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Conscripting Attorneys to Battle Corporate Fraud without Shields or Armor? Reconsidering Retaliatory Discharge in Light of Sarbanes-Oxley

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NOTE

CONSCRIPTING ATTORNEYS TO BATTLE CORPORATE FRAUD WITHOUT SHIELDS OR ARMOR? RECONSIDERING RETALIATORY DISCHARGE IN LIGHT OF SARBANES-OXLEY

Kim T. Vu*

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INTRODUCTION

The extraordinary outbreak of corporate scandals in large public companies like Enron and WorldCom¹ prompted Congress to enact the Sarbanes-Oxley Act of 2002² (“Sarbanes-Oxley” or “SOX”) to thwart corporate fraud and restore public confidence in corporate governance.³ As the most far-reaching securities regulations since the securities laws originally passed in 1933 and 1934,⁴ Sarbanes-Oxley sought to rein in corporate fraud by enhancing disclosure,⁵ strengthening auditor and audit committee independence,⁶ holding senior management accountable,⁷ and imposing tougher civil and criminal penalties for violations.⁸

Sarbanes-Oxley imposes internal reporting obligations on attorneys.⁹ Under § 307¹⁰ of SOX and the Securities and Exchange Commission’s

1. See Ken Brown, *Company Blowups Abound, Rebounds Rare; Scandals, Weak Economy Crush Every Market Sector, But Investors Find Winners*, WALL ST. J., Jan. 2, 2003, at R2; see also Greg Hitt, *Bush Signs Sweeping Legislation Aimed at Curbing Corporate Fraud*, WALL ST. J., July 31, 2002, at A4 (describing reform legislation as responsive to reported scandals at public companies such as Enron, WorldCom, Global Crossing, Adelphia, Xerox, and Tyco).

2. Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (Supp. III 2003)). Officially, the statute is entitled the “Public Company Accounting Reform and Investor Protection Act of 2002.” The statute, however, is commonly referred to as the Sarbanes-Oxley Act of 2002.

3. See S. REP. NO. 107-205, at 1–2 (2002).

This bill . . . hold[s] bad actors accountable for their fraud and deception The legislation goes much farther, and it should because the problem goes much deeper. We are faced with much more than just the wrongdoing of individual executives. We are faced with a crisis of confidence in America’s capital markets and in American business . . . above and beyond hundreds of billions of dollars [that have been] wiped out. That is what has happened already. You do not have investor confidence. Without investor confidence, we will not have the economic recovery that we need. Jobs aren’t being created. Frankly, this affects all of us.

148 CONG. REC. S6524–25 (daily ed. July 10, 2002) (statement of Sen. Wellstone); see also Press Release, White House Office of the Press Secretary, President Bush Signs Corporate Corruption Bill (July 30, 2002), available at <http://www.whitehouse.gov/news/releases/2002/07/20020730.html>.

4. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2000)); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78 (2000)); Hitt, *supra* note 1.

5. Sarbanes-Oxley Act of 2002 § 404 (codified at 15 U.S.C. § 7262 (Supp. III 2003)); see Certification of Disclosure in Companies’ Quarterly and Annual Reports, Final Rule, 67 Fed. Reg. 57,276, 57,277 (Sept. 9, 2002) (to be codified at 17 C.F.R. pt. 228, 229, 232, 240, 249, 270 and 174), available at <http://www.sec.gov/rules/final/33-8124.htm>.

6. Sarbanes-Oxley Act of 2002 §§ 201–209 (codified at 15 U.S.C. §§ 7231–7234 (Supp. III 2003) (amending § 10A of the Securities Exchange Act of 1934, 15 U.S.C. § 78j-1 (2000))).

7. Sarbanes-Oxley Act of 2002 § 302 (codified at 15 U.S.C. § 7241 (Supp. III 2003)).

8. Sarbanes-Oxley Act of 2002 § 906 (codified at 18 U.S.C. § 1350 (Supp. III 2003)). A knowing false certification is punishable by a fine of up to \$1 million and/or ten years in prison. *Id.* § 906(c)(1) (codified at 18 U.S.C. § 1350(c)(1) (Supp. III 2003)). A willful false certification is punishable by a fine of up to \$5 million and/or twenty years in prison. *Id.* § 906(c)(2) (codified at 18 U.S.C. § 1350(c)(2) (Supp. III 2003)).

9. Sarbanes-Oxley Act of 2002 § 307 (codified at 15 U.S.C. § 7245 (Supp. III 2003)).

10. *Id.* (requiring that the Securities and Exchange Commission adopt rules of professional conduct for lawyers practicing before the SEC). This section provides as follows:

(“SEC”) implementation of SOX through Rule 205,¹¹ an attorney who detects evidence of a material violation¹² by her client must report the violation up the ladder to the corporation’s chief legal officer (“CLO”) or the chief executive officer (“CEO”).¹³ If these officers do not provide an appropriate response,¹⁴ the attorney must continue up the ladder and report to the audit committee, to a committee of independent directors, or to the full board of directors.¹⁵ Section 307 caps the attorney’s whistleblowing obligation at reports to the corporation’s board of directors,¹⁶ but permits attorneys to go outside the corporation and report to the SEC.¹⁷ In other words, attorneys

Not later than 180 days after July 30, 2002, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—

- (1) *requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and*
- (2) *if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.*

Id. (emphasis added). Pursuant to the statute, the SEC issued Rule 205 to implement the “up the ladder” reporting requirements for securities lawyers. *See infra* note 11.

11. 17 C.F.R. §§ 205.1–205.7 (2005) (promulgating rules to implement § 307 of the Sarbanes-Oxley Act), available at <http://www.sec.gov/rules/final/33-8185.htm>.

12. “Evidence of a material violation” under SOX and the SEC regulations means “credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.” 17 C.F.R. § 205.2(e) (2005). “Material violation” under SOX and the SEC regulations means “a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law.” 17 C.F.R. § 205.2(i) (2005).

13. *See supra* note 10 (describing the “up the ladder” reporting requirements).

14. “Appropriate response,” according to the SEC, is “a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:

- (1) . . . no material violation . . . occurred, is ongoing, or is about to occur;
- (2) . . . [t]he issuer . . . adopted appropriate remedial measures . . . ; or
- (3) . . . [t]he issuer . . . retained or directed an attorney to review the reported evidence of a material violation”

17 C.F.R. § 205.2(b) (2005).

15. *Id.*

16. “[I]t does not envision the lawyer going outside the client’. . . ‘The report goes to the highest authority within the company itself.’” John Caher, *Corporate Reform Bill Means Changes in Client Relations*, N.Y. L.J., July 29, 2002, at 1–2 (quoting Stephen Gillers, legal ethics expert and Vice Dean of New York University School of Law).

17. The SEC’s regulation implementing § 307 of SOX provides as follows:

An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer’s consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

must serve as internal whistleblowers to the corporation, and may voluntarily serve as external whistleblowers to the SEC.¹⁸

While Sarbanes-Oxley provides protection to whistleblower-employees who expose corporate fraud, it remains unclear whether SOX protects whistleblower-attorneys.¹⁹ Purportedly, SOX protects all reporting employees from retaliation through the whistleblower provisions under § 806.²⁰ Section 806 provides in part:

Civil action to protect against retaliation in fraud cases
 (a) Whistleblower protection for employees of publicly traded companies. *No [public] company . . . or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee [to provide information to a Federal agency, a member of Congress, or a supervisor over the employee of any conduct the employee reasonably believes is a violation of any SEC rule or regulation or any Federal law provision relating to fraud against shareholders].*²¹

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury . . . or committing any act . . . that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

17 C.F.R. § 205.3(d)(2) (2005) (emphasis added).

18. A "whistleblower" has been defined as one who, in good faith, publicizes or discloses the potential harmful conduct of past employers, supervisors, or co-workers. Robert D. Boyle, *A Review of Whistleblower Protections and Suggestions for Change*, 41 LAB. L.J. 821, 822 (1990).

19. See John C. Coffee, Jr., *Myth & Reality: SEC's Proposed Attorney Standards*, 229 N.Y. L.J., Jan 26, 2003, at 5 (speculating that "[r]ather than [becoming] exposed targets for retaliation, corporate employees, including attorneys, who report 'up the ladder' may have received the equivalent of tenure" from § 806).

I use the terms "reporting attorneys" and "whistleblower-attorneys" to signify both in-house and outside attorneys who are subject to Sarbanes-Oxley's § 307 reporting-up obligation. Section 307 and the underlying SEC regulations apply to all attorneys "appearing and practicing before the [SEC]." 17 C.F.R. § 205.2. This includes both in-house counsel and outside counsel whose practice includes transacting any business with the SEC; representing the issuer in an SEC proceeding or inquiry; and providing advice on securities laws, the SEC's rules or regulations, or any information that is incorporated into any document filed or submitted to the SEC. *Id.*

20. See Sarbanes-Oxley Act of 2002 § 806 (codified at 18 U.S.C. § 1514A (Supp. III 2003)). Section 806 prohibits retaliation against *employees* of publicly traded companies for reporting or assisting in an investigation of fraud against shareholders. Whistleblowers are protected from harassment, demotion, suspension, discharge or any other manner of discrimination by the companies' employees, officers, contractors, or subcontractors. *Id.*

An employee who prevails in an action under this statute is entitled to "all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c) (Supp. III 2003). An employee may seek remedies such as reinstatement with same seniority status, back wages with interest, and any special damages sustained including litigation costs, expert witness fees, and reasonable attorney fees.

21. Sarbanes-Oxley Act of 2002 § 806 (codified as 18 U.S.C. § 1514A (Supp. III 2003) (emphasis added).

The whistleblower provision prohibits retaliation against employees of publicly traded companies for reporting or assisting in an investigation of fraud against shareholders.²² The statutory text, however, does not explicitly address whether § 806 applies to reporting attorneys employed by public companies. Indeed, the statute does not provide explicit language connecting § 307's whistleblowing obligations with § 806's whistleblower protections.²³ Past case law on retaliatory discharge, which traditionally has not treated attorneys as employees,²⁴ creates uncertainty as to whether the Department of Labor²⁵ and the federal courts will treat reporting attorneys as "employees" under § 806. Unless statutory protection is clearly available to attorneys who report under § 307, attorneys will remain vulnerable to retaliation and may be reluctant to whistleblow on corporate fraud.

The current vulnerability of attorneys is apparent in the case of John E. Isselmann, Jr., the former general counsel of Electro Scientific Industries Incorporated ("ESI").²⁶ ESI's chief financial officer ("CFO") and Controller engaged in an accounting scheme that inflated ESI's quarterly financial results.²⁷ The CFO and the Controller did not seek Isselmann's legal counsel when they eliminated employee benefits in Asia and fraudulently applied the money to ESI's bottom line to increase it by \$1 million.²⁸ When Isselmann finally learned of the accounting fraud, he attempted to raise the legality issue in an audit committee meeting, but the CFO cut him off.²⁹ Fearing termination by management, Isselmann did not press the issue forward to the audit committee.³⁰ The company ultimately filed erroneous financial

22. *Id.*

23. See Larry Cata Backer, *Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley*, 2004 MICH. ST. L. REV. 327, 380-381 (2004) (observing that SOX lacks clarity regarding whether there is any relationship between the reporting requirements for attorneys under § 307 and the whistleblower protections under § 806).

24. See e.g., *Wise v. Consol. Edison Co. of N.Y.*, 723 N.Y.S.2d 462 (N.Y. 2001) (dismissing an in-house counsel's employment claim for wrongful discharge because it would reveal attorney-client confidences); *Balla v. Gambro*, 584 N.E.2d 104 (Ill. 1991) (holding that an attorney is bound by his ethical obligations and does not need a public policy exception like other employees).

25. An employee alleging retaliation has 90 days from the date of violation to file a complaint with the Secretary of Labor. The Department of Labor's Occupational Safety and Health Administration ("OSHA") has sixty days to complete the initial investigation. If there is reasonable cause to believe a violation has occurred, then OSHA will issue a preliminary order providing relief to the whistleblower. The employer has the right of judicial review if an objection is filed within thirty days of receipt of the investigation findings and preliminary order. If the Department of Labor fails to issue a final decision within 180 days of the filing of the claim, the employee may bring an action in the appropriate U.S. district court. 18 U.S.C. § 1514A(b)(Supp. III 2003).

26. *In re John E. Isselmann, Jr., Accounting and Auditing Enforcement Release No. 2108* (Sept. 23, 2004) [hereinafter Isselmann], <http://www.sec.gov/litigation/admin/34-50428.htm>; see also Cathleen Flahardy, *Chutes and Ladders*, CORP. LEGAL TIMES, Jan. 2005, at 10.

27. Isselmann, *supra* note 26; see also Flahardy, *supra* note 26.

28. Isselmann, *supra* note 26; see also Flahardy, *supra* note 26.

29. Isselmann, *supra* note 26; see also Flahardy, *supra* note 26.

30. See Flahardy, *supra* note 26. ("I'm sure that in retrospect, all concerned wish Isselmann had spoken up as soon as he knew about the problem. But if he had done so, I think there's a pretty good chance he would have been fired.")

results.³¹ Five months later, Isselmann reported the CFO's illegal activity to the audit committee and then resigned from ESI.³² The SEC felt Isselmann's whistleblowing effort came too late.³³ Despite the fact that he eventually reported the misconduct and gave up his job, Isselmann still faced an enforcement action by the SEC for failing to report up the corporate ladder and prevent the fraud.³⁴ In this case, the whistleblower-attorney decided to quit before getting fired in retaliation, but consider the case if management had terminated him. Would Isselmann have had a remedy for retaliatory discharge? Might Isselmann have blown the whistle earlier if he had not borne the economic risk of losing his job?

Isselmann's predicament is not unique, and other attorneys have faced similar situations with immoral managers.³⁵ A case will eventually arise under SOX in which management discharges an attorney in retaliation for reporting under § 307. When such a case arises, the Department of Labor³⁶ and the federal courts will need to interpret and clarify SOX's whistleblower provision. As courts attempt to determine whether whistleblower-attorneys are protected under § 806, they will likely look to common law approaches and other federal whistleblower statutes for guidance.

Traditionally, the common law has left whistleblower-attorneys like Isselmann without a cause of action if they endure retaliatory discharge.³⁷ While the public policy exception to the employment-at-will doctrine³⁸ pro-

31. See *id.* ESI reported revenues of \$207 million in fiscal year 2004.

32. See *id.*

33. See *id.*

34. The SEC did not claim that Isselmann participated in the scheme that fraudulently boosted the quarterly financials at ESI. The SEC did not even allege that Isselmann knew about the fraud at the company. The enforcement action was based on the SEC's claim that Isselmann failed to communicate material information to ESI's audit committee and outside auditors and that the information would have stopped the accounting fraud. In his settlement with the SEC, Isselmann neither admitted nor denied the agency's allegations. He agreed to pay a \$50,000 civil penalty and consented to a cease-and-desist order. See Isselmann, *supra* note 26.

35. See, e.g., Letter from Elaine J. Mittleman, Comments on Proposed Rule Implementation of Standards of Professional Conduct for Attorneys, File No. 27-45-02, (Apr. 17, 2003), available at <http://www.sec.gov/rules/proposed/s74502/ejmittleman1.htm> (describing Mittleman's personal story as a whistleblower-attorney, which resulted in her being terminated by her supervisor in retaliation for reporting concerns that a company was providing them with overly optimistic financial reports).

36. The Department of Labor's OSHA is the administrative agency charged with handling whistleblower actions arising under Sarbanes-Oxley. 18 U.S.C. § 1514A(b); see also *supra* note 25 (describing the role of OSHA under § 806 and when an employee may bring an action to U.S. district court).

37. Only California, Massachusetts, Montana, Tennessee, and Utah have definitively ruled that attorneys may state a claim for common law retaliatory discharge. See *Gen. Dynamics Corp. v. Rose*, 876 P.2d 487 (Cal. 1994); *GTE Products Corp. v. Stewart*, 653 N.E.2d 161 (Mass. 1995); *Burkhart v. Semitool, Inc.*, 5 P.3d 1031 (Mont. 2000); *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852 (Tenn. 2002); *Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603 (Utah 2003).

38. The employment-at-will doctrine originally allowed employers to discharge an employee "for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong." *Payne v. Western & Atlantic R.R.*, 81 Tenn. 507, 519-20 (1884). Today, however, most states have statutory or judicially created public policy exceptions to limit the employment-at-will doctrine. It is generally no longer permissible for an employer to discharge an employee at-will for an unlawful reason or for a purpose that contravenes public policy. Whistleblower-employees are

protects whistleblower-employees from termination in contravention of a public policy, courts traditionally have not treated attorneys like other employees. Currently, courts remain divided on how to address attorney retaliatory discharge claims. The case law has developed along three lines: (1) complete bans on attorney retaliatory discharge claims—the traditional view, (2) recognition of attorney retaliatory discharge claims tempered by limits on disclosure of confidential information—the limited-claim view, and (3) recognition of attorney retaliatory discharge claims without any limits on the use of confidential information—the wide-open view.³⁹

This Note advocates that federal courts should allow attorneys to bring retaliatory discharge claims under SOX. Traditional rationales prohibiting the claims of retaliatory discharge by attorneys do not apply in the context of Sarbanes-Oxley. This Note contends that the Department of Labor and the federal courts should interpret the whistleblower provisions of § 806 as protecting attorneys who report under § 307. Assuring reporting attorneys that they have protection from retaliation will encourage them to whistleblow and thereby advance SOX's policy goal of ferreting out corporate fraud. Part I explores the legal landscape of retaliatory discharge suits by attorneys. This Part examines the rationales of the traditional view, the limited-claim view, and the wide-open view. Part II considers whether reporting attorneys are protected as "employees" under the whistleblower provisions of § 806. This Part argues that, based on plain meaning, statutory purpose, legislative history, and policy considerations, courts should interpret § 806 as covering attorneys reporting under § 307 to carry out the substantive goal of SOX. Part III counters the common law's traditional view that has denied retaliatory discharge claims by whistleblower-attorneys. This Part argues that the legislative goal of Sarbanes-Oxley to combat corporate fraud takes precedence over common law policies of preserving the traditional attorney-client relationship. This Part also rebuts the traditional rationale that attorneys already bound by ethical obligations do not need additional support to whistleblow, and instead, contends that strong economic and psychological incentives encourage attorneys to sidestep the reporting requirements.

I. EXAMINING THREE APPROACHES TO RETALIATORY DISCHARGE SUITS BY ATTORNEYS

The traditional approach, represented by the seminal decision in *Balla v. Gambro*,⁴⁰ has relied on two reasons to deny claims of retaliatory discharge

protected under the public policy exception. See *Public-Policy Exception to At-Will Employment*, INDIVIDUAL EML. RTS. MAN. (BNA) No.156, at 527:101 (1998).

39. See Lucian T. Pera, *Lawyers as Whistleblowers: A Quick Tour of the Emerging Law of Retaliatory Discharge of In-House Counsel*, in UNDERSTANDING DEVELOPMENTS IN WHISTLEBLOWER LAW 2 YEARS AFTER SARBANES-OXLEY 385, 385-401 (2005) (outlining the landscape of the law of retaliatory discharge and the three approaches courts have taken).

40. 584 N.E.2d 104 (Ill. 1991). Roger Balla was an in-house attorney for a distributor of kidney dialysis equipment. Balla discovered that a shipment of kidney dialyzers was defective and could result in death or serious bodily harm to patients. He informed the president that the shipment did not comply with FDA regulations. When Balla heard that the company intended to accept and

by whistleblower-attorneys. The first rationale of the traditional view is that such suits adversely affect the attorney-client relationship.⁴¹ In *Balla*, the Illinois Supreme Court stated that extending the tort of retaliatory discharge to in-house counsel would have an undesirable chilling effect on attorney-client communications.⁴² The *Balla* court explained that if courts grant in-house attorneys the right to sue their employers for retaliatory discharge, employers might be less forthright and candid with their attorneys.⁴³ The court further explained that employers would hesitate to seek advice from attorneys regarding potentially questionable corporate conduct if they knew their attorneys could use this information in a retaliatory discharge suit.⁴⁴ Courts following the *Balla* rationale similarly maintain that allowing attorneys to sue employer-clients would have a chilling effect on attorney-client communications and would be contrary to a client's unfettered right to fire her counsel.

The second rationale of the traditional view assumes that an attorney's professional rules of conduct adequately safeguard the public policy of protecting the public interest.⁴⁵ The *Balla* court stated that a cause of action to encourage praiseworthy behavior from attorneys was unnecessary.⁴⁶ Unlike other employees, attorney-employees technically do not have a choice between making the report and keeping their job; attorneys must report to comply with their ethical obligations.⁴⁷ To support its ruling, the *Balla* court cited *Willy v. Coastal Corp.*, which held that allowing attorneys to withdraw voluntarily under the standards of professional conduct makes it unnecessary to extend the public policy exception to cover attorneys.⁴⁸ Thus, the second rationale of the traditional view is that professional duties are sufficient to ensure that attorneys will "do the right thing," and that

sell the defective dialyzers, he threatened to report to the FDA to protect the public. The corporation terminated Balla in retaliation. *See id.*

41. *See, e.g.*, *Nordling v. N. States Power Co.*, 465 N.W.2d 81 (Minn. Ct. App. 1991) (holding that the client's absolute right to terminate its attorney barred all retaliatory discharge suits by in-house counsel); *Herbster v. N. Am. Co. for Life & Health Ins.*, 501 N.E.2d 343 (Ill. App. Ct. 1986) (holding that a retaliatory discharge claim for attorneys would undermine the attorney-client relationship).

42. 584 N.E.2d at 110.

43. *Id.* at 109.

44. *Id.* The *Balla* court quoted the U.S. Supreme Court regarding the attorney-client privilege:

Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.

Id. at 110 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

45. *See Willy v. Coastal Corp.*, 647 F. Supp. 116 (S.D. Tex. 1986) (finding it unnecessary to provide any additional incentive to an attorney when the applicable rules of professional conduct prescribed the desired behavior).

46. *Balla*, 584 N.E.2d at 113.

47. *See id.*

48. *See id.* at 118.

whistleblower protections are unnecessary to encourage attorneys to act in accordance with the public interest.

Some courts have rejected the traditional approach and embraced the limited-claim approach.⁴⁹ The limited-claim view attempts to balance competing interests by recognizing retaliatory discharge claims by attorneys under limited circumstances.⁵⁰ The California Supreme Court's unanimous opinion in *General Dynamics v. Superior Court*,⁵¹ rejecting the traditional reasoning in *Balla*, is the seminal case for the limited-claim view. *General Dynamics* allowed an attorney to claim retaliatory discharge so long as the attorney was following a specific mandatory duty and can prove the claim without disclosing confidential client information.⁵² In *Kachmar v. Sungard Data Systems, Inc.*, the Third Circuit applied the *General Dynamics* reasoning in ruling that federal laws take precedence over at-will discharge principles and permitted in-house counsel to state a claim of retaliatory discharge under Title VII.⁵³ The Department of Labor, which handles whistleblower actions arising under Sarbanes-Oxley, followed the Third Circuit and held in *Willy v. Coastal Corp.* that in-house counsel could maintain actions under federal whistleblower statutes when litigating the claim would not divulge materials protected by attorney-client privilege.⁵⁴

More recently, some courts have moved beyond the limited-claim approach to adopt the wide-open approach, which allows an attorney to bring a retaliatory discharge claim without any limitation.⁵⁵ The wide-open view permits attorneys to use confidential client information to prove their claims of retaliatory discharge. These courts reason that attorneys should have the same full use of courts as other employees: a lawyer "does not forfeit his rights simply because to prove them he must utilize confidential information. Nor does the client gain a right to cheat the lawyer by imparting

49. See, e.g., *Kachmar v. Sungard Data Sys., Inc.*, 109 F.3d 173 (3rd Cir. 1997) (recognizing a limited claim for retaliatory discharge under Title VII); *GTE Prods. Corp. v. Stewart*, 653 N.E.2d 161 (Mass. 1995) (allowing an attorney's retaliatory discharge claim if it can be proved without violating the attorney-client privilege and confidentiality); *Gen. Dynamics Corp. v. Rose* (permitting a retaliatory discharge claim if the statute or ethical rule the attorney was following allows the attorney to breach the general requirement of confidentiality).

50. See Pera, *supra* note 39, at 392.

51. 876 P.2d at 487.

52. *Id.*

53. 109 F.3d at 181 ("The federal courts that have addressed the question have cited the important public policies underlying federal anti-discrimination legislation and the supremacy of federal laws in determining that federal anti-discrimination statutes take precedence over the at-will discharge principle.").

54. *In re Donald J. Willy v. Coastal Corp.*, 2004 DOL Ad. Rev. Bd. LEXIS 19, ARB No. 98-060, ALJ No. 85-CAA-1 (ARB Feb. 27, 2004) ([Our ruling] . . . is in accord with other decisions that have permitted former in-house counsel to advance affirmative federal claims against their employers . . . so long as the attorney-client privilege is not violated."). *But see Willy v. Admin. Review Bd.*, 423 F.3d 483 (5th Cir. 2005) (holding that attorneys may use confidential documents, otherwise protected by the attorney-client privilege and the duty of confidentiality, to prove a retaliatory discharge claim).

55. See, e.g., *Alexander v. Tandem Staffing Solutions, Inc.*, 2004 Fla. App LEXIS 9947 (Fl. Ct. App., July 7, 2004); *Spratley v. State Farm Mut. Auto. Ins. Co.*, 78 P.3d 603 (Utah 2003).

confidences to him.”⁵⁶ Recently, in *Willy v. Administrative Review Board*,⁵⁷ the Fifth Circuit applied exceptions to the attorney-client privilege and the duty of confidentiality and held that an attorney may use confidential documents to prove his retaliatory discharge case.⁵⁸

II. READING SARBANES-OXLEY § 806 PROPERLY PROVIDES PROTECTION TO ATTORNEYS REPORTING UNDER § 307

This Part argues that based on plain meaning, an interpretation of the statute as a whole, legislative history, and policy considerations, federal courts should interpret § 806’s whistleblower provisions to cover attorneys and thereby give effect to the expressed goal of Sarbanes-Oxley. Section II.A argues that a plain reading of § 806 and the OSHA regulations supports interpreting the whistleblower provision to cover reporting attorneys as “employees.” Section II.B asserts that construing the statute as a whole and in light of its general purpose necessitates interpreting § 806 in connection with § 307 to protect reporting attorneys. Section II.C contends that the legislative history demands interpreting § 806 as protecting all corporate whistleblowers, including reporting attorneys. Section II.D asserts that interpreting the whistleblower provisions to protect reporting attorneys advances the policy goal of SOX to combat corporate fraud.

A. *The Plain Meaning of “Employee” under § 806 and the OSHA Regulations Includes In-House Counsel and Outside Attorneys*

The plain meaning of § 806, together with OSHA’s implementing regulations,⁵⁹ supports interpreting the whistleblower provision to protect a reporting attorney as an “employee.” First, a plain meaning interpretation⁶⁰ of § 806 indicates that in-house counsel should be covered as employees. Section 806 expressly prohibits a company “or any officer, employee, contractor, subcontractor, or agent of such company” from retaliating against an “employee” for whistleblowing.⁶¹ The common meaning of “employee,” as

56. *Burkhart v. Semitool, Inc.*, 5 P.3d 1031, 1041 (Mont. 2000) (quoting *Doe v. A Corp.*, 709 F.2d 1043, 1050 (5th Cir. 1983)).

57. 423 F.3d 483 (5th Cir. 2005).

58. The Fifth Circuit observed in *Doe*, “‘a lawyer, however, does not forfeit his rights as an employee simply because to prove them he must utilize confidential information,’ and we are disinclined to hold that he has.” *Id.* at 500 (quoting *Doe v. A Corp.*, 709 F.2d 1043, 1050 (5th Cir. 1983)).

59. The Department of Labor’s OSHA published final regulations setting out the procedures for handling whistleblower actions arising under § 806 of Sarbanes-Oxley. 69 Fed. Reg. 52104 (Aug. 24, 2004) (to be codified at 29 C.F.R. pt. 1980); *see also supra* note 36.

60. The U.S. Supreme Court articulated the plain meaning rule as follows: “the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.” *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

61. Sarbanes-Oxley Act of 2002 § 806 (codified at 18 U.S.C. § 1514A (Supp. III 2003)).

someone who works in the service of an employer,⁶² supports including in-house counsel⁶³ as employees under SOX's whistleblower provision. In-house attorneys work solely for one company and are salaried employees on the company's payroll. Just like other employees in a company, in-house attorneys receive employee benefits and have income taxes withheld by the company. Given their employment situation, a plain meaning interpretation of the term "employee" in § 806 includes in-house attorneys under the whistleblower provision.

Second, a plain meaning interpretation of the OSHA regulations supports interpreting § 806 as covering both in-house and outside attorneys. The regulations define "employee" as "an individual presently or formerly working for a [publicly traded] company or company representative . . . or an individual whose employment could be affected by a publicly traded company or company representative."⁶⁴ OSHA's definition of "employee" plainly includes in-house counsel because the company directly affects and determines the employment status of its in-house counsel. The OSHA regulations further support including outside attorneys as "employees." The regulations define "company representative" as used in the definition of "employee" to mean "any officer, employee, contractor, subcontractor, or agent of a company."⁶⁵ When a public company retains a law firm for legal services, the law firm serves as a contractor⁶⁶ or agent⁶⁷ to the company. It follows that as a contractor or agent of a company, a law firm falls under OSHA's definition of "company representative." As a company representative, the law firm determines the employment of its outside attorneys working on matters for a company. Under a plain reading of OSHA's regulatory definitions, an outside attorney retained to work for a public company falls under § 806's protection as an "employee" because her law firm employment could be affected by a company or company representative (the law firm). For example, if an outside attorney were to whistleblow on a corporate manager, the manager could use the company's relationship with the law firm to pressure the law firm to retaliate against the outside attorney. Because corporate clients may affect a law firm's employment decisions, outside attorneys are in a position that warrants whistleblower protection. A plain meaning interpretation of § 806 and the OSHA regulations indicates

62. *Black's Law Dictionary* defines "employee" as "A person who works in the service of another person (employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance." BLACK'S LAW DICTIONARY 564 (8th ed. 2004).

63. *Black's Law Dictionary* defines "in-house counsel" as "One or more lawyers employed by a company." *Id.* at 375 (emphasis added).

64. 29 C.F.R. § 1980.101 (2005) (emphasis added).

65. *Id.*

66. *Black's Law Dictionary* defines "contractor" as "one who contracts to do work or provide supplies for another." BLACK'S LAW DICTIONARY, *supra* note 62, at 350.

67. *Black's Law Dictionary* defines "agent" as "One who is authorized to act for or in place of another; a representative." *Id.* at 68.

that SOX's whistleblower provision protects both in-house counsel and outside attorneys.

*B. Reading SOX as a Consistent Whole Supports
Connecting § 806 with § 307*

This Section asserts that construing SOX as a whole statute, in light of its general purpose, necessitates interpreting § 806 in connection with § 307 to protect reporting attorneys. Sarbanes-Oxley passed as a whole, not in parts or sections, and the statute expresses an overall purpose for its enactment. Consequently, confining statutory interpretation to the one section in question would be improper.⁶⁸ Instead, when a court construes a particular section of a statute, it should view that section in connection with other sections to produce a harmonious whole.⁶⁹ Courts should interpret § 806 in connection with other sections to be consistent with the purpose of SOX as a whole.

In the introduction of Sarbanes-Oxley, Congress expressed the general purpose of the statute's enactment: "To protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes."⁷⁰ Both §§ 307 and 806 are provisions enacted to help further this purpose. Section 307 serves SOX's objective because attorney reports of fraud will help identify inaccurate corporate disclosures and protect investors from fraud. Section 806 helps carry out the statute's purpose by providing corporate employees with protection from retaliation if they report on corporate fraud. By enacting §§ 307 and 806, Congress aimed to promote greater whistleblowing by attorneys and other employees.

Connecting §§ 307 and 806 so that they qualify and relate to each other reveals that § 806 should protect attorneys who are reporting under § 307. Section 806 is a general provision that assures all corporate employees that if they come forward to whistleblow on fraud, SOX will protect them from retaliation. Section 307 is a specific provision that compels attorneys to assume an affirmative duty to report evidence of fraud up the ladder and confines attorney whistleblowing to the corporation and the SEC. Not only does § 806 apply to support attorney reporting under § 307, but § 307 inversely serves as a qualifier for § 806 to indicate the type of whistleblowing that will be protected for an attorney. In other words, attorneys should receive § 806's protections like other employees to support their § 307

68. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, § 46.05 (6th ed. 2000).

69. See *id.* on the "whole statute" interpretation used by courts: "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole [S]tatutes must be construed to further the intent of the legislature as evidenced by the entire statutory scheme." *Id.* (citations omitted).

70. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (Supp. III 2003)).

obligations, but § 806's protections should be qualified to apply to attorneys only when they report within the parameters of § 307.

Interpreting §§ 307 and 806 on a broader level, both provisions function to advance SOX's expressed goal by encouraging employees to whistleblow on corporate fraud. Since SOX requires attorneys to whistleblow, it must be interpreted as also providing reporting attorneys with the corollary protections given to other corporate employees who whistleblow. By enacting § 806 of SOX, Congress recognized that whistleblower-employees may face retaliation and must have statutory protection if they are to come forward to report on fraud. Attorneys are no different from other corporate employees in their vulnerability to retaliation. Attorneys, like other employees, will be more encouraged to whistleblow on fraud if they have statutory protection from retaliation. Sarbanes-Oxley's central purpose would be best furthered by interpreting § 806 as also protecting attorneys from retaliation.

Courts have broadly construed other federal whistleblower statutes in accordance with their purpose. These broad constructions support interpreting § 806 to advance SOX's substantive goals. Such a purposive interpretation⁷¹ would be in line with *Passaic Valley Sewerage Commissioners v. U.S. Department of Labor*, a case Senator Patrick Leahy cited in his committee report on Sarbanes-Oxley.⁷² In *Passaic Valley*, the Third Circuit interpreted the whistleblower provisions of the Clean Water Act ("CWA").⁷³ The CWA clearly protects whistleblowers who report externally to enforcement agencies.⁷⁴ The CWA is unclear, however, on whether it also protects whistleblowers who report internally to officers within the organization.⁷⁵ The Third Circuit interpreted the whistleblower provision broadly to apply to whistleblowers in both situations. The *Passaic Valley* court reasoned that a broad interpretation of the CWA is necessary to effectuate Congress' substantive goal under the Clean Water Act.⁷⁶ Similarly, in *Jones v. Flagship*

71. Justice Felix Frankfurter explained the logic behind purposive interpretation: "Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy . . . [The aim] is evinced in the language of the statute, as read in the light of other external manifestations of purpose." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538-39 (1947).

72. *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474 (3d Cir. 1993). See S. REP. NO. 107-146, at 19 (2002).

73. 33 U.S.C. § 1251-1387. See *Passaic Valley*, 992 F.2d 474 (3d Cir. 1993) (holding that the Clean Water Act's legislative intent, supported by federal decisions, permitted a broad interpretation of the Act's whistleblower provision to include intracorporate complaints).

74. *Passaic Valley*, 992 F.2d at 478.

75. *Id.* at 478. Section 507(a) of Clean Water Act (the whistleblower protection provision) provides as follows:

No person shall fire, or in any other way discriminate against . . . any employee . . . by reason of the fact that such employee or representative *has filed, instituted, or caused to be filed or instituted any proceeding under this Act or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of [the Clean Water Act]*. 33 U.S.C. § 1367(a) (2000).

76. The *Passaic Valley* court explained as follows:

International,⁷⁷ the Fifth Circuit interpreted Title VII's whistleblower provision in the context of the statute's overall purpose.⁷⁸ The *Jones* court emphasized that the whistleblower provision must be construed broadly to extend to all employees, including attorneys, to give effect to Congress' intent of eliminating invidious employment practices through Title VII.⁷⁹

Sarbanes-Oxley's whistleblower provision is analogous to other whistleblower statutes in that it contains an ambiguity; it does not explicitly state whether § 806 protects attorneys reporting under § 307.⁸⁰ By construing § 806 in connection with § 307 and in accordance with the statute's purpose, § 806's whistleblower protections encompass reporting attorneys. The interpretation of other federal whistleblower statutes in *Passaic Valley* and *Jones* suggests that courts should interpret § 806 to give effect to SOX's general purpose. Interpreting the whistleblower provision in light of SOX's statutory purpose necessitates that courts construe § 806 broadly to protect reporting attorneys and advance SOX's substantive goal of combating corporate fraud.

C. Legislative History Indicates § 806 Covers Reporting Attorneys

The legislative history of § 806 indicates that Congress intended to prevent corporate fraud by protecting all corporate whistleblowers, including corporate attorneys. Senator Leahy, who authored the whistleblower provision and the sectional analysis in the official legislative history,⁸¹ explained the purpose behind § 806:

When sophisticated corporations set up complex fraud schemes, *corporate insiders* are often the only ones who can disclose what happened and why.

[W]histleblower provisions . . . are intended to encourage employees to aid in the enforcement of these statutes by raising substantiated claims through protected procedural channels If the regulatory scheme is to effectuate its substantive goals, employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute.

Passaic Valley, 992 F.2d at 478.

77. 793 F.2d 714 (5th Cir. 1986) (interpreting the whistleblower protection provision in Title VII broadly to extend to all employees, including terminated attorneys).

78. *Id.* at 726.

79. "We are well aware that the provisions of Title VII must be construed broadly in order to give effect to Congress' intent in eliminating invidious employment practices. Moreover, because the enforcement of Title VII rights necessarily depends on the ability of individuals to present their grievances without the threat of retaliatory conduct by their employers, rigid enforcement of [Title VII's whistleblower provision] is required." *Id.* at 726 (citation omitted).

80. 18 U.S.C. § 1514A (Supp. III 2003).

81. Sen. Leahy, along with Sen. Grassley, authored SOX's whistleblower provision. Sen. Leahy received "unanimous consent that a section by section analysis and discussion of [SOX], which [he] authored, be included in the CONGRESSIONAL RECORD as part of the official legislative history . . . in order to provide guidance in the legal interpretation of these provisions." 148 CONG. REC. S7418, S7418 (daily ed. July 26, 2002) (statement of Sen. Leahy).

Unfortunately, the Enron case also demonstrates the vulnerability of corporate whistleblowers to retaliation under current law.⁸²

[C]orporate employees at both Enron and Andersen attempted to report or “blow the whistle” on fraud, but they were discouraged at nearly every turn This “corporate code of silence” not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.⁸³

Senator Leahy’s remarks imply that Congress enacted § 806 to change the corporate climate in which a code of silence pervades among employees and discourages whistleblowing.⁸⁴ Senator Leahy’s use of the phrase “corporate insider” identifies the primary type of employee that § 806 aims to protect. The term “insider” generally means “[a] person who has knowledge of facts not generally available to the general public.”⁸⁵ In the securities context, the term “insider” encompasses outside professionals, including attorneys, who are privy to inside information.⁸⁶ In *United States v. O’Hagan*,⁸⁷ the U.S. Supreme Court stated that the traditional theory of insider trading “applies not only to officers, directors, and other permanent

82. 148 CONG. REC. S6436, S6438 (daily ed. July 9, 2002) (statement of Sen. Leahy) (emphasis added). “[C]orporate whistleblowers are left unprotected under current law. This is a significant deficiency because often, in complex fraud prosecutions, these insiders are the only firsthand witnesses to the fraud.” *Id.*

83. S. REP. NO. 107-146, at 5 (2002).

84. No other legislators have taken a contrary position. Aside from Sen. Leahy, Sen. Grassley is the only other legislator who commented on the whistleblower provision at length in the legislative history. Consistent with Sen. Leahy’s view, Sen. Grassley stated as follows:

[O]ne important way to protect investors is to ensure that corporate whistleblowers will be protected from retaliation when they go public with knowledge of fraud Only whistleblowers can explain why something is wrong and provide evidence to prove it Without these brave men and women, prosecutors would lack an important tool in their efforts to curb corporate fraud. It is for these reasons that I have worked to provide protections for corporate whistleblowers . . . who are retaliated against for exposing fraud, waste and abuse.

Penalties for White Collar Crime: Hearings Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 107th Cong. 166 (2002) (statement of Sen. Charles E. Grassley, Member, Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary).

In the legislative history of § 806, the only other comments consisted of brief statements supporting the provision. For example, Sen. McCain stated, “I rise in strong support of the underlying Leahy amendment I also believe that we must protect the corporate whistle-blower from being punished for having the moral courage to break the corporate code of silence. This amendment does that.” 148 CONG. REC. S6528 (daily ed. July 10, 2002) (statement of Sen. McCain).

85. BLACK’S LAW DICTIONARY, *supra* note 62, at 810. “A person or firm that receives inside information in the course of performing professional duties for a client” is also included in the definition of “insider.” *Id.*

86. Although a corporation’s officers and directors are the classic examples of corporate insiders, the Supreme Court has stated that “attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation” may also be considered insiders. *U.S. v. O’Hagan*, 521 U.S. 642, 652 (1997); *see also* *Dirks v. SEC*, 463 U.S. 646, 655 (1983); Elizabeth Williams, Annotation, *Attorneys, Accountants, Consultants, or the Like as “Insiders” Within § 10(b) of the Securities Exchange Act of 1934*, 191 A.L.R. FED. 623 (2005).

87. *U.S. v. O’Hagan*, 521 U.S. 642 (1997).

insiders of a corporation, but also to attorneys, accountants, consultants, and others who temporarily become fiduciaries of the corporation.’⁸⁸ As corporate insiders, both in-house counsel and outside attorneys fall within Senator Leahy’s conception of corporate whistleblowers. Thus, legislative history demands that courts interpret attorneys as falling within SOX’s whistleblower protection.

D. Policy Considerations Support Interpreting § 806 to Protect Attorneys

Policy considerations further support interpreting § 806 to protect whistleblower-attorneys who are harmed for reporting on fraud. When an attorney reports on corporate fraud under § 307, she promotes the public interest and advances SOX’s policy goal. An attorney also assumes enormous personal risk if she whistleblows on management. Harassment, isolation, blacklisting, denials of promotion, and termination are common consequences for whistleblowers.⁸⁹ If a manager retaliates against a reporting attorney for acting in the public interest, § 806 should allow an attorney to seek redress for the injuries she suffered because of whistleblowing. Without some protection from the harms of whistleblowing, the tremendous social, economic, and psychological pressures will often silence attorneys and discourage them from becoming whistleblowers.⁹⁰

The SEC regulations promulgated to implement § 307’s reporting-up rule are too weak to compel complete adherence by attorneys looking to avoid the negative effects of whistleblowing. The SEC’s loose language in Rule 205 provides attorneys with considerable discretion to abstain from reporting, which may mitigate SOX’s efficacy in expelling corporate fraud. Rule 205.3(b) implementing § 307’s reporting-up obligation provides as follows:

Duty to report evidence of a material violation.

- (1) If an attorney . . . becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer’s chief legal officer . . . or to both the issuer’s chief legal officer and its chief executive officer
- (2) The chief legal officer . . . shall cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate
- (3) Unless an attorney who has made a report . . . reasonably believes that the chief legal officer or the chief executive officer of the issuer . . . has provided an *appropriate response* within a reasonable time, the attorney

88. *Id.* at 652.

89. See MYRON P. GLAZER & PENINA M. GLAZER, *THE WHISTLEBLOWERS: EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY* 133–66 (1989) (describing methods of management retaliation).

90. See discussion *infra* Section III.B.

shall report the evidence of a material violation to: [the audit committee, another committee of independent directors, or the board of directors].⁹¹

The standard that triggers an attorney's reporting obligation is weak and convoluted and may allow attorneys to evade reporting.⁹² Under Rule 205.3(b)(1), an attorney must report when she "becomes aware of evidence of a material violation."⁹³ The standard that triggers an obligation to report, therefore, is "evidence of a material violation," which is defined as "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur."⁹⁴ If an attorney is unaware of the evidence or unsure of its materiality, she is not obligated to report.

The SEC's regulations implementing Sarbanes-Oxley perpetuate the problem of "see no evil, report no evil."⁹⁵ Because the SEC only holds attorneys accountable for failure to disclose information of which they are aware, attorneys may choose to refrain from unearthing evidence of securities laws violations and fiduciary breaches to avoid triggering their reporting obligations.⁹⁶ An attorney can limit her liability by turning a blind eye and thereby avoid becoming aware of evidence of legal impropriety.⁹⁷

In addition to avoiding the trigger by not being proactive, attorneys may also use the SEC's ambiguous standard to justify management's questionable activities.⁹⁸ "[A]ny lawyer . . . will almost always be able to conclude that it is not 'unreasonable' to conclude that the evidence before her demonstrates legal conduct."⁹⁹ Attorneys are trained to find arguments for legality within the gray areas of the law.¹⁰⁰ With the SEC's loose construction of the

91. 17 C.F.R. § 205.2(b) (2005) (emphasis added).

92. See Comments of Susan P. Koniak, et al. on the Proposed Rules Implementing Standards of Professional Conduct for Attorneys, File No. S7-45-02, 17 C.F.R. Part 205 (Dec. 17, 2002) [hereinafter Koniak et al.], available at <http://www.sec.gov/rules/proposed/s74502/skoniak1.htm> (Susan Koniak, who helped Senator Edwards draft the § 307 reporting-up requirement, assesses how well the SEC fulfilled its duty under § 307 to issue rules prescribing minimum standards for attorneys); see also Robert J. Jossen, *Dealing with the Lawyer's Responsibilities Under the Sarbanes-Oxley Act of 2002: Ethical Dilemmas and Practical Considerations*, SJ064 667 (2003) (Westlaw).

93. 17 C.F.R. § 205.3(b)(1); see *supra* note 12.

94. 17 C.F.R. § 205.2(e); see *supra* note 12.

95. See Koniak et al., *supra* note 92.

96. See Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097, 1127 (2003).

97. See *id.* at 1127.

98. See Sung Hui Kim, *Ethics in Corporate Representation: The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1026-35 (2005) (describing how people are susceptible to motivated reasoning and have a tendency to process information in a self-serving manner).

99. Koniak et al., *supra* note 92.

100. See *id.*

triggering standard, attorneys have a loophole through which they can exercise their lawyering abilities and elude reporting requirements.¹⁰¹

Not only does the triggering standard invite inaction from attorneys, but the reporting rule will be difficult to enforce.¹⁰² The SEC must assume the burden of proving two negatives. To enforce Rule 205, the SEC must show that it was *unreasonable* for the attorney *not* to conclude that a violation was reasonably likely.¹⁰³ The triggering standard's double negative, which violates the SEC's own "plain English" rules,¹⁰⁴ is difficult to understand, interpret, and apply. The standard "will be read by many lawyers as encouraging them to hide in the folds that the double negative creates."¹⁰⁵ The very phrasing of the reporting rule encourages attorneys to be passive.

Finally, even if conspicuous material evidence prevents an attorney from rationalizing away the duty to make the initial report, the attorney may still be able to wiggle out of follow-up reporting based on her discretion concerning what an "appropriate response" is.¹⁰⁶ An attorney who makes an initial report and receives what she "reasonably believes is an appropriate and timely response" is off the hook and "need do nothing more."¹⁰⁷ No matter how cursory the response, an attorney may be inclined to accept it as "appropriate."¹⁰⁸ Attorneys will want to get off the reporting ladder as soon as possible because disagreeing with management on the scope of the response is likely to damage their business relationship.¹⁰⁹

101. *See id.*

102. *See id.*; *see also* Coffee, *supra* note 19 (asserting that the reporting rule is probably largely unenforceable because of the ease with which attorneys can demonstrate that the information known to them did not pass the triggering threshold of materiality, except in the "once-in-a-decade case of an egregious knowing violation").

103. Koniak et al., *supra* note 92; *see also* Lisa H. Nicholson, *SarbOx 307's Impact on Subordinate In-house Counsel: Between a Rock and a Hard Place*, 2004 MICH. ST. L. REV. 559, 612 (arguing that a triggering standard with a double negative "will create an enforcement nightmare for the SEC"); Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 752-53 (2004) (same).

104. Rule 421(d)(2) under the Securities Act of 1933 states, "You must draft language . . . so that at a minimum it substantially complies with each of the following plain English writing principles: . . . (vi) No multiple negatives." 17 C.F.R. 230.421(d)(2) (2005).

105. Koniak et al., *supra* note 92. ("If the Commission meant to adopt a rule that the lawyer must report 'when a reasonable lawyer would conclude' . . . the Commission would not have used the double negative. Every lawyer understands that. The Commission's standard is an invitation to inaction.")

106. *See supra* note 14. As one commentator notes, the definition of the term "appropriate response" is "ambiguous and raises significant uncertainty." Letter from Richard Hall, Partner, Cravath, Swaine & Moore, to Jonathan G. Katz, Secretary, SEC (Dec 18, 2002), available at <http://www.sec.gov/rules/proposed/s74502/csmoore121802.htm>.

107. *Id.*

108. *See* Jill E. Fisch & Caroline M. Gentile, *The Qualified Legal Compliance Committee: Using the Attorney Conduct Rules to Restructure the Board of Directors*, 53 DUKE L.J. 517, 548 (2003). ("[A]ny disagreement with the issuer about the scope of the response is likely to impair future business relationships, if the initial report has not already destroyed those relationships.")

109. *Id.*

The triggering standard and the “appropriate response” evaluation articulated by Rule 205 provide attorneys with loopholes to exercise discretion and sidestep “mandatory” reporting. These factors, combined with the disincentives of reporting on management,¹¹⁰ may lead attorneys to rationalize non-compliance. If courts interpret § 806 to protect attorneys from retaliation, however, attorneys will be more likely to expose wrongdoing. As Jesselyn Radack explains, “the guiding principle behind [whistleblower protection] law is the logic of disclosure [U]nless rights are provided and protected under the law, potential whistleblowers will often choose to remain silent.”¹¹¹ Laws that protect whistleblowers encourage whistleblowing by diminishing the fear of retaliation.¹¹² Section 806 specifically provides that whistleblowers subjected to retaliation are entitled to compensatory damages, including reinstatement with the same seniority status, back pay with interest, and any special damages sustained because of the discrimination.¹¹³ While these remedies do not address all the disincentives whistleblowers face when they report, they do help protect against termination and compensate for economic loss, which are important considerations.¹¹⁴ By interpreting § 806 to provide corporate attorneys with legal safeguards against retaliation, courts will provide whistleblower-attorneys with protections that are crucial to realizing the policy goal of Sarbanes-Oxley.¹¹⁵

III. REJECTING THE TRADITIONAL VIEW IN THE CONTEXT OF SARBANES-OXLEY

Given the statute’s ambiguity, courts might look to common law justifications to deny reporting attorneys the whistleblower protections afforded under Sarbanes-Oxley. This Part considers and sets aside the traditional rationales used by lower courts to deny claims of retaliatory discharge by

110. See discussion *infra* Section III.B.

111. Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS 125, 135 (quoting 2002: A Year for Whistleblowers, BRIDGING THE GAP NEWSLETTER, Winter 2002, at 2).

112. See Elletta Sangrey Callahan, Terry Morehead Dworkin & David Lewis, *Whistleblowing: Australian, U.K. and U.S. Approaches to Disclosure in the Public Interest*, 44 VA. J. INT’L L. 879, 882 (2004) (“The premise behind most whistleblowing legislation is that people of conscience who work within large organizations would disclose observed wrongdoing and important errors, but for fear of losing their jobs or other forms of retaliation. Laws that protect whistleblowers from retaliation are thus assumed to encourage whistleblowing by ridding employees of these fears.”).

113. See 18 U.S.C. § 1514A(c) (Supp. 2003).

114. See Callahan et al., *supra* note 112, at 901. (“Meaningful damage awards for whistleblowers can deter reprisals and compensate whistleblowers for the severe negative consequences that usually accompany retaliation.”).

115. See Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 703 (1994) (“[D]ecisions [in which courts refuse to recognize lawyers’ rights as whistleblowers to sue for reprisals] institutionalize precisely the wrong incentive structures. Given all the social, economic, and psychological pressures against informing, some minimum legal safeguards against reprisal are a crucial counterweight.”).

whistleblower-attorneys. Section III.A counters the traditional view's first rationale that bars retaliatory discharge suits to protect the attorney-client relationship. This Section argues that preserving the traditional attorney-client relationship is not a compelling justification in light of the expressed goal of SOX to transform the attorney-client relationship and promote reports of corporate fraud. Section III.B refutes the traditional view's second rationale that attorneys already bound by ethical obligations do not need additional incentive to whistleblow. An attorney practicing in the corporate world is disinclined to report on fraud due to certain economic and psychological influences. Consequently, whistleblower protections need to supplement the reporting-up obligation if SOX is to be effective in generating attorney reports of corporate fraud.

A. The Legislative Purpose of SOX Trumps the Attorney-Client Relationship

Although preserving the attorney-client relationship is a legitimate concern, using this rationale to prohibit retaliatory discharge claims by attorneys does not make sense within the context of Sarbanes-Oxley. By imposing whistleblowing duties on attorneys under § 307, Congress has chosen to transform the attorney-client relationship in the corporate context to advance the legislative purpose of curbing corporate fraud.¹¹⁶

Barring retaliatory discharge suits by whistleblower-attorneys on the premise that such claims might chill attorney-client communication¹¹⁷ is no longer justifiable in the context of Sarbanes-Oxley. Congress passed Sarbanes-Oxley with the goal of preventing corporate fraud,¹¹⁸ and § 307 serves that end by requiring attorneys to whistleblow on fraudulent managers.¹¹⁹ By

116. Senator Edwards described the purpose of § 307:

[Section 307] is about making sure those lawyers, in addition to the accountants and executives in the company, don't violate the law and, in fact, more importantly, ensure that the law is being followed If you find out that the managers are breaking the law, you must tell them to stop If they won't act responsibly and in compliance with the law, then you go to the board and say something has to be done; there is a violation of the law occurring. It is basically going up the ladder, up the chain of command.

148 CONG. REC. S6515, 6552 (daily ed. July 10, 2002) (statement of Sen. Edwards).

117. In a retaliatory discharge suit, the disclosure of confidential client information may implicate two distinct legal doctrines: the ethical duty of confidentiality and the attorney-client privilege. The duty of confidentiality is a broad ethical rule, defined by professional rules of ethics, which provides that an attorney must keep confidential all information related to the representation of the client. The attorney-client privilege, on the other hand, is a rule of evidence, which protects the disclosure of information exchanged in confidence between a client and an attorney. Both the ethical duty of confidentiality and the attorney-client-privilege contain exceptions that permit an attorney to disclose confidential information. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.7.1, at 296 (1986).

118. See 148 CONG. REC. S6516, 6524 (daily ed. July 10, 2002) (statement of Sen. Wellstone) ("This bill . . . hold[s] bad actors accountable for their fraud and deception."); see also Press Release, White House Office of the Press Sec'y, President Bush Signs Corporate Corruption Bill (July 30, 2002), available at <http://www.whitehouse.gov/news/releases/2002/07/20020730.html>.

119. See *supra* note 116 and accompanying text.

compelling attorneys to become whistleblowers, SOX arguably already chills communication and circumscribes the attorney's traditional relationship with managers.¹²⁰ Section 307 seeks to sever the close allegiance attorneys foster with corporate managers, and strives to realign attorneys with the interests of the organizational client.¹²¹ A whistleblower-attorney acts in the best interest of the organizational client if she brings the illegal acts of managers to the corporation's attention.¹²² Corporate attorneys may be reluctant, however, to place the interests of the organizational client above management because management controls their employment status.¹²³ A bar on claims of retaliatory discharge chills an attorney's communication of fraud to the organizational client. By denying attorneys a cause of action when they become victims of retaliation, courts deter attorneys from communicating management's unlawful conduct, which harms the interests of the organizational client as well as the public policy behind Sarbanes-Oxley.

Second, protecting whistleblower-attorneys from retaliatory discharge should not affect the client's trust and candor in the relationship, at least in circumstances in which corporate managers seek legal advice on compliance with the law. The dissent in *Balla* reasoned as follows:

[R]etaliatory discharge would chill the attorney-client relationship and discourage a corporate client from communicating freely with the attorney *only* where . . . the employer decides to go forward with particular conduct, regardless of advice that it is contrary to law. . . . [T]o allow a corporate employer to discharge its in-house counsel under such circumstances, without fear of any sanction, is truly to give the assistance and protection of the courts to scoundrels.¹²⁴

Recognizing a claim of retaliatory discharge in the SOX context would target public corporations that allow unscrupulous managers to terminate a dutiful attorney who reports up the ladder in fulfillment of her duties under § 307. Although public policy could conceivably reap some benefit from barring retaliatory discharge to make even unscrupulous managers feel free to speak to attorneys, continuing to deny attorneys a remedy for retaliation would be contrary to SOX's goal of protecting whistleblowers reporting on

120. See discussion *infra* Section III.B.

121. Describing the motivation behind § 307, Senator John Edwards explained, "We have seen corporate lawyers sometimes forget who their client is. What happens is their day-to-day conduct is with the CEO or the chief financial officer because those are the individuals responsible for hiring them. So as a result, that is with whom they have a relationship The problem is that the CEO and the chief financial officer are not the client." 148 CONG. REC. S6516, 6551-52 (daily ed. July 10, 2002).

122. Brian D. Forrow, *The Corporate Law Department Lawyer: Counsel to the Entity*, in *MANAGEMENT FOR IN-HOUSE COUNSEL*, 43, 44 (Michael L. Goldblatt et al. eds., 1985) ("[S]ignificant violations of law are contrary to the long range interests of the corporation" and corporate attorneys should strive to "forestall the company [from] offending public opinion through acts that indicate social indifference or social irresponsibility.').

123. See discussion *infra* Section III.B.

124. *Balla v. Gambro, Inc.* 584 N.E.2d 104, 114 (Freeman, J., dissenting) (emphasis added).

fraud. Given that the common law interest of protecting the attorney-client relationship primarily results in shielding unscrupulous managers, the countervailing and specific legislative purpose of Sarbanes-Oxley to protect the investing public should carry greater weight.

Third, the disclosure of information subject to the attorney-client privilege should not preclude retaliatory discharge claims in the SOX context because corporate clients often waive the privilege anyway. Federal agencies already pressure corporations to waive the privilege when they are under investigation for corporate fraud.¹²⁵ An issue sufficiently egregious to trigger the attorney's reporting-up obligation is likely also to trigger an SEC investigation.¹²⁶ Corporations under investigation often waive the attorney-client privilege and yield to the SEC's policy of granting leniency in exchange for corporate cooperation.¹²⁷ In its federal guidelines for conducting corporate fraud investigations, the Department of Justice instructs federal prosecutors to factor in a corporation's "willingness to cooperate" and "waiver of the corporate attorney-client and work product privileges" when bringing charges or negotiating plea agreements.¹²⁸ Supporting the federal prosecutorial policy, the U.S. Sentencing Commission has adopted amendments to the Federal Sentencing Guidelines for Organization strongly suggesting that "cooperation" for the purposes of mitigation in sentencing includes a waiver of attorney-client privilege and work product protection.¹²⁹ In cases involving massive fraud or criminal conduct, large public companies "are under more pressure than ever to cooperate with investigations by waiving the attorney-client privilege and turning over documents"¹³⁰ Given the federal

125. Prosecutors have expanded the crime-fraud exception to the attorney-client privilege in the corporate context to make the existence of the privilege uncertain. See David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 153–58 (2000) (describing government efforts to get corporations under investigation to waive the privilege).

126. I am grateful to Professor Adam Pritchard for this observation.

127. Zornow & Krakaur, *supra* note 125, at 149 ("[U]nder the legal, financial, and public relations pressures of a criminal investigation, the company will feel compelled to waive privilege. Indeed, it may now be safe to assume that a corporation will turn over privileged information [Corporations] have yielded in the face of increasingly aggressive federal prosecutorial tactics.").

128. Memorandum from the Deputy Att'y Gen. of the U.S. Dep't of Justice to All Component Heads and U.S. Att'ys, U.S. Dep't of Justice, Part II.A.4 (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>; see also Memorandum from Deputy U.S. Att'y Gen. Larry D. Thompson, Deputy U.S. Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Att'ys, U.S. Dep't of Justice (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm; Press Release No. 2001-117, Sec. and Exch. Comm'n, SEC Issues Report of Investigation and Statement Setting Forth Framework for Evaluating Cooperation in Exercising Prosecutorial Discretion (Oct. 23, 2001), available at <http://www.sec.gov/news/press/2001-117.txt>.

129. Assoc. of Corporate Counsel, *The Federal Sentencing Guidelines for Organizations: What's Up?* 1 (Feb. 2005), available at [http://www.nacdl.org/public.nsf/m mediasources/20050308a/\\$FILE/ACC_SentGuides.doc](http://www.nacdl.org/public.nsf/m mediasources/20050308a/$FILE/ACC_SentGuides.doc).

130. David Hechler, *Scandals Help Erode Privilege: Investigators Are Seeking Attorney-Client Communications*, NAT'L L.J., Dec. 23 – Dec. 30, 2002, at A22; see also Zornow & Krakaur, *supra* note 125, at 148 ("[Federal prosecutors] now often insist, even at the outset of an investigation, that corporations turn over privileged communications, attorney work product, and

standards used to prosecute and sentence corporations, a waiver of attorney-client privilege is often a precondition to settlement.¹³¹ Thus, since federal agencies already pressure corporations to waive the attorney-client privilege in corporate fraud investigations, protecting the privilege should not be of primary concern in retaliatory discharge suits by whistleblower-attorneys acting in accordance with Sarbanes-Oxley.

Fourth, state professional rules of confidentiality should not prevent attorneys from reporting under § 307 or from establishing a retaliatory discharge claim. Although SOX's provision permitting attorney whistleblowing to the SEC may conflict with the professional rules of confidentiality in some states, conflicting state rules should yield to federal preemption.¹³² The U.S. Supreme Court "has consistently upheld the authority of federal agencies to implement rules of conduct that diverge from and supersede state laws that address the same conduct."¹³³ The SEC states that if "a conflict arises because a state rule prohibits an attorney from exercising the discretion provided by a federal regulation, the federal regulation takes priority."¹³⁴ The American Bar Association implicitly recognized the preemption of SOX by creating new exceptions to confidentiality under Model Rules of Professional Conduct Rule 1.6 consistent with the attorney's reporting-up obligation under § 307 and Rule 205.¹³⁵ In addition to the new exceptions in line with SOX, the *Model Rules* also provide attorneys with an exception for using confidential information in retaliatory discharge claims. Rule 1.6(b)(5) permits an attorney to reveal confidential client information when the attorney reasonably believes it necessary "to establish a *claim* or defense" in a controversy with the client.¹³⁶ Remarking on confidentiality in retaliatory discharge cases, the ABA concluded that nothing in the Model

incriminating statements from corporate employees as a condition of favorable treatment in the exercise of the prosecutor's considerable discretion. Furthermore, the government now views a corporation's failure to disclose privileged information immediately as a clandestine effort to hide the truth. The erosion of corporate privileges by forced waivers coincides with a growing focus on corporate culpability in our criminal justice system.").

131. See Susan W. Crump, *The Attorney-Client Privilege and Other Ethical Issues in the Corporate Context Where There Is Widespread Fraud or Criminal Conduct*, 45 S. TEX. L. REV. 171, 183 (2003).

132. See Comment Letter from Giovanni P. Prezioso, Gen. Counsel, U.S. Sec. and Exch. Commission to J. Richard Manning, President, Wash. Bar Ass'n and David W. Savage, President-Elect, Wash. Bar Ass'n, (July 23, 2003) [hereinafter Prezioso], available at <http://www.sec.gov/news/speech/spch072303gpp.htm>; see also *United States v. Locke*, 529 U.S. 89, 110 (2000) ("[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation . . .") (alteration in the original) (internal quotation marks omitted) (quoting *City of New York v. FCC*, 486 U.S. 57, 63-64 (1989)).

133. Prezioso, *supra* note 132; see also *Sperry v. State of Florida*, 373 U.S. 379 (1963) (holding that Florida could not enjoin a non-lawyer registered to practice before the federal Patent and Trademark Office from prosecuting patent applications in Florida, even though the non-lawyer's actions constituted unauthorized practice of law under Florida state bar rules).

134. Prezioso, *supra* note 132.

135. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2), (3) (2004).

136. *Id.* 1.6(b)(5) (2004).

Rules bars retaliatory discharge claims from being recognized.¹³⁷ The ABA also noted that an attorney “must take care not to disclose client information beyond that which the attorney reasonably believes is necessary to establish her claim.”¹³⁸ Based on federal preemption and the ABA’s guidance in adopting exceptions to the duty of confidentiality, state professional rules should not prevent attorneys from reporting under SOX or from using confidential information to establish retaliatory discharge claims.

Finally, even if protecting the attorney-client privilege and the confidentiality rule is of primary concern in SOX cases, recognizing retaliatory discharge claims of attorneys will not reveal confidential information if courts adopt the limited-claim approach. The California Supreme Court, in *General Dynamics*, noted that there are ample possibilities for preserving confidential communications through “[t]he use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings”¹³⁹ Although such protective measures require more attention by courts, doing so would provide reporting attorneys with some protection if they abide by § 307 and suffer retaliation for it. The limited-claim approach balances the concern of confidentiality while providing a minimal measure of protection to whistleblower-attorneys discharged for reporting under SOX. Although it is not as supportive as the wide-open view and will not completely neutralize the disadvantages of whistleblowing, allowing attorneys a limited-claim for retaliatory discharge will help produce a more effective reporting-up rule under Sarbanes-Oxley.

B. Ethical Obligations Are Insufficient to Ensure Whistleblowing Actions

This Section disputes the second rationale of the traditional approach, that is, that attorneys already bound by ethical obligations do not need additional incentive to whistleblow. As Justice Freeman articulated, “attorneys 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.”¹⁴⁰ Although attorneys are professionally obligated to report misconduct, without judicial protection from retaliatory discharge, attorneys may keep quiet about management misconduct in order to escape personal harm. Section III.B.1 contends that strong economic incentives align attorneys with management interests, discouraging attorneys from undertaking whistleblowing actions against management. Section III.B.2 argues that, although § 307 creates liability for attorneys who fail to report

137. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 01-424 (2001).

138. *Id.* (emphasis omitted).

139. *Gen. Dynamics Corp. v. Superior Court*, 876 P.2d 487, 504 (Cal. 1994).

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

as required, barring change in the nature of corporate representation, attorneys may continue to have psychological biases that hinder them from reporting on management.

1. *Career Incentives Align Corporate Attorneys with Management*

This Section examines the incentives, specifically compensation and career advancement, that align outside and in-house attorneys with management and cause them to refrain from whistleblowing under § 307. Despite reporting requirements, strong market forces and career incentives discourage corporate attorneys from reporting on managers.¹⁴¹ Management exerts control over these economic incentives, which manifest somewhat differently for outside and in-house counsel. Outside attorneys are motivated to align with management because of considerations for retaining future client business and obtaining partnership status.¹⁴² These incentives are even stronger for in-house counsel, given that their career and income depend entirely upon a single corporate client.¹⁴³ With compensation and career advancement directly tied to their relationships with management, both outside and in-house attorneys face pressure to align themselves with management and sidestep their reporting duties under § 307.

For outside attorneys, compensation and career advancement—such as admission into a law firm partnership—largely depend on an attorney's ability to generate business.¹⁴⁴ Although the corporate entity may be the attorney's client, managers are the people who oversee and dictate the everyday responsibilities of corporate attorneys.¹⁴⁵ Boards of directors rarely play a role in the retention, evaluation, or compensation of corporate counsel.¹⁴⁶ Instead, management defines the objectives of the representation, identifies the responsibilities of retained counsel, and determines whether the attorney's work performance is acceptable.¹⁴⁷ "The allocation of future work offers management a continual tool with which to reward good performance and sanction poor performance."¹⁴⁸

141. See Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 25 (2002) ("A good economist's first instinct would be to determine whether there are incentives built into the financial system that encourage deception and fraud. A president who wanted to make business trustworthy again and renew the nation's confidence would address these incentives directly." (quoting Jeff Madrick, *Economic Scene*, N.Y. TIMES, July 11, 2002, at C2)); see also David McGowan, *Why Not Try The Carrot? A Modest Proposal to Grant Immunity to Lawyers Who Disclose Client Financial Misconduct*, 92 CAL. L. REV. 1825 (2004) (explaining that attorneys need incentives to order to disclose financial fraud).

142. See Fisch & Rosen, *supra* note 96, at 1123.

143. See Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 204 (2001).

144. See Fisch & Rosen, *supra* note 96, at 1123.

145. See discussion *infra* Section III.B.1.

146. See Fisch & Rosen, *supra* note 96, at 1123.

147. See discussion *infra* Section III.B.1.

148. See Fisch & Rosen, *supra* note 96, at 1123.

The market for legal services creates robust incentives for outside attorneys to do whatever it takes to accommodate corporate clients in order to obtain future work.¹⁴⁹ Intense competition exists among attorneys and law firms for corporate clients, and powerful clients can easily shop for expedient advice.¹⁵⁰ For example, a multitude of law firms once vied to work for Enron because of the lucrative fees and prominence attached to representing a major corporation.¹⁵¹ If Vinson & Elkins, Enron's primary outside counsel, had refused to structure a transaction in accordance with management's instructions, a long line of competitors was ready and waiting to take its place.¹⁵² Moreover, if an outside attorney blows the whistle on a prominent corporate client, she might expect to lose not only that client, but possibly others as well.¹⁵³ Clients who can pick and choose law firms may be reluctant to hire an attorney with a reputation as a corporate whistleblower.¹⁵⁴

For in-house attorneys, the situation is worse because compensation and career advancement occur within the corporation and hinge on the attorney's loyalty and relationship with management.¹⁵⁵ The ideal in-house attorney, in the eyes of a corporate manager, is a person with a "can-do attitude" who facilitates management's objectives. As J.P. Morgan, the renowned investment banker and manager, once observed, "I want a lawyer who tells me how to do something—not what I can't do."¹⁵⁶ Managers are more likely to promote attorneys who help them reach their goals than those who thwart their plans. To become an effective in-house attorney, "[one also has to be] a welcome and respected participant in creating the corporate culture. [She] must be invited to meetings There is no way a lawyer can force herself into client activities where she is not welcomed or she is not trusted and

149. See Symposium, *The Evolving Legal and Ethical Role of the Corporate Attorney after the Sarbanes-Oxley Act of 2002: Panel One: The Collapse of the Corporate Model*, 52 AM. U. L. REV. 579, 602 (2003) ("[T]here is an enormous temptation to do what your client wants you to do, to try and say yes. In part, this is because the client pays your bills and does not have to hire you again if management is unhappy with the work you've done." (statement of Charles E. Davidow, Partner, Wilmer Cutler & Pickering)).

150. See Rhode & Paton, *supra* note 141, at 25.

151. See Michael C. Bender, *Enron Lawyers Are Accused of Hiding Employee's Claims*, AUSTIN AM. STATESMAN, Mar. 15, 2002, at D1 (noting that Vinson & Elkins billed Enron for \$36 million over the prior year); see also Fisch & Rosen, *supra* note 96, at 1124.

152. See Fisch & Rosen, *supra* note 96, at 1124.

153. John Gibeaut, *Telling Secrets: When In-House Lawyers Sue Their Employers, They Find Themselves in the Middle of the Debate on Client Confidentiality*, A.B.A. J., Nov. 2004, at 39, 73 ("[L]awyers who have filed retaliatory discharge actions also face possible ostracism by their peers. And neither companies nor firms are particularly eager to hire a lawyer who's trying to expose a client's dirty laundry in a courtroom.").

154. Susan W. Ausman, a former Arthur Andersen whistleblower-attorney who was fired in retaliation, remarked regarding her employability after whistleblowing: "[The headhunter] said, 'No one is going to hire you until your litigation is resolved.' . . . I think if you ask people in general if whistle-blowing is a good idea, they'd say yes. People think whistle-blowers are great, but they don't necessarily want one in their organization." *Id.* (internal quotation marks omitted).

155. See Kim, *supra* note 143, at 204.

156. Tom Alberg, *Cost, Quality: Concerns of In-House Counsel*, NAT'L L.J., Dec. 12, 1988, at 15, 16.

expect to hear anything important.”¹⁵⁷ “Because in-house attorneys routinely work with management on various matters, in-house counsel can benefit from management’s trust, not simply as counsel, but as a respected co-worker.”¹⁵⁸ With their livelihood and career prospects entirely dependent on management, in-house counsel face powerful incentives to eschew taking actions that might remove them from management’s good graces.

The fact that the corporation is an in-house counsel’s sole client exacerbates the disincentives for reporting. The corporation alone controls the in-house attorney’s career and economic fate. Unlike a law firm attorney who has a roster of clients, an in-house attorney who has a falling out with her client may have her entire livelihood and in-house career ended.¹⁵⁹ An attorney may become damaged goods in the in-house market and have a difficult time landing another position if she has a reputation for exposing managers.¹⁶⁰ Given the high stakes, “an in-house attorney will always weigh any legal decision made on his part against the possibility of being fired, the loss of his livelihood, and the possibility of being professionally blacklisted.”¹⁶¹ This “all-or-nothing situation” for in-house attorneys creates even greater pressure to conform to the wishes and objectives of managers.¹⁶²

While creating liability exposure for outside and in-house attorneys under § 307 undoubtedly alters the balance, it does not resolve the economic problems inherent in the representation of a corporate entity. If a whistleblower-attorney crosses management, she risks experiencing significant economic harm: demotion, termination, and even career suicide.¹⁶³ Sarbanes-Oxley attempts to counterbalance the significant economic incentives that management holds over attorneys by imposing the risk of an SEC enforcement action on attorneys. An attorney who violates § 307 risks “being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission.”¹⁶⁴ Instead of directly

157. Symposium, *The Evolving Legal and Ethical Role of the Corporate Attorney After the Sarbanes-Oxley Act of 2002: Panel Three: Ethical Dilemmas Associated with the Corporate Attorney’s New Role*, 52 AM. U. L. REV. 655, 669 (2003) (statement of Susan Hackett, Sr. V.P. & Gen. Counsel, Am. Corp. Counsel Ass’n).

158. Grace M. Giesel, *The Ethics or Employment Dilemma of In-House Counsel*, 5 GEO. J. LEGAL ETHICS 535, 544 (1992).

159. Symposium, *supra* note 157, at 687 (“[I]f you fall out with your client, it is not just one client off the roster of the firm. Your livelihood has now ended, and potentially it can be a career ending issue You may be damaged goods now in the in-house market.” (statement of Susan Hackett, Sr. V.P. and Gen. Counsel, Am. Corp. Counsel Ass’n)).

160. *Id.* at 687 (“It is inconceivable to me that a lawyer who chooses to report to the SEC is going to be a welcome colleague on the team in the future, even if that person had an obligation to do so. That is unfortunate, but that’s just reality. Even if they are not fired outright, they will probably be constructively unemployed by that corporation pretty soon.” (statement of Susan Hackett, Sr. V.P. and Gen. Counsel, Am. Corp. Counsel Ass’n)).

161. Lauren C. Cohen, Note, *In-House Counsel and the Attorney-Client Privilege: How Sarbanes-Oxley Misses the Point*, 9 STAN. J.L. BUS. & FIN. 297, 316 (2004).

162. See Kim, *supra* note 143, at 204.

163. See GLAZER & GLAZER, *supra* note 89, at 133–66.

164. 17 C.F.R. § 205.6(b) (2005).

addressing the systemic factors that pressure both outside and in-house attorneys, § 307 simply adds a competing punishment to the mix.¹⁶⁵ The incentives illustrated above, which define the relational dynamics of attorneys and managers, will continue to influence both outside and in-house counsel. Recognizing claims for retaliatory discharge by whistleblower-attorneys may help mitigate those pressures. As the *General Dynamics* court explained, “the retaliatory discharge tort [vindicates] fundamental public policies by encouraging employees to act in ways that advance them. By providing [attorneys] with a remedy in tort damages for resisting socially damaging organizational conduct, the courts mitigate the otherwise considerable economic and cultural pressures . . . to silently conform.”¹⁶⁶ By interpreting § 806 to protect whistleblower-attorneys, courts further the policy goal of SOX by compensating for some of the economic harm that inhibits attorneys from reporting on managers.

2. Structure of Representation Creates Psychological Barriers

Whistleblower protection for attorneys is necessary because while Sarbanes-Oxley increases reporting duties for attorneys, it leaves intact the structure of corporate representation that aligns attorneys with management interests. It perpetuates a pro-management bias that previously existed under the ABA’s Model Rule 1.13 by re-adopting the formalistic conception of the client as the corporate entity—a nonexistent legal abstraction.¹⁶⁷ Because they remain economically tied to management, attorneys are less able to whistleblow on management without more protection. The structure of corporate representation creates a “secondary allegiance” to managers.¹⁶⁸ This secondary allegiance could lead an attorney to overlook, either intentionally or subconsciously, marginal misconduct by managers.¹⁶⁹ Thus, § 307 will not result in better information flow within the corporate hierarchy unless reporting attorneys receive some measure of protection from management through § 806.¹⁷⁰

Certain ambiguities are inherent in representing the nonhuman corporate client.¹⁷¹ Corporate attorneys under Rule 1.13 of the ABA Model Rules are

165. See Fisch & Rosen, *supra* note 96, at 1124-26.

166. *Gen. Dynamics v. Superior Court*, 876 P.2d 487, 501 (Cal. 1994).

167. To eliminate lingering management bias, the SEC could have designated the board of directors as the corporate client, rather than have the client be a fictional corporate entity that management can supplant. See Stephen M. Bainbridge & Christina J. Johnson, *Managerialism, Legal Ethics, and Sarbanes-Oxley Section 307*, 2004 MICH. ST. L. REV. 299, 316-17.

168. See *id.* at 307.

169. See *id.*

170. See *id.* at 302-03.

171. See *id.* at 317 n.110 (“If a corporation is a legal fiction, an entity that has no real existence, who actually is the client, and what obligations does a lawyer owe to that client? Only real people can ask questions.”) (quoting Thomas M. Skove, *Lawyering After Enron*, FED. LAW., May 2003, at 32, 39).

obligated to represent the best interests of the client—the corporate entity.¹⁷² The SEC's Rule 205 implementation of Sarbanes-Oxley echoes this notion and attaches the attorney's ethical duties to the corporate entity.¹⁷³ The corporate client, unlike an individual client who can assert her own autonomy and relate specific objectives to the attorney, can only communicate its wishes through its agents. The corporate manager "is effectively the personification of the corporate client for most ordinary legal purposes."¹⁷⁴ In order to provide effective representation, the attorney and the corporate manager must somehow replicate the confidentiality and intimacy that exists between an attorney and an individual client.¹⁷⁵

It may be difficult for attorneys to internalize that the corporate manager, a person who functions as the physical face of the corporate entity, should nevertheless be disregarded to protect the interests of a fictional entity that is the nominal client.¹⁷⁶ It may be "psychologically awkward" for the corporate lawyer to conceptualize that she "owes professional allegiances to the corporate entity, but owes no duties to the managers who have the power to select, retain, supervise, pay, and fire the lawyer."¹⁷⁷ Although an attorney's ultimate duty theoretically lies with the corporation, her daily duties most directly involve the corporate managers who create her assignments. Senator John Edwards, who introduced the amendment to include § 307 in Sarbanes-Oxley, explained as follows:

We have seen corporate lawyers sometimes forget who their client is. What happens is their day-to-day conduct is with the CEO or the chief financial officer because those are the individuals responsible for hiring them. So as a result, that is with whom they have a relationship. When they go to lunch with their client, the corporation, they are usually going to lunch with the CEO or the chief financial officer. When they get phone calls, they are usually returning calls to the CEO or the chief financial officer. The problem is that the CEO and the chief financial officer are not the client.¹⁷⁸

Attorneys develop close working relationships with managers, which make attorneys more likely to give managers the psychological benefit of the doubt.¹⁷⁹ The rapport attorneys have with managers reduces the attorney's capacity to perceive danger signals that might indicate fraud.¹⁸⁰

172. MODEL RULES OF PROF'L CONDUCT R. 1.13 (2004).

173. See 17 C.F.R. § 205 (2005).

174. Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 29 (1987).

175. Kim, *supra* note 143, at 194.

176. Hazard, *supra* note 174, at 29.

177. See Kim, *supra* note 143, at 194 (footnote omitted).

178. 148 CONG. REC. S6524, S6551–52 (daily ed. July 10, 2002) (statement of Sen. Edwards).

179. See Kim, *supra* note 98, at 1026–34.

180. See Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75, 95 (1993).

Attorneys may not want to see fraud because it would harm the close relationship that attorneys have with managers.¹⁸¹ A broken relationship with management could then translate into the career harms previously discussed. In other words, psychological biases created by the structure of corporate representation may limit an attorney's ability and desire to perceive and interpret management behavior as wrong.¹⁸²

In contrast, Sarbanes-Oxley's § 301, governing auditors, ensures that auditors are independent from management, and thus, able to whistleblow on corporate fraud.¹⁸³ Unlike SOX's provision for attorneys, § 301 severs the economic and psychological ties that auditors previously shared with management. Section 301 achieves this separation from management by transferring all responsibility for the hiring, supervision, retention, and compensation of auditors to the audit committee, whose own independence is also enhanced by SOX.¹⁸⁴ While there may be good reasons for management to retain supervisory control over legal counsel but not auditors, the differences between §§ 301 and 307 illustrate that attorneys, unlike auditors, are not in a position to whistleblow effectively without additional protection from management. Although whistleblower protection will not eliminate the psychological difficulties inherent in the structure of corporate representation, § 806 can help insulate attorneys from management retaliation and neutralize some of the economic disincentives attorneys face by reporting under § 307. For gatekeepers—attorneys and auditors alike—to be truly effective monitors of management on behalf of investors, they must have insulation from management.¹⁸⁵

Ethical obligations imposed on attorneys through § 307 do not adequately compel attorneys to report on corporate fraud. While as a matter of law, attorneys subject to § 307 and the SEC rules of professional conduct are required to abide by their duties, in practice, attorneys may "ignore or rationalize away" these obligations to protect their livelihood.¹⁸⁶ As Justice Freeman explains, "We cannot continue to delude ourselves . . . that attorneys' ethical duties, alone, are always sufficient to guarantee that lawyers will 'do the right thing.' . . . [T]he *incentive needed is recognition of a cause*

181. See Kim, *supra* note 98, at 1026–34.

182. See Fisch & Rosen, *supra* note 96, at 1124.

183. This provision governing "Standards Relating to Audit Committees" has been codified at 15 U.S.C. § 78j-1(m).

184. Section 301 of the Sarbanes-Oxley Act mandates that the audit committee "be directly responsible for the appointment, compensation, and oversight of the work" of the independent auditor. This provision has been codified as § 10A(m)(2) of the Securities Exchange Act of 1934. 15 U.S.C. § 78j-1(m)(2) (Supp. 2003). Section 301 also establishes minimum standards for audit committee members and bars them from accepting "any consulting, advisory, or other compensatory fee from the issuer." 15 U.S.C. § 78j-1(m)(3)(B)(i) (Supp. 2003).

185. See John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 335 (2004).

186. See *Gen. Dynamics v. Superior Court*, 876 P.2d 487, 490 (Cal. 1994).

of action for retaliatory discharge, in the appropriate case.”¹⁸⁷ Justice Freeman’s reasoning applies with particular force to the case of attorneys under § 307. Whistleblowing on corporate fraud presents immense personal risk for attorneys. Unless courts protect whistleblower-attorneys from retaliation, corporate attorneys will not be able to whistleblow and promote the substantive goal of Sarbanes-Oxley.¹⁸⁸ The structure of corporate representation, compounded by strong economic incentives, makes it unlikely that corporate attorneys will aggressively whistleblow on management misconduct. Section 806 is not a complete antidote to the difficulties of whistleblowing; it will not eliminate the psychological barriers of attorney reporting. Affording whistleblower-attorneys the protection of § 806, however, will help counterbalance some of the economic pressures attorneys face in reporting under § 307.

CONCLUSION

If federal courts interpret § 806 as not protecting attorneys reporting under § 307, then Sarbanes-Oxley would create a quandary for attorneys. It would draft attorneys into a crusade against corporate fraud, leaving them without shields or armor to endure the anticipated strikes by management, and then punish them if they are unable to whistleblow on the hand that feeds them. The traditional rationales used to deny whistleblower protections for attorneys no longer hold sway in the corporate context. In the wake of the Enron debacle, Congress enacted Sarbanes-Oxley to transform the corporate climate and enhance detection, prevention, and prosecution of corporate fraud. By providing attorneys with the shields and armor of § 806, courts further the legislative goal of Sarbanes-Oxley. Allowing retaliatory discharge claims mitigates the disincentives attorneys encounter when they put their careers on the line to prevent future Enrons and advance the public interest.

187. *Balla v. Gambro, Inc.* 584 N.E.2d 104, 113 (Ill. 1991) (Freeman, J., dissenting) (emphasis added).

188. *Gen. Dynamics*, 876 P.2d at 502 (“[I]t is virtually certain that, without the prospect of limited judicial access, [attorneys] confronted with the dilemma of choosing between adhering to professional ethical norms and surrendering to the employer’s unethical demands will almost always find silence the better part of valor.”).

