[University of Colorado Law Review](https://scholar.law.colorado.edu/lawreview)

Volume 79 | Issue 4 Article 3

Fall 2008

Retaliatory Discharge and the Ethical Rules Governing Attorneys

Alex B. Long

Follow this and additional works at: https://scholar.law.colorado.edu/lawreview

Part of the Torts Commons

Recommended Citation

Alex B. Long, *Retaliatory Discharge and the Ethical Rules Governing Attorneys*, 79 U. COLO. L. REV. 1043 (2008).
Available at: https://scholar.law.colorado.edu/lawreview/vol79/iss4/3

This Article is brought to you for free and open access by the Law School Journals at Colorado Law Scholarly Commons. It has been accepted for inclusion in University of Colorado Law Review by an authorized editor of Colorado Law Scholarly Commons. For more information, please contact rebecca.ciota@colorado.edu.

RETALIATORY DISCHARGE AND THE ETHICAL RULES GOVERNING ATTORNEYS

ALEX B. LONG*

In Garcetti v. Ceballos, *the Supreme Court held that a deputy district attorney who, as part of his job duties, raised concerns with his superiors about possibly unlawful activity and was allegedly fired in response had no First Amendment retaliation claim. In support of its conclusion, the Court suggested that adequate checks already existed at the state and federal level to curb the behavior of employers who engage in unlawful activity and to protect the employees who seek to prevent or expose such activity. In addition to state and federal whistleblower statutes, the Court singled out the rules of professional conduct governing attorneys as providing additional safeguards for attorneys in situations similar to the plaintiff in* Garcetti. *This begs an important question: to what extent do the rules governing the practice of law actually provide attorneys with protection from employer retaliation? Based on the case law to date, the answer is decidedly unclear.*

Numerous cases attest to the fact that attorneys who report the misconduct of their employers or other attorneys—either internally or externally—face the real possibility of retaliatory discharge. It is not only the act of "blowing the whistle" that potentially exposes an attorney to retaliation. In numerous cases, attorneys have charged that their employers have taken action against them for otherwise complying with their ethical obligations or acting in furtherance of the policies underlying the rules of professional conduct. Courts have taken a variety of approaches to such cases, some refusing to recognize any kind of breach of contract or retaliatory discharge claim on the part of an attorney and others recognizing such claims, but under limited circumstances. This Article attempts to resolve some of the confusion by offering a comprehensive approach to claims of retaliatory discharge brought by attorneys.

* Associate Professor of Law, University of Tennessee College of Law. Thanks to Carl Pierce and Richard Moberly for their comments on an earlier draft. Thanks also to Melissa Hart and the other organizers and participants at the Second Annual Colloquium on Current Scholarship in Labor and Employment.

INTRODUCTION

The United States Supreme Court's 2006 decision in *Garcetti v. Ceballos*[1] caused a great deal of consternation concerning the fate of government attorneys who raise concerns internally about illegal or unethical conduct on the part of a governmental actor. In *Garcetti*, a deputy district attorney alleged that he was retaliated against after he raised concerns with his superiors that an arrest warrant affidavit contained false information.[2] The Court held that because the attorney was acting pursuant to his job duties, he had no First Amendment retaliation claim.[3] In the Court's view, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[4] Numerous commentators subsequently criticized the Court's decision for having a potentially chilling effect on the willingness of government attorneys to address alleged wrongdoing on the part of other government officials.[5]

Although the *Garcetti* decision only applies to public employees, it also raises some disturbing possibilities for private attorneys. In some instances, an attorney may be required as both an ethical and a professional matter to oppose wrongdoing on the part of an employer or client.[6] In the case of private attorneys, the *Garcetti* majority suggested that adequate checks already existed at the state and federal levels to protect employees who seek to prevent or expose unlawful activity on the part of their employers.[7] However, a 2008 opinion from the Minnesota Court of Appeals suggests that some of those checks might be inadequate. In *Kidwell v. Sybaritic, Inc.*, the court used essentially the same reasoning as *Garcetti* to rule that a corporate in-house attorney who was discharged for reporting

1. 547 U.S. 410 (2006).
2. *Id.* at 414.
3. *Id.* at 421.
4. *Id.*
5. *See, e.g.*, Beverley H. Earle, *The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A Proposal for Change*, 44 AM. BUS. L.J. 1, 17 (2007); John Sanchez, *The Law of Retaliation After* Burlington Northern *and* Garcetti, 30 J. AM. TRIAL ADVOC. 539, 563 (2007).
6. *See Garcetti*, 547 U.S. at 446 (Breyer, J., dissenting) (noting that a government attorney may have an ethical as well as a constitutional and professional obligation to speak in some instances).
7. *Id.* at 425 (majority opinion).

illegal conduct to senior management had no protection under Minnesota's whistleblower protection statute.[8] As in *Garcetti*, the court observed that the attorney was already obligated—both as a matter of his employment agreement and his ethical duties of competence and to render candid advice—to make the report.[9] Similar to *Garcetti's* First Amendment analysis, the court held that a discharged employee has no claim under Minnesota's whistleblower statute where the report of illegal conduct "is a communication that was made to fulfill the employee's job responsibilities."[10] If the rule were otherwise for attorneys, the court explained, attorneys might engage in protected activity on a daily basis by virtue of the nature of their jobs.[11]

In addition to state and federal whistleblower statutes, the Supreme Court singled out the rules of professional conduct governing attorneys as providing additional safeguards for attorneys in situations similar to the plaintiff in *Garcetti*.[12] This begs an important question: to what extent do the rules governing the practice of law actually provide private attorneys with protection from employer retaliation? The American Bar Association's (ABA) first code of ethics, the Canons of Professional Ethics, advised in 1908 that "[l]awyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession."[13] Despite this admirable sentiment, many modern attorneys quite understandably fear exposing corrupt or dishonest conduct in the legal profession and business fields, not just before courts or disciplinary authorities, but within their own law firms and the offices of their employers.[14] At virtually every turn, lawyers receive conflicting signals concerning the appropriateness of "blowing the whistle" on a client or employer or bringing suit after being fired for having done so. The ethical rules governing lawyers sometimes re-

8. Kidwell v. Sybaritic, Inc., 749 N.W.2d 855 (Minn. Ct. App. 2008).

9. *Id.* at 866.

10. *Id.* at 865. Prior decisional law interpreting the whistleblower statute required that an employee's purpose must be to expose illegality in order for the conduct to be protected. Where an employee's job duties require an employee to expose illegality, there is a presumption under Minnesota law that the employee's purpose in making the report was to further the employer's interest, not to expose illegality. *Id.* at 866.

11. *Id.* at 866.

12. *Garcetti*, 547 U.S. at 425.

13. CANONS OF PROFESSIONAL ETHICS Canon 29 (1908).

14. Douglas R. Richmond, *Professional Responsibilities of Law Firm Associates*, 45 BRANDEIS L.J. 199, 247 (2007).

quire lawyers who learn of illegal, unethical, or damaging behavior to either report up the corporate ladder or to report out to disciplinary authorities or others.[15] Yet, in addition to the tremendous cultural, economic, and psychological pressures all whistleblowers face,[16] whistleblowing lawyers face pressures unique to the practice of law. Lawyers learn early on that one of their most sacred professional duties is to maintain client confidences.[17] They are also told repeatedly that it is a lawyer's duty to zealously represent a client and to carry out the client's decisions concerning the representation.[18] Accordingly, attorneys who disclose confidential information, refuse to follow orders, or sue after being fired for having taken such action may meet with even less sympathy and greater scorn from other members of their profession than non-lawyers in similar situations.

Yet, there is at least some reason to think that public and professional attitudes may be shifting concerning the proper conduct of lawyers who learn of serious misconduct in the course of their duties. The Enron and Worldcom scandals led many to question the inability or unwillingness of corporate attorneys to prevent their clients from committing such corporate fraud.[19] Congress responded with the Sarbanes-Oxley Act,[20] which provided increased protection for whistleblowers who expose fraud and imposed an obligation upon attorneys representing publicly-traded companies to report up the corporate ladder upon learning of corporate misconduct.[21] For its part, the ABA's 2000 ethics reforms loosened some of the traditional restrictions on the ability of attorneys to disclose client confidences in order to protect the health or financial interests of

---

15. MODEL RULES OF PROF'L CONDUCT R. 1.13(b), 8.3(c) (2003).

16. Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 95 (2007).

17. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

18. *Id.* pmbl. ¶ 2, R 1.2(a).

19. *See* Robert Eli Rosen, *Resistances To Reforming Corporate Governance: The Diffusion of QLCCS*, 74 FORDHAM L. REV. 1251, 1259 (2005).

20. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., and 28 U.S.C.).

21. 18 U.S.C. § 1514A; Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71669–71707 (proposed Nov. 21, 2002) (to be codified at 17 C.F.R. pt. 205). The effectiveness of the Act's whistleblower provision is open to debate. *See* Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65 (2007) (detailing whistleblowers' low success rate under the Act).

others.[22] Taking a cue from Sarbanes-Oxley, the ABA imposed a stricter "up-the-ladder" reporting requirement for corporate attorneys than had existed previously.[23] In addition, concerns over declining standards of professionalism among attorneys and the failure of the legal profession to adequately police itself continue to abound.[24] In short, there is a strong argument that the trend at present is in favor of permitting attorneys to disclose client confidences in order to prevent harm and to take a more active role in opposing the misconduct of clients, their employers, and other attorneys.

To what extent, then, should attorneys enjoy legal protection when they are retaliated against after engaging in whistleblowing behavior? Numerous cases attest to the fact that attorneys who report the misconduct of their employers or other attorneys—either internally or externally—face the real possibility of retaliatory discharge.[25] It is not only the act of "blowing the whistle" that potentially exposes an attorney to retaliation. In numerous cases, attorneys have charged that their employers took action against them for otherwise complying with their ethical obligations or for acting in furtherance of the policies underlying the rules of professional conduct.[26] Although ethics codes may impose duties upon attorneys to act in a particular manner or may provide guidance as to how an attorney may or should act when confronted with wrongful behavior, they do not, in and of themselves, establish any type of protection from retaliation for an attorney who attempts to seek refuge behind the rules. Instead, if such rules provide any measure of protection for attorneys, it is because courts are willing to recognize breach of contract or retaliatory discharge claims tethered to such rules.

---

22. *See* Nancy J. Moore, *"In the Interests of Justice": Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 FORDHAM L. REV. 1775, 1775–79 (2002) (discussing the loosening of the ethical rules regarding client confidentiality).

23. *See* Mark D. Nozette & Robert A. Creamer, *Professionalism: The Next Level*, 79 TUL. L. REV. 1539, 1552–53 (2005).

24. *See id.* at 1543–45 (discussing decline in lawyer civility); Kathryn W. Tate, *The Boundaries of Professional Self-Policing: Must a Law Firm Prevent and Report a Firm Member's Securities Trading on the Basis of Client Confidences?*, 40 U. KAN. L. REV. 807, 811 (1992) (noting the potential for external regulation of the legal profession if lawyers fail to initiate investigations into professional misconduct).

25. *See infra* notes 34–38 and accompanying text.

26. *See infra* notes 39–45 and accompanying text.

The majority of courts have been willing, in theory, to recognize the validity of such claims.[27] A number of decisions, however, have either imposed limitations on such claims or have prohibited them altogether.[28] Even where courts have shown more sympathy toward attorneys in this bind, no clear consensus exists as to the proper approach to such cases. Instead, state courts already employ a wide variety of competing approaches with respect to the tort of retaliatory or wrongful discharge.[29] Cases involving attorneys who have been discharged for conduct related to their ethical duties—which implicate any number of complicated professional responsibility and employment law issues[30]—have only contributed to this variety.

This Article attempts to resolve some of the current confusion by offering a comprehensive approach to claims of retaliatory discharge brought by attorneys. Part I categorizes the retaliatory discharge cases involving attorneys that have arisen to date and attempts to describe some of the ethical issues that are implicated in each category. Part II discusses the problem in more detail, analyzing the competing interests of discharged attorneys, their employers, and the public. Part III assesses the approach of some courts that allows discharged attorneys to proceed under an implied contract theory. Part IV assesses the torts-based approach most discharged attorneys have pursued in such situations and the competing approaches courts have taken in response. Ultimately, the Article proposes an approach for resolution of such claims that draws upon case law interpreting the anti-retaliation provision of Title VII of the Civil Rights Act of 1964.[31]

I. THE MODEL RULES OF PROFESSIONAL CONDUCT AND RETALIATORY DISCHARGE

Retaliatory discharge cases involving attorneys have arisen in a number of different situations. The basic theme in virtually every case involves an attorney forced to choose between retaining his job and engaging in the ethical practice of

---

27. *See infra* notes 33–45 and accompanying text.

28. *See infra* notes 16674–16877 and accompanying text.

29. *See* Nancy Modesitt, *Wrongful Discharge: The Use of Federal Law as a Source of Public Policy*, 8 U. PA. J. LAB. & EMP. L. 623, 625–26 (2006) ("Courts have taken widely divergent positions with regard to defining public policy.").

30. *See infra* Part I.

31. 42 U.S.C. § 2000e-3(a) (2000).

law. However, there is considerable variation in terms of the details of the cases. These differences potentially implicate a number of ethical rules and may play an important role in determining whether a court will recognize the validity of an attorney's claim.

A. *Categorizing the Cases*

There are potentially any number of ways in which the policies underlying the ethical rules governing attorneys could conflict with the lawyer's employment prospects. To date, however, the cases tend to fall into one of six categories.[32] The first two categories involve traditional law-firm attorneys (typically associates) as plaintiffs.[33] In the first category, a law-firm attorney learns of unethical conduct on the part of another attorney and is fired, allegedly in response for reporting or threatening to report the misconduct to disciplinary authorities.[34] Typically, the scenario involves one attorney in a firm uncovering the misconduct of another attorney in that same firm.[35] However, it may also arise where a firm is reluctant to allow one of its members to file disciplinary charges against opposing counsel.[36] The second category of cases is similar, but involves internal, rather than external, whistleblowing. In the second category, a law-firm attorney raises concerns with firm management about unethical conduct on the part of another attorney and is fired, allegedly in response.[37]

---

32. Excluded from this list are cases in which an in-house attorney brings a retaliation or discrimination claim against her employer pursuant to Title VII. *See, e.g.*, Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364 (5th Cir. 1998). Such claims raise statutory issues specific to Title VII.

33. *Cf.* Kelly v. Hunton & Williams, No. 97-CV-5631, 1999 WL 408416, at *1 (E.D.N.Y June 17, 1999) (involving law firm associate who was forced to resign after raising questions to firm management about partner's supposed overbilling); Jacobson v. Knepper & Moga, P.C., 706 N.E.2d 491, 492 (Ill. 1998) (involving associate who was fired after insisting that firm cease its practice of filing certain actions in wrong venue). Although law firm associates would seem to face the greatest risk of retaliation from a law firm in such cases, in at least one instance a law firm partner was expelled for raising ethical concerns about another partner and later filed wrongful discharge and breach of fiduciary duty claims. Bohatch v. Butler & Binion, 977 S.W.2d 543, 544 (Tex. 1998).

34. *See, e.g.*, Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 896 So. 2d 787, 791 (Fla. Dist. Ct. App. 2005); Matzkin v. Delaney, Zemetis, Donahue, Durham & Noonan, PC, No. CV044000288S, 2005 WL 2009277 (Conn. Super. Ct. July 19, 2005); Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992).

35. *See Wieder*, 609 N.E.2d at 632 (involving this basic fact pattern).

36. *See Matzkin*, 2005 WL 2009277, at *1 (involving this basic fact pattern).

37. *See Kelly*, 1999 WL 408416, at *1; *Jacobson*, 706 N.E.2d 491; *Bohatch*, 977

Categories three through six raise similar ethical issues, but involve in-house counsel. In the third category, an in-house attorney learns of unethical conduct on the part of another attorney and is fired, allegedly in response to reporting or threatening to report such activity to disciplinary authorities.[38] In the fourth type of case, an in-house attorney is fired after refusing to participate in possibly illegal conduct or conduct that would otherwise violate the lawyer's ethical duties.[39] In the fifth (and perhaps most common) type of case, in-house counsel learns of similar conduct on the part of the employer and is fired, allegedly for attempting to remedy such misconduct internally.[40] Such internal remedial attempts might involve reporting the misconduct to higher authorities within the organization[41] or taking independent action within the confines of the company to put a stop to the misconduct.[42] In the final category, an in-house attorney learns of possibly illegal conduct on the part of the employer and is fired, allegedly for reporting or threatening to report the conduct to law enforcement or other appropriate external authorities.[43] Such cases could include the situation in which an attorney is under an ethical duty to report to such authorities,[44] as well as the situation where the

---

S.W.2d at 544; Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873 (D.C. 1998), *aff'd* 799 A.2d 381 (D.C. 2002).

38. *See, e.g.*, Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852 (Tenn. 2002).

39. *See, e.g.*, Meadows v. Kindercare Learning Ctrs., Inc., No. Civ. 03-1647-HU, 2004 WL 2203299 (D. Or. Sept. 29, 2004); Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986); Spratley v. State Farm Mut. Auto. Ins. Co., Nos. 20011002, 20011003, 2003 WL 21994704 (Utah Aug. 22, 2003); Burkhart v. Semitool, Inc., 5 P.3d 1031 (Mont. 2000); Herbster v. N. Am. Co. for Life & Health Ins., 501 N.E.2d 343 (Ill. 1986).

40. Heckman v. Zurich Holding Co. of Am., No. Civ.A.06-2435-KHV, 2007 WL 1347753 (D. Kan. May 8, 2007); O'Brien v. Stolt-Nielsen Transp. Group Ltd., No. X08CV020190051S, 2003 WL 21499215 (Conn. Super. Ct. June 13, 2003); Considine v. Compass Group USA, Inc., 551 S.E.2d 179 (N.C. Ct. App. 2001); GTE Prods. Corp. v. Stewart, 653 N.E.2d 161 (Mass. 1995); Gen. Dynamics Corp. v. Super. Ct., 876 P.2d 487 (Cal. 1994); Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578 (Del. Ch. 1994); Nordling v. N. States Power Co., 478 N.W.2d 498 (Minn. 1991); Parker v. M & T Chems., Inc., 566 A.2d 215 (N.J. Super. 1989); McGonagle v. Union Fid. Corp., 556 A.2d 878 (Pa. Super. 1989). *See generally* Michaelson v. Minn. Mining & Mfg. Co., 474 N.W.2d 174 (Minn. Ct. App. 1991) (involving attorney who was allegedly reassigned after having given advice concerning the legality of employer's employment practices).

41. *See Shearin*, 652 A.2d at 582.

42. *See McGonagle*, 556 A.2d at 880.

43. *See* Balla v. Gambro, 584 N.E.2d 104 (Ill. 1991).

44. *Id.* at 109 (citing ILL. RULES OF PROF'L CONDUCT R. 1.6(b) (1991)).

attorney is merely *permitted* by the ethical rules to disclose such conduct externally.[45]

Category 1	Category 2
Law-Firm Attorney Another Attorney's Unethical Conduct Report to Disciplinary Authorities	Law-Firm Attorney Another Attorney's Unethical Conduct Internal Remedial Attempts
Category 3	**Category 4**
In-House Counsel Another Attorney's Unethical Conduct Report to Disciplinary Authorities	In-House Counsel Corporation's Illegal or Unethical Conduct Refusal to Participate
Category 5	**Category 6**
In-House Counsel Corporation's Illegal or Unethical Conduct Internal Remedial Attempts	In-House Counsel Corporation's Illegal Conduct Report to Law Enforcement Authorities

Regardless of the situation, in each category, the lawyer faces the quandary of choosing between furthering the policies underlying the ethical rules governing lawyer and the prospect of being fired for having done so. Each category of cases may implicate a number of ethical duties.

B. *Category 1: Law-Firm Attorney/Another Attorney's Unethical Conduct/Report to Disciplinary Authorities*

In the first category, the primary ethical duty at issue is likely to be an attorney's duty to report serious misconduct on the part of another attorney to disciplinary authorities. According to Model Rule 8.3(a), "[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional au-

45. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2003) (providing that, under limited circumstances, an attorney may reveal information relating to the representation of a client to the extent the attorney reasonably believes necessary to prevent substantial injury to the organizational client).

thority."[46] An attorney's obligation to report is limited to serious violations, that is, "those offenses that a self-regulating profession must vigorously endeavor to prevent."[47] Therefore, the drafters recognized that the rule, to some extent, requires an attorney to make a judgment call as to whether a duty to report exists.[48] For obvious reasons, it is a judgment call many attorneys try to avoid having to make and a duty many attorneys often fail to live up to altogether.[49] As a practical matter, the failure to report the serious misconduct of another attorney rarely results in professional discipline,[50] at least where the failure is the lawyer's only offense.[51] Nonetheless, the ethical obligation exists and, according to the drafters of the Model Rules, is essential to the regulation of the legal profession.[52] Because of their subordinate position, law-firm associates are particularly vulnerable to the threat of retaliation for reporting the misconduct of another attorney (especially a partner) within the firm.[53] Thus, where a law firm or employer has made it clear that it does not wish the attorney to report such misconduct, the attorney may face the dilemma of having to choose between the attorney's ethical obligations and retaining his job.

C. *Category 2: Law-Firm Attorney/Another Attorney's Unethical Conduct/Internal Remedial Attempts*

The second category of cases, consisting of law-firm attorneys who raise concerns with firm management about unethi-

---

46. *Id.* R. 8.3(a).

47. *Id.* R. 8.3(a) cmt. 3.

48. *Id.*

49. *See* Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 848 (2002) (stating that reporting rules are "rarely followed").

50. *Id.*

51. *See* Margaret Kline Kirkpatrick, Comment, *Partners Dumping Partners: Business Before Ethics in* Bohatch v. Butler & Binion, 83 MINN. L. REV. 1767, 1773–74 (1999) ("The only case in which an attorney was disciplined solely for failing to report another attorney's misconduct was the Illinois Supreme Court's decision in *In re Himmel*.").

52. MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 1 (2003). *See generally* Lindsay M. Oldham & Christine M. Whitledge, *The Catch-22 of Model Rule 8.3*, 15 GEO. J. LEGAL ETHICS 881, 881 (2002) (reporting that nineteen percent of all cases prosecuted by the Chicago Bar Association were originally reported by attorneys).

53. Richmond, *supra* note 14, at 247.

cal conduct on the part of another attorney in the firm, may also implicate Rule 8.3(a). However, such cases may raise additional concerns. In many instances, it is not realistic to expect an attorney to report unethical conduct to disciplinary authorities without first addressing the matter internally. A partner's fiduciary duty to other partners[54] or an associate's general duty of loyalty to his employer[55] may prompt an attorney to first address a matter internally. In addition, an attorney may not *know* that the other attorney has actually committed a serious violation of the ethical rules. As Model Rule 8.3(a)'s reporting requirement is only triggered upon actual knowledge of such violations, the attorney may wish to seek further information or guidance from others within the firm before going to disciplinary authorities.

Despite these realities, the ethical rules are less specific about an attorney's duty to report misconduct *internally*. The Model Rules of Professional Conduct do speak in general terms about a partner's ethical duty in such cases. A partner in a firm who knows of ethical misconduct by another attorney in the firm has a duty to take reasonable remedial action in order to avoid or mitigate any adverse consequences.[56] Such action might logically include notifying other partners within the firm in order to investigate further and determine how to proceed.[57] There is no counterpart in the rules for law-firm associates, however. No rule speaks directly to the responsibility of an associate to notify others within the firm of possible misconduct by another attorney.

In some instances, Model Rule 5.2(a) arguably compels an associate to take such action. According to Model Rule 5.2(a), "[a] lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person."[58] Therefore, if a subordinate attorney is directed to engage in fraudulent billing or some other type of unethical practice, the subordinate attorney cannot avoid disciplinary ac-

54. *See, e.g.*, Meehan v. Shaughnessy, 535 N.E.2d 1255, 1263 (Mass. 1989) (explaining that law firm partners owe each other a fiduciary duty).

55. *See* Richmond, *supra* note 14, at 259 (explaining that law firm associates owe a duty of loyalty to act for the firm's benefit).

56. MODEL RULES OF PROF'L CONDUCT R. 5.1(b)(3) (2003).

57. *See* Bohatch v. Butler & Binion, 977 S.W.2d 543, 560 (Tex. 1998) (Spector, J., dissenting) (explaining that a partner who suspects another partner of overbilling is bound, both as a fiduciary matter and as an ethical matter, to address the matter).

58. MODEL RULES OF PROF'L CONDUCT R. 5.2(a) (2003).

tion simply by claiming to have been following orders. The comments to Model Rule 5.2 clearly anticipate a dialogue between an associate and a supervisor in instances where the propriety of the supervisor's instructions is debatable. According to the comments, where there is a "reasonably arguable" question concerning whether a proposed course of action is ethically permitted, a subordinate may rely on the supervisor's "reasonable resolution of the question."[59] The comment, therefore, arguably presupposes a duty on the part of the subordinate to address the matter internally by bringing it to the attention of a supervisor and a duty to evaluate whether the supervisor's resolution of the matter is "reasonable."[60]

Of course, even if Model Rule 5.2 does not impose such a duty, a subordinate attorney may, as a practical matter, be well-advised to seek resolution on the matter from someone within the firm.[61] Because the rule deprives a subordinate attorney of a "good soldier" or "Nuremberg" defense, the subordinate attorney who complies with a supervisor's instructions may face potential disciplinary action, despite the subordinate's concern that the proposed course of action might violate the rules.[62] In other situations, it might be difficult for a subordinate attorney to argue that Model Rule 5.2 imposes any duty. If, for example, an associate believes, but does not know for certain, that a firm partner—but one who does not supervise the associate—might be engaged in unethical conduct in some matter unrelated to the associate, there is arguably no ethical rule that speaks directly to the associate's duty. This is

59. *Id.* R. 5.2(a) cmt. 2.

60. *See* Irwin D. Miller, *Preventing Misconduct by Promoting the Ethics of Attorney's Supervisory Duties*, 70 NOTRE DAME L. REV. 259, 299 (1994) ("The subordinate's obligation under Rule 5.2(b) is to determine whether the steps taken by the supervisor are reasonable under the circumstances."); *see also* Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 884 n.20 (D.C. 1998) (involving discharged associate who unsuccessfully advanced this same basic argument).

61. *See* Ass'n of the Bar of the City of New York, Opinion 82-79 (1982) ("[W]e believe it is desirable that the associate endeavor to raise any dispute over the propriety of a partner's conduct within the firm before reporting any alleged ethical violation to a tribunal or a disciplinary committee."); Miller, *supra* note 60, at 296 ("Rule 5.2 should prompt subordinates to seek out effective guidance and supervision from superiors or others when a question of professional conduct is raised."). To date, the cases falling into this category have involved attorneys who have raised concerns internally about the misconduct of other attorneys. They have not included cases in which a law firm attorney is discharged after refusing to participate in unlawful or unethical conduct. Such situations implicate a different set of ethical rules. *See infra* notes 70–72 and accompanying text.

62. Richmond, *supra* note 14, at 207.

because Rule 5.2 speaks only to the situation where an associate follows orders from a supervisory lawyer.[63] The risk for an associate in bringing the matter to the attention of a supervisor under any of these scenarios is that the associate will incur the wrath of the partner in question or other partners and thereby face the prospect of retaliation.

D. *Category 3: In-House Counsel/Another Attorney's Unethical Conduct/Report to Disciplinary Authorities*

Cases in the third category present essentially the same ethical dilemma as cases in the first category: the duty to make an external report of serious misconduct concerning another attorney versus the desire to keep one's job.[64] Regardless of whether the attorney's employer is a law firm or a business organization, the attorney faces the possibility of being fired for reporting the misconduct of another attorney. However, the special nature of the attorney-client relationship involving in-house attorneys may add an additional wrinkle to an already difficult situation.

Despite the employer-employee relationship, nothing in the Model Rules gives a law firm the right to prevent one of its attorneys from disclosing the serious misconduct of another lawyer to disciplinary authorities. A client, however, may exercise such veto power. In order to disclose another lawyer's ethics violation to disciplinary authorities, an attorney may need to disclose information relating to the representation of a client. Unless an exception to the confidentiality rules permit the lawyer to disclose such information ethically, the lawyer's client must consent.[65] As such, the confidentiality rules governing lawyers give the client the right to prevent the lawyer from fulfilling what would otherwise be the lawyer's ethical duty.[66] An in-house attorney's employer is, of course, also the attorney's client. Accordingly, if management does not wish for its in-house attorney to report the misconduct of another attorney, the attorney is bound by that decision.

63. MODEL RULES OF PROF'L CONDUCT R. 5.2(b) (2003).

64. *See supra* notes 46–523 and accompanying text.

65. MODEL RULES OF PROF'L CONDUCT R. 1.6(a), 8.3 cmt. 2 (2003).

66. *See generally* Peter K. Rofes, *Another Misunderstood Relation: Confidentiality and the Duty to Report*, 14 GEO. J. LEGAL ETHICS 621, 629 (2001) (noting the difficulty courts and ethics committees have had in coming to grips with the notion that a lawyer's duty of confidentiality trumps the duty to report misconduct).

Unlike in the case of a typical attorney-client relationship, an in-house attorney may be less inclined to even raise the issue of reporting with the client. Law-firm clients may sometimes have concerns over the disclosure of confidential information that may accompany a report of unethical conduct on the part of a firm attorney. But, because a report of unethical conduct on the part of an in-house attorney also implicates the corporation itself, corporations are more likely to see such behavior as potentially producing a host of negative consequences for the organization. Moreover, a culture of silence within the organization may discourage such whistleblowing.[67] Although the Sarbanes-Oxley Act, with its protection for corporate whistleblowers, was enacted to combat this type of corporate culture,[68] corporations have long viewed dissenters as disloyal and not "team players."[69] Of course, law-firm attorneys may face similar pressures when deciding whether to report the misconduct of another lawyer within the firm. However, the firm, unlike the client/employer of an in-house attorney, has no authority to stop the attorney from reporting.

E. Category 4: In-House Counsel/Corporation's Illegal or Unethical Client Conduct/Refusal to Participate

In the fourth category of cases, the dilemma faced by an in-house attorney who uncovers client wrongdoing is perhaps more acute than that faced by law-firm attorneys in similar situations. An attorney is ethically prohibited from engaging in criminal acts that reflect adversely on the attorney's trustworthiness or fitness as a lawyer in other respects, as well as from engaging in more generalized conduct involving dishonesty, fraud, deceit, or misrepresentation.[70] An attorney is also ethically prohibited from assisting a client in conduct the lawyer knows is criminal or fraudulent.[71] Obviously then, an at-

67. Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1023 (2005). For a discussion of how corporate cultures and social pressures within an organization may influence individuals' whistleblowing behavior, see David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 MICH. L. REV. 1781, 1785 (2007).

68. *See* Hess, *supra* note 67, at 1782–83 (discussing the Act's attempts to improve organizational ethics by encouraging corporate whistleblowing).

69. Paul E. Rossler, Comment, *Running for Cover Under Sarbanes-Oxley*, 41 TULSA L. REV. 573, 574 (2006).

70. MODEL RULES OF PROF'L CONDUCT R. 8.4(b)(c) (2003).

71. *Id.* R. 1.2(d).

torney may not blindly follow a client's instructions with respect to illegal or dishonest conduct. If the client insists upon the lawyer's participation in such conduct, the lawyer's only option is to withdraw from the representation.[72]

No lawyer likes to lose business. Comparatively speaking, however, the pressure on a law-firm attorney to refuse to participate in a client's illegal or unethical conduct is less than the pressure facing an in-house attorney. The typical attorney has numerous clients. Although business realities and the internal pressures of working at a law firm may make an attorney reluctant to withdraw from representation in such a case, the loss of one client is unlikely to have drastic consequences for the attorney's economic well-being. In contrast, the typical in-house attorney has one client. The refusal to provide services in a matter will likely result in the loss of the attorney's job. As such, in-house attorneys are generally more economically dependent on their client/employer's business.[73]

The role of an in-house attorney differs from that of outside counsel in other meaningful ways. In-house attorneys frequently have managerial and policy-making responsibilities with respect to clients that distinguish their jobs from those of outside attorneys.[74] As such, in-house attorneys are likely to be more immersed in the corporate culture of their clients and to be considered part of "the team" than are outside attorneys.[75] And, at least in comparison to law-firm *associates*, they are more likely to be immersed in the corporate culture of their employers than are outside attorneys. The pressure, therefore, to look the other way in the face of an employer/client's illegal or unethical conduct is arguably correspondingly greater.[76]

---

72. *Id.* R. 1.2 cmt. 10, 1.16(a)(1).

73. *See* Gen. Dynamics Corp. v. Super. Ct., 876 P.2d 487, 491 (Cal. 1994).

74. *See* Rachel S. Arnow Richman, *A Cause Worth Quitting For? The Conflict Between Professional Ethics and Individual Rights in Discriminatory Treatment of Corporate Counsel*, 75 IND. L.J. 963, 991–92 (2000) (discussing the scope of an in-house attorney's duties).

75. *Id.* at 991.

76. *See Gen. Dynamics Corp.*, 876 P.2d at 492 ("Even the most dedicated professionals, their economic and professional fate allied with that of the business organizations they serve, may be irresistibly tempted to cut corners by bending the ethical norms that regulate an attorney's professional conduct."). For a discussion as to the reasons behind lawyer complicity in client fraud, see Donald C. Langevort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75 (1993).

F. Category 5: In-House Counsel/Illegal or Unethical Conduct/Internal Remedial Attempts

In the fifth category, an in-house attorney faces retaliation after having tried internally to convince the corporation to comply with the law. Again, the special nature of in-house counsel may create particularly acute problems for an attorney confronting illegal or unethical conduct on the part of his one and only client. In addition to an attorney's duties to avoid illegal or fraudulent conduct and to refrain from assisting a client in such conduct, an attorney owes a duty to render candid advice.[77] In the case of an in-house attorney who represents an organizational client, the attorney owes this duty to the organization.[78] In addition, all lawyers owe a duty of competence, which includes inquiry into facts relevant to the representation.[79] Accordingly, an in-house attorney who suspects that the organization is engaging in illegal conduct may owe a duty to investigate the misconduct, inform those within the organization that such activity is taking place, and advise them of the legal consequences associated with such conduct.[80]

Model Rule 1.13 establishes a fairly elaborate process an attorney must follow when an organizational client is engaged in illegal conduct. An attorney for an organizational client must first determine whether someone associated with the organization

> is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization.[81]

If so, the attorney must proceed "as is reasonably necessary in the best interest of the organization," which, the rule assumes, will ordinarily require the lawyer to "refer the matter to higher

---

77. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003).

78. *Id.* R. 1.13(a).

79. *Id.* R. 1.1 cmt. 5.

80. *See* H. Lowell Brown, *The Dilemma of Corporate Counsel Faced with Client Misconduct: Disclosure of Client Confidences or Constructive Discharge*, 44 BUFF. L. REV. 777, 789 (1996) (stating that corporate counsel must inquire into possible corporate misconduct in order to properly advise the corporate client).

81. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2003).

authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law."[82] The rule, therefore, *requires* that an attorney in such a case report the wrongdoing internally.[83] Attorneys who practice in front of the Securities and Exchange Commission (SEC) have a similar "up the ladder" reporting requirement under the SEC's standards of professional conduct established pursuant to the Sarbanes-Oxley Act.[84]

Even where Rule 1.13 does not mandate any particular action on the part of an in-house attorney who learns of the organizational client's illegal conduct,[85] the attorney's duty to render candid advice and the duty of competence may compel the attorney to at least notify others within the corporate structure that such activity is planned or is taking place and that such activities may have legal consequences.[86] The danger, of course, is that in doing so, the attorney may be labeled a "troublemaker" or "not a team player" and may potentially face retaliation.[87] Unlike an attorney who represents an organizational client on a one-time or limited basis, an in-house attorney may be exposed to virtually every facet of the organization's operations.[88] The pressure to overlook the duty to address an organizational client's illegal conduct internally may be stronger in the case of an in-house attorney as a result. As the California Supreme Court has suggested, the special

---

82. *Id.*

83. The rule also allows, but does not require, the attorney to reveal such information to others outside the organization as the lawyer reasonably believes necessary to prevent substantial injury to the organization. *Id.* R. 1.13(c).

84. Pub. L. No. 107-204, 116 Stat. 745 (2002); Commodity and Securities Exchanges, 17 C.F.R. pt. 205 (2006).

85. Perhaps, for example, because the violation of law is unlikely to result in *substantial* injury to the client.

86. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (2003) ("Competent handling of a particular matter includes inquiry into . . . the factual and legal elements of the problem."); *id.* R. 2.1 ("In representing a client, a lawyer shall . . . render candid advice.").

87. *See* Rossler, *supra* note 69 and accompanying text. If the attorney is discharged as a result of bringing the matter to the attention of higher authorities within the corporation, Model Rule 1.13 provides that an attorney "shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal." MODEL RULES OF PROF'L CONDUCT R. 1.13(e) (2003).

88. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 17.7 (3d ed. Supp. 2007) (noting that in-house attorneys are more integrated into the operation of a business than outside attorneys).

role played by in-house counsel may tempt "even the most dedicated" attorneys to "cut corners":

> Th[e] expansion in the scope and stature of in-house counsel's work, together with an inevitably close professional identification with the fortunes and objectives of the corporate employer, can easily subject the in-house attorney to unusual pressures to conform to organizational goals, pressures that are qualitatively different from those imposed on the outside lawyer.[89]

G. *Category 6: In-House Counsel/Illegal or Unethical Conduct/Report to Law Enforcement Authorities*

The final category of cases involves one of the more debated topics in legal ethics: the extent to which an attorney may disclose information related to the representation of a client in order to protect others.[90] In this category, an attorney faces retaliation after having reported or threatened to report to law enforcement, or other appropriate external authorities, information concerning the client/employer's ongoing or planned criminal conduct. States are, of course, free to adopt their own rules governing the legal profession, and there is considerable variety among the states in terms of confidentiality rules.[91] Therefore, the extent of the dilemma that confronts a lawyer who wishes to report such information depends to some extent on the confidentiality rules that exist in a given jurisdiction.

Under the Model Rules, only a limited number of situations allow an attorney to depart from what would ordinarily be the attorney's duty to maintain client confidences. The Model Rules list several situations when disclosure of client confidences is permissible in order to protect the interests of others. Under Model Rule 1.6(b), an attorney may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary

> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to

89. Gen. Dynamics Corp. v. Super. Ct., 876 P.2d 487, 491–92 (Cal. 1994).
90. *See* Moore, *supra* note 22, at 1775–77 (noting the debate over this issue).
91. *See infra* notes 97–98 and accompanying text.

> the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; [and]
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.[92]

The limited nature of Model Rule 1.6(b) bears emphasis. First, a lawyer may only reveal information in order to protect others where the lawyer's services have somehow been used or are being used to harm the property or financial interests of another, except where a lawyer reasonably believes it necessary to reveal the information to prevent reasonably certain death or substantial bodily harm. Thus, unless an in-house attorney has somehow been involved in the matter of concern, the rule would not permit the attorney to reveal confidential information concerning the client's illegal conduct in order to protect the financial or property interests of another. In addition, the rule permits, but does not *require*, an attorney to disclose confidential information. Thus, even where the prerequisites of Model Rule 1.6 are satisfied, an in-house attorney would not have a *duty* under the rule to disclose information concerning the client's crime.[93]

Model Rule 1.13 contains a similar permissive disclosure provision. If an attorney reported a violation of the law all the way up the corporate ladder, and the highest authority that can act on behalf of the organization failed to respond in an appropriate manner, and the attorney reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the attorney *may* disclose client confidences to the extent the attorney reasonably believes necessary to prevent substantial injury to the organization.[94] The attorney may do so regardless of whether Model Rule 1.6 permits such action.[95]

---

92. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2003).

93. To date, there have been few, if any, reported cases involving an *outside* attorney who is fired by his or her law firm after the attorney, pursuant to the permissive disclosure provisions of Model Rule 1.6, discloses or attempts to disclose confidential information about a client.

94. MODEL RULES OF PROF'L CONDUCT R. 1.13(c) (2003).

95. *Id.*

Of course, an in-house attorney may nonetheless face a substantial dilemma where an ethical rule permits disclosure. One of a lawyer's most fundamental duties is the duty to maintain client confidences.[96] Therefore, the permissive nature of Model Rules 1.6 and 1.13 may present a lawyer with the dilemma of deciding whether to place greater value on protecting the interests of others or keeping a client's secrets inviolate. The dilemma may again be compounded for in-house counsel, who knows that disclosure of information concerning the client/employer's illegal conduct may lead to termination of employment.

Where a jurisdiction's disclosure rules differ from those of the Model Rules, an in-house attorney's dilemma in such cases may be more acute. Some jurisdictions rejected the Model Rules permissive approach and instead made disclosure of client confidences mandatory in some instances.[97] Such situations are typically limited to where the lawyer reasonably believes it necessary to prevent a client from committing a crime that is likely to result in death or substantial bodily harm.[98] In these instances, an in-house attorney's ethical duty may be clearer than under the Model Rules. However, the attorney's practical dilemma is, if anything, more pronounced. Where disclosure to law enforcement authorities is merely permissive, an attorney who fears for his or her job may always choose not to disclose and may fall back on the assertion that disclosure was not required. Where, however, disclosure of a client's illegal conduct is mandatory, an attorney faces the practical dilemma of deciding between complying with one's ethical duty and keeping one's job.[99]

96. *See id.* R. 1.6 cmt. 2 ("A fundamental principle in the client-lawyer relationship is that . . . the lawyer must not reveal information relating to the representation.").

97. For example, somewhere around thirteen jurisdictions provide that where an attorney knows of a client's intent to commit a crime or other act that is likely to result in death or bodily injury the attorney must disclose the information reasonably necessary to prevent the result. THOMAS D. MORGAN & RONALD ROTUNDA, 2008 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY App. A (2008).

98. *See, e.g.*, TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05(e) (2007). Rarer is the rule that requires disclosure in order to prevent a client from committing *any* crime. FLA. STAT. ANN. BAR RULES R. 1.6(b)(1) (2007).

99. Balla v. Gambro, 584 N.E.2d 104, 113 (Ill. 1991) (Freeman, J., dissenting).

II. THE NATURE OF THE PROBLEM

In at least one sense, these kinds of cases are simply a subset of the broader category of cases involving employees whose job performance is governed by a professional code of ethics. The central dilemma such an employee faces—choosing between one's job and furthering the policies underlying an ethical rule—is the same, regardless of the ethics code in question.[100] Given the difficulty in balancing the competing interests at stake, courts are split as to whether to afford a remedy to professional employees subject to this dilemma.[101] However, the special policy concerns present in the case of an *attorney* trapped in this situation make the resolution of such cases particularly difficult.

A. *The Public's Interest*

Courts routinely employ sweeping language concerning the "higher duty" to which lawyers are subject.[102] Such sweeping language aside, the public unquestionably has a substantial interest in insuring that attorneys comply with both the letter and spirit of the ethical rules governing attorneys. Numerous statements in the law governing lawyers concern the public nature of the rules. The Preamble to the Model Rules of Professional Conduct refers to a lawyer as "a public citizen having special responsibility for the quality of justice."[103] According to

---

100. The leading case involving the interplay between employee discharge and professional codes of ethics is *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980), wherein a physician claimed that compliance with her job duties would violate her Hippocratic Oath.

101. Perhaps a majority of decisions have rejected the claims of professional employees who have challenged the legality of their discharges under such circumstances. Manzer v. Diamond Shamrock Chem. Co., No. 89-6315, 1990 WL 92630 (6th Cir. July 3, 1990); Jaynes v. Centura Health Corp., 148 P.3d 241, 245 (Colo. App. 2006); Emerick v. Kuhn, No. CV 94-04608695, 1995 WL 405678, at *2 (Conn. Super. June 14, 1995); Suchodolski v. Mich. Consol. Gas Co., 316 N.W.2d 710, 712 (Mich. 1982); Sullivan v. Mass. Mut. Life Ins. Co., 802 F. Supp. 716, 727 (D. Conn. 1992). A number of courts have, however, been willing to afford a remedy to an employee under such circumstances. Lopresti v. Rutland Reg'l Health Servs., Inc., 865 A.2d 1102 (Vt. 2004); Rocky Mountain Hosp. & Med. Serv. v. Mariani, 916 P.2d 519, 526 (Colo. 1996); Kirk v. Mercy Hosp. Tri-County, 851 S.W.2d 617, 622 (Mo. Ct. App. 1993).

102. *See, e.g.*, Bohatch v. Butler & Binion, 977 S.W.2d 543, 560 (Tex. 1998) (Spector, J., dissenting) ("[A]ttorneys organizing together to practice law are subject to a higher duty toward their clients and the public interest than those in other occupations.").

103. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 1 (2003).

the ABA Standards for Imposing Lawyer Sanctions, "[t]he purpose of lawyer disciplinary proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession."[104] Numerous courts have stated that the very existence and enforcement of such rules contributes to public confidence in the judicial process.[105]

Professor Richard W. Painter has suggested that there are three kinds of professional responsibility rules: rules that protect clients, rules that protect third parties, and rules that protect the legal system.[106] Rules that protect the legal system directly advance a public interest. Although one might be tempted to argue that rules protecting clients and third parties merely impose upon attorneys obligations that are limited to a narrow class of individuals, the reality is that compliance with these rules ultimately contributes to the proper functioning of the legal system. Violation of the rule regarding competence, for example, may be a violation of a duty owed to one person: the lawyer's client.[107] However, enforcement of the rule may deter future incompetence on the part of the lawyer, thereby protecting future clients of the attorney in question as well as promoting the orderly administration of justice.[108] Even where a rule may not immediately protect a third person, its enforcement may ultimately prevent harm to the public at large. For example, Model Rule 5.1, which imposes upon supervising attorneys a duty to take reasonable measures to insure their subordinate attorneys are practicing law in accordance with the ethical rules,[109] exists to protect all current and future clients of the supervising attorney and, by extension, the orderly administration of justice.[110] In short, although some rules are purely technical in nature or advance solely the interests of the

---

104. ABA MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS III.A 1.1 (1992).

105. *See, e.g.*, Wieder v. Skala, 609 N.E.2d 105, 109 n.2 (N.Y. 1992) (noting that unethical conduct that " 'tends to reflect adversely on the legal profession as a whole and to undermine public confidence in (the Bar) warrants disciplinary action' " (quoting Matter of Rowe, 604 N.E.2d 728, 730 (N.Y. 1992))).

106. Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 674 (2001).

107. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

108. *See supra* note 104 and accompanying text.

109. MODEL RULES OF PROF'L CONDUCT R. 5.1 (2003).

110. *See generally* Miller, *supra* note 60, at 268 (noting the connection between Rule 5.1 and the duty of competence).

legal profession, they are extremely difficult to isolate.[111] Ultimately, virtually all of the rules benefit third parties and protect the public from abuses of trust that may ultimately impact the administration of justice.[112] If left unchecked, the ability of legal employers to discharge attorneys who attempt to further the purpose of the ethical rules may jeopardize a substantial public policy.

Not surprisingly, most courts have had little difficulty concluding that at least some of the ethical rules governing attorneys articulate substantial public policies.[113] However, it is sometimes difficult to isolate those instances in which an employer's actions jeopardize such a policy. For example, in *Wallace v. Skadden, Arps, Slate, Meagher & Flom*,[114] a law-firm associate complained internally about several instances of alleged unethical conduct on the part of other attorneys within the firm.[115] Each of the associate's alleged instances of misconduct arguably involved conduct prohibited by the jurisdiction's rules of professional conduct; however, not every alleged

111. Some commentators have suggested that most, or at least some, of the rules of professional conduct are self-interested devices designed to preserve lawyers' monopoly on the practice of law. Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 419 (2005) [hereinafter Barton, *The ABA, the Rules, and Professionalism*]. Perhaps the most commonly cited examples are the rules prohibiting the unauthorized practice of law, which are frequently labeled as blatant exclusionary practices designed to protect the profit margins of members of the local bar. *See* Margaret Onys Rentz, *Laying Down the Law: Bringing Down the Legal Cartel in Real Estate Settlement Services and Beyond*, 40 GA. L. REV. 293, 297–99 (2005) (linking the high cost of legal representation with such exclusionary practices). Benjamin Barton has recently argued that when the actions of lawyers and the rules governing their conduct are challenged in court, those doing the challenging will find themselves confronted with a judiciary that actively seeks to produce the result that the legal profession as a whole would prefer. Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 454 & n.1 (2008) [hereinafter Barton, *Interests of the Legal Profession*].

112. *See* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 508–09 (1985) (discussing the public purpose of the rules regarding admission to the bar).

113. Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852, 864 (Tenn. 2002) ("It cannot be seriously questioned that many of the duties imposed upon lawyers by the Tennessee Code of Professional Responsibility represent a clear and definitive statement of public policy."); Gen. Dynamics Corp. v. Super. Ct., 876 P.2d 487, 498 (Cal. 1994) ("Some (but not all) of these professional norms incorporate important public values."); *see also* Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578, 588 (Del. Ch. 1994) ("The maintenance of established codes of ethical behavior by licensed professionals is of immense social value.").

114. 715 A.2d 873 (D.C. 1998).

115. *Id.* at 883.

violation implicated a substantial public interest. For instance, the associate alleged, among other claims, that his supervising attorney had falsely claimed authorship of a brief he had never even read.[116] This appears to have been an allegation that the supervising attorney violated Model Rule 8.4(c)'s prohibition on conduct involving dishonesty, fraud, deceit, or misrepresentation.[117] It strains credibility to argue, however, that the law firm's decision to fire the complaining associate for reporting such conduct jeopardized any substantial public interest. The supervising attorney's conduct, as alleged, smacks of the kind of petty, ladder-climbing behavior anyone who has ever worked in an office is familiar with, rather than a serious threat to the public interest. More serious, however, was the complaining attorney's allegation that firm attorneys lied to clients by altering copies of documents after they were filed.[118] This type of alleged misconduct potentially has the kind of third-party effects that give the public a greater interest in the firing and that might warrant an exception to the traditional employment-at-will rule.[119]

B. *The Competing Interests of the Employer and the Public*

Although the public may have a strong interest in prohibiting an employer from discharging an attorney under such circumstances, there may be situations in which an employer has a legitimate justification for the discharge. Indeed, in many instances, the employer's interest will draw strength from other public policies articulated by the law governing lawyers. In some instances, these policies are so substantial and well-defined that they pose a formidable obstacle for the attorney seeking a remedy for the discharge.

---

116. *Id.*

117. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2003). Some have argued that Rule 8.4(c) applies only to more serious forms of misrepresentation. David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791, 817 (1995).

118. *Wallace*, 715 A.2d at 883.

119. *See* Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1945 (1996) (arguing for a tort exception to the employment-at-will rule in order to control the adverse effect on third parties created by contracting parties).

1. Preserving Employer Discretion

a. *Employer Discretion in the Law-Firm Setting*

Although courts and commentators have offered numerous justifications for the employment-at-will rule, one of the most common is that the ability of an employer to make business judgments free from judicial interference is essential to a competitive free market system.[120] This rationale applies not just to traditional businesses, but to law firms as well, where the market for legal representation is highly competitive. Indeed, given the fact that many judges have first-hand experience running law firms, it should hardly be surprising to find some judges reluctant to interfere with the ability of firm partners to run their firms as they see fit.[121]

Because, by definition, all rules place limits on behavior, law firms are already somewhat constrained in their ability to run their businesses as they wish. However, some ethical rules impose more than just general restrictions on law-firm autonomy. Model Rules 5.1 and 5.3 impose upon law-firm management an affirmative duty to take reasonable steps to ensure the firm has in place measures "giving reasonable assurance" that both lawyers and nonlawyers are in compliance with the professional obligations of a lawyer.[122] These rules, therefore, impose upon attorneys with managerial authority some duty of supervision with respect to subordinate lawyers and nonlawyers, that is, a duty to act in a particular manner instead of a duty not to act badly. Accordingly, these rules walk a narrow path between promoting compliance with the ethical rules governing attorneys and intruding upon a firm's management style.[123]

---

120. *See* Scott A. Moss, *Where There's At-Will, There Are Many Ways: Redressing the Increasing Incoherence of Employment at Will*, 67 U. PITT. L. REV. 295, 299–300 (2005) (citing examples of state case law justifying the rule on free market grounds).

121. *See generally* Barton, *Interests of the Legal Profession*, *supra* note 111, at 456 (arguing that because "[j]udges tend to come from a very select group of individuals who have thrived within the institution of legal thought and practice," they bring with them their own biases, which generally favor the interests of the legal profession).

122. MODEL RULES OF PROF'L CONDUCT R. 5.1, 5.3 (2003).

123. *See generally* Ted Schneyer, *Professional Discipline for Law Firms*, 77 CORNELL L. REV. 1, 17 (1991) (stating that "ethics rules have also begun to regulate matters of law firm governance that bear on ethical compliance" and citing Model Rule 5.1 as an example).

At the same time, the special nature of the practice of law may provide extra weight to a law firm's interest in running its business as it sees fit. Law firms are in the business of providing client representation. Arguably then, law firms should be given greater discretion when making personnel decisions regarding their attorneys because the public's interest in quality legal representation is so strong. The reality is that internal reports of unethical conduct and external reports to disciplinary authorities of such conduct may strain working relationships within a firm or otherwise create discord that affects the representation of clients.[124] Given an attorney's ethical duty of competent representation[125] and a firm's incentive to provide quality representation, such problems should ordinarily be capable of being resolved without any detrimental impact on clients. However, there may be instances where the manner in which an attorney raises ethical concerns may make effective client representation extremely difficult. Where such is the case, a firm might be justified in discharging an attorney despite the substantial public policy the discharged attorney may have advanced by raising concerns.

b. *In-House Attorneys and the Discretion of the Client as Employer*

Retaliatory discharge cases involving in-house attorneys not only implicate the bedrock principle of employment law—that an employer may fire its employees for any reason,[126] they also implicate one of the bedrock principles of the attorney-client relationship—that a client is free to fire an attorney at any time and for any reason.[127] One of the primary justifica-

124. *See* Bohatch v. Butler & Binion, 977 S.W.2d 543, 557 (Tex. 1998) (Hecht, J., concurring) (suggesting that tensions among attorneys in a firm resulting from charges of overbilling "might easily prevent proper representation of clients"); *see also id.* at 556 (noting that attorney's charge of overbilling on the part of another attorney resulted in "the report of possible overbilling to one of the firm's major clients, potentially jeopardizing that relationship"). *See generally* Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 886 (D.C. 1998) ("The narrow exceptions to the 'employment at-will' doctrine . . . were not designed to prevent an employer from terminating an at-will employee in order to eliminate unacceptable internal conflict and turmoil.").

125. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

126. *See supra* note 1200 and accompanying text.

127. *See* MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 4 (2003) ("A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services."); *see also* Gen. Dynamics Corp. v. Super. Ct., 876 P.2d 487, 493 (Cal. 1994) (referring to the unilateral right of the client to

tions for this rule is that attorney-client relationships are based on trust and that in order to function effectively, a client must retain confidence in the attorney.[128] Therefore, "any friction or distrust" that enters into this highly personal relationship hinders effective representation and justifies a client's unilateral right to discharge his or her attorney.[129]

While there are any number of exceptions to the employment-at-will rule,[130] there are virtually no exceptions to the principle that a client is free to discharge an attorney for any reason. Arguably then, the employer/client has a stronger argument concerning the need for discretion in the case of an in-house attorney than does the typical legal employer, given the great emphasis that the law governing lawyers places on a client's right to discharge an attorney. Because greater trust is needed for an attorney-client relationship to function effectively than is needed for the typical employer-employee relationship to function effectively, a corporate client may be more sensitive to in-house counsel's charges of unethical or illegal conduct. Not surprisingly, some employers have asserted a client's unilateral right to discharge an attorney as an absolute defense to the retaliatory discharge claim of an in-house attorney.[131]

Finally, the special rules associated with employment law and the law governing lawyers may work in tandem to strengthen an employer's interest in retaining its discretion. In *GTE Products Corp. v. Stewart*,[132] an in-house attorney claimed he had been constructively discharged after repeated disagreements with his employer concerning the attorney's advice.[133] According to the description of the Massachusetts Supreme Judicial Council, the attorney advised the company to take "aggressive and (presumably) costly measures to protect consumer safety and guard against possible corporate liability."[134] In so doing, the attorney apparently advised the com-

---

fire an attorney as "probably *the* central value of the lawyer-client relationship") (emphasis in original).

128. Rhoades v. Norfolk & W. Ry. Co., 399 N.E.2d 969, 974 (Ill. 1979).

129. Herbster v. N. Am. Co. for Life & Health Ins., 501 N.E.2d 343, 347 (Ill. Ct. App. 1986); *Gen. Dynamics Corp.*, 876 P.2d at 493.

130. *See infra* Parts III & IV.

131. Heckman v. Zurich Holding Co. of Am., Civ.A. No. 06-2435-KHV, 2007 WL 1347753, at *3 (D. Kan. May 8, 2007); Burkhart v. Semitool, Inc., 5 P.3d 1031, 1038 (Mont. 2000).

132. 653 N.E.2d 161 (Mass. 1995).

133. *Id.* at 164.

134. *Id.*

pany to actually do more than was required by the law in an attempt to bring the company into " 'compliance with the highest ethical business standards.' "[135]

It is, of course, the duty of an attorney to provide advice to a client, and that advice may include economic and moral considerations as well as legal considerations.[136] Given their extensive involvement in the affairs of the corporation, in-house attorneys are, in the words of one commentator, "ideally situated to serve as leaders in the struggle to define the parameters of corporate conscience."[137] However, because the *GTE Products Corp.* court viewed the disagreement between attorney and client as involving "matters committed to the business judgment of the company" rather than matters of genuine public concern (such as safety issues), the court was reluctant to recognize a retaliatory discharge claim.[138] In effect, the court acknowledged the fundamental principle of employment law—that an employer is free to run its business as it sees fit with an eye toward maximizing profit—and the fundamental principle of the law governing lawyers—that a client retains the authority to make decisions with respect to the objectives of the representation.[139] Short of some compelling public interest in the employer's resolution of the disagreement, the interests of the employer/client should prevail.

2. Other Countervailing Public Policies

Ironically, an attorney who relies on a particular rule of professional conduct as the source of public policy for purposes of a retaliatory discharge claim may run into the employer's defensive attempts to assert a different rule that suggests a competing public policy. Because the ethical rules regulate the at-

135. *Id.* at 168 (quoting plaintiff's complaint).

136. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003).

137. Sarah Helene Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 ST. LOUIS U. L.J. 989, 992 (2007).

138. *See GTE Products Corp.*, 653 N.E.2d at 168; *see also* McGonagle v. Union Fid. Corp., 556 A.2d 878, 885 (Pa. Super. Ct. 1989) (stating that "when the act to be performed turns upon a question of judgment, as to its legality or ethical nature, the employer should not be precluded from conducting its businesses where the professional's opinion is open to question"); MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 3 (2003) ("When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful.").

139. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2003).

torney-client relationship, this occurs most commonly in the case of an in-house attorney. In such cases, the attorney may have to contend with the policies underlying the rules regarding withdrawal from representation and client confidentiality in order to proceed with the retaliatory discharge claim.

a. Confidentiality Concerns and the Adverse Impact on the Attorney-Client Relationship

Perhaps the most commonly advanced argument against recognition of retaliatory discharge claims by in-house counsel is that recognition of such claims might have a chilling effect on the attorney-client relationship. The leading case in support of this argument—and the leading case in support of the view that retaliatory discharge claims by in-house attorneys are not permitted in general—is the Illinois Supreme Court's decision in *Balla v. Gambro, Inc.*[140] In *Balla*, an in-house attorney learned of his employer's plan to market potentially dangerous kidney dialyzers.[141] In response, the attorney informed the company's president that "he would do whatever necessary to stop the sale of the dialyzers."[142] Shortly thereafter, the attorney was discharged and subsequently notified the Food and Drug Administration (FDA) about the company's plans regarding the dialyzers.[143]

The Illinois Supreme Court based its decision to reject the attorney's retaliatory discharge claim—and to establish a bar to such claims by in-house attorneys more generally—on a number of grounds. One of its primary concerns was that permitting such claims might make employers "less willing to be forthright and candid with their in-house counsel."[144] The court referenced the long-standing freedom of clients to discharge their attorneys at will, noting the basis for the rule is that the attorney-client relationship is based on trust.[145] Permitting in-house attorneys to bring retaliatory discharge claims would potentially inject an element of distrust into the relationship and make employers hesitant to be candid with their

140. 584 N.E.2d 104 (Ill. 1991).
141. *Id.* at 106.
142. *Id.*
143. *Id.*
144. *Id.* at 109.
145. *Id.*

attorneys, "knowing that their in-house counsel could use this information in a retaliatory discharge suit."[146]

Since then, courts have almost uniformly rejected the *Balla* court's arguments concerning confidentiality on both black-letter law and policy grounds.[147] Model Rule 1.6(b)(5) provides for an exception to a lawyer's duty to maintain client confidences where disclosure is reasonably necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client."[148] Based on the plain language of Model Rule 1.6(b)(5), several courts have concluded the rule permits the disclosure of confidential information where necessary to establish a retaliatory discharge claim.[149] The ABA has issued a formal opinion to the same effect.[150]

In addition, the Tennessee Supreme Court has suggested that the *Balla* court's concern over the potentially chilling effect on the attorney-client relationship permitting such claims is flawed for at least two reasons. First, recognition of a right to bring a retaliatory discharge claim would do little to chill the attorney-client relationship in what is almost certainly the majority of cases: where the client seeks legal advice from in-house counsel with the intent to comply with the law.[151] The only instance where permitting such claims would discourage communication would be where the client/employer is bent on violating the law regardless of the in-house attorney's legal advice.[152] Second, there are already several instances where the ethical rules governing attorneys permit disclosure.[153] As a re-

146. *Id.*

147. *See* Heckman v. Zurich Holding Co., 242 F.R.D. 606, 608–09 (D. Kan. 2007) (citing cases). Courts that have rejected this aspect of *Balla* have generally taken one of two approaches. Some courts have permitted lawyers to bring retaliatory discharge claims but only "in those rare instances" where a lawyer can establish a claim without breaching the attorney-client privilege. Gen. Dynamics Corp. v. Super. Ct., 876 P.2d 487, 503 (Cal. 1994). Others have taken a more permissive approach, permitting such claims subject to the caveat that a lawyer "must make every effort practicable to avoid unnecessary disclosure" of client confidences. Crews v. Buckman Labs., Int'l, Inc., 78 S.W.3d 852, 866 (Tenn. 2002).

148. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2003).

149. Spratley v. State Farm Mut. Auto. Ins. Co., 78 P.3d 603, 609 (Utah 2003); Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852, 864 (Tenn. 2002); Burkhart v. Semitool, Inc., 5 P.3d 1031, 1041 (Mont. 2000).

150. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 01-424 (2001) (opining that Model Rule 1.6 permits an attorney to file suit for retaliatory discharge, but that attorney should take reasonable steps to avoid unnecessary disclosure of client confidences).

151. *Crews*, 78 S.W.3d at 861.

152. Balla v. Gambro, 584 N.E.2d 104, 114 (Ill. 1991) (Freeman, J., dissenting).

153. *Crews*, 78 S.W.3d at 861.

sult, it is difficult to see how the trust necessary for the attorney-client relationship to function would be further diminished "by the remote possibility of a retaliatory discharge suit."[154]

Indeed, the Model Rules of Professional Conduct reflect the fact that the duties of loyalty and confidentiality are not absolute values by permitting disclosure of client confidences in some instances.[155] As Professor Nancy J. Moore has noted, "prior to the adoption of the *Model Rules* in 1983, ABA codes permitted lawyers to disclose the intent of a client to commit *any* crime, including economic crimes."[156] Prior to the ABA's Ethics 2000 Project, which liberalized the rules regarding disclosure of confidential information, the majority of states took a similarly expansive view of an attorney's ability to disclose confidential information in order to prevent or mitigate financial or bodily harm to third parties.[157] In short, there is ample support for the notion that the law governing lawyers has long recognized that the duties of loyalty and confidentiality may give way where the public interest is threatened.

None of which is to say that an employer's concerns over the disclosure of confidential and possibly highly embarrassing information are trivial. By permitting disclosure of otherwise confidential information, Model Rule 1.6(b)(5) creates the potential for the disclosure of potentially voluminous and damaging confidential information. It is for this reason that jurisdictions following the literal language of Model Rule 1.6(b)(5) stress that the rule permits disclosure of confidential information only to the extent reasonably necessary to establish the attorney's claim. Therefore, an attorney " 'must make every effort practicable to avoid unnecessary disclosure of [client confidences and secrets], to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.' "[158]

---

154. *Id.*
155. Moore, *supra* note 22, at 1777.
156. *Id.*
157. *Id.* at 1787.
158. *Crews*, 78 S.W.3d at 864 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 19 (2002)).

b. *The Impact of Other Professional Responsibility Rules*

In prohibiting in-house attorneys from bringing retaliatory discharge claims, the *Balla* court used two ethical rules against the plaintiff/attorney in explaining why public policy did not favor allowing such claims. The court's primary justification for not permitting in-house attorneys to bring retaliatory discharge claims was that the public policy of protecting the lives and property of citizens was already adequately safeguarded by the existence of a mandatory code of ethics for attorneys.[159] Although acknowledging that there is no more substantial public policy than the policy in favor of protecting the lives and property of citizens,[160] the court believed that this policy was already safeguarded by the existence of a mandatory duty on the part of an attorney under Illinois' rules to disclose client confidences to the extent necessary "to prevent the client from committing an act that would result in death or serious bodily injury."[161]

Courts that have considered this argument have determined it to be an unrealistic appraisal of human behavior and the special pressures in-house attorneys face.[162] Although one hopes that lawyers will always obey their ethical obligations, it becomes more difficult to do so when presented with the choice of complying with an ethical obligation and keeping one's job. The temptation to ignore one's ethical duties is even greater for in-house attorneys who, in the words of the California Supreme Court, "owe their livelihoods, career goals and satisfaction to a single organizational employer."[163]

Equally problematic is the *Balla* court's use of the ethical rules governing attorneys to prohibit in-house attorneys from bringing retaliatory discharge claims. According to the court, an attorney who believes the client is ordering the attorney to engage in illegal conduct has one option: withdrawal from all representation of the client.[164] Recognizing a right to sue when the discharged attorney is ethically obligated to withdraw from

159. *Balla*, 584 N.E.2d at 108.
160. *Id.* at 107–08.
161. *Id.* at 109 (quoting ILL. RULES OF PROF'L CONDUCT R. 1.6(b) (1991)).
162. *Crews*, 78 S.W.3d at 860; Gen. Dynamics Corp. v. Super. Ct., 876 P.2d 487, 492 (Cal. 1994).
163. *Gen. Dynamics*, 876 P.2d at 491; *see also supra* notes 73–76 and accompanying text (discussing the special pressures facing in-house attorneys).
164. *Balla*, 584 N.E.2d at 110.

representing a client in any event would be inconsistent with the values and goals expressed by the rules of professional conduct.[165] In the court's view, "[a]n attorney's obligation to follow these Rules of Professional Conduct should not be the foundation for a claim of retaliatory discharge."[166]

At least in a jurisdiction that employs the current version of the Model Rules, the *Balla* court's observation is incorrect. Under the current version of Model Rule 1.2(d), an attorney is not required to withdraw from representing a client on *all* matters when the client insists that the attorney assist the client in wrongdoing. Instead, according to the Comments to the rule, once an attorney learns that a client is using her services for the purpose of committing an intentional or fraudulent act, the attorney must "withdraw from the representation of the client *in the matter*."[167] Thus, an in-house attorney need not *resign* in order to fulfill her ethical obligations. Instead, the attorney must cease representing the client on the matter in which the client is engaging in wrongful conduct.[168] Such a result better reflects the reality facing in-house attorneys. Given the sweeping scope of an in-house attorney's job, an in-house attorney may have as many ongoing "matters" as outside counsel.[169] Yet, the typical law-firm attorney will often be able to cease representing a client on any and all matters without incurring substantial damage to the firm's bottom line. Because in-house attorneys lack the same luxury, their pressure to "look the other way" is typically greater.

3. Cost-Absorption Concerns

The final justification for not permitting a retaliatory discharge claim by a discharged attorney—at least in the case of a discharged in-house attorney—is that it is unfair to force the employer of an attorney to bear the economic costs associated

165. *Id.*; *see also* Willy v. Coastal Corp., 647 F. Supp. 116, 118 (S.D. Tex. 1986) (applying same logic in rejecting in-house attorney's retaliatory discharge claim).

166. *Balla*, 584 N.E.2d at 110.

167. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) cmt. 10 (2003) (emphasis added).

168. The same is true with respect to an in-house attorney's obligations under the SEC's proposed (but not acted upon) rule, enacted pursuant to the Sarbanes-Oxley Act, regarding rules of professional conduct for attorneys practicing before the Commission. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71669-71707 (proposed Nov. 21, 2002) (to be codified at 17 C.F.R. pt. 205).

169. *See supra* note 89 and accompanying text.

with an attorney's compliance with the rules of professional conduct. According to *Balla*, where an attorney has an ethical obligation to reveal confidential information concerning the client/employer, "the attorney-client relationship will be irreversibly strained and the client will more than likely discharge its in-house counsel."[170] The court reasoned that recognizing a retaliatory discharge claim in such instances would force the client/employer "to pay damages to its former in-house counsel to essentially mitigate the financial harm the attorney suffered for having to abide by the Rules of Professional Conduct."[171]

The *Balla* court's reasoning was offered in the context of an attorney under a duty to disclose confidential information regarding the representation of a client.[172] However, the court's reasoning would logically extend to any situation in which an attorney has a mandatory ethical duty to take a particular action that the client/employer perceives as being adverse to its interests. Once again, the flaw in *Balla*'s reasoning is that it gives little weight to the public's interest in such matters. Where an employer discharges an attorney who has complied with an ethical duty, it makes far more sense to force the employer to bear the costs associated with such action where it is the employer who was seeking to circumvent public policy to begin with.[173] Forcing the attorney to bear the costs of the discharge in such cases simply makes it more likely that future attorneys will ignore their ethical obligations, thus increasing the odds that the public's interests in having an ethical legal profession will be frustrated.

C. *Approaches to the Problem*

Given the difficult policy issues at play, it should not be surprising that no clear consensus exists as to the proper treatment of claims involving an attorney who is retaliated against for deciding to further the policies underlying the rules of professional conduct. In some instances, the interests of the discharged attorney and the public align to create powerful arguments in favor of granting an attorney a remedy. In other instances, the interest that legal employers and the public

170. *Balla*, 584 N.E.2d at 110.
171. *Id.*
172. *See supra* note 161 and accompanying text.
173. Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852, 862 (Tenn. 2002).

share in effective client representation provides a powerful counter argument.

As alluded to, a few courts have established a blanket prohibition on attorneys suing their former employers under a retaliatory discharge theory.[174] Other courts have indicated a willingness to permit such claims in general, but have refused to recognize the claim of a discharged attorney under the particular facts of the case,[175] or placed limitations on the attorney's ability to disclose client confidences while litigating a claim.[176]

Courts have also split as to which theory of recovery they will permit. Some courts refuse to recognize claims brought under the tort theory of retaliatory or wrongful discharge in violation of public policy, but are willing to recognize an attorney's claim that the discharge amounted to a violation of an implied contractual duty.[177] The majority of courts recognize a tort theory of retaliatory or wrongful discharge in violation of public policy.[178] Again, however, the approach that a court will take in a given case, as well as the outcome, can be difficult to predict.

III. IMPLIED CONTRACTUAL DUTIES AND THE ETHICAL RULES GOVERNING ATTORNEYS

The default rule of all employment law is that absent a contractual limitation on the ability of an employer to fire one of its employees, an employer is free to discharge an employee at any time and for any reason.[179] In an attempt to escape the strictures of this employment-at-will doctrine, employees frequently assert that the words or actions of an employer have

174. Jacobson v. Knepper & Moga, P.C., 706 N.E.2d 491 (Ill. 1998); *Balla*, 584 N.E.2d at 104; Willy v. Coastal Corp., 647 F. Supp. 116 (S.D. Tex. 1986)*; see also* Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 896 So. 2d 787, 791 (Fla. App. Dist. 2005) (refusing to recognize a statutory retaliation claim for attorneys premised upon discharge for complying with a rule of professional conduct).

175. *See, e.g.*, McGonagle v. Union Fid. Corp., 556 A.2d 878 (Pa. Super. Ct. 1989).

176. Gen. Dynamics Corp. v. Super. Ct., 876 P.2d 487 (Cal. 1994).

177. Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578 (Del. Ch. 1994); Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992).

178. *See, e.g.*, Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873 (D.C. 1998).

179. *See, e.g.*, Winters v. Houston Chronicle Publ'g Co., 795 S.W.2d 723, 723 (Tex. 1990).

expressly or impliedly limited the employer's rights under the at-will doctrine. In cases in which an attorney has been discharged after attempting to comply with the attorney's ethical obligations, some attorneys have enjoyed success on an implied contract theory.

For example, in *Wieder v. Skala*, a law-firm associate was fired, allegedly for insisting that his law firm report the misconduct of a fellow associate to disciplinary authorities.[180] Specifically, the other associate allegedly committed several acts of malpractice, fraud, and deceit upon clients.[181] The New York Court of Appeals held that there was an implied contractual term that both the associate and the firm would practice law in accordance with the ethical standards of the legal profession, despite the fact that the associate was an at-will employee of the firm.[182] The court stated that, whether the limitation was framed in terms of an implied-in-law contractual term or a limitation by virtue of the implied duty of good faith and fair dealing present in every contract, the firm was limited in its ability to fire the associate for complying with his ethical obligations.[183] While recognizing an implied-in-law contractual theory, the New York Court of Appeals rejected the associate's tort-based wrongful discharge theory, stating that such alteration of the employment-at-will rule was better left to the state legislature.[184]

The Delaware Chancery Court adopted a similar approach with respect to in-house attorneys in *Shearin v. E.F. Hutton Group, Inc.* There, an in-house attorney, in accordance with his duties under Delaware's Rules of Professional Conduct, sought to inform a trust company's board of directors about illegal activity taking place within the company.[185] The attorney was subsequently fired, allegedly in response.[186] The court concluded that corporate employers hire their attorneys with the understanding that an attorney's services must be rendered in conformity with the rules of professional conduct.[187] There-

180. *Wieder*, 609 N.E.2d at 109.

181. *Id.* at 106.

182. *Id.* at 109. *But see* Bohatch v. Butler & Binion, 977 S.W.2d 543 (Tex. 1998) (rejecting discharged partner's breach of contract and breach of fiduciary duty claims stemming from her allegedly retaliatory discharge).

183. *Wieder*, 609 N.E.2d at 109.

184. *Id.* at 110.

185. 652 A.2d 578, 585 (Del. Ch. 1994).

186. *Id.*

187. *Id.* at 588.

fore, the attorney's compliance with such rules is "an implicit term of every lawyer's contract of retention or of employment."[188]

This contractual approach may provide other courts with an effective and efficient way of dealing with similar situations. However, there are several limitations to this approach. One problem with resolving the attorney discharge cases by reference to implied contractual duties is that the employer may well have a perfectly legitimate reason for discharging the attorney; nonetheless, the public interest in permitting such action is offended. In some instances, the discharging employer may very well be motivated by ill will or lack an objectively reasonable basis for discharging the troublemaking attorney. Sometimes, however, the employer will have objectively legitimate reasons for discharging the attorney. For example, accusations of unethical conduct may strain working relationships to the point that it is difficult to carry out the representation of a client.[189] A refusal to go along with conduct that involves a debatable point concerning an attorney's ethical duties may do the same. Despite this fact, the societal interest in permitting an attorney to make such accusations free from the fear of discharge may outweigh the employer's interest.

This is precisely the situation for which the tort of retaliatory discharge in violation of public policy was created. In the words of one court, "[t]he very purpose of recognizing an employee's action for retaliatory discharge in violation of public policy is to encourage the employee to protect the public interest."[190] Contract law, with its usual focus on the mental states and actions of the contracting parties alone, may be too blunt an instrument for vindicating the societal interests at stake in these cases.

In addition, the contractual approach is limited in its scope to situations in which an attorney claims to have been discharged after complying with an ethical *obligation*; it does not address situations in which the rules of professional conduct

---

188. *Id.*; *see also* Daniel S. Reynolds, *Wrongful Discharge of Employed Counsel*, 1 GEO. J. LEGAL ETHICS 553, 583 (1987) ("The presumption . . . is that one who hires a lawyer hires someone packaged, as it were, with certain legal and fiduciary constraints on behavior, many of which are identified in the professional rules, and which both parties can reasonably expect will govern the performance of the legal services.").

189. *See* Bohatch v. Butler & Binion, 977 S.W.2d 543, 556 (Tex. 1998) (Hecht, J., concurring in the judgment).

190. Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852, 860 (Tenn. 2002).

permit or fail to address the actions of the attorney leading to the discharge.[191] Nor does it address situations in which the rules neither expressly permit nor require any particular action, but where the attorney's actions clearly further the policies underlying the rules. Recognizing the existence of an implied contractual term limiting the ability of an employer to discharge an attorney for complying with the attorney's ethical obligations may be a fair and efficient means of handling many of the kinds of cases discussed in this Article. Ultimately, however, the contractual approach is an underinclusive means of dealing with the problem of retaliatory discharges.

IV. RETALIATORY DISCHARGE IN VIOLATION OF PUBLIC POLICY AND THE ETHICAL RULES GOVERNING ATTORNEYS

Given the shortcomings of contractual claims involving the retaliatory discharge of attorneys, the more appropriate theory—and sometimes the *only* viable theory—is a tort claim of retaliatory discharge in violation of public policy. Such claims present their own obstacles, but assuming those obstacles can be overcome, retaliatory discharge claims will often do the best job of furthering the public interest in these cases. By drawing upon existing employment discrimination law, courts can formulate an approach that effectively balances the competing interests at stake.

A. *Retaliatory Discharge Basics and Some Initial Benefits and Obstacles*

In most jurisdictions, the basics of a retaliatory or wrongful discharge claim are well-established.[192] However, the nuances of such claims often vary from state to state and case to case. The tort of retaliatory discharge represents an exception to the principle of employment at-will.[193] The principle under-

191. *See* Rojas v. Debevoise & Plimpton, 634 N.Y.S.2d 358, 361 (N.Y. App. Div. 1995) (stating that discharged attorney had no claim under *Wieder* because attorney was not faced with the choice "of continued employment or possible suspension or disbarment for violation of an ethical obligation imposed by the Disciplinary Rules and Code of Professional Responsibility").

192. *See* Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie?*, 58 U. CIN. L. REV. 397, 398–399 (1989) (summarizing the basic elements of the tort).

193. *See* Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 105 (Colo. 1992) (discussing the rule and its exceptions).

lying the tort claim is that an employer's absolute right to discharge an employee may be curtailed " 'if the discharge of the employee contravenes a clear mandate of public policy.' "[194] Thus, the tort claim does not exist primarily to protect employees from unjust firings, but to protect broader societal interests.[195] Where a discharge jeopardizes a substantial public policy, the employer's interests must be substantial themselves in order to support the discharge.[196] For the reasons previously discussed, in many instances, an employer's discharge of an attorney would seem to provide the basis for a retaliatory discharge claim. Depending upon the jurisdiction, however, there may be significant limitations to such claims.

In order to pursue a retaliatory discharge claim, a plaintiff must identify a source that articulates the public policy jeopardized by the firing.[197] The rules of professional conduct governing lawyers encompass nearly all of the qualities that courts typically prize when deciding whether the alleged source of public policy is a valid one. Unlike some professional codes of ethics, the ethical rules governing lawyers are not purely technical or self-serving in nature, but instead serve a public purpose.[198] The Model Rules of Professional Conduct also eschew broad, hortatory language, which does little to put the parties on notice as to the limits of acceptable behavior.[199] Instead, the Model Rules use relatively concrete ethical standards, framed in the form of black-letter rules.[200] Finally, unlike the ethics codes of many professions, the ethical rules governing attorneys emanate from governmental action.[201] The state rules of

---

194. *Id.* at 107 (quoting Thompson v. St. Regis Paper Co., 685 P.2d 1081, 1089 (Wash. 1984)).

195. Gen. Dynamics Corp. v. Super. Ct., 876 P.2d 487, 497 (Cal. 1994); Palmateer v. Int'l Harvester Co., 421 N.E.2d 876, 880 (Ill. 1981).

196. *See* Collins v. Rizkana, 652 N.E.2d 653, 658 (Ohio 1995) (stating that an employer must have "overriding legitimate business justification[s]" for the termination).

197. Modesitt, *supra* note 29, at 625–26.

198. *See supra* note 111 and accompanying text; Pierce v. Ortho Pharm. Corp., 417 A.2d 505, 512 (N.J. 1980) ("[A] code of ethics designed to serve only the interests of the profession or an administrative regulation concerned with technical matters probably would not be sufficient.").

199. *See* Rocky Mountain Hosp. and Med. Serv. v. Mariani, 916 P.2d 519, 525 (Colo. 1996) (stating that the policy must be articulated clearly enough so that "the acceptable behavior is concrete and discernible as opposed to a broad hortatory statement of policy that gives little direction as to the bounds of proper behavior"); Barton, *The ABA, the Rules, and Professionalism*, *supra* note 111, at 438.

200. Painter, *supra* note 1066, at 668; Barton, *The ABA, the Rules, and Professionalism*, *supra* note 111, at 438.

201. *See* Jaynes v. Centura Health Corp., 148 P.3d 241, 245 (Colo. Ct. App.

professional conduct governing lawyers are rules adopted by the state's highest court, pursuant to its authority to regulate the legal profession.[202] Thus, a co-equal branch of government, acting pursuant to its constitutional,[203] legislatively-delegated,[204] or common law[205] authority to regulate the legal profession, is responsible for the promulgation of the rules.

Despite this, some jurisdictions may be unwilling to recognize a retaliatory discharge claim premised upon the discharge of an attorney for action that furthers the policies underlying the rules of professional conduct.[206] Several courts have limited the sources of public policy for purposes of a wrongful discharge claim to legislative enactments, or at least have expressed a strong preference for such positive law.[207] In the words of one court, the "recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally the function of the legislative branch."[208] Thus, a jurisdiction's rules of professional conduct, adopted by the jurisdiction's highest appellate court, may not qualify as a source of public policy.

A jurisdiction might also be reluctant to recognize an attorney's wrongful discharge claim because it does not fit neatly within one of the cubbyholes recognized by the jurisdiction as an exception to the employment-at-will rule. As described by one court, the most common types of wrongful discharge cases have involved employees fired for the following types of conduct:

2006) (stating that in most cases in which courts have held that ethics codes may constitute sources of public policy, the codes have emanated from governmental action).

202. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 24 (1986).

203. *See* Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 896 So. 2d 787, 791 (Fla. App. Dist. 2005) (noting court's authority to promulgate rules governing lawyers as granted by state constitution).

204. *See* Wieder v. Skala, 609 N.E.2d 105, 108 (N.Y. 1992) (noting legislature's delegation of responsibility for regulating the legal profession in the jurisdiction).

205. *See* WOLFRAM, *supra* note 202, at 24 (noting that state courts claim the inherent power to regulate the legal profession).

206. *See supra* note 1844 and accompanying text.

207. *See* Thompto v. Coburn's, Inc., 871 F. Supp. 1097, 1116 (N.D. Iowa 1994) (noting opinions from Iowa Supreme Court identifying statutes and constitutional provisions as the sources of public policy in tortious discharge cases); Adler v. Am. Standard Corp., 432 A.2d 464, 469 (Md. 1981) ("With few exceptions, courts recognizing a cause of action for wrongful discharge have to some extent relied on statutory expressions of public policy as a basis for the employee's claim.").

208. *Adler*, 432 A.2d at 472.

> (1) refusal to participate in illegal activity; (2) the employee's refusal to forsake the performance of an important public duty or obligation; (3) the employee's refusal to forego the exercise of a job-related legal right or privilege; (4) the employee's "whistleblowing" activity or other conduct exposing the employer's wrongdoing; and (5) the employee's performance of an act that public policy would encourage under circumstances where retaliatory discharge is supported by evidence of the employer's bad faith, malice, or retaliation.[209]

Depending upon the facts, a retaliatory discharge claim premised on an attorney's fulfillment of her ethical obligation may fit within one of several of these cubbyholes. Using the categories described previously, attorneys in Category 4, who refuse to participate in a client's illegal activities, fit neatly within the refusal to participate in illegal activity cubbyhole. Like an employee who is fired for fulfilling jury duty[210] or providing testimony in a judicial or administrative hearing,[211] an attorney who, as in Categories 1 and 3, otherwise fulfills an ethical obligation is fulfilling an important public obligation. Just as participation in the judicial process is essential to the administration of justice,[212] so, too, is the willingness of attorneys to comply with their ethical obligations. Without an attorney's compliance with his or her ethical duties, the public's interest in the administration of justice would be adversely affected.[213] An attorney may also fit within one of a jurisdiction's recognized cubbyholes even where the attorney does not have an ethical obligation to act in a particular manner. Attorneys in Category 2, for example, who lack any affirmative duty to engage in internal remedial attempts to address unethical conduct, may nonetheless engage in protected whistleblowing activity in some jurisdictions.

Some attorneys likely will encounter problems in the pursuit of their retaliatory discharge claims either because their actions do not technically fit within one of the above cubbyholes or because the jurisdiction in question does not recognize the relevant cubbyhole. For example, an attorney who refuses to

---

209. Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 107 (Colo. 1992) (internal citations omitted).

210. Nees v. Hocks, 536 P.2d 512, 516 (Or. 1975).

211. Kistler v. Life Care Ctrs. of Am., Inc., 620 F. Supp. 1268, 1270 (D. Kan. 1985).

212. *Id.*

213. *See supra* note 1044 and accompanying text.

participate in conduct that would violate the attorney's ethical obligations, but that is not necessarily *illegal*, may not be able to fit her claim with the exception for refusal to participate in illegal activity.[214] An attorney in Category 2 or 5 who blows the whistle internally on illegal or unethical conduct may be left unprotected either because the jurisdiction does not recognize the whistleblowing exception or because the exception protects external, as opposed to internal, whistleblowers.[215]

In conclusion, there are likely situations in which these types of problems exist, and courts are unwilling to depart from prior precedent in order to afford a discharged attorney a tort remedy. Where such is the case, the contract approach described previously may provide an attorney with an avenue for recovery.[216] Where, however, these limitations do not exist, or where a court is willing to recognize a special rule for attorneys based on the special policy concerns present, the tort theory of retaliatory discharge may be the more appropriate remedy because of its increased ability to balance the competing interests.

B. Resolving Retaliatory Discharge Claims Involving the Ethical Rules Governing Attorneys

To prevail on a retaliatory discharge claim, a plaintiff must ultimately establish that the employer's justification for the discharge is insufficient to trump the public's interest in preventing the discharge.[217] An employer's interest in such a case is strengthened where the discharged attorney's actions have the potential to adversely affect client representation. However, just as the nature and strength of an employer's interest may vary depending upon the circumstances, the nature and strength of the societal interest in the discharge of an attorney may also vary. In order to best balance the competing inter-

214. *Cf.* Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213, 216 (S.C. 1985) (recognizing an exception to the employment-at-will rule only where an employee refuses to participate in violations of criminal law).

215. *See* Elizabeth C. Tippett, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law*, 11 EMP. RTS. & EMP. POL'Y J. 1, 4–5 (2007) ("Slightly more than half of states allow whistleblowers to bring a claim against their employer for common law wrongful discharge in violation of public policy.").

216. *See supra* Part III.

217. *See, e.g.*, Collins v. Rizkana, 652 N.E.2d 653, 657–58 (Ohio 1995) (listing elements of retaliatory discharge claim).

ests, courts should borrow the basic framework for resolving retaliation claims under Title VII, which affords different levels of protection from retaliation depending upon whether the plaintiff was participating in an official proceeding under Title VII, or whether the plaintiff was opposing unlawful employer conduct in a more general manner. Therefore, the relevant inquiry in any case will involve consideration of whether the discharged attorney was fired for participating in the disciplinary process itself, or whether the attorney was fired for opposing unlawful or unethical conduct more generally, with greater protection extended in the former instance. By borrowing the basic framework for resolving retaliation claims from Title VII, courts can best balance the competing interests at stake.

1. Retaliation Under Title VII

Title VII of the Civil Rights Act of 1964 famously prohibits discrimination on the basis of race, sex, religion, and national origin.[218] In order for this guarantee to have meaning, employees must feel free to seek redress for discrimination and assist others in doing so without fear of employer retaliation.[219] To that end, section 704(a) of Title VII of the Civil Rights Act of 1964 prohibits an employer from retaliating against an employee for engaging in two forms of conduct: (1) opposing an employer's discriminatory conduct (opposition conduct) and (2) making a charge of discrimination or testifying, assisting, or participating in any manner in an EEOC investigation, proceeding, or hearing under Title VII (participation conduct).[220] Opposition conduct is the less formal of the two forms of protected conduct and may include making internal complaints to management, writing letters that are critical of management, and expressing support for coworkers who have filed discrimination charges.[221] In contrast, participation conduct occurs only where an employee participates in "the machinery set up by Title VII to enforce its provisions," such as by filing a charge of discrimination or providing testimony during a lawsuit.[222]

218. 42 U.S.C. § 2000e-2(a)(1) (2000).

219. Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 950 (2007).

220. 42 U.S.C. § 2000e-3(a) (2000).

221. Sumner v. U.S. Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990).

222. Silver v. KCA, Inc., 586 F.2d 138, 141 (9th Cir. 1978); *see also* Booker v. Brown & Williamson Tobacco Co., Inc., 879 F.2d 1304, 1313 (6th Cir. 1989) (same).

Although the Act protects both forms of conduct from employer retaliation, an employee who engages in opposition conduct is, according to most courts, entitled to less protection than an employee who files a formal charge of discrimination or otherwise participates in an EEOC proceeding. According to some courts, an employee who participates in a proceeding authorized by Title VII is protected regardless of whether discrimination is found to have occurred, and even regardless of whether the charge of discrimination was reasonable.[223] In contrast, for an employee's opposition conduct to be protected, the employee must have a good faith, reasonable belief that the conduct she is opposing is unlawful under Title VII.[224] Moreover, where the means of opposition are unreasonable—for instance, illegal—an employee's conduct is unprotected.[225]

Opposition conduct serves an important function, and retaliation resulting from such conduct may chill the willingness of other employees to speak up in the face of employer discrimination.[226] However, retaliation based on an employee's participation in an EEOC proceeding may potentially chill the willingness of employees to utilize the very tools Congress provided to remedy discrimination.[227] As one court has stated, "[s]ince the enforcement of Title VII rights is necessarily dependent on individual complaints, freedom of action by employees presenting grievances to agencies must be protected against the threat of retaliatory conduct by employers who may resent that they are charged with discrimination."[228] Because the charge process, by which complaints are filed and investigated, is "the lifeblood of Title VII," there must be uninhibited access to the remedial framework provided in the statute.[229] Imposing a requirement that the charge of discrimination ultimately be meritorious, or even made with a good faith belief that the employer's conduct was in violation of the law, could

223. Johnson v. Univ. of Cincinnati, 215 F.3d 561, 582 (6th Cir. 2000); Wyatt v. City of Boston, 35 F.3d 13, 15 (1st Cir. 1994).

224. Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1125 (8th Cir. 2006).

225. Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222, 231–32 (1st Cir. 1976).

226. *See* Sias v. City Demonstration Agency, 588 F.2d 692, 695 (9th Cir. 1978) (noting the chilling effect that permitting retaliation would have on internal opposition to perceived unlawful conduct).

227. *Id.* at 695.

228. EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66, 72 (S.D.N.Y. 1975).

229. EEOC v. Va. Carolina Veneer Corp., 495 F. Supp. 775, 777 (W.D. Va. 1980).

chill participation in the process.[230] Consequently, participation conduct is entitled to greater protection than is opposition conduct.

2. Participating in the Disciplinary Process

In Categories 1 and 3 of the retaliatory discharge cases, the attorney is discharged after reporting or threatening to report another lawyer's ethical violation to disciplinary authorities;[231] thus, the societal interest at stake involves the disciplinary process itself. It is the disciplinary process that helps deter potential ethical abuses among other attorneys and attempts to preserve the public's trust in the legal system.[232] Therefore, it is essential that individuals who know of unethical conduct on the part of an attorney have unfettered access to the machinery of the disciplinary process. Lawyers are more likely than laypersons to observe misconduct and to recognize it as such, given their education, experience, and daily interaction with the legal system and other lawyers.[233] Without the willingness of lawyers to participate, the disciplinary process would be unable to carry out its mission. For this reason, numerous states recognize an absolute privilege for at least some forms of tort liability based on the filing of a disciplinary complaint.[234]

Once one concludes that an attorney's act of reporting the serious misconduct of another attorney to disciplinary authorities should qualify as protected conduct, the next question is what amount of protection such conduct merits. Given the similarities to participation conduct under Title VII, an attorney who complies with his reporting obligation under Model Rule 8.3 or otherwise participates in the jurisdiction's formal disciplinary process should enjoy heightened protection from retaliatory discharge. While the analogy to Title VII participa-

230. *Sias*, 588 F.2d at 695 ("If the availability of that protection were to turn on whether the employee's charge were ultimately found to be meritorious, resort to the remedies provided by the Act would be severely chilled.") (citing Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1004–1007 (5th Cir. 1969)).

231. *See supra* notes 34–36 and accompanying text.

232. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS 4 (2005).

233. Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct: A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259, 265 & n.21 (2003).

234. *See id.* at 323 n.369 (stating that absolute immunity in defamation actions is the norm in such cases).

tion conduct is not perfect,[235] the similarities are substantial enough to warrant similar treatment. The vast majority of professional discipline results from the filing of complaints of unethical conduct.[236] Thus, as is the case with Title VII, the filing of disciplinary charges is, for practical purposes, the lifeblood of the enforcement process. And, as is the case with the filing of a charge of discrimination under Title VII, the imposition of a reasonableness requirement might discourage individuals from filing a charge or otherwise participating in the disciplinary process.[237] Given the decidedly substantial interest the public has in enforcement of the ethical rules governing attorneys, participation in the formal disciplinary process merits a heightened level of protection.

Although a heightened form of protection from retaliatory discharge for participating in the disciplinary process should exist, the protection should not be absolute. In the case of Title VII, one of the primary concerns with extending protection to

---

235. One of the justifications for extending absolute protection to the filing of a charge of discrimination or otherwise participating in an EEOC process is that the EEOC lacks the authority to investigate instances of alleged discrimination unless someone has filed a charge of discrimination. *Pettway*, 411 F.2d at 1005. Since "the filing of charges and the giving of information by employees is essential to the Commission's administration of Title VII," the Fifth Circuit Court of Appeals has reasoned, absolute protection for such actions is required. *Id.*; *see also* EEOC v. Va. Carolina Veneer Corp., 495 F. Supp. 775, 777 (W.D. Va. 1980) (stating that since a charge of discrimination is necessary to initiate the enforcement of EEOC proceedings, the charge is "the lifeblood" of Title VII). In contrast, many jurisdictions permit their disciplinary agencies to investigate possibly unethical conduct on the part of attorneys without receipt of a complaint. *See* ABA MODEL RULES OF DISCIPLINARY ENFORCEMENT R. 11(A) ("The disciplinary counsel shall evaluate all information coming to his or her attention by complaint or from other sources alleging lawyer misconduct or incapacity."); TENNESSEE SUPREME COURT Rule 9 § 8.1 (stating that state's disciplinary agency "is authorized to investigate information coming from a source other than a written complaint if the Board deems the information sufficiently credible or verifiable through objective means"). Another justification for the absolute protection afforded to participation conduct is that the statutory language compels such protection. The statute provides that that it is illegal to discriminate against an employee who has participated "in any manner" in an EEOC proceeding. 42 U.S.C. § 2000e-2(a)(1) (2000).

236. In Tennessee, for example, the Tennessee Board of Professional Responsibility's statistics concerning the disciplinary process list the number of complaints received by the Board, but fail to even mention the number of instances in which discipline resulted from the Board having received information concerning unethical conduct from some other source. Board of Professional Responsibility of the Supreme Court of Tennessee, *Thirteenth Annual Report*, http://www.tbpr.org/NewsAndPublications/AnnualReports/Pdfs/annualreport30th.pdf (last visited Aug. 30, 2007).

237. *See supra* note 2300 and accompanying text.

opposition and participation conduct is that such conduct may substantially disrupt the working environment.[238] However, most courts have implicitly concluded that the potential harm to Title VII's remedial framework of permitting adverse action against an employee for participation conduct outweighs the potential harm to employers. In the case of legal employers, however, any adverse effect on the working environment may affect not only the employer's bottom line, but also the interests of a represented client. Optimistically, most intra-office conflict resulting from baseless disciplinary charges can be overcome as the lawyers in question fulfill their duties of loyalty and competence. However, there may be instances where effective client representation is rendered impossible. For example, where there are a limited number of lawyers in an office, relations between lawyers may be strained to the point that the interests of clients will inevitably be adversely affected.[239]

For a number of reasons, unreasonable formal accusations of unethical conduct against other attorneys should be relatively rare. Knowingly filing a false charge of unethical conduct against another attorney might result in tort liability[240] as well as a retaliatory ethical complaint filed by the aggrieved attorney for having engaged in dishonest conduct related to the disciplinary process.[241] Where, however, one attorney falsely accuses another attorney of unethical conduct and is discharged as a result of that accusation, it should be theoretically possible for an employer to assert an affirmative defense to a retaliatory discharge claim in order to further the public's interest in effective client representation. The defense should be something akin to a showing of actual business necessity in the sense that the false accusation made it impossible for the client to receive competent representation or that discharge of the attorney was reasonably necessary for effective client representation.[242]

---

238. *See* Hochstadt v. Worcester Found. for Experimental Biology, 545 F.2d 222 (1st Cir. 1976) (concluding opposition conduct was not protected where manner of opposition interfered with working relationships and interfered with work).

239. *See* Bohatch v. Butler & Binion, 977 S.W.2d 543, 556 (Tex. 1998) (Hecht, J., concurring) (noting the "impossible strain on three lawyers working together on the same business for the same client in a small but important office" resulting from an internal charge of unethical conduct).

240. *See* Greenbaum, *supra* note 2333, at 322 n.365 (listing cases); *see also* MODEL RULES OF PROF'L CONDUCT R. 8.1 (2003) (prohibiting knowingly making a false statement of material fact in connection with a disciplinary matter).

241. Greenbaum, *supra* note 2333, at 322.

242. *Cf.* Dothard v. Rawlinson, 433 U.S. 321, 331 n.14 (1977) (stating that to

3. Opposing Unlawful or Unethical Conduct Internally

In Categories 2, 4, and 5, the attorney is discharged after somehow internally opposing unlawful or unethical conduct on the part of the employer.[243] In the case of a law-firm attorney, the attorney's opposition might take the form of notifying superiors about possibly unethical conduct as well as raising concerns about the propriety of certain actions.[244] In the case of an in-house attorney, the attorney's opposition might take the form of refusing to go along with possibly unethical or illegal conduct or raising concerns internally about such conduct, including, perhaps, reporting up the corporate ladder.[245] Not every form of internal griping merits protection from discharge, of course.[246] Nor should the act of providing routine advice that the client rejects qualify as protected conduct.[247] However, where it is clear that an attorney is taking a stand against possibly unethical or illegal client activity, such conduct may be accurately characterized as opposition conduct.

Such opposition conduct has the potential to put an end to unethical behavior that is potentially harmful to clients, third parties, or the legal system more generally without resort to more formal measures, and is thus deserving of at least some degree of protection. Indeed, because internal forms of opposition may obviate the need to disclose potentially damaging client confidences, it is essential that opposition conduct be protected.[248] However, the degree of protection to which an attorney who opposes possibly unethical or illegal conduct is entitled may vary depending upon whether the attorney had an

---

satisfy Title VII's affirmative defense in disparate impact cases, the employer must demonstrate that the challenged practice is "necessary to safe and efficient job performance").

243. *See supra* notes 37, 39–40 and accompanying text.

244. *See supra* note 37 and accompanying text.

245. *See supra* note 39–42 and accompanying text.

246. *See* EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 n.3 (11th Cir. 2000) (stating that not every informal complaint of illegal harassment qualifies as protected conduct under Title VII).

247. *See* Michaelson v. Minn. Mining & Mfg Co., 474 N.W.2d 174 (Minn. Ct. App. 1991) (rejecting retaliatory discharge claim of attorney who was reassigned after having given advice concerning the legality of employer's employment practices that the employer rejected).

248. *See* Duggin, *supra* note 1377, at 1029 (stating that "the optimal solution for lawyers and corporations alike would be to create an environment that obviates the necessity for reporting damaging information outside the client entity").

ethical duty to take the action or whether the rules simply permitted the attorney to take the action.

a. Attorney Acting Under a Duty

Where an attorney's opposition conduct is mandated by an ethical rule, the societal interests are similar to those implicated when an attorney reports the misconduct of another attorney to disciplinary authorities. In both situations, the public's interests in maintaining an ethical legal profession and promoting the fair administration of justice are jeopardized when an attorney fears that his opposition to illegal or unlawful conduct will result in retaliation. Accordingly, such opposition conduct merits at least some protection.

Despite the strong public policy in favor of encouraging compliance with ethical obligations, attorneys who believe they are ethically obligated to oppose the conduct of their employers should not be entitled to the absolute protection that should be extended to the filing of a disciplinary complaint. Situations implicating a lawyer's ethical duties often involve complicated issues affecting client interests and employer discretion. Ultimately, employer retaliation in the case of a lawyer who complies with an ethical duty does not directly threaten the machinery enforcing the ethical rules governing lawyers to the same extent as retaliation based on participation in the disciplinary process. Accordingly, some lesser form of protection for opposition conduct is appropriate.

An attorney who engages in internal opposition conduct that he believes to be ethically required should be afforded protection comparable to that provided in Title VII cases involving opposition conduct. Specifically, an attorney engages in protected opposition conduct when the attorney has a good faith, reasonable belief that the action the attorney has taken is ethically required. This should not be a lax standard. Unlike most Title VII plaintiffs, who cannot reasonably be expected to understand the vagaries of employment discrimination law, all attorneys are expected to understand the ethical rules that regulate their conduct.[249] While many situations present complicated ethical issues that defy easy resolution, attorneys

249. *See, e.g.*, In re Devaney, 870 A.2d 53, 57 (D.C. 2005); Whelan's Case, 619 A.2d 571, 573 (N.H. 1992).

should not be able to claim ignorance of their ethical obligations easily.

As is the case with Title VII, the means of opposition that an attorney employs in carrying out the perceived legal duty must also be reasonable. The determination of whether the means of opposition were reasonable must be made with reference to the attorney's ethical duties and the interest in effective client representation. An otherwise protected form of opposition conduct may be rendered unprotected where an attorney violates some ethical obligation—such as the attorney's duty of confidentiality—while in the process of opposing the employer's misconduct.[250] Similarly, where the attorney engages in conduct that is unnecessarily disruptive to the working environment, and thereby creates the potential for diminished client representation, the conduct should not be protected. In some instances, an otherwise proper form of opposition may be rendered improper simply based on the timing of events or the unique circumstances of the employer's business. For example, where there is a debatable question between a subordinate attorney and her supervisor concerning the attorney's ethical duties, the subordinate attorney's refusal to follow instructions, standing alone, might be an unreasonable form of opposition. This is likely to be the case where the refusal has substantial adverse consequences for the client, either because of time constraints or the limited number of other attorneys capable of carrying out the representation.[251]

b. *Attorney's Actions Permitted*

Situations in which an attorney is permitted, but not ethically required, to take a certain action present a more difficult

250. *See* Douglas v. DynMcDermott Petrol. Operations Co., 144 F.3d 364, 374 (5th Cir. 1998) (holding that in-house attorney's disclosure of information concerning inter-office complaints of discrimination was not protected activity under Title VII because it constituted a breach of attorney's duties of confidentiality and loyalty to employer); *cf. supra* note 2255 and accompanying text (noting that opposition conduct involving illegal behavior is not protected under Title VII).

251. *See generally* Shearin v. E.F. Hutton Group, 652 A.2d 578, 586 (Del. Ch. 1994) (suggesting that question of employer's good faith belief that "plaintiff had no professional obligation to take the actions that triggered her termination" is relevant to the determination of whether plaintiff's claim is valid); MODEL RULES OF PROF'L CONDUCT R. 5.2 cmt. 2 (2003) (stating that a supervisor may assume responsibility for making a judgment as to a debatable ethical question because "[o]therwise a consistent course of action or position could not be taken").

challenge.[252] In such cases, the public policy at stake is not as clearly articulated and may not be as substantial as when an attorney has a *duty* to take particular action.[253] An attorney who engages in internal opposition conduct may still advance a substantial public interest, and an employer's discharge of such an attorney may very well jeopardize the public policy at stake. But given the lack of any obligation to act on the part of the attorney, the employer's interest in running its workplace, the client's interest in maintaining a relationship of trust with the attorney, and/or the public's interest in ensuring effective client representation may be sufficiently weighty in a given case to trump the societal interest advanced by the opposing attorney.[254]

The fact that an attorney lacks an ethical obligation to take certain action does not necessarily mean that the discharge of the attorney for taking such action does not offend public policy. For example, the Tennessee Supreme Court has held that the fact that an attorney did not have a mandatory duty to report the misconduct of another individual under the jurisdiction's rules of professional conduct was not fatal to her retaliatory discharge claim.[255] In *Crews v. Buckman Laboratories International, Inc.*, an in-house attorney reported to disciplinary authorities that another employee, who had passed the bar exam but was not licensed as an attorney, was engaging in the unauthorized practice of law.[256] Because the duty to report serious misconduct to disciplinary authorities only applies with respect to other lawyers, and because the other individual was not yet a lawyer, the plaintiff was under no duty to report her actions.[257] Nonetheless, given the "clear public policy evidenced" by the ethical rules governing the unauthorized practice of law and the duty to report serious misconduct, the court concluded that a clear public policy existed sufficient to support the plaintiff's wrongful discharge claim.[258]

---

252. Gen. Dynamics Corp. v. Super. Ct., 876 P.2d 487, 503 (Cal. 1994).

253. *See* Rocky Mountain Hosp. & Med. Serv. v. Mariani, 916 P.2d 519, 525 (Colo. 1996) (stating that the public policy exception to the employment-at-will rule was meant to prevent the situation in which "[a] professional employee [is] forced to choose between violating his or her ethical obligations or being terminated").

254. *See supra* Parts II.A. & B.

255. Crews v. Buckman Labs. Int'l, Inc., 78 S.W.3d 852, 865 (Tenn. 2002).

256. *Id.* at 855–56.

257. *Id.* at 865 n.6.

258. *Id.*

Although *Crews* involved a case of external whistleblowing, similar forms of internal opposition to unethical behavior should be protected. Take, for example, the case of a law-firm associate who is either instructed to engage in possibly unethical conduct or who observes or suspects that such conduct is taking place within the firm. Although it could be argued that Model Rule 5.2 impliedly imposes upon subordinate attorneys an ethical duty to inform an attorney with supervisory authority about a different supervisor's instructions to engage in possibly unethical conduct, the rule fails to explicitly impose such a duty.[259] Perhaps not surprisingly, at least one court has held that Model Rule 5.2 does not serve as the basis for an attorney's retaliatory discharge claim where the attorney was allegedly discharged in retaliation for raising concerns about unethical conduct with firm management.[260]

Courts that take such an overly formalistic approach miss the opportunity to further the important policies underlying Model Rule 5.2. As Professor Irwin D. Miller has argued, Model Rule 5.2 can be viewed as an attempt "to encourage associates to question the ethical atmosphere in which they practice."[261] By raising concerns about whether another attorney's conduct or proposed course of conduct is ethically permissible, a subordinate attorney helps foster "a firm's ethical infrastructure."[262] The public certainly has a strong interest in the development of a culture of ethical practice among law firms. And, more specifically, where a subordinate raises concerns about behavior that, by itself, has potentially significant third-party effects or otherwise jeopardizes a substantial public interest, the subordinate acts in a manner that is consistent with the purpose of Rule 5.2 and that furthers a substantial public policy.

At the same time, society also has an interest in not forcing employers—particularly legal employers—to retain individuals who lack the restraint to not complain about minor issues, such as falsely claiming authorship of a brief.[263] A rule that would protect an attorney who opposes trivial rule violations would be unworkable.[264] Likewise, there is a societal interest in insur-

259. Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 884 (D.C. 1998).

260. *Cf. id.* at 884 (involving similar fact pattern).

261. Miller, *supra* note 60, at 294.

262. *Id.* at 295.

263. *See supra* note 1177 and accompanying text.

264. *See generally* Wieder v. Skala, 609 N.E.2d 105, 109 (N.Y. 1992) ("[W]e, by

ing that legal employers retain the ability to discipline attorneys who complain about serious issues in a manner that hinders effective client representation.

The same reasoning applies to in-house attorneys and their employers. Model Rule 2.1 imposes a mandatory duty on a lawyer to render candid advice and permits the lawyer to "refer not only to the law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."[265] Thus, Model Rule 2.1 articulates a policy in favor of encouraging clients to do more than simply the minimum that would be necessary to avoid legal liability, but further to do what is right because it is the right thing to do. However, there is a long-standing societal interest in preserving employer discretion and protecting client choice with respect to the goals of representation.[266] Therefore, it would be inconsistent with those policies to force an employer to retain an in-house attorney who repeatedly insists that the company do more than what is legally required in order to comply with the lawyer's own sense of ethical business standards.[267] Those types of decisions have long been left to employers and clients, and in the absence of an affirmative duty to provide such advice, an employer/client should not be held liable if it concludes that the attorney's advice is no longer desired.

Where an attorney claims no clear ethical duty to oppose the conduct of his or her employer, the employer's hands should be tied with respect to firing only where it is clear that the public's interest in promoting ethical conduct outweighs the employer's interests. There are at least two situations in which this might be the case. In the first, an attorney has a good faith, reasonable belief that he is being instructed to engage in conduct that might be unethical, seeks guidance or resolution of the matter from others within the firm, and is discharged as a result. Regardless of whether the attorney in this scenario has a duty under the rules to raise a question about the instructions he received, the attorney certainly has a duty to

no means, suggest that each provision of the Code of Professional Responsibility should be deemed incorporated as an implied-in-law term in every contractual relationship between or among lawyers.").

265. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2003).

266. *Id.* R. 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . .").

267. *See* GTE Prods. Corp. v. Stewart, 653 N.E.2d 161, 168 (Mass. 1995) (involving similar fact pattern).

comply with the ethical rules. And the fact that he was simply following orders is no excuse for the ethical violation unless he was acting in accordance with a supervisor's reasonable resolution of an arguable question of professional duty.[268] Accordingly, an attorney who has been instructed to engage in behavior that raises a debatable ethical question confronts essentially the same dilemma as an attorney who claims an ethical duty to oppose a particular practice.

In the second situation, an attorney, reasonably and in good faith, raises concerns internally about the propriety of another's serious misconduct, even though the conduct does not necessarily directly involve the attorney. Although the term "serious misconduct" sounds, at first glance, every bit as vague as the term "substantial public policy," a workable standard for defining the concept exists. The *ABA Model Rules for Lawyer Disciplinary Enforcement* provides state disciplinary agencies with a framework for enforcement of the ethical rules governing attorneys.[269] These rules attempt to distinguish between "lesser misconduct," that is, "conduct that does not warrant a sanction restricting the respondent's license to practice law," and misconduct of a more serious nature, which would warrant suspension or disbarment.[270] Rule 9(B) provides a laundry list of such offenses, including the misappropriation of funds, conduct resulting in or likely to result in substantial prejudice to a client or other person, and conduct constituting a serious crime.[271]

Some tinkering with the above definition might be justified,[272] but the standards articulated in Rule 9(B) may provide courts with a means of balancing the competing interests. Permitting an attorney to bring a retaliatory discharge claim based on internal opposition to "serious misconduct" would further the public's interests in an ethical and competent legal profession and a fair and efficient legal system. While Rule

268. MODEL RULES OF PROF'L CONDUCT R. 5.2 (2003).

269. *See* ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT pmbl. (2007) (stating that the rules are promulgated "to maintain appropriate standards of professional conduct").

270. *Id.* R. 9(B).

271. *Id.* R. 9(B), 19(C).

272. The rule's inclusion of misconduct involving dishonesty, deceit, fraud, or misrepresentation—without any type of qualification—is potentially problematic given its breadth. The term "dishonesty" covers a huge range of conduct, some of which might be perfectly acceptable in the business world. Therefore, perhaps the inclusion of a requirement that the dishonest conduct must be of a substantial nature would make the rule more workable.

9(B) of the *Model Rules for Lawyer Disciplinary Enforcement* obviously has no application to non-lawyers, the considerations listed are easily transferable to the corporate world that employs in-house attorneys. The application of these considerations would further the public's interest in ethical business practices. A court would be justified in concluding that the public's interest in permitting the attorney to take action outweighs an employer's interest, provided the attorney has a good faith, reasonable belief that serious misconduct may have or is about to occur, opposes such misconduct in a reasonable manner, and does so without going beyond the confines of the employer. Accordingly, a retaliatory discharge claim should be permitted under such circumstances.

4. Reporting Unlawful or Unethical Conduct to Law Enforcement Authorities

Finally, cases in Category 6 involve an in-house attorney who reports or threatens to report unlawful or unethical conduct to law enforcement or other appropriate authorities.[273] One feature that distinguishes these cases from other cases involving in-house attorneys is that, given the greater potential that the client will face criminal or civil liability, reporting the organization to law enforcement has the potential to harm the organization's interests in a more dramatic fashion than where an attorney reports corporate misconduct up the corporate ladder or reports attorney misconduct to disciplinary authorities. The other feature that distinguishes such cases is the increased likelihood that harm to others will ensue unless the lawyer acts to prevent it, since disclosure of client confidences is typically only required or permitted where the health or financial interests of other individuals are threatened.[274] Despite these differences, courts can resolve retaliatory discharge claims involving such fact patterns by applying the rules discussed previously with respect to opposition conduct.[275]

Where a jurisdiction's rules of professional responsibility *require* a lawyer to reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent a client from harming the interests of others, an attorney who takes such action should be protected

273. *See supra* notes 43–45 and accompanying text.

274. *See supra* note 98 and accompanying text.

275. *See supra* Part IV.B.3.

from retaliatory discharge. Specifically, the attorney should be protected where he had a good faith, reasonable belief that such action was necessary and the means utilized by the attorney were themselves reasonable. In such cases, there is a clear public policy favoring disclosure, as evidenced by the existence of the ethical duty. Moreover, the public's interest is likely to be substantial because, to the extent the duty exists in a jurisdiction, it is likely to exist only where a crime is being committed or the health or financial interests of another are stake.[276]

Where a jurisdiction's rules of professional responsibility permit, but do not require, an in-house attorney to reveal information relating to the representation of a client, the matter is more complicated. Given the legal profession's longstanding commitment to maintaining client confidences,[277] there is a reasonable argument that the public interests at stake conflict to the point that permissive disclosure rules do not articulate a clear public policy. However, a jurisdiction's choice to permit the disclosure of client confidences in order to prevent substantial harm to others comes as close as possible to articulating a clear public policy choice in favor of protecting third parties.[278] Accordingly, an attorney should be protected from retaliatory discharge under the rules described previously regarding opposition conduct not involving an affirmative duty to act. Specifically, the attorney's actions should be protected where the attorney has a good faith, reasonable belief that serious misconduct has occurred or is about to occur and opposes such misconduct in a reasonable manner.[279] At a minimum, given the policy choice expressed in the permissive disclosure rules, attorneys should not be treated less favorably than non-attorneys

276. *See supra* notes 97–98 and accompanying text.

277. *See supra* note 96 and accompanying text.

278. *See supra* note 92 and accompanying text.

279. As mentioned, another possible variation on this scenario would involve an *outside* attorney who is fired by his or her law firm after the attorney, pursuant to the permissive disclosure provisions of Model Rule 1.6, discloses or attempts to disclose confidential information about a client. To date, there have been few, if any, such reported cases. *See supra* note 93 and accompanying text. Accordingly, it is difficult to hypothesize as to the appropriate resolution of such cases. However, such a situation might possibly justify a different approach given the differences between inside and outside counsel. For example, if a law firm represents a corporation in multiple matters, the decision of a lone attorney to disclose confidential information about the corporate client at a particular point in time might adversely impact the firm's representation of the client in other ongoing matters. Accordingly, the interest in effective client representation might be sufficiently strong to prohibit a retaliatory discharge claim under such circumstances.

in similar jurisdictions for purposes of a jurisdiction's retaliatory discharge rules.[280]

CONCLUSION

Situations in which an employer discharges an attorney for engaging in conduct that furthers the policies underlying the rules of professional conduct present courts with challenging dilemmas. Such situations may sometimes pit the principles of informed client decision making and effective client representation against the public's interests in an ethical legal profession and the administration of justice. Although the resolution of attorney retaliatory discharge claims involving this clash of principles may prove difficult in a given case, the resolution of such cases can be made orderly and equitable through a resort to the case law surrounding retaliation claims under Title VII.

---

280. *See* 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING 477 (2d ed. Supp. 1993) (arguing that it is "bizarre" that a lawyer, "who has affirmative duties concerning the administration of justice, should be denied redress for discharge resulting from trying to carry out those very duties" when a non-attorney in the same situation would have such redress).