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NOTES

PROTECTING ATTORNEYS AGAINST WRONGFUL DISCHARGE: EXTENSION OF THE PUBLIC POLICY EXCEPTION

INTRODUCTION

According to the at will doctrine, an employer has the unfettered right to discharge its employees.¹ However, changes in the modern employment relationship have encouraged legislatures and courts to modify this rule in an effort to balance the interests of employers, employees, and society.² The most widely accepted judicial modification is wrongful discharge based upon the public policy exception.³ Under this theory, a plaintiff can recover by

1. *Payne v. Western & Atlantic R.R.*, 81 Tenn. 507, 519-20 (1884) (stating that “[employers] may dismiss their employees at will . . . for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong”), *overruled on other grounds*, *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915). It has been estimated that a majority of American workers are at will employees. *Current Developments in Wrongful Discharge*, ALI-ABA Course of Study, May 3, 1990, available in Westlaw, C517 ALI-ABA 1, at 5 [hereinafter *Current Developments*].

2. See *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981) (stating the need to balance the interests of employers, employees, and society); Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 727-34 (1991) (discussing the reasons for judicially imposed limits on employer power and arguing that courts revised the at will employment doctrine in order to better balance the employer-employee relationship in the context of modern society).

3. Note, *Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1947-50 (1983) [hereinafter *Public Policy Exception*].

For the purposes of this Note, no distinction will be drawn between wrongful discharge based upon the public policy exception and retaliatory discharge. Wrongful discharge based upon the public policy exception requires a showing that the employee's

showing that an employer's discharge contravened a clearly mandated public policy.⁴ The purpose of the public policy exception is to protect public policies by protecting employees against arbitrary and unfair treatment by employers.⁵ Employees should not be forced to choose between continuing employment and contravening public policy.

Like many other employees, non-professionals and professionals alike, attorneys are hired at will.⁶ This means clients have the right to discharge their attorneys at any time, for any reason. Unlike other employees, however, attorneys who are employees⁷ are

discharge contravened a clearly mandated public policy. Retaliatory discharge is a subset of the public policy exception. An employee has a claim for retaliatory discharge when 1) the employer terminates the employee in response to specific action taken by the employee, and 2) the discharge was in contravention of a clearly mandated public policy. *Palmateer*, 421 N.E.2d at 881. If there is a distinction between the public policy exception and retaliatory discharge, it is slight for the purposes of this note. An employee relying upon the public policy exception, in essence, argues that his employer fired him in response to his refusal to contravene public policy or his performance of an act encouraged by public policy. *But see* Raymis H.C. Kim, Comment, *In-House Counsel's Wrongful Discharge Action Under the Public Policy Exception and Retaliatory Discharge Doctrine*, 67 WASH. L. REV. 893, 896, 904 (1992) (arguing that there is an important difference between the public policy exception and retaliatory discharge and contending that retaliatory discharge should be limited to discharges of employees whose activities harm the employer).

In addition, the purpose of this Note is not to contend that the public policy exception is the best approach to wrongful discharge. Rather, given that the exception exists, this Note asserts that the exception should be extended to cover attorneys who are employees.

4. *See* *Petermann v. International Bhd. of Teamsters*, 344 P.2d 25, 27 (Cal. Ct. App. 1959) (allowing, for the first time, a wrongful discharge claim based upon public policy).

5. *See* *Peck*, *supra* note 2, at 744 (stating that courts have used the public policy exception to limit an employer's decision to terminate employees when violations of public policy are involved).

6. *See* MODERN LEGAL ETHICS 545 (1986) ("It is now uniformly recognized that the client-lawyer contract is terminable at will by the client.").

7. This Note does not argue that the public policy exception should be extended to all attorneys. Rather, it asserts that the public policy exception should only be extended to attorneys who are employees. Thus, references to attorneys means attorneys who are in an employer-employee relationship. For example, attorneys employed by corporations are employees of corporations. For cases involving in-house counsel, see *Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd*, 855 F.2d 1160 (5th Cir. 1988); *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991); *Nordling v. Northern State Power Co.*, 478 N.W.2d 498 (Minn. 1991); *Herbster v. North American Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986). Law associates are employees of law firms. *See, e.g.*, *Wieder v. Skala*, 609 N.E.2d 105 (N.Y. 1992). In contrast to these attorneys who are employees, solo private practitioners are more like independent contractors. *Cf. Nordling v. Northern States Power Co.*, 465 N.W.2d 81, 87 (Minn. Ct. App. 1991), *rev'd*, 478 N.W.2d 498 (Minn. 1991) (*Kalitowski, J.*, concurring in part, dissenting in part) (arguing that in-house counsel are not analogous to private attorneys). It is beyond the scope of

denied the right to sue for wrongful discharge based upon the public policy exception. Courts justify their refusal to deviate from the at will rule when the plaintiff is an attorney for two basic reasons. First, extending the public policy exception is unnecessary because attorneys are bound by an ethical code which adequately protects the public interest.⁸ Second, permitting such suits would impair the attorney-client relationship which is based upon trust and confidence.⁹ These justifications raise important issues about a plaintiff's status as an attorney. However, they do not support an absolute bar to wrongful discharge suits by attorneys based upon the public policy exception. Rather, they require courts to modify their analysis to take into consideration the attorney-client relationship.

This Note argues that the public policy exception should be extended to attorneys who are employees. Part I discusses the employment at will doctrine and the development of wrongful discharge. Part II examines the public policy exception as a basis for wrongful discharge claims and attempts to outline the parameters of the exception. Courts should require plaintiffs to demonstrate that their discharges violate a *specific* and *fundamental* public policy evidenced by, or discernible within, a statutory or constitutional provision or administrative rule which has the full force of law. Part III examines wrongful discharge cases brought by attorneys. First, this part discusses cases in which courts provide relief to the attorney by finding an implied contract. These cases illustrate the courts' desire to provide protection while limiting available remedies. This Note argues that finding an implied-in-law obligation and breach of contract is not an adequate solution. Next, this part presents the cases in which courts have directly addressed the issue of whether the public policy exception should be extended to attorneys. Most courts deny a cause of action. Part IV argues that the public policy exception should be extended to attorneys. This part demonstrates that the courts' reliance on ethical codes is not only inconsistent but unsound. This part also contends that extension of the public policy exception will not always impair the attorney-client relationship and that, under certain circumstances, other public policies may deserve more protection. Part V suggests that

this Note to consider whether protection should be extended to attorneys who are not in an employer-employee relationship.

8. See *infra* notes 164-89 and accompanying text.

9. *Id.*

instead of barring suits by attorneys, courts should modify their public policy analysis in order to duly consider the attorney-client relationship.

I. THE DEVELOPMENT OF WRONGFUL DISCHARGE

A. *Employment At Will Doctrine*

According to the employment at will doctrine, an employer can discharge an employee at will "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."¹⁰ This doctrine, unique to the United States,¹¹ developed during the nineteenth century.¹² It marked a departure from English common law which, in the eighteenth century, presumed that an employment relationship of indefinite duration was a hiring for one year.¹³ During the nineteenth century, this presumption evolved into a rule that, unless otherwise specified, an employment relationship could only be terminated after a notice period fixed by the custom in the trade, or after a reasonable time if there was no custom,¹⁴ provided there was no cause for immediate dismissal.

In contrast, American law developed the at will employment rule which allowed either party to terminate the employment re-

10. *Payne v. Western & Atlantic R.R.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, *Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915); *see also* *Speeder Cycle Co. v. Teeters*, 48 N.E. 595, 597 (Ind. App. Ct. 1897) (noting that discharged, at will employees can only recover wages already earned, and not future wages, because they are not hired for a specified term); *East Line & Red River R.R. v. Scott*, 10 S.W. 99, 102 (Tex. 1888) (stating that when an employer and an employee have not agreed on a specific length of employment, the hiring is at will).

11. *See* William L. Mauk, *Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 IDAHO L. REV. 201, 204 (1985) (stating that unlike other major industrial countries, the United States has failed to develop job protection for all employees); Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time For a Statute*, 62 VA. L. REV. 481, 508-19 (1976) (stating that the United States is one of the few nations which does not protect workers from unjust termination); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1844 (1980) [hereinafter *Duty to Terminate*].

12. The at will rule is often traced to Horace Wood. According to Wood, "a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out [sic] a yearly hiring, the burden is upon him to establish it by proof." HORACE WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 282-86 (1886). However, the rule existed in several states before Wood published his treatise. *See, e.g.*, *Prentiss v. Ledyard*, 28 Wis. 131, 133 (1871).

13. WOOD, *supra* note 12, at 282-86 (comparing the English and American rules); Mauk, *supra* note 11, at 203.

14. Peck, *supra* note 2, at 721.

lationship at any time for any reason.¹⁵ By the twentieth century this rule had been readily adopted throughout the United States. Its emergence fit the conditions and philosophy prevalent at the end of the nineteenth century.¹⁶ The country was experiencing tremendous economic growth, and arguably, at will employment helped promote growth and entrepreneurship by protecting employers and giving them greater freedom to end the employment relationship.¹⁷ Allowing employers this freedom gave them the ability to allocate their resources efficiently and to adapt to changing economic conditions. At the same time, however, it provided no protection for employees.

The at will rule also promoted prevailing notions of laissez-faire, economic individualism, and freedom of contract, all of which supported an employer's right to control his own business and an employee's right to freely negotiate with his employer.¹⁸ At will employment presumed that both the employer and employee could contract to protect themselves. As a result, without an explicit statement of a definite term, the employer and employee could terminate the relationship regardless of the reason, without interference from the law. The Supreme Court supported the notion that regulation of the employer-employee relationship interfered with both parties' freedom to contract.¹⁹ In one decision, the

15. The development of the at will doctrine meant that unionized employees found themselves in a more favorable position than non-unionized employees. William B. Gould IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 B.Y.U. L. REV. 885, 887-89. Through collective bargaining, union employees negotiated agreements that contained just cause provisions and rules which affected promotions and transfers. *Id.* at 889. These agreements limited an employer's right to discharge unionized employees. In contrast, the at will employee was without any protection and, thus, subject to the employer's power which could be exercised in an arbitrary and unfair way.

16. See Daniel A. Mathews, Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1440 (1975) (stating that the at will doctrine facilitated industrialization by minimizing employee rights upon discharge); *Duty to Terminate*, *supra* note 11, at 1825-26 (noting that the at will doctrine fit the nineteenth century notion of laissez-faire economics).

17. See Mathews, *supra* note 16, at 1441 (describing an American belief that freedom of the marketplace would stimulate economic growth and benefit all of society).

18. *Id.*; see also *Duty to Terminate*, *supra* note 11, at 1825-26 (noting that proponents of the at will rule often argue that it promotes entrepreneurship by not imposing burdensome legal duties on parties to an employment contract).

19. See *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (holding unconstitutional a Kansas statute which made it a misdemeanor to require employees to agree not to join a union); *Adair v. United States*, 208 U.S. 161, 172-75 (1908) (holding unconstitutional a federal statute which made it illegal to discharge an employee for joining a union). These deci-

Court explained:

The right of the employee to quit the service of the employer for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee In all such particulars the employer and employee have equality of right, and any legislation that disturbs equality is an arbitrary interference with the liberty of contract²⁰

The legal profession was no exception to this rule. Attorneys were hired at will. As one court stated, "[i]t is well established in the case of the client that he may at any time for any reason which seems satisfactory to him, however arbitrary, discharge his attorney."²¹ Acceptance and application of the at will rule to attorneys occurred at a time when most attorneys practiced alone²² and when the development of the large law firm and the notion of the corporate attorney were just beginning to emerge.²³ Presumably then, attorneys had numerous clients and were, therefore, not dependent upon a single client or employer.

B. *Erosion of the At Will Rule and Development of Wrongful Discharge*

Although employment at will remains the rule today, changes in modern employment conditions have prompted statutory and judicial modifications over the last twenty years.²⁴ Well over half of

sions were repudiated in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). See also *Duty to Terminate*, *supra* note 11, at 1826 (discussing the Supreme Court's efforts to protect contract rights in both its *Adair* and *Coppage* decisions); J. Peter Shapiro & James F. Tune, Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 346-47 (1974) (stating that the Supreme Court's support for the at will rule in the nineteenth century was founded on its belief in an individual's right to contract).

20. *Adair*, 208 U.S. at 174-75.

21. *In re Dunn*, 98 N.E. 914, 916 (N.Y. 1912); see also *Lawler v. Dunn*, 176 N.W. 989, 990 (Minn. 1920) (stating that clients can discharge their attorneys with or without cause).

22. Wayne K. Hobson, *Symbol of the New Profession: Emergence of the Large Law Firm*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 3 (Gerard W. Gawalt ed., 1984) (stating that by 1930 most lawyers still practiced alone or with one partner).

23. WAYNE K. HOBSON, THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY, 1890-1930, at 141-208 (1986) (discussing the development of the large law firm between 1890 and 1930).

24. Gould, *supra* note 15, at 895-99 (discussing factors which influenced recent changes in employment at will).

the states have modified or have recognized exceptions to the at will rule.²⁵ These modifications give an employee the right to sue for wrongful discharge under contract or tort theories, and, thereby, curb an employer's unfettered right to discharge employees. The gradual erosion of the at will doctrine resulted from changes in the employment relationship and increasing awareness of employee vulnerability to employer coercion.²⁶

The modern employment relationship is vastly different than it was when the at will doctrine emerged in the nineteenth century.²⁷ Today the opportunity for self-employment has declined,²⁸ corporations have grown,²⁹ and "[o]nly the most unusual employee possesses sufficient bargaining power to insist upon a restriction of the dismissal power."³⁰ Many jobs are on a take-it or leave-it basis, meaning individuals must take the job under terms set by the employer or not at all.³¹ Due to the scarcity of jobs, those seeking

25. *Current Developments*, *supra* note 1, at 5.

26. See Mauk, *supra* note 11, at 204-05 (stating that the economic circumstances which justified the at will doctrine no longer exist); Peck, *supra* note 2, at 720 (arguing that courts modified the at will rule due to changes in the law which stressed the importance of Americans' interest in employment and illustrated that the at will doctrine was an "anachronism"); Mathews, *supra* note 16, at 1443-46 (contending that the employee in a modern employment relationship is unable to contract against wrongful discharge).

27. Lawrence E. Blades notes the importance of employer power by referring to an often quoted passage:

[W]e have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for *all* of their income is something new in the world. *For our generation, the substance of life is in another man's hands.*

Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1404 (1967) (quoting F. Tannenbaum).

28. Mauk, *supra* note 11, at 204 (noting that today 90% of Americans are employees); Shapiro & Tune, *supra* note 19, at 337-38.

29. Blades, *supra* note 27, at 1404 (stating "[I]t is a widely accepted proposition that large corporations now pose a threat to individual freedom comparable to that which would be posed if governmental power were unchecked.>").

30. Mathews, *supra* note 16, at 1443; see also Gould, *supra* note 15, at 892-95 (discussing the power relationship between employer and employee as an element when considering the modification of the at will rule).

31. See Mathews, *supra* note 16, at 1443 (stating that in most cases terms of employment are imposed on a take-it or leave-it basis). *But see Duty to Terminate*, *supra* note 11, at 1829-34 (arguing that this rationale for judicial intervention is problematic and that the at will rule should not be altered due to unequal bargaining power but due to inefficiency).

employment cannot afford to turn down offers, regardless of the terms.³² Individuals already employed cannot easily refuse to work under particular conditions or to follow an employer's demand. These employees lack the luxury of being able to move from job to job, and immobility weakens their bargaining power.³³

The importance of employment increases the gravity of an employee's lack of bargaining power in the modern employment relationship.³⁴ Employment is critical because it provides income needed to obtain necessities, shapes the aspirations and beliefs of the employee and his family, and defines one's social status and identity.³⁵ With these changes in the employer-employee relationship emerged the awareness that the at will rule was unsuited for modern conditions.³⁶

As changes in the modern employment relationship have taken place and given rise to erosion of the at will rule, shifts in the legal profession have made those changes increasingly relevant to attorneys because more and more attorneys are employees confronted with similar problems. According to the American Bar Foundation's Statistical Profile of the United States Legal Profession, the number of in-house attorneys has increased.³⁷ Presently, ten percent of attorneys, or over 55,000 attorneys, are employed in private industry.³⁸ The number of solo practitioners has decreased,³⁹ and the number of attorneys in law firms has in-

32. Blades, *supra* note 27, at 1405.

33. See *id.* (explaining that as modern technology advances, and specialization increases, employee immobility will become more of a problem); see also Shapiro & Tune, *supra* note 19, at 338 (noting that job immobility is partly due to seniority policies used by employers to increase work force stability).

34. See Gould, *supra* note 15, at 892 (acknowledging that employment is central to an individual's "existence and dignity"); Mathews, *supra* note 16, at 1444-45 (arguing that employment is critical to a person's social status, identity, and self-esteem).

35. Gould, *supra* note 15, at 892; Mathews, *supra* note 16, at 1444-45.

36. See Mauk, *supra* note 11, at 204 (arguing that the conditions which once justified at will employment no longer exist); Peck, *supra* note 2, at 724-25 (pointing to a new climate in employer-employee relationships and arguing that the at will employment rule is now obsolete); see also Mathews, *supra* note 16, at 1446 (noting that in the 1930s, application of the at will rule declined as the judiciary and the legislature began to more heavily regulate the employer-employee relationship).

37. See *Ethical Considerations for the Corporate Legal Counsel*, ALI-ABA Course of Study, Dec. 6, 1990, available in Westlaw, C566 ALI-ABA 109, at 11 [hereinafter *Corporate Legal Counsel*].

38. *Id.*

39. While in 1930 most attorneys practiced alone or with one other partner, today only about 52% of attorneys are solo practitioners or practicing with one other partner. BARBARA CURRAN & CLARA N. CARSON, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT:

creased.⁴⁰ In essence, these changes demonstrate that today more attorneys are employees: "Instead of client and lawyer the relation of employer and employee has been substituted A great many of our lawyers, those who are now exercising great weight and influence in the country, are employees."⁴¹ However, despite this fact, most courts refuse to deviate from the general rule which permits clients to discharge their attorneys for any reason or no reason.

C. Statutory Modifications

The unjust results produced by strict application of the employment at will doctrine led to statutory modifications of the rule at the federal and state level. Since the 1960s, Congress has passed many federal statutes which limit an employer's absolute right to discharge an employee.⁴² Title VII makes it unlawful for an employer to discharge an employee because of race, color, religion, gender, or national origin.⁴³ The Age Discrimination in Employment Act prohibits an employer from terminating an employee on the basis of age.⁴⁴ Several federal statutes contain whistle blower provisions which protect employees against termination in retaliation for reporting illegal conduct.⁴⁵

State legislatures also have made inroads into the at will rule by enacting statutes which restrict an employer's right to discharge employees.⁴⁶ The District of Columbia has a statute which prevents employers from firing employees for reasons other than individual merit. It lists fifteen, non-exclusive, protected categories, including race, religion, personal appearance, sexual orientation, and

THE U.S. LEGAL PROFESSION IN 1988, at 21-22 (1991); Hobson, *supra* note 22, at 3.

40. See, e.g., CURRAN & CARSON, *supra* note 39, at 21-22 (showing that in 1988 approximately 50% of all attorneys worked in law firms); Hobson, *supra* note 22, at 7 (noting the increase in large law firms over the last century).

41. Hobson, *supra* note 22, at 4 (quoting James D. Andrews' speech to the American Bar Association in 1906 when the notions of the large law firm and corporate attorney were just developing).

42. See *Current Developments*, *supra* note 1, at 6-8 (reviewing federal statutes which have modified the at will rule).

43. 42 U.S.C. § 2000e-2(a) (1988).

44. 29 U.S.C. § 623(a) (1988).

45. For instance, the following statutes contain whistleblower provisions: Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) (1988); Occupational Safety and Health Act, 29 U.S.C. § 660(c) (1988); Air Pollution Prevention and Control Act, 42 U.S.C. § 7622(a) (1988).

46. See *Current Developments*, *supra* note 1, at 8-11 (reviewing state laws which limit an employer's unfettered right to discharge employees).

political affiliation.⁴⁷ Many states have passed legislation which protects employees who file workers compensation claims.⁴⁸

In addition, states have enacted legislation to protect whistleblowers in order to promote disclosure under certain circumstances.⁴⁹ The breadth of these statutes varies. For example, the New York whistleblowing statute provides limited protection for employees against retaliatory discharge.⁵⁰ The statute includes only public health and safety whistleblowing and requires the employee to be correct—a violation must have taken place.⁵¹ In contrast, states such as Connecticut and Illinois have broader whistleblowing statutes. Connecticut protects employees who report violations or suspected violations of any law or regulation.⁵² Illinois law protects employees who disclose information that they reasonably believe demonstrates mismanagement, extreme waste of funds, abuse of authority, or substantial danger to public safety, providing the disclosure is not prohibited by law.⁵³

47. Human Rights Act, D.C. CODE ANN. § 1-2501 (1992).

48. *See, e.g.*, CAL. LAB. CODE § 132a (West Supp. 1994); FLA. STAT. ANN. § 440.205 (West 1991); MO. ANN. STAT. § 287.780 (Vernon 1993).

49. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 15.361-15.369 (West Supp. 1993); N.J. STAT. ANN. § 34:19-3 (West Supp. 1993); N.Y. LAB. LAW § 740 (McKinney 1988); TENN. CODE ANN. § 50-1-304 (1991).

50. N.Y. LAB. LAW § 740(2)(a) (McKinney 1988).

51. The statute provides that:

[A]n employer shall not take any retaliatory personnel action against an employee because such employee . . . discloses, or threatens to disclose . . . an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety

Id.

52. CONN. GEN. STAT. ANN. § 31-51m(6) (West Supp. 1993) (providing that "[n]o employer shall discharge . . . any employee because the employee . . . reports, verbally or in writing, a violation or suspected violation of any state or federal law or regulation or any municipal ordinance or regulation to a public body").

53. ILL. COMP. STAT. ANN. § 415/19c.1 (Smith-Hurd 1993). The statute reads:

In any case involving any disclosure of information by an employee which the employee reasonably believes evidences -

(i) a violation of any law, rule, or regulation; or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety . . . [n]o disciplinary action shall be taken versus any employee for the disclosure

Id.

D. Judicial Modifications

Courts have modified the at will rule by recognizing wrongful discharge claims founded upon contract and tort theories, or a combination of the two.⁵⁴ Depending upon the jurisdiction, different contract theories can be used as the basis of a claim. Some courts are willing to find implied contracts in cases where the employer has made promises or assurances to the employee.⁵⁵ These promises can be made orally or in writing, such as company manuals. Courts in California and Massachusetts have held that every contract contains a covenant of good faith and fair dealing.⁵⁶ Under this theory, the employee can recover contract damages by demonstrating that the employer terminated the relationship in bad faith.

Many courts recognize a limit on an employer's unfettered right to discharge an employee under a tort theory. Some wrongful discharge claims are based upon an allegation of intentional infliction of emotional distress,⁵⁷ but in most cases, courts limit the at will rule through the public policy exception.⁵⁸ In essence, a breach of public policy is a breach of duty imposed by law,⁵⁹ thus giving the aggrieved employee a cause of action in tort.

54. See *Current Developments*, *supra* note 1, at 11-15 (discussing implied contracts from the employer's oral and written assurances); Peck, *supra* note 2, at 734-49 (discussing current contract and public policy theories used by the courts).

55. See, e.g., *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 885 (Mich. 1980) (holding that contract provision may become part of the contract either by express agreement, oral or written, or by the employee's legitimate expectations created by the employer's policy statements); *Weiner v. McGraw-Hill Inc.*, 443 N.E.2d 441, 442 (N.Y. 1982) (recognizing a breach of contract claim where employee was discharged without cause or rehabilitative efforts set forth in employer's personnel handbook).

56. See *Cleary v. American Airlines Inc.*, 168 Cal. Rptr. 722, 728 (Cal. Ct. App. 1980) ("[T]here is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement."); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251, 1256 (Mass. 1977) ("Good faith and fair dealing between parties are pervasive requirements in our law; it can be said fairly, that parties to contracts or commercial transactions are bound by this standard."); see also *Duty to Terminate*, *supra* note 11, at 1836-44 (arguing that courts can provide a remedy by implying a duty to terminate only in good faith).

57. See, e.g., *Agis v. Howard Johnson Co.*, 355 N.E.2d 315 (Mass. 1976) (holding that a cause of action existed for an intentional infliction of severe emotional distress without physical injury).

58. See *Public Policy Exception*, *supra* note 3, at 1931 (stating that the most widely accepted limitation on the at will rule is the public policy exception).

59. *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512 (N.J. 1980).

II. PUBLIC POLICY EXCEPTION TO EMPLOYMENT AT WILL AS THE BASIS FOR A WRONGFUL DISCHARGE CLAIM

The majority of states recognizing wrongful discharge claims based upon the public policy exception generally agree that an employer cannot fire an employee for refusing to contravene public policy or performing an act encouraged by public policy.⁶⁰ The rationale for this exception "rests on the recognition that in a civilized society the rights of each person are necessarily limited by the rights of others and of the public at large."⁶¹ More specifically, an employer's right to discharge is restricted by the rights of employees and society. An employer cannot use the threat of discharge to coerce employees to commit illegal acts, conceal wrongdoing, or act against the public interest.⁶²

Though the general concept of the public policy exception seems easy to articulate and understand, its application has been difficult. This difficulty is clearly illustrated by courts implementing the public policy exception and creating a pattern of incoherent and, seemingly, arbitrary decisions.⁶³ The problem courts have faced lies in defining public policy. As the first court to recognize the public policy exception admitted, "[t]he term 'public policy' is inherently not subject to precise definition."⁶⁴

Different courts have developed different definitions for the term public policy. The Supreme Court of Illinois has stated that "public policy concerns what is right and just and what affects the citizens of the State collectively."⁶⁵ A California court reasoned that public policy embodied the notion "that no citizen can lawfully

60. There are several broad categories of public policy exceptions: refusing to commit an unlawful act; exercising a statutory or constitutional right; performing an important public obligation; and reporting illegal conduct. However, some courts refuse to recognize a cause of action for wrongful discharge based upon the public policy exception. *See, e.g.,* Hinrichs v. Tranquillaire Hosp. 352 So.2d 1130, 1131 (Ala. 1977); De Marco v. Publix Super Markets, Inc., 384 So.2d 1253, 1254 (Fla. 1980); Murphy v. American Home Prod. Corp., 448 N.E.2d 86, 87 (N.Y. 1983).

61. *Gantt v. Sentry Ins.*, 824 P.2d 680, 686-87 (Cal. 1992).

62. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 376 (Cal. 1988) (*en banc*).

63. *See Public Policy Exception, supra* note 3, at 1947-50 (arguing that judicial decisions regarding the public policy exception have been incoherent, discretionary, and arbitrary).

64. *Petermann v. International Bd. of Teamsters*, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (citation omitted). "[T]he Achilles heel of the principle lies in the definition of public policy." *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981).

65. *Palmateer*, 421 N.E.2d at 878-79.

ly do that which has a tendency to be injurious to the public or against the public good."⁶⁶ The Supreme Court of Oregon concluded that "there can be circumstances in which an employer discharges an employee for such a socially undesirable motive that the employer must respond in damages for any injury done."⁶⁷ Yet another definition is that "a clearly mandated public policy . . . strikes at the heart of a citizen's social right, duties and responsibilities."⁶⁸ Such definitions provide little guidance for determining which public policies are of such magnitude that employees deserve protection.

Courts have tried to define the scope of public policy by limiting the sources from which an employee can derive a public policy. Many courts require the plaintiff to demonstrate that a public policy is expressed in a specific statute or constitution,⁶⁹ while other courts accept non-legislative sources such as ethical codes and judicial decisions as expressions of public policy.⁷⁰ Despite efforts to define the boundaries of public policy, its meaning remains nebulous and sketchy. As a result, uncertainty, vagueness, and inconsistency created by judicial decisions about the public policy exception have left employers and employees uncertain about their rights and obligations to each other and society.

Though a precise definition may be difficult to establish, it is possible to create parameters which define the public policy exception. These parameters must be created in light of the ends which are sought to be achieved by use of the exception. In the wrongful discharge context, courts struggle to balance the rights and interests of employers, employees, and society.⁷¹ Employers have an inter-

66. *Petermann*, 344 P.2d at 27 (quoting *Safeway Store v. Retail Clerks Int. Ass'n*, 261 P.2d 721, 726 (Cal. 1953)).

67. *Nees v. Hocks*, 536 P.2d 512, 515 (Or. 1975).

68. *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 899 (3d Cir. 1983) (quoting *Palmateer*, 421 N.E.2d at 878-79).

69. See, e.g., *Shapiro v. Wells Fargo Realty Advisors*, 199 Cal. Rptr. 613, 618 (Cal. Ct. App. 1984); *Schultz v. Production Stamping Corp.*, 434 N.W.2d 780, 783 (Wis. 1989).

70. See, e.g., *Dabbs v. Cardiopulmonary Management Servs.*, 234 Cal. Rptr. 129, 133 (Cal. Ct. App. 1987); *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512 (N.J. 1980).

71. See *Palmateer*, 421 N.E.2d at 878 (stating the need to balance the interests of employers, employees, and society); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 841 (Wis. 1983) (stating that the public policy exception balances interests of employers, employees, and society); *Peck*, *supra* note 2, at 727-34 (discussing the reasons for judicially imposed limits on employer power and arguing that courts revised the at will employment doctrine in order to better balance the employer-employee relationship in the context of modern society); *Shapiro & Tune*, *supra* note 19 (discussing the balancing ap-

est in knowing that they have broad discretion to manage their businesses.⁷² This includes the right to retain qualified and competent employees and the right to discharge inadequate employees without fear of litigation. Employees seek job security, protection against arbitrary and unfair treatment, and protection against employer coercion.⁷³ Employees should not be forced to choose between contravening public policy and continuing employment. The public has an interest in balancing the interests of the employer and employee.⁷⁴ On the one hand, society derives a benefit from profitable and efficient businesses and a more stable job market.⁷⁵ On the other, it benefits from compliance with its basic policies, laws, and values.

Although society wants its citizens to do what is "right and just," rewarding an employee for voluntary moral behavior can often threaten an employer's ability to efficiently manage his business. A case which illustrates the tension between these competing interests is *Palmateer v. International Harvester Co.*⁷⁶ In *Palmateer*, the plaintiff alleged that he was fired for providing local law enforcement authorities with information about another employee who was suspected of violating the criminal code and for agreeing to assist in the investigation and trial if necessary. The court held that the plaintiff had a cause of action for wrongful discharge because there is no public policy more fundamental than enforcing a state's criminal code and protecting the lives and property of citizens.⁷⁷ The court recognized that its decision did not rest upon any statutory or constitutional provision which required citizens to report criminal activities,⁷⁸ but it stated that public policy supported "citizen crime-fighters."⁷⁹

The majority's opinion reflects society's desire to protect those

proach between employee's right to job security and employer's right to terminate).

72. See *Palmateer*, 421 N.E.2d at 878 (arguing that employers need freedom to run efficient businesses); *Brockmeyer*, 335 N.W.2d at 841 (adopting a narrow public policy exception in order to give employers flexibility in hiring).

73. See *Brockmeyer*, 335 N.W.2d at 841 (adopting a narrow public policy exception in order to safeguard employees from employers' actions which impinge on fundamental public policies).

74. See *Palmateer*, 421 N.E.2d at 878 (arguing that unchecked power in the hands of the employer or employee threatens public policy).

75. *Brockmeyer*, 335 N.W.2d at 841.

76. 421 N.E.2d 876 (Ill. 1981).

77. *Id.* at 879.

78. *Id.* at 880.

79. *Id.*

who report wrongdoing. However, although the outcome seems proper, arguably, it fails to adequately address the interests of the employer. Dissenting, Justice Ryan attacked the majority opinion and expressed valid criticisms about loose application of the public policy exception. In *Kelsay v. Motorola, Inc.*,⁸⁰ Justice Ryan wrote the court's opinion which upheld a plaintiff's right to sue for wrongful discharge when she alleged that she was terminated for filing a worker's compensation claim. However, he declined to agree with the majority in *Palmateer* because the public policy enunciated by the court could not be found in any legislative expression. Courts must consider the expectations and interests of both the employee and employer, and "[i]n the process of emerging from the harshness of the former [at will] rule, we must guard against swinging the pendulum to the opposite extreme."⁸¹ Justice Ryan expressed concern about the use of wrongful discharge based upon the public policy exception and its effect on business.⁸² He argued that a judicially created public policy in this case only serves to hamper an employer's ability to discharge an unwanted employee "who could be completely disruptive of labor-management relations through his police spying and citizen crime-fighter activities."⁸³

Given that public policy is such a nebulous concept and that employers and employees are uncertain as to their obligations to one another and society, it is crucial to create guidelines which help define the term, keeping in mind the need to balance the competing interests. Courts should narrow the scope of the public policy exception by requiring plaintiffs to demonstrate that their discharges violate a *specific* and *fundamental* public policy evidenced by, or discernible within, a statutory or constitutional provi-

80. 384 N.E.2d 353 (Ill. 1978).

81. *Palmateer*, 421 N.E.2d at 884 (Ryan, J., dissenting).

82. In his dissent, Justice Ryan quoted Professor Blades who supported broader use of wrongful discharge but recognized the adverse effects of litigation on a business.

[T]here is the danger that the average jury will identify with, and therefore believe, the employee. This possibility could give rise to vexatious lawsuits by disgruntled employees fabricating plausible tales of employer coercion. If the potential for vexatious suits by discharged employees is too great, employers will be inhibited in exercising their best judgment as to which employees should or should not be retained [T]he employer's prerogative to make independent, good faith judgments about employees is important in our free enterprise system.

Id. at 885 (citation omitted).

83. *Id.*

sion or administrative rule or regulation which has the full force of law.⁸⁴

A rule which roots public policy in statutes, constitutions, and administrative rules protects the interests of employers, employees, and society.⁸⁵ Employers are given some standards with which to determine or predict whether a discharge constitutes a violation of public policy. Their fear of endless litigation by terminated employees is diminished because groundless suits are discouraged by requiring reference to certain sources of public policy. Requiring statutory, constitutional, or administrative expression of public policy also promotes employees' interests by providing job security. It becomes clear that an employer cannot discharge an employee for refusing to commit an illegal act,⁸⁶ for exercising a statutory

84. Not all administrative rules have the full effect of the law. The definition of the word "rule" demonstrates the many functions an administrative rule can serve.

'[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

5 U.S.C. § 551(4) (1988).

In *Pacific Gas & Elec. Co. v. Federal Power Comm'n.*, 506 F.2d 33, 37-40 (D.C. Cir. 1974), the U.S. Court of Appeals for the D.C. Circuit discussed the distinction between a substantive rule and a general statement of policy. "A properly adopted substantive rule establishes a standard of conduct which has the force of law." *Id.* at 38. However, a general statement of policy does not have the effect of law. Rather, it "only announces what the agency seeks to establish as policy." *Id.* For the purposes of this Note, references to administrative rules upon which a discharged employee can rely are those rules which have the full force of law.

85. This Note argues that statutes, constitutions, and administrative rules are valid sources of public policy. However, simply relying upon a provision from one of these sources is not sufficient. The plaintiff must be able to support her claim with a specific and fundamental public policy found in one of the sources.

86. Courts have recognized wrongful discharge claims for refusing to commit an illegal act in a variety of circumstances. *See, e.g.*, *Woodson v. AMF Leisureland Centers Inc.*, 842 F.2d 699, 700 (3d Cir. 1988) (employee refused to sell liquor to intoxicated patron); *McNulty v. Borden, Inc.*, 474 F. Supp. 1111, 1121 (E.D. Pa. 1979) (refusing to participate in an illegal price-fixing scheme); *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385, 386 (Conn. 1980) (insisting that employer comply with the state Food, Drug and Cosmetic Act); *Trombetta v. Detroit, Toledo & Ironton R.R. Co.*, 265 N.W.2d 385, 386 (Mich. Ct. App. 1978) (employee refused to manipulate pollution sample results); *O'Sullivan v. Mallon*, 390 A.2d. 149, 149 (N.J. Super. Ct. Law Div. 1978) (employee refused to perform a catheterization procedure without the proper training); *Johnson v. Kreiser's, Inc.*, 433 N.W.2d 225, 226 (S.D. 1988) (employee refused to allow the corporation's president to use corporation property for personal use). *But see* *Naqvi v.*

or constitutional right,⁸⁷ or for fulfilling a duty imposed by law.⁸⁸ Society also benefits from the balancing of employer and employee interests and the protection of fundamental public policies. Both parties are made aware of their obligations and responsibilities, and both can fulfill those duties without fear of retaliation or improper action by the other. Requiring a statutory, constitutional, or administrative expression of public policy makes the standards for wrongful discharge more understandable and manageable, and it is a way "to accommodate the legitimate expectations of both [the employers and the employees]."⁸⁹

A leading case which balances the competing interests and illustrates the advantages of requiring plaintiffs to point to certain sources of public policy is *Petermann v. International Brotherhood of Teamsters*.⁹⁰ In *Petermann*, the employer instructed the employee to testify falsely before a government committee. After the employee testified truthfully, the employer discharged him. The California Court of Appeals reversed the lower court's ruling that the plaintiff failed to state a claim.⁹¹ It recognized that the employer had broad discretion to terminate employees but stated that statutory and public policy concerns limited this discretion.⁹² Perjury was a crime, and allowing an employer to discharge an employee who refused to break the law was contrary to the public welfare. "It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer

Oudensha America, Inc., 702 F. Supp. 671, 672 (N.D. Ill. 1988) (holding that employee who refused to participate in illegal activities which violated the Internal Revenue Code did not state a public policy upon which to base his claim), *rev'd*, 897 F.2d 531 (7th Cir. 1990).

87. See, e.g., *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896 (3d Cir. 1983) (employee fired for refusing to participate in political lobbying); *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 357 (Ill. 1978) (holding that employer cannot discharge employee for filing workers compensation claim). *But see* *Segal v. Arrow Indus. Corp.*, 364 So.2d 89, 89 (Fla. Dist. Ct. App. 1978) (refusing to recognize cause of action for employee at will who was discharged for filing workers compensation claim).

88. See, e.g., *Nees v. Hocks*, 536 P.2d 512, 516 (Or. 1975) (employee discharged for participating in jury duty); *Field v. Philadelphia Elec. Co.*, 565 A.2d 1170, 1172 (Pa. Super. Ct. 1989) (cause of action where employee, hired as expert in nuclear safety, was discharged for making statutorily required report); *Reuther v. Fowler & Williams Inc.*, 386 A.2d 119, 121 (Pa. Super. Ct. 1978) (employee discharged for serving on jury).

89. *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 884 (Ill. 1981) (Ryan, J., dissenting).

90. 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

91. *Id.* at 28.

92. *Id.* at 27.

to discharge any employee . . . on the ground that the employee declined to commit perjury, *an act specifically enjoined by statute.*"⁹³ Thus, even though the statute was penal and did not provide an individual with a remedy, the court held that the plaintiff was entitled to civil relief due to the public policy of encouraging truthful testimony.⁹⁴

Although some courts limit sources of public policy to statutory and constitutional provisions,⁹⁵ allowing employees to rely also upon administrative rules or regulations⁹⁶ is justified because such rules can have the effect of law and are promulgated by government agencies pursuant to legislatively conferred authority.⁹⁷ In *Winkelman v. Beloit Memorial Hospital*,⁹⁸ the Supreme Court of Wisconsin found that a cause of action existed where a hospital discharged a nurse for refusing to render services for which she was not qualified. The hospital wanted the plaintiff to "float" to a particular unit.⁹⁹ However, the plaintiff lacked the qualifications required by a state administrative rule to work in that particular area. The plaintiff did not work in the unit,¹⁰⁰ and shortly thereafter, the hospital terminated her.

The court held that the administrative rule embodied a well-defined public policy that nurses should only render services for which they are qualified.¹⁰¹ The court explained that public policy exceptions can be found in administrative rules as well as statutes

93. *Id.* (emphasis added).

94. *Id.*

95. *See, e.g.,* *Shapiro v. Wells Fargo Realty Advisors*, 199 Cal. Rptr. 613, 618 (Cal. Ct. App. 1984); *Schultz v. Production Stamping Corp.*, 434 N.W.2d 780, 783 (Wis. 1989).

96. *See supra* note 84.

97. *See, e.g.,* *Boyle v. Vista Eyewear, Inc.*, 700 S.W.2d 859, 860 (Mo. Ct. App. 1985) (plaintiff stated a cause of action where he was discharged for reporting violations of federal eyeglass testing regulations); *O'Sullivan v. Mallon*, 390 A.2d 149, 149 (N.J. Super. Ct. Law Div. 1978) (recognizing wrongful discharge claim by x-ray technician who refused to catheterize a patient due to medical regulations); *Winkelman v. Beloit Memorial Hosp.*, 483 N.W.2d 211, 212 (Wis. 1992) (nurse terminated for refusing to work in particular unit because she lacked the training and education required by an administrative rule).

98. 483 N.W.2d 211 (Wis. 1992).

99. Maternity nurses floated into areas which needed more help. *Id.* at 212.

100. Evidence on this point was conflicting. The plaintiff testified that her head nurse gave her three options: float, find a replacement, or take an unexcused absence day. The head nurse stated that she gave plaintiff two options: float or find a replacement. *Id.* at 213.

101. *Id.* at 216.

and constitutions.¹⁰² In this case, the public policy was clear and fundamental: patients should only be given care by those who are qualified. The court did not rely upon the general administrative rule which stated that the Board of Nursing should discipline negligent nurses. Rather, it relied upon a more specific rule which stated that negligence includes "[o]ffering or performing services as a licensed practical nurse or registered nurse for which the licensee or registrant is not qualified by education, training or experience."¹⁰³ *Winkelman* demonstrates that, like statutes, administrative rules can contain fundamental and specific public policies which improper discharges can undermine. This, coupled with the fact that administrative rules can have the full force of law, provides support for including administrative rules as a source of public policy.

Some courts have expanded sources of public policies to include ethical codes,¹⁰⁴ however such expansion does not seem justified.¹⁰⁵ Given that all citizens are expected to abide by the law, it is reasonable to require employers to know the law and to act within its confines. It is reasonable to demand that they not undermine or frustrate the policies behind those laws by discharging employees. In contrast, ethical codes lack the full force of law and

102. *Id.* at 215.

103. *Id.* at 213 (quoting WIS. ADMIN. CODE § N. 7.03(1)(g)) (Dec. 1993).

104. *See, e.g.,* Warthen v. Toms River Community Memorial Hosp., 488 A.2d 229, 232-33 (N.J. Super. Ct. App. Div. 1985) (discussing when an ethical code can serve as a source of public policy), *cert. denied*, 501 A.2d 926 (N.J. 1985); Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (N.J. 1980) (stating that in some instances ethical codes may contain public policy). *But cf.* Sullivan v. Massachusetts Mutual Life Ins. Co., 802 F. Supp. 716, 727 (D. Conn. 1992) (stating that ethical codes in security industry do not have the force of law and, thus, are not a source of public policy); Suchodolski v. Michigan Consol. Gas Co., 316 N.W.2d 710, 712 (Mich. 1982) (ethical codes created by private association does not establish public policy).

105. This is not to deny that professional employees face difficult dilemmas. Unlike other employees, professional employees confront conflicts between their codes of ethics and their positions as at will employees. Conflicts are created by codes that impose upon professionals special duties and responsibilities which extend beyond those required by law. Noncompliance with these obligations can result in the revocation of a license to practice in the profession, disciplinary proceedings, and, under certain circumstance, civil and criminal penalties. When faced with an employer's demand, a professional employee may have to decide between continuing employment or violating his code of ethics. *But cf.* Sara A. Corello, Note, *In-House Counsel's Right to Sue for Retaliatory Discharge*, 92 COLUM. L. REV. 389 (1992) (arguing that in-house attorneys should be able to sue for retaliatory discharge for refusing to violate their ethical code); Alfred G. Felui, Note, *Discharge of Professional Employees: Protecting Against Dismissal for Acts Within a Professional Code of Ethics*, 11 COLUM. HUM. RTS. L. REV. 149, 177-80 (1979-1980) (arguing that ethical codes should be a source of public policy).

apply only to members of a profession.¹⁰⁶ Such codes provide professions with a mechanism by which to self-regulate.¹⁰⁷ They establish standards used against professionals in cases of malpractice or negligence.¹⁰⁸ While professionals swear to abide by their profession's code of ethics, employers generally do not take such an oath. Thus, they should not be bound by a professional's ethical code.

In some cases, the employer may be part of the profession and may be required to abide by the profession's code of ethics,¹⁰⁹ however, even under these circumstances, ethical codes should not be a source of public policy because they are often too vague.¹¹⁰ Many provisions simply contain broad statements of general policy

106. See WOLFRAM, *supra* note 6, at 48-49 (discussing purposes of ethical codes); Criton A. Constantinides, Note, *Professional Ethics Codes in Court: Redefining the Social Contract Between the Public and the Professions*, 25 GA. L. REV. 1327, 1339-41 (1991) (discussing the purpose of ethical codes).

107. See Constantinides, *supra* note 106, at 1334-39 (discussing the means and justifications of self-regulation).

108. The Model Rules state that:

[V]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

MODEL RULES OF PROFESSIONAL CONDUCT Scope (1992). Similarly, the Model Code states that the Code does not "undertake to define standards for civil liability of lawyers for professional conduct." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1983). Despite these statements, courts have used the ethical codes to establish standards with which to measure lawyers' conduct for civil liability purposes. See, e.g., *Woodruff v. Tomlin*, 616 F.2d 924, 936 (6th Cir.) (Rules of Professional Responsibility do not define standard for civil liability, but they are some of evidence of required conduct), *cert. denied*, 449 U.S. 888 (1980); *Lipton v. Boesky*, 313 N.W.2d 163, 166-67 (Mich. Ct. App. 1981) (violation of the Code of Professional Responsibility is rebuttable evidence of malpractice); see also WOLFRAM, *supra* note 6, at 51-53 (discussing application of ethical codes in the civil context); Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 286-95 (1979) (giving justifications for widespread use of the Code in civil suits); Constantinides, *supra* note 106, at 1354-66 (discussing the use of professional codes of ethics in civil actions).

109. For example, law firms are typically managed by partners who are attorneys, and employ law associates. All are bound by the state ethical code governing attorneys.

110. This is not to suggest that ethical codes never provide clear cut answers. Rather, it is to assert that ethical codes and the provisions within each code vary in scope and specificity and are often subject to various interpretations. See generally RENA A. GORLIN, CODES OF PROFESSIONAL RESPONSIBILITY (2d ed. 1990) (containing ethical codes for different professions). As a result, they are difficult to use as a source of public policy. Cf. Constantinides, *supra* note 106, at 1348-53 (discussing the vagueness and scope of ethical codes in the context of civil cases against professionals).

which are vulnerable to subjective interpretations.¹¹¹ As a result, they provide little guidance for the employer and greater opportunity for a discharged employee to sue. Ethical provisions which are discretionary only exacerbate this problem. Using ethical codes as embodiments of public policy raises several difficult questions for which courts have given, at best, ambiguous answers. Among these questions are: Who interprets the ethical provisions and decides what is and what is not a violation? Is it enough that the employee subjectively believes that following the employer's request is a violation of his ethical code or must the action truly be a violation? Which provisions in ethical codes constitute public policy and how is a court to decide?

No court has found a public policy exception simply by relying on an ethical provision, calling into question a court's ability to effectively use them as a source of public policy. Rather, courts have either denied the cause of action¹¹² or found a public policy exception based upon an ethical provision which is supported by a statute.¹¹³

A leading case involving ethical codes and wrongful discharge based upon the public policy exception is *Pierce v. Ortho Pharmaceutical Corp.*¹¹⁴ The case and the court's opinion illustrate the problems which are created when ethical codes are used as a source of public policy. In *Pierce*, the plaintiff, a physician, argued that her employer fired her for refusing to violate her ethical code.

111. For example, Rule 102 of the Code of Professional Conduct of the American Institute of Certified Public Accountants provides that "[i]n the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others." CODE OF PROFESSIONAL CONDUCT OF AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS Rule 102 (1988). Rule 501 states "[a] member shall not commit an act discreditable to the profession." CODE OF PROFESSIONAL CONDUCT Rule 501 (1988). Similarly, the Code for Nurses contains broad provisions, for instance, "[t]he nurse provides services with respect for human dignity and the uniqueness of the client . . ." CODE FOR NURSES 1 (1985).

112. See, e.g., *Suchodolski v. Michigan Consol. Gas Co.*, 316 N.W.2d 710, 712 (Mich. 1982) (holding that the code of ethics for auditors is not a source of clearly mandated public policy); *Warthen v. Toms River Community Memorial Hosp.*, 488 A.2d 229, 234 (N.J. Super. Ct. App. Div. 1985) (denying a cause of action for wrongful discharge based on the Code For Nurses), cert. denied, 501 A.2d 926 (N.J. 1985); *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 514 (N.J. 1980) (granting summary judgment in a case where the plaintiff asserted an ethical code to be a source of public policy).

113. See, e.g., *Kalman v. Grand Union Co.*, 443 A.2d 728, 730 (N.J. Super. Ct. App. Div. 1982) (holding that a pharmacist's code of ethics and a state statute are two sources of public policy).

114. 417 A.2d 505 (N.J. 1980).

She asserted that continuing development of loperamide, a liquid drug, violated her interpretation of the Hippocratic Oath because the proposed formula contained saccharin, a controversial ingredient.¹¹⁵ The trial court granted the defendant's motion for summary judgment.¹¹⁶ The Appellate Division reversed and remanded, stating that the grant of summary judgment had been premature and that a full record was required.¹¹⁷ The New Jersey Supreme Court reversed and reinstated the summary judgment granted by the trial court.¹¹⁸

The court held that ethical codes could be a source of public policy under certain circumstances.¹¹⁹ Without describing these circumstances, the court determined that Pierce's reliance upon the Hippocratic Oath did not meet the clearly mandated public policy standard. The provision upon which she relied read "I will prescribe a regimen for the good of my patients according to my ability and my judgment and never do harm to anyone."¹²⁰ The court stated that such general language did not prohibit the research being conducted by Ortho.¹²¹

The court then found that Pierce's position was based upon her personal morals and that she, in essence, wanted the research on loperamide stopped due to the controversial nature of the drug.¹²² To allow the personal beliefs of professional employees to dictate which projects end and which continue would result in "chaos." The court explained:

[A]n employee does not have a right to continued employment when he or she refuses to conduct research simply because it would contravene his or her personal morals. An employee at will who refuses to work for an employer in

115. *Id.* at 507. Continuing development meant that Ortho would file an application with the Federal Food and Drug Administration (FDA), continue lab testing, and begin work on a formulation. FDA approval would allow Ortho to test the new drug on humans. However, approval was required before such testing could be conducted. *Id.* at 507. Despite the need to obtain FDA approval, Pierce continued her opposition to the development of loperamide.

116. *Id.* at 506.

117. *Pierce v. Ortho Pharmaceutical Corp.*, 399 A.2d 1023, 1026-27 (N.J. Super. Ct. App. Div. 1979), *rev'd*, 417 A.2d 505 (N.J. 1980).

118. *Pierce*, 417 A.2d at 506.

119. *Id.* at 512.

120. *Id.* at 513.

121. *Id.*

122. *Id.* at 513-14.

answer to a call of conscience should recognize that other employees might heed a different call.¹²³

Pierce illustrates the questions and ambiguities created by the use of ethical codes as sources of public policy.¹²⁴ *Pierce* felt that continuing work on the drug would require her to violate her ethical code. *Pierce's* supervisor, another doctor, disagreed. Who is to decide and must there really be a violation? Assuming there was no ethical violation, should it be sufficient that *Pierce* thought she would have to violate her ethical code? This raises the difficult distinction between personal beliefs and ethical obligations. Finally, not all ethical provisions meet the standard of the public policy exception. The court left unanswered exactly when a provision rises to the level of public policy and how a court is to decide. With these questions unanswered, the obligations of employers and employees are made more unclear by including ethical codes as a possible source of public policy.

After identifying an appropriate source of public policy, the plaintiff should have to demonstrate that the implicated public policy is specific. Not all statutory or constitutional provisions or administrative rules contain a public policy sufficient to support a claim of wrongful discharge based upon the public policy exception. Rather, the employee must show that the policy is precise,

123. *Id.* at 514.

124. Similar issues were raised in *Warthen v. Toms River Community Memorial Hosp.*, 488 A.2d 229, 229 (N.J. Super. Ct. App. Div. 1985). The plaintiff, Corrine Warthen, brought a claim against her employer alleging that she had been wrongfully discharged for her refusal to dialyze a particular patient. Warthen, a nurse, refused to perform the procedure because the patient had suffered cardiac arrest and severe internal hemorrhaging during two prior dialysis procedures. She explained to her supervisor that she had "moral, medical, and philosophical objections" to performing the dialysis on the particular patient. *Id.* at 230. The supervisor reassigned Warthen. Later that summer, Warthen was asked to perform the procedure on the same patient. Warthen again refused. The head nurse warned that Warthen would be terminated if she refused. Warthen refused and was discharged.

Warthen argued that her refusal to dialyze the patient was consistent with the code for nurses and that the code embodied a public policy. The provision which she cited stated, "the nurse provides services with respect for human dignity and the uniqueness of the client unrestricted by considerations of social or economic status, personal attributes, or the nature of health problems." *Id.* at 233. The Superior Court of New Jersey found that this provision "define[d] a standard of conduct beneficial only to the individual nurse and not to the public at large." *Id.* The clearly mandated public policy of preserving life outweighed the policy in the code's provision which recognized a nurse's right to refuse to participate in a procedure that she thought threatened human dignity. Further, to allow a nurse to refuse to perform certain duties based upon personal beliefs and morals would disrupt the administration of a hospital. *Id.* at 234.

and not simply a general statement of broad policy.¹²⁵ The employee must also demonstrate that his or her refusal to violate the policy was reasonable not simply a result of the employee's subjective interpretation of the policy source. By requiring the public policy to be specific, not only will employees be prevented from invoking general and broad statements of public policy to support their claims, but the ability of the courts to invent public policies will be constrained.

The effects of such a limit on the public policy exception are illustrated by *Lampe v. Presbyterian Medical Center*.¹²⁶ In *Lampe*, the court held that broad policies contained in statutes which created the State Board of Nursing and gave it authority to discipline negligent nurses did not establish a claim for wrongful discharge.¹²⁷ Lampe worked as a nurse at Presbyterian Medical Center. She was responsible for determining the number of nurse staffing hours needed to run her unit.¹²⁸ Lampe believed that her unit required a large staff because the new staffing system instituted by the hospital required the nurses to work long overtime hours and the bed occupancy rate was high. At the same time, however, the defendants asked Lampe to reduce the number of overtime hours in her unit. Lampe did not comply, feeling that such a reduction in hours threatened the welfare of her patients.¹²⁹ The court refused to extend the tort of wrongful discharge based upon the public policy exception in this case because it found that Lampe relied upon a broad, general statement of policy.¹³⁰

The general claim in *Lampe* resembles the claim in *Winkelman v. Beloit Memorial Hospital*.¹³¹ Recall in *Winkelman*, the plaintiff,

125. See, e.g., *Lampe v. Presbyterian Medical Ctr.*, 590 P.2d 513, 515 (Colo. Ct. App. 1978) (nurse failed to state a claim for wrongful discharge because the statute upon which she relied stated a general, not specific policy); *Hancock v. Express One Int'l Ins.*, 800 S.W.2d 634 (Tex. Ct. App. 1990) (plaintiff could not rely on state highway regulations where regulations were not sufficiently specific to constitute a clear public policy mandate).

126. 590 P.2d 513 (Colo. Ct. App. 1978).

127. *Id.* at 515. The provision establishing the State Board of Nursing stated that "in order to safeguard life, health, property and the public welfare . . . it is necessary that a proper regulatory authority be established." *Id.* Lampe also relied upon the statute which gave power to the Nursing Board "[t]o withhold, deny, revoke, suspend, or refuse to renew any license . . . upon proof that such person . . . has negligently or willfully acted in a manner inconsistent with the health or safety of persons under her care." *Id.* (quoting COLO. REV. STAT. § 12-38-217 (1973)).

128. *Id.* at 514.

129. *Id.*

130. *Id.* at 515.

131. 483 N.W.2d 211 (Wis. 1992). See *supra* notes 98-103 and accompanying text

a nurse, alleged that she was wrongfully terminated for refusing to work in a unit for which she lacked adequate training. Like Lampe, Winkelman pointed to a statute which provided that the state Board of Nursing had the authority to revoke, limit, or suspend a nurse's license for negligent acts.¹³² However, the crucial difference is that Winkelman did not base her claim solely on this general provision. Instead, a specific rule existed which supported her claim. It stated that negligence included offering services for which one was not qualified.¹³³ In contrast, *Lampe* only cited to broad language from which the court could not find support for her claim.

A final hurdle which courts should require plaintiffs to overcome is a showing that the implicated public policy is fundamental, in that the frustration of that policy threatens the public interest. It is not enough that "a discharged employee's conduct was praiseworthy or . . . [that] the public may have derived *some* benefit from it."¹³⁴ The plaintiff must demonstrate that such discharges endanger the public health, safety, or general welfare. Though this raises the issue of what constitutes a threat to society, the requirement that the policy be fundamental is an attempt to limit the public policy exception to those cases which involve discharges that would actually have an adverse effect on the public if tolerated.¹³⁵

For example, requiring that the discharge threaten the public safety, health, and welfare would eliminate cases like *Roxberry v. Robertson & Penn, Inc.*¹³⁶ In *Roxberry*, the plaintiff was an employee discharged for reporting that certain shirts had been washed

(discussing the *Winkelman* decision).

132. *Winkelman*, 483 N.W.2d at 213, 216. The provision upon which Lampe relied similarly empowered the state Board of Nursing. *Lampe v. Presbyterian Medical Ctr.*, 590 P.2d 513, 515 (Colo. Ct. App. 1978).

133. *Winkelman*, 483 N.W.2d at 213.

134. *Brockmeyer v. Dunn & Bradstreet*, 335 N.W.2d 834, 840 (Wis. 1983) (emphasis added).

135. See, e.g., *Roxberry v. Robertson & Penn, Inc.*, No. 91-3330, 1992 WL 102551, at *3 (10th Cir. May 15, 1992) (holding that the plaintiff did not establish a cause of action in a wrongful discharge action); *Campbell v. Ford Indus. Inc.*, 546 P.2d 141, 145 (Or. 1976) (holding that statutory right to examine corporation's books is not substantial public policy because its purpose is to protect private and proprietary interests of the stockholder).

136. No. 91-3330, 1992 WL 102551 (10th Cir. May 15, 1992). The court did not focus on the public policy involved, but rather whether the plaintiff failed to state a cause of action because she reported the violation to the victim and not company officials or law enforcement.

rather than dry-cleaned in violation of a contract. Although the plaintiff acted admirably by reporting the contractual violation, no fundamental public policy was threatened. Rather, the violation involved the interests of the parties to the contract, not the public. Whether the shirts were washed or dry-cleaned did not threaten the public.

After demonstrating that a discharge violates a *specific* and *fundamental* public policy evidenced by a statutory or constitutional provision or administrative rule which has the full force of the law, the plaintiff must then show that his discharge undermines or frustrates that public policy.

III. WRONGFUL DISCHARGE CLAIMS BY ATTORNEYS

Over the past eight years, attorneys have brought several wrongful discharge claims based upon the public policy exception. Courts have resolved these cases in several different ways.¹³⁷ Some courts barred such suits due to plaintiffs' status as attorneys, regardless of whether a clearly mandated public policy was involved.¹³⁸ Other courts avoided expansion of the public policy exception to attorneys, but provided protection by finding a breach of contract,¹³⁹ and still other courts allowed suits by attorneys under state whistleblower statutes.¹⁴⁰ The issue these cases either

137. See *supra* note 3 (noting that for the purposes of this Note, no distinction is being drawn between wrongful discharge based upon public policy and retaliatory discharge).

138. See, e.g., *Willy v. Coastal Corp.*, 647 F. Supp. 116, 118 (S.D. Tex. 1986) (refusing to extend the public policy exception to cover an attorney who believed he was asked to violate the law), *rev'd*, 855 F.2d 1160 (5th Cir. 1988); *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 107 (Ill. 1991) (holding that an in-house counsel had no cause of action for retaliatory discharge when his employer discharged him for reporting the employer's sale of defective kidney dialyzer machines); *Herbster v. North American Co. for Life & Health Ins.*, 501 N.E.2d 343, 348 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987) (holding that in-house counsel had no cause of action for retaliatory discharge despite being terminated for refusing to destroy discovery documents).

139. See, e.g., *Mourad v. Automobile Club Ins. Ass'n*, 465 N.W.2d 395, 396 (Mich. Ct. App. 1991) (attorney stated claim for breach of just cause contract); see also *Nordling v. Northern State Power Co.*, 478 N.W.2d 498, 502 (Minn. 1991). The court in *Nordling* held that the attorney-client relationship did not bar a breach of contract claim by the attorney against his employer as long as the attorney-client relationship was not compromised. *Id.* It explained that an "in-house attorney is also a company employee, and we see no reason to deny the job security aspects of the employer-employee relationship if this can be done without violence to the integrity of the attorney-client relationship." *Id.* Issues regarding the employee-employer aspect of the relationship are less likely to involve or threaten the special attributes of the attorney-client relationship. *Id.*

140. See, e.g., *Nordling*, 478 N.W.2d at 504 (holding that consideration of the attorney-client relationship was unnecessary because, as a matter of law, there was no violation of

raise or side-step is whether, like other employees, attorneys should be able to bring wrongful discharge suits based upon the public policy exception.

A. *Breach of Contract*

Some courts allowing wrongful discharge suits by attorneys have avoided the nebulous public policy exception by finding that the plaintiff stated a claim for relief based upon a breach of contract.¹⁴¹ This approach suggests that courts want to provide protection for attorneys while limiting the remedies to contract remedies.¹⁴² However, the overreaching implications of finding implied-in-law obligations demonstrate that it is not an adequate solution.

In *Mourad v. Automobile Club Insurance Association*,¹⁴³ the court upheld a judgment in favor of an attorney employed by an insurance company who was fired for refusing to violate his code of ethics.¹⁴⁴ The attorney successfully argued that his discharge breached an implied just cause contract. On appeal, the court found that the jury did not err by finding that the defendant's policy manual had established a just cause contract and that the employer had no cause to demote the plaintiff when he refused to violate his code of ethics.¹⁴⁵ The court acknowledged that the ethical code only bound attorneys, however, it stated that employers could indirectly bind themselves by hiring an attorney and agreeing not to terminate him without cause.¹⁴⁶ Since the plaintiff could not recover under both a breach of contract theory and a retaliatory dis-

the state whistleblower statute); *Parker v. M & T Chemicals Inc.*, 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989) (attorney-client relationship did not preclude retaliatory discharge claim by attorney based upon the New Jersey whistleblower statute).

141. See, e.g., *Wieder v. Skala*, 609 N.E.2d 105, 105 (N.Y. 1992) (finding attorney had a valid wrongful discharge claim against his law firm for breach of contract); *Mourad*, 465 N.W.2d at 395.

142. Contract remedies for wrongfully discharged employees are generally limited to the salary the employee would have made less the income earned through the employee's mitigation efforts. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* § 14-18 (3d ed. 1987). There are several limitations on contract damages. The most important for the purposes of this Note is that, regardless of bad motive for the breach of contract, punitive damages are generally not awarded as in tort actions. See E. ALLAN FARNSWORTH, *CONTRACTS* § 12.8 (2d ed. 1990); see also *Brockmeyer v. Dunn & Bradstreet*, 335 N.W.2d 834, 841 (Wis. 1983) (limiting wrongful discharge damages to contractual remedies).

143. 465 N.W.2d 395 (Mich. Ct. App. 1991)

144. *Id.* at 403.

145. *Id.* at 398.

146. *Id.* at 400.

charge theory, the court declined to address whether an attorney could bring a retaliatory discharge claim against his employer for refusing to violate his code of ethics.¹⁴⁷

In another case, *Wieder v. Skala*,¹⁴⁸ a law firm associate brought a wrongful discharge suit against his firm. Wieder, a law associate, informed senior partners in his firm that another associate had made false, material misrepresentations and asked the firm to report the misconduct to the appropriate disciplinary committee as required by the Code of Professional Responsibility.¹⁴⁹ The partners did nothing.¹⁵⁰ After further insistence by Wieder, the firm finally submitted a misconduct report.¹⁵¹ Wieder remained employed, but several days after he filed motions in an important case, the firm terminated him.¹⁵² Wieder then filed a wrongful discharge suit.¹⁵³

The court refused to recognize the tort of wrongful discharge based upon the public policy exception, stating that such changes in employment relationships were for the legislature to decide.¹⁵⁴ However, the court did find that Wieder stated a claim for breach of contract.

We agree with plaintiff that in any hiring of an attorney as an associate to practice law with a firm there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession. Erecting or countenancing disincentives to compliance with the applicable rules of professional conduct, plaintiff contends, would subvert the central professional purpose of his relationship with the firm—the lawful and ethical practice of law.¹⁵⁵

The court stated that the provision involved in this case was essen-

147. *Id.* at 401.

148. 609 N.E.2d 105 (N.Y. 1992).

149. *Id.* at 106.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 109.

155. *Id.* at 108.

tial to the self-regulation and survival of the legal profession.¹⁵⁶ However, it noted that not all ethical provisions established implied-in-law obligations.

Though the outcome in *Wieder* seems appropriate from a moral or ethical stand point, the decision has far reaching implications which show that finding an implied-in-law obligation and breach of contract is not the appropriate solution to providing attorneys with protection. The effect of *Wieder* has the potential to go well beyond its facts because the court stated an extremely broad rule which was not limited by any particular facts in the case. In *Mourad*, the jury decided whether a just cause contract existed based upon the company's policy manual and whether the employer breached that contract. In contrast, the *Wieder* court found an implied-in-law duty simply by relying upon the firm's hiring of the plaintiff. It concluded "that in *any* hiring of an attorney as an associate to practice law with a firm there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression."¹⁵⁷ In other words, the court is willing to find an implied-in-law term between *every* law firm and *each* of its law associates.¹⁵⁸

Putting aside the breadth of the court's decision, other problems arise which lead to the conclusion that breach of contract stemming from implied obligations is not an adequate solution. The *Wieder* court left unanswered which ethical provisions established implied-in-law obligations and how a court was to decide. It only stated that not all ethical provisions were incorporated into the contract.¹⁵⁹ Without more explanation, law firms do not know what the contract contains and, thus, what action will constitute a

156. *Id.*

157. *Id.* (emphasis added).

158. The breadth of this rule does not end with law firms and law associates. Rather, carrying through the rationale of the court to its logical conclusion, it makes sense to find implied-in-law obligations between other professional employees and their employers. For instance, accountants and accounting firms are analogous to law associates and law firms. Accounting firms hire accountants to provide accounting services. These services, rendered for the firm's clients, are "the very core and indeed, the only purpose" for the accountant's association with the firm. *Id.* Arguably, from this association flows an implied duty on both parties to comply with the Code of Professional Conduct of the American Institute of Certified Public Accountants. According to *Wieder*, to find otherwise undermines the very purpose of the professional relationship, namely the ethical practice of accounting. *Id.* The rationale of the court could be applied to other professionals such as doctors and nurses.

159. *Id.* at 109.

breach of contract. In fact, they cannot even guess or predict because the court provided no guidelines or standards by which to judge what might be a breach. Assuming the issue of content is resolved, using ethical codes as a basis for implied obligations still creates problems which stem from deciding who is going to interpret the ethical provision and whether subjective belief of a violation is enough to support a breach of contract claim.¹⁶⁰

The reality of the *Wieder* decision seems to be that the court wants to provide an incentive for attorneys to act ethically and legally, but it wants to limit the remedy for discharge. However, in an effort to limit the remedy, the court creates a tenuous and over-reaching rule.

B. Public Policy Exception

In contrast to the courts which have used a contract theory to protect attorneys, other courts have denied protection to attorneys and refused to extend the public policy exception. The cases barring such suits illustrate the dilemma attorneys face when confronted with a choice between continuing employment and complying with their code of ethics and demonstrate the unfair outcomes caused by disparate treatment. In *Herbster v. North American Co. for Life & Health Insurance*,¹⁶¹ Herbster, plaintiff and in-house counsel, brought a suit for retaliatory discharge based on the allegation that his employer fired him for refusing to destroy or remove discovery information which supported claims of fraud being brought against the employer. He argued that compliance with his employer's demand would require him to violate certain provisions in the Code of Professional Responsibility and the state statute regarding obstruction of justice.¹⁶²

After stating that "[t]here is no question that there are public policy considerations in this case to support" the allegation that Herbster's discharge contravened a clearly mandated public policy,

160. See *supra* notes 114-25 and accompanying text.

161. 501 N.E.2d 343 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987). But see Dennis M. Nolan, Note, *Herbster v. North American Company for Life and Health Insurance: Attorney's Retaliatory Discharge Action Unjustly Dismissed*, 21 J. MARSHALL L. REV. 215 (1987) (criticizing the *Herbster* court for not adequately analyzing whether, in certain instances, attorneys are employees); Nancy K. Renfer, Comment, *Corporate Counsels' Lack of Retaliatory Discharge Action*, 10 N. ILL. U. L. REV. 89, 98-105 (1989) (discussing *Herbster* and its implications).

162. *Herbster*, 501 N.E.2d at 344.

the court refused to extend the public policy exception.¹⁶³ Explaining its refusal, the court distinguished *Herbster* from other employees. First, although *Herbster* argued that he was not only an attorney but also an employee, the court could not separate *Herbster's* position as an employee from his profession.¹⁶⁴ It made clear that unlike other employees, *Herbster* was an attorney subject to an ethical code. Second, the court stated that "unlike the employees in the present retaliatory discharge cases, attorneys occupy a special position in our society."¹⁶⁵ The court explained that the attorney-client relationship places the attorney in a special position to receive confidential information and to influence client behavior. Given this relationship, the law imposes special obligations upon attorneys.¹⁶⁶ Third, given the uniqueness of the attorney-client relationship, it is necessary for the client to have the right to terminate the relationship for any reason or no reason.¹⁶⁷ At the same time, the court recognized attorneys have the right to end the relationship as long as the client is not prejudiced.¹⁶⁸

After drawing distinctions between employees and attorneys and emphasizing the important aspects of the attorney-client relationship, the court concluded that the public policy exception could not be expanded to cover attorneys. Such expansion threatened the "mutual trust" and confidential nature of the attorney-client relationship.¹⁶⁹

A case which relied heavily upon *Herbster* and which clearly demonstrates the dangers of not protecting attorneys in some situations is *Balla v. Gambro, Inc.*¹⁷⁰ In *Balla*, an in-house attorney brought a claim for retaliatory discharge against his former employer, Gambro, Inc. (Gambro). Gambro is a company which distributes kidney dialysis equipment manufactured by Gambro Germany. *Balla* was director of administration. He advised and represented Gambro on legal matters and ensured that the company complied

163. *Id.*

164. *Id.* at 346.

165. *Id.*

166. *Id.* at 347.

167. *Id.* The unfettered right to terminate one's attorney "is implied in every contract of employment and is deemed necessary because of the deeply embedded concept of the confidential nature of the relationship between the attorney and the client and the evil that would obviously be engendered by any friction or distrust." *Id.*

168. *Id.* at 348.

169. *Id.*

170. 584 N.E.2d 104 (Ill. 1991).

with federal, state, and local regulations and laws.¹⁷¹

Gambro Germany sent a letter to Gambro stating that it was shipping kidney dialyzers which might present certain risks for acute patients. Balla informed the company president of this information and stated that the dialyzers should be rejected for failing to meet the standards of the Food and Drug Administration (FDA).¹⁷² The president rejected the shipment but one week later, without informing Balla, told Gambro Germany it would accept the dialyzers. When Balla discovered that the shipment had been accepted, he notified the president that he would do whatever was necessary to stop the sale of the particular dialyzers.¹⁷³ Gambro terminated Balla. The next day, Balla reported the shipment to the FDA who seized the dialyzers and found them to be adulterated.¹⁷⁴

After the trial court determined that Balla failed to state a cause of action, the appellate court reversed in part, finding that a material issue of fact existed as to whether Balla disclosed the dialyzer information in his capacity as an attorney.¹⁷⁵ The court stated that there would be no question of Balla's standing to bring the claim if he were not an attorney,¹⁷⁶ but that his status as an attorney required the court to consider the nature and special attributes of the attorney-client relationship. The court articulated a three-part test. First, if Balla learned of the dialyzer information as a layman, the attorney-client relationship was not threatened, and Balla could bring the suit.¹⁷⁷ Second, if it was unclear whether Balla learned the information as a layman, then it was presumed that he was acting in his capacity as an attorney. The court then must consider whether the information was gained through the attorney-client relationship and whether it was privileged. If not, the suit could be brought.¹⁷⁸ Third, even if Balla was acting in his capacity as an attorney and the information was privileged, the court must consider other public policies which favor disclosure. It noted:

171. *Id.* at 105.

172. *Id.* at 106.

173. *Id.*

174. *Id.*

175. *Balla v. Gambro, Inc.*, 560 N.E.2d 1043, 1047 (Ill. App. Ct. 1990), *rev'd*, 584 N.E.2d 104 (Ill. 1991).

176. *Id.* at 1045-46.

177. *Id.* at 1046.

178. *Id.*

The sanctity of the attorney/client privilege is not an absolute bar to disclosure After balancing the competing public policies of the attorney/client privilege versus protecting individuals from serious bodily harm or death, we find clear support in favor of disclosing information when the attorney reasonably believes it is necessary to prevent serious bodily harm or death.¹⁷⁹

This test, in essence, means that even if a plaintiff is acting as an attorney, he may still be able to bring a suit for retaliatory discharge because the policies behind disclosure could outweigh the policies supporting the attorney-client relationship. However, the appellate court reduced the implications of its decision by stating its support of the *Herbster* decision and distinguishing the facts of the case before it.¹⁸⁰

On appeal, the Supreme Court of Illinois reversed the appellate court and held that Balla had no cause of action, despite acknowledging that "it appear[s] . . . this discharge was in contravention of a clearly mandated public policy . . . [and that] '[t]here is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens.'"¹⁸¹ The court reviewed the *Herbster* decision and agreed with the notion that in-house counsel do not have a claim for retaliatory discharge. It based its decision on the purpose of the tort of retaliatory discharge and the potential effects its expansion could have on the attorney-client relationship.¹⁸²

The court explained that expansion of the exception was unnecessary because the public interest was adequately safeguarded by the fact that attorneys are bound by an ethical code. The Rules of Professional Conduct required Balla to report Gambro's intention to sell the defective dialyzers.¹⁸³ Balla alleged and the FDA seizure

179. *Id.* The court cited to Rule 4-101(c) of the Illinois Code of Professional Responsibility which mandated disclosure by attorneys when it appeared necessary to prevent client action that would result in death or serious bodily harm. Rule 4-101(d)(3) also permitted an attorney to reveal a client's intent to commit a crime. *Id.*

180. *Id.* at 1047. It distinguished *Herbster*, first, by noting that *Herbster* was clearly acting in his capacity as an attorney and, second, by stating that the public policy concerns recognized by Illinois courts were not implicated in *Herbster*. *Id.*

181. *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 107-08 (Ill. 1991) (citations omitted).

182. *Id.* at 108.

183. *Id.* at 109. The court quoted the provision upon which it relied: "Rule 1.6(b) of the Rules of Professional Conduct reads: 'A lawyer *shall* reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would

supported that the dialyzers could have caused serious bodily injury or death. As a result, the court concluded that Balla had a duty to report the sale. Though Balla contended that attorneys face a choice between unemployment and violating their ethical code, the court stated that there was no choice involved. Unlike other employees, attorneys were bound to follow their code of ethics.¹⁸⁴

The court raised other ethical considerations. The Rules required Balla to withdraw from representing Gambro if such representation would have violated his ethical code. Though Balla argued that this view conflicted with difficult realities, the court responded that "[h]owever difficult economically and perhaps emotionally it is for in-house counsel to discontinue representing an employer/client, we refuse to allow in-house counsel to sue their employer/client for damages because they obeyed their ethical obligations."¹⁸⁵

Besides being unnecessary, the court determined that extension of retaliatory discharge to attorneys would have an adverse effect on the attorney-client relationship. It described the confidential nature of the relationship and expressed concern that allowing such suits would inhibit the essential free flow of communication between attorney and client.¹⁸⁶

Herbster and *Balla* demonstrate that the rationale behind barring wrongful discharge suits by attorneys is based upon the unique relationship between attorney and client and the ethical code which binds attorneys. However, these cases also illustrate the serious dilemma confronted by attorneys who are employees. Namely whether to follow their ethical code and be discharged for doing so, or to remain employed. These cases also illustrate the unfairness of disparate treatment, while attorneys are denied protection when a clearly mandated public policy is implicated, other employees are protected.

result in death or serious bodily injury." *Id.* (citations omitted).

184. *Id.* at 109.

185. *Id.* at 110. The court added that it felt that the employer should not have to bear the costs of an attorney following his code of ethics. *Id.*

186. *Id.* at 109. The court then addressed Balla's argument that he learned of the dialyzer information in his capacity as manager not attorney. The court found that no issue of material fact existed because it was clear from the pleadings and depositions that Balla was acting as Gambro's general counsel. *Id.* at 112.

IV. ALLOWING ATTORNEYS TO BRING WRONGFUL DISCHARGE SUITS BASED UPON THE PUBLIC POLICY EXCEPTION

Attorneys disagree generally about whether they should have the right to sue their employers for wrongful discharge. One attorney has stated, "[w]hy should others be protected and not me? It makes me look like a hired gun [there] to protect bad guys There are other public policies that are more important than attorney-client privilege or the duty of confidentiality."¹⁸⁷ However, another attorney argues, "[l]awyers can't do the kind of job they need to do unless the client is open and candid and not afraid to tell anything To protect that important aspect, you need to take away lawyers' rights that other people admittedly have."¹⁸⁸

Courts have not adequately considered how wrongful discharge claims brought by lawyers fit into the public policy exception and employment law. Most courts that have addressed the issue have agreed that attorneys should not be given the right to sue for wrongful discharge based upon the public policy exception, even if the discharge implicates a public policy.¹⁸⁹ Courts reason that extension of the public policy exception is unnecessary because the public interest is sufficiently protected by the fact that attorneys are bound by a code of ethics.¹⁹⁰ They conclude that allowing such suits would impair the confidential nature of the attorney-client relationship and rely upon high sounding notions of professionalism and the unexplained but accepted idea that attorneys have a "special" position in our society.¹⁹¹

187. Barbara Franklin, *Whistleblower Firings: In-House Lawyers Debate Right to Sue Employers*, N.Y. L.J., Nov. 15, 1990, at 5.

188. *Id.*

189. *See, e.g., Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986), *rev'd on other grounds*, 855 F.2d 1160 (5th Cir. 1988); *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991); *Herbster v. North American Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987). But some courts have avoided the public policy exception. *See, e.g., Mourad v. Automobile Club Ins. Ass'n*, 465 N.W.2d 395 (Mich. Ct. App. 1991) (finding breach of just cause contract); *Wieder v. Skala*, 609 N.E.2d 105 (N.Y. 1992) (addressing breach of contract based upon implied-in-law obligation).

190. *Willy*, 647 F. Supp. at 118; *Balla*, 584 N.E.2d at 108-09; *Herbster*, 501 N.E.2d at 346.

191. *See, e.g., Balla*, 584 N.E.2d at 109-10 (noting that an extension of the tort of retaliatory discharge would have a negative impact on the attorney-client relationship); *Herbster*, 501 N.E.2d at 346-48 (finding the special nature of the attorney-client relationship to be sufficient grounds for refusing to allow an attorney's retaliatory discharge claim).

The articulation of these arguments has replaced analysis and resulted in outcomes which are unsound. This Note does not deny the truth of the courts' arguments regarding the attorney-client relationship. Rather, it argues that despite their truth, under certain circumstances, the public policy exception should be used to protect attorneys. After examining the arguments against extension of the public policy exception over attorneys, it becomes clear that the primary issue is the attorney-client relationship and the fear that extension of the public policy exception to attorneys will impair and threaten that relationship.

A plaintiff's status as an attorney does not nullify the rationale supporting the public policy exception. Instead, it requires the courts to modify their analysis in order to take into account the attorney-client relationship. Rather than blindly asserting the importance of the attorney-client relationship and denying attorneys the right to bring wrongful discharge suits based upon the public policy exception, courts should allow attorneys, who are also employees, to sue when they are discharged for refusing to contravene a clearly mandated public policy. If the plaintiff meets the public policy standard and if the court can provide protection without severely impairing the attorney-client relationship, then the court should allow the suit to proceed.¹⁹² In essence, this approach requires the courts to weigh the policies supporting the special nature of the attorney-client relationship and the policies supporting disclosure. Courts may find that under certain circumstances the attorney-client relationship is not even threatened.¹⁹³

A. *Reliance Upon Ethical Codes*

Courts justify their refusal to extend protection to attorneys under the public policy exception, in part, by claiming that extension of the exception is unnecessary because attorneys are bound by a code of ethics which adequately protects the public.¹⁹⁴ This rationale is irreconcilable with cases involving other types of professional employees,¹⁹⁵ and it ignores the reality that attorneys

192. The Appellate Court in *Balla* suggested such an approach as the third prong of its test. See *supra* notes 179-80 and accompanying text.

193. For example, in *Wieder*, the law associate's suit did not threaten any attorney-client relationship. See also *infra* notes 241-45 and accompanying text.

194. See, e.g., *Willy*, 647 F. Supp. at 118; *Balla*, 584 N.E.2d at 108-09.

195. See, e.g., *Kalman v. Grand Union Co.*, 443 A.2d 728 (N.J. Super. Ct. App. Div. 1982) (noting that courts have allowed wrongful discharge claims by pharmacists despite the fact that they are bound by a professional code of ethics); see also *infra* notes 202-24

who are employees are "no less human than nonattorneys and, thus, no less given to the temptation to either ignore or rationalize away their ethical obligations when complying therewith may render them unable to feed and support their families."¹⁹⁶

Non-professional employees are bound by rules of law. Courts reason that allowing employees to bring wrongful discharge suits based upon the public policy exception provides them with protection they need to challenge an employer's unreasonable demands or unfair treatment.¹⁹⁷ Having the right to sue in such circumstances does not provide an incentive to sue an employer, but instead provides an incentive to act lawfully, in the public interest, and within one's rights. This protection is necessary since employees are vulnerable to employers' abuses of power.

With the exception of attorneys, courts apply similar reasoning to professional employees because professional and non-professional employees are often similarly situated.¹⁹⁸ For example, professional employees receive their income and benefits from one source. Employers have the power to demote professional employees or, at least, foreclose them from advancement. The working environment of professional employees can be made intolerable so they are forced to resign. Finally, mobility in the job market is often limited, thereby, providing fewer alternatives and opportunities for professional employees. As a result, professional employees, like other employees, are susceptible to employer coercion.

Given that professionals are not free from employer abuses of power, courts are willing to hear their claims and to provide protection when plaintiffs demonstrate a violation of a clear public policy mandate.¹⁹⁹ In *Winkelman v. Beloit Memorial Hospital*, the

and accompanying text.

196. *Balla*, 584 N.E.2d at 113 (Freeman, J., dissenting).

197. See *supra* notes 24-36, 60-62 and accompanying text.

198. See, e.g., *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505, 512-13 (N.J. 1980) (indicating a willingness to allow doctors to bring wrongful discharge claims based on the public policy exception); *Warthen v. Toms River Community Memorial Hosp.*, 488 A.2d 229, 231-32 (N.J. Super. Ct. App. Div. 1985) (finding that although a nurse had failed to demonstrate that her discharge violated a public policy, the public policy exception to at will employment did extend to the nursing profession).

199. Blades recognized the professional's dilemma and offered some compelling examples:

Consider, for example, the plight of an engineer who is told that he will lose his job unless he falsifies his data or conclusions, or unless he approves a product which does not conform to specifications or meet minimum standards. Consider also the dilemma of a corporate attorney who is told, say in the

court held that the plaintiff, a nurse, stated a cause of action when she alleged that the hospital terminated her for refusing to render services for which she was not qualified.²⁰⁰ In another case, a nurse stated a cause of action under the public policy exception because she was terminated for providing information to a commission established by the state to protect the rights of the mentally ill.²⁰¹ In *Kalman v. Grand Union Co.*,²⁰² the court held that a pharmacist who refused to violate a state law by closing a pharmacy stated a claim of wrongful discharge under the public policy exception. Many professionals, including doctors,²⁰³ nurses,²⁰⁴ and accountants²⁰⁵ have failed to articulate a clearly mandated public policy, and courts have dismissed their claims. However, these dismissals illustrate that courts provide professional employees, with the exception of attorneys, with the opportunity to present their claims and to argue that their discharges have violated public policy.

context of an impending tax audit or antitrust investigation, to draft backdated corporate records concerning events which never took place or to falsify other documents so that adverse legal consequences may be avoided by the corporation; and the predicament of an accountant who is told to falsify his employer's profit and loss statement in order to enable the employer to obtain credit.

Blades, *supra* note 27, at 1408-09 (citations omitted).

200. See *supra* notes 98-103 and accompanying text.

201. *Witt v. Forest Hosp., Inc.*, 450 N.E.2d 811, 812-13 (Ill. App. Ct. 1983) (upholding lower courts finding that plaintiff's discharge for communications with the Guardianship and Advocacy Commission violated public policy); see also *Sides v. Duke Hospital*, 328 S.E.2d 818, 826-27 (N.C. Ct. App. 1985) (holding that a nurse stated a wrongful discharge claim when she alleged that she was discharged for refusing to testify falsely during a medical malpractice trial).

202. 443 A.2d 728 (N.J. Super. Ct. App. Div. 1982).

203. See, e.g., *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (N.J. 1980) (holding that a doctor failed to demonstrate that her ethical code contained a clearly mandated public policy).

204. See, e.g., *Lampe v. Presbyterian Medical Ctr.*, 590 P.2d 513 (Colo. Ct. App. 1978) (holding that broad policies contained in statutes did not satisfy the clearly mandated public policy standard); *Warthen v. Toms River Community Memorial Hosp.*, 488 A.2d 229 (N.J. Super. Ct. App. Div. 1985) (holding that plaintiff failed to demonstrate that her discharge violated a clearly mandated public policy embodied in the ethical code governing nurses).

205. See, e.g., *Naqvi v. Oudensha America, Inc.*, 702 F. Supp. 671 (N.D. Ill. 1988) (stating that the Internal Revenue Code did not establish a public policy upon which plaintiff could base his wrongful discharge claim), *rev'd*, 847 F.2d 531 (7th Cir. 1990); *Suchodolski v. Michigan Consol. Gas Co.*, 316 N.W.2d 710 (Mich. 1982) (stating that the case involved a corporate management dispute and that plaintiff failed to articulate a fundamental public policy).

Two inferences can be drawn from the fact that courts allow professionals to bring wrongful discharge claims based upon the public policy exception. First, it suggests that courts do not think that ethical obligations alone are enough to compel professionals to act legally and ethically. Given the importance of employment, when faced with the choice of continued employment or compliance with an ethical provision, the professional may ignore or rationalize away the ethical obligation.²⁰⁶ Second, given this lack of confidence in ethical codes, courts allow professionals to use the public policy exception in an effort to eliminate the fear of discharge and to provide an incentive for the professional to act legally and ethically, thereby, protecting the public interest.²⁰⁷

The rationale behind cases involving professional employees is inconsistent with the rationale behind cases involving attorneys who rely upon ethical codes and obligations. On the one hand, courts contend it is unnecessary to extend the public policy exception to cover attorneys who are employees because they are bound by an ethical code which protects the public interest.²⁰⁸ They have to follow their ethical obligations, even if it means the loss of employment. On the other hand, courts allow all other professional employees who are bound by ethical codes to bring such claims in order to encourage them to act ethically and legally. Recognizing the difficult dilemma, courts provide an incentive to professional employees to act in the public interest.

This inconsistency can be illustrated by considering *Kalman v. Grand Union Co.*²⁰⁹ In *Kalman*, a New Jersey appellate court reversed the lower court and held that the plaintiff's claim for wrongful discharge based upon the public policy exception was supported by a state statute and the plaintiff's professional code of

206. See, e.g., *Pierce*, 417 A.2d at 512 (finding that the public policy exception to the at will rule should apply to professional employees, in part so that professionals will know that their jobs are secure when they act in accordance with a clear mandate of public policy).

207. *Id.*

208. For example, an ethical code might require an attorney to voluntarily withdraw if the attorney believes that his client is intent upon pursuing an illegal act. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1983); see also *Herbster v. North American Co. for Life & Health Ins.*, 501 N.E.2d 343, 348 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987). An ethical code may require an attorney to disclose information under certain circumstances. See, e.g., *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 109 (Ill. 1991).

209. 443 A.2d 728 (N.J. Super. Ct. App. Div. 1982).

ethics.²¹⁰ Kalman, a pharmacist, was discharged by his employer for refusing to close the pharmacy, which according to a state statute was required to remain open as long as the store remained open. Kalman argued that his termination violated two sources of public policy, a state statute and his code of ethics. The court agreed that the statute expressed a clearly mandated public policy. Closing the pharmacy created a danger to the public because without the presence of a pharmacist, unauthorized individuals might gain access to the drugs.²¹¹

The fact that the statute contained a clear public policy mandate provided the link necessary for the court to find that Kalman's ethical code was also a source of public policy. According to the provision in the Code of Ethics of the American Pharmaceutical Association, a pharmacist "has the duty to observe the law, to uphold the dignity and honor of the profession, and to accept its ethical principles. He should not engage in any activity that will bring discredit to the profession and *should expose, without fear or favor, illegal or unethical conduct in the profession.*"²¹² This provision supported Kalman's wrongful discharge claim because it coincided with public policy in a state statute and justified his actions.²¹³

This decision is irreconcilable with cases like *Balla* where the court declined to extend the public policy exception to attorneys. In *Balla*, an ethical provision required the attorney to disclose information. The court stated that "[i]n-house counsel do not have a choice of whether to follow their ethical obligations as attorneys licensed to practice law, or follow the illegal and unethical demands of their clients. In-house counsel must abide by the Rules of Professional Conduct."²¹⁴ In stark contrast, the *Kalman* court extended the public policy exception to include Kalman, even though it "had no doubt that plaintiff was required by [the professional ethical code] to report defendant's attempt to flout state regulations."²¹⁵ Despite Kalman's ethical obligation to act, the court provided him with an opportunity to argue that he was

210. *Id.* at 731.

211. *Id.* at 730.

212. *Id.* (emphasis added) (quoting the Code of Ethics of the American Pharmaceutical Association).

213. *Id.* at 730-31.

214. *Balla*, 584 N.E.2d at 109.

215. *Kalman*, 443 A.2d at 730.

wrongfully discharged. If the rationale of the cases involving attorneys had been applied to the *Kalman* facts, extension of the public policy exception would have been unnecessary because *Kalman* had to adhere to the regulations and the professional code of ethics.

The inconsistent treatment of attorneys and other professional employees would make sense only if attorneys were not similarly situated or if courts assumed that attorneys cannot contemplate ignoring their ethical obligations.²¹⁶ However, like other professional employees, attorneys are susceptible to employer coercion. Status as an attorney does not insulate one against employer abuses of power which injure the public interest. Attorneys confront the choice between following an employer's demands and compliance with ethical codes. A corporation pressures its in-house counsel to shred documents,²¹⁷ or a law firm associate insists that his law firm comply with disciplinary rules.²¹⁸ In these situations, an employee-employer relationship exists and should not be ignored because attorneys are just as vulnerable to demands that contravene public policy as other professionals. As one state bar association asserted in a brief to a court, "[i]n today's legal market, the loss of a job could be tantamount to the loss of a legal career; few attorneys are likely to comply with their ethical obligations in the face of such economic coercion."²¹⁹

Assuming for the moment that the *Balla* court is correct and that attorneys have no choice but to follow their ethical codes, courts still need to extend the public policy exception to attorneys. Ethical codes do not guarantee that the public interest is adequately protected because not all ethical provisions are mandatory. In many circumstances, the attorney can disregard or ignore the public interest without violating his code. The *Balla* court could argue that because the Illinois ethical provision *required* the attorney to disclose, any added incentive to act ethically was redundant and un-

216. See *supra* note 211 and accompanying text.

217. See *Herbster v. North American Co. for Life & Health Ins.*, 501 N.E.2d 343, 344 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987) (discussing claim for wrongful discharge in which the attorney was allegedly fired for refusing to shred documents).

218. See *Wieder v. Skala*, 609 N.E.2d 105, 106 (N.Y. 1992) (finding attorney had valid claim against former law firm for discharging after he insisted that firm report colleagues misconduct).

219. Andrew Blum, *The Dangers of Upholding Legal Ethics*, NAT'L L.J., Nov. 2, 1992, at 8, 8 (quoting from the brief of the New York Bar Association's Committee on Professional Responsibility).

necessary.²²⁰ However, when the ethical provision is discretionary, as it is in many states, this argument is lost.²²¹ In such situations, courts need to extend the public policy exception to attorneys in order to provide an incentive for the attorney to act in the interest of society.

In contrast to the provision in *Balla*,²²² the Model Code,²²³ and many state ethical codes²²⁴ contain disclosure provisions which permit the attorney to disclose but do not mandate disclosure. In states adopting discretionary provisions, protection of the public interest is tenuous because attorneys know that disclosure is likely to result in the loss of employment.²²⁵ When confronted with such a large personal sacrifice, an attorney may be compelled to remain silent. In doing so, he does not violate his ethical code or any law. Thus, although an attorney can ethically do "what is right and just," he may choose not to do so.

Reliance upon ethical provisions which permit or require an attorney to withdraw ignores the economic situation of attorneys who are employees.²²⁶ Ethical provisions regarding withdrawal were created to apply to private practitioners who have many clients and who are economically independent.²²⁷ These attorneys are in a position to refuse their client's improper demands. In fact, the threat of withdrawal provides them with leverage which can be used to persuade their clients to act lawfully. However, attorneys

220. See *supra* note 186 and accompanying text.

221. See *infra* notes 227-30 and accompanying text.

222. According to the Model Rules, "[a] lawyer may reveal [client] information to the extent the lawyer reasonably believes necessary" to frustrate a client's attempt to commit an illegal act that is likely to result in imminent death or substantial bodily harm. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1992) (emphasis added).

223. The Model Code states that an attorney "may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1983) (emphasis added).

224. See STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 59-62 (Little, Brown and Co. ed., 1993) (listing state variations regarding disclosure).

225. In *Balla*, the court stated "[p]resumably, in situations where an in-house counsel obeys his or her ethical obligations and reveals certain information regarding the employer/client, the attorney-client relationship will be irreversibly strained and the client will more than likely discharge its in-house counsel." *Balla v. Gambro, Inc.*, 584 N.E.2d 104, 110 (Ill. 1991).

226. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1994) (providing rules for required disclosure); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1983) (providing rules for required or discretionary withdrawal).

227. Lawrence Dubin & Donald Jolliffe, *Recent Discharge Cases Focus New Attention on Counsel as Employee*, NAT'L L.J., May 20, 1991, at S2.

who are employees are in a different position. Their employers control issues of compensation, promotion, and tenure,²²⁸ and withdrawal provides them with little leverage. As a result, withdrawal, in essence, means unemployment.

Although withdrawal allows the attorney to terminate his relationship with the client, the public interest is not protected. The court in *Balla* supported its refusal to recognize the attorney's retaliatory discharge claim in part due to the state ethical provision which governed an attorney's duty to withdraw.²²⁹ It explained that under the provision the plaintiff-attorney was required to withdraw. Similarly, in *Willy*, the court concluded:

[I]f an attorney believes that his client is intent upon pursuing an illegal act, the attorney's option is to voluntarily withdraw from employment. When an attorney elects not to withdraw and not to follow the client's wishes, he should not be surprised that his client no longer desires his services.²³⁰

However, withdrawal simply removes the attorney from the situation. It does not allow the attorney to protect the public interest.

Attorneys should not be denied the incentive given to other professional employees to act legally and ethically merely because they are bound by an ethical code. Such a code alone does not adequately safeguard the public interest, regardless of whether it contains mandatory or discretionary provisions. The courts themselves concede this point when they allow other professionals to sue for wrongful discharge based upon the public policy exception.

B. *Impairment of Attorney-Client Relationship*

In essence, the issue of whether courts should permit attorneys to bring wrongful discharge claims based upon the public policy exception is rooted in the effect such suits have on the attorney-client relationship. In *Herbster* and *Balla*, the courts described the special attributes of the attorney-client relationship, stating that "[t]he mutual trust, exchanges of confidence, reliance on judgment

228. See *Nordling v. Northern State Power Co.*, 478 N.W.2d 498, 502 (Minn. 1991) (recognizing that in-house counsel is also a corporate employee and stating that job security should not be denied if the attorney-client relationship is not impaired).

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

230. *Willy v. Coastal Corp.*, 647 F. Supp. 116, (S.D. Tex. 1986), *rev'd*, 855 F.2d 1160 (5th Cir. 1988) (citation omitted).

and personal nature of the attorney-client relationship demonstrate the unique position attorneys occupy in our society."²³¹ In light of the nature of this relationship and the negative impact distrust would generate, the courts concluded that the client must have an unrestricted right to discharge an attorney, despite the attorney's position as an employee. Therefore, the public policy exception should not be extended to cover attorneys.

The crux of this argument is that full and frank communication between attorney and client is essential, and if attorneys are allowed to sue for wrongful discharge the flow of information will be hampered.²³² Clients may hesitate to turn to their attorney for advice about questionable conduct knowing that their attorney could use the information in a wrongful discharge suit. As a result, instead of seeking legal advice, clients may go forward uninformed.²³³ Fear of wrongful discharge suits may discourage clients from being candid with their attorneys. Thus, attorneys will provide legal advice without complete information. To avoid this chilling effect, courts contend that clients must have an absolute right to discharge their attorneys.

The *Balla* and *Herbster* courts raise valid concerns about the attorney-client relationship. However, these concerns do not justify an absolute bar to wrongful discharge suits brought by attorneys.²³⁴ Such a rigid rule ignores two considerations. First, in some instances, the attorney-client relationship is not threatened or impaired. Second, under certain circumstances, the implicated public policy deserves more protection than the attorney-client relationship.

231. *Herbster v. North American Co. for Life & Health Ins.*, 501 N.E.2d 343, 348 (Ill. App. Ct. 1986), *cert. denied*, 484 U.S. 850 (1987); *see also Balla*, 584 N.E.2d at 108 (Ill. 1991) (quoting *Herbster*); Donald R. Jolliffe, *Privilege Is at Issue in Discharge Claims, Client Confidentiality Raises In-house Concern*, NAT'L L.J., Dec. 2, 1991, at S6 (discussing potential adverse effects stemming from retaliatory discharge suits by in-house counsel).

232. *But cf.* Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 364 (1989) (criticizing the justifications for confidentiality).

233. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 2 (1994) (stating that the purpose of confidentiality is to encourage individuals to seek legal advice early and to promote full disclosure).

234. *See* Elliot M. Abramson, *Why Not Retaliatory Discharge for Attorneys: A Polemic*, 58 TENN. L. REV. 271, 278 (1991) (stating that the "trust and confidence respecting the attorney-client relationship is really just knee-jerk formalism" and that the relationship should not bar attorneys from bringing retaliatory discharge suits).

1. No Threat to the Attorney-Client Relationship

Expanding the public policy exception to attorneys does not necessarily impair the attorney-client relationship. In cases where there is no impairment, a court's refusal to extend the exception is illogical. The facts of *Wieder v. Skala*²³⁵ present a case in which an attorney-client relationship is not implicated. Wieder sued his law firm for wrongful discharge. He alleged that he was discharged for insisting that his firm report the misconduct of another attorney, Mr. Lubin. In his complaint, Wieder stated that Lubin did some legal work for him regarding the purchase of a condominium.²³⁶ While rendering these services, Lubin allegedly neglected his duties, misled Wieder,²³⁷ and made false statements about Wieder's mortgage.²³⁸ Under such facts, the sanctity of the attorney-client relationship could not justify a court's refusal to extend the public policy exception. Since Wieder disclosed the information, there is no attorney-client relationship to protect.²³⁹

When an attorney-client relationship is involved, extending the public policy exception to attorneys may still be appropriate because the relationship is not seriously threatened. In cases where attorneys refuse to commit illegal acts, allowing suits based upon the public policy exception will not reduce the flow of communication between the attorney and client, when the client is also the employer. The client is not deterred from seeking legal advice because the information conveyed by the client to the attorney is still protected by the confidentiality rules. The attorney cannot

235. See *supra* notes 148-60 and accompanying text.

236. See David Margolick, *New York High Court Backs Whistle-Blowing Lawyers*, N.Y. TIMES, Dec. 22, 1992, at A12; Blum, *supra* note 219, at 8 (discussing the *Wieder* case).

237. See Margolick, *supra* note 236, at A12.

238. See Blum, *supra* note 19, at 8.

239. Wieder, in this case, was in the position of a client, and he chose to disclose information regarding his relationship with Lubin. However, had there been a third party client, the attorney-client relationship would have been more problematic. Under such circumstances, disclosure of client information would most likely be needed for the attorney to prove his claim. Even under such circumstances, courts should not simply bar the suit. Rather, they should consider whether the attorney-client relationship is implicated. For various reasons, impairment of the relationship may be questionable. Issues regarding the employer-employee relationship may not threaten the attorney-client relationship. For example, confidential client information may not have to be disclosed. If the client was harmed by the improper conduct of the attorney, the client may not object to the use of the information. It may be that the attorney-client relationship is threatened, and an attorney should be barred from bringing a wrongful discharge suit. However, before reaching this conclusion, the court should consider whether the attorney-client relationship is implicated.

affirmatively act and use the information against the client, unless permitted by his ethical code. Even when a client asks an attorney to violate the law, the attorney cannot disclose that that request was made. The right to sue is only triggered when the client terminates the attorney for refusing to participate in the illegal conduct.²⁴⁰ Thus, extending the public policy exception to attorneys will not discourage open communication, but will discourage clients from requesting their attorneys to violate the law. At the same time, attorneys will be encouraged to refuse to participate in illegal acts. This is fair given that all citizens, including the employer, are governed and bound by the law.

Similarly, in cases where attorneys ethically disclose, permitting wrongful discharge suits will not impair the attorney-client relationship. Allowing such suits will not reduce the flow of communication between client and attorney any more than the ethical provisions which require or permit disclosure.²⁴¹ The Model Code states that an attorney "*may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime.*"²⁴² In *Balla*, the ethical provision required the attorney to disclose information when necessary to prevent the client from committing an act that would cause serious bodily harm or death.²⁴³ Regardless of whether attorneys can sue or not, the flow of communication is already chilled by these exceptions to confidentiality. As the court in *Balla* stated, attorneys "do not have a choice of whether to follow their ethical obligations as attorneys licensed to practice law."²⁴⁴ Thus, courts need not be concerned that permitting attorneys to bring wrongful discharge suits when they ethically disclose will adversely affect the communication between client and attorney.

240. For example, the attorney in *Herbster* brought a wrongful discharge suit alleging that his employer, North American Co., terminated him for refusing to violate the law. Had North American Co. not terminated Herbster, he would not have been able to sue nor could he disclose their request that he destroy documents, unless permitted by the state code of ethics.

241. Note that the attorney must be able to find the public policy not only in an ethical code but in a statute, institution, or administrative rule.

242. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1983) (emphasis added).

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

244. *Id.*

2. Public Policies Outweighing the Policies Behind the Attorney-Client Relationship

Exceptions to confidentiality signal that certain implicated public policies deserve more protection than the attorney-client relationship. The attorney-client relationship is based upon trust and confidence. However, the rules which protect that aspect of the relationship are not absolute. The exceptions, adopted by the supreme court of each state, indicate that under particular instances, the benefit of disclosure outweighs the benefit of confidentiality. The ethical provision in *Balla* provided that "[a] lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily injury."²⁴⁵ Limiting disclosure to information necessary to prevent the crime demonstrates the court's reluctance to impinge upon the attorney-client relationship. However, despite the limitation, by adopting this exception to client confidentiality, the Supreme Court of Illinois determined that protecting the public against serious injury or death outweighed the policies behind the attorney-client relationship.²⁴⁶

The Model Rules place truthful testimony above the policies behind the attorney-client relationship. Rule 3.3(a)(4) provides that "[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."²⁴⁷ The comments explain that this rule requires

245. *Id.* (citation omitted). Other states have mandatory disclosure rules under certain circumstances. For example, Connecticut and several other states require disclosure of information to prevent serious violent crimes. GILLERS & SIMON, *supra* note 224, at 59-62.

246. Exceptions to the confidentiality rule vary. The Model Code allows attorneys to disclose a client's intent to commit a future crime. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1983). The Model Rules has a narrower exception which requires an attorney to disclose information necessary to prevent the client from committing a crime which will result in imminent death or serious bodily harm. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1994). States have adopted modified versions of these rules. Several states allow the attorney to disclose information necessary to prevent a client from committing a crime that will cause "substantial injury to the financial interest or property of another." See GILLERS & SIMON, *supra* note 224, at 59 (analyzing the disclosure requirements in various states). Other possible exceptions can exist regarding perjured testimony.

247. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4) (1994). States adopt different provisions regarding perjury. See GILLERS & SIMON, *supra* note 224, at 172-74 (discussing state provisions regarding perjury); see also MODEL CODE OF PROFESSIONAL

the attorney to disclose to the court that his client has committed perjury.²⁴⁸ "Such a disclosure can result in grave consequences to the client, . . . [b]ut the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement."²⁴⁹ Thus, under the Model Rules, the policies behind truthful testimony and candor to the court outweigh the policies behind the attorney-client relationship.

By creating exceptions to confidentiality rules, state supreme courts signal that certain public policies are more important than client confidentiality. If an attorney is fired for protecting such a public policy and that policy is rooted in a statute, constitution, or administrative rule, the attorney should be able to sue for wrongful discharge. The argument that the confidentiality of the attorney-client relationship bars such a suit is not valid, if in that state, it is mandatory for the attorney to disclose under the circumstances. The mandatory provision demonstrates the state supreme court determined that the public policy outweighs the confidentiality.

When the disclosure rule is not mandatory, the argument for allowing attorneys to sue for wrongful discharge based upon the public policy exception is still compelling. The fact that the disclosure is discretionary weakens the argument that the state supreme court believes the policies behind the exceptions always outweigh the policies behind the attorney-client relationship. However, giving the attorney the opportunity to disclose suggests that certain public policies can be more important than the confidentiality between attorney and client. Extending the public policy exception in these cases is compelling because the attorney has a choice: protect the public interest and lose one's job or stay silent and remain employed. Either way, the attorney acts ethically. Given the magnitude of the public policies involved, courts should provide the incentive to attorneys to further the public interest.

RESPONSIBILITY DR 7-102(B) (1983) (containing the Model Code provisions regarding perjured testimony).

248. Note that the Model Code differs from the Model Rules. It allows an attorney to disclose his client's intention to commit perjury under DR 4-101(C)(3), the exception which permits the attorney to reveal future crimes. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1983). While requiring an attorney to reveal that a person other than his client has committed perjury, the Model Code does not allow the attorney to disclose that his client committed perjury. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B) (1983).

249. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 cmt. 6 (1994).

Courts are concerned about impairing the attorney-client relationship. However, despite this concern, a complete bar to suits brought by attorneys is illogical. In some instances, the attorney-client relationship is not threatened, and in others, the implicated public policy outweighs the policies which support the sanctity of the attorney-client relationship.

V. CONSIDERATION OF THE ATTORNEY-CLIENT RELATIONSHIP

In cases brought by attorneys, courts should take into account the attorney-client relationship. After determining whether the attorney has met the clearly mandated public policy standard, courts should consider whether protection of that public policy would impair the relationship. If the attorney-client relationship is not implicated, the suit should proceed. If, on the other hand, the attorney-client relationship is threatened, courts should weigh the magnitude of the public policy against the policies supporting the confidential nature of the attorney-client relationship. This approach forces courts to analyze the circumstances rather than simply reiterate the importance of the attorney-client relationship and, on that basis alone, dismiss the suit. Courts are not without guidance when weighing public policies against the attorney-client relationship. Provisions in the ethical codes suggest which public policies are so important that they deserve protection.

CONCLUSION

Unlike all other employees, attorneys who are employees are denied the opportunity to bring wrongful discharge claims based upon the public policy exception. This denial cannot be justified by the fact that attorneys are bound by an ethical code. First, such reasoning is inconsistent given that doctors, nurses, accountants, and other professionals who are bound by ethical codes are permitted to bring claims based upon the public policy exception. Second, ethical codes do not guarantee that the public interest will be protected since many provisions are discretionary. Third, refusing to extend the public policy exception cannot always be justified by concerns surrounding the attorney-client relationship. Under some circumstances, there may be no relationship to protect or the relationship may not be threatened or impaired. In other instances, countervailing public policies may outweigh the policies behind protecting the sanctity of the attorney-client relationship. Evidence of these public policies can be found in the exceptions to the con-

fidentiality rules.

Rather than blindly asserting the importance of the attorney-client relationship and ignoring the reality that some attorneys are employees, courts should apply their public policy analysis and take into consideration the attorney-client relationship. By extending the public policy exception to attorneys, courts are not providing attorneys with the incentive to sue. They are providing attorneys with the incentive to act ethically and in the public interest.

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