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Wrongful Discharge for In-House Attorneys: Holding the Line Against Lawyers' Self-Interest

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WRONGFUL DISCHARGE FOR IN-HOUSE ATTORNEYS? HOLDING THE LINE AGAINST LAWYERS' SELF-INTEREST

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Wrongful discharge has emerged as one of the more fashionable causes of action. Both courts and legislatures are crafting rules that restrict the circumstances under which employers may exercise their previously unfettered right to discharge employees for any or no reason. Although the war over the at-will discharge rule is already lost, the fighting is actually intensifying on one battleground—the in-house legal department. Several courts have denied common law discharge remedies to in-house attorneys, even when a remedy clearly existed for lay-employees, on the basis that the professional ethics codes impliedly precluded such suits. Commentators have decried these decisions as absurd, knee-jerk reactions unsupported by either the ethics codes or common sense. This student note disagrees, arguing that although the ethics rules can be manipulated to permit discharge suits by in-house attorneys, doing so violates fundamental principles of attorney-client loyalty and confidentiality—principles that both manifest themselves in specific ethics rules and resonate throughout the ethics rules as a whole. This note concludes that discharge suits brought by in-house attorneys, whether statutory or common-law, are inimicable to an adversarial legal system that depends on candid attorney-client communications.

> Alas my love! Ye do me wrong. To cast me off discourteously.
>
> Anonymous[1]

> Being liable to evil from you if I comply not with a wish which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it. If, in spite of that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command, or to violate the duty which it imposes.
>
> John Austin[2]

I. INTRODUCTION

Exceptions to the common-law doctrine of at-will employment

1. Anonymous, *Greensleeves*, *in* THE PENGUIN DICTIONARY OF QUOTATIONS 7 (J.M. Cohen & M.J. Cohen eds., 1977).
2. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 7 (Lecture 1) (1832).

threaten to swallow the rule.[3] While in years past employers were free to discharge their employees for even the most despicable of reasons, both labor and employment law, as well as a judicial erosion of the common-law ability to discharge with impunity,[4] constrain today's employer.

Legislatures increasingly are prohibiting employers from firing employees for reporting illegal conduct.[5] Courts also are eroding the at-will rule in two significant ways: by finding implied contractual protections and by permitting discharged employees to sue in tort where the dismissal violated the state's public policy. Courts that permit tort suits do so because of a belief that granting employers an absolute and unqualified right to define their work force, even within the boundaries set by legislation, frustrates important principles of public policy.[6] Believing that they should neither countenance nor protect objectionable behavior through a judicial grant of civil suit immunity, courts often permit employees fired under unsavory circumstances to sue their former employers for damages. Whether founded on legislation, public policy, or otherwise, these suits collectively are known as wrongful discharge suits.[7]

Owing perhaps to a heightened, and seemingly selfish, interest that attorneys have in exploring their own retaliatory discharge options, wrongful discharge suits brought by attorneys enjoy a media exposure comparatively far in excess of that of discharge suits brought by other types of plaintiffs. The few existing cases are deemed noteworthy enough to merit full-scale articles in the legal tabloids,[8] substantial scholarly treatment in the law reviews,[9] and even continuing coverage in the

3. ANDREW D. HILL, "WRONGFUL DISCHARGE" AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE 13-14 (1987) (stating that at-will rule has been "riddled with exceptions and exemptions" and noting that over "two-thirds of American jurisdictions have abandoned an absolute employment-at-will rule").

4. *See infra* notes 21-59 and accompanying text.

5. *See infra* notes 27-36 and accompanying text.

6. *See, e.g.*, Sheets v. Teddy's Frosted Foods, 427 A.2d 385, 387 (Conn. 1980) ("[T]he right to discharge an employee hired at will is [not] so fundamentally different from other contract rights that its exercise is never subject to judicial scrutiny regardless of how outrageous, how violative of public policy, the employer's conduct may be."). *See generally* Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) (arguing that courts must protect employees from the abusive exercise of power by employers).

7. Courts and commentators also denominate such suits as "retaliatory discharge" or "unjust dismissal." The terms, however, all connote the same species of claim.

8. *See* Anand Agneshwar, *In-House Counsel's Dilemma*, NAT'L L.J., Nov. 5, 1990, at S1; Karen Dillon, *ACCA Grapples with Absolute Attorney-Client Privilege*, AM. LAW., Nov. 1990, at 35; Lawrence Dubin & Donald R. Joliffe, *Recent Discharge Cases Focus New Attention on Counsel as Employee; Courts Weigh House Counsel's Role as Employee*, NAT'L L.J., May 20, 1991, at S2; Donald R. Joliffe, *Privilege Is at Issue in Discharge Claims*, NAT'L L.J., Dec. 2, 1991, at S6; Arthur L. Raynes, *Are Attorneys Whistleblowers?*, N.J. L.J., June 20, 1991, at 16.

9. *See* Elliott M. Abramson, *Why Not Retaliatory Discharge for Attorneys: A Polemic*, 58 TENN. L. REV. 271 (1991); Stephen Gillers, *Protecting Lawyers Who Just Say No*, 5 GA. ST. U. L. REV. 1 (1988); Daniel S. Reynolds, *Wrongful Discharge of Employed Counsel*, 1 GEO. J. LEGAL ETHICS 553 (1988); Kenneth J. Wilbur, *Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility*, 92 DICK. L. REV. 777 (1988); Dennis M. Nolan, Comment, Herbster v. North American Company for Life and Health Insurance: *Attorney's Retaliatory Dis-*

United States Law Week.[10] Unfortunately, this affair with the theory of extending the cause of action has not translated into a substantial body of case law; few attorneys seem willing to lead by example in this area.

The few decided cases demonstrate a nagging reluctance to fully extend the cause of action to in-house attorneys.[11] Although the claims based on statute or implied contract generally have met with success, the public policy decisions largely have failed.[12] Even when in-house attorneys are permitted to sue for discharge, the courts dance around the practical issues—like whether the attorney may disclose client confidences necessary to proving the claim.[13]

This singular exclusion of attorneys from an otherwise status-independent remedy, coupled with the fervency with which attorneys defend their own cause, has led some authors to ridicule the courts' resolutions of this subject.[14] Critics have lambasted the early public policy decisions, finding flaws in both the factors analyzed and the analyses themselves.[15] These cases, however, are both better and worse than the critics profess: better because they reach plausible, and arguably correct, results in a hotly debated area; and worse because the hazy and sometimes superficial arguments offered as justification for the decisions distract both readers and critics from the overriding "big picture" concerns. In failing to look past the formalisms of the professional ethics codes, the early public policy cases not only asserted indefensible grounds for decision, but also overlooked compelling *policy* arguments more neatly tailored to the issue. Conversely, in their wholesale adoption of statutory and "contractual" claims, some of the other attorney discharge decisions fail to adequately consider their effects on attorney-client relations.

This note examines the current corpus of attorney discharge cases and the scholarly criticism it has spawned and determines that, although valid procedures exist for a wrongful discharge cause of action for in-house attorneys, permitting such claims is likely to perniciously erode relations between in-house lawyers and their corporate employers. The state-enacted ethics rules articulate important considerations concerning the special relationship between attorneys, clients, and the public. Hav-

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charge Action Unjustly Dismissed, 21 J. MARSHALL L. REV. 215 (1987); Nancy K. Renfer, Comment, *Corporate Counsels' Lack of Retaliatory Discharge Action*, 10 N. ILL. U. L. REV. 89 (1989).

10. *See In-House Counsel*, 60 U.S.L.W. 2406 (Jan. 7, 1992); *Rights of In-House Counsel Limited with Respect to Wrongful Discharge Suits*, 60 U.S.L.W. 1101 (Jan. 7, 1992); *In-House Counsel*, 59 U.S.L.W. 2449 (Feb. 5, 1991); *Corporate Counsel*, 59 U.S.L.W. 2187 (Oct. 2, 1990); *In-House Lawyers*, 58 U.S.L.W. 2342 (Dec. 12, 1989); *Discharges*, 55 U.S.L.W. 2377 (Jan. 20, 1987).

11. *See infra* notes 72-165 and accompanying text.

12. *Compare* Nordling v. Northern States Power Co., 478 N.W.2d 498 (Minn. 1991) (permitting discharged attorney to sue under implied contract theory) *with* Balla v. Gambro, Inc., 145 Ill. 2d 492, 584 N.E.2d 104, 164 Ill. Dec. 892 (1991) (refusing to extend Illinois' public policy tort to discharged attorney). *See infra* notes 72-165 and accompanying text.

13. *See infra* notes 89-90, 111-14 and accompanying text.

14. *See generally* Gillers, *supra* note 9 (criticizing both *Herbster* and *Willy*); Reynolds, *supra* note 9 (same); Renfer, *supra* note 9 (criticizing *Herbster*).

15. *See* Reynolds, *supra* note 9, at 559.

ing subordinated the interest of the lawyer to the interest of the client, and, more fundamentally, having carefully defined the role of the attorney within a business organization, the ethics rules manifest the general precept that society is better served by involving lawyers in the decision-making processes of corporate America. The attorney's special status as trusted confidant, however, does not come without a price. The extent to which lawyers and courts are willing either to accept that price or substitute for it diminished attorney-client relations is crucial to resolving the debate.

Towards that end, part II of this note explores the contours of wrongful discharge law as it has developed in the general work force.[16] Part III follows with an analysis of how wrongful discharge cases involving attorneys have proceeded within that general framework.[17] Attorney discharge suits have been successful within most parts of that framework, yet unsuccessful in one significant area—public policy suits. Part IV then critically examines the existing case law, focusing on two major themes: (1) Do the arguments articulated in the decisions either for or against extending the cause of action withstand scrutiny?; and (2) Which factors legitimately inform the debate?[18] Part V of this note applies the relevant factors to the various species of attorney discharge suits, finding that, although some factors permit the claims, the larger concerns of the attorney-client relationship argue against them.[19] Finally, this note concludes that, although attorney discharge suits can be brought within the existing framework, doing so promises to compromise long-term and systemwide attorney-client relations.[20] Taking the ethical duties seriously requires that corporate counsel bear the burden of the attorney-client relationship. Discharge suits by in-house attorneys fail to invoke the clear mandate of public policy necessary to extension of the public policy cause of action, and they demand close "big picture" scrutiny by the courts even where the claim arises under statutory or contractual protection.

II. THE EVOLUTION OF WRONGFUL DISCHARGE

Private-sector employees hired for an indefinite term and not subject to a collective bargaining agreement traditionally have been at-will employees.[21] The doctrine of at-will employment states that either the employer or the employee may, at any time and for any or no reason, terminate the employment.[22] Yet while the concept of employment at-will, now firmly embedded in American minds through 100-plus years of

16. *See infra* notes 21-58 and accompanying text.
17. *See infra* notes 60-165 and accompanying text.
18. *See infra* notes 166-262 and accompanying text.
19. *See infra* notes 263-82 and accompanying text.
20. *See infra* notes 282-84 and accompanying text.
21. *See* MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 2 (1988).
22. *Id.*

employment history, seems unremarkable if not natural, neither logic nor precedent mandates the existence of an at-will doctrine. Rather, at-will employment is a decidedly American creation[23]—a judge-made doctrine that, as a public policy election, turned the English common-law rule on its head.[24] Once articulated, the at-will employment rule steamrolled the courts and the casebooks until, under a freedom of contract theory, it "achieved constitutional status"[25] in 1908.[26]

Although the United States Supreme Court no longer considers the at-will rule a proper subject for constitutional protection,[27] the at-will rule remains the theoretical core of employment law in America.[28] In recent years, however, legislatures and courts have brought the at-will rule under siege.[29] Both federal and state legislatures have created exceptions to the at-will rule. Congress, for example, enacted the National Labor Relations Act[30] and Title VII of the Civil Rights Act of 1964,[31] both of which prohibit termination of employment under specified cir-

23. The at-will doctrine is judicial fiat with recent origins in the United States. *See id.* Most major industrial nations do not subscribe to the at-will theory. Canada, France, Germany, Great Britain, and Japan, for example, all legislatively require "good cause" before terminating an employment relationship. *See* HILL, *supra* note 3, at 11-12.

24. The "English Rule" presumed an indefinite hiring to be for one year so that neither the master nor the servant could take advantage of the seasonal work loads. HILL, *supra* note 3, at 1; Jay M. Feinman, *The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118, 120 (1976). The actual public policy reason for the change in the law is a matter of some dispute. While some commentators argue that the at-will rule finds its roots in the once fashionable theory of freedom of contract, *see* Note, *Protecting At-Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1824-25 (1980), others reject that view and argue that the at-will rule surfaced as a necessary element of the emerging capitalist society—one that shifted the burden of business cycles from employers to employees. Feinman, *supra*, at 134. Perhaps the most cynical view taken, though, is that public policy may not have been involved at all. The rule first appeared in H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (1877), and may have hoisted itself up by its own bootstraps. Feinman writes that, although Wood offered neither legitimate precedent for his assertion nor any policy justification for his rule, the at-will rule prevailed because "a modern, comprehensive treatise stating a clear rule of practical application would almost inevitably attract a wide following and be cited as authority." Feinman, *supra*, at 127.

25. HILL, *supra* note 3, at 7.

26. *See* Adair v. United States, 208 U.S. 161 (1908) (holding that statutes limiting an employer's right to discharge were an unconstitutional infringement of freedom of contract).

27. Constitutional at-will employment status ended with the demise of substantive economic due process. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

28. *See* HILL, *supra* note 3, at 10. In 1987, Montana deviated from presumptive at-will employment and became the first, and so far only, state to pass comprehensive wrongful discharge legislation which preempted all prior common-law remedies. *See* Wrongful Discharge from Employment Act, MONT. CODE ANN. § 39-2-901 to -914 (1987). The Act provides:

A discharge is wrongful if:

(1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;

(2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

(3) the employer violated the express provisions of its own written personnel policy.

Id. § 39-2-904.

29. Recently, "the legal profession has witnessed an explosion of litigation and scholarly discussion concerning the cause of action of wrongful discharge." Wilbur, *supra* note 9, at 777.

30. Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (1988)).

31. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e (1988)).

cumstances.[32] Similarly, "[s]tate legislatures have enacted a panoply of laws restricting the right of employers to discharge . . . their employees."[33] These state statutes span the discharge spectrum from fair employment practice[34] to jury duty protection[35] to protection for whistleblowing.[36]

State courts and federal courts applying state law also have brought the at-will rule under siege.[37] Because of its judicial origins,[38] courts feel free to deviate from this doctrine as the circumstances dictate.[39] Courts, then, have demonstrated an amazing ingenuity in finding reasons to depart from the at-will rule. Employee protection has emerged under theories of implied contract,[40] implied obligations of good faith,[41] and

32. The National Labor Relations Act both provides that employees cannot be fired for their involvement in union activities and grants to employees the right to collectively bargain for employment contracts—a right through which valuable job security guarantees can be procured. *See* LEX K. LARSON & PHILIP BOROWSKY, UNJUST DISMISSAL § 2.05, at 2-11 to -13 (1992). Title VII prohibits employment decisions based on race, color, sex, religion, and national origin. 42 U.S.C. § 2000e (1988). The Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) (1988), the Occupational Safety and Health Act, 29 U.S.C. § 660(c) (1988), and the Veterans Reemployment Rights Act, 38 U.S.C. § 2021 (1988), all contain specific employment protections. Explicit statutory protections are commendable; however, the protected "characteristics" may now be protected under the ever-expanding public policy exception to the at-will rule. *See infra* notes 44-58 and accompanying text.

33. LARSON & BOROWSKY, *supra* note 32, § 5.01, at 5-1.

34. Fair employment practice regulations typically include protections similar to Title VII and frequently also extend protection to such characteristics as arrest records, personal appearance, and sexual orientation. *Id.* § 5.02, at 5-2 to -3.

35. *Id.* § 5.02, at 5-3.

36. *Id.* § 5.03, at 5-6 to -11.

37. HILL, *supra* note 3, at 7. This attack on the at-will rule has generated case law sufficient to spawn several compilations. *See generally* LARSON & BOROWSKY, *supra* note 32; KENNETH J. MCCULLOCH, TERMINATION OF EMPLOYEE RIGHTS (1989); NATIONAL EMPLOYMENT LAW INST., EMPLOYMENT AT-WILL: A 1989 STATE-BY-STATE SURVEY (1989).

38. *See supra* notes 23-24 and accompanying text. The at-will rule has been codified in several states. The statutes, however, appear to have little effect. In Montana, the statutory at-will rule, MONT. CODE ANN. § 39-2-503 (1991), largely has been eclipsed by the newer Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -914 (1991). *See supra* note 28 (discussing the Act). Similarly, California's codification of at-will employment, CAL. LAB. CODE § 2922 (West 1989), has been pitted by judge-made exceptions. *See* HILL, *supra* note 3, at 55-75.

39. Courts that disagree with the wisdom of extending the doctrine simply refuse to apply it. *See, e.g.*, Andress v. Augusta Nursing Facilities, 275 S.E.2d 368 (Ga. Ct. App. 1980) (finding motive for dismissal irrelevant because of strict at-will rule). Additionally, some legal scholars continue to advocate the merits of the at-will rule. *See, e.g.*, Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984). Epstein argues that, on a default basis, the at-will rule lends predictability to litigation and advances the joint interests of the parties. *Id.* at 951. In support of both his empirical and normative arguments, he cites monitoring costs, reputational loss, risk diversification, and imperfect information as factors that all favor the at-will rule. *Id.* at 967-74.

40. Both written and oral communications may serve as the basis for an implied contract claim. IRA M. SHEPARD ET AL., WITHOUT JUST CAUSE: AN EMPLOYER'S PRACTICAL AND LEGAL GUIDE ON WRONGFUL DISCHARGE 75 (1989). Typically, these cases arise in the context of employee handbooks or manuals. *See, e.g.*, Duldulao v. Saint Mary of Nazareth Hosp., 115 Ill. 2d 482, 505 N.E.2d 314, 106 Ill. Dec. 8 (1987) (finding at-will employment modified by employee handbook so as to create enforceable contractual rights); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980) (ruling that employee handbook created "just cause" contract); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983) (holding that whether at-will employment is modified by an employee handbook is a question of fact). *But see* Butterfield v. Citibank, 437 N.W.2d 857 (S.D. 1989) (ruling that employee handbook insufficient to modify at-will employment).

violations of public policy,[42] among others. Thus, although the at-will rule remains, in theory, the core of employment law, both courts and legislatures have riddled it with exceptions.[43] For the contemporary employer, the at-will rule, as a doctrinal core, is substantially decayed, if not hollowed.

The first court to craft a public policy exception to the at-will rule was the California District Court of Appeal in *Petermann v. International Brotherhood of Teamsters*.[44] In *Petermann*, the court found that the employer had fired the plaintiff because he refused to give false testimony[45] favorable to his union at a hearing before the California Legislation Committee.[46] The court held that the plaintiff stated a cause of action for wrongful 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 . . . ."[47] Thus, the court abrogated the judicially created employer privilege because of what it believed was an overriding public policy of upholding the integrity of the judicial process.[48]

California's public policy exception stood alone for many years before Indiana followed suit and recognized a claim for retaliatory discharge where an employee was fired for exercising statutory rights.[49] Other courts since have adopted California's "judicial integrity"[50] and

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In response to the emergence of handbook exceptions, employers have started including disclaimers in their employee manuals. Some of these have been successful. *See, e.g.*, Grimes v. Allied Stores Corp., 768 P.2d 528 (Wash. Ct. App. 1989). Others have not. *See, e.g.*, Preston v. Claridge Hotel & Casino, 555 A.2d 12 (N.J. Super. Ct. App. Div. 1989).

41. *See, e.g.*, Reed v. Municipality of Anchorage, 782 P.2d 1155 (Alaska 1989) (holding that an enforceable duty of good faith is implied into every employment relationship—at-will employment included); Cleary v. American Airlines, 168 Cal. Rptr. 722 (Ct. App. 1980) (holding that, although employee handbook was not an implied contract per se, it was evidence of the employer's obligation of good faith and fair dealing concerning employee discharge). Technically, neither implied contracts nor good faith claims are exceptions to the at-will rule. Because an enforceable contract is found to exist, the employment, by definition, was never at-will. Courts, however, characterize these developments as exceptions to the at-will rule because the rationales for imposing the obligations often have nothing to do with the intent of the parties and everything to do with the state's public policy. LARSON & BOROWSKY, *supra* note 32, § 3.02, at 3-2.

42. *See infra* notes 44-58 and accompanying text.

43. *See generally* NATIONAL EMPLOYMENT LAW INST., *supra* note 37 (listing at-will exceptions for all 50 states).

44. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

45. CAL. PENAL CODE § 118 (West 1954) (perjury).

46. *Petermann*, 344 P.2d at 26.

47. *Id.* at 27.

48. *Id.*

49. Frampton v. Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973) (holding that, because Indiana's Workman's Compensation Act embraces clear public policy of protecting workers from on-the-job injury, employers may not lawfully discharge employees for filing discharge claims).

50. *See, e.g.*, Sides v. Duke Hosp., 328 S.E.2d 818 (N.C. Ct. App. 1985) (finding deposition testimony adverse to employer protected by public policy of preventing perjury); Nees v. Hocks, 536 P.2d 512 (Or. 1975) (ruling that plaintiff fired for refusing to seek excusal from one month's jury service entitled to relief because of public policy in having citizens serve freely on juries). *But see* Phillips v. Goodyear Tire & Rubber Co., 651 F.2d 1051 (5th Cir. 1981) (holding that employee fired

Indiana's "statutory rights"[51] exceptions and have further extended the public policy exception to include protection for, among other things, refusal to participate in unlawful acts,[52] refusal to violate administrative regulations,[53] refusal to violate professional codes of ethics,[54] and the performance of important public obligations.[55]

Courts are cognizant, however, of the amorphous quality of a "public policy" standard[56] and have been careful to limit the expansion of the public policy exception to cases where the overriding public policy is clear.[57] In fact, some courts have refused to craft a public policy exception at all, holding that the proper entity to alter the at-will rule is the legislature.[58] This judicial caution, where it is found, has been consistently occupation-neutral with one notable exception—attorneys. Cir-

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for giving deposition testimony adverse to his employer was not entitled to relief); Bender Ship Repair, Inc. v. Stevens, 379 So. 2d 594 (Ala. 1980) (finding no exception to at-will rule for employee fired for missing work while serving on grand jury).

51. *See, e.g.*, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353, 23 Ill. Dec. 559 (1978) (employee terminated for filing workers' compensation claim); Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988) (same). Frequently, however, statutory remedies preempt wrongful discharge claims brought for terminations resulting from the exercise of statutory rights. *See* Potter v. Arizona S. Coach Lines, 248 Cal. Rptr. 284 (Ct. App. 1988) (holding state workers' compensation act to be exclusive remedy for employees terminated because of work-related injuries).

52. *See, e.g.*, Tameny v. Atlantic Richfield Co., 610 P.2d 1330 (Cal. 1980) (creating public policy exception for gas salesman fired for refusing to engage in retail gas price fixing scheme); Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 485 N.E.2d 372, 92 Ill. Dec. 561 (1985) (finding that public policy exception exists where radiographer fired for refusing to operate a radioactive cobalt unit in violation of NRC standards), *cert. denied*, 475 U.S. 1122 (1986); Sabine Pilot Serv. v. Hauck, 687 S.W.2d 733 (Tex. 1985) (crafting 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).

53. *See, e.g.*, Kalman v. Grand Union Co., 443 A.2d 728 (N.J. Super. Ct. App. Div. 1982) (extending public policy exception to pharmacist fired for refusing to close his pharmacy counter contrary to state regulations). *But see* Andress v. Augusta Nursing Facilities, 275 S.E.2d 368 (Ga. Ct. App. 1980) (holding that although plaintiffs alleged that they were fired for refusing to violate nursing home regulations, inquiries into motive for the dismissals were irrelevant because of strict at-will rule).

54. *See* Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505 (N.J. 1980) (stating that ethical standards may provide a source of public policy). *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).

55. *See, e.g.*, Woodson v. AMF Leisureland Ctrs., 842 F.2d 699 (3d Cir. 1988) (extending public policy exception to barmaid fired for refusing to serve liquor to a visibly intoxicated patron); Knight v. American Guard & Alert, Inc., 714 P.2d 788 (Alaska 1986) (extending public policy to Trans-Alaska Pipeline security guard fired for informing the pipeline operator, Aleyeska, that other guards were drinking and using drugs while on duty). *But see* Sieverson v. Allied Stores Corp., 776 P.2d 38 (Or. Ct. App. 1989) (holding that internal reporting of employee abuse and sex discrimination did not implicate the state's public policy).

56. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878, 52 Ill. Dec. 12, 15 (1981) ("[T]he Achilles heel of the principle lies in the definition of public policy."); Petermann v. International Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. 1959) (" 'The term 'public policy' is inherently not subject to precise definition . . . .' ") (quoting Safeway Stores v. Retail Clerks Int'l Ass'n, 261 P.2d 721, 726 (Cal. 1953)).

57. HILL, *supra* note 3, at 28; PLAYER, *supra* note 21, § 1.02, at 4-5. Only now are state courts beginning to draw recognizable lines defining the boundaries of public policy wrongful discharge. *See, e.g.*, Lambert v. City of Lake Forest, 186 Ill. App. 3d 937, 542 N.E.2d 1216, 134 Ill. Dec. 709 (2d Dist. 1989) (analyzing and classifying situations in which the public policy exception has been extended).

58. *See* International City Management Ass'n Retirement Corp. v. Watkins, 726 F. Supp. 1

cumstances that would afford a nonattorney a discharge remedy do not always yield a remedy to attorneys. Courts, it seems, are fearful of infringing on the attorney-client relationship. When confronted with wrongful discharge suits brought by in-house attorneys, courts will take a deep breath, search for attorney-client considerations and, if found, proceed guardedly, if at all.[59]

III. ATTORNEY CASES

Wrongful discharge cases involving attorneys are a relative rarity.[60] Although discharge claims filed by attorneys are, of course, not unknown, the paucity of reported cases might lead one to believe that attorneys were rarely, if ever, fired. Attorneys are fired, though, and when terminated attorneys sue their previous employers for wrongful discharge, the circumstances and theories alleged are as diverse as those found in the claims of discharged nonattorneys. The outcomes correspondingly differ. In a span of just eight days last December, both the Illinois and Minnesota Supreme Courts considered whether in-house attorneys may sue for wrongful discharge: Illinois said "no";[61] Minnesota said "yes."[62] This discrepancy reflects an existing split among other courts. Although different, these two decisions are not necessarily inconsistent; for the types of claims raised, while all being of the attorney discharge species, are fundamentally different creatures.

An examination of the types of claims attorneys have brought helps clarify what factors courts should consider when an attorney sues for wrongful discharge. The claims roughly can be distilled into three categories: (1) discharge suits brought by attorneys as lay-employees; (2) discharge suits brought by "attorneys as attorneys" where the attorney enjoys statutory or "contractual" protection; and (3) discharge suits brought by "attorneys as attorneys" in the absence of statutory or "contractual" protection—the public policy claims.

A. Attorneys as Lay-Employees

Attorneys have filed wrongful discharge claims for terminations precipitated by events both related and unrelated to the attorneys' law-related duties. When the discharge is not a by-product of the lawyer's legal endeavors, the claim generally is treated no differently than it would be in any other context.

(D.D.C. 1989) (refusing to recognize a public policy exception to the at-will rule); Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661 (Mo. 1988) (same).

59. *See infra* notes 72-165 and accompanying text.

60. *See* Wilbur, *supra* note 9, at 779-80; Reynolds, *supra* note 9, at 563-64. Reynolds properly notes, however, that the scope of activity may be obscured by unreported opinions and settlements. *See* Reynolds, *supra* note 9, at 564.

61. Balla v. Gambro, Inc., 145 Ill. 2d 492, 584 N.E.2d 104, 164 Ill. Dec. 892 (1991).

62. Nordling v. Northern States Power Co., 478 N.W.2d 498 (Minn. 1991).

In *Meredith v. C.E. Walther, Inc.*,[63] for example, an in-house attorney, Meredith, was discharged for his involvement in a lawsuit against his employer.[64] Meredith's employer fired him after he gave deposition testimony concerning trust assets that the corporate employer allegedly had misappropriated.[65] The Alabama Supreme Court refused to recognize a public policy wrongful discharge cause of action; rather, the court utilized traditional discharge analysis and, because the trust asset litigation was unrelated to Meredith's legal work for the corporate employer, took no special account of Meredith's position as in-house counsel.[66]

Similarly, in *Hentzel v. Singer Co.*,[67] an in-house attorney was fired for lobbying for a smoke-free work environment.[68] In holding that Hentzel stated a cause of action for wrongful discharge,[69] the court nowhere discussed Hentzel's position as an attorney. Rather, the analysis centered on typical discharge issues: preemption and the state's public policy concerning unsafe work environments.[70] Thus, when an attorney is fired for conduct unrelated to the attorney's legal work for the employer, courts will disregard the attorney's occupation status and proceed with a traditional discharge analysis.[71]

B. Statutory or "Contractual" Protection for Law-Related Conduct

Even when the discharge is a by-product of the lawyer's legal work, the decision to permit the claim still may read much like a garden-variety wrongful discharge opinion. Although the employer typically raises the special relationship between attorney and client as a bar to this type of lawsuit, no court so far has found attorney-client considerations to preclude a statutory or contractual discharge suit by an in-house attorney. Rather, the courts either will brush off attorney-client complications as irrelevant to the case at hand or confidently trumpet their faith in the trial court's ability to handle the nasty confidentiality issues that they have so skillfully skirted.

1. "Statutory" Protection: The In-House Attorney as Whistle-Blower

In *Parker v. M & T Chemicals*,[72] the plaintiff, an attorney, was em-

63. 422 So. 2d 761 (Ala. 1982).
64. *Id.* at 762.
65. *Id.*
66. *Id.* at 762-63. The Alabama legislature subsequently took action to prevent employee discharges based on activity concerning the integrity of the judicial system. *See* ALA. CODE §§ 12-16-8.1, 25-5-11.1 (1986).
67. 188 Cal. Rptr. 159 (Ct. App. 1982).
68. *Id.* at 160.
69. *Id.* at 168.
70. *Id.* at 161-68.
71. *See also* Kier v. Commercial Union Ins. Cos., 808 F.2d 1254 (7th Cir. 1987) (disregarding attorney status in age discrimination case); Jones v. Flagship Int'l, 793 F.2d 714 (5th Cir. 1986) (sex discrimination), *cert. denied*, 479 U.S. 1065 (1987); Bellissimo v. Westinghouse Elec. Corp., 764 F.2d 175 (3d Cir. 1985) (sex discrimination), *cert. denied*, 475 U.S. 1035 (1986).
72. 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989).

ployed by M & T Chemicals (M & T) as director of patents.[73] Although Parker's duties included some administrative and business functions, he continued to perform legal functions as well.[74] For several years, M & T had tried unsuccessfully to develop the specialized technology needed to manufacture methyltin stabilizers.[75] M & T's competitors, who had been successful in this endeavor, were parties to litigation in which the presiding court inadvertently released the technology, which was subject to a protective order.[76] Although M & T was not a party to that litigation and had no right to view the sealed transcripts, M & T arranged to obtain the released transcripts from an unauthorized possessor.[77] M & T requested that Parker "supervise the copying and use of [the] confidential transcripts."[78] Parker refused, writing a memorandum in which he voiced his objection to M & T's proposed conduct; he was subsequently constructively discharged.[79]

The New Jersey legislature recently had enacted the Conscientious Employee Protection Act (CEPA),[80] commonly referred to as the whistle-blower act.[81] CEPA prohibits retaliatory action against an employee who objects to or refuses 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.[82] Thus, in *Parker*, the court did not require the attorney-employee to prove a clear mandate of public policy, only that CEPA's protection extended to his discharge.

Having decided that the whistle-blower statute covered Parker's discharge, the court then considered the statute's constitutionality as applied to attorneys.[83] In refusing to "read in-house attorneys out of the Act's protection,"[84] the court found that CEPA would "discourage employers from inducing employee-attorneys to participate in or condone illegal schemes"[85] and as such would "reinforce[ ] the Court's constitu-

73. *Id.* at 216.
74. *Id.* at 217.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* Apparently, M & T's general counsel, who also knew of the transcripts' unsavory origins, delegated their use to his subordinate in an attempt to insulate himself from the unlawful and unethical conduct. *Id.*
79. *Id.* at 217-18.
80. N.J. STAT. ANN. § 34:19-3(c) (1988).
81. *Parker*, 566 A.2d at 218.
82. N.J. STAT. ANN. § 34:19-3(c) (1988).
83. M & T argued that CEPA was unconstitutional because it impinged on the New Jersey Supreme Court's "plenary and exclusive power to regulate the conduct of attorneys." *Parker*, 566 A.2d at 219. The court rejected this argument, however, stating that although the client may be required to pay damages, the client is still free to discharge an attorney at any time. *Id.* at 220. The court also rejected a strict separation of powers interpretation and held that the doctrine is not violated if the intruding branch "only attempts to share and exercise jointly responsibility and power." *Id.* at 221.
84. *Id.*
85. *Id.* at 220.

tional mission to encourage and insure the ethical practice of law."[86]

Additionally, M & T argued that the attorney-client privilege inherently conflicted with the CEPA and that entertaining the cause of action was "inimicable to the healthy subsistence of attorney-client relationships in general."[87] The court rejected the attorney-client privilege argument, finding that, in the context of whistle-blowing disputes, the attorney-client privilege would afford no protection because of the "crime or fraud" exception to the privilege.[88] More fundamentally, 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."[89] Although noting that lawyers may reveal confidences to resolve certain disputes with the client and that protective orders may limit the hemorrhaging when disclosures are made, the court offered no affirmative guidance, contending that such issues "must be resolved by trial-level judges as they arise."[90]

2. *"Just Cause" for Concern: "Contractual" Protection for In-House Attorneys*

Attorney-client considerations also arose where an in-house attorney was fired in contravention of an "implied contract." In *Mourad v. Automobile Club Insurance Ass'n*,[91] the Automobile Club Insurance Association (Auto Club) employed the plaintiff/attorney as its legal area manager.[92] Although Mourad was not employed pursuant to a contract, Auto Club did distribute to its personnel and implement a policy manual and supplemental pamphlets, which together created a contract to terminate for just cause.[93] Despite the employer's satisfaction with Mourad's legal skills, Auto Club demoted him to executive attorney, a litigation position.[94] Auto Club claimed that the demotion was in response to Mourad's administrative deficiencies; Mourad alleged, however, that he was demoted for refusing to implement policy decisions contrary to the state's code of professional conduct.[95]

Mourad subsequently resigned his new position as executive attorney and filed suit against Auto Club alleging, inter alia, retaliatory con-

86. *Id.* at 221.

87. *Id.*

88. *Id.* The intricacies of the attorney-client privilege and client confidentiality are explored *infra* at notes 172-220 and accompanying text. Although it appears that the New Jersey Supreme Court may be confusing privilege with confidentiality, the concept of disclosure of client crimes pervades both.

89. *Parker*, 566 A.2d at 222 n.2.

90. *Id.*

91. 465 N.W.2d 395 (Mich. Ct. App. 1991).

92. *Id.* at 397. As legal area manager, Mourad advised Auto Club on policy decisions, supervised the attorney staff in pending litigation, authorized settlements, and handled personnel. *Id.* He did not handle individual third-party cases. *Id.*

93. *Id.* at 398.

94. *Id.* at 397.

95. *Id.*

structive discharge and breach of an implied "just cause" contract.[96] The jury returned a verdict in Mourad's favor, granting monetary relief for both claims.[97] On appeal, the Michigan Court of Appeals affirmed the "just cause" contract claim but disallowed the retaliatory discharge claim as both duplicative and inconsistent with a finding of an enforceable contract.[98]

The court disagreed with Auto Club's contention that Mourad's attorney status precluded the "just cause" contract cause of action. In declining to adopt a complete bar to attorney discharge suits, the court sidestepped the attorney-client considerations by noting that, although Mourad was employed by Auto Club, he was an attorney for the insureds[99] and that his position with respect to Auto Club was administrative.[100] Thus, even though the court made no specific determination of how the attorney-client relationship would affect an attorney discharge suit, the court, by turning somersaults to dispose of the issue, evinced a clear belief that the attorney-client relationship is largely irrelevant when a "contract" is involved.

3. *Shedding "Light" and the Abuse of "Power": Spies and Surveillance at the Electric Company*

A recent Minnesota Supreme Court case further captures these two concepts—statutory and contractual wrongful discharge—in action. In *Nordling v. Northern State Power Co.*,[101] the Minnesota Supreme Court held that attorney-client considerations do not necessarily preclude either contractual or statutory discharge claims by in-house attorneys. Here, at long last, the court begins an intelligent dialogue about what client confidences in-house attorneys may disclose when pressing their claims.

Gale Nordling began working for Northern States Power Company (NSP) in 1971 as an engineer. With NSP's assistance, Nordling also completed law school. A licensed Minnesota attorney, Nordling then served in NSP's legal department, working primarily with the engineering departments in drafting contracts and negotiating construction contracts.[102] Events turned sour at NSP when a private attorney was retained to assist with upcoming Public Utility Commission (PUC) pro-

96. *Id.*

97. *Id.* at 397-98.

98. *Id.* at 400-01. The court found that implied "just cause" contract and retaliatory discharge were alternative theories concerning the same facts. Because retaliatory discharge concerns a public policy exception to at-will employment, a finding of an implied "just cause" contract necessarily precludes a retaliatory discharge claim. *Id.*

99. The court construed Mourad's relationship with Auto Club as that of a third-party "hired gun"; Auto Club's obligation to defend its insureds was satisfied by hiring, and paying for, an "independent" attorney to represent them. *Id.* Thus, Mourad's duty of loyalty inured not to the benefactor but to the beneficiary. *Id.*

100. *Id.*

101. 478 N.W.2d 498 (Minn. 1991).

102. *Id.* at 499.

ceedings concerning rate increases necessitated by the newly constructed SherCo III plant. Anticipating PUC inquisition into possible waste or misappropriation of funds at SherCo III, the private attorney suggested surveillance of NSP employees, both at work and at home.[103] Believing the surveillance to be an illegal invasion of privacy, Nordling first voiced his opposition to the plan to his superiors in the legal department, McGannon and Johnson. When they failed to act, Nordling reported the plan to SherCo III's general manager; news of the plan eventually reached NSP's Chief Executive Officer, James Howard, who killed the surveillance plan.[104] Relations between Nordling and McGannon thereafter were rocky, and, in November 1987, McGannon discharged Nordling both without warning and without first complying with disciplinary procedures contained in NSP's employee handbook.[105]

First issued in 1984, NSP's employee handbook contained a section entitled "Positive Discipline," through which NSP sought to change inappropriate employee behavior. "Positive Discipline" entailed three steps: an "Oral Reminder," a "Written Reminder," and a "Decision Making Leave"—a day off with pay for the employee to consider his or her commitment to the job and to NSP.[106] The handbook goes on to say that failure of the "Positive Discipline" system may result in termination and also lists examples of conduct that could result in discharge.[107]

Reversing the appellate court's summary ban on discharge suits by in-house attorneys,[108] the Minnesota Supreme Court held that discharge suits raised by in-house counsel may proceed if they "can be done without violence to the integrity of the attorney-client relationship."[109] Concluding that "[t]he reasons for the discharge do not appear to implicate company confidences or secrets," the court remanded to the trial court with instructions to proceed with the suit as it would with any other suit:

> [If] a claim of privilege is raised, . . . [t]he trial court will decide whether or not there is a privilege for the data sought to be used, and, if so, whether the privilege has been waived. Obviously, an in-house attorney is not excused from keeping privileged communications confidential just because he is in-house.[110]

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

104. *Id.*

105. Nordling v. Northern States Power Co., 478 N.W.2d 498, 500 (Minn. 1991).

106. *Id.* at 499.

107. *Id.* Although NSP claimed to have issued separate guidelines disclaiming the disciplinary procedures as not constituting a contract or guarantee of employment, Nordling claimed never to have received those guidelines. *Id.* at 499-500.

108. The appellate court placed great weight on *Herbster*, finding it "instructive" and "persuasive." *Nordling*, 465 N.W.2d at 85-86. Although *Herbster* technically is inapposite because it involved neither contractual nor statutory protections, the Minnesota appellate court, like the Illinois appellate court in *Herbster*, was unable to separate Nordling's employee status from his attorney status, thereby finding attorney-client considerations insurmountable. *Id.* at 86.

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

110. *Id.* at 503.

Though Nordling also asked the court to provide further guidance, the court eschewed adopting any test for possible permissible disclosure, finding it imprudent to speculate on potential countervailing public policies and stating that "any such public policy reasons would have to be particularly egregious."[111]

The court similarly dodged the confidentiality issue in considering Nordling's claim under Minnesota's whistle-blower act.[112] The court found the retaliatory discharge claim "more likely to implicate the attorney-client relationship"[113] because the claim directly related to client wrongdoing. But, because the court could identify no statute violated by NSP's conduct, Minnesota's statutory whistle-blower law was inapplicable,[114] and the court again gladly sidestepped whether countervailing public policies might permit disclosure of client confidences in a discharge suit.

In summary, then, no current decision involving a statutory or contractual wrongful discharge claim brought by an in-house attorney precludes the claim because of attorney-client considerations. The cases, however, do not necessarily resolve attorney-client problems, but rather tend to avoid or defer them. After considering the final category of attorney discharge suits, those brought under the "public policy" exception to the at-will employment rule, this note will return to this issue, analyzing what specific attorney-client considerations are implicated and how they affect these suits.

C. Attorney Discharge in the Absence of Statutory or "Contractual" Protection

The truly intriguing cases arise when an attorney is discharged in the absence of either statutory or contractual protection and for reasons relating to his duties as an attorney. Because the employer allegedly fires an attorney for acting in a legal capacity, the attorney-client relationship is squarely confronted by a discharge suit. And without the escape hatch of an applicable statute or an enforceable "contract," courts cannot evade this confrontation. The issue then is purely one of public policy: Does the state extend its public policy exception to the at-will rule to attorneys terminated for law-related events—events that, at the least, implicate the attorney's mandate of loyalty and confidentiality to the client?

111. *Id.*

112. MINN. STAT. § 181.932(1)(a) (1992) (prohibiting an employer from penalizing an employee in any condition of employment because the employee reports a suspected violation of law to an employer governmental body or law enforcement official).

113. *Nordling*, 478 N.W.2d at 504.

114. Minnesota's whistle-blower statute applies only where the employee is fired for reporting a violation of a state or federal law or rule to an employer or to a governmental regulatory or enforcement agency. MINN. STAT. § 181.932(1)(a) (1992). Although Nordling blew the whistle to his employer, the surveillance of employees, though possibly an invasion of privacy and certainly questionable business behavior, violates no *statute or rule*. Thus, Nordling failed to meet the statutory elements of the whistle-blower statute.

More precisely, in an extralegislative battle between the state's desire to discourage illegal and unsavory conduct and an employer's prerogative, backed by a long-standing presumption of at-will employment,[115] to define his legal work force, who wins?

The evolution of the public policy wrongful discharge cause of action for attorneys fired for "attorney conduct" has been both short and controversial.[116] Although the first cases held that the attorney-client relationship precluded a public policy wrongful discharge cause of action, a later case retreated from this unyielding position. In doing so, that court both distinguished the older cases and criticized their rationales. For the first time, then, a court confronted with a "public policy" discharge claim looked past the lofty rhetoric of attorney-client confidentiality and fully analyzed the attorney-client considerations. Recently, however, the Illinois Supreme Court reversed that decision, reinstating the attorney-client relationship as a bar to public policy discharge suits brought by in-house attorneys. A brief exploration of these cases and their resolutions will demonstrate both the types of issues that must be addressed and the mistakes courts have made in addressing them.

1. The Early Cases

Until 1986, a cause of action for wrongful discharge of attorneys for acts performed in furtherance of their legal responsibilities[117] existed only in theory.[118] In that year, courts in Illinois and Texas decided two cases in which they were asked to recognize that cause of action.

a. *Herbster v. North American Co. for Life & Health Insurance*[119]

In *Herbster*, the North American Company for Life and Health Insurance (North American) employed the plaintiff, a licensed attorney, as its chief legal officer and vice-president in charge of North American's

115. *See supra* notes 21-28 and accompanying text.

116. Although doctrinal rumblings were first heard back in 1967, *see* Blades, *supra* note 6, at 1408-09 (discussing wrongful discharge in the areas of engineering, accountancy, and law), the first public policy attorney discharge case was not decided until 1986. *See* Herbster v. North Am. Co. for Life & Health Ins., 150 Ill. App. 3d 21, 501 N.E.2d 343, 103 Ill. Dec. 322 (1st Dist. 1986), *appeal denied*, 114 Ill. 2d 545, 508 N.E.2d 728, 108 Ill. Dec. 417, *cert. denied*, 484 U.S. 850 (1987).

117. Wrongful discharge suits filed by attorneys for terminations precipitated by nonlegal activities are treated like any other wrongful discharge suit. *See supra* notes 63-71 and accompanying text.

118. *See, e.g.*, Theodore J. Schneyer, *Limited Tenure for Lawyers and the Structure of Lawyer Client Relations: A Critique of the Lawyer's Proposed Right to Sue for Wrongful Discharge*, 59 NEB. L. REV. 11 (1980) (analyzing wrongful discharge and its relation to the old disciplinary code, MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1978)); Jon P. Christiansen, Note, *A Remedy for the Discharge of Professional Employees Who Refuse To Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics*, 28 VAND. L. REV. 805 (1975) (arguing that a wrongful discharge remedy could be found in both the emerging common-law remedies and in judicial regulation of attorney conduct).

119. 150 Ill. App. 3d 21, 501 N.E.2d 343, 103 Ill. Dec. 322 (1st Dist. 1986), *appeal denied*, 114 Ill. 2d 545, 508 N.E.2d 728, 108 Ill. Dec. 417, *cert. denied*, 484 U.S. 850 (1987).

legal department.[120] The employment was pursuant to an oral contract and thus was terminable at will.[121] North American discharged Herbster after he refused to destroy or remove discovery material.[122] Subsequently, Herbster sued North American for retaliatory discharge.[123] The Illinois Appellate Court affirmed the trial court's grant of summary judgment for North American.[124]

In holding that the claim for retaliatory discharge was not available, the *Herbster* court stated that, although there was "no question that there [were] public policy considerations" to support the claim,[125] the attorney-client relationship precluded the expansion of the claim to attorneys.[126] Relying on the Illinois Supreme Court's recent admonition to maintain a narrow interpretation of retaliatory discharge,[127] the *Herbster* court stated that it could not "separate plaintiff's role as an employee from his profession."[128] The court found that the need for "full and frank consultation between a client and [a] legal advisor" and the existence of "special obligations upon an attorney" to the client "permeate all phases of the relationship, including the contract for employment."[129] Thus, according to the *Herbster* court, "[t]he mutual trust, exchanges of confidence, reliance on judgment and personal nature of the attorney-client relationship," along with the "different rules and . . . different duties and responsibilities" of attorneys are considerations that "are so necessary to our system of jurisprudence that extending the tort to the attorney-client relationship here is not justified."[130] Rather, for attorneys in this situation, "[w]ithdrawal is not only . . . appropriate . . . but may be mandated . . . ."[131]

b. *Willy v. Coastal Corp.*[132]

The plaintiff in *Willy* was an in-house attorney whose work consisted primarily of monitoring the Coastal Corporation's (Coastal's) compliance with environmental laws.[133] Willy claimed that Coastal had

120. *Id.* at 23, 501 N.E.2d at 344, 103 Ill. Dec. at 323.
121. *Id.*
122. *Id.* North American was involved, along with other insurance companies, in lawsuits pending in federal court in Alabama. *Id.*
123. *Id.*
124. *Id.* at 23, 29-30, 501 N.E.2d at 344, 348, 103 Ill. Dec. at 323, 327.
125. *Id.* at 23-24, 501 N.E.2d at 344, 103 Ill. Dec. at 323.
126. *Id.* at 29-30, 501 N.E.2d at 348, 103 Ill. Dec. at 327.
127. *See* Barr v. Kelso-Burnett Co., 106 Ill. 2d 520, 525, 478 N.E.2d 1354, 1356-57, 88 Ill. Dec. 628, 630-31 (1985). In that case, the court reversed and dismissed the plaintiff's claim of wrongful discharge, stating 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." *Id.* at 525, 478 N.E.2d at 1356, 88 Ill. Dec. at 630.
128. *Herbster*, 150 Ill. App. 3d at 26, 501 N.E.2d at 346, 103 Ill. Dec. at 325.
129. *Id.* at 27, 501 N.E.2d at 347, 103 Ill. Dec. at 326.
130. *Id.* at 29-30, 501 N.E.2d at 348, 103 Ill. Dec. at 327.
131. *Id.* at 29, 501 N.E.2d at 348, 103 Ill. Dec. at 327.
132. 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd in part*, 855 F.2d 1160 (5th Cir. 1988).
133. *Id.* at 117.

discharged him because of friction created by his requests that the company comply with the environmental laws.[134] Willy, however, did not report his concerns to any outside authorities.[135] Rather, Willy asked the court to extend its public policy exception to "an attorney who believes he has been asked to violate the law."[136] The *Willy* court responded curtly to this request:

> [A]n attorney, as an officer of the Court, often is placed in the dilemma of serving either his client's wishes or the law's demands. . . . [T]he Texas Canons of Ethics and the Disciplinary Rules are the standard for an attorney's professional conduct. If an attorney believes that his client is intent on 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 the client's wishes, he should not be surprised that his client no longer desires his services.[137]

Thus, because of this "well-established standard for professional conduct" it was not "necessary or proper to extend the . . . public policy exception . . . ."[138]

The thrust of both *Herbster* and *Willy* was a concession to the merits of the status quo. Both courts considered withdrawal an adequate remedy to the lawyer's dilemma,[139] obviating any need for a new, more palatable remedy. In addition, the *Herbster* court interposed the interests in maintaining the full force of the attorney-client privilege as a barrier to such a cause of action.[140]

The academic community's chilly reception of both *Herbster* and *Willy* is evidenced by the nearly unanimous criticism of the cases.[141] Commentators have labeled these decisions as "painfully easy to criticize."[142] Nevertheless, the Illinois Supreme Court recently refused to permit public policy discharge suits by in-house attorneys, reversing an appellate decision that had attacked the unassailability of the attorney-client considerations.

2. *Holding the Line:* Balla v. Gambro, Inc.[143]

The Illinois Supreme Court followed the reasoning of *Herbster* in

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134. *Id.*

135. *Id.*

136. *Id.* at 118.

137. *Id.* (citation omitted).

138. *Id.* The Court noted, however, that the "very narrow" public policy exception in Texas did extend to employees who themselves refused to perform illegal acts. *Id.* at 118 n.2 (quoting Hauck v. Sabine Pilot Serv., 687 S.W.2d 733, 735 (Tex. 1985)).

139. *See supra* notes 131, 136-38 and accompanying text.

140. *See supra* notes 125-30 and accompanying text.

141. *See generally* Abramson, *supra* note 9; Gillers, *supra* note 9; Reynolds, *supra* note 9; Renfer, *supra* note 9.

142. Gillers, *supra* note 9, at 18; Reynolds, *supra* note 9, at 565.

143. 145 Ill. 2d 492, 584 N.E.2d 104, 164 Ill. Dec. 892 (1991).

Balla v. Gambro, Inc.[144] Roger Balla worked as in-house counsel for Gambro, Inc. (Gambro). Gambro distributes kidney dialysis equipment manufactured by its German parent; included in these products are dialyzers, which filter the blood of patients with impaired kidney function.[145] The United States Food and Drug Administration (FDA) regulates the manufacture and sale of dialyzers.[146]

Prior to his termination, Balla served Gambro in several capacities. Initially, Balla served as Gambro's Director of Administration, whose responsibilities 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, and preventing or minimizing legal or administrative proceedings; and coordinating the activities of the manager of regulatory affairs."[147] Starting in 1983, Balla also assumed the duties of manager of regulatory affairs, which entailed " 'ensuring awareness of and compliance with federal, state and local laws and regulations affecting the company's operations and products.' "[148] Balla's ultimate position with Gambro was as "Dir[ector] of Admin[istration]/Personnel; General Counsel; [Manager] of Regulatory Affairs."[149]

Balla's problems with Gambro began with a 1985 shipment of dialyzers from Gambro's German parent corporation, Gambro Dialysatoren. Balla had informed Gambro's president, Maupin, that the shipment had to be rejected because the dialyzers did not meet FDA regulations. Although Maupin told Balla he was rejecting the shipment, Gambro ultimately accepted the dialyzers for sale "to a unit that [was] not currently [its] customer but who buys only on price."[150] Balla alleged that, upon learning of the proposed sale, he told Maupin "that he would do whatever necessary to stop the sale of the dialyzers."[151] Several weeks later, Maupin fired Balla. The next day, Balla reported the shipment to the FDA, who seized the dialyzers and found them defective.[152] Balla then sued Gambro for wrongful discharge.

The trial court granted Gambro's summary judgment motion, finding that Balla performed as Gambro's counsel and that, because a client has an absolute right to discharge an attorney, Balla's discharge was nonactionable.[153] The appellate court reversed and remanded, offering the

144. *Id.*
145. *Id.* at 494, 584 N.E.2d at 105, 164 Ill. Dec. at 893.
146. *Id.* at 495, 584 N.E.2d at 105, 164 Ill. Dec. 893.
147. *Id.* at 495, 584 N.E.2d at 105-06, 164 Ill. Dec. at 893-94.
148. *Id.* at 496, 584 N.E.2d at 106, 164 Ill. Dec. at 894.
149. *Id.* at 495, 584 N.E.2d at 106, 164 Ill. Dec. at 894.
150. *Id.* at 496, 584 N.E.2d at 106, 164 Ill. Dec. at 894.
151. *Id.*
152. *Id.* at 497, 584 N.E.2d at 106, 164 Ill. Dec. at 894.
153. Balla v. Gambro, Inc., 203 Ill. App. 3d 57, 60, 560 N.E.2d 1043, 1045, 148 Ill. Dec. 446, 448 (1st Dist. 1990).

following three-part test to determine whether an attorney may state a cause of action for wrongful discharge:

> (1) whether the discharge involved information the attorney learned in a legal capacity or as a layperson;
> (2) whether the attorney acquired the information via an attorney-client relationship and whether such information was privileged; and
> (3) whether any countervailing public policies favored disclosure despite the presence of privileged information learned as a result of the attorney-client relationship.[154]

The Illinois Supreme Court again reversed and reinstated the trial court's dismissal, holding that the tort of wrongful discharge is not available to in-house counsel.[155]

Although noting that " 'there is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens,' "[156] the court found that Balla's attorney status precluded a discharge suit. The court so concluded, however, not solely on attorney-client grounds, but also because of the "nature and purpose of the tort of retaliatory discharge."[157]

Adhering to the precept that the retaliatory discharge tort is both narrow and limited, the court argued that extension of the tort is unwarranted because the underlying public policy was protected adequately by existing safeguards—the Illinois Rules of Professional Conduct. Pursuant to Rule 1.6(b), Balla was required to report the sale of the defective dialyzers.[158] Thus, contrary to Balla's claim that he faced a "Hobson's choice" of either complying with the employer's wishes and risking his professional license or challenging the action and risking his continued employment, Balla's course of conduct was clearly mapped: "In-house counsel must abide by the Rules of Professional Conduct. [Balla] had no choice but to report to the FDA Gambro's intention to sell or distribute these dialyzers, and consequently protect the aforementioned public policy."[159] The court thus assumed that in-house attorneys universally

154. *Id.* at 61-62, 560 N.E.2d at 1046, 148 Ill. Dec. at 449.

155. Balla v. Gambro, Inc., 145 Ill. 2d 492, 510, 584 N.E.2d 104, 113, 164 Ill. Dec. 892, 901 (1991).

156. *Id.* at 499, 584 N.E.2d at 107-08, 164 Ill. Dec. at 895-96 (quoting Palmateer v. International Harvester Co., 85 Ill. 2d 124, 132, 421 N.E.2d 876, 879, 52 Ill. Dec. 13, 16 (1981)).

157. *Id.* at 501, 584 N.E.2d at 108, 164 Ill. Dec. at 896. It was perhaps the court's desire to hold the line on public policy exceptions that gave continued life to this controversy: the court denied the parties' motion to dismiss voluntarily after reaching a confidential settlement which, to this day, still stands. *See* Nicholas Varchaver, *Opposite Answers in Whistle-Blower Cases*, AM. LAW., Mar. 1992, at 52.

158. "A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily injury." Illinois Rules of Professional Conduct, ILL. ANN. STAT. ch. 110A, Rule 1.6(b) (Smith-Hurd Supp. 1991).

159. *Balla*, 145 Ill. 2d at 502, 584 N.E.2d at 109, 164 Ill. Dec. at 897.

would follow the ethics rules, with those "safeguards" obviating the *need* for further protection.

The Illinois Supreme Court also believed that extending the tort to in-house counsel would have pernicious effects on attorney-client relationships. First, a client has an absolute right to the attorney of her choice because the attorney-client relationship is based on absolute trust. Second, because of this trust, " 'the attorney is placed in the unique position of maintaining a close relationship with a client where the attorney receives secrets, disclosures, and information that otherwise would not be divulged to intimate friends.' "[160] According to the court, extending the tort of retaliatory discharge to in-house counsel would chill attorney-client communications. Citing the United States Supreme Court's well-known aphorism identifying the attorney-client privilege as promoting "full and frank communication between attorneys and their clients . . . ,"[161] the court found it wise not to interfere with attorney-client relations by affording lawyers added opportunities to disclose privileged communications.[162]

The Illinois Supreme Court also found Balla's ethical obligation to withdraw to be instructive. Under Rule 1.16, an attorney is required to withdraw from representation either if continued representation will result in a violation of the Rules of Professional Conduct or if the attorney is discharged.[163] The court found it unacceptable to permit an in-house lawyer to sue his employer where the attorney simply was following his ethical duties. An in-house lawyer

> is first and foremost an attorney bound by the Rules of Professional Conduct. These Rules . . . articulate in a concrete fashion certain values and goals such as defending the integrity of the judicial system, promoting the administration of justice and protecting the integrity of the legal profession. An attorney's obligation to follow these Rules . . . should not be the foundation for a claim of retaliatory discharge.[164]

Moreover, stated the court, permitting such suits would impermissibly shift the burden of compliance with the Rules from attorneys to their employers, a shift the court found untenable because "all attorneys know or should know that at certain times in their professional career, they will have to forgo economic gains in order to protect the integrity of the legal profession."[165]

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160. *Id.* at 503, 584 N.E.2d at 109, 164 Ill. Dec. at 897 (quoting Herbster v. North Am. Co. for Life & Health Ins., 150 Ill. App. 3d 21, 27, 501 N.E.2d 343, 346, 103 Ill. Dec. 322, 325 (2d Dist. 1986)).

161. *Id.* at 504, 584 N.E.2d at 110, 164 Ill. Dec. at 898 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

162. *Id.*

163. Illinois Rules of Professional Conduct, ILL. ANN. STAT. ch. 110A, Rule 1.16(a)(2), (a)(4) (Smith-Hurd Supp. 1991).

164. *Balla*, 145 Ill. 2d at 504-05, 584 N.E.2d at 110, 164 Ill. Dec. at 898.

165. *Id.* at 505, 584 N.E.2d at 110, 164 Ill. Dec. at 898.

In summary, the court sought to rationalize away the claim on both need and desire. Because the ethics rules themselves will protect the public adequately, extension of the tort is not *needed*. Because attorney-client relations sanctimoniously are to be preferred to protecting attorneys' continued employment, extension of the tort is not *desired*.

As detailed above, categorization of the existing attorney discharge decisions helps to predict how courts will resolve future cases. The existing decisions consistently apply, or fail to apply, similar considerations. However, predicting how a court *might* decide a case is not enough; one must also explain how courts *should* decide these cases. Has the courts' use of attorney-client considerations to preclude public policy suits callously overlooked sound justification for extension of the cause of action to in-house attorneys? Alternatively, does the courts' acceptance of "contractual" or statutory claims fail to give proper respect to the client's control over his or her choice of attorney, thereby eroding harmonious attorney-client relations? Indeed, should courts treat these cases differently at all, or do they raise identical considerations, meriting identical treatment? This note argues that all attorney discharge suits are not equal—that some perhaps should be allowed while others clearly should not. Reaching this conclusion entails two separate inquiries: first, identifying and evaluating factors that might argue either for or against such claims in general, and second, applying those factors to our three categories of discharge suits. Parts IV and V address these issues respectively.

IV. THE IMPACT OF ETHICS: THE RULES AND THEIR REASONS

If nothing else, the decisions within the categories of attorney discharge have been consistent. Attorneys always can sue as lay-employees.[166] Because attorney-client considerations do not arise in this context, this result makes sense, and this note will not revisit those cases.[167] At the other end, attorneys cannot sue for law-related conduct discharges under the public policy exception.[168] The courts have held the attorney-client considerations to prohibit such suits. And somewhere in the middle, "attorneys as attorneys" can *plead* a case for wrongful

166. *See supra* notes 63-71 and accompanying text.

167. Dismissing these cases as unproblematic opens this note up for the same criticism it levies against several of the decisions—that attorney-client problems cannot simply be assumed away. *See infra* notes 214-15 and accompanying text. Such an assumption, however, is warranted here. This note ultimately argues that the courts should preserve harmonious attorney-client relations by refusing to hear attorney discharge claims so that employers will not feel the need to keep in-house lawyers in the dark about business practices or problems. *See infra* text accompanying notes 263-84. Because "lay-person" suits center on facts unrelated to the attorney's conduct as a lawyer, however, permitting them will work no such harm to overall attorney-client relations. That attorneys conceivably could use the opportunity to hold client confidences over employers' heads is discussed *infra* at text accompanying notes 256-62, which debunks the idea that "fear of abuse" alone should preclude these claims.

168. *See supra* notes 119-65 and accompanying text.

discharge where either a statutory or contractual protection supports the claim.[169] However, because the existing cases do not explore fully the limits of disclosure of client confidences in support of these suits, we do not know if attorneys can *prove* those cases.

The decisions are consistent in another way—few of them fully analyze the considerations on which they are based. In the statutory and contractual cases, the decisions pay only lip service to the appropriateness of permitting the claim, assuming that the suits should proceed without seriously considering the propriety of such action. One plausibly can argue that avoiding either the souring of attorney-client relations, the necessity of resolving sensitive and tricky disclosure issues likely to arise at trial, or the temptation for in-house attorneys to abuse the claim militates against permitting such claims.

Conversely, courts confronted with public policy cases implicitly have concluded that, although a public policy favoring disclosure may be present, it cannot surpass the rival public policies found in the attorney-client relationship.[170] Critics of these cases have asserted that none of the attorney-client defenses, individually or collectively, could prevent a finding of public policy in favor of disclosure.[171]

Yet while the critics have accurately elucidated the flaws in the various arguments for and against the panoply of cases, they may have analyzed them in isolation. Is this right? Or does it miss the proverbial big picture? A reasoned analysis of the extension of the wrongful discharge claim to attorneys reveals four factors that need to be considered: (1) attorney-client considerations; (2) the monitoring function of attorneys; (3) withdrawal as the proper course of action; and (4) possible abuses of the extension.

A. Attorney-Client Confidentiality

"Nothing lends more vitality to the client-lawyer relationship than effective communications between lawyer and client."[172] Simply stated, then, in a society with an adversarial legal system which depends upon independent counsel and representation, legal rules should seek to maximize the vitality of the attorney-client relationship by maximizing attorney-client communications. Both the ethical and evidentiary rules pertaining to attorney-client communications embody this fundamental concern; communications made between lawyer and client are largely immune from compelled disclosure in court and are subject to a general

169. *See supra* notes 72-114 and accompanying text.

170. *See, e.g.*, Herbster v. North Am. Co. for Life & Health Ins., 150 Ill. App. 3d 21, 501 N.E.2d 343, 103 Ill. Dec. 322 (2d Dist. 1986), *appeal denied*, 114 Ill. 2d 545, 508 N.E.2d 728, 108 Ill. Dec. 417, *cert. denied*, 484 U.S. 850 (1987).

171. *See* Gillers, *supra* note 9; Reynolds, *supra* note 9; Renfer, *supra* note 9.

172. CHARLES WOLFRAM, MODERN LEGAL ETHICS § 4.5, at 163-64 (Hornbook Series Student ed. 1986).

duty of confidentiality.[173]

Proponents of attorney discharge suits argue that these considerations are, in this context, phantoms—that they disappear in the light of potentially applicable exceptions to the general rules.[174] Several courts have disagreed, one countering that these exceptions are irrelevant because "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."[175] As will be seen, confidentiality concerns do not construct an inviolable barrier precluding such suits. However, the passages through the confidentiality issues and leading to attorney discharge suits offer uneasy footing and threaten to betray the profession that blazed those trails.

A discussion of these attorney-client considerations requires, at the outset, at least a rudimentary taxonomy of what these considerations are. Primarily, the attorney-client relationship creates two special concerns: privilege and confidentiality.[176] Although "courts and attorneys sometimes confuse confidentiality and [the] attorney-client privilege," the concepts are distinct.[177]

1. The Attorney-Client Privilege

The attorney-client privilege is a rule of evidence, recognized in every state, that protects at trial the confidential exchanges between attorney and client.[178] Typically, the privilege applies to confidential disclosures made to the attorney in the course of seeking legal advice.[179] The privilege does not exist, however, if it is waived[180] or if the communications concern a continuing or future crime or fraud.[181]

The privilege exists to promote and protect "full and frank communication between attorneys and their clients . . . ."[182] Because the privilege is designed to induce the client's behavior—specifically, as an incentive toward the client's candor—the control of the privilege rests in

173. *See infra* notes 178-81, 185-88 and accompanying text.

174. *See* Abramson, *supra* note 9, at 277-78; Gillers, *supra* note 9, at 14-17, 19; Reynolds, *supra* note 9, at 570-74.

175. Balla v. Gambro, Inc., 145 Ill. 2d 492, 503, 584 N.E.2d 104, 109, 164 Ill. Dec. 892, 897 (1991).

176. WOLFRAM, *supra* note 172, § 6.1.1, at 242.

177. Renfer, *supra* note 9, at 103.

178. WOLFRAM, *supra* note 172, § 6.1.1, at 242.

179. *Id.* § 6.3.1, at 250-51.

180. Where the client discloses the information to third parties or has acted in a manner suggesting a lack of confidentiality, the court may find the attorney-client privilege to have been waived by the client. *Id.* §§ 6.4.4-.4.9, at 269-78.

181. In one form or another, the crime or fraud exception appears to be universally accepted. *Id.* § 6.4.10, at 279. The United States Supreme Court, through Justice Cardozo, also has endorsed the exception. *See* Clark v. United States, 289 U.S. 1, 15 (1933) (citing crime or fraud exception as supporting analogous exception in context of otherwise privileged juror conduct).

182. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (extending attorney-client privilege beyond the corporate "control group" to realize more fully the benefits of "full and frank disclosure").

the client's hands.[183] Thus, in the absence of a crime-fraud exception or a waiver, an employer-defendant could insist that an employee-attorney not disclose any confidences at trial. Still, the evidentiary privilege is only a procedural limitation because, in most cases, the attorney will not need to testify at trial.[184]

2. *The Professional Ethics Confidentiality Requirement*

Whereas the attorney-client privilege was born of the law of evidence, attorney-client confidentiality finds its roots in the law of agency.[185] The professional codes of legal ethics impose on attorneys a fiduciary duty to their clients.[186] The codes recognize this duty as a means of regulating and policing the legal community to ensure that it is the master (the client) and not the servant (the attorney) who is served by the lawyer's endeavors.[187] Although the client is the beneficiary of confidentiality, the codes, and not the client, determine the extent to which these confidences are honored and protected.[188]

While a nontestifying lawyer is in no danger of running afoul of the attorney-client evidentiary privilege, he or she teeters precariously on the ledge of unauthorized disclosure of client confidences when bringing a wrongful discharge suit. Because the ABA Model Rules[189] presume that a lawyer's knowledge about the client is confidential,[190] this note assumes that the information necessary to plead a suit for wrongful discharge is protected by the duty of confidentiality. The relevant inquiries, then, focus on the availability of exceptions to the confidentiality rules and the wisdom of using those exceptions in this context.

The Model Rules pertaining to disclosure of client confidences[191] are

183. WOLFRAM, *supra* note 172, § 6.3.4, at 253.

184. Renfer, *supra* note 9, at 104. The attorney could testify, of course. But, because control of the attorney-client evidentiary privilege rests in the hands of the (ex-)client, the attorney would be unable to disclose client confidences on the witness stand.

185. ROBERT H. ARONSON & DONALD T. WECKSTEIN, PROFESSIONAL RESPONSIBILITY 197 (1991).

186. *Id.* The law of agency provides the theoretical foundation for protection of the client but the ethics codes expand the protections because of the importance of "well-informed" legal advisors. *See* WOLFRAM, *supra* note 172, § 6.7.3, at 300.

187. WOLFRAM, *supra* note 172, §§ 6.7.2-.3, at 297-301; *see also id.* § 6.7.6, at 304-06 (discussing possible abuse by attorneys of confidential client information).

188. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 12 (1992) ("[T]he lawyer has professional discretion to reveal information in order to prevent . . . homicide or serious bodily injury . . . .").

189. MODEL RULES OF PROFESSIONAL CONDUCT (1992). Because the Model Rules are the "contemporary" ethics guidelines, they will be the focus of this note. For a discussion of how an attorney discharge suit might proceed under the *Model Code of Professional Responsibility*, see Wilbur, *supra* note 9, at 791-803. Professor Wilbur discusses such a suit hypothetically and concludes that "a lawyer should be protected from discharge whenever he refuses to comply with an employer's request which he reasonably believes would violate the Code." *Id.* at 791.

190. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1992); *see also id.* cmt. 5 ("The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.").

191. The Model Rules define "confidences" only indirectly. Model Rule 1.6(a), concerning confidentiality, states that the lawyer shall not disclose "information relating to representation of a

permissive in nature. Model Rule 1.6(b) states, inter alia, that client confidences *may* be disclosed in order to prevent a client from committing a criminal act likely to result in immediate death or significant bodily harm or to establish a claim against the client.[192]

Essentially, the Model Rules embody a modern "crime or fraud" exception that permits an attorney to disclose client confidences when the client is acting dangerously.[193] Under the Model Rules, the attorney in *Balla* violated no confidentiality requirement because the client's dangerous acts—the illegal sale of defective dialyzers—extinguished the duty of confidentiality. In contrast, the Model Rules do not provide for disclosure of confidences when the client acts in furtherance of a nondangerous crime.[194] Thus, in a *Herbster*-type situation, the confidentiality requirement remains intact because the destruction of discovery materials, however unethical and unsavory it may be, is not "likely to result in imminent death or substantial bodily harm."[195] Similarly, the Minnesota power company's alleged plans to spy on its employees would not erode the duty of confidentiality found in the Model Rules.

In contrast, some Model-Rules-based states have adopted ethics rules that make disclosure mandatory in some circumstances, permissive in others.[196] In Illinois, for example, disclosure of client confidences is *required* to prevent death or serious bodily injury but is *permitted* when the client is intent on committing a crime.[197] The Illinois ethics rules,

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client" subject to certain exceptions. *Id.* Rule 1.6(a); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1981) (stating that confidence "refers to information protected by the attorney-client [evidentiary] privilege").

192. The Model Rules state in pertinent part:

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

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

Of course, the disclosure requirements become mandatory when the attorney is before a tribunal, *see id.* Rule 3.3(a), and they apply "even if compliance requires disclosure of information otherwise protected by rule 1.6." *Id.* Rule 3.3(b).

193. This note will use the term "crime or fraud" to refer to exceptions under Rule 1.6(b)(1) when the client's criminal conduct threatens immediate death or serious bodily injury. The "crime or fraud" phrase shelters two technical inaccuracies in that (a) Rule 1.6 does not include the attorney-client evidentiary privilege's reference to "fraud," and (b) the phrase does not specifically limit its application to those situations risking death or serious injury. Nevertheless, the term "crime or fraud" is ingrained in this subject matter's vocabulary and will be used here to maintain consistency.

194. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1992).

195. *Id.* Rule 1.6(b)(1).

196. *See, e.g.*, FLA. STAT. ANN. § 4-1.6 (West 1991) (making disclosure mandatory to prevent death or substantial bodily harm, permissible to establish a claim against the client).

197. The Illinois Rules of Professional Conduct state in pertinent part:

> (a) Except when required under Rule 1.6(b) or permitted under Rule 1.6(c), a lawyer shall not . . . use or reveal a [client] confidence . . . .
>
> (b) 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.
>
> (c) A lawyer *may* use or reveal:

and ethics rules similar to the Illinois rules, thus exempt from confidentiality requirements most situations in which a lawyer would have cause to react contrary to the wishes of the client. For example, in *Balla*-type situations, where the client is acting in a dangerous manner, the confidentiality requirement does more than just fall away; the attorney is required to disclose the client's intentions.[198] Similarly, when a client acts in furtherance of a crime, the confidentiality requirement also disappears; the attorney is permitted to disclose the client's confidences.[199] Thus, in situations like those present in *Herbster*, *Nordling*, and even *Willy*, the attorney has breached no attorney-client confidences because they were extinguished when the attorney learned of the impending crime.

Another Model Rules exception to the prohibition on disclosing client confidences welds the prongs of the bifurcated privilege/confidentiality model. The Model Rules permit disclosure of client confidences to the extent the lawyer reasonably believes necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."[200] Although this exception issues from the ethics code, it enables attorneys to testify at trial concerning matters that otherwise would be confidential under the evidentiary privilege.[201] Although the exception has been used both offensively and defensively, the extent to which it may be used offensively is unclear.[202]

An attorney may disclose client confidences in "self-defense" when the client sues the attorney.[203] An attorney also may disclose confidences when attempting to collect a fee.[204] Critics of the cases that use the attorney-client privilege to shield employers from discharge suits argue that, if nothing else, the fee-collection exception demonstrates the patent

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. . .

(2) the intention of a client to commit a crime in circumstances other than those enumerated in Rule 1.6(b); or

(3) confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer . . . against an accusation of wrongful conduct.

Illinois Rules of Professional Conduct, ILL. ANN. STAT. ch. 110A, Rule 1.6 (Smith-Hurd Supp. 1991) (emphasis added).

198. *See id.*

199. *Id.*

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

201. *See* WOLFRAM, *supra* note 172, § 6.7.8, at 307-08. Disclosures, however, must be limited to those necessary. *Id.* § 6.7.8, at 309. Permitting the attorney to decide how much disclosure is necessary is problematic, though. One author has suggested that disclosure of client confidences in self-defense should by screened by the court. *See* Henry D. Levine, *Self-Interest or Self-Defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 HOFSTRA L. REV. 783, 825-26 (1977) (extended historical and critical discussion, concluding that the breadth of permissible disclosure is acceptable contingent on a leave-of-court requirement); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 13 (1992) ("[A] disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.").

202. Some states textually limit the ABA Model Rules' broad language. For example, the Illinois Code of Professional Responsibility specifically limits offensive disclosure of client confidences to fee collection. ILL. ANN. STAT. ch. 110A, Rule 1.6(b)(3) (Smith-Hurd Supp. 1991).

203. WOLFRAM, *supra* note 172, § 6.7.8, at 307.

204. *Id.* at 308.

inadequacy of client confidences as a prohibition on civil suits.[205] Yet while the ease with which confidentiality is superseded by the pursuit of the almighty dollar seems incongruous with the concept of confidentiality as a barrier to discharge suits, the fee-collection exception, having been criticized as "scandalously self-serving,"[206] is not the kind of noble exception that admits of great extension or expansion.[207] Nevertheless, should the courts be so inclined, this exception can be interpreted to obviate confidentiality concerns in attorney discharge suits simply by categorizing such suits as falling under the Model Rule 1.6(b)(2) "claim or defense against the client" exception.[208]

3. *"Reasonably Necessary Disclosure": What to Reveal and How to Reveal It*

Simply being permitted under the ethics rules to disclose confidences does not grant to the lawyer an absolute license to kiss and tell. Rather, Model Rule 1.6(b), which includes both the "crime or fraud" and "claim or defense" confidentiality exceptions, limits disclosure "to the extent the lawyer reasonably believes necessary . . . ."[209] Although some commentators argue that the aforementioned exceptions make confidentiality a feigned obstacle,[210] those exceptions, to the extent that they sensibly apply, do not make these suits "easy cases." To the contrary, determining which disclosures meet the "reasonably necessary" standard, and whether procedural devices such as protective orders alter that determination, poses significant problems in the administration of a wrongful discharge suit by an attorney.

a. Extent of Disclosure

Although the Model Rules contemplate that instances will arise in which disclosure of client confidences is necessary—and perhaps, from a moral perspective, unavoidable—the Rules temper the scope of permissible disclosure through hazy text and comments. The term "reasonably

205. *See* Gillers, *supra* note 9, at 15-17; Reynolds, *supra* note 9, at 572-73; Renfer, *supra* note 9, at 103-04.

206. ALAN H. GOLDMAN, THE MORAL FOUNDATION OF PROFESSIONAL ETHICS 101 (1980).

207. Nevertheless, one professor of professional ethics advocates just that: "Today we allow lawyers who are suing for their fees to reveal client confidences. . . . If you can do that suing for three thousand dollars in legal fees, it seems to me you should be able to do that when you're suing for your economic life." Karen Dillon, *ACCA Grapples with Absolute Attorney-Client Privilege*, AM. LAW., Nov. 1990, at 35.

208. As Professor Gillers puts it, "the exception the rule creates to the ordinary duties of confidentiality and loyalty is about as broad as any person could reasonably desire in order to advance and protect her own interests despite the conflicting interests of others, former clients included." Gillers, *supra* note 9, at 15-16. One might note the irony created by the two exceptions: protecting citizens from harm requires a circus-like hoop-jumping demonstration; protecting lawyers—the drafters—is a concept that apparently spreads as wide as the mouth of the lawyer arguing it.

209. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1992); *see supra* note 192 (reprinting Rule 1.6(b)).

210. *See* sources cited *supra* note 174.

necessary," of course, is a classic example of weasel words, and it scarcely can be doubted that the Model Rules intended to avoid establishing bright-line standards of permissible disclosure. Nevertheless, the drafters perhaps created confusion by linking two distinct concepts to that nebulous standard: whether the disclosure is reasonably necessary because of the likelihood that the client will in fact act in a dangerous manner; and, assuming such an act, just how much disclosure is reasonably necessary to prevent the misguided and dangerous deeds. For the crime/fraud exceptions, only the first meaning is relevant. Certainly, the attorney must decide if the client actually will commit the crime. But, once the decision is made, the question of the scope of disclosure is answered: the attorney must disclose the client's plans to commit the crime, i.e., make full disclosure. Hinting to authorities about extraneous details simply will not do in this context. Yet the comments cloud this seemingly clear issue by reiterating that the disclosure should be "no greater than the lawyer reasonably believes necessary to the purpose."[211]

Conversely, with the "claim or defense" cases, only the second meaning is relevant. Whether disclosure is permitted at all is a nonissue because the dispute is a done deal. The real issue is how much confidential information is reasonably necessary to establish the claim. Here, the comments are comparatively lucid: "disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence"[212] and "the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure."[213]

In practice, then, client confidences do pose a legitimate problem despite the existence of the Rule 1.6 exceptions. With the easier cases, the crime or fraud cases, the lawyer must ascertain both the likelihood of harm and the likelihood that the dangerous crime will be committed. In *Balla*, those issues seem straightforward, as the transaction to sell the defective dialyzers seemed to be set.[214] Moreover, for our purposes—a trial—the sale was no longer confidential because the FDA already had made the bust. But, assume the facts of *Nordling*[215] in a jurisdiction like Illinois, where any crime will afford the exception. Did Nordling really know that the crime would be committed? No! In fact, he knew that it would not; the executive officers already had killed the surveillance plan. Thus, disclosure of the plan would violate Model Rule 1.6's confidential-

211. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 13 (1992).

212. *Id.* cmt. 17.

213. *Id.* cmt. 18.

214. *See supra* notes 143-52 and accompanying text (discussing Balla v. Gambro, Inc., 145 Ill. 2d 492, 584 N.E.2d 104, 164 Ill. Dec. 892 (1991)).

215. Nordling v. Northern States Power Co., 478 N.W.2d 498 (Minn. 1991); *see supra* notes 101-07 and accompanying text (discussing *Nordling*).

ity requirement. Further, the lawyer must decide how much confidential information is reasonably necessary to *prevent* the crime—a term that the Rules do not define.

Even more problematic are the "claim or defense" cases. Whether to disclose is not difficult, for that is determined by the existence of a dispute. But it is not at all clear how much confidential information is reasonably necessary to establish the claim. And it is in the attorney's interest to overdisclose both to put forth all possible favorable evidence and simply to drive home the point that the employer is a bad person.

b. Protective Orders

The comments to the Model Rules suggest that an attorney who discloses client confidences should do so as discreetly as possible. Proponents of attorney discharge claims argue that the use of protective orders renders confidentiality considerations moot because the corporate employer will not be damaged if only the court and the parties know the employer's secrets.[216] Yet protective orders are still problematic. The simple fact that a business has "something to hide" can damage the business's reputation. The grant of a protective order does not magically cleanse the reputation of the entity whose confidences are being protected. Indeed, a protective order can arouse suspicion. In one current attorney discharge controversy (albeit one presently embodying a distinguishable dispute), an ex-IBM lawyer is fighting protective orders issued in IBM's favor.[217] In a related area, the Ohio Supreme Court muzzled a former Jeep lawyer, preventing him from testifying as an expert in products liability cases against his old employer.[218] In both cases, the protective orders themselves have become notorious.[219] Thus, corporate employers can only be half-heartened by the prospect of having their confidences sealed by protective order.[220]

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216. *See, e.g.*, Reynolds, *supra* note 9, at 555 n.7.

217. *See* Agneshwar, *supra* note 8, at S12. Michael Murray, a former in-house lawyer at IBM, claims he was wrongfully discharged for questioning IBM's allegedly discriminatory practices and for refusing to remain silent about the problems he perceived. *Id.* When Murray sued, IBM successfully petitioned the court to seal what it considered confidential documents and to restrain Murray from disclosing that material to the public. *Id.* Murray violated that restraining order and faces criminal charges. Barbara Lyne, *Ex-IBM Lawyer Fights Contempt; Attorney-Client Privilege*, NAT'L L.J., Oct. 21, 1991, at 3, 35.

218. *See* Thomas Scheffey, *Sweeping Ruling Muzzles Corporate Insiders*, CONN. L. TRIB., Sept. 16, 1991, *available in* LEXIS, Nexis Library, LGLNEW File.

219. *See* Agneshwar, *supra* note 8, at S12; Scheffey, *supra* note 218.

220. IBM officers surely do not view protective orders as the cure-all to confidentiality disputes. IBM chairman John F. Akers and IBM general counsel Donato A. Evangelista were subpoenaed to testify at Murray's contempt proceedings. Lyne, *supra* note 217, at 3.

Moreover, *Parker* demonstrates that protective orders can fail to protect the confidential information. That case arose *because* the court inadvertently leaked proprietary information subject to a protective order. Parker v. M & T Chems., 566 A.2d 215, 217 (N.J. Super. Ct. App. Div. 1989); *see supra* notes 72-79 and accompanying text (discussing *Parker*).

B. The Attorney as Monitor

A perhaps unjustly overlooked concern in these cases is the extent to which society expects today's lawyers to be regulatory bodies. Although the cases consistently mention the desirability and necessity of "full and frank" communication between attorney and client, they seldom flesh out the benefits of this cozy relationship.[221] Fundamentally, "full and frank" communication ensures that attorneys are consulted before potentially illegal or socially harmful activity is undertaken.[222] Attorneys, being well versed in the intricacies of the law, are in the best position to detect and discourage unlawful conduct. In protecting attorney-client communications, society vests in attorneys this monitoring function.

The attorney's monitoring function is clearest in the context of reporting professional misconduct of other attorneys. The ABA rules require an attorney to report this misconduct to the existing investigatory or regulatory body.[223] This requirement rests on strong footing. Given the complexity of legal issues and clients' general lack of understanding of attorneys' professional responsibilities, only other lawyers can effectively police the legal system.[224] Though this has proven to be somewhat disappointing,[225] the possible alternative—a government inspection agency, for example—appears even less appealing.[226] And as the legal

221. *See, e.g.*, Mourad v. Northern States Power Co., 478 N.W.2d 498 (Minn. 1991); *Parker*, 566 A.2d 215. Not surprisingly, the Supreme Court's *Upjohn* decision serves as the exception to that rule. Upjohn Co. v. United States, 449 U.S. 383, 392 (1981) (discussing effect of attorney-client privilege on communications between corporate officials and attorneys).

222. *Upjohn*, 449 U.S. at 389 (stating that full and frank communication "promote[s] broader public interests in the observance of law"); *id.* at 392 (reversing narrow attorney-client privilege that "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 3 (1992) ("Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct."); WOLFRAM, *supra* note 172, § 6.1.3, at 243.

223. Model Rule 8.3(a) states in pertinent part:

> A lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1992).

Model Rule 8.4 provides, in pertinent part, that:

> It is professional misconduct for a lawyer to:
>
> . . .
>
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . .

Id. Rule 8.4.

224. *See* WOLFRAM, *supra* note 172, § 2.1, at 20-21. Although some commentators rightfully question whether lawyers are the only people capable of policing the legal system, *see id.*, lawyers surely are suited to be at least part of an effective regulatory program.

225. *See* Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of* Himmel, 1988 U. ILL. L. REV. 977, 979 (describing reluctance of lawyers to report misconduct of other lawyers).

226. The legal profession's desire to be self-governing is apparent just from reading its self-promulgated ethics rules: "self-regulation . . . helps maintain the legal profession's independence from government domination." MODEL RULES OF PROFESSIONAL CONDUCT pmbl. cmt. 10 (1992).

community's reputation becomes increasingly tarnished, courts might begin to hold attorneys more accountable for this monitoring function. A sobering example of this is found in the Illinois decision *In re Himmel*.[227]

In *Himmel*, an attorney's license was suspended for one year because he failed to report the ethical violations of another attorney.[228] This sanction was levied even though Himmel was suing the other attorney on behalf of the abused client and the client had already reported her old attorney's misconduct.[229] The court reiterated the importance of a lawyer's duty to report misconduct, stating that a violation of the reporting rule mandated the imposition of discipline.[230]

The monitoring duties of corporate counsel are more subtle. Ideally, a corporation will consult with its attorneys about the corporation's everyday business practices.[231] This may take the form of a simple "ok" by corporate counsel before a corporation undertakes a project, or it may manifest itself as a comprehensive internal legal audit of the corporate practices. Although internal legal audits are not required by law,[232] many areas such as labor and environmental law are well suited to internal legal audit programs.[233]

The ideal corporation, however, does not stop with the information/detection phase.[234] Rather, the ideal corporation will take the information gathered and seek to remedy any violations that were uncovered.[235] Often, though, management and counsel disagree on what, if any, action should be taken.[236] When this happens, in-house

227. 125 Ill. 2d 531, 533 N.E.2d 790, 127 Ill. Dec. 708 (1988).

228. *Id.* at 536-37, 546, 533 N.E.2d at 791-92, 796, 127 Ill. Dec. at 709-10, 714.

229. *Id.* at 536-37, 533 N.E.2d at 791-92, 127 Ill. Dec. at 709-10.

230. *Id.* at 541, 533 N.E.2d at 793-94, 127 Ill. Dec. at 711-13.

231. *See, e.g.*, Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986) (Willy employed to give legal advice concerning compliance with environmental laws), *rev'd in part*, 855 F.2d 1160 (5th Cir. 1988); Balla v. Gambro, Inc., 203 Ill. App. 3d 57, 560 N.E.2d 1043, 148 Ill. Dec. 446 (1st Dist. 1990) (Balla, as chief legal officer, was in charge of monitoring Gambro's compliance with FDA regulations), *rev'd*, 145 Ill. 2d 492, 584 N.E.2d 104, 164 Ill. Dec. 892 (1991).

232. Some commentators favor extending the board of directors' oversight responsibilities to include the installation of law compliance programs. *See* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 684 (1974). These proposed obligations mirror the accounting control obligations. *See* Atherton v. Anderson, 99 F.2d 883 (6th Cir. 1938) (requiring proper accounting for bank's lending procedures). Mandatory legal audits and general oversight, however, appear unpopular. *See* Reynolds, *supra* note 9, at 581 (describing corporate bar's "ferocious" attack on SEC internal audit proposals).

233. *See* Mary Lu Christie, *Labor Law: An Inside View*, AM. LAW., Mar. 1992 (Special report on corporate counsel), at 28, 30 ("The in-house lawyer is in an ideal position to develop a *preventive* program . . . to ensure compliance with the myriad of statutes in this area.") (emphasis added); John S. Guttmann, Jr. et al., *Environmental Law: Beyond Crisis Management*, AM. LAW., Mar. 1992 (Special report on corporate counsel), at 22, 24 ("Environmental compliance audits are among the most fundamental steps a business can take to prevent future environmental problems.").

234. *See* C. Barry Schaefer, *Professional Tenure: Is It Really a Solution?*, 59 NEB. L. REV. 28, 31 (1980) ("[S]taff attorneys can effectively participate in problem definition and resolution.").

235. Upjohn Co. v. United States, 449 U.S. 383, 386-87 (1981) (internal investigation of illegal foreign payments); *see also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 3 (1992).

236. *See* Schaefer, *supra* note 234, at 30 (where corporate policy is simply to capitalize on opportunities in disregard of the law, there is potential for conflict between the attorney and the employer).

counsel may find herself in an ethical, but not a legal, dilemma. To facilitate the monitoring function of attorneys, the Model Rules detail the proper behavior of corporate counsel.

When a corporate attorney discovers what she believes to be questionable activity, her course of conduct is clearly laid out in the Model Rules, which state that the in-house attorney "represents the organization . . . ."[237] When the in-house attorney learns of illegal activity within the corporation, "the lawyer shall proceed as is reasonably necessary in the best interest of the organization."[238] The measures taken by the attorney, which may include asking for reconsideration of the matter or, if necessary, taking the issue "to the top," are to be "designed to minimize disruption of the organization and the risk of revealing information . . . ."[239] If, after taking these steps, the in-house attorney believes the corporation is still engaging in illegal conduct, the Model Rules provide that the lawyer may resign.[240]

The reason for drafting detailed procedures on the corporate counsel's role in dealing with internal illegalities is closely related to the confidential disclosure exceptions[241] and perhaps is expressed best in the comments to the confidentiality rules. Comment nine to Rule 1.6 states that "[t]he public is better protected if full and open communication by the client is encouraged than if it is inhibited."[242]

If full and frank disclosure is inhibited by the specter of a discharge suit, then attorneys may be "left out of the loop," so that internal audits are not effected (at least by ethical lawyers).[243] The bottom line is that our legal system should value "full and frank" communications not solely because of the benefit to the individuals involved, but also for the benefit to society as a whole: corporations that involve attorneys in the decision-making process are more likely to understand the legal implica-

237. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1992).
238. *Id.* Rule 1.13(b).
239. *Id.*
240. *Id.* Rule 1.13(c).
241. *See supra* notes 191-204 and accompanying text.
242. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 9 (1992).
243. One commentator notes, "[a]bsence of confidentiality in [attorney discharge] situations will not prevent corporate personnel from consulting with their company's attorneys for *legitimate* reasons." Abramson, *supra* note 9, at 286 (emphasis added). This may well be true; indeed, it supports this note's argument. Attorney involvement in *legitimate* business practices is not at issue here. As counsel for Gambro, Inc. states, "[i]f [employers] start to get the perception that there is a reasonable fear of being sued by in-house counsel, one of the steps might be giving the more mundane legal work to in-housers and saving the confidential stuff for outside counsel." Dillon, *supra* note 8, at 35 (quoting Pedersen & Houpt lawyer Arthur Sternberg).

In a related context, attorney tenure, one critic of tenure argued that such a "job-guarantee" would make the attorney "more academic and less responsible, imaginative, creative and accountable as a member of the management team, and hence reduce his over-all effectiveness and credibility." Schaefer, *supra* note 234, at 33. The attorney would be estranged from day-to-day management. *Id.* Thus, the "law department would simply be referred to in order to defend the company against problems which might well have been prevented had the staff attorneys been given the effective opportunity to participate in the definition and resolution of the problems at the outset." *Id.*

tions of their proposed actions and, consequently, are more likely to tailor their acts to comply with the law. Extension of the wrongful discharge cause of action, whether statutory or common-law, is sure to erode full and frank communications and thus lessen the efficacy of the attorney as monitor.

C. *Withdrawal*

The *Balla*, *Herbster*, and *Willy* courts argued that an attorney's obligation to withdraw from representation when fired makes a wrongful discharge suit nonsensical.[244] After all, it is the ethics rules, not the employer, that require the loss of the client. On one level, this is irrefutably true: an attorney who is fired by a client must also resign as that client's lawyer.[245] As the comments to Rule 1.16 put it, "[a] client has a right to discharge a lawyer at any time, with or without cause . . . ."[246]

This line of argument, however, ignores an important distinction between the ethics rules' mandate of withdrawal and either a common-law or statutory remedy for that particular discharge. Thus, critics argue that questioning the adequacy of withdrawal as the attorney's proper course of conduct also is a fruitless exercise, contending that the question is not whether the attorney should withdraw (they assume yes), but whether financial compensation is available for the loss of the job.[247] This represents an arguably legitimate distinction. The comments to Rule 1.16, after stating the client's "absolute" right to attorney of choice, provide that, although a discharged attorney must withdraw, the lawyer has a right to payment for his or her services.[248] Thus, the Rules do contemplate a discharged lawyer's receiving compensation from the client after withdrawal.

Nevertheless, a wrongful discharge suit goes much further than a simple suit for fees. A suit for fees only requires that the employer pay *quantum meruit* for an attorney's services.[249] But a discharge suit effectively requires that an employer pay double for legal services: once for the replacement lawyer's wages and again in the form of damages for the fired attorney. The question distills into this: if the ethics rules contemplate that a client has an absolute right to the attorney of his or her choice, is that choice fettered by the imposition of costlier legal services? Put another way, will employers be discouraged from exercising their right to choice of attorney by the threat of a discharge suit? And if so,

244. *See supra* notes 131, 137-38, 163-65 and accompanying text; *see also* Joliffe, *supra* note 8, at S6.

245. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(3) (1992).

246. *Id.* Rule 1.16 cmt. 4.

247. *See* Reynolds, *supra* note 9, at 574-75.

248. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 cmt. 4 (1992).

249. *See* Reynolds, *supra* note 9, at 575; *see also* Nordling v. Northern States Power Co., 478 N.W.2d 498, 501 (Minn. 1991) (stating that "[t]he discharged lawyer is entitled to recover in only quantum meruit for services rendered to the time of discharge); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 cmt. 4 (1992).

will that not result in a poor attorney-client relationship which necessarily will precipitate the unwanted attorney's being "left out of the loop?" The withdrawal rule seems to argue for restricting the ability of lawyers to seek compensation for dismissal because of the pernicious effect on the employer's choice of and trust in counsel.

If a wrongful discharge claim is unavailable, what, then, is the attorney to do when faced with a perceived ethical dilemma? Although society will want to preserve the sanctity, flexibility and trust of an attorney-client relationship, surely it does not want to force attorneys to work for their ethical enemies.

Rule 1.16 of the Model Rules requires a lawyer to withdraw if continued representation will result in a violation of the Model Rules or of the law.[250] Model Rule 1.2, concerning the lawyer's scope of representation, states that a lawyer shall not counsel a client to engage in, or assist a client in, violating a law but may discuss the conduct with the client in attempting to determine the legality of the conduct and any possible consequences.[251] The official comments to Rule 1.2 make it clear that a lawyer is not required to withdraw simply because the lawyer discovers or discusses illegal activity; counseling is distinct from assisting and engaging.[252]

Regarding other attorney-client situations, Model Rule 1.16 is permissive; the lawyer may withdraw if the client persists in illegal activity with which the lawyer is associated.[253] Included in this category is the option of a lawyer to withdraw if the client pursues objectives the lawyer finds repugnant or imprudent.[254] As no ethical violation accrues to the lawyer who knows of, but is not involved with, an employer's illegal activity,[255] the difference between withdrawal for knowledge of illegal activity and withdrawal for repugnance or imprudence is simply a matter of degree. Thus, a lawyer is only required to withdraw if the lawyer is asked to act contrary to law or professional ethics but is permitted to withdraw if faced with conduct contrary to the lawyer's own personal ethics. The Model Rules appear to balance lawyers' and clients' interests, providing clients an absolute right to counsel of choice, and in return providing lawyers with a vehicle for escaping from either the illegal or the legal but unsavory conduct of the employer. Money damage suits brought by discharged attorneys may upset this balance, thereby further chilling attorney-client relations.

D. Fear of Abuse

The potential for abuse of a right exists whenever one party receives

250. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(1) (1992).
251. *Id.* Rule 1.2.
252. *Id.* Rule 1.2 cmt. 6.
253. *Id.* Rule 1.16(b)(1).
254. *Id.* Rule 1.16(b)(3).
255. *See supra* note 252 and accompanying text.

an inordinate or unnecessary benefit from that right. In the attorney discharge arena, the cause of action may be abused if extension of the claim gives attorneys the "upper hand" in relation to employers. The most cogent examples of potential abuse exist in the realms of confidentiality and bargaining power. Fear of abuse, however, ultimately proves to be largely unfounded.

Intuitively, one might think that if ever a case for abuse of a cause of action exists, it does so when attorneys are allowed to sue their former employers. Being both well-versed in the language of lawsuits and litigious by nature, the newly unemployed attorney, briefcase brimming with potentially damaging secrets, would find the ex-employer easy prey for either a hefty verdict or, ideally, a considerable settlement. The real world tells us otherwise.

As a practical objection, courts might be concerned with rightfully discharged attorneys alleging that they were discharged for mixed motives.[256] Motivational concerns, however, arise irrespective of professional attorney status.[257] Moreover, as a whole, lawyers are less likely to sue than other professionals.[258] Thus, the fear generated by attorneys as plaintiffs must come not from volume but from the threat of an especially "bloody kill." The focus then shifts to potential damage to the employer—either by exposing questionable, though perhaps legal, conduct or by revealing corporate secrets. As we have seen before, the "reasonably necessary" disclosure limitations and the availability of protective orders, though offering some protection to the employer, are not panaceas.

Courts also might fear abuse of the cause of action if it empowers attorneys unnecessarily. Because discharge suits arise as a remedy to the unequal bargaining power of employees (if they had equal bargaining power, judicial protection would be unnecessary and the at-will rule would be flawlessly workable and efficient!), extension of the cause of action to employees who do have sufficient bargaining power would tip the scales too far in favor of the employee.[259] Certainly attorneys, possessing specialized knowledge and skill, command more bargaining power than other at-will employees. However, common sense quickly

256. One commentator, apparently worried about spurious or vexatious discharge suits brought by disgruntled in-house lawyers, suggests that in-house law offices protect themselves with "paper trails." Gabrielle Georgi, *Counsel-Client Conduct Tested by Termination*, RECORDER, June 19, 1991, *available in* LEXIS, Nexis Library, LGLNEW File. Georgi suggests that a proper "paper trail" would include standardized review procedures, documented warnings, and witnessed interviews prior to termination of an in-house lawyer. *Id.* Although "paper trails" may be the type of "cover-your-behind" safeguards necessary to risk-free employee terminations in today's business world, these sterile procedures seem certain to inject an adversarial tone into what otherwise might be a close attorney-client relationship. To the extent that "fear of abuse" precipitates "paper trails" or other combative measures, then it does rise to the level of an independently legitimate concern.

257. *See* Reynolds, *supra* note 9, at 555 n.7.

258. *See* Gillers, *supra* note 9, at 563-64; Wilbur, *supra* note 9, at 778.

259. *See* Epstein, *supra* note 39, at 974 (arguing that the economics of a firing are roughly symmetrical).

disposes of fears based on bargaining power. If the bargaining power of the attorney is greater than that of the employer, then opportunities abound for the attorney to rectify relational problems or, if nothing else, to find ready employment elsewhere. If, however, the bargaining power of the attorney is less than that of the employer, then all of the criticisms of at-will employment apply with full force and a wrongful discharge cause of action makes sense.

Indeed, this is a main concern for those who support attorney discharge suits for in-house attorneys. Unlike their law-firm counterparts, in-house lawyers have only one client. A private attorney, having many clients, can make a very credible threat to discontinue representation of a client who seeks to violate the law or public policy. In contrast, an employer justifiably can discount the in-house attorney's threats of withdrawal because the attorney is effectively opting for absolute unemployment.[260] And while an employer, especially one engaged in questionable business practices, would prefer to have consistent representation and not have to find new counsel and bring him or her up to speed, the corporate employer is likely to encounter little hardship in finding a new lawyer. Conversely, the withdrawn lawyer faces a much harder and riskier job search.

Practical considerations also mitigate against the fear that attorneys will abuse such a cause of action. First, lawsuits, even for attorneys, are expensive, especially for the attorney who is unemployed.[261] In addition, a lawsuit presents many opportunity costs. If the attorney is unemployed, the existence of a lawsuit against the former employer may make the discharged attorney a pariah; surely many corporations would be hesitant to hire a "litigious" individual, especially for their in-house corporate staff. If the attorney is employed, the new employer likely will not appreciate the new attorney's taking days off to vindicate a personal grievance.[262] Thus, although a discharged attorney possesses a poten-

260. Although some commentators play up the in-house lawyer's dependency on one client and suggest that, for wrongful discharge purposes, courts should consider them differently, *see* Gillers, *supra* note 9, at 19, courts do not seem receptive to the idea of creating two classes of attorneys. *See* Nordling v. Northern States Power Co., 478 N.W.2d 498, 501-02 (Minn. 1991) (arguing that private practice attorneys are just as likely to encounter problems of mobility and marketability). The American Corporate Counsel Association (ACCA) also rejects treating in-house lawyers differently than outside lawyers, even when that prevents them from asserting discharge rights. *See* Amicus Curiae Brief for the American Corporate Counsel Association at 5-6, Balla v. Gambro, Inc., 145 Ill. 2d 492, 584 N.E.2d 104, 164 Ill. Dec. 892 (1991) (No. 70942) [hereinafter ACCA Brief].

As a final caveat to the notion that in-house attorneys are somehow more client-dependent than law firms, this note offers two observations. First, although a large firm has many clients, it is naive to assert that, on a functional level, that firm will be any less sensitive to losing its *largest* client than an in-house lawyer will be to losing his *only* client. Moreover, within the large firm, it is likely that a handful of lawyers devote a substantial, and often predominant, amount of time to that particular client. From the individual lawyer's perspective—and that is the relevant perspective for "undue influence" purposes—that client is every bit as influential as the in-house lawyer's corporate employer.

261. *See* Gillers, *supra* note 9, at 21.

262. *Id.*

tially damaging arsenal in a discharge suit, concerns of abuse stemming solely from "inside information" probably are mitigated by economic forces.

V. RESTRICTING THE CAUSE OF ACTION: REASONABLE LIMITATIONS AND UNREASONABLE EXPECTATIONS

A. Statutory and "Contractual" Suits: A Critical Look at the Conventional Wisdom

Asking whether attorney-client considerations should preclude discharge suits brought by in-house counsel may be asking the wrong question. The courts have not seemed to find extending the cause of action troublesome, perhaps because extension is incorrect terminology: by definition, the statutory or contractual claim exists by virtue of the statute or the contract. It seems the question, then, is whether attorney-client considerations justify carving out an exclusionary exception precluding attorneys from exercising discharge remedies granted either by statute or the common law of contract. Furthermore, assuming that a cause of action should exist, may plaintiffs proceed with the suit when client confidences are sure to be revealed? Although the "conventional wisdom" has been to permit statutory and "contractual" attorney discharge suits,[263] this note challenges that "wisdom."

Fundamentally, the existence of wrongful discharge suits by in-house attorneys, even when legislated or impliedly agreed to, promises to alienate corporate employers from their in-house attorneys. Critics might suggest that the lack of empirical evidence to support that contention exposes it as a heavy weight hanging from a slender reed—that all of this is pessimistic doom saying. But we can assume that entities act for a reason,[264] and that reason typically is self-interest.[265] If involving attorneys in all aspects of the business can lead to either increased legal costs or, perhaps worse, bad press, then self-interest may require leaving the lawyers "out of the loop," thereby chilling attorney-client relations in general.[266]

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263. *See, e.g.*, Mourad v. Automobile Club Ins. Assoc., 465 N.W.2d 395 (Mich. Ct. App. 1991); Norlding v. Northern States Power Co., 478 N.W.2d 498 (Minn. 1991); Parker v. M & T Chems., 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989).

264. "Cause and effect, means and ends, seeds and fruit, cannot be severed; for the effect already blooms in the cause, the end pre-exists in the means, the fruit in the seed." RALPH WALDO EMERSON, *Compensation*, *in* 2 COMPLETE WORKS 103 (Harvard ed. 1929).

265. THOMAS HOBBES, LEVIATHAN 103 (Michael Oakeshott ed., Collier Books 1962) (1651).

266. Causally linking attorney discharge suits with attorney-client relations is relevant only to the extent that attorney-client communications are in fact an elastic function. That is, if attorney-client communications proceed independently of harmonious attorney-client relations, then attorney discharge suits can have no effects on whether lawyers are involved in day-to-day business practices.

A recent empirical study of the attorney-client privilege supports the heretofore largely assumed effect of confidentiality on client candor. Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191 (1989). Professor Alexander surveyed both corporate executives and in-house lawyers, finding that "a clear majority [of both] said that in their experience, the privilege encouraged candor." *Id.* at 244. Alexander found that the privilege

In addition, courts must reconcile these suits with the attorney's obligation to withdraw when discharged and the client's right to discharge a lawyer at any time and for any reason. The Model Rules contemplate only that a fired lawyer be compensated for services rendered, not injustices suffered, and damage awards fetter the client's right to counsel of choice, thereby saddling an employer with a lawyer whom the client neither trusts nor meaningfully consults.[267]

Given that our goal should be to foster universal attorney-client trust and candor, this note argues that courts should deny statutory and "contractual" discharge remedies to in-house lawyers.[268] Although discharge statutes and implied contract theories provide a viable framework for these claims, permitting attorneys to sue for wrongful discharge seriously threatens harmonious attorney-client relations, regardless of the source of the remedy.[269] However, because courts in fact are permitting

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" 'puts people at ease' " and encouraged law-abiding conduct. *Id.* at 244-45. The article offers several statements by in-house lawyers, one offering that " '[t]he privilege encourages open and frank communications. Lawyers can thereby keep clients from doing foolish things, and this is in society's interests in the long run.' " *Id.* at 245.

Of course, whether clients will be more candid with in-house attorneys based on the attorneys' duty of confidentiality is a slightly different inquiry. However, one can viscerally sense that communications will be more candid when told in secret than when theoretically told to the world. The Model Rules appear to make this inference as well. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 2 (1992) ("The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation . . . but also encourages people to seek early legal assistance."). For this note's purposes, the Alexander article stands not so much as proof that clients will disclose more to "trusted" attorneys as it is evidence that attorney-client communications are elastic, varying with clients' confidence in the privacy of the disclosures.

267. *See supra* notes 244-55 and accompanying text.

268. Arguing for a class-specific exclusion to a general rule is not, of course, without its problems. Some might argue that courts should not exclude "groups" from causes of action, that claims should be status-neutral. However, courts can legitimately do that.

The law of defamation provides a cogent example of a class-specific exclusion to a general cause of action. In *City of Chicago v. Tribune Co.*, the Illinois Supreme Court held that a municipal corporation could not sue for defamation. 307 Ill. 595, 139 N.E. 86 (1923). The court found that citizens had an absolute privilege to criticize the government, a privilege "founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his statements" concerning the government. *Id.* at 608, 139 N.E. at 90. The court reasoned that "it is better that an occasional individual or newspaper that is so perverted in judgment and so misguided in his or her civic duty should go free than that all of the citizens should be put in jeopardy of imprisonment or economic subjugation if they venture to criticize an inefficient or corrupt government." *Id.* at 610, 139 N.E. at 91.

Exceptions are more problematic regarding whistle-blower statutes than "just cause" contracts, however. Because the "just cause" contract is a judge-made creature, the courts simply would be amending their own rules. But whistle-blower statutes are legislative creatures, and excepting in-house lawyers from the coverage of facially occupation-neutral statutes requires some interpretive gymnastics. Nevertheless, courts legitimately can rule that the legislatures did not envision the statute as applying to attorneys, pointing to the resultant inconsistency with the withdrawal requirement and noting that the regulation of attorneys traditionally has been the province of the courts, not the legislatures.

269. Whether an in-house lawyer who had an actual negotiated contract could enforce it is not relevant here. In such a circumstance, the employer/client might be deemed to have visited the sins of increased cost or diminished attorney-client relations upon itself. This note does not consider the policy ramifications of enabling a client to overtly limit its choice of attorney.

these claims,[270] the inquiry must continue.

Even assuming that statutory or "contractual" discharge suits benefit the legal system in general, and therefore should exist, to what extent may lawyers reveal confidences reasonably necessary to further the claim? Several courts have punted here, exclaiming that confidences are unlikely to arise but that, to the extent they do arise, the trial courts will deal with the problem.[271] But this is no answer at all. Granted, in some cases, confidences are in fact unlikely to arise at trial. In most whistleblower cases, for example, confidences will not be implicated because the material is now open knowledge. Similarly, many "contractual" cases will not involve client confidences; the dispute may simply center on whether an employer followed proper procedures in dismissing an in-house attorney who was chronically late, for example. But what if the "unjust cause" for dismissal is the attorney's refusal to violate a nondangerous securities regulation? The attorney's obligation of confidentiality still exists, and the confidential matter is *central* to the claim. Therefore, despite the lower probability that confidences will be at issue in a statutory or "contractual" case, courts cannot simply assume them out of existence.

Perhaps the Minnesota Supreme Court did all it could do, permitting the suit but effectively preempting any disclosures of client confidences.[272] After all, what business does a court have in refusing to hear a case because evidentiary issues will be tricky? Further, when confidences present themselves as evidence, what business does the attorney have in violating his pledge of confidentiality to the client? Exceptions exist, but for limited and often self-serving reasons.[273] If one knows that client confidences will be revealed, it is is not beyond the pale to suggest that the "cost" of the disclosure exceeds its benefits—that a few aggrieved lawyers should be sacrificed in the name of full and frank disclosure and harmonious attorney-client relations. An employer haled into court by its discharged attorney is certain to resent that lawyer, and probably the legal system itself,[274] for turning a theoretically amicable relationship into an open courtroom dogfight. If courts agree to hear attorney discharge cases, they should not compound the mistake by permitting lawyers to violate their duty of confidentiality to those employer/clients.

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270. *See, e.g.*, Mourad v. Automobile Club Ins. Ass'n, 465 N.W.2d 395 (Mich. Ct. App. 1991); Nordling v. Northern States Power Co., 478 N.W.2d 498 (Minn. 1991); Parker v. M & T Chems., 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989).

271. *Parker*, 566 A.2d at 222 n.2.

272. *See Nordling*, 478 N.W.2d 498; *see supra* notes 108-14 and accompanying text (discussing *Nordling*).

273. *See supra* notes 191-208 and accompanying text.

274. "Understandably, clients may see a wrongful-discharge cause of action for attorneys as one more example of how the legal profession looks after its own—particularly in questions of legal ethics." Dubin & Joliffe, *supra* note 8, at S4.

B. The Mixed Message of Public Policy: Bad News for Well-Intentioned Lawyers

Deciding whether the courts should create a public policy exception to the at-will rule is a somewhat different inquiry. Whereas with statutory or "contractual" suits we were concerned with carving exceptions to *exclude* in-house attorneys from an existing cause of action, here we are concerned with carving an exception to *permit* the cause of action. In other words, because the general at-will rule denies such claims, we must decide whether attorney discharge suits invoke sufficient public policy concerns to override the at-will rule. Analyzing all of the "public policies" relevant to the issue reveals that attorneys should not be able to state a public policy cause of action of wrongful discharge—even where a similarly situated nonlawyer would be able to do so.

Most states require that public policy exceptions to the at-will rule spring from a clearly mandated public policy of the state.[275] Within a given state, courts must analyze particular discharges along a public policy continuum to determine whether the state's public policy clearly mandates extending the cause of action. Thus, in a nonlawyer context, this note might proceed by defining that public policy continuum and establishing a point on that line that divides actionable from nonactionable discharges. Such an inquiry is not called for here, however, because this note contends that preserving the sanctity of attorney-client relations implicates strong public policies that, if anything, clearly mandate that in-house attorneys not be able to sue for wrongful discharge.

Many commentators have noted that it seems unfair, if not outrageous, that in-house attorneys are singularly excluded from an otherwise available remedy.[276] After all, they say, in-house attorneys are in the harshest of double binds, being slave to both the ethical duties of the profession and the caprice of a single private employer. Yet, the attorney-client relationship argues on two levels against letting in-house attorneys sue for wrongful discharge.

On one level, the individual Model Rules generally subordinate the interests of the in-house lawyer to those of the client. The clearest example is Rule 1.13, which specifies that the in-house lawyer must act at all times in "the best interest of the organization,"[277] even when the lawyer believes that illegal activity is underfoot. Rule 1.16, concerning withdrawal, similarly evidences the state's policy decision to subordinate the lawyer to the client. "A client has a right to discharge a lawyer at any time, with or without cause . . . ."[278] Moreover, Rule 1.16 establishes the threat of withdrawal, not the threat of a discharge suit, as the attorney's

275. *See* Palmateer v. International Harvester Co., 85 Ill. 2d 124, 134, 421 N.E.2d 876, 881, 52 Ill. Dec. 13, 18 (1981).

276. Gillers, *supra* note 9, at 3-4; Reynolds, *supra* note 9, at 565; Abramson, *supra* note 9, at 286-87.

277. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1992).

278. *Id.* Rule 1.16 cmt. 4.

appropriate course of conduct when seeking to influence the client's behavior.[279] On a second level, Rule 1.6's prohibition on revealing client confidences suggests that, because confidences often will be necessary to proving the claim, wrongful discharge suits by in-house attorneys are inimicable to the state's public policy supporting full and frank disclosure and harmonious attorney-client relations.[280]

Granted, proponents of these discharge suits correctly argue that the individual rules do not necessarily preclude the cause of action. Rule 1.16 withdrawal, for example, only requires that the attorney cease to represent the client, not that the attorney be precluded from recovering damages for the lost employment. This argument, however, fails to recognize the practical chill these suits would work on the client's willingness to exercise its right to choice of attorney. Further, they note, Rule 1.6 blossoms with exceptions, ranging from the case-specific "crime or fraud" exception to the potentially all-encompassing "claim or dispute" exception. Indeed, where states *require* attorneys to disclose confidences to prevent a client's dangerous crimes, the public policy overtly seems to favor protecting the compliant in-house lawyer.

While all of that is true, we must be careful not to overlook the interests those exceptions serve. The exceptions exist because they further the interests of society—of the public in general. Attorneys may disclose a client's intent to commit a dangerous crime because society is better served by valuing the public safety. And though the "claim or dispute" exception may be simply the bastard child of lawyers' self-interest, it enjoys a theoretical public policy foundation in that attorneys might be reluctant to represent clients absent advance payment. A "discharge" exception, on the other hand, would not spring forth from societal interest. Rather, a discharge exception would elevate an attorney's personal grievance over the public's interest in harmonious attorney-client relations. Moreover, although limited disclosure and protective orders may help to limit the external damage to the client, they do little to allay the client's fear that a different "trusted" attorney also may betray that trust in furtherance of a personal claim.

Finally, all of these individual rules underscore the pervasive concerns of the regulation between attorneys and clients—ensuring that clients both trust and confide in their lawyers and preserving the public's faith in the legal system. Lawyers are ideally, perhaps exclusively, suited to monitor client conduct and steer that conduct within the guidelines set by law. If the attorney is to serve as monitor, communications between attorney and client must be completely uninhibited, and clients must have complete confidence in their lawyers. The existence of a wrongful discharge cause of action for in-house lawyers would erode that trust, and therefore fail to invoke the overall clear mandate of public policy,

279. *Id.* Rule 1.16; *see supra* notes 244-55 and accompanying text.
280. *Id.* Rule 1.6; *see supra* notes 191-95, 200-08 and accompanying text.

notwithstanding any "smaller" public policies subsumed by the ethics rules or implicated by unsavory client behavior. As recognized by both the American Corporate Counsel Association[281] and the Supreme Court, "sound legal advice or advocacy serves the public ends and . . . such advice or advocacy depends upon [attorneys] being fully informed by the client."[282]

VI. CONCLUSION

Despite the theoretical presumption of at-will employment, both legislatures and courts significantly limit employers' ability to discharge employees for reasons thought either unethical or contrary to our system of social justice. Simultaneously, state-promulgated ethics regulations of attorneys reinforce the notion that lawyers should serve their clients, not themselves. These two broadly-stated concerns clash when in-house attorneys sue for wrongful discharge.

Because society as a whole is better served by an attorney regulatory system that strives to protect and enhance client trust in attorneys, and thereby preserve the full and frank communication necessary to having legally well-informed businesses, wrongful discharge suits by attorneys are contrary to both the public interest and the best interests of in-house attorneys in general. Despite the Illinois Supreme Court's denying the cause of action, however, wrongful discharge suits by in-house attorneys seem to be gaining momentum. And today's successes surely will incite more and more claims. This note concludes that such a trend is unfortunate, for by benefiting the individually aggrieved in-house attorneys, we also diminish all in-house attorneys in the eyes of their employer-clients.

In-house lawyers have found themselves in a dilemma, but not the one they perceive. In-house counsel suggest that their dilemma is whether to serve the client's wishes and violate the law, or to obey ethics requirements and lose their jobs. In fact, the dilemma is much deeper: having created a sanctuary in the business world by crafting confidentiality rules which permit clients to safely confide in their attorneys, lawyers now want to break their cloister when those confidences conflict with their personal grievances. Put another way, attorneys, having benefited from the privileges of ethics-imposed confidentiality, now want to disregard the obligations—and are willing to jeopardize the special position that attorneys enjoy within the business community to do so. But as ACCA board member Norman Krishova stated, "[in-house attorneys] can't have it both ways. As in-house counsel we want to be treated just as outside lawyers, with all the benefits and detriments that accompany

281. *See* ACCA Brief, *supra* note 260. The ACCA argued in its amicus curiae brief that "[e]xpanding the tort of retaliatory discharge to encompass in-house counsel threatens to vitiate the attorney-client privilege, severely undermine the special trust and confidence that corporate clients place in their in-house counsel, and defeat the very goals sought to be advanced by retaliatory discharge actions." *Id.* at 7.

282. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

that."[283] In-house attorneys, however, simply cannot have it both ways; they must choose between serving their clients or serving themselves.[284] The former may have harsh results for individual lawyers, but the latter has pernicious effects for all.

No one doubts that the ethics rules and an attorney's personal profit often clash. And few seriously disagree that when those interests clash, ethics should prevail. But how do we apportion that cost of compliance in situations such as this, where the price can be so high? Because an adversarial legal system requires effective legal counsel for all, we must guard against imposing that cost on the client. Such a result disserves not just that client but all who depend on legal counsel. This note argues that the costs associated with being an ethical attorney are better levied at the feet of the unfortunate few than on the shoulders of the entire profession and the public it serves.

283. Dillon, *supra* note 8, at 35.

284. This note recognizes that its conclusion would lead to severe hardship for a number of lawyers who "did the right thing," only to be left with neither a job nor a civil remedy. Some commentators say that such a situation will result in lawyers disregarding their ethical duties in favor of keeping their jobs. *See, e.g.*, Wilbur, *supra* note 9, at 808; Renfer, *supra* note 9, at 104; *see also* Gillers, *supra* note 9, at 19 ("A prime purpose of wrongful discharge doctrine is to enable employees to resist encouragement toward certain kinds of behavior, including illegal behavior. . . ."). To the extent that this argues for compromising attorney-client relations to ensure ethical behavior, this note dissents, professing, perhaps too optimistically, that adherence to the ethics rules by all attorneys would force employers to similarly respect those rules.

For those readers who contend that adherence to the spirit of the ethics rules in this context comes only at the expense of "truth" or "justice," this note suggests that our adversarial legal system long has subordinated such abstract notions to "process," believing that "truth" and "justice" are best realized by the confrontation of conflicting views when coupled with trusted and informed representation. *Compare* Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975) (applauding adversarial system as protector of individual dignity, even if it distorts "truth") *with* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (arguing that adversarial system wrongly deemphasizes "truth"). Denying wrongful discharge remedies to in-house attorneys is simply another manifestation of that belief.