Retaliatory Discharge of In-House Counsel: A Cause of Action - Ethical Obligations v. Fiduciary Duties

Michael P. Sheehan

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RETALIATORY DISCHARGE OF IN-HOUSE COUNSEL: A CAUSE OF ACTION—ETHICAL OBLIGATIONS v. FIDUCIARY DUTIES

INTRODUCTION

[A lawyer] stands "as a shield"... in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character." The creation of a cause of action for retaliatory discharge of in-house counsel would serve to promote and preserve the image of attorneys possessing "moral character." Attorneys often find themselves in situations where they must follow their ethical obligations rather than the wishes of their client. Under these circumstances, when an attorney refuses to engage in unethical activity, the client traditionally has had the power to discharge its attorney at will. Until recently, the at-will employment doctrine applied equally to attorneys in private practice, as well as to corporate attorneys, otherwise known as in-house counsel. The consequences of being discharged, however, are quite different for an in-house counsel as opposed to the traditional lawyer. The increased pressures of work, family and society often make living up to the ideal "moral character," as described by Justice Frankfurter, a serious challenge for in-house counsel on account of their complete dependence upon their employer and only client, the corporation.

The ability of the client to discharge his attorney at-will is dependent upon trust and protected communications between the attorney and the client without which no attorney-client relationship should exist. An extension of the retaliatory discharge cause of action to in-house counsel affects the basic foundations of the attorney-client relationship. Such effects occur primarily because the conflict comes down to a struggle between an in-house counsel's fiduciary duty to the

2. See infra notes 7-30 and accompanying text (discussing at-will employment and retaliatory discharge).
3. See infra notes 31-37 and accompanying text (discussing the role of in-house counsel).
4. Schware, 353 U.S. at 247 (Frankfurter, J., concurring).
client and the counsel's duty to follow the legal profession's ethical rules of responsibility. A client may ask an attorney to act in a manner which violates his or her code of professional conduct. If the attorney's refusal to violate the code results in the attorney's discharge, fiduciary duties owed to the client have traditionally been held to prohibit a cause of action for retaliatory discharge.\(^5\) However, due to the unique position held by the in-house attorney, some courts have found grounds which override this potential conflict and concluded that the in-house counsel has a claim for retaliatory discharge.\(^6\) In Section I, this Comment will address the doctrine of at-will employment and retaliatory discharge. This section will also define the role of in-house counsel in the twentieth century, as well as describe the attorney-client privilege and attorney-client confidentiality. Additionally, in Section I, this Comment will examine those cases both accepting and rejecting retaliatory discharge as a cause of action available to in-house counsel. Finally, in Section II, this Comment will analyze whether a cause of action for retaliatory discharge should exist for in-house counsel. Ultimately, this Comment concludes that a retaliatory discharge cause of action should extend to in-house counsel. The conflict between fiduciary and ethical duties, when it does exist, is secondary to the need to create a remedy for in-house attorneys who follow their ethical obligations. As the number of companies bringing attorneys in-house continues to grow, courts should fashion a rule which protects ethical in-house attorneys while not allowing unethical clients (corporations) to go unpunished.

I. BACKGROUND

A. At-Will Employees and Retaliatory Discharge

The common law doctrine of employment at-will guarantees that in the absence of a contract for a specified period of time, an employment relationship may be terminated at any time by either the employer or the employee.\(^7\) At-will employment is a judge-made doctrine of American origin.\(^8\) In its traditional form, the doctrine of

\(^6\) See, e.g., General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994).
\(^7\) Kelsay v. Motorola, Inc., 384 N.E.2d 353, 360 (Ill. 1978); Robinson v. Christopher Greater Area Rural Health Planning Corp., 566 N.E.2d 768, 771 (Ill. App. Ct. 1991); see also MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 2 (1988) (stating that under the “American Rule” unless an agreement by the parties to the contrary existed, the employment relationship is at-will and can be terminated by either party for any or no reason).
\(^8\) ANDREW HILL, “WRONGFUL DISCHARGE” AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE 11-12 (1987). Most industrial nations do not follow the theory of at-will employment. Id. Countries such as Canada, France, Great Britain and Japan all require “good
at-will employment allows an employer to discharge an employee "for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong."9 Underlying the fundamental tenet of employment law is the principle of "mutuality of obligation: if the employee is free to quit at any time, then the employer must be free to dismiss at any time."10 The development of the doctrine of at-will employment is largely attributable to an 1877 treatise by Horace Gray Wood, *Master and Servant*, that set forth a contract paradigm for employment relationships.11 H.G. Wood wrote in his treatise:

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10. Summers, * supra* note 8, at 484-85. One 19th century court stated:

> May I not refuse to trade with any one? May I not forbid my family to trade with any one? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster? . . . All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong.

*Palmateer*, 421 N.E.2d at 878 (quoting Payne v. Western & Atlantic R.R. Co., 81 Tenn. (13 Lea) 507, 518-20 (1884)).

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . . .

[It is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.]

The doctrine achieved constitutional approval in the United States in 1908.

Today, the United States Supreme Court no longer grants the at-will employment rule unfettered constitutional protection. Since the 1950's, courts and legislatures have created an exception to traditional at-will employment that restricts an employer's ability to discharge employees. Currently, an employer may be subject to a lawsuit for

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1933. Despite this, different arguments exist regarding the origin of the at-will employment doctrine. One line of argument suggests that at-will employment has its roots in the freedom of contract. Note, Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 HARV. L. REV. 1816, 1824-25 (1980). Another argues that at-will employment came about as a necessary element of the emerging capitalist society, one that shifted the burden of business cycles from employers to employees. Jay M. Friedman, The Development of the Employment at Will Rule, 20 AM. J. LEGAL HIST. 118, 118 (1976). As noted above, the final suggestion is that H.G. Wood's treatise is the basis for at-will employment, even though such a position is supported by neither legitimate precedent nor any policy justification. *Id.* at 126-27. The reason that at-will employment became the rule is because "a modern, comprehensive treatise stating a clear rule of practical application would almost inevitably attract a wide following and be cited as authority." *Id.* at 127.

12. Gary Minda & Katie R. Raab, *Time For an Unjust Dismissal Statute in New York*, 54 BROOK L. REV. 1137, 1141 (1989) (citing H.G. Wood, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877)). Commentators generally agree that H.G. Wood's analysis was not supported by the cited authorities. See, e.g., Yonover, supra note 11, at 67 (pointing out that Wood's reliance upon the following four United States cases was seriously misplaced, as none furnish firm support for his approach to general hiring: Franklin Mining Co. v. Harris, 24 Mich. 115 (1871); Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 (1870); Wilder v. United States, 5 Ct. Cl. 462 (1869), *rev'd on other grounds*, 80 U.S. 254 (1872); and DeBriar v. Minturn, 1 Cal. 450 (1851)).

13. See Coppage v. Kansas, 236 U.S. 1, 24 (1915) (holding that statutes limiting an employer's right to discharge were an unconstitutional infringement of the freedom of contract); Adair v. United States, 208 U.S. 161, 175-76 (1908) (invalidating federal legislation forbidding employers to require employees to agree not join a union).

14. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (resulting in an end to constitutional at-will employment status with the demise of substantive economic due process by holding that the Constitution does not protect an employer's freedom to contract with its employees on whatever terms it desires); Steven S. Gensler, Wrongful Discharge For In-House Attorneys? Holding the Line Against Lawyers' Self-Interest, 1992 U. ILL. L. REV. 515, 519-20 (discussing the end of constitutional at-will employment status).

retributive discharge if that employer discharges an employee in retaliation for the employee's activities, and the discharge contravenes a clearly mandated public policy.\textsuperscript{16}

Retaliatory discharge protections are premised on a number of theories such as implied contract,\textsuperscript{17} implied obligations of good faith\textsuperscript{18} and violations of public policy.\textsuperscript{19} The first case to incorporate a public policy exception into the at-will employment doctrine was \textit{Petermann v. International Brotherhood of Teamsters}\.\textsuperscript{20} In \textit{Petermann}, the court found that the employee was fired from his job because he refused to give false testimony favorable to his union at a hearing before the California Legislative Committee.\textsuperscript{21} The California Appellate Court held that the employee stated a cause of action for retaliatory discharge because "in order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration . . . ."\textsuperscript{22} The court circumvented

\textsuperscript{16} See Palmateer v. International Harvester Co., 421 N.E.2d 876, 881 (Ill. 1981); see also HILL, \textit{supra} note 8, at 13-14 (stating that two-thirds of American jurisdictions have abandoned an absolute employment-at-will rule).

\textsuperscript{17} Gensler, \textit{supra} note 14, at 520-21. Implied contracts may arise out of both written and oral communications. IRA M. SHEPARD ET AL., \textit{WITHOUT JUST CAUSE: AN EMPLOYER'S PRACTICAL AND LEGAL GUIDE ON WRONGFUL DISCHARGE} 75 (1989). These cases most often arise in the context of employment relationships based on employee handbooks or manuals. See, e.g., Duldulao v. Saint Mary of Nazareth Hosp., 505 N.E.2d 314, 318 (Ill. 1987) (determining that at-will employment was modified by employee handbook so as to create enforceable contractual rights).

\textsuperscript{18} Gensler, \textit{supra} note 14 at 520-21; see, e.g., Reed v. Municipality of Anchorage, 782 P.2d 1155, 1158 (Alaska 1989) (holding that an enforceable duty of good faith is implied into every employment relationship, including at-will employment).

\textsuperscript{19} Gensler, \textit{supra} note 14, at 520-21.

\textsuperscript{20} 344 P.2d 25, 27-28 (Cal. Dist. Ct. App. 1959). The retaliatory discharge cause of action is derived from the public policy exception to at-will employment and is generally recognized when: (1) an employer discharges an employee in retaliation for employee activities; and (2) the discharge contravenes a clearly mandated public policy. Palmateer v. International Harvester Co., 421 N.E.2d 876, 881 (Ill. 1981); accord Balla v. Gambro, Inc., 584 N.E.2d 104, 107 (Ill. 1991) (quoting Palmateer, 421 N.E.2d at 881) ("All that is required . . . is that the employer discharge the employee in retaliation for the employee's activities, and that the discharge be in contravention of a clearly mandated public policy."). "The retaliatory discharge exception has a narrower scope than the public policy exception." John Jacob Kobus, Jr., \textit{Note, Establishing Corporate Counsel's Right to Sue for Retaliatory Discharge}, 29 VAL. U. L. REV. 1343, 1363 (1995) (citing Palmateer, 421 N.E.2d at 878). This is because with the retaliatory discharge exception, the employee must be discharged in retaliation for the employee's activities, while the public policy exception only requires that the discharge contravene a clearly mandated public policy. \textit{Id}. The difference is crucial because a plaintiff suing under the public policy exception need only prove that the discharge was contrary to public policy, whereas a plaintiff suing under the retaliatory discharge theory must also prove that the discharge was in "retaliation" for his or her actions. \textit{Id}.

\textsuperscript{21} \textit{Petermann}, 344 P.2d at 27.

\textsuperscript{22} \textit{Id}.
the judicially created employer privilege to discharge with or without cause because of what it characterized as an overriding public policy of upholding the integrity of the judicial process.23 This public policy exception has been extended to include refusal to participate in unlawful acts,24 refusal to violate administrative regulations25 and codes of ethics,26 as well as the performance of important public obligations.27 Courts have been careful to limit the exception to cases where the overarching public policy is clear.28 Many courts, however, are reluctant to extend the public policy exception to attorneys because they

23. Id. The court stated: "The presence of false testimony in any proceeding tends to interfere with the proper administration of public affairs and the administration of justice." Id. The court believed "it would be obnoxious to the interest of the state and contrary to public policy . . . to allow an employer to discharge any employee . . . on the ground that the employee declined to commit perjury," an act which is prohibited by statute. Id. (referring to CAL. PENAL CODE § 118 (West 1957)).

24. See, e.g., Tameny v. Atlantic Richfield Co., 610 P.2d 1330, 1337 (Cal. 1980) (creating a public policy exception for gas salesman who was fired for refusing to engage in a retail gas price fixing scheme); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985) (creating a public policy exception for deck hand fired for refusing to pump his sea vessel's bilge into the water in violation of federal environmental law).


Employees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers [and] . . . in certain instances, a professional code of ethics may contain an expression of public policy.

Id.; see generally Alfred G. Feliu, Discharge of Professional Employees: Protecting Against Dismissal For Acts Within A Professional Code of Ethics, 11 COLUM. HUM. RTS. L. REV. 149 (1979-80) (examining the need for a retaliatory discharge cause of action for professional employees who are subject to a professional code of ethics and are subsequently discharged).

27. See, e.g., Woodson v. AMF Leisureland Ctrs., Inc., 842 F.2d 699, 702 (3d Cir. 1988) (extending the public policy exception to barmaid fired for refusing to serve liquor to a visibly intoxicated person); Knight v. American Guard & Alert, Inc., 714 P.2d 788, 791-92 (Alaska 1986) (extending the public policy exception to Trans-Alaska Pipeline security guard who was discharged for informing the pipeline operator, Alyeska, that other guards were drinking and using drugs while on duty).

28. Hill, supra note 8, at 28; see, e.g., Lambert v. City of Lake Forest, 542 N.E.2d 1216 (Ill. App. Ct. 1989) (analyzing and classifying situations in which the public policy exception has been expanded). In Palmateer v. International Harvester Co., the court stated that "the Achilles heel of the principle lies in the definition of public policy." 421 N.E.2d 876, 878 (Ill. 1981). The court in Petermann attempted to clarify the confusion over defining public policy:

The term "public policy" is inherently not subject to precise definition . . . . Mr. Story, in his work on Contracts (section 546), says: "It has never been defined by the courts, but has been left loose and free of definition in the same manner as fraud." By "public policy" is intended that principle of law which has a tendency to be injurious to the public or against the public good . . . .

are fearful of infringing upon the attorney-client relationship. Only recently have courts begun to extend the retaliatory discharge exception to in-house counsel.

1. The Role of In-House Counsel

A growing number of attorneys within the legal profession are employed by only one corporate client. These attorneys are known as in-house counsel or corporate counsel. Black's Law Dictionary defines house counsel as any "lawyer who acts as attorney for business though carried as an employee of that business and not as an independent lawyer. Generally, such lawyer advises business on day to day matters. Large businesses have legal departments with attorneys assigned to specialized areas of law . . . ." As employees of large businesses, generally corporations, in-house counsel serve only one

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[Public policy concerns what is right and just and what effects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions. Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizens social rights, duties, and responsibilities before the tort will be allowed.

421 N.E.2d at 878-79 (citations omitted).


31. See The State of the Legal Profession, 1990 ABA Young Lawyers Division 7 (noting that in 1990 six percent of practicing lawyers were corporate counsel). A number of observers believe as law firms continue to grow and legal costs increase, this percentage will continue to rise, primarily due to an effort to keep ever-rising legal costs at a minimum. Mark Stevens, Power of Attorney: The Rise of the Giant Law Firm 7-9 (1987). Another survey indicated that more than ten percent of all attorneys in the United States are employed by corporations as in-house counsel. See Jeff Barge, For In-House Counsel, Safety In Numbers, A.B.A. J., Jan. 1995, at 28 (stating that in-house counsel comprise about 10 percent of the entire attorney population) (citing Fred Krebs, president of the 10,000 member American Corporate Counsel Association).

32. General Dynamics Corp. v. Superior Court, 876 P.2d 487, 491 (Cal. 1994). Over the last two decades the number and stature of in-house counsel has increased rapidly. Id. Corporations have found that in-house counsel meet rather important needs. Id. A few of these needs are cost incentives, the increasing complexity of the regulatory environment, and the problematic nature of such organizations. Id.

client, their employer, and that client controls all of their activities. In-house counsel has become more important to corporations because they can devote their time and resources to reducing fees and shifting the workload in-house.

Today there is a large and increasing number of attorneys working for corporations. This growth may be attributed to the benefits in-house counsel offer to corporations. Not only do in-house counsel reduce costs to corporations, their time is devoted solely to the corporation which employs them—their only client. A unique situation is created due to the fact that in-house counsel have only one client, as compared to an attorney in private practice with a larger client base. Therefore, the question that naturally arises is whether their status as in-house counsel precludes them from pursuing a cause of action for wrongful termination of employment.

34. Patricia Leigh O'Dell, Retaliatory Discharge: Corporate Counsel in A Catch-22, 44 Ala. L. Rev. 573, 580 (1993). Because the client-corporation has pervasive control, the employment environment for an in-house counsel resembles essentially all the same characteristics of ordinary at-will employment. Id. The role of the in-house counsel as practicing lawyers does not change the essential nature of their status as employees. Id. at 597. Similar to other corporate executives, in-house counsel have supervisors, must follow corporate policies and are subject to review. Id. Louis C. Friedman suggested that in-house counsel need just as much judicial protection as their non-legal department counterparts. Louis C. Friedman, Should California House Counsel Be Allowed to Claim Wrongful Termination? 14 W. St. Univ. L. Rev. 431, 439 (1987). Sara Corello argues that the in-house counsel’s relationship with his or her employer is nearly identical to other employees in two of the most important respects: (1) in-house counsel are dependent on their employer-corporation for their entire income, benefits and pension; and (2) in-house counsel are governed by any employee handbook and personnel policies, as well as being subject to company controlled salary levels and promotions. Corello, supra note 8, at 405-06. The corporation also controls the lawyer’s hours and “the focus and nature of [the in-house counsel’s] practice.” Nordling, 465 N.W.2d at 87 (Kalitowski, J., concurring in part and dissenting in part); see also Balla v. Gambro, Inc., 584 N.E.2d 104, 113 (Ill. 1991) (Freeman, J., dissenting) (stating that in-house counsel are just as tempted as other employees “to either ignore or rationalize away their ethical obligations when complying therewith may render them unable to feed and support their family”).

35. Mark Stevens described the emerging importance of corporate counsel in the following way:

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

Stevens, supra note 31, at 9.


37. Id.
B. The Attorney-Client Relationship: Privilege and Confidentiality

The vitality of effective representation lies in the effective communication between lawyer and client.\(^3\) The attorney-client relationship is traditionally a bilateral one in which a lawyer represents a client and owes a fiduciary duty to that client.\(^3\) The attorney-client relationship is promoted by two mechanisms: the attorney-client privilege and attorney-client confidentiality.\(^4\) Critics and courts fear that retaliatory discharge suits are contrary to the lawyer's obligation as an attorney to promote the interests of their client.\(^4\) Also, critics argue that retaliatory discharge suits by attorneys will breach the attorney client privilege and confidentiality owed to the client.\(^4\)

Proponents of retaliatory discharge claims argue that the claims serve the goals of

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38. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.5 (1986). The Supreme Court characterized the attorney-client relationship as *sui generis*, stating that "[t]here are few of the business relations of life involving a higher trust and confidence than that of attorney and client . . . few more anxiously guarded by the law, or governed by sterner principles of morality and justice . . . ." Stockton v. Ford, 52 U.S. 232, 247 (1850).

39. John Levin, *Ethical Issues in Serving the Organization as Client*, 81 ILL. B.J. 483, 483 (1993). Rule 1.13, entitled Organization as Client, of the Illinois Rules of Professional Conduct embodies this bilateral concept. *Id.* Rule 1.13 provides that the lawyer represents the organization acting through its duly authorized "constituents," for example the employees, officers, directors, and shareholders. *Id.* The lawyer owes no special duty to the constituents because the lawyer represents the organization as a whole and owes a fiduciary obligation only to the legal entity. *Id.* at 484. Yet in all corporate settings, the counsel is directed by individual officers because the corporation can only function through its constituents. WOLFRAM, supra note 38, § 13.7. When the objectives of the officer and the corporation are not the same, however, the in-house counsel is required to pursue the best interest of the corporation even if it means going against the officer's interest. *Id.*

40. Gensler, supra note 14, at 538. The concepts are distinct, though they are often times confused or considered to mean the same thing. Nancy K. Renfer, Comment, *Corporate Counsels' Lack of Retaliatory Discharge Action*, 10 N. ILL. U. L. REV. 89, 103 (1989). Confidentiality differs from attorney-client privilege in that the scope of information protected is greater under confidentiality. See 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.6:108, at 142.9 to - .10 ("The relationship between the attorney-client privilege and the confidentiality principle has great practical significance, for although lawyers often assert the privilege as a matter of instinct, they are ethically required to do so by the broader [confidentiality] principle."); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1992) ("The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law . . . . A lawyer may not disclose such information except as authorized by the Rules of Professional Conduct or other law.").

41. Corello, supra note 8, at 406-07. Steven Gensler argues that the courts should preserve harmonious attorney-client relationships by refusing to allow attorney discharge claims in an attempt to dissuade employers from concealing business practices or problems from their in-house counsel. Gensler, supra note 14, at 536 n.167. Additionally, the Illinois Supreme Court stated that "the danger exists that if in-house counsel are granted a right to sue their employers in tort for retaliatory discharge, employers might further limit their communications with their in-house counsel." Balla v. Gambro, Inc., 584 N.E.2d 104, 109 (Ill. 1991).

42. See, e.g., Gensler, supra note 14, at 536-52 (arguing that in order to preserve the harmonious attorney-client relationship courts should not extend the cause of action to in-house coun-
the legal system without interfering with the ethical obligations of the attorney-client privilege or attorney-client confidentiality.\textsuperscript{43}

I. The Attorney-Client Privilege

The attorney-client privilege\textsuperscript{44} is a rule of evidence that prohibits the lawyer from disclosing information obtained through confidential communications with the client and relating to representation in judicial or other proceedings.\textsuperscript{45} Typically, the privilege applies to confi-
dential disclosures made by the client to the attorney in the course of seeking legal advice.\textsuperscript{46} The privilege exists in order to protect and promote "full and frank communication between attorneys and their clients...."\textsuperscript{47} The rationale which underlies the attorney-client privilege is that the attorney should function as advocate and confidential advisor to his client.\textsuperscript{48} If the privilege is waived or if the communications concern a continuing or future crime or fraud, the privilege ceases to exist.\textsuperscript{49} Finally, the obligation of confidentiality is the same for in-house counsel as it is for independent lawyers.\textsuperscript{50}

2. Attorney-Client Confidentiality

In contrast to the attorney-client privilege, which applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise be required to produce evidence concerning a client, attorney-client confidentiality is a rule of ethics that applies in situations "other than those where evidence is sought from the lawyers through compulsion of law."\textsuperscript{51} The rule of confidentiality applies not only to client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (iv) between representatives of the client or between the client and a representative of the client, or (v) among lawyers and their representatives representing the same client. Unif. R. Evid. 502(b) (1974). Rule 502(d) of the Uniform Rules of Evidence states: "There is no privilege under this rule...[a]s to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer. Unif. R. Evid. 502(d)(3) (1974).\textsuperscript{46} Wolfram, supra note 38, § 6.3.2, at 251.\textsuperscript{47} UpJohn v. United States, 449 U.S. 383, 389 (1981).\textsuperscript{48} Geoffrey C. Hazard, Jr., An Historical Perspective on the Attorney-Client Privilege, 66 Cal. L. Rev. 1061, 1061 (1978).\textsuperscript{49} Wolfram, supra note 38, §§ 6.4.2 and 6.4.10, at 268-69, 279-82. Important exceptions to confidentiality include: (a) the crime-fraud exception; (b) the death or bodily injury exception; (c) the deceased client exception; (d) the exception when a client breaches a duty to a lawyer; and the joint client exception. Roger C. Cramton, Proposed Legislation Concerning a Lawyer's Duty of Confidentiality, 22 Pepp. L. Rev. 1467, 1472 (1995).\textsuperscript{50} Corello, supra note 8, at 411 n.126 (citing Doe v. A. Corp., 709 F.2d 1043, 1046-48 (5th Cir. 1983); Coleman v. American Broadcasting Cos., 106 F.R.D. 201, 206 (D.D.C. 1985); In re LTV Sec. Litig., 89 F.R.D. 595, 601 (N.D. Tex. 1981); Barr Marine Prods. Co. v. Borg-Warner Corp., 84 F.R.D. 631, 635-36 (E.D. Pa. 1979)).\textsuperscript{51} Model Rules of Professional Conduct Rule 1.6 cmt. (1992). Although not enacted in all states, an expression of a lawyer's ethical duty of confidentiality may be found in the Professional Code of Conduct and is as follows:

(a) A lawyer shall not reveal information relating to representations of a client unless the client consent 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
matters communicated in confidence by the client to his or her attorney but also to information relating to representation, whatever its source.\textsuperscript{52} The professional codes of legal ethics define the scope of attorney-client confidentiality.\textsuperscript{53} The foundation of attorney-client confidentiality is based upon the law of agency.\textsuperscript{54} The professional codes of legal ethics regulate the legal community in an effort to ensure that it is the principle (the client) who is served by the agent (the attorney).\textsuperscript{55} Furthermore, a fiduciary duty owed to the client is imposed on the attorney by the professional code of legal ethics.\textsuperscript{56} These professional codes of ethics, which have been enacted in slightly different forms in all the states,\textsuperscript{57} are necessary for a number of reasons. First, such ethical standards discourage abuses of client information by attorneys through professional disciplinary measures.\textsuperscript{58} Second, in those situations when it is not clear as to whether the information is privileged or not these codes provide an additional safeguard.\textsuperscript{59} Finally, because these rules incorporate the general law of agency, agents (lawyers) are bound by professional codes of ethics to keep information about their principles (clients) confidential.\textsuperscript{60} Although the client receives the benefits of confidentiality, the codes, and not the client, determine which confidences are honored and protected.\textsuperscript{61}

\textsuperscript{52} \textit{Id.} Rule 1.6.
\textsuperscript{53} \textit{Id.} Rule 1.6 cmt.
\textsuperscript{55} Gensler, \textit{supra} note 14, at 539.
\textsuperscript{56} \textit{Id.} While the law of agency established a theoretical bases for client protection, the legal ethics codes enlarge these protections due to the importance of “well-informed” legal advisors. \textit{Wolfram, supra} note 38, § 6.7.3, at 300.
\textsuperscript{57} David Luban, \textit{Lawyers and Justice: An Ethical Study} at xxvii (1988).
\textsuperscript{58} \textit{Wolfram, supra} note 38, § 6.7.3 at 300.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 299-300.
\textsuperscript{61} \textit{Id.} § 6.7.2 to -3; see also \textit{id.} § 6.7.6 (discussing possible abuse by attorneys of confidential information). Both sets of rules provide exceptions to the confidentiality rule, however, the exception in the Model Code is broader than the exception provided in the Model Rules. Raymis H.C. Kim, \textit{In-House Counsel’s Wrongful Discharge Under the Public Policy Exception}
The cornerstone of the attorney-client relationship is effective communication. Attorney-client privilege and confidentiality seek to maximize the vitality of the attorney-client relationship by ensuring the sanctity of communications between an attorney and his or her client. The rules of evidence and the professional codes of legal ethics apply to in-house counsel the same as they apply to attorneys in private practice. Thus, effective communication between an attorney and his or her client is no less important for in-house counsel. In fact, with the increased dependence placed on in-house counsel, full and frank communications between in-house counsel and their large business employers is essential to effective representation.

C. Retaliatory Discharge Law as Applied to In-House Counsel

A number of jurisdictions have addressed the question of whether to extend a cause of action for retaliatory discharge to in-house counsel. At the heart of these decisions has been an analysis of whether the status of the in-house attorney should preclude them from bringing a retaliatory discharge claim. The early line of cases maintained that in-house counsel could be discharged at any time for no reason or any reason at all. The established rule is that, as attorneys, in-house counsel owe their clients special fiduciary duties which would otherwise be infringed if courts allowed retaliatory discharge claims by at-

and Retaliatory Discharge Doctrine, 67 WASH. L. REV. 893, 898 (1992). For example, the Model Code allows a lawyer to reveal "the intention of [the] client to commit a crime and the information necessary to prevent the crime." MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(c)(3) (1981). An attorney has the option to keep information confidential even if the crime-fraud exception to the attorney-client privilege applies. Kim, supra, at 898. The attorney-client confidentiality does not extend to communications of a client's intent to commit a future crime or fraud. Id. Although the ethical codes allow an attorney to disclose confidential information, the attorney is not required to disclose. Id. More restrictive confidentiality rules have been adopted in nine states requiring attorneys to report information on future crimes, on penalty of disbarment for failure to do so. See, e.g., ILCS RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1994) ("A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client form committing an act that would result in death or serious bodily harm."). The states other than Illinois which have adopted mandatory disclosure rules are Arizona, Connecticut, Florida, New Jersey, Nevada, North Dakota, Virginia and Wisconsin. HAZARD & HODES, supra note 40, § AP4:104, app. at 1262 n.2.

Only recently have courts begun to allow for a limited exception to traditional at-will employment. This exception, based largely on public policy, enables in-house counsel to seek a remedy for retaliatory discharge.

1. Courts Which Have Refused to Extend a Cause of Action to In-House Counsel—Decisions Leading Up to Balla v. Gambro, Inc.

Balla v. Gambro, Inc. was the culmination of a number of earlier decisions in the area of retaliatory discharge which declined to extend a cause of action to in-house counsel. The role and character of the attorney-client relationship has been closely analyzed with respect to extending a cause of action for retaliatory discharge to attorneys. Prior to Balla, three major decisions refused to extend a cause of action to in-house counsel who were allegedly victims of retaliatory discharge.

a. Herbster v. North American Company for Life and Health Insurance

The Appellate Court of Illinois was confronted with the question of retaliatory discharge in Herbster v. North American Co. for Life & Health Insurance. The suit arose when the plaintiff, chief legal officer and vice-president in charge of the legal department for North American Health Insurance, refused to destroy or remove documents relating to a pending law suit against North American. The plaintiff

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63. See, e.g., General Dynamics, 876 P.2d at 503 (indicating that retaliatory discharge actions by attorneys are limited by conflicts with professional ethics); Herbster v. North Am. Co. for Life and Health Ins., 501 N.E.2d 343, 346 (Ill. App. Ct. 1986) (stating that confidential communications between attorney and client are "inviolate" after termination); Nordling, 478 N.W.2d at 504 (expressing concern about privileged information and retaliatory charges).

64. See, e.g., Klages, 118 L.R.R.M. (BNA) at 2463, 2468 (indicating that "in roads" now exist to an employers "unfettered" power to discharge an employee-at-will); General Dynamics, 876 P.2d at 495 (holding that an employer must adhere to its published discharge procedures when terminating an in-house counsel); Mourad, 465 N.W.2d at 399 (discussing cases that have made exception to at-will employment termination because of public policy); Nordling, 478 N.W.2d at 503 (holding that attorney could pursue cause of action for employer's failure to follow contractual provisions in employee handbook); Parker, 566 A.2d at 218 (stating that employer has a duty to protect employee's right to refuse to violate public policy).

65. 584 N.E.2d 104 (Ill. 1991).


67. Id. at 344. The documents were work product from North American's actuarial department and contained information which suggested fraud in the sale of flexible annuities sold by North American. Id. If plaintiff would have followed orders, the action would have constituted
appealed from the trial court’s grant of summary judgment in favor of North American Health Insurance. \(^6^9\)

In response, the appellate court addressed the issue of whether an attorney, as an employee of a large business, is entitled to a cause of action for retaliatory discharge. \(^7^0\) The *Herbster* court reiterated the Illinois Supreme Courts’ holding in *Barr v. Kelso-Burnett Co.* that

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[t]his court has not, by its *Palmateer* and *Kelsay* decisions, “rejected a narrow interpretation of the retaliatory discharge tort” and does not “strongly support” the expansion of the tort. The common law doctrine that an employer may discharge an employee-at-will for any reason or for no reason is still the law in Illinois, except for when the discharge violates a clearly mandated public policy. \(^7^1\)

The court could not “separate plaintiff’s role as an employee from his profession” because his duties for the corporation were legal in nature. \(^7^2\) According to the court, the attorney has the opportunity to withdraw, and in some instances the law mandates that an attorney

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\(^6^9\) Id. North American’s motion for summary judgment averred that:

(1) there was no genuine issue as to any material fact; (2) there was no cause of action for retaliatory discharge by an attorney who is terminated by his client; (3) plaintiff was discharged because the quality of his work; and (4) they never ordered, demanded or directed plaintiff to destroy or remove any discovery information.

\(^7^0\) Id. at 344. Neither counsel nor court cited any case on point, thus the court looked to the history of retaliatory discharge to determine whether the plaintiff was an employee within the meaning of existing retaliatory discharge case law. *Id.* In 1978, Illinois recognized retaliatory discharge as an exception to the general rule which barred a cause of action by at-will employees. *Id.* See *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 360 (Ill. 1978) (holding that an employer’s absolute power to discharge at-will should not prevail when it is used to prevent an employee from asserting his statutory rights under the Worker’s Compensation Act because such an action, if permitted, would greatly undermine the Act); see also *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981) (stating that there is a growing need for the tort of retaliatory discharge as an exception to the general rule that at-will employees may be discharged for any reason or for no reason at all). The *Herbster* court, while concentrating on the rise of large, specialized corporations and the relative immobility of current employees, felt that the retaliatory discharge exception adequately recognized that employees often do not stand on equal footing with employers. 501 N.E.2d at 345.

\(^7^1\) *Herbster*, 501 N.E.2d at 345 (quoting *Barr v. Kelso-Burnett*, 478 N.E.2d 1354, 1356 (Ill. 1985)).

\(^7^2\) *Herbster*, 501 N.E.2d at 345-46. The court pointed to the fact that attorneys maintain a special position in our society, the uniqueness of which is shown by the fact that the attorney receives secrets and information “that otherwise would not be divulged to intimate friends.” *Id.* at 346. On account of this unique relationship the law subjects the attorney to a fiduciary duty in favor of his client. *Id.* at 347. Furthermore, because of the confidential nature of the attorney-client relationship, the general law provides that a client may terminate the relationship with an attorney with or without cause. *Id.; see Tobias v. King*, 406 N.E.2d 101, 103 (Ill. App. Ct. 1980) (stating that a client may discharge counsel at any time, with or without cause).
withdraw when his client threatens to commit a crime. The court could not justify extending the tort to attorneys because "the mutual trust, exchanges of confidence, reliance on judgment and personal nature of the attorney-client relationship" are so necessary to our judicial system. Thus, the court held that an attorney under these circumstances did not have a cause of action for retaliatory discharge.

b. Willy v. Coastal Corporation

In Willy v. Coastal Corp., Donald Willy, as in-house counsel for Coastal Corporation, brought a retaliatory discharge suit in a Texas federal district court. Willy alleged he was discharged for insisting that Coastal Corporation comply with various federal and state environmental laws. The court upheld Willy's dismissal on the ground that if an attorney believes that his client is intent upon pursuing an illegal act, the attorney's option is to voluntarily withdraw from employment. When an attorney elects not to withdraw and not to follow his client's wishes, he should not be surprised that his client no longer desires his services. Once the client does elect to terminate the relationship, however, the attorney is required to withdraw from any further representation of that client. The standard is the same for an in-house counsel.

The Willy court did not find that extending the public policy exception was necessary or proper. Nor did the court find a cause of action for termination of an attorney's services to be within the exception to employment-at-will, as adopted by the Texas Supreme Court.

73. Herbster, 501 N.E.2d at 348.
74. Id.
75. Id. Roger Balla argued that the Herbster opinion, while declining to extend the tort of retaliatory discharge on its facts, did not foreclose the possibility of extending the tort under different circumstances. Balla v. Gambro, Inc., 584 N.E.2d 104, 106 (III. 1991). Balla pointed to the fact that the duties of the plaintiff in Herbster were limited to legal matters, while Balla, in addition to being general counsel, served as the director of administration and personnel and manager of regulatory affairs for Gambro. Id. The Balla court rejected this argument. Id.
77. Id. at 117.
78. Id. Willy contended that he "left the employment of the company involuntarily." Id.
79. Id. at 118.
80. Id.
81. Id.
c. *McGonagle v. Union Fidelity Corporation*

In *McGonagle v. Union Fidelity Corp.*, John McGonagle, as corporation counsel for Union Fidelity Life Insurance Company, became aware that Union Fidelity was not in compliance with various state insurance regulations. Union Fidelity intended to mail insurance policies in Utah which McGonagle concluded would be a violation of Utah's insurance regulations. After a meeting with the vice-president in charge of marketing, McGonagle refused to authorize the mailings to Utah because he considered them to be "illegal." McGonagle was subsequently dismissed from his position as corporation counsel.

McGonagle filed a complaint averring that his termination was the result of his efforts to have Union Fidelity and its subsidiaries discontinue their violations of the insurance laws of several states. In addition, McGonagle alleged that his termination was wrongful because it violated a clear and compelling mandate of public policy. The Pennsylvania Superior Court found no Pennsylvania case on point which supported the argument that McGonagle was terminated because he attempted to fulfill state statutory responsibilities. According to the court, in the absence of any recognized violation of state law or public policy the court need not inquire into whether the defendants had a justifiable reason for firing McGonagle. In turn, the court suggested that if the plaintiff could point to a "specific expression of public pol-

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83. *Id.* at 879. In December of 1980, McGonagle was named general counsel as well as being a manager of the Union Fidelity Insurance Company, a leader in mass-marketing insurance via direct mail. *Id.* In February of 1981, he became a vice-president at Union Fidelity and was named to the board of directors. *Id.*
84. *Id.*
85. *Id.* At the meeting the vice-president of marketing "threatened to start firing [personnel] until he recovered enough salary to cover the dollars that he was losing on the sale . . . ." *Id.* McGonagle later learned of other questionable insurance practices conducted by Union Fidelity in New York, Minnesota, Connecticut and Pennsylvania. *Id.* at 879-80. McGonagle decided to stop the issuance of policies in Utah and Pennsylvania because he felt they were illegal, even though he knew that such a decision would have economic repercussions. *Id.* at 880. Additionally, McGonagle ceased the practice of not honoring CAT scan claims because he feared such a policy would expose the corporation to "unfair claims" charges. *Id.*
86. *Id.* at 881. On April 29, 1981, the vice-president of marketing told McGonagle, "I want your resignation, I want you out of here." *Id.* at 880. The termination did not comply with the company's policy manual on personnel changes. *Id.* at 881.
87. *Id.* A jury returned a verdict in favor of McGonagle in the amount of $30,000 for the wrongful discharge claim and an additional $32,000 in punitive damages. *Id.* Union Fidelity appealed. *Id.*
88. *Id.*
89. *Id.* at 883.
90. *Id.*
icy violated by his discharge,” then the court would qualify the discharge as “wrongful and within the sphere of public policy.”91 The court made it clear that the attorney has a dual role to abide by federal and state law as well as follow the professional code of ethics.92 These responsibilities may demand that the in-house counsel forego the performance of an act commanded by the employer.93

d. Balla v. Gambro, Inc.

Balla v. Gambro, Inc.94 is the leading opinion denying retaliatory discharge suits by in-house counsel. In that case, Roger Balla, in-house counsel for Gambro, filed a complaint in tort for retaliatory discharge seeking twenty-two million dollars in damages.95 Gambro, a distributor of kidney dialysis equipment,96 hired Balla on March 17, 1980 to “be responsible for all legal matters within the company and for personnel within the company’s sales office.”97 Gambro Dialysatorem, Gambro’s affiliate in Germany, notified Gambro that defective dialyzers would be shipped in their next delivery.98 Balla advised the president of Gambro to reject the shipment on account of its failure to comply with U.S. Food and Drug Administration (FDA) regulations.99 One week later, the president of Gambro decided to accept the shipment of dialyzers and sell them to a buyer who was not

91. Id. at 885.
92. Id.
93. Id.
94. 584 N.E.2d 104 (Ill. 1991).
95. Id. at 106. Balla alleged that he was fired in contravention of Illinois public policy. Id. The trial court dismissed the action on Gambro’s motion for summary judgment. Id. at 105. The appellate court decision, Gambro Inc. v. Balla, 560 N.E.2d 1043 (Ill. App. Ct. 1990), was reversed. Balla, 584 N.E.2d at 105.
97. Balla, 584 N.E.2d at 105. As director of administration, Balla’s duties included: “advising, counseling and representing management on legal matters; establishing and administering personnel policies; coordinating and overseeing corporate activities to assure compliance with applicable laws and regulations; . . . preventing or minimizing legal or administrative proceedings” and, as of August, 1983 managed regulatory affairs. Id. at 105-06. As manager of regulatory affairs Balla was “responsible for ensuring awareness of and compliance with federal, state and local laws and regulations affecting the company’s operations and products.” Id. at 106.
98. Id. Gambro Germany advised Gambro that: “[f]or acute patients risk is that the acute uremic situation will not be improved in spite of the treatment . . . . The chronic patient may note the effect as a slow progression of the uremic situation and depending on the interval between medical check-ups the medical risk may be overlooked.” Id.
99. Id.
currently a customer of Gambro. When Balla learned of the decision he told the president of Gambro that he would do whatever was necessary to stop the sale of the defective dialyzers. Two weeks later, on September 4, 1985, Balla was discharged from his job at Gambro. The next day, Balla reported Gambro’s violations to the FDA, which seized the shipment of defective dialyzers and determined them to be in violation of section 501(h) of the Food, Drug and Cosmetic Act.

After Balla brought suit for retaliatory discharge, Gambro moved for summary judgment, which the trial court granted. The trial court held that due to Balla’s status as Gambro’s attorney, the complaint failed to state a cause of action because a client has an absolute right to discharge their attorney. The Appellate Court of Illinois for the First District reversed and remanded, holding that the trial court erred in determining that Balla, as an attorney, was barred from bringing a suit for retaliatory discharge. In particular, the appellate court articulated three questions of fact which needed determination by the trier of fact: (1) whether the discharge related to information which Balla obtained as a “layman” (non-legal position); (2) whether Balla acquired the information as a result of his attorney-client relationship and whether the information was privileged; and (3) whether any countervailing public policy considerations exist which favor disclosure of privileged information obtained from the attorney-client relationship.

Ultimately, the Illinois Supreme Court reversed the appellate court decision, reaffirming the circuit court decision. The supreme court maintained the position that “an employer may discharge an employee-at-will for any reason or for no reason [at all].” The Illinois Supreme Court has followed a very narrow and limited approach to the tort of retaliatory discharge. The first decision in Illinois to allow a cause of action for retaliatory discharge was Kelsay v. Motorola, Inc. The supreme court created an exception to the

100. Id.
101. Id.
102. Id.
103. Id.
105. Id.
106. Id. at 1047.
107. Id.
109. Id.
110. Id. at 107 (quoting Barr v. Kelso-Burnett Co., 478 N.E.2d 1354, 1356 (Ill. 1985)).
111. 384 N.E.2d 353 (Ill. 1978).
The general rule that at-will employment is terminable at any time and for any or no cause when it upheld a suit for discharge in retaliation for filing workmen’s compensation claims. The retaliatory discharge cause of action was slightly enlarged in Palmateer v. International Harvester Co. to include cases in which an employer terminates an employee in violation of an established public policy. The Supreme Court of Illinois stated, in Barr v. Kelso-Burnett Co., that “this court has not, by its Palmateer and Kelsay decisions, ‘rejected a narrow interpretation of the retaliatory discharge tort’ and does not ‘strongly support’ the expansion of the tort.” This view was echoed in Herb-
ster v. North American Co. for Life & Health Insurance, in which the Illinois Appellate Court, Second District, declined to extend the tort of retaliatory discharge to in-house counsel, primarily because of the special relationship between the attorney and the client. The court found that "the mutual trust, exchanges of confidence, reliance on judgment and personal nature of the attorney-client relationship demonstrate the unique position attorneys occupy in our society."

Despite any limitations the Illinois Supreme Court has placed on the tort of retaliatory discharge, its ultimate purpose lies in its protection of public policy. Applying the reasoning from the Herbster decision, the Balla court found that the policy of protecting the lives and property of citizens is adequately safeguarded under the Rules of Professional Conduct. The Rules require an attorney in Balla's position to report Gambro's intention to sell dialyzers which would result in death or bodily harm to people. According to the Illinois Supreme Court, in-house counsel do not have a choice between committing an illegal or unethical act, as demanded by their employer, or following their ethical obligations; all attorneys are bound by the code of ethics. The court stated that if in-house counsel were allowed to recover for retaliatory discharge the side-effects on the attorney-client


Thus, to establish a cause of action for retaliatory discharge in Illinois an employee must show that: (1) he or she was discharged; (2) that the discharge was in retaliation of the employees activities; and (3) that the discharge was in contravention of a clearly mandated public policy. Hartlein v. Illinois Power Co., 601 N.E.2d 720, 728 (Ill. 1992). "The element of causation is not met if the employer has a valid basis, which is not pretextual, for discharging the employee." Id. 117. 501 N.E.2d 343, 348 (Ill. App. Ct. 1986).

118. Id. The appellate court distinguished the role of attorneys from other employees involved in earlier retaliatory discharge suits. The court pointed out that most employees do not have the mutuality of choice that is an integral part of the professional relationship which attorneys enjoy. Id. For these reasons the appellate court found "that all aspects are so necessary to our system of jurisprudence that extending this tort to the attorney-client relationship here is not justified." Id.

120. Id. at 108-09.
121. Id. See Rules of Professional Conduct, Ill. Sup. Ct. R. 1.6(b) (West 1994) ("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 harm.").
privilege might create a chilling effect on the communication between
an employer-corporation and the in-house counsel.\textsuperscript{123} The court
noted, for example, that if in-house counsel could use all corporate
information in a retaliatory discharge action, employers might be less
candid or even refuse to consult in-house counsel regarding poten-
tially illegal corporate conduct.\textsuperscript{124} The court finally suggested that
when in-house counsel are presented with ethical conflicts, they have
the opportunity and the obligation to withdraw from representa-
tion.\textsuperscript{125} The court reasoned that attorneys should understand that at
certain times in their legal careers they must forego monetary gain in
order to uphold the integrity of the legal profession.\textsuperscript{126}

Though these courts have not extended a cause of action to wrong-
fully discharged in-house counsel, they represent but one side of the
spectrum. While arguments for protecting the attorney-client privi-
lege and attorney-client confidentiality are very persuasive in many
circumstances, some courts have found situations where the extension
of a retaliatory discharge cause of action was warranted.

2. \textit{Courts Which Have Extended a Cause of Action to In-House
Counsel—Decisions Leading Up to General Dynamics v.
Superior Court}

Changing economic conditions have prompted criticism that the at-
twill doctrine is detrimental to the interests of all parties involved in
the employment relationship.\textsuperscript{127} As a result, some courts and legisla-
tures have begun to fashion a remedy for wrongfully discharged em-
ployees in the form of a civil action for retaliatory discharge. A
variety of reasons have been offered as support for those jurisdictions
which have concluded that in-house counsel have a cause of action for
retaliatory discharge.

\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.} The United States Supreme Court, in \textit{UpJohn Co. v. United States}, stated the follow-
ing regarding the attorney-client privilege:
Its purpose is to encourage the full and frank communication between attorneys and
their clients and thereby promote broader public interests in the observance of law and
administration of justice. The privilege recognizes that strong legal advice or advocacy
serves public ends and that such advice or advocacy depends upon the lawyer's being
fully informed by the client.
\textsuperscript{125} \textit{Balla}, 584 N.E.2d at 110.
\textsuperscript{126} \textit{Id.} Balla argued that the choice of withdrawing from representation is “simplistic and
uncompassionate, and is completely at odds with contemporary realities facing in-house attor-
neys.” \textit{Id.}
\textsuperscript{127} O'Dell, supra note 34, at 573.
Although the decision in *Balla v. Gambro, Inc.* was considered the leading opinion throughout the nation addressing retaliatory discharge of in-house counsel, the seeds were sown for an extension of a retaliatory discharge claim to in-house counsel in a number of earlier decisions. These earlier cases based their holdings in favor of a cause of action for retaliatory discharge on a number of grounds: (1) whistle-blower statutes; (2) implied-in-fact contracts; and (3) statutory or ethical considerations. *General Dynamics Corp. v. Superior Court*, which ultimately acknowledged the cause of action of retaliatory discharge for in-house counsel, was the culmination of these earlier decisions.

a. *Parker v. M & T Chemicals*

The New Jersey Superior Court in *Parker v. M & T Chemicals*, addressed the issue of wrongful discharge of an in-house counsel. Sheldon Parker, an attorney, was employed by M & T Chemicals as director of patents. His duties included administrative and business functions as well as performing in a legal capacity. The corporation requested that Parker oversee the copying and use of confidential transcripts which contained a competitor's technology needed to manufacture methyltin stabilizers. Parker alleged that after his refusal to follow the corporation's request, he was subjected to retaliation and


129. *Parker*, 566 A.2d at 215; see infra notes 146-49 and accompanying text (discussing whistle-blower acts as applied to retaliatory discharge).

130. See, e.g., *Mourad*, 465 N.W.2d at 395; *Nordling*, 478 N.W.2d at 498; see infra notes 145-63 and accompanying text (discussing the "implied contract to discharge for cause" exception as applied to retaliatory discharge).


132. 566 A.2d at 216.

133. *Id.* Sheldon Parker was employed for seven years during which time "he received favorable evaluations and raises which recognized his meritorious service." *Id.* at 217.

134. *Id.*

135. *Id.* Parker sent a memorandum to M & T's general counsel in which he objected to M & T's proposed actions. *Id.* Parker continued to object because he reasonably believed that the corporation was "engaged in unlawful and fraudulent conduct in violation of the canons of ethics binding attorneys." *Id.* at 218.
eventually a "constructive discharge." The New Jersey court held that this case fell under the Conscientious Employee Protection Act (CECA), commonly referred to as the "whistle-blower act." The court held that CECA could constitutionally apply to attorneys. The court stated that CECA is not inconsistent with the Code of Professional Ethics when the attorney seeks monetary damages, as opposed to reinstatement, because the employer can still file an ethics complaint against a former attorney if any professional confidences or proprieties were violated. Nevertheless, the court refused to speculate on "the scope or extent of the attorney-client privilege against disclosure of confidential communications in litigation of this sort."

b. Klages v. Sperry Corporation

Similarly, in Klages v. Sperry Corp., a Pennsylvania court upheld a suit by an in-house counsel fired in retaliation for investigating

136. *Id.* Parker alleged in his complaint that “defendants created an intolerable work environment for plaintiff that exacerbated an existing medical condition and caused plaintiff great anxiety, embarrassment and humiliation . . . . By this conduct defendants constructively discharged plaintiff from his employment.” *Id.*

137. N.J. STAT. ANN. § 34:19-3(c) (West 1988).

138. *Parker*, 566 A.2d at 216. The Whistleblower Act prohibits retaliatory discharge when employees object to or refuse to participate in an activity that the employee reasonably believes is in violation of a law or is incompatible with a clear mandate of public policy. *Id.* at 218.

139. *Id.* at 220. The court rejected defendant’s assertion that the whistle-blowers act (Act) unconstitutionally impinged on the Supreme Court’s plenary and exclusive power to regulate the conduct of attorneys. *Id.* at 219. Rather, the court stated that its construction of the Act “compels a retaliating employer to pay damages to an employee-attorney who is wrongfully discharged or mistreated for refusing to join a scheme to cheat a competitor or, indeed, for any reason which is violative of law, fraudulent, criminal, or incompatible with a clear mandate of . . . public policy concerning public health, safety or welfare.” *Id.* at 220.

140. *Id.* The employer has the opportunity to prove at trial that the discharge was due to incompetence, disloyalty, reduction in force, or any other legitimate reason. *Id.* The Court assured that its holding did not discourage ethics complaints against “shiftless attorneys or foist unwanted counselors on public or even private clients” because the employer (client) still has the opportunity to file an ethics complaint against the former employee (attorney). *Id.* The court believed its holding would discourage employers from inducing employee-attorneys to participate in or condone illegal activities, instead, with specific statutory protections, the attorney should be encouraged to resist such inducements. *Id.*

141. *Id.* at 222 n.2. The court stated that questions concerning the attorney-client privilege, when they arise, should be resolved at the trial level. *Id.* Rules of Professional Conduct Rule 1.6(c)(2) states:

[A] lawyer may reveal information to the extent the lawyer reasonably believes necessary: (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved. A lawyer is permitted to disclose otherwise confidential information which he reasonably believes necessary to support a claim against a client.

RULES OF PROFESSIONAL CONDUCT RULE 1.6(c)(2) (1992).

whether real estate commissions paid by the Sperry Corporation to
the president's wife constituted securities violations.\textsuperscript{143} The court
suggested that the suit was necessary to promote compliance with the
securities statutes and with the legal code of ethics.\textsuperscript{144}

c. \textit{Mourad v. Automobile Insurance Association}

In \textit{Mourad v. Automobile Insurance Ass'n},\textsuperscript{145} a Michigan appellate
court was faced with a case where the plaintiff was demoted from legal
area manager to executive attorney.\textsuperscript{146} The plaintiff brought an action
based on a breach of contract, constructive discharge, retaliatory de-
motion and infliction of emotional distress.\textsuperscript{147} The corporation con-
tended that the demotion was in response to Mourad's administrative
deficiencies, while Mourad claimed the demotion was in response to
his refusal to implement policy decisions contrary to the state's code
of professional conduct.\textsuperscript{148} At the trial court level the jury found that
the company manual created a contract to terminate for just cause.\textsuperscript{149}

The Michigan Court of Appeals affirmed the "just cause" contract
claim but disallowed Mourad's retaliatory discharge claim as both du-
plicative and inconsistent with a finding of an enforceable contract.\textsuperscript{150}
The retaliatory discharge claim was duplicative because the defend-
ants "knew or should have known that plaintiff was bound by the code
of professional conduct and incorporated this fact in creating a just-

\begin{itemize}
  \item \textsuperscript{143} \textit{Id.} Plaintiff, Robert D. Klages, was employed by the Sperry Corporation as vice presi-
dent and general counsel of Computer Systems, an unincorporated business group within the
Sperry Corporation. \textit{Id.}
  \item \textsuperscript{144} \textit{Id.} at 2469.
  \item \textsuperscript{146} \textit{Id.} at 396. Roger Mourad was employed by Auto Club Insurance Association. \textit{Id.} at 397.
  Plaintiff was named legal area manager in 1980, which entailed heading the corporations in-
house legal department. \textit{Id.} Then in March of 1983 plaintiff was demoted to an executive attor-
ney position. \textit{Id.} The legal department's tasks included supervising outside counsel, as well as
providing legal counsel and advice to the corporations claims staff regarding nonlitigation mat-
ters. \textit{Id.}
  \item \textsuperscript{147} \textit{Id.} A jury awarded plaintiff a verdict in the amount of $1,773,000, which the defendant
appealed. \textit{Id.} While the plaintiff filed a cross appeal on account of the trial court's refusal to
enter an additional $500,000 in exemplary damages which the jury awarded on a special verdict
form for intentional infliction of emotional distress. \textit{Id.}
  \item \textsuperscript{148} \textit{Id.} The Court stated: "It appears that plaintiff was an excellent lawyer." \textit{Id.} Plaintiff's
supervisor claimed that plaintiff was unable to implement the corporation's policies and plaintiff
"did not have the 'administrative talents' necessary to effectively implement cost-containment
measures in the legal department." \textit{Id.} Plaintiff claims his demotion stems from alleged unethi-
cal and illegal orders from his supervisors, who were not attorneys, which he refused to carry out
because these orders violated the Code of Professional Responsibility and Canons of Ethics. \textit{Id.}
  \item \textsuperscript{149} \textit{Id.} at 398.
  \item \textsuperscript{150} \textit{Id.} at 401.
\end{itemize}
cause employment contract.” 151 The court of appeals distinguished the earlier retaliatory discharge of in-house counsel decisions of the courts in Willy, Herbster, and Parker concluding that those cases addressed the question of whether the state will recognize a public policy exception in the typical employment-at-will contract. 152 Whereas in Mourad the jury found that a just-cause contract existed which was then breached by defendants. 153 The court further noted that it refused to adopt a complete bar to suits brought by an attorney for retaliatory discharge and breach of a contract for just cause on the basis of the attorney-client relationship. 154


The Minnesota Supreme Court addressed the issue of wrongful discharge in Nordling v. Northern States Power Co., 155 where a private attorney suggested surveillance of Northern State Power (NSP) employees, both at work and at home. 156 Gale K. Nordling, as NSP’s in-house counsel, voiced opposition to this suggestion believing it to be an illegal invasion of privacy. 157 When his supervisors failed to act, Nordling reported the surveillance plan to company executives who

151. Id. at 400. Although the corporation was not directly bound by the code of professional conduct, the defendants contracted not to terminate an attorney without good cause, thereby agreeing to be bound indirectly by the code. Id.

152. Id. at 399.

153. Id. The court concluded that to find a public policy exception required a different inquiry from that necessary to find a breach of a just-cause contract. Id. In Mourad, the court merely needed to find contractual rights between the parties, as compared to determining restrictions on employment discharge based on public policy grounds. Id. Another point of distinction was that Mourad did not simply involve an attorney-client relationship between the plaintiff and defendant because the plaintiff, who supervised lawsuits involving catastrophic injury, was also plaintiff for the insureds. Id. at 400.

154. Id. at 399.

155. 478 N.W.2d 498 (Minn. 1991).

156. Nordling v. Northern State Power, 465 N.W.2d 81, 83 (Minn. App. 1991). In the beginning of 1987, NSP was planning to seek approval for electricity rate increases for which the NSP Law Department began preparations for proceedings before the Public Utility Commission. Id. at 83. “SherCo III,” a new electrical power generation facility, because of its $1 billion cost of construction, was the major reason for the rate increase. Id. The Law Department established a task force which was to prepare for potential questions which the Commission might ask in regards to the rate increases. Id. The task force consulted an attorney in private practice to determine which procedures NSP would need to follow in order to comply with the commission. Id. David McGannon, NSP’s Vice President of Law, told Gale K. Nordling that the private attorney was conducting a “personal lifestyle investigation” of NSP employees working at the SherCo III power plant. Id.

157. Id. Nordling started working for NSP in 1971 as an engineer and continued to work in this capacity while he attended law school. Id. at 82. After passing the bar in 1975, Nordling joined the NSP Law Department as in-house counsel. Id. Nordling’s responsibilities included drafting and negotiating contracts related to the utility business, which included construction of NSP’s utility plants. Id.
then put a stop to the plan.\textsuperscript{158} Soon thereafter, Nordling was discharged without notice or warning.\textsuperscript{159} In addition, NSP failed to comply with disciplinary procedures contained in the NSP's employee handbook.\textsuperscript{160} Nordling filed suit against NSP and its vice president, David McGannon.\textsuperscript{161} The \textit{Nordling} court resolved the case by holding that the attorney-client privilege does not prevent an attorney from bringing a wrongful discharge suit based on an implied contract theory.\textsuperscript{162} Despite holding that an in-house counsel may have the right to file a claim for retaliatory discharge, the Minnesota Supreme Court dismissed the retaliatory discharge action as a matter of law because there was no violation of the state's whistleblower statute or of any state or federal law.\textsuperscript{163}

From these earlier rulings emerged the \textit{General Dynamics} decision. In \textit{Parker}, the court was willing to create an exception to the general rule that attorneys may not pursue a claim for retaliatory discharge, holding that the facts of the case fell under the state's whistle-blower act.\textsuperscript{164} The \textit{Klages} decision based its finding of a cause of action for

\begin{enumerate}
\item[158.] Id. at 83. McGannon began to closely monitor Nordling's activities because he suspected that Nordling was spending his time on non-work related matters during the day. \textit{Id.} McGannon next sent Nordling a memorandum which cited Nordling for failing to comply with an earlier memorandum that instructed Law Department personnel on use of the message board to let people know when one was out of the office. \textit{Id.} at 83-84. Soon after the memorandum was sent, Nordling met with McGannon because he felt these criticisms were unwarranted. \textit{Id.} at 84. McGannon retracted the memorandum and indicated that he would destroy it. \textit{Id.}
\item[159.] \textit{Id.}
\item[160.] \textit{Id.} McGannon's stated reasons for discharging Nordling included his belief that Nordling was unhappy and that this mood was effecting his job performance. This, coupled with the fact that Nordling did not say "good morning, good night, [or] how are you" and that he impeded a lunch meeting between Law Department personnel were acts leading to his dismissal. \textit{Id.} While the NSP employee handbook provided a policy of "Positive Discipline" which outlined steps to be followed before an employee could be terminated, none of them were followed before Nordling was discharged. \textit{Id.}
\item[162.] \textit{Id.} at 502.
\item[163.] \textit{Id.} at 504. While the \textit{Nordling} court did not rule on the retaliatory discharge issue, the case is nonetheless important because it recognizes a wrongful discharge action by an in-house counsel against his or her employer. \textit{Id.} at 499. The Minnesota Supreme Court stated:
\begin{quote}
The fact remains . . . that the in-house attorney is also a company employee, and we see no reason to deny the job security aspects of the employer-employee relationship if this can be done without violence to the integrity of the attorney-client relationship. For matters of compensations, promotion, and tenure, inside counsel are ordinarily subject to the same administrative personnel supervision as other company employees. These personnel arrangements differ from the traditional scenario of the self-employed attorney representing a client; and these differences are such, we think, that the elements of client trust and attorney autonomy are less likely to be implicated in the employer-employee aspect of in-house counsel status.
\end{quote}
\textit{Id.} at 502.
in-house counsel on public policy grounds, while the court in *Mourad* went as far as finding that a just cause contract had been formed. Finally, the *Nordling* court stated that the attorney-client relationship did not prohibit an attorney from bringing a retaliatory discharge suit based upon an implied contract theory. Thus, *General Dynamics* was not a radical departure from the *Balla* line of cases which refused to extend the retaliatory discharge cause of action to in-house counsel. Rather it was merely the last step in a series of cases which provided a retaliatory discharge cause of action for in-house counsel.

e. *General Dynamics Corporation v. Superior Court*

The California Supreme Court in *General Dynamics Corp. v. Superior Court* allowed former in-house counsel, Andrew Rose, to sue his employer, General Dynamics Corporation, for wrongful discharge under California tort law provided the discharge was premised on Rose's adherence to mandatory professional duties or his refusal to violate legal or ethical rules which protect the public interest. Rose had worked for General Dynamics as an attorney since 1978. On June 24, 1991, Rose was fired for, according to General Dynamics, a loss of the company's confidence in his ability to vigorously represent General Dynamics' interests. Rose contended that the "real" reasons for his discharge had to do with an attempt by company officials to cover up widespread drug use among the General Dynamics workforce, a refusal by General Dynamics to investigate the bugging of the office of the company's chief of security, and the displeasure of company officials with legal advice Rose gave concerning several hundred million dollars in back pay claims which General Dynamics allegedly owed its employees. The complaint relied on two

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168. 876 P.2d 487 (Cal. 1994).
169. Id. at 490.
170. Id. Rose began working as a 27-year-old contract administrator at General Dynamics' Pomona plant. Id. During the 14 years Rose was employed at General Dynamics he climbed the corporate ladder earning repeated commendations, until he was in line to become a division vice-president and general counsel. Id.
171. Id.
172. Id.
173. Id. An investigation at the Pomona plant led to the termination of more than 60 General Dynamics employees. Id. at 490-91.
174. Id. at 491. The alleged bugging of offices could be a criminal offense and a serious breach of national security since it involved a major defense contractor. Id.
175. Id.
different theories of relief. First, General Dynamics, through its conduct and other assurances, had impliedly represented to Rose over the years that he was subject to discharge only for "good cause." Second, Rose was in fact fired for cumulative reasons, all of which violated fundamental public policies.

The California Supreme Court granted review to consider the issue of whether an attorney's status as in-house counsel precludes a cause of action for damages following an allegedly wrongful discharge. General Dynamics relied upon Fracasse v. Brent, a case in which the California Supreme Court granted the client an absolute right to discharge a lawyer at any time for any reason. General Dynamics argued that, based upon Fracasse, Rose had no cause of action for retaliatory discharge since he was an attorney. While the supreme court in General Dynamics reaffirmed the rule in Fracasse, the court qualified that Fracasse only granted an "absolute" right to discharge their attorney for any or no cause to personal injury clients.

176. Id.
177. Id. "General dynamics filed a general demurrer to the complaint, asserting that Rose failed to state a claim for relief." Id. Because Rose had been employed as an in-house counsel, the company contended, he was subject to discharge at any time, "for any reason or for no reason." Id. "The trial court overruled the demurrer and the Court of Appeal denied General Dynamics' ensuing petition for a writ of mandate, ruling that, at least at the pleading stage, the complaint was sufficient to survive a general demurrer as to both theories of relief." Id.

178. Id. at 489. The court recognized a change in the times resulting from a growth in the number and role of in-house counsel which triggered a change in the character and role of the lawyer's place in society—contrasted with the 19th Century image which was "based predominantly on the small- to mid-size firm of like minded attorneys whose economic fortunes were not tethered to the good will of a single client." Id. at 491. No longer is the relationship between an attorney and his client a "one-shot" deal—characteristic of traditional law firms. Id. Rather, in-house counsel conduct business under heavily regulated conditions, often taking "on a larger advisory and compliance role, anticipating potential legal problems, advising on possible solutions, and generally assisting the corporation in achieving its business aims while minimizing entanglement in the increasingly complex legal web that regulates organizational conduct in our society." Id. In-house counsel have to deal with the pressures to conform with organizational goals, while adhering to the dictates of the lawyer's professional code of responsibility. Id. at 492.

179. 494 P.2d 9 (Cal. 1972). In Fracasse, an attorney represented a woman in a personal injury lawsuit under a contingent fee arrangement. Id. The client discharged the attorney in favor of new counsel. Id. The former attorney claimed that he had been discharged without just cause and sought a declaratory judgment to recover his one-third contingency fee—a percentage of the final recovery by his former client. Id. The court held that "a client should have both the power and the right at any time to discharge his attorney with or without cause." Id. The court premised its holding on the belief that no client should be forced to have an attorney represent them when they have lost confidence and trust in their attorney, because confidence and trust lie at the heart of the fiduciary relationship. Id.

180. General Dynamics, 876 P.2d at 492.
181. Id.
182. Id. at 493. The court added that "[i]f, as a matter of legal doctrine, the client's right to discharge can be invoked without consequence in all circumstances, it might easily produce un-
supreme court in General Dynamics differentiated between the sources of contract and tort claims in wrongful discharge cases, concluding that these claims are analytically different from the circumstances that are faced by the contingent fee plaintiff, which the court had to address in Fracasse v. Brent.183

Rose’s complaint did not contest General Dynamics’s right to discharge employees of its corporation. Instead, he claimed that there is a cost to be paid for such action.184 The court acknowledged that under certain circumstances, an in-house counsel may pursue a wrongful discharge claim for damages, despite the fact that reinstatement is not an available remedy.185 The court found that, in terminating Rose, General Dynamics had breached an implied-in-fact contract.186

The court held that Rose was hired by General Dynamics as a “career oriented” employee with an expectation of permanent employment, provided Rose performed satisfactory; “that he was promised job security and substantial retirement benefits; that he regularly received outstanding performance reviews, promotions, salary increases, and commendations throughout his 14-year tenure; and that the company abruptly terminated him without adhering to its published discharge procedures.”187 These facts suggest that General Dynamics had created a reasonable expectation through its conduct and various oral representations that Rose would only be terminated with just cause.188

Thus, while General Dynamics has the right to terminate any of its in-house counsel in which it has lost confidence, it may not do so “without honoring antecedent contractual obligations to discharge an attorney-employee only on the occurrence of specified conditions.”189

conscionable results.” Id. at 494. For example, an attorney in New York contracts to work for a corporation in Los Angeles, and thus he moves his entire family to California. Id. Three months later, he is summarily discharged. Id. The court stated in General Dynamics that “[t]o insist in the face of such egregious circumstances that our opinion in Fracasse... immunizes the employer by providing an ‘absolute’ right to discharge with complete impunity... would compel us to embrace as intuitively unjust, even outrageous, result...” Id.
183. Id. at 495.
184. Id. When a retaliatory discharge claim on an implied contract is based on public policy grounds the cost to the defendant should be lost wages and other related damages. Id. at 495-97. Implied-in-fact contract claims work as a limitation on an employer’s traditional power to terminate its employees at-will. Id. at 495.
185. Id.
186. Id.
187. Id.
188. Id.
189. Id. at 496. The California Supreme Court felt that the Minnesota Supreme Court summarized the situation best when it stated:
The fact remains... that the in-house attorney is also a company employee, as we see no reason to deny the job security aspects of the employer-employee relationship if this can be done without violence to the integrity of the attorney-client relationship. For matters of compensation, promotion and tenure, inside counsel are ordinarily sub-
The court next looked at Rose’s claim that his discharge violated public policy.\textsuperscript{190} In order to contest a wrongful discharge on public policy grounds, Rose needed to establish that his discharge violated a “‘fundamental policy that [is] delineated in constitutional or statutory provisions’ of the law of this state.”\textsuperscript{191} The court’s decision attempted to accommodate two conflicting values: the fiduciary duty of the attorney to the client and the duty of the attorney to adhere to professional ethical norms.\textsuperscript{192} The court recognized that there is a strong counter-argument against allowing retaliatory discharge claims by in-house counsel.\textsuperscript{193} However, the California Supreme Court did not be-
lieve that these countervailing factors outweighed the need for a limited rule in which discharged in-house counsel had a cause of action for wrongful discharge.\textsuperscript{194}

The Supreme Court of California devised a test to determine when an in-house counsel has a retaliatory discharge claim against his or her employer. First, the court must "ask whether the attorney was discharged for following a mandatory ethical obligation prescribed by professional rule or statute."\textsuperscript{195} Under most circumstances, if the answer is yes, then the attorney will have a retaliatory discharge action against the employer.\textsuperscript{196} Second, "if, on the other hand, the conduct which the attorney has engaged is merely ethically permissible, but not required by statute or ethical code, then the court must apply a two-pronged test."\textsuperscript{197} The court must first determine whether the employer's conduct would give rise to a retaliatory discharge action by a non-attorney employee under \textit{Gantt v. Sentry Insurance} and related cases.\textsuperscript{198} Thus, the plaintiff must show that the discharge violated a "fundamental policy that is delineated in constitutional or statutory" provisions of the law of this state.\textsuperscript{199} If the facts would give rise to such a cause of action, then the court must determine if there is some statute or ethical rule which permits an attorney to engage in the "nonfiduciary" conduct which was the ultimate reason for the discharge.\textsuperscript{200}

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\item those professional obligations. As more than one critic of these opinions has pointed out, both cases appear to reflect not only an unspoken adherence to anachronistic model of the attorney's place in contemporary society, but an inverted view of the consequences of the in-house counsel's essential professional role. \textit{General Dynamics}, 876 P.2d at 500. Also, the court points to the fact that there would have clearly been a cause of action had this case involved a non-lawyer employee of General Dynamics. \textit{Id.} The court has rejected the remedy of withdrawal (quitting one's job) because nonlawyer employees are not asked to quietly surrender their positions, rather society should encourage and give support to those who try to expose unlawful activity. \textit{Id.} at 502. The remedy of withdrawal does not confront the high costs which follow resignation and, in failing to provide a remedy, the professional stature of in-house counsel will be lessened. \textit{Id.}
\item \textsuperscript{194} \textit{Id.} at 502-05.
\item \textsuperscript{195} \textit{Id.} at 502. For example, if an in-house counsel was asked to commit a crime or act that would subject him to disbarment and was then discharged because the in-house counsel refused to engage in such conduct, the attorney would have been fired for adhering to mandatory ethical obligations. \textit{Id.} Thus, the attorney would have a cause of action against his employer for retaliatory discharge. \textit{Id.} at 502-03.
\item \textsuperscript{196} \textit{Id.}
\item \textsuperscript{197} \textit{Id.} at 503.
\item \textsuperscript{198} \textit{Id.}
\item \textsuperscript{199} \textit{Id.} at 496.
\item \textsuperscript{200} \textit{Id.} at 503. For example, if the in-house counsel is acting under a statutory exception to the attorney-client privilege which specifically permits the attorney to breach the rule of confidentiality owed to the client the attorney would be permitted to engage in the "non-fiduciary" conduct. \textit{Id.}
\end{itemize}
The court emphasized the limited scope of this rule because "[t]he lawyer's high duty of fidelity to the interests of the client work [sic] against a tort remedy that is coextensive with that available to the nonattorney employee." The court held that there is no reason inherent in the nature of an attorney's role as in-house counsel that precludes the maintenance of a retaliatory discharge claim, provided that it can be established without breaching the attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship. In *General Dynamics*, Rose never alleged that the conduct which led to his discharge was required or supported by any required rules of professional conduct or any relevant state statute. Therefore, the supreme court remanded the case to the trial court and Rose was permitted to amend his complaint against General Dynamics in accordance with the decision set forth by the court.

The Supreme Court of California, in *General Dynamics Corp. v. Superior Court*, created a limited exception to the traditional at-will employment doctrine for in-house counsel. The *General Dynamics* test attempts to protect attorney-client privilege and confidentiality, while at the same time protecting the interests of the in-house counsel. Thus, the court in *General Dynamics* held that justice and equity allow a wrongfully discharged in-house counsel to maintain a retaliatory discharge cause of action.

**D. Attorneys Treated as Lay Employees**

A final approach to retaliatory discharge of in-house counsel has been to treat the attorney as a lay employee. In *Meredith v. C.E. Walther, Inc.*, the plaintiff was fired after he gave deposition testimony concerning trust assets that the corporate employer allegedly had misappropriated. The court treated the discharged attorney as

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201. *Id.*

202. *Id.* at 503-05. The court makes three points concerning its holding. First, those in-house counsel who publicly expose their corporations secrets will only be protected in those instances where disclosure is explicitly mandated or allowed by an ethics code provision or statute. *Id.* at 503. Second, "the statutory attorney-client privilege should continue to be strictly observed. We reject any suggestion that the scope of the privilege should be diluted in the context of in-house counsel and their corporate clients." *Id.* at 504. Finally, the corporation may always produce evidence that the discharge was not retaliatory, thereby proving that the discharge was not wrongful. *Id.* at 505.

203. *Id.*

204. *Id.*

205. *Id.*

206. 422 So. 2d 761 (Ala. 1982).

207. *Id.* at 762. A lawsuit had been commenced against C.E. Walther, Inc. alleging that they converted trust assets. *Id.* Plaintiff, who was employed as in-house attorney, testified in a depo-
a regular employee because he was fired for something unrelated to his role as in-house counsel.\textsuperscript{208} However, the court held that the plaintiff failed to state a cause of action for wrongful discharge of an at-will employee.\textsuperscript{209} As seen in \textit{Meredith}, courts may disregard an in-house counsel’s status as an attorney and apply traditional discharge analysis, when an attorney’s discharge is for conduct which is unrelated to the scope of the in-house counsel’s role as an attorney.\textsuperscript{210}

\section*{Analysis}

The judicially created doctrine of at-will employment has been in a state of evolution during the twentieth century.\textsuperscript{211} The retaliatory discharge exception to the at-will rule allows an employee to recover damages from his employer when he or she is discharged “in contravention of a clearly mandated public policy.”\textsuperscript{212} The recent development of retaliatory discharge suits has raised a question which other jurisdictions will need to address: Should a cause of action for retaliatory discharge exist for in-house counsel? From this simple question, many strong arguments have been made both for and against an extension of the tort of retaliatory discharge to in-house counsel.

Some courts and critics are reluctant to extend the privilege of retaliatory discharge to in-house counsel because of the potential “chilling effect” on communications between attorneys and clients which could have a detrimental effect on the attorney-client relationship.\textsuperscript{213} In

\footnotesize{\textsuperscript{208} Id. As a result of plaintiff’s actions the corporation terminated plaintiff’s employment. \textit{Id.}}

\footnotesize{\textsuperscript{209} Id. at 761-62.}


\footnotesize{\textsuperscript{211} See \textit{supra} notes 7-30 and accompanying text (discussing the general history of at-will employment and retaliatory discharge).}

\footnotesize{\textsuperscript{212} Palmateer v. International Harvester Co., 421 N.E.2d 876, 881 (Ill. 1981).}

\footnotesize{\textsuperscript{213} Balla v. Gambro, Inc., 584 N.E.2d 104, 110-11 (Ill. 1991). The court fears that an extension of the retaliatory discharge cause of action to in-house counsel may harm the at-will nature of the attorney-client relationship which purportedly promotes mutual trust and free communi-}
contrast, other courts and commentators are willing to expand the retaliatory discharge cause of action to include in-house counsel. The answer depends on whether the courts and commentators focus on the detrimental effects to the in-house counsel or upon sanctity of the attorney-client relationship. The goal of both sides is to preserve and encourage the pursuit of ethical conduct.

A. Conflict Between Fiduciary Duty Owed to One's Client and the Ethical Responsibilities of an Attorney

A lawyer has to stand "as a shield . . . in defense of right and to ward off wrong." No one ever said this would be an easy task. The practice of law is an honored profession, in part because of the fiduciary duties owed to one's client, and in part because of the professional code of conduct which guide an attorney's conduct. The attorney must serve as an advocate for his client as well as a confidential advisor. Under certain circumstances the attorney may be confronted with the dilemma of choosing between the fiduciary duties owed to the client and the ethical obligations which an attorney must follow on account of his or her status as an attorney.
1. The Problem of Competing Interests

What should an attorney do, for example, when he becomes aware of widespread drug use in his client's corporation?\textsuperscript{218} when his request to investigate the potential illegality of bugging company employees is ignored?\textsuperscript{219} when he becomes aware of potentially several hundred million dollars in back pay claims which might be owed to his client's employees?\textsuperscript{220} when he learns that his client may be selling defective products which could endanger the lives of many people?\textsuperscript{221} If the business of lawyers is to represent their clients, one would think that the lawyer ought to carry out their clients' wishes. Such a presumption assumes that the client's needs or requests are legal and ethical. In situations such as these the fiduciary duties owed to the client will often conflict with the ethical obligations of an attorney enumerated in the professional code of conduct.

The professional codes of conduct, such as the Model Rules of Professional Conduct, provide some guidance for attorneys when deciding how to conduct their legal practice. According to Rule 1.2 of the Model Rules of Professional Conduct:

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  \item[(d)] A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
  \item[(e)] When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.\textsuperscript{222}
\end{itemize}

Since attorneys are expected to act with the utmost of moral character, attorneys have only one option: to do that which is legal.\textsuperscript{223} Therefore, the attorney's ethical responsibility is to advise his or her corporate employers of the illegality of their proposed course of conduct. If these corporate employers refuse to accept the in-house counsel's advice and proceed with the illegal conduct, the in-house counsel is required to withdraw from any connection with the unethical or illegal conduct because the in-house counsel cannot knowingly assist a

\begin{thebibliography}{99}
\bibitem{218} General Dynamics Corp. v. Superior Court, 876 P.2d 487, 490 (Cal. 1994).
\bibitem{219} \textit{id}.
\bibitem{220} \textit{id} at 491.
\bibitem{222} \texttt{MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1992)}.
\bibitem{223} \textit{id} Rule 1.2 discusses the scope of representation and states that an attorney shall not counsel a client to engage in, or assist a client in violating a law, but may discuss the consequences of any proposed conduct. \textit{id}.
\end{thebibliography}
client in criminal or fraudulent conduct. The attorney must withdraw from representation if the corporation insists on the attorney’s involvement in any attempt by the corporation: to cover up widespread drug use among a client corporation’s workforce; to bug the corporation’s employees offices; to cover-up potential back pay owed to the corporation’s employees. Furthermore, the attorney must withdraw and report to the proper authorities any knowledge about the sale of defective products which will endanger the lives of innocent people. Where the price is lost faith in the legal system, upholding the integrity of the profession of law and the judicial process must always be the quintessential goal of every attorney.

In the best of all worlds the client would respect the attorney’s ethical obligations. In the competitive business world of the twentieth century, however, the stark reality is that for many of those attorneys who refuse to either break the law or to violate the professional code of ethics, the client will simply seek other counsel who are more willing to carry out the corporation’s wishes while overlooking their own ethical obligations. Such an outcome is particularly shattering to the in-house counsel who only represents one client. Unfortunately, termination of employment for in-house counsel in today’s competitive job market can have devastating effects on one’s chances of gaining future employment, as well as being a permanent mark on one’s employment record.

The position of in-house counsel is qualitatively different from that of an attorney in private practice. First, the in-house counsel is an employee of the corporation. On account of the pervasive control which the corporation has over the in-house counsel the counsel pos-

224. According to Rule 1.16 of the Model Rules of Professional Conduct, Declining or Terminating Representation, “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law.” Model Rules of Professional Conduct Rule 1.16 (1992).

225. See Model Rules of Professional Conduct Rule 1.6 and 1.16 (1992). Rule 1.16(a)(1) requires an attorney to withdraw if continued representation will result in a violation of the Model Rules or the law. Id. Rule 1.16. While Rule 1.6 permits a lawyer to reveal confidential client information to the extent the lawyer reasonably believes necessary to “prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.” Id. Rule 1.6.

226. O’Dell, supra note 34, at 574. Withdrawal for an lawyer in private practice is not only required but it is a reasonable alternative. Id. On the other hand, for attorneys who represent only one client, such as in-house counsel, withdrawal means the loss of one’s entire livelihood. Id. Thus, the in-house counsel is faced with a much more difficult set of circumstances than attorneys in private practice. Id.

227. Id. at 577. Stakes are high for wage earners: “today, if a worker loses his job, he loses almost every resource except social welfare relief.” Id.
sess nearly all the same characteristics of the ordinary at-will employee. In-house counsel are subject to corporation policy, they have supervisors, and their employment and advancement is subject to review by corporate executives. As Sara Corello argued, in her article, "In-House Counsel's Right to Sue for Retaliatory Discharge," in-house counsel are completely dependent upon the corporation for their entire income, benefits and pension. Thus, when a difficult ethical decision arises, in-house counsel are just as tempted as other employees "to either ignore or rationalize away their ethical obligations when complying therewith may render them unable to feed and support their families." Although there is no justification for an attorney failing to honor his or her ethical duties, the court should remedy the harm inflicted upon an in-house counsel who was discharged in retaliation for acting in an ethical and legal fashion. Such a result in no way prohibits a corporation from discharging its in-house counsel, but merely provides that under certain circumstances there may be a cost to such a decision. Allowing a right of recovery for retaliatory discharge would encourage in-house counsel to conduct themselves ethically under all circumstances because the fear of being fired will not be as harsh, nor carry with it such devastating consequences.

B. The Conflicting Approaches to Retaliatory Discharge Suits by In-House Counsel

Until General Dynamics v. Superior Court, the leading case addressing the issue of retaliatory discharge of in-house counsel was Balla v. Gambro, Inc. A number of jurisdictions, such as Texas and Pennsylvania, followed Balla in rejecting a cause of action for retaliatory discharge would encourage in-house counsel to conduct themselves ethically under all circumstances because the fear of being fired will not be as harsh, nor carry with it such devastating consequences.

228. See supra notes 31-37 and accompanying text (discussing the role of in-house counsel).
229. See Corello, supra note 8, at 405 (discussing in-house counsel relationship with the corporation).
231. According to Michael L. Closen and Mark E. Wojick, extending a cause of action for retaliatory discharge would encourage the ethical behavior of corporate counsel by protecting honest attorneys, while punishing dishonest corporations. Michael L. Closen & Mark E. Wojick, Lawyers Out in the Cold, A.B.A. J., Nov. 1987, at 96. Closen and Wojick said: "If an employee tells his lawyer to do something unlawful, the lawyer should be encouraged . . . to refuse to do so. If the employer persists, [the employer is] wilfully trying to break the law and should not be insulated from a retaliation-discharge suit if he fires the honest lawyer." Id. Thus, no purpose is served by shielding employers from tort liability, while "permitting actions for retaliatory discharge would protect those lawyers who comply with professional rules of conduct and other statements of clearly mandated public policy." Kobus, Jr., supra note 20, at 1390-91.
232. 876 P.2d 487 (Cal. 1994).
tory discharge of in-house counsel based on public policy. The General Dynamics decision, which upheld a retaliatory discharge cause of action for in-house counsel—based upon an implied contract theory and public policy grounds—creates a confrontation for future courts: Whether or not a retaliatory discharge cause of action should exist for in-house counsel.

1. Acceptance of a Cause of Action?

The at-will nature of the attorney-client relationship supposedly promotes mutual trust and free communications between attorneys and their clients. Courts in the interest of justice have recognized in limited circumstances a public policy exception to the at-will employment rule when an employee is discharged in contravention of a clearly mandated public policy. Should courts include retaliatory discharge of in-house counsel among those limited circumstances in which a cause of action exists?

a. No Cause of Action for In-house Counsel

The two most common reasons given by courts for not extending the retaliatory discharge cause of action to in-house counsel are: (1) the traditional at-will employment nature of the attorney-client relationship, and; (2) the perceived adverse effect on the attorney-client relationship. These courts have supported the at-will nature of the attorney-client employment relationship by reasoning that if courts were to allow such retaliatory discharge actions the confidential nature of the attorney-client relationship would be impaired. The courts hold that lawyers do not have a choice between committing illegal or unethical acts, since they are under a duty to follow the code of professional responsibility. And when lawyers are presented

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236. Id. at 104; see also Herbster v. North American Co. for Life and Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1991) (recognizing a limited exception to the at-will employment rule).
237. Balla, 584 N.E.2d at 109; see also McGonagle, 556 A.2d at 887 (refusing to recognize a claim for wrongful termination by in-house counsel). Also, corporations are concerned “that erosion of the at-will doctrine will disrupt business efficiency and flexibility, will invite frivolous lawsuits, and saddle employers with mediocre or unqualified workers.” Mauk, supra note 226, at 206.
238. See supra notes 123-24 and accompanying text (discussing the adverse effects an extension of the wrongful discharge cause of action will have on the attorney-client relationship).
239. See supra note 122 and accompanying text (discussing the duty imposed by the professional code of ethics).
with such ethical conflicts the attorney has the obligation to withdraw from representation.\textsuperscript{240}

The strength of finding no-cause of action for wrongfully discharged attorneys is the existence of a bright line rule. Courts would be able to conclude that under all circumstances an attorney’s retaliatory dismissal is without remedy. Secondly, by providing no cause of action, the courts are protecting the strongly recognized goal that “sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer [sic] being fully informed by the client.”\textsuperscript{241} Thus, most importantly the integrity of the judicial process would be preserved by disallowing a cause of action to in-house counsel—but at what cost?

The problem with the \textit{Balla} line of reasoning is that the courts have over-simplified their response by merely focusing on the in-house counsel’s status as an attorney, rather than critically examining the nature and role of the in-house counsel.\textsuperscript{242} The role of the attorney has shifted with the growth of corporations and their drive to bring legal counsel in-house.\textsuperscript{243} In-house counsel are in many respects more similar to employees than they are to private practice attorneys. However, these in-house attorneys are not allowed a cause of action for an alleged retaliatory discharge, even though an employee of the corporation in the same situation would have a cause of action.\textsuperscript{244} Withdrawal does not become a viable option if the attorney is faced with the prospect of prolonged unemployment, termination of benefits and a permanently blemished employment record. Courts which choose to follow \textit{Balla} have decided that in some cases attorneys must forego monetary gain in order to uphold the legal profession.\textsuperscript{245} The \textit{Balla} court noted that one commentator has criticized the “no cause of action” line of decisions by stating that, “[i]t is clear that there would have been a right of action had the employee not been a lawyer. It thus seems bizarre that a lawyer-employee, who has affirmative duties concerning the administration of justice, should be denied redress for discharge resulting from trying to carry out those very duties.”\textsuperscript{246}

\textsuperscript{240} \textit{See supra} note 125 and accompanying text (discussing the obligation of withdrawal).
\textsuperscript{242} \textit{See supra} note 65-126 and accompanying text (discussing the \textit{Balla} line of cases).
\textsuperscript{243} \textit{See supra} note 31-37 and accompanying text (discussing the increasing use by corporations of in-house counsel).
\textsuperscript{244} \textit{See supra} note 34 and accompanying text (explaining the similarities between in-house counsel and non-attorney corporate employees).
\textsuperscript{245} \textit{See supra} note 127 (discussing \textit{Balla v. Gambro} and its reasoning).
\textsuperscript{246} \textit{General Dynamics Corp. v. Superior Court}, 876 P.2d 487, 500-01 (Cal. 1994).
The reality is that when an in-house counsel is wrongfully discharged, that attorney is without income or benefits for upholding the integrity of the legal profession, while the corporation goes unpunished. Finding solace in the fact that the integrity of the profession has been protected is not enough to overcome the injustice which has occurred. The reality is that unethical employers are receiving the protection of the law when courts fail to extend a claim for retaliatory discharge to a wrongfully terminated in-house counsel.

b. A Cause of Action for In-House Counsel

A number of approaches have been offered to support a retaliatory discharge cause of action for in-house counsel. One option is to treat attorneys, such as in-house counsel, as lay-employees when the conduct which the discharge was based upon is unrelated to the in-house counsel's duties as an attorney. Such an option allows the courts to apply traditional at-will employment analysis. Two problems may arise from such an approach. First, application of such an approach is of limited scope because most often in-house counsel are discharged for conduct within the scope of their employment as in-house counsel—providing legal advice. Second, separating one's duties as a lay employee from those duties performed as an attorney creates a tenuous and difficult task for the judiciary. Therefore, in order to best promote the interest of upholding the integrity of the judicial process, courts should create for in-house their own exception to traditional at-will employment doctrine.

In response to the need for justice in this area of the law, courts have fashioned a remedy for in-house counsel who are wrongfully discharged in retaliation for refusal to commit illegal or unethical conduct. The General Dynamics decision is narrowly drawn and recognizes that under certain circumstances, an in-house counsel may have a retaliatory discharge cause of action. The court announced two such limited circumstances: First, if the court finds that an im-

247. See supra notes 206-10 and accompanying text (discussing Meredith v. C.E. Walther, Inc., 420 So. 2d 761 (Ala. 1982)).

248. See supra notes 127-205 and accompanying text (discussing decisions that have upheld a cause of action for wrongful discharge). Supporters argue that extending retaliatory discharge lawsuits to in-house counsel serves two functions: First, the corporation can not coerce employees into committing criminal or unethical acts without sanction. Abramson, supra note 45, at 278. Secondly, courts discourage lawyers from becoming "pawns in effectuating obstructions of justice" by the corporation. Id.

249. General Dynamics, 876 P.2d at 502-05; see supra notes 203-09 and accompanying text (discussing the test established by the California Supreme Court to be applied to an alleged retaliatory discharge of in-house counsel).
plied contract existed which provided that termination would be for just cause, then the in-house counsel will have a cause of action; second, if the court holds that the corporations actions violated public policy, then a cause of action for retaliatory discharge exists if the plaintiff can meet the requirements set forth in *General Dynamics*.251

The court's conclusion in *General Dynamics* to extend the retaliatory discharge cause of action to in-house counsel is a promising step towards encouraging and promoting the moral character of attorneys. If there is a weakness in the *General Dynamics* decision, it lies in those situations where the public policy has not been clearly articulated because there is no bright line rule against which employers may gauge their conduct.252 However, this same problem would arise in the case of retaliatory discharge of non-attorney employees, and the argument should have no greater weight in the case of in-house counsel.

The court in *General Dynamics* based its decision on a number of considerations. First, the *General Dynamics* decision does not prevent corporations from discharging in-house counsel. Corporations will simply have to pay a price when the discharge is retaliatory. Second, the decision takes into consideration the special position which in-house counsel have assumed in the business and legal communities, while addressing the fact that withdrawal is not always a viable option for in-house counsel.253 Third, compensation would encourage ethical behavior while supporting the unemployed counsel during his search for other employment. Fourth, and possibly most importantly, the overriding goal of upholding the integrity of the judicial process is not harmed in any way by the *General Dynamics* decision because private

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250. *Id.* at 495-97; *see supra* note 184-89 and accompanying text (discussing implied contracts).

251. *General Dynamics*, 876 P.2d at 496-98. *See supra* notes 190-93 and accompanying text (discussing the public policy exception to wrongful discharge). The California Supreme Court devised a two-part test: First, the court must "ask whether the attorney was discharged for following a mandatory ethical obligation prescribed by professional rule or statute." If so, then a cause of action exists. However, if the attorney's conduct is "merely ethically permissible, but not required by statute or ethical code," then the court must ask whether the employer's conduct would give rise to a retaliatory discharge claim by a non-attorney employee, and "whether some statute of ethical rule, such as the statutory exceptions to the attorney-client privilege, specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employee and engage in the 'nonfiduciary' conduct for which he was terminated." *General Dynamics*, 876 P.2d at 502-05.

252. *See supra* note 205 and accompanying text (discussing the public policy issue in the context of *General Dynamics*). Public policy is a pure creature of law, thus unless a court has announced a policy which is delineated from the law of the state no policy exists. *General Dynamics*, 876 P.2d at 496.

253. *See supra* note 125 and accompanying text (discussing the obligation of withdrawal).
communications which relate to the criminal or fraudulent conduct fall within the exception created by the rules of professional conduct while all other communications remain protected.\textsuperscript{254} Further, the corporation maintains the power to discharge and when accused of wrongful discharge, the corporation can still defend its action by producing evidence in its defense. Finally, the decision is sufficiently limited to situations in which an implied contract for just cause dismissal was found or the discharge violated public policy, thereby permitting a cause of action for retaliatory discharge of in-house counsel serves justice to all injured parties and to the public as a whole.\textsuperscript{255}

III. Conclusion

The retaliatory discharge cause of action has gained acceptance in the twentieth century in response to a perceived need by the courts to fashion a remedy for discharged employees. Courts and legislatures since the 1950's have allowed suits that restrict an employer's ability to discharge its employees. Although courts are reluctant to extend a cause of action to attorneys, the time has come for a limited exception which would allow in-house counsel the opportunity to seek a remedy for retaliatory discharge. The nature of the in-house counsel in the modern business world is such that the position of in-house counsel is more analogous to that of a lay-employee than to the private practice attorney. Therefore, the same principles should apply to an in-house counsel as apply to a lay employee. The attorney-client relationship is not harmed by an extension of the cause of action because the codes of professional conduct provide exceptions to the attorney-client privilege and confidentiality for criminal and fraudulent conduct.

The cause of action would enable attorneys to conduct themselves in an ethical manner, while protecting their professional career and financial security. Thus, the attorney will still be able to stand as a shield in defense of right and a sword against wrong. In the end, an attorney should not be left without any remedy at law because he lost his job when his ethical duties as an attorney conflicted with his fiduciary duties to the client.

\textit{Michael P. Sheehan}

\textsuperscript{254} Model Rules of Professional Conduct Rule 1.6 (1992).

\textsuperscript{255} See supra notes 192-200 and accompanying text (discussing the test formulated in General Dynamics).