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IN-HOUSE COUNSEL'S WRONGFUL DISCHARGE ACTION UNDER THE PUBLIC POLICY EXCEPTION AND RETALIATORY DISCHARGE DOCTRINE

Raymis H.C. Kim

Abstract: Most courts hold that in-house counsel have no cause of action under public policy or retaliatory discharge exceptions to the at-will employment rule. This is true even when they are discharged in contravention of a clearly mandated public policy. These courts have rationalized that such recognition would be contrary to the at-will nature of attorney-client employment and would have an adverse effect on the attorney-client relationship. This Comment proposes that courts should extend the public policy exception and retaliatory discharge doctrine to in-house counsel to protect the public from illegal corporate acts and provide relief to in-house counsel.

Suppose Medical Instrument, an Illinois corporation, manufactures and markets kidney dialyzers. It has in stock dozens of defective dialyzers which do not meet Food and Drug Administration (FDA) regulations and may cause substantial injury to patients. The president of Medical Instrument consults Bob Jones, an in-house counsel, regarding the company's plans to sell the machines. Bob objects to the sale of dialyzers and threatens to report to the FDA if the dialyzers are put on the market. Nonetheless, the president orders that the defective dialyzers be sold. Bob is fired and promptly reports to the FDA. Jane Smith, another in-house counsel, asks the president to reconsider the decision to sell. Jane also approaches the Board of Directors in her attempt to stop the imminent sale. Her pleas are ignored. Finally, without resigning, she reports the impending sale to the FDA. The company fires her. Under a recent Illinois Supreme Court case, neither Jane nor Bob would have a wrongful discharge cause of action against Medical Instrument.[1]

Under the traditional common law doctrine of employment-at-will, an employer or an employee may sever an employment relationship for any reason, or for no reason at all, absent an existing employment contract for a fixed term.[2] Since the beginning of this century, however, courts gradually have eroded the at-will employment doctrine by creating several exceptions. The most widely recognized exception to

1. This hypothetical is based on a recent Illinois Supreme Court case. *See* Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991).

2. Cheryl S. Massingale, *At-Will Employment, Going, Going . . .*, 24 U. RICH. L. REV. 187, 187 (1990).

the at-will-employment rule is the "public policy exception."[3] This exception generally recognizes a cause of action for wrongful discharge when an employee is fired for refusing to commit unlawful acts, for performing important public or ethical obligations, or for exercising statutory rights.[4]

The tort of retaliatory discharge is an action under the "public policy exception" to the at-will employment rule.[5] Retaliatory discharge has been recognized when (1) an employer discharges an employee in retaliation for employee activities, and (2) the discharge contravenes a clearly mandated public policy.[6] Most jurisdictions that recognize the public policy exception doctrine also recognize retaliatory discharge as applied to non-attorney employees.[7] However, most courts have refused to apply these doctrines to in-house counsel because of the traditional at-will nature of attorney-client employment and the possible adverse effect such causes of action may have on the attorney-client relationship.[8]

Recently, the supreme courts of Minnesota and Illinois addressed the issue of whether in-house counsel may bring wrongful discharge actions against employers. The Minnesota Supreme Court recognized the wrongful discharge action based on an implied contract theory, without deciding whether it would allow a retaliatory discharge action by an in-house counsel.[9] The Illinois Supreme Court, on the other hand, rejected the retaliatory discharge cause of action by an in-house counsel, even though it found that the discharge was in contravention of clearly mandated public policy.[10]

This Comment begins by introducing the public policy and retaliatory discharge exceptions to the at-will employment rule. It also provides background on attorney-client privilege and confidentiality rules, and then surveys major cases concerning discharge of in-house counsel. Finally, the Comment examines the in-house counsel's dilemma in reporting illegal acts of the employer-client. The Comment concludes that when protecting public safety, an in-house counsel should be pro-

3. Seymour Moskowitz, *Employment-at-Will & Codes of Ethics: The Professional's Dilemma*, 23 VAL. U. L. REV. 33, 49 (1988).

4. *Id.* at 50.

5. Massingale, *supra* note 2, at 191.

6. *See, e.g.*, Palmateer v. International Harvester Co., 421 N.E.2d 876, 881 (Ill. 1981).

7. *See infra* text accompanying notes 17–25.

8. *See, e.g.*, Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991); Herbster v. North Am. Co. for Life and Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986); *see infra* text accompanying notes 54–58, 79–88.

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

10. *Balla*, 584 N.E.2d at 104.

vided a remedy under the public policy exception and the retaliatory discharge doctrine.

I. PUBLIC POLICY EXCEPTION AND RETALIATORY DISCHARGE DOCTRINE IN LIGHT OF THE ATTORNEY-CLIENT RELATIONSHIP

A. *The At-Will Employment Rule and the Public Policy Exception Doctrine*

Originally, supporters justified the at-will employment rule on the basis of both freedom of contract and freedom of enterprise.[11] The freedom of contract rationale supported the idea that both the employer and employee should be free to create or terminate an employment relationship at any time.[12] The freedom of enterprise rationale provided employers with flexibility in hiring practices and employees with mobility in the job market, so that employers and employees could adjust to changing business climates.[13] The at-will employment rule thus provided crucial flexibility for businesses during the industrial revolution of the 19th and early 20th centuries.[14]

In the early twentieth century, the United States Supreme Court granted constitutional protection to the at-will employment rule by striking down federal and state statutes which made it unlawful to discharge a worker solely on the basis of union membership.[15] This rule conferred upon employers nearly absolute control of workers and led to abuses, by allowing, for example, long working hours and child labor.[16] Recognizing the inequities, courts created wrongful discharge exceptions to the at-will employment doctrine. The most important exceptions are the public policy exception based on tort, the implied contract exception, and the just cause exception.[17]

The public policy exception to the at-will employment rule has generally been recognized when an employee is discharged for his or her

11. Massingale, *supra* note 2, at 188–89.

12. Moskowitz, *supra* note 3, at 38–40.

13. *See* Massingale, *supra* note 2, at 188–89.

14. *Id.*

15. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908). *See generally* Moskowitz, *supra* note 3, at 38–39.

16. *See* Massingale, *supra* note 2, at 189; Moskowitz, *supra* note 3, at 43; *see, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918); Lochner v. New York, 198 U.S. 45 (1905).

17. Massingale, *supra* note 2, at 191. Among these, the implied contract exception and the just cause exception have been accepted in some states and are beyond the scope of this Comment.

activities in contravention of a clearly mandated public policy.[18] A California appellate court was the first to allow a wrongful discharge action under the public policy exception.[19] That discharge resulted from the employee's refusal to commit perjury at a state legislative committee hearing on behalf of the employer.[20] However, due to the firm establishment of the at-will employment doctrine, this case was not viewed as a serious modification of the at-will employment rule at that time.[21] Then, in 1973, the Supreme Court of Indiana recognized an employee's claim of wrongful discharge for filing worker's compensation claims.[22] Since then, about half of the states have applied the public policy exception doctrine to discharges for refusing to commit illegal acts, for performing public or ethical obligations, or for exercising other statutory rights.[23]

The retaliatory discharge cause of action is derived from the public policy exception to at-will employment, and is generally recognized when (1) an employer discharges an employee in retaliation for employee activities, and (2) the discharge contravenes a clearly mandated public policy.[24] Its scope, however, is narrower than the public policy exception in that the employee must be discharged in retaliation for the employee's activities. The public policy exception only requires that the discharge contravene a clearly mandated public policy. This difference is crucial because a plaintiff suing under the public policy exception need only prove that the discharge was contrary to public policy, whereas a plaintiff suing under the retaliatory discharge theory must also prove that the discharge was in "retaliation" for his or her activities.[25]

B. Attorney-Client Confidentiality and Privilege

Although the public policy exception and retaliatory discharge doctrine have been applied to nonprofessional employees in jurisdictions

18. *See, e.g.*, Balla v. Gambro, Inc., 584 N.E.2d 104 (Ill. 1991); Herbster v. North Am. Co. for Life and Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986).

19. Petermann v. International Bhd. of Teamsters Local 396, 344 P.2d 25 (Cal. Ct. App. 1959); *see* Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 WASH. L. REV. 719, 723–24 (1991).

20. *Petermann*, 344 P.2d at 25.

21. Peck, *supra* note 19, at 723–24.

22. Frampton v. Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973).

23. *See* Moskowitz, *supra* note 3, at 49–50.

24. *See* Palmateer v. International Harvester Co., 421 N.E.2d 876, 881 (Ill. 1981); *see also* Balla v. Gambro, Inc., 584 N.E.2d 104, 107 (Ill. 1991) (quoting *Palmateer*).

25. In addition, this Comment proposes that the retaliatory discharge doctrine should apply only when an employer discharges an employee for activities that actually harm the employer's interest. *See infra* text accompanying notes 93–95.

that recognize such causes of action, the availability of these doctrines to in-house counsel who are both attorneys and corporate employees has been limited. The principal roadblock preventing recognition of these actions by in-house counsel has been concern for the effect such recognition would have on the attorney-client relationship.

1. Attorney-Client Confidentiality and Exceptions

The scope of attorney-client confidentiality is defined by professional rules of ethics.[26] The most influential rules are the Model Rules of Professional Conduct (Model Rules), which have been adopted in some form in thirty-five states.[27] The Model Code of Professional Responsibility (Model Code), predecessor to the Model Rules, is followed in some states that have not adopted the Model Rules.[28] Both sets of rules proscribe disclosure by an attorney of all information about a client, regardless of when and from whom the information was obtained.[29]

There are several rationales for mandatory confidentiality. First, these ethical standards discourage attorney abuse of client information by providing for professional disciplinary measures.[30] Second, they provide an additional safeguard to the attorney-client privilege when there is doubt as to whether the information is privileged or not.[31] Finally, the rules incorporate the general law of agency, imposing duties on agents to keep information about their principals confidential.[32]

The Model Rules and Model Code both provide exceptions to the confidentiality rule. For example, the Model Rules permit disclosure of confidential information to the extent the lawyer reasonably believes it necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[33] The Model Code exception is broader than that of the Model Rules, and allows a lawyer to reveal "[t]he intention of [the] client to commit a crime and the information necessary to prevent the

26. *See* Charles W. Wolfram, Modern Legal Ethics § 6.7, at 296 (1986).

27. 2 Geoffrey C. Hazard Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct § AP4:101, app. at 1255 (2d ed. Supp. 1991).

28. *Id.* at n.1. These states are Massachusetts, Oregon, Virginia, and New York. *Id.*

29. Wolfram, *supra* note 26, § 6.7, at 298.

30. *Id.* at 300.

31. *Id.*

32. *Id.* at 299–300.

33. Model Rules of Professional Conduct Rule 1.6(b)(1) (1983).

crime."[34] Under these rules, an attorney may keep information confidential even if the crime-fraud exception to the attorney-client privilege applies.[35] An attorney is thus permitted to disclose confidential information, but is not required to do so. Nine states have adopted more restrictive confidentiality rules requiring attorneys to report such information on future crimes, on penalty of disbarment for failing to do so.[36]

2. Attorney-Client Privilege and Crime-Fraud Exception

The attorney-client privilege is defined by the law of evidence through statutes and judicial decisions, and its scope is narrower than the confidentiality rule.[37] It protects disclosure of information exchanged in confidence between a client and an attorney.[38] The privilege, however, applies only to communications made by a client seeking legal assistance.[39] The rationale behind the attorney-client privilege is that it is essential to the attorney's function as advocate and confidential advisor.[40] As an advocate and an advisor, the attorney can adequately represent the client only if the client is free to disclose all information, both good and bad.[41]

An exception to attorney-client privilege exists when a client intends to commit a future crime or fraud. Under the crime-fraud exception, the privilege does not extend to communications between a client and an attorney concerning the future crime or fraud.[42] A common rationale for this exception is that the privilege should only be used as a defense to past wrongdoing within an adversary system and not as

34. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(3) (1981).

35. Under the crime-fraud exception, the attorney-client privilege does not extend to communications of a client's intent to commit a future crime or fraud. *See infra* text accompanying notes 42–44.

36. *See, e.g.*, ILL. ANN. STAT. ch. 110A, Rule 1.6(b) (Smith-Hurd Supp. 1991) ("A lawyer shall reveal information about a client to the extent it appears necessary to prevent the client from committing an act that would result in death or serious bodily harm."). Besides Illinois, states that have adopted mandatory disclosure rules are Arizona, Connecticut, Florida, New Jersey, Nevada, North Dakota, Virginia, and Wisconsin. HAZARD & HODES, *supra* note 27, § AP4:104, app. at 1262 n.2.

37. Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1064–65 (1978).

38. *See* WOLFRAM, *supra* note 26, § 6.3, at 264.

39. *Id.* at 251.

40. Hazard, *supra* note 37, at 1061.

41. *Id.*

42. *Id.* at 1065. 2 JACK B. WEINSTEIN, WEINSTEIN'S EVIDENCE, Sup. Ct. Std. 503(d)(1) (Supp. 1990) also provides that there is no privilege "[i]f the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud."

an aid to future crime.[43] Accordingly, an attorney who assists future or continuing crimes is acting as an accessory before the fact, and is not acting within the adversary system.[44]

C. The Corporate Employer as Sole Client

When an employer discloses a future illegal act to an in-house counsel, or requests that the counsel participate in that act, the in-house counsel is put in a uniquely difficult situation. Unlike a private practitioner, an in-house counsel is both an employee of, and an attorney to, the company. The in-house counsel depends solely on that employer-client for livelihood.

Within a corporate setting, an in-house counsel may be faced with the question of who the client is. Under the entity representation doctrine, an in-house counsel represents the corporate organization, which acts only through its duly authorized constituents.[45] The counsel's fiduciary duty is owed to the interest of the corporation and not to a single stockholder, director, officer, or employee of the entity.[46] Yet in all corporate settings, the counsel is directed by individual officers because the corporation can only function through its constituents.[47] However, when the objectives of an officer and the corporation diverge, the in-house counsel is required to pursue the best interest of the corporation even if it means repudiating the officer's interest.[48]

The conflict between an officer and an in-house counsel is greatest when the officer rejects the counsel's advice about the illegality of proposed conduct. Under the Model Rules, the counsel is clearly obliged to seek reversal of proposed or continuing illegal conduct within the organization.[49] The options include asking the officer for reconsideration, requesting the officer to seek a separate legal opinion, and referring the matter to higher authority in the organization.[50] However, the conduct addressed by the Model Rules must relate to a violation of a legal obligation to the corporation, or a violation of law which reasonably might be imputed to the organization, and must be likely to result in substantial injury to the organization.[51] If the counsel's effort

43. WOLFRAM, *supra* note 26, § 6.4, at 279 n.44.
44. *Id.* at 279.
45. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1983).
46. *See* WOLFRAM, *supra* note 26, § 13.7, at 735.
47. *Id.* at 734.
48. *Id.* at 735.
49. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b) (1983). *See generally* WOLFRAM, *supra* note 26, § 13.7, at 744.
50. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b) (1983).
51. *Id.*

to correct a clear violation of law is unsuccessful despite resort to the highest authority of the corporation, the counsel may resign.[52] This rule takes into account the hardship on in-house counsel, and thus does not require a mandatory withdrawal unless further representation violates the Model Rules or the law.[53]

D. *Case History of Wrongful Discharges of In-House Counsel*

1. *Appellate Court Treatment*

The first court to deal squarely with the issue of retaliatory discharge of in-house counsel was an Illinois appellate court in *Herbster v. North American Co. for Life and Health Insurance.*[54] Herbster, in-house counsel in charge of the legal department, alleged that he was discharged for refusing to destroy files following a discovery request.[55] Despite acknowledging that the discharge violated a clearly mandated public policy of ensuring the state's interest in full and complete discovery, the court refused to extend retaliatory discharge actions to attorneys.[56] The court reasoned that the expansion of the public policy exception rule to attorneys would seriously impair mutual trust and the personal employment nature of the attorney-client relationship.[57] Thus, the *Herbster* court held that the tort of retaliatory discharge was not available to an attorney even if the discharge was inconsistent with public policy concerns.[58]

Breaking new ground, a New Jersey appellate court recognized a retaliatory discharge cause of action by an in-house counsel in *Parker v. M & T Chemicals, Inc.*[59] In this case, a former in-house counsel brought a retaliatory discharge action under New Jersey's Conscientious Employee Protection Act (Whistleblower's Act).[60] The attorney alleged that he was discharged because he refused to steal or misappropriate a competitor's trade secrets.[61] The *Parker* court extended the protection of the Whistleblower's Act to in-house counsel and held that the statute was not inconsistent with an in-house counsel's claim for monetary damages in a retaliatory discharge suit.[62]

52. *Id.* Rule 1.13(c).
53. WOLFRAM, *supra* note 26, § 13.7, at 746.
54. 501 N.E.2d 343 (Ill. App. Ct. 1986).
55. *Id.* at 344.
56. *Id.* at 348.
57. *Id.* at 347–48.
58. *Id.* at 344, 348.
59. 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989).
60. *Id.* at 216, 218.
61. *Id.* at 217–18.
62. *Id.* at 222.

A Michigan appeals court likewise approved of a wrongful discharge action by an in-house counsel based on a just cause contract in *Mourad v. Automobile Club Insurance Ass'n.*[63] Mourad, Automobile Club's former legal manager, brought a wrongful discharge action based on breach of a just cause employment contract[64] and retaliatory discharge.[65] The attorney claimed that he was demoted following his refusal to comply with unethical and illegal orders.[66] Noting that Mourad provided legal as well as administrative services, the court recognized the in-house counsel's just cause employment contract action despite the existence of an attorney-client relationship.[67] The *Mourad* court, however, declined to address whether an in-house counsel has a retaliatory discharge cause of action, observing that the breach of just cause contract and retaliatory discharge suits are alternative theories of recovery.[68]

2. *Recent State Supreme Court Treatment*

The cases above demonstrate some courts' willingness to recognize a wrongful discharge action by an in-house counsel against the employer. However, the courts have been reluctant to recognize retaliatory discharge for in-house counsel even when they have found the discharge to be against clear public policy. Instead, some courts have relied on a contractual basis for allowing wrongful discharge claims, to avoid the complex questions of attorney-client relations.[69]

a. Nordling v. Northern States Power Co.

In *Nordling v. Northern States Power Co.,*[70] Nordling, an in-house counsel for Northern States Power Co. (NSP), was informed of a plan to investigate the personal lifestyles of employees at a new company facility.[71] Believing that the plan, which included surveillance of employees at home, was possibly illegal, Nordling reported the plan to the general manager of the project, who shelved the plan.[72] Although

63. 465 N.W.2d 395 (Mich. Ct. App. 1991).

64. Just cause employment contracts have been recognized when an employer fires an employee in breach of an implied promise to discharge only for "a fair and honest cause or reason." *See* Wendi J. Delmendo, Comment, *Determining Just Cause: An Equitable Solution for the Workplace*, 66 WASH. L. REV. 831, 833 (1991).

65. *Mourad*, 465 N.W.2d at 397.

66. *Id.*

67. *Id.* at 399–400.

68. *Id.* at 400.

69. *See, e.g., id.*; Nordling v. Northern States Power Co., 478 N.W.2d 498, 502 (Minn. 1991).

70. *Nordling*, 478 N.W.2d at 498.

71. *Id.* at 500.

72. *Id.*

NSP's employee handbook specified procedures for dismissing its employees, the vice president of NSP's law department summarily discharged Nordling without warning and without following these procedures.[73] Nordling then filed suit against NSP and its vice president.[74]

The *Nordling* court resolved the case by holding that attorney-client privilege does not prevent an attorney from bringing a wrongful discharge claim based on an implied contract theory.[75] The court, however, dismissed the retaliatory discharge action as a matter of law because there was no violation of the state's whistleblower statute or of any state or federal law.[76] The court conceded that a retaliatory discharge claim is more likely to involve the attorney-client relationship than a breach of contract discharge, thereby raising issues of revealing client confidences and wrongdoing.[77] Although the *Nordling* court did not rule on the retaliatory discharge issue, this case is nevertheless important because it recognizes a wrongful discharge action by an in-house counsel against the employer.[78]

b. Balla v. Gambro, Inc.

The Illinois Supreme Court addressed the issue of retaliatory discharge of in-house counsel in *Balla v. Gambro, Inc.*[79] Balla, the in-house counsel for Gambro, Inc., told the president of his company that a shipment of defective kidney dialyzers should be kept off the market because it did not meet FDA regulations.[80] He also told the president that he would do whatever was necessary to stop the sale of the dialyzers.[81] The president of the company did not follow his advice and ordered the defective product to be shipped from its affiliate company in Germany.[82] At the same time, the company fired Balla, who then reported the violation to the FDA.[83] The FDA promptly seized the dialyzers and determined that they were in violation of a federal act.[84]

73. *Id.*
74. *Id.*
75. *Id.* at 502.
76. *See id.* at 504.
77. *Id.*
78. *Id.* at 499.
79. 584 N.E.2d 104 (Ill. 1991).
80. *Id.* at 106.
81. *Id.*
82. *Id.* at 105–06.
83. *Id.* at 106.
84. *Id.*

The *Balla* court conceded that the in-house counsel was discharged in retaliation for his activity, and in contravention of a clearly mandated public policy of protecting lives and property.[85] Notwithstanding this finding, the Illinois Supreme Court held that an in-house counsel has no cause of action for retaliatory discharge.[86] The *Balla* court reasoned that the policy of protecting the public from defective products is already furthered by the Illinois Rules of Professional Conduct, which require an attorney to report a client's intention to commit an act that will result in death or serious public injury.[87] Moreover, the court noted that recognition of retaliatory discharge actions by in-house counsel would have an adverse effect on the attorney-client relationship.[88]

II. THE PUBLIC POLICY EXCEPTION AND RETALIATORY DISCHARGE ACTIONS SHOULD EXTEND TO IN-HOUSE COUNSEL

Even when courts have allowed wrongful discharge actions brought by nonprofessional employees based on the public policy exception and the retaliatory discharge doctrine, most courts have not extended such causes of action to in-house counsel.[89] The two most common reasons given by courts are: (1) the traditional at-will employment nature of the attorney-client relationship, and (2) the perceived adverse effect on the attorney-client relationship.[90] Although courts have offered two seemingly separate reasons for rejecting in-house counsel's wrongful discharge actions, the latter rationale has been used to justify the former.[91] Specifically, these courts have supported the at-will nature of the attorney-client employment by reasoning that allowing such wrongful discharge actions would impair the confidential nature of the attorney-client relationship.[92] The possible adverse effect on the attorney-client relationship is therefore the principal rationale for rejecting the public policy exception and the retaliatory discharge actions.

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85. *Id.* at 107.
86. *Id.* at 108.
87. *Id.* at 108–09. Illinois is one of nine states that has adopted mandatory disclosure rules. *See supra* note 36 and accompanying text.
88. *Balla*, 584 N.E.2d at 109–10.
89. *See, e.g., id.*; Herbster v. North Am. Co. for Life and Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986).
90. *See Balla*, 584 N.E.2d at 109.
91. *See, e.g., Balla*, 584 N.E.2d at 109; *Herbster*, 501 N.E.2d at 347.
92. *Herbster*, 501 N.E.2d at 347.

The rationales for denying the public policy exception and the retaliatory discharge actions can no longer be justified. The existing attorney-client relationship would not be adversely affected by recognizing such causes of action. Moreover, given the economic realities of an in-house counsel's employment situation and the goal of protecting the public from illegal corporate acts, courts should extend the public policy exception and retaliatory discharge actions to in-house counsel to mitigate the difficult burdens imposed on them.

A. Clarifying the Definition of Retaliatory Discharge

The retaliatory discharge doctrine requires proof that the employer discharged the employee in retaliation for the employee's activities. Most courts, however, have treated retaliatory discharge as synonymous with the public policy exception doctrine and thus have confused the two doctrines. For example, the retaliatory discharge doctrine enunciated by the Illinois Supreme Court merely requires that the discharge be in retaliation for the employee's activities and in contravention of a clearly mandated public policy.[93] This definition does not sufficiently reflect the meaning of "retaliation." Some common definitions of the word "retaliate" are "[t]o return like for like, esp[ecially] to return evil for evil" and "[t]o pay back (an injury) in kind."[94] The definition of retaliatory discharge doctrine should incorporate the connotation of returning injury in kind and apply only when the employee is discharged for activities that actually harm the employer's interest. The retaliatory discharge doctrine thus should be recognized only when (1) an employer discharges an employee in retaliation for employee activities that actually harm the employer, and (2) the discharge contravenes a clearly mandated public policy.[95]

Under this modified definition, many claims previously classified as retaliatory discharge actions would fall only under the public policy exception. For example, mere refusal by an employee to do an illegal or unethical act[96] would not amount to activity harmful to the employer. Thus, the Minnesota Supreme Court was correct in ruling that *Nordling v. Northern States Power Co.* did not involve sufficient evidence of retaliation when Nordling merely reported the questiona-

93. Palmateer v. International Harvester Co., 421 N.E.2d 876, 881 (Ill. 1981); *see also Balla*, 584 N.E.2d at 107 (quoting *Palmateer*).

94. THE AMERICAN HERITAGE DICTIONARY 1055 (2d college ed. 1982).

95. *See supra* text accompanying note 24.

96. *See, e.g., Herbster*, 501 N.E.2d at 343 (discharge for refusing to destroy discovery documents); *see supra* text accompanying notes 54–58.

ble surveillance of employees to company officials.[97] Nordling's refusal to go along with the proposed plan and his reporting it to company officers did not harm the employer's economic interest. It merely prevented the company from pursuing a potentially illegal or tortious conduct.

Likewise, mere threats to report a contemplated illegal act are not activities harmful to the employer's economic interest. For example, Balla's threat to report the illegal shipment of defective dialyzers to the FDA[98] was not an activity harmful to Gambro, Inc. Such threats may disrupt the corporate environment but the employer's economic interest has not yet been harmed.[99]

In contrast, actions such as reporting an imminent illegal act to outside authorities and filing a workers' compensation claim are activities that harm the company's interest. So called "whistleblowing" harms the employer's economic interest because it may subject the employer to criminal and civil investigations and sanctions. Similarly, filing workers' compensation claims harms the employer's economic interest by raising the employer's workers' compensation premiums.[100]

Even if courts are not willing to accept the public policy exception rule for in-house counsel, they should at least recognize retaliatory discharge actions. By requiring the in-house counsel to prove that the discharge was in retaliation for activities harmful to the employer, this doctrine provides some evidentiary protection for the employer. It also provides a remedy and protection for in-house counsel who seek to safeguard the public from unlawful corporate conduct.

B. Public Policy Exception and Retaliatory Discharge Actions for In-House Counsel Will Provide Increased Public Protection Without Significant Adverse Effect on Counsel-Company Relationship

The principal roadblock to courts' recognition of public policy exception and retaliatory discharge actions by in-house counsel has

97. Nordling v. Northern States Power Co., 478 N.W.2d 498, 504 (Minn. 1991).

98. *See* Balla v. Gambro, Inc., 584 N.E.2d 104, 106 (Ill. 1991).

99. However, if the threat had been carried out before Balla was fired, Gambro, Inc. may have been liable for civil and criminal penalties under FDA regulations that would harm the company. *See id.* at 106.

100. The retaliatory discharge actions in workers' compensation claims paved the way to eventual recognition of the public policy exception doctrine in general. *See, e.g.*, Frampton v. Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973). Since *Frampton*, 27 states have recognized retaliatory discharge actions for filing workers' compensation claims. *See generally* Jean C. Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 HASTINGS L.J. 551, 554–55 (1986).

been the supposed adverse impact on attorney-client confidentiality and privilege, and the perceived adequacy of professional ethics rules in preventing a client's illegal act. Recognition of such actions, however, would not adversely affect attorney-client confidentiality. Moreover, relying exclusively on the ethics of in-house counsel does not adequately protect the overriding goal of protecting public health and safety. In order to protect the public against illegal corporate acts, the public policy exception and retaliatory discharge doctrine should be recognized for in-house counsel.

1. *Recognition of Public Policy and Retaliatory Discharge Doctrines Will Not Have a Chilling Effect on Attorney-Client Relationships*

Extension of the public policy exception and the retaliatory discharge doctrine to in-house counsel would not significantly impair the attorney-client relationship. If courts deny these causes of action, they would be protecting mostly "scoundrel" employers who discharge in-house counsel for upholding the law and ethics. On the other hand, recognition of these wrongful discharge actions would facilitate resolution of disputes between in-house counsel and corporate officers within the corporate organization. Moreover, in jurisdictions that have adopted mandatory disclosure rules, the chilling effect on the attorney-client relationship resulting from the recognition of these actions would not be significant.

Denial of in-house counsel's discharge actions under the public policy exception and retaliatory discharge doctrine protects mostly "scoundrel" employers who discharge a counsel for upholding law and ethics.[101] The principal argument against the recognition of such causes of action is that an employer would be less candid regarding potentially questionable corporate conduct knowing that the counsel could use this information in a retaliatory suit.[102] This argument, however, presupposes that an employer would discharge the in-house counsel if the attorney disagrees with the questionable conduct. Normally, corporations seek advice from in-house counsel to avoid, rather than to commit, illegal activities in their business conduct. Corporate employers that seek legal counsel for the purpose of avoiding illegal acts would thus be receptive to the in-house counsel's advice. Companies that seek to gain competitive advantage at any cost by engaging in

101. *Balla*, 584 N.E.2d at 114. (Freeman, J., dissenting). The attorney-client privilege has been criticized as protecting only the guilty. *See generally* WOLFRAM, *supra* note 26, § 6.1, at 246–47.

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

illegal activities, however, are not likely to heed the in-house counsel's advice, and are far more likely to discharge in-house counsel for upholding the law and ethics.

Recognizing the public policy exception and the retaliatory discharge action does not further impair the existing attorney-client relationship. In-house counsel's reporting of a clearly illegal act by an officer may have no more adverse impact on attorney-client communication than when the counsel seeks a reversal of such decision by resorting to higher authorities within the organization. Under the entity doctrine, in-house counsel serve the corporate organization and not corporate officers.[103] When a corporate officer contemplates a clearly illegal act, the in-house counsel's duty to prevent such conduct is owed to the corporation itself, even if it means repudiating an officer's illegal conduct or resorting to higher authorities.[104] Normally, if the higher authorities do not approve of illegal conduct as a matter of corporate policy, the in-house counsel's resort to superiors alone would impair the officer's willingness to communicate illegal matters in the future. It is only when the employer condones unlawful acts that the attorney-client relationship would be impaired.

The recognition of the public policy and retaliatory discharge doctrines also encourages resolution of disputes within the corporation by creating incentives for an employer to resolve the differences within the corporate organization. These wrongful discharge actions would deter most employers from firing their counsel prematurely for seeking reversal of illegal acts. This deterrent effect would encourage employers to be more receptive to their in-house counsel's advice and reinforce in-house counsel's efforts when they resort to higher authorities within the corporate hierarchy.

In jurisdictions that have adopted mandatory disclosure rules,[105] the possible chilling effect on the attorney-client relationship caused by the recognition of the public policy exception and retaliatory discharge actions would be insignificant. Clients in those jurisdictions that mandate disclosure may be just as likely to be hesitant to reveal their intent to commit future crimes. In fact, by providing a rule that allows no discretion on the part of attorneys, clients may be more reluctant to disclose adverse information than if attorneys were given some discretion on whether to disclose or not. This denial of attorneys' discretion by mandating disclosure may reduce clients' trust in their attorneys

103. *See supra* text accompanying notes 45–48.

104. *See supra* notes 48–50 and accompanying text.

105. Nine states have adopted mandatory disclosure rules. *See supra* note 36 and accompanying text.

far more than where they are merely aware of a possible public policy or retaliatory discharge action by their attorneys. In this way, the mandatory disclosure requirement would have a more significant chilling effect on the attorney-client relationship than that resulting from the recognition of these wrongful discharge actions.

2. *Codes of Professional Ethics Are Not Adequate Safeguards in Preventing Corporations' Illegal Acts*

The discretionary disclosure of client confidences under both the Model Rules and the Model Code does not adequately protect public safety. The Model Rules permit an attorney to disclose a client's intent to commit a crime that is likely to cause imminent death or substantial bodily harm.[106] The Model Code is broader and provides that an attorney may reveal the intentions of a client if necessary to prevent a crime.[107] Under these rules, the adequacy of public protection depends on the discretion of individual attorneys.

Within the corporate environment, in-house counsel are likely to be even more loyal to their client-company than private practitioners due to their dependence on a single client. By foregoing disclosure of corporate confidences, an in-house counsel is able to abide by the professional ethics rules and keep his or her job. In this setting, where an in-house counsel has little incentive to report illegal acts of the company, it is doubtful that the public will be adequately protected from such acts.

On the other hand, requiring in-house counsel to disclose a company's future illegal act may provide adequate safeguards, at least against that specific act. Given the chilling effect on the attorney-client relationship by the mandatory disclosure requirement, however,[108] the rule may have the effect of discouraging a company's disclosure of illegal acts to counsel. Without consulting with in-house counsel, who might dissuade a corporate officer from committing an illegal act, the rule may result in increased illegal corporate acts in the long run.

Internal dispute provisions in the Model Rules for in-house counsel do not adequately address the prevention of illegal corporate acts. The Model Rules outline steps a corporate counsel is obligated to pursue within the organization to seek reversal of a corporate decision that violates a legal obligation to the organization, or violates a law which

106. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1983).

107. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1981).

108. *See supra* text accompanying note 105.

reasonably might be imputed to the organization.[109] Counsel, however, may not disclose such information if it does not meet the crime and substantial injury requirements specified in rule 1.6. Counsel has the option of resigning if unsuccessful in obtaining reversal of the proposed violation.[110] Although the requirement for corporate counsel to seek reversal within the organization is reasonable because it encourages resolution of disputes internally, it provides neither sufficient disclosure, nor adequate protection of the public from the corporation's illegal acts.

The policy of protecting the public from illegal corporate conduct should be at least as important as the economic interests of attorneys.[111] The Model Rules and Model Code allow attorneys to disclose confidential information to establish a claim for legal fees against clients.[112] These rules implicitly recognize that an attorney's economic interest has priority over attorney-client privilege and confidentiality. When in-house counsel seek to protect the public from their client's unlawful acts, they should be given the same degree of protection afforded to attorneys who sue their clients for their own economic interest.

C. The In-House Counsel's Dilemma

The professional ethics rules place in-house counsel who possess knowledge of illegal employer acts in a difficult position. An attorney who blows the whistle on an employer's illegal acts may be terminated. An attorney who remains silent may be disbarred for violation of the ethics rules, or may even be personally liable to potential victims of illegal corporate acts.[113]

1. Economic Consequences of In-House Counsel's Termination

Unlike private practitioners, in-house counsel depend on single client-employers for their entire incomes. If in-house counsel become privy to a client's unethical or illegal acts, this arrangement deprives

109. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(b) (1983). Counsel may ask reconsideration of the decision, advise that a second legal opinion be sought, or refer the matter to the higher authority in the organization. *Id.*

110. *See id.* Rule 1.13(c). However, counsel must withdraw if representation would violate rules of professional conduct or other law. *See id.* Rule 1.16(a)(1).

111. Even the *Balla* court conceded that there is no policy more important than the public policy of protecting the lives and property of the public. Balla v. Gambro, Inc., 584 N.E.2d 104, 107–08 (Ill. 1991).

112. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(4) (1981).

113. Hazard, *supra* note 37, at 1068–69.

them of the significant independence that private practitioners enjoy. Private practitioners may withdraw from representing their client and report the incidents to the proper authorities, thus abiding by the rules of professional conduct without incurring total economic loss. The client a practitioner loses is but one of many, and thus the economic impact would not be as severe as that of a fired in-house counsel in most circumstances.[114]

In-house counsel generally do not enjoy such diversity of clients. Like all other employees of a company, in-house counsel are expected to further company objectives. When the means used to achieve the company's objectives are illegal, in-house counsel may be obligated to report such incidents under professional ethics codes to the detriment of their employment status within the company. If they do not report the illegal acts of the employer, they may be disbarred. In both situations, their loss is total, both economically and professionally. If they report and lose their employment, they must start over in establishing a practice or look for another job, having been stigmatized as a whistleblower. If they do not report, they risk losing their privilege of practicing law altogether. Such is the dilemma of in-house counsel.

This dilemma puts in-house counsel in a particularly difficult position to protect the public against illegal corporate conduct. Sound reasons exist to limit public policy and retaliatory discharge actions by attorneys to some degree. At present, in-house counsel bear the heavy economic and social burden with little mitigating protection. This burden should not be imposed on in-house counsel without providing relief through wrongful discharge actions.

2. *Role of In-House Counsel Within the Employment Setting*

In-house counsel frequently assume additional functions such as administrative and personnel duties.[115] Sometimes they cease practicing law altogether to work as administrative and personnel officers. In denying the public policy and retaliatory discharge causes of action, some courts have emphasized that in-house counsel were licensed to

114. Even lawyers working in law firms are provided some internal procedures to guard against such hardship. Law firm associates receive their instructions from lawyers who are obligated to uphold the code of professional ethics. *See generally* Kenneth J. Wilbur, *Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility*, 92 DICK. L. REV. 777, 782 (1988).

115. For example, the in-house counsel in *Balla v. Gambro, Inc.*, held additional positions of director of administration and personnel, and manager of regulatory affairs. *Balla*, 584 N.E.2d at 106. Also, the court in *Mourad v. Automobile Club Ins. Ass'n*, noted that the counsel was acting in an administrative role. Mourad v. Automobile Club Ins. Ass'n, 465 N.W.2d 395, 400 (Mich. Ct. App. 1991).

practice law within its jurisdiction at all times.[116] This is a factor that should not be significant when in-house counsel assume duties other than those which attorneys typically perform.

When in-house counsel become privy to illegal corporate acts in capacities other than as a corporate counsel, they should be treated like any other non-lawyer employees in extending public policy and retaliatory discharge actions. In these situations, where licensed attorneys are not practicing law, the usual concerns for the attorney-client relationship should have little relevance, and public policy and retaliatory discharge actions should be allowed.

D. Nordling *Is a Breakthrough in Recognizing Wrongful Discharge Action by In-House Counsel*

Nordling was the first state supreme court case to recognize a wrongful discharge action by an in-house counsel, albeit on an implied contract basis. The *Nordling* court seemed ready to accept retaliatory discharge actions by in-house counsel if it found a violation of the state's whistleblower statute, but Nordling was unable to prove the violation of any federal or state law.[117] The significant distinction between *Nordling* and *Balla*, however, seems to be that in *Nordling*, the planned surveillance was never carried out,[118] while in *Balla*, the defective dialyzers were actually shipped for sale in violation of FDA regulation.[119] Mere contemplation of an illegal act did not give rise to an actionable public policy exception or retaliatory discharge.

E. Critique of Balla v. Gambro, Inc.

Although the *Balla* court correctly refused to recognize a retaliatory discharge action by the in-house counsel, it should have extended the public policy exception doctrine to such counsel.[120] In denying the latter cause of action, the *Balla* court disregarded economic realities and the unique hardship faced by in-house counsel. *Balla* presented a compelling case for recognizing a wrongful discharge action based on the public policy exception. The *Balla* court conceded that the discharge was in violation of a clearly mandated public policy of protect-

116. *See Balla*, 584 N.E.2d at 110; Herbster v. North Am. Co. for Life and Health Ins., 501 N.E.2d 343, 346 (Ill. App. Ct. 1986).

117. Nordling v. Northern States Power Co., 478 N.W.2d 498, 504 (Minn. 1991).

118. *Id.* at 500.

119. *Balla*, 584 N.E.2d at 106.

120. *See supra* text accompanying notes 93–100. The retaliatory discharge doctrine referred to by the *Balla* court should be the public policy exception doctrine according to the modified definition of retaliatory discharge doctrine.

ing lives and property.[121] Under the Illinois mandatory disclosure rule, in-house counsel have no remedy under the public policy exception or retaliatory discharge doctrine even when acting to protect public health and safety.

The *Balla* court distinguished the dilemma faced by an in-house counsel from an employee faced with the choice of whether or not to file a workers' compensation claim.[122] It noted that while in-house counsel has no choice but to report under the Illinois mandatory disclosure rule, an employee eligible for workers' compensation benefits has a choice whether or not to file a claim.[123] This distinction is highly artificial and is not persuasive. Employers sometimes terminate employees who file such claims.[124] In most states, however, such terminations are deterred by the extension of the retaliatory discharge doctrine.[125]

In-house counsel face a situation analogous to an employee filing a workers' compensation claim without any statutory or judicial protection for wrongful discharge. In-house counsel have no remedy for discharge when reporting an illegal act of an employer under the *Balla* court's holding. As the *Balla* court conceded, reporting illegal corporate acts would almost certainly lead to termination of the in-house counsel.[126] The economic loss suffered by terminated in-house counsel is therefore substantially the same as that of ordinary workers discharged for whistleblowing.

The *Balla* court disapproved of retaliatory discharge because it would shift the burden and cost of obeying the attorney's Rules of Professional Conduct to the employer.[127] The *Balla* court stated that the attorney would have to forego "economic gains" in order to protect the integrity of the legal profession.[128] What the in-house counsel foregoes, however, is not merely "economic gains," but employment and livelihood.[129]

The *Balla* court's treatment of the withdrawal by an in-house counsel as equal to the discharge by the employer does not adequately take into account the hardship on the in-house counsel. The *Balla* court noted that the in-house counsel was required to withdraw from repre-

121. *Balla*, 584 N.E.2d at 107–08.
122. *Id.* at 109.
123. *Id.*
124. *See, e.g.*, Frampton v. Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973).
125. *See* Love, *supra* note 100, at 554 n.26.
126. *Balla*, 584 N.E.2d at 110.
127. *Id.*
128. *Id.*
129. *Id.* at 115 (Freeman, J., dissenting).

senting Gambro, Inc. under Illinois law.[130] The court reasoned that because Gambro, Inc. fired Balla, it satisfied the statute's requirement.[131] Even the Model Rules recognize the unique nature of this hardship and provide that attorneys serving corporations "may" resign when they are unable to prevent illegal corporate conduct.[132] By making the reporting mandatory, the Illinois professional code gives no alternative to an in-house counsel and includes no mitigating provisions.

The attorney-client privilege and confidentiality cannot justify the *Balla* court's refusal to recognize the public policy exception. The Illinois mandatory disclosure requirement probably has more of a chilling effect on the attorney-client relationship than the extension of public policy and retaliatory discharge actions to in-house counsel.[133] Equally important, the public policy of protecting lives and property of citizens is not adequately protected by relying exclusively on in-house counsel to report illegal acts.[134] The end result of the denial of the public policy exception cause of action by in-house counsel is that corporations may be encouraged to commit illegal acts.

III. CONCLUSION

Although the majority of courts recognize the public policy exception and retaliatory discharge doctrine, most courts still refuse to extend these doctrines to in-house counsel.[135] There are no longer sound justifications for withholding such wrongful discharge relief from in-house counsel. Recognition of these actions by in-house counsel would not have a significant adverse impact on the attorney-client relationship. Moreover, the existing professional codes of ethics do not adequately safeguard the public against illegal corporate conduct. By recognizing the public policy exception and retaliatory discharge actions, courts can provide additional protection for the public against illegal corporate conduct, without significant impact on the existing counsel-company relationship. At the same time, these actions would provide a way out of the economic and moral dilemma faced by in-house counsel.

130. *Id.* at 110. *See* ILL. ANN. STAT. ch. 110A, Rules 1.16(a)(2), (a)(4) (Smith-Hurd Supp. 1991).

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

132. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(c) (1983); *see also* WOLFRAM, *supra* note 26, § 13.7, at 746.

133. *See supra* text accompanying note 105.

134. *See supra* text accompanying notes 106–12.

135. *See, e.g., Balla*, 584 N.E.2d at 104; Herbster v. North Am. Co. for Life and Health Ins., 501 N.E.2d 343 (Ill. App. Ct. 1986).