Client Confidences in Disputes Between In-House Attorneys and Their Employer-Clients: Much Ado About Nothing — Or Something?

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Full fathom five thy father lies;
Of his bones are coral made;
Those are pearls that were his eyes;
Nothing of him that doth fade
But doth suffer a sea-change
Into something rich and strange.[1]

INTRODUCTION

Most lawyers would probably agree that the business of law[2] has experienced a sea change in the past decade, but few would argue that the results rival the coral and pearls of Shakespeare's imagery. Practices that were rare in the legal profession before the economic upheaval of the 1980s have become so commonplace that they merit little discussion in the mid-1990s.[3] Law firm failures, split-offs, mergers, and downsizings; the focus of many firms on marketing and business generation; the transition from conventional hourly rates to creative billing practices; and non-traditional career choices by lawyers have transformed the structure, economics, and civilities of law practice today.[4] The dramatic increase in the numbers of in-house counsel — and in

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[1] WILLIAM SHAKESPEARE, THE TEMPEST, act 1, sc. 2 (Robert Langbaum ed., Signet Classic 1964) (1611).

[2] I use the term "business of law" deliberately to distinguish this concept from the profession of law. Within the concept "business of law," I include the ways that attorneys organize themselves to provide legal services, structure their relationships in those organizations, make compensation decisions, and market the legal services that they provide.

[3] I premise certain statements here about changes in the profession and business of law on my personal experiences as an associate and a partner in the law firm of Powell, Goldstein, Frazer & Murphy in Atlanta, Georgia, and Washington, D.C., from 1981 to 1993 and on the experiences of my colleagues during those same years. My experiences from 1993 to 1995 as Vice President and General Counsel for a $700 million publicly-held retail apparel company with headquarters in Knoxville, Tennessee, also inform my perspective on certain issues that confront in-house attorneys today.

[4] *See, e.g.*, MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 77-116 (1991) (discussing structural changes that have transformed big law firms over last twenty years); ROBERT W. HAMILTON, FUNDAMENTALS OF MODERN BUSINESS § 22.4 (1989) (arguing that traditional outside law firm practice has given way to in-house legal staffs); Dick Dahl, *Share the Pain, Share the Gain*, A.B.A. J., June 1996, at 68, 68 (discussing alternative billing methods); Darlene Ricker, *The Vanishing Hourly Fee*, A.B.A. J., March 1994, at 66, 67 (arguing that changes in both economy and clients' expectations have generated shift toward alternative billing); Saundra Torry, *Attorneys Who Come In-House from the Cold*, WASH. POST, July 10, 1995, at F7 (describing movement from law firm practice to in-house legal departments).

their attendant responsibility, power, and prestige — constitutes one of the clearest manifestations of these changes.[5]

As the number of in-house counsel has increased so have employment-related disputes between the attorneys and their employers who are, in this context, also their clients.[6] As the matters that in-house attorneys handled grew in scope and sophistication, so did the potential for ethical dilemmas that lead to such disputes. Because the disputes were largely unanticipated, in-house attorneys found themselves in the unfortunate and unenviable position of having to address complex ethical and legal issues with little guidance from the courts or the organized bar.[7]

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[5] I believe that four major factors explain the impact of these changes on the circumstances of in-house counsel. First, the economic pressures on law firms created an environment that many lawyers found less fulfilling; they then began to seek other opportunities for practicing law. Second, as lawyers began considering alternatives to the traditional law firm associate-to-partner career path, they explored the opportunities afforded by in-house legal departments as one of many options. Third, as corporations began viewing in-house legal departments as a way to curb the rapidly increasing cost of legal services, they became more willing to pay the competitive salaries that would attract lawyers who had the ability and experience to handle more complex matters. Finally, law firm downsizings, failures, and mergers created significant career uncertainties for lawyers and made in-house legal departments appear to be more satisfying and stable environments in which to practice law.

Corporate America has clearly profited from the recent changes in the roles of in-house attorneys. It has enjoyed both substantial cost savings and the greater accessibility and more specialized focus of in-house counsel. Recent estimates indicate that about 10% of all practicing attorneys in the United States practice as in-house counsel. Telephone Interview with Jim Merklinger, Staff Attorney, American Corporate Counsel Association (Sept. 4, 1996); *see also* Ted Schneyer, *Professionalism and Public Policy: The Case of House Counsel*, 2 GEO. J. LEGAL ETHICS 449, 458 (1988) (claiming that roughly 10% of lawyers are in-house counsel). The 1995 Price Waterhouse Law Department Spending Survey states that in-house lawyers now provide more than half of their employers' legal work in the areas of antitrust, bankruptcy, employee benefits, contracts, environmental, general corporate, labor, mergers and acquisitions, real estate, non-governmental regulatory matters, and securities and financial issues. The 1995 survey included 240 companies from 13 industries, over 75% of which were Fortune 500 companies. Telephone Interview with Melanca Clark, 1996 Survey Editor, Price Waterhouse LLP (Sept. 4, 1996). Partners and associates in prestigious law firms, who once considered in-house attorneys to be less competent or less committed than attorneys in private practice, *see* Torry, *supra* note 4, at F7 (discussing increased prestige that is attached to in-house attorneys), now aggressively seek, or secure, opportunities to join in-house legal departments.

[6] *See infra* notes 25-32 and accompanying text (discussing various employment related disputes arising between in-house counsel and their employer-clients).

[7] For example, neither the MODEL RULES OF PROFESSIONAL RESPONSIBILITY nor the most recent draft of the ALI RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS provides any specific guidance to in-house attorneys who are involved in employment-related

One of the most problematic questions involving in-house attorneys is whether they should, and will, receive the same judicial protection of their employment relationships that is afforded to nonattorney employees. In other words, must attorneys surrender the protections afforded other employees simply because their employers are also their clients? Most courts have held that in-house attorneys can sue for breaches of express or implied contracts of employment as well as for many statutorily-proscribed wrongs, including gender, age, and race discrimination.[8]

Courts, however, have generally refused to permit attorneys to state a claim for retaliatory discharge on the same terms as other employees.[9] These courts have articulated two fundamental reasons for this position. The first focuses on the public policy rationale for protecting employees against retaliatory discharge. The courts that refuse to grant this cause of action to in-house counsel state that the rules of professional conduct prescribe the attorney's appropriate conduct.[10] In-house attorneys, accordingly, require no additional incentive to take appropriate action. Because rules of professional conduct mandate

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disputes with their employers. This lack of guidance has similarly disadvantaged the employer-clients of in-house lawyers. For example, the executives of many corporations apparently do not understand that the lawyer for the corporation represents the corporate entity rather than the corporation's executives. If the executives do comprehend this distinction, they often fail to appreciate its ramifications. Many executives also do not understand the scope of the attorney's obligation to maintain client confidences. Finally, the executives clearly do not know whether, and if so, under what circumstances, their in-house attorneys may sue them over disputes that arise out of the employment relationship between the lawyer and the corporation.

The lack of understanding in these critical areas inevitably leads to confusion, disappointment, and conflict. As the United States Supreme Court said in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), about the application of the attorney-client privilege to in-house attorneys, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 393. This admonition is equally applicable to the ethical obligation to maintain client confidences, implicated when in-house attorneys contemplate suing their employer-clients for retaliatory discharge. In-house attorneys and their employer-clients require clear articulation of this obligation to understand their relative rights and responsibilities in this complex relationship.

[8] *See infra* notes 25-29 and accompanying text (discussing courts' recognition of attorneys' right to sue for employment-related wrongs).

[9] *See infra* Part I.C.1 (discussing two major policies guiding in-house attorney retaliatory discharge cases).

[10] *See, e.g.*, Balla v. Gambro, Inc., 584 N.E.2d 104, 108-09 (Ill. 1991).

specific action by attorneys who encounter ethical dilemmas, the attorneys do not need the additional protection afforded by the tort of retaliatory discharge to encourage them to "do the right thing."[11] The second reason emphasizes the potential damage to the special relationship of trust between attorneys and their clients were in-house attorneys permitted to sue for retaliatory discharge.[12]

Numerous commentators have sharply criticized the decisions and reasoning of the courts denying this cause of action to in-house attorneys.[13] Moreover, the recent decisions of the California Supreme Court in *General Dynamics Corp. v. Superior Court*[14] and the Supreme Judicial Court of Massachusetts in *GTE Products Corp. v. Stewart*[15] have recognized that in-house attorneys may assert a claim of retaliatory discharge in limited circumstances. These decisions, however, have provided little guidance to in-house attorneys and their employers, who must ascertain the respective rights and responsibilities of each party to this complex relationship.

One of the most significant questions that the *General Dynamics* and *GTE* decisions have left unresolved is the extent to which an in-house attorney's obligation to maintain client confidences circumscribes that attorney's ability to state a claim for retaliatory discharge.[16] Both courts indicated that an attorney could not disclose client confidences absent an applicable exception in either the rules of evidence or rules of professional ethics.[17] Neither court, however, provided any guidance as to whether

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[11] *See infra* Part I.C.1.a (discussing rationale for denying in-house attorneys cause of action for retaliatory discharge).

[12] *See infra* Part I.C.1.b (discussing cases focusing on unique relationship of trust between attorneys and clients as basis for refusing to allow in-house attorneys to sue their employers for retaliatory discharge).

[13] *See, e.g.*, Elliott M. Abramson, *Why Not Retaliatory Discharge for Attorneys: A Polemic*, 58 TENN. L. REV. 271, 278-79 (1991) (arguing that retaliatory discharge cause of action should be available to attorneys); Grace M. Giesel, *The Ethics or Employment Dilemma of In-House Counsel*, 5 GEO. J. LEGAL ETHICS 535, 562-82 (1992) (discussing need for wrongful discharge cause of action as counterbalance to economic pressures).

[14] 876 P.2d 487 (Cal. 1994).

[15] 653 N.E.2d 161 (Mass. 1995).

[16] *See infra* Part II.A (discussing *General Dynamics*'s alternative analyses for determining when in-house attorney may state claim for retaliatory discharge).

[17] *See General Dynamics*, 876 P.2d at 503-04; *GTE Prods.*, 653 N.E.2d at 167-68.

the dispute between the attorney and the employer-client actually satisfied any of the articulated exceptions to the obligation of confidentiality.

This uncertainty may effectively render the retaliatory discharge cause of action meaningless for in-house lawyers because they will not know whether they will be permitted to disclose the information necessary to support their claims. Moreover, this uncertainty leaves employer-clients with little guidance about the circumstances under which their in-house attorneys may be permitted to disclose otherwise protected client confidences. This may lead corporations to be unduly circumspect in their dealings with in-house counsel, denying the corporation the benefit of effective advice. Perhaps most importantly, this uncertainty virtually ensures that the public interest will not be protected in the manner contemplated by the courts that have afforded in-house attorneys the right to sue for retaliatory discharge. The *General Dynamics* and *GTE* decisions fail to articulate a clearly-defined, meaningful cause of action.

There are several reasons why in-house attorneys should have the same right to assert a claim for retaliatory discharge against their employer-clients as nonattorney employees. First, the public interest that the tort of retaliatory discharge is intended to protect is at least as compelling in the case of an attorney employee as in that of a nonattorney employee.[18] A second important reason is that courts must provide in-house attorneys with appropriate and meaningful encouragement to adhere to the highest standards of ethical conduct.[19] Third, the actions of individual employees, and not the corporation itself, frequently create the

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[18] The case of *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991), is a salient example. Roger Balla, in-house counsel for Gambro, learned that Gambro intended to distribute kidney dialysis equipment that did not satisfy U.S. Food and Drug Administration regulations. Balla believed that this equipment could cause death or serious bodily injury to users and, accordingly, informed the president of Gambro that he would attempt to prevent the distribution of this equipment. Gambro fired Balla, who then sued for retaliatory discharge. *See id.* at 106. The Illinois Supreme Court denied Balla the right to assert a claim against his employer, even though the applicable rules of professional conduct required Balla to disclose Gambro's intention to sell the faulty dialysis equipment. *See id.* at 110; *infra* notes 37-40 and accompanying text.

[19] *See infra* Part I.C.1.a (discussing theme in *Balla* that attorneys are ethically obligated to act in certain ways and, accordingly, that they require no additional protection such as that afforded by tort of retaliatory discharge).

ethical dilemmas that in-house attorneys must confront and that have the potential to evolve into disputes. Accordingly, the corporate stakeholders (including its directors, officers, shareholders, employees, suppliers, and the communities in which the corporation conducts its business) will generally be well-served if the individual employee wrongdoers cannot rely on the unique nature of the attorney-client relationship as a shield against accountability for their actions. Fourth, businesses may behave better if they know that in-house counsel will be free to confront them about unlawful or fraudulent conduct and to pursue a claim for retaliatory discharge if they are discharged for having done so. Finally, despite the concerns articulated by in-house counsel themselves,[20] the legal profession generally, and in-house attorneys specifically, will be well-served by affording in-house attorneys a meaningful cause of action when they fulfill their ethical obligations and protect the public interest.

This Article has introduced the dilemma faced by in-house attorneys who find themselves in the position of choosing between their jobs and their ethical obligations. Part I provides a brief historical analysis of the tort of retaliatory discharge. It specifically evaluates the cases addressing the extent to which in-house lawyers may state a claim for retaliatory discharge. Part II analyzes the *General Dynamics* and *GTE* opinions, particularly the courts' pronouncements about the unique relationship between attorneys and their clients and the attorneys' obligation to maintain client confidences. Part III reviews the rules of professional conduct and evidentiary rules regarding the obligation to maintain client confidences and its exceptions. Part IV suggests that a resolution of the competing interests in cases involving disputes between in-house counsel and their employer-clients requires a contextual analysis of in-house counsel's unique role. Finally, Part V suggests that the courts and organized bar associations can and should interpret the articulated exceptions to the existing rules of professional conduct and evidentiary rules regarding client confidences to allow in-house attorneys to disclose such confidences to the extent necessary to support a meaningful

[20] For a discussion of concerns articulated by the American Corporate Counsel Association (ACCA) see *infra* Part IV.B.1.

cause of action for retaliatory discharge. When the existing rules cannot be interpreted in this manner, I suggest appropriate modifications to those rules.

I. A HISTORICAL ANALYSIS

A. The Tort of Retaliatory Discharge

With few exceptions, the common law supported the right of an employer to discharge an at-will employee for any reason or for no reason at all.[21] A substantial majority of states now have a public policy exception to the employment-at-will rule ("the public policy exception").[22] This exception provides employees a cause of action in tort for retaliatory discharge if their dismissals are in retaliation against them and the discharge contravenes a clearly mandated public policy.[23]

Courts, in granting the employee the right to sue for retaliatory discharge, have deemed it important to encourage the employee to act in a manner that protects the public interest.[24] The primary interest these courts protect is the interest of the public, not the interest of the employee in maintaining the

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[21] *See* RESTATEMENT (SECOND) OF AGENCY § 442 cmt. a (1958) (providing that promises by principal to employ and by agent to serve are interpreted as promises to employ and to serve at agreed rate, absent manifestations to contrary, but only so long as either party wishes). Because of statutorily imposed exceptions to this rule, such as prohibitions against discrimination based on age, race, or gender, I have often heard the common law rule reformulated as "an employer may discharge an at-will employee for any reason or for no reason but not for a bad reason."

[22] For a list of states that recognize a public policy exception to the employment-at-will rule, see Michael A. DiSabatino, Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R.4TH 544, § 4[a] (1982 & Supp. 1996).

[23] *See id.* §4[a], at 556. Most states require plaintiffs suing for retaliatory discharge to show that the defendant's action threatens a clearly defined, well-established public policy, although the parameters of the public policy exception vary from state to state. *See* Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1936-37 (1983) (finding that courts recognize three broad categories of motives: refusing to commit unlawful act, performing important public obligation, and exercising statutory right or privilege).

[24] *See generally* Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655 (1996) (arguing that law of wrongful discharge supports interest of individual employees and important public interests). For a list of federal statutes containing "whistleblowing" provisions, see *id.* at 1660 n.20.

employment relationship. The employee whose employment relationship is protected, of course, receives a tangential benefit — no small matter if you are the employee.

B. Employment-Related Claims by In-House Attorneys Against Their Employer-Clients

Courts have recognized that in-house attorneys do not forfeit the statutory protections afforded to other employees simply because their employer is also their client. These courts have reached this conclusion despite the duty of loyalty an attorney owes to a client, the special relationship of trust between attorney and client, and the possible implications regarding the obligation to maintain client confidences. Courts have found that attorneys can sue for age discrimination and for race discrimination.[25] At least one court has held that attorneys fall within the class of employees covered under a "whistleblower" statute and that extending the protection of such a statute to an in-house attorney is consistent with the attorney's ethical obligations.[26] The California Supreme Court recently decided that government attorneys have the right to sue their employer under a state labor relations statute.[27] Courts have also allowed in-house attorneys to sue for breach of express and implied employment contracts[28] and to assert a claim for wrongful termination based on the implied covenant of good faith and fair dealing.[29] In

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[25] *See, e.g.*, Stinneford v. Spiegel Inc., 845 F. Supp. 1243, 1245-47 (N.D. Ill. 1994) (holding that general counsel was employee within meaning of Age Discrimination in Employment Act and employer must have legitimate nondiscriminatory reason for dismissing general counsel); Golightly-Howell v. Oil, Chem. & Atomic Workers Int'l Union, 806 F. Supp. 921, 924 (D. Colo. 1992) (holding that Title VII prohibits discrimination against in-house counsel); Rand v. CF Indus., Inc., 797 F. Supp. 643, 645 (N.D. Ill. 1992) (holding that ADEA preempts client's state law right to discharge attorney; in-house attorneys are not excluded from purview of ADEA).

[26] *See* Parker v. M & T Chems., Inc., 566 A.2d 215, 220 (N.J. Super. Ct. App. Div. 1989) (holding that Conscientious Employee Protection Act was not inconsistent with Code of Professional Ethics and wrongfully discharged attorney could recover monetary damages from retaliating employer).

[27] *See* Santa Clara County Counsel Attorneys Ass'n v. Woodside, 869 P.2d 1142, 1149, 1159 (Cal. 1994) (holding that Meyers-Milias-Brown Act authorized suit by county attorneys' employee association and bars county from discharging attorneys for exercising right to sue).

[28] *See* Chyten v. Lawrence & Howell Invs., 22 Cal. Rptr. 2d 392, 397-98 (Ct. App. 1993) (holding attorney was entitled to enforce termination provisions of employment contract).

[29] *See Golightly-Howell*, 806 F. Supp. at 924 (holding that in-house attorney's claim did

addition, one state bar association has determined that attorneys have the right to participate as members of class action suits asserting certain employee benefit claims.[30]

C. The Right of In-House Attorneys to Sue for Retaliatory Discharge

During the last decade, however, courts have issued twelve decisions that considered whether in-house attorneys may state a claim for retaliatory discharge.[31] Only three courts have permitted an in-house attorney to state such a claim.[32]

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not implicate attorney-client relationship so as to bar claims for breach of contract and implied covenant of good faith and fair dealing).

[30] *See* The Ass'n of the Bar of the City of New York Comm. on Professional and Judicial Ethics, Formal Op. 1994-1 (1994) (allowing attorney to be member of class action, but not class representative or prosecuting attorney).

[31] *See* Willy v. Coastal Corp., 647 F. Supp. 116, 118 (S.D. Tex. 1986) (holding that attorney asked to violate law did not qualify for Texas public policy exception), *rev'd*, 855 F.2d 1160 (5th Cir. 1988), *cert. granted*, 501 U.S. 1216 (1991), *aff'd*, 504 U.S. 935 (1992); Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1031-32, 1032-36 (Cal. 1994) (holding alleged "whistleblowing" employee was not constructively discharged, and that employee did not show discharge violated public policy); Balla v. Gambro, Inc., 584 N.E.2d 104, 107 (Ill. 1991) (holding that attorney did not have cause of action against employer for retaliatory discharge); Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343, 348 (Ill. App. Ct. 1986) (holding tort of retaliatory discharge was not available to general counsel working solely for corporation and whose oral contract was terminable at-will); Flesner v. Technical Communications Corp., 575 N.E.2d 1107, 1111 (Mass. 1991) (holding that allowing employers to terminate employees for obeying law violates public policy); Mourad v. Automobile Club Ins. Ass'n, 465 N.W.2d 395, 403 (Mich. 1991) (refusing to address attorney's retaliatory discharge claim, but holding that attorney could maintain action for breach of contract based on retaliatory demotion and constructive discharge resulting from attorney's refusal to violate Code of Professional Conduct); Michaelson v. Minnesota Mining & Mfg. Co., 474 N.W.2d 174, 179-80, 180-81 (Minn. Ct. App. 1991) (holding counsel could not raise tort and contract claims against employer based on finding that employer's policy guides did not modify employee's at-will employment contract and evidence failed to support retaliatory discharge claim), *aff'd*, 479 N.W.2d 58 (Minn. 1992); Nordling v. Northern States Power Co., 465 N.W.2d 81, 86-87 (Minn. Ct. App.) (holding that in-house counsel's claims of tortious interference with contract claims could not proceed against corporation or corporate officer), *rev'd*, 478 N.W.2d 498 (Minn. 1991); McGonagle v. Union Fidelity Corp., 556 A.2d 878, 885 (Pa. Super. Ct. 1989) (holding that discharge of general counsel for refusing to approve insurance mailings which violated insurance laws of other states was not clearly against Pennsylvania public policy and did not support claim for wrongful discharge by at-will employee); *see also infra* note 32 and accompanying text (citing three cases that recognize in-house attorneys' right to state claim for retaliatory discharge).

[32] *See* General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994) (permitting in-house counsel to maintain action for wrongful discharge in limited circumstances); GTE

1. Common Themes in Cases Denying In-House Attorneys the Right to Sue for Retaliatory Discharge

Two major policies emerge in the cases denying in-house attorneys the right to state a claim for retaliatory discharge. First, some courts believe that attorneys do not need the encouragement to protect the public interest that the tort of retaliatory discharge provides. These courts reason that the rules of professional conduct mandate the appropriate behavior in these circumstances and, therefore, the protection of the cause of action for retaliatory discharge is superfluous.[33] Second, courts fear that a recognition of the tort of retaliatory discharge will significantly impair the special relationship of trust between attorneys and their clients.[34]

a. Attorneys Do Not Require the Protection Afforded by the Tort of Retaliatory Discharge

The public policy exception serves to protect the public interest. The exception is meant to enhance the likelihood that employers will conduct their businesses in a lawful and appropriate manner. It does so by protecting employees who perform important public obligations, exercise statutorily-protected rights or privileges, or refuse to commit unlawful acts.[35] Because the rules of professional conduct mandate specific action by attorneys in similar situations, certain courts state that attorneys require no further encouragement to adhere to these rules.[36] These courts reason that ethical duties require attorneys "to do

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Prods. Corp. v. Stewart, 653 N.E.2d 161, 166 (Mass. 1995) (same); Parker v. M & T Chems., Inc., 566 A.2d 215, 222 (N.J. Super. Ct. App. Div. 1989) (holding that discharged attorney may seek monetary damages as opposed to reinstatement for claim of retaliatory discharge). The *Parker* decision arose in the context of the New Jersey Conscientious Employee Protection Act, a "whistleblower" statute. *See id.* at 216.

[33] *See, e.g., Balla*, 584 N.E.2d at 108-09.

[34] *See, e.g., Herbster*, 501 N.E.2d at 348 (explaining that attorneys' unique position in our society and personal nature of attorney-client relationship justify not allowing retaliatory discharge cause of action to general counsel).

[35] *See General Dynamics*, 876 P.2d at 497 (quoting *Foley v. Interactive Data Corp.*, 765 P.2d 373, 376-79 (Cal. 1988), explaining characteristics of public policy exception).

[36] *See, e.g., Balla*, 584 N.E.2d at 109 (explaining that in-house counsel must follow Rules of Professional Conduct); *Herbster*, 501 N.E.2d at 346 (stating that attorneys are subject to Code of Professional Responsibility and thus tort of retaliatory discharge not available).

the right thing" anyway, so the public interest is served without the need to protect the attorney against retaliation.

The court in *Balla v. Gambro, Inc.*[37] took this position and denied Balla a cause of action for retaliatory discharge. It found that "the public policy to be protected, that of protecting the lives and property of citizens, is adequately safeguarded without extending the tort of retaliatory discharge to in-house counsel."[38] The Illinois rules of professional conduct require that in-house attorneys adhere to their ethical obligations, rather than the "illegal and unethical demands of their clients."[39] Balla, therefore, had an ethical duty to report Gambro's intention to distribute faulty dialysis equipment.[40]

However, this ruling does not merely decline to encourage compliance with the ethical responsibilities inherent in the Illinois rules of professional conduct. It effectively and tacitly sanctions a punitive disincentive for adhering to them. The court allowed Balla's employer to punish him for adhering to a mandatory rule of professional conduct. Under the Illinois court's

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[37] 584 N.E.2d 104 (Ill. 1991). *Balla* is one of the trio of cases often cited in support of the view that in-house attorneys do not have the right to sue for retaliatory discharge. The other two cases are *Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd*, 855 F.2d 1160 (5th Cir. 1988), *cert. granted*, 501 U.S. 1216 (1991), *aff'd*, 504 U.S. 935 (1992), and *Herbster v. North American Co. for Life & Health Insurance*, 501 N.E.2d 343 (Ill. App. Ct. 1986).

[38] *Balla*, 584 N.E.2d at 108.

[39] *Id.* at 109.

[40] *See id.* Balla believed that the use of such dialyzers could cause death or serious bodily harm to patients. *See id.* Accordingly, under Rule 1.6 of the Rules of Professional Conduct as adopted by the Supreme Court of Illinois, Balla was required to report Gambro's intention to sell the faulty dialyzers. *See id.* Rule 1.6 provides that "'[a] lawyer *shall* reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily injury.'" *Id.* (alteration in original) (quoting ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)).

In a strongly worded dissent, Justice Freeman stated that

> as a matter of law, an attorney cannot even contemplate ignoring his ethical obligations in favor of continuing his employment. [However,] to say that the categorical nature of ethical obligations is sufficient to ensure that the ethical obligations will be satisfied simply ignores reality. Specifically, it ignores that, as unfortunate for society as it may be, attorneys are no less human than nonattorneys and, thus, no less given to the temptation to either ignore or rationalize away their ethical obligations when complying therewith may render them unable to feed and support their families.

Id. at 113 (Freeman, J., dissenting).

decision, Balla had two choices: comply with his ethical obligations and lose his job; or remain silent, keep his job, and face serious ethical sanctions.

The court in *Willy v. Coastal Corp.*[41] adopted similar reasoning in denying an in-house attorney the right to sue for retaliatory discharge.[42] The lawyer in *Willy* alleged that his employer terminated his employment because he refused to violate environmental laws. The court observed that the purpose of the public policy exception in Texas is to "encourage law enforce-

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[41] 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd*, 855 F.2d 1160 (5th Cir. 1988), *cert. granted*, 501 U.S. 1216 (1991), *aff'd*, 504 U.S. 935 (1992). *Willy* was reversed on appeal and dismissed on the basis that the federal court lacked federal question jurisdiction with respect to the issues before the court. *Willy*, 855 F.2d at 1173. Willy then sued Coastal Corporation and Coastal States Management Co., a subsidiary. The court found that Coastal wrongfully terminated Willy, awarding him actual damages of $267,283, punitive damages of $232,717, and prejudgment interest of $412,757.99. Willy v. Coastal States Management Company, No. 01-94-01261-CV, slip op. at 2 (Tex. Ct. App. Oct. 24, 1996). In a final amended judgment the trial court awarded no prejudgment interest. In an unreported opinion issued after this Article was written, the Court of Appeals of Texas reversed. *Id.* According to the court, Willy's status as in-house counsel did not preclude him from stating a claim against his employer-client for retaliatory discharge if he could do so without violating his obligation to maintain client confidences. *Id.* slip op. at 7. The court determined, however, that Willy could not prove his claim without disclosing client confidences and, accordingly, rendered judgment for Coastal. *Id.* The court analyzed the attorney's obligation to maintain client confidences under the Texas Code of Professional Responsibility, as in effect at the time Willy brought his suit. The court focused on the narrow exception to the obligation to maintain client confidences set forth in DR 4-101(C)(4), which permits disclosures of client confidences only to the extent "necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct." *Willy*, No. 01-94-01261-CV, slip op. at 8 (quoting TEXAS CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101). The court then concluded that because the rule did not permit disclosure "when necessary to prove a claim against the client," Willy could not be relieved of his obligation to maintain client confidences and, accordingly, could not pursue his claim for retaliatory discharge. *Id.* In a footnote to the opinion, the court noticed that in 1990 Texas adopted the Texas Rules of Professional Conduct. *Id.* slip op. at 8 n.5. Although the applicable Texas rule now permits disclosure "to the extent necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client," *id.* slip op. at 8 n.6 (quoting TEXAS RULES OF PROFESSIONAL CONDUCT Rule 1.05(c)(5)), the court appears to endorse a very narrow reading of that exception. The court references the comments to Rule 1.05 which suggest that this exception applies to situations in which a lawyer is attempting to collect a fee. *Id.* Part III of this Article analyzes the applicable exceptions to the obligation to maintain client confidences in the Model Code of Professional Responsibility and the Model Rules of Professional Conduct. Part V of this Article suggests interpretations of and changes to the applicable rules necessary to support a meaningful cause of action for retaliatory discharge for corporate counsel.

[42] *See Willy*, 647 F. Supp. at 117 (finding no cause of action for termination of employment-at-will attorney).

ment."[43] The court concluded, however, that "[a]n attorney, as an officer of the Court [sic], often is placed in the dilemma of serving either his client's wishes or the law's demands."[44] The court stated that the rules of professional conduct in Texas permit voluntary withdrawal if an attorney believes that a client intends to pursue an illegal act. If the attorney elects not to withdraw yet declines to follow the client's wishes, the attorney "should not be surprised that his client no longer desires his services."[45] The court, therefore, declined to extend the public policy exception to in-house attorneys, finding it unnecessary to provide any additional incentive to an attorney for whom the applicable rules of professional conduct prescribe the desired behavior.[46]

It is not surprising that writers have vigorously criticized this rationale for denying attorneys the right to state a claim for retaliatory discharge.[47] Few would quarrel with the suggestion

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[43] *See id.* at 118 (citing Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (Kilgarlin, J., concurring)).

[44] *Id.*

[45] *Id.*

[46] *See id.* (holding that rules of professional conduct mandating specific ethical action are sufficient).

[47] *See* Chanda R. Coblentz, Note, *The Impact of* General Dynamics Corp. v. Superior Court *on the Evolving Tort of Retaliatory Discharge for In-House Attorneys*, 52 WASH & LEE L. REV. 991, 1047-56 (1995) (positing that courts should balance public policy considerations in favor of providing in-house attorneys tort of retaliatory discharge against ethical obligations of attorney-client relationship); Sara A. Corello, Note, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 COLUM. L. REV. 389, 397-99 (1992) (arguing that in-house attorneys should be granted cause of action for retaliatory discharge to protect public interest in effective in-house legal advice); Cathyrn C. Dakin, Note, *Protecting Attorneys Against Wrongful Discharge: Extension of the Public Policy Exception*, 44 CASE W. RES. L. REV. 1043, 1077-86 (1995) (asserting that ethical codes should not present absolute bar to attorneys who wish to maintain wrongful discharge actions); Michelle M. Gubola, Casenote, *In-House Attorneys' Claims for Wrongful Discharge:* General Dynamics Corp. v. Superior Court, *876 P.2d 487 (Cal. 1994).*, 64 U. CIN. L. REV. 227, 244 (1995) (claiming that courts can protect attorney-client confidence by limiting circumstances in which attorneys can bring retaliatory discharge claims); Raymis H.C. Kim, Comment, *In-House Counsel's Wrongful Discharge Action Under the Public Policy Exception and Retaliatory Discharge Doctrine*, 67 WASH. L. REV. 893, 908-09 (1992) (arguing that disallowing attorneys' actions for retaliatory discharge may lead to increase in illegal corporate behavior over time); John Jacob Kobus, Jr., Note, *Establishing Corporate Counsel's Right to Sue for Retaliatory Discharge*, 29 VAL. U. L. REV. 1343, 1375-80 (1995) (noting that remedy of withdrawal under ethical codes is inadequate because in-house attorney is left entirely without income); Rodd B. Lape, Comment, General Dynamics Corp. v. Superior Court*: Striking a Blow for Corporate Counsel*, 56 OHIO ST. L.J. 1303, 1324-28 (1995) (suggesting that courts should not worry about adverse effects of allowing wrongful discharge

that attorneys have an obligation to comply with the ethical rules and standards of their profession. Most would agree that society has no obligation to provide economic incentives for lawyers to do so. The *Balla* and *Willy* courts, however, articulated a policy that imposes on in-house lawyers a significant disincentive to comply with their ethical obligations.

b. The Importance of Trust to the Attorney-Client Relationship

The second theme in the in-house attorney retaliatory discharge cases is the fear that application of the public policy exception would irreparably harm the relationship of trust existing between attorneys and their clients. Only one recent empirical study,[48] however, has closely analyzed whether the client's expectation of confidentiality is essential to that relationship of trust.[49] Moreover, that study's results are not conclusive.[50]

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suits because attorney-client relationship will be impaired only where corporate client wants to undertake illegal or unethical activity); Elliott M. Lonker, Note, General Dynamics v. Superior Court*: One Giant Step Forward for In-House Counsel or One Small Step Back to the Status Quo?*, 31 CAL. W. L. REV. 277, 297-300 (1995) (maintaining that rules of ethical conduct should not apply homogeneously to both in-house and independent counsel); Patricia Leigh O'Dell, Commentary, *Retaliatory Discharge: Corporate Counsel in a Catch-22*, 44 ALA. L. REV. 573, 592-97 (1993) (arguing that extending retaliatory discharge cause of action to in-house attorneys encourages ethical behavior by corporate counsel); Michael P. Sheehan, Comment, *Retaliatory Discharge of In-House Counsel: A Cause of Action — Ethical Obligations v. Fiduciary Duties*, 45 DEPAUL L. REV. 859, 892-96 (1996) (arguing that cause of action for retaliatory discharge would merely assign cost to, but not prohibit corporations from, firing in-house counsel); Justine Thompson, Note, *Who is Right About Responsibility: An Application of Rights Talk to* Balla v. Gambro, Inc. *and* General Dynamics Corp. v. Rose, 44 DUKE L.J. 1020, 1041-43 (1995) (arguing that denying in-house attorneys right to sue for wrongful discharge discourages attorneys from fulfilling ethical obligations to legal profession and general community).

[48] *See* Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 260-94 (1989) (comparing traditional assumptions regarding attorney-client privilege with views of participants). Professor Alexander's study was based on interviews with in-house attorneys, outside attorneys, corporate executives, and judges in New York City. *See id.* at 206-12 (detailing statistical information on backgrounds of attorneys and judges surveyed). The purpose of the study was to empirically test certain assumptions about the practical effects of the attorney-client privilege in the corporate context. *See id.* at 193 (noting non-existence of empirical research of attorney-client privilege in corporate context).

[49] The responses to certain questions posed by Professor Alexander in his study are interesting in the context of this Article. First, the outside lawyers were asked for their perceptions of the extent to which corporate representatives at the upper management, middle management, and below-middle management levels believe that the attorney-client

Nonetheless, many lawyers and judges presume that the client's expectation of confidentiality is essential.[51]

The importance of this special relationship of trust was critical in *Balla* and in *Herbster v. North American Co. for Life & Health Insurance*,[52] the precursor to *Balla*. In *Herbster*, the Illinois appellate court denied an in-house attorney the right to sue for retaliatory discharge. The plaintiff's employment relationship was allegedly terminated for his refusal to destroy or remove documents that had been requested from his employer in pending lawsuits.[53] The court found that "[t]he mutual trust, exchanges of confidence, reliance on judgment, and personal nature of the

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privilege applies to their communications with counsel. *See id.* at 235. Not surprisingly, the lawyers stated that the number of employees who believe the privilege applies was far greater at the upper management level than at the middle or lower management level. *See id.* In fact, 89.2% of lawyers thought that at least a majority of upper management believed the attorney-client privilege applied to their communications with counsel. Only 8.8% of lawyers, however, thought that at least a majority of employees below-middle management shared that belief. *See id.* at 236 tbl.1.

Second, Professor Alexander asked the in-house counsel, outside counsel, and executives whether they believed that the attorney-client privilege encourages candor on the part of corporate representatives who are aware of the privilege. *See id.* at 241. Sixty-two percent of in-house counsel, 88.5% of outside counsel and 75% of executives indicated a belief that the attorney-client privilege has a positive influence on candor. *See id.* at 245 tbl.4. Not unpredictably, however, about one-third of the executives who expressed the view that the privilege increased candor noted that the degree of diminished candor in the absence of privilege would depend on the circumstances. *See id.* at 246. Furthermore, a few executives responded that in the absence of privilege, candor with in-house counsel would be unaffected, although the level of candor with outside counsel would be decreased. *See id.* at 246-47.

[50] Professor Alexander found that privilege is not always the key factor despite the common view that privilege positively affects candor in corporate attorney-client relationships. *See id.* at 247. When asked to identify and rank in importance other factors that affected the candor of executives, the survey participants identified as the most important factor the trust or confidence in the specific attorney. *See id.* at 248. Other factors included a recognized need of candor for the attorney to give good advice; a corporate "culture" encouraging candid communications; an "employment duty" of candor; a fear of contradiction or potential consequences during litigation; and the employee's predisposition for candidness. *See id.* at 247-48. Identified as having a negative influence on candor was the corporate representative's fear that full disclosure might jeopardize the representative's employment status. *See id.* at 248.

[51] *See, e.g.*, Balla v. Gambro, Inc., 584 N.E.2d 104, 109 (Ill. 1991) (stating that confidentiality is necessary for proper functioning of attorney-client relationship); Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343, 346-47 (Ill. App. Ct. 1986) (stating that purpose of attorney-client privilege is to promote full and frank communications).

[52] 501 N.E.2d 343 (Ill. App. Ct. 1986).

[53] *See id.* at 344.

attorney-client relationship"[54] are vitally important and that the expansion of the public policy exception would have a negative impact on that relationship.[55] It therefore refused to expand the exception to include in-house attorneys.[56]

The Illinois Supreme Court in *Balla*, speaking five years after the decision of the Illinois appellate court in *Herbster*, quoted and adopted the *Herbster* court's language regarding the attributes of the special relationship between attorney and client.[57] The *Balla* court was clearly concerned with the negative impact that in-house attorney retaliatory discharge suits would have on the attorney-client relationship.[58] The court suggested that employers might be less forthright and candid with their in-house attorneys if those attorneys were permitted to sue for retaliatory discharge.[59] The court stated that "[e]mployers might be hesitant to turn to their in-house counsel for advice regarding potentially questionable corporate conduct knowing that their in-house counsel could use this information in a retaliatory discharge suit."[60]

2. Criticism of Theories Supporting a Denial to In-House Attorneys of the Right to Sue for Retaliatory Discharge

The two major themes courts articulate when denying in-house attorneys the right to sue for retaliatory discharge fail to recognize several modern realities confronting in-house attorneys and their employers. The first — that tort law need not reinforce attorneys' ethical obligations — ignores the fact that allowing employers to discharge in-house attorneys for conduct man-

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[54] *Id.* at 348.

[55] *See id.*

[56] *See id.*

[57] *See* Balla v. Gambro, Inc., 584 N.E.2d 104, 108 (Ill. 1991).

[58] *See id.* at 109-10.

[59] *See id.* at 110.

[60] *Id.* at 109. This belief is clearly the basis for the position on the issue of retaliatory discharge taken by the ACCA, the national bar association exclusively dealing with corporate attorneys. ACCA Amicus Curiae Brief at 1, GTE Prods. Corp. v. Stewart, 653 N.E.2d 161 (Mass. 1995) (No. SJC-6749). The ACCA has 38 local chapters and more than 10,200 members who are employed by approximately 4300 organizations. *See id.*; *see also infra* Part IV.B (discussing ACCA's position on retaliatory discharge).

dated by the rules of professional conduct actually penalizes attorneys for adhering to their ethical precepts.[61] This allows a wrongdoing employer-client to derive immunity for its wrongdoing from the lawyer's ethical obligations. This position seems to be based on certain unfounded assumptions about the practice of law today. Most significant is the assumption that attorneys are oblivious to economic and professional realities, including the need to support themselves and their families and the difficulties inherent in changing jobs. Unfortunately, the choice between their ethical obligations and their jobs will not always be clear. Attorneys may face significant obstacles in their search for other employment, particularly when the lawyer has resigned from a prior position in a manner that raises questions about his willingness to "be a team player."[62] Offering attorneys the choice of violating their ethical obligations, resigning from their employment, or being fired will not foster attorney conduct that serves either the legal profession or the public interest.

The second theme is that extending the tort of retaliatory discharge to in-house attorneys would have a negative impact on the attorney-client relationship. Although this idea may be more persuasive, it fails to recognize certain realities that may either minimize this negative impact or have a compensating positive effect. First, corporate America realizes substantial tangible and intangible benefits from its ability to secure sophisticated, timely, and cost-effective legal services from in-house attorneys. The remote possibility of a retaliatory discharge suit by an in-house attorney will not cause corporations to forego these benefits. Second, the possibility of a claim for retaliatory discharge by an in-house attorney may actually have a prophylactic effect,

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[61] *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT, § 1.16:206, at 476.1 (2d ed. 1990 & Supp. 1996) (pointing out contradiction inherent in causing attorneys to suffer substantial monetary penalty for doing required duty).

[62] In *In re Allstate Ins. Co.*, 722 S.W.2d 947 (Mo. 1987), the Missouri Supreme Court concluded that in-house counsel for an insurance company should be permitted to represent insureds in spite of the significant potential for conflict. *See id.* at 953. In a scathing dissenting opinion, Judge Greene observed that "anyone who believes that in conflict of interest situations, a salaried lawyer employee of Allstate would not place the welfare of the corporation above that of the policyholder . . . probably also believes in the Tooth Fairy and the Easter Bunny." *Id.* at 959 (Greene, J., dissenting); *see also* Schneyer, *supra* note 5, at 465-68 (discussing *In re Allstate*).

encouraging corporations to conduct their businesses lawfully and ethically. Finally, clients "never can have — nor should have — unqualified assurance that a lawyer will maintain confidences concerning future or on-going legal wrongs."[63] Although the possibility that an in-house attorney might sue for retaliatory discharge may alter the attorney-client relationship, that alteration would, on balance, be beneficial rather than detrimental to the corporate entity, its in-house counsel, and the public interest.

II. THE ATTORNEY-CLIENT RELATIONSHIP AS VIEWED BY THE COURTS IN *GENERAL DYNAMICS* AND *GTE*

The unique relationship between attorneys and their clients and the specific obligation of an attorney to maintain client confidences figured prominently in both the *General Dynamics*[64] and *GTE*[65] opinions. These cases recognized the retaliatory discharge cause of action for in-house attorneys and spoke to the importance of the attorneys' obligation to maintain client confidences.

A. General Dynamics v. Superior Court

The California Supreme Court's 1994 decision in *General Dynamics* was the first opinion to permit an in-house lawyer to state a claim for retaliatory discharge against his employer since the much-criticized 1991 *Balla* opinion. In *General Dynamics*, the court considered whether Andrew Rose, an attorney who after fourteen years with General Dynamics Corporation was "fired, abruptly and wrongfully,"[66] should have the right to sue his

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[63] 1 HAZARD & HODES, *supra* note 61, § 1.16:206, at 478.1.

[64] General Dynamics Corp. v. Superior Court, 876 P.2d 487, 503-05 (Cal. 1994).

[65] GTE Prods. Corp. v. Stewart, 653 N.E.2d at 161, 165-67 (Mass. 1995). Although it is common for lawyers to blur the distinction between the attorney-client privilege and the lawyer's obligation to maintain client confidences, courts and commentators usually get it right. *See* Fred C. Zacharias, *Privilege and Confidentiality in California*, 28 U.C. DAVIS L. REV. 367, 369 (1995). This was, however, not the case in *GTE* and *General Dynamics*, where both courts blurred this distinction. It is clear, however, that an attorney who believes it is necessary or appropriate to disclose the secrets of her client must find an exception under the rules of professional conduct and an exception under the rules of evidence in order to make such a disclosure with impunity.

[66] *General Dynamics*, 876 P.2d at 490. Rose stated, in his complaint, that although

employer. Rose had attempted to sue for breach of an implied contract and for retaliatory discharge.[67] In concluding that Rose's status as an attorney did not bar his pursuit of those actions, the *General Dynamics* court thoroughly analyzed the "effects of in-house counsel's professional role and ethical duties" on the availability of the cause of action for retaliatory discharge.[68]

The court first discussed General Dynamics's contention that a client's unfettered right to discharge an attorney at any time and for any reason[69] forecloses an action by the attorney for such dismissal.[70] In characterizing this position as one that would "compel [the court] to embrace an intuitively unjust, even outrageous, result,"[71] the court noted that Rose did not contest the right of General Dynamics to discharge an attorney, whether outside or in-house.[72] The court simply agreed with Rose's assertion that there was a potential cost associated with doing so, measured in damages based on breach of contract or retaliatory discharge.[73]

The court, however, acknowledged the existence of a "substantial counterargument" against allowing an in-house attorney to pursue a claim for retaliatory discharge. It based this counterargument on the two reasons articulated in *Balla*: the

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General Dynamics' proffered reason for his dismissal was "a loss of . . . confidence in [his] ability to represent vigorously its interests," his dismissal was actually a result of

> an attempt by company officials to cover up widespread drug use among the General Dynamics workforce, a refusal to investigate the mysterious "bugging" of the office of the company's chief of security, and the displeasure of company officials over certain legal advice Rose had given them, rather than any loss of confidence in his legal ability or commitment to the company's interests.

Id.

[67] *See id.* at 490-91 (stating theories of relief).

[68] *See id.* at 492.

[69] *See id.* at 491. "A client has a right to discharge a lawyer at any time, with or without cause . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 cmt. (1995); *see also* Herbster v. North Am. Co. For Life & Health Insurance, 501 N.E.2d 343, 347 (Ill. App. Ct. 1986) (stating that termination with or without cause is general rule).

[70] *See General Dynamics*, 876 P.2d at 492.

[71] *Id.* at 494.

[72] *See id.* at 494-95.

[73] *See id.*

lack of incentive needed to encourage attorneys to comply with their rules of professional conduct, and the potential damage to the attorney-client relationship.[74]

The *General Dynamics* court recognized that the Illinois courts in *Balla* and *Herbster* "grappled conscientiously with the conflicting values" presented by such cases.[75] However, the *General Dynamics* court found that "[i]f their reasoning and conclusions can be faulted, it is because one searches in vain for a principled link between the ethical duties of the in-house attorney and the courts' refusal to grant such an employee a tort remedy under conditions that directly implicate those professional obligations."[76] The court reasoned that both *Balla* and *Herbster* "reflect not only an unspoken adherence to an anachronistic model of the attorney's place and role in contemporary society, but an inverted view of the consequences of the in-house attorney's essential professional role."[77]

The *General Dynamics* court then concluded that an attorney's status as an in-house lawyer does not bar a claim for retaliatory discharge but emphasized the limited scope of that conclusion.[78] The court suggested two approaches for determining whether an in-house attorney should be allowed to sue for retaliatory discharge. One approach is appropriate if the in-house attorney's action that was allegedly the basis for the discharge was mandated under the applicable rules of professional conduct. In such instances, the court concluded that "under most circumstances [the attorney would] have a retaliatory discharge cause of action against the employer."[79] If, on the other hand, the action that allegedly led to the discharge were merely permissible under the ethical rules, the attorney would first have to demonstrate that the conduct would also give rise to a claim for retaliatory discharge for a nonattorney employee. If so, the attorney must further demonstrate that "some statute or ethical rule, such as the statutory exceptions to the attorney-client

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[74] *See id.* at 498-502 (citing Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991)).

[75] *See id.* at 500 (citing *Balla* and *Herbster*).

[76] *Id.*

[77] *Id.*

[78] *See id.* at 503.

[79] *Id.*

privlege . . . specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer."[80]

It would be reasonable to conclude, at this juncture of the opinion, that the court was imposing different standards of confidentiality on the in-house attorney, premised on whether the conduct that allegedly supported the attorney's discharge was *mandated* or merely *permitted* by the applicable rules of professional conduct. This distinction might lead one to conclude that the court was attempting to remove a barrier to a meaningful cause of action for attorneys whose conduct was mandated by the rules of professional conduct. That conclusion, however, is apparently incorrect. Having articulated its alternative analyses, the court issued a strong admonition that "the in-house attorney who publicly exposes the client's secrets will usually find no sanctuary in the courts."[81] Moreover, "where the elements of a wrongful discharge in violation of fundamental public policy claim cannot, for reasons peculiar to the particular case, be fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege."[82] Through this admonition, the court seemingly qualifies the first of its alternative analyses and thus imposes the same standard of confidentiality on attorneys whether their conduct is mandated or merely permitted under the applicable rules of conduct. This standard requires in-house attorneys, who otherwise would have a cause of action for retaliatory discharge, to identify "some statute or ethical rule . . . [that] specifically

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[80] *Id.*

[81] *Id.*

[82] *Id.* at 503-04. Perhaps the court assumed that any action taken by an in-house attorney that is mandated under the rules of professional conduct would also fall within one of the statutory exceptions to the attorney's obligation to maintain client confidences. Unfortunately, this is not the case. Consider the admonition against the attorney's participation in a client fraud set forth in Rule 4.1 of the MODEL RULES OF PROFESSIONAL CONDUCT. The ABA House of Delegates refused to adopt the Kutak Commission's proposal, *see infra* note 121, to include a client's intention to commit fraud as one of the exceptions under Rule 1.6 of the Model Rules to the attorney's obligation to maintain client confidences. *See generally* Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701 (1993) (asserting that exceptions to duty to maintain confidences as set forth in Model Rules have given rise to difficulties in legal community).

permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer,"[83] or forego the cause of action.

One who has been a corporate general counsel may have difficulty imagining many circumstances in which an in-house attorney would be able to state a claim for retaliatory discharge without disclosing client confidences. Under the rule articulated by the *General Dynamics* court, the task is therefore to determine whether such a disclosure falls within any of the exceptions to the prohibitions set forth in the applicable rules of professional conduct or evidentiary rules.[84]

B. GTE Products Corporation v. Stewart[85]

Approximately one year after the California Supreme Court announced its decision in *General Dynamics*, the Supreme Judicial Court of Massachusetts considered the claim of Jefferson Davis Stewart, former in-house counsel for the lighting companies of GTE Products Corporation. Stewart asserted that GTE constructively discharged him in retaliation for his attempts to convince management of the need to issue public warnings about safety risks associated with the use of certain GTE products and his insistence that GTE comply with certain federal regulations regarding the treatment of hazardous waste.[86] Stewart asked the

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[83] *General Dynamics*, 876 P.2d at 503.

[84] California's rules of professional conduct follow neither the Model Code of Professional Responsibility nor the Model Rules, and California declined to include a rule on confidentiality in its own rules of professional conduct. Section 6068(e) of California's Business and Professions Code, however, requires a lawyer "to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." CAL. BUS. & PROF. CODE § 6068(e) (West 1995). Thus, it appears that the California statutory obligation of confidentiality is more onerous and provides fewer exceptions than the obligations imposed under the law of any other jurisdiction. *See* Zacharias, *supra* note 65, at 404 (concluding that, although lawyers usually fail to distinguish between privileges and obligations, lawyers generally err on side of attorney-client confidentiality). The *General Dynamics* court provides no guidance regarding whether, and to what extent, any exception exists to this apparently absolute prohibition on disclosure of client confidences that would apply in a dispute between an in-house attorney and his employer-client. Yet, the court permitted Mr. Rose to assert a claim for retaliatory discharge against General Dynamics.

[85] 653 N.E.2d 161 (Mass. 1995).

[86] Stewart made the following allegations: (1) he was wrongfully discharged in retaliation for certain legal advice he had rendered to GTE; (2) GTE breached the implied

court to consider whether summary judgment was properly granted to GTE, its individual officers, and its management employees.[87]

Although the appellate court determined that summary judgment was appropriate,[88] it declined to follow the line of cases denying in-house counsel the right to state a claim for retaliatory discharge.[89] The court first noted the public policy exception (which generally takes the form of a claim in tort for retaliatory discharge)[90] to the general rule in Massachusetts that an at-will employee may be discharged for "almost any reason or for no

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covenant of good faith and fair dealing in its employment relationship with Stewart; (3) GTE conspired with other named defendants to commit wrongful discharge against Stewart; and (4) the actions by GTE and other defendants constituted intentional infliction of emotional distress. *See id.* at 163 n.2.

[87] *See id.* at 163.

[88] *See id.* Since Stewart did not claim that he had been terminated from his position with GTE, his claim was based on the theory of constructive discharge. According to the court:

> Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation.

Id. at 168 (quoting Turner v. Anheuser-Busch, Inc., 876 P.2d 1022, 1025 (Cal. 1994)). The court's decision in *GTE* turned on whether GTE's actions rose to the level of a constructive discharge. The court determined that "the conditions under which Stewart alleges he would have been forced to work had he remained at GTE were not so intolerable that a reasonable person would have felt compelled to resign as general counsel." *Id.* at 169. Accordingly, the court determined that summary judgment had been appropriately granted to GTE on the issue of constructive discharge. *See id.* at 169-70.

[89] *See id.* at 165.

[90] *See id.* at 164. The court cited several instances in which the discharge of an employee had been shown to be in violation of public policy. "'Redress is available for employees who are terminated for asserting a legally guaranteed right (e.g., filing workers' compensation claim), for doing what the law requires (e.g., serving on a jury), or for refusing to do that which the law forbids (e.g., committing perjury).'" *Id.* (quoting Smith-Pfeffer v. Superintendent of the Walter E. Fernald State Sch., 533 N.E.2d 1368, 1371 (Mass. 1989)). Employees have also, in limited circumstances, been granted redress as a result of a termination of employment for "'performing important public deeds, even though the law does not absolutely require the performance of such a deed.'" *Id.* at 164-65 (quoting Flesner v. Technical Communications Corp., 575 N.E.2d 1107, 1111 (Mass. 1991)).

reason."[91] The court then considered whether Stewart's status as an in-house attorney barred him from maintaining such a claim.[92]

The *GTE* court first summarized the positions articulated in *Herbster, Willy,* and *Balla.*[93] It then compared the reasoning of these courts to that of the court in *General Dynamics,* which the *GTE* court characterized as concluding that a "claim of wrongful discharge protects more than the private interests in job security and professional reputation of the claimant."[94] In other words, when in-house attorneys (or other employees) seek redress for retaliatory discharge, they protect not only their own economic security and professional reputations but, perhaps more importantly, the interest of the public threatened by the employer's wrongful conduct. According to the *GTE* court, the status of an employee as an attorney "does not diminish the public interest in the furtherance of that policy."[95] Finding the *General Dynamics* reasoning to be more persuasive than that of *Herbster, Willy,* and *Balla,* the *GTE* court concluded that the status of an employee as an attorney should not preclude the availability of a claim for retaliatory discharge. The "public interest is better served if in-house counsel's resolve to comply with ethical and statutorily mandated duties is strengthened by providing judicial recourse when an employer's demands are in direct and unequivocal conflict with those duties."[96]

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[91] *Id.* at 164 (quoting Jackson v. Action for Boston Community Dev., Inc., 525 N.E.2d 411, 412 (Mass. 1988)).

[92] *See id.*

[93] *See id.* at 165. According to the *GTE* court, these courts based their determinations on three factors. First, recognition of the right of in-house attorneys to sue their employers for retaliatory discharge would have a destructive impact on the attorney-client relationship. *See id.* Second, the policy of protecting the public welfare does not require extending the public policy exception to in-house attorneys because codes of professional conduct already require them to take appropriate action. Accordingly, in-house attorneys require no further encouragement. *See id.* Finally, because a client has an unfettered right to discharge an attorney in whom the client has lost confidence, a company should have the right to discharge its in-house attorney without fear of being sued for retaliatory discharge. *See id.*

[94] *Id.*

[95] *Id.* (citing General Dynamics Corp. v. Superior Court, 876 P.2d 487, 497 (Cal. 1994)).

[96] *Id.* at 166; *see also* General Dynamics Corp. v. Superior Court, 876 P.2d 487, 502 (Cal. 1994). The appropriate role of in-house counsel has been a critical focus of the analysis in cases that have considered the application of the attorney-client privilege to in-house attorneys, the extent to which in-house attorneys should have access to documents in

Having afforded in-house attorneys the apparent incentive and right to comply with their ethical obligations, the *GTE* court then adopted both the tenor and the substance of the *General Dynamics* decision regarding the obligation to maintain client confidences. Quoting *General Dynamics*, the *GTE* court warned in-house attorneys that "'[e]xcept in those *rare* instances when disclosure is explicitly permitted . . . it is never the business of the lawyer to disclose publicly the secrets of the client.'"[97] To state a claim for retaliatory discharge, the *GTE* court required that "the claim can be proved without any violation of the attorney's obligation to respect client confidences and secrets."[98] The court added that the exceptions to the obligation to protect client confidences are "extremely limited."[99] The court observed, however, that Massachusetts was currently considering a modified version of the Model Rules of Professional Conduct that would "appear to permit disclosure of client confidences in some circumstances in which disclosure is forbidden" under the current rules.[100]

The proposed rule differs from the existing one in two significant ways. First it expands the exception that only permits disclosure to collect a fee or in defense of an accusation of wrongful conduct. The new rule would include any situation in which an attorney

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litigation that are the subject of protective orders, and whether in-house attorneys employed by insurance companies can adequately represent the interests of the insured clients of insurance companies. *See* Schneyer, *supra* note 5, at 460, 462 n.75 (citing United States Steel Corp. v. United States, 569 F. Supp. 870, 872 (Ct. Int'l Trade 1983) (discussing role of in-house attorneys), *vacated*, 7 C.I.T. 117 (1984)); *see also* Akzo, N.V. v. United States Int'l Trade Comm'n, 808 F.2d 1471, 1482-85 (Fed. Cir. 1986) (discussing in-house attorneys' access to documents under protective order); A. Hirsen, Inc. v. United States, 657 F. Supp. 1297, 1298 (Ct. Int'l Trade 1987) (discussing role of in-house attorneys); 1 HAZARD & HODES, *supra* note 61, at § 1.16:206 (discussing wrongful discharge of attorneys).

[97] *GTE Prods.*, 653 N.E.2d at 167 (emphasis added) (quoting *General Dynamics*, 876 P.2d at 503).

[98] *Id.*

[99] *Id.* In a footnote, the court articulated, without analysis, the four situations under which an attorney may be permitted to disclose client confidences under the Massachusetts Canons of Ethics and Disciplinary Rules Regulating the Practice of Law. MASS. SUPREME JUDICIAL COURT RULES Rule 3:07 (1996). The language of Disciplinary Rule 4-101(C) is identical to the language of Model Code of Professional Responsibility DR 4-101(C) (1986). *See infra* text accompanying note 114.

[100] *Id.*

> believes [disclosure to be] necessary 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.[101]

Second, the proposed rules would add a new exception permitting disclosure "to the extent the lawyer believes necessary to rectify client fraud in which the lawyer's services had been used."[102] Although the *GTE* court indicated that the revised rule would "appear" to expand the circumstances under which an attorney could disclose client confidences, it offered no opinion about whether such circumstances would include a situation in which an in-house attorney otherwise would have a right to sue for retaliatory discharge.

C. *The Impact of the* General Dynamics *and* GTE *Treatment of the Obligation to Maintain Client Confidences on In-House Attorneys' Right to Sue for Retaliatory Discharge*

In *General Dynamics* and *GTE* the courts state unequivocally that they will neither condone nor tolerate any dilution of the attorneys' obligation to maintain client confidences.[103] Therefore, in-house attorneys can maintain a case for retaliatory discharge only in those "rare" instances in which the applicable rules of professional conduct expressly provide an exception to that obligation.[104] Neither court seems to conclude, explicitly or implicitly, that the mere existence of the dispute between the in-house attorney and her employer would satisfy one of the applicable exceptions.[105]

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[101] *Id.* (citing MASS. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(4) (Proposed 1996)).

[102] *Id.* (citing MASS. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(5) (Proposed 1996)); *see also* 2 HAZARD & HODES, *supra* note 61, § 4.1:302, at 721.

[103] *See* General Dynamics Corp. v. Superior Court, 876 P.2d 487, 504 (Cal. 1994); *GTE Prods.*, 653 N.E.2d at 167-68.

[104] *See General Dynamics*, 876 P.2d at 503 (stating that attorneys who publicly expose clients' secrets will usually find no sanctuary in courts except in rare instances when disclosure is permitted or mandated by ethical code); *GTE Prods.* 653 N.E.2d at 167 (stating that exceptions to obligation to protect client confidences are very limited).

[105] *See* CAL. BUS. & PROF. CODE § 6068(e) (West 1995); MASS. SUPREME JUDICIAL COURT

The courts do evince some willingness to use procedural devices to allow limited disclosure of confidential information to support a claim for retaliatory discharge.[106] The limited availability and feasibility of these procedural devices would not, however, comfort an in-house attorney who is contemplating such a claim against her employer. Moreover, it is unclear whether these procedural devices, even when sanctioned by the courts, would insulate in-house attorneys from ethics charges by their employer-clients.

The degree of discomfort experienced by in-house attorneys in such a position would no doubt be heightened by the *General Dynamics* court's admonition that "an attorney who unsuccessfully pursues a retaliatory discharge suit, and in doing so discloses privileged client confidences, may be subject to state bar disciplinary proceedings."[107] The court's admonition likely has force not only when an attorney "unsuccessfully pursues a retaliatory discharge suit and . . . discloses privileged confidences,"[108] but also when an attorney *successfully* sues for retaliatory discharge and discloses such confidences. When the *General Dynamics* court stated that the attorney who publicly exposes the client's secrets will usually find no sanctuary in the court, it did not qualify that statement with an exception for those instances in which the attorney has successfully sued the client for retaliatory discharge.[109] If an attorney who sues for retaliatory discharge could face disciplinary proceedings, the courts in *General Dynamics* and *GTE* may have liberated in-house attorneys from the Hobson's choice of choosing between their ethical obligations and their jobs, but substituted the opportunity to choose between their cause of action and their profession.[110] If this is

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RULES Rule 3:07, DR 4-101 (1996); *General Dynamics*, 876 P.2d at 503 n.6; *GTE Prods.*, 653 N.E.2d at 167.

[106] *See General Dynamics*, 876 P.2d at 504. Examples of such procedural devices include in camera proceedings, sealing and protective orders, limitations on the admissibility of evidence, and orders restricting the use of information in subsequent proceedings. *See id.*

[107] *Id.* (citing Dixon v. State Bar, 653 P.2d 321, 328 (Cal. 1982) and CAL. BUS. & PROF. CODE § 6068(e) (West 1995)).

[108] *Id.*

[109] *See id.* at 503.

[110] The choice faced by in-house attorneys who find themselves in this situation has been compared to the dilemma that was the subject of the 1884 English criminal case of *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884). Dudley and Stephens, together with two

true, then the *General Dynamics* and *GTE* courts have failed to accord a meaningful cause of action to in-house attorneys and, therefore, have failed to adequately support the public policy that the tort of retaliatory discharge exists to protect.

III. THE OBLIGATION OF CONFIDENTIALITY UNDER THE MODEL CODE, THE MODEL RULES, AND THE ATTORNEY-CLIENT PRIVILEGE

This Article next explores whether the recent decisions permitting in-house attorneys to sue for retaliatory discharge will have the effect intended by the courts. It specifically considers whether these decisions will provide to attorneys an incentive to adhere to the highest ethical standards without fear of unacceptable personal risk. It correspondingly considers whether the restrictions on an attorney's ability to disclose client confidences impose an insurmountable barrier to in-house attorneys' pursuit of claims against their employers.[111] It does so by reviewing the three uniform statements of an attorney's obligation to maintain client confidences: the Model Code of Professional Responsibility

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companions, were lost at sea. With little food or water, the men believed they faced inevitable death and so, on the twentieth day, Dudley and Stephens murdered and cannibalized Parker, one of the other two men. Shortly thereafter, a passing ship picked up Dudley, Stephens, and the third man. Dudley and Stephens were tried and convicted of murder; despite the reluctance of the lords to uphold a murder conviction under these circumstances, the conviction was upheld and both men were sentenced to death but, as the lords knew would be the case, the Crown reduced the sentence to six months imprisonment. *See* Giesel, *supra* note 13, at 535, 535-36 (comparing in-house counsel who has only one client with sole practitioner who has many clients).

[111] It is interesting to note that the vast majority of the courts that have permitted in-house attorneys to sue for violations of statutorily-imposed employment mandates, such as age, race, and gender discrimination, have not specifically limited the ability of the attorney to utilize client confidences in support of such a claim to the extent of the courts in *General Dynamics* and *GTE*. *See* Stinneford v. Spiegel Inc., 845 F. Supp 1243, 1247 (N.D. Ill. 1994) (finding that "in-house counsel's age discrimination action is less likely to have a chilling effect on the attorney-client relationship than a retaliatory discharge action"); Rand v. CF Indus., Inc., 797 F. Supp. 643, 646-47 (N.D. Ill. 1992) (finding that "issues involved in age discrimination action brought by a discharged member of a corporate in-house legal staff are less likely to touch on matters sensitive to attorney-client relationship than are issues arising in a retaliatory discharge suit"). *But see* Golightly-Howell v. Oil, Chem. & Atomic Worker's Int'l Union, 806 F. Supp 921, 924 (D. Colo. 1992) (quoting Nordling v. Northern States Power Co., 478 N.W.2d 498, 502 (Minn. 1991) and finding that "in-house counsel are entitled to the same job security as any other employees 'if this can be done without violence to the integrity of the attorney-client relationship'").

("Model Code"), the Model Rules of Professional Conduct ("Model Rules"), and the Uniform Rules of Evidence.

A. The Model Code of Professional Responsibility

The American Bar Association (ABA) adopted in 1969 and promulgated in 1970 the Model Code. Within several years, the courts and the bar associations in virtually all states had adopted the Model Code with few modifications.[112] Disciplinary Rule (DR) 4-101 of the Model Code set forth the prohibition against the disclosure of client confidences.[113] DR 4-101 generally prohibited an attorney's disclosure of client confidences except in four situations described in DR 4-101(C). Under that subsection 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.[114]

A footnote to DR 4-101[115] relates numerous instructive historical exceptions to the attorney obligation to maintain client confidences. These exceptions arose from the laws of agency and evidence as articulated in ABA Opinion 250.[116] That opinion

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[112] *See* 1 HAZARD & HODES, *supra* note 61, § 202, at lxvi.

[113] The Code of Professional Responsibility is organized into three levels of rules or standards: (1) broad general principles known as Canons; (2) aspirational standards known as Ethical Considerations; and (3) black letter rules known as Disciplinary Rules. *See* 1 *id.* In theory, the Disciplinary Rules were the minimum standards of behavior while the Canons and Ethical Considerations were intended as guidelines. In practice, however, it was difficult to draw these distinctions and the Canons and Ethical Considerations were often viewed as binding. *See* 1 *id.*

[114] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1986).

[115] The Preface to the Model Code explains that the footnotes are for the sole purpose of relating the provisions of the Model Code to the ABA Canons of Professional Ethics adopted in 1908, the Opinions of the ABA Committee on Professional Ethics, and certain other sources. The footnotes "are not intended to be an annotation of the views taken by the ABA Special Committee on Evaluation of Ethical Standards." MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmbl. n.1 (1986). The Special Committee on Evaluation of Ethical Standards is the committee that was responsible for drafting the Model Code. *See* 1 HAZARD & HODES, *supra* note 61, § 202, at lxvi.

[116] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY pmbl. n.1 (1986) (quoting ABA

set forth a general exception to the rule that a lawyer may not reveal the confidences of his client. It interpreted one of the 1908 Canons of Professional Ethics and no longer has any force and effect. It is, however, quoted in the Model Code as guidance to the relationship between the provisions of the Model Code and the ABA Canons of Professional Ethics.[117] The ABA Opinion 250 exception applied when disclosure was necessary to protect the attorney's interests arising out of the attorney-client relationship.[118] Citing treatises from the laws of agency and evidence, Opinion 250 further permitted an attorney to disclose a client's confidential information "when it [became] necessary for his own protection . . . [or] was essential as a means of obtaining or defending his own rights."[119] Furthermore, "[i]t has frequently been held that the rule as to privileged communications does not apply when litigation arises between attorney and client to the extent that their communications are relevant to the issue."[120]

These pronouncements arguably provide little insight into the appropriate interpretation of today's ethical constructs. They do, however, provide an interesting historical perspective, indicating that the possibility of disputes between attorneys and their clients was considered long before the problems faced by contemporary in-house counsel were ever contemplated. And, unlike the Model Code drafters, the drafters of the Canons of Professional Ethics, and those charged with its interpretation, did not limit their contemplation of such disputes to unpaid fees and allegations of lawyer misconduct.

B. The Model Rules of Professional Conduct

The ABA House of Delegates adopted the Model Rules in 1983.[121] The period between the promulgation of their first

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Opinion 250).

[117] *See id.* Canon 4 n.19.

[118] *See id.* (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 250 (1943)).

[119] *Id.* (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 250 (1943) and quoting 2 MECHEM ON AGENCY § 2313 (2d ed. 1914)).

[120] *Id.* (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 250 (1943) and quoting 5 BURR W. JONES, COMMENTARIES ON EVIDENCE, § 2165 (2d ed. 1926)).

[121] *See* 2 HAZARD & HODES, *supra* note 61, app. 1, at 971. Because of general

draft in 1980 and their eventual adoption in 1983 was filled with spirited and contentious debate over the rules on client confidences.[122] It is interesting that the attack on the Kutak Commission's[123] original draft on client confidences came from both ends of the spectrum: those who believed that the proposed rule would permit too much disclosure and those who believed it would not permit enough.[124] According to Professors William Hodes[125] and Geoffrey Hazard,[126] however, "no version, proposed or eventually adopted, significantly changed the practical impact of the Code and then current law."[127] They believe, even though there was perceived to be little substantive difference between the provisions on client confidences

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dissatisfaction with the Code of Professional Responsibility, in 1977 the ABA appointed the Special Commission on Evaluation of Professional Standards to review the Model Code and determine whether revisions were appropriate. The Special Commission became known as the Kutak Commission after its chair, Robert Kutak. *See* 1 *id.* § 203, at lxvii. The Model Rules have been amended several times since their adoption in 1983. *See* 2 *id.*, app. 1, at 971.

[122] *See* 1 *id.* §§ 204, 205. For various views on the tenor and substance of the debate on the various drafts of the Model Rules, see generally Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 640 (1981) (stating pace of change of Rules is accelerating); Gerard J. Clark, *Fear and Loathing in New Orleans: The Sorry Fate of the Kutak Commission's Rules*, 17 SUFFOLK U. L. REV. 79, 79-81 (1983) (commenting on radical attempt to eliminate requirement of "zealous advocacy" on part of attorney); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 690 (1981) (commenting on imbalance between professionals and public representation on Kutak commission); Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 L. & SOC. INQUIRY 677, 681-88 (1989) (casting doubt on validity of critical theories about significance of ethics codes, and stressing structural differentiation of today's legal profession). For an in-depth analysis of the debate about the rules on client confidences, see generally R.W. Nahstoll, *The Lawyer's Allegiance: Priorities Regarding Confidentiality*, 41 WASH. & LEE L. REV. 421 (1984) (concluding that Model Rules addressing confidentiality are inadequate and need amendment to conform to Kutak Commission's proposals).

[123] *See supra* note 121.

[124] *See* 1 HAZARD & HODES, *supra* note 61, § 1.6:101, at 127.

[125] Professor William Hodes is Professor of Law at Indiana University School of Law, Indianapolis, and writes frequently in the area of professional responsibility.

[126] Professor Geoffrey C. Hazard, Jr. is Trustee Professor of Law at the University of Pennsylvania where he teaches Professional Responsibility and Civil Procedure. Professor Hazard writes frequently in the area of professional responsibility and was the Reporter for the Kutak Commission.

[127] 1 HAZARD & HODES, *supra* note 61, § 1.6:101, at 128; *see also* W. William Hodes, *The Code of Professional Responsibility, the Kutak Rules, and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 739-40 (1981) (concluding major contribution of discussion draft was to expose public perception of lawyer as "hired gun").

in the Model Rules and those in the Model Code, "the debate . . . confirmed the traditional understanding that the principle of confidentiality serves public policies important enough to warrant a basic rule of confidentiality that is unstintingly observed."[128] The debate over confidentiality clarified a second principle: narrow exceptions to the obligation to maintain client confidences *must* be created, "lest unworthy clients take advantage of rules designed to shield information about past actions in order to cover up on-going or future misdeeds."[129] Clients who abuse the system in this manner and then "compound the offense by attempting to hold the lawyers to rules intended for a socially constructive purpose . . . should be considered to have forfeited any claim to confidentiality, if not their very entitlement to legal services."[130]

The attorney's obligation to maintain client confidences is set forth in Rule 1.6 of the Model Rules.[131] The two exceptions

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[128] 1 HAZARD & HODES, *supra* note 61, § 1.6:101, at 128.

[129] 1 *id.* § 1.6:101, at 130.1.

[130] 1 *id.*

[131] Rule 1.6 of the Model Rules 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 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 (1995).

The most vigorous debate with respect to the language of Rule 1.6 addressed the exceptions to the obligation to maintain client confidences, set forth in the Proposed Final Draft of the Model Rules submitted by the Kutak Commission to the ABA House of Delegates in 1982. One of these exceptions would have permitted disclosure when necessary "[t]o prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in . . . substantial injury to the financial interests or property of another . . . ." 1 HAZARD & HODES, *supra* note 61, §1.6:109, at 168.3 n.6 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (Proposed Final Draft 1982)). Another

included in Rule 1.6 are often characterized as the "future harm" exception[132] and the "self-defense" exception.[133] The

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would have permitted disclosure "[t]o rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used." 1 *id.* The House of Delegates ultimately rejected both of these exceptions in an attempt to enact a virtually absolute obligation of confidentiality, even in the face of ongoing and serious misconduct by a client. *See* 1 *id.* § 205, at lxx. The exception dealing with criminal acts by clients was ultimately limited to "act[s] that the lawyer believes [are] likely to result in imminent death or substantial bodily harm . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1995). "We stand by liars and thieves, not just in court, but outside of it as well, and we keep our mouth shut." Susan P. Koniak, *When Courts Refuse to Frame the Law and Others Frame It to Their Will*, 66 S. CAL. L. REV. 1075, 1099 (1993). The exception language in the Proposed Final Draft dealing with possible disputes between attorneys and their clients was adopted as subsection (b)(2) to Rule 1.6 exactly as proposed with one addition, which expanded the exception to include a response "to allegations in any proceeding concerning the lawyer's representation of the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1995). One other exception that was included in the Proposed Final Draft but was also rejected by the ABA House of Delegates would permit disclosure to "comply with law." *See* 1 HAZARD & HODES, *supra* note 61, § 1.6:112, at 168.7. Although rejected by the ABA, the Comments to Rule 1.6 support the argument that a "'required by law' exception may be read into Rule 1.6(b)(2)." 1 *id.* § 1.6:112, at 168.9. Furthermore, Hazard and Hodes argue that "[c]ourts in jurisdictions adopting the present language of Rule 1.6 . . . will be obliged to read in a 'required by law' exception." 1 *id.* § 1.6:112, at 168.8.

The ABA Standing Committee on Ethics and Professional Responsibility made one more attempt to treat the problematic restraints placed on lawyers in situations involving fraudulent conduct by clients. In 1991, the Committee proposed an amendment to Rule 1.6 that would permit disclosure "to the extent the lawyer reasonably believes necessary . . . to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used." Hazard, *supra* note 82, at 721. The same interests (primarily the American College of Trial Lawyers) opposed this amendment as successfully as they opposed the broader exception dealing with client fraud. *See id.* The proposed amendment was rejected. *See id.* at 724. Professor Hazard has criticized the narrowing of the exceptions and the refusal to adopt the amendment to Rule 1.6.

> Responsible law-giving require[s] recognition at least that honest lawyers can suffer the misfortune of having dishonest clients; that such a lawyer is at risk of being drawn into a transaction which is tainted with fraud or other illegality; that in such an eventuality the lawyer can be charged with being an accessory to the client's wrongdoing; that honest lawyers should be able effectively to disengage themselves from client fraud; and that being able to effect such a disengagement requires clear legal authority to disclose client confidences if necessary to that purpose. It also requires having no tears for clients who draw their lawyers into fraudulent schemes.

Id. at 720.

[132] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1995). The significant difference between this exception and that rejected by the ABA, *see supra* note 131, is of course the difference between prospective and past acts. In addition, the exception, as adopted by the ABA, was limited to a prospective act "that the lawyer believes is likely to

future harm exception is so limited, both in scope and application, that it is unlikely to be of significant value to in-house attorneys.[134] The self-defense exception, on the other hand, may be interpreted to provide meaningful relief to lawyers when the obligation to maintain client confidences unduly hampers their ability to sue for retaliatory discharge.

1. The Self-Defense Exception

Subsection (b)(2) of Rule 1.6 permits disclosure of client confidences

> [t]o 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.[135]

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result in imminent death or substantial bodily harm." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1). The Proposed Final Draft would have broadened the circumstances under which disclosure was permitted to include "substantial injury to the financial interest or property of another." 1 HAZARD & HODES, *supra* note 61, § 1.6:109, at 168.3 n.6 (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (Proposed Final Draft 1982)). Finally, the Proposed Final Draft would have permitted disclosure when the criminal or fraudulent act was likely to result in "death" without a showing that the "death" be "imminent."

[133] *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1995).

[134] Subsection (b)(1) of Rule 1.6 permits disclosure of client confidences "[t]o prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily injury." *Id.* Rule 1.6(b)(1). The following states mandate rather than simply permit disclosure under these circumstances: Arizona (ARIZ. RULES OF PROFESSIONAL CONDUCT ER 1.6 (1983)), Connecticut (CONN. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1986)), Florida (FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-1.6 (1993)), Hawaii (HAW. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1994)), Illinois (ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1991)), Nevada (NEV. RULES OF PROFESSIONAL CONDUCT Rule 156 (1986)), New Jersey (N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1984)), North Dakota (N.D. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1986)), and Wisconsin (WIS. RULES OF PROFESSIONAL CONDUCT Rule SCR 20:1.6 (1988).

While the "future harm" exception would clearly protect an in-house attorney from disciplinary action, it is unclear whether it would permit the attorney to disclose the additional confidential information needed to state a claim against his or her employer for retaliatory discharge. The in-house attorney who wishes to state such a claim may be required to look elsewhere for an exception to the obligation to maintain client confidences.

[135] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1995).

The precursor to the Model Rules' self-defense exception is set forth in DR 4-101(C)(4) of the Model Code, which permits a lawyer to disclose client confidences as "necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."[136] A strict textual analysis would support, and perhaps demand, the conclusion that the scope of the Model Rules' self-defense exception is significantly broader than its counterpart in the Model Code. Commentators have characterized this self-defense exception, however, as "a direct descendant of the Code of Professional Responsibility"[137] that "remained essentially unchanged from its Code roots through the entire revision process."[138] The same commentators note, however, that "this relatively uncontroversial exception now requires a closer look, and may become more controversial, for it may be called upon to do double or triple duty, to compensate for the exceptions deleted from the Proposed Final Draft by the ABA House of Delegates."[139] I suggest that the so-called self-defense exception may actually be called upon to do quadruple duty. It could provide an essential element of a two-part remedy for in-house counsel: (1) the ability to state a claim for retaliatory discharge; and (2) appropriate relief from the obligation to maintain client confidences.

a. The Application of the Self-Defense Exception to Disputes Between In-House Attorneys and Their Employer-Clients

In comparison to the language of the similar exception in the Model Code,[140] the language of the Model Rules' self-defense exception is extremely broad. The first clause of this exception, which permits attorneys to disclose client confidences "[t]o establish a claim or defense on behalf of the lawyer in a

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[136] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1986).

[137] *See e.g.*, 1 HAZARD & HODES, *supra* note 61, § 1.6:305, at 175.

[138] 1 *id.*

[139] 1 *id.*

[140] The Model Code limits the self-defense exception to two specifically articulated situations: fee disputes and defense "against an accusation of wrongful conduct." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1986).

controversy between the lawyer and the client,"[141] is often viewed, however, as dealing primarily with fee disputes and malpractice claims. These are, of course, precisely the situations that are mentioned in the counterpart to this exception in the Model Code.[142] Professors Hazard and Hodes have characterized this exception as permitting the "lawyer . . . to meet the client on even terms, and not be rendered helpless by the client's self-interested version of the facts. Once an adversarial relationship has developed, simple fairness demands that the lawyer be permitted to present his claim or defense without handicap."[143]

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[141] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1995).

[142] MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1986) states that disclosure is permitted as "necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."

[143] 1 HAZARD & HODES, *supra* note 61, § 1.6:305, at 176. The third clause of the "self defense" exception, which permits disclosure "to respond to allegations in any proceeding concerning the lawyer's representation of the client," *see* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1995), appears to overlap significantly with the first clause. Such a proceeding could, in virtually every instance, also be characterized as a "controversy between the lawyer and the client," *id.*, which would permit the attorney to disclose confidential information to "establish a claim or a defense" under the first clause of the self-defense exception. The most significant difference between the first and third clauses, therefore, seems to be the limitation in the third clause to disclosure in situations in which the attorney is responding to allegations — a limitation that a textual interpretation would indicate does not exist in the first clause. It is this difference that makes the first clause particularly helpful to an in-house attorney who has not been accused of any wrongdoing (apparently a predicate for recourse to the second and third clauses), but wishes to assert a claim against an employer-client for retaliatory discharge.

The second clause of the self-defense exception permits disclosure "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved." *Id.* The most significant debate about the scope of this exception is whether it can be used in a preemptive manner. One might argue that the introductory language to Rule 1.6(b), which permits disclosure only "to the extent the lawyer reasonably believes necessary," *id.* Rule 1.6(b), would support the conclusion that the exception is available to a lawyer only in a defensive situation. The Comment to Rule 1.6, however, states that the lawyer need not "await the commencement of an action" but rather may "[respond] directly to a third party who has made such an assertion." *Id.* Rule 1.6 cmt. 18.

One of the most interesting aspects of Rule 1.6 lies not in the text itself but in the Comments. In an effort to deal with the unwillingness of the ABA House of Delegates to adopt the "rectify fraud" exception, the Comments to Rule 1.6 were drafted to provide lawyers the ability to withdraw from representation, give notice of such withdrawal, and "withdraw or disaffirm any opinion, document, affirmation or the like." *Id.* Rule 1.6 cmt. 16. Textually, the ability to effect a "noisy withdrawal" (which has the effect of signalling third parties that the client has committed a fraud or other crime) exists as a result of the "carve out" interpretation in the Comment to Rule 1.6 that such action will not be deemed to be a disclosure of a client confidence. Thus, there is no need for an exception. *See* 1 HAZARD & HODES, *supra* note 61, § 1.6:313. Consider, however, the plight of the in-house

b. The Oregon Bar Association's Interpretation of the Self-Defense Exception

The Oregon State Bar Association recently considered the plight of in-house counsel who are unable to pursue effectively a remedy for retaliatory discharge because of restrictions on disclosure of client confidences.[144] The Oregon rules of professional conduct are based on the Model Code. The rule prohibiting disclosure of client confidences, however, includes an exception when disclosure is necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."[145] The Oregon State Bar Association has suggested that

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counsel who effects a "noisy withdrawal" and is then terminated from employment as a result of having done so.

The debate about whether the Rule 1.6(b)(2) exceptions are available to a lawyer on a preemptive basis has generally focused on the middle clause of that provision. There are two possible reasons for this situation. First, the provisions of subsection (b)(2) are often lumped together colloquially under the term "self-defense" exceptions. The clear language of the first clause, however, permits a lawyer to "establish a claim . . . in a controversy between the client and the lawyer." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1995). Accordingly, one can read that exception as permitting affirmative as well as defensive action. This moots any debate about whether the exception's availability is limited to defensive action. Many lawyers believe that the first clause of subsection (b)(2) is limited to fee disputes and malpractice claims. This assumption may eliminate the debate because the scope of the exception is already presumed to be extremely narrow. This presumption, although perhaps defensible from a historical perspective, may not be accurate today or in the future.

[144] The Oregon State Bar Association Board of Governors issued a Formal Opinion in January 1994 addressing whether a "lawyer [may] bring a civil action for wrongful termination if bringing the action requires disclosure of confidences or secrets of [the] Company." Or. St. B. Ass'n on Ethics and Prof'l Responsibility, Formal Op. 1994-136 (1994). In concluding that a lawyer may bring such an action, the Oregon Bar stated that the "plain language" of the exception to DR 4-101(C) which permits a lawyer to disclose confidences to state a "claim or defense on behalf of a lawyer in a controversy between the lawyer and the client," would "permit disclosure to establish a wrongful discharge claim." *Id.* Noting the absence of precedent in Oregon applying this exception to an "affirmative claim," the Oregon Bar nonetheless concluded that such a use was permitted. The Opinion notes the existence, however, of "recognized limits on how much [a] [l]awyer may reveal and the circumstances of the revelation." *Id.* Those limitations include the requirement that the disclosure be "reasonably necessary to establish the claim asserted." *Id.* (citing Or. St. B. Ass'n Legal Ethics Op. 1991-104 (1991)). Additionally, the limitations may include the obligation of the lawyer "to take affirmative actions to ensure that any confidential information is revealed to the least public manner, including insistence on an appropriate protective order." *Id.* (citing ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 87-88 (2d ed. 1992)).

[145] Or. St. B. Ass'n on Ethics and Prof'l Responsibility, Formal Op. 1994-135 (1994). No other bar association has considered how any exception to the obligation to maintain client

this exception's plain language would allow an attorney to disclose client confidences to the extent necessary to state a claim for retaliatory discharge. The Oregon courts, however, have not considered the related question of whether an in-house attorney may, in fact, state a claim for retaliatory discharge. The Oregon State Bar Association, therefore, assumes the availability of such a cause of action to the in-house attorney and, accordingly, offers no opinion about whether such a cause of action would be recognized by the Oregon courts. If such a cause of action were recognized, in-house attorneys would be relieved of their obligation to maintain client confidences to the extent necessary to support their claims for retaliatory discharge. The interpretation of the Oregon bar provides an appropriate model for other jurisdictions to follow.

C. The Attorney-Client Privilege

Although lawyers often refer interchangeably to the attorney-client privilege and the ethical obligation to maintain client confidences, courts and commentators are generally careful to distinguish these concepts.[146] The attorney-client privilege derives from the law of evidence and is generally administered by the courts, while the obligation to maintain client confidences arises under lawyers' rules of professional conduct and is generally defined and articulated by lawyer organizations. Both concepts are generally considered to share the same goals: "encouraging clients to rely upon attorneys, enhancing lawyers' ability to operate effectively in the adversarial system, fostering client dignity and autonomy, and enabling lawyers to find out about and dissuade clients from engaging in misconduct."[147] The scope and application of these two concepts, however, often differ significantly. The courts, which have the responsibility for administering the attorney-client privilege, are concerned with ascertaining truth, and thus generally construe the privilege narrowly. Lawyer organizations, which define the scope and administer the rules of confidentiality, are interested in

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confidences applies to disputes between in-house attorneys and their employer-clients.

[146] *See* Zacharias, *supra* note 65, at 369 (distinguishing privilege from ethical obligation).

[147] *Id.* at 369-70.

protecting the attorney-client relationship and, accordingly, seek to impose a broad obligation of confidentiality.[148]

Rule 502 of the Uniform Rules of Evidence[149] sets forth the attorney-client privilege.[150] The rule grants to a client the "privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client."[151] The privilege applies generally to communications between the client and the client's lawyer, expanded to include representatives of the client and representatives of the lawyer. It also applies among those lawyers, and their representatives, who are representing the same client.[152] As do the Model Code and the Model Rules, the Uniform Rules of Evidence provide certain exceptions to the attorney-client privilege.

Rule 502 excludes from the privilege "communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer."[153] Although the Uniform Rules of Evidence provide no assistance in determining the scope of the client's "duty" to the lawyer, "the weight of authority seems to support the view that when client and attorney become embroiled in a controversy between themselves . . . the seal is removed from the attorney's lips."[154]

D. Reconciling General Dynamics[155] *and* GTE[156] *with the Obligation to Maintain Client Confidences*

The courts in *General Dynamics* and *GTE* recognized the in-house attorney's right to sue for retaliatory discharge. Each

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[148] *See id.* at 370.

[149] The National Conference of Commissioners on Uniform State Laws approved the Uniform Rules of Evidence in 1974. A number of significant amendments were approved in 1986. Thirty-nine states have adopted the Uniform Rules, with some significant modifications. *See* UNIF. R. EVID. Historical Notes, 13A U.L.A. 2 (1994); *see also id.* Table of Jurisdictions Wherein Rules Have Been Adopted, 13A U.L.A. 1 (Supp. 1996) (enumerating adopting states).

[150] *See id.* Rule 502, 13A U.L.A. 518, 518-20 (1994).

[151] *Id.* Rule 502(b), 13A U.L.A. 518, 519 (1994).

[152] *See id.*

[153] *Id.* Rule 502(d)(3), 13A U.L.A. 518, 520 (1994).

[154] JOHN WILLIAM STRONG, MCCORMICK ON EVIDENCE 337 (4th ed. 1992).

[155] 876 P.2d 487 (Cal. 1994).

[156] 653 N.E.2d 161 (Mass. 1995).

court, however, clearly stated its unwillingness to abrogate or modify the attorney's obligation to maintain client confidences in support of that right. The *General Dynamics* court, in particular, admonished in-house attorneys that disclosing client confidences in support of a retaliatory discharge claim could subject them to disciplinary proceedings.[157]

Faced with the courts' antipathy to any reduction of the obligation to maintain client confidences and their warnings of possible disciplinary action, in-house attorneys must consider whether they can assert their claim without disclosing confidences. If not, the attorneys must then identify an applicable exception to the obligation to maintain client confidences. The Model Code, the Model Rules, and the Uniform Rules of Evidence, however, provide no specific guidance to in-house attorneys who need to determine whether such an exception exists.[158] Oregon's state bar association is the only one to consider whether the existing exceptions apply when in-house attorneys sue their employers for retaliatory discharge. In-house attorneys may, of course, seek the courts' guidance and the imposition of procedural safeguards during the prosecution of such a claim. They still, however, have no guidance at the critical moments when they face choices that may lead to retaliatory action by their employers. Given this uncertainty, extending the tort of retaliatory discharge to in-house attorneys fails to fulfill its essential purpose — encouraging behavior that protects the public interest.

IV. A CONTEXTUAL ANALYSIS

The starting point for any analysis of the attorney's obligation to maintain client confidences, and the exceptions thereto, is the context in which that obligation arises. It is clear that in-house attorneys practice law in an environment that can differ, in varying degrees, from those in which other attorneys practice law. These differences may require the development of ethical rules that address the unique dilemmas encountered by in-house

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[157] *See General Dynamics*, 876 P.2d at 503-04.

[158] In fact, neither the Model Code nor the Model Rules mentions specific situations encountered by in-house attorneys in a single comment or hypothetical situation included in their explanatory materials.

counsel. Many in-house attorneys clearly fear, however, the ramifications of a contextual analysis suggesting that they should be treated differently from their colleagues in private practice.[159]

A. The "Inferiority Complex" of In-House Lawyers[160]

1. Articulation by the *General Dynamics* Court of the Need for Contextual Analysis

The court in *General Dynamics* recognized the propriety of a contextual analysis. In discussing the increase in numbers and the expansion of the role of in-house counsel, it noted "the descriptive inadequacy of the nineteenth century model of the lawyer's place and role in society — one based predominantly on the small-to-middle-sized firm of like-minded attorneys whose economic fortunes were not tethered to the good will of a single client."[161] The court further observed that "the economic

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[159] For a discussion of the positions taken by the ACCA about specific situations involving in-house attorneys, see *infra* Part IV.B.1.

[160] Professor Ted Schneyer convincingly argues that a common thread runs through three different lines of cases that each ask whether in-house attorneys should have exactly the same rights and responsibilities as their colleagues in private practice. These lines of cases address the following issues, respectively: (1) whether in-house attorneys should be permitted access to confidential information subject to a protective order that permits only attorneys, and bars employees of the parties from, access to the confidential information; (2) whether attorneys employed by an insurance company should be permitted to defend insureds on claims that are covered by policies issued by the insurance company; and (3) whether in-house attorneys should be allowed to state a claim against their employers for wrongful discharge. Schneyer, *supra* note 5, at 459. Professor Schneyer finds in each instance that "the courts are making public policy on the basis of findings which may . . . reflect nothing so much as the bar's ambivalence as to whether in-house counsel are truly professionals." *Id.* The ambivalence of the bar and, perhaps, the courts, with respect to the status of in-house attorneys reflects a historical attitude that in-house attorneys are less professional, less independent, and less competent than their colleagues in private practice. *See* HAMILTON, *supra* note 4, § 22.4, at 786-87 (explaining that corporations' internal legal staffs were considered "backwater of the legal profession"). *But cf.* Torry, *supra* note 4, at F7 (discussing recent trend of top attorneys to become in-house counsel). *See generally* Schneyer, *supra* note 5, at 480-81 (discussing judges' view that in-house attorneys are not professionals).

Professor Schneyer argues that this attitude might lead a court to find that in-house attorneys *should not* be permitted access to documents under a protective order, *should not* be permitted to defend parties insured by the insurance companies that are their employers and *should* be permitted to state a claim for retaliatory discharge. *See* Schneyer, *supra* note 5, at 480. Courts that reach these conclusions arguably emphasize in-house attorneys' status as employees over their professional role as lawyers. Conversely, courts holding the belief that in-house attorneys have the same professional status as their colleagues in pri-

fate of in-house attorneys is tied directly to a single employer, at whose sufferance they serve,"[162] which is contrary to that of a partner in a law firm with a multiple client base that provides economic and professional independence. The court thus concluded that in-house counsel are just as economically dependent on their employers as other corporate executives.[163] Finally, the court contrasted in-house counsel's multifaceted role with the single transaction that typifies the outside law firm's relationship with its clients. The in-house attorney often acts in a significant advisory and compliance role and must anticipate potential legal problems and recommend solutions.[164] In this capacity, the in-house attorney may be expected to assist the corporation in achieving its business goals, "while minimizing entanglement in the increasingly complex legal web that regulates organizational conduct in our society."[165] As the scope and sophistication of their work expands, they may be subjected "to unusual pressures to conform to organizational goals, pressures that are qualitatively different from those imposed on the outside lawyer."[166]

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vate practice and, accordingly, should be held to the identical standards of conduct might find that in-house attorneys *should* be permitted access to documents under a protective order, *should* be permitted to defend parties insured by the insurance companies that are their employers and *should not* be permitted to state a claim for retaliatory discharge. These courts are emphasizing the in-house attorneys' professional role as lawyers rather than their status as employees. In-house attorneys who embrace the decisions denying in-house attorneys the right to sue for retaliatory discharge clearly fear the ramifications of a distinction between the rights and obligations of in-house counsel and those of outside attorneys. Responding to *Herbster v. North American Co. for Life & Health Insurance*, 501 N.E.2d 343 (Ill. App. Ct. 1986), Stephen B. Middlebrook, former ACCA Policy Committee Chairman and Aetna Life & Casualty Co. General Counsel, claims that "[i]f we are trying to project what we are — that is, professionals who happen to be in one particular setting — then maybe we can't have it both ways . . . we take the bad with the good." Martha Middleton, *State Bill May Help In-House Attorneys; Fired Lawyers to Sue?*, NAT'L LAW J. May 30, 1988, at 3.

[161] General Dynamics Corp. v. Superior Court, 876 P.2d 487, 491 (Cal. 1994).

[162] *Id.* For a contrary view of the professional independence of outside lawyers, see Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507 (1994) (discussing moral independence theory).

[163] *See General Dynamics*, 876 P.2d at 491.

[164] *See id.*

[165] *See id.*

[166] *Id.* at 492. In 1993 I resigned from my law firm partnership to accept a position as Vice President and General Counsel and Corporate Secretary for a $700 million publicly-held retail apparel chain. Approximately one month after I had assumed that position and relocated my family from Atlanta, Georgia, to Knoxville, I learned that in March of 1992 the Chairman and CEO of the company, who also owned approximately 63% of the issued

In-house counsel, however, view the recognition of any distinction between themselves and lawyers in private practice as a two-edged sword. They hold the memory of a not-so-distant past when many of their colleagues considered them to be second-class citizens.[167] And, unfortunately, their concern — that different professional rules for in-house counsel could foster those same attitudes — are not totally unfounded.

2. Status of In-House Attorneys in the European Community

Consider, for example, the status of in-house attorneys in the European Community (EC). Four of the EC Member States — Italy, France, Belgium and Luxembourg — do not even allow in-house attorneys to be members of the bar.[168] The rationale

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and outstanding shares, had acquired from the company investment securities that were rapidly decreasing in value from their face value of $6.6 million. The $6.6 million check written by the CEO in payment for the securities, although reflected as cash on the financial statements of the company, was not deposited for nearly a year. The company cashed the check in December 1992, and the payment was funded by a personal loan to the CEO from a bank. When the loan matured in April of 1993, the company repaid it without the knowledge of the Board of Directors and accepted another check from the CEO for the $6.6 million. This check was also held uncashed but was carried on the company's books as cash on hand.

I participated with the Audit Committee of the Board of Directors in an inquiry into this matter which resulted in a public disclosure of the "accounting irregularities" related to this transaction. At the same time, the company disclosed that it had paid certain personal expenses of the CEO without the knowledge of the Board of Directors and that these expenses were supposed to be repaid on an annual basis. The company also disclosed that, at the request of the Board of Directors, the CEO had reimbursed the company for those personal expenses and that the practice of paying these expenses had been discontinued. On the day of the public disclosure, the stock of the company dropped from $15 to $11.75 per share, before stabilizing at $13.25 per share. The Chief Financial Officer of the company resigned on the same day. Shortly thereafter, a securities class action suit was filed against the company, the Chairman and CEO, the President, the Chief Financial Officer and a former board member. The SEC also instituted an investigation which culminated in a cease and desist order against the company and the CEO, which required the company to refrain from violating federal securities laws. The former Chief Financial Officer, who resigned on the date of the disclosure, was barred from practicing accountancy before the SEC for a three-year period. All of the information set forth above has been previously disclosed in press releases and public announcements by the company.

[167] *See* Torry, *supra* note 4, at F7 (discussing recent trend of top attorneys becoming in-house counsel).

[168] *See* Alison M. Hill, Note, *A Problem of Privilege: In-House Counsel and the Attorney-Client Privilege in the United States and the European Community*, 27 CASE W. RES. J. INT'L L. 145, 157 n.49, 158 (1995) (citing Case 155/79, AM & S Europe Ltd. v. Commission, 1982 E.C.R.

given for this distinction is that an in-house attorney cannot maintain the requisite level of independence from her client to be a practicing lawyer.[169] Moreover, in 1983 the European Court of Justice determined that the attorney-client privilege, in the EC, does not extend to communications with in-house attorneys.[170] This is true, even though in-house attorneys are still members of the bar in all but four of the Member States and are bound by the same rules of professional conduct as outside attorneys.[171] In-house attorneys thus are accorded the attorney-client privilege in the national courts of all but four of the Member States in which they practice law, but not in the European Court of Justice.[172] The ABA and the U.S. State Department protested the decision by the European Court of Justice on the basis that it "would deny clients of U.S. lawyers a right that U.S. courts and antitrust enforcement agencies grant to clients of European lawyers."[173] However, that decision remains in effect and is an indication of the type of attitude that could lead to a diminution in the professional status of in-house counsel in this country.[174]

3. Concerns About Referrals of Matters to Outside Counsel

In-house attorneys also know that outside lawyers can use the possibility that in-house attorneys may not be held to the same standards of professional conduct as outside lawyers to convince

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1575, 1655, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8757 (1982) (Slynn's opinion)).

[169] *See id.* at 158; *see also* Schneyer, *supra* note 5, at 481 (discussing some outside attorneys' views that they are more professional than in-house counsel).

[170] *See* Case 155/79, AM & S Europe Ltd. v. Commission, 1982 E.C.R. 1575, 1611, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8757 (1982); Theofanis Christoforou, *Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case*, 9 FORDHAM INT'L L.J. 1, 1-3 (1985) (discussing decision in *AM & S Europe Ltd.*).

[171] *See* Hill, *supra* note 168, at 158.

[172] *See id.*

[173] *EC Attorney-Client Privilege Extension to House Counsel Supported by U.S.*, INT'L TRADE REP. (BNA), Oct. 12, 1983, at 75.

[174] Ted Schneyer cites doubts about the professional status of in-house attorneys in Europe as support for his thesis that concerns about in-house attorneys' professional status underlie much of the debate about their rights and obligations in the U.S. *See* Schneyer, *supra* note 5, at 481.

their corporate clients that sensitive matters should always be referred to outside counsel.[175] In fact, an article on the potential negative impact of the *General Dynamics* decision on the relationship between in-house attorneys and their employers quoted a partner in the law firm of Gibson, Dunn & Crutcher, which represented General Dynamics in its dispute with Andrew Rose to that effect.[176] The partner stated that "[the decision in *General Dynamics*] certainly poses a problem for in-house clients whether they are going to use in-house counsel for anything sensitive."[177] This attitude is similar to that of law firms following the decision in *United States v. Arthur Young & Co.*,[178] an opinion that denied to accountant work-papers the same privilege that applies to attorney workproduct.[179] Many law firms relied on that decision to convince clients to refer sensitive tax matters to the tax departments at law firms, rather than their accounting firms, in order to avail themselves of the attorney workproduct privilege. It is easy to imagine similar conversations between outside counsel and senior executives today about the problems of referring sensitive matters to in-house counsel.

4. Corporate Realities

The fear that corporate America will forego the benefits of in-house legal advice because of a concern about the possibility of a retaliatory discharge claim and potential limited disclosure of confidential information ignores certain realities. Corporations enjoy tremendous benefits from having in-house counsel.[180] These benefits may, in fact, be more pronounced when addressing complex and sensitive legal issues because of the accessibility and perspective that in-house attorneys can provide. Few corporations will abandon this source of cost-effective legal services

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[175] In my experience, in-house attorneys know this either because they have "done it" in their roles as outside attorneys in law firms or "had it done to them" in their roles as in-house attorneys.

[176] *See* Don J. DeBenedictis, *Fired In-House Counsel May Sue in Calif.*, ABA J., Oct. 1994, at 24.

[177] *Id.*

[178] 465 U.S. 805 (1984).

[179] *See id.* at 815-21.

[180] *See* Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 487 (1989).

out of fear that an in-house attorney's retaliatory discharge claim may lead to limited disclosure of confidential information. In fact, this concern presupposes that such corporations would fire an in-house attorney in retaliation for his adherence to rules of professional conduct. Most corporations, however, expect their in-house counsel to provide advice that will ensure that the corporation conducts business in an ethical and lawful manner. Such corporations would not terminate an in-house attorney in retaliation for providing such advice. Situations do arise when it is appropriate to retain outside counsel to render advice on particularly sensitive matters. This may happen either because of potential conflicts of interest or because it is appropriate for these matters to be handled by attorneys who are perceived to have more independence or specialized expertise than in-house attorneys. Extending the protection of the tort of retaliatory discharge to in-house attorneys will not, however, significantly increase the number of situations in which corporations will elect to refer sensitive matters to outside counsel that would otherwise be handled by in-house attorneys.

B. Modern "Inferiority Complex"

1. A Case Study of the American Corporate Counsel Association

It is not surprising that in-house attorneys are proceeding cautiously through what they believe is a minefield. Consider, for example, the evolution of pronouncements by the American Corporate Counsel Association (ACCA) on the availability of the tort of retaliatory discharge for in-house attorneys. First, following the 1986 decision in *Herbster*, the general counsel for Aetna and chair of the ACCA Policy Committee, Stephen B. Middlebrook, stated that "[i]f we are trying to project what we are — that is professionals [— then we must accept decisions like *Herbster*.]"[181]

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[181] Schneyer, *supra* note 5, at 472-73 (citing Martha Middleton, *State Bill May Help In-House Attorneys*, NAT'L L.J., May 30, 1988, at 3). The decision in *Herbster*, of course, denied to in-house attorneys the right to state a claim for retaliatory discharge under any circumstances.

Then, in 1991, the ACCA adopted the following Policy Statement:

> To the extent a cause of action for wrongful discharge may otherwise exist, a former in-house counsel may not maintain such a cause of action against a former corporate employer, its officers or directors if (a) the actions taken by the former in-house counsel which gave rise to the termination of employment constituted a violation of the code of professional responsibility of the applicable jurisdiction or (b) in order to maintain such cause of action, the former in-house counsel must introduce in evidence information which is privileged.[182]

Note, however, that the ACCA does not state that an in-house attorney should have the right to sue for retaliatory discharge. The ACCA simply says that if such a right exists, it should be limited in accordance with the Policy Statement. This distinction becomes important to the analysis of subsequent ACCA pronouncements on this subject.[183]

In August of 1993, the ACCA filed an amicus curiae brief in *Santa Clara County Counsel Attorneys Ass'n v. Woodside*.[184] In this case, the Supreme Court of California determined that the right of government employees to sue a public agency for violation of a California labor relations statute extends to an employee association for county attorneys. The California Supreme Court rejected the decision of the Court of Appeals that the duty of loyalty owed by an attorney to her client precluded such an action by the county attorneys. Once again, calling for "sameness," the ACCA, in its amicus brief, "urged the California court to require all attorneys to comply with the ethical obligations of the profession, regardless of their place of employment."[185] Furthermore, the ACCA stated that "the degree of respect and influence accorded to in-house attorneys — including government attorneys — is in direct proportion to the degree they are expected to conform to the highest standards of professional conduct."[186] The ACCA criticized the decision of the court in

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[182] Board of Directors of the American Corporate Counsel Association Policy Statement on Wrongful Discharge Suits Filed By In-House Counsel (adopted November 6, 1991) [hereinafter ACCA Policy Statement on Wrongful Discharge].

[183] *See infra* note 189 (discussing interview with Krivosha).

[184] 869 P.2d 1142 (Cal. 1994).

[185] *Items of Interest That Crossed Our Desk*, 12 ACCA DOCKET, Spring 1994, at 8.

[186] *Id.* (quoting ACCA Amicus Curiae Brief at 5, Santa Clara County Counsel Attorneys

Santa Clara because the "ruling create[d] a distinction among practicing attorneys in regards to their ethical obligations."[187]

The ACCA declined to file an amicus brief in *General Dynamics*[188] and greeted the decision with equanimity, finding it

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Ass'n v. County of Santa Clara, 869 P.2d 1142 (Cal. 1994), also quoted in GTE Prods. Corp. v. Stewart, 653 N.E.2d 161 (Mass. 1995)). It is interesting to note that the author of this brief was Daniel S. Hapke, Jr., ACCA's Chairman at that time and Vice President and General Counsel of General Dynamics Corporation, Space Systems Division.

[187] *See id.* (discussing ACCA's support of Santa Clara County's position that attorneys must resign prior to asserting any claim against county). On its face, the ACCA's position in *Santa Clara* may seem inconsistent with the following statement made by the ACCA upon the adoption of the ACCA Policy Statement on Wrongful Discharge, *supra* note 182. The Policy Statement was in effect at the time of the ACCA's filing of its amicus brief in *Santa Clara* and remains in effect today. This statement clearly recognizes certain rights of in-house attorneys relative to their employers:

> In declaring the above policy regarding the right to maintain a cause of action for wrongful discharge, ACCA does not suggest that in-house counsel can be discharged in violation of state or federal laws, such as those prohibiting discrimination. ACCA also recognizes the right of in-house counsel to sue a former corporate employer for wages or benefits allegedly due and owing the former in-house counsel by the former corporate employer, or for breach of contract between the former in-house counsel by the former corporate employer, provided, however that in bringing such action the counsel should not be permitted to use any information which constitutes privileged communications between the corporate employer and such counsel.

ACCA Policy Statement on Wrongful Discharge, *supra* note 182. Note that each of the rights that the ACCA acknowledges in the Policy Statement assumes that the attorney attempting to enforce those rights is no longer an employee of the client. This comports with the position taken by the County and supported by the ACCA in *Santa Clara*: "'[L]itigation against the County on these issues may not be maintained by lawyers employed by the County unless the lawyers cease employment in the County Counsel's Office or the County consents.'" *Santa Clara County Attorneys Ass'n*, 869 P.2d at 1146 (quoting memorandum from County Counsel Steven Woodside to attorneys in County Counsel Office). Would the ACCA argue that a former in-house attorney may assert a discrimination claim but that an in-house attorney who remains employed may not? Must an in-house attorney resign or wait to be fired to assert such a claim?

[188] *See* Torry, *supra* note 4, at F7. The ACCA did elect to file a brief in *GTE Products Corp. v. Stewart*, 653 N.E.2d 161 (Mass. 1995), on the narrow but critical issue of whether "in-house counsel [may] unilaterally abrogate the attorney client privilege and divulge privileged information in a wrongful termination action against a former client." ACCA Amicus Curiae Brief at 2, *GTE Prods.*, 653 N.E.2d 161 (Mass. 1995). In focusing on this narrow issue, the ACCA once again sidestepped the broader issue of whether an in-house attorney should be able to maintain such an action under any circumstances. Rather, the ACCA emphasized its belief that

> the professional obligation of the in-house attorney must predominate in any action for wrongful discharge. . . . An in-house attorney should have, and his or her client should perceive that he or she has, the same ethical obligations as

consistent with the ACCA Policy on Wrongful Discharge.[189] Because the court emphasized the ethical obligations of in-house counsel, the ACCA concluded that the opinion "strikes a balance between the professional obligations of an attorney and the rights of an employee."[190] Fred Krebs, President and Chief Operating Officer of the ACCA, emphasized the significance of the court's decision that "in the final analysis, . . . protection of the attorney-client privilege was paramount."[191] Expressing once again the concerns of in-house attorneys about a diminution in status if they are seen as being held to a lesser standard of professional conduct, Mr. Krebs stated, "I think it is fair to say in-house counsel could well be relegated to second class status relative to outside attorneys if they are not perceived as having the same obligations and privileges."[192]

These various pronouncements by the ACCA demonstrate the consistency with which in-house attorneys assume positions that they believe are necessary to enhance their professional stature. They do so even when those positions substantially limit the individual rights of in-house attorneys as employees and pervert the public interest. In each instance, however, the ACCA assumed that the stature of in-house attorneys is enhanced only when they have exactly the same responsibilities as attorneys in private practice. That assumption focuses on the limited relationship between clients and their lawyers, and fails to consider the broader relationship between lawyers and society. Characterizing

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> outside counsel. Such a perception is critical to the professional stature and integrity of all employed counsel . . . .

Id. at 10.

[189] *See Items of Interest That Crossed Our Desk, supra* note 185, at 6. It is interesting, however, that in an interview with the *California Lawyer* prior to the California Supreme Court's decision in *General Dynamics*, Norman Krivosha, chairman of the ACCA, a former chief justice of the Supreme Court of Nebraska and general counsel to Ameritas Life Insurance Corporation of Lincoln, Nebraska, argued that an in-house lawyer should have the right to sue for wrongful termination "[o]nly if there is an explicit contract that has been breached. It must be the kind of contract that would entitle outside counsel to sue. Whatever a lawyer in private practice cannot do for ethical reasons, an in-house lawyer is prohibited from doing." Nina Schuyler, *Identity Crisis: Should Employment Law Protect In-House Counsel from the Managers Who Hire Them?*, CALIFORNIA LAWYER, June 1994, at 45.

[190] *See Items of Interest That Crossed Our Desk, supra* note 185, at 8.

[191] Memorandum from Fred Krebs, President and Chief Operating Officer, ACCA, to the ACCA Board of Directors 2 (July 20, 1994) (on file with ACCA).

[192] *Id.*

the debate as one that considers only the interests of attorneys and their clients completely ignores the public policy that underlies the tort of retaliatory discharge in the first instance.

It is curious, therefore, that the *General Dynamics* court concluded that the *failure* to afford to in-house counsel a remedy *not* available to their colleagues in private practice would "almost certainly foster a degradation of in-house counsel's professional stature."[193] Focusing on the significant economic cost and professional risk for in-house attorneys who are forced to choose between their ethical obligations and the unethical demands of their employers, the court noted that such attorneys "will almost always find silence the better part of valor."[194] In other words, a contextual analysis of the unique role of in-house counsel mandates a recognition that, under certain circumstances, they must be treated differently than their colleagues in private practice. The failure to do so may lead to the very diminution in professional stature that in-house attorneys fear in continuing to maintain that equal status mandates equal treatment. In fact, the extension of a meaningful cause of action for retaliatory discharge to in-house attorneys may be necessary for in-house attorneys to maintain the very independence from their clients that is necessary to support their status as professionals.

2. Summary

The courts and the ACCA have made numerous pronouncements about the obligation to maintain client confidences in the context of in-house attorneys' claims against their employers. Unfortunately, neither the courts nor the ACCA provides any guidance about the extent to which the very disclosures of confidential information that may be required to support a legitimate claim for retaliatory discharge are permissible. If the right to sue for retaliatory discharge is to be a meaningful remedy — one that protects not only the in-house attorney but also the public — in-house attorneys must know whether they can assert such a cause of action without violating their ethical duties. Further-

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[193] General Dynamics Corp. v. Superior Court, 876 P.2d 487, 502 (Cal. 1994).

[194] *Id.*

more, this knowledge must be available to in-house attorneys at the time they face the critical decisions that may lead to retaliation by their employers.

C. Resolution

The solution is relatively straightforward. The lawyers who drafted the Model Code justified an exception to the obligation to maintain client confidences when a lawyer becomes embroiled in a fee dispute with a client or is accused of malpractice. In this situation, the only interest that is being protected is that of the attorney — either her pocketbook (in the case of an unpaid fee) or reputation and pocketbook (in the case of a claim of malpractice). An action for retaliatory discharge, however, protects two interests — the in-house attorney's rights as an employee and, more importantly, the interest of the public that is the raison d'etre for the tort of retaliatory discharge.

A textual analysis of the Model Rules indicates an expansion of the scope of the Model Code exception by the use of the words "to assert a claim or defense."[195] The Comments to Model Rule 1.6, however, discuss only this exception's application to the defense of claims against the lawyer and to the collection of fees.[196] It is not surprising, therefore, that commentators view these exceptions in the Model Rules as "essentially unchanged from [their Model] Code roots."[197] If the drafters had intended, however, to limit the application of this exception to fee disputes and defenses against claims of wrongdoing, they could have simply imported that language from the Model Code. Instead, however, they chose the significantly more expansive "to assert a claim or defense" language.[198]

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[195] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1995).

[196] The Comments to Rule 1.6 do state that the so-called "self-defense" exception "does not require the lawyer to await the commencement of an action or proceeding" to respond. *Id.* Rule 1.6, cmt. 18. Rather, the lawyer may respond at the time an assertion is made. This position, however, still assumes that the lawyer is responding to an allegation of wrongdoing rather than affirmatively asserting a claim against the client.

[197] 1 HAZARD & HODES, *supra* note 61, § 1.6:305, at 175.

[198] The explanation for this disparity lies in the perspective of those who influenced the development of the rules of professional conduct. The influence of civil and criminal trial lawyers on the development of these rules, specifically including that of the powerful

I neither dismiss nor minimize in-house attorneys' concerns about contextual analyses that differentiate them from their private practice colleagues. I do believe that these concerns are overstated and fail to recognize the tremendous benefits that corporate America has derived from the increased stature and scope of responsibility of in-house counsel. Corporations will not generally forego these benefits simply because the retaliatory discharge cause of action is recognized for in-house counsel.

V. SUGGESTIONS: WHAT STATES SHOULD DO AND WHY

In many instances, the existing rules regarding disclosure of client confidences can be interpreted to support a meaningful cause of action for retaliatory discharge for in-house attorneys. In other instances, a simple modification of the existing rules may be necessary to ensure that they can be interpreted to protect the interests of both in-house attorneys and attorneys in private practice.[199] Thirteen states need to adopt relatively

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American College of Trial Lawyers, resulted in rules that are peculiarly litigation-oriented. *See* Nahstoll, *supra* note 122, at 438. "[T]he Code did not take into account many non-litigation situations, and virtually ignored the fact that many modern lawyers practice in complex organizations, and that many clients consist of complex entities." 1 HAZARD & HODES, *supra* note 61, § 202, at lxvi. Consequently, the rules fail to address the interests of either transactional lawyers generally or in-house attorneys specifically, whose roles as counselor and advisor often implicate different ethical considerations. *See id.* Furthermore, the supporters of very narrow exceptions to the obligation to maintain client confidences would undoubtedly argue that their position supports a professional relationship between attorneys and their clients that serves the public interest at large. I believe, however, that the public interest was not paramount in the minds of those who argued for these narrow exceptions. Rather, I believe the more narrow interest in protecting zealous advocacy, primarily in the litigation context, prevailed.

[199] Consider, for example, the Illinois Rules of Professional Conduct in effect at the time that Roger Balla disclosed his client's intention to sell faulty dialysis equipment. *See supra* notes 37-40 and accompanying text. First, the Illinois Rules mandated disclosure "to prevent the client from committing an act that would result in death or serious bodily harm." ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1991). Balla's initial disclosure, therefore, was not only protected, but was required by the Illinois Rules. On the other hand, Illinois followed the Model Code approach and limited other disclosures to information necessary to collect a fee or defend against an accusation of wrongful conduct. *See id.* Rule 1.6(c)(3). The text of this exception seems too narrow for Balla to disclose additional confidential information in support of his claim of retaliatory discharge. Furthermore, neither the Comments nor commentary regarding this Model Code provision would support a broader interpretation. Although the protected disclosure of Gambro's intention to sell the faulty dialysis equipment might have been sufficient in this situation to prove Balla's claim of retaliatory discharge, this exception would be available only in those rare

simple amendments to their existing rules of professional responsibility to make the retaliatory discharge cause of action a meaningful remedy for in-house attorneys. Nine of these states currently follow the Model Code approach and refer specifically to fee disputes and defenses against claims of wrongdoing.[200] These jurisdictions should consider why they permit an attorney to disclose client confidences to collect a fee when the financial interest of the attorney is the only interest protected, but prohibit an in-house attorney from making such a disclosure to protect the public interest. Four states have unique provisions governing the obligation to maintain client confidences with exceptions that are too narrow to help in-house attorneys in these circumstances.[201] The unique nature of the provisions in

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instances in which prevention of death or serious bodily harm permits or mandates the disclosure. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995). Therefore, even had the Illinois courts been willing to recognize an in-house attorney's right to sue for retaliatory discharge, Balla could not have disclosed additional confidential information in support of that claim. The Illinois Rules of Professional Conduct would be among the rules that would require amendment to address this situation.

The exceptions in effect in Massachusetts at the time of the *GTE* decision were, in the words of the *GTE* court, "extremely limited" and would have similarly limited Stewart's ability to disclose information necessary to support his claim of retaliatory discharge. *See* GTE Prods. Corp. v. Stewart, 653 N.E.2d 161, 167 (Mass. 1995). The *GTE* court noted, however, that amendments to this rule were under consideration that "would appear to permit disclosure of client confidences in some circumstances in which disclosure is forbidden as unethical under the present disciplinary rules." *Id.* at 167 n.12. The proposed rule includes the Model Rules exception permitting disclosure to the extent "necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client." *Id.* Although the court did not state whether disclosures of confidential information by an in-house attorney to establish a claim of retaliatory discharge would fall within the exceptions in the proposed rule, it suggested that the new rules "might . . . affect the ability of in-house counsel to prove a claim of wrongful discharge." *Id.* To date, these modifications have not been adopted in Massachusetts.

[200] *See* GA. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(b)(4) (1996); IOWA CODE OF PROFESSIONAL RESPONSIBILITY FOR LAWYERS DR 4-101(c)(4) (1996); ME. CODE OF PROFESSIONAL RESPONSIBILITY Rule 3.6(h)(3) (1996); MASS. SUPREME JUDICIAL COURT RULES Rule 3:07, DR 4-101(C)(4) (1996); MICH. RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(5) (1996); MINN. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(5) (1995); TENN. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(4) (1995); VT. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(4) (1996); VA. CODE OF RESPONSIBILITY DR 1.6(b)(2) (1996).

[201] *See* CAL. BUS. & PROF. CODE § 6068(e) (West 1990) (stating that attorneys must maintain confidences even in face of personal peril); NEB. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1996) (listing exceptions; including by consent after full disclosure, when permitted by disciplinary rules or otherwise required, and when disclosure is necessary to prevent crime); N.Y. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1995) (same); OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1996) (same).

these four states, however, is no impediment to the adoption of the broader Model Rules exception. All thirteen states should adopt the more expansive Model Rules language that permits disclosure "to establish a claim or defense" and broadly interpret that phrasing.

In the remaining thirty-seven states and the District of Columbia, the existing rules of professional conduct can, and should, be interpreted to permit an in-house attorney to disclose client confidences to the limited extent necessary to support an otherwise valid claim for retaliatory discharge.[202] These jurisdictions generally follow the Model Rules approach and include the broad "to establish a claim or defense" exception to the obligation to maintain client confidences. Despite the broad language of this exception, it has typically been narrowly interpreted as limited to fee disputes and defenses against claims of wrongful conduct, evincing its Model Code origins. These states should

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[202] For statutes stating that an attorney may reveal confidences to establish a claim or defense in a controversy between attorney and client see ALA. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995); ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1995); ARIZ. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996); ARK. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996); COLO. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996); CONN. RULES OF PROFESSIONAL CONDUCT Rule 1.6(d) (1995); DEL. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1996); D.C. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1996); FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-1.6(c)(2) (1996); HAW. RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(3) (1995); IDAHO RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1996); ILL. CODE OF PROFESSIONAL CONDUCT Rule 1.6 (1996); IND. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1996); KAN. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (1996); KY. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1996); LA. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1996); MD. LAWYER'S RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (1996); MISS. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1996); MO. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1995); MONT. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1996); NEV. RULES OF PROFESSIONAL CONDUCT Rule 156 (1995); N.H. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1995); N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6(e)(2) (1995); N.M. RULES OF PROFESSIONAL CONDUCT Rule 16-106(D) (1995); N.C. RULES OF PROFESSIONAL CONDUCT Rule 4 (1995); N.D. RULES OF PROFESSIONAL CONDUCT Rule 1.6(e) (1996); OKLA. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(3) (1996); OR. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(4) (1996); PA. RULES OF PROFESSIONAL CONDUCT Rule 1.6(c)(3) (1988); R.I. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1995); S.C. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1995); S.D. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1996); TX. RULES OF PROFESSIONAL CONDUCT Rule 1.05(c)(5) (1996); UTAH RULES OF PROFESSIONAL PRACTICE Rule 1.6(b)(3) (1995); WASH. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1990); W. VA. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1996); WIS. RULES OF PROFESSIONAL CONDUCT SCR 20:1.6(c)(2) (1995); WYO. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1995).

interpret this general rule to address the concerns of attorneys who must assert a claim against a client other than for a fee. This interpretation would afford a meaningful remedy to in-house attorneys, who could then disclose sufficient information to prove the elements of a cause of action for retaliatory discharge.

Consider the interpretation of the broad Model Rules exception by the Oregon Bar Association, the only bar association that has addressed the applicability of this exception to an attorney's claim for retaliatory discharge. The Oregon Bar analyzed the exception in the context of an attorney who alleged termination of employment for refusing to make an inaccurate oath to the patent office. Had the lawyer made the inaccurate oath, he could have been subject to criminal prosecution.[203] The Oregon Bar acknowledged that it had previously interpreted the relevant exception as applicable only to defenses asserted by the lawyer.[204] Even though no Oregon court had ever considered whether the exception could be applied to affirmative claims by the lawyer, the Oregon Bar concluded that "the plain language of [the exception] permits disclosure to establish a wrongful discharge claim."[205] The Oregon Bar cautioned, however, that there are "recognized limits on how much a lawyer may reveal and the circumstances of the revelation."[206] The Bar specifically cautioned that "the information which the attorney seeks to disclose must be reasonably necessary to establish the claim asserted."[207] The Bar stated that attorneys must also take all appropriate steps to ensure that the information is disclosed in the least public manner by, for example, seeking protective orders.[208]

Although the Oregon Bar articulated limitations on the information that the in-house attorney may disclose, these limitations comport with the requirements of the Model Rules and the courts' admonitions in *General Dynamics* and *GTE*. Model Rule 1.6 limits the scope of the permitted disclosure to information

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[203] *See* Or. St. B. Ass'n on Ethics and Prof'l Responsibility, Formal Op. 1994-136 (1994).
[204] *See id.*
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *See id.*

that the lawyer "reasonably believes [is] necessary"[209] to establish the claim or defense. The Comments to Rule 1.6 reinforce the restrictive nature of this language. They warn that

> disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.[210]

The requirement that the disclosure be limited to information that the lawyer reasonably believes is necessary to establish a

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[209] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1995).

[210] *Id.* Rule 1.6 cmt. 18. The court in *General Dynamics* emphasized the "array of ad hoc measures" in the "equitable arsenal" of trial courts that would allow in-house attorneys to establish their retaliatory discharge claim without disclosing protected client information. *See* General Dynamics Corp. v. Superior Court, 876 P.2d 487, 504 (Cal. 1994). These devices include "sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings and . . . in camera proceedings." *Id.* The court also admonished that "by taking an aggressive managerial role, judges can minimize the dangers to the legitimate privilege interests the trial of such cases may present." *Id.* The *GTE* court, however, was less sanguine about the availability of these protective devices to enhance significantly the in-house attorney's ability to establish a retaliatory discharge claim. That court stated that "confidentiality concerns may to some degree be ameliorated by a trial court's use of . . . protective devices." GTE Prods. Corp. v. Stewart, 653 N.E.2d 161, 167 (Mass. 1995). The court cautioned, nonetheless, that "the circumstances in which in-house counsel may pursue a claim for wrongful discharge will, of necessity, be limited by the broad obligation to guard client confidences." *Id.*

It is clear that these protective devices, although helpful to in-house attorneys in certain circumstances, cannot alone make the tort of retaliatory discharge a meaningful remedy for in-house counsel. In some instances, the use of these protective devices may effectively protect confidential information, the disclosure of which would arguably enhance the protection of the public interest that supports the tort of retaliatory discharge. The protection of the public interest does not, however, always require disclosure. It may also be protected, for example, by refusing to commit an unlawful act or by performing an important public obligation. Finally, in some circumstances, the public interest may be protected through disclosures that are either permitted or mandated under other provisions of the applicable rules of professional conduct. The rules of professional conduct must permit in-house attorneys to disclose confidential information to the extent necessary to prove the elements of a claim for retaliatory discharge. Courts must then carefully manage the pursuit of these claims to balance the interests of in-house attorneys, their employer-clients, and the public; a responsibility that trial judges regularly discharge in modern civil litigation.

claim may seem subjective. Federal and state court judges, however, often apply this or similar standards in other litigation disputes and should experience little difficulty doing so in this situation.

The suggested approach addresses two important concerns. First, it supports a meaningful retaliatory discharge cause of action for in-house attorneys. It recognizes that the public interest underlying the tort of retaliatory discharge is at least as deserving of protection as the right of lawyers to collect their fees. Second, it does so through a contextual interpretation of rules generally applicable to all lawyers. It thus addresses the concerns of in-house attorneys about the possible negative ramifications of developing different professional rules specifically for in-house attorneys.

CONCLUSION

The past decade has witnessed a sea change in the business of law. In few areas has this change had a more significant impact than on the role and stature of in-house counsel. The changing role of in-house counsel raises numerous ethical dilemmas that challenge longstanding assumptions about the relationships between attorneys and their clients and the attorneys' obligation to protect the public interest. These assumptions are strikingly illustrated by the consideration of whether, and under what circumstances, in-house attorneys should be permitted to sue their employer-clients for retaliatory discharge. The debate over this issue has frequently focused on whether in-house attorneys should have exactly the same professional rights and responsibilities as attorneys in private practice. It has effectively ignored the public interest that the tort of retaliatory discharge serves. The debate has recently centered on how substantially the attorney's obligation to maintain client confidences circumscribes the right to sue for retaliatory discharge. I maintain that without appropriate recalibration of the obligation to maintain client confidences, extending the tort of retaliatory discharge to in-house attorneys will not protect the public interest, thus frustrating the intention of the courts that have allowed such claims.

The concerns articulated by the ACCA about the negative ramifications of having different standards of professional con-

duct for in-house attorneys unfortunately have some basis. It is possible in this instance, however, for in-house attorneys to have it both ways. Ethical rules of general application to all attorneys may be interpreted to afford in-house attorneys a meaningful remedy for retaliatory discharge.

The American Corporate Counsel Association, the American Bar Association, and the state bar associations must now assume a leadership role in developing ethical and evidentiary rules that make sense in the context of the changing environment in which attorneys practice law. These associations should specifically urge the modification or interpretation of existing professional ethics requirements to afford to in-house attorneys a meaningful cause of action for retaliatory discharge. The public interest, the legal profession, and in-house attorneys and their employers will be well served by providing much needed guidance and protection to in-house attorneys who find themselves in the untenable position of having to choose between their ethical obligations and their jobs.

Just as sailors require sextants, compasses, and charts to navigate safely the treacherous shoals, lawyers require clearly articulated rules and standards of conduct to negotiate the dramatically changing environment in which they practice law. The legal profession must develop rules that challenge old assumptions and recognize and efficaciously address the new order. The response of the legal profession to this new order could well determine how effectively it weathers the sea change and whether it will realize the pearls and coral of Shakespeare's imagery.