> Confidentiality breeds trust in the judicial system and helps it function.<sup>449</sup> If courts freely permit discharged attorneys to disclose confidential client matters, citizens' trust in the judicial system will decline.<sup>450</sup> Additionally, even if courts in states that have adopted the Model Rules permit attorneys to use information gathered during the course of representing the client, the court may still exclude the evidence when the client invokes the attorney-client privilege.<sup>451</sup>

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wrongful discharge cases brought by in-house attorneys in other jurisdictions. *Id.* at \*2-3. The Stewart court elected to follow the approach set forth in *General Dynamics*. *Id.* at \*3. The court stated that an in-house attorney should not lack protection from wrongful discharge solely because of his status as an attorney. *Id.* Rather, the court agreed with the *General Dynamics* court that the availability of legal recourse against employers will help in-house attorneys better serve the public interest by upholding ethical duties. *Id.* The court emphasized that it would recognize a retaliatory discharge action brought by an in-house attorney only in very narrow circumstances. *Id.* at \*4. In Massachusetts, a court will recognize an in-house attorney's claim for wrongful discharge only if it depends on "(1) explicit and unequivocal statutory or ethical norms (2) which embody policies of importance to the public at large in the circumstances of the particular case, and (3) the claim can be proved without any violation of the attorney's obligation to respect client confidences and secrets." *Id.* Even if a nonattorney employee in the same circumstances could bring a wrongful discharge action, an in-house attorney may proceed only if the lawyer will not violate attorney-client confidentiality. *Id.* After addressing this threshold issue, the court examined whether the lower court properly granted summary judgment to GTE. *Id.* Because Stewart did not allege that GTE fired him, Stewart needed to prove that GTE constructively discharged him from his position as general counsel. *Id.* at \*5. The court concluded that as a matter of law, Stewart failed to provide sufficient proof of constructive discharge. *Id.* Although the Supreme Judicial Court differed with the district court by agreeing to recognize wrongful discharge actions brought by in-house counsel, the court affirmed the district court's grant of summary judgment to GTE because no triable issue of fact existed with regard to the question of constructive discharge. *Id.* at \*6.

448. *See id.* at \*4 (allowing in-house attorneys to bring wrongful discharge actions in only limited circumstances in which attorneys would not reveal client confidences).

449. *See* MODEL RULES OF PROFESSIONAL CONDUCT pmbl. (1992) (stating that "a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private").

450. *See id.* (stating that confidentiality between attorney and client promotes greater confidence in judicial system).

451. *See* *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) (stating that client must claim attorney-client privilege); Hazard, *supra* note 398, at 1065 (stating that if client claims attorney-client privilege, communications between attorney and client are protected unless subject to exception).

In order to clarify the proper course of action that states should take with regard to allowing the use of client confidences in retaliatory discharge actions, the ABA needs to amend Model Rule 1.13 specifically to address this issue.<sup>452</sup> An amended section could state:

(c) If despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization,

(1) the lawyer may report the misconduct to an outside authority;

(2) the lawyer must withdraw in accordance with Rule 1.16 if the lawyer's continued representation of the client will result in a violation of the rules of professional conduct or other law; or

(3) the lawyer may withdraw in accordance with the provisions of Rule 1.16(b).<sup>453</sup>

This amendment would help clarify an attorney's ability to report wrongdoing to outside authorities in order to support public policy.<sup>454</sup> Additionally, the amended rule would provide greater clarity in identifying when an attorney must withdraw from representation as opposed to when an attorney may withdraw.<sup>455</sup>

Additionally, ABA comments to Model Rule 1.6 that address the allowable scope of asserting claims against former clients could provide immense guidance to attorneys following the ethics rules and to courts attempting to apply the rules. Amending Model Rule 1.6 is also an option. One possible amendment to Model Rule 1.6 would address permissible disclosures by attorneys representing organizations and would add a limitation on the disclosure of client confidences in actions against former clients. The new section would read:

452. Additionally, the ABA should amend the Model Code. Currently, the Model Code fails to provide a disciplinary rule that addresses the representation of an organization. Although EC 5-18 applies to the situation, an Ethical Consideration is not mandatory in character. See *supra* note 311 (distinguishing mandatory Disciplinary Rules and aspirational Ethical Considerations). States could individually amend their governing ethical rules without waiting for the ABA to act.

453. See *supra* note 402 (providing text of current Rule 1.13); see also Kim, *supra* note 3, at 908 (stating that current Model Rule 1.13 fails to adequately address prevention of illegal corporate acts); *supra* part VII (discussing ambiguity of current Rule 1.13).

454. See *supra* notes 405-12 and accompanying text (discussing ambiguity of current Model Rule 1.13).

455. See *supra* notes 405-12 and accompanying text (discussing ambiguity of current Model Rule 1.13).



(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;

(2) to prevent an organizational client from committing a violation of law that is likely to result in substantial injury to the organization;

(3) to protect the public's health and well-being from an organizational client's wrongful acts;

(4) to establish a defense on behalf of the lawyer in a controversy between the lawyer and the client;

(5) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(6) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(7) to collect any fee owed from the client.

(c) A lawyer may reveal such information to the extent permitted by the applicable attorney-client evidentiary privilege

(1) to establish a claim, other than for fees, against the client.<sup>456</sup>

The proposed amendment to Model Rule 1.6 would eliminate potential conflicts with Model Rule 1.13 and provide greater clarity about the use of client confidences when asserting claims against former clients.<sup>457</sup> By allowing the disclosure of client confidences when an exception to the attorney-client privilege applies, those clients committing crimes or fraud could not hide behind the privilege.<sup>458</sup> However, for lesser forms of wrongdoing, retaliatory discharge plaintiffs must rely on proof outside of client-lawyer confidences.<sup>459</sup> Overall, courts must carefully guard client confidences and allow attorneys to reveal those confidences only in rare situations.

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456. See *supra* note 381 (providing text of current Model Rule 1.6); see also *supra* part VII (discussing relation of Model Rule 1.6 and Model Rule 1.13).

457. See *supra* notes 386-88 and accompanying text (discussing right of attorney to assert claim against former client).

458. See *Clark v. United States*, 289 U.S. 1, 15 (1933) (stating that privilege takes flight when it is abused).

459. See *General Dynamics Corp. v. Superior Court*, 876 P.2d 487, 503-04 (1994) (en banc) (stating that court should dismiss action if attorney-client privilege does not allow disclosure of information).

### IX. Conclusion

Protecting society is an important goal that attorneys must strive to achieve.<sup>460</sup> However, lawyers also must remain conscious of the ethical duty that they owe to their clients.<sup>461</sup> In the context of retaliatory discharge actions, courts must attempt to balance these two responsibilities.<sup>462</sup> The *General Dynamics* test affords in-house attorneys discharged for upholding mandatory ethical obligations a reasonable remedy that protects both society and the confidences of the client. Courts should not extend further the retaliatory discharge remedy and jeopardize client confidences. Rather, the state legislatures must consider revising the governing ethical rules to eliminate ambiguity and to provide specific direction to corporate counsel dealing with potential ethical conflicts.<sup>463</sup>

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460. See ABA COMM. ON PROFESSIONALISM, *supra* note 429, at 15 (recommending that attorneys preserve and develop devotion to public interest).

461. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992) (requiring attorneys to preserve client confidences); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1983) (same).

462. See *supra* parts IV, V (surveying retaliatory discharge cases brought by in-house attorneys in which courts attempted to balance attorneys' ethical duties with their representation of clients).

463. See *supra* part VIII (offering amendments to Model Rules).

