

General Dynamics Corp. v. Superior Court: **Striking a Blow for Corporate Counsel**

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I. INTRODUCTION

Imagine you are a loyal employee for a major national corporation. You have been employed by the corporation for the past fifteen years and have been rewarded for your hard work with numerous promotions and pay raises. You have a nice house in the suburbs, a loving spouse, and two young children; you are living the proverbial American dream. One day, you discover that certain members of the corporation are engaging in (or are planning to engage in) conduct that violates a state or federal law. Although you are under no legal or professional duty to report this discovered illegal conduct,¹ your loyalty to the corporation and your conscience lead you to notify your supervisor and disclose the situation. One week later, you are summoned to the office of the president of the corporation and are summarily fired. You are quite naturally upset and your feelings of betrayal lead you to investigate the possible legal options that may be available.

Most people would not be surprised to discover that, on the basis of these hypothetical facts, many attorneys would be more than willing to represent this fictional employee. In fact, the chances for some type of recovery in this hypothetical case are most likely quite good. There is, however, one caveat to this optimistic prediction of recovery: it must be assumed that the fictional corporate employee is not an attorney. If the employee is also an attorney, the chance for any recovery declines significantly, and, depending on the state in which the legal action is brought, the chance for recovery may be nil.²

This Note will analyze the recent decision of the California Supreme Court in *General Dynamics Corp. v. Superior Court*.³ In this decision, the California

¹ For the purposes of this hypothetical, I am making the assumption that this fictional employee will not be violating any state or federal law by failing to report the discovered conduct. In reality, it is quite possible that the employee would be potentially liable for any harm caused by the unreported conduct under some conspiracy or accessory theory. Furthermore, it is likely that this fictional employee, as a condition of continued employment, would also be under some affirmative duty to report the discovered illegal conduct to a superior within the corporation.

² For a listing of relevant cases in the states that have decided this question, see *infra* note 6.

³ 876 P.2d 487 (Cal. 1994).

Supreme Court upheld the decision of Judge Joseph E. Johnston of the Superior Court of San Bernardino County⁴ that allowed a discharged corporate attorney to sue his former employer under the theory of wrongful discharge⁵ and breach of an implied contract. Part II of this Note will review the facts of *General Dynamics* and summarize the reasoning and holding of the California Supreme Court. Part III will provide a brief history of the employment at-will doctrine and will examine how this general doctrine has been eroded in recent years. Part IV will consist of an analysis of the *General Dynamics* decision, focusing mainly on the public policy (wrongful discharge) theory of recovery. The allowance of this theory of recovery is what sets apart the *General Dynamics* decision from the handful of other discharge cases that have dealt specifically with in-house attorneys.⁶ In fact, of the cases that have allowed

⁴ *General Dynamics Corp. v. Rose*, No. RCV 059238 (Cal. Super. Ct. Mar. 4, 1992), *aff'd sub nom. General Dynamics Corp. v. Superior Court*, No. E010883, 1993 WL 225346 (Cal. App. Dep't Super. Ct. June 8, 1993), *aff'd*, 876 P.2d 487 (Cal. 1994).

⁵ The term "wrongful discharge" is often used in conjunction with or in place of other similar terms, most notably "retaliatory discharge," "tortious discharge," and "abusive discharge." These terms will be used interchangeably throughout this Note and are meant to denominate those theories of recovery that are based solely on a tort notion that the employer has wrongly violated a state's public policy. Please note that the courts and commentators in the field of employment law often use these terms to apply collectively to causes of action based not only upon a public policy tort theory of recovery, but also upon theories based on specific statutory enactments as well as theories based on contract law. Again, this Note will use such terms only to represent the former theory of recovery.

⁶ *Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd in part on other grounds*, 855 F.2d 1160 (5th Cir. 1988), and *aff'd on other grounds*, 503 U.S. 131 (1992) (granting employer's motion to dismiss complaint of plaintiff-house counsel who alleged he was discharged for giving the company legal advice concerning compliance with various federal and state environmental laws); *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991) (denying in-house counsel's claim for retaliatory discharge where attorney alleged that he was discharged when he objected to the shipment of tainted kidney dialysis equipment by the corporation); *Herbster v. North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 728 (Ill. 1987), *cert. denied*, 484 U.S. 850 (1987) (denying former chief legal officer and vice-president in charge of the corporate legal department the right to sue for retaliatory discharge where attorney alleged he was terminated for refusing to remove or destroy sensitive internal company documents that were subject to a discovery request in litigation brought by an insured against the corporation); *Mourad v. Automobile Club Ins. Ass'n*, 465 N.W.2d 395 (Mich. Ct. App. 1991), *appeal denied*, 478 N.W.2d 443 (Mich. 1991) (allowing an in-house attorney to maintain a cause of action for breach of an employment contract to terminate for just cause, which was established by the company's policy manual and pamphlets); *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991) (holding that an in-house attorney may maintain a breach of contract claim against his former employer based on the

corporate attorneys to bring a discharge suit against their former employer and client,⁷ the wrongful discharge theory of recovery had not, before *General Dynamics*, been approved.⁸ Although some commentators have argued that recovery for in-house attorneys should never be allowed solely on a wrongful discharge theory,⁹ this Note will assert that such a recovery should be allowed and that, consequently, the *General Dynamics* decision is on solid footing. This Note takes a realistic and practical look at the issue of wrongful discharge suits brought by in-house attorneys and the problems that these suits can raise and reaches the same equitable conclusion as that reached by the California Supreme Court in *General Dynamics*.

contention that he was fired in violation of the procedures established by an employee handbook); *Parker v. M & T Chems., Inc.*, 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989) (holding that an in-house attorney was entitled to maintain a retaliatory discharge action under a whistleblower statute); *Kaplan v. Heinfling*, 526 N.Y.S.2d 73 (N.Y. App. Div. 1988), *appeal denied*, 531 N.E.2d 658 (N.Y. 1988) (holding that an attorney who was counsel to a corporation could not maintain a suit for fraud and tortious interference with the attorney's contract with the corporation).

Although these suits are a relative rarity, there has been significant scholarly comment on the issues raised in these cases. *See, e.g.*, Elliott M. Abramson, *Why Not Retaliatory Discharge for Attorneys: A Polemic*, 58 TENN. L. REV. 271 (1991); Alfred G. Felio, *Discharge of Professional Employees: Protecting Against Dismissal for Acts Within a Professional Code of Ethics*, 11 COLUM. HUM. RTS. L. REV. 149 (1979); 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); 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); Note, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 COLUM. L. REV. 389 (1992). The purpose of this Note is not to summarize the material already covered in the scholarly writings on this subject. This Note is an attempt to look specifically at the wrongful discharge (public policy) theory of recovery in these cases and how this theory was applied in *General Dynamics*. This Note will analyze the specific public policy aspect of the arguments against extending this cause of action to corporate attorneys and attempt to refute these concerns and justify an expansion of this theory of recovery by using a very realistic and practical analysis of the public policy justifications of such an extension.

⁷ *Mourad v. Automobile Club Ins. Ass'n*, 465 N.W.2d 395 (Mich. Ct. App. 1991), *appeal denied*, 478 N.W.2d 443 (Mich. 1991); *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991); *Parker v. M & T Chems. Inc.*, 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989).

⁸ *General Dynamics Corp. v. Superior Court*, 876 P.2d 487, 501 (Cal. 1994); Steven S. Gensler, *Wrongful Discharge for In-House Attorneys? Holding the Line Against Lawyers' Self-Interest*, 1992 U. ILL. L. REV. 515, 518 (1992).

⁹ *See Gensler, supra* note 8.

II. *GENERAL DYNAMICS CORP. V. SUPERIOR COURT*

A. *The Facts*

Andrew Rose¹⁰ was an attorney employed by General Dynamics Corporation (hereinafter General Dynamics).¹¹ In 1978, at the age of twenty-seven, Rose began working for General Dynamics as a contract administrator at its Pomona plant and steadily progressed within the corporation, earning repeated commendations and, after fourteen years, he was in line to become a division vice-president and general counsel.¹² Shortly before his termination with the company, however, Rose was involved in several incidents that allegedly displeased his supervisors.¹³

First, Rose spearheaded an investigation into employee drug use at the Pomona plant and uncovered widespread drug use among the General Dynamics workforce; this discovery eventually led to the termination of more than sixty General Dynamics employees.¹⁴ The second incident involved the "bugging" of the office of the chief of security.¹⁵ Rose protested the company's failure to investigate this incident that, if true, would be a criminal offense and a possible breach of national security (the incident involved a major defense contractor).¹⁶ The last incident involved Rose's advice to General Dynamics officials that the company's salary policy with respect to the compensation paid a certain class of employees might be in violation of the federal Fair Labor Standards Act of 1938,¹⁷ possibly exposing the corporation to millions of dollars in backpay claims.¹⁸

On June 24, 1991, Rose was abruptly fired by General Dynamics, the company claiming that he had been terminated because of a loss of its

¹⁰ The "facts" hereinafter discussed are only the "facts" as alleged by the plaintiff, Mr. Andrew Rose, in his complaint as originally filed. *General Dynamics*, 876 P.2d at 490. The only issue before the California Supreme Court was whether the plaintiff had stated a valid claim for relief. *Id.* at 489. After holding that the plaintiff was entitled to go forward with his claim, the court remanded the case for further proceedings at which time a determination of the "facts" will be made. *Id.* at 505.

¹¹ *Id.* at 490.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 490-91.

¹⁵ *Id.* at 491.

¹⁶ *Id.*

¹⁷ 29 U.S.C. §§ 201-19 (1988).

¹⁸ *General Dynamics*, 876 P.2d at 491.

confidence in his ability to vigorously represent the corporation's interests.¹⁹ Rose subsequently filed a complaint against General Dynamics, relying on two main theories of relief.²⁰ First, he alleged that General Dynamics, by its conduct and other assurances, had implicitly represented over the years that he was subject to dismissal only for "good cause."²¹ Second, the complaint alleged that Rose was fired for his involvement in the above three incidents and that his termination violated fundamental public policy.²² The company filed a general demurrer, asserting that because Rose had been employed as an in-house attorney, he was subject to discharge at any time "for any reason or for no reason."²³ Consequently, the corporation asserted, Rose had failed to state a claim for relief.²⁴ The trial court overruled the demurrer and the Court of Appeal denied General Dynamics' ensuing writ of mandate, ruling that the complaint was sufficient, at least at the pleading stage, to survive a general demurrer as to both theories for relief.²⁵ The California Supreme Court then granted review.²⁶

B. *The California Supreme Court's Decision and Reasoning*

The main issue in this case was whether an attorney's status as "in-house"²⁷ counsel affected his right to pursue a claim for damages following an allegedly wrongful termination of employment.²⁸ In its opinion, the California Supreme Court discussed the important characteristics of the role of in-house counsel as opposed to the traditional role of the attorney in our society.²⁹ The

¹⁹ *Id.* at 490.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* For a more detailed discussion of the theory behind this cause of action, see *infra* notes 79-105 and accompanying text.

²³ *Id.* at 491.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 489.

²⁷ I will use the term "in-house counsel/attorney" interchangeably with the term "corporate counsel/attorney" throughout the remainder of this Note to describe attorneys who are the full-time employees of a single, corporate client. The literature surrounding this area of law has used a variety of terms to describe the corporate attorney including "inside" or "house" counsel. See, e.g., Reynolds, *supra* note 6, at 554 n.4.

²⁸ *General Dynamics*, 876 P.2d at 489.

²⁹ *Id.* at 491. The court also noted the growth in the number of in-house counsel in recent years. *Id.* One survey even indicates that more than ten percent of all attorneys in the United States are employed in-house by corporations. *Id.* at n.2.

court pointed out that, unlike the law firm partner,³⁰ the economic fate of in-house attorneys is tied directly to a single employer "at whose sufferance they serve."³¹ Thus, the court correctly noted that "from an economic standpoint, the dependence of in-house counsel is indistinguishable from that of other corporate [employees] who also owe their livelihoods and career goals and satisfaction to a single organizational employer."³² Moreover, the court also recognized the dissimilarity between the professional relationship of "inside" corporate attorneys and "outside" attorneys to their respective clients.³³ The corporate attorney is not hired for a "one shot" undertaking, but instead often takes on a larger advisory and compliance role.³⁴ The court asserted that this expansion in the scope of the corporate attorney's work, along with the close professional identification with the corporate employer, can easily subject the in-house attorney to unusual pressures to conform to organizational goals.³⁵

The heart of General Dynamics' defense was its total reliance on the court's earlier decision in *Fracasse v. Brent*.³⁶ The corporation asserted that this case was dispositive of all issues raised by Rose in his complaint.³⁷ In *Fracasse*, the California Supreme Court had concluded that "a client should have both the power and the right at any time to discharge his attorney with or without cause."³⁸ While it reaffirmed its holding in *Fracasse*, the *General*

³⁰ Of course not every attorney employed in the United States is employed as either corporate counsel or a private practitioner. In today's legal environment, attorneys are employed in a variety of settings. It is not the purpose of this Note to survey the different possible opportunities available to attorneys or to compare the corporate counsel's position to every possible legal position that may be available to an attorney. Instead, this Note, where appropriate, will concentrate on the same comparison used by the California Supreme Court, namely the comparison between corporate counsel and the private practitioner.

³¹ *General Dynamics*, 876 P.2d at 491.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 492.

³⁶ 494 P.2d 9 (Cal. 1972). In *Fracasse*, an attorney had entered into a contingent fee contract with a client to represent her in a personal injury lawsuit. Before any recovery had been made on her behalf, the client decided to terminate the relationship. The attorney then filed an action against the former client claiming that he had been discharged without cause and in breach of the agreed upon contingency fee contract. The court affirmed the trial court's dismissal in favor of the former client.

³⁷ *General Dynamics*, 876 P.2d at 492.

³⁸ *Fracasse*, 494 P.2d at 13. The court, however, also held that the client had to compensate the former attorney for the value of any services previously provided in the event of a subsequent recovery.

Dynamics court noted that the absolute right relied upon as a defense could not be read as broadly as the corporation wished; to do so could lead to unconscionable results.³⁹ Consequently, the court stated that “our language in *Fracasse* should not be read as standing for more than its context and rationale will reasonably support.”⁴⁰ As such, the court did not feel constrained by its opinion in that earlier case.⁴¹ It is against this backdrop, then, that the court went on to evaluate the two theories of recovery set forth by Rose in his original complaint.

1. *The Implied-in-Fact Contract Claim*

The court recognized the validity of the implied-in-fact contract claim as a limitation on the employer’s historical at-will power to terminate its employees.⁴² Because this case came to the court at the pleadings stage only, however, General Dynamics had not challenged the factual accuracy of any

³⁹ *General Dynamics*, 876 P.2d at 494. In fact, the court states that “‘general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.’” *Id.* (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)). Thus, the court demonstrated the possible unconscionable results of such a broad reading of the right that was upheld in *Fracasse* by creating the following hypothetical:

Suppose an attorney in New York responds to a professional advertisement seeking an assistant general counsel for a corporation headquartered in Los Angeles. A series of negotiations ensues and the parties execute a written contract under which the employer agrees to hire the attorney to perform legal work as a full time employee for an agreed salary. Suppose further that the agreement provides that the attorney can only be terminated for specified reasons. The newly hired lawyer-employee then sells his house, moves family and goods across the country, buys a new home, enrolls his children in local schools, and begins his new employment. Three months later, he is summarily fired by the company for reasons that are not among those stipulated in the employment contract. To insist in the face of such egregious circumstances that our opinion in *Fracasse* . . . immunizes the employer by providing an “absolute” right to discharge the employee with complete impunity, foreclosing suit on the contract terms, would compel us to embrace an intuitively unjust, even outrageous, result on the basis of a holding expressly shaped by the unique concerns confronting the contingent fee personal injury client who has lost faith in counsel.

Id.

⁴⁰ *Id.* (citation omitted).

⁴¹ *Id.* at 495.

⁴² *Id.* For a brief look at the history of the employment at-will doctrine and the fairly recent limitations placed upon that doctrine, see *infra* notes 79–105 and accompanying text.

allegations in Rose's original complaint.⁴³ Instead, General Dynamics' only challenge to this theory of relief was that the holding in *Fracasse* applied globally to immunize the corporation from any liability as a consequence of its termination of Rose.⁴⁴ As already noted, the court did not feel constrained by its holding in *Fracasse*.⁴⁵ The court felt that the overriding distinction between the *Fracasse* case and the case then before it lay in the allegations that Rose was hired as a "career oriented" employee with an expectation of permanent employment, provided, of course, that his performance was satisfactory.⁴⁶ Thus, the court held that while General Dynamics did have the right to discharge any member of its corporate legal staff in whom it had lost confidence, that right did not mean that it could do so without honoring antecedent contractual obligations.⁴⁷ "In short, implied-in-fact limitations being a species of contract, no reason appears why an employer that elects to limit its at-will freedom to terminate the employment relationship with in-house counsel should not be held to the terms of its bargain."⁴⁸

⁴³ *Id.* This statement holds true for both claims pursued by Rose (i.e., the implied-in-fact contract claim and the wrongful discharge claim).

⁴⁴ *Id.*

⁴⁵ See *supra* text accompanying note 41.

⁴⁶ *General Dynamics*, 876 P.2d at 495. The court further illustrated the distinction between *Fracasse* and Rose's case by noting that Rose was allegedly promised job security and substantial retirement benefits, that he allegedly received regular outstanding performance reviews, promotions, salary increases, and commendations throughout his fourteen-year employment, and that the corporation abruptly discharged him without adhering to its published discharge procedures. *Id.*

⁴⁷ *Id.* at 496.

⁴⁸ *Id.* The court found instructive the recent opinion of the Minnesota Supreme Court in which that court stated:

"The fact remains . . . that the in-house attorney is also a company employee, and we see no reason to deny the job security aspects of the employer-employee relationship if this can be done without violence to the integrity of the attorney-client relationship. For matters of compensation, promotion, and tenure, inside counsel are ordinarily subject to the same administrative personnel supervision as other company employees. These personnel arrangements differ from the traditional scenario of the self-employed attorney representing a client; and these differences are such, we think, that the elements of client trust and attorney autonomy are less likely to be implicated in the employer-employee aspect of the in-house counsel status."

Id. (alteration in original) (quoting *Nordling v. Northern States Power Co.*, 478 N.W.2d 498, 502 (Minn. 1991)).

2. *The Wrongful Discharge Claim*

The court also recognized the validity of the wrongful discharge claim as another limitation on the general employment at-will doctrine. In quoting from one of its earlier opinions, the court stated that the theoretical “reason for labeling the discharge wrongful in such cases is not based on the terms and conditions of the contract, but rather arises out of a duty implied in law on the part of the employer to conduct its affairs in compliance with public policy”⁴⁹ The court, in discussing the validity of the wrongful discharge claim under California law, enumerated three requirements of such a claim.

First, there is a requirement that the public policy at issue be not only “fundamental,” but also clearly established in the Constitution and positive law of the state.⁵⁰ The second requirement is that the policy subverted by the employee’s conduct, although established by positive law, must be truly a public one.⁵¹ The third requirement, under California law, of a valid wrongful discharge claim was well stated in *Foley v. Interactive Data Corp.*,⁵² which explained that “decisions recognizing a tort action for discharge in violation of public policy seek to protect the public, by protecting the employee who refuses to commit a crime, who reports criminal activity to proper authorities, or who discloses other illegal, unethical, or unsafe practices.”⁵³

The court recognized that this foundational public policy rationale is particularly important in the case of an attorney-employee who owes a dual allegiance: the highest duty is to the welfare and interests of the client, limited by a sometimes competing duty, namely the requirement that attorneys conduct themselves within the scope of their professional ethical norms.⁵⁴ In California, the minimum ethical standards that an attorney must follow are those found within the California Rules of Professional Conduct. The court noted that these circumstances can place an attorney in a moral dilemma where the attorney

⁴⁹ *Id.* at 497 (quoting *Foley v. Interactive Data Corp.*, 765 P.2d 373, 377 (Cal. 1988)).

⁵⁰ *Id.*

⁵¹ *Id.* The public policy must be one “affect[ing] a duty which inures to the benefit of the public at large rather than to a particular employer or employee.” *Foley*, 765 P.2d at 379.

⁵² 765 P.2d 373 (Cal. 1988) (holding that plaintiff had no cause of action for tortious discharge in contravention of public policy because no substantial public policy was violated by plaintiff’s termination).

⁵³ *General Dynamics*, 876 P.2d at 497 (quoting *Foley*, 765 P.2d at 380) (citations omitted).

⁵⁴ *Id.* at 497–98. For more information on attorney ethical norms, see *infra* notes 145–57 and 163–82 and accompanying text.

may have to choose between the interests of the client, and the interests embodied in the ethical norms of his profession.⁵⁵ The court correctly concluded that this moral dilemma can affect all attorneys, not just corporate attorneys.⁵⁶ The court also pointed out, however, that the unique economic and professional situation of the in-house counsel can intensify the pressure brought about by such a moral dilemma in a way that is not present for the "non-corporate" attorney.⁵⁷ As a result, the court concluded that in many cases, in-house counsel may have an even more powerful claim to judicial protection than their "non-corporate" counterparts.⁵⁸

The California Supreme Court was not blind, however, to the substantial counterargument against permitting the pursuit of a retaliatory discharge tort claim by in-house counsel. This counterargument holds that the maintenance of such suits should be denied because such suits pose too great a threat to the attorney-client relationship.⁵⁹ The court discussed three recent cases that have illustrated this rationale.⁶⁰ The courts that have declined to permit corporate counsel to pursue wrongful discharge claims have rested their conclusions on two distinct grounds. First, because the fiduciary qualities of the profession

⁵⁵ *Id.* at 498.

⁵⁶ *Id.*

⁵⁷ *Id.* The unique situation of the in-house attorney includes all those distinguishing factors that were previously discussed by the court. Thus, the in-house attorney may also be forced not only to choose between the interests of the client and the interests of his profession's ethical considerations, but also between continued employment and unemployment.

⁵⁸ *Id.*

⁵⁹ *Id.* The leading case following this rationale is *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991) (denying in-house counsel's claim for retaliatory discharge where attorney alleged that he was discharged when he objected to the shipment of tainted kidney dialysis equipment by the corporation).

⁶⁰ *Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd in part on other grounds*, 855 F.2d 1160 (5th Cir. 1988), *and aff'd on other grounds*, 503 U.S. 131 (1992) (granting employer's motion to dismiss complaint of plaintiff-house counsel who alleged he was discharged for giving the company legal advice concerning compliance with various federal and state environmental laws); *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991) (denying in-house counsel's claim for retaliatory discharge where attorney alleged that he was discharged when he objected to the shipment of tainted kidney dialysis equipment by the corporation); *Herbster v. North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 728 (Ill. 1987), *cert. denied*, 484 U.S. 850 (1987) (denying former chief legal officer and vice-president in charge of the corporate legal department the right to sue for retaliatory discharge where attorney alleged he was terminated for refusing to remove or destroy sensitive internal company documents that were subject to a discovery request in litigation brought by an insured against the corporation).

pervade the attorney-client relationship, it is essential to the proper functioning of the attorney's role that the client be assured that all matters disclosed to counsel in confidence will remain sacrosanct.⁶¹ Second, a wrongful discharge cause of action may be redundant. If attorneys are in situations that would enable them to bring such a claim, it is quite likely that the attorneys would already be under an ethical obligation to sever the professional relationship with the erring client.⁶²

The California Supreme Court eventually reached the conclusion that in-house counsel may state a cause of action in tort for retaliatory discharge.⁶³ The court reached its conclusion in part because of the ethical constraints placed upon the in-house counsel.⁶⁴ The court also rejected the emphasis by some courts⁶⁵ on the "remedy" of the in-house counsel's duty to withdraw.⁶⁶ In *General Dynamics*, the court rejected this "remedy" as illusory, noting that "courts do not require nonlawyer employees to quietly surrender their jobs rather than 'go along' with an employer's unlawful demands."⁶⁷ The court, however, did limit, in two ways, the scope of its conclusion that the in-house

⁶¹ *General Dynamics*, 876 P.2d at 500. For further discussion of this rationale, see *infra* notes 132-57 and accompanying text.

⁶² *Id.* For further discussion of this rationale, see *infra* notes 163-82 and accompanying text.

⁶³ *Id.* at 505.

⁶⁴ *Id.* at 498. The court's rationale can be illustrated by its assertion that:

Granted the priest-like license to receive the most intimate and damning disclosures of the client, granted the sanctity of the professional privilege, granted the uniquely influential position attorneys occupy in our society, it is precisely because of that role that attorneys should be accorded a retaliatory discharge remedy in those instances in which mandatory ethical norms embodied in the Rules of Professional Conduct collide with illegitimate demands of the employer and the attorney insists on adhering to his or her clear professional duty. It is, after all, the office of the retaliatory discharge tort to vindicate fundamental public policies by encouraging employees to act in ways that advance them. By providing the employee with a remedy in tort damages for resisting socially damaging organizational conduct, the courts mitigate the otherwise considerable economic and cultural pressures on the individual employee to silently conform.

Id. at 501 (emphasis omitted).

⁶⁵ See cases cited *supra* note 6.

⁶⁶ *General Dynamics*, 876 P.2d at 502. For further discussion of this rationale, see *infra* notes 163-82 and accompanying text.

⁶⁷ *Id.* The court noted that "the retaliatory discharge tort claim is designed to encourage and support precisely the *opposite* reaction." *Id.*

attorney may state a cause of action for wrongful discharge.⁶⁸

First, the court drew a distinction between the cases in which the in-house attorney was discharged for following a mandatory ethical obligation prescribed by a professional rule or statute⁶⁹ and the cases in which the in-house attorney was discharged for conduct that was merely ethically permissible, but not required by statute or ethical code.⁷⁰ In cases of the second variety, before allowing a wrongful discharge claim to go forward, a court must resolve two important questions: (1) whether the employer's conduct is of a kind that would give rise to a wrongful discharge claim by a nonattorney employee; and, (2) whether some statute or ethical rule specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer and engage in the "nonfiduciary" conduct for which he was terminated.⁷¹

The second limitation the court placed on the scope of a permissible retaliatory discharge cause of action related to the concern expressed by other courts⁷² for the integrity of the fiduciary aspects of the attorney-client relationship.⁷³ This second limitation is actually threefold. First, the court felt that the fiduciary values underlying the professional relationship of an attorney and her client can be protected by limiting judicial access to claims grounded explicitly in the ethical norms embodied in the Rules of Professional Responsibility and statutes of like effect.⁷⁴ Second, the court noted that the contours of the statutory attorney-client privilege should continue to be observed.⁷⁵ Last, the court stated that trial courts can and should implement an array of *ad hoc* measures from their equitable arsenal⁷⁶ designed to permit the

⁶⁸ *Id.* at 503.

⁶⁹ *Id.* at 502. For example, CAL. BUS. & PROF. CODE § 6068 (West 1989) provides for a list of mandatory duties of an attorney, including counseling or maintaining such actions, proceedings, or defenses only as appear to him or her "legal or just."

⁷⁰ *General Dynamics*, 876 P.2d at 503.

⁷¹ *Id.*

⁷² *E.g.*, *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991).

⁷³ *General Dynamics*, 876 P.2d at 504. The concern is that by allowing corporate counsel to bring retaliatory discharge claims against their former employers and clients, the confidentiality of the attorney-client privilege may be breached by the disclosure of confidential material in the course of a trial. It is thought that this possible consequence of allowing wrongful discharge suits by in-house counsel could have a chilling effect on the confidential relationship between an attorney and her client.

⁷⁴ *Id.* at 503.

⁷⁵ *Id.* at 504. In California, the attorney-client privilege is defined by statute. CAL. EVID. CODE §§ 950-962 (West 1989).

⁷⁶ These *ad hoc* measures can include the use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings,

attorney-plaintiff to attempt to make the necessary proof while at the same time protecting from disclosure client confidences subject to the privilege.⁷⁷ Consequently, the court ruled that the case should be remanded to the trial court and that the plaintiff, Rose, be permitted to amend his complaint in accordance with the views expressed by the court.⁷⁸

III. THE EMPLOYMENT AT-WILL DOCTRINE AND ITS RECENT DECLINE

Before any meaningful analysis of the California Supreme Court's opinion in *General Dynamics* can be undertaken, it is important to take a brief look at the history of the employment at-will doctrine and its decline in recent years.⁷⁹

The employment at-will doctrine is a distinctly American development that is a clear departure from the English common law approach to employment relationships.⁸⁰ The general judge-made doctrine of employment at-will states that either the employer or the employee may, at any time and for any reason or no reason, terminate the employment relationship.⁸¹ The American notion of employment at-will first took a firm hold in the United States beginning in the last part of the nineteenth century⁸² and is still a basic concept taught in all first-year contracts courses. In recent years, however, the at-will rule has been

and *in camera* proceedings. *General Dynamics*, 876 P.2d at 504.

⁷⁷ *Id.*

⁷⁸ *Id.* at 505. Rose was allowed to amend his complaint because he had failed to allege that the conduct that allegedly led to his discharge was required or supported by any provision of the California Rules of Professional Conduct or any other relevant statute. *Id.*

⁷⁹ It is not the purpose of this Note to go into any detail of the growth and decline of the employment at-will doctrine. For the purposes of this Note, it is only important to briefly lay the background and recent developments of the employment at-will doctrine. For a more complete coverage of this subject, see ANDREW D. HILL, "WRONGFUL DISCHARGE" AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE (1987).

⁸⁰ See HILL, *supra* note 79, at 1. Under the English rule, an employment relationship was presumed, unless otherwise agreed upon, to be an agreement for a yearly term of employment with each party being required to give reasonable notice to the other if a termination of the relationship was sought. *Id.* See also *Beeston v. Collyer*, 130 Eng. Rep. 786 (C.P. 1827); *Baxter v. Nurse*, 134 Eng. Rep. 1171 (C.P. 1844); RICHARD B. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* 219 n.2 (Harper Torchbook 1965) (1946).

⁸¹ See MACK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW 2* (practitioner's ed. 1988).

⁸² HILL, *supra* note 79, at 1. See also *Debriar v. Minturn*, 1 Cal. 450 (1851); *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56 (1870); *Franklin Mining Co. v. Harris*, 24 Mich. 115 (1871); *Payne v. Western & Atl. R.R.*, 81 Tenn. 507 (1884), *overruled by*, *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915).

“riddled with exceptions and exemptions.”⁸³ This erosion of the at-will rule is occurring at the hands of both legislatures⁸⁴ and courts.⁸⁵

For the purposes of this Note, probably the most important legislative exception to the at-will rule is the enactment by states of statutes commonly known as “Whistleblower Protection Acts.”⁸⁶ Generally, these statutes are

⁸³ HILL, *supra* note 79, at 14. *See also infra* notes 84-105 and accompanying text.

⁸⁴ The legislative exceptions to the employment at-will doctrine have been created at both the federal and state levels. Examples of federal legislation limiting the employer's power of termination include: National Labor Relations Act of 1935, 9 U.S.C. § 151 (1988) (providing, in part, that employees cannot be fired for involvement in union activities); Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) (1988) (declaring, in part, an employer's discharge of any employee because of such individual's age an unlawful act); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1988) (declaring, in part, the discharge of an employee because of race, color, religion, sex, or marital status an unlawful employment practice). Generally, such federal enactments deny the employer the right to discharge an employee on the basis of sex, race, religion, age, and other enumerated characteristics.

Examples of specific state legislation limiting the employer's power to terminate include: the Illinois Human Rights Act, ILL. ANN. STAT. ch. 775, §§ 1-102 (Smith-Hurd 1991) (forbidding, in part, employers from discharging employees on the basis of race, color, religion, national origin, age, sex, or marital status); the Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS § 37.2102 (1985 & Supp. 1991) (prohibiting, in part, employee discharge on the basis of religion, race, color, national origin, age, sex, or marital status); the New York Human Rights Law, N.Y. EXEC. LAW § 290 (McKinney 1982) (forbidding, in part, an employer of four or more employees from discharging an employee because of age, race, creed, color, national origin, sex, disability, or marital status). For a detailed state-by-state analysis of the major statutory exceptions to the at-will doctrine, see LEX K. LARSON & PHILIP BOROWSKY, UNJUST DISMISSAL §§ 10.01-10.52 (1994).

⁸⁵ *See, e.g.*, *Wagenseller v. Scottsdale Memorial Hosp.*, 710 P.2d 1025 (Ariz. 1985) (en banc) (holding that an employer may not discharge an employee for “bad cause”—that which violates public policy); *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987) (en banc) (holding that an employment handbook can create enforceable rights under ordinary contract principles or a theory of promissory estoppel); *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 551 N.E.2d 981 (Ohio 1990) (recognizing a cause of action in tort for wrongful discharge in violation of public policy), *overruled by* *Cage v. Gateways to Better Living, Inc.*, No. 94 C.A. 44, 1995 WL 382170 (Ohio Ct. App. June 26, 1995). For a detailed state-by-state analysis of the major judicial exceptions to the at-will doctrine, see LARSON & BOROWSKY, *supra* note 84, at §§ 10.01-10.52.

According to a recent survey, 43 of the 50 jurisdictions have adopted the so-called “retaliatory discharge” or “wrongful discharge” cause of action as an exception to the employer's historical at-will power of termination. *See Note, In-House Counsel's Right to Sue for Retaliatory Discharge, supra* note 6, at 394.

⁸⁶ *See, e.g.*, CONN. GEN. STAT. ANN. §§ 31-51 (West 1983) (applying to private employers and political subdivisions of the state); CONN. GEN. STAT. ANN. §§ 4-61 (West

created in order to protect employees from being discharged in retaliation for the employees' reporting of an illegal act perpetrated by the employer or another employee.⁸⁷ These statutes are usually premised on the notion that the state's public policy is to encourage reporting of harmful or illegal acts and to protect those employees who decide to come forward with such information.⁸⁸

As noted above, the courts have also taken a significant role in the derogation of the employment at-will doctrine.⁸⁹ In fact, because the employment at-will rule is a purely judge-made doctrine, many courts have felt free to deviate from it as the circumstances dictate.⁹⁰ As one commentator has noted, the courts are whittling away the general at-will rule in two significant ways: "by finding implied contractual protections⁹¹ and by permitting discharged employees to sue in tort where the dismissal violated the state's public policy."⁹² The distinction between the contract theory exceptions and the public policy tort exception (hereinafter the "public policy" exception) to the employment at-will doctrine is made by focusing on the duty that has been allegedly breached: is it a duty mandated by a promise set forth in an explicit

Supp. 1994) (applying to state employees); MICH. COMP. LAWS ANN. §§ 15.361-369 (West 1981 & Supp. 1994) (applying to both private and state employees); LA. REV. STAT. ANN. § 30:2027 (West 1989 & Supp. 1994) (prohibiting any retaliatory action against an employee who makes a good faith report of a violation of local, state, or federal environmental law or regulation). The federal government and roughly three-fourths of the states have enacted this type of legislation. LARSON & BOROWSKY, *supra* note 84, at § 5.03.

California has two whistleblower statutes. *See infra* note 87. The California Supreme Court, however, did not consider this theory of recovery in *General Dynamics*. One possible explanation of this may be that Mr. Rose did not state such a claim in his complaint. Whatever the reason for this omission, these statutes are important in corporate attorney discharge suits not only because these statutes offer a viable theory of recovery, but because the statutes represent an explicit enunciation of the public policy considerations that are put forth as grounds for the extension of the wrongful discharge cause of action to corporate attorneys.

⁸⁷ For example, California's general whistleblower statute provides in pertinent part: "No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation." CAL. LABOR CODE § 1102.5 (West 1989). California also has a whistleblower statute that applies specifically to public employees. CAL. GOV'T CODE § 8547 (West Supp. 1994).

⁸⁸ LARSON & BOROWSKY, *supra* note 84, at § 5.03.

⁸⁹ *See supra* note 85.

⁹⁰ Gensler, *supra* note 8, at 521.

⁹¹ These can include implied-in-fact employment contracts or more simply, implied obligations of good faith. Gensler, *supra* note 8, at 516.

⁹² *Id.*

or implied contract or is it a duty implied by law?⁹³

A. *Contract Theory Exceptions to the Employment At-Will Doctrine*

Contract theory exceptions to the employment at-will doctrine have encountered greater acceptance than the emerging public policy theory.⁹⁴ As noted above, however, the main focus of this Note is to concentrate on the public policy exception to the employment at-will doctrine and how this exception relates to the corporate attorney. Thus, it is only necessary to mention that the court in *General Dynamics* did rely, in part, on an implied-in-fact contract theory to reach its decision. In its reliance on this theory, however, the California Supreme Court broke no new ground in this area of the law and simply added its support to similar decisions reached by other courts.⁹⁵

B. *The Public Policy Exception to the Employment At-Will Doctrine*

The first court to craft a public policy exception to the employment at-will doctrine was the California District Court of Appeals in *Petermann v.*

⁹³ See William L. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201, 209 (1985). This distinction is not always easily made by the courts and many times the analysis performed by courts does not take into account this distinction. *Id.* at 207.

The California Supreme Court, however, has not fallen prey to this "mixing of theories." In *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980), the court distinguished between tort and contract theories, stating: "'[I]t [is] well established in this state that if the cause of action arises from a breach of a promise set forth in the contract, the action is ex contractu, but if it arises from a breach of duty growing out of the contract it is ex delicto [(in tort)].'" *Id.* at 1334 (quoting *Eads v. Marks*, 249 P.2d 257, 260 (Cal. 1952) (quoting *Peterson v. Sherman*, 157 P.2d 863 (Cal. Ct. App. 1945))). Thus, it is not surprising that the court in *General Dynamics* made this same distinction and analyzed each theoretical cause of action separately.

⁹⁴ Mauk, *supra* note 93, at 214. *But cf.* *Reynolds*, *supra* note 6, at 557 (stating that the tort mode of legal discourse has generally predominated).

⁹⁵ *Mourad v. Automobile Club Ins. Ass'n*, 465 N.W.2d 395 (Mich. Ct. App. 1991), *appeal denied*, 478 N.W.2d 443 (Mich. 1991) (allowing an in-house attorney to maintain a cause of action for breach of an employment contract to terminate for just cause, which was established by the company's policy manual and pamphlets); *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991) (holding that an in-house attorney may maintain a breach of contract claim against his former employer based on the contention that he was fired in violation of the procedures established by an employee handbook).

International Brotherhood of Teamsters.⁹⁶ The court in *Petermann* abrogated the judicially created employer privilege because of what it believed was an overriding public policy of upholding the integrity of the judicial process.⁹⁷ “Essentially, this growing body of case law describes a duty of employers not to harm (e.g., fire) their employees who act in a way compelled by some public policy or refrain from acting in a way forbidden by such a policy.”⁹⁸ Thus, as a matter of law, the wrongful discharge cause of action imposes a duty on the employer from the outside.⁹⁹ It has been said that this theoretical exception to the at-will rule is based upon “some external state policy that is deemed to supersede the parties’ agreement.”¹⁰⁰

The courts, however, have been more reluctant to recognize the public policy exception to the traditional at-will rule.¹⁰¹ This may be due in part to the amorphous quality of a “public policy” standard.¹⁰² Consequently, some courts have been careful to limit the extension of the public policy exception to cases where the overriding public policy is clear.¹⁰³ Other courts have even refused

⁹⁶ 344 P.2d 25 (Cal. Dist. Ct. App. 1959). The court found that the employer had fired the plaintiff because he had refused to give false testimony favorable to his union at a hearing. *Id.* at 26. The court held that the plaintiff had 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.” *Id.* at 27.

As one commentator noted, California’s public policy exception stood alone for many years until the Indiana Supreme Court followed suit in *Franpton v. Central Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973), a case in which Indiana recognized a claim for retaliatory discharge where an employee was fired for exercising statutory rights created under the Workman’s Compensation Act. Gensler, *supra* note 8, at 521.

⁹⁷ *Id.*

⁹⁸ Reynolds, *supra* note 6, at 559.

⁹⁹ HILL, *supra* note 79, at 25.

¹⁰⁰ *Id.* at 26 (quoting ROBERT E. WILLIAMS & THOMAS R. BAGBY, *ALLIS-CHALMERS CORP. v. LUECK: THE IMPACT OF THE SUPREME COURT’S DECISION ON WRONGFUL DISCHARGE SUITS AND OTHER STATE COURT EMPLOYMENT LITIGATION* 19 (1986)). The Illinois Supreme Court stated that “[t]he foundation of the tort of retaliatory discharge lies in the protection of public policy” *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 880 (Ill. 1981), *remanded*, 489 N.E.2d 474 (Ill. App. Ct. 1986).

¹⁰¹ See *supra* note 94 and accompanying text.

¹⁰² Gensler, *supra* note 8, at 522. Several courts have explicitly recognized this “shortcoming” of the public policy exception. See, e.g., *Petermann v. International Bhd. of Teamsters*, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (stating that “[t]he term ‘public policy’ is inherently not subject to precise definition”); *Palmateer v. International Harvester Co.*, 421 N.E.2d at 878 (stating that “the Achilles heel of the principle lies in the definition of public policy.”).

¹⁰³ HILL, *supra* note 79, at 28.

to create a public policy exception at all, asserting that the legislature is the only proper entity to alter the at-will rule.¹⁰⁴ It appears, however, that the courts have all been in agreement on the scope of the public policy exception to the at-will rule in at least one area: the discharged corporate attorney.¹⁰⁵

IV. AN ANALYSIS OF *GENERAL DYNAMICS CORP. V. SUPERIOR COURT*

Discharge cases involving corporate attorneys are a relative rarity.¹⁰⁶ Of the few reported cases, only three courts, prior to *General Dynamics*, have allowed corporate attorneys to successfully bring such a claim, and of these three courts, not one has allowed the claim to go forward on a public policy theory.¹⁰⁷ Although the *General Dynamics* opinion can be viewed as exceptional because it is one of the rare cases in which an in-house attorney was allowed to bring a claim against his former employer and client, the opinion's real contribution is its allowance of a public policy exception to the at-will rule where a corporate attorney has been discharged. Not surprisingly then, California has once again broken new ground in the area of employment law.¹⁰⁸

While there has been substantial theoretical discussion of the possibility of corporate counsel discharge suits in general,¹⁰⁹ "the truly intriguing case arises when an in-house attorney is discharged in the absence of either statutory or

¹⁰⁴ Gensler, *supra* note 8, at 522. See, e.g., *International City Management Ass'n Retirement Corp. v. Watkins*, 726 F. Supp. 1 (D.D.C. 1989) (refusing to recognize a public policy exception on such grounds); *Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661 (Mo. 1988) (en banc) (same).

¹⁰⁵ See *infra* text accompanying notes 107-14.

¹⁰⁶ See cases cited *supra* note 6. See also *Reynolds*, *supra* note 6, at 563-64; *Wilbur*, *supra* note 6, at 779-80.

¹⁰⁷ *Mourad v. Automobile Club Ins. Ass'n*, 465 N.W.2d 395 (Mich. Ct. App. 1991) (allowing an in-house attorney to maintain a cause of action for breach of an employment contract to terminate for just cause, which was established by the company's policy manual and pamphlets); *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991) (holding that an in-house attorney may maintain a breach of contract claim against his former employer based on the contention that he was fired in violation of the procedures established by an employee handbook); *Parker v. M & T Chems., Inc.*, 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989) (holding that an in-house attorney was entitled to maintain a retaliatory discharge action under a whistleblower statute).

¹⁰⁸ See *Petermann v. International Bhd. of Teamsters*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959) (holding, for the first time, that a public policy exception to the at-will doctrine should be allowed).

¹⁰⁹ See sources cited *supra* note 6.

contractual protection and for reasons relating to his duties as an attorney.”¹¹⁰ In this situation, the in-house attorney must rely purely on a public policy exception to the at-will rule. In such a case, the in-house attorney must claim that his discharge was in violation of a basic public policy of the state. This line of argument, however, can lead to fundamental difficulties for in-house attorneys because if the attorneys were terminated for activities that were performed while they were acting in a legal capacity, public policy concerns that are squarely antithetical to their claim can be directly implicated. These competing public policy concerns involve the sanctity of the attorney-client relationship and include the client’s absolute right to sever the attorney-client relationship¹¹¹ as well as the confidentiality of communications that take place within this and in the furtherance of this relationship.¹¹² As a result, a court faced with a corporate attorney discharge suit is forced to balance and weigh the effects of numerous competing public policy concerns.¹¹³ This difficult task, then, is what makes these cases “truly intriguing” and has led some courts to seemingly skirt such issues.¹¹⁴

A. Public Policy Concerns Weighing Against Extension of the Wrongful Discharge Cause of Action to Corporate Attorneys

The courts have dealt with two main public policy concerns that weigh against the extension of the wrongful discharge cause of action to corporate attorneys. The first is the absolute right of a client to terminate the attorney-client relationship at any time and for any reason. The second is the confidentiality of the attorney-client relationship.

1. The Client’s Right to Sever the Attorney-Client Relationship

The corporation in *General Dynamics* attempted to assert as a total defense

¹¹⁰ Gensler, *supra* note 8, at 529.

¹¹¹ This was the absolute defense that the corporation attempted to invoke in *General Dynamics*. *General Dynamics v. Superior Court*, 876 P.2d 487, 491 (Cal. 1994). For further discussion of this topic, see *infra* notes 115–31 and accompanying text.

¹¹² This “confidentiality” can have two components. The first is the attorney-client privilege and is controlled by rules of evidence. See *infra* notes 136–44 and accompanying text. The second component is the attorney-client confidence and is governed by rules of ethics. See *infra* notes 145–57 and accompanying text.

¹¹³ As Steven Gensler points out, the issue “is purely one of public policy.” Gensler, *supra* note 8, at 529.

¹¹⁴ See cases cited *supra* note 6.

the client's absolute right to sever the attorney-client relationship.¹¹⁵ This same defense tactic has been successfully utilized in several in-house attorney discharge suits in which courts have denied the attorney the right to bring a cause of action against his former employer.¹¹⁶ As stated by the Illinois Supreme Court, this general rule "recognizes that the relationship between an attorney and client is based on trust and that the client must have confidence in his attorney in order to ensure that the relationship will function properly."¹¹⁷ Implicit in this statement is the notion that "no client should be forced to suffer representation by an attorney in whom [the client's] confidence . . . has been lost."¹¹⁸

This general right of a client, however, does not mean that all clients may unilaterally discharge their attorneys under any and all circumstances without consequence. For example, at least one federal court has held that, because discrimination against an employee based on race or sex is prohibited by Title VII of the Civil Rights Act of 1964,¹¹⁹ such discrimination is also prohibited against one employed as in-house counsel.¹²⁰ California also has limited the client's discretion by holding that the Meyers-Milias-Brown Act¹²¹ creates an exception to the general notion that a client may discharge an attorney at will.¹²² Even in *Fracasse*, the case relied upon by General Dynamics,¹²³ the

¹¹⁵ See *supra* notes 36-41 and accompanying text.

¹¹⁶ See, e.g., *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 109 (Ill. 1991) ("Generally, a client may discharge his attorney at any time, with or without cause."); *Herbster v. North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343, 347 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 728 (Ill. 1987), *cert. denied*, 484 U.S. 850 (1987) ("[T]he general rule is that a client may terminate the relationship between himself and his attorney with or without cause.").

¹¹⁷ *Rhoades v. Norfolk & W. Ry. Co.*, 399 N.E.2d 969, 974 (Ill. 1979) (allowing discharged law firm to recover on quantum meruit basis fees for reasonable services performed for former client up to the time of termination). The California Supreme Court has stated that it "should be sufficient that the client, for whatever reason, lost faith in the attorney, to establish 'cause' for discharging him." *Fracasse v. Brent*, 494 P.2d 9, 13 (Cal. 1972) (en banc).

¹¹⁸ *General Dynamics v. Superior Court*, 876 P.2d 487, 493 (Cal. 1994).

¹¹⁹ 42 U.S.C. § 2000e-2(a)(1) (1988) (declaring, in part, the discharge of an employee because of race, color, religion, sex, or marital status an unlawful employment practice).

¹²⁰ *Golightly-Howell v. Oil, Chem. & Atomic Workers Int'l Union*, 806 F. Supp. 921, 924 (D. Colo. 1992) (allowing an African-American female to bring a Title VII suit against the union after she was discharged from her post as the union's in-house counsel).

¹²¹ CAL. GOV'T CODE §§ 3500-3511 (West 1988 & Supp. 1995) (requiring public agencies to refrain from making unilateral changes in employees' wages and working conditions until the employer and employees have bargained to an impasse).

¹²² *Santa Clara County Attorneys Ass'n v. Woodside*, 869 P.2d 1142, 1160 (Cal.) (en

California Supreme Court recognized that, in the event of a recovery, the dissatisfied client was required to compensate the discharged attorney for at least the reasonable value of any services provided.¹²⁴ Thus, the *General Dynamics* court was squarely on point when it realized that if clients could discharge their attorneys without consequence in all circumstances, unconscionable results could easily be produced.¹²⁵ The California Supreme Court was also correct when it held that the general right of a client to terminate the attorney-client relationship could never be as broad as that urged by *General Dynamics*.¹²⁶ Therefore, as the *General Dynamics* court noted, a court dealing with an in-house attorney discharge suit should not feel constrained by the client's defense of an absolute right to discontinue the attorney-client relationship.¹²⁷

The California Supreme Court also was correct in recognizing that Rose's complaint did not even contest the right of *General Dynamics* to sever the attorney-client relationship at any time and for any reason.¹²⁸ Rose simply asserted, and the court agreed, that under the circumstances alleged in the complaint, there should be a cost paid for *General Dynamics*' actions.¹²⁹ By allowing corporate counsel discharge suits, courts will not be infringing in any way on the client's right to sever the attorney-client relationship.¹³⁰ As long as reinstatement is not an available remedy, a court allowing such a suit will not be forcing any client to suffer representation by an attorney in whom the client

banc), *reh'g denied*, 1994 Cal. LEXIS 2768 (Cal. 1994) (allowing an attorney employee association to bring an action for declaratory and injunctive relief under the Meyers-Milias-Brown Act).

¹²³ See *supra* notes 36-41 and accompanying text.

¹²⁴ *Fracasse v. Brent*, 494 P.2d 9 (Cal. 1972) (allowing a personal-injury, contingent-fee client to discharge her attorney, but holding that the client had to compensate the former attorney for the value of any services previously provided in the event of a subsequent recovery).

¹²⁵ See *supra* note 39 and accompanying text.

¹²⁶ See *supra* note 39 and accompanying text.

¹²⁷ The California Supreme Court noted that it did not feel constrained by its earlier holding that a client did possess such a right. See *supra* notes 40-41 and accompanying text.

¹²⁸ *General Dynamics v. Superior Court*, 876 P.2d 487, 494-95 (Cal. 1994).

¹²⁹ *Id.*

¹³⁰ As previously noted, the right of a client to sever the attorney-client relationship quite simply is just that, the right to end the professional relationship. The right encompasses nothing more. For example, a client could not run up thousands of dollars in legal bills, discharge his or her attorney a few minutes before a settlement of the case, and then expect to walk away without paying a penny. No one could reasonably assert that any client had such right. The only right that such a client possesses is the right to end the professional relationship. This is the only right that courts have protected.

has lost confidence.¹³¹ The only claim of such a suit is that the client should pay a price where the attorney has been discharged in violation of a fundamental public policy. Accordingly, the blind recitation of this general proposition of law is not a defensible reason to disallow corporate counsel discharge suits and the courts that have previously done so have simply failed to analyze carefully and logically each legal argument presented to them.

2. Confidentiality of the Attorney-Client Relationship

The preservation of the confidentiality of the attorney-client relationship is the reason most cited by courts for denying a corporate attorney the right to bring a claim against his or her former employer.¹³² As one noted legal commentator asserted, “[n]othing lends more vitality to the client-lawyer relationship than effective communications between lawyer and client.”¹³³ Generally, the confidential aspect of the attorney-client relationship can, in fact, be subdivided into two separate categories: (1) the attorney-client privilege; and, (2) the ethical rules of attorney-client confidence.¹³⁴ Neither of these sources, however, can provide a firm basis for an unassailable wall of silence around an in-house lawyer in a dispute with a former employer and client.¹³⁵

a. The Attorney-Client Privilege

The attorney-client privilege is actually a rule of evidence that protects the exchanges between attorneys and their clients from disclosure at trial.¹³⁶ This privilege does not exist, however, if it is waived by the client or if the involved communication concerns a continuing or future fraud or crime.¹³⁷ As the

¹³¹ Courts should be careful not to overlook the importance of the fact that, in the type of case discussed in this Note, the sole reason that the corporate client has lost confidence in its attorney is because the attorney refused to be a party to some act that would either violate the law or violate the attorney's professional code of conduct. By denying corporate counsel the right to bring a discharge suit, a court would be in effect rewarding the crooked client while at the same time punishing the conscientious in-house attorney. For a further discussion of this point, see *infra* notes 159–62 and accompanying text.

¹³² See cases cited *supra* note 6.

¹³³ CHARLES WOLFRAM, MODERN LEGAL ETHICS § 4.5, at 163–64 (1986).

¹³⁴ *Id.* § 6.1.1, at 242.

¹³⁵ Reynolds, *supra* note 6, at 571.

¹³⁶ WOLFRAM, *supra* note 133, § 6.1.1, at 242. Generally, the privilege applies to confidential communications made between an attorney and his or her client that are made in the course of seeking legal advice. *Id.* § 6.3.1, at 250–51.

¹³⁷ The latter exception is commonly known as the crime or fraud exception and is

United States Supreme Court has stated, the privilege exists to promote and protect "full and frank communication between attorneys and their clients" ¹³⁸ Because the issue of waiver is not likely to be implicated in corporate counsel discharge suits, the only relief such a fired in-house attorney can have is to rely on the crime or fraud exception to the attorney-client privilege.

Several courts have held up the attorney-client privilege as a bar, at least in part, to discharge suits by in-house attorneys. ¹³⁹ These courts have generally asserted that the allowance of such suits would chill attorney-client communication thus defeating the goal of promoting "full and frank communication" between attorneys and their clients. ¹⁴⁰ The court in *General Dynamics*, however, took a more realistic approach to this potential problem. The court emphatically rejected any suggestion that the attorney-client privilege should be diluted, ¹⁴¹ but noted, correctly, that many of these cases will likely lie outside the statutory privilege. ¹⁴² In fact, although never specifically mentioned by the court, the California Evidence Code specifically states that there is no privilege "if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud." ¹⁴³ Thus, while a suit by in-house counsel may involve the potential disclosure of privileged information, such a case can be dealt with appropriately by the courts ¹⁴⁴ and such suits should not be banned *in toto* because the attorney-client privilege *might* be implicated. Courts relying on the attorney-client privilege as a bar to these suits are simply taking the easy way out of what is admittedly a difficult situation.

apparently universally accepted. *Id.* § 6.4.10, at 279. See *Clark v. United States*, 289 U.S. 1, 15 (1933) (citing the crime or fraud exception as supporting an analogous exception in the context of otherwise privileged juror conduct).

¹³⁸ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

¹³⁹ See, e.g., *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991); *Herbster v. North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343, 346-47 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 728 (Ill. 1986), *cert. denied*, 484 U.S. 850 (1987).

¹⁴⁰ *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 110 (Ill. 1991).

¹⁴¹ *General Dynamics v. Superior Court*, 876 P.2d 487, 504 (Cal. 1994).

¹⁴² *Id.* The court stated that "[m]atters involving the commission of a crime or a fraud . . . are statutory and well-recognized exceptions to the attorney-client privilege." *Id.*

¹⁴³ CAL. EVID. CODE § 956 (West 1989).

¹⁴⁴ This was the view taken by the California Supreme Court. *General Dynamics*, 876 P.2d at 503-04. In the cases where a wrongful discharge claim cannot be proved without impermissibly breaching the attorney-client privilege, the suit should be dismissed in the interest of protecting the privilege. *Id.* Such action, however, will seldom, if ever, be appropriate at the demurrer stage of litigation. *Id.* at 504.

b. *Ethical Rules of Attorney-Client Confidence*

The professional codes of legal ethics impose on attorneys a fiduciary duty to their clients¹⁴⁵ and the professional rules of confidentiality are generally far more encompassing than the evidentiary privilege.¹⁴⁶ For an in-house attorney bringing a discharge suit against his or her former employer, the danger of running afoul of the attorney-client privilege, as alluded to earlier, would only be present if the case actually went to trial.¹⁴⁷ The unauthorized disclosure of client confidences, however, is a very real danger to any former in-house attorney bringing such a suit because it is likely that the attorney will have to disclose confidential information when drafting the complaint.¹⁴⁸ Thus, if in-house attorneys wish to bring discharge suits without violating the ethical attorney-client confidence, they must avail themselves of some exception to the confidentiality rules.

Under most rules of professional conduct there are exceptions to the general proscription against disclosure of confidential information.¹⁴⁹ These exceptions are of two kinds: permissive disclosure exceptions¹⁵⁰ and mandatory disclosure exceptions.¹⁵¹ For example, Rule 1.6 of the *Model Rules of Professional Conduct* permits disclosures "to the extent the lawyer reasonably

¹⁴⁵ ROBERT H. ARONSON & DONALD T. WECKSTEIN, PROFESSIONAL RESPONSIBILITY 254 (1991).

¹⁴⁶ Reynolds, *supra* note 6, at 572. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1994) ("The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client."). Both the Model Rules of Professional Responsibility and the Model Code of Professional Responsibility generally proscribe disclosure by an attorney of all information about a client. WOLFRAM, *supra* note 133, § 6.7, at 296.

¹⁴⁷ By this I mean that any possible breaches of the attorney-client privilege would only occur if the attorney, in a trial, were to attempt to offer evidence that was in fact protected by the privilege.

¹⁴⁸ See Gensler, *supra* note 8, at 539.

¹⁴⁹ See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1994) (allowing, *inter alia*, a lawyer to reveal confidential information to prevent a client from committing a criminal act that is likely to result in imminent death or substantial bodily harm or to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client); OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1994) (allowing a lawyer to reveal the intention of a client to commit a crime and the information necessary to prevent the crime).

¹⁵⁰ See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. (1994).

¹⁵¹ See, e.g., ILL. RULES OF PROFESSIONAL CONDUCT Rule 1.6 (b) (1995) ("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.").

believes necessary . . . to establish a claim . . . on behalf of the lawyer in a controversy between the lawyer and the client."¹⁵² Despite these exceptions, some courts have denied corporate counsel the right to bring any wrongful discharge action because such actions would allegedly chill the confidential nature of the attorney-client relationship.¹⁵³

In reality, corporate counsel wrongful discharge suits would not adversely impair the confidential nature of the attorney-client relationship. The principle argument against the recognition of such suits is that an employer would be less candid regarding potentially questionable corporate conduct knowing that the counsel could use this information in a wrongful discharge suit.¹⁵⁴ This argument is flawed in two significant ways. First, in states that require an in-house attorney (under the professional rules of conduct) to disclose a client's planned criminal conduct, any possible "chilling" effect would not be any greater than it is currently under these mandatory disclosure requirements.¹⁵⁵ The same would be true, to a large extent, in situations where the in-house attorney would be permitted, and not compelled, to disclose the company's plan to commit an illegal act. Secondly, this argument is flawed because it presupposes that an employer would discharge the corporate counsel if the attorney disagrees with the questionable conduct.¹⁵⁶ This rather cynical view is not realistic. Usually, corporations seek advice from in-house counsel in order to avoid, not commit, illegal activities. Consequently, corporations that would seek to gain a competitive advantage at any cost by engaging in illegal conduct are not likely to heed in-house counsel's advice anyway, and it is these corporations that are the most likely to terminate the in-house attorney for upholding the law and ethics.¹⁵⁷ As a result, if the confidential nature of the

¹⁵² MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1994).

¹⁵³ See, e.g., *Herbster v. North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343, 347 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 728 (Ill. 1987), *cert. denied*, 484 U.S. 850 (1987).

¹⁵⁴ *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 109 (Ill. 1991).

¹⁵⁵ For example, if an in-house attorney were practicing in a state that requires mandatory disclosure to prevent illegal conduct on the part of the client, the allowance of a wrongful discharge suit would not impair the ideal behind attorney-client confidentiality of full and frank disclosure because the corporation would already be aware that the attorney would have to disclose any plan by the company to commit an illegal act. This same argument also holds true in situations that require the in-house attorney to withdraw from the representation of a client that insists on breaking the law or insists on the attorney breaking a rule of professional conduct. See *infra* notes 171-82 and accompanying text.

¹⁵⁶ Raymis H.C. Kim, *In-House Counsel's Wrongful Discharge Action Under the Public Policy Exception and Retaliatory Discharge Doctrine*, 67 WASH. L. REV. 893, 906 (1992).

¹⁵⁷ *Id.* at 906-07.

attorney-client relationship is to be impaired at all by allowing wrongful discharge suits, it will only be impaired in the relationships in which the corporate client wishes to perform some illegal or unethical activity. In these cases, courts should not be worried about any possible adverse effects on attorney-client confidentiality.

B. Public Policy Concerns Weighing in Favor of Extension of the Wrongful Discharge Cause of Action to Corporate Attorneys

Generally, the courts that have dealt with in-house attorney discharge cases have failed to evaluate in any detail the public policy concerns that weigh in favor of extending the wrongful discharge cause of action to the fired attorneys.¹⁵⁸ These cases, however, do implicate at least two important public policy considerations that are favorable to such an extension. The first such consideration seems painfully obvious, yet for some reason the courts and commentators have failed to give it much attention. This consideration is the basic proscription against acts that have been defined as criminal by society. The second consideration involves the public policy concerns expressed in the various rules and codes of professional conduct that favor ethical behavior by all attorneys.

¹⁵⁸ See *Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd in part on other grounds*, 855 F.2d 1160 (5th Cir. 1988), and *aff'd on other grounds*, 503 U.S. 131 (1992) (granting employer's motion to dismiss complaint of plaintiff-house counsel who alleged he was discharged for giving the company legal advice concerning compliance with various federal and state environmental laws); *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991) (denying in-house counsel's claim for retaliatory discharge where attorney alleged that he was discharged when he objected to the shipment of tainted kidney dialysis equipment by the corporation); *Herbster v. North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 728 (Ill. 1987), *cert. denied*, 484 U.S. 850 (1987) (denying former chief legal officer and vice-president in charge of the corporate legal department the right to sue for retaliatory discharge where attorney alleged he was terminated for refusing to remove or destroy sensitive internal company documents that were subject to a discovery request in litigation brought by an insured against the corporation); *Kaplan v. Heinfling*, 526 N.Y.S.2d 73 (N.Y. App. Div. 1988), *appeal denied*, 531 N.E.2d 658 (N.Y. 1988) (holding that an attorney who was counsel to a corporation could not maintain a suit for fraud and tortious interference with the attorney's contract with the corporation). Instead, these cases have mainly focused on the public policy considerations that favor the denial of a wrongful discharge cause of action for the corporate attorney.

1. *The Public Policy Concerns Embodied in the Criminal Law*

Whatever theory one uses to justify the workings of the criminal justice system, the general goal of our system is to prevent socially undesirable conduct.¹⁵⁹ The main purpose of criminal law is to prevent harm from occurring in society and substantive criminal law is the primary prophylactic used to effectuate this purpose.¹⁶⁰ When courts fail to grant a cause of action to an in-house attorney who was fired for either refusing to break a criminal law or for reporting a planned violation of such a law, the public policy considerations that are the foundation of our criminal justice system are openly frustrated.¹⁶¹ For whatever reason, the courts and commentators, including the court in *General Dynamics*, have failed to accord the proper weight to this policy consideration. Courts must be careful in these cases not to lose site of the "big picture."

By returning to the original hypothetical presented in Part I of this Note, it is easy to see how a failure to allow the corporate attorney to bring a suit against his or her former employer will frustrate the public policy behind our criminal justice system. The fictional corporate attorney in this hypothetical has uncovered a current or planned violation of the law and is consequently terminated for attempting to report or halt such a violation. By allowing the employer, in this situation, to discharge the attorney without impunity, a court would be encouraging (or at least not discouraging) conduct that is socially undesirable while, at the same time, discouraging conduct (by the attorney) that is highly desirable under our chosen system of justice. Viewing the problem in this light, it is difficult to imagine how such an inequitable result could be reached. As Professor Joan Krauskopf put it, "[a] public policy mandated in criminal law could not be secondary to a . . . policy of employer freedom to terminate."¹⁶²

¹⁵⁹ See generally WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* (2d ed. 1986).

¹⁶⁰ *Id.* § 1.2, at 6.

¹⁶¹ The Illinois Supreme Court, in allowing a fired employee to utilize the tort claim of retaliatory discharge, stated that "[p]ublic policy favors the exposure of crime." *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 880 (Ill. 1981), *remanded*, 489 N.E.2d 474 (Ill. App. Ct. 1986) (quoting *Joiner v. Benton Community Bank*, 411 N.E.2d 229, 231 (Ill. 1980)).

¹⁶² Joan M. Krauskopf, *Employment Discharge: Survey and Critique of the Modern At Will Rule*, 51 *UMKC L. REV.* 189, 236 (1983).

2. *The Public Policy Concerns Embodied in Ethical Rules of Conduct*

A second public policy consideration weighing in favor of granting in-house counsel the right to sue for wrongful discharge is closely related to the public policy choices encompassed in our criminal justice system. This second consideration is the fundamental rule that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”¹⁶³ Corporate attorneys, as officers of the court, occupy a place in our society that a nonlawyer corporate employee does not.¹⁶⁴ Because of their position in society and the highly fiduciary nature of the attorney-client relationship, people place great trust and confidence in the legal profession.¹⁶⁵ In order to protect the public and to promote respect and confidence in the legal profession, state bar associations have adopted rules of professional conduct.¹⁶⁶ At the most general level, the legal profession’s rules of conduct mandate that the in-house attorney¹⁶⁷ should maintain only the highest standards of professional and ethical conduct and should act only in a manner that will uphold and further this standard.¹⁶⁸ As a consequence, in-house attorneys are required by their profession¹⁶⁹ to conduct themselves in a manner that the

¹⁶³ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1994).

¹⁶⁴ *See, e.g.*, OHIO CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5 (1994) (stating that “[b]ecause of his position in society, even minor violations of the law by a lawyer may tend to lessen public confidence in the legal profession.”).

¹⁶⁵ “A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” MODEL RULES OF PROFESSIONAL CONDUCT pmb1. (1994).

¹⁶⁶ *See, e.g.*, RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 1-100 (1994) (stating that the rules have been adopted to “protect the public and promote respect and confidence in the legal profession”); OHIO CODE OF PROFESSIONAL RESPONSIBILITY EC 1-4 (1994) (stating that the “integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of proper officials”).

¹⁶⁷ The legal profession’s rules of conduct apply, of course, to all licensed attorneys, but the concentration on only in-house attorneys is necessitated by the purpose of this Note.

¹⁶⁸ *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT pmb1. (1994) (“A lawyer should strive to attain the highest level of legal skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.”); OHIO CODE OF PROFESSIONAL RESPONSIBILITY EC 1-5 (1994) (“A lawyer should maintain high standards of professional conduct He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct.”).

¹⁶⁹ For example, in Ohio, as in most states, attorneys, as a condition of admission to practice law, must pledge “to observe and abide by the Code of Professional Responsibility adopted by the Supreme Court of Ohio.” SUPREME COURT RULES FOR THE GOVERNMENT OF

nonlawyer corporate employee is not.¹⁷⁰

Several courts have dealt with this public policy consideration by noting that these very same rules of professional conduct appear to decide the issue against allowing wrongful discharge suits by fired in-house attorneys.¹⁷¹ Most states' rules of professional conduct either permit or compel an in-house attorney to "withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law."¹⁷² Withdrawal has been the standard, reflexive response to the question of how a lawyer should respond to a client's continuing or proposed wrongdoing.¹⁷³ As a result, some courts have declined to extend the wrongful discharge cause of action to corporate attorneys because, according to these courts, doing so would be redundant: "[S]uch attorneys are under an ethical obligation to sever their professional relationship with the erring client in any event—meaning, in the case of in-house counsel, resigning their employment."¹⁷⁴ Withdrawal, however, is not the question here; the question is whether, once withdrawal has been effected (voluntarily or otherwise), does the in-house attorney have any further remedy?¹⁷⁵ I believe, while not directly addressing this latter question, that the California Supreme Court did in fact deal with the issues raised by such an inquiry.

The California Supreme Court recognized the emphasis that other courts¹⁷⁶

THE BAR OF OHIO Rule I, § 7 (1994). If attorneys fall below the minimum mandates of the Ohio Code of Professional Responsibility, they can be subject to disciplinary action, including disbarment. *See* OHIO CODE OF PROFESSIONAL RESPONSIBILITY Preface (1994).

¹⁷⁰ This is not to suggest that nonlawyer corporate employees will not feel a moral obligation to uphold the same level of standards that is required of attorneys. However, there will usually not be any professional requirement (in the same sense as this term is applied to attorneys) compelling the nonlawyer corporate employee to uphold this standard of conduct.

¹⁷¹ *See, e.g.,* Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991); Herbster v. North Am. Co. for Life & Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 728 (Ill. 1987), *cert. denied*, 484 U.S. 850 (1987).

¹⁷² MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(1) (1994); *see also* RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA Rule 3-700 (1994) (making withdrawal mandatory when, *inter alia*, continued employment will result in violation of the rules and making withdrawal permissive when, *inter alia*, the client seeks to pursue an illegal course of conduct or continued employment is likely to result in a violation of the rules).

¹⁷³ Reynolds, *supra* note 6, at 574.

¹⁷⁴ General Dynamics v. Superior Court, 876 P.2d 487, 500 (Cal. 1994).

¹⁷⁵ Reynolds, *supra* note 6, at 574.

¹⁷⁶ *See* Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd in part on other grounds*, 855 F.2d 1160 (5th Cir. 1988), *and aff'd on other grounds*, 503 U.S. 131

have placed on the "remedy" of withdrawal, but stated that this "remedy" is only "illusory."¹⁷⁷ The court explained that its lack of confidence in such a "remedy" was twofold. First, the court noted that "[c]ourts do not require nonlawyer employees to quietly surrender their jobs rather than 'go along' with an employer's unlawful demands."¹⁷⁸ It is clear that this distinction between corporate lawyers and nonlawyer employees leads to grossly inequitable results, and as the court realized, the "wrongful discharge tort claim is designed to encourage and support precisely the opposite" result.¹⁷⁹ The second reason the court gave for its assertion that the withdrawal "remedy" is illusory relates specifically to the status of the in-house attorney as a corporate employee. Although some courts and commentators have denied the propriety of drawing any distinction between the corporate attorney and the noncorporate attorney, the reliance on this distinction is precisely what makes the California Supreme Court's reasoning so persuasive. The court correctly noted that "the withdrawal 'remedy' fails to seriously confront the very real and extraordinarily high costs that resignation entails."¹⁸⁰ Corporate attorneys, unlike their private practice colleagues, have only one client from whose representation they can withdraw. In such a situation, in-house attorneys are faced with two choices. On the one hand, they can choose to adhere to the ethical norms of their profession and withdraw, forfeiting their only means of income, or they can choose to surrender to their employer's unethical demands thereby retaining their employment and salary.¹⁸¹ Added to this economic pressure is the institutional pressure, commonly present in corporate settings, to be a "team player." While we would all like to believe the corporate attorney, if faced with such a "choice" would "do the right thing," it is an unfortunate fact of life that we do not live in such a fairy-tale world. We live in a world where the pressures placed on human beings often compel even the most ethical people to choose the path of least resistance, even when they know it is not "the right thing" to do. Unlike other courts that have grappled with

(1992); *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991); *Herbster v. North Am. Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986), *appeal denied*, 508 N.E.2d 728 (Ill. 1987), *cert. denied*, 484 U.S. 850 (1987).

¹⁷⁷ *General Dynamics*, 876 P.2d at 502.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* (emphasis omitted).

¹⁸⁰ *Id.*

¹⁸¹ In addition to the immediate loss of compensation, the in-house attorney will also be faced with the specter of attempting to secure new employment in an ever tightening legal market. Furthermore, this daunting task will not be made any easier by the fact that it will be very likely that the newly unemployed attorney will be hindered by the lack of a "sparkling" recommendation from his or her previous employer.

this issue, the California Supreme Court was realistic and recognized that corporate attorneys are not characters in a fairy tale.¹⁸² Consequently, the withdrawal “remedy” as an answer to the public policy considerations embodied in the rules of professional conduct is, in reality, grossly inadequate. Today, courts faced with a case implicating such an important public policy concern should follow California’s lead and look beyond withdrawal as the only answer.

V. CONCLUSION

Although most jurisdictions recognize the public policy exception to the traditional employment at-will rule, until now, no court has seen fit to extend this cause of action to in-house counsel.¹⁸³ The majority of courts that have dealt with these discharge suits have refused to extend, on any theory, a cause of action to the discharged corporate counsel.¹⁸⁴ The decisions by these courts generally have been grounded in a rigid and formalistic interpretation of employment law, the evidentiary rules of privilege, and the various rules of professional conduct. These courts have steadfastly refused to adequately examine *all* of the public policy concerns implicated by these discharge suits and have continued to view *all* attorneys in a light more appropriate for the private practitioner of the nineteenth century. This narrow and myopic approach adopted by these courts has led to grossly anachronistic results.

The California Supreme Court, on the other hand, has once again stepped forward to take the lead in an area of law that, if given the choice, most courts would choose to avoid. In a refreshingly modern opinion, the *General Dynamics* court has openly and honestly addressed many of the “tough” issues that the corporate attorney discharge suit presents. The court realized that the traditional role of the attorney in our society has greatly changed and consequently, as we approach the twenty-first century, the view of the attorney

¹⁸² As the court noted:

[I]t is virtually certain that, without the prospect of limited judicial access, in-house attorneys—especially those in mid-career who occupy senior positions—confronted with the dilemma of choosing between adhering to professional ethical norms and surrendering to the employer’s unethical demands will almost always find silence the better part of valor.

General Dynamics, 876 P.2d at 502. However cynical this view may be, I think it is the correct view.

¹⁸³ See cases cited *supra* note 6.

¹⁸⁴ See cases cited *supra* note 6.

applied by many courts is no longer appropriate. The *General Dynamics* opinion is both functional and practical, recognizing that the ideals embodied in the rules of professional conduct are just that, ideals. In the reality of the corporate world, in-house attorneys are placed under extraordinary pressure to conform to the desires of their employer and even the most upstanding and ethical individual can fall victim to these pressures. The position taken by the California Supreme Court may be criticized as being excessively cynical, but the reality of the modern world requires courts to take such a view. In short, everyone wants the in-house attorney to “do the right thing” and the overriding aims of society’s public policy choices are all slanted in this direction. However, we all know that it is not always easy to “do the right thing” and by denying the in-house attorney any right to a wrongful discharge claim, we will only make the decision more difficult. There is nothing wrong with making ethical conduct as easy as possible. Now in California, thanks to the court in *General Dynamics*, the decision to “do the right thing” has been made much easier for the in-house attorney.